

Abandoned by bureaucracy

A lawyer is helping people in their struggle to claim their land, against a government department that has 'lost' claims of 20 000 former labour tenants

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ANALYSIS

THE past is persistent, its debris strewn across the landscape and through wrecked lives.

Thabiso Mhense spends his hours trying to put things in order and lives back together. An attorney with the Legal Resources Centre, he's working on 30-odd cases, some big, some small, not all of them making headlines.

The law has always been an obvious tool to fix things, he says.

"I was born in Edendale, you know," he says by way of explanation, letting the ghosts of history and geography fill the ellipsis: Greater Edendale, where Harry Gwala taught, where Moses Mabhi-da is buried, where Selby Msimang was born, where Nelson Mandela gave his last public speech and where the Seven Days' War between Inkatha and the ANC killed scores of people and drove thousands out of their homes.

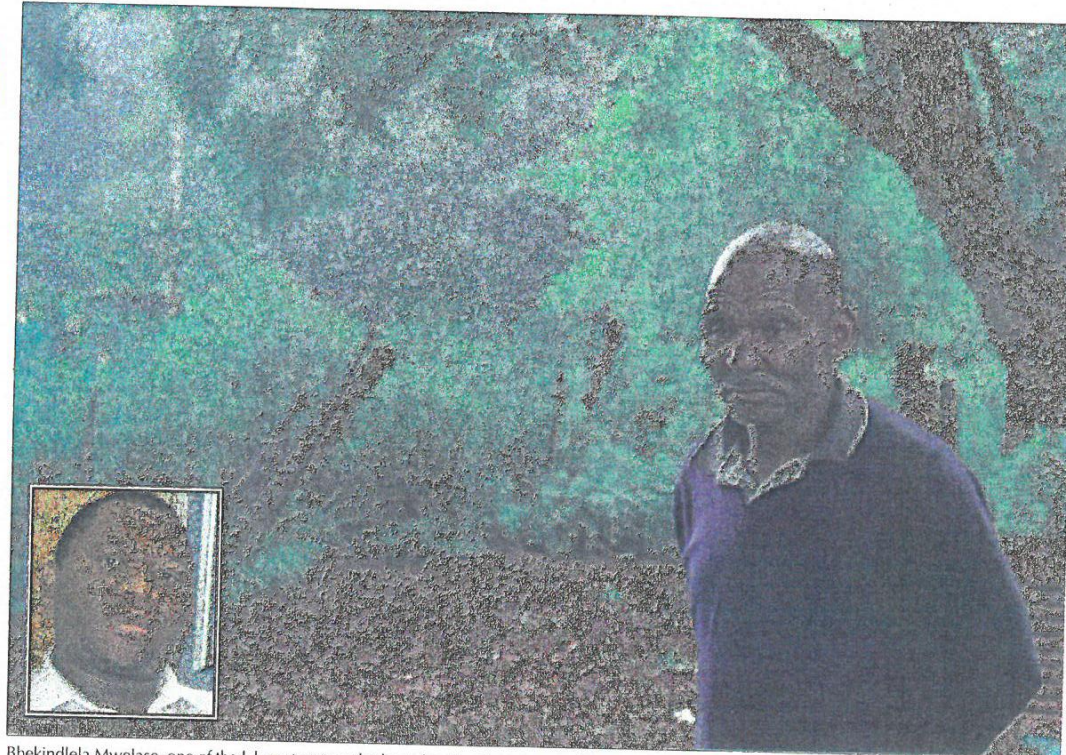
But the peace that has followed the war has not brought an end to the struggle. Mhense lists some of the cases he's fighting.

Down on the Wild Coast, the Xolobeni community is pitted against both an Australian mining company that wants to mine titanium, and traditional leaders they feel have sold them out.

The proposed opencast mine, they say, will drive them off their fields, destroy the graves of ancestors and ruin their health. There has already been blood, and the fight ahead is likely to be long and vicious.

In Eden Park in Johannesburg, a snarl-up of bureaucracy and corruption that cheated nearly 1 000 people out of RDP houses they were entitled to, is nearly resolved. That story goes back to 1996 when prospective homeowners put their names on a list to be allocated houses in an RDP project in Ekurhuleni.

More than a decade later, in 2010, they realised that even though they were first in line, houses were being given to people who had applied much later, and so they decided to take the law into their own hands and moved in regardless. Threatened with eviction by the municipal-



Bhekindlela Mwelase, one of the labour tenants who has taken the Department of Rural Development and Land Reform to court to force it to comply with the Labour Tenants Act. INSET: Thabiso Mhense, the Legal Resources Centre lawyer who is doing battle for labour tenants and Afra against the Department of Rural Development and Land Reform.

PICTURES: TOM DRAPER

ity, with LRC's help they went to court and won eventually. What came out in the process, as Mhense politely puts it, is that provincial and municipal housing lists "weren't talking to each other" and applications "went missing" and so legitimate claims and hopes became hostage to fraud and incompetence. All that remains to do now, 20 years on, is for the owners to have their houses put in their names.

At Msiza, in Mpumalanga, another of Mhense's cases is winding down successfully. This story goes back to 1999, when a group of labour tenants laid a claim, under the Labour Tenants Act, to land they had historically lived on.

Initial delays were caused by the then Department of Land Affairs, which had to be taken to court to act on the claim, and then came more years of delays and disputes over payouts between the farmer who owned the land and the department. Now, 17 years on, agreement has been reached and the final paperwork is being dealt with.

Mhense's immediate preoccupation is with a case much closer to home. He refers to it as the Mwelase case. Polite society is more likely to know it as the Hilton College case, referring to the private school in the Midlands favoured by elites then as now and who can afford the annual fees of R236 000. Either way, the

story remains the same. It's a labour tenant claim. It goes back to 2001, the cut-off date for labour tenants to stake their claim to land they had lived on in exchange for their labour. Of course it goes back much further than that, to an era when land was cheaper than labour and farmers, especially those on stingy land, needed flexible ways to get the work done without having to pay cash, which was in short supply.

Technically, there has been no such thing as labour tenancy for a long time. Partly it withered because of the changing needs of agriculture and capital, which in South Africa's history meant white capital. The 1913 Native Land Act took its

toll, as did the 1936 Native Trust and Land Act. Neither managed to finish it off, and so by the 1950s and '60s, as land became more valuable than labour made redundant by modernisation, labour tenants were evicted on a large scale, their numbers contributing to the 4 million people cleared from their land under apartheid and nearly a million more since.

While some argue that labour tenancy is dead, others argue that it persists, although it has been adapted to changing times and no longer goes by the same name. However, the constitution, given force by the 1996 Labour Tenants Act, sought to give security of tenure to these isolated

families stranded on land owned by others, abandoned by government policies that have in the meantime moved on from the Freedom Charter ideals of 1994, and neglected by what used to be a department formed to look after them.

The Mwelase case is given its name by Bhekindlela Mwelase, the first applicant. The other applicants are Jabu Mwelase, Mndeni Sikhakane, Bazibile Mngoma, and the Association for Rural Advancement (Afra), on whose behalf the centre is acting. The respondents are formidable. They appear on the court papers as the director-general for the Department of Rural Development and Land Reform, the minister of rural development and land reform, and the Hiltonian Society, which owns Hilton College.

It, too, goes far back in history, founded in 1872 on what was originally a Voortrekker farm called Ongegund, the Afrikaans word meaning "begrudged".

Bhekindlela Mwelase, who is now 85, has been part of most of that history since he was born on the Hilton College estate, where his parents and grandparents lived.

It is on that history that he based his labour tenant claim in 2001. The school opposed it, as did most landowners at the time. Fast-forward to 2012. By this stage, the claim had still not been settled. In-between, the department had lost the records of the claim.

The dispute had now extended from the school to the department, which was taken to court to explain why it had not implemented the act, as it was required to do, and referred the claims to the Land Claims Court for a ruling on whether the claimants were labour tenants and if so, for the department to grant them their land or negotiate an alternative. Not only had the department not done so in this particular case, but also in thousands of others.

The numbers differ, with the department referring to "more than 10 000" in one replying affidavit, and 19 000 in another, although the figure of 22 000 has also been cited.

The Mwelase case has therefore

been a class-action case, although the term isn't used in South African law, and so what the court was asked to rule, and it did so, was that the department provide a list of claims, their status, as well as its plans to settle the thousands of outstanding claims. By last year, in spite of a court order and a series of broken promises recorded in piles of court papers, this had not happened, and so on January 29 it's back to the Land Claims Court in Randburg to get the department to do as it had been ordered. A land claim which foundered on bureaucratic dysfunction (the department admits to losing claims, but pleads staffing capacity and budget constraints) has now morphed into trying to address delinquency in adhering to court orders.

Mhense doesn't believe there's anything sinister in the department's inaction.

"To be honest," he says, "I think the department is not running properly. It's just chaos and paralysis."

Even so, "now we are drawing a line", says Mhense. To force the issue, Afra will ask Judge Mokotedi

Mpshe to appoint a "Special Master" to supervise the department in its implementation of the Labour Tenants Act. If this request is granted, it would be a precedent, and other government departments, such as the Department of Home Affairs, with a history of ignoring the courts, will take note.

And if that doesn't work? Mhense admits: "I'm worried. Even if we get the order, what if the department says, We don't have records? The court can't order the department to reopen the process of collecting claims. And is there a Plan B or given all that has already gone before, a Plan Z, if it comes to that?"

"Then," says Mhense, "we'll claim for constitutional damages". Multiplied by about 20 000 cases that the department is being asked to account for, that's a lot of money.

"It's time. People have been waiting a long time," says Mhense.

● Vanderhaeghen is an itinerant researcher.

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