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23 July 2021

The Chairperson: Portfolio Committee
Justice and Correctional Services
Parliament of the Republic of South Africa
Cape Town
8000

Attention: Hon. Magwanishe
Mr Ramaano

[redacted]

AGBIZ WRITTEN SUBMISSION ON THE LAND COURT BILL, 2021

Dear Honourable Magwanishe, Mr Ramaano,

Agbiz would like to thank the Portfolio Committee for the opportunity to submit written comments. We trust that our input will assist the Portfolio Committee in its deliberations.

Table of abbreviations

Legislation	**Abbreviation**
Upgrading of Land Tenure Rights Act 112 of 1991	ULTRA
Land Reform: Provision of Land and Assistance Act 126 of 1993	Act 126
KwaZulu-Natal Ingonyama Trust Act 3KZ of 1994	Ingonyama Trust Act
Restitution of Land Rights Act 22 of 1994	Restitution Act

Land Reform (Labour Tenants) Act 3 of 1996	Labour Tenants Act
Interim Protection of Informal Land Rights Act 31 of 1996	IPILRA
Extension of Security of Tenure Act 62 of 1997	ESTA
Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998	PIE

1. Who we are

The Agricultural Business Chamber (Agbiz) is a voluntary, dynamic and influential association of agribusinesses operating in South and southern Africa. Key constituents of Agbiz include the major banks in South Africa, Development Finance Institutions, short term and crop insurance companies, agribusinesses, commodity organisations and co-operatives providing a range of services and products to farmers, and various other businesses and associations in the food and fibre value chains in the country. Conservative estimates attribute 14% of South Africa's GDP to the food and fibre value chain, although its proportionate contribution to the rural economy and rural job creation is significantly higher.

Agbiz's function is to ensure that agribusiness plays a constructive role in the country's economic growth, development and transformation, and to create an environment in which agribusinesses of all sizes, can thrive, expand and be competitive. One way in which we seek to achieve this is by providing thoroughly researched inputs on draft laws and policies affecting our members.

Agbiz is also an active member of Business Unity South Africa (BUSA) and participates in many Nedlac activities through the Business Constituency.

2. Introduction

Agbiz and its members are committed to building an agricultural sector that is prosperous, dynamic, efficient, inclusive and sustainable. The transformation of the agricultural value chain is hence a core objective of Agbiz and land reform naturally plays a significant role therein. Many of our members are not large land owners per se but their businesses are dependent upon a vibrant and growing agricultural sector. A successful land reform programme is seen as a prerequisite for sustainability in the sector as well as a potential driver of growth as it facilitates the entry of new participants into the primary sector.

Many agribusinesses, cooperatives and commodity organisations have invested greatly into supporting new entrants to the farming sector through various farmer support programmes. Our members therefore have an interest in the development of policies and programmes that can facilitate access to land for their future clients. As an association, we have invested a huge amount of time and resources in promoting a sustainable land reform process. This includes our leadership in the Agricultural and agro-processing master plan, Operation Phakisa, the NAREG process, as well as numerous Nedlac Job processes including the Job Summit where a blended finance scheme for land reform is being developed.

We therefore have a substantial interest in the success of the Land Court as it forms an integral part of the institutional framework required to drive land reform in South Africa.

3. General comments on the Bill

3.1. Necessity for the Bill

Agbiz supports the Bill as it is vital to capacitate the judiciary with sufficient, specialist judges to adjudicate on land matters. Access to justice is a vital component of land reform. Whilst Agbiz has invested heavily into policies and schemes that seek to incentivise land redistribution, many land restitution and labour tenant claims simply cannot move forward unless disputes are settled in a specialist court. Other land reform beneficiaries, farm workers and land owners alike are also entitled to access

to justice. The High-Level Panel on the Assessment of Key Legislation has rightly highlighted the limited capacity of the Land Claims Court as a bottleneck in the land restitution process in particular:

> *…The resultant confusion and dissatisfaction has led to the Land Claims Court becoming overwhelmed with cases. Despite the enormous volume and often very complex cases, there are no permanent judges of the Land Claims Court.*[1]

With roughly 8000 restitution cases submitted prior to 1998 still unresolved, and another 140 000 new claims yet to be processed, the capacity constraints simply have to be resolved to ensure that claimants see justice in their lifetime.

The current status quo can at best be described as a temporary measure. The Land Claims Court was created through the Restitution of Land Rights Act but judges have to be seconded from the High Court. The Amendment Act (Act 15 of 2014) sought to address this issue but once again dealt with it on a piece meal basis. The Act contained constructive amendments that would expand the capacity of the Land Claims Court and permit judges to be appointed full-time the bench. However, the Amendment Act also made provision for the controversial, re-opening of the lodgement process and was ultimately set-aside by the Constitutional Court due to a lack of consultation. The Court also interdicted the Commission from processing new claims before the pre-1998 claims were finalised. Although the provisions relating to the Land Claims Court were not controversial, they fell also fell by the wayside when the Amendment Bill was struck down. For this reason, we support dedicated legislation that sets out the powers, composition and jurisdiction of the Court. This is far more durable than the piece-meal approach previously followed as it delinks the institutional arrangements from substantive issues related to restitution. ***With this in mind, our comments are intended to bolster the Bill and ensure an efficient and effective Land Court.***

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[1] Parliament. High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change. 2017. at p 235.

3.2. Land Court of Appeal

The matters which the Land Court will adjudicate on are specialist areas of the law that requires a purposive interpretation of the Constitution. The calculation of compensation where land is expropriated for land reform purposes is one area in particular where specialist knowledge and skills are required. For this reason, it makes sense to have a specialist appeal mechanism so that we can build up a robust jurisprudence to give content to just and equitable compensation as provided for in the Constitution.

The only concern we harbour is whether the current or expected caseload will justify the costs to create a specialist court of appeal? If one has regard to the number of cases that are currently taken on appeal from the Land Claims Court, then it seems difficult to justify the expense. As an alternative, the legislature could consider expanding the composition of the Land Court to enable a full bench of the same court to sit as a court of appeal. This would prevent a duplication of costs as the administrative staff supporting the Land Court and the Land Court of Appeal would be one and the same. All that may be required is the appointment of sufficient judges so that an appeal can be made to a bench of 3 or 5 judges on any given matter.

3.3. Compulsory arbitration

Clause 13 (3) of the Bill permits the Judge President to refer any matter set down for hearing to mediation or arbitration. ***We fully support mediation*** as it allows the parties to a dispute the opportunity to reach a negotiated agreement. Aside from preventing unnecessary litigation, mediation is well suited to land reform disputes as it seeks to reach agreement between parties who may have been on opposite sides of race-based, historical conflicts. In this regard mediation can play a central role to promote reconciliation on the land issue.

Arbitration is fundamentally different. Where mediation requires the parties to reach agreement, arbitration is a quasi-judicial process where an independent third party makes a ruling. The only benefit that arbitration has over formal litigation is that it is inquisitorial in nature, requires a less formal procedure and may reduce costs

associated with legal representation. The first aspect is rendered redundant as clause 14 (2) allows the Land Court to conduct proceedings on an informal or inquisitorial basis in any event.

Arbitration is by implication a limitation on either party's right to have a dispute resolved by a court as provided for by section 34 of the Constitution. For this reason, the consent of both parties is typically required for a matter to be heard via arbitration and the agreement ensures that the arbitration award is binding. ***In this instance, neither party's consent is required as the Judge President can summarily refer a matter to arbitration. This is therefore a limitation on section 34 of the Constitution which may not be justifiable.***

From a content point of view, it is unclear why a matter that is set down for hearing in a specialist court would be referred to an arbitrator who need not be an expert in land rights matters. The entire premise of the Bill is based on the argument that land reform is a specialised matter that requires specialist judges to hear a matter. ***There is no indication in clause 32 that an arbitrator needs to be a specialist in the field***. The concept therefore contradicts the purpose of the legislation.

As currently drafted, the Bill does not specify which cases can or cannot be sent for arbitration. This implies that arbitration could be ordered for any matter over which the court has jurisdiction. This is simply not appropriate. The ESTA Amendment Act caters for the establishment of multi-stakeholder bodies known as the Land Rights Management Board and Land Rights Management Committees to resolve tenure disputes. These are specialist bodies and it would simply be inappropriate to refer a dispute to a non-specialist arbitrator if the specialist, statutory bodies could not resolve the matter. Likewise, the ULTRA Amendment Bill makes provision for the Minister to adjudicate on applications for the conversion of an informal land right to full ownership. If an affected party is dissatisfied with the Minister's decision, it can be appealed to the Land Court (if both amendment Bills pass un their current form). It again seems inappropriate for an arbitrator to adjudicate on a matter which has already gone through administrative adjudication by the Minister.

Finally, it is doubtful that an arbitrator would be able to decide on an eviction application under the ESTA or PIE Act, both of which will fall under the exclusive jurisdiction of the Land Court. Section 26 (3) of the Constitution states that:

> *(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.*

An arbitration award may be made an order of court under the Bill but it is doubtful whether this process would withstand constitutional scrutiny in eviction cases where the court itself did not consider all relevant circumstances. ***The application of arbitration in eviction disputes under PIE or ESTA is therefore constitutionally questionable.***

As a potential alternative to compulsory arbitration, the Portfolio Committee could consider referring a matter to an expert for administrative adjudication. Matters related to expropriation and compensation in particular could benefit from such a process as the finer details of calculating the productive value of a farm used for certain agricultural commodities could benefit from the insight of a specialist valuer. There is also international precedent for an arrangement of this nature. The Lands Acquisition Act of the Commonwealth of Australia[2] makes provision for compensation to be determined by an "expert"[3] who is skilled in valuation techniques in line with the Act. Likewise, the Lands Acquisition Act of Tasmania[4] also caters for compensation to be determined by "specialist arbitration"[5]. What sets this process apart from compulsory arbitration under this Bill is that:

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[2] Act 15 of 1989.

[3] See s 80 of the Lands Acquisition Act of the Commonwealth of Australia.

[4] Act 23 of 1993.

[5] See section 6 of the Land Acquisition Act of Tasmania.

- The third party must have specialist expertise (not a general arbitrator);
- The parties must consent it; and
- The determination may be revied by a formal court of law.

A similar arrangement could be considered as an alternative to compulsory arbitration of a generalist nature.

4. Detailed comments on specific provisions of the Act

4.1. Definitions

The definition of a “claim” only refers to claims submitted under the Restitution of Land Rights Act and be expanded to include labour tenant claims. The schedule seeks to replace the definition of a “court” in the Land Reform (Labour Tenants) Act with the Labour Court, thereby bringing labour tenant claims under the jurisdiction of the court. As the definition is currently worded, it does not seem to include Labour Tenant Claims submitted under that Act which could be a potential omission. We support extending the jurisdiction of the Land Court to include adjudicating the validity of labour tenant claims and would simply motivate for an additional subclause (c) to be added, which can read:

> *(c) any claim for the acquisition of land lodged with the Director-General in terms of the Land Reform (Labour Tenants) Act 3 of 1996.*

The definition of a “dispute” should not include an “alleged dispute”. The substantive provisions of the Act requires that formal court procedure as set out in chapter 4 must be followed when instituting action in the Land Court. This is not only required for the sake of efficiency but is also central to the requirement of procedural fairness. Where a dispute exists over an issue which the court have been given jurisdiction, it is vital that the correct procedure is followed by all applicants. The challenge with an ‘alleged dispute”, is that it may open the door the court to adjudicate on matters which has not followed the correct procedures. In other words, a dispute will exist even where the formal processes were not followed as long as there are allegations. This undermines procedural fairness and may prejudice litigants. We

therefore propose that the definition be amended to remove the words "…, *and includes an alleged dispute"*.

4.2. Clause 8 – Appointment of judges of Court

Subclause 4 requires at least half of the judges to have been judges of the high court at the time that they were appointed. Although the Land Claims Court is a specialist court, the provisions of the Superior Courts Act still governs the process requirements. In this light, a judge appointed to the bench of the Land Court will need a working knowledge of court procedure as well as specialist knowledge of the legislation under its jurisdiction. From this point of view, we support the notion that judges should, as far as possible, be sourced from the High Court. However, will the requirement that half of the judges appointed to the court be existing judges ensure that all judges have the requisite knowledge of court procedure? This is especially important in light of the fact that clause 4 (2) requires hearings before the court to be heard before a single judge. Clause 8 (4) (b) requires that judges have specialist knowledge in land rights matters. Whilst this is supported, it does open the possibility that a land rights specialist is appointed to the Bench without previous experience as a judge. Instead of requiring 50% of the appointees to be judges from the high court, ***an additional subclause could simply be added under clause 4 that requires appointees to have the requisite knowledge of court procedures.***

Clause 8 requires the President to appoint judges on the advice of the Judicial Service Commission but permits the Minster to appoint acting judges. Whilst this provision is broadly in line with similar legislation such as the Labour Relations Act (in connection with appointments to the Labour Court), it is unclear why the duty is split between the President and the Minister. ***When the President appoints a judge, he does so as part of his prerogative powers as the head of state, not as the head of the executive. The Minister is in all respects part of the Executive. Will it not threaten the separation of powers if the Minister is permitted to appoint acting judges?***

One can understand that the appointment of an acting judge is an interim measure and requires expediency. However, if this is the rationale, then should this duty not rest solely with the Judge President of the Court? ***The Judge President will in all***

likelihood be in the best position to judge the need for acting judges based on the case load of the court as well as to identify potential candidates who are well suited to fulfil the role of an acting judge.

4.3. Clause 13 – Institution of proceedings

Clause 13 (3) requires the registrar to refer all matters to the Judge President after receiving notification from a person of his or her intention to institute proceedings. The Judge President is then required to decide whether the matter should be sent to mediation or arbitration based on the criteria set out in subclause 4. ***Whilst we do not oppose the criteria, it may be premature for the Judge President to make a decision until he or she has had sight of the arguments advanced by all parties to the dispute*** including a friend of the court (*amicus curiae*).

We propose that all parties should be permitted to submit their pleadings and host a pretrial conference before an evaluation can realistically be made. The judge presiding over the pretrial conference will be best placed to advise the Judge President as to whether the matter should be referred or proceed directly to litigation based on the criteria contained in subclause 4.

4.4. Clause 14 - Rules governing procedure of the Court

Clause 14 requires the rules relating to the High Court to apply to the Land Court "…*with the necessary changes required by the context to the Court*…". We understand that the Land Court's rules may need to differ but who decides when changes are necessitated by the context and at what point does this take place? Based on the wording it seems as though the court may decide on a case-by-case basis when the context justifies a deviation. Such a situation will cause a great deal of uncertainty***. It would place potential litigants in a far better position if the Judge President is empowered to issue practice directives or required to publish deviations from the High Court rules to provide certainty to litigants***.

4.5. Clause 17 – powers of Court on hearing of appeals

As outlined in the general comments above, we do not support the notion of compulsory arbitration. We therefore propose that the word ‘arbitrator’ be removed from subclause (b).

4.6. Clause 18 – Judgement by default

The provision is supported in principle as a litigant who has followed the correct procedure should not be denied relief if the other party fails to respond. ***The provision should perhaps just be qualified in the context of an eviction order under the PIE or ESTA Acts***. According to section 26 (3) of the Constitution, a person can only be evicted from their home by an order of court made after considering all the relevant circumstances. In the case of an eviction order, it may not be sufficient for the court to merely be satisfied that the proper service process was followed as the court will need to consider “all relevant circumstances”.

4.7. Clause 22 – Admissibility of evidence

As with Clause 14, the Bill once again allows the established law of evidence to apply subject to deviations permitted by the Court. In this instance, the threshold for permitting evidence that would otherwise not be admissible to be heard is whether “…it considers [the evidence] relevant and cogent to the matter being heard.”. This once again creates uncertainty as litigants will not be able to know which evidence is admissible and which is not before the litigation takes place. Such a situation will make it very difficult for litigants to prepare their heads of argument.

Exceptions to the generally accepted laws of evidence will likewise not be applicable in all disputes before the court. For instance, hearsay evidence is permitted under the Restitution Act but should not be permitted when the facts at hand relate to ESTA, the Ingonyama trust or any other statute that does not expressly permit such evidence to be heard. To provide certainty to litigants, we propose that section 22 (1) be reworded to limit exceptions to those contained in specific legislation such as the Restitution Act.

4.8. Clause 28 - Court orders

In line with our principal opposition to compulsory arbitration, we propose that subclause (g) be deleted.

The powers of the court set out in subclause 3 goes to the heart of the purpose of the court. A potential oversight is that it only relates to ‘claims’ and ‘claimants’, which limits the scope to land restitution when read with the definition for a claim. These substantive powers of the court should apply to any facet of land reform over which the court has jurisdiction, including labour tenant claims, conversion of land rights under the ULTRA, land redistribution and the rights of occupiers whose tenure is protected by IPILRA or the Ingonyama Trust Act.

We do not dispute the nature of the relief that the court can order but propose that the scope be expanded to apply to all legislation falling under the court’s jurisdiction, not merely the Restitution Act.

4.9. Clause 30 – Costs

Clause 30 (2) (a) requires the court to consider whether the matter should have been taken to mediation or arbitration in awarding a cost order. There is an internal contradiction in the Bill which makes this provision non-sensical. According to clause 13, a litigant must give notice of his intention to institute proceedings after which the Judge President determines whether the matter must first go to mediation or arbitration. In other words, if the matter should have gone to mediation first then the Judge President should have made that determination under clause 13. ***It is unjust to punish a litigant with a punitive cost order where the Judge President decided that the matter should proceed directly to court under clause 13***.

4.10. Clause 31 – Mediation

Agbiz supports the introduction of this provision as several land disputes, especially those related to tenure, can effectively been settled through mediation. Be that as it may, there may be some omissions in the procedure set out in subclause 2 to 3. For instance, the clause does not set out who appoints the mediator nor whether the

mediator is required to have specialist knowledge, expertise or experience in land rights matters. Will a mediator be assigned from a panel or do the parties need to consent to the appointment of the mediator?

Furthermore, the Bill fails to take cognisance of the mediation procedures set out in the ESTA Amendment Bill. The ESTA Amendment Bill creates new institutions known as the Land Rights Management Board and local Land Rights Management Committees. The legislation also sets out a procedure whereby these institutions must attempt to mediate tenure conflicts before an eviction order is considered. Whilst Agbiz supports the principle of mediation, there is a potential conflict relating to the procedure set out for mediation as well as the entity that must arrange for mediation. It is vital that the provisions are harmonised before this Bill is passed.

4.11. Clause 32 – Arbitration

For the reasons set out in under general comments, we do not support the notion of compulsory arbitration. We therefore propose that this section be deleted in its entirety.

4.12. Clause 33 – Settling of matters

Whilst we support settlement agreements being endorsed by the court, it is not appropriate to list arbitration under this clause as arbitration is not based on agreement. Arbitration is a quasi-judicial process where a third party makes a ruling and he or she does not require both parties to agree with the outcome.

4.13. Chapter 5 – Land Court of Appeal

As stated under our general comments, we do not believe that the number of cases currently appealed from the Land Claims Court justifies the creation of a specialist Land Court of Appeal. The same purpose can be achieved at a significantly lower cost if litigants were permitted to appeal a decision to the full bench of the Land Court.

4.14. Clause 53 – Regulations

The Minister and the Department of Justice and Correctional Services certainly have a responsibility to ensure that the court is capacitated to run its administrative affairs

optimally. However, certain matters listed in clause 53 (1) go beyond the administration of the court. Subclauses (g), (h), (i), (k) and (l) relate to court process which should remain the prerogative of the Judge President of the Court.

4.15. Schedule 1 – Laws Amended

The schedule appears to award the Land Court exclusive jurisdiction over cases brought under both ESTA and PIE. This raises the practical question of where the court will be physically located? Will it operate from the premises currently occupied by the Land Claims Court in Randburg? The question is posed as litigants from tenure disputes arising from ESTA are likely to be based in deep rural areas whilst the majority of PIE cases are likely to be based in metros. ***Will the Land Court be able to operate effectively as the court of first instance (exclusive jurisdiction) for both PIE and ESTA without prejudicing litigants who would need to travel far to reach the court?***

As the law currently stands, ESTA evictions are subject to an automatic review by the Land Claims Court. However, this is different from awarding the Land Court exclusive jurisdiction as witnesses need to travel to the court-a-quo but may not need to do so on review. Magistrate's Courts have a national footprint which enables ESTA litigants physical access. Will these litigants need to travel to Randburg from across the country if the Land Court is given exclusive jurisdiction?

Perhaps the Portfolio Committee can deliberate on which practical solution can offer rural litigants the best access to court.

5. Conclusion

Thank you once again for the opportunity to submit comments and trust that the Portfolio Committee will consider our comments favourably.

Yours sincerely

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