

Trespassing and Unlawful Occupation of Private Land

GUIDELINES KNOW YOUR RIGHTS AND ACT IMMEDIATELY

INTRODUCTION

South African farmers are burdened with multiple worries related to land ownership. The South African Parliament has also decided to look into the amendment of the Constitution (section 25) to allow for expropriation of land amongst others without compensation. Following the decision of Parliament, various organisations are making statements on land which may have a catastrophic implication for agriculture, especially since they are based on unqualified and incorrect assumptions. These statements may lead to acts of trespassing and land invasions. Trespassing and unlawful occupation of private land, with the inevitable eviction stress, is now more prevalent since the decision of Parliament.

The intention of these guidelines is to provide practical guidance to farming communities on how to deal with trespassing and unlawful occupation of land and is not intended to be legal advice.

This document should be read with on how to deal with land invasions the national instruction 7 of 2017, issued by the police. (att)

REGULATORY FRAMEWORK

A trespasser is someone who enters land without the permission of the owner. If a court finds a trespasser guilty of an offence in terms of Section 1 (1) of the Trespass Act, it may order a summary removal of such a person from the land concerned. This power does not include an order to remove structures. To remove such structures, the court order must include such an order.

An unlawful occupier is someone who resides on land without the express permission of the owner. It is a criminal offense to directly or indirectly receive or solicit payment of any money or other considerations as a fee or charged for arranging or organising or permit for a person to occupy land without the consent of the owner or person in charge of that land. Unlawful occupiers may only be evicted in terms of an order of a Magistrate or High Court. Such an order is obtained by the owner through an application to the court and the National Instruction 7 of 2017, issued by the police.

Despite the rights given to land owners in the South African Constitution, a flood of inflammatory

remarks by politicians have given impetus to the problem over the last couple of years.

This has been aggravated by the fact that both the South African Police Service (SAPS) and many farmers are unsure of how trespassing, unlawful occupation of land and evictions should be dealt with.

The need to provide guidance to SAPS members – and indirectly to farmers – has led to several police discussions and instructions in this regard. These include comprehensive guidelines to SAPS members from the deputy national commissioner for policing in March 2017, followed by the National Instruction 7 of 2017, which deals with trespassing, unlawful occupation of land and evictions.

The role and responsibilities of SAPS members during incidents of land invasions and evictions are defined in the guidelines to all senior police management and distributed to even the lowest level. National Instruction 7 of 2017 deals with, amongst others, different legal positions, practical guidance and responsibilities.

Giving background to the problem and the need for National Instruction 7 of 2017, which has been effective since 27 July 2017, the following introductory remarks should give some insight: “Occupation 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 disputes around such issues are frequently charged with emotions and the police service is, 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.”

This is followed by a warning that SAPS have to guard against overzealous or unlawful intervention. “The Service is at risk not only regarding civil claims resulting from injury to persons or damage to property where members are involved, but also negative publicity and loss of public confidence.”

Police members are therefore urged to address cases in accordance with the directive given to them and the applicable legislation.

LEGAL FRAMEWORK

Several acts are involved where policing of land invasions and evictions have to occur.

- Extension of Security Tenure Act, 1997 (Act 62 of 1997), also known as Esta;
- Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996), better known as the LTA;

- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (Act 19 of 1998), also known as PIEA;
- Trespass Act, 1959 (Act 6 of 1959);
- Magistrates Court Act, 1944 (Act 32 of 1944);
- Sheriffs Act, 1986 (Act 90 of 1986);
- Rental Housing Act, 1999 (Act 50 of 1999);
- The Fencing Act, 1963 (Act 31 of 1963).

Police members are also guided by the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa (GNR.740 of 23 August 2010).

It is important that farmers take note of the fact that some occupiers are protected by a couple of these acts.

National Instruction 7 of 2017 explains the different legal positions as follows:

- Lawful occupiers: These are people who reside on land with the owner's permission (in writing, orally or even given tacitly) – occupiers are regulated by Esta and labour tenants regulated by the LTA.

Esta protects the rights of the occupier, who may only be evicted in terms of an order of the magistrate's court, land court or high court. The LTA protects the right of occupation of a labour tenant and his or her "associates", including family members. They may only be evicted in terms of an order of the land claims court.

- Unlawful occupiers: These occupiers reside on land without the owner's permission and their rights are protected by the PIEA. They are mostly "squatters" and may only be evicted in terms of an order of the magistrate's court or high court.

Here it is very important that land owners act with urgency: As soon as a structure or building has been erected on land, is inhabited and under control by a person, the person is considered to reside on such land and the relevant court has to decide on the matter.

- Trespassers: A trespasser is a person who enters land without the owner's permission. According to Section 1 of the Trespass Act, 1959 such a person will be guilty of an offence, unless he or she has a lawful reason to be there.

Trespassers have to be arrested as soon as possible by SAPS members after a complaint of trespassing was lodged and they must be brought before a court.

As a general principle, police officers have to make sure that the rights of a person charged in terms of the Trespass Act are not protected by other legislation, including Esta or PIEA. SAPS members are, however, also reminded of the following in the March 2017 guidelines: “Members must not misuse the mentioned legislation and instructions to avoid complying with their responsibilities in accordance with the Trespass Act. Where applicable, members must not hesitate to take the necessary steps in accordance with the Trespass Act.”

PRACTICAL GUIDANCE

In both the March 2017 guidelines and National Instruction 7 of 2017 SAPS members are given practical guidance of how they should deal with trespassing, squatting and other violations. It is clearly stated that “South African legislation protects the rights of owners and persons in charge of land, premises and buildings, as well as the occupiers thereof under certain circumstances, as prescribed by such legislation. A member of the Service may be requested to deal with a complaint that a person’s land, premises or building is unlawfully occupied by another. Members must ensure that they strictly address complaints of this nature in accordance with the national instruction, as well as the applicable legislation.”

SAPS members are also reminded that 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 an eviction or actions authorised by the court, for example the demolition and removal of structures. However, 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, SAPS members could be requested to assist the sheriff to enforce law and order and provide protection.

Police members are also reminded that, in dealing with land invasions, 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. It is important to keep in mind that a person in the process of erecting a building or structure and not inhabiting it, is not residing on such land and therefore a case of trespassing may be made out.” Even if the perpetrators are still in the process of erecting shacks or other structures, a case of trespassing can still be opened. Once a structure has been erected and is ready for occupation, the owner of the land will have to approach the court for an eviction order.

Station commanders and operational commanders have to guide the whole process carefully, according to SAPS management. They have to ensure that police members are conversant with the provisions of legislation with regard to trespassing and unlawful occupation of property, including the rights of all involved parties. This is in order to ensure that members follow the correct procedures when confronted with land related situations.

The station commander also has to inform the provincial head: Operational Response Services and the provincial commissioner immediately when he or she becomes aware of an intention to invade land or of a land invasion. The relevant provincial public order policing unit or national intervention unit will then be placed on standby depending on the severity of the incident.

The police may not refuse to register a case of trespassing when it is clear that there is no occupation yet on the land or premises.

LAND OWNER ACTIONS

According to National Instruction 7 of 2017, land owners or people in charge of the property have to lodge a formal complaint with the Police Service. An affidavit with the following information has to be provided in order for the police to act:

- The capacity of the complainant (whether he or she is the owner, lawful occupier or person in charge of the property in question);
- Particulars of the suspects who entered the property;
- Whether the owner, lawful occupier or person in charge gave permission to the suspects to enter the property or not; and
- Whether the suspects have any lawful reason for entering the property.

It is also important that, when a specific person who is planning or instigating persons to invade a specific piece of land can be identified, an interdict may be obtained to prevent the land invasion. The police can only act against a respondent who is committing contempt of court and, for this purpose, SAPS would require statements indicating that the respondent was in breach of the conditions as set out in the interdict. A warrant of arrest is required before such a person may be arrested.

As known, both privately-owned and state-owned land can be invaded unlawfully. Remember that the state has a duty to assist private landowners to protect their land. Therefore: know your rights and act as fast as possible.

Landowners must report any absence of proper police response to complaints of land invasions

immediately to the station- or cluster commander. It is recommended that such response should also be reported to the provincial organisation that should then inform the office of the provincial commissioner.

PRACTICAL GUIDELINES FOR THE LAND OWNER

The following guidelines should be considered to deal with acts of trespassing and the unlawful occupation of land:

- Implement Agri SA's Farm Access Protocol and display the applicable signage at entrances and boundary fences.
- Utilise the local Priority Committee to develop action plans with the police to effectively deal with trespassing and the unlawful occupation of land so that all parties know exactly what is expected from them in dealing with these situations.
- Identify open areas in the Farmer Association's territory which could be threatened by trespassing or the unlawful occupation of land.
- Identify un-occupied farms and develop an action plan with the police on how to deal with trespassing and unlawful occupation of land on these properties.
- Report all trespassing and unlawful occupation acts immediately to the local police.
- In all cases of trespassing and unlawful land invasions, proper records must be kept for evidence purposes, such as photos, statements of eyewitnesses, case numbers, date and time of events such as they occur.
- Make sure that you know what is happening on your property and act immediately in cases of unlawful actions.
- Complete an authority of representation by a neighbour or legal representative to act on behalf of the landowner when such landowner is not available to register a case of trespassing or land invasion.
- Keep a copy of the title deed available to use as evidence when registering a case of a land invasion, to prove ownership.
- Educate workers to report immediately any unknown person within the boundaries of the farm.

REFERENCES

- Implementation guidelines: Rural Safety Strategy
- National Instruction 7 of 2017 – Unlawful occupation of land and evictions, July 2017

- Trespassing, squatting and other violations of acts governing and controlling land ownership: The role and responsibilities of the South African Police Service in dealing with evictions and trespass incidents: 30 March 2017
- Agri SA information document on how to deal with trespassing and land invasions.