A critical examination of the legal ambiguities surrounding labour tenants in terms of the Land Reform (Labour Tenants) Act.

by

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DECLARATION

I, **Bronwyn Amor Gabriel**, declare that *A critical examination of the legal ambiguities surrounding labour tenants in terms of the Land Reform (Labour Tenants) Act* is my own work and that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Student: Bronwyn Amor Gabriel

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DEDICATION

I dedicate this thesis to my beloved grandmother, Anna Gabriel. Your unconditional love, support, and endless prayers have been my strength. You instilled in me the courage to face every challenge and never give up on my dreams. Your belief, sacrifices, and investments in my education, from undergraduate to postgraduate, are blessings I will cherish forever.

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LIST OF ABBREVIATIONS AND KEYWORDS

AFRA	Association for Rural Advancement
CC	Constitutional Court
DRDLR	Department of Rural Development and Land Reform
ESTA	Extension of Security of Tenure Act 62 of 1997
GGA	Glen Grey Act 25 of 1894
HC	High Court
LCC	Land Claims Court
LTA	Land Reform (Labour Tenant) Act 3 of 1996
MC	Magistrate's Court
NLA	Native Land Act 27 of 1913
NLTA	Native Land Trust Act 18 of 1936
NSCA	Native Service Contract Act 24 of 1932
SCA	Supreme Court of Appeal

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LIST OF KEYWORDS	
Eviction	'includes the deprivation of a right of occupation or use of land;'[1]
Labour tenant	'means a person— (*a*) who is residing or has the right to reside on a farm; (*b*) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph (*a*), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and (*c*) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm, including a person who has been appointed a successor to a labour tenant in accordance with the provisions of section 3 (4) and (5), but excluding a farmworker;'[2]
Grazing rights	'means farm land which is used to meet the feed requirements of livestock, and which the owner has set aside for that purpose or which has been used for that purpose with the permission of the owner;'[3]
Land rights	'means any real or personal right in land, including a right to share cropping or grazing land;'[4]
Landowner	'means the owner, as defined in section 102 of the Deeds Registries Act, 1937 (Act No. 47 of 1937), of a farm, and where it occurs in the definition of "labour tenant", includes his or her successors and predecessors in title;'[5] '"**owner**" means, in relation to— (*a*) immovable property, subject to paragraph (*b*), the person registered as the owner or holder thereof and includes the trustee in an insolvent estate, a liquidator or trustee elected or appointed under the Agricultural Credit Act, 1966 (Act No. 28 of 1966), the liquidator of a company or a close corporation which is an owner and the executor of

[1] Section 1 of Land Reform (Labour Tenants) Act 3 of 1996.
[2] Section 1 of Land Reform (Labour Tenants) Act 3 of 1996.
[3] Section 1 of Land Reform (Labour Tenants) Act 3 of 1996.
[4] Section 1 of Land Reform (Labour Tenants) Act 3 of 1996.
[5] Section 1 of Land Reform (Labour Tenants) Act 3 of 1996.

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	any owner who has died or the representative recognized by law of any owner who is a minor or of unsound mind or is otherwise under disability, provided such trustee, liquidator, executor or legal representative is acting within the authority conferred on him or her by law; (*b*) immovable property, real rights in immovable property and notarial bonds— (i) which are registered in the name of both spouses in a marriage in community of property, either one or both of the spouses; (ii) which are registered in the name of only one spouse and which forms part of the joint estate of both spouses in a marriage in community of property, either one or both of the spouses; (iii) which are registered under section 17 (1) in the name of both spouses in a marriage in community of property to which the provisions of Chapter III of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), are not applicable, the husband; (iv) which are registered in the name of only one spouse and which form part of the joint estate of both spouses in a marriage in community of property to which the provisions of Chapter III of the Matrimonial Property Act, 1984, are not applicable, the husband;'[6]
Person in charge	**'**means a person who at the time of the relevant act, omission or conduct had or has legal authority to give consent to a person to reside on the land in question;'[7]
Just and equitable	'…the term "just and equitable" relates to both interests, that is what is just and equitable not only to the persons who occupied the land illegally but to the landowner as well. He held that the term also implies that a court, when deciding on a matter of this nature, would be obliged to break away from a purely legalistic approach and have regard to extraneous factors such as morality, fairness, social values and implications and circumstances which would necessitate bringing out an equitably principled judgment.'[8]

[6] Section 102 of Deeds Registries Act 47 of 1937.
[7] Extension of Security of Tenure Act 62 of 1997.
[8] *Port Elizabeth Municipality v Various Occupiers 2004* (12) BCLR 1268 (CC) 1288 A-B.

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CHAPTER 1: A BACKGROUND STUDY ON THE SIGNIFICANCE OF LABOUR TENANCY

1.1 INTRODUCTION

The history of South Africa includes the recognition of labour tenants with the numerous enactment of legislation.[9] The Land Reform (Labour Tenant) Act (LTA) was enacted to redress the past injustices suffered by labour tenants.[10] However since the enactment it only had one amendment, which did not address the pertinent issue namely the definition of a labour tenant. Loosely defined a labour tenant is a person who has land, grazing and tenure rights on the land of another, subject to working on such land.[11] The courts have explored various approached to interpret this definition and have caused inconsistency.[12] If a claimant falls short of the definition he or she is disqualified from all benefits deriving from the LTA.[13] Therefore placing this issue in the hands of the courts is an injustice to labour tenants. This mini dissertation will explore whether the LTA is affording enough protection to labour tenants with its implementation and interpretation of its provisions. The LTA will further be compared to previous legislation that governed labour tenants on farms and the Land Tenure Security Bill[14] proposed by the Department of Rural Development and Land Reform (DRDLR). Studies of the landmark case law will be discussed to determine which interpretation of the definition of a labour tenant affords more protection.

1.2 BACKGROUND AND SIGNIFICANCE OF THE STUDY

The Gannahoek farm in the district of Colenso, KwaZulu-Natal, was occupied by the local black community before colonialism.[15] In KwaZulu-Natal the labour tenancy system comprised of labour tenants working on white-owned farms, for a specific period, in exchange for monetary remuneration and rights to graze livestock and cultivate the land. During the unemployed months the labour tenants worked elsewhere and maintained the cultivation of land. Furthermore, the labour tenancy system included 'labour farms', where only labour tenants lived with their livestock in exchange for six months work on the owner's commercial farm somewhere else. The first white owner acquired the land in 1854 and the local black community continued to reside on the land.

[9] Glen Grey Act 25 of 1894; Native Land Act 27 of 1913; Native Trust and Land Act 18 of 1936.
[10] Land Reform (Labour Tenants) Act 3 of 1996.
[11] Land Reform (Labour Tenants) Act 3 of 1996.
[12] *Mahlangu v De Jager* 1999 (1) All SA 692 (LCC) and *Tselentis Mining (Pty) Ltd and Others v Mdlalose and Others* 1998 (1) BCLR 104 (N).
[13] Pienaar J and Brickhill *'Land'* in Woolman S et el (eds) *Constitutional Law of South Africa* 5 ed (2007).
[14] Land Tenure Security Bill (GN 33894 in *GG* 1118 of 24 December 2010).
[15] Association for Rural Advancement Newspaper 13 "Gannahoek: A labour tenant land struggle", AFRA, November 1991.

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The McFie family became the new owners of the farm in 1894-1990 and the labour tenancy system permitted by the previous owner continued, even though the tenants worked on the owner's commercial farms in another district.[16] The McFie family subsequently sold the farm to Performance Farming Enterprises (Pty) Ltd (hereafter referred to as *"PFE"*) and informed the community thereof, in January 1990.[17] PFE's intention was to convert the farm into a game farm. The community was under the impression that the labour tenancy system of the previous owners would continue with the new owners. However, the legal representatives of PFE instituted eviction proceedings to evict the 15 families residing on the farm.[18] The families were given three months' notice to vacate the land.[19]

The legal representatives of PFE proposed alternative accommodation to the families in the resettlement townships of Waaihoek or Ezakheni, in the district of Ladysmith. The community rejected the proposal for the following reasons: [20]

i. they lived on the land before the white farmers became the owners and thus believed they had a lawful right to live thereon;
ii. they actively farmed on the land;
iii. they have the right to own the land under their labour;
iv. they did not want to abandon their ancestors' graves which have cultural and religious significance;
v. the evictees had to sell their livestock; and
vi. the farm was more peaceful than the townships where violence occurred.

This dispute occurred during a period when the democratic government turned a blind eye to land reform. The South African Agricultural Union (SAAU) and Natal Agricultural Union (NAU), amongst other agricultural unions, were heavily against the promulgation of the Land Reform (Labour tenant) Bill (hereinafter referred to as *"the LRB"*).[21] SAAU was not opposed to the acknowledgement of the labour tenant rights or the protection against unlawful evictions. However the union was of the opinion that rights of the labour tenant will impede on that of the landowner because the last mentioned was not

[16] Association for Rural Advancement Newspaper 13 "Gannahoek: A labour tenant land struggle", AFRA, November 1991.
[17] Association for Rural Advancement Newspaper 13 "Gannahoek: A labour tenant land struggle", AFRA, November 1991.
[18] Association for Rural Advancement Newspaper 13 "Gannahoek: A labour tenant land struggle", AFRA, November 1991.
[19] Association for Rural Advancement Newspaper 13 "Gannahoek: A labour tenant land struggle", AFRA, November 1991.
[20] Association for Rural Advancement Newspaper 13 "Gannahoek: A labour tenant land struggle", AFRA, November 1991.
[21] Crowling M, Hornby D and Oettlé "Research report on the Tenure of Security of labour tenants and former labour tenants in South Africa", AFRA, June 2017, 5-6.

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consulted.[22] Furthermore, the approach seemed hash and in contrast with the principles of justice and fairness. NAU collectively rejected the LRB at its conference.[23] The interested parties of the public were of the opinion that the LRB was going to be insufficient. In that it did not afford protection to those evicted before the cut-off date, being 2 June 1995.[24] The LRB was also considered to be 'complex in nature' with the difficulty to understand its wording in which it was drafted. The White Paper on Land Reform (1991) did not make mention of labour tenancy. The Apartheid government permitted the white farm owners to provide accommodation, access to education on farms, health care to employees and the right to arbitrarily evict labour tenants.[25] As a result of the Apartheid government giving the white farm owners the right to arbitrarily evict labour tenants, there was little legal protection against the eviction of labour tenants. Especially in a time when farm owners were in fear of losing or limiting their property rights and the right to ownership trumped any other right.[26] The Gannahoek farm negotiations were significant because amid the democratic government turning a blind eye on labour tenants in the White Paper on Land Reform in 1991 and various parties was against and for the enactment of the LRB, the parties involved in the Gannahoek negotiations came to an agreement and addressed the issue at hand with regards to the labour tenants.

The democratic government addressed the injustices caused by the racial discriminatory legislation enacted in respect to land,[27] by the Apartheid government with a land reform programme encompassing three components namely: land redistribution, security of tenure, and restitution.[28] The foundation of the land programme is the Constitution of the Republic of South Africa (the Constitution) in section 25.[29] The section is also known as the 'Property Clause', which imposes a negative duty of protection of property and does not explicitly guarantee the right to purchase, possess, and dispose of property.[30] A negative duty of protection of property means that the Legislature may not enact legislation which will render persons landless or homeless and create tenure insecurities, unless the

[22] Crowling M, Hornby D and Oettlé "Research report on the Tenure of Security of labour tenants and former labour tenants in South Africa", AFRA, June 2017, 5-6.
[23] Crowling M, Hornby D and Oettlé "Research report on the Tenure of Security of labour tenants and former labour tenants in South Africa", AFRA, June 2017, 5-6.
[24] Crowling M, Hornby D and Oettlé "Research report on the Tenure of Security of labour tenants and former labour tenants in South Africa", AFRA, June 2017, 5-6.
[25] Association for Rural Advancement Newspaper 13 "Gannahoek: A labour tenant land struggle", AFRA, November 1991.
[26] Association for Rural Advancement Newspaper 13 "Gannahoek: A labour tenant land struggle", AFRA, November 1991.
[27] Racial discriminatory legislation such as the Native Land Act, Native Land Trust Act and Glen Grey Act.
[28] Kloppers HJ and Pienaar GJ 'The historical context of land reform in South Africa and early policies' 2014 (17) 2 *PER* 667.
[29] Section 25 of The Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution").
[30] *First National Bank of SA Limited t/a Wesbank v Commissioner for the SA Revenue Services; First National Bank of SA t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) para [48].

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circumstances indicate otherwise.[31] 'A proportionate balance' must be struck between protecting the existing property rights and the promotion of public interest, when interpreting the property clause as a whole.[32]

The property clause does not exist in isolation it is interpreted with socio- economic rights.[33] The right to housing correlates with the property clause and the land legislation.[34] In terms of section 26(1)-(2) of the Constitution every person has the right to 'access adequate accommodation' subject to the availability of government resources. In *Government of the Republic of South Africa and Others v Grootboom and Others* the Constitutional Court (CC) found that 'adequate accommodation' refers to access to land, municipal services and a place of dwelling.[35] The CC in *Port Elizabeth Municipality v Various Occupiers* further remarked that the possibility of securing a home comes from the right to land.[36] The right to dignity was interpreted with security of tenure under ESTA in the *Daniels v Scribante* case by the CC.[37] The court highlighted the land and farm occupants' history and iterated that ESTA was enacted to protect those vulnerable persons. The court stated the following: 'Addressing that mischief is not only about securing the tenure of ESTA occupiers. It is also about affording occupiers the dignity that eluded most of them throughout the colonial and apartheid regimes. We must adopt an interpretation that best advances this noble purpose of section 25(6) and ESTA.'[38] Therefore an overlap exits between rights enforced in terms of the property clause and socio-economic rights.[39] Furthermore, section 25(9) puts a constitutional obligation on the Legislature to enact land legislation in terms of ss (5), (6) and (7).[40] Hence the right of administration justice and access to information may be relevant because determinations made by the state may give rise to an administration action.[41] An administration action is reviewed according to the provisions of Promotion of Administrative Justice Act (PAJA), which holds the government accountable for their actions in respect of the enactment and implementation of land legislation.[42]

[31] Pienaar J and Brickhill *'Land'* in Woolman S et el (eds) *Constitutional Law of South Africa* 5 ed (2007) 4.
[32] *First National Bank of SA Limited t/a Wesbank v Commissioner for the SA Revenue Services; First National Bank of SA t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para [50].
[33] *Minister of Health and Others v Treatment Action Campaign* and Others (No 2) 2002 (5) SA 721 (CC) para [94].
[34] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para [35].
[35] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para [35].
[36] *Port Elizabeth Municipality v Various Occupiers 2004* (12) BCLR 1268 (CC) para [19].
[37] *Daniels v Scribante and Another* 2017 (4) SA 341 (CC) para [15].
[38] *Daniels v Scribante and Another* 2017 (4) SA 341 (CC) para [15].
[39] Pienaar J and Brickhill *'Land'* in Woolman S et el (eds) *Constitutional Law of South Africa* 5 ed (2007) 7.
[40] Section 25(9) of the Constitution.
[41] Pienaar J and Brickhill *'Land'* in Woolman S et el (eds) *Constitutional Law of South Africa* 5 ed (2007) 7.
[42] Promotion of Administrative Justice Act 3 of 2000.

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Section 25(1)-(3) aims to secure the property rights and delimit the scope of that protection, while ss (4)-(9) refers to land reform and matter related thereto.[43] Section 25(4) deals with land administration, ss (5) land distribution ss (6) security of tenure, ss (7) land restitution and ss (8) the reform of legislation referring to natural sources.[44] The democratic government implemented land reform programmes to redress social injustices, inequality, poverty and land deprivations by the previous racially discriminatory enacted legislation.[45] The government acknowledged that a 'comprehensive land reform program was necessary' and initiated the Reconstructive and Development Program (RDP)[46] The foundational framework was for national government to sustain a policy to distribute land equally and the provincial government provide departmental assistance. The Department of Land Affairs (DLA) was established to 'design, implement and monitor' the land reform programme.[47] The Land Reform Policy; Land Reform Implementation; and Survey and Deeds were the three subdivisions of the DLA. The Commission on the Restitution of Land Rights (CRLR) and Land Claims Court (LCC) was established to assist the DLA, with the implementation of the restitution claiming process.[48]

The Legislature enacted various legislation to support the programs rolled out by the DLA.[49] The land reform programme was initiated by the Restitution of Land Rights Act (RLRA), which aimed to redress the injustices caused by the racially discriminatory legislation, such as the Native Land Act.[50]

The land redistribution programme aids black people with a grant to acquire white-owned land.[51] The Land Reform Pilot Programme was established which commenced the redistribution of land to underprivileged persons with land for tenure security and to promote their lives.[52] The Development Facilitation Act was enacted to speed up the acquisition of land development projects.[53] The Provision

[43] Pienaar J and Brickhill *'Land'* in Woolman S et el (eds) *Constitutional Law of South Africa* 5 ed (2007) 4.
[44] Pienaar J and Brickhill *'Land'* in Woolman S et el (eds) *Constitutional Law of South Africa* 5 ed (2007) 4.
[45] Boyle H 'The land problem: What does the future hold for South Africa's land reform program' (2001) 11 *Indiana International and Comparative Law Review* 3 677.
[46] Boyle H 'The land problem: What does the future hold for South Africa's land reform program' (2001) 11 *Indiana International and Comparative Law Review* 3 677.
[47] Boyle H 'The land problem: What does the future hold for South Africa's land reform program' (2001) 11 *Indiana International and Comparative Law Review* 3 677.
[48] Boyle H 'The land problem: What does the future hold for South Africa's land reform program' (2001) 11 *Indiana International and Comparative Law Review* 3 677-678.
[49] Boyle H 'The land problem: What does the future hold for South Africa's land reform program' (2001) 11 *Indiana International and Comparative Law Review* 3 678.
[50] Restitution of Land Rights Act 22 of 1994.
[51] Boudredux K 'Land reform as social justice the case of South Africa' (2010) *Blackwell* 16.
[52] Boyle H 'The land problem: What does the future hold for South Africa's land reform program' (2001) 11 *Indiana International and Comparative Law Review* 3 680.
[53] Boyle H 'The land problem: What does the future hold for South Africa's land reform program' (2001) 11 *Indiana International and Comparative Law Review* 3 680.

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of Land and Assistance Act was enacted to enable legal grounds to qualify for land redistribution.[54] In support of these pieces of legislation the Presidential Commission of Inquiry into the Provision of Rural Financial Services (the Strauss Commission) was established, to inquire a method to advance the rural underprivileged persons access to formal financial facilities.[55] The government further relied on the 'willing buyer/willing seller' approach with regards to land redistribution.[56] The programme provided grants to applicants to assist them in purchasing land in rural areas for farming operation. The Settlement/Land Acquisition Grant (SLAG) programme was to assist households with a monthly income less than R1500 with a grant to purchase land for self-sustaining farms.[57] This programme was replaced in 2001 by the Land Redistribution for Agricultural Development (LRAD). Previously disadvantaged persons could apply for a grant to purchase farm land or resources to use on the farm, for commercial farming purposes.[58]

The tenure reform programme were aimed at identifying and improving tenure rights of farm workers living on white-owned farms and those living on land that was homelands.[59] The Promotion of Informal Land Rights Act was the foundation of this programme.[60]

The Department of Rural Development and Land Reform was created after the restructuring of the DLA in 2009.[61] The first approach of the Rural Development and Land Reform Strategic Plan for the period of 2010-2013 was to review and change the tenure systems on land.[62] The Strategic Plan was structured in alignment with the Green Paper on Land Reform and based on three branches, known as the land reform; agrarian advancement; and rural areas advancement.[63] The Comprehensive Rural Development Programme was established according to the three branches of the Strategic Plan. This programme would do the following: 'the review of all current land reform projects; review of land acquisition approaches, especially the willing-buyer-willing-seller approach; the facilitation of secure access to land for persons who live on farms; the protection of land rights for farm labourers; and expediting the finalisation of the restitution programme.'[64] The Recapitalisation and Development

[54] Provision of Land and Assistance Act 126 of 1993.
[55] The Rural Financial Services Commission "A review of the Interim Report of the Strauss Commission and an invitation to comment", Land and Agriculture Policy Centre, May 1996.
[56] Boudredux K 'Land reform as social justice the case of South Africa' (2010) *Blackwell* 16.
[57] Boudredux K 'Land reform as social justice the case of South Africa' (2010) *Blackwell* 16.
[58] Boudredux K 'Land reform as social justice the case of South Africa' (2010) *Blackwell* 16.
[59] Boudredux K 'Land reform as social justice the case of South Africa' (2010) *Blackwell* 16.
[60] Boudredux K 'Land reform as social justice the case of South Africa' (2010) *Blackwell* 16.
[61] Pienaar JM 'The mechanics of intervention and the Green Paper on Land Reform' (2014) (17) *PER* 2 644.
[62] Minister of Department of Rural Development and Land Reform *Strategic Plan 2010-2013* (2009) 2.
[63] Pienaar JM 'The mechanics of intervention and the Green Paper on Land Reform' (2014) (17) *PER* 2 645.
[64] Pienaar JM 'The mechanics of intervention and the Green Paper on Land Reform' (2014) (17) *PER* 2 646.

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Programme was established in 2010 to revive and revitalise the unsuccessful land reform programmes which indicated slow progress. It further helped the new farmers and provided land benefits for the future.[65] The National Summit for Vulnerable Workers in 2010 indicated that the determinations that were made in the 2005 National Land Summit had to be executed especially the abolition of the willing-buyer-willing-seller approach. It further held that the provisions of Extension of Security of Tenure Act (ESTA) had to be reviewed and tighten up.[66]

The democratic government and the DRDLR enacted various legislation and established programmes, respectively, to ensure that the injustices caused by the racially discriminatory land legislation is redressed. Evidently much attention has been given to review, restructuring and implement the land reform programmes. The DRDLR received timelines in which it had to ensure that the programmes were run effectively.[67] Hence the foundation for these programmes was solid. Unfortunately the legislation enacted with these programmes were not amended or developed according to modern changes in respect of land.[68] The LTA is one of the pieces of legislation that received the least attention after its enactment. The interpretation of the definition of the term 'labour tenant' has been problematic since its enactment and the courts took initiative to determine which approach to follow.[69] Instead of the Legislature amending the LTA for more clarity the DRLRD proposed for its repeal.[70]

The purpose of the enactment of the LTA was 'to provide for security of tenure of labour tenants and those persons occupying or using land as a result of their association with labour tenants; provide for the acquisition of land and rights in land by labour tenants; and to provide for matters connected therewith.'[71] Bearing this in mind, leading up to the enactment of the LTA potential labour tenant claimants were evicted forcefully and arbitrarily by farmers because farmers feared losing their property rights. Despite the enactment of the LTA, large-scale farm evictions continued.[72] The complex nature and difficulty to grasp the LTA led to these evictions. The poorly drafted definition of a labour tenant confused the courts and two stances were taken with regards to the interpretation of definition.[73] The

[65] Pienaar JM 'The mechanics of intervention and the Green Paper on Land Reform' (2014) (17) *PER* 2 646, 647.
[66] Pienaar JM 'The mechanics of intervention and the Green Paper on Land Reform' (2014) (17) *PER* 2 647.
[67] Pienaar JM 'The mechanics of intervention and the Green Paper on Land Reform' (2014) (17) *PER* 2 647.
[68] Pienaar JM 'The mechanics of intervention and the Green Paper on Land Reform' (2014) (17) *PER* 2 647.
[69] *Ngcobo and Others v Salima CC; Ngcobo and Others v Van Rensburg* 1999 (2) SA 1057 (SCA).
[70] Land Tenure Security Bill of 2010.
[71] Preamble of the Land Reform (Labour Tenants) Act 3 of 1996.
[72] Association for Rural Advancement Newspaper 13 "Gannahoek: A labour tenant land struggle", AFRA, November 1991.
[73] *Zulu and others v Van Rensburg and others* 1996 2 All SA (LCC) and *Tselentis Mining (Pty) Ltd and Others v Mdlalose and Others* 1998 (1) BCLR 104 (N).

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interpretation of the term 'labour tenant',[74] adopted by the courts, has the potential to further weaken the protection to those claiming labour tenancy. The interpretation of this term is of extreme importance as it is the gateway to protection by the LTA.

The inadequate measures to protect labour tenants, as envisaged by the LTA, persist even after 30 years of a constitutional democracy and transformative Constitution. In light of all the controversies over the LTA, the DRDLR proposed the Land Tenure Security Bill (hereafter referred to as *"the Bill"*), in 2010 to repeal the LTA.[75] Nothing has yet come from the proposed Bill and labour tenants wait in anticipation for their lot to be determined. The purpose of this dissertation is to analyse the interpretation of the term by the courts. Furthermore, it will determine the effect thereof on the protection offered by the LTA and whether the proposed Bill will afford more protection than the LTA.

1.3 RELEVANCE OF THE STUDY

The labour tenancy system has been consistently under attack, even prior to the Union government.[76] During the Union government the labour tenancy system consisted of the following: (a) a black person registered as a labour tenant had the right to reside on white-owned land for the a period fixed to his employment agreement; (b) he had to work on the land or have someone work in his stead; (c) he had the right to use the land for farming purposes; and (d) he had the right to keep livestock and graze it on such land.[77] Once the employment agreement expired or was terminated the labour tenant was given reasonable notice to vacate the land, if such notice was not mentioned in the agreement. The right to ownership and reasonable notice was the legal basis for the eviction of labour tenants.[78] Labour tenants therefore had no security of tenure and were vulnerable to evictions.[79]

Labour tenants had no relevance in the 1950's and the Labour Control Boards was established (during the 1960-1970's), to phase out the tenancy system by the 1980.[80] Approximately 740 000 labour tenants were arbitrarily and forcefully evicted from white-owned land. In the northern parts of Kwa-Zulu Natal and Mpumalanga however, the labour tenancy system existed until the early 1990.[81] During this period labour tenants were severely under attack again. The landowners in the district of Colenso and

[74] Section 1 of the LTA.
[75] Land Tenure Security Bill of 2010.
[76] Freedman W 'The Labour Tenants Act: Whom does it protect' (2000) 117 *SALJ* 450.
[77] Native Trust and Land Act 18 of 1936.
[78] Native Trust and Land Act 18 of 1936.
[79] Freedman W 'The Labour Tenants Act: Whom does it protect' (2000) 117 *SALJ* 450.
[80] Freedman W 'The Labour Tenants Act: Whom does it protect' (2000) 117 *SALJ* 450, 451.
[81] Freedman W 'The Labour Tenants Act: Whom does it protect' (2000) 117 *SALJ* 450, 451.

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Weenan in Kwa-Zulu Natal and Mpumalanga constructively evicted labour tenants.[82] They burned down homesteads, cut fences, impounded cattle and harmed cattle of the labour tenants. The labour tenants retaliated by killing landowners.[83] As a cry out for help against the forceful evictions, the labour tenants marched to the Colenso police station in the year 1992.[84] The reason for this was, amongst other things, 'the transition to majority rule and the decision to implement wide-ranging land reforms, both of which caused farmers to clear their lands of tenants before political changes could secure the tenants' claims'.[85] This all took place amid negotiations to bring about democratic change in South Africa.

The effect of these large-scale evictions was that labour tenants with their families and livestock were landless and homeless.[86] The landowner did allow for evicted labour tenants to access the land to remove and destroy structures or materials; and tend to the crops, reap and remove it once it has matured.[87] This was not very practical since vacant land was not easily accessible and potentially far to travel back to the farm where they evict from. The search for alternative land and a home was difficult during the Union government era.[88] The injustices that transpired with regards to land based on race during the pre-colonial, colonial, Union and Apartheid era is still visible in today's society. The land and housing issues of today was to a great extent established due to the arbitrary and forceful eviction legislation enacted, under the aforementioned eras.[89]

The Legislature had to intervene and enacted the LTA to protect labour tenants against unlawful and arbitrary evictions.[90] A survey was conducted by the Nkuzi Development Association, to determine the number evictions after the Apartheid era.[91] Although the Constitution and its subsidiary legislation was enacted to combat unlawful evictions, the surveys indicated that more evictions to place between 1994-

[82] Williams G 'Transforming labour tenants: A critique of the Land Reform (Labour Tenants) Act of 1996' University of the Witwatersrand Seminar Paper of 30 September 1996 2.
[83] Williams G 'Transforming labour tenants: A critique of the Land Reform (Labour Tenants) Act of 1996' University of the Witwatersrand Seminar Paper of 30 September 1996 2.
[84] Williams G 'Transforming labour tenants: A critique of the Land Reform (Labour Tenants) Act of 1996' University of the Witwatersrand Seminar Paper of 30 September 1996 2.
[85] Freedman W 'The Labour Tenants Act: Whom does it protect' (2000) 117 *SALJ* 451.
[86] Du Plessis W and Pienaar J 'The more things change, the more they stay the same: The story of communal land tenure in South Africa' (2010) 16 *Fundamina* (1) 79.
[87] Native Trust and Land Act 18 of 1936.
[88] Du Plessis W and Pienaar J 'The more things change, the more they stay the same: The story of communal land tenure in South Africa' (2010) 16 *Fundamina* (1) 79.
[89] Van der Walt A 'Exclusivity of ownership security of tenure and eviction orders: a model to evaluate South African land-reform legislation' (2002) 2 *JSAL* 263.
[90] Land Reform (Labour Tenants) Act 3 of 1996.
[91] Yeni S 'Land is more than farming: former labour tenants' views on land expropriation without compensation' in Mabasa K and Mabasa B (eds) *Land in South Africa: Contested meaning and nation formation* (2021) 193.

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2004 than, in the last 10 years of Apartheid. Moreover, the land claims were making slow progress because the DRDLR officials were not informing landowners of these claims.[92] In addition to this, due to the passiveness of the officials, in their respective roles, tenure insecurity for labour tenants was created.[93] The LTA was designed with a dual purpose namely: (a) to secure tenure and (b) redistribution of land under the provisions of Chapter 3.[94] The DRDLR therefore play a pivotal role in the implementation of the LTA provisions and land reform programme. Therefore, their reluctance to be active role players can jeopardise the entire system to redress the past injustices.

The DRDLR and its officials has not been the only hindrance for labour tenants, the Legislature is also contributing. The most crucial issue with the LTA is the poorly drafted definition of the term 'labour tenant'.[95] A labour tenant is:

> 'a person –
> (a) who is residing or has the right to reside on a farm;
> (b) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and
> (c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm, including a person who has been appointed as a successor to a labour tenant in accordance with the provisions of section 3 (4) and (5), but excluding a farmworker.' [96]

The definition was contentious since the enactment of the LTA and the courts took two opposing stances, regarding the scope thereof.[97] The two opposing stances by the courts were a broad and narrow interpretation of the definition of a labour tenant.[98] The broad interpretation had a disjunctive interpretation of the definition whereby two of the three-part definition was sufficient to qualify as a labour tenant. This meant that a claimant could qualify as a labour tenants if he could prove compliance to either paras (a) and (b); paras (a) and (c); or just para (c).[99] While the narrow approach had a

[92] Yeni S 'Land is more than farming: former labour tenants' views on land expropriation without compensation' in Mabasa K and Mabasa B (eds) *Land in South Africa: Contested meaning and nation formation* (2021) 193.
[93] Yeni S 'Land is more than farming: former labour tenants' views on land expropriation without compensation' in Mabasa K and Mabasa B (eds) *Land in South Africa: Contested meaning and nation formation* (2021) 193.
[94] Moloto J 'South African legal reform after April 1994' (2001) 26 *North Carolina Journal of International Law and Commercial Regulation* 3 668.
[95] *Ngcobo and Others v Salima CC; Ngcobo and Others v Van Rensburg* 1999 (2) SA 1057 (SCA).
[96] Section 1 of the LTA.
[97] Crowling M, Hornby D and Oettlé "Research report on the Tenure of Security of labour tenants and former labour tenants in South Africa", AFRA, June 2017, 9.
[98] Crowling M, Hornby D and Oettlé "Research report on the Tenure of Security of labour tenants and former labour tenants in South Africa", AFRA, June 2017, 9-10.
[99] *Klopper and others v Mkhize and others* 1998 (1) SA 406 (N).

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conjunctive interpretation of the definition and a claimant had to meet all three parts of the definition to qualify as a labour tenant.[100] In other words paras (a), (b) and (c) collectively be proven for a claimant to qualify as a labour tenant.[101] The Supreme Court of Appeal (SCA), set the precedent in the *Ngcobo and Others v Salima CC; Ngcobo and Others v Van Rensburg* 1999 case by confirming all previous judgement that conjunctively interpreted the definition.[102]

The question now arises whether this interpretation affords appropriate protection for the tenure of labour tenants in light of the LTA objectives. This is important since the SCA has recently heard an appeal in the *Andendorf No and another v Kubheka and another* 2022 and did not rely on the precedent except for the conjunctive interpretation.[103] Together with this the DRDLR has proposed a draft on the Land Tenure Bill in 2010, which aims to repeal the LTA and ESTA for its consolidation under the Bill. The Bill has not been promulgated into legislation and the likeliness of this happening is slim. Again, labour tenants are not receiving the very much needed attention. The provisions of LTA stands, with the Bill not being passed, which allows for the labour tenant rights and benefits to be transferred to a successor. Labour tenancy will therefore not be phased out but continue to exist until the Legislature and or DRDLR decides to fulfil their Constitutional mandate. Until such time this dissertation aims to bring awareness to the existing legal ambiguities surrounding labour tenant pertaining the LTA.

1.4 RESEARCH QUESTIONS

The primary research question is: how have the courts interpreted the term 'labour tenant' in the LTA and what is the effect thereof on the protection offered by the Act?

Flowing from this primary research question, the following sub-questions emerge:

(a) Compared to the legislation enacted before the Apartheid era with regard to land and labour tenancy, what difference did the LTA bring about with regards to the rights and protection afforded to labour tenants?
(b) Did the enactment of the LTA achieve its objectives compared to the past discriminatory legislation that governed land and labour tenancy?

[100] Crowling M, Hornby D and Oettlé "Research report on the Tenure of Security of labour tenants and former labour tenants in South Africa", AFRA, June 2017, 9-10.
[101] *Mahlangu v De Jager* 2000 (3) SA 145 (LCC).
[102] *Ngcobo and Others v Salima CC; Ngcobo and Others v Van Rensburg* 1999 (2) SA 1057 (SCA).
[103] *Andendorf No and another v Kubheka and another* [2022] JOL 52710 (SCA).

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(c) What is the effect of the current interpretation of the term 'labour tenant on the protection of potential labour tenants against eviction from farms?

(d) What are the solutions to the current issues of the LTA should it not provide appropriate protection to labour tenants?(e) If the LTA provides appropriate protection to labour tenants what are the recommendations for better implementation of the LTA?

1.5 CHAPTERS OUTLINE

This thesis comprises of six chapters. Chapter 1 sets out the introduction, background and significance of the study, relevance of the study and research questions. Chapter 2 continues the discussion on the history behind labour tenancy. The chapter explores the legislation preceding the labour tenancy system to explain how the system came about. Followed by the legislation that governed the labour tenancy system. Chapter 3 explains the legal framework regarding labour tenancy that overcame the past transgressions highlighted in the previous chapter. International law influences and the Constitution will be included in the discussion of the legal framework of labour tenancy. Ultimately the LTA, its objectives and eviction procedure will be discussed in detail. The eviction provisions of the Union legislation and that of the LTA will be compared. The clauses of the Bill will be discussed and critically analysed. Chapter 4 consists of an in-depth case law discussion on the various interpretations of the definition of a labour tenant. The chapter aims to illustrate the flaws in the definition of the term labour tenant and how it deviates from the objectives of the LTA. Chapter 5 takes it a bit further with an analysis of the interpretation of the definition of the term 'labour tenant'. The Constitution and interpretation rules will be the point of departure for the analysis. The following will be discussed in detail: disjunctive and conjunctive interpretation; ownership of the land; and the effect of not having a cut-off date. Chapter 6 concludes the thesis with recommendations.

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CHAPTER 2: HISTORICAL OVERVIEW OF LEGISLATION GOVERNING LABOUR TENANTS

2.1 INTRODUCTION

Before colonialism, indigenous black people were owners of land and were economically active as traders, farmers, craft persons, and professionals.[104] Ownership of land, as internationally recognised, provides for absolute power over land.[105] This means that the owner has 'unrestricted and exclusive control' and can exercise the right to ownership as he deems fit.[106] The right to ownership however has always been subject to limitation.[107] Under the colonial rule and Apartheid regimes, black people were deprived of ownership in land.[108] Black ownership was labelled as the 'Native question' which was informally described at the Intercolonial Conference in 1903 as 'embracing the present and future status of all aboriginal natives of South Africa, and the relation in which they stand towards the European population.'[109] The colonial rule and Apartheid government's approach in answering the 'Native question' led to land and livestock deprivation from black people. The commencement of the deprivation took place by way of expropriation of land and separation of areas, followed by proclamations which ultimately led to the enactment of racial discriminatory legislation of land.[110] The rise to political and economic supremacy by white people in South African society has been aided by their control over land and ability to effectively maintain and utilize land rights.[111] The aforementioned had the effect of forcing black people, who were deprived of land and livestock, to become labour tenants on white farms.[112]

Chapter 1 briefly highlighted the issues with the definition of the term labour tenant, its interpretation and compliance of the definition is the gateway to rights and entitlements under the LTA. In order to understand the labour tenancy system, an analytical discussion of the legislation that established this system is necessary. A historical overview of the legislation enacted by the various governments to address the 'Native question' and how it led to the labour tenancy system existence, shall be discussed

[104] Boudredux K 'Land reform as social justice the case of South Africa' (2010) *Blackwell* 14.
[105] Van Der Merwe D 'Land tenure in South Africa: A Brief history and some reform proposals' (1989) 4 *Journal of South African Law* 663.
[106] *Johannesburg Municipal Council v Rand Townships Registrar* 1910 TPD 1314.
[107] Section 36 of the Constitution.
[108] Natives Land Act 27 of 1913.
[109] South African History Online 'The Natives Land Act of 1913' available at https://www.sahistory.org.za/article/natives-land-act-1913 (accessed 18 October 2023).
[110] Glen Grey Act 25 of 1894 and Native Land Act 18 of 1913.
[111] Van Der Merwe D 'Land tenure in South Africa: A Brief history and some reform proposals' (1989) 4 *Journal of South African Law* 663.
[112] Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 371-375.

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and analysed in this chapter. For this dissertation the word 'black people' is 'a generic term which means black Africans, Coloureds and Indians'.[113]

2.2 LEGISLATION PRECEDING THE LABOUR TENANCY SYSTEM

The commencement of the labour tenancy system can only be understood by explaining the preceding land legislation namely, the Glen Grey Act and Native Land Act respectively. In addressing the 'Native question', the government enacted legislation to acquire and segregate the land according to race, which ultimately led to its absolute power over black people. The purpose and effect of the enactment of the Glen Grey Act and Native Land Act shall be analytically discussed in this section. As mentioned above, to gain absolute power over the masses one has to acquire land.

2.2.1 The Glen Grey Act of 1894

The Glen district was located between Queenstown and Wodehouse of the Cape Colony.[114] The agricultural area had vacant land that was available for cropping and grazing. The land however was mainly occupied by the Thembu people, who were residents in the area.[115] A Commission was established to determine the owners of the land, where the Thembu people were residing. In 1892 the Commission reported that the Thembu people were the owners of 55 and ½ morgen (2.1 acres) of the land.[116] The colonial settlers and government nevertheless believed that the Thembu people should be deprived of their land since they were resistant towards the colonial government.[117] The Commission was in favour of the report because it would have resulted in limiting the increasing number of black people, who wanted access to the vacant land; and it would entail employing black people, who had nowhere else to go, as labourers on white-owned farms. [118]

The Glen Grey Act 25 of 1894 (GGA) was enacted with the main focus 'to provide for the disposal of lands and for the administration of local affairs within the District of Glen Grey and other proclaimed district'. [119] The GGA could apply in any district where the majority of inhabitants were black people in

[113] Employment Equity Act 55 of 1998.
[114] Bouch R 'Glen Grey before Cecil Rhodes: How a crisis of local colonial authority led to the Glen Grey Act of 1894' (1993) 27 *Canadian Journal of African Studies* (1) 1.
[115] Bouch R 'Glen Grey before Cecil Rhodes: How a crisis of local colonial authority led to the Glen Grey Act of 1894' (1993) 27 *Canadian Journal of African Studies* (1) 9, 14 18.
[116] South African History Online 'The Natives Land Act of 1913' available at https://www.sahistory.org.za/article/natives-land-act-1913 (accessed 18 October 2023).
[117] Bouch R 'Glen Grey before Cecil Rhodes: How a crisis of local colonial authority led to the Glen Grey Act of 1894' (1993) 27 *Canadian Journal of African Studies* (1) 18, 19.
[118] Bouch R 'Glen Grey before Cecil Rhodes: How a crisis of local colonial authority led to the Glen Grey Act of 1894' (1993) 27 *Canadian Journal of African Studies* (1) 21.
[119] Ramutsindela Maano 'Property rights, land tenure and racial disclosures' (2012) 77 *GeoJournal JSTOR* 6 756.

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order for the land to be administered and allocated accordingly.[120] It further provided that each family head be allocated a piece of land and that the vacant land be sold to the white farmers. It was determined that the family head and those claiming land, with the consent of the governor, should they receive land, shall only receive four morgen of land.[121] The 'one man one lot' principle was applied, which meant that one black person, ideally the head of the family, was only entitled to own one piece of land. [122] The consent of the governor was a condition to acquire land because it first had to be determined if a white farmer proposed to acquire the land. The land could further not be subdivided or leased and have a registered bond on it.[123] Tax laws, among other things, were implemented by the government and the black owner had to pay 15 shillings per year. The black customary laws applied in terms of inheritance for the successor. [124] Black landowners had to be in compliance with the followings requirements, in order to hold their title to ownership: (a) use the land for agricultural purposes; (b) pay land taxes; (c) have no stock theft; and (d) not resist the colonial government. If the black landowners failed comply with these requirements his ownership to the land would have been deprived.[125]

The provisions of the GGA took away the autonomy the black people had with regard to land ownership by ending the common land tenure system.[126] The introduction of the individual land tax system (one man one lot) as opposed to a common land tenure system was only the beginning.[127] Under the common land tenure system the black community had the homelands where they collectively had control over the land and its resources.[128] The agricultural land was over occupied by black people and the enactment of the GGA was to decrease this number. Hence the introduction of the individual land tax system and prerequisite for the designated family heads to farm on the land eliminated the common

[120] Ramutsindela Maano 'Property rights, land tenure and racial disclosures' (2012) 77 GeoJournal JSTOR 6 756.
[121] South African History Online 'The Natives Land Act of 1913' available at *https://www.sahistory.org.za/article/natives-land-act-1913* (accessed 18 October 2023).
[122] Du Plessis WJ 'African indigenous land rights in a private ownership paradigm' (2011) 14 *PER* 11 45.
[123] Van Der Merwe D 'Land tenure in South Africa: A Brief history and some reform proposals' (1989) 4 *Journal of South African Law* 675.
[124] Van Der Merwe D 'Land tenure in South Africa: A Brief history and some reform proposals' (1989) 4 *Journal of South African Law* 675.
[125] Van Der Merwe D 'Land tenure in South Africa: A Brief history and some reform proposals' (1989) 4 *Journal of South African Law* 675-676.
[126] Strauss M 'A historical exposition of spatial injustices and segregated urban settlement in South Africa' (2019) 25 *Fundamina* 2 144.
[127] Van Der Merwe D 'Land tenure in South Africa: A Brief history and some reform proposals' (1989) 4 *Journal of South African Law* 675-676.
[128] Cabannes Y 'Cooperative, communal and collective forms of land tenure and their contribution to social function of land and housing' available at *https://www.citego.org/bdf_fiche-document-1364_en.html#:~:text=Communal%20tenure%20%E2%80%9Crefers%20to%20a,fisheries%2C%20wetlands%20or%20irrigation%20waters*. (accessed 08 January 2024).

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land tenure system. [129] This forced a number of black people, who were squatting and occupying the vacant land in the Glen District to labour on white farms. The occupation and land use rights of the black people were thus under government control, limiting their capability to compete with white farmers. [130] The provisions of the GGA inevitably established crop sharing between black farm workers and their white farm owners, which later became the labour tenancy system.[131]

Amid the enactment of the GGA black people were still occupying white land.[132] After the formation of the Union in 1910, a new Minister of Native Affairs was appointed to inquire into the squatting issue.[133] The number of black people squatting on white land increased in the year 1913 and informal tenancy agreements were entered into by them with white farmers. [134] The black people secured their residence on white farms with rental agreements, fixed-term labour, or sharing their crops with the white farmers.[135] The rental agreements permitted black people working and living on the farms, to cultivate a portion of land for themselves.[136] The harvested crops were then shared with the white farmer, in turn for the employment of the black person residing on the farm.[137] The provisions of the GGA did not prohibit crop sharing however in practice it was clear that the white farmers were working towards establishing labour tenancy. The Union government was therefore urged to enact more severe legislation to address the 'Native question', as crop sharing continued between the parties.[138]

2.2.2 The Native Land Act of 1913

The Union government took a significant step in response to the 'Native question' by enacting the Native Land Act 27 of 1913 (NLA).[139] The government initiated its Land Dispossession Project with the

[129] Van Der Merwe D 'Land tenure in South Africa: A Brief history and some reform proposals' (1989) 4 *Journal of South African Law* 675-676.
[130] Van Der Merwe D 'Land tenure in South Africa: A Brief history and some reform proposals' (1989) 4 *Journal of South African Law* 675-676.
[131] Van Der Merwe D 'Land tenure in South Africa: A Brief history and some reform proposals' (1989) 4 *Journal of South African Law* 676.
[132] Van Der Merwe D 'Land tenure in South Africa: A Brief history and some reform proposals' (1989) 4 *Journal of South African Law* 677.
[133] South African History Online 'The Natives Land Act of 1913' available at *https://www.sahistory.org.za/article/natives-land-act-1913* (accessed 18 October 2023).
[134] Van Der Merwe D 'Land tenure in South Africa: A Brief history and some reform proposals' (1989) 4 *Journal of South African Law* 677.
[135] Van Der Merwe D 'Land tenure in South Africa: A Brief history and some reform proposals' (1989) 4 *Journal of South African Law* 677.
[136] Kloppers HJ and Pienaar GJ 'The historical context of land reform in South Africa and early policies' (2014) 17 *PER* 2 682.
[137] Kloppers HJ and Pienaar GJ 'The historical context of land reform in South Africa and early policies' (2014) 17 *PER* 2 682.
[138] Kloppers HJ and Pienaar GJ 'The historical context of land reform in South Africa and early policies' (2014) 17 *PER* 2 682.
[139] South African History Online 'The Natives Land Act of 1913' available at *https://www.sahistory.org.za/article/natives-land-act-1913* (accessed 18 October 2023).

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enactment of this piece of legislation.[140] A clear distinction between races was made with the definitions in the NLA.[141] A 'native' was defined as:

> 'any person, male or female, who is a member of an aboriginal race or tribe of Africa; and shall further include any company or other body of persons, corporate or unincorporate, if the persons who have a controlling interest therein are natives.' [142]

The majority of the black population were greatly impacted by the provisions of the NLA, as it was the gateway for further racial discrimination legislation that would further deprive black people of land from rights.[143] The NLA was enacted to provide for 'native or scheduled areas', which designated specific areas for the exclusive usage and occupation of black people.[144] The provisions furthermore, contained anti-squatting measures to prevent sharecropping.[145] A crop sharer leases a portion of the farm from the owner for farming purposes and his compensation is in the form of sharing his crops with the owner.[146] While a person working on the farm of the owner and having the right to use and occupy that land is a labour tenant.[147] The NLA explicitly prohibited remuneration in cash or sharecropping as a mechanism for black people to secure tenure on farms.[148] However it left open the possibility of black labour tenants to produce agricultural goods for white farmers. The provisions of the NLA were not retrospective which meant that the existing sharecropping agreements could continue until the Legislature decided otherwise.[149] Hence the existing sharecrop agreements were governed by the NLA but future agreements were prohibited.

Section 1(1) (a) & (b) of the NLA read as follows:

[140] Lephakga T 'The history of theologised politics of South Africa, the 1913 Land Act and its impact in the fight from the black self' (2013) 39 *Studia Historiae Ecclesiasticae* 2 2.
[141] Natives Land Act 27 of 1913.
[142] Natives Land Act 27 of 1913.
[143] South African History Online 'The Natives Land Act of 1913' available at https://www.sahistory.org.za/article/natives-land-act-1913 (accessed 18 October 2023).
[144] Van der Walt AJ 'Towards the development of post-Apartheid land law: An exploratory survey' (1990) 23 *De Jure* (1) 4.
[145] South African History Online 'The Natives Land Act of 1913' available at https://www.sahistory.org.za/article/natives-land-act-1913 (accessed 18 October 2023).
[146] History.com editors 'Sharecropping' available at https://www.history.com/topics/black-history/sharecropping (accessed 22 May 2024).
[147] Land Reform (Labour Tenants) Act 3 of 1996.
[148] Beinart W and Delius P 'The historical context and legacy of the Native Land Act of 1913' (2014) 40 *Journal of Southern African Studies* 4 670.
[149] Beinart W and Delius P 'The historical context and legacy of the Native Land Act of 1913' (2014) 40 *Journal of Southern African Studies* 4 670.

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> 'except with the approval of the Governor- General – a native shall not enter into any agreement or transaction for the purchase, hire or other acquisition from a person other than a native, of any such land or any right thereto, interest thereon or servitude there over; and'.[150]

> 'except with the approval of the Governor- General – a person other than a native shall not enter into any agreement or transaction for the purchase from a native of any such land or any right thereto, interest therein, or servitude there over.'[151]

Moreover, section 1(2) of the NLA read as follows:

> 'From and after the commencement of this Act, no person other than a native shall purchase, hire or in any manner whatever acquire land in a scheduled native area or enter into any agreement or transaction for the purchase, hire or other acquisition, direct or indirect, of any such land or any right thereto or interest therein or servitude there over, except with the approval of the Governor-General.'[152]

In essence, these sections prohibited black people from acquiring land outside the native or scheduled areas designated to them, unless they had the approval of the Governor-General.[153] Similarly the white farmers could not purchase land within the native or scheduled areas unless they have the approval of the Governor-General.[154] In the handful of instances that black people owned land outside of the native or scheduled areas, these provisions ensured that they could not acquire more land and that their movement was restricted to the native or scheduled areas.[155] The definition together with section 1 affected millions of black people because it precluded black people from purchasing or leasing land in 93% of South Africa.[156]

This meant that ownership of land in the native or scheduled areas could only be obtained by black people.[157] An offence would be committed by anyone discovered to be occupying land in violation of section 1 of the NLA. Black people could avoid the sanction for non-compliance with the provisions of section 1 if they were willing to become labour tenants on white farms. [158] This showcases that becoming a labour tenant is a form of punishment.

[150] Natives Land Act 27 of 1913.
[151] Natives Land Act 27 of 1913.
[152] Natives Land Act 27 of 1913.
[153] Van Der Merwe D 'Land tenure in South Africa: A Brief history and some reform proposals' (1989) 4 *Journal of South African Law* 679.
[154] Van Der Merwe D 'Land tenure in South Africa: A Brief history and some reform proposals' (1989) 4 *Journal of South African Law* 679.
[155] Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 370-371.
[156] South African History Online 'The Natives Land Act of 1913' available at *https://www.sahistory.org.za/article/natives-land-act-1913* (accessed 18 October 2023).
[157] Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 370-371.
[158] Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 370-371.

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To summarise, the enactment of the NLA firstly ensured that, black people could only acquire land in the scheduled or native areas.[159] Secondly, it established the Beaumont Commission to determine which land shall be allocated to black and white people and it identified the scheduled or native areas. Thirdly, the purpose of the NLA was to govern the different kinds of tenancies that existed on white farms.[160] The implementation of the provisions of the NLA had the result of depriving the majority of the population of their land, allowing them only to acquire land in scheduled or native areas.[161] Although black people could own land in native or schedules areas, the NLA made it nearly impossible for black people to compete with white farmers.[162] In addition to this, the government supplied white farmers with low-interest loans, while black people did not receive loans from it. [163] Hence white farmers could purchase machinery and other necessary farming equipment to build, sustain and enhance their farms. Upon the commencement of the NLA, white farmers instituted eviction procedures and black people had to 'return' to their 'land of origin'.[164] The provisions of the NLA left black people landless which subsequently rendered them homeless. The scheduled or native areas were overcrowded. Black people had to search for vacant land to inhabit which led to children and cattle dying and ultimately poverty.[165]

2.3 LEGISLATION GOVERNING LABOUR TENANCY SYSTEM

White people gained absolute power over black people with the enactment of the GGA and NTA.[166] It deprived land from black people; created an individual tax system; limited their right to acquire land;[167] prohibited land lease agreements with white landowners and the sharing of crops between the parties.[168] The white landowners nevertheless entered into informal agreements with black people living

[159] Beinart W and Delius P 'The historical context and legacy of the Native Land Act of 1913' (2014) 40 *Journal of Southern African Studies* 4 670.
[160] Beinart W and Delius P 'The historical context and legacy of the Native Land Act of 1913' (2014) 40 *Journal of Southern African Studies* 4 670.
[161] Natives Land Act 27 of 1913.
[162] South African History Online 'The Natives Land Act of 1913' available at *https://www.sahistory.org.za/article/natives-land-act-1913* (accessed 18 October 2023).
[163] South African History Online 'The Natives Land Act of 1913' available at *https://www.sahistory.org.za/article/natives-land-act-1913* (accessed 18 October 2023).
[164] Du Plessis W and Pienaar J 'The more things change, the more they stay the same: The story of communal land tenure in South Africa' (2010) 16 *Fundamina* (1) 79.
[165] Du Plessis W and Pienaar J 'The more things change, the more they stay the same: The story of communal land tenure in South Africa' (2010) 16 *Fundamina* (1) 79.
[166] Van Der Merwe D 'Land tenure in South Africa: A Brief history and some reform proposals' (1989) 4 *Journal of South African Law* 663.
[167] South African History Online 'The Natives Land Act of 1913' available at *https://www.sahistory.org.za/article/natives-land-act-1913* (accessed 18 October 2023).
[168] Natives Land Act 27 of 1913.

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on farms, to work on it and share crops with the owner.[169] Emphasis was placed on employment to circumvent the legislation but crop sharing was taking place and labour tenancy was established. Hence the Union government had to enact legislation to regulate the circumstances on the farms. Section 10 of the NLA gave recognition to the labour tenancy system.[170] The definitions recognised a 'farm labourer' and black people renting pieces of land in return for crop sharing.[171] The government, therefore, had to enact the Native Service Contract Act (NSCA) and the Native Trust and Land Act (NTLA) to regulate the established labour tenancy system. The purpose of the strict provisions of the NSCA and NTLA shall be analytically discussed in this section.

2.3.1 The Native Service Contract Act of 1932

The Native Service Contract Act 24 of 1932 (NSCA) was the Union government's first attempt to control the labour tenancy system.[172] A labour tenant was defined as any black person, who was obliged to give a service or who had consented to live on and utilize land subject to the clauses of the labour tenant agreement.[173] The labour-tenant agreement had no formalities.[174] The agreement however had to have mutual responsibilities for the parties bound to its clauses.[175] The labour tenant could serve under the agreement for a maximum period of three years.[176] Hence the agreement would expire by effluxion of time and it would terminate if the farmer was unable to rely on the services of the labour tenant for more than three months, due to absenteeism without the necessary consent.[177] Upon the termination of the agreement, the labour tenant was allowed to tend to any crop left on the farm until it fully grows for it to be harvested and removed from the farm.[178] Any structures on the land lived on and utilized by the labour tenant could be taken down, eradicated, or destroyed by the labour tenant if the white farmer did not provide the building materials of such structure.[179] If the labour tenant agreement

[169] Van Der Merwe D 'Land tenure in South Africa: A Brief history and some reform proposals' (1989) 4 *Journal of South African Law* 677.
[170] Natives Land Act 27 of 1913.
[171] Section 10 of Native Land Act 27 of 1913.
[172] Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 371-372.
[173] S 1 of the NSCA.
[174] S 5(2) of the NSCA. Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 371-372.
[175] S 5(2) of the NSCA. Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 371-372.
[176] S 5(1) of the NSCA. Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 371-372.
[177] S 5(5) of the NSCA. Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 371-372.
[178] S 5(7) of the NSCA. Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 371-372.
[179] S 5(8). Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 371-372.

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came to an end by effluxion of time, he had one month to vacate the land otherwise it would result in an offence, in terms of the NSCA.[180]

The NSCA had the effect of enabling black people to live outside the native or scheduled areas drawing them close to the rural economy.[181] In addition to this, it expanded the existing labour tenancy legislation and imposed more control on black people. In turn, it would result in the eviction of the labour tenants' entire family should the tenancy come to an end.[182] The right of residence of the labour tenant and his family was dependent on the labour tenancy agreement entered into by the parties. The evictees therefore had to return to the scheduled or native areas. The NSCA permitted additional measures such as corporal punishment and the carrying of a pass to access the farm.[183] The situation for black people got worse with the enactment of the Native Trust and Land Act.

2.3.2 The Native Trust and Land Act of 1936

The Native Trust and Land Act 18 of 1936 (NTLA) was a continuum of the NLA which was to follow through with the Land Dispossession Project of the government.[184] The purpose of the enactment of NTLA was to provide land for black settlement and address the persistent squatting issue that prevailed amid the implementation of the NLA.[185] Black settlement meant that the South African Native Trust (hereafter referred to as *"the Native Trust"*) could under special circumstances, as it deemed fit, subject to conditions, 'grant, sell, lease of otherwise dispose of land the property of the Trust to natives.'[186] In addition to this, it provided for 'released areas', which was land that was made available for the extension of the native or scheduled areas.[187] The Native Trust allowed the Union government to administer trust land for the settlement; support; benefit; and material welfare of black people of the Union.[188]

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[180] S 5(12) of the NSCA. Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 371-372.

[181] South African History Online 'Segregationist legislation timeline 1930-1939' available at https://www.sahistory.org.za/article/segregationist-legislation-timeline-1930-1939 (accessed 10 November 2023).

[182] South African History Online 'Segregationist legislation timeline 1930-1939' available at https://www.sahistory.org.za/article/segregationist-legislation-timeline-1930-1939 (accessed 10 November 2023).

[183] South African History Online 'Segregationist legislation timeline 1930-1939' available at https://www.sahistory.org.za/article/segregationist-legislation-timeline-1930-1939 (accessed 10 November 2023).

[184] Lephakga T 'The history of theologised politics of South Africa, the 1913 Land Act and its impact in the fight from the black self' (2013) 39 *Studia Historiae Ecclesiasticae* 2 6.

[185] Du Plessis W and Pienaar J 'The more things change, the more they stay the same: The story of communal land tenure in South Africa' (2010) 16 *Fundamina* (1) 79.

[186] Section 18(2) the Native Trust and Land Act or Development Trust and Land Act of 1936.

[187] Van Der Merwe D 'Land tenure in South Africa: A Brief history and some reform proposals' (1989) 4 *Journal of South African Law* 679.

[188] Kloppers HJ and Pienaar GJ 'The historical context of land reform in South Africa and early policies' (2014) 17 *PER* 2 682.

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The South African Development Trust (hereafter referred to as *"the Development Trust")* put an end to the right of black people to acquire land as individuals.[189] According to section 2(1) of the NTLA, specific land could be and was transferred to the Native Trust to be administered.[190] The Development Trust Fund purchased and advanced the Trust land, and provided for the needs of black people in such areas.[191] It mainly facilitated and advanced the 'material, moral and social well-being of natives' living on the land of the Trust. The land purchased by it was for black settlement subject to the limitation of 13% of the total land in the Union of South Africa.[192]

The NLA provided for 8% of the reserved land to be made available for black people to purchase, while the Development Trust made 13% of the land available.[193] The NTLA made 5% of the land available for settlement.[194] This meant that 80% of the population was limited to access 13% of the land in South Africa.[195] The land acquired by it however was still insufficient to accommodate the majority of the population that was rendered homeless.[196] The Minister of Native Affairs thus registered the land in his name.[197] Black people were therefore no longer landowners. Even if they had a title deed registered to their name at the Deeds Office. The land was nevertheless owned by the government.[198] According to section 48(1)(g) of the NTLA however, the Governor-General may make regulations that gives the Native Trust authority to 'purchase, hire or occupy land held by the Trust' to black people subject to conditions.[199] Inevitably the enactment of the NTLA was the sequel to the political objective, implementing racial division.[200]

The NTLA was further enacted to respond to the Union government's increasing anxiety over the immense amount of black people who resided and worked as labour tenants on white farms.[201] Chapter 4 included several regulations governing the tenure of black people who lived on property other than the native or scheduled and 'released areas'. Black people were prohibited from residing on specific

[189] Kloppers HJ and Pienaar GJ 'The historical context of land reform in South Africa and early policies' (2014) 17 *PER* 2 682.
[190] Section 2(1) of 1936.
[191] Kloppers HJ and Pienaar GJ 'The historical context of land reform in South Africa and early policies' (2014) 17 *PER* 2 683.
[192] Kloppers HJ and Pienaar GJ 'The historical context of land reform in South Africa and early policies' (2014) 17 *PER* 2 683.
[193] Kloppers HJ and Pienaar GJ 'The historical context of land reform in South Africa and early policies' (2014) 17 *PER* 2 683.
[194] *Daniels v Scribante and Another* 2017 (4) SA 341 (CC) para 15.
[195] *Daniels v Scribante and Another* 2017 (4) SA 341 (CC) para 15.
[196] Du Plessis W and Pienaar J 'The more things change, the more they stay the same: The story of communal land tenure in South Africa' (2010) 16 *Fundamina* (1) 79.
[197] Du Plessis W and Pienaar J 'The more things change, the more they stay the same: The story of communal land tenure in South Africa' (2010) 16 *Fundamina* (1) 79.
[198] Du Plessis W and Pienaar J 'The more things change, the more they stay the same: The story of communal land tenure in South Africa' (2010) 16 *Fundamina* (1) 79.
[199] Section 48(1)(g) of 1936.
[200] Kloppers HJ and Pienaar GJ 'The historical context of land reform in South Africa and early policies' (2014) 17 *PER* 2 684.
[201] Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 372-375.

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land unless the person was (a) the registered proprietor of that land; (b) a worker of the owner of that land; (c) a legally recognised labour tenant; (d) a recognised squatter; or (e) alternatively excluded from the limitations contained in Chapter 4.[202] A black person who lived on land in violation of the provisions of the NTLA would be guilty of an offence. Therefore, any farmer who needed labour tenants on his land had to make sure that they were registered as such, with the local Black Commissioner. [203]

The Labour Tenant Board (LTB) led by the Black Commissioner, was empowered to call upon white landowners to 'show cause'[204] as to why the labour tenants on their farms should not be reduced.[205] The LTB presumed that a landowner needed only five labour tenants on his farm to conduct farm operations or be of domestic service for a period of six months.[206] Despite the presumed number of labour tenants being presumed to be five, the LTB had the discretion to determine how many labour tenants a landowner required on his farm.[207] This meant that the number of labour tenants were presumed and not limited to five labour tenants per landowner, by the LTB.

In the event that the number of labour tenants exceeded that provided by the LTB, the landowner was granted 12 months to reduce the number of labour tenants to the number provided by the LTB.[208] In other words, if a landowner had more labour tenants than provided by the LTB but less than the presumed number of five, the number of labour tenants must be reduced to that provided by the LTB. Any 'excessive' labour tenancy agreements were terminated upon the date of the deduction of the number of labour tenants and eviction proceedings were commenced for the excess number of labour tenants.[209] The LTB had the authority to rescind the cause shown by the landowner to not reduce the number of labour tenants on his farm. A license had to be obtained from the LTB to keep the number of labour tenants that exceeded that provided by the LTB. [210] The expiration of the license was on the 30th of June of the subsequent year it was applied for but it could be renewed for a year subject to payment to the Black Commissioner.[211] The labour tenants and his dependants who resided with him on the

[202] Section 26(1) of 1936.
[203] Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 372-375.
[204] Section 29(1) of 1936.
[205] Section 29(1) of 1936.
[206] Section 30(1) of 1936.
[207] Section 30 of 1936.
[208] Section 30(1)-(4) of 1936.
[209] Section 30(1)-(4) of 1936.
[210] Section 30(1)-(4) of 1936.
[211] Section 30(1)-(4) of 1936.

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farm were required to work on the farm with him.[212] The Masters and Servants Act governed the relationship between the parties *mutatis mutandis*.[213]

All farmers needed to fill out a prescribed form containing the information of every black resident on their farm, including their identity number, full name, and details about their permissions, licenses, and work terms.[214] The white farmer would violate the provisions of the NTLA if inaccurate or insufficient information was submitted or if there is non-compliance to provisions. This made it impossible for white farmers to exceed the number of labour tenants on their property that they had paid for in license fees and enrolled with the Black Commissioner.[215]

Illegal occupants were given written notification calling on them to provide why they should not be evicted from the areas outside native or scheduled and released areas.[216] A warrant authorising the police to remove the illegal occupants, with reasonable force if required, would be issued if the Black Commissioner could not be convinced that those in question had a right of occupation. Following the eviction, the Union government and the Department of Black Affairs were required to provide alternative accommodation to the evictees in a native or scheduled or released area.[217] This led to the widespread evictions of labour tenants from farms throughout the 1960s and 1970s as Chapter 4 of the NTLA was applied strictly.[218]

In summary, the NTLA has been called 'perhaps the most concerted legislative attack on peasant squatters and labour tenants.'[219] The legislative attack on peasant squatters and labour tenants was in line with the achievement of the objectives of the NTLA. Its main objective was to regulate the labour tenancy system and control labour tenants. This was achieved with the establishment of the LTB and the strict compliance of Chapter 4 by it. The LTB was bestowed with the authority to presume and limit the amount of labour tenants of a farmer. Furthermore, it could evict the excess amount of labour tenants with his or her families from a farm. The then powers bestowed on the LTB are similar to a Land Claims Court under the LTA. The right to exercise control over the property of the farmer was limited, with the amount of labour tenants presumed or allocated by the LTB. The labour tenants could no longer bargain with farmers as they pleased. They were bound to the provisions of Chapter 4 and

[212] Section 31 of 1936.
[213] Section 31 of 1936.
[214] Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 372-375.
[215] Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 372-375.
[216] Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 372-375.
[217] Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 372-375.
[218] Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 372-375.
[219] Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 374.

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the authority of the LTB. Chapter 4 ensured that its provisions were complied with and ensured that the discretion of the LTB was complied with, with the sanction in the event of non-compliance. It was therefore not enough for the Union government to address the native question with land legislation, such as the GGA and NLA. Therefore, the government regulated labour tenancy through a range of legislative measures including deprivation of black ownership and the control of land acquisition amongst races; regulating the various tenures forms and ultimately the labour tenancy system on farms. Every aspect of a black person's life, including their employment was heavily regulated.

2.4 CONCLUSION

The so-called native question was addressed, firstly, with the enactment of land legislation namely: the GGA and the NLA.[220] The GGA created an individual tax system with its 'one man one lot' approach, which terminated the communal system. Black people who did not comply with the requirements to acquire land had to vacate the Thembu land, as it was allocated to white people. The GGA was merely the beginning of the enactment of land deprivation legislation and it was not only applicable in the Cape colony but any other district where black people resided.[221] Subsequently, the NLA was promulgated and implemented. This racially discriminatory land legislation created a Commission to determine which land shall be allocated to black people and white people in South Africa.[222] The native or scheduled areas allocated to black people comprised only 8% of the land in the country.[223] The NLTA did black people a favour by availing 5% of land for settlement.[224] The Union government ensured that black people could no longer become owners of land with the enactment of this legislation in an attempt to address the native question.

The farmers nevertheless established a labour tenancy system which first started with crop sharing under the GGA.[225] Farmers started to disguise crop sharing with the employment of black people on their farms. The NLA recognised farm labourers and the sharing of crops between farm owners and black people.[226] This essentially further established labour tenancy. The government therefore had to regulate the various forms of tenure on farms. Subsequently the NSCA was enacted to control the labour tenancy system. Thereafter Chapter 4 of the NTLA created stringent requirements that had to be

[220] Glen Grey Act 25 of 1894 and Native Land Act 18 of 1913.
[221] Ramutsindela Maano 'Property rights, land tenure and racial disclosures' 2012 77 GeoJournal JSTOR 6 756.
[222] South African History Online 'The Natives Land Act of 1913' available at https://www.sahistory.org.za/article/natives-land-act-1913 (accessed 18 October 2023).
[223] *Daniels v Scribante and Another* 2017 (4) SA 341 (CC) para 15.
[224] *Daniels v Scribante and Another* 2017 (4) SA 341 (CC). para 15.
[225] South African History Online 'The Natives Land Act of 1913' available at https://www.sahistory.org.za/article/natives-land-act-1913 (accessed 18 October 2023).
[226] Section 10 of 1913.

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complied with by both the farmer and the labour tenant. The farmer and labour tenants were controlled by the LTB, which had a unique set of powers. It was not enough for the government to enact legislation to regulate the ownership of land. Black people could not escape the control of the government with regard to the ownership, right of residence, employment and livelihoods on farms. This proves to show that: absolute power over persons starts with the control of land.

The legislation enacted regulated the deprivation of land from black people; various tenure forms on farms; which ultimately regulated the relationship between land, landowners and black people. Moreover, these legislative provisions established a dependency relationship where the landowner has the upper hand over labour tenants. This enacted legislation made them experience great hardships. Black people were restricted to only owning farmland in the areas allocated to them. This was further stripped away from them with the Development of Native Trust. Even if they had a registered title deed in the deeds registries office the owner of that land would be the Minster of Native Affairs because the Native Trust would settle with black people. In other words, black people could only enjoy a personal right and not a real right. To continue the stay on farm land they resorted to tenure agreements with farm owners. These tenure agreements would later be regulated by the government under the NTLA. In order to stay on farmland, they were subject to the harsh requirements of the NTLA with regards to labour tenancy. The labour tenancy system was for a maximum of three years under the NSCA and reduced to 6 months under the NTLA. Mere absenteeism could also lead to the termination of the agreement. The labour tenant and his family would be evicted one month after the eviction order by the LTB. Failure of which would lead to a criminal offence under the NTLA. The LTB took the bargaining power between the labour tenant and owner of the farm away with its establishment. The labour tenancy cannot be discussed without the inclusion of the land dispossession discussion. The importance of the historical overview is to illustrate the legislation that brought about the labour tenancy system and the legislation prior thereto, to understand the entire concept and what the current legislation is attempting to redress. The following chapter will compare the legislation discussed here to the LTA to determine whether there is a difference between the past and present legislation.

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CHAPTER 3: THE LEGAL FRAMEWORK REGARDING LABOUR TENANCY

3.1 INTRODUCTION

The disputes of labour tenancy, in South Africa, are complicated and contentious.[227] The topic is contentious because it represents a conflict that has existed for more than 100 years regarding the protection of tenure as well as accessibility to land.[228] On the one hand is the white commercial farmer who has the right to ownership, subject to limitations in terms of section 36 of the Constitution, over the land.[229] On the other hand are the labour tenants, who have often enjoyed much longer tenure with the land than the farmer who is the registered owner.[230] In many cases black families were the owners of the land since pre-colonial times but the land was deprived with racial discriminatory laws.[231] The shift from owners to merely labour tenants changed the status or relationship blacks had with the land because they had no proof of ownership since there was an absence of a registered title deed with the Deeds Office.[232] This placed labour tenants extremely vulnerable to evictions and displacement.[233]

In light of the injustices created by the racial discriminatory legislation, the democratic government had to enact legislation to redress and settle the land disputes.[234] The so-called 'Native question' now became the 'labour tenant question' under the new constitutional dispensation. Neither the government under apartheid nor the democratic one was eager to solve the labour tenant issue.[235] For example, there was no mention of any land tenure provisions for labour tenants in the 1991 White Paper on Land Reform published by the apartheid government. However, the influence of the Freedom Charter and the impact of land rights organisations led to the recognition of the rights of labour tenants by the new democratically elected government.[236] Despite the inclusion of labour tenant rights in the policy of the democratic government, in practice the labour tenants did not receive their needed attention due to the

[227] Crowling M, Hornby D and Oettlé "Research report on the Tenure of Security of labour tenants and former labour tenants in South Africa", AFRA, June 2017 3.
[228] Williams G 'Transforming labour tenants: A critique of the Land Reform (Labour Tenants) Act of 1996' University of the Witwatersrand seminar paper of 30 September 1996 1.
[229] Section 25 and 36 of the Constitution.
[230] Crowling M, Hornby D and Oettlé "Research report on the Tenure of Security of labour tenants and former labour tenants in South Africa", AFRA, June 2017 3.
[231] Boudredux K 'Land reform as social justice the case of South Africa' 2010 *Blackwell* 14.
[232] Du Plessis W and Pienaar J 'The more things change, the more they stay the same: The story of communal land tenure in South Africa' (2010) 16 *Fundamina* (1) 79.
[233] Williams G 'Transforming labour tenants: A critique of the Land Reform (Labour Tenants) Act of 1996' University of the Witwatersrand seminar paper of 30 September 1996 1.
[234] Section 25(9) of the Constitution.
[235] Crowling M, Hornby D and Oettlé "Research report on the Tenure of Security of labour tenants and former labour tenants in South Africa", AFRA, June 2017 5.
[236] Crowling M, Hornby D and Oettlé "Research report on the Tenure of Security of labour tenants and former labour tenants in South Africa", AFRA, June 2017 5.

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competing rights between landowners and labour tenants; and the governmental bodies could not process all the claims under the new enacted land legislation.[237]

The question now arises, whether the LTA has achieved its objectives. This chapter explores this question. Before these legislative instruments are considered, the chapter explains the attention given to labour tenants in international law and the South African Constitution. The drafting of the Constitution of South Africa was inspired by international law and it makes provision for international law to be considered when interpreting subsidiary legislation.[238] Therefore international standards that shaped the Constitution have to be looked at to understand its legislation. The provisions of the LTA and that of the Union legislation, namely the NSCA and the NTLA will be discussed and compared, to answer the question posed in this chapter. Following a discussion of the Land Tenure Security Bill (hereinafter referred to as *"the Bill"*). The Bill was proposed by the DRLR to repeal the LTA and ESTA into one consolidated piece of legislation.[239] The persons protected by the Bill, the rights and duties of such persons, its eviction procedure be discussed and will be analysed. The eviction procedure of the Bill and LTA will be compared to determine if it provides better protection against evictions and provide more or less property rights.

3.2 LABOUR TENANCY IN INTERNATIONAL LAW AND THE SOUTH AFRICAN CONSTITUTION

International law influenced the drafters of the transformative Constitution of South Africa.[240] The Universal Declaration of Human Rights (UDHR)[241] with its two binding Covenants: the International Covenant on Civil and Political Rights (ICCPR)[242] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[243] were considered during the drafting of the Constitution and enactment of subsidiary legislation.[244] The UDHR and ICESCR hold economic, social, and cultural rights that are linked to the accessibility of land. These rights include the right to housing, food, health, and labour. Housing is internationally recognised as a basic human right which should be interpreted broadly as

[237] Crowling M, Hornby D and Oettlé "Research report on the Tenure of Security of labour tenants and former labour tenants in South Africa", AFRA, June 2017 5.
[238] Section 39 of the Constitution.
[239] Land Tenure Security Bill of 2010.
[240] Kapindu RE 'The influence of international human rights law on South African labour and housing law' (2009) 10 ESR Review 4 6-8.
[241] Universal Declaration of Human Rights 1948 (1948) UN Resolution 217A (III).
[242] International Covenant on Civil and Political Rights 1966 (1966) 171 UN Treaty Series 999.
[243] International Covenant on Economic, Social and Cultural Rights 1966 (1966) 3 UN Treaty Series 933.
[244] Wickeri E and Kalhan A 'Land rights issues in international human rights law' (2010) *Institute for human rights and business* 4-5.

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'the right to live somewhere in security, peace and dignity.'[245] Security of tenure and protection against forced or arbitrary evictions, are international standards. This again ensures the right to housing. All evictions must be just and governments must adopt domestic legislation to ensure this.[246] These rights are crucial when considering the position that the legislation discussed in chapter 2 placed labour tenants, especially the fact that it made them extremely vulnerable to evictions.

The Bill of Rights in the Constitution of South Africa was inspired by the social and economic rights of the ICESCR.[247] It inspired section 26 and subsidiary legislation. Section 26(3) reads that no person may be arbitrarily evicted or have his or her home destroyed.[248] The competent court may only order an eviction if it deems it just and equitable, after considering the circumstances of the evictee.[249] As internationally recognised, no force, unlawful or arbitrary evictions are permitted.[250] Furthermore, the property clause, section 25, ensures the redress of the injustices concerning tenure security suffered by persons or communities in the past due to racial discrimination.[251]

3.3 LAND REFORM (LABOUR TENANTS) ACT 3 OF 1996

Section 25(6) states that '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.'[252] The rights associated herewith are the right to housing; health care, food, water, and social security; to dignity; equality and cultural, religious, and linguistic communities, amongst other rights.[253] The LTA is the subsidiary legislation enacted to protect land rights and provide tenure security to labour tenants.[254] This section considers the objectives of the LTA. Thereafter, it compares the LTA to previous racially discriminatory pieces of legislation, specifically the eviction provisions of the NSCA and NTLA. It then discusses the eviction process set out by the LTA and compares the previous legislation with each other to determine whether its objectives have been met.

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[245] Wickeri E and Kalhan A 'Land rights issues in international human rights law' (2010) *Institute for human rights and business* 5.
[246] Wickeri E and Kalhan A 'Land rights issues in international human rights law' (2010) *Institute for human rights and business* 6-7.
[247] Kapindu RE 'The influence of international human rights law on South African labour and housing law' (2009) 10 ESR Review 4 4 6-8.
[248] Section 26 of the Constitution.
[249] Section 26 read with section 172(1)(b) of the Constitution.
[250] Wickeri E and Kalhan A 'Land rights issues in international human rights law' (2010) *Institute for human rights and business* 6-7.
[251] Section 25 of the Constitution.
[252] Section 25(6) of the Constitution.
[253] The Bill of Rights.
[254] Long title of the LTA.

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3.3.1 THE OBJECTIVES OF THE LAND REFORM (LABOUR TENANT) ACT

The primary objective of the LTA is to safeguard the tenure of labour tenants and their associates, with regard to the rights to residence or the cultivation of the land they live on.[255] Furthermore it is to enable the acquisition of land by labour tenants and any other matters related to them. The LTA acknowledges the previous discriminatory legislation based on race, which led to a systematic violation of human rights and a prevention of the acquisition of land.[256] Hence it aims to ensure that labour tenants and those associated by them have the 'full and equal enjoyment of human rights and freedoms.'[257] In addition hereto, it ensures the safeguarding of tenure and the opportunity to acquire land. Ultimately it aims to prohibit any further prejudice towards labour tenants.[258] The LTA is only applicable to evictions of labour tenants residing on a farm. Three categories of persons are protected under the LTA namely: labour tenants, their associates, and labour tenant claimants.[259]

In the words of Coertse the 'forgotten people who are described as labour tenants', were given a piece of the legislation to redress the injustices done in the past.[260] The LTA contrasts previously discriminatory legislation by framing it with the objectives of the transformative Constitution. It aims to redress the injustices caused by the previous legislation by the sanctions for the non-compliance with the eviction proceedings provisions; the just and equitable court orders are required in respect of evictions; the succession in title for the rights bestowed on labour tenants; and the prolonged period of labour tenancy to enjoy the rights bestowed to only labour tenants.[261] While the objectives of the LTA are clear and admirable, the implementation is problematic for various reasons.

Unfortunately labour tenants, unexpectedly, have not received as much attention during the land reform program's implementation, especially in light of the Freedom Charter's goals.[262] The main reason for this is most likely due to ineffective implementation of the LTA, by the DRDLR, which plays a pivotal role in its implementation.[263] Amongst other issues the DRDLR does not have the budgetary and/or

[255] Long title of the LTA.
[256] Long title of the LTA.
[257] Long title of the LTA.
[258] Long title of the LTA.
[259] Long title of the LTA.
[260] Coertse CJ 'Land Reform (Labour Tenants) Act 3 of 1996' (1998) *De Rebus* 37.
[261] Long title of the LTA.
[262] Wegerif M, Russel B and Grundling I "Still searching for security. The reality of farm dweller evictions in South Africa", Social Surveys and Nkuzi Development Association, December 2005 39.
[263] Crowling M, Hornby D and Oettlé "Research report on the Tenure of Security of labour tenants and former labour tenants in South Africa", AFRA, June 2017 14.

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resource capacity to fully implement the LTA.[264] For example, there were little efforts to recruit more employees or extend the budget for implementation expenses. Moreover, those who were recruited did not possess the necessary skill set to be of assistance for implementation.[265] Together with this, the implementation of the definition of the term 'labour tenant' creates a difficulty in proving the existence of labour tenancy.[266] As indicated in chapter 1 the difficulty lies in proving the three-part definition and that a claimant is not a farm worker.[267] To prove this is time consuming, expensive and the DRDLR provides limited assistance to prove claims of labour tenancy.[268] The following section will discuss evictions dealt with under the Union government compared to that of the LTA.

3.3.2 EVICTION UNDER UNION GOVERNMENT LEGISLATION VS THE LTA

In Chapter 2 the legislation that regulated labour tenants were discussed in detail. The impact of the NSCA and NTLA, amongst other legislation, was discussed. In this part the provisions that governed the eviction proceeding of labour tenants during the Union government era will be discussed. These provisions will be compared to that of the LTA.

3.3.2.1 Evictions of labour tenants under the Apartheid legislation

The agreements of labour tenants were terminated under the NSCA by way of the completion of the fixed-term contract or absenteeism of three months without the prior consent of the farmer.[269] The labour tenants could attend to crops on the farm after the termination of their agreement and reap it once it has matured. The structures erected by them on the farm could be removed if it was built with their material.[270] The non-compliance to vacate the farm upon the termination of the contract resulted in an offence.

In terms of the NTLA, a black person was deemed to an unlawful occupant when he continued to reside on land after his right to residence has expired.[271] The right to residence was coupled with any existing agreement between the landowner and a black person. If the agreement had no notice period to vacate

[264] Crowling M, Hornby D and Oettlé "Research report on the Tenure of Security of labour tenants and former labour tenants in South Africa", AFRA, June 2017 16.
[265] Crowling M, Hornby D and Oettlé "Research report on the Tenure of Security of labour tenants and former labour tenants in South Africa", AFRA, June 2017 15.
[266] Wegerif M, Russel B and Grundling I "Still searching for security. The reality of farm dweller evictions in South Africa", Social Surveys and Nkuzi Development Association, December 2005 36.
[267] *Mahlangu v De Jager* 1999 1 All SA 692 (LCC).
[268] Wegerif M, Russel B and Grundling I "Still searching for security. The reality of farm dweller evictions in South Africa", Social Surveys and Nkuzi Development Association, December 2005 36.
[269] Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 371-372.
[270] Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 371-372.
[271] Section 37(5) of 1936.

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the land the NTLA prescribed a period of such.[272] A labour tenant had three (3) months to vacate the land.[273] Once the black person is an unlawful occupant the owner of the land could lodge a complaint with the Black Commissioner of the district, for the eviction process to commence.[274] The NTLA established a labour control board with a Black Commissioner, to regulate labour tenants on farms and hold farmers accountable to each registered labour tenant on their farms.[275] The Black Commissioner had the authority to preside over eviction applications; investigate each matter; grant evictions orders; issue warrants; and direct the police force to execute it.[276]

The Black Commissioner would call upon the black person to show cause as to why he should not be evicted from the land with a notice.[277] The notice will indicate the date, time and place where the black person had to appear and provide reason to not be evicted from the land.[278] The police served this notice on the black person and provided a return of service, as proof of service to the labour control board.[279] The Black Commissioner would hear the evidence and investigate the matter.[280] In the event that the black person failed to prove that his right of residence should continue, a warrant of execution would be issued. The warrant would give any member of the police the authority to immediately evict the unlawful occupant.[281] The warrant of execution permitted the police to 'use and exercise such reasonable force as may be necessary.'[282]

3.3.2.2 Evictions of labour tenants under the LTA

The eviction of labour tenants and their associates may only be in respect of a court order by the court authorised by the LTA.[283] Only the landowner my institute eviction proceedings, except if the owner provides evidence under oath that (s)he supports the eviction proceedings.[284] The landowner must serve the labour tenant and Director-General with a notice of intention of eviction of the labour tenant and his associates, not less than two (2) calendar months.[285] The notice of intention must contain the reasons for the eviction of the labour tenant and his associates. Within the two months the Director-

[272] Section 37(5) of 1936.
[273] Section 37(5)(b) of 1936.
[274] Section 37(1) of 1936.
[275] Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* (2) 372-375.
[276] Section 37 of 1936.
[277] Section 37(1) of 1936.
[278] Section 37(1) of 1936.
[279] Section 37(2) of 1936.
[280] Section 37(3) of 1936.
[281] Section 37(3) of 1936.
[282] Section 37(4) of 1936.
[283] Section 5 of the LTA.
[284] Section 6(1) of the LTA.
[285] Section 11(1) of the LTA.

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General will 'attempt to mediate a settlement' any disputes between the labour tenant and landowner.[286]

The eviction order granted by the court may not be granted unless it is 'just and equitable'.[287] The term 'just and equitable' means the following: '…the term "just and equitable" relates to both interests, that is what is just and equitable not only to the persons who occupied the land illegally but to the landowner as well. He held that the term also implies that a court, when deciding on a matter of this nature, would be obliged to break away from a purely legalistic approach and have regard to extraneous factors such as morality, fairness, social values and implications and circumstances which would necessitate bringing out an equitably principled judgment.'[288] The eviction of a labour tenant would be just and equitable, given the circumstances, if a labour tenant has reached the age of 65 and is unable to work himself and he does not or refuses to appoint an associate to work in his stead.[289] Furthermore, if a labour tenant or his associated has 'committed a material breach' that has severed the relationship between the landowner and labour tenant to an irretrievable point.[290] The labour tenant and his associates may be evicted from the farm subject to the order being just and equitable in the given circumstances.[291] These are the substantive reasons of the eviction procedure by the LTA.

The eviction procedure can be limited by the age of the labour tenant, his death and the property rights of the landowner.[292] When a labour tenant reaches the age of 65 and he is unable to conduct labour to the landowner he must nominate his associate in his stead.[293] The labour tenant and his associates shall then not be evicted in terms of section 7 of the LTA.[294] Upon the death of a labour tenant his associates shall receive a 12 month notice to vacate the farm.[295] However if the property rights of the landowner is 'unfairly prejudiced' by the associates, the owner may apply for 'equitable relief' from the court.[296] The court must make a just and equitable order giving the circumstance.[297]

[286] Section 11(2)-(3) of the LTA.
[287] Section 7 of the LTA.
[288] *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) 1288 A-B.
[289] Section 7(2)(a) of the LTA.
[290] Section 7(2)(b) of the LTA.
[291] Section 7(3) & (4) of the LTA.
[292] Section 9 of the LTA.
[293] Section 9(1)(a) of the LTA.
[294] Section 9(1)(b) of the LTA.
[295] Section 9(2) of the LTA.
[296] Section 9(3) of the LTA.
[297] Section 9(3) of the LTA.

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Evicted labour tenants are entitled to compensation payment, which must be just and equitable.[298] The court has to take the following circumstances into account to determine the compensation amount:
'(a) the replacement value of such structures and improvements; (b) the value of materials which the labour tenant may remove; (c) the value of materials supplied by the' owner or his or her predecessors for the erection of such structures and improvements; (d) if the labour tenant has not been given the opportunity to remove the crop, the value of the crop; and (e) the circumstances which gave rise to the eviction, including the conduct of the parties.'[299] The eviction order may not be executed until this compensation is paid to the labour tenant.[300] The court may order that the labour tenant get a 'fair opportunity' by the landowner to remove structures and destroy improvements that were built by the labour tenant and 'tend to a crop which he or she is entitled, until it is ripe and thereafter reap and remove it.'[301]

An eviction order may not be granted pending the outcome for an acquisition of land claim.[302] Only if the court finds it fair, just and equitable based on special circumstances to evict such claimant.[303] An urgent application for the removal of a labour tenant and or his associates may be applied for if an 'imminent danger of substantial damage' to the property of the landowner or lessee.[304] This is the last resort if no other remedy is available to protect rights of the landowner.[305]

3.3.2.3 Evictions of labour tenants under the Union government legislation compared to the LTA
The Black Commissioner together with the LTB played a key-role in the eviction process under the Union government legislation. This body had the same authority as a court with a magistrate but it was unjust because there were no checks and balances provided - i.e. no right to appeal or question the decision of the Board. The provisions of the LTA validate an eviction with a court order only and in the court authorised by it namely the Land Claims Court. The court order must also be just and equitable in the given circumstances of labour tenant and associates. The court must further balance the competing property rights of the landowner and the labour tenant.

The notice period under the LTA provides for mediation unlike with the NTLA where notice was only give to appear before the LTB. As seen with the Gannahoek farm, mediation brought about great

[298] Section 10(1)(a) of the LTA.
[299] Section 10(2)(a)-(e) of the LTA.
[300] Section 10(3) of the LTA.
[301] Section 10(1)(b)(i) & (ii) of the LTA.
[302] Section 14 of the LTA.
[303] Section 14 of the LTA.
[304] Section 15 of the LTA.
[305] Section 15 of the LTA.

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results because both the landowner and labour tenants conceded and exercised their property rights equally. The landowner and labour tenants have a relationship therefore, the inclusion of mediation will allow for this relationship to continue existing. While a court proceeding will potentially sever the relationship because win-lose approach.

Although the right to property has subject to limitations during the Union government era, the landowners heavily relied there upon with evictions. The labour tenants had to show cause as to why they should not be evicted under the NTLA. This means that the landowner did not have to provide reasons as to why the labour tenants must be evicted. The agreement of service, reasonable notice and right to ownership was the only reasons one can infer the landowner relied upon. The LTA is a true reflection of the right to ownership not being absolute. The landowner is required to substantiate the eviction of the labour tenant and his associates in the notice of intention to evict. The mere fact that he is the owner of the land is no longer sufficient to evict.

Labour tenants were forcefully removed by the any member of police immediately with a warrant of execution by the LTB and Black Commissioner. Section 26(3) of the Constitution prohibits the forceful eviction of a person their home. The LTA does not permit the forceful or arbitrary evictions of labour tenants and his associates. Only urgent eviction applications allow for the immediate removal of a labour tenant and his associate. The LTA went further with just and equitable compensation which must accompany the eviction order. Hence a labour tenant and his associates may not be evicted unless the compensation is paid to him. It is evident that the eviction procedure under the LTA compared to that of the Union government is just and strikes a balance between the competing property rights of the landowner and labour tenant. The following part discusses the Land Tenure Security Bill proposed by the DRDLR to consolidate the LTA and ETSA.

3.4 THE LAND TENURE SECURITY BILL OF 2010

The National Land Tenure Conference of 2001 and National Land Summit of 2005 together with the DRDLR agreed that the implementation, interpretation, and enforcement of the LTA and ESTA are not on par with its objectives.[306] The DRDLR has determined the following implementation, interpretation, and enforcement issues:

(a) farm owners circumvent the implementation of ESTA and LTA provisions due to existing grey areas and as a result of this persons are being evicted while farm owners make one-side

[306] Land Tenure Security Bill of 2010.

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decisions to strip them from their rights. The grey areas are in the provisions of land legislation and caused by a lack of proper implementation of land policies, and such provisions.[307] In addition to this there is also a need for more administrative systems in respect of tenure security;[308]

(b) people who live on farms have limited access to justice when the circumstances call for it due to a lack of financial resources, and the government lacks a purposeful system for providing aid;

(c) current policy unintentionally encourages settlements on farms, which hampers access to social and economic infrastructure; and

(d) the provision of accommodation that is linked to an employment contract is discouraged by uncertainty regarding the potential assertion of tenure rights.[309]

The proposed Bill aims to redress these issues by: 'tighten up legislation by, amongst other things, creating substantive rights in land for occupiers; implement a well-resourced programme of information dissemination, support to farm dwellers and enforcement of the tenure laws; proactively create new, sustainable settlements in farming areas; and proactively create new, sustainable settlements in farming areas; and more effective system for the monitoring of arbitrary evictions, in particular a rapid response system for evictions, eviction threats or retrogressive measures with significant consequences.'[310] It is for this very purpose that the clauses of the Bill must be explained, discussed and compared with the LTA since it will be the future of occupants under ESTA and labour tenants and their associates under the LTA. The persons protected by the Bill, the rights and duties of such persons, its eviction procedure will be discussed and it will be analysed. The aforementioned shall be done to determine if the Bill provides more protection to land and property rights than the LTA.

3.4.1 Persons protected by the Bill

Clause 7(1), namely persons residing on farms is a catch-all provision, states that a person residing on someone else's land with his consent or has rights to reside on the land excluding the exercise of mineral land rights.[311] Clause 7(2) has the same wording as the current LTA labour tenant definition but

[307] Dhliwayo P 'Tenure security and farmland: Will recent policy and legislation development improve the plight of rural dwellers' (2014) 25 *SLR* 1 143.
[308] Dhliwayo P 'Tenure security and farmland: Will recent policy and legislation development improve the plight of rural dwellers' (2014) 25 *SLR* 1 143.
[309] Memorandum on the object of the Land Tenure Security Bill of 2010.
[310] Memorandum on the object of the Land Tenure Security Bill of 2010.
[311] Clause 7(1) of the Bill.

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if it is not complied with persons will still be covered by section 7(1).[312] Five groups of people are covered by the Bill, some of which overlap somewhat. These groups include people who reside on farms; people who are employed on farms; persons who are connected to others who are employed or reside on farms; farm owners and authorized agents; and people who have permission to reside there.[313]

3.4.2 Rights and obligations of persons residing on farms and farm owners

The rights of persons residing on farms include: the right to crop and graze; to keep livestock; to erect houses and homesteads and rights associated therewith; access to roadways; visitation rights; burial rights; skills development for commercial farmers; access to education and health services; Labour Relations Act (LRA) employee rights and rights associated thereto.[314] These rights can be limited by 'reasonable conditions' by the farm owner 'in order to safeguard life or property on the land.'[315] The persons residing on a farm is obligated to conduct labour in terms of their employment agreement.[316] Furthermore, to not 'intentionally or unlawfully harm' any farm resident; 'cause material damage' to the belongings of the farm owner; or aid a person to unlawfully occupy the land by erecting 'new dwellings.'[317]

The farm owner on the other hand, has the right to property, employer rights under the LRA, family rights and the right to dignity.[318] These rights are limited by 'reasonable conditions' of the Bill.[319] Farm owners are obligated to not 'intentionally or unlawfully harm' any farm resident; 'cause material damage' to the belongings of the persons residing or working on the farm; withhold persons residing and working on farms from education, health or any public service; or violate any LRA provision or other employment legislation.[320]

[312] Clause 7(2) of the Bill.
[313] Pienaar JM and Kamkueman A "Farmland and tenure security: New policy and legislative developments' (2011) 3 *SLR* 731.
[314] Clause 15 of the Bill.
[315] Clause 15 of the Bill.
[316] Clause 16 of the Bill.
[317] Clause 16 of the Bill.
[318] Clause 13 of the Bill.
[319] Clause 13 of the Bill.
[320] Clause 14 of the Bill.

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3.4.3 The eviction procedure

The Bill broadens the scope of eviction by including constructive eviction.[321] This means that an eviction can occur by an 'any act or omission resulting in the permanent or temporary removal of a person residing on farm against her or his will from her or his home or land being occupied.'[322] Constructive eviction may occur by, amongst other things, withholding access to residence on the farm or a denial of burial rights.[323]The landowner must first serve a 30 day notice of cancellation for the right to residence of the persons residing on the farm.[324] The lawful cancellation of the right to residence must be just and fair.[325] The right to residence governed by an employment contract is cancelled once it expires, the person resigns or by dismissal. In the event that a dispute arises with regards to the termination of the employment contract the right of residence will not be affected until the dispute is resolved in terms of the LRA. [326]The right of residence of a person who has been on the land for more than 10 years, is 60 years of age and is unable to work can only be evicted if he contravenes one of the obligations contained in clause 16.[327] Upon the death of the person residing on the land, his family members shall receive a 12 months' notice to vacate unless they contravene clause 16. The owner however may enter into an agreement with the family member to either extend or shorten the period of the right to residence.[328] If the right to residence is cancelled during the application for the acquisition of land application, it shall be considered void.[329]

Once the right to residence has been cancelled and the person residing on the farm has not vacated the land, a written notice of intention to eviction must be served not less than three months.[330] The notice must be served on the persons affected, the local municipality manager of the area where the land is located, the Land Rights Management Board (LRMB) and the Director-General.[331] It must contain the reasons for the proposed eviction. Furthermore, the eviction procedure requires the following: '(a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed

[321] Clause 19 of the Bill.
[322] Clause 19 of the Bill.
[323] Clause 19 of the Bill.
[324] Clause 23 of the Bill.
[325] Clause 20(2) of the Bill.
[326] Clause 20(1) & (3) of the Bill.
[327] Clause 20(6) of the Bill.
[328] Clause 20(7) & (9) of the Bill.
[329] Clause 20(8) of the Bill.
[330] Clause 23(1)(a) & (b) of the Bill.
[331] Clause 23(1)(b) of the Bill.

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evictions, and, where applicable, on the alternative purpose for which the land or accommodation is to be used, to be made available in reasonable time to all those affected; (d) where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.'[332] The court may further appoint a probation officer or governmental official to submit a report, within a reasonable period. The report must include the 'availability of suitable alternative accommodation to the person residing on the land'[333]; identify which constitutional right will be affected; indicate the 'undue hardship' that the presence of the persons residing on the farm will have on the landowner; and any related matter arising out of the circumstances.[334] The Bill also makes provision for urgent eviction applications pending the final outcome of an application[335], under similar circumstances as the LTA.

All eviction orders granted may not render the evictees 'homeless or vulnerable' to the breach of any human rights contained in the constitution.[336] Upon the satisfaction of the court that both the procedural and substantive aspects have been complied with it must grant a just and equitable eviction order.[337]
The court shall make a just and equitable decision based on the grounds for the eviction and the fairness of the contractual terms between the landowner and persons residing on the farm.[338] An eviction order may only be executed two months after it has been granted.[339] The local municipality manager, LRMB and the landowner must submit a plan to the court detailing the suitable alternative land available for the evictees.[340]

3.4.4 Analysis of the Bill

The existing grey areas highlighted by the DRDLR indicated that, the policies and land tenure legislation enacted for tenure security are insufficient in its protection for labour tenants.[341] The problem

[332] Clause 20(10)(a)-(h) of the Bill.
[333] Clause 23(2) of the Bill.
[334] Clause 23(2)(a)-(d) of the Bill.
[335] Clause 22(2) of the Bill.
[336] Clause 20(11) of the Bill.
[337] Clause 24(1) & (2) of the Bill.
[338] Clause 24(3) of the Bill.
[339] Clause 25 of the Bill.
[340] Clause 25 of the Bill.
[341] Dhliwayo P 'Tenure security and farmland: Will recent policy and legislation development improve the plight of rural dwellers' (2014) 25 *SLR* 1 143.

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with the implementation of the provisions of the LTA begins with the definition of the term 'labour tenant'. Eviction proceedings are instituted at the Magistrates' Court (MC) and later has to be referred to the Land Claims Court (LCC) because respondent claims labour tenancy.[342] The appropriate court and jurisdiction becomes a problem which leads to the incorrect reliance and application of land tenure legislation. Although the LTA has been amended to make a clear distinction between labour tenants and farm workers it is clear that the confusion prevails.[343] This is because on the one hand the claimant has to prove all elements of the three-part definition and this in itself is difficult. While on the other hand the landowner must prove that the claimant is a farm worker.[344] Together with the definition problem is, for those who did qualify as labour tenants, the finalisation of land acquisition claims are sluggish. The LTA thus is not appropriately securing tenure and is also failing to develop the residential conditions on farms.[345] The DRDLR is well aware of the shortfalls of the land tenure legislation with regards to tenure security and poor implementation of its other initiatives, including tenure reform programmes. It was on this basis that it proposed the Bill to advance the tenure reform programmes and secure tenure rights.[346] The difference between the Bill and LTA will be identified followed by the critique of authors Dhliwayo, Pienaar and Kamkuemah.

The clauses of the Bill differ significantly from the provisions of the LTA. The repeal and consolidation of ESTA and the LTA will eliminate the problems regarding jurisdiction when eviction applications are instituted. Five categories of persons are protected by the Bill and their family members, as defined by the Bill, shall receive respective tenure security. Constructive eviction shall be included as a form of removing persons from the farm and is prohibited by the Bill. The list of detailed rights in clause 15 does not distinguish between persons covered by ESTA and the LTA, all persons residing on farms shall receive the same rights. Unlike the LTA eviction orders may not be granted in the absence of suitable alternative land. A person residing on a farm with or without consent may continue to reside on the farm subject to certain condition according to clause 11. This right to reside on a farm with consent

[342] Dhliwayo P 'Tenure security and farmland: Will recent policy and legislation development improve the plight of rural dwellers' (2014) 25 *SLR* 1 150,151.
[343] Dhliwayo P 'Tenure security and farmland: Will recent policy and legislation development improve the plight of rural dwellers' (2014) 25 *SLR* 1 150,151.
[344] Dhliwayo P 'Tenure security and farmland: Will recent policy and legislation development improve the plight of rural dwellers' (2014) 25 *SLR* 1 150,151.
[345] Dhliwayo P 'Tenure security and farmland: Will recent policy and legislation development improve the plight of rural dwellers' (2014) 25 *SLR* 1 150,151.
[346] Dhliwayo P 'Tenure security and farmland: Will recent policy and legislation development improve the plight of rural dwellers' (2014) 25 *SLR* 1 150,151.

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shall be binding on successors in title. The right to reside is not coupled with an employment agreement or being unemployed on the farm due to retirement age.

The author Dhliwayo, believes that the Bill will be in alignment with the constitutional values since it provides more tenure security than the current land tenure legislation.[347] However, the Bill does not address the issues at hand, that being the implementation of the land tenure legislation amongst other things. Moreover, she prefers the amendment of ESTA and the LTA respectively.[348] The Legislature can use this Bill as a guideline to improve these pieces of legislation. The reason for this is that the consolidation of ESTA and the LTA will not be practical since occupants and labour tenants enjoy different rights.[349] Furthermore, the persons residing on the farm shall have all the listed rights but the landowner has a negative duty towards it. This means that the landowner need not act proactively.[350]

The Bill is in contrast to the White Paper on the South African Land Policy of 1997 that highlights the establishment of 'long-term security for farm dwellers', according to Pienaar.[351] The Bill and its Draft Policy rather focuses on 'settlement paradigm'.[352] The categories of persons covered by the Bill exclude persons residing in forest, resorts and land other than municipal areas which were protected by ESTA. Should the Bill be promulgated into legislation an entire class of persons will be vulnerable and prone to evictions and legal ambiguities will be cause with regards to the term 'agricultural land'.[353] The clauses referring to the notices of eviction, Chapter 6 and 7 are drafted vaguely. The notice period of two months is insufficient for the respective parties to devise and submit on a plan for suitable alternative land.[354] Moreover, guidelines should be provided to set a structure for this plan and the court should be included in this process. The Bill is silent on compensation payments for those who eventually will face eviction as in the ESTA and the LTA.[355] The authors Pienaar and Kamkuemah believes that the Bill can provide more than its proposing.[356] For the aforementioned reasons and

[347] Dhliwayo P 'Tenure security and farmland: Will recent policy and legislation development improve the plight of rural dwellers' (2014) 25 *SLR* 1 154-158.
[348] Dhliwayo P 'Tenure security and farmland: Will recent policy and legislation development improve the plight of rural dwellers' (2014) 25 *SLR* 1 154-158.
[349] Dhliwayo P 'Tenure security and farmland: Will recent policy and legislation development improve the plight of rural dwellers' (2014) 25 *SLR* 1 154-158.
[350] Dhliwayo P 'Tenure security and farmland: Will recent policy and legislation development improve the plight of rural dwellers' (2014) 25 *SLR* 1 154-158.
[351] Pienaar JM 'Land Reform' (2014) 451-453.
[352] Pienaar JM 'Land Reform' (2014) 451-453.
[353] Pienaar JM 'Land Reform' (2014) 451-453.
[354] Pienaar JM 'Land Reform' (2014) 451-453.
[355] Pienaar JM 'Land Reform' (2014) 451-453.
[356] Pienaar JM and Kamkueman A 'Farmland and tenure security: New policy and legislative developments' (2011) 3 *SLR* 740.

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because the list of rights contained in the Bill cannot be exercised by all persons residing on farms. Clause 7(1) clearly has the definition of person receiving protection by ESTA and 7(2) that of a labour tenant.[357] Furthermore, the Bill does not make a clear distinction between long-term occupiers and occupiers. Unfortunately, not all persons residing on farms can claim the right to crop and graze or have burial rights.[358]

The inclusion of constructive eviction amongst other things provides slightly more security of tenure. Looking at the constructive eviction that took place in Colenso during the early 1990, this is a step in the right direction to secure tenure. The inclusion of suitable alternative land resonates with section 26 of the Constitution and confirms correlation between socio-economic rights and the property clause. I agree with the shortfalls of the Bill highlighted by the authors. However, it must be added that the Bill could have been suitable if it was in line with the 1997 White Paper on Land Reform and permitted the transferability of the right to use and occupy the land like the LTA. The provision that permits the transfer of the right to use and occupy the land is significant to the LTA. The Bill provides for consent to be successive in title instead. The inclusion of a clear distinction between labour tenants, long-term occupant and occupants; and their respective rights; and entitlements it would have been suitable. As the author Dhliwayo stated the current problem is the implementation of the legislation. This means even if the Bill was flawless and properly drafted the problem of implementation would still exist. Therefore, leaving the definition of the term 'labour tenant' as is and consolidating the poorly drafted LTA with the overlapping provisions of ESTA, in respect of a farm worker, will add fuel to the fire.

3.5 CONCLUSION

The prospects of the Bill providing sufficient protection to secure tenure for labour tenants are good. However, the Bill falls short compared to the LTA which permits the transferability of the right to use and occupy the land. Therefore, the LTA provides more benefits with regards to the protection of tenure rights of labour tenants while the Bill has one-size-fit-all" approach. ESTA has subsequently been amended and the chances of the Bill being promulgated into legislation is slim. Hence the application of the existing legislation, including the definition of labour tenant in the LTA remains a problem but is of great importance. A person can only enjoy the protection of the LTA if they comply with the definition three-part of labour tenant. Thus the term labour tenant of utmost importance. It is the gateway of all

[357] Pienaar JM and Kamkueman A 'Farmland and tenure security: New policy and legislative developments' (2011) 3 *SLR* 731,733.
[358] Pienaar JM and Kamkueman A 'Farmland and tenure security: New policy and legislative developments' (2011) 3 *SLR* 733.

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rights and benefits deriving from the LTA. If a claimant falls short of this definition, he is deemed to be a farm worker whom only enjoy tenure rights and cannot claim the acquisition of land in terms of Chapter 3 of the LTA. The following chapter considers how the courts have interpreted this term.

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CHAPTER 4: THE COURT'S INTERPRETATION OF THE TERM 'LABOUR TENANT'

4.1 INTRODUCTION

The protection of the LTA is conditional upon a person qualifying as a labour tenant. Accordingly interpreting the term labour tenant is of utmost importance to the realisation of the rights to be exercised through the Act. The definition of the term labour tenant created uncertainty of its interpretation in the courts.[359] As quoted earlier, the definition has three parts. It means a person:

> '(a) who is residing or has, the right to reside on a farm
> (b) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph, or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and
> (c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm, including a person who has been appointed a successor to a labour tenant in accordance with the provisions of, section· 3(4) ·and (5), but excluding a farmworker.'[360]

The courts have followed two opposing interpretations of the definition of labour tenancy as provided for in the LTA, namely a broad and narrow interpretation of the definition. [361] The broad interpretation had a disjunctive interpretation of the definition whereby meeting any two parts of the three-part definition was sufficient to be identified as a labour tenant.[362] The claimant need only to comply with paras (a) and (b); or (a) and (c); or merely para (c) to qualify as a labour tenant.[363] In contrast, the narrow interpretation had a conjunctive interpretation of the definition and a person had to meet all three parts of the definition to be identified as a labour tenant.[364] The claimant has to comply with paras (a), (b) and (c) of the definition of the term labour tenant.[365]

The narrow interpretation had the potential to exclude claimants if they fall short of the definition. [366] The narrow conjunctive interpretation appears to disqualify all first-generation labour tenants.[367] The wording of para (c) of the definition of term labour tenant is claimed to be ambiguous and 'open invitation to varied interpretations'. This means that a number of claimants will not be protected by the

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[359] *Tselentis Mining (Pty) Ltd and Others v Mdlalose and Others* 1998 (1) BCLR 104 (N).
[360] Section 1 of 1996.
[361] *Mahlangu v De Jager* 1999 (1) All SA 692 (LCC) and *Tselentis Mining (Pty) Ltd and Others v Mdlalose and Others* 1998 (1) BCLR 104 (N).
[362] *Tselentis Mining (Pty) Ltd and Others v Mdlalose and Others* 1998 (1) BCLR 104 (N).
[363] *Klopper and others v Mkhize and others* 1998 (1) SA 406 (N).
[364] *Mahlangu v De Jager* 1999 (1) All SA 692 (LCC).
[365] *Ngcobo and Others v Salima CC; Ngcobo and Others v Van Rensburg* 1999 (2) SA 1057 (SCA).
[366] Crowling M, Hornby D and Oettlé 'Research report on the Tenure of Security of labour tenants and former labour tenants in South Africa", AFRA, June 2017 9-11.
[367] A first-generation labour tenant is a person who resides on the land; has the right to use and occupy the land; but whose parents or grandparents did not have the right to use and occupy the land of the same owner where the labour tenant lives.

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LTA and drastically limit the scope of the LTA which will ultimately frustrate its objectives.[368] The broad interpretation would temper the definition significantly because the word 'and', at the end of para (b), would have to be alternated to 'or', to claim labour tenancy.[369] Words can only be read in or alternated to avoid an 'unreasonable, inconsistent or unjust' meaning in the interpretation thereof.[370] No such meaning comes forth because of the narrow interpretation and should the courts do so it would create technical irregularities and cause absurdities. In this regard the narrow, conjunction, interpretation was set as the precedent for the definition of the term labour tenant.[371]

The landmark cases on the interpretation of the definition of term the 'labour tenant' are discussed in this chapter. The different court decisions will then be compared to one another to determine which interpretation includes more labour tenant claimants.

4.2 CASES REGARDING THE INTERPRETATION OF THE TERM LABOUR TENANTS

The cases in which the court interpreted the definition of the term labour tenant are discussed in this section in chronological order: (a) *Mahlangu v De Jager*; (b) *Zulu and others v Van Rensburg and others: (c) Klopper and others v Mkhize and others;(d) Tselentis Mining (Pty) Ltd and Others v Mdlalose and Others*: (e) *Ngcobo and Others v Salima CC; Ncgobo and Others v Van Rensburg*; and (f) *Andendorf NO and another v Kubheka and another*. The first two cases were heard by the Land Claims Court. The third and fourth cases were heard by the Natal High Court. The statuses of these courts are the same. The fifth case was heard by the Supreme Court of Appeal, binding both the Land Claims Court and the High Courts. All five of these matters were heard between 1996 and 1999. The sixth and final case, discussed here, was decided a full 20 years after the SCA matter, also by the SCA. Borne in mind that the SCA has the inherent power to develop common law and set precedents binding lower courts.[372] These cases are significant because it laid the foundation for the interpretation of the definition of the term labour tenant. Moreover, the only two cases recorded to have disjunctively interpret the definition are included here. The SCA cases confirmed that the conjunction interpretation of the definition and has to be discussed since it is considered to be law. Each case is discussed with reference to the facts, legal question before the court, etc.

[368] Crowling M, Hornby D and Oettlé 'Research report on the Tenure of Security of labour tenants and former labour tenants in South Africa", AFRA, June 2017 9-11.
[369] *Ngcobo v Van Rensburg* 1999 (2) SA 525 (LCC) 542B-F.
[370] *Ngcobo and Others v Salima CC; Ngcobo and Others v Van Rensburg* 1999 (2) SA 1057 (SCA) 1067J-1067.
[371] 1067J-1067.
[372] Section 173 of the Constitution.

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4.2.1 *Mahlangu v De Jager* (LCC)[373]

4.2.1.1 Facts

The respondent sought an eviction order from the Bethal Magistrates' Court to evict Mr Mahlangu, the applicant and his family.[374] On 9 April 1996, the applicant and his family were evicted from the farm. The applicant sought an urgent application on the basis of section 16 of the LTA for the restoration of his rights.[375] The applicant sought for the following rights, amongst others to be restored: to reside on the farm; to occupy the house he used to live in with his contents therein; to keep his livestock; and utilise the portion farm he previously used. The applicant further sought to be regarded as a labour tenant for purposes of the LTA.[376]The court held that the applicant must first comply with the definition of the term labour tenant in order for him to claim and benefit rights under the LTA. The applicant did not disclose the compliance of the three-part definition in his affidavit.[377] The court ordered that the applicant start proceedings *de novo* due to the lack of disclosing crucial evidence in his affidavit and procedural errors on his part.[378]

The grandfather of the applicant initially came to the Banklaagte farm.[379] The applicant and his father had been born and raised on the farm of the respondent. The relatives of the applicant were buried on the farm. The applicant had his house built on the farm and resided there with his family. The applicant had the right to crop and graze on a portion of the respondent's land. In total the applicant had 30 chickens, 25 cattle, 8 goats, and 5 dogs on the farm.[380] The applicant thus had the right to reside on the farm for most of his life and had lived there until February 1996, when the respondent instituted eviction proceedings at the Magistrates' Court of Bethal.[381]

The applicant was also a general worker and tractor driver on the farm.[382] His children assisted him with work during the harvest seasons while they were not formally employed by the respondent. The

[373] *Mahlangu v De Jager* 1999 (1) All SA 691 (LCC).
[374] *Mahlangu v De Jager* 1996 (3) SA 235 (LCC).
[375] *Mahlangu v De Jager* 1996 (3) SA 235 (LCC).
[376] *Mahlangu v De Jager* 1996 (3) SA 235 (LCC).
[377] *Mahlangu v De Jager* 1996 (3) SA 235 (LCC).
[378] *Mahlangu v De Jager* 1996 (3) SA 235 (LCC).
[379] *Mahlangu v De Jager* 1999 696A-J –705A-C.
[380] 696A–705C.
[381] 696A–705C.
[382] 696A–705C.

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respondent further permitted his children to work on his behalf whenever he was ill.[383] The applicant received the following remuneration, in cash and kind for his work done, from the respondent:

- 1L of milk for everyday he worked, which was 24 days a month;
- 80kg bag of sifted mealie meal p.m.;
- 10x 70kg bag of yellow mealies p.m.;
- 20x 70kg of white mealies p.a.;
- Cash bonus of R100 p.a.;
- R250 salary after the 1994 elections prior thereto it was R20 (the salary was increased to discourage the applicant from cultivating the land allocated to him); and
- R0.90 for the shearing of 30 sheep p.a.[384]

4.2.1.2 Issues and arguments[385]

As a preliminary question, the court had to consider whether the applicant, Mr Mahlangu, was a labour tenant in accordance with the LTA, in order for him to claim the restoration of his rights.

The respondent however alleged that the applicant is a farm worker and, therefore, excluded from being considered a labour tenant.[386] Accordingly, the court had to determine whether the applicant was a labour tenant or a farm worker on 2 June 1995. It distinguished the two concepts by stating that a 'farm worker is, by definition, a person who is paid predominantly in cash or in some other form of remuneration for the services he or she has to render, and not predominantly in the right to occupy and use land, and who is obliged to perform his or her services personally.'[387] This requires 'a weighing up of what the worker is being paid in the form of cash and other remuneration against his payment by way of a right to occupy and use land.'[388] The court therefore had to compare the remuneration earned and the value of the use of the land by the applicant. This is also known as the 'predominance test'.[389]

4.2.1.3 Finding of the court

The court found that the right to occupy and graze outweighed the remuneration. It was important that not only the value of the grazing be taken into account, but also the value of the residential occupation and use.[390]

[383] 696A–705C.
[384] 696A–705C.
[385] 696A–705C.
[386] 696A–705C.
[387] *Mahlangu v De Jager* 1996 (3) SA 235 (LCC) 6.
[388] *Mahlangu v De Jager* 1996 (3) SA 235 (LCC) 6.
[389] 696A–705C.
[390] 696A–705C.

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The court applied the narrow interpretation and found the applicant to be a labour tenant, which was straightforward because she complied with all the requirements provided for in the definition of labour tenant.[391] The court further set a precedent to determine the value of land compared to the remuneration received by an applicant with the 'predominance test'.

The court found that the applicant complied with the requirements in paras (a)-(c) of the definition of a labour tenant. His rights were therefore restored in terms is section 16 of the LTA.[392] Hence, there was no need to determine whether the definition could be read disjunctively, to allow someone to be deemed a labour tenant who does not meet all three of the requirements.

4.2.2 *Zulu and others v Van Rensburg and others* (LCC)[393]

4.2.2.1 Facts

The applicants in the matter had the right to crop and graze on the Nooitgedagt farms.[394] They had the following on the farm: (a) 155 head of cattle; (b) 180 head of small stock; (c) 16 horses and; (d) a kraal. The respondents acquired the farm from the previous owners and requested that the applicants conclude a written contract.[395] The terms of the contract were to continue the right of residence, subject to them working on the farm and it limited the number of livestock kept on the farm. The applicants refused to sign the contract due to the drastic limitation of the number of livestock they could keep on the farm.[396] The respondents threatened to evict them should they fail to sign the contract. Upon the persistent refusal to sign the contract the respondents served a written notice of eviction on the applicants. The applicants had seven days to remove their livestock.[397] The applicants failed to do so and the respondent subsequently removed the applicants' livestock from the farm and impounded it in terms of the Natal Ordinance. In response, the applicants thus applied for a *mandament van spolie* order.[398] From the facts, the parents/grandparents did not all live on the same farm as the applicants.[399] Some applicants, lived on different farms owned by the same owner and on others lived on different

[391] 696A–705C.
[392] 696A–705C.
[393] *Zulu and others v Van Rensburg and others* 1996 2 All SA 615 (LCC).
[394] 626G- 631E.
[395] 627A-631I.
[396] 627A-631I.
[397] 627A-631I.
[398] The speedy remedy, a *mandament van spoilie* allows an owner to recover property taken 'by unlawful self-help'. In Van der Walt A and Pienaar GJ *Introduction of Property Law* (2016) 7 ed 227.
[399] 626G- 631E. Briefly explain what the MvS remedy entails in a footnote with reference to standard sources on it.

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farms not owned by the same owner.[400] Moreover, they also received remuneration, potentially of a value higher than the grazing/cropping rights.[401]

4.2.2.2 Issues, Rationale and Finding of the court

The court first had to determine whether the applicants were labour tenants before it could grant the *mandament van spoilie* and rights claimed by the applicants in terms of the LTA.

The court confirmed the decision in *Mahlunga v De Jager* that the elements of the definition of labour tenant must be read conjunctively.[402] The plain meaning of the word 'and' contained in the definition was used to interpret the term conjunctively. The court held that it was the intention of the Legislature to include paragraph (c) by virtue of the word 'and' in the definition and that any other interpretation would lead to 'absurdity'.[403]

The court was satisfied that the applicants were labour tenants and had met the first two requirements of the definition.[404] The question turned on whether the applicants met the third requirement of the definition. In respect of the applicants whose parents/grandparents had lived on other farms owned by the owner, thanks to the word 'a farm' in para (c) of the definition the applicants could qualify as labour tenants. If the para read that it is the same farm referred to in paras (a) and (b) some of the applicants could not have qualified because their parents and grandparents enjoyed such rights for the former owner but on a different farm.[405]

A more difficult question was whether those applicants met para (c) whose parents/grandparents lived 'on other farms in the Vryheid district not forming part of the farms to which this dispute relates, but similarly provided labour to the owners or lessees of those farms as labour tenants in return for cropping and grazing rights'.[406] The court found that they did.[407] This was based on the 'context of the statute as a whole and its purpose.'[408] One of its purposes is protection against eviction, since labour tenants were so easily evicted in the past.[409] The court gave an example of 'a person whose predecessors had over the generations consistently been labour tenants…but had been forced by

[400] 626G- 631E.
[401] 626G- 631E.
[402] 631G-643B.
[403] 631G-643B.
[404] 631G-643B.
[405] 631G-643B.
[406] 634C.
[407] 634C.
[408] 635E.
[409] 635E.

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evictions to move from farm to farm.'[410] This person would not qualify as a labour tenant, while someone whose parents 'had been fortunate enough to avoid eviction' would.[411]

The court found that:

> 'What then in effect becomes a disqualifying criterion is the fact of past evictions, the very problem which the Act sought to deal with. A statute is presumed not to give rise to a harsh or discriminatory result. Such a result is avoided if the interpretation contended for by Mr Loots is adopted. It is clear that the legislature intended to protect a particular class of persons whose way of life had been based, over the generations, on labour tenancy, without confining it to that part of the class who had not been subject to eviction.' [412]

Based on this the court found that they complied with para (c), even though the farms their parents/grandparents resided on were owned by someone else.[413]

This case therefore supported the conjunctive approach, confirming also that all three parts of the definition would be complied with if the parents/grandparents lived on another farm owned by the owner. It also found that (c) does not require the parents/grandparents to have been labour tenants, but only that they had cropping or grazing rights. Para (c) is, therefore, complied with even if the parents/grandparents received remuneration of a greater value than the cropping or grazing rights.[414] Moreover, it interpreted para (c) to not require that the land on which the parents/grandparents resided be owned by the owner of the land in question.

4.2.3 *Klopper and others v Mkhize and others* (N)[415]

4.2.3.1 Facts

The 15 respondents who was residing and had been employed by the applicant on his farm unit in the Dundee area refused to report for work in August 1995.[416] The respondents received notices to terminate the employment contracts and subsequent thereto notices to vacate the farm. The applicant and respondent entered into contracts in terms of which their right to residence was dependent on their employment status.[417] However some respondents were no longer workers and nonetheless resided on the farm. The respondents refused to vacate the farm in July 1996 and an application to eject them and

[410] 635F-G.
[411] 635G.
[412] 635G-H.
[413] 635H.
[414] 634A-B
[415] *Klopper and others v Mkhize and others* 1998 (1) SA 406 (N).
[416] *Klopper and others v Mkhize and others* 1998 (1) SA 406 (N).
[417] *Klopper and others v Mkhize and others* 1998 (1) SA 406 (N).

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declare that they were not labour tenants was launched. The applicants argued that the respondents are not labour tenants on the basis that, by their admission, they do not comply with para (c).[418]

4.2.3.2 Issues and Finding of the court

The court had to determine whether the claimants were indeed labour tenants as averred in their affidavits.[419]

The court found that 'on the papers, there are sharp disputes on virtually all of the relevant issues'.[420] It had to determine whether oral evidence was necessary. In trying to persuade the court to hear the matters on the papers only, the applicants argued that the respondents could not be considered labour tenants. This is because they had admitted to not meeting para (c).[421] Based on the conjunctive approach, used in *Mahlangu* they can therefore not be labour tenants.

In dismissing this argument, the court made the following finding:

> 'It seems to me that in *Mahlangu's* case, no more was said, however, than that what must be read conjunctively are paras (a) and (b). It is true that in *Zulu's* case, it was said that all three paragraphs must be read conjunctively, but this may well have been the result of a misunderstanding by the Court of what had been said in *Mahlangu's* case. I am in any event unable, with respect, to agree with the interpretation given in *Zulu's* case. The definition is in more than one respect obscurely worded, but, in my view, it would in substantial measure stultify the object of the Act if para (c) were required to be read conjunctively with both paras (a) and (b). It may well have been intended that paras (a) and (b) must read conjunctively, but it seems to me that the further the intention was that para (c) must either be read on its own or conjunctively with para (a) only. I, in any event, see no warrant for all three paragraphs conjunctively.'[422]

The court held that the courts in the respective judgments came to an incorrect conclusion with regard to the interpretation of the definition of a labour tenant. [423] It further held that para (a) and (b) must be read conjunctively and para (a) and (c) could be read together or para (c) could be read alone. The matter was referred to the court a *quo* for parties to adduce oral evidence, as the affidavits submitted to the court had discrepancies.[424]

The learned judge suggests that the claimants must either, only have a right to reside on the farm and exercise cropping and grazing rights; or have the right to reside on the farm and his or her father or

[418] 408E-G.
[419] *Klopper and others v Mkhize and others* 1998 (1) SA 406 (N).
[420] 407C-D.
[421] 408E-H.
[422] 408 H-J.
[423] 408 H-J.
[424] 408 H-J.

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grandparents had or the right to crop and graze on the farm or a farm of the same owner; or only he or she must only be in compliance of the latter.[425] However the court did not provide reasoning for the remarks of the interpretations in the *Mahlangu* and *Zulu* cases. The merits of the case were also not given attention. Unlike the *Mahlangu* and *Zulu* cases discussed above, the interpretations by the learned judge create first-generation labour tenants with the disjunctive interpretation of paras (a) and (b).[426] This case, therefore, supports the disjunctive approach, even suggesting compliance with (c) alone as sufficient. As a result of the affidavits of the parties being in conflicting and differing in essential evidence, the matter was remanded for trial to hear oral evidence on the disputes.

4.2.4 *Tselentis Mining (Pty) Ltd and Others v Mdlalose and Others* (N)[427]

4.2.4.1 Facts

The first applicant was the owner of the Rustplaas farm and the second applicant had the right to 'fell, reap and remove trees on the farm'.[428] The respondents had the right to reside on the farm which was coupled with their employment contract. The applicants sought an eviction order from the Natal High Court (HC).[429] The 29 respondents facing eviction and 18 of them opposed the application. On 6 March 1997 the respondents had to return to court to show cause why the eviction order should not be granted.[430] The respondents alleged that they were labour tenants and were entitled protection under the LTA and that the HC did not have the jurisdiction to hear the matter. In particular, the fifth respondent has been residing on Rustplaas for 44 years with her children.[431] She has the right to crop and graze as per the verbal agreement with the farm owner. The father of the respondent was born on the farm, worked for the previous owners of the farm, and had the right to crop and graze.[432] The seventh respondent resided most of her life on the farm with her child and parents. She had cropping and grazing rights acquired by a verbal agreement with the farm owner. [433]

[425] 408 H-J.
[426] *Klopper and others v Mkhize and others* 1998 (1) SA 406 (N).
[427] *Tselentis Mining (Pty) Ltd and Others v Mdlalose and Others* 1998 (1) BCLR 104 (N).
[428] 105F-J.
[429] 107F-J.
[430] 106A-B.
[431] 114A-J.
[432] 114A-J.
[433] 117F-J.

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4.2.4.2 Issue and Finding

The court had to determine whether the labour claimants were labour tenants.[434]

In determining whether the respondents are labour tenants, the court agreed in part with the *Klopper* judgment[435] that the disjunctive approach should be followed. Either paras (a) and (b); or (a) and (c) is enough to comply with the definition of the term labour tenant. However, the court disagreed with the finding that (c) can be read alone:

> 'Turning to the definition of "labour tenant" itself, in the light of what I have already held with reference to other provisions of the Act, in my opinion, the word 'and' as used in such definition does not mean 'or''. It has its ordinary meaning but, in my opinion, giving it such meaning, in the context of the Act, and more particularly Chapter II thereof, its effect is not that paragraphs (a), (b) and (c) of the definition are to be read conjunctively; its effect is that paragraphs (a) and (b) are to be read conjunctively and paragraphs (a) and (c) are to be read conjunctively, but disjunctively from paragraphs (a) and (b).'[436]

The court justified this finding by way of an example:

> 'A person (A) who qualifies as a labour tenant as of 2 June 1995 in terms of paras (a) and (b) of the definition of 'labour tenant' has a son (B). A person (C) who qualifies as a labour tenant as of 2 June 1995 in terms of paras (a) and (b) of the definition of 'labour tenant' has a son (D). As of 2 June 1995 each of B and D resided or had a right to reside on the relevant farm, but neither B nor D had the rights envisaged by para (b) of the definition. A is alive as at 22 March 1996, the date of commencement of the Act. A can ensure that B has the benefits of the occupation and use of the relevant part of the farm and the concomitant rights by appointing B as his successor (s 3(3)(b)) or, if A dies without appointing a successor, A's family can appoint B as A's successor (s 3(4)). C died before 22 March 1996. There is no way in which para (c) of the definition of 'labour tenant' D can acquire the relevant benefits notwithstanding A that C, his father, enjoyed such benefits. This is manifestly unfair to D, who is prejudiced, as against B, by the mere accident that C has died before 22 March 1996, whereas A is alive as of such date. The legislature can hardly have intended such prejudice to exist. Certainly, no reason for such discrimination as between B and D occurs to me or, in my opinion, appears B from the Act.'[437]

The court held that the disjunctive interpretation should either be, a conjunctive interpretation of para (a) and (b) or (a) and (c).[438] The conjunctive interpretation in the *Mahlangu* and *Zulu* cases would have disqualified the respondents from claiming that they are labour tenants. The respondents were either in compliance with paras (a) and (b) or (a) and (c).

The court determined whether the 18 respondent, whom opposed the eviction application, were labour tenants. The court found the 5th respondent only in compliance with paras (a) and (b) of the

[434] 106G-I.
[435] *Klopper and others v Mkhize and others* 1998 (1) SA 406 (N).
[436] 111 G-H.
[437] 110 F-I.
[438] 109A-110I.

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definition.[439] In addition to this, the court did not see the need for her to prove the compliance with para (c). The 6th, 13th, 16th, 20th, and 29th respondents had similar circumstances as the 5th respondent and the court came to the same finding.[440] The court found that the respondent only had to prove being in compliance of para (c). The 8th and 21st-28th respondents had similar circumstances as the 7th respondent and the court came to the same finding.[441] The court ordered that the matter be referred to the court *a quo* for it to hear oral evidence by the parties in the case, as disputes arose in the affidavits.[442]

4.2.5 *Ngcobo and Others v Salima CC; Ncgobo and Others v Van Rensburg* (SCA)[443]

4.2.5.1 Facts

Ngcobo and Others v Salima CC

The Natal HC heard two matters together.[444] In *Salimba CC*, the second and fourth applicants did not comply with part (c) of the definition in that they did not have ancestors that had worked on a farm in return for rights of use and occupation of the land. They therefore contended that the definition should be interpreted disjunctively so that they only need to comply with two of the three parts of the definition (a) and (b).[445] The first and third applicants also did not comply with part (c). Two issues came to light with these appellants namely: the court had to determine whether owner of the farm in para (b) had to be the same as in para (c); and on whom the burden of proof rest to show that the applicants are not farmworkers?[446] The HC ordered against the applicants and an eviction order was granted.[447]

Ngcobo and Others v Van Rensburg

In *Van Rensburg*, the appellants did not comply with part (b) of the definition.[448] They complied only with parts (a) and (c) of the definition. They resided on the farm and their ancestors had rendered services to the owner but they had never done so.[449] They therefore sought a disjunctive approach to the interpretation of the definition of labour tenant, so that they only needed to comply with two of the

[439] 112J-117D.
[440] 117G-119F.
[441] 119G-120F.
[442] *Tselentis Mining (Pty) Ltd and Others v Mdlalose and Others* 1998 (1) BCLR 104 (N).
[443] *Ngcobo and Others v Salima CC; Ngcobo and Others v Van Rensburg* 1999 (2) SA 1057 (SCA).
[444] 1059I-1061A.
[445] 1059I-1061A.
[446] 1059I-1061A.
[447] 10661A.
[448] 1061B-1062A.
[449] 1061B-1062A.

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three parts of the definition ((a) and (c)).[450]The HC also ordered against the applicants and granted an eviction order.

4.2.5.2 Issues

The court addressed three issues.[451] It had to determine whether the applicants were labour tenants. In doing so, the court had to confirm whether the conjunctive or disjunctive interpretation should apply in subsequent cases.[452] Furthermore, whether the farm referred to in paras (a) and (b); and (c) must have the same owner or be the same farm. The duration of the right to reside to qualify as a labour tenant or farm worker and the on whom the onus rests to prove that the claimant is a farm worker was the other issue.[453]

4.2.5.3 Finding

The applicants in the matter were relying on the judgment in the *Tselentis* case (disjunctive approach), whereas the respondents relied on the one in the *Zulu* case (conjunctive approach).[454]

The SCA held that a labour tenant cannot be defined by only applying para (c) as in the *Klopper* judgment because it would permit any person living in the urban areas and not a particular farm, without the right to reside on that farm but whose predecessor had the rights as labour tenant on that farm, to qualify as a labour tenant on that farm.[455] The court further held that the conjunctive interpretation of paras (a) and (c) will completely ignore the existence of para (b). These interpretations were found to be absurd and not what the Legislature would have intended. The court reiterated, the purpose of the LTA, that it seeks to balance section 25 of the Constitution and the common law right to ownership must be struck and evictions must be interpreted in alignment thereof.[456] Therefore, it would not have been the intention of the Legislature to exclude para (b). The Legislature would have intended that the person alleging labour tenancy should be required to have cropping and grazing rights and not only inherit the right from his or her successors.[457]

The court referred to the court *a quo* and held that the conjunctive interpretation requires 'no modification of the definition, nor even the adoption of any secondary or unusual meaning for any of the

[450] 1061B-1062A.
[451] *Ngcobo and Others v Salima CC; Ngcobo and Others v Van Rensburg* 1999 (2) SA 1057 (SCA).
[452] *Ngcobo and Others v Salima CC; Ngcobo and Others v Van Rensburg* 1999 (2) SA 1057 (SCA).
[453] *Ngcobo and Others v Salima CC; Ngcobo and Others v Van Rensburg* 1999 (2) SA 1057 (SCA).
[454] *Ngcobo and Others v Salima CC; Ngcobo and Others v Van Rensburg* 1999 (2) SA 1057 (SCA).
[455] 1063 B-J.
[456] 1064 A-E.
[457] 1064 A-E.

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words in the definition…'.[458] Furthermore, the court held that the words 'and' and 'or' can be alternated when interpreting legislation. The need to alternate between the words would be in an instance when the interpretation creates an 'unreasonable, inconsistent or unjust' meaning.[459] In this case no such interpretation came about and it was not necessary to alternate between the words 'and' and 'or'. Therefore, the ordinary meaning of the word 'and' should be applied when interpreting the definition of a labour tenant, unless the context shows or very strong grounds illustrates that the Legislature intended otherwise.[460] The court held that the rulings made in the *Klopper* and *Tselentis* cases were based on the incorrect interpretation. The rulings made in the *Mahlangu* and *Zulu* cases are therefore the correct interpretations.[461]

With regards to para (c) the court held the following:

> 'I respectfully disagree with the decision of Hurt J in the court a quo that the rights under discussion should have been exercised by the present tenant and his or her parent or grandparent on a farm or farms belonging to the same owner or his or her predecessors or successors. I am of the view that the change from "the" farm to "a" farm in the definition cannot be ignored, i.e. that "a" cannot simply be replaced by "the". The same reasoning which I have applied earlier in this judgment in respect of 'and' and 'or'' would seem to me to be applicable.'[462]

The court further held that the definition should not be interpreted so strictly that it requires a pre-established historical relationship, between the alleged labour tenant and a specific farm owner of the grandparents or parents.[463] The same principle as explained above was applied in the words 'the' and 'a' farm to alternate between the two words due to the Legislature's intention to protect a broad class of persons. The court disagreed with the court *a quo* that a certain class of persons, successors and predecessors, and the same owners were intended to be protected.[464] The court further held that it could not have been the intention of the Legislature to protect a certain class of persons and deliberately exclude claimants merely because they exercised the right to crop and graze on a farm with a different owner than the farm their grandparents/parents had such right.[465] Hence the class of persons could not have only been second-generation labour tenants but also first generation.[466] The court was of the opinion that this broad interpretation will strike a balance between the rights of a labour tenant and the owner of the farm in a just and equitable manner. The court concluded that the farm

[458] 1066 G.
[459] 1068 A-C
[460] 1065 A-J and 1066 A-J.
[461] *Ngcobo and Others v Salima CC; Ngcobo and Others v Van Rensburg* 1999 (2) SA 1057 (SCA).
[462] 1072I-J.
[463] 1071C.
[464] 1072I.
[465] 1072J and 1073A.
[466] 1070A-1073C.

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referred to in paras (a) and (b) does not have the same owner as in para (c).[467] This means the farm owner where the claimant lives need not have the same owner as the farm where the parents or grandparents were labour tenants.[468]

With regards to the question of whether the applicants were farmworkers and therefore excluded from the definition of labour tenants. The issue was at which point in time the court had to look to determine whether someone was a labour tenant or a farmworker. The court gave different options: the present time, on 2 June 1995, or a broader period.[469] The court finally held the following:

> 'In my view, the only way to make sense of the confusion reigning in this area is to conclude that the proviso relating to 'farmworker' cannot, for the reasons advanced above, refer only to the present time. It must refer to the whole period in respect of which the present occupier, whose occupation is under attack, has been occupying the land in question. The proviso relating to farmworker applies not only to para (a) but also to (b), which also refers to the past.'[470]

The aforementioned had the effect of establishing labour tenancy after 2 June 1995, as the whole period can take place after this date.[471] This is confirmed by the court's finding that:

> 'It obviously could never have been the intention of the legislature to exclude from the protection of the Act anyone who has, since 2 June 1995, become a labour tenant as defined in the Act.' [472]

The court found that the court *a quo* interpreted the period to establish labour tenancy incorrectly. The claimant should not prove that he was a labour tenant on 2 June 1995 because his or her status could have interchanged between a farm worker and a labour tenant over the years.[473] The date of institution of the eviction proceedings or present date was also the incorrect period to determine labour tenancy. The court therefore held that the entire period when the claimant occupied and used the land must be considered. [474] The court upheld the appeal of *Salimba CC* and dismissed that of *Van Rensburg*.[475]

The court accordingly set a precedent for the interpretation of the definition of the term labour tenant. The court confirmed that the conjunctive interpretation should be followed when interpreting the term labour tenant. Furthermore, that the owner of the farm where the claimant resides and that of the parent or grandparent can differ; and claimants can become labour tenants post the cut-off date of 2 June

[467] 1070A-1073C.
[468] 1070A-1073C.
[469] *Ngcobo and Others v Salima CC; Ngcobo and Others v Van Rensburg* 1999 (2) SA 1057 (SCA).
[470] 1075 F-G.
[471] *Ngcobo and Others v Salima CC; Ngcobo and Others v Van Rensburg* 1999 (2) SA 1057 (SCA).
[472] 1075 E.
[473] 1074B-1076B.
[474] *Ngcobo and Others v Salima CC; Ngcobo and Others v Van Rensburg* 1999 (2) SA 1057 (SCA).
[475] *Ngcobo and Others v Salima CC; Ngcobo and Others v Van Rensburg* 1999 (2) SA 1057 (SCA).

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1995. The SCA has the inherent authority to bind the lower courts to this finding, which means that all lower courts must interpret the term labour tenant as such.

4.2.6 *Andendorf NO and another v Kubheka and another*[476]

4.2.6.1 Facts

The facts of the case referred herein are found in the LCC judgment and the issues and findings from the SCA judgment. Mr Kubheka, the Plaintiff, is a 69-year-old person born and raised on the Glen Barton farm (hereafter referred to as *"the GBF"*), Newcastle, KwaZulu Natal.[477] His parents had the right to crop and graze on the GBF and they worked on the farm without receiving remuneration. The Plaintiff and his siblings started working on the GBF when they were 11 years old.[478] His parents subsequently passed on and were buried on the farm.

The owner of the GBF passed on and his nephew Mr Theunissen became the person in charge. In 1975 Mr Theunissen asked the Plaintiff to move to his farm, also situated in the GBF valley, to conduct work for him. He moved with 20 cattle, 5 goats, and 2 horses.[479] He was given a designated area to build his homestead, the right to crop and graze, remuneration of R30, and mielies monthly while working on the farm. He got married, had children, and had a homestead with 8 structures on it. [480] There was no limit on the number of livestock he kept on the farm and two grazing camps for his cattle between the years 1975 and 2001. The wife of the Plaintiff sold the produce harvested, chickens and milk from their cows at the local market, for income to sustain a living. [481]

The farm was leased to Mr Van de Linde became between the years 1978 and 1984 after the passing of Mr Theunissen. During this time, the remuneration of the Plaintiff remained R20 and mielies per month and his rights continued. [482] In 1986 the wife of Dr Andendorf became the owner of the farm and she was consequently considered to be the person in charge. The rights of the Plaintiff remained the same and he was remunerated R80 per month. [483]

In 1955 the farm was leased to Mr Oosthuizen the plaintiff's rights nevertheless, continued and he received R100 per month and mielies. In 2001 Mr Lubbe was the new lessee and he remunerated the

[476] *Andendorf No and another v Kubheka and another* [2022] JOL 52710 (SCA).
[477] *Kubheka v Andendorf* 2019 3 All SA 566 (LCC).
[478] *Kubheka* (LCC) para 13-64.
[479] *Kubheka* (LCC) para 13-64.
[480] *Kubheka* (LCC) para 13-64.
[481] *Kubheka* (LCC) para 13-64.
[482] *Kubheka* (LCC) para 13-64.
[483] *Kubheka* (LCC) para 13-64.

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Plaintiff with R750 per month and mielie meal. He did the same work as was done for Mr Oosthuizen but he was limited to one grazing camp.[484] The Plaintiff retired from work in 2004. Two of his children sadly passed on and were buried on the farm.[485]

The LCC declared Mr Kubheka to be a labour tenant in terms of section 33(2A) of the LTA and awarded him a portion of portion 1 of the Cadie farm in terms of section 16 of the LTA.[486] The matter was brought on appeal to the SCA to determine whether the trial court was correct in its findings.[487]

4.2.6.2 Issues:[488]

The court had to determine whether the first respondent is a labour tenant and if so, what the impact were based on the facts. The court also had to confirm whether Andendorf has proved that Kubheka is a farm worker.

4.2.6.3 Finding

The SCA confirmed the decision of the LCC, with its finding that the first respondent is a labour tenant in terms of the LTA.[489] The court held that to interfere with the factual findings of a trial court holds a higher threshold and that it must have been "painfully wrong" in its finding. It was common cause that the first respondent complied with para (a), as he resides and resided on the Cadie farm since 1975.[490] The fulfilment of para (b) according to the court was not disputed as the applicant portrayed it to be and found that the applicant had indeed worked on the farm in return for the right to graze and crop on 2 June 1995.[491] The evidence adduced with regard to the cropping and grazing rights of the parents of the first respondent was undisputed. Hence he complied with para (c) and all three of the requirements were met.[492]

As for whether the applicant was a farm worker, the court was of the opinion that, should the applicants have regarded the first respondent as a farm worker, a written agreement with the terms and conditions would have been kept for record keeping.[493] Since Adendorf have multiple family businesses and were educated and sophisticated, record keeping would be part of the manner of running business.

[484] *Kubheka* (LCC) para 13-64.
[485] *Kubheka* (LCC) para 132.
[486] *Andendorf No and another v Kubheka and another* 2022 29 (SCA).
[487] *Andendorf No and another v Kubheka and another* 2022 29 (SCA).
[488] Para [4].
[489] Para [12]-[24].
[490] Para [12]-[24].
[491] Para [12]-[24].
[492] Para [12]-[24].
[493] Para [12]-[24].

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Furthermore, the Adendorf report, that was submitted, failed to prove that the applicant was predominantly paid in cash and thus a farm worker. For these reasons, the court dismissed the appeal.[494]

The SCA decision therefore confirms the conjunctive interpretation as the preferred one. It did not address the issues created by the precedent set by *Ncgobo*, whether the owner of the farm in para (b) and para (c) can differ; and whether claimants can become labour tenants post the cut-off date of 2 June 1995. The SCA, in *Andendorf*, does limit its investigation to whether the applicant was a labour tenant as at 2 June 1995.[495] This suggests a different approach to *Ncgobo.* Nevertheless, the LCC decision of *Andendorf*, confirmed by the SCA, quotes the paragraph in *Ncgobo* which follows more holistic approach instead of focussing on a specific moment in time.[496]

4.3 KEY THEMES, SIMILARITIES AND DIFFERENCES OF THE DISCUSSED CASE LAW

The case law discussed illustrated the importance of qualifying to be a labour tenant as defined by the LTA. The claimants could not be entitled to rights without complying with the definition. The implementation problems highlighted in the memorandum of the Bill is evident in the case law discussed above. The common issue was jurisdiction. *Mahlangu* was first instituted in the MC and *Klopper* and *Tselentis* in the HC. One can infer a denial of the existence of labour tenancy and deliberate bypass of the right legislative implementation by farm owners instituting eviction applications. In addition to this, claimants raised the existence of labour tenancy as a 'defence' to escape eviction but even if you comply with the definition you can still be evicted. This all could be understood as it was the first attempts to implement the LTA and the courts being agents in redressing the past injustices.

Mahlangu set the precedent to determine the value of the right to use and occupy the land v that of remuneration. This clearly differentiated between a farm worker and labour tenant even if the value of remuneration exceeded that of the right to use and occupy land. The case law subsequent to *Mahlangu*, not mention in this study but referred to in the judgments above, relied on this predominant test. The LCC in *Ngcobo* also relied upon it but the SCA decided to determine the period which the claimed resided on the land instead. The SCA reasoned that the value of the use of land must greatly exceed that of the remuneration and that does not often happen. This is true but the duration that the claimant had the right to use and occupy should rather be considered in conjunction to the predominant test. Simply since farm workers and labour tenants have two things in common namely: remuneration

[494] Para [12]-[24].
[495] Para 13.
[496] Para 12 of the LCC decision.

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and occupation. Only determining the duration of occupation can also establish that the claimant is a farm worker. The distinguishing factor between a farm worker and labour tenant is that the last mentioned has the right to crop and graze on the land of another. If it the duration thereof can be determined a more wholesome distinction can be made.

The conjunctive interpretation was confirmed by the SCA in *Ngcobo* and the *Adendorf* relied on the precedent set. The disjunctive interpretations of *Klopper and Tselentis* are therefore irrelevant in common law. However, is worth noting that the court in *Tselentis* attempted to accommodate first-generation labour tenants with its interpretation and the SCA in *Ngcobo* stated that it could not have been the intention of the Legislature to have protected a certain class of persons. It seems as if the SCA is attempting to accommodate first-generation labour tenants with its interpretation of para (c). In *Zulu* the court interpreted the definition conjunctively and to include claimants where the farm owners referred to in para (a) and (b) differed from that in para (c). The court did so by a purposive interpretation of the LTA as a whole and the history of labour tenants. Whereas the SCA interpreted the LTA with section 25 of the Constitution and the intention of the Legislature in order to strike a balance between the property rights. Bearing in mind that Section 25(1) already protects the property of an owner. None of the courts considered to interpret or mention any socio-economic rights with its interpretation.

The SCA in *Ngcobo* did not address the issue of who the onus rest to prove that the claimant is a farm owner since the applicants proved that they are not farm workers. *Mahlangu* prior to the amendment of the LTA determined that the claimant must prove the compliance of three-part definition and the landowner that such claimant is a farm worker. The SCA should have considered confirming the findings of *Mahlangu*. The LTA was subsequently amended and the SCA in *Adendorf,* quoted section 2(5) to clarify that the onus shifts to the landowner to prove that the claimant is a farm worker.

Sadly, the courts heavily relied on the intention of the Legislature, while there are various rules of interpretation. As mentioned in chapter 1 of this thesis, the CC in *Daniels* stated that when the courts are tasked to interpret legislation it should apply the best interpretation. The intention of the Legislature is not the only interpretation rule and cannot heavily be relied on when interpreting legislation.

4.4 CONCLUSION

This chapter discussed several important cases dealing with the definition of the term labour tenant in the LTA. This is crucial since a person can only enjoy the protections and benefits offered by the Act if they fall within the definition of the term. The following chapter relies on the findings of the cases

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discussed in this chapter to create a clear understanding of how the term is should be construed and the effects thereof on the rights of those involved. Recommendations of how the term should be defined and the reasons therefor will be included in the next chapter.

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CHAPTER 5: ANALYSIS OF THE INTERPRETATION OF THE TERM LABOUR TENANTS

5.1 INTRODUCTION

The research indicates that the interpretation of the term 'labour tenant' in the LTA brings about the following issues: (1) whether the parts of the definition must be interpreted disjunctively or conjunctively; (2) whether para (c) of the definition must be interpreted to include farms not owned by the owner in question; (3) what the effect is of the cut-off date for labour tenancy claims; and (4) a lack of implementation of the LTA. Together with this, the Bill drafted by the DRDLR to replace the LTA surprisingly has the possibility of bringing relief but it does not address the current issues. This chapter shall lead a discussion on each issue highlighted by the implementation of the LTA. It will further indicate whether the Bill is any different from the LTA.

5.2 STATUTORY INTERPRETATION IN THE NEW CONSTITUTIONAL ERA

A brief overview of the current approach to the interpretation of statutes should be considered to determine which interpretation, conjunctive or disjunctive, is the correct one. Interpretation expert, Prof Le Roux, identifies the four elements of statutory interpretation as grammatical, schematic, purposive, and teleological interpretation.[497] Interpretation is the process of giving words used in legislation meaning while taking into account the context that is provided, by interpreting the specific provision or provisions in the context of the legislation as a whole and the background related to its promulgation.[498] The court may not, in its role to interpret legislation, enter the arena of the Legislature and create legislation.[499] The court merely has the role of interpreting legislation and should refrain from becoming 'judicial law-makers' when interpreting legislation.[500] The starting point will be the actual reading of the word in alignment with the context and purpose of the provision against the background of the legislation and how it came into existence.[501] The new age of interpretation should be the reading of the context together with the language in question.[502] The intention of the Legislature is not helpful and 'to speak of an intention of parliament is entirely artificial.'[503] The intention legislation is motivated by are political agendas since the makers of legislation are the representatives of different political parties. Thus to seek for its intention is artificial.[504] Hence to it is impractical and ambiguous to search for

[497] Le Roux 'The interpretive process' (17 October 2017) lecture, University of Cape Town, as referred to in Draga L and Fick S 'Fisher v Unlawful Occupiers: could the court have interpreted the 'may' in section 9(3)(a) of the Housing Act as a 'must' under the circumstances of the case?' (2019) 35 *SAJHR* (24) 410-424.
[498] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA (SCA) 603F-G.
[499] Du Plessis L *'Interpretation'* in Woolman S et el (eds) *Constitutional Law of South Africa* 5 ed (2007) 11.
[500] Du Plessis L *'Interpretation'* in Woolman S et el (eds) *Constitutional Law of South Africa* 5 ed (2007) 11.
[501] Du Plessis L *'Interpretation'* in Woolman S et el (eds) *Constitutional Law of South Africa* 5 ed (2007) 160-161.
[502] 604 E-F.
[503] 606A.
[504] 606A-C.

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fleeting and possibly mythical meaning. The interpretation process can be determined independently from the intention of the Legislature.[505]

The grammatical interpretation is the 'linguistic and grammatical meaning'.[506] The entire piece of legislation and the section in which the word or phrase is being interpreted is taken into account when interpreting schematically. In other words, the context of the text is considered.[507] The purposive interpretation seeks the interpretation that allows the text to best achieve the purpose of the legislation and depends on the preamble, long title, and purpose of the section in question.[508] Teleological interpretation refers to the Constitution, section 39(2), the spirit, purport, and objectives of the Bill of Rights.[509] The Bill of Rights and the Constitution as a whole should be considered in this interpretation. It prefers an interpretation that is in line with the Bill of Rights.[510] The interpretation should be within the bounds of the Constitution but not 'unduly strain' the meaning of the word or phrase. The limitation clause should also be taken into account.[511] Even though the interpretation may not 'unduly strain' the meaning of the word or phrase, the rights of the parties involved can still be limited to accommodate the interest of the public.[512] The 'Von Savigny quartet' also known as the comparative element was added to the elements of interpretation, it allows for a comparison between domestic legislation with international legislation and standards.[513] In *S v Makwanyane* the CC stated the following: 'We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.'[514]

The following sections analyse the interpretation used by the courts in the cases discussed in chapter 4 at the hand of the interpretive approach laid out by Prof le Roux. Reference to the work of Prof le Roux

[505] 608E.
[506] Le Roux 'The interpretive process' (17 October 2017) lecture, University of Cape Town, as referred to in Draga L and Fick S 'Fisher v Unlawful Occupiers: could the court have interpreted the 'may' in section 9(3)(a) of the Housing Act as a 'must' under the circumstances of the case?' (2019) 35 *SAJHR* (24) 410-424.
[507] Du Plessis L *'Interpretation'* in Woolman S et el (eds) *Constitutional Law of South Africa* 5 ed (2007) 171-172.
[508] Le Roux 'The interpretive process' (17 October 2017) lecture, University of Cape Town, as referred to in Draga L and Fick S 'Fisher v Unlawful Occupiers: could the court have interpreted the 'may' in section 9(3)(a) of the Housing Act as a 'must' under the circumstances of the case?' (2019) 35 *SAJHR* (24) 410-424.
[509] Le Roux 'The interpretive process' (17 October 2017) lecture, University of Cape Town, as referred to in Draga L and Fick S 'Fisher v Unlawful Occupiers: could the court have interpreted the 'may' in section 9(3)(a) of the Housing Act as a 'must' under the circumstances of the case?' (2019) 35 *SAJHR* (24) 410-424.
[510] Le Roux 'The interpretive process' (17 October 2017) lecture, University of Cape Town, as referred to in Draga L and Fick S 'Fisher v Unlawful Occupiers: could the court have interpreted the 'may' in section 9(3)(a) of the Housing Act as a 'must' under the circumstances of the case?' (2019) 35 *SAJHR* (24) 420.
[511] Draga L and Fick S 'Fisher v Unlawful Occupiers: could the court have interpreted the 'may' in section 9(3)(a) of the Housing Act as a 'must' under the circumstances of the case?' (2019) 35 *SAJHR* (24) 410-424.
[512] Draga L and Fick S 'Fisher v Unlawful Occupiers: could the court have interpreted the 'may' in section 9(3)(a) of the Housing Act as a 'must' under the circumstances of the case?' (2019) 35 *SAJHR* (24) 410-424.
[513] Du Plessis L *'Interpretation'* in Woolman S et el (eds) *Constitutional Law of South Africa* 5 ed (2007) 171.
[514] *S v Makwanyane* 1995 (3) SA 391 (CC) 415D-F.

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will be made in (a) the disjunctive and conjunctive interpretation; (b) the fact that the owners have not to be the same in the definition; and (c) the effect of the new cut-off date. The interpretations used in these aspects will be identified, the effects thereof and whether it was the appropriate interpretation. The elements of interpretation are important for these aspects discussed here since it will show case to what determination the courts could have come, had it not rely so heavily on the intention of the Legislature.

5.3 DISJUNCTIVE OR CONJUNCTIVE INTERPRETATION

In *Mahlangu* and *Zulu*, the LCC followed the conjunctive approach namely; the claimants had to prove the compliance of the three-part definition of the term labour tenant to qualify as one. The intention of the Legislature and grammatical meaning of the word 'and' at the end of para (b) determined the labour tenancy in these cases. In contrast, in *Klopper* and *Tselentis*, the LCC followed the disjunctive approach. The court in *Klopper* found complying with paras (a) and (b); (a) and (c); or solely (c) is sufficient to qualify as a labour tenant.[515] In the *Tselentis* case, it found that para (a) cannot be interpreted disjunctively from paras (b) and (c). Similarly, para (c) cannot be interpreted disjunctively from paras (a) and (b). Hence paras (a) and (b) must be read conjunctively with para (c) respectively. In other words, following the disjunctive interpretation parties should prove either factors (a) and (b) *or* (a) and (c).[516] It is not necessary to comply with all three factors when following a disjunctive interpretation of the concept of 'labour tenant' in the LTA.

The *Tselentis* and *Klopper* judgments entailed the schematic method and it created legal uncertainties.[517] The result thereof, amongst other things, would give rise to a claimant primarily remunerated in cash and kind on 2 June 1995 but also had the right to live and use the land to qualify as a labour tenant. The children of the claimant would automatically qualify as labour tenants because they will comply paras (a) and (c).[518] The parent of such claimant will enjoy labour tenancy benefits, even if he faces eviction or is being evicted from the farm. The child or claimant could have further been entitled to claim land in terms of section 16 of the LTA.[519] The disjunctive definition by *Tselentis* would result in a labour tenant having the right to elect whether or not he wants to reside on the farm, elect whether he wants to conduct labour personally or in his stead, and enjoy the right to use the land

[515] *Klopper and others v Mkhize and others* 1998 (1) SA 406 (N).
[516] *Tselentis Mining (Pty) Ltd and Others v Mdlalose and Others* 1998 (1) BCLR 104 (N).
[517] *Ngcobo and another v Van Rensburg and others* 1997 4 All SA 537 (LCC).
[518] *Ngcobo and another v Van Rensburg and others* 1997 4 All SA 537 (LCC).
[519] *Ngcobo and another v Van Rensburg and others* 1997 4 All SA 537 (LCC).

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personally or by his parent or grandparent.[520] Furthermore, should the schematic interpretation of *Tselentis* be followed it gives rise to rights being asserted prematurely.[521] The court interpreted the definitions of 'associates' and 'family members' with that of the term labour tenant. However, the associates and family members of a labour tenant cannot enjoy the benefits bestowed on him if he is merely a claimant. Only once a claimant becomes a labour tenant can he in terms of the LTA have persons associated with him and his family members. The labour tenancy of the claimant cannot be on an associate or family member on the farm, as *Tselentis* portrays it, because he is not yet a labour tenant. This interpretation in a nutshell is confusing and creates legal uncertainty. The only advantage of the disjunctive interpretation is that it accommodates first-generation labour tenants.

The SCA in *Ncgobo* and later confirmed in *Andendorf*, set the precedent with regards to which interpretation to follow when interpreting the definition of the term labour tenant. Accordingly, the SCA determined that the conjunctive interpretation should be followed.[522] In other words, the court rejected the disjunctive interpretation judgments of *Tselentis* and *Klopper* and confirmed the conjunctive judgments of *Mahlangu*, *Zulu,* and the court a quo.

In the SCA, the word 'and' at the end of para (b) was interpreted in its grammatical literal meaning. This means that an additional requirement follows after para (b) which must be complied with for one to qualify as a labour tenant.[523] The court added that sometimes the words 'and' and 'or' are incorrectly placed in legislation and that courts may sometimes find them to be equivocal to each other.[524] Following close to the interpretive approach set out by Le Roux, the court identifies the factors to be considered, in order to find the two words equivocal, as follows: (a) the context requires it (schematic); (b) the interpretation will be 'unreasonable, inconsistent, unjust or result in absurdity'; or (c) it would be unconstitutional or in contrast with the spirit, purport and object of the Bill of Rights (teleological).[525] The court found that these factors were absent and thus the grammatical meaning was applied.[526] In other words para (c) cannot be applied alone and or respectively with paras (a) and (b) to qualify claimants as labour tenants. The full compliance of the three-part definition of the term labour tenant qualifies a

[520] *Ngcobo and another v Van Rensburg and others* 1997 4 All SA 537 (LCC).
[521] *Ngcobo and another v Van Rensburg and others* 1997 4 All SA 537 (LCC).
[522] *Ngcobo and Others v Salima CC; Ngcobo and Others v Van Rensburg* 1999 (2) SA 1057 (SCA).
[523] *Ngcobo and Others v Salima CC; Ngcobo and Others v Van Rensburg* 1999 (2) SA 1057 (SCA).
[524] 1063G.
[525] *Ngcobo and Others v Salima CC; Ngcobo and Others v Van Rensburg* 1999 (2) SA 1057 (SCA).
[526] 1069F-G.

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claimant as a labour tenant.[527] Therefore, the SCA in *Ngcobo* exhausted all the methods of interpretation and decided upon the grammatical one.

The conjunctive interpretation, interpreted grammatically allows for a consistent interpretation; does not give rise to absurdity; and 'requires no modification of the definition'; and 'adoption of any secondary or unusual meaning for any words in the definition'.[528] One must admit that the conjunctive interpretation is a bit harsh but there are other legislation enacted to protect persons living on farms from being evicted arbitrarily.[529]

The purposive element of interpretation would have included the preamble, long title and purpose of section 1 of the LTA, to achieve the purpose of it entirely. Section 1 of the LTA also known as the definition clause gives a description of terms used in the LTA. The LTA was enacted to secure tenure for labour tenants and its associates; the acquisition of land; and provide land rights to claimants.[530] The purpose of it was to address the racially discriminatory legislation and practices which caused a breach of human rights and denied access to land.[531] Labour tenants are previously disadvantaged person by unfair discrimination. Hence the LTA was enacted to promote the full and equal enjoyment of human rights and freedoms. Labour tenants should no longer be prejudiced and must be assisted to secure their and ultimately become land owners.[532]

In chapter 2 we learned that labour tenancy on farms compromised of two factors namely: the person had to work; and have the right to reside crop and graze on the white-owned farm. Labour tenants did in some instances, worked on the commercial farm of the owner in another district and had the right to reside and use the land on another farm of the same owner. As seen with the case law and Gannahoek, the owners of the farms changed but the labour tenancy system continued. As discussed in chapter 3, during the Union government era labour tenants were evicted on the basis of a mere reasonable notice and they were evicted. Moreover, tenure of labour tenants was always under attack and they were prone to evictions. Even in the transitional years from the Apartheid to the democratic government large scale and constructive evictions took place. If the definition was interpreted in respect hereof it would determine whether the claimant or their ancestors had tenure insecurity, were prone to evictions and whether their human rights have been violated by past discriminatory legislation. If para

[527] *Ngcobo and Others v Salima CC; Ngcobo and Others v Van Rensburg* 1999 (2) SA 1057 (SCA).
[528] *Ngcobo and another v Van Rensburg and others* 1997 4 All SA 537 (LCC).
[529] ESTA.
[530] Long title of the Land Reform (Labour Tenants) Act 3 of 1996.
[531] Preamble of the Land Reform (Labour Tenants) Act 3 of 1996.
[532] Preamble of the Land Reform (Labour Tenants) Act 3 of 1996.

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(c) for example was interpreted in such manner it would have struck a balance between the competing property interests of the landowner and claimant.

The teleological interpretation has the Bill of Rights as its point of departure, with section 39(2) of the Constitution. This section includes the comparison interpretation since section 39(2) refers to the consideration of international standards and legislation.[533] Van Der Walt states that property legislation should be interpreted widely, inclusive of section 25 and 26.[534] He further states that the duty to protection of property is both negative and positive. The following was said with regards to the positive duty of property: 'that property may be regulated within a broader property system of property law if the regulation has a justifiable public purpose; that legislation affecting property must achieve an equitable balance between the interests of the property owner and the public; and that restitution, secure tenure and access to land and housing should be promoted. In addition to these positive features, the Constitution proscribes the property system from enabling arbitrary deprivation of property or eviction from homes; as well as arbitrary dispossession, insecure tenure, landlessness and homelessness.'[535] This notion basically refers to an owner cannot have absolute ownership and the government cannot have unrestricted power in respect of property.[536]

The teleological interpretation would have illustrated that section 25(1) already protects property of persons. The property clause should have been interpreted widely to include the affected rights contained in the Bill of Rights, such as the right to housing and dignity. Chapter 1 explained the correlation of the right to housing and the property clause. An eviction order granted without the availability of suitable accommodation (whether the evictee refuse to accept it or not) is similar to the previous racial discriminatory legislation. Labour tenants would be rendered landless and homeless. This is not in line with the spirit, purport and values of the Constitution and the Bill of Rights. Similarly the right to dignity can also be interpreted with the property clause and legislation because being rendered homeless strips from the dignity of an evictee. As said before the property clause does not exist in isolation it is linked to socio-economic rights.

[533] Section 39(2) of the Constitution.

[534] Draga L and Fick S 'Fisher v Unlawful Occupiers: could the court have interpreted the 'may' in section 9(3)(a) of the Housing Act as a 'must' under the circumstances of the case?' (2019) 35 *SAJHR* (24) 422.

[535] Draga L and Fick S 'Fisher v Unlawful Occupiers: could the court have interpreted the 'may' in section 9(3)(a) of the Housing Act as a 'must' under the circumstances of the case?' (2019) 35 *SAJHR* (24) 422.

[536] Draga L and Fick S 'Fisher v Unlawful Occupiers: could the court have interpreted the 'may' in section 9(3)(a) of the Housing Act as a 'must' under the circumstances of the case?' (2019) 35 *SAJHR* (24) 422.

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5.4 FACT THAT OWNER IN (c) NEED NOT BE THE SAME OWNER

The court *a quo* in the *Ngcobo* case found that the farm referred to in para (b), where the claimant resides, refers back to the farm referred to in para (a).[537] However the farm referred to in para (c) does not expressly refer to that in para (a). This difference in wording indicates that the Legislature did not intend that these farms be the same one.[538] Therefore the parent or grandparent did not have to reside on the same farm as the claimant. The learned judge interpreted para (c) in light of the history of the labour tenant system.[539] The court explained that previously landowners would either sell or subdivide their land.[540] The labour tenants would either relocate with farmers or become employees of the new owners.[541] The children of the labour tenants would mature and work for the landowner or on another farm of the owner, as that of their parent or grandparent. Hence a 'historical relationship' between the labour tenant family and landowner was what the Legislature intended. [542]

The court a quo of *Ngcobo* continued with the significance of the definition of 'owner' under the LTA.[543] 'Owner' refers to its definition in the Deeds Registries Act 47 of 1937, which refers to present owners of immovable property, whether it is under curatorship, executorship, or by a trustee and owner is within the definition in the term labour tenant. Thus for purposes of the LTA owner refers to previous and future owners of the land. It is for this reason that the judge in the court a quo found that a historical relationship must exist between the labour tenant family and the farm owner.[544] The learned judge further held the following:

> 'Such a wide interpretation would mean that one of requirements for qualification as a 'labour tenant' is, simply, that the claimant must have a grandparent or a parent who was once a labour tenant under the old system. It must be borne in mind that the Act is intended to entrench rights of occupation of property and confer rights of acquisition of property to protect people who had, for practical purposes, been bound to that property or its owner by the bonds of the feudal tenant system over an appreciable period.'[545]

However, the SCA in *Ngcobo* respectfully disagreed with the court a quo in this regard.[546] The court held that the wording of 'a' and 'the' farm cannot be ignored. The court reasoned the same as with the words 'and' and 'or'. The court held that the Legislature could not have intended to accommodate

[537] *Ngcobo* (SCA) 1071G-1072D.
[538] *Ngcobo* (SCA) 1071G-1072D.
[539] *Ngcobo* (SCA) 1071G-1072D.
[540] 1072B-D.
[541] *Ngcobo* (SCA) 1071G-1072D.
[542] *Ngcobo* (SCA) 1071G-1072D.
[543] *Ngcobo* (SCA) 1071G-1072D.
[544] *Ngcobo* (SCA) 1071G-1072D.
[545] *Ngcobo* (SCA) 1071G-1072D.
[546] *Ngcobo* (SCA) 1072D-E.

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second-generation labour tenants only, by limiting the owners of the farms to be the same.[547] The objective of the LTA was highlighted by the court and the wording in para (c) should be applied as it is.

In my view, the interpretation by the court a quo of *Ngcobo* is the correct one, with regards to the same owner in para (c). The learned judge held that the focus should be shifted from the change in words in the paragraph to the owner of the farm while acknowledging the change in words between paras (a) and (c).[548] The court took the purposive element together with the history of labour tenants, as highlighted in chapter 2 of this dissertation, to interpret para (c). The purpose of the LTA was to protect the class of persons who have been previously disadvantaged by legislation that caused insecure tenure on farm. The learned judge further held the following: 'It is clear that, in enacting the requirement in paragraph (c) of the definition (referred to in the *Ngcobo* case as 'a second generational requirement'), the legislator was narrowing down the class of people who would qualify for benefits under the Act to those whose history of 'labour tenancy' stretched back more than a generation.'[549] The LCC in *Ngcobo* found that the LTA protects 'over more than one generation'.[550] Furthermore, Professor Juanita Pienaar found that the LTA seeks to protect second and even third-generation labour tenants from insecure land tenure.[551] She compared farm workers and labour tenants with each other. Given the provisions of the LTA only claimants from the second generation can become labour tenants and that labour tenancy can be phased out by acquisition of land.[552] While ESTA merely secures tenure and farm workers have right, such as burial rights, which labour tenants will not have since they eventually become landowners.[553]

Be that as it may, since this was a SCA decision, the current precedent is that a person can be classified as a labour tenant even if their ancestors were labour tenants on farms owned by someone other than the owner on which the claimant resides. While *Andendorf* (SCA) came after *Ncgobo*, it did not address this issue.

5.5 EFFECT OF NOT HAVING THE 1995 CUT-OFF

Before *Ncgobo*, the position was that in terms of the provisions of the LTA a person claiming labour tenancy must allege such rights on or before 2 June 1995.[554] This means a person claiming labour

[547] 1073A.
[548] *Ngcobo* (SCA) 1072E-H.
[549] *Ngcobo* (SCA) 1071G-1072D.
[550] *Ngcobo* (LCC) 1072E-H.
[551] Pienaar J and Brickhill *'Land'* in Woolman S et el (eds) *Constitutional Law of South Africa* 5 ed (2007) 15.
[552] Pienaar J and Brickhill *'Land'* in Woolman S et el (eds) *Constitutional Law of South Africa* 5 ed (2007) 16.
[553] Pienaar J and Brickhill *'Land'* in Woolman S et el (eds) *Constitutional Law of South Africa* 5 ed (2007) 16.
[554] Land Reform (Labour tenants) Act 3 of 1996.

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tenancy must allege that he or she has had the right to reside on the farm in question; had the right to cultivate that land and his or her parent; and grandparent had the same right on such farm or another of the same owner, on or before 2 June 1995. A claimant thus alleging he or she had these rights of labour tenancy after the cut-off date cannot claim such rights. The cut-off date, with its retrospective effect has been chosen to protect potential claimants who might have been evicted prior to that date or who suffered lesser tenure and land right due to the fear of implementation of the then Labour tenants Bill.[555]

In *Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg* the SCA ruled that it could never have been the intention of the Legislature to exclude persons who claimed labour tenancy after the date.[556] The court resorted to determining the intention of the Legislature. However, as previously held, the interpretation became impractical and ambiguous. Inevitably the court deviated from the context of the LTA as a whole and its purpose in the interpretation process. As indicated by the judgment of *Natal Municipal Pension Fund* the language should have been interpreted in alignment with the purpose of the LTA against the background of its enactment.[557] Prof Le Roux' purposive element needed to be apply in this instance.[558] Hence the SCA indicated that the LCC in *Zulu,* HC in *Tselentis and* the *court a quo* were incorrect in finding that the claimants could only claim labour tenancy if they were alleged labour tenants on or before 2 June 1995.[559] There are opposing views in academic literature pertaining to the SCA interpretation in this respect.

The author Freedman disagreed with the court's interpretation and had the following issues:[560]

i. A person claiming labour tenancy would be able to become a labour tenant without having to live on the farm on or before 2 June 1995;
ii. This interpretation will lead to a deviation from what the Legislature has intended. The persons claiming labour tenancy after 2 June 1995 would be deprived of the benefits bestowed to labour tenants and their family members by section 3(1) and 16(1).[561] Section 3(1) permits a labour tenant on 2 June 1995 to use and occupy the farm with his or her family. Section 16(1) permits a

[555] Crowling M, Hornby D and Oettlé "Research report on the Tenure of Security of labour tenants and former labour tenants in South Africa", (AFRA), June 2017 5.
[556] Freedman W 'The Labour Tenants Act: Whom does it protect' (2000) 117 *SALJ* 452,456-458.
[557] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA (SCA).
[558] Le Roux 'The interpretive process' (17 October 2017) lecture, University of Cape Town, as referred to in Draga L and Fick S 'Fisher v Unlawful Occupiers: could the court have interpreted the 'may' in section 9(3)(a) of the Housing Act as a 'must' under the circumstances of the case?' (2019) 35 *SAJHR* (24) 410-424.
[559] 1073H-1075G.
[560] Freedman W 'The Labour Tenants Act: Whom does it protect' (2000) 117 SALJ 452,456-458.
[561] Freedman W 'The Labour Tenants Act: Whom does it protect' (2000) 117 SALJ 452,456-458.

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labour tenant in terms of section 3 to acquire land should he or she meet the requirements of the provisions of the section;[562] and

iii. The abovementioned anomalies could not have been in alignment with the Legislature's intention.[563]

The author suggested that the piece of legislation be referred to Parliament or the SCA should reconsider its interpretation.[564]

Theunis Roux agrees in part with the precedent set by the SCA with regard to the conjunctive interpretation.[565] However, the research of the author suggests otherwise with regards to the third issue addressed by the SCA. The research is as follows:

> 'The last part of the Supreme Court of Appeal's judgment is problematic in two respects. For one, the holding that an alleged labour tenant's status under the definition of 'farmworker' must be determined over the whole period during which he or she has been complying with paras (a) and (b) will complicate evidentiary disputes over the distinction between labour tenants and farmworkers. Under either one of the two approaches suggested in the earlier decisions the evaluation of remuneration in cash or in kind versus the right to occupy and use the land was at least restricted to a precise point in time. According to Olivier JA's 'predominance-over-time' test, by contrast, evidence will have to be adduced on the situation pertaining over a number of years. The court will then have to evaluate which form of remuneration predominated at each stage and for how long, before finally adding up the periods of predominance to arrive at a decision. Quite apart from the litigation costs associated with such an exercise, this test will be almost impossible to apply in the field, i.e. where NGO workers and paralegals are required to advise rural dwellers on their rights.'[566]

The distinction between a farm worker and a labour tenant will be complicated concerning the law of evidence.[567] Moreover, the author states that there will be no eviction proceedings to follow in terms of the LTA, should claimants become labour tenants post the cut-off date of 2 June 1995. His research shows that section 5 of the LTA governs the eviction procedure and does not make mention of the cut-off date.[568] However a labour tenant may only be evicted upon termination of rights in terms of section 3(2) of the LTA. The rights bestowed to a labour tenant and his family are in section 3(1) which recognises a labour tenant as a person on or before 2 June 1995.[569] Hence claimants who became labour tenants post the cut-off date will not have an eviction procedure prescribed by the LTA. The

[562] Land Reform (Labour tenants) Act 3 of 1996.
[563] Freedman W 'The Labour Tenants Act: Whom does it protect' (2000) 117 SALJ 452,456-458.
[564] Freedman W 'The Labour Tenants Act: Whom does it protect' (2000) 117 SALJ 452,456-458.
[565] Roux T 'Constitutional Developments' (1999) *Annual Survey of South African Law* 328,329.
[566] Roux T 'Constitutional Developments' (1999) *Annual Survey of South African Law* 328,329.
[567] Roux T 'Constitutional Developments' (1999) *Annual Survey of South African Law* 328,329.
[568] Roux T 'Constitutional Developments' (1999) *Annual Survey of South African Law* 328,329.
[569] Roux T 'Constitutional Developments' (1999) *Annual Survey of South African Law* 328,329.

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author suggested that the LTA must be applied consistently according to the intention of the Legislature and it was to protect the labour tenants on or before 2 June 1995.[570]

Persons who fall short of the definition of a labour tenant are identified as farm workers and are protected by ESTA from arbitrary evictions. The LTA was enacted to protect those persons on agricultural land whose tenure was insecure by the previous racially discriminatory legislation. It seeks to protect persons who either inherit the right to cultivate the land of another or claim labour tenancy because their parents or grandparents had such rights. A claimant falling short of these objectives of the LTA does not qualify for protection and the court should not take it upon itself to unduly strain the meaning of words with various interpretations, to accommodate such persons.

Be that as it may, the current situation is that we have an SCA decision finding that persons can become labour tenants after the cut-off date. This has the effect that the Act can be applicable indefinitely. With the cut-off applicable, the Act would have been slowly phased out.[571] It could be argued that the subsequent SCA decision of *Andendorf* overturned *Ngcobo.* However, the court did not directly address this issue. Instead it confirmed the LCC decision in which the *Ncgobo* stance on a more holistic approach to the cut-off date was supported.

Permitting this interpretation of the SCA in *Ngcobo* would lead to the same inconsistencies, as mentioned herein, as the disjunctive interpretation in *Klopper* and *Tselentis* because all three judgments attempt to accommodate first-generation labour tenants. This would have the effect of para (c) being ignored which means only paras (a) and (b) would comply. The 'and' at the end of para (b) would have to be interpreted as 'or'. The claimant will merely have to prove the right to use and occupy the land. The learned judge held in the SCA judgment that the definition cannot be interpreted as such but her interpretation of para (c) has the same result.[572] Interpreting the para as such would go against the purpose and objectives of the LTA. Para (c) makes mention of parents and grandparents and that is an indicator that the right should be inherited or transferred to a successor to enjoy the benefits deriving from it. Furthermore, ignoring the cut-off date is another attempt by the court to cater for first-generation labour tenants. Again this deviates from the purpose of the LTA and only an amendment thereto can accommodate first-generation labour tenants; not an interpretation.

[570] Roux T 'Constitutional Developments' (1999) *Annual Survey of South African Law* 328,329.
[571] Pienaar J and Brickhill *'Land'* in Woolman S et el (eds) *Constitutional Law of South Africa* 5 ed (2007) 15-16.
[572] 1066B-C.

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5.6 CONCLUSION

This chapter analysed the effects of the court's decisions on the definition of the term 'labour tenant' in the LTA. In sum, the chapter found the following primary effects. First, due to the SCA in the *Ngcobo* judgment, the conjunctive interpretation must be followed when interpreting the definition of the term labour tenant. Second, the owner of the farm where the claimant resides need not be the same as that of the parents or grandparents in para (c) of the definition. Third, the cut-off date, 2 June 1995, is no longer applicable and the claimant can claim labour tenancy post the date.

The conjunction interpretation affords protection to the class of persons the LTA aimed to protect second-generation labour tenants and their associates. Persons who fall short of this definition can still have secure tenure under the provisions of ESTA. The fact that the owner of the farms referred to in paras (a) and (b) does not have to be the same as that of para (c) provides more protection to claimants. However para (c) must be interpreted either according to the purposive and or teleological elements of interpretation. Other elements of interpretations will have the effect of an imbalance of property rights. This is because the claimant will be permitted to realise cropping and grazing rights, which he obtained from his ancestor who lived on a different farm with a different owner. Similarly disqualifying a claimant who complied with the paras (a) and (b) but could not comply with para (c) because his ancestors realised these rights on the land of another owner is prejudicial. The purposive and or teleological interpretation will therefore strike an appropriate balance with these competing rights. The cut-off date is a bit overreaching. The role of the court is to interpret legislation not to be judicial law-making. The cut-off date applies retrospectively to accommodate claims post that date but alleges labour tenancy prior to such date. Interpreting the cut-off date as the SCA did in *Ngcobo* is an act of judicial law-making. The interpretation of the definition could be improved by exploring all the interpretation elements and choosing the correct one, without trying to accommodate first-generation labour tenants. The following chapter concludes the thesis.

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CHAPTER 6: CONCLUDING REMARKS

6.1 INTRODUCTION

The legal ambiguities surrounding labour tenants in terms of the LTA, the interpretation of the term labour tenant has been the issue since the enactment thereof.[573] Little to no attention has been given to this issue by the Legislature and the court took it upon itself to 'resolve' this issue. The main research question of this thesis is: how have the courts interpreted the term 'labour tenant' and what is the effect thereof?

This chapter summarises the main findings of the thesis. Thereafter, it concludes the thesis with some recommendations.

6.2 FINDINGS OF THE THESIS

Chapter 2 set out the history of legislation that governed labour tenancy. The primary findings in Chapter 2 were that black people endured many hardships, from land deprivation to becoming occupants on farms with the enactment of a plethora of racially discriminatory legislation. They were ultimately subject to becoming labour tenants to secure tenure on farm lands. However this tenure was only secured for a fixed period. This legislation laid the foundation of the racially discriminatory legislation that followed thereafter. Ultimately every aspect of a black person's life was governed by a piece of legislation.

The aim of Chapter 3 was to determine whether the existing legislation differs from previous legislation and whether the LTA is providing sufficient protection to labour tenants. The primary findings were that the LTA provides more protection than the previous legislation with regard to the eviction proceedings and tenure security. Moreover, the LTA also provides for the succession of the right and the right to crop and graze. The Bill falls short in addressing the current issues with regards to the LTA, which its implementation and a hands-on approach from the DRDLR. The Bill could have been suitable if it was in line with the 1997 White Paper on Land Reform and permitted the transferability of the right to use and occupy the land like the LTA. Together with this it should have included a clear distinction between labour tenants, long-term occupant and occupants; and their respective rights; and entitlements it would have been suitable. It does however provide more tenure security than the LTA and ESTA.

Chapter 4 and 5 discussed and analysed the relevant cases relating to the definition of the term labour tenant. Two LCC, two HC and two SCA cases were discussed. The purpose of this was to identify and

[573] Crowling M, Hornby D and Oettlé "Research report on the Tenure of Security of labour tenants and former labour tenants in South Africa", (AFRA), June 2017.

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analyse the effect of the primary findings of the courts concerning the interpretation of this term. It was found that the conjunctive interpretation must be followed when interpreting the definition of the term labour tenant. The appropriate interpretation of three-part definition was looked at and the purposive and or teleological interpretation conjunctively, is the best suited. The farm owner of the farm where the claimant resides need not be the same as that of his parents/grandparents. The period of claiming labour tenancy has been extended post the cut-off 2 June 1995. It was found that the LTA aims to protect only second generation labour tenants. This position is confirmed by the wording of the definition of the term labour tenant, learned judges in numerous cases studies and legal scholars, despite the SCA' decision in *Ngcobo*. Therefore, to interpret the definition to include first-generation labour tenants is in contrast with the objectives and purpose of the LTA and requires for an amendment and not a 'so-called' broad interpretation.

6.3 HOW THE TERM 'LABOUR TENANT' SHOULD BE INTERPRETED:

The definition of the term labour tenant should be interpreted conjunctively and a claimant who falls short of this definition can seek tenure security from the provision of ESTA. The reason for this is that the LTA was designed to protect second and even third-generation labour tenants only.

The farm owners in para (a) - (c) may differ only if it is interpreted with the purposive and or teleological elements. Any other interpretation will create an imbalance of the property rights of the landowner and labour tenant. For example: if a claimant is allowed to exercise the right to use land on the farm where he lives merely because his ancestor had this right on a different farm with a different owner, by virtue of the intention of the Legislature. Bearing in mind that this right to use the land may be binding on successors in title and labour tenancy will be established on a farm with a different owner to that of the ancestors farm. As previously mentioned the intention of the Legislature is artificial and not considered in modern interpretation elements. However if this same example is interpreted with the purposive and or teleological elements it would have a different result. The fact that the right to ownership may be limited would be understood because the purpose of the LTA (long title and preamble) and or the Bill of Rights will be enshrined in the interpretation.

The distinguishing factor between farm workers and labour tenants are the use of land. The common factors are remuneration and the right of residence. Therefore shifting from the pre-dominance test to the duration of the occupancy will not constitute any difference. Moreover, the SCA did so by extending the cut-off date which is an amendment of the provisions of the LTA. The SCA overplayed its role of interpreting legislation and becoming judicial law-makers. Thus the preferable recommendation is to consider the period of the use of land together with the pre-dominance test on or before 2 June 1995.

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The possibility of the Bill being promulgated into legislation is slim since ESTA was amended in the year 2018. As mentioned in chapter 3, the Bill does not address the implementation issue. One of the definitions of a person residing on a farm is similar to that of the term labour tenant. Should the Bill be passed we are back to square one. Although the Bill has promising provisions for the security of tenure it will entertain the current problems instead of addressing it. It further provides for all persons residing on the farm to have the same rights which are impractical since labour tenants and occupiers have different rights. For these reasons, amongst other things the Bill may remain stationed.

The sad reality is that the LTA has not been amended since the year 1997 and the possibility of this happening also slim. It can be inferred that the Legislature and the DRDLR are waiting for labour tenants and the labour tenancy system to phase out. However, the provisions of the LTA permit that the right to use the land may be binding on successors in title. Hence the labour tenancy system will continue to exist, if land was not claimed by the claimant. The Legislature has to fulfil its constitutional mandate to ensure that labour tenants are not further prejudiced. As suggested by Warren Freedman, the LTA must be referred to Parliament or the SCA reconsider its ruling with regards to the cut-off date.

6.4 CONCLUSION AND RECOMMENDATIONS

The legal ambiguities surrounding labour tenants in terms of the LTA have been accumulating controversy from its enactment until now. These issues cannot further be swept under the rug until labour tenants are phased out because that is not happening anytime soon. The time has come for Parliament to either clean up their mess by amending the LTA or consider altering the Bill before its promulgating into legislation.

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