

Government Gazette Staatskoerant

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID-AFRIKA

Vol. 498

Pretoria, 22 December
Desember 2006

No. 29501

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GENERAL NOTICE

NOTICE 1851 OF 2006

DEPARTMENT OF HOUSING

PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND AMENDMENT BILL, 2006

The Department of Housing hereby publishes the draft Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill, 2006 for public information, discussion and comment.

Interested persons and, institutions are invited to submit written comment on the draft Bill on or before **2 February 2007** to the Director-General, Department of Housing, for the attention of-

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REPUBLIC OF SOUTH AFRICA

**PREVENTION OF ILLEGAL EVICTION FROM
AND UNLAWFUL OCCUPATION OF LAND
AMENDMENT BILL, 2006**

(MINISTER OF HOUSING)

[B - 2006]

GENERAL EXPLANATORY NOTE:

- [] Words in bold type in square brackets indicate omissions from existing enactments.
_____ Words underlined with a solid line indicate insertions in existing enactments.
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BILL

To amend the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 so as to amend and include certain definitions; to qualify the application of the Act; to amplify the provisions relating to the prohibition of certain acts and to create offences in that regard; to better regulate the granting of a court order for eviction; to amend the procedures for the eviction of unlawful occupiers; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Substitution of Long Title to Act 19 of 1998

1. The following long title is hereby substituted for the long title to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (hereinafter referred to as the principal Act):

"ACT

To provide for the application of this Act; to prohibit certain acts in respect of unlawful occupation of land and to create offences related to such acts; to provide for procedures for the eviction of unlawful occupiers; to regulate the granting of a court order for eviction; to repeal the Prevention of Illegal Squatting Act, 1951, and other obsolete laws; and to provide for matters incidental thereto."

Amendment of section 1 of Act 19 of 1998

2. Section 1 of the principal Act is hereby amended by-
 - (a) the insertion after the definition of "consent" of the following definition:

"constructive eviction" means any act or omission, including the deprivation of access to land or to essential services or other facilities related to land, which is calculated or likely to induce a person to vacate occupied land or refrain from exercising access to land;"

- (b) the substitution for the definition of "evict" of the following definition:

" **"evict"** means to deprive a person of occupation of land or access to [a building or structure, or the] land [on which such building or structure is erected,] against his or her will, and 'eviction' has a corresponding meaning;"

- (c) the substitution for the definition of "land" of the following definition:

" **"land"** includes a portion of land and buildings or structures on land;"

- (d) the substitution for the definition of "Minister" of the following definition:

" **"Minister"** means the Minister designated by the **[State]** President;"

- (e) the substitution for the definition of "municipality" of the following definition:

"municipality" means [a municipality in terms of section 10B of the Local Government Transition Act, 1993 (Act No. 209 of 1993)] an organ of state within the local sphere of government exercising legislative and executive authority within the area it administers and controls;"

- (f) by the substitution for the definition of "owner" of the following definition:

" **"owner"** means the registered owner of land **[, including]** and includes an organ of state which administers or controls land;"

- (g) by the substitution for the definition of "person in charge" of the following definition:

" **"person in charge"** means a person who has or at the relevant time had legal

authority to **[give permission to a person to enter or reside upon the]** administer or control land [in question];"

- (h) by the substitution for the definition of "unlawful occupier" of the following definition:

" **"unlawful occupier"** means a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, (Act 62 of 1997) and excluding a person who is a labour tenant in terms of the Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996) [whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act 31 of 1996)];"

Substitution of section 2 of Act 19 of 1998

3. The following section is hereby substituted for section 2 of the principal Act:

"Application of Act

2. (1) This Act applies in respect of all land throughout the Republic.
- (2) This Act does not apply to a person who occupied land—
(a) as a tenant;
(b) in terms of any other agreement; or
(c) as the owner of land,
and who continues to occupy the land in question despite the fact that the tenancy or agreement has been validly terminated or the person is no longer the owner of the land.
- (3) Notwithstanding subsection (2), a court may order that this Act applies if the court is satisfied that the plight of a person is of such a nature that any act or omission by the owner or person in charge of land was calculated to avoid the application of this Act."

Substitution of section 3 of Act 19 of 1998

4. The following section is hereby substituted for section 3 of the principal Act:

"[Prohibition of receipt or solicitation of consideration in respect of unlawful occupation of land] Prohibition of certain acts

3.(1) No person may—

- (a) directly or indirectly receive or solicit payment of any money or other consideration as a fee or charge for arranging or organising or permitting a person to occupy land without the consent of the owner or person in charge of that land[.];
- (b) arrange or permit any person to occupy land without the consent of the owner or person in charge of the land;
- (c) practice constructive eviction.

- (2) The money or consideration contemplated in subsection (1)(a) includes, but is not limited to, membership fees, legal costs, administration costs, services, services connection fees, payment for any socio-economic infrastructure, or any assets acquired with such money: Provided that the reference to 'legal costs' shall not include money collected solely for the purposes of defraying legal costs associated with the opposition of proceedings for eviction.

- [(2)](3)** Any person who contravenes **[a provision of]** subsection (1) is guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years, or to both such fine and such imprisonment.

- [(3)](4)** The court which convicts any person of a contravention of **[this section]** subsection (1) must order any money or any assets acquired with such money, or other consideration received by that person which have been seized, to be forfeited, and the said money and the proceeds of the sale of such assets or such other consideration **[may] must** be paid—

- (a) to the person or persons from whom the money, assets or other consideration was received; **[and]** or
- (b) where such person or persons cannot be positively identified, into the National Revenue Fund, or in the case where the land is administered or controlled by a municipality, into the relevant municipal operating account.

[(4))(5) If any money has been received in contravention of subsection (1) but has not been seized or made available for purposes of confiscation, the court which convicts any person of a contravention of this section, **[may]** must order the amount proved to the satisfaction of the court to have been received by such person, and the proceeds of the sale of any assets acquired with such money to be paid —

- (a) to the person or persons from whom the money or other consideration was received; **[and]** or
- (b) where **[such]** the person or persons contemplated in paragraph (a) cannot be positively identified, into the National Revenue Fund; or where the land is administered or controlled by a municipality, into the relevant municipal operating account.

and such order has the effect of and may be executed against such person as if it were a civil judgment in favour of that person or those persons from whom the money or other consideration was received or in favour of the State.".

Amendment of Section 4 of Act 19 of 1998

5. Section 4 of the principal Act is hereby amended—

- (a) by the substitution for subsection (2) of the following subsection:
 - "(2) The owner or person in charge who institutes the proceedings must give at least two months written notice of his or her intention to institute such proceedings to:
 - (a) the unlawful occupier; and
 - (b) (i) the head of the provincial office of the national Department of Land Affairs;
 - (ii) the provincial department of housing; and
 - (iii) the municipality;

in whose areas of jurisdiction the land is situated.

(2A) Any of the organs of state referred to in subsection (2)(b) and any other organ of state having an interest in the proceedings may join or be joined as a party in such proceedings."

(b) by the substitution for subsection (3) of the following subsection:

"(3) [Subject to the provisions of subsection (2), the] The procedure for the serving of notices and filing of papers in terms of this Act is as prescribed by the rules of the court in question."

(c) by the insertion after paragraph (c) of subsection (5) of the following paragraph:

"(cA) set out the relief to be sought, with particular reference to subsections (6) and (8)."

(d) by the substitution for subsection (6) of the following subsection:

"(6) [If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women] A court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all relevant circumstances including—

(a) the circumstances under which the unlawful occupier occupied the land;

(b) the period of occupation;

(c) the availability to the unlawful occupier of suitable alternative accommodation or land;

(d) the rights and needs of the elderly, children, disabled persons and households headed by women; and

(e) the constitutional rights and duties of all affected persons including the State."

(e) by the deletion of subsection (7).

(f) by the substitution for subsection (10) of the following subsection:

- "(10) (a) The court which orders the eviction of any person in terms of this Act may make an order that is just and equitable for –
- (i) the retention or demolition and removal of improvements to the land or buildings or of materials used in such improvements;
 - (ii) the retention, tending or harvesting of any standing crop; and
 - (iii) the payment of compensation for any improvement, materials or standing crop obtained by one party from the other.
- (b) In making an order in terms of paragraph (a) the court must have regard to all relevant factors, including –
- (i) whether the improvements were made or the crops planted with the consent of the owner or person in charge;
 - (ii) whether the improvements are necessary or useful to the party required to pay compensation for such improvements;
 - (iii) the consequences and the fairness of the terms and conditions of any agreement between the parties relating to the liability for, or the exclusion of liability for compensation or the determination of compensation;
 - (iv) the hardship caused to each party; and
 - (v) the circumstances in terms of subsection (6).
- (c) No order for the eviction of any person in terms of this Act may be

executed before the payment of compensation which has been ordered, has been made or guaranteed to the satisfaction of the court."

Amendment of section 5 of Act 19 of 1998

6. The following section is hereby substituted for section 5 of the principal Act:

"Urgent proceedings for eviction.

5.(1) Notwithstanding the provisions of section 4, the owner or person in charge of land may institute urgent proceedings for the eviction of an unlawful occupier of that land pending the outcome of proceedings for a final order, and the court may grant such an order if it is satisfied that—

- (a) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land;
- (b) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; **[and]**
- (bA) it is just and equitable to grant the order taking into consideration the speed and scale of the unlawful occupation; and
- (d) there is no other effective remedy available.

[(2) Before the hearing of the proceedings contemplated in subsection (1), the court must give written and effective notice of the intention of the owner or person in charge to obtain an order for eviction of the unlawful occupier must be given served on to the unlawful occupier and the municipality in whose area of jurisdiction the land is situated.]

(2) The owner or person in charge who institutes the proceedings must give written notice of his or her intention to institute such proceedings to-

- (a) the unlawful occupier; and
- (b) (i) the head of the provincial office of the national Department of Land Affairs;
(ii) the provincial department of housing; and

(iii) the municipality;

in whose areas of jurisdiction the land is situated.

(2A) Any of the organs of state referred to in subsection (2)(b) and any other organ of state having an interest in the proceedings may join or be joined as a party in such proceedings.

(3) The procedure for the serving of notices and filing of papers in terms of this Act is as prescribed by the rules of the court in question.

(4) Subject to the provisions of subsection (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the court, service must be effected in the manner directed by the court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.

[(3)](5) The notice of proceedings contemplated in subsection (2) must—

(a) state that proceedings will be instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;

(b) indicate on what date and at what time the court will hear the proceedings;

(c) set out the grounds for the proposed eviction; **[and]**

(cA) set out the relief sought, with particular reference to section 4(6) and 4(8); and

(d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid."

Amendment of section 6 of Act 19 of 1998

7. Section 6 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

"An organ of state may institute proceedings for the eviction of an unlawful occupier from land which **[falls within its area of jurisdiction except where the unlawful occupier is a mortgagor and the land in question is sold in a sale in execution**

pursuant to a mortgage,] it administers or controls, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if—";

(b) by the substitution for subsection (3) of the following subsection:

"(3) In deciding whether it is just and equitable to grant an order for eviction, **[the court must have regard to—**

- (a) **the circumstances under which the unlawful occupier occupied the land and erected the building or structure;**
- (b) **the period the unlawful occupier and his or her family have resided on the land in question; and**
- (c) **the availability to the unlawful occupier of suitable alternative accommodation or land.]**

section 4(6) applies with the changes required by the context."

Amendment of section 7 of Act 19 of 1998

8. Section 7 of the principal Act is hereby amended –

(a) by the substitution for subsection (1) of the following subsection:

"(1) If the municipality in whose area of jurisdiction the land in question is situated **[is not he owner of] does not administer or control** the land the municipality may, on the conditions that it may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the municipality may determine."

(b) by the substitution for subsection (2) of the following subsection:

"(2) If the municipality in whose area of jurisdiction the land in question is situated **[is the owner of] administers or controls** the land in question, the member of the Executive Council designated by the Premier of the province concerned, or his or her

nominee, may, on the conditions that he or she may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the said member of the Executive Council may determine."

Short title

9. This Act is called the Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Act, 2006.

**MEMORANDUM ON THE OBJECTS OF THE PREVENTION OF
ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF
LAND AMENDMENT BILL, 2006**

1. BACKGROUND

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (Act No. 19 of 1998), hereinafter referred to as "the Act", came into operation on 5 June 1998. The intention of the Act was to provide for the prohibition of unlawful eviction, and to put in place fair procedures for the eviction of unlawful occupiers who occupy land without the permission of the owner or the person in charge of such land.

However, since its inception, various interpretation and implementation problems have been identified, and this Amendment Bill seeks to address these issues.

2. OBJECTS OF THE BILL

2.1 The Bill substitutes the Long Title of the Act to reflect the amendments proposed by the Bill.

2.2 The Bill seeks to amend section 1 of the Act by –

- (a) inserting a definition for "constructive eviction" so as to allow for the prohibition of this practice under an amendment to section 3 of the Act, which deals with the prohibition of certain acts;
- (b) amending the definition of "evict" by deleting references to 'building' and 'structure';
- (c) amending the definition of "land" to include buildings and structures on land. Many buildings, particularly high-rise buildings have been and continue to be occupied unlawfully, often at the instance of non-owners who then collect rent from the illegal occupants;
- (d) amending the definition of "Minister";
- (e) amending the definition of "municipality";
- (f) amending the definitions of "owner" and "person in charge" to include organs of state which administers or controls land; and
- (g) amending the definition of "unlawful occupier" so as to exclude persons to whom the

Extension of Security of Tenure Act, 1997, and the Land Reform (Labour Tenants) Act, 1996 applies, whilst simultaneously including persons to whom the Interim Protection of Informal Land Rights Act, 1996, under the definition.

- 2.3 There has been confusion as to whether or not the Act applies to proceedings for the eviction of erstwhile tenants, or mortgagors who refused to vacate land after their leases were cancelled or on foreclosure of their bonds. The Supreme Court of Appeal has held that these categories of persons do indeed fall under the provisions of the Act—[Ndlovu, Ngcobo, Bekker & another v Jika 2003 (1) SA 113 (SCA)] It is submitted that it is not desirable and that it was not the intention that the Act should apply to tenants and mortgagors who default in terms of their prior agreements with landlords and financial institutions, respectively. The Act should cover only those persons who unlawfully invade land without the prior consent of the landowner or person in charge of land.

It has thus been necessary to amend section 2 of the Act (application section) to state specifically that the Act does not apply to a person who occupied land as a tenant, in terms of any other agreement or as the owner of land and who continues to occupy despite the fact that the tenancy or agreement has been validly terminated or the person is no longer the owner of the land.

- 2.4 A problem that may arise as a result of the amendment of section 2, is that an owner or person in charge of land may try to avoid the application of the Act, e.g. by entering into a simulated agreement with unlawful occupiers, only to terminate it shortly afterwards. In this regard the Bill seeks to grant a court the power to order that the Act applies if it is satisfied that the plight of a person is of such a nature that any act or omission by the owner or person in charge of land was calculated to avoid the application of this Act.
- 2.5 Whilst the Act currently prohibits the receipt or solicitation of money or other consideration as a fee for arranging for a person to occupy land without the consent of the owner, the act of arranging an unlawful occupation of land is not an offence. Due to the nature and increase in land invasions, often on land which has already been earmarked for housing development, it is deemed necessary to make it an offence for a person to arrange the unlawful occupation of land. It is proposed to amend section 3(1) of the Act in this regard.

In addition, section 3(1) is also amended to prohibit the practice of "constructive eviction". The phrase constructive eviction means any act or omission, including the deprivation of access to land or to essential services or other facilities related to land, which is calculated or likely to induce a person to vacate occupied land or refrain from exercising access to land.

- 2.6 Sections 3(3) and 3(4) currently provides that money or other considerations received by a person in contravention of section 3, must upon conviction of such person be repaid to the person from whom it was received, or if the person cannot be positively identified, into the National Revenue Fund. In this regard two issues have been identified and is addressed in the proposed amendments. Firstly, the reference to money or other consideration is not wide enough and should also include any assets acquired with such money. Secondly, it is deemed necessary to, where land is administered or controlled by a municipality, any money should rather be paid into the municipal operating account and not the National Revenue Fund.
- 2.7 Section 4(2) of the Act incorrectly provide that "the court must serve/give written and effective notice.". This is clearly not the function of the court and it is proposed to amend the section suitably.
- 2.8 Section 4(2) as well as 4(5) is amended to align its provisions pertaining to the giving of notice regarding eviction proceedings with that of the Extension of Security of Tenure Act, 1997 and the Land Reform (Labour Tenants) Act, 1996, whilst section 4(10), which deals with the content of a court order for eviction, is also aligned with the corresponding provisions of the mentioned laws.
- 2.9 In respect of eviction proceedings before a court, sections 4(6), 4(7) and 6(3) of the Act currently draw a distinction between persons occupying for less than six months and persons occupying for more than six months. In cases of occupation of less than six months, the Act prescribes certain criteria which a court may take into account when deciding whether or not to issue an eviction order, whilst the Act prescribes different criteria in cases of occupation in excess of six months. This clearly constitutes unequal protection of a person's right not to be evicted, as afforded by section 26(3) of the Constitution. The proposed amendments to the said sections remove the six months distinction and provide for a single set of criteria to be applicable in all cases of unlawful occupation.

- 2.10 Section 5 of the Act which deals with urgent proceedings for eviction is substituted –
- (a) to align its provisions regarding the giving of notice with that contained in section 4 of the Act; and
 - (b) to add to the conditions that a court must take into account before granting an order, by the insertion of section 5(1)(bA) which provides that a court may only grant an order if it is satisfied that it is just and equitable to grant the order taking into consideration the speed and scale of the unlawful occupation.
- 2.11 As a consequence of the amendments to section 2 of the Act, the Bill seeks to amend section 6 accordingly.
- 2.12 Sections 7(1) and 7(2) of the Act contains provisions pertaining to municipalities as being either the "owner of land" or not the "owner of land". This phrase is problematic in that although a municipality may in certain cases for all intents and purposes be the "owner" of certain land, the formality of transfer of ownership in the Deeds Office may not have been finalised. To address this occurrence, the referral to "owner" is substituted to now refer to land which the municipality "administers or controls".

3. PERSONS CONSULTED

- 3.1 An earlier version of this Bill was published in the *Gazette* for public comment during August 2004, and inputs were received from institutions which included—

The Banking Council;

Ekurhuleni Metro;

Tshwane Metro;

The provincial administrations of the Western Cape and KwaZulu-Natal;

AGRI SA;

SAPOA;

Department of Justice;

COSATU;

Legal Resources Centre.

3.2 The current draft Bill has been subject to extensive consultation with the Department of Land Affairs as well as a thorough workshop held with relevant government departments and bodies.

3.3 Due to the substantial changes made to the earlier version of the Bill, it will again be published in the *Gazette* for public comment.

4. IMPLICATIONS FOR PROVINCES

None.

5. FINANCIAL IMPLICATIONS

None.

6. PARLIAMENTARY PROCEDURE

6.1 The State Law Advisers and the Department of Housing are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

6.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.
