

CHAPTER 5 LEGAL AND/OR ILLEGAL SETTLEMENT ON LAND

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5.1 OVERVIEW

5.1.1 The functions of the South African National Roads Agency Limited (SANRAL) include the management and control of national roads for the Republic of South Africa¹.

5.1.2 SANRAL is not only empowered to exploit, for gain or reward, any immovable property belonging to it, but as a landowner, is also statutorily obliged to ensure that land which is part of a national road reserve and land that is not immediately required by SANRAL, is not invaded or occupied illegally².

5.1.3 It is necessary to differentiate between situations where persons are in the process of moving onto SANRAL land or have only been there for a short period, and those situations where persons have been in occupation of SANRAL land for some time and have established structures thereon. In the first instance, one is dealing with land invasions and in the second, illegal occupants.

5.1.4 This Chapter identifies the responses of SANRAL to these different situations.

5.2 STATUTORY AUTHORITY AND/OR RESTRICTIONS PLACED ON SANRAL.

5.2.1 Although SANRAL is statutorily obliged to manage and control the immovable property under its jurisdiction, it

must do so in accordance with the legislation applicable thereto.

5.2.2 In terms of the Constitution, no one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property³.

5.2.3 The Constitution also provides that no one may be evicted from their home, or have their home demolished⁴.

5.2.4 As noted above, various legislation is applicable to the occupation of land within South Africa. Such legislation deals with the rights of both the occupiers and owners of land, as well as the eviction of occupiers from land. This legislation includes⁵:

the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (the "PIE" Act);

the Interim Protection of Informal Land Rights - Act, 31 of 1996;

the Extension of Security of Tenure - Act, 62 of 1997;

the Land Reform (Labour Tenants) Act, 3 of 1996;

the Restitution of Land Rights Act, 22 of 1994.

5.3 ADOPTED GUIDELINES.**5.3.1 LAND INVASIONS.**

(a) A bold approach should be taken with

¹ Section 25 of the South African National Roads Agency Limited and National Roads Act 1998.

² Section 26(1) of Act 7 of 1998.

³ Section 25(1) of the Constitution of the Republic of South Africa, Act 108 of 1996.

⁴ Section 26(3) of the Constitution.

⁵ Also see DEFINITIONS and ABBREVIATIONS

regard to the understanding of the term “occupation”. Occupation is more than merely a presence on the land. It suggests an habitual physical presence or a physical presence for a substantial period of time.

(b) Persons who have not established an habitual physical presence on the land or who have not been there for a substantial period, will not be regarded as illegal occupiers. In those cases, SANRAL will not regard the “PIE” Act as being applicable to it.

(c) Clearly, there may be exceptions that arise, particularly where the persons on the land have been there for a short period, but have already established proper structures.

(d) The emphasis at all times should be on the prevention of occupation of land in the first place. SANRAL's land should be monitored to ensure that the earliest possible response is made to any invasion of SANRAL's land.

(e) In the event of SANRAL becoming aware of persons who have invaded its land but who are not yet in occupation, immediate steps must be taken to remove these persons from the land. Speed of response is of the absolute essence. This should either be done in conjunction with the South African Police Services, a Municipality's Security Services or a private security firm.

(f) Prior to removal of such persons, the following approach must be adopted:

(i) SANRAL's Responsible Officer must approach such persons and issue a verbal

warning to them that they are acting illegally. The official should be accompanied by an interpreter.

(ii) At the same time, the persons must be issued with Notices⁶ in English (and preferably also in their own language) advising them that unless they move off the land by a stipulated date and time, action will be taken to have them removed. If possible, the persons must sign copies of the Notices to acknowledge receipt, but photographs should in any event be taken to confirm that Notices have been handed over.

(iii) The date and time for vacation of the property must take into account the particular circumstances of the matter. If there is a serious threat to the safety of the invaders and/or the road users, then a short period of time should be given for them to vacate the land. They may even only be given a period of a few hours.

(iv) If a few days are given, the area must be monitored to ensure that no further influx of people takes place and to prevent further or more permanent structures from being erected. This can be achieved by the appointment of a competent Security Firm.

(v) A few hours prior to the deadline, the invaders must again be notified that they must vacate the property and remove their goods by the time given.

(vi) If the persons still refuse to co-operate, they must then be moved off the property with the assistance of the South African Police Services, a Municipality's Security

⁶ See ANNEXURES 5.1 and 5.2

Services or a private Security Firm.

(vii) Photographs must be taken prior to, during and after the eviction of such persons.

(viii) The land must then be monitored to prevent any re-invasion thereof.

5.3.2 ILLEGAL OCCUPANTS

(a) In situations where persons have been in occupation of SANRAL's land for some time and have established themselves on such land, it is not possible to proceed on the basis set out in paragraph 5.3.1 above and SANRAL must either bring an Application to Court for an order allowing the eviction of the occupiers from the land or, alternatively, make arrangements for their relocation to other land.

(b) It must always be borne in mind that legal action in these circumstances is costly and there is little or no chance of recovering costs if a Court Application is successful.

(c) Even if a Court Application is brought by SANRAL, SANRAL will still have to show that there is alternative land or accommodation available for the occupiers to move to, as this is required in terms of the "PIE" Act⁷.

(d) A more positive approach should therefore be adopted to problems within this category and SANRAL should attempt, where possible, feasible and necessary, to make arrangements for the relocation of occupiers by agreement. If the land is not required for road purposes, SANRAL should

also investigate whether the land can be disposed of without having to first relocate the occupants.

(e) If it is established that persons are in occupation of land belonging to or under control of SANRAL, then evidence relating to such occupation should be obtained as soon as possible, including, but not necessarily limited to, the following:

(i) any evidence of imminent danger or damage to persons or property;

(ii) Photographic evidence of the extent of occupation and the status of the structures;

(iii) the circumstances under which the unlawful occupiers occupied the land and erected the buildings or structures;

(iv) the period of occupation;

(v) information as to what controls were put in place to monitor unlawful occupation and why, despite such controls, unlawful occupation still took place;

(vi) evidence of any person receiving payments from illegal occupiers for the right to occupy that land;

(vii) a general assessment of the profile of the persons occupying the land illegally including, where applicable, the number of elderly persons, children, disabled persons, and women-headed households; and

(viii) where possible, the names of the persons occupying the land illegally.

⁷ See DEFINITIONS and ABBREVIATIONS

(f) Steps must immediately be taken to prevent any further occupation of the land and any person invading the land thereafter, must be removed in accordance with the process described in paragraph 5.3.1 above.

(g) an assessment must be made as to whether SANRAL requires the land which has been occupied and if not, it must be determined whether the land is suitable for residential occupation. The determination of this possibility should be done in conjunction with the Municipality having jurisdiction over the land and should take into account the following factors:

(i) the technical and financial feasibility of developing the land;

(ii) development options for the land;

(iii) the community profile;

(iv) availability of housing opportunities to the illegal occupants;

(v) availability of alternative land (state or private) to which the occupants could be relocated;

(vi) legal options⁸

(h) It must be noted that it is not SANRAL's task to become involved in the delivery of housing but SANRAL must seek to obtain the co-operation of other Government Bodies (including the Department of Land Affairs and the various Provincial Departments of Housing) and the Municipality having jurisdiction over the land concerned, to

identify land and source funds for its development. Subsidised housing in South Africa is driven by Municipalities and it is essential that the relevant Municipality be drawn into the process as soon as possible. It is likely that the majority of the illegal occupants will be able to access housing subsidies through the relevant Provincial Housing Department.

(i) If the the land in question is required by SANRAL and alternative land has been identified as is required by the "PIE" Act, then the alternative land can be developed and the illegal occupiers can be relocated onto it. SANRAL's land must then be monitored to ensure that it is not re-occupied by other persons.

(j) When identifying land for development, SANRAL should liase with the Municipality having jurisdiction over that land. However, if the Municipality is not prepared to co-operate or does not have the capacity to do so, then SANRAL should liase with the Provincial Department of Housing and, if necessary, the MEC for Housing for the particular Province as that Department will be the source of housing subsidies which will be required for the development of the land.

(k) Another possibility is for SANRAL to call for proposals and assistance from the private sector and Low-income Housing Developers can then attend to the necessary negotiations with the Municipality and Provincial Department of Housing on behalf of SANRAL.

⁸ See paragraph 5.4 below

(l) It must be noted that Section 48(5) of the South African National Roads Agency Limited and National Roads Act, 7 of 1998 (the Act⁹) provides that where a person has, without permission, erected, constructed, laid or established a structure on, over or below the surface of a national road or land within a Buidling Restriction Area¹⁰, such person must be given not less than 30 days' notice to remove the unauthorised structure. It is important to note that if such a Notice is ignored, SANRAL may remove such structure in terms of Section 48(6) of the Act and can even recover the costs incurred from that person. However, SANRAL should not merely remove such structures as the "PIE" Act applies in respect of all land throughout the Republic¹¹. Therefore, if such a structure is occupied, SANRAL is obliged to act in accordance with the provisions of the "PIE" Act.

(m) If alternative land is identified, but the illegal occupiers refuse to move, SANRAL should proceed with an Application for the eviction of such occupiers in accordance with the provisions of the "PIE" Act¹².

(n) The possibility of bringing urgent proceedings for the removal of illegal occupiers must be borne in mind. It is possible that persons may have been in occupation for an extended period, but that their occupation begins to cause danger for other people living in the area or for road users. In those circumstances, it may be necessary or possible for SANRAL to institute urgent proceedings in terms of the "PIE" Act and this possibility should not be overlooked.

5.4 THE IMPLICATIONS OF THE "PIE" ACT¹³

This Act applies to all land (whether private or public) throughout South Africa. One of the main purposes of the "PIE" Act is to determine procedures for the eviction of unlawful occupiers of land. There are a number of important issues which must be considered with Applications for eviction in terms of this Act.

5.4.1 Applications for the eviction of persons who have been in occupation for less than six months¹⁴.

(a) At least fourteen days' notice of the proceedings must be given to the unlawful occupiers of the land, as well as the Municipality having jurisdiction over the land in question.

(b) the rules of the court in which application is being made must be followed with regard to service of the notice. this means that if the application is brought in either the high or magistrate's court, the rules of that particular court must be complied with.

(c) if it is not possible to obtain service in terms of these rules, then an application can be made to court for an order giving directions on service.

(d) the court will only grant an order for eviction if it is of the opinion that it is just and equitable to do so after considering all relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.

⁹ See DEFINITIONS and ABBREVIATIONS

¹⁰ See DEFINITIONS and ABBREVIATIONS

¹¹ Section 2 of the "PIE" Act

¹² See paragraph 5.4 below

¹³ See DEFINITIONS and ABBREVIATIONS

¹⁴ Section 4 of the "PIE" Act

(e) if the court does grant an order for eviction, it will determine a just and equitable date by which the unlawful occupiers must have vacated the land. In deciding upon this date, the Court will take into account all relevant circumstances, including the period the unlawful occupiers and their families have resided on the land in question.

5.4.2 Applications for eviction of persons who have been in occupation for more than six months¹⁵.

(a) In these situations, apart from considering the factors described above, the Court will also consider whether land has been made available or can reasonably be made available by a Municipality or other Organ of State or another landowner for the relocation of the unlawful occupiers.

(b) The Court will also take the factors referred to above into account in determining the date by when the unlawful occupiers must have vacated the land. If the unlawful occupiers have been in occupation for a substantial period, then it can be expected that those persons will be given an extended period of time to vacate the property.

5.4.3 Urgent proceedings for eviction¹⁶.

(a) The Court will only grant permission for urgent proceedings if it is satisfied that -

(i) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupiers are not immediately evicted from the land;

(ii) the likely hardship to the owner or other affected person if an Order for Eviction is not granted, exceeds the likely hardship to the unlawful occupiers against whom the order is sought, if any Order for Eviction is granted; and

(iii) there is no other effective remedy available.

(b) The unlawful occupiers must still be given notice of these proceedings.

5.4.4 Eviction by an Organ of State¹⁷.

(a) In addition to the factors described above, the Court must also be convinced that it is in the public interest to grant such an Order. "Public interest" includes the interest of the health and safety of those occupying the land and the public in general.

(b) In these instances, the State must give information to the Court on the availability to the unlawful occupiers of suitable alternative accommodation or land.

(c) It is noted that SANRAL is an Organ of State¹⁸.

5.4.5 Other provisions.

(a) Urgent proceedings will be in the nature of interim proceedings and a final Application will still be considered by the Court in due course even if an Order for the Eviction of the illegal occupiers is given.

(b) Anyone who evicts an unlawful occupier without the authority of an Order of

¹⁵ Section 4(7) of Act 19 of 1998

¹⁶ Section 5 of the "PIE" Act.

¹⁷ Section 6 of the "PIE" Act

¹⁸ Section 1 of Act 19 of 1998 read with section 239 of Act 108 of 1996

Court is guilty of an offence.

(c) The Magistrate's Court has jurisdiction to issue an Order in terms of the "PIE" Act.

(d) It is important to note that the provisions of the "PIE" Act apply to all occupants of land, whether such occupation is legal or illegal.

(e) In instances where an occupant was given permission to occupy SANRAL's land, whether by SANRAL or by the previous owner, the provisions of other legislation may also apply. In that event, the occupant could have informal rights to such land in terms of Act 31 of 1996¹⁹, Act 62 of 1997²⁰ or Act 3 of 1996²¹. In such cases, it will be necessary to also comply with the provisions of the particular legislation that is applicable if it is necessary to relocate or evict such an occupant.

legal action, the written approval of SANRAL's Chief Executive Officer must be obtained. The Chief Executive Officer must also be informed of any evictions arising from a response to a land invasion.

5.5.4 In the event that it is necessary to proceed with an Application to Court, the person signing affidavits on behalf of SANRAL must have delegated authority²² to do so.

5.5.5 If alternative land is found to which illegal occupants can be relocated, and such land is developed with services and housing using subsidies granted by the Department of Housing, the cost of relocating the occupants to such land, cannot be paid out of the subsidies. This cost will have to be borne by SANRAL unless alternative arrangements can be made with the Municipality having jurisdiction over the land concerned.

5.5 GENERAL.

5.5.1 It is incumbent upon all employees of SANRAL as well as SANRAL's Service Providers to make every effort to ensure that SANRAL's land is not unlawfully occupied and that land invasions are dealt with expeditiously.

5.5.2 In the event that SANRAL receives a report of an invasion or occupation of land, immediate action must be taken in accordance with the above-mentioned guidelines.

5.5.3 Prior to the commencement of any

ANNEXURES²³.

5.1 Draft Notice to be addressed to a person occupying land within the road reserve.

5.2 Draft Notice to be addressed to a person occupying land owned by or under the control of SANRAL.

¹⁹ Interim Protection of Informal Land Rights Act

²⁰ Extension of security of Tenure Act

²¹ Land Reform (Labour Tenants) Act

²² See SANRAL's DELEGATIONS OF AUTHORITY.

²³ The draft Notices annexed hereto are examples only and may be changed to suit particular circumstances.

5 ANNEXURES

Annexure 5.1

(PLACE ON SANRAL LETTERHEAD)

----- (insert date)

TO WHOM IT MAY CONCERN

Dear Sir/Madam

**NATIONAL ROUTE, SECTION.....: TO: ILLEGAL
ERECTION OF A STRUCTURE ON LAND WITHIN THE ROAD RESERVE OF A DECLARED
NATIONAL ROAD AT APPROXIMATELY KM..... NORTH/SOUTH/EAST/WEST**

It has come to the attention of the South African National Roads Agency Limited [SANRAL] that you have recently moved onto land that is part of the declared road reserve of a national road and thus under the control of SANRAL by virtue of the provisions of the South African National Roads Agency Limited and National Roads Act, 1998 (Act 7 of 1998) [the Act].

In terms of Section 48(1) of the Act, no person may, without the prior written permission of SANRAL, construct or establish any structure on or over a national road or within the relevant road reserve. In terms of section 48(8) of the Act, any person contravening section 48(1) thereof, is guilty of an offence and is liable on conviction to a term of imprisonment or a fine, or to both a term of imprisonment and a fine.

As SANRAL has not provided you with permission to construct any structure on the above-mentioned land and as SANRAL is also not prepared to allow you to remain on the property, you are hereby given notice to vacate this property and to remove the illegal structure by:

_____ (insert time), on

_____ (insert date).

In the event that you do not comply with this Notice, SANRAL shall take such steps as may be necessary to have your structure removed and all SANRAL's rights in this regard, are hereby reserved.

Yours faithfully

.....
for THE SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED.

5 ANNEXURES

Annexure 5.2

(PLACE ON SANRAL LETTERHEAD)

----- (insert date)

TO WHOM IT MAY CONCERN

Dear Sir/Madam

NATIONAL ROUTE, SECTION: TO ILLEGAL PRESENCE ON LAND OWNED BY OR UNDER THE CONTROL OF THE SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED AT APPROXIMATELY KM NORTH/SOUTH/EAST/WEST

It has come to the attention of the South African National Roads Agency Limited (SANRAL) that you have recently moved on to land owned by or under the control of SANRAL.

SANRAL is not prepared to allow you to remain on this property and therefore, you are hereby given notice to vacate this property by:

_____ (insert time), on

_____ (insert date),

In the event that you do not comply with this notice, SANRAL shall take such steps as may be necessary to have you evicted from the property. All SANRAL's rights in this regard, are hereby reserved.

Yours faithfully

.....
for THE SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED.

Chapter 5 - Legal and/or illegal settlement on land