

© Legal Assistance Centre, 2006

Language editor: Sandie Fitchat
Layout and design: The Word Factory
Cover: A disabled former farm worker with members of his family. Farm 6, Mangetti West.

Oshikoto Region. Cover photograph: Willem Odendaal

			••••

CONTENTS

Acknowledgements	iii
Chapter 1	1
Study background	1
Research objectives and methodology	2
Chapter 2	3
Introduction: Common law evictions	3
The High Court	4
The Labour Act and the establishment of District Labour Courts	5
The phasing out of District Labour Courts	7
The National Resettlement Policy	
Interviews with Labour Relations Officers	10
Chapter 3	12
Presentation of research data	
Summary of data extracted from court rolls	12
Reasons for filing complaints at the District Labour Courts	
Findings	20
Chapter 4	22
Drafting legislation for Namibia	22
Namibia's Draft National Land Tenure Policy	22
South Africa's Extension of Security of Tenure Act	23
Findings	27
Chapter 5	28
Conclusion and recommendations	
Bibliography	31
Literature	
Legislation	
Appendix 1: Interviewees	32

ACKNOWLEDGEMENTS

We wish to thank the *Gesellschaft für Technische Zusammenarbeit* (GTZ/German Development Cooperation) in Namibia for making the funding available to produce this report.

We would also like to thank the *Evangelischer Entwicklungsdienst* (EED/Church Development Service) and HORIZONT3000 for their ongoing support of the Legal Assistance Centre's Land, Environment and Development (LEAD) Project.

We also thank -

- Mr Albert Engel at the GTZ in Namibia, for his assistance in facilitating funding for this report, and
- Ms Sandie Fitchat, for editing and layout of the report.

Finally, LEAD thanks all the study interviewees (see Appendix 1) for their time and invaluable contributions. In this respect, special thanks are due to Petrus Unengu, Chief: Lower Courts, for his guidance, while the assistance of the Clerks at the District Labour Courts in Gobabis, Keetmanshoop and Otjiwarongo is also greatly appreciated.

LEAD researchers Willem Odendaal and Shadrack Tjiramba were the authors of this report. Willem Odendaal designed and implemented the field research. Although every effort has been made to ensure accuracy of the information presented here, any errors that may remain are the sole responsibility of the authors.

Willem Odendaal

LEAD Project June 2006

CHAPTER 1

STUDY BACKGROUND

The agricultural sector in Namibia is one of the biggest employers in the country, but some often perceive it as one of the employment sectors where unfair labour practices are rife.

Farm workers generally have no choice but to make their homes at their workplaces. In addition, workers employed in the Namibian agricultural sector often have little access to direct daily information and formal education, and are amongst the lowest cash-wage earners in Namibia. As a result, farm workers have limited employment opportunities outside the agricultural sector. Given these facts, it becomes clear why the situation of farm workers is often described as a continuous 'cycle of dependency' and vulnerability. Viewed against these perceptions of farm workers' working and living conditions, farm worker evictions in Namibia have over recent years received growing attention from Government, non-governmental organisation (NGO) and commercial farming circles.

Equally significant is the fact that farm worker evictions – which appear to be mainly the result of labour-related disputes – have increasingly become entangled as part and parcel of the national land reform debate. This became apparent when the former Prime Minister, Theo-Ben Gurirab, announced in February 2004 that Government was introducing the option of expropriating land to run concurrently with the 'willing buyer–willing seller' principle, also mentioned that "Government has witnessed with dismay and outrage how farm workers are left destitute and dumped with their families and belongings on the roadsides by their former employers …and, as a result, the Labour Act [No. 6 of 1992] is flouted and unrest has arisen in certain parts of the country". In the months following this announcement, the Government has targeted a number of farms for expropriation that had reported labour-related disputes and from which farm workers were evicted.

But, despite assumptions that the socio-economic conditions and legal bargaining power of farm workers are less favourable in comparison with other economic sectors, little research data exists on the rationale behind evictions and the effect evictions have on farm worker communities. Whether our Namibian courts can enforce existing eviction order procedures, in view of the sensitive political climate surrounding land reform in the country, has also been criticised by many campaigning for better basic living conditions for farm workers. Currently, no specific legislation exists that protects Namibian farm workers' land tenure rights when eviction orders are applied for, or when farm ownership changes. For example, a farm worker who has worked and resided on a farm for decades can be evicted by a new farm owner when s/he acquires ownership of the farm. Although previous field research by the Legal Assistance Centre suggests that retired farm workers are allowed to continue living on the farm in some cases, no specific legislation exists that protects their right to do so.

⁻

¹ Statement by the Rt Hon. Theo-Ben Gurirab, MP, then Prime Minister of the Republic of Namibia; Windhoek, 25 February 2004; http://www.grnnet.gov.na/News/Archive/2004/february/week4/legal_rpt.htm site last accessed 13 June 2006

RESEARCH OBJECTIVES AND METHODOLOGY

In view of the abovementioned study background, the aims and objectives of the research team were to –

- review land and labour legislation and its impact on the land tenure security and labour rights of farm workers in Namibia
- gather data from courts and investigate how farm worker tenure rights and livelihoods are impacted by court findings, and
- make recommendations, primarily by comparing the Namibian situation with South African legislation on securing farm worker tenure, and assessing the applicability of such legislation on integrating farm workers more effectively into the current Namibian land reform programme.

Data was gathered from Labour District Courts files in Gobabis, Keetmanshoop, and Otjiwarongo. The research team conducted interviews in Gobabis, Keetmanshoop, Otjiwarongo, and Windhoek with court officials, representatives of Government Ministries, and stakeholders in the agricultural sector.

All interviews took place during April and May 2006.

CHAPTER 2

INTRODUCTION: COMMON LAW EVICTIONS

The common law eviction procedure is a civil action that is brought against a person to remove him/her from land or property. The protection of possession and ownership of property includes all remedies that are concerned with the prohibition, opposition, restoration and compensation of infringements upon control of a holder or possessor of a thing.² Lawful possessors have a real right that is protected by the legal order, but under common law it is unacceptable to use the same argument with reference to unlawful possession. However, unlawful possessors are protected by calling on the common law remedy – the *mandament van spolie*, or spoliation order. It must be kept in mind, however, given the exceptional nature of this remedy that the existence of rights is not in question when the spoliation order is applied, since it is based upon the principle that unlawfully deprived possession must be restored before the merits of the parties' claims to possession are investigated.

For example, where a farm worker is dismissed and evicted without proper notice, s/he can keep the contract of employment alive by going to the court to say that s/he was not given reasonable notice. The farm worker cannot be evicted from his/her house. In other words, even when the farm owner has given the farm worker enough notice, the worker cannot be evicted. Should a farm worker be evicted in such circumstances, the eviction would be illegal. In order to legally evict a farm worker under common law, the owner must first obtain a court order from either a Magistrate's Court or the High Court. Without a court order, neither the owner nor the Police can evict a worker. Should the owner or the Police evict a farm worker without a court order, then the farm worker can apply for a spoliation order.

The common law principle behind the spoliation order is that no one should be allowed to take the law into his/her own hands and no one is permitted to dispossess another forcibly or wrongfully and against his/her consent of the possession of property, whether movable or immovable.³

If a property owner has legal grounds to evict a worker, for example, if the worker did not turn up for work and had no excuse, then the owner is obliged to notify the worker that there is a problem. Once the problem has been discussed, the property owner or his/her representative will usually draw up a written agreement to have whatever seems to be the problem fixed by a certain date.

If the worker refuses to correct the problem within the time frame agreed on, the property owner must then file a complaint with the court. The worker will receive a copy of this complaint along with a summons to appear in court. The owner cannot legally evict a person without a hearing.

Once the complaint has been filed with the court, both parties will receive a notice of hearing, setting a hearing date. If the complainant contests the eviction, s/he must file an answer with the court within five business days of having receiving the notice of hearing. If the complainant

-

² Olivier et al. 1992:178

³ ibid.:155

decides to ignore the summons, the court is then allowed to issue the property owner a final judgement allowing the sheriff to evict the complainant.⁴

THE HIGH COURT

The High Court Act, 1990 (No. 16 of 1990) provides for the jurisdiction of the High Court of Namibia in accordance of Article 80 of the Namibian Constitution. Article 80 (2) provides that the High Court has the jurisdiction to hear and adjudicate civil and criminal prosecutions, including cases that involve the interpretation, implementation and upholding of the Constitution. The High Court also has the jurisdiction to hear and adjudicate appeals from lower courts, such as Magistrates' Courts. Furthermore, the High Court has the power to remit a case to the court of first instance or the court whose judgment is the subject of appeal for further hearing. The court may also confirm, amend or set aside the judgment or order which is the subject of appeal, and give any judgment or make any order which the circumstances may require.

The High Court, which is based in Windhoek, deals with urgent eviction orders. For example, an application for eviction would be urgent if there was a belief that a real threat and danger existed with respect to the owner's property if the person(s) against whom an eviction order was being sought was not evicted. However, it appears from our findings that the High Court is very seldom approached for urgent orders regarding farm worker evictions. Table 1 below shows that members of the Namibia Agricultural Union (NAU) reported a total of 11 cases of evictions/unrest over the period 2001–2006. By Region, these cases took place in Omaheke (4), Otjozondjupa (3), Khomas (3), and Hardap (1).

Our research in the High Court's registrar files shows that, over the last five years, no cases where filed in the High Court that involved a farm owner applying for an eviction order against a farm worker.⁵ For example, two eviction cases that received prominent attention in the media, the Kalkpan (2002) and Arcadia Nord (2005–2006) cases, were dealt with in the Gobabis Magistrate's Court. As far as we could determine, the only case that was dealt with in the High Court was the Ongombo West case brought in 2003. The matter was eventually settled out of court and the farm owner reappointed the workers.

4 www.jud2.ct.gov; site last accessed 12 May 2006

4

⁵ A lawyer from Gobabis explained that applying for evictions procedures in the High Court was seen as too expensive and cumbersome.

Table 1: Total eviction/unrest cases reported by Namibia Agricultural Union members, 2001–2006

Year of reporting	Region where reported	
2002	Omaheke	
2003	Khomas	
2004	Khomas	
	Otjozondjupa	
	Hardap	
2005	Khomas	
2000	Omaheke	
	Otjozondjupa	
2006	Omaheke (2 cases)	
2000	Otjozondjupa	
Total cases	11	

THE LABOUR ACT AND THE ESTABLISHMENT OF DISTRICT LABOUR COURTS

The District Labour Courts where established in accordance with Part IV of the Labour Act, 1992 (No. 6 of 1992). The latter Act is still in force, pending the proclamation of its 2004 counterpart (No. 15 of 2004).

District Labour Courts are part of the Magistrate's Court system to resolve disputes between employees and employers. The 1992 Act contains provisions relating to basic conditions of employment, as well as specific rules concerning termination of service, dismissal of workers, and disciplinary action. These provisions and rules set out the minimum conditions that apply to all contracts of employment between individual employers and their individual workers. District Labour Courts do not deal with eviction cases.

The Constitution of the Republic of Namibia of 1990 lays down some fundamental human rights, which are also embodied in the 1992 Act. The Act in turn creates conditions through which the concerns of labourers in all of Namibia's commercial sectors can be addressed, including that of agricultural labourers. The 1992 Act also stipulates that farm workers have a right to adequate housing, cultivate land, and keep livestock. In addition, where farm workers are required to live on farms, their and their dependants' reasonable needs as regards housing, sanitation, and water must be met.

However, the 1992 Act does not specifically provide farm workers with land tenure rights: it leaves it up to the farm owner's discretion what the words "reasonable requirements" and "reasonable needs" under section 38 mean. Section 38 also does not provide for the needs of retired and other workers left homeless because they can no longer contribute to labour or have to the leave the farm because the owner has sold it.

Access to workers' homes is a further point of contention under section 38. The fact that farm workers have no legal land tenure rights means that farm owners maintain the right to determine who can visit and who can reside on the farm as dependants of their workers. As a result, restrictions are placed on farm workers' freedom to mix with others as they choose, as would otherwise be their right in rented or privately owned property.

Nevertheless, the 1992 Act provides means by which persons who believe they are not receiving the minimum conditions applicable to their employment are able to lodge complaints with the District Labour Courts and have the situation corrected. In cases of discrimination or harassment, the Labour Court (and not the District Labour Courts) deals with complaints. In circumstances where infringement of these conditions is thought to have occurred, the assistance of Labour Inspectors employed by the Ministry of Labour and Social Welfare can often resolve the problem without the need to bring the matter to court.

Where it is verified that an employee has been dismissed or disciplined, the employer must prove that such action was not taken unfairly. If a District Labour Court is satisfied that an employee has been unfairly dismissed, it may issue an order –

- (i) to reinstate the employee in the same or a comparable position
- (ii) to pay an amount equal to any losses suffered through dismissal (whether or not the employee is reinstated), and
- (iii) imposing a disciplinary penalty if the court deems this to be just and equitable in the circumstances.

If a District Labour Court is satisfied that unfair disciplinary action has been taken against an employee, it may issue an order –

- (i) setting aside such action
- (ii) imposing an alternative penalty which the court considers appropriate, and
- (iii) referring the matter back to the employer for reconsideration in the light of any directions specified by the court.

In considering complaints under section 45 of the 1992 Act, the court is required to have regard to the procedure by which the employer reached his/her decision to dismiss or discipline an employee. The rules with which a District Labour Court has to comply are as follows:⁶

Rule 3 stipulates that complaints must be lodged at the Clerk of the Court in the district where the complaint arose or where the respondent resides or practises his/her business. The Clerk of the Court will fill in the relevant forms that must then be served on the respondent. Rule 5(1)(b) stipulates that the Clerk of the Court will fix a trial date which must not be earlier than 30 days and not later than 60 days from the date the said complaint was lodged. The Clerk of the Court will also refer the matter to a Labour Inspector and a conference should take place before the date of hearing. The Labour Inspector will, in accordance with Rule 6, inform the complainant and respondent of the

_

⁶ Cohrssen & Light (1998:19)

date on which the conference will be held. At the conference, the Labour Inspector will attempt to settle the matter or investigate it further.

- If the respondent wishes to defend a complaint, s/he must, in writing and on the prescribed form, furnish reasons for opposing the complaint, and serve it on the complainant within 14 days of receiving the complaint. The original form and proof of service on the complainant must be then filed at the office of the Clerk of the Court. Rule 8 stipulates that if the respondent wishes to institute a counter complaint, s/he must then deliver this together with his/her reply in terms of Rule 7.
- A complainant or respondent may ask the Clerk of the Court to summon any witness s/he may need, or ask the Clerk of the Court to notify a person to produce certain documents and/or books of account or registers at the hearing.
- If the matter has not been settled at the pre-trial conference, Rule 10(4) provides that the matter goes to court. If the respondent is duly served with a copy of the complaint and a notice of hearing, and s/he fails to attend the hearing, the court may make an order against him/her for the amount or performance claimed. If the complainant fails to attend the hearing, the court may dismiss the claim in terms of Rule 10(5).
- When the parties go to court, the court needs to consider all the details regarding the claim in order to work out or double-check the monetary value of the claim. If an order for the payment of money is made against one of the parties, and such party does not pay within the time ordered by the court, such party can be proceeded against in terms of the normal debt recovery procedures mentioned in Rule 23 of the Magistrate's Court Act, 1944 (No. 32 of 1944). A party failing to abide by the order of a District Labour Court can also be charged with contempt of court.

THE PHASING OUT OF DISTRICT LABOUR COURTS

Under the Labour Act, 2004 (No. 15 of 2004), whose date of commencement is yet to be proclaimed, District Labour Courts will be phased out, although the Labour Court system will remain. Section 115 of the 2004 Act provides that the Labour Court has exclusive jurisdiction to determine appeals from decisions of the Labour Commissioner made not only in terms of this Act, but also in terms of arbitrators' awards.

The phasing out of District Labour Courts is attributed to their slow pace in finalising matters. Their other shortcomings can be linked to the magistrates or residing officers concerned often being overloaded with files from other courts, since these officials are responsible for various other civil or criminal complaints. In other instances, it has happened that documents were removed from District Labour Court files because Clerks of the Court would make such files available to people upon request, but without supervision. In many cases, individuals would deliberately remove the Rule 6 conference report or the police statement – rendering the magistrate unable to continue with the case or grant a judgement. Such cases would then be removed from the roll.

The Ministry of Labour and Social Welfare is of the opinion that the process of arbitration, conciliation and mediation will be more effective in resolving labour matters; it is seen as an alternative to litigation as it provides for cases being finalised within 30 days. A skilled and professional arbitrator will be assigned by the Labour Commissioner to resolve matters.

Arbitration is the process by which two adversarial parties submit their claims to an independent and unbiased mediator. The arbitrator then decides in favour of either claimant or declares a settlement that compromises between the two competing positions. As the two parties have agreed to abide by the arbitrator's ruling, there is typically no further action by either party once the ruling is made public. Although the result of an arbitration hearing may not please one of the parties or even both of them, the outcome is usually preferable to continuing a strike or other action that benefits nobody in the long run.

There is currently a shortage of Labour Relations Officers, which increases the pressure on these officers to investigate labour-related disputes. In addition, District Labour Courts are not always capable of finalising cases – due to events where Rule 6 conference reports are lost or not being submitted to the courts in time. Another shortcoming is the high staff turnover in respect of Regional Labour Relations Officers. Many regard the current salary scale for these officers as very low, considering their workload.

The Ministry of Labour and Social Welfare provides opportunities to these officers to upgrade their qualifications at the University of Namibia or at South African institutions to obtain a postgraduate Diploma in Arbitration and Mediation. After obtaining a higher qualification, Labour Relations Officers often apply for positions at the Office of the Labour Commissioner, leaving a vacuum in their respective regional offices. According to some Labour Relations Officers, the salary grading system should be brought in line with the one that applies for the Office of the Labour Commissioner.

Regarding the duties of Labour Relations Officers, Chapter 8 of the 2004 Act provides for alternative dispute resolution mechanisms, namely arbitration and conciliation, in dealing with labour disputes. During the revision of the 1992 Act, the debate focused on making arbitration a compulsory alternative process for dispute resolution, rather than leaving the option as voluntary. Section 83 of the 2004 Act provides for any party to refer a labour dispute to the Office of the Labour Commissioner or any other labour office, in writing, and the Labour Commissioner is obliged to make available to the parties the names of arbitrators who, in terms of section 98, are qualified to determine the dispute. Section 83 also provides that the parties may, by agreement, nominate one or more persons for appointment as arbitrator. The arbitrator is required to fix the date, time, and place of the hearing. The arbitrator then conducts the hearing in whatever manner most expeditiously permits full presentation of the evidence and arguments of the parties, and s/he arranges for appropriate minutes to be taken of the proceedings.

Communication other than at oral hearings between the parties and a neutral arbitrator will not be allowed, unless the parties and the arbitrator agree otherwise. Any other oral or written communication from the parties to the arbitrator shall be directed to the Labour Commissioner for transmittal to the arbitrator. The arbitrator is required to interpret and apply rules insofar as they relate to his/her powers and duties. Where there is more than one arbitrator and a difference arises among them concerning the meaning or application of any such rule, it shall be decided by a majority vote.

Once these mechanisms are successfully implemented, they will hopefully deal with the backlog of cases, take the pressure off the Labour Inspectorate, and resolve cases more quickly than the Labour Courts.⁷

It is foreseen that the Professional Arbitration and Mediation Association of Namibia (PAMAN) will play a proactive role under the 2004 Act in promoting alternative dispute resolution amongst the public as an equitable, just and efficient means of resolving disputes.

According to the Controlling Labour Relations Officer at the Office of the Labour Commissioner, conciliation and arbitration would be the ideal alternative to labour dispute resolution: it is not as complex and technical as the court process, simple language is used during the process, and parties are able to negotiate in a less formal and less costly manner.

Section 83(18) of the 2004 Act provides that parties to a dispute must within 30 days of conclusion of the arbitration proceedings issue an award (outcome of the process), which is binding. Section 86 of the 2004 Act provides for appeals or reviews of arbitration awards, should any party affected by the award deem this necessary. A party to a dispute may also appeal against an arbitrator's award in accordance with the rules of the Labour Court within 30 days after such award has been served.

The Controlling Labour Relations Officer further noted that the Office of the Labour Commissioner would be implementing sections 83 and 86 of arbitration procedures by the end of 2006 as human resources had already been trained and the necessary technical support was in place. The Labour Commissioner would be tasked with the recruitment of arbitrators and conciliators, with priority given to the Windhoek Office, the Southern Office in Keetmanshoop and Northern Office in Grootfontein.

THE NATIONAL RESETTLEMENT POLICY

The National Resettlement Policy of 2001 does not provide guidelines on how farm workers' rights of tenure are to be protected once commercial farms become available for resettlement purposes. In recognition of this fact, the Government established the Commission of Inquiry into Labour-related Matters affecting Agricultural and Domestic Employees – the so-called Kameeta Commission, after its Chairperson, Bishop ZN Kameeta. The Commission's report and recommendations were presented to the President in 1997. However, the Government has yet to consider these recommendations for implementation.

The 2004 Labour Act, unlike its 1992 counterpart, does not contain any provisions that could afford some tenure protection to farm workers in the event that their employment contracts are terminated. In addition, the fact that Labour Relations Officers are under-resourced undermines the Ministry of Labour and Social Welfare's ability to investigate and resolve farm labour disputes. Thus, the 2004 Act only addresses the general labour concerns of farm workers, and not specifically the issue of their tenure rights.

9

⁷ Interviews with Chief Labour Inspector Ndilimeke Nghimutina and Labour Relations Officer Penda ya Otto of the Ministry of Labour and Social Welfare, 10 May 2005

INTERVIEWS WITH LABOUR RELATIONS OFFICERS

Labour Relations Officers are part of the Office of the Labour Commissioner established in 1992. The Labour Commissioner is responsible for, among other things, the registering of trade unions, employers' organisations, and collective agreements. The process is aimed at promoting and maintaining harmonious labour relations between and among trade unions, employers, and employers' organisations.

According to the Labour Relations Officer in the Omaheke Region, Mr Sam Kambazembi, the normal procedure for an employee to follow is to approach the Office of the Labour Inspector. The Labour Inspector's role is to conduct an investigation into the matter reported, and to act as mediator in trying to resolve it in accordance with the provisions laid down by the 1992 Labour Act. In the event that the matter cannot be resolved through mediation, it is referred to the District Labour Court. Most cases, according to the said Labour Relations Officer, concern employees who feel they have been dismissed unfairly. Usually, while their case is pending, employees are obliged to find alternative accommodation. Generally, in such circumstances, the relationship between employer and employee has broken down; as a result, the employee would be required to leave the place of employment – which cannot be construed as eviction.

In terms of eviction cases, Mr Kambazembi referred to the case of the Kalkpan Farm in 2002. The facts of this case are that the former owner had always allowed his retired workers to remain on the farm. After the farmer himself retired, he became a resident of the Gobabis old age home, and gave the farm over to his son-in-law. The son-in-law decided he no longer needed all the people that were in his employ, and got an order to evict them. The Messenger of the Court was instructed to carry out the eviction order. At this point the Governor of Omaheke and other top Government officials intervened to stop the Sheriff's Office from executing the eviction order. According to Mr Kambazembi, the farm owner was told not to go ahead with the eviction, otherwise the Government would be forced to expropriate the farm. The farm owner eventually gave in and agreed to let the ex-farm workers stay on the farm in perpetuity without paying rent.

According to Mr Kambazembi, many dismissed farm workers who have livestock often have no place to go and there is no provision or remedy for such a worker. More often than not, labour disputes involving farm workers are handled by Labour Relations Officers. In addition, the Labour Relations Office has no power to cause this person to be resettled or to recommend his/her resettlement because the Ministry of Labour and Social Welfare has no representative on the Regional Resettlement Committee. Another constraint is that the Omaheke Labour Relations Office is responsible for 1,072 farms as well as all the businesses in Gobabis. Since the Office is clearly understaffed, it cannot reach all farm workers. As a result, Labour Inspectors only visited those farms where disputes arose.

Deputy Labour Commissioner

⁸ The hierarchy of the Office is as follows:

Labour Commissioner

Control Labour Relations Officers – based in Windhoek and responsible for supervising regional offices

Chief Labour Relations Officers

Labour Relations Officers

Most complaints reported at the Gobabis Labour Relations Office involved basic conditions of employment, i.e. leave issues, minimum wages, and employees who were absent from work without reason – especially after payday or month-end.

As Mr Kambazembi explained, the situation on most farms in Namibia was that there were generations of families that had worked there; if it happened that a relative died and was buried on the farm, that person's relatives continued living and working there. Often, the reality was that these people had lived on a specific farm their entire life, and regarded it as their only home. For example, younger generations who were not in employment on a specific farm would go and seek employment elsewhere, but would return to the farm — which they saw as their home. As generations passed, the farm management also changed, typically with a different management style that required changing the human resource base on the farm. The new owner might decide to keep the strong young men and women in his employ, and verbally request the others to vacate the land by mutual agreement or by means of an eviction order. This would affect retired workers, older women, and children. In such a situation, where the farmer indicates that this people were not and are not his employees s/he has the right in terms of common law evictions to get these people off his property, and there is unfortunately absolutely nothing we can do because there is no legislative framework in place to protect these people.

According to Mr Fritz Spiegel, a Labour Relations Officer at the Keetmanshoop Labour Relations Office, their office was responsible for the entire southern part of the country, namely the Hardap and Karas Regions.

The Labour Relations Office is staffed with four Labour Inspectors: two in Keetmanshoop, one in Lüderitz, and one in Mariental. Although the population is relatively small, the area itself is vast – making inspections and outreach to the farms difficult because of a lack of human resources.

The complaints that the Keetmanshoop Labour Relations Office hears from farm workers involve unfair dismissals, non-payment of leave days, non-payment of severance packages, and employers not complying with the stipulated minimum wage. In the latter respect, emerging farmers are particularly negligent. The Labour Relations Office conducts routine inspections on farms, during which they identify problems. In the event that problems contravening the 1992 Labour Act are identified, the Labour Relations Office issues the employer with an action letter, in which s/he is instructed to act and give feedback within a given time. Follow-up inspections are done to ascertain if any actions have been taken. A total of 389 cases have been reported since January 2005. Of these, the Labour Inspectorate has settled 300, while 60 were referred to the District Labour Court and 29 are still pending.

Mr Spiegel expressed his concern regarding the high turnover of Labour Inspectors. In Mr Spiegel's opinion, the situation weakened the Labour Inspectorates' ability to fulfil their duties. He feels that stronger provision should be made for farm workers to keep livestock to sustain their basic needs.

However there is no provision or remedy for farm workers who find themselves in such positions. More often labour disputes involving farm workers are handled by Labour Relations Officers and given the above scenario when a worker with livestock looses his job, the Labour Inspectorate has no recommending power to assist this person for resettlement because the Ministry of Labour has no representative on the regional resettlement committee.

CHAPTER 3

PRESENTATION OF RESEARCH DATA

The purpose of this Chapter is to present our research data and findings on District Labour Courts in Gobabis, Keetmanshoop and Otjiwarongo. During each visit to the respective District Labour Court, the research team inspected the court rolls. The team was guided by Clerks of the Court as to which cases constituted farm worker vs. farm owner disputes. A short summary of the facts and the outcome of each case are presented below.

SUMMARY OF DATA EXTRACTED FROM COURT ROLLS

Table 2 shows that 23 (13.9%) out of 165 cases that related to farm worker vs. farm owner disputes were dealt with over the period 2001–2005 in the Gobabis District Labour Court.

Table 2: Gobabis District Labour Court Register

Year	Total number of labour cases	Number of dispute cases between farm workers and farm owners
2001	34	2
2002	18	2
2003	35	6
2004	32	3
2005	46	10
Total	165	23

2001 cases

26/2001

A complaint of unfair dismissal was lodged against the respondent, where the respondent had not given the complainant proper notice. The complainant claimed leave days and a severance package from the respondent. The outcome of the case is not reported; it was possibly struck from the court roll.

29/2001

A complaint was made of non-payment for work performed for the respondent. The case was struck from the court roll after the complainant did not turn up for court proceedings.

04/2002

A complaint of unfair dismissal was lodged. The court ordered the respondent to pay a severance package of N\$535 to the complainant.

16/2002

A complaint concerning breach of contract was lodged against the respondent. The circumstances under which the complaint was made are not stated. The complainant was absent on the day of the court hearing, and as a result the matter was removed from the court roll.

2003 cases

O9/2003

Two complainants lodged a complaint of unfair dismissal as regards not receiving a severance package. Judgment was granted in favour of the complainants. The first complainant received a severance package of N\$576, while the second received one of N\$756.

13/2003

A complaint of unfair dismissal was lodged. The out-of-court settlement in this case amounted to N\$1,000.

14/2003

A complaint of unfair dismissal was lodged. The complainant was absent from the court hearing, so the matter was removed from the court roll in terms of Rule 10(5) of the 1992 Labour Act.

15/2003

The complainant stated that he had received less than the minimum wage stipulated by law. The outcome of case is unknown; it may either have been settled out of court or struck from the court roll.

23/2003

A complaint of unfair dismissal and receiving less than the minimum wage was lodged. No grounds for the complainant's absence from court proceedings were given, but the complaint was dismissed in terms of Rule 10(5) of the 1992 Labour Act.

17/2003

This case appears to refer to stock theft charges against two complainants: a father and his son. The complainants allege that the respondents beat them up, which the respondents deny. The complainants claimed six months' remuneration in terms of section 36 of the 1992 Labour Act, which amounted to N\$7,500. The respondents placed the burden of proof on the complainants and denied that any action on the respondents' part constituted their unfair dismissal. The outcome of this case is unknown. It might have been settled between the parties out of court, or the complainants might have dropped their charges.

2004 cases

08/2004

A complaint of unfair dismissal was lodged, but the court dismissed the claim.

09/2004

A complaint of unfair dismissal was lodged. The respondent was ordered to pay N\$1,900 to the complainant, being leave due and a severance package.

20/2004

A complaint was lodged against a respondent for the latter's refusal to comply with minimum wage requirements. The matter was settled at a Rule 6 conference after agreement was reached.

O2/2005

A complaint of unfair dismissal was lodged. The matter was removed from the court roll after neither the complainant nor the respondent appeared in court.

03/2005

A complaint of unfair dismissal was lodged. The matter was removed from the court roll after neither the complainant nor the respondent appeared in court.

04/2005

A complaint of unfair dismissal was lodged and settled at a Rule 6 conference.

05/2005

A complaint regarding breach of contract and a request for payment was lodged, but the complainant later withdrew the charge.

12/2005

A complaint of outstanding payments was lodged. The court ordered the respondent to pay the outstanding amount to the complainant. The amount payable to the complainant was not mentioned in the file.

17/2005

A complaint of unfair dismissal was lodged. The complainant did not turn up for the Rule 6 conference or for the trial date. The order was dismissed in terms of Rule 10(5) of the 1992 Labour Act.

20/2005

A complaint of unfair dismissal was lodged. The court ordered the respondent to pay the complainant a severance package of N\$480.

26/2005

A complaint of unfair dismissal was lodged and an amount of N\$110 was paid to the complainant.

> 32/2005

A complaint of unfair dismissal was lodged. The complainant demanded payment of a severance package and compensation for unutilised leave days. The court dismissed the case because the complainant had resigned of his own accord.

42/2005

A complaint of unfair labour practices was lodged. The matter was settled out of court for N\$533.

Table 3 shows that 12 (5.8%) out of 207 cases that related to farm worker vs. farm owner disputes were dealt with over the period 2001–2005 in the Keetmanshoop District Labour Court.

Table 3: Keetmanshoop District Labour Court Register

Year	Total number of labour cases	Number of dispute cases between farm workers and farm owners
2001	No cases found	0
2002	47	2
2003	33	2
2004	72	3

Year	Total number of labour cases	Number of dispute cases between farm workers and farm owners
2005	55	5
Total	207	12

It appears that the record of cases heard during this year went missing after the Magistrate's courthouse was renovated. As a result, no case reports for 2001 were found.

2002 cases

03/2002

A complaint of unfair dismissal was lodged. The respondent was ordered to compensate the complainant for loss of income and wages to the tune of N\$2,100.

10/2002

A complaint of unfair dismissal and unfair labour practices was lodged. The respondent was ordered to pay out three months' wages for loss of income, wages for a one-month notice period, unutilised leave days, and a severance package.

2003 cases

02/2003

A complaint of unfair dismissal was lodged. The respondent was ordered to pay out unutilised leave days and one month's salary to the complainant.

19/2003

A complaint was lodged relating to the respondent not complying with the legal requirement for a minimum wage. The respondent was ordered not only to pay the complainant compensation retroactively, but also to reinstate the complainant.

2004 cases

03/2004

A complaint of unfair dismissal was lodged, which included a claim by the complainant for not having received wages for one month. The respondent was ordered to pay out the complainant's unutilised leave days as well as a month's salary as a severance package.

59/2004

A complaint of child labour, unlawful labour practices and refusing to pay the required minimum wage was lodged against the respondent. At a Rule 6 conference, the respondent agreed to pay out accrued leave, one month's salary for the notice period, and outstanding wages.

64/2004

The complaint entailed the respondent not having paid wages as contractually agreed, so the complainant sued for breach of contract. The outcome of this case was not stated in the court file.

O7/2005

This complaint involved a domestic worker on a farm who had not received the minimum wage over a period of two years. The respondent was ordered to pay the complainant an amount of N\$4,000.

19/2005

A complaint of unfair dismissal was lodged. The matter is still pending.

> 35/2005

A complaint of unfair dismissal was lodged. The matter is still pending.

40/2005

A complaint of unfair labour practices was lodged. The respondent was ordered to pay remuneration in terms of section 36(1), (2), 3(a) and 3(b) of the 1992 Labour Act.

67/2005

A complaint of unfair dismissal was lodged. The matter is still pending.

Table 4 shows that 21 (7.3%) out of 286 cases that related to farm worker vs. farm owner disputes were dealt with over the period 2001–2005 in the Otjiwarongo District Labour Court.

Table 4: Otjiwarongo District Labour Court Register

Year	Total number of labour cases	Number of dispute cases between farm workers and farm owners
2001	47	3
2002	51	4
2003	70	7
2004	56	1
2005	62	6
Total	286	21

2001 cases

05/2001 and 09/2001

It is not clear why this case was reported under two separate case numbers. It dealt with a complaint of unfair dismissal; however, the outcome is unknown. It is possible that the complainant withdrew his complaint.

29/2001

A complaint of unlawful deductions from wages was laid against the respondent. The case was settled at a pre-trial conference, after which a payment of N\$620 was made to the complainant.

43/2001

A complaint of unfair dismissal was lodged. The case was postponed *sine die*, i.e. with no appointed date for resumption. It is possible that the case was settled out of court.

04/2002

A complaint of non-payment of wages was lodged. The case was settled after the respondent paid the complainant N\$300.

16/2002

A complaint of unfair compensation was lodged. The complainants had entered into an agreement with the respondent to engage in a bush-cutting project. The parties had agreed on a set fee to be paid to the complainants per hectare upon completion of the project. Once the project was complete, the complainants alleged that the respondent did not remunerate them according to their agreement. The matter was heard at a Rule 6 conference in order to be settled, but was subsequently referred back to the District Labour Court for a ruling. However, the case was not heard there – possibly because the complainants did not turn up at the court hearing. As a result, the case was removed from the court roll.

> 32/2002

A complaint of unfair dismissal was lodged, after which the case was settled at a pre-trial conference when payment of N\$580 was made to the complainant.

33/2002

A complaint of unfair compensation was lodged. The outcome of this case is unknown, however. It may be that the case was settled out of court or that the charge was withdrawn.

2003 cases

22/2003

The exact reason for the complaint in this case was not clearly stated, but most probably relates to an unfair dismissal. It appears that the case was removed from the court roll.

31/2003

The file of this case is incomplete and the reason for the complaint is not known. As a result, the outcome of the case is also unknown.

> 32/2003

A complaint of unfair dismissal was lodged. The case was settled, and the complainant received N\$130 as severance pay.

40/2003

A complaint entailing a labour-related dispute was lodged. The case was settled and the farm worker was reinstated.

43/2003

This case, which deals with an unfair dismissal, was heard in the wrong district (Otjiwarongo). As a result, no Rule 6 conference was held. The file states that the case should have been heard in the Otavi–Grootfontein District Labour Court.

51/2003

A complaint of unfair dismissal was lodged. The outcome of the case is unknown.

52/2003

A complaint of unfair dismissal was lodged. The outcome of the case is unknown.

2004 cases

36/2004

The file of this case is incomplete and the reason for the complaint is not known. As a result, the outcome of the case is also unknown.

05/2005

A labour-related complaint was lodged. The file of this case is incomplete and the reason for the complaint is not known. As a result, the outcome of the case is also unknown.

09/2005

A complaint of unfair dismissal was lodged. The complainants' cause of action was based on an alleged breach of contract of employment. The respondent denied that he employed the complainants and that any employment contract had existed between the parties. The respondent purchased Farm Otjiku No. 192 and the remainder of Farm Grootgeluk No. 193, where the complainants were previously employed on or about 17 November 2003. The transfer of the farms was registered on 16 February 2004. The previous owner of the farm had employed the complainants. The respondent had not employed the complainants prior to or after the respondent bought the farms. The complainants lodged their complaints on 22 February 2005, more than 12 months after the respondent's cause of action. The complainants' claim has since lapsed in terms of section 24 of the 1992 Labour Act. The respondent requested an order that the complainants' claim be dismissed with costs. The matter was referred to the High Court. The complainant and nine others are currently living in the corridors along the D2404 road. The outcome of this case is still unknown.

Table 5: Total number of disputes between farm workers and farm owners reported in Gobabis, Keetmanshoop and Otjiwarongo District Labour Courts

Year	Total number of labour cases	Number of disputes between farm workers and farm owners
2001–2005	658	56

In total, 56 (8.5%) of the 658 cases reported in the Gobabis, Keetmanshoop and Otjiwarongo District Labour Courts relate to disputes between farm workers and farm owners. Other cases reported in the District Labour Courts typically included labour complaints from the wholesale and retail trade, from domestic workers, and security services – to name a few. Due to time constraints, the research team only focused on identifying those cases that dealt specifically with labour-related disputes between farm workers and farm owners.

REASONS FOR FILING COMPLAINTS AT THE DISTRICT LABOUR COURTS

The reasons for filing complaints in the selected District Labour Courts were as follows:

Table 6: Gobabis

Reason for complaint	Total
Unfair dismissal	15
Unlawful deductions from wages	0
Non-payment of wages	2
Unfair compensation	0
Breach of contract	2
Wages less than the required minimum	2
Unfair labour practices	1
Total	22

Table 7: Keetmanshoop

Reason for complaint	Total
Unfair dismissal	8
Unlawful deductions from wages	0
Non-payment of wages	0
Unfair compensation	0
Breach of contract	1
Wages less than the required minimum	1
Unfair labour practices	2
Total	12

Table 8: Otjiwarongo

Reason for complaint	Total
Unfair dismissal	7
Unlawful deductions from wages	1
Non-payment of wages	1
Unfair compensation	2
Breach of contract	0
Wages less than the required minimum	1
Unfair labour practices	1
Total	13

19

FINDINGS

The focus of this chapter was on the research conducted on labour-related disputes between farm owners and farm workers that were reported in the Gobabis, Keetmanshoop and Otjiwarongo District Labour Courts. The aim was to determine the effect that labour disputes and, more specifically, farm worker evictions had on securing the livelihoods of farm workers and their dependants. However, due to time, financial and other constraints, this study did not allow us to determine the number of farm workers that were unlawfully evicted from their homes.

Our findings nevertheless reveal that there are many shortcomings regarding accessibility when it comes to aggrieved parties making use of the District Labour Courts. It appears that most complainants, who are farm workers, had no legal presentation when a case went to the District Labour Court. Furthermore, the fact that many cases were removed from the court roll might indicate that cases in the District Labour Courts either take too much time to conclude, or that the parties involved in a dispute simply lose interest in pursuing their cases when they do not receive legal aid from the Government.

A person applying for legal aid should earn an income of N\$1,500 or less per month, including deductions for income tax and social security. An applicant is required to submit a recent payslip as proof of income. Applications for legal aid can be made through any Magistrate's Court office, meaning that one does not need to come to the Legal Aid Directorate in Windhoek in person to do so. The Director of Legal Aid is responsible for selecting a legal representative for the applicant, and takes into consideration the merits of the particular case as well as whether the applicant is employed or not. The Director informs the applicant in writing about the outcome of his/her application. If the application is approved, the Directorate acquires the services of a legal practitioner, who could either be selected from private practice or from the Government's attorneys. The applicant is then informed as to who will represent him/her in the matter at hand.⁹

As stated earlier, a local Magistrate's Court often assists legal aid applicants who live outside Windhoek in submitting their applications to the Legal Aid Directorate. The reported backlog in processing these applications in Windhoek could, however, be seen as impacting negatively on complainants in respect of them receiving a fair trial in District Labour Courts. Moreover, the research team spoke to evicted farm workers in the Gobabis and Otjiwarongo areas, who complained that they often did not understand the proceedings at court. To compound matters, in some cases the financial circumstances of those who have been evicted do not allow them to travel to court to attend their hearings. For example, the research team spoke to some evicted farm workers who were currently living in the road corridor next to the farm of their former employ, i.e. approximately 100 km from the District Labour Court where they were required to attend court hearings.

The data show that the majority of cases involved unfair dismissal. The next most frequent complaint involved unpaid salaries or severance packages. All the complainants were farm workers and, in most cases, male. As noted above, none of the complainants appear to have had legal representation. Technically, complainants could apply for legal aid from the Government; but the Clerks of the District Labour Courts to whom we spoke during our visits stated that the application process was very cumbersome, and that most complainants found it difficult to understand the court procedures.

_

⁹ Telephonic conversation with Mr Vero Mbahuurua, Director of Legal Aid, 30 May 2006

The abovementioned court files we investigated do not clearly show how many of the farm workers that were involved in labour disputes left or remained on the farm owner's property after the case was resolved. It could be assumed that, in cases where the relationship between owner and worker had irretrievably broken down, the worker was left with no other option but to leave the property in search for other work or another place to stay. Furthermore, farm workers who have lost their work due to labour-related disputes or the fact that a farm has changed ownership also do not receive any preferential treatment from the Ministry of Lands and Resettlement, although they are emergency cases.

CHAPTER 4

DRAFTING LEGISLATION FOR NAMIBIA

In the absence of clear legislation dealing with securing farm workers' rights of tenure in Namibia, South African legislation – namely the Extension of Security of Tenure Act, 1997 (No. 62 of 1997) – could offer some guidelines for possibly developing similar legislation in this country. Generally, the provisions in Namibia's Draft National Land Tenure Policy are very similar to the Extension of Security of Tenure Act. These two pieces of legislation will be discussed below.

Namibia's Draft National Land Tenure Policy

The then Ministry of Lands, Resettlement and Rehabilitation released the final draft of the National Land Tenure Policy in October 2003. This Policy seeks to establish Regional Land Tenure Committees within each of Namibia's 13 Regions to address key issues concerning farm labourers. Once established, these Committees will be able to mediate in disputes involving eviction, removal and resettlement in respect of the owners and occupiers of land, as well as assist such owners and occupiers in drafting agreements between them.

The Draft National Land Tenure Policy has not yet become official policy. When it does, commercial farmers will be obliged to draw up agreements with their workers. Farm workers as well as their dependants will have the right to indefinite occupation if they have lived and worked on a farm for a minimum period of ten years. When the farm worker retires, s/he will have legally recognised rights to remain on the farm and will be able to use the land according to his/her reasonable needs for farming activities.

The Draft Policy further states that all established legal procedures must be met before eviction can take place. Besides its mediating role, each Regional Land Tenure Committee will be able to investigate disputes between farm owners and their workers. Such Committees will also have the power to remove and suitably resettle farm workers. Either party in a dispute will be entitled to refer his/her claim or eviction or restoration of rights of residence to a court of law if mediation between the two parties has failed.

In the event a farm worker is required to leave the farm, s/he will be given a grace period during which the owner, in collaboration with the Ministry of Lands and Resettlement, will help to arrange for a suitable site for the worker's resettlement.

If the owner wishes to obtain an eviction order, a notice of intention must be given to the occupier. In particular, an occupier will be required to vacate the farm if s/he violates the conditions of the owner—occupier contract. In such a case, the farm worker will be given due notice and the owner, in collaboration with the Ministry of Lands and Resettlement, is again required to help in arranging for a suitable site for the worker's resettlement.

¹⁰ According to Ms Foussy Ngh-Namugongo, Chief Development Planner, Directorate of Land Reform, Ministry of Lands and Resettlement, 28 April 2006

22

In summary, the Draft Policy's focus on mediation between farm owners and farm workers in the case of a dispute between them should be seen as a welcome alternative to solving the oft-confusing court procedures usually employed not only in such disputes, but also where farm workers are evicted.

South Africa's Extension of Security of Tenure Act

Background

The Extension of Security of Tenure Act, 1997 (No. 62 of 1997) provides for measures to, with State assistance, –

- facilitate long-term security of land tenure
- regulate the conditions of residence on certain land
- regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated, and
- regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from land.

The Act was promulgated with the aim of providing additional and improved security of tenure for people whose tenure of land was insecure and who were threatened by evictions. This applies mostly, but not exclusively, to farm workers not protected by the Land Reform (Labour Tenants) Act, 1996 (No. 3 of 1996). The Extension of Security of Tenure Act applies to rural – i.e. agricultural – areas only, and not to land in a township that was established, approved, proclaimed or recognised in terms of any other law.

The most important issue in the Extension of Security of Tenure Act is that it applies to all lawful occupiers of land. An *occupier* is defined as a person residing on land which belongs to another person, and who, by 4 February 1997 or thereafter, has had consent or another right in law to do so, but excluding a person using or intending to use the land in question mainly for industrial, mining, commercial and commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family.

In other words, protection against eviction is directed solely towards occupiers of land owned by another party, and not towards each and every person residing on such land.

Specifically protected under the South African Act is security of tenure for persons older than 60 who have occupied land for longer than 10 years, and whom the landowner has employed. Specific provision is also made for the rights of a spouse or dependant of an occupier for 12 months after such occupier's death. Owners' rights are protected by making exceptions to the protective measures in the Act in cases where the occupier has committed certain criminal or unacceptable acts, or where the occupier's residence rights were based solely on his/her duration of employment with the employer.

In general, consent to occupy may be withdrawn and evictions may take place only if such actions are in line with the parties' constitutional rights, if the proper procedures laid down in the Act have been followed, and if the withdrawal of rights or eviction is just and equitable in the circumstances.

Tacit consent is regarded as sufficient to qualify the occupier for the protection under the Act. An occupier has the right to reside on the land in question and to utilise it in line with the rights of the owner or person in charge. However, an occupier is prohibited from intentionally and unlawfully causing harm or material damage to the landowners' property.

The rights of an occupier

The Act provides that an occupier has the right to reside on and use the land on which s/he resided and which s/he used on or after 4 February 1997, and to have access to such services as agreed upon – whether expressly or tacitly – with the owner or person in charge.

Balanced with the rights of the owner or person in charge, an occupier is entitled to the following:

- The right to security of tenure
- The right to receive bona fide visitors at reasonable times and for reasonable periods. The owner or person in charge may impose reasonable conditions that are normally applicable to visitors entering such land in order to safeguard life or property or to prevent the undue disruption of work on the land, and the occupier is liable for any act, omission or conduct of any of his/her visitors causing damage to others while such a visitor is on the land if the occupier, by taking reasonable steps, could have prevented such damage
- The right to receive postal or other communication
- The right to family life in accordance with the culture of that family
- The right to bury a deceased member of his/her family who, at the time of that person's death, was residing on the land on which the occupier is residing, if an established practice in respect of the land exists
- The right not to be denied or deprived of access to water, and
- ▶ The right not to be denied or deprived of access to educational or health services.

What an occupier may not do

An occupier may not -

- intentionally and unlawfully harm any other person occupying the land
- intentionally and unlawfully cause material damage to the property of the owner or person in charge
- engage in conduct which threatens or intimidates others who lawfully occupy the land or other land in the vicinity, or
- enable or assist unauthorised persons to establish new dwellings on the land in question.

Any person has the right to visit and maintain his or her family graves on land that belongs to another person, subject to any reasonable condition imposed by the owner or person in charge of such land in order to safeguard life or property or to prevent the undue disruption of work on the land.

An owner may have a trespassing animal usually or actually in the care of an occupier impounded and removed to a pound in accordance with the provisions of any applicable law, if the owner or person in charge has given the occupier at least 72 hours' notice to remove the animal from the place where it is trespassing and the occupier has failed to do so.

An owner or person in charge may not prejudice an occupier if one of the reasons for the prejudice is the past, present or anticipated exercise of any legal right.

Evictions of occupiers

The Act provides for the following eviction procedures:

- Eviction of a person who was an occupier on 4 February 1997
- Eviction of persons who became occupiers after 4 February 1997
- Urgent eviction proceedings

An owner can apply to his/her local Magistrate's Court or to the Land Claims Court for an occupier to be evicted. Applications can also be made to the High Court if all parties to the dispute agree to it. Disputes between parties can also be settled by way of mediation. An arbitrator can also be appointed in such cases.

If an occupier has been evicted in contravention of the Act, s/he may apply for reinstatement. Such an order may include provisions regarding the payment of compensation, or the repair, reconstruction or replacement of any building. The owner or person in charge of the property has to give the occupier, the municipality in whose area of jurisdiction the land is situated, and the head of the relevant provincial office of the Department of Land Affairs not less than two calendar months' written notice of the intention to obtain an eviction order. The notice should contain the particulars and grounds for eviction.

An occupier may be evicted only in terms of an order of court issued under this Act. Eviction without a court order is an offence in terms of the Act.

Eviction of a person who was an occupier on 4 February 1997

A court may grant an eviction order of a person who was an occupier on 4 February 1997 if -

- the occupier has breached section 6(3) of the Act, and if the court is satisfied that the breach is material and that the occupier has not remedied this breach. A breach in terms of section 6(3), for example, would be when an occupier has
 - intentionally and unlawfully harmed another person occupying the land
 - intentionally and unlawfully caused material damage to the property of the owner or person in charge
 - engaged in conduct that has threatened or intimidated others who lawfully have occupied the land or other land in the vicinity, or
 - enabled or assisted unauthorised persons to establish new dwellings on the land in question
- although the owner or person in charge has complied with the terms of any agreement pertaining to the occupier's right to reside on the land and has fulfilled his/her duties in terms of the law, the occupier has breached a material and fair term of the agreement despite being reasonably able to comply with such a term, and has not remedied the breach despite being given one calendar month's notice in writing to do so
- the occupier has committed such a fundamental breach between him/her and the owner or person in charge that its remedy is impracticable, or
- the occupier is or was an employee whose right of residence arose solely from that employment and if s/he has voluntarily resigned.

A court can even grant an eviction order if none of the above circumstances apply, as long as it is satisfied that suitable alternative accommodation is available to the occupiers. The definition of *suitable* as regards alternative accommodation means it is safe and overall not less favourable than the occupiers' previous situation, having regard to –

- the residential accommodation and land for agricultural use available to the occupiers prior to their eviction
- the reasonable needs and requirements of all of the occupiers in the household in question for residential accommodation, land for agricultural use, and services
- their joint earning abilities, and
- the need to reside in proximity to opportunities for employment or other economic activities if they intend to be economically active.

Eviction of persons who became occupiers after 4 February 1997

A court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997 if it is of the opinion that it is just and equitable to do so if the occupier had the consent of the owner to reside on the land in question, and an express, material and fair term of such consent was that it would terminate upon a fixed or determinable date on termination of such consent by the effluxion of time.

In order to determine whether it is just and equitable to grant an order for eviction in terms of this section, the court takes into account –

- the period that the occupier has resided on the land in question
- the fairness of the terms of any agreement between the parties
- whether suitable alternative accommodation is available to the occupier
- the reason for the proposed eviction, and
- the balance of the interests of the owner or person in charge, the occupier, and the remaining occupiers on the land.

Urgent eviction proceedings

The South African Act also provides for urgent eviction proceedings in respect of occupiers. An eviction order will be granted if there is a real and imminent danger of substantial injury or damage to any person or property if eviction does not take place, if there is no other remedy available, and if the likely hardship of the owner exceeds the likely hardship to the occupier. In such cases, the owner or person in charge is required to give reasonable notice of any application for the urgent eviction of an occupier to the municipality in whose area of jurisdiction the land in question is situated, as well as to the head of the relevant provincial office of the Department of Land Affairs for his/her information.

Other provisions of the Act regarding evictions

The person seeking an eviction order should satisfy the court that the procedure followed is fair. If a court decides to grant an eviction order, a just and equitable date on which vacation has to take place and the date on which the eviction order will be carried out have to be determined. In order to determine these dates, the court will take into account all relevant factors, including —

- the fairness of the provisions of the agreement between the parties
- the balance of interests of the owner or person in charge, the occupier, and the remaining occupiers on the land, and
- the period that the occupier has resided on the land in question.

The eviction order can coincide with other orders, such as an order regarding the payment of compensation for structures and buildings that were erected by the occupier and compensation for crops planted by the occupier. The Act provides that a court may, if the sheriff in question so requests, authorise any person to assist such sheriff to carry out the eviction order.

FINDINGS

While South Africa has developed ample legislation to protect farm workers from arbitrary evictions and unfair labour practices since its democratisation in 1994, including the Land Reform Act (Labour Tenants) Act, 1996 (No. 3 of 1996), the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (No. 19 of 1998), and more importantly, the Extension of Security of Tenure Act, 1997 (No. 62 of 1997), since Namibia's independence in 1990 it has only developed the Draft National Land Tenure Policy.

Traditionally, common law eviction procedures in Namibia have always strongly focused on the rights of the landowner. Where landowners have requested these eviction orders against farm workers, they have often been met with a very vocal expression of dislike or disgust from both Government and political circles in recent years. However, there rests an undeniable duty on the Government to create land reform and labour legislation that not only strikes a balance between the proprietary rights of the landowner and the basic human rights of the farm worker, but also reflects the caring and humane values of a free and democratic society.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

This final chapter presents a summary of the study, the conclusions it reaches, and recommendations on the way forward.

Conclusion

With the inception of the 1992 Labour Act, a framework was created for the resolution of labour disputes. Fourteen years later, however, many shortcomings have been identified regarding people's access to District Labour Courts. In addition, these courts operate within the Magistrates' Court system, which is often described as overburdened because of the lack of magistrates in Namibia. As a result, cases often get postponed or struck from the court roll.

Our research shows that many cases were removed from the court roll, which might be an indication that cases being heard in the District Labour Courts either take too long to conclude, or that parties involved in a dispute simply lose interest in continuing with their cases.

Although the focus of this study was on District Labour Court files as they related to employment disputes, we also looked at how labour-related institutes as a whole operate and interlink with each other. What the research shows, however, is that the District Labour Court system has not been successful, especially as regards dealing with farm worker concerns, as these workers often do not have the financial means or transport to attend court hearings. Furthermore, it is doubtful whether farm workers – who are often regarded as some of the most marginalised of workers in the job market – fully understand court proceedings.

A further issue that came up during the study, but was not necessarily directly addressed by it, was how the introduction of legislation regarding security of land tenure would impact on the concept of ownership. Influenced by Western perspectives of ownership, ownership and property rights in Namibia have traditionally strongly been associated with private and individual ownership of property. The question that might arise is whether or not introducing legislation that secures farm workers' rights of tenure would result in a change in the concept of ownership.

In light of the need for land reform in Namibia, an ideal solution would perhaps be found in introducing legislation that, on the one hand, seeks to protect the rights of an owner of property and, on the other, creates the circumstances within which the rights of an occupier can be established. In other words, a balance has to be struck between the proprietary rights of the owner, and the basic socio-economic and human rights of the farm worker through secured rights of tenure.

Recommendations

Strengthen the role of the Directorate of Labour Services

The Ministry of Labour and Social Welfare should have a representative on the Regional Resettlement Committee in order to represent dismissed farm workers who have cattle, and make appropriate recommendations for their resettlement.

The Ministry also needs to deploy more Labour Relations Officers to the Regions in order to carry out the work effectively.

A further recommendation is that Labour Relations Officers should be able to make recommendations to Regional Resettlement Committees for former farm workers to receive preference when it comes to the allocation of land for resettlement.

Strengthen legal assistance to farm workers

Clerks of the Court indicated that applications for legal aid from the Government were being processed at a painstakingly slow rate. Taking this factor into consideration, as well as the fact that farm workers lack the financial resources to defend their cases in court, it perhaps becomes clearer why so many cases were either not heard or were simply removed from the court roll. In view of this fact, it is recommended that the Government should strengthen its legal aid support to persons such as farm workers, who have a low income.

Prioritise farm workers as a beneficiary group in the resettlement programme

The Government currently lacks a clear and comprehensive support policy on strengthening farm workers' rights of tenure. More significantly, the Government's land reform programme has failed to strengthen and secure such rights for farm workers.

Nevertheless, it is commendable that, in its recently released "Recommendations, Strategic Options and Action Plan on Land Reform in Namibia", the Government pointed out that unemployed workers with experience on working on farms were particularly suitable for resettlement.

Provide suitable alternative accommodation

Regional Councils should, in collaboration with the Ministries of Lands and Resettlement and Labour and Social Welfare, play a more prominent role in their respective Regions to provide rudimentary accommodation to evicted farm workers who have consequently become illegal occupants in corridors along district farm roads. The availability of suitable alternative land has to be considered before an eviction order is granted. Such legislation would put the onus of providing suitable alternative land on the State.

Act justly and equitably

The 'just and equitable' principle features prominently in South Africa's Prevention of Illegal Eviction from and Unlawful Occupation of Land Act. It is recommended that this principle should also feature in Namibian legislation.

Where private individuals and organs of State apply for the eviction of unlawful occupiers, courts should only grant eviction orders if the principle of justness and equitability is applied after considering all the relevant circumstances. These should include circumstances under which the unlawful occupier occupied the land, the period of such occupation, and whether suitable alternative accommodation or land is available to the unlawful occupier.

In addition, the rights and needs of the elderly, children, persons with disabilities, and households headed by women need to be taken into consideration.

As was mentioned in the previous recommendation, the availability of suitable alternative accommodation or land is an important factor that should be considered by the court or during arbitration in determining whether it is just and equitable to grant an eviction order. An eviction order also needs to employ the principle of justness and equitability in determining the date on which the unlawful occupier has to vacate the land, and the date on which the order would be carried out if such land was not vacated.

Urgent eviction proceedings

The Court should only grant an urgent eviction order if it is satisfied that there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not evicted from the land. Such circumstances would usually include the likelihood that hardship to the owner or any other affected person exceeds the likely hardship to the unlawful occupier against whom the order is sought.

Further research

In view of the above findings, it is recommended that a more comprehensive desktop and fieldwork study on the scale of evictions and their impact on the livelihoods of farm workers and the landless should be conducted.

The desktop component will involve analysing existing and comparative background material such previous studies on farm worker-related issues and existing and proposed land and labour legislation.

The fieldwork component would probably involve semi-scheduled face-to-face interviews with selected farm worker households in the Erongo, Hardap, Karas, Kunene, Omaheke, Oshikoto, and Otjozondjupa Regions to determine not only how many households and individuals have been evicted since 1990, but also the nature of such evictions and their impact on evictee households. In addition, the fieldwork component would include the development of a comprehensive profile not only of who has been evicted according to their sex, age, level of education and duration of residence on the farm before being evicted, but also of the number of children affected by evictions.

Finally, future research should include interviews with commercial farmers, in order to gain different perspectives on the cause and nature of evictions.

BIBLIOGRAPHY

LITERATURE

- Cohrssen, R & C Light. 1998. *The Labour Act in practice: Guidelines for employers and employees*. Windhoek: Namibia Institute for Democracy.
- Olivier, NJJ, GJ Pienaar & AJ van der Walt. 1992. Law of Property: Student's handbook (Second Edition). Cape Town: Juta & Co Ltd.
- Republic of Namibia. 2002. *The Draft National Land Tenure Policy*. Windhoek: Ministry of Lands, Resettlement and Rehabilitation.
- Republic of Namibia. 2001. *The National Resettlement Policy*. Windhoek: Ministry of Lands, Resettlement and Rehabilitation.

LEGISLATION

Republic of Namibia

Constitution of the Republic of Namibia, 1990 High Court Act, 1990 (No. 16 of 1990) Labour Act, 1992 (No. 6 of 1992) Labour Act, 2004 (No. 15 of 2004) Magistrate's Court Act, 1944 (No. 32 of 1944)

Republic of South Africa

Extension of Security of Tenure Act, 1997 (No. 62 of 1997)
Land Reform (Labour Tenants) Act, 1996 (No. 3 of 1996)
Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (No. 19 of 1998)

APPENDIX 1: INTERVIEWEES

Gebhardt, Ileni Selma Chief Magistrate, Keetmanshoop

Haager, Claus-Peter Manager, Research and Development, Namibia Agricultural Union

Haakuria, Leticia Senior Legal Clerk, Otjiwarongo District Labour Court

Hiveluah, Ulitala Permanent Secretary, Ministry of Labour and Social Welfare

Kambazembi, Sam

Labour Relations Officer, Gobabis

Mbahuurua, Vero

Director of Legal Aid, Ministry of Justice

Chief Control Labour Relations Officer

Nghimutina, Ndilimeke Chief Labour Relations Officer, Directorate of Labour Services,

Ministry of Labour and Social Welfare

Ngh-Namugongo, Foussy Chief Development Planner, Directorate of Land Reform, Ministry

of Lands and Resettlement

Nicodemus, Meriam Control Labour Relations Officer, Office of the Labour

Commissioner

Shuuveni, John Chief Magistrate, Gobabis

Spiegel, Fritz Labour Relations Officer, Keetmanshoop

Ujaha, Richard Labour Relations Officer, Directorate of Labour Services, Ministry

of Labour and Social Welfare

Unengu, Petrus Chief: Lower Courts

Walters, John Ombudsman

Ya Otto, Penda Labour Relations Officer, Directorate of Labour Services, Ministry

of Labour and Social Welfare