

FARM LAND AND TENURE SECURITY: NEW POLICY AND LEGISLATIVE DEVELOPMENTS

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1 Introduction

On 24 December 2010 a new Draft Tenure Security Policy¹ and concomitant Draft Land Tenure Security Bill² were published for comment. These new measures focus on farm land in particular and have specific implications for two pieces of legislation, namely the Extension of Security of Tenure Act 62 of 1997 (“ESTA”) and the Land Reform (Labour Tenant) Act 3 of 1996 (the “Labour Tenant Act”). Why was it necessary to introduce new tenure measures, seventeen years after an all encompassing land reform programme was embarked on? What do these measures entail and what are the implications thereof? In order to answer these questions a brief historical background, with an emphasis on rural areas, will be provided so that the reasons for tenure reform are clear. This will be followed by a brief evaluation of tenure reform to date. After the need for further progress has been established, an analysis of the new developments and proposals follows.

2 Brief historical background

Tenure refers to the manner in which land is held or in which control over land is exercised.³ Therefore, in order for tenure to be secure, one needs to be protected against arbitrary eviction and against interference, abuse and violation of occupational rights. Secure tenure is thus the antithesis of vulnerability. Before an all encompassing land reform programme was embarked on in 1994, of which tenure reform is one of the sub-components, tenure was directly linked to race.⁴ The racial background of a person and the location of the land, determined the kind of tenure relevant.⁵ In this regard,

¹ RSA *Draft Tenure Security Policy* GN 1118 in GG 33894 of 24-12-2010

² The Land Tenure Security Bill (draft) in GN 1118 GG 33894 of 24-12-2010

³ D Carey Miller & A Pope *Land Title in South Africa* (2000) 456

⁴ The other land reform sub-programmes are the redistribution programme under s 25(5) and the restitution programme under s 25(7) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”)

⁵ See, generally, PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s Law of Property* 5 ed (2006) 586, 607; Carey Miller & Pope *Land Title* 29-40; T Bennett “African Land – A History of Dispossession” in R Zimmermann & D Visser (eds) *Southern Cross: Civil and Common Law in South Africa* (1996) 65 65-94; C Walker *Landmarked: Land Claims and Land Restitution in South Africa* (2008) 11-31; CR Cross & RJ Haines *Towards Freehold? Options for Land and Development in South Africa’s Black Rural Areas* (1988) 73-92

over many years, a complex, intricate web of tenure forms developed.⁶ Essentially the approach in relation to rural areas was the following: the land in South Africa was divided into black areas and the rest of South Africa.⁷ The areas allocated for the exclusive use of black persons were, over years, further divided into four independent national states,⁸ six self-governing territories⁹ and the South African Development Trust (“SADT”) areas. Land tenure in the self-governing territories and the SADT-land was regulated by Proclamation R188 of 1969,¹⁰ issued in terms of the Black Administration Act 38 of 1927,¹¹ and provided for quitrent and permission to occupy. Quitrent is the registered occupation of surveyed land in terms of which the holder received possession of the land while the state remained the owner. Accordingly, quitrent title could be suspended or cancelled by the Minister. Permission to occupy is the statutory form of communal land tenure in relation to unsurveyed land. It entitled the holder to occupy a residential and/or an arable site. Although both forms of tenure provided a permanent right of occupation to the holder and rights to use the commonage, these tenure forms were not identical to common law ownership. Furthermore, different measures applied to towns within rural areas.¹² Land within the independent national states was also held under quitrent tenure and permission to occupy, although communal tenure was dominant in these areas.¹³

The complex system of racially-based measures effectively led to the uprooting of a well-established, independent black farming community.¹⁴ Apart from that, outside the self-governing territories and national states, where large commercial farms operated, tenure security of (usually) black occupiers and labour tenants diminished to those of mere wage-workers that left them extremely vulnerable to evictions.¹⁵

⁶ CG van der Merwe & JM Pienaar “Land Reform in South Africa” in P Jackson & DC Wilde (eds) *The Reform of Property Law* (1997) 334-338; W du Plessis & JM Pienaar “The More Things Change, the More They Stay the Same: The Story of Communal Land Tenure in South Africa” (2010) 16 *Fundamina* 73-78-81; JM Pienaar “Customary Law of Property” in C Rautenbach, K Bekker & N Goolam (eds) *Introduction to Legal Pluralism* 3 ed (2010) 75-83-84

⁷ This was achieved through various racial statutes, for example, the Black Land Act 27 of 1913 which prohibited blacks from acquiring land outside the areas allocated to them, while also prohibiting whites from acquiring land in areas allocated for blacks. See in general Cross & Haines *Towards Freehold* 44; Bennet “African Land” in *Southern Cross* 79

⁸ Transkei, Bophuthatswana, Venda and Ciskei

⁹ KwaNdebele, QwaQwa, Gazankulu, Lebowa, KwaZulu-Natal and KaNgwane

¹⁰ Proc R188 in *GG* 2486 of 11-07-1969

¹¹ Pienaar “Customary Law of Property” in *Legal Pluralism* 84

¹² Van der Merwe & Pienaar “Land Reform” in *Reform of Property Law* 335-338; Pienaar “Customary Law of Property” in *Legal Pluralism* 83

¹³ Van der Merwe & Pienaar “Land Reform” in *Reform of Property Law* 334-338; Du Plessis & Pienaar (2010) *Fundamina* 73-81

¹⁴ See JM Pienaar “Farm Workers: Extending Security of Tenure in Terms of Recent Legislation” (1998) 13 *SAPL* 423-424-427 regarding the historical background of especially ESTA

¹⁵ See H Wolpe “Capitalism and Cheap Labour Power in South Africa: From Segregation to Apartheid” in W Beinart & S Dubow (eds) *Segregation and Apartheid in Twentieth-century South Africa* (1995) 60-60-91. See also, in general, C van Onselen *The Seed is Mine: The Life of Kas Maine, a South African Sharecropper 1894-1985* (1996); W Beinart, P Delius & S Trapido *Putting Plough to the Ground: Accumulation and Dispossession in Rural South Africa* (1986); and the publications of TJ Keegan, especially *Facing the Storm: Portraits of Black Lives in Rural South Africa* (1988) and *Colonial South Africa and the Origins of the Racial Order* (1996) 291-292

Accordingly, prior to the new political dispensation, when the White Paper on Land Reform was published in 1991,¹⁶ the tenure system in South Africa was diverse, fragmented, racially based and insecure. Following the new political dispensation, it is within this prevailing fragmented context that the White Paper on South African Land Policy was published in 1997, with a threefold point of departure relating to tenure reform:¹⁷ to

- move away from the permit-based approach towards a rights-based approach;
- enable beneficiaries to choose the kind of tenure best suited for their needs; and
- focus on vulnerable sections of the population.

The aims of tenure reform were:¹⁸ to

- rationalise and streamline the complex land tenure and land control system referred to above;
- improve security of tenure; and
- bring tenure in line with constitutional imperatives like equality and dignity.

In this regard the Constitution provides for the following:¹⁹

“A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided for by an Act of Parliament, either to tenure which is legally secure or to comparable redress” – section 25(6).

“Parliament must enact the legislation referred to in subsection (6)” – section 25(9).

Because insecure tenure can, to a large extent, be ascribed to past discriminatory laws and practices, both individuals and communities are entitled to secure tenure or equitable redress. From the above it is clear that the onus is on Parliament to draft and enact the necessary legislation to address insecurity. In fact, Parliament already promulgated tenure-related legislation *before* the new constitutional dispensation commenced, by way of the Upgrading of Land Rights Act 112 of 1991, the Less Formal Township Establishment Act 112 of 1991, and the Provision of Land and Assistance Act 126 of 1993.²⁰ Post 1994 two broad categories of tenure measures were issued: those aimed at regulating tenure on an interim basis, and those measures aimed at overhauling the tenure system as a whole.²¹ The Interim Protection of Informal Land Rights Act 31 of 1996 (“Interim Protection Act”) is an example of the first-mentioned category. The two legislative measures

¹⁶ RSA *White Paper on Land Reform* (1991)

¹⁷ Department of Agriculture and Land Affairs *White Paper on SA Land Policy* (1997) vi

¹⁸ Badenhorst et al *Law of Property* 607; Carey Miller & Pope *Land Title* 456; AJ van der Walt *Constitutional Property Law* (2005) 308

¹⁹ Constitution of the Republic of South Africa, 1996

²⁰ See for detailed discussions of these legislative measures JM Pienaar & J Brickhill “Land” in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (RS 3 2011) 48–25–48–27; Badenhorst et al *Law of Property* 589, 604–605; Carey Miller & Pope *Land Title* 405–411

²¹ See for more information Pienaar & Brickhill “Land” in *CLOSA* 48–25–48–27; H Mostert, JM Pienaar & J van Wyk “Land” in WA Joubert (ed) *LAWSA 14* (2010) paras 121, 125–140

now in the spotlight, namely ESTA and the Labour Tenant Act, are examples of measures aimed at fundamentally altering the existing tenure disposition, especially in relation to white-owned commercial farms.²²

3 Evaluating tenure reform performance in South Africa

If measured against the three main objectives of the tenure reform programme, namely (a) rationalisation; (b) increased security; and (c) the embodiment of constitutional imperatives, it becomes clear why Government deemed it necessary to introduce a new Policy and Bill at the end of 2010. Concerning the question of whether the complex system of permits and tenure rights was indeed rationalised and streamlined, it is important to underline that, although notorious racially-based land measures were repealed by the Abolition of Racially Based Land Measures Act 108 of 1991, secondary or subordinate notices, proclamations and regulations issued under the main Acts, remained in force. Accordingly, quitrent and permission to occupy remained in force. Although some of these “old order” rights were automatically upgraded,²³ others remained insecure. With the commencement of the Interim Protection Act in 1996, the application of which is being extended on an annual basis,²⁴ informal, unregistered and undocumented rights were effectively elevated to real rights. The unconstitutionality finding of the Communal Land Rights Act 11 of 2004 (“CLARA”) in the course of 2010,²⁵ has underlined that permit-based and other insecure rights are still a reality – seventeen years after the new political dispensation commenced. Apart from the fact that identical tenure forms prevalent in the former dispensation are still being used on a daily basis today, new land control forms have furthermore developed. One such an example is the use of a communal property association as a mechanism to acquire, hold and manage common property on behalf of communities.²⁶ The intricate tenure system has therefore not been dismantled and made more streamlined. Instead, to some degree, it has not only survived intact, but may even have become more complex.

Whether insecure tenure has indeed become more secure, is the second question to address. Mention has already been made of the upgrading of some of the insecure rights under the Upgrading of Land Rights Act.²⁷ However, many of the lesser rights, or “old order rights” are still prevalent today. Tenure forms in traditional areas, that were supposed to have been dealt with under CLARA, are currently in limbo. Perhaps the clearest

²² See for a detailed discussion of the tenure reform programme Pienaar & Brickhill “Land” in *CLOSA* 48–25-48–51

²³ For example, Schedule I – rights consisting of deeds of grant, leasehold and quitrent were upgraded to ownership – see Pienaar “Customary Law of Property” in *Legal Pluralism* 85

²⁴ Most recently by way of GN 745 in *GG* 33428 of 27-08-2010

²⁵ *Tongoane v The Minister of Agriculture and Land Affairs* 2010 6 SA 214 (CC) This case, though relevant in relation to communal areas only and not applicable to commercial farm land outside communal areas, has underlined the many complexities inherent to tenure reform. Whenever reform occurs in relation to communal areas, it will have to be consistent with reforms on commercial farms, thereby an all-encompassing approach is needed

²⁶ Badenhorst et al *Law of Property* 620-622

²⁷ 588-589

indication that insecure tenure is still as much a problem today as 20 years ago, is the number of evictions that occur in South Africa. Research done by Nkuzi Development has shown that evictions have in fact increased post 1994 and that the largest percentage by far relates to unlawful evictions.²⁸ It was especially in rural areas that ESTA, and to a lesser extent, the Labour Tenant Act, was supposed to have altered power relations and impacted on evictions. Unfortunately, these measures failed to achieve their respective aims.²⁹

Lastly, the question of whether land tenure has been brought in line with constitutional imperatives, like equality and dignity, has to be answered in light of the prevailing backlog in the provision of housing and the living conditions in which some persons, especially rural and farm dwellers, often find themselves. After seventeen years it would seem real, effective tenure reform in especially rural areas, is still lacking.³⁰

In light of the brief evaluation of the tenure reform programme above, it is clear that the overall tenure reform programme is in dire need of some kind of resuscitation. In order to determine whether the newly proposed measures would address the existing short-comings in relation to farm land in particular, it is necessary to set out in detail what the proposals entail. The Draft Tenure Security Policy will be discussed first, followed by a discussion of the Draft Land Tenure Security Bill.

4 Draft Tenure Security Policy

4 1 Introduction

The importance of tenure reform is underlined in light of the point of departure that the Policy review “may not be unduly hamstrung by reluctance to depart from the traditional system of common law”.³¹ The aims of the current review are fourfold:³² to

- protect relative rights;
- enhance security of tenure;
- effect peaceful and harmonious relationships; and
- sustain production discipline.

²⁸ Nkuzi Development Association *Still Searching for Security: The Reality of Farm Dweller Evictions in South Africa* (2005) 40-48

²⁹ Various detailed analyses of the particular short-comings and failures of ESTA and labour tenancy legislation have been published to date and will accordingly not be repeated here. See *Draft Tenure Security Policy* 1-2. See also, for more detail, JM Pienaar & K Geysers “Occupier” for Purposes of the Extension of Security of Tenure Act: The Plight of Female Spouses and Widows” (2010) 73 *THRHR* 248-260; JM Pienaar “Tenure Security: Overview and Challenges” (2011) 1 *Speculum Juris* 108-108-133. See also Lawyers for Human Rights “SFP challenges unlawful evictions” (2011) *Die Okkupeerder: Newsletter of the Security of Farmworkers Project* 2 2-3; Programme for Land and Agrarian Studies (PLAAS) *Umhlaba Wethu* 5 (2008) 7; R Hall *Farm Tenure* PLAAS Occasional Paper No 3, University of the Western Cape (2003) 2-16; and R Hall *Land and Agrarian Reform in Integrated Development Plans* PLAAS Research Report No 23, University of the Western Cape (2006) 7-22

³⁰ B Cousins & R Hall *Rights Without Illusions: The Potential and Limits of Rights-Based Approaches to Securing Land Tenure in Rural South Africa* PLAAS Working Paper 18, University of the Western Cape (2011) para 2 2 <www.plaas.org.za/pubs/wp/WP18Cousins-Hall052011.pdf> (accessed 02-06-2011)

³¹ *RSA Draft Tenure Security Policy* 3

³² 4

In the ensuing policy and legislative proposals the following critical issues need further attention:

- tightening up legislation by creating substantive rights in land for occupiers;
- information dissemination;
- effecting new settlements in farming areas; and
- monitoring evictions.

The following discussion is not a detailed discussion of the whole Policy. Instead, only the most important aspects, linked to the Bill below, will be highlighted.

4 2 Resettlement and agri-villages

Although the Policy specifically refers to agri-villages, this is no new development. In fact, agri-villages have been on the statute books since ESTA was promulgated in 1997. The underlying idea is that accommodation/housing and employment on farms should be de-linked or separated. Not only would this enable workers to move freely from employer to employer, but tenure security would also be achieved, with all the benefits thereof, if land rights were vested in the workers and not the farm owners. In order for such an endeavour to succeed, a unique partnership between local authorities, land owners and farm workers is required. To date, these enterprises have hardly been successful. Revitalising agri-villages is therefore a priority for government.

The Policy refers to a “Farm Worker’s Grouping”, who could initially be title deed holder of the land that was acquired by way of donation, purchase or expropriation. State land may also be involved. Although the Worker’s Grouping would be the initial title holder, the community would be in charge, in accordance with rules worked out by mutual consent of the “village community”, the financier and the municipality. A permit system would form the basis of land holding and could include permits for pasture, residential and cultivation purposes.³³ The particular permit will set out the period involved as well as the necessary provisions and conditions. The Policy also states that the transfer of freehold land is possible “to persons who make better use of allotted land”³⁴ in accordance with particular rules. Persons who do not perform as required on the other hand, may lose their land. The challenge and difficulties in acquiring suitable land is underlined, thereby highlighting the future use of expropriation.³⁵

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4 3 Arbitrary evictions

In order to monitor evictions in general, a Land Rights Management Board is proposed to deal proactively with evictions and their underlying causes.³⁶ Conditions for and limitations on evictions will be spelled out.

4 4 Development

Development of farm land is directly linked with the overall aims, objectives and strategies of the Comprehensive Rural Development Programme driven by Government.³⁷

4 5 Compliance and enforcement

In the past, numerous difficulties were experienced with compliance and enforcement of especially ESTA.³⁸ It is envisaged that the proposed Land Rights Management Board will play an integral role in improved compliance and enforcement of the new measures.³⁹ Further mechanisms identified in the Policy include alternative dispute resolution mechanisms and a Register of Interests on farms.⁴⁰

5 Draft Land Tenure Security Bill

5 1 Introduction

Right from the outset, the Draft Land Tenure Security Bill proclaims a clear focus on farm land.⁴¹ The objectives of the Bill and the Policy are identical, namely, to protect relative rights; to enhance security of tenure; to effect peaceful and harmonious relationships; and to sustain production discipline.⁴²

The scope of the Bill is set out in clause 2 with an emphasis on agricultural land and land used for agricultural purposes, excluding land occupied by traditional communities.⁴³ The Bill essentially repeals the existing ESTA and Labour Tenant Act and combines them into one new legislative measure. However, Chapter III of the Labour Tenant Act still applies in relation to labour tenancy claims that have already been instituted.⁴⁴ The Prevention

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³⁷ 9 See also W du Plessis, NJJ Olivier & JM Pienaar “Land Matters and Rural Development: 2009 (2)” (2009) 24 *SAPL* 588 608-610 for an exposition of the approach followed in the restructured Department of Rural Development and Land Reform in which an emphasis is placed on rural development, coupled with increased commercialisation. See also R Hall *A Fresh Start for Rural Development and Agrarian Reform?* PLAAS Policy Brief 29 (July 2009) 1-6

³⁸ RSA *Draft Tenure Security Policy* 10. See also Pienaar & Geyser (2010) *THRHR* 248; Pienaar (2011) *Speculum Juris* 108

³⁹ RSA *Draft Tenure Security Policy* 10

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⁴¹ Long title and Preamble of the Draft Land Tenure Security Bill

⁴² Cl 2. However, there are no provisions in the Bill aimed at or focused on production discipline as such

⁴³ These areas include land that would have been covered by CLARA had it not been found to be unconstitutional. It is questionable whether the overhaul of rural tenure can afford to exclude vast areas of rural land

⁴⁴ These claims relate to land or rights in land under the current ss 16 and 17 of the Labour Tenant Act – see Badenhorst et al *Law of Property* 601-604 for more detail

of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE”) and the Interim Protection Act are specifically excluded from the ambit of the Bill.⁴⁵

Apart from the first introductory chapters one and two, the Bill has eight further chapters dealing with the following: Chapter 3: categories of persons covered by the Bill; Chapter 4: relative rights and duties; Chapter 5: management of evictions; Chapter 6: agri-villages and land development measures; Chapter 7: management of resettlement units and agri-villages; Chapter 8: Land Rights management Board; Chapter 9: Dispute Resolutions and Courts; and Chapter 10: Miscellaneous.

5.2 Persons covered by the Bill

The scope of the Bill, in relation to persons and categories of persons, is set out in Chapter 3. Five broad categories of persons are identified that fall within the ambit of the Bill, some of which overlap to some extent. These categories are: persons residing on farms;⁴⁶ persons working on farms;⁴⁷ persons associated with persons working or residing on farms;⁴⁸ farm owners and authorised agents;⁴⁹ and persons who have consent to reside.⁵⁰

The first category, persons residing on farms, is the only group who face the risk of losing their homes when evicted. In order to qualify, a person must have consent to reside or must have another right in law to reside. This definition is similar to the definition in ESTA,⁵¹ except that the Bill now includes this person’s family members. This category also incorporates persons who meet the requirements of labour tenancy, as set out in the current Labour Tenant Act. In light of the difficulties experienced by spouses and partners to qualify as occupiers for purposes of ESTA,⁵² the proposed definition provides slightly more protection in that family members are now specifically included in the definition.⁵³ This category of persons has an extensive list of rights, nineteen individual rights in total, set out in clause 15 and particular duties set out in clause 16. The rights provided for are formulated rather broadly and do not distinguish between persons who would formerly have fallen under ESTA and those that would have qualified as labour tenants. These rights listed include *inter alia* the right to own livestock that may not unreasonably be restricted,

⁴⁵ Cl 4 of the Draft Land Tenure Security Bill. PIE has national application and applies to both rural and urban areas, whereas the Draft Land Tenure Security Bill will only apply to rural areas and land used for agricultural purposes. See for more information regarding the application of PIE Badenhorst et al *Law of Property* 247-250, 652-660

⁴⁶ Cl 7 of the Draft Land Tenure Security Bill

⁴⁷ Cl 8

⁴⁸ Cl 9

⁴⁹ Cl 10

⁵⁰ Cl 11

⁵¹ S 1(1) of ESTA

⁵² Pienaar & Geysers (2010) *THRHR* 248

⁵³ In terms of *Landbounavorsingsraad v Klaasen* 2005 3 SA 410 (LCC) a distinction is made between occupiers in the narrow sense and occupiers in the broad sense. Only persons who qualify as occupiers in the narrow sense may, for example, be served with eviction notices. This category includes only persons who have a legal *nexus* with the land owner. In reality, this usually excludes spouses and family members. Therefore, although spouses and family members presently fall within the scope of ESTA, they do not enjoy *full* protection.

cropping and grazing rights, the right to build homes and homesteads, the right to bury family members on the farm and access to burial grounds and ancestral land, the right not to be denied or deprived of educational and health services, the right to commercial farming and access to skills, the right to education for self and family, and the right to family life. All of these rights are subject to reasonable conditions.

The basic duties of this category include the duty to provide labour, as agreed. They must furthermore not intentionally and unlawfully harm persons; cause material damage and assist persons to occupy land unlawfully.

The second category of persons is those working on farms.⁵⁴ This category is especially broad as it includes *any* person who in *any* manner assists carrying on or conducting the business of farming. This includes a person employed in a home on the farm or engaged by the owner in farming activities and includes a domestic worker and security guard. Their rights relate to labour legislation, education for self and family, family life, and dignity.⁵⁵ Their duties are identical to persons residing on land.⁵⁶ This category may overlap with the first category and *vice versa*.

The third category relates to persons associated with persons working or residing on farms.⁵⁷ At first glance this category seems especially broad. However, most of the persons listed in this section have effectively already been incorporated into one of the other categories set out above, for example: spouse or partner; child (including niece and nephew under eighteen and over eighteen if still attending school); parents; and siblings. Many persons listed in this category would already have been included under clause 8 dealing with family members as part of the first category discussed above.

Farm owners and authorised agents constitute the fourth category.⁵⁸ A farm owner includes any person or institution that owns agricultural land or receives any pecuniary benefits therefrom. Persons who act as agents or managers of such land also fall within the ambit of the Bill. Under clause 13 this category has all of the rights set out in the Constitution, including the right to property and family life, employer's rights and a right to dignity. Any of these rights may be subject to reasonable conditions. Their duties are set out in clause 14 and include a prohibition to intentionally and unlawfully cause harm to any person or material damage to property. They must furthermore not prevent persons residing on farms or working on farms from accessing educational, health or any other public facility. They are also prohibited from breaching labour law provisions.

The last category identified in the Bill relates to persons who have consent to reside on the land. This is not a totally new category as it essentially relates to persons who already fall under clause 8 of the Bill, namely those residing on the land. Clause 11 is thus an elaboration of what consent entails, the consequences thereof, and the implications of withdrawal of consent.

⁵⁴ Cl 8 of the Draft Land Tenure Security Bill

⁵⁵ Cl 17

⁵⁶ Cl 18

⁵⁷ Cl 9

⁵⁸ Cl 10

Persons who resided on or used land with the consent of the owner and such consent was lawfully withdrawn, shall be deemed to be a person still residing. However, this will only be the case if the person has resided continuously on the land for at least one year after consent was withdrawn.⁵⁹ For purposes of the Bill, consent will be effective, despite a defect or a failure to obtain the requisite authority. Persons who reside openly for six months are deemed to have consent. Consent contemplated in the Bill is binding on all successors in title.

In comparison to the existing legislative measures, it is notable that no distinction is drawn between persons who occupied land before and after February 1997, as is the case presently under ESTA.⁶⁰ There is also no specific distinction between long-term and other occupiers.⁶¹ It is also interesting to note that, excluding persons residing on farms and land owners, the other two categories of beneficiaries have identical rights and duties. The long list of individual rights for persons residing on farms is general and unspecific. For example, a general right to burial is provided for, whereas the existing right in ESTA is more defined and delineated.⁶² A general right to build homes and homesteads is also provided for in the Bill. Accordingly, no distinction is made between persons who would formerly have qualified as occupiers (ESTA), as opposed to persons who would have qualified as labour tenants.

The categories of beneficiaries and their corresponding rights overlap. Therefore, it is possible that one individual would enjoy protection under one or more provisions.

The duties of land owners are generally formulated negatively. This means there is a duty on them *not* to prevent access to housing, education *et cetera*, but there is no clear positive duty to provide housing or access to water and services.

Regarding persons associated with persons residing or working on farms (the third category), it is unclear how the land owner in practice would be able to realise rights of these persons to, for example, health and education.

5.3 Management of evictions

Chapter 5 of the Bill deals specifically with the management of evictions. Clause 19 sets out the scope of eviction. This entails an act or omission that results in temporary or permanent removal of persons against their will from their home or land that is being occupied. A new development consists of a long list of actions or omissions that would result in *constructive eviction*,⁶³ for example, the prevention of access to residence; interference with performance of cultural practices; refusal of allowing to bury someone on the land; denial of access to water or electricity; demolition of a home; forcing different families to live together; and forced relocation of a homestead.

⁵⁹ There including persons who started off under cl 8

⁶⁰ See for more detail Badenhorst et al *Law of Property* 608-609

⁶¹ As provided for under s 8(4) of ESTA – see Badenhorst et al *Law of Property* 610-611

⁶² See especially Pienaar & Brickhill “Land” in *CLOSA* 48–32-48–36

⁶³ Cl 19(2) of the Draft Land Tenure Security Bill

Clause 20 sets out the conditions or circumstances relating to lawful evictions. If residence and employment are linked,⁶⁴ then all labour legislation has to be complied with and formal eviction proceedings have to be lodged. In instances where the occupier has resided for a period longer than ten years and he or she is sixty years of age or is a former employee who cannot work due to ill health, injury or disability,⁶⁵ that person can generally not be evicted, except if that person is guilty of a section 16(2) breach.⁶⁶ When such a person dies, his or her family members can remain on the land for a further twelve months. If residence has indeed been terminated or family members remain on the land for a further twelve months, the parties can reach an agreement regarding the conditions of continued residence for the period following termination and preceding eviction. If no agreement can be reached, parties may also proceed to court for required conditions of continued residence.⁶⁷ Evictions may only proceed if all substantive and procedural requirements have been met. In this regard clause 20(10) provides a list of safeguards that have to be complied with, including that there must have been opportunity for genuine consultation; evictions cannot be carried out in bad weather or at night; that there must be legal representation; and that, where groups of people are evicted, government officials have to be present.

Clause 20(11) provides that no eviction may result in persons affected being rendered homeless or vulnerable to the violation of other human rights.⁶⁸ Effectively this means that persons cannot be evicted if there is no alternative accommodation available. For a provision like this to be employed sensibly, two qualifications immediately come to mind: (a) some kind of investigation or survey has to be done to determine the availability of accommodation; and (b) sufficient support and other mechanisms have to be in place to realise or provide accommodation if necessary. Caution is also required: the mere availability of alternative accommodation does not automatically guarantee an eviction. *All circumstances* still have to be considered. Clause 21 underlines that persons residing on farms may only be evicted in terms of an order of court issued under the Tenure Security Bill.⁶⁹

The particular eviction proceedings are set out in clause 22. An owner has to give three months' notice of intention to lodge eviction proceedings to (a) the person to be evicted; (b) the municipal manager; and (c) the Land Rights Management Board (the "Board"). Urgent eviction proceedings are also provided for in identical terms to those currently provided for in ESTA.⁷⁰ In any application under clause 22 the owner furthermore has to give notice

⁶⁴ This is mostly the case as farm workers are employed on the farm that they occupy

⁶⁵ This description incorporates the present definition of "long-term occupiers" in s 8(4) of ESTA

⁶⁶ Unlawfully injured another, caused damage, or unlawfully enabled or promoted occupation of land

⁶⁷ Cl 20(9) of the Draft Land Tenure Security Bill

⁶⁸ This is a *verbatim* reformulation of one of the procedural protections that was formulated under the UN Committee on Economic, Social and Cultural Rights *General Comment 7: The Right to Adequate Housing (Art 11.1): Forced Evictions* (1997) UN Doc E/1998/22 3 4 flowing from art 11(1) International Convention on Economic, Social and Cultural Rights (1966) UN Doc E/1998/22 that sets out the right to adequate housing

⁶⁹ This is also in line with s 26(3) of the Constitution that provides that no one may be evicted from their home without a court order and only after the court considered all relevant circumstances

⁷⁰ S 15 of ESTA

to the municipal manager and the Board in advance. Although the reason for serving the various notices is clear, it is not clear why *different sets of bodies and institutions* receive the various notices in each instance.

Under clause 23 an eviction order may be granted if the person had not vacated the home after 30 days' notice and after the expiry of 30 days, the land owner had given at least three months' notice of intention to evict to the person affected, the municipal manager, the Board, and the Director-General. The particular provisions and the grounds for eviction have to be set out in the notice. Clause 23 provides for a probation report with certain required information to be requested within a reasonable time.⁷¹

Furthermore, an eviction order may be granted if the consent to reside was tied to a period in time and the time had lapsed.⁷² In all other instances an eviction order may only be granted if it is just and equitable in the particular circumstances. In this regard the reason for the eviction and the fairness of particular terms and conditions are relevant.

If an eviction order is granted, it may only be executed after at least two months.⁷³ The court shall furthermore direct the municipal manager, the Board and the land owner to draft a plan to be submitted jointly with particulars relating to the person and the provision of suitable alternative accommodation. This plan has to be submitted within two months after the eviction order was granted.

5 4 Agri-villages and resettlement

The Draft Tenure Security Policy highlights the necessity of agri-villages and resettlement. As mentioned, clause 20(11) of the Bill provides that no eviction may render a person homeless. Accordingly, a clear synergy between the chapters dealing with eviction and resettlement is required. Of great importance is the role and function of the Board, with the assistance of the Minister, to establish sustainable human settlements.

Prior to the establishment of agri-villages, the owner may enter into agreements with persons residing on farms in terms of which these persons are to be relocated to suitable alternative land.⁷⁴ This agreement is subject to Ministerial approval.⁷⁵ Furthermore, those likely to be affected by eviction are to be assisted to acquire suitable alternative accommodation, also in relation to productive land.⁷⁶ In the case of (lawful) evictions the Board also has to see to it that the rights of all groups are adhered to, including the right to safe, affordable, equitable alternative accommodation.⁷⁷ In the context of resettlement, the Board needs to ensure that various eviction criteria have been adhered to, including the rights of women, children and the vulnerable; that full and informed consent was given relating to the relocation; that

⁷¹ Cl 23(2) of the Draft Land Tenure Security Bill

⁷² Cl 24(1)

⁷³ Cl 25(1)

⁷⁴ Cl 26(4)

⁷⁵ Cl 26(5)

⁷⁶ Cl 27(1)

⁷⁷ Cl 27(2)

full consultation occurred; and that all plans, including those proposed by communities themselves, were taken into account.⁷⁸

Relocation means to move a person from one piece of land to another piece of land.⁷⁹ Accordingly, relocation can be relevant *even before an eviction occurs* in that the land owner and the occupiers could agree to a relocation, which relocation is subject to Ministerial consent.⁸⁰ It is unclear whether the Board is also a party in these kinds of agreements. However, because all eviction applications could render persons “likely to be evicted”,⁸¹ the Board is automatically involved in all eviction applications. It would seem that, although the Board is automatically involved in all evictions, it is not necessarily involved in agreements *prior* to eviction. If the Board is not involved in all relocations, how would it have an overall view of relocations and resettlements and be pro-active? It is also unclear whether the removal of persons from one part of the farm to another part of the same farm constitutes a “resettlement” and whether the criteria listed above would then have to be adhered to as well.

Clause 28 provides that expropriation may be employed to further the objectives of the Bill. Where permanent expropriation is not desirable, clause 29 provides for a “temporary right” to use a piece of land for resettlement purposes. Would this settlement area be a settlement similar to a transit area? Can these temporary rights be upgraded or made permanent at a later stage? Do the criteria for resettlement areas have to be adhered to in these instances as well (interim settlement), or do those criteria only come into play where resettlement is permanent? What would be the case if the community is already present on the land and temporary use rights are acquired but no resettlement or relocation occurs? Would the criteria mentioned above also apply in these circumstances? These are but some of the questions remaining.

5 5 Management of resettlement units and agri-villages

Chapter 7 of the Bill deals with the management of resettlement areas and agri-villages. A committee of the resettled community or agri-village representatives is established under clause 33 to manage the affairs of the community. The committee is registered by the Board, reports to the Board and the total of the committee members is prescribed by the Board. The management rules, that have to be fair and reasonable, are made by the Board and relates to the administration, control, use and enjoyment of individual units and common areas. Although the community can amend the rules, the amendment has to be approved by the Board.⁸² The other duties and functions of the Committee are set out in clause 35 and include the duties to advise, aid, liaise and assist where necessary. From this exposition it is clear

⁷⁸ Cl 27(5)

⁷⁹ Cl 1

⁸⁰ Cl 26(4)

⁸¹ Cl 27(1)

⁸² Cl 34

that, although the relevant committee runs the affairs of the community, the real power and authority are located in the Board.

5 6 Land Rights Management Board

The Board is established under clause 36 of the Bill, and the role and responsibilities thereof are set out in clause 37. These include *inter alia* the duty to enable and promote development, to manage land rights, to acquire land for resettlement; to provide guidelines for community committees and to provide and arrange for legal aid where necessary. The Board consists of between seven to nine members, and the required qualifications and experiences of members are set out in clause 39.

5 7 Dispute resolutions and courts

Chapter 9 of the Bill deals with dispute resolutions and courts. Although the Land Claims Court (“LCC”) is the preferred court that has all the powers necessary to deal with all matters under the Bill, parties may also institute proceedings in the relevant magistrate’s court.⁸³ In this regard, the magistrate’s court has jurisdiction in relation to proceedings for the relocation or restoration of rights and criminal proceedings under the Act and can grant interdicts and issue declaratory orders.⁸⁴ Civil appeals from the magistrate’s courts are to the LCC. Any orders made by the magistrate’s court are subject to automatic review by the LCC, during which can be confirmed, replaced, or substituted, or the case can be remitted to the magistrate’s court. No review is available if an appeal has been lodged. Orders are suspended for the duration of the review. Proceedings lodged in the high courts are transferred to the LCC. Appeals from the LCC are to the Supreme Court of Appeal. Furthermore, parties are able to approach the Board to appoint persons to facilitate dispute resolution meetings.⁸⁵

6 Discussion

Despite acting as overarching framework, the Draft Tenure Security Policy has various *lacunae* in relation to the Tenure Security Bill. Accordingly, a lack of synergy between the Policy and the Bill is the first aspect to be discussed here. Apart from this, the Bill itself is problematic in many respects.

6 1 Lack of Synergy

Although the Policy focuses on farm land, the Bill refers to agricultural land only, with no clarification as to what “agricultural land” entails. The Constitutional Court judgment in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd*⁸⁶ has underscored how difficult it can be to establish whether land

⁸³ Cl 42

⁸⁴ Cl 43

⁸⁵ Cl 44

⁸⁶ 2008 11 BCLR 1123 (CC); 2009 1 SA 337 (CC)

is “agricultural land”, depending on where the land is located and which legislative measures apply.⁸⁷ Therefore, although the scope of the Bill is not as broad as that of the current ESTA, it is from the outset unclear what the *exact* scope of the Bill is.

Resettlement and agri-villages are highlighted as one of the main focus areas of government in the improvement of tenure security. Despite this emphasis and the long discussion thereof in the Policy, the whole of Chapter 7, which addresses resettlement and agri-villages, is rather vague and ambiguous. The exact stage at which time these provisions become relevant and how they function, remain uncertain. It is not clear from the Bill whether the provisions dealing with “resettlement” relate to occupiers or labour tenants. Although the Bill states that labour tenancy claims will continue to be dealt with under Chapter III of the Labour Tenant Act, the Policy and Bill provide for land for “productive purposes”, thereby incorporating labour tenancy. Although the provisions are vague, it seems as if resettlement can be for shorter or longer periods of time. According to the Policy, settlement will be dealt with in accordance with permits, but it can also be in the form of freehold. It can furthermore be individual or in relation to communal areas and it can be residential or agricultural (for cultivation purposes). Mention is also made of the fact that rights can be taken away if the land is not used productively. Accordingly, it seems as if tenure can be (a) rather temporary as it is linked to a permit system; (b) conditional (as it may be lost if it is not used productively); and (c) can be of an “evolving” nature, as it can be “upgraded” to freehold if used productively. On all of these matters, the Bill is silent: there is no indication of the *kinds* of rights or interests available, who qualifies, when and what the content of the rights or interests would be. In this regard there is no translation of the constructs and ideals set out in the Draft Policy into the Bill itself.

Furthermore, in relation to resettlement and agri-villages, the Draft Policy states that the community rules will be “agreed on”⁸⁸ and thus drafted by the community themselves. That is not the case in the Bill. Instead, the drafting of community rules is the prerogative of the Board.

The Draft Policy also provides for an “efficient and accessible system to record and register rights”⁸⁹ whereas there is no mention thereof in the Bill itself. Therefore, neither the acquisition of rights, nor the recording thereof is dealt with.

The Draft Policy makes reference to new initiatives, including alternative dispute resolution mechanisms, legal aid and legal representation and a register of interests on farms. The Bill provides that any person may approach the Board to appoint a person to facilitate dispute resolution meetings, without setting out the consequences of such meetings. Although the Labour Tenant Act presently provides that an arbitrator may be appointed⁹⁰ and that proceedings

⁸⁷ See Mostert et al “Land” in *LAWSA 14* para 94

⁸⁸ *RSA Draft Tenure Security Policy* 6

⁸⁹ 5

⁹⁰ S 18 of the Labour Tenant Act

may be referred to arbitration,⁹¹ it has hardly occurred in practice. Perhaps the reasons for the non-appointment need to be researched and the provision for alternative dispute resolution mechanisms in the Bill revisited.⁹²

Despite the current provisions in ESTA and the Labour Tenant Act aimed at legal aid and representation, securing these services remains problematic. Hopefully the involvement of the Board in this regard will prove more successful. The reference to a Register of Interests in the Policy never resonated in the Bill itself. Surely such a Register would be necessary if a pro-active approach is to be followed by the Board?

6 2 Inherent flaws and problems in the Bill

Although the exact scope of the Bill is unclear, persons occupying forestry areas, resorts and other land outside urban areas (including land within a township, but who used to be occupiers under ESTA immediately prior to the establishment, approval and proclamation of such townships) will not be protected under the Bill. These categories of persons currently enjoy protection under ESTA. Accordingly, the commencement of the Bill will decrease the number of persons who enjoy protection and will cause some confusion as to what “agricultural land” entails.

Some clauses in the Bill are drafted poorly. For example, the clauses and provisions dealing with eviction notices are confusing in relation to the different persons and entities that have to be notified and the time period involved. Throughout Chapters 6 and 7 various references are made to agreements. The exact time when these different agreements are to be entered into, as well as their implications, are unclear. Despite envisaging the pro-active conduct of the Board, the Bill has yet to indicate *how exactly* the conduct of the Board is to be pro-active. In order for it to play an overarching role, it would need clear guidelines, support and sufficient resources and information. Provisions dealing with resettlement and relocation are furthermore vague and ambiguous: would a relocation on the same farm constitute resettlement; does an *in situ* upgrading constitute resettlement; and would an interim resettlement require the same approach as a permanent resettlement area?

Although the submission of a plan to deal with persons facing eviction is supported, the time period (two months) for the plan to be submitted may be too short. Furthermore, additional guidelines are needed relating to the content of the plan and the possible responses of the court. For example, it has to be possible for the court to interdict the role players to address short-comings in the plan or to provide more information when necessary and refer the plan back for re-submission. The most recent judgment in the case of *Residents of Joe Slovo Community, Western Cape v Thubelisa Homes*⁹³ has illustrated the crucial importance of precise instructions in this regard, as well as how complex and time-consuming these issues may be.

⁹¹ S 19

⁹² See also T Roux “Pro-Poor Court, Anti-Poor Outcomes: Explaining the Performance of the SA Land Claims Court” (2004) 20 *SAJHR* 511 526

⁹³ 2010 3 SA 454 (CC)

Section 14 of ESTA currently provides for the payment of compensation and/or damages in the event of eviction contrary to the provisions of the Act. The Bill does not have a similar provision.

The Bill formulates the duties of land owners negatively. This means that, although there is, for example, a duty not to cut off water supply, there is no positive duty to actually supply water. In instances where there is no existing water supply, there is thus no duty on the land owner to address the shortcoming. Furthermore, references to the right of “development” in clause 15 are vague and should be defined more precisely.

In short, although problems experienced in the implementation and effective application of especially ESTA necessitated a new, more holistic approach,⁹⁴ the Draft Policy and Draft Land Tenure Security Bill did not rise to the occasion. When the 1997 White Paper on South African Land Policy was published an emphasis was placed on, *inter alia*, the creation of *long-term security* for farm dwellers in particular.⁹⁵ Instead, the new Policy seems to move away from the secure rights paradigm towards a “settlement paradigm” in terms of which the particular rights; and the content, scope, acquisition and loss thereof are not defined and set out. It is questionable whether occupancy, essentially determined by the Management Board, would result in secure tenure within this context. In instances where occupiers are still resident on (commercial) farms, the proposed clause 20(11), which provides that eviction may not render a person homeless, will only be effective if (a) secure, effective support mechanisms are in place and if (b) institutions and departments involved have the necessary financial and other capacities to deal with these issues.

7 Conclusion

The farm land puzzle affects millions of South-Africans: farm workers, labour tenants, rural dwellers, occupiers, communities, and land owners. The pieces of the puzzle consist of various policy documents, strategies, plans and legislative measures.⁹⁶ Recent developments propose that some pieces of the puzzle are to be reshuffled, new pieces added and other pieces removed. Unfortunately, the connections between the different pieces in the puzzle do not fit properly, resulting in important parts of the picture remaining incomplete. Tenure cannot be secure if the relevant rights have not been defined. Furthermore, rights cannot be acquired or transferred if the relevant enabling mechanisms are absent. Apart from the fact that the pieces are not sufficiently exact to make the perfect fit, the frame of the puzzle is furthermore incomplete: what exactly is the scope of the new Bill and what is “farm land”? Even though communal land had specifically been cut out of the picture, tenure reform relating to commercial farms on the one hand and communal areas on the other would have to correspond on some level.

⁹⁴ Pienaar (2011) *Speculum Juris* 108; Cousins & Hall *Rights Without Illusions* para 2.2

⁹⁵ Department of Agriculture and Land Affairs *White Paper on SA Land Policy* (1997) 3.25, 4.9

⁹⁶ See Pienaar (2011) *Speculum Juris* 108

Can effective tenure reform relating to farm land and agriculture really occur when large portions of rural areas are excluded?

It seems that, seventeen years after work started on the puzzle, all the relevant pieces are as yet not on the table. It is imperative that the gaps be filled and the pieces refitted, but within a sound and well-constructed framework and in accordance with a clear vision. If re-evaluated again after seventeen years, will the piecemeal adjustment of the puzzle have stood the test of time?

SUMMARY

On 24 December 2010 a new Draft Tenure Security Policy and concomitant Draft Land Tenure Security Bill were published for comment. These new measures focus on farm land in particular and have specific implications for the Extension of Security of Tenure Act 62 of 1997 (“ESTA”) and the Land Reform (Labour Tenant) Act 3 of 1996. This contribution briefly explores the reasons for the introduction of these new measures at this point in time, thereafter the Policy and Bill are analysed in detail. In light of our finding that the three main objectives of the tenure reform programme, namely (a) rationalisation; (b) increased security; and (c) the embodiment of constitutional imperatives, have not been achieved, some kind of intervention seventeen years after the tenure reform programme was embarked on, is to be expected. However, it is questionable whether the proposed Policy and Bill in their present formats will address the prevalent short-comings sufficiently. In this regard the contribution identifies two main problem areas: (a) a glaring lack of synergy between the Policy and the Bill; and (b) inherent flaws in the Bill itself. Regarding the first problem, various concepts and constructs identified in the Policy remain unattended to in the Bill. Accordingly, new initiatives proposed in the Policy, for example, the introduction of a permit system, have not been given effect to in the Bill. In fact, neither the acquisition, nor the recording or transfer of rights, have been dealt with in the Bill. The Bill is furthermore drafted poorly, thereby resulting in confusing and ambiguous provisions, for example, relating to the service of notice in eviction proceedings and matters surrounding resettlement areas. In this regard numerous questions remain unanswered. The conclusion is reached that, although intervention in the tenure programme is necessary, the most recent proposals do not embody an all-encompassing approach, resulting in numerous *lacunae* leaving important issues unaddressed.