

## **CHAPTER 6**

### **CASE STUDIES: LAND INVASIONS**

#### **INTRODUCTION**

On 2001-08-20 Ms Pat Dunn, the chairperson of the Mangete Landowners' Association, made a presentation to the committee on the illegal occupation of farm land belonging to members of the Association. The Committee also became aware of other, similar cases in which farm land had been illegally occupied, especially in KwaZulu-Natal, and it was agreed that three Committee members would make a field trip to KZN and visit affected areas. The three Committee members travelled to Mangete (about 100 km north of Durban) and Nonoti (about 80 km north of Durban) on 2002-06-24, and to Nqabeni (about 180 km from Durban, to the south) the next day. Although, because of time constraints, it was not possible to visit another area where intimidation of farmers appears land-related, viz. the Verulam policing area, press reports were followed up with the reporters concerned, and the station commissioner at the local police station was interviewed telephonically. Subsequent to the visit by members to KZN, the attention of the committee was drawn, at the end of August 2002, to threats of further invasion of farm land in the Kranskop area of KZN where, it transpired, encroachment on farm land had been taking place for several years.

At the request of the Committee, Agri SA and the Transvaal Agricultural Union made further submissions on the problem of land occupation. As a result of that two other committee members visited the Daveyton area in Gauteng on 2002-08-01, where a large number of illegal residents had made their home on a farm.

#### **MANGETE**

##### **Submission by the Mangete Landowners Association**

According to Ms Dunn the Mangete Landowners' Association was formed in 1995. This Association represents the farming community in Mangete, near the KZN north coast town of Mandeni, whether or not members of the community actually engage in farming activities. The area in question, also known as Dunn Land, is owned by descendants of 19<sup>th</sup> century settler John Dunn, who died in 1895, leaving numerous children, as he was polygamously married to many Zulu wives. In total, the area in question is the equivalent of one large commercial farm. It is divided into sixty three farms, with farming activities centering mainly on sugar cane.

Ms Dunn informed the Committee that illegal occupants had been moving on to this privately owned land since 1993, erecting homes, including substantial block structures. The illegal occupants appeared to be acting on the instructions of a traditional leader in the area adjoining Mangete. The landowners turned to the law to protect their interests

and in 1995 launched an action in the High Court for the eviction of the squatters, which resulted in a formal land claim to Dunn Land being submitted by *Inkosi* Mathaba on behalf of the Macambini tribe who occupy the neighbouring area. As a result of the submission of this claim the High Court action was suspended while the claim was in progress. The claim itself was referred by the then Regional Land Claims Commissioner to the Land Claims Court for adjudication.

Despite the fact that the Restitution of Land Rights Act of 1994 makes it an offence to invade land which is subject to a claim, nothing was done about the illegal occupants, and the invasions continued. Many of the squatters were not even members of the Macambini tribe, having come to the area from elsewhere. Approximately one thousand families were living illegally on the land, and less than one third of these squatters were claimants. At the beginning of June 2001 the Mangete Landowners' Association, bowing to pressure from the Regional Land Claims Commissioner and a number of politicians, agreed to defer proceedings in the Land Claims Court with a view to seeking an out of court settlement of the land claim in negotiations with affected parties.

The invasions and the subsequent land claim had dire consequences for the owners of the land in Mangete. Not only were they to develop the land once the claim had been lodged, but since the early days of the invasions they experienced numerous incidents of threat to their lives and properties, intimidation, and arson, which seriously jeopardised their safety and their livelihoods. Not only were sugar cane crops regularly burnt, with all the attendant financial consequences, but in April 2001 the community hall, built by the farmers, was completely destroyed by arson. Ms Dunn herself was held up by armed men at her home during March 2001. They stole valuables, and drove her car away; it was later found abandoned on N2 road, its engine seized. The Mangete Landowners' Association ensured that all incidents were reported to the SAPS and that the Regional Land Claims Commission, which was processing the claim, was kept fully updated with regular reports. However, nothing was being done to remedy the situation.

Ms Dunn gave detailed information to the Committee about illegal building operations, robbery, violence and intimidation of legal owners, and malicious damage to property or arson. She also handed over twelve reports compiled by the Mangete Landowners' Association during 1998 and 1999. Details of more recent (2000/2001) incidents were also provided, including twenty seven with the relevant SAPS CAS numbers. Among the victims of violent crime in the area were children, who were constantly harassed when walking to and from school. On 3 November 2000 a nine year old pupil at Mangete Primary school was raped on her way home, and another woman was raped in her home in January 2001. Cattle belonging to illegal occupants caused damage to crops and vegetation, and some squatters were allegedly illegally harvesting the sugar cane crops of the owners of the property. On 2001-02-19 a squatter led a blockade of the main access road to Mangete, and there was another blockade of a side road on 8 March 2001

**Field visit to the area on 2001-06-24**

The three Committee members were taken for a brief tour of some of the invaded areas, and also visited the burnt out community hall. The roads were bad, and the land owners were experiencing problems in having them maintained - yet squatters appeared to have easy access to graders to have roads to their homes made and maintained. The members paid a visit to the farm of Ms Joan Dunn, from where there was a good view of a large number of homes which had been built by illegal occupants. The farm on which the building had been taking place was a deceased estate, and Joan had previously leased it herself and farmed cane on it - which was no longer possible. According to these illegal occupants, who were not even claimants, they had been put there by a local *induna* (headman) of the chief. New houses were constantly being built. On Joan Dunn's own farm her sugar cane crop had been burnt. The committee members also met with Mr Lyndon Dunn, who was experiencing similar problems, and the party stopped near the site of the grave of Catherine Dunn, a wife of John Dunn. A guest house which had previously stood at that site, which had been used to accommodate members of the 19<sup>th</sup> century colonial government, had been demolished by the squatters, who had used the material for their own buildings.

### **Developments in Mangete since the visit by the Committee**

During subsequent interviews Ms Dunn kept the Committee abreast of developments. On 2002-06-09 fires on six different, geographically separated, farms - all having illegal occupants living in their vicinity - caused around one million rand worth of damage to sugar cane crops and destroyed outbuildings on farms. Homesteads on farms were also threatened but were saved by the timely intervention of farmers who battled the flames throughout the night. Although similar fires, especially during the dry June and July months, had occurred since the earliest days of illegal occupations, Mr Lyndon Dunn, with whom the committee members had met two weeks earlier, was quoted in a local newspaper as saying: 'I have lived here all my life, but what is happening here tonight is the worst I have seen. There seem to be fires everywhere.'

A spokesperson for the SAPS denied that the fires were the work of an arsonist, claiming that they had been started by a carelessly discarded cigarette - a claim which was flatly denied by Mangete landowners. Publicly challenging this explanation in a letter to the press, Pat Dunn pointed out that the 'magic cigarette' would have had to have 'flown backwards from the north against a southerly gale force wind, avoiding dozens of farms on its way, to land 10km away on a farm in the southernmost part of Mangete'. Why, she asked, had the accounts of eyewitnesses who saw the source of fire as being from an informal settlement above the farmhouse, been ignored by the police? Mangete landowners were unhappy with the police response in general, alleging that before issuing a statement to the media that the fires were probably caused by the burning cigarette the police, despite going to the area after being informed about the fires, had not bothered to travel to the specific farms where the fires were raging to speak with the owners, who were busy trying to put out the fires.

The Mangete Landowners' Association was also very unhappy with the conduct of the

office of the Regional Land Claims Commissioner. In February 2002 Ms Dunn wrote to the National Minister of Agriculture and Land Affairs, sending a copy of the letter to offices of the President and a number of national and provincial ministers and functionaries, detailing the failure of that office to honour undertakings which had been made when the court case had originally been postponed and spelling out in detail the type of problems which were being experienced.

In November 2002 the Association decided that, since there appeared to be no progress in settling the dispute, it was imperative that the court proceedings should resume. However, at a pre-trial hearing that month, which the Land Claims Commissioner failed to attend, the Association was persuaded to postpone the court case once again. Later that month the Regional Land Claims Commissioner announced what she termed an 'open ended' settlement in terms of section 42D of the Restitution of Land Rights Act, No 22 of 1994, which involved the expenditure of several million rand to purchase land in and around the area. Mangete landowners were at a loss to understand how there could have been a settlement when they themselves had not been consulted, and alleged gross procedural irregularities, in that the Commission had been approaching individual landowners with a view to pressurising them to sell their land. The public statement released by the Commission provided no clarification concerning crucial questions arising out of the purported settlement: Were all the claimants agreeable, and had they agreed to move? What was the position concerning the non-claimants? While the media release had focussed on the purchase of land, there was no information about whether there were funds for the re-settlement of all the illegal occupants, and the re-building of their houses. Nor was it clear whether there could even be a settlement when the validity of the claim had not been established in the first place.

When the court case, scheduled for April 2003, was postponed yet again, members of the Landowners' Association planned a meeting to decide the way forward. However, before the meeting could be held Pat Dunn and her husband, Mr John Hunt, were attacked at their Mangete home by four armed intruders during the early hours of the morning of 2003-04. John Hunt was shot and seriously injured, and Pat Dunn was badly beaten. The couple's dogs, and dogs belonging to family members on other nearby farms, had been poisoned. Hunt had managed to activate the alarm system and the robbers fled with the couple's cellphones, cash and other valuables. Pat Dunn's car was also taken, but was later found abandoned in a nearby township.

Hunt's injuries were very serious, but he survived and is in the process of slowly recovering, but the attack has left Pat Dunn severely traumatised - especially as it was the second attack on her, in her own home, in just over two years (see above). Furthermore, she had previously been warned by workers that there was talk that her husband (rather than she herself) would be killed.

The police have arrested three men, and a fourth suspect is still outstanding. They maintain that the motive was purely robbery - but given the warnings, and the fact that the chief in the neighbouring area is widely alleged to have known criminals close to him, the victims themselves, and members of their community, believe that the attack was

linked to the land dispute.

## **NONOTI**

The Nonoti area, which lies south of the Tugela river, north of the town of kwaDukuza, has historically been farmed by Indian farmers, some of whom are believed to have owned the land since the end of 19<sup>th</sup> century. According to a press report illegal occupants had been moving on to the private farmland for ten or more years, and invasions had intensified before the 1994 elections. One of those believed to be responsible for settling people on the land had claimed that the land had belonged to his father, and had started selling land to people while farmers were still on the land - forcing them to abandon their farms in fear of their lives. The man was subsequently charged for fraud but died before the trial was finalised. Farming activities has become impossible for many. For example, in 2001 a KwaDukuza councillor, Madhan Singh, moved out of the area after his wife was held up at gunpoint by a gang of armed men; he was, however, still the legal owner.

After visiting Mangete, the committee members travelled to Nonoti on 24 June, and met with Mr Narain Harikrishna, chairperson of the local Farmers' Association. He confirmed that the invasions had started ten or more years previously, and that at least twenty individual small-scale sugar cane farmers had been affected. Farmers had tried to use legal means to deal with the situation, including through obtaining court interdicts, but the police were not prepared to implement them. He estimated that at least 400 to 500 hectare of land was affected, and says that the theft of crops (sugar cane and, especially, food crops) was rife from farms where farming activities continued. Some farmers were prepared to sell land to Land Affairs and there were currently some negotiations in progress. The previous Minister of Land Affairs had purchased land at the mouth of the Nonoti River to accommodate some of the illegal occupants, but the number of invaders kept growing, as did the extent of the land being occupied in areas other than the Nonoti River mouth. People were reportedly selling land, and occupants were not necessarily from the area; some might be from as far afield as the Transkei region. Mr Harikrishna was aware of land claims involving white-owned farms a little further away, in the Doringkop area. Mr Harikrishna drove with the Committee members to view the affected area: What had, a mere few years ago, been farmland now appeared to be one large informal settlement.

An increase in crime in the area was attributed to squatters by persons interviewed by a *Sunday Times* journalist the month following on the visit to the area by the Committee members. Jeewan Makaardood, a farmer and chairman of the Nonoti Farm Watch, is quoted as saying 'We are being robbed of our livelihood. Squatters are building their homes on land that should have been used for farming. Our crops are being destroyed.' The number of farmers in the area dwindled considerably during the previous past three years, and farmers still in the area were feeling very threatened. According to this report, farms further afield were also affected: Another farmer, Thej Singh, had had to abandon his farm near the Tugela River, about 20km from Nonoti, two years previously, and his

land had been stripped completely. Crime had become so bad that farmers were forced to tend their farms with armed guards watching over them. At a meeting the previous week (mid July 2002) farmers claimed that one of the squatters was illegally subdividing abandoned farms and selling them for about R100 a plot. The farmers also alleged that he was reputed to sell plots in exchange for alcohol. The farmers claimed that the provincial minister, the MEC for Agriculture, had suggested that farmers 'negotiate' with the land invaders.

Fear levels increased when a shopkeeper, Mr Rajoo Naicker, aged 68, was shot dead on 2002-08-25 when he was forced at gunpoint to open the Sotsha Store which he operated on his farm in nearby Doornkop. His brother, Mr Chinsamy Naicker, aged 65, was shot and seriously injured.

## **NQABENI**

Prior to the visit by Committee members, one of the members interviewed some of the farmers in the Nqabeni area, which lies between Izingolweni and Harding on the KwaZulu-Natal South Coast, telephonically. The Committee member also visited Mr Simon Joyce and his mother-in-law, Ms Iris Fynn, in their Durban flat. The latter was the legal owner of a farm in Nqabeni, which had been allocated to her farther in 1910. Mr Joyce managed the farm on her behalf and the family had lived on the farm until a few years ago, but had to move to Durban because of intimidation and violence from illegal occupants.

Mr Joyce says that around 1994 the family of a worker who had been displaced from another farm, moved on to theirs, but now there are many families there. In 1996 Mr Joyce, using local attorneys, obtained an eviction order, which has been served on the illegal occupants. However, when the local sheriff went to move the occupants he was shot at, and that was the end of the attempt to move them. A relative of the family and his wife, who also farmed in the area, was also been shot at by illegal occupants on their farm. The SAPS has confirmed to the Committee that a certain Mnganyelwa Jali was charged with attempted murder in 1996, but that the public prosecutor withdrew the case for some unknown reason. Attempts were then made to put the case back on the court roll but it was later established that the accused was deceased.

The three Committee members travelled to Nqabeni on 2002-07-25, where they had a meeting with local farmers of the Nqabeni Farmers' Association. The meeting, chaired by the president of the Association, Mr Mitchell Lawrence, was well attended and a number of those present spoke about their own personal experiences, and those of other people, with regard to land ownership and encroachment.

As with Mangete, the farms which have been invaded are owned by persons formerly classified as 'coloured'; some plots have been owned by a particular family for generations. They are adjacent to the Mtimudi tribal area, headed by a traditional leader, Chief Mavundla. There are also some white farmers in the area. The farmers told

Committee members that their farms had previously extended all the way to Harding, but because of encroachment by squatters only a portion of the original area was left and that was now also under threat.

It was believed that 'coloured' occupation of Nqabeni (as opposed to it being a tribal reserve area) dated to the time of Queen Victoria. However, the legal status of the land varied - many farmers had title deeds, but some of the land was designated as trust land. For example, the Fynn family had long lived in the area, and Mr Francis Fynn addressed the meeting about the family's continuing struggle to secure title deeds. He had even led a deputation to Pretoria in 1993 in an unsuccessful attempt to sort the matter out. The influx of illegal occupants on to 'coloured' land had already started then, and it was particularly bad between 1993 and 1998. The Fynn family's land was divided into lots. Some of the lots had squatters living on them, and the chief of the neighbouring area (Mavundla) was claiming them. However, people from other tribal areas were living there, and were reportedly being charged (illegally) for doing so.

Farmers with title deeds to land were also experiencing problems. For example, Mr Ogle bought the farm Brookside in August 1999. There were two families living on the property at that stage and Mr Ogle was told that they would be leaving the farm (but they did not). He began to invest money to set up a farming infrastructure and to renovate the house his family was to live in. A few months later he noticed that fencing and poles were being removed by people from the neighbouring Celebane (tribal) ward, but when he confronted the people responsible and tried to reason with them they refused to listen and became more hostile, and more people settled on his land. His staff were threatened with violence, and he was warned that his tractors would be burned. He then contacted the chief's *induna* (headman) in the area, and was informed that it was tribal land, and that the *induna* was carrying out orders of the chief to settle people on the land. Mr Ogle then made contact with the chief, who provided a letter in Zulu saying that the *induna* could not settle any more people on the farm until the dispute had been resolved. According to a newspaper article handed to the Committee, three other farms near the Celebane ward were also similarly affected. Threats to Mr Ogle continued, and staff were no longer prepared to work for him because of the intimidation and harassment from illegal occupants. Although reports were made to the police they failed to intervene effectively, despite Mr Ogle having sought and obtained a court order. He also approached the Department of Land Affairs and the person he saw said he would look into it, but heard nothing further. As relationships deteriorated further, the Ogle family felt increasingly unsafe, and on 2000-01-17 Mrs Ogle was attacked by several gunmen and shot, kicked, stabbed and left for dead. According to Mr Ogle the police was called but arrived only an hour later.

The chief continued to claim the land, and squatters had erected solid structures with tiled roofs on them. Mr and Mrs Ogle have moved to Port Shepstone, but continued to re-pay the loan they took to buy the farm, despite not being able to continue with farming. The farm has been leased to Mr Abrahams, whose own farm adjoins that of the Ogles. His crops have been burnt, and he has been told that if he stopped cultivating the burning will stop.

A number of other farms, including those owned by members of the Fynn, Gruit, and Manning families, had experienced similar problems, including the constant threat of violence. Winston Fynn had lost 3.5 km of fencing, which had been cut up and left lying around. The police could not assist, saying there was not enough evidence. The illegal occupants were also over-grazing the land. There was a great deal of stock theft, even in broad daylight.

At the beginning of 2002 Veronica Narainsamy had been driving home from her shop to her farm, through a cane farm. When she got out of her car to open a boundary gate two youngsters with guns attacked and assaulted her. They took money and the motive appeared to be robbery.

Farmers perceived racial overtones to what was happening. A farm near the Ogle farm had been bought by a former police member who was black and there were no squatters on his farm. Nor had white farms in the area, Illovo Sugar company farms, or a government farm, been invaded.

There had been various attempts to seek assistance from the Department of Land Affairs. On two occasions meetings had been arranged and farmers had travelled to Harding, but no one from the Department had turned up. Land Affairs had made it clear to the farmers that the government would not move squatters, for it would create problems if they did so. However, the government would buy land if people wanted to sell it.

The farmers were now part of a Farm Watch cell together with local white farmers.

## **VERULAM / HAZELMERE**

The attention of the Committee was also drawn to the encroachment on Indian owned farms by squatters in the Verulam/Hazelmere area, between Durban and Tongaat, by a newspaper report about an attack on Mr Moonsami Govender (aged 70) and his wife Manogari (61) in January 2002. There were also a number of other attacks on small-scale farmers in this Verulam/Tongaat area: Mr Velayutha Gounden (67) and his family were terrorised by three men on their farm in the Verulam area and their house was ransacked in April 2002, and Mr Kesavan Govender was shot dead at his farmhouse in the same area at the end of June 2002. On 2002-10-12 Mr Balasundrum Naicker (44) was shot dead at his Tongaat farm early in the morning when he went to the rescue of his wife who was being attacked while removing an item from the washing line. Their son was critically injured in the same attack. African farmers, too, may be victims in these areas: on 2001-12-09 Tongaat farmer Bheka Mbuze, 38, was shot in the head and seriously injured while sitting in the kitchen of his home.

Unfortunately there was insufficient time to travel to the area during the two-day field visit by the three Committee members. One member did interview the newspaper reporter who was covering events in the area, and also telephonically interviewed the local station

commissioner at Verulam SAPS.

According to a report in the Durban-based newspaper *Post*, Mr and Mrs Govender and their 18 year old son underwent a terrifying two hour ordeal during the early morning hours of 2002-01-18 when eleven thugs armed with bush knives attacked them on their pineapple and curry leaf farm outside the town of Verulam. While trying to gain access to the Govenders's wood and iron home, the attackers reportedly told them: 'The farm belongs to us. You cannot do anything to stop us. Today is your last day. We are going to finish you and your family'. Mrs Govender had a brick hurled in the face, and her husband almost lost two fingers when he was slashed with a panga. Mrs Govender managed to activate the farm siren, which alerted neighbours, and the attackers fled. The police arrived and took the couple to hospital for treatment. When they returned from hospital later on Friday, they found that their house had been stripped completely and all their possessions stolen - furniture, jewellery, clothing, electrical tools, light fittings and window frames. The Govenders abandoned their property and moved into Verulam to live with their daughter.

Several months later, another reporter interviewed farmers in the Hazelmere/Verulam area, and noted that farmers - many of whom had farmed in the area for generations - were robbed of their produce, and suffered regular burglaries and hijackings. The chairman of the Verulam and District Farm Watch suggested that local Indian farmers were 'very trusting' and lacked alarms and burglar guards, and definitely needed to tighten up on security, in the face of what another executive member of the local Farm Watch described as a '200%' increase in crime during 2002.

According to the reporter who wrote the article on the January 2002 attack on the Govender family the situation remains unchanged; people continued, during early 2003, to telephone his newspaper complaining about theft (e.g. their vegetables being stolen), and their children being mugged when travelling to school. He claimed that the police found it difficult to operate in the area because some of those making trouble were well armed.

The Verulam station commissioner confirmed to the Committee in March 2003 that there were housebreakings, and that the situation was tense. He said that the police were patrolling the affected area. Squatting was taking place on some farms, including in the Buffelsdraai area. For example, squatters had moved on to the farm of a Mr V K Govender and were threatening to kill him. The illegal occupants came from kwaMashu and Inanda (nearby black -occupied areas) and there were also Xhosa people from the Transkei. It was alleged that one of the men behind these invasions was selling land which was not legally his.

## **KRANSKOP**

On 24 August 2002-08-24 white farmers in the Kranskop area were handed a memorandum from the local amaNgcolosi Tribal Authority, which borders on

commercial farm land. The memorandum was headed 'Reasons that lead to a decision to chase the Whites out of the area', and explained why it had been necessary to take this decision.

The precipitating factor which led to this protest, and to farmers expressing fears that they would be targeted for 'Zimbabwe-style' land invasions, appears to have been the shooting dead of an alleged poacher on one of the farms on 2002-08-09, by security guards hired by local farmers. The memorandum was handed to the chairman of the local Farmers' Association, Mr Rolf Konigkramer, by an estimated crowd of 200 to 300 protesters, and listed the following problems facing community members:

- the impounding of goats and cattle,
- the killing of donkeys,
- the shooting of innocent civilians by white security guards,
- the pointing of firearms at people using the road passing near 'the farm', and
- the discovery of bones in the bush and sugar cane fields on the farms of persons who had allegedly been killed by whites and their security guards.

'We beg not to be misunderstood, we don't mean we don't want the Whites' the memorandum continues, 'we are just asking for them to be removed from our society'. Resolutions taken by the community at a meeting held on 2002-08-13 are listed as follows:

1. 'We don't need the Whites in the in the area and we ask them not to come beyond Kranskop. They must stay 10 kilometres away from us.
2. Whoever came with sugar cane [interpreted as a reference to Indian sugar cane farmers in the area] he/she must take it away, whoever came with the soil/land he/she must take it away and leave the Tribal land.
3. We don't need security guards
4. We don't want the whites to go to Shushu even if they are going for fishing we don't want them
5. We don't want whites to go to Die Kop (Etsheni likaNtumjambili)
6. We are asking the Station Commander to go and fetch any Whites at Shushu right now if there are any
7. The cattle, goats and the donkeys that were pounded and those that were killed we want them back
8. From now on we demand that no cattle, no goat and no donkeys are pounded
9. We want all our demands to be met and complied with within a month that include the return of cattle, goats and donkeys and their removal (sic)
10. Failing which we will be up in arms as we are not scared of anyone
11. We are appealing to the National Minister of Land Affairs to intervene in this matter'

## **Background to the events of August 2002**

Before describing the events which followed on the handing over of the memorandum as detailed in information given to the Committee by farmers and other interested parties, and published in the media, it should be noted that there had been other reported incidents of violence and intimidation in the area in recent years:

In September 1997 four pregnant cows, valued at about R45 000, were driven off Esperance Farm into a neighbouring plantation, where they were gunned down with AK47 rifles and chopped up for the meat to be sold. Although stock theft was rife in the area, it was the first time that cattle had been gunned down in this way.

In December 1998 farmer Friedl Redinger was ambushed and shot dead on his farm, near the border with the Ngcolosi area. The case is described in greater detail elsewhere.

In 1998 local medical practitioner Dr Alois Mngadi bought a farm in the Kranskop area intending to develop it for tourism purposes with the help of the local community. However, in April 2000 members of the community invaded his land and started clearing bush to make way for homes they intended building. Following a meeting with the local chief he abandoned his plans for it was 'clear at the meeting that if (he) didn't co-operate, they'd invade (his) farm'. According to Dr Mngadi his farm was surrounded by Druten Ranch, the farm on which the shooting of the alleged poacher occurred in August 2002, and he was expecting to sell it to the same group which had shown interest in purchasing Druten Ranch.

## **Information received by the committee about the events of August 2002**

Details about the protest action and the circumstances under which it took place were provided to the Committee by Mr Edsel Hohls, the chairman for safety and security for the KwaZulu-Natal Agricultural Union (Kwanalu). In addition the Committee had telephonic interviews with other interested parties, including a member of the local farming community who preferred to remain anonymous, about the circumstances which gave rise to the protest action. The Committee also perused several press reports on the matter.

According to Mr Hohls, and others cited in press reports, farmers experienced a huge poaching problem. It was alleged that one of the organisers of the protest of 24 August was himself facing poaching charges, and that the campaign against the farmers had started after this person had been caught poaching. The police, too, confirmed that poaching was 'rife in the district.' The alleged poacher, Njabulo Bhengu (aged 19) was shot dead and two of his companions injured on 9 August, during a skirmish with security guards employed by local farmers. The aim of the security guards allegedly was 'to find out the whereabouts and modus operandi of the poachers.' The guards reportedly encountered a group of poachers, including the deceased, carrying the carcass of a female bush buck (a protected species). According to the police, they initially believed that there had been a 'battle between rival poaching gangs', and they only became aware of the involvement of the security guards many hours later, following a report from the security

firm concerned, which voluntarily handed in the weapon used by the guard, Mr Sibongiseni Nzimande, who was then charged with murder. Farmers claimed that, in their response to this incident, the police acted in a partisan manner, in that the alleged poachers were still at large, and had not appeared in court to face counter charges. In response, the police pointed out that in addition to the murder charge, a case of attempted murder, poaching and trespassing had been opened against the men who had been shot and injured.

The human bones referred to in the memorandum handed over during the protest refers to the fact that the remains of four bodies had been found 'in shallow graves on farms', and a fifth one was found shortly after the protest action. According to the member of the local farming community who does not wish to be named, the corpse had been beheaded, and the hands had been cut off, with one arm found nearby. There is a great deal of violence in the neighbouring tribal reserve area and, in fact, there was no evidence that the deceased had been killed in the areas in which their bodies had been found. Nevertheless, a Tribal Authority councillor from amaNgcolosi claimed that the find 'reinforced suspicions' that farmers were 'on the warpath' against them.' This person confirmed that cattle, goats and donkeys were constantly straying on to farms on the border with the amaNgcolosi reserve, and that the farmers had adopted a policy of impounding the animals. 'Unfortunately, two white farmers from another area, who were leasing the farm on which the shooting of the poacher took place, previously had impounded cattle, sold them and had kept the proceeds for themselves'. The person asserted that the guards involved in the shooting of the alleged poacher had been hired privately by two farmers, and not by the Conservancy 'which represents all farmers and through which the local security company is hired'.

The Committee also received written comments from Mr Marius Koen, who runs a private security firm which had previously provided security for the farmers, in which he levelled certain allegations against the security company personnel. He claims, *inter alia*, that former SANDF operatives who had served in Angola and Namibia and 'Portuguese speaking men', who were not registered with SIRA, were being employed by the security firm concerned. According to Koen the incident 'resulted in fuelling the conflict between the Kranskop farmers and their neighbours to the extent that threats are now being made against the farmers'. Similarly, in an article in the *Farmers' Weekly*, Darren Taylor comments: 'To say the local people, specifically those not employed on the farms, detest Buffalo Security is an understatement.'

While the incident involving the security guard may have sparked off the August 2002 process, it seems from the information available to the Committee that it merely brought to a head long-simmering tensions in the area. The anonymous person in the farming community referred to above, for example, notes: 'Most of the farmers carry weapons at all times. We have had numerous attacks and three farmers have been killed in our area. Trespassing is a serious problem on border farms and the farmers involved require that anybody wanting to visit the farm or to drive through it, must ask permission from the farmer. Farmers are not unreasonable, but do try to limit vehicles from carting building materials onto border farms, as squatting is a very real problem. Our sugarcane is set

alight frequently after trespassers have been apprehended or reprimanded’.

In his submission, which is based on his own experience of providing security for the farmers, Koen lists thirteen farms near to the border with the reserve area which have experienced problems, including incidents of poaching, arson, and stray animals on property, and illegal land occupation. Fencing was stolen, and boundaries were difficult to distinguish. Cattle and goats caused considerable damage to crops, the impoundment of livestock was a contentious issue, especially as poor people found the costs of reclaiming their cattle beyond their meagre means. Theft of timber and sugarcane was also rife. He notes that the 1945 legislation governing the impounding of stock is outdated and badly in need of review. He also stresses that farmers should ensure that the conditions of relevant labour legislation are adhered to, and recommends that labour be unionised.

Koen explains that trespass charges against people from the nearby tribal land may arise because cutting across commercial farms considerably shortens distances for people travelling on foot. He also points out that the theft of timber and sugar cane may stem from the poverty in which these people live. Given levels of conflict in areas adjacent to the farmland, the violence may also spill over on to farms with people fleeing to stay with relatives and friends there. Koen also alludes to the land factor in problems experienced by some of the Kranskop farmers. For example, the local *inkosi* started to make claims that the land on which the Ntombeni store was situated - on the boundary of the Reserve, and catering for its residents - belonged to him. After incidents of theft, housebreaking, threats, and an attempted murder on the owner, Mr Witthoft, the family, fearing for their safety, abandoned the property, which was reportedly ‘stripped down to nothing within two weeks of their departure’. This created the impression that ‘with enough pressure people can be forced off their properties’.

Media reports citing interviews with farmers and residents of neighbouring Reserve areas also suggest that disputes over land lie at the heart of what is happening in Kranskop. Journalist Dumisani Zondi cites ‘Tribal residents’ as claiming that farmers had encroached on their land when they took over farms in the area in 1991 and thereafter extended their boundaries still further. This allegation was denied by the Kranskop Farmers’ Association chairman, Mr Rolf Konigkramer, but, according to Zondi a spokesperson for the Land Commission confirmed that there was a land claim by the amaNgcolosi people and that this would affect several farms in the area. In the *Farmers’ Weekly* article Darren Taylor describes the process of encroachment taking place in Kranskop and elsewhere: Gradually, over a period of years, illegal occupants move further and further on to farming land through grazing their livestock on it and cutting fences until farmers abandon the land. At Kranskop ‘14 commercial farms of more than 10 000ha have been abandoned to masses of squatters now trying to make a living there.’

### **Developments since August 2002**

The situation following on the handing over of the memorandum was extremely tense, with a number of farmers in the area receiving threats, including Mr André Swanepoel,

whose farm was apparently mistakenly identified as that on which the killing of Njabulo Bhengu had taken place. (The incident in fact took place on a neighbouring farm.) Even doctors working at Ntunjambili hospital, living in the Kranskop area and serving the Reserve area, were reportedly considering moving away because of the call to chase whites from the area. At a meeting held during early September, aimed at a peaceful resolution of the dispute between the two parties, the provincial Member of Executive Committee for Safety and Security, *Inkosi* Ngubane, expressed his disapproval of the memorandum, and stressed that land invasions were illegal and that a Zimbabwe-type situation would not be tolerated. However, according to Taylor both Ngubane and Mr Khathi (the councillor identified by the farmers as being instrumental in leading the protest against them) agreed that farmers should not be allowed to own more than one farm; they should be ceded to the government for 'redistribution to the landless'.

*Inkosi* Ngubane and Agricultural and Environmental Affairs MEC Narend Singh subsequently appointed a task team to look into sources of conflict in the district, which intervention reportedly resulted in the withdrawal of public threats against farmers and white tourists and the convening of a series of meetings between local farmers and representatives of the tribal authority.' Several of the latter representatives continued to insist that Druten Ranch be returned to the local black community, claiming it was their land. However, the report continues, despite a 1997 investigation by the Land Claims Commission having found there was no valid land claim, homes were still being built on properties illegally. Mr Edsel Hohls, who had personally lost 13km of fencing, and been shot at twice while burning firebreaks, claimed that the police were not doing enough about the situation.

The case against the security guard, Ndimande, was finalised in the Pietermaritzburg High Court on 2002-12-04. He was found guilty of the murder of Bhengu and was sentenced to twelve years imprisonment, plus five years' imprisonment for each of the attempted murder of Bhengu's three companions. The judge found the accused's claim that he was shot at first as 'false beyond a reasonable doubt'.

According to an update by Edsel Hohls at the end of February 2003 the situation was still very tense, and 'deteriorating', in that

poaching was escalating,

dogs had been shot,

farmworkers were being intimidated,

theft of timber and crops continued and was not being prosecuted because it was seen as 'petty theft', and

the police were reluctant to open cases and had to be 'forced to do so'.

As at the middle of March, a senior prosecutor in the office of the DPP, Pietermaritzburg, was due to visit the area in connection with the farmers' concerns about the lack of prosecutions. Although meetings between representatives of the farmers and the neighbouring community had been scheduled to continue, under the auspices of provincial government, delays had been experienced, and relevant documentation had

reportedly been 'lost'.

Mr Walter Redinger, brother of the deceased Friedl Redinger, has informed the Committee that the deceased's farm is 'unfarmable', with illegal occupants still living on it, re-established plantations of trees hacked down, and the area burnt. He and the other trustee of the farm have taken a decision to offer the farm for sale to the Department of Land Affairs for re-distribution purposes, and are going out of their way to ensure that amicable relationships are maintained with their black neighbours. An area has already been allocated on which to build a school.

In a new development, two claimants from nearby black areas had lodged a restitution claim for 30 000 hectares of Kranskop farmland. These claims appeared in the Government Gazette March 2003-03-07. Although the cut off date for lodging claims had long since passed the office of the Land Claims Commissioner maintained that the claims had in fact been lodged in 1998.

## **OTHER LAND INVASIONS IN KWAZULU-NATAL**

A further instance of attempted land invasion came to light when farmers in the Vryheid area, together with a local chief, *Inkosi* Johannes Mdlalose, obtained a temporary High court interdict on 2003-03-28, restraining the elder brother of the same chief, Jabulani Mdlalose, from encouraging the illegal occupation of over 200 farms in the district. Johannes Mdlalose further alleged that his brother Jabulani was representing himself as the rightful chief, and was allocating land on farms which were privately owned. Jabulani Mdlalose, however, claimed that a number of farms in the area had been given back to the tribal authority during the latter 1980s by the previous government. The court gave Jabulani Mdlalose until 2003-04-24 to show cause why the order should not be made final. However, the respondent filed opposing affidavits and the matter is set down for argument in the High court on 20 June 2003.

While the claim by Mr Edsel Hohls of Kranskop that farmers had had to abandon hundreds of thousands of acres of prime agricultural land could reportedly not be substantiated by kwaNalu, it seems that the type of encroachment which has been happening in Kranskop is occurring elsewhere. In a telephonic interview in March 2003, Mr John du Preez, Chairperson of the Rietvlei Farmers' Association in the Greytown/Muden area, described how a similar process had been occurring in the Middeldrift area, lying roughly within a triangle bounded by Muden and Weenen in the east and Mooi River in the west. This area, it should be noted, has long experienced problems between farmers and neighbouring black communities, linked to, among other things, forced removals of black people for purposes of homeland consolidation in the 1970s and 1980s.

According to a media report the situation has been exacerbated by the way in which land claims in the area have been handled by the Land Claims Commission. According to

game farmer Peter Channing, who had been the target of a number of violent attacks, the Commission had offered him around R5 million to buy his 6 000 ha game farm, situated within the protected Thukela Biosphere reserve. He claimed that he needed R17 million for the property - or the 'same thing' elsewhere in the province - and had not accepted the offer. He had subsequently discovered that in the 2001/2002 annual report of the Commission on Restitution of Land Rights it was stated that the claim had been settled, and reflected millions of rand as paid out to him. The neighbouring community thus believed he had been paid and should move out. The land claims commissioner is quoted in the report as saying that there was a printing error in the report and accused Channing of making a 'mountain out of an anthil'. Noting that the error could cause 'unnecessary conflict', the spokesperson for land issues in the neighbouring area, Jotham Myaka, goes on to say: 'My concern is that people like us, land facilitators, were not involved in this claim from the start'. He warned: 'If this claim is not facilitated properly the game on Channing's farm will be gone in a morning.'

## **MODDERKLIP**

Agri SA provided the Committee with information regarding the illegal occupation of the farm of Mr A.C. ('Braam') Duvenhage (aged 71). The farm 'Modder East' is situated between Daveyton and Benoni and the legal owner is in fact a company, Modderklip Boerdery (Pty) Ltd, of which Duvenhage is a director. Duvenhage has been farming there since 1965.

Two members of the Committee visited the farm on 2002-08-01, where they met Mr Duvenhage. Mr Duvenhage guided them through a portion of the occupied land. Squatters had built shacks on most of the land. The land is adjacent to an area set aside for council housing, from where squatters had encroached onto the farm. The streets had names and the Committee members saw a nursery school or crèche with the requisite recreational facilities for the children. Water was drawn from pipes laid into the ground. A portion of the land lay fallow, but it was littered with plastic bags. Mr Duvenhage informed the Committee members that he was unable to farm on this piece of land because his farm manager had been attacked while tilling the soil. The attackers had been armed. An expensive tractor had also been stolen.

Surprisingly, when the squatters saw Mr Duvenhage they greeted him by name and chatted to him. The Committee members spoke to some of the squatters, and they said that they had come 'from Daveyton'. When asked why they had come they replied that 'there were no houses in Daveyton'.

Mr Duvenhage gave the Committee members the history of the case and the various steps he had taken to have the squatters removed. It all had come to nothing, however, and he had approached the Transvaal High Court for relief. At the time of the visit of the Committee the case was still pending, but judgement was delivered on 2002-11-20 under the title of Modderklip Boerdery (Pty) Ltd versus The President of the Republic of South Africa and Others. Apart from the President, the other respondents in the case were the

Minister of Safety and Security, the Minister of Agriculture and Land Affairs, the Minister of Housing, the National Commissioner of Police, the Sheriff of the Court for Benoni, Ekurhuleni Metropolitan Municipality (which in effect is the Greater Benoni Municipality) and the 'Modder East Illegal Occupants' (as they were referred to in the papers). At a later stage Agri SA took part in the proceedings as so-called *amicus curiae*, representing the farming community in general.

The extensive judgement outlines the history of the case in detail, before dealing with the legal aspects relating to the duty of the State to prevent the illegal occupation of land, or 'land-grab' as it is called in the judgement. This judgement is of such importance in respect of the illegal occupation of land that it is summarised below, but in fairly great detail. It is acknowledged that the summary contains lengthy direct extracts from the judgement, but to facilitate reading, no quotation marks are used. Also, the various Ministerial offices are jointly referred to as the Government, unless it appears otherwise from the context.

### **History of the case**

In the early 1990s a steady influx of people took place into the East Rand area, particularly Daveyton, and as a result a number of informal settlements were established. In May 2000 fifty shacks appeared on the farm virtually overnight, with approximately 400 squatters in residence. At this time the farm was fully operational and was cultivating a specific type of grass fodder. Duvenhage was in fact running the farming operations.

On 2000-05-17 Duvenhage laid a charge of trespassing at the local police station, but the matter was transferred to Daveyton Police Station. A few days later Duvenhage attended a meeting with the Police. Numerous offenders were arrested, charged, found guilty, warned and released. Shortly thereafter a second meeting was convened with the head of the nearby Modderbee prison, who stated that further action against the squatters would mean that the already overflowing prison would be further burdened with the arrest and incarceration of the 400 squatters. The head of the prison recommended that an eviction order be sought.

Shortly hereafter, squatting grew at an alarming rate, and by October 2000 the number of squatters had grown to about 18 000, with approximately 4 000 shacks. This took place under the eyes of the Police who did nothing to prevent it, despite the fact that Duvenhage had reported this to the Police at a high level. Duvenhage was told that according to the 'law' (probably the Prevention of Illegal Eviction and Wrongful Occupation of Land Act, No 19 of 1998) the squatters could only be removed by means of a court order.

Modderklip Boerdery then lodged an application in the Witwatersrand Local Division of the High Court against the squatters for their eviction. The squatters obtained legal representation and opposed the application. It was nevertheless granted on 2001-04-12, when the squatters were directed to clear the property within two months and remove

their shacks. The Sheriff of the Court was authorised to evict and remove the squatters in the event that the latter failed to act as ordered.

The Sheriff served the eviction order on the squatters on 2001-05-10. After the two month period none of the squatters on the farm Modder East had removed their shacks. A warrant for eviction was issued by the Registrar of the High Court and given to the Sheriff. The Sheriff, however, reacted by saying that the squatters would only be removed with the assistance of private contractors, the cost of which Modderklip Boerdery would be responsible for. The Sheriff requested Modderklip Boerdery to deposit R1.8 million into her trust account before she would act. (A later estimate of the private contractor's costs came to R2.2 million, as a result of the increase in the number of squatters on the property.)

On 2001-07-06 Duvenage laid a further charge at the Daveyton Police Station against the squatters for illegal occupation of the farm as well as being in contempt of the court order. Letters were also sent to the President, the Minister of safety and Security, the Minister of Agriculture and Land Affairs and to the National Commissioner of Police, enclosing copies of Duvenhage's affidavit to the Police and the court order.

The President's office indicated that the matter was receiving attention, but no further correspondence was received. On 16 July 2001 a further letter was addressed to the President containing a plea to the government to become actively involved in the matter to ensure that the eviction order could be fulfilled. The same letter was sent to the Ministers and the Commissioner. Only the Minister of Safety and Security responded, who said that the Police Service could not intervene in a civil matter, and he added: 'I am concerned about the long term effect this type of situation can have on the Government's Land Reform Programme. I would appreciate it if you could sensitise the Minister of Land Affairs about the situation, and possibly explore alternative solutions from that perspective.'

A further urgent request to the Daveyton Police Station that the squatters be formally charged was ignored, but on 18 June 2001-06-18 Modderklip's attorneys received a telephone call from a senior police official who said that the charges against the squatters were being investigated. The official admitted that the police had a duty to investigate each charge laid and to charge the offenders and bring them before court, but said this would be impossible as it would lead to violent opposition, not only among the squatters but residents in Daveyton also. The official suggested that a meeting be held with all the stakeholders. Nothing was done despite the attorneys' willingness to participate in the discussion.

The office of Minister of Agriculture and Land finally acknowledged receipt of applicant's letter on 2001-07-16, saying that the matter was receiving attention. This was followed by a letter saying that, in terms of a Presidential minute, the Department of Housing administered the Prevention of Illegal Eviction and Unlawful Occupation of Land Act. Modderklip's attorneys then sent a letter with copies of the correspondence to the office of the Minister of Housing, but no response was received.

The position therefore was that the President did not respond to Duvenhage's plea, the Minister for Safety and Security refused to do anything as he viewed the problem as a civil matter, the Minister of Agriculture and Land affairs viewed it as a matter for the Minister of Housing, the Minister of Housing did not respond, the National Commissioner of Police did not respond and the sheriff claimed R1.8 million before she would do anything.

On 2001-08-06, the Municipality advised Modderklip in a notice that the number of squatters had increased and inquired whether any progress had been made in evicting the squatters in terms of the court order. In fact, however, the squatting fell within the jurisdiction of the Municipality, which failed to exercise its authority to address the problem. Instead the Municipality wanted to buy an unoccupied part of the farm Modder East immediately adjacent to the squatting area and threatened Modderklip with expropriation should the negotiations fail. According to Duvenhage the Municipality was only interested in acquiring the best part of the farm and wished to leave him with the squatting problem. By this time, the number of squatters had grown considerably and was estimated at approximately 6 000 shacks and 36 000 squatters.

It was under these circumstances that Modderklip approached the Transvaal High Court on 2001-09-03 for a declaratory order. The nature of the order sought was that the Government had a legal duty to take steps to remove the illegal squatters from the property, including the duty to assist the sheriff to fulfil her duties in this regard, and to see to it that the squatters vacate the property within a certain period of time. During the trial the application was extended to force the Government to put a comprehensive plan of action before the court within a specific period of time. As basis for the application Modderklip relied on its rights in terms of the Constitution.

The case was heard on 2002-10-12 and judgement was delivered on 2002-11-20. In its judgement the court found that in essence the case was about the effective execution of the original court order of 2001-04-12, after compliance with all procedural and material provisions of the Prevention of Illegal Eviction and Wrongful Occupation of Land 19 of 1998 (hereinafter called the '1998 Act'). Of cardinal interest was the role and duties of appropriate state organs to ensure that the court order was effectively complied with and, where it was not complied with, that effective execution would take place.

### **Findings of the court in respect of the legal position**

Previously the unlawful occupation and wrongful occupation of land was governed by the Prevention of Illegal Squatting Act, No 52 of 1951 (the Squatting Act). The general ambit of the Squatting Act was that unlawful occupation or squatting was a crime, which could be terminated with rather heavy-handed eviction procedures. Eviction orders were usually coupled with demolition orders.

From the long title of the 1998 Act read with the preamble it is clear that the object of the

1998 Act was to prohibit unlawful eviction, to set out procedures for the eviction of unlawful occupiers, to repeal the former as well as other defunct laws and to give effect to certain key provisions of the Bill of Rights which are embodied in the Interim and later the Final Constitution. It is clear that the law tried to effect a balance between the protection of property rights as set out in section 25(1) of the Constitution on the one hand, and the provisions set out in section 26(3), which protect the individual from arbitrary evictions, on the other hand. Even though a lengthy eviction procedure was created, which hampers the common law rights of ownership of the property owner, it is clear that the 1998 Act honours the protection given in section 25(1) of the Constitution. Once eviction is allowed, the Act aims at doing so effectively, precisely because the situation would otherwise lead to an infringement of the fundamental protection which ownership of property enjoys in terms of section 25(1).

The Court interpreted the 1998 Act as follows: The Act creates a time period - in legal terms called a *spatium* - during which procedures for eviction must be complied with in the course of the balancing process. During this period, however, the landowner can be seriously prejudiced. In order to achieve equilibrium between the apparently conflicting rights, wide powers and discretions are bestowed on the Court with respect to the eviction of unlawful occupiers. In terms of section 4 (10) of the Act the Court is empowered to grant an order for the demolition and removal of the buildings or structures erected by the occupiers. In terms of section 4(11) the Court is empowered to appoint a person to assist the Sheriff in executing an order for eviction, demolition or removal on request subject to the conditions stipulated by the Court. In terms of section 4(12) the Court is empowered to grant an order for the eviction of the unlawful occupiers or for the demolition or removal of buildings or structures subject to conditions that the court deems just, and which the Court can, on good cause shown, amend any condition of an eviction order.

The last named capacity which is granted to the Court, namely to amend an eviction order on good cause shown, is radical and differs drastically from the provisions of the earlier Squatters Act. This capacity to amend the order is necessary to achieve an effective balance between the fundamental rights of the landowner set out in section 25(1) of the Constitution and the prohibition of arbitrary evictions set out in section 26(3). The need for this balancing instrument is apparent from the following:

1. Contrary to the prior position, the 1998 Act demands a procedure that can be lengthy by nature. Where eviction previously could occur summarily due to the criminal nature of the unlawful occupation, now unlawful occupation is in terms of the 1998 Act no longer *per se* a crime.
2. In the period which has to lapse between the first moment of wrongful infringement and the eventual eviction order, the landowner is deprived of his right to enjoyment and use of the particular land to the extent that the particular land is physically occupied. The earlier position of summary eviction prevented such unlawful occupation from becoming in any way permanent - it was nipped in the bud.
3. The danger of the fair and reasonable balancing process which the 1998 Act is aiming at, is that during the course of the *spatium* the unlawful occupiers could settle and escalate to a land grab situation, particularly where the occupation is orchestrated

politically or in any other way, and that the police and sheriff, when the *spatium* has passed and the eviction order is granted in the end, throw up their hands. The result is precisely that which the 1998 Act did not intend, namely a *de facto* alienation and confiscation of property contrary to the fundamental protection of section 25(1) of the Constitution. This is precisely what happened in the Modderklip case - during this period the numbers of squatters grew from 400 to 15 000.

4. The capacity to amend an eviction order on good cause shown, therefore, is the instrument by which effect is given to the court order and the equitable balancing of interests is achieved. Only when the court's eviction order is effectively enforced, will the constitutional balance of interests be possible - otherwise the *spatium* will be an instrument for illegal appropriation of land in the style of Zimbabwe.

Two fundamental questions arise in this regard:

Is the Government constitutionally obliged under the circumstances of this case to ensure that the supremacy of the law is maintained and to support the court with practical measures and to guarantee the effectiveness of the court's order?

Can the court force the Government to fulfil its constitutional duties or to even directly order that the court order be executed?

In terms of the Preamble to the Constitution, Chapter 1, section 1(c) and section 2, a fundamental value upon which the Republic of South Africa as a democratic state is founded, is the supremacy of the Constitution and the rule of law, which brings into being that all legal rules and actions must be compatible therewith and that the obligations which are bestowed thereby must be fulfilled.

The Bill of Rights, which protects certain fundamental rights of all people in the country, is the cornerstone of democracy in South Africa. The Constitution compels the State to honour the rights embodied in the Bill of Rights, to protect it, to further and realise it. The Bill of Rights applies to the whole body of law and binds the legislative, executive and judicial authority and all organs of state. That is clear from the Constitution, Chapter 2, sections 7(1), 7(2) and 8(1).

In the Preamble to the Constitution it is further stated that one of the fundamental values on which the people of South Africa founded a democracy is that every citizen is protected equally by the law. This right is entrenched in section 9(1) of the Constitution, which provides: 'Everyone is equal before the law and is entitled to the protection and privilege of the law.'

Another crucial provision of the Bill of Rights, which must be honoured, protected, promoted and realised is the right to property. The appropriate provision reads:

25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application ...

Section 165(4) of the Constitution places an imperative obligation on the organs of state to ensure that the supremacy of the law is safeguarded, as will appear from the provision ‘Organs of state, through legislative and other measures, must assist and protect the courts to ensure... the effectiveness of the courts.’ In this regard the Court referred to an article written by a previous Chief Justice, where he said: ‘There can be no doubt that the depth of judicial power in the modern state is formidable, and in this country it is arguable even awesome. Independence in the exercise of that power is crucial to the legitimacy of the power. .... There is an inherent paradox about all this power. Unlike Parliament or the executive, the court does not have the power of the purse or the army or the police to execute its will. .... They would be impotent to protect the Constitution if the agencies of the state which control the mighty physical and financial resources of the state refuse to command those resources to enforce the orders of the courts.’

It is therefore the duty of the State to create proper structures by means of legislation and officials to support and to protect the courts in fulfilling their functions. But, where in a particular case it is clear that the existing institutions are not effective or cannot be effective, or where existing measures which would normally be used in that case, are ineffective, then it is imperative, in terms of section 165(4) of the Constitution, the organs of State apply other measures that can be effectively utilised. This is exactly why section 165(4) refers to ‘other measures’.

These ‘other measures’ are not necessarily measures that are specifically designed to protect the courts. If policies and programmes exist which can guarantee the enforcement of a court’s order, then there is a duty to apply them to ensure the effectiveness of the court. The effectiveness of the courts, after all, depends upon the respect of the organs of state as well as the people.

The functions and capacities bestowed on state departments and administrations (including the Municipality), both statutory and otherwise, include measures which allow the State to fulfil the obligations placed on them in terms of the Constitution to ensure the effectiveness of the court’s order and to give expression to Modderklip’s rights in the Bill of Rights.

The judgement specifically rejects the argument by the Government’s legal representative that the State has no responsibility in respect of the alternative accommodation or the re-settlement of the unlawful occupiers, as long as the State has a statutory framework, policy and programmes to address the question of land reform. Section 165(4) requires not only policy measures but also the reasonable and effective execution thereof. What has been said by the Constitutional Court with respect to the socio-economic rights is *mutates mutandis* also applicable in respect of land reform: Mere legislation is not enough - the State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the Executive. Section 85 of the Constitution places the obligations on the President and the other members of cabinet to jointly co-ordinate the functions of state departments and administrations.

### **The court's findings in respect of the present matter.**

Section 7(2) of the Constitution reads as follows: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.' It implies that the State must ensure that an effective remedy exists for the protection of these rights. It cannot be disputed that the squatters infringed Modderklip's rights as set out in section 25 of the Constitution.

The problem that arose in this case is no longer a question of just a civil matter between Modderklip and the squatters, as the Minister for Safety and Security said. That is not in keeping with the reality of the situation. It can not be seen as merely a case where the appropriate organs of state can turn their backs on the applicant to wrestle with this problem alone. The cardinal question is the effective execution of an order of the court and the enforcement of the fundamental value of the supremacy of the law, while ensuring that Modderklip is not denied the ownership of his property in conflict with his rights entrenched in the Bill of Rights.

The matter is a classic case of an 'illegal land-grab', which brings the whole question of the supremacy of the law to the fore. The 1998 Act is being emasculated without the support of the State in the enforcement of the eviction order. It is in the public interest that this form of land grab is urgently and immediately stopped and that the appropriate organs of state are constitutionally obligated to play their parts. In this process, Modderklip is *de facto* being dispossessed in a manner which threatened the cornerstones of the Constitution, leading to chaos. The state's authority is contemptuously being disregarded by the squatters, while the particular organs of state simply ignore their constitutional obligations - the result is unavoidably political chaos and the denial of the Constitution.

The essential question is whether it can be tolerated that the Government admittedly left the applicant to his lot despite the public interest involved in this matter. A private landowner who is a law-abiding citizen and who by his own sweat and blood has acquired his land, is being left with the responsibility ensuring that the squatters are removed at his own expense. In this matter prepayment of the sum of R2 million is requested by the Sheriff before the eviction process of approximately 36 000 people will begin. A further practical problem arises, namely where the squatters and their property will be removed to. If the appropriate organs of state are not involved in this process, the same people may return a day or so later and the same process will recur, to his detriment. What about the private landowner who does not have the capacity to pay sums of this nature? The value of the land may, for example, be considerably less than the costs demanded from the owner, which is the case in the present matter. The passive observance by the authorities is therefore catastrophic for a landowner, against the public interest and contrary to the underlying values and provisions of the Constitution.

As far as the Police are concerned, the statutory capabilities and measures required by them to ensure the effective execution of the order of court do exist:

1. Section 205(3) of the Constitution provides that one of the goals of the police service is to protect and secure the citizens of the Republic as well as their property and to

uphold the law and apply it.

2. Section 205(2) of the Constitution provides further that the national legislation must be such that it empowers the police service to effectively meet its responsibilities.
3. The constitutional goal mentioned above is also contained in the preamble of the South African Police Services Act, No 68 of 1995. The legislature created the necessary provision to allow the SAPS as an organ of state to guarantee the effectiveness of the courts, as well as orders of the courts granted to protect property and enforce the fundamental rights guaranteed in the Bill of Rights - see section 14, read with section 13(1) and (3)(a) and 26.

As far as the Minister of Agriculture and Land Affairs, the Minister of Housing and also the Municipality are concerned, the necessary legislative and other measures also exist to allow these organs of state to guarantee the effectiveness of the courts and in particular to take the necessary steps to provide effective execution of the court order:

1. In terms of existing legislation the premier of a province can designate state land or other land that can be obtained for the development of informal settlements. The local authority can also make land available for designation. The province can therefore designate land for expropriation if necessary. If there is an urgent need to acquire land, the premier can by notice in the official gazette make land available or designate land for informal settlement. Laws with respect to the establishment of townships and town planning are not applicable. This is therefore a very effective weapon by means of which immediate settlement can take place.
2. The Minister of Agriculture and Land Affairs has wide powers with respect to the availability of land so that problems of this nature can be properly addressed and effective execution of the court order can take place. The mechanisms with respect to the acquisition and availability of land can be exercised in terms of the Expropriation Act, No 63 of 1975.
3. The Minister of Housing also has the necessary capacities to assist in ensuring that the court order is effectively executed. From the Housing Act, No 107 of 1997, it appears that a municipality in whose jurisdiction the land is situated, is obligated to exercise the functions that are necessary to facilitate the effective execution of the court order. The necessary expropriation capacities are available with which these organs of state can in a practical manner come forward as stakeholders to solve this problem.
4. The whole question of the co-ordination of the housing programmes which the executive authority and its national, provincial and local branches have set out, are available for application by these respondents in compliance with the constitutional obligations referred to above.
5. The Government is not seeing the realities of the matter and chooses to ignore it as a private issue, where the question of the resettlement of the unlawful occupiers is not linked to the effective execution of the eviction order of the court.

The essence of the problem is precisely what should happen to the unlawful occupiers in

the execution of the court's eviction order. This problem, which is facing the authorities directly, is closely linked to the effective execution of the court order. The argument by the Government that the only obligations it has is to provide for the establishment of the necessary legal structures by which Modderklip can enforce his rights and protect them properly, is therefore rejected. The effective execution of the court's eviction order cannot be divorced from the question of whether the State's policy and programmes were reasonable and complied with the State's constitutional obligations.

Although the necessary statutory capacities and measures are in fact available to enable the executive authority and its branches - national, provincial and local - to assist the court in the effective execution of the court order, it appeared that the Government has done nothing to effect the resettlement of the squatters: no viability studies for their resettlement has been conducted, their removal has not been prioritised, it has not been decided where they should be resettled, and no programme has been formulated for the resettlement.

The court cannot tolerate a situation where the court's orders are not effectively executed, because the appropriate organs of state fail to perform the necessary functions imposed on them by the law, where the necessary measures exist to allow the execution of the court order, as the Constitution orders them to do. In the words of a Zimbabwean judgement: 'The reality is that the government is unwilling to carry out a sustainable program of land reform in terms of its own law. The first thing to be done is to return to lawfulness. A huge problem has been created. Thousands of people have been permitted ... to invade properties unlawfully. They have no right to be there. The situation will not be easy to resolve, but it must be resolved. Either their presence must be legalised, or they must be removed.'

In terms of sections 38 and 172(1)(a) and (b) of the Constitution the court has to provide appropriate relief where a fundamental right was infringed. The court has a wide discretion to formulate appropriate relief. In terms of section 173 the court also has an inherent authority, taking into consideration the interests of justice, to protect its own process and to develop the common law. Also, in terms of section 172 the court can make any order that is fair and just. The court can therefore provide an appropriate remedy within its discretion for the particular situation where a fundamental right is infringed. This remedy could in certain circumstances imply that organs of state can be ordered to apply their statutory powers to protect the rights in the Bill of Rights (section 7(2)) or protect the court's effectiveness (section 165(4)).

The court also has to take into consideration that the existing institution created by the State to execute an order of court, namely the Sheriff, is ineffective in case of the theft of land which attacks the pillars of the Constitution and which amounts to rule by the masses, intimidation and destruction of democracy. There exist competent authorities that, properly co-ordinated, can ensure that the court order is enforced effectively. The refusal by the State to properly use these capabilities is a refusal to maintain a democratic state - something that totally undermines the Constitution and leads to the collapse of the values of an open and democratic society and the supremacy of the law.

The Court therefore finds that under these circumstance it can provide the appropriate legal remedies to uphold the fundamental right in section 25 of the Constitution and the pillars thereof. Any order should be aimed at the solution of the problem in a co-ordinated manner while using the existing statutory capacities, policy and programmes.

### **The declaratory order of the court**

As part of its declaratory order, the Court made the following findings:

1. Section 25 of the Constitution provided that no one can be deprived of his property, save in terms of a generally applicable law, and then only in public interest and at a fair compensation. Modderklip's rights in this regard are infringed by the squatters' refusal to evacuate the particular land in terms of the eviction order of 12 April 2001.
2. The Government was obliged in terms of section 26(1) and (2) read with 25(5) of the Constitution to take reasonable measures within its available resources to give effect to the squatters' right to suitable housing and land.
3. The Government was obliged in terms of section 165(4) of the Constitution to put in place the necessary measures to support and protect the court to ensure the effective execution of the eviction order.
4. The Government did not fulfil its obligations set out above, nor its obligation in terms of section 7(2) of the Constitution to protect Modderklip's fundamental rights with respect to the unlawful occupation of its land.
5. Specifically, the Minister and National Commissioner of Police did not fulfil their obligations in terms of section 205(3) of the Constitution, read with section 14 of the SA Police Service Act, No 68 of 1995, in that they had failed to properly investigate the charges against the squatters with a view to criminal prosecution and had failed to protect Modderklip's property.
6. The Government's existing policy, actions and programmes in respect of the matter fell short of their constitutional obligations in that:
  - (a) It did not make provision for the prioritisation of a project or projects for the resettlement of the squatters under circumstances where Modderklip's rights in terms of section 25 of the Constitution are infringed upon and where an order of court exists for the immediate eviction of the squatters.
  - (b) It did not provide for the execution of the government's obligations in terms of section 165(4) of the Constitution.
  - (c) It created and tolerated the *de facto* expropriation of Modderklip's land.
  - (d) Contrary to section 9 of the Constitution, Modderklip was being treated unequally in that he as an individual had to bear the burden of the squatters' occupation of his land on behalf of society.

The court finally ordered the Government to deliver a comprehensive plan to the Court on or before 28 February 2003, in which provision is made for:

- (a) the termination of the infringement of Modderklip's rights by the squatters within a reasonable timeframe, whether by expropriation of the applicant's land or otherwise;
- (b) compliance by the Government with its obligations in terms of section 25(5) read with sections 26(1) and (2) of the Constitution;
- (c) prioritisation of a scheme or schemes for the provision of housing, alternatively access to land, for those squatters who qualify therefore;
- (d) removal of the squatters who do not qualify as mentioned above; and
- (e) monitoring the implementation of the abovementioned plan.

The court order further made provision for the various parties to the case to comment on the above plan, after which the Court could once more be approached to make a final decision.

In conclusion the Court ordered the Government to pay all the legal costs of Modderklip Boerdery as well as some of those of the *amicus curiae*.

### **Comments on the Modderklip matter.**

The State has now taken the Modderklip judgement on appeal. No date for the hearing of the appeal in the Appeal Court in Bloemfontein has been determined yet.

Finally, it should be noted that during the court proceedings reference was also made to the so-called Bredell matter, where squatting took place on the other side of Daveyton a few kilometres away from Modder East. The squatters occupied land that the Government co-owned and the Government brought an application to the Court for the eviction of the squatters during July 2001. The eviction order was granted. When the two day period expired the Sheriff of the Court together with the private company and a large police presence went in and removed the squatters and their property. When the court granted the eviction order, the Court stated that it was only 'right and fair' to evict the squatters, considering among other things, the blatant invasion of the property, the short stay on the property and the probability that the squatters could return to where they had come from.

### **GENERAL COMMENTS**

The illegal occupation of farmland obviously poses a serious threat to farming as a commercial enterprise. It inevitably leads to theft of livestock, crops, fencing, equipment, etc. Nevertheless, it cannot be described as a farm attack *per se*. However, the case studies above show that the illegal occupation of land frequently leads to farm attacks in

the narrow sense of the word. If the farmer attempts to resist the infringement on his property, even by legal means, the result is very frequently intimidation of some kind which, by definition, is a farm attack. Furthermore, the end result is often robbery and murder, i.e. farm attacks in the narrow sense of the word. The illegal occupation of land is therefore one of the major causes of farm attacks.

It is obvious that the question of land has become an enormous problem. It may well become a bigger threat to the farming community than the problem of farm attacks in the narrow sense of the word.