

DRAFT TENURE SECURITY POLICY

Background

Despite the Constitutional guarantees afforded to those who reside and work on farms, challenges remain in the environment within which both the land owners and those who till the land operate. The historical legacies of the skewed patterns of landholding, untenable power relations in the farming communities, lack of conducive environment for the realisation of the potentials of others, continued denial of rights, negative effects of instability on agricultural production, insecurity, and many others form the basis of this policy review. Reform efforts in this area then involves the change and restructuring of the economic, legal and political arrangements governing the ownership, management and relations on agricultural land in line with overall national economic development. It involves a restructuring of existing systems so as to results in direct changes in the social class and political and economic power structure of those affected.

The challenges around the two pieces of legislation (Extension of Security of Tenure Act, No. 62 of 1997 and the Land Reform (Labour Tenants) Act No. 3 of 1996) include the followings:

- ESTA “unfairly strengthen the hand of labour and prejudice employers during protracted labour disputes”, and that Section 8 of the ESTA has made farmers apprehensive about employing permanent workers and about providing accommodation for workers on their farms;
- ESTA has not been effective in stemming the tide of evictions;
- Lack of effective implementation framework (including limited state enforcement capacity;
- the ability of farmers to circumvent the legislation or exploit loopholes; and
- the failure to publicise the legislation.

In addition to these challenges are the imperatives of economic participation, inclusiveness and ensuring food security. The farming community are critical

stakeholders in achieving these. Thus, the political, economic, socio-cultural and legal dimensions of the underlying causes, consequences and effects of the relations on farms require re-examination. The **political** angle must address the relational nature of the parties involved (owners, tenants, farmworkers and farmdwellers) inclusive of correlative rights and obligations, how current reform efforts link to land reform in the wider sense, the State capacity to accommodate or favour tenure reform initiatives and how effective is the administration of land tenure. At the **economic** level, we must attend to the effect of tenure systems on agrarian and other sources of production and income, what economic use is made of common property resources, how the land tenure system intersect with markets for land, capital, labour, inputs and outputs, and the impact of land rights clarity or lack of it on investment. In this policy development, due cognisance is taken of the conditions for successful agricultural enterprise, i.e. land, labour, capital, market access, and management. The **socio-cultural** aspects include how rights to land connect within wider social and cultural relationships, the impact of the structure of land rights on gender inequality and other primordial power relations, association of tenure systems with class, racial ethnic and/or other forms of inequality, how indigenous tenure forms been affected by colonial and post-colonial laws, and how do reform policies interact with informal evolutionary processes. Ultimately we must seek answers to the questions of how **constitutional and legal** frameworks affect tenure, are there appropriate and legally secure options for rural and urban situations, and the appropriate balance between the rights of the landowners and the occupants.

The policy proposal is to seek **efficiency** and **effectiveness** in the protection mechanism for the vulnerable groups of occupants (tenants, farmworkers and farmdwellers) on agricultural undertakings. This requires review of existing laws which govern the circumstances under which land owners can evict occupants, and which regulate and protect the rights of tenants and other occupants. Policy intends to specify procedures to provide alternative land to enable vulnerable occupants so as to become the holders of independent land rights within the Comprehensive Rural Development Programmes, and thereby addressing the underlying problem of conflict between current land owners and occupants. Increased correlative rights, duties and obligations among those on farms (owners, tenants, farmworkers and farmdwellers) will be instituted to place the

onus on all as stakeholders in devising and implementing practical solutions to tenure disputes, and which provides incentives to combine on-site solutions (eg. regulated occupancy rights for some) with off-site solutions (eg. State-subsidised or state-financed acquisition of alternative land, Agri-villages, etc) for others.

Constitutional Environment

The thrust of this policy review, including of the law on land rights and tenure forms, may not however be unduly hamstrung by reluctance to depart from the traditional system of the common law. The proposed reforms are not simply aimed at making possible the reallocation of rights in land without seeking to achieve the revision of substantive principles of property law. Our reform agenda may have significant implications for traditional principles of property. Even the 1997 White Paper speaks to this in commenting on the complexity of the process of tenure reform that finding solutions *'may entail new systems of land holding, land rights and forms of ownership, and therefore have far-reaching implications.'* This current point of departure is buttressed by the constitutional injunction that the state must *'take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.'* The Constitution further mandates the enactment of tenure reform legislation to deal with the insecure tenure of individuals or communities *'as a result of past racially discriminatory laws or practices'* and for restitution or equitable redress, *'to the extent provided by an Act of Parliament'* in respect of dispossessions after 19 June 1913 which also occurred on the basis of racially discriminatory laws or practices. The Constitution's reform agenda is emphasized in its declaration that no provision of the property section of the Bill of Rights *'may impede the state from taking legislative and other measures to achieve land, water and related reform in order to redress the results of past racial discrimination'*. The subsection in question goes on to define the extent of entrenchment in stating that any departure from this statement of priorities must be in accordance with the general approach of section 36 concerning the limitation of a right provided for in the Bill of Rights.

Policy Objectives

The current policy review seeks to achieve the following strategic objectives:

- (a) to protect the relative rights of farm-workers, farm-dwellers, and farm owners;
- (b) to enhance the security of tenure of farm-dwellers;
- (c) to create conditions conducive to peaceful and harmonious relationships on farms and in farming communities; and
- (d) to sustain production discipline on land in the interest of food security.

Sustainable livelihoods will be underpinned by the followings:

- (a) Secure tenure
- (b) The right to live in the way that the family wants to, with dignity
- (c) The right to meet their own basic survival needs
- (d) Development

Four critical areas are to be further pursued in the ensuing policy and legislative proposals:

- (a) Tighten up legislation by, amongst other things, creating substantive rights in land for occupiers;
- (b) Implement a well-resourced programme of information dissemination, support to farm dwellers and enforcement of the tenure laws;
- (c) Proactively create new, sustainable settlements in farming areas; and
- (d) more effective system for the monitoring of arbitrary evictions, in particular a rapid response system for mass eviction threats or retrogressive measures with significant consequences

Fostering Efficiency in Farm Relations

In order to foster efficiency in farm relations, the following measures are to be pursued:

- (a) adequate *information* on land rights:- this implies effective *communication* of legal reforms to farm owners and to potential beneficiaries;
- (b) *institutional capacity* (inside and outside government) to advise and support rights-holders and facilitate their active use of the law;
- (c) accessible and efficient *systems to record and register rights*;
- (d) *in case of disputes, access to the courts*, or alternative conflict resolution mechanisms; and
- (e) an integrated state support on development measures to farming communities and the vulnerable groups.

Power Relations

Laws are necessary but not sufficient for the transformation of the current state of relations on our farms. Policy recognised that formally defined rights intersect and interact with other institutional frameworks, both formal and informal, in the real world contexts of the prospective rights-holders. We acknowledge that the position of those who work on farms, their dependants and others interact with the other forces that are both historical and current. These issues centrally involve issues of power, authority and contestation, and require us to consider law as only one source of rule-making in society. Continuous engagement with the stakeholders in the farming community, labour and civil society will be intensified to ensure that we reduce and ultimately eliminate distortions in the nature of relations on our farms.

Resettlement - Agri-Villages – Onsite and Offsite

Currently, occupiers of farms have weak and precarious use rights. It is expected in the long run that a mix of both onsite and offsite resettlement will be utilised to deal with the issue of livelihoods and tenure security of the vulnerable groups on farms. Intended beneficiaries will include those covered and not covered by the Extension of Security of Tenure Act and the Land Reform (Labour Tenants) Act. We propose that those evicted,

or prone to evicted, and others be afforded the opportunity to opt for resettlement in agri-villages. Current land owners are critical stakeholders in the proposed approach. This may be achieved through situations such as one large farm or several farms providing land either through sale or donation to a Farm Worker's grouping, who could initially be the title deed holder for / of the land. The State will also have the option to acquire farms primarily through voluntary purchase, or where State Land exists to use such, and as a last resort to acquire within the legal framework of expropriation with due compensation being paid.

Social organisation of the Agri-villages will be regulated and local rules to govern the establishment and operation of such a village are to be worked out and agreed upon jointly by the participants namely the 'village community', the financier and the respective municipalities. Issues such as: community levies, repayment conditions, transfer of ownership, if one wants to leave the area, change of place of work, standard of housing and financing conditions for the individuals, maintenance of communal facilities, where they exist or are planned, and other aspects relevant to the local conditions, are to be addressed and regulated.

Positive aspects of agri-village development include individuals have security of tenure, allows the individual to build-up equity [build a home - compared to just having a roof over one's head], depending on the size of such a village, government services such as schooling, kindergartens, health care, etc. can be provided not only to the village community but also to other families living in the vicinity, and allows the provision of better basic infrastructure: water, electricity, sanitation, roads, etc.

Suitable land will be acquired to resettle persons on a long term basis Land in resettlement areas may be held under a temporary permit system, which confers land rights to the permit holder. Each settler is given permits such as to pasture livestock on a communal basis, to reside on a given plot and to cultivate arable plots. The period over which the permits are valid will be specified and beneficiaries will have the right of use of land for as long as he does not violate the provisions of the permits. Rules will be instituted to afford the transfer in freehold title to those who make better use of allotted

land. In the absence of secure tenure, the inheritance procedures in the event of a death of beneficiary will be instituted. Land may be taken away from non-performers.

We will ensure the strengthening of public institutions and improvement in the provision of public goods and services (e.g. extension, credit, market information and quality public services) which are considered essential for successful agricultural production.

Since a significant number of labour tenant claims have been resolved by resettlement, the key proposal is that in cases where groups are allotted land purchased by the State, increased level of support and organisation will be offered to ensure that land allocated are subdivided in the manner proposed for resettlement initiatives.

Challenge in Land Acquisition

A challenge lies in the related area of land acquisition. In redistribution, the combination of 'demand-led' and 'willing buyer, willing seller' policies has meant that would-be beneficiaries of land reform are themselves responsible for identifying land, and depend on the willingness of current owners to transact with them. In commercial agricultural, for both social and economic reasons, farm dwellers do face severe difficulties in acquiring suitable land: farm dwellers are unlikely to be able to afford to buy land without subdivision of large commercial units (to which current policy, and landowners themselves, are strongly antagonistic), and many owners will undoubtedly be reluctant to sell land for the settlement of workers and former workers adjacent to their property. This makes a strong argument for more forcible intervention by the state, using its power of expropriation, in order to acquire land on behalf of farm dwellers. Thus, the securing of tenure for farm dwellers needs to be seen in the wider context of resettlement, in terms of which intervention by the state, working closely with intended beneficiaries, is required over an extended period to acquire appropriate land and provide support to beneficiaries in order to achieve sustainable development and to alleviate poverty.

Dealing with Arbitrary Evictions

The tenure rights of farm dwellers are protected by law, yet this protection must be seen within the context of the competing rights of landowners and employers. The problems

identified with ESTA, and the reasons why its provisions are thought to have had minimal impact, are twofold. Firstly, where landowners apply for an eviction order, it is almost invariably approved by the court, regardless of the circumstances. It is widely perceived that the magistrates' courts either do not apply ESTA in all cases where they are legally obliged to do so, or ignore important aspects that are designed to protect the rights of occupiers. An inquiry by the South African Human Rights Commission in 2003 found 'widespread non-compliance' with ESTA at all levels of the justice system. The report stated:

There is a lack of compliance with ESTA provisions that regulate eviction proceedings. There is complete lack of compliance with the legislative provisions of ESTA in some court proceedings, resulting in farm dwellers being denied their ESTA rights and being evicted in terms of common law.

A more robust institutional environment is proposed. A land rights management board will amongst others ensure that the stakeholders are involved in pro-actively dealing with evictions and its underlying causes.

Legislation will define:

- Conditions and Circumstances under which Evictions may be lawful, and
- General Limitations on Evictions for special categories including - those over the age of 60 [or a prescribed class] who have worked/lived on a farmed for a prescribed period.

While the constitutionally-guaranteed rights are to continue to enjoy protection, and as such arbitrary evictions will remain prohibited, it is recognised that a more desirable option is to offer the affected persons opportunities within and outside the farms they leave to create better life for themselves. Suitable and alternative accommodation, farming opportunities and tenure forms will be offered as relief from the undesirable consequences of evictions.

Legal Aid

In the landmark judgement of *Nkuzi Development Association v Government of the Republic of South Africa and the Legal Aid Board* (LCC 10/01), the Land Claims Court made a declaratory order that people who have a right to security of tenure under ESTA or the LTA, and whose security of tenure is threatened or has been breached, have a right to legal representation or legal aid at state expense if substantial injustice would otherwise result and if they cannot reasonably afford the cost of legal representation from their own resources. The state is under a duty to provide this legal representation or legal aid through mechanisms selected by it.

Development Rights

In addition to regulating evictions, ESTA makes provision for farm dwellers to apply for grants for 'on-farm' or 'off-farm' land or development (e.g. housing), and it specifically allows for expropriation for 'purposes of any development in terms of this Act', but the first of these measures has been applied in few cases and the latter not at all. It has been argued that while the legal provision exists to implement a programme that gives farm dwellers long-term security of tenure, this remains dependent on the willingness of the Minister to use his powers to design and implement such a programme, and there is effectively no right under the legislation for a farm dweller to claim security of tenure if the state should fail to provide it. The new policy proposals recognise this situation and within the framework of the Comprehensive Rural Development Programme, appropriate state measures including off-site and on-site resettlement will be afforded to the vulnerable group.

Compliance and Enforcement

The current environment is bedevilled by:

- Inadequate responses to complaints;
- Institutional weakness in law enforcement;
- Ineffective monitoring system;
- Adversarial legal system, less power for court to be pro-poor;
- Scaled-down activities of Social movement ; and

- Lack or inadequate legal representation/legal aid to the poor

It is proposed that the Land Rights Management Board will offer the institutional climate for redressing these inadequacies. In order to deal with issues of compliance and enforcement, and also improve on relations on farms, the followings are proposed:

- Alternative Dispute Resolution Mechanisms;
- Provision of legal representation; and
- Register of interests on farms.

Integration in provision of Government Services

We propose within the Comprehensive Rural Development Programme (CRDP) the followings:

- Coordinated delivery mechanism for farming settlements;
- Improved policy clarity on provision infrastructure in rural areas/farms to enable municipal service provision on farms, which are essentially private land; and
- Special norms for the provision of services recognising isolated and dispersed nature of certain settlements.

The provision of Government services will nonetheless be within shared responsibilities with land owners who are also employers. We will therefore seek to further define the roles of the farmowner in ensuring basic services on farms alongside the roles of the State in the provision of services on farms.

Conclusion

We cannot claim to have dealt with the issue of evictions, paternalism and violence on farms until the power relationships in rural areas and on farms are changed significantly. This requires a reduction in farm workers' and labour tenants' dependency on large-scale commercial farmers. This will only be achieved if land and housing access (and related social services) is de-linked from employment contracts. Farm workers need independent access to land, while the conditions of labour tenancy contracts need to be regulated.

While we continue to protect farm workers and labour tenants against unfair evictions, new settlement models within the Comprehensive Rural Development Programme is the suggested route. We recognise the reality that there is a move away from permanent labour towards temporary or part-time labour, because of temporary, casual or/and seasonal workers who are not covered by the LTA or ESTA. We must therefore continue to interact with the Department of Labour to strengthen labour laws on the rights of this class of workers not covered by current policy and legislative proposal.

Increased institutional support to implementation of new legislation will ensure a more effective implementation, monitoring, compliance and enforcement.