

# **Research Report on the Tenure Security of Labour Tenants and Former Labour Tenants in South Africa**

Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa

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## 1. Introduction

Issues surrounding labour tenancy in South Africa are controversial and complex. The issue is controversial in that it currently reflects a struggle over access to land and tenure security that spans more than a century. The controversy surrounding labour tenancy derives from the fact that the role players within this scenario often hold widely differentiated perceptions about each other's rights, duties and respective power relationships.

At the one end of the scale, white commercial farmers consider themselves to be the owners of the farms they occupy in the sense of the Roman Dutch Law concept of dominium. In their view, the fact that they have title to the land confers on them absolute powers of disposal. This means that they see themselves as exercising sole discretion over who should reside on the land as well as over the activities of any occupier of that land. In addition, the constraints of modern commercial farming dictate that a farm must be run along the lines of a business where profit margins become the driving force.

This can be contrasted with the perception of labour tenants who, in many instances, have enjoyed much longer relationships with the land they occupy than the farmer who legally owns that land. This often spans generations, and in many cases the land was expropriated from African families who had occupied it since time immemorial. In this way, many Africans suddenly found themselves converted from the status of customary owners of the land, to mere occupiers. Thus they were forced to comprehend how a piece of paper in the form of a title deed lodged in some distant bureaucratic office could deprive them of the land that they were born on, and where their ancestors were buried. The effect of this was that the only place that these families could call home belonged to someone else, and hence they lacked security of tenure in respect of that land. It is hardly surprising therefore that many labour tenants regarded themselves as the true owners of the land - especially where a farm had been recently acquired by a new owner.

The origins of labour tenancy and the reasons for its continued existence are many and varied. Thus, according to Gumbi,<sup>1</sup> in the early years of a rural economy where white and African farmers were competing for survival, land and labour were inextricably linked and therefore it is not surprising that the exchange of labour for continued access to land arose as a result. Labour tenants can be broadly defined as those who have historically worked the land in return for the right to occupy the land on which they lived, as well as grazing and cropping rights. Remuneration in monetary form was minimal and hence tenants had to survive on the rights of use of land that they enjoyed and the ability to eke out a livelihood from that use.

Hornby describes labour tenancy as 'a continuum in which boundaries become increasingly blurred as one nears the centre.'<sup>2</sup> This is due to the various types and categories of labour tenant, farm dweller and farm worker that have developed in practice (see below for a more detailed discussion).

However, the definition outlined above constitutes the standard form of labour tenancy. It can be said to have its origins in the exploitation of those without legal rights to land by those with such rights, which in turn has resulted in the pervasive economic marginalisation of labour tenants. In this sense labour tenants were a source of cheap labour<sup>3</sup> and often took on characteristics akin to

slavery,<sup>4</sup> with a practice of tenant families being compelled to offer members (including children) for service on the farm.

This was largely brought on by the unequal power relations that arose from the uneven competition for land between African and white farmers within the context of acute land and labour shortages. The loss or absence of political power on the part of the former condemned the majority of labour tenants to an existence of economic deprivation. For many, the best-case scenario has been one of basic subsistence, entailing survival on the bare necessities of life.

This occurred within the context of the absence of secure tenure, with the tenants enjoying virtually no protection against arbitrary evictions<sup>5</sup>. This arose from the fact that any rights that tenants enjoyed were dependent on the discretion of the farmer, who was the legal owner of the land.

During the 1950's the labour tenant system came under pressure from the Apartheid government. There were numerous reasons for this. Gumbi suggests that this was due to the fact that the system was not providing sufficient labour to white farmers and nor was it addressing the land shortages of African tenants<sup>6</sup>. No doubt the government also wanted to move surplus labour tenant to the 'homelands' in accordance with Apartheid policies. The Nel Commission of Enquiry<sup>7</sup> recommended the abolition of the system, to be replaced with wage-earning agricultural labour, as it considered the system to be out-dated and inappropriate for the supply of labour in a modern agricultural economy.

According to Muller<sup>8</sup>,

'The subsequent (Nel) Committee of Enquiry into the Labour Tenancy System in 1961 found that legislation should be introduced as soon as possible to abolish labour tenancy completely. An important finding by the Committee was that the Labour Tenant Control Boards "could not exercise effective control over farm labour" and recommendations were made that a prohibition on the residence of labour tenants had to be placed on farms to abolish this system. Thus, in 1964 the Bantu Laws Amendment Act was passed. This law sought to hasten the abolishment of labour tenancy and transform this particular labour system into wage labour.'

However, labour tenancy was never eradicated as it continued to provide benefits to certain farmers, as well as to labour tenants. Undercapitalized farmers who had not modernized their farming operations benefitted from the supply of cheap labour provided by the system. On the other hand, certain labour tenants clung to the system because, at the very least, they were able to access some agricultural land. This enabled them to derive additional income through a system of multiple livelihoods, whereby certain family members would earn wages through regular employment on the farms or earn income from other sources. These cropping and grazing rights were important since wages and working conditions on the farms were abysmal<sup>9</sup>, as existing labour regulations at that stage did not apply to farm workers.

However, it is important to point out that that the abolition of the labour tenant system increased the exploitation and vulnerability of labour tenants: the standard labour tenant contract (which provided for any able-bodied family member to provide work for the farmer on a rotational basis) no

longer applied, and hence farmers were able to make up their own rules and conditions<sup>10</sup>. An underlying factor in this scenario was that farmers were able to evict tenants and their families should they become dissatisfied with any aspect of the tenant's tenure. Farmers could also refuse tenants cropping and grazing rights at will.

By the end of the 1980's AFRA research indicated that there were approximately 500,000 individuals operating within some form of the labour tenant system, offering labour in exchange for cropping, grazing or tenure, with some form of occasional wages in light of the official illegality of the system. This was found mainly in KZN and Mpumalanga, although labour tenants were also found in other parts of the country. Tenants lacked any form of tenure security, and hence this needed to be addressed by the incoming democratic government of South Africa in terms of the constitutionally guaranteed right to tenure security.

However, there has been reluctance on the part of both the apartheid government and the current government to address the labour tenant question. The old regime's 1992 White Paper on Land Reform (which set out the National Party's blueprint for land reform in the new constitutional dispensation) no mention is made of any land tenure provisions for labour tenants. The ANC government initially recognised the importance of labour tenants, both because of their position in the Freedom Charter in 1955 and the influence of land rights NGOs on the ANC prior to and immediately after 1994. Despite labour tenants being a focus of post-apartheid policy, the ANC government has continued to neglect them. This is largely because the legal complexity of contestation of property rights and claims outweighed the state's capacity to implement the new legislation. Furthermore, where land claims were successfully implemented, the ANC bought into commercial farmer claims that it had created poverty traps. And later, the ANC disputed NGO claims about the number of labour tenants affected. Shifts in government land policy in the late 1990s and then again in the 2014-2015 away from a transfer of land in title to the poor and increasingly to leaseholds for wealthier commercialising black farmer further eroded the legitimacy of labour tenant claims to land ownership in the eyes of the current administration. Nevertheless, the Constitutional obligation and legal imperatives to secure the tenure of labour tenants remains.

## **2. Background**

The principal legislation regulating labour tenants is the Land Reform (Labour Tenants) Act 3 of 1996 (hereafter referred to as the Act), which was enacted on the 12<sup>th</sup> March 1996 and came into effect 10 days later. In order to protect labour tenants who might have been evicted or who might have suffered a reduction of rights in anticipation of the enactment of the Act, it operates retrospectively by protecting occupation rights as at the 2<sup>nd</sup> June 1995.

The Land Reform (Labour Tenants) Bill (hereafter referred to as the Bill) that preceded the Act was initially vehemently opposed by organised agriculture, including the South African Agricultural Union (SAAU) and the Natal Agricultural Union (NAU). The latter unanimously rejected the Bill at a NAU congress on the 6<sup>th</sup> September 1995. The SAAU, while stating that it had no objection to honouring the rights of labour tenants or protection against illegal evictions, nonetheless considered that depriving landowners of property rights through the extension of labour tenant rights without consulting landowners was contrary to the rule of law<sup>11</sup>. The SAAU further submitted that the Bill

was draconian and contrary to the principles of justice and fairness, and contravened a promise given by the government that the title deeds of farmers would be safe.

On the other hand civil society in general argued that the Bill did not go far enough. One of these arguments related to the fact that the Bill did not extend protection to tenants who were evicted prior to the 2<sup>nd</sup> June 1995. Criticism was also levelled at the complex nature of the Bill, as well as the complicated language in which it was drafted<sup>12</sup>. Aitcheson observed that the perception amongst certain labour tenant communities was that the Bill favoured the interests of white commercial farmers, whereas many farmers regarded it as being inimical to their interests<sup>13</sup>. This is despite the fact that the adoption of the Bill was preceded by intense negotiations. However, a negotiation process of this nature can often result in a compromise by both sides, with the result that neither side is happy with the final outcome.

It is submitted that in such cases an effective communications process should precede the enforcement of such legislation in order to ensure that interested parties are adequately informed of the provisions of the Act. This is particularly important in the case of people in labour tenant communities who, owing to poor education systems, have some of the lowest levels of knowledge and education in the country. In addition, the enactment of such legislation should be followed up by an efficient implementation plan that reduces uncertainty and speculation as well as contestation about the content of such legislation. None of this, however, eventuated, which severely hampered the effectiveness of the Act.

### **3. Content of the Land Reform (Labour Tenants) Act 3 of 1996**

#### *Purpose*

The overall purpose of the Act is to protect the current occupational rights of labour tenants, which include land use. This means that all rights of use and occupation enjoyed by a labour tenant on a particular farm vested in such labour tenant on the 2<sup>nd</sup> June 1995, and hence would be protected in terms of the Act. The converse of this is that tenure security would be enhanced through restrictions on the powers of landowners to arbitrarily and summarily evict labour tenants, as well as the conferring of rights on labour tenants not to be evicted unless certain substantive and procedural conditions had been satisfied. The most important aspect of the Act, however, is chapter 3, which provides for mechanisms by which labour tenants are able to acquire ownership of land that they are entitled to use and occupy. Thus, any labour tenant could apply to the Department of Land Affairs (which subsequently became the Department of Rural Development and Land Reform in 2009, and is hereafter referred to as the Department) prior to the 31<sup>st</sup> March 2001 for an order that would confer title not only for the land that such tenants were occupying, but also the land that they were using for cropping and grazing.

#### *Definition of a Labour Tenant*

There are three elements to the definition of labour tenant:

- a) Such person must have the right to reside on a farm (i.e. agricultural land as defined in terms of the Subdivision of Agricultural Land Act 70 of 1970);

- b) Such person must have enjoyed cropping and grazing rights on that farm or another farm of the landowner and has provided labour in consideration of such rights;
- c) Whose parents or grandparents were labour tenants.

### *Eviction*

The wide Common Law powers of eviction through vindicatory action have been fairly drastically limited in terms of the Act, which prohibits evictions unless they occur by way of an 'order of Court issued under the Act (section 5)' and can only occur at the instance of the owner (section 6).

Thereafter, an eviction order will only be granted where it is found by the Court to be 'just and equitable' and the labour tenant has either failed to provide labour in terms of a labour tenant agreement or the labour tenant (or associate) has committed a material breach of the relationship between the labour tenant or the associate and the owner or lessee of the land. This breach must be of such a nature that, 'it is not possible to remedy it, either at all or in a manner which would reasonably restore the relationship' (section 7).

### *Offences*

Section 15 creates the offence of illegal eviction in the form of the removal or eviction of any labour tenant without the authority of an order of a competent court. Thus, any landowner taking the law into his own hands and summarily evicting any labour tenant without following the requisite processes (essentially, the obtaining of a Court Order) is guilty of an offence and liable to a fine or two years imprisonment.

In order to facilitate the prosecution of offenders, labour tenants who have been illegally evicted may initiate a private prosecution without having to obtain a certificate of non-prosecution, which is required for any private prosecution in terms of the Criminal Procedure Act.

### *Acquisition of Land*

An extremely important provision of the Act is the fact that it facilitates the acquisition of land by labour tenants in terms of section 16, which confers a right upon a labour tenant to apply for an award of the land that such tenant is entitled to occupy or use in terms of the Act. The cut-off date for lodging such claims was the 31<sup>st</sup> March 2001.

An important accessory right is that no agreement in which a labour tenant waives rights to acquire land between such tenant and the landowner shall come into operation unless the Director General is satisfied that the labour tenant had full knowledge of the nature and extent of the rights, as well as the consequences of the waiver of such rights. This must occur before such rights are incorporated into an Order of Court.

The Act thereafter prescribes a procedure that entails an application for such acquisition of land to be referred to the Director General, after which notice must be served on the relevant landowner, as well as the publication of such notice in the Government Gazette. This is followed by attempts,

brokered by the Director General, to settle the claim between the parties, failing which the matter must be referred to Court.

#### **4. Problems Arising from the Act**

##### *The Land Claims Court*

The Act envisages a rights-orientated approach that is triggered by the lodging of claims in respect of such rights. It is thus adversarial in nature, which in many cases has the effect of increasing contestation of such rights between the two parties (i.e. the landowner and the labour tenant). This rights-based approach is realised in practice through the operation of the Land Claims Court (LCC), which is the ultimate custodian of the rights and protections contained in the Act.

Although the LCC is considered to be a Court of equity, it has not tended to function along the lines of an institution charged with ensuring fairness and justice. Instead, a survey of the judgements emanating from that Court has indicated that it has set greater store by its status as an equivalent of the High Court. It has therefore tended to function in a formalistic nature where technicalities rather than considerations of fairness and equity become the overriding factors.

In practical terms this formal approach has resulted in the usual criticisms levelled against formal litigation processes, which include delays, escalating costs, and difficulties in securing court dates and venues. The seat of the Court is in Randburg, Johannesburg, and situations often arise where urgent applications have to be made in Randburg in regard to matters that have arisen in rural areas in remote parts of the country. This means that in practice the Court is distant from the communities that it is designed to serve, and difficult to access.

An example of this formalistic approach is that the Court has divided the acquisition of land process for labour tenants into two distinct phases. The first phase is that an application must be made by a labour tenant to be declared a labour tenant in terms of the definition of the Act. Thereafter, a claim must be lodged with the Director General, and the second phase commences when the tenant applies to Court for the acquisition of land. This is extremely time-consuming and costly, and must be streamlined if it is to be effective and timely.

From an overall perspective it can be said that the Court's role in the implementation of the Act has not been a positive one. What is surprising in this regard is that, although the Act makes extensive reference to mediation and arbitration, no effort has been made to promote these forms of Alternative Dispute Resolution (ADR) as a means of implementing the Act and settling disputes.

The same type of dispute mechanisms contained in the Labour Relations Act through the Commission for Conciliation, Mediation and Arbitration (CCMA) could have been implemented within the existing framework of the Act, requiring mediation of any dispute prior to referral to arbitration should the parties fail to reach settlement. Similarly to the process in the CCMA, this could have resulted in a speedy, cheap and effective dispute resolution mechanism that avoids the technicalities of formal litigation and focuses on resolving the particular dispute at hand. The LCC could still have played an important role in dealing with highly complex or precedent-setting cases.

These failures in respect of ADR mechanisms such as mediation and arbitration provided for in the Act bear special consideration. In a 1998 investigative report into the impacts of the Act, Aitchison et al<sup>14</sup> were at pains to point out that:

‘The investigation clearly shows that the vast majority of legal cases related to the Act are now not settled by litigation but by mediation and negotiation. The Department needs to build its capacity to facilitate this process through a variety of mechanisms including legal advice, facilitation of mediation and negotiation, rural fora, etc. The Department should consider strengthening regional facilitation offices, particularly as the major problems occur in only a few regions... the allocating of more resources to the implementation of the Act is vitally necessary.

Needless to say, this timely recommendation was not implemented.

### *Defining labour tenants*

A rights-based approach requires rights to be clearly defined. In addition, it is necessary to define the persons in whom such rights vest, as well as the persons against whom such rights can be realised. This creates a triangle of rights of occupation, use and enjoyment on the part of a defined category of labour tenants in respect of certain farmland that is owned by landowners.

Right at the outset the definition of a labour tenant, as set out in the Act, was controversial, and led to conflicting decisions within the Land Claims Court itself. Thus, two conflicting approaches were adopted by the Courts in regard to the extent or limit of the definition of a labour tenant. The broad approach supports a disjunctive interpretation whereby compliance with all three of the requirements set out in paragraphs (a) to (c) (i.e. that the person should reside on a farm in terms of para (a), and should enjoy cropping or grazing rights and in consideration of such rights provide labour to the farmer in terms of para (b), and whose parents or grandparents would also have been labour tenants in terms of para (c)) is not required. This is notwithstanding that the definition contains the word ‘and’ between (b) and (c), which implies that a labour tenant must not only have enjoyed grazing rights in consideration for the provision of labour but that, in addition, his or her parents or grandparents should also have been labour tenants. This second narrow approach was adopted in Mahlangu v De Jager 1996(3) SA 235 (LCC) and Ngcobo v van Rensburg 1999(2) SA 525 (LCC). It entails the application of ‘and in the normal conjunctive sense where compliance with all three requirements is required.’

Critics of the narrow approach argue that such an interpretation (which requires compliance with all three paragraphs) could severely limit the ambit and application of the Act, since many potential labour tenants would be excluded from the narrow definition. This in turn could frustrate the objectives of the Act<sup>15</sup>. In addition, it has been submitted that the wording of paragraph (c) requiring that parents or grandparents should also have resided on a farm (or had the use of cropping and grazing rights) is so obscure that it is an ‘open invitation to varied interpretations.’<sup>16</sup>

The above illustrates the problems that arise with these attempts to categorise and define the concept of labour tenant in this manner. The narrow conjunctive approach appears to exclude all

first generation labour tenants (since they would not comply with para (c) in that they did not have parents or grandparents who resided on a farm or who were labour tenants).

In addition, the definition of labour tenant must be juxtaposed to that of farm worker, which is defined in the Act as an employee on a farm who is paid predominately in cash or some other form of remuneration other than predominately in the right to occupy and use land, and who also is obliged to perform such service personally. This definition is of critical importance since any person found to be a farm worker is excluded from the definition of labour tenant, and hence cannot benefit in terms of the Act.

This distinction in the Act between labour tenant and farm worker has proved to be problematic, since farmers have tended to convert labour tenants into farm workers by introducing employment contracts and reducing cropping and grazing rights in favour of increased wages. In order to assist labour tenants in this regard, it was necessary to amend the Act to provide that where a person complies with paragraphs (a), (b) and (c) of the definition of labour tenant such person shall be presumed not to be a farm worker. Thus the onus is on the farmer to establish that such person is a farm worker and not on the tenant to prove that he or she is not a farm worker. Although this is of assistance, in the broader context it has not made much impact on the situation.

The Court has devoted a considerable amount of time and energy to determining whether farm dwellers were labour tenants or farm workers. Farmers have been able to hire expensive, experienced lawyers to fight their cases, whereas labour tenants have had to rely on (often inexperienced) lawyers provided by either the Legal Aid Board or the Land Rights Management Facility panel. The end result is that labour tenants have frequently found themselves on the losing side of legal cases, notwithstanding the strength of their respective cases.

As a result, the LCC has been forced to grapple with comparing the wage earned by a worker with the value of any other non-wage benefits. In Mahlangu v De Jager 2000(3) 145 (LCC) it was held that, in order to determine whether the Applicant was a farm worker, a comparison had to be made between what he or she earned as remuneration for work done on the one hand, and the value of his or her occupation and use of land on the other. The difficulties in this approach were illustrated in Landman v Ndozi; Landman v Gama 2005(4) SA 89 (LCC) where the question was raised as to how such rights of occupation were to be valued and from whose perspective (i.e. that of the tenant, the landowner or the Court) in order to determine what was predominant.

This can result in extremely arbitrary consequences. Thus, where it is held that a person's occupation of the land and non-wage benefits derived from the land are marginally lower than the threshold (however that is calculated) so as to result in such person being found to be remunerated predominantly in cash, he or she will be categorised as a farm worker and hence will fall outside the ambit of protection and benefits of the Act. On the other hand, someone who earned slightly less doing the same work on the same farm could be found to be a labour tenant. This arbitrary process is divisive and unhelpful.

In order to avoid this problem, the definition of a labour tenant should not be so rigidly contrasted with that of a farm worker. The definition should rather focus on the relationship that any

particular individual has with the land, and the degree of utilisation and dependence on that land. This could include such factors as the length of that relationship, and whether that individual has another residence elsewhere that could be called his or her home.

It is difficult to perceive how the drafters of the Act did not foresee that such rigid categorisation would result in farmers altering the applicable conditions in order to convert labour tenants into farm workers. This would obviously benefit the farmer, since the definition of farm worker would neutralise any land acquisition claims on his farm. But, on the other hand, this often drastically prejudices labour tenants who find themselves deprived of the occupation and use of benefits of the land as a result of legislation that was designed to assist them.

This must also be viewed within the context of the increasing casualization of farm labour due to the economic pressures of non-subsidised agricultural output within the global economy. This is a factor that cannot be ignored, and will impact on the plight of labour tenants and legislation designed to protect them.

#### *Land restitution and labour tenants*

Confusion has arisen concerning overlapping claims between the Restitution of Land Rights Act and the Land Reform (Labour Tenants) Act. Restitution and tenure security form two of the three pillars of land reform principles in South Africa since 1994 (the third being redistribution), and they are all constitutionally entrenched. However, there are a number of cases where different communities and individuals have lodged claims over the same land in their different capacities as restitution claimants and land tenant claimants.

This has occurred, for example, where land was expropriated and the occupants forcibly removed by the Apartheid government, and the land was redistributed to white commercial farmers who introduced a labour tenancy system. In such cases the labour tenants would have remained on the land post-expropriation, whereas the restitution claimants were residing elsewhere and seeking restitution from the time that they were forcibly removed from the land.

This raises the critical question of who should enjoy preference in such a scenario. In KwaZulu Natal (KZN), the Regional Land Claims Commission (RLCC) adopted a more proactive role than the Provincial Land Reform Office (PLRO) of the Department, with the result that a number of communities were informed that restitution claims take precedence over labour tenant claims. In such scenarios the latter often find themselves being deprived of their rights to land that is being claimed by restitution claimants.

This is precisely what occurred in a case related to the Gongolo area of KZN, which involved approximately 40 commercial farms and restitution claimants who were no longer on the land and resided elsewhere (having been scattered all over the province) as a result of the Apartheid government's forced removal programme. However, white farmers who subsequently acquired the land had introduced labour tenants. These labour tenants also lodged claims in respect of section 16 of the Act (which provides for the acquisition of land) at more or less the same time as the restitution claim was lodged by the restitution claimants in terms of the Restitution Act.

Of interest to this scenario was the fact that the landowners vehemently disputed the restitution claimants' claims, but never disputed those of the labour tenants. In fact, during the long, complex and costly litigation process that was pursued in regard to these claims, which persisted from the early 1990's until 2014, the landowners never disputed the accuracy of the list of labour tenants that was compiled by AFRA, or that the labour tenants on the list were entitled to acquisition of land in terms of the Labour Tenant Act. In 2006 Mr Sthembiso Mahlaba, Chairperson of the Gongolo Committee, had this to say about the overlapping claims and the manner in which they were handled by the RLCC:

'These overlaps are a problem to the communities, especially those living on farms, as the RLCC officials always stress that restitution supersedes labour tenant claims. That alone is causing uncertainty for communities living on farms. It has left people confused as to whether they have any rights as labour tenants. In fact what is happening here is that the government is causing unnecessary confusion amongst the community with its programs, instead of addressing our land need.'

He goes on to say:

'Let me give you an example. With one of the farms here that the Commission has bought for people – Birdspruit Farm, Gongolo - there is community in-fighting over that farm because restitution claimants are telling inside people (the people living on the farm) that they, the restitution claimants are the landowners now and that they will make the rules, not the people living on the farm.'<sup>17</sup>

In 2014 when, as a result of the litigation instituted by AFRA on behalf of the Gongolo community, the Department for Rural Development and Land Reform (the Department) was compelled to provide a list of restitution claimants, it failed to do so. This included any community claims for land in Gongolo. All that could be produced by the Department were two family claims and an individual claim in respect of three farms, and yet somehow these claims were able to hold up 40 farms and thousands of labour tenants for fifteen years. This begs the question as to where the Department derived the notion that restitution claims took precedence over those of labour tenants, when simple logic and legal process indicate that the opposite should be the true position. Labour tenant rights are derived from the current rights of occupation, use and enjoyment of the land. These rights are opposable against current landowners and hence should be equally opposable against restitution claimants who are currently not residing on that land.

The Department has used overlapping claims as justification for inaction, which appears to have developed into a deliberate policy of non-implementation of labour tenant claims on the basis that restitution claimants enjoy preference over labour tenants. The Director General conceded as much in a replying affidavit in Mwelase v D-G DRDLR (LCC 107/213) in an attempt to explain the lack of implementation of and the abject failure on the part of the Department to process thousands of labour tenant claims throughout the country (this is a class action case that is discussed more fully later in this report).

It is submitted that the solution to this problem is simple. At the outset, labour tenant claims should enjoy precedence over all other claims in respect of land. However, there is nothing to prevent restitution claimants from being processed simultaneously with labour tenant claimants over the same piece of land, as the outcome will affect different claimants in different ways. It seems that the Department and the Land Claims Commission are confusing competing restitution claims referred to it in the Restitution Act (which obviously need to be dealt with prior to the facilitation of any restitution claim) with the issue of simultaneous restitution and labour tenant claims.

### *Impact on evictions*

The Act should have had a major impact on reducing the number of evictions of labour tenants. This is because section 5 of the Act - which is headed *Prohibition on Evictions* - expressly stipulates that a labour tenant may only be evicted in terms of an order of Court issued under this Act. Thereafter, provision is made for the application for eviction before for such a court order will be granted. Such an application can only occur at the instance of the owner, and an Order of Eviction will only be granted where the Court deems it to be just and equitable on the basis that the labour tenant has failed to provide labour, or he or she has committed a material breach of the relationship between the landowner and the individual.

It is important to note that the mere refusal or failure to provide labour, or the commission of a material breach, is not of itself a justification for the granting of the Order. It is necessary to show, in addition, that the granting of such order is just and equitable in the circumstances.

This process is far removed from the virtually automatic right of eviction that exists in terms of the Common Law, and hence it would be assumed that its enactment would have resulted in a marked reduction of the number of evictions of labour tenants. This is particularly so since section 14 prohibits the eviction of a labour tenant if an application for acquisition of land in terms of chapter 3 of the Act is pending. This means that once an occupier has made such application in terms of section 16 of the Act, he or she cannot be evicted pending the finalisation of such claim.

Despite these protections, it does not appear to have made any positive impact in practice, although this is difficult to quantify accurately due to the absence of reliable statistics. A national survey on evictions conducted by the Nkuzi Development Association concluded that approximately 940 000 rural dwellers were evicted between 1994 and 2003, and only 1% of those were evicted legally through a Court Order. However, these figures are not broken down into the various categories such as labour tenants, occupiers under the Extension of Security of Tenure Act (No. 62 of 1997) (ESTA), farm dwellers, etc. In addition, the number and extent of illegal evictions calls into question the efficacy of the provision in both the Labour Tenant Act and ESTA that make it a criminal offence to evict anyone without following the procedures set out in the legislation.

This raises the question as to how this was possible, given the fact that legislative protection was in place – particularly the legislative provisions criminalising illegal evictions (i.e. in terms of section 15 of the Labour Tenants Act and 23 of ESTA). One contributing factor is the rigid categorisation and strict definition of a labour tenant. It stands to reason that any person who fails to prove that he or she complies with all the elements of the defence of labour tenants cannot be certain of protection

under the Act. Such person does not automatically qualify as an ESTA occupier, since it is possible that he or she could be defined as a farm worker, and farm workers may be evicted in terms of section 8(2) of ESTA in the event of the termination of employment through resignation or dismissal. In such cases a person who has narrowly missed out on being defined as a labour tenant could end up simultaneously losing their job, and would also render him or herself liable to be evicted from the only place that they can call home. The law as it currently stands does nothing to offer any form of protection in such circumstances.

Protection from arbitrary eviction is the cornerstone of tenure security, and failures on the part of the Act to protect labour tenants in this regard are a violation of their constitutional rights. Responsibility for this failure could be levelled at the technical and rigid nature of the Act, as well as the failure on the part of the Department to fully implement the Act. This is particularly the situation in regard to labour tenants who have been evicted in contravention of section 14 of the Act (i.e. where applications for the acquisition of land have been made). Although the Act prohibits eviction in such circumstances, these have still occurred where the Department has lost the records or where the landowner has challenged the status of the occupier.

Once again it is submitted that any solution should operate on two levels. Right at the outset the Department should put steps in place that will result in proper implementation of the Act. In particular, alternative accommodation for every evicted farm dweller should be arranged and this should become the focal point of any application for eviction. At present it is non-existent at a local level, where officials are not even aware of their obligations in this respect.

The second aspect is that the Labour Tenant Act must be interpreted so as to focus on the extent of the relationship that the occupier enjoys in regard to a particular piece of land. The deeper the relationship the higher the level of protection will be.

#### *Lack of implementation*

Failure to effectively implement the Act is probably the greatest cause for the lack of adequate protection of the tenure security and other rights of labour tenants. At the outset the Act required a 'hands on' approach from the Department, as it was cast as a major role player in terms of the Act due to its mandate to carry out a wide range of obligations and responsibilities. Thus, for example, in regard to the right to acquire land in terms of chapter 3 of the Act, this process does not take the form of a contest between the landowner and labour tenant since the application in terms of section 16 of the Act must be lodged with the Director-General (and not the landowner), who is thereafter obliged forthwith to notify the landowner and cause notice of the application to be published in the Government Gazette. This must be followed by a request for further particulars from the landowner, and the latter must respond to the Director-General.

Thereafter the Director-General has the obligation to facilitate settlement or refer the matter to Court, where the Department is obliged to act as a party to those particular proceedings. In addition, the Director-General must vet any agreement whereby a labour tenant waives a right.

Thus, unlike ordinary civil litigation, which occurs between two parties in the form of a contest between a plaintiff and defendant, litigation in terms of chapter 3 of the Act provides for the Director-General to be interposed as an active participant. This raises the question as to the consequences when the Director-General fails to carry out these responsibilities. In ordinary civil litigation, if the plaintiff fails to comply with the process the matter is dismissed, whereas in the case of non-compliance on the part of the defendant, the plaintiff is entitled to a default judgement. However, in labour tenant litigation both the labour tenant and the landowner can be held to ransom by the Director-General, whose non-compliance results in a breakdown of the entire process.

This is what has occurred in the case of thousands of labour tenant applications. As an example, this scenario played out in the Gongolo case (mentioned in more detail above), where both the occupiers and the landowners brought a court application to compel the Department to refer the matter to court.

Thus, in circumstances where the Director-General plays such a pivotal role in the process, effective implementation at the instance of the Department is vital to the achievement of any of the rights and protections contained in the Act.

This is rendered even more critical in regard to the formalistic and rigid rights-based approach adopted by the Act. Reliance on legal rights has been criticised by a number of commentators and analysts<sup>18</sup>. However, the basis of these rights is set out in the Constitution (in particular section 25- see below for a detailed analysis), and hence labour tenants are vested with basic rights that the Department is obliged to realise.

The Department has contended that labour tenants have been dealt with in terms of other legislation and land redistribution programmes (such as the Proactive Land Acquisition Strategy (PLAS), Settlement Land Acquisition Grants (SLAG), Land Distribution for Agricultural Development (LRAD), and others)<sup>19</sup>. However, it is submitted that this must not detract from the fact that labour tenants are first and foremost entitled to the rights and protections set out in the Act and therefore the starting point for the Department is the realisation of these rights. Anything short of this constitutes a denial of these rights in terms of section 25(6) of the Constitution.

It is difficult to fathom why, given the fact that a hands-on implementation process was an essential element for any positive outcome of the Act, the Department failed so extensively in regard to implementation. It is however clear that right from the outset the Department lacked the necessary capacity for full implementation, and made little effort to remedy the problem<sup>20</sup>. Thus few attempts were made to increase staffing levels or to budget specifically for the costs of the implementation of the Act.

This is notwithstanding the fact that the Department was aware of the additional workload<sup>21</sup>, yet it was only in September 1997 that the first Departmental post was specifically allocated towards the implementation of 120 cases registered with the Provincial Department of Land Affairs (PDLA) in KZN<sup>22</sup>. This caused Hornby to remark that 'provincial offices of the DLA found themselves responsible for a piece of legislation without human resources to administer it.'<sup>23</sup> It was conceded

by officials within the Department that it would not be possible to effectively implement the Act due to a shortage of personnel with appropriate skills.<sup>24</sup>

One consequence of this was that the KZN Provincial Office requested AFRA not to embark on a planned communication strategy about the Act because it was feared that the office would be overwhelmed by labour tenant applications that it lacked the capacity to deal with. This trend of non-implementation has continued in various forms to the present day, with the result that thousands of labour tenants have not realised their rights or been the recipients of protections that are accorded to them in terms of the Act<sup>25</sup>. These include those who have made application for land that have not been processed, as well as individuals that qualify for labour tenant status that remain unprotected due to a lack of enforcement.

The Department has attempted to explain this on the basis that there has been a policy shift away from providing small pieces of land to individuals, due to the fact that it is time consuming, costly and hence not cost effective. The Director General has specifically alluded to this in a Replying Affidavit in the case of Mwalase, AFRA & Others v Director-General & Others (LCC 107/213 – AFRA class action)), and hence that labour tenant applications have been diverted into other land reform programmes such as redistribution. This can be observed, for example, in Gongolo, where the Department is currently purchasing farms and then leasing them to certain occupants rather than transferring ownership of the land.

However, this approach is open to serious criticism on a number of fronts. Firstly, this was instituted without any form of consultation or communication with effected parties – most particularly labour tenants themselves. Secondly, it has resulted in Departmental officials, when confronted by AFRA staff about implementation in specific cases, arguing that the policy change trumps the existing rights set out in the Act. This of course makes no legal sense.

Thirdly, a failure to implement rights-based legislation turns these rights into an illusion. This creates confusion, which in turn threatens stability in the affected communities. It is thus no exaggeration to remark that whole communities (constituting both labour tenants and landowners) have been living in limbo for the past 15 years as a result of the uncertainty brought about by the non-implementation of the Act.

This problem needs to be addressed by embarking on a concerted implementation strategy accompanied by an overhaul of the entire process in order to streamline it and render it more effective.

## **5. Constitutional aspects of the Act**

Section 25 of the Bill of Rights contained in the Constitution has entrenched the right to property as a fundamental right.<sup>26</sup> However, the property clause is recognised as a ‘two-pronged’ mechanism with which to protect private property against impermissible imposition on the one hand, and with which to bring about transformation of existing patterns of private property on the other. In this respect it is important to note that the Courts are required to play a dual role in balancing out the

tensions and conflicting interests that arise between the protective and reformative characteristics of the constitutional right to property.<sup>27</sup>

The Labour Tenants Act is a good illustration of these tensions. On the one hand, white commercial farmers will point to the fact that they are the legal owners of the land and henceforth are to be protected by section 25(1) of the Constitution, which prescribes that no one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property.

On the other hand, section 25(6) stipulates that a person or community whose tenure of land is legally insecure as a result of past discriminatory laws or practices is entitled, to the extent by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

Commercial farmers will tend to rally behind section 25(1), whereas labour tenants will place reliance on section 25(6) in order to gain access to land. The latter are also enabled through section 25(5), which obliges the State to foster conditions which enable citizens to gain access to land on an equitable basis, together with section 25(8) which enables the state to take legislative measures to achieve land reform in order to redress the results of past racial discrimination.

Thus, it is clear that, notwithstanding the Constitutional imperative to protect private property (which is the cornerstone of any capitalist, market-orientated economy), it was also vitally important for the Constitution to attempt to redress the imbalances of the past as a result of apartheid policies. It is also important to take note of the fact that sections 25(5) and (6) refer exclusively to land, and therefore these provisions provide the gateway for the Government's land reform policies. It is within this context that the Labour Tenant Act must be evaluated.

Section 25 of the Constitution is far more focused on land reform than its predecessor, section 28 of the Interim Constitution. At the outset the three pillars of land reform are constitutionally entrenched viz redistribution in terms of section 26(5), tenure security reform in terms of section 26(6), and restitution in terms of section 26(7). In addition, the interpretation of the property clause (i.e. section 25 in its entirety) is determined at the outset by the specifically stipulated interpretational provision of section 25(4) that deals with two aspects relating to an interpretation. Firstly, the term 'public interest', which is a justification for expropriation in terms of section 25(2), must be interpreted to include the nation's commitment to land reform (section 25(4)(a)). Secondly, in terms of section 25(4)(b), reference to property that may be expropriated is not limited to land<sup>28</sup>.

This is a powerful interpretative tool that can be utilised in the struggle for tenure security, since it elevates land reform to the status of a constitutional imperative. This strengthens the claims of labour tenants when arguing that they have occupied a particular farm for generations, and that the land they occupy is the only place that they refer to as their home. Section 25(4)(b) introduces an element of sustainability on the land since access to all types of other natural resources is included within this context.

Section 39 is also relevant to the question of interpreting the property clause since it stipulates that, when interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on dignity, equality and freedom. Labour tenants have been denied these three values of dignity, equality and freedom through the historical process of labour tenancy, and it

thus becomes necessary to redress the glaring imbalances that have arisen as a result of past racially discriminatory practices in this regard.

This accords with the purposive approach to the interpretation of the Constitution that has been adopted by the Constitutional Court and is essentially 'context-orientated.'<sup>29</sup> This includes taking account of the relevant historical and social background, including South Africa's history of racial dispossession and its hope for a new democratic future.

An important interpretative guideline derived from this is that the conflicting interests between landowners and labour tenants relating to economic and political power (or the lack thereof) that characterises the stark divisions between these two groups must be taken into account. As stated by van der Walt, it is these considerations that elevate related property issues to a constitutional level where the values of dignity, equality and freedom inform and embody property protection<sup>30</sup>.

This discourse on property rights and the Constitution illustrated the stark reality that no property rights are absolute. However, not only do they require a balancing out against each other (e.g. protection vs. reform), but also in terms of other constitutional limitations. Thus, at the outset, the positive obligation on the State to realise labour tenant rights in legislation is limited in terms of the proviso to section 25(5), which provides that the State may only be obliged to take reasonable measures within its available resources.

In this respect the Department has persistently utilised resource limitations as a justification when it comes to the failures of acquisition of land for labour tenants, and therefore this aspect needs to be addressed within the context of various decisions of the Constitutional Court that, in turn, place limitations on the State when attempting to raise this issue. For example in the *Government of the Republic of South Africa v Grootboom 2001(1) SA 46 (CC at paragraph 41)* the Constitutional Court held that the State must nonetheless act reasonably and hence take 'reasonable measures' in order to respect, protect, promote and fulfil labour tenant rights to the acquisition of land.

The second limitation is set out in section 36 of the Constitution, the limitations clause, which stipulates that any right conferred upon labour tenants that infringes upon the property rights of landowners may only be justified if this is done in terms of a law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This must take into account a number of factors, which include the nature of the particular right, the importance of the purpose of the limitation, the nature and extent of the limitation, and the relation between it and its purpose. It is also necessary to ascertain whether less restrictive means could achieve that particular purpose.

In this regard the Labour Tenants Act passes constitutional muster since it is an Act of general application that endeavours to confer some form of tenure security in accordance with the land reform obligations in the Constitution. The fact that the Department has failed to implement the Act effectively therefore means that it is in violation of their constitutional obligations. This constitutes the basis for the Class Action legal case that is currently being brought against the Department by AFRA and others.

## **6. Labour Tenant Class Action Legal Case**

## **Mwelase and others vs. The Director-General for the Department of Rural Development and Land Reform, Case Number 107/2013**

**Applicants:** Bhekindlela Mwelase, Jabu Agness Mwelase N.O.; Mndeni Sikhakhane; Bazibile Gretta Mngoma N.O.; Association For Rural Advancement.

**Respondents:** The Director-General for the Department of Rural Development and Land Reform; Minister of Rural Development and Land Reform; The Hiltonian Society

**Nature of Case:** Class Action by AFRA on behalf of labour tenants to set legal grounds for the DRDLR to implement the Land Reform (Labour Tenants) Act (No. 3 of 1996).

### *Background to the Case*

AFRA's experience in terms of labour tenants shows that thousands of applications lodged with the Department by labour tenants in terms of Section 16 of the Act for the acquisition of land before the cut-off date of the 31<sup>st</sup> March 2001 remain unprocessed 15 years later. The consequences for many of those concerned have been dire, especially since they have been reduced to an existence of hope that has been followed by dashed expectations.

A particularly large group of labour tenants who live in the back yard of one of the richest school in South Africa, Hilton College, were working AFRA in 2011, and AFRA realised that their plight was no different from that of the thousands of other labour tenant applicants whose claims remained unprocessed. As a result AFRA, duly assisted by the Legal Resources Centre (LRC), decided to bring a class action on behalf of all outstanding claimants in order to compel the Department to process the thousands of unprocessed claims. The Application was launched in the name of Mwalase, AFRA and Others v Director-General (DRDLR) & Others (LCC 107/2013 July 2013). This took the form of a structural interdict, which would be overseen by the Court, for systemic relief in respect of all outstanding labour tenant applications.

### *Summary of the Case*

The Department's response to the legal process was one of persistent failure to meet any deadlines, and thereafter to apply for condonation at the last possible moment. While this appeared to have been intended to frustrate the applicants, as well as to draw out the proceedings in the hope that the said applicants would abandon the application, it had the opposite effect in that the applicants (i.e. AFRA, the LRC, the individual labour tenant applications and the labour tenant community as a whole) hardened their collective resolve to see the process through in the hope of receiving relief for the broad class of labour tenants – particularly those with outstanding acquisition of land applications.

After further non-compliance and failure to meet deadlines by the Department and the consequent delays, the matter was finally set down for a Court hearing on the 19<sup>th</sup> September 2014 – more than a year after the application had been launched.

During this process the Department attempted to enter into negotiations with AFRA in order to settle this matter. In the course of these negotiations it became apparent that the Department had unilaterally determined that acquiring small parcels of land for individual labour tenants and their

families was not cost effective, and hence they should be dealt with under the redistribution policy and programme.

This ignores the clear rights vested in labour tenants in terms of the Act and Constitution. Thus it became apparent that, owing to incompetence, corruption, arrogance and a whole host of unspecified reasons, the Department had comprehensively and systematically failed to carry out its mandate in terms of the labour tenant applications to process and finalise the claims made by labour tenant for the acquisition of land.

It also became apparent through this process that the Department has failed to maintain accurate records of labour tenant claims, which means that thousands of applications have been lost or cannot be traced. The individual applicants in the present matter are a case in point. The Department has no record of their Section 16 applications, and yet it is common cause between the parties that the landowners, the Hiltonian Society, were served with notices in terms of Section 17, which must have been preceded by Section 16 applications. Thus, failure to keep accurate records is of major concern and is yet another example of the denial of rights to labour tenants.

On the 19<sup>th</sup> September 2014 the matter finally came before the Land Claims Court in Randburg, with 70 labour tenants and community activists from KwaZulu Natal in attendance. After all the attempts to frustrate the process leading up to this hearing, the Department consented to the proposed order of the applicants being granted with little argument. By doing this the Court conceded that the labour tenants who had lodged claims before the deadline of the 31<sup>st</sup> March 2001 that had not been finalised constituted a distinct class that in turn constituted the subject of this class action. The Department also conceded that these outstanding claims should be dealt with as part of a process where AFRA and the Department would cooperate under the supervision of the Court. In this regard the Department undertook to submit three reports outlining progress concerning implementation, to which AFRA could respond.

The court order further compelled the Department to provide the statistics pertaining to the current status of all labour tenant applications that were lodged in terms of the Labour Tenant Act, together with a schedule indicating the status of each individual labour tenant claim. In addition, the Department was to provide a report outlining the plans that it has developed for the processing of all outstanding labour tenant claims. This information was to be submitted to AFRA by the 31<sup>st</sup> of March 2015.

Although the Respondent filed the first report a few days late, they thereafter submitted a wholly inadequate report in August 2015, once more missing the subsequent deadline of the 31 July 2015. They then failed to submit any report on their next deadline of the 30 October 2015, prompting AFRA to instruct the LRC to bring the matter before Court once more on the 29<sup>th</sup> January 2016.

#### *29<sup>th</sup> January 2016 Court Hearing*

There was a wide range of National media present on the day, as well as numerous social movements and NGOs from across the country as broader knowledge of and support for the case continued to grow. Attendees from Tshintsha Amakhaya, a civil society alliance for land and food justice in South Africa, included the South Cape Land Committee, the Surplus People's Project, the Nkuzi Development Association and the Women on Farms Project. There were furthermore

representatives from the Landless People's Movement, the KwaZulu Natal Christian Council and the Rural Women's Assembly.

Presiding Judge Mokotedi Mpshe stated in the Court proceedings that he recognised the importance of this case for successful land reform in South Africa, and for realizing the Constitutional rights of some of South Africa's most vulnerable citizens. The applicants took the view that, in light of the Department's renewed commitment to labour tenants, and the nature and scale of the problem (combined with the Department's failure to properly assess the extent of the problem), ordinary court supervision would be ineffective. A special master to assist the court and the Department to ensure the speediest possible resolution of labour tenant claims would be the most effective means of supervision. However, Judge Mpshe decided that more time was needed for the complex arguments regarding a special master to be made, and the case was postponed until 24<sup>th</sup> March 2015.

#### *24<sup>th</sup> March 2016 Court Hearing*

On the 24<sup>th</sup> of March, AFRA once again supported labour tenants who wished to attend the court hearing to enable their attendance. There was prominent media presence, with multiple television channels, print journalists and radio stations covering the event, adding increased public pressure to the case.

At this point in the proceedings, the Minister suddenly intervened. This was totally unexpected on the part of the applicants since the Minister and the Director-General (who up until that stage had been representing the Department) are both members of the Department, and hence both act on the latter's behalf. There can thus be no conflict of interests between the two which could justify the Minister's intervention in addition to that of the Director-General.

From the pleadings (and in particular, the answering affidavit from the Minister) it is evident that he was opposing the appointment of a special master, which had been proposed by the applicants as a practical means of resolving this impasse since a special master would be interposed between the parties and the Court, and would be vested with powers to oversee the process in terms of which outstanding labour tenants claims would be processed. The Department's continuous systemic failure has given rise to the applicant's belief that a special master would be the only mechanism powerful enough to oversee the implementation of the Labour Tenants Act. The case, however, was delayed once again as the Minister's new legal counsel indicated that they had more evidence to present.

Judge Mpshe acknowledged during the proceedings that the matter should be settled in the public interest, and that *'This is an important case which the public is looking at with keen eyes as to what is going to happen.'* He further acknowledged that the case is dealing with people who could well be evicted from their homes if this matter is not settled quickly, and who have nowhere else to go. *'It is the duty of the state and the law to protect such people, thus it places this matter squarely within the realm of public interest.'*

After hearing both sides of the argument for and against the postponement of the case, and despite the fact that Judge Mpshe himself clearly identified that the Minister had failed to submit substantial information to enable the Judge to make an informed decision, he finally delivered a Judgment that allowed the application for postponement until the 12 May 2016.

*'We are not happy at this result,'* said Sthembiso Mahlaba, who is the Community leader and representative for labour tenants in the Gongolo region of KwaZulu Natal involved in the Class Action case, and was interviewed by AFRA staff and members of the press outside Court that day.

*'We find out on the day of the hearing that we have to wait again because the Government Department has new information that it can't yet give out. How many more delays will there be? Our people need answers; they are getting angrier. They face evictions, hunger and poor living conditions – they can't get services like water and electricity when their claims haven't been processed. We came here today to hear the Judge for ourselves; we are leaving disappointed.'*

When the Minister filed his “new” evidence in April 2016, it turned out not to be new at all. It was, in fact, just a repeat of the main claim made in the original answering affidavit filed on his behalf in April 2014 – that labour tenants have been assisted under the Restitution Act and other land reform processes. That evidence was not only already before the court and not in dispute, it was largely irrelevant as the Department had since accepted that it was nonetheless obliged to process labour tenant claims under the Act. The only explanations for the Minister's conduct are that he did not understand the nature and history of the dispute before the Court, or that his intention was to delay the matter by filing obviously irrelevant material. The matter therefore proceeded to the hearing scheduled for the 12 May 2016 on exactly the same basis that it would have been heard on 24 March 2016.

### *Negotiations*

Shortly before the scheduled hearing, the Department and AFRA began to enter into negotiations to see if they could agree on a settlement. Progress was made and, on the morning of the hearing, the parties asked that the matter should stand down for them to attempt to agree on a settlement. A draft was agreed between the parties' legal representatives, but after a long delay was rejected by the Minister who proposed several substantive changes. These changes sought to set up a new structure to deal with labour tenants that would essentially operate through existing institutions such as DAMCs and DLRCs. Another key aspect was that the Department undertook to negotiate a Memorandum of Understanding with AFRA in regard to the establishment of a Forum of NGO's who dealt with labour tenants in order to take this process forward. The Applicants were not willing to agree to the changes, but agreed to continue negotiating over the weekend to see if they could reach an agreement.

AFRA still had several serious reservations and tabled these to the Court in a Memorandum of Explanation, but reluctantly agreed to the Court Order regarding the Negotiations as a result of pressure and in an effort to seek co-operation from the Department in order to remedy the plight of labour tenants. An agreement was reached and made an order of court on 17 May 2016. The parties did not agree on the details, but agreed on the terms for further negotiation, with the aim of agreeing a Memorandum of Understanding (MOU) before the 30 June 2016.

After a constructive start to negotiations, AFRA was hopeful that a more beneficial outcome for labour tenants could be achieved through a mutual understanding and partnership.

### *Back to Court*

However, instead of engaging in negotiations with AFRA concerning the establishment of this NGO Forum, the negotiations broke down after Minister Gugile Nkwinti made a unilateral decision to announce his intention to convene a 'National Forum of NGOs' to determine terms of reference in respect of a programme for farm dwellers (labour tenants and occupiers) in the national press on the 10th June 2016. This decision was made despite the premise of the court order being that all items contained within the scope of the Memorandum of Understanding were for negotiation, including the possible establishment of such a forum. This decision was made without the consultation of AFRA. Consequently AFRA, with the assistance of the LRC, informed the court that the negotiations had broken down and the case returned to court.

#### *10<sup>th</sup> and 11<sup>th</sup> of October Court Hearing*

Labour tenants, supported by AFRA and represented by the LRC, therefore returned to court to once again argue for the appointment of a special master to ensure the implementation of the Labour Tenants Act. A ground-breaking judgement by Judge AJ Ncube, made an order of Court on the 8<sup>th</sup> December states that:

“[1] The First Respondent’s failure to process or refer to the Court applications brought under Section 16 of the Land Reform Labour Tenants Act, No 3 of 1996 (“the Act”), is declared to be inconsistent with Sections 10, 25(6), 33, 195 and 238 of the Constitution of the Republic of South Africa, 1996.

[2] A Special Master of Labour Tenants (“Special Master”) shall be appointed as set forth hereunder.”

The process stipulated in the Order included the Court reconvening on the 3 March 2017 to consider the candidates nominated for the position, and, if there was a suitable candidate, to appoint him or her. An implementation plan was then due to be submitted by the Special Master and the DRDLR by the 31 March 2017. A Special Master is defined in the Judgement as “...an independent person who is appointed by, and reports to, the Court. His or her duty is to assist the Court. In the present case it would be assist the court in the processing and adjudication of labour tenant claims in the manner as determined by the Court.”

In laying out the reasoning behind the judgement, Judge Ncube made the following important statements:

“Effective relief is undoubtedly required for the many thousands of vulnerable labour tenants. ... The [DRDLR has] not been able to provide statistics of exactly how many labour tenant claims have been lodged throughout the country. Numerous requests by the Applicants for this information have not be adequately acceded to. However, the First and Second Respondents do not deny that they have failed to process labour tenant applications adequately and that many claims remain unattended to.”

“The matter in which I am required to decide is whether it would be appropriate to appoint a Special Master to deal with the serious problems that have been created due to the many years of disregard and neglect of labour tenants’ claims. It is common cause that many applicants for awards in land have either moved away or died, that land has changed hands and disturbingly, that files

have been lost by the Department. It also appears to be common cause that in many ways the Department is required to start the entire process from scratch.”

*20<sup>th</sup> February 2017 Court Hearing re: Appeal*

The Minister and the Acting Director General of DRDLR filed for leave to appeal the December 8<sup>th</sup> Judgement, and the Applicants but in an application for an interim implementation of the order, should leave to appeal be granted, pending the outcome of the appeal being finalised, on the basis of irreparable harm to labour tenants due to the delay and their age and vulnerability.

In a Judgement dated the 2<sup>nd</sup> March 2017, Judge Ncube granted the First and Second respondents leave to appeal on the basis that there is a reasonable prospect of success in that the Supreme Court of Appeal might find that the appointment of a Special Master should not be part of South African law, or that the appointment of a Special Master violates the doctrine of separation of powers, or that on the facts of this case, the appointment of a Special Master was not justified.

The Applicants’ application for an interim implementation of the order was not granted on the basis that the DRDLR continue to attempt to process labour tenant claims while the appeals process continues. The case will therefore proceed to the Supreme Court of Appeal later in 2017.

*Summarised Chronology*

<b>Date</b>	<b>Event</b>
9 July 2013	Institution of applicants’ claim before the LCC
21 Aug 2013	Notice of Intention to Oppose: Minister and DG
4 Nov 2013	Answering Affidavit: Hiltonian Society
<b>25 November 2013</b>	<b>Hearing before Spilg J. Individual relief granted</b>
31 January 2104	Answering Affidavit due
27 March 2013	Answering Affidavit: Minister and DG
28 May 2014	Applicants’ Replying Affidavit
<b>19 Sept 2014</b>	<b>Application argued in the LCC. “Collation Order”</b>
31 March 2015	First Report due
24 April 2015	First Report filed: Minister and DG
<b>12 May 2015</b>	<b>Postponement because DG and Minister filed late</b>
<b>9 June 2015</b>	<b>Supervision Order</b>
31 July 2015	Second Report Due
4 August 2015	Second Report Filed
6 Aug 2015	Answering affidavit to DG’s report
30 October 2015	Third Report Due
28 Dec 2015	Applicants’ set down for hearing
19 Jan 2016	Third Report and Application for condonation: Minister and DG
<b>29 Jan 2016</b>	<b>Court hearing: postponement agreed between the parties</b>
12 Feb 2016	Fourth Report: DG
2 March 2016	Answering affidavit to DG’s report
<b>24 March 2016</b>	<b>Court hearing: Minister represented by separate counsel to that of the DG. Court order: postponement to 12 May 2016</b>
14 April 2016	Minister’s Affidavit

22 April 2016	Answer to Minister's Affidavit
<b>12 May 2016</b>	<b>Hearing: Matter postponed for settlement negotiations</b>
<b>17 May 2016</b>	<b>Negotiation Order made an order of court</b>
30 May 2016	Negotiation meeting in Umhlanga, KZN
8 June 2016	Representative of the Department announces Minister's unilateral creation of NGO Forum
1 July 2016	Applicants set matter down for hearing
29 July 2016	Meeting to establish NGO Forum held despite numerous objections by applicants
<b>10 &amp; 11 October 2016</b>	<b>Court hearing re: appointment of Special Master</b>
<b>8 December 2017</b>	<b>Court order states that a Special Master must to appointed by March 2017</b>
<b>20 February 2017</b>	<b>Court hearing re: leave to appeal and granting of an interim order</b>
<b>2 March 2017</b>	<b>Court order states that DRDLR are granted leave to appeal the Special Master judgement, and the Applicants application for an interim implementation of the order is dismissed</b>
31 March 2017	Applicants send letter to the Supreme Court of Appeals (SCA) requesting preferment enrolment due to the urgent nature of the case.
<b>To be confirmed</b>	<b>Appeal hearing in the SCA</b>

## 7. Key Debates

Key debates on labour tenants that emerged in the early 1990s continue to resonate today. These debates were often reflective of the historical analysis and interpretation of labour tenancy from various scholars offering a wide range of interpretations. This section considers five key debates.

- *Do labour tenants still exist in South Africa, and if so, should they be prioritised for land reform?*

Figures about the number of labour tenants that exist are contested, ranging from National Land Committee claims in the mid 1990s of 500,000 or more to estimates of actual claimants in terms of the Act of about 22,000. The Land Claims Court has also adjudicated the issue of how to define labour tenants, resulting in increasingly technical definitions. However, labour tenancy is also a social category, referring to a specific form of farm labour mobilisation, in which labour reproduces itself through its own farming activity and not through wages. It is this latter category, not the legal definition that is at issue in the question. Williams<sup>31</sup> argues that the category of labour tenants does not inevitably mutate into waged farm workers. The process of becoming workers is the result of multiple pressures on securing an income in order to live (from both farming and wage work in the cities), generational conflicts between the labour tenant parent and their children who provide the labour, and state regulation which shifts power to one or other of the bargaining parties. These are long historical processes, which are not yet complete. Despite the erosion of "pure labour tenancy" through the introduction of wages, and reduction of access to land for residence, livestock grazing and cropping, large numbers of households living on farms they do not own continue to fight to keep access to land for livestock and gardens. These hybrid type farm worker-labour tenant social categories are found mostly on commercial farms in KwaZulu-Natal and Mpumalanga, but also in the Free State and Eastern Cape.

The Labour Tenants Act has been neither able to stop this long process of transformation, nor strengthen the bargaining position of labour tenants to secure land for farming. While labour tenants, who have historically had insecure tenure, are Constitutionally and legally entitled to secure tenure, they are also potential beneficiaries of policies that aim to promote the emergence of small commercial farmers. This is because they already have capital resources (in the form of livestock), farming skills, are located in farming environments and often want to expand their farming.

- *What have been the unintended consequences of the Land Reform (Labour Tenants) Act, why have these arisen and how can they be mitigated?*

The implementation of labour tenants act from 1996 quickly resulted in widespread conflict on farms. What appeared to be a technically simple process – namely, the lodging of a claim in terms of Section 16 of the Act, followed by a notification to the landowner in terms of Section 17 of the Act – proved to have political, social and legal complexity that the drafters of the Act could not have predicted. Officials responsible for implementation were drawn into disputes between landowners and claimants that absorbed huge amounts of time. Many owners referred the claims to the Courts, resulting in lengthy and expensive adjudications, with outcomes frequently unfavourable to the claimants. Various attempts by officials to find alternative models of implementation were tried and later abandoned, sometimes for no apparent reason and with little effort at monitoring and evaluation.

Furthermore, Wegerif<sup>32</sup> has shown that more people have been evicted from farms since 1994 than in the decade before democracy. He found that while the causes for an escalation in evictions from farms were complex, the primary causes were changes in the agricultural economy. Land rights legislation was unable to stop the eviction of over a million people, resulting in policy paralysis for fear of the social and economic consequences.

Where claims were successfully implemented, the commercial farming unions and organisations argued that the Act had spent large amounts of public funding to create poverty traps which had not changed the lives of the claimants. This claim echoed a growing discourse that land reform had failed. Despite Minister Nkwinti stating that most land reform had indeed failed, there is alternative evidence to that these claims are exaggerated<sup>33</sup>. For example, Hornby<sup>34</sup> shows in a case study of the Besters area that labour tenants who acquire sufficient land and capital do make a success of farming, with significant improvements to income levels and livelihoods.

Perhaps the most important unintended consequence was the failure of government and land rights NGOs to predict the impact of the uniquely prescriptive nature of the Act on undermining the possibility of labour tenants making successful land claims. The Act doesn't simply prescribe procedures; it also dictates extremely tight time frames for sequenced responses. For example, on receipt of a claim, the Department is expected "forthwith" to issue a notice to landowners. Failure to do so is a procedural violation. And yet the conflicts such notices generated made fulfilment of this requirement increasingly difficult. Ultimately, when implementation stalled, many labour tenants died or gave up and moved, victims of constructive eviction, and evidence of claims were lost.

Mitigation of these unintended consequences requires Government to recognise the Constitutional imperatives contained in the Labour Tenants Act. Failure to implement is in violation of the Constitution. The focus of government should be on how to implement in a consultative way that

produces optimum outcomes. District level solutions involving landowners and claimants should be supported.

- *Why has the ANC government neglected labour tenants despite its historical commitment to them?*

The unintended consequences noted above required the Department to reflect on and evaluate implementation models. Instead, officials were increasingly caught up in waves of new laws and policies that were layered on top of existing legal requirements, creating confusion and unnecessary complexity. These changes reflected shifts in policy frameworks, as new political priorities emerged under changed Ministers and Presidents. The Labour Tenants Act was a casualty of the shift from 1998 onwards away from rights-based programmes to programmes supporting rural economic development through prioritising black commercial farmers. Some labour tenants were initially able to maximise resources under Minister Thoko Didiza, securing ownership of land while accessing the increased grants for establishing commercially viable farming operations. However, with policy shifts away from land ownership to leasehold, and the increasing budget allocations to fewer black commercial farmers through the recapitalisation programme, the rights of labour tenants to secure tenure along with their potential to grow the numbers of small farmers has fallen by the wayside. The 2011 Green Paper on Land had as its cornerstone that *'state and public land should remain under leasehold'*.

In 2001 the **South African Human Rights Commission (SAHRC)** initiated a three-phase process of research, public awareness and public hearings on alleged human rights violations on farms which culminated in a report in 2003.<sup>35</sup> The findings were that:

*"Despite constitutional provisions and the promulgation of legislation such as ESTA and LTA to protect those whose tenure on the land is legally insecure, evictions and the rights of those who dwell on the farm owners' land dominated the Inquiry. There is a clear lack of support for the legislation from organised agriculture and a failure to ensure legal representation for those whose rights are violated."*<sup>36</sup>

Follow up public hearings resulted in a second SAHRC report in 2007, which recorded that the then Minister of Land Affairs was of the view that the LTA was not implementable: *'The previous Agriculture and Land Affairs Minister – Thoko Didiza publicly expressed concerns ... that both ESTA and the Labour tenants act... was not implementable...[stating] that if we accept that farming is a business, the relation between owner and worker should not be tied to tenure.'*<sup>37</sup>

The SAHRC report identified lack of political will to implement the law and provide services to farm dwellers as the primary cause of failure as opposed to attributing this to the inadequacies in the laws passed to protect farm workers' rights.

An aspect of this neglect is labour tenants inability to mobilise politically to demand the rights they are entitled to by law. This is the result partly of the fragmented nature of lives on farms, which makes consciousness and collective action difficult to organise. It is also the result of larger social processes that have driven (often forced) the migration of farm workers, occupiers and labour tenants off farms and into the informal settlements on the peripheries of small towns. Labour tenant

households have not always contested these changes, with younger people and sometimes women seeing advantages to living closer to a wider range of services. And yet being forced to choose between access to land for livestock and access to services and employment opportunities is itself the result of the state's failure to develop a coherent and consistent policy around property.

The government's failures to redress the apartheid and colonial legacies and to provide service in township and informal settlements, along with rising unemployment and awareness of widening inequality is creating the conditions in which the politics of land is acquiring a new urgency (see #Fees Must Fall demands for land). Greenberg<sup>38</sup> argues that land also forms an important component of securing livelihoods where employment is an increasingly unlikely prospect for many.

- *Can implementation of the Land Reform (Labour Tenants) Act help address rural poverty and spatial inequality?*

The highly prescriptive nature of the Act, together with evidence from the Land Claims Court that the Minister has no political will to implement it, means that the Act cannot be implemented to achieve the intentions for which it was drafted. Partly, as shown above, this is the consequence of the time prescriptions in the Act's provisions, which make compliance very difficult. However, if a different approach to implementing the law were adopted, there is strong evidence<sup>39</sup> that it can help to address rural poverty and spatial inequality, as its drafters intended.

The National Development Plan (NDP)<sup>40</sup>, with evidence from agricultural economists<sup>41 42</sup>, has identified and prioritised small farmer development as a key driver of rural employment and rural economic development. Cousins<sup>43</sup> has also argued that a policy that redistributes 80% of white-owned commercial farms to the 200,000 to 250,000 existing black small farmers would drive agrarian transformation. Such a massive redistribution of land from large, white owned farms to black owned smaller farms would significantly impact on spatial inequality, as it currently exists in rural areas. The approximately 22,000 labour tenants who lodged claims to land under the Act are already small farmers who have the capital base and farming experience to be able to expand their operations. In terms of these arguments, they should be prioritised for land redistribution in order to reduce rural poverty and spatial inequality. If this were a policy priority, the objectives of the Act would be realised, with significant positive impacts on rural society.

- *Should restitution claims take precedence over labour tenant claims?*

As was discussed at length in section four regarding the unintended outcomes of the Act, confusion has arisen concerning overlapping claims between the Restitution of Land Rights Act and the Land Reform (Labour Tenants) Act.

It is unclear where the idea that restitution claims take precedence over those of labour tenants arose, or why this stance has been adopted by the Department, who have used overlapping claims as justification for inaction<sup>44</sup>. It seems that the Department and the Land Claims Commission are confusing competing restitution claims referred to it in the Restitution Act (which obviously need to be dealt with prior to the facilitation of any restitution claim) with the issue of simultaneous restitution and labour tenant claims.

Legal process and logic both indicate that as labour tenant rights are derived from the current rights of occupation, use and enjoyment of the land, these rights are opposable against current landowners and hence should be equally opposable against restitution claimants, who do not currently reside on the land. Urgent legal clarity in this regard would go a long way to resolving this debate conclusively, and protecting the rights of labour tenants.

## **8. High Level Panel Public Hearings**

The High Level Panel held hearings in all nine provinces. While labour tenants were only occasionally specifically referenced, issues relating to farm workers and dwellers, tenure security, evictions and access to housing and services featured strongly. As labour tenants are a specific category of farm dwellers, many of these references also address the plight of labour tenants. Some of the key points raised are as follows:

### *Limpopo hearings*

A staff member from the Nkuzi Development Association, a land right support organisation that has worked with farm dwellers, small scale farmers, and vulnerable people in rural communities for 20 years, stated that,

‘We do acknowledge that for the past 22 years, government has passed several progressive pieces of legislations, among them the ... Labour Tenant Act. Sadly ... there has been almost a lack of political will to actually implement progressive pieces of this legislation. ... We need a holistic approach to deal with issues affecting farm dwellers.’<sup>45</sup>

### *Kwa-Zulu Natal hearings*

The coordinator of a network of land NGOs noted that inequality is at an all-time high and noted that ‘farms need to be subdivided and the legislation needs to change to facilitate this.’<sup>46</sup>

A staff member from a land rights NGO noted that,

‘In as far as the laws have been put in place they have often not been well resourced. In particular, we want to point out the Labour Tenants Act of 1996. Furthermore, legislation has not been effectively implemented nor has legislation been regularly reviewed. AFRA works with farm dwellers, with farm workers, with labour tenants especially youth and women largely on commercial farms. We find that people’s experiences that legislation is not implemented effectively on the ground. The gap between what the intention is and what is actually received by beneficiaries is huge. ... We found, by our own calculations, that if labour tenant claims were to be processed by the current rate it would take another 50 years for the outstanding approximately 11000 claims to be processed. This is an unacceptable situation

It appears that the department has decided it makes policy regardless of the Constitution and regardless of law. It has argued this in the Land Claims Court that there is a distinction in its mind between constitutional rights and constitutionally derived policy, and what it calls the discretionary policy; policy at the discretion of the Minister, policy at the discretion of the Director General, policy at the discretion of government which overrides legislation, which overrides the Constitution. This is a shocking state of affairs, and we believe that in order to go forward, not only this Panel but also Parliament must be empowered to

intervene by regularly reviewing the performance of the Department in relation to the targets and the outcomes that are defined in the legislation.<sup>47</sup>

### *Free State hearings*

A speaker from Inyanda at the Bloemfontein hearing asked, 'In Act number 3 of 1994 provides security of tenure for labour tenants and those who occupy or use land as result of their association with labour tenants. How true is this? Is it going to be implemented?' and stated that 'This committee and Parliament doesn't want to touch the properties of the Minority.'

It should be noted, however, that there some some challenges around the organisation of the hearings and those who were not able to make the submissions they had prepared. AFRA received a memo from community representatives of farm dwellers, labour tenants and farm workers who attended the High Level Panel Public Hearings in Durban on the 20<sup>th</sup> October 2016, expressing their anger and disappointment at the manner in which the hearing was conducted, which left them and others unable to share the submissions they had prepared. They stated that the problems on farms were acknowledged, but they who actually experience it and we were not given a chance to speak. They further stated, "The inaction of Government means that farm owners feel more powerful because they are confident that, even though there are rights and laws, nothing will be changed or done."

## **8. Conclusion**

While the Land Reform (Labour Tenants) Act is a critically important piece of legislation for protecting and promoting the rights of a highly marginalised and vulnerable class of South African citizens, a review of the past 20 years since the Act was promulgated illustrates that it has to a large degree failed in its aims due to a widespread failure in implementation.

There have undoubtedly been benefits from the Act. The rights that it creates for labour tenants have empowered many tenants, even where a failure of implementation has prevented the full realisation of their rights, as many farm owners are now aware of the rights of tenants and are willing to negotiate around issues about which they would have acted unilaterally prior to the passing of the Act. Labour tenants have increased bargaining power, and have legal protection from eviction. Some labour tenants have gained land and been able to use it productively.

One of the critical limitations of the Act, however, is the rigid formulation of the definition of a labour tenant, which created arbitrary distinctions in some cases between those classified as farm workers and those categorised as labour tenants, even when living and working in very similar conditions on the same piece of land. This formulation excluded many who consider themselves to be labour tenants from the protections and provision of the Act.

One of the failures in the implementation of the Act has been the limitations of the Land Claims Courts as a means of resolving claims, and the fact that the Alternative Dispute Resolution (ADR) mechanisms in the Act itself have been side-lined in favour of slow, onerous legal processes. The question needs to be asked: why have these alternative mediation mechanisms, which in many cases are vastly more cost- and time-efficient, not been used either in the past or currently, and what can be put in place to change this?

To a large degree, the on-going vulnerability of labour tenants can be attributed to the failures and dysfunctions of the Department of Rural Development and Land Reform, who have failed over the past 20 years to realise the rights of the majority of labour tenant claims, allocate sufficient resources and budget to enable the Act to be fully implemented, or keep accurate and up-to-date records of claims, including those dealt with under other land reform policies. This failure has undermined the constitutional rights of thousands of labour tenants, whose rights have been overlooked or reduced.

For the intentions of the Act to be realised, and the recently renewed commitment of the Department to fully implement the Act to become a reality, streamlined and properly resourced systems for effective communication, mediation and the processing of labour tenant claims will need to be implemented within the Department as a matter of urgency. Parliament can play a key oversight role in ensuring the Department as assiduously monitored and held to account for their mandate to protect and advance the rights of labour tenants.

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