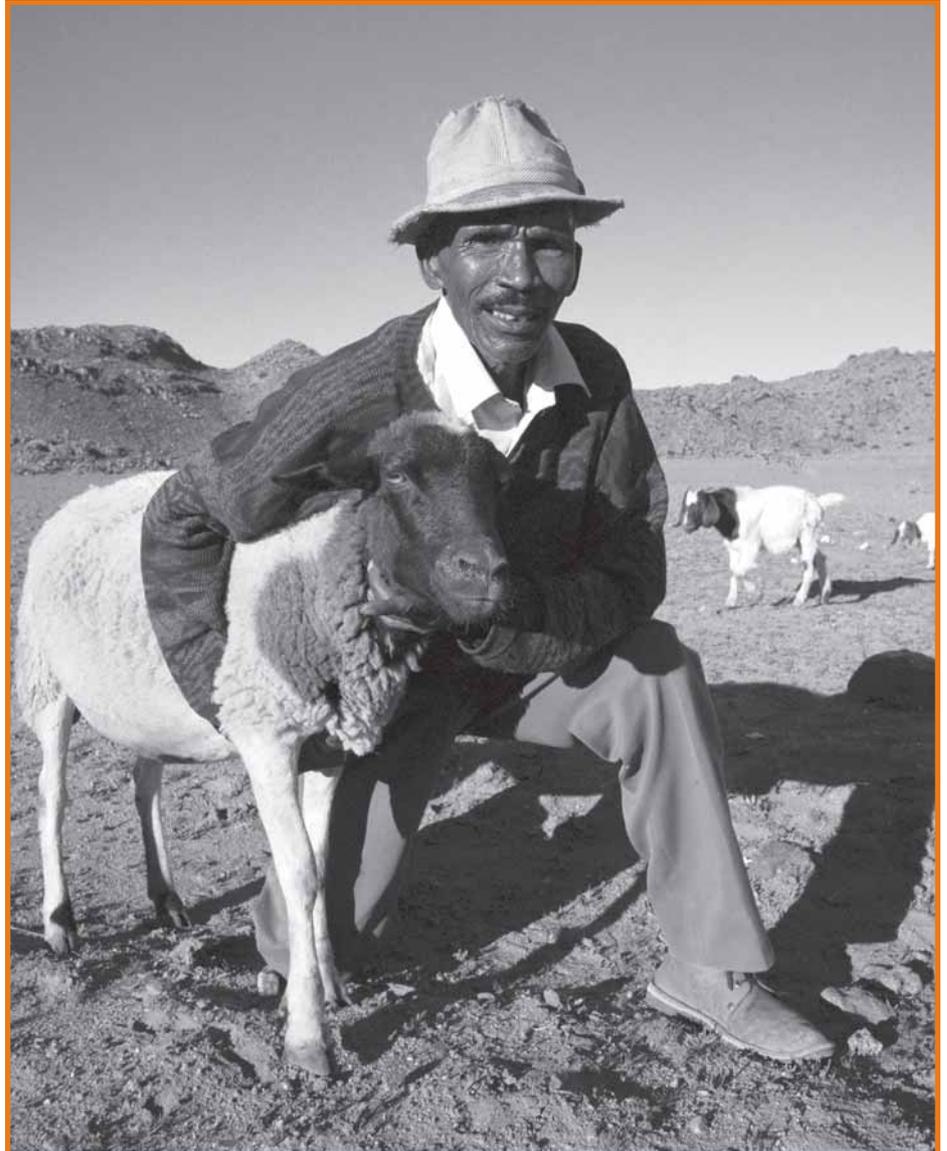


**CHAPTER 6**

**Land rights**



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## KEY WORDS

Access	Able to have, get or use something, eg access to land and housing.
Acquire/Acquisition	To get or gain something with the possibility of keeping it permanently, eg buy land.
Arbitrary deprivation	Taking away someone's property rights in an unfair and unlawful way.
Arbitrate	Decide on a case where the two sides (eg land claimant and land owner) cannot agree.
Breach	Break or not respect, eg breach your rights, breach an agreement.
Declaratory order	A court order stating the correct legal position on an issue.
Deprivation	Taking away, eg deprivation of property.
Equitable	Fair and reasonable.
Equity	Fairness.
Expropriate/ Expropriation	When the State takes away property from an owner for a public purpose (eg to achieve land reform), usually with compensation being paid to the owner.
Indicators	Signs or measures used for understanding and evaluating progress.
Interim order	A temporary court order that needs to be made a final court order at a later date.
Labour tenants	People allowed to live on and develop land in return for their labour.
Occupiers	People living on land belonging to someone else.
Peri-urban	Bordering on or surrounding an urban area.
Precedent	A case decision that other courts have to follow.

Public interest	In the interests of the general public.
Redress	Money or another kind of compensation, eg for past discrimination.
Repeal	Withdraw a law or part of the law.
Restitution	Returning what you had or compensating you for what you lost, eg restitution of land to communities dispossessed under apartheid laws.
Security of tenure/ Tenure security	Giving people legally secure rights in land or housing.
Violate/ Violation	Going against or not respecting your rights.

## 6.1

# Why is it important to understand your land rights?

### CASE STUDY



### ILLEGALLY EVICTED WOMAN RESTORED TO HER HOME

Salome is 23 and lived with her one-year-old baby on a farm near Bela-Bela in Limpopo. Salome was born on the farm, as her father worked for the land owner for over 20 years. After her father's death in 2001, the farm owner gave Salome 12 months' notice under the Extension of Security of Tenure Act (ESTA) to vacate the farm.

However, she did not leave the farm, as she had nowhere to go. On 26 November 2004, the owner broke down the doors to her house and took all her belongings and dumped them on the road outside the farm. Salome contacted a lawyer attached to the Nkuzi Development Association, who visited the site on 2 December and found Salome with her belongings and her baby staying by the side of the road, with nowhere else to go.

Nkuzi brought an urgent application for restoration of tenure rights in the Bela-Bela Magistrate's Court, arguing that the owner had no court order for the eviction and the eviction was therefore illegal. An interim order was granted restoring Salome to the house and ordering the owner to repair the damage to the house and other property. The order was later confirmed by the Court as a final court order.

*Report from Nandu Malumbete, Attorney,  
Nkuzi Development Association, 2005*

*Knowing and understanding your land rights will allow you and your community to take steps to advance and protect these rights.*

## 6.2

# History and current context

### 6.2.1 The impact of apartheid

During apartheid, laws such as the *Natives Land Act 27 of 1913* and the *Native Trust and Land Act 18 of 1936* restricted the African population to 13% of the total land area of South Africa. Overcrowded reserves were the only area where Africans could lawfully own land. The dispossession of land forced successful black farmers to seek employment as farm labourers, thus converting them into insecure land occupiers and tenants.

For many black South Africans, forced removals meant that people were driven from their homes, loaded onto trucks and transported to relocation sites. Their properties were expropriated without compensation and bulldozers demolished their houses. Influx control laws also prevented Africans from getting permanent land rights in urban areas.

The *Group Areas Act 36 of 1950* allocated certain areas to specific race groups. For example, this meant that a black person could not own land in

Camps Bay because this land was in a 'white area'. Under this law, many black people were forcibly removed from their homes, and resettled in underdeveloped and underserved areas.

The legacy of decades of dispossession and legal discrimination lives on into the democratic era with very limited access to land by black people, lack of livelihood opportunities and the concentration of poverty in rural areas, as the statistics below illustrate.

### CASE STUDY



### DISTRICT SIX

District Six was home to many people of colour in Cape Town. Many years of living there had made it a cultural symbol for people. It was proclaimed a group area for white people in 1966. When this happened, people's homes were bulldozed, and the community's livelihood and culture destroyed. Thousands of residents were forcibly removed to barren areas of the Cape Flats.

### EXAMPLES



### LAND AND POVERTY IN SOUTH AFRICA

- *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.*
- *Around 57% of South Africans were living below the income poverty line in 2001, a figure unchanged since 1994.*
- *Poverty is heavily concentrated in the rural areas – the poorest provinces are Limpopo and Eastern Cape, with 77% and 72% of their populations living below the income poverty line.*
- *Approximately 16 million people live in the communal areas of the old 'homelands', and between 3 and 5 million live as tenants on commercial farms.*

*Human Sciences Research Council, 2004, and R. Hall, 2004*

For information on changes to the law through the Customary Marriages Act of 1998, see page 221.

Most rural women in South Africa are agricultural producers, cultivating mainly subsistence crops. Apartheid policies forced many women to take over the running of rural property when their husbands and sons were forced into wage labour on the mines and in the cities. Women worked on agricultural production in addition to being heads of households, caring for children and maintaining the household. Customary laws also prevented women from owning land. For many years, a woman was not able to get effective land rights without the permission of her husband or guardian.

## 6.2.2 Current barriers to land rights

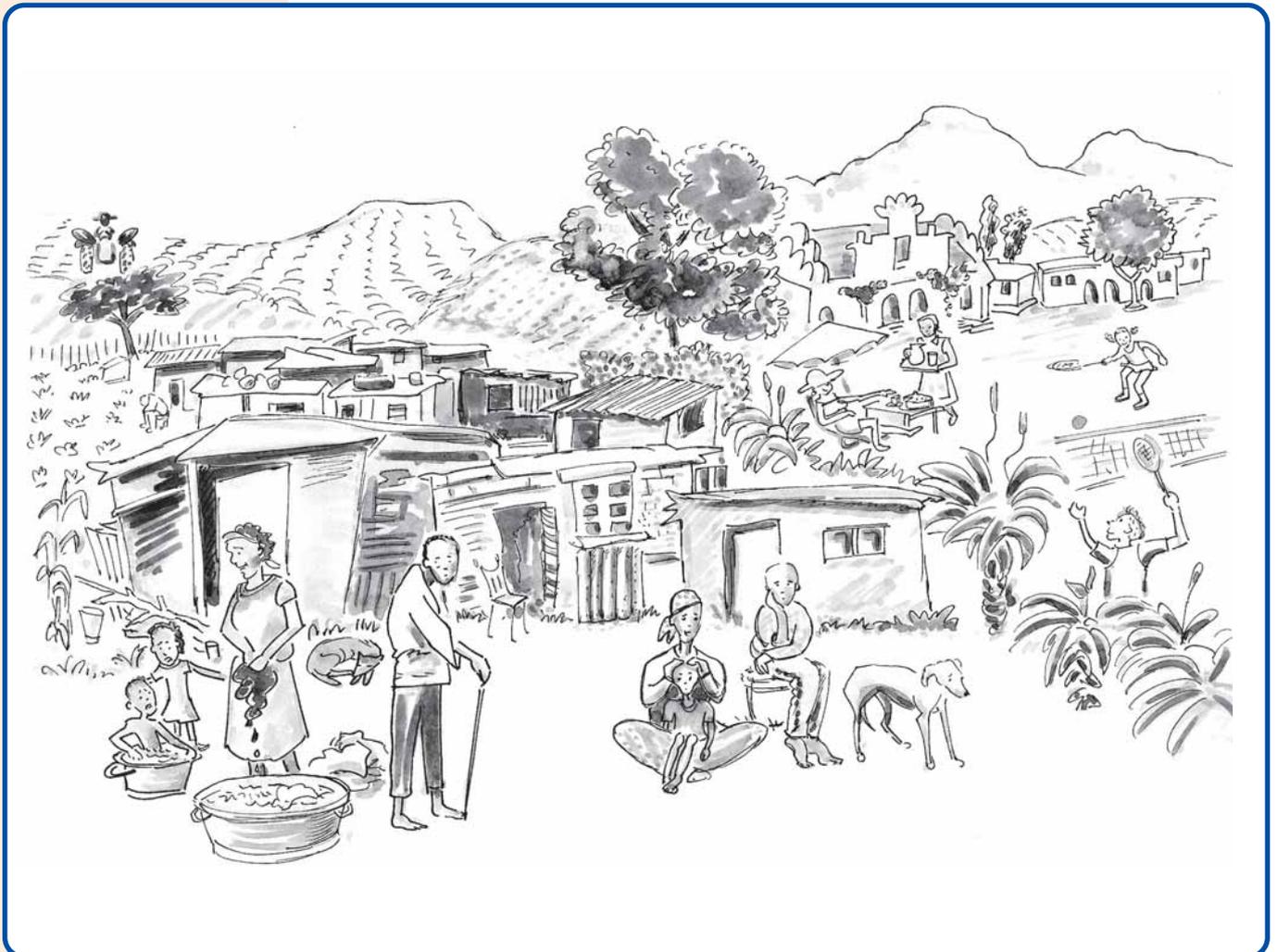
### Access to land is not enough

Since 1994, there has been a growing awareness, both within government and among landless people, that access to land alone cannot provide a way out of poverty. For access and control over land to be productive and sustainable, it must be linked to a range of other services and infrastructure, such as affordable credit, training and access to markets.

### Apartheid policies

During the apartheid years, the main approach to land tenure was that the land rights of black people were administered on their behalf by various 'trusts' and State arrangements. There was a range of statutory land tenure systems allowing black people to hold, occupy and use, but not own land.

These rights were not registered under the central deeds registration system. This has created a huge problem, since most long-term occupiers of rural land in the old 'homelands' are not able to establish a clear legal right to the land they occupy. This has left millions of people, particularly the rural poor and women, in a vulnerable position.



## **Problems with restitution**

To date, the restitution process has not lived up to its promise of returning land and restoring dignity and livelihoods to the millions of people dispossessed under colonialism and apartheid. Of approximately 79 000 claims brought under the *Restitution of Land Rights Act 22 of 1994*, the great majority has been settled by cash compensation, without any return of land. Approximately 920 000 hectares of land had been restored to around 180 000 beneficiaries by the end of 2005, but many of these people have struggled to make productive use of the land after many decades of displacement.

Of the remaining claims, a large number are community claims in rural areas, mainly in Limpopo, Mpumalanga and KwaZulu-Natal, involving large areas of high potential agricultural land. It remains to be seen whether this can make a real difference to the lives of claimants.

## **Limited benefits from redistribution**

The redistribution programme has been dominated by the transfer of farms to groups of beneficiaries, usually registered as a Trust or Communal Property Association (CPA). Throughout the country, these groups have suffered from a lack of cohesion. Poorly designed and inappropriate business plans, together with lack of access to support services, have meant that most redistribution projects struggle to deliver benefits to their members, and some projects have collapsed.

## **Lack of security for farm housing**

Disputes between farm dwellers and owners often lead to eviction, loss of livelihoods and even violence:

“The Mazibukos were thrown out of their kraal in mid-winter after their son, who tended livestock for the farmer who owned the land, was accused of stealing a cow. Their son claimed that, despite his protests that the animal had strayed, he was assaulted by one of the farmer’s security guards as punishment. When he refused to return to work, the family was told to go, because the money for their rent and grazing came from his payment.” *Schadeberg, 2005, 91*

## **Challenges for women**

Women as producers and owners of small-scale enterprises face a number of barriers in gaining ownership or use of land and other natural resources. Most rural women do not have access to land in their own names – they usually get access through a male relative. Many women also experience problems in accessing credit, appropriate technology and skills training.

## **Challenges for people living with disabilities**

People living with disabilities also experience many difficulties in accessing land, as they are often considered to be unable to use the land effectively:

“When trying to access land as a disabled adult, we are usually told that our father, or a child who has reached the age of 21, or other senior member needs to sign for it – in other words, the land will belong to them.”

*Liebenberg and Pillay, 1998, 9.*

## 6.3

# Your land rights in the Constitution

Section 25 of the *Constitution (Act 108 of 1996)* protects the right to property, including land rights, and also makes the State implement a variety of land reforms. This section has been the subject of much controversy. Some have argued that it protects existing property rights and entrenches the current extreme racial imbalance of property rights in South Africa.

The right to property was one of the most hotly contested issues in the period before the adoption of the Constitution:

- Trade unions, non-governmental organisations (NGOs) and progressive research institutions all raised serious objections to including the right to property in the Constitution. They were concerned that a property clause in the Constitution would frustrate land and related reforms.
- The National Party, the Democratic Party, white commercial farmers' organisations, and big business strongly favoured including the right to property because property rights were fundamental to a market economy.

Eventually, a property clause was included in the Constitution, but it was worded to try and lessen its impact on land and related reforms. Today, many organisations believe that the property clause places serious limits on the Government's capacity to deliver on the land reform programme. Others view it as a potentially powerful basis for land reform that has not been adequately reflected in government policies to date.

We will now go through the different elements of section 25, the property rights clause.

### 6.3.1 Deprivation of property

Section 25(1) of the Constitution says that property rights may not be interfered with unless it is done under a "law of general application" – in other words, the law does not target named or easily identifiable individuals or groups.

Section 25(1) also prohibits the arbitrary deprivation of property.

#### EXAMPLE



#### A LAW THAT IS NOT OF GENERAL APPLICATION

*Imagine a law that says that State officials may enter and inspect the land of Leslie Davids and Pumi Kumalo at any time to see if there are any fire hazards on the land. As this law specifically names Leslie and Pumi, it is not a law of general application and therefore cannot legally be used to interfere with the enjoyment of their property rights.*

## EXAMPLE



## ARBITRARY DEPRIVATION

*A long-standing industrial area is suddenly zoned for residential use for no good reason. This results in a number of people losing their means of livelihood. We can argue that this is an arbitrary deprivation of property.*

### 6.3.2 Expropriation of property

Expropriation means taking away a person's ownership of property. Under section 25(2) of the Constitution:

- Expropriation also needs a "law of general application".
- Expropriation can only be done for a public purpose or in the public interest.
- The *public interest* "includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources" (section 25(4)).
- When your land is expropriated, you must be compensated. The amount (how much), the time (when) and manner (how) of compensation can either be agreed to by those affected, or decided and confirmed by a court order.

### 6.3.3 Just and equitable compensation

Section 25(3) of the Constitution gives some guidance in working out how much compensation someone, whose land has been expropriated, should be paid. Most importantly, compensation must be "just and equitable, reflecting a fair balance between the public interest and the interests of those affected".

In deciding on the amount of compensation, a court must consider all relevant circumstances, including:

- The current use of the property.
- The history of ownership and use of the property.
- The market value of the property.
- The amount of State investment in the land.
- The purpose of the expropriation.

Some of these factors are new and different from many other legal systems, and from past practice in South Africa, where compensation is calculated using the market value of the property. Using only the market value makes land reform expensive for the Government, and may be a barrier to effective land redistribution.

## 6.3.4 Equitable access to land

Section 25(5) of the Constitution places a duty on the State to:

“Take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”

This does not mean that the State must provide everyone with free land, and is not a ‘right to land’. But it does mean that the State must take steps and create conditions that make it possible for disadvantaged individuals and groups to gain access to land. Thus the State must remove apartheid laws that did not allow black people to have access to land.

The State must also take positive steps to assist disadvantaged people to get land, for example, the various grants provided by the Department of Land Affairs under its redistribution and tenure reform programmes.

For more details on land redistribution grants, see page 209.

## 6.3.5 Security of tenure

Under sections 25(6) and 25(9) of the Constitution, Parliament must make laws that promote security of tenure, or provide some form of redress for people or communities whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices.

These laws have been widely ignored and many farm dwellers continue to face eviction. A recent study by Nkuzi Development Association and Social Surveys found that 2.3 million people were displaced from farms since 1994. Of these, 942 000 had been the victims of evictions (*Wegerif, Russell and Grundling, 2005*).

### CASE STUDY



### HOW LAND OWNERS REMOVE RIGHTFUL OCCUPIERS

Between 2001 and 2003, the South African Human Rights Commission (SAHRC) compiled a report on conditions facing farm dwellers in South Africa. In spite of the *Extension of Security of Tenure Act 62 of 1997* (ESTA), the SAHRC found widespread avoidance of the law by land owners, a lack of enforcement by police and intimidation of farm dwellers:

“Typical examples provided to the Inquiry of how land owners attempt to circumvent the provisions of ESTA are to:

- Intimidate and victimise occupiers in order to force them to leave the land.
- Cut the electricity supply in order to make the conditions of residence intolerable.
- Make workers sign agreements at the Commission for Conciliation, Mediation and Arbitration (CCMA) stating that they will leave the farm.”

SAHRC, 2003, 60



### **6.3.6 Restitution of property or equitable redress**

Section 25(7) of the Constitution says that a person or community who lost their property after 19 June 1913 as a result of past racially discriminatory laws or practices, has a right to restitution of that property or to equitable redress (fair and reasonable compensation).

For information on the Restitution of Land Rights Act, see page 211.

### **6.3.7 Taking steps to redress the results of past discrimination**

Section 25(8) was put into the property rights clause of the Constitution to try and ensure that private property rights did not frustrate land reform. It says that steps taken by the State to achieve land, water and similar reforms to redress the results of past racial discrimination do not violate the property clause if they are:

“Reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”

## 6.4

# Guides to interpreting your land rights

### 6.4.1 Decisions of the courts

For more cases interpreting land rights, see page 217 onwards.

In South Africa, decisions of the courts, especially the Constitutional Court and the Land Claims Court, are important sources for interpreting your land rights. They tell us what the content and limits of these rights are.

#### COURT CASE



#### PROPERTY RIGHTS AND LAND RESTITUTION

In the 1996 case of *Transvaal Agricultural Union v The Minister of Land Affairs*, the Constitutional Court dealt with a constitutional challenge under the *interim Constitution (Act 200 of 1993)* to the Restitution of Land Rights Act of 1994. The agricultural union challenged some sections of the Act that they argued went against its members' right to property and free economic activity protected in the Constitution.

The Constitutional Court decided:

- The effect of these provisions was that the existing rights of ownership did not have priority over claims for restitution.
- Instead, these interests had to be balanced against each other, and resolved in a way that is just and equitable.

Apart from saying that interests have to be balanced, the decision in this case doesn't resolve the issue of the opposing nature of the relationship between commercial agricultural farmers and land claimants.

### 6.4.2 International law

The right to property in international human rights law has been a very controversial issue. While many Western countries argued for a strong protection of property, socialist and developing countries emphasised the social function of property. This allows for interference with property rights in the name of the public interest, for example, for land reform and environmental reasons.

The next table shows the different aspects of land rights that are protected by a selection of international documents and bodies protecting land, property and development rights.

For more detail on international law, see Chapter 3.

International instrument	Protection given to land and property rights
United Nations (UN) Declaration of Human Rights, 1948	<ul style="list-style-type: none"> <li>• Provides for a right to own property.</li> <li>• Prohibits arbitrary deprivation of property, but does not provide a compensation standard.</li> </ul>
Convention on the Elimination of All Forms of Discrimination Against Women CEDAW (1979)	<ul style="list-style-type: none"> <li>• Protects rural women's right to participate in and benefit from rural development and implementing development planning.</li> <li>• Protects rural women's right to have access to agricultural credit, loans and marketing facilities.</li> <li>• Protects equal treatment in land and agrarian reform and in land settlement schemes.</li> </ul>
The Social Policy Convention (International Labour Organisation – ILO), 1962	<ul style="list-style-type: none"> <li>• Aims to improve the standard of living for agricultural producers.</li> <li>• Supervises land tenancy arrangements.</li> </ul>
Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO), 1989	<ul style="list-style-type: none"> <li>• Recognises the special relationship between indigenous people and their land.</li> <li>• Calls for adopting special measures on their behalf.</li> <li>• Safeguards against arbitrary removal of indigenous people from their traditional land with procedural guarantees.</li> <li>• Calls for respect for customary procedures.</li> </ul>
Declaration on the Right to Development, 1986	<ul style="list-style-type: none"> <li>• Emphasises equity and equality of opportunity in the development process.</li> </ul>
UN Declaration on Social Progress and Development, 1969	<ul style="list-style-type: none"> <li>• Recognises the social function of property, including land.</li> <li>• Calls for forms of land ownership that ensure equal rights to property for all.</li> </ul>
The Peasants' Charter (UN Food and Agricultural Organisation)	<ul style="list-style-type: none"> <li>• Advocates land tenure reform and land redistribution for the benefit of those who are landless and small farmers.</li> <li>• Notes the importance of development strategies as a means to redistribute power.</li> <li>• Regulates changes in customary tenure.</li> <li>• Calls for community participation in and control over natural resources.</li> </ul>
African Charter on Human and Peoples' Rights, 1981	<ul style="list-style-type: none"> <li>• Guarantees the right to property.</li> <li>• Says that public need and general community interests may justify the State interfering with people's property rights.</li> <li>• Protects the rights of dispossessed people to lawful recovery of their property and adequate compensation.</li> </ul>
American Convention on Human Rights, 1969	<ul style="list-style-type: none"> <li>• Protects the right to use and enjoy property.</li> <li>• Prohibits arbitrary deprivation of property, unless there is payment of just compensation.</li> </ul>

## 6.5

# Policies, legislation and programmes to implement your land rights

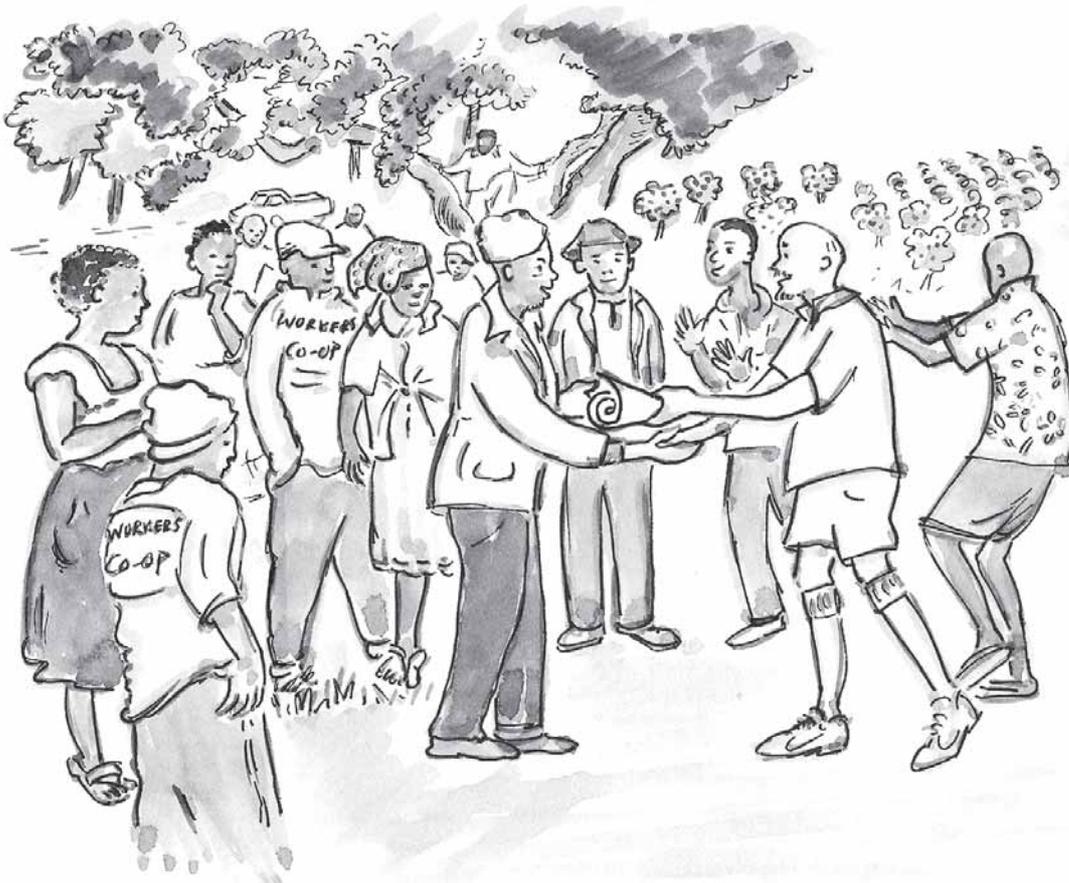
### 6.5.1 Policies and programmes

#### a) National land policy

Details of the Government's land reform programme are set out in the *White Paper on South African Land Policy, 1997*.

The land reform programme has three sub-programmes:

- *Land restitution* – returning land or compensating victims for land rights lost since 19 June 1913 because of racially discriminatory laws or practices.
- *Land redistribution* – achieving a fairer distribution of land in South Africa, for example, through making it possible for poor and disadvantaged people to buy land with the help of a Settlement/Land Acquisition Grant.
- *Land tenure reform* – bringing all people occupying land under a legally secure system of landholding. The programme provides for secure forms of land tenure, helps to resolve tenure disputes, and makes grants and subsidies accessible to provide people with secure tenure.



## b) Land redistribution grants

Up to 2000, 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. This could be used towards buying land, usually as part of a group.

Since 2001, the Land Redistribution for Agricultural Development (LRAD) Grant has largely replaced the Settlement/Land Acquisition Grant. The new grant has no income limit and provides grants of between R20 000 and R100 000 to individuals, based on their ability to make a contribution of their own.

According to the Department of Land Affairs, the objectives of the LRAD are to:

- Increase access to agricultural land by black people (Africans, Coloureds, and Indians) and to contribute to the redistribution of approximately 30% of the country's commercial agricultural land (previously 'white commercial farm land') over the duration of the programme.
- Contribute to relieving the congestion in overcrowded old 'homeland' areas.
- Improve nutrition and incomes of the rural poor who want to farm on any scale.
- Overcome the legacy of past racial and gender discrimination in ownership of farm land.
- Facilitate structural change over the long-term by assisting black people who want to establish small and medium-sized farms.
- Stimulate growth from agriculture.
- Create stronger linkages between farm and off-farm income-generating activities.
- Expand opportunities for young people who stay in rural areas.
- Empower beneficiaries to improve their economic and social well being, and to enable people currently accessing agricultural land in communal areas to make better productive use of their land.
- Promote environmental sustainability of land and other natural resources.

A separate Grant for Municipal Commonage is available to municipalities wishing to acquire land that can be allocated for use as grazing or garden allotments to local people unable to acquire land of their own.

### GUIDELINES



### HOW TO APPLY FOR THE GRANTS

- Groups or individuals wishing to access grants to acquire land or upgrade their land tenure can apply for grants at the provincial offices of the Department of Land Affairs, now known as Provincial Land Reform Offices (PLROs). You can also apply at district offices in most District Municipalities.
- Local Municipalities may also apply to the Department of Land Affairs for the Grant for Municipal Commonage, either to acquire new commonage or to 'buy back' commonage that has been leased out on long leases to commercial farmers or for non-agricultural uses. This grant is not available for individuals.

Farm Equity Schemes allow farm workers to buy a share in a farming enterprise, without necessarily becoming land owners. Farm Equity Schemes are largely implemented by using the LRAD.

## 6.5.2 Key land legislation

### a) The Interim Protection of Informal Land Rights Act

#### EXAMPLE



#### PROTECTING INFORMAL LAND RIGHTS

Communities have been powerless to stop development projects taking place on communal grazing land that threatens to deprive them of their 'informal' rights because they have no clear legal right to the land. The Interim Protection of Informal Land Rights Act now ensures that the process of deprivation happens only with the consent of the holder of the informal land rights.

The *Interim Protection of Informal Land Rights Act 31 of 1996* includes an interim (temporary) method to protect people with insecure tenure from losing their rights to and interests in land, while waiting for long-term tenure reform. The Act gives basic protection when "informal rights to land" are threatened.

The main point of this Act is to ensure that there is legal recognition and protection of the various kinds of land rights existing in South Africa. However, inequality remains because the constitutional protection of existing property rights is stronger than this law protecting informal rights.

The Act is likely to remain in force for some years while the *Communal Land Rights Act 11 of 2004* is being implemented.

### b) The Communal Land Rights Act

The Communal Land Rights Act was signed into law in July 2004, but by August 2006 the implementation of the Act had not yet begun. The Act aims to give

secure land tenure rights to communities and people who occupy and use land previously reserved for occupation by African people. Most of this land is registered in the name of the State or is held in trust by the Minister of Land Affairs or the Ingonyama Trust on behalf of particular communities.

The Act allows the setting up of these structures:

- Communities may

#### COURT CASE



#### CHALLENGING THE COMMUNITY LAND RIGHTS ACT

In April 2006, four rural communities – two in Mpumalanga and one each in Limpopo and North West – were assisted by Webber Wentzel Bowers Attorneys and the Legal Resources Centre (LRC) to launch a constitutional challenge to stop implementation of the Communal Land Rights Act. The case is expected to be heard first in the High Court (Transvaal Provincial Division) late in 2006.

The communities argued that the Act:

- Gives wide new powers to traditional leaders and the Minister of Land Affairs.
- Will undermine women's rights.
- Will threaten the security of tenure in all communal land.
- Imposes a 'fourth tier of government' on previously marginalised 'homeland' citizens (in addition to the national, provincial and local levels of government).

establish a land administration committee to manage and administer communal land on behalf of a community as the owner of the land. Where a community has a recognised traditional council, the powers and duties of a land administration committee of the community may be exercised and performed by this council.

- The Minister may set up land rights boards to advise on land issues and to supervise the workings of the land administration committees. These Boards will be made up of appointees of the Minister, nominees of the Provincial Houses of Traditional Leaders and representatives of communities.

Land and gender activists, and many affected communities, have strongly criticised the Act. They say that it strengthens undemocratic and patriarchal practices in the name of 'tradition', and grants very wide powers to unelected traditional leaders.

### c) **The Restitution of Land Rights Act**

The Restitution of Land Rights Act of 1994 deals with the restitution of land rights to those people who lost their land after 19 June 1913 under racially-based policies. You could get restitution for:

- Loss of possession leading to landlessness, or
- No or poor compensation for the value of the lost land.

This Act also established the legal framework and structures for restitution. These include the Commission for Restitution of Land Rights and the Land Claims Court. The deadline for submitting restitution claims to the Commission was 31 December 1998, and the current deadline set by government for settling all claims is 31 March 2008.

In 2003, the Restitution of Land Rights Act was amended to enable the Minister of Land Affairs to expropriate property without a court order for restitution or other land reform purposes.

### d) **The Extension of Security of Tenure Act**

ESTA aims to give security of tenure for vulnerable occupiers of rural and peri-urban land, and to allow for the acquisition of land by vulnerable occupiers. This Act:

- Protects occupiers against unfair evictions by the land owner.
- Provides for legal evictions under certain circumstances.
- Sets out the rights and duties of owners and occupiers.
- Protects people living on land belonging to someone else by giving them a basic level of *tenure security*. This means that the occupiers have the right to continue living on and using this land, including the right to graze cattle and draw water. The land owner cannot cancel or change the occupiers' rights without their consent, unless there is good reason, and the occupiers have had a chance to answer complaints against them.
- Gives special protection to occupiers who have lived on the land for 10 years, and who are 60 or older, or who are living with a disability.



For more on ESTA and housing, see Chapter 7 on page 245.

In 2001, ESTA was amended to specifically allow occupiers to bury family members on the land where they lived, a right that was previously much contested by land owners. Under the new section 6(2)(dA), an ESTA occupier was given the right:

“To bury a deceased member of his or her family who, at the time of that person’s death, was residing on the land in which the occupier is residing, in accordance with their religion or cultural belief, if an established practice in respect of the land exists.”

## GUIDELINES



## EVICCTIONS

ESTA sets out the process a landowner must follow before evicting an occupier:

1. Termination (ending) of the right of residence of an occupier can arise from the employment agreement when an occupier resigns or is dismissed in a fair way under the *Labour Relations Act 66 of 1995*.
2. Two months’ notice must be given to the occupier, the municipality and the Department of Land Affairs.
3. The court may order an eviction to be stopped, occupiers to be allowed back in their homes, and the payment of damages.
4. The court’s decision must be based on justice and equity, and take all relevant circumstances into account, for example:
  - The period of residence of the occupier, or
  - The availability of suitable alternative accommodation for people being evicted.

### COURT CASE



### WOMEN AS INDEPENDENT OCCUPIERS

In the 1999 case of *Conradie v Hanekom* (Conradie case), 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. According to the Land Claims Court, 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 stay in the house to fulfil his wife's right to family life.

For many years, women's housing rights have been tied to their male partner's contract. The Conradie case challenges the discriminatory housing practice on farms where, if the man is evicted, the woman is automatically evicted. This is an important case for securing housing rights for women on farms.

### COURT CASE



### RIGHTS OF PROPERTY OWNERS, RIGHTS OF OCCUPIERS AND DUTIES OF THE STATE

In the 2004 case of *President of the Republic of South Africa, Minister of Agriculture and Land Affairs v Modderklip Boerdery (Pty) Ltd* (Modderklip case), the Constitutional Court dealt with a case involving a land owner trying to evict a group of 40 000 people occupying its property at Benoni.

Modderklip Boerdery got an eviction order from the Pretoria High Court in 1999 but, when they found this impossible to implement, they once again went to the High Court. The High Court ordered the State to present a comprehensive plan to the Court indicating the steps it would take to implement the eviction order. The State then appealed to the Supreme Court of Appeal (SCA).

The SCA largely agreed with the judgment of the Pretoria High Court, and also decided:

- The State had to pay compensation to Modderklip for the loss caused by the unlawful occupation.
- The occupiers had a right to remain on the land until alternative accommodation was made available to them by the State.

The State appealed against the SCA judgment to the Constitutional Court. Unlike the SCA, the Constitutional Court did not engage with arguments on whether the section 25(1) rights of Modderklip had been violated. Rather, the Court focused on the right of the property owner to access the courts in section 34 of the Constitution, read with the constitutional principle of the 'rule of law'.

The Constitutional Court decided:

- The State should compensate Modderklip for the unlawful occupation of its property – this would ensure that the occupiers would continue to have accommodation until suitable alternatives were found.
- The State has the constitutional duty of progressively realising the rights of access to adequate housing or land for the homeless.

In deciding what should happen to the occupiers, the Court considered:

- The aims of legislation covering evictions.
- The principle that a court should be reluctant to grant an eviction order against relatively settled occupiers unless it is satisfied that a reasonable alternative is available.

For more on the Grootboom case, see Chapter 1 on page 31.

The Constitutional Court did not define the minimum rights for landless people in getting access to adequate housing. But the Court made it clear that the State cannot use broad excuses about housing backlogs, resource constraints or the threat of land invasions to justify not fulfilling its socio-economic rights duties to vulnerable people. The Court thus confirmed the protection extended to occupiers and the duty to treat all people humanely in its judgment in the Grootboom case (*Government of the Republic of South Africa and Others v Grootboom and Others*).

### **e) The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act**

The *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998* (PIE):

- Prohibits unlawful evictions and sets out fair procedures for the eviction of “unlawful occupiers”.
- Recognises that special consideration needs to be given to the rights of the elderly, children, people living with disabilities and households headed by women.

For more on PIE and housing, see Chapter 7 on page 247.

### **f) The Communal Property Associations Act**

The *Communal Property Associations Act 28 of 1996*:

- Recognises that many African people hold land through communal systems.
- Establishes a new kind of legal body, a communal property association (CPA), for members of disadvantaged and poor communities to jointly acquire, hold and manage property under a written constitution.

The community has to develop a constitution that includes:

- Democratic processes.
- Equal representation of men and women.
- Ways of ensuring transparency, accountability and consultation.
- How the resources will be managed.

Community education and training is needed to make the rules and process for developing a CPA more accessible, especially when there is a high level of illiteracy in the community.

### **g) The Land Reform (Labour Tenants) Act**

The *Land Reform (Labour Tenants) Act 3 of 1996* protects labour tenants and their families from eviction, and promotes their acquisition of land rights.

The Act defines a “labour tenant” as:

- A person who is residing on or has the right to reside on a farm.
- A person who has or had the right to use cropping and grazing land on this farm (or another farm of the owner), and in return works or has worked for the owner or lessee.

## EXAMPLES



## POSSIBLE EVICTIONS

- When the labour tenant has broken the employment contract.
- When the labour tenant is guilty of misconduct.
- When the owner has specific needs for the land.

- A person whose parent or grandparent resided or resides on a farm, and had the use of cropping or grazing land on this farm (or another farm of the owner or lessee), and in return works or worked for the owner or lessee of the other farm.
- A person appointed as successor to a labour tenant under this Act.

According to the Act, a farm worker is not a labour tenant.

What the Act says:

- Labour tenants can only be evicted in limited circumstances, and the eviction must be “just and equitable”.
- If the court orders an eviction, it can order the owner to pay just and equitable compensation, or allow the labour tenant to tend a crop until it is ripe to reap and remove.
- Only the Land Claims Court can order an eviction of a labour tenant.
- Labour tenants can buy land (either land that they are living on or alternative land).
- Labour tenants can get subsidies to buy land.

## COURT CASE



## PROTECTING THE RIGHTS OF LABOUR TENANTS

In the 1996 case of *Zulu and Others v Van Rensburg and Others*, the Land Claims Court decided that the impounding of the labour tenants’ livestock was the same as an eviction, even though the tenants were not physically evicted. This was based on the definition of “labour tenant” in the Act – this made it clear that the right to use the land for grazing or cropping was part of the labour tenant’s right to occupy the land.

## h) The Development Facilitation Act

The *Development Facilitation Act 67 of 1995* introduced steps to facilitate and speed up the implementation of land projects, especially serviced land for low-income housing.

## i) The Transformation of Certain Rural Areas Act

The *Transformation of Certain Rural Areas Act 94 of 1998* has the aim of reforming land tenure in the 23 ‘Act 9’ areas (previously ‘Coloured Rural Areas’). These are in the Northern, Western and Eastern Cape provinces, and in the Free State.

The Act provides for the transfer of land that is currently held in trust by the Minister of Agriculture and Land Affairs to a municipality, a CPA or other institution, and for the survey and registration of individual holdings.

The implementation of the Act was at an advanced stage in the six Act 9 areas of Namaqualand by the end of 2005, and was set to proceed in the remaining areas during 2006. This is the first large-scale reform of communal

tenure in South Africa since 1994, and is likely to provide many important lessons for implementing the Communal Land Rights Act.

### 6.5.3 Land institutions

#### a) **The Commission on Restitution of Land Rights**

The Commission on Restitution of Land Rights (Restitution Commission) was established in 1995 under the Restitution of Land Rights Act, with a national office under a Chief Land Claims Commissioner and seven regional offices under Regional Land Claims Commissioners. The Restitution Commission was originally an independent body, but now forms part of the Department of Land Affairs.

The Restitution Commission is responsible for receiving and investigating claims for restitution of the land rights of individuals or communities who lost their land as a result of apartheid policies, and for settling these claims through:

- Restoring the land, or
- Providing alternative land, or
- Paying compensation.

In 1999, the Restitution of Land Rights Act was amended:

- Where agreement could be reached between the claimants, the Restitution Commission and other affected parties (eg land owners), claims no longer had to be referred to the Land Claims Court.
- The claim could be settled by an “administrative route”, leading to a section 42(d) notice by the Minister of Land Affairs.

The introduction of the administrative route was an important step in accelerating the settlement of land claims.

#### b) **The Land Claims Court**

The Land Claims Court has the task of confirming agreements that are referred to it by the Restitution Commission and arbitrating in cases where no agreement has been reached. The Court’s main powers are to decide on restitution, compensation and rightful ownership.

The Land Claims Court can also hear eviction cases under ESTA and the Land Reform (Labour Tenants) Act, and review land-related cases referred to it from the Magistrates’ Courts.

#### c) **The Land and Agricultural Bank**

The Land and Agricultural Bank (better known as ‘the Land Bank’) is a parastatal body that provides mortgage finance to acquire land and finance for agriculture-related activities. The bank is being transformed to serve the needs of people targeted in the land reform programme, through providing grants on behalf of the Department of Land Affairs and small loans to new farmers.

For contact details of the Commission on Restitution of Land Rights, the Land Claims Court and the Department of Land Affairs, see the back cover pocket.

## 6.6

# Protecting and advancing your land rights

### 6.6.1 The right to restitution

Since 1999, most land claims have been settled by negotiation, rather than by the courts. Nevertheless, the restitution process continues to be shaped by key judgments of the Land Claims Court. An important judgment was handed down in the case of the Kranspoort Community, where the Court ruled on:

- The concept of ‘beneficial occupation’.
- The definition of “community”.
- Providing for the upgrading of rights to freehold title.

#### COURT CASE



#### COMMUNITY LAND RIGHTS

In the 1999 Land Claims Court case of *Kranspoort Community: in re Farm Kranspoort 48 LS* (Kranspoort case), the Kranspoort community made a claim that it was dispossessed of land under a racially discriminatory law or practice. The community lived on a Dutch Reformed Church mission station at the foot of the Soutpansberg in Limpopo from 1890 until they were removed between 1955 and 1964. The community applied for the restitution of their rights under the Restitution of Land Rights Act.

The Dutch Reformed Church of Transvaal opposed the claim. The Church claimed:

- There was no “community” either at the time of the removals or at the time the claim was lodged.
- Even if a community existed, it did not have any rights in the land.
- Even if the community proved its claim, they should not receive restoration of the farm, but rather some other award such as compensation.
- It was not feasible to restore the land because the community could not viably re-establish themselves there.
- The area was environmentally sensitive and a restoration order would be bad for the environment.

The Land Claims Court decided:

- The evidence proved that there was a “community” at the time of the removals and at the time the claim was lodged.
- The community had beneficial occupation of the farm for at least 10 years before the removals.
- The removals were as a result of a racially discriminatory law or practice, as the Group Areas Act was used to remove the people and the removals were carried out in a racist manner.

More...

Kranspoort case continued

- The group had not received “compensation”, because any compensation given was not “just and equitable”, as directed by the Act.
- Restoring the land to the community would be just and equitable, and allowed upgrading of the beneficial occupation to full ownership.

The Court imposed conditions that the community had to fulfil before there could be restoration of the land. These were:

- The formation by the community of a CPA to hold the property.
- The approval by the Court of a draft constitution for the CPA.
- Confirmation by the CPA that it wants restoration of the land and not some other form of compensation.
- The formulation of plans for the development and use of the property.

The community had to meet these conditions within a fixed time limit, or the court order would fall away. Then the community would be able to get a different type of compensation.

## 6.6.2 The right to security of tenure – challenging unfair evictions

Even with the introduction of ESTA and the land reform programme, farm dwellers continue to face the threat of eviction. Farm dwellers throughout the country, along with the NGOs and legal advice centres that support them, have reported enormous difficulties facing farm dwellers attempting to exercise their rights. Common complaints include:

- Intimidation and disregard for the law by land owners.
- Lack of assistance from police and prosecutors.
- Lack of responsiveness by officials of the Department of Land Affairs.

### COURT CASE



### RIGHT TO LEGAL REPRESENTATION

In the 2001 case of *Nkuzi Development Association v the Government of the Republic of South Africa and the Legal Aid Board* (Nkuzi case), the Land Claims Court made a declaratory order saying that:

- People who have a right to security of tenure under ESTA and the Land Reform (Labour Tenants) Act, and whose security of tenure is threatened or has been breached, have a right to legal representation or legal aid at State expense.
- They have this right to legal representation:
  - If substantial injustice would otherwise result, and
  - If they cannot reasonably afford the cost of legal representation from their own resources.
- The State is under a duty to provide this legal representation or legal aid through mechanisms selected by it.

## CASE STUDY



## RURAL LEGAL TRUST

After the judgment in the Nkuzi case, it was widely recognised that access to legal representation was critical to exercise people's land rights, and that State legal services in many parts of the country were greatly inadequate. To meet this challenge, a new NGO, the Rural Legal Trust (RLT) was established in 2001 to provide legal services to rural dwellers throughout the country.

The RLT aimed to fill the gap in the services provided by the Legal Aid Board (LAB) by identifying organisations that were dealing with land issues in provinces and entering into cooperation agreements with them to establish and support legal teams on the LAB's behalf. The idea is that capacity is placed within provinces in a cost-effective and speedy manner. This approach also enhanced the services that these organisations were giving to help enforce and protect community land rights.

The RLT has entered into a cooperation partnership with these organisations:

- Nkuzi Development Association in Limpopo.
- KwaZulu-Natal Land Legal Cluster in KwaZulu-Natal.
- North West University in the North West.
- Association for Community and Rural Advancement in the Northern Cape.
- Southern Cape Land Committee in the Western Cape.
- Wits Law Clinic, Nkuzi and Noko Incorporated in Gauteng.
- Mpumalanga Land Legal Cluster in Mpumalanga.
- University of Free State Legal Aid Clinic and Free State Rural Development Association in the Free State.
- Rhodes Legal Aid Clinic and the Legal Resources Centre in the Eastern Cape.

The RLT and its cooperation partners also work closely with a network of paralegal associations and advice offices throughout the country.

### 6.6.3 Mobilising for the right of equitable access to land

Land reform cannot operate in isolation from a broader programme of rural economic development and transformation that targets job creation, service provision, housing and other services. Water services and alternative labour-saving systems will reduce the heavy burden of domestic labour on women.

Over the past decades, a variety of initiatives have been taken by civil society to mobilise around access to land, but with limited success. The collapse of the National Land Committee, the leading NGO network in the land sector for many years, in 2004–5, and the failure of the Landless People's Movement to form an effective organisation, has left the sector without a strong voice at the national level.

The *Rural People's Charter* was adopted and the Rural Development Initiative was launched at the Bloemfontein Rural People's Convention held on 23–25 April 1999. This followed more than a year of consultations between the land and rural development sector, NGOs and rural communities. The Rural

People's Charter and the Rural Development Initiative were a response to the declining political weight given to rural issues, as reflected in government budget allocations.

In December 2003, the Trust for Community Outreach and Education convened a People's Tribunal on Landlessness in Port Elizabeth. This Tribunal provided an opportunity for landless people and the dispossessed to provide testimony on their personal experiences, and senior government officials were questioned on the progress of land reform in the country. The Tribunal was highly critical of the slow pace of reform and the ongoing exclusion of landless people in policy-making and policy implementation.

### **National Land Summit**

In July 2005, the Government and civil society convened a National Land Summit to review the progress of land reform. Broad consensus was reached on the weaknesses of the land reform programme, and the need to replace the 'willing seller, willing buyer' policy with a more aggressive approach that would accelerate the redistribution of land to the historically oppressed.

Key resolutions from the National Land Summit included a call to:

- Accelerate the restoration of land to claimants.
- Re-open the lodgement process for eligible claimants who missed the 1998 land claim deadline.
- Replace the 'willing buyer, willing seller' policy with a stronger State-led approach, with greater use of expropriation.
- Include a 'social obligation' clause to protect landless people who occupy unused land.
- Limit the amount of land that can be held by any one person.
- Stop all evictions from farms, while reviewing tenure legislation.
- Improve after-settlement support for all land reform beneficiaries.

It remains to be seen how the Government and civil society will take the resolutions of the National Land Summit forward.

## **6.6.4 Gender equality and land rights**

A study by gender activists on the gender impact of the land reform programme over a five-year period clearly shows a lack of vision within the Department of Land Affairs on why gender equity is crucial to the land reform process (*Hargreaves and Meer, 1999, 9*).

The study concluded:

- Policies are not guided by gender equity principles.
- There are no mechanisms in place to implement gender equity.
- There is a lack of understanding of the highly unequal power relations of gender that affect access to and control over land and resources.

- The Department of Land Affairs has not developed any clear indicators to measure whether or not its gender policy or commitments under international treaties, such as CEDAW, are being followed.

In 1999, the Centre for Rural Legal Studies completed a research report: *Promoting Equity and Sustainable Development for Women Farmworkers in the Western Cape*. The report develops gender indicators for ESTA and CEDAW.

## **Customary Marriages Act**

The *Customary Marriages Act 120 of 1998* allows women to enter into contracts and to acquire land and property rights. While the Act is a step forward for women married under customary law, there are still many issues that need to be addressed before rural women can enjoy effective equality in relation to land and property.

The Customary Marriages Act:

- Repeals the minority status of women under the *Black Administration Act 38 of 1927*.
- Allows women in customary marriages to enter into contracts, to access credit, to become home owners, and to acquire other rights in land and property.
- Says all customary marriages must be registered.
- Says all customary marriages entered into after the Act comes into force, are taken as being *in community of property* – this means that the woman is joint owner of the marital property.

There are now real opportunities for women to improve and protect their land rights, but not enough organisations to assist them in the process. To achieve gender equality in the land reform process, women must participate fully at all levels. Gender equality will be achieved only with the removal of all legal, social and economic restrictions on the participation of women.

The land reform agenda therefore needs to include:

- Further reform of the rules governing customary marriages.
- Natural resource management policies.
- Agricultural policy support.
- Changing inheritance laws, when they are obstacles to women receiving and holding rights in land.

There is a clear need for a strong lobby to campaign for women's land rights in rural areas. Women's capacity to benefit from land reform is limited by their lack of knowledge of the structures and legal opportunities they can use. NGOs and community organisations can play an important role to:

- Educate rural women around jointly registering leases and other rights to land and property in the names of both male and female partners.
- Lobby for equal representation in decision-making structures.
- Change attitudes on women's land rights.

## 6.6.5 Indigenous land rights

The *United Nations Human Development Report* (1999) confirmed that there is an urgent need for understanding the spiritual, social, cultural, economic and political significance of lands, territories and resources to indigenous societies for their continued survival and vitality.

### COURT CASE



### RICHTERSVELD LAND CLAIM FOR INDIGENOUS LAND RIGHTS

The 2003 case of *Alexkor Ltd and Another v The Richtersveld Community and Others* (Richtersveld case) has set an important precedent for other communities. The community of 3 000 people used to be nomadic and pastoralist people, who traditionally occupied the Richtersveld area. Over many decades, the people of the Richtersveld were removed from the diamond-rich lands along the Gariiep (Orange) River and denied access to natural resources.

The land claimed is currently held by the State-owned diamond mine, Alexkor Limited, that is in the process of being privatised. The Legal Resources Centre (LRC) is negotiating for a community equity share in the mine and to secure the land rights of the community. The case represents a unique opportunity for the South African legal system to bring its approach in line with international legal practices.

In the Land Claims Court in 1999, the State and Alexkor Limited argued that there are no grounds to claim the right to aboriginal title or ownership based on indigenous rights in South Africa. These arguments were rejected by the Land Claims Court, but in 2003 the Supreme Court of Appeal granted leave to appeal against this judgment.

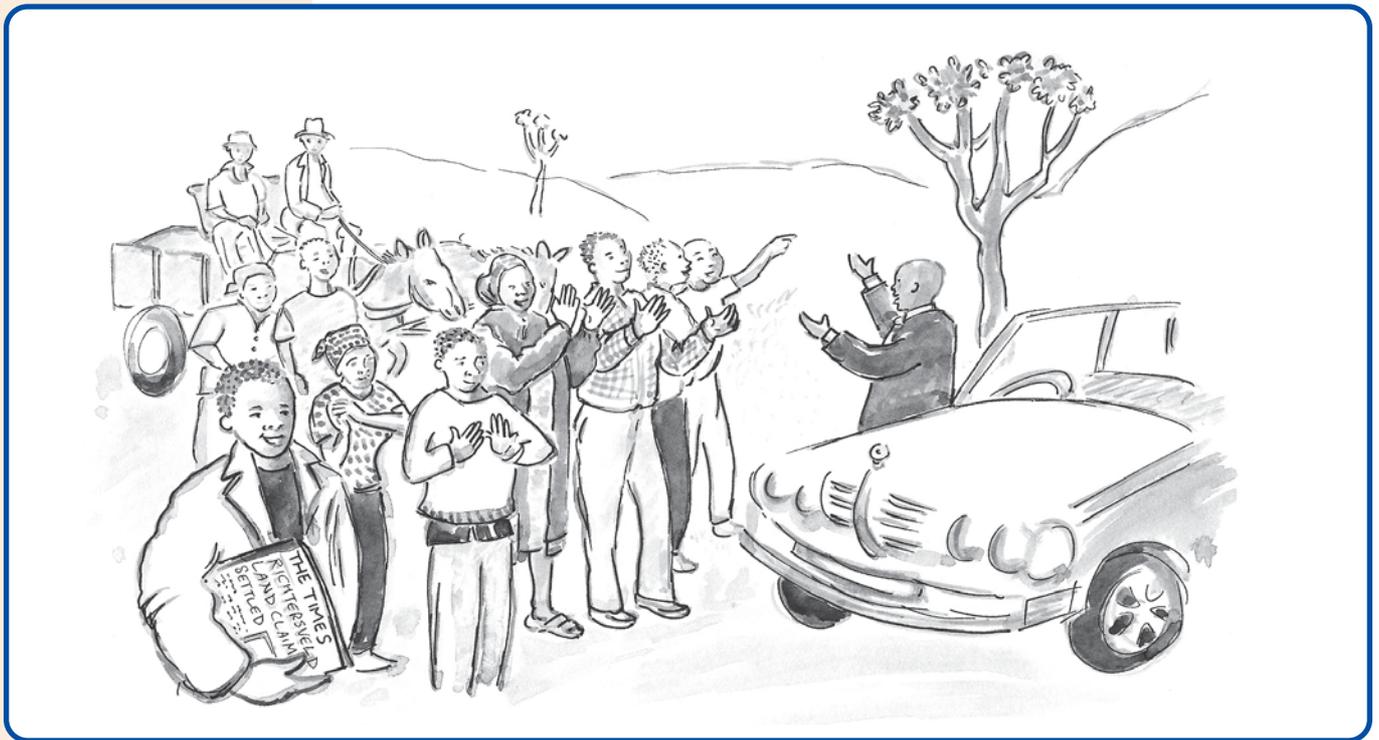
The Supreme Court of Appeal confirmed that the Richtersveld community had been in exclusive possession of the whole of the Richtersveld, including the subject land, prior to and after its annexation by the British Crown in 1847.

In October 2003, after another appeal by Alexkor and the State, the Constitutional Court decided that the Richtersveld community had a right under section 2(1) of the Restitution of Land Rights Act to:

- Restitution of the right to ownership of the subject land (including its minerals and precious stones), and
- The exclusive beneficial use and occupation of the land.

By June 2005, the Richtersveld case was once again before the Land Claims Court for arguments on the restitution award (*The Richtersveld Community v The Government of the Republic of South Africa and Others*). The demands of the community include the return of the 85 000 hectares of land currently owned by Alexkor, compensation of R1.5 billion for loss the diamonds mined by Alexkor, R1.3 billion for rehabilitation of the environment and further compensation of R10 million.

Initial discussions with the State around a negotiated settlement were unsuccessful, and the State and Alexkor are vigorously contesting the claims for compensation. An important milestone was achieved in November 2005 when the Land Claims Court ordered the State to pay R5 million towards the community's legal costs.



## 6.7

### Challenges

Although a range of land reform steps have been taken in South Africa, much more is needed before the existing distribution pattern and inequalities in access to land are resolved. For example:

- Redistribution of land under the redistribution and restitution programmes has been extremely slow – this is due to the ‘market-based’ approach taken by government and the lack of capacity within key agencies such as the Department of Land Affairs, provincial Departments of Agriculture and local municipalities.
- Farm dwellers, including labour tenants, remain vulnerable to eviction and other abuses of their rights, and more effective means need to be found to provide them with tenure security.
- In the communal areas of the old ‘homelands’, debate continues around the direction that tenure reform should take, and the future role of traditional leaders.
- Where people have obtained land under the land reform programme, they have often struggled to make effective use of it, due to poor settlement planning and a lack of appropriate support from State and private agencies.

Solutions to the challenges of land redistribution, tenure security and effective land use clearly require coordinated efforts by landless people themselves, government agencies and non-governmental organisations. In recent years, land-sector NGOs and movements of the landless have, with a few exceptions, remained poorly organised and under-resourced. There is an urgent need to build capacity and increase participation in the sector.

## Discussion ideas



### TALKING POINT 1

Share experiences and ideas in a discussion group:

1. *In your community, were groups of people forcibly removed or relocated?*
2. *Were they able to use the law to defend their rights? If not, why?*
3. *Is restitution all about the return of land? Are other forms of compensation appropriate in some cases?*
4. *What additional support is required for people who regain their land, and who should provide this support?*

### TALKING POINT 2

Read this case study and discuss the questions in small groups:

Mrs Mvusa is 78. She was employed as a domestic worker for Mrs Wattle on the farm Riversend since 1965. In 1966, the owner of the farm, Mr Wattle, died and left Mrs Wattle the farm. Mrs Mvusa remained on the farm where she built a house and lived with her children. She also grazed her livestock on the farm. The new owner of the farm gave Mrs Mvusa an eviction summons on 9 July 1998. The notice said that she was occupying the land unlawfully.

1. *What legislation protects Mrs Mvusa from being evicted from the farm?*
2. *Are the correct procedures being followed in this eviction?*

3. *What are Mrs Mvusa's rights under land laws and the Constitution?*
4. *What international documents could further support and protect Mrs Mvusa?*

### TALKING POINT 3

Discuss these questions in small groups:

1. *How can women's participation in the land reform process be ensured?*
2. *How many women in the group are affected by the Customary Marriages Act of 1998? For example, has your home been registered in your name or only in your partner's name?*
3. *How can we be sensitive to and respect the traditions of customary law, and at the same time push for the equal participation of women?*
4. *What support can your organisation provide on land issues to people in rural areas?*
5. *What are the most urgent needs and demands in your urban area?*



### TALKING POINT 4

Discuss these questions in small groups:

1. *What are the factors that continue to limit people's land rights?*
2. *Do you think the State is doing enough to advance people's land rights? What more can be done?*
3. *What can poor and landless people themselves do to advance their land rights?*

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