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13 September 2016

The Chairperson
Portfolio Committee
Rural Development and Land Reform
P O Box 15
8000 CAPE TOWN



Attention: The Portfolio Committee on Rural Development and Land Reform

cc Ms P Nyamza - Committee Secretary eMail: panyamza@parliament.gov.za.
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Public hearings on the Extension of Security of Tenure Amendment Bill [B24 – 2015]

We refer to the meeting held with appointees from your offices with regard to the public meetings taking place in KwaZulu-Natal during September 2016. During our meeting we were also invited to submit written commentary.

Herewith please find the written commentary which has been submitted as formulated by Agri SA and Kwanalu at this time.

At the end we have included a practical example of challenges faced by landowners.

Yours sincerely

S La Marque (Mrs)
CEO

KWANALU and AGRI SA COMMENTS ON THE EXTENSION OF SECURITY OF TENURE AMENDMENT BILL (2015)

These comments have been formulated from inputs received from Kwanalu and other members.

1. Introduction and Background

Kwanalu and Agri SA's members are farmers, who are very directly affected by the provisions of the Extension of Security of Tenure Act (ESTA) and any amendments thereto. ESTA has been a controversial piece of legislation ever since its promulgation in 1997. We have participated in the 3 year consultation process (NAREG process) following the publication of the Green Paper on Land Reform. Some of the outcomes of this process were the Policy on Land Tenure Security in Commercial Farming Areas and the ESTA Amendment Bill. The concept of land rights management committees and a land rights management board emanates from the Green Paper. The policy is a very comprehensive one which identifies the key challenges regarding land tenure in commercial farming areas and puts forward key principles for a land tenure security policy in commercial farming areas. It acknowledges shortcomings in implementation to date and proposes funding options for improved tenure security. It also starts to look at incentives for landowners to provide services and improve farm dweller rights.

We note that Agri SA also participated in the NEDLAC negotiations on the Bill as part of the business delegation. During these negotiations all the points of contention were thoroughly debated. Some amendments were agreed upon, but a number of areas of disagreement remain. This submission will focus on those areas of disagreement.

On the positive side, the stronger focus on mediation and the institution of a system of tenure grants is welcomed by Agri SA, provided that sufficient funds are made available to remunerate and secure professional mediators. We strongly believe that timeous intervention by committed stakeholders and where required objective, professional mediators can greatly assist in settling many disputes before positions become entrenched and situations get out of hand. It needs to be recognised that the system of land rights management committees which is envisaged may prove to be costly and the state would need to budget accordingly.

It is important to note however that the eviction process is already a very drawn out and expensive process and care must be taken not to make it even longer and more expensive.

Kwanalu Agri SA fully realizes that eviction is a very emotive issue. It needs to be dealt with, with great sensitivity. There will however always be a need for eviction in certain circumstances and that needs to be recognised and effectively catered for.

The ILO study into conditions of farms was released in July 2015. It had a strong focus on issues of tenure and evictions. It is important to note the following findings in particular:

- Recently, it has been alleged that the Western Cape has been hit by a wave of farm evictions, suggesting that the latter has been one of the main causes leading to the expansion of rural towns. During this research it was difficult to find any objective evidence proving that this is indeed the case. Municipalities, the courts, Department of Rural Development and Land Reform do not keep consistent, reliable information on evictions, and if they do, such information was not made available to the researchers despite numerous requests. Data provided by these sources were mostly conflicting. Moreover, while getting information about

legal evictions was still an exercise of the possible, getting any objective information about illegal evictions proved to be virtually impossible.

- Legislation and policy aiming to provide farm workers with housing and security of tenure appears to be hugely out of step with a growing, farm worker population who live off-farm. Extending on-farm tenure security and protection from eviction is no longer the single, biggest need of farm workers. Farm workers are increasingly becoming a diverse group, living in a variety of different situations and with a range of needs of which tenure security is but one.
- While ESTA makes provision for the Minister of the Department of Rural Development and Land Reform to facilitate off-site developments to extend the security of tenure of workers, little evidence could be found of any such development in recent times. It would clearly be to the benefit of the majority of seasonal workers if government could provide subsidies for on-farm housing that would improve seasonal accommodation, but also to develop long-term, permanent housing for an increasingly off-farm farm worker community.

2. Some general points

There are a number of areas where the Bill is vague on how certain things need to happen and when. These areas require clarification. This can be done by way of regulations, provided that the regulations are promulgated shortly after the Bill has been signed into law. The draft regulations should also be made available for public comment. For example, the Bill requires that a mediation process must be followed prior to a court process for eviction. It is however not clear who should initiate the mediation process and when this needs to be done. Also, if the requirement that occupiers may not be evicted unless they were legally represented (which is a highly problematic for us), is proceeded with, it is unclear when and how occupiers are to be informed of their right to legal assistance and how to go about to get legal assistance.

3. Clause by clause comments

3.1 Clause 1: Amendment of section 1 - Definitions

“family” – From the perspective of the landowner, it is important that there be absolute clarity and certainty as to which persons are regarded as family members of the occupier. Family is not defined in the Act. We recognise that section 6(2) (d) of the Act provides that occupiers have the right to family life and section 6(4) refers to family graves. However we should guard against an open ended definition or a broader category of persons as commercial farms are places of production and cannot accommodate unlimited numbers of people.

3.2 Clause 2: Amendment of section 4 – Subsidies

We welcome this provision. In our view, the lack of implementation of section 4 of the Act, which provide for long term tenure security on- or off farm, was in the most part due to a lack of dedicated funding. Hopefully the introduction of tenure grants will solve this shortcoming. We hope that the funds for tenure grants will be ring-fenced in the Department's budget.

3.3 Clause 3: Amendment of section 6 – Rights and duties of occupier

We support the right of lawful occupiers to take reasonable measures to maintain their

houses provided that maintenance does not extend to the expansion or erection of new dwellings as this may pose a liability for the landowner.

In many cases the landowner would maintain the farmworker's houses on the farm. However, on some farms occupiers live in houses which were not built by the farm owner and in such cases the occupiers often undertake the maintenance themselves. So it needs to be recognised that a diversity of situations exist on farms as far as tenure and housing is concerned. Whilst farmers have a duty of maintenance where they provide housing as a condition of service to a worker or where they lease out the housing, this duty may not exist in situations where there is no employment or landlord and tenant relationship.

Occupiers cannot be allowed to add or build on to existing houses without the permission of the landowner under the guise of maintenance as this could result in the land owner incurring liability. Building regulations are applicable to buildings on farms and the farmer is responsible to ensure that these are complied with, failing which, he could incur liability. Agri SA has submitted that this is not the intention of this clause; however it should be clarified so as to avoid unintended consequences. Maintenance should be limited to essential aspects such as fixing leaking roofs, cracks in walls, broken windows or any other improvements with prior notice to the owner. To this extent, we welcome the provision provided that it is qualified to better reflect the intention as we understand it.

With regards to the erection of tombstones, Agri SA supported this addition in principle during the NEDLAC process as we acknowledge that it forms part of the occupier's rights to dignity, freedom of religion, belief, expression and cultural practice. This must also be balanced with the land owner's rights, and as such we regard it as reasonable that such a person will be required to provide some proof of kinship and of the fact that the person in question is in fact buried on the land. Bearing in mind the farm is a production unit, we believe that the marking of graves and rites needs to be within reason. There have been cases where such rites involved hundreds of people wanting to spend a week on a farm. Such a situation could be very disruptive and may pose a genuine threat to health and safety e.g. where pesticides are being used or large machinery operated for example. We propose that the words "provided that this is reasonable and does not unreasonably infringe on the rights of the landowner or person in charge" be added after the words "perform rites on".

3.4 Clause 4: Amendment of section 9 – Limitation on evictions

We are opposed to the insertion of clause 4(1) (b). Whilst we fully recognise the right of occupiers to legal representation, this is a duty that rests on the Department, which it is currently dealing with, quite effectively, through the Land Rights Management Facility. However, it cannot be made a pre-condition for eviction.

The way that this clause is worded limits the jurisdiction of the court in a situation where a government department fails to comply with a responsibility placed on it by the courts (the Nkuzi-judgement) and this will be to the detriment of the landowner. There is no provision in the Constitution which guarantees legal representation in a situation such as this and the courts cannot and should not be barred from exercising their discretion merely because an occupier was not legally represented.

An attempt to insert such a precondition could give rise to a constitutional challenge. Land owners have the right to not to be deprived of their property arbitrarily in terms of section 25 (1) of the Constitution. The protection of ownership afforded by section 25 (1) includes the right to vindicate one's property, which in the case of immovable property could ultimately result in an eviction. By placing such a limitation on the court's discretion to award an eviction order, one is actually placing a limitation on the owner's right to vindicate his property, which in turn is a deprivation. Only a court can determine whether such a deprivation is constitutionally permissible. Drawn out and expensive litigation would not be in the best interest of any affected parties, and as such we propose that the legislature should strive to remove this possibility by rather placing a positive obligation on the state to assist occupiers with legal aid as this would be far less contentious than placing a restriction on the property owner's rights and the powers of the court as the latter could expose the Department to unnecessary litigation.

The term "in the interests of justice" which serves as a qualification, is quite vague? From whose point of view is this to be considered – the occupier or the landowner or both?

We regard this provision as an unjustified limitation of the rights of the landowner.

3.5 Clause 5: Amendment of section 10 – Order for eviction of person who was occupier on 4 February 1997

The onus should be on both parties to seek a solution to their dispute. The word "or" in this clause should be changed to "and" to make this clear.

Whilst Agri SA fully supports mediation, time limits should be set so that unsuccessful attempts at mediation do not unduly delay the eviction process.

"...is satisfied that the circumstances surrounding the order for eviction is of such a nature that it could not be settled by way of mediation or arbitration"

This wording could be problematic as an arbitrator would arguably never be able to make a binding decision in favour of the land owner where the owner wishes to evict an occupier. Section 26 (3) of the Constitution states that

"No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

This section clearly states that an eviction order can only be made by a court, not an arbitrator. Unlike mediation, arbitration is by its very nature binding, so should a dispute regarding a threatened eviction be referred to arbitration, the arbitrator would only ever be able to rule in favour of the occupier as the opposite would in fact amount to an eviction, which an arbitrator is not constitutionally authorised to do. This in itself would violate the constitutionally protected *audi alteram partem* rule. So whilst the parties could still attempt to settle the dispute through a non-binding mechanism such as mediation prior to approaching a court, the role of an arbitrator in such a dispute would be redundant.

As a result, it is redundant to state that a court may only award an eviction order if the dispute could not be resolved through arbitration because a dispute of this nature cannot constitutionally be resolved through arbitration. We therefore suggest that the words "or arbitration" be removed, and the clause would read as follows:

"(e) the owner or person in charge or the occupier have attempted mediation to settle the dispute in terms of section 21 or referred the dispute for arbitration in terms of section 22, and the court is satisfied that the circumstances surrounding the order for eviction is of such a nature that it could not be settled by way of mediation."

Mediators need to be truly impartial. Moreover, in order to attract experienced mediators, they will have to be remunerated fairly and the Department will have to budget for this. The appointment of mediators needs to happen speedily, so as to not unnecessarily delay the process. The Bill also needs to be clear on who will initiate the mediation and carry the related costs.

The wording "surrounding the order for eviction" is also problematic – because at the stage when the court needs to decide whether or not to evict, no decision has yet been made to evict.

3.6 Clause 7: Amendment of section 12 – Further provisions regarding eviction

This is a new clause that was not part of the version of the Bill which was before NEDLAC. It seems a strange requirement to expect the courts to make a determination on weather conditions, which are often not all that predictable. If a date two or three months from the date of judgement is determined for the eviction to take place, the court will have no way of knowing what the weather will be like. It is not practicable to impose such a function on a court.

It is not clear what will happen if it does end up raining on that day. Postponing an eviction may lead to additional cost for the landowner. We are not unsympathetic to the plight of people who are evicted, but laws should be clear and practical and executable. This kind of clause can bring about a lot of uncertainty. We are of the view that this clause should be deleted.

Practical example of challenges faced by landowners:

We run a mixed farming operation in Northern Kwa Zulu Natal that has downscaled significantly because we can't find agreeable solutions:

On our farm we built about 30, four roomed cement houses for the working staff from about 1990 to about 2009. These houses include, running water, electricity, flushing toilets and showers. (the houses were built in the middle of the original farm)

These houses were built for the employees and their intermediate family to stay in while being employed by the business.

The problem comes when employees pass away, are dismissed or resign they and their family insist that it is their right to stay on the farm and in our custom build houses. The problem is now

getting so bad that even the second and third generation are now becoming arrogant and refuse to leave the farm when senior employees stop working for us.

The employees signed their employment contracts, accommodation being a benefit to them only while being employed by the business.

Due to the fact that terminated employees refuse to move out of our houses and no longer work for us, we are now forced to use contractors to perform our farming operation as there is no more housing available for new employees who wish to come and work for us. The issue now comes that the ex-employees just sit on the farm and revert to crime to feed them self, which makes our farming operation a non-viable business going forward.

We have tried to resolve this problem by buying a piece of land about 72 ha in size, a farm adjacent to our original farm. We offered them this piece of land to move to but they refuse to move there. This site has a school, a trading store, has electricity and is situated next to a main tar road that connects Paulpietersburg with Vryheid.

The occupants and their families are now operating shabeens on the farm., They are cutting down our trees from the plantation to build mud houses which they rent out to the general public to generate an income. They are very aggressive which causes a security concern. My son and his family was threatened with their life 3 months ago and our farm manager was attacked about 2 months ago while counting cattle. All this is recorded to the Police.

Secondly we have the issue with illegal burials on the farm. Taking the atmosphere of the above into account, the illegal occupants just bury people on the farm as and when they feeling like it. There is no more control over the occupants.

If we can't find a solution to this cause, we will have no other option but to close down our farming operation in Vryheid.

How will the government assist landowners in creating a legislative and political environment that is conducive to farming, provide for removing illegal occupants and ex-employees from the farm allowing the farming enterprise to get back to sustainable and safe working levels?

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