PATHWAYS OUT OF POVERTY

Improving Farm Dwellers’ Tenure Security and Access to Housing and Services

A GUIDE TO LEGISLATION, POLICY AND CASE LAW

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Acknowledgements

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Glossary of terms

For the purposes of clarity, the following definitions have been used in this report.

**Constructive eviction**
This refers to the situation where the farm owner or person in charge make conditions on the farm intolerable in order to pressure farm dwellers into leaving the farm. For example, some farm owners may cut off farm dwellers’ water or electricity supply.

**Eviction**
The process through which farm dwellers are forced against their will to leave farms and their homes by the deliberate actions of the owner or person in charge. An eviction affects people who did not want to leave the farm and who did not leave voluntarily or for personal reasons. An eviction could include: instances where farm dwellers are told to leave the farm and believed they had no option but to comply; instances where farm dwellers received written notice to leave the farm from the owner or court and believed they had no option but to comply; or instances where farm dwellers were forced to leave the farm because conditions were made intolerable for them.

**Farm**
A piece of land used primarily for agricultural purposes, either currently or in recent years. Farms are generally within an area not demarcated as urban, but do not necessarily include all land outside urban areas.

**Farm dweller**
Any person, other than the farm owner or person in charge, who is living on a farm. This includes farm workers living on farms (who may or may not be working on the farm where they live); farm workers’ spouses, partners or family members; occupiers and long-term occupiers in terms of ESTA; labour tenants and their associates.

**Farm worker**
A person who works on a farm regularly, whether full-time, part-time or seasonally. A farm worker is not necessarily a farm dweller as some do not live on the farm.

**Labour tenant**
Farm dwellers who derive their rights to be on and use land through the provision of labour to the landowner. The Land Reform (Labour Tenants) Act (LTA) uses a more complex definition that, amongst other things, also requires labour tenants to prove that their parents and/or grandparents were labour tenants.

**Occupier**
A person who is not the owner of land but who lives on a farm with express or tacit consent of the owner or person in charge. This definition is a legal construct derived from the Extension of Security of Tenure Act (ESTA). Occupiers are granted a number of protections in terms of ESTA.

**Suitable alternative accommodation**
Alternative accommodation is defined in section 1 of ESTA as alternative accommodation that is safe and overall not less favourable than the occupiers’ previous accommodation having regard to the residential use and whether land is available for the purposes of cultivation. Whether alternative accommodation is suitable depends on the reasonable needs of all occupiers in the household in question, the joint earning abilities of the household and the need to reside in proximity to opportunities for employment or other economic activities if they intend to be economically active.
1. INTRODUCTION
The land, our purpose is the land; that is what we must achieve. The land is our whole lives: we plough it for food; we build our houses from the soil; we live on it; and we are buried in it. When the whites took our land away from us, we lost the dignity of our lives: we could no longer feed our children; we were forced to become servants; we were treated like animals.¹

Twenty years after the end of apartheid farm dwellers remain some of the most vulnerable people in South Africa, with many still facing extreme tenure insecurity and lacking access to adequate housing and basic services.² The approximately three million black South Africans (6% of the population) who live on privately owned farms in formerly white commercial farming areas are among the poorest South Africans,³ whose vulnerability is exacerbated by their “socio-economic marginality and geographical isolation”.⁴

These inequalities have persisted despite the introduction of a number of fundamental rights in the South African Constitution which provide essential protections to farm dwellers, including the promotion of tenure security to previously disadvantaged persons, the right of access to adequate housing and the right of access to adequate water, food and health care. In fact, since 1994 a variety of laws and policies have been put in place to give effect to the constitutional imperative for land reform, and to regulate and improve the rights and living conditions of farm dwellers. However, in spite of these new laws and policies many farm dwellers continue to live in fear that they may lose their homes or rights to land.

It is in this light that the Association for Rural Advancement (AFRA) conceived of the Pathways Project. The project aims to find pathways out of poverty for people living on farms they do not own by facilitating and building consensus between farm owners, farm dwellers and the state on how to realise the rights of farm dwellers. The project identifies as a key underlying cause of poverty on farms the absence of an administrative framework that secures the tenure of labour tenants, farm workers and occupiers, and which can provide them with access to a range of essential services, such as access to adequate housing, water, electricity and sanitation services. A critical component of the project is the development of a report which details and examines the existing legal and regulatory framework governing farm dwellers’ tenure security and access to essential services and tries to understand why farm dwellers remain so vulnerable.

² The term “farm dwellers” does not only refer to farm workers but also refers to the many other people who live on farms who may not be employed on these farms. The term is therefore a generic reference to all persons who live on farms that are owned by others, including farm workers, the families or dependents of farm workers and labour tenants.
This report has therefore been developed to assist non-governmental organisations (NGOs) and public interest law practitioners in navigating the highly complex legal and policy framework regulating farm dwellers’ rights to tenure security and access to adequate housing and basic services, as well as understanding the various roles and responsibilities of key stakeholders. In doing so, the report provides a comprehensive analysis of the legislation, policies, case law and financial mechanisms associated with farm dwellers’ tenure security, access to adequate housing and basic services, and considers why the legal and policy framework has not been able to adequately protect the rights of farm dwellers. It is hoped that the report might act as a guide to farm dwellers, farm owners, NGOs, lawyers and government officials.

The research for this report was conducted by way of a desktop review of the primary and secondary sources related to farm dwellers’ tenure security and access to adequate housing and essential services. This included a comprehensive review of relevant legislation, regulations, policies, procedures, key case law,5 best practice approaches, financial mechanisms and media reports. In addition, the research included an in-depth review of the literature on farm dwellers’ tenure and access to services, including academic papers, research reports, and opinion pieces.

**Section two** of the report critically evaluates the complex framework of laws and policies governing the tenure security and access to housing and essential services of farm dwellers. In this section, the three pieces of legislation governing tenure security and the protection against unlawful and arbitrary evictions, namely the Extension of Security of Tenure Act (ESTA), the Land Reform (Labour Tenants) Act (LTA) and the Prevention of Illegal Evictions, and Unlawful Occupation of Land, Act (PIE) are analysed. Thereafter, various other laws that are relevant to the land and housing rights of farm dwellers are discussed including the Spatial Planning and Land Use Management Act (SPLUMA), the Local Government: Municipal Systems Act and the Housing Act. This section also discusses the legal principles that have been developed through the courts.

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5 A full review of the case law dealing with the rights of farm dwellers falls outside the scope of this report. This report focuses on key judgments delivered by the Land Claims Court (LCC), the Supreme Court of Appeal (SCA) and the Constitutional Court.
Section three considers how the legal and policy framework regulating farm dwellers’ tenure security and access to adequate housing and basic services has been implemented in practice. Although many factors have contributed to farm dwellers’ continuing vulnerability and insecurity, this section indicates that there has been a systematic failure in relation to the application, interpretation and enforcement of the legal and policy regime regulating farm dwellers’ rights to tenure and access to housing and basic services. This section further addresses some of the most pressing issues related to the lack of implementation of the legal framework.

Section four provides an overview of the key financial mechanisms that are available for the purposes of providing secure tenure and access to adequate housing and basic services to farm dwellers. The requirements and constraints of the different financial mechanisms are discussed. Section five identifies some of the most important role players involved in the realisation of farm dwellers’ rights to tenure security and access to adequate housing and basic services. The report concludes with section six, which provides various recommendations on how the rights of farm dwellers can be upheld more effectively.

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6 These include socio-economic considerations, labour issues, the impact of climate and natural elements, political developments and a range of international and local economic changes in the agricultural sector. See, generally, Margaret Visser & Stuart Ferrer, Farm Workers’ Living and Working Conditions in South Africa: Key Trends, Emergent Issues, and Underlying and Structural Problems, ILO Research Report (2015).
2. LEGAL FRAMEWORK
2.1 The need for tenure reform

The history of South Africa is characterised by large-scale land dispossession spanning the colonial era until the end of apartheid. The apartheid government systematically established and maintained a complex legal framework that drove black people off their land, destroyed the various means through which black people accessed land, steadily diminished the status of black people in relation to the land they occupied and used, and prohibited black people from legally owning land. The system meant that the land rights available to black people were limited to customary land rights in the homelands or statutory land ‘rights’ which provided for a permit-based system. These rights were “generally subservient, permit-based or ‘held in trust’” by the government. The rights held by black people were therefore of a “second class status”. In addition, there were many individuals or communities who occupied and used land without any legal foundation of any kind, often for decades, rendering them at risk of eviction. The combined result of these apartheid laws was that the degree of tenure security that black people were entitled to was more precarious than the tenure security to which white people were entitled.

Farm dwellers were some of the most directly affected by the myriad of apartheid laws as their “independent access to land was eroded through successive laws and economic pressure”. The effect was that many black people were prevented from engaging in their own production and compelled to live on white-owned farmland and supply labour to commercial farmers in order to earn a livelihood. Apartheid laws and policies also contributed to evictions from farmland. During apartheid, many black people were arbitrarily evicted with farm owners rarely seeking eviction orders. Even in the instances where farm owners used legal means to evict occupiers, it was extremely easy to obtain eviction orders. In terms of the South African common law, a landowner was entitled to evict an occupier by simply proving ownership and the absence of consent or some other right in law to occupy. Farm owners where therefore entitled to eviction orders irrespective of the hardship that the eviction would cause for those occupying farmland. These eviction orders regularly took the form of default judgments issued in the absence of those being evicted.

Apartheid laws heavily skewed the ownership and control of land, to the disadvantage of the black majority. By the end of apartheid, approximately 82 million hectares of commercial farmland (86% of all farmland) was concentrated in the hands the white minority (who made up only 10.9% of the population) held by

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8 Since the system was permit-based, the particular permit would determine the types of rights a person had in relation to land. Some of these permits included residential permits, lodger’s permits, hostel permits or certificates of occupation. See Juanita M Pienaar, “Tenure Reform in South Africa: Overview and Challenges”, Speculum Juris, 1 (2011), p. 110.
16 Common law is a system of law characterised by case law, which is law developed by judges through decisions of courts over time. South African common law includes elements of Roman-Dutch law as well as the legal rules and practices developed by our own courts over the years. Prior to the coming into force of the Constitution, property relations in South Africa were predominantly regulated by the common law.
19 Nkuzi Development Association, Still Searching for Security, p. 34.
approximately 60,000 owners. On these farms, millions of farm dwellers faced extreme tenure insecurity and lacked access to many essential services.

After the collapse of apartheid, the adoption of the Constitution of the Republic of South Africa, 1996 (the Constitution) significantly altered the apartheid legal framework. By enshrining a variety of human rights in the Bill of Rights, the Constitution sought to actively reshape the power structures and social relationships that characterised the apartheid era and address systemic social vulnerability and disadvantage. It is for this reason that the property clause of the Constitution “granted specific rights of redress to victims of past dispossession and set the legal basis for a potentially far-reaching land reform program”.

In order to rectify the historic imbalances in power and give effect to the Constitution, the post-apartheid government embarked on a multi-faceted land reform programme which aims to address unequal land-holding patterns and protect, secure and strengthen the land rights of historically disadvantaged people. South Africa’s land reform programme is set out in the White Paper on South African Land Policy (1997) and consists of three pillars:

- **Land restitution**, which is aimed at restoring land to those unfairly dispossessed since 1913 as a result of racially discriminatory laws and practices;
- **Land redistribution**, which is aimed at changing the racial patterns of land ownership in South Africa; and
- **Tenure reform**, which is aimed at protecting, securing and strengthening the rights that people have over land, especially where those rights are weak as a result of racially discriminatory laws and practices.

While each of these initiatives have a role to play in addressing the tenure insecurity faced by farm dwellers, tenure reform is of particular relevance. The primary goals of the tenure reform programme are to facilitate the transition from a permit-based approach to a rights-based approach to land tenure; while simultaneously protecting existing, fragile land rights.

Since 1994 a number of laws and policies have been put in place to give effect to the constitutional imperative for land reform, and to regulate and improve the rights and conditions of farm dwellers. However, in spite of these new laws and policies black people living on white-owned commercial farms

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remain among the most vulnerable people in South Africa. This section critically evaluates the complex framework of laws and policies governing the tenure security and access to essential services of farm dwellers. The section begins with a discussion of the rights and obligations contained in the Constitution. Next, this section analyses three pieces of legislation governing tenure security and the protection against unlawful and arbitrary evictions, namely the Extension of Security of Tenure Act (ESTA), the Land Reform (Labour Tenants) Act (LTA) and the Prevention of Illegal Evictions, and Unlawful Occupation of Land, Act (PIE). Thereafter, this section discusses various other laws that are relevant to the land and housing rights of farm dwellers.

2.2 The Constitution

In 1996, South Africa adopted the final version of the Constitution after a long process of constitutional negotiations with a range of political parties. The Constitution is the supreme law of South Africa, which means that all laws and policies must be consistent with it.

The Constitution enshrines a variety of socio-economic rights associated with farm dwellers in the Bill of Rights, including the promotion of tenure security to previously disadvantaged persons, the right of access to adequate housing and the right of access to adequate water, food and health care. The state is obliged to “respect, protect, promote and fulfil” these rights. The Constitution also places a number of duties on local government to provide essential services. Although these rights and legal duties are identified as the most important constitutional provisions related to farm dwellers, a number of other fundamental rights contained in the Constitution are closely related to these provisions. These include the rights to human dignity, privacy, education, healthcare and the rights of children. These rights may also be adversely affected by the tenure arrangements and living conditions on farms.

This section discusses the right to tenure security, the right of access to adequate housing and the right of access to basic services, as well as the constitutional duties on local government to provide essential services.

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28 See Cousins & Hall, Rights without Illusions, p. 11.
29 Section 2 of the Constitution.
30 Socio-economic rights are rights that guarantee state-supported entitlements to tenure security, housing, health care services, education, social security and a range of other social goods. These rights are traditionally distinguished from civil and political rights. Socio-economic rights do not provide for immediately claimable rights. Instead, these rights require the state to adopt and implement a reasonable programme to progressively realise these rights within available resources. The South Africa Constitution is one of only a few that provide for justiciable socio-economic rights (in other words, the socio-economic rights can be enforced by the courts). For a detailed discussion of the socio-economic rights in the South African Constitution, see generally Sandra Liebenberg, Socio-Economic Rights: Adjudication under a Transformative Constitution (2010).
31 See section 7(2) of the Constitution. Although these obligations are interconnected, the duties these obligations place on the state differ in practice (Liebenberg, Socio-Economic Rights, pp. 54-55). The obligation to “respect” places a duty on the state not to impair a person’s existing rights. In other words, the state must refrain from interfering directly or indirectly with a person’s rights. The obligation to “protect” requires the state to take measures to prevent others, including individuals, groups and corporations, from interfering with a person’s rights. One measure through which the state could protect rights would be by enacting protective legislation. Examples of protective legislation include ESTA and PIE, which were specifically enacted to ensure that arbitrary evictions do not occur, thereby giving expression to the right not to be arbitrarily evicted and the right to secure tenure. However, this obligation does not end with the enactment of protective legislation, it also requires that the state ensure that such protective legislation is effectively implemented in practice. The obligation to “promote” and to “fulfil” a right requires that the state “adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures toward the full realisation of the right”. See Kate Tissington, A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice, SERI Resource Guide (2010), pp. 42-43.
32 See sections 10, 14, 27 and 28 of the Constitution. A full discussion of these rights in relation to farm dwellers falls outside of the scope of this report.
(a) Right to tenure security

The legal basis for land and tenure reform is found in section 25 of the Constitution, which regulates the right to property and land. Section 25 balances different interests by guaranteeing existing rights to property (section 25(1) to (3)) and placing clear responsibilities on the state to carry out land reform (section 25(4) to (9)). The state’s duty to carry out land reform is fleshed out in the latter subsections. This includes the duty to protect and strengthen the tenure security of historically disadvantaged groups (section 25(6) and (9)), to restitute land to those dispossessed as a result of racially discriminatory laws or policies (section 25(7)), and to take reasonable steps to ensure that people are able to gain access to land on a more equal basis (section 25(5)). Importantly, section 25(8) seeks to ease the tension in the property clause by ensuring that no provision of section 25 “may impede the state from taking legislative and other measures to achieve land, water or related reform in order to redress the results of past racial discrimination”. Therefore, section 25(4) to (9) clearly indicate that the protection of property as an individual right is not absolute but subject to societal considerations and the constitutional imperative for land reform.

The most important subsections of the property clause, for the purposes of farm dwellers, are section 25(6) and (9). Section 25(6) of the Constitution provides a right to tenure security:

“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.”

and section 25(9) of the Constitution obliges the state to pass legislation that gives effect to that right:

“Parliament must enact the legislation referred to in subsection (6).”

Tenure security refers to the legal and practical ability to defend one’s ownership, occupation, use of, control over and access to land from interference by others. A critical component of tenure security is the legal right not to be unlawfully or arbitrarily evicted from one’s home. Without secure tenure, people are unable to exercise their rights over land and face the risk of losing these rights altogether. Section 25(6) and (9) seek to ensure that those whose tenure is legally insecure as a result of previously racially discriminatory laws

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23 Section 25 of the Constitution was fiercely contested during the constitutional negotiations, with some arguing that the Constitution should retain the property arrangements as they stood in 1994 and others arguing that the Constitution should provide for the restoration of land to those dispossessed during apartheid. In the end, section 25 gave expression to both of these competing interests. See André J Van der Walt, Constitutional Property Law, 3 ed (2011), pp. 16-19; Lahiff & Gi, “Land Redistribution in South Africa”, pp. 28-29; and, generally, DLA, White Paper on South African Land Policy.

24 Section 25(8) of the Constitution reads: “No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).”

25 See First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC), para. 49. See also the general limitation clause, section 36 of the Constitution.


27 Mahomed, Understanding Land Tenure Law, p. 28. This means that there is a close relationship between the right to secure tenure contained in section 25(6) of the Constitution and the right not to be arbitrarily evicted from one’s home contained in section 26(3) of the Constitution.

or practices are granted constitutional protection and compel Parliament to protect, secure and strengthen the rights of those with insecure tenure through legislation. The state is therefore constitutionally obliged to protect and strengthen the tenure rights of occupiers on privately owned farms and state land (including farm dwellers and labour tenants). In order to give effect to these provisions, the state passed various laws including ESTA and the LTA.39

Another provision relevant to farm dwellers and labour tenants is section 25(5) of the Constitution. Section 25(5) places a constitutional obligation on the state to take reasonable measures to ensure that people are able to gain access to land on a more equal basis.40 This provision provides that the state may achieve this objective by adopting legislation or developing and implementing government programmes, and acknowledges that the state has limited resources and therefore will not be able to achieve this objective immediately.

(b) Right of access to adequate housing

Section 26 of the Constitution protects the right of access to adequate housing. It comprises of three subsections:

- **section 26(1)** provides that “everyone” has a right of access to adequate housing,
- **section 26(2)** obliges the state to take reasonable steps to progressively provide access to adequate housing, and
- **section 26(3)** prohibits arbitrary evictions by requiring that evictions be authorised by a court order made after having regard to “all the relevant circumstances”.41

The exact interaction between these three subsections has not been entirely clarified. This is due to the fact that the South African courts have upheld an interpretation of the section 26(1) right of everyone to have access to adequate housing that is qualified by the section 26(2) restriction of the state’s obligation to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights”. This approach means that neither the section 26(1) right nor the section 26(2) right exist as a self-standing or stand-alone entitlement but rather that, the content of each right is determined by the reasonableness of the state’s response to progressively realising that right.42

For this reason, the content of the right of access to adequate housing has largely been shaped by section 26(2) of the Constitution, which requires the state to take “reasonable” steps to realise the right to housing. Although this sets a seemingly objective standard, there is still considerable uncertainty about what “housing” rights bearers are entitled to and what constitutes “adequate” housing in a constitutional context.43 This is due to the fact that the Constitutional Court has, in keeping with its approach to other

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39 This is expressly affirmed in the objectives of ESTA and the LTA.
40 Section 25(5) of the Constitution reads: “The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”
41 Section 26 of the Constitution reads: “(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable measures, within available resources, to achieve the progressive realisation of this right. (3) No-one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”
42 Malcolm Langford, Richard Stacey & Danwood Chirwa, “Water”, in Stuart Woolman & Michael Bishop (eds), Constitutional Law of South Africa, 2 ed (2013 Revision Service 5), 568-1, 568-24, 568-B-25. Although Langford et al write in the context of water, the principle applies in the housing context as the Constitutional Court has adopted the same approach in relation to the interpretation of all socio-economic rights including the right of access to adequate housing and the right of access to water.
43 SERI, Evictions and Alternative Accommodation, p. 9.
socio-economic rights, been hesitant to give specific content to the right of access to adequate housing, opting instead to grant the state a measure of discretion to fulfil this right provided that the steps taken to fulfil the right are reasonable.44

The right of access to adequate housing is the most hotly contested and frequently litigated socio-economic right, and has, over the past 20 years, given rise to a number of fundamental housing and eviction cases before the Constitutional Court and the Supreme Court of Appeal.45 These decisions have incrementally developed housing and eviction law and enshrined critical substantive and procedural protections for occupiers facing the threat of an eviction.

(c) Right of access to basic services

The Constitution provides a fundamental right for “everyone” to have access to sufficient food and water in section 27(1) of the Constitution.46 These rights, like other socio-economic rights, are limited in their application by section 27(2) which provides that the state must take reasonable steps to progressively realise these rights within available resources. As with the right of access to adequate housing, the content of the rights to water and food are therefore dependent on the reasonableness of the programmes or policies which the state adopts to give effect to these rights.

In relation to electricity, the Constitution does not include a provision that expressly entitles people to electricity. However, in spite of the fact that the Constitution does not include such a right, the Constitutional Court has found that local government bears a responsibility to provide electricity “as a matter of public duty”47 and that “electricity is an important basic municipal service which local government is ordinarily obliged to provide”.48 This means that municipalities are under an obligation to provide electricity to those within its area of jurisdiction.

In terms of the Constitution, the obligation to provide basic services is primarily borne by local government. Section 152(1) of the Constitution sets out the objects and an overarching set of obligations for local government. These obligations include to “ensure the provision of services to communities in a sustainable manner” and to “promote social and economic development” in communities within their areas.49 In addition, section 153 of the Constitution saddles municipalities with a number of key development duties. In particular, section 153(a) states that municipalities are “obliged to prioritise the social and economic development of the community”.

Section 139(5) of the Constitution further buttresses these duties by imposing an obligation on municipalities to ensure that each member of the community has access to at least a minimum level of basic services.50 Moreover, section 195(1) of the Constitution sets out the basic values and principles that public administration should adhere to and be guided by, including that “services must be provided

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44 SERI, Evictions and Alternative Accommodation, p. 9.
45 See, generally, SERI, Evictions and Alternative Accommodation.
46 Section 27(1) of the Constitution reads: “Everyone has the right to have access to -
(a) health care services, including reproductive health care;
(b) sufficient food and water; and
(c) social security, including, if they are unable to support themselves and their dependents, social assistance.”
47 Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett v Buffalo City Municipality and Others; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng, (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae) 2005 (1) SA 530 (CC), para. 38, where the Constitutional Court held that “municipalities are obliged to provide water and electricity to the residents in their area as a matter of public duty”.
48 Joseph v City of Johannesburg 2010 (4) SA 55 (CC), paras. 34 and 39.
49 Section 152(1)(b) and (c) of the Constitution.
impartially, fairly, equitably and without bias” and that “people’s needs must be responded to and the public must be encouraged to participate in policy-making”.51

Taken together, these provisions clearly affirm that local government carries the central mandate for ensuring that people within its area of jurisdiction are provided with basic municipal services, including water, electricity and sanitation.52 Municipalities are required to “strive” to achieve these objectives within their financial and administrative capacities53 by structuring and managing their administration in a manner that would realise these constitutional duties, and budgeting and planning for the provision of basic municipal services.54 In doing so, municipalities are required to give priority to the basic needs of communities.55 This responsibility rests on local government because “[m]unicipalities are, after all, at the forefront of government integration with citizens”56 and are therefore ideally suited to respond, react and plan for the needs of local communities.

2.3 Legislation governing tenure security and evictions

In order to give effect to sections 25(6) and 26(3) of the Constitution, the state passed various important pieces of legislation. In this section, the three laws governing tenure security and evictions will be analysed, namely ESTA, the LTA and PIE. These laws were either specifically formulated to give expression to the state’s tenure reform programme or have significant implications for tenure reform.57

(a) Extension of Security of Tenure Act (ESTA)

In the context of farm dwellers, one of the most important laws is the Extension of Security of Tenure Act 62 of 1997 (ESTA). ESTA was intended to play a critical role in facilitating tenure reform in rural areas. The Act aims to achieve tenure security by:

- regulating the eviction of farm dwellers (and their dependents) more strictly by setting out a legal process that needs to be followed before a court would be willing to authorise an eviction;58
- providing for farm dwellers to obtain more substantive tenure rights (and associated rights) on the farms they occupy; and
- providing for mechanisms to enable the state to provide long-term tenure security to farm dwellers (specifically through a discretionary subsidy).59

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51 Section 195(1)(d) and (e) of the Constitution.
52 Joseph, para. 34.
53 Section 152(2) of the Constitution.
54 Section 153(a) of the Constitution.
55 Section 153(a) of the Constitution.
56 Joseph, para. 45.
57 For example, PIE is a piece of legislation that may not, strictly speaking, have been enacted to give effect to tenure reform, but may, in certain circumstances, have implications for tenure reform. Pienaar, “Tenure Reform in South Africa”, pp. 111 and 121-122.
With an acute awareness of the “historically shaped and deeply entrenched relations of power on farms”, ESTA regulates the relationship between farm dwellers and farm owners by placing rights and responsibilities on both parties and promoting the tenure security of farm dwellers. As mentioned above this is achieved, in the short term, by strictly regulating evictions from farmland and entitling farm dwellers to various rights and, in the long term, by providing for long-term tenure security. This does not mean that evictions may never occur, but simply that farm dwellers may only be evicted when it is “just and equitable” to do so. Ultimately, the Act seeks to balance the rights of farm dwellers with those of farm owners and “circumscribe[s] the rights of property owners in relation to farm dwellers.”

Who is protected by ESTA?

ESTA applies to agricultural land in rural and peri-urban areas only. The Act applies to “occupiers”. The Act distinguishes between two types of occupiers: occupiers (also referred to by some commentators as “short-term occupiers”) and long-term occupiers. An occupier is defined in the Act as “a person residing on land which belongs to another person and who has ... consent or another right in law to do so” and specifically excludes persons who use the farm for commercial, industrial or mining enterprises and persons who earn more than R5 000 a month. On the other hand, a long-term occupier is a person who has resided on farmland owned by another for a period of 10 years and has either reached the age of 60, or is an employee or former employee of the farm owner and as a result of ill-health, injury or disability is unable to supply labour to the farm owner. Long-term occupiers have more substantive rights and protections in terms of ESTA and are generally entitled to retire on the farmland they occupy. This is evident from the more onerous requirements that apply in relation to the eviction of long-term occupiers which ensure that long-term occupiers are only evicted in exceptional cases.

The main characteristic of an occupier or long-term occupier is therefore that he or she resides on farmland that belongs to another person with the consent of the owner or person in charge or some other right in law. ESTA provides that consent may be express or tacit, and creates a presumption that if a person has resided on land for a period of one year, they are presumed to have the consent of the owner to do so (unless the contrary is proven).

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60 Hall, Farm Tenure, p. 2.
61 For example, ESTA requires occupiers to abide by their residency agreement with the farm owner. Hall, Farm Tenure, p. 4.
64 ESTA applies to “all land other than land in a township established, approved, proclaimed or otherwise recognised as such in law or encircled by such a township, but including any land within such a township which has been designated for agricultural purposes in terms of any law”. See Ngwenya v Grannersbergen 1999 (4) SA 62 (LCC) (Ngwenya); Lebowa Platinum Mines Ltd v Viljoen 2009 (3) SA 511 (SCA) (Lebowa), para. 9; Pienaar, “Tenure Reform in South Africa”, p. 115; and Juanita M. Pienaar & Koos Geyser, “Occupier” for the Purposes of the Extension of Security of Tenure Act: The Plight of Female Spouses and Widows”, Tydskrif vir Hededaagse Romeins-Hollandse Reg, 73(2) (2010), p. 250; and Chenwi, Evictions in South Africa, p. 28.
65 Although the term “short-term occupier” may have the benefit of clarity, the term does not appear in the text of ESTA and seems to connote a less permanent right to occupation. For these reasons, this report has opted to use the terms “occupier” and “long-term occupier”. See Pienaar, “Tenure Reform in South Africa”, p. 115; Pienaar & Geyser, “Occupier” for the Purposes of ESTA”, p. 250.
66 Section 8(4) of ESTA. See also Pienaar, “Tenure Reform in South Africa”, pp. 115-116; Pienaar & Geyser, “Occupier” for the Purposes of ESTA”, p. 250.
67 See the definition of “occupier” in section 1 of ESTA. See also Pienaar, “Tenure Reform in South Africa”, p. 115; Pienaar & Geyser, “Occupier” for the Purposes of ESTA”, p. 250.
68 See the definition of “occupier” in section 1 of ESTA; and, generally, Lebowa. The earning restriction is determined by the Minister of Rural Development and Land Reform in terms of regulations.
69 Section 8(4) of ESTA. See also Pienaar & Geyser, “Occupier” for the Purposes of ESTA”, p. 251.
70 Halle v Downs, Land Claims Court, Case No LCC788/2007 (20 November 2008); Pienaar & Geyser, “Occupier” for the Purposes of ESTA”, p. 251.
71 Section 8(4) of ESTA provides that the right to residence of a long-term occupier may only be terminated if such occupier has harmed any other person occupying the land, caused material damage to the property of the farm owner, engaged in conduct that threatens or intimidates others, assisted others in unlawfully occupying the farm, or has committed such a fundamental breach of the relationship between him or her and the farm owner that it is not practically possible to remedy it. See section 8(4), read with section 10(1)(a)-(c) and section 6(3), of ESTA.
72 Pienaar & Geyser, “Occupier” for the Purposes of ESTA”, p. 250.
73 See the definition of “consent” in section 1 of ESTA. See also Klaase v Van der Merwe N.O. 2016 (6) SA 131 (CC) (Klaase), paras. 49-66, and particularly para. 53 (where the Constitutional Court asserted that consent “is no less ‘actual’ because it is given tacitly”).
74 Section 3(4) and (5) of ESTA provide that, for the purposes of civil proceedings in terms of ESTA, if a person has continuously and openly resided on land for a period of one year they are presumed to have the consent of the owner of such land (unless the contrary is proven).
Case law has played an integral role in developing the concept of consent for the purposes of ESTA. For many years, the most important case in this regard was the Land Claims Court’s (LCC) decision in *Landbounavorsingsraad v Klaasen*. In this case, the court interpreted consent to mean that a person must be or must have been a party to a “consent agreement” with the owner or person in charge of the land, in terms of which the owner or person in charge gives consent to the occupier to reside on the land and the occupier receives such consent. The court therefore emphasised the need for a legal relationship between the farm owner and occupier. Only a person who had reached such an agreement with the owner or person in charge would qualify as an occupier for the purposes of ESTA. As the wives and family members of farm workers were generally not parties to these agreements, they would ordinarily not qualify as occupiers for the purposes of the Act. Only if an owner directly consented to wives or family members living on the land would they be occupiers in their own capacity. These references to the need for direct consent seemed to suggest that farm dwellers required express consent from the owner or person in charge before they would qualify as occupiers in terms of ESTA. The effect of this decision was to draw a distinction between two types of occupiers, so-called ‘primary occupiers’ and ‘secondary occupiers’. According to the court’s interpretation ‘primary occupiers’ reside on farmland in their own right and are, as a result, granted protection in terms of ESTA, while ‘secondary occupiers’ are occupiers whose permission to reside on farmland is wholly dependent on the rights of ‘primary occupiers’ and are, as a result, not granted protection in terms of ESTA. This distinction significantly curtailed the rights of ‘secondary occupiers’ by stripping them of the protections guaranteed in ESTA and placing them at risk of possible arbitrary evictions. Women and dependent children who are less likely to have direct relationships with farm owners were disproportionately affected by the judgment.

The Constitutional Court decision of *Klaase v Van der Merwe NO* fundamentally altered this approach by affirming that wives and family members of farm workers could, in certain circumstances, qualify as occupiers in terms of ESTA. The case was brought by Mrs Klaase, the wife of a farm worker, who had lived with her husband in a small cottage on the farm where he worked for over 30 years. The farm owner applied for, and was granted, an eviction order authorising the eviction of Mr Klaase in the Magistrates’ Court. In terms of the decision in *Landbounavorsingsraad* the effect of this order would have been to evict Mrs Klaase alongside her husband, as she derived her right to reside on the farm through him. As a result, Mrs Klaase had not been joined to the eviction proceedings.

Mrs Klaase contested this interpretation in the Constitutional Court, arguing that the farm owner had tacitly consented to her occupation and, consequently, that she qualified as an occupier in terms of ESTA.

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75 *Landbounavorsingsraad v Klaasen* 2005 (3) SA 410 (LCC) (*Landbounavorsingsraad*). For a detailed description of this case, see Pienaar,* “Tenure Reform in South Africa”,* p. 116; Pienaar & Geyser, “‘Occupier’ for the Purposes of ESTA”, pp. 253-257.

76 *Landbounavorsingsraad*, para. 21.

77 *Landbounavorsingsraad*, para. 23.

78 *Landbounavorsingsraad*, para. 24.

79 These occupiers are also referred to as “occupiers in the narrow sense” in *Landbounavorsingsraad* and as “occupiers” in *Klaase*. These occupiers are also referred to “occupiers in the broad sense” in *Landbounavorsingsraad* or as “residents” or “household occupants” in terms of section 6(2)(d) or 10(3) of ESTA in *Klaase*.

80 Some of the provisions of ESTA arguably support this interpretation. For example, section 10(3) of ESTA, provides that “a court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so”. In this regard, see *Landbounavorsingsraad*; *Kiepersol Poultry Farm* (Pty) Ltd v Phayiisa 2010 (3) SA 152 (SCA); and the minority judgment of Justice Zondo in *Klaase*. However, many commentators have criticised this approach (see the sources referred to below at n. 82). Theunis Roux, specifically, argues that the legislature never intended to create two categories of occupiers by pointing to the fact that initial drafts of ESTA that made this distinction were abandoned in favour of a more inclusive approach. See Theunis Roux, “Pro-Poor Court, Anti-Poor Outcomes: Explaining the Performance of the South African Land Claims Court”, *South African Journal on Human Rights* (2004), pp. 511-543.

81 Some commentators have criticised the *Landbounavorsingsraad* decision on the grounds that it disproportionately affects women and dependent family members, is overly focused on express consent and fails to comply with the constitutional guarantees against unlawful and arbitrary evictions laid out in section 26(3) of the Constitution. See Pienaar, “Tenure Reform in South Africa”, p. 116; Pienaar & Geyser, “‘Occupier’ for the Purposes of ESTA”, p. 256; Roux, “Pro-Poor Court, Anti-Poor Outcomes”, pp. 511-543.

In the majority decision, written by Acting Justice Matojane, the court stated that the Constitution enjoins a court to “promote the spirit, purport and objects of the Bill of Rights” when interpreting legislation.\(^{84}\) For the court, this meant that it should have regard to the purposes of ESTA when interpreting the definition of “occupier” and the meaning of “consent”.\(^{85}\) The court held that ESTA had been enacted to protect those with insecure tenure by giving effect to the constitutional promise of tenure security and guarantee against arbitrary eviction.\(^{86}\) Given the importance of these constitutional imperatives, the court found that it should adopt a generous interpretation of the Act that would “afford [occupiers] the fullest possible protection of their constitutional guarantees”.\(^{87}\) On this basis, the court rejected the LCC’s narrow construction of “occupier” in \textit{Landbouwavorsingsraad} for impermissibly restricting the meaning of consent in a manner that failed to have regard for the “mischief ESTA sought to remedy”.\(^{88}\) The eviction of individuals on the basis of the conduct of their spouses or family members without the protections provided for in ESTA or the Constitution would have a highly detrimental impact on the tenure security of farm dwellers and directly undermine the objectives of ESTA. The court then reaffirmed that “consent” in terms of ESTA includes tacit consent\(^{89}\) and held that the farm owner’s failure to object to Mrs Klaase’s decades-long residence on the farm and inability to take steps to evict her implied that he consented to her occupancy.\(^{90}\) Accordingly, Mrs Klaase had resided on the farm with the consent of the owner and qualified as an “occupier” for the purposes of ESTA. This meant that Mrs Klaase was afforded the protections provided in ESTA, and that the eviction order was set aside.\(^{91}\)

The \textit{Klaase} case has therefore done away with the distinction between ‘primary’ and ‘secondary’ occupiers by providing that any person who occupies farmland with the express or tacit consent of the owner or person in charge would qualify as an occupier in terms of ESTA and, consequently, be afforded the full legal protections provided for in ESTA.\(^{92}\) While the full effect of \textit{Klaase} are yet to be felt, the judgment clearly affirms the independent rights of the wives and dependent family members of farm workers as occupiers for the purposes of ESTA thereby protecting them against arbitrary evictions.

### Regulation of eviction

In the short term, ESTA protects the tenure rights of farm dwellers by strictly regulating evictions from farmland. Farm dwellers may therefore only be evicted once certain procedural and substantive requirements have been met.

The Act sets out, in detail, the procedure that should be followed by a farm owner to evict farm occupants. The process to obtain an eviction order first entails the farm owner terminating the right of residence of an occupier on a lawful ground and notifying the occupier that his or her rights to residence have been terminated.\(^{93}\) If the occupier has not vacated the farm in terms of the notice of termination of residence, the farm owner is required to give two calendar months notice of his or her intention to evict the occupier.\(^{94}\) This is referred to as a section 9(2) notice and it should be served on the occupier, the municipality in whose jurisdiction the farm falls and the provincial office of the Department of Rural Development.

\(^{84}\) Section 39(2) of the Constitution. See also \textit{Klaase}, para. 50.
\(^{85}\) \textit{Klaase}, paras. 50 and 52.
\(^{86}\) \textit{Klaase}, para. 51.
\(^{87}\) \textit{Klaase}, para. 51.
\(^{88}\) \textit{Klaase}, para. 54.
\(^{89}\) \textit{Klaase}, para. 54-55.
\(^{90}\) \textit{Klaase}, para. 53.
\(^{91}\) \textit{Klaase}, para. 54.
\(^{92}\) The minority judgment found that Mrs Klaase was not an occupier in terms of ESTA because, to the extent that she had been given consent by the owner of the farm to reside on the farm, such consent was for her to reside on the farm under or through her husband and not independently of his right to reside on the farm. See \textit{Klaase}, paras. 69-154.
\(^{93}\) If a farm dweller openly and continuously occupies land for a period exceeding three years (see section 3(4) of ESTA) and without the farm owner or person in charge taking steps to evict him or her, such person would be deemed to have the tacit consent of the owner to reside of the farm. This consent can only be withdrawn in terms of section 8 of ESTA.
\(^{94}\) Section 8(1) of ESTA.
\(^{95}\) Section 9(2) of ESTA. See also Visser & Ferrer, \textit{Farm Workers’ Living and Working Conditions}, pp. 59-61.
and Land Reform (DRDLR). In the notice, the farm owner should clearly identify the ground on which the eviction is based. In instances where the farm dweller being evicted was already an occupier on 4 February 1997, the farm owner must comply with the provisions set out in section 10 of ESTA. When the farm dweller being evicted became an occupier after 4 February 1997, the farm owner must comply with the provisions set out in section 11 of ESTA. If the occupier does not vacate the land, the farm owner is required to approach a court which will determine whether the termination of the right to residence was lawful and whether or not to grant an eviction order having due regard to the specific circumstances of the case. Section 19 of ESTA provides that if a Magistrates’ Court grants an eviction order, the decision must be automatically reviewed by the LCC and may not be implemented until the review had been completed.

Ultimately, ESTA provides that occupiers may only be evicted if a court order is obtained authorising such eviction. Moreover, a court may only grant an eviction order if it is of the opinion that the eviction is “just and equitable” having regard to “all the relevant circumstances”. Fairness is therefore a general requirement of the Act. In considering whether an eviction would be just and equitable, a court should adopt a context-sensitive approach and have regard to various factors, including:

- The period of occupation;
- The fairness of the terms of the agreement between the farm owner and the occupier;
- The reason for the proposed eviction;
- Whether suitable alternative accommodation is available to the occupier or whether homelessness will ensue as a result of the eviction; and
- The balance of interests of the farm owner (on the one hand) and the occupier (on the other).

Importantly, section 10(2) and section 11(3) of ESTA emphasise that a court, when determining whether an eviction is just and equitable in the circumstances, must be satisfied that suitable alternative accommodation is available to occupiers facing eviction. The prominence of these provisions indicate that the availability of alternative accommodation or the risk of being rendered homeless are particularly critical factors in assessing whether an eviction is just and equitable, and suggest that an eviction would ordinarily not be just and equitable if those evicted would be rendered homeless.

These provisions are, in many respects, remarkably similar to the provisions of the Prevention of Illegal Evictions from, and Unlawful Occupation of, Land Act (PIE). In particular, the factors that need to be considered by a court before determining whether an eviction should be authorised are closely aligned.

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95 Section 8(2) of ESTA.
96 Whether the termination of the occupier’s right to residence is lawful will depend on a number of factors listed in section 8(1) of ESTA. These factors include the fairness of the agreement between the parties; the conduct of the parties giving rise to the termination; the interests of the parties, including “the comparative hardship to the owner of the person in charge [and] the occupier concerned ... if the right to residence is or is not terminated”; the fairness of the procedure followed by the owner, including whether the occupier had or should have been given an effective opportunity to make representations before the decision was made to terminate; and whether there was a reasonable expectation of renewal of the right to residence.
97 Sections 9(2), 10 and 11 of ESTA.
98 Section 19(3) and (5) of ESTA. See also Pienaar, “Tenure Reform in South Africa”, pp. 119-120.
99 Section 9(1) of ESTA. This requirement gives effect to section 26(3) of the Constitution.
100 Section 9(1) of ESTA, read with section 26(3) of the Constitution.
102 Section 11(3) of ESTA. See also Pienaar, “Tenure Reform in South Africa”, p. 118.
103 Section 10(3) of ESTA limits this provision slightly by providing that an eviction may still occur if suitable alternative accommodation remains unavailable to an occupier 9 months after the date of termination of his or her right to residence, or the efficient carrying on of any operations of the owner will be seriously prejudiced unless the dwelling is available for occupation by another person.
104 See the discussion of PIE in section 2.3 (c) below.
The Constitutional Court has held that an eviction would ordinarily not be just and equitable if those evicted would be rendered homeless as a result of such eviction.\textsuperscript{105} Although these decisions were taken in the context of eviction proceedings instituted in terms of PIE, these requirements have been read directly into section 26(3) of the Constitution. A court would therefore be entitled to refuse an eviction from farmland if the eviction would render farm dwellers homeless.

In addition to this principle, recent cases in the LCC - \textit{Lebombo Cape Properties (Pty) Ltd v Awie Abdol}\textsuperscript{106} and \textit{Diedericks v Univeg Operations South Africa (Pty) Ltd t/a Heldervue Estates}\textsuperscript{107} - have imported the principle of meaningful engagement into eviction proceedings in terms of ESTA. These cases require farm dwellers, farm owners and the state to “meaningfully engage” with one another “in a proactive and honest endeavour to find mutually acceptable solutions” before taking steps to evict occupiers or their dependents.\textsuperscript{108} This means that the parties in eviction proceedings should participate in a “two-way process in which [the state] and those about to become homeless would talk to each other meaningfully” in order to reach agreement on a number of issues related to the eviction and the provision of alternative accommodation.\textsuperscript{109}

Finally, recent case law has affirmed that the primary obligation to provide access to adequate housing rests on local government, including the duty to provide suitable alternative accommodation to those rendered homeless as a result of an eviction.\textsuperscript{110} The courts have held that the legal framework supports this position by referring to the centrality of local government in the notification and reporting procedures, as well as their central function in the provision of housing.\textsuperscript{111}

In order to assist a court in determining whether an eviction would be just and equitable, section 9(3) of ESTA provides that a court must request that a probation officer or official of the DRDLR submit a report setting out whether suitable alternative accommodation is available for the occupiers, indicating how the eviction will affect the constitutional rights of the occupiers, and pointing out any undue hardship which an eviction would cause for the occupiers or the farm owner.\textsuperscript{112} This report must be submitted to the court within a “reasonable time”.\textsuperscript{113} The purpose of a section 9(3) report is to ensure that the court has sufficient information to make an informed decision about whether an eviction is just and equitable in the circumstances. However, in practice, courts frequently proceed with eviction proceedings without probation reports.\textsuperscript{114} In doing so, the courts have effectively done away with an important protection that was available to farm dwellers threatened with an eviction.

There have been a number of conflicting court decisions in the LCC dealing with the importance of the section 9(3) reports as a component of the eviction process.\textsuperscript{115} In \textit{Westminster Produce (Pty) Ltd t/a Elgin Orchids v Simons},\textsuperscript{116} the LCC held that the legislature could not have intended that no court matter could proceed without a section 9(3) report where there were no grounds to believe that such report would affect the decision of the court. This judgment implies that a section 9(3) report may not be compulsory in all situations. However, other LCC judgments have underscored the importance of section 9(3) reports to the eviction process. These judgments include \textit{Viceremo (Pty) Ltd v Visage and Mitchell},\textsuperscript{117} \textit{Valley Packers
Co-Operative Limited v Dietloff; and El Rio Farming (Pty) Ltd v Jacobs. In these cases, the LCC held that the failure to wait for the production of a section 9(3) report was sufficiently serious to warrant the setting aside of the eviction order granted by the Magistrates Courts. According to these decisions, the lack of a probation report means that a magistrate would be unable to fully consider the availability of alternative accommodation to the occupiers or the impact of an eviction on the constitutional rights of occupiers (and particularly the rights of children). These cases seem to indicate that the LCC consider probation reports sufficiently serious if there are grounds for believing that the contents of the report could sway the decision.

As mentioned above, ESTA provides that long-term occupiers cannot be evicted from a farm except under certain exceptional circumstances. If these long-term occupiers are evicted, the farm owner must provide suitable alternative accommodation.

Occupiers’ rights

ESTA provides a number of substantive rights for occupiers. These include:

- the right to tenure security,
- the right to continue to live on and use the land,
- the right to live with their families and “enjoy a family life that is in keeping with their culture”,
- the right to receive visitors,
- the right to visit and maintain their family graves on the farm,
- the right to, in certain circumstances, be buried on the farm or bury their relatives on the farm; and
- the right to access essential services as per agreement with the owner, including the right not to be denied or deprived of access to water, education and health services.

Long-term occupiers are also entitled to these rights in addition to the right to suitable alternative accommodation if they are evicted.

The right to family life to which occupiers are entitled in terms of section 6(2)(d) of ESTA has been fleshed out in court cases. This provision states that occupiers should ordinarily be allowed to live with their families and “enjoy a family life that is in keeping with their culture”. However, the Act does not define the term family nor does it provide guidance on how this term should be interpreted. This issue came under consideration in the Constitutional Court matter of Hattingh v Juta. In this case, an elderly occupier lived on a smallholding outside Stellenbosch with her three sons (two adult sons and a minor) and her daughter-in-law. The farm owner instituted eviction proceedings against the two adult sons and...
the daughter-in-law of the occupier. The farm owner indicated that he was willing to allow the occupier and her minor son to continue living on the property but needed the space occupied by her other sons to accommodate his farm manager who, at the time, had to travel long distances to attend work. The occupier resisted the application for an eviction. Before the LCC the judge determined that ‘family’ should be understood to mean nuclear family, i.e. the spouse and dependents of an occupier.

In the Constitutional Court, however, the court found differently. The court held that it is not possible to define what family means as families come in “all shapes and sizes”. As a result the court rejected the LCC’s interpretation that a family in terms of ESTA meant a nuclear family, but declined to provide an alternative definition. Instead the court turned its attention to section 6(2) of ESTA, which states that the right to family life must be “balanced with the rights of the owner”. The court held that it was important to strike a fair and equitable balance between the competing interests of the parties. The court found that ESTA entitles an occupier to a family life that is as normal as possible, having regard to the landowner’s rights. The extent of what is allowed will depend on the specific set of facts and on the need to strike a fair balance between enabling the occupier to enjoy his or her right to family life and allowing the landowner to enjoy his or her rights to land. If, in a particular case, the balancing leads to unjust or inequitable consequences for either the landowner or the farm occupier, then the other party’s rights may be appropriately limited. In balancing the competing rights of the parties, the court found that the balance was in favour of the landowner and found that it would be just and equitable to evict the adult children and daughter-in-law.

The approach adopted by the Constitutional Court in Hattingh highlights that justice and fairness are central to the legislative scheme created in terms of ESTA. The court noted that various provisions in ESTA seek to “infuse justice and equity or fairness” into the relationship between farm owners and occupiers. The requirement of justice and fairness in the determination of eviction cases requires courts to carefully balance the competing rights of farm owners, on the one hand, and farm dwellers, on the other. If an eviction would result in undue hardship for one of the parties, the court should be hesitant to grant an eviction order. It should also be noted that the approach of balancing conflicting rights is also found in eviction jurisprudence in terms of PIE.

At the time of writing the Constitutional Court had recently also elaborated on the meaning and content of the right of ESTA occupiers to reside on and use farmland in Daniels v Scribante (Daniels). In this case, Ms Yolanda Daniels, a domestic worker who lived with her minor children on a farm outside Stellenbosch for the previous 16 years, sought to make improvements to her dwelling at her own cost – she wanted to level the floors, pave part of the outside area and install an indoor water supply, a wash basin, a second window and a ceiling. As the court noted, these improvements were not luxuries but were “ordinary, basic things”. Ms Daniels notified the farm manager of her intention to make these improvements in a letter but she received no response. However, once work had commenced, she received a letter from the farm manager ordering her to stop the work. He argued that ESTA did not allow for occupiers to make improvements to their dwellings without the consent of the farm owner or person in charge. This, even though the farm manager accepted that without these improvements the dwelling was not fit for human habitation. The Magistrates’ Court and LCC agreed with the farm manager’s arguments, finding that an occupier under ESTA does not have a right to effect improvements to her dwelling without the consent of the farm owner or person in charge. The case was then taken on appeal to the Constitutional Court.

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132 Hattingh, para. 34.
133 Hattingh, para. 34.
134 Hattingh, paras. 32 and 41.
135 Hattingh, para. 35.
136 Hattingh, para. 42.
137 Hattingh, paras. 32-33.
138 See the discussion of PIE in section 2.3 (c) below.
140 Both Justice Madlanga’s majority judgment and Justice Froneman’s concurring judgment noted that these improvements were not luxury improvements but “basic human amenities” necessary for a dignified existence. See Daniels, paras. 7 and 112.
141 Daniels, para. 7.
In a majority judgment, written by Justice Madlanga, the Constitutional Court rejected the farm manager’s argument. The court expressly linked access to land and housing with the protection and advancement of human dignity. As the court stated: “An indispensable pivot to [the right to tenure security] is the right to human dignity. There can be no true security of tenure under conditions devoid of human dignity.”

After carefully considering the legacy of land dispossession brought about as a result of colonialism and apartheid, the court assessed sections 5, 6 and 13 of ESTA. Although the court noted that these sections do not provide an explicit right for an occupier to make improvements meant to bring her dwelling to a standard suitable for human habitation, the court found that a literal reading of these provisions would be “unduly narrow”. Instead, the court looked at the purpose of ESTA. For the court, ESTA was legislation that not only gives effect to section 25(6) of the Constitution, but also plays an important role in responding to the particularly deplorable history of land dispossession in South Africa. When viewed in this context, the court held that a purposive interpretation of ESTA meant that an occupier had the right to make improvements to the dwelling in which they live. To hold otherwise would render an occupier’s right to reside on and use farmland “empty”. As Justice Madlanga explained:

“A occupier who lives on property under the most deplorable conditions does ‘reside’ on that property. But is that the right conferred by ESTA? Definitely not. The occupier’s right to reside must be consonant with the fundamental rights contained section 5 [of ESTA], in particular - for present purposes - the right to human dignity. Put differently, the occupation is not simply about a roof over the occupier’s head. Yes, it is about that. But it is about more than just that. It is about occupation that conduces to human dignity and the other fundamental rights.”

Moreover, the court held that if occupiers were not allowed to upgrade their dwellings, the intolerable conditions could lead to “eviction[s] by stealth by property owners”. This would be in direct conflict with the aims of ESTA and the right to tenure security in the Constitution.

The court also considered the tension between the rights of farm owners and farm dwellers while addressing the farm manager and farm owners’ second argument. The farm manager and owners argued that the court should not rule that an occupier has a right to make improvements to bring their dwelling to a standard that is constitutionally compliant, because that would be tantamount to indirectly placing a positive obligation on the owner or person in charge to ensure an occupier’s enjoyment of the section 25(6) right. This is due to the fact that the farm owner may be required to reimburse the occupier for the improvements made on the dwelling in terms of section 13 of ESTA. In response, the court found that the provisions of the Bill of Rights - including the right to tenure security in section 25(6) - could, in certain circumstances, bind private land owners and could therefore place a financial obligation on a land owner to reimburse an occupier who had upgraded their dwelling. As Justice Madlanga states:

142 Daniels, para. 2.
143 Daniels, paras. 13-22.
144 Daniels, paras. 27-29.
145 Daniels, para. 29.
146 Daniels, para. 31.
147 De Vos, “The Constitutional Court speaks about land and dignity”.
148 Daniels, para. 37.
By its very nature, the duty imposed by the right to security of tenure, in both the negative and positive form, does rest on private persons. People requiring protection under ESTA more often than not live on land owned by private persons ... And I dare say the obligation resting, in particular, on an owner is a positive one. A private person is enjoined by section 25(6) of the Constitution through ESTA to accommodate another on her or his land. It is so that the obligation is also negative in the sense that the occupier's right should not be ‘improperly invaded’.149

Justice Madlanga’s majority judgment is therefore wide-reaching as it affirms that farm owners may, in certain circumstances, be required to take positive steps to realise the rights of ESTA occupiers living on their farms. This could include reimbursing an occupier for improvements that she made to her dwelling when she leaves the farm, as was the subject of the Daniels case, but it could equally extend to the realisation of a host of other fundamental rights including occupiers’ rights of access to adequate housing and basic services.

In the end, Daniels is a crucial judgment that ensures that the right to reside on and use farmland in terms of ESTA entitles occupiers to make improvements or alterations to their dwellings that are necessary to ensure a dignified existence and that occupiers may make these improvements without the consent of the farm owner or person in charge, provided that they attempt to meaningful engage with the owner about how these improvements will be made. In addition, occupiers may later also have a right to claim compensation for such improvements in accordance with section 13 of ESTA. It also provides an important foundation for the recognition that farm owners may, in certain circumstances, be required to take positive action to realise the rights of ESTA occupiers living on their land.

**Long-term security**

As the title suggests, ESTA also seeks to promote the long-term tenure security of farm dwellers.150 However, sections 4 and 26 of ESTA, which are the primary sections related to long-term security, are of “a very general nature and lack detail concerning the various options of tenure security available”.151 Section 4 of ESTA provides that the Minister of Rural Development and Land Reform is required to make funds available for subsidies to facilitate the planning and implementation of on-site and off-site housing developments for farm dwellers.152 On-site developments refer to the development of the land already occupied by farm dwellers (which belong to the landowner), while off-site developments entail granting farm dwellers long-term security on other land. Where farm dwellers express a preference for on-site development, reasons must be provided justifying why on-site development is not feasible or why off-site development is being pursued.153 Section 4 is complimented by section 26, which grants the Minister the power to expropriate land for the purposes of on-site or off-site developments.

ESTA therefore creates potentially far-reaching mechanisms for extending long-term tenure to farm dwellers. However, neither of these measures has been widely used to date.154 Where grants have been provided,
they usually have involved farm residents moving off farms and into townships rather than granting them agricultural land of their own or securing accommodation on the farms where they currently reside.155

Problems with ESTA

Although ESTA provides some protection to farm dwellers, many have criticised the Act on the basis that the protections provided are primarily procedural.156 As Hall notes, ESTA “combines weak substantive rights with strong procedural requirements”.157 For example, many praise ESTA's detailed procedural regulations governing evictions from farmland but criticise the fact that ESTA is less effective at creating and elaborating on the content of the substantive tenure rights of farm dwellers.

ESTA also creates a link between employment and the occupation rights of farm dwellers employed on the farm. ESTA offers limited protection in these cases despite the fact that the Act was intended to provide protection to farm dwellers and workers. In these instances, the termination of an employment relationship or dismissal of a farm worker would constitute a lawful ground for a farm owner to terminate the right of residency of such farm worker (and their dependents). This places many farm workers in a precarious situation, where the termination of an employment relationship could have a direct bearing on their rights to occupy and use farmland. As Du Toit writes: “To lose your job ... is to lose your home”.158

Various commentators have noted that there has been “widespread non-compliance” with ESTA in practice.159 As discussed more fully below, evictions from farms have continued at an alarming pace and the tenure rights of farm dwellers have remained vulnerable. In addition, awareness of ESTA has also remained very low.160 Many farm dwellers are unaware of their rights in terms of ESTA, and those that are aware of their rights are not familiar with the remedies and support available to them.161 This has prevented many from utilising the Act to protect themselves.

Although ESTA provides some critical protection to vulnerable groups, commentators have argued that the law has also had unintended consequences. As the South African Human Rights Commission (SAHRC) states in its 2007 assessment of the tenure rights of farm dwellers:

“ESTA has had unintended and undesirable consequences ... Attempting to privilege tenure security in isolation from a larger development programme to address living and working conditions on farms, has practically extinguished many of the other rights of farm dwellers and their families - such as the right to adequate housing, health and education... It provides a disincentive to landowners and employers to improve on-farm housing and facilities.”162
Others have noted that ESTA has been unable to provide adequate solutions to the complex problems posed by farm dwellers’ security of tenure and access to services:

“The existing approach to providing tenure security under ESTA has relied on legal protection and procedural requirements that have hardly been enforced and that do not address the complex social, economic and environmental problems that farms and their owners and workers are faced with. More supportive public policies are needed to shift decision making by farm owners and managers either through regulation or incentives.”

ESTA Amendment Bill

In October 2015, the DRDLR published the Extension of Security of Tenure Amendment Bill 24 of 2015 (ESTA Amendment Bill) for public comment. The Amendment Bill has not yet been passed into law but it may have a considerable impact on the legal and policy scheme governing farm dwellers. For this reason, it is discussed briefly below.

The Amendment Bill proposes various potentially far-reaching changes to the current legal framework created in terms of ESTA. First, the definition of dependent has been circumscribed in the Amendment Bill as “a family member to whom the occupier has a legal duty to support”. This proposed amendment would considerably curtail occupiers’ right to family life by excluding adult children and other extended family members from the ambit of the Act. The effect of this change would be to narrow the scope of the Act only to ‘primary occupiers’ and their legal dependents. Second, the Amendment Bill replaces section 4 “subsidies” with “tenure rights”. At first glance, the significance of this change in terminology is unclear as they seem to be synonyms. However, some commentators suggest that this change in terminology indicates that subsidies will be directed at farm owners rather than farm dwellers. In the past, section 4 of ESTA was rarely used to enhance the tenure of farm dwellers. The change in terminology seems to suggest that the state is altering its approach by attempting to incentivise farm owners into providing access to adequate housing and basic services on farmland. As Hall writes:

“Now, these funds are to be shared between farm dwellers and farmers. The context is the stand-off between municipalities which are obliged to provide free basic services to indigent people, and farmers who maintain that they have no such obligation. In this Amendment Bill, the state is conceding that it will pay farmers for providing not only services but also accommodation. How this is to be costed is not made clear, nor how the state can provide farm dwellers with free basic services (like other citizens) if the farm owner is unwilling to provide these.”

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165 Hall, “What’s the Alternative to Government’s Flawed ESTA Amendment Bill?”.
However, the Amendment Bill fails in the same ways as ESTA by failing to spell out the details and implications of the section 4 subsidy. As in the exiting law, the Amendment Bill does not indicate how much can be paid to farm owners nor does it specify the conditions under which the subsidy can be paid to farm owners. Other proposed amendments include a new duty on farm dwellers to maintain their homes and a recognition that the state is responsible for providing suitable alternative accommodation to farm dwellers rendered homeless as a result of an eviction.

The primary flaw in the Amendment Bill, however, is that it does not address the existing problems in relation to the implementation of ESTA and fails to rectify these problems.

(b) Land Reform (Labour Tenants) Act (LTA)

The Land Reform (Labour Tenants) Act 3 of 1996 (the LTA) is another important piece of legislation that seeks to give effect to the state's tenure reform programme. The LTA has two core aims:

- to protect labour tenants (and their associates) by providing legal recognition of their existing rights over land, including protection against arbitrary evictions; and
- to facilitate land redistribution by creating an application process through which labour tenants could acquire ownership and other corresponding rights to land that they live on (or other land).

The key feature of the LTA is that it not only grants protection against arbitrary and procedurally unfair evictions but also provides for labour tenants to acquire ownership of portions of the land that formed part of the farm that they occupied and used (or alternative land). The objectives of the LTA mean that it is a unique law that incorporates aspects of both tenure reform and land redistribution.

Who is protected by the LTA?

The LTA applies to farmland only. The Act applies to “labour tenants” and their associates. A labour tenant is defined in the Act as a person:

- who provides labour to a farm owner or lessee;
- is compensated for their labour by receiving the right to reside on a farm and use cropping or grazing land on the farm (or other land owned by the farm owner); and
- whose parent and/or grandparent also provided labour to a farm owner or lessee in exchange for the right to occupy and use cropping or grazing land on such farmland (or other land owned by the farm owner).

The Act specifically excludes farm workers - that is people employed on farms that are predominantly compensated in cash or some other form of remuneration and not predominantly in the right to occupy and use land - from the ambit of the definition of a labour tenant. Historically, providing compensation in the form of the right to occupy and use farmland was a way to substitute low or non-existent wages. Given the
The main characteristic of a labour tenant, therefore, is that they provided labour primarily in exchange for the right to occupy and use part of a farm (they may also have received wages but they should have been primarily compensated in the form of the right to occupy and use land). The degree to which a person is compensated with access to and use of farmland therefore plays an important role in determining whether such person could be considered a labour tenant for purposes of the LTA. Some commentators therefore refer to a “predominance test” to determine whether a person qualifies as a labour tenant: if the value of access to land exceeds the cash wages received, the person would be considered a labour tenant. Case law has developed guidelines on how to determine whether a person was predominantly compensated in access to land. In *Landman v Ndlozi; Landman v Gama*, the LCC stated that the value of using the land may be determined from the perspective of the employer, the employee or by objective standards depending on the circumstances of the case. This is important as the value of a benefit may be different for employers and employees. The court also stated that the whole period of employment needs to be considered. In some cases, the dividing line is fine. For example, Hall refers to one labour tenant application that was decided in favour of a labour tenant after a dispute regarding the value of a few chickens.

Case law has played an important role in interpreting who would qualify as a labour tenant for the purposes of the Act. One of the most important cases in this respect is the Supreme Court of Appeal’s (SCA) decision in *Brown v Mbense*. In this case Ms Mbense, a 67 year old woman, sought to be declared a labour tenant in terms of the LTA. Ms Mbense had been born on a farm in the Umgeni District of KwaZulu-Natal and had lived there her whole life. Her parents had also been born on the farm and had lived and worked there until their deaths. She claimed that there was an agreement between her parents and the previous farm owner, entered into before she was born, that they could keep livestock and plough portions of the land. Ms Mbense had worked on the farm as a cook and cared for the farm owner’s children, and had used cropping land on the farm for many years. The decision of the LCC to declared Ms Mbense a labour tenant was taken on appeal to the SCA. In the SCA, the majority judgment focused on whether Ms Mbense had proved that she had the right to use cropping or grazing land in return for labour to the farm owner; and whether her parents or grandparents had lived on the farm and had had the right to use cropping or grazing land in return for labour to the farm owner. In considering these issues, the court emphasised the need to consider the effect and substance of all agreements entered into between the person, their parents or grandparents and the farm owner or lessee. While assessing these agreements, courts should adopt a more substantive and less formal approach, and should be mindful of the power imbalance between labour tenants and farm owners. The majority found that Ms Mbhense did have the right to use cropping land on the farm, an entitlement which she had exercised freely over a lengthy period, both during her employment and afterwards, and in return for which she provided labour to the farm owner. The court also held that her father provided labour at least partly in exchange for the right to use cropping or grazing land on the farm. Having regard to all of these facts, the court concluded that Ms Mbense qualified as a labour tenant in terms of the LTA.

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172 Hall, *Farm Tenure*, p. 29.
173 Hall, *Farm Tenure*, p. 29. See also Woerman NO v Masondo 2002 (2) All SA 53 (A) (Woerman).
176 Landman, para. 17.
177 Hall, *Farm Tenure*, p. 29.
179 Brown, para. 21.
180 Brown, para. 30.
181 Brown, para. 27.
182 Brown, para. 31.
183 Brown, para. 35.
Labour tenancy is further complicated by the variety of forms it historically took. There are many variations in the labour tenancy system, which mean that labour tenancy is often considered a “fuzzy” concept.\(^{184}\) For example in certain parts of KwaZulu-Natal the head of a family could, historically, provide his sons or wives’ labour 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”;\(^ {185}\) while in the KwaZulu-Natal Midlands, there were entire farms that were only occupied and used by labour tenants with the labour tenants being required to provide labour on another farm.\(^ {186}\) These variations mean that whether a person qualifies as a labour tenant in terms of the LTA would depend on the particular circumstances of the case.

The LTA also provides certain protections for associates of labour tenants. Labour tenant associates are defined in the Act as family members of a labour tenant and any other person who has been nominated by a labour tenant to provide labour or as a successor of a labour tenant (in terms of the Act).\(^ {187}\) Associates have many of the same rights and protections in terms of the LTA that labour tenants are entitled to, but are not entitled to lodge applications to acquire land.\(^ {188}\)

### Regulation of eviction

Like ESTA, the LTA strictly regulates the eviction of labour tenants from farmland by stipulating how and through what processes such eviction may occur.\(^ {189}\) Section 5 of the LTA provides that a labour tenant or their associate may only be evicted in terms of a court order. Before a court would be entitled to grant an eviction order in terms of the LTA, the court must be satisfied that the eviction would be “just and equitable” in the circumstances.\(^ {190}\) In addition, a court may only authorise an eviction if:

- a labour tenant has, contrary to the agreement between the parties, refused or failed to provide labour to the owner and continues to do so despite the owner serving one month’s written notice on him or her; or
- the labour tenant (or his or her associate) has committed such a material breach of the relationship between the parties, that is is not practically possible to remedy it.\(^ {191}\)

When applying for the eviction of a labour tenant, a farm owner is required to serve two months notice of eviction on the labour tenant, his or her associates, and the Director-General of the DRDLR.\(^ {192}\) During this period, the Director-General is obliged to convene a meeting between the labour tenant and the farm owner. The purpose of this meeting is to see if the parties can reach a mediated settlement.\(^ {193}\) If no such settlement can be reached, the eviction proceedings should be dealt with by a court.

These provisions create a procedure for eviction which is similar to the procedure provided for in ESTA in a number of respects. This suggests that the courts should also consider eviction proceedings in terms of the LTA on a case-by-case basis.

Importantly, the LTA provides that a labour tenant who lodges an application in terms of the LTA to acquire the land that they occupy or use (or other land) may ordinarily not be evicted while such application is

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\(^ {184}\) Hall, Farm Tenure, p. 29.
\(^ {185}\) Gavin Williams, “Transforming Labour Tenants”, in Michael Lipton, Mike de Klerk & Merle Lipton (eds), Land, Labour and Livelihoods in Rural South Africa II: KwaZulu-Natal and Northern Province (1996), p. 220. See also Hall, Farm Tenure, p. 24.
\(^ {186}\) Hall, Farm Tenure, p. 24.
\(^ {187}\) See the definition of “associate” in section 1 of the LTA. See also sections 3(4) and 4(1) of the LTA.
\(^ {188}\) Labour tenant associates are also afforded the right to occupy and use land, are protected against arbitrary eviction (section 7(3)), and are allowed to remain on the farm for a period of 12 months after a labour tenant’s death (section 9(2)).
\(^ {190}\) Section 7(2) of the LTA.
\(^ {191}\) Section 7(2)(a) and (b) of the LTA.
\(^ {192}\) Section 11(1) of the LTA.
\(^ {193}\) Section 11(3) of the LTA.
pending. In relation to this category of labour tenants, a court may only grant an eviction order if “special circumstances exist which make it fair, just and equitable to do so, taking all the circumstances into account.”

Right to occupy and use farmland

The LTA expressly affirms that a person who was a labour tenant on 2 June 1995 would be entitled to occupy and use the part of the farm which they occupied or used on that date. This right may only be terminated in terms of section 3(2) of the Act.

Right to acquire ownership

The LTA provides for labour tenants to obtain long-term tenure rights through the assisted purchase of the land they currently occupy or use (or alternative land). This is done by allowing labour tenants to lodge applications to acquire ownership and related rights in respect of the land they live on and use with the DRDLR (the deadline for these applications was 31 March 2001). If the owner agrees that the applicants were labour tenants, he or she would be compelled to sell the land (or suitable alternative land) to the applicants at prices determined by a state appointed valuer. If the owner denies the applicants were labour tenants, the application would be referred to and be resolved by the LCC.

By the deadline, 19,416 labour tenant applications had been lodged. According to Cousins and Hall, 41,791 hectares of land had been transferred to 7,834 labour tenants by 2004. However, no more recent data is available and many applications have remained unresolved.

Problems with the LTA

The state has been slow to implement the Act. In part, this can be attributed to the lack of resources and capacity in the state. Some commentators have also suggested that processes adopted by the state have contributed to the inability to realise the promises of the LTA. For example, Hall notes that the Act provides for an application lodgement that is directed at the farm owners, yet the state has dealt with these applications as if they are claims against the state by investigating and “validating” them. In terms of this approach, the state did not always inform landowners of the labour tenant applications “forthwith” as is provided for in section 17 of the LTA and sometimes even waited for years to inform owners. This not only delayed the implementation of the Act, but also stripped labour tenants of the protections guaranteed in the Act.

In fact, the formal and procedural implementation of the Act all but ceased since the early 2000s. Cousins and Hall note that the state stopped implementing the Act after a large number of landowners initiated legal challenges in response to notices of labour tenant applications in respect of their land. The state seems to have been unprepared for the volume of legal challenges and responded by ceasing to issue further notices in terms of the Act. In fact, in 2016, the Director-General for the DRDLR admitted in court papers that the DRDLR had not been proactively attending to labour tenant claims for a number of years. The state has therefore refused to implement the LTA, thereby significantly undermining the tenure security of labour tenants.

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194 Section 14 of the LTA.
195 Section 14 of the LTA.
196 Section 3(1) of the LTA.
197 Sections 16-28 of the LTA. See also Hall, Farm Tenure, p. 24.
200 Cousins & Hall, Rights without Illusions, p. 12.
201 Cousins & Hall, Rights without Illusions, pp. 15-16.
202 Hall, Farm Tenure, p. 28.
204 Cousins & Hall, Rights without Illusions, p. 12. See also Mwelase v Director-General for the Department of Rural Development and Land Reform, Land Claims Court, Case No. 107/2013 (8 December 2016) (Mwelase), para. 5.
A recent decision in the LCC is poised to change this by compelling the state to implement the LTA. In *Mwelase v Director-General for the Department of Rural Development and Land Reform (Mwelase)* the court found that the refusal, inability and unwillingness of the state to implement the LTA warranted the appointment of a special master to assist the court in meaningfully monitoring the implementation of the LTA. The special master is an independent person who reports to the court and is charged with assisting the court in processing and adjudicating labour tenant claims. For the court, the systematic neglect of labour tenant claims justified the creation of this new remedy to effectively protect the threatened constitutional rights of labour tenants.

The appointment of the special master is a significant step in the right direction, but much more needs to be done on the part of the state to ensure the effective and efficient implementation of the LTA.

**c) Prevention of Illegal Evictions from, and Unlawful Occupation of, Land Act (PIE)**

The Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE) is not, strictly speaking, aimed at promoting the tenure rights of farm dwellers. Instead, the Act seeks to regulate the unlawful occupation of land in a manner that gives expression to the constitutional right to dignity and prevention of arbitrary evictions. However, the Act has the potential to impact on tenure security. In particular, the legal principles that have developed through case law in terms of PIE hold considerable persuasive value for how eviction proceedings in terms of ESTA should be handled. For this reason, PIE is briefly discussed below.

**Who is protected by PIE?**

While PIE also regulates evictions, it differs from ESTA and the LTA in relation to its application. ESTA applies in rural and peri-urban contexts, and in instances where an occupier occupies land with the consent of the landowner. On the other hand, PIE applies nationally in both urban and rural areas and regulates the procedure to be followed to evict “unlawful occupiers”. Unlawful occupiers are defined in terms of the Act as a person who occupies land without the express or tacit consent of the owner or person in charge of the property or without any other right in law to occupy such land. This category includes persons who never had any consent from the landowner and were thus unlawful from the outset, as well as persons who had consent or some other legal right to occupy, but whose consent lapsed at a later stage and thus became unlawful. PIE specifically excludes persons who are occupiers in terms of ESTA from the definition of unlawful occupiers.

PIE is therefore unlikely to be used in relation to the eviction of farm dwellers. This is due to the fact that occupiers in terms of ESTA and the LTA occupy farmland with the consent of the farm owner or person in charge (or some other right in law), while unlawful occupiers in terms of PIE occupy land without the consent of the landowner or person in charge (or some other right in law). While either category could include persons who, at some point, had consent from the landowner, the different systems and procedures envisioned in these laws could make it very difficult for farm occupiers to claim protection in terms of multiple Acts. As each law has different requirements for an eviction, provide different protections and evictions proceedings are even heard in different courts, it would be impractical for farm dwellers to claim

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206 *Mwelase*, para. 36.
207 *Mwelase*, para. 19.
208 *Mwelase*, paras. 34-35.
210 Pienaar & Geyser, “‘Occupier’ for the Purposes of ESTA”, p. 250.
211 Section 2 of PIE. See also Pienaar & Geyser, “‘Occupier’ for the Purposes of ESTA”, p. 250; and Chenwi, *Evictions in South Africa*, p. 36.
212 See the definition of “unlawful occupier” in section 1 of PIE.
213 *Ndlovu v Ngcobo: Bekker v Jika* 2003 (1) SA 113 (SCA). See also Pienaar & Geyser, “‘Occupier’ for the Purposes of ESTA”, p. 250.
214 See the definition of “unlawful occupier” in section 1 of PIE. See also *Ndlovu*, para. 146; Chenwi, *Evictions in South Africa*, p. 36.
protection in terms of multiple laws. Moreover, the distinctive purposes of these laws and the exclusionary provisions found in both ESTA and PIE seem to indicate that the legislature did not intend for these pieces of legislation to overlap.\textsuperscript{215}

\textbf{Regulation of eviction}

PIE gives effect to section 26(3) of the Constitution’s requirement that a court consider all the relevant circumstances before making an eviction order.\textsuperscript{216} It requires the eviction of an unlawful occupier must be “just and equitable”, having regard to a range of factors, including whether the occupiers include vulnerable categories of persons (the elderly, children, persons with disabilities and female-headed households), the duration of occupation and the availability of alternative accommodation or the state provision of alternative accommodation in instances where occupiers are unable to obtain alternatives on their own.\textsuperscript{217} This list is not an exhaustive list.\textsuperscript{218} Therefore, a court may consider any circumstance it deems relevant. An eviction order may not be granted unless an eviction would be just and equitable in the circumstances.

The case law that has developed in relation to eviction proceedings in term of PIE may be useful for the purposes of this report. This is due to the fact that the Constitutional Court has developed, as a principle of law, that the right of access to adequate housing contained in section 26 of the Constitution obliges the state to provide temporary alternative accommodation to evictees who are rendered homeless as a result of an eviction.\textsuperscript{219} This principle was developed through a series of cases before the court (discussed below). Although this legal principle was developed in the context of eviction proceedings brought in terms of PIE, the Constitutional Court has recognised that it flows directly from section 26(3) of the Constitution. This implies that these cases would be applicable in the context of eviction proceedings instituted in terms of ESTA. Moreover, two recent cases before the LCC - \textit{Lebombo and Diedericks} - expressly affirmed many of these judgments in relation to ESTA.

The principle was first fully established by the Constitutional Court in the case of \textit{Port Elizabeth Municipality v Various Occupiers (PE Municipality)} when it considered an application for eviction in terms of PIE brought by the Port Elizabeth Municipality. In the case, the court recognised that the right against arbitrary eviction contained in section 26(3) of the Constitution and PIE empowered a court to refuse an eviction order if it believed that an eviction would not be “just and equitable” in the circumstances.\textsuperscript{220} Whether the occupiers were able to access alternative accommodation after an eviction or, if they were unable to access suitable alternatives by themselves, whether the state intended to provide alternative accommodation to the evictees was a critical consideration during this determination. The court found that courts should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.\textsuperscript{221}

\begin{flushright}
\textit{“} courts should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.\textit{”}
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\textsuperscript{215} This approach seems to be further supported by the Ndlovu case, where the SCA stated that “the exclusion in PIE of the application of ESTA is a strong indication in favour of a more limited ambit of PIE”. See Ndlovu, para. 146.

\textsuperscript{216} See the objects of PIE.

\textsuperscript{217} Sections 4(6) and (7) of PIE. See also Occupiers Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele 2010 (9) BCLR 911 (SCA) (Shulana Court), para 13, which effectively does away with the distinction between these two provisions.

\textsuperscript{218} Shulana Court, para 13.

\textsuperscript{219} See Stuart Wilson, “Breaking the Tie: Evictions from Private Land Homelessness and the New Normality”, \textit{South African Law Journal}, 126(2) (2009), p. 289. See also Modder East Squatters v Modderkip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderkip Boerdery (Pty) Ltd 2004 (5) All SA 169 (SCA) (Modderkip); Olivia Road; PE Municipality; Blue Moonlight; Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries 2012 (4) BCLR 382 (CC) (Skurweplaas); and Occupiers of Portion R25 of the Farm Mooiplaats v Golden Thread 2012 (2) SA 337 (CC) (Mooiplaats).

\textsuperscript{220} PE Municipality, para. 25.

\textsuperscript{221} PE Municipality, para. 28.
The court noted that the type of alternative accommodation that the state would have to provide will differ depending on the circumstances of the particular case, but that the right to housing requires that “everyone must be treated with care and concern” and that “if the measures though statistically successful, fail to respond to the needs of those most desperate, they may not pass” constitutional muster.222

This principle was expanded in City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd (Blue Moonlight), where the Constitutional Court heard an eviction application brought by a private landlord. The court determined that the state had a responsibility towards occupiers who would be rendered homeless as a result of an eviction regardless of whether such occupiers were evicted from state land or privately owned land. The court declared the state’s housing policy “unreasonable” to the extent that it failed to provide alternative accommodation to those evicted from private property, noting that “[t]o the extent that eviction may result in homelessness, it is of little relevance whether the removal from one’s home is at the instance of the City or a private property owner”.223 Two decisions handed down after these cases have further fleshed out this principle. In Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd224 and Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd225 the Constitutional Court ordered that to ensure that the occupiers were not rendered homeless prior to the state provision of alternative accommodation, the court also required a linkage between the date of eviction and the date upon which the municipality should provide alternative accommodation.226 This meant that the occupiers could remain on the property until the state provided alternative accommodation.

Although these principles have not all been comprehensively developed in the context of ESTA, these judgments hold considerable persuasive value for how eviction proceedings in terms of ESTA should be handled.

(d) Conclusion

The previous sections set out the complex network of laws that governing tenure security and evictions of farm dwellers. While the broader aims of ESTA, the LTA and PIE are similar, namely to promote short-term tenure security by strictly regulating evictions, the laws differ in significant respects by providing different eviction proceedings for different categories of rural or urban occupiers227 and providing distinctive protections and benefits. In each case, the Act most applicable needs to be identified, which has significant implications for the farm dwellers and landowners in terms of the requirements that need to be met for an eviction order to be granted, the types of protections available to occupiers, the onus of proof and the court to be approached.228 The complexity of this legislative framework is a potential disadvantage that may lead to significant confusion. For example, it may not always be immediately apparent whether a person qualifies as an occupier in terms of ESTA, a labour tenant in terms of the LTA or an unlawful occupier in terms of PIE. Valuable resources could be conserved by developing simpler and more streamlined approaches to eviction proceedings,229 or allowing these pieces of legislation to complement one another to create a framework of protection for farm dwellers. After all, these laws each seek to protect vulnerable groups of occupiers. This is not to argue that comprehensive legislative reform should be undertaken, but adjustments to the legislative scheme so that ESTA, PIE and the LTA complement each more effectively would ensure optimal protection of farm dwellers.

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222 PE Municipality, para. 29.
223 Blue Moonlight, para. 95.
224 Occupiers of Portion R25 of the Farm Mooiplaats v Golden Thread 2012 (2) SA 337 (CC) (Mooiplaats).
225 Occupiers of Skurweplaas v PPC Aggregate Quarries 2012 (4) BCLR 392 (CC) (Skurweplaas).
226 Skurweplaas, para. 13.
It may be useful to identify commonalities in the legislative framework and develop these more strongly in relation to each of the laws. For example, the far-reaching procedural and substantive protections developed in the context of eviction proceedings instituted in terms of PIE would substantially strengthen the protections provided for in ESTA and the LTA. While this type of cross-pollination is beginning to emerge in cases such as Lebombo and Diedericks, there is considerable scope for further development.

The preceding sections indicate that the case law developed in terms of ESTA, the LTA and PIE has further developed the substantive and procedural protections afforded to farm dwellers. The most important principle laid down in the case law is that courts, when considering evictions proceedings from farms, should attempt to strike a fair and equitable balance between the rights of the farm dwellers, on the one hand, and the rights of the farm owner, on the other. In weighing the different rights of the parties, courts should consider whether an eviction would lead to unjust or inequitable consequences for the parties and may reasonably limit the rights of parties to ensure that these unjust consequences do not take place. This principle has far-reaching implications in instances where an eviction from farmland may result in farm dwellers being rendered homeless. Ordinarily, a court would not be entitled to grant an eviction order if the eviction would lead to a farm dweller becoming homeless as a result of such eviction, unless alternative accommodation is available to the farm dweller, or, if the farm dweller is unable to acquire alternative accommodation by herself, the state provides alternative accommodation. This principle means that farm owners’ rights to property may, under certain circumstances, be temporarily limited in instances where the rights of farm dwellers need to be given expression. It also means that the state is under a constitutional duty to provide alternative accommodation to farm dwellers who would be rendered homeless as a result of an eviction. In addition to this principle, the case law requires farm dwellers, farm owners and the state to “meaningfully engage” with one another “in a proactive and honest endeavour to find mutually acceptable solutions” before attempting litigation.

Finally, case law has also affirmed that the primary obligation to provide access to adequate housing rests on local government, including the duty to provide alternative accommodation to those rendered homeless as a result of an eviction. This means that local government is constitutionally obliged to budget and plan for the provision of suitable alternative accommodation for farm dwellers who are evicted from farmland and, if necessary, should leverage provincial and national funding to do so.

Another concern emerging from the above discussion is the problems related to the implementation of the legal framework established in terms of ESTA, the LTA and PIE. The challenges associated with implementation are discussed in section 3 of this report.

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230 Hattingh and Diedericks.
231 See PE Municipality and Diedericks.
232 Diedericks v Univeg Operations South Africa (Pty) Ltd t/a Heldervue Estates, Land Claims Court, Case No. LCC18/2011 (23 August 2011).
# COMPARISON BETWEEN ESTA, THE LTA AND THE PIE ACT

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<tr>
<td><strong>Application</strong></td>
<td>ESTA applies on agricultural land in rural and peri-urban areas only. Section 2(1) of ESTA states that it applies to “all land other than land in a township established, approved, proclaimed or otherwise recognised as such in law or encircled by such a township, but including any land within such a township which has been designated for agricultural purposes in terms of any law”.</td>
<td>The LTA applies to farm land only. Section 1 of the LTA defines “farm” as “a portion or portions of agricultural land as defined in the Subdivision of Agricultural Land Act 70 of 1970”.</td>
<td>PIE applies nationally in both urban and rural areas.</td>
</tr>
</tbody>
</table>
| **Who is protected?** | ESTA provides protection for two categories of occupiers, namely occupiers and long term occupiers. **Occupiers:**  
- A person residing on farm land which belongs to another person and who has consent or another right in law occupy (section 1 of ESTA).  
- Excludes persons who use farms for commercial, industrial or mining enterprises and persons who earn more than R5 000 a month.  
- Express or tacit consent from the farm owner or person in charge of the farm is sufficient.  
**Long term occupiers:**  
- A person who has resided on the farmland in question for a period of ten years and has either reached the age of 60 or is an employee or former employee of the farm owner and, as a result of ill-health, injury or disability, is unable to supply labour (section 8(4) of ESTA).  
- Long term occupiers have more substantive rights and protections in terms of ESTA and are generally able to retire on the farmland they occupy. | The LTA distinguishes between three different categories of persons each with their own rights and protections. These categories are: labour tenants, labour tenant associates and labour tenant claimants. **Labour tenant:**  
- A person who is compensated for his or her labour by receiving the right to reside on a farm and use cropping or grazing land on the farm (or other land owned by the farm owner) AND whose parents or grandparents were labour tenants (section 1 of the LTA).  
- Farm workers do not qualify as labour tenants. Farm workers are persons employed by a farm owner and who were remunerated primarily in cash and not in the right to occupy and use land.  
- The key feature of a labour tenant is thus that he or she should be compensated for their labour predominantly in the right to occupy and use farmland (Brown v Mbense and Another 2008 (5) SA 489 (SCA)). | PIE protects unlawful occupiers. **Unlawful occupiers:** A person who occupies land without the express or tacit consent of the owner or person in charge of the property and without any other right in law to occupy such land (section 1 of PIE). This includes persons who at one point had consent or a legal right to occupy but whose consent or legal right to occupy has since lapsed (Ndlovu v Ngcobo; Bekker and Another v Jika 2003 (1) SA 113 (SCA)). The definition also expressly excludes a person who is an occupier in terms of ESTA. |
### Extension of Security of Tenure Act (ESTA)

**Associate:**
- A person who is a family member or who has been nominated as a successor of a labour tenant (section 1 of the LTA).

**Claimant:**
- A labour tenant who lodged an application to receive the land he or she is entitled to occupy and use (or compensatory land) in terms of section 17(1) of the LTA.

### Land Reform (Labour Tenants) Act (LTA)

**Labour tenant:**
- The LTA provides that a person who was a labour tenant on 2 June 1995 shall have the right to occupy and use farmland which he or she was using or occupying on that date. This right may only be terminated in specific circumstances (section 3(1) of the LTA).

- The LTA provides that labour tenants have protection against arbitrary eviction:
  - A labour tenant may only be evicted if a court grants an eviction order (section 5 of the LTA).
  - A court may only grant an eviction order if it is satisfied that the eviction would be “just and equitable” in the circumstances AND the labour tenant either refused or failed to provide labour to the farm owner (despite the farm owner giving him or her one months written notice) or the labour tenant committee a material breach of the relationship with the owner that is not capable of being fixed (section 7(2) of the LTA).

- When applying for an eviction order, the farm owner or person in charge may also request an eviction order for the associates of the labour tenant.

### Prevention of Illegal Evictions and Unlawful Occupation of Land Act (PIE)

**Unlawful occupiers:**
- PIE provides various procedural and substantive protections against eviction.

- Unlawful occupiers may not be evicted unless a court order is obtained authorising such eviction. An eviction order may only be granted if a court is satisfied that the eviction would be “just and equitable” in the circumstances.

- Sections 4(6) and (7) of PIE list a number of factors that a court needs to take into account before an eviction order can be granted, including the duration of occupation, whether the unlawful occupiers include vulnerable groups of people and the availability of alternative accommodation. The factors included in these sections are not an exhaustive list, which means that the court can consider any circumstance it deems relevant (Occupiers Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele 2010 (9) BCLR 911 (SCA)).
### LAWS

<table>
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<tr>
<td>• The DRDLR is required to produce a report in terms of section 9(3) of ESTA setting out whether suitable alternative accommodation is available for the occupiers, indicating how the eviction will affect the constitutional rights of the occupiers, and pointing out any undue hardship which an eviction would cause for the occupiers or the farm owner.</td>
<td>• The LTA provides that the farm owner must provide a notice of eviction to the labour tenant, his or her associates and the Director General of DRDLR (not less than 2 months before instituting proceedings). This notice is to inform these parties of the owner’s intention to institute eviction proceedings (section 11(1) and (3) of the LTA).</td>
<td>• Land owner or person in charge of the property must issue a notice of eviction (also referred to as a section 4(2) notice or a 14 day notice) on the Unlawful occupiers to inform them on the time and date of the court hearing, the grounds for the eviction and to explain that the unlawful occupiers have the right to challenge the eviction in court. The protections were supplemented with more procedural protections developed through case law over the years. Courts have found that: • in order to make sure that they are “fully informed” of all the relevant circumstance prior to ordering an eviction, they can insist on receiving more information (Port Elizabeth Municipality v Various Occupiers 2005 (1) SA (CC)); and in eviction proceedings where people could be rendered homeless as a result of an eviction, the relevant municipality should be joined as a party to the legal proceedings (Sailing Queen Investments v Occupants La Colleen Court 2008 (6) BCLR 666 (W)). In addition, the courts require that municipalities file reports to the court to make sure that the court has sufficient information to make an informed decision. This report must include information about the personal circumstances of the occupiers, the</td>
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<td>• ESTA provides a number of substantive rights for occupiers. These include the right to tenure security; the right to continue to live on and use the land; the right to live with their families and “enjoy a family life that is in keeping with their culture”; the right to receive visitors; the right to visit and maintain his or her family graves on the farm; the right to, in certain circumstances, be buried on the farm or bury their relatives on the farm; and the right to access essential services as per agreement with the owner, including the right not to be denied or deprived of access to water, educational and health services.</td>
<td>• ESTA provides protection against the withdrawal of their right to residence (their right of residence may only be terminated in exceptional circumstances). • ESTA provides protection against eviction by requiring that an occupier may only be evicted if a court order authorises such eviction (section 9(1) of ESTA). Moreover, long term occupiers may only be evicted on specific grounds. • Long term occupiers are entitled to the same substantive rights to which other occupiers are entitled.</td>
<td>• Associates have all the same legal and procedural protections afforded to labour tenants, except they cannot lodge a claim in terms of section 17(1) of the LTA. • In the event of the death of a labour tenant, his or her associate may remain on the farm land for a period of 12 months after they are given written notice to vacate the land (section 9(2) of LTA).</td>
<td>• Labour tenant claimants have even greater protections against arbitrary eviction. Ordinarily labour tenant claimants may not be evicted while his or her application in terms of the LTA is pending. A court may only order an eviction of a labour tenant claimant in exceptional cases where “special circumstances exist which make it fair, just and equitable” to do so, taking into account all the relevant circumstances. • If a claimant’s claim is successful, he or she has the right to apply for a state advance or subsidy to purchase the land (section 27 of the LTA).</td>
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<td>Long term occupiers:</td>
<td>• If a claimant’s claim is successful, he or she has the right to apply for a state advance or subsidy to purchase the land (section 27 of the LTA).</td>
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### What rights are protected (cont.)?

- In the event of the death of a long term occupier, his or her spouse or dependents may remain on the farm land for a period of 12 months after they are given written notice to vacate the land (section 8(5) of ESTA).
- Parties in eviction proceedings are required to “meaningfully engage” with one another before embarking on litigation (Diedericks v Univeg Operations South Africa (Pty) Ltd t/a Heldervue Estates, Land Claims Court, Case No. LLC 18/2011 (23 August 2011)).
- The state is legally obliged to make alternative accommodation or alternative land available to occupiers that would otherwise become homeless as a result of eviction. This principle is applicable whether the occupiers are being evicted from public or private land (Port Elizabeth Municipality v Various Occupiers 2005 (1) SA (CC); Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg 2008 (3) 208 (CC)).

### Which court or forum has jurisdiction?

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<td>• In the event of the death of a long term occupier, his or her spouse or dependents may remain on the farm land for a period of 12 months after they are given written notice to vacate the land (section 8(5) of ESTA).</td>
<td>availability of alternative accommodation, the municipality’s current housing policy and progress reports on the implementation of the municipality’s housing policy and the provision of alternative accommodation (City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others 2012 (6) SA 294 (SCA); Sailing Queen Investments v Occupants La Colleene Court 2008 (6) BCLR 666 (W)). Parties in eviction proceedings are required to “meaningfully engage” with one another before embarking on litigation (Port Elizabeth Municipality v Various Occupiers 2005 (1) SA (CC); Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg 2008 (3) 208 (CC)).</td>
<td>The LCC has exclusive jurisdiction to apply the Act (section 5 and 29 of the LTA). All cases should be transferred to the LCC once it becomes clear that the case deals with the LTA (section 13(1A) of the LTA).</td>
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<td>Eviction proceedings in terms of PIE may be brought in the Magistrates’ Court or High Court.</td>
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<td>• The state is legally obliged to make alternative accommodation or alternative land available to occupiers that would otherwise become homeless as a result of eviction. This principle is applicable whether the occupiers are being evicted from public or private land (Port Elizabeth Municipality v Various Occupiers 2005 (1) SA (CC); Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg 2008 (3) 208 (CC)).</td>
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<td>Either the Magistrates’ Court in whose jurisdiction the case is heard, or the Land Claims Court (LCC), have jurisdiction to hear eviction proceedings. All eviction orders granted by a Magistrates’ Court are subject to automatic review in the LCC (section 19(3) of ESTA).</td>
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<tr>
<td>Which court or forum has jurisdiction (cont.)?</td>
<td>Eviction orders authorised by Magistrates’ Courts are suspended until they have been reviewed by the LCC (section 19(5) of ESTA). This means that these orders cannot typically be enforced unless they have been confirmed by the LCC. However, in practice, evictions often occur before the LCC has a chance to review the eviction order. Even if the LCC overturns the order, the farm dwellers have often already left the farm.</td>
<td>This means that only the LCC has the power to grant eviction orders in terms of the LTA. However, the courts have found that the Magistrates’ Court may have jurisdiction to hear eviction proceedings in certain circumstances. In cases where the eviction order is unopposed by labour tenants (request for summary judgment), the Magistrates’ Court would have jurisdiction (Makhomboti v Klingenberg 1999 (1) SA 135 (TPD); Mosehla v Sancor BK 2001 (3) SA 1207 (SCA)). This means that unopposed eviction cases may be heard in the Magistrates’ Court. The LTA does not provide for automatic review of eviction orders granted by the Magistrates’ Court. However, the LTA provides that summary judgments handed down in the Magistrates’ Court may be appealed to the LCC (section 13(3) of the LTA).</td>
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<tr>
<td>Who may institute eviction proceedings?</td>
<td>Only the farm owner or person in charge of the farm (a person who has the legal authority to give permission to a person to enter or reside on the property) may institute eviction proceedings in terms of ESTA.</td>
<td>Only the farm owner may institute eviction proceedings in terms of the LTA (section 6(1) of the LTA). If someone else bring eviction proceedings, the owner must give evidence under oath that he or she supports the application.</td>
<td>Only the land owner or person in charge of the land (a person who has the legal authority to give permission to a person to enter or reside on the property) may institute eviction proceedings in term of PIE (section 4(1) of PIE).</td>
</tr>
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<tr>
<td>Alternative dispute resolution mechanisms</td>
<td>ESTA provides for mediation and arbitration proceedings to resolve disputes between farm owners, farm dwellers and the state. Any party involved in a dispute in terms of ESTA may request the Director General of the DRDLR to appoint a person with expertise in dispute resolution to facilitate meetings of interested parties, and mediate a dispute (sections 21 and 22 of ESTA). The parties involved in eviction proceedings in terms of ESTA are also required to “meaningfully engage” with each other about all aspects of an eviction, relocation and the availability or provision of alternative accommodation (Diedericks v Univeg Operations South Africa (Pty) Ltd t/a Heldervue Estates, Land Claims Court, Case No. LLC 18/2011 (23 August 2011)).</td>
<td>The LTA provides for alternative dispute resolution between parties involved in disputes in terms of the LTA. Sections 11 and 36 of the LTA expressly provide for the parties involved in a dispute to participate in mediation. The LTA says that before instituting legal proceedings, the Director General of the DRDLR must convene a meeting between the parties involved in the dispute in terms of the LTA to attempt to negotiate a mediated settlement.</td>
<td>PIE makes provision for the possibility of mediation (section 7 of PIE). In addition, the Constitutional Court has held that parties in eviction proceedings are required to “meaningfully engage” with one another before embarking on litigation. The courts have described meaningful engagement as a two way process where the state, property owners and unlawful occupiers negotiate with each other in order to reach agreement about a number of important issues related to the eviction and the provision of alternative accommodation (Port Elizabeth Municipality v Various Occupiers 2005 (1) SA (CC); Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg 2008 (3) 208 (CC)).</td>
</tr>
<tr>
<td>Criminal offences</td>
<td>ESTA specifies that it is a criminal offence to evict an occupier without a court order authorising such eviction. This crime may be punishable with a fine, two years imprisonment or both (section 23 of ESTA). The Act also makes provision for private prosecutions.</td>
<td>The LTA states that it is a criminal offence to evict a labour tenant or labour tenant associate without a court order authorising such eviction. This crime may be punishable with a fine, two years imprisonment or both (sections 15A(1) and (3) of the LTA). The Act makes provision for private prosecutions.</td>
<td>Section 8 of PIE makes it a crime to evict an unlawful occupier without a court order specifically authorising such eviction. This crime may be punishable with a fine, two years imprisonment or both. The Act makes provision for private prosecutions.</td>
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</table>
2.4. Other legislation

This section analyses various laws that are not directly aimed at promoting the tenure security of farm dwellers, but are important for the realisation of farm dwellers’ rights to housing and access to basic services.

(a) Spatial Planning and Land Use Management Act (SPLUMA)

The Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) provides a framework for spatial development planning, land development and land use management in South Africa at municipal, provincial and national spheres. For the first time, it introduces a unitary planning system in the country and requires the inclusion of previously excluded areas, such as informal and traditional or customary areas.

Through the enactment of a set of development principles, SPLUMA establishes a normative framework that applies to “all organs of state and other authorities responsible for the implementation of legislation regulating the use and development of land”. The principles of ‘spatial justice’ and ‘spatial resilience’ resonate strongly with the farm dweller context as they require, among other things, that:

- Past imbalances be redressed;
- Previously excluded people and areas be included;
- Land use schemes and other spatial planning mechanisms, such as spatial development frameworks, specifically incorporate provisions that are flexible and appropriate for the management of disadvantaged areas;
- Provisions to accommodate access to secure tenure and the upgrading of informal areas be included in land development procedures;
- The value of land or property not act as an impediment or restriction to the exercise of discretion on the part of a Municipal Planning Tribunal; and
- Sustainable livelihoods in communities most likely to suffer the impacts of economic and environmental shocks be accommodated in spatial plans, policies and land use management systems.

SPLUMA requires that “all principles contained in this Act apply to all aspects of spatial development” which implies that other principles, such as ‘spatial sustainability’ and ‘efficiency’ must be brought to bear as well.

Although the application of the development principles is legally required in a range of spatial planning mechanisms, it is of concern that they might mean anything to anyone. Indeed, it is possible that they could be deployed to serve a variety of competing interests. In addition, the application of them all, that is the principles in conjunction with one another, will be a difficult balance to strike. Civil society stakeholders have a role to play in motivating their application in contexts where spatial planning mechanisms have not traditionally been applied, including the farm dweller context. Municipalities in rural areas may require assistance in the balanced application of the SPLUMA principles.

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233 Chapter 2 of SPLUMA.
234 Section 6(1) of SPLUMA.
235 Section 7(a) and (d) of SPLUMA.
236 Sections 12(1)(h) and (i) and 21(a) of SPLUMA.
237 Section 6(2) of SPLUMA.
238 Section 7(b) of SPLUMA.
239 Section 7(c) of SPLUMA.
In the preparation of spatial development frameworks at all three spheres of government, SPLUMA requires that consideration be given to “the inclusion of previously disadvantaged areas, ... (and) rural areas, ... and their inclusion and integration into the spatial, economic, social and environmental objectives of the relevant sphere” and that historical and spatial imbalances be addressed. Furthermore, the municipal spatial development framework must “assist in integrating, coordinating, aligning and expressing development policies and plans emanating from the various sectors of the spheres of government ...”. The municipal spatial development framework must be prepared as part of the municipal integrated development plan, give effect to SPLUMA’s development principles and include estimates of the demand for housing, as well as the location of planned housing projects. It is also a requirement that municipal spatial development frameworks “identify the designation of areas in the municipality where incremental upgrading approaches to development and regulation will be applicable”.

Municipal spatial development frameworks should therefore include and integrate farmland and the people living there; align land reform (which includes tenure reform and redistribution as these apply to the farm dweller and labour tenant contexts) and human settlement development (including rural housing) policies and programmes at national and provincial sphere; and plan for farm dweller housing needs and the location of future housing projects which address them. Furthermore, consideration could be given to the designation of incremental upgrading areas, making it possible to address development and regulation on and off farms in an incremental way.

Several land use management provisions have a bearing on the farm dweller context. SPLUMA requires that a “municipality must, after public consultation, adopt and approve a single land use scheme for its entire area within five years of the commencement of the Act”. A land use scheme must “include the incremental introduction of land use management and regulation in ... rural areas ...” and “include provisions for affordable housing in residential land development”. In addition SPLUMA makes provision for a new land use zone:

“A land use scheme may include provisions relating to—

(b) specific requirements regarding any special zones identified to address the municipal priorities of the municipality.”

The implications of these land use management provisions for the farm dweller context have not yet been worked out. In due course, it will be important to assess the extent to which land use management and regulation is being incrementally introduced into rural areas, with the provision of support where it is not. Municipalities will need to apply themselves to the management of land use in the farm dweller context, where people living on farms have the constitutional rights outlined earlier in this report, and in relation to the application of the spatial justice principle which requires, among other things, accommodating access to secure tenure. From a land use perspective, farm dwellers have historically been ‘concealed’ within privately owned commercial farmland and agricultural land use zoning. SPLUMA requires a more balanced
approach to land use management and regulation. The ‘special zone’ mechanism could potentially be applied to address the tenure security and access to housing and services needs of people living on farms but a model approach would likely be needed should rural municipalities decide to use this provision.

SPLUMA also makes several *land development management* provisions which have a bearing on the farm dweller context. A Municipal Planning Tribunal must “be guided by the development principles set out in Chapter 2” of SPLUMA and it must make decisions that are consistent with “…measures designed to protect and promote the sustainable use of agricultural land, national and provincial policies and the municipal spatial development framework”. Further, when deciding on an application the tribunal must also:

\[
\text{take into account-}
\]

\(\text{(ii) the constitutional transformation imperative and related duties of the State;}\)

\[...
\]

\(\text{(iv) the respective rights and obligations of all those affected.}\)

The application of these land development management provisions to the farm dweller context have not yet been tested but it can be said that, when land development decisions affect farm dwellers either on- or off-site, then the development principles, the municipal spatial development framework and constitutional rights and obligations must be brought to bear.

It is of some concern that non-owners have no standing in land development applications: SPLUMA creates standing for owners, not users of land. This could mean that farm dwellers have no ability to participate in the decisions about the land on which they live. Decisions made, without their involvement, about the land on which they live, could affect their rights. The limitation of standing in land development applications to owners is in conflict with the spirit, object and purposes of the legislation governing the tenure security and eviction of farm dwellers. ESTA and the LTA seek to strengthen the tenure, occupation and use rights of farm dwellers. Further, the Constitutional Court has insisted that ESTA (and other land reform and tenure reform legislation) should be interpreted purposefully.

It is however conceivable that a farm dweller could participate in tribunal proceedings if he or she were granted ‘intervener status’: SPLUMA makes provision that an interested person may petition to intervene in an application and that a tribunal or appeal authority can grant intervener status. It is not clear that a farm dweller would be aware of an application on the land on which he or she lives because SPLUMA does not require that notice be given of an application at the property or on the land for to which the application applies.

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254 Chapter 6 of SPLUMA.
255 See Section 35 (1): the body which determines land use and development applications within a municipal area, established by a municipality.
256 Section 42(1)(a) of SPLUMA.
257 Section 42(1)(b) of SPLUMA.
258 Section 42(1)(c) of SPLUMA.
259 As far as we are aware.
261 Although this principle has been established in relation to eviction proceedings, the balance required between the rights of owners and farm dwellers in ESTA and the LTA and occupiers in terms of PIE, could perhaps be considered in a broader context, in this case land development applications.
262 See Daniels; and Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd 2007 (6) SA 199 (CC).
263 In terms of section 41(2) of SPLUMA, a land development application includes township establishment, the subdivision of land, the consolidation of different pieces of land, the amendment of a land use or town planning scheme, the removal, amendment or suspension of a restrictive condition.
264 Adapted from SERI, “Submission on the City of Johannesburg’s Municipal Planning By-Law”.

PATHWAYS OUT OF POVERTY: Improving Farm Dwellers’ Tenure Security and Access to Housing and Services
(b) Local Government: Municipal Systems Act (Systems Act)

The Local Government: Municipal Systems Act 32 of 2000 (Systems Act) is one in a set of legislative pieces regulating local government. The Act gives content to the various constitutional duties of local government and fleshes out the constitutional provisions in relation to the developmental functions of municipalities. For the purposes of this report, only the provisions in the Systems Act related to housing and the provision of basic services will be analysed.

Section 4(2) of the Systems Act sets out the duties of municipal councils, the bodies that exercise legislative and executive authority at local government level. A key duty provided for in section 4(2)(f) is to ensure that the local community is granted access to municipal services on an equitable basis. Section 4(2)(f) reads:

“The council of a municipality, within the municipality’s financial and administrative capacity and having regard to practical considerations, has the duty to -

(f) give members of the local community equitable access to the municipal services to which they are entitled.”

Section 73(1) and (2) of the Systems Act gives further content to the obligations of municipalities to provide access to basic services. These sections read:

“(1) A municipality must give effect to the provisions of the Constitution and -
(a) give priority to the basic needs of the local community;
(b) promote the development of the local community; and
(c) ensure that all members of the local community have access to at least the minimal level of basic municipal services.

(2) Municipal services must -
(a) be equitable and accessible;
(b) be provided in a manner that is conducive to -
(i) the prudent, economic, efficient and effective use of available resources; and
(ii) the improvement of standards of quality over time;
(c) be financially sustainable;
(d) be environmentally sustainable; and
(e) be regularly reviewed with the view to upgrading, extension and improvement.”

265 The other two laws are the Local Government: Municipal Structures Act 117 of 1998 (Municipal Structures Act) and the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA).
The Systems Act therefore clearly affirms the obligations to provide access to basic services that are laid out in the Constitution and seeks to elaborate on how these obligations should be complied with. However, the Systems Act also places considerable emphasis on the provision of services in a manner that is “financially sustainable” and would make “prudent, economic, efficient and effective use of available resources”. Given the additional expense that is likely needed to provide essential infrastructure and municipal services on farms, which are often located in far-flung rural areas, it seems unsurprising that municipalities have not prioritised the provision of services to farm dwellers. By instilling the principles of financial prudence in the legislative scheme, the Systems Act may, inadvertently, have resulted in municipalities shying away from providing infrastructure and municipal services on farms or in farming areas. Moreover, municipalities may be reticent to provide infrastructure or basic services to farm dwellers since these services frequently need to be provided on private land owned by farmers. To government officials this may seem to be wasteful and fruitless expenditure or, at the very least, an imprudent use of available resources (see discussion on provision of services on privately owned land in section 3 of this report).

The Systems Act also provides for a process of “developmentally-orientated planning” through the development and implementation of Integrated Development Plans (IDPs or singular IDP). The IDP is a single, inclusive, five year strategic plan for the development of a municipal area and the promotion of the economic and social development of the community living in the municipal area. The plan is reviewed by the municipal council annually. Every municipality is further required to establish an IDP forum to develop, monitor and measure the implementation of and review the municipality’s IDP.

The IDP is one of the most important instruments for municipalities to ensure that their budgeting and planning processes are in line with their constitutional obligations to give priority to the basic needs of the local community and to promote the social and economic development of the community. IDPs therefore offer a critical opportunity through which the developmental needs of vulnerable groups, including farm dwellers, could be foregrounded. As part of the process of developing an IDP, a municipality should assess the needs of the local community and draw up a vision for the long-term future. The municipality must identify priority issues for attention and, within those priority areas, identify objectives to be reached within the term of the specific municipal council. Strategies for reaching these objectives must be set out and delegated to relevant departments. In addition, the municipality is required to budget for and apportion funds for each to the objectives identified in the IDP. Each IDP must include a housing chapter which details the housing needs of the communities in the municipal area. A critical component of the IDP process is interaction with the local communities, as well as national and provincial government to ensure that a holistic plan for the municipal area is developed that aligns with strategic planning at other governmental levels.

Although the objectives of the IDP processes are laudable, in practice it does not always comply with the legislative vision. IDPs are frequently criticised for failing to be genuinely participatory, with communities often being excluded from participating in budgeting and IDP processes. The Systems Act also goes further than merely requiring that local communities be consulted by requiring that local communities should actively be encouraged to be part of the drafting of the IDP.

266 Sections 23 to 34 of the Systems Act. See also SECTION 27 et al, Making Local Government Work, pp. 24-28.
271 Public Services Commission (PSC), State of Public Service Report, p. 20.
In spite of criticisms levelled against IDPs, they remain an important tool for the identification of and realisation of the tenure, housing and basic service needs of farm dwellers. In particular, IDPs should play an important role in relation to information collection and data capture about farm dwellers, their living conditions, their development needs and progress in the realisation of their rights in a participative manner.

(c) Housing Act and National Housing Code

The Housing Act 107 of 1999 (the Housing Act) is the primary piece of legislation dealing with housing in South Africa. The Act provides for the national housing development process by laying down general principles for housing development in all spheres of government; defining the functions of national, provincial and local governments in respect of housing development; and laying the basis for the financing of the national housing programmes. Section 2(1) the Housing Act provides that all spheres of government must give priority to the needs of the poor in respect of housing development, and are mandated to meaningfully consult with individuals and communities affected by housing development. The Act further provides that the state must ensure that housing developments offer as wide a choice of housing and tenure options as is reasonably possible; are economically, fiscally, socially and financially affordable and sustainable; are based on integrated development planning; are administered in a transparent, accountable and equitable manner; and uphold the practice of good governance.

In addition, section 9(1)(a)(i) and (iii) of the Housing Act are important in the context of farm dwellers’ rights to housing and access to basic services. These provisions state:

“(1) Every municipality must, as part of the municipality’s process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to -

(a) ensure that -

(i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis; [and]

... 

(iii) services in respect of water, sanitation, electricity, roads, storm-water drainage and transport are provided in a manner which is economically efficient…"

The bulk of the regulatory framework relating to housing - the main principles, policy choices and implementation rules - are not set out in the Act but in the National Housing Code. Section 4 of the Housing Act requires the Minister of Human Settlements to publish the National Housing Code and specifies that the Code should include the national housing policy and administrative and procedural guidelines for the implementation of the policy. According to the Housing Act, the Code is delegated legislation that is legally binding on provincial and local level. This means that both the Act and the Code

273 Tissington, A Resource Guide to Housing, p. 27.
276 Section 4 of the Housing Act provides:

“(1) The Minister must publish a code called the National Housing Code (in this section referred to as the “Code”).

(2) The Code -

(a) must contain national housing policy;

(b) may, after consultation with every MEC and the national organisation representing municipalities as contemplated in section 163(a) of the Constitution, include administrative and procedural guidelines in respect of -

(i) the effective implementation and application of the national housing policy;

(ii) any other matter that is reasonably incidental to national housing policy.”
277 Section 7(3) of the Housing Act, which states that the MEC is obliged to administer every national housing programme contained in the Code.
278 Delegated legislation refers to laws made by persons or bodies who are granted law-making powers in terms of primary legislation. This is ordinarily done by expressly granting a government official (such as a Minister or MEC) the power to develop policy or regulation through a piece of primary legislation. See Clark & Tissington, “Courts as a Site or Struggle”, pp. 378-379; Melani v City of Johannesburg, South Gauteng High Court, Case No. 02752/2014 (22 March 2016) (Melani), para. 32.
constitute concrete, legally enforceable legislative instruments and that the implementation of national housing programmes must be consistent with the prescripts laid out in the Code.

In 2009, the revised Code was published. The Code sets out the government housing programmes available. For the purposes of this report, the most important of these programmes are the Emergency Housing Programme (EHP), the Upgrading of Informal Settlement Programme (UISP) and the Farm Residents Housing Assistance Programme (FRHAP). Each of these programmes is discussed below.

**Emergency Housing Programme (EHP)**

The Emergency Housing Programme (EHP) makes provision for municipalities to apply for grants from provincial government to provide emergency housing to those affected by emergencies. As the EHP states, the aim is to enable municipalities to “provide temporary relief to people in urban and rural areas who find themselves in emergencies” through the provision of land, municipal engineering services, relocation assistance and accommodation. The cost of consumption of certain basic services can also be funded through the programme for a period of three years (provided approval is obtained from the MEC and the municipality is unable to fund these services from its own resources). Evictions and the threat of imminent evictions are specifically classed in the programme as emergencies.

The programme provides for a broad range of possible emergency housing options, including various types of temporary and permanent housing. A housing option that is particularly relevant in the context of farm dwellers facing eviction is “temporary assistance with resettlement to a permanent temporary settlement area” in cases where municipalities choose to establish such areas for affected persons until permanent housing at another location becomes available. However, ultimately it is within the discretion of the municipality to determine whether assistance is required in terms of the programme and decide what approach should be adopted based on the emergency housing need.

The EHP prescribes certain minimum and maximum requirements in relation to the temporary shelter and basic engineering services provided:

- **Water:** access to a water point or tap for every 25 families.
- **Sanitation:** temporary sanitation facilities must be provided, which may differ depending on the context but Ventilated Improved Pit (VIP) latrines must be provided as a first option on the basis of one VIP per five families.
- **Electricity:** high mast lighting should be provided in certain circumstances.
- **Temporary shelter:** the temporary shelter should be strong, stable, durable and grant protection against the elements, with a floor area between 24m² and 30m² depending on the funding available.

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279. The Code was first published in 2004 and revised in 2009. See Department of Housing, National Housing Code (2004); and Department of Human Settlements (DHS), National Housing Code (2009).
283. See also the discussion of the financial mechanisms in section 4 below.
286. The services that the EHP could fund are water consumption, sanitation services, refuse removal and high-mast street lighting (where applicable). DHS, “Emergency Housing Programme”, p. 18.
289. DHS, “Emergency Housing Programme”, p. 34.
290. DHS, “Emergency Housing Programme”, pp. 38-39. See also the technical specifications laid out in Residents of Joe Slovo Community, Western Cape v Thubelisha Homes 2010 (3) SA 454 (CC), paras. 9-10.
The EHP applies to all people who are homeless or are likely to become homeless as a result of an eviction or emergency. The ordinary housing qualifying criteria therefore do not apply in relation to assistance provided in terms of the EHP. This means that assistance can be provided to people or households regardless of their household income, citizenship, whether they have dependents or whether they have previously received assistance through a national housing programme.

Two critical principles that guide the implementation of the EHP are important opportunities for the use of the programme to provide temporary housing assistance to farm dwellers who are evicted from their homes. First, the EHP creates a strong preference for allowing occupiers to remain on the land they occupy by providing that relocations should only be carried out as a last resort once other alternatives have been exhausted. Along with the on-site development options offered in the programme, this principle creates opportunities for utilising the EHP to repair or reconstruct existing housing on farms or, at the very least, make genuine attempts to identify ways in which farm dwellers could be accommodated on the farmland from which they are being evicted. Second, the EHP provides that the provision of alternative accommodation in the wake of an eviction or emergency should, wherever possible, be the first step in providing permanent housing. As the programme states, temporary alternative accommodation should wherever possible be “an initial phase towards a permanent housing solution”. Moreover, if this is not possible, the EHP says that temporary alternative accommodation should be provided “while steps are being taken to prepare and develop land for permanent settlement purposes in terms of the approved municipal IDP and development priorities”. These provisions ensure that the EHP can be used to provide immediate relief to people rendered homeless due to an eviction or other emergency and indicates that funding provided in terms of the EHP could be used strategically to ensure that the housing or infrastructure developed through the EHP could be upgraded or redeveloped through other housing programmes.

Despite the potential usefulness of the EHP for addressing the temporary housing needs of evictees in rural and urban areas, municipalities and provincial governments seem to be reluctant to use the programme. Research conducted by the Social Housing Foundation and Urban Landmark in 2009 indicates that the programme has only occasionally been used to address emergencies or evictions. The study found that only six of South Africa’s nine provinces had disbursed funds in terms of the programme and that the programme was primarily used to provide assistance in cases of natural disasters and floods in rural areas. The programme has not been widely used to provide temporary alternative accommodation in instances of eviction. Some commentators argue that this is due to narrow conceptions of what constitutes an emergency at municipal and provincial levels. Municipalities have also complained of provincial governments’ reluctance to release funds in terms of the programme claiming that they have struggled to access funding despite making multiple requests over the years. However, the programme has been used to develop temporary relocation areas (TRAs) or ‘transit camps’ across the country ostensibly as a temporary solution to the housing backlog. TRAs, as well as the temporary structures provided in these areas, have been criticised by academics, practitioners and the people living in these areas. The primary criticism levelled against TRAs is that they fail to satisfactorily address the housing and development needs of those living in these areas and that households are “often left [in these areas] indefinitely with no

298 See Tissington, A Resource Guide to Housing, p. 96, who refers to the City of Johannesburg’s multiple unapproved requests over the years.
timeline on when they will receive permanent accommodation.” Some have also argued that households that are moved to TRAs are “off the ‘backlog radar’” as they are neither in dire need of housing assistance nor have they received formal housing assistance from the state. To exacerbate these issues, municipal officials have been hesitant to invest further in these areas given their temporary nature.

The potentially wide application of the EHP and the flexibility it offers means that it is a critical policy instrument that could be employed by municipalities to provide temporary alternative accommodation to farm dwellers that are evicted or are at risk of eviction. This is confirmed by a legal opinion obtained by the Drakenstein Municipality from the Community Law Centre (CLC). The benefit of the programme is that the ordinary qualification criteria do not apply and that it makes no distinction between rural and urban evictions. As May notes:

“[T]he programme is flexible enough to make provision for ‘imminent eviction from land … or situations where pro-active steps ought to be taken to forestall such consequences.’ This enables a municipality to assess its current and foreseeable housing needs, particularly in respect of vulnerable farm dwellers.”

However, the problems with the implementation of the EHP raise questions about its effectiveness in providing assistance to farm dwellers in the wake of evictions. Although various government departments at national and provincial level have identified the programme as a potentially useful programme in the context of farm dweller evictions, the EHP has not been seriously used to address the housing needs of farm dwellers facing eviction at scale and the failed implementation of the programme has considerably undermined the potential positive impact that this programme could have had to date.

Upgrading of Informal Settlements Programme (UISP)

The Upgrading of Informal Settlement Programme (UISP) provides for municipalities to apply for funding from provincial government to redevelop informal settlements by incrementally providing occupiers with infrastructure, tenure security, and access to basic services in an inclusive and participatory manner. The programme funds the creation of serviced stands through the installation of both interim and permanent municipal engineering services. Where interim services are provided, they should always constitute “the first...
phase of the provision of permanent services”. The UISP does not provide assistance for the construction of housing, which should be funded through one of the other national housing programmes in phase 4 of the upgrading project. Tenure security is a central component of the UISP and can be achieved through “a variety of tenure arrangements [that] are to be defined through a process of engagement between local authorities and residents”. Moreover, the programme envisages an inclusive and participatory relationship between beneficiary communities and municipalities by expressly providing for the funding of different types of community participation throughout the upgrading process.

The UISP creates an extremely strong preference for in situ upgrading and the minimisation of the disruptive effects of relocation. However, the latter is an option under the programme as a measure of last resort when other alternatives have been exhausted. In the context of informal settlements on farmland or in farming areas, this means that all efforts should be made to accommodate the occupiers on the land where they currently reside before considering relocation to alternative land. On-farm upgrading is particularly tenable when considering that the programme empowers the state to purchase or expropriate land, rehabilitate land that may be unsuitable for conventional low-income housing development and install interim services pending the decision to upgrade an informal settlement. This suggests that occupied farmland could be purchased or subdivided to develop UISP projects for farm dwellers.

The UISP applies to beneficiaries who qualify in terms of the generic qualification criteria but, under certain circumstances, may also apply to those who do not qualify. In cases where prospective beneficiaries do not qualify in terms of the generic qualification criteria, the MEC has a discretionary power to award conditional access to the programme “on a case-by-case basis”. As with the EHP, this means that people could access assistance through the UISP regardless of their household income, citizenship, whether they have dependents or whether they have previously received assistance through a national housing programme.

Implementation of the programme has, however, been lacking. As one commentator wrote, “at all levels of government, and in all parts of the country, there has been a systematic failure to implement the substantive content of [the housing policy] that recommends and makes financial provision for participatory and collective in situ upgrades”. There are a number of interconnected reasons for this lack of implementation. First, the institutional and bureaucratic framework for the provision of housing is geared towards building state-subsidised housing in greenfield projects. Many municipalities and housing developers are familiar with developing greenfield housing and are uncomfortable with implementing in situ upgrading projects. This is partially due to the lack of institutional capacity and political will on the part of government officials to engage directly with communities in informal settlements. Second, municipalities and provinces often feel that many of the functions provided for in the UISP are in conflict with fiscal frameworks prohibiting “wasteful and inefficient expenditure”. The combined effect of these challenges is that municipalities and provinces generally refrain from initiating incremental upgrading projects, preferring instead to focus on fully formalised housing developments.

307 Occupiers could be granted a range of tenure rights, including rental agreements, the gratuitous loan of the site to occupiers for the purposes of occupation (so-called commodatum) or full ownership (during phase 4). DHS, “Upgrading of Informal Settlement Programme”, pp. 15 and 38.
308 See DHS, “Upgrading or Informal Settlement Programme”, p. 15. See also Clark & Tissington, “Courts and a Site of Struggle”, pp. 386-389; Beja, paras. 53-67; and Melani, para. 54.
309 DHS, “Upgrading of Informal Settlements Programme”, pp. 9 and 32. See also Melani, paras. 34-35; and Clark & Tissington, “Courts as a Site of Struggle”, p. 379.
313 Tissington, A Resource Guide to Housing, p. 31; Clark & Tissington, “Courts as a Site of Struggle”, p. 376.
314 Clark & Tissington, “Courts as a Site of Struggle”, p. 376.
The widespread unwillingness to implement the UISP has been challenged by communities living in informal settlements through litigation. These cases have shown that communities can compel municipalities to consider the application of the UISP in relation to their informal settlement and, if municipalities believe that the UISP does not apply, communities can challenge the decision not to apply the UISP before a court. As the court stated in Melani, “the [municipality] had to at least consider whether the UISP applies ... without making a decision to completely ignore in situ upgrad[ing] and relocate the residents”. Accordingly, municipalities are legally obliged to consider whether the UISP applies to all informal settlements in their municipal areas (including informal settlements on privately owned farmland). If municipalities fail to do so, communities can approach a court to force municipalities to consider the UISP.

As with the EHP, the UISP is focused on providing immediate relief and long term security. This is evident in the provisions allowing for the installation of interim services, on the one hand, and the incremental focus and development of serviced stands, on the other. These dual objectives mean that the UISP could potentially be utilised to address the housing and basic service needs of farm dwellers. Moreover, the provisions empowering the state to purchase or expropriate land for upgrading projects mean that upgrading projects could be pursued on farmland currently occupied by farm dwellers.

**Farm Residents Housing Assistance Programme (FRHAP)**

The Farm Residents Housing Assistance Programme (FRHAP) is another critical national housing programme that specifically prioritises housing developments for farm occupiers and labour tenants. The programme aims “to provide a flexible mechanism which will promote access to adequate housing, including basic services (as an option of last resort) and secure tenure to farm workers and residents in a variety of farming situations across the country”. The programme is expressly aligned with the land reform programme to provide “a holistic solution to address the housing and developmental needs of labour tenants targeted by the land reform programme”.

The FRHAP makes provision for various on-site and off-site development options. The primary housing developments envisioned in the programme are the provision of on-site rental housing units or individual ownership housing units. The programme provides funding for the construction of housing or serviced stands, the upgrading or renovation of existing housing on farmland and, where no other funding options are available, the installation of basic engineering services. The programme prescribes certain minimum requirements in relation to the housing and basic engineering services (although funding for the provision of basic services is only provided in exceptional cases, FRHAP requires that all households have access to the minimum level of basic services set out in the programme).

- **Water:** access to a water point or tap for every 25 families.
- **Sanitation:** VIP latrine for each household (or what is agreed to by the community).
- **Storm water management:** a storm water management system should be provided to ensure that houses are not affected by flooding.
- **Housing:** the housing provided should comply with the minimum National Norms and Standards (unless the MEC specifically allows deviation).

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315 See Nokotyana v Ekuthuleni Metropolitan Municipality 2010 (4) BCLR 312 (CC) (Nokotyana); Beja and Melani. See also Clark & Tissington, “Courts as a Site of Struggle”, pp. 380-389.
316 Nokotyana, paras. 55-57; and Melani, paras. 42-50.
317 Melani, para. 43.
318 DHS, “Farm Residents Housing Assistance Programme”, p. 21.
320 DHS, “Farm Residents Housing Assistance Programme”, p. 30.
321 DHS, “Farm Residents Housing Assistance Programme”, pp. 31-32.
Farm dwellers also obtain tenure security through the programme. The type of tenure security available to farm dwellers depends on the type of development and includes rental agreements (where the rental payable is dependent of the maintenance and operating costs of housing stock), rights to occupy or individual ownership through the sub-division of land and transfer of land to housing beneficiaries.

The FRHAP makes provision for three different types of on-farm housing developments:

- **Rental housing developments where the farm owner acts as developer:** In terms of this type of development, the farm owner applies for and develops rental housing units on the farmland where farm dwellers currently reside (while retaining ownership of the farmland). The farm owner is required to comply with various bureaucratic requirements, including proving his or her competence as a housing developer and registering with the National Home Builders Registration Council (NHBRC). Farm dwellers obtain tenure in the form of rental accommodation and qualify for ownership subsidies once they vacate the rental units. The farm owner is responsible for maintenance of the housing stock.322

- **Rental housing developments where a housing institution acts as developer:** In terms of this development option, the farm owner grants long term tenure rights to an accredited housing institution for the purposes of developing, holding and managing rental housing development on the farmland where farm dwellers reside (while retaining ownership of the farmland). This can be done by the conclusion of a long-term lease agreement or the registration of a servitude against the title deed of the property. Farm dwellers obtain tenure in the form of rental accommodation. The housing institution is responsible for the maintenance and operation of the rental housing stock.323

- **Subdivision of farmland and transfer to the farm dwellers where farm owner, beneficiaries, provincial government or a private housing institution act as developer:** This development option envisages a farm owner who is willing to subdivide a portion of her property and transfer the title deeds of these subdivided portions to qualifying farm dweller beneficiaries.324 The farm dweller beneficiaries would therefore become owners of the land and housing they are provided in terms of the programme. The FRHAP specifically provides that the subdivided property must include land for the development of housing units and agricultural purposes. The programme makes provision for various actors to take on the role of developer, including the farm owner,325 the farm dwellers themselves (by establishing a legal entity to act as developer in terms of the Enhanced People’s Housing Process (EPHP))326 or the provincial housing department or private developer (at the behest of the farm dwellers).327 In the case of the latter, the province can delegate its functions to the municipality if it is satisfied that the municipality has sufficient capacity and infrastructure to complete the development project.

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322 DHS, “Farm Residents Housing Assistance Programme”, pp. 23 and 33-38.
323 DHS, “Farm Residents Housing Assistance Programme”, pp. 38-42.
326 DHS, “Farm Residents Housing Assistance Programme”, pp. 24 and 46.
327 DHS, “Farm Residents Housing Assistance Programme” pp. 23-24 and 43-46.
The FRHAP applies in both urban and rural areas. The programme assists farm residents or full time farm workers and labour tenants who satisfy the generic national housing qualification criteria.

At core, this means that farm dwellers and labour tenants can only access assistance through the FRHAP if they are South African citizens or permanent residents, are older than 18 and capable of concluding a contract, are married or have financial dependents, earn a monthly household income of less than R3 500, have never owned a house and have never previously received assistance through a national housing programme. The programme also allows for single labour tenants (who do not have dependents) to qualify for assistance.

The unique focus on farm dwellers and labour tenants and the range of on-farm development options mean the FRHAP is ideally suited to addressing the housing and developmental needs of farm dwellers in a diversity of situations. However, the programme has significant limitations. The first limitation is the application of the generic eligibility criteria for state subsidised housing. The increase in the minimum wage has meant that the household income of most farm dweller households is more than R3 500 a month. Another serious limitation is that the “focus [of the programme is] on strengthening existing service centres, towns and villages rather than compounding the [problems associated with service delivery] by the injudicious creation of new agriculturally based (unsustainable) settlements.”

The programme therefore specifies that it “must be applied with circumspection” and that the creation of new farm resident settlements or agri-villages should be an option of last resort. The FRHAP says that a circumscribed application of the programme is necessary due to the already onerous service delivery burden on municipalities in rural areas. According to the FRHAP, municipalities are “severely challenged to provide basic services to existing rural towns / settlements” and the proliferation of housing developments on farms would exacerbate this burden.

These limitations have dramatically curtailed the application of the programme. In fact, since FRHAP was introduced in 2009 not a single subsidy application has been received or awarded. The programme is therefore at risk of being discontinued.
(d) Conclusion

While the three laws discussed above in section 2.3 are primarily focused on regulating arbitrary evictions and strengthening tenure security, the laws discussed in this section - SPLUMA, the Systems Act, the Housing Act and the National Housing Code - are more closely related to the achievement of long-term tenure security and access to housing and basic services. These laws could each be described as framework law - i.e. a law that provides a framework of regulation within which farm dwellers’ rights to tenure security, access to housing and basic services can be realised. In each case, the legislative provisions make mechanisms available that could be utilised to achieve the full or partial realisation of farm dwellers’ rights. The legislation discussed in section 2.3 is largely protective in nature, while the legislation discussed in section 2.4 is more developmental in nature.

The most significant finding from the assessment of SPLUMA, the Systems Act and the Housing Act and National Housing Code is that the legal framework contains a number of innovative mechanisms to address the tenure security, housing and developmental needs of farm dwellers. Some of these mechanisms include special zones and development areas designated for incremental development in terms of SPLUMA, IDP processes related to housing and basic services, and flexible on-site and off-site development options provided for in terms of the national housing programmes.

Some common features emerge from the laws discussed above. Firstly, they all emphasise addressing the developmental needs of poor communities on an equitable basis. The legal framework is therefore geared toward achieving the progressive realisation of the rights of poor communities, and the financial and regulatory mechanisms that are provided for in these laws reflect this aim. This means that the needs of marginalised groups, such as farm dwellers, are visible in the legal framework. Another commonality is that inclusive and participatory processes underpin all of these laws.

The chief problem in relation to these laws however, is the state’s lack of awareness of the legislative provisions and the inability or unwillingness to implement these laws and policies. Although the state has made significant strides in the provision of state subsidised housing and access to basic services over the years, the state’s successes have not significantly improved the tenure security and access to housing and services of farm dwellers on commercial farms. This is partially due to the uneven implementation of the laws and policies outlined above. For example, the Individual Subsidy Programme, the main housing delivery mechanism for state subsidised housing, has been relatively well implemented across the country. However, the national housing programmes that are applicable to farm dwellers (including FRHAP, EHP and the UISP) have only been implemented in isolated instances and have failed to adequately address the housing and developmental needs facing farm dwellers at scale. The IDP processes, too, have failed to satisfactorily target farm dwellers or empower farm dwellers to advocate for their developmental interests. Unfortunately, the haphazard implementation of these mechanisms has meant that the potential impact of these laws and programmes in the context of farm dwellers has remain unrealised.

While the reasons for the failure to implement are varied, a pervasive problem seems to be that many municipalities and provincial governments feel constrained by fiscal frameworks prohibiting “wasteful and inefficient expenditure”. For example, municipalities have struggled to provide access to basic services to communities in far flung rural areas or on farms because this is perceived to be an inefficient use of resources. Similarly, municipalities and provinces implementing the EHP and UISP have been reluctant to provide interim services pending the installation of permanent services due to the view that this may be unnecessary or wasteful use of resources. Local and provincial government therefore struggle to reconcile what they consider a contradiction between provisions in the legal framework and an overarching duty to spend resources wisely.
3. IMPLEMENTATION OF THE LEGAL FRAMEWORK
The legal framework governing farm dwellers’ tenure security, access to housing and basic services outlined in the preceding sections is aimed at transforming the existing relationships on farms by providing a variety of substantive and procedural protections to farm dwellers and creating mechanisms through which farm dwellers’ rights can be realised. Despite these legal protections and mechanisms, the legal and policy regime has not fundamentally altered the power dynamics on farms. Farm dwellers remain extremely vulnerable, with many still lacking access to adequate levels of tenure security, housing and basic services. Many factors have contributed to farm dwellers’ continuing vulnerability and insecurity, including socio-economic considerations, labour issues, the impact of climate and natural elements, political developments and a range of international and local economic changes in the agricultural sector.

The primary reasons for the inability to achieve meaningful security for farm dwellers, however, seem to be various weaknesses in the legal regime itself and the manner in which the regime has been implemented. This is affirmed by the DRDLR in the 2011 Green Paper on Land Reform, where the department acknowledged a “total system failure” of the land reform initiatives aimed at “protect[ing] the rights and security of tenure of farm workers and dwellers”.

The DRDLR identified a range of contributing problems: the failure to adequately articulate the legislative and policy framework to stakeholders; lack of effective organisation and mobilisation by labour unions on farms; weak enforcement of legislation by law-enforcement agencies; poor implementation of existing policies by the state; the mishandling of eviction cases by the judicial system; and the poor or non-existent monitoring, co-ordination and communication between government departments and other organs of state in relation to the legal and policy framework governing farm dwellers’ rights.

These problems indicate that there has been a systematic failure in relation to the application, interpretation and enforcement of the legal and policy regime regulating farm dwellers’ rights to tenure security and access to housing and basic services. This section analyses three interrelated problems, namely weaknesses in the legal scheme itself, problems with the interpretation of the legal scheme, and failures in the implementation and enforcement of the legal scheme.

(a) Problems with the legal framework

There are various flaws in the legal system that have contributed to the inability to fully realise the rights of farm dwellers in relation to tenure security and access to housing and basic services.

The first issue with the legislative and policy scheme is that the legislation governing evictions (specifically ESTA and the LTA) consists primarily of procedural protections against arbitrary eviction. This scheme essentially makes legal evictions harder to obtain but does not dramatically change the substantive rights and entitlements of farm dwellers in relation to the land that they occupy and use. In addition, the mechanisms for long-term tenure security are generally weak and lacking in clarity. It seems unsurprising therefore that these laws have been unable to curb evictions from farmland in a meaningful way.

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339 Visser & Ferrer, Farm Workers’ Living and Working Conditions.
343 Hall, Farm Tenure, p. 22.
The complexity of the framework governing evictions from farmland is another issue. While the broader aims of ESTA, the LTA and PIE may be similar, these laws do not provide identical processes, protections or benefits. In fact, these laws differ in significant respects. The distinctions between different groups of occupiers, rights and eviction processes continue to cause confusion. These distinctions are, consequently, a hurdle to the effective implementation of these laws as they place a burden on all the parties involved in evictions proceedings.

There also seems to be a disjuncture between the legislation governing evictions and promoting tenure security (ESTA, the LTA and PIE), on the one hand, and the legislation and policies that provide mechanisms for the enforcement of farm dwellers’ rights to tenure security and access to housing and basic services (SPLUMA, the Systems Act, the Housing Act and National Housing Code etc.), on the other. These legal regimes do not seem to be suitably aligned. For example, a number of the national housing programmes are ideally suited to provide on-farm or off-farm housing to farm dwellers such as the EHP, UISP or FRHAP. However, these programmes have not been used strategically to provide suitable alternative accommodation for farm dwellers who have been evicted from farms nor have these programmes been linked to section 4 subsidies in terms of ESTA (which could have provided additional funding for housing developments). This may be due in part to the lack of co-ordination and communication between different government departments. Regardless of the reasons, the lack of alignment between these legislative regimes represents a missed opportunity.

Most significantly, the legal framework governing farm dwellers’ tenure security and access to housing and basic services has failed in the sense that it has not dramatically altered the position of farm dwellers. This is largely due to the inability of the legislative framework to satisfactorily address the problem of existing power relations on farms. The legal regime therefore has not been able to overcome the inherent tensions in the laws with the balance of power often being automatically in favour of farm owners.

(b) Problems with interpretation of the legal framework

The manner in which the legal framework has been interpreted by government officials, the lower courts and, on occasion, the LCC has diminished the potential impact of the legal framework.

In the lower courts, magistrates routinely grant eviction orders in terms of ESTA or the LTA. A strong body of evidence suggests that eviction orders are often granted in the Magistrates’ Courts without applying the correct procedure in terms of ESTA. These eviction orders are frequently overturned on automatic review before the LCC.344 However, by the time the automatic review is completed, evictions have often occurred and farm dwellers have left the farms they were occupying. Restoration orders, which would entitle farm dwellers that were evicted through unlawful processes to reoccupy the property they were unlawfully evicted from, are often ineffectual since the previous occupiers cannot be tracked down once they have left the farm. Many magistrates have also authorised evictions without requiring the state to provide suitable alternative accommodation to farm dwellers who are at risk of becoming homeless. This suggests that magistrates have struggled to come to grips with the new legal framework and regularly fail to adequately apply their minds to eviction cases. Further training on eviction legislation may be necessary.

In addition, some of the jurisprudence that has emerged from the LCC has been criticised for its failure to broaden and strengthen the legal protections afforded to farm dwellers.345 Some of these decisions have narrowed the scope of ESTA and the LTA. For example, the LCC’s judgment in Landbouenavorsingsraad

344 See, for example, Karabo v Kok 1998 (4) SA 1014 (LCC); De Kock v Juggles 1999 (4) SA 43 (LCC); Glen Elgin Trust v Titus 2001 (2) All SA 86 (LCC); JAD Properties Trust v Tshabalala, Land Claims Court, Case No. LCC58R/2009 (4 August 2010); Goosen v Mtetwa, Land Claims Court, Case No. LCC27R/2010 (18 August 2010); and Nel v Beleng, Land Claims Court, Case No. LCC77R/2011 (14 February 2012).

345 See, for example, Roux, “Pro-Poor Court, Anti-Poor Outcomes”.
limited the application of ESTA to persons who were occupying farms with the express consent of the farm owner or person in charge, thereby creating the distinction between ‘primary’ and ‘secondary’ occupiers. The judgment in Landbouwraad had a limiting effect on the potential impact of the legislation by excluding anyone who did not have a direct legal relationship with the farm owner or person in charge from the definition of “occupier” for the purposes of ESTA. The case essentially stripped spouses, dependents and family members (mostly women and children) of the substantive and procedural protections afforded to occupiers. Moreover, the case may also have contributed to perceptions among farm owners that the rights of spouses and dependent family members of farm occupiers are less important. Although this decision has finally been limited by the Constitutional Court in Klaase, the effect of the decision was felt by many spouses and dependents of farm occupiers who were not afforded protection while the judgment stood. Nkuzi Development has also directly linked the judicial interpretation of ESTA to the disproportionate number of evictions of women and children from farms.

Another example of problematic judicial interpretations limiting the protective measures provided for in ESTA, is the series of court cases that allowed eviction proceedings to continue without section 9(3) reports. These decisions have essentially done away with a critical procedural step that not only ensured that the rights of farm dwellers and farm owners were properly investigated during eviction proceedings but would also have ensured that a court had sufficient information to determine whether an eviction was just and equitable in the circumstances.

(c) Problems with the implementation and enforcement of the legal framework

Widespread non-compliance with the legislative and policy regime

Commentators have argued that the state has been unable to effectively implement the legal framework governing evictions and tenure security on farms. This has resulted in widespread non-compliance with the legal procedures by farm owners and municipalities, which the state has not been able to address. Evictions from farmland have escalated despite the constitutional provisions and legislation governing arbitrary evictions. Unlawful evictions (evictions that do not follow the proper legal procedure in terms of ESTA, the LTA or PIE) and constructive evictions (situations where the farm owners make conditions on the farm intolerable in order to pressurise farm dwellers into leaving the farm), in particular, remain common features of the rural landscape. The exact extent to which evictions are occurring is not entirely clear due to the absence of accurate information on evictions and the lack of monitoring by government. However, numerous authors and research institutions have observed the phenomenon and described it as “widespread”.

A survey by Nkuzi Development in 2005 indicates that only 1% of evictions from farms were lawful. The survey highlighted the severity and frequency of evictions from farms. It found that in the 21 years between 1984 and 2004, approximately two million people had been evicted from farms, with more being evicted in the decade after 1994 than in the preceding decade. The survey found that evictions continued unabated throughout the period surveyed and were not arrested or, in any way, hampered by the coming into force of tenure reform legislation, including ESTA and the LTA. In addition, many of the farm dwellers who are evicted are vulnerable groups, including the dependents of farm workers (mostly

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149 Hall, Farm Tenure, p. 8; SAHRC, Report on the Inquiry into Human Rights Violations in Farming Communities; SAHRC, Progress Made.
women and children) and older persons who do not yet qualify as long-term occupiers in terms of ESTA. Some commentators have suggested that these evictions may represent attempts on the part of some farm owners to circumvent the protections afforded in these laws.

Moreover, the state has systematically failed to provide alternative accommodation in cases of evictions that would render farm dwellers homeless. The availability of such alternative accommodation is a critical part of the enquiry that needs to be conducted before a court can authorise an eviction from farmland in terms of ESTA, the LTA and PIE. However, in practice, very little alternative accommodation has been provided by farm owners or municipalities and the little that has been provided has had a marginal effect because of the widespread non-compliance with the legal framework.

State’s inability to implement and ensure compliance with the legal and policy framework

The state has struggled to implement the legal framework protecting farm dwellers from eviction and providing long-term tenure security and access to housing and basic services. The inability to implement the provisions set out in law and policy extend to various state organs, including the DRDLR, the Department of Human Settlements (DHS), provincial government, local government and the justice system.

The first significant failure relates to the state’s monitoring of both lawful and unlawful evictions from farmland. The state is required to monitor the number of actual or threatened evictions, as well as the compliance with eviction legislation and the provision of suitable alternative accommodation. The DRDLR is primarily responsible for monitoring. However, the DRDLR has not been able to develop adequate monitoring systems since the eviction laws have been put in place. As some commentators write, monitoring “has been at best chaotic and, at worst, absent”. This has meant that the information that the DRDLR has collected is largely incomplete, under-representative of the scale of evictions and “potentially misleading”. In fact, the DRDLR has declined to publish its data due to its inadequacy. A number of reasons have been proposed for the failure to adequately monitor evictions and the compliance with eviction legislation, including disputes within the DRDLR about which directorate is responsible for monitoring, lack of capacity and resources, and a dysfunctional database. What is apparent, however, is that the state has not yet taken serious measures to address this deficiency. Without effective monitoring, the state is severely hampered in its ability to intervene in eviction cases and to plan for, budget and appropriately respond to the tenure, housing and basic service needs of farm dwellers.

The DRDLR and municipalities have also been unable to meaningfully intervene in threatened farm evictions - a critical task in terms of eviction legislation. Various stages during evictions procedures refer to the intervention of the state, either implicitly and explicitly. The first stage during which the state has an opportunity to intervene is after the receipt of eviction notices. Eviction proceedings provided for in ESTA, the LTA and PIE all require farm owners to serve notice of the intention to institute eviction proceedings on the DRDLR (in terms of ESTA and the LTA) and the municipality in whose municipal area the farm falls (in terms of ESTA and PIE). The notification process forewarns the state of imminent evictions so that it can monitor ongoing evictions, prepare to fulfil its obligations in terms of eviction legislation and try to intervene and assist the parties in reaching a negotiated settlement. For example, once a notification is received in terms of section 11(1) of the LTA, the DRDLR is required to call a meeting with the farm owner and labour tenants to see if disputes can be settled by agreement. However, the state has essentially

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534 De Satgé & Blecher, “Farmworker Housing”; Wisborg et al, Farm Workers and Farm Dwellers in Limpopo, pp. 83-84
535 Hall, Farm Tenure, p. 17.
536 Hall, Farm Tenure, p. 36.
537 Hall, Farm Tenure, p. 5.
538 See section 9(2) of ESTA, section 11(1) of the LTA and section 4(2) of PIE.
539 See section 11(3) of the LTA.
ignored eviction notices issued in terms of ESTA and the LTA. The notification process is therefore an essential protective mechanism that has not been effectively used in practice. The second stage during which the state can meaningfully intervene in eviction proceedings is in the production of informational reports to assist the courts in making their decisions during eviction proceedings. Section 9(3) of ESTA provides that DRDLR or probation officers are required to produce and submit such a report to the court. Case law developed in the context of eviction proceedings in terms of PIE has also placed a similar duty to report on municipalities. In both instances, the state is required to investigate how the proposed eviction would impact on the farm owner and farm dwellers, whether the eviction threatens the constitutional rights of the parties and whether alternative accommodation is available to farm dwellers or whether such accommodation could be made available by the state. These reports represent an important tool through which courts can gain more information about the circumstances surrounding the eviction and make an informed determination about whether the eviction would be just and equitable. The failure on the part of the state to produce these reports - especially in relation to ESTA - has meant that another important procedural protection has been under-utilised in practice.

The DRDLR has also failed to effectively implement the provisions related to the provision of long-term tenure security of farm dwellers provided for in ESTA and the LTA.360

Moreover, the state has been unable to develop a comprehensive approach to the enforcement of eviction legislation. In particular, the justice system has failed to enforce compliance through the mechanisms provided for in eviction legislation. The laws governing evictions provide that evictions from farmland that do not comply with the strict procedures set out in each law constitute a criminal offence that is punishable by either two years or imprisonment, a fine or both.361 However, the justice system has been slow to act on these provisions. This is evident from the inability of the justice system to arrest, charge and prosecute farm owners who illegally evict farm dwellers from their properties.

The DRDLR and municipalities have also struggled with financial and capacity constraints, further inhibiting their ability to effectively implement the legal framework.

Vulnerability of farm dwellers

Farm dwellers therefore remain vulnerable, with chronic tenure insecurity. This vulnerability is exacerbated by the “socio-economic marginality and geographical isolation” of farm dwellers.362 In addition many farmworkers or dwellers are uneducated or illiterate, live in extreme poverty and deprivation and have low levels of social mobilisation through unions. These factors have “contributed towards farm workers being invisible as a political constituency”.363

Varied levels of access to tenure security, housing and basic services

Where farm dwellers have been able to remain on farms, the quality of their housing and essential services varies from satisfactory to woefully inadequate.364 The adequacy of housing and essential services is often dependent on the location. For example, Wisborg et al describe structurally unsound housing in various parts of Mpumalanga and Limpopo, with little or no access to land for the cultivation of crops or keeping of livestock and inadequate access to services.365 Wisborg et al also note that some farm dwellers complained that they were prevented from receiving visitors - a right they are specifically entitled to in terms of ESTA.

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360  See the discussions of ESTA and the LTA above.
361  See section 23 of ESTA, section 15A of the LTA and section 8 of PIE.
362  Hall, Farm Tenure, p. 3.
363  Hall, Farm Tenure, p. 3.
364  Hall, Farm Tenure, p. 2.
365  Wisborg et al, Farm Workers and Farm Dwellers in Limpopo.
Political climate

The literature seems to suggest that some farm owners may view labour tenants, farm workers and occupiers on their land as a potential liability and a threat to their property rights. However, rather than being a consistent issue, this seems to be a sporadic issue that arises periodically when land policy is politically debated.

In this light, some farm owners have sought to divert the costs of services and maintenance of housing stock to farm dwellers by concluding lease agreements with farm dwellers that are subject to the payment of rent (in some cases the rental payable is nominal). Occasionally payment is also requested for the provision of services. In most cases, rental and service costs can be deducted from the salaries of farm workers.366 This seems to be a dramatic departure from the past. Historically, the paternalistic approach of apartheid farm owners to farm workers resulted in access to services or land use options as part of the renumeration package. In some places farm workers were provided with access to water, electricity, firewood and other services including food rations.367 This shift has been linked to the economic pressures on farm owners and the rising minimum wage, as well as sectoral determinations legalising the possibility for these deductions being made part of a minimum wage.368

Some commentators have also suggested that farm owners lack financial incentives to provide tenure security, adequate housing and access to services.369 One such commentator notes:

“For farmers, there is little incentive to promote ESTA principles. Farmers are facing heavy economic and financial pressures, as well as an uncertain political environment. There appear to be no international precedents for legislation like ESTA so farmers experience this legislation as yet another burden in an already fraught business environment.”370

Concerns about voluntary departures from farms

Given the complicated legal avenues through which to obtain an eviction in terms of ESTA, the LTA or PIE, many farm owners and farm dwellers have sought alternatives to drawn-out eviction proceedings. This has given rise to the remarkably common practice of farm dwellers “selling” or “waiving” their tenure rights in exchange for compensation in a type of negotiated settlement.371 Hall describes this practice as farm dwellers “accept[ing] cash payouts from landowners to vacate their land.”372 While this practice may be a useful mechanism through which to negotiate an amicable departure from the farmland, the inequalities in bargaining power between farm owners and farm dweller are a cause for concern. The inequalities in bargaining power may have an impact on the amounts of compensation farm dwellers can negotiate.

In fact, some anecdotal evidence suggests that farm dwellers who have the support of NGOs have been able to secure fairer settlements. This case study of a negotiated departure by two farm dwellers illustrates the importance of careful negotiations between farm owners and farm dwellers:

367 Wisborg et al, Farm Workers and Farm Dwellers in Limpopo, p. 89.
368 Wisborg et al, Farm Workers and Farm Dwellers in Limpopo, p. 91; Andries Du Toit & Fadeela Ally, “The Externalisation and Casualisation of Farm Labour in Western Cape Horticulture”, PLAAS Research Report 16 (2003); Atkinson, Going for Broke.
369 Phuhlisani, Tenure Security of Farm Workers and Dwellers.
370 Atkinson, Going for Broke, p. 87.
371 This occurrence seems to be taking place despite the prohibition of such agreements in ESTA.
372 Hall, Farm Tenure, p. 28.
In 2003 ... Sarah (59) and her much older husband Zakariah (91) were evicted from a farm in the Waterpoort area [in Limpopo], where they have spent most of their lives. The farm was bought by a European investor who merged it with others to create a large game farm... [T]hey were assisted by a land NGO, Nkuzi Development Organisation, and secured compensation of R20 000 for the loss of their home. They had heard that others evicted at the same time, who did not get NGO help, had only received R10 000. The cash with which to rebuild their existence was consumed within a year by the cost of moving and the bricks and cement for a house that stood unfinished. At the time of the eviction, Zakariah was 83, an old man, while Sarah at 51 had few opportunities for employment. They tried to subsist on his pension and were looking forward to the day Sarah would receive hers.373

As this case study shows, negotiated departures from farm do not always result in farm dwellers receiving adequate or fair compensation.374 In some cases, the compensation received by farm dwellers only sustain households for a short while, often leaving occupiers without wage income, livelihood strategies or the social networks that they had on farms.375

Provision of housing and services on private land

One of the primary challenges in relation to the provision of housing and services to farm dwellers is the belief, on the part of some government officials, that state subsidised housing or services cannot be installed on private land that is not owned by the beneficiary. However, a variety of different housing programmes allow for the provision of services on private land. Two examples are the EHP and the UISP. In spite of the fact that the legal framework allows for the provision of housing and services, municipalities and provinces often feel constrained by fiscal frameworks prohibiting "wasteful and inefficient expenditure", in that the provision of services on private land is viewed as an unnecessary or inefficient use of resources.

De Satgé & Blecher suggest that this problem can be clarified in legislation or in guidelines issued to government departments.376 They refer to the provision of water services on private land. The Sustainable Development Consortium states that in 2005 the Department of Water Affairs and Forestry (DWAF) issued a guide to municipalities in response to the provision of water services to residents on privately owned land which made it clear that “all residents, wherever they may live, are entitled to receive at least a basic level of water and sanitation services”. It further stipulated that “[t]here is no legal impediment to the use of government grants to fund infrastructure for poor households on private land not owned by that household, provided that the intermediary (private land owner) makes a financial contribution”.377 This is also confirmed by a legal opinion from the Community Law Centre (CLC), which states that case law confirms that municipalities have a constitutional duty to deliver on their mandate to provide basic services to every person in their municipal community. This includes access to water and sanitation, housing, healthcare and sufficient food as set out in the Systems Act. The key issue therefore is only the extent of the contribution of the owner and the willingness of the owner to maintain any infrastructure afterwards.

373 Wisborg et al, Farm Workers and Farm Dwellers in Limpopo, pp. 83-84.
374 Wisborg et al, Farm Workers and Farm Dwellers in Limpopo.
375 Wisborg et al, Farm Workers and Farm Dwellers in Limpopo, pp. 83-84.
4. FUNDING MECHANISMS
A number of financial mechanisms and subsidies are available to secure farm dweller tenure rights and access to housing and basic services. These include:

- **Institutional Housing Subsidy:** The Institutional Subsidy Programme (ISP) is aimed at providing “affordable rental housing” to the lower end of the market, and may be used in the context of rental housing stock on farms.\(^{378}\) In terms of the ISP, capital grants can be provided to registered housing institutions to construct and manage affordable rental units outside of restructuring zones in respect of beneficiaries that qualify in terms of the basic qualification criteria.\(^{379}\) In order to benefit, a household therefore needs to earn less than R3 500 per month. A review commissioned by the DHS found that the institutional subsidy was best suited to address the on-farm housing needs of farm workers.\(^{380}\) It suggested that municipalities take on the role of housing institutions and establish municipal service entities to fulfil this function.

- **Subsidy in terms of section 4 of ESTA:** Section 4 of ESTA empowers the Minister of RDLR to grant subsidies to facilitate the planning and implementation of on-site and off-site developments to enable farm workers and occupiers who need long-term security of tenure to acquire land or rights in land. The DRDLR is mandated to deal with these subsidies, however this mechanism has not been used widely for the funding of development. It is unclear whether few applications have been received or whether the DRDLR has been unable or unwilling to make funding available. In addition, commentators note that officials claim that the “bureaucratic processes” in relation to section 4 subsidies are “too onerous” as the Minister has to personally sign off on each subsidy.\(^{381}\) The review commissioned by the DHS, mentioned above, also noted that section 4 subsidies would be a viable subsidy in the context of farmworkers and occupiers.

- **Finance Linked Individual Subsidy (FLISP):** Where farmworker households are earning more than the subsidy threshold and therefore do not qualify for the institutional subsidy, they may be eligible for FLISP. As the name suggests, the subsidy is subject to a loan from a financial institution. FLISP is a subsidy that it awarded to households that qualify for a mortgage bond and can be used to lower the mortgage bond repayments made by the household. The subsidy is aimed at households in the “gap market”, namely those earning between R3 501 and R15 000 a month. However, as a report by Phuhlisani points out, home ownership does not seem likely for farm dwellers that fall within this income bracket given the fact that high levels of indebtedness are likely to disqualify them from obtaining mortgages.\(^{382}\) Moreover, in the vast majority of instances, banks only grant mortgage bonds over land that is owned by the mortgagor. This means that, in the current framework, farm workers or dwellers would have to obtain ownership of the land through subdivision or some other process before they would be able to apply for a mortgage and a subsidy through FLISP.

- **Farm Residents Housing Assistance Subsidy (FRHAP):** FRHAP provides for subsidies to develop adequate housing for farm workers and occupiers. It provides multiple subsidy options, allowing for on-site and off-site housing depending on the most appropriate solution in the circumstances. Due to the remote rural locations of the beneficiaries of this subsidy and the difficulties most rural municipalities have to deliver the required services, FRHAP provides for farm owners to act as the key service delivery agents or developers in terms of the programme.\(^{383}\) The subsidy can be granted in various ways. One option is that the farm owner applies directly for the subsidy but the farm workers and occupiers must be granted long term security of tenure (e.g. by entering into long term lease agreements). In this case, the farm owner would be responsible for

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381 Hall, *Farm Tenure*, p. 18. It seems unlikely that the Minister would do this personally when he could easily have delegated this function to another official - something which often happened in relation to discretionary powers of this nature in legislation.
382 Phuhlisani, *Tenure Security of Farm Workers*.
383 De Satgé & Mischa Blecher, *Farmworker Housing*, p. 35.
maintaining the subsidised housing stock using his or her own resources. A second option is for farm workers and dwellers to apply for the subdivision of farmland so that individual title deeds can be transferred to farm workers. In these cases, the farm owner can still act as the developer. If he or she is unwilling to do so, the beneficiaries can approach the provincial DHS. The subsidy is only available to permanent employees and is subject to the standard qualifying criteria.\footnote{De Satgé & Mischa Blecher, \emph{Farmworker Housing}, p. 36} The DHS raises concerns about the “affordability to farm workers and occupiers to pay the cost of housing and associated municipal rates and service charges that will arise in most off-farm settlement options” and explicitly discourages the creation and development of agri-villages.\footnote{DHS, “Farm Residents Housing Assistance Programme”, p. 17.}

- **Emergency Housing Programme (EHP):** This Programme makes provision for municipalities to apply for grants from provincial governments to provide emergency housing to persons who find themselves in an “emergency housing situation”. An eviction or the threat of imminent eviction is specifically classed in the policy as an emergency housing situation.\footnote{May, “Ex parte: Drakenstein Municipality”.} The EHP makes provision for a broad range of possible emergency housing options, including various types of temporary and permanent accommodation options. The EHP is therefore a potentially important policy instrument through which municipalities could provide emergency accommodation for those in dire need, including farm workers or dwellers who are evicted from farmland and would otherwise be rendered homeless. A legal opinion obtained by the Drakenstein Municipality from the Community Law Centre (CLC) confirmed the possibility of the EHP being used for this purpose.\footnote{May, “Ex parte: Drakenstein Municipality”.} The benefit of the programme is that the ordinary qualification criteria do not apply and the EHP makes no distinction between rural and urban evictions. As May notes: “[T]he programme is flexible enough to make provision for ‘imminent eviction from land … or situations where pro-active steps ought to be taken to forestall such consequences.’ This enables a municipality to assess its current and foreseeable housing needs, particularly in respect of vulnerable farm dwellers.”\footnote{May, “Ex parte: Drakenstein Municipality”, pp. 14-15.} In practice, however, municipalities have been hesitant to make EHP available because they believe that it would be seen as the municipality facilitating queue-jumping.

- **Municipal Infrastructure Grant (MIG):** Another important funding option is the MIG. The MIG is a funding arrangement that makes provision for a capital grant to be made to municipalities in order to provide basic infrastructure to enhance access to services by the poor. The grant funds can only be used for the provision of infrastructure. This means that it cannot be used for housing specifically. However, it could be used by municipalities to fulfil their other municipal service delivery functions, including the provision of water and sanitation, electricity infrastructure or high-mast lighting. The MIG is therefore a possible complimentary revenue stream that can be used in conjunction with other subsidies to provide access to basic services for farm workers and dwellers.

Despite the multiple subsidies available, the specific context of farm workers and occupiers could restrict the funding mechanisms available. The first limitation is that these subsidies, in isolation, are often insufficient to purchase the land on which farm dwellers are living (in the instances that farm owners are willing to sell) or are insufficient to purchase alternative land. Although this could be rectified if government provided that multiple subsidies could be pooled together to create additional funding, the criteria of many of these subsidies specify that beneficiaries may not receive funding in terms of other subsidies. A second limitation is that farm dwellers often do not qualify for these grants because they fall outside of the standard qualifying criteria. In relation to the housing assistance, the National Housing Code requires that a household earn less than R3 500 per month. From 1 March 2016 the minimum wage was set at R128.26 per day with a minimum monthly payment of R2 778.83.\footnote{Phuhlisani, \emph{Tenure Security of Farm Workers}.} This means that a farm worker household with a full-time worker earning the minimum wage along with some additional part time work might still not qualify for the housing assistance.
income from other family members would raise household earning above the R3 500 ceiling for the basic housing subsidy. This also does not take into account farm workers who earn more than the minimum wage. In relation to FLISP, the reality is that very few will be granted access to a mortgage or financing options given that they earn very little. A third limitation is that many of these grants are administered by different departments or governmental agencies with very poor inter-departmental communication and coordination. For example, the DHS rarely prioritises farmworkers access to state subsidised housing unless there is a clear emergency. Municipalities implement MIGs but do not proactively plan to use these funds for the provision of basic service infrastructure for farm workers.

However, the wide range of financial mechanisms that are available to farm dwellers means funding cannot legitimately be described as a hurdle to the realisation of farm dwellers’ tenure security, access to housing and basic services. The limitations of the system simply require the government to plan and prioritise and find innovative solutions to apply the funding framework currently available.

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390 Phuhlisani, Tenure Security of Farm Workers.
### COMPARISON OF FINANCIAL MECHANISMS

<table>
<thead>
<tr>
<th>FINANCIAL INSTRUMENTS</th>
<th>Institutional Housing Subsidy Programme (ISP)</th>
<th>Section 4 Subsidy in terms of ESTA</th>
<th>Emergency Housing Programme (EHP)</th>
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<tr>
<td><strong>Application</strong></td>
<td>The ISP is aimed at providing “affordable rental housing” to the lower end of the market. The programme applies throughout South Africa in both rural and urban areas. Could be used to develop rental housing stock on- or off-farmland.</td>
<td>Section 4 of ESTA empowers the Minister of Rural Development and Land Reform to grant subsidies to facilitate the planning and implementation of on-site or off-site developments to enable farm dwellers obtain long term tenure security. Funding is available for the acquisition and development of land. The programme provides for the possibility of on- and off-site developments. If the farm dwellers indicate a preference for on-farm developments but off-farm development is pursued, the Minister is required to provide reasons why on-farm development is not possible or feasible. Section 4 is complemented by section 26 of ESTA, which grants the Minister the power to expropriate land for on-farm or off-farm developments.</td>
<td>The EHP provides for municipalities to receive grants from provincial government to provide temporary relief to people affected by emergencies through the provision of emergency housing. Evictions or the threat of evictions are specifically included in the definition of emergency. This means that the programme could be used to provide alternative accommodation to farm dwellers who are evicted. Funding is available for the purchase of land, the installation of municipal engineering services, relocation assistance and the provision of emergency housing. The cost of consumption of basic services (for a period of 3 years) can also be funded through the programme, provided the MEC allows for the funds to be used in this way. The programme provides for on-site and off-site developments but prioritises on-site developments.</td>
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<td><strong>Administration</strong></td>
<td>The subsidy is allocated to an approved housing institution which applies for, develops and manages rental housing stock. Municipalities could take on the role of developer by creating municipal service entities in terms of the Municipal Systems Act. If the municipality is not accredited, or lacks capacity to perform these functions, provincial government could assist the municipality.</td>
<td>Provincial government, the relevant municipality or a housing institution can be used to facilitate, implement and undertake developments in terms of section 4 of ESTA (section 4(4) of ESTA). The Minister of Rural Development and Land Reform is responsible for funding these development projects.</td>
<td>Municipalities are responsible for initiating, applying for, and implementing emergency housing projects in terms of the programme. Provincial government is responsible for funding emergency housing projects and plays an oversight role.</td>
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<td><strong>Upgrading of Informal Settlement Programme (UISP)</strong></td>
<td><strong>Farm Residents Housing Assistance Programme (FRHAP)</strong></td>
<td><strong>Finance Linked Individual Subsidy Programme (FLISP)</strong></td>
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<td>The programme provides for municipalities to apply for grants from provincial government to redevelop informal settlements by incrementally providing infrastructure, tenure security and access to basic services. Funding is available for the installation of interim and permanent services, the development of serviced stands, the development of social amenities (in exceptional circumstances) and facilitating community participation. Housing developments (the development of top structures) are funded separately through one of the other national housing programmes in phase 4 of the programme. The programme makes provision for the possibility of on-site and off-site developments, but prioritises <em>in situ</em> upgrading by stating that relocation should only be pursued as an “option of last resort”.</td>
<td>The programme aims to assist farm residents and labour tenants to access housing and tenure security. It also provides for the provision of access to basic services (where no other funding is available). The programme is closely linked to the land reform programme and other national housing programmes. The programme provides for various on-farm and off-farm options.</td>
<td>The programme aims to assist qualifying households who have secured a mortgage bond to acquire a residential property or serviced stand, or to build housing. The programme targets the so-called gap market.</td>
<td>The MIG is a capital grant made to municipalities to fund basic municipal infrastructure to enhance access to basic services for poor communities. Funding is available to upgrade and build basic municipal infrastructure. This means that the funding may not be used directly for housing development. However, the MIG may be used as a complementary funding stream.</td>
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<td>Municipalities are required to investigate whether any informal settlements in their municipal area qualify for assistance in terms of the programme (including informal settlements on private land), and are responsible for initiating, applying for and implementing the programme. Municipalities play the role of developer. Provincial government is responsible for funding upgrading projects and plays an oversight role. Provincial government may also play a developer role if the municipality is incapable or insufficiently resourced.</td>
<td>The role of developer in terms of the FRHAP differs depending on the development option. The farm owner, a housing institution, the provincial government, the municipality or the beneficiaries themselves (through a legal entity and the application of the Enhanced People’s Housing Process (ePHP)) could play the role of developer. Depending on the development option, these different parties may be responsible for applying in terms of the programme, initiating the development and operating or maintaining the development.</td>
<td>The programme is administered by the National Housing Finance Corporation (NHFC), which accepts and assesses applications. Applications must be submitted through provincial government, the municipality, the housing institution or a private developer.</td>
<td>Municipalities administer the funds in terms of their IDP processes. No application is required. The funds are deposited automatically to municipalities from national government.</td>
</tr>
<tr>
<td>FINANCIAL INSTRUMENTS</td>
<td>Institutional Housing Subsidy Programme (ISP)</td>
<td>Section 4 Subsidy in terms of ESTA</td>
<td>Emergency Housing Programme (EHP)</td>
</tr>
<tr>
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<tr>
<td><strong>Tenure</strong></td>
<td>The primary form of tenure provided is rental accommodation. In addition, the programme provides for the possibility of private ownership by stating that rental units may be sold to tenants after 4 years (from initial occupation). The Individual Subsidy Programme may be used to assist tenants who require financial assistance to purchase their units.</td>
<td>The type of tenure awarded to beneficiaries may differ depending on the type of development. Tenure would likely include either rental accommodation, rights of occupation and individual ownership.</td>
<td>The EHP provides for beneficiaries to obtain tenure in the form of lease agreements.</td>
</tr>
</tbody>
</table>
| **Qualification criteria** | The generic housing qualification criteria apply to beneficiaries. This means that beneficiaries can only access assistance through the programme if they: • are South African citizens or permanent residents, • are older than 18 and capable of concluding a contract, • are married or have financial dependents, • earn a monthly household income of less than R3 500, • have never owned a house, and • have never previously received assistance through a national housing programme. The programme also provides that single people without dependents, people who have owned a house before, and people who have previously benefitted through one of the national housing programmes are eligible to rent units through the programme but are not entitled to purchase the housing units. | To qualify, beneficiaries must qualify as “occupiers” for the purposes of ESTA. | The generic housing qualification criteria do not apply. Any person that will be rendered homeless, or is in dire housing need as a result of an emergency or eviction, qualifies for assistance in terms of the EHP.
<table>
<thead>
<tr>
<th>Upgrading of Informal Settlement Programme (UISP)</th>
<th>Farm Residents Housing Assistance Programme (FRHAP)</th>
<th>Finance Linked Individual Subsidy Programme (FLISP)</th>
<th>Municipal Infrastructure Grant (MIG)</th>
</tr>
</thead>
</table>
| The UISP makes provision for various tenure arrangements depending on the phase of the project:  
  • Phases 1-3: The tenure arrangements available during these phases include lease agreements, commodatum (gratuitous loan) or “any other agreement short of ownership”.  
  • Phase 4: The MEC has final discretion over the type of tenure arrangements that beneficiaries could receive at this stage. However, this could include a diverse range of tenure options including individual ownership. |
| The type of tenure rights available to beneficiaries will depend on the type of development option.  
Generally, two types of rights will be made available:  
  • In the case of rental housing development by the farm owner or housing institution, beneficiaries will receive lease agreements or rights to occupy.  
  • In the case of the subdivision of farm land and transfer of land to beneficiaries, beneficiaries will receive individual ownership. |
| The programme aims to provide individual ownership subject to a mortgage bond (held by a financial institution). |
| The generic housing qualification criteria apply to beneficiaries. This means that beneficiaries can only access assistance through the programme if they:  
  • are South African citizens or permanent residents,  
  • are older than 18 and capable of concluding a contract,  
  • are married or have financial dependents,  
  • earn a monthly household income of less than R3 500,  
  • have never owned a house, and  
  • have never previously received assistance through a national housing programme.  
The MEC has a discretionary power to award subsidies in terms of the programme on a “case by case” basis. This means that people who are not eligible in terms of the generic qualification criteria could still be able to access assistance in terms of the programme. |
| Beneficiaries can only access assistance through the programme if they:  
  • earn a monthly household income between R3 500 and R15 000,  
  • have an approved home loan from a financial institution,  
  • are South African citizens or permanent residents,  
  • are older than 18 and capable of concluding a contract,  
  • have never owned a house, and  
  • have never previously received assistance through a national housing programme.  
In addition, the beneficiaries must either be farm residents in terms of ESTA or labour tenants in terms of the LTA.  
Single labour tenants without dependents may also benefit in terms of the programme. |
<p>| The only limitations in relation to the MIG is that it must be used for upgrading or building municipal infrastructure and that it must be used to benefit poor communities. |</p>
<table>
<thead>
<tr>
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</tr>
</thead>
</table>
| **Value of subsidy** | The subsidy amount is annually adjusted by the Director-General of DHS. In 2011, the amount was R52 427 per unit. The housing institution or municipality are also required to make a capital contribution over and above the institutional subsidy (in 2011, this was set at a minimum of R2 479 per unit). | The Minister of Rural Development and Land Reform determines the amount awarded (the amount is not specified in ESTA). | The project needs determine the amount of the grant provided in terms of the EHP, but it cannot exceed the basic requirements set out in the programme. The amounts are adjusted annually by the Director General of the DHS. Different levels of funding are available depending on the project:  
• The provision of permanent services can be funded up to R22 416 (for repairs) (in 2011) and an amount equal to the individual Subsidy amount (for reconstruction) (R160 573 in 2017).  
• The provision of temporary services can be funded up to R4 230 (for the installation of services) and R47 659 for the construction of temporary shelter (in 2011).  
• Municipalities may compliment the funding received in terms of the EHP with their own funds. |
<p>| <strong>Use and accessibility in practice</strong> | Recent information on the use and accessibility of the programme was not available. However the Public Services Commission (PSC) in 2003 suggested that the ISP be overhauled to ensure that it could provide an acceptable and affordable end product. This was mainly due to the high maintenance costs on housing developers that made it more expensive. The PSC also found that the ISP was not always used as it was intended, namely to create rental housing stock or ownership through sectional title schemes. Instead, the PSC found that it was used “as a way to get larger subsidies for individual ownership housing”. | The state has failed to implement the measures provided for in section 4 and 26 of ESTA at scale. The section 4 subsidy has not been widely used to fund either on-farm or off-farm developments over the years. It is not entirely clear whether this is due to few application being received or whether the Minister has been reluctant to approve applications. For example, the South African Human Rights Commission (SAHRC) found in 2007 that only 18 projects benefiting a total of 273 people had been initiated in terms of this funding mechanism. The Director General of the DRDCLR acknowledged that section 4 subsidies have been badly implemented. | Although the programme has been used effectively to address the emergency needs of people affected by natural disasters and floods, it has not been widely used to provide alternative accommodation to farm dwellers in the wake of evictions from farmland. Municipalities have argued that it is difficult to access funding for emergency housing projects from provincial governments. Temporary Relocation Areas (TRAs) or transit camps have been widely criticised. |
| <strong>Additional information</strong> | A review commissioned by the DHS found that the institutional subsidy was best suited to address the on-farm housing needs of farm workers. It suggested that municipalities take on the role of housing institutions. | | The EHP states that when interim services are provided they should, as far as possible, constitute the first stage in the provision of permanent services. |</p>
<table>
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<tr>
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<tr>
<td>The project needs determine the amount of the grant provided in terms of the UISP, but it cannot exceed the amounts set out in the programme. The programme provides that the funding available for phases 1 to 3 is equal to the subsidy in terms of the Individual Subsidy Programme. This means that the current amount would be R160 573 (in 2017). Municipalities are required to make a 10% minimum capital contribution (municipalities may use their Municipal Infrastructure Grants (MIG) for this purpose).</td>
<td>The programme provides that the funding available is equal to the subsidy in terms of the Individual Subsidy programme. This means that the current amount would be R160 573 (in 2017).</td>
<td>The subsidy is a once-off grant amount ranging between R10 000 and R87 000 depending on the monthly income of the beneficiary. The value of the subsidy differs depending on the municipality. Funding is apportioned directly from the National Treasury in terms of the Division of Revenue Act each year.</td>
<td>Municipalities and provincial governments have been reluctant to implement the programme. This may be due to their lack of familiarity with informal settlement upgrading, their desire to deliver houses and issues related to spending on interim services. Since 2009 when the programme was introduced, there has never been an application for funding in terms of the programme (nor has an application been approved). Farm dwellers are unlikely to qualify in terms of the programme. This is due to the fact that financial institutions could be unlikely to offer farm dwellers mortgages due to low wages. The Centre for Affordable Housing Finance in Africa have said that there has been a slow uptake of the programme nationally: “[b]etween April 2012 and March 2014, only 1 696 FLISP subsidies were extended”. This was a “fraction” of the budget available in terms of the programme. In the past, municipalities across the country have not been able to use up their MIG.</td>
</tr>
<tr>
<td><strong>The programme emphasises the importance of inclusive and participatory development. Prospective beneficiaries can compel municipalities to consider the programme by approaching a court.</strong></td>
<td><strong>The programme provides that it must be applied with circumspection. This is due to the fact that the service delivery obligations of municipalities may be compounded by the proliferation of rural settlements on farms and in far-flung rural areas.</strong></td>
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| The programme emphasises the importance of inclusive and participatory development. Prospective beneficiaries can compel municipalities to consider the programme by approaching a court. | The programme provides that it must be applied with circumspection. This is due to the fact that the service delivery obligations of municipalities may be compounded by the proliferation of rural settlements on farms and in far-flung rural areas. | | |
5. STAKEHOLDERS AND INSTITUTIONAL COORDINATION
A wide array of stakeholders is involved in the provision of tenure security, housing and access to services to farm owners and dwellers. There seems to be very little cooperation between the different stakeholders about who should bear responsibility for securing tenure and providing access to housing and basic services for farmworkers and farm dwellers.

The primary role-players are discussed below.

- **Farm owners:** The legal framework governing farm dwellers’ rights to tenure security, housing and basic services may, in certain circumstances, limit the rights of farm owners in relation to their land. These limitations are usually temporary and limited in scope. However, the literature suggests that farm owners may sometimes resent these limitations and actively seek ways to circumvent the obligations placed on them in terms of the legal framework. In particular, in certain circumstances farm owners may be responsible for providing alternative accommodation in cases of eviction. They are able to access financing in order to provide better housing stock on their farms, however, many have been hesitant to do so as they would have to act as developers and maintain the housing stock afterwards.

- **Department of Rural Development and Land Reform (DRDLR):** The DRDLR has a number of important obligations in relation to farm dwellers and occupiers. They include monitoring evictions, compiling probation officer reports on evictions, and identifying and advocating for section 4 subsidies. The role of the DRDLR in relation to section 9(3) reports is particularly crucial. In terms of section 9(3) of ESTA, a probation officer is required to write a report for a court hearing an eviction application to provide a court with all the “relevant circumstances” before the court makes a decision. The report is supposed to show how the eviction would affect the occupier and owner and assess the likely hardship that would be caused to the occupier should the eviction order be granted and to the owner should the order be denied. These reports must include a discussion of the availability of alternative accommodation for the occupiers should the eviction order be granted. They are similar to information orders required from municipalities in terms of PIE eviction proceedings, which have been critical in courts having sufficient information to make an appropriate decision. However, the DRDLR often do not provide section 9(3) reports. This has led to LLC judgments finding that section 9(3) reports are not compulsory, and that courts should allow a “reasonable period” for the DRDLR to produce the report after which it may issue an eviction order. While some of the case law is more progressive - requiring a court to wait for a probation officer report if it believes the report will contain information that will sway the court - the inability of the DRDLR to provide these reports significantly undermines the procedural protections provided in ESTA. In addition, commentators have noted that the DRDLR is chronically mismanaged and severely under-resourced. The DRDLR has, for example, been unable to monitor and gather data on the extent of rural evictions. As Hall notes, the DRDLR is “overwhelmed with cases and cannot respond to all of them”. She described a chaotic DRDLR, which only had one official to enforce ESTA and the LTA in a district.

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391 Hall, *Farm Tenure*, p. 5.
392 Hall, *Farm Tenure*, p. 10.
• **Municipalities:** The role of municipalities in respect of farmworkers is severely underemphasised. As the primary duty bearers in relation to emergency housing provision (as provided for in terms of the Constitutional Court jurisprudence) and service provision (in terms of the Constitution and the municipal laws), municipalities bear primary responsibility for ensuring that services, infrastructure and emergency housing are provided to farmworkers and farm dwellers. Yet, to date these entities have largely been able to escape their responsibilities. Moreover, the Constitutional Court has confirmed that municipalities are ideally suited to providing alternative accommodation to those rendered homeless as a result of an eviction. As May argues, “in the case of housing obligations, emphasis has been placed on emergency housing as a priority, especially as local government has been cited in case law and policy as the guardian of this function”.393 There are a number of reasons why municipalities have been hesitant to take responsibility for their constitutionally mandated duties. The first is their financial and capacity constraints. The DHS notes that rural municipalities are “already extremely hard pressed to deliver basic services”.394 Du Toit and Ally go further by saying:

> Many of the core issues affecting workers’ welfare - services, housing, education, transport and health services - are no longer conveniently the responsibility of a single relatively well-resourced and easily available paternalist employer. Instead they are now the responsibility of much more distant and often overstretched rural local governments.395

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393 May, “Ex parte: Drakenstein Municipality”, p. 63.
394 DHS, “Farm Residents Housing Assistance Programme” p. 17.
6. CONCLUSIONS AND RECOMMENDATIONS
The laws and regulations governing farm dwellers' rights to tenure security and access to adequate housing and basic services establish a framework that has the potential to create a sound foundation for progressively realising farm dwellers' constitutional rights. This framework does not only provide protection against arbitrary and unlawful evictions for farm dwellers, but also provides useful mechanisms through which the rights and living conditions of farm dwellers can be improved. While there are some problems in the legal framework and the manner in which it has been interpreted by magistrates and state officials, the most serious concern is the state's inability or unwillingness to effectively implement the legal framework it has put in place.

In this light, AFRA has initiated the Pathways Project to create a platform for negotiation between farm dwellers, landowners and different spheres of government in order to find ways of unblocking the obstacles that impede implementation of systematic settlement of land and service rights.

The report indicated various challenges that need to be addressed for the legal and policy framework to become more effective at realising the rights of farm dwellers and the following recommendations are made to address them:

**Recommendations for national and provincial government**

- The DRDLR (and other organs of state) should develop mechanisms to ensure that the legal regime governing farm dwellers' tenure security, access to housing and basic services is implemented more effectively. This includes making provision for the funding, implementation and enforcement of protection mechanisms relating to evictions (as provided for in ESTA, the LTA and PIE) and the implementation of measures related to the provision of long-term tenure security, assess to housing and access to basic services (as provided for in section 4 of ESTA, the land redistribution measures in the LTA and the various national housing programmes applicable to farm dwellers).

- The DRDLR should engage with the DHS about how to ensure that the national housing programmes catering specifically for farm dwellers are made more accessible. Key in this regard is the Farm Residents Housing Assistance Programme. Rather than terminating the programme, as appears to be the current direction, DRDLR and DHS should discuss its use and amendment, including a consideration of how the housing subsidy criteria and particularly the income threshold limits the number of farm dwellers that can gain access to housing assistance, and how this can be remedied.

- Government departments at national and provincial levels should put in place measures to ensure that the justice system becomes responsive to the legislation and policy scheme governing farm dwellers. This relates particularly to the measures provided for by the laws governing evictions. In developing these measures, the DRDLR should work with the Department of Justice and Constitutional Development, public prosecutors, the Commissioner of Police and the Legal Aid Board.

- The DRDLR (and other organs of state) should provide further training on the legal framework governing tenure security, access to housing and basic services to officials in relevant departments, as well as magistrates.

- The DRDLR should establish an effective monitoring and evaluation system for farm dweller evictions (in terms of ESTA, the LTA and PIE). This system should allow the state to respond to or intervene in evictions from farmland and should be linked to alternative dispute resolution mechanisms.

- The DRDLR should strengthen the existing measures related to alternative dispute resolution.

- The DRDLR should ensure that the officials charged with monitoring evictions from farmland proactively intervene in evictions during the two-month period after a section 9(2) notice and produce quality section 9(3) reports during the early stages of eviction proceedings.
• The DRDLR should develop a coordinated and comprehensive plan to ensure that farm dwellers who are at risk of becoming homeless as a result of evictions are provided suitable alternative accommodation. This should include providing funding and assistance to rural municipalities to enable them to acquire land for evictees and to develop suitable alternative accommodation.

• The departments responsible for the implementation of the legal framework at national, provincial and local spheres of government should strengthen coordination and communication among themselves. This should include clarifying the roles and responsibilities of different departments in relation to one another.

• The DRDLR should assist municipalities with model drafting and guidelines for municipal planning by-laws, spatial development frameworks and land use schemes to ensure that the SPLUMA development principles are applied to the farm dweller context.

• The prevailing distinctions in the legislative scheme regulating eviction from farmland are not ideal. The system should be simplified (while maintaining existing protections) or the system should be adapted to ensure that the laws complement one another more effectively.

• The departments responsible for the implementation of the legislative regime at national and provincial spheres should ensure that municipalities are aware of the provisions in the legal framework that allow for the installation of basic services on private land (under certain conditions). These departments should also provide guidance and support to municipalities that seek to implement such projects.

Recommendations for local government

• Municipalities should adopt reasonable housing policies which make provision for both permanent accommodation and suitable alternative accommodation for farm dwellers facing homelessness as a result of eviction. Municipalities are legally required to provide access to suitable alternative accommodation to people who would otherwise be rendered homeless as a result of an eviction, including farm dwellers evicted from farmland.

• Municipalities are obliged to budget and plan for the provision of suitable alternative accommodation or emergency accommodation for those in emergency housing need and, if necessary, should leverage provincial and/national funding to do so.

• Municipalities should embrace their developmental duties in terms of the legal framework regulating farm dwellers’ tenure security and access to housing and basic services and prioritise the needs of farm dwellers as they constitute a vulnerable group. This could include prioritising the needs of farm dwellers in the IDP and SPLUMA processes and initiating housing and development projects in terms of the national housing programmes.

• Municipalities should apply the SPLUMA development principles in their spatial development frameworks, by-laws, land use management systems and development decision making.

• Municipalities should attempt to find ways to balance the tensions in the fiscal framework. In particular, the duty to spend resources wisely should not be used to justify the failure or refusal to realise the rights of farm dwellers.
Recommendation for farm owners

• Farm owners should recognise that their rights to property and ownership are not paramount. The constitutional and legislative framework governing evictions has meant that the rights of farm owners may, in certain circumstances, be partially limited by the rights of farm dwellers.
• Farm owners should respect the rights of farm dwellers as provided for in legislation (including ESTA, the LTA and PIE), and the rights of farm dwellers to dignified living conditions.
• Farm owners should comply with the legal requirements set out in legislation when terminating the right of residence or instituting eviction proceedings against farm dwellers. Where possible, farm owners should attempt to resolve disputes through alternative dispute resolution mechanisms.
• Farm owners should be open to working with government departments at provincial and local level to protect and realise the rights of farm dwellers.

Recommendations for civil society

• Civil society should play a supportive role, including assisting government in information collection and in developing effective enforcement measures. Civil society should also try to develop or initiate pilot projects with government support, by utilising some of the innovative mechanisms provided for in the legal framework.
• Civil society should establish mechanisms to provide support to farm dwellers. This could include popular education processes to inform farm dwellers of their rights, assisting farm dwellers in mobilisation and organisation, and supporting farm dwellers during alternative dispute resolution (among others).
• Civil society should advocate for government to implement and enforce the legislative and policy framework governing farm dwellers’ rights to tenure security and access to basic services and housing, and should push for legislative changes that would further enhance the substantive and procedural protections afforded to farm dwellers.
• There is considerable scope for the development of eviction jurisprudence in terms of ESTA and the LTA. Civil society could play an important role in developing case law in a manner that enhances and strengthens the substantive and procedural protections afforded to farm dwellers. The body of progressive case law developed in terms of PIE may be an important reference point for such development.
• Civil society could also consider how it could make more effective use of the enforcement measures provided for in eviction legislation. For example, eviction legislation provides for the private prosecution of illegal evictions in instances where public prosecutors are unwilling or unable to prosecute.
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