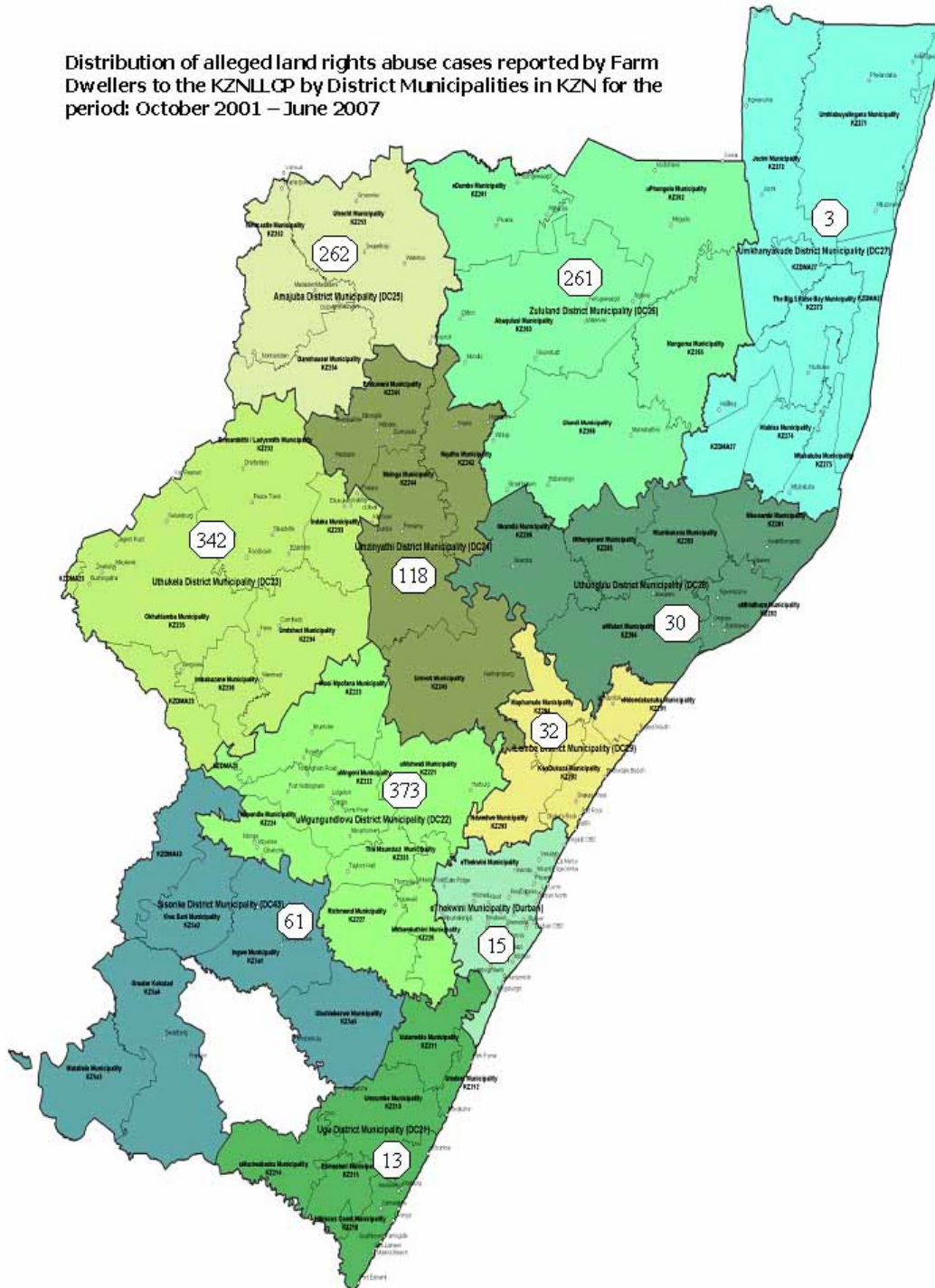


# “Some kind of civil war”<sup>1</sup>

## Trend report on the ongoing conflict over land rights on farms in KZN July 2007

Distribution of alleged land rights abuse cases reported by Farm Dwellers to the KZNLLCP by District Municipalities in KZN for the period: October 2001 – June 2007



<sup>1</sup> A civil war is defined broadly by WIKIPEDIA as “a *war* in which parties within the same culture, society or nationality fight against each other for the control of political power”. In this South African context we argue that political power should be understood not just as the right to vote but the right to enjoy the benefits of citizenship.

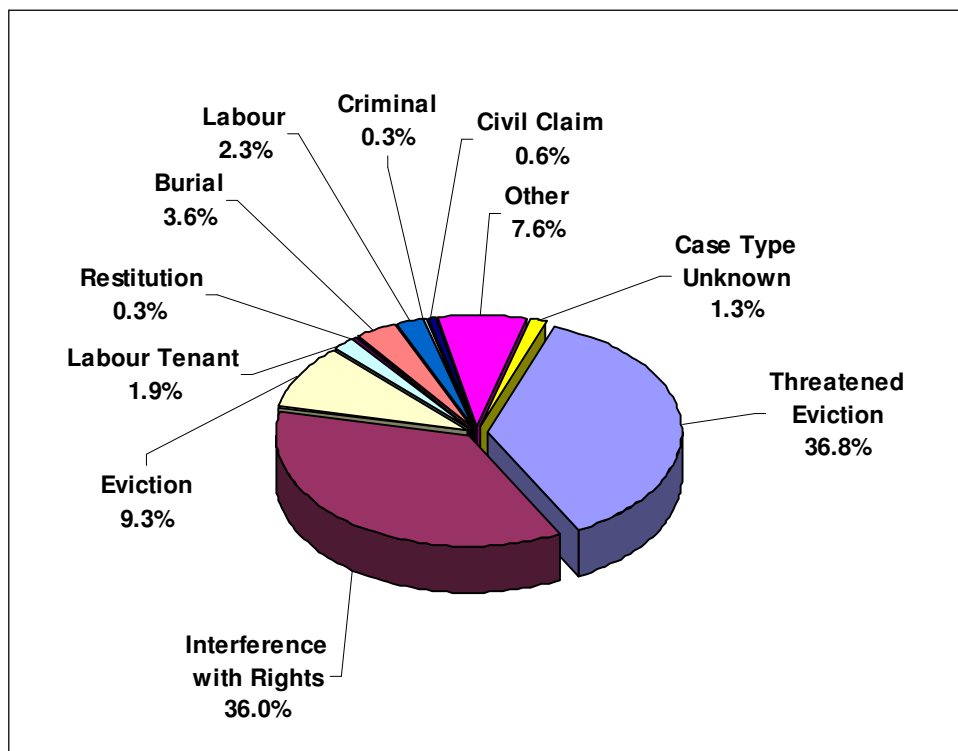
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## Law and justice...

Since October 2001 farm dwellers, in KwaZulu-Natal, have reported 1599 cases of alleged socio-economic related abuses to the KZN Land Legal Cluster Project (KZNLLCP).<sup>2</sup> This has meant that an average of 24 cases a month were opened between October 2001 and June 2007. Due to the contested nature of these rights the resolution of these allegations has been protracted. Compounded by a lack of accessible and affordable legal services to represent farm dwellers in defending these rights, 60% of these matters remain unresolved to date.

While the complaints have varied, by far the largest number of complaints remain that of evictions, threatened evictions and interference with rights, where threatened evictions account for 36.8% of all complaints. A threatened eviction and interference with rights ranges from a formal threat to evict as prescribed in the legislation to an informal attempt by landowners to coerce people to leave the land voluntarily. This has included cutting off access to water, locking gates, reducing stock numbers, impounding cattle, harassing and intimidating families, firing labour etc.



This ongoing trend, as documented by this project in KZN, highlights a seemingly untenable situation created by government's attempts to provide increased security to families on farms. Through giving Farm dwellers socio-economic land rights, on "privately"<sup>3</sup> owned land government

<sup>2</sup> The KZN Land Legal Cluster partnership was originally formed in 2000 as a response to a lack of affordable and accessible legal service to farm dwellers after the LAB judicare system collapsed. It was an attempt to provide an interim service while the state developed a new solution, as the partners believe this is a service that farm dwellers should receive from the state. The current partners include AFRA, the Community Legal Resource and Development Centre and the UKZN campus law clinic in Pietermaritzburg. See end of report for contact details.

<sup>3</sup> The concept of privately owned land is often understood to mean land that an individual has undiluted rights over. However, this is hardly ever the case as governments regulate land use in a number of ways constraining any individual from using land as they please. Unfortunately this is poorly recognised by many and often private land ownership is regarded as sacrosanct undermining attempts to give socio-economic rights to tenants.

has left the resolution of farm dwellers redress for dispossession to a highly contested negotiation and litigation process. It is a problem that requires more careful consideration.

Inside these contestations lies more than a debate about law – it is in fact seen by many farm dwellers as their path to an expected justice or redress under the new dispensation. The fact that they still have to fight for this justice, despite the new dispensation and new laws, and that they seem to be fighting a losing battle is leading many to seek alternative means to achieving such justice. There is an urgent need to understand this conflict and to find new ways to address it!

### **The quest for secure tenure...**

While the South African Constitution entitles its citizens to secure tenure the Constitution also limits this right to “the extent provided by an Act of Parliament 25(6&7)”. So while all are entitled, such entitlement has to be defined in the actual laws passed. Whether such laws have actually ensured that South Africans have secure tenure has not yet been challenged in the Constitutional Court. The negative result of such an seemingly indirect statement of rights in the constitution, has already been exposed in the courts too often narrow legalistic interpretation of who qualifies as labour tenants under the Land Reform (Labour tenants) Act No 3 of 1996 or qualifies as an occupier under the Extensions of Security of Tenure Act No. 62 of 1997.

This ambiguity is also compounded in the implementation of the Acts outside of court, where the policy and programmes aimed at farm dwellers by various departments and spheres of government is at best poorly defined and at worst non-existent. This ambiguity and gap is evidenced in the ongoing human rights abuses of tenant families on farms and in the further marginalisation of this most vulnerable sector of society. Many of those with real insecure tenure remain dispossessed, and in turn fail to meet the new requirements of post-apartheid citizenship. They remain invisible to the state without secure tenure and secure tenure is assumed to be achieved through the acquisition of land in the form of title deeds. This arises because a key assumption by government officials is that secure access to land (erroneously equated with title deeds) is a precondition for secure access to basic services and development rights. This has been advertently or inadvertently entrenched through the interpretation of the constitutional rights, in legislation and policies. Narrow focus on economic loss in our history of land dispossession, has resulted in an accent on restoring title, as title to property is erroneously equated with placing an economic asset in the hands of the poor.

Of more concern is the current emphasis on the eviction aspect of the LTA and ESTA rather than on the original restorative purpose behind the passing of such legislation. Attempts by the Department of Land Affairs (DLA) to draft a bill which would consolidate these two pieces of legislation has been slow and confusing. This process finally resulted in cabinet redirecting the department to focus on the eviction aspect of the two laws and to amalgamate it with the review of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No 19 of 1998 (PIE) by the department of Housing with a view to producing one piece of legislation regulating evictions. The development or socio economic rights of the farm dweller would now be dealt with in a separate law! The Constitutional court has however, recently, June 2007, taken a more generous interpretation of the existing laws arguing for the recognition of the original purpose of the legislation.<sup>4</sup>

During May and June 2005, AFRA ran a series of workshops with groups of people resident on farms across KZN. The participants were all people currently residing on farms from twenty local farming districts across KZN. The workshops were intended to provide a platform for farm dwellers to discuss their understanding of the challenges which impact on their livelihoods and tenure security and also to articulate concerns about problems and failings of the government's

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<sup>4</sup> Popela judgement: case CCT 69/06

national land reform programme, with recommendations for resolving such. This was done to support people on farms to engage with the proposed new bill consolidating the Extension of Security of Tenure Act No. 62 of 1997 (ESTA) and the Land Reform (Labour Tenants) Acts No.3 of 1996 (LTA). Both of these acts currently regulate farm residents rights on land.

The content of the resulting discussions pose a significant challenge to Government and to civil society in that they raise hard hitting perspectives about how farm dwellers see their relationship to their homes and the land, perceptions about rights which they do and do not have, and about what the future holds<sup>5</sup>. The central concerns relate to ownership of land and rights to reside on land. ***Most farm dwellers see themselves primarily as indigenous land rights holders rather than as workers of a landowner:***

*“Farms came to the people. Our great grandparents were already here when the land was ruled by Amakhosi. The Amakhosi were removed through wars between AmaZulu and the Whites, with the intention to grab our land and make it their own. The Zulus failed. That is why we are being oppressed by the whites. We do not have a say with regard to land ownership. That’s how our grandparents found themselves oppressed just as we are”-*  
Respondent in workshop: AFRA report2005.

This relationship to land rather than to employers is the heart of the ongoing contestations over land in the commercial farming areas.

This perspective is not new and was well captured, in the 1980’s already, in the AFRA special report No. 8, entitled the Fields of Wrath where they quote a man working for the local chief in the Tugela Basin area when being interviewed about evictions and cattle impounding.

*“Whites never owned that land. They bought the right to own our work. That has always been the law.”<sup>6</sup>*

That dispossession has to be redressed is not debated anymore. Rather, what constituted dispossession and what its consequences were and how this can be redressed in the interests of the individual, South African citizenry and the international economic community is where the contestation takes place. The Popela judgement also hints quite strongly at the way in which it is currently being measured in the Department of Land Affairs implementation:

*“[86] Finally, it is appropriate to observe that the rights of the individual applicants were not merely economic rights to graze and cultivate in a particular area. They were rights of family connection with certain pieces of land, where the aged were buried and children were born and where modest homesteads passed from generation to generation. And they were not simply there by grace and favour. The paternalistic and feudal-type relationship involved contributions by the family, who worked the lands of the farmer. However unfair the relationship was, as a relic of past conquests of land dispossession, it formalised a minimal degree of respect by the farm owners for the connection of the indigenous families to the land. It had a cultural and spiritual dimension that rendered the destruction of the rights more than just economic loss. These are factors that might require appropriate consideration by the Department or the Land Claims Court when an appropriate remedy is fashioned.”<sup>7</sup>*

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<sup>5</sup> AFRA, *This is our home - it is our land, our history and our right.* - Consolidated verbatim report of workshops with farm dwellers 2005.

<sup>6</sup> AFRA, Fields of wrath

<sup>7</sup> Popela judgement: case CCT 69/06

Despite this ongoing conflict over land the state has still not managed to meet the constitutional obligation set out in Section 25 of providing people with secure tenure.

## What do the stats tell us....

District Municipality	No. of Cases	Evictions	Threatened Evictions	Interference With Rights	Labour Tenant Applications	Other
uMgungundlovu	373	65	166	91	3	47
Uthukela	342	24	116	137	15	47
Zululand	261	18	79	121	3	38
Amajuba	262	5	100	124	3	30
Umzinyathi	118	7	47	43	6	15
Sisonke	61	6	20	24	0	11
uThungulu	30	10	6	6	0	8
iLembe	32	5	10	8	0	9
Ugu	13	3	5	4	0	1
eThekweni	15	1	4	0	0	10
Mpumalanga	11	2	3	4	0	2
Free State	8	1	6	1	0	0
Umkhanyakude	3	0	0	1	0	2
Unknown	70	2	27	12	1	13
<b>Total</b>	<b>1599</b>	<b>149</b>	<b>589</b>	<b>576</b>	<b>31</b>	<b>233</b>

### People affected

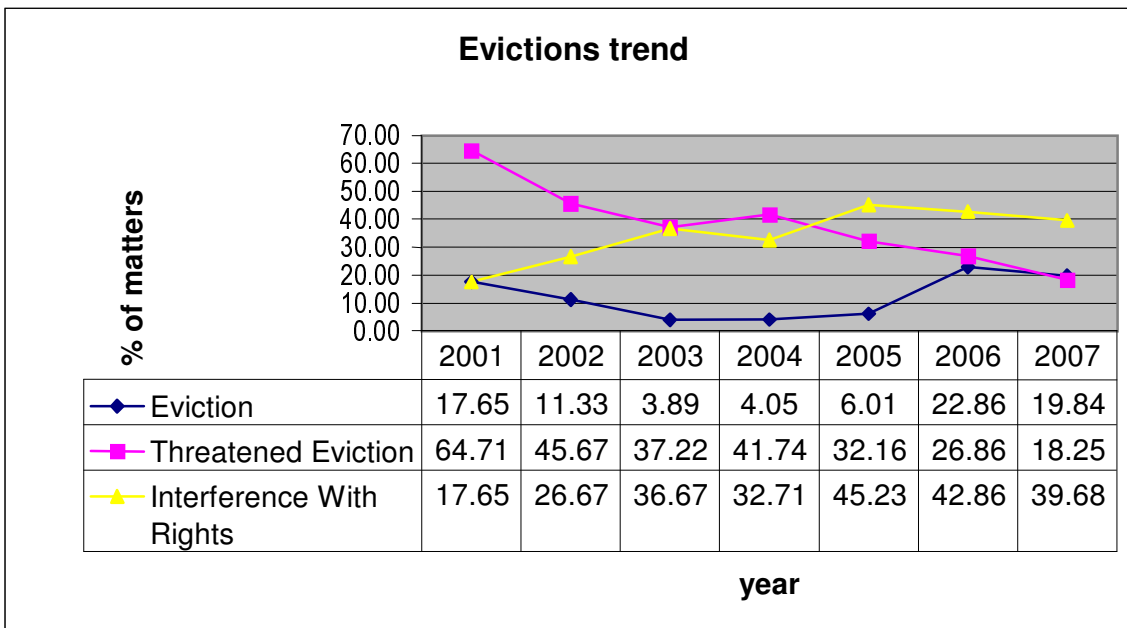
The cases opened by the Land Legal Cluster project are evidence of the minimum number of conflicts over land rights in KZN only. While there are no reliable statistics of the numbers of families living on farms across the country it is possible to extrapolate the 1543 matters as follows: Each matter affects a family which has a home on a farm. Each family can reliably be estimated to have on average 8 family members affected by the matter. Effectively the 1543 matters become land rights conflicts affecting 12344 people at least!

While many cases are referred to the Cluster many people do not know about this free legal service. So these statistics only reflect on what the project deals with.

## Types of matters....

### *Threatened evictions*

While the number of legal evictions has dropped over the years there is increasing numbers of threatened evictions and interference with rights which require ongoing protracted negotiations to resolve. Often these kinds of matters do not require court intervention but they are indicative of problems in relationships on the farms which will arise again and again until long term resolution is found. At the moment the only real long term resolution remains that of relocating off farms or purchasing a section of the farms i.e. remaining on farms with land rights on someone else's property does not appear to provide for long term solutions.

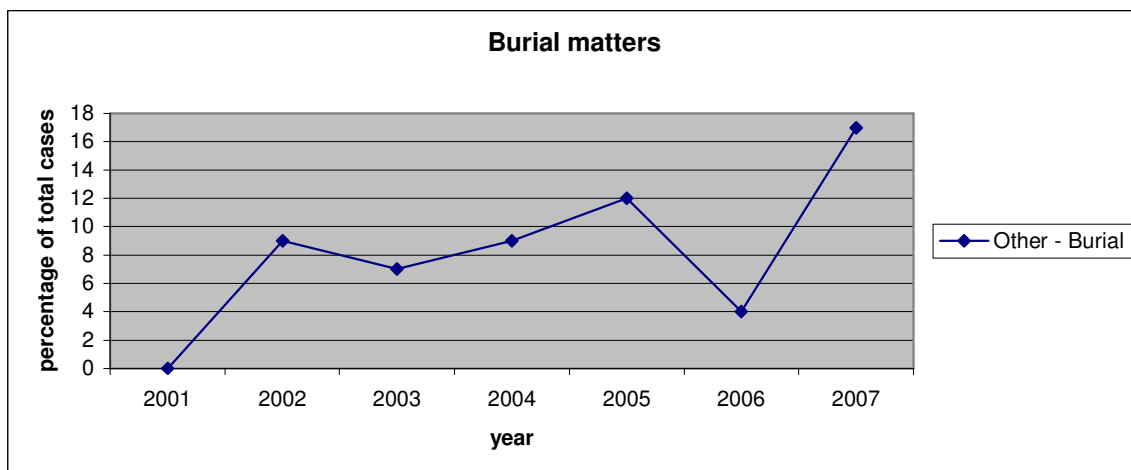


#### ***Labour issues***

Although many farmers would argue that labour issues are not to be confused with land issues it is of concern that disputes begin with labour issues and result in land rights contestations. At the heart of many of the labour disputes lies the question of indigenous access to the land and highlights the lack of long term programme available for farm dwellers to gain real secure access to land.

#### ***Burials***

Despite passing of legislation affording farm dwellers this right to bury these disputes continue to arise. Many are being settled outside of court but they highlight once again the contested nature of land rights and peoples belief about their indigenous claim to the land.



#### ***Labour tenant claims***

Although the number of these matters appears low this has more to do with the fact that the Cluster project has deliberately not taken on labour tenant claims. This statistics merely highlights those exceptions to this rule. It remains a deep concern that the labour tenant

applications are not being dealt with and even more so in the light of the recent Constitutional judgment – Popela, which seems to suggest that Labour tenants claims, can be equated in many cases with restitution matters.

### **Lack of access to affordable legal services...**

The Land Legal Cluster project firmly believes that the state should provide an affordable and accessible legal service to farm dwellers through the established Legal Aid Board Justice Centre system. This service should not be provided primarily by the private sector or Civil society. This was confirmed in 2001 by the Land Claims Court judgment LCC10/01 where Judge Moloto ordered that

*“...2 The Minister of Justice and the Minister of Land Affairs are directed to take all reasonable measures to give effect to this order, so that people in all parts of the country who have rights as set out in this order, are able to exercise those rights effectively.”*

### **Some lessons from the Land Legal Cluster work over the last 6 years provide useful pointers for the successful provision of this service by the state:**

#### *Issues to ensure socio-economic change / transformation is achieved through application of laws*

- The legislation enacted to secure peoples' rights focus' primarily on achieving this through litigation and negotiation. This has had the effect of locking people into complex processes, as it is often necessary to litigate to establish their status on farms and then negotiate or mediate to actually change their relationship with landowners. This indicates serious limitations in the ability of the Acts alone to effect socio-economic change. Given the ongoing abuses and increasing conflicts it raises the need to review the content of the acts themselves as a primary strategy to achieve changed social and economic relations in commercial agricultural areas.
- Currently it implies serious and deliberate state interventionist role. While it is useful to separate a legal services strategy from a broader agriculture or agrarian reform strategy they remain interconnected. Land rights will affect levels of reform, service delivery options and development.

#### *Issues to consider for accessible services*

- Farm dwellers socio-economic situation means that they are far from transport, far from cities, far from quick access to communication and information.
- In addition many are illiterate and cannot explain their problems in terms of existing laws. This requires a service that is empathetic and can speak the language well and interpret the problem into legal sense.
- Small towns offer biased magistrates and police services in favor of landowners.
- Once reports are made or charges laid farm dwellers return to vulnerable circumstances, within the owner's property against whom they have laid charges.
- Legal support needs to be trained, mobile, close to farming areas and aggressive in action. It also needs to establish co-operative relations with SAPS and magistrates to harness their support.

- Accessibility also implies that cases are handled through teamwork, as lawyers will not manage to undertake long site visits as well as ensure they are well prepared for court matters. This requires a rethink in the legal service approaches.

### *Issues to consider for affordable services*

- The legal service always requires on site intervention and case development and management because of the vulnerability of the client and because of their complexity of understanding their relationships on land use and access. It is also exacerbated by the fact that the client is poor and often illiterate to be able to give detailed reliable statements away from their physical environment.
- This means that the legal service must be mobile, well trained to understand the physical circumstances of farm dwellers and farming relationships, aggressive to go on site and investigate and well resourced as site visits and taking statements and following up is time consuming. It also implies not working office hours to ensure accessibility and this further adds to costs.
- Given this situation the use of private law firms or consultants using consulting rates will prove to be exorbitant of the service will be less than adequate as it is cut back to work within what the consultant can afford to spend.
- Also, given that civil matters are regarded as negotiated matters and normally quite drawn out, it is unlikely that the average farm dweller would ever afford the services of a private law firm. Such service would need to be encouraged and possibly subsidized by the state to ensure the legal fraternity tackles this area of work and addresses the issues of justice and socio-economic change as intended by the state.
- In addition where matters are lost in court, the ordering of costs against farm dweller clients is almost insurmountable for farm dwellers to take on. This matter requires the attention of the Dept of Justice or at least the state.
- Again the issues of teams handling cases will reduce the costs of only working with lawyers. Resolving non-litigious matters is possible out of court if there are well trained facilitators, managed with a clear strategy by government.

### *Issues to consider for consistent service*

- For consistency such a service must be driven by the state to ensure it meets the intentions of the government in achieving socio-economic changes and justice for all. It is not a long-term solution for it to be managed by civil society or the private sector.

## **Finding legal practitioners willing to take on civil matters...**

There is a severe shortage of skilled lawyers working on land rights matters in defense of farm dwellers. The mere creation of legal posts by the state in the Legal Aid Board system will not alleviate this problem. This strategy requires direct intervention and support by law societies and law schools.

While there are paralegal organizations, many are community based, not well skilled and resource poor. They are often not mobile and severely constrained to play the role of facilitator in a legal team.

The majority of cases have not required formal mediation services and mediation services of professional mediators have also meant handing matters to people who are not trained or focused on land rights matters. This has led to problematic settlement of cases and created difficulties for co-

ordination with DLA when settlement includes land purchases or relocations etc. It seems preferable to focus time and costs on developing a highly skilled group of facilitators or senior level paralegals who are able to manage negotiations, conflicts and facilitate settlements between parties.

Lawyers do not naturally work in teams and have been trained to take individual and final responsibility for clients. As this service needs to achieve both defense of farm dweller rights and contribute to broader objectives of socio-economic change each matter handled by a lawyer has broader social implications which need monitoring by the state. In addition many matters can be settled out of court and can move backwards and forward between court and out of court. This requires that lawyers working with facilitators/paralegals are willing and open to team work.

## **Conclusion**

Whichever angle you tackle this issue from it remains a concern for the success of the land reform programme, for the success of agriculture, for the success of transformation and for the success of an effective justice system. It is a problem that requires the state; the private sector and civil society to solve with those affected most.

At the very least we call on the Department of Justice, with the support of the Department of Land Affairs, to tackle the issue with sincerity and commitment – to raise the funds required for the Legal Aid Board to take on this urgent responsibility.

We also call on all those organizations and people who support this call are encouraged to exert the necessary pressure to bring this about.

**Lisa del Grande, July 2007**

(This brief is drawn from two pieces of work by AFRA: Research paper done for Professor Heinz Klug on the impact constitutionalising of socio-economic rights entitled The rise and fall of socio-economic land rights in KZN - 2007, and a recent trend report highlighting statistics gathered from AFRA's ongoing support to farm dwellers on land rights matters.)

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