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Your Ref:

Our Ref: SK/zm

2 December 2013

The CHAIRPERSON
PORTFOLIO COMMITTEE ON RURAL DEVELOPMENT AND LAND REFORM
PARLIAMENT
P O BOX 115
CAPE TOWN
8000

Per email: pnyamza@parliament.gov.za

Dear Chairperson

RE: RESTITUTION OF LAND RIGHTS AMENDMENT BILL

We are pleased to attach for your Portfolio Committee's attention the submission of the Legal Resources Centre in respect of the Restitution of Land Rights Amendment Bill.

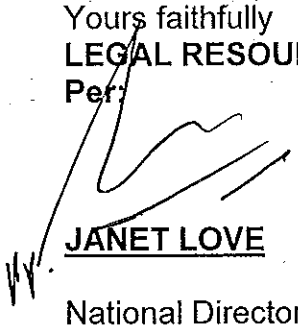
We believe this bill to be especially important as the realization of land rights is essential to the transformation of South Africa as required by our Constitution. In the circumstances we have taken the liberty of both commenting on the Bill and making further proposals for your committee's consideration which we believe would ensure a more rapid realization of the these constitutional objectives.

We in addition to this written submission would appreciate an opportunity to address your Portfolio Committee when it deliberates on the bill. We by that stage will have had further reports on the submissions made to the hearings in the Provinces and will have been able to possibly draft some further amendments to support the proposals contained in our submission. We would appreciate it if the Portfolio Committee could remain in contact with Henk Smith at the Legal Resources Centre so that we can arrange our attendance at the hearing. His contact address is set out below.

We wish to also express our thanks to you and the committee, and to the committee clerk, for arranging and granting us an extension for our submission – and apologize for any inconvenience caused by the late delivery hereof.

We await your response.

Yours faithfully
LEGAL RESOURCES CENTRE
Per:



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RESTITUTION OF LAND RIGHTS ACT AMENDMENT BILL, 2013

SUBMISSIONS TO THE PORTFOLIO COMMITTEE ON RURAL DEVELOPMENT AND LAND REFORM

02 DECEMBER 2013

C/O Henk Smith
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Legal Resources Centre

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1. INTRODUCTION AND CONTEXT

INTRODUCTION

1. As the effects of the 1913 Land Act continue to devastate communities across South Africa, the Legal Resources Centre commends efforts to revitalise and reformulate the land restitution process. While many of the land restitution programme's shortcomings will be best addressed through enhancing the capacity of the Commission on Restitution of Land Rights (the Commission) and ensuring that the restitution programme is appropriately resourced, there is also value in amending the enabling legislative framework, the Restitution of Land Rights Act 22 of 1994 (the Act).

2. This submission seeks first to contextualise land restitution efforts in the context of the broader land reform effort.

3. It then seeks to identify provisions of the Restitution of Land Rights Amendment Bill, 2013 (as introduced in the National Assembly on 13 September 2013, the Bill) that can be strengthened or should be reconsidered:

   3.1. It cautiously supports the re-opening of land claims in the amendment of section 2 of the Act subject to the development of concrete protections for those who lodged their claims before the initial 1998 cut-off. It notes that our 22 June 2013 submission on the draft bill sought guidance on what protections would be offered for existing claimants and expresses concern that such guidance has not been provided;

   3.2. It questions the amendments to the process of appointing judges to the Land Claims Court (the LCC), noting especially the challenges likely to be faced should the LCC be composed exclusively of current High Court judges. It encourages the Portfolio Committee to consider empowering the JSC to select qualified persons with experience in areas of law relevant to the land restitution programme as judges whether they are current High Court judges or not.

4. In then identifies sections of the Act which we suggest could be amended:

   4.1. It first considers the way in which the independence of the Commission has been undermined. To address this, it proposes judicial oversight over

the section 42D settlements agreed to by the Minister as well as the amendment of section 4 to establish a minimum number of Regional Land Claims Commissioners;

4.2. It notes with concern the frequent delays, sometimes for years, in transferring awards after the finalisation of claims and proposes an amendment to the Act mandating that awards be effected within 12 months of claims being finalised. It also proposes that the Commission report to Parliament on the implementation of court orders;

4.3. It seeks the amendment of section 33 to clarify that the costs of restitution and the ability of claimants to use restituted land productively, while not irrelevant, should not be accepted as preconditions for land restitution awards;

4.4. It seeks the amendment of section 29(4) of the Act to provide for legal aid at an earlier stage than is currently provided for. It proposes the provision of legal aid beginning with the process of lodging a claim.

5. The submission then considers broader questions around the implementation of the land restitution programme and whether further changes, legislative or otherwise, are needed around betterment and traditional leadership.

5.1. It considers whether betterment should be addressed through the land restitution programme and finds that betterment would be better addressed through legislation and policy specifically tailored to its unique impact on communities;

5.2. It considers the need to ensure that land restitution implementation provides protections for all individuals and communities seeking restitution, even and especially those whose land rights are governed by some form of customary land tenure.

CONTEXT

6. Marking the centenary of the Native Land Act of 1913, President Zuma declared that it had "turned black people into wanderers, labourers and pariahs in their own land." The *ad hoc* Committee on the 1913 Land Act, which is constituted by representatives from both houses of Parliament and from across the political spectrum, was tasked with coordinating oversight

on the reversal of the legacy of this Act.[1] Its report to the National Assembly offers helpful context in understanding the impact of the Act, assessing the progress of programmes established to reverse the Natives Land Act, and makes recommendations for reversing this legacy.

7. While the land restitution programme is a central element of the land reform programme post-1994, the Committee's report assessed the land restitution in the context of the other land reform programmes that target land redistribution, enhanced tenure security, and development support for the enhanced utilisation of land by marginalised and previously disadvantaged land owners and occupants. The land reform policy as a whole should be understood in light of the broad vision to redress the injustices of apartheid, foster national reconciliation and stability, underpin economic growth, and improve householder welfare and alleviate poverty.

8. While the implementation of the land restitution programme has been slow, it has generally been perceived to have benefited greater numbers than other land reform policies. The *ad hoc* Committee notes that "settled land claims have benefitted about 368 090 households, with a total 134 873 female headed households."[2] Many of the beneficiaries of land restitution are from lower-income communities.

9. In contrast, the *ad hoc* Committee notes that the redistribution programme has benefited fewer households and no longer targets lower-income households. It notes the transition from the pro-poor Settlement Land Acquisition Grants to the Land Redistribution for Agricultural Development in 2001 which removed the emphasis on households earning less than R 1 500 per month and began to target contributions from beneficiaries of land redistribution. The Committee notes the mid-term review report of the Department of Rural Development and Land Reform (2009 to 2012) which "shows that on average per year about 800 householders benefited from the redistribution process accounting for a budget of approximately 1.5 billion per year. The Committee noted that large sums of money were increasingly benefitting the few."[3]

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[1] 'Draft report of the *ad hoc* Committee: Coordinated oversight on the reversal of the legacy of the Native Land Act of 1913 – A report to the National Assembly of the Parliament of South Africa' 15 October 2013 at p 5.
[2] Ibid at p 14.
[3] Ibid at p 20.

10. Given the perception, shared by the *ad hoc* Committee, that the land redistribution programme is 'benefitting the few', the burden on addressing the unequal distribution of land pre-1994 is increasingly falling on the land restitution programme. If this trend continues with the re-opening of land claims, this may lead to an over-subscription of land claims that goes beyond the scope and capacity of the restitution programme.

11. In this regard, we wish to draw the Portfolio Committee's attention to the submission to the Department on the Draft Restitution Land Rights Amendment by Professor Cheryl Walker. While acknowledging the vital importance of redress for the land injustices of the past, she notes "serious questions about the suitability of the restitution programme...to carry the weight of popular expectations and aspirations around land and redress...and to manage the unexpected policy dilemmas that the commitment to land restoration as the primary and preferred form of redress produces."[4]

12. We also note the tendency, as the weight of expectations for redress is increasingly placed on land restitution, to burden the land restitution programme with the National Development Plan's objectives, as reflected in the Comprehensive Rural Development Plan and the Recapitalisation and Development Plan, to build an inclusive rural economy through job creation in agriculture and related sectors.

13. While building an inclusive rural economy is an important policy aim that should inform the land redistribution programme, the land restitution programme is a rights-based programme seeking to give effect to the constitutional guarantee of land restitution. Providing relief to persons and communities who were dispossessed of property as a result of past racially discriminatory laws and policies must not be contingent on whether sufficient jobs will be created.

14. The consequence of the above is that persons and communities with low income levels may only be able to benefit from land reform if they were historically dispossessed. This excludes millions who should be targeted by the land reform programme and increases the likelihood that those with

[4] Cherryl Walker 'Comments on the Restitution of Land Rights Amendment Bill (Government Gazette No. 36477, 23 May 2013)' 22 June 2013 at p 1.

marginal claims will seek restitution as they are unlikely to benefit from redistribution.

15. We therefore encourage the Portfolio Committee to consider our submissions below, and its further deliberations upon the Restitution of Land Rights Act Amendment Bill, in light of the burden of expectations and development policy that has been placed on the land restitution programme.

2. AMENDMENT OF SECTION 2

THE EFFECT OF RE-OPENING OF CLAIMS

1. The LRC has welcomed the re-opening of claims and the extension of the cut-off date to 31 December 2018 contained in clause 1 of the Bill. It has also cautioned that the re-opening of claims must be managed in a particularly careful manner so as not to prejudice claimants who lodged claims before the initial deadline and to ensure that the Commission has adequate capacity to consider new claims.

2. The first judges of the Land Claims Court were appointed for five-year terms and it was expected that all land claims would be settled by the end of their first terms.[5] Seventeen years after the initial cut-off date, the *ad hoc* Committee on the 1913 Land Act has found that around 80 000 claims have been settled while nearly 9 000 claims are outstanding. Of the nearly 9 000 outstanding claims, over 7 000 are yet to be gazetted.[6]

3. While the number of claims settled is significant, it is important to note that over 20 000 of the settled claims are not yet finalised. Of the finalised claims, the Committee found that approximately 1.5 million hectares of the 3 million hectares awarded has yet to be transferred.[7] Further, while the data is not clear, it seems that the majority of outstanding claims are community claims. Community claims, which are often in rural areas, tend to involve larger numbers of claimants and greater amounts of land, indicating that much work remains to be completed to finalise the land claims filed before the initial cut-off date. While the complexity of these claims is certainly a factor in these delays, the capacity of the Commission (in terms of skills and staff numbers) has also been a contributing factor with the *ad hoc* Committee expressing concerns that the Commission currently lacks the capacity to resolve claims already on its books.

4. While it is difficult to ascertain the number of valid claims that were not submitted before the 1998 cut-off, the explanatory memorandum to the Bill estimates that at least 3.5 million people were forcibly removed from their

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[5] Alan Dodson "Property Restitution in South Africa and Kosovo : Lessons for Fair and Efficient Restitution Procedures" : Paper given at PLAAS Seminar 2006 at p 7.
[6] Supra note 1 at p 15.
[7] Ibid.

land as a result of racially discriminatory laws between 1960 and 1982. As only around 80 000 claims were lodged before 31 December 1998, there are likely many who are entitled to land restitution who did not lodge claims before this deadline.

5. While the large numbers of people who could benefit from the revised cut-off date is a significant positive, it is also an area for concern given the significant number of outstanding claims yet to be resolved. The Commission recently stated that a Regulatory Impact Assessment had indicated that there would be around 397 000 valid claims that would cost between R 129-179 billion to settle over the next 15 years. While we have not yet had access to this RIA and therefore reserve comment on it, we would like to underscore the enormity of this figure.

6. Given the constraints faced by the Commission in finalising existing claims, many of our partners, as well as clients who have outstanding claims, have expressed understandable concern that the Commission will lack the capacity to continue to process existing claims. There is also concern that finalised claims will be reassessed as new claims are filed. As the Commission has previously struggled to track and settle overlapping claims, there is concern that existing claims will be undermined by new claims.

7. The concern regarding overlapping claims will be amplified if legislation is passed to allow Khoi and San groupings to claim for restitution of land from pre-1913 as the department is currently proposing. If such claims are allowed, there will certainly be significant overlap between pre-1913 dispossessions of Khoi and San groupings and post-1913 dispossessions.

8. The Commission committed to prioritising existing claims during a presentation to the Portfolio Committee on 15 October 2013.[8] The *ad hoc* Committee has recommended that the Department and the Commission should "prioritise settlement of restitution claims lodged prior to 31 December 1998."[9] The Chairperson of the Portfolio Committee has also

[8] Parliamentary Monitoring Group 'PMG Report: Restitution of Land Rights Amendment Bill: Departmental briefing' 15 October 2013. Available at: http://www.pmg.org.za/report/20131015-restitution-land-rights-amendment-bill-departmental-briefing-audit-outcomes-department-rural-development-and. [Accessed 01 December 2013].
[9] Supra note 1 at p 32.

assured claimants that the re-opening of claims will not affect previous claims.[10]

9. We agree with the principle that existing land claimants should not be prejudiced by subsequent claims to the same land and therefore cautiously welcome the commitment of the Commission and Parliament to protect existing claimants. In our submission to the Department on an earlier draft of the bill, we encouraged Parliament to "enquire of the Commission exactly how it intends to deal with these matters in a manner more efficient than reflected" in previous cases with overlapping claims.[11]

10. As we have not received any details on the manner in which the Commission and/or the Committee propose to provide these protections, we encourage the Portfolio Committee to ensure that clear guidelines are established around this issue and intend to address such guidelines if given the opportunity to present before the Portfolio Committee.

11. As options for prioritising existing claims are contemplated, we would encourage the Portfolio to consider the possibility of ring-fencing existing claims against subsequent claims. This would ensure that claims, either claims which are already finalised or all claims filed before the 1998 cut-off date, are shielded from claims made post-1998 to the same land. Subsequent claimants would thus still be entitled to alternative restitution remedies but not to the restoration of the land in question.

12. The LRC strongly believes that this ring-fencing option, while complex, is both feasible and advisable. It is currently considering proposals prepared by counsel on ring-fencing provisions that provide effective protection for existing claimants in a constitutional fashion and will report further if given the opportunity to make oral representations to the Portfolio Committee.

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[10] Foster Mohale 'NO LAND, NO VOTE, LIMPOPO RESIDENTS CAUTION'. Available at: http://www.parliament.gov.za/live/content.php?Item_ID=5167. [Accessed 01 December 2013].
[11] 'Draft Restitution Amendment of Land Rights Amendment Bill, 2013: LRC Submission to the Department of Rural Development and Land Reform' 24 June 2013.

3. AMENDMENT OF SECTION 22

APPOINTMENT OF JUDGES

1. The Bill provides for a simplified process of appointing permanent judges to the Land Claims Court. In amending section 22, it provides for the President to appoint only current judges of the High Court, acting on the advice of the Judicial Service Commission. It repeals section 23, which provides that non-High Court judges appointed to the LCC must have "expertise in the fields of law and land matters relevant to the application of this Act."

2. While we acknowledge the challenges faced in the lack of permanent appointees to the LCC, we do not believe these amendments will address these challenges sufficiently. Current High Court judges face obligations to two Judge Presidents when serving on the LCC. With the minimum of five LCC judges appointed, the Court will more realistically have 2.5 judges given these other commitments. In our experience, the practice of having judges who are obliged to other courts means that cases often cannot be dealt with in one continuous sitting. This leads to unnecessary delays, a significant issue when all current claimants have been waiting at least 15 years since the lodgement of their claim.

3. The importance of avoiding delays is underscored when considering the impact of re-opening claims. With the Regulatory Impact Assessment's estimate that 397 000 additional valid claims will be lodged, the LCC will face a significant increase in its workload. If only one per cent of these claims are heard by the LCC, and assuming a conservative estimate of three days per hearing, the Court will face an additional 11 910 days of hearings. With five full-time judges, this would entail 2 382 days of hearings per judge, or 6.5 years of hearings with 365 hearings a year.

4. Even if the estimate in the RIA is too high, these conservative calculations illustrate the immense workload the LCC will face with the re-opening of claims. This is especially the case as LCC judges' workload includes a significant amount of work at the pre-trial stage even where matters are eventually settled.

5. We therefore urge the Committee to not fetter the discretion of the Judicial Service Commission by limiting the pool of candidates for LCC appointments to current High Court judges. This problem can easily be avoided by

allowing the President to appoint persons recommended by the JSC directly to the LCC or to the LCC and the High Court simultaneously. The JSC would thus be empowered to recommend qualified candidates for appointment as LCC judges with continued consideration of experience in relevant areas of law for appointees who are not judges of the High Court.

6. In this regard, we encourage the Committee to consider the model of the Labour Court. Per section 153 of the Labour Relations Act 66 of 1998, the President appoints judges on the advice of NEDLAC and the Judicial Service Commission. Where a non-High Court judge is to be appointed, they must be a legal practitioner and "have knowledge, experience and expertise in labour law." Per the recent Superior Courts Act 10 of 2013, the terms and conditions of employment for judges of the Labour Court has been set in terms of the Judges' Remuneration and Conditions of Employment Act 47 of 2001.

7. It is suggested that a similar model would work for the LCC. The JSC should select the candidates with some consideration of their experience in areas of law that are relevant for the application of the Act. LCC judges' terms and conditions of employment should be aligned with those of High Court judges.

8. The Bill also empowers the Minister to appoint acting judges to the LCC for such a term that the Minister shall determine. Previously, the Minister was only able to appoint acting judges for one-month terms while the President was empowered to make longer appointments. This is a positive development as it should streamline the process of expeditiously appointing acting judges.

4. PROTECTING THE INDEPENDENCE OF THE COMMISSION

1. The Commission on Restitution of Land Rights was established as an independent body by Chapter II of the Restitution of Land Rights Act to assist claimants to vindicate their right to restitution contained in s 25(7) of the Constitution as articulated in s 2 of the Act.

2. Despite the clear intention for the Commission to be an independent statutory body, the Commission is increasingly indistinguishable from the Department of Rural Affairs and Land Reform. According to the Chief Land Claims Commissioner, the Commission's strategic direction is provided by the Minister and the Director General of the Department.[12] The Department and the Commission have often instructed the same counsel in cases before the Land Claims Court.

3. While the Act does provide for the Minister to perform certain functions, this convergence is troubling as the purpose of the Commission is clear: giving effect to the constitutional right to land restitution. The purpose of the Department is broader, and some of the guidance from the Department seems to deemphasise the right to restitution in favour of other Department objectives.

4. The Commission's lack of independence can be ascertained in two areas: policy guidance from the Department and the limited technical capacity within the Commission to act independently.

POLICY

5. As mentioned above, the Commission defers to the Department on issues of strategy. This can be seen particularly clearly in the policy guidance the Department provides to the Commission. The Commission appears to accept the National Development Plan and the Comprehensive Rural Development Plan, read with the Recapitalisation and Development Plan, as the guiding policies for carrying out its mandate.

[12] Commission on Restitution of Land Rights 'Annual Report 2012-13' May 2013 at p 10.

6. Providing overarching guidance, the NDP argues that "[the] longer-term solution to skewed ownership and control is to grow the economy rapidly enough and focus on spreading opportunities for black people as it grows."[13] The NDP identifies only two objectives for building an inclusive rural economy (Chapter Six): job creation in agriculture and related industries and a positive trade balance for agricultural products.[14]

7. The Comprehensive Rural Development Plan (CRDP), which seeks to promote enterprise and industry development, also informs the land restitution programme. According to the CRDP, "projects will be linked to the acquisition of and access to land through the three land reform programmes (redistribution, tenure and restitution). All projects implemented through the three programmes will be implemented efficiently but in a sustainable manner linked to the strategic objective of the CRDP."[15]

8. Numerous core objectives of the CRPD are to be accomplished through Recapitalisation and Development Plan (RADP), which states that it is 'closely aligned with Chapter 6 of the NDP.'[16] The RADP, which explicitly incorporates restitution within its remit, seeks to "ensure that the enterprises are profitable and sustainable across the value chain in line with the Business Plan which stipulates comprehensive development requirements of targeted properties over 5 year recapitalization and development cycle."[17] It largely seeks to achieve this through strategic partnerships or co-management between emerging black farmers and partners with existing capacity to share, often the previous owners of the land.

9. While assessing the effectiveness of these policies is beyond the scope of this submission, these policies should not be relevant in determining the eligibility of claimants and the scope of the restitution they are to be

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[13] National Planning Commission 'National Development Plan 2030: Our Future – Make it Work' 2011 at p 117. Available at: http://www.npconline.co.za/medialib/downloads/home/NPC National Development Plan Vision 2030 -lo-res.pdf. [Accessed 1 December 2013].
[14] Ibid at p 57.
[15] DRDLR 'The Comprehensive Rural Development Programme Framework' 28 July 2009 at p 13. Available at: http://www.dla.gov.za/phocadownload/Documents/crdp_version1-28july09.pdf. [Accessed 1 December 2013].
[16] DRDLR 'Policy for the Recapitalisation and Development Programme' 23 July 2013 at p 9. Available at: http://www.dla.gov.za/phocadownload/Policies/rdp_23july2013.pdf. [Accessed on 1 December 2013].
[17] DRDLR 'Three Years Review of the Recapitalisation and Development Programme'. Available at: http://www.dla.gov.za/phocadownload/Land-Reform/RADP/September2013_RADP_MID_TERM.pdf. [Accessed 1 December 2013].

awarded. Restitution is based on whether a claimant has established a right to redress. Whether an award is made must be based on whether the facts of the claim match the requirements in terms of section 25(7) of the Constitution, section 2 of the Act and relevant case law. While Department policy may then be relevant in offering claimants support post-restitution, their right to restitution is not and cannot be subject to these policies considerations (please see section 6 of this submission on considerations of costs and productivity).

Section 42D

10. While the Department's direction of the Commission is generally exercised without a clear legal basis, it is submitted that the current section 42D of the Act concretises the Minister's position over the Commission. The current section 42D was established in 1999 to establish a more expeditious process for settling claims. It empowers the Minister to enter into agreements with interested parties to settle land claims through the award of land or alternative forms of restitution.

11. As the majority of claims are settled under section 42D rather than through a court-overseen settlement per section 14 or a court order under section 35, section 42D significantly increases the authority of the Minister to influence the factors used by the Commission in determining whether a valid claim exists and how the claim should be settled.

12. The significance of this influence is seen most clearly when considering the requirements for approval of a section 42D settlement. They include a plan for the development and use of the land, business plans, a share equity agreement, and a strategic partner agreement. This is the clearest example of the increasing influence of the NDP, the CRDP and the RADP. It illustrates the need for guidance to ensure that restitution awards are not contingent upon Department policies but are solely based on giving effect to the section 25(7) right to restitution.

13. We therefore ask Parliament to consider amending section 42D to require 42D settlement agreements to be subject to court confirmation.

CAPACITY

14. In its 2011-2014 Strategic Plan, the Department noted high staff turnover in the Commission and identified shortages of skills in critical areas such as

legal support, quality assurance, research, and information management.[18] The *ad hoc* Committee expressed concern about the Commission's capacity "to ensure timely settlement of existing claims and newly lodged claims." The Committee noted that "critical in-house expertise is required to fast-track settlement of land claims."[19]

15. The courts have also commented frequently on the shortage of skills at the Commission. The Commission has been criticised for:

    15.1. Failing to give timeous notice of a referral to the LCC to a competing claimant;[20]
    15.2. Inadequately researching claims;[2122]
    15.3. Arbitrarily determining compensation payable as equitable redress;[23] and,
    15.4. Irrationally merging community claims.[24]

16. These shortcomings are not highlighted to criticise the Commission. The Commission's tasks are extraordinarily difficult. Researching claims, balancing the interests of claimants, owners and other parties, and drafting complex property transfer agreements require exceptional skills.

17. It is essential that the Commission be provided sufficient capacity to manage these tasks efficiently and effectively, especially with the reopening of claims. Where the Commission lacks capacity, its independence is undermined as it is forced to rely on the Department or external consultants. We therefore encourage the Portfolio Committee to consider means of ensuring the Commission has sufficient capacity to carry out its functions independently.

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[18] DRDLR 'Department of Rural Development and Land Reform Amended Strategic Plan 2011 – 2014' 2013. Available at: http://www.dla.gov.za/publications/strategic-plans/file/1824. [Accessed 02 December 2013]
[19] Supra note 1 at p 26.
[20] *Monyeki and Another v Regional Land Claims Commissioner, Limpopo Province and Others* (LCC 18/04) [2012] ZALCC 2 (29 February 2012).
[21] *Mhlanganisweni Community v Minister of Rural Development and Land Reform and Others* (LCC 156/2009) [2012] ZALCC 7 (19 April 2012).
[22] *Crafcor Farming (Pty) Ltd v Regional Land Claims Commissioner, Kwazulu-Natal and Others* (LCC46/2007) [2009] ZALCC 10 (4 September 2009).
[23] *Naidoo v Land Claims Commission and Another* (LCC112/07) [2012] ZALCC 14 (27 September 2012).
[24] *Crafcor Farming (Pty) Ltd* supra note 18.

18. In this regard, we are troubled by the practice of the Minister of appointing only one Regional Land Claims Commissioner. There has been no indication that there are plans to appoint any other RLCCs.

19. In section 4(3) of the Act's provision for the appointment of "as many regional land claims commissions as may be appointed by the Minister", as well as the plain meaning of regional commissioner, it is clear that the legislature sought to provide for the appointment of multiple RLCCs to facilitate the work of the Commission.

20. We therefore encourage the Committee to consider amending the legislation to provide for a mandatory minimum number of RLCCs to ensure that there are sufficient senior personnel capable of deputising for the Chief Land Claims Commissioner to carry out the Commission's mandate. These RLCCs, already envisioned by the Act, need not be allocated per province.

5. ENSURING TRANSFERS POST-AWARD

1. A significant obstacle to claimants' realisation of their rights is the frequent delays in the transfer of land after a claim has been finalised. According to the *ad hoc* Committee's report, "the Committee expressed its concerns because, of the 3 million hectares of land awarded to claimants, approximately 1.5 million or 50 per cent of the total land awards had not been transferred to beneficiaries."[25]

2. In an annexure to the *ad hoc* Committee's report, it is noted that the Makgoba Trust in Limpopo was established in 2004 to acquire land restored to them in terms of restitution and that 'disputes between the Trust and traditional leaders stalled development.'[26]

3. In the Cata claim, a settlement was agreed in 2000 and a CPA established in 2004 to receive the land transfer, which was to be made promptly. In 2010 the community felt forced to go to court to compel the Department to effect the transfer, and in January 2013 the court ordered transfer by May 2013. The order is yet to be effected.

4. In each case there may be specific factors that underpin delays in land transfers. It is clear, however, that policy decisions have a significant impact on these delays. For instance, it has been alleged that the Minister has placed a moratorium on transfers of land to communities, even when an award has been made.[27] This appears to be the grounds for the delay in the Cata claim, as the Chief Director of the Department has stated:

> *In the circumstances whilst it was felt that the order sought by the applicants in this matter should not be opposed, the Minister has issued an instruction that these matters be opposed on the grounds that discussions for the implementation of CLARA are still continuing and no state land has to be transferred until this process has been finalised.*[28]

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[25] Supra note 1 at p 15.
[26] Supra note 1 at p35.
[27] Christopher Morris 'Failed Deeds: The Masakhane CPAs and State Negligence Under Customary Land Reform Policies' at p 5. Available at: http://www.landdivided2013.org.za/sites/default/files/Morris - Failed Deeds_24April2013version.pdf. [Accessed 01 December 2013].
[28] Ibid.

5. In the *Crookes Brothers* case and the Mbokozi claim, the Minister sought to argue that it lacked sufficient resources to purchase land that was subject to a finalised land claim. In both cases the courts awarded the payment of the value of the land and ordered costs against the Minister. Per Ponnan JA in *Crookes Brothers*, "the conduct of the officials in the employ of respondents evokes strong feelings of disquiet. Because of their conduct the public purse is much the poorer."[29] Per Meer J in the Mbokozi claim:

> *The high ranking statutory approval of the agreements in terms of Section 42 D of the Act as aforementioned created expectations which were thwarted by unacceptable dilatoriness on the part of Respondents. Conduct of this ilk on the part of state officials flies in the face of fair contractual practice and furthers the aims neither of land restitution nor the right thereto as embodied respectively in the Act and the Constitution.*[30]

6. These delays in transfers are unacceptable. In many cases, claimants have had to wait years for their claims to be processed. After finalising their claims they should finally be able to receive the land they have been awarded and begin to make use of it.

7. We therefore urge the Committee to consider amending the Act to require the transfer of land to successful claimants within twelve months after the finalisation of a claim. Claims finalised before this Bill becomes law should be required to be transferred within 12 months of its promulgation. Delays beyond this deadline should only be allowable with court approval.

SECTION 6(2)(a)

8. An additional means of monitoring the implementation of restitution awards would be through amending section 6(2)(a) of the Act. The section currently provides that:

> *(2) The Commission may, at a meeting or through the Chief Land Claims Commissioner, a regional land claims commissioner or a person designated by any such commissioner –*

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[29] *Crookes Brothers Ltd v Regional Land Claims Commission for the Province of Mpumalanga and Others* (590/2011) [2012] ZASCA 128 at para 27.
[30] *Quinella Trading (Pty) Ltd and Others v Minister of Rural Development and Land Reform and Others* (LCC 03/2010) [2010] ZALCC 14 at para 34.

(a) monitor and make recommendations concerning the implementation of orders made by the Court under section 35.

9. This merely entails the Commission reporting to itself on its implementation of orders which seems an ineffective means of monitoring implementation. It is submitted that the Act should be amended to require that reports on the implementation of orders made by the Court under section 35 be given to Parliament.

6. AMENDING SECTION 33

ADDRESSING COSTS AND PRODUCTIVITY

INTRODUCTION

1. The LRC welcomes the deletion of clause 9 from the earlier draft of the bill.[31] The clause sought to amend section 33 of the Act to include cost of restoration and 'the ability of the claimant to use the land productively' as factors in any decision of the LCC. As we submitted earlier, such an amendment would have been difficult to implement uniformly and would have reduced the likelihood that land would be restored to claimants. Where awards are made, they will be more likely to be for alternative remedies instead of the restoration of land. It has been suggested by Department officials that the additional factors would 'lower the ceiling' for successful claims.

2. This result would be problematic as it would undermine the right to restitution found in s 25(7) of the Constitution. As the Supreme Court of Appeal and the Constitutional Court have held, the starting point in fulfilling this right "is that the whole of the land should be restored, save where restoration is not possible due to compelling public interest considerations."[32]

3. The consideration of costs and productivity is not irrelevant. It is submitted, however, that these factors should be considered in determining the nature and extent of the restoration rather than whether restoration should be ordered at all.

4. In a recent case, the Supreme Court of Appeal appeared to hold that costs and production were essential factors in applying the current section 33, going so far as to remit a case back to the LCC with an explicit directive to consider the cost of expropriating the land and the effect of a restoration order on the productivity of land.[33]

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[31] Draft published for public comment by the Minister for Rural Development and Land Reform on 23 May 2013 in Notice 503 of 2013, Government Gazette No. 36477.
[32] *Mphela and Others v Haakdoornbult Boerdery CC and Others* [2008] ZACC 5 at para 32.
[33] *The Baphiring Community and Others v Tshwaranani Projects CC and Others* (806/12) [2013] ZASCA 99 (6 September 2013).

5. Given the limited capacity of the Commission noted above, we are concerned about the imposition of further requirements for the processing of land restitution claims. These additional requirements will increase the burden upon the Commission in its initial research and expand the grounds upon which Commission decisions may be reviewed. This will lead to increased delays in the realisation of rights.

6. It is also important to note, as discussed above, that the restoration of the 'whole of the land' is of paramount concern in giving effect to the constitutional right to land restitution. It is therefore troubling that the current section 33 has been interpreted as requiring a consideration of costs and productivity as essential factors before an order will be made. This is particularly troubling as the state has a duty to budget sufficiently in order to meet its constitutional obligations.

7. In the *Blue Moonlight Properties* case, the Constitutional Court held that "it is not good enough for the city to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations."[34] While this judgment dealt with the right to housing, which is limited by 'available resources' under section 26 of the Constitution, there is no approximate limitation to the right to restitution.

8. It is also troubling as considerations of costs and productivity have not featured prominently in previous settlements and orders of the LCC. Indeed, there has been a wide range of costs per hectare in awards. In the recent Mala Mala settlement, the cost per hectare was around R 83 000. While this is more expensive than the average claim, costs have reached as high as R 230 000 per hectare in restitution claims.

9. Establishing costs as a factor at this stage will therefore result in claims that were not processed earlier, through no fault of the claimants, being considered according to different standards than previous claims. These claimants will be less likely to have an order of land restoration and may face a 'lower ceiling' for their claim.

10. While the financial constraints of the state may be considered, it is important to note that land restitution currently accounts for only 0.29% of the total

[34] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33 at para 74.

budget. While the budget for restitution has increased by 9% from 2008/2009 to 2013/2014, it is striking that the total budget has risen by 82% over the same period. It is clear that the costs of restitution have not been causing undue pressure to the national budget.

11. While costs and productivity are factors to be considered by the court, they are properly understood amongst a range of factors to be considered by the court in determining an award. We would therefore encourage an amendment to section 33 to clarify that the costs of expropriating the land and resettling a community should not be preconditions in determining whether it is feasible to order restoration of the land.

7. AMENDING SECTION 29(4)

THE NEED FOR EXPANDED LEGAL AID

1. The provision of funding for legal representation before the LCC, guided by section 29(4) of the Act, has been vitally important for many claimants ability to articulate and vindicate their rights to restitution. It has also provided a great benefit to Courts when sifting through claims. This has been the case in straightforward claims, but it has been especially true in complex situations with multiple, overlapping claims.

2. As the window for claims is re-opened, the number of complex cases with conflicting claims will increase significantly. In lodging claims, unassisted claimants may make errors in the initial documentation that will ultimately prove fatal to, or merely undermine, their claims. It is therefore suggested that providing legal aid when a matter goes to court will often be too late for claimants.

3. Section 34 of the Constitution provides a right to a "fair public hearing before a Court or, where appropriate, another independent and impartial tribunal forum." In the *Magidiwana* case, the North Gauteng High Court has held that whether a right to legal representation exists in the context of a non-judicial commission of inquiry should be determined according to the possibility of, among other things, the undermining of constitutional rights should the commission reach an adverse outcome.[35]

4. It is submitted that claimants' rights to representation in lodging claims should be interpreted similarly. As the lack of representation may have a significant impact on the fulfilment of the constitutional right to restitution, the Committee should amend section 29(4) to ensure that claimants have the option of representation at this stage.

5. We encourage the Committee to consider the Land Rights Management Facility established to ensure that individuals who needed legal representation to enforce their rights under the Land Reform (Labour Tenants) Act and the Extension of Security of Tenure Act. The Department

[35] *Magidiwana and Another v President of the Republic of South Africa and Others* (37904/2013) [2013] ZAGPPHC 292 at para 37.

has established call centres to receive complaints. Where a complaint relates to rights under the Land Reform Act or ESTA, the Department refers the matter to the Facility. While the beneficiaries of the Facility would also likely be eligible for traditional legal aid, the Facility provides access to specific legal expertise and ensures that such aid is provided at an early stage in the legal process.

6. It should also be noted that there may be instances where the claim process would benefit enormously from legal representation for claimants and claimants are not eligible for legal assistance. Per the Act, there is no ground for the provision of legal assistance beyond the inability of a party to pay for legal representation. We therefore encourage the Portfolio Committee to consider amending the Act to allow the Chief Land Claims Commissioner the discretion to arrange legal representation for such party where justice would be better served through representation.

8. BETTERMENT PLANNING AND RESTITUTION

1. The explanatory memorandum on the objects of the draft Restitution of Land Rights Amendment Bill makes very clear that one of the key reasons for extending the cut-off date to 2018 is the failure to provide remedies to those dispossessed through betterment planning schemes in claims lodged before the 1998 cut-off.

2. We commend the commitment to address the grievous impact of betterment planning on communities. We express serious reservations, however, on the idea of addressing betterment under the Restitution Act. We suggest that betterment would be better addressed under a different programme.

3. The stated purpose of betterment planning was the conservation of soil and other agricultural resources. The authority to establish such plans was derived from section 25 of the notorious Black Administration Act, which empowered the Governor General to pass laws in respect to all black people and 'black areas' without reference to Parliament.

4. The assertion that betterment planning promoted soil management is seriously undermined by the findings of the government reports that congestion was the primary cause of soil deterioration, with the Tomlinson Commission finding that 80% of the population would have to be removed from the reserves for betterment planning schemes to succeed.[36]

5. In reality, betterment schemes were used to apportion increasingly small portions of land. This asserted political control over communities as traditional leaders who refused to implement betterment regulations were often replaced with leaders who would.[37] The decreased plot sizes undercut the capacity of communities to use the land productively, forcing them to seek other sources of income and thus ensuring that mines and commercial farms had access to a large pool of migrant labour. As De Wet and McAllister found, the short and long term effects

[36] D Houghton 'The Tomlinson report; a summary of the findings and recommendations in the Tomlinson Commission' South African Institute of Race Relations 1956 at p 152.
[37] Yawitch 'Betterment: The Myth of Homeland Development' South African Institute of Race Relations 1982 at p 110.

of betterment were reduced agricultural production, causing "an even greater reliance on migratory labour than before."

6. In the words of Nyaniso Gxekwa of Tyutyuza, "We were living happily before betterment. There was good neighbourliness and mutual support. We helped each other with ploughing, planting and working the land. When the Trust came, we started to experience death, because things that people had worked hard for were taken from them. People resented that, and as a result, they died."[38]

7. It is clear that the impact of betterment schemes was an immense blow to control over livelihoods. It is also clear that the scale of providing redress for betterment schemes is immense. The explanatory memorandum suggests that if dispossessions from betterment and homeland consolidations are taken into account, the number of persons who may make valid claims based on dispossessions from 1960 to 1982 might rise from 3.5 million to 7.5 million. According to Walker and Platzky's survey of official documents, in 1967 the extent of 'planned' areas included 60% of the reserves in Natal, 77% of the Ciskei, 76% of the 'Northern Territories' and 80% of the 'Western Territories' (of the then Transvaal).[39]

8. Under the betterment regulations, each betterment area had to be proclaimed in the Government Gazette. Between 1939 and 1967 there were a total of 12 such betterment proclamations, though betterment projects continued through the 1980s. In our own research, we have noted that there were a grand total of 544 betterment areas declared by 1967, with 257 in what is now the Eastern Cape alone.

9. From the above, it is evident that betterment schemes do not fit cleanly within the land restitution model. Often these schemes did not lead to removals as such, but rather undermined the agency of individuals and communities to control their own livelihoods and make their own decisions regarding the use of their land. As discussed above, this does not mean that those who suffered under betterment schemes should not be entitled to redress. From our research, the grievous impact of these schemes must be addressed.

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[38] 'The Cata Story & its People' Available at: http://cata.org.za/the-community/the-cata-story-its-people/. [Accessed 01 December 2013].
[39] 'The Surplus People' 1985 at p 45.

10. We suggest that given the mismatch with the land restitution model, and the immense scale of the impact of betterment schemes, that betterment be addressed, as suggested in the 1997 White Paper on Land Reform, through a separate programme tailored to its unique injustices.

11. We encourage the Portfolio Committee to consider the provisions of the Spatial Planning and Land Use Management Bill of 2012, currently before the National Assembly, as it begins to address some of the land use issues related to betterment (though not sufficiently). Given the role of traditional leaders in enforcing betterment schemes noted above, the democratisation of traditional leadership structures through the reform of the Traditional Leadership and Governance Framework Act of 2003 or a significant re-drafting of the Traditional Affairs Bill will also be necessary to provide appropriate redress.

9. RESTITUTION AND CUSTOMARY LAND TENURE

1. Persons living under customary law faced significant dispossessions in the establishment and frequent reorganisation of the 'homelands'. As the report of the *ad hoc* Committee noted, these 'homelands' constituted only 13 per cent of the nation's land but contained 'no less than a third of the country's population.'[40]

2. In detailing the context and background of the need for tenure reform, the Communal Land Tenure Policy (CLTP) notes that "some traditional or tribal institutions were corrupted by the appointment of chiefs and headmen who were prepared to collaborate with the colonial and later apartheid administrations."[41] This had significant consequences, as the CLTP notes, because "the apartheid state aimed to rule indirectly through handpicked leaders. In the process it sponsored socio-political systems that were profoundly corrupt as well as highly oppressive, particularly to women and youth."[42]

3. Despite beginning with such a robust discussion of the flaws of some traditional leadership structures, the CLTP seeks the institutionalisation of communal land use rights to be administered "by traditional councils in areas that observe customary law."[43] In setting this objective, the CLTP does not appear to address any of the issues with the historical role of traditional leaders under apartheid.

4. Given the distortions of customary law noted in the CLTP, we submit that it is imperative that redress for these dispossessions ensure that individuals and communities are able to seek restitution independently of traditional leadership structures if that is their preference.

5. To achieve this objective of protecting the rights of individuals and communities, the *ad hoc* Committee "argued for a legal protection of the rights of individuals prior to the transfer of title to the Traditional Councils to counter the 'trumping' of the rights of households and families, thus

[40] Supra note 1.
[41] DLRDLR 'Communal Land Tenure Policy' 24 August 2013 at p 5.
[42] Ibid at p 6.
[43] Ibid at p 12.

undermining their legal security and stripping them of any redress against abuse of power."[44] It also noted that many Traditional Councils have not had elections and therefore have questionable legal status to receive such land transfers.[45]

6. We share the *ad hoc* Committee's concern that the current policy does not adequately provide for the protection of household and family land rights upon transfers to Traditional Councils. In the context of restitution, it is important in giving effect to the constitutional right to restitution that families, households and communities are allowed to determine how the land they are awarded is to be managed.

7. This means that where claimants prefer that their restituted land is managed according to customary law by recognised traditional leaders that this preference is honoured. Where this is not a community's preference, however, it is imperative that this preference is also respected.

8. Given this position, we are concerned that the Communal Land Tenure Policy regards communal property associations (CPAs) exclusively as alternative land management models for areas outside the jurisdiction of traditional councils. This appears to reflect earlier statements by policy makers that CPAs "undermine the authority of traditional leaders."[46]

9. This position is informed by the same assumptions made about customary land tenure by colonial and apartheid rules and is not reflective of customary land tenure under living customary law. As Professor Okoth-Ogendo has demonstrated, customary land tenure is based on the management of access and control over land rights guided by communities, with families and households being the primary arbiters of land rights. The role of traditional leaders in land management is primarily one of dispute resolution rather than determining land distribution. The perception that control of the land vested in a traditional leader or traditional council was introduced by colonial and apartheid

[44] Supra note 1 at p 18.
[45] Ibid.
[46] Affidavit filed by the Regional Claims Commission Manager of the Eastern Cape in *Cata Communal Property Association vs The Minister of Rural Development and Others* LCC 146/2011.

administrators based on misconceptions of customary law and the policies of 'indirect rule' critiqued by the CLTP.

10. As land was managed communally rather than by traditional leaders, CPAs can and must be seen as entirely reconcilable with customary land tenure and do not undermine the authority of traditional leaders. Indeed, the democratic foundation of the CPA model would be entirely consonant with customary leadership derived from the consent of a community.

11. We therefore encourage the Commission and the Department to consider developing CPAs that slot into current customary structures where that is the preference of communities receiving restituted land.