

HIGH LEVEL PANEL ON THE ASSESSMENT OF KEY LEGISLATION AND THE ACCELERATION
OF FUNDAMENTAL CHANGE

REPORT OF WORKING GROUP 2 ON LAND REFORM, REDISTRIBUTION, RESTITUTION AND
SECURITY OF TENURE

ROUNDTABLE 6A

“TENURE SECURITY: RURAL EVICTIONS”

(SAICA, Johannesburg, 23 November 2016)

1. INTRODUCTION

Roundtable 6A was held at the offices of SAICA in Johannesburg on 23 November 2016 on the theme of ***Tenure Security for Farm Dwellers and Labour Tenants***. The Working Group was addressed by invited experts who presented written papers on different aspects of the theme and then participated in subsequent discussion sessions. The presentations were as follows: **Ms Vuyi Nxasana (DRDLR)** - represented by Messrs L Mahlangu and J Ntuli – on the *Policy framework for tenure security for farm dwellers and labour tenants: implementation of laws aimed at strengthening land tenure rights*; **Professor Ruth Hall (PLAAS, UWC)** on *The broader structure of the agrarian economy and its impacts on farm dwellers and workers*; **Thabiso Mbhense (LRC)** on *A critique of tenure reform policies and legislation, highlighting key points of convergence or disagreement among policy researchers and observers*; **Ms Laurel Oettle and Mr Siya Sithole (AFRA)** on *The main points on the tenure security of labour tenants and former labour tenants in South Africa*.

Presented below is a consolidated summary of the issues raised by the presenters, and which emerged during the discussions. The summary is followed by a brief assessment of the discussion trends and interlinkages between sub-themes, followed by a listing of the legislation (including draft legislation, and policy documents) referred to in the discussion. The report concludes with a collated list of conclusions and recommendations.

2. ISSUES RAISED

- The DRDLR presented the policies it applied, anchored by the Land Tenure Security Policy, which provides for a 4-tier system encompassing privately-owned and publicly-owned land, and communal land. This policy is aligned to the Comprehensive Rural Development Programme (CRDP). The presentation covered the issues of commercial farming, the Extension of Security of Tenure Amendment Bill, the Land Rights Management Facility and the 50/50 policy.
- The CRDP recognises several priorities that relate to tenure security, ranging from the fast-tracking of the settlement of land tenure claims, to dealing effectively with illegal evictions, including the affording of access to legal representation for evictees. The DRDLR acknowledged the weakness of the tools at its disposal, in the form of the **Labour Tenancy Act (LTA)** and the **Extension of Security of Tenure Act (ESTA)**, not necessarily in the content, but in the implementation of this legislation. In essence the problem, according to the department, lies in the unequal implementation of these Acts which were aimed at alleviating the plight of farm dwellers and workers. The Department also conceded the difficulties they faced in cases where there were claims for restitution over land on which there were labour tenants residing, where the latter were not part of the claimant group. Finally, on the commercial aspect, the presentation discussed the conflicts between communal land tenure rights and the incursion of mining or tourism, placing some of the blame on the fragmentation of responsibility for these issues, in that the Departments of Mineral Resources and Tourism were the other actors and their interventions and activities were not always aligned to the needs of DRDLR. In concluding the discussion under the land tenure security policy, the presentation listed the policy options under consideration by the Department, which include the development of a land tenure security policy framework; land tenure security programmes; sustainable funding of land rights management programmes; effective monitoring of land rights and

research on tenure insecurity; and, land tenure administration reforms and enhanced institutional capacities.

- **ESTA Amendment Bill.** In the first place, the Department intends to implement an effective programme of information dissemination about the Bill, to render support to farm dwellers in protecting their tenure rights, to compensate them if these right are violated, and to establish an effective land rights administration system. The Bill proposed five major amendments:
 - clarification of terms by defining concepts such as “dependant”, “family” and “reside” in their proper cultural context
 - introduction of tenure grants in the place of subsidies to enable occupiers to acquire sustainable alternative housing
 - expanding the rights of occupiers to include the right to erect and maintain tombstones on the family plot
 - to install a mediation and arbitration regime as a further mechanism for regulating evictions, as an alternative to immediate court process (this entails amending sections 10 and 11 on the granting of a court order).
 - establishing the Land Rights Management Board and Land Right Management Committee.

- **Land Rights Management Facility (LRMF)**, established in 2008 to provide legal representation to farm dwellers and labour tenants, after efforts to do this through the Legal Aid Board had proved unsuccessful. Conceding that the current legal regime does not prohibit evictions but requires that evictees be legally represented in court proceedings, the presentation provides a breakdown of the 776 court cases currently going through the system: a few are in the Magistrates Court; 1% are in the Land Claims Court; 14% at the High Court and 25% in the Constitutional Court. The highest numbers of illegal eviction are in Stellenbosch in the Western Cape, Amajuba in KZN, Gert Sibanda District in Mpumalanga, and Eastern Cape. Limpopo, Free State and North West provinces experience the lowest levels of illegal eviction. The

Department has supplemented the LRMF with an effective monitoring system that includes affected occupiers.

- The DRDLR presentation concluded with a discussion of the so-called **50/50 Policy** (Strengthening of Relative Rights). This is based on joint ownership and management and control of land between the farm owner and the workers, in a partnership that requires that a new company be formed where the farm owner and the workers are shareholders. The project is targeting 2 million hectares of commercial and agricultural farmland, 700 000 farm dwellers, and 2 million labour tenants. It envisages a contract between farm workers and farm owners, and it is a condition of the deal that the land in question is not subject to a restitution claim.
- The presentation by **Ruth Hall** focused on three aspects of the topic: **ESTA**, the **Limpopo Study** and the **50/50 Policy**. On **ESTA**, the following points were made:
 - ESTA is poorly implemented, both in respect of the provisions to limit and regulate evictions and with regard to long term rights.
 - There are approximately 39 996 commercial farms in South Africa that accommodate both farm dwellers and workers. The reduction in workforce is not due to **ESTA**, but has occurred over a long period of time. There has been a long term trend towards job shedding in agriculture due to the movement of farm workers and dwellers, among other causes. As agriculture changes fewer people are employed. Thus, even as wages increase, the wage bill has not increased significantly. The State is ambivalent on how to deal with public land rights on privately owned farms.
 - The policy thinking underlying ESTA was that:
 - A major cause of instability in rural areas are the millions of people who live in insecure arrangements on land belonging to other people. They have no alternative place to live and no

alternative means of survival. The root cause of the problem is a structural one and it requires a structural solution.” To what extent has **ESTA** provided this structural solution?

- Section 4 of the Act places an obligation on the Minister to take certain steps to make resources available to secure long-term tenure.
- It is important to distinguish between legal and illegal evictions, although illegal evictions have been the norm. Parties in eviction cases must be legally represented, hence the establishment of the Land Rights Management Facility.
- Evidence indicates that evictees do not end up on other farms, but in informal settlements as backyard dwellers, etc.
- The **Limpopo Study** was conducted between 2008 and 2012 to assess conditions of tenure on farms. The study involved four main sites (farms) reflecting different agricultural sectors, i.e. game farm, citrus, horticulture and vegetables.
- The game farm is currently subject to a land restitution claim where people are fenced in without any livelihood. On the vegetable farm adult children have to leave the farm. The horticulture farm is also subject to a land restitution claim, however, the long term farm dwellers are not part of the restitution claim. On the citrus farm there is a crackdown on farm dwellers owning livestock.
- Farm workers and dwellers experience various violations of their tenure rights. For example, families are split through forced controls on farms where, for example, children who reach high school stage are no longer allowed to stay on farms, as there is no employment relationship. Also, men and women are treated differently on farms. There is also a widespread practice of evicting the elderly and the right to remain on farms is not recognised by many owners.
- The outcomes of **ESTA** not being implemented include:
 - Ongoing evictions.
 - Residency on farms becoming more limited to employment.

- Section 4 of the Act which provides for redistribution in the form of on-farm and off-farm settlements is not being implemented.
 - Spatial apartheid is maintained between white farming areas and former bantustans, with people being sent back to the former black homelands when they are evicted from farms.
 - The right to a family life is routinely violated.
- In terms of the Strengthening of **Relative Rights (50/50) Policy** each farm owner is to retain 50% ownership of the farm, and will cede 50% ownership to workers, who would acquire shares in the farm depending on their length of service. The policy states that 50% of the equity in the *business* will be compulsorily acquired by the state. But at other points in the document it conflates this with 'land'.
- **Thabiso Mbhense** presented on **ESTA** which was promulgated in terms of section 25 of the Constitution. The presentation made the following observations:
 - Many South Africans do not have secure tenure of their homes and the land which they use;
 - As stated in the Act's preamble, the law should promote the achievement of long-term security for occupiers of land;
 - ESTA was promulgated to assist people who are vulnerable
 - The Act has unintended consequences, Parliament did not consider the imbalance in power between the land owners and the occupiers, with the result that the measures in the Act are skewed in favour of the land owners
 - It is important to note who qualifies under ESTA: persons who earn more than R5000 do not qualify. The problem here is that a worker who may have earned less than R5000 in 1997 now earns more than that due to inflation, and is in danger of eviction at the very time that he is at his most vulnerable as a long-serving worker)

- Also, in terms of section 8(2) those people whose rights of residence are based solely on employment lose those rights once the employment is terminated, which offers no protection at all since owners will frequently terminate employment precisely to trigger an eviction.
- Section 8(5) is just as problematic in the way it assigns “primary” and “secondary” rights to farm dwellers. The latter are usually women and children, who immediately become liable to eviction once the “primary” member loses the right of residence
- Challenging provisions within ESTA that should be addressed include section 9(3) [courts hearing eviction applications without the required probation report], section 17 [the use of the rules of the High Court in eviction matters in Magistrates Courts because rules for the latter have never been promulgated], section 19 [failure to subject Magistrates’ decisions to automatic review by the Land Claims Court as required] and section 23 [which provides for criminal prosecution of an owner who contravenes **ESTA** and is never used].
- With all of these failings, it is surprising that the **ESTA Amendment Bill** is addressing *none* of them, leading to the suspicion that the only objective of the Bill is to introduce the Land Rights Management Board and the Land Rights Management Committee.
- The **AFRA** presentation focused on the **Land Reform (Labour Tenants) Act, No. 3 of 1996**, and highlighted the example of the labour tenants class action legal case of *Mwelase and others v the Director-General for the Department of Rural Development and Land Reform, Case Number 107/2013*.
- The purpose of the **Land Reform (Labour Tenants) Act** is to protect current occupational rights of labour tenants, including land use, as vested on 2 June 1995.
- The Act contains a three-fold definition of a labour tenant to include a person that has a right to reside on a farm; a person that enjoys cropping and grazing rights on the farm (or on another farm of the landowner and has provided

labour in consideration of such rights); or a person whose parents or grandparents were labour tenants. This definition is narrow and has been criticised for its lack of inclusivity, thereby contradicting the objectives of the Act. Moreover, it has the potential of ambiguous interpretations, as the wording is obscure.

- A key aspect of the Act relates to the acquisition of land ownership in terms of section 16. This section provides labour tenants with an opportunity to lodge claims to own land they are entitled to occupy or use in terms of the Act. The application period ended 31st March 2001. Whilst the promulgation of the Act should have resulted in the reduction in evictions, in practice, evictions continue to occur.
- The AFRA presentation then turned to the case of *Mwelase and others v the Director-General for the Department of Rural Development and Land Reform (DRDLR)*, a class action on behalf of labour tenants to set legal grounds for the DRDLR to implement the **Land Reform (Labour Tenants) Act**. The case involves 22 000 applications lodged by labour tenants before the cut-off date of 31 March 2001, but which remain unprocessed 15 years later. Judgment in the case was still awaited at the time of the presentation, but has since been given, requiring the DRDLR to process labour tenant claims and to report to the court on its progress.

3. DISCUSSION

- The first round of questions probed issues of:
 - subsidies to farm workers under section 4 of ESTA and how much of these were paid over;
 - access to water rights for farm dwellers;
 - whether the matter of graves was not covered by existing provisions relating to maintenance;
 - the provision of electricity and other services;
 - whether the ESTA Amendment Bill was not just a subterfuge to introduce the Land Rights Management Boards and Committees; and

- importantly, whether the resources promised under the LTA to secure the rights of labour tenants were ever actually applied to that purpose. This last question, in particular, sought to raise the issue that in the past, provisions meant to resource and empower the project of promoting tenure security had not been implemented, and what was to stop the proposed amendments to ESTA (and LTA?) from being similarly ignored?
- In response, the DRDLR conceded that the ESTA amendments were “technical amendments” for now, as a stopgap while the Department completed ongoing work on the bigger picture (ie, the land tenure security policy, and the 50/50 issue). The process of amendment is long and the options being considered have included in the past the idea of combining the ESTA and LTA into one omnibus statute. Because all of that would take a considerable amount of time, the decision has been taken to go for “low hanging fruit” and concentrate on the areas that could be dealt with speedily.
- On the provision of services, the need to consult the landowner presents an obstacle and renders the Department powerless to intervene except when crisis point is reached, e.g. when water is cut off. Many farmers are reluctant to consent to electricity or water being brought on for fear of attracting many people from outside.
- On subsidies, both **ESTA** (section 4) and the **LTA** (section 17) talk about Parliament having to make money available for acquiring land, but there was never any grant dedicated to that. ESTA was implemented for a while and then the projected budget was “diverted to another piece of legislation that we have in the Department”. (A follow-up question pointed out that a SA Human Rights Commission hearing in 2004 heard about a few uses of the section 4 subsidy in the N Cape, W Cape and Gauteng and none in the other provinces. Given that this provision gives the Department the power to buy out land so as to secure the tenure of its occupants, is it not violating the rights of these vulnerable people for the Department to redirect budget to other projects?) In response the DRDLR presenters disputed the figures, citing some 5000 applications of the subsidy policy in KZN alone, until the practice stopped

around 2010. The presenters conceded that between 2010 and 2014 the provisions of ESTA and the LTA were “technically” suspended.

- This matter elicited some robust debate. It transpired that In a redistribution workshop the Department indicated that the entire redistribution budget would be spent on Agri-parks. However, the point was made that budget expenditure is regulated by law. This raised the question of what exactly the provision was that was being used to divert budget from one project to another. What money has been spent on meeting the requirements of section 4 of ESTA and through which laws? The Department’s response was that it is not correct to say that the Minister is re-directing resources at the expense of other projects. The 50/50 Policy is a Government-wide adopted programme that was also backed by a Presidential pronouncement during a State of the Nation Address, thus the Department must implement it. Accordingly, the Department is not attempting to elevate one programme over another, but rather to augment what already exists. Thus, whilst the ESTA and Labour Tenants Acts remain, the 50/50 Policy is an additional initiative to address the challenges experienced in the system. Moreover, Agri-Parks has its own allocated budget and officials were wrong to announce that the redistribution budget would be redirected towards Agri-Parks.
- Further discussion ensued about the respective roles of SAPS and Municipalities in matters of farm evictions, with the verdict being generally that these institutions are by and large not helpful – it was reported that SAPS in particular are reluctant to go against land owners and that their knowledge of ESTA is suspect. Share equity schemes (50/50) were also discussed. There was evidence from both the restitution and redistribution areas that the unequal balance of power between beneficiaries and mentors was so pronounced that in many cases the subsidy ends up going to the farm owner, with very little benefit for the beneficiaries. The question was raised as to how the 50/50 policy aimed to address this entrenched inequity.
- Looking at the discussion as a whole, there was a thread of common concern amongst the non-government participants that the Department’s explanations and justification for policy changes and choices were either unclear or not

convincing. This disquiet is aptly summed up by the following observations from AFRA, based on their experiences in KZN:

- The DRDLR has capacity constraints in terms of its human resources; with a lack of adequate and competent staff, high staff turnover and resultant loss of institutional memory. When people enquire about progress around their claims, the Department's response is always that there is a lack of a budget.
- The policies and strategies of the Department are incoherent.
- People's rights are being altered without any consultation or their consent. For example, with Communal Property Associations (CPAs) people are "forced" into groups, owning land with strangers. The process is land-owner led, but the Department failed to reinstate lost rights.
- Success stories and approaches are not properly documented and advanced and lessons are not learnt.
- The Labour Tenants Act, to a large extent, has failed to meet its aim due to a lack of implementation.
- Whilst the Act has some benefits, it also has very significant limitations. Benefits of the Act include that it empowered many labour tenants; increased their bargaining power; raised awareness of rights; afforded legal protection from eviction; and some have gained land and have been able to use it productively. On the other hand, the limitations of the Act relate to its rigid definition of a labour tenant; alternative cost- and time-efficient mediation mechanisms are not in use; and time consuming legal procedures leave claimants in limbo with increased livelihood and land tenure insecurity.

4. LEGISLATION REFERRED TO IN SUBMISSIONS

- **Land reform (Labour Tenants) Act 3 of 1996**
- **Extension of Security of Tenure Act 62 of 1997 (ESTA)**
- **ESTA Amendment Bill**

5. SOME CONCLUSIONS

- There is no need to repeal or amend the Act. Instead, the provisions of the Act should be properly implemented, as there is a failure to implement the entire intention of the Act.
- The ESTA amendment Bill misrepresents what the problem is, hence its provisions are off target and do not fully address the challenges. So for example, the Bill should require the South African Police Service to respond to charges of illegal evictions; the National Prosecuting Authority to prosecute, etc.
- The State is ambivalent about enforcing ESTA. There is no dedicated budget to enforce, it fails to prosecute violators and there is very limited usage of section 4 of the Act.
- There is a policy vacuum regarding the future of farm dwellers.
- Whilst the 50/50 Policy is a distraction, it is not about rights but benefits a few at a massive cost to the fiscus.
- Continuation of current trends that is characterised by low enforcement and low service provision. This scenario is likely if there is little political will or pressure from farm dwellers.
- State involvement, where the State enforces and provides services. This scenario is likely if there is political will for service delivery but not much pressure from farm dwellers. More carrots, less sticks, i.e. more incentives for farmers. At present the State is paying for the full cost of transformation at market price instead of sharing the cost with farmers. This scenario envisages a situation where the State leverages change and shares the cost with farmers. Requires mobilisation and demand for land and jobs, as well as a responsive Government that prioritises rural development.
- Radical restructuring where, amongst others, farm dwellers become small-scale farmers through rapid restitution or redistribution. This would require substantial mobilisation by farm dwellers and a leftward shift in national politics.

- Equity share schemes entail workers investing their land grants in the farms where they are employed.
- The question is whether equity share schemes contribute to transformation by providing poor black people with a pragmatic option to engage in high-profit sectors of commercial agriculture, or whether it just represents a new form of exploitation through which commercial farmers are able to spread the risk and recapitalise businesses while securing market access and credibility?
- Whilst theoretically there are merits in the policy, it has failed largely in practice. As a result, they have not really impacted the livelihoods of farm workers, nor power relations between farm workers and owners. The moratorium that was placed on farm equity share schemes in 2009 was lifted, but no change occurred in the interim.
- Some of the unintended outcomes of the farm equity share schemes include incentives for employers; it pits workers against each other; and it sees the State subsidising commercial farming.
- Arguably, equity sharing is the wrong model, as it is ambiguous and has a high price tag.
- Due to the limitation of ESTA and the LTA, as well as their lack of implementation, a new farm tenure law was drafted and re-drafted four times, but no wider debate on the policy approach has taken place.

6. RECOMMENDATIONS

- Discard the current draft of ESTA Amendment Bill in its entirety and develop a new ESTA Amendment Bill.
- The new Amendment Bill should include the following:
 - section 8(2)-(3) – to require the Department to ensure (and the courts to supervise) that potential evictees with labour disputes pending at the CCMA have been assisted to understand the procedure and the implications of signing settlement agreements;
 - section 9(3) - to require courts to consider s9(3) reports prior to proceeding with eviction applications;

- **section 23(1) - to require SAPS to respond to charges of illegal eviction and NPA to prosecute;**
- **As further protection for potential evictees, the procedural and legal safeguards set out in section 20(10) of the Draft Land Tenure Security Bill [B-2010] should be revived and incorporated into the new amendment. The provision specified that an eviction shall be lawful only where adequate procedural and legal safeguards have been complied with including:**
 - **An opportunity for genuine consultation with those affected;**
 - **Adequate and reasonable notice for all affected persons prior to the scheduled date of eviction**
 - **Information on the proposed eviction and where applicable, on the alternative purpose for which the land or accommodation is to be used, to be made available in reasonable time to all those affected;**
 - **Where groups of people are involved government officials or their representatives to be present during an eviction;**
 - **All persons carrying out an eviction to be properly identified;**
 - **Evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;**
 - **Provisions of legal remedies; and**
 - **Provision where possible of legal aid to persons who are in need of it to seek redress from the courts.**
- **Promote section 4 of the Act to secure long term rights through tenure upgrades.**
- **Develop prioritisation criteria for farm dwellers in land redistribution.**
- **Amend the Bill to inflate the 'prescribed amount' to approx. R15,000 in 2016 Rand (equivalent to R5,000 in 1997 @ 6% p.a.).**
- **Raise awareness about the provisions of ESTA among farm dwellers and farm owners.**
- **Establish dedicated posts and monitoring and evaluation systems linked to performance management (institutional solution).**

- **Provide for disclosure of details of ESTA cases dealt with by the Department of Rural Development and Land Reform.**
- **Section 8(5) of the Act should be amended to accommodate employed and unemployed people.**
- **The Act should not classify people according to primary and secondary rights status.**
- **Prioritise the full implementation of the Act.**
- **Allocate appropriate resources for the implementation of the Act.**
- **Update all records relating to applications and make the status of such applications available.**
- **Streamline systems for communication and mediation.**
- **The Department should develop a comprehensive, carefully budgeted implementation plan for the Act that incorporates input from all stakeholders. Consideration should also be given to how alternative dispute processes can be embedded in the plan.**
- **Data on labour tenants needs to be verified as a matter of urgency (most recent gazetted list of claims contains wrong details) to ensure better implementation of the Act, as the Act cannot be implemented properly with incomplete and incorrect information.**
- **The Act should be amended to allow a sworn affidavit to be accepted as proof that a claim was lodged, as claims reportedly get lost.**
- **An improved communication strategy is required that allows all parties to be engaged effectively, including labour tenants, farm owners, civil society and interest groups.**