

# **The rise and fall of Socio-Economic Land Rights in the province of KwaZulu-Natal, South Africa - A case study**

**Clever Chisoro, Lisa Del Grande, Ndabe Ziqubu**

**May 2007**

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## **The rise and fall of Socio-Economic Land Rights in the province of KwaZulu-Natal, South Africa - A case study**

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*The general working hypothesis of the primary research project, that this paper hopes to contribute to, is that socio-economic rights to land are not merely determined by the formal legal framework governing access and use of land but also by a host of other factors such as the institutional, political, social and legal dynamics that are in turn shaped by the histories and contexts within which these rights are being institutionalised.<sup>1</sup> The South African context provides the backdrop to the research question which will enable a practical analysis of how socio-economic rights have been introduced, formulated and implemented, following “(t)he inclusion of justiciable socio-economic rights in the South Africa(n) post-apartheid constitution..”<sup>2</sup>*

*The research question gives primary focus to three key aspects of socio-economic rights, namely land, water and health. With regard land, as a socio-economic right, it is suggested by the hypothesis that “(t)he final property clause guarantees not only the restitution of land taken after 1913 (S. Af. Const. 1996: s 25(7)) and a right to legally secure tenure for those whose tenure is insecure as a result of racially discriminatory laws or practices (s25(6)), but also includes an obligation on the state to enable citizens to gain access to land on an equitable basis (s25(5)). Furthermore, the state is granted a limited exemption from the protective provisions of the property clause so as to empower it to undertake land reform (s25(8)).”<sup>3</sup>*

*The specific purpose of this paper is to consider the introduction, formulation and implementation of land rights as justiciable socio-economic rights. To enable this four case studies will be considered where it is possible to track and highlight the changes in people’s access to land, their use of land and the land tenure arrangements they have established or used to secure, defend or assert their rights.*

*All four cases are based in the province of KwaZulu-Natal, where people have experienced a long and intensely devastating history of dispossession through periods of colonialism and then apartheid. It is also a province where strong traditional authority systems existed and have adapted and endured and where the growth of white commercial agriculture played a key role in removals, the suppression of black agricultural practices and the creation of cheap farm labour.*

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In line with the ongoing debates around the secondary nature of socio-economic rights many of the clauses in section 25 the South African Constitution, imply the need for reasonableness in supporting the assertion of land rights. This has come about despite the apparent assertiveness of the ANC government to insert socio-economic rights into the Constitution in 1996. Redistribution as a key programme of land reform is derived directly from the Constitutional obligation that states, in relation to equitable access, that “(t)he state must take reasonable legislative and other measures within its available resources, to foster conditions 25 (5)” to bring this about. In relation to entitlements to restitution and secure tenure the Constitution limits this entitlement to “the extent provided by an Act of Parliament 25(6&7”. The result of such apparent indirect or ambiguous statements of rights in the constitution has already been exposed in many of the subsequent land reform acts passed by parliament, where courts have tended to apply a narrow legalistic interpretation of who qualifies as labour tenants under the Land Reform ( Labour tenants) Act No 3 of 1996 (LTA) or qualifies as an occupier under the Extensions of Security of Tenure Act No. 62 of 1997 (ESTA).

This ambiguity is also compounded in the implementation of the Acts outside of court, through the development of associated policy and programmes. This is evidenced in the ongoing human rights abuses of tenants on farms and in the further marginalisation of the most vulnerable sectors 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 have become invisible through the implementation of land reform programmes. A common argument perpetuating this is that secure access to land is a precondition for secure access to basic services and development rights and that this has been advertently or inadvertently established through the

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<sup>1</sup> NSF05-proposal by Professor Heinz Klug

<sup>2</sup> *ibid*

<sup>3</sup> *ibid*

interpretation of the constitutional rights, in legislation and policies. So, basically without title you cannot claim to have secure tenure and you then cannot access services. In effect you are not a full citizen! At the same time once land is “privatised” through the issuing of title the state is then arguing that it cannot provide services on privately owned land or intervene in the rights of families within communal property entities established under the land reform programme. This narrow focus on dispossession as an economic loss has resulted in an accent on restoring title which is seen as placing an economic asset in the hands of the poor. An idea very much in line with the dominant liberal economic discourse, which interprets land as property to be possessed, commodified and traded.

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.<sup>4</sup> The Constitutional court has recently, June 2007, taken a more generous interpretation of land rights afforded by these acts, arguing for the recognition of the original purpose of the legislation.<sup>5</sup> The Popela judgment emphasized that:

*“[51] This Court has reiterated that the Constitution must be interpreted purposively.<sup>46</sup> Many pronouncements in this Court and other courts endeavor to encapsulate this purposive approach.”<sup>6</sup>*

That dispossession has to be redressed is often 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>*

The build up to the ANC policy conference in 2007, eleven years after the final South African constitution was agreed to, has witnessed many important discussions and reflections in this regard. The continuous practical interpretation of the constitution with regard property is clearly affected by dominant and contested sociological and economic discourses around development, reflected in the debates and position papers for the ANC policy conference. This dilemma was recently well captured by Jeremy Cronin in his briefing in the *Mail and Guardian* as one where the state “runs the risk of building a two-faced developmental state. On the one hand, a “first world” state, with relatively well-resourced departments and state-owned enterprises whose principal mission is to remove market constraints, lowering the cost of doing business (for business). On the other hand, a “caring” but woefully under-resourced and overwhelmed “third world” state, focused on delivery to the poor. This duality is sometimes in evidence within a single ministry, such as agriculture (for white-dominated commercial farming) and land (that is, “native”) affairs.”<sup>8</sup>

Even more worrying in this debate is the growing frustration that the state might have deliberately misinterpreted what should have constituted a genuine direct socio-economic right. Again this falls within

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<sup>4</sup> Attempts by the department to draft a bill which would consolidate these two pieces of legislation resulted in cabinet redirecting the department to aligning the eviction issue in this legislation with that being reviewed by the department of Housing in the PIE Act with a view to producing one piece of legislation regulating evictions.

<sup>5</sup> Popela judgement: case CCT 69/06

<sup>6</sup> Ibid

<sup>7</sup> Ibid

<sup>8</sup> Cronin, J., The dangers of two-faced development : Polokwane Briefing, Mail and Guardian, 3 June 2007.

the ongoing debates about the role of socio-economic rights or human rights discourse and its impact on peoples' struggles for recognition and active citizenship. The possibility that a focus on human rights emphasises the individual and undermines the necessary social aspect of development or that it dilutes the political nature of citizenry by elevating the power of the state<sup>9</sup>, through its ability to "provide services" or give effect to socio-economic rights, is also an aspect to consider when examining the interpretation and implementation of land rights. Faced with a historical "duality" in the economic, social and political system the state appears intent on blending the two towards that of individualised rights based on private property systems, possibly hoping to erode the more traditional systems over time rather than publicly denigrating them and setting them aside. Potentially, a serious miscalculation of the role and meaning of land access in peoples' perceptions of citizenry.

Responses from farm dwellers in the province in KwaZulu-Natal to questions about why they find themselves in the dire circumstances they are in highlight this possible ongoing misunderstanding of the nature of their rights:

*"Because of the history of apartheid in South Africa white people came to our country and took everything we had including livestock, land etc and as a result of that we ended up dependant on them."*

*"It's because of battles that took place. Black people lost and White people took all the land. They placed us in small places in the townships and divided us and made us their slaves. The new government is a ploy to make us think we are being given our land back."*

Responses from two of the farm dweller respondents in the AFRA workshops 2005<sup>10</sup>

Farm dwellers reflected on a loss that was far greater than just access to secure tenure or to land. They alluded to a lost identity. It is this that that current programmes and laws like the LTA and ESTA are failing to give them. As far back as 1998, Lyov Hassim warned in his report to the National Land Committee<sup>11</sup> on the Land Reform (labour Tenants) Act 3 of 1996, that *"the Act not just lock(s) labour tenants into complex processes but locks them into these processes in a very specific way"*.<sup>12</sup> He referred to the term "litigotiation" to argue that labour tenants in asserting their socio-economic land rights *"are locked into formal litigation and thereafter negotiation and mediation"* making for a long drawn out process, which when asserting requires the state to give it effect.<sup>13</sup>

In essence this paper will reflect on the problem of interpreting what the socio economic rights have become, in implementation. At the same time though it will also reflect on the problems that have arisen in trying to codify the socio economic rights within certain economic, political and social discourses and how this has tended to undermine the reality of what people believe they have the right to. This has translated not only into frustrations with the implementation of the laws passed, which give effect to the constitutional requirements (S25 6), but also to the marginalizing of groups not originally fully recognised in the codification process. This has also meant that mobilising around such rights for changes to the interpretation or for the inclusion of groups not originally recognised, through advocating for policy change, is difficult. It is often seen to be challenging political institutions from places seen as being outside the recognised civil society groupings.

## **Approach**

The specific purpose of this paper is to consider the introduction, formulation and implementation of land rights as justiciable socio-economic rights. To enable this four case studies will be considered where it is possible to track and highlight the changes in people's access to land, their use of land and the land tenure arrangements they have established or used to secure, defend or assert their rights.

All four cases are based in the province of KwaZulu-Natal, where people have experienced a long and intensely devastating history of dispossession through periods of colonialism and then apartheid. It is also a

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<sup>9</sup> This is well explored in a recent paper by Michael Neocosmos entitled *"Civil society, citizenship and the politics of the (im)possible: rethinking militancy in Africa today"*

<sup>10</sup> AFRA report, 2005, *This is our home, our history, our right*, Consolidated verbatim report, Farm dweller workshops, May 2005

<sup>11</sup> Now defunct, a network of land based NGO's working with rural people on land access.

<sup>12</sup> Hassim, Lyov, 2000, *Where to "izwe Elethu"* : Final report into the land Reform ( Labour Tenants) Act No. 3 of 1996

<sup>13</sup> *ibid*

province where strong traditional authority systems existed and have adapted and endured and where the growth of white commercial agriculture played a key role in removals, the suppression of black agricultural practices and the creation of cheap farm labour.

The cases will track the three communities of Cornfields, Ekuthuleni and Gongolo because they effectively capture the main land rights issues in the periods under review. Cornfields, a rural community of over 600 families, currently holds land under two legal forms of communal some of which they accessed through the current land reform programme. They hold land in freehold form and under a communal Trust which was accessed through the redistribution programme. The Ekuthuleni community, also some 200 rural households, acquired land through the current land reform redistribution programme and hold it under Communal Property Association<sup>14</sup>. They form a part of a larger traditional authority area. The Gongolo community are currently a combination of farm residents claiming the land through the Land Reform (Labour Tenants) Act no 3 of 1996, occupiers as defined by the Extension of Security of Tenure Act No. 62 of 1997, and restitution claimants made up of former farm residents who were evicted off the farms under apartheid. The farm dweller sector as a whole, will also be examined briefly as a fourth case, emphasising some of the experiences in the Gongolo community.

The case studies are drawn from the Association For Rural Advancement's (AFRA) experiences with the respective communities which have been documented over a number of years.<sup>15</sup> This has been complemented by brief interviews with role players in the communities where AFRA's archival information was incomplete for the purposes of drafting these case studies.

In examining each of the communities changing access to land and security of tenure and how the insertion of socio-economic rights in the current constitution has affected this, this study relies on some assumptions and understandings of key issues and debates on land as a socio-economic right, functions of African and western tenure systems, and key moments in South Africa's history.

### **Socio-economic land rights**

It is common cause that land has many different values to different people and groups of people in society. Establishing rights of access to land for particular and various uses have led to many forms of tenure arrangements in different societies. There are numerous debates about how rights come to be and whether it is possible to classify them into first, second and third generation rights. Some of this seems to lie in whether certain rights can be classified as natural and universal, while on the other hand arguments are made for rights that require proactive state intervention for their realization.<sup>16</sup> The assumption that this paper concurs with is that without the 'enjoyment of socio-economic rights' people will not have "full enjoyment of civil and political rights".<sup>17</sup>

In this vein the argument that "*(a) right is not a right because the bearer is able to litigate in the face of its violation. Quite the contrary, the bearer is able to litigate in the face of violation because he/she has a right. The right therefore, is logically prior to the ability to litigate*"<sup>18</sup>, is where the assumptions in this paper start with regard land rights. This statement is useful because it raises the question about how rights come to be which allows a fundamental exploration of what constitutes a land right rather than assuming that land rights are what is defined by the South African Constitution or subsequent Acts or that all rights in land fall into the category of socio-economic rights.

Some consideration of how people perceive their rights in land in relation to their social and economic situations or their livelihoods arrangements is necessary. In turn an understanding of the purpose of the recognising such rights in that society is important assuming that rights have emerged over time in societies, driven by the context (social, economic, political etc.). Most important it seems to require some

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<sup>14</sup> This under the Communal Property Association Act No28 of 1996

<sup>15</sup> AFRA is a land rights non governmental organisation which was formed in 1979 to support communities resisting forced removals.

<sup>16</sup> Seleane, M, 2001, *Socio-Economic rights in the South African Constitution: Theory and Practice*, HSRC press, social science publisher

<sup>17</sup> Ibid pg 43

<sup>18</sup> ibid

consideration of who needs to recognize or respect this right for such a right to exist. In this way the nature of the land right should be more easily identifiable as a social or economic or political/ civil right, or a combination of these categories. If the case studies are considered in this manner then it might be possible to analyse how the Constitutional definitions of land rights and the various land reform Acts definitions have eroded or supported the rights as conceived by the respective communities. And whether they are in effect “socio-economic” rights as defined by legislation.

A further complication or confusion in South African society arises when regarding land rights as socio economic rights when land is conceived of as property, or more specifically as private property. Section 25 of the South African Constitution conflates land rights with property in its conception. Drawing on the idea that property is a man-made institution that ‘creates and maintains relations between people’ Macpherson in his work *The Meaning of Property* argues that it is both an institution and a concept.<sup>19</sup> Key is the idea that property is rights in or to something rather than possession of a thing. It is a system of rights of each person in relation to other persons. It is the idea that society needed to recognise certain basic or natural rights of individuals to certain things for society to function, like the right to life, land, water etc. It is this basic recognition by society of individuals to certain things/ property that gives rise to the ability to enforce the right. Society’s recognition of individual rights to property is critical to being able to enforce a right and it is the ability to enforce that makes guaranteed rights possible. Most often society will recognise some legitimate form of state<sup>20</sup> as the necessary enforcer and guarantor of these recognised rights.<sup>21</sup>

Its enforceability by a third party, like the state, means that access to this right is controlled. This leads to the argument that property is a political relationship between people.<sup>22</sup>

Using this framework Macpherson explains how the concept of common property has been undermined by the rise in the capitalist market economy from the seventeenth century onwards. Based on the idea that the institution of property (as rights to or in something) is recognised in society primarily from the view that everyone has basic natural rights to the resources that give rise to sustaining life, common property served this type of purpose. He defines common property as individual rights to the same property, where individual rights are enforced by the state who both creates and guarantees these rights. This type of property right while enforceable was not exclusive, nor easily commodified/ tradable and it had some limitations. However, it performed an important social function in society.<sup>23</sup>

The rise of capitalist markets required property rights to be exclusive, absolute and alienable. Open market access to and control over rights in property gives rise to shift the power to control society, and eroded the power of feudal systems. In promoting the capitalist economy the capitalist states allowed the previously unsaleable rights in things to be parcelled off into marketable commodities. This has also given rise to the idea that the property market is about buying and selling of land as opposed to the purchase and sale of enforceable exclusive rights in the land.<sup>24</sup>

Key to this framework is the role of the state over time. As the enforcer or guarantor of property rights the state played a controlling role over how land has been developed and what value has been ascribed to the rights in the land. Through the use of the urban planning tools the state has variously affected access to and control over land i.e. property rights and their values.<sup>25</sup>

Examples in South Africa, today, of how this confusion over what is “private” property has played itself out through the contestation between “private” property rights of land owners in farming areas and the introduction of new land rights, through ESTA and LTA, for farm dwellers on the same property. A recent case, 2007, in point highlighted this growing confusion of the state over its role as “guarantor” of rights.

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<sup>19</sup> Macpherson, C B (1978) *The meaning of property* pp 1 -13

<sup>20</sup> A **state** is a political [association](#) with effective [dominion](#) over a geographic [area](#). It usually includes the set of [institutions](#) that claim the [authority](#) to make the rules that govern the people of the society in that territory, though its status as a state often depends in part on being recognized by a number of other states as having internal and external [sovereignty](#) over it. – Wikipedia definition

<sup>21</sup> Macpherson, C B (1978) *The meaning of property* pp 1 -13

<sup>22</sup> *ibid*

<sup>23</sup> *ibid*

<sup>24</sup> *ibid*

<sup>25</sup> *ibid*

*A land owner, of a small holding in the Thornville area of KwaZulu-Natal removed the roofs of the tenants on his property in an attempt to coerce them to move off his property. The tenants had been residing on the property when he purchased it. The owner believed that as he was the "owner" he had a right to remove the tenants without going to court to evict them. The tenants sought and received an urgent interim order under ESTA requiring the owner to replace the roofs and restore their given rights to the property. The owner ignored the order and subsequent letters from the tenants lawyers urging him to comply ( with a threat of asking the court for a contempt of court order). The owner went ahead and completely demolished the homes of the tenants forcing them to seek shelter off the property.*

*Interventions by AFRA seeking interim relief from the state in the form of temporary accommodation through the use of tents on the property failed as the state concluded that this was private property and until the court gave a final order restoring the tenants rights they could not intervene. Arguments by AFRA that ESTA automatically gave these tenants rights and that it was the "owner" who had violated the rights, by not obtaining a legal eviction order, did not move the lawyers, the magistrate or the state into any action that allowed the tenants to assert their land rights. Due process had to be followed until the owner agreed to rebuild the homes through a court driven process.*

The interplay between the various land rights in this case highlight that land rights clearly do not fall into one category of rights – political, civil or socio-economic and that the concept of private property remains sacrosanct in the eyes of the state and the legal system. The possibility that some land rights are those that might be regarded as negative rights or first generation and some are positive or second generation is playing itself out in the South African context. What actions the state needs to take to give effect to the land rights it has created through Acts of parliament continues to be contested. While the above case highlights questions of direct state intervention to bring about effective new land rights, the idea that the state should at the bare minimum provide new rights holders with access to a justice system was confirmed in the Land Claims Court case LCC10/01 in 2001 in the matter between Nkuzi Development Association (applicant) and the Government of the Republic of South Africa (first respondent) and the Legal Aid Board ( second respondent). Describing the labour tenants and occupiers inability to access legal aid Judge Moloto argued that :

*[6] As a result of the above, very many poor, illiterate litigants appear in court unrepresented. Labour tenants and occupiers form a significant portion of such litigants. There is a need to assist labour tenants and occupiers to protect their constitutionally guaranteed rights. One of the ways in which the rights of labour tenants and occupiers, as outlined in section 25 of the Constitution and further expanded upon in the Labour Tenants Act and ESTA, can be protected is to ensure that their right in terms of section 344 of the Constitution is upheld. This means that labour tenants and occupiers are entitled to a fair trial before they can be evicted and for the trial to be fair it is necessary that the labour tenant or occupier understands his or her rights under the law and the complexities of a trial. Where he or she does not understand, there is a need for legal representation, or at the very least, an explanation of his or her rights by the judicial officer. Given the order I intend making it is important that information about the rights of labour tenants and occupiers to a just and fair trial be disseminated as widely as possible.<sup>26</sup>*

The judge then made the following unambiguous order which sealed the states minimum role in effecting land rights:

*[12] The following order is made:*

*1 It is declared that:*

*1.1 The persons who have a right to security of tenure in terms of the Extension of Security of Tenure Act, Act 62 of 1997 and the Land Reform (Labour Tenants) Act, Act 3 of 1996, and whose security of tenure is threatened or has been infringed, have a right to legal representation or legal aid at State expense if substantial injustice would otherwise result, and if they cannot reasonably afford the cost thereof from their own resources.*

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<sup>26</sup> South African land claims court judgement :LCC 10/01

*1.2 The State is under a duty to provide such legal representation or legal aid through mechanisms selected by it.*

*1.3 The cases in which substantial injustice could result include, but are not limited to, cases where*

*1.3.1 the potential consequences for the person concerned are severe, which will be so if the person concerned might be deprived of a home and will not readily obtain suitable alternative accommodation; and*

*1.3.2 the person concerned is not likely to be able effectively to present his or her case unrepresented, having regard to the complexity of the case, the legal procedure, and the education, knowledge and skills of the person concerned.*

*1.4 Legal aid or legal representation need not be provided in cases where there is no reasonable or probable cause.*

*1.5 The State or its agent is entitled to adopt a screening process to establish whether the person concerned is entitled to legal aid or legal representation, before granting such aid or representation.*

*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.*

It should be noted though, that despite this judgement, that by 2007, neither Minister has taken any “reasonable measure” to give effect to the order.

In the current context in South Africa what then constitutes a socio-economic land right? The South African constitution seems to refer to four aspects namely; entitlement to reasonable conditions to allow equitable access to land, entitlement to restitution in as far as Acts passed by parliament allows; and entitlement to secure tenure in as far as Acts of parliament allows; and finally no arbitrary deprivation of property rights.

With regard each of these the South African government, through the Department of Land Affairs has developed legislation, polices and programmes. In effect the approach followed divided the constitutional rights into three broad programmes:

- Redistribution – addressing the reasonable conditions for equitable access;
- Restitution – addressing the entitlement to restitution; and
- Tenure reform – addressing the entitlement to secure tenure.

## **Land Redistribution**

The programme was designed to redistribute land to the landless poor, labour tenants, farm dwellers and emerging farmers for residential and productive purposes to improve their livelihoods and quality of life. It does not in itself create land rights as these rights depend on the form of tenure arrangement people opt to use to access the land. It was to address the disparity between the 87% of the land dominated by white commercial farming and the 13% in the former ‘homelands’. It would ease congestion in the communal areas and diversify the ownership structure of commercial farmland. The major legal framework for the implementation of this programme was the Provision of Certain Land Settlement Act 126 of 1993, amended in 1998 and now entitled Provision of Land and Assistance Act 126 of 1993. Under this Act, the beneficiaries themselves identified the land on sale based on the willing buyer, willing seller principle and on existing land market operations. The government then provided them with financial assistance to buy the land and to develop it. Up to 1999, the government provided the Settlement/Land Acquisition Grant (SLAG), a grant of R16 000 made available to qualifying households. In August 2001, the government launched a new land redistribution policy, Land Redistribution for Agricultural Development (LRAD), with the goal of establishing a class of African commercial farmers. Under this programme, individual beneficiaries could access, along a sliding scale, from R20 000 to R100 000 after making a contribution in cash or kind, the size of which determined the value of the grant. LRAD was an improvement on SLAG in that it made grants available to individuals rather than to households, thereby increasing the levels of funding since each adult household member could apply.

However, the poor are at a disadvantage since they have to compete with the rich for access to the limited land resources and this programme is application based. Although there is growing frustration about who gets access to this programme and the slow pace at which it has unfolded, there has not yet been any serious legal contestation about whether the state has provided reasonable conditions for equitable access to land.

When it was launched, LRAD was intended to make a major contribution of achieving the government's target of transferring 30% of agricultural land by 2014, a total of 24,6 million hectares. At the end of 2005, only 500 000 hectares of land had been redistributed to 50 000 households (about 250 000 individuals). There is an urgent need for the government to find new ways of accelerating the programme if it intends to achieve its intended target and its constitutional obligation of ensuring the provision of reasonable conditions for equitable access to land.<sup>27</sup>

## Land Restitution

The final Act passed by parliament giving effect to the entitlement to restitution resulted in a programme whose objective is to restore land and provide other remedies to people dispossessed by racially discriminatory legislation passed by the previous governments since 19 June 1913 (i.e. when the Natives' Land Act was passed), while ensuring that no disruption was caused to agricultural production and political stability. The Constitution and the Restitution of Land Rights Act 22 of 1994 provided the major legal framework for the implementation of the programme. The main forms of restitution were restoration of land from which claimants were dispossessed, provision of alternative land and payment of compensation. This programme remains hotly disputed and criticised by all sectors of society.

In the recent Popela judgment Judge Moseneke appeared to seek to remind the Department who the constitution was seeking to address when he said that:

*"These rights, as defined,<sup>37</sup> go well beyond the orthodox common law notions of rights in land. They include any right in land, whether registered or not; the interests of labour tenants and sharecroppers; customary law interests; interests of a beneficiary under a trust; and a beneficial occupation for a continuous period of not less than ten years before the dispossession. The legislative scheme points to a purpose to make good the ample hurt, indignity and injustice of racial dispossession of rights or interests in land that continued to take place after 19 June 1913."<sup>28</sup>*

The Commission on Restitution of Land Rights (CRLR) received a total of 63455 restitution claims by the deadline for submission in December 1998 but only 41 claims had been settled by March 1999. However, the pace of settling claims rose after the amendment of the act to allow for administrative settlements by the CRLR and the Minister without having to go through adjudication by the Land Claims Court. By 30 June 2005, 62 127 claims were settled, transferring a total of 916 470 hectares of land for the benefit of 900 000 people. By the end of 2005, about 9 000 rural claims were still outstanding. In view of this large number of outstanding rural claims, the government extended the deadline of settling the claims to March 2008.<sup>29</sup> Many questions remain about what constitutes a "settled" claim with arguments that the Departments generous definition of settlement is hiding massive unresolved problems. This includes large numbers of people receiving financial settlement instead of access to land, rushed settlement agreements with little real attention to sustainable land uses and secure tenure arrangements of groups and individuals receiving rights in land.

The issues around who should benefit ( what rights were lost) and what gets restored ( beyond title deeds to land) have been overshadowed by the political pressure to finalise the existing claims, but will undoubtedly resurface when the cut off date is no longer extended.

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<sup>27</sup> Ruth Hall, *Transforming rural South Africa? Taking stock of Land Reform*, HSRC, Cape Town, 2007.

<sup>28</sup> Popela judgement: case CCT 69/06

<sup>29</sup> Ibid.

## Land Tenure Reform

In seeking to address the entitlement to secure tenure the department confusingly created a separate programme, and developed separate legislation from those giving effect to redistribution and restitution. Initial focus was on securing rights of farm dwellers and creating a unitary tenure system by drawing in the traditional authority areas. The enactment of the Communal Property Association Act no28 of 1996, allowing for the registration of a new legal entity holding group rights however, highlighted the clearly overlapping nature of the programmes when those receiving land through redistribution and restitution were compelled to use this tenure form to secure their rights.

Essentially the programme aimed to redress the discrimination in terms of the nature of land rights held by Africans, specifically for people living on commercial farms, former homelands and other places where people owned land communally. The two laws that have been passed to secure the tenure security of farm dwellers are the Land Reform (Labour Tenants) Act 2 of 1996 (LTA) and the Extension of Security of Tenure Act 62 of 1997 (ESTA). Both pieces of legislation aim to regulate tenure relations between owners and occupiers of farms and determine when and how occupiers may be evicted so as to prevent people from being arbitrarily evicted and left with no alternative place to go.

This programme has been the slowest and most difficult aspect of the land reform process to implement. It seems as if ESTA and LTA are just mechanisms of regulating evictions rather than to reform tenure rights in a proactive manner. It is therefore not surprising that between 1994-2005, only 50 000 people have acquired private property land tenure rights, as opposed to the rights afforded to them by ESTA and LTA as residents, involving a mere 90 000 hectares. Ongoing and protracted disputes, both of litigious and non litigious nature, dog the land reform programme and the commercial agriculture sector. At the heart of these disputes is disagreement over who has what right. A matter that has been left to parties to resolve through litigation. In the province of KwaZulu- Natal alone, 1599 alleged cases of rights abuses were opened by farm dwellers between 2001 and 2007.<sup>30</sup> As outlined earlier the parties enter this judicial system on a highly uneven playing field, with ongoing lack of adequate representation by farm dwellers, poor knowledge of the law by Magistrates and even narrow interpretation of the rights by the Land Claims court as pointed out by the Popela Constitutional Court judgment.

In February 2004, the government passed the Communal Land Rights Act 11 of 2004 (CLaRA). It empowers the Minister of Land Affairs to transfer ownership of communal land from the state to the communities under land administration committees. Traditional authorities will play the role of administration committees where they are in place. CLaRA has been criticized for compromising democracy by imposing un-elected tribal authorities on the people, its failure to address congestion in rural areas and its inability to secure land rights for the beneficiaries of land tenure reform. Three years after it was passed, CLaRA is yet to be implemented.<sup>31</sup> When attempts by civil society to stop the passing of this legislation in its current form failed, following its enactment a legal challenge was put together, in support of four communities, challenging the constitutionality of the Act.

*“The stated aim of the CLRA is to improve tenure security. Yet four rural communities are challenging the constitutionality of the Communal Land Rights Act (CLaRA). They argue that instead of securing their rights in the land, the CLRA makes them, and key categories of people - such as single women – less secure. It does this because together with the new Traditional Leadership and Governance Framework Act (TLGFA), it imposes apartheid era boundaries and structures on their communities. The communities are Kalkfontein and Dixie (both in Mpumalanga), Makuleke (Limpopo) and Makgobistad (North West).*

*Another key complaint is that the Act will reinforce the patriarchal power relations that contribute to the problems women face in trying to access land and being evicted from their homes at the end of their marriages”.*<sup>32</sup>

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<sup>30</sup> KZN Land Legal Cluster trend report: June 2007

<sup>31</sup> Ibid.

<sup>32</sup> Legal Resource Centre brief to AFRA outlining the challenge

What rights are created or recognised and conferred on people who fall within the ambit of the Act sits at the heart of many of the critiques of this Act. The legal challenge summarises their concern as follows:

*“An intrinsic feature of systems of property rights is the ability to make decisions about the property. Under customary systems of property rights decisions are taken at different levels of social organisation, including at the level of the family. By transferring ownership at the level of the “community” and individual only, the CLRA undermines decision-making power and control at other levels.”<sup>33</sup>*

## **African tenure system**

The enduring nature of the African tenure system, which is well captured in many papers<sup>34</sup>, within the farm dweller households and communities appears to require a similar level of recognition and consideration to that now being given to families residing in more traditional communal areas.

Interestingly the kinds of discussions taking place currently around communal or customary forms of tenure and how they might be better understood and worked with has shifted towards an acknowledgement and acceptance of, at least, the systems ability to endure and adapt through a variety of economic development programmes. There also seems to be some recognition or at least debate about its ability to work more favourably in the interest of the poor and marginalised than that of private individualised forms of tenure.<sup>35</sup> Cousins and Claasens argue that...

*“The central issue is how to recognize and secure land rights that are clearly distinct from ‘Western-legal’<sup>36</sup> forms of private property but are not simply ‘customary’, given the impacts of both colonial policies and of past and current processes of rapid social change. ....In contexts marked by social differentiation, large-scale migration, commodification of production relations and increasing institutional complexity, there is evidence of increasing levels of conflict over land rights, as well as of rising levels of land sales and other kinds of transactions.”<sup>37</sup>*

Although their paper focuses on communal areas there is growing evidence that farm dwellers hold onto similar historical perspectives in the way in which they describe their relationships to land. Their identity and relationships in farming areas can simply not be reduced to that of a class of labourers only or primarily. Certainly this recognition came through strongly in the Popela Constitutional court judgement and confirmed the responses of farm dwellers in workshops evaluating their situation in 2005 with regard security of tenure.<sup>38</sup>

In considering its impact on the communities in the case studies it can be simply described as a system of land tenure in which the entire community claims collective rights to the access and use of land. In this system, people, through their families, have rights to land which they may not alienate except through some form of recognised group authority oversight. Land is regarded less as an economic asset for the purposes of making the market function than an economic asset for the purposes of making a social system function. Land rights are embedded in a range of social relationships and units such as households and kinship networks. They include family rights to residential and arable land as well as community access to property resources as grazing, forests and water. Land rights are derived from accepted membership of a social unit e.g. birth, affiliation or allegiance to a group and its political authority or transactions of various kinds e.g. gifts, loans and purchases. Property boundaries are natural features such as rivers, valleys, ridges and indigenous trees. These boundaries are flexible and negotiable over time but they are relatively stable. If a boundary or any other land dispute arises, the induna and elders of the area meet to resolve it. They also meet regularly to discuss enforcement of land rights and regulation of common property resources. An outsider intending to settle in an area begins by either approaching an acquaintance living in that area for assistance in

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<sup>33</sup> *ibid*

<sup>34</sup> Alcock & Hornby, Butler, Cousins and Claasens

<sup>35</sup> Cousins and Claasens, Butler, Alcock and Hornby

<sup>36</sup> Daley and Hoblely (2005: 8) suggest this useful term for dominant notions of property.

<sup>37</sup> Cousins and Claasens

<sup>38</sup> documented in AFRA, *This is our home - it is our land, our history and our right.*- consolidated verbatim report of workshops with farm dwellers 2005.

identifying land or he can approach the induna directly for the land. He is required to bring a 'reference' letter from his former inkosi to ensure that he does not have a criminal record. He is then given a piece of land if it is available.<sup>39</sup>

### **Roman/Dutch Law tenure system**

This system was introduced with settlement of Europeans in South Africa. Part of the British colonial project established an indirect form of rule which enabled the African tenure system to function alongside the new system albeit in adapted forms. It is a formal system of land rights that equates tenure security with exclusive rights over a particular spatially demarcated parcel of land. A detailed survey of the property boundaries is carried out to create documentary evidence of the property. It is then registered in the name of the owner who is then issued with a title deed that confers on him jurisdiction and exclusive control of the property and its resources.<sup>40</sup> It is alienable and achieves its value through the market interest in it.

Fundamentally, it remains as the core of the current tenure system in South Africa. Attempts to engage with it or erode those rights in practice, through the implementation of laws like ESTA and LTA, have met with fierce resistance. It underpins the governments approach to land reform as the implementation remains premised on a market driven approach. Despite growing calls for a state driven programme requiring direct intervention through expropriation the state remains loathe to shift from this premise. Recent adaptations in the form of a Proactive Land Acquisition Strategy (PLAS) which would see the state as the buyer, holding land for communities until they are ready to take "ownership", still assumes that the market is the key mechanism for reform to take place and that this is a mechanism to create live/economic assets (tradable commodities) out of "dead" ones. A recent speech by the Minister for land and agriculture, Lulu Xingwana confirms this thinking :

*"We are trying to ensure that the dead assets in the hands of our people such as land and livestock generate income and jobs, through animal massification by means of improved and increased production, nutrition and genetic improvement. To further maximise the use of land while also responding to the global need for renewable energy, we have completed a draft strategy for crop production to feed into the national bio-fuel strategy. The strategy estimates a 10 million ton crop production from three million cultivated hectares per growing season, of which two million hectares will be based in the former homelands."*<sup>41</sup>

It really suggests that the recipient communities are holding the processes back rather than there being any recalcitrant sellers. In this way the state also assumes more control over how communities will get equitable access to land i.e. they will need to satisfy the state's own agricultural programme ambitions before getting access to agricultural land!

### **Time Line of South African Land Policy**

The extent to which people realise their socio-economic rights to land is determined largely by the way the government regulates the access and use of land through various legislative provisions. From the beginning of the country's colonial invasion in 1652, wars of land dispossession were waged against the indigenous people to seize their land for the extraction and use of its natural resources by the white settlers, and as a form of social control of indigenous populations. Colonial authorities deliberately alienated the blacks from land ownership so as to ensure their availability as a cheap and docile source of labour force to service the agricultural and mining economies. The 1913 Natives' Land Act had far reaching consequences on people's land rights. It divided the country into 'reserves' where blacks could own land and the rest of the country where they could not. Only 7% of the country's total land surface was set aside for the reserves while the remaining 93% was under white control. The 1936 Native Trust and Land Act reinforced the 1913 Land Act

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<sup>39</sup> Ben Cousins and Aninka Claassens, More than simply 'socially embedded': recognising the distinctiveness of African land rights, 2006.

<sup>40</sup> Liz Alden Wily, Land rights reform and Governance in Africa, UNDP, New York, 2006.

<sup>41</sup> Address by Minister for Agriculture and Land Affairs Ms Lulu Xingwana, Budget Vote Speech at the National Council of Provinces (NCOP), Cape Town: 6 June 2007

policy of land segregation. It identified a paltry 6,2 million hectares of land to be added to the 'reserves', increasing the aggregate African land from 7% to 13%, thereby placing an absolute limit on the land that would be available for African settlement. The Act established the South African Native Trust whose duty was to acquire and develop land for Africans. However, the government failed to reach the 13% quota for African reserves, initially because of its involvement in World War 2 and then due to resistance by white commercial farmers to make land available to the Trust. The Act also forbade registration of new tenants on farms inevitably leading to increased urbanisation that the 1913 Act had started. Urbanisation in turn created over-crowdedness, diseases and related socio-economic problems. The government's response to minimise urbanisation was the passing of the 1945 Black (Urban Areas) Consolidation Act that created separate areas for African residents in which they could acquire land. Africans were only allowed access to urban areas where they were employed.<sup>42</sup>

By the time the National Party came to power in 1948, both urban and rural land in the country was divided along racial lines. Freehold communities living outside the 'native reserves' were referred to as 'back spots' and risked forced removals at any time. The two Land Acts resulted in large-scale evictions of farm dwellers on a daily basis. Some of them went to towns while others flocked to the freehold areas. By the 1940's, the reserves and freehold areas became overcrowded thereby diminishing their capability of sustainable agriculture. Many heads of families became migrant labourers on white farms, mines and in the cities, while women, children and the elderly were left to work on the land. The National party consolidated the discriminatory policy of land settlement by passing the 1959 Promotion of Bantu Self-Government Act that aimed at granting political rights to Africans in the 'homelands', 264 pieces of unproductive land scattered all over the country. Despite Tomlinson Commission's recommendation to avail adequate infrastructure, land and money to make the 'homelands' viable, the government spent very little on them and by 1980 had failed even to acquire the 1,2 million acres of land set aside by the 1936 Land Act.<sup>43</sup>

Between 1960 and 1983, over 3,5 million people were forcibly removed from their lands to create separate and eventually 'independent' states for African people. In the same period, over 500 000 people were removed from black freehold areas. The government referred to these areas as 'black spots' because it felt that they were black-occupied areas in white-designated land that needed to be eliminated. In Natal alone, 105 000 people were removed from 109 freehold areas and 14 missions between 1948-1982. In 1956 the government amended the 1936 Land Act to provide for the registration of all labour tenants, prohibiting engagement of new rent-paying tenants and the establishment of a Labour Tenants Control Board that would administer this process. The Bantu Laws Amendment Act of 1964 provided for the banning of labour tenancy in any district through a simple proclamation in the Government Gazette. As a result of this law, between 1960-74, 740 000 labour tenants and 753 000 people living illegally on land ('squatters') were evicted. These forced removals caused enormous psychological and physical pain and outbreaks of diseases due to absence of basic amenities in new resettlement areas.

In response to the increasing popular resistance against the discriminatory land policies and forced removals in particular, the government declared a State of Emergency in 1986. Between 1986-89, the government unleashed a wave of brutal state repression, mass detentions, state-sponsored hit squads and harassment of activists opposed to apartheid. When the government realised that such an explosive and volatile situation could not be sustained for long, it made legislative concessions such as repealing the notorious pass laws by passing the Abolition of Influx Control Act of 1986, and holding secret negotiations with ANC leaders about a political settlement. On 2 February 1990, the government lifted the ban on the ANC and other political organisations. The formal negotiations that began immediately afterwards resulted in the country's first democratic elections that brought the ANC to power on 27 April 1994.<sup>44</sup>

The new government faced a daunting task of redressing the racially biased land policies of the apartheid era. The following section will consider the four community case studies in the light of the above introduction.

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<sup>42</sup> A. Harley and R. Fotheringham, *AFRA: 20 Years in the Land rights struggle, 1979-1999*, AFRA, Pietermaritzburg, 1999.

<sup>43</sup> *Ibid*

<sup>44</sup> *Ibid*.

## CASE STUDIES

### 1.1 CORNFIELDS: SECURING LAND RIGHTS FOR DEVELOPMENT

#### Location

Cornfields is located in the Umtshezi municipality, in the Midlands area of KwaZulu Natal Province, about 27 kilometres north-east of the town of Estcourt.

#### Pre-colonial period

During pre-colonial times the indigenous Africans lived in this area under traditional authorities. Their land rights were communal in nature i.e. they had family rights to residential and arable land and common access and use of property resources such as grazing, forests and water. The traditional authorities acted as custodians of people's land rights i.e. they ensured enforcement of land rights, regulated the use of common property and resolved disputes over land claims and boundaries.<sup>45</sup>

#### Colonial period

After the country's colonisation by white settlers, the white farmers became the new landowners. The indigenous people's status changed to being labour tenants. Cornfields became Hattingh Farm after a white farmer of that name bought it. The labour tenants continued to have residential, cropping and grazing land rights in exchange for their labour.<sup>46</sup>

#### Purchase of Hattingh Farm

In 1912 the above situation took a dramatic change with the purchase of part of Hattingh Farm (600 hectares) by Wilcox, a Baptist Church missionary. Wilcox sub-divided the land into different sizes of plots (i.e. 5, 10 and 20 acres) and offered them for sale, as freehold title, to those who had the financial means and were willing to become Christians. A few labour tenants who satisfied these two conditions took up the offer and bought mostly 5 or 10 acre plots. Most of the others were unable to satisfy these two conditions and had no choice but to relocate to the portion of the farm still owned by Hattingh. Some evictees from surrounding farms and people from overcrowded reserves within the province and elsewhere also bought plots.<sup>47</sup>

The new freehold landowners provided land to most of the people who continued to flock to this area, after all the land had been bought, if they felt they had sufficient land to do so. The new tenants underwent a screening process undertaken by a committee elected by the landowners and were obliged to bring a transfer letter from where they came. The letter served as proof that they did not have a criminal record from where they were coming. They were also supposed to be converted to Christianity. Depending on the availability of land, tenants were either given only residential land or cropping and grazing land as well.

The issue of the tenants' land rights differed from one landowner to the other. Most of the landowners considered the tenants as their subjects and as a result barred them from enjoying certain rights e.g. attending landowners' meetings, becoming committee members, having unlimited number of stock. Others were liberal and allowed their tenants to enjoy some but not all privileges e.g. they allowed their tenants to have unlimited number of stock and sometimes asked them to attend some meetings on their behalf.

The people who bought the land cherished the idea of owning their pieces of land by possessing the freehold title deeds. Although in theory they possessed individual title to their land, in practice they adopted the communal land ownership system. The Cornfields community elected a committee that administered and regulated their land rights. The committee designated a common grazing area for all the landowners.

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<sup>45</sup> Interview on 20/02/07 with the following Cornfields freehold title holders and Trust committee members: Absalom Mabaso, Sobongile Gumede, Mzwini Mkhize, Vincent Mbhele and Mkhishwa Ndlovu.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

Although each landowner claimed individual title to residential and cropping land, the grazing land was communally owned.

Landowners grew mainly maize and corn for subsistence purposes. They also kept varying numbers of cattle to subsidise their crop yields.

### Effects of Legislation on Freehold Land Rights

The 1913 Natives' Land Act was a very significant event in the history of African access to freehold land. Although the Act did not itself provide for relocation of freehold areas, it legislated the principle of territorial segregation with respect to white and African land ownership in the country and laid down the basis for future grossly inequitable allocation of land between white and black people. By providing that only certain strictly defined areas would be open to African ownership and occupation, and by placing the power to determine and regulate these areas in the hands of the all-white Parliament, it put a stop to the previous very limited purchase of freehold land on the open market by Africans. Furthermore, it made isolated African properties that had already been bought on freehold (e.g. Cornfields) very vulnerable to the charge that they were misplaced in white territory.<sup>48</sup>

From 1914 to the 1940's economic conditions in Cornfields deteriorated mainly due to overpopulation and lack of capital with which to develop the land to accommodate denser settlement and more intensive agricultural methods that were suitable for this area. Since some of the people who came to Cornfields brought with them their stock as well, the area also became increasingly overgrazed and overstocked thereby reducing the size of arable land. To worsen the situation, government's failure to provide the area with the necessary financial and technical support plunged Cornfields into poverty. The people had no choice but to resort to migrant labour to supplement their meagre resources. The Cornfields local leadership felt powerless to improve their community's predicament because the government increasingly usurped their powers by appointing their own leadership, defining boundaries and overseeing all judicial matters.

The 1936 Native Trust and Land Act posed a great threat to the future of all freehold areas. The government called them 'black spots,' an official term for black-owned freehold lands in white-designated areas that the state felt should be eliminated. Their status, despite the ownership of freehold title, was made increasingly insecure by a provision in the Act that permitted the Minister of Agriculture to expropriate African land situated outside the reserves. At any time, African title deeds in Cornfields would not be a guaranteed security of tenure for it was considered a 'black spot.'<sup>49</sup>

### Forced Removals, 1948-1985

From 1948, the Nationalist government instituted a programme of forced removals from 'black spots' to implement its policy of racial segregation of rural land. It is estimated that of the 363 'black spots' in Natal, by 1982 116 of them had been completely removed, 7 had been partly removed, 195 were under threat of removal, 28 were likely to be incorporated into KwaZulu while the status of the remaining 17 was unknown. A total of about 105 000 people had been removed while approximately 245 000 people were still under threat of removals. Throughout the 1980's, plans to remove the freehold communities continued through the government's policy of Bantustan development and the consolidation of KwaZulu.<sup>50</sup>

In 1982 the Cornfields community was informed that the government would move them to Mqwabalanda, a proposed resettlement area near Wembezi Township and 20 kilometres west of Estcourt. In response to this proposal, in 1984 the people of Cornfields sent a strongly worded memorandum to the Minister of Agriculture expressing their opposition to the move.

### 'Suspension' of Forced Removals

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<sup>48</sup> Surplus People Project, *Forced Removals in South Africa*, Vol.4: Natal, SPP, Cape Town, 1983.

<sup>49</sup> AFRA, *Special Report No. 7: From Removals to Development: Cornfields-Profile and History of a Rural Community*, AFRA, Pietermaritzburg, 1991.

<sup>50</sup> A. Harley and R. Fotheringham, *AFRA: 20 years in the land rights struggle, 1979-1999*, AFRA, Pietermaritzburg, 1999.

In February 1985, under immense opposition from the affected communities as well as national and international pressure, the government was forced to announce the 'suspension' of the removals. However, it began to employ subtle and indirect tactics of forcing people to move to the new resettlement areas. Those who agreed to move to Mqwabalanda were promised free transport, monetary compensation, fertile fields, grazing lands and all basic amenities. But those who refused to leave Cornfields were told that the state would not give them any development aid.

The deteriorating conditions in Cornfields, enticing monetary compensation and facilities promised by the government in the resettlement areas finally forced about 4300 people (395 families), mostly tenants, to move to Mqwabalanda at the beginning of 1988. Both the landowners and tenants who relocated lost their land rights in the process. The rest of the community continued their resistance to leave Cornfields and requested the government to upgrade the area. In October 1989, after the government made it clear that no development aid would be given to Cornfields, the community set up a Development Committee that would source national and international financial and material aid to develop the area. They also requested AFRA to assist them in undertaking human resources capacity building programmes by training their leaders in various skills such as preparation of budget proposals, project management, fundraising and acquisition of basic accounting knowledge. In a memorandum they delivered to the Minister of Development Aid on 4 June 1990, Cornfields community voiced their opposition to removal and demanded government's provision of financial, material and human resources assistance. The community was receiving increasing national and international support from land and human rights organisations thereby putting immense pressure on the government to review its land policies. It was therefore not surprising that on 18 July 1990 the Department of Development Aid conceded to the Cornfields Residents Committee demands not to be moved. However, it did not promise them any development aid. Therefore the future development of Cornfields remained unclear since this reprieve merely granted the people security of tenure to their title deeds and nothing else.<sup>51</sup>

## Cornfields in Post 1994 Period

### Acquisition of additional land

At independence Cornfields freehold title landholders felt that their land rights were secure in view of the reprieve from removal granted to them in 1990 and because they held title deeds recognised by the new government as proof of land ownership. But they needed more land for cropping, grazing as well as collection of firewood and thatching grass. Through their Residents Committee, they therefore asked the Department of Regional and Land Affairs for this additional land. The government acquired an additional 8500 hectares of privately owned land adjoining their area under the Provision of Certain Land for Settlement Act 126 of 1993. It requested the community to elect Trustees and register a Trust that would manage the additional land. Initially, the state provided 80% grant while each prospective landholder would contribute the remaining 20% in form of a loan (15%) and down payment (5%).<sup>52</sup> But because of a change in the government's land reform policy, the purchase price was converted into a 100% government grant and the landholders were no longer required to make any contributions. However, some people who had already paid their contributions never had any refunds. They are accusing the Trustees of embezzling their funds since they have tried in vain to have a proper account of how their money has been used. Since its formation, the Trust has not carried out its normal operations and as a result people have just allocated themselves plots on the acquired land.<sup>53</sup>

### Landholders' rights

On the original freehold land, the landowners claim that they still hold more superior land rights than their tenants. The tenants on the other hand contend that they now have equal land rights to their landlords in terms of the new government's land reform programme. The people who set up residence on the additional land purchased through the Land reform programme, have the same rights under the Trust.<sup>54</sup> However, since

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<sup>51</sup> AFRA News No.55, May 2003, All that happened in Cornfields AFRA, Pietermaritzburg, 2003.

<sup>52</sup> AFRA News No. 27 April/May 1994 Cornfields and Tembahlile finalise land purchase, AFRA, Pietermaritzburg, 1994. See also AFRA News Nos. 2 (1988), 7 (1990), 8 (1990) and 9 (1991).

<sup>53</sup> Interview on 20/02/07. See also AFRA Annual Activities Reports for 2004, 2005 and 2006.

<sup>54</sup> Ibid.

the establishment of the Trust and the registration of the land in the name of the Trust many more families have settled in Cornfields. The land rights of these families is very unclear as neither the Trust nor the freehold families can agree how these additional families came into the area.

The issue of land rights in Cornfields has been complicated by the presence of various committees whose functions are unclear to the people. In addition to the Residents Committee that has been in existence before independence, there are three more bodies: a Trust, formed to administer the affairs of the additional land as well as the ward and development committees established under the developmental local governmental system. Since each of these structures purport to promote the community's access and use of their land, the people are confused as to which one they should pay allegiance.<sup>55</sup>

What is the way forward?

Most people feel that to solve this problem, the leadership of the various committees must meet and decide which structure should be tasked with the administration of the community's affairs. Clearly, if the problem remains unresolved, economic development will remain a nightmare for the Cornfields community despite its legally "strong" land rights established through the freehold title deeds and community Trust.<sup>56</sup>

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<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

## 1.2 EKUTHULENI: SECURING RIGHTS OF FAMILIES AND LEVERAGING CAPITAL

### Location

Ekuthuleni is situated about ten kilometres from the town of Melmoth in Mthonjaneni District, KwaZulu Natal Province. The farm is 1 160 hectares in size.

### Pre-colonial period

During this period, land was administered by amakhosi with the assistance of their izinduna who were in charge of various wards. Actual land allocation in each ward was the responsibility of the induna. Landowners practised the African land tenure system in which each family had land rights to its residential and cropping land while the entire community had access to the grazing area. Dwellings took up most of the flat land leaving the growing of crops to steep slopes. Agriculture was for subsistence. The main crops grown were maize and beans. Most people also kept cattle, goats and sheep for milk and meat to supplement their agricultural yields. A few people also kept donkeys and horses for ploughing and transport purposes respectively.<sup>57</sup>

Natural resources formed an important component of people's livelihoods in this community. The main natural resources people used to sustain their lives were water, thatching, firewood, reeds for making mats (ikwane) and harvesting medicinal herbs (muthi) from the forest. Access to water did not need the landowner's permission to use the resource. Women could choose where they wanted to collect and use the water without bothering to ask for the landowner's permission because access to this resource overrode any other rights on the land. In the cases of thatching grass, ikwane and firewood, one needed permission from the landowner to harvest them. But as for muthi from indigenous trees, access simply required a person to be on the landowner's plot but permission to harvest the trees was not required because the landowner was not responsible for producing the trees.<sup>58</sup>

If any newcomer intended to settle in Ekuthuleni, he approached a landowner in the community whom he knew possessed additional land. If the landowner agreed to give him land, he took him to the induna who in turn took him to the inkosi for introduction. The inkosi then showed the newcomer the land in the presence of the neighbouring landowners who verified the plot's boundaries. The new landowner did not pay for the land. At times, the induna would allocate part of the grazing land to outsiders who looked for land. But he would discuss the issue with his people and obtain their consent. If they agreed to his proposal, the outsider was then given the land.<sup>59</sup>

### The Lutheran Church reign, 1868-1971

The Lutheran Church "bought" Ekuthuleni from the local inkosi in 1868. It wanted to have a place to build churches and schools and to use as a base for the preaching of the word of God to the people in the surrounding communities. The church allowed the people to continue living in this area provided that each family paid an annual rent of R1, 50 for residential and cropping land rights and a stipulated amount per head of stock. A family that failed to pay the rent, provided labour for a period stipulated by the church. Some of the families were converted to Christianity and became the Amakholwa.<sup>60</sup>

The church designated one portion of land that was used by the entire community as a cemetery. Every family was supposed to bury their dead family members on this piece of land. The church also developed a set of rules and regulations that every person was obliged to follow. A church disciplinary committee was

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<sup>57</sup> Interviews on 10/03/07 with the following Ekuthuleni CPA Committee members: Mr Mnyandu (CPA Chairperson), Mr C. Nxumalo, Mr B. Mnyandu and Mrs Dlodla.

<sup>58</sup> Donna Hornby, *Tenure Rights and Practices on a State-owned Farm-the community of Ekuthuleni*, AFRA, Pietermaritzburg, 1999.

<sup>59</sup> Ibid.

<sup>60</sup> Interview on 10/03/07 with CPA Committee members.

established to try those people who contravened the regulations. If the committee felt that the offence was serious, the offender would be evicted from the area.<sup>61</sup>

### State control, 1971-1994

The government considered Ekuthuleni a 'black spot' (a black-occupied area in white-designated land that required the occupiers to be relocated to African reserves.) It therefore bought the land from the church in 1971 so that it could relocate the people as soon as it identified a suitable resettlement area. It barred people from building new houses because they could be removed at any time. This move greatly compromised people's land rights because they could not undertake any long-term development programmes on their properties since they could be evicted at any time. However, they were allowed to continue cultivating their fields and keeping their animals at an annual rental fee of three Rand per family. The government appointed a white officer whose duty was to undertake frequent checks on the area to ensure that the people adhered to the stipulation of not building new houses. But when the government withdrew him from the area and kept quiet about relocating, people began building new houses and the situation went back to normal.<sup>62</sup>

### Post 1994 period

At independence in 1994 the government, through the Department of Land Affairs (DLA) became the owner of the land. In 1997, representatives of the 224 households living on this land requested the DLA to transfer the land to them so that they could be acknowledged as the legal owners of the land rights by virtue of the fact that they had been living on this land for generations. DLA officials explained to them that since they did not have individual titles to the land, the only way land could be transferred to them would be through the establishment of a legal entity such as a Communal Property Association (CPA) or a Trust that would administer the land on their behalf.<sup>63</sup> The landholders opted for a CPA and established this legal entity to run the affairs of their land rights. Landholders themselves are members of the CPA.<sup>64</sup>

### AFRA'S work in Ekuthuleni

In 1999 AFRA set up a PILAR (Piloting Local Administration of Records) project in Ekuthuleni, after the community had requested them to help them with the compilation of records of their individual land rights that would be legal, affordable and sustainable. It was an attempt to find a cost-effective alternative to the formal surveying of the land that was beyond their financial means. The local records were seen to be essential for obtaining credit and guaranteeing tenure security under the country's legal system.<sup>65</sup>

In its efforts to assist the community in creating the records for their land rights, AFRA undertook two processes. First, it consulted widely with a diversity of stakeholders in order to obtain a clear set of legal and technical options with which to proceed. Secondly, it analysed processes in both the formal and informal tenure systems with the objective of trying to find ways of bridging them and to devise some options to present to the community. In its consultations with stakeholders, it found out that any claim to land rights required surveying and registration, long, complex processes that were too expensive for the poor and that conflicted with community practices e.g. consent to subdivide. Therefore, as things stood then, there was no

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<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> The Communal Property Associations (CPA) Act No. 28 of 1996 provided for the establishment of CPAs to enable self-constituted groups of people to acquire, hold and manage land on a communal basis. This form of communal property institution (cpi) used constitution making as the mechanism to construct the group and create a legal person that can own land. The primary purpose of this new cpi was to provide rural people with a relatively simple alternative to individual freehold, tribal administration and other legal group ownership options. The assumption behind the CPA Act drafting was that available legal forms (e.g. companies, voluntary associations, trusts and sectional titles) were generally not appropriate due to complex administrative requirements or, as in trusts, because they placed the property in the hands of some on behalf others. Major objectives of CPAs were provision of a simple mechanism of transferring land to groups of people, providing them with tenure security, ensuring a democratic governance, promoting a sustainable management of natural resources and ensuring gender equality.

<sup>64</sup> Interview with CPA committee members on 10/03/07

<sup>65</sup> Donna Hornby, *Securing Tenure at Ekuthuleni*, AFRA, Pietermaritzburg, 2004. See also James Bourhill (1998) *Valuation exercise for Department of Land Affairs*; Rosalie Kingwill (2005) *Options for Developmental Land Administration Systems*; Denis Rugege (2005) *Adopting 'First level Adjudication' into GIS Medium*.

way of providing members with legal record of land rights that would have public legitimacy (with credit institutions and courts) and which government would back with resources for demarcation and registration.<sup>66</sup>

To assist the community in undertaking a relatively affordable but accurate method of surveying the land, AFRA used the so-called 'general boundary' technique. Landholdings were accurately demarcated using household interviews and aerial photographic maps showing existing tenure arrangements. The functioning local land administration system was described and documented and existing shortcomings and problems identified. A recording system was built around local practice and knowledge. Spatial data were digitised using modern geo-spatial technology to produce mapped layouts of land rights and land use. At the end of the exercise, AFRA had assisted the Ekuthuleni community to draw up their land rights boundaries in a participatory mapping activity. What is now needed is for the state to provide the necessary legal framework to support such cost-effective and local land administration systems so that the landholders can gain legal recognition of their land rights.<sup>67</sup>

It was assumed that the enactment of CLaRA would fill this gap. However, the Act has yet to be implemented and remains caught up in the development of regulations and systems that will enable it to be implemented. In the mean time the community has had to find ways to work within the CPA arrangement, which at the outset was a mismatch with what they were seeking from the state.

## Conclusion

Important lessons can be learned from the Ekuthuleni land ownership patterns. First, the situation in Ekuthuleni shows that the dominant Roman/Dutch Law property ownership system in South Africa is incompatible with the requirements of the ordinary poor people of the country who lack both the expertise and the financial resources to sustain and maintain such an elite system. AFRA's PILAR project emphasises the importance of working with practices people are familiar with in order to secure tenure. It also asserts the importance of communal tenure as a viable option amongst various management options. Positive features such as the social cohesion, flexible character of boundaries and the people's general perception towards property rights existing in communal areas such as Ekuthuleni provides a good starting point for government to devise the necessary legal framework to consolidate this communal system of land tenure.

The African tenure system as it operates at Ekuthuleni provides a functional tenure security for most people in the community. It adapts to the changing socio-economic needs of the community. It meets the needs of the poor for cheap access to land for it is based on a relatively functional tenure security, oral based evidence and adjudication practices. It is the duty of the government to formalise this land tenure system and to institute the necessary legal framework to ensure the landholders' tenure security.

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<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

### 1.3 GONGOLO: A CONTINUING STRUGGLE FOR LAND RIGHTS

#### Location

Gongolo is farmland located across the Umtshezi and the Mooi Mpopfana municipal areas, in Midlands of the KwaZulu Natal Province. It is bounded by the Bushman's River in the west and Mooi River in the east. It covers Mthembu and Mchunu traditional authority (TA) areas. Within the Mthembu TA, there are a number of sub wards referred to in Zulu as *isigodi*. These TA wards traverse farm land areas reflecting the TA social and political traditional relationship with people in those areas. Across the farmland area of Gongolo there are seven traditional wards (*isigodi*'s) three of which fall under the Mchunu TA (Phofini, Nhlanguwini and Mgwenya) and four under the Mthembu area (Ntunda, Matshesi, Mhlumbe and Nonthethe). It is farm land covering approximately 40 000 hectares in size.

#### Pre-colonial period

During this era, the chiefs administered the land with the assistance of their *izinduna* who presided over the various *izigodi* (wards), the totality of which formed the chief's area of jurisdiction. Community structures consisted of households that were headed by men who in most cases married more than one wife. Each wife had her own house and took care of her children who helped her in various duties e.g. tilling the land. Land was utilised in various ways. First, it was used for the growing of crops, the main ones being corn, peas and beans. It was the women's duty, with the assistance of their children, to till the land while men specialised in hunting. Land was also used for residence and common grazing for livestock. In some parts of this area, there were places that were reserved for tourist purposes e.g. woodland that contained wild trees peculiar to this area either because of their fruits or other characteristics. An example of such a tree was the *uzwathi* tree whose bark was used to light a fire.<sup>68</sup>

An outsider who intended to settle in this area approached the *induna* who in turn took him to the chief to present his request. The chief interrogated him on his life history and his reasons for intending to leave his original home. If land was available, the chief would first ask the newcomer to bring a reference letter from the *induna* of his original home that cleared him from any crimes. After the presentation of this letter, the chief asked the *induna* to allocate the newcomer a piece of land in the presence of the neighbours and local elders who would verify its boundaries. At times, neighbours would lend him a few head of cattle for milking if he did not have any. If he was lucky that some of them gave birth during the three or four years that he was allowed to keep them, he would retain the calves and return the cows that were lent to him.<sup>69</sup>

#### Colonial/Apartheid periods

In the early period of colonisation in this area, white settlers used the barter system to expropriate land from the indigenous Africans. They gave the local chiefs items such as pieces of cloth, guns and ammunition in exchange for land. As time went on, they just expropriated the land by force. The indigenous African people were then forced to be labour tenants. Initially, the white landowner asked the household head to work on the farm for three months per year. With the passage of time, the working period per year increased to six months. During the 1960's and early 1970's, the state, in conjunction with the commercial agricultural sector, launched a drive to replace labour tenancy with a system of reduced full time labour. The result was a massive state-assisted eviction of labour tenants that reached its peak in Natal between 1969 and 1976 during which more than 20 000 people were evicted. The evictees were resettled in rudimentary "closer settlements" that were hastily erected and generally far away from urban centres. During this period, farmers in this area also evicted most of their tenants and retained only a few they thought were adequate to sustain farm work on a full time basis. During this time, farm owners also drastically reduced the tenants' head of cattle and cropping land. At the same time goat rearing was outlawed.<sup>70</sup>

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<sup>68</sup> Interview on 26/04/07 with the following Gongolo Committee members: Mr Michael Majola, Mr Sithembiso Mahlaba, Mr Jabulani Mchunu and Mrs Dingeni Gumbi.

<sup>69</sup> Ibid.

<sup>70</sup> Cheryl Walker, AFRA Special Report No. 1 Mass Removals in Natal: Consolidation and Farm Evictions, AFRA, Pietermaritzburg, 1981.

The eviction process faced stiff resistance from the labour tenants who regarded the land as theirs. They argued that it was unfair for the farmers to evict them from the land on which they had lived for generations. They pointed to their family graves that dated well back into the 19<sup>th</sup> century as proof of their claim of the land before the white settlers expropriated it from them. They believed that their ties of settlement, cultivation and family ties were far more binding to them than a mere title deed that the white farmers based their land ownership on.<sup>71</sup>

Farmers in this area frequently impounded labour tenants' livestock for trespass and demanded exorbitant trespass fees before they could release them. They accused the tenants of breaking their fences to allow their animals to graze on their land. They also alleged that the tenants' cattle were a threat to their business since they spread diseases onto their livestock. In most cases, the tenants had no option but to sell some of their animals in order to raise the required fines. Since they were given limited time to pay the fines, local speculators exploited their desperation to pay very low prices for their livestock. According to the Weenen Pound records, 78 stockowners sold 122 head of cattle and 74 goats to these speculators between 1991 and 1992.<sup>72</sup>

The stock impounding confrontations that took place on Ncunjane Farm serve as a classic example of what happened on other farms in this area. From the beginning of 1991 Peter Channing leased a farm belonging to an absentee owner, Werner Seele. As soon as he took over the farm, Channing set tough conditions for his tenants. He ordered each family to pay a monthly rental of R60 and an additional R6 per head of cattle and R2 per goat. He also ordered them to reduce their livestock to 250 cattle and 300 goats by August 1991. The tenants told Channing that they were unable to raise these rentals and requested him to reduce the rentals to R10 per family, R2 per head of cattle and 50 cents per goat. Channing rejected this request and impounded all their cattle and goats and demanded payment of R21 250 before he could release them. The tenants refused to pay the fine and with the assistance of the Weenen-based Church Agricultural Farm Trust and AFRA, they took Channing to court. After a protracted legal battle involving several court hearings, the tenants won a Supreme Court interdict that restrained Channing from interfering with the tenants' lives and ordered the return of the livestock. Conflicts and confrontations between the tenants and Channing continued throughout 1991. Several tenants were arrested and jailed for trespassing. One of the tenants, Muziwabantu Majosi, was shot and wounded in the leg for trespass when he went to collect his goats that had strayed into Channing's neighbouring farm. However, this standoff was resolved in an out-of-court settlement at the beginning of 1992. Channing withdrew his R2 250 damages claim against the tenants. Tenants agreed to pay rentals of R20 a month per family, R5 for each head of cattle and R2 for each goat. They also agreed to limit their livestock to a maximum of 180 head of cattle and 300 goats, to plough a maximum of one acre per family and to build no more huts.<sup>73</sup>

### Situation in Gongolo at independence

When the government initiated its land reform programme at independence in 1994 and requested the people to lodge their claims, the following categories of claims and land rights emerged in Gongolo.<sup>74</sup>

*Restitution Claimants:* These were people who were dispossessed of their land through racially discriminatory apartheid laws and practices. Most of them were forcibly removed from this area during farm evictions of the 1960's and 1970's. They demanded a return to their land.

*Labour Tenants:* These were people who survived farm evictions and were still working on the farms at independence. They wanted the government to ascertain their land tenure security and lodged their claims under the Labour Tenancy Act that protects their land rights on the farms they are staying on until their applications to acquire the land they have lived on and used is settled.

*Occupiers:* These were people living on this land but were not labour tenants. They have rights of occupation in terms of the Extension of Security of Tenure Act. Some of the people might also qualify as labour tenant

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<sup>71</sup> Ibid.

<sup>72</sup> Fred Kockott, *The Fields of Wrath*, AFRA, Pietermaritzburg, 1993.

<sup>73</sup> Ibid.

<sup>74</sup> Phelelani Duma, *Status Report on the Gongolo Project*, AFRA, Pietermaritzburg, 2004.

claimants but failed to lodge claims within the prescribed time frames of the Act. While they might assert their rights of residence in terms of the LTA they would not be able to lodge applications to acquire the land in terms of this Act anymore. Those who do not meet the definitions of a labour tenant as outlined by the LTA would fall within the ambit of ESTA. As rights holders under ESTA they cannot lay any legally recognised claim to the land but can expect protection of their occupational rights under the ESTA and can make an application to the DLA for support to purchase land under the redistribution programme.

*Traditional Authorities:* The Mthembu and Mchunu traditional authorities claim that this area falls under their jurisdiction and therefore they must be consulted over important matters relating to the area's land rights. Although they took a back seat in the land claim disputes from the beginning, there was need for the various claimants to keep them abreast of developments.

*The existing white landowners:* holding land under the roman Dutch system as private land owners.

### Reaction of White Farmers<sup>75</sup>

In a calculative move to retain the land, 16 local white landowners consolidated all their farms (40 000 hectares) and formed the Gongolo Wildlife Reserve (GWR) to manage a proposed wildlife reserve. They produced a feasibility study that argues that their farming activities are no longer viable and hence the land should be converted from agricultural land to a wildlife reserve. This move left many farm workers unemployed.

The situation in Gongolo has generated a protracted conflict of interests over the land between the farmers and the community and has reached a deadlock. GWR is requesting government to support its initiative as a viable local economic development plan which might require relocating people staying on its properties so that it can launch its eco-tourism venture. On the other hand, the community claims that it has land rights that do not require them to relocate to give way to a game reserve or anything else. They point out that the state must facilitate giving them back their land. They will then take part in negotiations about how to develop the land economically and viably, be it in the form of the wildlife reserve or otherwise. The municipalities responsible for servicing this area also find themselves in a difficult position for they feel they cannot provide services until the land issues and development vision for the area are resolved.

### AFRA's involvement in Gongolo

AFRA was "invited" to the area by DLA to "Build peoples capacity". A committee already existed whom we met and started working with in about 2000. AFRA viewed capacity building as a process made up of a number of interventions which have a clear objective. Ultimately the farm dwellers in this case needed to be empowered to make their own informed choices about their future and also be able to articulate what these choices were and how they could achieve them. This would mean that they would be required to negotiate successfully for their desired outcomes.

Afra's approach to capacity building with the Gongolo communities has entailed:

Firstly, sorting out representation of each ward committee and the Gongolo committee. Proper representation in structures was seen as a priority by Afra when dealing with labour tenancy issues. It was observed that the committees were not fully representing Gongolo communities and Afra undertook to resolve this issue with the existing committee.

Secondly, (2000-2001) Afra worked with the DLA in conducting a house to house survey to ensure that there is a base line data against which an impact assessment could be made. The main purpose of the survey was to get all the names of people residing on the affected farms and to get an idea which wards (isigodi) they resided in. AFRA set up an electronic database of this information.

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<sup>75</sup> Phelelani Duma, Report on the Gongolo Current Status, AFRA, Pietermaritzburg, 2004. See also Isibuko seAfrica (2006) Amachunu and Abathembu Community: Land Use Plan; Tsietsi Mkhele (2006) AFRA News No.59: Learning from Gongolo and AFRA Annual Reports, 2004-2006.

Thirdly, Afra assisted the DLA in a process that would help resolve residents land rights. A strategy was devised to ensure that every person on the farms had rights that were acknowledged through a signed letter by relevant bodies and institutions including the land owners.

Fourthly, (2001) Afra conducted a series of community workshops in each ward using participatory methods/tools to assist people to determine their livelihood strategies and how the unfolding land reform processes could be used to improve these. The information obtained was going to be used as a basis for negotiations by relevant parties and also help planning for future settlement options of Gongolo communities.

Finally, (2002) Afra has begun to prepare the Gongolo committee for negotiations. The approach that Afra undertook in designing the framework for the negotiations training was slightly different from a pure theoretical training. Afra felt it was more useful to train the committee on how to use the information that had come out of the ward workshops for understanding how to approach negotiations. In this way, the committee would be in a better position to express confidently what people want since they would have been involved in the workshops themselves.

The RLCC then declared the extent of the claim and confusion arose between DLA and RLCC as to who should “lead” the process. The RLCC did not see the relevance of signing the agreed letters ( between owners and residents), which would agree on who had what land rights as a precursor to negotiations, and so this was stalled. The community was not prepared to meet land owners without some agreement of status in place. Since then no jointly facilitated meeting called by government between landowner and committee has taken place to date.

Many attempts to meet RLCC and DLA were tried without success. During this time the committee joined up with the Restitution committee.

Eventually in 2004/2005 AFRA suggested an alternative process to the committee in an attempt to put community back in “charge”. This was a proposed process to establish a negotiating framework and forum in the district, driven by Local Government rather than Land Affairs. All parties seemed to agree to this process except DLA and RLCC.

AFRA then commissioned a consultant to start some of the proposed work of mapping areas and the affected people. This resulted in the community outlining their understanding of the traditional boundaries that they still worked with in the social systems. This mapping exercise was shared with other parties to highlight the complexities of the issues and the varying views on the issues in the area but it did not unlock the impasse as was hoped.

By mid 2006 became obvious that still beholden to DLA and RLCC poor process – so committee and AFRA revisited options and elected to do their own planning of the land so that the community can decide how this land be used in future regardless of how they come to access it.

### Government’s role in tackling the problem<sup>76</sup>

The Department of Land Affairs (DLA) and the Regional Land Claims Commission (RLCC) arranged several meetings with farmers and landowners in an attempt to resolve the land values and purchasing prices. These departments indicated that the landowners asked for exorbitant prices of their land, an aspect that hindered the purchasing of the land, impacting negatively on the progress of the people’s land claim. Although the RLCC promised the community that it would expropriate the land, it has not yet carried out its promise.

Although the Claimants Committee attended numerous meetings with various stakeholders, including the government, nothing tangible materialised from these meetings. Two meetings between government ministers and tenants turned out to be attempts to push the latter into accepting the reserve proposal on the basis that there was no real alternative plan on the table. At the same time, GWR representatives met with

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<sup>76</sup> Ibid.

government cabinet ministers, business and local government representatives to rally support for their business plan. Landowners received huge financial support from the private sector to develop their proposal into a viable business plan. By contrast, the tenants received no money to develop their own land use plans.

Without the knowledge of the tenants, the RLCC met with the local traditional leaders and established Trusts, with the Amakhosi as the Chair of these. When the claimants voiced their objections against such divide and rule tactics, they were accused of being against the traditional leaders. The RLCC negotiated the purchase of pieces of land from willing sellers without consulting with the claimants regarding which land they were claiming. Numerous attempts by the Claimants Committee to clarify what the government officials were doing regarding their problem received contradictory answers from the government. Letters that were written to Regional Land Claims Director, Provincial Director of Land Affairs and Minister of Land Affairs raising concerns about the process and severe lack of communication and consultation received no response. In December 2004 when the claimants undertook a protest march to Estcourt, no government official attended the march to receive their memorandum and there was no state response to the issues highlighted in this memorandum.

### Identifying Major Stakeholders<sup>77</sup>

After realising that all the strategies it had applied had failed to bring all the stakeholders together, the Claimants Committee, with AFRA's help, developed a Planned Process that would achieve this. All major stakeholders were identified and a schedule of bilateral meetings with them was agreed upon. In addition to the land claimants themselves, (restitution claimants, farm dwellers and traditional authorities) the following stakeholders were identified:

*The Regional Land Claims Commission:* As a creation of statute, this structure has the mandate to ensure that the community's land rights are restored or alternative equitable redress is afforded to the people. Its duty is to facilitate the settling of claimants' applications.

*Provincial Land Reform Office:* Its role is to facilitate the security of tenure of farm dwellers in terms of the Land Reform Act (LTA) and Extension of Security of Tenure Act (ESTA). It must process the labour tenant applications and also secure/protect the rights of ESTA occupiers through section 4 of the Act.

*uThukela and uMgungundlovu Municipalities:* Since the land in question falls within the boundaries of the two municipalities, they both have a role and interests in the planned development i.e. business or residential settlement. They are reluctant to be involved in the development of the area before the land rights issue is settled.

*Department of Economic Affairs:* This department is interested in the economic development of the area. They view the area as an economic boost if the land rights problem is settled.

*The Land Owners:* The 16 farm owners who formed the Gongolo Wildlife Reserve constitute an important component of the stakeholders. Since the land claims are on their properties, they obviously have to be involved in the negotiations to solve this problem. On their part, they would like to see a speedy settlement of the problem so that they can pursue their business interests.

### Steps to break the Deadlock<sup>78</sup>

Most of the stakeholders felt that the proposed Gongolo Land Claim Planned Process would help resolve the deadlock. The claimants were convinced that this process was sensible and gave the Claimants Committee a go ahead to engage with these stakeholders around the Planned Process. In addition, the Committee jointly with AFRA conducted visits to seven traditional wards to educate the community about the proposed process and to ask for their assistance in developing traditional boundaries to enable the stakeholders have the same baseline information.

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<sup>77</sup> Ibid.

<sup>78</sup> Ibid. See also Isibuko seAfrica (2006) Amachunu and Abathembu Community: Land Use Plan.

AFRA commissioned a consultant to develop a base set of parameters that would assist the stakeholders in resolving the claims issue. The consultant established that there was need for the mapping of the geographic areas affected by the restitution claims (registered with the RLCC); labour tenant claims (registered with DLA); current occupiers; the GWR as proposed by the landowners; traditional authority boundaries; traditional wards; municipal boundaries; and land parcels and ownership. There was also need to establish who and how many people made up the restitution claim per ward; who and how many people made up labour tenant claims; and how many residents there were per farm.

In November 2005, AFRA and the Claimants Committee convened a meeting with mayors, deputy mayors and ward councillors of the affected municipalities. They were acquainted with the objectives and procedure of the Planned Process. The consultant then made a presentation of his findings. Delegates at this meeting approved the formation of a Steering Committee that would have the responsibility of convening a broader Stakeholder Forum with powers to actively engage all the stakeholders in resolving the claims issue. The Steering Committee held its first meeting at the end of November 2005 to structure itself and to plan for the broader stakeholder meeting.

Meanwhile, in October 2006 the RLCC appointed a consultant, Maseko Hlongwa and Associates, to develop a land use plan for the areas claimed by the restitution claimants. However, the Gongolo Community were concerned about this development since they were of the opinion that they should have been consulted and involved in such a process that would obviously affect their lives. After analysing the physiography, geology and rainfall patterns of the area, the consultants pointed out that only 7 000 hectares situated in the south central and south eastern parts were suitable for commercial crop production while the remaining 33 000 hectares were unsuitable for commercial agriculture. Therefore, they strongly recommended that the area be utilised for the development of a game reserve and lodges since it contains all the required conditions for such a venture

The RLCC requested the Gongolo community leaders to attend a meeting in January 2007 to discuss the Maseko Land use Plan. A meeting that was scheduled for mid January failed to take place because some Gongolo community leaders were absent. However, the community leaders indicated that they will reject the plan because it favours the establishment of the game reserve as proposed by the GWR and that they were never consulted or involved in its compilation in the first place. They requested AFRA to assist them prepare an alternative land use plan in which the community will participate. Up to now, no further progress has been made on this matter.<sup>79</sup>

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<sup>79</sup> This came out in my discussions with Bheki Ndlela (Officer at AFRA) who works closely with the Gongolo community and was scheduled to attend the aborted meeting.

## 1.4 THE CASE OF THE FARM DWELLER

### Who is a farm dweller? What are the rationalities...

During May and June, 2005, AFRA ( Association For Rural Advancement – NGO working with people on farms in KwaZulu-Natal(KZN)) ran a series of workshops with groups of people resident on farms across KZN. Sixteen small group discussions were held in four workshops with 250 participants. 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 national land reform programme, with recommendations for resolving such. This was done to support people on farms to engage with the proposed new bill which is to consolidate of 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.

AFRA adopted an open space approach to the discussions using key guiding questions to initiate group discussions on five key themes:

- How people defined themselves and their families ( definitions of who has rights);
- How they lived and measured their livelihoods ( content of positive and negative rights);
- Conflicting rights and relationships with land owners (Authority and recourse);
- Matching law and practice ( how development is benefiting them);
- Expectations of the state.

The approach avoided a discussion on the existing legislation to ensure that people spoke about the perceived rights and the actual practices so that they could identify the gaps in the current laws and set out their expected principles for any new laws or policy.

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>80</sup>. The central concerns relate to ownership of land and rights to reside on land.

*“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.*

There are also, disturbing accounts of the negative impact of current legislation, abuse of human rights, limitations on Constitutional rights to education, and basic services and resources. There is also a growing dissatisfaction with powerlessness, landlessness and ongoing assaults on the dignity and integrity of their families, their homes and their livelihoods<sup>81</sup>.

To view marginality from the perspective of the farm dweller, it is most useful to start by reconstructing the term “farm dweller” and begin to see it as a political concept. At face value this term refers to persons who live on farm lands that belong to another person<sup>82</sup>. The neutrality of the term has been challenged by various parties including those who fall within this category of South African society. Farm dwellers have argued that it ‘does not fully capture the strength of their connection to the land’ as it is important to emphasise their status as “indigenous people”<sup>83</sup>. The response from farm dwellers on the question of who did not qualify as a

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<sup>80</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>81</sup> Ibid

<sup>82</sup> Nkuzi – *Still searching for Security* – eviction survey report 2006

<sup>83</sup> Ibid , Nkuzi pg iii

farm dweller relied heavily on the idea that the home that they have on the farms is the only family home and it is recognised through the practice of traditional ritual ceremonies which only take place at the family home. Those who do not practice such rituals at their homes on farms are assumed to do this at homes off the farm. In such cases these families would not be regarded as farm dwellers by other farm dwellers but rather as workers.<sup>84</sup>

They have also, at times, rejected the term because some feel it further marginalizes their ability to become citizens<sup>85</sup>. To date, however, no suitable alternative has been proposed that would capture the relationship of such persons to the land rather than to the work place.

This relationship to the land lies at the core of the argument for accepting this term as a political and social concept as well as a strong aspect of people on farms multiple identities. While it might be argued that there is in fact literature about people on farms the overwhelming majority of this refers to their identity as farm workers or labourers. The problem with such references is not that this is not a part of their identity but rather that it denies a very important aspect of their historical social and political identity, and in doing this erroneous assumptions are made about how farm dwellers understand their history and their rights to land. In denying their direct relationship to the land they become homeless and powerless to assert strong membership rights to the new broader political and social community. Such a dominant rationality must affect their agency or lack of such to act against their continued marginalisation. Where do they belong and which aspect of their multiple identities will or should give them power to act?

This perspective is captured quite succinctly 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>86</sup>*

### **How come we don't know the farm dweller? Creating and perpetuating rationalities...**

Such perspectives are deeply embedded in peoples understanding of the history of dispossession and its impact on their lives. While the creation of a labour force in rural areas is well documented<sup>87</sup> how this affected peoples perceived relationship (access and use rights) to the land as the essence of their social and political identity is less often questioned. Through a combination of colonial demarcations; numerous battles between the British, the Boers and the indigenous African people; and apartheid policies (all underpinned by both economic and ethnic imperatives) indigenous African people either “woke up” to find themselves on someone else's farm or moved onto such newly created farms through various farming and working relationships over time.

*“Because of the history of apartheid in South Africa white people came to our country and took everything we had including livestock, land etc and as a result of that we ended up dependant on them.”*

*“It's because of battles that took place. Black people lost and White people took all the land. They placed us in small places in the townships and divided us and made us their slaves. The new government is a ploy to make us think we are being given our land back.”*

Responses from two of the farm dweller respondents in the AFRA workshops 2005<sup>88</sup>

The overwhelming response in the workshop with the farm dwellers<sup>89</sup> to enquiries about who they were and who they regarded as family, with associate rights in the home, was disconnected from how the current laws

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<sup>84</sup> AFRA, *This is our home - it is our land, our history and our right.*- consolidated verbatim report of workshops with farm dwellers 2005....pg28-29

<sup>85</sup> Ibid .. pg 31

<sup>86</sup> AFRA , *Fields of wrath*

<sup>87</sup> Atkinson, D, 2007, *Going for Broke*, HSRC press., SPP special report , AFRA reports

<sup>88</sup> AFRA: *This is our home.*

define farm dweller families. Rather, it is possible to hear in their rationality on what defines home and family that aspects of the African Tenure system have endured through time and the structural creation of new identities for farm dwellers.

Key in this rationality is the understanding that “that land rights tend to be attached to membership of some unit of production; are specific to a resource management or production function or group of functions; and are tied to and maintained through active participation in the processes of production and reproduction at particular levels of social organization.”<sup>90</sup>

A few of the 250 responses to the above enquiry of who constitutes family, as opposed to how the ESTA and LTA define this :

- *“I am living with my mother, father, three sisters, their two children and my brother. Six of my siblings are married. We live on state land. My brothers are living in town because of work and have taken their spouses and children to be nearer to schools. During holidays they come home to the farm.”*
- *“It was my mom and my sisters and my brothers because we were born in one family. My father was born on the farm and it is our culture that we don’t want to go anywhere because there is no other place we know. There are two of my brothers who live outside the home and they came and visit the home and sleep and the landowner does not have problem with them. If there was a problem we would work together to solve it.”*
- *“It is my sister whom I live with. My parents and my brothers live in town to get better jobs. They are part of the family because we do every thing together and they had the right to live on the farm. They always come home at anytime, even to sleep as well, and the landowner does not have the problem with them. They have the right to live at the farm because it is the place we grew up and there is no other place we know”.*
- *“My family is my brothers, my sister, my parents and my aunts. My aunts were chased away by the landowner saying that the law does not allow them to stay at the farm with us. I had to stand up for that. I went to the DLA and I asked them which of these laws says people must not come and visit their family at the farms and they said I must go and see AFRA. Those people who I have mentioned are the members of the family by the law - they have the right to live on the farm.”*
- *“I stay with 8 children on the farm. My children work outside the farm. One works in Mozambique, one works in Durban and one works in Johannesburg. They come back every month end but the one in Mozambique only comes back after six months. It is still their home here because they stay in temporary accommodation in their respective employment”.*<sup>91</sup>

Even though this seems a relatively obvious point to make it is worth emphasising the argument that in any political and social system land tenure remains the “basis upon which people organise their livelihoods, access many of the services of the state (and private sector) and which the state uses as a base for exercising its relationships with its citizenry. Tenure and tenure security are therefore fundamental to understanding relationships, power dynamics and resource flows between people and between people and the state.”<sup>92</sup> The enduring nature of the African tenure system, which is well captured in many papers<sup>93</sup>, within the households and farm dweller communities appears to require a similar level of recognition and consideration to that now being given to families residing in more traditional communal areas.

### What are their land rights...

Since October 2001 farm dwellers, in KwaZulu-Natal, have reported 1599 cases of alleged socio-economic related abuses to the Land Legal Cluster partners.<sup>94</sup> This has meant that an average of 24 cases a month were

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<sup>89</sup> AFRA: This is our home..

<sup>90</sup> Cousins and Claasens

<sup>91</sup> AFRA

<sup>92</sup> Cousins, Tessa

<sup>93</sup> Hornby & Alcock, Butler, Cousins and Claasens.

<sup>94</sup> The 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

opened between October 2001 and March 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 governments attempts to provide increased security to families on farms. Through giving Farm dwellers socio-economic land rights, on “privately”<sup>95</sup> owned land government 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.

### **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***

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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.

<sup>95</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.

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.”*

Despite this judgement no long term solution has been put in place to at least provide affordable and accessible legal services to farm dwellers.

## Conclusions...

This section of the paper draws on the above case studies and the context created in the introduction and tries to analyse the major aspects that characterise people's socio-economic land rights. It will draw examples from what has happened and still happening in the three case study areas of Cornfields, Ekuthuleni and Gongolo.

### Consciousness of land rights and strategies of asserting them

The cases studies presented indicated a strong consciousness among people of their indigenous right to land and of what they have lost through dispossession. Farm dwellers, like those in Gongolo, are unequivocal about what land rights they had and lost and consciously refer to the arrival of white people and the creation of farm lands over areas that they resided in. In both Cornfields and Ekuthuleni people are quite able to reflect on the indigenous or African tenure land rights system.

What is less certain in all three cases is how they have had to adapt their practices over time and how this has affected their ability to engage with the current set of land rights afforded to them. Quite clearly all four cases indicate an attempt to assert land rights under the new dispensations laws. Despite the adaptations the communities have made over time to sustain their livelihoods within the various changes to their land rights they have expected to be able to gain redress for what they believe they lost. The realisation of these expectations has obviously been limited as each community has found the need to adapt their livelihood practices once again to enable them to benefit from the current government land reform programme. The manner in which they have tried to reassert their right to land and their rights on land seem to indicate both a consciousness and lack of such. As they have realised the shortcomings of the land reform programmes in terms of their needs or expectations they have also begun to develop various strategies to address this gap. This has ranged from adapting their practices to try to meet the new laws (as was the case in Cornfields and Ekuthuleni) to stepping right outside of the legal framework to work with the realities of what is required and accepted locally as their land rights (again reflected in the later decisions of Ekuthuleni and in the Gongolo community and farm dweller communities resistance to conforming and accepting the interpretations of the laws).

All four communities made some form of claim in terms of the land reform programme. However, what they approached the Department of Land Affairs for and what they were channelled into accepting highlight the following three worrying trends. These suggest that people are not able to adopt the new rights afforded to them because those rights have tended to further erode what little tenure security they have.

The first is the ongoing and increasing conflict in commercial farming areas which host large numbers of farm dwelling families. The rights created through the enactment of ESTA and the LTA require farm dwellers to assert an identity they are not familiar with. While people are becoming more familiar with what the law has prescribed as their rights, in asserting this newly created and legislated identity they also find themselves forsaking rights that they believe they have. This can include giving up their indigenous rights to the land they live on to obtain access to basic services provided by the state. Access to basic infrastructure, like potable water and electricity, understood by farm dwellers to be rights of all citizens, has failed to materialise with the state arguing (erroneously) that it cannot deliver services on private property.<sup>96</sup>

Common disputes also include the building of new residences for the expansion of family members. While farm dwellers regard family as all those who are dependent regardless of age and all those women that marry into the family, the law under ESTA individualises the occupational right and in practice offers a weaker right to wives and dependents than the primary head of household. Landowners make a point of identifying all members of the household and limiting further growth, as well as pushing children who reach 18 years off the farms as they are deemed to be adults and not dependent. Hence the limitation on the building of new dwellings. Linked to this problem is the notion of the farm being home and not just a house. Farm dwellers talk of relationship to the land while the legislation talks of their relationship with the land owner. While the law attempts regulate arbitrary evictions it fails to recognise the family and the home suggesting less interest in the social and economic issues of family life than in stabilising property relations.

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<sup>96</sup> See report by Rosalie Kingwill

Included in the notion of family and homes is the practice of burying near homesteads in family grave sites. This is linked to the belief that land rights are intergenerational land being looked after for those from ancestors through to the yet to be born. Even though the law broadly recognises this practice it has been a hotly contested matter in an outside of court rooms with varying results. In KZN this led to a dispute between national and provincial spheres of government over whose competency this fell within. While the national Department of Land Affairs made provision for this practice in ESTA the provincial department argued that burials and cemeteries was a local government matter and the provincial law required burials to be in registered cemeteries. A push by NGO's and farm dwellers for the provincial legislation to be amended to align with ESTA saw a two year process of amending provincial legislation take place. While this was a success of sorts in law the disputes have continued in practice with farm dwellers now relying on strategies outside of the law to continue the practice, like proceeding with burials despite verbal denials by the owner, compelling the owner to seek court interdicts. Fewer interdicts are being sought by land owners as the NGO's and farm dwellers have made good use of the media to highlight this ongoing problem successfully garnering public support and pressurising many landowners to quietly comply.<sup>97</sup>

Another important aspect of farm dwellers cultural and social systems is the ownership of cattle. The impounding of cattle remains an ongoing dispute in asserting land rights. While the law clearly states that rights cannot be reduced without following due process as it is argued that it would be tantamount to an eviction and even though the matter between *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) has led to a review of the Impounding law as many sections of it were declared unconstitutional, the battle over cattle continues. An unresolved issue inside the ongoing matter is that farm dwellers would have to brand and register all their cattle for the law to apply. Previously many land owners branded the farm dwellers cattle with their own brands making the disputes over who the cattle belonged to complex when they arose. Despite these problems being resolved through their own branding and registering many remain reluctant to follow this route as it would require them to admit to how many cattle they actually have on the farms. As a key source of wealth and livelihoods for farm dwellers the battle over cattle is far from resolved.

In the Gongolo area these disputes are common even though or perhaps because farm dwellers have lodged claims through the LTA and the Restitution Act. What is apparent though is that despite people have struggled to understand what their rights to restitution are. This has meant that many have not lodged claims and that there are overlapping claims between those on the farms and those that were evicted off the farms. The potential for conflict between these groups in the process of settling the claims and in post settlement situations remains. Land owners in the area have not only continued to challenge the rights people have under LTA and ESTA in various disputes but have also suggested that people are neither legitimate labour tenants nor restitution claimants. Should the state proceed with an expropriation these disputes will play themselves out in the court room.

The governments inability to put in place an accessible and affordable justice system to alleviate these inevitable conflicts point to an urgent need for reviewing this path to securing tenure and restoring land rights.

The second trend of concern is the collapsing communal tenure systems established through the land reform programmes. In 2000 the Department of Land Affairs commissioned the Legal Entity Assessment Project (LEAP)<sup>98</sup> to undertake scoping exercise on the status of CPA's. The outcome was worrying as it suggested that many were not functioning and communities under these tenure arrangements had adapted the systems with a hybrid form of CPA's and traditional systems. Both the Ekuthuleni and Cornfields cases suggest that this should have been anticipated as certain African tenure system practices endured in their communities despite taking freehold title, as Cornfields residents were compelled to do, or living on church land, as was the case with those living in Ekuthuleni.

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<sup>97</sup> Press coverage in mainstream media over 2005 and 2006 highlight this issue.

<sup>98</sup> LEAP is a collaborative project established by a few NGO's and practitioners to explore the problems with communal property institutions. Its work can be sourced on their website [www.leap.org.za](http://www.leap.org.za)

Again it is clear that people are very familiar with the land rights they held and lost in the African tenure systems. Despite people grasping how to gain access to land in the “new” systems offered or imposed on them like freehold or Trusts or CPA’s they have ended up outside of these systems through which they gained access. In the case of Cornfields despite “owning” the land it is clear that families within the system are unable to assert any land rights and that as a group they are unable to utilise their rights to the land in any socially or economically productive way anymore. In addition they are also unable to access an assistance from the state to resolve these problems as they are a combination of freehold and Communal Trust, both of which can be regarded as private forms of ownership. In effect they have fallen outside of the law.

In Ekuthuleni while people have engaged with the new law more comprehensively than Cornfields through processes with AFRA, they have also been unable to resolve their land rights needs. The Department of Land Affairs response has been to primarily suggest that these problems are a matter of capacity building or training so that people can better understand how to manage these systems.<sup>99</sup> Even though this has been hotly contested the Department has not seriously engaged with this debate and has allowed the matter to recede in the face of other more obvious problems it is facing, like the slow pace of land reform. Recipients of land reform rights are still receiving them under communal systems of CPA’s and Trusts. In 2005 it was announced that the Minister of land Affairs was considering taking back title from 70 of these systems in the Limpopo province as they were failing to run the farms they had received through the land reform programme. The Minister and the department attributed the problems once again to the lack of experience and training amongst recipient groups and the irresponsible lack of interest amongst recipients to farm.

Of further concern is that large sections of the CLaRA appear to have been lifted from the problematic CPA Act. A strong criticism of the Act is that it creates land administration structures that will be expected to give effect to peoples land rights through overseeing access, registration, disputes etc. with little to no state support for doing this and with little to no accountability to any state institution to guarantee the rights it must uphold. In provinces like KZN, with strong traditional authority systems these communal property institutions are already regarded as a threat to their own authority. Having had the land that they used to support their subjects/ citizens usurped and with little options open to regain this land through the land reform programme the states drive to create democratic communal institutions (CPI) or private individualised ownership has created further complexities in the management of CPI’s. This obfuscation of the system of authority needed to secure any form of tenure has contributed to the collapse of these systems and increased conflict where more than one point of authority exists. In such situations little if any secure tenure exists and people have poor access to land despite the statistic that the title deed is held by a black land owner. This has exhibited itself in all three of the cases.

The third trend is that of falling outside the legal system. In effect this might be argued as the drive to privatise the problem of the rural poor. This is evidenced in the focus on transfer of title as a measure of success in land reform. The number of parcels of land transferred from white owners to black owners is reflected as a meeting of the targets set that would ensure equitable access to land. Little discussion or evaluation is taking place on the levels of security afforded by these forms of tenure established by the state programmes. In addition little responsibility is taken by the state for the failure of these tenure forms to secure tenure. Once land has been transferred the community in effect becomes private. A confused state which has played itself out in Cornfields when they have been unable to resolve their internal disputes over land rights and access to resources and have had no clear recourse outside of their community; in Ekuthuleni where people requested improved security of tenure for households without compromising the control of the group over access to the area and return they received a CPA which has not been able to prevent newcomers from settling in the area nor clarified the improved secure tenure; in farm dweller communities where their new rights of secure tenure are pitted against the rights of private property.

*People in all the four case study areas have complained about the yawning gaps that exist between the law in the books and actual practice on the ground. They complained that the land reform legal system itself does not go far enough to ameliorate the situation of the poor people who urgently need land. They believe that the willing buyer, willing seller policy has slowed down the process of land*

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<sup>99</sup> **Scoping Report On Communal Property Institutions in Land Reform**, Tessa Cousins and Donna Hornby, (Legal Entity Assessment Project), For the Department of Land Affairs, October 2002. Following this DLA Commissioned a CPI review.. which seemed to eventually fade away. It remains unclear how this review changed any approaches or policies.

*redistribution. Secondly, they are dissatisfied with the government's failure to implement even the little that the legal framework has put in place. They contend that as a result of government's lip service to the land reform programme, many communities are still in the dark about the progress of their land claims more than ten years after lodging them. This has seriously affected their economic status as they hesitate to invest in the land due to uncertainty of what will happen next.*

*It is suggested by the people that the Roman/Dutch Law (Private property tenure system), to which the government subscribes has failed, to adapt to the African tenure system that most people continue to practise on the ground. They advocate that the current land reform legal system should incorporate and adapt to the African tenure system rather than forcing the people to stick to the freehold tenure system that is foreign to them.*

It seems clear that the government has a responsibility to consider and address all three trends mentioned and that it is failing to do this unambiguously. Decisions need to be made about the social and economic direction of the country and its relationship to the required land holding arrangements or land rights. Tenure systems remain deeply embedded in social and economic systems regardless of whether they are private, state owned or traditional.

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