

## NATIONAL INSTRUCTION # OF 2016 UNLAWFUL OCCUPATION OF LAND AND EVICTIONS

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### 1. Background

- (1) A need was identified to provide guidance to members of the Service in respect of their role and responsibilities during incidents of land invasions or evictions, to ensure that members act within the perimeters of all applicable legislation.
- (2) Occupation of land by *unlawful occupiers* which is against the wishes of the owner of such property, is an issue often precipitated by socio-economic, socio-historic or socio-political factors. Evictions, subsequent litigation and the disputes around the issue are frequently charged with emotion and the Service are more often than not involved in some or other capacity, whether it be as a party expected to play an active role during an eviction or the litigation in connection therewith, or to maintain public order during an eviction.
- (3) As such, the Service may be involved in matters of land invasions and evictions and must guard against overzealous or unlawful intervention. The Minister of Police and the Service are at risk not only regarding civil claims resulting from injury to persons or damage to property, but also negative publicity and loss of public confidence.
- (4) Land owners and occupiers must be requested to report incidents of land invasions and illegal evictions to their local police stations. In the absence of proper police response the Station or Cluster Commander, Operational Coordination or the Office of the Provincial Commissioner should be contacted to ensure that the necessary attention is given as indicated in the guideline document.
- (5) The legal framework within which policing of land invasions and evictions must occur is the —
  - (a) Extension of Security Tenure Act, 1997 (Act No 62 of 1997);
  - (b) Land Reform (Labour Tenants) Act, 1996 (Act No 3 of 1996);
  - (c) Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (Act No 19 of 1998);
  - (d) Trespass Act, 1959 (Act No 6 of 1959); and
  - (e) Rental Housing Act, 1999 (Act No. 50 of 1999).

- (6) The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 provides for —
- (a) the prohibition of illegal eviction; and
  - (b) procedures for the eviction of *unlawful occupiers*.
- (7) The Extension of Security Tenure Act, 1997 provides for —
- (a) long-term security of land tenure;
  - (b) the conditions on and circumstances under which the right of persons to reside on land may be terminated; and
  - (c) the conditions and circumstances, under which persons whose right of residence has been terminated, may be evicted from land.
- In very broad terms, the Extension of Security Tenure Act, 1997 is applicable only to land other than land in an approved township or to land designated for agricultural purposes within such a township.
- (8) Section 1 of the Trespass Act, 1959 provides that any person who without the permission of the lawful occupier of any land or any building or part of a building; or of the owner or person in charge of any land or any building or part of a building that is not lawfully occupied by any person, enters or is upon such land or enters or is in such building or part of a building, shall be guilty of an offence unless he has lawful reason to enter or be upon such land or enter or be in such building or part of a building. A person who is entitled to be on land in terms of the Extension of Security of Tenure Act, 1997, shall be deemed to have lawful reason to enter and be upon such land.
- (9) The Rental Housing Act, 1999 provides for the the Rental Housing Tribunal which is a statutory body which provides mechanisms to resolve disputes between land lords and tenants. A ruling by the Rental Housing Tribunal is regarded to be an order of the Magistrates' Court.

## 2. Definitions

In this Instruction, unless the context otherwise indicates, —

- (a) "court" means any division of the High Court or a magistrates court;
- (b) "ESTA" means the Extension of Security Tenure Act, 1997 (Act No 62 of 1997);
- (c) "evict" to expel someone from vacant land, a place, premises or property with the support of the law, and "eviction" has a corresponding meaning;
- (d) "eviction order" means an order issued by a court that compels someone to leave vacant land, a place, premises or property;
- (e) "LTA" means the Land Reform (Labour Tenants) Act, 1996 (Act No 3 of 1996);
- (f) "occupier" means a person who resides on land with the permission or consent of the owner. The consent does not have to be expressed (in writing or orally), but may also be given tacitly;
- (g) "PIEA" means the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (Act No 19 of 1998);
- (h) "sheriff" means a person appointed in terms of section 2 of the Sheriffs Act, 1986 (Act No 90 of 1986), and a person appointed in terms of section 5 and section 6 of that Act as an acting sheriff and a deputy sheriff, respectively;
- (i) "Trespass Act" means the Trespass Act, 1959 (Act No 6 of 1959); and
- (j) "unlawful occupier" means a person who occupies land without the express or tacit consent of the owner or person in charge.

### 3. The position of different persons in terms of the legislation

#### (1) Lawful Occupiers

A lawful occupier is a person who resides on land with the permission of the owner of the land. There are two distinctive persons identified in the legislation:

#### (a) Occupier

(i) An occupier is a person living (residing) on land with the owner's consent. This consent does not have to be express (in writing or orally) but may also be given tacitly. An example of express consent is where an occupier resides on the land after asking the owner permission. An example of tacit consent would be the case where a person lives on a farm with the full knowledge of the owner. If the owner does not take steps to evict that occupier, the owner gave tacit consent through his or her conduct.

(ii) Such an occupier must also earn a gross salary in excess of a prescribed amount. ESTA protects the rights of the occupier, but does not protect persons who use the land for industrial, mining, commercial or commercial farming purposes and it does not apply in land proclaimed or recognized as townships.

#### (b) Labour tenant

(i) A labour tenant is a person who resides on a farm and has the right to use the farm of the owner (or other land belonging to the owner) and who, in return, works for the owner (as did that person's parents or grandparents).

(ii) The labour tenant may provide this labour through someone else – for example, the father is a labour tenant who uses the farm in return for his son or daughter working for the owner. A farm worker, who gets paid for his work mainly in cash, does not qualify as a labour tenant. Farm workers have to do the work themselves.

which is another factor distinguishing them from labour tenants. The right of occupation of a labour tenant and his or her "associates" (family members, employees) is protected by the LTA.

#### (2) Unlawful Occupiers

An unlawful occupier is someone who resides on land without the express or tacit permission of the owner. Occupiers who fall under the ESTA are not unlawful occupiers. The rights of an unlawful occupier are protected by the PIEA. This category of occupier will mostly be what is commonly known as, "squatters".

#### (3) Trespasser

(a) A trespasser is someone who enters land without the permission of the owner. When a trespasser "resides" on the land or property of the owner, the trespasser must be regarded as an unlawful occupier and the PIEA or ESTA will apply. "reside" means that a person has his place of abode or dwells permanently at a particular place.

(b) A court who finds a trespasser guilty of an offence in terms of section 1(1) of the Trespass Act, may order the summary removal of such a person from the land concerned. This power does NOT include an order to remove structures.

### 4. General Principles

The following general principles apply:

(a) Where the PIEA refers to a "building or structure", that reference includes a hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter.

(b) Where the PIEA refers to "consent", it means express or tacit consent, whether in writing or otherwise, of the owner of the land (or the person in charge) to the occupation by the occupier of the land in question.

- (c) If persons start occupying property and the owner or person in charge allows this occupation unhindered, it may be construed as tacit consent. ESTA goes further to include a holder of mineral rights proposing to terminate a right of residence or to evict, in which case the express or tacit consent of that mineral rights holder is construed as consent.
- (d) Where PIE refers to "owner", it means the registered owner of land, including an organ of state. Where PIE refers to the "person in charge", it means the person who has the necessary legal authority to give permission to a person to enter or reside upon the land in question. ESTA refers to the owner at the time of the relevant act, and extends the concept to the holder of mineral rights;
- (e) A person who is an occupier in terms of ESTA is not necessarily regarded as an "unlawful occupier" for purposes of the PIEA.
- (f) An "occupier" for purposes of ESTA is a person residing on land which belongs to another person, and who has on 4 February 1997, or thereafter, had consent, or any other right in law, to do so, but excluding a person who is, or is intending, to use the land in question mainly for industrial, mining, commercial or commercial farming purposes (except if that person and his family works the land him- or herself), or a person who has an income in excess of the prescribed amount.
- 5. Practical guidance for operational commanders**
- (1) Station Commanders, as well as operational commanders, must ensure that members are conversant with the provisions of legislation in regards of trespassing and unlawful occupation of property, including the rights of all involved parties, in order to ensure that members follow the correct procedures when confronted with situations of such nature.
- (2) A police member will most likely come into contact with the above-mentioned issues, if:

- (a) a property owner lodges a complaint at the Community Service Centre of the police station that his or her land was illegally trespassed/occupied/invaded; or
- (b) an occupier complains of an unlawful eviction.
- (3) Whenever an owner or a person in charge of vacant land, place, premises or property approaches the Service to lay a charge of trespass in terms of the *Trespass Act*, the members must ascertain whether the rights of the person against whom the charge is laid against, is not protected by other legislation, eg the *ESTA*, *LTA* or *PIEA*.
- (4) When it is clear that the person against whom the complaint was lodged does not reside on the land, or in the property and that the person is not an occupier, the police member attending to the complaint must deal with the matter according to the normal procedures for trespassing.
- (5) However, when the person "trespassing" is an occupier, that person enjoys the protection of the *LTA*, *ESTA* or *PIEA* and the police member should immediately advise complainant to obtain legal advice or consult an attorney in order to obtain an *eviction order* in terms of the applicable legislation. No person may evict an *unlawful occupier* except on the authority of an *eviction order* of a competent court.
- (6) Evictions outside the applicable legislation are illegal and the legislation provide for criminal offences – section 8 (1) of *PIEA* and section 23(1) of *ESTA* provide that *eviction* without a court order is an offence.

- (7) Evictions of labour tenants, lawful occupiers and unlawful occupiers may only take place under the following circumstances:

LABOUR TENANTS	LAWFUL OCCUPIERS	LAWFUL OCCUPIERS
<ul style="list-style-type: none"> <li>• Labour tenants may only be evicted in terms of:               <ul style="list-style-type: none"> <li>◦ an order of the Land Claims Court</li> <li>◦ Section 5 of the LTA</li> </ul> </li> <li>• Such an order is obtained by the owner through an application to the court.</li> </ul>	<ul style="list-style-type: none"> <li>• Lawful Occupiers may only be evicted in terms of an order of the Magistrate's, Land or High Court.</li> <li>• Eviction under ESTA is done in three phases:               <ul style="list-style-type: none"> <li>◦ The owner terminates the right to occupy in terms of section 8 of ESTA;</li> <li>◦ The owner obtains a court order if the occupier does not vacate the land within the set period; and</li> <li>◦ The eviction order is implemented.</li> </ul> </li> <li>• Whenever an occupier has lived on the land since 4 February 1997, and did not do anything wrong in terms of the ESTA (malicious damage to the property, intimidation etc), suitable accommodation as defined in ESTA must be provided.</li> </ul>	<ul style="list-style-type: none"> <li>• Unlawful occupiers may only be evicted in terms of an order of the Magistrate's or High Court.</li> <li>• Such an order is obtained by the owner through an application to the court.</li> <li>• It is a criminal offence to directly or indirectly receive or solicit payment of any money or other consideration as a fee or charge for arranging for or permitting a person to occupy land without the consent of the owner or person in charge of that land.</li> </ul>

## 6. Responsibilities of members of the Service

- (1) Only a sheriff and persons authorised by a court to assist the sheriff may carry out an eviction order, provided that the sheriff must at all times be present during such eviction or actions authorised by the court (eg demolition and removal of buildings or structures), subject to the conditions as determined by the court.
- (2) In situations where there is sufficient information to indicate that a sheriff and his or her employees may be exposed to injury, death or damage to property, members of the Service will be requested to assist the sheriff to perform a law and order, as well as protection service.
- (3) The Sheriff may request assistance from the Service with the execution of a court order where that Sheriff expects resistance. In practice, the following process should be followed:
  - (a) The Sheriff applies in writing to the Station Commander. The applications must:
    - (i) provide the date of execution of the court order;
    - (ii) be accompanied by a copy of the court order;
    - (iii) provide a brief description of the nature and extent of the assistance; and
    - (iv) state reasons why assistance is needed and in the case of expected resistance, information available to the Sheriff.
  - (b) The Station Commander must consider the application and decide whether assistance may be given in light of:
    - (i) the necessity demonstrated by the Sheriff;
    - (ii) the available resources; and
    - (iii) threat assessment reports from Crime Intelligence.
  - (c) Where assistance is refused, full reasons must be provided and a copy of the refusal must be forwarded to the Office of the Provincial Commissioner.
- (4) Members of the Service may not participate in the eviction, but must render protection to the sheriff and his or her staff. A person, who willfully obstructs or interferes with the duties of a sheriff or his or her

assistants in the performance of their duties, is guilty of an offence.

(5) The Station Commander must ensure that a written operational plan is drafted by the officer responsible for the operation and that full and proper records are kept of the event. Even if it is not expected that the assistance may involve the management of crowds, the planning principles contained in National Instruction 4/2014 with regards to crowd management, may be of some assistance in the planning phase.

(6) In all cases where assistance is to be rendered, consideration must be given to request assistance from the relevant Provincial Public Order Policing.

## 7. Trespassing

(1) Trespassers must be arrested as soon as possible by members of the Service as soon as reasonably possible a complaint of trespassing was lodged and must be brought before a court.

(2) The owner or person in charge of the property must lodge a formal complaint with the Service and provide an affidavit where the following information clearly for members to act:

- (a) the capacity of the complainant (whether he or she is the owner, lawful occupier or person in charge of the property in question);
- (b) particulars of the suspect(s) who entered the property in question;
- (c) whether the owner, lawful occupier or person in charge gave permission to the suspect(s) to enter the property in question or not; and
- (d) whether the suspect(s) have any lawful reason for entering the property.

(3) If the suspect leases the property or is an employee of the complainant or *bona fide* visitor to a lawful occupier, the suspect may have a lawful reason and the owner, lawful occupier or person in charge of the property must explain why ESTA or PIEA is not applicable.

(4) If it is clear that the suspect(s) have been residing on the property for some time, the owner must be advised that the trespasser should be evicted by an order of court.

## 8. Dealing with land invasions

(1) If a member of the Service is notified of an invasion of land on a large scale, it is important to act within the shortest possible period of time. Land invasions are usually associated with the occupation of land by force or threats of force.

(2) The Station Commander must inform the Provincial Head Public Order Policing and the Provincial Commissioner immediately if he or she becomes aware of an intention to invade land or of a land invasion, to immediately activate or place the relevant Provincial Public Order Policing Unit or National Intervention Unit on standby depending on the severity of the incident.

(3) If a specific person can be identified who are planning or instigating persons, to invade a specific land and interdict may be obtained by the owner or occupier to prevent the invasion of the land. The SAPS can only act against respondents who are committing contempt of court and for this purpose the SAPS would require statements indicating that the respondent was in breach of the conditions as set out in the interdict. However, a warrant of arrest is required before such persons may be arrested.

(4) In addition to the above, if information exists under oath that a person or persons are conspiring to invade land such person or persons may be arrested in terms of the Public Violence Act, 1956 (Act No. 17 of 1956), Section 18(2)(a).

## 9. Responsibilities during an unlawful land invasion

Members must take note of the responsibilities of the following roleplayers:

- (1) Owner of land

- (a) Both state-owned land and privately-owned land can be invaded unlawfully.
- (b) State-owned land is land that is under the control of the Departments of Rural Development and Land Reform or Public Works, provincial government or the municipality.
- (c) Depending on available resources, the state has a constitutional duty to ensure that all citizens can enjoy their basic rights to access to land and/or to housing. In special circumstances, such as large-scale invasions, the state has a similar duty to assist private landowners to protect their land.
- (d) Where *unlawful occupiers* whose basic rights are not at risk need to be evicted, the government authority responsible for the state land concerned or the private land owner must, without delay, approach the court for an *eviction order* in terms of PIE
- (e) Individuals (including *unlawful occupiers*) who have no access to agricultural land can approach the Department of Land Affairs for assistance to find suitable agricultural land
- (f) Individuals in need of housing can approach the local municipality or, if necessary, the provincial or national Department of Housing for assistance.
- (2) Department of Rural Development and Land Reform
- (a) The Department of Rural Development and Land Reform must approach the court for an order to evict *unlawful occupiers* of *state land* under its control as long as the basic rights of the *unlawful occupiers* are not in question.
- (b) assist *unlawful occupiers* of any state or private land who need and have no agricultural land to obtain access to suitable agricultural land;
- (c) assist other government authorities to find suitable alternative land for the *unlawful occupiers* in need of housing; and
- (d) if required and where special circumstances exist, assist private agricultural land owners whose land has been unlawfully invaded to relocate *occupiers* in need of agricultural land to suitable alternative land.

- (3) The Service
- (a) Where a complaint is laid which seems to be related to land invasion, the member of the South African Police Service on duty in the Community Service Centre must:
- (i) advise the land owner to approach the court without delay for an *eviction order* in terms of the PIE and inform the land owner that any delay may have an impact on the implementation of an *eviction order* - where private land has been unlawfully invaded and no special circumstances exist with regards to the vulnerability of the *occupiers*;
- (ii) advise the land owner to approach any office of the Department of Rural Development and Land Affairs for assistance - where private land has been unlawfully invaded and special circumstances exist regarding the vulnerability of the *occupiers*, eg a need for access to agricultural land exists; or
- (iii) advise the land owner to approach the area's local municipality or, if necessary, the provincial or national Department of Housing for assistance - where private land has been unlawfully invaded and special circumstances exist, eg a need for housing exists.
- (b) The Service must investigate offences committed.
- (c) In all cases where members of the Service act during land invasions or illegal evictions, proper records must be kept for evidence purposes.
- (d) Even though the Service have a role to play in evictions, that role is limited to its mandate. It is clear that land invasions and evictions must be dealt with through proper court processes where the Service will rarely be involved.
- (e) It is important to establish operational protocols to deal with requests for assistance, whether it is in the form of a criminal

complaint by a property owner or an evictee or a request for assistance by the Sheriff.

(7) If the circumstances are of such a nature that the incident results in public violence, the Provincial Head, Public Order Policing should be contacted to activate the responsible Public Order Unit to assist who are properly trained to deal with such incidents and dispersing of disorderly crowds. If suspects are arrested in huge numbers proper record must be kept of the police official who arrested each suspect. The circumstances which resulted in the public violence must be clearly stipulated. Each different offence will be dealt with and investigated according to its own criteria and requirements.

#### 10. Complaints in terms of the Rental Housing Act

- (1) It is expected of every Station Commander to designate a member (preferably the Commander of Visible Policing at the station) to coordinate requests for assistance by the Rental Housing Tribunal.
- (2) Although it is an offence to unlawfully lock out a tenant or to unlawfully shut off the utilities of the rental housing property, members may not open such rental housing property or reconnect a utility.
- (3) The case must be registered in terms of National Instruction 3 of 2011: Registration of Case Dockets on the Crime Administration System (CAS).
- (4) Where the landlord is known, he or she should be contacted and requested to open the property for the tenant or reconnect the utilities and be informed that he or she should refer the matter to the Rental Housing Tribunal for decision rather than taking the law into his or her own hands.