

REPUBLIC OF SOUTH AFRICA

EXTENSION OF SECURITY OF TENURE AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 39232 of 25 September 2015)
(The English text is the official text of the Bill)*

(MINISTER OF RURAL DEVELOPMENT AND LAND REFORM)

[B 24—2015]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Extension of Security of Tenure Act, 1997, so as to amend and insert certain definitions; to substitute the provision of subsidies with tenure grants; to further regulate the rights of occupiers; to provide for legal representation for occupiers; to further regulate the eviction of occupiers by enforcing alternative resolution mechanisms provided for in the Act; to provide for the establishment and operation of a Land Rights Management Board; to provide for the establishment and operation of Land Rights Management Committees to identify, monitor and settle land rights disputes; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 62 of 1997, as amended by section 20 of Act 61 of 1998, section 6 of Act 51 of 2001 and section 35 of Act 4 of 2011

1. Section 1 of the Extension of Security of Tenure Act, 1997 (hereinafter referred to as the principal Act), is hereby amended—

- (a) by the insertion before the definition of “consent” of the following definition:
“**‘Board’** means the Land Rights Management Board established in terms of section 15A;”;
- (b) by the insertion after the definition of “court” of the following definition: 10
“**‘dependant’** means a family member whom the occupier has a legal duty to support;”;
- (c) by the insertion after the definition of “evict” of the following definition:
“**‘family’** means the occupier’s spouse, and includes—
(i) a spouse in a customary marriage, whether or not the marriage is registered; 15
(ii) a child, including an adopted child;
(iii) a grandchild;
(iv) a parent; and
(iv) a grandparent, 20
who are dependants of the occupier and who reside on the land with the occupier;”;

- (d) by the insertion after the definition of “Land Claims Court” of the following definition:
 “**‘Land Rights Management Committees’** means the Land Rights Management Committees contemplated in section 15H;”;
- (e) by the substitution for the definition of “Minister” of the following definition: 5
 “**‘Minister’** means the Minister [of] responsible for Rural Development and Land Reform [or an officer of the Department of Rural Development and Land Reform who has been designated by the Minister either generally or in respect of a particular case, or in respect of cases of a particular nature: Provided that the powers referred to in section 28 shall be excluded from any such designation];”;
- (f) by the substitution for the definition of “municipality” of the following definition:
 “**‘municipality’** means a municipality as defined in section 1 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000);”;
- (g) by the substitution for the definition of “occupier” of the following definition:
 “**‘occupier’** means a person residing on land which belongs to another person, and who [has or], on 4 February 1997 or thereafter, had consent or another right in law to do so, but excluding— 20
 (a) . . .
 (b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and 25
 (c) a person who has an income in excess of the prescribed amount;”;
- (h) by the insertion after the definition of “regulation” of the following definition: 30
 “**‘reside’** means to live at a place permanently, and **‘residence’** has a corresponding meaning.”.

Amendment of section 4 of Act 62 of 1997, as amended by section 21 of Act 61 of 1998

2. Section 4 of the principal Act is hereby amended— 35
- (a) by the substitution for the heading of the following heading:
 “**[Subsidies] Tenure grants**”;
- (b) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:
 “The Minister shall, from moneys appropriated by Parliament for that purpose and subject to the conditions the Minister may prescribe in general or determine in a particular case, **[grant subsidies]** provide tenure grants—”;
- (c) by the deletion in subsection (1) of the word “and” at the end of paragraph (b) and the addition of the following paragraphs: 45
 “(d) to enable occupiers and former occupiers to acquire suitable alternative accommodation; and
 (e) to compensate owners or persons in charge for the provision of accommodation and services to occupiers and their families.”;
- (d) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words: 50
 “**In deciding whether to approve an application for a [subsidy] tenure grant, and if so, the priority to be given to that application, the Minister shall have regard to the extent to which an application complies with the following criteria:**”;
- (e) by the deletion in subsection (2) of paragraph (c); 55
 (f) by the deletion in subsection (2) of the word “and” at the end of paragraph (e);
 (g) by the substitution in subsection (2) for paragraph (f) of the following paragraph:

- (f) there is an urgent need for the development or suitable alternative accommodation because occupiers have been evicted or are about to be evicted[:]; and”;
- (h) by the addition in subsection (2) of the following paragraph:
 “(g) the provision of accommodation and services contemplated in subsection (1)(e) entails a mutual accommodation of the interests of occupiers and owners:”; and
- (i) by the substitution for subsections (3), (4), (5) and (6) of the following subsections, respectively:
- “(3) Where the persons who are intended to benefit from a development have been identified, a **[subsidy] tenure grant** shall not be **[granted]** provided unless the Minister has been satisfied that the development is acceptable to a majority of the adults concerned.
- (4) The Minister may, for the purposes of this section, **[grant subsidies]** provide tenure grants through an agreement with a provincial government or a municipality, or a person or body which he or she has recognised for that purpose, where—
- (a) a provincial government or a municipality or such person or body will facilitate, implement or undertake or contract with a third party for the facilitation, implementation or undertaking of a development or suitable alternative accommodation; or
- (b) the **[subsidy] tenure grant** is paid to the provincial government or a municipality or such person or body to enable it to facilitate, implement or undertake or contract with a third party for the facilitation, implementation or undertaking of a development or for the provision of suitable alternative accommodation.
- (5) No transfer duty shall be payable in respect of any transaction for the acquisition of land in terms of this section or in respect of any transaction for the acquisition of land which is financed by a **[subsidy] tenure grant** in terms of this section.
- (6) A potential beneficiary of a development or of suitable alternative accommodation may apply for a housing subsidy as provided for in terms of **[sections 10A, 10B, 10C and 10D of the Housing Act, 1966 (Act No. 4 of 1966)]** the Housing Act, 1997 (Act No. 107 of 1997).”.

Amendment of section 6 of Act 62 of 1997, as amended by section 7 of Act 51 of 2001

3. Section 6 of the principal Act is hereby amended—

- (a) by the insertion in subsection (2) after paragraph (dA) of the following paragraph:
 “(dB) to take reasonable measures to maintain the dwelling occupied by him or her or members of his or her family;”; and
- (b) by the substitution for subsection (4) of the following subsection:
 “(4) Any person shall have the right to visit and maintain, or erect a tombstone on, mark, place symbols or perform rites on, his or her family graves on land which belongs to another person, subject to any reasonable condition imposed by the owner or person in charge of such land in order to safeguard life or property or to prevent the undue disruption of work on the land.”.

Amendment of section 9 of Act 62 of 1997, as amended by section 10 of Act 11 of 2000 and section 36 of Act 4 of 2011

4. Section 9 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

- “(1) Notwithstanding the provisions of any other law an occupier may be evicted only—
- (a) in terms of an order of court issued under this Act, and
 - (b) if such occupier was legally represented at the proceedings in terms of which such a court order was issued unless—
 - (i) such occupier expressly waived his or her right to obtain state funded legal representation; or
 - (ii) the court determined that the interests of justice would not be harmed by lack of legal representation.”.

Amendment of section 10 of Act 62 of 1997, as amended by section 25 of Act 61 of 1998

5. Section 10 of the principal Act is hereby amended by the deletion in subsection (1) of the word “or” at the end of paragraph (c), insertion of the word “or” at the end of paragraph (d) and the addition of the following paragraph:

- “(e) the owner or person in charge or the occupier have attempted mediation to settle the dispute in terms of section 21 or referred the dispute for arbitration in terms of section 22, and the court is satisfied that the circumstances surrounding the order for eviction is of such a nature that it could not be settled by way of mediation or arbitration.”.

Amendment of section 11 of Act 62 of 1997, as amended by section 25 of Act 61 of 1998

6. Section 11 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

- “(2) In circumstances other than those contemplated in subsection (1), a court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997, if—
- (a) ~~[it]~~ the court is of the opinion that it is just and equitable to do so; and
 - (b) the owner or person in charge of the land and the occupier have attempted mediation to settle the dispute in terms of section 21 or referred the dispute for arbitration in terms of section 22, and the court is satisfied that the circumstances surrounding the order for eviction is of such a nature that it could not be settled by way of mediation or arbitration.”.

Amendment of section 12 of Act 62 of 1997

7. Section 12 of the principal Act is hereby amended by the deletion in subsection (1) of the word “and” at the end of paragraph (a), addition of that word at the end of paragraph (b) and addition of the following paragraph:

- “(c) determine reasonable weather conditions under which an eviction order may be carried out.”.

Insertion of Chapter IVA in Act 62 of 1997

8. The following Chapter is hereby inserted in the principal Act after Chapter IV:

“CHAPTER IVA

LAND RIGHTS MANAGEMENT BOARD

Establishment of Board

15A. The Land Rights Management Board is hereby established.

Composition of Board

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15B. (1) The Board consists of a chairperson, deputy chairperson and such other number of members determined and appointed by the Minister.

(2) A member of the Board is appointed for such a period and either full-time or part-time, as determined by the Minister in a letter of appointment: Provided that a member may not be appointed for more than two consecutive terms. 10

(3) A member of the Board must—

- (a) be a fit and proper person to hold office as a member; and
- (b) have appropriate qualifications and relevant experience.

(4) The Board must— 15

- (a) be representative of the communities and interests affected by this Act; and
- (b) have not less than 50% women members.

(5) Before the Minister appoints members of the Board in terms of subsection (1), the Minister must by notice in two newspapers and the *Gazette* invite all interested persons to submit, within the period and in the manner mentioned in the notice, the names of persons fit to be appointed as members of the Board. 20

(6) The Minister must appoint a nomination committee to make recommendations to the Minister for the appointment of members of the Board. 25

(7) In establishing a nomination committee, the Minister must ensure that the committee is broadly representative of the various racial groups and geographic areas of the Republic and that both males and females are represented. 30

(8) The deputy chairperson of the Board must act as chairperson in the absence of the chairperson of the Board.

(9) (a) The Board may determine the proceedings at its meetings as it may deem fit, and must cause minutes of such proceedings to be kept.

(b) A majority of the members of the Board is a quorum for a meeting of the Board. 35

Functions of Board

15C. (1) The Board shall—

- (a) advise the Minister and Director-General on tenure security matters in respect of commercial farming areas, rural freehold and communal areas; 40
- (b) guide and oversee the Land Rights Management Committees in the execution of their functions in terms of this Act;
- (c) create and maintain a data base of occupiers, land rights disputes and their resolution as well as evictions, which must contain such additional information as may be prescribed; 45
- (d) provide for the mediation and arbitration of land rights disputes arising from the application of this Act;
- (e) facilitate the implementation of information dissemination measures to develop awareness of the provisions of this Act; 50
- (f) monitor and evaluate the impact of related laws, in relation to the functions of the Board;
- (g) create mechanisms for the provision of legal assistance and legal representation to affected persons in terms of this Act;
- (h) formulate a means test governing situations in which the Board will fund legal assistance and mediation; 55

- (i) identify and recommend acquisition of land for settlement or resettlement of occupiers, including facilitation of the implementation of section 4;
 - (j) facilitate the provision of municipal services on the acquired land, in consultation with the municipality concerned; and
 - (k) generally deal with any other matter referred to it by the Minister.
- (2) The Board shall involve all the various structures and representatives of organisations with vested interests in land within the commercial farming areas, to promote effective ways of monitoring and mediating land rights disputes.
- (3) The Board may delegate its functions, except the functions contemplated in subsection (1)(a), (b) and (g), to the Land Rights Management Committees.

Remuneration of members of Board

- 15D.** (1) The remuneration, allowances and other terms and conditions of appointment and service benefits of members of the Board must be determined by the Minister in consultation with the Minister of Finance, taking into account—
- (a) the role, duties and responsibilities of a member of the Board;
 - (b) affordability in relation to the responsibilities of the Board; and
 - (c) the level of expertise and experience required from a member of the Board.
- (2) Conditions of appointment may differ in respect of—
- (a) the chairperson and other members of the Board;
 - (b) full-time and part-time members; or
 - (c) any other appropriate circumstances.

Disqualification from membership

- 15E.** A person may not be appointed as a member of the Board if he or she—
- (a) is an unrehabilitated insolvent;
 - (b) has been declared by a court to be mentally ill;
 - (c) has been convicted of an offence in the Republic or elsewhere and was sentenced to imprisonment for a period exceeding 12 months without the option of a fine, other than an offence committed prior to 27 April 1994 associated with a political objective for which amnesty was granted by the Truth and Reconciliation Commission;
 - (d) is a member of the National Assembly, a provincial legislature or any municipal council, or is a delegate to the National Council of Provinces;
 - (e) is not a citizen of, or does not have the right of permanent residence in, the Republic; or
 - (f) has, as a result of improper conduct, been removed from a position of trust by a competent court of law.

Vacation and removal from office

- 15F.** (1) A member of the Board must vacate office if—
- (a) he or she becomes disqualified in terms of section 15E;
 - (b) he or she resigns; or
 - (c) he or she has been absent, without leave of the chairperson, from more than two consecutive meetings of the Board.
- (2) (a) If a member of the Board dies or vacates his or her office before the expiry of the period for which he or she was appointed, the Minister must appoint a person to fill the vacancy for the unexpired term for which such member had been appointed.
- (b) The provisions of section 15B(2) to (7) apply to the filling of a vacancy in terms of paragraph (a).

(3) (a) Subject to the provisions of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), the Minister may remove a member of the Board on the grounds of misconduct, incapacity or incompetence.

(b) A decision to remove a member of the Board on the grounds of misconduct or incompetence must be based on a finding to that effect by an investigative committee appointed by the Minister.

(c) The Minister may suspend a member of the Board who is under investigation in terms of paragraph (b).

Support to and reports by the Board

15G. (1) (a) The Director-General must provide administrative and financial support to the Board so as to enable the Board to perform its functions in terms of this Act.

(b) The Board may, with the approval of the Director-General and subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999), appoint a person or institution to assist the Board or a Land Rights Management Committee in the execution of its functions.

(2) The Board must quarterly, or when requested by the Minister, provide a comprehensive report on its activities to the Minister.

Land Rights Management Committees

15H. (1) (a) The Minister may, on the recommendation of the Board, establish Land Rights Management Committees and determine their areas of operation.

(b) The number of such committees and the number of members of each committee must be determined by the Minister after consultation with the Board.

(2) (a) The Committees shall be composed of representatives of occupiers, labour tenants, communal property associations, various land owners, officials from the Department of Rural Development and Land Reform, state institutions with vested interests in land matters, various relevant non-government organisations and civil society organisations, local farming and business development agencies, organised labour and representatives of the local government structures.

(b) The Board must, after consultation with the Director-General and having regard to the provisions of paragraph (a), nominate the persons to be appointed as members of a committee.

(c) The persons identified in terms of paragraph (b) must be appointed by the Minister.

(3) The Committees shall—

(a) identify and monitor land rights disputes observed through adequate participation of all actors whose relative rights are contested;

(b) take steps to resolve a dispute referred to in paragraph (a);

(c) in the event that a dispute cannot be resolved, refer such dispute to the Board;

(d) assist the Board in—

(i) providing the information necessary to populate the data base contemplated in section 15C(1)(c);

(ii) identifying land referred to in section 15C(1)(i); and

(e) perform such functions as delegated to it in terms of section 15C(3).”.

Amendment of section 21 of Act 62 of 1997

9. Section 21 of the principal Act is hereby amended by the insertion of the following subsection after subsection (3):

“(3A) The Director-General may refer the disputes contemplated in this section to the Board for mediation or arbitration as contemplated in section 15C(1)(d).”.

Amendment of section 28 of Act 62 of 1997

10. Section 28 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) general conditions for the **[granting of subsidies]** provision of tenure grants in terms of section 4;”.

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Short title and commencement

11. This Act is called the Extension of Security of Tenure Amendment Act, 2015, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF EXTENSION OF SECURITY OF TENURE AMENDMENT BILL, 2015

1. BACKGROUND

- 1.1 Despite the existing legislation on evictions, land rights protection and land access programmes, a significant proportion of the population, including occupiers, still face insecure tenure and other forms of land rights violations including evictions from their homes.
- 1.2 The Extension of Security of Tenure Act, 1997 (Act No. 62 of 1997) (ESTA), in its current form has a number of limitations that make it easier for farm dwellers to be evicted by landowners. Firstly, the concept of “occupier” which is used in law is too broadly defined and interpreted. For instance, by categorising some farm dwellers as the main or primary occupiers while others (for example wives and children) are considered secondary occupiers, the law wrongly exposes large populations of vulnerable occupiers’ families to undue eviction processes. This vulnerability arises especially upon the death of “primary occupiers”.
- 1.3 In addition, ESTA fails to provide clarity around the general concept of residence. Many farm dwellers have established home bases in commercial farming areas while working in other places of the country including in mines and urban areas.
- 1.4 There is also no clear and adequate obligation on providing alternative accommodation for those that have been evicted.
- 1.5 It has furthermore been found that the existing institutional arrangements and capacities have also not been sufficient to address the quality and scale of land rights conflicts and tenure securities found in commercial farming areas. In order to address this shortcoming it is proposed that the Land Rights Management Board (LRMB) be established as a stakeholder forum to institutionalise land rights management and land dispute resolution, in order to promote the effective realisation of land tenure security among all actors within freehold land tenure areas. In order to assist the LRMB in the execution of its functions it is proposed that Land Rights Management Committees (LRMC’s) be established at the district level to strengthen participation in land reform and rural development processes. The LRMC’s will also explore and attempt to resolve local land rights conflicts.
- 1.6 In order to deal with the challenges outlined above, it is proposed that the ESTA be amended as indicated in paragraph 2.

2. STRUCTURE OF BILL

- 2.1 Clause 1 of the Bill proposes amendments to certain definitions and the insertion of definitions of “dependant”, “family” and “reside”.
- 2.2 Clause 2 proposes the substitution of section 4 of ESTA so as to provide for tenure grants with a view to promoting long term tenure security. This clause replaces the existing provision regarding subsidies, and in addition to those matters for which subsidies could be granted, also provides for tenure grants—
 - (a) to enable occupiers and former occupiers to acquire suitable alternative accommodation; and
 - (b) to compensate owners or persons in charge for the provision of accommodation and services to occupiers and their families.
- 2.3 Clause 3 proposes an amendment to section 6 of ESTA so as to provide that —
 - (a) an occupier has the right to take reasonable measures to maintain the dwelling occupied by him or her or his family; and

(b) any person shall have the right to erect a tombstone on, mark, place symbols or perform rites on his or her family graves.

- 2.4 Clause 4 proposes an amendment to section 9 of ESTA so as to provide that a court may only issue an eviction order if the occupier concerned was legally represented, unless the occupier waived such right or the court determines that the interest of justice would not be harmed by the lack of such representation.
- 2.5 Clauses 5 and 6 propose an amendment to sections 10 and 11 of ESTA so as to provide that before an eviction order is granted, the parties must have attempted to mediate and settle the dispute or must have referred the dispute for arbitration.
- 2.6 Clause 7 amends section 12 of ESTA so as to add another requirement for the court to implement when dealing with evictions of occupiers. The amendment provides that the court that orders the eviction of an occupier shall take cognisance of weather conditions under which an eviction order may be carried out.
- 2.7 Clause 8 proposes the insertion of a new Chapter IVA, which provides for the establishment of a Land Rights Management Board to advise the Minister and Director-General on tenure security matters, amongst others. The new Chapter IVA also proposes the establishment of Land Rights Management Committees, to identify and monitor land rights disputes observed through adequate participation of all actors whose relative rights are contested, and to take steps to resolve the dispute, amongst others.
- 2.8 Clause 9 proposes an amendment to section 21 of ESTA so as to provide for the referral of a dispute to the Board by the Director-General.
- 2.9 Clause 10 proposes an amendment to section 28 of ESTA so as to provide for the general conditions for the provision of tenure grants.
- 2.10 Clause 11 contains the short title and commencement.

3. DEPARTMENTS AND INSTITUTIONS CONSULTED

The following Departments and institutions were consulted:

- (a) Land Non-Government Organisations;
- (b) Organised Agriculture;
- (c) Agri-Business Chamber;
- (d) South African Local Government Association;
- (e) WARD;
- (f) Department of Human Settlements;
- (g) Department of Agriculture, Forestry and Fisheries;
- (h) Human Rights Watch; and
- (i) Law Society of South Africa.

4. FINANCIAL IMPLICATIONS FOR THE STATE

The Department of Rural Development and Land Reform is in the process of finalising a Regulatory Impact Assessment. Once this process has been finalised the estimated financial implications will be provided.

5. PARLIAMENTARY PROCEDURE

- 5.1. The State Law Advisers and the Department are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution, since it contains no provision to which the procedure set out in section 74 or section 76 of the Constitution applies. In other words, the Bill **does not** deal with any of the matters listed in Schedule 4 to the Constitution (functional areas of concurrent national and provincial legisla-

tive competence) wherein the procedure established by section 76 of the Constitution would apply.

- 5.2. The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.