

**COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA)**  
**ON THE DRAFT LAND TENURE SECURITY BILL, 2011**

The Law Society of South Africa (LSSA) has considered the Draft land Tenure Security Bill, 2011 and comments as follows:

1. **INTRODUCTION**

*In the Memorandum on the objects of the Land Tenure Security Bill, 2011, it is stated that "Section 25(6) of the Constitution of the Republic of South Africa, 1996 entitles persons whose land tenure is legally insecure as a result of past racially discriminatory laws and practices, either to legally secure tenure or comparable redress."*

It is further stated that the Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996) and the Extension of Security of Tenure Act, 1997 (Act 62 of 1997), which sought to achieve this Constitutional imperative in relation to persons residing on farms, have shown some weakness at interpretation, enforcement and general implementation levels.

The intention is consequently to repeal these two Acts and to address their shortcomings by the introduction of the proposed new Land Tenure Security Bill, 2011.

The *Draft Tenure Security Policy* document states that the current environment is negatively influenced 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

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- lack of or inadequate legal representation / legal aid to the poor.

It is proposed that the *Land Rights Management Board* (see Chapter 8 – Sections 36 to 41 of the Bill) “*will offer the institutional climate for redressing these inadequacies.*”

The LSSA is of the view that the existing legislation was never properly canvassed or administered. What is required is not new legislation, but competent and dedicated officials to enforce the existing legislation properly. The proposed Bill as such will not resolve the problems identified by the Department in the absence of competent and dedicated officials.

We are further of the view that generally the Bill is poorly drafted and requires the input of a suitably qualified and skilled draftsman. Examples of the poor draftsmanship are as follows:

- Section 10 of the Act applies to a person who acts as “*the controlling mind of another person including a natural person.*” This is an extremely vague notion, particularly in its application to a natural person.
- Section 19(2)(g) – The word “*you*” should be replaced by “*a person*” .
- Section 24(1) where it reads “*.... if it was affixed term....*” should read “*... if it is a fixed term...*”.
- Section 25 should read “*.....residing on a farm....*”.

## 2. PREAMBLE

It is unclear what is meant by “*arbitrary evictions*”. There can only be either lawful or unlawful evictions.

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### 3. CHAPTER 1

#### 3.1 Section 1: Definitions:

3.1.1 The definition of *“right in land”* should not include *“the right to cropping and grazing land”* as farms vary. Cropping would most likely not apply to a Kalahari cattle farm and grazing would not apply to a wine farm.

3.1.2 Regarding the definition of *“suitable alternative land”* it is unclear what is meant by *“not less favourable”*. Would the land in the Agri Village (see Chapter 6) be less favourable if the person that resided on the farm no longer has grazing or cropping rights, notwithstanding the fact that the new accommodation is clearly superior, with better access to schools and medical care?

### 4. CHAPTER 2

4.1 Section 3 is too vague. *“Agricultural land”* should be properly defined. As the Section now reads, agricultural land that is used for mining purposes would be exempt from the provisions of the Act.

### 5. CHAPTER 3

5.1 Sections 7 and 9 – The words *“... including his or her family members...”* in Section 7(1) are simply too wide. What is meant by *family members*? It is uncertain how this category of person can be reconciled with the category of person contemplated in Section 9 (*“... persons associated with persons residing or working on farms ...”*). It is submitted that the wording of these two sections are too vague and in fact quite confusing.

5.2 Section 11(1) is virtually tantamount to a form of acquisitive prescription and constitutes a harsh infringement on the rights of registered property owners.

5.3 Section 11(2) deviates from standard principles that apply to both company law and trust law.

5.4 Section 11(4) should be amplified to read: "*Consent or valid termination contemplated in this Act shall be binding on successors in title.*"

6. CHAPTER 4

6.1 Section 12 reads as follows: "*All persons affected by this Act must respect the right of every person and not violate any right of another person protected by the Constitution.*" It is submitted that the rights of the citizens of South Africa are adequately protected by the Bill of Rights in the Constitution. We submit that it is superfluous to refer to these well entrenched rights which in any event apply to ALL citizens and not only to the farmers and the persons residing or working on farms.

6.2 Section 13 is difficult to justify or to understand. A farm owner (like ANY other citizen) has a host of rights in terms of the Constitution and the common law. Why the need to mention the obvious and then proceed to refer to four inherent rights which a farm owner (like any other citizen who owns property and employs people) has in any event? The question arises as to why mention should be made of only some of the many rights to which farmers and all other people are in any event entitled to in terms of our Constitution.

6.3 Section 14 – It is equally difficult to justify or to understand why obvious and well-established common law and statutory crimes and prohibitions should be enumerated. Our criminal law surely covers these matters adequately.

6.4 Section 15 is too vague to have any substantive meaning. Against whom are the provisions of Sections 15(1)(k) and (l) enforceable?

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- 6.5 Sections 15(1)(a), (b) and (c) appear to be in order, but it is uncertain whether these sections can be reconciled with Section 15(1)(n). It unclear what is meant by "*commercial farming*" in this regard. Does this section entitle persons residing on a farm to do commercial farming in competition with the owner of the land? It is submitted that Section 15(2) does not address this question.
- 6.6 Section 16 – We are of the view that our criminal law addresses the matters referred to in Section 16(2)(a) and (b) adequately.
- 6.7 Section 17(b) – It is unclear against whom this section is enforceable. If the farm owner, does this mean that he or she may not be obstructive with regard to the worker's wish to obtain education, or is the farm owner actually obliged to provide the required education?
- 6.8 Section 18 – We submit that our criminal law addresses the matters referred to in Section 18(2)(a) and (b) adequately.

## 7. CHAPTER 5

- 7.1 Section 19(2) - 's' in the word "*followings*" should be deleted.
- 7.2 Section 19(2)(b) - It is unclear whether Section 19(2)(b) will apply if a school is closed because of the establishment of a full-fledged government school in the near vicinity of the farm, thus making it impossible either to obtain or retain teachers for the farm school.
- 7.3 Section 19(2)(g) - The words "*....you have....*" should be deleted and replaced with the words "*....a person has....*"
- 7.4 Section 20(1) should be amended so that the opening two lines thereof read as follows:

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*"A person who resides on land as part of the conditions of his or her employment may be evicted upon lawful termination ....."*

Furthermore, in that sub-section the phrase *"... a formal process of eviction..."* should be replaced with *".....proceedings for eviction....."*

- 7.5 Section 20(2) - The phrase *".....the right of residence of a person residing on a farm may be terminated..."* should read *"....the right of a person to reside on the farm may be terminated....."* This should also be substituted in sub-section 3 of that section.
- 7.6 Section 20(8) should likewise read *"Any termination of the right of a person to reside on a farm intended to prevent such person from acquiring rights in terms of this section shall be void."*. Similar repetitive phraseology should be deleted from sub-paragraph 9 as well.
- 7.7 Section 20(10) - Is the word *"genuine"* necessary where it appears in (a)? In (e) the question arises as to what if it is not possible to properly identify all persons to be evicted, such as in the case of a mass invasion?
- 7.8 Section 20(11) renders an eviction order unenforceable and defeats the objective of the entire Section 20.
- 7.9 Section 22(1) needs to be re-drafted. What is meant by *'An eviction proceedings'*? Surely it should commence reading *"Eviction proceedings ..."* Furthermore, the words *'continued or maintained'* where they appear in that sub-section appear to be superfluous, unless it is intended that if such proceedings have been instituted without 3 months' notice having been given, they can then only be continued after 3 months of such notice of intention being given subsequently.

7.10 Section 22(2) – It may be appropriate to make provision for the removal of vagrants, squatters and/or mass invaders of farms as a separate sub-section. However, in such an instance it would be preferable to have a separate section of the Act to deal with such cases so that farm owners would not be obliged to give the 3 months' notice of their intention to bring such an application as provided for in Section 22(1) and Section 23(1) (b) and thereafter be delayed by a further 2 months to execute such an order as provided in Section 25 (1) of the Bill.

7.11 Section 23(1)(a) and (b) need to be re-drafted as the event envisaged in (a) occurs after the event referred to in (b). Section 23 (1) should therefore read as follows:

*"23.(1) A Court may make an order for the eviction of a person residing on a farm if:*

*(a) the owner has given notice in writing to the person residing on the farm terminating the right of residence and calling upon him to vacate within a period of 30 days; and*

*(b) the owner has given a copy of the notice to:*

*(i) the municipality in whose area of jurisdiction the land in question is situated;*

*(ii) the Board; and*

*(iii) the Director General.*

*(c) the person residing on the farm has not vacated the land after the period of 30 days after the owner has given notice to all parties referred to in sub-paragraph (a) and (b) above has expired; and*

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*(d) not less than 3 calendar months have passed since the giving of written notice by the owner (to whom) of his or her intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based."*

7.12 Section 23(1) - The periods envisaged in Section 23(1) are far too long. It envisages firstly a notice to the resident to vacate within 30 days and thereafter a further notice indicating an intention to apply for an eviction order 3 calendar months thereafter. Surely the first 30 day notice is sufficient and should incorporate in it the intention to obtain an order for eviction "containing the prescribed particulars and setting out the grounds on which the eviction is based". Coupled with this must be considered the fact that, in terms of Section 25(1) of the Bill, an order for eviction may not be executed within a period of 2 months. Given that the legal process could endure for a period of some months, such proceedings will not be instituted before 4 months have elapsed and thereafter the eviction could only take place after 2 months have elapsed after the conclusion of the proceedings. This delay of more than 6 months would be untenable, especially in the case of vagrancy or mass invasion referred to above.

7.13 Section 23(2) provides that the Court must request a probation officer as contemplated in Section 1 of the Probation Services Act, 1991, to submit a report. The Probation Services Act deals with programs aimed at combating of crime and for the rendering of assistance to treatment of persons involved in crime. It is therefore uncertain as to the purpose of burdening the probation service with filing reports relating to civil actions in respect of evictions.

7.14 Section 24(1) - The wording of this sub-section is meaningless as it stands. It should read as follows:

*"24(1) If it was an express term of the contract granting the right to a person to reside on a farm that the residence would terminate upon a fixed or determinable date, a Court may on the passing of the aforesaid date*



*grant an order for eviction of that person if it is just and equitable to do so."*

7.15 Section 25(1) should read:

*"25(1) Where the Court grants an order for the eviction of a person residing on a farm, such order may not be executed within a period of less than 2 months."*

However, this is merely a proposed amendment to improve the drafting. The period of 2 months coupled with the other periods is too long. See 7.12 above.

7.16 Section 25 interchangeably refers to *granting of an eviction* and the *issuing of an order*. Conciseness and consistency in referring to the granting of an eviction order is needed.

## 8. CHAPTER 6

8.1 Section 27(5)(a) and (b). We submit that these rights are adequately protected under our Constitution and the common law and that it is unnecessary to state the obvious.

## 9. CHAPTER 8

9.1 Sections 36 and 37 – The question arises as to whether a single Land Rights Management Board will be sufficient for the proper enforcement of the proposed legislation. The Board should have the power to appoint committees with delegated powers to act in its place and stead in the various provinces, comprising of members well acquainted with the particular problems and culture of the people of the area in question. The members of the Board must be competent and experienced, failing whereof the proposed legislation will in all probability fail to achieve the required objectives.

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10. CHAPTER 9

10.1 Section 42(1) creates various problems.

10.1.1 No specific provision is made that the Land Claims Court may grant eviction orders.

10.1.2 The granting to that Court of the right to decide any constitutional matter may be an unconstitutional provision as it purports to confer the right to decide on constitutional matters which a Constitution in fact confers on the Constitutional Court.

10.2 Section 42(3) should be deleted. Surely the rules of the Magistrate's Court apply in that Court and there is no need for the Rules Board to create ancillary and parallel rules for the governing of procedures in that Court. By the same token, there is no need for the Rules Board to make rules for the High Court to deal with these matters. It follows that Section 42(4) should also be deleted.

10.3 Section 43(2) which deals with the jurisdiction of the Magistrate's Court appears to conflict with Section 42(2). Although Section 42 appears to deal with the choice of Court, it nonetheless confers jurisdiction on the Magistrate's Court to exercise the powers referred to Section 42(1) which have been conferred upon the Land Claims Court.

10.4 Section 43(4) should be deleted. There is no good reason why the decision of a Magistrate's Court should be subject to automatic review. Such automatic review would result in unnecessary delay, particularly bearing in mind the existing time parameters referred to above. There would be no point to instituting eviction proceedings in the Magistrate's Court for this reason. Similarly, sub-section 5 and 6 should be deleted as well.

10.5 Section 43(7) infringes upon the High Court's inherent jurisdiction to hear all matters and the sub-section is therefore unconstitutional. Furthermore, the costs involved in transferring such

matters from the High Court to the Land Claims Court would result in considerable time delays and the incurrence of unnecessary expense.

10.6 Section 43(8) - A separate set of rules for the Land Claims Court should be unnecessary. Surely the rules of the High Court can be applied? Furthermore, if the envisaged rules are necessary, then surely the Rules Board can draft such rules.

10.7 Section 43(8)(b) – The provisions of this section should be deleted for the reason stated above.