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Legal Resources Centre

EXTENSION OF SECURITY OF TENURE AMENDMENT BILL [B24-2-15]

SUBMISSION TO
THE PORTFOLIO COMMITTEE
(RURAL DEVELOPMENT & LAND REFORM)

4 January 2016

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INTRODUCTION

1. The Extension of Security of Tenure Act 62 of 1997 ("ESTA") was enacted to give effect to section 25 (6) of the Constitution[1]. Section 25 (6) states that "*a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent, provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress*".

2. ESTA targets occupiers, some of the most vulnerable people in South Africa. Whilst ESTA is and was intended to provide protection to the vulnerable people in our country, it has and continues to fail to fulfil its main intended objectives and many occupiers continue to live in harsh and oppressive conditions.

3. The Legal Resources Centre (LRC) welcomes the initiatives of amendments introduced by the Extension of Security of Tenure Act Amendment Bill [B24-2015], hereinafter referred to as "the Amendment Bill". The LRC together with other civil society organisations had hoped that the Amendment Bill would have been an opportunity to introduce provisions which protect occupiers from eviction and ensure security of tenure. Unfortunately a number of provisions of the Amendment Bill do not provide occupiers with the envisaged protection from eviction and do not provide sufficient measures to ensure security of tenure for all occupiers.

4. This submission therefore seeks to first outline existing problems with the provisions of ESTA and the manner in which ESTA has been implemented by various state entities such as government departments and interpreted by the courts.

5. Our submissions then seek to identify provisions and definitions of the Amendment Bill that can be strengthened or which must be reconsidered.

6. Our submissions question the manner in which the Amendment Bill deals with eviction and legal procedures to be complied with by land owners. We note at this stage that it is concerning that section 8(2) and section 8(3) of ESTA have not been considered or amended in the Amendment Bill. As we explain later in our submissions, the failure to amend these

[1] Constitution of the Republic of South Africa Act 108 of 1996

provisions fails to take sufficient account of the interests of occupiers who find themselves at risk of losing the only place they have called home.

7. This submission will further propose that in order to provide firm measures to ensure security of tenure and protect occupiers from the harsh realities of evictions, a competent court should not decide on and consider an eviction matter without the provision of the probation officer's report.

8. Section 23 (1) of ESTA makes it criminal offence for a landowner to evict without a competent court order. The Amendment Bill does not contain provisions to ensure that section 23(1) of ESTA is made enforceable and that there are legal consequences which follow when occupiers are unlawfully evicted. Our submission seeks to address ways in which section 23(1) of ESTA may be enforced by the state from the police station to prosecution.

9. Our submission questions the introduction of the Land Rights Management Board and the Land Rights Management Committees. It particularly questions the purpose of these entities, the way in which the Land Rights Management Board will function across the country in practical terms and whether the Land Rights Management Committees will work parallel to the already existing land reform district committees.

10. Our submission considers the proposed tenure grants, which may have the effect of increasing resources for land owners but not assisting occupiers. The proposed tenure grants seek to replace the subsidies which had been previously made available to occupiers upon application.

11. Our submissions address the new obligation and requirement imposed on occupiers, to maintain their own dwelling structures. Instead of providing greater security and provide and extension of the occupiers rights, in order to address the imbalances of the past, the Amendment Bill in this regard requires occupiers to "*take reasonable measures"* to maintain the dwelling structures occupied. The submission further considers this requirement in light of the prejudice occupiers have experienced by not being granted the opportunity to improve their dwelling structures.

12. We furthermore revisit the proposals made during the National Land Tenure Security Summit in 2001 where a National Task Team was

established with the purpose of ensuring the implementation of certain terms of reference. These terms of reference have been summarised and included under general comments, which we urge the Portfolio Committee and the Department to consider.

DEFINITIONS AND AMENDMENTS

13. The Amendment Bill aims to introduce a number of definitions in ESTA. Whilst the proposed definitions are aimed at providing a greater scope of protection to certain occupiers, the wording and description of a number of the proposed definitions appear to provide less protection to occupiers. There are in this regard a few concepts which have been considered several judgements of the Land Claims and other courts.

Reside and residence

14. The term "**reside**" is currently not defined in ESTA and such lack of definition has resulted in several difficulties encountered by occupiers faced with the threat of eviction.

15. The difficulties with the term "reside" have however recently been dealt with in a Land Claims Court judgment which has interpreted the concept of residence.

16. In Mathebula & Another v Mr. Harry LCC72/2015), Ngcukaitobi AJ stated at page 7 at paragraph 16 that "*…. it is apparent that the term "reside" is not limited to the mere physical presence at a particular place at a given point in time. Furthermore, once the right of residence is considered to exist in terms of the legislation, certain other associative rights also come into being.*"

17. Further at page 11 at paragraph 21 stated that "the meaning of the "reside" as used in section 6(2) (dA) of ESTA should not depend on mathematical formulas, such as how many days in a week does a person spend in a particular farm. Nor should it depend on the subjective views of the owner of the land or the occupier. In determining whether a person is resident, there should at least be a degree of physical presence. But this need not necessarily be continuous.

18. Importantly, the Court should accept that actual physical presence may be interrupted by economic factors, such as employment. Where this is the case, there must at least be an intention – exhibited by conduct – to

return on a permanent basis to one's residence. It is wrong to assume, in all instances, that simply because one lives elsewhere out of economic necessity, that fact should *ipso facto* exclude their residence of a particular farm."

19. In this judgment the term "reside" is broadly interpreted. It covers "*an intention - exhibited by conduct – to return on a permanent basis to one's residence*." It also takes into account the fact that "actual physical presence may be interrupted by economic factors such as employment". It recognises that it is not always possible for an occupier to be on the farm on a daily basis.

20. The proposed amendment intends to insert the term "reside" in ESTA. Clause 1 (h) of the Amendment Bill states that "'reside' means "to live at a place permanently; and "residence" has a corresponding meaning." The proposed amendment is in our view not favourable to occupiers as it is too narrow. It only provides protection to occupiers who are residing on farms on a permanent basis. The proposed amendment may be interpreted to mean that if an occupier is not on the farm on a daily basis he/she does not reside on the farm on a permanent basisWe are of the view that the proposed definition will likely do more harm than good if inserted in ESTA.

21. The Mathebula judgment discussed above provides an important contextual interpretation of how the concept of residence ought to be defined, in order to protect all occupiers.

Occupier

22. The term "**occupier**" is defined in ESTA. The proposed amendment of the definition of occupier intends only to remove the words "has or" from the definition of an "occupier" in ESTA.

23. This is surprising because paragraph (c) of the definition of "occupier" limits the potential scope of ESTA's protection. In terms of paragraph (c) of ESTA read together with ESTA Regulations, a person who has an income in excess of R5000 does not qualify to be an occupier in terms of

ESTA.[2] The amount of R5000 in ESTA Regulation has never been adjusted since 18 December 1998.

24. We propose that the Department should consider adjusting the ESTA Regulations by increasing the amount from R5 000.00. We do not believe that the removal of the words "has or" from the definition of an "occupier" in ESTA will strengthen the right of occupiers of farm land.

Dependant

25. The term "**dependant**" is not defined in ESTA. The proposed amendment intends to insert the definition of "dependant" in ESTA. The word "dependant" is defined in the Bill as follows: "'dependant' means a family member to whom the occupier has a legal duty to support".

26. In African culture it is common practice that an individual is not only a dependant for the duty of support but an individual can constitute a dependant for various reasons such as moral, religious, social, social support and preserving of family relations. Therefore the proposed definition of a "dependant" poses problems particularly within the African culture.

27. In our view the inclusion of the proposed definition of "dependant" in ESTA will not necessarily serve the purpose of strengthening or protecting the rights of farm occupiers.

28. It should be noted that even though the term "dependant" is not defined in ESTA, it appears in some of the sections in ESTA. It is normally used by the owners of farm land to evict spouses or dependants of occupiers of farm land. Section 8 (5) of ESTA provides that: "*On the death of an occupier contemplated in subsection (4), the right of residence of an occupier who was his or her spouse or dependant may be terminated only on 12 calendar months' written notice to leave the land, unless such a spouse or dependant has committed a breach contemplated in section 10 (1).*"

29. ESTA as it stands categorizes occupiers of farm land. There are those occupiers who are regarded as having "primary right status" and those who are regarded as having "secondary rights status". Taking into

[2] See "*Does ESTA Still protect occupiers of farm land in South Africa*", De Rebus, August 2014, Page 22 and 23, Issue No. 544

account the history of our country, most of the occupiers who are having secondary right status are women and children.

30. Women were previously not employed on farms because farm labour was regarded as hard labour. The farm owners preferred men instead of women and as a result men acquired primary right status. This classification of occupiers has created a number of problems. Once the occupier who is regarded as having the primary right status (mainly men) dies his/her spouse (mainly women) is given 12 calendar months' notice to vacate the farm. The proposed insertion of the definition of "dependent" in ESTA is unlikely to solve the problems faced by women and children especially in so far as their eviction from farms is concerned.

31. The proposed definition of a dependent actually negatively affects farm workers' right to family life as family members of farm workers are not also defined as dependents. We propose that the proposed definition of "dependant" be removed from the Amendment Bill, as it in its current form it will not serve the purpose of providing protection to occupiers.

Family

32. The term "**family**" is not defined in ESTA. However it appears in some of the sections in ESTA. The proposed amendment intends to insert the definition of the term "family" in ESTA. Clause 1 (c) of the Amendment Bill states that: "'family' means "*the occupier's spouse, including a spouse in a customary marriage, whether or not the marriage is registered; child, including an adopted child, grandchild, parent and grandparent, who are dependants of the occupier and who reside on the land with the occupier*." This proposed definition is unduly limited as it does not cover partners that are living together but not married.

EVICTION PROCEDURES

33. ESTA was enacted with the purpose and intent of regulating eviction procedures of farm occupiers in the spirit of section 26 (3) of the Constitution. Section 26 (3) of the Constitution provides that "no *one may be evicted from their home or have their home demolished, without an order of court after considering all the relevant circumstances*." No legislation may permit arbitrary evictions. ESTA was enacted to ensure that this particular constitutional provision is promoted and protected.

34. Farm occupiers have been evicted in great numbers, despite the existence of ESTA. Many such evictions have not been legal as many landowners have failed to follow the correct legal procedures for eviction as set out in ESTA.

35. Even in instances where the eviction is lawful, occupiers have had little or no legal representation, to ensure that in the event of a threat of eviction order issued by the court, the court considers a safeguard for the occupier in the form of the provision of suitable alternative accommodation.

36. We therefore agree with the contention in the explanatory memorandum to the Amendment Bill, that by making it easier to evict occupiers, ESTA in its current form has failed occupiers in ensuring that they have security of tenure and that their rights are adequately protected.

37. We note that the Amendment Bill leaves section 8(2) and 8(3) of ESTA unaffected. In our experience, these are the principal grounds relied on by the owners of farms for ESTA eviction orders.

38. As currently worded, we respectfully submit that these sections confer inadequate procedural protections on occupiers who are also providing labour on farms who have been dismissed from employment. Our experience is that in most successful eviction cases, all that the owner has to do is to show that the labourer/worker has been dismissed and that there is no pending proceedings before the CCMA. In our experience, most farm labourers/workers are not aware of their rights at the CCMA and they often sign settlement agreements arising from their employment disputes without fully understanding that an eviction application will follow.

39. We are aware that other civil society organisations have in the past proposed an amendment which would require the court hearing an application for eviction to have proof that the labourers/workers' rights at the CCMA were fully explained and the labourer/worker is given written notice which records that if the labourer/worker signs a settlement a CCMA settlement this will result in a termination of rights under section 8(2) and this carries a consequence that eviction proceedings will follow.

40. We respectfully maintain that the Department should take this opportunity to ensure that stronger procedural safeguards are put in place to address the concerns raised by civil society which are detailed in the in the preceding paragraph. Such safeguards should take account of the rights of farm labourers to have a fair court hearing or arbitration hearing at the CCMA in which they fully understand the proceedings of such a hearing and also its consequences.

41. We therefore propose that sections 8 (2) and 8 (3) of ESTA should be amended so as to confer greater protection to farm labourers or farm workers whom are also farm occupiers. It is proposed that such provisions should not, as it is in its current form, be heavily reliant on the provisions of the Labour Relations Act, for determination of eviction of the occupier. The determination of eviction should be made by the court upon application by the land owner against the occupier.

42. We urge that section 9(3) of ESTA should be amended so that it is expressly stated that a court cannot grant an ESTA eviction order in the absence of a probation report and a report from the local municipality on emergency housing.

43. The hearing of an eviction application/action in the absence of the probation report is an issue that urgently calls out for legislative certainty. Our experience has been that in many cases, magistrates hear eviction cases without the probation report.

44. We have also established that some of the judges of the Land Claims Court have adopted the procedure of hearing eviction applications/actions without the probation reports. The Land Claims Court has expressed its dissatisfaction with officials of the Department of Rural Development who do not prepare and send to court the probation reports. As a result, farm occupiers are prejudiced as a result of the inefficiency of the officials of the Department.

45. The lack of preparation of the probation officer's report reveals the lack of commitment and seriousness of the Department and its officials towards the lives of farm occupiers. We propose that the provision of a probation officer report should be mandatory before a court grants an order for the eviction of a farm occupier. It is submitted that such reports are important to ensure that the courts consider the provision and availability of

alternative accommodation of the occupiers as a result of an eviction. The report also assists the courts to consider the constitutional rights of the occupiers, "including the rights of the children …..to education".

46. ESTA in its terms requires the probation report to address the following issues:
    (i) On the availability of suitable alternative accommodation to the occupier;
    (ii) Indicating how an eviction will affect the constitutional rights of any affected persons, including the rights of children, if any, to education;
    (iii) Pointing out any undue hardships which an eviction would cause the occupier; and
    (iv) On any other matter as may be prescribed.

47. The issues set out in section 9 (3) (a) – (c) have a significant impact on the judicial consideration that precedes any decision to grant an order evicting occupiers. The failure of the officials of the Department to comply with court directives to provide a probation report is also deeply disturbing. We urge the Minister to set in motion steps to address the non-compliance by officials in his Department who, even after being directed by courts to provide probation report, fail to do so.

48. Eviction orders which may result in an occupier being rendered homeless should not generally be granted without alternative accommodation being offered by the local municipality. In 2010 draft there were 8 limitations on evictions[3]. It has been noted that in the 2013 draft, the limitations have been excluded.

[3] Draft Land Tenure Security Bill [B-2010] section 20 (10) "an eviction shall be lawful only where adequate procedural and legal safeguards have been complied with including-
    (a) An opportunity for genuine consultation with those affected;
    (b) Adequate and reasonable notice for all affected persons prior to the scheduled date of eviction
    (c) Information on the proposed eviction and where applicable, on the alternative purpose for which the land or accommodation is to be used, to be made available in reasonable time to all those affected;
    (d) Where groups of people are involved government officials or their representatives to be present during an eviction;
    (e) All persons carrying out an eviction to be properly identified;
    (f) Evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
    (g) Provisions of legal remedies; and
    (h) Provision where possible of legal aid to persons who are in need of it to seek redress from the courts.

49. We propose that the Amendment Bill should provide that in each and every eviction application/action, the local municipality and the Department of Rural Development and Land Reform must be cited as necessary parties.

ADVANCING WOMEN AND CHILDREN'S RIGHTS- EVICTION PROCEDURES

50. We note with regret that the ESTA Amendment Bill does not take the opportunity to advance the protection of women and children of an occupier who falls within section 8 (4) of ESTA as section 8(5) is left intact.

51. It is our submission that women and children suffer great injustice and prejudice upon the death of the male occupier. ESTA in its current form (in terms of section 8 (5)), requires spouses and dependants of male occupiers to vacate the farm upon expiration of the 12 month period.

52. In our experience, this particular requirement in ESTA has left many women and children in extremely vulnerable position as they, in many instances are faced with the reality of homelessness after the expiration of the 12 month calendar month period as legislated, or earlier if breach occurs.

53. In order to advance women and children's rights it is therefore proposed that these particular provisions in ESTA ought to have been removed by the Bill or substantially amended to provided for greater procedural protection. In the absence of this, it is submitted that the section 8 (5) of ESTA in its current form, is discriminatory towards women and children, and amounts to a denial of their security of tenure. Spouses and children of occupiers should be treated as independent occupiers. Their right to reside should not be linked to their spouses.

IMPROVEMENTS OF DWELLING STRUCTURES BY OCCUPIERS

54. One of the thorny issues between the owners and occupiers of farms in South Africa is the renovation of existing houses and or construction of new houses by the farm occupiers.

55. On the one hand, land owners feel that as owners of land they have a right to enjoy undisturbed use and ownership of their land. On the other

hand, occupiers feel that as occupiers of land they have a right of security of tenure including the renovation and construction of new houses on land where they reside. ESTA is silent on this issue. We therefore urge the Department to take this opportunity to add to the Amendment Bill a section that will give farm occupiers the right to renovate their existing structures. It is submitted that such inclusion would be in line with the provision of section 26 (1) of the Constitution which provides that everyone has the right to have access to adequate housing.

56. The Amendment Bill however imposes a new obligation of farm occupiers to "maintain their dwelling structures". In terms of clause 6 (2) (dB) of the Amendment Bill occupiers will be required to maintain their own dwellings. This particular provision appears to be imposing an unfair burden particularly to occupiers who also provide labour on the farm under the employ of the farm owner.

57. Instead of extending further secure rights to the occupiers, the Amendment Bill seeks to impose a new obligation. It is submitted that the Bill encourages a shift in responsibility from the owners' decent living conditions to employees as defined in terms of the Sectoral Determination for farm workers.

58. The provision of accommodation is part of the cost of labour for businesses such as farms, which in many instances are located far away from urban settlements. The cost of maintaining such dwelling has been unfairly imposed on the occupier, without any clear indication of the way in which such requirement would be implemented.

59. It is therefore submitted that this requirement imposed should be removed from the Bill as it infringe on the rights of occupiers to decent living conditions, which ought to be provided by the owners/employers.

LAND RIGHTS MANAGEMENT BOARD AND LAND RIGHTS MANAGEMENT COMMITTEES

60. We have noted that the Amendment Bill introduces the Land Rights Management Board and Land Rights Management Committees. We are of the view that there has been little or no public consultations conducted on the establishment of the board.

61. The board will be given broad powers without any guidance or structured discretion to regulate the exercise of these powers. It is inconsistent with the rule of law for legislation to provide for broad discretionary powers containing no express constraints, as those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision.[4]

62. It is submitted further that the land rights management board and the district committees will take on existing responsibilities of the Department, which include identifying, monitoring and settling land disputes, providing legal assistance and support to occupiers as well as establishing and maintaining a database of the occupiers.

63. We propose that Portfolio Committee takes the following into account when considering the proposed establishment of the board as provided for in the Amendment Bill:

63.1 The functions and operation of the board have been outlined in clause 15C of the Amendment Bill. The practical measures which will be employed in ensuring that the board serves its functions have not been outlined.

63.2 The proposed amendment states that the board will amongst other things "*create mechanisms for the provision of legal assistance and representation*". The motivation for this function of the Board is unclear. The Department has an already existing legal department and a panel of attorneys who are appointed to handle all land related legal disputes. Therefore, will the board work with the already established entities? Will it provide support to the existing entities? Or will the functioning of the board in the provision of legal assistance be considered a separate form of assistance?

63.3 It appears from the Bill that the Minister will appoint and oversee the functioning and operation of the board with the assistance of the Director-General. There appears to be no proper system or plan in place which will inform the Minister and Director General

[4] Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC)

on matters relating to the accountability of the Board and how it executes its role and duties.

63.4 It is submitted that the requirement of an "appropriate qualification" as a qualification requirement for a board member is vague and problematic. The membership of the board, as apparent in the wording of the Bill, is a vital component of ensuring the overall function of the board. It is submitted that a mere requirement of an "appropriate qualification" is very broad and not a sufficient description for a qualifying member.

63.5 Furthermore, in terms of clause 15C (1) (d) of the Bill the board will "*provide for the mediation and arbitration of land rights disputes arising from the application*" of ESTA. Section 21 (1) of ESTA provides that "*Any party may request the Director-General to appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle to mediate and settle any dispute…*" The inclusion of section 15C (1) (d) will amount to an unnecessary repetition. Furthermore, we are aware that section 21 (1) of ESTA has not yet been adequately utilised. How will the Department ensure that section 15c (1) (d) of the Bill is effectively and adequately utilised?

63.6 The Land Rights Management Committees ("the committee") appear to be necessary only upon recommendation by the board. The membership and composition of the committee appear to be representative and would be of great assistance and support to the functioning of the board. However the Amendment Bill proposes that the board has all powers and discretion in the appointment and nomination of committee members. The Minister appears to have a limited role in the appointment of the committee members as it appears that the Minister only endorses the decisions already taken by the board on the appointment of committee members. The committees will be operating parallel to the land reform district committees. This is potentially problematic because it will amount to splitting of the functions of land reform institutions at local level.

ESTA, OTHER LAND REFORM MEASURES AND LAND USE PLANNING

64. The National Development Plan ("NDP") proffers the development of half a million hectares of irrigation farms, the establishment of a new class of small farmers and one million new jobs[5]. The relationship between the Amendment Bill, the land rights committees and land use management and planning instruments are not apparent. The tenure of farm dwellers as a category of vulnerable persons under the bill of rights must be linked to proper planning.

LAND TENURE GRANTS

65. The Bill introduces "land tenure grants" which will replace the "subsidies" which had been made available to occupiers in accordance with the provisions of section 4 of ESTA. It appears that the reason for the removal of the word "subsidy" could be that the tenure grants would be made available to the farm owners as opposed the occupiers, although there is no clarity provided in this regard.

66. The quantum of the new tenure grants has not been defined nor has there been qualifying criteria provided for it being made available. In the circumstances, the provision empowers the Department to pay money in the form of a grant to either farm owners or occupiers, or to both, but there is no guidance on how much should be paid, when it should be paid and furthermore, under what circumstances, the grants are to be paid.

67. The tenure grants (from the national land reform budget) would be paid to farm owners to develop their basic services. It is submitted that this amendment reverts to the situation when the state used to subsidize farmers for their farm labour in terms of basic services and housing without leveraging for better rights for the workers. The issue of the responsibility for alternative accommodation is left unclear in the Amendment Bill

68. It is submitted that the proposed tenure grants will not serve the interests of the occupiers in ensuring long term security of tenure. The previous subsidy grants, although minimally utilized by the Department, ensured better measures of protecting the interests of the occupiers and ensured that they acquire land and have tenure security.

[5]National Development Plan Chapter 6: An Integrated Inclusive Economy pg 197

GENERAL COMMENTS

69. It has been noted that the Bill leaves section 23 (5) (i) unaffected. Sections 23 (5) (c) (i) and 23 (5) (c)(iv) of ESTA refer to the term “attorney general”. It is well known that this position or title no longer exists in our law. It is thus submitted that the term “Attorney General” is changed and substituted with the term “Director of Public Prosecutions”.

70. During the land tenure summit held in 2001 civil society organisations proposed that a national task team ought to be established. In terms of the proposal, the task team would have the following terms of reference:

70.1 The Department should acquire land for ESTA evictees and evicted farm occupiers must be explicitly prioritized in the implementation of land redistribution.

70.2 The Department should clarify how its budget will be apportioned to provide evicted ESTA occupiers with access to land on which to base a livelihood, whether through agriculture on a subsistence or small scale commercial basis, or through non-agricultural use of land.

70.3 Ensure that the justice system becomes responsive to ESTA. The Department must work with the various state Departments of Justice, public prosecutions, the Commissioner of Police, and Legal Aid Board in order to provide training on ESTA.

70.4 Ensure that the distinction between labour and tenant rights is upheld: the Department must work with the Department of labour and the CCMA.

70.5 Oversee the establishment of a monitoring and evaluation system for ESTA and link this to an alternative dispute resolution (ADR) to intervene in threatened evictions.

70.6 The Reform Justice system is to ensure that the probation officer’s report at the commencement of the eviction application and the clerks/registrars of courts should request it at this stage; the Department monitors the recommendations accepted by the courts and should intervene where it appears that magistrates and

judges in their judgments appear to be biased towards land owners.

70.7 Ensure that the Department monitors settlement agreements which appear to be contrary to ESTA through the section 9 (2)(d) Notices and taken up with CCMA structures.

70.8 Judgement applications in relation to common law evictions should be funded by legal aid as a priority.

70.9 Justice forums and labour forums need to be created provincially by all provincial offices of the Department so that an integrated approach is promoted between the government departments.

70.10 Section 23 charges should be captured on the national database of the SAPS and decentralised.

70.11 ESTA officers should be required to proactively intervene when section 9 (2) (d) notices are served as 2 month probation period is given in terms of the Act.

70.12 The Department should clarify how it intends to provide evicted occupiers who have not been provided with suitable alternative accommodation.

70.13 Notice periods for termination of employment and for ESTA are distinct requirements governed by different pieces of legislation, protecting different rights. Notice periods must never run concurrently.

71. Unfortunately, the comments made by civil society organizations in 2001 appear not to have been considered or taken into account in the Amendment Bill

PUBLIC PARTICIPATION

72. Sections 59, 72 and 118 of the Constitution require the National Assembly, the National Council of Provinces and Provincial Legislatures to "*facilitate public involvement in [their] legislative and other processes*". There is therefore a positive obligation on the National Assembly to take

reasonable steps to ensure public participation in the passage of legislation.

73. The standard for determining whether legislative bodies have facilitated public involvement is reasonableness. Reasonableness is "*an objective standard which is sensitive to the facts and circumstances of a particular case*."[6] The Constitutional Court has pointed out that "*What is ultimately important*, *is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process.*"[7] Or as Ngcobo J put it elsewhere, the legislature must "*provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them.*"[8]

74. There is an obligation on Parliament to ensure that groups of people who are particularly affected by a bill are properly consulted in the public participation process. As the Constitutional Court has stated *"the more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the Legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.*"[9]

75. The importance of proper public participation on this Amendment Bill was stressed at the department's briefing of the Portfolio Committee held on 21 October 2015.

76. According to the minutes of the meeting Mr Mnguni, a member of the Portfolio Committee, "*appealed for a thorough process of public hearings, and for the consultation processes to reach at least 2.6 million people out of the 2.8 million people affected. Within the constraints of resources or time, it would be essential for the Committee to have provided maximised public hearings throughout South Africa. He advised that the Committee should be separated into groups of two or three and should conduct public hearings on three to six sites per province within two or three weeks in January 2016.***"**

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[6] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC)
[7] Ibid at para 129
[8] Ibid at para 145
[9] *Matatiele Municipality and Others v President of the Republic of South Africa and Others 2007 (1) BCLR 47 (CC)*

77. We note that the Regulatory Impact Assessment (RIA) conducted in respect of the Amendment Bill, refers to consultation with a range of "stakeholders" and NEDLAC regarding the Amendment Bill.[10]

78. It is of concern that the RIA does not address the nature of consultations and public participation initiatives conducted directly with farm dwellers and occupiers who will be directly affected by the Amendment Bill.

79. We urge the Committee to ensure that consultation with stakeholders such as civil society and farmworker unions does not take place as a substitute for consultation and public participation with occupiers and farm dwellers themselves. We further emphasise that sufficient steps must be taken and resources allocated to ensure that public hearings on the Amendment Bill are effective and reach the remote areas of rural land where the vast majority of farm dwellers and occupiers in South Africa reside.

CONCLUSION

80. We look forward to engaging with the Portfolio Committee on the issues raised in these submissions.

[10] Regulatory Impact Assessment (RIA) Report on the 2013 Extension of Security of Tenure Amendment Bill (ESTA Amendment Bill), p 28