

Tenure security in relation to farmland

Priviledge Dhliwayo

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Supervisor: Prof AJ van der Walt

Co-Supervisor: Prof JM Pienaar

Faculty of Law

Department of Public Law

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Declaration

By submitting this thesis electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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Summary

Section 25(6) of the Constitution of the Republic of South Africa 1996 guarantees legally secure tenure to persons whose tenure of land is insecure as a result of past racially discriminatory laws and practices. The Extension of Security of Tenure Act 62 of 1997 (ESTA) and the Land Reform (Labour Tenants) Act 3 of 1996 (LTA) were enacted to give effect to section 25(6), read with section 25(9) of the Constitution, with the aim to improve and strengthen tenure security in rural areas, including farmland. However, the general opinion amongst scholars is that these efforts to strengthen tenure security have generally failed to ensure legally secure tenure on farmland. To this effect, the *Draft tenure security policy* and Draft Land Tenure Security Bill (2010) were formulated to introduce new measures to improve tenure security on farmland. This gives a clear indication that eighteen years after the government embarked on an all-encompassing land reform programme, its intended goals have not yet been achieved, resulting in the continued challenges faced by farm dwellers.

The thesis discusses the inherent challenges associated with tenure security on white-owned commercial farmland, with specific reference to government's obligation to improve tenure security; the nature of farm dwellers' rights; and the shortcomings of the existing policy and legislative measures. A historical overview explains the effects of the apartheid land holding system that underpins the need for tenure reform, while an analysis of constitutional and international law sets out the guiding principles on tenure security. An analysis of the applicable policy and legislative measures establishes the causes of continued tenure insecurity on farmland, which include shortcomings in the main legislative measures; failure by the legislature to translate policy into legislation; misinterpretation and misapplication of legislation by the courts; and lack of effective implementation. The thesis considers the impact of the *Draft tenure security policy* and the Bill in light of the challenges facing farm dwellers and concludes that tenure security in relation to farmland remains insecure and government still falls short of the appropriate solutions to address the tenure security challenges on farmland.

Opsomming

Artikel 25(6) van die Grondwet van die Republiek van Suid-Afrika 1996 waarborg sekerheid van verblyfregte vir persone wie se verblyfregte regsonseker is as gevolg van ras-diskriminerende wette en praktyke van die verlede. Die Wet op die Uitbreiding van Sekerheid van Verblyfreg 62 van 1997 (ESTA) en die Wet op Grondhervorming (Huurarbeiders) 3 van 1996 (LTA) is gepromulgeer om gevolg te gee aan artikel 25(6), saamgelees met artikel 25(9), van die Grondwet, wat daarop gemik is om die sekerheid van verblyfregte in landelike gebiede te verbeter en te versterk. Die algemene siening onder geleerdes is egter dat hierdie pogings om sekerheid van bestaande verblyfregte te versterk oor die algemeen ten opsigte van verblyfregte op landbougrond gefaal het. In verband hiermee is die *Konsep beleid op sekerheid van verblyfregte (Draft tenure security policy)* en die Konsep Wetsontwerp op die Sekerheid van Verblyfregte in Grond (Draft Land Tenure Security Bill) (2010) geformuleer om nuwe maatreëls voor te stel om sekerheid van verblyfregte ten opsigte van landbougrond te bewerkstellig. Hierdie ontwikkelings gee 'n aanduiding dat die staat ná 'n omvattende grondhervormingsprogram van agtien jaar nie die beoogde doelwitte bereik het nie en dat plaasbewoners steeds uitdagings in die gesig staar.

Hierdie tesis bespreek die inherente uitdagings wat geassosioseer word met regsonsekere verblyfregte ten opsigte van kommersiële landbougrond, hoofsaaklik van wit grondeienaars, met spesifieke verwysing na die staat se plig om regsekerheid te versterk; die aard van plaasbewoners se regte; en die tekortkominge van die bestaande beleids- en wetgewende maatreëls. Die behoefte aan hervorming word beklemtoon met verwysing na 'n historiese oorsig wat die uitwerking van die apartheid-grondbeheerstelsel verduidelik, terwyl 'n analise van grondwetlike en internasionale reg die beginsels met betrekking tot die sekerheid van verblyfregte uiteensit. 'n Analise van die toepaslike beleids- en wetgewende maatreëls dui op die oorsake van voortdurende onsekerheid van verblyfregte in landbougrond, wat die volgende insluit: tekortkominge in die primêre wetgewende maatreëls; versuim deur die wetgewer om beleid in wetgewing om te skakel; foutiewe uitleg of toepassing van wetgewing deur die howe; en 'n gebrek aan die effektiewe uitvoering van wetgewing.

Die tesis oorweeg die impak van die *Konsep beleid op sekerheid van verblyfregte (Draft tenure security policy)* en die Konsep Wetsontwerp in die lig van die uitdagings waarmee plaasbewoners steeds te kampe het, en kom tot die gevolgtrekking dat verblyfregte ten opsigte van landbougrond steeds regsonseker is en dat die staat steeds versuim om geskikte oplossings vir die uitdagings daar te stel.

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Chapter one: Introduction

1 1 Introduction

The Constitution provides that persons or communities whose tenure of land is legally insecure as a result of past racially discriminatory laws and practices are entitled, to the extent provided by an Act of Parliament, to either tenure which is legally secure or comparable redress.¹ It further provides in section 25(9) that Parliament must enact the legislation referred to in subsection (6).

The 1997 *White paper on South African land policy* (1997 *White paper*)² addresses land issues in general, but with special emphasis on tenure security. In this regard, the focus is placed on measures to address tenure disputes, the provision of suitable alternative accommodation in cases of eviction and mechanisms to acquire the necessary land. Legislation such as the Extension of Security of Tenure Act 62 of 1997 (ESTA) and the Land Reform (Labour Tenants) Act 3 of 1996 (LTA) was enacted to give effect to section 25(6), read with 25(9) of the Constitution, as well as to the principles set out in the 1997 *White paper* regarding the right to secure tenure.

In the course of 2010, the government presented the *Draft tenure security policy*³ and the Draft Land Tenure Security Bill (2010).⁴ The main thrust of both the *Policy* and the Bill is the consolidation of ESTA and LTA in a further attempt to provide adequate and stronger tenure rights for farm dwellers (farm workers, including labour tenants, residing and working on farmland). This new intervention redefines the government's commitment to improve farm dwellers' lives while residing on and off of farmland. The *Draft tenure security policy* commences by stating that

¹ Section 25(6) of the Constitution of the Republic of South Africa 1996.

² Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997).

³ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010).

⁴ Republic of South Africa, Department of Rural Development and Land Reform Draft Land Tenure Security Bill [B-2010] GN 1118 in GG 33894 of 24-12-2010.

“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 land holding; 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...”⁵

Despite a land tenure reform programme being operative for eighteen years already, this 2010 policy review is a clear indication that tenure security is still lacking.⁶ Consequently, government is still confronted with the need to find appropriate solutions to tenure challenges in general, but in particular relating to white-owned commercial farmland.

Since embarking on an intensified tenure reform programme after 1994, the South African government has formulated and implemented a number of land tenure policies and legislative measures aimed at the protection of rural dwellers. However, there are particular shortcomings in main legislative measures that have serious negative implications for tenure security on farmland. The shortcomings in tenure security legislation range from poor drafting or formulation and misinterpretation and misapplication by the courts to a general lack of or ineffective implementation. In addition to the legislative framework, strategic plans⁷ and programmes⁸ have been formulated to address issues relating to tenure reform on farmland. Despite these interventions, farm dwellers’ protection has not been fully achieved. Insecure tenure continues to cause instability and under-development in rural areas, especially on white-owned commercial farmland.

Amongst the shortcomings that hinder the success of the overall land reform programme, especially tenure security reforms, is lack of implementation. The implementation of numerous interventions, which the Department of Rural

⁵ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010) 1.

⁶ Pienaar JM & Kamkuemah A “Farm land and tenure security: New policy and legislative developments” (2011) 22 *Stellenbosch Law Review* 724-741.

⁷ Republic of South Africa, Department of Rural Development and Land Reform *Strategic plan 2010-2013* (2010).

⁸ Republic of South Africa, Department of Rural Development and Land Reform *Comprehensive rural development programme* (2009).

Development and Land Reform (DRDLR) designed, has failed to achieve the intended goal of improving tenure security. In this regard, the responsible officials and institutions have shown a lack of capacity to translate the relevant legislation into reality. Consequently, the plans and programmes that have been drafted to support these initiatives have not been aligned or implemented successfully. To address these issues, the government drafted the new *Policy* and Bill to provide new ways to deal with the existing tenure security challenges.

To a large extent, the current landholding system in South Africa still reflects the effects of the practices, policies and laws that prevailed during the apartheid era.⁹ The racially-based land policies and laws led to insecurity, landlessness and poverty, especially in rural areas. In this regard, the three key elements of the land reform programme were developed as an initiative designed to redress the injustices of forced removals and the denial of access to land.¹⁰ Overall, the land reform programme is designed to foster national reconciliation and stability; to underpin economic growth; to improve household welfare; and to alleviate poverty.¹¹

The thesis deals with the multi-faceted land reform programme, which was embarked on by the government since 1994, with specific reference to the land tenure reform programme. The tenure reform process is focused on two separate objectives.¹² The first objective is to address the state of land administration in communal areas, while the second objective is to improve tenure security of farm dwellers living on white-owned commercial farms. The main focus of this thesis is to look at the second objective of tenure reform, that is, tenure security on white-owned commercial farmland.¹³

⁹ Pienaar JM & Kamkuemah A "Farm land and tenure security: New policy and legislative developments" (2011) 22 *Stellenbosch Law Review* 724-741 at 726.

¹⁰ Republic of South Africa, Department of Land Affairs *White paper on the South African land policy* (1997).

¹¹ Republic of South Africa, Department of Land Affairs *White paper on the South African land policy* (1997) V.

¹² Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 34.

¹³ Farmland refers to a portion or portions of agricultural land as defined as such in the Subdivision of Agricultural Land Act 70 of 1970. See also section 1 of the Extension of Security of Tenure Act 62 of 1997.

This thesis is premised on the viewpoint that tenure insecurity on farmland continues unabated despite the enactment of tenure security legislation that aims to give effect to tenure reform, as mandated in sections 25(6) and 25(9) of the Constitution. The purpose of this research is to explore the inherent challenges associated with tenure security on farmland. These challenges include, but are not limited, to tenure insecurity; overlapping land rights; lack of legal assistance; vulnerability of women and children; and unlawful evictions. This implies that farm dwellers continue to have weak land rights, regardless of the fact that their rights derive from the post-1996 tenure reform legislation. These statutory rights compete against the rights of land owners, but many of these occupiers are unaware of the nature of their rights. In many instances, effective enforcement of their rights is difficult or impossible. Consequently, they face significant obstacles in enforcing their rights through the legal system. In this context, the focus of the thesis is on the implementation and enforcement of relevant tenure reform legislation as well as the policy framework that informs legislative developments, in light of the constitutional right to legally secure tenure and international standards.

Throughout this thesis, the concept of tenure security is analysed with a focus on the challenges faced by farm dwellers on farmland. When assessing tenure security in relation to farmland, the position of both the farm owner and farm dwellers is relevant. The research highlights the importance of tenure security on farmland and shows how farm dwellers can enforce their rights. Secure tenure mainly guarantees production; food security; legal protection against forced removals; and equitable access to land.¹⁴ Most farm dwellers have insecure tenure and this has implications for their livelihood. Therefore, attention is drawn to the role of the state in addressing the conflict between farm owners and farm dwellers and how an equitable balance can be reached. This is essential to determine what security of tenure on farmland entails as well as to assess the farm owners' perspective on tenure reform. Clarifying these aspects contributes to the understanding of the ambit of the government's tenure reform initiatives. Accordingly, investigating tenure reform assists in

¹⁴ Chenwi L *Evictions in South Africa: Relevant international and national standards* (2008) at 8. See also Ghezae N *Natural resource tenure: A crucial aspect of poverty reduction and human rights* (2009) at 38.

identifying the underlying rights that need to be secured for previously disadvantaged groups.

1 2 Research questions, aims and hypotheses

The central issue in this research is the persistence of the inherent challenges affecting farm dwellers with reference to tenure security reforms on farmland. In other words, the main question is, what is the cause of the continued existence of insecurity on farmland and how can it be addressed? To address this central issue, the thesis sets out to investigate four inter-related aspects.

Firstly, it examines whether the existing tenure reform initiatives are in line with the constitutional imperatives. In other words, it seeks to examine whether ESTA and LTA give effect to section 25(6), read with section 25(9) of the Constitution. Accordingly, this research aspect is investigated with specific reference to tenure security legislation, namely ESTA and LTA, in view of the question whether the acts introduce adequate approaches to the landholding system in trying to reverse the injustices caused by the apartheid era. This is based on the understanding that the Constitution provides a framework within which tenure rights can be evaluated and understood. The Constitution encompasses a range of socio-economic rights¹⁵ entrenched in the Bill of Rights, which includes the promotion of legally secure tenure rights for previously disadvantaged persons¹⁶ and the right to have access to adequate housing.¹⁷ The preamble of the Constitution empowers and obliges the state to provide adequate measures that would improve the quality of life for all people and this ensures equal protection under the law.

Secondly, the thesis assesses whether the existing tenure security legislation is adequate to ensure tenure security for farm dwellers. The aim of tenure security legislation, particularly ESTA and LTA is, *inter alia*, to give farm dwellers secure

¹⁵ The socio-economic rights enabling land reform start with section 25(4) of the Constitution, which provides that the public interest will 'include the nation's commitment to land reform'. A list of socio-economic rights is also stated in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 19.

¹⁶ Section 25(6) of the Constitution of the Republic of South Africa 1996.

¹⁷ Section 26(1) of the Constitution of the Republic of South Africa 1996.

tenure rights and to deal with matters connected therewith. This second aspect is premised on the basis that the tenure reform programme has failed to reach the aims it set out to achieve since the policies and laws that were supposed to secure tenure for farm dwellers and labour tenants have failed to create a legal framework in which these occupiers can occupy land with secure rights. The hypothesis is that the failure to provide adequate tenure rights for farm dwellers results from the inherent and other related problems with the laws. Firstly, the legislation itself is poorly formulated and inadequate and secondly, the legislation is not implemented properly or at all. The aim in this regard is to investigate possible measures that can be implemented to improve tenure security on farmland to address these failures.

Thirdly, the challenges faced by farm dwellers are explored to assess whether the government and relevant role players are doing enough to ensure the improvement of tenure security on farmland. In this context, the thesis takes into account policy and corrective legislative measures to consider how these measures impact on the continued existence of tenure security.

Fourthly, the thesis investigates whether there are viable and suitable solutions to the challenges associated with the tenure security system on farmland. The aim is to identify ways in which maximum enforcement of the current tenure reform measures can be achieved. This is in line with the assumption that to circumvent the failures in the current tenure reform legislation, either new legislation should be enacted or existing measures should be amended to ensure the strengthening and protection of tenure rights. As a result, throughout the thesis, various suggestions are made on how to further the achievement of tenure security on farmland.

The key aspects of the research question set out above are addressed using various methodologies. An overview of the historical background of the landholding system in South Africa is provided, mainly to establish the need for the implementation of land tenure reform in the post-apartheid era. An analysis of section 25 of the Constitution is undertaken to assess tenure security in the constitutional context. In addition, an analysis of policy documents and legislation is made to establish

whether the right to security of tenure for farm dwellers is being strengthened and protected by these policies and laws. Furthermore, the research considers case law that deals with substantive matters involving farm dwellers, such as denial of burial rights, evictions and the promotion of short and long-term tenure security. With regard to international standards, the focus is on the international instruments on tenure security and housing to determine the guiding principles that can assist in improving tenure security in South Africa. This provides a platform for a comparative analysis.

1 3 Overview of substantive chapters

The thesis concentrates on the relationship between farm dwellers and farm owners in assessing tenure security on farmland. This research is confined to the period from the 1990s to date. This period is chosen because land reform was initiated in 1991 when new land laws and policies were first put in place in order to reform the landholding system. As such, tenure reform measures should be examined throughout its process of implementation, taking into account constitutional imperatives and policy and legislative measures to determine whether the intended goals of the land reform programme, in particular tenure reform, have been achieved.

The thesis is divided into six chapters, including this introductory chapter, which provides an insight into the research problem and an overview of the thesis and its objectives. This is followed by chapter two, which discusses the constitutional framework on tenure reform, highlighting the legal basis of tenure security and other provisions in the Constitution, including section 26, that have an impact on tenure security. It starts off by giving an account of the impact of the colonial and apartheid practices and laws on the landholding system and overlapping systems of land tenure and land rights. The historical overview provides an understanding of the origins of the current tenure security challenges on farmland. It also underlines the need for tenure reform in post-apartheid South Africa. The chapter further looks at the development of the overall land reform programme, but with particular emphasis on tenure reform in relation to farmland, and outlines the most important aspects of

tenure security. It highlights the fact that tenure security principles are embedded in the Constitution. Furthermore, guiding principles on tenure security reform are drawn from the relevant international law instruments that recognise and protect the right to tenure security. International law instruments discussed in this chapter give an indication that the right to housing is essential for the promotion and improvement of tenure security.¹⁸ Nevertheless, since the focus of this research is on tenure security, a detailed analysis of the right to housing falls outside the scope of this research.

Having established the reasons for the need to improve and increase tenure security on farmland, with reference to the historical overview and the constitutional and international framework regarding tenure reform in chapter two, the purpose of chapter three is to give an overview of the land reform policy and its development in post-apartheid South Africa. This takes place in light of various relevant policy documents to determine the policy aspects that impact on tenure security on farmland.

Chapter three examines the four dimensions inherent in various policy documents, namely the constitutional imperatives; the content of the policy; implementation issues; and whether legislation has been promulgated to give effect to the policy objectives. In this context, chapter three provides an analysis of the relevant policy documents to assess the four dimensions found in policy documents, in light of the inherent challenges associated with the tenure security system on farmland.

In this regard, chapter three discusses the development and implementation of tenure reform policies in South Africa, with particular focus on policy relating to tenure security on farmland. Throughout the process of formulating policy, the government committed itself to people's rights to choose their own form of tenure system. Apart from various policy documents aimed at tenure security, the 1997 *White paper* emerged to set out or to address the need for tenure security for all South Africans living in insecure arrangements as a result of the past discriminatory

¹⁸ The International Covenant on Economic, Social and Cultural Rights 16 December 1966 concluded and entered into force on 3 January 1976, 993 UNTS 3.

laws. A set of fundamental principles is provided by the 1997 *White paper* to guide the development of tenure reform.

With regard to farm dwellers' rights, the policy-makers' attention has been on tenure rights in particular. Arguably, even though the policy measures had a great impact on the previously disadvantaged groups of society, tenure reform remains problematic because of the many challenges and problems highlighted in this chapter. Chapter three further evaluates whether the policy measures are effective in ensuring legally secure tenure for farm dwellers.

In light of the overarching policy framework dealing with tenure reform, as set out in chapter three, the main purpose of chapter four is to provide an analysis of the consequent statutory measures that had been introduced in view of the policy framework, with particular emphasis on ESTA and LTA. These measures are discussed and analysed in detail as they were specifically promulgated to improve and strengthen tenure security of farm dwellers. The aim is to identify the tenure reform regulatory and statutory framework to demonstrate the challenges and successes of the land tenure reform programme on farmland.

Chapter four starts by giving a general overview of the tenure reform legislation. It establishes that the tenure reform legislative measures that were promulgated to strengthen farm dwellers' tenure rights include measures that upgrade tenure rights;¹⁹ transform existing land rights or introduce new tenure rights;²⁰ offer an interim protection of tenure rights;²¹ and prescribe the procedure for lawful evictions.²² The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) is mentioned but not fully discussed in this thesis, since it is not primarily aimed at tenure reform. PIE applies in respect of all land throughout South

¹⁹ The Upgrading of Land Rights Act 112 of 1991.

²⁰ The Communal Land Rights Act 11 of 2004.

²¹ The Interim Protection of Informal Land Rights Act 31 of 1996.

²² The Land Reform (Labour Tenants) Act 3 of 1996 and the Extension of Security of Tenure Act 62 of 1997.

Africa,²³ including farmland. However, PIE aims to regulate the eviction of unlawful occupiers²⁴ from land and this excludes a person who is an occupier in terms of ESTA. ESTA mainly applies to persons who occupy land with the consent of the landowner,²⁵ while PIE is concerned with the general problem of occupation without consent. In this regard, the protective provisions of PIE will only apply to farm dwellers who are unlawful occupiers at the time eviction proceedings are lodged.

In line with the broader objectives of this thesis, chapter four gives an evaluation of ESTA and LTA. In this regard, the greatest part of the chapter gives an exposition of the shortcomings that are associated with ESTA and LTA. Furthermore, an evaluation of tenure security legislation in the constitutional framework is provided to bring out the intended constitutional balance between protecting existing property rights and benefiting farm dwellers.

It is argued in this chapter that government agencies should put in place measures that enable the strengthening of tenure security on farmland to give effect to farm dwellers' housing and other fundamental rights. In this light, there is also a need to investigate the potential of amending the existing tenure reform legislation or the implementation of new tenure reform legislation to fulfil the objectives of the Constitution.²⁶

The enactment of ESTA and LTA sought to give effect to section 25(6) of the Constitution in relation to farm dwellers. However, over the years the two acts remained in a perpetual state of review because of the unintended consequences resulting from, *inter alia*, the poor implementation of the two acts.²⁷ This necessitated

²³ See section 2 of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998.

²⁴ According to section 1 of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998, an unlawful occupier refers to a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land.

²⁵ See section 1(1) of the Extension of Security of Tenure Act 62 of 1997.

²⁶ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997).

²⁷ Cousins B & Hall R "Rights without illusions: The potential and limits of rights-based approaches to securing land tenure in rural South Africa" (2011) *PLAAS Working paper 18* par 2.2 <www.plaas.org.za/pubs/wp/WP18Cousins-Hall052011.pdf> (accessed 03-06-2011). See also the

state intervention and regulatory measures to improve tenure conditions on farmland. Chapter five follows the policy and statutory analysis in the previous chapters with an assessment of the need to further increase tenure security on farmland. It scrutinises recent interventions made by the government, which entails measures to address the land administration system; to develop tenure reform in line with rural development; to improve tenure security on farmland; and to assist farm dwellers to acquire legal representation. The chapter discusses the new developments in the land tenure reform sector, paying particular attention to the *Draft tenure security policy* and Draft Land Tenure Security Bill published in the course of 2010. The constitutional implications of the Bill are analysed in line with the methodology established in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance (FNB)*²⁸ to determine the extent of the limitation imposed on farm owners' property rights by the Draft Bill and whether the regulatory measures provided in the Bill are justifiable.

The post-1994 period has seen a number of developments within the tenure reform sector. Since apartheid practices were abolished, a number of policies and laws have been implemented to restore the imbalances that resulted from the past discriminatory laws. ESTA and LTA sought to introduce significant changes in the land tenure system. Most importantly, the acts were meant to facilitate legally secure tenure for farm dwellers. However, apparently these acts have failed in achieving their respective goals, thereby underlining the necessity to investigate the reasons for its failure. In this light, it is clear that further developments within the tenure reform sector are necessary to provide for adequate tenure security. However, it remains to be seen whether the new *Policy* and the Bill will adequately rectify the existing challenges on farmland. As such, it is therefore essential to set out and explain these new developments and their likely impact on tenure reform.

Memorandum on the objects of the Land Tenure Security Bill (2010) 1 in Republic of South Africa, Department of Rural Development and Land Reform Draft Land Tenure Security Bill [B-2010] GN 1118 in GG 33894 of 24-12-2010.

²⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 para 46.

Chapter six will summarise the conclusions on all chapters; bring together the conclusion on the reasons why insecurity persists; and state the conclusions on whether the new *Policy* and Bill can solve the problem. Finally, possible recommendations that can assist in achieving tenure security on farmland are provided.

Chapter two:

Tenure reform in the constitutional context

2 1 Introduction

Tenure security in South Africa refers to the rights associated with the way in which people can own or occupy land.¹ According to Mahomed,² the rights associated with tenure security ensure that people are not unlawfully or arbitrarily evicted from their homes without due regard to the procedural and substantive elements as well as to relevant circumstances.³ Accordingly, tenure insecurity implies that land holders face the risk of losing their interests in land.⁴ The main causes and also a reflection of the reality of tenure insecurity experienced in South Africa, include unclear, informal or overlapping land rights, limited women's land rights as well as vulnerability of farm workers and labour tenants.⁵ These factors in turn have a direct impact on the future sustainability of households for farm dwellers in general. Also, depending on the circumstances, these factors can lead to homelessness, food insecurity and increased poverty.⁶

¹ Mahomed A *Understanding land tenure law: Commentary and legislation* (2009) 28.

² Mahomed A *Understanding land tenure law: Commentary and legislation* (2009) 28.

³ Section 26(3) of the Constitution of the Republic of South Africa 1996; Van Heerden CM & Boraine A "Reading procedure and substance into the basic rights of security of tenure" (2006) 39 *De Jure* 319-353 at 320. *Jaftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) deals with the protection of a debtor's right to housing and not to be evicted from his home without an order of court made after considering all the relevant circumstances. See also *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 34.

⁴ Mutangadura G "The incidence of land tenure insecurity in Southern Africa: Policy implications for sustaining development" (2007) 31 *Natural Resources Forum* 176-187 at 177. Tshitereke C "There shall be houses, security and comfort" 2009 *Institute of Security Studies Papers* 1-16 at 12-13 argues that without security of tenure, families live with constant fear of losing their homes.

⁵ Mutangadura G "The incidence of land tenure insecurity in Southern Africa: Policy implications for sustaining development" (2007) 31 *Natural Resources Forum* 176-187 at 180 argues that tenure rights are often overlapping and confusing because original right holders were forced to accommodate thousands of refugees from apartheid. In some cases the occupiers were told by state officials that they had been awarded the land as compensation and in other cases they became informal tenants without clear contractual agreements since there was no administrative support for the system of land rights. Van der Walt AJ "Property rights and hierarchies of power: An evaluation of land reform policy in South Africa" (1999) 64 *Koers* 259-294 at 275 also argues that the overlapping of conflicting layers of land-use claims and rights was caused by forced removals and resettlements in already occupied areas during the apartheid era, which is a major source of insecurity of tenure in rural areas.

⁶ The consequences of tenure insecurity are further discussed in section 2 5 2 of this chapter.

To comprehend the problems caused by insecure tenure, it is essential to understand the concept of land tenure. Land tenure embodies an overarching system of rights and institutions that govern access to, use of and control over land.⁷ Furthermore, land tenure can be defined as the terms and conditions under which land is held, used and transacted.⁸ Although this chapter deals to some extent with aspects relating to access to land and housing, the main focus is on tenure security. In this context, the matters linked with farm dwellers that work and live on farmland are especially highlighted.

Prior to 1991, the South African land holding system was racially based. Millions of black South Africans were removed from their land and homes, which *inter alia* had the overall effect of weakening their rights and interests in land. For the majority of South Africans in rural areas, the historical dispossession of land has resulted in high levels of insecure tenure, especially on white-owned commercial farmland.⁹ Farm dwellers continue to live on farmland without rights in the land and in constant fear of being evicted because of insecure tenure.

The South African Constitution is a rights-based document that promises security of tenure to previously disadvantaged citizens, including farm dwellers and places a duty on the state, as enunciated in section 25(6) of the Constitution to enact legislation providing for tenure that is legally secure. To ensure security of tenure for this vulnerable group, the government adopted a rights-based approach. In terms of this approach, the regulation of tenure reform should move away from a permit-based approach towards a system of legally enforceable rights in land, which is consistent with the constitutional commitment to advance basic human rights.¹⁰

⁷ Mutangadura G "The incidence of land tenure insecurity in Southern Africa: Policy implications for sustaining development" (2007) 31 *Natural Resources Forum* 176-187 at 176.

⁸ Hall R "Evaluating land and agrarian reform in South Africa: Farm tenure" (2003) *PLAAS Occasional Paper No 3* 1-42 at 3 <<http://www.plaas.org.za/pubs/downloads/LREP3.pdf>> (accessed 17-10-2011).

⁹ Lahiff E & Rugege S "A critical assessment of land redistribution policy in the light of the *Grootboom* judgment" (2002) 6 *Law, Democracy and Development* 279-319 at 279.

¹⁰ See Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 60; Claassens A "Land rights and local decision-making processes: Proposals for tenure reform" in Cousins B (ed) *At the crossroads: Land and agrarian reform in South Africa into the 21st century* (2000) 129-142 at 129.

Since the promulgation of the South African Constitution,¹¹ greater emphasis is placed on the influence that international law can have in the South African legal system. Therefore, the South African government and courts are under an obligation to uphold and enforce international standards.¹² The Constitution also recognises the injustices of the past and, as provided for by the preamble, aims to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.”¹³ Furthermore, the Constitution protects existing property rights against interference, while also providing for land reform in particular.¹⁴

Secure tenure is internationally recognised as a condition for human well-being.¹⁵ In this respect, the South African Constitution mandates the government to implement policies and laws that would provide for a tenure reform programme.¹⁶ In a broad perspective, international law provides standards that aim to ensure that the rights of land occupiers are protected and that vulnerable groups are not further subjected to arbitrary evictions. As a result, the South African approach to tenure security is informed by international standards, even though it still functions within the ambit of South African realities.

¹¹ The Constitution of the Republic of South Africa 1996.

¹² Sections 39(1)(b) and 233 of the Constitution require the courts to consider international law when interpreting the Bill of Rights so as to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

¹³ The preamble of the Constitution of the Republic of South Africa 1996.

¹⁴ Section 25(1)-(3) of the Constitution guarantees the protection of existing property rights against unconstitutional interference, while section 25(5)-(9) provides a guarantee of state action to promote land and other related reforms. There is an inherent tension in the property clause between protecting existing rights and the reform of property interests. These seemingly contradictory provisions are interpreted purposively to ensure that both the protective and the reformative purposes of section 25 are respected, protected and promoted. Section 25(4) is an interpretative provision that applies to both sections 25(1)-(3) and 25(5)-(9). See Van der Walt AJ *Constitutional property law* (3rd ed 2011) 12-16.

¹⁵ The International Covenant on Economic, Social and Cultural Rights 16 December 1966 concluded and entered into force on 3 January 1976, 993 UNTS 3; Committee on Economic, Social and Cultural Rights, General Comment 4 *The right to adequate housing*, 13 December 1991 UN Doc E/1992/23; Hoffman S & Morgan J “A ‘rights-based approach’ to security of tenure entitlements in social housing” (2009) paper presented at the European Network for Housing Research, Prague conference 28 June – 1 July 2009 1-18 at 1<www.soc.cas.cz/download/919/paper-hoffman-12.pdf> (accessed 19-09-2011).

¹⁶ Section 25(9) of the Constitution states that Parliament must enact the legislation referred to in section 25(6). See Van der Walt AJ *Constitutional property law* (3rd ed 2011) 21.

This chapter is concerned with the foundational, constitutional rights associated with tenure security. It examines the relevant international instruments that recognise the right to tenure security before reviewing the constitutional mandate to improve tenure security in South Africa. In this discussion, cognisance is taken of the property clause that embodies the constitutional framework for land reform in general and tenure security in particular.

The first part of this chapter focuses on the background of the South African land reform programme, which explains the need for tenure reform, particularly in relation to farmland. This part of the chapter commences by setting out the legal basis for land reform, followed by an exposition of the importance of land reform in general for the majority of South Africans in the context of the apartheid history. Subsequently, this part of the chapter discusses the inclusion of the property clause in the Constitution and the tension between protecting existing property rights and promoting land reform. Within the context of tenure reform a brief discussion of the restitution and redistribution programmes is necessary to enhance understanding of the links that exist between the three land reform programmes. As such, a brief outline of the redistribution and restitution programme is provided. Although the three land reform programmes are distinct, their main aim is similar, namely to redress the historical injustices in land holding.

After the South African position has been set out, the focus shifts to the international paradigm in which the South African land reform programme operates. This discussion focuses on the international instruments that recognise the right to and protection of tenure security. In addition to providing an international framework, it may also assist in determining how tenure rights in South Africa can be further strengthened and protected.

The third part proceeds with a discussion of tenure reform in the constitutional framework. Firstly, it discusses the right to tenure security as mandated by section 25(6) of the Constitution. This is followed by a brief discussion of the legislation that was implemented to give effect to tenure security. This discussion is aimed at only

providing an exposition of legislative measures and is not an in-depth analysis of provisions, as an analysis of statutory tenure reform measures follows in chapter 4 below. Furthermore, this part of the chapter gives an overview of other provisions in the Constitution, such as section 26, which also has a bearing on tenure reform. Having discussed the constitutional provisions that give effect to tenure reform, it is essential to provide an in-depth discussion of the tenure reform programme and set out its aims and the mechanisms employed to achieve these aims.

The final part of this chapter focuses on farmland in the South African context. It highlights the significance of having tenure security for farm dwellers. The views of farm owners in this context are also set out briefly to explore whether a balance of rights between farm owners and farm dwellers can be achieved. In light of the above, the chapter will conclude by highlighting that tenure insecurity on farmland continues unabated despite section 25(6) of the Constitution, which mandates the government to provide for legally secure tenure to previously disadvantaged persons.

2 2 The South African land reform programme

2 2 1 Historical overview

The land reform programme plays a central part in post-apartheid reconstruction and development. Land reform emerged, *inter alia*, from efforts to redress the legacy of colonialism, which resulted in racial and unequal distribution of land and ownership.¹⁷ The scope of the current problem of homelessness and tenure insecurity in South Africa, particularly on farmland, can historically be linked to the three main pillars of apartheid. According to Pienaar,¹⁸ these pillars include the promulgation and strict enforcement of influx control measures; legislative measures regulating group areas on the basis of race; and measures regulating the unlawful occupation of land or squatting. The first two pillars are the most relevant to this study in determining the reasons why apartheid and discrimination contributed to homelessness and lack of

¹⁷ The land dispossessions led to extreme land shortages and insecurity of tenure for much of the black population. See Barry M “Now another thing must happen: *Richtersveld* and the dilemmas of land reform in post-apartheid South Africa” (2004) 20 *South African Journal on Human Rights* 354-382 at 357-359.

¹⁸ Pienaar JM “‘Unlawful occupier’ in perspective: History, legislation and case law” in Mostert H & De Waal MJ (eds) *Essays in honour of CG van der Merwe* (2011) 309-329 at 310.

tenure security in rural areas, specifically on white-owned commercial farmland. The third pillar, relating to the measures regulating the unlawful occupation of land or squatting, mainly applied in urban areas.¹⁹

A complex and intricate system of primary and subordinate legislation of the apartheid era contributed to homelessness and lack of tenure security.²⁰ It is estimated that until 1991 about 17 000 statutory measures, in the form of statutes, proclamations and regulations, were issued to segregate land occupation according to racial diversity.²¹ The process of racial segregation of land control gained momentum with the commencement of the so-called “Land Acts”, although this process had already begun under the colonial authorities.²² Accordingly, a series of apartheid land laws were premised on the concept of territorial segregation and division of land rights based on race and cultural background.²³

The Black Land Act 27 of 1913²⁴ combined the territorial segregation practices and made provision for “scheduled areas”, where occupation was restricted to black persons only.²⁵ The Black Land Act was succeeded by the Development Trust and Land Act 18 of 1936, which provided for “released areas”, also restricted to black

¹⁹ In urban areas, segregation was driven by the Natives (Urban Areas) Act 21 of 1923; the Natives (Urban Areas) Consolidation Act 25 of 1945; and the Black Communities Development Act 4 of 1984. These acts prescribed the measures and conditions on which temporary land rights could be obtained. See Pienaar JM “Unlawful occupier’ in perspective: History, legislation and case law” in Mostert H & De Waal MJ (eds) *Essays in honour of CG van der Merwe* (2011) 309-329 at 311; Van der Walt AJ & Pienaar GJ *Introduction to the law of property* (6th ed 2009) 319.

²⁰ Van der Merwe CG & Pienaar JM “Land reform in South Africa” in Jackson P & Wilde DC *The reform of property law* (1997) 334-380 at 334.

²¹ Van der Merwe CG & Pienaar JM “Land reform in South Africa” in Jackson P & Wilde DC *The reform of property law* (1997) 334-380 at 334; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman’s The law of property* (5th ed 2006) 585; Du Plessis WJ “African indigenous land rights in a private ownership paradigm” (2011) 14 *Potchefstroom Electronic Law Journal* 44-69 at 45 fn 2.

²² Jaichand V *Restitution of land rights: A workbook* (1997) 1-4; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman’s The law of property* (5th ed 2006) 585.

²³ Such as the Black Land Act 27 of 1913; the Development Trust and Land Act 18 of 1936; the Group Areas Act 36 of 1966; and the Black Communities Development Act 4 of 1984. See Budlender G & Latsky J “Unravelling rights to land in rural race zones” in De Klerk M (ed) *A harvest of discontent: The land question in South Africa* (1991) 115-137 at 116-117; Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 19-33; Van der Walt AJ “Towards the development of post-apartheid land law: An exploratory survey” (1990) 23 *De Jure* 1-45.

²⁴ The Act was previously referred to as the Natives Land Act 27 of 1913.

²⁵ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman’s The law of property* (5th ed 2006) 585; Du Plessis WJ “African indigenous land rights in a private ownership paradigm” (2011) 14 *Potchefstroom Electronic Law Journal* 44-69 at 45.

persons.²⁶ Other developments included the Group Areas Act 36 of 1966, which regulated the acquisition, alienation and occupational rights to land. A series of legislative measures, including the Promotion of Bantu Self-Government Act 46 of 1959 and the Bantu Homelands Citizens Act 26 of 1970 led to the realization of four independent national states, the so-called homelands encompassing the Transkei, Bophuthatswana, Ciskei and Venda,²⁷ together with six-self-governing territories, namely KwaNdebele, QwaQwa, Gazankulu, Lebowa, KwaZulu-Natal and KaNgwane.²⁸ The segregation of people and the division of land was made possible by legislation authorizing the forced removal and the eviction of the people from their land.²⁹ As a consequence, black persons were confined to the reserves, ruling out any further acquisition of land by black persons in the white areas.³⁰

Various means by which black persons accessed and owned land were destroyed by apartheid legislation,³¹ steadily reducing the status of most share-croppers to tenant farmers and eventually to wage labourers.³² The majority of black persons in urban and rural areas were driven off of their land by the enabling legislation.³³ This amounted to labour tenants having to accept wage labour as they could not engage in their own production. The effect was to prohibit share-cropping³⁴ arrangements

²⁶ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 585; Du Plessis WJ "African indigenous land rights in a private ownership paradigm" (2011) 14 *Potchefstroom Electronic Law Journal* 44-69 at 45.

²⁷ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 585.

²⁸ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 585.

²⁹ Du Plessis WJ "African indigenous land rights in a private ownership paradigm" (2011) 14 *Potchefstroom Electronic Law Journal* 44-69 at 45; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 586.

³⁰ Currie I & De Waal J *The bill of rights handbook* (5th ed 2005) 564. Barnes G "Land and tenure reform in post-apartheid South Africa: An international perspective" (1993) 22 *South African Journal of Surveying and Mapping* 145-152 at 146 argues that the Natives Land Act 27 of 1913 created a system of land tenure that deprived the majority of the South African population of the ability to own land.

³¹ Before the passing of the Natives Land Act 27 of 1913, black persons acquired land through leasing, share-cropping and contracts of sale or other contracts in respect of the acquisition of land outside reserves. See Currie I & De Waal J *The bill of rights handbook* (5th ed 2005) 564; Ramutsindela M "Property rights, land tenure and racial discourses" (2010) *GeoJournal* 1-11 at 4.

³² Binswanger HP & Deininger K "South African land policy: The legacy of history and current options" in Venter M & Anderson M (eds) *Land, property rights and the new Constitution* (1993) 94-120 at 105.

³³ See the Prevention of Illegal Squatting Act 52 of 1951 and the Bantu Laws Amendment Act 42 of 1964.

³⁴ Share-cropping involved verbal agreements between white landlords and black tenants to share the harvests in proportion to the economic inputs they made to the farms. See Ramutsindela M "Property

and all other forms of tenancy. In the 1960s, the apartheid government began to eliminate the labour tenant system throughout South Africa.³⁵ Consequently, black farmers were gradually removed from white-owned commercial farmland, leaving them with no access and rights to land, resulting in the present day problems being faced by many farm dwellers.³⁶

In light of these developments, black persons were essentially allowed to remain on white-owned land for the provision of labour. Furthermore, apartheid laws and policies contributed to the series of evictions that South Africa is still facing today.³⁷ Therefore, long-term consequences of the apartheid land laws were that black land rights were made weak and insecure because they were treated as unrecognised and unprotected property relations.³⁸ On the other hand, white land rights were strong, defined and protected.³⁹

Land reform in South Africa began in the 1990s with the publication of the *White paper on land reform* (1991),⁴⁰ which embodied a strong emphasis on amending the wrongs of the past. The 1991 *White paper* called for the abolition of all racially discriminatory land laws. During this period, various other laws were promulgated in a bid to remove the racially discriminatory land system.⁴¹ However, no meaningful changes emerged in 1991 as the legislation and policies merely repealed the racially-based land laws but did not fully address the injustices of racially-based land

rights, land tenure and racial discourses" (2010) *GeoJournal* 1-11 at 4; Currie I & De Waal J *The bill of rights handbook* (5th ed 2005) 564.

³⁵ Yates T "Justice delayed but not denied: The Constitutional Court delivers on the promise of transformation" (2007) 1-3 at 1 <http://nkuzi.org.za/images/stories/esr_article_popela_sept2007.pdf> (accessed 03-05-2011).

³⁶ Yates T "Justice delayed but not denied: The Constitutional Court delivers on the promise of transformation" (2007) 1-3 at 1-2 <http://nkuzi.org.za/images/stories/esr_article_popela_sept2007.pdf> (accessed 03-05-2011).

³⁷ Chenwi L *Evictions in South Africa: Relevant international and national standards* (2008) 2.

³⁸ Van der Walt AJ "Property rights and hierarchies of power: A critical evaluation of land reform policy in South Africa" (1999) 64 *Koers* 259-294 at 262-263.

³⁹ Van der Walt AJ "Property rights and hierarchies of power: A critical evaluation of land reform policy in South Africa" (1999) 64 *Koers* 259-294 at 262.

⁴⁰ Republic of South Africa, Department of Land Affairs *White paper on South African land reform* (1991).

⁴¹ The laws included the Abolition of Racially Based Land Measures Act 108 of 1991, which deracialised the land holding system by repealing race-based legislation; the Upgrading of Land Tenure Rights Act 112 of 1991; and the Less Formal Township Establishment Act 113 of 1991. See also Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 249-266.

dispossessions; the inequitable distribution of land; tenure insecurity; and unsustainable land use.⁴² Accordingly, to address the legacy of land dispossessions and racially-based land laws, the government first rescinded the discriminatory legislation and thereafter introduced a programme of land reform.⁴³

Since 1991, significant land reform initiatives have been designed and implemented, initially in terms of the Interim Constitution.⁴⁴ After the democratic elections of 1994, land reform took a central position in the Reconstruction and Development Programme (RDP).⁴⁵ In terms of the RDP, land reform was envisaged as the central and driving force for rural development in general.⁴⁶ The RDP recognises that access to land and secure rights in land is the most basic need for rural dwellers as they were previously denied access to land by apartheid laws and policies. The RDP⁴⁷ and the *White paper on reconstruction and development* (1994)⁴⁸ both underline the need for an integrated socio-economic policy framework that would eradicate apartheid policies and laws and build a democratic future.

In this regard, the 1996 Constitution places a clear responsibility on the state to carry out land and related reforms and grants specific rights to victims of past discriminatory land practices.⁴⁹ Land reform is a significant and central aspect in South Africa's quest to reduce poverty and to promote equity, economic growth and

⁴² See Pienaar JM "Farm workers: Extending security of tenure in terms of recent legislation" (1998) 13 *South African Public Law* 422-437 at 424.

⁴³ The land reform programmes aim to address inequality in relation to land access, insecure tenure and restitution claims. See section 25(5)-(7) of the Constitution of the Republic of South Africa 1996.

⁴⁴ The Interim Constitution of the Republic of South Africa Act 200 of 1993.

⁴⁵ See African National Congress *The reconstruction and development programme: A policy framework* (1994); Ngqangweni SS "Land reform and related issues in South Africa" in Munyuki-Hungwe M (ed) *Land reform and tenure in Southern Africa: Current practices, alternatives and prospects* (2004) 135-152 at 136.

⁴⁶ In 1994, the RDP was adopted and it set out the principles guiding the land reform policy. These guiding principles gave birth to the *White paper on South African land policy* (1997). See also Van der Westhuizen C "Land reform: Lessons from a South-Eastern Free State experience" (2005) 34 *SA Tydskrif vir Landbouvoorsigtig* 1-18 at 2.

⁴⁷ African National Congress *The reconstruction and development programme: A policy framework* (1994) para 1.1.1.

⁴⁸ Republic of South Africa *White paper on reconstruction and development* (1994).

⁴⁹ Section 25(8) of the Constitution. See Lahiff E "With what land rights? Tenure arrangements and support" in Hall R (ed) *Another countryside? Policy options for land and agrarian reform in South Africa* (2009) 93-117 at 93.

sustainable development.⁵⁰ Accordingly, the primary aim of land reform includes accommodating historically disadvantaged persons who have been denied access to land and have been disinherited of their land rights.⁵¹

The constitutional imperative for land reform embodied in section 25 of the 1996 Constitution was subsequently supported by the 1997 *White paper on South African land policy*.⁵² The *White paper* of 1997 sets out the vision and implementation strategy for South Africa's land policy, which is aimed at *inter alia* promoting reconciliation and stability. The South African land policy is also aimed at contributing to economic growth and poverty alleviation. To achieve these goals, the land reform programme has three main pillars, which are set out in section 25(5), 25(6) and 25(7) of the Constitution respectively. Firstly, section 25(5) places a general duty upon the state to take reasonable legislative and other steps, within its available resources, to foster conditions which promote equitable access to land. Secondly, section 25(6) places a specific duty upon the state to ensure security of tenure for previously disadvantaged persons. Thirdly, section 25(7) entitles a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices to restitution or equitable redress.⁵³

Van der Walt⁵⁴ argues that these constitutional provisions for land reform are important to the overall structure of the property clause, as they reflect the importance of reform and transformation in South Africa. It is important at this stage to set out the seemingly contradictory relationship between the land reform programme and the property clause. In this regard, the relationship between the

⁵⁰ This is encapsulated in section 25(5)-(7) of the Constitution of the Republic of South Africa 1996.

⁵¹ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997). The *White paper* outlines the main objectives of the land reform programme: to redress the injustices of apartheid; foster national reconciliation and stability; underpin economic growth; and improve household welfare and alleviate poverty. See also Mahomed N "Greening land and agrarian reform: A case for sustainable agriculture" in Cousins B (ed) *At the crossroads: Land and agrarian reform in South Africa into the 21st century* (2000) 163-175 at 164.

⁵² Du Plessis W & Pienaar J "The more things change, the more they stay the same: The story of communal land tenure in South Africa" (2010) 16 *Fundamina: A Journal of Legal History* 73-114 at 82.

⁵³ The three areas of land reform are distinguished in the African National Congress *The reconstruction and development programme: A policy framework* (1994) para 2.4 and also articulated in the Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997). See also Van der Walt AJ *Constitutional property law* (3rd ed 2011) 21.

⁵⁴ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 21.

protection of existing property rights and the promotion of land reform is discussed in the following section.

2 2 2 Land reform and the property clause: Section 25

As pointed out earlier, the Constitution sets out broad guidelines for a new land dispensation, based on equality before the law and the redress of historical injustices.⁵⁵ The basis for the inclusion of the property clause is provided for in the Interim Constitution.⁵⁶ Van der Walt⁵⁷ observes that the 1993 property clause indicates a new phase in the recognition, development and protection of property rights. He argues further that the new dispensation affects both the protection of existing land rights and the possibility and legitimacy of land reform programmes.⁵⁸

The inclusion of the property clause in the South African Interim Constitution ignited considerable controversy.⁵⁹ This led to fears that the property clause would either entrench existing property rights too strongly or that it would undermine existing property rights for the sake of land reform.⁶⁰ Nonetheless, in the end the drafters agreed on a property clause that protects existing rights while allowing the state to

⁵⁵ Section 25(4)-(9) of the Constitution of the Republic of South Africa 1996.

⁵⁶ The Interim Constitution of the Republic of South Africa Act 200 of 1993.

⁵⁷ Van der Walt AJ *The constitutional property clause: A comparative analysis of section 25 of the South African Constitution of 1996* (1997) 153 sets out the two major innovations that were introduced by the Interim Constitution.

⁵⁸ Van der Walt AJ *The constitutional property clause: A comparative analysis of section 25 of the South African Constitution of 1996* (1997) 153; Currie I & De Waal J *The bill of rights handbook* (5th ed 2005) 533; *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 49.

⁵⁹ The introduction of a property clause in the South African Constitution generated speculation and debate amongst politicians and academics during the early 1990s. See Chaskalson M "The property clause: Section 28 of the Constitution" (1994) 10 *South African Journal on Human Rights* 131-139 at 131; Chaskalson M "Stumbling towards section 28: Negotiations over the protection of property rights in the Interim Constitution" (1995) 11 *South African Journal on Human Rights* 222-240 at 223-224; Van der Walt AJ "An overview of developments in constitutional property law since the introduction of the property clause in 1993" (2004) 19 *South African Public Law* 46-89 at 47-48; Marco-Thyse S "Land rights in South Africa: A mechanism against poverty?" (2006) 49 *Development* 133-137 at 134 <<http://www.palgrave-journals.com/development/journal/v49/n3/pdf/1100290a.pdf>> (accessed 05-09-2011).

⁶⁰ See Van der Walt AJ *The Constitutional property clause: A comparative analysis of section 25 of the South African Constitution of 1996* (1997) 7-8; Jaichand V *Restitution of land rights: A workbook* (1997) 35-36.

embark on a land reform programme that had, amongst other challenges, to deal with the situation of farm dwellers.⁶¹

The Interim Constitution provided for the constitutional protection of property rights in section 28 and made provision in sections 121-123 for a restitution programme.⁶² Unlike its predecessor, the 1996 Constitution combined the protection of existing property rights and the government's commitment to land reform in a single property clause. As a result, the new property clause is more comprehensive and explicitly provides for land reform initiatives.⁶³

The first part of the property clause in the 1996 Constitution deals with protecting existing rights to property,⁶⁴ while the rest of the clause provides a clear constitutional authority for land reform and other related measures.⁶⁵ The government's commitment to land reform is elaborated on in section 25(4) of the Constitution, which provides that property is not limited to land and that the "public interest" includes the possibility of utilising land for land reform purposes.⁶⁶ It can be argued that once the government achieves the intended outcome envisaged in section 25(4) of the Constitution, it will have an impact on all the three components of land reform programme and it might afford the majority of South Africans access to land and secure tenure rights in such land.

⁶¹ See Lahiff E & Rugege S "A critical assessment of land redistribution policy in the light of the *Grootboom* judgment" (2002) 6 *Law, Democracy and Development* 279-319 at 280; Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 30.

⁶² See Van der Walt AJ *Constitutional property law* (2nd ed 2005) 287 for a discussion of the land reform process (the chapter on land reform was left out of the 3rd ed 2011).

⁶³ See Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 289-303; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 591.

⁶⁴ See section 25(1)-(3) of the Constitution, which deals with existing property rights and the state's power to expropriate property. See also Van der Walt AJ *Constitutional property law* (3rd ed 2011) 16-19.

⁶⁵ Section 25(4)-(9) of the Constitution contains provisions that make land reform and its initiatives legitimate. See also the Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) para 3.1.5.

⁶⁶ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 593.

Furthermore, section 25(8) of the Constitution ensures that no provision of section 25 may impede the state from taking legislative and other measures to achieve land, water and other related reforms to redress the results of past racial discrimination, provided that such measures are in accordance with the limitation requirements in section 36. Tellingly, section 25(8) of the Constitution is endowed with the final substantive provision of the property clause that seeks to clarify the position regarding the tension between the basic protection of property and the Constitution's reform agenda.⁶⁷ Therefore, the provisions in section 25(4)-(9) emphasise that under the Constitution, the protection of property as an individual right is not absolute but subject to societal considerations, as well as the international and constitutional imperative to reform.⁶⁸

Although the introduction of the constitutional property clause was an attempt to introduce transformative measures in the whole land control system, strengthening weak tenure rights will have an impact on current landowners' property rights. As a result, the tenure reform initiatives that protect and strengthen farm dwellers' tenure rights should be implemented in a justifiable manner, as required by section 25(1),⁶⁹ read with section 36(1) of the Constitution.⁷⁰ Furthermore, since the Constitution⁷¹ legitimises the promotion of land reform for a public interest, it entails that the rights of property owners are not absolute.⁷² The anti-eviction measures introduced by the Constitution⁷³ and statutory laws⁷⁴ restrict landowners' entitlements to exclude others

⁶⁷ Carey Miller DL & Pope A "South African land reform" (2000) 44 *Journal of African Law* 167-194 at 169.

⁶⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 49.

⁶⁹ Section 25(1) of the Constitution protects property against arbitrary deprivation. See Van der Walt AJ *Constitutional property law* (3rd ed 2011) 237-240; Currie I & De Waal J *The bill of rights handbook* (5th ed 2005) 561-562.

⁷⁰ Section 36 (1) is the general limitation clause, which provides for the limitation of all rights in the Bill of Rights in terms of law of general application and to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. See Liebenberg S *Socio-economic rights - Adjudication under a transformative Constitution* (2010) 93-97.

⁷¹ Section 25(4) of the Constitution.

⁷² Pienaar G "The registration of fragmented use-rights as a development tool in rural areas" in *Constitution and law IV: Developments in the contemporary constitutional state* (2001) 107-125 at 109-110.

⁷³ The legal basis for the anti-eviction measures is provided for in section 26(3) of the Constitution, which provides that no one may be evicted from their home without a court order, after considering all the relevant circumstances and that no law shall permit arbitrary evictions.

⁷⁴ Various land reform laws were enacted in accordance with section 26(3) of the Constitution: the Land Reform (Labour Tenants) Act 3 of 1996; the Extension of Security of Tenure Act 62 of 1997; the

from their property. These anti-eviction measures strengthen weak tenure rights of farm dwellers by safeguarding them against arbitrary evictions.

2 2 3 *Brief outline of the land reform programme*

Tenure reform, land redistribution and land restitution are all part of the broader land reform programme, although each programme is aimed at addressing certain specific problems of racial land dispossession. Additionally, the three components of the land reform programme are complimentary parts that facilitate social transformation.⁷⁵ Tenure reform is intended to remove the discriminatory imbalance between secure, strong and clearly administered individual or co-ownership property rights and the insecure and ill-administered landownership system that prevailed in the former homelands and on white-owned commercial farms in relation to farm dwellers.⁷⁶ The following discussion outlines the land redistribution and restitution programmes with specific views on the role that these programmes play in the land holding system. Tenure reform, which is the main focus in this chapter, will be dealt with in particular in section 2 4 3 below.

The land redistribution programme is a wide, all-encompassing programme aimed at rectifying the inequalities in land distribution patterns.⁷⁷ The programme targets mostly those who do not have land or who do not qualify for tenure reform or for the restitution programme, to assist them to purchase land on a willing buyer/willing seller basis.⁷⁸ One of the main aims of this programme is to broaden access to land, especially for previously disadvantaged persons and to provide for the necessary

Interim Protection of Informal Land Rights Act 31 of 1996; and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. For a discussion of the anti-eviction measures in the Constitution and land reform laws, see Van der Walt AJ "Exclusivity of ownership, security of tenure, and eviction orders: A model to evaluate South African land reform legislation" 2002 *Tydskrif vir die Suid-Afrikaanse Reg* 254-289 at 263-266.

⁷⁵ The three land reform programmes attempt to achieve the balance between the protection of existing property rights on the one hand and constitutional guarantees of land reform on the other hand.

⁷⁶ Drimie S "Implementing land reform at Impendle state land: Policy and local politics in KwaZulu-Natal" (2003) 22 *Politeia* 38-66 at 40-41. Tenure reform is discussed in section 2 4 3 below.

⁷⁷ Van der Walt AJ "Property rights and hierarchies of power: An evaluation of land reform policy in South Africa" (1999) 64 *Koers* 259-294 at 275.

⁷⁸ De Villiers B *Land reform: Issues and challenges - A comparative overview of experiences in Zimbabwe, Namibia, South Africa and Australia* (2003) 50; Drimie S "Implementing land reform at Impendle state land: Policy and local politics in Kwazulu-Natal" (2003) 22 *Politeia* 38-66 at 40.

mechanisms to enable such access.⁷⁹ Having access to land will improve the livelihoods and quality of life of the landless, in particular farm dwellers.⁸⁰

Land redistribution is authorised by section 25(5) of the Constitution⁸¹ and the provision imposes a positive obligation on the state to enhance accessibility of land. A central piece of legislation to regulate the redistribution process is the Provision of Land and Assistance Act.⁸² Land redistribution has also been implemented through the Land Redistribution for Agricultural Development (LRAD) programme. The main aim of LRAD is to facilitate the transfer of agricultural land to landless people who have the resources and experience to become farmers.⁸³ This is done by way of allocating grants to suitable applicants.

In *Government of the Republic of South Africa and Others v Grootboom and Others*,⁸⁴ the Constitutional Court identified access to land as a socio-economic right and urged those in need of land to call on the state to make land available to them. The Constitutional Court further stated that the right to housing should be considered in the context of the cluster of socio-economic rights enshrined in the Constitution. These socio-economic rights entrench the right of access to land, access to adequate housing, healthcare, food, water and social security.⁸⁵ Although the case was primarily about the right of access to adequate housing, the Constitutional Court

⁷⁹ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 593-594; Makopi S "Awards to provide security of tenure and comparable redress" in Cousins B (ed) *At the crossroads: Land and agrarian reform in South Africa into the 21st century* (2000) 143-150 at 144.

⁸⁰ Cliffe L "Land reform in South Africa" (2000) 27 *Review of African Political Economy* 273-286 at 274.

⁸¹ Section 25(5) of the Constitution stipulates that the state must take reasonable legislative and other measures, within its available resources, to foster conditions that would enable citizens to gain access to land on an equitable basis.

⁸² Act 126 of 1993.

⁸³ Moseley WG "Neoliberal agricultural policy versus agrarian justice: Farm workers and land redistribution in South Africa's Western Cape Province" (2007) 89 *South African Geographical Journal* 4-13 at 4-5.

⁸⁴ 2001 (1) SA 46 (CC) para 19. For a discussion of the *Grootboom* judgment, see Roux T "Understanding *Grootboom* - A response to Cass R Sunstein" (2002) 12 *Constitutional Forum* 41-51; Wesson M "*Grootboom* and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court" (2004) 20 *South African Journal on Human Rights* 284-308; McMurray I & Jansen van Rensburg L "The utilisation of the right of children to shelter to alleviate poverty in South Africa" (2004) 1 *Potchefstroom Electronic Law Journal* 1-29.

⁸⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 19. See also De Vos P "The right to housing" in Brand D & Heyns C (eds) *Socio-economic rights in South Africa* (2005) 85-106 at 88.

also addressed the right of access to land. The judgment recognises that the availability of land is central to the realisation of the right of access to adequate housing with secure tenure.⁸⁶ Importantly, the Constitution does not expressly define access to land as a right, although the Constitutional Court has interpreted it as a right.⁸⁷

However, land remains the major source of livelihood for most people living on farmland. The government has a clear duty to ensure equitable land distribution among all South Africans to redress the injustices of the past racially discriminatory land laws and practices.⁸⁸

In terms of the restitution programme, individuals or communities who were dispossessed of their land after 19 June 1913 by means of racially discriminatory legislation or practices without proper compensation had the right to submit claims, either for the return of the land or for compensation. Section 25(7) of the Constitution prescribes the constitutional authority for the restitution process. The mechanism for the restitution process was created under the Restitution of Land Rights Act (Restitution Act),⁸⁹ which aims to provide redress to victims of racial land dispossession and therefore contributes to equitable redistribution of land in South Africa. The Act also makes provision for the establishment of the Commission on Restitution of Land Rights and the Land Claims Court to administer and adjudicate restitution claims.⁹⁰

The restitution process must be implemented in such a way as to support the process of reconciliation, reconstruction and development. It is furthermore in line

⁸⁶ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 35. See also Van Wyk J “The relationship (or not) between rights of access to land and housing: De-linking land from its components” (2005) 16 *Stellenbosch Law Review* 466-487.

⁸⁷ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 35; Rugege S “Land reform in South Africa: An overview” (2004) 32 *International Journal of Legal Information* 1-28 at 8.

⁸⁸ This is emphasised in section 25(4)-(5) of the Constitution of the Republic of South Africa 1996.

⁸⁹ Act 22 of 1994.

⁹⁰ Hall R “Land and agrarian reform in South Africa: A status report 2004” (2004) *PLAAS Research Paper No 20* 1-69 at 12 <<http://www.plaas.org.za/pubs/downloads/RR20%20Ruth%20Repro.pdf>> (accessed 06-09-2011).

with the over-arching consideration of fairness and justice for individuals, communities and the country as a whole.⁹¹ Whilst the restitution process deals with those individuals or communities who lost their land, tenure reform includes persons who experience tenure insecurity, while in occupation of land. However, both the tenure reform and restitution programmes are mandated by the Constitution and are closely linked, to such an extent that combined processes culminate in secure tenure for the claimants.⁹²

The discussion above illustrates the South African position with respect to land reform in general. The following discussion provides an overview of the nature and role of tenure security reforms within the broader land reform programme. This will be followed by an analysis of applicable international instruments to derive the general principles on tenure security and how these principles can be applied in South African law to strengthen tenure security of various occupiers, in particular farm dwellers.

2 2 4 *Nature and role of tenure security reforms: An overview*

The underlying nature of tenure security reforms is to ensure legally validated systems of land holding and to give effect to the constitutional imperative in section 25(6). Tenure security reforms involve issues relating to interests in land and the forms that these interests should take. Within the broader land reform programme, tenure security reforms are particularly aimed at devising secure forms of land tenure; resolving tenure disputes; and providing alternatives for people who are displaced in the process.⁹³

⁹¹ See Mbao MLM "Undoing the injustices of the past: Restitution of rights in land in post-apartheid South Africa, with special reference to the North-West Province" (2002) 27 *Journal for Juridical Science* 88-114 at 94-95; Van der Westhuizen C "Land reform: Lessons from South-Eastern Free State experience" (2005) 34 *SA Tydskrif vir Landbouvoeligting* 1-18 at 3; Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 6.

⁹² Makopi S "Awards to provide security of tenure and comparable redress" in Cousins B (ed) *At the crossroad: Land and agrarian reform in South Africa into the 21st century* (2000) 143-150 at 144.

⁹³ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) VI.

Tenure security reforms play a major role in post-apartheid South Africa. The reforms are intended to deal with various challenges created in the past that impede the process of improving tenure security. In both urban and rural areas, black South Africans experience highly conditional land tenure arrangements, which restrict tenure security and investment opportunities.⁹⁴ Tenure security reforms are therefore meant to benefit land occupiers by upgrading their land tenure arrangements to make them stronger.

Reforms aimed at improving tenure security are mainly derived from policy and legislative measures.⁹⁵ The policy measures set out ideas and guiding principles that are given effect to by legislation. Legislative measures encompass various ways of reforming tenure security with the intention of ensuring tenure security to occupiers of land. As is illustrated in chapter 4,⁹⁶ the reforms include those that upgrade weak tenure rights; create new forms of tenure; transform existing tenure rights; offer protection to occupiers on an interim basis; and prescribe procedures for allowing lawful evictions.

With regard to farm dwellers, tenure security reforms regulate their rights on farmland, ensuring them protection. This is necessary to bring some form of certainty in respect of tenure policy and laws governing land rights. However, tenure security reforms are not only intended to extend secure tenure to farm dwellers but also to strengthen tenure systems in communal areas, by changing practices that have resulted in the erosion of tenure rights. In addition, these reforms endeavour to bring government services to communities that do not have legally secure tenure rights.⁹⁷

Furthermore, these reforms attempt to resolve the overlapping and competing tenure rights of various occupiers and landowners to accommodate the mutual interests of both parties. This brings about reconciliation and harmony in both rural and urban

⁹⁴ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) VIII.

⁹⁵ See the discussion in chapters 3 and 4 below.

⁹⁶ See chapter 4 at 4.2.

⁹⁷ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) VIII.

areas in relation to tenure systems and may also result in improved settlement and tenure conditions.⁹⁸

2 3 An international law perspective on tenure reform

The rights-based approach on which tenure security in South Africa is based underlines the importance of human rights and their universality. Accordingly, security of tenure is essential for the majority of South Africans for the protection and advancement of their human rights. To determine the guiding principles that can be attributed to tenure security in South Africa, it is necessary to consider international law. The South African government has signed and approved some of the international instruments⁹⁹ and is under an obligation to apply the recognised standards. Such an obligation will further ensure the promotion of values recognised in international law by the government of South Africa.

Section 39(1) of the Constitution recognises the importance of international law in the interpretation of the Bill of Rights.¹⁰⁰ Section 39(1), together with section 233 of the Constitution requires a court when interpreting legislation to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.¹⁰¹ Accordingly, these provisions ensure that the courts will be guided by international law when interpreting the Bill of Rights and legislation.

Article 17 of the Universal Declaration of Human Rights (UDHR)¹⁰² is an international human rights provision relating to property rights.¹⁰³ This provision, together with the provision in article 25(1) of UDHR, can be interpreted as a mechanism that

⁹⁸ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) XIII.

⁹⁹ The relevant international instruments are discussed below.

¹⁰⁰ Section 39(1)(b) of the Constitution provides that a court, tribunal or forum must consider international law when interpreting the Bill of Rights.

¹⁰¹ Dugard J *International law: A South African perspective* (4th ed 2011) 347-348.

¹⁰² Adopted by the General Assembly of the United Nations, Resolution 217 A (III) of 10 December 1948 UN Doc A/810. Article 17(1) of the UDHR states that no one shall be arbitrarily deprived of his or her property.

¹⁰³ Zirker OL "This land is my land: The evolution of property rights and land reform in South Africa" (2003) 18 *Connecticut Journal of International Law* 621-641 at 631-632.

safeguards farm dwellers' tenure rights and that mandates state parties to ensure housing and land rights for farm dwellers.¹⁰⁴ However, the property provision in the UDHR is not binding and was not included in the subsequent International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁰⁵ and the International Covenant on Civil and Political Rights (ICCPR),¹⁰⁶ which gave content and binding effect to the rights in the UDHR.¹⁰⁷ Although article 17 of the UDHR contains the provision relating to property, this provision is not of particular importance in assisting with the interpretation of the property clause because the right to property in international law is not clearly defined and was excluded from the binding international instruments.¹⁰⁸

Conversely, a number of international instruments provide for rights protecting people's homes and security of tenure.¹⁰⁹ The ICESCR¹¹⁰ recognises various substantive rights, *inter alia* the right to adequate housing, which includes the right to have security of tenure.¹¹¹ It also guarantees legal protection against evictions without a court order. To some extent, the South African Constitution echoes the same spirit as the ICESCR since it provides for protection against arbitrary evictions.¹¹²

¹⁰⁴ Article 25(1) of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations, Resolution 217 A (III) of 10 December 1948 UN Doc A/810, provides for the right to adequate living standards, which includes housing with secure tenure.

¹⁰⁵ Concluded on 16 December 1966 and entered into force on 3 January 1976, 993 UNTS 3.

¹⁰⁶ Concluded on 16 December 1966 and entered into force on 23 March 1976, 999 UNTS 171.

¹⁰⁷ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 82-83. See also Slade BV *International law in the interpretation of sections 25 and 26 of the Constitution* (LLM thesis Stellenbosch University 2010) ch 3 for a discussion of the role of international law in interpreting the right to property.

¹⁰⁸ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 82-83.

¹⁰⁹ Such as the International Covenant on Economic, Social and Cultural Rights 16 December 1966 concluded and entered into force on 3 January 1976, 993 UNTS 3. The ICESCR is seen as one of the most important international instruments relating to socio-economic rights. See Dugard J *International law: A South African perspective* (4th ed 2011) 330-331; Liebenberg S *Socio-economic rights - Adjudication under a transformative Constitution* (2010) 101-118; Currie I & De Waal J *The bill of rights handbook* (5th ed 2005) 574. The South African government is a signatory to the Covenant, but has not ratified it yet.

¹¹⁰ The International Covenant on Economic, Social and Cultural Rights 16 December 1966 concluded and entered into force on 3 January 1976, 993 UNTS 3.

¹¹¹ Article 11(1) of the ICESCR states: "The state parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions."

¹¹² Section 26(3) of the Constitution. See Currie I & De Waal J *The bill of rights handbook* (5th ed 2005) 572-576 for a discussion of the state's obligation to protect socio-economic rights.

General Comment No 4, which gives content on the right to housing in article 11(1) of the ICESCR, states that security of tenure may take many forms. This is not limited to ownership, but includes the right to possess a degree of security of tenure, which guarantees legal protection against forced eviction, harassment and other threats.¹¹³ The right to housing should not be interpreted in a narrow sense, but instead the right should be interpreted as an entitlement to live somewhere in security, peace and dignity.¹¹⁴ The manner in which the Committee on Economic, Social and Cultural Rights paraphrases article 11(1) of the ICESCR provides guiding principles against evictions and a platform for the protection of tenure rights.¹¹⁵ In this regard, legal security of tenure in South Africa must bring about complete tenure security that guarantees legal protection against any kind of unlawful or arbitrary eviction to all persons, particularly farm dwellers.¹¹⁶

For farm owners and dwellers, land is a vital component of a particular way of life as it can be linked with the right to housing and livelihood. South African case law shows the conflict between the rights of private landowners and occupiers' strengthened tenure rights as enacted in the tenure reform legislation mandated by the Constitution.¹¹⁷ However, international law makes provision for guidelines to deal with such conflicting rights. The United Nations Declaration on Social Progress and Development¹¹⁸ recognises the social function of property, including land, and calls

¹¹³ Committee on Economic, Social and Cultural Rights, General Comment 4 *The right to adequate housing*, 13 December 1991 UN Doc E/1992/23. See also Van Heerden CM & Boraine A "Reading procedure and substance into the basic right to security of tenure" (2006) 39 *De Jure* 319-353 at 325.

¹¹⁴ See Leckie S *Housing, land, and property restitution rights of refugees and displaced persons: Laws, cases, and materials* (2007) 161; Leckie S "The UN Committee on Economic, Social and Cultural Rights and the right to adequate housing: Towards an appropriate approach" (1989) 11 *Human Rights Quarterly* 522-560 at 548-549.

¹¹⁵ The Committee on Economic, Social and Cultural Rights, General Comment 4 *The right to adequate housing*, 13 December 1991 UN Doc E/1992/23 elaborated on the states' responsibilities under article 11(1) of the ICESCR and identified that the key entitlements making up the right to adequate housing are accessibility, affordability and security of tenure. State parties are as a result enjoined to protect vulnerable groups against forced evictions. See Hoffman S & Morgan J "A 'rights-based approach' to security of tenure entitlements in social housing" (2009) paper presented at the European Network for Housing Research Prague conference 28 June - 1 July 2009 1-18 at 3 <www.soc.cas.cz/download/919/paper-hoffman-12.pdf> (accessed 19-09-2011).

¹¹⁶ De Vos P "The right to housing" in Brand D & Heyns C (eds) *Socio-economic rights in South Africa* (2005) 85-106 at 102.

¹¹⁷ For example, see *Nhlabathi and Others v Fick* [2003] 2 All SA 323 (LCC). The case dealt with the rights of farm labourers in terms of section 6(2)(dA) of ESTA to bury a deceased family member on the land on which they reside.

¹¹⁸ The United Nations Declaration on Social Progress and Development adopted by the General Assembly Resolution 2542 (XXIV) of 11 December 1969. Article 6 provides that social progress and

for forms of land ownership that ensure equal rights to property for all. The Declaration of Principles and Programme of Action of the World Conference on Agrarian Reform and Rural Development,¹¹⁹ also known as “The Peasants’ Charter”, is concerned with the reorganisation of land tenure. It advocates the imposition of land ceilings in countries where substantial reorganisation of land tenure and land redistribution to landless persons and small holders are needed as part of a rural development strategy.¹²⁰

The Indigenous and Tribal Peoples Convention¹²¹ is a key instrument in the evolution of the notion of land rights in international law. This Convention recognises the special relationship between indigenous people and their lands, while it also requires states to adopt special measures of protection on their behalf. Additionally, it provides safeguards against the arbitrary removal of indigenous people from their traditional lands.¹²² Despite the international standards and national laws that advocate the protection and strengthening of tenure rights, the violations that farm dwellers currently encounter in South Africa remain complex and profound. A large number of farm dwellers are still victims of forced removals from farms where they used to work and reside.¹²³

development require participation of all members of society in productive and socially useful labour. Furthermore, article 6 provides that social progress and development should be established in conformity with human rights and fundamental freedoms. Article 6 gives recognition to the principles of justice; social function of land; forms of ownership of land; and the means of production which preclude any kind of exploitation of man. Additionally, article 6 provides that social progress and development should ensure equal rights to property for all and create conditions leading to genuine equality among people. See also articles 17(d) and 18(b) of the United Nations Declaration on Social Progress and Development 1969.

¹¹⁹ The Peasants’ Charter: The Declaration of Principles and Programme of Action of the World Conference on Agrarian Reform and Rural Development 1979 concluded and entered into force in 1981.

¹²⁰ See article II(A)(i) of the Peasants’ Charter: The Declaration of Principles and Programme of Action of the World Conference on Agrarian Reform and Rural Development 1979 concluded and entered into force in 1981.

¹²¹ Convention Concerning Tribal and Indigenous Peoples in Independent Countries 1989 concluded and entered into force on 5 September 1991, ILO 169.

¹²² See articles 14(1)-(3), 15(1) and 16(1) of the Convention Concerning Tribal and Indigenous Peoples in Independent Countries 1989; Quane H “The rights of indigenous peoples and the development process” (2005) 27 *Human Rights Quarterly* 652-682 at 677.

¹²³ Lahiff E & S Rugege “A critical assessment of land redistribution policy in the light of the *Grootboom* judgment” (2002) 6 *Law, Democracy and Development* 279-319 at 280.

Special attention should also be given to the rights of women to land. It is an undisputed fact that land ownership and land tenure systems have historically discriminated against women.¹²⁴ Even though the South African Constitution entrenches the principle of non-discrimination in section 9, women continue to be subjected to unfair discrimination under land tenure systems.¹²⁵ Internationally, women's land rights are recognised in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹²⁶ CEDAW can be interpreted as protecting the rights of women to have access to property, agrarian development initiatives as well as adequate tenure security. The government has to guard against such discrimination and has to impose measures that will upgrade women's tenure rights to afford women equal protection under the law.

In conclusion, international law requires state parties to implement land reforms that make provision for the strengthening of tenure security. As indicated above, section 25(6) of the Constitution embodies the same provision and obliges the government to enact legislation to give effect to the right to have legally secure tenure. However, international guarantees on tenure security cannot materialise in South Africa without the enactment of laws that aim to provide efficient tenure reform mechanisms. The constitutional provision that gives effect to the enactment of the tenure reform laws is discussed below.

¹²⁴ On women's property rights see Walker C "Elusive equality: Women, property rights and land reform in South Africa" (2009) 25 *South African Journal on Human Rights* 467-490 at 486-487; Chenwi L & McLean K "A woman's home is her castle? Poor women and housing inadequacy in South Africa" (2009) 25 *South African Journal on Human Rights* 517-545 at 529; Claassens A & Mnisi S "Rural women redefining land rights in the context of living customary law" (2009) 25 *South African Journal on Human Rights* 491-516 at 492-494; *Bhe v Magistrate Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC); *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC).

¹²⁵ Bohler-Muller N & Daniels B "Does the Communal Land Rights Act really protect the rights of rural women to own land?" 2009 *Africagrowth Agenda* 26-27 at 26.

¹²⁶ Article 14(2)(g)-(h) the Convention on the Elimination of All Forms of Discrimination against Women 18 December 1979 concluded and entered into force on 3 September 1981, 1249 UNTS 13 stipulates that state parties are obliged to take appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on the basis of equality for men and women, that they participate in and benefit from rural development. It also aims to ensure that women's rights to land are equally treated.

2 4 Constitutional and statutory framework for tenure reform

2 4 1 *Constitutional endorsement of tenure security: Section 25(6)*

Examination of the constitutional framework for tenure reform in South Africa shows that the Constitution recognises the injustices of the past and aims to create social stability, equity and economic growth. A social and economic basis for reform is manifested in the Constitution, which sets standards and guides the government in the steps it should take to improve tenure security in South Africa.¹²⁷ Since the focus of this chapter is on tenure reform in particular, section 25(6) of the Constitution, which embodies this imperative, is discussed first. A discussion of the other provisions in the Constitution that are relevant to tenure security as well as the tenure reform programme follows thereafter.

The government has a constitutional mandate to enact legislation and to formulate any other reasonable measures to advance and create equitable access to land¹²⁸ and also to ensure that rights and interests in land are legally secure. Section 25(6) makes provision for improved tenure security. To determine the imperative for tenure reform, reference should be made to section 25(6), which provides 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, to either tenure that is legally secure or comparable redress. Section 25(6) should be read with section 25(9), which provides that Parliament must enact the legislation referred to in subsection (6). Section 25(6) of the Constitution requires that insecure tenure of land that is insecure due to past discriminatory laws and practices should be reformed or transformed into legally secure tenure by the use of relevant legislation. Accordingly, section 25(6) of the Constitution, ensures legally secure tenure to previously disadvantaged persons by placing an obligation on the legislature to enact laws to give effect to this right.

The government's attempt to provide tenure security for farm dwellers has been made possible through the enactment of legislation that gives effect to the

¹²⁷ The preamble of the Constitution of the Republic of South Africa 1996.

¹²⁸ See section 25(5) of the Constitution of the Republic of South Africa 1996.

constitutional mandate.¹²⁹ The legislation promulgated in accordance with section 25(6), read with section 25(9) of the Constitution, largely makes provision for tenure security in rural areas.¹³⁰ Seemingly, the practical extent of the right to security of tenure as envisaged by section 25(6) is determined by legislation.¹³¹ Importantly, keeping in mind that tenure relates to the manner in which land is held or controlled, section 25(6) is aimed at introducing some new forms of tenure, which results in the amendment of existing weak forms of tenure.

In light of the constitutional imperative, the government enacted the following laws to facilitate tenure reform for previously disadvantaged groups: the Communal Property Associations Act,¹³² which provides a legal mechanism to accommodate the needs of those who wish to hold land collectively; the Interim Protection of Informal Land Rights Act,¹³³ which is a holding measure that protects the interests of people who have informal rights to land pending long-term reform measures; the Land Reform (Labour Tenants) Act (LTA),¹³⁴ which provides security of tenure for labour tenants; and the Extension of Security of Tenure Act (ESTA),¹³⁵ which provides security of tenure for occupiers residing on rural or peri-urban land. The above-mentioned tenure reform legislation is designed to secure land rights of various occupiers. Additionally, tenure reform legislation creates and develops a transformative land tenure system in rural areas that improves land rights of occupiers.¹³⁶ Therefore, effective implementation of tenure legislation will upgrade tenure security for farm dwellers and provide long-term security of tenure on farmland.

¹²⁹ The government aims to deal with the legacy of the past and comply with its constitutional obligations by enacting a number of laws to provide improved conditions for farm dwellers. Some of the key laws affecting farm dwellers are the Development Facilitation Act 67 of 1995; the Land Reform (Labour Tenants) Act 3 of 1996; the Interim Protection of Informal Land Rights Act 31 of 1996; and the Extension of Security of Tenure Act 62 of 1997.

¹³⁰ Section 2(1)(a)-(b) of the Extension of Security of Tenure Act 62 of 1997 is applicable to all people living on rural or peri-urban farmland.

¹³¹ Currie I & De Waal J *The bill of rights handbook* (5th ed 2005) 564.

¹³² Act 28 of 1996.

¹³³ Act 31 of 1996.

¹³⁴ Act 3 of 1996.

¹³⁵ Act 62 of 1997.

¹³⁶ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 64, concurs with this view where it states that tenure reform delivers security of tenure in diverse ways such as awarding independent land rights, secure lease agreements and through protection against eviction.

For example, ESTA¹³⁷ provides for tenure security in two ways. Firstly, it aids occupiers living on rural or peri-urban land to obtain stronger rights to the land that they occupy.¹³⁸ This will facilitate the acquisition of either ownership or other land rights in the designated areas.¹³⁹ Secondly, it lays down procedures that owners or persons in charge of rural or peri-urban land must follow before they can evict these occupiers.¹⁴⁰ Significantly, ESTA reinforces the nature of land rights enjoyed by occupiers and secures those rights against arbitrary evictions.¹⁴¹

A *Draft tenure security policy* and Draft Land Tenure Security Bill were published in 2010¹⁴² and focus particularly on farmland, with a proposition of stronger tenure rights for farm dwellers.¹⁴³ These new developments have serious implications for ESTA and the LTA in that the Bill proposes to repeal the two acts and consolidate them into a single law. Recently, a *Green paper on land reform*¹⁴⁴ was published that intends to restructure the current tenure system into a single, coherent four-tier system of land tenure. The aim is to ensure that all South Africans, particularly black persons living in rural areas, have reasonable access to land with secure tenure rights. The discussion on the new developments in the tenure reform sector is dealt with in chapter 5.

¹³⁷ The Extension of Security of Act 62 of 1997. For a detailed discussion of the Act see Van der Walt AJ *Constitutional property law* (2nd ed 2005) 316-326 (the chapter on land reform was left out of the 3rd ed 2011); Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 492-515; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 608-619.

¹³⁸ ESTA facilitates long-term security of land tenure by way of subsidies for on-site and off-site developments. See section 4 of the Extension of Security of Tenure Act 62 of 1997. Section 1(1)(c) of ESTA defines off-site development as a development that provides the occupants with an independent tenure right on land owned by someone other than the owner of the land on which they reside immediately prior to such development. On the other hand, on-site development denotes a development which provides the occupants with an independent tenure right on land on which they reside or previously resided.

¹³⁹ Van der Walt AJ "Property rights and hierarchies of power: An evaluation of land reform policy in South Africa" (1999) 64 *Koers* 259-294 at 286.

¹⁴⁰ Cliffe L "Land reform in South Africa" (2000) 27 *Review of African Political Economy* 273-286 at 275.

¹⁴¹ Van der Walt AJ "Property rights and hierarchies of power: An evaluation of land reform policy in South Africa" (1999) 64 *Koers* 259-294 at 287.

¹⁴² Republic of South Africa, Department of Rural Development and Land Reform Draft Land Tenure Security Bill [B-2010] GN 1118 in GG 33894 of 24-12-2010.

¹⁴³ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010).

¹⁴⁴ Republic of South Africa, Department of Rural Development and Land Reform *Green paper on land reform* (2011).

2 4 2 *Other constitutional provisions relevant to tenure security*

Although tenure security is the focus of this chapter, it is also necessary to discuss other provisions in the Constitution that have an impact on tenure security. Certain provisions in the Bill of Rights are important to mention in this chapter as they could be useful in enforcing the right to tenure security. These provisions include the right to have access to adequate housing;¹⁴⁵ the right to equality;¹⁴⁶ the right to dignity;¹⁴⁷ and the right to life.¹⁴⁸

The right to have access to adequate housing is particularly important, since tenure security is an element of the right to housing. Conversely, the notion of tenure security is also significant when considering the right to adequate housing. It is essential to point out that in South Africa security of tenure on farmland is mainly linked to housing.¹⁴⁹ This implies that housing rights are important and should be protected. Accordingly, failure to provide adequate housing for farm dwellers also has an effect on their tenure security. Section 26 of the Constitution¹⁵⁰ is aimed at ensuring that everyone has access to adequate housing and the state must introduce and improve on measures that would give effect to this right. A negative right is expressly entrenched in section 26(3) of the Constitution, unqualified by considerations relating to the state's available resources, against arbitrary evictions and demolitions.¹⁵¹

¹⁴⁵ Section 26 (1) of the Constitution of the Republic of South Africa 1996.

¹⁴⁶ Section 9 of the Constitution of the Republic of South Africa 1996.

¹⁴⁷ Section 10 of the Constitution of the Republic of South Africa 1996.

¹⁴⁸ Section 11 of the Constitution of the Republic of South Africa 1996.

¹⁴⁹ Cousins B & Hall R "Rights without illusions: The potential and limits of rights-based approaches to securing land tenure in rural South Africa" (2011) *PLAAS Working paper 18* para 2 <www.plaas.org.za/pubs/wp/WP18Cousins-Hall052011.pdf> (accessed 03-06-2011).

¹⁵⁰ Section 26 places both positive as well as negative obligations on the state and all other persons to desist from action that would prevent or impair the right to access adequate housing. See Currie I & De Waal J *The bill of rights handbook* (5th ed 2005) 572-573; Van Heerden CM & Boraine A "Reading procedure and substance into the basic right of security of tenure" (2006) 39 *De Jure* 319-353 at 320; Maass S "Rental housing as adequate housing" (2011) 22 *Stellenbosch Law Review* 759-774 at 760.

¹⁵¹ Currie I & De Waal J *The bill of rights handbook* (5th ed 2005) 587; De Vos P "The right to housing" in Brand D & Heyns C (eds) *Socio-economic rights in South Africa* (2005) 85-106 at 92; *Jaftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) para 67; *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 88.

In terms of section 26(3) of the Constitution, the courts are mandated to consider all relevant circumstances before an eviction order is granted.¹⁵² For this reason, the court has to take into account farm dwellers' tenure security rights. Section 26(3) strengthens tenure rights of farm dwellers as it also plays a major role in enforcing housing rights and preventing unlawful evictions. The Prevention of Illegal Eviction from and Unlawful Occupation of Land (PIE)¹⁵³ was enacted to give effect to section 26(3). However, this Act is not relevant to this particular study since it has mainly been used in urban areas and on farms where occupiers have not had permission to occupy the land, as is required by ESTA.¹⁵⁴

The judgments in *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)*¹⁵⁵ and *Government of the Republic of South Africa and Others v Grootboom and Others*¹⁵⁶ have confirmed the duty of the state to respect people's right to a home and to implement programmes aimed at ensuring access to housing for all. The provision of housing for the majority of South Africans is a step further towards the recognition of tenure reforms that will ensure legally secure tenure for the various occupiers.

The above-mentioned constitutional provisions confirm what the government must do to uphold land reform programmes. Land tenure depicts a long history of racial barriers to land rights that led to the exclusion of persons and communities from acquiring secure land tenure.¹⁵⁷ If the government successfully implements tenure reform initiatives, this should result in the strengthening of farm dwellers' tenure rights. The aims and importance of the tenure reform programme are discussed below.

¹⁵² Currie I & De Waal J *The bill of rights handbook* (5th ed 2005) 587.

¹⁵³ Act 19 of 1998.

¹⁵⁴ ESTA is concerned with enhancing the security of tenure of persons who occupy rural land with consent, while PIE is directed towards the general problem of occupation without consent. As such, the benefits and protective measures in PIE only benefit occupiers who are unlawful occupiers at the time eviction proceedings are lodged.

¹⁵⁵ 2004 (6) SA 40 (SCA).

¹⁵⁶ 2001 (1) SA 46 (CC).

¹⁵⁷ Pienaar G "Aspects of land administration in the context of good governance" (2009) 12 *Potchefstroom Electronic Law Journal* 14-55 at 17; Carey Miller DL (with Pope A) *Land title in South Africa* (2000) at 241-245.

2 4 3 Tenure reform programme

Tenure reform is mandated by the Constitution¹⁵⁸ and is aimed at transforming the legal basis of land holding,¹⁵⁹ which is *inter alia* directed towards the implementation of social change.¹⁶⁰ Furthermore, tenure reform deals with the provision of legal forms of land holding, which can either be based on the process of restitution or redistribution or by way of upholding an existing form of land holding.¹⁶¹ This view affirms that restitution, redistribution and tenure reform processes are on some level inseparable. In fact, tenure reform also has relevance for persons who obtain land under the redistribution and restitution programmes.¹⁶²

Tenure reform has two separate components. The first intends to provide legally secure tenure for people living on communal or state land, while the second deals with securing the tenure rights of people living on other people's land, such as farm dwellers.¹⁶³ The latter component is relevant to this study. Tenure reform deals with people who currently use and occupy land. The objectives of the tenure reform programme, as described in the 1997 *White paper*, are to address the inequalities between owners and occupiers by formalising informal rights; to protect and strengthen existing rights of vulnerable occupiers; and setting in place restrictions on the removal of occupiers from the land they occupy.¹⁶⁴

¹⁵⁸ Section 25(6) of the Constitution of the Republic of South Africa 1996.

¹⁵⁹ Tenure reform will transform the legal basis of land holding by eradicating apartheid practices and introducing substantive tenure protection.

¹⁶⁰ Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 456. Additionally, in the South African context tenure reform refers to policies and laws that seek to strengthen the property rights of those who already occupy land under various relatively insecure forms of tenure. According to the Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) VI, land tenure reform is the most complex area of land reform because it aims to bring all people occupying land under a unitary, legally validated system of landholding. Consequently, the tenure reform process will develop secure forms of land tenure and help resolve tenure disputes.

¹⁶¹ Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 457.

¹⁶² See Lahiff E "Tenure arrangements and support for land rights in South Africa's land reform" in Hall R (ed) *Another countryside? Policy options for land and agrarian reform in South Africa* (2007) 1-40 at 6.

¹⁶³ Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 34.

¹⁶⁴ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 64. See Van der Walt AJ *Constitutional property law* (2nd ed 2005) 310 for a discussion of the tenure reform programme (the chapter on land reform was left out of the 3rd ed 2011).

The history of South Africa reveals that current tenure insecurity is the result of laws, policies and practices of the apartheid era.¹⁶⁵ Tenure reform aims to rectify some of the negative effects of apartheid as it strengthens existing tenure forms that were weakened by apartheid land laws and introduces new forms of tenure. The underlying premise is that the impact of the apartheid land laws¹⁶⁶ cannot be rectified by the mere abolition of apartheid land laws, by restitution or by improved access to land. Instead, the additional support of the tenure reform programme is needed.¹⁶⁷ The essence of the tenure reform process is to increase the value and security of existing land tenure rights. Various South African tenure reform laws serve this purpose by providing firm requirements and procedures that must be met before an occupier's rights may be terminated.¹⁶⁸ The tenure reform initiatives implemented to date depict the constitutional mandate on tenure reform in rural areas, particularly on farmland.

Tenure reform is intended to effect real rights for the rural and urban people through a rights-based approach that involves upgrading or formalising entire systems of land holding into legally enforceable rights to land.¹⁶⁹ According to Carey Miller and Pope, land tenure reform remains a process of reform under which land is held and

¹⁶⁵ Budlender G "The constitutional protection of property rights" in Budlender G, Latsky J & Roux T *Juta's new land law* (OS 1998) ch 1 1-75. Van der Walt AJ "Property rights and hierarchies of power: A critical evaluation of land reform policy in South Africa" (1999) 64 *Koers* 259-294 at 281 affirms this contention where he states that tenure reform is a process by which the land rights of people who have land or access to land are strengthened and secured. Furthermore, these land rights are usually insecure, either because of the way in which they have been acquired or because of past discriminatory laws. Van der Walt AJ *Constitutional property law* (2nd ed 2005) 309 (the chapter on land reform was left out of the 3rd ed 2011) argues that tenure reform is necessary because of the negative effects that apartheid land laws had on land rights in general. See section 2.2 above for a discussion of the background to the land reform programme.

¹⁶⁶ The Black Land Act 27 of 1913, the Prevention of Illegal Squatting Act 52 of 1951 and the Bantu Laws Amendment Act 42 of 1964.

¹⁶⁷ Van der Walt AJ *Constitutional property law* (2nd ed 2005) 309 (the chapter on land reform was left out of the 3rd ed 2011).

¹⁶⁸ Important for this study is the Extension of Security of Tenure Act 62 of 1997 and the Land Reform (Labour Tenants) Act 3 of 1996. The aim of LTA and ESTA is to enable occupiers to acquire rights to their own land, either on farms or off the farm. This would be made possible through the government's housing subsidy programme or through grants under the land reform policy.

¹⁶⁹ Drimie S "Implementing land reform at Impendle state land: Policy and local politics in Kwazulu-Natal" (2003) 22 *Politeia* 38-66 at 41; Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 60; Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 456, state that tenure reform introduces accessible new forms of tenure, which reflect a major shift from permit-based to rights-based approach.

acquired, as well as a process directed towards strengthening the legal rights basis of various forms of land holding.¹⁷⁰

The fundamental goal of tenure reform is to enhance people's existing but weak land rights by providing a legal basis for and protection of those rights and interests in land. Tenure reform is necessary to give recognition to the rights in land of vulnerable occupiers who were denied such rights by apartheid laws and as a result provide these occupiers with stronger tenure security rights.¹⁷¹ This is necessary in order to avoid the undue suffering and social instability caused by unfair evictions and landlessness.¹⁷²

2 5 Tenure security on farmland

2 5 1 Introduction

The preceding section generally focused on tenure reform and the mechanisms that are provided to ensure the success of tenure reform. In this part, the recognition of tenure security on farmland is explored. It is necessary to consider tenure reform on farmland to determine the importance of tenure security for farm dwellers and how the programme affects farm owners.

As mentioned previously, tenure reform with respect to farmland aims to address the inequalities between farm owners and farm dwellers by formalising informal land rights and upgrading weak land rights. The tenure reform process on farmland has been difficult to manage due to many reasons, which includes the fact that the

¹⁷⁰ Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 456.

¹⁷¹ Van der Walt AJ *Constitutional property law* (2nd ed 2005) 310 (the chapter on land reform was left out of the 3rd ed 2011).

¹⁷² Adams M, Cousins B & Manona S "Land tenure and economic development in rural South Africa: Constraints and opportunities" in Cousins B (ed) *At the crossroads: Land and agrarian reform in South Africa into the 21st century* (2000) 111-128 at 112.

process was marked by conflicts between the then Department of Land Affairs¹⁷³ and white-commercial farm owners regarding tenure security of farm dwellers.¹⁷⁴

ESTA¹⁷⁵ contains provisions that regulate the relationship between landowners and farm dwellers. The Act further regulates the conditions of residence on relevant land and facilitates long-term security of tenure.¹⁷⁶ One of the main purposes of ESTA is to ensure that farm dwellers are guaranteed basic human rights. In terms of these rights, they can conduct family life; receive visitors; bury family members on land; and have access to water, health and education.¹⁷⁷ However, all of these rights are subject to reasonable limitations imposed by farm owners.¹⁷⁸

Both farm dwellers and land owners have protected rights in the Constitution, such as the right to human dignity; privacy; the right to freedom and security of person; freedom of religion, belief, opinion and of expression; and freedom of movement.¹⁷⁹ They both also derive rights from LTA¹⁸⁰ and ESTA.¹⁸¹ Therefore, any tenure reform initiative should take cognisance of these rights in order to avoid any possible conflict on farmland.

2 5 2 *Farm dwellers' tenure security*

It is accepted that land dispossessions contributed to the situation of many people caught up in a cycle of poverty and homelessness. Additionally, the legacy of discriminatory laws still has a negative impact on the living conditions of the majority of South Africans.¹⁸² In this respect, the provision of security of tenure in terms of the

¹⁷³ Now referred to as the Department of Rural Development and Land Reform.

¹⁷⁴ See Ngqangweni SS "Land reform and related issues in South Africa" in Munyuki-Hungwe M (ed) *Land reform and tenure in Southern Africa: Current practices, alternatives and prospects* (2004) 135-152 at 140.

¹⁷⁵ The Extension of Security of Tenure Act 62 of 1997.

¹⁷⁶ See the Extension of Security of Tenure Act 62 of 1997.

¹⁷⁷ Sections 5 and 6 of the Extension of Security of Tenure Act 62 of 1997.

¹⁷⁸ See Section 6 of the Extension of Security of Tenure Act 62 of 1997.

¹⁷⁹ Pienaar JM "Farm workers: Extending security of tenure in terms of recent legislation" (1998) 13 *South African Public Law* 423- 437 at 429-431.

¹⁸⁰ The Land Reform (Labour Tenants) Act 3 of 1996.

¹⁸¹ The Extension of Security of Tenure Act 62 of 1997.

¹⁸² See Smith MDJ "Land reform in South Africa as a means to combat poverty" (2004) 45 *Dutch Reformed Theological Journal* 466-474 at 467.

tenure legislation is primarily meant to facilitate the process of upgrading tenure rights and to protect farm dwellers.¹⁸³ This protection must be seen within the context of the competing rights of landowners and various occupiers.

An important component of tenure security for farm dwellers is the confidence and certainty with which one can transact one's rights. Secure land rights are also important for farm dwellers who are dependent on farming on someone else's land for their livelihoods.¹⁸⁴ In addition, secure land rights provide an important sense of safety from eviction and reduce land conflicts.

However, there are numerous land tenure issues that affect farm dwellers. Firstly, the constitutional right to security of tenure remains illusory for millions of farm dwellers. The current situation has presented a systematic failure in the implementation of ESTA and LTA by the government.¹⁸⁵ The inherent flaws in the application and implementation of these acts make it difficult for farm dwellers to acquire tenure security.¹⁸⁶ Many farm dwellers do not have legally recognised rights to the land that they currently occupy. This might be as a result of the lack of legal status of their underlying rights in relation to the farmland.¹⁸⁷

Unlawful evictions on farms continue unabated¹⁸⁸ and the trend of most of the evictions is that farm dwellers are left without alternative land to live on.¹⁸⁹ In most

¹⁸³ Roodt MJ "Security of tenure and livelihood options in South Africa: A case study of a rural community facing eviction under post-apartheid legislation in the Eastern Cape Province" (2007) 37 *Africanus* 3-12 at 5.

¹⁸⁴ Ghezae N *Natural resource tenure: A crucial aspect of poverty reduction and human rights* (2009) 38.

¹⁸⁵ Republic of South Africa, Department of Rural Development and Land Reform *Green paper on land reform* (2011) paras 10.3-10.4.

¹⁸⁶ The poor implementation of tenure reform legislation is discussed in chapter 4.

¹⁸⁷ Roodt MJ "Security of tenure and livelihood options in South Africa: A case study of a rural community facing eviction under post-apartheid legislation in the Eastern Cape Province" (2007) 37 *Africanus* 3-12 at 3-4. See also *Nkuzi Development Association v Government of the Republic of South Africa and Another* 2002 (2) SA 733 (LCC) para 4.

¹⁸⁸ Evictions on farmland are made possible due to lack of secure tenure.

¹⁸⁹ Mutangadura G "The incidence of land tenure insecurity in Southern Africa: Policy implications for sustaining development" (2007) 31 *Natural Resources Forum* 176-187 at 184 argues that the major challenges hampering the implementation of ESTA to improve the tenure security of farm dwellers include inadequate training and understanding of the Act by personnel responsible for its

instances, it is the historical link between housing and employment on farms that renders farm dwellers vulnerable to evictions. The fact that security of tenure is linked to employment has resulted in the creation of short-term security of tenure, which is not adequate for the protection of farm dwellers since it does not offer long-term security of tenure.¹⁹⁰ The link between tenure rights and employment also increases the vulnerability of women and children, since their security of tenure is usually linked to the continued employment of usually the male member of the household.¹⁹¹ If the male member dies or his employment is terminated, the women and children are likely to face eviction from the home or land that they occupy. Women and children therefore generally do not vest independent occupational rights. Additionally, the evictions granted by the courts¹⁹² often result in homelessness since the eviction orders are routinely granted in the absence of suitable alternative accommodation being made available to farm dwellers.¹⁹³

Farm dwellers face difficulties in challenging evictions *inter alia* because of the lack of legal representation. In *Nkuzi Development Association v Government of the Republic of South Africa*¹⁹⁴ the court held that indigent farm dwellers whose tenure is threatened are entitled to legal representation at the state's expense. Despite this

implementation (police and magistrates) and the institutional and capacity constraints experienced by enforcing agencies.

¹⁹⁰ Chenwi L "Seeking security: Towards a new vision for tenure relations in farming areas" (2005) 6 *Economic and Social Rights in South Africa* 18-20 at 19.

¹⁹¹ In *Conradie v Hanekom and Another* 1999 (4) SA 491 (LCC) para 20, the court held that women's tenure is not contingent on their partners' tenure and that their rights cannot be extinguished as a result of their partners' eviction in terms of ESTA. (In this case, the husband and wife each had their own employment contract with the owner thus the wife was an occupier herself.) However, in *Landbounavorsingsraad v Klaasen* 2005 (3) SA 410 (LCC) paras 26-37 the court did not recognise the tenure rights of women. The court found that women who live on farms but are not employed do not have tenure rights and are not occupiers in their own right. This results in the exclusion of a majority of the women who are unemployed and living on farmland. Women are occupiers "in the broad sense" because they derive their occupation *via* their husband or partners. So when the husband or partner loses his job, they cannot continue occupying the house. As such, they do not have independent occupation rights.

¹⁹² The courts in this case refer to the magistrates' court and the Land Claims Court.

¹⁹³ Lahiff E "Tenure arrangements and support for land rights in South Africa's land reform" in Hall R (ed) *Another countryside? Policy options for land and agrarian reform in South Africa* (2007) 1-40 at 21 argues that magistrates' courts either do not apply ESTA in all cases where they are obliged to do so, or ignore aspects that are designed to protect the rights of occupiers.

¹⁹⁴ *Nkuzi Development Association v Government of the Republic of South Africa* 2002 (2) SA 733 (LCC) para 12.

judgment, farm dwellers still have problems in accessing legal representation.¹⁹⁵ Furthermore, due to the lack of awareness of their rights, farm dwellers are still faced with the inability to access off-site and on-site housing subsidy schemes for long-term security of tenure.¹⁹⁶

Tenure reform must set in place viable institutions and mechanisms that resolve the problems of insecurity, inequality and uncertainty regarding land rights. It can be argued that the solutions to the above-mentioned problems may entail new systems of landholding, land rights and forms of ownership, and may therefore have far-reaching implications for farm dwellers.¹⁹⁷ On this basis the government is committed to land tenure reform to provide certainty and improve the livelihoods of vulnerable groups, particularly farm dwellers.

2 5 3 *Farmers' perspectives on tenure reform*

As pointed out above, the right of access to adequate housing and protection from arbitrary eviction is well entrenched in international¹⁹⁸ and in South African law.¹⁹⁹ However, some farm owners still have little regard for these rights, leaving farm dwellers vulnerable. On the other hand, the tenure reform process can potentially have detrimental implications for farm owners.²⁰⁰ In this respect, the current farm owners' use of land will be subjected to regulatory restrictions, such as in eviction cases. With due regard to the country's history of land dispossessions, it is essential to rectify the inequitable land distribution and to strengthen tenure security. However,

¹⁹⁵ See Chenwi L "Seeking security: Towards a new vision for tenure relations in farming areas" (2005) 6 *Economic and Social Rights in South Africa* 18-20 at 19; Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 37.

¹⁹⁶ Chenwi L *Evictions in South Africa: Relevant international and national standards* (2008) 3; Greenberg S *Development update: Piecemeal reforms and calls for action, land reform in South Africa* (2003) 45; Chenwi L "Seeking security: Towards a new vision for tenure relations in farming areas" (2005) 6 *Economic and Social Rights in South Africa* 18-20 at 19.

¹⁹⁷ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 60.

¹⁹⁸ See section 2 3 above for a discussion of Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (1966), which is the most significant international legal source on the right to adequate housing under international human rights law.

¹⁹⁹ See section 2 4 2 above for a discussion of section 26(3) of the Constitution of the Republic of South Africa 1996.

²⁰⁰ See Keightley R "The impact of the Extension of Security of Tenure Act on an owner's right to vindicate immovable property" (1999) 15 *South African Journal on Human Rights* 277-307. In this article, the author discusses the impact of ESTA on rural landowners.

this should be done in compliance with the requirements of sections 25 and 36 of the Constitution.

Farm owners argue that tenure reform laws have contributed to a deterioration of relations between farm owners and farm workers.²⁰¹ In some instances this had the effect of causing many farm owners who had lived in relative harmony with their workers to start mistreating or evicting them.²⁰² Many farm owners blame new tenure laws and policies for increased evictions on farms. Amongst these laws is ESTA,²⁰³ which farm owners regard as highly contentious and the main reason for conflict between owners and occupiers on farmland.²⁰⁴ ESTA is said to undermine the extent of control farm owners can exert over those who live on their land. On this basis, it is argued that the provisions of ESTA have led to unintended consequences, such as the unwillingness of farm owners to house people on their farms and the deterioration of farm workers' housing.²⁰⁵

The most common complaint is that farm owners have to continue providing housing and services to farm workers whose employment has been terminated.²⁰⁶ This causes social problems and poses a security risk on farmlands. ESTA intended to legislate the terms under which evictions from a farm could take place. However, ESTA has undoubtedly caused at least some of the subsequent evictions and tension between farm owners and farm dwellers.²⁰⁷

²⁰¹ Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 7.

²⁰² ESTA tilts the balance of power in favour of farm dwellers. As a result, farmers are prompted to adopt a policy not to employ permanent workers, so as to avoid providing them with accommodation on the farms. See Manuel V "Opinion: Agriculture new security of tenure bill is a grim harvest for farmers" (2011) *BusinessDay.co.za* <<http://opinion-agriculture-new-security-of-tenure-bill-is-a-grim-harvest-for-farmers/>> (accessed 02-09-2011).

²⁰³ Act 62 of 1997.

²⁰⁴ Greenberg S *Development update: Piecemeal reforms and calls for action, land reform in South Africa* (2003) 45.

²⁰⁵ Greenberg S *Development update: Piecemeal reforms and calls for action, land reform in South Africa* (2003) 44.

²⁰⁶ Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 85.

²⁰⁷ Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 47.

Farm owners also argue that farm dwellers will benefit more if they are housed in agri-villages and rural towns or if transport is arranged for them to and from the farms.²⁰⁸ This will ensure that prime agricultural land remains available for production. In addition, agri-villages will improve the lives of farm dwellers as they would be provided with a place to establish their homes and to access natural resources. Whether agri-villages will provide effective legally secure tenure for farm dwellers is a question, dealt with in chapter 5, where new developments in the tenure reform sector are analysed.

2 5 4 *The balancing of rights between farm owners and farm dwellers*

The evaluation and balancing of rights between farm owners and farm dwellers is challenging because of the relationship between land reform programmes and property owners' existing rights. This is in line with the general view that the property clause entrenches existing rights in such a way that they are protected from most regulatory interferences with property.²⁰⁹ The decision in *Port Elizabeth Municipality v Various Occupiers*²¹⁰ underscores the fact that the protection of existing private law-based relations to property is not the primary purpose of section 25.²¹¹ Instead, this provision is aimed at achieving social transformation, in accordance with constitutional values such as human dignity, equality and freedom.²¹²

When considering tenure rights of farm dwellers, there is a need to look at the property rights of farm owners as well as occupiers and to reconcile the competing rights and interests in a just manner.²¹³ It is important to recognise and accommodate the interests of both farm owners and farm dwellers within a constitutional framework, because everyone is entitled to live in dignity and security, especially vulnerable groups such as farm dwellers. The land reform programme is

²⁰⁸ Greenberg S *Development update: Piecemeal reforms and calls for action, land reform in South Africa* (2003) 46.

²⁰⁹ Van der Walt AJ *The constitutional property clause: A comparative analysis of section 25 of the South African Constitution of 1996* (1997) 162.

²¹⁰ 2005 (1) SA 217 (CC) paras 16-17.

²¹¹ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 581.

²¹² *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 15-16.

²¹³ One of the challenging aspects of the property clause is the relationship between the land reform processes and the protection of existing property rights.

part of the state's responsibility and has to be exercised in the public interest. Furthermore, the state is obliged to protect property and in doing so, an equitable constitutional balance between the interests of the individual and the public has to be attained so as to rectify the injustices of the past racially discriminatory laws. This will bring out the expected transformation of land holding in South Africa.

In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance (FNB)*²¹⁴ the Constitutional Court stated that the purpose of section 25 has to be seen as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also striking a proportionate balance between these two functions. As a result, the property clause has to be regarded as a constitutional effort in balancing the individual and general public interest in a constitutional manner.²¹⁵

Without secure tenure in land, the majority of farm dwellers would be denied a life with dignity and security. Consequently, having secure tenure rights in land makes the right to life and human dignity possible, which fosters a sense of belonging. This is in line with the social function of property, which encompasses issues such as equity, fairness and justice in access to land.²¹⁶ Therefore, the state has legitimate grounds to interfere with existing property rights in order to serve the social function.

²¹⁴ 2002 (4) SA 768 (CC) paras 49-50.

²¹⁵ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 20-21 argues that the property clause was drafted in such a way as to legitimatise land reform and to ensure that the constitutional protection of existing rights should not exclude or frustrate land reforms. See also Van der Walt AJ "Striving for the better interpretation: A critical reflection on the Constitutional Court's *Harksen* and *FNB* decisions on the property clause" (2004) 121 *South African Law Journal* 854-878 at 866. Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 521 state that the South African property clause serves a dual purpose, which is to secure existing rights on the one hand and promote social transformation on the other.

²¹⁶ See South African Human Rights Commission *Third economic and social rights report 1999/2000* (November 2001) 278-279 <<http://www.info.gov.za/view/DownloadFileAction?id=94653>> (accessed 02-06-2012).

2 6 Conclusion

It is clear that the apartheid racially discriminatory laws and policies led to the dispossession of land belonging to the majority of South Africans. Accordingly, the South African history of land dispossession, forced removals and racially-based distribution of land has resulted in tenure insecurity among the majority of South African citizens.²¹⁷ The purpose of the historical overview was, as pointed out in the introduction, to gain insight into the policies and laws that have determined the land holding system.

In light of the above, tenure security entails legal considerations on how land is held, used and transacted. Accordingly, the reforms on tenure security govern the land holding system and provide rights and responsibilities that limit the farm owners' exclusive use of his or her property to benefit the farm dwellers.

As indicated above, in South Africa, land reform has been conceptualised primarily as a programme to restore and redistribute rights in rural, agricultural land to formally dispossessed or marginalised black South Africans and to provide secure land tenure rights.²¹⁸ It can be deduced from the overview above that land reform is not only conceived as a means by which the state could address the injustices of the past, but also as a means to promote development and alleviate poverty.²¹⁹ Indeed, the success of the envisaged land reform goals is fundamental to the broader strategy of transforming South Africa's society at large. Hence land reform, which promises to provide a way of redressing past injustices, is an important part of the process to assist South Africa's transition from an apartheid state towards a constitutional state.²²⁰

²¹⁷ Republic of South Africa, Department of Land Affairs *White paper on the South African land policy* (1997). See also Van der Walt AJ "Exclusivity of ownership, security of tenure, and eviction orders: A model to evaluate South African land-reform legislation" 2002 *Tydskrif vir die Suid-Afrikaanse Reg* 254-289 at 255.

²¹⁸ Walker C "Elusive equality: Women, property rights and land reform in South Africa" (2009) 25 *South African Journal on Human Rights* 467-490 at 472.

²¹⁹ Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 7; Drimie S "Implementing land reform at Impendle state land: Policy and local politics in Kwazulu-Natal" (2003) 22 *Politeia* 38-66 at 38.

²²⁰ James D *Gaining ground? "Rights" and "property" in South African land reform* (2007) 11.

Furthermore, this chapter indicates that the Constitution provides guiding principles for the development of land reform initiatives. In light of section 25 of the Constitution, the government is under an obligation to foster conditions to enable access to land and adequate housing to the previously disadvantaged groups, which includes strengthening their tenure rights.²²¹ This obligation arises from international instruments that recognise the right to tenure security, adequate housing and safeguards against arbitrary removals from land that is occupied by landless persons. The same obligation is echoed in section 25(6) and 26 of the Constitution.

Section 25(6) is the authorising provision for tenure reform and it requires the state to enact legislation to give effect to the right to have legally secure tenure to persons living under insecure tenure arrangements. Various laws have been enacted to give effect to this right, especially ESTA and LTA, which provide tenure security for occupiers in both rural and peri-urban land.

Despite the constitutional and international obligations with regard to tenure security, insecure tenure rights for farm dwellers continue to be a major grievance in South Africa.²²² Evidence has shown that the legislature has failed to implement efficient tenure reform legislation and as a result, farm dwellers still face tenure insecurity.²²³ As such, it remains a challenge to enforce the constitutional mandate to provide for especially farm dwellers with legally secure tenure.

The chapter contends that the problem of tenure insecurity on farmland should be addressed urgently. To give effect to section 25(6), the government should grant farm dwellers substantive legally secure tenure rights that would protect them on the farmland against adverse interference from farm owners. Consequently, substantive

²²¹ The Constitutional Court in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 19 observed that the stronger the right to land, the greater the prospect of a secure home.

²²² Hall R "The shifting terrain of land reform in South Africa: The national land summit" (2005) 32 *Review of African Political Economy* 621-627 at 625.

²²³ Hall R "The shifting terrain of land reform in South Africa: The national land summit" (2005) 32 *Review of African Political Economy* 621-627 at 625. Kepe T & Cousins B "Radical land reform is the key to sustainable rural development in South Africa" (2002) *PLAAS Policy Brief No 3* 1-4 at 2 <<http://www.plaas.org.za/pubs/pb/PB03.pdf/>> (accessed 06-09-2011) argue that very little has been achieved to date with regard to tenure reform in former homelands and even in relation to farmlands, since the tenure legislation has had little success in preventing evictions of vulnerable people.

tenure rights should generally rectify the imbalances of the past and South Africa would be fulfilling its international obligations.

In a nutshell, this chapter grapples with the realisation of the purpose of tenure security within the confines of the Constitution. The chapter also establishes what tenure security means for farm dwellers and the problems they are facing as a result of insecure tenure. The government has already put in place policy and legislative measures that address the issue of tenure insecurity. It is suggested that tenure reform policies and laws should be aimed at ensuring an acceptable level of tenure protection for various occupiers. The following chapters examine the measures that are being implemented to protect and strengthen tenure rights and the efficacy of the land tenure reform policies and laws. This will be done in light of the tenure reform policy documents and laws. The question in the following chapters revolves around the tenure reform initiatives and whether they are in line with constitutional and international imperatives.

Chapter three:

Policy framework on tenure reform

3 1 Introduction

The purpose of the historical overview was to set out the reasons why the apartheid era caused homelessness and lack of tenure security, particularly in rural areas, so as to gain an insight into the historical and constitutional reasons for the land reform programme.¹ The purpose of this chapter is to provide an overview of land reform policy in post-apartheid South Africa, with particular focus on the policy aspects that have an impact on farm dwellers. In this context, the inherent challenges associated with the tenure security system on farmland are discussed with reference to the relevant policy documents.

Land tenure reform is a necessity, but reform alone is not sufficient for the sustainability of rural development and improvement of livelihoods. Issues such as conflicting land claims; overcrowding; insecure tenure arrangements; and evictions on farmland continue to hamper sustainable development. These tenure issues need to be addressed effectively by means of a suitable policy framework that will provide the measures to strengthen tenure security and ensure sustainable development.

Since the focus of this chapter is on the policy framework dealing with tenure reform and not on the legislative framework itself, an explanation of the scope and content of a policy is necessary to effectively distinguish it from legislation. Policy is broadly defined by Bright as “the result of a decision taken as to how to achieve a particular objective.”² In this context, a policy outlines what the government aims to achieve and the measures it will take to achieve its goals. A policy differs from legislation³ and regulations⁴ in that a policy prescribes principles and measures that inform the

¹ See chapter 2 at 2 2 1.

² Bright S *Landlord and tenant law in context* (2007) 143.

³ Garner BA (ed) *Black's law dictionary* (7th ed 1999) 910 defines legislation as the whole body of enacted laws.

⁴ Garner BA (ed) *Black's law dictionary* (7th ed 1999) 1289 states that a regulation is defined as a rule or order, having legal force, issued by an administrative agency or a local government.

government in enacting new laws needed to achieve certain objectives. Accordingly, policy reflects fundamental and problematic areas that the government must address by means of legislation. This means that a policy provides clear objectives, which ensures that the law is developed in a guided manner.⁵ Conversely, the law can also play an important role in the implementation of policy.⁶ This chapter sets out the policy framework on tenure reform, providing the basic principles that guide the government in enacting tenure legislation. An in-depth discussion of the legislative framework on tenure reform follows in chapter four.

With regard to land reform, policy that is formulated by the government clarifies the priorities set out to achieve the land reform programme. A policy on land reform also suggests practical steps that may be appropriate for achieving the purposes of land reform in South Africa. Since this chapter is focussed on tenure reform, policy in this regard plays a crucial role in identifying the strategies, guidelines and practices that constitute the land tenure system. It is imperative that a policy framework on tenure reform is developed to address tenure issues, particularly on farmland. Policy on tenure reform should also ensure sustainable development, including protection of farm dwellers.

Subsequent to the abolition of apartheid laws and practices, the policy established by government was mainly intended to redress the racial imbalance in the land holding system.⁷ This objective was derived from an understanding that land reform has the potential to address poverty matters through targeted resource transfers and by addressing the economic and social injustices caused by apartheid land dispossession.⁸ It is apparent that the historical land dispossession strengthened by apartheid laws is the main reason for the tenure reform policy, which aims to benefit

⁵ Bright S *Landlord and tenant law in context* (2007) 143.

⁶ Bright S *Landlord and tenant law in context* (2007) 143.

⁷ Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 1; Drimie S "Implementing land reform at Impendle state land: Policy and local politics in KwaZulu-Natal" (2003) 22 *Politeia* 38-66 at 38. Makopi S "Awards to provide security of tenure and comparable redress" in Cousins B (ed) *At the crossroads: Land and agrarian reform in South Africa into the 21st century* (2000) 143-150 at 143 argues that it is the outcomes of the historical circumstances that prompted the newly emergent democratic state in South Africa to prioritise the issue of land reform.

⁸ Drimie S "Implementing land reform at Impendle state land: Policy and local politics in KwaZulu-Natal" (2003) 22 *Politeia* 38-66 at 38.

the majority of the South African population. However, after eighteen years of policy implementation land reform has made only limited progress.⁹ Furthermore, new reform initiatives are still being formulated by the government in an attempt to address the ongoing problems associated with tenure reform.¹⁰ Many of the original objectives, namely the inequitable distribution of land ownership; the need for security of tenure for persons whose tenure of land is insecure as a result of past racial discriminatory laws; and the need for sustainable use of land,¹¹ have not yet been met. These objectives include the undertakings made in the Reconstruction and Development Programme (RDP)¹² and the *White paper on South African land policy* (1997),¹³ which provided a set of guidelines and principles for developing land reform.

There are four dimensions inherent in these policy documents, namely the constitutional imperatives; the content of the policy; implementation issues; and whether legislation has been enacted to give effect to the policy objectives. This chapter deals with the questions whether the policy is in line with the constitutional imperatives; whether the content of the policy complies with the Constitution; and whether the implementation of the policy fulfils the purpose of the policy as well as the constitutional goals. In so doing, focus is on the policy aspects relating to tenure security for farm dwellers.

The chapter is divided into three sections. Section one includes a discussion on the various land reform policy documents that have been developed since 1991. This section of the chapter is aimed at providing a broad overview of the policy framework on land reform. The policy documents covered in this first section and throughout the

⁹ Zuma JG *State of the nation address of the President of the Republic of South Africa* (2012) <<http://www.info.gov.za/speeches/DynamicAction?pageid=461&sid=24980&tid=55960>> (accessed 13-02-2012) placed emphasis on the progress of government priorities. See also Pienaar JM "Tenure reform in South Africa: Overview and challenges" (2011) 25 *Speculum Juris* 108-133 at 127-128.

¹⁰ Pienaar JM "Tenure reform in South Africa: Overview and challenges" (2011) 25 *Speculum Juris* 108-133 at 109. See chapter 5 for a detailed discussion of the new tenure reform initiatives.

¹¹ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 7.

¹² African National Congress *The reconstruction and development programme: A policy framework* (1994).

¹³ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997).

chapter include the *White paper on South African land reform* (1991);¹⁴ the Reconstruction and Development Programme (1994);¹⁵ the *Land policy framework document* (1995);¹⁶ the *Green paper on South African land policy* (1996);¹⁷ the *White paper on South African land policy* (1997);¹⁸ and the *Green paper on land reform* (2011).¹⁹ Also, this part of the chapter briefly discusses possible policy changes that have occurred since the land reform programme was initiated in 1991. Since the 2011 *Green paper on land reform*²⁰ gives a general overview of the land reform programme, it is briefly discussed to provide a new perspective into the policy developments. The *Draft tenure security policy*²¹ is the most recent policy document that particularly focuses on farmland with a proposition of stronger tenure rights for farm dwellers. It is also relevant in determining possible policy shifts in the tenure reform sphere. However, the *Draft tenure security policy* falls under new developments in the tenure reform sector and is embodied in the new Draft Land Tenure Security Bill.²² Chapter five discusses all the new developments, which include the proposed policy and legislative measures that have been drafted but not yet implemented. This first section of the chapter provides an overview of the existing policy documents that have already been implemented. Therefore, an in-depth discussion of the *Draft tenure security policy* follows in chapter five.

The second section deals with the constitutional right to have legally secure tenure and the policy aspects that specifically relate to tenure security. Tenure reform is a component of a general land policy that drives the land reform programme and addresses tenure issues, particularly on farmland. This section discusses the policy

¹⁴ Republic of South Africa, Department of Land Affairs *White paper on South African land reform* (1991).

¹⁵ African National Congress *The reconstruction and development programme: A policy framework* (1994).

¹⁶ Republic of South Africa, Department of Land Affairs *Land policy: Framework document* (1995).

¹⁷ Republic of South Africa, Department of Land Affairs *Green paper on South African land policy* (1996).

¹⁸ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997).

¹⁹ Republic of South Africa, Department of Rural Development and Land Reform *Green paper on land reform* (2011).

²⁰ Republic of South Africa, Department of Rural Development and Land Reform *Green paper on land reform* (2011).

²¹ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010).

²² Republic of South Africa, Department of Rural Development and Land Reform Draft Land Tenure Security Bill [B-2010] GN 1118 in GG 33894 of 24-12-2010.

objectives and principles that shape the legislative measures for tenure reform. In this light, tenure reform policies that apply to farm dwellers mainly on white-owned commercial farmland are discussed in line with the constitutional imperative.

The third section deals with the implementation of the policy framework on tenure reform, with regard to farmland. This section gives an exposition of the progress made by the policy in addressing tenure issues on farmland. The discussion places emphasis on the successes and failures of the tenure reform programme in light of the policy objectives and the broader goals of the land reform programme. The chapter concludes by showing that the success of tenure reform ultimately depends on enacting appropriate legislation to give effect to the policy objectives.

3 2 South African land reform policy

3 2 1 Introduction

The apartheid regime created insecurity in land tenure by not allowing the majority of the South African population to establish secure land rights and also by eroding the rights that existed.²³ To develop an effective land reform policy, several issues that the land reform programme aims to address are identified in the 1997 *White paper on South African land policy* (1997 *White paper*). These issues include injustices of racially-based land dispossession; inequitable distribution of land ownership; unsustainable use of land; and the need for security of tenure.²⁴ As a result, South Africa's land reform policy was developed in recognition of the fact that land ownership and land development patterns at that stage strongly reflected the political and economic conditions of the apartheid era.²⁵ To overcome the effects of such racially-based land policies of the apartheid era, and to give effect to the constitutional obligations, the government implemented the land reform programme.

²³ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 91-92. See chapter 2 at 2 2 1.

²⁴ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) V.

²⁵ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) V.

3 2 2 Land reform policy developments

As indicated in chapter two,²⁶ land reform in South Africa began with the introduction of the *White paper on land reform* in 1991. The primary objective of the 1991 *White paper on land reform* was to offer equal opportunities for the acquisition, use and enjoyment of land to all the people within the social and economic realities of the country.²⁷ The primary objective is set out in three parts, namely to broaden access of rights in land; to upgrade the quality and integrity of the title in land; and to promote effective utilisation of land.²⁸ To achieve the first objective, the government identified two essential policy positions. These were the abolition of all racially-based restrictions on land rights and the provision of support to extend access of land rights to the whole population.²⁹ In respect of the first objective, the Abolition of Racially Based Land Measures Act³⁰ was enacted, which called for the abolition of all land laws based on race. Therefore, the real policy framework for land reform began in 1991.

To secure the second objective, namely the promotion of quality and security of title in land on an equitable basis for all people, the government proposed three policy positions that should be followed. These included the rationalisation of racially-based land tenure rights and land registration systems with a view to upgrade lower order rights; the acknowledgment of tribal land tenure; and protection of the integrity of title in land.³¹ To implement the second objective of the policy, the Upgrading of Land Tenure Rights Act³² was enacted to deal with the conversion of land tenure rights into ownership. A further discussion of the laws that were enacted in 1991 to implement the policy follows in chapter four, which deals with the legislative framework on tenure reform.

²⁶ See chapter 2 at 2 2 1.

²⁷ Republic of South Africa, Department of Land Affairs *White paper on South African land reform* (1991) 1.

²⁸ Republic of South Africa, Department of Land Affairs *White paper on South African land reform* (1991) 2; Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 245; Smith EB "South African land reform policy and international human rights law" (2000) 19 *Wisconsin International Law Journal* 267-288 at 284.

²⁹ Republic of South Africa, Department of Land Affairs *White paper on South African land reform* (1991) 2. See also Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 245.

³⁰ Act 108 of 1991.

³¹ Republic of South Africa, Department of Land Affairs *White paper on South African land reform* (1991) 7. See also Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 245.

³² Act 112 of 1991.

In 1994, land reform acquired a central place in the RDP.³³ As indicated in chapter two,³⁴ the RDP identified land reform as the “central and driving force of a rural development programme”.³⁵ It identifies the three key elements of a land reform programme as being restitution of land to victims of forced removals; redistribution of land to landless people; and tenure reform that would provide security of tenure to all South Africans.³⁶ The RDP called for security of tenure rights for all South Africans by adopting a tenure policy that recognises the diverse forms of tenure existing in South Africa.³⁷ The RDP was based on certain fundamental assumptions.³⁸ The first assumption was that the most basic need for rural people was land. Secondly, the apartheid system resulted in the impoverishment of the black majority and eviction of farm dwellers from their homes. Thirdly, the mere repeal of discriminatory legislation would not be sufficient to address the inequitable distribution of land and economic resources. The RDP also stipulated that a national land reform programme should address gender inequities; employment opportunities; rural development; and tenure insecurity.³⁹ Furthermore, the land reform programme should benefit the most vulnerable groups in society.⁴⁰

The ANC *Agricultural policy*⁴¹ reiterates the same principles outlined in the RDP. The *Agricultural policy* stipulates that policy on housing and land reform must address farm workers’ rights to decent housing, services, and security of tenure and provide

³³ African National Congress *The reconstruction and development programme: A policy framework* (1994).

³⁴ See chapter 2 at 2.2.1.

³⁵ African National Congress *The reconstruction and development programme: A policy framework* (1994) para 2.4.2. See also Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 30.

³⁶ African National Congress *The reconstruction and development programme: A policy framework* (1994). See also Lund S “An overview of the land reform pilot programme” in Van Zyl J, Kirsten J & Binswanger HP (eds) *Agricultural land reform in South Africa: Policies, markets and mechanisms* (1996) 547-562 at 547.

³⁷ African National Congress *The reconstruction and development programme: A policy framework* (1994) para 2.4.4. Para 2.5.12 states that the RDP called for the development of new and innovative forms of tenure, such as group-based holding systems.

³⁸ African National Congress *The reconstruction and development programme: A policy framework* (1994) para 2.4.1. See also Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 8.

³⁹ African National Congress *The reconstruction and development programme: A policy framework* (1994) para 2.4.2.

⁴⁰ African National Congress *The reconstruction and development programme: A policy framework* (1994) para 2.4.3.

⁴¹ African National Congress *Agricultural policy* (1994) para 5.3

<<http://www.anc.org.za/show.php?id=274>> (accessed 09-02-2012).

assistance in establishing farm workers' interests in land. In addition, the *Agricultural policy* states that all farm workers should have the right to security of tenure on residential sites and land for household food security.

The 1995 *Land policy framework document*⁴² (*Framework document*) contained the fundamental principles that set the basis for the formulation of the policy on land reform in general. The government's commitment to tenure reform and people's right to choose their preferred tenure system are laid out in the *Framework document*.⁴³ Accordingly, the *Framework document* warned against the arbitrary imposition of freehold tenure rights and the possibility that this could result in increased landlessness.⁴⁴ The 1996 *Green paper on land policy* also suggested a tenure reform programme that emphasises the extension of formal rights based on the principle that people have the right to a tenure system of their preference.⁴⁵

The 1996 *Green paper on land policy* was the precursor to the 1997 *White paper*. The stated vision of the 1996 *Green paper on land policy* was to implement a South African land policy that is just; contributes to economic growth; and builds reconciliation and stability.⁴⁶ Consequently, the *Green paper on land policy* retained the RDP's commitment to include a range of marginalised groups into the land reform policy's main objectives. Farm dwellers are among the marginalised groups that the land reform policy seeks to protect. The *Green paper on land policy* formally introduced the three components of the land reform programme, namely restitution, redistribution and tenure reform. A new set of land-related legislation was also proposed, including the Restitution of Land Rights Act;⁴⁷ the Provision of Certain Land for Settlement Act;⁴⁸ and the Land Reform (Labour Tenants) Act (LTA).⁴⁹ The

⁴² Republic of South Africa, Department of Land Affairs *Land policy: Framework document* (1995) 4.

⁴³ Republic of South Africa, Department of Land Affairs *Land policy: Framework document* (1995) 11-12.

⁴⁴ Republic of South Africa, Department of Land Affairs *Land policy: Framework document* (1995) 12.

⁴⁵ Republic of South Africa, Department of Land Affairs *Green paper on South African land policy* (1996).

⁴⁶ Republic of South Africa, Department of Land Affairs *Green paper on South African land policy* (1996).

⁴⁷ Act 22 of 1994.

⁴⁸ The Act is now referred to as the Provision for Land and Assistance Act 126 of 1993. The Act provides for grants to persons wishing to purchase land from the state or private owners. See Lahiff E

proposed tenure reform programme included legal recognition of communal tenure and recognition of the role of traditional authorities in land administration.⁵⁰ Furthermore, the *Green paper on land policy* introduced the settlement/land acquisition grant, the settlement planning grant and the district planning grant as measures to support the enforcement of land reform programmes.

In 1997, the government issued a *White paper on South African land policy* that created a post-constitutional policy framework for land reform. The 1997 *White paper* contains an all-encompassing policy relating to land and land reform and reconfirms the policy objectives stated in the RDP.⁵¹ The 1997 *White paper* is comprehensive, indicating the result of a fairly wide process of consultation.⁵² The 1997 *White paper* has four basic objectives. These include promoting justice; building reconciliation and political stability; promoting economic growth; and alleviating poverty.⁵³ The land policy set out to address the injustices of racially-based land dispossession; the racially skewed inequitable distribution of land; tenure insecurity; the lack of an accurate record and register of land rights; and the ineffective administration of public land.⁵⁴ Importantly, the 1997 *White paper* stated that land reform would be based on a willing buyer/willing seller principle.⁵⁵ Government intervention would occur in the form of financial grants to potential beneficiaries.⁵⁶

The 1997 *White paper* recognised that tenure reform is a complex process with “far-reaching implications” that involve the creation of new systems of landholding, land

& Rugege S “A critical assessment of land redistribution policy in the light of the *Grootboom* judgment” (2002) 6 *Law, Democracy and Development* 279-319 at 295.

⁴⁹ Act 3 of 1996.

⁵⁰ Republic of South Africa, Department of Land Affairs *Green paper on South African land policy* (1996).

⁵¹ Du Plessis W, Olivier N & Pienaar J “Land: Still a contentious issue” (1998) 13 *South African Public Law* 149-169 at 150.

⁵² Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997).

⁵³ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) V. See also Pienaar JM “Restitutionary road: Reflecting on good governance and the role of the land claims court” (2011) 14 *Potchefstroom Electronic Law Journal* 30-48 at 33-34.

⁵⁴ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) V.

⁵⁵ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 38. The willing buyer/willing seller principle is also mentioned in chapter 2 at 2 2 3.

⁵⁶ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) VII.

rights and forms of ownership.⁵⁷ The 1997 *White paper* nevertheless envisaged a unitary, non-racial system of land rights that would be compatible with the spirit of the Constitution, allowing a choice of landholding that would meet people's needs more effectively. However, the 1997 *White paper* anticipated this to be a slow process driven by initiatives and requests from right holders. As a result, the 1997 *White paper* did not set any specific time frames for the completion of the land reform programme.⁵⁸

Apart from the policy documents mentioned above, the Land Reform Pilot Programme (LRPP)⁵⁹ came into operation in 1994. The central aim of this project was to develop equitable and sustainable mechanisms to kick-start a wide ranging national land reform programme.⁶⁰ The LRPP was intended to serve as a "test" for the land reform programme and to provide on-going information according to which policies and plans would change.⁶¹ The LRPP places strong emphasis on shaping the nature of government intervention for land reform. The LRPP's design for the use of state resources intended to ensure that access to land will assist in the eradication of poverty. It also intended for land utilisation to be sustainable and productive, while securing various forms of tenure.⁶²

3 2 3 *Evaluation*

Since 1994 the South African government has developed a comprehensive and far-reaching land reform policy. The RDP provided a set of guidelines and principles that gave direction to the initial process of formulating the land reform policy and

⁵⁷ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) para 4.16.

⁵⁸ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) para 4.20.

⁵⁹ Republic of South Africa, Department of Land Affairs *Land reform pilot programme* (1994).

⁶⁰ Republic of South Africa, Department of Land Affairs *Land reform pilot programme* (1994) 1. See also Hargreaves S "The land reform pilot programme: Capturing opportunities for rural women" (1996) 30 *Agenda* 18-25 at 18.

⁶¹ Hargreaves S "The land reform pilot programme: Capturing opportunities for rural women" (1996) 30 *Agenda* 18-25 at 18-19.

⁶² Hargreaves S "The land reform pilot programme: Capturing opportunities for rural women" (1996) 30 *Agenda* 18-25 at 18, argues that the LRPP is to adhere to the RDP guidelines and ensure that women's land rights are secure and that the rights of the poor are protected.

programme. As a result the national land reform programme in South Africa is aimed at contributing to rural development as an integral part of the RDP.⁶³

As indicated above, the intention of the RDP with regard to land reform was to create new livelihood opportunities for the rural poor and in doing so, to alleviate pressure on the natural resource base. To implement the RDP, the government's land policy aims to deal with *inter alia* the need for security of tenure for all. In this light, various policy documents were as a result developed and linked to the RDP and, most significantly, to the 1996 constitutional provisions for land reform.⁶⁴ The 1997 *White paper* is an example of a policy for land reform that was developed in line with the RDP objectives and to give effect to the constitutional provisions.

The above overview has highlighted that the policy framework on land reform in general, and tenure reform in particular, was previously characterised by principles aimed at building a unitary, non-racial system of land rights for all South Africans and ensuring that all tenure systems are consistent with the Constitution's commitment to basic human rights. Current policy is still aimed at the same principle objectives, which indicates that no or little progress has been made. The tenure reform sector still faces complex issues associated with insecure tenure for farm dwellers.

Land tenure reform has been extremely difficult to address.⁶⁵ Pienaar⁶⁶ argues that the nature of tenure reform makes it difficult to determine how much reform has in fact occurred. Further, because of the complexity of the tenure reform process, the 1997 *White paper* had proposed that a separate *Green paper on land tenure policy* be published at the end of 1997.⁶⁷ However, the *Green paper on land tenure policy*

⁶³ Cooper D, Fakir MS & Bromley D "Land reform and management of environmental impact" in Van Zyl J, Kirsten J & Binswanger HP (eds) *Agricultural land reform in South Africa: Policies, markets and mechanisms* (1996) 589-601 at 589.

⁶⁴ Alden C & Anseeuw W *Land, liberation and compromise in Southern Africa* (2009) 92.

⁶⁵ Du Plessis W, Olivier N & Pienaar J "Land: Still a contentious issue" (1998) 13 *South African Public Law* 149-169 at 151; Smith EB "South African land reform policy and international human rights law" (2000) 19 *Wisconsin International Law Journal* 267-288 at 287.

⁶⁶ Pienaar JM "Tenure reform in South Africa: Overview and challenges" (2011) 25 *Speculum Juris* 108-133 at 128.

⁶⁷ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) para 4.15.

has not yet been published. Some developments are evident in the tenure reform sector but it is still in the early stages and it remains difficult to determine whether such developments will bring about changes and address tenure issues.⁶⁸

Instead of publishing a *Green paper* focussed on tenure reform only, as envisaged in the 1997 *White paper*, the *Green paper on land reform* was published on 31 August 2011.⁶⁹ The 2011 *Green paper on land reform* covers land reform in general. Much emphasis is placed on land as a national asset and on the notion that the land tenure system should be fundamentally reviewed. The vision for land reform as stated in the 2011 *Green paper on land reform* recognises a re-configured single, coherent four-tier system of land tenure⁷⁰ and clearly defined property rights. It further recognises secure forms of long-term land tenure and effective land use planning.⁷¹

According to Pienaar,⁷² the single four-tier system embodies strange terminology that is foreign to South African law. Furthermore, Pienaar argues that the exposition of the tenure system as stated in the 2011 *Green paper on land reform* is incomplete. Hall⁷³ concurs, arguing that the 2011 *Green paper on land reform* provides no guidance to any of the crucial questions facing land and agrarian reform in South Africa and therefore she called the *Green paper on land reform* “insubstantial and vague”.⁷⁴ It is also argued that the 2011 *Green paper on land reform* does not offer any vision on how to address the inequalities of the apartheid

⁶⁸ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010).

⁶⁹ Pienaar JM “Land reform” 2011(3) *Juta’s Quarterly Review of South African Law* para 1.

⁷⁰ Republic of South Africa, Department of Rural Development and Land Reform *Green paper on South African land reform* (2011) para 3.1 states that the four-tier system of land tenure will ensure that all South Africans, particularly rural blacks, have a reasonable access to land with secure rights, in order to fulfil their basic needs for housing and productive livelihoods. The *Green paper* defines the single four-tier system as an integration of the current forms of ownership that includes communal, state, public and private.

⁷¹ Republic of South Africa, Department of Rural Development and Land Reform *Green paper on South African land reform* (2011).

⁷² Pienaar JM “Land reform” 2011(3) *Juta’s Quarterly Review of South African Law* para 1.

⁷³ Hall R is a senior researcher at the Institute for Poverty, Land and Agrarian Studies (PLAAS) at the University of the Western Cape.

⁷⁴ Child K “*Green Paper on Land Reform offers ‘no guidance’*” (2011) <<http://mg.co.za/article/2011-09-21-green-paper-on-land-reform-offers-no-guidance>> (accessed 31-01-2012).

era in a coherent and sustainable way that is in line with the values of the Constitution.⁷⁵

The period between 1991 and 2011 was characterised by policy formulations on tenure reform, but little progress was made to address tenure issues. The 2011 *Green paper on land reform* is vague on how the tenure system can be promoted to strengthen the tenure rights of farm dwellers. However, tenure reform progress and possible shifts are evident in the 2010 *Draft tenure security policy*, which is discussed in depth in chapter five.

3 3 Constitutional imperatives and policy aspects relating to tenure security

3 3 1 Introduction

To reiterate, the government's policy pertaining to the land reform programme is based on various policy documents. The section above discusses the general policy framework on land reform, with a particular focus on tenure reform. This section first deals with the question whether the policy framework on tenure reform complies with the constitutional imperatives. This is followed by a discussion on the policy aspects that impact on tenure security in relation to farmland. The land tenure reform process is guided by a policy framework that sets out the parameters within which tenure reform measures can be effectively implemented. The policy framework on tenure reform is mainly informed by broad principles that are drawn from the 1996 Constitution and the 1997 *White paper*.⁷⁶ However, these principles tend to be modified by various social, political and economic conditions that prevail across the diverse categories of communal tenure, farm tenure and resettlement.⁷⁷

⁷⁵ Mazibuko L "Land Reform *Green Paper*. Minister Nkwinti must go back to the drawing board" (2011) <<http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=257121&sn=Marketingweb+detail&pid=90389>> (accessed 31-01-2012).

⁷⁶ Lahiff E "With what land rights? Tenure arrangements and support" in Hall R (ed) *Another countryside? Policy options for land and agrarian reform in South Africa* (2009) 93-117 at 94.

⁷⁷ Lahiff E "With what land rights? Tenure arrangements and support" in Hall R (ed) *Another countryside? Policy options for land and agrarian reform in South Africa* (2009) 93-117 at 94.

3 3 2 *Constitutional aspects*

As indicated in chapter two,⁷⁸ the 1996 Constitution sought to achieve a balance between the protection of existing property rights on the one hand and the constitutional guarantees of land reform on the other. According to the 1997 *White paper*,⁷⁹ section 25 of the Constitution provides clear constitutional authority for land reform.⁸⁰ The Constitution also guarantees the right to equality before the law and equal protection and benefit of the law.⁸¹

To determine whether the policy framework is in line with the constitutional imperatives, it is necessary to first highlight the constitutional provisions relating to the right to secure tenure. The relevant provisions relating to secure tenure rights are found in section 25(6), read with section 25(9) of the Constitution.⁸² Section 25(6) expressly acknowledges that legally secure tenure should be granted to persons whose tenure of land is legally insecure as a result of past racially discriminatory laws.

The 1997 *White paper* recognises the constitutional right of secure tenure and sets out an approach that seeks to give effect to the constitutional imperative for the tenure security right. The policy encompasses the tenure reform process, which aims to address the requirement in section 25(6) by strengthening and securing land interests of persons occupying land. As a result, if tenure security on farmland is strengthened, it would contribute to the achievement of the constitutional imperatives and policy objectives.

⁷⁸ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) VI. See also chapter 2 at 2 1.

⁷⁹ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) para 3.1.5.

⁸⁰ See sections 25(5)-(9) of the Constitution. See also chapter 2 at 2 2 3; Atfield R, Hattingh J & Matshabaphala M "Sustainable development, sustainable livelihoods and land reform in South Africa: A conceptual and ethical inquiry" (2004) 25 *Third World Quarterly* 405-421 at 410.

⁸¹ Section 9(1) of the Constitution of the Republic of South Africa 1996.

⁸² In terms of section 25(6), read with section 25(9) of the Constitution the state has the obligation to secure by means of legislation, other forms of land tenure that are insecure as a result of apartheid legislation and policies.

The 1997 *White paper* also indicated that it is necessary to develop a law that will regulate and protect the rights of occupants on land belonging to others.⁸³ The policy provides that ESTA⁸⁴ was developed to address the relationship between occupiers and landowners as well as the circumstances and procedures under which evictions can take place.⁸⁵ This Act gives effect to section 25(6), read with section 25(9) of the Constitution as well as the policy framework on tenure reform.⁸⁶ The result is that the policy framework on tenure reform is constitutional as evidenced by its provisions, objectives and guidelines that conform to the requirements of section 25(6) and 25(9) of the Constitution.

3 3 3 *Policy objectives and guiding principles*

In terms of the 1997 *White paper*, farm dwellers are viewed as a vulnerable group whose property rights need to be protected and strengthened.⁸⁷ The 1997 *White paper* reviews the problems of land tenure and identifies various aspects that underlie the necessity for reform. As a result, the problems inherent on farmland with regard to tenure security are reflected in a set of guiding principles formulated in the 1997 *White paper*. Furthermore, the scope and content of the tenure reform programme is evident in its purpose that is stipulated in the 1997 *White paper*.⁸⁸

As indicated earlier, the initial tenure reform programme was formulated within the general framework of the RDP.⁸⁹ From 1994 onwards, activities within the framework of the RDP focussed on the development of the land reform programme to redress

⁸³ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 64.

⁸⁴ Extension of Security of Tenure Act 62 of 1997.

⁸⁵ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 64.

⁸⁶ A detailed discussion on the Act follows in chapter 4.

⁸⁷ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 33. See also Lahiff E "With what land rights? Tenure arrangements and support" in Hall R (ed) *Another countryside? Policy options for land and agrarian reform in South Africa* (2009) 93-117 at 103.

⁸⁸ The purpose of tenure reform is to bring all people occupying land under a unitary, legally validated system of land holding. It will devise secure forms of land tenure, help resolve tenure disputes and provide alternatives for people who are displaced in the process. See Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) VI; Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 457.

⁸⁹ See section 3 2 2 of this chapter above.

past and present inequalities.⁹⁰ One key principle of the 1997 *White paper* is that land tenure policies must move towards rights and away from permits and aim to build a unitary, non-racial system of land rights for all South Africans.⁹¹ This involves an obligation to transform all permit-based and subservient forms of land interests into legally enforceable land rights.⁹² Therefore, the rights-based systems would allow people to choose the tenure system they prefer from a variety of options.⁹³ A rights-based approach will also assist in addressing situations of overlapping rights, through the provision of a coherent system that will enable occupiers to acquire land under secure arrangements.⁹⁴ As is stated in chapter two,⁹⁵ the government adopted a rights-based approach that recognises the Constitution's commitment to basic human rights and equality. Accordingly, the rights-based approach also contributes to the development of law that gives effect to section 25(6) of the Constitution.

Additionally, tenure reform processes must recognise and accommodate the *de facto* vested rights that exist, including interests existing without formal legal recognition.⁹⁶ The new tenure system should be consistent with the constitutional principles of democracy, equality, and due process. As such, tenure legislative measures informed by the policy framework should be able to bring the law in line with realities on the ground.

3 3 4 Policy recognition of farmland

The policy framework on tenure reform forms part of a process of reforming the rural sector and addressing the inequalities in landholding. As indicated earlier, the main

⁹⁰ One of the main goals of the RDP was to prioritise tenure reform.

⁹¹ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 57-58. See also Du Plessis WJ "African indigenous land rights in a private ownership paradigm" (2011) 14 *Potchefstroom Electronic Law Journal* 45-69 at 46.

⁹² Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 60.

⁹³ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 60. See also Pienaar JM "Tenure reform in South Africa: Overview and challenges" (2011) 25 *Speculum Juris* 108-133 at 110-111; Carey Miller DL & Pope A "South African land reform" (2000) 44 *Journal of African Law* 167-194 at 183.

⁹⁴ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) para 4.16 outlines the underlying principles that have guided the drafting of legislation and the implementation of programmes of reform.

⁹⁵ See chapter 2 at 2 1.

⁹⁶ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 61.

problem that tenure reform policy addresses is the underlying insecure land tenure rights, which surface mostly on farmlands.⁹⁷ The policy framework on tenure reform ensures that emphasis is placed on preventing evictions and undue suffering of farm dwellers. Consequently, various policy aspects in relation to tenure security have been introduced to protect the interests of farm dwellers living on white-owned commercial farmland.

While the apartheid policies contributed to land disposessions and tenure insecurity, the policy on tenure reform will create an opportunity for reforms that will enable farm dwellers to acquire tenure security on the farms where they work and live. This implies that the tenure reform programme attempts to address the systemic insecurity of tenure for the majority of South Africans, which is the result of the discriminatory policies and laws.

According to Carey Miller and Pope,⁹⁸ farm dwellers belong to the poorest and least secure sector of the population in respect of their land holding. Therefore, policy in respect of farm dwellers aims to improve tenure security and at the same time contribute to a more equitable distribution of land.⁹⁹ Within the context of the Extension of Security of Tenure Act (ESTA),¹⁰⁰ two principal options are identified for farm dwellers. One is the “off-site settlement” option, which involves the acquisition and development of land for housing adjacent to the farmland.¹⁰¹ Another option is an “on-site settlement” providing for an investment in farm housing for the farm workers.¹⁰²

⁹⁷ See Cousins B “More than socially embedded: The distinctive character of communal tenure regimes in South Africa and its implications for land policy” (2007) 7 *Journal of Agrarian Change* 281-315 at 284.

⁹⁸ Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 403; Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 7.

⁹⁹ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) para 4.9.

¹⁰⁰ Act 62 of 1997. See section 4 (1) (a) of ESTA.

¹⁰¹ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) para 4.9.2. See also Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 403.

¹⁰² Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) para 4.9.2. See also Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 403.

It is also striking how the 1997 *White paper* framed the problem of tenure insecurity not only as a human rights issue, but also as an obstacle to stability in rural areas.¹⁰³ In this light, it is imperative that key measures be implemented by the government and its agencies to stabilise conditions particularly on farmland. Currently, the 1997 *White paper* recognises and protects existing ownership rights, guarantees basic human rights and promotes long-term security through government initiatives. Furthermore, the contents of the 1997 *White paper* complies with the rights enshrined in the Constitution, in particular the right to have legally secure tenure. However, the real problem why the policy has not yet been successful lies in its implementation.

3 4 Implementation issues

3 4 1 Introduction

A policy should not only give direction for land reform, but must also stipulate the necessary mechanisms, such as land administration systems, to guide the implementation of the policy objectives.¹⁰⁴ With regard to farm dwellers, the government's attention has been on strengthening their tenure rights. However, it appears in this section as well as in subsequent chapters that the legislation promulgated to give effect to the policy has not been effective, because farm dwellers still occupy farmland with insecure tenure. Arguably, tenure reform remains problematic because of the continuous constraints on the security of the farm dwellers' tenure rights.

According to Van der Merwe,¹⁰⁵ the success of any land tenure system rests largely on the manner in which it is administered. In *Government of the Republic of South*

¹⁰³ Cousins B & Hall R "Rights without illusions: The potential and limits of rights-based approaches to securing land tenure in rural South Africa" 2011 *PLAAS Working paper 18* para 2.1 <www.plaas.org.za/pubs/wp/WP18Cousins-Hall052011.pdf> (accessed 03-06-2011). See also Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 34.

¹⁰⁴ Barnes G "Land and tenure reform in post-apartheid South Africa: An international perspective" (1993) 22 *South African Journal of Surveying and Mapping* 145-152 at 145.

¹⁰⁵ Van der Merwe D "Land tenure in South Africa: Changing the face of property law" (1990) 1 *Stellenbosch Law Review* 321-335 at 334.

Africa and Others v Grootboom and Others,¹⁰⁶ the Constitutional Court also clarified that state policy should be assessed by considering both the policy itself and the manner in which it is implemented. This section discusses the achievements brought about by the policy framework on tenure reform as well as the failures in this regard. In so doing, it is imperative to recognise the problems associated with tenure reform on farmland and how the policy is being implemented to address such issues.

3 4 2 Tenure reform policy successes

A key development in the tenure reform sector after the implementation of the 1997 *White paper* is the enactment of legislation.¹⁰⁷ Positive implementation of tenure reform policy in rural areas has emerged slowly compared to other components of the land reform programme.¹⁰⁸ In this regard, it has been suggested that tenure reform is probably the most neglected area of land reform.¹⁰⁹ This is despite its potential to have an impact on more people than the other land reform programmes. According to Ntsebeza,¹¹⁰ the 1997 *White paper* has attempted to justify the delay in terms of the complexity of tenure reform in rural areas. This view is supported by the possibility that solutions to address the tenure reform issues may entail new systems of land holding, land rights and forms of ownership that have far-reaching implications. While not denying these complexities, it is essential to consider that the

¹⁰⁶ 2001 (1) SA 46 (CC) para 42. See also Lahiff E & Rugege S "A critical assessment of land redistribution policy in the light of the *Grootboom* judgment" (2002) 6 *Law, Democracy and Development* 279-319 at 304.

¹⁰⁷ This legislation includes the Land Reform (Labour Tenants) Act 3 of 1996, which provides security of tenure to labour tenants; the Interim Protection of Informal Land Rights Act 31 of 1996, which is a holding measure which protects the interests of people who have informal rights to land while an investigation is in progress; the Communal Property Association Act 28 of 1996, which provides a legal mechanism to accommodate the needs of those people who wish to hold land collectively; amendments to the Upgrading of Land Tenure Rights Act 112 of 1991 bring this Act into line with the government's policy on the conversion of rights in land.

¹⁰⁸ Ntsebeza L "Land rights and democratisation: Rural tenure reform in South Africa's former Bantustans" (2003) 52 *Transformation* 68-95 at 70. Lahiff E "Land reform in South Africa: Is it meeting the challenge" (2001) *PLAAS Policy Brief No 1* 1-6 at 1 <<http://www.plaas.org.za/pubs/pb/PBO1.pdf>> (accessed 07-02-2012) states that in the South African rural context, tenure reform is generally taken to mean the protection, or strengthening of the rights of residents of privately-owned farms and state land together with the reform of the communal tenure system prevailing in the former homelands.

¹⁰⁹ Pienaar JM "Tenure reform in South Africa: Overview and challenges" (2011) 25 *Speculum Juris* 108-133 at 128; Lahiff E "Land reform in South Africa: Is it meeting the challenge" (2001) *PLAAS Policy Brief No 1* 1-6 at 1 <<http://www.plaas.org.za/pubs/pb/PBO1.pdf>> (accessed 07-02-2012).

¹¹⁰ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 60; Ntsebeza L "Land rights and democratisation: Rural tenure reform in South Africa's former Bantustans" (2003) 52 *Transformation* 68-95 at 70.

government has not really presented a workable approach towards the development of farm dwellers' tenure rights.

However, certain measures have been put in place by the government, intended to achieve policy objectives in respect of rural land. These include grants¹¹¹ and services¹¹² offered in terms of the land reform programme. The then Department of Land Affairs recognised the fact that the provision of land and tenure security alone is not sufficient to guarantee an improvement of life for land reform beneficiaries.¹¹³ Accordingly, the grants and services were designed to support the land reform programme.

Farm dwellers are among the categories of people who benefit from the grants and services programme. The settlement/land acquisition grant is currently set at a maximum of R16 000 per beneficiary household, to be used for land acquisition and the enhancement of tenure rights.¹¹⁴ The objective of the grants and services programme is to improve tenure security and access to land to the historically disadvantaged groups.¹¹⁵ The provision of grants has usually involved people moving from "off-site settlements" into townships rather than granting farm dwellers land of their own for productive purposes and secure accommodation on farms where they work.¹¹⁶ In this regard, state effort is required to improve the quality of life for farm dwellers.

¹¹¹ Republic of South Africa, Department of Land Affairs *Grants and services of the land reform programme* (2001) 2-3 outlines the type of grants as follows: the land redistribution and agricultural development (LRAD) grant; the LRAD planning grant; the settlement/land acquisition grant; the grant for the acquisition and development of land for municipal commonage; the settlement planning grant; the grant for the purpose of determining land development objectives; and the restitution discretionary grant.

¹¹² These include facilitation; training and capacity building; and dispute resolution services. See Republic of South Africa, Department of Land Affairs *Grants and services of the land reform programme* (2001) 3.

¹¹³ Republic of South Africa, Department of Land Affairs *Grants and services of the land reform programme* (2001).

¹¹⁴ Republic of South Africa, Department of Land Affairs *Grants and services of the land reform programme* (2001) 2.

¹¹⁵ Republic of South Africa, Department of Land Affairs *Grants and services of the land reform programme* (2001) 9.

¹¹⁶ Lahiff E "Land reform in South Africa: Is it meeting the challenge" (2001) *PLAAS Policy Brief No 1* 1-6 at 2 <<http://www.plaas.org.za/pubs/pb/PBO1.pdf>> (accessed 07-02-2012).

Reforming the legal status of occupiers' rights on white-owned commercial farmland was a core element of the 1997 *White Paper*.¹¹⁷ The 1997 *White paper* aimed to develop the mechanisms for upgrading *de facto* vested interests in land into legally enforceable rights and to ensure protection for occupants of privately-owned land.¹¹⁸ Various laws have been enacted to this end to complement the policy, but reforming the tenure system has been the least developed of the three land reform programmes.

3 4 3 *Tenure reform policy failures*

Since 1991, significant developments took place under the tenure reform programme that elevated rural and urban land rights to full ownership.¹¹⁹ However, the land rights of the majority of South Africans living on white-owned commercial farmland remain insecure. It is clear that the tenure security issues on white-owned commercial farmland remain largely unresolved.

The 1997 *White paper* identified farm dwellers as beneficiaries of the land reform programme. Although the land reform policy has identified gender equality and promoting women's rights as key objectives, it has been suggested that women have not been particularly well-served by the different programmes that have been put in place since 1994.¹²⁰ It is rather unfortunate that the implementation of the policy on tenure reform has not been focussed on improving tenure arrangements for farm

¹¹⁷ Hall R & Cliffe L "Introduction" in Hall R (ed) *Another countryside? Policy options for land and agrarian reform in South Africa* (2009) 1-22 at 6.

¹¹⁸ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 60.

¹¹⁹ The 1991 *White paper on land reform* was followed by two statutes, the Abolition of Racially Based Land Measures Act 108 of 1991; and the Upgrading of Land Tenure Rights Act 112 of 1991, which made a radical change to the South African land law. See Bennet TW "African land - A history of dispossession" in Zimmerman R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) 65-94 at 91-92.

¹²⁰ Walker C "Elusive equality: Women, property rights and land reform in South Africa" (2009) 25 *South African Journal on Human Rights* 467-490 at 467. See also Pienaar JM "Tenure reform in South Africa: Overview and challenges" (2011) 25 *Speculum Juris* 108-133 at 129, who states that women are still under-represented in decision-making processes.

dwellers, especially women, since to date the existing policy has failed to bring about the expected transformation of land holding in South Africa.¹²¹

Furthermore, the tenure reform programme has failed to provide an alternative livelihood for most farm dwellers living on “on-site” or “off-site” settlements. Policy failures are evident in the lack of sufficient resources to monitor and evaluate programmes. Widely reported evictions and violent incidents on white-owned commercial farmland have put land tenure reform in the spotlight.¹²² Evictions are still gathering momentum on white-owned commercial farmland and this culminates in many farm dwellers losing their tenuous hold on land.¹²³

Constraints and limitations affecting the land tenure reform programme include a deficiency in the financial and administrative capacity required for effective implementation and the need to improve enforcement mechanisms of the current tenure laws.¹²⁴ The extent to which the policy can facilitate improved tenure security depends much on whether the policy vision and ideas are explicitly translated into action.¹²⁵ The challenge is the implementation of the policy framework on tenure reform and its development into legislation that is aimed at enhancing tenure security on farmland.¹²⁶ It is important that the governmental institutions in charge of land administration monitor the implementation of the policy on tenure reform and put mechanisms in place to enforce the policy objectives through legislation.

¹²¹ Pienaar JM “Tenure reform in South Africa: Overview and challenges” (2011) 25 *Speculum Juris* 108-133 at 109; Lahiff E “Land reform in South Africa: Is it meeting the challenge” (2001) *PLAAS Policy Brief No 1* 1-6 at 6 <<http://www.plaas.org.za/pubs/pb/PBO1.pdf>> (accessed 07-02-2012).

¹²² Pienaar JM “Tenure reform in South Africa: Overview and challenges” (2011) 25 *Speculum Juris* 108-133 at 128; Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 41-42.

¹²³ Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 7-8.

¹²⁴ Mutangadura G “The incidence of land tenure insecurity in Southern Africa: Policy implications for sustaining development” (2007) 31 *Natural Resources Forum* 176-187 at 183; Dreyer JS “Land reform: A key human rights issue and a challenge for religion in post-apartheid South Africa” (2005) 20 *Practical Theology in South Africa* 1-18 at 7.

¹²⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 42. See also Mutangadura G “The incidence of land tenure insecurity in Southern Africa: Policy implications for sustaining development” (2007) 31 *Natural Resources Forum* 176-187 at 185.

¹²⁶ Mutangadura G “The incidence of land tenure insecurity in Southern Africa: Policy implications for sustaining development” (2007) 31 *Natural Resources Forum* 176-187 at 186 observes that the greatest challenge is in expediting the process of developing land policies, converting new policies into new laws and implementing the new laws effectively.

Policy attention with respect to farm dwellers' rights has focussed mainly on tenure security. However, access to other socio-economic rights such as access to adequate housing, legal representation and access to health care continue to be constrained, leaving farm dwellers in insecure tenure arrangements.¹²⁷ Furthermore, policy on tenure reform is unclear about how public services should be provided to farm dwellers living on white-owned commercial farmland. Additionally, it is argued that government has no coherent and coordinated response to the situation of farm dwellers.¹²⁸

The 2011 *Green paper on land reform* recognises that the real problem with the protection of rights and security of tenure of farm dwellers might be as a result of a total system failure.¹²⁹ The 2011 *Green paper on land reform* identifies ways that reflect failure to protect the rights and security of tenure of farm dwellers. Some of the ways identified include the inadequate articulation of policies and legislation that govern farm dwellers' protection; the poor implementation of policies by organs of state; and the mishandling of eviction cases by the judicial system.¹³⁰ The problems outlined by the 2011 *Green paper on land reform* show that the policy objectives on tenure reform have not yet been met. Accordingly, the evaluation of the content and implementation of the policy framework on tenure reform indicates that there is a serious need for new approaches regarding the strengthening of tenure security for farm dwellers.

3 5 Conclusion

The above sections discuss the development and the progress made by the policy framework on tenure reform in South Africa since the early 1990s. The government is still in the process of reforming land tenure systems. Throughout the policy

¹²⁷ Cousins B & Hall R "Rights without illusions: The potential and limits of rights-based approaches to securing land tenure in rural South Africa" 2011 *PLAAS Working paper 18* para 2.1 <www.plaas.org.za/pubs/wp/WP18Cousins-Hall052011.pdf> (accessed 03-06-2011).

¹²⁸ Cousins B & Hall R "Rights without illusions: The potential and limits of rights-based approaches to securing land tenure in rural South Africa" 2011 *PLAAS Working paper 18* para 2.1 <www.plaas.org.za/pubs/wp/WP18Cousins-Hall052011.pdf> (accessed 03-06-2011).

¹²⁹ Republic of South Africa, Department of Rural Development and Land Reform *Green paper on South African land reform* (2011) para 10.3.

¹³⁰ Republic of South Africa, Department of Rural Development and Land Reform *Green paper on South African land reform* (2011) para 10.4.

formulation process, the government dedicated itself to the right of persons to choose the tenure system that suits them best. Much hope was fuelled up by the RDP with its commitment to secure tenure rights of farm dwellers.¹³¹ Pienaar¹³² argues that the most applicable policy for land reform, in particular tenure reform, is mainly stated in the 1997 *White paper*. The 1997 *White paper* encompass the policy regarding tenure security on farmland. Farm dwellers are singled out as being one of the most insecure sectors of the population.¹³³ The settlement/land acquisition grant is being used by the government as a subsidy to farm dwellers to improve tenure security and contribute to reconciliation and harmony on farmland.¹³⁴

According to the 1997 *White paper*,¹³⁵ the vision of the government is to provide a more balanced allocation of land and resources; establish partnerships between farm dwellers and farm owners; and make provision for secure tenure for all rural people. However, eighteen years since the implementation of the RDP and several other policies, tenure issues particularly relating to farmland are still largely unresolved. On white-owned commercial farmland, farm dwellers still face tenure insecurity and lack of basic facilities despite the policy designed to protect them.

The immediate challenge on farmland is the need to draft new legislation or to amend the existing legislation. Furthermore, the challenge is to improve the enforcement of measures that would meet the constitutional obligation of redressing insecure land tenure as a result of past discriminatory laws and practices. According to Lahiff,¹³⁶ policy on tenure reform must secure tenure rights for farm residents and workers in farming districts and not just in townships. In spite of the enactment of

¹³¹ Lahiff E "Land reform in South Africa: Is it meeting the challenge" (2001) *PLAAS Policy Brief No 1* 1-6 at 1 <<http://www.plaas.org.za/pubs/pb/PBO1.pdf>> (accessed 07-02-2012).

¹³² Pienaar G "Registration of informal land-use rights in South Africa giving teeth to toothless paper tigers" 2000 *Tydskrif vir die Suid-Afrikaanse Reg* 442-468 at 444.

¹³³ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) X.

¹³⁴ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) X.

¹³⁵ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 12.

¹³⁶ Lahiff E "Land reform in South Africa: Is it meeting the challenge" (2001) *PLAAS Policy Brief No 1* 1-6 at 2 <<http://www.plaas.org.za/pubs/pb/PBO1.pdf>> (accessed 07-02-2012).

several policies, little has changed concerning the uncertainty of tenure for most farm dwellers and in communal lands.

Tenure security issues on farmland would be best managed through a coherent policy that establishes properly legitimatised rules and systems that govern the implementation of various measures and laws. However, the challenge in transforming the guiding principles in the policy results from the failure to devise new measures to enforce legislation and establish institutional structures necessary for carrying out policy objectives.

This overview and assessment of the policy framework in respect of tenure reform provides the backdrop for the identification of the most crucial areas that need to be addressed by the South African government. Given the apartheid legacy of the imbalance in land holding, tenure reform policy must focus on securing and upgrading the tenure rights of various land occupiers. Tenure reform policies can materialise through the enactment of legislation in this area. This chapter also provides an insight into the policy initiatives that are aimed at addressing tenure issues on farmland and that form the basis for the enactment of tenure reform legislation. However, there remains an urgent need for a comprehensive, transparent reform process that will result in democratic systems of land administration and secure tenure that will ensure adequate protection for farm dwellers. A further discussion on tenure reform legislation and how the legislation addresses tenure security issues on farmland follows in chapter four.

Chapter four: Statutory framework on tenure reform

4 1 Introduction

Chapter three indicated the envisaged outcome of the government's land reform policy.¹ The stated vision of the *White paper on South African land policy* (1997 *White paper*)² is to transform South African society into a society that is based on democratic values, social justice and fundamental human rights.³ The 1997 *White paper* focuses on land reform, including tenure security on farmland and one of its aims is to address the injustices of the past and alleviate poverty. The particular focus on poverty alleviation requires the identification of marginalised groups in need of land, such as farm dwellers.⁴ In relation to tenure security reforms on farmland, the 1997 *White paper* focuses on resolving tenure disputes and creating conditions for the acquisition of suitable alternative land and housing for people with insecure tenure.⁵

Land tenure reform involves recognising or upgrading the informal rights of those occupying but not owning land.⁶ The tenure reform programme is governed by its legal framework, inspired by the provision contained in section 25(6) of the Constitution of the Republic of South Africa 1996 (the Constitution).⁷ The policy framework on tenure reform regarding farm dwellers is also outlined in the 1997

¹ See chapter 3 at 3 2.

² Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997).

³ See Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 7; Mahomed A *Understanding land tenure law: Commentary and legislation* (2010) 19.

⁴ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 12.

⁵ See chapter 2 at 2 2 1 for more background and information on tenure insecurity. See also Mahomed A *Understanding land tenure law: Commentary and legislation* (2010) 20.

⁶ See chapter 2 at 2 4 3 for a discussion on the tenure reform programme.

⁷ Section 25(6) of the Constitution of the Republic of South Africa 1996 encompasses the key constitutional provision for land tenure reform. See Hall R "Evaluating land and agrarian reform in South Africa: Farm tenure" (2003) *PLAAS Occasional Paper No 3* 1-42 at 3 <<http://www.plaas.org.za/pubs/downloads/LREP3.pdf>> (accessed 17-10-2011).

White paper.⁸ The Extension of Security of Tenure Act 62 of 1997 (ESTA) and the Land Reform (Labour Tenants) Act 3 of 1996 (LTA) were enacted to give effect to the requirement to provide secure tenure, specifically to occupiers of farmland as foreseen in the Constitution and the 1997 *White paper*.

The ESTA and LTA similarly aim to promote long-term security of tenure; regulate evictions; and introduce a set of rights and duties that govern the relationship of both occupiers and landowners. The primary function of ESTA and LTA within their different spheres is to strengthen and clarify the right of an occupier to reside on and use certain land. This is done by way of regulating ancillary rights linked to the right to reside and the provision of long-term security of tenure.

ESTA applies nationally but it is generally limited to people living in rural or peri-urban areas.⁹ This area is usually farmland or property zoned for agricultural use and thus occupation of land in this area is normally linked to the consent of the landowner.¹⁰ The underlying aim of the Act is generally to protect and strengthen the

⁸ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 60-69. See also Republic of South Africa, Department of Land Affairs *White paper on land reform* (1991), which also sets out the policy on tenure reform.

⁹ Section 2 of the Extension of Security of Tenure Act 62 of 1997. See also *Lebowa Platinum Mines Ltd v Viljoen* 2009 (3) SA 511 (SCA). In *Ngwenya v Grannersberger* 1999 (4) SA 62 (LCC) the respondents contested the application by arguing that the property comprised of land within an approved township and that the property was encircled by townships, thereby excluding the application of ESTA. In this regard see also Pienaar J & Brickhill J "Land" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional law of South Africa* (2nd ed OS 2007) ch 48 1-68 at 28; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 608; Van der Walt AJ *Constitutional property law* (2nd ed 2005) 317 (the chapter on land reform was left out of the 3rd ed 2011); Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 35; Pienaar JM "Tenure reform in South Africa: Overview and challenges (2011) 25 *Speculum Juris* 108-133 at 115.

¹⁰ See section 2(1)(a) of the Extension of Security of Tenure Act 62 of 1997. This section of the Act was one of the provisions which prompted counsel for the respondents in *Karabo and Others v Kok and Others* 1998 (4) SA 1014 (LCC) to argue that the application of ESTA should be restricted to land used for agricultural purposes. This argument was rejected by the Land Claims Court as being irreconcilable with the plain meaning of section 2(1). The Court held that ESTA applies to all land other than land in a township or encircled by a township. See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 608; Roux T "The Extension of Security of Tenure Act" in Budlender G, Latsky J & Roux T *Juta's new land law* (OS 1998) ch 7 1-61 at 7A-16; Hall R "Evaluating land and agrarian reform in South Africa: Farm tenure" (2003) *PLAAS Occasional Paper No 3* 1-42 at 3 <<http://www.plaas.org.za/pubs/downloads/LREP3.pdf>> (accessed 17-10-2011). The Subdivision of Agricultural Land Act 70 of 1970 defines a farm as a portion or portions of agricultural land.

tenure rights of occupiers.¹¹ Case law has indicated that the Act mostly protects a certain category of vulnerable persons, especially farm dwellers.¹² Unlike ESTA, which applies to rural land in general, the LTA is applicable to agricultural land only¹³ and it aims to protect labour tenants specifically. In essence, both acts generally apply to farmland and not to urban areas.

ESTA and LTA were intended to address the insecure tenure rights of farm dwellers. However, as is illustrated later in this chapter, these acts have failed to create real tenure security in the form of ownership or other secure forms of occupancy, such as long-term occupation. Instead, farm dwellers continue to suffer illegal evictions and other human rights abuses. The continuation of illegal evictions on farmland is in part due to weaknesses in the tenure security legislation and also due to the failure of all role players, such as the state and landowners, to implement farm dwellers' tenure rights as they are set out in the acts.¹⁴

The main focus of this chapter is on the relevant provisions of tenure security legislation; the main problems associated with tenure security legislation on farmland; and whether tenure security legislation addresses these problems. Therefore, the central component of this chapter is focused on the weaknesses in ESTA and LTA as well as poor implementation by the relevant government agencies, resulting in insecure tenure on farmland and lack of livelihood for farm dwellers.

This chapter is divided into four sections. The first section provides a discussion of the key laws enacted by government, which have some form of tenure reform as

¹¹ Section 2 of the Extension of Security of Tenure Act 62 of 1997.

¹² *Mkangeli v Joubert* 2002 (4) SA 36 (SCA) paras 9-10. See Pienaar JM & Geysers K "Occupier' for purposes of the Extension of Security of Tenure Act: The plight of female spouses and widows" (2010) 73 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 248-265 at 249.

¹³ Section 1(a) of the Land Reform (Labour Tenants) Act 3 of 1996 defines a labour tenant as someone who is residing or has a right to reside on a farm. See footnote 10 above for the definition of a farm. See also Mahomed A *Understanding land tenure law: Commentary and legislation* (2010) 104-105.

¹⁴ Yates T "Liberation betrayed: The case of continued evictions of farm dwellers in the "new" South Africa" in Hebinck P & Shackleton C (eds) *Reforming land and resource use in South Africa: Impact on livelihoods* (2011) 162-187 at 163.

their primary purpose. However, this chapter does not deal with all tenure reform laws in depth. The main focus will be on legislation aimed at tenure security in relation to farmland.¹⁵

The second section discusses the laws that are in place specifically to protect and extend farm dwellers' tenure rights. An overview of the tenure security legislation that applies to farm dwellers is provided, outlining the provisions of the tenure security legislation as well as its intended purpose.

The third section reviews some of the problems associated with ESTA and LTA. The problems with ESTA and LTA are mainly inherent in the laws itself as well as in their implementation.¹⁶ Other problems linked to the inherent flaws and implementation of the legislation manifest mainly in case law, which deals with different aspects of land tenure security issues.¹⁷ It is necessary to discuss relevant case law in this regard with specific focus on the application of tenure legislation and on the procedure followed by courts in dealing with substantive matters involving the rights associated with tenure security, such as the promotion of long-term security of tenure; burial rights; and eviction. This section will also review the extent to which key legislation designed to promote security of tenure and regulate evictions has been effectively implemented by government agencies and non-governmental organisations (NGOs).

The fourth section of the chapter evaluates tenure security legislation in the constitutional framework. The section examines the progress made in terms of ESTA and LTA towards achieving tenure security for farm dwellers on white-owned

¹⁵ ESTA and LTA are examples of the tenure security legislation that protects and strengthens farm dwellers tenure security.

¹⁶ Cousins B & Hall R "Rights without illusions: The potential and limits of rights-based approaches to securing land tenure in rural South Africa" 2011 *PLAAS Working paper 18* para 2.2 <www.plaas.org.za/pubs/wp/WP18Cousins-Hall052011.pdf> (accessed 03-06-2011).

¹⁷ The problems linked to tenure security legislation include evictions; inadequate legal representation; shortage of housing; poor living conditions; literacy issues; procedural issues; labour issues; and the scope and application of ESTA and LTA. However, not all of these problems are dealt with in case law. Some issues relating to eviction; legal representation; termination of employment and accommodation; procedure; and the scope of the legislation are usually dealt with when the issue reaches the court. With regard to implementation issues, it is mainly the government agencies and the NGOs that deal with such matters.

commercial farmland. The progress made in terms of ESTA is assessed in relation to the two main aims of the Act, namely regulating evictions and the promotion of long-term security of tenure.

4 2 Overview of general tenure reform legislation

4 2 1 Introduction

The various tenure reform laws were enacted to protect the rights of people living on land of which they were not the registered owners. The tenure reform laws recognise the weak tenure rights of farm dwellers in particular and aim to provide stronger and more secure tenure rights. These tenure reform laws include the Upgrading of Land Tenure Rights Act 112 of 1991; the Interim Protection of Informal Land Rights Act 31 of 1996; the Communal Property Associations Act 28 of 1996; the LTA; the ESTA; and the Communal Land Rights Act 11 of 2004 (CLARA).

Legislation enacted to give effect to the tenure reform goals and to protect the tenure security right referred to in the Constitution is categorised differently in relation to their objectives. The categories range from legislative measures that upgrade tenure rights;¹⁸ transform existing rights or create new land rights;¹⁹ protect occupiers' rights on an interim basis while the tenure reform programme was in the process of being developed and implemented;²⁰ and lay down procedures for allowing evictions and requirements for carrying them out lawfully.²¹ The discussion below focuses mainly on legislation intended to facilitate the land tenure reform programme in general. ESTA and LTA are dealt with in section 4 3 below, which specifically focuses on legislation aimed at providing and strengthening tenure security for farm dwellers.

¹⁸ See the Upgrading of Land Tenure Rights Act 112 of 1991.

¹⁹ See the Communal Land Rights Act 11 of 2004; the Communal Property Associations Act 28 of 1996, which provides for the creation and registration of communal property associations; and the Development Facilitation Act 67 of 1995, which secures "initial ownership". In this regard see Pienaar JM "Tenure reform in South Africa: Overview and challenges" (2011) 25 *Speculum Juris* 108-133 at 111; Van der Walt AJ "Exclusivity of ownership, security of tenure, and eviction orders: A model to evaluate South African land-reform legislation" 2002 *Tydskrif vir die Suid-Afrikaanse Reg* 254-286 at 264-266.

²⁰ Interim Protection of Informal Land Rights Act 31 of 1996.

²¹ The Land Reform (Labour Tenants) Act 3 of 1996 and the Extension of Security of Tenure Act 62 of 1997.

4 2 2 *Upgrading of Land Tenure Rights Act 112 of 1991*

The Act was the first major development in the implementation of the land tenure reform programme. It was enacted soon after the abolition of racially-based land laws and practices and it removed statutory restrictions in respect of the acquisition or occupation of land.²² The Act provided for the upgrading and conversion into ownership of certain rights granted in respect of land; for the transfer of tribal land in full ownership to tribes; and for matters connected therewith.²³ It aimed to upgrade various forms of limited land tenure rights, which were prevalent in the apartheid era and accorded lesser rights in land to the majority of South Africans.²⁴

In this context, the underlying aim of the Act was to secure tenure by making provision for the upgrading of certain rights.²⁵ Depending on the nature of the right, upgrading under the Act was either automatic or on the basis of a process of registration initiated by the holder.²⁶ For example, leaseholds, deeds of grant and quitrents were automatically upgraded into ownership.²⁷ Leasehold, deeds of grant and quitrents issued anywhere in South Africa, except within the self-governing territories, were upgradable if they related to plots in a formalized town.²⁸ These rights were upgraded automatically into ownership with the implementation of the Act and registration of the rights only took place at a later stage.²⁹

²² Carey Miller DL & Pope A "Land reform in South Africa" (2000) 44 *Journal of African Law* 167-194 at 184.

²³ See the preamble of the Upgrading of Land Tenure Act 112 of 1991.

²⁴ See the historical overview in chapter 2 at 2 2 1. See also Carey Miller DL & Pope A "Land reform in South Africa" (2000) 44 *Journal of African Law* 167-194 at 184.

²⁵ Pienaar JM "Tenure reform in South Africa: Overview and challenges" (2011) 25 *Speculum Juris* 108-133 at 112; Van der Merwe CG & Pienaar JM "Land reform in South Africa" in Jackson P & Wilde DC (eds) *The reform of property law* (1997) 334-380 at 351.

²⁶ Pienaar JM "Tenure reform in South Africa: Overview and challenges" (2011) 25 *Speculum Juris* 108-133 at 112; Carey Miller DL & Pope A "Land reform in South Africa" (2000) 44 *Journal of African Law* 167-194 at 184.

²⁷ See section 2(1)(a) of the Upgrading of Land Tenure Act 112 of 1991.

²⁸ Section 15(1) of the Upgrading of Land Tenure Act 112 of 1991.

²⁹ Section 2(2)(a) of the Upgrading of Land Tenure Act 112 of 1991. See also Pienaar JM "Tenure reform in South Africa: Overview and challenges" (2011) 25 *Speculum Juris* 108-133 at 112.

The Act was initially promulgated with the underlying idea to promote individual ownership, especially within the township context.³⁰ Since the Act came into operation it has been amended a few times to bring it more in line with its initial intended purpose to provide not only for individual ownership as such, but also to ensure a range of protected tenure options.³¹

4 2 3 *Development Facilitation Act 67 of 1995*

The Development Facilitation Act 67 of 1995 also makes use of the mechanism of upgrading land rights, which is an appropriate solution to the widespread problem of weak property rights.³² The main objectives of the Act that are particularly relevant to this study include the provision of security of tenure for all land users and promotion of a variety of land tenure forms.³³ The Act is directly linked to the effective implementation and facilitation of the reconstruction and development programmes and other projects relating to land by laying down general principles governing all future land development throughout the whole of the Republic of South Africa.³⁴ It accommodates a new encompassing developmental approach entailing the development of both rural and urban areas, land tenure matters, general planning and conservation standards, financial measures and a new planning and developmental infrastructure.³⁵ However, its relevance in relation to farmland in particular, is somewhat limited.

³⁰ Pienaar JM "Tenure reform in South Africa: Overview and challenges" (2011) 25 *Speculum Juris* 108-133 at 112; Carey Miller DL & Pope A "Land reform in South Africa" (2000) 44 *Journal of African Law* 167-194 at 184.

³¹ Pienaar JM "Tenure reform in South Africa: Overview and challenges" (2011) 25 *Speculum Juris* 108-133 at 112; Carey Miller DL & Pope A "Land reform in South Africa" (2000) 44 *Journal of African Law* 167-194 at 184.

³² Section 63 of the Development Facilitation Act 67 of 1995 provides for the upgrading of certain unregistered and informal tenure arrangements to full ownership. See also Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 662; Carey Miller DL & Pope A "Land reform in South Africa" (2000) 44 *Journal of African Law* 167-194 at 184.

³³ See the preamble of the Development Facilitation Act 67 of 1995. See also Van der Walt AJ & Pienaar GJ *Introduction to the law of property law* (6th ed 2009) 326.

³⁴ See the preamble of the Development Facilitation Act 67 of 1995; Van der Merwe CG & Pienaar JM "Land reform in South Africa" in Jackson P & Wilde DC (eds) *The reform of property law* (1997) 334-380 at 368; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 661; Van der Walt AJ & Pienaar GJ *Introduction to the law of property law* (6th ed 2009) 327.

³⁵ Van der Merwe CG & Pienaar JM "Land reform in South Africa" in Jackson P & Wilde DC (eds) *The reform of property law* (1997) 334-380 at 368.

4 2 4 *Communal Property Associations Act 28 of 1996*

The Communal Property Associations Act 28 of 1996 (CPAA) is also a tenure reform measure that makes provision for security of tenure within a communal property association. The primary purpose of the Act is to provide a viable basis for landholding by a community.³⁶ The CPAA allows a community to form itself into a juristic person for the purposes of acquiring, holding and managing property on a basis agreed to by the members in a written constitution.³⁷ This is done on behalf of and for the benefit of disadvantaged communities.³⁸ The CPAA therefore deals with rights vested in a community itself, but embodies the entitlements and protection in a new juristic person created in terms of the Act, thereby effecting tenure security.³⁹ The CPAA basically regulates tenure rights of members of a communal property association and everything connected with the association. This is accomplished in two ways: firstly by registering the provisional association and secondly by registering the communal property association once all the requirements as set out in the Act have been complied with.⁴⁰

4 2 5 *The Interim Protection of Informal Land Rights Act 31 of 1996*

The Interim Protection of Informal Land Rights Act 31 of 1996 was initially regarded as an interim measure and was meant to have lapsed at the end of December 1997. However, due to complexities in the land reform programme, the Act is still in force and its use is extended on an annual basis.⁴¹ The aim of the Act is to provide for the temporary protection of certain rights and interests in land that are not otherwise

³⁶ Carey Miller DL & Pope A "South African land reform" (2000) 44 *Journal of African Law* 167-194 at 185.

³⁷ The preamble of the Communal Property Associations Act 28 of 1996. See also Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 620; Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 467; Carey Miller DL & Pope A "South African land reform" (2000) 44 *Journal of African Law* 167-194 at 185.

³⁸ Van der Merwe CG & Pienaar JM "Land reform in South Africa" in Jackson P & Wilde DC (eds) *The reform of property law* (1997) 334-380 at 365-366. See also Van der Walt AJ & Pienaar GJ *Introduction to the law of property* (6th ed 2009) 331.

³⁹ Pienaar JM "Tenure reform in South Africa: Overview and challenges" (2011) 25 *Speculum Juris* 108-133 at 114.

⁴⁰ Section 5 of the Communal Property Associations Act 28 of 1996. See also Pienaar JM "Tenure reform in South Africa: Overview and challenges" (2011) 25 *Speculum Juris* 108-133 at 114.

⁴¹ Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 466; Van der Walt *Constitutional property law* (2nd ed 2005) 311 (the chapter on land reform was left out of the 3rd ed 2011). The application of the Act was extended for the fifteenth time to 31 December 2012 by GN 1030 in GG 34836 of 08-12-2011.

adequately protected by law for the duration of the reform process.⁴² This implies that the Act ensures legal recognition and protection of the various kinds of land rights and interests existing in South Africa, pending permanent reform measures.

4 2 6 *The Communal Land Rights Act 11 of 2004*

The Communal Land Rights Act 11 of 2004 (CLARA) was intended to be the primary tool for providing legally secure tenure and comparable redress on communal lands. The objective was to fulfil the provision in section 25(6) and 25(9) of the Constitution by transforming insecure “old order rights” into “new order rights” that are stronger and more secure.⁴³ These rights would then have been registered in the name of the communities or individuals who hold or occupy land communally. In light of the fact that CLARA was declared unconstitutional,⁴⁴ the Act will not be further discussed here.

The tenure reform legislative measures outlined above are discussed briefly to provide an exposition of their use and employment within the overall tenure reform programme. The relevant legislation that remains to be considered is the ESTA and LTA, which are specifically aimed at providing tenure security for farm dwellers who work and live on farmland.

⁴² Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 619; Chenwi L *Evictions in South Africa: Relevant international and national standards* (2008) 58; Van der Walt AJ & Pienaar GJ *Introduction to the law of property* (6th ed 2009) 331; Van der Walt AJ *Constitutional property law* (2nd ed 2005) 311 (the chapter on land reform was left out of the 3rd ed 2011); Van der Merwe CG & Pienaar JM “Land reform in South Africa” in Jackson P & Wilde DC (eds) *The reform of property law* (1997) 334-380 at 365; Carey Miller DL & Pope A “Land reform in South Africa” (2000) 44 *Journal of African Law* 167-194 at 186; Van der Walt AJ “Exclusivity of ownership, security of tenure, and eviction orders: A model to evaluate South African land-reform legislation” 2002 *Tydskrif vir die Suid-Afrikaanse Reg* 254-286 at 282.

⁴³ Pienaar JM “Tenure reform in South Africa: Overview and challenges” (2011) 25 *Speculum Juris* 108-133 at 120; Van der Walt AJ & Pienaar GJ *Introduction to the law of property law* (6th ed 2009) 331.

⁴⁴ The Constitutional Court in *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC) declared CLARA unconstitutional in its entirety, mainly because of the incorrect procedure that was followed in its enactment. CLARA was passed under the procedure prescribed in section 75 of the Constitution, which governs the enactment of Bills that do not affect provinces. Instead, section 76 of the Constitution ought to have been followed because CLARA impacted directly on provincial matters as well as on indigenous and customary law issues. See paras 49, 111-112 and 116 of the *Tongoane* judgment.

4 3 Legislation specifically aimed at securing tenure for farm dwellers

4 3 1 Introduction

Two of the most important pieces of legislation to improve the rights of farm dwellers are the LTA and ESTA.⁴⁵ The government promulgated ESTA and LTA in line with section 25(6), read with section 25(9) of the Constitution, to create the enabling legislative framework that will facilitate the acquisition and strengthening of tenure security in rural areas.⁴⁶ The acts offer significant protection to parties in tenure-related disputes by circumscribing the rights of and imposing duties on both owners and occupiers.⁴⁷ In addition, ESTA and LTA aim to provide the necessary framework for implementing a viable land tenure reform programme.⁴⁸

The ESTA and LTA permit the development of various forms of tenure; prescribe key definitions; set out the nature of the legal protection afforded to owners, occupiers and labour tenants; and outline eviction procedures.⁴⁹ ESTA and LTA ensure that the rights and duties of all parties are recognised and protected. In terms of ESTA, security of tenure is offered to many people who may not have secure tenure of their homes or dwellings and are therefore vulnerable to evictions. The LTA specifically protects labour tenants.

4 3 2 Purpose and provisions of ESTA

ESTA is aimed at changing the balance of power in land ownership and this is done in two ways; firstly by limiting and regulating circumstances in which evictions can take place⁵⁰ and secondly by making provision for the promotion of long-term security of tenure for lawful occupiers of rural land.⁵¹ The procedure for

⁴⁵ De Villiers B *Land reform: Issues and challenges – A comparative overview of experiences in Zimbabwe, Namibia, South Africa and Australia* (2003) 49.

⁴⁶ Mahomed A *Understanding land tenure law: Commentary and legislation* (2010) 3.

⁴⁷ Mahomed A *Understanding land tenure law: Commentary and legislation* (2010) 3.

⁴⁸ Mahomed A *Understanding land tenure law: Commentary and legislation* (2010) 3.

⁴⁹ Mahomed A *Understanding land tenure law: Commentary and legislation* (2010) 4.

⁵⁰ Roux T “The Extension of Security of Tenure Act” in Budlender G, Latsky J & Roux T *Juta’s new land law* (OS 1998) ch 7 1-61 at 7A-17.

⁵¹ Roux T “The Extension of Security of Tenure Act” in Budlender G, Latsky J & Roux T *Juta’s new land law* (OS 1998) ch 7 1-61 at 7A-17; Van der Walt AJ *Constitutional property law* (2nd ed 2005) 316 (the chapter on land reform was left out of the 3rd ed 2011); Roodt MJ “Security of tenure and

strengthening tenure rights in terms of the Constitution and ESTA is meant to be an integral part of the process of addressing gross inequality in land ownership.⁵²

Farm dwellers are accorded various rights under ESTA. If these rights are recognised and enforced, tenure security on farmland would be strengthened. Firstly, ESTA grants occupiers who lived on someone else's land on or after 4 February 1997 with the permission of the farm owner, a secure legal right to live and use that land.⁵³ This implies that once the farm owner revokes his or her permission, the right of residence of the occupier is terminated. However, this provision does not entitle the farm owner to arbitrarily evict the occupiers. Instead, the farm owner must first apply to court to effect the eviction of an occupier.⁵⁴ The obligation placed on the farm owner to apply for an eviction against an occupier amounts to the protection and strengthening of the occupiers' right to reside on the land.

The Act sets out the rights and duties of farm dwellers and farm owners.⁵⁵ It also sets out the principles and values that should regulate relationships between land occupiers and farm owners.⁵⁶ The occupiers have the right to receive visitors, the right to family life and not to be deprived of access to basic facilities such as water, health, and education services.⁵⁷ The Act gives the occupiers the right to visit and

livelihood options in South Africa: A case study of a rural community facing eviction under post-apartheid legislation in the Eastern Cape Province" (2007) 37 *Africanus* 3-12 at 4-5.

⁵² Roodt MJ "Security of tenure and livelihood options in South Africa: A case study of a rural community facing eviction under post-apartheid legislation in the Eastern Cape Province" (2007) 37 *Africanus* 3-12 at 5. Roux T "The Extension of Security of Tenure Act" in Budlender G, Latsky J & Roux T *Juta's new land law* (OS 1998) ch 7 1-61 at 7A-3 states that ESTA is aimed at redressing the legacy of apartheid land law and that its provisions attempt to transform historically entrenched power relationships so as to bring justice to the present society.

⁵³ Section 3 of the Extension of Security of Tenure Act 62 of 1997.

⁵⁴ Section 9(1) of the Extension of Security of Tenure Act 62 of 1997. See also Hall R "Evaluating land and agrarian reform in South Africa: Farm tenure" (2003) *PLAAS Occasional Paper No 3* 1-42 at 4 <<http://www.plaas.org.za/pubs/downloads/LREP3.pdf>> (accessed 17-10-2011).

⁵⁵ Sections 5-7 of the Extension on Security of Tenure Act 62 of 1997.

⁵⁶ Sections 6-7 of the Extension on Security of Tenure Act 62 of 1997. See also *Mkangeli and Others v Joubert and Others* 2002 (4) SA 36 (SCA); Mahomed A *Understanding land tenure law: Commentary and legislation* (2010) 54; Naidoo L "Social mobilisation of farm workers and dwellers in the Eastern Cape" in Helliker K & Murisa T (eds) *Land struggles and civil society in Southern Africa* (2011) 71-112 at 90.

⁵⁷ Section 6(1)-(2) and (4) of the Extension of Security of Tenure Act 62 of 1997. The case of *Conradie v Hanekom and Another* 1999 (4) SA 491 (LCC) illustrates the application of the right to family life. In this case Mr Hanekom's employment contract was cancelled as a result of bad behaviour, leading to an application for eviction by the farm owner. The court held that because Mrs

maintain graves on farmland in rural and peri-urban areas. ESTA also creates special rights that are granted to long-term occupiers. Long-term occupiers are those occupiers over the age of 60 years who have resided on the farm for at least 10 years or who are disabled or unable to work as a result of sickness.⁵⁸ Long-term occupiers may only be evicted if they have violated the terms of occupation.⁵⁹ This provision shows the extent to which ESTA aims to secure and protect the tenure rights of farm dwellers.

Secondly, the provisions of ESTA protect farm owners by placing duties on the occupiers. It stipulates that occupiers may not harm or threaten other people on the land, damage property or help others to unlawfully establish dwellings.⁶⁰ Occupiers are under an obligation to follow the terms of their tenancy and failure to abide by these terms may warrant their eviction from the farm.⁶¹ This implies that ESTA provides for measures to extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of farm owners.⁶²

Thirdly and most importantly, ESTA protects occupiers against unfair or arbitrary eviction by stipulating the circumstances under which an occupier may be evicted.⁶³ As a result, an eviction may only be effected in terms of an eviction order issued by a court. Additionally, ESTA provides ways to resolve disputes over land rights through mediation, arbitration or the courts. However, as will become clear later on, the enactment of ESTA has not been able to curb evictions on farmland.⁶⁴

Hanekom had a right to family life, her husband (Mr Hanekom) was allowed to remain on the farm, thereby making the eviction order fall away.

⁵⁸ Section 8(4)(a)-(b) of the Extension of Security of Tenure Act 62 of 1997.

⁵⁹ Section 8(4) of the Extension of Security of Tenure Act 62 of 1997.

⁶⁰ Section 6(3)(a)-(b) of the Extension of Security of Tenure Act 62 of 1997.

⁶¹ Hall R "Evaluating land and agrarian reform in South Africa: Farm tenure" (2003) *PLAAS Occasional Paper No 3* 1-42 at 4 <<http://www.plaas.org.za/pubs/downloads/LREP3.pdf>> (accessed on 17-10-2011).

⁶² Yates T "Liberation betrayed: The case of continued evictions of farm dwellers in the 'new' South Africa" in Hebinck P & Shackleton C (eds) *Reforming land and resource use in South Africa: Impact on livelihoods* (2011) 162-187 at 164; Roodt MJ "Security of tenure and livelihood options in South Africa: A case study of a rural community facing eviction under post-apartheid legislation in the Eastern Cape Province" (2007) 37 *Africanus* 3-12 at 5.

⁶³ Sections 9-12 of the Extension of Security of Tenure Act 62 of 1997. See also Chenwi L *Evictions in South Africa: Relevant international and national standards* (2008) 28.

⁶⁴ See section 4.4 of this chapter below.

Fourthly, ESTA outlines the measures for occupiers to acquire long-term security of tenure on land, where possible through the joint efforts of occupiers, farm owners and government bodies.⁶⁵ Section 4 of ESTA envisages a mechanism through which long-term security may be achieved. Long-term security of tenure may be achieved through the provision of subsidies to assist occupiers facing eviction to find suitable alternative accommodation. The relevant provision of the Act states that the Minister may grant subsidies to facilitate the planning and implementation of on-site and off-site developments; enable occupiers, former occupiers and other people who need long-term security of tenure to acquire land or rights to land; and for the development of land occupied or to be occupied in terms of on-site or off-site developments.⁶⁶ Accordingly, occupiers are provided with financial assistance from the state to upgrade rights on the land that they occupy so that they can have long-term security of tenure.

4 3 3 Purpose and provisions of LTA

The LTA applies only to labour tenants as defined by the Act and excludes other categories of rural dwellers, such as farm workers.⁶⁷ The Act also applies to farmland, which is a portion or portions of agricultural land as defined as such in the Subdivision of Agricultural Land Act 70 of 1970.

The purpose of LTA is to provide for security of tenure to labour tenants and other persons who occupy and use farmland as a result of their association with labour

⁶⁵ See the preamble of the Extension of Security of Tenure Act 62 of 1997. See also Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 610; Yates T "Liberation betrayed: The case of continued evictions of farm dwellers in the 'new' South Africa" in Hebinck P & Shackleton C (eds) *Reforming land and resource use in South Africa: Impact on livelihoods* (2011) 162-187 at 164; *Diedericks v Univeg Operations South Africa (Pty) Ltd t/a Heldervue Estates* (LCC18/2011) [2011] ZALCC 11 (23 August 2011) para 19.

⁶⁶ Section 4 of the Extension of Security of Tenure Act 67 of 1997. See also Yates T "Liberation betrayed: The case of continued evictions of farm dwellers in the 'new' South Africa" in Hebinck P & Shackleton C (eds) *Reforming land and resource use in South Africa: Impact on livelihoods* (2011) 162-187 at 164; Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 514-515; Roodt MJ "Security of tenure and livelihood options in South Africa: A case study of a rural community facing eviction under post-apartheid legislation in the Eastern Cape Province" (2007) 37 *Africanus* 3-12 at 5.

⁶⁷ Section 1 of the Land Reform (Labour Tenants) Act 3 of 1996. See also the Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 49; Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 528; Van der Walt AJ *Constitutional property law* (2nd ed 2005) 312 (the chapter on land reform was left out of the 3rd ed 2011).

tenants.⁶⁸ The Act seeks to provide labour tenants with three types of rights, namely rights of occupation; protection against unlawful evictions; and the acquisition of land rights and measures to obtain security of tenure.⁶⁹ The Act embodies elements of redistribution as well as of tenure reform that aim to provide people with secure tenure.⁷⁰

The Act is principally intended to achieve two goals.⁷¹ On the one hand the Act intends to provide tenure security for labour tenants by protecting existing land rights and ensuring that labour tenants are not evicted from the land without proper procedures being followed.⁷² The result is that once a person qualifies as a labour tenant, the right to occupy land with his family can only be terminated in line with the requirements of the Act.⁷³ In effect, the LTA provides labour tenants with protection against arbitrary eviction. On the other hand, the Act provides for the acquisition of land ownership and other related land rights on the basis of the circumstances of labour tenancy.⁷⁴ An application process was created by the Act whereby a narrow class of labour tenants who lived under a system which allowed them to retain

⁶⁸ See the preamble of the Land Reform (Labour Tenants) Act 3 of 1996. See the case of *Makhomboti v Klingenberg and Another* 1999 (1) SA 135 (T), which dealt with the right of a labour tenant to occupy and use land.

⁶⁹ Mahomed A *Understanding land tenure law: Commentary and legislation* (2010) 97; Chenwi L *Evictions in South Africa: Relevant international and national standards* (2008) 44.

⁷⁰ Van der Walt AJ *Constitutional property law* (2nd ed 2005) 315 (the chapter on land reform was left out of the 3rd ed 2011); Mahomed A *Understanding land tenure law: Commentary and legislation* (2010) 97-98; Pienaar JM "Tenure reform in South Africa: Overview and challenges" (2011) 25 *Speculum Juris* 108-133 at 122.

⁷¹ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 601.

⁷² In terms of section 3(1) of the Land Reform (Labour Tenants) Act 3 of 1996, a person who was a labour tenant on 2 June 1995 has the right to occupy and use the part of the farm that was being used and occupied on that date or that was restored to him under this Act or any other law. Such a right according to section 3(2) of the LTA may only be terminated in accordance with the Act, for example when the rights are waived; in case of a person's death; eviction; and in cases where the tenant acquires ownership or compensation. In this regard see Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 532.

⁷³ Section 3(2) of the Land Reform (Labour Tenants) Act 3 of 1996. See also Van der Walt AJ *Constitutional property law* (2nd ed 2005) 314 (the chapter on land reform was left out of the 3rd ed 2011); Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 598; Van der Walt AJ "Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation" 2002 *Tydskrif vir die Suid-Afrikaanse Reg* 254-289 at 271-274.

⁷⁴ Section 16(1) of the Land Reform (Labour Tenants) Act 3 of 1996 gives the labour tenant the right to acquire a right in land. See also Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 49; Van der Merwe CG & Pienaar JM "Land reform in South Africa" in Jackson P & Wilde DC (eds) *The reform of property law* (1997) 334-380 at 360; Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 527; Van der Walt AJ *Constitutional property law* (2nd ed 2005) 314 (the chapter on land reform was left out of the 3rd ed 2011).

production and residential rights in land in exchange for provision of labour to white commercial farmers, could obtain ownership of the land on which they had historically lived and worked.⁷⁵

4 4 Problems associated with tenure security legislation

4 4 1 Introduction

The purpose of land tenure reform is to move towards the transformation of subservient forms of land rights and interests into legally enforceable rights to land.⁷⁶ The problems associated with tenure insecurity still surface on farmland, mainly due to the weaknesses and inappropriate application of tenure security legislation. As a result of the weaknesses in the legislative provisions, both ESTA and LTA have not been able to fully address living and working conditions on white-owned commercial farms.⁷⁷ This in turn raises questions about the application, interpretation and enforcement mechanisms of the two tenure security acts. Unlike LTA, which only caters for labour tenants, ESTA presents many problems⁷⁸ that are inherent in its provisions since it stipulates rights and duties for different categories of people living on farmland.

4 4 1 1 Inherent flaws in ESTA

The provisions of ESTA⁷⁹ are limited in that they only apply to farm dwellers while residing on farmland. The Act fails to articulate a strategy that enables these farm dwellers to access land when they have been evicted, dismissed or retrenched. Loss of tenure on white-owned commercial farms is not linked to a robust programme of

⁷⁵ Section 12 of the Land Reform (Labour Tenants) Act 3 of 1996. See also Yates T "Liberation betrayed: The case of continued evictions of farm dwellers in the "new" South Africa" in Hebinck P & Shackleton C (eds) *Reforming land and resource use in South Africa: Impact on livelihoods* (2011) 162-187 at 163-164. Hall R "Evaluating land and agrarian reform in South Africa: Farm tenure" (2003) *PLAAS Occasional Paper No 3* 1-42 at 24 <<http://www.plaas.org.za/pubs/downloads/LREP3.pdf>> (accessed 17-10-2011) argues that the LTA is intended to enable labour tenants to become independent farmers on their own land.

⁷⁶ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 60.

⁷⁷ Naidoo L "Social mobilisation of farm workers and dwellers in the Eastern Cape" in Helliker K & Murisa T (eds) *Land struggles and civil society in Southern Africa* (2011) 71-112 at 87.

⁷⁸ The problems mostly arise in respect of the scope, application, interpretation as well as the implementation of ESTA.

⁷⁹ Section 2(1) of the Extension of Security of Tenure Act 62 of 1997.

secure off-farm tenure and land access.⁸⁰ The failure of the Act to provide for long-term tenure security is constantly exposed when farm dwellers are fairly or unfairly evicted and have difficulties in finding alternative accommodation post eviction.⁸¹

Furthermore, ESTA creates a link between employment and the right of residence of occupiers employed on farmland.⁸² The courts are faced with a challenge when addressing the gender-differentiated forms through which employment, housing and tenure are secured on farms.⁸³ By creating this link, the Act has increased the varying degrees of tenure precariousness among women and children living on farmland. This in fact reinforces the trend whereby women's access to secure tenure

⁸⁰ Naidoo L "Poverty and insecurity of farm workers and dwellers in post-apartheid South Africa" in Hebinck P & Shackleton C (eds) *Reforming land and resource use in South Africa: Impact on livelihoods* (2011) 188-208 at 198.

⁸¹ The court in *Lebombo Cape Properties (Pty) Ltd v Abdol and Others* [2012] JOL 28246 (LCC) para 39(d) had to consider an appeal against a refusal by the magistrates' court to grant an eviction order against 35 respondents who occupied extremely unhealthy homes situated on a farm. The court ordered the applicant occupiers and the local authorities to engage with each other meaningfully as soon as possible on the provision of emergency housing for the occupiers after they have vacated the property. In *Diedericks v Univeg Operations South Africa (Pty) Ltd t/a Heldervue Estates* (LCC18/2011) [2011] ZALCC 11 (23 August 2011) para 21, the court ordered the applicant and the respondent to engage with one another as well as to jointly or separately engage with the local authority meaningfully in an effort to resolve issues, in a way that upholds constitutional values. Para 11 of the *Diedericks* judgment states that in light of Constitutional Court decisions, it now appears as settled law that in determining the relevant circumstances to satisfy section 26(3) of the Constitution, a court must establish if there has been meaningful engagement. See *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC), which dealt with the right to have access to adequate housing in the context of an eviction. The Constitutional Court in this case issued an interim order that directed the parties to "engage with each other meaningfully". Other Constitutional Court decisions dealing with the issue of meaningful engagement include *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC); *Abahlali baseMjondolo Movement of South Africa and others v Premier of KwaZulu-Natal and others* 2010 (2) BCLR 99 (CC). For a detailed discussion on meaningful engagement see Muller G "Conceptualising 'meaningful engagement' as a deliberative democratic partnership" (2011) 22 *Stellenbosch Law Review* 742-758. See also Chenwi L "Seeking security: Towards a new vision for tenure relations in farming areas" (2005) 6 *Economic and Social Rights in South Africa* 18-20 at 19; Chenwi L & Liebenberg S "The constitutional protection of those facing eviction from 'bad buildings': Case review" (2008) 9 *Economic and Social Rights in South Africa* 12-17; Chenwi L "A new approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*" (2009) 2 *Constitutional Court Review* 371-393; Naidoo L "Social mobilisation of farm workers and dwellers in the Eastern Cape" in Helliker K & Murisa T (eds) *Land struggles and civil society in Southern Africa* (2011) 71-112 at 90.

⁸² Section 8(2) of the Extension of Security of Tenure Act 62 of 1997.

⁸³ Naidoo L "Poverty and insecurity of farm workers and dwellers in post-apartheid South Africa" in Hebinck P & Shackleton C (eds) *Reforming land and resource use in South Africa: Impact on livelihoods* (2011) 188-208 at 198. Yates T "Liberation betrayed: The case of continued evictions of farm dwellers in the 'new' South Africa" in Hebinck P & Shackleton C (eds) *Reforming land and resource use in South Africa: Impact on livelihoods* (2011) 162-187 at 180 also argues that ESTA does not make it clear whether women have independent tenure rights, separate from their partners and spouses.

and housing on farmland is mediated through a male occupier who is the head of the household. Accordingly, women and their dependants, who are not employed by the farm owner, can be legally evicted after a year if their husbands died while being employed on the farm.⁸⁴ This implies that seasonal female workers and young workers who do not work on the farm where they live can also be legally evicted at any time.⁸⁵ The complex link between land tenure and employment status, established under ESTA, appears to be one of the strongest causes of farm evictions.⁸⁶ It follows that the farm dwellers' employment status is important in determining the extent of any farm dwellers' tenure vulnerability.⁸⁷

Maass⁸⁸ suggests that tenure security in urban rental housing can be strengthened effectively if the occupation right should in principle be perpetual. Furthermore, Maass⁸⁹ is of the view that the period of occupation should mainly be dependent on the occupiers' will and not on the tenancy arrangement. This will ensure that occupiers are protected against termination of their occupation right. However, the same argument is difficult to make in relation to tenure security on farmland. This is so because the right to reside on the farm is often linked to their employment contracts. In this light, Maass⁹⁰ argues that a contract-based tenancy does not ensure tenure security, because termination of the tenant's occupation right is either fixed or dependent on the will of the landowner. As such, requiring protection against termination of farm dwellers' right to reside on the farmland would require very sophisticated policy to decide when such kind of strong protection might be feasible on farmland.

⁸⁴ Section 8(5) of the Extension of Security of Tenure Act 62 of 1997.

⁸⁵ Naidoo L "Poverty and insecurity of farm workers and dwellers in post-apartheid South Africa" in Hebinck P & Shackleton C (eds) *Reforming land and resource use in South Africa: Impact on livelihoods* (2011) 188-208 at 198.

⁸⁶ In the case of *Joubert v Hendricks and Another* (LCC55/05) [2007] ZALCC 6 (19 March 2007) the respondent's right of residence arose solely from an employment contract. See also *Hattingh and Others v Juta* (440/2011) [2012] ZASCA 84 (30 May 2012); *Diedericks v Univeg Operations South Africa (Pty) Ltd t/a Heldervue Estates* (LCC18/2011) [2011] ZALCC 11 (23 August 2011).

⁸⁷ Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 68.

⁸⁸ Maass S "Rental housing as adequate housing" (2011) 22 *Stellenbosch Law Review* 759-774 at 772-774.

⁸⁹ Maass S "Rental housing as adequate housing" (2011) 22 *Stellenbosch Law Review* 759-774 at 772-774.

⁹⁰ Maass S "Rental housing as adequate housing" (2011) 22 *Stellenbosch Law Review* 759-774 at 774.

The main emphasis of ESTA is on regulating tenure conditions on farmland, particularly for farm dwellers. In the process, farmers have acquired means to alter and control tenure conditions of farm dwellers by using the procedures outlined in ESTA to their advantage and in some instances by disregarding the law.⁹¹ Additionally, farm dwellers' rights are still limited by farm owners since they require permission to use the land.⁹² Naidoo⁹³ argues that farm dwellers are required to seek permission to keep livestock, grow vegetables as well as to receive visitors on the farmland. The effect is that the land interests of farm dwellers are compromised because they are unable to freely exercise their rights in terms of ESTA.⁹⁴ This raises questions about the efficacy of the tenure legislation in addressing the conditions of farm dwellers.

Additionally, ESTA has not been able to transform power relations on farmland, since the effect of the Act is to a large extent to secure the farmers' land ownership and interests in the land. ESTA is unable to overcome tensions between protecting property rights of farm owners and protecting the land interests of farm dwellers.⁹⁵ The balance of power in most instances lies with farm owners since farm dwellers have to seek permission to exercise their rights on the farm, as opposed to having the backing of statutory mechanisms to enforce their rights.⁹⁶ Furthermore, farm owners violate tenure rights of farm dwellers by preventing them from exercising

⁹¹ Naidoo L "Poverty and insecurity of farm workers and dwellers in post-apartheid South Africa" in Hebinck P & Shackleton C (eds) *Reforming land and resource use in South Africa: Impact on livelihoods* (2011) 188-208 at 199; Lahiff E "Land reform in South Africa: Is it meeting the challenge" (2001) *PLAAS Policy Brief No 1* 1-6 at 2 <<http://www.plaas.org.za/pubs/pb/PBO1.pdf>> (accessed 07-02-2012).

⁹² Naidoo L "Social mobilisation of farm workers and dwellers in the Eastern Cape" in Helliker K & Murisa T (eds) *Land struggles and civil society in Southern Africa* (2011) 71-112 at 90.

⁹³ Naidoo L "Social mobilisation of farm workers and dwellers in the Eastern Cape" in Helliker K & Murisa T (eds) *Land struggles and civil society in Southern Africa* (2011) 71-112 at 90.

⁹⁴ Naidoo L "Poverty and insecurity of farm workers and dwellers in post-apartheid South Africa" in Hebinck P & Shackleton C (eds) *Reforming land and resource use in South Africa: Impact on livelihoods* (2011) 188-208 at 200; Naidoo L "Social mobilisation of farm workers and dwellers in the Eastern Cape" in Helliker K & Murisa T (eds) *Land struggles and civil society in Southern Africa* (2011) 71-112 at 90.

⁹⁵ Naidoo L "Poverty and insecurity of farm workers and dwellers in post-apartheid South Africa" in Hebinck P & Shackleton C (eds) *Reforming land and resource use in South Africa: Impact on livelihoods* (2011) 188-208 at 200.

⁹⁶ Such rights include the right to graze their livestock, to receive visitors and to bury their family members. See Naidoo L "Social mobilisation of farm workers and dwellers in the Eastern Cape" in Helliker K & Murisa T (eds) *Land struggles and civil society in Southern Africa* (2011) 71-112 at 105.

their burial rights as well as the right to family life.⁹⁷ In this respect, tenure legislation is vague and weak, since its outcome tends to favour the rights of farm owners over those of farm dwellers.⁹⁸

Therefore, compliance with the somewhat limited provisions of ESTA is largely dependent on enforcement procedures. However, the Department of Rural Development and Land Reform (DRDLR) has not developed a comprehensive approach to the enforcement of ESTA, which serves to encourage farm owner's indifference and non-compliance with the Act.⁹⁹

4 4 1 2 *ESTA: Interpretation issues*

ESTA was developed with the intention to protect the independent rights of all family members by not creating different classes of primary and secondary occupiers.¹⁰⁰ According to Roux,¹⁰¹ the draft version of the Extension of Security of Tenure Act that was published for public comment in February 1997 provided an express distinction between “primary” and “secondary” occupiers. The category of “secondary” occupiers consists mainly of women and children living on commercial farms. Furthermore, Roux¹⁰² argues that the clear intention behind this distinction was to amend the common law by providing special protection against arbitrary eviction to the “secondary” occupiers. After the National Land Committee intervened, the drafters were persuaded that the distinction between primary and secondary occupiers would only perpetuate the discriminatory treatment of female farm

⁹⁷ See *Serole and Another v Pienaar* 2000 (1) SA 328 (LCC); *Nkosi and Another v Buhrmann* 2002 (1) SA 372 (SCA), which concerned the refusal of the farm owner to grant occupiers' burial rights. See also Naidoo L “Social mobilisation of farm workers and dwellers in the Eastern Cape” in Helliker K & Murisa T (eds) *Land struggles and civil society in Southern Africa* (2011) 71-112 at 90.

⁹⁸ Naidoo L “Social mobilisation of farm workers and dwellers in the Eastern Cape” in Helliker K & Murisa T (eds) *Land struggles and civil society in Southern Africa* (2011) 71-112 at 104.

⁹⁹ Naidoo L “Poverty and insecurity of farm workers and dwellers in post-apartheid South Africa” in Hebinck P & Shackleton C (eds) *Reforming land and resource use in South Africa: Impact on livelihoods* (2011) 188-208 at 200.

¹⁰⁰ Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 50.

¹⁰¹ Roux T “Pro-poor court, anti-poor outcomes: Explaining the performance of the South African Land Claims Court” (2004) 20 *South African Journal on Human Rights* 511-543 at 525-526.

¹⁰² Roux T “Pro-poor court, anti-poor outcomes: Explaining the performance of the South African Land Claims Court” (2004) 20 *South African Journal on Human Rights* 511-543 at 525-526.

workers.¹⁰³ This distinction was accordingly dropped. In effect, this meant that “secondary” occupiers would be protected as occupiers in their own right.

However, despite the intended aim of ESTA, the way the courts, in particular the Land Claims Court (LCC), have interpreted the Act has resulted in tenure rights being accorded mainly to “primary” occupiers.¹⁰⁴ These “primary” occupiers are usually men, who are seen by the farm owner and the courts as the main employees on the farm, as well as the heads of the farm dwellers’ households.¹⁰⁵ This results in women being more vulnerable to evictions and often discriminated against by farm owners and courts. The major reason for this treatment, as indicated above, is that women are seen as “secondary” occupiers, who derive tenure rights from their association with the male head of the household.

The courts, when interpreting ESTA, have made clear the status of male occupiers but the position of spouses and dependants is not clearly stated.¹⁰⁶ Women living on farmland are often not regarded as having the legal rights of an occupier.¹⁰⁷ This raises the question whether spouses or dependants should be occupiers in their own right so as to provide them with protection under ESTA.

In *Conradie v Hanekom and Another*,¹⁰⁸ the status of the woman was not an issue since it was clear from the outset that she was an occupier for the purposes of ESTA. However, what had to be determined by the LCC was whether it would be fair to evict her together with her husband, who had been dismissed for misconduct. The

¹⁰³ Roux T “Pro-poor court, anti-poor outcomes: Explaining the performance of the South African Land Claims Court” (2004) 20 *South African Journal on Human Rights* 511-543 at 525-526.

¹⁰⁴ Roux T “Pro-poor court, anti-poor outcomes: Explaining the performance of the South African Land Claims Court” (2004) 20 *South African Journal on Human Rights* 511-543 at 525-526. See also Mahomed A *Understanding land tenure law: Commentary and legislation* (2010) 43-44.

¹⁰⁵ Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 50.

¹⁰⁶ Pienaar JM “Land reform” 2008 (4) *Juta’s Quarterly Review of South African Law* para 2.4.

¹⁰⁷ Kleinbooi K “A bulletin tracking land reform in South Africa” (2009) 8 *Umhlaba Wethu* 1-12 at 4 <http://www.plaas.org.za/pubs/nl/uw/umhlaba_wethu_8.pdf> (accessed 05-04-2012).

¹⁰⁸ 1999 (4) SA 491 (LCC). In this case the applicant sought to evict Mr Hanekom together with his wife from the farm in terms of section 10(1)(a) and (c) of ESTA due to Mr Hanekom’s misconduct. Both respondents were employed by the applicant and were therefore both occupiers in their own right under section 1(1) of ESTA.

LCC held that the wife could not be evicted merely because her husband was evicted, since she was herself an employee on the farm and therefore an occupier in her own right.¹⁰⁹ As such, separate grounds for evicting her had to be alleged and proven.¹¹⁰ Although her husband was lawfully dismissed and therefore liable to eviction under the Act, he could not be denied access to the farm because his wife's right to family life entitled him to stay on the farm with her.¹¹¹ In effect, this meant that he could not be evicted either. In light of the *Conradie v Hanekom*¹¹² judgment, a female spouse can be an occupier in her own right if she concluded a separate employment agreement with the farm owner. Therefore, a female spouse can be protected by the provisions in ESTA, despite her husband's misconduct.

The case of *Landbounavorsingsraad v Klaasen*¹¹³ further developed the principle that spouses and dependants derive their rights from the "primary" occupier. The *Landbounavorsingsraad* judgment highlights the distinction between primary and secondary occupiers. According to the LCC, the concept "occupier" in ESTA had to be understood in a wide and a narrow sense.¹¹⁴ The narrow sense encompasses those occupiers who are or who were parties to a consent agreement with the owner or the person in charge of the land or those who have "another right in law" to reside on the land,¹¹⁵ while occupiers in the wider sense encompass those who derive their right of residence through or under occupiers in the narrow sense. However, the LCC held that occupiers in the wide sense fell outside the statutory definition of

¹⁰⁹ 1999 (4) SA 491 (LCC) para 20.

¹¹⁰ *Conradie v Hanekom and Another* 1999 (4) SA 491 (LCC) para 21.

¹¹¹ *Conradie v Hanekom and Another* 1999 (4) SA 491 (LCC) para 22. See also Roux T "Pro-poor court, anti-poor outcomes: Explaining the performance of the South African Land Claims Court" (2004) 20 *South African Journal on Human Rights* 511-543 at 526.

¹¹² *Conradie v Hanekom and Another* 1999 (4) SA 491 (LCC).

¹¹³ 2005 (3) SA 410 (LCC). This is an eviction case, where the court had to consider whether notices of intention to evict had to be served on all persons occupying a residence or on only the primary occupier. The question raised concerned the occupier status of the husband as the head of the household, and whether his wife and dependants were also occupiers for the purposes of ESTA. See also Pienaar JM & Geyser K "'Occupier' for purposes of the Extension of Security of Tenure Act: The plight of female spouses and widows" (2010) 73 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 248-265 at 253.

¹¹⁴ *Landbounavorsingsraad v Klaasen* 2005 (3) SA 410 (LCC) para 33. See also Mahomed A *Understanding land tenure law: Commentary and legislation* (2010) 47; Roux T "Pro-poor court, anti-poor outcomes: Explaining the performance of the South African Land Claims Court" (2004) 20 *South African Journal on Human Rights* 511-543 at 526.

¹¹⁵ *Landbounavorsingsraad v Klaasen* 2005 (3) SA 410 (LCC) para 33.

“occupier”¹¹⁶ resulting in the notice of eviction to be served on occupiers in the narrow sense only.

The effect of this interpretation seems to be that only “primary” occupiers have legal tenure rights to live on the land and that the other family members cannot claim tenure security other than through or under the occupier.¹¹⁷ This implies that once the eviction is ordered against the occupier, it is effective against the occupier and all his family members living with him. The interpretation adopted by the court seemingly contradicts the intention of the legislature not to distinguish between occupiers in the wide and narrow sense.¹¹⁸ The *Landbounavorsingsraad* judgment therefore puts women and dependants in a vulnerable position in that they can be routinely evicted along with their husbands, unless they can prove that their tenure rights are not derived from the tenure rights of the male head of the household.¹¹⁹

Eviction cases have also shown that women and children are more vulnerable to eviction than men.¹²⁰ The reason for this, as stated by the Nkuzi Development Association and Social Surveys,¹²¹ is because the judicial interpretation of ESTA and the attitude of many farm owners have in practice defined women and children’s tenure rights as “secondary”, being acquired indirectly through their association with the employed male member of the household.¹²²

¹¹⁶ *Landbounavorsingsraad v Klaasen* 2005 (3) SA 410 (LCC) para 33.

¹¹⁷ Mahomed A *Understanding land tenure law: Commentary and legislation* (2010) 50.

¹¹⁸ Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 50.

¹¹⁹ Roux T “Pro-poor court, anti-poor outcomes: Explaining the performance of the South African Land Claims Court” (2004) 20 *South African Journal on Human Rights* 511-543 at 527.

¹²⁰ Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 76; Chenwi L “Seeking security: Towards a new vision for tenure relations in farming areas” (2005) 6 *Economic and Social Rights in South Africa* 18-20 at 19.

¹²¹ The Nkuzi Development Association, in conjunction with Social Surveys, sought to document the history of evictions of rural dwellers based on a comprehensive survey of people displaced from farms for the period 1984-2004. This survey was then compiled and published in a book. See Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005).

¹²² Chenwi L “Seeking security: Towards a new vision for tenure relations in farming areas” (2005) 6 *Economic and Social Rights in South Africa* 18-20 at 19; Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 41.

Subsequent decisions have upheld the principle that spouses and dependants derive their rights from the “primary” occupier.¹²³ In *Kiepersol Poultry Farm (Pty) Ltd v Phayisa*¹²⁴ the court confirmed that the son of a long-term occupier was not an occupier in his own right but had rights as a dependant of his father.¹²⁵ Important to note is that the current position followed by the courts runs counter to the intention of the legislature to fulfil its constitutional mandate to provide increased security of tenure to the most vulnerable groups in society.¹²⁶

Having dealt with the inherent flaws in ESTA especially and how the Act is interpreted by the courts, the following section deals with the implementation of tenure security legislation, which also forms part of the problems associated with tenure security legislation in general.

4 4 2 *Implementation of tenure security legislation*

4 4 2 1 *Introduction*

This section examines the extent to which key legislation designed to promote security of tenure and regulate evictions has been implemented. Despite the promulgation of legislation to protect tenure security, there has been an increase in the vulnerability of farm dwellers.¹²⁷ Evictions still occur on farmland without adherence to the Constitution and relevant legislation. These evictions are in some

¹²³ *Simonsig Landgoed (Edms) Bpk v Vers and Others* 2007 (5) SA 103 (C) para 19. See also Pienaar JM & Geysers K “Occupier’ for purposes of the Extension of Security of Tenure Act: The plight of female spouses and widows” (2010) 73 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 248-265 at 257.

¹²⁴ 2010 (3) SA 152 (SCA).

¹²⁵ The rights of the son in this case were derived from his father, who was a long-term occupier.

¹²⁶ Mahomed A *Understanding land tenure law: Commentary and legislation* (2010) 51. See also *Hattingh and Others v Juta* (440/2011) [2012] ZASCA 84 (30 May 2012), which dealt with the right to family life. See also Sibanda S “Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty” (2011) 22 *Stellenbosch Law Review* 482-500 at 489 who argues that the courts interpret and enforce the Constitution in ways that subvert the progressive and egalitarian social and political vision of transformation.

¹²⁷ South African Human Rights Commission *Progress made in terms of land tenure security and labour relations in farming communities since 2003* (2008) 9
<http://www.sahrc.org.za/home/21files/Reports/Farming%20Inquiry%20Report_2008.pdf> (accessed on 28-03-2012).

cases carried out without the provision of alternative accommodation.¹²⁸ Since ESTA affects many rural dwellers, its implementation has proved to be more complicated than has been the case with the LTA.¹²⁹ As a result, this section will focus more on the implementation of ESTA.

4 4 2 2 Regulation of evictions in terms of ESTA

ESTA sets out a long and complex procedural process that should be followed by farm owners to effect legal evictions from farms.¹³⁰ However, since the promulgation of the Act, security of tenure on farmland has not been addressed effectively. Rather, the Act regulates evictions of farm dwellers through the courts, which in some instances grant unfair eviction orders.¹³¹ In some cases ESTA has been applied to effect a legal eviction, instead of granting farm dwellers secure rights in land or alternative land.¹³² Even where farm dwellers are legally evicted there is substantial evidence that magistrates had failed to apply the correct eviction procedure in a number of cases, which were overturned on automatic review by the Land Claims Court.¹³³

ESTA requires that alternative accommodation of an equivalent standard to the house they occupied on the farm should be provided to farm dwellers upon

¹²⁸ *EL RIO Farming (Pty) Ltd v Jacobs* (LCC36R/11) [2011] ZALCC 12 (25 August 2011) concerned the automatic review of an eviction order in terms of section 19(3) of ESTA. Paras 10-11 of the decision show that the magistrate did not follow the correct procedure in awarding an eviction order.

¹²⁹ Roux T "The Extension of Security of Tenure Act" in Budlender G, Latsky J & Roux T *Juta's new land law* (OS 1998) ch 7 1-61 at 7A-6.

¹³⁰ Section 8-13 of the Extension of Security of Tenure Act 62 of 1997.

¹³¹ ESTA does not prohibit all evictions generally, but only evictions that are unfair and arbitrary. See Lahiff E "With what land rights? Tenure arrangements and support" in Hall R (ed) *Another countryside? Policy options for land and agrarian reform in South Africa* (2009) 93-117 at 94.

¹³² *Diedericks v Univeg Operations South Africa (Pty) Ltd t/a Heldervue Estates* (LCC18/2011) [2011] ZALCC 11 (23 August 2011). See also Roodt MJ "Security of tenure and livelihood options in South Africa: A case study of a rural community facing eviction under post-apartheid legislation in the Eastern Cape Province" (2007) 37 *Africanus* 3-12 at 4.

¹³³ *Karabo and Others v Kok and Others* 1998 (4) SA 1014 (LCC); *De Kock v Juggles and Another* 1999 (4) SA 43 (LCC); *Glen Elgin Trust v Titus and another* [2001] 2 ALL SA 86 (LCC); *S Fargo and others v Vecto Trade (Edms) Bpk* [2007] JOL 20057 (LCC); *JAD Properties Trust v Tshabalala* (LCC58R/2009) [2010] ZALCC 21 (4 August 2010); *Goosen v Mtetwa* (LCC27R/2010) [2010] ZALCC 22, 18 August 2010. In *Nel v Beleng and Others* (LCC77R/2011) [2012] ZALCC 1 (14 February 2012), the magistrate's order for eviction was set aside on an automatic review since the magistrate did not follow the appropriate procedure for eviction in terms of ESTA. These cases provide evidence that the substantial and procedural requirements of ESTA in terms of section 19(3) have not been complied with consistently. See also Pienaar JM "Land reform" 2010 (3) *Juta's Quarterly Review of South African Law* para 2.4.

eviction.¹³⁴ The requirement for alternative accommodation applies to eviction orders that are granted to persons who were occupiers on 4 February 1997.¹³⁵ This notion, according to the survey conducted by the Nkuzi Development Association and Social Surveys,¹³⁶ has been largely ignored. The survey shows that among the evicted households who were interviewed, only a few farm dwellers acquired alternative accommodation.¹³⁷ The findings of the survey also highlight the failure of tenure laws, particularly ESTA, to solve the problem of tenure insecurity on farmland. Farm dwellers continue to be forced off farmland and displaced to informal settlements and urban townships in search of a livelihood.¹³⁸

In most instances, ESTA has been ineffective in ensuring that evictions are carried out only in terms of court orders.¹³⁹ This is despite section 23 of ESTA, which makes it an offence for a person to evict an occupier except on authority of an order of a competent court. This provision has not been effectively implemented by government agencies to enable farm dwellers to reside on farmland without being in fear of untimely eviction. Furthermore, the DRDLR has failed to put a monitoring system in place that would allow for the on-going tracking of evictions from farms.¹⁴⁰ ESTA remains poorly implemented in this respect and illegal evictions continue unabated.

4 4 2 3 *Provision for long-term security under ESTA*

Section 4 of ESTA envisions a mechanism through which long-term tenure security may be achieved by occupiers through the release of grants by the Minister. This

¹³⁴ Section 1(1)(XVII) of the Extension of Security of Tenure Act 62 of 1997 defines suitable alternative accommodation. See also Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 35.

¹³⁵ See section 10(2) of the Extension of Security of Tenure Act 62 of 1997.

¹³⁶ See footnote 121 above.

¹³⁷ Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 48.

¹³⁸ Yates T "Liberation betrayed: The case of continued evictions of farm dwellers in the 'new' South Africa" in Hebinck P & Shackleton C (eds) *Reforming land and resource use in South Africa: Impact on livelihoods* (2011) 162-187 at 164.

¹³⁹ Greenberg S "Status report on land and agricultural policy in South Africa, 2010" (2010) *PLAAS Research Report No 40* 1-47 at 17 <http://www.plaas.org.za/pubs/rr/PLAAS_RR40_Greenberg.pdf/> (accessed 05-04-2012); Lahiff E "Land reform in South Africa: A status report 2008" (2008) *PLAAS Research Report No 38* 1-42 at 4 <http://www.plaas.org.za/pubs/rr/PLAAS_RR38_Lahiff.pdf/> (accessed 05-04-2012).

¹⁴⁰ Chenwi L "Seeking security: Towards a new vision for tenure relations in farming areas" (2005) 6 *Economic and Social Rights in South Africa* 18-20 at 20.

section has not been used effectively to provide subsidies for occupiers to create long-term security.¹⁴¹ The failure of the state to implement section 4 of the Act has led to the continued suffering of many farm dwellers as they are at times evicted without the offer of alternative land or housing.¹⁴² The DRDLR is still unable to give reliable information on the number of projects completed in terms of section 4 of ESTA or to indicate any trends in the number of evictions.¹⁴³ This shows the inability of the DRDLR to establish implementation systems that could reduce the number of people evicted. Effective implementation in this regard could have led to the development of solutions, leading to the acquisition of long-term security of tenure as envisaged in section 25(6) of the Constitution.

4 4 2 4 *Legal representation in terms of ESTA*

A number of legal evictions have been obtained through court proceedings, although many people are evicted and displaced from farms without any legal representation.¹⁴⁴ The enforcement of farm dwellers' tenure rights requires access to information, courts and legal representation. Having such legal assistance is necessary to put farm dwellers in a better position, as they would be able to make use of the tenure laws to defend their rights.¹⁴⁵

Access to information is a key factor in the extent to which farm dwellers are able to properly exercise their rights in terms of ESTA. ESTA fails to create a procedure to enable farm dwellers to obtain confirmation of their rights to land through courts or

¹⁴¹ Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 36; Lahiff E "Land reform in South Africa: Is it meeting the challenge" (2001) *PLAAS Policy Brief No 1* 1-6 at 1 <<http://www.plaas.org.za/pubs/pb/PBO1.pdf>> (accessed 07-02-2012).

¹⁴² Yates T "Liberation betrayed: The case of continued evictions of farm dwellers in the 'new' South Africa" in Hebinck P & Shackleton C (eds) *Reforming land and resource use in South Africa: Impact on livelihoods* (2011) 162-187 at 164.

¹⁴³ Yates T "Liberation betrayed: The case of continued evictions of farm dwellers in the 'new' South Africa" in Hebinck P & Shackleton C (eds) *Reforming land and resource use in South Africa: Impact on livelihoods* (2011) 162-187 at 169.

¹⁴⁴ *Nkuzi Development Association v Government of the Republic of South Africa and Another* 2002 (2) SA 733 (LCC). See also South African Human Rights Commission *Progress made in terms of land tenure security and labour relations in farming communities since 2003* (2008) 25 <http://www.sahrc.org.za/home/21files/Reports/Farming%20Inquiry%20Report_2008.pdf> (accessed on 28-03-2012).

¹⁴⁵ Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 39.

other structures.¹⁴⁶ The lack of awareness of farm dwellers' tenure rights has resulted in the majority of farm evictions, whether they are legal or illegal, going unchallenged.¹⁴⁷ These evictions are normally accompanied by loss of rights and livelihood. This loss occurs as a result of lack of knowledge of farm dwellers' rights under ESTA; lack of legal representation; lack of adequate communication by the state to remedy the situation; and administrative incompetence within the state institutions entrusted with the delivery of land reform.¹⁴⁸

The *Nkuzi Development Association v Government of the Republic of South Africa and Another*¹⁴⁹ judgment confirmed the right of farm dwellers to legal assistance when facing evictions. The court held that such assistance should be provided by the state.¹⁵⁰ However, even in cases where legal evictions have been obtained it appears that many farm dwellers fail to access legal representation in eviction cases.¹⁵¹ This is despite the *Nkuzi* judgement, which obliged the DRDLR and the Ministry of Justice to extend legal services to the farming communities under the auspices of the Legal Aid Board.¹⁵² Furthermore, regardless of the Land Rights Management Facility that was created to provide legal services, farm dwellers still fail to access adequate legal representation.¹⁵³

¹⁴⁶ Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 36.

¹⁴⁷ Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 41.

¹⁴⁸ Roodt MJ "Security of tenure and livelihood options in South Africa: A case study of a rural community facing eviction under post-apartheid legislation in the Eastern Cape Province" (2007) 37 *Africanus* 3-12 at 3-4.

¹⁴⁹ 2002 (2) SA 733 (LCC).

¹⁵⁰ *Nkuzi Development Association v Government of the Republic of South Africa and Another* 2002 (2) SA 733 (LCC) para 12.

¹⁵¹ Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 37; Chenwi L "Seeking security: Towards a new vision for tenure relations in farming areas" (2005) 6 *Economic and Social Rights in South Africa* 18-20 at 19; South African Human Rights Commission *Progress made in terms of land tenure security and labour relations in farming communities since 2003* (2008) 25

<http://www.sahrc.org.za/home/21files/Reports/Farming%20Inquiry%20Report_2008.pdf> (accessed on 28-03-2012).

¹⁵² *Nkuzi Development Association v Government of the Republic of South Africa and Another* 2002 (2) SA 733 (LCC) para 12(2).

¹⁵³ See chapter 5 at 5 3 6 for a detailed discussion on the Land Rights Management Facility.

4 4 2 5 *Implementation of the LTA*

There has been little progress towards achieving security of tenure for labour tenants in terms of the LTA.¹⁵⁴ The problem in implementing the LTA mainly lies in its reliance on magistrates' courts to determine whether or not an evictee falls within the definition of a labour tenant or farm worker.¹⁵⁵ The definition of a labour tenant is problematic in its own right.¹⁵⁶ According to Hall,¹⁵⁷ one possible problem is the determination of whether a claimant is predominantly remunerated through access to land, since many labour tenants receive cash wages. Another problem could be that a labour tenant has to show that their families (grandparents) practised labour tenancy in the area for at least a year.¹⁵⁸

Furthermore, there has been under-prioritisation and very slow progress has been made towards the settlement of labour tenant claims.¹⁵⁹ As a result, the rights of people who lodged claims in terms of the LTA are undermined.¹⁶⁰ According to

¹⁵⁴ Hall R "Evaluating land and agrarian reform in South Africa: Farm tenure" (2003) *PLAAS Occasional Paper No 3 1-42* at 25-27

<<http://www.plaas.org.za/pubs/downloads/LREP3.pdf>> (accessed 17-10-2011).

¹⁵⁵ See *Mahlangu v De Jager* 1996 (3) SA 235 (LCC); *Van Zuydam v Zulu* 1999 (3) SA 736 (LCC) para 16-28.

¹⁵⁶ The narrow definition of labour tenants in section 1 of the LTA excludes many groups from the benefits of the Act. For example, section 3(1) of the LTA states that those persons who lost their labour tenancy status before June 1995 are not covered and protected by the LTA. See *Van Zuydam v Zulu* 1999 (3) SA 736 (LCC). See also Hall R "Evaluating land and agrarian reform in South Africa: Farm tenure" (2003) *PLAAS Occasional Paper No 3 1-42* at 29

<<http://www.plaas.org.za/pubs/downloads/LREP3.pdf>> (accessed 17-10-2011).

¹⁵⁷ Hall R "Evaluating land and agrarian reform in South Africa: Farm tenure" (2003) *PLAAS Occasional Paper No 3 1-42* at 29

<<http://www.plaas.org.za/pubs/downloads/LREP3.pdf>> (accessed 17-10-2011).

¹⁵⁸ See section 1 of the Land Reform (Labour Tenant) Act 3 of 1996; Hall R "Evaluating land and agrarian reform in South Africa: Farm tenure" (2003) *PLAAS Occasional Paper No 3 1-42* at 29

<<http://www.plaas.org.za/pubs/downloads/LREP3.pdf>> (accessed 17-10-2011).

¹⁵⁹ Lahiff E "Land reform in South Africa: Is it meeting the challenge" (2001) *PLAAS Policy Brief No 1 1-6* at 3 <<http://www.plaas.org.za/pubs/pb/PBO1.pdf>> (accessed 07-02-2012), states that the final figures for the number of claims lodged under the LTA by the cut-off date in March 2001 are not available. However, as of March 2000, only 2 917 claims had been lodged in KwaZulu-Natal and 2 086 in Mpumalanga. The estimated figure of unresolved claims is also not made clear by the DRDLR. See also South African Human Rights Commission *Inquiry into human rights violations in farming communities* (2003) 13-14

<<http://us-cdn.creamermedia.co.za/assets/articles/attachments/00738-farming.pdf>> (accessed on 02-06-2012).

¹⁶⁰ South African Human Rights Commission *Progress made in terms of land tenure security and labour relations in farming communities since 2003* (2008) 9

<http://www.sahrc.org.za/home/21files/Reports/Farming%20Inquiry%20Report_2008.pdf> (accessed on 28-03-2012).

Lahiff,¹⁶¹ the slow process of land claims resulted from the inability of the previous Department of Land Affairs (DLA) to act and the changes in the Legal Aid Board tariffs, coupled with the dissolution of the Independent Mediation Services of South Africa. These constraints appeared to have increased the administrative and financial burden on the DLA and caused considerable paralysis within the DLA, as indicated by the lack of statistics on the number of claims received and settled.¹⁶² The process is also made complex in that a labour tenant is only entitled to claim the benefits and protection that flow from the Act if he or she complies with the elements of the definition of a labour tenant and if the landowner cannot prove that the claimant is a farm worker.¹⁶³

The lack of implementation of both ESTA and LTA is evident in the continuous insecure tenure arrangements on farmland. Furthermore, the general living conditions on farms remain poor mainly because of the low housing standards and lack of essential services such as schools, ablution facilities and water sources to meet the basic needs of farm dwellers.¹⁶⁴ This lends weight to the argument that only partial protection exists for people living and working on white-owned commercial farms.¹⁶⁵ As a result, tenure security legislation has had little impact on securing tenure and improving living conditions on farmland.

4 5 ESTA and LTA in the constitutional framework

4 5 1 Introduction

Section 25(6) and 25(9) of the 1996 Constitution places the DRDLR under a constitutional obligation to develop measures that set out the types of vested interests in land. The DRDLR is also obliged to develop mechanisms to convert such

¹⁶¹ Lahiff E "Land reform in South Africa: Is it meeting the challenge" (2001) *PLAAS Policy Brief No 1* 1-6 at 3 <<http://www.plaas.org.za/pubs/pb/PBO1.pdf>> (accessed 07-02-2012).

¹⁶² Lahiff E "Land reform in South Africa: Is it meeting the challenge" (2001) *PLAAS Policy Brief No 1* 1-6 at 3 <<http://www.plaas.org.za/pubs/pb/PBO1.pdf>> (accessed 07-02-2012).

¹⁶³ Mahomed A *Understanding land tenure law: Commentary and legislation* (2010) 109; Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 36.

¹⁶⁴ Naidoo L "Social mobilisation of farm workers and dwellers in the Eastern Cape" in Helliker K & Murisa T (eds) *Land struggles and civil society in Southern Africa* (2011) 71-112 at 86-87.

¹⁶⁵ Naidoo L "Social mobilisation of farm workers and dwellers in the Eastern Cape" in Helliker K & Murisa T (eds) *Land struggles and civil society in Southern Africa* (2011) 71-112 at 86.

interests in land into legally secure tenure rights.¹⁶⁶ In terms of section 25(6), vulnerable persons are entitled to legally secure tenure. ESTA and LTA were enacted to uphold tenure security for the majority of South Africans. Since ESTA and the LTA have been unable to curb evictions and provide for long-term secure tenure, serious questions are being raised as to the effectiveness of the implementation of tenure security legislation and whether it is in line with the Constitution.¹⁶⁷

4 5 2 *Protection of rights under the Constitution and tenure security legislation*

The Constitution recognises private property rights but also empowers the state and places it under an obligation to enact a land reform programme. The Constitution provides a framework for the implementation of a far-reaching land reform programme that should balance the rights of the landowners and occupiers.¹⁶⁸ As such, the Constitution, ESTA and LTA provide redress for past injustices in relation to forced removals, denial of secure tenure rights and denial of opportunities to acquire and own land.¹⁶⁹

The Constitution guarantees all South Africans *inter alia*, the following human rights: equality; dignity; life; freedom and security of person; privacy; freedom of religion, belief and opinion and of expression; freedom of association; and freedom of movement and residence.¹⁷⁰ However, these rights can legitimately be limited if the limitation complies with section 36 of the Constitution. Section 5 of ESTA echoes the spirit of section 36 of the Constitution. It provides that, subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall

¹⁶⁶ Moagi LA "A gendered perspective on issues and challenges surrounding land tenure security in South Africa: An analysis of critical security studies" (2008) 3 *International NGO Journal* 213-223 at 215.

¹⁶⁷ Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 43.

¹⁶⁸ Section 25 of the Constitution of the Republic of South Africa 1996. See also Yates T "Liberation betrayed: The case of continued evictions of farm dwellers in the 'new' South Africa" in Hebinck P & Shackleton C (eds) *Reforming land and resource use in South Africa: Impact on livelihoods* (2011) 162-187 at 169.

¹⁶⁹ Yates T "Liberation betrayed: The case of continued evictions of farm dwellers in the 'new' South Africa" in Hebinck P & Shackleton C (eds) *Reforming land and resource use in South Africa: Impact on livelihoods* (2011) 162-187 at 163.

¹⁷⁰ Sections 9-21 of the Constitution of the Republic of South Africa 1996.

have the right to human dignity; freedom and security of person; privacy; freedom of religion, belief and opinion and of expression; freedom of association; and freedom of movement with due regard to the objects of the Constitution and ESTA.¹⁷¹ This implies that ESTA complies with the constitutional imperatives by aiming to ensure that basic human rights of occupiers are protected.

In the case of *Nhlabathi and Others v Fick*,¹⁷² the landowner refused permission for burial of a member of the occupier's family, arguing that section 6(2)(dA) of ESTA was unconstitutional because it violated the protection given to property under section 25 of the Constitution. Section 6(2)(dA) of ESTA confers upon an occupier the right to bury a deceased member of his or her family on the land on which both the occupier and the deceased had been residing at the time of the person's death. To apply section 6(2)(dA) of ESTA, one must show a link between the right to reside on the land and the burial right. The burial right should also be in accordance with religion or cultural beliefs and that an established practice exists in respect of land.¹⁷³ An "established practice" denotes a practice in terms of which the owners or persons in charge routinely gave permission to people residing on land to bury deceased family members on that land in accordance with their religious cultural belief.¹⁷⁴ In *Nhlabathi v Fick*, the court held that an established practice does not relate to a particular family but that the practice had to have been established in respect of land.¹⁷⁵ An occupier is granted the right to reside on land in terms of section 6(1) of ESTA. Accordingly, an occupier's burial right is an incident of the right to reside on land.

In this regard, the issue that the court had to deal with relates to the constitutional validity of section 6(2)(dA) of the Act.¹⁷⁶ The court held that section 6(2)(dA) of ESTA

¹⁷¹ Mahomed A *Understanding land tenure law: Commentary and legislation* (2010) 31.

¹⁷² [2003] 2 ALL SA 323 (LCC).

¹⁷³ *Dlamini and Another v Joosten and Others* 2006 (3) SA 342 (SCA) para 1. See also Pienaar J & Mostert H "The balance between burial rights and landownership in South Africa: Issues of content, nature and constitutionality" (2005) 122 *South African Law Journal* 633-630 at 635.

¹⁷⁴ See section 1(1) of the Extension of Security of Tenure Act 62 of 1997.

¹⁷⁵ *Nhlabathi and Others v Fick* [2003] All SA 323 (LCC) para 36-37. See also Pienaar J & Mostert H "The balance between burial rights and landownership in South Africa: Issues of content, nature and constitutionality" (2005) 122 *South African Law Journal* 633-630 at 653.

¹⁷⁶ *Nhlabathi and Others v Fick* [2003] All SA 323 (LCC) para 20.

is in line with the Constitution after having regard to the following circumstances: whether the burial right constitutes a major intrusion on the landowners' property; whether the right can be balanced with the landowners' property rights; whether the right exist only when there is an established past practice with regard to grave sites; and whether the right will enable occupiers to comply with religious or cultural beliefs that form an important part of their security of tenure.¹⁷⁷

The *Nhlabathi* judgment concluded that the statutory obligation placed on the landowner in terms of section 6(2)(dA) of ESTA was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.¹⁷⁸ This conclusion was based on the following reasons: firstly, the court found that the burial right constitutes a minor intrusion into the landowner's rights. Secondly, the court was convinced that the balancing of interests required by the provision in section 6(2)(dA) of ESTA ensures that the interests of both the landowner and the occupier are served. Thirdly, the court was also convinced that an established practice existed in relation to the land. Finally, the court highlighted that the right conferred upon occupiers by section 6(2)(dA), enabled them to comply with their religious and cultural beliefs.¹⁷⁹ In this light, the court noted that statutory recognition of religion and cultural beliefs accords with the state's mandate to institute land reform measures.¹⁸⁰

The court's judgment in *Nhlabathi* clarified the scope of burial rights¹⁸¹ by setting out the requirements of section 6(2)(dA) of the Act. Accordingly, section 6(2)(dA) of ESTA was held to be in line with the Constitution. In essence, this section has attained tenure security for occupiers by giving them statutory recognition of their

¹⁷⁷ *Nhlabathi and Others v Fick* [2003] All SA 323 (LCC) para 31.

¹⁷⁸ *Nhlabathi and Others v Fick* [2003] All SA 323 (LCC) paras 32-35. See also Van der Walt AJ *Constitutional property law* (2nd ed 2005) 346-347 (the chapter on land reform was left out of the 3rd ed 2011).

¹⁷⁹ *Nhlabathi and Others v Fick* [2003] All SA 323 (LCC) para 35. See also Pienaar J & Mostert H "The balance between burial rights and landownership in South Africa: Issues of content, nature and constitutionality" (2005) 122 *South African Law Journal* 633-630 at 650-654.

¹⁸⁰ *Nhlabathi and Others v Fick* [2003] All SA 323 (LCC) para 35.

¹⁸¹ Section 6(2) of the Extension of Security of Tenure Act 62 of 1997 was amended in 2001 to include burial rights of occupiers in section 6(2)(dA) and section 6(5). Prior to the amendments, the burial rights of occupiers without the owner's consent were not recognised by the courts. See *Serole and Another v Pienaar* 2000 (1) SA 328 (LCC); *Nkosi and Another v Bührmann* 2002 (1) SA 372 (SCA). See also Mahomed A *Understanding land tenure law: Commentary and legislation* (2010) 55-58.

tenure security in accordance with the constitutional mandate in section 25(6) of the Constitution.

Van der Walt¹⁸² argues that section 6 of ESTA stabilizes the right of residence of occupiers who resided on and used land on 4 February 1997 and ensures that they can continue exercising that right unless it is terminated in accordance with the Act. Furthermore, Van der Walt¹⁸³ argues that as far as section 6 of ESTA is concerned, the objectives of the Act are achieved by elevating what was a weak and vulnerable lesser land right into a secure and well-protected real right.¹⁸⁴ On this point, Roux argues that the legal nature of the right of residence in section 6(1) of ESTA is that of a real right in land.¹⁸⁵ In this case, as pointed out by Van der Walt and Roux, an occupier's position on the farm is secured because of the real right in land that the occupier holds.¹⁸⁶ Van der Walt and Roux's argument that an occupier holds a real right in land is undoubtedly correct and the real right the occupier has resembles a limited real right in land.

A limited real right is a right in property that belongs to a person other than the holder of such a right.¹⁸⁷ Farm dwellers reside on farmland with the consent of the farm owner and it appears as though they acquire a limited real right in such land. The right that the farm dwellers hold are recognised in terms of legislation,¹⁸⁸ although

¹⁸² Van der Walt AJ *Constitutional property law* (2nd ed 2005) 319 (the chapter on land reform was left out of the 3rd ed 2011). See also Van der Walt AJ "Property rights v religious rights: *Bührmann v Nkos*" (2002) 13 *Stellenbosch Law Review* 394-414.

¹⁸³ Van der Walt AJ *Constitutional property law* (2nd ed 2005) 319 (the chapter on land reform was left out of the 3rd ed 2011).

¹⁸⁴ A real right can be either ownership or a limited real right. Ownership is the most complete real right, which is held in one's own property. See Mostert H & Pope A (eds) *The principles of the law of property in South Africa* (2010) 42; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 47.

¹⁸⁵ The right of residence in section 6 of ESTA includes all the statutory rights contained in sections 5-6 and any other rights agreed to by the owner. See Roux T "The Extension of Security of Tenure Act" in Budlender G, Latsky J & Roux T *Juta's new land law* (OS 1998) ch 7 1-61 at 7A-18.

¹⁸⁶ Roux T "The Extension of Security of Tenure Act" in Budlender G, Latsky J & Roux T *Juta's new land law* (OS 1998) ch 7 1-61 at 7A-3.

¹⁸⁷ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 47.

¹⁸⁸ For example the Extension of Security of Tenure Act 62 of 1997 and the Land Reform (Labour Tenants) Act 3 of 1996. Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 663 states that the land reform programme has led to the development of new limited real rights. In the tenure reform context, the new limited real rights were created to improve access to and strengthen the security of occupiers' land rights. See also Van der Walt AJ *The*

the legislation does not provide an explanation of the legal nature of the right. To determine the legal nature of the right that farm dwellers hold, it is necessary to establish whether the right is real or personal.¹⁸⁹ A real right in land is registrable if it amounts to “subtraction from the *dominium*” and if it is enforceable against successors in title.¹⁹⁰ The right of residence that the farm dwellers have clearly satisfies the “subtraction from the *dominium*” test because of the burden it imposes on the farmland.¹⁹¹ Given that the right to occupy in section 6(1) of ESTA apparently creates a real right, it restricts the owner’s rights in his capacity as owner of the land.¹⁹² Importantly, ESTA specifically provides that the right of farm dwellers shall be binding on successors in title.¹⁹³ Therefore, section 6(1) of ESTA, read with

constitutional property clause: A comparative analysis of section 25 of the South African Constitution of 1996 (1997) 160.

¹⁸⁹ Various theories have been developed in an attempt to distinguish between real rights and personal rights. See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman’s The law of property* (5th ed 2006) 50-55; Mostert H & Pope A (eds) *The principles of the law of property in South Africa* (2010) 45. The focus here is on the practical manner in which the courts have dealt with the problem of distinguishing between real and personal rights. In formulating the test that has to be applied to determine whether or not a particular right is real, the court in *Ex parte Geldenhuys* 1926 OPD 155 at 164 referred to a right as being real if its correlative obligation constitutes a burden on the servient land. The court in *Ex parte Geldenhuys* laid down the subtraction from the *dominium* test, which was also applied in subsequent cases such as *Lorentz v Melle and Others* 1978 (3) SA 1044 (T); *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C); *Erlax Properties (Pty) Ltd v Registrar of Deeds and Others* 1992 (1) SA 879 (A); and *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) The principle derived from these cases is that a right will be real and registrable if it constitutes a real burden on the land. The right constitutes a real burden on the land if it amounts to a subtraction from the *dominium*, where ownership entitlements are diminished by the granting of the right and if it binds successors in title. See Roux T “The Extension of Security of Tenure Act” in Budlender G, Latsky J & Roux T *Juta’s new land law* (OS 1998) ch 7 1-61 at 7A-18 (footnote 2); Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 96-99.

¹⁹⁰ Section 63(1) of the Deeds Registries Act 47 of 1937 provides that only real rights in land are registrable and that personal rights may be registered only if, in the opinion of the Registrar, they are ancillary or otherwise complementary to registrable real rights. Mostert H & Pope A (eds) *The principles of the law of property in South Africa* (2010) 49 state that only real rights in land are registrable and automatically enforceable against successors in title, while personal rights do not bind successors in title.

¹⁹¹ The farm dweller’s right to reside on farmland and all the rights they enjoy in relation to the farmland impose a physical limitation on the property rights of the affected landowner. As a result of the limitation, the landowner’s use of the property is restricted. See *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA), which concerned a condition in a deed of sale that limited the use of property. The decision of the court in this case confirmed the two requirements that had to be satisfied when determining whether such a condition could be registered and a real right created.

¹⁹² Section 63(1) of the Deeds Registries Act 47 of 1937 does not provide a definition of a personal right but it prohibits the registration of a “condition which does not restrict the right of ownership”. This condition could be interpreted to serve as a definition for a personal right. On the contrary, a “condition which restricts the right of ownership” can be used to define a limited real right. See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman’s The law of property* (5th ed 2006) 50 (with reference to footnote 45).

¹⁹³ See section 24(1) of the Extension of Security of Tenure Act 62 of 1997.

section 24(1) of ESTA, indicates that the requirements for the vesting of a limited real right are complied with in the case of the rights of farm dwellers.

Generally, all limited real rights in land must be registered and before such registration takes place they are merely personal rights.¹⁹⁴ The registrability of rights in land ensures that rights may be adequately protected and enforced against subsequent owners.¹⁹⁵ ESTA does not make provision for the registration of farm dweller's rights. Consequently, farm dwellers occupy land in terms of rights that are not registered.¹⁹⁶ The farm dwellers' rights will probably remain personal as a result of the non-registration of the rights and the principled distinction between real and personal rights based on registrability.¹⁹⁷ In this regard, it seems likely that section 24(1) of ESTA can be interpreted as a provision that fulfils the registration requirement, particularly in this instance where no registration is statutorily provided for. In terms of section 24(1) of ESTA, farm dwellers are given the power to enforce their rights against the farm owner as well as his or her successors in title. Accordingly, section 24(1) of ESTA ensures enforceability of rights against subsequent farm owners, a requirement that would otherwise be fulfilled by registration in terms of section 63(1) of the Deeds Registries Act 47 of 1937. Therefore, it is probably unnecessary to register the rights because of the provisions in the Act that protect and strengthen farm dweller's rights. In this regard, the legal nature of farm dwellers rights is similar to limited real rights even without registration.

In terms of the LTA, a labour tenant exchanges his or her labour and services for the right to utilise and cultivate the land. The legal nature of the rights enjoyed by labour tenants under the LTA is not provided for in the Act. However, in some instances,

¹⁹⁴ As a general rule personal rights may not be registered. See section 63(1) of the Deeds Registries Act 47 of 1937.

¹⁹⁵ Mostert H & Pope A (eds) *The principles of the law of property in South Africa* (2010) 49.

¹⁹⁶ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 663.

¹⁹⁷ Importantly, registration is not necessary in all circumstances. A real right can be obtained in the absence of registration. For example, registration is not a requirement for the acquisition of a real right to land by original means, such as by means of occupation or prescription; no registration is required in the case of a lessee who obtains a real right when he is in possession of the land or building which he has leased for a short term lease and for the first ten years of the long lease; and real rights may be created or transferred by virtue of a statute. See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 82-83.

labour tenants are entitled to make an application to acquire the land that they occupied or used in terms of the labour tenancy, during a five year period, prior to the commencement of the LTA.¹⁹⁸ Once such a labour tenant is successful in an application to acquire ownership in the specific parcel of land, he or she is technically no longer a labour tenant, but an independent landowner.¹⁹⁹

Theoretically, it seems that the legal nature of rights that are held by farm dwellers grant them more protection and stronger tenure rights on farmland. In this way, ESTA and LTA satisfy the constitutional obligation under section 25(6), read with 25(9) of the Constitution, by making provision for legally secure tenure to previously disadvantaged persons.

On the contrary, Roux²⁰⁰ argues that no statute has been enacted that embodies the tenure security right in its entirety. This assertion can be correct in respect of the fact that ESTA and LTA seem to have many loopholes in their provisions and weak enforcement mechanisms that limit their effectiveness. Also, the LTA addresses the needs of a fairly small and historically distinct class of farm dwellers.²⁰¹ On its own, the LTA cannot be said to have fulfilled the state's obligation in terms of section 25(6), read with 25(9) of the Constitution.²⁰² One possible explanation why the LTA does not fulfil its obligation is because the rights under the LTA are not automatically granted. In a dispute involving the LTA, a person has to first show that he or she qualifies to be a labour tenant before invoking the provisions of the LTA.²⁰³

Furthermore, the Constitution demands the provision of legally secure tenure to vulnerable persons in society. ESTA makes provision in section 4 for people to

¹⁹⁸ Section 16(1)(b) of the Land Reform (Labour Tenants) Act 3 of 1996.

¹⁹⁹ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 664.

²⁰⁰ Roux T "The Extension of Security of Tenure Act" in Budlender G, Latsky J & Roux T *Juta's new land law* (OS 1998) ch 7 1-61 at 7A-5.

²⁰¹ Lahiff E "Land reform in South Africa: Is it meeting the challenge" (2001) *PLAAS Policy Brief No 1* 1-6 at 2 <<http://www.plaas.org.za/pubs/pb/PBO1.pdf>> (accessed 07-02-2012) states that labour tenants are largely concentrated in Mpumalanga and KwaZulu-Natal.

²⁰² Roux T "The Extension of Security of Tenure Act" in Budlender G, Latsky J & Roux T *Juta's new land law* (OS 1998) ch 7 1-61 at 7A-5.

²⁰³ See section 4 3 3 of this chapter above.

acquire long-term security of tenure by enabling the Minister to release subsidies for the planning and implementation of on-site and off-site developments.²⁰⁴ However, this provision is yet to be realized for many farm dwellers who are unlawfully evicted and who continue to live under insecure tenure conditions on white-owned commercial farms.

Non-compliance with the constitutional demands in relation to the provisions of ESTA and LTA is mainly in their poor implementation. However, in theory, ESTA and LTA comply with the constitutional imperative in section 25(6), read with section 25(9) of the Constitution. The provisions of the two acts provide measures that enable farm dwellers to acquire legally secure tenure.

4 6 Conclusion

ESTA and LTA are examples of tenure security legislation that has been passed to safeguard the interest of farm dwellers. The legislative framework regulating farm tenure has remained in a perpetual state of review,²⁰⁵ since the legislation has not been sufficiently effective to make provision for strengthened tenure security rights and adequate protection for farm dwellers.²⁰⁶ As is indicated in the sections above, the real problem with the tenure security legislation is inherent in the laws and in their implementation.

²⁰⁴ Naidoo L "Poverty and insecurity of farm workers and dwellers in post-apartheid South Africa" in Hebinck P & Shackleton C (eds) *Reforming land and resource use in South Africa: Impact on livelihoods* (2011) 188-208 at 197.

²⁰⁵ The LTA was reviewed in 1998 after the previous Department of Land Affairs noted that the LTA was prompting loss of tenure rights and evictions. Similarly, in 1999, a national review of ESTA concluded that problems experienced were inherent in law and not just implementation problems. In 2001, the Minister undertook to review ESTA and the LTA and to consolidate the two acts into a single law. Further, Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010), proposes to consolidate ESTA and LTA to provide stronger protection and secure tenure rights for farm dwellers. See Cousins B & Hall R "Rights without illusions: The potential and limits of rights-based approaches to securing land tenure in rural South Africa" 2011 *PLAAS Working paper 18* para 2.2 <www.plaas.org.za/pubs/wp/WP18Cousins-Hall052011.pdf> (accessed 03-06-2011).

²⁰⁶ Cousins B & Hall R "Rights without illusions: The potential and limits of rights-based approaches to securing land tenure in rural South Africa" 2011 *PLAAS Working paper 18* para 2.2 <www.plaas.org.za/pubs/wp/WP18Cousins-Hall052011.pdf> (accessed 03-06-2011).

Tenure for the majority of rural occupiers, especially farm dwellers, remains insecure as a result of weak enforcement procedures. Even where court processes have been used to solve tenure disputes, this has left farm dwellers mostly in a vulnerable position as they are either evicted from the farms or left with no other source of livelihood. This is evident in the eviction orders granted against unrepresented farm dwellers. Also, the misinterpretation of the provisions in the tenure security legislation by the courts seems to justify this concern.

For ESTA and LTA to be effective in securing the tenure rights of farm dwellers on white-owned commercial farms certain conditions must exist. One is the farm owners' acceptance and implementation of the provisions in the acts and the other is the effective deployment of enforcement mechanisms by the DRDLR.²⁰⁷ Despite tenure security legislation, farm dwellers are still not well positioned to seek help as they are unaware of their rights, showing that there is insufficient support from the state to assist farm dwellers to claim their rights.²⁰⁸ Therefore, the success of ESTA and LTA depends not only on the continued commitment of the DRDLR but also on the co-operation of the Departments of Justice; Labour; Agriculture; and Human Settlements as well as NGOs. Furthermore, ESTA depends on the support and proper application of its provisions by the magistrates' courts.²⁰⁹

The ultimate objective of the Constitution and ESTA is to provide long-term security of tenure to farm dwellers. As such, section 4 of ESTA should be utilised to find ways that will facilitate long-term security of tenure on farmland. In addition, the courts should avoid using narrow interpretation strategies of tenure security legislation as it simply prevents the legislation from achieving its constitutional objectives. Accordingly, tenure security legislation must be interpreted and applied in line with the constitutional values and demands.²¹⁰

²⁰⁷ Naidoo L "Social mobilisation of farm workers and dwellers in the Eastern Cape" in Helliker K & Murisa T (eds) *Land struggles and civil society in Southern Africa* (2011) 71-112 at 90.

²⁰⁸ See Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 39.

²⁰⁹ Roux T "The Extension of Security of Tenure Act" in Budlender G, Latsky J & Roux T *Juta's new land law* (OS 1998) ch 7 1-61 at 7A-6.

²¹⁰ *Diedericks v Univeg Operations South Africa (Pty) Ltd t/a Heldervue Estates* (LCC18/2011) [2011] ZALCC 11 (23 August 2011) para 16.

In conclusion, the state's obligation under the Constitution to promulgate legislation dealing with the promotion of secure tenure was in part fulfilled with the enactment of ESTA and LTA.²¹¹ This is so because ESTA and LTA have not yet produced the expected impact on tenure security of farm dwellers.²¹² ESTA has had unintended consequences, one of them being the immense increase in the scale of evictions. It has also led landowners to withdraw rights of access and use of land as well as limiting occupational rights through employment contracts.²¹³ This implies that tenure issues on farmland have not been addressed sufficiently in terms of section 25(6) of the Constitution. In view of this, the DRDLR has drafted a new *Policy* on tenure security,²¹⁴ which is linked to the Draft Land Tenure Security Bill²¹⁵ and aims to address the shortcomings of the current tenure security legislation. The following chapter discusses these new developments and how they will impact on tenure security on farmland.

²¹¹ Pienaar J & Brickhill J "Land" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional law of South Africa* (2nd ed OS 2007) ch 48 1-68 at 28.

²¹² Pienaar JM "Land reform" 2010 (4) *Juta's Quarterly Review of South African Law* para 1.1.

²¹³ South African Human Rights Commission *Progress made in terms of land tenure security and labour relations in farming communities since 2003* (2008) 9
<http://www.sahrc.org.za/home/21files/Reports/Farming%20Inquiry%20Report_2008.pdf> (accessed on 28-03-2012).

²¹⁴ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010).

²¹⁵ Republic of South Africa, Department of Rural Development and Land Reform Draft Land Tenure Security Bill [B-2010] GN 1118 in GG 33894 of 24-12-2010.

Chapter five: New developments in the tenure reform sector

5 1 Introduction

The preceding chapters provide a brief historical background of tenure reform as well as tenure reform current policy and statutory measures, to put the need for tenure reform into perspective.¹ It is undoubtedly true that prior to 1991, the South African land holding system was racially based.² This led, *inter alia*, to forced removals from land and a diversified land tenure system with different forms of land control.³ Access to land and the extent to which one can exert control over property was as a result adversely affected. Since 1991, policies and legislation have been proposed and promulgated to address the various issues connected to the land holding system. It is now eighteen years since the government embarked on the land reform programme, in particular tenure reform, but the initiatives have not yet yielded great results. Despite the fact that the government has enacted tenure laws since 1994, farm dwellers are still faced with the effects of forced removals and land dispossessions.

As a result of the injustices and consequences of the apartheid era, particularly in relation to land distribution, much focus has been on land reform since 1994.⁴ This has resulted in considerable efforts in terms of enacting legislation, drafting policy and establishing various mechanisms to implement the land reform programme. The chapters above on policy and statutory measures respectively identify shortcomings in the policy and legislation and how these shortcomings affect farm dwellers that are living on farmland as well as off farmland.⁵ These chapters led to the conclusion that the policy and tenure security legislation have not adequately addressed the issues

¹ See chapter 2, 3 and 4.

² See chapter 2.

³ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 607.

⁴ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 33.

⁵ See chapters 3 and 4 for a detailed discussion of these shortcomings. The Extension of Security of Tenure Act 62 of 1997 (ESTA) and the Land Reform (Labour Tenants) Act 3 of 1996 are the legislative measures that were specifically enacted to address tenure issues on farmland.

in relation to tenure security on farmland. This conclusion is drawn from the little progress that has been made to achieve legally secure tenure, mainly due to the loopholes in tenure security legislation, poor implementation as well as insufficient land administration systems.

Consequently, a new *Draft tenure security policy*⁶ and Draft Land Tenure Security Bill⁷ were published on 24 December 2010. The main focus of the draft tenure security *Policy* and Bill is on farmland, which has specific implications for tenure security legislation, namely ESTA and LTA. It is necessary to consider what these new measures entail and how, if at all, they might improve the situation on farmland.

This chapter discusses the newly proposed policy and legislative measures developed to address the shortcomings that were identified in the previous chapters. This is done in line with the historical context of tenure reform, particularly tenure security on farmland, and evaluating whether the draft *Policy* and Bill comply with or achieve the tenure reform goals set out by the *White paper on South African land policy (1997 White paper)*.⁸ The analysis advanced in this chapter is based on the understanding that tenure insecurity, evictions and landlessness continue unabated on farmlands. This is despite the constitutional guarantee and legislation promulgated to give effect to the constitutional right of legally secure tenure to historically disadvantaged persons in society. Accordingly, this chapter is subdivided into three sections.

The first section of this chapter discusses the further need to increase tenure security on farmland. This is done by looking at whether the underlying goals of tenure reform stipulated in the 1997 *White paper* have been sufficiently achieved to give effect to the constitutional imperatives and tenure reform legislation. This section highlights that new interventions in the tenure reform sector are crucial.

⁶ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010).

⁷ Republic of South Africa, Department of Rural Development and Land Reform Draft Land Tenure Security Bill [B-2010] GN 1118 in GG 33894 of 24-12-2010.

⁸ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997).

The second section of this chapter looks at current interventions employed by the government as well as the role players responsible for enforcing tenure reform measures. In this section, it is argued that institutional developments should be considered as a solution to the problems associated with tenure security on farmland. Once the institutions are in order, the enforcement and management of tenure security will be more efficient. Furthermore, it is argued that the land administration systems should be improved so as to guarantee land use rights and legally secure tenure. As such, merely enacting policy and legislative measures in line with section 25(6) and 25(9) of the Constitution is not sufficient to enhance tenure security.

The third section deals with the new interventions developed by the government that are specifically aimed to address tenure security issues on farmland. The new interventions to be discussed in this section are the new draft tenure security *Policy* and Bill. It is argued in this section that the new measures were drafted and published following the general view that tenure on farmland continues to be fragmented and insecure, despite the constitutional guarantee in section 25(6) and the existing tenure security legislation. The constitutional implications of the newly proposed interventions are also discussed.

5 2 The need for increased tenure security on farmland

5 2 1 Introduction

The exposition of policy and legislative measures above as well as the challenges and problems experienced on farmland identified there⁹ raises the question whether the overall land reform goals identified in 1991 and 1994 have been achieved successfully. The main aims of tenure reform since 1991 were to (a) rationalise and streamline the complex land tenure and land control system; (b) improve security of tenure either by upgrading insecure rights or by developing new forms of secure tenure; and (c) to bring tenure reform in line with constitutional imperatives like

⁹ See chapters 3 and 4.

dignity and equality.¹⁰ To determine why it is necessary to increase tenure security on farmland, the answer to this question depends on whether the tenure reform goals have been sufficiently met. This section evaluates the present position with reference to the three overall tenure reform goals.

5.2.2 Rationalising the complex land tenure system

As a result of the fragmented and racially-based land holding system followed in the apartheid era, South Africa inherited a diversified land tenure system with land control forms that were determined according to race groups and regions.¹¹ Accordingly, it became difficult to determine the precise form and content of land rights as well as the exact institutions responsible for administering these rights.¹² In this context, rationalisation of the complex land tenure system refers to the phasing out of certain racially-based practices and laws to create new policies and legislation that will amend or reform the specific form of land holding.¹³ As is indicated in chapter two, all racially-based land measures were repealed in 1991. Since this period, new legislation aimed at addressing the injustices of the past has been enacted. The laws that specified separate group areas were abolished and this enabled black persons to acquire land of their own as well as the capacity to choose the tenure system that best suits them.¹⁴

Tenure reform legislation has attempted to rationalise tenure systems but it appears that the legislation has not been successful. One possible explanation for the failure to adequately rationalise the tenure reform system is with reference to the different tenure laws that offer both interim and permanent solutions. Apart from the

¹⁰ Pienaar JM “Tenure reform in South Africa: Overview and challenges (2011) 25 *Speculum Juris* 108-133 at 127; Pienaar JM & Kamkuemah A “Farm land and tenure security: New policy and legislative developments” (2011) 22 *Stellenbosch Law Review* 724-741 at 726; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The law of property* (5th ed 2006) 607; Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 456-459.

¹¹ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The law of property* (5th ed 2006) 607; Carey Miller DL (with Pope A) *Land title in South Africa* (2000) 456-461.

¹² Cousins B “‘Embeddedness’ versus titling: African land tenure systems and the potential impacts of the Communal Land Rights Act 11 of 2004” (2005) 16 *Stellenbosch Law Review* 488-513 at 488; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The law of property* (5th ed 2006) 607.

¹³ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The law of property* (5th ed 2006) 607.

¹⁴ See chapter 2.

application of tenure reform legislation, different forms of tenure still prevail in rural areas.¹⁵ ESTA and LTA have also not been able to rationalise the land holding system on farmland as a result of the inherent flaws and poor implementation of the two acts, leading to continued insecure tenure on farmlands. Pienaar¹⁶ argues that the decision that the Communal Land Rights Act¹⁷ was unconstitutional underlined the fact that permit-based and other insecure tenure forms are still prevalent in South African communal lands. Accordingly, the land tenure system has not been rationalised or streamlined.¹⁸

Far from rationalising the existing land tenure administration system, it is possible that the DRDLR has added yet another complex situation in land tenure systems with the drafting of the new draft tenure security *Policy* and Bill. It remains to be considered whether the new Draft Land Tenure Security Bill, which intends to consolidate ESTA and LTA into a single piece of legislation, will be able to streamline the land tenure system. To conclude, not only have the pre-1994 land control forms been retained, but additional forms have also been added. It appears that the tenure system is still complex and fragmented.

5 2 3 *Improving security of tenure*

Since 1994, the South African government announced plans for development and transformation in general but with a specific focus on rural areas in an all-encompassing land reform programme. These plans are highlighted in the policies and laws that were enacted to transform the land holding system. To date, the intended outcome of the government's plans is overshadowed by failures that

¹⁵ Republic of South Africa, Department of Rural Development and Land Reform *Strategic plan 2010-2013* (2010) 4 defines rural areas as areas which include all traditional communal areas; farmland; peri-urban areas; informal settlements and small rural towns. ESTA and LTA are aimed at amending the existing tenure system on white-owned commercial farmland, while the Communal Land Rights Act 11 of 2004 (CLARA) was intended to govern the transformation of "old order rights" to "new order rights" in relation to communal lands.

¹⁶ Pienaar JM & Kamkuemah A "Farm land and tenure security: New policy and legislative developments" (2011) 22 *Stellenbosch Law Review* 724-741 at 727.

¹⁷ Act 11 of 2004.

¹⁸ Pienaar JM & Kamkuemah A "Farm land and tenure security: New policy and legislative developments" (2011) 22 *Stellenbosch Law Review* 724-741 at 727; Pienaar JM "Tenure reform in South Africa: Overview and challenges (2011) 25 *Speculum Juris* 108-133 at 127-128.

continue to hamper the success of land reform, in particular tenure reform on farmland.

Due to the poor drafting and implementation of tenure security legislation, security of tenure on farmland has not improved.¹⁹ The processing of land claims of labour tenants also remains slow.²⁰ Furthermore, the provisions of ESTA are not being adequately enforced to make provision for subsidies to facilitate long-term security of tenure.²¹ The high rate of evictions on farmland since 1994, as well as lack of efficiency in processing labour tenant claims, shows that tenure security has deteriorated instead of improving.²²

Accordingly, the land tenure reform programme has failed significantly to have an impact on white-owned commercial farms. The government continues to be confronted by problems emerging from the failures in implementing tenure reforms. Government has as a result embarked on a process of enacting new measures aimed at speeding up the process of land reform and transforming the land holding system.

5 2 4 *Compliance with constitutional imperatives*

It is not clear whether statutory provision for tenure security on farmland has been brought in line with the constitutional rights of farm dwellers. This is probably as a result of the difficulty in monitoring the tenure reform process.²³ However, non-compliance with the constitutional imperatives can be deduced from the inadequate regulatory enforcement of tenure legislation, which has led to widespread violations of constitutional rights, such as the right to equality, dignity and right to have access

¹⁹ See chapter 4 at 4 4 2.

²⁰ See chapter 4 at 4 4 2 5. See also South African Human Rights Commission *Inquiry into human rights violations in farming communities* (2003) 14 <<http://us-cdn.creamermedia.co.za/assets/articles/attachments/00738-fariming.pdf>> (accessed 02-06-2012).

²¹ See section 4 of the Extension of Security of Tenure Act 62 of 1997.

²² Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 41-50.

²³ Pienaar JM "Tenure reform in South Africa: Overview and challenges (2011) 25 *Speculum Juris* 108-133 at 128 states that the particular nature of tenure reform makes it extremely difficult to determine how much reform has in fact occurred and its impact on the beneficiaries.

to adequate housing.²⁴ Women on farmland still find themselves in a precarious position as their tenure rights are not specified in the legislation and the interpretation of the courts places women in a vulnerable position to eviction.²⁵ Also, due to an increasing number of evictions resulting in landlessness; poor housing conditions; gender inequalities; and lack of access to basic services on farmland, farm dwellers' rights to equality and dignity are violated. Therefore, there is need to increase tenure security on farmland to ensure the realisation of the constitutional rights of vulnerable farm dwellers.

5 2 5 *Legislation to give effect to section 25(6)*

As indicated in chapter 4, ESTA and LTA have been enacted to give effect to section 25(6), read with section 25(9) of the Constitution. The extent to which ESTA and LTA have impacted on tenure security on farmland is not enough to render the legislation a success. There are many flaws in the legislation, which has resulted in continued tenure insecurity on farmland.²⁶ This is an indication that ESTA and LTA have failed to achieve the tenure reform goals. The new measures are therefore necessary to address the shortcomings in tenure legislation and the issues associated with the legislation.

5 2 6 *Conclusion*

It is now eighteen years since the government embarked on a tenure reform process and still new measures are being developed. There are no clear and concise follow-up measures from the DRDLR to ensure the success of tenure reform measures from various officials responsible for enforcing and regulating tenure measures. This

²⁴ Pienaar JM & Kamkuemah A "Farm land and tenure security: New policy and legislative developments" (2011) 22 *Stellenbosch Law Review* 724-741 at 728; Pienaar JM "Tenure reform in South Africa: Overview and challenges (2011) 25 *Speculum Juris* 108-133 at 129.

²⁵ Pienaar JM & Geysers K "'Occupier' for purposes of the Extension of Security of Tenure Act: The plight of female spouses and widows" (2010) 73 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 248-265. See also chapter 4 at 4 4 1 2.

²⁶ See chapter 4; compare Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010) 1-2 for a detailed analyses of the shortcomings of tenure security legislation.

in fact shows that tenure reform goals are yet to be met or achieved.²⁷ It also provides a clear indication of the dire need to introduce new measures that will govern the land tenure reform process on white-owned commercial farms. Accordingly, it is necessary for the government to establish new measures that will address tenure issues on farmland and fulfil the intended objectives listed in the 1997 *White paper*, together with section 25(6) and 25(9) of the Constitution.

5 3 Rethinking tenure reform: Recent interventions

5 3 1 Introduction

The preceding section reviews the tenure reform goals and whether they have been achieved in relation to the existing tenure security legislation. The South African Human Rights Commission in its inquiry highlighted that little progress had been made toward achieving security of tenure for farm dwellers and that there is limited awareness among farm dwellers of their tenure and labour rights.²⁸ This implies that there is still need to increase tenure security on farmland to achieve the intended objectives of tenure reform. The government is mandated to ensure that tenure security is provided to all vulnerable persons particularly those living on white-owned commercial farmland. In this case the DRDLR employed a number of interventions to support the implementation of tenure legislation and policies.

This section analyses the recent interventions announced by the government and their possible impact on tenure security on farmland, bearing in mind that these interventions also impact on other programmes apart from tenure reform. These interventions range from plans, programmes and institutions developed or established to facilitate the achievement of land tenure reform. The recent interventions employed by the government indicate that the government and its agencies are aware of the problems confronting farm dwellers, especially on white-

²⁷ Pienaar JM & Kamkuemah A "Farm land and tenure security: New policy and legislative developments" (2011) 22 *Stellenbosch Law Review* 724-741 at 728; Pienaar JM "Tenure reform in South Africa: Overview and challenges (2011) 25 *Speculum Juris* 108-133 at 129.

²⁸ South African Human Rights Commission *Inquiry into human rights violations in farming communities* (2003) <<http://us-cdn.creamermedia.co.za/assets/articles/attachments/00738-fariming.pdf>> (accessed 02-06-2012). See also Mahomed A "Security of tenure: Giving effect to the mandate of South African Human Rights Commission" (2006) 7 *Economic and Social Rights in South Africa* 18-21 at 18.

owned commercial farms. Government invoked these recent interventions as a corrective measure due to the uncertainty in the implementation of tenure security legislation. In light of this, the DRDLR together with civil society groups have made certain attempts to promote rights on farmland by raising awareness of tenure legislation, promoting co-operation between state agencies and mediating disputes.²⁹

5 3 2 *Institutional and administrative capacity*

The 1997 *White paper* stipulates that the intended purpose of the land reform programme will be achieved by a land policy that ensures accessible means to record and register rights in property; establish broad norms and guidelines for land use planning; effectively manage public land; and develop a responsive land administration service.³⁰ Furthermore, the 1997 *White paper* envisages that the success of land reform is not merely dependant on access to land but also on the provision of support services and infrastructural as well as other development programmes to contribute to the improvement of quality of life.³¹ This implies that the success of land reform, particularly tenure reform, requires a partnership between the three spheres of government, that is, the national, provincial and local levels together with the private and non-governmental sectors. It is an acknowledgement that the 1997 *White paper* has already set the framework for the effective implementation of land reform and an efficient delivery system cannot be excluded.

Despite specific measures contained in the 1997 *White paper*, the underlying problems associated with tenure security impede the progress of tenure reform, especially on farmland. As explained in previous chapters, the problems and challenges surrounding tenure security on farmland are mainly due to the inherent flaws in tenure security legislation and its poor implementation. Therefore, there is still a need to improve the implementation capacity of tenure security legislation.

²⁹ Hall R "Land and agrarian reform in South Africa: A status report 2004" (2004) *PLAAS Research Report No 20* 1-69 at 39 <<http://www.plaas.org.za/pubs/downloads/RR20%20Ruth%20Repro.pdf>> (accessed 06-09-2011).

³⁰ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) para 2.1.

³¹ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) para 2.1.

In his *State of the nation address* in 2009, the then President of South Africa announced that government would introduce a comprehensive programme to build economic and social infrastructure.³² In addition, the President also indicated that a comprehensive rural development strategy linked to land reform, agrarian transformation and food security would be developed and implemented. According to the *Strategic plan* of the DRDLR, land and agrarian reform should be integrated to develop a sustainable rural development policy.³³ This new approach to land reform was envisaged when the Department of Land Affairs and Agriculture was restructured in 2009, resulting in the Department of Rural Development and Land Reform on the one hand and the Department of Agriculture, Forestry and Fisheries, on the other hand.³⁴ This approach to land reform (and particularly to tenure reform) is linked with the process of rural development.³⁵ The restructuring of the ministries to combine rural development with land reform is a possible recognition of the failure of the land reform programme to provide support and protection to beneficiaries of land.³⁶

Various institutions are responsible for the management of tenure security issues, namely the DRDLR; courts; police; non-governmental organisations (NGOs); private sectors; and farm owners. The DRDLR has powers to monitor the implementation process of tenure security legislation and to oversee that the tenure reform process is being carried out properly. To support the core vision of the 1997 *White paper* and to give effect to section 25(6) of the Constitution, the DRDLR devised ways to further

³² Motlanthe K *State of the nation address of the President of South Africa* (2009) <<http://www.info.gov.za/speeches/2009/09020611061001.htm>> (accessed 08-05-2012). See also Olivier NJJ, Van Zyl C & Williams C "Rural development within the context of development, sustainability and rural issues – some constitutional, policy and implementation perspectives" (2010) 13 *Potchefstroom Electronic Law Journal* 101-169 at 134-135; Du Plessis W, Olivier N & Pienaar J "Land matters and rural development" (2009) 24 *South African Public Law* 588-610 at 588.

³³ Republic of South Africa, Department of Rural Development and Land Reform *Strategic plan 2010-2013* (2010); Du Plessis W, Olivier N & Pienaar J "Land matters and rural development" (2009) 24 *South African Public Law* 588-610 at 588.

³⁴ Pienaar JM "Tenure reform in South Africa: Overview and challenges" (2011) 25 *Speculum Juris* 108-133 at 126.

³⁵ Pienaar JM "Tenure reform in South Africa: Overview and challenges" (2011) 25 *Speculum Juris* 108-133 at 126; Hall R "A fresh start for rural development and agrarian reform" (2009) *PLAAS Policy Brief No 29* 1-6 at 1-2 <<http://www.plaas.org.za/sites/default/files/publications-pdf/PB29.pdf>> (accessed 07-06-2012).

³⁶ Greenberg S "Tasks for a rural development ministry" (2009) <<http://www.sacsis.org.za/site/article/289.1>> (accessed 08-05-2012).

the achievement of tenure security on white-owned commercial farms. The following sections discuss the interventions made by the DRDLR.

5 3 3 *Strategic plan of the DRDLR*

The *Strategic plan* of the DRDLR states that rural development and land reform must be used as a catalyst to reverse the effects caused by the apartheid era in relation to land holding.³⁷ Its main objective is to improve the quality of life of rural households by enhancing food security through agricultural production.³⁸ This means that the emphasis would be on land reform in rural development strategies. The *Strategic plan* stipulates that there is need to fundamentally review the current land tenure system during the *Medium strategic framework* (MSF) period.³⁹ Furthermore, the strategy of the DRDLR is to seek “social cohesion and development”. In this context the *Strategic plan* intends to address the injustices of the past by linking land reform measures with rural development.

To facilitate the reform of the current land tenure systems, the DRDLR is proposing two options in its *Strategic plan*. The first option provides that all productive land will become a national asset, envisaging a quitrent land tenure system, either with perpetual or limited rights.⁴⁰ In line with the first option, all tenure legislation will be

³⁷ Republic of South Africa, Department of Rural Development and Land Reform *Strategic plan 2010-2013* (2010) 3. See also Pienaar JM “Tenure reform in South Africa: Overview and challenges” (2011) 25 *Speculum Juris* 108-133 at 130.

³⁸ Republic of South Africa, Department of Rural Development and Land Reform *Strategic plan 2010-2013* (2010) 4 states that the strategy of the DRDLR to achieve rural development is through “agrarian transformation”, which is the rapid change in relations of land; livestock; cropping; and community.

³⁹ Republic of South Africa, Department of Rural Development and Land Reform *Strategic plan 2010-2013* (2010) 2. The government has defined the *Medium term strategic framework* (MTSF) for the period ending in 2014 to include the following priorities: speeding up growth and transforming the economy to create decent work and sustainable livelihoods; massive programme to build economic and social infrastructure; comprehensive rural development strategy linked to land and agrarian reform and food security; strengthening the skills and human resource base; improving the health profile of all South Africans; intensify the fight against crime and corruption; building cohesive, caring and sustainable communities; pursuing African advancement and advance the international cooperation; sustainable resource management and use; and building a developmental state including improvement of public services and strengthening of democratic institutions. Deputy Minister Phaahla of the DRDLR emphasised the need to overhaul land policy and legislation with specific reference to the land tenure system. See Republic of South Africa, Department of Rural Development and Land Reform *Strategic plan 2010-2013* (2010) 11.

⁴⁰ Republic of South Africa, Department of Rural Development and Land Reform *Strategic plan 2010-2013* (2010) 11.

subsequently reviewed and brought under a single national land policy framework. The second option focuses on a review of current tenure policies and legislation to maintain the current free-hold title system, but within the ambit of a land ceilings framework linked to categorisation of farmers.⁴¹ Furthermore, the second option also investigates the possibility of a State Land Management Board to facilitate the management of state-owned agricultural land and leases.⁴² The resulting effect of the strategy is repossession of lost land and restoring the centrality of indigenous cultures.⁴³ The general approach to tenure reform is also emphasised in the new draft tenure security *Policy* and Bill.

5 3 4 *Comprehensive rural development programme*

Land reform in South Africa remains a crucial priority. To ensure sustainable land reform, the DRDLR aligned the land reform programme with the *Comprehensive rural development programme* (CRDP), which is aimed at ensuring that rural communities are mobilised so that they can contribute in the improvement of their quality of life, through government support.⁴⁴ The CRDP was introduced in 2009 as an all-encompassing strategy that is intended to create social cohesion and development of rural areas.⁴⁵ This strategy is premised on the three pillars of land reform, agrarian transformation and rural development. The establishment of the CRDP revitalises the commitment of the government to achieve the land reform programme and to develop rural communities.

The CRDP is also aimed at facilitating infrastructural development. This programme will effectively deal with rural poverty through the optimal use and management of natural resources. The objectives of the CRDP will be achieved through a co-

⁴¹ Republic of South Africa, Department of Rural Development and Land Reform *Strategic plan 2010-2013* (2010) 11. See also Du Plessis W, Olivier N & Pienaar J "Land matters and rural development" (2009) 24 *South African Public Law* 588-610 at 610.

⁴² Republic of South Africa, Department of Rural Development and Land Reform *Strategic plan 2010-2013* (2010) 11.

⁴³ Republic of South Africa, Department of Rural Development and Land Reform *Strategic plan 2010-2013* (2010) 2.

⁴⁴ Republic of South Africa, Department of Rural Development and Land Reform *Annual report 2010-2011* (2010) 13.

⁴⁵ Republic of South Africa, Department of Rural Development and Land Reform *Strategic plan 2010-2013* (2010) 11.

ordinated and integrated broad-based agrarian transformation as well as economic and social infrastructure that will benefit the rural communities.⁴⁶ The CRDP will deal with agrarian development, rural development and land reform to ensure an effective implementation of its objectives.⁴⁷ In the context of tenure reform, particularly with regard to farm dwellers, the CRDP aims to increase the pace of tenure reform by fast-tracking the settlement of labour tenant claims, especially in KwaZulu-Natal and Mpumalanga; facilitating secure access to land by farm dwellers; dealing effectively and promptly with illegal evictions; protecting the land rights of farm workers and creating decent jobs on farms; establishing agri-villages for local economic development on farms; providing basic needs for farm dwellers, such as water, sanitation, electricity and housing; and providing support and capacity building to farm dwellers.⁴⁸

5 3 5 *Recapitalisation and development programme*

The *Recapitalisation and development programme* (RADP) was established in 2009 and seeks to resuscitate all distressed land reform projects implemented since 1994.⁴⁹ This will be achieved *inter alia* by establishing rural development monitors and guaranteeing food security.⁵⁰ The RADP will apply to all emerging farmers needing and deserving of support as well as future land beneficiaries.⁵¹ With regard to tenure reform, the Extension of Security of Tenure Act (ESTA)⁵² is applicable to the RADP in that section 4 of ESTA enjoins the Minister to allocate funds for developments related to farm dwellers that are living in insecure tenure.⁵³ Furthermore, ESTA also allows for the inclusion of other role players in the

⁴⁶ Republic of South Africa, Department of Rural Development and Land Reform *Comprehensive rural development programme* (2009) 13.

⁴⁷ Republic of South Africa, Department of Rural Development and Land Reform *Comprehensive rural development programme* (2009).

⁴⁸ Republic of South Africa, Department of Rural Development and Land Reform *Comprehensive rural development programme* (2009).

⁴⁹ Republic of South Africa, Department of Rural Development and Land Reform *Annual report 2010-2011* (2010) 14.

⁵⁰ Republic of South Africa, Department of Rural Development and Land Reform *Recapitalisation policy* (2011) 3-4.

⁵¹ Republic of South Africa, Department of Rural Development and Land Reform *Recapitalisation policy* (2011) 4.

⁵² Act 62 of 1997.

⁵³ Republic of South Africa, Department of Rural Development and Land Reform *Recapitalisation policy* (2011) 12-13.

implementation of the proposed developments.⁵⁴ The Land Reform (Labour Tenants) Act⁵⁵ is also relevant for the implementation of the RADP.

The RADP encourages share-equity schemes,⁵⁶ which seek to contribute towards the achievement of land reform objectives by roping in private sector participation in land reform through equity sharing in the enterprises. The key elements of the equity schemes are, among other things, to secure land tenure, especially ownership and leasing agreements.⁵⁷ In relation to tenure reform, farm worker equity-share schemes⁵⁸ are encouraged. The farm-worker equity-share scheme provides worker-shareholders with housing and it further strengthens their tenure security by protecting them against losing both their homes and jobs if the scheme fails.⁵⁹ Accordingly, the share-equity scheme secures proper support services for the promotion of tenure security on farmland as well as rural development.

5 3 6 *Land Rights Management Facility*

Most of the rights provided for by the LTA and ESTA require legal mechanisms for their assertion and enforcement. The *Nkuzi Development Association v Government of the Republic of South Africa and Another*⁶⁰ held that the state has the obligation to provide a mechanism for legal representation for farm dwellers. This decision was reached after having considered the vulnerability of farm dwellers due to the failure to enforce tenure legislation and the government's failure to provide farm dwellers

⁵⁴ Section 4 of ESTA provides that the Minister may for the purposes of this section grant subsidies through an agreement with a provincial government or a municipality or a person or body which he or she has recognised for that purpose.

⁵⁵ Act 3 of 1996.

⁵⁶ The 1997 *White paper* describes share equity schemes as a partnership with the private sector, which represents a well balanced mix of farming systems, flourishing agricultural sector and secure tenure for all stakeholders.

⁵⁷ Republic of South Africa, Department of Rural Development and Land Reform *Recapitalisation policy* (2011) 9.

⁵⁸ Knight SL & Lyne MC "Perceptions of farm worker equity-share schemes in South Africa" (2002) 41 *Agrekon* 356-374 at 357 describes farm worker equity-share schemes as privately owned farming operations that are generally restructured as companies with the original owner of the farm and the farm workers as shareholders.

⁵⁹ Knight SL & Lyne MC "Perceptions of farm worker equity-share schemes in South Africa" (2002) 41 *Agrekon* 356-374 at 367.

⁶⁰ 2002 (2) SA 733 (LCC). See also chapter 4 at 4 4 2 4.

with legal representation. The *Nkuzi* judgment⁶¹ suggests that more effort is required to protect the rights of farm dwellers.

With regards to land rights and the prevention of illegal evictions, the then Department of Land Affairs (DLA) established the Land Rights Management Facility (LRMF) in 2007. The LRMF is a mechanism employed to provide legal advice and protect the land rights of vulnerable farm dwellers.⁶² The LRMF has two components, namely the Legal Services Project (LSP) and the National Land Mediation Panel (NLMP).⁶³ The LRMF focuses on three key areas, namely legal representation and advice services; mediation services; and eviction monitoring.⁶⁴ According to Mahomed,⁶⁵ the approach of the LRMF reflects the idea that land tenure reform must occur within a unitary, rights-based and non-racial system of land rights for all South Africans.

Due to the fact that farm dwellers receive little or no legal assistance to help them to claim their tenure rights or to protect them against arbitrary evictions, the DLA established the LSP as a facilitative and institutionalised mechanism to make provision for legal assistance.⁶⁶ The aim of the LSP is to provide legal representation to farm dwellers that are facing eviction or the threat of eviction. In addition, the LSP endeavours to facilitate redress for the poor and marginalised persons through legal processes and forums such as courts.⁶⁷ The LSP operates together with the NLMP and assists in providing a viable land tenure assistance programme. As such, the LSP provides a valuable resource to the most vulnerable and marginalised persons in rural areas.

⁶¹ *Nkuzi Development Association v Government of the Republic of South Africa and Another* 2002 (2) SA 733 (LCC).

⁶² Lahiff E "Land reform in South Africa: A status report" (2008) *PLAAS Research Report No 38* 1-42 at 4 <http://www.plaas.org.za/pubs/rr/PLAAS_RR38_Lahiff.pdf> (accessed 05-04-2012).

⁶³ Mahomed A *Understanding land tenure law: Commentary and legislation* (2010) 3.

⁶⁴ Republic of South Africa, Department of Rural Development and Land Reform *Mid-term review* (2012) 25.

⁶⁵ Mahomed A *Understanding land tenure law: Commentary and legislation* (2010) 3.

⁶⁶ This project was set up in December 2007 by the then Department of land Affairs, Tenure Reform Implementation Systems Directorate.

⁶⁷ Mahomed A *Understanding land tenure law: Commentary and legislation* (2010) 5.

In its mid-term review, the DRDLR stated that eviction cases continue to constitute the largest percentage of referrals made to the LRMF. As a result, the DRDLR will continue to utilise the LRMF as a tool to protect the land rights of vulnerable farm dwellers.⁶⁸ However, once the new Draft Land Tenure Security Bill commences, the proposed Land Rights Management Board will probably take over the responsibilities of the LRMF.

5 3 7 Conclusion

The government has attempted to achieve the tenure reform goals to make provision for tenure security on farmland through various mechanisms. These mechanisms do not only impact on tenure security, but also on agrarian transformation, rural development and food security.

The interventions reviewed above highlight the ongoing process employed by the government and its agencies to improve tenure security on farmland. It appears that the government has a lot to offer in trying to improve tenure security on farmland. However, in practice a lot has not yet been done to support the needs of farm dwellers. These current interventions are inadequate due to, among other things, limited capacity of the DRDLR; lack of resources or funding; and inappropriate institutions. Therefore, the government should develop or establish more backup systems, such as highly trained officials, who will ensure the enforcement of policy and legislative measures and also provide sufficient funding to effectively implement tenure security on farmland.

The lack of institutional capacity has major implications for the implementation of tenure policy and legislative measures. This is worsened by the lack of funding to support various programmes intended to boost rural development and livelihood on farmland. The effect has a negative impact on the tenure system on farmland. As is described in chapter 4, ESTA was mainly intended to provide farm dwellers with greater protection and security of tenure through regulating eviction procedures and

⁶⁸ Republic of South Africa, Department of Rural Development and Land Reform *Strategic plan 2010-2013* (2010) 12.

providing subsidies for long-term occupation. The implementation and monitoring of the Act by government and other role players has been particularly weak, leading to the continued tenure insecurity on farmland. As such, the institutional and administrative mechanisms need to be supplemented and further supported by coherent policy and legislative measures.

Given the major problems confronting tenure security on farmland, the government developed new mechanisms that specifically deal with tenure security on farmland. It is therefore necessary to look at the new tenure reform measures to establish their effectiveness in addressing tenure security issues and challenges on farmland. The following section will discuss the new interventions in relation to tenure security on farmland.

5 4 Tenure security: New interventions

5 4 1 Introduction

The section above gives an overview of the existing and newly introduced mechanisms (including plans and programmes) and institutions that are directed at improving tenure security on farmland. Notwithstanding the current interventions and the enactment of tenure security legislation, many challenges still exist on farmland in general and white-owned commercial farmland in particular. The challenges in the implementation of tenure reform and its legislative and policy measures explain why a review of the land tenure system, especially on farmland, is necessary.⁶⁹ In this regard, a new *Draft tenure security policy* was developed by the DRDLR, together with a new Bill.

Since secure tenure denotes rights in land holding, it requires an effective land administration system that is clear and concise and provides clarity and certainty regarding the contents, nature and recording of the rights.⁷⁰ The Bill and *Policy*

⁶⁹ Republic of South Africa, Department of Rural Development and Land Reform *Annual report 2010-2011* (2010) 21.

⁷⁰ Cousins T "Secure tenure – Some principles" 2003 <www.leap.org.za/LEA032.doc> (accessed 04-05-2012).

introduce new mechanisms that are crucial for the further development of tenure reform and the protection of tenure rights. The *Policy* and Bill acknowledge the fact that legally secure tenure will be available to vulnerable persons in society if the necessary procedures and authorities are put in place.

Sections 5 2 and 5 3 above reflect on the need to introduce new measures in the tenure reform sector. This section provides an analysis of the new interventions that relate to tenure security on farmland in particular. It further evaluates whether the new measures will bring about legally secure tenure on farmland and highlights its implications. The new *Draft tenure security policy*⁷¹ will be discussed first, followed by a discussion of the Draft Land Tenure Security Bill.⁷² The analysis will centre on the overall tenure reform goals and how these are reflected and/or incorporated in the *Policy* and Bill respectively.

5 4 2 *Analysis of the Draft tenure security policy*

Many factors contributed to the drafting of a new policy review, namely the historical legacies of the skewed patterns of land holding; untenable power relations especially on white-owned commercial farms; continued denial of rights; the link between employment contracts and the right of residence on farmland; evictions; and insecurity.⁷³ The new *Draft tenure security policy* was developed in light of the constitutional imperatives in section 25(5)-(9), with the underlying idea being that the policy review may not be unduly hamstrung by reluctance to depart from the traditional system of the common law.⁷⁴ This means that the proposed reforms may have implications for the traditional principles of property.⁷⁵ The new *Draft tenure security policy* makes reference to the 1997 *White paper* that highlighted that the

⁷¹ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010).

⁷² Republic of South Africa, Department of Rural Development and Land Reform Draft Land Tenure Security Bill [B-2010] GN 1118 in GG 33894 of 24-12-2010.

⁷³ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010) 1.

⁷⁴ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010) 3. See also Pienaar JM & Kamkuemah A "Farm land and tenure security: New policy and legislative developments" (2011) 22 *Stellenbosch Law Review* 724-741 at 728.

⁷⁵ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010) 3.

then existing complexity could require new systems of land holding and forms of ownership and could therefore have far-reaching implications.⁷⁶

The aim of the new policy review is to promote and protect the relative rights of farm dwellers; to enhance the security of tenure of farm dwellers; to create conditions conducive to peaceful and harmonious relationships on farmland; and to sustain production discipline in the interest of food security.⁷⁷ The possible outcome of the above-stated aims is that section 25(6) of the Constitution will be given effect to if the aims are effectively implemented while addressing tenure security issues on white-owned commercial farms. This policy review also seeks efficiency and effectiveness in the enforcement of mechanisms designed to protect vulnerable groups, particularly farm dwellers.⁷⁸

The policy review does not only address tenure security issues but also looks at the effects of tenure security on agrarian reform, land administration systems and land management.⁷⁹ This is an indication that tenure security is linked to rural development. To pursue the policy aims together with the proposals advanced by the new policy review, the DRDLR is determined to tighten up legislation by creating substantive rights in land for occupiers; implement a well-resourced programme of information dissemination and enforcement of tenure laws; proactively create sustainable settlements; and establish an effective system for monitoring evictions.⁸⁰

The new policy review states that the current tenure security system on farmland is negatively affected by inadequate responses to complaints; institutional weakness in law enforcement; ineffective monitoring systems; an adversarial legal system;

⁷⁶ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010) 3.

⁷⁷ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010).

⁷⁸ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010) 2.

⁷⁹ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010) 2.

⁸⁰ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010) 4.

scaled-down activities of social movement; and inadequate legal representation.⁸¹ The existing legal system is not adequate to monitor land rights matters and as a result the new *Policy* proposes the establishment of the Land Rights Management Board, which will offer an institutional climate for redressing the lack of tenure security on farmland.⁸² To facilitate and co-ordinate the implementation of tenure security and to improve relations on farmland, the DRDLR proposes alternative dispute resolution mechanisms; provision of legal representation; and establishing a register of interests on farms.⁸³

5 4 3 *Evaluating the new policy measures*

The 1997 *White paper* aimed to recognise and protect existing *de facto* rights; prevent arbitrary evictions; guarantee basic human rights; and promote long-term security through government subsidies.⁸⁴ The 1997 *White paper* also sought to balance the rights and interests of owners and occupiers as a means of encouraging harmonious relations on farms.⁸⁵ The new *Draft tenure security policy* has identified the various challenges linked with the current tenure security measures. To determine whether the new *Policy* will effectively address the challenges associated with tenure security, it is necessary to evaluate the new *Policy* in line with the tenure reform goals set out in the 1997 *White paper*.⁸⁶ To reiterate, the tenure reform goals embodied in the 1997 *White paper* include (a) rationalising the complex land tenure system; (b) improving security of tenure; and (c) bringing tenure in line with constitutional imperatives like equality and dignity.

The rights of the farm owners and farm dwellers are often overlapping and conflicting due to the lack of administrative support, which governs the land tenure system on

⁸¹ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010) 9.

⁸² Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010) 10.

⁸³ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010) 10. See Pienaar JM & Kamkuemah A "Farm land and tenure security: New policy and legislative developments" (2011) 22 *Stellenbosch Law Review* 724- 741 at 730.

⁸⁴ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 57.

⁸⁵ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 33.

⁸⁶ The tenure reform goals are discussed above in this chapter, section 5 2.

farmland. As a result, the land tenure system is complex, which impacts on farm dwellers' knowledge of the real extent and nature of their rights, as well as the institutions and laws that affect them. The DRDLR can be said to be tackling the problem of unclear and overlapping land rights by the use of the *Draft land tenure security policy*. This policy review intends to facilitate the recording of rights; enable the registration of land tenure rights; and set up administrative structures that are responsible for the enforcement of tenure laws. Furthermore, the policy review states that the reform efforts that are needed to address the problems associated with tenure security involve the change and restructuring of the economic; political; socio-cultural; and legal arrangements that govern land ownership, land management and power relations on farmland.⁸⁷

Traditionally, housing for farm dwellers has been tied to employment contracts, resulting in a situation where the loss of a job or the death of a farm worker regularly leads to eviction of the entire family. The *Draft policy* suggests that this issue can only be solved if access to land and housing is not linked to employment contracts.⁸⁸ This will afford farm dwellers with an independent right to access land or housing. Such a proposal will, to some extent, result in the rationalisation of the complex land tenure system by ensuring that the form of tenure security on farmland allows farm dwellers to exercise their tenure rights separately, without invoking employment contracts. In other words, taking labour issues out of the equation will simplify land tenure issues, particularly when addressing the challenges that are being faced by farm dwellers on white-owned commercial farmland. In addition, de-linking housing and employment will result in the achievement and improvement of tenure security on farmland.⁸⁹ This implies that the new policy review is in line with the constitutional demands and also gives effect to the tenure reform aims that are contained in the 1997 *White paper*.

⁸⁷ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010) 1.

⁸⁸ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010) 10.

⁸⁹ Pienaar JM & Kamkuemah A "Farm land and tenure security: New policy and legislative developments" (2011) 22 *Stellenbosch Law Review* 724-741 at 729.

The new *Draft tenure security policy* has various proposals that are aimed at improving tenure security on farmland, which forms the main objective of the *Policy*. The new *Draft tenure security policy* also makes provision for an efficient and accessible system to record and register rights.⁹⁰ This initiative highlights one of the main objectives of the government to improve tenure security on farmland. The proposed registration of farm dwellers' tenure rights will upgrade the weak tenure rights that they currently hold and provide them with more secure and stronger tenure rights. In property law, the process of registration ensures that a person obtains at least a right that has similar effect to a real or limited real right in relation to his or her property.⁹¹ However, in relation to the policy review, it will depend on the type of rights that are afforded to farm dwellers, since the rights would likely be based on a permit.⁹²

The *Policy* also proposes that agri-villages can be used to offer alternative accommodation to persons who are evicted or prone to eviction. These agri-villages are not a new development, but the *Policy* merely makes reference to agri-villages by suggesting ways in which they can be used more effectively to promote tenure security. The *Draft tenure security policy* proposes the use of one large farm or several farms acquired through sale or donation, which will be given to a "Farm worker's grouping", who could initially be the title deed holder of the land.⁹³ To achieve this initiative, the farm owners together with the state will also be involved. Regarding the issue of evictions, the *Draft tenure security policy* states that arbitrary evictions will be prohibited and suggests that suitable or alternative accommodation will be provided as a form of relief to vulnerable persons or victims of evictions.⁹⁴ The effect is that farm dwellers will not be rendered homeless after being evicted from the houses they occupy on farmland. Accordingly, the achievement of tenure security on

⁹⁰ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010) 5.

⁹¹ See chapter 4 at 4 5 2 for a detailed discussion on the nature of the farm dwellers' rights.

⁹² Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010) 6.

⁹³ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010) 6.

⁹⁴ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010) 8.

farmland will ensure the protection of constitutional rights afforded to farm dwellers, such as equality, dignity and housing.

5 4 4 *The Draft Land Tenure Security Bill*

5 4 4 1 *Introduction*

The *Memorandum on the objects of the Land Tenure Security Bill 2010* commences by reiterating section 25(6) of the Constitution, which requires legally secure tenure to persons whose tenure security is legally insecure due to past racially-discriminatory laws and practices. Furthermore, the *Memorandum* states that the LTA and ESTA, which sought to give effect to section 25(6) of the Constitution in relation to farm dwellers, appear to be weak as far as their interpretation, enforcement and implementation are concerned.⁹⁵ The objectives of the Bill are similar to that of the *Policy*, namely to protect the relative rights of farm dwellers; to enhance security of tenure; to create conditions to foster peaceful and harmonious relationships on farmlands; and to sustain production discipline.⁹⁶ These broad objectives of the Bill seek to improve tenure security on farmland and to provide protection to historically disadvantaged persons, but within the broader framework of food security.

The Bill intends to consolidate ESTA and LTA to ensure that all farm dwellers generally enjoy the same rights and are not further prejudiced.⁹⁷ In essence, the Bill repeals the two existing tenure security laws and combines them into a single piece of legislation that will deal with all matters related to tenure security on farmlands.⁹⁸ However, the particular provisions of the LTA that relate to labour tenancy claims for the acquisition of ownership or other rights in land will still be applicable.⁹⁹ One of the main purposes of the Bill is to improve tenure security on farmland by changing and

⁹⁵ See *Memorandum on the objects of the Land Tenure Security Bill* (2010) paras 1.1-1.3.

⁹⁶ *Memorandum on the objects of the Land Tenure Security Bill* (2010) para 2. See also clause 2 of the Draft Land Tenure Security Bill 2010.

⁹⁷ Preamble of the Draft Land Tenure Security Bill 2010.

⁹⁸ See the preamble of the Draft Land Tenure Security Bill. See also Pienaar JM & Kamkuemah A "Farm land and tenure security: New policy and legislative developments" (2011) 22 *Stellenbosch Law Review* 724- 741 at 730.

⁹⁹ See clause 5(1) of the Draft Land Tenure Security Bill 2010. See also Pienaar JM & Kamkuemah A "Farm land and tenure security: New policy and legislative developments" (2011) 22 *Stellenbosch Law Review* 724- 741 at 730.

restructuring power relations on farmland and addressing the shortcomings identified in ESTA and LTA. According to the preamble, the Bill also seeks to make provision for long-term security of tenure for persons residing on farmland as well as for the provision of alternative land. The Bill will apply to all agricultural land, that is, land used for agricultural purposes or farms other than land occupied by traditional communities.¹⁰⁰ As such the Bill provides protection to the same groups of persons currently covered under the ESTA and LTA.

As indicated above, the objectives of tenure reform as set out in the 1997 *White paper* are to rationalise the complex land tenure system; to improve tenure security; and to bring tenure reform in line with the constitutional imperatives. The question that arises in relation to the Bill is whether it meets these particular objectives. To answer this question, there is a need to evaluate the relevant provisions in the Bill and determine whether the Bill is in line with the constitutional imperatives and the goals enunciated in the 1997 *White paper*.

5 4 4 2 *Evaluating proposed legislative measures*

5 4 4 2 1 *Beneficiaries*

The Bill covers a broad category of persons, namely those who reside on the farms;¹⁰¹ those working on the farms;¹⁰² persons associated with persons residing or working on farms;¹⁰³ farm owners and authorised agents;¹⁰⁴ and persons who have consent to reside on farmland.¹⁰⁵ Unlike the category of persons who are covered under ESTA and LTA, the Bill is broadly formulated and it affords protection and strengthened tenure to different categories of persons. The Bill specifically includes family members. This reduces misunderstanding and misinterpretation regarding the persons covered and protected by the Bill. Earlier case law shows the difficulty the

¹⁰⁰ See clause 3 of the Draft Land Tenure Security Bill 2010. The Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE) and the Interim Protection of Informal Land Rights Act 31 of 1996 are specifically excluded from the scope of the Bill.

¹⁰¹ Clause 7 of the Draft Land Tenure Security Bill 2010.

¹⁰² Clause 8 of the Draft Land Tenure Security Bill 2010.

¹⁰³ Clause 9 of the Draft Land Tenure Security Bill 2010.

¹⁰⁴ Clause 10 of the Draft Land Tenure Security Bill 2010.

¹⁰⁵ Clause 11 of the Draft Land Tenure Security Bill 2010.

courts face when applying and interpreting ESTA.¹⁰⁶ The major challenge was that ESTA did not include an occupier's family members in the definition of the term "occupier".¹⁰⁷ Such an omission subjected spouses and dependants to evictions and less protection from ESTA provisions.

By contrast, the Bill now makes it possible for spouses and dependents to qualify as "occupiers" in their own right.¹⁰⁸ The proposed definition of an "occupier" affords more protection and strengthened tenure security to all family members residing on the farm. The addition of family members to qualify as occupiers, improves tenure security on farmland, giving effect to one of the goals of tenure reform.

5 4 4 2 2 *Proposed consolidation of ESTA and LTA*

Currently the land tenure system on farmland is governed by two legislative measures, namely ESTA and LTA. According to the preamble of the Bill, these tenure security laws would be consolidated to ensure that persons residing on the farms and labour tenants enjoy the same rights. The government's proposal to combine ESTA and LTA to make a single statute may result in the rationalisation of the complex land tenure system. The effect is that only a single legislative measure would be applicable to all categories of persons residing or working on farmland. The consolidation of the two acts would also be used to give effect to section 25(6) of the Constitution by providing legally secure tenure to all persons who were historically disadvantaged. In addition, the single legislation that is proposed by the Bill will reduce the uncertainty regarding persons who fall under ESTA or the LTA and the possibility of having overlapping and conflicting rights on farmland. In other words, the jurisdictional question will be simplified. This will in turn assist in addressing some of the shortcomings in ESTA and LTA.

¹⁰⁶ Pienaar JM & Geyser K "Occupier' for purposes of the Extension of Security of Tenure Act: The plight of female spouses and widows" (2010) 73 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 248-265 for a detailed discussion of the term "occupier" under ESTA.

¹⁰⁷ See chapter 4 at 4 4 1 2.

¹⁰⁸ Clause 7(1) of the Draft Land Tenure Security Bill 2010.

However, consolidating ESTA and LTA into a single legislative measure does not automatically make the process of tenure reform on farmland simple. This process can be made more complex due to the fact that the Bill makes identical provisions for two different categories of persons, namely farm workers and labour tenants who both reside on farmland but have different circumstances.

5 4 4 2 3 *Management*

The Bill establishes a single Land Rights Management Board that holds various responsibilities.¹⁰⁹ These include *inter alia* effective and efficient implementation measures designed to achieve the objectives of the Bill; management of land rights; facilitation of dispute resolutions; implementation of information dissemination; acquiring land for resettlement; and ensuring the effective management of committees in resettled communities.¹¹⁰ The proposed Land Rights Management Board also contributes to the rationalisation of the complex land tenure system in that one institution will be responsible for the implementation of tenure security on farmland and its administration. The Land Rights Management Board could be a good idea if it is effectively implemented. The Land Rights Management Board will make the whole system of implementing tenure security legislation, enforcing tenure rights and the process of eviction simpler, as the whole process will be governed by a single institution.¹¹¹

In terms of the second objective of tenure reform that refers to the improvement of tenure security, the Bill will to a greater extent improve tenure security on farmland. The idea of improving tenure security is essentially two-dimensional. Firstly, it involves improving tenure security of farm dwellers while they still reside on farmland and secondly, improving their tenure security once they have been evicted.

¹⁰⁹ Clause 36 of the Draft Land Tenure Security Bill 2010.

¹¹⁰ Clause 37 of the Draft Land Tenure Security Bill 2010 sets out the role and responsibilities of the Land Rights Management Board.

¹¹¹ The eviction process could be simplified in relation to farm dwellers mainly because of the requirement for legal representation, suitable alternative accommodation and the inclusion of Land Rights Management Board and the municipal manager in the eviction process. See clause 20 and 22 of the Draft Land Tenure Security Bill (2010).

With regard to improving tenure security on farmland, the Bill sets out the conditions and circumstances for lawful evictions.¹¹² Clause 20(11) of the Bill provides that no eviction may render persons affected homeless or vulnerable to the violation of other human rights. Clause 20(11) of the Bill is likely to have two implications. On the one hand, the clause implies that the farm owner may not evict farm dwellers without alternative accommodation, which might lead to a lengthy and expensive process. According to Pienaar,¹¹³ a sensible application of this clause requires a lot of proactive conduct, for example an investigation has to be done to determine the availability of alternative accommodation as well as sufficient support and other mechanisms to provide the required suitable accommodation. On the other hand, the eviction process is made simpler and more possible for the land owner if alternative accommodation is available. However, clause 21 of the Bill provides that an eviction will only be carried out in terms of a court order. This means that the availability of accommodation does not automatically guarantee eviction since the farm owner is still obliged to follow the eviction procedure.¹¹⁴ The new eviction measures are therefore likely to enhance tenure security on farmland.

Similar to the *Policy*, the Bill also proposes agri-villages to be utilised in case of eviction or threatened eviction.¹¹⁵ This proposal ensures the achievement of tenure security when a person has been evicted from the farmland. This is not a new development, but the proposed idea will go a long way in improving tenure security for farm dwellers. Unfortunately, the provisions in the Bill dealing with agri-villages are vague and unclear. The duties and responsibilities are not clearly specified, for example it is not clear in the Bill whether the government will provide for the establishment of agri-villages.

The idea to de-link the right to reside on farmland and employment contracts increases tenure security on farmland and reduces uncertainty regarding tenure

¹¹² Clause 20 of the Draft Land Tenure Security Bill 2010.

¹¹³ Pienaar JM & Kamkuemah A "Farm land and tenure security: New policy and legislative developments" (2011) 22 *Stellenbosch Law Review* 724- 741 at 734.

¹¹⁴ See clause 22 of the Draft Land Tenure Security Bill 2010. See also Pienaar JM & Kamkuemah A "Farm land and tenure security: New policy and legislative developments" (2011) 22 *Stellenbosch Law Review* 724- 741 at 734.

¹¹⁵ See clause 26 of the Draft Land Tenure Security Bill 2010.

rights.¹¹⁶ Furthermore, de-linking employment and residence makes the process of eviction simpler as labour legislation is side-stepped and only formal eviction proceedings have to be lodged.¹¹⁷ This implies that farm dwellers are provided with housing irrespective of where they specifically provide labour, as long as it relates to farmland. As such it does not necessarily mean that if a person's employment contract is terminated, his or her right to housing is also terminated.

The Bill provides tenure security for all occupiers and offers protection to occupiers who have resided on the farmland for at least ten years and who are older than sixty years.¹¹⁸ This category of persons will be protected even if they are no longer able to work on the farm, unless they commit a breach contemplated in clause 16(2) of the Bill. This aspect of the Bill also impacts on the constitutional right to have access to adequate housing¹¹⁹ and not to be discriminated against on the ground of age.¹²⁰

Important to note is that the duties of farm owners are generally formulated negatively. This means that no pro-active conduct from the farm owner is required, for example, they are not allowed to prevent farm dwellers from exercising their rights, such as the right to have access to housing and education. In this context, it is also not clear whether farm owners are obliged to make available housing and other basic services for farm dwellers. The mere fact that farm owners cannot prevent farm dwellers from exercising their right to housing is an important element to consider, when determining whether the Bill improves tenure security on farmland.

With regard to bringing tenure security in line with constitutional imperatives, the Bill will certainly pass constitutional muster. The Bill states that an eviction will only be carried out if alternative accommodation is available. This assertion alone implies that no person will be made homeless during or after eviction processes. Therefore, everyone is entitled to have access to housing pending eviction procedures. In

¹¹⁶ See the *Memorandum on the objects of the Land Tenure Security Bill* (2010) para 1 5 5.

¹¹⁷ Pienaar JM & Kamkuemah A "Farm land and tenure security: New policy and legislative developments" (2011) 22 *Stellenbosch Law Review* 724- 741 at 734.

¹¹⁸ See clause 20(6) of the Draft Land Tenure Security Bill 2010.

¹¹⁹ Section 26(1) of the Constitution of the Republic of South Africa 1996.

¹²⁰ Section 9(3) of the Constitution of the Republic of South Africa 1996.

addition, the Bill also has a long list of actions that amount to constructive eviction of farm dwellers. These include actions such as preventing access to a place of residence; closure of schools; interference with performance of cultural practices; denial or prevention of access to water and electricity; refusal to bury deceased family members; unilateral reduction of rights protected; demolishing farm dwellers homes and forcing farm dwellers to relocate.¹²¹ In this way, the Bill regulates the manner in which the farm owner exercises his rights to give effect to the constitutional rights of farm dwellers.

5 4 5 Constitutional property law analysis

The Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance (FNB)*¹²² held that the purpose of section 25 as a whole is to strike a proportionate balance between the protection of existing private property rights and the promotion of the public interest. According to Van der Walt,¹²³ section 25 of the Constitution serves both a protective and reformatory purpose. In this regard, the section can be divided into two parts, namely section 25(1)-(3), which guarantees the protection of existing property rights against unconstitutional interference and section 25(5)-(9), which provides a guarantee of state action to promote land and other related reform. Section 25(4) applies to both sections as an interpretive provision. Accordingly, the overall effect of section 25 is that the protection of property as an individual right is not absolute but subject to societal considerations, which may include the necessity for land reform.¹²⁴ This section evaluates the constitutional implications of the Draft Land Tenure Security Bill in relation to the property rights of farm owners.

¹²¹ Clause 19(2) of the Draft Land Tenure Security Bill 2010.

¹²² *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 para 50. See also Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* (2nd ed OS 2003) ch 46 1-37 at 3.

¹²³ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 13. See also chapter 2 at 2 2 2 for a discussion on land reform and the property clause.

¹²⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 para 50; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 16; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 33. See also Van der Walt AJ "Constitutional property law" (2009) 3 *Juta's Quarterly Review of South African Law* para 2.2.

The Bill provides a comprehensive and an open-ended¹²⁵ list of rights that persons residing on farmland can exercise.¹²⁶ These rights include, but are not limited to, the right to cultural beliefs; the right to bury deceased members of the family on the relevant farmland; the right to education; the right to family life; and the right to access basic services such as electricity and water. The list is general and unspecific and makes it difficult to determine how these rights can be limited in order to protect the rights of farm owners. In addition, substantive restrictions are imposed on the land owners' right to obtain an eviction order.¹²⁷ Such a broad, open-ended list of rights, together with the anti-eviction provisions, is likely to constitute a deprivation in that certain entitlements of the farm owner with regard to his property are restricted, due to the rights that are given to farm dwellers while residing on the farm.

This has a potentially negative impact on the property rights of the farm owner.¹²⁸ The question that arises is whether the open-ended list of rights granted to farm dwellers, as well as the eviction process that has to some extent been complicated by the Bill, amounts to a deprivation in terms of section 25(1). If this question is answered in the affirmative, that is, if there is indeed a deprivation of property, the following question will be whether the deprivation satisfies the requirements stated in section 25(1) of the Constitution.

To determine whether clause 15(1) and clause 19-25 of the Bill (these provisions have the effect of limiting the farm owners' property rights) amount to a deprivation of property, it is important to consider the *FNB* decision. The *FNB* decision is regarded as the "leading judgment regarding the property clause in the Constitution".¹²⁹ The

¹²⁵ Soanes C & Stevenson A *Concise Oxford English dictionary* (11th ed 2006) 1001 defines open-ended as having no predetermined limit.

¹²⁶ Clause 15(1) of the Draft Land Tenure Security Bill 2010.

¹²⁷ See clauses 19-25 of the Draft Land Tenure Security Bill 2010.

¹²⁸ Zirker OL "This land is my land: The evolution of property rights and land reform in South Africa" (2003) 18 *Connecticut Journal of International Law* 621-641 at 632 argues that through the implementation of the 1996 Constitution, property rights were firmly established as a protected right for all South Africans.

¹²⁹ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 35.

Constitutional Court in *FNB*¹³⁰ established a new methodology, which proposes that all limitations of property rights will be regarded as deprivations and tested against the requirements of section 25(1) of the Constitution. The methodology entails a seven-stage inquiry that is set out as follows:¹³¹ the court has to first determine whether the law in question affects property as understood by section 25. If the law in question affects property as understood by section 25, the court must determine whether there was a deprivation of property. If there was a deprivation of property, the next question is whether such deprivation is consistent with the provisions of section 25(1). If the deprivation is inconsistent with the provisions of section 25(1), it has to be determined whether such deprivation should be justified under section 36 of the Constitution. If the deprivation is not arbitrary or (if it was arbitrary) justified under section 36 of the Constitution, the next question is whether the deprivation amounts to an expropriation for purposes of section 25(2) of the Constitution. If the deprivation amounts to an expropriation, the court has to determine whether the expropriation complies with the requirements of section 25(2)(a) and (b) of the Constitution. If there is non-compliance with the requirements of section 25(2)-(3), the next question is whether the expropriation is justified under section 36.

The first question to determine in any constitutional property inquiry is whether the interest at stake constitutes property as contemplated in section 25(1) and 25(2) of the Constitution.¹³² The protection afforded to property holders under section 25 of the Constitution can only be triggered if the law interferes with an interest that constitutes property.¹³³ The Constitutional Court in *FNB* declined to provide a comprehensive definition of the term “property” for purposes of section 25, on the basis that such an attempt would be “judicially unwise” and “practically

¹³⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 46 and 57-58.

¹³¹ These questions were formulated in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 para 46. See also Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* (2nd ed OS 2003) ch 46 1-37 at 3.

¹³² Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* (2nd ed OS 2003) ch 46 1-37 at 10.

¹³³ Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* (2nd ed OS 2003) ch 46 1-37 at 10.

impossible”.¹³⁴ Instead, the court recognised that ownership of corporeal movables, together with ownership of land, lies at the heart of our constitutional concept of property.¹³⁵ Such recognition confirms the stipulated provision in section 25(4)(b) that property is not only limited to land.¹³⁶ In this light, it can be acknowledged that section 25 applies to cases that involve ownership of land, in other words to land reform cases.

The Bill interferes with the property rights of the farm owner by granting and allowing farm dwellers to exercise certain rights on the farm. The farm owner in this case does not necessarily lose the ownership of his property (farmland), but some of the entitlements of his property right (ownership) are affected. These may include the farm owners’ right to evict, as well as his entitlements to exclusion; disposal; and use and enjoyment of the property. It follows that the property interest that is at stake is the farm owners’ entitlements to exclusion, disposal and use and enjoyment of property as well as the right to evict.

Section 25(1) of the Constitution provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. This section confirms that property holders can be deprived of their property if the deprivation is authorised by law of general application and if such law does not provide for arbitrary deprivation.

The decision of the Constitutional Court in *FNB* brought certainty to the issue of interpreting the term “deprivation” by describing it as “any interference with the use, enjoyment or exploitation of private property”.¹³⁷ Van der Walt¹³⁸ states that section

¹³⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 para 51.

¹³⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 para 51.

¹³⁶ Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* (2nd ed OS 2003) ch 46 1-37 at 10.

¹³⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 para 57. See also Van der Walt AJ *Constitutional property law* (3rd ed 2011) 204.

¹³⁸ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 192.

25(1) of the Constitution entails a deprivation that is uncompensated and constitutes regulatory restrictions on the use, enjoyment and exploitation of property. A deprivation can therefore be defined as properly authorised and fairly imposed regulatory limitations on the use, enjoyment, exploitation or disposal of property, for the sake of protecting and promoting public health and safety or other legitimate public purposes, without compensation.¹³⁹ Accordingly, the limitations on the exercise of one's property rights imposed by the Bill perfectly suit the definition of a deprivation and this is a clear indication that the provisions in the Bill amount to deprivation of the farm owners' property rights.

The requirements for a deprivation of property are that (a) the deprivation must take place in terms of law of general application and that (b) such law may not permit arbitrary deprivation. The first requirement ensures that the deprivation of property is properly authorised in accordance with the law, and embodies the legitimate principles of the Constitution.¹⁴⁰ In this context the Bill, once it has been properly promulgated into legislation, will qualify as law of general application that authorises the deprivation of property of the farm owner in that it applies to all agricultural land and is intended to protect farm dwellers.¹⁴¹ Having satisfied the first requirement, it is necessary to determine whether the deprivation would be arbitrary.

The second requirement entails that law of general application may not permit arbitrary deprivation. In accordance with the *FNB* decision, law of general application causes arbitrary deprivation when there is insufficient reason for the deprivation or when the deprivation is procedurally unfair.¹⁴² The central inquiry in determining whether there is sufficient reason for deprivation is based on the relationship

¹³⁹ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 212.

¹⁴⁰ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 232.

¹⁴¹ Woolman S & Botha H "Limitations" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional law of South Africa* (2nd ed OS 2006) ch 34 1-136 at 50-51 state that the law of general application should be formally valid in the sense that it was properly enacted and promulgated. According to Van der Walt AJ *Constitutional property law* (3rd ed 2011) 232 law of general application means that the authorising law must be generally and equally applicable and ensure parity of treatment; non-arbitrary in the sense that the law is applied according to discernible standard; the law should be precise enough to ensure that people can arrange their conduct to meet its standards; and the law should be accessible to the public.

¹⁴² See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100. See also Van der Walt AJ *Constitutional property law* (3rd ed 2011) 245.

between the law in question, the ends the law seeks to achieve and the impact of restrictions on the use and enjoyment of property.¹⁴³ The Constitutional Court in *FNB*¹⁴⁴ further highlighted that a sufficient *nexus* should exist between the means employed and the ends sought to be achieved as well as the purpose of the deprivation and its effects on the owner of the property.

The first step in this context is to evaluate the means employed and the ends sought to be achieved, together with the purpose of the deprivation. According to Van der Walt,¹⁴⁵ section 25(1) of the Constitution recognises the power to impose regulatory limitation on the use and enjoyment of property, even when that causes deprivation of property, because such regulatory action protects and promotes public health and safety interests. He further argues that section 25(1) can be assumed to include an implicit requirement that deprivation of property should serve a legitimate public purpose or be in the public interest. The reasons for the deprivation of a farm owners' property can be inferred from the objectives of the Bill.

The purpose of the Bill as indicated above is to give effect to section 25(5)-(6) and section 26 of the Constitution by promoting and protecting the relative rights of farm dwellers; enhancing security of tenure; creating conditions for peaceful and harmonious relationships; and sustaining production discipline. The Bill is introduced as a result of the failure of ESTA and LTA to provide adequate tenure security on farmland and to address tenure disputes between farm owners and farm dwellers. In addition, the purpose of the Bill is a legitimate government function, namely to further the public interest in the land reform programme and in improved tenure security. As a result, the open-ended list of rights granted to the farm dwellers, together with the strict requirements for eviction, is intended to deal with the shortcomings in the current tenure security legislation and to successfully achieve strengthened tenure

¹⁴³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 49.

¹⁴⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 98. See also Van der Walt AJ *Constitutional property law* (3rd ed 2011) 245.

¹⁴⁵ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 228.

security on farmland, in accordance with explicit constitutional obligations.¹⁴⁶ These reasons are sufficient to justify the deprivation imposed by the Bill as it serves an important public interest, namely improving tenure security on farmland, which is one of the components of the land reform programme and a constitutional obligation imposed and authorised by section 25(6) of the Constitution.¹⁴⁷

The arbitrariness inquiry also involves the question whether the deprivation is procedurally fair. The Constitutional Court in *Mkontwana* and *Reflect-All* discussed the meaning of procedural fairness in the context of section 25(1) of the Constitution.¹⁴⁸ *Mkontwana* describes procedural fairness as a flexible concept that can be determined with reference to all the circumstances.¹⁴⁹ In determining the meaning of procedural fairness, the Constitutional Court in *Reflect-All* confirmed and applied the meaning adopted in *Mkontwana* that procedural fairness is a flexible concept, which depends on all the circumstances.¹⁵⁰ As such, procedural fairness has to be determined on the basis of each case.

In this context, the provisions in the Bill amount to a deprivation of the farm owners' property rights. The deprivation is caused directly by the application of the Bill in the sense that administrative action is not required to give effect to the restrictions. On this basis, there is a possibility of procedural unfairness, taking into account that the Bill grants farm dwellers an open-ended list of rights without first consulting with the farm owner. However, the farm owner is allowed to impose reasonable conditions on

¹⁴⁶ With regard to strict requirements for evictions, the court in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 11-23 held that the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 and all land reform laws should be interpreted within its proper historical and constitutional framework. See also Van der Walt AJ *Constitutional property law* (3rd ed 2011) 296-297.

¹⁴⁷ The public interest requirement includes the nation's commitment to land reform as stipulated in section 25(4) (a) of the Constitution.

¹⁴⁸ The *FNB* decision deals extensively with the issue of substantive arbitrariness but omitted to define or discuss the concept of procedural fairness. See Van der Walt AJ "Procedurally arbitrary deprivation of property" (2012) 23 *Stellenbosch Law Review* 88-94 at 88.

¹⁴⁹ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) para 65.

¹⁵⁰ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 40-47.

the rights granted to farm dwellers.¹⁵¹ In other words, the farm owner still retains control over the farmland. Furthermore, the farm owner is entitled to institute a claim for the removal of persons residing on his or her land upon breach in the exercise of rights by an occupier.¹⁵² In some instances, the farm owner can make an urgent application for the removal of persons residing on his land if for example there is a real or imminent danger of substantial injury or damage to any person or property if the person residing on the land is not removed.¹⁵³ This implies that the farm owner is granted a reasonable opportunity to protect his property interests. It follows that the Bill, once it qualifies as legislation, will possibly satisfy the requirement for procedural fairness.

In addition, when evaluating whether there is sufficient reason for the deprivation, regard must be had to the relationship between the purpose of the deprivation and the person whose property is affected. In other words, it is necessary in any arbitrariness inquiry to consider the possible impact of the deprivation on the property holder. In this regard, the *FNB* decision looks at the nature of the property and whether the deprivation embraces all the entitlements of ownership. For example, where the property in question is ownership of land, the court has to establish a more compelling purpose for the depriving law to constitute sufficient reason for the deprivation. Also, in instances where the deprivation embraces all the entitlements of ownership, the purpose of the deprivation will have to be more compelling than when the deprivation affects only some of the entitlements of ownership.

In this case, the property interest which is likely to be affected by the application of the Bill has been identified above as the entitlements of exclusion, disposal, use and enjoyment of property as well as the right to evict. The depriving law (Bill) in this

¹⁵¹ See clause 15(2) of the Draft Land Tenure Security Bill 2010.

¹⁵² See clause 16(2) of the Draft Land Tenure Security Bill 2010.

¹⁵³ See clause 22(2)(a) of the Draft Land Tenure Security Bill 2010.

case constitutes a deprivation of some of the farm owners' entitlements of ownership but does not necessarily take away the ownership of property.¹⁵⁴

The purpose of the Bill is to give effect to the constitutional imperatives, particularly section 25(6) of the Constitution by improving tenure security on farmland. Furthermore, one of the main reasons for adopting the Constitution was to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.¹⁵⁵ The Constitution was also adopted to improve the quality of life of all citizens and free the potential of each person. Due to the history of land dispossessions and social and economic repercussions, tenure reform is an attempt by the government to attain the stated goal of social justice and economic progress.¹⁵⁶ Furthermore, the anti-eviction provisions in the Bill are particularly aimed at rectifying the past injustices of the apartheid era as far as eviction of occupiers is concerned, in accordance with the transformative purpose of the Constitution. In as much as the Bill constitutes a regulatory deprivation,¹⁵⁷ its objectives provide sufficient reason for allowing interference with the farm owners' property and this excludes the possibility that the deprivation is arbitrary. Since the purpose of the Bill will in the majority of cases probably outweigh the effect that the deprivation will have on the affected farm owner, and seeing that the deprivation will probably not be procedurally unfair because of the possibilities left for the farm owner to protect his interests, the proportionality test will in all likelihood favour the conclusion that the deprivation brought about by the Bill is not arbitrary. In light of the above, the provisions of the Bill cannot be regarded as arbitrary as is understood under section 25(1) of the Constitution.

¹⁵⁴ This view excludes the possibility of expropriation. According to Van der Walt AJ *Constitutional property law* (3rd ed 2011) 191 expropriation is largely a matter of the state actually taking ownership of property for a public purpose and therefore the term deprivation in section 25(1) refers to other, possibly lesser forms of limitation, not involving expropriation. See also *Mkotwana v Nelson Mandela Metropolitan Municipality and Another*; *Bissett and Others v Buffalo City Municipality and Others*; *Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) para 32.

¹⁵⁵ See the preamble to the Constitution.

¹⁵⁶ Zirker OL "This land is my land: The evolution of property rights and land reform in South Africa" (2003) 18 *Connecticut Journal of International Law* 621-641 at 634.

¹⁵⁷ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 296 states that regulatory deprivations have been mostly visible in the post-1994 South African property law, mainly to restrict landowners' right to evict and exclude others from their property.

The *FNB* decision also discusses the interplay between deprivation and expropriation.¹⁵⁸ The question whether the deprivation brought about by the Bill amounts to expropriation must, according to the *FNB* test, be considered once it has been determined that the deprivation is not arbitrary. As indicated above, the Constitutional Court in *FNB* describes a deprivation as any interference with property. With regard to expropriation, the court concluded that it is a subset of deprivation.¹⁵⁹ This implies that the requirements for deprivation have to be complied with first before considering the requirements for an expropriation.¹⁶⁰ It is clear that the deprivation of the farm owners' property rights does not amount to an arbitrary deprivation. It follows that the deprivation satisfies the requirements of section 25(1) and therefore, there is no need to determine whether the deprivation can be justified in terms of section 36 of the Constitution. The next step would be to determine whether the deprivation of the farm owners' property rights amounts to an expropriation in terms of section 25(2) of the Constitution.

According to the *FNB* methodology expropriation will be considered in two instances, namely whether the deprivation has satisfied the section 25(1) requirements or whether non-compliance with section 25(1) requirements was justified in terms of section 36(1) of the Constitution.¹⁶¹ Section 25(2) of the Constitution makes provision for expropriation. The section provides that property may be expropriated only in terms of law of general application, for a public purpose or in the public interest. It further states that expropriation should be subject to compensation that is just and equitable and prescribe the conditions for determining compensation in section 25(3) of the Constitution. Consequently, the distinguishing factor between deprivation and

¹⁵⁸ The distinction between expropriation and other forms of deprivation of property was discussed in *Harksen v Lane NO and Others* 1998(1) SA 300 (CC) and *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA).

¹⁵⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57-58; Van der Walt *Constitutional property law* (3rd ed 2011) 340-341.

¹⁶⁰ Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* (2nd ed OS 2003) ch 46 1-37 at 29 states that the *FNB* decision treated expropriation as a form of deprivation and insisted that an impugned laws, even where it clearly provided for the expropriation of property, first be tested for compliance with section 25(1) of the Constitution.

¹⁶¹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 59. See also Van der Walt AJ *Constitutional property law* (3rd ed 2011) 220.

expropriation is that compensation is required for expropriation.¹⁶² This distinction is brought out by the analysis of section 25(1) and section 25(2) of the Constitution as set out in the *FNB* methodology.

In South African law, expropriation is authorised by legislation and must be carried out in the public interest and for a public purpose, for it to be valid.¹⁶³ Furthermore, expropriation is an administrative action, which empowers the state to exercise discretion in terms of the authorising legislation to expropriate property for a public purpose.¹⁶⁴

The power to expropriate must be specifically granted by legislation. In this regard, the authorising legislation must explicitly provide the purpose for the expropriation of property.¹⁶⁵ The provisions in question (clause 15(1) and 19-25 of the Bill) are not intended to expropriate property but to regulate the manner in which a farm owner exercises his or her property rights to accommodate the interests of farm dwellers and to further the interests of land reform. It follows that these particular provisions do not authorise expropriation.

However, clause 28 of the Bill authorises expropriation of property and explains that expropriation must be regulated by the Expropriation Act 63 of 1975 and in accordance with section 25(3) of the Constitution. Section 25(2) of the Constitution stipulates that property may be expropriated for a public purpose or in the public interest. Section 25(4)(a) expressly provides that the public interest requirement includes “the nation’s commitment to land reform and to reforms to bring about equitable access to all South Africa’s natural resources”. It is most likely that once the Bill passes into legislation, this provision will clearly authorise expropriation for a public purpose, namely to improve tenure security on farmland. Accordingly, the paragraphs above provides a possibility that in any constitutional property inquiry that involves land reform cases, it is unnecessary to go through the expropriation

¹⁶² Van der Walt AJ *Constitutional property law* (3rd ed 2011) 343-344.

¹⁶³ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 452.

¹⁶⁴ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 456.

¹⁶⁵ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 454.

stage as the issue would have gone through the arbitrariness test in terms of section 25(1).¹⁶⁶ In light of the above, it is clear that clause 15(1) and 19-25 of the Bill do not amount to an expropriation but to a deprivation that is non-arbitrary. Firstly, none of the provisions authorise expropriation of property and secondly, the provisions do not specify the public purpose for expropriation.

5 5 Conclusion

The government has attempted to address tenure related issues on farmland. Regardless of the many interventions employed by the DRDLR, the land tenure security system generally in rural areas, but more particularly on white-owned commercial farms, still needs attention from relevant role players. To address these shortcomings, tenure reform has to involve the implementation of laws and rules that govern tenure security on farmland. The existing tenure laws have proved to be ineffective because of poor implementation and ill-administrative systems. Therefore, the new draft tenure security *Policy* and Bill must not only remain as policy and legislative measures but their ideas, goals and provisions must be transformed into reality to change lives on a daily basis.

It cannot be said with certainty whether the new draft tenure security *Policy* and the Bill will be effective. It remains to be seen, once the *Policy* and Bill are in operation whether tenure security on farmland will be improved. However, it is clear that the definition of persons residing on farms broadens the ambit of the Bill compared to the extent provided for under ESTA and LTA. This means that in theory at least, the Bill is much wider than the mere consolidation of ESTA and LTA, resulting in the creation of a brand new piece of legislation.¹⁶⁷ The Bill is also likely to cause conflict between farm owners and farm dwellers, given the open-ended list of rights that farm

¹⁶⁶ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 458-459 argues that the requirement in section 25(2) is highly unlikely going to play a significant role in most if not all constitutional property cases dealing with expropriation, particularly if Roux's prediction about the "telescoping" effect of the *FNB* decision comes true and all property issues are decided on the basis of the arbitrary deprivation test. See also Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* (2nd ed OS 2003) ch 46 1-37 at 2-5.

¹⁶⁷ Agri-SA "Land tenure security Bill: Agri-SA's critique" (29 March 2011) <[http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=228424&sn=Marketing web+detail](http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=228424&sn=Marketing+web+detail)> (accessed 22-05-2012).

dwellers can exercise. The conflict will be as a result of competing interests on the same piece of land. In light of the constitutional analysis above, an appropriate balance will be established between the protection of farm owners' rights and the rights of farm dwellers.

However, whether the new interventions will improve tenure security is dependent on how the *Policy* and the Bill are implemented and the strategies employed by the DRDLR. Already the eviction process has been made too expensive, lengthy and difficult. This new proposed process requires a competent local government for it to be successful¹⁶⁸ and this also requires the support of the state and the availability of adequate funding. This implies that the mere drafting of the *Policy* and Bill does not automatically guarantee improved tenure security.

The 1997 *White paper* envisaged the recording and registering of farm dwellers' rights.¹⁶⁹ The *Draft tenure security policy* also makes provision for such recording and registering of rights but the Bill makes no mention of either the recording or registering of rights. This is an indication that the new *Policy* and the Bill do not complement each other. Indeed, there are lots of ideas and directions stemming from the *Strategic plan* of the DRDLR; the *Comprehensive rural development programme*; the new draft tenure security *Policy* and Bill; and the 2011 *Green paper on land reform*. These ideas and directions seem disconnected on the one hand and overlapping on the other hand. Therefore, although there are various measures, ideas and provisions, the way ahead still seems unclear.

¹⁶⁸ See clause 25(2) of the Draft Land Tenure Security Bill 2010.

¹⁶⁹ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) para 2.1.

Chapter 6: Conclusion

6 1 Introduction

The basis of this thesis is the aftermath of the former South African racially-based landholding system and farm dwellers' consequently insecure tenure. Tenure insecurity on farmland is a direct result of the history of land dispossessions that occurred in the colonial and apartheid era.¹ Today, many South Africans occupy land with insecure tenure, especially those working and residing on white-owned commercial farms. Despite the constitutional guarantee that previously disadvantaged households, including farm dwellers, are entitled to legally secure tenure, challenges regarding these households' tenure rights continue to exist on farmland.

On this basis, the thesis provides an overview of tenure security and tenure reform in South Africa, with a focus on farmland. The point of departure is that tenure security on white-owned commercial farmland continues unabated despite the provision in section 25(6) of the Constitution, together with policy and legislative measures adopted and promulgated in line with it, that is aimed at ensuring more secure tenure. The thesis begins by providing an overview of the historical context in which security of tenure was regulated in general, but with a focus on farmland. One of the main characteristics of the apartheid laws and practices was identified as being the erosion of rights and interests in the use of land by black people.²

The thesis aimed to assess whether the current tenure reform initiatives are in line with the constitutional imperatives; whether the existing tenure reform policy and legislation is adequate to ensure tenure security for farm dwellers; whether government agencies and the courts provide adequate measures to enforce tenure reform legislation; and how the challenges associated with the tenure security system on farmland can be addressed more effectively. The thesis demonstrates

¹ See chapter 2 at 2 2.

² See chapter 2 at 2 2 1 for a discussion on the history of the landholding system in South Africa.

that land reform in general and tenure reform in particular is important for addressing issues relating to tenure security on farmland. In this context, it specifically focused on farm dwellers. This involved an assessment of the nature and role of tenure security as well as various government initiatives developed effectively to implement tenure security reforms on farmland.

Generally, academics, government and various other organisations agree that tenure security on farmland remains insecure, mainly due to the weak and ineffective implementation of the Extension of Security of Tenure Act 62 of 1997 (ESTA) and the Land Reform (Labour Tenants) Act 3 of 1996 (LTA).³ Addressing insecure tenure on farmland has proved to be an extremely complex challenge facing the government, given that tenure security on white-owned commercial farms is reflective of a much broader issue than other land reform initiatives such as housing. The form of tenure security on farmland reflects the nature of property rights and social and economic relations in South Africa as well as the legacy of years of apartheid policies, laws and practices. In light of this, to give effect to the constitutional guarantee of legally secure tenure, it is necessary to consider the plight of farm dwellers, while also taking into account property rights of farm owners within the constitutional framework.

The provisions in the Constitution and its characteristics play a major role in transforming South Africa into a democratic state, which is based on the principles of equality, freedom and human dignity. Land reform, particularly tenure reform, can be regarded as transformation sensitive in the sense that the reforms are specifically aimed at rectifying the injustices caused by the apartheid practices and laws. Most importantly, the reforms are essentially aimed at a progressive future.

Sibanda looks at the nature and role of transformative constitutionalism and how it impacts on the eradication of poverty in South Africa.⁴ He is of the view that despite

³ See chapter 4 at 4.4.2 for a discussion on the implementation of tenure security legislation.

⁴ Sibanda S “Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty” (2011) 22 *Stellenbosch Law Review* 482-500.

the transformative vision of the Constitution, South African citizens still continue to face inequality and the accompanying challenges that arose during the apartheid era.⁵ Sibanda argues that

“...while recognising the importance of political transformation that has ushered in a democratic era, [I] will point out that despite the Constitution’s preambular commitment to ‘improve the lives of all citizens’ and the inclusion of socio-economic rights in the Bill of Rights, living conditions in South Africa from a social and economic perspective remain fundamentally unchanged for many black citizens for whom apartheid’s multiple legacies continue to be a living and lived reality.”⁶

In light of the main findings of this study, it can be argued that the lack of tenure security on farmland depicts the government’s failure to address tenure issues in line with the Constitution’s transformative purpose, which includes establishing a just and equitable balance between protecting existing property rights and the promotion of land reform in the public interest and eradicating poverty in all sectors of society. Although legislation has been enacted to give effect to section 25(6), read with 25(9) of the Constitution and to facilitate tenure security in rural communities, it has failed to provide sufficient protection for farm dwellers. In this sense, it was necessary to assess tenure security and its reforms in relation to farmland to identify the underlying rights of farm dwellers and to determine how they can be further improved and protected.

6 2 Tenure security: general guiding principles

It has been established in this thesis that as a result of developments and practices during the apartheid era, black farm dwellers’ rights have been undermined, resulting in insufficient access to land and in existing tenure being insecure. The tenure reform process is informed by the broad principles that are drawn from the Constitution and the 1997 *White paper on South African land policy* (1997 *White paper*).⁷ The

⁵ Sibanda S “Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty” (2011) 22 *Stellenbosch Law Review* 482-500 at 482. See also Michelman FI “Liberal constitutionalism, property rights, and the assault on poverty” 2011 (22) *Stellenbosch Law Review* 706-723.

⁶ Sibanda S “Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty” (2011) 22 *Stellenbosch Law Review* 482-500 at 485.

⁷ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997).

Constitution sets out the legal basis for tenure reform and places a clear obligation on the state to carry out land and related reforms, which will strengthen and improve the land rights of historically disadvantaged persons.⁸ The Constitution requires the state to provide either secure tenure of land to people and communities whose tenure is legally insecure as a result of past racially discriminatory laws or practices or comparable redress.⁹

Tenure reform aims to redress the discriminatory effect in terms of the nature of land rights held by black persons residing on communal lands and on white-owned commercial farms. The focus of this thesis is on white-owned commercial farms with specific reference to farm dwellers. A right to have tenure security is recognised or acknowledged as a right to own, occupy or use a specified piece of land.¹⁰ However, judging from the findings of this thesis, the right to occupy or use a specified piece of land does not automatically result in secure tenure. Furthermore, it is clear that secure tenure is not only limited to ownership but also includes the prevention or regulation of unjustified interference with lesser rights. In this context, tenure security entails the quality of the rights that a farm dweller holds. Tenure security can also be used to describe the relation between a farm dweller as the holder of the tenure security right and the farm owner, on whose farmland tenure rights are exercised. This relation mainly signifies employment agreements and family relations with regard to the protection offered to family members, especially women and children residing on farmland.

Tenure security reforms seek to strengthen the property rights of persons who already occupy land under various relatively insecure forms of tenure.¹¹ In this respect, tenure security reforms are intended to protect rights of farm dwellers against unlawful or unjustified interference from the farm owner or against unfair evictions. Tenure security reforms are expected to bring about certainty regarding

⁸ Section 25(8) of the Constitution of the Republic of South Africa 1996.

⁹ See section 25(6) of the Constitution of the Republic of South Africa 1996.

¹⁰ Mahomed A *Understanding land tenure law: Commentary and legislation* (2009) 28. See also Pienaar JM & Kamkuemah A "Farm land and tenure security: New policy and legislative developments" (2011) 22 *Stellenbosch Law Review* 724-741 at 724.

¹¹ Lahiff E "With what land rights? Tenure arrangements and support" in Hall R (ed) *Another countryside? Policy options for land and agrarian reform in South Africa* (2009) 93-117 at 93.

the exercise of tenure rights and their duration as well as to improve the quality of life and livelihoods of farm dwellers. If there is no such certainty, the rights of farm dwellers will be negatively affected, resulting in continuous hardships for those living on farmland. Furthermore, tenure security reforms such as legislation bring about a certain degree of clarity on the status of tenure rights, especially in the absence of registration of rights.¹²

In this context both ESTA and LTA provide strong statutory rights that vest in farm dwellers. Tenure security legislation, especially ESTA, seeks to protect a variety of tenure rights without necessarily conferring ownership on farm dwellers. Furthermore, the legislation does not offer registration of farm dwellers' rights. Instead, a more balanced approach to individual rights is taken, which ensures that occupiers gain secure access to land with improved or strengthened tenure security rights, while simultaneously protecting the rights of farm owners.

In terms of ESTA, the nature of rights acquired by farm dwellers is similar to a limited real right, which gives them stronger protection in the exercise of their rights while residing on farmland.¹³ ESTA does not grant farm dwellers ownership rights to the land (residence) which they occupy on the farmland, but long-term security would include ownership rights, mainly in relation to off-farm developments or in agri-villages. On the contrary, farm dwellers under the LTA can acquire ownership rights to the land that they occupy where labour tenancy has been practiced for at least a generation and if a claimant can be described as a labour tenant in terms of the requirements of the Act.¹⁴ This implies that LTA secures the rights of farm dwellers to land and assists them to become independent farmers on their own land. In theory, labour tenants acquire stronger legal rights than other farm dwellers. This means that there are two elements encompassed in the LTA, namely the tenure reform element, which secures the land rights of labour tenants and specifies the conditions

¹² See chapter 4 at 4 5 2.

¹³ See chapter 4 at 4 5 2.

¹⁴ See chapter 4 at 4 5 2. See also Hall R "Evaluating land and agrarian reform in South Africa: Farm tenure" (2003) *PLAAS Occasional Paper No 3* 1-42 at 23-24 <<http://www.plaas.org.za/pubs/downloads/LREP3.pdf>> (accessed 17-10-2011).

under which they may be evicted, and a redistribution element that provides for labour tenants to gain title to the land they have used under tenancy arrangements.¹⁵

Apart from redistributive goals involving the acquisition of ownership, the notable feature of both ESTA and LTA is that tenure security is not promoted through the registration of farm dwellers' rights, although those rights could – once secured in terms of the legislation – have much the same effect as registered limited real rights.

6 3 Constitutional framework

Section 25 of the Constitution, the property clause, broadly emphasises the government's commitment to land reform, of which tenure reform is part. The biggest challenge with the property clause is the seemingly contradictory relationship between the protection of existing property rights and land reform initiatives. The property rights can be subjected to regulatory restrictions to carry out the necessary reforms, which may include improving tenure security on farmland. Such regulations can be introduced in the form of legislation, for example ESTA; LTA; and the new Draft Land Tenure Security Bill.

Tenure security legislation places substantive restrictions on the land owners' property rights, but does not necessarily take away ownership rights. Instead, land owners lose their entitlements to exclusion, disposal and to use and enjoyment of property, which is likely to constitute a deprivation in terms of section 25(1) of the Constitution. In line with the *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance (FNB)*¹⁶ methodology regarding the limitation of property rights, it is imperative to ascertain whether the limitation of property rights imposed by tenure security legislation amounts to a deprivation that will eventually lead to arbitrary deprivation if the requirements in section 25(1) are not met.

¹⁵ Lahiff E "With what land rights? Tenure arrangements and support" in Hall R (ed) *Another countryside? Policy options for land and agrarian reform in South Africa* (2009) 93-117 at 108.

¹⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 para 46.

The Constitution prohibits arbitrary deprivation of property but at the same time specifies the tenure security entitlements granted to persons living under insecure tenure arrangements.¹⁷ The power to impose restrictions on ownership through land reform legislation is acknowledged by the Constitution, since such restrictions protect and promote the public interest. Land reform, specifically tenure reform is a legitimate government purpose that is undertaken in the public interest. According to the findings of this thesis, deprivation of the farm owners' property rights is consistent with section 25 (1) as it serves as a legitimate public interest, intended to promote, protect and improve farm dwellers' tenure rights.

Accordingly, the state has the power and responsibility to establish and ensure the enforcement of regulatory measures over the exercise of property belonging to farm owners in the public interest, so as to benefit farm dwellers.¹⁸ This occurs despite the effect such regulations can have on the existing property rights of farm owners. Policy and legislative measures have illustrated the nature and development of tenure security over the past eighteen years and established the manner in which existing property rights and farm dwellers' rights are protected and regulated in a constitutional context.¹⁹ With regard to the inherent effect of the apartheid policies and laws, particularly on farmland, it seems reasonable to argue that the goal of a constitutional property clause is to bring about justice and equality in the landholding system.

International law plays a major role in determining principles that govern tenure security reforms and the advancement of human rights. International law instruments make provision for rights that protect peoples' homes and their tenure security.²⁰ The right to have secure tenure forms part of a general right to have a good standard of living, which includes having a place to live together with other basic human rights such as cultural rights and the right to family life.²¹ Farm dwellers are often subjected

¹⁷ Section 25 of the Constitution (the property clause).

¹⁸ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 227-228.

¹⁹ See chapters 3 and 4 for a detailed discussion on the policy and statutory framework on tenure reform.

²⁰ See chapter 2 at 2 3.

²¹ Eide A, Krause C & Rosas A (eds) *Economic, social and cultural rights* (2nd ed 2001) 150.

to unfair evictions, which result in homelessness and infringement of their basic human rights, including the right to have access to adequate housing and the right to dignity. The provision(s) in General Comment No 4 of the International Covenant on Economic, Social and Cultural Rights²² implies that tenure security is linked to the right to housing and should be strengthened to guarantee protection against unlawful evictions and any other threats to human rights. Tenure security in the international law context is essential to protect farm dwellers and to strengthen and improve their rights to land. South Africa has an obligation to recognise and promote the values and standards under international law.²³ It is on this basis that the South African government should ensure that its citizens, especially farm dwellers, have access to adequate housing with secure tenure. In light of the international law guidelines, land reforms are necessary for the strengthening of tenure security. South Africa acted in accordance with these principles and made provision in section 25(6), read with section 25(8) and section 25(9) of the Constitution for the reform of tenure security and other related land reforms.

Accordingly, the tenure rights on farmland are protected under South African law, including the Constitution that confers basic human rights to farm dwellers. This protection of rights is, however, seen within the context of competing rights of farm owners. It follows that an appropriate balance should be established to protect the rights of both the farm owner and farm dweller.

6 4 Evaluating tenure reform policy and legislative measures

As indicated earlier, the thesis aims to address the following questions: whether the current tenure reform initiatives are in line with the constitutional imperatives; whether the existing tenure reform policy and legislation is adequate to ensure tenure security for farm dwellers; whether government agencies and the courts provide adequate measures to enforce tenure reform legislation; and how the challenges associated with the tenure security system on farmland can be addressed more effectively. This section discusses the findings surrounding the first

²² Committee on Economic, Social and Cultural Rights, General Comment 4 *The right to adequate housing*, 13 December 1991 UN Doc E/1992/23.

²³ See section 39(1) and 233 of the Constitution of the Republic of South Africa 1996.

three questions, while the findings on the last question are discussed in section 6.5 below, which provides recommendations on the way forward in addressing tenure security challenges on farmland.

Since 1994, plans for transformation and development of rural areas, including farmland, have been announced by the government. The current government's initial plan and vision were embodied in the Reconstruction and Development Programme (1994)²⁴ and various other policies,²⁵ including the 1997 *White paper*. However, little progress has been made to achieve transformation in rural areas and particularly on farmland. The progress has been overshadowed by many failures surrounding the implementation of tenure reform measures.

The government developed the land reform programme in general and land tenure reform in particular to restructure the landholding system, redress the injustices of the colonial and apartheid land dispossessions and to transform social and economic relations, mainly in the rural areas. According to the 1997 *White paper*,²⁶ the main objective of tenure reform on farmland is to secure the rights of farm dwellers and to protect them against arbitrary evictions and provide them with the necessary options through which they could become owners on their own land.

In response to the question whether the current tenure reform initiatives comply with the constitutional imperatives, it was firstly established in this thesis that the reforms are in line with the Constitution, seeing that the tenure reform process has resulted in a range of legislation to give effect to section 25(6), read with section 25(9) of the Constitution. It is clear that the effect of the Constitution is to overturn the apartheid landholding system and introduce a new approach that recognises the interests and rights of all land occupiers.

²⁴ African National Congress *The reconstruction and development programme: A policy framework* (1994).

²⁵ See chapter 3.

²⁶ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 47.

Secondly, it was established that ESTA and LTA do not fall short of the constitutional requirements to make provision for tenure security for victims of past racially discriminatory laws and practices. However, it was also established that the initiatives that had been introduced nevertheless do not fully comply with the constitutional requirements to the extent that they do not succeed in bringing about substantial improvements in tenure security on farmland. In part, the failure of the acts lies in the inherent flaws in the legislation itself and in the inadequate ways that they are formulated and implemented. The failure of the acts also reflects the government's persistent neglect of the tenure reform goals stipulated in the 1997 *White paper*.

In examining whether the current tenure reform measures are effective to strengthen farm dwellers' rights, the study focussed on the policy and legislative measures that are designed to improve tenure rights on farmland. As a result of the past legislation and practices rural dwellers, particularly farm dwellers, are in a precarious position to enforce their rights to land. ESTA and LTA were formulated and implemented to address the problems faced by farm dwellers.²⁷ ESTA and LTA both aim to regulate tenure relations between farm owners and farm dwellers and to set out the process that farm owners have to comply with when evicting farm dwellers. Accordingly, tenure policy and legislative measures have been created with the primary intention of protecting farm dwellers from arbitrary denial and termination of their rights or interests in land through eviction.

According to the preamble of ESTA, occupiers who do not have secure tenure are likely to be vulnerable to unfair evictions. ESTA acknowledges that unfair evictions can lead to great hardship, conflict and social instability in rural areas. As a result, tenure reform measures on farmland focus mainly on balancing the rights of landowners and farm dwellers and on how to strengthen the land rights of farm dwellers and prevent arbitrary evictions.

²⁷ ESTA and LTA are the principal legislative measures that have been established to secure the tenure rights of farm dwellers.

Regardless of the generally positive effect of ESTA and LTA, farm dwellers are still faced with various problems. Farm dwellers still do not have real tenure security and their access to land and housing remains limited. Notably, farm owners take advantage of the loopholes in the ESTA provisions to frustrate tenure rights of farm dwellers, showing farm owners' unwillingness to adhere to measures stipulated in ESTA.

One of the main aims of ESTA is to ensure secure tenure for farm dwellers, while they are in occupation on farmland. In this regard, tenure security legislation has been ineffective as a result of poor formulation of legislation, lack of adequate enforcement of tenure rights by the courts and poor implementation. To achieve secure tenure on farmland, rights of farm dwellers should be clearly formulated in a way that determines their right to live on the land and how they can exercise their rights.

The provision of secure tenure to farm dwellers after eviction from the farmland is also lacking. Tenure security legislation has been enacted but it is not implemented correctly. In some instances, the courts are reluctant to enforce as well as to follow the eviction procedure prescribed under ESTA.²⁸ In this context, evictions that occur on farmland can be distinguished in two ways, namely evictions that take place within the framework of ESTA but incorrectly applied and the numerous illegal evictions that occur on farmland that are not reflected in court judgments (these are cases reported in the media). This implies that evictions on farmland continue to occur outside the existing legislative framework.

In this regard, legislation should clearly state the procedure for eviction, namely that it should be granted by a court order; should be lawful; legal representation should be provided for farm dwellers in court proceedings; and suitable alternative accommodation should be available, such as settlement areas. Essentially, the role of the courts should be clearly stated, setting out how the courts can enforce tenure

²⁸ See chapter 4 at 4 4 2 2.

rights. In this light, legislation can only be effective if the legislation is clearly formulated and implemented accordingly.

The legislation and implementers of legislation focus mainly on ways to regulate and facilitate evictions and on post-eviction procedures, rather than focusing on providing measures that prevent evictions from occurring. Clearly, the government has failed to play its role in preventing evictions on farmland. The legislation needs to clearly provide for positive mechanisms that support long-term tenure rights, both on-farm and off-farm, to prevent evictions. Perhaps the government needs to subsidise farm owners in support of viable suitable solutions for settlement areas.

In response to the question whether government agencies and courts adequately provide mechanisms to enforce tenure security measures, it was established that the majority of problems with the policy and legislative measures include the failure of the policy-makers to formulate the appropriate policy; poor formulation of legislative measures; misinterpretation and misapplication of legislation by the courts; and poor implementation of legislation by government and other role players.²⁹ ESTA and LTA have failed in both their principal goals, namely in regulating evictions³⁰ and promoting long-term tenure security on farmland. Although the thesis has identified some problematic aspects of tenure security legislation, such as poor drafting and formulation, it is the implementation of the legislative measures that poses the biggest obstacle to tenure security. This is especially evident from the state's failure to implement section 4 of ESTA, which places responsibility on the Minister to grant subsidies to facilitate the acquisition of land on behalf of farm dwellers.³¹ Furthermore, the state on the one hand has failed to supply safeguards against evictions of farm dwellers to prevent or lessen evictions. The courts on the other hand have failed to effectively interpret legislation to protect farm dwellers against possible evictions. In practice, the implementation of LTA provisions to transform labour tenants' rights into formal ownership has been a slow process.

²⁹ See chapter 4 at 4 4 for a discussion on the problems associated with tenure security legislation.

³⁰ Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) highlights the scale of evictions and its impact on farm dwellers' lives, resulting from poor application and implementation of tenure security legislation.

³¹ See chapter 4 at 4 4 2 3.

It appears that the tenure reform aspect of ESTA and LTA has failed to materialise and to improve tenure on farmland. In addition, various attempts to develop policy to reform the incoherent tenure and land administration system have not yielded any significant results. The lack of adequate protection of tenure security rights undoubtedly represents policy and legislative failure. This failure can be attributed to many aspects, including the manner in which policy and legislative measures are formulated; the interpretation of legislation; the strategies developed to implement policy and legislative measures; and the state's failure to provide legal assistance to farm dwellers to protect their rights. In practice, very little has been done to assist farm dwellers to enjoy their constitutionally guaranteed rights, together with the protection offered to them in legislation. This simply highlights that apart from poor formulation and implementation, the existing tenure security legislation is inadequate to promote and protect tenure rights.

6 5 Reforming tenure security: new measures

Many challenges on farmland pertaining to tenure security still display the effects of the apartheid era. This has led the government to revisit its strategies on tenure reform to improve tenure security and address tenure disputes on farmland. In the past five years, recent interventions such as the *Strategic plan*,³² *Recapitalisation and development programme*,³³ *Comprehensive rural development programme*,³⁴ and the Land Rights Management Facility established in 2007 were developed to resuscitate the land reform programme and to introduce more effective ways to speed up the process of tenure reform on farmland. These interventions do not seem to have made much impact on improving tenure security on farmland, since there is still limited change in the extent to which farm dwellers can exercise their tenure rights on farmland. This is an indication that the policy and legislative measures, together with the recent interventions, have not been able to transform the power relations on farmland. It follows that eighteen years after the promulgation of policy

³² See Republic of South Africa, Department of Rural Development and Land Reform *Strategic plan 2010-2013* (2010).

³³ Republic of South Africa, Department of Rural Development and Land Reform *Recapitalisation policy* (2011).

³⁴ Republic of South Africa, Department of Rural Development and Land Reform *Comprehensive rural development programme* (2009).

and legislative measures in the landholding system, the same challenges still confront tenure reform on white-owned commercial farmland.

In recognition of the challenges associated with the existing tenure reform framework, the government presented a new *Draft tenure security policy*³⁵ and Draft Land Tenure Security Bill³⁶ to strengthen and improve tenure rights on farmland and to consolidate ESTA and LTA into a single piece of law. The new draft tenure security *Policy* and the Bill are intended to address the persistent failure by the government to achieve legally secure tenure on farmland.

It is argued in this thesis that there appears to be a mismatch between the *Strategic plan* of the Department of Rural Development and Land Reform (DRDLR); the *Recapitalisation and development programme*; the *Comprehensive rural development programme*; the *Draft tenure security policy*; the Draft Land Tenure Security Bill; and the 2011 *Green paper on land reform* and the general expectations surrounding tenure reform, as well as the constitutional transformative paradigm. Prior to the drafting of the new tenure security *Policy* and the Bill, plans and programmes were already underway. However, no progress was made in achieving long-term security of tenure for farm dwellers, prompting the government to draft a *Policy* and Bill instead of translating the existing plans and programmes into more viable measures to achieve tenure security. Such an initiative by the government creates a gap between the objectives of the existing plans and programmes and of the new *Policy* and Bill, but without indicating any clear way forward. A disjuncture is further created between these interventions and the 1997 *White paper*. Although the 1997 *White paper* placed a lot of emphasis on creating long-term security of tenure for farm dwellers, it seems as if all the recent interventions embarked on by government fall short of this objective. In this context Pienaar³⁷ argues that the new *Draft tenure security policy* seems to have moved away from the secure rights

³⁵ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010).

³⁶ Republic of South Africa, Department of Rural Development and Land Reform Draft Land Tenure Security Bill [B-2010] GN 1118 in GG 33894 of 24-12-2010.

³⁷ Pienaar JM & Kamkuemah A "Farm land and tenure security: New policy and legislative developments" (2011) 22 *Stellenbosch Law Review* 724-741 at 740.

paradigm towards a settlement paradigm, which is lacking in detail. Consequently, these interventions seem to have overshadowed the primary objectives of the 1997 *White paper* and the constitutional provision regarding tenure reform and its drive to ensure legally secure tenure on farmland. On this basis, it is unclear what changes the new *Draft tenure security policy* and Draft Land Tenure Security Bill will bring to farm dwellers if and when they become operative.

Furthermore, the *Strategic plan* of the DRDLR and the *Comprehensive rural development programme* both introduce an all-encompassing strategy that is premised on creating social cohesion and development in rural areas. The *Strategic plan* envisages drastic options calling for the nationalisation of all land and the retention of the freehold tenure reforms.³⁸ Apart from the *Strategic plan* and the *Comprehensive rural development programme*, nationalisation of all land is not mentioned in the draft tenure security *Policy* or the Bill. Surely, if the new developments are intended to improve and strengthen tenure security on farmland, their envisaged visions and objectives should at least complement each other. Unfortunately, this is not the case as the new developments do not fit into an acceptable pattern that drives tenure security reforms.

The draft tenure security *Policy* and Bill act as an overarching framework intended to improve tenure security, but various gaps exist in relation to these new interventions. The focus of the *Draft tenure security policy* is on farmland, while the Bill only makes reference to “agricultural land”. It is not clear from the Bill what “agricultural land” entails. The Bill merely states that the Act applies to all agricultural land; land used for agricultural purposes; or farms other than land occupied by traditional communities.³⁹ As a result, the scope of the Bill is unclear from its inception.⁴⁰

³⁸ See chapter 5 at 5 3 3. See also Pienaar JM “Tenure reform in South Africa: Overview and challenges” (2011) 25 *Speculum Juris* 108-133 at 130-131.

³⁹ See clause 3 of the Draft Land Tenure Security Bill.

⁴⁰ Pienaar JM & Kamkuemah A “Farm land and tenure security: New policy and legislative developments” (2011) 22 *Stellenbosch Law Review* 724-741 at 738.

To promote efficiency in farm relations, the new *Policy* provides for an accessible and effective system to record and register rights.⁴¹ There is no mention of this measure in the Bill, which is silent on the manner in which rights are acquired, recorded and registered. In addition to the system of recording and registering rights, the new *Policy* also proposes a register of interests on farms to deal with the issues relating to compliance and enforcement and to improve relations on farms.⁴² The Bill does not make reference to the proposed register of interests, though such a register would be likely to improve tenure security on farmland.⁴³

Although the challenges experienced on farmland in relation to policy and legislative measures paved the way to the drafting of new policy and legislation, the *Policy* and Bill are far from providing appropriate measures or approaches that will address tenure security challenges on farmland. The effect is that land tenure on farmland will remain insecure. It will be problematic to improve tenure security on farmland if the scope of the Bill and the kind of rights to be exercised by farm dwellers remain undefined. The result is that the *Policy* and Bill will fail to address the key challenges facing tenure reform on farmland. In this view, there are no clear guidelines or directions on the way forward. To ensure a suitable way forward, the government needs to fill in the gaps that exist between its new interventions and work out a coherent and properly formulated framework, setting out the kind of rights that should be available to farm dwellers and how they can be acquired and recorded.

The recommendations discussed below give an indication of what tenure security on farmland might look like and how the reform measures can be further improved to meet the requirements of section 25(6), read with section 25(9) of the Constitution.

⁴¹ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010) 5.

⁴² Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010) 10.

⁴³ Pienaar JM & Kamkuemah A "Farm land and tenure security: New policy and legislative developments" (2011) 22 *Stellenbosch Law Review* 724-741 at 738-739.

6 6 Recommendations

Eighteen years after an all-encompassing land reform programme was embarked on, there is hardly any change in the tenure reform sector.⁴⁴ The most effective element of tenure security, namely how victims of the past racial injustices can gain access to and hold land, is still largely unresolved. Tenure remains largely undefined and potentially insecure. Additionally, tenure arrangements on farmland are still in limbo. There is clearly a need to revisit the policy and statutory framework for tenure reform, with particular attention on how farm dwellers can access and hold land with legally secure tenure.

Tenure security should be seen as an instrument of progress and agrarian development as well as instrumental in socio-economic development in rural areas, particularly on white-owned commercial farmland. To assist in furthering progress and in addressing the challenges associated with tenure security on farmland, tenure security legislation should be tightened by creating substantive rights in land for occupiers and balancing the rights of farm owners with those of farm dwellers.⁴⁵

Moreover, the specific tenure reform challenges on farmland should be seen within the wider context of how such reforms are formulated, interpreted and implemented. Since the principal problem with the current policy and legislative measures appears to lie in its implementation, all role players responsible for the enforcement of tenure rights on farmland, including the DRDLR, courts and police, should play a more positive role in delivering on the constitutional mandate with regard to the protection of farm dwellers' rights.⁴⁶ In this sense, all role players should act proactively rather than using regressive mechanisms that hamper the improvement of tenure security on farmland.

⁴⁴ Pienaar JM & Kamkuemah A "Farm land and tenure security: New policy and legislative developments" (2011) 22 *Stellenbosch Law Review* 724-741 at 724-728; Pienaar JM "Tenure reform in South Africa: Overview and challenges" (2011) 25 *Speculum Juris* 108-133.

⁴⁵ Lahiff E "With what land rights? Tenure arrangements and support" in Hall R (ed) *Another countryside? Policy options for land and agrarian reform in South Africa* (2009) 93-117 at 111. See also Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 191.

⁴⁶ Lahiff E "With what land rights? Tenure arrangements and support" in Hall R (ed) *Another countryside? Policy options for land and agrarian reform in South Africa* (2009) 93-117 at 110.

Although ESTA and LTA provide for measures by which farm dwellers can acquire long-term secure tenure rights, either on the farm or elsewhere, the Land Redistribution and Agricultural Development (LRAD) grant is being used by farm dwellers to acquire long-term tenure rights.⁴⁷ This clearly shows the government's reluctance to make use of section 4 of ESTA to improve tenure security rights of farm dwellers. Instead, there should be a specific mechanism, perhaps in the form of tenure reform grants, specifically developed to assist the needs of farm dwellers. Another option is for the government to put mechanisms in place that will ensure effective development of settlement areas to achieve long-term security. Section 4 of ESTA and the *Draft tenure security policy* and Draft Land Tenure Security Bill already make provision for the establishment of agri-villages. The idea that the government should use its expropriation powers to acquire land for resettlement areas is not new, however there is no clear evidence to show that the government has applied the expropriation measure in terms of ESTA to advance tenure reform.⁴⁸ As such, instead of providing subsidies in terms of section 4 of ESTA, the government might proactively acquire land, using its expropriation powers where necessary, to build suitable off-farm houses specifically for farm dwellers.⁴⁹ The effect would be that the housing of farm dwellers will no longer be tied to their employment and this will also reduce the burden on the government to release settlement grants to farm dwellers.⁵⁰ In this context, tenure reform on farmland does not need to be seen as part of a redistributive reform but should rather have its own reform measures to protect and improve farm dwellers' tenure security. This might have the effect of speeding up the tenure reform process on farmland.

The main focus of policy-makers should be on finding ways to achieve long-term and secure rights on farmland rather than concentrating on addressing the impact of

⁴⁷ Republic of South Africa, Department of Land Affairs *Annual report 1 April 2006-31 March 2007* (2007) 19. See also Lahiff E "Land reform in South Africa: A status report 2008" (2008) *PLAAS Research Report No 38* 1-42 at 3-4 <http://www.plaas.org.za/pubs/rr/PLAAS_RR38_Lahiff.pdf> (accessed 05-04-2012).

⁴⁸ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010) 9.

⁴⁹ Lahiff E "With what land rights? Tenure arrangements and support" in Hall R (ed) *Another countryside? Policy options for land and agrarian reform in South Africa* (2009) 93-117 at 109.

⁵⁰ Republic of South Africa, Department of Land Affairs *White paper on South African land policy* (1997) 47 states that the channelling of settlements grants to farm workers is problematic because their housing is often linked to the employment agreement with the farm owner.

evictions. Instead, tenure reform measures should be formulated in such a way that they prevent evictions from occurring on farmland rather than regulating and facilitating evictions.⁵¹ In this context, tenure reform measures, for example ESTA, can be amended to make provision for measures that reduce the occurrence of evictions on farmland.

Policy and legislative measures should specifically recognise the rights and interests of women and children working and residing on farmland. Since the occupational rights of women on farmland are often tied to their husbands' or partners' employment contracts, it is recommended that tenure security reforms on farmland should recognise and protect independent tenure rights of women. In most cases the termination of farm workers' employment results in the termination of their rights to reside on farmland.⁵² The effect is that upon such termination, farm dwellers are deprived of protection granted by the Constitution and ESTA since they are left homeless. In light of this, tenure rights of farm dwellers (both males and females) should be separated from their employment status so that job losses do not automatically lead to their eviction. Accordingly, tenure security on farmland can be effectively strengthened if the link between employment and the right to reside on farmland is removed.⁵³ However, delinking employment and the right to reside on farmland has possible implications for farm owners. For example, farm owners would be compelled to allow workers whose employment had been terminated to remain on farmland, possibly depriving new employees of housing. This problem can probably be solved by establishing and developing agri-villages to cater for those whose employment had been terminated and also for those who are no longer able to work on the farm due to old age or any form of physical disability.

Importantly, an option for registering rights of farm dwellers should be established.⁵⁴ It has been identified in this thesis that to date, tenure rights are not acquired by

⁵¹ Maass S "Rental housing as adequate housing" (2011) 22 Stellenbosch Law Review 759-774 at 772-774.

⁵² See chapter 4 at 4 4 1 1.

⁵³ Hall R "The shifting terrain of land reform in South Africa: The national land summit" (2005) 32 *Review of African Political Economy* 621-627 at 625.

⁵⁴ Lahiff E "With what land rights? Tenure arrangements and support" in Hall R (ed) *Another countryside? Policy options for land and agrarian reform in South Africa* (2009) 93-117 at 114. See

registration but through legislation only. The deeds registration system in South Africa does not provide for the registration of all the different land tenure rights that are statutorily recognised.⁵⁵ As such, land tenure rights can generally be acknowledged and safeguarded by legislation, even in the absence of registration. On this basis, if legislation can provide more secure rights in the absence of registration, then registration of tenure rights might not be necessary. However, the existence of legislation does not automatically ensure more secure tenure rights, given the challenges faced by farm dwellers because of insecure tenure. The main problem is that the existing policy and legislative measures as well as the *Draft tenure security policy* and Draft Land Tenure Security Bill do not state the exact nature of tenure rights and the enforcement of rights is still lacking. Accordingly, tenure security legislation should be formulated accurately so that the nature of rights can easily be ascertained. In this regard, the kind of rights that have to be recognised for farm dwellers might either be ownership or limited real rights.

Pienaar⁵⁶ argues that although rights of occupiers are acknowledged by legislation, security of tenure would hardly be achieved where there is a dispute over the legitimacy of a claim or right in terms of the LTA or ESTA. The main reason is that rights conferred by legislation generally do not comply with the requirements of the publicity principle⁵⁷ and therefore the rights are uncertain until confirmed by a court order.⁵⁸ As a result, legislation alone is not sufficient to obtain security of tenure, but an additional registration of title is required to confirm the tenure right or claim, especially in labour tenant cases. In this regard, it can be argued that not all tenure

also Pienaar G “The registration of fragmented use-rights as a development tool in rural areas” in *Constitution and law IV: Developments in the contemporary constitutional state* (2001) 107-125.

⁵⁵ Section 63(1) of the Deeds Registries Act 47 of 1937 recognises the registration of rights in immovable property that is ownership or limited real rights. See Pienaar G “The registration of fragmented use-rights as a development tool in rural areas” in *Constitution and law IV: Developments in the contemporary constitutional state* (2001) 107-125 at 107.

⁵⁶ Pienaar G “The registration of fragmented use-rights as a development tool in rural areas” in *Constitution and law IV: Developments in the contemporary constitutional state* (2001) 107-125 at 110.

⁵⁷ Mostert H & Pope A (eds) *The principles of the law of property in South Africa* (2010) 56-57 state that the publicity principle entails that outsiders should be able to deduce from externally perceivable indications whether real rights in property exist and when transfer of a real right from one person to another occurs.

⁵⁸ Pienaar G “The registration of fragmented use-rights as a development tool in rural areas” in *Constitution and law IV: Developments in the contemporary constitutional state* (2001) 107-125 at 110.

rights should be registered. Instead the central right, that is, the occupational right should be registered. The occupational right encompasses all the other statutory rights included under tenure security legislation and those rights agreed to by the farm owner, such as burial rights and other basic human rights.⁵⁹ Registration of the right to reside on farmland might ensure certainty and protection against unexpected evictions, and might also guarantee the protection of other related tenure rights. The process of registration is however expensive and time consuming, which might delay the process of acquiring stronger tenure rights. Perhaps, existing tenure security legislation should be amended to insert a provision setting out an easy and inexpensive registration procedure of farm dwellers' tenure rights. This implies that security should be offered by legislation and registration to ensure stronger tenure rights for farm dwellers.

The effect is that registration can further strengthen the rights of farm dwellers and this will assist them to defend their rights against interferences by the farm owner, if the rights relates to on-farm development. In this light, the recording system and registration of farm dwellers' tenure rights proposed by the *Draft tenure security policy* will likely add more value to the right to have legally secure tenure. However, the *Policy* should be amended to provide for the manner in which the registration system will work in practice. Furthermore, since the Bill is silent on the registration provision, the Bill should also be amended to make provision for registration.

ESTA and LTA have undergone several reviews resulting in the proposed consolidation of the two acts to improve tenure security for farm dwellers.⁶⁰ However, it is difficult to see whether the consolidation will make a difference to the current situation on farmland. Instead of consolidating tenure legislation or drafting new legislation, the existing legislation should be amended, setting out clearly the objectives of tenure security; the people it intends to protect and benefit; the rights that they are entitled to hold under the legislation and how these rights can be

⁵⁹ See chapter 4 at 4 5 2.

⁶⁰ Republic of South Africa, Department of Rural Development and Land Reform *Draft tenure security policy* (2010); Republic of South Africa, Department of Rural Development and Land Reform *Draft Land Tenure Security Bill* [B-2010] GN 1118 in GG 33894 of 24-12-2010.

enforced. Accordingly, the amendment of the provisions in ESTA and LTA should be intended to better suit the social, cultural and economic needs of farm dwellers and to fulfil the constitutional imperatives.

As a result of the constant failure by the state and other role players to implement the current tenure security legislative measures, it is highly uncertain whether drafting new legislation or the consolidation of ESTA and LTA can yield any satisfactory results in improving farm dwellers' tenure rights and tenure conditions or arrangements on farmland. On this basis, it appears that the way forward is for the government to improve on its formulation and implementation strategies with regard to legislation. Furthermore, officials or institutions responsible for implementation should be retrained to ensure competent and dedicated officials who will effectively enforce existing legislation.

Legislative reform will likely ensure that the rights of farm dwellers are effectively protected and at the same time the rights of farm owners are protected. Such reform will remove the reluctance of the state to impinge on farm owners' property rights while necessitating the land tenure reform programme.⁶¹ As such, the amendment of legislation should provide more vigorous legislative provisions to effectively secure rights of both farm owners and farm dwellers and prevent arbitrary evictions.

Accordingly, to ensure a comprehensive and sustainable tenure reform process on farmland, coherent and well formulated policy and legislative measures are required. There should be a holistic policy that must provide for both long-term and short-term solutions to tenure security challenges on farmland. The policy reform must include a new strategy for implementation; information dissemination; monitoring; and an evaluation system to provide a way forward in addressing tenure security issues.⁶² Tenure reform policy and legislative measures must be implemented in a strategic manner that keeps its primary objectives prioritised, namely improving tenure

⁶¹ Lahiff E "With what land rights? Tenure arrangements and support" in Hall R (ed) *Another countryside? Policy options for land and agrarian reform in South Africa* (2009) 93-117 at 111.

⁶² Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 187.

security, particularly on farmland. Effective implementation of tenure reform policy and legislative measures will enhance tenure security rights of farm dwellers and this will promote social cohesion and development in rural areas, in line with the DRDLR's *Strategic plan* on rural development.

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