

NATIONAL INSTRUCTION 7 OF 2017 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 roles 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 disputes around such issues are frequently charged with emotions and the 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.
- (3) As such, the Service may be involved in matters of land invasions or *evictions* and must 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.
- (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 matter is attended to.
- (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);
 - (e) Rental Housing Act, 1999 (Act No. 50 of 1999);
 - (f) Magistrates Court Act, 1944 (Act No. 32 of 1944);
 - (g) Rules regulating the Conduct of the Proceedings of the

- Magistrates' Courts of South Africa (GNR.740 of 23 August 2010); and
- (h) Sheriffs Act, 1986 (Act No 90 of 1986).

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*” means to expel someone from land, a place, premises or property in terms of the law (or a court order), 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) “*reside*” means that a person has his place of abode or dwells permanently at a particular place;
- (i) “*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;
- (j) “*Trespass Act*” means the Trespass Act, 1959 (Act No 6 of 1959); and

- (k) “*unlawful occupier*” means a person who occupies and *resides* on land without the express or tacit consent of the owner or person in charge.

3. Different legal positions

(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 regulated by ESTA

- (i) An *occupier* in terms of *ESTA* 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) A person earning more than the prescribed gross income (currently R 5000.00) is not regarded as an *occupier*. In terms of *ESTA*.
- (iii) *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. *ESTA* refers to the owner at the time of the relevant act, and extends the concept to the holder of mineral rights.
- (iv) An *Occupier* occupying the land in terms of *ESTA* may only be evicted in terms of an order of the Magistrate’s Court, Land Court or High Court.

(b) Labour tenant regulated by the LTA

- (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 or her 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*.
- (iii) A labour tenant may only be evicted in terms of an order of the Land Claims Court.

(2) Unlawful Occupiers

- (a) An *unlawful occupier* is someone who *resides* on land without the express or tacit permission of the owner. *Occupiers* who fall under the *ESTA* or *LTA* are not *unlawful occupiers*.
- (b) The rights of an *unlawful occupier* are protected by the *PIEA*. This category of *occupiers* will mostly be what is commonly known as “squatters”.
- (c) As soon as a building or structure has been erected on land and is inhabited by a person (the person has factual control of the building or structure), the person is considered to *reside* on such land. It is a factual question how long he or she was *residing* there, to be best dealt with by the relevant *court*. A person in the process of erecting a building or structure and not inhabiting the building or structure is not *residing* on such land.

- (d) *Unlawful occupiers* may only be evicted in terms of an order of the Magistrate's Court or High Court.
- (e) Where the *PIEA* refers to a "building or structure", and includes a hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter.
- (f) 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.
- (g) If persons start occupying property and the owner or person in charge allows this occupation unhindered, it may be construed as tacit consent.
- (h) Where *PIEA* refers to "owner", it means the *registered* owner of land, including an organ of state. Where *PIEA* 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.

(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 should be regarded as an *occupier* and the *PIEA* will apply (see paragraph 3(2)(c) in this regard).
- (b) 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, will 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 *ESTA* or *LTA* is deemed to have lawful reason to enter and be upon such land.

- (c) 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.
- (d) Trespassers must be arrested as soon as possible by members of the Service after a complaint of trespassing was lodged and must be brought before a *court*.
- (e) The owner or person in charge of the property must lodge a formal complaint with the Service and provide an affidavit with the following information clear for members to act:
 - (i) the capacity of the complainant (whether he or she is the owner, lawful *occupier* or person in charge of the property in question);
 - (ii) particulars of the suspect(s) who entered the property in question;
 - (iii) whether the owner, lawful *occupier* or person in charge gave permission to the suspect(s) to enter the property in question or not; and
 - (iv) whether the suspect(s) have any lawful reason for entering the property.
- (f) 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 for his or her presence. Members must establish from the facts provided by the complainant whether the *Trespass Act*, *ESTA*, *LTA* or *PIEA* is applicable in the circumstances.
- (g) If it is **clear** that the suspect(s) have been *residing* on the property, the owner must be advised that the trespasser should be evicted by means of an order of *court*.

4. 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 regard to 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 on, occupied or invaded by a person or persons; 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 are not protected by other legislation, eg the *ESTA*, *LTA* or *PIEA*.
- (4) If it is clear that the person against whom the complaint lodged does not reside on the land or 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 the 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.

5. 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 enforce 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 the light of —
 - (i) the necessity demonstrated by the *Sheriff*;
 - (ii) the available resources; and
 - (iii) threat assessment reports from Crime Intelligence; and
 - (iv) weather conditions, such a rain, extreme cold, etc. (the *sheriff* must be informed that should adverse weather conditions exist on the particular day that assistance is required, he or she should wait for conditions to improve before assistance can be provided).
 - (c) Where assistance is refused, full reasons must be provided and a copy of the refusal must be forwarded to the Office of the relevant Provincial Commissioner.

- (d) If the Station Commander is in doubt concerning the legal position of an application, he or she may obtain legal advice from the relevant Provincial Legal Services.
- (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 wilfully 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. Where the *sheriff* and his or her staff exceeds his or her powers, assaults or otherwise act unlawful in the presence of members of the Service, he or she or the relevant member of his or her staff must be requested to refrain from such conduct or restrained (and a case be opened and investigated).
- (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 of 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 Public Order Policing Unit.

6. 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. Keeping in mind that if a person in the process of erecting a building or structure and not inhabiting the building or structure he or she is not *residing* on such land and therefore a case of trespassing may be made out.
- (2) The Station Commander must inform the Provincial Head: Operational Response Services 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 complainant informs a member that a person or persons have entered his or her land or premises without consent and are threatening to erect buildings or structures or they are in the process of erecting buildings or structures for habitation, the member must act immediately to ensure that the complaint is attended to and the situation on the land (at the crime scene) is assessed to determine if there is a threat of unlawful occupation. If persons are found on the land or premises that are in the process of erecting buildings or structures for habitation or threatening to erect such buildings or structures, the member at the scene must inform them that they are trespassing and that they will be arrested if they do not leave the land or premises immediately. If the trespassers refuse to leave the land or premises they must be arrested in order to stop them from continuing to commit the offence of trespassing. If the trespassers have erected the building or structure on land and is inhabiting it (the person has factual control of the building or structure), the complainant must be informed that he or she will have to apply for an eviction order in terms of *PIEA*.
- (4) If a specific person can be identified who is planning or instigating persons to invade a specific land an interdict may be obtained by the owner or *occupier* to prevent the invasion of the land. The Service can only act against a respondent who is committing contempt of *court* and for this purpose the Service 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 person may be arrested.
- (5) 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 section 18(2)(a) of the Riotous Assemblies Act, 1956 (Act No. 17 of 1956).

7. Responsibilities during an unlawful land invasion

Members must take note of the responsibilities of the following role-players:

- (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 have access to land and 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 PIEA.
 - (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

The Department of Rural Development and Land Reform must —

 - (a) 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, a 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 *PIEA* 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 has 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.
- (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*.

- (f) If the circumstances are of such a nature that the incident results in public violence, the Provincial Head: Operational Response Services should be contacted to activate the responsible Public Order Unit, who are properly trained to deal with such incidents, to assist in dispersing 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 recorded. Each different offence will be dealt with and investigated according to its own criteria and requirements.

8. Complaints in terms of the Rental Housing Act

- (1) The Rental Housing Act, 1999 provides for 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) It is expected of every Station Commander to designate a member (preferably the Commander of Visible Policing at the station) to co-ordinate requests for assistance by the Rental Housing Tribunal.
- (3) 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.
- (4) The case must be registered in terms of National Instruction 3 of 2011: Registration of Case Dockets on the Crime Administration System (CAS) and investigated.
- (5) 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.