Land Matters and Rural Development: 2019

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Abstract

This note includes the most important 2019 land reform developments pertaining to land restitution, land redistribution, tenure reform, unlawful occupation, housing, spatial planning, deeds and expropriation, including the amendment of the property clause.

Keywords: Land reform, land restitution, land redistribution, tenure reform, unlawful occupation, housing, spatial planning, deeds, expropriation, property clause

UNISA university of south africa PRESS

Southern African Public Law
https://upjournals.co.za/index.php/SAPL
Volume 35 | Number 1 | 2020 | #7389 | 30 pages

https://doi.org/10.25159/2522-6800/7389
ISSN 2522-6800 (Online), 2219-6412 (Print)

General

South Africa's land reform legislation is again on the table with the imminent amendment of section 25 of the Constitution of the Republic of South Africa. An amendment to section 25 was published in December 2019.[1] At the time of writing of the note, the deadline for public comment regarding the envisaged constitutional amendment was extended, whereas amendments to expropriation legislation had not been published yet. A draft policy on beneficiary selection was published early January 2020[2] and there is discussion regarding a permanent Land Court.[3] A lot of activity, much of which is still pending, has thus taken place in the land reform arena.

According to the Department of Rural Development and Land Reform's Annual Report 2018/19,[4] 85 324.5523 ha were acquired of which 53 977.548 ha were transferred to smallholder farmers and 9 675.5201 ha to farm workers and labour tenants (642 labour tenant claims were finalised). 208 farms were supported by post-settlement grants and 2 251 households were supported under the one household, one hectare programme (932 women headed households, 316 youth headed and six persons living with disabilities). 502 land claims were settled and 995 land claims finalised, while 140 phased projects were approved. A number of outstanding claims could not be settled due to various challenges, including family disputes, historical value disputes and verification of claimants. Notably, the Department underspent on land reform and land restitution projects.[5]

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Land Restitution

The Minister of Public Works promised to release land for restitution purposes for those who were affected by the Group Areas Act 36 of 1966 in the Western Cape.[6] In August

1 Draft Constitution Eighteenth Amendment Bill, GG 42902 (13 December 2019) GN 652.

2 National Policy for Beneficiary Selection and Land Allocation, GG 42939 (3 January 2020) GN 2, not discussed in this contribution as the scope encompasses 2019 developments.

3 Linda Ensor, 'Plan to Establish a Permanent Land Court is in the Offing' *Business Day* (14 November 2019).

4 Department of Rural Development and Land Reform, 'Annual Report 2018/19' <https://www.drdlr.gov.za/sites/Internet/ResourceCenter/DRDLR%20Document%20Centre/DRDLR_AR_2018_2019.pdf> accessed 12 January 2020.

5 Land Reform (R134.5 million) and Restitution (R95.1 million)—the funds were transferred to finance other programmes.

6 Mervyn Charles, 'Watch: De Lille Promises to Release 100 Parcels of Land over the Next Year' *IOL* (25 November 2019).

the deputy president announced that 100 parcels of land were released for restitution.[7] A community received their land after many years of litigation in the Melmoth area. Determining the value of property for land reform purposes remains unresolved. In this regard the minister did not want to give effect to an agreement between the Department and the owners of the land as to the value of the properties, but decided that she will implement the Valuer-General's valuation. The court stated that the minister was not bound by the Valuer-General's ruling. Her successor decided to abide by the court's finding as well as the agreement.[8] Determining the specific role and function of the Valuer-General going forward, especially in light of the possibility of expropriation with nil compensation, is critical.

Land restitution is not without its own challenges. A forensic audit was conducted into the expensive Mala Mala land deal[9] and the redevelopment of District Six remains contentious.[10] In this context an important judgment[11] was handed down, dealt with in more detail below; and other developments occurred.[12] In the meantime the finalisation of the Restitution Amendment Act is also still outstanding.

Court Decisions

Speaker of the National Assembly v Land Access Movement of South Africa[13] succeeds the previous unconstitutionality finding of the Restitution of Land Rights Amendment Act 15 of 2014. In 2016 in *Land Access Movement of South Africa v Chairperson, National Council of Provinces*[14], the Constitutional Court (CC) struck down the Amendment Act on the basis of insufficient public participation and consultation. That finding meant the Act was declared invalid from 28 July 2016 and that the Commission

7 Anon, 'Policy: 100 Pieces of Land Released for Restitution – Mabuza' *Legalbrief* (16 August 2019).

8 *Emakhasaneni Community v Minister of Rural Development and Land Reform and Others, Entembeni v Minister of Rural Development and Land Reform and Others, Mthonjaneni Community v Minister of Rural Development and Land Reform and Others* (LCC 03/2009, LCC 230/2009, LCC 201/2013) [2019] ZALCC 27 (6 March 2019); Anon, 'Litigation: State Settles Land Claim after 13 Years' *Legalbrief* (23 September 2019).

9 Anon, 'General: Minister on the Spot over Mala Mala Inaction' *Legalbrief Forensic* (28 February 2019).

10 Anon, 'Litigation: District Six Land Claimants Allege Justice "Miscarriage"' *Legalbrief* (6 March 2019); Anon, 'Litigation: District Six Claimants want Answers from Minister' *Legalbrief* (2 April 2019); J Gerber, 'District Six: Land Minister Ordered to Appear in Court after Failure to Comply with Court Order' *News24* (17 April 2019).

11 *District Six Committee v Minister of Rural Development and Land Reform* [2019] 4 All SA 89 (LCC).

12 In September under a new Minister a request for proposals to participate in the redevelopment of District Six were published in the Government Gazette—GG 42684 (6 September 2019) GN 469. The Minister of Higher Education, Science and Technology thereafter published a memorandum of agreement to release land of the Cape Peninsula University of Technology (built in District Six after the removals) for rapid development—GG 42720 (20 September 2019) GN R1221.

13 2019 (6) SA 568 (CC).

14 2016 (5) SA 635 (CC).

was interdicted from processing any claims. The underlying idea was that government would enact a new Act in the twenty-four-month grace period, to address the problematic matters.

However, two days after expiration of the deadline, an application was lodged for an extension of eight months, lapsing on 29 March 2019. In September 2018, the CC granted an interim extension. The application before the CC in the present matter was brought by the Speaker to seek a further extension in order to enable Parliament to finalise the process of enacting the new Amendment Act.

The CC had to address whether it could grant the extension sought, and if so, whether it would be just and equitable to do so.[15] Parliament submitted that it was already in advanced stages of its enactment process and provided an exposition of what had already been done, indicating that the work would be completed within the extended time period.[16] Essentially, Parliament argued that the failure was not due to its remissness, but rather, the inadequacy of the time afforded. An extension would not change the status quo as the interdict would remain in place and the Commission would continue with its assessment of old claims, while submitting monthly progress reports.[17] The application was supported by section 172(1)*(b)* of the Constitution which empowered the CC to make just and equitable orders. These contentions were all supported by the communities.

The LAMOSE respondents opposed the application, mainly on four grounds: (a) the CC was *functus officio* and no longer had the power to grant the relief sought; (b) the application was late; (c) Parliament had not shown any exceptional circumstances that would support an application for extension; and (d) it was unlikely that Parliament would correct defects in the proposed time.[18]

At the time the Amendment Act had been found unconstitutional thousands of claims had already been submitted under that Act. As Parliament had failed to act within the required twenty-four-month period, the real question before the CC was what constituted a 'just and equitable' order in relation to those interdicted claims that had been kept in abeyance.[19] Before the content of such an order was dealt with, the CC first canvassed the question of whether it was indeed *functus officio* and found, with reference to *Zondi 2*[20] that it could proceed to grant a just and equitable order.

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15 Paragraph 14.
16 See the whole of para 15.
17 Paragraph 16.
18 See paras 19–20.
19 Paragraph 23.
20 *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC).

Regarding the actual content and character of the application, LAMOSA contended that the act of interdicting the processing of claims until either the enactment of a new Amendment Act or the final processing of old claims, operated like a suspension of a declaration of invalidity, in that the processing of the interdicted claims was suspended.[21] In this light the application fell within the ambit of section 172(1)*(b)*, which would require determining whether a case for an extension had indeed been made.[22]

The principles underlying whether the CC should grant an extension of the interdict against the processing of the interdicted claims were found in various judgments.[23] In the present instance the following factors regarding a just and equitable order were relevant:[24]

- the sufficiency of Parliament's explanation for failing to correct the defect within the period of suspension;
- the prejudice likely to be suffered if the suspension was not extended;
- the prospects of correcting the defect within the extended period; and
- the need to promote a functional and orderly state administration for the benefit of the general public.

Here the CC *per* Mhlantla J highlighted the following: the applicant brought the application three days after the twenty-four-month period had expired, with no exceptional circumstances. For almost eleven of the twenty-four months Parliament had done nothing and when it did act, the process was very slow.[25] It was highly unlikely that the process would be completed by the (extended) deadline of 29 March.[26] The applicant also failed to provide a timetable, including the public participation processes.[27] It would be impossible to do all of this before 29 March 2019. In this light the application for extension could not be granted.[28]

Of critical importance was also the status quo of the restitution programme, set out in detail in paragraph 46 of the judgment. In this context 4 601 out of the 5 757 outstanding claims were at the fourth and final stage of settlement. However, 163 383 claims had

21 Paragraph 28.
22 Paragraph 29.
23 See paras 31–36 generally.
24 Paragraph 36.
25 Paragraph 38.
26 Paragraph 39.
27 Paragraph 41.
28 Paragraph 40.

been lodged when the Amendment Act commenced—these were the interdicted claims, waiting to be processed. Although these statistics were put before the court, no explanation or clarification of peculiarities or challenges in this context were provided.

Mhlantla J posed the question whether it would be just and equitable to grant an order that had the effect of excluding Parliament from the processing of new claims or whether it would be more appropriate to defer to Parliament's powers to enact legislation.[29] The interdict was in place so that Parliament could enact a new Act. As it was unclear when this would happen, given the issues above, it might be unfair to perpetuate the interdict against processing said claims.[30] However, an order that would require the CC to 'dabble in the work of legislating' was equally undesirable.[31] Also pertinent to the matter was the link between land and dignity[32] and the value and necessity of an expeditious land restitution process.[33] Given all of the above the following order was made:[34] The Commission was prohibited from processing any claims lodged between 1 July 2014 and 28 July 2016, until the earlier of the dates when (a) it had settled or referred to the LCC all claims lodged before 31 December 1998 (old claims) or (b) the LCC, upon application by any interested party, granted permission to the Commission to begin processing interdicted claims, whether in respect of the whole or part of the RSA and whether in respect of part or all of the process for administering an interdicted claim. Until the relevant date, no interdicted claims could be adjudicated on or considered in any manner whatsoever by the LCC in any proceedings, provided that interdicted claimants could be admitted as interested parties before the LCC solely to the extent that their participation could contribute to the establishment or rejection of old claims or in respect of any other issue that the presiding judge could allow to be addressed in the interests of justice. Furthermore, no interdicted claim should be entitled to any relief having the effect of: (a) the relief granted to any claimant in terms of section 35 of the Restitution of Land Rights Act 22 of 1994 in respect of a finalised claim; (b) the terms of the agreement concluded in terms of section 42D of the Restitution Act; or (c) an award in terms of section 42E(1)*(a)* or *(b)* of the Act, unless the LCC in exceptional circumstances ordered otherwise, or awarded to such interdicted claimant land or a right in land that was subject to a pending claim for restoration by an old claimant.

Six monthly reports furthermore have to be submitted by the Chief Land Claims Commissioner setting out the number of outstanding claims and corresponding anticipated finalisation dates, the nature of constraints, the solutions that had been

29 Paragraph 54.
30 Paragraph 55.
31 Paragraph 56.
32 Paragraph 65.
33 See para 66.
34 See the whole of para 67.

implemented and further matters as the LCC might direct. The LCC was furthermore especially empowered to make such orders as it deemed fit to expedite and prioritise processing of old claims.

A set period of twenty-four months is not a long time to re-draft a legislative measure and complete all the formalities, including public participation and engagement. When time is of the essence, it is critical to prioritise and to allocate and utilise resources accordingly. Parliament has effectively repeated its mistake with the first Bill: insufficient time, rushed process, which would again ultimately result in incomplete and unsatisfactory public engagement and consultation. This is unfair to both the first wave claimants—whose claims are still hanging, and the second wave claimants—whose claims are still in limbo, almost five years after lodging them. Although it seems apt that the Commission has to report to the LCC as to ensure progress, sustainably and effectively, it should in principle not be necessary: surely the Commission knows what it has to do and how, to identify problems and shortcomings and plan proactively and strategically?

Also, within the restitution domain, is the LCC judgment dealing with the District Six dilemma. In *District Six Committee v Minister of Rural Development and Land Reform*,[35] the then Minister of Rural Development and Land Reform (Minister Mashabane) was found to be in breach of her constitutional duties, resulting in a personal costs order being handed down against her. In November 2018 the LCC handed down an order, on agreement that the minister had to formulate, without delay and in consultation with the body of claimants, a reasonable plan and programme that was to be implemented to satisfy the claims of the claimants.[36] The required items were set out in detail, including a conceptual layout of the redevelopment, funding details, the budget, estimated time frames and the allocation methodology. The plan was supposed to be submitted within three months of the order and thereafter at three-monthly intervals, until the development had been completed.

The background of the District Six dispossession is well known and well documented,[37] supplemented by personal experiences of some of the surviving claimants.[38] The restitution process was approached in stages: phase one began in 2004 and overlapped with phase two, both of which were completed in 2013. While some claimants took transfer of property as part of these two phases, the third phase had not even begun, resulting in much uncertainty regarding the beneficiaries on the one hand and units on the other.[39] The specific breakdown of the District Six claimants was provided as

35 District Six Committee (n 11).
36 See whole of para 8.
37 See the brief overview in paras 12–19.
38 See paras 20–26.
39 Paragraph 35.

follows: 2 670 claims were lodged before the 1998 cut-off date.[40] Of these, 1 380 received financial compensation—already paid—and 1 216 claimants opted for land restoration of which 247 had received homes pursuant to the first and second phases. The remaining 969 had not received homes and did not know when they could expect transfer. By February 2019 the November 2018-plan had not been finalised, apparently because consultations were still ongoing[41] and due to affordability concerns.[42] In May 2019 a further report was submitted by the minister herself, explaining that the plan was still incomplete.[43] Essentially, there was no difference between the February and the May 2019 reports filed.[44] That meant the terms of the November 2018 LCC order remained unfulfilled.

During the minister's personal appearance in court she explained that she was brought up to speed by the previous minister, Minister Nkwinti, and that the issues of District Six fell under her direct responsibility.[45] Her primary explanations related to financial constraints and complexity, calling on expertise of various experts, all of which protracted the process.[46]

Although it was clear that the minister had not complied with the November 2018 order and was in breach of her constitutional obligations imposed by section 165(5) of the Constitution,[47] the further question was whether she was guilty of contempt of court. This was denied by her and she testified to her commitment towards land reform.[48] Non-compliance was not a result of deliberate contempt but instead, certain constraints facing her department. However, given the background above, the court found it not probable that the constraints facing the department only became apparent in February 2019. Further, '... a member of Cabinet, acting reasonably, in good faith and in discharge of their constitutional obligations could not agree to a court order when they must have been aware that it would not be possible to comply with it.'[49]

But what steps did the minister take to comply with the court order?[50] Apart from various meetings, with different role players, the minister could give no evidence of any steps taken to comply with the court order specifically. There were no initiatives to

40 When the process was re-opened again in 2014 a further 749 clams were lodged. These claims are all still in limbo and cannot be processed until all of the first wave land claims (lodged during 1995–1998) have been finalised.
41 Paragraph 64.
42 Paragraph 66.
43 Paragraph 68.
44 Paragraph 72.
45 Paragraph 74.
46 Paragraph 77.
47 Paragraph 78.
48 Paragraph 83.
49 Paragraph 87.
50 From para 89.

either raise more funds or secure any money for budgeting. What the minister did was not a display of serious, meaningful and bona fide attempt to comply with the order.[51] Instead, the court employed words like 'lackadaisical, lacking sufficient appreciation of the scale, urgency and importance of the issue at hand'; 'acute lack of insight' and 'inability to grasp some essential facts pertaining to the matter.'[52] In this light the conclusion was reached that the minister was reckless and grossly negligent in failing to ensure that compliance would be possible before consenting to the order. Thereafter she did not take adequate and reasonable steps to ensure that the matter was attended to.[53]

A declaratory order was thus handed down, stating that the conduct of the minister was a violation of the November 2018 order, in breach of section 165 of the Constitution, and that the minister should bear personal costs in respect of the proceedings. The minister was found to be grossly negligent in the discharge of her official duties.[54]

The above case law has underlined the sad state of affairs where restitution is concerned. Not only has the legislative process grounded to a halt but outstanding claims have not been dealt with effectively. Within departmental structures administrative staff is insufficiently capacitated and overall, in spearheading the department, there seems to be a lack of insight and leadership. The judgment above has underlined the incapacity of the former minister herself. Since the hearing a new minister has been appointed, Thoko Didiza, who has been an incumbent of this ministry before. While it is conceivable that she will need some time to find her feet, at least with regard to the District Six dilemma, which is not unknown to her, she ought to proceed quite speedily.

Land Reform

Interim Protection of Informal Land Rights Act 31 of 1996

The Act has been extended from 31 December 2019 to 31 December 2020—again an indication that still no solution has been found to address the challenges of the tenure system.[55]

Upgrading of Land Tenure Rights Act 112 of 1991

In *Herbert NO and Others v Senqu Municipality and Others*[56] the Constitutional Court confirmed the Eastern Cape High Court decision[57] regarding the unconstitutionality of

51 Paragraph 92.
52 Paragraph 97.
53 Paragraph 98.
54 Paragraph 105.
55 GG 42887 (6 December 2019) GN 1572.
56 2019 (6) SA 231 (CC).
57 *Herbert NO and Others v Senqu Municipality and Others* [2018] 4 All SA 677 (ECG).

section 25A of the Upgrading of Land Tenure Rights Act 112 of 1991 and section 1 of the Land Affairs General Amendment Act 61 of 1998 in so far as section 3 of the Upgrading Act did not apply to former so-called independent states, such as the Transkei, where the land in question is situated. Section 3 provides for the automatic conversion of certain land tenure rights into ownership. Jafta J correctly stated that the 'discriminatory differentiation to which millions of black people continue to be subjected in the former homelands should have been remedied a long time ago.'[58] The court indicated that it is unacceptable that many people are still denied access to secure tenure rights.[59]

This is the second CC judgment invalidating certain provisions of the Upgrading Act. In *Rahube v Rahube and Others*[60] section 2(1) of the Act was declared unconstitutional on the basis of gender discrimination, as the automatic upgrading of rights benefited family heads in principle, who were male. The White Paper on Land Reform, 1997 already set out the importance of tenure reform, which was further underscored in section 25(6) of the Constitution. Yet, in 2019 we are still grappling with this matter.

Communal Property Association Act 28 of 1996

The case of *Babatas Communal Property Association v Lebatlang and Others*[61] illustrates the challenges that communal property associations (CPAs) still have.[62] In this case a dispute arose whether the members of the newly elected CPA executive were indeed members of the CPA. As a result, Absa Bank froze the CPA's bank account which impacted on their daily operations. An interdict was applied for by the applicants to be recognised as a duly elected CPA committee. The court found that the respondents did not follow the correct procedures to declare the elections invalid as they should have appealed to the minister. The MEC's appointment of the CPA committee therefore stood. The interdict was therefore granted to allow the CPA to continue their operations on the farms in question.

Kwazulu-Natal Ingonyama Trust Act 3 of 1994

Changing the concept of communal land remains a bone of contention, especially Ingonyama Trust land that was created during the period of transition to a democratic South Africa. The Ingonyama Trust issued a notice that it intended to replace existing

58 Paragraph 36.
59 Paragraphs 37, 45–47.
60 (CCT319/17) [2018] ZACC 42 (30 October 2018).
61 (957/2019) [2019] ZANCHC 51 (4 October 2019).
62 Also see Department of Rural Development and Land Reform, 'Communal Property Association Annual Report 2018/19' <https://www.drdlr.gov.za/sites/Internet/ResourceCenter/DRDLR%20Document%20Centre/Communal%20Property%20Associations%20Annual%20Report%202018_2019.pdf>accessed 12 January 2020.

permissions to occupy with long term leases as the new tenure form, requiring payment which impacted on people in the rural areas who could not afford this type of lease, inevitably leading to more poverty and food insecurity. It has also been argued to be in conflict with traditional communal tenure where a once-off payment is made to the Ingonyama.[63] The payment of lease was challenged in an on-going case in the KwaZulu Natal High Court.[64] The trust money was supposed to develop the Ingonyama trust land, but the Auditor-General has given the board negative reports, twice in a row.[65]

Labour Tenants

Mr Mwelase, a labour tenant, had gone through the spectrum of courts in an endeavour to conclude labour tenant claims, starting in the LCC,[66] proceeding to the SCA,[67] and finally to the CC in *Mwelase v Director-General for the Department of Rural Development and Land Reform.*[68] The applicant submitted his labour tenancy claim before the submission date, but the officials failed to process his and many other claims. The delay had been to such an extent that the matter was referred to the LCC, which concluded with an order calling for the appointment of a Special Master for labour tenants. On appeal to the SCA the department was successful, on the basis that the SCA found the appointment of a Special Master to be a 'judicial overreach' and overturned the LCC's order. In the CC the issue was the extent of the LCC's power to fashion and implement remedies to secure practical justice for claimants who had no secure tenure, despite a statute being promulgated to deal with them specifically. It was in this light that Justice Cameron drafted the majority judgment (with Froneman, Khampepe, Madlanga, Mhlantla and Theron JJ and Nicholls AJ concurring).

The Justices argued that although Land Reform (Labour Tenants) Act 3 of 1996 provides for labour tenants claims and the process is likewise described, a 'snag', as the CC identified the issue, is that the detailed mechanisms all depended on efficient

63 Nokwanda Sihlali, 'Justice Delayed for Residents on Trust Land' *Mail & Guardian* (29 November 2019); Gabriele Steinhauser and Aaisha Dadi Patel, 'South Africa 'Wrestles over Zulu King's Vast Landholdings' LARC Customs Contested (15 October 2019) <https://www.customcontested.co.za/south-africa-wrestles-over-zulu-kings-vast-landholdings/> accessed 10 January 2020; Bongani Mthethwa, 'King Zwelithini's Trust Needs More Time to Deal with Lawsuit over Land' *TimesLive* (14 February 2019).

64 The case was postponed to March 2020. Also see Tony Carnie, 'Eleventh-hour Delay in Court Case Involving King Goodwill Zwelithini' *GroundUp* (29 November 2019); Anon, 'General: Rebuilding District Six to Cost R11bn – Minister' *Legalbrief* (9 May 2019).

65 Andisiwe Makinana, 'Parliament Questions Ingonyama Trust Audit Finding' *TimesLive* (9 October 2019).

66 *Mwelase v Director-General, Department of Rural Development and Land Reform* 2017 (4) SA 422 (LCC).

67 *Director-General, Department of Rural Development and Land Reform v Mwelase* 2019 (2) SA 81 (SCA).

68 2019 (6) SA 597 (CC).

departmental action and processes.[69] When the department did not pull their weight, the whole process was destined to grind to a halt. Furthermore, where claims were opposed and the parties could not settle, the department had to refer the claim to the LCC. When the department failed to do so, the claim was likewise 'inextricably snagged'.[70]

After various attempts to finalise Mr Mwelase's claim, including a 2013 order of the LCC, the LCC was approached to intervene more radically, resulting in the appointment of the Special Master, in 2016. In the SCA the majority overturned the appointment and instead confirmed that the department was required to deliver to the LCC an implementation plan envisioning a senior manager (or managers) responsible for the national implementation of the Act. Essentially, the SCA found the LCC order was a 'gross intrusion by a court into the domain of the Executive' and thus a 'textbook case of judicial overreach'.[71]

The main contention of the department was the matter of separation of powers: the Special Master was an outsider who would take over the department.[72] When considering *Black Sash I*[73] in this regard the CC was satisfied that the 'sustained, large-scale systemic dysfunctionality and obduracy that is evidenced here' did not really compare. The CC specifically highlighted the department's obstinate misapprehension of its statutory duties: '[i]t has shown unresponsiveness plus a refusal to account to those dependent on its cooperation for the realisation of their land claims and associated constitutional rights.'[74]

The further evidence placed before the court by the department in 2019 was unsettlingly similar to that provided in the 2016 report, during the LC hearing, alluded to above. This highlighted the hopeless struggle the department was engaged in, which had to be dealt with in a determined fashion.[75] Of critical importance is the fact that the most vulnerable and marginalised have suffered from these failures. It is in this context that effective, just and equitable remedies had to be crafted. If this required the temporary, supervised oversight of administration where the bureaucracy has shown itself to be unable to perform, then, that had to be done.[76] Accordingly, 'practically effective judicial intervention' was required.[77]

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69 See para 10].
70 Paragraph 11.
71 Paragraph 35.
72 Paragraph 37.
73 *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC).
74 Paragraph 40.
75 Paragraph 46.
76 Paragraph 49.
77 Paragraph 49.

Regarding the issue of overreach, it was underlined that, when courts did intervene, they did so with the necessary trepidation.[78] The CC was satisfied that the appointment of the Master was in the format of being an agent of the LCC and not to usurp the department.[79] In this light the CC formulated a practical twofold question: (a) did the LCC have the statutory power to appoint such a Master; and (b) how extreme were the rights violations and departmental dysfunction that the evidence revealed?[80] Section 32 of the Restitution Act expressly constitutes the LCC as a court of law, with all the powers the High Court has in relation to matters falling within the jurisdiction, specifically relating to land. Furthermore, section 38 of the Constitution provides for appropriate relief, whereas section 172(1)*(a)* of the Constitution enjoins courts to declare any law or conduct inconsistent with the Constitution as invalid to the extent of inconsistency. Section 172 also specifically empowers a court, when deciding a constitutional matter within its power, to make any order that is just and equitable: 'It is an injunction to do practical justice, as best and as humbly, as the circumstances demand.'[81] Notably, the Constitution affords the LCC inherent power to protect and to regulate its own processes and to develop the common law. Overall, these provisions empowered it to remedy wrongs, including through materially innovative remedial measures. That was the power that the LCC exercised in this instance.[82]

The CC was satisfied that the LCC directed itself properly and scrupulously to the facts at hand, which showed failing institutional functionality of an extensive and sustained degree—crying out for a very particular remedy.[83] The LCC's order had to be restored, enabling the appointment of a Special Master to deal with labour tenancy claims.

Justice Jafta (with Ledwaba AJ concurring) handed down a minority judgment which confirmed the main premise of the majority judgment, but differed with regard to intrusion into the domain of the Executive.[84] The minority judgment disagreed with the conclusion reached concerning the exercise of the LCC's inherent powers on the one hand, and the finding that section 173 of the Constitution afforded the LCC an inherent power to regulate its own processes and develop the common law, on the other. Of particular concern was that the order of the LCC entailed the appointment of a person / functionary whose duties were not yet specified, but which included dealing with a budget.

Not only has this judgment highlighted the problems and difficulties land reform had been bogged down with practically, but it has also underlined that legislation is only as

78 Paragraph 53.
79 Paragraphs 55–59.
80 Paragraph 63.
81 Paragraph 65.
82 Paragraph 66.
83 Paragraph 69.
84 Paragraph 81 and further.

effective as its effective implementation. That requires committed staff members, with sufficient resources. All methods employed previously—structural interdicts, time lines, report back sessions, etc, have failed. It was thus crucial that an individual be especially appointed to only focus on the problem at hand and its solution. Unfortunately, this necessity has resulted, yet again, in a further appointment. This new functionary will again require a budget, an office, committed staff, and a very clear, succinct brief as to what the specific role and function of the Special Master is to be.

Unlawful Occupation

Ngomane and Others v City of Johannesburg Metropolitan Municipality[85] concerned an appeal against the decision by the Gauteng Local Division of the High Court in Johannesburg. The application was brought by a group of destitute and homeless people whose belongings and materials were confiscated and subsequently destroyed by the City of Johannesburg Metropolitan Police Department (the JMPD) in an apparent clean up exercise in terms of the public health bylaws of the Johannesburg Metropolitan Municipality (the City), the respondents.[86]

The applicants had erected makeshift structures every night, as shelter on a traffic island under a bridge in the central Johannesburg business district. By their own admission they would dismantle the structures every morning when they went in search of employment and food, just to re-erect it at night.[87] They left their personal possessions and the materials used (cardboard boxes, wooden pallets and plastic sheeting) for their shelters on the traffic island, and returned each night.[88] The majority of applicants had been living under the bridge for at least two years. Twenty-two of them were employed, earning a meagre income between R350 to R1000 a month. Said traffic island separated a busy street with a number of trading businesses on either side.[89] On 1 February 2017, JMPD officials arrived on the scene with a convoy of motor vehicles, including waste removal trucks and loaded all the applicants' belongings on the trucks and took everything to a landfill, where it was destroyed. This exercise coincided with verbal insults and the use of pepper spray.[90] It was thus contended that the conduct of the respondent's officials amounted to an eviction, which was a breach of sections 26(3) and 25 of the Constitution, constituting the right not to have your home demolished

85 (734/2017) [2018] ZASCA 57 (3 April 2019).
86 Paragraphs 1 and 5.
87 Paragraph 1.
88 According to the applicants these personal effects included food, mattresses, blankets, clothing, money, identity documents and other important documents.
89 Paragraph 2.
90 Paragraph 3.

without an order of court and not to be deprived of property arbitrarily. Infringement on their rights to dignity and adequate shelter was also averred.[91]

The City opposed the application, and instead, relayed the problems they faced with homeless people. As part of the City's intervention strategy a sub-unit of the department of Social Development was established that regulated shelter management, skills development and drug rehabilitation programmes. There was a suitable municipal shelter in the immediate vicinity of the traffic island. Access depended on a South African identity document and a daily fee of R8.[92] Apparently the applicants showed no interest in any of these services.[93] The City argued that action was necessary as numerous complaints were received from the trading businesses, as well as from members of the public concerning the occupation of the pavements and other social interferences.[94]

Concerning the relief sought, the respondents argued that no eviction was committed as no shelters were destroyed during the clean-up operation. Instead, only unattended and abandoned rubbish was removed. Regarding valuable possession, the City acted in accordance with its policy, namely drafting an inventory and safe-keeping for collection by the respective owners.[95] However, a video taken of the clean-up exercise showed officials indiscriminately gathering and discarding all materials and belongings into a truck, including bulging suitcases, bags and rucksacks. Clearly, there was no compliance with said policy.[96]

In the court *a quo* the applicants wanted the return of their possessions or alternatively, the return of similar materials. The following facts were trite: the applicants were not chased away or threatened by the City's officials as initially believed; the officials were well aware that the materials belonged to the homeless people; no inventory of valuable and personal items occurred; it was doubtful that items such as cash, cell phones and identity documents would be left unattended in a public place; and no demolition of the shelters took place (applicants admitted that they dismantled their own structures every morning just to re-erect it at night).[97] In the court *a quo* the *rei vindicatio* was unsuccessful because of the inadequate description of the materials and because the materials could not be returned. On the basis of non-restoration the *mandament van spolie* was likewise unsuccessful, with reference to *Tswelopele Non-Profit Organisation*

91 ibid.
92 Paragraph 4.
93 ibid.
94 Paragraph 5.
95 Paragraph 6.
96 ibid.
97 Paragraph 7.

& Others v City of Tshwane Metropolitan Municipality and Others.[98] A claim for damages was possible, although the value of the belongings was negligible.[99]

Regarding eviction the court *a quo* held that the traffic island was a public thoroughfare designated for the purpose of facilitating traffic and could thus not be equated with a home or land as envisaged in section 26 of the Constitution and section 1 of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act (PIE).[100] Sleeping rough on a traffic island was insufficient to constitute occupation. As there was no occupation of land in terms of PIE, there was no eviction.[101]

A number of issues had to be addressed on appeal, namely: (a) whether the traffic island constituted 'land' in terms of PIE; (b) whether the temporary structures erected by the applicants every night constituted a 'home' and 'shelter' in terms of PIE; (c) whether the clean-up operation by the respondents constituted an eviction under PIE; (d) whether a constitutional remedy similar to the one crafted in *Tswelopele* had to be awarded; and (e) whether punitive constitutional damages ought to be awarded.[102]

A purposive interpretation of PIE was sought, which would allow the SCA to include the traffic island in the meaning of 'land' under PIE. It was further contended that the Court should interpret 'building' or 'structure' widely to include plastic sheets, cardboard boxes and wooden pallets for purposes of section 1 of PIE. Such an approach would amount to a demolition of their homes or structures and thus constitute an unlawful eviction from homes. The applicants also argued that they could not be removed from the traffic island until they were provided alternative accommodation.[103] On appeal reliance was placed on constitutional damages and not PIE. Despite this, the SCA found it necessary to briefly explain why PIE was not applicable: Section 1 of PIE relates to 'building or structure includes any hut, shack, tent or similar structure or any form of temporary or permanent dwelling or shelter,' which could be constructed from several parts or material put together. Not even the most generous of interpretations of the words 'building' or 'structure', (regardless of whether it is temporary or permanent) could include the confiscated material. Thus, no demolition occurred because there were no buildings or structures to demolish.[104] Accordingly, no eviction took place. It was thus not necessary for the court to decide whether the traffic island could constitute land that could be occupied under PIE.[105] Concurring with the court a quo was the finding that the *mandament van spolie* was not applicable to the matter at hand, because the

98 Paragraphs 7–8.
99 Paragraph 8.
100 Paragraph 9.
101 ibid.
102 Paragraph 11.
103 Paragraph 12.
104 Paragraph 16.
105 Paragraph 17.

remedy could only be granted if the material was still in existence and could be returned. The SCA opined that in *Tswelopele* the *mandament van spolie's* applicability and appropriateness was denied since the property was also damaged or destroyed.[106] This resulted in the court in *Tswelopele* crafting a constitutional remedy being the reconstruction of the materials to produce a substituted equivalent of what was destroyed.[107] While the constitutional remedy was relevant in *Tswelopele,* it was inappropriate here, as what was required in this matter was a 'remedy because the confiscation and destruction of the applicants' property as a patent, arbitrary deprivation thereof in contravention of section 25(1) of the Constitution.'[108] The SCA also held that there was a violation of the right to privacy (section 14(c) of the Constitution) and dignity (section 10 of the Constitution).[109] The SCA relied on section 172(1)(a) of the Constitution due to constitutional violations and on section 38 of the Constitution,[110] that provided for appropriate relief with reference to *Fose v Minister of Safety and Security.*[111] Appropriate relief in this matter had to be effective so as to adequately vindicate constitutional rights.[112] In light of this the SCA held that although the applicants sought the return of the destroyed materials and belongings, this was impossible to do since it was not sufficiently described and thus could not be replaced by the respondents.[113] It was also near impossible to determine the market value of the destroyed materials. However, the materials were clearly extremely valuable to the applicants, regardless of its negligible value. Unlike the court a quo, the SCA held that constitutional damages were not appropriate relief, as this remedy would be too expensive and time-consuming.[114] The applicants had indicated that they would each be willing to accept a standard, nominal amount of R1500 compensation for the loss of their confiscated and destroyed property and the wrong that they have suffered.[115] This amount however did not include the materials of the applicants' temporary shelters. The SCA further held that the amount of R1500 would constitute appropriate relief in terms of section 38 and ordered the payment thereof as compensation for the destruction of the applicants' property. The SCA expressed the hope that the declaratory order would deter the City from dealing with homeless people in this fashion in future.[116]

While the judgment has confirmed that the *mandament van spolie* is not an appropriate remedy where the restoration of possession is impossible, aligned with standard

106 Paragraph 19–20.
107 Paragraph 20.
108 Paragraph 21.
109 Paragraph 21.
110 Paragraph 22.
111 1997 (3) SA 786 (CC) paras 18–19.
112 Paragraphs 22–23.
113 Paragraph 24.
114 Paragraph 25.
115 Paragraph 26.
116 Paragraphs 27–28.

property law principles, the exact application and scope of this particular remedy crafted here, is unclear. The fact that materials used for shelter or housing are at stake, adds to the complexity. Where does the constitutional remedy employed in *Tswelopele* end and where does this new remedy crafted here, begin and how is all of this related to the possible development of the common law *mandament van spolie*? A lot of questions thus remain. The approach of the SCA to specifically emphasize the constitutional rights of vulnerable people and that everyone deserves to be treated with the necessary respect and not as social nuisances or disturbances, is lauded.

Spatial Planning

Dykema v Malebane and Another[117] concerns applications that were submitted subsequent to the suspension and declaration of invalidity of Chapters V and VI of the Development Facilitation Act 67 of 1995 (DFA),[118] but before the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) came into operation. The court held that such applications are valid and pending and that it should therefore be dealt with in terms of section 60 of the SPLUMA.[119] The Constitutional Court set a date when remedial legislation should have been put in place when they declared the above chapters as invalid. Parliament did not manage to put SPLUMA in place causing a three-year gap with no legislation in place, resulting in much confusion.[120]

In *McKay and Others v Ursiweb (Proprietary) Ltd and Others*[121] the court granted a final interdict in a case where land was used in contravention of the restrictive conditions and township scheme that were perceived to be in the interest of the community.[122] The court stated that not only the owners of the land have locus standi but anyone who has a sufficient protectable interest.[123] If a public right is infringed, use can be made of an interdict. The court stated that it cannot stay its order for a certain period as requested by the respondents.[124]

Housing

Urban housing is becoming more expensive, increasingly leading to evictions to make way for developers.[125] *Biermann v Buffalo City Metropolitan Municipality*[126] concerns the struggle of a developer to provide high density housing within the Buffalo City

117 2019 (11) BCLR 1299 (CC).
118 *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC).
119 Order of the Court.
120 Paragraphs 1–4 of the *Dykema* case (n 117). See the legislative history in paras 5–17.
121 (3510/2019) [2019] ZAFSHC 232 (5 December 2019).
122 Paragraph 4.
123 Paragraph 9.
124 Paragraph 13–14.
125 Anon, 'General: Western Cape Eviction Cases Spiral' *Legalbrief* (10 October 2019).
126 (EL179/2019) [2019] ZAECELLC 33 (5 December 2019).

Metropolitan Municipality. The court described in elaborate terms the ineptitude of the municipal officials to give effect to its own and its council's decisions and its disregard for court orders.

Deeds

The Electronic Deeds Registration Systems Act 19 of 2019[127] came into effect on 2 December 2019.[128] The Act deals with the development, establishment and maintenance of an electronic deeds registration system,[129] to improve the validity of deeds and documents,[130] determine who the authorised users will be[131] and to make provision for the issuance of regulations[132] and transitional provisions.[133]

The Deeds Registries Amendment Regulations, 2019 as amended[134] deal with destroyed and lost deeds and the relevant re-application process. Regulations dealing with fees were published and came into effect one month after publication in the Government Gazette.[135]

Property Practitioners and Profession

The Property Practitioners Act 22 of 2019 will commence on a date to be set out in the Government Gazette.[136] The Act will repeal the Estate Agents Affairs Act 112 of 1976 and aims to regulate property practitioners by establishing an Authority that should protect and promote the interests of consumers as well as provide for education, training and development of such practitioners.[137] The Act sets out a dispute resolution mechanism[138] and the transformation of the property market.[139] A Property Sector Transformation Fund has also been established.[140]

127 GG 42744 (3 October 2019) GN 1293.
128 GG 42871 (29 November 2019) Proc 59.
129 Section 2. This will align the different registration systems of the past.
130 Section 3.
131 Section 4.
132 Section 5.
133 Sections 6–7.
134 Amends reg 68(1), insert s 68(1E) as well as the relevant forms—GG 42186 (25 January 2019) GN R62, as amended by GG 42813 (1 November 2019) GN R1418.
135 GG 42902 (19 December 2019) GN 653.
136 GG 42746 (3 October 2019) GN 1295.
137 Section 3 read with ch 10.
138 Sections 29–31.
139 Chapter 4.
140 Chapter 7.

New rules for the Property Valuers Profession, 2020 were published,[141] as well as a notice setting out the scope of work for the different categories of property valuators.[142] These rules will hopefully address some of the issues raised in the restitution cases above.

Sectional Titles

The courts in a number of cases had to deal with matters relating to sectional titles. In *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd,*[143] the court interpreted the letter of the Act. It decided that when a body corporate increases the levies of non-resident sections of a sectional title, these members are adversely affected and that they have to give their permission in writing.[144] In the *Spilhaus* case[145] the Constitutional Court had to decide whether the individual owners in a sectional title scheme have locus standi to enforce a zoning scheme regulation in the common property area (in casu the upgrading of a mobile cellular mast).[146] The High Court determined that the individual owners have locus standi, while this finding was overruled in the Supreme Court of Appeal.[147] The Constitutional Court upheld the High Court decision in that 'the relevant zoning scheme was not followed. The applicants in whose interest the zoning scheme was passed have the right to enforce it', they need not indicate 'that they have suffered special damages. Their standing flows from the fact that the conduct complained of is prohibited in the interests of the applicants.'[148]

In *Mineur v Baydunes Body Corporate and Others*[149] the court held that the 'proper interpretation' of section 13(1)*(g)* of the Sectional Titles Management Act 8 of 2011 (as read with management rule 30*(f)*) is that, 'where an owner intends to use a section … for a use other than its purpose as shown expressly or by implication on a registered sectional plan, and such intended use will materially affect the other owners in the scheme, the consent of all owners in the scheme is required.'[150]

141 GG 42902 (13 December 2019) GN 653.
142 GG 42861 (29 November 2019) GN 1537.
143 (1082/2018) [2019] ZASCA 161 (28 November 2019).
144 Paragraphs 21–22.
145 *Spilhaus Property Holdings (Pty) Limited and Others v MTN and Another* 2019 (4) SA 406 (CC).
146 Paragraphs 1–2.
147 *Spilhaus Property Holdings (Pty) Ltd v MTN Mobile Telephone Networks (Pty) Ltd* (13621/2014) [2016] ZAWCHC 215 (3 November 2016); *Mobile Telephone Networks (Pty) Ltd v Spilhaus Property Holdings (Pty) Limited* 2018 (3) SA 396 (SCA).
148 *Spilhaus* case (n 145) para 49.
149 2019 (5) SA 260 (WCC).
150 Paragraph 47.

Expropriation

While the long-awaited Draft Constitution Eighteenth Amendment Bill (Draft Bill),[151] aimed at amending section 25 of the Constitution, the property clause, was published on 13 December 2019 for comment, the new Expropriation Act has not yet been finalised. This discussion is thus focused on amending section 25, as it is ultimately linked to expropriation and the possibility of nil compensation. It is ironic that, although the aim of the Bill is to 'make explicit that which is implicit', there is actually no consensus of what is 'implicit' in section 25. What is important to remember, however, is that the amendment is only aimed at *clarifying* matters and not amending law per se. Any *adjustments* to (as opposed to clarifications of) the legal position would thus, strictly speaking, fall beyond the Committee's brief. That is the case as the whole purpose was to only make explicit that which is implicit.

Interestingly, the Memorandum to the Bill uses both phrases: 'expropriation with nil compensation' and 'expropriation without compensation'. These phrases are not identical: the first version indicates that there is a consideration of compensation, which may be nil in a particular context, for particular reasons. The second version accepts that there is not even a need to consider the issue of compensation. The latter version is not the one envisaged in the Bill. In this context it is also important to note that the basic points of departure have not changed, namely that expropriation can still only take place in the public interest or for a public purpose, subject to the payment of just and equitable compensation. Accordingly, expropriation is in principle followed by the payment of just and equitable compensation, but in very particular instances only—for land reform purposes—may it be possible that nil compensation is to be paid.

The preamble is essentially a number of (political) points, not really aligned with the Bill itself. In this regard the emphasis on 'the dispossessed' and their 'views' is interesting. By focusing only on the dispossessed in the preamble, the restitution programme seems to be the main tool that is going to be relevant under the new expropriation dispensation. That is too narrow as urgent addressing of the redistribution and tenure reform programmes is also required. Further, by highlighting that the dispossessed 'are of the view' that very little is being done where land reform is concerned, the duties and responsibilities of government are overlooked. Instead, it suggests that it is merely a perception of a group of people, and not a lived reality. This stance ignores the recent judgments handed down, some of which were also discussed in this note above, where the ineptitude of various role players and functionaries, including a former minister, had been highlighted specifically. The aims highlighted in the preamble, namely equitable access to land, to empower citizens to be productive participants in ownership, food security and agricultural reform programmes, are not encompassing enough. What is needed is an effective land reform programme,

[151] GG 42902 (13 December 2019) GN 652.

approached holistically, while simultaneously recognising its complexity and multi-dimensionality. Inconceivably, the preamble makes no mention of expropriation at all. The reference to 'an amount of nil compensation is explicitly stated as a legitimate option for land reform' is thus suspended, hanging in the air, so-to-speak.

With regard to the three specific amendments to section 25, it is important to understand that the payment of nil compensation is not the automatic result in each and every instance of expropriation. The suggested formulation of section 25(2)*(b)* requires that the amount of compensation as well as the time and manner of payment, may be agreed to or may be decided or approved by a court. However, where land and any improvements thereon are expropriated for land reform purposes, a *court may determine* that the amount of compensation is nil. Thus, only a *court* can determine when nil compensation is at stake and that would only be the case in certain instances, namely for land reform purposes; and even then, not in all such instances. The reference to a 'court' means that functionaries are thus not empowered to make that final decision regarding nil compensation. This approach is again embodied in section 25(3A), where reference is also made to a court [that] 'may determine that the amount of compensation is nil.' As mentioned, not all instances of expropriation for land reform purposes will necessarily result in nil compensation.

Amended section 25(3A) provides that national legislation must set out the specific circumstances where a court may determine that nil compensation is to be paid. This is a contentious issue: on the one hand there is a risk that national legislation may be amended more expediently than the Constitution, which may mean that the scope of instances can be very flexible and thus unpredictable. On the other hand, national legislation with specific categories or instances of expropriation with nil compensation may be too limited, which could curb land reform unnecessarily. However, requiring that national legislation set out the instances specifically is nothing strange as a bill of rights is not the place to provide full details and information.

The constitutional amendment is aimed at promoting land reform and confirming that expropriation is a legitimate option for land reform purposes. Of critical importance is the term 'land reform' and what that entails as it is defined differently in extant legislative measures. For example, while it is trite that land reform in South Africa embodies redistribution (section 25(5)), tenure reform (section 25(6)) and restitution (section 25(7)), the Property Valuation Act 17 of 2014 also includes 'development' in the concept of land reform. If the latter approach is followed, the scope of land reform is thus much greater and correspondingly, the scope for expropriation with nil compensation as well. It must be clarified as soon as possible what this concept means.

Land Redistribution and Rural Development

In February 2019, the president announced that the government had finalised thirty-year leases with 900 farmers and that traditional leaders would make more land available for agricultural purposes.[152] The provision of land for redistribution under lease rather than ownership, however, remains contentious.[153] In *Rakgase and Another v Minister of Rural Development and Land Reform and Another*,[154] Davis J held that the decision to grant a thirty-year lease over land to the seventy-eight-year old applicant who qualified for a grant (and on which he farmed since 1991) rather than to sell the land to him, amounted to a breach of a constitutional obligation. The granting of the lease is an administrative action and therefore reviewable on the basis that no reasons were provided, and that the officials failed to act rationally and reasonably. This decision highlighted especially the disconnect in redistribution policies and alignment with legislation.

In September 2019, the president launched a district-based coordination model or 'Khawuleza'[155] that will pursue 'single, integrated district plans enabled by the vision of "One District; One Plan; One Budget; One Approach"' and address silo-approach governance. The 2020/21 national and provincial budgets will be allocated in terms of forty-four districts and eight metros in accordance with integrated development plans. The private sector also has a role to play in land redistribution. Although Amplats transferred land to communities in the Rustenburg areas, it is likely that the land belonged to the community in the first place.[156]

The tariffs for services rendered in terms of the Subdivision of Agricultural Land Act 70 of 1970 and the Conservation of Agricultural Resources Act 43 of 1983 have been revised.[157]

Setou argues that land reform and redistribution should be expedited and long term solutions need to be found—the focus should not be on expropriation only.[158] Aliber proposes that smallholdings should be allocated to women and that only five per cent of

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152 Bekezela Phakathi, 'Government Wants to Unleash Agriculture Revolution, Says Cyril Ramaphosa' *Business Day* (19 February 2019).

153 Anon, 'Land Reform: "Absurd" to Offer Man (78) 30-year Lease' *Legalbrief* (6 May 2019).

154 [2019] 4 All SA 511 (GP).

155 Anon, 'President to Launch District-based Coordination Model' *SANews* (12 September 2019) <https://www.sanews.gov.za/south-africa/president-launch-district-based-coordination-model> accessed 10 January 2020.

156 Felix Njini, 'Amplats Hands Land to South Africans amid Expropriation Push' *Moneyweb* (15 March 2019).

157 GG 42337 (29 March 2019) GN 470.

158 Peter Setou, 'Efficacious Handling of Land Reform the Long-term Solution for Lasting Peace' *Business Day* (10 May 2019).

the land should be held as large scale farms,[159] while researchers indicate that most farms in South Africa are small scale farms. There seems to be a lack of understanding of what should be considered as commercial farming and small-scale farming respectively.[160] Unfortunately also in the redistribution context allegations of fraud came to the fore.[161]

Conclusion

While various initiatives were launched in the course of 2019, decisions handed down by the spectrum of courts have unfortunately highlighted the dismal performance of the land reform programme overall, at all relevant levels: drafting and implementing legislation; interpreting and applying policies, poor administrative discipline and a lack of leadership and accountability. The myriad of problems was further underscored by the publication of the Report of the Advisory Panel on Land Reform and Agriculture, published on 19 May 2019. Apart from highlighting key issues in land reform, the report also provided for a bouquet of new bodies, institutions, funds and legislative developments. The Special Master, resulting from the *Mwelesa*-judgment, is to be added to this already extensive list. This person's role has to be aligned effectively with current functionaries and offices, as well as the envisaged and proposed ones, including new developments within the expropriation domain.

Recent case law has also underlined that progress is only really made once courts are involved, especially when the CC finally intervenes. It is not viable, sustainable or practical for claimants and other potential beneficiaries of various sub-programmes of the overall land reform programme to approach the court for relief where a statute sets out clearly the relevant functionaries and corresponding processes, duties and responsibilities. Approaching the court should then be the exception and not the rule. Unfortunately, that is not the case presently.

While an amended section 25 is likely to send out a signal that land reform is being taken serious, it is unlikely that expropriation with nil compensation is going to solve the prevailing problems, disconnects and difficulties recent case law has highlighted. The timing of the amendment to enable nil compensation in certain instances is furthermore interesting, having regard to the fact that the land reform budget was (again) underspent. As alluded to above, what is required urgently is an effective land reform

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159 Farber T, 'You can Bet the Farm on Giving Land to Women, Says Expert' *TimesLive* (11 February 2019).

160 Johann Kirsten and Wandile Sihlobo, 'Perception that Agriculture is Dominated by Large Commercial Farms is Incorrect' *Business Day* (5 March 2019).

161 Philani Nombembe, 'Western Cape Farmers up for Fraud in R8.6m Land Redistribution Scam' *TimesLive* (3 April 2019).

programme, approached holistically, coupled by well-resourced and capacitated staff, with visionary leadership. That is still lacking.

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