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Waiting for a Revolution

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By Teresa C. Yates

"Land reform does not happen immediately unless you have a complete revolution." So went the response of a lawyer, contracted to assist the South African Department of Land Affairs with implementation of its new Extension of Tenure Security Bill, to complaints about the Bill's many shortcomings.

South Africans, white and nonwhite, accepted compromise in return for a peaceful transition to democratic rule. One of the results has been legislation that attempts to accommodate the concerns of all interested parties — and, in the end, satisfies no one. The Extension of Tenure Security Bill is an example.

Tenure reform is the most laggard segment of the South African Land Reform Program. When I arrived here last year a core-group of experts was charged with formulating tenure policy for the Department of Land Affairs (DLA). That group has since disbanded, and a new "National Tenure Directorate" is advising the Minister on national policy.

In July 1996, the DLA launched tenure case-studies in all of the provinces except the one in which I live and work, the Northern Province. The purpose of the case-studies was to assist the DLA in its drafting of policy and legislation. None of the case-studies is complete, but the DLA tabled its Extension of Tenure Security Bill on June 17, 1997. This legislation, if passed by Parliament, will be the cornerstone of DLA tenure policy.

A group called the Northern Province Coalition, which has been trying to help blacks reclaim land taken from them during some 80 years of apartheid and protect them against eviction while the claims are pending, learned belatedly that written submissions from groups such as theirs would be accepted by the Parliamentary committee working on the legislation. I was invited to a coalition meeting and discovered that I was the only person in the room who had read the Bill. A vote was taken to send a submission to the committee, and I was asked to draft it.

The result follows. I have put the text of relevant parts of the original Bill in bold-face type and brackets so that readers can understand the suggested changes.

SUBMISSION

The Northern Province Coalition on the Extension of Tenure Security Bill is a group of Provincial NonGovernmental Organizations (NGOs) and Labour Unions concerned with the rights of the poor and landless. The member organizations of the Coalition: The Nkuzi Development Association; The Land Research Unit; Lawyers for Human Rights; The South African Agricultural, Plantation and Allied Workers Union; The NGO Coalition; The Law & Farmworkers Research Institute for Applied Labor; The Northern Province Rural Development Forum; The Vhembe Human Rights Centre; and The Mankweng Legal Bureau. We hereby offer the following opinion of the Extension of Tenure Security Bill as our joint submission to the Port-

folio Committee on Land Affairs.

The Northern Province is widely regarded as the poorest and most rural of South Africa's nine provinces, The implications of this bill are therefore of great concern to the members of this coalition.

Our comments and suggestions are intended to move the bill toward true extension of tenure, which in our opinion means ownership for the majority of occupiers rather than leaving it as it is, which is simply a bill that regulates occupation of and eviction from privately owned land.

We will use examples of actual eviction cases in the Northern Province that we have been dealing with to illustrate some of our points.

I. GENERAL COMMENTS

[Chapter 1 section (iv) of the original Bill provides that the "effective date" means February 1997]

1. The effective date of the bill should be retroactive to 1992.

The bill does not take into account unfair evictions prior to 4 February 1997. For decades, farm dwellers have been the victims of unfair evictions. This bill should provide a mechanism for those evicted any time during the past five years to claim restoration of those rights which were lost.

Example: Seven families on Poggio farm near Moeketsi were evicted last year. The families had lived on the farm for generations, working for themselves, then as labour tenants when whites came to occupy the land, and then as farmworkers for low wages when labour tenancy was abolished in the 1960s.

The houses and personal property of these families were destroyed before they could salvage anything and they were forced to leave the land. One old woman had to be carried out of her house as the bulldozers arrived.

If this Bill were retroactive beyond 4 February 1997 this community would have been able to rely on the Extension of Tenure Security Bill to negotiate their continued occupation of the land. If the Bill remains as it is, many other communities dispossessed of their right to occupy land they were born on and lived on all their lives will have no legal mechanism to have their tenure rights restored. There are many other communities in the Northern Province that have been similarly evicted and who have no recourse under this bill.

2. Rights of occupation should be determined on an individual basis.

The bill creates categories of secondary occupiers whose rights derive from primary occupiers who are employed by the owner, or who are 60 years old and have lived on the land for more than 20 years. The right of occupancy of secondary occupiers should be determined on their own merits, taking into consideration their length of occupation. A person who has lived on a farm for many years and is not yet

60 years old should not be faced with eviction if his/her spouse or parent is evicted or dies.

3. The Bill should provide a mechanism to move long-term farm dwellers toward ownership of land

Farm dwellers who have lived on land for twenty years or more should obtain rights of ownership, not just the usufruct rights that currently exist in the bill. Landowners should be compelled to provide farm dwellers who have resided on land for twenty years or more with title to the land that they occupy. This could be done through a voluntary arrangement with the landowner, or through the Minister of Land Affairs' power of expropriation.

4. The right of occupation should not be linked to employment.

The bill does not address problems of tenure security that are prevalent in rural communities in the Northern Province. Farmworkers are the poorest section of the labour force. Their right to occupy land should not simply be tied to employment, without taking into account any other criteria, particularly the length of time they have lived on the land.

Example: Mrs. Moko has lived in the same place for 38 years. She has worked on the farm for 29 of those years. Mrs. Moko has five children and grandchildren. She was recently dismissed and told to leave the farm. Mrs. Moko is not yet sixty years old (she is in her forties) and is therefore not protected by section 8(4) of the bill, even though she has lived on the land for more than twenty years.

Mrs. Moko has filed a claim for unfair dismissal under the Labour Relations Act with the CCMA. Her labour claim is unlikely to result in a resumption of her employment with the owner of the farm. If her labour claim succeeds she is likely to be awarded some compensation, but Mrs. Moko will still have to leave the farm.

Mrs. Moko earned R150 (U.S.\$50) per month until 1996, at which time her wage was raised to R160. With this small amount of money she has had to support herself and her children. Mrs. Moko has no money saved and she does not know where she will go if she is forced to leave the only home she has known for the past 38 years.

The bill, in not taking into account the length of time people have occupied land when employment agreements are ended, fails to provide security for long-term occupiers like Mrs. Moko.

5. Redress should not lie with the courts.

Magistrate's courts in rural communities are often staffed by people who are landowners themselves, or part of the same social circles as landowners. The magistrate's courts in the Northern Province are notorious for their bias in favour of white landowners. We therefore propose that special eviction boards be created to hear only eviction cases. These boards could be structured similarly to the conciliation and arbitration board under the Labour Relations Act.

6. Subsidy grants should not be linked only to the R15,000 redistribution and housing grants.

It is not clear whether the subsidies provided for in the bill are the same R15,000 grants that poor people are entitled to apply for to purchase land or housing. Any subsidies that are granted under this bill should enable victims of eviction to purchase and settle on land that is comparable to the land that they are forced to leave. This is unlikely to be possible if the subsidies are limited to R15,000 per household.

II. COMMENTS ON SPECIFIC SECTIONS OF THE BILL

7. Definitions

[Chapter 1, section ix: "occupier means a person residing on land which belongs to another person, and who has or on the effective date had the express or tacit consent of the owner or person in charge to occupy such land, or has or on that date had another right in law to reside on such land, but excluding —

(a) a labour tenant as defined in section 1 of the Land Reform(Labour Tenants)Act, 1996 (Act No. 3 of 1996);

(b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes;]

Recommendations

"occupier" should include persons "who are residing on land which belongs to another person ... on or after the effective date..." If a person moves onto land after 4 February 1997 and occupies the land with the express or tacit consent of the owner for one year or longer, the person would satisfy the criteria for consent set forth in Section 3(4) and would therefore fit the requirements of the act except for his/her occupation of the land on the effective date.

If the intent of the bill is to give protection to this category of occupiers, then it should be made clear in the definition.

The exclusion of people who are using the land for "commercial or commercial farming purposes" from the definition of "occupier" would seem to include anyone whose only source of income comes from selling part of his/her crops. It is not clear whether such people would fall within the category of "commercial farmers." If small-scale "commercial" farmers are excluded from the definition of occupier then the effect of this bill will be to deprive many people in the Northern Province of their only source of income.

We would like to believe that the intent of this exclusion is to prevent development of larger commercial enterprises rather than small-scale farming projects. If this is the case, then it should be made clear in the definition.

8. Section 3(5)

[Section 3(5): The provisions of subsection (4) shall not

be applicable to any land held by the State or an organ of state.]

This section should be deleted. Occupiers of state-owned land should have the same protection against unjust evictions as occupiers of private land. This is particularly relevant in the Northern Province where the majority of the population occupy land that was formerly part of Venda, Gazankulu or Lebowa, three former bantustans. All of this land, which was formerly held by the South African Development Trust, is now "owned" by the state. By excluding state land from this section, the majority of occupiers in this Province are afforded no protection under this bill.

9. Section 6 (2)(b)(i)

[Section 6 (2): Without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with the rights of the owner or person in charge, an occupier shall have the right —

(i) to receive *bona fide* visitors at reasonable times and for reasonable periods: Provided that—

the owner or person in charge may impose reasonable conditions that are normally applicable to visitors entering such land in order to safeguard life property or to prevent the undue disruption of work on the land;]

The Section and subSection should simply give occupiers the right to have visitors. The limitations that can be imposed on that right should not be any more than the limitations that could be placed on an individual's constitutional right to freedom of association, which right is restated in section 5 of this bill.

10. Section 6(2)(b)(ii)

[Section 6(2)(b):

(ii) The occupier shall be liable for any act, omission or conduct of any of his or her visitors causing damage to others while such a visitor is on the land if the occupier, by taking reasonable steps, could have prevented such damage]

This section should be deleted. If these are not limitations that could be imposed on an individual's constitutional right, then they should not be limitations placed in this bill.

11. Section 6(3)(a)

[Section 6(3)(a):

(3) An occupier may not—

(a) intentionally harm any other person occupying the land;]

Should be deleted. If an occupier commits assault, or some other criminal offence then there are criminal laws which will apply. Such crimes should not be

linked to a person's right to occupy land.

12. Section 6(3)(b)

[Section 6(3)(b):

(b) intentionally or negligently cause material damage to the property of the owner or person in charge;]

Should be deleted. As with criminal law offences, common-law offences should not be linked with rights of occupation.

13. Section 6(3)(e)

[Section 6(3)(e):

(e) enable or assist unauthorised persons to establish new dwellings on the land in question.]

Should not apply to immediate family members. This section should also be amended to read "assist unauthorised persons to establish new dwellings." "[E]nable" suggests that occupiers are expected to take affirmative action to stop the establishment of new dwellings. This is not a burden that occupiers should have to carry.

Furthermore, pressure on families in rural areas often necessitates establishing new dwellings in order to keep the families together.

This section could potentially conflict with Section 6(2)(d) of the bill, which guarantees occupiers the right to "family life." This right would be denied if an occupier's family is forced to leave the land because they cannot build new dwellings for them.

14. Section 7(1)

[Section 7(1): The owner or person in charge of land may have a trespassing animal usually in the care of an occupier impounded and removed to a pound in accordance with the provisions of any applicable law, if the owner or person in charge has given the occupier at least 72 hours notice to remove the animal from the place where it is trespassing and the occupier has failed to do so; Provided that the owner or person in charge may take reasonable steps to prevent the animal from causing damage during those 72 hours.]

The specific circumstances of the case must be taken into consideration before animals can be confiscated. The time that the occupiers have lived on the land and the length of time that they have maintained livestock on the land needs to be considered, as well as the "damage" that is being caused by the animals. In some instances if livestock have had calves there may be an increase in the numbers of animals on the land. In such an instance the owner must give the occupier time to make accommodation for the young calves, keeping in mind that young animals will need to remain with their mothers for some time after birth. Seventy-two hours would therefore be an unreasonable notice period in such an instance. The bill should also require that the owner pay rea-

sonable compensation for any confiscated animals. (See comment on Section 13 below).

15. Section 8(4)

[Section 8(4): The right of residence of an occupier who has resided on the land in question for twenty years and —

(a) has reached the age of 60 years; or

(b) is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge, may not be terminated unless that occupier has committed a breach contemplated in section 10(1)(a) or (c)]

This section creates a usufruct right for individuals who fall within a very limited category. The right created here is subject to the occupier not committing a breach under Section 10(1)(a) or (c).

Section 10(1)(a) provides that an occupier contemplated under Section 8(4) may be evicted if the occupier has breached Section 6(3). Section 6(3) provides that an occupier contemplated under Section 8(4) may be evicted if the occupier "intentionally or negligently cause[s] material damage to the property" or "unreasonably" interferes "with the use of the land by the owner or person in charge" or "enable[s] or assist[s] unauthorised persons to establish new dwellings on the land in question."

The occupiers would, thus, lose their usufruct rights if, for example their adult children remained on the land with them. In some instances owners have argued that ploughing fields, or collecting firewood constitute negligent and material damage to the property.

The "right" created under this section will be meaningless to the majority of farm occupiers if their families are forced to leave them, and they are prevented from ploughing fields for themselves.

16. Section 8(5)

[Section 8(5):

On the death of an occupier contemplated in subsection (4), the right of residence of his or her spouse or any dependent who resided on the land at the time of his or her death may be terminated only on 12 months' written notice to leave the land, unless such a spouse or dependent —

(a) has committed a breach contemplated in section 10(1); or

(b) is able to obtain suitable alternative accommodation.]

The right of an occupier to remain on land should not terminate upon the death of a spouse without considering other criteria such as length of time the spouse has lived on the land. This section places women in a particularly vulnerable position.

Example: Phineas Maake is 60 years old and has lived on the same farm all of his life. He is a former employee of the owner of the land. Under this section Phineas has usufruct rights in his residence.

Makwedi Maake, Phineas' wife, is 40 years old and has five children aged 14 - 26. She has lived on this land for 28 years all of her children were born there. If Phineas dies before Makwedi has reached her 60th birthday the owner can evict her and her children with, at most, 12 calendar months' notice.

Makwedi Maake should have a right to occupy that is directly related to the length of time that she has lived on the land. Her right should not be solely dependent on the length of her husband's life.

17. Section 8(7)(b)

[Section 8(7)(b):

If an occupier's right to residence has been terminated in terms of this section—

(b) The owner or person in charge may, pending an application for eviction, institute proceedings in a court for a determination of the terms and conditions of further residence, including payment of reasonable rent, having regard to the income and assets of all the members of the occupier's household to whom the termination applies.]

This Section should not apply to spouses and dependents of the occupier whose rights have been terminated. Or this section should be deleted.

18. Section 9(d)

[Section 9(d)

A court may make an order for the eviction of an occupier if —

(d) the owner or person in charge has given the occupier not less than two calendar months' written notice of the intention to obtain an order for eviction, which notice shall —

(i) contain the prescribed particulars; and

(ii) set out the grounds on which the eviction is based]

Written notice should be in the language of the occupier. In cases where occupiers are unable to read the notice should be explained in the language of the occupier by a disinterested third party.

19. Section 13(1)(a)

[Section 13(1)(a):

If a court makes an order for an eviction in terms of this Act —

(a) the court shall order the owner or person in charge

to pay compensation for structures erected and improvements made by the occupier and any standing crops planted by the occupier, to the extent that it is just and equitable with due regard to all relevant factors, including whether —

(i) the improvements were made or the crops planted with the consent of the owner or person in charge;

(ii) the improvements were necessary or useful to the occupier; and

(iii) a written agreement between the occupier and the owner or person in charge, entered into prior to the making of improvements, provides that the occupier shall not be entitled to compensation for improvements identified in that agreement]

Should include compensation for the occupier's livestock that is confiscated or destroyed.

20. Section 13(1)(c)

[Section 13(1)(c):

The court may order the owner or person in charge to grant the occupier a fair opportunity to —

(i) demolish any structures and improvements erected or made by the occupier and his or her predecessors, and to remove materials so salvaged; and

(ii) tend to standing crops to which he or she is entitled until they are ready for harvesting, and then to harvest and remove them.]

Should read "the court *shall* order the owner or person in charge to grant the occupier a fair opportunity. . ."

21. Section 23(2)

[Section 23(2):

No person shall willfully obstruct or interfere with an official in the employ of the State or a mediator in the performance of his or her duties under this Act.

The protection against interference contemplated under this section should be extended to NGOs and community groups that have been asked to assist occupiers in protecting their rights under this bill. NGOs will be the primary facilitators for communities facing eviction; they should therefore be protected under this Section.

22. Section 26

[Section 26:

(1) Without derogating from the powers that the Minister may exercise under the Expropriation Act, 1975 (Act No. 63 of 1975), the Minister may for the purposes of any development in terms of this Act, exercise equivalent powers to the powers that such other Minister may exer-

cise under the Expropriation Act, 1975.

(2) Notwithstanding the provisions of the Expropriation Act 1975, the owner of the land in question shall be given a hearing before any land is expropriated for a development in terms of this Act.

(3) In the event of expropriation, compensation shall be paid as prescribed by the Constitution, with due regard to the provisions of section 12(3), (4) and (5) of the Expropriation Act, 1975.]

We support the inclusion of the Minister's power to expropriate land for the purpose of furthering the aims and

objectives of the bill. We encourage the Minister to exercise this power to the full extent that the law allows.

CONCLUSION

The Bill does not provide adequate protection against evictions and does not provide the majority of occupiers of rural farm land true security of tenure. Its main objective is to regulate the right of residence and the eviction process. In this regard the Bill disregards the social and economic realities of rural farm communities. Perhaps this Bill would be more palatable if it were called what it actually is — The Regulation of Residence and Evictions Bill.

