

**IN OR OUT OF COURT? STRATEGIES FOR RESOLVING FARM TENURE DISPUTES**

**IN LIMPOPO PROVINCE, SOUTH AFRICA**

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A thesis submitted in partial fulfilment of the requirements for the degree of Masters *Philosophiae* (MPhil) in Poverty, Land and Agrarian Studies in the Institute of Poverty, Land and Agrarian Studies, University of the Western Cape.



**SUPERVISOR: Dr Ruth Hall**

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Vhembe district



## **Abstract**

### **In or out of court? Strategies for resolving Farm Tenure Disputes in Limpopo Province, South Africa.**

S.E. Shirinda                      MPhil Thesis: Institute of Poverty, Land and Agrarian Studies,  
University of the Western Cape.

In this thesis I explore dispute resolution mechanisms within the context of the Extension of Security of Tenure Act, 62 of 1997 (ESTA) and more generally the extent to which the law and the court can be used to effect social change. I examine dispute resolution processes that parties to farm tenure utilise towards exercising their land rights. I give practical demonstrations of how parties on farms utilised processes to resolve eviction and burial disputes on farms in Limpopo province, South Africa. I focus on four case studies from farm dweller cases from Vhembe district, two evictions and two burials. The thesis compares and contrasts the cases settled through out of court settlements with those decided through the court processes. It is based on case files kept at the Nkuzi Development Association (Nkuzi) Elim office and follow up interviews with farm occupiers as well as court judgments on cases that were decided in court.

I argue that decisions on choosing appropriate dispute resolution processes are determined by the parties' economic position and the availability of land reform support Non-Governmental Organizations (NGOs) and lawyers. The findings drawn from the case studies show that ESTA dispute resolution mechanisms do not give choices to the parties in deciding how best to resolve tenure disputes they face, rather, they are forced to approach the courts. Parties to farm tenure disputes face challenges in using mediation and arbitration processes due to a lack of support from the relevant government agencies. These challenges ultimately deprive parties in disputes from making effective choices when deciding on a dispute resolution process that is appropriate for the dispute they are confronted with. This study concludes that ESTA is limited when offering necessary choices to the farm parties in disputes. The findings of this study point to the need for amendment of ESTA to provide parties in farm disputes with a choice of using mediation or arbitration processes directly as an alternative for those who do not want to resolve the dispute in court. In addition, an amendment should include the negotiation process and make the use of negotiation, mediation and arbitration compulsory for parties to first exhaust their use before approaching the court.

## DECLARATION

I declare that *'In or out of court? Strategies for resolving Farm Tenure Disputes in Limpopo Province, South Africa'* is my own work. All other sources, used or quoted, have been indicated and acknowledged by means of complete references. This thesis has not been submitted for a degree at another university.

SHIRHAMI EDDIE SHIRINDA



NOVEMBER 2011

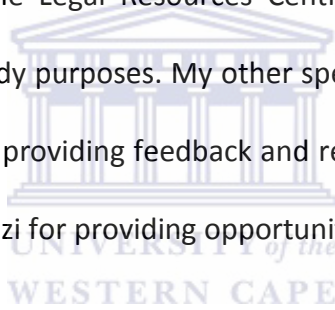
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## LIST OF ACRONYMS AND ABBREVIATIONS

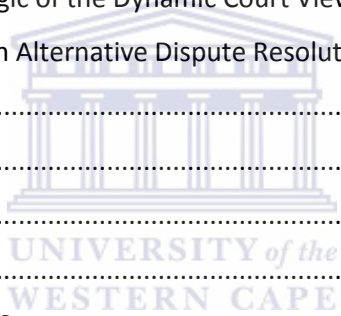
ANC	African National Congress
CCMA	Commission for Conciliation, Mediation, Arbitration
CODESA	Conference for a Democratic South Africa
COSATU	Congress of South Africa Trade Union
DLA	Department of Land Affairs
ICD	Independent Complaint's Directorate
Ndimma	Ndimma Communications
NGO	Non-Governmental Organization
NLC	National Land Committee
Nkuzi	Nkuzi Development Association
NTTLC	Nzhelele/Tshipise Transitional Local Council
RDP	Reconstruction and Development Programme
SAHRC	South Africa Human Rights Commission
SAAPAWU	South African Agricultural, Plantation and Allied Workers Union
SADT	South Africa Development Trust
TUSAA	Trade Union of South African Authority
ZCA	Zoutpansberg Cultural Association



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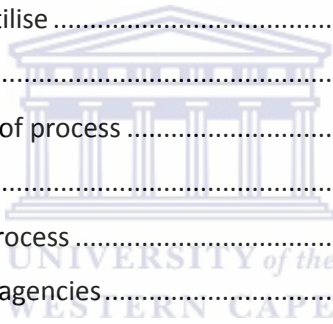
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## CHAPTER 1: INTRODUCTION TO THE STUDY

### 1.1. Introduction

Colonial conquest, subjugation of black interests, and lately the injustice of the Apartheid government have all contributed to the insecurity, landlessness, homelessness and poverty of South Africa's black majority (Bundy 1972). The origin of South African tenure insecurity lies in colonial conquest and the apartheid system's racial segregation, laws and practices that outlawed the ownership of land by blacks in areas designated for whites (Ross 1999:21; Beinart and Bundy 1987). Large-scale commercial farms account for approximately 65% of the territory of South Africa and are home to an estimated 3 million farm dwellers (Hall 2004a:37). According to Statistics SA Agricultural Censuses and Surveys 2012 commercial farms account for a total number of 773,9 farm workers and domestic workers in 2007 (<http://www.daff.gov.za/docs/statsinfo/Ab2012>).

Under colonial, union and apartheid rule black people, particularly farm dwellers, were, by law, tied into a subservient relationship with the landowners where they resided on land, under conditions set out by the white landowners (Lahiff 2007:19). The injustices of apartheid land policies in South Africa were and remain a major cause for the insecurity, landlessness, homelessness and poverty of the black majority (Van der Walt 2005; DLA 1997). The practices of the colonial, union and the apartheid laws have resulted in the displacement of black South Africans from their land and homes.

The post-1994 government has embarked on Land Reform Programmes, aiming to redress these issues and redistribute land. The Constitution, Act 108 of 1996 mandated that Parliament enact legislation specifically to improve and/or redress the insecurity that rural dwellers have and still experienced (RSA 1996). Government policy aims at securing tenure rights for people living on farms, but tries to balance the interests of farm dwellers and landowners (DLA 1997:33). The Extension of Security of Tenure Act, 62 of 1997 (ESTA) was enacted to, amongst others, to fulfil the Constitutional mandate to regulate evictions and improve farm tenure relations (RSA 1997). ESTA provides mechanisms such as court, mediation and arbitration in which disputes over land rights can be resolved.



Nkuzi Development Association and Social Survey have documented the history of evictions of rural dwellers from farms for the period 1984 to 2004 (Wegerif *et al* 2005). The survey has sought to find out, amongst other things, whether mechanisms that have been introduced in ESTA have indeed achieved their stated goals. Amongst the findings, the survey indicates that despite the regulatory provisions of ESTA, more black people have been evicted from white farms in the first ten years of democracy than were evicted in the previous ten years under apartheid rule (Wegerif *et al* 2005:185). The National Evictions Survey estimated that only 1% of evictions involved any sort of legal process (Nkuzi Development Association and Social Surveys Africa 2005:15). According to the survey the reason behind evictions are largely economic, with the biggest problem being that farmers are making and enforcing decisions based on their own economic interests

over farm workers who, over 90% of whom, are not unionised and have no power to defend their own economic interests. The survey also found that only one percent of farm evictions involved a court process and some of those that had been through the court process did so with no legal representation. The survey has provided the following estimates of farm dwellers displaced and/or evicted between 1984 and 2004:

**TOTAL NUMBER OF PEOPLE DISPLACED AND EVICTED FROM FARMS**

	Displaced from farms	Evicted from farms
1984 – 1993	1,832,341	737,114
1994 – 2004	2,351,086	942,303
TOTAL	4,183,427	1,679,417

These figures show that the number of farm dwellers displaced and evicted from farms has increased during the period 1994 to 2004 (Nkuzi Development Association and Social Surveys Africa 2005: 07).

In practice, farm disputes have been handled through different strategies including unlawful acts and other processes that reconcile parties' interests without the actual use of courts (Atkinson 2007). An inquiry by SAHRC in 2003 found 'widespread non-compliance' with ESTA at all levels of the justice system (SAHRC 2003:177). The SAHRC reported 'a high rate of illegal evictions with a lack of law enforcement and prosecution of

offenders' (SAHRC 2003:179). Wegerif *et al* argue that there is need for secure tenure and that the ESTA's legal processes are ineffective (Wegerif *et al* 2005).

The coming into force of ESTA has seen numerous court challenges and practices against anti-eviction provisions (Van der Walt 2005). Hall argues that ESTA provides relatively weak rights as it allows farm dwellers to be made homeless through legally sanctioned means (Hall 2003:24)

The 2003 SAHRC enquiry reported employers as hostile towards trade unions and have adopted a number of strategies to intimidate and frustrate trade union organisers, including threats of violence and denial of access to farm property (SAHRC 2003:29). Again SAHRC in 2004 found that support for the tenure legislation from organized agriculture and their legal representatives were, lacking (SAHRC 2004:10).

Few studies have explored what processes farm tenure parties utilised and why one was preferred over another. This study seeks to explore why and how parties to farm tenure relations decide on processes to resolve disputes between them and provide a grounded theory using the researcher's practical experience of Nkuzi Development Association's (Nkuzi)'s role when providing a service to parties on farms within the context of ESTA. Nkuzi's motivation for involving itself in the case studies comes from its role as part of the National Land Committee (NLC) national programme of monitoring the implementation of ESTA in both the Gauteng and Limpopo provinces of South Africa.

I argue that ESTA's court option is ineffective in bringing about societal change; out of court processes offer occupiers a better platform to amicably settle tenure disputes with landowners. I also argue that ESTA – as the law that has been enacted to protect the land rights of people on farms – has limited mechanisms with which to effect the necessary change that the Constitution of the country requires.

## 1.2. Objective of the Study

The overall objective of the study is to analyse the tenure related disputes between landowners and occupiers, exploring the choice of strategies and/or mechanisms that parties to farm tenure utilise to resolve disputes between them. This thesis is an in-depth study of four case studies from Vhembe district of Limpopo province of South Africa – the former Zoutpansberg district of Transvaal.



Figure 1: Map of Vhembe District

Source: <http://www.vhembe.co.za>

This study attempts to explore the experiences of farm dwellers and landowners in dealing with tenure related disputes following the enactment of ESTA.

The wider significance of this study is its contribution to knowledge and understanding of the processes that resolve tenure disputes, in a socio-legal perspective. This study also seeks to understand the processes that parties to tenure disputes are able to utilise. This is achieved by examining the mechanisms and/or strategies adopted by landowners and occupiers; determining why parties opt for one process rather than another; and determining the implications these choices have for the outcomes of land tenure disputes.



This study has the following specific objectives:

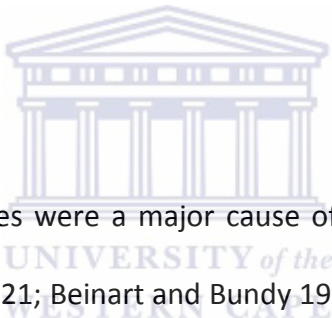
- i) To document experiences of parties to farm tenure disputes when implementing ESTA provisions;
- ii) To understand why parties are able or unable to achieve the intended aims of the law makers when faced with tenure dispute;
- iii) To examine the alternative dispute strategies adopted by landowners, farm workers and occupiers towards addressing tenure disputes; and
- iv) To determine why parties opt for one process rather than another, and the implications of these choices for the outcomes.

### **1.3. Rationale of the Study**



The study has adopted the case study method in order to understand the experiences of farm tenure parties in the context of ESTA with the aim of conducting a qualitative assessment of the processes that party to farm tenure utilise in resolving disputes between occupiers and landowners – following the coming into force of ESTA. This study provides lessons on the implementation of ESTA through court and out of court processes. The understanding gained is to be used as a basis for recommending measures to improve tenure security on farms and also to guide policy-makers in developing future tenure legislation and improving intervention strategies related thereto.

#### **1.4. Research Problem**



Colonial and apartheid land policies were a major cause of insecurity, landlessness and poverty in South Africa (Ross 1999:21; Beinart and Bundy 1987). The policies also resulted in inefficient urban and rural land use patterns and a fragmented system of land administration (DLA 1997). Since 1994, the South African government's White Paper on land policy has developed a land reform programme with restitution, redistribution and tenure reform (DLA 1997).

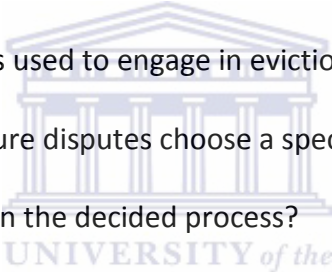
Tenure reform, the concern of this thesis, is the third leg of land reform. It aims to provide legally secure tenure for people living on communal land and also deals with securing the tenure of farm dwellers, farm workers and labour tenants living on land belonging to others. The principal policy measures taken to secure tenure rights of farm dwellers and

workers are the enactment of ESTA and the Land Reform (Labour Tenants) Act of 1996. However, after a decade, ESTA has been a dismal failure. Land activists and successive ministers of Agriculture officials have repeatedly called for ESTA's review or replacement (Mayende 2004:49).

Despite the new legislation, black people living on farms in South Africa remain amongst the most vulnerable people in society (Nkuzi Development Association and Social Survey Africa 2005). There is widespread belief that the court processes are biased against farm dwellers. Roux argues that 'anti-poor' interpretation of the courts in a number of cases seems to justify the process' biasness in favour of farm owners' (Roux 2004:515). Atkinson believes that there is 'still a complete policy void as far as farm labour is concerned' (Atkinson 2007:69). Some research shows that the degree of closure is now compromised by activities of trade unions and community organizers even though they are limited (Ewert and du Toit 2005; Rutherford and Addison 2007). Wegerif *et al* comment that low rate of trade union membership amongst farm workers in Limpopo province is due to difficulty in accessing the farms that are closed to outside world (Wegerif et al 2005).

Faced with these challenges landowners and farm occupiers generated various alternative strategies to deal with tenure relations – other than the court route as emphasized by ESTA. Hence, this study explores the manner in which individual parties have decided on what processes to use when dealing with tenure related disputes on farms – since 1997.

The key research questions focus on power relations; experiences and perceptions; and other factors that influence choices of strategy. Another focus is on the factors characterizing the court route as envisaged in law and seen in practice; comparing factors distinguishing court cases and those negotiated. Also included in the research is an examination of the main strengths and weaknesses of alternative strategies and an attempt to understand the implications of this analysis for methods of enforcing the tenure rights provided for in ESTA. With the aid of literature from prior studies, I define the following research questions:

- 
- (a) Who decides on the process used to engage in eviction or burial disputes?
  - (b) Why do parties to farm tenure disputes choose a specific process?
  - (c) How do parties participate in the decided process?
  - (d) Do the parties view the processes as serving a useful purpose in achieving their goals, and how so?
  - (e) When deciding on the process, what need did the parties hope to fulfil?
  - (f) What are the power relations; experiences and perceptions; and other factors influencing strategies and choices made by the actors?
  - (g) What characterises the court route as envisaged in law and seen in practice, and what characterises cases of mediation and negotiation?
  - (h) How do government agencies and other role players influence the choices made by the parties?

- (i) What were the outcomes and the impact of the different strategies on parties' behaviour and relationships?
- (j) What are the main strengths and weaknesses of the alternative strategies – the court route versus mediation and negotiation?
- (k) What are the implications of the analysis for methods to protect the tenure security of farm workers and dwellers?

### **1.5. Structure of the Study**

The study is organized into eight chapters. **Chapter one** introduces the thesis, setting out the aim of the research and rationale of the study, explaining the context that gives rise to the research in relation to the literature in the field. The chapter concludes by presenting the research problem and the questions that the study seeks to answer.

**Chapter two** discusses the diversity of research methods used in the course of the study and outlines the procedures and sources of data that have been used in the investigation. The chapter provides a motivation for the use of this studies' methodology and clarifies the relationship between research questions; methods used to collect data; limitations of the methods; interpretation of data; and the nature of the account produced thereafter. As the study involves people as research subjects, a statement on research ethics will also be presented in this chapter.

**Chapter three** provides the history of the Zoutpansberg district of the Transvaal – now the Vhembe district of Limpopo – in relation to land dispossession and social relations on farms. It sets out to contextualise how events in the wider socio-legal environment have impacted on the farming sector and affected the lives and livelihoods of those within it. The period covered extends through the pre-colonial era, the colonial era, the Union of South Africa, apartheid, transition, and the post-apartheid eras.

**Chapter four** surveys the legal framework governing the tenure security of people residing on privately owned land – as regulated by the 1996 Constitution, Common law, rules of international law, tenure policy, and the provisions of ESTA as amended.

**Chapter five** provides socio-legal theoretical approaches to dispute resolution mechanisms. The chapter also examines theories on the use of law, court and alternative dispute resolution (ADR) as tools for societal change. I adopt a view that looks at the court's effectiveness and the use of ADR as tools for social change. The conclusion to be drawn here is that the court alone cannot produce social change. Other government institutions and relevant stake holders have to jointly implement the law through Commission for Conciliation, Mediation and Arbitration (CCMA) type dispute resolution mechanisms.

**Chapter six** presents two farm dweller eviction cases; comparing one that was dealt with through court processes and another that was handled through negotiated settlement processes. The chapter also examines the difference between outcomes of negotiated

settlements with those resolved through court processes. This chapter presents an analysis of data – in relation to the theoretical approach – about the effectiveness of the law, court and alternative dispute resolution mechanisms as tools for social change. The chapter concludes the reason for choosing the process as well as outcome and implications of such a choice.

**Chapter seven** presents two burial cases and – as in Chapter six - examines processes that farm parties utilised towards resolving tenure disputes; comparing the outcome of the processes that the parties engaged in. Like the analysis of eviction cases in chapter six, the chapter analyses the burial cases in relation to the theoretical approach about the effectiveness of law, courts and alternative dispute resolution mechanisms as tools for social change. The chapter concludes by presenting the process and reason for choosing the process as well as the outcome and the implication of such a choice.

**Chapter eight** concludes the study, and address the wider implications and challenges of ESTA dispute resolution mechanisms that have emerged from the findings in this chapter.

## **CHAPTER 2: RESEARCH METHODS**

### **2.1. Introduction**

This chapter outlines and describes research methods used in the course of the study and discusses methodological issues that have arisen. It clarifies the relationship between research questions, methods used to collect data, limitations of the methods, interpretation of data, and the nature of the account produced thereafter.

### **2.2. Research Design and Methodology**

The research design and methodology follows a case study approach using qualitative research strategies. Schram defines the case study method as an attempt to illuminate why a decision or set of decisions were taken; how they were implemented; and with what result (Schramm, 1971). Kitay and Callus define a case study as a research strategy that is used to study one or more selected social phenomena and to explain the phenomena by placing them in their wider context (Kitay and Callus 1998:103). The case study strategy enabled the researcher to access a range of information sources, such as documents, artefacts, interviews and observations. According to Kitay and Callus case studies can be conducted with limited resources – such as time and money (Kitay and Callus 1998).

Case studies emphasise detailed contextual analysis of a limited number of events or conditions and their relationships. Researcher Robert K. Yin defines the case study

research method as an empirical inquiry that investigates a contemporary phenomenon within its real-life context; when the boundaries between phenomenon and context are not clearly evident; and in which multiple sources of evidence are used (Yin 1984: 23).

The field of study is a socio-legal one with its focus on the role of court and out of court processes, and law as tools for social change in the context of ESTA. The study is based on field experience of seven years as a fieldworker and three years as a lawyer in the employment of Nkuzi, assisting farm workers and dwellers towards exercising their labour and land rights in the post-1996 democratic South Africa.

Fieldwork and legal representation that the researcher played in the interaction with the parties, limit the opportunity for the study's objectivity. I am declaring my position and involvement in the cases on behalf of certain clients. I endeavoured to solicit and record the perspectives of the parties other than those I represented. My interest in this study is not primarily to assess who was right or wrong, morally or in relation to the law, but rather to understand how they opted to pursue their interests.

The bulk of the fieldwork was spent in full engagement with farm dwellers towards finding possible solutions for tenure problems of unfair dismissals and evictions on farms. However, the interaction provided an opportunity for the researcher to observe and talk to both parties and those assisting them. Many of the farm workers, dwellers as well as landowners and employers where Nkuzi has done some work, trusted Nkuzi and viewed it



as the most supportive institution when facing problems with their employers or owners of the land they resided on. Some landowners, both, with legal representatives and without, also appreciated information dissemination of legislation that affected their relations with their workers and people residing on their land free of charge.

When responding to calls, the strategy was to first consult with the aggrieved party, usually the farm dweller or worker, getting a sense of how he or she would like the matter to be resolved, then proceed to the landowner or employer to get his or her side of the story, likewise, also enquire as to how he or she would like to see the matter resolved. Communication with workers and dwellers was easy as the researcher speaks Xitsonga and Tshivenda, the languages mostly spoken by farm dwellers in the area. Also the researcher had little difficulties in communicating with landowners, particularly that most landowners know least one language that farm dwellers or workers speak and also most if not all are able to communicate in English. The researcher has also an added advantage of understanding Afrikaans, being the language that almost all landowner speak and as such where necessary, use it as the last resort.

### **2.3. Case Study Selection**

This study focuses on both primary and secondary data. Primary data includes field notes and case files kept at the office of Nkuzi Elim office. Four farm dweller cases were purposively selected - two cases involving eviction of occupiers and two involving the

occupiers' right to bury that observed and attended by Nkuzi Elim office. These cases were compared and contrasted, examining the different ways through which cases were settled using court or out of court processes. Full descriptions of the cases are provided in chapters six and seven.

#### **2.4. Research Techniques**

The main tool used for data collection in this study was analysis of secondary data – such as fieldwork notes; case files; court judgments; follow up interviews; and participant observation. With permission from the Nkuzi director, I visited the Nkuzi Elim office and accessed and made copies of case files, during a period between July 2008 and July 2009. Follow up Interviews were conducted between September 2009 and February 2010. Interviewees were selected based on criteria aiming to cover relevant viewpoints by identifying those who possess special knowledge. Interviews were conducted in Tshivenda. To supplement the case files, field notes – compiled at the time by the researcher - were used. Emerson defines field notes as 'accounts describing experiences and observations of the researcher to try and understand the true perspectives of the subject being studied' (Emerson 1995:179).

#### **2.5. Data analysis and presentation**

In order to assist in the synthesis of data, collected data was broken up into manageable themes. Mouton suggests that it helps the author to establish themes in the data

(Mouton 2001). Analysis of data used for the study is qualitative in nature and involves the contrasting and comparing of issues derived from the cases studies in order to distinguish common issues that emerge across them. Data were analysed in relation to the research questions and the specified objectives of the study. The findings were written up as text for discussion along the research questions and themes.

## **2.6. Ethical conduct**

Confidentiality and anonymity of study participants was no given consideration when writing presenting cases studies. This was mostly due to the fact that by the time the study was conducted, all the case studies were already in the public domain, with real names of participants mentioned in newspapers, radio and television and some were contained in court papers. However, when a need arises for a follow up interviews, informed consent was first obtained

## **2.7. Conclusion**

The above chapter has presented the methods and techniques that were employed in the collection, analysis and interpretation of data. It also identifies the strategies of inquiry that the study uses and offers a full explanation of the data collection processes. As such, this chapter provides motivation for the use of the particular research methods employed as well as explaining the limitation and gaps experienced during data collection.

## CHAPTER 3: HISTORY OF LAND DISPOSSESSION IN THE ZOUTPANSBERG DISTRICT OF THE TRANSVAAL

### 3.1. Introduction

South Africa's land dispossession began in the Western Cape following the arrival of the Dutch East India Company in 1652, which used it as a refreshment station for Dutch ships navigating the spice trade route to India (Davenport 1977). Ranching and farming activities led to expansion into the interior and to confrontations with the local African peoples (Omer-Cooper 1987:05). Colonial and apartheid regimes utilized various processes to dispossess indigenous groups for racial motives (Levin and Weiner 1991).



Trapido is convinced that 'relationships of power and property which had existed in the Cape Colony from which they have migrated' were reproduced later in the Transvaal (Trapido 1908:351). Some of the influences and trends in the Cape Colony that might have impacted in ways on the white migrants include amongst others, the increasing availability of African labour to white farmers on the Cape Eastern Frontier, the evolution of a system of apprenticeship, the emergence of a class of wealthy farming families who were very successful with more market-oriented farming, the dispossession of the land of some of the indigenous communities and accumulation of land in the hands of a few and the practice by white farmers of demarcating new farms in the immediate vicinity of indigenous communities in order to secure good quality land (Davenport 1987:391).

In the Zoutpansberg district the emergence of the *'swart skuts'* (black marksmen) in the ivory trade added another dimension to the cooperation between white hunters/farmers and African labourers in the frontier zone (Wagner 1980:330). How black families remain on farms and made the farms their home in South Africa is traced from the dynamics of political change in the second half of nineteenth century South Africa (Tempelhoff & Nemudzivadi 1997:102). The study of South African agrarian history becomes relevant if one connects agrarian history to the mineral discoveries of the late nineteenth century (Saunders 1983:13). So this implies that mineral discovery in the South Africa interior has marked a major turning point in the country's agrarian history.

This chapter explores the background of land dispossession and social relations in the Zoutpansberg district. Zoutpansberg was the north-eastern division of the Transvaal, – now the Vhembe district of the Limpopo province. Events and factors that contribute to the insecure tenure situation that post-1994 farm dwellers find themselves in, is examined. The chapter is divided into four periods: the pre-Union of South Africa era, the Union of South Africa era, the apartheid era, and negotiations and the Adoption of the 1996 Constitution.

### **3.2. Zoutpanberg: Pre-Union of South Africa (1820-1910)**

South African land dispossession began when the first white settlers arrived at the Cape in 1652. The first forced relocation took place in 1658 when Jan van Riebeeck claimed the land west of Salt and Liesbeek rivers (Levin 1996). A J Christopher and L Vail trace and

locate the development of segregated cities and towns that came with conquest and dispossession in different times and different places (Christopher 1994; Vail 1989). An important work in this respect is Timothy Keegan's *Rural transformations in industrialising South Africa*, that gives a thorough overview of the development of commercial agriculture during the late nineteenth century up to 1914 (Keegan 1986). Some of the stipulations in the ordinances and laws that were passed showed resemblance to the provisions of the Master and Servants Ordinance of 1841 and the Masters and Servants Act of 1856 in the Cape Colony (Ross 1986:84). Legislation was used to force blacks to become farm labourers (Van der Horst 1942:292).

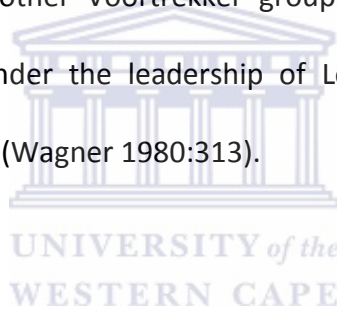


The district of Zoutpansberg experienced the effects of colonial conquest, segregation and apartheid land dispossession that subjected farm dwellers and workers to the landless situation in other parts of the country (Carry Miller 2000:03). 'Zoutpansberg' is the name given by the Boers in the nineteenth century to a range of mountains in the far north of the then province of Transvaal (Wagner 1980:313).

The oral tradition of the Zoutpansberg, the present Vhembe district - recorded in the early twentieth century - tells of dispossession of the early inhabitants starting from the period when the ancestors of the Venda people migrating from the Great Lakes of East Africa (Weismann 1908; Van Warmelo 1940; Stayt 1931 and 1968). The Venda people are said to have crossed the Limpopo River and the ancestors of the Tsonga speaking people coming

from Mozambique (Van Warmelo 1940; Stayt 1931). Early inhabitants of the Zoutpansberg traded iron hoes that they forged with the Tsonga speaking people (Van Warmelo 1940). The Tsonga speaking people are reported to have dominated the copper trade from Messina, had access to Portuguese traders on the east African coast and believed to have also kept cattle (Stayt 1931).

Land dispossession in the Zoutpansberg district started when Voortrekkers – who were followers of Coenraad de Buys – from the Cape Colony reached the area in the early 1820s (Wagner 1980:318). Two other Voortrekker groups reached the Zoutpansberg mountain range in 1836, one under the leadership of Louis Trigardt (Trichardt) and another under Hans van Rensburg (Wagner 1980:313).



The first white settlement was the town of Schoemansdale founded by Hendrik Potgieter in 1848 (Wilson and Thompson 1969). The village of Schoemansdale was laid out in the winter of 1848 (Wagner 1980:318). The arrival of trekkers and Voortrekkers, exposed the African communities they found in Zoutpansberg to a new set of outside influences such as the Cape labour laws, the construction of private land ownership, and notions of an un-free labour system. There were conflicts as well as instances of accommodation and trade between the Voortrekkers and the early inhabitants of the area. Local African communities continually challenged settlers' authority (Potgieter 1958:23; Giliomee 1989). African communities exchange grain surplus for various products including meat with Voortrekkers.

The initial arrival of Voortrekkers in Zoutpansberg is recorded to have been marked by violence and bloodshed (Stayt 1968). Despite the white settlement, African communities continued to enjoy access and use of the land for decades (Wagner 1980:318; Wessman 1908:10; Stayt 1968).

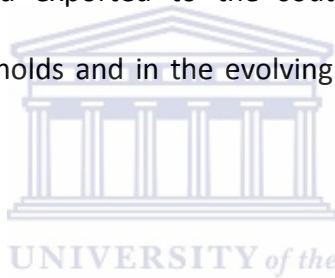
Between 1848 and 1867 Zoutpansberg was described as the hunting frontier. The Boers of Zoutpansberg were not the first to exploit the hunting grounds in the northern Transvaal, rather the first to extensively apply a piece of European technology – gun to it (Wagner 1980:324). However, the Boers were highly dependent on African marksmen to hunt elephant, especially within the malaria and tsetse belt (Boeyens 1994:198). According to Stayt African hunters supplied the Voortrekkers with ivory, and were in return supplied with firearms and as a result, many Africans in the north had acquired guns from the trekkers through three years of service (Stayt 1968). The Boers needed the services of the blacks for hunting elephants and according to B.H. Dicke, the Venda ruler, Ramabulana and his subjects were employed as gun carriers and later as hunters (Dicke 1925:07). The Venda used the opportunity and learnt how to use firearms. It is also said that they acquired firearms from coastal traders who were intent on sidelining the white hunting fraternity at Schoemansdale (Moller-Malan 1953:148).

By 1848 relations between Voortrekkers and neighbouring African communities assumed the pattern of an indentured system. Through this system Africans were subjected to



providing labour for Voortrekkers for a definite period of time in exchange for free passage to a new country (Delius and Trapido 1983:64). Some Africans were able to turn the guns they acquired to effective armed resistance against land dispossession (Bonner 1983:69; Jeppe and Kotze 1887).

Wagner wrote of Zoutpansberg emerging as an important hunting and trading centre (Wagner 1980:313). After a number of years of active hunting, the elephant population in the region started dwindling, hunters then resorted to collecting 'black ivory' – young children who were captured and exported to the south by ox-wagon to work as 'inboekelinge' on farms, in households and in the evolving industrial activities (Boeyens 1991:31).



To the East of Zoutpansberg, the ivory trade was dominated by Portuguese traders who had close ties with various Tsonga-Shangaan speaking communities (Wilson and Thompson 1969). The Tsonga in Transvaal called themselves *maGwamba*. The Boers in the nineteenth century referred to them as *knopneusen*, which the English translated as 'Knobnoses'. Native Commissioner Oscar Dahl estimated about thirty independent headmen in his district in 1879, mustering between them about 10 000 warriors (Transvaal Archives: SN12/187/79).

White farmers and hunters in Zoutpansberg area and the eastern Transvaal experienced ore difficulty in acquiring African labour and as a result thereof it appears that white

farmers in these areas relied largely on indentured (*inboekselinge*) labour (Delius & Trapido 1983:53; Wagner 1980:332). According to Delius & Trapido indentured labour was an important source of labour for white farmers in the Transvaal until the early 1870s. Jan Boeyens describes how the trade in black children and the institution of 'apprenticeship' in Zoutpansberg, was operated by the northernmost Voortrekkers. Apprentices were taken in outright raids, claimed as tribute, and in some cases obtained through barter with AmaSwati from among their war prisoners (Boeyens 1994).

Before 1870 Zoutpansberg reputation as a major source of 'black ivory', was known as far South as the Cape. 'Black ivory' was the term for African children who were transported by wagon to other parts of the ZAR and the Orange Free State and sold to local burghers where they were kept as slaves (Boeyens 1994; Bonner 1983:80; Delius and Trapido 1983:65). Boeyens describes the indentured system as a practice that often degraded into a form of slavery, particularly with regard to the manner in which young children, or 'apprentices', were obtained, traded and controlled (Boeyens 1994). Some children were obtained as gifts from Africans while some were captives, known as *buit* (booty) who were distributed by Voortrekkers among themselves after commando raids on African communities (Liebenberg 1959). According to Connor the Transvaal Boers could buy slaves and apprentices from groups of professional elephant hunters around the confluence of the Limpopo and Levubu rivers which they used as a central hideout and camping spot. Native chiefs had to provide labourers to the whites and were exempted

from paying tribute (*opgaaf*) to the Transvaal Republic or *Zuid Afrikaansche Republiek* (ZAR) (Connor 2003).

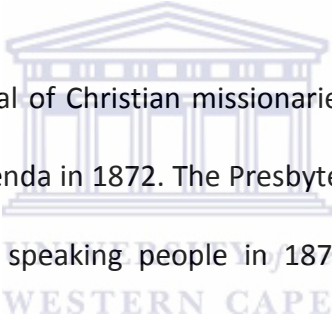
The ZAR was an independent, Boer-ruled, country established in 1852 and was independent from 1856. During the ZAR administration, relations between trekkers and Africans were unpleasant due to taxation, cattle rustling and control over the supply of fire arms. In exchange for their labour the ZAR permitted some Africans to remain in their original dwelling places, even those allocated as part of white farms (Struben 1920). *Opgaaf* was – according to Delius – made out of cattle, sheep, goats, grain, hoes, ivory, copper ingots, or leopard skins (Delius 1983).

Women and young children were required to guard the crops against pests, while adult men provided labour for elephant hunting. Upon reaching adulthood, African children were known to marry, raise families and even to begin farming on their own while required to continue settling close to their former owners and remain ever liable for service, as did their children (Delius and Trapido 1983; Wagner 1980:197). According to Wagner during the time, law viewed tribute labour as a two-tier system wherein labour was required from a tributary homestead for up to fourteen days without payment.

Zoutpansberg was also known in the coast as a major source of ‘white ivory’ and other game products. Wagner gives an example from 1856 when Commandant Jan Jacobs returned from an attack on the stronghold of the Venda chief Rasikhuthuma in which

about twenty-five Africans were shot, with 76 head of cattle, 108 sheep and goats, and 13 young Africans captured as slaves (Wagner 1980:198).

In 1866 war broke out in Zoutpansberg district between the trekkers and the Venda speaking Africans, when the Voortrekkers intervened in a Venda chief succession dispute. The Venda chief Makhado attacked an outlying Voortrekker settlement that led to the Voortrekkers abandoning Schoemansdale town on 15 July 1867 (Marks & Atmore 1984; Hopkins 2006).



In 1870s the district saw the arrival of Christian missionaries. The Lutherans established their mission Station among the Venda in 1872. The Presbyterian missionaries established their mission among the Tsonga speaking people in 1875. The missionaries like the trekkers, also took large tracts of land from the African inhabitants of the Zoutpansberg district (Lahiff 2000).

In 1877 Transvaal was annexed by the British who sold it to black people, but land was never transferred to African ownership. It was registered under the name of the Secretary of Native Affairs as trustee, but this was never divulged to the 'purchasers'. In the Dutch-controlled Orange Free State and Transvaal areas, no individual ownership by black people was allowed (du Plessis 1996).

By the end of the nineteenth century, the process of African conquest in South Africa was almost complete, although in many areas, African people continued to farm on white land through systems of land tenure that allowed some independent African production. In the Zoutpansberg district white landownership was small and land alienation limited. Because successive governments did not want a class of desperately poor white settlers who had been dispossessed in other parts of the country to flock to urban areas, the state had as a matter of policy extended financial assistance to keep the poor white settlers on the land (Wagner 1968).

In 1900 the ZAR was annexed by the United Kingdom during the Second Boer War but the official surrender of the territory only took place at the end of the war, on 31 May 1902. Following the Second Boer War that took place between 1899 and 1902, the inhabitants of the Zoutpansberg district, both Voortrekkers and Africans, were disarmed by the new British administration. The British divided the area under three Native Commissioners' areas: Louis Trichardt, Speloken and Sibasa (Commissioner of Native Affairs 1904).

By 1902, about 900 to 1200 farms had been established in the Zoutpansberg; the leader of the settlers during this period was a former Landdrost of the Kruger Republic, G G Munnik. During his leadership most of Zoutpansberg land was given to white settlers and this greatly reduced the area occupied by African communities (Report of the Crown Land Zoutpansberg Commission 1908).

Following the second Boer War (1899 -1902) the Venda people were disarmed by the new British administration. This resulted in much of their territory being thrown open to white settlers and a vast area delimited as 'native locations' for the leading chiefs such as Mphephu, Tshivhase, Mphaphuli, Khakhu, Rambuda and Thengwe (Stayt 1968:19). Native locations were introduced partly to change the conditions under which Africans occupied land and exercised their autonomy. Although the policy gave an opportunity to more allocation of land to white settlers, some did not welcome the policy. They argued that it would reduce the availability of African labour that they depended on for their farming (Wagner 1968).



The post-war period saw the establishment of land settlement schemes that separated English-speaking settlers from Boer settlers (Boeyens 1999). Boers returning to the Zoutpansberg after 1902 faced shortages of African farm labour (Wagner 1968). According to Wagner the shortage resulted from the Native Affairs Department's introduction of a policy of demarcating separate locations for ethnic groups; the Vhavenda and the Tsonga speaking people.

In the aftermath of the Anglo-Boer War, Britain re-annexed the South African Republic and the Orange Free State. These new territories, renamed the Transvaal Colony and the Orange River Colony respectively, were added to Britain's existing South African territories, the Cape Colony and the Colony of Natal (Thompson 1960).

The British Parliament passed the *South Africa Act of 1909* which created the Union of South Africa from the British Colonies of the Cape of Good Hope; Natal; the Orange River Colony; and the Transvaal Colony (South Africa Act 1909). The South Africa Act was a major piece of legislation passed by the Parliament of the United Kingdom with the intent of uniting various British colonies and granting them some degree of autonomy (Thompson 1960; Brand 1910). The Union of South Africa is therefore the historic predecessor to the present-day Republic of South Africa.

### **3.3. Zoutpansberg: Union of South Africa (1910 – 1948)**

The Union government was established by King Edward VII of the United Kingdom. He proclaimed the establishment of the Union of South Africa wherein the British and the Afrikaners were to rule together (Brand 1910). The Union of South Africa was inaugurated on the 31<sup>st</sup> of May 1910, with Louis Botha as its Prime Minister. Various Union governments took various measures during the era of segregation to supply farmers with labour (Beinart & Dubow 1995:177).

Zoutpansberg district became the Transvaal Province of the Union of South Africa (Thompson 1960). The key challenge of the Union government was to define a single land and labour dispensation for South Africa. At this stage there was a huge demand from the rural constituency of the South African Party that was threatened by the success of African farmers in sharecropping forms of tenure (Robertson 1971). De Kiewiet gives an

overview of the state intervention into transforming South African agriculture from subsistence farming to a capitalist orientated venture. In his overview, he divides rural South African society into 'the landed and the landless' (De Kiewiet 1941:193). According to De Kiewiet landless group consisted of poor whites, or *bywoners*, who ranged in definition from squatters, to sharecroppers, and labour tenants.

Terms and conditions of employment of blacks on white owned farms are dealt with in Van der Horst's work wherein he discusses various social divisions between blacks and whites as well as the manner in which blacks' remuneration varied from being paid in their share of the produce, grazing and planting rights to cash wages (Van der Horst 1942). Her work point out that despite the seeming immobility of farm labourers due to various discriminatory laws, there was still shortage of farm labour according to farmers, apparently due to urbanization that was on the increase in this period.

The first attempted implementation of segregation policy was with regard to the rural areas which had been alienated into farms for white ownership. The South African Act of the Union government dealt with race in two specific provisions; first it entrenched the vote of the Cape Colony which operated free of racial considerations, although due to socio-economic restrictions no real political expression of non-whites was possible and, second it made 'native affairs' a matter for the national government (Robertson 1971).



The passing of the 1913 Land Act mark the state's intervention into the control of farm labour and was thus a political and legislative in its focus and methodology. The Act was the first major piece of segregation legislation passed by the Union Parliament. It formed the basis for apartheid in 1948 and remained its cornerstone until the 1990s. Initially the Act had an effect of restricting African land ownership to African reserves that only made up to less than 10 per cent of South Africa's land surface (Ross 1999).

The Land Act was directed specifically against the small class of successful, market-oriented African farmers that had emerged over the preceding 50 years, as well as against the numerous African sharecroppers who rented white-owned land outside of the reserve areas (Wolpe 1927). The Act was aimed to force sharecroppers into labour tenancy, to increase the pool of migrant workers for the cheap labour mines, and to undermine the basis for an independent African peasantry (Ross 1999). Black South Africans could not purchase or lease land outside of the reserves, which at that stage incorporated about 8 per cent of South Africa's land area (Ross 1999; Wolpe 1927). As a result of the Act, the majority of Africans could no longer live as subsistence farmers (Ross 1999:88).

The 1913 Act was not immediately enforced as there were differences between farmers on the issue, some farmers wanted tenants evicted and redistributed as farm labourers while white small-scale farmers did not want sharecroppers and labour tenants removed as labour tenants provided a critical source of income for whites who were struggling to survive from the land (Ross 1999).

The denial of the right to a grave in a particular territory as an outcome of the Land Act was described by Sol Plaatjie:

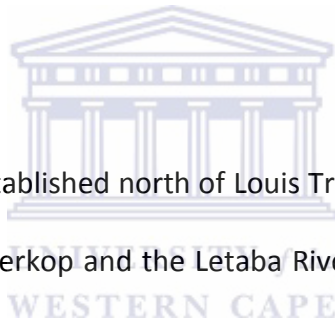
*Even criminals who are hanged have the right to a proper grave. But under the cruel workings of the Land Act, little children, whose only crime is that God did not make them whites sometimes have no right to be buried in the country of their ancestors (Sol Plaatjie 1982)..*

In 1916 the Union government appointed the Beaumont Commission who proposed an additional million hectares of land for the reserves to the core that had been scheduled in 1913. The Commission's proposal brought an outcry from white farmers who supported the principle of segregation but did not want to allow any more land to go to the reserves. In response to the white farmers' reaction, the Union government shelved the Beaumont recommendations and appointed five Local Committees to review the proposals (Robertson 1987).

Duncan gives an overview of the measures taken by the South African government in its policy towards farm labourers for the first half of the twentieth century (Duncan 1995). The study is useful as it provides a list of various cabinet ministers and civil servants who were responsible for the day-to-day functioning of state bureaucracy in the state's attempt to solve the farm labour question. Like Duncan, Ainslie's work presents the establishment and the functioning of the labour bureaus in ensuring supply the

agricultural sector with labour, the use of petty offenders and the use of convict labour on farms (Ainslie 1977).

M. Lacey study "*Working for Boroko*" is regarded as one of the first labour histories which give specific attention to the farm labour question (Lacey 1981). Its focus falls on state intervention where Lacey shows how the origins of a coercive labour system in South Africa can be sought in the Pact Government's manipulation of segregation legislation so as to favour white farmers. Like in other parts of the country, the Zoutpansberg white farmers of the period benefitted at the expense of the black farm workers from the state intervention.



By the 1920's white farms were established north of Louis Trichardt, as far as Messina and to the south-east towards Bandelierkop and the Letaba River in Zoutpansberg district. In 1924 the Pact-government – representing the farmers and white workers – came into power. It argued for 'difference in treatment of Natives and Europeans' but was not in favour of the land segregation policies pursued by the previous government.

The Pact-government introduced the 1926 Masters and Servants Act, which gave force of law to enforce master-slave relations of the colonial era (du Toit and Ally 2003:04). According to Du Toit and Ally, master-slave relationships were characterized by paternalism, which required masters to protect and care for the slaves and placed the latter under the authority of their masters. This ideology is said to have been based on the assumption that slaves were not mature human beings (du Toit and Ally 2003:04).

By the 1930s the government was settling poor white farmers on irrigable land along the upper Levubu of the Zoutpansberg district of Transvaal. At the same period the states Artillery in the Zoutpansberg district were deployed to raid Africans for the purposes of collecting taxes and expropriating African livestock (Ross 1993:48; Wagner 1980).

The government enacted the *Native Service Contracts Act of 1932* which stated that the whole family could be evicted from white farming land if one member of the family failed to render labour services (Van der Horst 1942). Van der Horst argues that the Act had discriminatory effects of drawing all Africans outside the reserves into agricultural economy, while extending controls over labour tenancy (Husy 2001:45). The Act formed the legal basis for the paternalism system of control to be in which well to what some authors refers to as paternalistic discourse to be used as a framework system of control within which the farmer expected commitment from the workers and the latter expected benefits such as food rations and protection (Du Toit and Ally 2003).

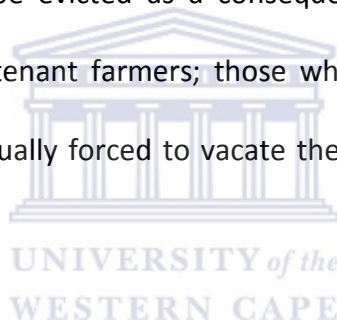
Paternalism offered protection for farm workers but at the same time trapped them in unequal power relations of dependency, which could limit possibilities of resistance (du Toit 1995). Wilson and Thompson believe that paternalism on farms is still part of a complex social construct, in which physical proximity coexists with social distance (Wilson & Thompson 1971:154). Van Onselen argues that paternalism as an overriding ideology

on South African farms is much more than a static abusive concept, claiming that it is much more fluid as the relationship could be challenged and also eroded (Van Onselen 1996). Rural paternalism was integral to the construction and maintenance of a discriminatory labour regime in which farm workers, amongst others, were excluded to white workers under the industrial relations legislation (Du Toit 2003:04). Due to the historical process that created the farm-worker class, farm workers had during this period become one of the most subjugated and marginalised sectors of South African society (Atkison 2007:91).

In 1933 Hertzog established a coalition government. This government passed *the Development Trust and Land Act of 1936* which formally authorized the addition of another 6.2 million hectares of land to the reserves that had been scheduled in 1913. Under the provisions of this Act, Black families who owned land under freehold tenure outside the reserves before 1913 were initially denied rights to land. In terms of the Trust Act, the Trust became the registered owner of all the reserves. This Act provided the basis for formalising the eviction of African peasants farming on white-owned land through extension of the size of the African reserve areas and it also made share-cropping and rent tenancy contracts illegal (Keegan 1936).

In 1936 Zoutpansberg district was introduced to the labour tenant system in 1936 (Keegan 1936:124). According to Keegan labour tenancy represented an intermediate stage in the transition from cash or crop tenancy to full proletarianization. This system

was advantageous to the white farmer as it compelled tenants to work for a minimum period of ninety days within a year and made their labour a form of payment to the farmer in return for access to a plot of land and permission to graze stock (Robert 1980). The service period in the contract was an important concern for labour tenants as the male tenants felt being tied to the farm for a whole year, preventing them from joining labour migrants in urban areas. The system gave the farm owner an opportunity to restrict the mobility of entire African families and force them to supply labour. If, for instance, a single member of the family failed to perform to the satisfaction of the white farmer, the whole family could be evicted as a consequence. This situation gradually weakened the position of black tenant farmers; those who resisted serving under the labour tenancy system were gradually forced to vacate their land (Robert 1980; Keegan 1936).

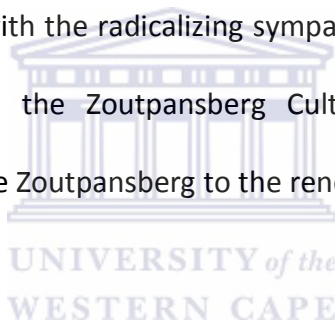


African communities adopted a variety of strategies to maintain and strengthen their access to land and their rights while providing little labour to white farmers. In their attempt to tie labour tenants to land for longer periods, white farmers sought state intervention to enforce the control over farm labour and to transform the cash rent tenants into a more dependable wage labour force (Tempelhoff 1989).

Farm Labourers were tied up to the farms through an elaborate system for registering and controlling the distribution of labour tenants in rural areas. Labourers were subjected to a

twenty day labour tenancy arrangement. Some sections of the white farmers supported the system while others argued that the system was unreliable – due to a lack of mechanisms to ensure the availability of Africans when they were needed. Most Africans had a tendency of disappearing at inconvenient times to plough their own fields, attend the burials of family members or to attend rituals decreed by traditional doctors (Tempelhoff 1989:487).

In the early 1940s Alpheus Maliba established the Zoutpansberg Balemi Association in the northern Transvaal who – along with the radicalizing sympathies of the Transvaal African Teachers Association – founded the Zoutpansberg Cultural Association (ZCA) that organized peasant resistance in the Zoutpansberg to the renewed divisions of crown lands (Delius 1993).

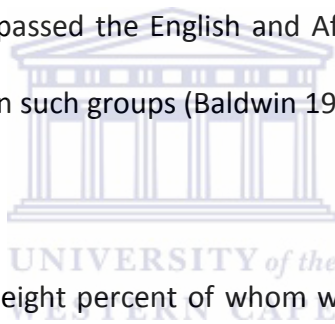


### **3.4. Zoutpansberg: Apartheid (1948 – 1994)**

By the time the National Party came into power in 1948, unequal access to land was already thoroughly entrenched. The Nationalist programme was limited by constraints from the past and the demand of the post-war period (Surplus People Project 1985:100). Apartheid was built on segregation policies (Beinart & Dubow 1995:177). It was a system of racial segregation enforced by the National Party governments of South Africa between 1948 and 1994, under which the rights of the majority 'non-white' inhabitants of South Africa were curtailed. Apartheid state consolidated the unequal access to land situation to

ensure that no black person was allowed to own land and that black people could only reside on farms at the discretion of the white landowners (Sparks 1990:136).

The apartheid government inherited the system of reserves, including the commitment of 1936 to add more land to the reserves. It passed a series of laws which codified separate racial development and suppressed political dissent (Platzky and Walker 1985). National Party leaders argued that South Africa was made up of four distinct racial groups: white, black, coloured, and Indian. These groups were split further into thirteen nations or racial federations. White people encompassed the English and Afrikaans language groups; the black populace was divided into ten such groups (Baldwin 1975).



Over three million people, ninety-eight percent of whom were black, were evicted from their homes under apartheid property laws (Sachs 1989:33). These laws enabled white landowners, local authorities and government officials to evict unwanted people off the land. Due to land dispossession black people were led into a different kind of poverty; unable to farm for themselves and were reduced to being a source of labour without the ability to own land (Baldwin 1975; Platzky and Walker 1985:141).

By 1950 the government established an irrigation scheme for poor white farmers, which only became fully operational with the construction of the Albasini dam (Frazer 2007). White settlers required cheap labour and sizeable numbers of the original inhabitants



remained on farms as unpaid labour tenants with some as rent-paying tenants (Platzky and Walker 1985). Restrictions on the land available to tenants along with demands for unpaid labour, led to a steady flow of labour tenant households off white farms into the crowded tribal locations (Horrell 1973).

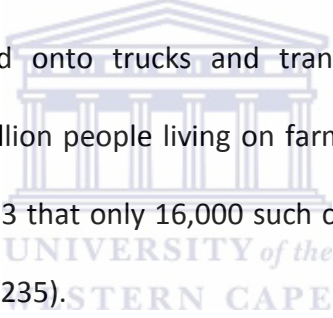
The main laws that played a major role in the massive relocation and forced removal of black people from land during the 50s, included: the *Prevention of Illegal Squatting Act, Act No 52 of 1951* that authorized the forcible removal of squatting communities. It allowed eviction and destruction of homes of squatters by landowners, local authorities and government officials. The *Natives Labour (Settlement of Disputes) Act of 1953* was enacted to control African labour. The Act prohibited strikes by Africans. The Act did not give legal recognition to African trade unions (Goldin 1987 ; Ross 1999).



The *Industrial Conciliation Amendment Act of 1956* was promulgated to substitute for the 1924 and 1937 Industrial Conciliation Acts. The primary objective of the Act was to separate the trade union movements along racial lines, with the aim of weakening them. The Act ended recognition of trade unions with White, Coloured and Indian membership. It lay down that trade unions with mixed membership had to cater exclusively for one racial group or split up into exclusive racial sections, each under the guidance of a White-controlled executive. At this time Africans had not yet been granted permission to belong to a registered union. The Act also gave additional powers to the minister to announce

strikes illegal in essential industries. Whites benefited from this Act because it gave legal force to White job reservation practices (*Industrial Conciliation Amendment Act of 1956*).

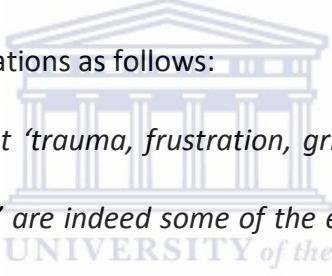
As far as people that resided on farms were concerned, the *Trespass Act of 1959* was enacted. This provided for the issuing of the 'trespass' to farm tenants and/or farm workers' family and all their livestock. The 'trespass' ordered them to vacate the farms by dates that suited the landowners. The *Black Laws Amendment Act* of 1963 was also used to abolish labour tenancy and squatting on farms, resulting in many black families being driven from their homes, loaded onto trucks and transported to relocation sites. According to Bundy out of one million people living on farms as labour tenants in 1936, the government announced in 1973 that only 16,000 such contracts remained, and were due to be phased out (Bundy 1979:235).

The logo of the University of the Western Cape is centered in the background of the text. It features a stylized classical building with a pediment and columns, rendered in a light blue color. Below the building, the text 'UNIVERSITY of the WESTERN CAPE' is written in a serif font, with 'UNIVERSITY of the' in a smaller size and 'WESTERN CAPE' in a larger size.

The 1960s saw attempts by the government to abolish labour tenancy in order to get black people off land in 'white areas'. Labour tenants were either forced to leave the land or remained as wage labourers. In Zoutpansberg district, labour tenancy was also abolished at the same period (Platzky and Walker 1985:30). Platzky and Walker give the example of the forced removal of 400 families from the Lutheran mission of Gertrudsburg by the army in 1960.

By 1962 the foundations had been laid for the division of the African people of the Northern Transvaal along ethnic lines, with the establishment of three territorial Authorities: Thohoyandou under Chief Mphephu for the Venda speaking people; Matshangana (later Gazankulu) under chief Mhinga for the Tsonga-Shangaan speaking people; and Lebowa for the Northern Sotho speakers (Hill 1964:15). Forced removals from white areas accelerated following the establishment of the homelands' (Horrell 1973).

Between 1963 and the late 1980s, approximately 3.5 million people were removed from their land and homes (Bundy 1990:08). Moseneke DCJ, citing Bundy, describes the impact of these forced evictions and relocations as follows:



*Bundy makes the point that 'trauma, frustration, grief, dull dragging apathy and surrender of the will to live' are indeed some of the effects of forcible evictions on the human condition. And, the consequences span over multiple areas of social life: frequently it is the case that families are left homeless, their social support structures severed and their welfare services, jobs and educational institutions, rendered inaccessible (Residents of Joe Slovo Community, Western Cape 2009 (9) BCLR 847 (CC) paragraph 8).*

In 1965 Blacks were given final notices to leave farms meant for white occupation only. In the late 1970s, following a change in policy, the government bought some farms from whites owners in order to expand homelands. Some farm dwellers and workers who remained on the farms were again forced to sell their livestock and required to work in

full-time service for minimal wages. Those who resisted selling their livestock or becoming employed workers were – in accordance with apartheid laws – evicted with aid of the brutal police force and white judiciary that was largely sympathetic with Parliament. Farm workers in the reserves were then obliged to spend lengthy periods on white farms without their families and without access to the ploughing and grazing land they had formerly used as tenants (Surplus People Project 1983).

In 1974 the master and servants legislation was repealed and this was the first step towards dismantling the fragmented labour regime established of a unified labour market policy for all workers in South Africa (Du Toit et al 2003:06). By 1979, 12,769 farm dwellers and workers were removed from 'black spots' in the Northern Transvaal in a single year (Surplus People Project 1985). In the early 1980s Surplus People Project found that between 1960 and 1983 a total of 3.5 million people had been forcibly removed and out of the number, 1.1 million people were removed from white farms. According to the census quoted by Platzky and Walker, in 1984 there were around 4.3 million black people living in white owned commercial farms (Platzky & Walker 1985:17).

By the late 1980s the apartheid government faced international condemnation and sanctions along with an increasingly well-organized resistance by non-white South Africans at home and in exile (Davenport 1990). The liberation movements also realized

that their armed struggle and economic sanctions were not going to result in a quick change in South Africa and this led the two parties to start informal contacts in 1985.

Secret meetings continued until 1990 when President Fredrik Willem de Klerk began negotiations to end apartheid. Political leaders were released and liberation movements unbanned, opening the way for official negotiations; starting from the 1991 Conference for a Democratic South Africa (CODESA). In 1991 the National Party government released *the White Paper on Land Reform*, setting forth a general approach to land reforms, including specific policies and legislation with which to implement them (Davis 1991).

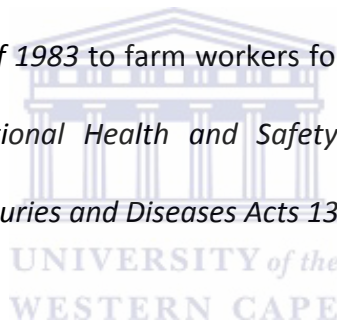


The *White Paper* acknowledged access to land as a basic human right, and proposed that access be achieved through the operation of a market economy in which free enterprise and private landownership would prevail (South Africa Country Report 1991). In the same year the apartheid government embarked upon a course of negotiations with representatives of the non-white majority to end the apartheid system (South African Country report 1991). Because land issues were central to the entire apartheid system and the policies underlying it, land reform was and still is regarded as the key element in the dismantling of apartheid (Davis 1991).

Disagreements between parties caused negotiations to cease during the second half of 1992. The talks resumed again early in 1993 with the goal of developing a new

Constitution and Political system that would permit more equitable participation in social and political life and access to resources for all South Africans. Robertson points to two problems stood out during negotiations – as various parties attempted to agree upon land reform measures: first, how to address the inequalities of past racial land allocation systems; and second, how best to achieve the first goal without disrupting and endangering the land-based economy of the country in the future (Robertson 1989).

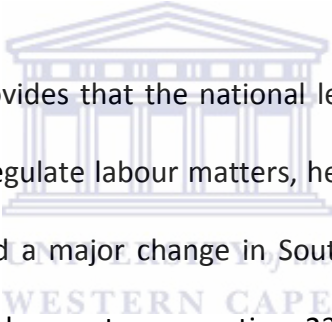
Other improvements of labour relations were the *Agricultural Labour Act 147 of 1993* which extended the provisions of the then *Labour Relations Act 28 of 1956* and the *Basic Conditions of Employment Act 3 of 1983* to farm workers for the first time. Farm workers are covered under the *Occupational Health and Safety Act 181 of 1993* and the *Compensation for Occupational Injuries and Diseases Acts 130 of 1993*.



To this day, high levels of racial inequality in land ownership symbolize and evoke a wider range of deprivations and oppressions than were experienced in the past and are seen to require redress in the present. Land issues were central to the entire apartheid system and the policies underlying it, as such land reform was – and still is a key element in the dismantling of apartheid (Davis 1991).

### 3.5. Zoutpansberg: Negotiations and the Adoption of the 1996 Constitution (1994 – 1996)

The achievement of universal franchise and the first non-racial elections of April 1994 were historic victories won after many decades of struggle. The African National Congress (ANC) won 62.6% of the national vote. The ANC formed the majority party in a Government of National Unity. The legacy of South African land history is to be found in the immense bitterness amongst black South Africans and the powerful desire to have land restored to its rightful owners. This is one reason why land reform was seen as a high priority by the government that took power after the first democratic elections in 1994.



Section 27 of the Constitution provides that the national legislation shall be enacted to give effect to its purpose and to regulate labour matters, hence the *Labour Relations Act* 66 of 1995 (LRA). This Act marked a major change in South African industrial relations system. The next significant development was section 23(1) of the Constitution that extended the right to fair labour practices to all workers and post-transition labour legislation applies to all employees regardless of sector. Farm workers enjoy full labour rights under (LRA). They are also entitled to employment related social security protection in terms of the *Unemployment Insurance Act and the 63 of 2001* (UIF). During 2002 the Minister of Labour issued a minimum wage sectoral determination to cover the farm worker sector in terms of the *Basic Conditions of Employment Act 75 of 1997* (BCEA). This was superseded by the sectoral determination 13 of 2006.

As a result of both the Constitution and LRA South Africa's workplace is democratized. Legislation, policies and practices that discriminated against majority of workers and deprived them of the rights such as rights to form, join unions and to participate in the activities of unions, were done away with. In terms of the Act, employers have right to lock out employees.

The newly-elected government was expected to introduce a radical land reform programme through the Reconstruction and Development Programme (RDP). The RDP had identified the issue of land redistribution as vital, stating 'a national land reform programme' that addresses the injustices of the apartheid past is the central and driving force of a programme of rural development (James 2001). Such a programme would be demand driven and aim to supply residential and productive land to the poorest section of the rural population and aspirant farmers. Special attention was also paid in the RDP to women who faced customary and legal obstacles to accessing land.

The post-1994 government developed measures that would allow access to land and ensure security of tenure for all South Africans. The basis for the initiatives undertaken are found in the Constitution, which protects the rights of all individuals and vests in them and institutions, the responsibility to protect those rights. The newly established Department of Land Affairs (DLA) produced a series of discussion and policy documents



including the framework document on land reform of 1995 and the Green Paper on Land Reform of 1996. Land reform – consisting of restitution (compensation in cash or land), land tenure reform; and land redistribution (transferring agricultural land to black ownership) – was introduced by the government after 1994 when the ANC came to power (DLA 1997).

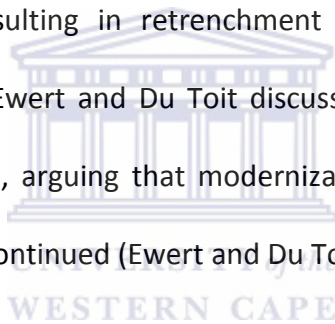
The government published the Rural Development Strategy of the Government of National Unity in 1995. According to Atkinson the strategies had a complete policy void as far as farm labour was concerned (Atkinson 2007:69). The section on land reform rested centrally on a restrictive and neo-liberal policy framework that had been lifted directly from a World Bank report on land reform in South Africa entitled the Rural Restructuring Programme.



National land policy set out in the *White Paper on South African Land Policy, 1997*, has three sub-programmes; namely, Land restitution, Land redistribution and Land tenure reform (DLA 1997) According to this framework, land reform in South Africa rested upon restitution and redistribution. The two pillars were incorporated into official government policy after the April 1994 elections swept the ANC into power, although a third pillar, the reform of land tenure was added in an effort to regulate the evictions of labour tenants and tenure of farm workers and dwellers as well as tenure of those on communal land (DLA 1997). Land tenure reform aimed to bring all people occupying land under a legally

secure system of landholding, helps to resolve tenure disputes, and makes grants and subsidies to provide people with secure tenure. It also concerned with the tenure of those on communal land (DLA 1997).

Like farm dwellers and workers in other parts of the country, tenure reform was supposed to prevent farm dwellers in Vhembe district from being arbitrarily evicted. Also the wider scope of land reform added the expediency of changing labour conditions. Following democratizations, South African agriculture entered the global market, and farms were no longer subsidized as before, resulting in retrenchment of permanent workers and providing housing only for rent. Ewert and Du Toit discuss the limited effects of these changes on paternalistic relations, arguing that modernization merely restructured the conditions for paternalistic to be continued (Ewert and Du Toit 2005:317).



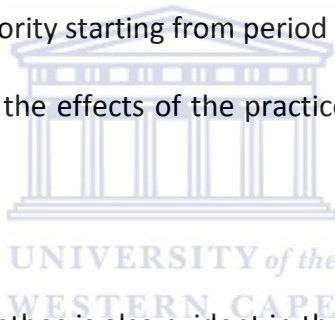
According to Human Science Research Council (HSRC) in 1994 approximately 86.2 million hectares of commercial farm land was owned by less than 60 000 white owners. By 2005, about 3.5% of this had been transferred to black people through the various official land reform programmes (HSRC 2004; Hall 2004a).

South Africa's land reform programme has progressed at a snail's pace with about 18% of all land in black hands (Mail & Guardian 23 January 2009). The argument in favour of a

link between economic development and security was forwarded by the agricultural society, *Agri SA*, claiming that the state's land reform interventions in private landownership caused uncertainty and affected the economy unfavourably, especially in terms of labour and food security (Landbouweekblad, November, 11, 2005).

### **3.6. Conclusion**

The chapter presented background of land dispossession that farm workers and occupiers of the former Zoutpansberg of Transvaal (now Vhembe district of Limpopo) are still suffering from. It discusses the effect of colonial and apartheid government practices and laws into the lives of the black majority starting from period of the early inhabitants of the Zoutpansberg area. In addition to the effects of the practices and laws such as the 1913 had on the lives of blacks.



From the discussion, paternalistic ethos is also evident in the way farmers interacted with farm dwellers and workers. The labour tenant system that was introduced in 1936 led to the forceful removal of the majority of farm dwellers from white farms while forcing those who remained to do so either as farm tenants or squatters (Robertson 1990). During the period when homelands and independence were established, the majority of farm dwellers were removed to the homelands in large numbers.

Lastly this chapter shows the black occupiers received legal recognition in the context of evictions from public and private land.

## **CHAPTER 4: LEGAL FRAMEWORK GOVERNING SOUTH AFRICAN TENURE RIGHTS**

### **4.1. Introduction**

Chapter three presented the historic background of land dispossession in South Africa with particular emphasis on how the laws and practices of the colonial and apartheid governments contributed to the insecurity of tenure that farm dwellers and workers presently experience. Following the change of government, South Africa developed policies and passed legislation with a view to redressing the results of the unjust laws and practices of the colonial and apartheid governments.

This chapter discusses the current tenure legal framework under which the land rights of people leaving farms belonging to others are regulated. This is done through an examination of rules of common law; international law; the National Land Policy; the Constitution; and the Extension of Tenure Act, 62 of 1997 (ESTA).

### **4.2. Common Law**

The common law of South Africa implies a law of non-statutory origin that is based on the Roman-Dutch law of the originally Dutch settlers. This is civilian law as interpreted by the Dutch writers of the 17<sup>th</sup> and 18<sup>th</sup> centuries (Du Plessis et al 1996). The originally primary sources of Roman Dutch law were the treatises of authors such as Grotius, Johannes Voet, Simon Groenewegen and Johannes van der Linden (Hosten et al 1995).

When the British took possession of the Cape in 1806 it was decided that the local Roman-Dutch law would remain in force. Since then, South African courts have used these laws and developed them when they have made decisions. As a result the South African legal system is regarded as a hybrid system of English common law and Roman-Dutch legal principles with greatest influence in the sphere of substantive private law (Du Bois 2007).

Common law – also known as case law or precedent – was developed by judges through the decisions of courts and similar tribunals rather than through legislative statutes or executive branch action. In cases where parties disagree on the law, the court looks to the past precedential decisions of relevant courts. If a similar dispute has been resolved in the past, the court is bound to follow the reasoning used in the prior decision. This principle is known as *stare decisis*. If, however, the court finds that the current dispute is fundamentally distinct from all previous cases – judges have the authority and duty to make law by creating precedent (*Marbury v. Madison*, 5 U.S. 137 (1803)).

The general South African law of property developed out of Roman-Dutch law, as adapted by local practices, court decisions and legislation. South African property law, the focus of this thesis, is the area of law that governs the various forms of ownership in real property as well as personal property (Mostert and Pope 2010).

With the founding of the Union government and the establishment of the Appellate Division, Roman-Dutch law in South Africa was infused with new life. The legal systems of

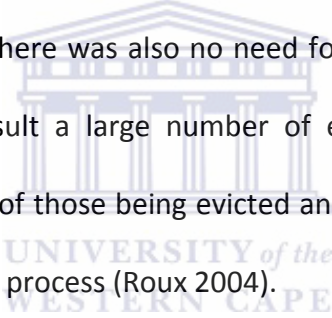
the four territories were made more consistent, partly through legislative innovation, and partly through the activities of the new Appellate Division of the Supreme Court – the highest court country-wide in terms of the 1909 South Africa Act. Roman law has remained a relevant component in several branches of the South African common law, namely the law of property, contract law, and the law of delict (Ross 1999).

Under common law it was easy for landowners to get court orders to evict farm dwellers, evictions were regulated in terms of common law and related apartheid legislation (Roux 2004: 471). According to Van der Walt the South African system of land rights has always privileged the institution of ownership and the land laws made it easy for the apartheid government to effect the evictions and forced removals required for racial segregation and the establishment of an unjust and inequitable land use system. Under the labour tenancy tenure arrangement, when a worker was fired or employment terminated in some way, the right to reside in the dwelling was also terminated (Van der Walt 2005).

The common law rules regulating eviction were set out in two cases: (1) *Graham v Ridley* 1931 TPD 476 al 479 and (2) *Chetty v Naidoo* 1974 (3) SA 13 (A). In both cases the courts held that when an owner of property seeks an eviction court order he or she is only required to allege that he or she is an owner of the property and that the person he or she is seeking an order against, is in possession of the property. Should the owner allege in his papers that the defendant had a right to possession; such right had to be terminated before instituting eviction proceedings. The onus is then on the defendant to prove lawful possession in terms of a lease agreement or any other right in law. Once the

owner alleges and proves the termination of the possessory right of the defendant, the latter will have no further recourse even if the eviction leaves him or her destitute and homeless.

Under common law rules of eviction, if the property owner instituted eviction proceedings against the male head of the household, the wife and the dependants were cited as defendants (Roux 2004). Eviction was a very strong remedy provided to property owners by the rules of Common Law to avoid the 'unlawful intrusion' of their property rights. There was no special notice requirement to give consideration to the fact that people were losing their homes. There was also no need for alternative accommodation or land to be available. As a result a large number of eviction orders were default judgements issued in the absence of those being evicted and a large number of evictions were carried out without any court process (Roux 2004).

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Notwithstanding the owner's strong Common law property rights, owners were not allowed to evict people without following the legal process. According to Roux occupiers could approach the courts for a *spoliation order* to fight against the unlawful removal from their land or home in terms of the Common Law (Roux 2004:271).

According to Van der Walt the Common Law rules of eviction were limited by the *Prevention of Illegal Squatting Act 52 of 1951* (PISA) which extended the already strong property rights to evict. Section 3B (1) (a) of PISA amended the application of the *mandament van spolie* through authorization of evictions without a court order. This had

the consequences that evictions did not take into account the socio-economic and personal circumstances of the occupiers when courts decide on evictions (Van der Walt 2005).

#### **4.3. International Law**

Various aspects of land rights are protected by a selection of international documents and bodies protecting land, property and development rights. International law mainly governs relations between States but also regulates the conduct of other actors, including individuals, international organizations, insurgents and national liberation movements (O'Shea 1989). The two most important sources of international law are the international treaties and international custom. International instruments such as the United Nations (UN) Declaration of Human Rights (1948) and the African Charter on Human and Peoples' Rights (1969) – amongst others – guarantee the right to property and protection against arbitrary deprivation of property.

From 1948 to 1990 South Africa was in conflict with both the International community and international law. This has changed with the coming of a democratically elected Parliament; human rights and racial equality - which are now constitutionally protected – and a new attitude towards international law. International law played a key role in the drafting of South Africa's interim Constitution of 1993 and the final Constitution of 1996. There are a number of clauses in the Bill of Rights of the final Constitution that are similar to clauses in international treaties. A ratified treaty only becomes part of South African



law when it is incorporated into law by national legislation. There are four types of supervisory systems of treaties in the forms of reporting, individual complaint; inter-State complaint; and investigatory systems. Once a State ratifies one of the UN human rights treaties, it has to prepare and send reports to the supervisory body on the progress that it has made in realizing the rights in the treaty.

International law can assist the courts in defining circumstances, which limit the possibility for eviction having an impact on the human rights of occupiers, especially when amongst others, their right to dignity, life, health, education and children's rights are infringed. Eviction is regulated by both International and regional human rights instruments including the Universal Declaration of Human Rights (UDHR); the International Covenant on Social and Cultural Rights (ICESCR); the International Covenant on Civil and Political Rights (ICCPR); the Convention on the Rights of the Child (CRC); and the African Charter on Human and People's Rights (African Charter).

The Universal Declaration of Human Rights (UDHR), in Article 17(1), articulates a right to own property, individually and collectively. The UDHR also protects people from being arbitrarily deprived of their property in Article 17(2).

The ICESCR is the United Nation's Human rights treaty that protects economic, social and cultural rights. The ICESCR is monitored by a body called the UN Committee on Economic, Social and Cultural Rights (UNCESCR). One of the functions of the UNCESCR is to publish interpretations of the content of the provisions of the ICESCR in the form of General

Comments. General Comments are not legally binding on State Parties but they serve to offer guidance and promote implementation of the Articles within the ICESCR.

The ICESCR is an important source of guidance for South African courts when interpreting socio-economic rights. State parties who have ratified the ICESCR are under obligation to ensure that the provisions in the Covenant are respected and implemented. Despite South Africa's non-ratification of the ICESCR, it may still have interpretive value to the rights enshrined in the Constitution as the courts may use both binding and non-binding law as tools of interpretation (De Waal *et al* 2001). In *S v Makwanyane* 1995 (3) SA 391 (CC) the court said that:

*Public international law would include binding and non-binding law ... it can be a guide to interpretation.*



The right not to be forcibly evicted is based on Article 11.1 of the ICESCR read with the UNESCR General Comment 7, paragraph 1. The article recognizes the right of housing which encompasses the right to security of tenure and which guarantees legal protection against eviction in that a person cannot be evicted without a court order.

The Committee observed – in its general comment No.4 – that all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction and other threats. It concluded that forced evictions are *prima facie* incompatible with the

requirements of the Covenant. Article 2.1 obliges States to use all appropriate means to promote the right to adequate housing. General Comment 7 paragraph 8 indicates that:

*The state must refrain from forced evictions and ensure that law is enforced against agents or third parties who carry out forced eviction.*

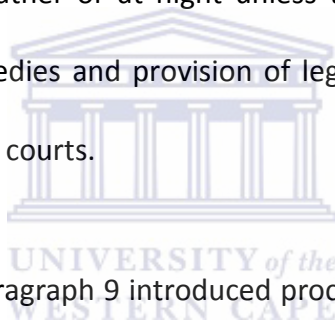
Paragraph 16 of the comment states further that:

*Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights.*

Paragraph 15 also prescribes procedural protective mechanisms for evictees in exceptional circumstances where eviction is unavoidable.

The procedural protections and due process for legal eviction are required by international law and standards. These requirements are set out in CESCR, as well as in the guidelines developed by the UN Special Rapporteur on the right to adequate housing. The Special Rapporteur on adequate housing observed in 2005 in a report of the right to adequate standard of living that children are often a large proportion of those evicted (UN Doc. E/CN. 4/2005/48). Article 3(1) of the Convention on the Rights of Children provided that whatever actions the government or other state agencies take in relation to children's security of tenure, they must ensure that the best interests of the child are primarily considered.

The CESCR sets out a number of measures to be followed by State parties to the ICESCR to safeguard the rights of persons subjected to evictions. These include: an opportunity for genuine consultation with those affected; adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; where groups of people are involved, government officials or their representatives to be present during an eviction; all persons carrying out the eviction to be properly identified; evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; provision of legal remedies and provision of legal aid to persons who are in need of it to seek redress from the courts.



UNESCR General Comment 15, paragraph 9 introduced procedural protections in relation to evictions, which can be considered as circumstances, which are to be considered before an application for an eviction is instituted.

Another international instrument that provides for the protection against forceful eviction is in terms of Article 17.1 of the ICCPR. This provision recognizes the right to be protected against arbitrary or unlawfully interference with one's home.

The Commission on Human Rights and the UN Commission on Human Rights have developed detailed standards of evictions. Forced evictions have been recognized by the UN Commission on Human Rights as a gross violation of human rights. This has been

affirmed by the Commission on Human Rights in terms of Resolution 1993/77. In terms of the resolution the Commission urged governments to:

*...take immediate measures, at all, to eliminate the practice of forced evictions, give legal security of tenure to all people currently threatened with forced eviction and to adopt all necessary measures giving full protection against forced eviction, provide immediate restriction, compensation or appropriate and sufficient alternative accommodation or land to persons and communities that have been forcibly evicted.*

Similarly, the Commission on Human Rights Resolution 2004/28 – adopted on the 16<sup>th</sup> of April 2004 – prohibits forced eviction.



In 1976 the United Nations Conference on Human Settlement (Report of Habitat 1976) noted that special attention should be paid to:

*Undertake major clearance operations when conservation and rehabilitation are not feasible and relocation measures are made.*

The African Commission on Human and Peoples' Rights (2001) has similarly stated that:

*At a very minimum, the right to shelter obliges the Nigerian government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes.*

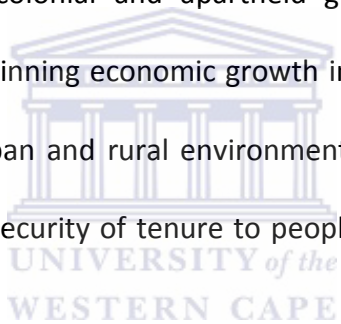
To provide guidance to governments on measures and procedures to be adopted in order to ensure that development-based evictions are not undertaken in contravention of existing international human rights standards and do not thus constitute “forced evictions”, the UN Special Rapporteur on adequate housing has developed Basic Principles and Guidelines on Development-Based Evictions and Displacement (CESCR, General Comment No. 7 paragraph 15). Article 17 of the Universal Declaration of Human Rights and article 14 of the African Charter guided the formation of South Africa’s property clause.

#### **4.4. South Africa’s Land Policy**

Land ownership and land use has often played an important role in shaping political, economic and social processes in South Africa. Colonial and apartheid land policies were a major cause of insecurity, landlessness and poverty in the country. In the new constitutional dispensation the apartheid land legacy had to be addressed so as to re-establish a system of non-discrimination and equitable access to land and housing (Van der Walt 2005). The advent of democracy in 1994 introduced the *White Paper on South Africa Land Policy* to guide the framework for land reform in South Africa (DLA 1997).

The land reform programme is characterized by three sub-programmes: *Land restitution*, *Land redistribution* and *Land tenure reform* (Carey Miller 2000). *Land restitution* aims to return land or compensate victims for land rights lost since 19 June 1913 because of racially discriminatory laws or practices; *Land redistribution* aims to achieving a fairer

distribution of land in South Africa through making it possible for poor and disadvantaged people to buy land with the help of a Settlement/Land Acquisition Grant; and *Land tenure reform* aims to bring all people occupying land under a legally secure system of landholding, providing for secure forms of a land tenure, helping to resolve tenure disputes, and making grants and subsidies accessible to provide people with secure tenure (DLA 1997). The policy sought to transform South African society into a society based on democratic values, social justice and fundamental human rights. The policy sets out the vision and implementation strategy to validate and harmonize forms of land ownership that evolved during colonial and apartheid governments; foster national reconciliation and stability underpinning economic growth improving household welfare; and alleviate poverty, both in urban and rural environments. The content of the policy includes programmes to provide security of tenure to people who are vulnerable and to prevent unfair evictions.



The policy provides key objectives including the ensuring of accessible means with which to record land and register rights in property; establish the broad norms and guidelines for land use planning; effectively manage public land; and develop a responsive client friendly land administration service (DLA 1997). The government's vision of a land policy and reform programme is one that seeks to contribute to reconciliation, stability, growth and development in an equitable and sustainable way. It presumes an active land market supported by an effective and accessible institutional framework. The policy focus of the land reform programme is aimed at achieving a better quality of life for the most

disadvantaged. The policy pursued the objectives of 'equity' and efficient that according to Hall aims, on the one hand, to bring about changes in social, economic and political relations while at the same time aims to improve overall output and factor productivity in agriculture (Hall 2004a).

The White paper provides for the transformation of insecure tenure rights into rights that are legally secure, creating conditions wherein the citizens have the right to choose a tenure system that suits their needs. According to Van der Walt it is important to improve the security of tenure of those individuals whose land rights were weakened by the colonial and apartheid land laws through the process of tenure reform (Van der Walt 2005).



The White Paper viewed farm dwellers as a vulnerable group whose property rights needed to be protected and strengthened:

*A major cause of instability in rural areas is the millions of people who live in insecure arrangements on land belonging to other people. They had and have simply no alternative place to live and no alternative means of survival. The evicted have nowhere else to go and suffer terrible hardships. The victims swell the ranks of the absolute landless and the destitute. They find themselves at the mercy of other landowners for refuge (DLA 1997:33).*



By 1999 the post 1994 advocated market-assistance programme for distribution of land purchase grants wherein previously disadvantaged people with a household income of less than R1 500 a month could apply for a Settlement/Land Acquisition Grant of R16 000 was brought to a halt replaced (DLA 1997).

In 2001 a new policy entitled the Land Redistribution for Agricultural Development (LRAD) programme was launched. This new grant has no income limit and provides grants of between R20 000 and R100 000 to individuals, based on their ability to make contribution of their own. LRAD also created Farm Equity Schemes that is aimed to allow farm workers to buy a share in a farming enterprise, without necessarily becoming land owners (DLA 2006).



While share equity schemes are often described as among more successful aspects of land reform in South Africa, they are also criticised for perpetuating high unequal relations between white-owner managers and black-worker shareholders (Kleinbooi *et al* 2006). According to Lahiff this phase of redistribution has been widely criticised for 'dumping' a large group of poor people on former commercial farms without skills and resources necessary to bring them into production (Lahiff 2000).

The 'willing buyer, willing seller approach has remained at the centre of South African land reform, including the widespread opposition and recurring promises for 'review' from government leaders and politicians. The abandonment of the approach was the uppermost demand from civil society and landless peoples' organizations while representatives of the landowners remained in favour of the approach (Lahiff 2000). The HRSC conducted a study of LRAD in three provinces and found that "...in many cases there was still no institutionalized alternative to laying the whole burden training, mentoring, and general capacitating on the departments on the provincial Agricultural departments (HRSC 2003:72).



Since 2005 the Department of Land Affairs has been exploring a number of alternatives policy options, including amongst others, pro-active land acquisition and area based planning wherein the state was to play a more active and strategic role in land purchase negotiations (DLA 2006). Under this approach the state or an intermediary trust was to become a land owner to create possibilities for state to provide lease land to provide beneficiaries on a trial basis prior to transfer of title.

The *2007 ANC National Policy Conference* identified rural development, Land reform and agrarian change as critical pillars of South Africa's land reform programme for transformation. The conference acknowledged that such a change must be integrated into a clear strategy that seeks to empower the poor, particularly those who already derive all

or part of their livelihood from the exploitation of productive land. However, the programme underpinned a market-driven programme, based on the notion of willing buyer/willing seller, which meant that the rights would come at a price (Motlanthe 2007).

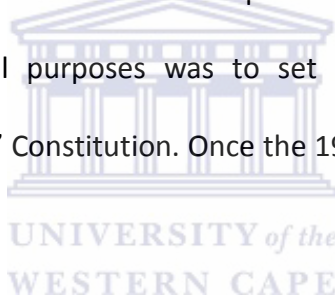
A.J. van der Walt, a private law specialist, responding to a question 'whether the land reform programme succeeds in breaking away from or undermining the hierarchies of power that were inherent in traditional common-law property relationships and, particularly, in the politically sanctioned and statutorily entrenched system of apartheid land law,' argued that the South African system of land rights has always privileged the institution of ownership, and in fact the whole system of apartheid land laws was built on and upheld in terms of this privilege (Van der Walt 1999:02). According to Van der Walt, the supremacy of white land rights and the deficiencies of black land rights under the apartheid regime were primarily results of political choices and the concomitant inequitable division of available land. The deficiencies of black land rights were supported and exacerbated by the hierarchical civil-law property system, resulting in strong white land rights and weak black land rights.

A.J. van der Walt provides an answer to the question of how land reform policy could be shaped to address the underlying, structural hierarchy of civil-law property rights, by arguing that current land reform programme continues to privilege ownership above other property rights and such uphold the existing hierarchical structures that formed

the backbone of the apartheid land regime of the land rights that are clustered around the structural and legal supremacy of the traditional ownership paradigm (Van der Walt 1999:03). Accordingly, he contends that if South African land reform is to be effective, it should amount to more than a merely superficial, mechanical reshuffling of land – it has to change the ‘background law’ that formed the basis on which apartheid land law was constructed.

#### **4.5. The Constitution of the Republic of South Africa (Act 108 of 1996)**

The Interim Constitution came into force on 27 April 1994 and it was a transitional constitution. One of its principal purposes was to set out the procedures for the negotiation and drafting of a ‘final’ Constitution. Once the 1996 Constitution was adopted the interim Constitution fell away.



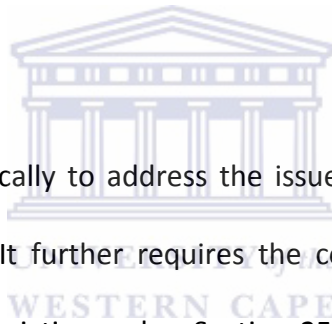
Property rights are protected by section 25 of the Constitution of the Republic of South Africa, Act 108 of 1996. Section 25(1) gives South Africans the right not to be deprived of property ‘except in terms of the general application of law and prohibits arbitrary deprivation of property’. Section 25(5) obliges the state to ‘take reasonable legislative measures, within its available resources, to foster conditions which enable citizens to gain access to land on equitable bases. The Constitution completed South Africa’s political transition (de Waal, Currie an Erasmus 2001).

Tenure of land rights are protected in terms of Section 25(6). The section states that:

*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 that is legally or to comparable redress.*

The right of a person(s) not to be arbitrarily evicted is provided for in section 26(3). It states that:

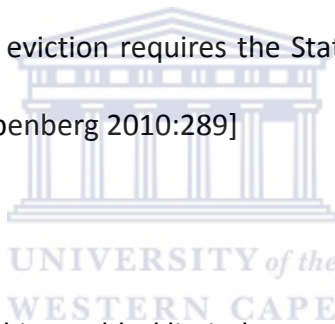
*No one may be evicted from their home or have their home demolished without an order of court made after considering all relevant circumstance. No legislation may permit arbitrary evictions.*



Section 26(3) was enacted specifically to address the issue of evictions and it prohibits evictions without a court order. It further requires the court to consider ‘all relevant circumstances’ before issuing an eviction order. Section 25(9) mandates that Parliament enacts legislation to protect and allow a person’s or community’s right either to tenure which is legally secured or to comparable redress. Both subsections have been embroidered on the enacted (ESTA) and the Labour Tenant Act, 3 of 1996 (LTA). The recognition of the housing rights in section 26 has created a powerful constitutional foundation for transforming evictions law in South Africa (Liebenberg 2010: 270). Liebenberg argues that one of the fundamental purposes of the human right to housing is to protect people against the misery and the multitude of negative effects on people’s well-being (Liebenberg 2010:270). The Constitutional Court in *Grootboom case* observed that section 26(3) as a special manifestation of the obligation in section 26(1) on the State

and private parties to refrain from preventing or impairing people's access to housing [2001 (1) SA 46 (CC), BCLR 1169 (CC)].

Liebenberg presented leading jurisprudence in terms of section 26(3) in which the obligations of organs of State in relation to the eviction of unlawful occupiers from their homes have been developed. Of particular importance to this study, Liebenberg cited Harms JA when pointing out, in *Grootboom* judgment that the State was under obligation 'to ensure, at the very least, that evictions are executed humanely. According to the Court, humanely execution of the eviction requires the State providing some land [2001 (1) SA 46 (CC), BCLR 1169 (CC); Liebenberg 2010:289]



Another case that Liebenberg cited is Modderklip judgment in which the remedy granted by the Supreme Court of Appeal was substantially upheld by the Constitutional Court where it was held that the residents were entitled to occupy the land until alternative land has been made available to them by the state or provincial or local authority and also the state was required to compensate the landowner for the occupation of its property (Liebenberg 2010:285). According to Liebenberg pragmatic and humane solutions to eviction-related conflicts which are consonant with the rights and values protected in the Constitution must be sought and achieved through active State involvement. In Liebenberg's words the state can only achieve this by putting in place and implement a reasonable programme which provides immediate relief for people who have no access to

land, no roof over their heads, and who are living in intolerable conditions or crisis situation (Liebenberg 2010:285).

The State's active participation has been emphasised in court cases decided in terms of PIE in which municipalities are said to have responsibility in an eviction application brought by a private landowner against unlawful occupiers. Liebenberg is of the view that where municipalities are cited as parties in eviction cases, such joinder is to place information before court on the availability of suitable alternative accommodation and to facilitate mediation of the dispute between the parties (Liebenberg 2010 :286).

Section 34 states that:



*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum.*

Section 38 of the Constitution provides that the following persons may approach a competent court when their rights have been infringed or threatened:

*Anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acts in the public interest; and association acting in the interest of its members.*

The South African Constitution gives international law a special role when courts and other bodies interpret the rights set out in the Bill of Rights. Section 39 of the Constitution demands an interpretation which promotes the values which underline an open and democratic society based on human dignity, equality and freedom. This section also provides for consideration of international law, as well as the foreign law when interpreting any legislation.

Apart from going to court, everyone has a right to take complaints to bodies like South African Human Rights Commission (SAHRC) and other related institutions to get a remedy if their socio-economic rights are violated. The Constitution establishes and mandates the South African Human Rights Commission (SAHRC) to monitor, assess, investigate and report the implementation of socio-economic rights, including land. The SAHRC works as a watchdog over the actions of government and private bodies that may affect human rights. Section 184(3) of the Constitution says that:

“Each year, the Human Rights Commission must require relevant organs of State to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.”

The SAHRC also uses various strategies to resolve disputes, such as mediation and negotiation. NGOs and community-based organizations have an important role to play

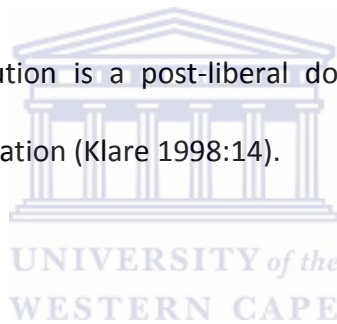


towards advancing socio-economic rights in South Africa. These organizations use different strategies including advocacy, education, litigation and training to promote and advance socio-economic rights.

Section 233 of the Constitution states:

*When interpreting any legislation, every court must prefer any reasonable interpretation of legislation that is consistent with International Law over any alternative interpretation that is inconsistent with International Law.*

The 1996 South African Constitution is a post-liberal document that authorises and requires social and legal transformation (Klare 1998:14).



#### **4.6. The Extension of Security of Tenure Act, 62 of 1997 (ESTA)**

In compliance with the Constitutional obligation as provided for in terms of Section 25(6), Parliament enacted various pieces of land tenure legislation, including the Land Reform (Labour Tenancy) Act 3 of 1996 (LTA); the Extension of security of Tenure Act 62 of 1997 (ESTA); the Prevention of Illegal Eviction from and Unlawful Occupation of Land, Act 19 of 1989 (PIE). These laws assume the power of rights and of courts.

ESTA is the main focus of this thesis along with securing tenure rights for farm dwellers and preventing illegal evictions of people who are in insecure tenure relations. ESTA

provides the means to regulate the relationship between people who live on farms. From the 4<sup>th</sup> of February 1997 ESTA has protected people who live on rural or peri-urban land with the permission of the owner of that land. It recognizes that many people residing on farms belonging to others are vulnerable to unfair evictions because they do not have secure tenure of their homes and the land that they use.

In section 1 of the ESTA defines an occupier as:

*A person residing on land which belongs to another person, and who has, on 4 February 1997 or thereafter, had consent (express or tacit) of the owner, or another right in law to do so.*

The definition is extended by section 3(2) by including:

*A person who was residing on the land belonging to another, who on 4 February 1997, previously did so with consent of the owner, was lawfully withdrawn prior to 4 February 1997, to be deemed to be an occupier provided that he or she has remained continuously on the land since the withdrawal of the consent and the withdrawal of consent was not just and equitable.*

In addition, persons who have continuously and openly resided on the land for a period of one year are presumed to have the requisite consent unless the contrary is proved.

Section 2(1) provides that:

*the Act shall apply to all land other than land in a township established, approved, proclaimed or otherwise recognised as such a township or townships, but including:*

*(a) any land within such a township which has been designated for agricultural purposes in terms of any law; and*

*(b) any land within such a township which has been established, approved, proclaimed or otherwise recognised after 4 February, 1997, in respect only of a person who was an occupier immediately prior to such establishment, approval, proclamation or recognition.*

Section 2(3) states that:



*The Minister may, from moneys appropriated by Parliament for that purpose and subject to such conditions as he or she may determine, make funds available to another person, body or institution which he or she has recognised for that purpose, to promote the implementation of the rights conferred by this Act.*

Ideally the Act is to be implemented through joint efforts of occupiers, land owners and government bodies.

There are two mechanisms set out by ESTA towards balancing the relationship between occupiers who are vulnerable to eviction and landowners:

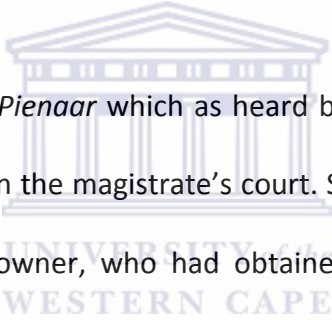
- (1) It provides procedures and limitations to prevent unfair and arbitrary evictions and other unfair restraints on occupiers' rights; and
- (2) It provides for the government's active assistance towards promoting secure tenure, either on land where occupiers are living or on alternative land in terms of section 4.

Section 4 places positive obligation on the government wherein the Minister is to grant subsidies to facilitate the planning and implementation of on-site and off-site developments; enable occupiers, former occupiers and other persons who need long-term security of tenure to acquire land or rights in land; and for the development of land occupied or to be occupied in terms of on-site or off-site developments. Along with section 4, section 26 of the Act gives the Minister of Agriculture and Land Affairs the power to expropriate land for the purposes of on-farm or off-farm development projects. Wegerif argues that the extent of implementation of section 4 of ESTA reflects either extreme weakness of the Act or lack of commitment on the part of government to give farm dwellers long-term tenure security (Wegerif 2004:231).

Section 5 details the fundamental rights and duties of both owners and occupiers. It provides for basic human rights of occupiers and owners which are set out in the Bill of Rights: human dignity; freedom and security of person; privacy; freedom of religion, belief and opinion and of expression; freedom of association; and freedom of movement.

Section 6(2) (d) provides the occupier with the right to security of tenure and to family life in accordance with the culture of that family.

During the first decade of post-apartheid land reform, tension between land owners and farm occupiers of agricultural land was one of the most tenure problems over burial of occupiers and their family members, particularly where land owners refused to give permission. Such rights and entitlements were claimed and rejected in two cases held in 1999.



The first was the case of *Serole v Pienaar* which was heard by the Land Claims Court as a review of a dismissal of the claim in the magistrate's court. Serole wanted to bury his son on the land of Pienaar, the landowner, who had obtained an urgent interdict in the magistrate's court to prevent Serole from doing so. Upon the merits of the case, the Land Claims Court concluded that such entitlement could not be deduced from the provision of ESTA or the Constitution [2000 (1) SA 328 (LCC)].

The second was the case of *Buhrman v Nkosi* in the High Court of the Transvaal Provincial Division, which began as an application, by Mr Buhrman for an interdict to prevent a burial by Mr Nkosi. The High Court rejected the application whereupon Mr Buhrman successfully appealed to the full bench of the same division. Mr Nkosi in turn appealed to the Supreme Court of Appeal which upheld the High Court judgment. The debate in the

two cases was whether – in the new democracy – the Constitution, the Bill of Rights and Land Reform legislation the dominant and near absolute right of ownership in land reigned supreme. The courts' answer was that the dominant and near absolute right of ownership in land remained unscathed in the absence of express legislation sanction and by virtue of section 25(1) of the Constitution [2000 (1) SA 145 (T)].

In terms of ESTA section 6(4) farm workers had a right to visit and maintain family graves on the land, but this did not include the right to bury occupiers or their family members on the land. Various courts held that, without sufficiently clear legislative authority, enforcement of such a burial right against the owner's wishes and without her consent would bring about too much of an encroachment on the right of the landowner. Consequently, it was assumed that occupiers and their family members could not be buried without the landowner's permission and that the landowner could withhold permission as one of the privileges of ownership.

In 2001 ESTA was amended by inserting a provision that now allows burial of occupiers and their family members on the land in accordance with the occupiers' religious and cultural beliefs, provided that an established practice exists in that the landowner previously routinely gave permission for burials (Land Affairs General Amendment Act 51 of 2001). In terms of the amendment the occupier enjoys this right in balance with the rights of the owner and subject to reasonable conditions that may be imposed by the owner or person in charge.

Furthermore, the legislature added section 6(5) which provided that:

*the family members of an occupier who has been on the land for ten years or more and has reached the age of sixty years or is disabled, shall on his or her death have a right to bury that occupier on the land on which he or she was residing at the time of his or her death, in accordance with their religion or cultural belief, subject to any reasonable conditions which are not more onerous than those prescribed and that may be imposed by the owner or person in charge.*

A number of cases following the amendment have been heard by the Land Claims Court. The first was the *Nhlabathi v Fick* Case No. LCC 42/02, in which the landowner challenged the applicant's *locus standi*, as to whether there was an 'established practice' to bury, whether the applicants were 'occupiers' and whether section 6(2) (dA) of (ESTA as amended) was unconstitutional in that it permitted an expropriation of land without compensation contrary to section 25(2) of the Constitution and that it permitted an arbitrary deprivation of property contrary to the provision of section 25(1) of the Constitution.

In respect of the applicant's *locus standi*, it emerged from the evidence that the eldest son was born out of wedlock and out of any form of customary union and therefore had no voice in matters concerning the deceased. It was held that the first applicant was an occupier in terms of ESTA. The court accepted the applicant's statement that the

collective income of the entire family was R1200.00 per month and accordingly they were not disqualified from being occupiers.

As to the landowner's argument that the section arbitrarily appropriated the landowner's land, the Court held that such a right is balanced with the rights of the owner – which could in certain circumstances outweigh the right to a grave. It was also held that burying ancestors close to where they occupiers live, is a religious or cultural imperative and the importance thereof would in most cases be sufficient reason to justify the deprivation of some incidents of land ownership. The court concluded that the legislation concerned is social interest legislation and the application was granted with no order of the costs.

The Nhlabathi case is therefore important as it provides some guidance to interpreting the provision to ESTA burial right for members of the family that wish to conduct burials on land that belongs to others in accordance with their cultural and religious beliefs.

There are various reactions to Nhlabathi judgment. Amongst others, Van der Walt holds the view that the judgment was a courageous one for reflecting the court's thorough appreciation of the full implications of the Constitution's transformative ideals. Van der Walt contends that the manner in which the judgment has being made is interesting and exemplifies a 'good practice' in current reform-driven adjudication on transformative constitutionalism (Van der Walt 2007). He also adds that the judgment is an example of the kind of context-sensitive and constitution-conscious reaction to existing law and the need for reform that is required to bring about meaningful reforms that could confront



the legacy of apartheid and create space for the advancement of social justice and the promotion of citizenship and community (Van der Walt 2009).

Judge President, Fikile Bam presented a paper remarked that most of the cases that the Land Claims Court held – in respect of farm burials – have been dismissed because applicants were unable to prove the stringent limitations of ‘residence at the time of death’ or ‘on which the occupier is residing’ or in accordance with their cultural belief or the existence of an ‘established practice’ (Morti Malherbe Memorial lecture (1 October 2008)). The Judge President also remarked that many are simply ill advised and have been brought to believe that allowing occupiers to be buried on their farms will result in claims of ownership of land by the families of occupiers (Bam 2008). According to Bam, transformative efforts in respect of farm burials would be easier if lawyers can tone down their adversarial litigation stances and explore other dispute resolution mechanisms that emphasise win-win outcomes – as was done in the area of labour disputes – and secure rights in terms of the Constitution and land reform laws.

Section 6(4) states that:

*Any person shall have the right to visit and maintain his or her family graves on land which belongs to another person, subject to any reasonable condition imposed by the owner or employer of such land in order to safeguard life and property or to prevent the undue disruption of work on the land.*

Another case in which the Constitutional Court decided on the issue of farm burials, was *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service 2002 (4) 768 (CC)*. The court indicated that the Legislature enact a new section 6(5) to allow the family members of a long-term occupier to bury him or her on the land on which he or she was residing at the time of his or her death. The court maintained that cemeteries, funeral parlours and crematoria are listed in Part B of Schedule 5 of the Constitution, and therefore falls within local government matters in respect of which provincial government have legislative competence contained in section 155(6)(a) and (7) of the Constitution.

The scope and application of the burial rights provisions in respect of the phrase 'residing on the land at the time of death', has been clarified in the *Tshivhula v Koedoepan Boerdery* wherein the Land Claims Court held that the phrase means that there must be sustained presence in a place without any present intention of leaving the farm rather than the literal meaning of dying within precinct of a given farm (LCC JDR 0222 2007).

Section 8(1) of ESTA regulates the termination of the right of residence on lawful ground, provided that such termination is 'just and equitable', having regard to all relevant factors. Termination of the right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement is regulated by section 8(2). Such a right may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act and the

termination shall take effect when any dispute over the termination has been determined in accordance with that Act.

The two eviction case studies that are discussed in chapter 6 below involve strike and retrenchment of workers. The strike is regulated by the Labour Relations Act (LRA), Act 66 of 1995 sections 64 and retrenchment by section 189 or 189A.

In respect of a strike or lockout situation, section 64 of the LRA provides that employees or employer may refer a dispute to a council or the Commission for Conciliation, Mediation and Arbitration (CCMA), which must issue a certificate that a dispute remains unresolved. If 30 days have elapsed since the referral; and 48 hours' written notice of a strike is given to the employer or a council (if the dispute relates to a collective agreement to be concluded in a council) or to an employers' organisation (if the employer is a member of an organisation that is a party to the dispute) or 48 hours' written notice of a lockout is given to the trade union, or to the workers (if they are not trade union members) or a council (if the dispute relates to a collective agreement to be concluded in a council).

During legal strikes workers - may not be dismissed nor have civil legal proceedings brought against them. Also during legal strikes employers – do not have to pay workers,

unless workers ask that payment in kind be continued; and may fairly dismiss a worker for misconduct or for operational needs.

If a strike or lockout is illegal, the matter must be referred to the Labour Court, which may grant an interdict or a restraining order.

In case of retrenchment process, section 198 is applicable where the employees in the work place are below 50. Retrenchment is allowed only for 'operational requirements' based on the employer's 'economic, technological, structural or similar needs', he is required to. Fair procedure for retrenchment happens when an employer considering retrenchment, consult whoever a collective agreement says must be consulted, or if none exists, the workplace forum, or if none exists, the union, or if none exists, the workers themselves. The employer must issue a written notice inviting the other party to consult with it and make all the relevant information available in writing at the consultations, including; reasons for retrenchment, alternatives considered including redeployment, number of workers to be retrenched, how it will be decided which workers to retrench, when the dismissals will take place, severance pay, what other help the employer will give to the workers who will be retrenched, possibilities of future re-employment for these workers, number of workers employed by the employer, and the number of workers the employer has retrenched during the past 12 months'

The people the employer is consulting with must be allowed to have their say and make suggestions on any of these issues. If the employer rejects what they say, he or she must give reasons in writing if the workers have submitted their representations in writing.

The consultation process is a 'joint consensus seeking' process. In other words the parties try and reach an agreement on the different issues, such as; whether retrenchment is justified and ways to avoid retrenchments, ways to reduce the number of people retrenched, ways to limit the harsh effects of retrenchment, the method and criteria for selecting workers to be retrenched: if there is no agreement, the employer must use fair and objective criteria, severance pay: workers can negotiate for higher severance pay than the LRA prescribes (which is 1 week's pay for every year of service)

If workers and the employer cannot agree, disputes over retrenchments and severance pay can be referred to the CCMA.

If a worker thinks that the dismissal was unfair, in other words that the employer didn't follow fair procedures or there is not a 'good reason' for the dismissal, then the worker can challenge the dismissal. If a dismissal is found to be unfair, the worker will be able to get reinstated or re-employed, or get compensation money.

In terms of section 8(4) of ESTA the right of residence of an occupier who:

*Has resided on the land in question or any other land belonging to the owner for 10 years and has reached the age of 60 years; or is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge, may not be terminated unless that occupier has committed a breach contemplated in section 10 (1) (a), (b) or (c) of the act.*

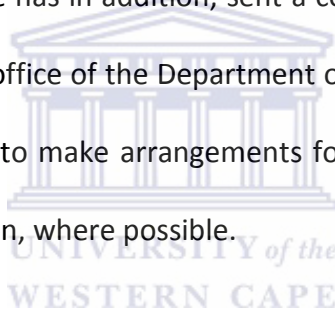
A breach – for the purposes of this subsection – excludes mere refusal or failure to provide labour. On the death of an occupier contemplated in subsection (4), the right of residence of an occupier who was his or her spouse or dependant may be terminated only on 12 calendar months' written notice to leave the land, unless such a spouse or dependant has committed a breach (Section 8(5)). However, any termination of the right of residence of an occupier to prevent the occupier from acquiring rights in terms of ESTA shall be void.

Section 8(4) of ESTA offers stronger protection to occupiers who are 60 years old or older, who have been on the land for ten years or more, or were in occupation prior to the enactment of the Act in 1997. The stronger protection is also given to occupiers who become disabled during the period of employment with the landowner. Section 8(5) provides that:

*Occupiers with stronger protection may only be terminated under certain conditions; which relate to unlawful activities or a serious breach in the relationship between owner and occupier.*

ESTA recognizes female households, children and elderly people as particularly vulnerable when faced with the threat of eviction or actual eviction.

An eviction is lawful if it is authorized by a competent court and the occupier has been given two months written notice that the owner intends to apply for an eviction order, the landowner or person in-charge has in addition, sent a copy of the notice letter to the local authority and the provincial office of the Department of Land Affairs in order for the municipality and the Department to make arrangements for alternative accommodation for the occupiers, and for mediation, where possible.



Court – in terms of ESTA – refers to the magistrate’s court and the Land Claims Court, including a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996).

Section 9 of ESTA contains the procedure for obtaining normal eviction orders. This section requires the landowner to first terminate the right of residence of an occupier in a just and equitable manner, before evicting an occupier. Procedures for a lawful eviction require that the landowner seeking an eviction is to give the occupier two months’ written notice that he or she intends to apply for an eviction order; serve a copy to the

local municipality and the provincial office of the Department of Land Affairs, now the provincial office of Rural Development and Land Reform; provide relevant circumstances and good reasons as to why the eviction order should be granted; and give occupiers an opportunity to respond to the allegations against them. Terminating the right of residence of an occupier whose right of residence arose from the employment agreement can occur when an occupier resigns or is dismissed in a fair way, following the *Labour Relations Act* of 1995.

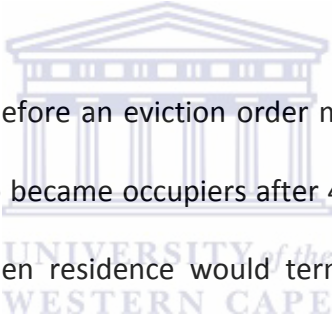
ESTA requires the court to call for a section 9(3) report in respect of persons who became occupiers after 4 February 1997 and it does not require the same report in respect of persons who became occupiers on or before 4 February 1997 and whose evictions occur in accordance with section 10(1). Section 10(2) provides for a party to a dispute under ESTA and to institute proceedings in the relevant magistrate's court or in the Land Claims Court. If all parties consent, proceedings may also be instituted in the High Court (section 17). A magistrate's court has jurisdiction to adjudicate over civil and criminal proceedings in terms of the Act. In that respect, it may also grant interdicts and issue declaratory orders. A party to ESTA dispute has a choice to institute proceedings in the magistrate's court or the Land Claims Court.

The court has an important role to play towards redressing occupier's tenure rights that are infringed or threatened under ESTA. It may order an eviction to be stopped, occupiers to be allowed back in their homes, and/or the payment of damages. The Act distinguishes between persons who were occupiers before – and on – the 4<sup>th</sup> of February 1997 and



those who became occupiers after that date. Depending on circumstances and the conduct/interests of the two parties, the court may also order an eviction even if no alternative accommodation is available.

Section 15 of ESTA provides for urgent proceedings for eviction, particularly if there is a real and imminent danger of substantial injury or damage to any person or property if the occupier is not forthwith removed from the land. Occupiers may only be evicted if a court issues an eviction order to the owner, particularly when there is alternative accommodation.



Specific procedures are required before an eviction order may be granted by a court. In case of an eviction of persons who became occupiers after 4 February 1997, factors such as existing agreements about when residence would terminate their occupation; the length of time the occupier has resided on the land; the availability of alternative accommodation; the reasons for the proposed eviction; and the respective interests of the owner and occupiers should all be taken into account. If an order for eviction is granted, compensation should be paid to the occupier for any improvements effected on the land, and the opportunity must be given for structures, crops, etc to be removed. In terms of section 13 such compensation – to be determined by the court – must be paid before the execution of the eviction order.

Where an occupier is evicted without a court order, the Act provides for an urgent remedy. A person so evicted may apply for an urgent application for restoration of lost

residence and rights and/or for compensation, damages and costs. Bearing in mind the values of the Constitution and the circumstances of the occupiers, the court may issue an order of eviction.

In terms of section 17, a party to tenure dispute may – subject to the provisions of sections 19 and 20 – institute proceedings in the magistrate’s court or Land Claims court within whose area of jurisdiction the land in question is situated. Section 19(3) provides for an automatic review of a magistrates order. This section has benefitted occupiers in the magistrate’s court as in– *Gartmore Farm (Pty) Ltd v Ndlovu and two others* – where the magistrate granted an eviction of occupiers by default of appearance to defend (Howick Magistrate Case number 1135/2000). No evidence was heard, the case was merely decided on the reading of the summons and other documents filed on record. The Land Claims Court set aside the order made by the magistrate, holding that a distinction had to be drawn between an order for eviction by default prior to the coming into operation of the Constitution and ESTA and eviction order applied thereafter (LCC 68R/00).

In terms of Section 21 the eviction of an occupier – without an order from a competent court where an eviction court order has been applied for – cannot be issued by the court without consideration of a range of factors, including the period for which the occupier has been residing on the land; the fairness of the terms of agreement; whether suitable alternative accommodation is available; the reason for the proposed eviction; and the balance of interests of the owner, the occupier and the remaining occupiers of the land.

Section 21 provides:

*(1) A party may request the Director-General to appoint one or more persons with the relevant expertise in dispute resolution to facilitate meetings of interested parties and attempt to settle the dispute through mediation and settle any dispute in terms of this Act.*

*(2) The Director-General may, on the conditions that he or she may determine, appoint a person referred to in subsection (1): Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on conditions that the Director-General may determine*



Section 22 provides:

*(1) If the parties to a dispute in terms of this Act refer the dispute to arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965), they may appoint as arbitrator a person from the panel of arbitrators established in terms of section 31(1) of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996).*

Section 23 of the Act makes a breach of ESTA a criminal offence and provides for action to be taken against those in contempt of this law. So far, however, there has not been a single conviction despite evidence of continued illegal evictions. Where eviction orders are sought through the correct channels, courts regularly grant such orders. The

enforcement of ESTA, then, has not contributed to fewer legal and illegal evictions. A few reasons have been identified for this weak enforcement.

Section 23 provides a person who has been unlawfully evicted an opportunity to institute private prosecution in terms of the provisions of the Criminal Procedure Act of 1977.

Ewert and du Toit found that farmers knocked down housing and blame operational costs and tenure legislation, including ESTA (Ewert and du Toit 2002). They also found that farmers preferred not to employ those aged 40 in order to avoid having farm workers qualifying for life-long tenure under ESTA. Atkinson said that as a result of minimum wage regulation some farmers have withdrawn the welfarist services they used to give to their workers and the services are still rendered it is done through monetary deductions from their meagre wages (Atkinson 2007; Wegerif, Russel and Grudling 2005).

DLA's ESTA Review Workshop in 1999 identified the need for 'Alternative Dispute Resolution' (ADR) systems and procedures to be developed in order to heal the relationship between the landowners and occupiers, to avoid litigation and to seek win-win resolutions to disputes. This would mean that on receiving section 9(2) (d) ESTA notice, the Minister for Department of Rural Development and Land Reform would appoint a qualified mediator to intervene and if the mediator failed, the matter would go to arbitration (DLA 1999).

#### **4.7. Conclusion**

This chapter has given a broad outline of various sources of law that govern the promotion and protection of tenure rights of people residing on land belonging to others. From the discussion in the chapter, it is clear that tenure rights are protected in terms of the international laws, Common law and South African laws.

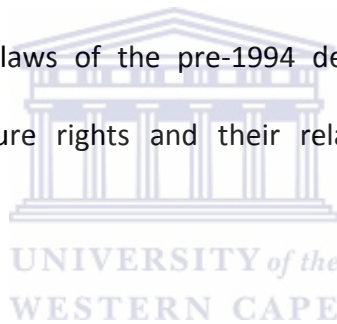
For the purposes of this study, the Extension of Security of Tenure Rights Act, No. 62 of 1997 (ESTA) has been outlined in this chapter, particularly, setting out clear ESTA provisions governing dispute resolution mechanisms. ESTA legal measures include amongst others, court, mediation and arbitration processes. The following chapter provides socio-legal theories of processes for resolving disputes.



## **CHAPTER 5: SOCIO-LEGAL THEORIES OF DISPUTE RESOLUTION PROCESSES TOWARDS BRINGING ABOUT SOCIAL CHANGE**

### **5.1. Introduction**

Chapter four presented the legal framework upon which South African tenure rights and obligations are regulated. Law as an instrument, to a large degree, contributes to the maintenance of unite members of the society (Dahl 1982). For the purposes of this study, I consider social change as a possible paradigmatic change in the socio-economic structure, where parties on farm relate to one another as equal partners on issues of developments where they reside. Also, as farm dwellers fall in the category of people who, due to the practices and laws of the pre-1994 democratic government, were discriminated against, their tenure rights and their relations with landowners are improved.



ESTA offers parties to farm tenure dispute mechanisms to deal with disputes between them; court, mediation and arbitration. Negotiation as another form of alternative dispute resolution is not provided for in ESTA. Also, it is not clear as to how parties decide on which process to use and also not clear as to why the initiator of a particular process chooses one mechanism over another. This chapter explores the underpinnings and practical use of law, courts and other dispute resolution processes as tools for bringing about social change.

Many authors consider law as a desirable necessary and highly efficient means of inducing change to societies, preferable to other dispute resolution mechanisms. Both American and South African jurisprudence offer useful theories towards understanding of the various roles the law, court and alternative disputes resolution play for social change to effectively happen. The main American jurisprudence on different conceptions of 'law' and 'society' used as guidance to the discussion as expressed by authors including Weber Ehrlich and Cotterrell. Other authors such as Rosenberg are essential in examination of the role that they courts play towards societal change. Also South African jurisprudence through the works of as authors including, amongst others, Van der Walt, Liebenberg and Roux are likewise significant particularly on the roles of law and courts. Since ESTA mechanisms include mediation and arbitration processes, the works of Mark Anstey, Charles Nupen, John Brand and others are examined to understand the role of the out of court processes towards societal change.

## **5.2. Law as Instrument for Social Change**

Law and society theorists have attempted to explain the relationship between legal and social change in the context of development of legal institutions. Cotterrell identifies four ways of conceptualizing law: law as one normative order, law as coercive order, law as dispute processing, and law as doctrine (Cotterrell 1992:39). Cotterrell also distinguishes between law as 'mechanism of regulation of social life through distinct institutions and

practices' and as 'a body of doctrine or ideas which can be logically or dogmatically interpreted and developed (Cotterrell 1992:41). Mnookin and Kornhauser view law as tool that can be used as a lever in negotiations, a spur to the making of agreements designed to avoid all recourse to it or as a means of controlling risk (Mnookin and Kornhauser 1979:952). In this sense they view bargaining or negotiation of a dispute occurring in the "shadow of law" and the 'shadow' framework is characterized by how parties bargain while knowing that certain legal rules could potentially be enforced by a court. According to Mnookin and Kornhauser a party that has an opportunity to point to a statute is likely to have additional power in the negotiations, using it as a threat to go to court if he or she does not get what he or she wants in the negotiations (Mnookin and Kornhauser 1979:952).

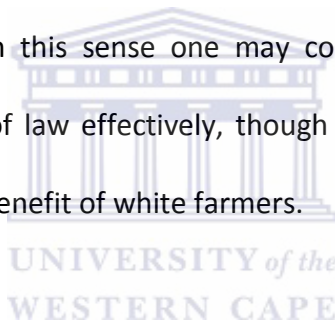


The manner in which South African colonial and apartheid governments use law bears a resemblance to what Cotterrell calls 'law as coercive in character.' Both regimes had laws that coercively managed to altered, though unjustly, the farming communities from being that of subsistence farming to a capitalist oriented agricultural venture. Both Union and apartheid governments regulated evictions in terms of common law where in terms of the law landowners could easily obtain eviction orders against occupiers. The discussion in Chapter three above has illustrates how the Union government laws such as the *1913 Natives Land Act* and the *Native Service Control Act of 1932* have been instrumental



towards creation of insecure tenure on farms as well as ensuring the supply of black labour to white farmers.

It has been said that apartheid land law established hierarchies of rights that made it possible to privilege white land rights over black occupation interests (Van der Walt 1999:259). Apartheid laws have also played a major role, coercively, stripping the independence of black farm occupiers of their means of livelihoods, eliminated their independent sharecropping and even rent tenancy to a status of landlessness and cheap farm labour (Van Horst 1942). In this sense one may correctly say that colonial and apartheid government's did use of law effectively, though unjustly, change the farming community's way of living to the benefit of white farmers.



During apartheid era forced removals and evictions in terms of influx control policies and their associated legislation were used to achieve the purposes of racial segregation and subordination. According to Liebenberg black occupiers were, as a result of the laws, in a powerless position as they enjoyed few legislative or common-law rights, and their interests in preserving their homes received scant legal recognition in the context of evictions from public or private land (Liebenberg 2010:269).

Concurring with Liebenberg, Van der Walt argues that “Grand apartheid” undermined what would normally be considered democratic forms of governance and citizenship because it institutionalised discriminatory and socially divisive and destructive agricultural and urban land use policies and management systems, thereby causing or exacerbating overcrowding, social displacement and economic marginalisation (Van der Walt 2007:01). Enactment of laws such as the *Prevention of Illegal Squatting Act 52 of 1951* and the *Natives Labour (Settlement of Disputes) Act of 1953* contributed to a large extent the landless and poverty stricken situation that the post-1994 farm occupiers are living in to date.



Efforts by liberal psychologists to reform the law argue that law inhibits the systemic, radical social change necessary for psychological and societal well-being through coercion. According to Friedman law has its hidden persuaders--its moral basis, its legitimacy, but in the last analysis it has force, too, to back it up. Law carries a powerful stick - the threat of force. He sees it as the fist inside its velvet glove and argues that law inhibits social change through the myth that the law is ‘legitimate,’ and that obedience to law is appropriate because legal authorities have the right to make demands (Friedman 1985).

Other authors such as Fox view law often as a hindrance to social transformation, as an inevitable weapon against radical activism, and as an opponent rather than an ally of those seeking fundamental change (Fox 1991). Along this thinking, Fox sees reliance on

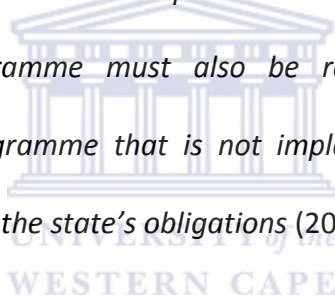
law for transformation of people's behaviour as risky and often short-sighted. To Fox beneficial behaviour of human beings develops naturally under the circumstances rather than because of legal threats or the mystification of legitimacy (Fox 1991).

Tapp believes that law opposes social change is through "the myth of humankind's inherent lawlessness," (Tapp 1974:46). He argues that the myths lead to people calling for social change as dangerous rather than liberating. Tapp also adds that law exists to protect some at the expense of others- to control rather than liberate. Along Tapp's argument Pienaar and Mostert are of the view that South African Constitutional protection and regulation of private property can be a tool both for protecting individual freedom and security and for initiating social change, illustrates the 'classic dilemma of liberal democracy' (Pienaar & Mostert 2005:633).

While Cotterrell supports the view that law can effectively produce fundamental societal change, he warns of the practical limits that it also possess (Cotterrell 1992). He believes that law can effectively produce change when other government bodies – through implementing and enforcing– supplement it. In support of the view, Van der Walt contends that the Apartheid era's framework for the effective implementation of land law had little bearing on property law but was provided for in what he calls 'neutral' structure of civil-law property institutions (Van der Walt 1999:02). South African Human Rights Commission (SAHRC) conducted an enquiry on the role of section 4 of ESTA and found

that an entitlement for a long term security of tenure that the law provides for farm dwellers is not legally enforceable as its implementation depends on the willingness of the Minister to use his/her powers for such to happen (SAHRC 2003). In line with Cotterrell and SAHRC's argument, Justice Yacoob stated in Grootboom judgment that:

*Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations* (2001 (1) SA 46 (CC).



### **5.3. Courts' Effectiveness in Bringing About Social Change**

The Extension of the Security of Tenure Act, 62 of 1997 (ESTA) provides dispute resolution measures, with the court as a major process through which parties to farm tenure disputes may have their issues resolved. Enforcing land rights through the courts have proven to be expensive and often impossible for most farm dwellers ([www.afra.co.za/jit\\_default\\_958.html](http://www.afra.co.za/jit_default_958.html)). This raises questions as to whether ESTA court mechanism is capable of bringing about social change for farm occupiers.

In an attempt to answer the above question, the study makes use of Gerald Rosenberg's book, *The Hollow Hope*, to discuss the role of court towards social change. Rosenberg examines two alternative constructions of the role of U.S. courts in producing significant social reform; Constrained Court view and the Dynamic Court view (Rosenberg 1991). In his book, he questions the validity of the commonly accepted saying that the Supreme Court of the United States is able to effect widespread social change.

### **5.3.1. *The Logic of the Constrained Court view***

The Constrained Court view holds that because of the existing constraints imposed upon the Court by the Constitution of the United States and the Congress, the Court is unable to accomplish significant change due to the presence of three constraints that must be overcome.

According to Rosenberg the first is that the nature of constitutional rights precludes the Court from hearing or effectively acting on many significant social reform claims, and lessens the chances of popular mobilization. This Constraint can be overcome if there is sufficient precedent for change. The second constraint is that the Court does not have sufficient independence from the Legislature and Executive to affect significant social reform. This Constraint can be overcome by securing support from substantial numbers in

Congress and securing the support of the executive branch. The third constraint is that Court does not have the power to develop necessary policy and implement decisions that could affect significant reform because the Court controls neither the Executive branch nor the Legislative branch, and it must rely on cooperation from the other two branches in order to enforce its decisions. According to Rosenberg, this Constraint can be overcome either by securing support of citizens, or at least not having significant opposition from all citizens (Rosenberg 1991:339).

Other Authors, though not directly supporting Rosenberg, discourage the use of courts towards expecting effective fundamental changes but for different reasons. Shapiro argues that the role of adjudication is, to decide which disputant is right or wrong, hence, such a process cannot be expected to result in a solution acceptable to both parties (Shapiro 1981). To Shapiro, the right or wrong judicial solution is an imposed solution which may make continuing relations between the disputants difficult or impossible. Durgard and Roux found that the South African Constitutional Court to have been extremely reluctant to act as a court of first instance in respect of literally poor litigants despite the Constitutional right of direct access has been (Gargarella *et al* 2006:112). Along the same view, Roux argues that South African courts have taken a conservative interpretation of the law - thereby interpreting legislation heavily in favour of existing property rights (Roux 2004).

### **5.3.2. Court Effectiveness: Logic of the Dynamic Court View**

Critics of the Constraint Court view maintain that Rosenberg's argument ignores the implications of court decisions on future actions that created more direct change. The Dynamic Court view maintains that the United States Supreme Court is indeed capable of affecting widespread change. This view asserts that there are advantages to the use of courts that the Constraint Court View misses (Rosenberg 1991).

Amongst the advantages of the use of courts, Rosenberg cites the following: (1) that courts are free from electoral constraints and institutional arrangements that hinder change; (2) that courts are uniquely situated to have capacity to act where other institutions are politically unwilling or structurally unable to proceed; (3) that courts are uniquely situated in that they are not required to maintain ongoing relations with interest groups – such as the financial backers that the executive branch and the elected officials need for getting their work done; and (4) that courts do not depend on carefully worked out institutional arrangements because they do not specialize in any one area (Rosenberg 1991 21).

In the 1999 eviction case of *Conradie v Hanekom*, a woman who worked on a farm in the Western Cape was granted the right to stay on the farm as an independent occupier after her husband was dismissed from the farm's employment. The Land Claims Court held that

even though her husband was dismissed from his employment, it goes against the Constitution to tie a wife's rights to her husband's actions. The court also allowed the husband to fulfil his wife's right to family life (LCC 8R/99).

Liebenberg's article on '*A new Paradigm for Eviction Law*' cited several judgments exhibiting features of a transformative approach to the adjudication of socio-economic rights (2010). Amongst the judgments the courts' unique position where it has a capacity to act where other institutions are politically unwilling or structurally unable to proceed, cited *Modderklip* and *Port Elizabeth Municipality* judgments. In this Judgments the State was ordered by the court to compensate the landowner for the occupation of its property while similarly declaring that the residents' entitlement to occupation of the land until alternative land has been made available to them by the State or provincial or local authority (Liebenberg 2010:285). In the *Port Elizabeth Municipality* judgment the court affirmed various rights and duties including a need for pragmatic and humane solutions to eviction-related conflicts which are consonant with the rights and values protected in the Constitution (Liebenberg 2010:285).

Liebenberg also cited the judgment in *Lebombo Cape Properties (Pty) Ltd v Awie Abdol and Others* the Land Claims Court (LCC) where the court held that the burden of provision of alternative accommodation to the Respondents cannot be shifted onto private



landowners; rather, state involvement to ensure that the Respondents concerned are not rendered roofless by their eviction was necessary (Liebenberg 2010). The Court through its powers ordered the applicant occupiers and local authority to engage with each other meaningfully on the provision of emergency housing for the occupiers after they have vacated the property (*LCC 129/2010 unreported*). *Modderklip* and *Port Elizabeth Municipality* judgments support Rosenberg's argument of the court's effectiveness towards social transformation despite court's 'inherent' limits.

Proponents of the Dynamic Court view also provide a number of examples pertaining to the immense power that the courts have at their disposal towards producing social reform. In terms of these powers, Fiss and Halpern argue that judicial office is structured by both ideological and institutional factors that force the judge to be objective while others view courts as a catalyst for change owing to their capability of providing publicity for issues where the public is ignorant of certain conditions, and political elites do not want to deal with them, thus putting public pressure on the elites to act (Fiss 1979:12; Halpern 1976:75).

Sachs argues that when it comes to protecting the rights of marginalized and vulnerable groups, it may be an advantage that the judges are not elected (Sachs 2009). In addition, he sees the greatest problem concerning judicial enforcement of social and economic rights as the social class from which judges traditionally had been drawn, and the nature

of traditional thinking, which tended to look at questions in abstract and formulaic ways that ignored the real lives of real people and ended up favouring the status quo rather than institutional incapacity (Sachs 2009:170). Contrarily, Van der Walt contends that courts fail to recognise opportunities for transformation because of common law tradition that resists change (Van der Walt 2002:259).

Although it is not disputed that a judicial solution in some instances worsened relations between disputants, proponents of the Dynamic Court view, amongst others, Grossman and Sarat argue that judicial decisions contain important extra-judicial effects capable of indirectly providing neutral forums where parties can work out their differences (Grossman and Sarat. 1981:89). Grossman and Sarat believe that the threat of litigation can serve as a basic political resource as – rather than spending money, time and effort defending a lawsuit – parties may find it more agreeable to negotiate (Grossman and Sarat 1981:89). Whereas Cavaagh and Sarat stress that without lawsuits’ threat many parties to disputes would never get to the bargaining table (Cavaagh and Sarat 1980:405).

Gargarella *et al* further explores theoretical question as to whether judges should decide on social and economic rights issues as a matter of democratic probity. He challenges two concepts of democracy in his paper, entitled *Too Far Removed from the People*, in which he accuses the judges of having made use of an excuse for not enforcing social and economic rights (Gargarella 2002). The first concept is that of an ‘elitist’ view of democracy in which judges act as gatekeepers against majoritarian impulses; second he

objects to the judges' understanding of '*participatory*' conceptions of democracy in which judges should not enforce social and economic rights in order to give due respect to the will of the people (Gargarella *et al* 2006:03). While challenging the concepts, he also develops a third view based on a conception of '*deliberative*' democracy, which he maintains would require judges to play the role of a supportive engine of public debate, prompting the political branches to act on the decisions reached through democratic deliberation (Gargarella *et al* 2006).

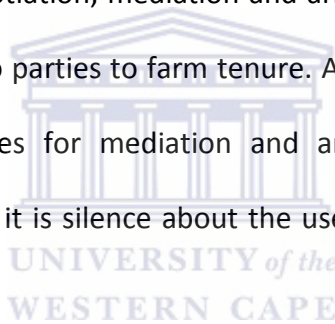
#### **5.4. Realisation of Rights through Alternative Dispute Resolution**

Alternative Dispute Resolution (ADR) can be defined as a popular umbrella term that is used to describe several different processes of dispute resolution (Ware 2001). These methods are believed to be more creative and more focused on problem solving than litigation, which has always been based on an adversarial model. Ury *et al* argue that ADR offers greater satisfaction with dispute outcomes and the success thereof leads to better relationships between former disputants and a lower likelihood that the dispute will recur (Ury *et al* 1993:13). Friedman and Percival claim that there are a number of disputes that are resolved by courts indirectly through Alternative Dispute Resolution (ADR) (Friedman and Percival 1976).

Some authors believe that ADR has the potential to increase the focus of dispute resolution process on parties' interests and to make the resolution of rights claims more

productive. Merry sees dispute settlement as a restoration of harmony in social relationships and as something that strikes a balance. In her study in Dover Square, she found that disputants use ADR more successfully than the court (Merry 1979). According to Merry ADR is appropriate for resolving disputes between parties with on-going relationships and also where they have a possibility of a future together thereby useful towards assisting such parties through mutually acceptable compromises.

For the purpose of this study negotiation, mediation and arbitration are examined as the out of court processes available to parties to farm tenure. Also it is essential to note that Section 21 of ESTA only provides for mediation and arbitration as the alternative mechanisms to court process and it is silence about the use of negotiation for the same purpose.



The section provides:

- (1) A party may request the Director-General to appoint one or more persons with the relevant expertise in dispute resolution to facilitate meetings of interested parties and attempt to settle the dispute through mediation and settle any dispute in terms of this Act.*
- (2) The Director-General may, on the conditions that he or she may determine, appoint a person referred to in subsection (1): Provided that the parties may at*

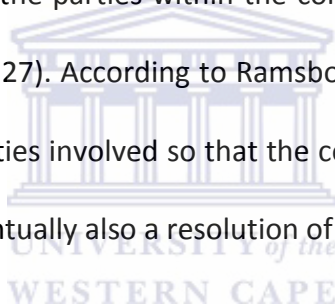
*any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on conditions that the Director-General may determine*

Critics of ADR worry that parties are unequal and therefore ADR may not alleviate the effects of a disparity in parties' economic positions as wealthy parties often have more power on those processes and may have access to documents and past decisions that the opposing poor party's cannot obtain (Brad 2003). Critics of ADR believe that ADR encourages compromise even in some disputes that are not appropriate for others. In serious justice conflicts and cases of intolerable moral difference, compromise is simply not an option because the issues mean too much to the disputants. Another concern is that ADR settlements are private and are not in the public record or exposed to public scrutiny. Nader in her critique of ADR mechanisms argues that when ADR model was extended to other parts of the world it became an instrument of 'coercive harmony', involving movement away from justice towards harmony and efficiency models (Nader 2002:134). Brad (2003) gives an example where ADR is used to settle out of court a dispute involving a company producing a defective product harming consumers without the issue getting any public exposure. Brad believes that this kind of a dispute needs to be taken up in court where a court ruling could force the company to fix all problems associated with the bad product or even to remove it from the market (Brad 2003).

This section discusses the three common forms of ADR – negotiations, mediation and arbitration.

#### **5.4.1. Negotiations**

Negotiation is a form of ADR, a strategy or process of searching for an agreement that satisfies various parties in a dispute (Fisher and Ury 1991; Uyangoda 2000:02). Richard describes negotiations as the fundamental dispute process in which two or more disputing parties try to work out their differences without intervention by a neutral party. In negotiation there may be instances where the parties to the negotiations are being represented by someone acting on instructions of the principals (Richard 1997:581). Negotiation is a process whereby the parties within the conflict seek to settle or resolve their conflicts (Ramsbotham 2005:27). According to Ramsbotham the process is aimed at changing the behaviour of the parties involved so that the conditions are there to reach a settlement to the conflict and eventually also a resolution of the conflict.



The following are according to Fisher and Ury advantages available in negotiation process:

*opportunity for parties to concentrate on solving the problem by finding a mutually-beneficial solution rather than on winning the other side, the process is a speedy and informal resolution of disputes that is generally less stressful, it allows for confidentiality and the avoidance of publicity and has potential to improve communication between parties thereby preserving or enhancing relationships between parties (Fisher and Ury 1991).*

Mitchell in Darby and MacGinty is of the view that when direct negotiations fail, a third party can be called in to assist. If that happens, a trilateral negotiating process then begins, with the introduction of a third party to facilitate or mediate (Mitchell in Darby and MacGinty 2003:77).

Disadvantages of negotiation process include the tendency to show that a party is not powerful enough to impose its will, thus giving the impression that the other party can manipulate it. A successful negotiation requires both sides to have specific goals and present them in a comprehensive manner, but also to have the ability to understand the other party's counteroffers.



#### **5.4.2. Mediation**

Mediation is a process in which a neutral third party assists the parties in resolving their dispute. It is a voluntary process where the parties maintain control over the outcome (Uyangoda 2000; Ramsbotham 2005). Mediator has no authority to impose a solution on the parties, but rather gives guidance to the parties through a series of stages to impose a solution (Richard 1997). In mediation parties are often bound by the results of the mediation so long as they remain committed to the mediation, whilst at times such agreements are confirmed and formalised as court judgements.

Theorists and practitioners of mediation claim that the mediation process can address many of the shortcomings of adjudication as it offers parties the possibility of acceptable conclusions, it is fast and cheap, it invites parties to a face to face interaction giving them the opportunity to hear each other and take into account the others' perspective, it also offers parties a chance to shift expectations and temper self-serving attitudes, while working to reach an acceptable accord (Minkel-Meadow *et al* 2006:619). According to Ramsbotham when some of the barriers described in the negotiation process prevent parties and their representatives from reaching agreements directly with each other, people often use mediation (Ramsbotham 2005).



Mediation is also said to be based on promoting public values which are important to many cases such as: reconciliation; social harmony; community; interconnection; relationships; and others, averring that they are more humane and far more capable of healing and reconciliation than adjudication (Bush 1989). Official mediators are usually official representatives of government, who have been asked to intervene as a third party, by one or both of the parties in conflict (Rotberg 1999).

Critics of mediation argue that in mediation important social and legal conflicts are silenced; significant public matters are privatised; and that power imbalances skewed results disempowering the already subordinated encouraging unjust compromises of



principles or rights that require sharp demarcations and enforcement (Menkel-Meadow *et al* 2006:626). These critics also question the neutrality of the third party, arguing that a third party may promise impartiality to the parties but in reality may know quite a bit about the disputants or the subject matter of the dispute.

### **5.4.3. Arbitration**

The definition of arbitration entails an impartial ADR process where the dispute is heard by one or more impartial arbitrators. Arbitrators are selected by the parties through an automated system that produces arbitrator lists. The process is considered by some as faster, less expensive, and less formal than litigation. During the hearing, parties make brief opening statements explaining what they intend to prove and what relief – e.g., money damages – is sought. Parties have the opportunity to present documents and witnesses in support of their positions; to object to documents and to question witnesses presented by other parties; and to make closing remarks to summarize their positions. Unlike mediation, the process is final and binding. It follows, therefore, that arbitrators evaluate the evidence and arguments presented and reach a final and binding decision – the ‘award’. Awards are only subject to court review on very limited grounds (Goldberg 1982).

Additionally, in the labour context, an individual may not be aware of how much could be lost by unwittingly agreeing to an arbitration clause to obtain employment, thereby giving up important rights such as the right to litigate or the ability to participate in a class action law suit against the employer (Brad 2003). The fact that arbitration allows parties to determine the rules of procedure is particularly advantageous in cases where companies involved in commercial and investment disputes are founded in and governed by different legal systems (Goldberg *et al* 1999).

Theoretically, the submission of the parties to arbitration implies that the parties will agree to carry out the award without delay. However, this can only be true for situations in which the disputants are seeking a conclusive settlement of their conflict. Parties submit themselves to arbitration only when they are incapable of reaching a negotiated agreement. In adversarial dispute resolution procedures, parties are hoping to see their interests served. If defeated, they are likely to consider options that promise more favourable outcomes, by challenging an obtained award or by trying to evade implementation of the decision (Goldberg 1982).

## **5.5. Conclusion**

This chapter has explored theories and scholastic views in respect of three aspects, namely: examining whether law as a tool is capable of producing social change; examining the court's effectiveness in impacting societal behavioural; and examining the Alternative Dispute

Resolution (ADR) processes' impact on conflicting society and its capability to produce social change.

This chapter has presented theories indicating that law is limited in its ability to produce social change despite the legislature's good intention. The theories call for relevant government institutions' support in order for change to take place. This chapter has also provided theories which focus on the court's effectiveness in producing social change. Like the theories on law's effectiveness to produce social change, this chapter has presented views that show that court alone cannot produce the necessary changes due to some constraints. The chapter has presented advantages and disadvantages of the ADR that need to be taken into account when parties are to choose an appropriate mechanism to resolve a particular dispute. The mechanisms presented in this chapter are essential for this study to assist in analysing the research questions as set out in the previous chapters.

## CHAPTER 6: EVICTION CASE STUDIES

### 6.1. Introduction

This chapter is presented in two parts. The first part examines two eviction case studies from the Vhembe district of the Limpopo province of South Africa. The first is the Maswiri<sup>1</sup> eviction case that started as a labour dispute wherein the parties engaged in various processes, including a court interdict, arrests, a strike, the threat of eviction and eventually negotiations. The second is the Sandfontein Boerdery case; an eviction case that started when the workers showed their interest in joining a union. The case involved processes such as CCMA conciliation and eviction court orders.

This section analyses the cases studies with reference to the wider literature discussed in the earlier chapters. Data is analysed in terms of the theories and perspectives examined in chapter five, particularly on the possibilities and constraints of law and courts towards changing society. The research questions outlined in chapter two are, in addition, used as themes for the analysis.

### 6.2. Maswiri Boerdery

The Maswiri Boerdery case (Maswiri) concerns the interlinking of various issues relating to labour and tenure issues. The case relates to a labour dispute between members of the

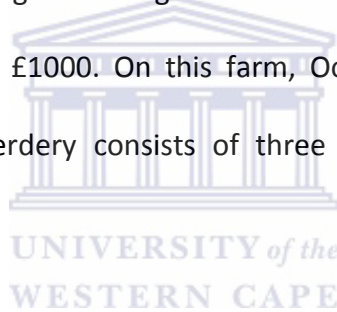
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<sup>1</sup> Venda word for Oranges

Trade Union of South African Authority (TUSAA) and Maswiri Boerdery (Pty) (Ltd) that ended up threatening the eviction of TUSAA members.

### **6.2.1. Historical context of the farm**

Maswiri Boerdery Pty Ltd is farming several farms in Tshipise and Musina of Vhembe district of Limpopo province with its head office in Schuitdrift situated in Tshipise farming area. Joubert Fourie, named after Piet Joubert who was a commander of the Boer forces during the 2nd Anglo Boer War, began farming on Schuitdrift. At first he rented the farm and finally bought it in 1934 for £1000. On this farm, Oom Andries' father produced tomatoes. Presently Maswiri Boerdery consists of three separate farms (Farmsecure Newsletter 2010)).



According to the managing director, Mr. Andries Fourie, the shifting from Tomatoes to oranges farming has taken place during Joubert Fourie's term and like his father he carried on with the farming that both his grandfather (interview with Andries Fourie 1998).

### **6.2.2. Parties**

There were three 'actors' in the dispute; the Maswiri Boerdery (Pty) Ltd., several hundred farm dwellers who were employees of the company and members of the Trade Union of South African Authorities (TUSAA), and Nkuzi Development Association (Nkuzi).

Maswiri Boerdery (Pty) (Ltd) (Maswiri), a citrus farming company with its head office at Schuitdrift farm, is situated 40km to the South of Musina town. The first tomato farming on Schuitdrift was started in 1934 when Mr Joubert Fourie bought the farm. Maswiri Boerdery consists of three separate farms and produces oranges and grapefruits for both the domestic and export markets (S Shirinda field notes 1998).

Prior to the unionization of workers, the company hired workers and allowed them to build their own houses on the farm. Workers were employed on permanent basis. At Schuitdrift there were 10 four roomed houses that the company built for the supervisors. There were water taps in all compound streets but no electricity. There were no toilets in the compound and farm dwellers were using the bush to respond to the call of nature (S Shirinda field notes: 1998).

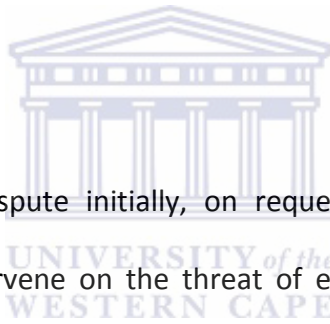
In all Maswiri owned farms there were no gates; people were walking freely in and out of the compounds. In Schuitdrift where the head office is situated, there was building rented out to another white person who was utilizing it as a shop. During working hours the shop remained open. There was a public road and a school at Schuitdrift that were build and

maintained by the government. Farm dwellers were allowed to bury the deceased family members and own small vegetable gardens (Thomani Muleya: 1998).

The second party was the Trade Union of South African Authorities (TUSAA). TUSAA had its head office in Pretoria and was operating all over the country through shop Stuaarts at workplaces where they had members. According to African Eye News, TUSAA was registered trade Union, initially with its priority, to improve working conditions of staff members in the employment of traditional authorities (African Eye News Service 1999).

During 1996 it represented employees from the departments of Agriculture, Water Affairs and Forestry, Education, Health, Home Affairs, Justice and Finance and Telkom. During 1995 it also participation in the march on the Union Building in Pretoria to demand the lock out and property rights clause to be excluded in the final Constitution and during 1997 it participating in a strike action against the Agricultural Research Council (ARC) together with NEHAWU and SAAPAWU representing ARC plants workers (<http://www.e-tools.co.za/newsbrief/1996/news0425>). During March 1999 Mail and Guardian reported a story wherein TUSAA challenged the unfair dismissal of a traditional Authority employee by a Limpopo traditional Leader ([mg.co.za/article/1999-03-08](http://mg.co.za/article/1999-03-08)). TUSAA ceased to operate as a union in 2004 following its failure to submit the financial statement (<http://www.workinfo.com/deregisteredtradeunions.htm>).

The third party was Nkuzi Development Association (Nkuzi), a land reform support Non-Governmental Organization (NGO), founded in 1997 to assist landless communities to access land and to contribute to positive agrarian transformation and effect holistic and sustainable growth for land reform beneficiaries. Nkuzi had amongst its programmes, a 'Farm Dwellers Programme' with its main objective, to ensure tenure security for farm occupiers, including land ownership and socio-economic rights through its assistance to farm occupiers and workers towards accessing their existing rights while lobbying to increase those rights and fill the gaps that may exist in current legislation (<http://www.nkuzi.org.za/>).



Nkuzi participated in Maswiri dispute initially, on request of the Ndzhelele/Tshipise Transitional Local Council to intervene on the threat of eviction against the dismissed workers. Being a land reform NGO, it was expected of it to assist the dismissed workers in their challenge to the court interdict that the land owner obtained from the High Court. TUSAA was excited with the involvement of Nkuzi to specifically deal with tenure related matters that court interdict brought into the labour dispute (S Shirinda field notes 1998).

### **6.2.3. Background to the dispute**

The dispute started early 1998 when several Maswiri workers were dismissed when they joined the TUSAA. Following their dismissal, the company replaced them with



Zimbabwean immigrants. Most of the workers joined the union July 1997 (Human Rights Watch March, 28, 2000).

According to the dismissed workers, they joined TUSAA in a bid to improve their working and living conditions. During the period Maswiri workers earned between R150.00 to R400.00 depending on the service of individual worker (interview with Richard Matodzi, 1998).

Maswiri workers occupied two residences – one at Schuitdrift where the head office is situated and another at Hayoma farm that is situated about 10 kilometres away from Schuitdrift. The dismissed employees resided on both farms with majority of them at Schuitdrift. Some workers resided on the farms with their parents of whom some were former farm workers. Some parents were, at the time of the dispute, receiving a pension grant and no longer in the employment of Maswiri while others still working and receiving pension (interview with Richard Matodzi 1998).

Azwitamisi Johannes Kwindu, the oldest of the dismissed workers, who worked many years for Maswiri and had lived at Schuitdrift since he was a child. He described his farm experience as an occupier and worker as follows:

*I started working when I was not even able to carry five litres of water, packing boxes for oranges. At the time of the dispute our average salary was R335 per*

*month and sometimes our employer would only pay us after six weeks (interview with Azwitamisi Johannes Kwinda 1998).*

Following few months of the workers' unionization, TUSAA with the leadership of the General Secretary, Mr. Nakedi Mogale, engaged the Maswiri management in a discussion towards improving the wage of the workers. One day, while the discussions were on, the workers heard that two colleagues who were also TUSAA members were arrested on allegation of the two workers being illegal immigrants. A delegation of union shop stewards was sent to the management to enquire about their colleagues' arrest. The delegation came back and reported to the members that the management's response was that police were doing their job. The response angered the workers and when they reported the incident to the general secretary of TUSAA, he advised them not to go to work demanding the release of the arrested members. He gave the advice without giving the employer a written notice of a strike. The arrest of the two workers and the strike then resulted in discussion between management and TUSAA deadlocking (SAHRC February 1999).

While the strike was continuing, one day, on the 3<sup>rd</sup> of March 1998, the striking workers in a mass meeting on the public road next to the management office, about 30 police came to the farm in response to a complaint from the management that the striking workers were contravening the High court order. The police were mostly white with some black police handling dogs (Human Rights Watch interview, Tshipise, March 28, 2000).

According to workers, police arrested them in the following manner:

*The police captain by the name of Eddie van der Walt gave an order that he wanted all of us inside the van in fifteen minutes. But we didn't want to get into the van because we didn't know any crime we had committed. After fifteen minutes he gave the order 'one minute, and after that minute 'on your marks, get ready, go' – and then they started grabbing people, assaulting, kicking and trampling on us (interview with Azwindini Mathavhulula 1998).*

During Human Rights Commission public enquiry that took place at Musina, police responded as follows:

*On arrival on the farm, we met a crowd, including some armed with sticks, stones iron pipes, and adopted a threatening, violent and provocative attitude (SAHRC 1999).*

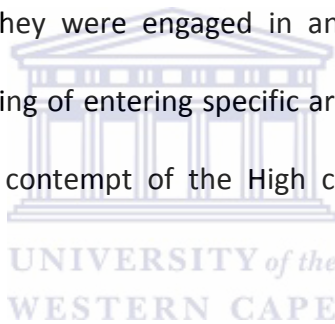
In an interview with the management, Cecilia Fourie responded as follows:

*The action of the union was an 'illegal strike'. TUSAA did not follow formal procedures for a strike. We issued several notices against TUSAA members - informing them that their strike was illegal and that they were to come back to*

*work. On advice of their union, they disregarded the notices and we had no other option than to approach the court of law applying for a court order – restricting the striking workers from being in the vicinity of the working place and other specific areas. We employed the private security to enforce the court order and we have called the police on realizing that the workers entered the prohibited area as per the court order (interview with Cecilia Fourie 1998).*

### **6.2.3.1 Trespass charge**

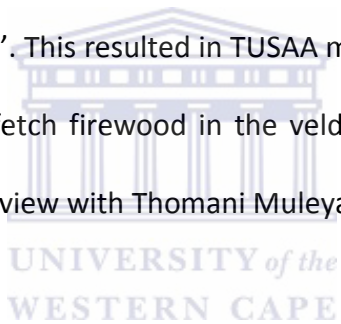
TUSAA members disputed that they were engaged in an illegal strike and they also disputed that their actions consisting of entering specific areas of the farm that the High Court interdicted them, were in contempt of the High court (interview with Richard Matodzi 1998).



On enquiry to the dismissed workers as to the reason for the manner they were engaged in the strike, their defence was that it was the only way to get the employer to take their grievances into consideration. Also they alleged that they were not aware of the existence of the court order and that they did not oppose the granting of the order because they were not served with copies of the application. They claimed to have first heard about the court interdict in two occasions; when a private security company – by the name of *Protrek*, employed by the company – started patrolling the farm and telling them that they had a court interdict with them that prevented them from entering some portions of

the farm, and secondly, one day during a TUSAA meeting when police from Musina arrived and disrupted the meeting. The coming of the police resulted in arrest of 252 people; 91 men, 118 women, 31 school going children and 12 infants. During the arrest, four of the arrested were also assaulted by the police during the arrest. Those arrested spent a night in police custody after TUSAA had appointed a Musina lawyer to apply bail for them (interview with Richard Matodzi 1998).

*Protrek* securities continued patrolling Maswiri Boerdery fields and arresting people who were found in the 'restricted areas'. This resulted in TUSAA members no longer being able to go to the river for fishing, to fetch firewood in the veld or even to use the bush to respond to the call of nature (Interview with Thomani Muleya 1998).



While the criminal case against the arrested TUSAA members was pending, the farm management established *Phatusano*, Venda term meaning work together, a rival union, with a majority of their members comprising of illegal migrants from Zimbabwe. TUSAA saw the dismissal of its members as unfair and the restriction of their movement on the farm as unreasonable (Interview with the general Secretary of TUSAA 1998).

According to Richard Matodzi, TUSAA referred the dismissal dispute to the Northern Province CCMA (now Limpopo CCMA). TUSAA and the company met at the CCMA

Conciliation process but the matter remained unresolved. TUSAA then referred the matter to Labour Court in Randburg (Labour Court 276/1999)

In an interview with Carlton Muleya, a TUSAA shop steward, he stated the following:

*The company dismissed us and employed about 700 Zimbabweans who do not have Identity documents. We have reported the matter to the CCMA. Now some of our members have been arrested by the police while we are waiting for the labour court to hear our case (interview with Carlton Muleya 1998).*

In the middle of April, the accused persons – on a charge of trespass – appeared in the Musina magistrates' court. On that day, the arrested did not have a legal representative as the one that was appointed by the Union to apply for bail, had withdrawn for the reason that he was not paid for the legal fees he incurred when applying bail for the accused. The matter was then postponed several times waiting for the accused to get a legal representative. As they were to travel to Musina from Tshipise – a distance of about 35km – each time they were to appear before court and having been dismissed from work, they had no money for transport or to buy food (S Shirinda field notes April 1998).

The Nzhelele/Tshipise Transitional Local Council (TLC) heard of the problem faced by the Maswiri workers and called Nkuzi Development Association (Nkuzi) to assist the workers. Nkuzi found that the arrested workers were members of TUSAA. The members provided Nkuzi field workers with contact details of the general secretary. During telephonic

conversation with the general secretary, Nkuzi noted that TUSAA did not have resources to deal with the criminal matter. The general secretary then requested Nkuzi to assist its members to defend the charges (S Shirinda field notes April 1998).

Nkuzi also assisted the arrested members to apply for State Legal Aid. All the applications were turned down for failure to meet a 'means test'. It then employed the service of the Legal Resources Centre in Johannesburg. It also paid the costs of transporting the arrested to court each time they were to appear and bought them food (S Shirinda field notes April 1998).

Again, Nkuzi assisted the four arrested members who were assaulted during the arrest in laying criminal charges against the police. The charges were not investigated by the police and only with the assistance of Nkuzi were statements from the witnesses obtained. The cases were later withdrawn by the Public Prosecutor for lack of evidence. Nkuzi reported the matter to the Independent Complaints Directorate. The ICD responded to the complaint that the police's conduct were in order (ICD) in Polokwane (S Shirinda field notes April 1998).

On the 27<sup>th</sup> of April 1998 there was a Poverty Hearing that took place in the Elim area about 20km from Louis Trichardt. Nkuzi organized a bus to transport the dismissed members to attend the poverty hearing enquiry at Elim where some of them managed to testify before the Commission. At the hearing, there were several journalists, including

two Finnish television journalists. The Finnish television journalists were impressed by the Maswiri workers testimonies and they decided to follow up on it. Two fieldworkers, including the researcher, accompanied the journalists to Tshipise to film the story (S Shirinda field notes April 1998).

The Finnish Television crew and the Nkuzi field workers arrived in Tshipise late on the same day of the enquiry – at about 19h00 – and managed to talk to a few occupiers. The next morning they again went to the farm. While on the farm – talking to occupiers – the private farm security spotted them and notified the farm managing director, Andries Fourie about their presence. Within minutes, neighbouring farmers arrived kidnapped them, and took them to the farm office. Andries Fourie called the police who, after half an hour, arrived, arrested them and escorted them in the direction of Musina. While driving to Musina, an Nkuzi worker contacted the Director of Nkuzi through a cell phone. As a result thereof police received a message from the provincial MEC for Safety and Security instructing them to release the four arrested people before they reached the police station (S Shirinda field notes 1998).

According to the SAPA the plight of the dismissed Maswiri workers was reported in various newspapers. The then provincial Director of Safety and Security, Serobi Maja, was quoted remarking in the follow manner:

*We condemn the farmers' actions; our government upheld the principle of the freedom of the press. We are going to investigate claims that the farm owner is*



*employing illegal immigrants from Zimbabwe and if we find it to be true, we will get him prosecuted (SAPA, April 3, 1998).*

Nkuzi reported the conduct of the Maswiri Company to the South African Human Rights Commission (SAHRC). The SAHRC conducted the enquiry on violation of human rights in the Tshipise farming area. The Police testified before the South African Human Rights Commission that they were called to the farm to maintain order. The commission found that at least 45 percent of Messina's mainly black population of 27,000 was unemployed, while the only work available to the others was to be found on the large white-owned farms that produce oranges and tomatoes for export (SAHRC 1998).

The reports of the Poverty Hearing and the SAHRC attracted national and international media who visited the area to cover the story from various angles. The Minister of Land Affairs and the provincial MEC for Agriculture, Reverend Farisani, conducted an investigation following the SAHRC findings by holding a stakeholders' meeting at Schuitdrift farm. At this stage TUSAA was no longer communicating to the dismissed workers. In the stakeholders' meeting called by the MEC, the Managing director of Maswiri, Ms Cecilia Fourie responded to the Limpopo MEC for Agriculture, Rev. Farisani in the following manner:

*The police raided Tshipise farms during March 1998 emanating from farmers' outcry about theft of fruits and implements in the area. We applied for a court*

*order in order to protect the company's property from striking employees (Cecilia Fourie 1998).*

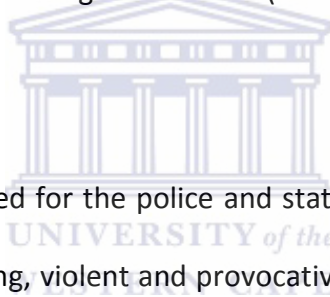
As the dismissed workers had no food and like in the arrest matter, TUSAA had no solution and was not communicating with its members, Nkuzi reported the starvation that the dismissed workers were facing to the district Social Welfare department in Thohoyandou. The Social workers then distributed food parcels to the occupiers of Schuitdrift and Hayoma farms. Nkuzi also approached the office of the Area Commissioner of police to discuss the involvement of the police in the Maswiri dispute (S Shirinda field notes 1998).

While the trespass case was pending at the Musina magistrates' court, *Protrek* security continued arresting people who were found in restricted areas as per the Pretoria High Court interdict order. A woman, who was also part of the people facing trespass charges on the mass arrest case, was arrested when she was found in the bush responding to the call of nature (S Shirinda field notes 1998).

When Maggie Randima was asked as to how she was arrested, she said the following:

*One day, I woke up in the morning. I was in my underwear going to the toilet in the bush. Before I even relieve myself the securities arrested me and locked me in the store (interview with Magie Randima 1998).*

During May 1998 the accused appeared before the Musina magistrates' court. They were legally represented by Nkuzi lawyer from the Legal Resources centre (LRC). During the trial, Andries Fourie testified on behalf of the farm management and stated that the accused contravened a court order that was served to them by the Sheriff of the court. The Sheriff also testified that he gave the court interdict order to four shop stewards, mentioning their names, but on cross examination by the LRC lawyer he changed the story saying that he did not give it to any particular person, he threw it on the ground next to people who were singing freedom songs at the farm (S Shirinda field notes 1998).



Captain Eddie van der Walt testified for the police and stated that people were arrested because they adopted a threatening, violent and provocative attitude and that the police did not have a court order but were told by the farm manager that the people were trespassing. The LRC lawyer then applied for the discharge of the accused because state witnesses contradicted each other on the charge and the manner of service of the court interdict. The magistrate discharged the accused as requested by the defence attorney (S Shirinda field notes 1998).

Following the discharge of the arrested and dismissed workers on the trespass charges, they continued residing in their residences but with no food. The General Secretary of the

union only communicated to the members on the farm via Nkuzi's Elim office field worker (S Shirinda field notes 1998).

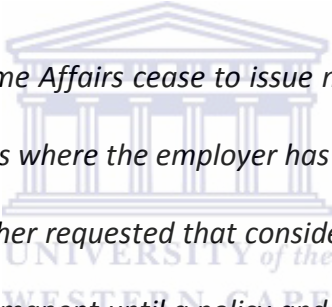
As the labour case was pending at the Labour Court, Nkuzi advised the dismissed workers to remain in their residences despite threats of eviction. At that time the only source of food was the district office of the Social Welfare in Thohoyandou on request of Nkuzi provided food parcels for families whose breadwinners were dismissed just for a week. Despite the strike, day to day operation of the company, including export of the products, continue as normal as the company had an alternative, though illegal, of employing Zimbabwean migrant workers who unlike South African workers, couldn't strike for better working and living conditions (interview with Thomani Muleya 1998).

Nkuzi conducted an investigation on provision of 'work permits' that the Zimbabwean workers were in position of around Tshipise farming area. Nkuzi found that the permits were issued by the department of Home Affairs and the permits were kept by employers. The migrant workers were issued with private 'identification cards' that once produced to the police and soldiers were - in terms of the agreement between police, soldiers, farmers and home affairs – allowed holders thereof not to be arrested for illegally entering the country (S Shirinda filed notes: 1998; Mail & Guardian February 12, 1999). ).

During a stakeholders' meeting between farmers, various departments and Nkuzi that was held in Musina, the Regional Director of Home Affairs in the Northern Province stated that the permits were issued in terms of a long-standing agreement between the

apartheid governments of South Africa and Zimbabwe. He confirmed that nobody had a copy of the agreement and many of the immigrant workers at Maswiri were legal according to the agreement until April (Regional Director of Home Affairs, Northern Province, Polokwane 1998).

Nkuzi forwarded a letter to the Regional Director of the Northern Province Home Affairs questioning the employment of illegal immigrants in Tshipise area (S Shirinda field notes 1999). In a letter that the Director-General of Land Affairs wrote to the Director-General of Home Affairs the following was said:



*that the Department of Home Affairs cease to issue new section 41 permits except in exceptional circumstances where the employer has proven that no local unskilled labour is available. It is further requested that consideration be given to temporary permits not being made permanent until a policy and enforcement mechanisms are adopted to ensure that both South African and foreign workers are not abused through employers side-stepping labour legislation and the ESTA (Director-General of Land Affairs 1999).*

In response to the letter quoted above, the Regional Director of Home Affairs stated the following:

*that following the agreement reached between the Provincial Director of the Department of Labour, Northern Province and the Department of Home Affairs, the*

*Department of Home Affairs will no longer issue permits without consulting the Department of Labour in the Province (Regional Director of Home Affairs 1999).*

### **6.2.3.2. Intimidation charge**

A week following their discharge on the trespass charge/contempt of court interdict order, the dismissed workers held a meeting near their homes; about ten members were arrested and charged with criminal charges of intimidation. According to a shop steward, TUSAA general Secretary, Nakeli Mogale, was informed of the arrest and also that bail in an amount of R300.00 for each of the arrested members was needed. TUSAA did nothing about the notice until Nkuzi volunteered to pay bail on their behalf and appointed a legal representative to act for them. The case was held at the Regional Magistrate's Court in Louis Trichardt, about 100 kilometres from Tshipise. Again Nkuzi paid for the transport and food for the accused on the day of court (S Shirinda field notes 1998).

### **6.2.3.3 Labour Court Settlement Agreement**

The dismissal case was set down for hearing at the Labour Court for the 15th of November 1999, about 22 months following the dismissal and striking of the workers. On the day of the hearing, the legal representatives of Maswiri approached the leaders of TUSAA, Nakedi Mogale and Malemela, before the court started with a suggestion to negotiate the dispute outside court. The union leaders informed the shop stewards, who were waiting in one of the court rooms about the suggestion. According to the shop stewards the two union leaders started talking to the legal representatives of the

company and only consulted them sometimes to clarify some issues. A settlement agreement was then signed by the company managers, union representatives and three shop stewards (interview with Malakia Mudau 1999).

Amongst the settlement agreement clauses, there was a provision that read:

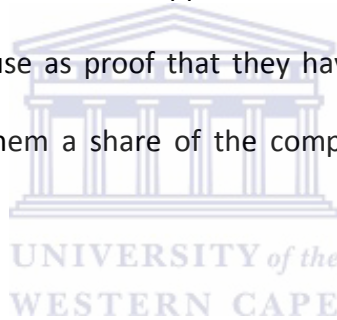
*that only ten (10) vacant posts are available and re-employment will be on condition that all dismissed employees apply for the job and in case one is not employed, such a person must come to the office, in possession of a door of his or her house indicating that he or she is vacating the farm to get his or her pension money that was due for the services he or she has rendered to the company*  
(Labour Court 276/1999).

The settlement agreement also had a clause that any of the dismissed workers whose applications would not be considered for re-employment, had until 18<sup>th</sup> of December 1999 to vacate the farm and would receive R100.00 as compensation (Labour Court 276/1999).

According to the unions' General Secretary the settlement idea was the initiative of the company lawyers on realizing that they did not have a winnable case. The General Secretary's written statement that was forwarded to Nkuzi indicated the settlement as a 'major victory' for farm workers (Mogale 1999).

Two days later, Nkuzi received a copy of the settlement agreement from the Labour Court registrar. On Nkuzi's closer examination of the settlement agreement, workers had been completely betrayed by TUSAA. The settlement purported to evict the occupiers without following the provisions of the Extension of Security of Tenure Act 62 of 1997 (S Shirinda field notes 1999).

A week after this, about 104 dismissed workers went to the office of the Maswiri Boerdery and applied for the job as per the settlement agreement. Only 7 of those who applied were re-appointed and those whose applications were rejected were told to go and remove a door from the house as proof that they have vacated their residence in order for the company to give them a share of the compensation of R100.00 each (S Shirinda field notes 1999).



Nkuzi visited the dismissed workers at Schuitdrift for the purposes of reading and translating the settlement agreement to them. Following the reading and translation of the settlement agreement, TUSAA members got upset to hear that they were to reapply for the job and not everyone was to be rehired. They then gave instructions to Nkuzi to get them a lawyer to challenging the agreement. Nkuzi also on behalf of the occupiers forwarded an application to the then provincial DLA, now provincial office of the Rural Development and Land Reform for the implementation of section 4 of ESTA. The application only received an acknowledgement but the matter was not further attended (S Shirinda field notes 1999).



Nkuzi, on behalf of the dismissed workers, on instructions of the dismissed workers appointed a Johannesburg law firm – SAMPSON OKES HIGGINS INC, a Sandton law firm – who made two applications: one to the Labour Court and the other to the Land Claims Court. The former requested the labour court to set aside the settlement agreement for its lack of jurisdiction to deal with eviction of occupiers on farm and the latter applying for a court interdict against the Maswiri Company from utilising the settlement agreement between it and TUSAA to evict the dismissed workers (Labour Court Case No. 276/1999).

During consultation with SAMPSON OKES HIGGINS INC and Nkuzi, Malakia Mudau, one of the three shop stewards, described how the settlement agreement was negotiated:

*The company's legal representatives, Maswiri management, Mogale and Manamele met in one of the court rooms talking about the case. Three of us were kept in another office where we were only consulted by Nakedi and Manamele when they wanted to clarify something (interview with Malakia Mudau 1999).*

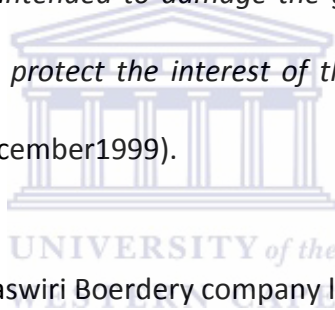
Malakia told Nkuzi and the lawyers that the settlement agreement was not discussed with the workers before and no instructions were given to the union to handle land issues at the Labour court. On behalf of the dismissed workers, he said that the out of court settlement was a betrayal to their struggle (Malakia Mudau 1999).

Nkuzi produced a press statement about the settlement agreement, highlighting how the union failed to assist the workers towards fighting for their labour rights. In the

statement, Nkuzi also said that the union nearly caused the occupiers' eviction from the land that most of them had resided since birth (S Shirinda field notes 1999).

In response to Nkuzi's statement, TUSAA released a counter press statement, threatening to institute civil action against Nkuzi for defamation of its name. The statement included a clause that read as follows:

*On the 16th of December 1999 ETV broadcasted damaging news as a result of the so called Nkuzi Development, one of the State surrogates, releasing a malicious statement that was really intended to damage the good name of TUSAA. TUSAA had done what it could to protect the interest of the workers (Mogale facsimile send to Nkuzi on 20<sup>th</sup> of December 1999).*



Nkuzi legal representatives and Maswiri Boerdery company lawyers exchanged letters and pleadings following the court applications. Maswiri Boerdery lawyers made an undertaking to Nkuzi that it would not enforce the agreement clauses that dealt with the termination of occupiers' residency as it appeared in the settlement agreement. In addition, it stated that in case eviction of the occupiers would be necessary, it would be applied to a competent court in terms of the ESTA (Letter from Maswiri legal representatives addressed to Higgins Inc: 2000).

Following the undertaking, the dismissed workers continued residing on the Maswiri Boerdery farms, although the majority did not get their jobs back; some managed to get

employment on the neighbouring farms; others went to villages in the former homeland of Venda; or went to the surrounding towns.

The Maswiri case shows how successful the negotiation process can be for occupiers – particularly when supported by a strong specialist land legal assistance such as Nkuzi. This process enabled them to challenge the settlement agreement between the employer company and the union who had the opportunity to take away occupiers land rights through a court that lacked the jurisdiction to decide on evictions.

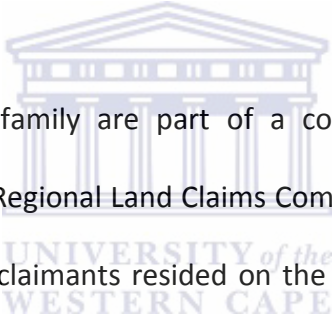
### **6.3. Sandfontein Boerdery (Pty) Ltd**

This case relates to the dismissal of seven employees and the eviction of four occupiers who were also employees on the farm Sandfontein 232 MT. The farm is situated about 6 kilometres from Louis Trichardt town, and 12 kilometres from Maelula village in the Vhembe district of Limpopo province.

#### **6.3.1. Labour history of Sandfontein**

Sandfontein Boerdery is operating as a company on a farm belonging to Mr. Hans Jargens Lombard. The company was managed by Mr. Mr Herman Johannes Jansen van Rensburg who leased the farm from the registered owner. The manager is the son-in-law to landowners (interview with Peter Magodi 2000).

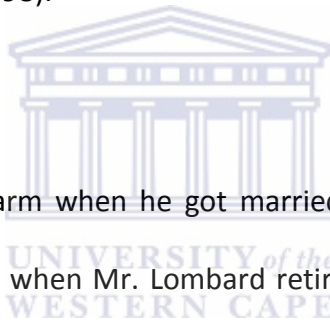
Like other white landowners in the Zoutpansberg district of the Transvaal, the registered owner of the farm, Mr. Lombard, purchased the farm during the 1930s during the period when farm occupiers in the area were subjected to labour tenancy system. In terms of the system, black people that Mr. Lombard found in the farm provided labour to him for three months for their stay and use of land for cultivation and plough fields. During the period when wage employment was introduced in the district, he entered wage employment with the black people who were residing in Sandfontein (Interview with Peter Magodi 2000).



Some families including Magodi family are part of a community that has lodged a restitution of Land claim with the Regional Land Claims Commissioner of Limpopo (RLCC). The basis of the claim is that the claimants resided on the farm prior to 'the first white occupation and registration of the farm. Also they alleged that when the land was offered for sale to the first white owner, they were not, in terms of the Native Land Act of 1913 and the 1936 did not have an option of buying the farm because they were 'blacks' who were prohibited from purchase land (interview with Magodi 1998).

The families that Mr. Lombard found on the land, amongst them, the Magodis, alleged that they have lived in the mud houses which they self-built. Some members of the families were working in neighbouring farms and Sandfontein was regarded as home. Those who got married were allowed to stay with their spouses and children as per family

needs. As Mr. Lombard wanted to utilize the portion of the land where the self built houses were situated, he relocated the families from the mud houses to occupy the cement bricks houses that he built next to his house and pack shed. This was the period when those who were not his employment, were forced to vacate the farm. Only those whose family members had employment arrangements remained. As one or two members of the family worked on the farm, the rest of the family members could work outside the farm. It was under these circumstances that some of the occupiers and workers at the time of dispute continued their stay on the farm despite where they worked (interview with Magodi, 1998).



Mr. Van Rensburg came to the farm when he got married to Mr. Lombard's daughter during 1991. It was at that period when Mr. Lombard retired and handed over his farm management to, Mr. Van Rensburg, his son-in-law. Mr. Van Rensburg took over the farm management as a going concern, continuing with citrus production and maintenance of timber that was his father-in-law's main activities. He even took over labour force and only employed few as the needs arose. Working conditions remained the same despite the exchange of hands of the management (interview with Magodi 1998).

Prior to the dispute male workers usually cut stubs with home light machines, waited for some days to allow them to dry and carry them to the side of the road. Women worked in groups of six washing and packing fruits in the pack shed (Human Rights Watch 2000).

### **6.3.2. Parties to the disputes**

The first party was Herman Johannes Jansen van Rensburg, the former employer of several farm employees, including his seven former employees. He leased the farm Sandfontein from Mr. Lombard, his father in-law. His company traded as Sandfontein Boerdery near Louis Trichardt town, now Makhado. Sandfontein Boerdery is amongst several fruit farms in Louis Trichardt ([safruitfarms.com](http://safruitfarms.com)).

The second party were former employees of Sandfontein Boerdery whom were dismissed from work and were also evicted from the farm. Initially the employees affected were seven; two men and five women. As three of the seven workers were spouses of workers and occupiers who were still employees and occupiers on the farm, only four; Mashau Rashavha, Ester Mudzusi, Ernest Mahungela and Peter Magodi were parties to the dispute (interview with Peter Magodi 1999). The eviction proceedings affected only four of the dismissed workers: Peter Magodi, Ernest Mahungela, Ester Mudzusi and Mashau Rashavha.

The third party is the South African Agricultural Plantation and Allied Workers Union (SAAPAWU) is a trade union in South Africa. It is affiliated with the Congress of South African Trade Unions and had its office in Braamfontein. According to the dismissed workers, SAAPAWU was on its recruitment campaign when it had its first meeting with

the farm manager and 33 workers indicating how both the employer and the workers would benefit from its activities.

The fourth party is the Nkuzi Development Association (Nkuzi), a land support NGO that has its head office in Polokwane and a sub-office in Elim. Nkuzi's involvement came late after the employer and the former employees have taken each other at the CCMA conciliation where the dispute remained unresolved.

#### **6.3.2.1. Peter Magodi**

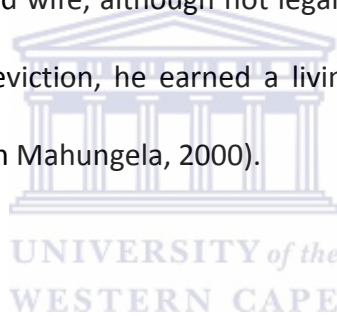
Peter Magodi was born at Sandfontein farm in 1960. His family and other families resided on the farm as a community of Maphaha. He started working at Sandfontein farm on a part time basis when he was still attending school. After leaving schooling, he worked fulltime on the same farm for 8 years under Mr Lombard, the registered owner of the farm. When the farms management was taken over by Mr Rensburg – the employer and the applicant in the eviction court application – he continued working on the farm. He left for Johannesburg for 5 years then came back to work and reside on the farm in 1992, he worked until he was 'retrenched' in October 1998 (interview with Magodi 2000).

Magodi resided in a two roomed house that he shared with his mother, sister and grandmother. His wife and children were staying in the nearby village at his mother in law's place because the person in charge of the farm did not want children on the farm.

Magodi was a member of Maphaha community which had lodged a Restitution claim on the same farm under dispute with the Regional Land Claims Commission of the Northern Province and Mpumalanga. At the time of the dispute, he worked part-time jobs in Levubu farming area (interview with Magodi 2000).

#### **6.3.2.2. Ernest Mahungela**

Ernest Mahungela came to Sandfontein farm during 1993 when he was employed by Mr Van Rensburg. While working there, he resided in a three roomed house where he stayed with Ester Mudzusi as husband and wife, although not legally married. He did not have a child with Ester. At the time of eviction, he earned a living through part-time jobs on neighbouring farms (interview with Mahungela, 2000).



#### **6.3.2.3. Ester Mudzusi**

Ester Mudzusi came to Sandfontein farm during 1992, when she was employed by Mr Van Rensburg. She had a two room house that she built at her mother's residential stand in the nearby village at Maelulo. Her children from the previous marriage stayed there with her mother. According to her, the house was convenient for the children to attend school at the village because there was no school on the farm. Like Mahungela and Magodi, at the time of the dispute, she earned a living through part-time jobs on the neighbouring farms (interview with Mudzusi 2000).



#### **6.3.2.4. Mashau Rashavha**

Mashau Rashavha had been residing on the farm since 1981. At the time of eviction, she was fifty-nine years old. According to her identity document she was born on the 11th of February 1941. Therefore on the 11<sup>th</sup> of February 2001, three weeks from then, she would be sixty years of age, entitling her the status of becoming a long term occupier in terms of section 8(4) of the ESTA. She was residing on the Sandfontein farm and occupied a room in a three roomed house that she shared with another family. Her daughter was married and stayed with her husband at Maelula (interview with Rashavha 2000).



#### **6.3.3. Background of the dispute**

In April 1998, an official from the South African Agricultural, Plantation and Allied Workers Union (SAAPAWU) visited Sandfontein farm with the intention to recruit workers to join as members of the union. The meeting was attended by both the farm manager and thirty three employees of Sandfontein Boerdery (S Shirinda field notes (1998).

After SAAPAWU's presentation, seven workers – Christinah Pandeli, Elisa Mulaudzi, Margaret Simali, Mashau Rashavha, Ester Mudzusi, Ernest Mahungela, and Peter Magodi – showed interest in joining the union. They did so by putting down their names in a book that SAAPAWU provided them (interview with Magodi 1998).

SAPAAWU's recruitment marked a major turning point of day to day running of the farm. Following the meeting, the manager called each of the seven into his office and told them that from that day onwards, they were to work according to 'Congress of South African Trade Union (COSATU) rules'. As they got into the manager's office, the manager enquired from each one of them as to how much they wanted him to increase their salaries by (S Shirinda field notes 1998).

Workers mentioned various amounts ranging from R1.00 to R5.00 increase [per day]. The employer was not happy of employers' requests and told them that he would rather reduce the hours that they worked per day. Peter Magodi described the employer's actions following the involvement of SAAPAWU as follows:

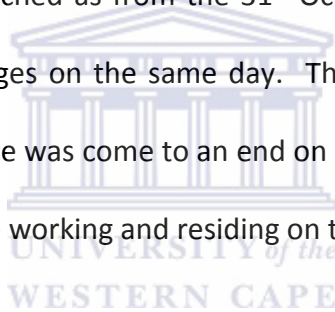
*Workers whose duties were to cutting trees were ordered to stop using machines to cut tree stubs, they were use the axes to cut, instead of carrying the tree stubs when they were dry, he ordered them to carry them while they were still wet. He also increased the fruit crates they were to pack, from 25 to 40 per day per person. As result, the work load that was done by six workers per day before the coming of the union, was then supposed to be done by two workers per day (interview with Magodi 1998).*

On enquiry of the reasons he was treating in a different manner, his response was as follows:

*The union could not help us as when we phone them they told us that we were not union members yet because we have not paid up membership dues (interview with Ester Mudzusi January 1999).*

#### **6.3.3.1. Dismissal of workers**

On the 31<sup>st</sup> of August 1998 the eight workers were then served with notices informing them that they were to be retrenched as from the 31<sup>st</sup> October 1998 and they were to receive their retrenchment packages on the same day. The eight employees were also notified that their right of residence was come to an end on the day of retrenchment. This implied that they were to continue working and residing on the farm for two months.

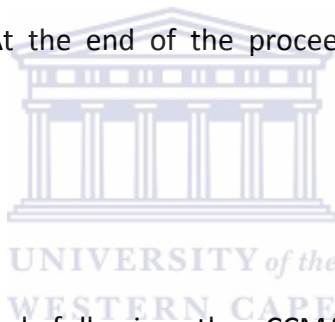


On the 31<sup>st</sup> of October, they were called to the office and given retrenchment packages and told to stop working; their employer then hired 20 Zimbabwean immigrants to fill their positions.

The seven workers then reported the manager's actions to the Nzhelele/Tshipise Transitional Local Council (TLC). On the 16<sup>th</sup> of December 1998 the TLC and COSATU representatives held a meeting with the seven workers to discuss the matter. During the meeting the TLC told the workers that the action of the employer was an unfair labour

practice and COSATU was supposed to assist them challenging the manager's actions. COSATU told them that they could not assist them at that stage because they were not affiliated with them. However, they were advised to report the matter to the local labour office in Louis Trichardt. The labour office assisted them in completing the CCMA referral forms challenging their dismissal (interview with Magodi December 1998).

The matter was set down for a conciliation hearing that took place on the 12<sup>th</sup> of January 1999. The dismissed workers and the manager met at the conciliation hearing. Both did not have legal representatives. At the end of the proceedings, the dispute remained unresolved.



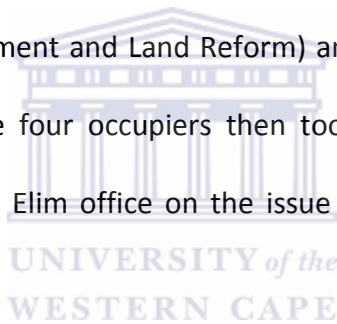
The matter remained unresolved following the CCMA conciliation process. The commissioner then issued a certificate to the effect that the matter remained unresolved implying that either party should have referred the dispute to the CCMA or the Labour Court for arbitration (S Shirinda field notes 1998).

### **6.3.3.2. Magistrates' Eviction Court Order**

None of the parties referred the dispute to the CCMA for arbitration or to the Labour Court, until the 15<sup>th</sup> of March 2000 when the employer hand-delivered notices of his intention to apply for an eviction order to the four dismissed workers in terms of section 9(2)(d)(i) of the ESTA. The notice meant that the person in charge (manager) planned to

go to court in two months' time or sometime thereafter to ask for an eviction order to be issued against the occupiers.

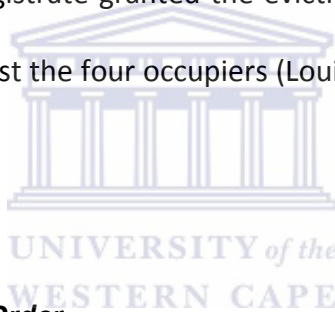
In May 2000 the person in charge, through his attorneys, Coxwell, Naude and Setyn, filed a Notice of Motion or application, enrolling the eviction matter at Louis Trichardt magistrates' court. The application was for the eviction of the four dismissed occupiers from Portion 1 of the farm, Sandfontein 232 MT, Northern Province. The application was served to the provincial office of the Department of Land Affairs (now provincial office of the Department of Rural Development and Land Reform) and the former Louis Trichardt municipality (now Makhado). The four occupiers then took the application served on them to Nkuzi's Legal Unit at the Elim office on the issue (Louis Trichardt Magistrate's court case 1045/2000).



Nkuzi Legal Unit consulted with the four dismissed workers and realized that the dismissed workers should have long referred the dismissal dispute to the CCMA or the Labour Court for arbitration within 90 days from the day the matter was unresolved at the Conciliation process. So when Nkuzi was eventually involved in the matter the deadline had been missed by more than twelve months. The only remedy left for the dismissed employees was to still refer the dismissal matter to CCMA for arbitration or to Labour Court but before that is done, filed an application for condonation of their late filing of the dismissal dispute(S Shirinda field notes 2000).

However, Nkuzi filed the opposing documents, on behalf of the occupiers, at the Louis Trichardt magistrates' court. Throughout the court proceedings the employer was legally represented by Coxwell, Naude and Steyn attorneys. Nkuzi also filed an application for condonation on behalf of the dismissed workers for arbitration process. The application did not succeed as it was too late (S Shirinda field notes 2000).

The application was heard by Mr I J Schepeers of the Louis Trichardt magistrates' court on the 19<sup>th</sup> of January 2011. The magistrate granted the eviction order as requested by the person in charge of the farm against the four occupiers (Louis Trichardt magistrate's court case 1045/2000).

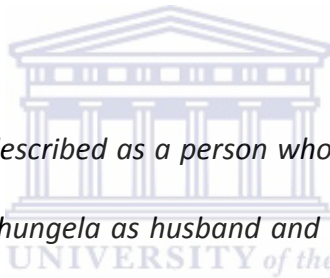


### **6.3.3.3. Land Claims Court Order**

The magistrates' eviction order was referred to the Land Claims Court (LCC) for an automatic review in terms of section 19(3) of the ESTA. On request of the LCC, Mrs H C Lombard, Chief Probation officer, filed a research report in respect of each of the appellants, as required in terms of section 9(3) of the Act. On the strength of the probation officer's report (LCC 29R/01) the LCC confirmed the magistrates' court eviction order.

The report described the following in respect of each of the four occupiers:

*...that Peter Magodi was living a single room in a compound provided by the person in charge of the farm. His mother, younger sister and his grandmother were still staying with him on the farm. The farm had no school and since Peter's wife was working at a pre-school in Maelula, it was convenient for her to stay at her maiden home with the children where the children attended school. The house that they stayed in belonged to his mother in law and he used to visit them during weekends.*

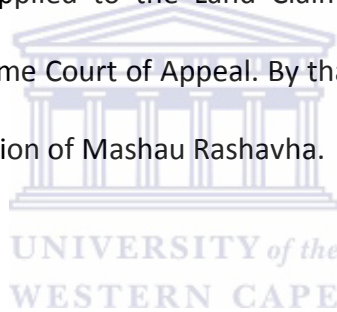


*...that Ester Mudzusi was described as a person who resided in a single room that she shared with Ernest Mahungela as husband and wife. Ernest was permanently employed at the nearby farm where there was accommodation in a compound. His partner was not allowed to join him there. Ester had children from her previous marriage who stayed with her mother at Maelula where she visited them during weekends.*

*...that Mashau Rashavha resided on the farm in a single room that she was provided for by the person in charge. Her son was residing at Maelula together with a wife and three other children. She also had a sister who resided at Maelula and Rashavha used to visit them during weekends.*

In an automatic review, held on the 19<sup>th</sup> of January 2001 the he order against Mashau Rashavha was set aside and referred back to the magistrates' court to consider whether or not section 8(4) of the ESTA was applicable to her situation and to consider the weight of factors contained in the probation officer's report. The magistrate reconsidered the factors and made a fresh order against Rashavha (LCC 29R/01).

On the 22<sup>nd</sup> of March 2001 Nkuzi, on behalf of the three occupiers; Peter Magodi, Ernest Mahungela and Ester Mudzusi applied to the Land Claims Court for leave to appeal against their eviction to the Supreme Court of Appeal. By that time the magistrates' court had not yet reconsidered the position of Mashau Rashavha.



Through their legal representatives, the parties agreed to wait on the issue of the appeal until the outcome of the automatic review of Rashavha's order was dealt with at the magistrate's court to its finality (S Shirinda field notes 2001).

Louis Trichardt magistrate's court reconsidered Mashau Rashavha's eviction order against her and the Land Claims Court confirmed the fresh order on automatic review on the 25<sup>th</sup> of April 2001; she was then given leave to join the appeal of the other three (LCC 29R/01).



On the 6<sup>th</sup> of August 2001 the four dismissed and evicted occupiers noted an appeal to the full bench of the Land Claims' court against the order of eviction granted by the Louis Trichardt magistrate on the 19<sup>th</sup> of January 2001, which was confirmed, on review as per LCC 29R/01.

In the answering affidavit to the appeal papers filed on behalf of the four occupiers, the person in charge of the farm responded as follows:

*I run a business known as Sandfontein Farming on the farm. I lease the farm from the owner, one Hans Jurgens Lombard. I terminated their rights of residence when I retrenched them in October 1998 because I was downsizing the workforce. I obtained an order of ejectment from the magistrate's court on the grounds that the applicants' right of residence arose solely from their employment. The magistrate's order was confirmed" (LCC 29R/01).*

The Land Claims Court noted that the Probation officers' report, as considered by the magistrates' court, when granting the eviction order was not responded to by both parties (LCC 29R/01).

According to the Probation officer's report, Magodi said that he was born on the farm and he went to Johannesburg to work while residing on the farm. During 1992 he came back from Johannesburg and was employed by the person in charge until October 1998 when

he was retrenched together with the other three. It also stated that before he was evicted, he was residing in a compound during the week and on weekends he visited his wife and children who resided with his mother in-law at Maelula village.

Magodi responded to the probation officer's report by indicated that in terms of Venda tradition and custom that he believes in and practice, it is taboo for him as a man to stay in a home belonging to his in-laws. He said that his in-laws' home was not an alternative accommodation and was contrary his custom and tradition. Such action has an element of belittling his status within the Venda community.

In respect of Ernest Mahungela, the Probation officer reported that Mahungela was permanently employed on the neighbouring farm and that there was accommodation in the compound. Mahungela's response was that at the compound he was not allowed to stay with his family.

In respect of Ester Mudzusi, the Probation officer reported that her three children from the previous marriage resided at Maelula with her mother; hence she can also reside there. Her response was that she preferred to stay with Mahungela and because Mahungela could not stay with her there because her mother resided there which is a taboo for both of them to stay together in one household.

In respect of Mashau Rashavha, the Probation officer was reported to that her married son resided at Maelula. The report also indicated that her other three children, also resided with her son and her sister resided next to her son's home. When she visited Maelula, she was residing at her sister's home. She had only one child who resided with her son while attending school at the village.

The appeal against the eviction of the four occupiers did not succeed. In respect of Peter Magodi, the LCC held that the fact that he was born on the farm and that during his lifetime he regarded the farm as his home, did not make him an occupier as defined under the ESTA and that his relationship with his mother and sister would not make him an occupier. It also held that he acquired his right of residence when he was re-employed on the farm. It was held that there was no longer any mechanism under the Labour Relations Act available to Magodi to have his dismissal set aside and that section 8(2) was applicable to his situation. It was concluded that the right of residence was properly cancelled. It was held that Magodi was using his mother-in-law's property for a long time to accommodate his wife and children and therefore his argument that it is taboo to rely on his in-laws for accommodation did not carry much weight. It was held that the respondent needed the room that he was occupying to house his seasonal contract workers (LCC 29R/01).

In respect of Ernest Mahungela and Ester Mudzusi the court accepted that the alternative accommodation available to them did not comply with the definition of suitable Alternative accommodation as defined in section 1 (1) of the ESTA and the eviction order

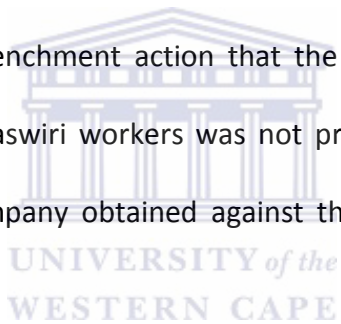
was then confirmed in terms of section 10(3) of the Act. It was held that they had not made an effort to secure accommodation for almost three years and there was no indication that they paid rent for the use of the room after their rights of residence were terminated. It was held that there was accommodation for Ernest at his work place and Ester had accommodation where her children were residing with her mother. It was held that the person in charge needed the room that they were residing in to accommodate his seasonal contract workers and therefore an eviction order against them was fair and justified (LCC 29R/01).

In respect of Mashau Rashavha, the court held that Rashavha was dismissed pursuant to a general retrenchment programme and that the dismissal was not successfully challenged under the applicable Labour laws. The court stated that there were not sufficient grounds for concluding that one of the grounds for the intended eviction was to prevent Rashavha from acquiring long term status in terms of section 8(4) of the ESTA. The Eviction of Rashavha was considered in terms of section 10(3) and it was found that the requirements of this section had been met. The Land Claims Court confirmed the order made by the magistrate against her that most of Rashavha's family including her three own children, four grandchildren and her sister lived in Maelula and it was more befitting for them to accept responsibility to accommodate her (LCC 29R/01).

#### **6.4. Eviction Case Study Analysis**

The two case studies have identified challenges for resolving farm eviction disputes in two broad ways; either approaching the court to claim one's entitlement in terms of ESTA or through back-and-forth communication to reach an agreement with the opposing party. This section therefore discusses the critical issues that have emerged from these case studies using ten factors identified as influencing the choice of process parties engaged in when attempting to resolve evictions.

Maswiri case also involves striking action which the farm management considered illegal. Sandfontein case deals with retrenchment action that the workers alleged that it was unfair dismissal. The strike by Maswiri workers was not procedurally legal. Likewise, the High Court interdict that the company obtained against the workers was not properly served to the workers.



Initially, parties in Maswiri case engaged in court battles – in terms of the High Court interdict and numerous court appearances before magistrates on criminal charges against some dismissed workers.

In Sandfontein case when the eviction matter was in court, legal representatives of the parties exchanged pleadings and arguments on behalf of their clients. Initially, when the labour dispute was before the CCMA, occupiers had no legal representation and as a result they did not manage to challenge the employer's action that they regarded as

unlawful. The failure thereof had a negative consequence to their eviction matter in both magistrate and Land Claims Court. The company, on the other hand, had the services of legal representatives who interpreted the law to its advantage. This shows that despite the presence of ESTA, for employees and/or farm dwellers to actually benefit from its provisions, an improved due process that can ensure that occupiers and workers get the necessary support to defend themselves.

The outcome of the court process in Sandfontein case was unfortunate to the occupiers taking into consideration that they had done nothing wrong and they have resided on the farm for many years. Their retrenchment was questionable as following their dismissal; the employer replaced them with temporary workers that he even told the court that the accommodation that the occupiers were using was needed to house the temporary workers, considering that he called the dismissal retrenchment.

Sandfontein is typical example of a situation of a party, the landowner party, which had additional power of the provisions of the Act to its advantage. In addition, the landowner's ability to easily access the services of lawyers who interpreted the law in the manner that legally justified his action, was an added advantage that he had over the occupiers who only received legal representatives when other process were long overdue.

Despite the presence of union on behalf of the Maswiri dismissed workers, the company's lawyers took advantage over union officials who had no lawyers to assist them towards drafting of a one sided settlement agreement in favour of the employer company.

#### **6.4.1. Unequal power relations**

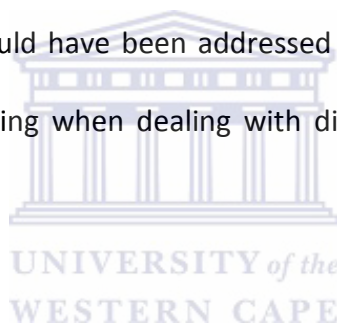
In both the Maswiri and Sandfontein case studies, the landowners and occupiers were in an unequal power relation, partly due to the historic paternalistic relationship inherited from the colonial and apartheid governments' practices. Partly because of the paternalistic belief system - that still influences relations between farm parties - for negotiation to fully take place, it requires the assistance of third parties to bridge the gap.



When ESTA was enacted, parties on farms were – and are still – unequal. Landowners' relations with occupiers have characteristics of both paternalism and indentured system (Boeyens 1994). The Sandfontein evictions bear resemblance to the evictions of the labour tenancy era where landowners were able to evict the whole family if one member of such a family refuse to supply labour (Ross 1999). In addition, the manner in which the Sandfontein evictions happened, confirms Van der Walt's view that the South African system on land laws privileges the institution of ownership, making it easy for the landowner to effect evictions (Van der Walt 2005a:413). Both evictions in this chapter demonstrate the continuation of power of eviction that landowners had under Common Law. The manner in which the courts disregarded occupiers' circumstances heavily only

because of their failure to challenge the employer's action when granting the eviction order, confirms Roux's assertion to the effect eviction is still a strong remedy provided to property owners (Roux 2004b:525).

Landowners have more resources to fight unwanted poor farm workers and occupiers. The latter come from poor backgrounds, and during apartheid, their human rights were violated without them being able to challenge farm employers and landowners in court. In that respect, power relations should have been addressed first to enable the parties to engage each other on equal footing when dealing with disputes between them in the context of the ESTA.

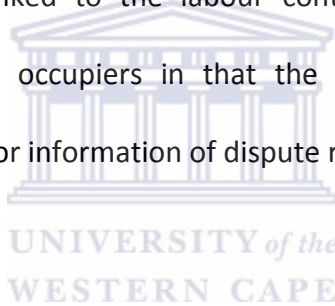


The legislators – when enacting the ESTA – seemed to have assumed that parties to farm tenure are equal. The ESTA provides for parties' interaction towards improving relations on farms. This implies that there should be legal aid for the poor workers and occupiers and that they should, without interference of employers, join unions and have access to the services of NGOs with relative ease. The government should 'level the playing field' for this to happen. In the Maswiri case, when the company came with the high court interdict that order was not given to the workers and the Sherriff did not even address the affected group about it. This shows a total disregard of the human rights of workers and occupiers on farms.



The Sheriff in the Maswiri case executed the court interdict in favour of the company by throwing it on the ground instead of giving it to the people mentioned in the interdict as respondents. This shows that the Sheriff did not believe that the workers and occupiers had a right to defend themselves in court processes.

The events in both cases exhibit elements of the common law regulation of power that enabled them to either evict families living on their land or to force more onerous conditions upon them with little or no challenge. In both cases the occupiers' rights of residence on the farms were linked to the labour contract. Such a link had been problematic for the Sandfontein occupiers in that the retrenchment was not fully challenged due to the workers' poor information of dispute resolution processes.



#### ***6.4.2. Parties' perceptions over strategies and choices***

Workers and occupiers are still afraid to question the employers and landowners. The latter are dominant in all matters affecting workers and occupiers; employers and landowners still believe they are superior.

Land rights in farming areas still reflect the colonial and apartheid patterns of land ownership where the owner of the property had absolute right to do as he/she pleased with everything on their property, workers and occupiers included. Landowners expect everyone on their land to comply with any condition that they put down without

question. This perception is evident in the conduct of the Maswiri management and the person in charge at Sandfontein.

When new laws are enacted by the government aiming to, amongst others, improve the lives of people previously disadvantaged by laws and practices of the past government, landowners, instead of raising their views to the lawmakers, institute court proceedings punishing employees and occupiers who attempt to exercise their new constitutional rights. Landowners and employers believe that courts are a solution for whatever problem they face in their relations with their workers and occupiers. Workers and occupiers viewed the courts as institutions that protect people who are able to pay for lawyers.



#### **6.4.3. Role of the Union**

Although the post 1994 government has promulgated laws such as LRA and ESTA, legislations that provides for the right of farm workers to join union of their choice, Maswiri and Sandfontein cases illustrate widespread negative reactions to farm workers' unionization. Disputes in both cases were triggered by the appearance of unions into the farm workplaces.

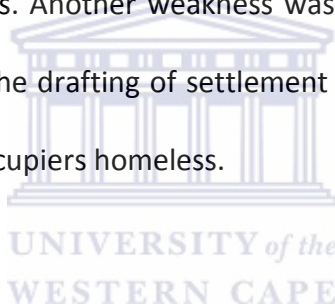
Maswiri case started immediately at the early stage of TUSAA's operation within the company's workplace and Sandfontein case started following SAPAAWU's first meeting

with both the employees and the manager. The manner in which the employers in both cases reacted against unions, clearly corroborates the findings of SAHRC enquiry to the effect that farm employers are hostile and frustrating trade union organizers (SAHRC 2003:29).

The manner, in which TUSAA officials singed the settlement negotiations in Maswiri case without legal representatives to assist them, is an example of difficulties that unions, if they want to make difference into the lives of farm labourers in new South Africa, have to improve as one of their strategies. TUSAA's advice to Maswiri workers to embark on strike action without following procedures for strike as laid down in the LRA was a serious mistake that weakened the case of the workers to an extent of them losing their employment and leading threat to occupiers' land rights. However, TUSAA's presence in Maswiri created, to a limited extent, a platform for farm parties to communicate their differences differently from the way it used to happen in the past.

In Sandfontein case workers were dismissed following SAPAAWU's recruitment process. SAPAAWU was weak to handle the tactics of uncooperative farmer. As the union was nowhere to be found when they were dismissed, Occupiers had no one to help them to respond to the employer's tricks. Worse off, workers only communicated with the company through legal notices. Under the circumstances, Sandfontein case lacked what Fisher, Ury and Uyangoda say are essential grounds to bring parties to dispute to a negotiation table (Fisher and Ury 1991; Uyangoda 2000:02).

To the contrary, Maswiri workers and occupiers had the assistance of TUSAA during the strike and also when the settlement agreement was drafted. The union's presence helped in shaping the employer or landowner's strategy of shifting between processes. However, TUSAA had its weakness; it was unable to hire services of legal representatives even where necessary. In two occasions TUSAA gave wrong advises to the workers and occupiers; firstly an advice given to workers to embark on strike that was technically illegal, and secondly advising the occupiers to march on the streets of the residences without following correct channels. Another weakness was the manner in which TUSAA represented its members during the drafting of settlement agreement, they lack of legal representative nearly rendered occupiers homeless.



#### **6.4.4. Role of Nkuzi**

In line with Cotterrell's views, Nkuzi was an important party in both cases. Its involvement influenced the parties' choice of processes to deal with their dispute. Through its ability to hire legal representatives for the workers and occupiers has been a positive effort towards putting ESTA dispute mechanisms into practice and has benefited the Maswiri occupiers to the greater extent. Also its legal representatives challenged Sandfontein landowner's court application in various court levels.

By providing legal representatives to occupiers in both cases, Nkuzi provided service that is government's responsibility while the latter was invisible. By so doing, Nkuzi acted as an external agency that Roscoe Pound says it is important for the effectiveness of law towards society change (Pound 1917).

In Maswiri case Nkuzi's legal representatives successfully assisted occupiers to apply for court order to set aside the clause that sought to evict them and that influenced the landowner party to bargaining table. The manner in which Nkuzi lawyers conducted themselves confirms the assertion by Cavaagh and Sarat that lawsuits threat has potential to bring disputing parties to bargaining table (Cavaagh and Sarat 1980:405). Also Nkuzi effort demonstrates Mnookin and Kornhauser's view that law can be used as a lever in negotiations (Mnookin and Kornhauser 1978:952).

Nkuzi got involved in Sandfontein eviction too late. When occupiers were served with court application, the dismissed workers already missed the right to challenge their dismissal CCMA arbitration. However, Nkuzi attempted to apply for condonation unsuccessfully.

In the Maswiri case, Nkuzi worked separately from TUSAA. A better strategy would have been when Nkuzi had joint operation with TUSAA towards assisting workers and occupiers.

#### **6.4.5. Role of government agencies**

ESTA emphasises cooperation between government and others bodies towards improving tenure relations on farms. The legislature's intention of cooperation between organs of state demonstrates Cotterrell's argument that law can effectively produce change when other government bodies – through implementing and enforcing– supplement it (Cotterrell 1992). Along this view, Justice Yacoob in *Grootboom* judgment stated legislative measures by themselves are not enough to achieve the intended result, it requires support by appropriate, well-directed policies and programmes implemented by the executive (2001 (1) SA 46 (CC)).



In Sandfontein eviction case the municipality and the office of the provincial DLA (now the office of Rural Development and Land Reform) despite the eviction court application served on them. In Maswiri case the government's role was only seen through the district Social Welfare department's provision of food parcels to the dismissed workers' family and this alone was far from getting the real dispute resolved.

It was unfortunate that Sandfontein case happened before *Modderklip* and *Port Elizabeth Municipality* judgments wherein the courts declared that residents were entitled to occupation of the land until alternative land has been made available by the State or

provincial or local authority. Similar judgment was given in *Lebombo Cape Properties (Pty) Ltd v Awie Abdol and Others* judgment wherein the Land Claims Court held that state involvement in eviction cases is necessary to ensure that the Respondents are not rendered roofless. In the same judgment the court ordered that landowner, occupiers and local authority engage with each other meaningfully on the provision of emergency housing for the occupiers (*LCC 129/2010 unreported*).

To a limited extent, the Probation officer in Sandfontein case produced a report when ordered to so by the Land Claims Court. Unfortunately, the report was only useful to the landowner as it suggested against what the occupiers regarded as taboo practices in terms of their tradition and culture and that was also disregarded by the Land Claims Court. Although ESTA provides for cooperation between government bodies and other stakeholders, It does not provides space for various actors to discuss possibilities towards reaching compromise, instead, it is clear on directing parties to approach court to resolve tenure dispute. Also, its calling for cooperation lacks incentives to encourage external parties to lend their aid.

Nzhelele/Tshipise Transitional Local Council had an opportunity to help the parties to discuss and try to find an amicable solution, but instead of them calling a meeting between the parties, they only held a meeting with the dismissed workers and advised

them to report the matter to the local labour office. As the first institution to know of the complaint, it was well positioned to initiate negotiations.

Absence of a reaction by the municipality and the provincial office of the DLA following their receipt of the eviction order court application confirm the criticisms by land activists and academic institutions supporting land reform that the state institutions suffer from ineffectiveness of the staff in delivering land reform. (Morris 2007; Walker 1998; Didiza 2006; Ntsebeza 2007). While some argue that state institutions primarily suffer a lack of resources, this too is attributed to general incompetence. In the past, when the state has had a lack of resources, it used to be seen to at least provides other mechanisms to assist poor farmers to continue producing through laws that allow them to hire cheap labour to supplement lack of mechanical resources. The period that this study covers has seen state institutions simply remaining mute even in situation that was clearly their area of expertise. If the institutions were expressly reporting their lack of resources and/or use the little resources at their disposal towards resolving the dispute that the parties face, it would indicate a general competence that is being impeded by such scarcity. As it is, there is little evidence that if the institutions had the resources, they would be able to perform their jobs better.

In Maswiri the provincial DLA failed to implement section 4 of the ESTA despite the application that Nkuzi forwarded on behalf of the occupiers when threatened with eviction. The MEC for Agriculture only responded to the media publication of the plight of the workers and occupiers by visiting the farm and talked to the landowners. The



investigation that was conducted by the MEC was a good platform for recommendation of on site or outside farm development in terms of section 4 of the ESTA.

Police were important actors in the Maswiri case. The case shows that police follow instructions of farmers when providing services to the people on farms. The employer and/or landowner party used the police to suppress the activities of the union and also to avoid on-going negotiations with the union. Police involvement in the case was not conducive to the parties' reaching amicable solutions to their disputes, instead, it help the landowner party to constructively make life difficult for the workers who were struggling to make means as they were already out of work for many months. Police were not investigating complaints of occupiers the way they did for landowners' complaints. This resulted in occupiers losing faith in the services they rendered on farms viewing them as only servicing the landowners at their expense.

In both cases the Department of labour was also notified of the unfair labour practice and the labour office was supposed to have visited the parties and attempted to get them to talk to each other towards finding a solution. Due to a lack of government involvement, farm employers and landowners even replaced their dismissed workers with Zimbabwean migrant workers illegally. None implementation of the law by government helps employers and landowners to maintain the old paternalistic style of living, where families were forced to supply labour in exchange of permission to use land or face eviction.

The case studies show farm dwellers and workers in a working environment that differs from the old paternalistic way, only by the provision of wage. Also the little wage that people on farms receive, indicate an element of inferiority between employers or landowners and the farm dwellers or employees to an extent that some employees are even victimised for requesting a little increase of the wages. The manner in which some employers react when employees request wage increase shows that employers still maintain the reactionary mind-set where the only solution was to immediately get rid of the employees rather than negotiate a solution to a dispute they face. This demonstrates that some employers are still treating their employees as labour tenants where the only solution to deal with dispute was eviction.

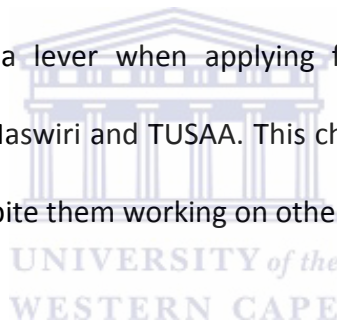


#### **6.4.6. Access to legal services**

The Maswiri Company applied for the High Court interdict on the advice of their lawyers. Similarly the employer in the Sandfontein case had access to lawyers who enabled him to follow all the legal steps to get rid of the unwanted workers and occupiers from the stage when he decided to dismiss them. In Sandfontein the dismissed workers attended the CCMA conciliation process without assistance from people with expertise in labour issues. This resulted in the dismissed workers not following the necessary processes; the CCMA awarded that dispute remained unresolved.

In the Maswiri case when the dismissed workers had no legal union representatives, the legal representatives of the company took this advantage to draft a one sided settlement agreement that favoured the company. According to Fisher *et al* (1983:11) the agreement's failure to improve the parties' relationship shows that the drafters of disregarded the interests of the occupiers and handed the settlement to the Labour Court to be made an order of court incorrectly.

The Nkuzi lawyers challenged the settlement between the company and TUSAA, in what Mnookin and Kornhauser ((1979) termed negotiating in the 'shadow of law'. Nkuzi had, in the process, used the ESTA as a lever when applying for the setting aside of the settlement agreement between Maswiri and TUSAA. This challenge had enabled them to continue residing on the farm despite them working on other farms.

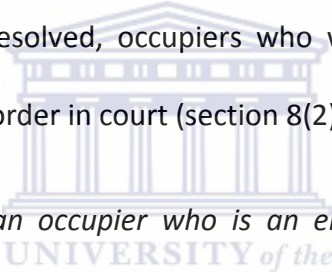


Access to legal services for both landowners/employers and employees/occupiers is conducive to improving communication between the parties that have had little history of interaction – except when giving or taking work related instructions. In the Maswiri case access to lawyers created an opportunity for the parties to make informed decisions on the processes that they had taken in resolving both labour and land matters. The way occupiers were protected, when the company made an undertaking to not evict any occupier without a court order, had given the affected occupiers a substantial amount of time to consider whether to continue residing on the farm or vacate, but not immediately as the company wanted it.

In the Sandfontein case only the employer or landowner had the opportunity to employ the services of legal representation; this negatively affected the parties who remained in their rigid positions in the CCMA conciliation process and did not act after the dispute remained unresolved. Nkuzi's Legal Units' assistance came very late and the relationship between the parties was already irretrievably broken.

#### **6.4.7. Characteristics of the Court and Out of court processes**

The court route in the context of the ESTA entails that if the occupiers are also employees, and their labour dispute is not resolved, occupiers who were also employees cannot defend an application for eviction order in court (section 8(2)). This section provides that:



*the right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act.*

The Sandfontein case is an example of a section 8(2) eviction case. In this case the employer only had to show the court a link between the employment and the right of residence and that the employment was terminated in terms of the provisions of the Labour Relations Act. This implied that the employer or landowner had to indicate to the court that the employment relationship had been terminated fairly.

In the Sandfontein eviction it was easy for the employer to show the link between labour and tenure situation of the occupiers. The way in which the labour matter was dealt with was not favourable to the occupiers. In his founding affidavit in the magistrate's court and in his answering affidavit in the Land Claims Court, the employer alleged that he retrenched his workers and he needed the houses they occupied for his temporary employees and that the retrenchment was in accordance with the provisions of the Labour Relations Act. The occupiers held a different view; in their affidavits, they indicated that their dismissal was due to their involvement with a union and that the matter was not fully dealt with through the CCMA process following the failed CCMA conciliation. The dismissed workers' failure to challenge the employer's action fully in terms of the Labour Relations Act, had removed their defence against the employer's actions. Under the circumstances, the court route entails application and interpretation of the law based on the available facts. This had caused the Sandfontein occupiers to lose their homes without the employer having fully proved that the dismissal of the workers was fairly done. This shows the weakness of the ESTA.

In the Maswiri case, the magistrates' court that dealt with trespass and intimidation cases, discharged the accused – in terms of section 174 of the Criminal Procedure Act of 1977 – when the State was unable to prove its cases against the accused. The court processes that the Maswiri Company initially utilised when it laid criminal charges and the obtaining of a High Court interdict, led the parties to see each other as enemies.

The court process created a situation where parties ran to police and court even for minor misunderstandings; that did not promote a spirit of talking out issues between themselves. At that stage the union and company legal representatives advised their clients at a distance in a manner that encouraged them not to listen to each other for solutions. By the time Nkuzi's legal representatives and the company's legal representative settled the threat of eviction, relations between the company and the dismissed workers had broken down, resulting in the company not evicting them but left them to remain on the farm with no job.

The outcome for the court route that the Sandfontein employer utilised benefitted him at the expense of the poor workers and occupiers who had to start a new life in an unfamiliar environment. The good times that the employer and the occupiers previously enjoyed had become nil because of the way their dispute was dealt with.

Negotiation processes allow the parties in a dispute an opportunity to communicate their differences and to seek an amicable solution between them. Negotiation is a basic means of getting what one party wants from the other. It is according to Fisher *at al* a back-and-fourth communication between opposing parties (Fisher *at al* (1991)).

The ESTA does not provide for negotiation, rather it has provisions for mediation or arbitration. The two processes as formulated in the ESTA limits the parties' discretion to use it as an alternative to the court route. It requires the referral, appointment and approval of the Director-General of the DLA for that to happen. This has not been

attempted in the case studies despite the provincial DLA's awareness of the issues. This shows another weakness of the ESTA's formulation of out of court processes towards resolving tenure disputes on farms.

#### **6.4.8. Court route as envisaged in the ESTA**

Both cases illustrate the difficulties that parties to the dispute face when making use of the court route as the first remedy to the ESTA disputes. The process is expensive and each party has to pay for the services of lawyers; the workers and occupiers could not easily acquire such funding. The economic advantage that landowners have over occupiers in using their ability to pay for experienced legal representation was evident in both the Maswiri and Sandfontein cases. In the Maswiri case TUSAA officials had to negotiate out of court competing with lawyers of the company who drafted the terms to the benefit of the company and at the expense of the poor farm workers.

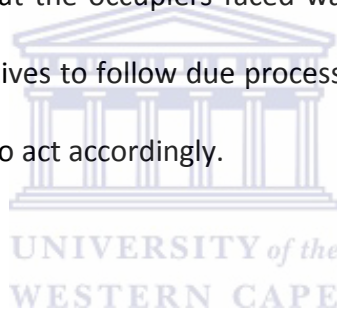
The other weakness of the court route as appears in the ESTA is that it mostly depends on civil procedures, which unlike criminal cases, requires a party to be represented by a lawyer – as the process relies largely on the exchange of pleadings and legal communications - before the case is heard by the magistrate or judge.

The other problem with the ESTA mediation is that the mediator may be appointed by parties themselves who incur the cost thereof. This option is not viable or likely in the South African farm eviction context given the farm workers and occupiers' poor economic position. There is no way they can pay for a mediator even if they foresee the process as

appropriate to their dispute. In both the Maswiri and Sandfontein cases, mediation at the States expense was necessary but the DLA did not try it when the cases were reported to it.

#### **6.4.9. Implications for law**

ESTA dispute resolution mechanisms appear to require parties to tenure dispute to resolve their problems through court process. Direct access to court for occupiers in terms of ESTA seems easy only when they are to report an illegal eviction to the police. In Sandfontein case, the problem that the occupiers faced was of civil nature that needed the assistance of legal representatives to follow due processes. As this rout requires legal expertise, occupiers were unable to act accordingly.



The experience of Sandfontein occupiers indicates inadequacy of ESTA dispute resolution mechanisms. It should have been to the advantage of the occupiers if ESTA made it compulsory for parties in tenure to first conciliate the dispute between them, thereafter get the assistance of a third party to help them to resolve the dispute before they approach the court. This suggestion supports Uyangoda's view that parties in an on-going relationship, when in dispute, need to first discuss ideas, information and options in order to reach a mutually acceptable agreement and only then approach the court as a last resort (Uyangoda 2000). This method of resolving disputes is lacking in the current version of the ESTA.



Tenure rights are regulated in relation to labour within the ESTA, has had the effect of making farm dwellers and/or workers more vulnerable, preventing protection and improvement of their tenure rights. This link has removed the only defence that the Sandfontein occupiers had in protecting their right of residence on the land. Nkuzi's Legal Units' attempt to condone their failure to refer the dispute to CCMA for the Arbitration process unfortunately came too late. Had Sandfontein workers' not have been abandoned by the union and also had they had an opportunity of competent and well resourced legal representation from the start, they would not have lost their case. The lack of competent legal representatives has caused them the benefit of the use of courts as a weapon towards fundamental change.



The jurisdiction given to the magistrates' court and the Land Claims Court by the ESTA, has been of great help to the Maswiri occupiers whose tenure rights were disregarded by the union and the company's legal representatives when settling the matter out of court as Nkuzi had the opportunity of using it as grounds for challenging the clause that sought to evict occupiers in a court lacking jurisdiction. This confirms Mnookin and Kornhauser's view (1979) that a party to a dispute can benefit in negotiating when the law is on its side.

The ESTA's call for an appointment of a Probation officer to provide a report on the circumstances of the occupiers before the eviction order is granted, is a good requirement as it ensures that occupiers' circumstances are considered before an eviction order is

granted. It was unfortunate that a Probation officer's report in the Sandfontein case was absent when the magistrates' court granted the order. It was eventually produced after an order from the Land Claims Court when reviewing the matter and was then written in a manner that assisted the landowner's application. The manner in which the Probation officer's report was considered – in the Sandfontein case by both the magistrates' court and the Land Claims Court when granting the eviction order - could be likened to default judgments issued under Common Law, where judgment would be made in the absence of those being evicted. The Probation officer's report was considered by both courts without the affected occupiers being given the chance to comment or respond thereto. This has led to the Land Claims Court disregarding the occupiers' tradition and custom by considering the homes of Magodi's in-laws and Rashavha's son-in-law, as alternative accommodations when granting the eviction order. Staying with the in-laws is taboo in accordance with the Venda tradition that Magodi and Rashavha belonged to.

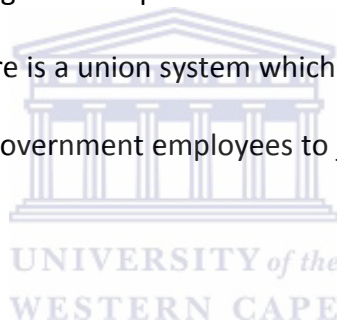
The probation officer in the Sandfontein case was a white Afrikaner with little or no knowledge of Venda culture and tradition. The way in which the report was used in this case suggests a need for the ESTA to talk about a combination of officers to examine what is happening. The knowledge of culture needs to be taken into account.

#### ***6.4.10. Implications of the study for protecting rights***

The South African farming community is unique as such regulations of tenure and labour rights alone cannot help the parties involved in farm tenure disputes to alter their

relations as the constitution calls for. There should be other projects designed to prepare them for a real change. One idea could be a project started at the school level targeting young people in the farming community, through a curriculum that is specifically designed to get black and white children to learn to live as brothers and sisters.

The other implication is that unions should treat workers, whether in urban or rural settings, equally. Major unions should have strategies to cover workers on farms and to guard against small unions exploiting farm workers as happened in Sandfontein. Small unions go in and out, concentrating on work places where they get easy money with little or no challenges to deal with. There is a union system which is well entrenched elsewhere in the country which even forces government employees to join; farm employees seem to be excluded from this system.



The mixing of labour and tenure in the ESTA is problematic. Labour relations affect tenure, and the fact that labour dispute resolution is not fully exhausted does not mean that an occupier's basic human rights should be neglected, as was the case in Sandfontein. There should be programs to inform land owners of the benefits that they can get from the Constitution and the new tenure laws. Unions should understand that farm employers and landowners need to adapt to the new Constitutional environment and shouldn't expect them to accept unions without some resistance. When the unions recruit farm workers they should have anticipated the sort of behaviour demonstrated by the

employer in the Sandfontein case and been prepared to handle the situation when it arose.

Every tenure dispute should be subject to negotiation, just as the post-1994 Constitution was negotiated. The constitutional process should be the model for dispute processes on farms. The ESTA should state that if there is tenure dispute, you must first show that all local remedies have been exhausted, before approaching court. ESTA's way of framing the issues shares some of the blame towards failing farm occupiers. Also regardless of whether unions and NGOs' negotiations fail or succeed, are well or poorly planned, ESTA does the employees a disservice by conflating the issues of labour and tenure.



## **6.5. Conclusion**

The South African Constitution and land laws force parties on farms to see themselves as partners in the farming sector. Both cases illustrate highly adversarial and authoritarian management behaviour of both landowners and employers. However, the presence of land reform support organization supplement the implementation of tenure legislation through influencing the settlement of disputes outside court process and that helps in achieve the objectives that the provisions of both the Constitution and tenure laws. Democratic laws alone cannot help the parties to change the perception that parties to farm tenure disputes have experienced for decades. The state and other non-governmental institution are required to assist parties towards the direction that the ESTA seeks to achieve. From the two eviction cases, it is clear that mediation and arbitration

measures provided by the ESTA are not automatically assisting the vulnerable workers and/or occupiers.

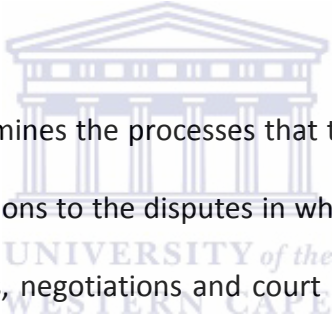
These eviction cases show the implications of the analysis on methods to protect the tenure security of farm workers and dwellers. The negotiation process – that is not even mentioned as part of ESTA dispute mechanisms – has, to a limited extent, provided protection to farm workers and dwellers threatened with eviction. The court process that ESTA provides has enabled landowners to evict occupiers for reasons that were not fully brought to the attention of the court for its consideration.



## CHAPTER 7: BURIAL CASE STUDIES AND ANALYSIS

### 7.1. Introduction

Chapter six presented two eviction cases and the analysis thereof. This chapter presents two burial cases contested between landowners and the families of the deceased as to whether the burials could take place on the farms or not. The first case involves a dispute over the burial of a long term occupier and ex-employee, who, following his retirement continued to reside on the farm; the second concerns a dispute over the burial of a member of a family with some members still residing on an adjacent portion of the farm.



As in Chapter six, this chapter examines the processes that the parties to a burial dispute have utilised towards finding solutions to the disputes in which they were embroiled. The processes include, amongst others, negotiations and court proceedings. These cases are important as they show what processes the parties chose, the reasons for such a choice and the implications on the outcomes of these choices, within the context of ESTA.

In concluding this chapter, I argue that ESTA dispute resolution mechanisms give limited choice to the parties in deciding on whether to settle their disputes through court or out of court processes.

## **7.2. *Elias Majoni Nkube burial***

This case involves the contest between the widow of the Late Elias Majoni Nkube and the landowner, Mr Gert Smit, over whether the deceased could be buried on the farm or not. This followed the death of the late Elias Majoni Nkube who died in Elim Hospital on the 23<sup>rd</sup> of March 1998. The dispute was between Mr Nkube's late widow – who wanted to bury her husband next to her house on the farm – and the landowner, Mr Gert Smit – who refused to give permission to bury the deceased on the farm.

### **7.2.1. *The dispute***

The dispute was about whether the deceased could be buried on the farm or not. According to Elim Hospital social worker, Mrs Jane Shilenge, Elias Majoni Nkube, died following a long illness in Elim Hospital during February 1998 (interview with social worker Mrs Jane Shilenge 21 June 1998).

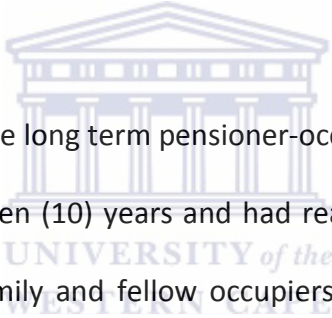
The deceased and the widow were residing on a portion of the farm Levubu 15 LT belonging to Mr Gert Smit – nicknamed 'Mdzhugu'<sup>2</sup> by farm workers in the Levubu farming area. The farm is situated about 40 kilometres east of Louis Trichardt town in the Vhembe district of the Limpopo province of South Africa (S Shirinda field notes, June 1998).

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<sup>2</sup> Mdzhugu is a Venda word for red

### **7.2.2. Parties to the dispute**

There were two parties: the first party was the widow, Elisa Moraba, a long term occupier in terms of section 8(4) of ESTA, a pensioner and ex-domestic worker on portion Levubu 15 LT; the second party was Mr Gert Smit, landowner and former employer of both the widow and the deceased, who took over management of the farm following his father's death in 1970.



The late Nkube and the widow were long term pensioner-occupiers who have resided and work on the farm for more than ten (10) years and had reached the age of 60, with no other relative except the Smit family and fellow occupiers and workers. There was no evidence that the couple had ever had a fight with the Smit family and also the latter do not know of any other place that the couple referred as their home except the farm (S Shirinda field notes 1998).

According to the widow, she was a former domestic worker who started working on the farm when the farm was still under the ownership of the late Mr Smit – the father of the landowner at the time of the dispute. The deceased worked as a foreman while the widow worked as a domestic worker (interview with Elisa Moraba, 1998).



As the two parties were not communicating about how they wanted the deceased to be buried, Nkuzi Development Association (Nkuzi), an NGO land reform support organization, interacted with the parties, on behalf of the widow, towards seeking an amicable solution (S Shirinda field notes 1998).

### **7.2.3. Background of the dispute**

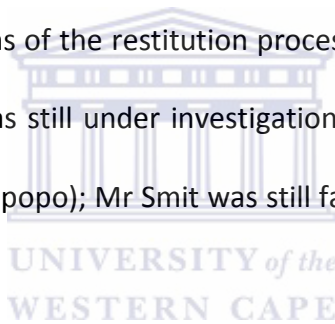
According to hospital records, the landowner, Mr Gert Smit, transported the late Mr Nkube, when he was seriously ill, to Elim Hospital for medical attention. The hospital file indicated Mr Gert Smit as the deceased's next of kin, implying he was the person to be notified in case of any emergency including death. Mr Smit did not act as was expected; he kept quiet until the hospital social workers reported the matter to Nkuzi (Interview with Jane Shilenge 1998). Mr. Smit's decision to list himself as the deceased's next of kin was dictated by the manner in which the hospital file was structured.

When the late Nkube was admitted in the hospital, particulars of the deceased as well as those of the next of kin were essential. According to the social worker the particulars are valuable in case a major surgery is required and for a seriously ill person, someone must sign on his or her behalf (interview with Mrs. Jane Shilenge 1998). It seems that at the time that the landowner and ex-employer of the late Nkube provided the details; he was honest and fulfils his responsibility as the ex-employer. The next of kin's details were

essential in case something happen to the ill person; the hospital should be able to communicate with someone who can take decision on behalf of the patient.

The Hospital social workers had heard from radio announcement of another farm burial case in Musina that Nkuzi had assisted successfully where the employer and landowner was evading to assist in the burial of his ex-employee. Social workers then referred Nkuzi case to Nkuzi's Elim office, hoping for a similar outcome (S Shirinda field notes 1998).

The portion of the farm, Levubu 15 LT, had been restored to the Shigalo Communal Property Association (CPA) in terms of the restitution process, in 2004. At the time of the dispute, the Shigalo land claim was still under investigation by the Regional Land Claims Commission of Limpopo (RLCC-Limpopo); Mr Smit was still farming on the land (S Shirinda field notes 1998).

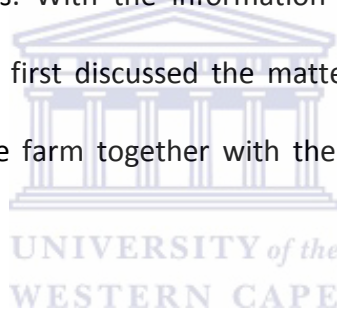


According to the widow, the late father of Mr Smit recruited her from Botswana during the 1930s and the deceased from Musina where he was working in the copper mines. Ever since their recruitment the widow and the deceased lived and worked in the same portion of the farm Levubu 15 LT. The widow and the deceased had no children or relatives in South Africa and they had lost touch with their homes of origin. The deceased retired in 1985 after he became blind and the widow retired in 1987. During their employment, the landowner built them a two roomed house in a farm compound where they resided with other farm workers. Following retirement, they continued residing on the farm. There was no cemetery on the farm and as a result thereof workers who died

were buried in the villages where their families resided in the former homelands of Gazankulu or Venda (S Shirinda field notes 1998).

#### **7.2.4. *Negotiations and media strategy***

The corpse was kept in Elim Hospital mortuary while the hospital personnel waited for about four months with no one claiming the corpse for purposes of burial. The Social workers then referred the case to Nkuzi. A researcher – representing Nkuzi as the field worker responsible for attending farm dweller issues – went to Elim Hospital to discuss the issue with the social workers. With the information from the social workers, he proceeded to the farm where he first discussed the matter with the widow and other farm workers who resided on the farm together with the widow and the deceased (S Shirinda 1998).



From interviews with the farm workers it emerged that the deceased and the widow were the oldest former employees of the landowner and long term occupiers on the farm. Both were pensioners and resided on the same farm for more than ten years. They had had no children and had no relatives known to the other farm workers (interview with Nkumeleni Mudau June 21 1998).

The widow told the fieldworker that she and the deceased had considered the farm as their home for many years. She said that they came to Levubu following their recruitment by the landowner's late father during the 1930s when the latter bought the farm. She also

said that since they came to Levubu, they had not lived elsewhere. About the death of her husband, she remarked as follows:

*Since I heard of the death I do not know what to do. I am waiting for anyone who can help me bury my husband next to our house (interview with Mrs Elisa Moraba June 21 1998).*

One of the farm workers echoed the widow's wishes:

*We would like the burial to take place on the farm but we do not know how we can talk to the landowner about this. He is not an easy person to approach on issues of this nature, he always refuses us day offs or permission to attend family funerals (personal interview with Nkumeleni Mudau June 1998).*

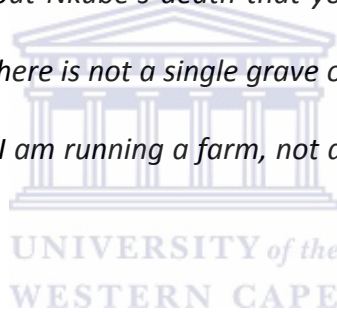
The farm workers gathered together a distance away from the fieldworker to discuss the issue between themselves. After about ten minutes, they went back to the field worker with a request that Nkuzi assist them in talking to the landowner as they felt that the deceased should be buried on the farm (S Shirinda field notes June 1998).

With the information gathered from the widow and the farm workers, the fieldworker proceeded to the farm house to talk to Mr Smit. The fieldworker found Mr Smit alone in the house. When Mr Smit saw the fieldworker he came out of the house to meet him. After a short greeting, Mr Smit wanted to know how he could help. The field worker introduced himself as an NGO worker who was approached by the Elim Hospital social

workers, requesting assistance in arranging a burial for the late Mr Nkube. He also told Mr Smit about the hospital records indicating him as the deceased's next of kin and that the hospital expected him to take charge of burial arrangements (S Shirinda field notes June 1998).

Mr Smit responded as follows:

*I know that Majoni, as he called himself, is late but I do not understand why you come to me about his burial. The government has a cemetery where we are all buried. What is special about Nkube's death that you bother yourself to come to talk to me about it? Since there is not a single grave on the farm, I cannot start one because of Nkube's death. I am running a farm, not a cemetery* (interview with Mr Gert Smit June 21 1998).



The fieldworker then informed the landowner about the communication that he had with the widow and other workers about the burial including their wish to have the deceased buried next to his house on the farm. The landowner responded that he was not going to be dictated to by the workers and that he was not going to use the farm as a cemetery because of Nkube's death. The alternative he suggested was for the farm workers and the widow to approach neighbouring chiefs and asked to bury the deceased in the village cemetery (S Shirinda field notes June 1998).

ESTA's silence on burial was a loophole as it did not seek to deal with burial at all. It seems that the legislature did not have the intention to deprive landowners of right in their property without compensation. The fieldworker went back to the widow and the workers and gave a report back. One of the workers commented and said that the employer is a person who never listens to workers' requests. He gave an example of constant refusal of permission for workers to attend family burials or for going to hospital when one is sick. He then suggested that it would be better if the researcher approach the municipality for the burial to take place in the municipal cemetery; the suggestion was supported by other workers (Nkumeleni Mudau 1998).

At the time of the deceased's death, ESTA was silent in respect of burials on farms. The only ESTA provision dealt with graves but not burials. Section 6(4) states that:

*Any person shall have the right to visit and maintain his or her graves on land which belongs to another person, subject to any reasonable conditions imposed by the owner or person in charge of such land in order to safeguard life or property or prevent the undue disruption of work on the land (RSA 1997).*

From the reading ESTA, it was clear to Nkuzi that there was no obligation for the landowner to provide a burial site for occupiers and/or workers on his farm. The landowner had to agree and if he disagreed nobody could force him to do otherwise. Nkuzi's case came to Nkuzi a year after ESTA came into force. At that time Nkuzi was a National Land Committee (NLC) affiliate; like other land NGOs in other provinces, it

monitored the implementation of ESTA in the Limpopo and Gauteng provinces. Nkube's case fit well into the NLC implementation monitoring programme; it illustrated how loopholes in ESTA negatively affected farm workers and dwellers towards achieving their constitutional rights (S Shirinda field notes 1998).

The fieldworker then explained to the workers the legal framework governing farm workers and occupiers' land rights on farms belonging to others. During the explanation, it was made clear to them that ESTA, had no provision entitling occupiers to conduct burials belonging to other people; as a result, the matter could not in any way be taken to court for a burial order against the landowner. Nkuzi also advised them of the pauper burial process but again indicated that it is the government's system used to bury deceased people who are unknown. He told them that the deceased's circumstances – especially in that he had a wife and that hospital records reflected the landowner as his next of kin - disqualified the deceased for a pauper burial (S Shirinda field notes 1998).

The Nkuzi fieldworker went on to advise the workers and the widow of a strategy of using the media to influence the landowner to change his mind. He told them of how Nkuzi had used the same strategy to successfully negotiate a burial with the Musina landowner (S Shirinda field notes 1998).

Nkuzi, with the mandate of the widow and the other occupiers, reported the story to the *Sowetan* newspaper, *Drum Magazine* and two local radio stations (*Munghana l'onene* and *Phalaphala FM*). Journalists from the above mentioned media interviewed the widow; the

Nkuzi fieldworker; the Elim Hospital social workers; the Provincial Department of Land Affairs officials; and the landowner about the issue (*interview with Mr Gert Smit June 21 1998*).

When interviewed by a *Sowetan* journalist, the landowner told him of the reason he did not want to grant permission. He said the following:

*I cannot give permission for the burial of Majoni on my farm because some people might, after the burial, come to claim the land because of the grave's existence (DRUM magazine June 25 1998).*

The above response led to Nkuzi realizing the landowner's basis for refusal to grant permission. The refusal was clearly motivated by fear and ignorance of the provision of the Restitution of Land Rights Act No. 22 of 1994. It was clear that the landowner had incorrect information as to how graves are used as evidence to support a restitution land claim. The *Drum* article prompted the Nkuzi fieldworker to contact the landowner proposing a further meeting to negotiate a solution to the dispute. During a telephone conversation, the landowner repeated his fear of a land claim. Nkuzi undertook to bring along a copy of the restitution of land rights and the Extension of Security of Tenure legislations to the meeting for him to read for himself what the laws provide (S Shirinda field notes 1998).



The meeting took place at the landowner's home on the 27<sup>th</sup> of June 1998. As promised during the meeting proposal, copies of the two Acts were handed over to him. The field worker also interpreted the provisions of the restitution of land rights Act, particularly the entitlement provision and ESTA provisions dealing with the rights of the landowner in respect of people who are entitled to visit and maintain family graves. The fieldworker also explained to the landowner his right to control visitors of graves through reasonable conditions (S Shirinda field notes 1998).

The fieldworker, in handing over copies of the Acts and explaining them, gave some assurance to the landowner that giving permission for a burial of a deceased person in 1998 would not in any way form part of evidence required to prove entitlement to a restitution claim as he thought; only graves of deceased people buried on the farm before 1994 are taken into consideration. The fieldworker indicated to the landowner that the circumstances of Nkube's grave, if he allowed the burial to take place on the farm, would not assist anyone as evidence for a restitution of land rights claim (S Shirinda field notes 1998).

#### **7.2.5. Process Outcome**

The information provided to the landowner resulted in him changing his attitude towards the issue. He stated that he could only allow the burial to take place if the widow made an undertaking that burying the deceased on the farm would not entitle her to claim the farm. The fieldworker went to discuss with the widow and other workers the new wishes

of the landowner. The fieldworker advised them to do as the landowner requested. The fieldworker through the assistance of the Legal Resources Centre lawyer, drafted the terms of a settlement agreement that reads as follows:

1. *that the landowner, Mr Gert Smit allows Mrs Elisa Moraba to bury her deceased husband, the late Mr Elias Majoni Nkube, on the portion of farm Levubu 15 LT, on condition that she will not, in future, utilise the said grave in support of a land claim in terms of the Restitution claim; and*
2. *Mrs Elisa Moraba, the widow, hereby undertakes not to utilise the grave of the late Elias Majoni Nkube in support a land restitution claim against the property of the landowner (S Shirinda field notes June 27 1998).*

The landowner signed the settlement agreement in front of two witnesses and the widow was transported to the Levubu police station where she had her thumbprint taken in front of a police officer and two witnesses (S Shirinda field notes 1998).

During the night of the 27<sup>th</sup> of June 1998, the day of the signing of the agreement, farm workers prepared the grave; the next morning, the 28<sup>th</sup> of June 1998, the late Mr Elias Majoni Nkube was laid to rest as per the wishes of his widow. The landowner donated an 80kg bag of mealie-meal to the mourners. The funeral was attended by farm workers under the employment of Mr Smit as well as from neighbouring farms. The Nkuzi fieldworker directed the programme (S Shirinda field notes June 1998).

Nkuzi was happy to see the landowner and the widow agreeing to terms and conditions that regulated the mutual burial of the deceased outside the parameters of ESTA. The settlement agreement was not only important for the burial of Mr Nkube but also provided a model for the burial of the widow when she died in 2001. In 2001 the landowner did not require a settlement to be signed; Mr. Smit gave instruction to his workers to bury her next to the late Nkube's grave (S Shirinda field notes June 1998).

### **7.3. The Tshivhula Case**

#### **7.3.1. Introduction**

This case concerns a burial of the deceased, Vho-Mukumela Tshivhula, who died on the 27<sup>th</sup> of January 2007. The deceased's family to bury her remains in Corningstone farm 699 MS, which was privately-owned by two legal persons – a family and a Close cooperation. The case came about at the period when ESTA, provided only for the burial of occupiers or their relatives, occupiers who resided on a farm where a practice of burying has been established. In this case, the deceased's family members resided in one portion of the farm and burial site on the other.

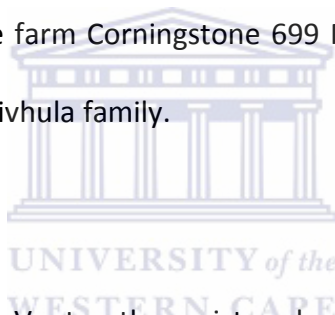
#### **7.3.2. The dispute**

The dispute was between the deceased's family, under the leadership of the deceased's son, Alifheli Samuel Tshivhula, who was residing in portion 4 of the farm. According to the family, the problem involved both owners of portion 3 and 4 whom both refused to grant them permission to bury the deceased on the farm.

### **7.3.3. Parties to the dispute**

There were three parties whom the dispute directly concerned. The first party was the deceased's family who only Alifheli Samuel Tshivhula's family, who resided in portion 4 with his wife and daughter with the rest of the Tshivhula members residing in various neighbouring villages in the former Venda homeland.

The second party was the Koedoepan Boerdery closed corporation of the Breytenbach family, that owns portion 3 of the farm Corningstone 699 MS. The portion, as indicated above had graves belonging to Tshivhula family.

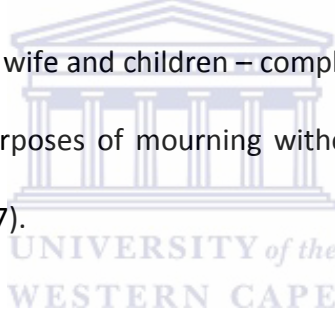


The third party was Roelof Jacobus Venter, the registered owner of portion 4 of the same farm where Alifheli Samuel Tshivhula and his family of three members resided in.

Two NGOs by the names Ndima communications (Ndima) and Nkuzi Development Association (Nkuzi) were indirectly involved in the dispute. The two NGOs were therefore interested parties, who assisted the deceased's family during the dispute. The provincial office of the Department of Land Affairs, now the office of the provincial Department of Rural Development and Land Reform also joined the disputing parties when court proceedings were instituted.

#### **7.3.4. Background of the dispute**

The family members of Tshivhula wanted to bury the deceased, Vho-Mukumela Tshivhula in what his family regarded as their ancestral burial site, situated in portion 3 of the farm Corningstone 699 MS. Initially the registered owner of portion 3, Mr Breytenbach senior, granted them permission then after four days he refused it. The family of the deceased engaged the services of a land rights NGO, Ndima Communications (Ndima) who negotiated the dispute wherein Mr Breytenbach again allowed the burial take place but under a condition that the family found unreasonable. In addition to the above dispute, the registered owner of portion 4 – a portion in which the son of the deceased, Alifheli Samuel Tshivhula, resided with his wife and children – complained about the many people who entered the farm for the purposes of mourning without his permission (interview with Alifheli Samuel Tshivhula 2007).



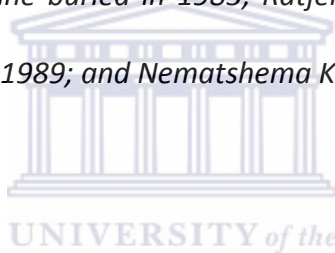
According members of the Tshivhula family, the family started staying in Corningstone farm 699 MS around 1902 when Pharuli Tshivhula, Alifheli's father and husband to the deceased started working for the late Mr Jan Venter. At that time the Tshivhula family was residing on the farm together with another fifteen (15) families (interview with Alifheli Samuel Tshivhula 2007).

The Tshivhula and Ratshikana families, of whom the head of the families were working on the farm as foremen, continued residing on portion 3 even after other families were forcefully removed from the farm between 1936 and 1953. During 1936, Corningstone

farm was subdivided, resulting in the separation of the residence from the burial site; during this time the farm was under the ownership of Mr Leach. The residences were on portion 4, while the burial site was on portion 3. According to Alifheli Tshivhula, before the subdivision of the farm, the following deceased members of the community were buried on the burial site:

*Joseph Tshishonga buried in 1940; Sophy Ratjekane buried in 1943; Joseph Ratjekane buried in 1944; Nyatshavhungwa Musina buried in 1956; Tshuvhubya Tshivhula buried in 1960; Johanna Sebola buried in 1972; Frans Sebola buried in 1981; John Samuel Ratjekane buried in 1983; Ratjekane buried in 1986; Mashau Khodoga Rakgadi buried in 1989; and Nematshema Kutama buried in 1991.*

And after the subdivision:



*Poppy Pharuli Tshivhula, Joseph Sebola and Maria Rakgadi were buried in 2001, 2002 and 2005 respectively. Maria Rakhadi was buried in portion 3 with permission of Mr Breytenbach senior (interview with Alifheli Samuel Tshivhula 2007).*

In 1997 the Mulapyana Community lodged a restitution of land rights claim with the Regional Land Claims Commission of Limpopo (RLCC); the Tshivhula family, including Alifheli Samuel Tshivhula – who remained on the farm when other families were forcefully removed from the farm – joined the community's claim. Alifheli's family joined the claim because he believed that his rights to the land were reduced when the farm was subdivided and the coming of the new owners restricted him to the small piece of land

where his homestead was situated. The land claim was at the time of dispute still under investigation by the Commission (interview with Samuel Alifheli Tshivhula 2007).

### **7.3.5. Attempted Negotiation**

On the death of Vho-Mukumela on the 27<sup>th</sup> of January 2007, Alifheli Tshivhula and other family members approached Mr Breytenbach - the owner of portion 3 where the burial site is situated – to make burial arrangements. Mr Breytenbach initially agreed to the request but after four days he changed his mind and informed the family about the withdrawal of the permission (interview with Samuel Alifheli Tshivhula 2007).

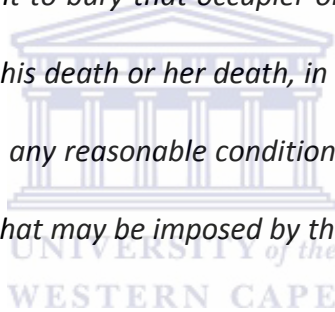
The Tshivhula family employed the services of Ndima Communications, a local land rights NGO, to assist in further negotiating with Mr Breytenbach. At that time, Mr Breytenbach was being assisted by Charles Pieterse Attorneys. After a lengthy negotiation between the Tshivhula family – with the assistance of Ndima – and Mr Breytenbach – with the assistance of Charles Pieterse Attorneys – permission was granted but on the condition that not more than 300 people were to attend the funeral (interview with Samuel Alifheli Tshivhula 2007).

Tshivhula family members found the condition to be unreasonable and decided to involve the services of Nkuzi's Legal Unit to force Mr Breytenbach to remove the condition. This view was shared by both Ndima and the family. Nkuzi's legal officer/researcher visited the family and consulted with some of the members.

### **7.3.6. Court proceedings**

During consultation with Nkuzi, it transpires that Mr Breytenbach was not refusing permission; as owner of the portion he was, in terms of ESTA entitled to impose conditions on the use of the land. As the dispute took place after ESTA had been amended to also regulate burials on farms belonging to others, Nkuzi lawyers read and interpreted section 6(5) of ESTA that reads as follows:

*The family members of an occupier contemplated in section 8(4) of this Act shall on his or her death have a right to bury that occupier on the land on which she or he was residing at the time of his death or her death, in accordance with their religion or cultural belief, subject to any reasonable conditions which are not more onerous than those prescribed and that may be imposed by the owner or person in charge.*



It also became clear that the way in which the farm was divided, the portion where the burial site is situated had no occupier, implying that the section 6(2) (dA), the clause inserted when ESTA was amended – to provide for the right of occupiers to bury their deceased family members who died while residing on the farm where an established burial practice exists – did not apply to the Tshivhula situation. However the family constantly emphasised that they had an established practice of burying on that land, and that they had lodged a land claim on the land and the landowner had no right to impose conditions when they wanted to use their land.



Nkuzi advised the family about the rule of law on the issue and that the provisions of ESTA regulating burial on farms did not cover this situation; the case had no legal basis for application of a court order to force the landowner to grant them permission without imposing any conditions. Nkuzi lawyers then contacted the provincial DLA to liaise with the family towards finding a solution to the problem (S Shirinda field notes 2007).

The court application was opposed by the owners of portions 3 and 4. The main application was supported by Alifheli Samuel Tshivhula's founding affidavit, where he stated that the burial site was established some years ago before the owners of portion 3 and 4 purchased the land. He stated also that the family and other community members who had lodged a restitution claim on the land, had been burying their deceased family members on the site without the permission of the owner of portion 3. He also stated that he was advised by his legal representatives on the issue of law cited in the affidavit. He stated that he was an occupier in terms of ESTA and that section 6(2) (dA) of ESTA was applicable for his family to bury the deceased in the family burial site (Louis Trichardt Case No. 462/2007).

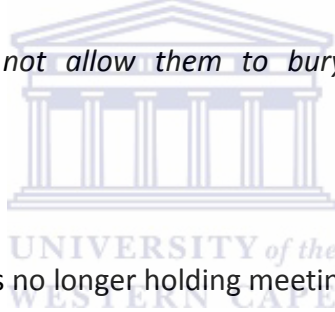
Alifheli Samuel Tshivhula's Founding affidavit also stated that his deceased mother was a long term occupier and he therefore appealed to the court for an order to be granted on urgent basis because his mother's body was lying in the mortuary and that the costs of keeping it there were accumulating on daily basis (Louis Trichardt Case No. 462/2007).

The application was opposed by the owner of portion 3. He submitted an answering affidavit where he deposed to the contrary:

*...that Samuel Alifheli Tshivhula was residing on portion 4 but his deceased mother and himself was not occupiers in terms of ESTA.*

*...that he gave the deceased's family permission to bury on condition that not more than 300 people attended the funeral because the farm is operated as a game farm.*

*...that he was entitled to impose the condition and that if they have problems with the condition, he would not allow them to bury (Louis Trichardt Case No. 462/2007).*



At this stage Nkuzi's Legal Unit was no longer holding meetings with the family but Nkuzi's Director attended some of the meetings with other stakeholders who felt that the landowners' refusal with the burial permission was politically motivated.

Louis Trichardt magistrates' court dismissed the application on the basis that there was no legal basis for the family to force either of the owners of portions 3 and 4.

On the 16<sup>th</sup> of April 2007 the Progressive Women's Movement in Limpopo (PWMSA) together with local stakeholders staged a protest march in support of the deceased's family, outside Louis Trichardt court building; demanding a speedy transformation of the country's justice system. The target was the Louis Trichardt magistrate who dismissed the

deceased's court interdict application. Maite Nkoane Mashabane, an official with PWMSA (now a Minister), said:

*The plight of the Tshivhulas is an indication that the justice system is far from transformed. We are saying to the justice system; let the Acts and the Constitution of this land give the Tshivhula family the right to bury their mother, at the place where she wished to be buried (SABC news April 16 2007).*

Also, in support of the Tshivhula family, the African National Congress Women's League (ANCWL) issued a statement from 3<sup>rd</sup> Floor Chief Albert Luthuli House, saying:

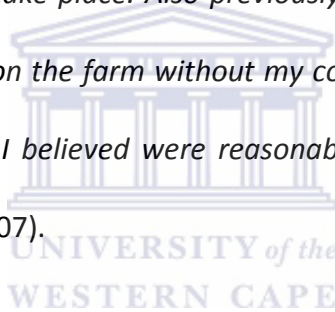
*We have noted with sadness that despite several attempts to find an amicable solution through negotiations with the landowners, there has been a deliberate attempt on the part of the landowners to frustrate the process. We learn that at every opportunity the courts have ruled against us (<http://www.anc.org.za>).*

In his answering affidavit to the Land Claims Court Application, Mr Breytenbach – the owner of portion 3 of Corningstone farm – stated that the Tshivhula family had no right in law to bury the deceased on that portion. He stated that neither Alifheli Samuel Tshivhula nor the deceased during her lifetime resided on portion 3. He also stated that the previous permission given for the burials of the deceased members on the farm were granted by owners before him and that such permission do not create a right to bury any person on the farm. He disputed the allegation contained in Alifheli Samuel Tshivhula's affidavit that he was an occupier in terms of ESTA since Alifheli earned a gross salary in

excess of the amount prescribed in the regulations – in terms of section 28(1) of ESTA, Government Notice R1632 GG 19587 dated 18 December 1998 (LCC 15/2007).

In an interview with the City Press, Mr Breytenbach remarked as follows:

*I feel sad about the whole issue. The old lady could have been buried in February if the family had not taken me to court. I will see what I do about my lawyers' fees. The only thing they need to do is to stick to the conditions I have put in place. I did not refuse them permission; it is the deceased's family that rejected the condition I have put for the burial to take place. Also previously I experienced problems with Alifheli visiting the graves on the farm without my consent and without subjecting himself to conditions that I believed were reasonable (Breytenbach cited in City Press 17<sup>th</sup> of September 2007).*



Nkuzi Development Association Director said:

*The problem lies with the law. The farmer took advantage of the law and used it against the interests of the farm workers. That is why the farmer has got a court order against the family on the case of burial and on the case of eviction. ESTA should be reviewed because it is full of loopholes. The other problem is that the Tshivhula family was represented by inexperienced lawyers, not conversant enough with land laws (Mufamadi cited in SABC news April 16 2007).*

The Land Claims Court dismissed the application. It held that the applicant was not entitled to bury Vho-Mukumela Tshivhula on any portion of farm Corningstone 699 MS without the consent and co-operation of the respondents. The court said that there is no common law principle to compel a landowner to give permission against his/or her will and would be surprised if such existed since the law cannot request or enforce indulgences but commands and enforces compliance. Also it said in the Tshivhula case neither the applicant nor deceased fell within the definition of 'occupier' in terms of the ESTA and no further statutory remedy was available to pursue the burial on portion 3 where the burial site is situated (LCC15/07).

The court also used the opportunity to clarify the scope and application of the burial rights provisions by stating that the phrase 'residing on the land at the time of death' does not have a literal meaning of expiring within the precinct of a given farm, because many die in hospitals away from home and others die during a trip to neighbouring states. It went further stating that the phrase mean that there must be a sustained presence in a place without any present intention of leaving it (LCC15/2007).

Following the intervention of the then MEC for Agriculture Dikeledi Magadzi – who appealed on behalf of the deceased family –Mr Breytenbach allowed the burial to take place; he gave permission on the same condition that not more than 300 people attend the funeral, also adding that it was the last burial that the family was conducting on his property (City Press 17<sup>th</sup> of September 2007).

The burial took place during September 2007 and the condition that not more than 300 people attend the funeral was respected. Following the burial the Tshivhula family spokesperson, Piet Tshivhula, commented as follows:

*We have not handled the issue correctly from the start. Breytenbach was not stubborn. People never spoke to him in the right manner. Instead they spoke like they owned his farm. We are now happy; it is over (City Press, 08 October 2007).*

The Tshivhula case study demonstrates how farm subdivisions that have taken place have, over time, limited the chances of some families who had an established practice of burial. After subdivisions ESTA amendment had removed the ground that strengthens their right of burial on the land. The Subdivision had created a border line which had the result of creating a residence where there is no burial site and a grave site where there are no occupiers. The case also illustrates how a misunderstanding of law between parties can worsen the dispute as a mistaken party might provoke the emotions of the party whose rights are being infringed. Although this case was dealt with in court, the burial took place in terms of the out of court settlement following the MEC's intervention.

#### **7.4. Burial Cases Studies Analysis**

##### **7.4.1. Unequal power relations**

Using Lukes' (1974) classic work on three dimensions of power, the Tshivhula and Nkube burial cases demonstrate elements of what he calls the 'dominating' power of

landownership. This power is evident from the way the landowners exhibited their authority and domination over their property as they reacted to the deceased's family members' requests to bury their deceased on the farm. The reactions were dictated by the landowners' subjective motives that in some instances had the backing of the rule of law while in others was out of ignorance of the land reform legislation. In the Nkube case the refusal of permission was based on the landowners' misunderstanding as to how graves are used in proving entitlement to claim restitution of a right to land. The fear that the landowner exhibited in this case demonstrates the negative perception that some landowners have about land restitution processes (Atkison 2003; Simbi and Aliber 2000).



In the Tshivhula burial case, ignorance of land reform legislation was on the part of the deceased's family as well as the institutions that supported them during the rejection of the condition placed by the owner of the portion of land where the burial site existed and also the institution of the court proceedings. Ndima and the provincial DLA supported the family in all the processes while it was clear that they lacked the legal ground for the outcome that they wanted. The way the deceased's family behaved in both negotiation and court processes, removed what Fisher and Ury (1991) regard as basic means of getting what one party want from the other. The family's conduct instead, pushed the landowners away from discussing and sharing their interest with him. The attitude discouraged compromise on the part of the landowners.

In the Nkube case the widow, who was powerless, could not have, on her own, decide on the process to convince the landowner to change his mind-set and understand the consequences of allowing the burial to take place on his land. Nkuzi's presence, acting on behalf of the widow, filled the power gap that existed between the two parties. Nkuzi initiated the negotiation process and during the process Nkuzi acted as the widow's agent. In that way Nkuzi was a go between for the parties; its involvement created a platform for the parties to see options opening up towards a right direction.

The way the two cases were finally resolved through negotiations, indicates a slight shift of power relations when compared to the period before 1997; both parties are able to take each other to court and are also capable of negotiating towards a mutual solution. Before 1997 practices were favourable to the landowner instituting court proceedings against occupiers. Informal and Negotiated routes were the only feature of social relations on farms used in negotiating terms such as those use in share cropping (van Onselen 1996). The difference is that now there is law and other informal institutional options for resolving disputes between parties.

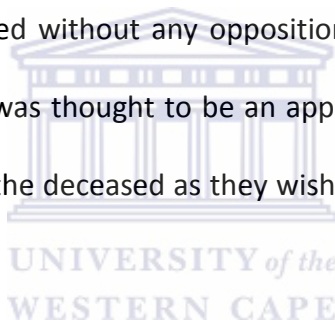
#### **7.4.2. Parties' perceptions of strategies and choices**

In Nkube case study, Nkuzi chose the negotiation process for the parties. According to Fisher *et al* negotiation is a fundamental dispute resolution process in which two or more disputing parties tries to work out their differences without intervention by a neutral party (Fisher et al 1991). In Nkube case parties communicated with each other through



Nkuzi. Nkuzi's perception of the process was that the widow could benefit more from talking to the landowner than by forcing him through court processes where she did not have legal ground to do so. In addition to the strategy of communicating with the parties, Nkuzi also used the media to publicise ESTA's limitations. In response to media publications, the landowner revealed his reason for not granting permission for burial and which created further opportunity for the parties to communicate their differences.

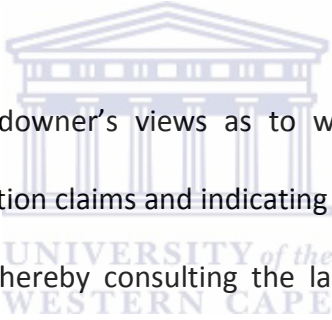
In the Tshivhula case, the deceased's family and Ndima perceived negotiation as a process of giving notice of what needs to happen to the other party and expect the latter to accept whatever is being requested without any opposition. Likewise the court process that they engaged themselves in was thought to be an appropriate strategy to force the landowner to allow them to bury the deceased as they wish on his land by virtue of them being claimants of the land.



#### ***7.4.3. The NGO's role***

Nkuzi and Ndima were important players in the manner the disputes in Nkuzi and Tshivhula cases; Nkuzi paved a way for the involvement of the then office of the Provincial Department of Land Affairs (now the office of the provincial Department of Rural Development and Land Reform) and Ndima worked closely to Tshivhula family in the negotiations and even in all court proceedings.

In Nkube case Nkuzi communicated with both parties. It participated in what Mitchell in Darby and MacGinty call a trilateral negotiation process where a third party is called to assist in facilitation of negotiation or mediation (Mitchell in Darby and MacGinty 2003:77). As the only party that was involved, Nkuzi had an advantage of giving advice that was not contrasting other advices, hence; it successfully influenced the outcome of the decision reached by both parties amicably. Realising that ESTA, the only legislation that regulated farm relations, did not provides for the widow's wish, Nkuzi publicised the story in the media wherein the landowner's attitude towards his former employees was exposed.



Media publicity included the landowner's views as to why he was refusing to give permission, i.e. his fear of a restitution claims and indicating. It was as a result of this view that Nkuzi changed it approach thereby consulting the landowner for the purpose of giving him correct information about Land Restitution Act. With correct information, the landowner was successfully influence towards settling the dispute amicable. The manner in which Nkuzi worked with the disputants illustrates what the supporters of ADR such as Merry that ADR processes have potential to increase the focus of dispute resolution on parties' interests and to make the resolution of rights claims more productive (Merry 1979).

Nkuzi was particularly well placed for disseminating information of restitution processes and burials on privately owned land. Its pedagogic role was a vehicle for not only the

occupiers, but also an opportunity for the creation of space for farm parties to communicate their wishes. The Nkube case was therefore an important insight for Nkuzi's future handling of burial cases on farms even after ESTA's burial amendment. In all cases that Nkuzi has taken to court, it did so when negotiation had failed even in situations where the circumstances were within the legal requirements. As such the court route was used only as a process of last resort.

Unlike the resolution of Nkube case that was done with few days, the Tshivhula disputes was resolved after some months. The family had many parties that offered support while the family was mourning and struggling to bury the deceased. Ndimu was amongst the major role players from the beginning of the dispute. Ndimu's understanding of the right of the deceased family was in line with the family's understanding of their right to bury on the land, its continued support to the family's wishes throughout the court proceedings. The manner in which Ndimu participated in the case and the result thereafter, is a precedent for NGOs and it can serve as warning to NGOs to be careful when providing advises to communities and families.

Both Nkuzi and Ndimu were involved in the Tshivhula case, though during different stages of the dispute. Ndimu accompanied the family to the first negotiation meeting and supported it during the court proceedings, with the belief that the landowner was wrong to refuse permission. Nkuzi, on the other hand, realized the lack of legal grounds towards the family's demand and advised them accordingly. Nkuzi referred the matter to the then

office of the provincial Department of Land Affairs, hoping that the latter would take up the matter through either ESTA Mediation or Arbitration processes.

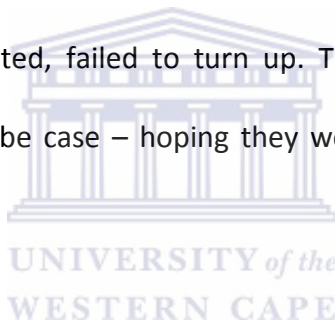
Tshivhula family's choice of court proceedings coupled with press statements of the ANCWL and PWMSA, escalated the dispute by making the issue public while the case was still to be decided by court. Such tendencies confirm Wilhelm Aubert's (1969:287) argument that making the dispute public may escalate it.

In the Tshivhula case, not everyone within the organization believed that the family had no legal ground to force the landowner to allow them to bury with no condition. Nkuzi's Legal Units' staff objected to the idea of instituting court proceedings on behalf of the family while the then Director of Nkuzi supported Ndima and the family to do. The reason for this was, amongst others, the fact that Nkuzi's legal Unit consisted of lawyers and their understanding of the issue was based on their legal expertise meanwhile Nkuzi's director and the others based their beliefs in terms of moral principles. Nkuzi's director also blamed the lawyer who assisted the Tshivhula family as having lost the court case because of his inexperience in land issues. Again this thinking shows Nkuzi's director's failure to understand that the law was limited in regard to the Tshivhula case; no lawyer, no matter how experienced, could have achieved judgment in favour of the Tshivhula family under the circumstances.

#### **7.4.4. Government agencies**

In the Tshivhula case the government had not attempted to negotiate, appoint a mediator or an arbitrator on receipt of the case. The DLA acted according to the family's wish, instructing a lawyer to institute court proceedings. This way of responding within the context of ESTA, suggests that the government officials shared the family's incorrect view of the burial right as provided in the amended ESTA.

In Nkubi case, Nkubi did not inform the DLA office of the case. The reason was that at the time of Nkubi's burial, Nkubi was also involved with the Maswiri eviction threat where the provincial DLA, who was invited, failed to turn up. This contributed to Nkubi not informing the DLA about the Nkubi case – hoping they would not react as they did at Maswiri.



ESTA provides for mediation and arbitration at the discretion of the provincial Department of Land Affairs but only on approval by the Minister, this has not been considered in both cases. In the Tshivhula case the DLA took the matter to court despite Nkubi's advice that the matter was not within the scope of ESTA amendment regulating farm burials since 2001.

In the Nkubi case, the action of the landowner was within the law as ESTA did not regulate the issue of burial; at the time of Nkubi's death, ESTA was only a year old. The lack of regulation suggested that the widow was to rely on the landowners' preparedness

to help and nothing beyond that. Negotiation as a strategy worked well in the Nkube case despite the initial negative reaction that the landowner showed. Nkuzi has played an important role in coming between the two parties, as its presence opened a platform for the parties to listening to each other's interests and wishes, enabling them to reach a mutual consensus to the extent of managing future burial situations on the farm. The Nkube case is one of many cases where on-going relationships between the parties have been preserved.

#### **7.4.5. Access to legal services**

Parties in the Tshivhula case had access to legal services. The landowner had lawyers at all the processes from the initial negotiations to all court proceedings. The lawyers' presence is evident from the landowner's imposition of the condition to the permission he gave to the family. This shows that the landowner, as opposed of the deceased's family, participated with correct information about ESTA. ESTA provides for the landowner or employer's right to impose 'reasonable' conditions to people visiting the farm. The issue remains that ESTA does not say who should determine the reasonableness of the condition, because what the landowner could see as reasonable could the occupier or family of the person buried on the land could see as unreasonable The presence of the lawyers in Tshivhula case contributed to the granting of the permission after the court battle where another condition was put to say that the deceased was the last to be buried on the land. The condition was put in a way that protected the land from being used for future burials.

In the Nkube case, the parties had no legal representatives. LRC was only consulted by Nkuzi during the drafting of the settlement agreement and the reason for such involvement was to ensure that the parties sign an agreement that was legally correct.

#### **7.4.6. Outcome of processes or strategies**

The outcome and impact of the strategy on the parties' behaviour and relationship in the Nkube case had been positive; the landowner also participated in providing for the food that was needed for the mourners on the day of the funeral. As only negotiation was used in this case, the parties retained control over the outcome. The process gave them an opportunity to craft a compromise in which each party got what valued more to them. On the death of the widow a few years after, the landowner allowed for her burial to take place next to her deceased husband on notification of her death by fellow farm occupiers. This shows that strategies that deal with the parties' fears and manage to address the underlying issues, have the potential for both parties to agree on conditions to guide future interactions between them, enabling each party to know what is expected in a given situation.

In contrast, the outcome and impact of the strategies used in the Tshivhula case had little gain to both parties' behaviour and relationship. Following the loss of legal fees paid towards the court challenges by the landowner – of the portion where there were graves – both parties were no longer on good terms. As the landowner's right to resist the burial was compromised, the burial was only allowed with the imposed condition that the

deceased was to be the last family member to be buried on the farm. This shows that by allowing the burial, he was not creating a right.

#### **7.4.7. Understanding of the law**

In the Nkube case, the landowner had incorrect information about land restitution which had influenced his initial refusal to give permission as per the widow's wish. The landowner's perception about land restitution showed the limited information available about government processes. Tshivhula family, Ndimma and the provincial office of DLA also had incorrect understanding of land reform legislation; particularly the regulation and protection afforded to families with grave sites and entitle to land restitution.

Misunderstanding of the restitution process in the Nkube and Tshivhula cases show that the government dissemination of information did not reach the targeted communities well. In the Tshivhula case, the family's understanding of the burial provision of ESTA and their belief that the land claim they had lodged with the Regional Land Rights Commission, entitled them to bury the deceased on the land, influenced their rejection to the condition that the landowner imposed on the permission he granted them and also influenced the decision to approach the court. Likewise, Ndimma and the office of the provincial Department of land Affairs' assistance to the family through the court process indicates that they, like the family, believed that the family had legal rights to bury on the farm. Also, the support that the family received from the ANC local women's league and



the provincial MEC for Agriculture, gave the family courage to go to court to fight for the right they never had in terms of ESTA.

Through the exchange of information in Nkube case, an amicable settlement agreement was reached in which the interests of both parties were satisfied; this also guided how the widow was to be buried when she died. ESTA did not have burial provision at the time of the dispute, and as such there was no way it could be resolved through court process.

ESTA court route entails that parties and enforcement agents should know the essential laws that they are tasked to implement. The then provincial office of the DLA's support of the Tshivhula case despite it being clear that the family had no legal grounds in law shows that the then PDLA office misunderstood its own law. Such a choice of the process have caused them to miss the benefit of appointing a mediator or arbitrator to facilitate a meeting to help the parties to communicate the issue in a manner that would assist in preserving and improving relations between them.

In both cases what helped, was not only the understanding of the law, but also the ability to know how to operate in a canny and sophisticated way within the 'informal' contract of paternalism.

#### **7.4.8. Implications for law**

The interpretation of the court in the Tshivhula case was done correctly in dismissing the application for lack of legal grounds. Following Shapiro's argument that the role of adjudication is, to decide which disputant is right or wrong, The Land Claims Court's decision was based on the rule of law that only provides for occupiers and their relatives to be buried in terms of section 6(2)(dA) of ESTA (Shapiro 1981). Implication of burial amendment is that only occupiers residing on farms where burial practice are allowed to continue burying their deceased persons

Nkube burial case dispute was unfortunate that it happened during the time when ESTA was silence on burial rights. If it the matter had been taken to court, it should have been rejected in the same manner as it was done in *Serole v Pienaar* and *Buhrmann v Nkosi* where the Land Claims Court concluded that such entitlement could not be deduced from the provision of ESTA or the Constitution and the dominant and near absolute right of ownership in land remained unscathed in the absence of express legislation sanction and by virtue of section 25(1) of the Constitution [2000 (1) SA 328 (LCC); [2000 (1) SA 145 (T)].

In Tshivhula case circumstances of the deceased's family did not meet the requirements as provided for in ESTA amendment governing burial on farms. The dispute came following the amendment of ESTA provisions. However, subdivisions that took place over time – have, separated the burial site from the occupiers' residence. Parties only reached settlement after court battles that have cost a lot of money and time. As the law was clear

on burial rights, the parties should have negotiated the settlement vigorously or at least assisted through the appointment of a mediator or arbitrator.



## **CHAPTER 8: CONCLUSIONS AND RECOMMENDATIONS**

### **8.1. Introduction**

This chapter provides a summative picture of the research findings; draws conclusions; and recommends insights gained through this study to other interested parties. This study sought to examine the processes that parties to farm tenure disputes utilised towards resolving tenure disputes between them. The study was conducted within the context of the Extension of Security Act, 62 of 1997 (ESTA); various conclusions were drawn. The summary, conclusion and recommendations are dealt with under the headings: research findings, what processes parties use; choice of process; challenges for using processes; recommendations; and conclusion.



### **8.2. Research findings**

The case studies showed that paternalism and dependency between landowners and occupiers plays an important role towards how parties' choose what process to employ when resolving tenure disputes. The four case studies show two trends of farmers' attitudes towards occupiers. There are those who indicate willingness to co-operate with occupiers, particularly those who granted permission for the burial of family members despite the law providing for such remedy and there are those who resist changes that the new dispensation brought for citizens to live in improved relationships.

The cases have also illustrate that occupiers and landowners are unlikely to choose appropriate strategy for resolving disputes, rather, the parties' economic position and the availability of land reform NGOs seem to have an influence on their choice of what process is to be used. Also, the involvement of third parties such as NGOs tends to influence the parties in the choice of the process.

The case studies have shown that promulgation of ESTA is an important step; it provides occupiers with a tool to contest landowners' strong common law rights of ownership. The study found that a lack of political will and institutional capacity necessary for the implementation of ESTA works against the objective of the Act. Of the four cases studies, negotiations have taken place in cases where a Land reform NGO was involved. The process followed in the Maswiri eviction case resulted in the landowner party realising his opportunity to get some economic return by settling the dispute out of court whilst occupiers received substantial amounts of time considering the advantages and disadvantages of remaining on the farm. Similarly, in the Nkube case the landowner entered into a settlement agreement with the deceased's widow and such an agreement had in the long run determined how the widow was to be buried.

The negotiated settlement in the Maswiri case was conducted in the 'shadow of law', implying that should negotiations have failed, court proceedings would have continued. The Sandfontein landowner's success in using the court to evict the occupiers implies that he can do it in the future and other landowners can do the same.

The four cases raise questions as to whether ESTA mechanisms are capable of bringing about the social change that the South African farming communities need dearly. In the Tshivhula case – since it was clear that the family lacked legal rights – Nkuzi’s judgment (2001) was wrongly applied by the PDLA. The manner in which the PDLA had handled the matter in Tshivhula shows misuse of funds and/or lack of strategy to give priority to deserving ESTA cases. The court’s dismissal of the case shows the weakness in the amendment made in respect of burials on farms for having disregarded subdivisions that have taken place separating burial sites and occupiers’ residential areas. It also shows that Parliament makes laws based on inadequate information.



### **8.3. *What processes parties utilise***

Chapter five of ESTA deals with dispute resolution and courts. This chapter provides for a party in a dispute to institute proceedings in the magistrate’s court or the Land Claims Court. In this sense a party, once having decided to approach the court has a choice between the two courts. In terms of section 21 of ESTA a party may request the Director-General of the DLA to appoint a mediator to facilitate meetings between interested parties and to attempt to mediate and settle the dispute. In terms of section 22 parties to a dispute may appoint an arbitrator from a panel of arbitrators established in terms of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996). The State is responsible for the payment of the services of the arbitrator. From the case studies, this framework can

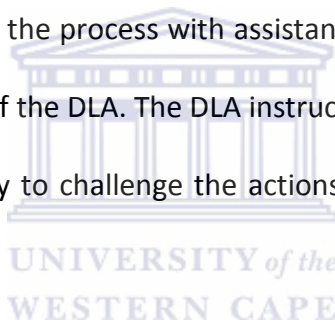
be seen to offer a direct choice to a party to choose between magistrate and Land Claims Court but as the mediator and arbitrator has to be paid from State funds; the parties had to notify the State to approve payment. Also the framework is silent on a process that can enable parties to discuss the issues on their own or with limited assistance of third party or government institutions.

#### **8.4. Choice of process**

The provision of dispute resolution mechanisms in ESTA is an important step towards addressing the injustices that have been caused by the laws and practices of the colonial and apartheid governments. If relations of parties on farms are to be improved, dispute resolution mechanisms need to provide a 'real' choice between out of court processes and court. The dominant element that is evident from these cases is that the paternalistic relationships inherited from the colonial and apartheid eras have had a lot of influence in favouring the use of the court process. The positive moral commitment that the landowners showed to the families of the deceased clearly shows that paternalism is not entirely negative and forgotten within the farming communities.

Landowners were in the past free to decide who should reside on their land and whom to evict, and the court route has helped them a lot in doing so. The experience of using court to evict occupiers is in the mindset of the landowners and unless this mindset is changed, the court will always be the first choice for them in resolving any kind of dispute.

Out of the four case studies examined, in three of them – the Maswiri, Tshivhula and Sandfontein cases – the landowners or employers were legally represented and as the disputes manifested, choices of processes utilised were made with advice of their legal representatives. In these cases it is difficult to separate the decision of the landowners or employers from the actions of their legal representatives. Occupiers in Maswiri and Sandfontein responded to the initiatives of the landowners or employers with the assistance of Nkuzi Development Association (Nkuzi) who, amongst others, provided free legal services from within and in some instances outsourcing. In the Tshivhula case the family of the deceased engaged in the process with assistance of Ndima Communications (Ndima) and the provincial office of the DLA. The DLA instructed paid legal representatives on behalf of the deceased's family to challenge the actions of the landowner in various courts.



In the fourth case (Nkube), Nkuzi assisted the deceased's widow in deciding on which process to engage; once the process was agreed upon with the widow, Nkuzi proposed it to the landowner who was unrepresented.

#### **8.5. Challenges for the choice of process**

This study has identified the challenges created by using inappropriate processes towards bringing about the social change that farming communities require in the post 1994 government. These lie in two areas: a lack of choice of processes within ESTA; and the unequal economic positions between farm parties. The main finding of the study is that



the present ESTA provision on dispute resolution is inadequate to produce the social change that parties to farm tenure disputes deserve in the new democratic South Africa.

The challenges that occupiers face vary from case to case. In all four case studies presented, occupiers of land have found it difficult to contest the actions of the landowners, particularly when ESTA court route was followed. Landowners still believe that they are entitled to dictate what happens to their property and everyone on it. This thinking influences landowners' to choose the court process, especially in cases involving the eviction of unwanted workers and occupiers from their land. The three cases resolved out of court shows that there is a positive benefit within the 'informal' contract of paternalism for the parties on farm.



#### **8.6. *Third parties' influence***

The Maswiri, Sandfontein and Tshivhula cases have shown that some occupiers become vulnerable to eviction due to poor union intervention. In the Maswiri case TUSAA advised the aggrieved workers to embark on an illegal strike and when the dismissal dispute was to be heard before the Labour Court, TUSAA signed an out of court settlement that nearly caused the occupiers' eviction from their homes without a court order from a competent court.

In the Sandfontein case SAAPAWU recruited workers for membership but when the employer took legal actions against them, following their unionization, the union was nowhere to be found to assist them in challenging the employer's actions. In the Maswiri and Sandfontein cases the landowners consulted lawyers in reaction to the union appearance on the farms and the dispute resolution process engaged in such situations were initiated by lawyers on behalf of the landowners. As such the presence of unions has affected the use of court processes to the disadvantage of the workers and occupiers.

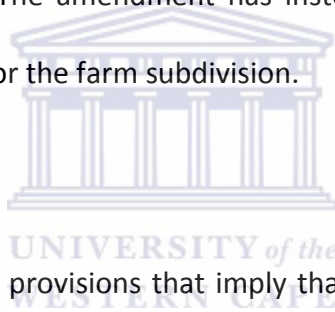
#### **8.7. Influence of Restitution process**

Evidence from the Nkuba and Tshivhula burial cases suggests that tenure dispute situations occur, amongst other reasons, due to a lack of understanding and poor advice regarding restitution of land rights processes. The Nkuba case required a lot of effort from, Nkuzi in convincing the landowner to arrive at a settlement agreement where the deceased was finally buried according to the widow's wishes. The limited knowledge that the landowner exhibited in this case shows that the state's dissemination of land reform processes is still necessary to improve people's understanding thereto. Similarly in the Tshivhula case Ndima accompanied the deceased's family to negotiate the burial of the deceased member in accordance to the family's culture and religion; both the family and Ndima rejected the condition of the landowner on the basis that the land belonged to them after they had lodged a restitution of land claim. This incorrect view had influenced

the deceased's family to follow the court process in a case where it was an inappropriate mechanism with which to resolve the dispute with the landowner.

### **8.8. Influence of Government agencies**

This study has shown that government agencies have limited capacity to utilise mediation and arbitration; rather they use the court process even in situations where it is not appropriate. The provision of ESTA in respect of burial rights is clear from the Act. Subdivision of farms that has taken place over time has clouded law-makers when enacting the burial amendment. The amendment has instead weakened the little land rights that some people had, but for the farm subdivision.



Amendment of ESTA added burial provisions that imply that burial disputes – such as in the Tshivhula and Nkube cases – would still not be appropriately resolved through the court process, rather they would be better dealt with through out of court processes. The on-going relationships that parties on farms have to preserve suggest the employment of CCMA type processes when dealing with tenure related matters. The way the landowner in the Tshivhula burial case – following courts adjudications – succeeded in his challenge to the family of the deceased's court applications confirms Bam's practical experience in participating in burial disputes that suggests that out of court processes help parties to manage to reach mutual and amicable settlements as opposed to the storms and passions that accompany litigation (Bam 2008).

## 8.9. Recommendations

The advent of the post-1994 democratic dispensation in South Africa and the concomitant constitutional directives to eradicate the legacy of apartheid and to promote the values of human dignity, equality and freedom has marked a major turning point in South African history. Under the 1996 Constitution the government has a duty to make land rights stronger. Section 25(6) of the Constitution mandated the government to take active steps to correct the results of past discrimination, including protecting occupiers from eviction without good reason and provides ways to resolve disputes over land rights.



This study attempted to answer amongst others, a question as to whether dispute resolution mechanisms within the context of the Extension of Security of Tenure Act, 62 of 1997 (ESTA) and more generally the extent to which the law and the court are able to effect fundamental social change. I chose to discuss four cases, involving eviction of occupiers and burial rights on farms to highlight strategies that parties to tenure dispute have utilized to resolve dispute that they encountered.

The eviction case studies presented in the study show that ESTA proceedings – court, mediation and arbitration – are not capable of permanently protecting and improving the land rights of occupiers and that the provisions only regulate evictions and provides ways

to resolve disputes over land rights. I align with the view that the anti-eviction legislation only temporarily delays eviction process and also to ensure that the prescribed procedures are followed. I concur with Bam's view that South Africa can go further with transformative efforts if the adversarial litigation stances are turned down (Bam 2008).

I therefore recommend that ESTA should be amended to compel parties in farm disputes to seek solutions through compulsory negotiation, mediation and arbitration processes as is the case in labour disputes where parties must first refer disputes to the Commission for Conciliation, Mediation and Arbitration (CCMA) before they approach the court. This obligation will encourage parties to land disputes to save money, time and preserve important relationships, thus satisfying all parties involved.



The manner in which the mediation and arbitration processes have been formulated in the Act does not provide full responsibility to a party in the dispute to take initiative on taking decision as to which process to utilize. Instead the provisions provide for a party to a dispute to request the DLA to appoint the mediator or may refer the dispute to arbitrator who is to be paid by the State.

To conclude, I recommend that ESTA be amended, rephrasing provisions dealing with mediation and arbitration to allow parties to use the processes – without having to get the approval of the DLA or State – as an alternative when they do not want to institute

court proceedings. In addition I recommend that, negotiation be used as an out of court process, like mediation and arbitration. Negotiation is a form of ADR, a process of searching for an agreement that satisfies various parties in a dispute (Fisher and Ury 1991). Also, when amending dispute resolution processes ESTA must compel parties to follow the CCMA type of dispute resolution before approaching the court in order to give them an opportunity to first discuss and try to find a solution to the dispute between themselves or with assistance of third parties, before approaching a mediator or arbitrator or court.



## References

Ainslie R (1977) *Masters and serfs: Farm Labour in South Africa* Rev. Edition. International Defence and Aid Fund for Southern Africa (London).

Atkinson D (2007) *Going for Broke: The fate of farm workers in arid South Africa*

Aubert, V (1952) 'White Collar Crime and Social Structure', *American Journal of Sociology* 58, 263-271.

Baldwin A (1975) 'Mass removal and Separate Development', *Journal of Southern African Studies*. Vol. 2: April 1975.

Bam, F (2008) *Rites to Burial: Rites ad Customs & Constitutional Reconciled*, Paper presented by Fikile Bam, Judge President of the Land Claims Court, at the *Morti Malherbe Memorial Lecture*: 1 October 2008.

Beinart W & Dubow S (ed) (1995) *Segregation and Apartheid in Twentieth Century South Africa*. Routledge, London.

Black, D (1989) *Sociological justice*. New York: Oxford University.

Bonner (1983) *Kings, Commonners and Concessioners: The Evolution and Dissolution of the Nineteenth-Century Swazi State*. Cambridge University Press.

Boeyens J (1991) 'Zwart invoor': inboekeling in Zoutpansberg, 1848 – 1969, *South African historical journal*, 24. 1. 31-66.

Boeyens J C A (1994) *Slavery in South Africa*. Pietermaritzburg: University of Natal Press.

Boeyens J C A (1994) "'Black Ivory": the indenture system and slavery in Zoutpansberg, 1848-1869. In E.A. Eldredge and F. Morton (eds) *Slavery in South Africa: captive labour on the Dutch frontier*: 187-214. Boulder: Westview Press

Boeyens J C A and Cole D T (1999) Kaditshwene, What's in a name? In, Finlayson, R(ed), *African Mosaic: Festschrift For J A Louw*. Unisa Press, Pretoria.

Brand Hon RH (1910) *The Union of South Africa*, Clarendon Press

Brad S (2003) "Alternative Dispute Resolution (ADR)." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder.

Bundy C (1972) *"The Emergence and Decline of a South African Peasantry,"* in African Affairs, vol. 1.

Bundy C (1988) *The rise and fall of the South African peasantry*, David Phillip: Cape Town.

Bundy C (1990) 'Land, Law and Power: Forced removals in historical contexts' In Murray, C and Reagan eds. *No place to rest: forced removals and the law in South Africa*. Cape Town: Oxford University Press and Labour Law Unit, University of Cape Town. Pp 3-12.

Burawoy M (1998) 'The *Extended Case Study Method*', *Sociological Theory* 16, 1 March 1998. American Sociological Association: Washington.

Burgess G and Burgess H (2003) *Conflict Research Consortium*, University of Colorado: Colorado.

Carey Miller D L and Anne Pope (2000) *Land title in South Africa*. Cape Town: Juta.

Commissioner of Native Affairs (1904)

Chisholm Hugh(ed) (1911) *Encyclopaedia Britannica. (Eleventh ed.)*, Cambridge University Press.

Community Law Centre (University of the Western Cape) (2007) *A Resource book (2<sup>nd</sup> ed). Socio-Economic Rights in South Africa*.

Cotterrell R (1992) *The Sociology of Law: An Introduction (2<sup>nd</sup> ed.)*. Butterworths, London, Dublin, Edinburgh

Connor T K (2003) 'Crooks, Commuters and Chiefs: Home and Belonging in a Border Zone in Pafuri, Gaza Province, Mozambique', *Journal of South African Studies*, Volume 21, Number 1, pp. 93-120.

Commissioner of Native Affairs (1904).

Christopher A J (1994) *The Atlas of Apartheid*, London, Routledge.

Danzig R (1973) 'Towards the creation of a Complementary, Decentralized System of Criminal Justice' *Stanford Law Review* 1(26)

Davenport T R H (1977) *A Morden History*, Macmillan Press: London.

Davenport T R H (1987) *South Africa: A Modern History*. Toronto; Buffalo: University of Toronto Press.

Davenport T R H (1990).*South Africa: A Modern History (4th ed)* University of Toronto Press: Toronto.



Davenport, T.R.H. (1991) *South Africa: A Modern History*. 41th ed. University of Toronto Press, Toronto and Buffalo.

Davis DM (1991) 'Remaking the South African Legal Order', *OC. JUST*, 18(1-2): 43-44, Summer 1992, at 65.

Darby and Mac Ginty (ed) (2003) *Contemporary Peacemaking*, Palgrave MacMillan: New York.

Dicke B H (1931) *Forty Years Ago* (Zoutpansberg Review and Mining Journal, 2 January 1931).

Delius P (1983) *The land belongs to us: The Pedi polity, the Boers and the British in the 19<sup>th</sup> century Transvaal*, Raven Press: Johannesburg.

Delius P (1984) *The Land Belongs To Us: The Pedi Polity, the Boers and the British in the Nineteenth-Century Transvaal*, University of California Press, Berkeley, Los Angeles.

Delius P and Trapido S (1983) 'Inboekelinge and Oorlams: The creation and Transformation of a Servile Class, in B. Bozzoli (ed) *Town and Countryside in the Transvaal: Capitalist Penetration and Populist Response* (53 – 81). Johannesburg.

De Kiewiet C W (1941) *History of South Africa, Social and Economic*, Oxford.

Department of Land Affairs (1997) 'White Paper on South African Land policy', Department of Land Affairs: Pretoria.

Department of Land Affairs (2006a) *Media Briefing by Minister of Agriculture and Land Affairs, Lulu Xingwana, 7 September 2006*.

Desmond C (1971) *The Discarded People: An Account of African Resettlement*, Penguin: London.

De Waal J, Currie I and Erasmus G (2001) *The Bill of Rights Handbook* (4th ed) Cape Town Juta.

Du Bois F (ed) (2007) "Wille's Principles of South African Law" 9th ed. Cape Town, Juta & Co.

du Plessis W (1996) 'Historical Overview: Evolution of Land Tenure Systems in South Africa', *International Conference on Land Tenure and Administration (November, 1996)*, Orlando, Florida.

Du Toit A & Ally F (2003) *The externalization and casualization of farm labour in Western Cape horticulture*. PLAAS Research Report 16, University of the Western Cape, Bellville.

Emerson R M, Fretz R I & Shaw L L (1995) *Writing Ethnographic Field notes*, University Of Chicago Press.

Ewert J & Du Toit A (2005) A deeping divide in the countryside: Restructuring and rural livelihoods in the South African wine industry, *Journal of Southern African Studies* 31 (2): 315 – 332.

'Farmsecure Newsletter (19<sup>th</sup> ed), (19, 01 October (2010): Sustainability and Profitability in Agriculture edited by Chantal Yazbek, Published by Farmsecure Media and Communications department, Tyger Valley, South Africa.

Feinstein C (2005) 'An Economic History of South Africa: Conquest, Discrimination and Development', Cambridge University Press: Cambridge.

Fisher E (1975) 'Community Courts: An Alternative to Conventional Criminal Adjudication' *American University Law Review* 24(1253).

Fisher R, Ury W & Patton B (1991) *Getting to Yes: Negotiating Agreement Without Giving* (2<sup>nd</sup> ed), Bruce Patton (ed), Penguin Books: New York.

Fox D R (1991) 'Law Against Social Change', Paper presented at the annual convention of the American Psychological Association, San Francisco.

Friedman L M (1984) *American law: An introduction*, Norton: New York.

Friedman L M (1985) *Total justice*. Boston: Beacon.

Friedman S and Atkinson D (1994) *The Long Journey: South Africa's quest for a negotiated settlement*, Ravan Press: Johannesburg.

Human Rights Commission (2003) *Final Report on the Inquiry into Human Rights Violations in Farming Communities*: Johannesburg: South African Human Rights Commission.

Gargarella R (2002) 'Too Far Removed from the People": Access to justice for the Poor: the Case of Latin America', paper issued by UNP, Chr. Michelson Institute: Bergen.

Gargarella R, Domingo P. and Roux T (2006) *Courts And Social Transformation in New Democracies: An Institutional Voice for the Poor*, Ashgate Pub Co.

Giliomee H (1989) 'The Eastern Frontier, 1770 – 1812', in Giliomee H and Elphick R(ed), *The Shaping of South African Society, 1652 -1840* (421 – 71). Middletown.

Goldberg S B (1999) *Dispute resolution: negotiation, mediation, and other processes* (3rd ed), Aspen Law & Business: Gaithersburg [Md].

Goldin, Ian (1987). *Making race: the politics and economics of coloured identity in South Africa*. Longman.

Gordon R W (1984) 'Critical Legal Histories', *Stanford Law Review* 36(57).

Gusfield J R (1963) *Symbolic Crusade: Status Politics and the American-Temperance Movement*, University of Illinois Press: Urbana.

Hahlo, HR and Kahn E (1968) *The South African Legal System and its Background*. Juta & Co, Cape Town

Hall A, Mytelka L and Oyeyinka B (2004) *Innovation Systems: Concepts and Implications for Agricultural Research Policy and Practice*, United Nations University: Maastricht.

Hall R (2003) *Farm tenure*. Evaluating Land and Agrarian Reform in South Africa series, No. 3. Cape Town, Programme for Land and Agrarian Studies, University of the Western Cape.

Hall R (2003) *Rural Restitution*, Evaluating land and agrarian reform in South Africa, (Occasional Paper series No. 2). Programme for Land and Agrarian studies (PLAAS), University of the Western Cape (UWC): Cape Town.

Hall R (2004a) 'A Political economy of land reform in South Africa', *Review of African Political Economy 100*. ROAPE Publications LTD.

Harries P (1987) 'A Forgotten Corner of the Transvaal: Reconstructing the History of a Relocated Community through Oral Testimony and Song', in Bozzoli B (ed) *Class, Community, and Conflict*. Ravan Press: Johannesburg.

Harries P (1989) 'Exclusion, Classification and Internal Colonialism: The emergence of Ethnicity Amongst the Tsonga-speakers of South Africa', in Vail L (ed), *The Creation of Tribalism in Southern Africa*. James Currey: London and University of California Press: Berkley.

Hill CR (1964) *Bantustans: The Fragmentation of South Africa*. Institute of Race Relations and Oxford University Press: London.

Hopkins P (2006) *Ghosts of South Africa*. Zebra Press: South Africa.

Horrell M (1973) *The African Homeland of South Africa*, South Africa Institute of Race Relations: Johannesburg.

Hosten W J (et al.) (1995) *Introduction to South African law and legal theory*. 2<sup>nd</sup> ed. – Durban: Butterworth.

HSRC (Human Science Research Council), 2003. *Land redistribution for Agricultural Development: Case studies in three provinces*. Unpublished report. Integrated Rural and Regional Development division, HSRC, Pretoria. October 2003.

Kariuki S and Van der Walt H (1990) 'Land Reform in South Africa: Still waiting', *Southern Africa Report (SAR) 15(3)*, (May, 2000).

Kahanovitz S (2007) 'Cases study prepared for Enhancing Urban Safety and Security', *Global Report on Human Settlements*, accessed on December 5<sup>th</sup> 2011, <<http://www.unhabitat.org/grhs/2007>>

Kahn E (1967) 'The Rules of Precedent Applied in South African Courts', *South African Law Journal* 4 3(175) pg. 308.

Keegan, T J (1986) *Rural Transformations in Industrializing South Africa: the Southern Highveld to 1914*. Johannesburg: Ravan Press.

Kelsen H (1945) *General Theory of Law and State (1961 ed)*, A. Wedberg (transl). Russell and Russell: New York.

Klare K (1998) 'Legal Culture and Transformative Constitutionalism', *SAJHR* 14(146-88).

Kleinbooi, K., Lahiff, E., and Boyce, T. (2006) *Land Reform, farm employment and Livelihoods. Western Cape case study. Theewaterskloof Local Municipality*. Cape Town.

Kitay J and Callus R (1998) 'Role and Challenge of Case Study Design in Industrial Relations Research, in Whitfield K and Strauss G (ed), *Researching the World of Work: Strategies and Methods on Studying Industrial Relations*. Cornell University Press: Ithaca and London.

James D (2001) 'Land for the Landless: Conflicting Images of Rural and Urban in South Africa's Land Reform Programme', *Journal of Contemporary African Studies*, Vol. 19, No. 1.

Jeppe J and Kotze J G (1887) *Die Locale Wetten der Zuid Afrikaansche Republiek, 1849 – 1885*. Pretoria.

Fisher, Ury and Patton, *Getting To Yes: Negotiating Agreement Without Giving In*, New York: Penguin Books, 1991

Lahiff E (2000) *An Apartheid Oasis: Agriculture and rural livelihoods, in Venda*. Frank Cass: London.

Lahiff E (2007) *Land Redistribution in South Africa: Progress to date: Paper prepared for the workshop "Land Redistribution in South Africa: Towards a common vision. Programme for Land and Agrarian Studies (PLAAS), University of the Western Cape*.

Lahiff E (2007) *Willing buyer, Willing seller: South Africa's failed experiment in market-led agrarian reform*. *Third World Quarterly* 28(2).

Levin R & Weiner D (1991) 'The Agrarian Question and the Emergence of Conflicting Agricultural Strategies in South Africa,' in S. Matlapa and A Munz (eds.), *Towards a New Agrarian Democratic Order*. Amsterdam: SAERT.

Levin R M and Weiner D (eds) (1994) *No More Tears: Struggles for Land in Mpumalanga, South Africa*. Africa World Press: Trenton [NJ].

Levin RM (1996) 'Land Restitution, the Chieftaincy and Territoriality: The case of the Mmaboi Land Claim in South Africa's Northern Province', *Centre for African Studies*.

Liebenberg B J (1959) *Die Vrystelling van die Slawe in die Kaapkolnie en die Implikasie Daarvan*, M.A. thesis. University of the Orange Free State: Bloemfontein.

Liebenberg S (2001) *The Protection of Economic and Social Rights in Domestic Legal Systems* 53, 83 in Eide, A et al, *Economic, Social and Cultural Rights*, 2<sup>nd</sup> edition, Kluwer Law International, Netherlands.

Liebenberg S (2005a) 'Towards a right to alternative accommodation? South Africa's constitutional jurisprudence on evictions' 2(3) *Housing and ESCR Rights Law* 1.

Liebenberg S (2010) *Socio-economic Rights: Adjudication Under a Transformative Constitution* (Juta Cape Town)



Lodge T (1983) *Black Politics in South Africa Since 1945*. Longman: New York.

Marcus T (1989) *Modernizing Super Exploitation: Restructuring South African Agriculture*, Zed Books: London.

Marks S and Atmore A (eds) (1984) *Economy and Society in Pre-Industrial South Africa*, Longman: London.

Maiese M (2003) *Negotiation: Beyond Intractability*, Burgess G and Burgess H (eds), Posted: October 2003 <<http://www.beyondintractability.org/essay/negotiation/>>Conflict Research Consortium, University of Colorado: Boulder.

Mayende G (2004) The challenge of land reform in South Africa: Issues, problems and prospects, in Roth, M, Sibanda, S., Nxasana, V. & Yates, T (eds) *Finding solutions, securing rights: Papers and perspectives from the National Land Tenure Conference, ICC, Durban, South Africa*: Pretoria: DLA.

McCann M (1998) *Taking Reform Seriously: Perspectives on Public Interest Liberalism*. Cornell University Press: Ithaca.

Merry S E (1979) *Going to court: Strategies of dispute management in an American urban neighbourhood* *Law and Society Review*

*Volume: 13, Issue: 4, Publisher: Law and Society Association, Pages: 891-925*

Mnookin RH, and Kornhauser L (1979) 'Bargaining in the Shadow of the Law: The Case of Divorce', *Yale Law Journal*, 88(950-970).

Moller-Malan D (1953) *The Chair of Ramabulana's*, Central News Agency.

Motlanthe K (2007) *52nd National Conference: Organisational Report* <<http://www.anc.org/za/conference>

Mostert H and Pope A (eds) (2010) *The Principles of The Law of Property in South Africa* (1st ed). Oxford University Press: London

Mouton J (2001) *How to succeed in your Masters and Doctoral studies: A South African guide resource book*, Van Schaik: Pretoria.

Murray C and O'Ragan C (eds) *The Case of Divorce, Yale Law Journal, and 88(950) No Place to Rest: Forced Removals and the Law in South Africa*. Cape Town: Oxford University Press.

Nader L (2002) *The Life of the Law: Anthropological Projects*, University of California Press: Berkeley.

Nkuzi Development Association and Social Surveys Africa (2005) *Summary of key findings from the national evictions survey Polokwane*: Nkuzi Development Association.

Omer-Cooper J D (1987) *History of South Africa*. London, Heinemann.

O'Shea A (1989) *International Law and Organization: A Practical Analysis*, Butterworths: Durban.

Pearsall J (1998) *New Oxford Dictionary: The Concise Oxford Dictionary (10th Ed)*, (1999, revised 2001). Oxford University Press.

Plaatje AT (1973) *Mafeking Diary: A Black Man's View of a White Man's War*, Comoroff J (ed), Ohio University Press: Athens.

Plaatjie S (1982) *Native Life in South Africa*, Ravan: Johannesburg.

Platzky L & Walker C (1985) *The Surplus People: Forced removal in South Africa* Ravan Press: Johannesburg

Pienaar J M and Mostert H (2005) "The balance between burial rights and land ownership in South Africa: Issues, content, nature and constitutionality" *South African Law Journal* 633-652

Potgieter F J (1958) *'Die Vestiging van die Blanke in Transvaal (1837 – 1886) met spesiale Verwysing na die Verhouding tussen die Mens en die Omgewing*, *Archives Year Book for South African History* 21(2): 1.208).

Pound R (1917) 'The Limits of Effective Legal Action', *International Journal of Ethics* 27(150 – 67).

Ramsbotham O (2005) *Contemporary conflict resolution: The prevention, management and transformation of deadly conflicts*, Polity Press: Cambridge.

*Report of the Crown Land Zoutpansberg Commission* (1908).

Richard C R (1997) 'Public Justice: Toward a State Action Theory of ADR', *85 California Law Review* 85(577).

Robert M E, Rachel I F and Linda L S (1995) *Writing Ethnographic Field notes*, University Of Chicago: Chicago.

Robertson J (1971) *Liberalism in South Africa: 1948-1963*, Clarendon Press: Oxford.

Robertson M K (1987) 'Black Land Tenure Disabilities and Some Rights', *Race And The Law in South Africa* 119. Juta and Co Ltd: South Africa

Robertson M (1989) 'Dividing the Land: An Introduction to apartheid Land Law', *Land Reform: South African options*, 21 *Colum. Hum. RTS. Rev.* 193, 201.

Rosenberg N G (1991) *The Hollow Hope: Can Courts Bring About Social Change*, University of Chicago Press: Chicago.

Ross R (1986) 'The Origins of Capitalist Agriculture in the Cape Colony: A Survey; in Beinart and Trapido (eds.) *Putting a Plough to the Ground – Accumulation and Dispossession in Rural South Africa*, Johannesburg: Ravan Press.

Ross R (1993) *Beyond the Pale: Essays on the History of Colonial South Africa* Wits University Press: Johannesburg.

Ross R (1999) *Concise history of South Africa*, Cambridge University Press: Cambridge.

Roux T (2004) *Pro Poor Court, anti-Poor Outcome in 2004* (2) *SALJ* 511 at 542

Roux T (2004) "Pro-Poor Court, Anti-Poor Outcomes: Explaining the Performance of the South African Land Claims Court" 20 *SAJHR* 511 527-530.

Sachs A (1989) 'A Bill of Rights for South Africa: Areas of Agreement and Disagreement', *COLUM. HUM. RTS. L. Rev* 21(15, 33).

- Sachs, A (2009) *"The strange Alchemy of Life and Law."* Oxford University press.
- Sachs A (1989) 'A Bill of Rights for South Africa: Areas of Agreement and Disagreement', *COLUM. HUM. RTS. L. Rev* 21(15, 33)
- Sachs A (1991) 'The Constitutional Position of White South Africans in a Democratic South Africa', *SOC. JUST.*18 (1-2)
- Sander F (1976) 'Varieties of Dispute Processing', *Federal Rules Decisions*70 (111).
- Shapiro M (1981) *Courts: A Comparative and Political Analysis*, University of Chicago Press: Chicago.
- Sheldon K (2004) 'Zone in Pafuri, Gaza Province, Mozambique', *Journal of Contemporary African Studies*, 21, 1, 93-120.
- Saunders C (1992) *Illustrated History of South Africa*, Cape Town, Readers Digest.
- Schramm W and Roberts D F (eds) (1971) *The process and effects of mass communication* (Rev ed). University of Illinois Press: Urbana [IL].
- Shapiro D L (2004) 'Emotions in Negotiation: Peril or Promise', *Marq. Law Review* 87(737).
- Silberberg H and Schoeman J (1983) *The law of Property* (2<sup>nd</sup> ed), Butterworth: Durban.
- Sonnekus JC (1978) 'Eggenote, Medebesit en die Mandament van Spolie ' *South African Law Journal* 217
- Social Survey Africa and Nkuzi Development Association* (2005:15)
- 'South Africa Country Report' (1991), *Economist Publications LTD, Business International*, available in LEXIS, MDEAFR.
- South African Human Rights Commission (SAHRC) (2004). *5<sup>th</sup> economic and social rights report 2002/2003*. Johannesburg: South African Human Rights Commission. Available: <http://www.sahrc.org.za/publications.htm> (January 2004).
- Sparks A (1990) *The mind of South Africa*. The story of the rise and fall of apartheid. London: William Heinemann.
- Stayt H A (1931) *The BaVenda* Oxford University Press: London (Reprinted Frank Cass)
- Stayt H A (1968) *The BaVenda*, Oxford University Press: London (Reprinted Frank Cass).



Struben H W (1920) *Recollections of Adventures: Pioneering and Development in South Africa, 1850 -1911*. Cape Town.

Surplus People Project (1983) *Forced Removals in South Africa, Volume 5: The Transvaal*, Surplus People Project: Cape Town.

Transvaal Archives: Government office SN12/187/79, Location Commission, Union of South Africa

Tapp J L (1974). *The psychological limits of legality* In J. R. Pennock & J. W. Chapman (Eds.), *The limits of law: Nomos XV* (pp. 46-75). New York: Lieber-Atherton.

Tempelhoff J & Nemudzivadi H (1999) *Riding the Storm of Change: Makhado, Venda and The South African Republic (1864 – 1895)*. (Department of History, Potchefstroom University for Higher Education, Vaal Triangle Campus).

Tempelhoff, J W N, (1989) “*Die Okkupasiestelsel in die Distrik Soutpansberg, 1886-1899*” unpublished D.Litt. University of South Africa.

The ANC National Policy Conference (2007)

Thompson L, (1960) *The Unification of South Africa 1902 – 1910*, Oxford University Press.

Thompson L (1990) *A history of South Africa*, Yale University Press: New Haven.

Trapido, S. (1979) “*Landlord and Tenant in a Colonial Economy: Transvaal, 1880-1910,*” *Journal of Southern African Studies*, 5(1)

Trapido, S. (1980) "The friends of the natives": merchants, peasants and the political and ideological structure of liberalism in the Cape', in S. Marks and A. Atmore, eds., *Economy and Society in Pre-Industrial South Africa* (London), pp. 247-74.

Unisia Study guide (1996) *Introduction to the theory of law*, University of South Africa: Pretoria.

Uyangoda J (ed) (2000) *Conflict resolution and peace studies, an introductory handbook* FES Publication 43. Friedrich Ebert Stiftung, Colombo. Accessed on the World Wide Web on the 07<sup>th</sup> of December 2009, URL:

Ury W, Brett J and Goldberg S (1988) *Getting Disputes Resolved: Designing Systems to cut the Costs of Conflict*, Jossey-Bass: San Francisco.

Vail L (1989) 'Introduction: ethnicity in Southern African history', in Vail L (ed) *The Creation of Tribalism in Southern Africa* pp1-20. James Curry: London.

- van der Horst S T (1942) *Native Labour in South Africa*. London: Oxford University Press.
- Van der Walt A J (1983) 'Three cases on the Mandament van Spolie SALJ (689).
- Van derWalt A J (2005) *Constitutional Property law* Juta & Co: Cape Town.
- Van der Walt A J (2005) *Property Theory and the Transformation of Property Law* in Cooke (ed) *Modern Studies in Property Law* 361.
- Van der Walt A J (2009) *Property in the Margins*, Hart publishing: Oxford and Portland Oregon.
- van Onselen C (1996) *The Seed is Mine: the Life of Kas Maine a South African Sharecropper, 1894 – 1985*, Hill & Wang, New York.
- van Onselen C (1992) 'The social and economic underpinning of paternalism and violence on the maize farms of the south-western Transvaal, 1900 – 1950', *Journal of Historical Sociology* 5(2): 33 – 235.
- van Warmelo N J (1940) *The Copper Miners of Musina and the Early History of the Zoutpansberg*, Union of South Africa, Department of Native Affairs: Pretoria.
- Wagner R (1980)'Zoutpansberg: The Dynamics of a Hunting Frontier, 1848-67', in S Marks & A Atmore (eds), *Economy and Society in Pre-Industrial South Africa* Longman London
- Walker D (1980) *The Oxford companion to law*, Oxford University Press: Oxford.
- Wallenstein P (2007) *Understanding conflict resolution*, Sage Publications: London.
- Waters H (1996) 'The future of surveying education in South Africa', *South African Journal of Surveying and Mapping* 23 (6).
- Ware S J (2001) *Alternative Dispute Resolution*, West Group: St Paul, Minnesota.
- Wegerif M, Russell B and Grundling I (2005) *Still Searching for Security: The reality of farm dweller evictions in South Africa*, Nkuzi Development Association: Polokwane & Social Surveys: Johannesburg.
- Wessman R (1908) *The BaVenda of the Speloken (Transvaal): A Contribution towards the Psychology and Folk-lore of African Peoples*, The African World: London.
- Williams G F (1905) *The Diamond Mines of South Africa, Vol. II*. New York.
- Wilson M and Thompson I (1969) *The Oxford History of South Africa, Vol. 1: South Africa to 1870*, Oxford.

Wilson M and. Thompson L M (eds.), (1971) *The Oxford History of South Africa*, 2 vols. (Oxford).

Wolpe H (1972) 'Capitalism and Cheap Labour Power in South Africa; from segregation to apartheid', *Economy and Society* 1 (4): 425 – 56.

Yin R K (1984) *Case study research: Design and methods*, Sage Publishing: Newbury Park, CA.

## LEGISLATION

Agricultural Labour Act 147 of 1993.

*Basic Conditions of Employment Act 3 of 1983.*

Black Administration Act 38 of 1927.

Compensation for Occupational Injuries and Diseases Acts 130 of 1993.

Constitution of the Republic of South Africa, Act 200 of 1993 (Interim Constitution).

Constitution of the Republic of South Africa, Act 108 of 1996 (Final Constitution).

Criminal Procedure Act of 1977.

Development Trust and Land Act of 1936.

Extension of Security of Tenure Act, No. 62 of 1997.

Group Areas Act 36 of 1966.

Industrial Conciliation Amendment Act of 1956.

Interim Protection of Informal Land Rights Act 31 of 1996.

Land Reform (Labour Tenants) Act of 1996.

Labour Relations Act 28 of 1956.

Labour Relations Act 66 of 1995.

Land Restitution and Reform Laws Amendment Act 18 of 1999.

Native Trust and Land Act 18 of 1936.

Occupational Health and Safety Act 181 of 1993.

Prevention of Illegal Squatting Act 52 of 1951.

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

Restitution of Land Rights Act 22 of 1994.

Restitution of Land Rights Amendment Act 48 of 2003.

White Paper on South African Land Policy, Department of Land Affairs, 1997.

The Black Laws Amendment Act of 1963.

The Natives' Land Act of 1913.

The Native Trust and Land Act of 1936

The Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996).

The Black Laws Amendment Act of 1963

Trespass Act of 1959

Unemployment Insurance Act and the 63 of 2001

## Cases

*Brown v. Board of Education (1954 and 1955).*

*Chetty v Naidoo* 1974 (3) SA 13 (A).

*Conradie v Hanekom* LCC 8R/99.

*First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*  
2002 (4) 768 (CC).

*Gartmore Farm (Pty) Ltd v Ndlovu and two others* (Magistrate's court case number  
1135/2000).

*Graham v Rdley* 1931 TPD 476 al 479.

*Magodi v Van Rensburg* (2001) 4 All SA 485 (LCC).

*Nhlabathi v Fick* Case No. LCC 42/02.

*Nkosi and Another v Buhrmann* (1/2000) [2001] ZASCA 98.



*President of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 200 (8) BCLR 786 (CC).

*Residents of Joe Slovo Community, Western Cape* 2009 (9) BCLR 847 (CC).

*Republic of South Africa and others v Grootboom and others* 2000 (11) BCLR 1169 (CC)

*Roe v. Wade (1973)*i.

*S v Makwanyane* 1995 (6) BCLR 665 (CC);

*Tshivhula v Koedoepan Boerdery* 2007 JDR 0222 (LCC).

## **International documents**



*African Charter on Human and People's Rights (1981)*.

*U.N. Declaration of Human Rights, (1948)*.

*International Covenant on Economic, Social and Cultural Rights, (1966)*.

*International Covenant on Civil and Political Rights, (1966)*.

*South African Human Rights Commission (SAHRC), (2004)*.

*National Land Committee (NLC), 1998*.

## **Websites**

*www.anc.org.za/events.php/52nd/National/Conference,% 52<sup>nd</sup>, accessed on the 5<sup>th</sup> December 2011.*

(<http://www.daff.gov.za/docs/statsinfo/Ab2012>).

[www.justice.gov.za/trc/hrvtrans/louistri/phulwana.htm](http://www.justice.gov.za/trc/hrvtrans/louistri/phulwana.htm), accessed on 5<sup>th</sup> December 2011.

Land Claims Court (summaries of judgments), accessed on 5<sup>th</sup> December 2011

[www.law.wits.ac.za/lcc](http://www.law.wits.ac.za/lcc), accessed 16<sup>th</sup> December 2009.

<http://www.vhembe.co.za/>, accessed on the 10<sup>th</sup> of January 2011.

<http://www.fessrilanka.org/pdf/pub/ConflictResolution/cr1.pdf> accessed 16<sup>th</sup> December 2009.

<http://www.e-tools.co.za/newsbrief/1996/news0425>, accessed 17 September 2012.

[mg.co.za/article/1999-03-08](http://mg.co.za/article/1999-03-08), accessed 17 September 2012.

<http://www.workinfo.com/deregisteredtradeunions.htm>, accessed 21 September 2012.

<http://www.nkuzi.org.za/>, accessed 10 October 2012.

[http://land.PWV.gov.za/publications/news/press\\_releasesKEYMES~2.DOC](http://land.PWV.gov.za/publications/news/press_releasesKEYMES~2.DOC) accessed 12 September 2012.

## **News Papers**

City Press of the 17<sup>th</sup> of September 2007.

City Press of the 08<sup>th</sup> of October 2007.

Mail & Guardian 23 January 2009

SAPA of the 13<sup>th</sup> of April 1998.

Landbouweekblad, November, 11, 2005.

## **Radio News**

SABC news 16<sup>th</sup> of April 2007).

*Munghana l'onene* FM 15<sup>th</sup> of June 1998

*Phalaphala FM* 15<sup>th</sup> of June 1998

## **List of informants**



Azwitamisi Johannes Kwinda, dismissed farm employee and occupier: Schuitdrift, Maswiri

Boerdery, Tshipise, 1998

Azwindini Mathavhulula, farm employee and occupier: Levubu, 1998

Carlton Muleya, dismissed farm employee and occupier: Schuitdrift, Maswiri Boerdery,

Tshipise, 1998.

Cecilia Fourie, farm manager: Maswiri Boerdery, Tshipise, 1998

Director-General of Land Affairs, Pretoria, 1999

Elisa Moraba, the late Elias Majoni Nkube's widow: Levubu 1998



Ernest Mahungela, dismissed employee and evictee, Sandfontein Boerdery, Louis Trichardt, 1998 - 2000.

Ester Mudzusi dismissed employee and evictee, Sandfontein Boerdery, Louis Trichardt, 1998 - 2000.

Gert Smit, landowner, Levubu, 1998

Magie Randima, dismissed farm employee and occupier: Schuitdrift, Maswiri Boerdery, Tshipise, 1998

Malakia Mudau, dismissed farm employee and occupier, Schuitdrift, Maswiri Boerdery, Tshipise, 1999

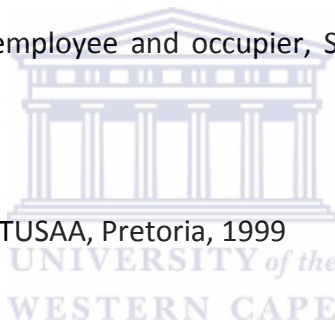
Nakeli Mogale, General Secretary: TUSAA, Pretoria, 1999

Peter Magodi, dismissed employee and evictee, Sandfontein Boerdery, Louis Trichardt, 1998 - 2000

Regional Director of Home Affairs, Northern Province, Polokwane 1998

Richard Matodzi, dismissed farm employee and occupier: Schuitdrift, Maswiri Boerdery, Tshipise, 1998

Thomani Muleya, dismissed farm employee and occupier: Hayoma, Maswiri Boerdery, Tshipise, 1998)



Sampson, Okes and Higgins Inc, Legal representatives of Maswiri dismissed workers and occupiers, Johannesburg, 2000

Mashau Rashavha dismissed employee and evictee, Sandfontein Boerdery, Louis Trichardt, 1998 - 2000

Jane Shilenge, Elim Hospital Social Worker, 1998

Nkumeleni Mudau, farm employee and occupier, Levubu, 1998

Samuel Alifheli Tshivhula, the son of the late Vho-Mukumela Tshivhula and claimant on Corningstone farm, Waterpoort 2007

S Shirinda field notes, Nkuzi field worker and legal officer: Nkuzi Development Association, Elim [1997 – 2007]

