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COMMENTS BY THE NATIONAL HOUSE OF TRADITIONAL AND KHOI-SAN LEADERS ON THE LAND COURT BILL (B 11 - 2021)

Introduction

The Land Court Bill was introduced in the National Assembly on 19 May 2021, and has been classified as a Section 75 Bill falling within the ambit of Section 39(1) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019). The Bill was referred to the National House of Traditional and Khoi-San Leaders by the Secretary to Parliament for comments by not later than 20 August 2021.

This submission is made by the National House of Traditional and Khoi-San Leaders, a statutory body, established in terms of the National House of Traditional and Khoi-San Leaders Act, 2019 (Act No. 3 of 2019). The role of the House is amongst others to promote the role of traditional leadership within a

democratic constitutional dispensation. Its main objective is to deal with matters relating to traditional leadership, the role of traditional leaders, customary law and customs of communities observing a system of customary law.

The African Continent which over the years had been under the leadership of the Institution of Traditional Leadership was affected by colonialism and apartheid. The regime inflicted a lot of hurt to the Institution of Traditional Leadership to the extent that some traditional leaders ended up serving them as a means to survive the brutality of the said government. Traditional Leaders who did not comply with the regime were stripped off their powers and made to flee their homes.

The customs and customary laws of different communities were affected by the regime and the powers of traditional leaders were taken away. Traditional Leaders were forced to align their customary laws and cultures with the laws of the time. Traditional Leaders continued to fight to reclaim what rightfully belonged to them as leaders of their communities with more emphasis on land. Land cannot be separated from the Institution of Traditional Leadership.

The National House of Traditional and Khoi-San Leaders' comments and submissions with regard to the Land Court Bill are as follows:

Clause 2: Purpose of the Bill

The National House of Traditional and Khoi-San Leaders appreciates the efforts by the Department of Justice and Correctional Services to introduce the Land Court Bill which seeks to establish a dedicated court to deal with claims for restitution of land. There is a need for a permanent court and permanent judges for this purpose as this will result in expeditious disposal of land restitution claims to the satisfaction of land claimants.

Clause 6: Seat of Court

Section 6 (1) of the Bill provides for the seat of the court to be in Johannesburg and that whenever it appears to the Judge President that it is expedient or in the interests of justice to hold its sitting for the hearing of any matter at a place elsewhere than at the seat of the Court, it may hold such sitting at that place.

Traditional Leaders support this section in that land claimants from traditional communities are forced to travel long distances to access courts, and it will be cheaper and speedier if the court can hold its sitting at a place that is more accessible to the people in rural communities.

The National House further recommend that the word “may” be replaced by “must”, to compel the court to hold its sitting for the hearing of any matter at a place elsewhere than at the seat of the court.

Clause 12: Appointment of assessors

This clause makes provision that the Court may sit with or without assessors who may not be more than two, to assist the Court in contested hearings. Assessors are appointed as prescribed and must first take an oath or make an affirmation administered by the judge.

The National House is of the view that there are people in rural communities who have experience and knowledge in matters regarding the dispossession of a land rights and the rules governing the allocation and occupation of land within the community, and therefore recommend that these people with historical facts should be considered for appointment.

Clause 13: Institution of Proceedings

This clause provides as to who has locus standi to institute court proceedings under this Act. Ninety-nine percent of land claims in this country are instituted by traditional leaders on behalf of community members. It is the recommendation of the National House the bill should make it clear that traditional leaders can institute proceedings in this Act on behalf of their traditional communities.

Clause 16: Intervention to proceedings before court, right to appear and legal representation

This clause empowers any person to apply to the Court for leave to intervene in the proceedings before the Court. A party to the proceedings may self-represent or be represented in Court by their own legal practitioner at their own cost. However, if a party cannot afford legal representation and it is in the interest of that party to have legal representation, the Court must refer the matter to Legal Aid South Africa to consider granting legal representation.

The National House is against the Court referring the matter to Legal Aid of South Africa and recommend that where a party cannot afford to pay for legal representation, the Court must arrange legal representation at the expense of the Commission.

Clause 22: Admissibility of evidence

This clause deals with the admissibility of evidence in Court. The Court is entitled to admit evidence, including **oral evidence** which it considers relevant and cogent to the matter being heard by it, whether or not such evidence would be admissible in any other court of law. The Court can admit **hearsay evidence** regarding the circumstances surrounding the dispossession of a land right or rights and the rules governing the dispossession of a land right or rights and the rules governing the dispossession and occupation of land within a claimant

community at the allocation and occupation of land within a claimant community at the time of dispossession, and **expert evidence** regarding the historical and anthropological facts relevant to any particular land claim.

The House support the view that hearsay evidence can be admitted by the Court regarding the circumstances surrounding the dispossession of land right. Most families in traditional communities have to rely on oral history and the existence of elders with knowledge of description, location and extent of land which their descendants occupied.

Clause 28: Court orders

This clause sets out various orders that the Court can make, and that it may at any stage after a dispute has been referred to it, if it becomes apparent that the dispute ought to have been referred to mediation or arbitration, stay the proceedings and refer the dispute to mediation or arbitration.

Traditional Leaders agree with this clause in that this will ensure that land related disputes are resolved speedily and may be settled out of court by using the mediation and arbitration approach.

Clause 28(3) (c)

This clause states that the Court may make an order for the State to pay claimant's compensation. The National House recommend that independent evaluations from the side of the community should be allowed to assess the amount for compensation.

Clause 51: Transitional Arrangements

Sub-clause (1) (a) provides for any proceedings arising out of the application of this Act or any other law conferring jurisdiction on the Court, pending in any other

than the Land Claims Court established by section 22 of the Restitution of Land Rights Act, at the commencement of this Act must be continued and concluded in every respect as if this Act had not been passed.

The National House recommend that in respect of claimants who already lodged their claims in terms of the Restitution Act, must be given the opportunity to choose whether their claims should be finalized in terms of the Land Court Act or in terms of the Restitution Act.

Clause 53: Regulations

The National House recommend that when making Regulations, the Minister must do that in Consultation with the National House of Traditional and Khoi-San Leaders.

Hoping that our comments will be considered.



NKOSIKAZI ND MHLAULI

ACTING CHAIRPERSON: NHTKL

DATE: 18 AUGUST 2021