

Evaluating land and agrarian reform
in
South Africa
An occasional paper series



3

Farm tenure

Ruth Hall



SCHOOL OF GOVERNMENT
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Evaluating land and agrarian reform in South Africa is a project undertaken by the Programme for Land and Agrarian Studies (PLAAS) to respond to the need expressed by civil society organisations for independent research to evaluate progress in, and inform debates on the future of, land and agrarian reform. The reports in this series are:

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List of acronyms and abbreviations

Act 126	Provision of Land and Assistance Act 126 of 1993
ADR	alternative dispute resolution
AFRA	Association for Rural Advancement
AgriSA	Agri South Africa
CALS	Centre for Applied Legal Studies
CBO	community-based organisation
CCMA	Commission for Conciliation, Mediation and Arbitration
CPA	communal property association
DCC	district coordinating committee
DG	director-general
DLA	Department of Land Affairs
EMP	Evictions Monitoring Programme
ESTA	Extension of Security of Tenure Act 62 of 1997
GDP	gross domestic product
IDC	Industrial Development Corporation
IMSSA	Independent Mediation Services of South Africa
Kwanalu	KwaZulu-Natal Agricultural Union
LCC	Land Claims Court
LRAD	Land Redistribution for Agricultural Development
LTA	Land Reform (Labour Tenants) Act 3 of 1996
MTEF	Medium Term Expenditure Framework
NGO	non-governmental organisation
NLC	National Land Committee
NLTC	National Land Tenure Conference
PLRO	provincial land reform office (of DLA)
RDP	Reconstruction and Development Programme
RLT	Rural Legal Trust
SADT	South African Development Trust
SAPS	South African Police Service
SLAG	Settlement/Land Acquisition Grant



A major cause of instability in rural areas are the millions of people who live in insecure arrangements on land belonging to other people. They had and have simply no alternative place to live and no alternative means of survival. The evicted have nowhere else to go and suffer terrible hardships. The victims swell the ranks of the absolute landless and the destitute. They find themselves at the mercy of other landowners for refuge. If no mercy is shown, land invasion is an unavoidable outcome. Because the root cause of the problem of insecurity of tenure under these circumstances is a structural one it requires a structural solution (DLA 1997:33).

1. Introduction

Farm dwellers are among the poorest South Africans. Most have access to residential land only. A minority has access to grazing land for their livestock or to arable land for cultivation, in return for which they may be required to provide their labour. Farm dwellers' access to land is precarious – until recently farm owners had unrestricted rights to evict farm dwellers – and is often very limited in its extent. It was in response to these conditions that the Department of Land Affairs (DLA) developed, as part of the national land reform programme, policies to secure the tenure rights of farm dwellers.

This report investigates to what extent these policies have succeeded in securing the existing tenure of farm dwellers or providing them with long-term secure rights to alternative land. The report describes the intentions of these policies, the mechanisms created to give effect to them, and the experience in enforcing these new rights. Also discussed are the special rights accorded to labour tenants and the application processes available to labour tenants who want to become owners of the land they use. The report assesses the extent to which the outcomes and impacts of these policies have met their objectives and have realised the rights enshrined in the Constitution. Finally, the report reflects on future challenges and extracts lessons from experience that need to inform future approaches to securing farm dwellers' rights.

The research on which this report is based combined primary and secondary research methods. These included desktop research to review legislation, policy and existing literature; interviews with key informants; and the collection and analysis of programme and project level documents including policies, plans, reports, judgments and agreements. Officials in the DLA at national, provincial and district level, as well as implementing partners, including consultants, service providers, legal practitioners and representatives of non-governmental organisations (NGOs) and farmers' associations, were interviewed.

A limitation of the research methods employed in the preparation of this report is that extensive primary fieldwork was not possible. The perspective on policy and institutions is nationally applicable, and various officials and NGO staff from across all provinces were interviewed. A geographical focus on certain provinces was intended to elicit a broad range of experiences, with the Western Cape and Limpopo representing contrasting experiences. KwaZulu-Natal is the province with the largest number of labour tenants, presenting a useful focus for that discussion.

Gathering and analysing data on farm tenure presented a major obstacle, as the DLA was not able to provide national eviction statistics or project information. The latter was available only from some provinces. Neither was any information on the intervention of DLA in threatened

or actual illegal evictions available. The absence of such information from debates on the future of farm tenure is a major finding of the study.

2. Historical background of land tenure in South Africa

The South African government's land reform programme seeks to transform the historically shaped and deeply entrenched relations of power on farms. Attempts to secure farm dwellers' rights to land through this programme have, of necessity, led to interventions in the 'private' realm.

Historical background

Farms have long been the locus of economic conflict in South Africa. Displacing black farmers was an important part of the colonial project, since their success stood in the way of white settlers' aspirations. Many people living on farms became farm workers as their independent access to land was eroded through successive laws and economic pressure. The independent black farmers of the late 19th century, undermined by hut taxes, loss of land and other legal restrictions, were pushed into seeking wage employment in the growing urban centres or entering into a variety of contractual arrangements with white landowners in an attempt to retain access to land. Yet forms of tenancy in the commercial farmlands have persisted in the face of more than a century of laws and taxes designed to stamp them out. Tenancy was often the only way in which black producers could retain access to land outside of the overcrowded homelands.

The white farming sector is built not only on this array of tenancy relations but also, in parts of the former Cape colony and the old Boer republics, on slave labour. The 'paternalist' relations between white farmers and black workers have evolved from this history. Up until the transition to democracy in the 1990s, white farms in South Africa were to a large extent fiefdoms, substantially autonomous from the larger polity, in which white masters controlled most aspects of the lives of black workers.

Traditionally, most farm workers live on the farms where they are employed. In addition, some poor people living on commercial farms are not employed but are involved in independent cultivation and grazing through a range of tenure arrangements. The category of 'farm dwellers' therefore refers to farm workers as well as a class of people who are not farm workers but may be unemployed former employees or other tenants whose continued residence is either tolerated by an owner or is explicitly the subject of a tenancy agreement between the two parties.

The commercial agricultural sector – often referred to as 'white' agriculture – is a crucial source of livelihood for many poor rural people. Farm workers' wages constitute 39% of rural incomes (RSA 2000:19). While it contributes only 4% of South Africa's gross domestic product (GDP) and 14% of the country's foreign exchange earnings, commercial agriculture is one of the largest employers in the country, providing about 625 000 permanent jobs and 305 000 temporary or part-time jobs (RSA 2000:50). Based on 1996 figures, commercial agriculture accounts for 11.5% of formal employment. However, since these figures predate the job-shedding trend of the late 1990s, the size of the sector may be over-represented.

The housing conditions of farm dwellers are generally very poor with few farm dwellers having access to electricity, running water and flush sanitation. Socio-economic indicators also paint a profile of extreme poverty and deprivation: most farm dwellers have little access to social infrastructure and have little education, and a third of children growing up on farms



suffer from malnutrition. Farm workers are the worst paid category of worker in South Africa, earning an average of R544 per month in 2000, with much lower wages in some parts of the country (RSA 2000:13). Low levels of unionisation, together with socio-economic marginality and geographic isolation, have contributed towards farm workers being invisible as a political constituency.

After 1994, labour legislation was extended to protect workers in the agricultural sector and a minimum wage for farm workers came into force in March 2003. Commentators have attributed the massive loss of farm jobs over the past decade and the rise in the rate of farm evictions to a combination of economic pressures on farmers and farmers' hostility towards labour and tenure laws. Job losses are, however, part of a larger process of restructuring in agriculture, in which changes in global commodity markets have combined with domestic deregulation and trade liberalisation to severely undermine the market for agricultural labour.

Reforming land tenure in South Africa

The land tenure reform programme has frequently been referred to as potentially the most significant of the three 'legs' of land reform, the other two being redistribution and restitution. Land tenure has been defined as 'the terms and conditions on which land is held, used and transacted' (Adams et al. 1999:1). Reforming land tenure involves recognising or upgrading the informal rights of those occupying but not owning land and is required by Section 25(6) of the Constitution, which states that:

A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress (RSA 1996a).

Tenure reform aims to address the inequalities between owners and occupiers by formalising informal rights, upgrading weak rights and setting in place restrictions on the removal of rights to land (DLA 1997:57). Whereas land redistribution and restitution involve the transfer of land ownership from one owner to another, tenure reform affects the ways in which people hold land.

The DLA's *White Paper on South African Land Policy* outlines the tenure policy towards farm dwellers (DLA 1997). As well as setting in place mechanisms to regulate when and how people may be evicted from farms, DLA policy allows farm dwellers to apply for grants with which they can buy land. Two laws have been enacted to give effect to this policy: the Extension of Security of Tenure Act 62 of 1997 (ESTA) and the Land Reform (Labour Tenants) Act 3 of 1996 (LTA).

3. The Extension of Security of Tenure Act

The Extension of Security of Tenure Act 62 of 1997 (ESTA) was enacted to secure the tenure rights of farm dwellers and to prevent arbitrary evictions. ESTA aims to regulate relations between farm owners and occupiers by placing rights and responsibilities on both parties and prescribing procedures through which an occupier may be evicted. It also provides for occupiers to acquire long-term security of tenure by purchasing land with state support. ESTA is applicable to all people living on farms – on property zoned for agriculture – with the consent of the landowner. This includes farm workers and their dependants as well as those farm dwellers who are not employed on the farms or who are not dependants of farm workers.

Provisions of ESTA

ESTA creates a category of 'occupier', namely a person who resides on a farm with the consent of the owner. Should this consent be revoked, this terminates the right of residence of the occupier, but does not entitle the owner to evict the occupier. Instead, the owner must apply for a court order to effect an eviction. ESTA prohibits the eviction of any occupier unless this is in terms of a court order. In essence, ESTA does four things:

- *Firstly, ESTA defines the tenure rights of occupiers.* Provided that they occupy land with the consent of the owner, farm dwellers are 'ESTA occupiers' and have the legal right to continue to live on and use the land. This right extends to services such as electricity, water and sanitation. Occupiers are entitled to live with their families and enjoy a family life that is in keeping with their culture. Occupiers over the age of 60 years who have resided on the farm for at least ten years or who are disabled or unable to work as a result of sickness are termed 'long-term occupiers' and may only be evicted if alternative accommodation is provided or if they have violated the terms of their occupation. A 2001 amendment to ESTA created an explicit right of occupiers, in accordance with their religion or cultural beliefs, to be buried on the farms where they lived and to bury their relatives there, if this was established practice on the farm (RSA 2001:Sections 6 and 7).¹ Relatives may also visit and maintain family graves on a farm even if they no longer live there.
- *Secondly, ESTA places duties on occupiers.* Occupiers must abide by the terms of their tenancy. This means that, should an occupier violate a condition of tenure, his/her tenure may be ended through eviction. Such violations include damage to property or causing harm to other occupiers or assisting people to build dwellings on the farm without the owner's consent.
- *Thirdly, ESTA stipulates when and how an occupier may be evicted.* Eviction may only happen in terms of an eviction order issued by a court. Any other eviction is illegal. An owner seeking an eviction order must demonstrate that consent for occupation has been withdrawn. Consent may be revoked if an occupier has violated a condition of tenure or if the owner can demonstrate that the eviction is necessary for the operational requirements of the farm. If the occupier's rights of residence arose solely as the result of an employment relationship, these rights may be terminated on resignation or dismissal. In addition, right of residence may be terminated for any other reason provided that the termination is 'just and equitable'. In considering an eviction matter, the court must take into account all relevant factors including the potential hardship to be caused to the occupiers, if evicted, or to the owner, if the occupier remains.
- *Fourthly, ESTA creates opportunities for occupiers to acquire long-term rights to land.* Occupiers are entitled to apply for, but are not guaranteed, grants with which to purchase land. Farm dwellers may use the grants to upgrade their rights on the land they occupy through subdivision and purchase of a portion of a farm, as long as the owner agrees to sell, or to seek long-term tenure security through the purchase of alternative land off the farm. In practice, the grant provided by DLA for this purpose is the Settlement/Land Acquisition Grant (SLAG), originally set at R15 000 and later increased to R16 000 per household. Courts may also order alternative accommodation to be made available for evicted occupiers, which requires the agreement of local councils.



Achievements and impact

The following assessment of the achievements and impact of ESTA examines its successes and failures in terms of its own objectives, namely to regulate relations between owners and occupiers, to regulate evictions and to provide options for long-term tenure security. The most significant contribution to land reform is ESTA's potential to regulate evictions, thus preventing arbitrary evictions that leave people destitute and without basic shelter. For this reason, the focus here falls on the evictions aspect of ESTA. Its achievements are also assessed in relation to the broader goals of the land reform programme and tenure reform, namely to address the injustices of the past, the need for more equitable distribution of land, the reduction of poverty and the promotion of economic growth (DLA 1997:7).

Monitoring evictions

DLA monitors evictions that take place in accordance with the legal procedures prescribed in ESTA. It also records incidents of threatened and actual illegal evictions that are brought to the attention of its district and provincial offices. In this way, and through collaborative attempts to pool information on evictions with NGOs, the South African Police Service (SAPS) and other institutions, DLA monitors compliance with ESTA.

The DLA director of monitoring and evaluation acknowledges that the Monitoring and Evaluation Directorate has data on legal evictions but says that this information is incomplete and potentially misleading, as it under-represents the scale of farm evictions. In particular, it does not reflect the number of illegal evictions that have taken place outside of ESTA. DLA is not willing to publish its statistics, arguing that these do not capture the volume of legal farm evictions, let alone illegal evictions (Ramakgopa, pers. comm.).

Within DLA, disputes have arisen as to which directorate is responsible for monitoring evictions: the Tenure Directorate (previously known as the Land Rights Directorate), which is in charge of tenure policy, or the Monitoring and Evaluation Directorate. In the past, the Implementation Branch of DLA kept information on the provision of alternative accommodation to evicted ESTA occupiers, but this unit was disestablished in a process of departmental restructuring between 1999 and 2001. This is now the responsibility of the Monitoring and Evaluation Directorate, though problems of limited staff and the dysfunctional nature of its database management have meant that this directorate is unable to report on it. The Tenure Directorate collects information from DLA district offices, but this, too, is acknowledged to be very incomplete. As a result, there is no set of adequate information on the extent of legal and illegal evictions from farms which could serve as a basis to assess the impact of ESTA.

The monitoring of evictions has received neither strong support nor adequate resourcing from within DLA. Initially, one ESTA coordinator was placed within each provincial office of DLA and tasked with overseeing implementation, including evictions monitoring. With the decentralisation thrust of the department's Project Mutingati, this function ceased. ESTA officers have been placed in some – but not all – of the district offices, and there is no dedicated coordinating or monitoring function at a provincial level. Indicative statistics are available only at a local level.

Box 1: Monitoring evictions

The Evictions Monitoring Programme (EMP) in KwaZulu-Natal is an example of a cooperative attempt to monitor farm evictions and is the joint creation of the DLA, the commercial farmers' union, Kwanalu, and a land rights NGO, the Association for Rural Advancement (AFRA). Details of cases reported to any of these institutions are recorded on forms that serve as a basis for intervention and follow-up. An analysis of the EMP data showed that a small minority of evictions were legal and involved a court order – 29 out of 669 cases recorded. A total of 9 813 people were affected by evictions in less than two years. The study also indicated that evictions peaked during 1999 and gradually started to decline during 2000. In one magisterial district alone, 102 cases were reported between June 1998 and May 2000. Few of the cases involved labour disputes. At the ESTA Review Workshop in 1999, DLA staff identified the KwaZulu-Natal programme as a model approach that other provinces should consider emulating. An internal assessment of the EMP conducted in 2000, though, identified a range of limitations that call into question the validity of the data.

Alongside the DLA, civil society structures have also established evictions monitoring systems. Nationally, the National Land Committee (NLC) and its affiliates in the various provinces have worked with the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand to maintain a database on farm evictions. This system became defunct towards the end of the 1990s but work has begun to revive it and to establish a national database to record cases dealt with by fieldworkers and paralegals or by attorneys working through the Rural Legal Trust (RLT) in private law firms and in NGOs.

Despite the resuscitation of evictions monitoring through the NLC, and planned improvements in DLA's system of evictions monitoring, there has been no agreement on whether or how the two systems will be integrated to provide a fuller national picture of farm evictions.

Sources: DLA 1999:3, 24; Maseko Hlongwa and Associates 2000:5, 13, 15–6; Mabokela, pers. comm.

Legal evictions under ESTA

The main source of information on legal evictions is the Land Claims Court (LCC). In terms of Section 19(3), all ESTA eviction orders must be referred to the LCC for review. By the end of 2002, 436 eviction cases had been reviewed by the LCC. An additional 283 ESTA cases, which did not necessarily involve eviction matters but dealt with litigation, applications for interdicts and declaratory orders, were heard directly by the LCC. This amounts to a total of 719 ESTA cases since the inception of the Act in 1997.

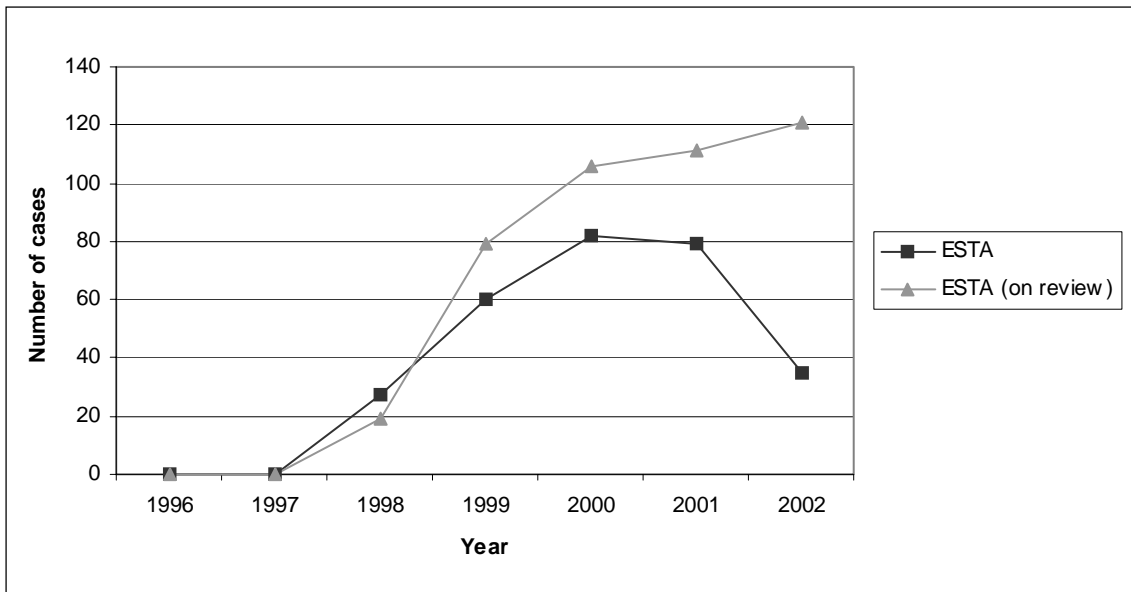
Table 1: ESTA cases at the Land Claims Court

Year	ESTA cases heard at LCC	ESTA eviction orders automatically reviewed under Section 19(3)	Total
1998	27	19	46
1999	60	79	139
2000	82	106	188
2001	79	111	190
2002	35	121	156
Total	283	436	719

Source: LCC 2003

Year on year there has been an increase in the number of eviction cases. While the number of cases being heard directly by the LCC is declining, the number of eviction orders granted by magistrates and reviewed by the LCC is continuing to rise, as is shown in Figure 1.



Figure 1: ESTA cases and automatic reviews at the Land Claims Court

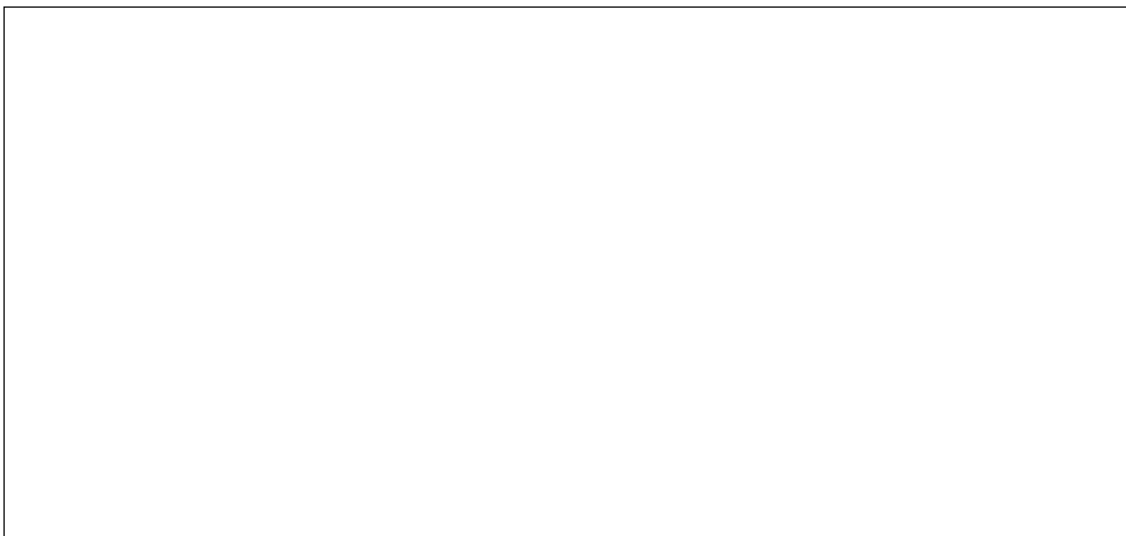
Source: LCC 2003

The shortcomings of the information available from the LCC records are that:

- The figures pertain to legal eviction cases, considered by both DLA and NGO staff to constitute a small minority of actual evictions. Illegal evictions are widely thought to be 'the real story'.
- Not all eviction orders from farms are reviewed by the LCC because magistrates are still using common law eviction. In other words, magistrates are not applying ESTA in situations where it should be applied (Robb-Cohen, pers. comm.).²
- Where ESTA is applied, not all eviction orders are reviewed by the LCC because some magistrates do not forward them for review but instruct sheriffs to enforce these orders (Khoza, pers. comm.).
- The LCC does not record the number of people evicted. Some cases may involve only one occupier, while others may involve many families.
- The LCC records do not always indicate in which magisterial district the occupier resided. For this reason, it is not possible to report accurately on how trends in eviction are spatially distributed, though anecdotal evidence from DLA staff and NGO workers indicates that there are enormous differences in the rates and trends in legal evictions across the country and even within provinces.

On review, the LCC may confirm ESTA eviction orders or refer them back to a magistrate for further investigation. It may also set them aside. The records kept by the LCC indicate that while the number of eviction orders granted by magistrates and referred to the LCC for review has risen over the years, the proportion of these set aside by the LCC has dropped.

According to attorneys appearing in eviction proceedings, this trend is almost certainly as a result of both the courts and farmers' legal counsel becoming more accustomed to the requirements of the Act and learning how to follow correct procedure to secure an eviction (Samaai, pers. comm.).

Figure 2: ESTA eviction orders set aside on review at the Land Claims Court

Illegal evictions

Illegal evictions include all situations in which ESTA occupiers have moved off farms against their will and in the absence of a court order for their eviction. The most obvious form of illegal eviction is where occupiers are removed by force, for example when the landowner changes the locks, erects a high fence around the home, or bulldozes or sets fire to the dwelling to prevent the occupiers from continuing to stay on the farm. 'Constructive evictions' are instances where ESTA occupiers leave the farm because conditions have been made intolerable, often through intimidation. Constructive evictions are also illegal. Examples include cases where occupiers have had their electricity or water supplies cut off, have had their privacy repeatedly invaded or have been threatened with violence.³

Though anecdotal evidence from DLA, NGOs and farm worker organisations indicates that illegal evictions are very widespread indeed, thus far only one landowner has been convicted for an illegal eviction and was given a suspended sentence – a fine, not a prison term (Wyngaard, pers. comm.). The general failure to prosecute and convict transgressors of ESTA has been a major shortcoming. There appears to have been no attempt to estimate the national extent of illegal evictions from farms since ESTA was promulgated. Though studies have mentioned the importance of farm evictions in changing patterns of migration within rural areas and between urban and rural areas, these have not pursued the issue of quantifying evictions (Bekker 2002:v). In the future it should be possible to draw inferences about farm evictions from census data.

The number of threatened evictions that come to the attention of the DLA far exceeds the number of actual legal evictions in terms of ESTA. In some provinces, DLA offices deal with ten times more threatened evictions than actual evictions. The extent of this 'fall-off' – between cases where there is notice of an intention to legally evict and an actual legal eviction order – could support the view that illegal evictions constitute the majority of evictions, though existing monitoring information makes it impossible to estimate its extent.



The absence of research or monitoring data undermines the capacity of government to estimate the impact of illegal evictions on the people concerned and on the demands placed on the state and its infrastructure, as former farm dwellers settle in existing formal or informal urban settlements, migrate to communal areas or, as is evident in parts of the country, establish new informal settlements on the periphery of rural towns or in the midst of commercial farming areas. As well as being a human rights issue and a development issue, farm dwellers' tenure rights are starting to become recognised as an economic and governance challenge, specifically for local government.

Implementation of ESTA

Evaluating the implementation of ESTA is particularly difficult since much of the process of implementation is not documented or recorded, and what documentation exists is of an uneven quality. This section therefore draws on interviews with government officials, NGO staff and others who are involved in implementing ESTA. Issues that have arisen in the course of implementation are discussed and are illustrated with reference to case studies. These highlight the need for better resourced, more forceful and more innovative approaches to implementation. They also point to the need to revisit more fundamentally the legal and policy framework – the paradigm within which ESTA is located.

Awareness of rights

The DLA initially focused on raising awareness among ESTA occupiers and farm owners of their new rights and obligations. Rights education for farm dwellers is a mammoth task. Low levels of unionisation – estimated to be below 5% – and the physical isolation of people living on farms are barriers to people becoming aware of their rights. A high proportion of farm dwellers are illiterate and have little access to the media or civic activity. Radio has proved to be an effective medium for reaching farm dwellers, though it is costly. Beyond some investment in raising awareness, the DLA's role is a reactive one: the onus is on occupiers to invoke their ESTA rights.

The shortcomings of implementation are not only due to farm dwellers being unaware of their ESTA rights. Staff in DLA, NGOs and trade unions paint a picture in which many farm dwellers are not aware that they have tenure rights at all, and those that know their rights may not be familiar with remedies and support available to them should they be evicted (Farm Worker and Dweller Coalition 2003). The capacity, procedures and approaches of the institutions charged with protecting the rights of farm dwellers, and responding to threatened evictions, have substantially shaped the impact of ESTA. According to one ESTA officer, occupiers either do not know their rights or, even if they do, they are unable to exercise these rights.

Intervention in eviction proceedings

DLA's primary responsibility for implementation lies in its response to threatened evictions. There are two crucial opportunities in the legally prescribed process for DLA to intervene to avert threatened evictions. Firstly, DLA should respond to owners' notification that they intend to seek eviction orders (Section 9(2)(d) notices). These notices must be sent to the occupier/s,

the DLA and the local municipality two months before court proceedings may commence. Secondly, DLA probation officers are required to write reports for the courts to consider when hearing eviction applications (Section 9(3) reports). These must summarise all 'relevant circumstances' affecting the occupier/s and owner and assess the likely hardship that would be caused to the occupier should the eviction be granted and to the owner if it is denied. These reports must also include a comment on the availability of alternative accommodation for the occupiers.

In practice, many occupiers treat the Section 9(2)(d) notice as a notice of eviction rather than as a notice of intention to institute proceedings towards obtaining an eviction order. This contributes to the disparity between the number of notices issued and the number of cases that go to court. In many instances, occupiers vacate the farms in this interim period. The notice period makes possible various interventions before the case goes to court, such as initiating negotiations to avert an eviction, securing legal representation for the occupier/s, planning by DLA and the municipality to provide alternative accommodation and preparing a probation officer's report in terms of Section 9(3). Though provincial DLA offices keep records of cases in which they are involved, they do not keep records of each ESTA eviction case. Frequently, the DLA does not respond to Section 9(2)(d) notices but waits for a request for a Section 9(3) report or to be notified of an eviction order. Likewise, municipalities usually do not respond to these notices and simply file them – even though the onus to plan for future settlements and services for evictees lies with the municipality.

ESTA officers have been appointed to provincial and district offices of the DLA to act as probation officers and prepare Section 9(3) reports to the court, but they are overwhelmed with cases and are unable to respond to each one. There have been conflicting judgments about whether these reports are mandatory. Though required by law, in practice they are often unavailable and the courts frequently proceed without them. LCC judgments have confirmed that a Section 9(3) report is not compulsory, but have stated that the court should allow a 'reasonable period' for the DLA to produce this report. In some magistrates' courts this 'reasonable period' has been interpreted to mean three weeks. Instead of ensuring that all relevant circumstances are brought to the court's attention, then, Section 9(3) has had the effect of delaying court processes for three weeks, following which proceedings may, and do, continue in the absence of this report (Samaai, pers. comm.).

ESTA officers in a number of provinces reported a practice of farmers' attorneys requesting Section 9(3) reports before their respective cases come to court, apparently with the intention of using the contents to argue that the occupiers would be able to obtain alternative accommodation – and can therefore be evicted. DLA's position is that it is not obliged to make these reports available ahead of time, or to any party other than the court.

Justice system

In 1998 the DLA launched a programme of training on ESTA, aimed at those institutions that were to play a role in its implementation, namely the SAPS, state prosecutors and magistrates. This training has continued in an ad hoc manner in some provinces. Training has proved to be



Box 2: Requirement of probation reports

In practice, magistrates' courts have not insisted on a Section 9(3) report before issuing an eviction order, and the LCC has not considered the absence of such a report to be a miscarriage of justice. In his judgment in *Westminster Produce (Pty) Ltd t/a Elgin Orchards v. Simons and Another*, Judge Gildenhuys argued that the law makers could not have intended that no court matter could proceed without a Section 9(3) report where there are no grounds to believe that its contents would affect the decision of the court. In other words, a report is not compulsory in all situations. However, a few LCC judgments over the past two years have indicated that the LCC takes these reports sufficiently seriously to set aside an eviction order if a magistrate has not requested or obtained a report, as long as there are grounds for believing that its contents could sway a decision. In *Vinceremo (Pty) Ltd v. Visagie and Mitchell*, Judge Moloto set aside an eviction order on the grounds that no probationary report was presented to the court and that the court therefore had not been able to fully consider the availability of alternative accommodation to the occupiers or the impact of eviction on the constitutional rights of the children to education. Similarly, in *Valley Packers Co-operative Limited v. Dietloff and Another* in 2000, Judge Moloto overturned the eviction order because, without a Section 9(3) report, the magistrate had not taken into account the issue of alternative accommodation and the potential impact of eviction on the children.

Sources: LCC 2000:7; LCC 2001a:6–8; LCC 2001b

an important but by no means sufficient means of ensuring the support of the justice system in enforcing ESTA. The level of understanding of ESTA among police and magistrates remains poor. Until recently, the SAPS computer-based information management system did not recognise illegal farm evictions as a crime and so police stations could not accept charges laid by evicted occupiers.

ESTA requires that the courts must assess applications for eviction on the basis of whether or not there is a compelling reason (RSA 1997:Sections 10 and 11). Magistrates granting eviction orders as well as the LCC have interpreted this very broadly. Examples include where people's tenure rights have been subordinated to anything from a change in farming operations to the desire to sell an unoccupied farm (Williams, pers. comm.). As landowners have sought evictions, an industry of consultants has proliferated to advise them on the provisions of the Act and how to go about evicting occupiers. The result is that the average time required from the issuing of a Section 9(2)(d) notice to the issuing of an eviction order has shrunk to about three months.

The justice system as a whole appears to have failed to enforce ESTA effectively. Both DLA and NGOs acknowledge that insufficient information is only part of the problem. In some rural towns, farmers are connected to magistrates, police commissioners and lawyers through social networks and retain forms of social power that may be insurmountable for farm dwellers seeking to enforce their rights. Legal practitioners, DLA staff and NGO staff interviewed referred to experiences where police have refused to intervene in illegal evictions or have not allowed farm dwellers to lay charges against farmers who allegedly violated ESTA. Some magistrates, and even some police officers and prosecutors, are openly hostile to ESTA (Hall et al. 2001). Some police officers have even been known to assist farmers to illegally evict farm dwellers (Farm Worker and Dweller Coalition 2003).

The court process is unfriendly to farm dwellers in a number of ways. It is an alienating and disempowering experience, often mediated through translations and reliant on legal terminology and court protocol likely to be unfamiliar to most farm dwellers. There are situations in which

illiteracy is a disadvantage. In addition, ESTA protects the rights that occupiers had in terms of agreements with landowners that were valid at the time the Act was promulgated and whose unilateral terms were set by owners. There are instances in which magistrates have believed owners' versions of who had 'consent' and what the terms of tenancy were (Wegerif, pers. comm.), thereby confirming the status quo. Given the odds stacked against farm dwellers, there are compelling reasons to believe that the court process is not ideal and that dispute resolution in other settings might fare better in affording farm dwellers a fair hearing.

The DLA's ESTA Review Workshop in 1999 identified the need for 'alternative dispute resolution' (ADR) systems and procedures to be developed in order to heal the relationship between owners and occupiers, to avoid litigation and to seek win-win resolutions to disputes. Ideally, this would mean that on receiving a Section 9(2)(d) notice, the DLA would appoint a qualified mediator to intervene, and if mediation failed, the matter would go to arbitration. Advantages of the ADR approach, as opposed to the court process, are that it is more cost-effective, speedier and not as antagonistic (Samaai, pers. comm.). This is in line with the view that negotiation should be the prime means of resolving disputes related to tenancy on farms.

Box 3: Alternative dispute resolution

Until its disbandment in 2000, the Independent Mediation Services of South Africa (IMSSA) hosted a land mediation panel consisting of conflict resolution experts on whose services DLA could draw. In 2002, the DLA initiated a process to design an alternative dispute resolution (ADR) system to ensure that, wherever possible, confrontational legal processes were avoided and the parties enabled to reach agreement. A team of consultants has been tasked to design the system. The ADR system to address farm tenure disputes is due to be piloted in early 2004.

Sources: Govender and Mahomed, pers. comm.

Two cases from Limpopo illustrate some of the problems in the formal justice system that have contributed to a failure in enforcing the law. The fact that in one case the farm dwellers were able to obtain some compensation was only as a result of repeated interventions by a land rights NGO reliant on donor funding.

Box 4: A failure of the justice system

After the homes of Maria Moko and other farm dwellers were bulldozed by the farm owner, and her possessions dumped at the side of a national road, Ms Moko attempted to lay a charge of illegal eviction against the farm owner. The police in the charge office at the local police station in Limpopo refused to open a criminal case, arguing that this was a private matter. Only after an NGO intervened and gave a copy of the ESTA law to the policemen, was the charge laid. Following this, the state prosecutor who was assigned the case refused to prosecute, also arguing that it was a civil rather than a criminal matter. After the NGO threatened to launch a private prosecution, the Attorney-General agreed that, since a crime may have been committed, the state should prosecute. The case was referred back to the same prosecutor. He lost the case as a result of insufficient evidence and, it was alleged, because he did not mount an effective case. Prosecuting authorities acknowledged that the prosecution had been flawed. With no further options available to Ms Moko, the NGO assisted her to sue the farmer and she reached an out-of-court cash settlement.

In another case, Mr Magodi and Mr Mahungela attempted to lay charges of assault against the owner of the farm on which they resided. The farmer had threatened them with eviction and had attempted to intimidate them into leaving the farm on several occasions. They alleged that he had verbally abused them, threatened



them with a gun, and physically assaulted them, and Mr Mahungela's partner, on separate occasions. The police refused to lay a charge against the farmer. Again, once the farm dwellers approached an NGO, and it intervened on their behalf, charges were laid. However, a year later the police had still not followed up the matter with the complainants.

Sources: Mashimbye, Letsoalo and Wegerif, pers. comm.

Institutional capacity

The provincial land reform offices (PLROs) of the DLA are, by and large, severely understaffed relative to the tasks with which they are charged. They also have very different levels of staffing, in terms of both the number of staff and their level of experience. Rapid staff turnover has also limited the ability of the department to respond effectively to actual or threatened evictions.

Box 5: Intervention in evictions in the Western Cape

In the Western Cape there has been no uniform system to record, respond to and collate Section 9(2)(d) notices. Some district offices keep systematic records of these notices, but the provincial office does not keep track of these. In some instances, ESTA officers respond to these notices by intervening in person. This is possible only in a minority of cases, though, since there is only one ESTA officer per DLA district office, making up a total of three ESTA officers in the province. The experience of one district office, in the Boland region of the Western Cape, illustrates the point. In the two years from April 2001 to March 2003, this office received a total of 404 Section 9(2)(d) notices but was only able to submit probation officer's reports in respect of 77 cases because of a shortage of staff. The office does not have any information on how many ESTA orders were granted in its district, nor how many of these proceeded after review by the LCC. As with ESTA officers in other district offices, the time of ESTA officers in the Western Cape districts is oversubscribed.

Sources: DLA no date; Samson and Beerwinkel, pers. comm.

However, 'capacity' alone does not explain the very different ways in which the PLROs have dealt with farm dwellers' tenure rights. Different levels of performance are indicative of different approaches within PLROs. Some PLROs clearly use the law as a resource through which to defend occupiers' rights while others resort to doing the very minimum that the law allows to support farm dwellers – and sometimes not even that. The Limpopo PLRO, for example, has failed to produce Section 9(3) reports for many cases of threatened eviction and has no record of how many reports it has compiled. It has also not disbursed any grants – as it is empowered to do through Section 4 of ESTA. It is not clear, then, that it has taken any steps at all towards implementing ESTA.

One factor cited by DLA staff that inhibits intervention in threatened evictions is that this requires confronting the racial politics still operating in the countryside. Officials find it difficult to effectively confront farmers since there is an 'issue of white landowners, black officials'. In addition, they feel unable to effectively negotiate alternatives to evictions as they see themselves as 'entering into the private realm' (Letsoalo, pers. comm.). However, bringing rights to bear on private land is precisely what ESTA was created to achieve.

Legal representation

The legal aid system is seriously under-funded and most attorneys are unwilling to take on eviction cases. Eviction matters have been regularly heard in magistrates' courts where occupiers are not fully aware of their rights or are unable to effectively defend them.

A legal challenge brought by the Nkuzi Development Association in 2001 resulted in an important judgment by the LCC that indigent ESTA occupiers (and labour tenants) facing eviction proceedings are entitled to legal representation at the state's expense (LCC 2001c). The court found that indigent occupiers are entitled to legal representation and that duties fall on the state to provide this and on judicial officers to bring this right to the attention of occupiers appearing before them. Failure to do so could result in an infringement of the right of the occupier to a fair trial, and so result in a miscarriage of justice. The judgment does not mean that all occupiers must have legal representation, but, as noted by the LCC, if an occupier is unrepresented in eviction proceedings, the court is under a duty to enquire why and provide this option (LCC 2001c:6).

DLA and the Department of Justice were ordered to put in place a reasonable programme to realise this right, though the judge did not specify how they should do so (Mahomed 2001). In response, DLA has approached the Legal Aid Board to assist in giving effect to the 'Nkuzi judgment', and the Department of Justice has instructed Justice Centres and Legal Aid Clinics not to turn away ESTA occupiers facing eviction, and to note that they are a special category. However, they have insufficient capacity to deal with ESTA, both because of limited staff and because their legal staff is not sufficiently familiar with ESTA.

PLRO staff dealing with ESTA confirm that there is no coherent system in place to give effect to this judgment. In most instances, they refer cases to the Rural Legal Trust (RLT), a network of attorneys placed in law firms or NGOs and financed through donor funding. However, it is clear that, with one or two attorneys in each province, this does not come near to meeting the total demand. Private attorneys are generally unwilling to take ESTA cases through the Legal Aid Board, because the tariffs are low and delays in payment are reputed to be long.

A preliminary analysis of all LCC judgments relating to ESTA indicates that the state has failed to give effect to the Nkuzi judgment. In more than half of all reported ESTA eviction cases reviewed by the LCC between July 2001 and April 2003, the occupiers were not represented by legal counsel. Occupiers threatened with eviction did not have legal representation in 42 out of the 66 reported cases in the period after the Nkuzi judgment until March 2003; and in 18 of these, the occupiers themselves were not present.

The findings of this research are that eviction proceedings have continued without legal representation for occupiers and that the occupiers themselves have not always been present at the hearings held to determine whether they are to be evicted or not. However, this information is incomplete. The proportion without legal representation may well be higher in ESTA cases for which judgments are not available, including all those where magistrates' eviction orders have been confirmed.⁴

Institutional coordination

There are weaknesses of coordination within DLA as well as between DLA and other government institutions. According to a number of DLA officials, although the department would be able to implement ESTA properly if it had more personnel, it would still be constrained by a lack of high-level coordination between the department and other institutions on which ESTA implementation depends, specifically municipalities. There have been some attempts to promote



cooperative governance, mainly at a provincial level. The ESTA Justice Forum in the Western Cape is one example, and there are similar initiatives in Gauteng and KwaZulu-Natal. Both DLA and NGO partners view this approach as constructive and effective, yet emphasise that more can be done.

Box 6: ESTA Justice Forum in the Western Cape

In the Western Cape, the PLRO has been instrumental in establishing an ESTA Justice Forum to address overlapping roles and promote coordination. Together with the DLA, this forum consists of the Department of Labour, the Department of Justice and representatives from Justice Centres, the Directorate of Public Prosecutions, the Department of Provincial and Local Government, the Department of Housing, SAPS provincial officials and area commissioners, the Commission for Conciliation, Mediation and Arbitration (CCMA), Agri Western Cape, farm worker trade unions and NGOs. The aim is to align systems and provide assistance to those interacting directly with occupiers threatened with eviction. However, the forum is accused of being 'a talkshop', in the sense that there is little political will behind it. Also, it consists of bureaucrats with little power to bring about substantial change. As one member commented, 'everyone comes with problems and wants others to sort them out'.

Sources: Mahomed, Samaai and Samson, pers. comm.

Labour and tenure rights

The breakdown of an employment relationship, through dismissal or retrenchment, is often a precursor to eviction. ESTA is bound up with labour rights in three ways. Firstly, employment is a primary means by which people acquire consent to reside on a farm – that is, one's status as a worker influences one's tenure rights. Over time, LCC judgments have emphasised employment as the basis of tenure rights, almost to the exclusion of any other rights.

Box 7: Employment as the basis of tenure rights

In the case of *Lombaard v. Motsumi*, Judge Moloto of the LCC argued that people who had resided on the farm since they were born or since they were children could not be said to have acquired a right to residence solely as a result of their employment. Instead, 'they seem to have been occupiers before they were employees'. Apparently contradicting this precedent, Judges Gildenhuys and Meer found in the case of *Magodi and Others v. Van Rensburg* that Peter Magodi and others, born on the farm and subsequently employed, only had occupier rights as a result of their employment, and that their right of residence could be terminated as a result of their employment coming to an end. In this judgment, it appears that the application of ESTA has been narrowed to disregard a history of residence prior to employment: a lifetime of living on a farm, with consent, did not constitute a right of occupation independent of a person's employment.

Sources: LCC 2001f; LCC 2001g; Mashimbye and Wegerif, pers. comm.

Secondly, where the Commission for Conciliation, Mediation and Arbitration (CCMA) hears labour disputes, settlement agreements have sometimes effectively diluted or negated the ESTA rights of farm workers. CCMA commissioners have acknowledged that this is a problem and now increasingly recognise the tenure implications of the settlements of labour disputes over which they preside.

Thirdly, the framework of labour rights has been used to unilaterally alter occupiers' tenure rights. The minimum wage regulations introduced in March 2003 allow for deductions from wages for payments in kind, including up to a maximum of 20% for food and accommodation. This has already been cited as a problem for ESTA rights, for example where new written

contracts include a rental agreement designed to offset the increased wage or even, in some cases, to achieve a net decrease in wages.⁵ In practice, labour and tenure rights intersect and impinge on one another.

Definition of an occupier

The definition of who is an occupier in terms of the Act has come under dispute in the course of implementing – and interpreting – ESTA. LCC judgments have distinguished between a primary occupier, who resides on a farm with the consent of the owner, and other household members, who reside there as a result but are not considered occupiers in their own right. This has changed the meaning of ‘consent’, as it ignores the tacit consent that landowners give to most people – largely women and children – living on their land and prioritises consent given to male household heads.

Box 8: Definition of an occupier

Elderly Mr Monyiki was a long-term occupier who had been a small-scale farmer in his own right as well as an employee on the farm where he and his extended family lived. When he was dismissed, he subsequently faced an eviction hearing, at which the court ruled that his adult daughter, who was a permanent employee on the farm, was not an occupier in her own right. Neither the fact that she had resided on the farm her entire life nor the fact that she was employed on the farm was considered to be a sufficient reason to believe that she had the consent of the owner to reside on the farm. Instead, Judge Moloto found that she was *not* an occupier on the basis of her employment. He argued that she was only employed because she resided on the farm, and that she only resided on the farm as a result of her father’s occupier status, which in turn was a result of his employment. In this way, Mr Monyiki and his children and grandchildren – totalling 15 people in several homesteads – were evicted. All of them had been born on the farm and lived there their entire lives, with the exception of Mr Monyiki himself who had moved there as a child.

Sources: LCC 2002; Mashimbye and Wegerif, pers. comm.

The net effect of judicial interpretation of ESTA has been to reduce the number of people considered to be occupiers and, in practice, to define women’s rights of residence as secondary rights, derived through their relations with men. Many farmers do not employ women as permanent workers but rather retain a flexible female seasonal labour force comprised of wives, partners and daughters of male workers, resulting in a pattern in which women access both employment and housing indirectly through their husbands or fathers.

Box 9: Women’s farm tenure rights

The case of *Hanekom v. Conradie* heard by the LCC set a precedent. The judgment clarified that women’s tenure rights are *not* contingent on their partners’, and that their rights cannot be extinguished as a result of their partners receiving eviction orders in terms of ESTA. Mary Hanekom lived on a farm in the Western Cape where she was a full-time employee. Her husband was dismissed and an eviction order granted against him. When Mary’s rights to remain on the farm were threatened, the court found that Mary had ESTA rights of her own. She was able to remain in her house on the farm and, because she had the right to family life, her husband was able to stay on the farm with her on the basis of *her* tenure rights.

Two developments have undermined this victory. Firstly, some time after winning her right to remain on the farm, Mary found her situation intolerable and left the farm, reportedly because of intimidation by the owner. The second issue is that a later LCC ruling in the case of *Landbou Navorsingsraad v. Klaasen* restricted the precedent and limited the people to whom ESTA is applicable. Judge Gildenhuys found that women who live



on farms but do not work on them are not ESTA occupiers themselves. This is because the woman has not received 'actual consent' to live on the farm but resides there through derivative consent via a family member who is employed and is an ESTA occupier. This also applies to children of farm workers, including adult children.

Sources: LCC 1999a; LCC 2001e

The Klaasen case means that women clustered in the temporary and seasonal labour force are much less likely to be recognised as ESTA occupiers in their own right. The judgment reinforces the link between labour and tenure rights among farm dwellers, a factor that limits the impact of ESTA.

Securing long-term tenure

The state is responsible for providing alternative accommodation to evicted occupiers, as long as their eviction was not due to them violating the terms of their tenure. However, the requirement of alternative accommodation has had limited impact due to widespread non-compliance and non-enforcement by the LCC (Umhlaba Development Services 2002:18).

Where a court does not explicitly order that alternative accommodation must be made available, DLA is empowered in terms of Section 4 of ESTA to use its discretion to release Settlement/Land Acquisition Grants (SLAGs) to the amount of R16 000 per household. In some parts of the country, DLA works with municipalities to secure housing subsidies instead, since municipalities can obtain these directly from the Department of Housing in respect of new settlements developed by the municipality (Samaai, pers. comm.). Farm owners are responsible for the provision of alternative accommodation only in the case of elderly 'long-term' occupiers, discussed further below, and this generally does not exceed the equivalent of a subsidy.

Long-term tenure security can be in the form of on-farm or off-farm settlement. It is difficult to form a picture of the extent to which DLA has pursued either route, because the monitoring systems of DLA do not provide uniform information for each province.

Province	No. of projects	Households	Female-headed households	Size of land (hectares)
Eastern Cape	*	*	*	*
Free State	*	*	*	*
Gauteng	6	143	33	72
KwaZulu-Natal	13	335	15	8 942
Limpopo	*	*	*	*
Mpumalanga	*	*	*	*
Northern Cape	*	*	*	*
North West	*	*	*	*
Western Cape	13	1 221	183	213
TOTAL	32	1 699	231	9 227

Source: DLA 2003a

Note: * ESTA project data not available from the DLA's Monitoring and Evaluation Directorate.

Some PLROs have worked on ESTA projects, though these are very few. DLA staff estimate these to be less than five projects each in four provinces other than those reflected in Table 2. The DLA in Limpopo has not released *any* Section 4 grants (Letsoalo, pers. comm.). This is, according to its provincial director, because evicted occupiers are accommodated within the redistribution programme instead – previously under SLAG and now under LRAD. However, the PLRO does not keep information on the number of farm workers or evicted farm dwellers among applicants in redistribution projects, so it is not possible to draw conclusions about the extent to which the landlessness created by farm evictions is being counteracted through redistribution. The DLA in Mpumalanga has also not transferred any ESTA projects (Sibanyoni, pers. comm.).

Other than in these two provinces, where there was nothing to report, interviews with officials in PLROs indicated that the reasons why the Monitoring and Evaluation Directorate was unable to report on ESTA projects were related to problems of information capturing. The fact that the directorate could not report on ESTA projects did not indicate that no projects had been delivered. In some provinces, PLROs reported that they used the Provision of Land and Assistance Act 126 of 1993 (the legal basis for redistribution grants) as a vehicle to secure ESTA occupiers' tenure (to purchase land for settlement, for instance), rather than Section 4 grants, as provided for in ESTA. This means that no distinction is made in DLA's own project data between ESTA occupiers and redistribution applicants. One reason for pursuing the redistribution route was that occupiers would receive more money through LRAD grants (a minimum of R20 000 per adult) than SLAG (R16 000 per household). Another reason was that the bureaucratic processes required to release a Section 4 grant were too onerous, whereas authority to release redistribution funds in terms of Act 126 had been delegated by the minister to the provinces.

Where these projects have happened, two divergent views have emerged of what constitutes suitable alternative accommodation. One is based on meeting basic needs for housing, a perspective that has led to some evicted occupiers getting low-cost housing – usually no more than a Reconstruction and Development Programme (RDP) house. NGOs and others have challenged this practice, arguing that ESTA occupiers evicted from their homes should receive at least equivalent, if not improved, housing and access to land, water or related resources. In addition, they should not be prejudiced by having to get into debt to acquire equivalent land or infrastructure on alternative land following an eviction (Williams, pers. comm.). In practice, it appears that DLA's provincial project approval committees tend to treat ESTA projects as redistribution projects, applying redistribution criteria, and fail to consider that these are based on the conversion of existing tenure rights (DLA 1999).

On-site settlement options

On-site settlement means that farm dwellers can conclude an agreement to secure their tenure with the farm owner or buy a subdivided portion of the farm, for example the house in which they live or another portion. Where farm dwellers' homes are not on the outer boundary of a farm, subdivision may leave them without access routes. Servitudes are likely to be needed and existing infrastructure may be inappropriate. Subdivision is usually expensive and complex, and



often considered unfeasible. It is also dependent on the willingness of owners to sell – and they have little incentive to do so. The low level of the grant also makes on-farm settlement difficult.

This route has seldom been actively pursued by DLA. One reason is that the process to obtain grants is usually kick-started only once eviction procedures have been initiated. These are not conducive circumstances in which to negotiate upgrading rights, since the farmer's aim is to remove the occupiers from the farm, not to sell their houses to them. A number of DLA staff members questioned whether there was any meaning to 'on-site settlement' for ESTA occupiers or whether, in fact, the options for occupiers are either to continue to live on-farm (if they can avoid eviction) or to purchase secure tenure rights elsewhere, using a grant.

Grants may also be used by farm dwellers to buy into share equity schemes on the farms where they reside, provided that a business plan demonstrates how this will contribute to securing their tenure rights. However, confusion abounds among farm dwellers about the distinctions between being shareholders in an operating company – and thus entitled to dividends – and having secure tenure. Some equity schemes include the transfer of individual or group ownership of farm dwellers' houses, but in most instances members of equity schemes have no more secure tenure than before (Farm Worker and Dweller Coalition 2003).⁶

On-farm settlement may not always be a desirable option for occupiers, if these tenure rights are not linked to development opportunities. Where relations between farm owners and dwellers have deteriorated, farm dwellers may find themselves in isolated circumstances without sufficient resources to survive. There are exceptional situations, though, where on-farm settlement amounts to the recognition that some 'farm dwellers' are *de facto* farmers involved in independent production.

Box 10: Farm dwellers on state-owned land

ESTA applies on all agricultural land, yet is sometimes viewed as applicable only to private land. The process of state land disposal offers an opportunity for ESTA occupiers – including residents on state forest land – to upgrade their rights to ownership and thereby also to obtain an income-generating asset. The following is an example of how farm workers can benefit from redistributive land reform. A study of state farms bought by the South African Development Trust (SADT) from white farmers for incorporation into the Ciskei in the early 1980s shows how farm dwellers might benefit more substantially from land reform than through the limited provisions of ESTA. The former farm workers remained on the land when it was consolidated into the Ciskei and farmed it independently – with the consent of the farmers who secured leases through the Ciskei in 1983. Because they occupy agricultural land with the consent of the person in charge, they are ESTA occupiers and should be able to upgrade their rights to ownership.

Source: Cocks & Kingwill 1998

Off-farm settlement options

The off-farm settlement option generally available to occupiers is urban low-cost housing. Access to low-cost housing means that ESTA occupiers are effectively pushed to the front of the housing queue by getting grants from the DLA's budget. Off-site options are often contingent on occupiers being able to participate in a larger housing development scheme. These usually provide minimal developmental opportunities. There have been some reports of ESTA occupiers having their RDP houses repossessed within months of occupation, as a result of defaulting

on payments for debts taken out for food and other consumption items. This challenges the approach of seeing tenure rights as distinct from developmental opportunities. In practice, poverty undermines tenure security.

The most feasible form of off-site settlement in many cases appears to be where a large number of farm dwellers become owners of their homes in an 'agri-village' – a densely settled area in a commercial farming district. This makes subdivision feasible and the unit costs of the planning and transfer manageable. Agri-villages can involve the development of land as a township in order to have the right to municipal services. However, they have been criticised as 'rural slums', in which people have no land for their own use, and as reservoirs of labour for surrounding commercial farmers. This model has been used in the horticultural sector of the Western Cape in particular, but is not well suited to agricultural regions characterised by extensive farming and low numbers of workers, like those in the Northern Cape. Nor does it provide a basis for a livelihood in a context where the demand for agricultural labour is declining rapidly.

Long-term occupiers

ESTA provides stronger substantive rights to occupiers over the age of 60 who have resided on the farm for ten years or more or who are unable to work as a result of sickness or disability. These 'long-term occupiers' may not normally be evicted unless they commit a violation of their obligations (as set out in Section 6 of the Act).

These provisions appear to have been better enforced than other aspects of ESTA, yet farmers have circumvented them by evicting occupiers before they reach 60 years of age. In practice, the requirement that alternative accommodation be made available to evicted long-term occupiers is not absolute.

Box 11: Long-term occupiers in Limpopo

Mrs Rashava, a farm dweller in Limpopo, was 59 years old when she was notified that an order for her eviction would be sought. The hearing in a magistrates' court took place after she turned 60 and an order for her eviction was granted. When her case was reviewed by the LCC, Judge Moloto referred the case back to the magistrate to reconsider two matters: firstly, whether she was a long-term occupier and secondly, whether all relevant circumstances, including the hardship she would suffer if evicted, had been considered. The magistrate's finding was that Section 8(4) of ESTA, which deals with long-term occupiers, did not apply to her, as the application for her eviction was filed before she was 60. This was despite the fact that at the time of the hearing at the magistrates' court she was over 60 and qualified as a long-term occupier. The court ordered that she be evicted without alternative accommodation.

Mr Monyiki and his wife, both over the age of 60, were similarly evicted without alternative accommodation. Mr Monyiki was a long-term occupier on the farm on which his wife was born. Although the owner of the farm where Mr Monyiki lived and farmed had offered him alternative land and a cash payout to move, he had refused these on the basis that the offers would not provide him with equivalent land. Because he had already refused these offers, the court granted an order to evict him and three generations of his family without alternative accommodation.

Sources: LCC 2002; Mashimbye and Wegerif, pers. comm.

The commercial farmers' association, AgriSA, has criticised the rights ESTA confers on long-term occupiers. The organisation's objection is that granting perpetual rights amounts to



expropriation without compensation, and has announced that it intends to challenge this in the Constitutional Court (Bosman, pers. comm.; Crosby, pers. comm.). Instead, they advocate off-farm solutions like agri-villages.

Can one sell one's rights?

There have been reports from various parts of the country that farmers have resorted to paying cash to ESTA occupiers in return for them agreeing to vacate their homes and move off farms. In the Western Cape, there are reports of amounts between R1 000 and R10 000 being paid to occupiers in return for waiving their ESTA rights, and that in the Boland and Overberg districts, there is an informal 'going rate' of between R1 000 and R5 000 (Samaai, pers. comm.). While rights cannot be simply 'sold' in this way, especially since occupiers would still be able to invoke their ESTA rights, in a landmark case in 1999, the LCC confirmed that an occupier may waive certain rights as part of a settlement agreement. An agreement would only be valid if it is concluded 'voluntarily' – though this may be a moot point – and if it is confirmed as an order of the court (LCC 1999b).

In KwaZulu-Natal, farmers have paid out amounts as high as R20 000 or R30 000 and supplied building materials to enable people to rebuild their homes elsewhere. These higher levels are probably a result of farmers' fears that occupiers might claim to be labour tenants, thus causing long delays and resulting in heavy legal costs should the farmers dispute the claims. Because of the stronger rights of labour tenants, and the complex and costly process involved, farm dwellers have an incentive to claim to be labour tenants. As one commentator observed, 'any farm dweller who gets evicted without claiming to be a labour tenant has got rocks in his legs' (Alcock, pers. comm.). For this reason, perhaps, there appear to have been fewer legal evictions in terms of ESTA in this province than in many other parts of the county.

Reaction of farmers

When it was promulgated in December 1997, ESTA was brought into effect retrospectively from its date of publication as a Bill in February of that year. Some farmers are said to have taken pre-emptive action by starting to evict occupiers before the law was passed – though there is no data on which to base even an estimate of the extent of this phenomenon. The fact that ESTA was retrospective seems to have had little impact, however: this investigation has found no record of occupiers who were evicted during 1997 being reinstated on farms, even though a small number of such cases went to court and a few resulted in cash settlements (Wyngaard, pers. comm.).

The official position of the major commercial farmers' association, AgriSA, is that it is not opposed to the regulation of farm evictions and encourages its membership to comply with ESTA. However, its position seems to differ from the views of the mostly white farmers who make up its rank and file membership. The organisation does, however, have a fairly comprehensive list of objections to ESTA.

AgriSA's president, Lourie Bosman, confirms that organised agriculture has opposed ESTA from the outset. While the organisation was not against the regulation of evictions, he argues that 'the detailed provisions are causing huge consequences for farmers and unforeseen

Box 12: AgriSA's objections to ESTA

AgriSA intends to challenge ESTA politically and through the courts on a number of issues. Its objections are:

- *Long-term occupiers:* Perpetual rights amount to expropriation without compensation, particularly since the right to family life enables dependants to acquire occupier rights indirectly.
- *Alternative accommodation:* Obligations placed on farmers penalise those who provide good housing and create disincentives for further investments in housing and infrastructure.
- *Definitions of an occupier:* Farmers want to be able to evict a whole family 'if the husband goes' and would not want to see other family members as occupiers in their own rights.
- *Transferability of obligations:* Consent should terminate with changes in ownership or management of a farm, and not be transferable from one owner or manager to another.
- *Right to family life:* This right should not include extended families, nor should it endure over generations.
- *Burial rights:* Landowners should be compensated for this substantive land right.
- *Livestock regulation:* ESTA makes it difficult for farmers to impound animals belonging to occupiers, since it requires a notice period between a transgression and impounding.
- *Termination of occupier rights:* AgriSA wants the grounds on which owners can terminate occupier rights to be extended and for the law to allow eviction notice periods to run concurrently with labour disputes being heard at the CCMA or Labour Court.

Sources: AgriSA 2002; Bosman and Crosby, pers. comm.

consequences for occupiers' (Bosman, pers. comm.). AgriSA's membership is reported to be willing to accommodate employees but unwilling to take on responsibilities for the extended families of employees. In other words, the members view ESTA as extending their net of social patronage. They are also unwilling 'to invest in existing housing because of the alternative accommodation provision', with the result that housing stock is deteriorating. Where there are large numbers of occupiers, farms are difficult to sell; ESTA therefore has 'a negative impact on the value of farms' (Bosman, pers. comm.).

AgriSA recommends, instead of a judicial process, the creation of district forums – involving occupiers, labour tenants, restitution claimants and farmers – that would seek holistic solutions. Farmers see ESTA as an 'unwanted intrusion onto their land' rather than a framework through which to find solutions that involve coexistence on the land (Umhlaba Development Services 2002:19). At present, farmers are faced with few incentives and only a very weak threat of sanctions to comply with ESTA. Future developments need to strengthen both the 'carrots' and the 'sticks'.

Evaluation of ESTA

ESTA is, nominally, a 'balanced' piece of legislation in that it imposes obligations on both farm dwellers and owners, as well as creating rights. What is surprising is that such an apparently even-handed law is to be applied to such a strikingly *unequal* set of social and economic relations – without the power to transform them. It also combines weak substantive rights with strong procedural requirements and relies on institutions that are at worst hostile to ESTA and at best inadequately resourced and coordinated to enforce these procedural rights.



Land reform has accorded new rights to farm dwellers, and networks have emerged among a range of actors to help to secure these rights in practice. In some areas, good working relations have developed between DLA and NGOs, while in some provinces these relations have degenerated to the point where there is minimal, if any, interaction. However, implementation has been characterised by very reactive approaches, partially a result of the way ESTA is framed. There are no clear measures for success: does a legal eviction constitute a success? There has been confusion over the nature of an ESTA project cycle and what is regarded as a completed project. As a DLA official noted, “‘success’ is always temporary, if on someone else’s land’, since the threat of eviction remains (Letsoalo, pers. comm.). In practice, there has been little support or pressure to find creative local solutions (Umhlaba Development Services 2002).

Initial evidence suggests that the rate at which ESTA occupiers are being evicted varies substantially across the country. The trend in Limpopo is that illegal evictions are continuing, while in the Western Cape evictions are increasingly happening through the legal process but without alternative accommodation. Farmers are opposed to ESTA and are likely to continue to resent the intrusion of state authority on the land they own. Over time, the narrow interpretation of ESTA’s provisions by the courts has addressed some of the concerns of landowners.

ESTA provides relatively weak rights. It allows farm dwellers to be made homeless through legally sanctioned means, and increasingly this seems to be the outcome. Even where legal procedures are being followed, occupiers are effectively still being left ‘on the road’ without a home.

Improved enforcement would not secure long-term independent tenure rights for farm dwellers, unless it is accompanied by a proactive approach to subdividing and transferring land. The problems with ESTA, then, are not merely related to implementation, though these are important, but are also fundamentally related to how the law is conceived.

Despite farm dwellers being identified as a key beneficiary group in the White Paper, they have ‘remained outside the key thrust of land reform delivery’ (Kingwill 2002:3). One limitation is that ESTA focuses on anti-eviction measures – or rather, measures to regulate instead of prevent eviction. Another is that viable on- and off-site options to secure tenure rights have not been adequately conceptualised or operationalised by government, financial institutions or NGOs currently playing a role in supporting land reform.

4. The Land Reform (Labour Tenants) Act

The Land Reform (Labour Tenants) Act 3 of 1996 (LTA) differs from ESTA in that it not only places restrictions on the eviction of labour tenants from farms but also gives labour tenants the right to claim stronger rights, including ownership, to the land they use. Like ESTA, the LTA was retrospectively enacted from the date of its publication as a Bill on 2 June 1995. At the same time, ‘some farmers decided to clear their land of tenants before political changes could allow the tenants to make a claim to the land on which they lived and worked’ (Williams 1996:216).

Ordinances and laws dating back more than a hundred years have sought to restrict tenants from gaining independent rights to land and to restrict the number of tenant families on

farms. In the absence of sufficient capital to invest in production, these laws secured landowners' control of labour, stipulated a minimum number of days of labour contribution per year, confirmed owners' rights to evict labourers, and levied taxes on African men on farms who did not provide at least six months' labour a year (Williams 1996:223).

The 1996 Act does the opposite; rather than securing owners' rights to labour, it seeks to secure tenants' rights to land. Instead of eliminating labour tenancy through the conversion of tenants into wage labourers, as was attempted on numerous occasions in the past, the Act is intended to enable labour tenants to become independent farmers on their own land.

Variations in labour tenancy systems

In northern KwaZulu-Natal the predominant form of labour tenancy has been where a patriarch would provide his adult sons' labour for six months per year and often his wife's (or wives') labour too, in return for which 'he got a place to build his homestead, arable land for each wife and grazing land for an agreed number of cattle' (Williams 1996:220). Sometimes this deal involved low wages being paid to those providing labour for the farmer, and higher wages offered for the other six months when these family members were not under contractual obligations to provide labour (Williams 1996:221).

In the Weenen district of the Midlands, labour tenancy took a very different form. Here, landowners established 'labour farms'. These labour farms were typically cultivated and grazed entirely by the stock of labour tenants; the owners had no independent agricultural production on these farms. Tenants or their family members were obliged to provide labour on other commercial farms belonging to the same owner. In cases where labour tenants' long-standing access to the land, which they considered to be their own, predated ownership by the current landowners, provision of labour was viewed as forced labour. Although not part of a contractual arrangement, the provision of this type of labour was viewed as necessary to avoid dispossession.

There are three broad types of tenancies: cash tenancy where a rental is paid, share tenancies like sharecropping, and labour tenancies. In practice, many contractual arrangements combine these in different ways at different times, depending on availability and relative value of access to land (for the tenant) and labour (for the owner).

Provisions of the LTA

The Labour Tenants Act does two main things. Firstly, *it protects labour tenants from unfair or arbitrary eviction* by regulating when and how tenants may be deprived of their homes and the land they use for cultivation and grazing. Secondly, *it allows labour tenants to obtain long-term secure and independent tenure rights* through the assisted purchase of the land they currently use or alternative land.

The Act is premised on the view that labour tenancy came to exist in South Africa precisely because of racial discrimination and restrictions in land rights. For this reason, labour tenants have informal rights to the land that they and their forebears have used. Labour tenants are defined in the Act as persons who reside or have the right to reside on a farm, who have or have had the right to use land on the farm (or another farm of the same owner) for grazing or cultivation purposes and provide labour in return for access to this land, and whose parents or grandparents were labour tenants (RSA 1996b).



Labour tenants are entitled to lodge applications with DLA for the land they live on and use. If the owners concede that the applicants are *bona fide* labour tenants, they are compelled to sell the land to the applicants at prices to be determined by a state-appointed valuer. If the owners deny that the applicants are labour tenants, the issue must be resolved by the LCC, which is empowered to make rulings concerning labour tenant applications. Regardless of which process is followed, DLA is obliged to support these applications which, unlike restitution claims, are lodged against current landowners rather than against the state.

Progress in labour tenant reform

After the LTA was promulgated, DLA launched a campaign to inform labour tenants of their new rights and to enable them to lodge applications for the land they live on and use. The period for lodging applications was extended to 31 March 2001 at the request of Parliament. As part of this campaign, 214 information sessions were held, through which DLA reached 7 648 labour tenants. There was initially an assumption within DLA that only in KwaZulu-Natal and Mpumalanga were there labour tenants, but, during the extension period, applications were lodged in all provinces except the Western Cape.

According to the director of monitoring and evaluation in the DLA, about 21 000 applications have been verified, of which about 19 000 were valid and 2 000 invalid, and approximately 5 000 claimants have received land. There are a few problems with this information. Firstly, it would appear that DLA decided that some of the applications were invalid and it discarded these, which it is not empowered to do in terms of the Act. Secondly, the level of progress seems surprisingly high and is contradicted by information from DLA's provincial offices and NGOs. Yet nationally, this is the best information available at present.

Province	Total number of applications	Processed Section 17 notices** / Court
Western Cape	-	-
KwaZulu-Natal	7 713	827
Mpumalanga	9 709	2 228
Northern Cape	15	4
Limpopo	380*	3*
Eastern Cape	79	-
Gauteng	650	2
North West	100	-
Free State	770	53
Total	19 416	3 117

Source: DLA 2002b

* as at July 2003 (Ramathikithi, pers. comm.)

** For an explanation of Section 17 notices, see page 27

DLA estimates that approximately 250 000 people stand to benefit from the LTA process. Applications, often submitted by one household member, can be grouped together so that all the tenants on a labour farm, for instance, could become participants in one project. When looking at the statistics, then, it is important to remember that, as in restitution, one application does not equal one project (Ramakgopa, pers. comm.). Where projects have been established and land transferred, it is not possible to say how many applications these represent.

The communal property association (CPA) register, likely to contain the majority of legal entities established in settled labour tenant projects, also provides some clues as to progress with the LTA. However, it does not contain a consistent level of detail. Of those CPAs that identifiably acquired land through the LTA, 33 have been registered in KwaZulu-Natal and 19 in Mpumalanga, giving a national total of 52 CPAs registered with respect to labour tenant projects.

DLA officials in KwaZulu-Natal say that the total number of labour tenant applications in that province is not known, nor does it appear that all those lodged can be followed up due to problems of seriously incomplete information.

Box 13: Counting labour tenants in KwaZulu-Natal

The researchers were able to obtain from the DLA provincial office in KwaZulu-Natal a database containing details of 2 917 labour tenant applications. However, it appears that these are only those recorded by the mobile unit set up by AFRA, on contract to DLA, during the one-year extension period before the final deadline for lodgement on 31 March 2001. It excludes all those applications submitted directly to DLA, which have apparently been recorded elsewhere.

There are a number of limitations in the information available on this database. At least 10% of the applications noted on the database do not include the names or ID numbers of the applicants. In addition, when registering their applications, some labour tenants were unable to say what the registered name of the property was, or even to provide the name of the owner. Broadly speaking, the information gaps make it exceptionally difficult to pursue the applications.

Sources: Del-Grande, Lewis and Pillay, pers. comm.

The labour tenant applications in KwaZulu-Natal are concentrated in the Midlands, Ujuba and Zululand districts. There are currently about 20 projects under way in the Midlands region and about 43 in Tugela. Based on approximate figures, it seems that in the region of 1% of all applications submitted are in the process of being set up as projects. The rest appear not to have been addressed at all, or are in the process of being investigated or negotiated.

As of March 2003, DLA had approved the transfer of land to labour tenants in a total of 76 projects in KwaZulu-Natal. These projects entail 2 336 households obtaining a total of 27 949 hectares at a total capital cost of R17 186 334 (DLA 2003b). In this instance, 'approved' means that funds have been approved, not that land has been transferred. This information does not compare the number of projects to the number of original applications, and it is therefore not possible to say how far along the road KwaZulu-Natal PLRO is towards completing the processing of all applications. By 2001, DLA had estimated that the labour tenant applications received in KwaZulu-Natal alone would require a capital investment of over half a billion rands (DLA 2001:139).



Another approach to assessing progress is the appearance of labour tenant cases at the LCC. Since the enactment of the LTA in 1996, there has been a peak (in 1999) and then a decline in the number of cases heard by the LCC. These have also declined as a proportion of all cases appearing at the LCC.

Year	Labour tenant cases at LCC	Total cases at LCC	Labour tenant cases as % of total cases
1996	17	31	55%
1997	20	35	57%
1998	50	156	32%
1999	78	172	45%
2000	29	127	23%
2001	9	100	9%
2002	15	121	12%
TOTAL	218	742	29%

Source: LCC 2003

The decline in labour tenant cases at the LCC does not necessarily mean that the rate of settling claims has declined, since settlement agreements between owners and tenants can be certified by DLA instead of going the legal route – and this seems to be the trend.

Implementation of the LTA

Implementation of the LTA is similar to the restitution process in that it is reliant on the submission and investigation of applications, sometimes called 'claims', in order to effect a transfer of land rights. The communication campaign launched by DLA to inform labour tenants of their new rights and to encourage them to lodge applications was considered to be successful and led to a sharp increase in the number of applications lodged. Labour tenant applications are lodged with DLA as claims against landowners, unlike restitution claims, which are claims against the state. Landowners are to be notified that there is a claim against them and are provided with the opportunity to dispute this within a specified period, at which stage the matter is to be referred to the LCC for adjudication. Failure to dispute the application constitutes acceptance of its validity.

Verification, validation and Section 17 notices

DLA's job on receipt of a labour tenant application is to notify the landowner in terms of Section 17 of the Act, giving her/him the opportunity to respond and to either admit or deny that the applicant is a labour tenant. Initially, most landowners responded by denying the existence of labour tenants on their land, but this led to lengthy legal proceedings in the LCC. While landowners are uncertain about what will ensue if they admit that the applicant is a labour tenant – and many are hesitant to do so – the prospect of lengthy and costly legal proceedings if they dispute the claim is similarly unappealing (Mngwengwe, pers. comm.).

Settlements out of court are much more attractive – and in many cases cost-effective – for landowners, something not anticipated in the drafting of the LTA. Increasingly farmers are responding with a denial but are still wanting to negotiate a settlement; they will acknowledge that the applicant is a labour tenant, but only for the purposes of an out-of-court agreement. In other words, they are able to conclude interim agreements without prejudice to their future prerogative to deny that the applicant is in fact a labour tenant in terms of the Act (Del-Grande, pers. comm.).

Box 14: Can labour tenants' rights be bought or sold?

Cases have been reported in which labour tenants accepted cash payouts from landowners to vacate their land but then refused to move. These agreements have no legal standing unless they are certified by the director-general (DG) or a provincial DLA official with authority delegated by the DG, or unless they are made an order of the LCC. However, DLA staff in some provinces appear to be unclear on the legal status of such cash payouts.

Sources: Naidoo and Zulu, pers. comm.

DLA appears to be treating labour tenant applications as claims against itself that need to be investigated and validated. Both the DLA's Monitoring and Evaluation Directorate and land activists in KwaZulu-Natal have said that DLA is validating applications and rejecting those that are invalid, and that the substantial number of invalid applications are by people who missed the restitution deadline or who are actually farm dwellers, not labour tenants. It was not possible to discern the process to be followed in cases where labour tenant applications were dismissed, and whether legal appeals have been pursued.

DLA officials acknowledge that they have not issued Section 17 notices for most of the applications. A reason cited is that the effect of issuing a notice is to set a process in motion where owners might evict or intimidate labour tenants, or institute legal proceedings to dispute that they are labour tenants. Either way, DLA is required to intervene and provincial and district offices are simply not sufficiently staffed to respond adequately. Also, specified time frames are governed by the Act, which dictates the project cycle of labour tenant claims. Officials say that this time pressure makes it difficult to settle applications in a developmental way; given more flexibility and support, they would be better able to ensure that land acquisition is sustainable and further resources are leveraged.

DLA has tried to pre-empt the conflict caused by these notices by engaging with farmers' associations before informing them of applications. Pending such processes, DLA has not issued Section 17 notices to affected landowners to notify them that applications for their land have been lodged. The LTA requires that once an application has been registered, these notices are to be dispatched 'forthwith' (RSA 1996b:Section 17). Interpretation of 'forthwith' is disputed; it could mean the same day, but certainly does not mean 'within a reasonable period' or 'within a few years'. DLA could therefore be in violation of the Act (Hornby, pers. comm.).

For these reasons, the KwaZulu-Natal PLRO is dealing with applications on an individual basis or, where grouping applications is appropriate, on a project-by-project basis. Prioritisation, as described by DLA staff and others in the province, is haphazard. Applications are prioritised for processing often in response to a crisis situation or where there is agreement among the parties on the way forward (Rankin, pers. comm.).



Box 15: Inaccurate information and labour tenant claims

In the case of Philemon Msiza of Middelberg in Mpumalanga, the LCC found that the inaccurate information on his form was no reason for DLA to delay processing his claim. The court found that DLA 'acted in a way that "subverts" the very law it has been entrusted to administer' by failing to provide support to a labour tenant and obstructing his claim. The judge called the DLA's attitude negligent and irresponsible.

Source: *Sunday Times* 2002

Definition of a labour tenant

In addition to procedural hold-ups, implementation has thrown up definitional questions regarding who is a labour tenant in terms of the Act. One problem is determining whether a claimant is predominantly remunerated through access to land, as many labour tenants also receive cash wages. This is referred to as the 'predominance test'. If the value of access to land exceeds the cash wage, the applicant can be considered a labour tenant. In some cases, the dividing line is fine. For example, one application was decided in favour of a labour tenant after a dispute regarding the value of a few chickens (Hornby, pers. comm.).

Wages on farms are so low that it should be relatively easy to show that someone is a labour tenant for the purposes of the Act. There has been an assumption that the 'value of the land' to which labour tenants have access is agricultural land – used for cultivation and grazing – rather than residential. If one factors residential rights into a calculation of the relative 'value' of access to land versus cash wages, a very large proportion of farm dwellers might be considered labour tenants. In this way, poor economic conditions make people look like labour tenants. This is because, even if they are not very involved in cultivation, the costs of accessing equivalent resources in a township are substantial and often outweigh wages (Alcock, pers. comm.).

Labour tenants also need to show that their families have lived on farms in the area for two generations, in other words, that their grandparents were labour tenants in the area. Although this has been very difficult to prove for some, the fact that the 'area' is undefined has opened up the possibilities for people to successfully submit applications.

There are real practices that distinguish farm dwellers who are entirely dependent on a cash wage from labour tenants who are substantially independent producers. Even so, 'labour tenant' is a 'fuzzy' concept in that its core is distinct but its edges are unclear and disputable. In practice, there is a range of tenancy arrangements through which people access land in return for providing cash, produce or labour, or a combination of these, to the owner. The tenancy arrangements are often based on 'verbal contracts' and are subject to change (Grimm 1998). In other words, someone who is considered a labour tenant this year may be considered a farm worker next year, that is if the proportion of her/his cash income increases or if the farmer restricts the number of livestock that may be grazed (Khubeka, pers. comm.).

Having established that labour tenancy is being practiced in a particular case, a second problem lies in determining *who* is the labour tenant. According to the Act, the person who uses the land is the labour tenant, not the person providing labour to the landowner. But this distinction is not always clear. In KwaZulu-Natal, a form of tenancy is practiced, named *endraai*, in which the provision of labour is regularly rotated among members of an extended family or kinship network. Use of the land may also be rotated or shared among members of a household and with a wider group (Hornby, pers. comm.).

One of the contradictions of labour tenancy is that while the 'tenant' (normally a man) gets access to land, it is usually not him but his wife or wives, or son/s who have to provide the labour. The farmer has only partial and indirect control over workers, via a family patriarch (Williams 1996:221). Considerations of who is a labour tenant and who has acquired what rights through the provision of labour for a landowner or on land set aside for own production, are informed by assumptions about social relations within households and kinship groups that are heavily gendered and generational.

Further problems arise in defining the area of land to which the labour tenant has rights. Where the land is used for cultivation, the matter may be quite apparent, but where it is used for livestock grazing, the boundaries are less clear. Part of a labour tenancy agreement can take the form of a tenant's cattle grazing together with the owner's herd, in which case it may be difficult to discern which land, and how much land, is the subject of the claim. In addition, in such situations, farmers were fairly easily able to pre-empt the Act by reducing the number of livestock belonging to the tenant (Hornby, pers. comm.). Anecdotal evidence has indicated that there was substantial pre-emptive action by farmers before the Act came into force, which effectively dispossessed labour tenants and undermined the aim of securing labour tenants' rights.

Grant-based land purchase

Although the LTA protects labour tenants from eviction and creates a right to purchase the land they use, the only means made available by DLA to assist in this purchase is the provision of a SLAG grant at R16 000 per household. In many situations this is insufficient to purchase the land or alternative land. As with ESTA, this leaves labour tenants in an invidious position. They may need to use their own resources and/or loan finance to make up the difference. If additional funds are not available, their tenure rights are effectively downgraded – or more people must be found to push up the subsidy amount to reach the selling price. The obligations of DLA to provide the resources to secure labour tenants' rights on the land claimed or on alternative land are not clear. Richard Clacey, former director of DLA in KwaZulu-Natal, reportedly argued that the provision of grants to labour tenants is entirely voluntary and DLA is under no obligation to fund the full cost of the land (Hornby, pers. comm.). This implies that, in acquiring ownership of land, labour tenants have a status no different to any applicant for a discretionary redistribution grant. As with ESTA, the value of the existing tenure right gets obscured in the application of redistribution mechanisms to tenure reform. As with restitution, the settlement of rights-based claims to land is substantially contingent on the willingness of current owners to sell at prices acceptable to the state.

The PLRO in KwaZulu-Natal has been using SLAG grants to settle labour tenant applications but is now moving increasingly towards using LRAD grants. A benefit of using LRAD grants is that, unlike SLAG, they are not linked to other grants, so beneficiaries can also obtain housing grants. Another benefit is that applicants can get more grant money through LRAD: each adult household member can apply for a grant of at least R20 000. The application of the SLAG grant to secure long-term tenure has been inappropriate, because the grant is set at a fixed, low level that cannot be tailored to the market price of land claimed by labour tenants (Madhanpal, pers. comm.). One of DLA's concerns is the size of projects – the number of participants and



their livestock relative to the size and quality of the land. The concern with scale has arisen from a concern about the extent of benefits that people will get in terms of income, as well as a desire to limit the number of cattle to avoid overgrazing.

DLA is starting to move away from a grant-based approach to settling labour tenant claims. Instead, it wants to combine LRAD and housing grants – sometimes in tandem with restitution – in order to compile a package suitable to a labour tenant application. Even so, there is both anger and suspicion among labour tenants that they have to produce ‘business plans’ in order to obtain a discretionary grant to become owners of the land they already use and to which the state has already recognised they have certain rights (Hornby, pers. comm.).

DLA staff argue that land availability is not an obstacle to labour tenants obtaining land. Since ‘there is plenty of land on the market’, they do not feel there is a need for expropriation at present, and point out that ‘expropriation takes longer and you end up paying a market-related price anyway’ (Mngwengwe, pers. comm.). However, LTA applications are claims to specific pieces of land and the availability of land in general is not of direct benefit in settling these. Because the LCC was not clear on the issue of compensation to landowners in some of its early rulings, DLA is now using market value as its purchase price. Expropriation is not seen by DLA as a viable route to cost-effective land reform, unless new approaches can expedite the process and make use of the constitutional provision to pay below-market level compensation.

An innovation to expedite the process of acquiring and transferring land to labour tenants is that DLA has an agreement with the Surveyor-General’s office to survey subdivided portions of farms prior to final approval of projects. Thus, the processes of project design by the DLA and subdivision by the Surveyor-General’s office can happen simultaneously, provided that there is sufficient agreement on which to presume that the projects under consideration will go ahead (Mngwengwe, pers. comm.).

Overlapping restitution and labour tenant claims

Labour tenant applications often conflict with restitution claims in two ways. Firstly, former labour tenants who were evicted from private farms may have lodged restitution claims to the land they had used, while current labour tenants have applied for the same land through the LTA. A second way is that labour tenants may have lodged *restitution* claims to the land they occupy and use as labour tenants – or that their parents or grandparents occupied or used – and then claimed this land again through the LTA process. Large numbers of people submitted restitution claims ‘because redistribution wasn’t taking off’ and then lodged labour tenant applications because they saw no progress with their restitution claims (Madhanpal, pers. comm.).

Two examples from KwaZulu-Natal illustrate some of these points. The case of Nkaseni shows how the restitution claims of evicted labour tenants to the land they had occupied and used conflicted with the labour tenant applications of those labour tenants who had not been evicted – and how conflict between the two groups was avoided. The case of Gongolo, where a large game reserve is planned, shows how overlapping labour tenant applications and restitution claims are conflicting with one another, with the two state institutions charged with responding to these claims operating according to different laws and different approaches to the resolution of claims.

Box 16: Labour tenant applications overlapping with restitution claims

At Nkaseni, a portion of prime agricultural land on the banks of the Tugela River was transferred to a group of labour tenants as a result of a negotiated agreement with the owner who agreed to the subdivision and sale of this portion. The whole farm is also under restitution claims by former labour tenants evicted during the period 1969–72. Some of the current labour tenants have lodged restitution claims to the same land. Much of the land under restitution claim has already been transferred through the labour tenant process. Although the two sets of claims – labour tenant and restitution – conflict with one another, the Regional Land Claims Commission and the local NGO, AFRA, were able to negotiate a deal with the restitution claimants that they would restrict their claim to the ‘remainder’ of the farm not already transferred to the labour tenants.

Also in KwaZulu-Natal, at Gongolo, 70 labour tenant applications involving more than 1 200 people as well as an unconfirmed number of restitution claims by former labour tenants were lodged in respect of land that is part of a proposed game reserve. A consortium of private funders supporting the plan to establish this reserve had secured high-level political support within the province and financial support from the Industrial Development Corporation (IDC). The Regional Land Claims Commission and DLA brokered a deal with the owners not to oppose the applications, but this was on the proviso that negotiations for the game reserve would continue. However, the labour tenants and restitution claimants want to use the land for their own agricultural production. While DLA has informed the labour tenants that their applications come first and they will be able to decide on how the land is to be used, the commission has exerted pressure on the restitution claimants to opt to become shareholders in the game reserve. The divisions between these two Acts and between implementing institutions have now translated into conflicting approaches, causing substantial confusion and conflict among the claimant groups. Also at issue is how the claims and applications will be grouped and whether they will be combined into one legal entity or whether separate legal entities will be created to mirror the jurisdictions of tribal wards.

Sources: Alcock, Del-Grande, Shange and Mngwengwe, pers. comm.

Institutional constraints

Institutional constraints have hampered the implementation of the LTA. Until recently, in KwaZulu-Natal, responsibility for both ESTA and the LTA rested with one staff member of DLA. Staff turnover and a problem of vacant positions in this PLRO have disrupted implementation. An unstable relationship between the PLRO and AFRA, the main land rights NGO in the province, has also affected implementation. The extent of DLA staff time required to settle a labour tenant application is costly, but so is contracting in private service providers to negotiate, facilitate and plan. The director of DLA in KwaZulu-Natal has said that at present ‘it takes R50 000 to spend a R16 000 grant in labour tenant implementation’ (Shabane cited in *AFRA News* 2002:13).

Strong institutional coordination and cooperation is needed to implement the LTA – between DLA and the provincial department of agriculture in order to ensure support for agricultural production and between DLA and local government in order to obtain alternative land and provide access routes where land has been subdivided. In most cases, this integration has not happened. One reason may be that municipalities are overwhelmed with a proliferation of responsibilities not matched with the supply of additional resources.

Local government is a key partner for DLA in implementing land reform. DLA has concluded agency agreements with local authorities to implement the LTA, though this experience has not always been positive (Madhanpal, pers. comm.). In some cases, DLA has managed to get municipalities to align their work with the LTA process, for example by providing boreholes and crèches. Where there is no, or little, balance of the grant left over after land has been



bought, the DLA is 'quite vigorous' in leveraging contributions from municipalities. In most districts, land reform steering committees or technical committees have been set up to integrate land reform with the work of municipalities. These were initiated before the advent of LRAD and have evolved into district coordinating committees (DCCs) involving the Department of Agriculture and others (Madhanpal, pers. comm.). The KwaZulu-Natal Department of Agriculture is under pressure to support LRAD and appears not to prioritise labour tenants – which is ironic since labour tenants, already agricultural producers, are prime candidates to form the class of 'emerging farmers' envisaged by LRAD (Hornby, pers. comm.).

Legal entities

Where groups of labour tenants take joint ownership of land, a legal entity must be established in whose name the property can be registered. This can be done through a Trust, but often takes the form of a communal property association (CPA), which the DLA is obliged to register, monitor and support. However, implementers have found that the registration of CPAs holds up land transfers for many months, since this involves a paper trail to and from national DLA. Authority has not been devolved to the provinces to circumvent this (Mngwengwe, pers. comm.; Rankin, pers. comm.). The problem pertains not only to the bureaucratic requirements that delay the process of the creation of CPAs, but also to the fragile nature of these institutions and their tendency to disintegrate or be overtaken by powerful individuals or interest groups.

Box 17: Legal entities and post-transfer support

At the farm Misgunst, now renamed Ntabeni, eight labour tenant households obtained grants through the Land Reform Pilot Programme (LRPP) to purchase the farm they had been occupying. This was before the LTA was enacted. The land was registered in the name of a Trust, and after the DLA had transferred all grant funding, it 'exited' the project. However, a few years later it became clear that there were serious internal conflicts within the project surrounding the allocation of arable land to households and the number of livestock allowed to graze. These conflicts originated in the inequalities within the group, particularly since the chair of the Trust was the wealthiest member, having an off-farm income from his taxi business, and so had more livestock than other members. As a result of conflicts within the group, a new committee was elected, but it was never registered as the new Trust. Now there is a dispute over who constitutes the committee and therefore who has powers of land allocation and management. Although senior DLA staff have instructed the provincial office to intervene to resolve conflicts within the group, local officials say this is not feasible for two reasons: firstly, because DLA has no authority to intervene in the affairs of the Trust since, unlike a CPA, it is a private entity, and secondly, because it would be an untenable precedent for DLA to intervene in each project where legal entities are dysfunctional or where conflicts emerge, as this would require intervention in nearly every project established thus far.

Sources: Zakwe, Ndlela, Xaba, Del-Grande, Walker and Madhanpal, pers. comm.

Conclusions on labour tenant reform

DLA seems to be in breach of the LTA on two counts: firstly, officials have used their discretionary powers to dismiss applications, and secondly, notices to landowners in respect of claims on their land have not been dispatched. However, not all applications contain the information that would enable DLA to issue the notices (Mngwengwe, pers. comm.). In some cases, this was because labour tenants were unable to supply all the information needed. These information gaps have jeopardised the chances of their applications being processed – one of the shortcomings of an application-based process. The minister has instructed DLA to expedite

the process of resolving labour tenant applications, and a district-by-district process of verification is planned for KwaZulu-Natal and Mpumalanga. This process is aimed at collecting sufficient information for notices to be issued and for projects to be developed.

Other challenges require more far-reaching interventions. The institutional weakness of DLA undermines the rights created in law. Labour tenants jeopardise existing relations with landowners by invoking these new rights. In this context, formidable institutional support is needed to give effect to these rights. It has been problematic that the tools of a discretionary grant-based programme are being applied in a rights-based programme to respond to the legally based applications of rights holders. In various ways, then, securing labour tenants' rights has proved to be far more complex than anticipated.

5. Consolidation of ESTA and LTA

At the 1999 ESTA Review Workshop, DLA officials recognised that some of the obstacles in implementing and enforcing ESTA were the result of fundamental problems with the way in which the law was conceived and written. They recognised that problems encountered in implementation were not only implementation problems *per se*, but were located at the level of policy and law (DLA 1999). A different approach was needed. Two reviews of the LTA in 1998 – one focusing on KwaZulu-Natal and the other on Mpumalanga – had reached similar conclusions and recommended that DLA review the law (Dlomo & Luphondwana 1998). According to these reports, the LTA was not only failing to provide long-term tenure security for most, it was in fact facilitating the alienation of labour tenants from their land.

Because the LTA combines an initial application process with general provisions to regulate eviction, it overlaps with ESTA. For this reason, the minister intends to 'consolidate' the two Acts by incorporating some aspects of the LTA into a new tenure security law. In early 2002, the minister appointed a task team of DLA officials to consider how this should be achieved. The reports from the 1999 ESTA Review Workshop and the Mpumalanga labour tenants study constitute their terms of reference. Using the concerns raised in these reports, the task team was instructed to develop draft legislation. Although initially termed a 'technical consolidation', the consolidated legislation is expected to depart from the existing laws in two ways:

- creating an independent form of tenure security for farm dwellers by altering the nature and content of rights of people living on farms, specifically by creating a category of non-evictable occupier
- overhauling the administrative and legal mechanisms for enforcing these rights, and developing alternative dispute resolution (ADR) mechanisms as the primary means of averting or responding to evictions (Mahomed, pers. comm.).

By the beginning of 2003, the legal drafting team had completed a fourth draft of what has been called the Tenure Security Laws Consolidation and Amendment Bill and, more than six months later, at the time of going to print, this is awaiting approval by the minister. On approval, it is to be published for public comment. Some NGOs and trade unions have complained that the drafting process has been a closed, even secretive, process thus far, with consultation being planned only once a draft Bill is completed. Provincial DLA officials also say that they want an



opportunity to influence the process and to draw on their experience of ESTA and LTA implementation to inform the new law.

6. Delivery targets and budgets

DLA's medium-term strategic and operational plan for the period 2002 to 2006 sets out detailed delivery targets and links these with budget targets. In addition, time frames for the development of policy and operational guidelines are established. The targets for delivery of land to labour tenants and farm workers are shown in Table 5.

Indicators	Targets 2002/03	Targets 2003/04	Targets 2004/05	Targets 2005/06
No. of farms transferred	125	96	134	142
No. of projects approved/completed	201	155	191	183
No. of hectares transferred	30 810	29 378	31 795	30 735
No. of households benefited	1 264	1 123	1 263	1 225

Source: DLA 2002a:16

It is not possible to report on whether the targets for financial year 2002/03 have been achieved, as the department does not record land transferred to farm dwellers. There is no budget specifically allocated to achieve these targets. All other delivery targets for the transfer of land are allocated budgets across the MTEF. In contrast, R442 million has been earmarked for the implementation of LRAD over the same period (DLA 2002a:23).

As part of its objective to provide rights in land, DLA aims to confirm security of tenure by dealing with ESTA and LTA eviction cases or threats of eviction. The targets, together with allocated budgets, are reflected in Table 6.

Indicators	Targets 2002/03	Targets 2003/04	Targets 2004/05	Targets 2005/06
Number of ESTA and LTA cases and/or eviction cases or threats completed	2 220	1 304	1 203	1 129
Budget R '000	Budget 2002/03	Budget 2003/04	Budget 2004/05	Budget 2005/06
	2 220	1 304	1 203	1 129

Source: DLA 2002a:25, 27

The budgets to achieve the targets for this scale of delivery seem low: intervention in each ESTA or LTA case involving threatened or actual evictions will cost the DLA R1 000 and this cost will remain at the same level (but decline in real rand terms) between 2002 and 2006.

7. Conclusions

There seem to be two strands to the discussions on the future of land reform for farm dwellers, informed by very different diagnoses of the problems. One view locates the shortcomings thus far firmly in the sphere of implementation and suggests that the way forward must be to invest further in enforcement. On the basis of this research, it seems that this has become a minority view within both DLA and the NGO sector. Another school of thought argues that the problems identified since the enactment of ESTA and the LTA stem from the weakness of the rights vested in farm dwellers, and so, while enforcement will always be a problem, rights cannot be secured as long as the fundamental inequalities in which social relations in the countryside are grounded remain intact. Both ESTA and the LTA are flawed pieces of legislation and have had unintended consequences, but legislative change cannot be expected to remedy all existing problems. Implementation and enforcement will need to be strengthened regardless of the form the new law takes.

This evaluation demonstrates a range of challenges that need to be addressed.

Farm tenure rights have been undermined by landowners' disdain for the law. ESTA aims to regulate evictions, which it has done, though unevenly and imperfectly. Evictions in some parts of the country are increasingly taking place through the legal route. The LTA aims to stop evictions – but has failed to do so – and to provide independent long-term rights. Labour tenants have been evicted illegally or through ESTA procedures. An unintended consequence of policy on farm dwellers' tenure rights has been to increase farmers' incentives to evict, while poor enforcement has meant that they have been able to do so, in violation of the law, with a degree of impunity.

Monitoring has been at best chaotic and, at worst, absent. A key finding of this study is the dysfunctional state of monitoring systems within DLA. It is not possible to comment on the profile of beneficiaries of farm tenure reform because this information is not recorded, except to say that women face the greatest obstacles to securing their tenure rights due to the gendered nature of farm labour markets and biases of employers. Further exploration of this is needed if future systems are to improve on experience to date. In the absence of reliable information on the extent of and trends in illegal, as well as legal, evictions no reliable impact assessment is possible.

The focus on rights has come at the cost of a developmental approach. There is little evidence that reforms to farm tenure have contributed towards the livelihoods of the rural poor, though they have partially protected the erosion of livelihoods by regulating and, in a few cases, preventing evictions. There have been achievements: a small number of labour tenant claims finalised and land transferred, a number of off-site low-cost housing settlements, and a few on-site equity and land-sharing projects. There remain enormous opportunities – as yet untapped – to develop innovative solutions that link rights with substantive opportunities for independent tenure and land-based livelihoods, but at present these have been restricted to ad hoc localised initiatives, often shaped by the interests of owners.

Rights-based land reform requires institutions capable of enforcing these rights. The status of the land rights of people occupying farmland has been legally improved, though the nature of these rights is highly procedural and the obstacles to realising them significant. There is evidence that institutions responsible for implementation and enforcement do not



have the staff capacity to discharge their duties. There is also evidence of weak coordination between DLA, Regional Land Claims Commissions, municipalities, the police and courts. Experience tells us a great deal about two very different legal approaches to improving the land rights of farm dwellers. While the labour tenant process is an application-based approach, ESTA provides statutory rights that can be invoked when occupiers' tenure is threatened. Neither has made major inroads into the distribution of power and resources in rural areas.

There is a contradiction between rights and reliance on grants to purchase land. At the heart of farm tenure debates is the question of whether land reform should secure farm dwellers' tenure rights by strengthening rights to land currently occupied or by enabling them to acquire their own land – securing tenure by becoming owners. When compared to the powers of the LTA, ESTA has been described as 'toothless', but neither law has provided secure tenure for people living on-farm, nor have they provided secure and viable alternatives for people off-farm. The purchase of land is assisted through DLA grants that have been made available on a discretionary basis. This effectively means that occupiers and labour tenants have no stronger entitlement than any other applicant for redistribution grants.

The availability of land has presented an obstacle to farm tenure reform. There is a need to make available to farm dwellers and labour tenants parcels of land of appropriate size and infrastructure. Overcoming the obstacles to subdividing land remains centrally important and has not been addressed in a systematic way. Together with the low level of the grants, large property sizes have forced farm dwellers to form large groups in order to acquire land – or to opt for low-cost housing in urban areas. In this way, the tenure reform process has become enmeshed with requirements and technical planning considerations resembling the redistribution programme, which are inappropriate when 'applicants' have pre-existing rights to the land.

The state's position on farm dwellers' tenure rights appears ambivalent. On the one hand, there is a strong message from within DLA that ESTA is unimplementable, that DLA as an institution cannot make it work and is unable to build effective relations with other institutions that also have a part to play – specifically the police, magistrates, the Legal Aid Board and Justice Centres, as well as municipalities and the Department of Housing. On the other hand, DLA has initiated a process not only to consolidate ESTA and the LTA but also to strengthen the rights contained in these laws and build into the new legislation clear lines of responsibility for enforcement – including the creation of an alternative dispute resolution mechanism. How this contradiction will be resolved is not a foregone conclusion. Meanwhile, farm tenure is a severely under-resourced area, indicating its low priority status. To date, budgets have not been ring-fenced, but in DLA's strategic plan for the MTEF 2002–2006, minimal budgets are allocated. These anticipate a steady or declining rate of projects over this period.

Tenure reform needs to be redistributive rather than confirming the status quo. A central challenge for land reform is to develop new ways of making further land and related resources available to farm dwellers in order to promote economic activities and the capacity of farm dwellers to generate viable livelihoods off the land. Reforming farm tenure must therefore not merely aim to secure the meagre resources to which farm dwellers currently have access, but must use this as a basis for redistributive land reform for farm dwellers, by expanding poor people's access to and control over land and related resources in rural areas.

Endnotes

1. Amending Sections 1(1), 6(dA) and 6(5) of ESTA.
2. However, common law evictions granted by magistrates' courts, where a defence has been mounted in terms of ESTA, must be sent for review by the LCC in order for the court to confirm that the magistrate was correct in rejecting the argument that ESTA was applicable. This was determined in the LCC judgment of *Skhosana v. Roos t/a Roos se Oord and Others*, case no. LCC50/99, obtained from the LCC website at <http://wwwserver.law.wits.ac.za/lcc/files/skhosana/skhosana.pdf>
3. These examples are drawn from cases dealt with by the Centre for Rural Legal Studies and Lawyers for Human Rights in the Western Cape and Nkuzi Development Association in Limpopo.
4. The LCC does *not* retain information on whether occupiers were represented by legal counsel during their eviction proceedings in magistrates' courts. It is only able to report on whether occupiers were represented when their cases were heard on review at the LCC, and even then, only keeps this information for those cases where the eviction was set aside. Where the eviction order was confirmed, the LCC returns the entire case file to the relevant magistrates' court and this information is lost.
5. ESTA/LTA network meeting, Pretoria, 10 April 2003.
6. See *Joint Ventures* by David Mason (report no. 7) in this series.

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Appendix A: List of key informants

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Terence Fife	Director, Western Cape PLRO
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Mpumi Gqalane	Northern Cape PLRO
Donna Hornby	Legal Entity Assessment Project
Maurice Khoza	Eastern Cape PLRO
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Vela Langa	Tenure Security Coordinating Committee, KwaZulu-Natal
Essy Letsoalo	Director, Limpopo PLRO
Domini Lewis	Association for Rural Advancement
Dan Mabokela	Farm Worker Coordinator, National Land Committee
Anwar Madhanpal	Regional Manager, KwaZulu-Natal PLRO
Ashraf Mahomed	Legal Resources Centre
Mpho Mahura	North West PLRO
Monty Malebye	North West PLRO
Malesela Manaka	Limpopo PLRO
George Mashimbye	Attorney, Nkuzi Development Association, Limpopo
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Thabi Shange	Regional Land Claims Commissioner, KwaZulu-Natal
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