South African Institute of Race Relations NPC
Submission to the
Portfolio Committee on Justice and Correctional Services,
National Assembly,
regarding the
Land Court Bill of 2021 [B11-2021],
Johannesburg, 23rd July 2021

Contents

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1 Introduction

The Portfolio Committee on Justice and Correctional Services in the National Assembly (the Committee) has invited interested parties to submit written comments on the Land Court Bill of 2021 [B11-2021] (the Bill) by 23rd July 2021. This submission is made by the South African Institute of Race Relations NPC (IRR), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

2 The Content of the Bill

Not all provisions of the Bill can be given full consideration in the limited period that has been allowed for comment on the Bill. Hence, only the most important and problematic clauses are highlighted below.

2.1 Purpose of the Bill

According to Section 2(1) of the Bill, the purpose of the measure is to increase access to land and 'promote land reform as a means of redressing the results of past discrimination and facilitate land justice'. Towards these ends, the Bill:[1]

(a) establishes a Land Court (the Court) with exclusive jurisdiction over land-related disputes, as set out in the Bill or other legislation;
(b) establishes a Land Court of Appeal (LCA) to hear all appeals from the Court, other than those that may go directly to the Constitutional Court; and
(c) provides for Court-ordered mediation and arbitration.

The Memorandum on the Objects of the Bill adds that the Court will replace the current Land Claims Court and establish a specialist court (and appeal court) to 'deal with all land-related matters as regulated by various Acts of Parliament'. This, adds the Memorandum, will 'contribute towards the development of appropriate jurisprudence' on land matters, while also

[1] Section 2(2), Bill

providing ‘a cheaper and speedier alternative dispute resolution mechanism in the form of mediation and arbitration’.[2]

2.2 Status, composition, jurisdiction, and appointment of the Court

2.2.1 Status

The Court is to be established as ‘a High Court’ of ‘law and equity’ and is to have ‘the authority, inherent powers, and standing’ of a Division of the High Court of South Africa under the Superior Courts Act. The Court is thus to be a ‘court of record’ and its hearings must generally be conducted in open court.[3]

2.2.2 Composition

The Court is to comprise a Judge President, a Deputy Judge President, and ‘so many other judges as may be determined in accordance with the prescribed criteria and approved by the President’. A single judge will generally preside over the hearings of the Court, unless the Judge President decides to the contrary.[4]

2.2.3 Jurisdiction

In general, the Court is to have ‘exclusive jurisdiction’ over all matters allocated to it under the Bill or any other legislation. Geographically, it is to have jurisdiction in the same areas as each Division of the High Court.[5]

2.2.4 Appointment of judges

The President of South Africa, ‘acting on the advice of the Judicial Service Commission’ (JSC), is empowered to appoint the Judge President and Deputy Judge President of the Court. He will also appoint ‘as many judges as is necessary’ to serve on the Court and will do so ‘on the advice of’ both the JSC and the Judge President of the Court.

The relevant section of the Bill is poorly worded, making for considerable uncertainty as to what it means. It seems, however, that both the Judge President and his deputy must be ‘judges of the High Court at the time’ of their appointment. As regards the other judges on the Court, the Bill ambiguously states that ‘at least half’ of them ‘must, as far as is practicable, have been judges at the time of their appointment’.[6]

Does this uncertain wording mean that only a tenth, or a quarter, or a third of the other judges need be judges already, if it is deemed not ‘practicable’ to find more who are already serving on the Bench? This ambiguity must be removed. Moreover, given the importance of sound adjudication on complex and vital land issues, the Bill should be amended to provide that all the judges appointed to the Court must already be judges with significant judicial experience at the time of their appointment.

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[2] Para 1.3, Memorandum on the Objects of the Land Court Bill, 2021
[3] Section 3, Bill
[4] Section 4, Bill
[5] Section 7, Bill
[6] Section 8(4), Bill

The Bill states that all the judges appointed must 'have experience in the field of land rights matters'. This criterion is to apply to every appointment: unlike the need for prior judicial experience and expertise which is given short shrift. This wording will encourage the appointment as judges of land activists with narrow and partisan views on land issues, rather than with the objectivity needed for balanced and independent adjudication.

The Bill's requirement that judges 'must…be representative in terms of race and gender' is inconsistent with Section 174 of the Constitution and invalid. Section 174 requires that judges must first and foremost be 'appropriately qualified' people who are 'fit and proper' to serve on the Bench. Only once these criteria have been met may 'consideration' be given, as a secondary issue, to 'the need for the judiciary to reflect broadly the racial and gender composition of South Africa'.[7] Moreover, the extent to which the demographic composition of the Bench has already changed since 1994 must also be taken into account when the need for further 'broad' representivity is considered.

2.3 Appointment of assessors

According to the Bill, 'not more than two assessors may be appointed' to adjudicate on any matter, together with the single Court judge who will normally preside. These assessors must be 'appointed in the prescribed manner' – in other words, in keeping with the procedures specified by the minister by regulation.[8] However, the Bill is silent as to the qualifications they must have and on what steps will be taken to ensure that only 'fit and proper' persons are brought in as assessors.

This matters a great deal because assessors, once they have taken the prescribed oath or made a similar affirmation, become 'members of the Court'.[9] According to the Bill, moreover, 'the decision…of the majority of the members of the Court upon any question of fact is the decision of the Court'.[10]

In other words, where two assessors are appointed in a case, they have the power to overrule the presiding judge on all questions of fact. Questions of law will need to be decided by the presiding judge, who will also rule on whether any given question is one of law or one of fact.[11] In very many instances, however, the disputes before the Court will turn primarily on questions of fact – which inadequately qualified and potentially partisan assessors will be empowered to decide.

This undermines the rule of law, the supremacy of which is guaranteed by Section 1(c) of the Constitution. It is also inconsistent with Section 34 of the Constitution, which gives everyone the right to have legal disputes decided by independent and impartial courts or similar

[7] Section 174(1), (2), Constitution of the Republic of South Africa, 1996
[8] Sections 12(1), 53(a), Land Court Bill
[9] Section 12(4), Bill
[10] Section 12(4)(a), Bill
[11] Section 12(4)(b), Bill

tribunals.[12] It also makes a mockery of Section 174 and its demanding requirements for appointments to the Bench, as earlier outlined.

2.4 Court procedures and the admissibility of evidence

2.4.1 Rules governing procedure

According to Section 14 of the Bill, the Court must generally follow the rules of procedure set out in the Superior Courts Act of 2013 and in the Rules laid down by the Rules Board for Courts of Law Act of 1985 for all divisions of the High Court of South Africa.[13]

Despite the procedural rules laid down in these statutes – which provide for a formal and adversarial system of adjudication – the Court is also empowered to 'conduct any part of any proceedings on an informal or inquisitorial basis'.[14] In addition, the Bill further undermines the established procedural rules by suggesting that the Court need follow only those rules that 'facilitate the expeditious handling of disputes and the minimisation of costs'.[15]

Unnecessary delays in litigation should of course be avoided, but many complex issues need detailed investigation and careful analysis before any informed decision can be taken. The established rules of procedure in the high courts have been developed over many centuries to help ensure that issues are properly aired and justice is done to both parties. These rules are important to the rule of law and need to be upheld, rather than eroded or curtailed.

2.4.2 Admissibility of evidence

Under Section 22(1) of the Bill, the Court 'may 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'.[16]

In addition, 'and without derogating from the generality' of this provision, the Court may take account of 'hearsay evidence regarding the circumstances surrounding the dispossession of a land right and the rules governing the allocation…of land within a claimant community at the time of such dispossession'.[17] The Court must then 'give such weight' to any hearsay or otherwise inadmissible evidence as 'it deems appropriate'.[18]

The Bill provides only one example of the type of hearsay evidence that may be admitted. However, it also makes it clear that this example is not to be seen as limiting or 'derogating' from the general power given to the Court to admit evidence that would normally be excluded from consideration. On the contrary, the only test laid down by the Bill is that the inadmissible evidence must be 'relevant and cogent'. Whether there is adequate reason to regard it as 'reliable' need not be considered.

[12] Sections 1(c), 34, Constitution
[13] Section 14(1), Bill
[14] Section 14(2), Bill
[15] Section 14(3), Bill
[16] Section 22(1), Bill
[17] Section 14(2(a), Bill
[18] Section 22(3), Bill

The established rules on the admissibility of evidence have also been developed over centuries to ensure the probity and reliability of the information used by the courts in adjudicating on disputes. These rules are vital in winnowing out misleading and perhaps false allegations – and hence in promoting fairness to all parties and maintaining public confidence in the courts. The rule against hearsay has long been regarded as particularly important in excluding testimony that witnesses may believe to be true but of which they have no personal knowledge – and which may easily be unreliable.

The Bill does not spell out whether decisions on admissibility will be regarded as questions of fact or questions of law. However, that the only criteria are 'relevance' and 'cogency' – rather than legal reliability – suggests that these decisions will be regarded as questions of fact. On this basis, decisions on admissibility will often in practice by made by two assessors with no institutional autonomy, limited individual independence, and little experience of how to evaluate the probity of evidence and exclude that which does not pass muster.

2.5 Court orders on relief and costs

2.5.1 Relief of many kinds

Under Section 28 of the Bill, the Court may 'make any appropriate order', including an interdict or declaratory order, an order for specific performance, or an award of damages.[19]

Where land is subject to restitution claims, the Court may also order that the relevant land be expropriated or otherwise acquired by the state and then 'restored' to a claimant, even if that land was previously held by other 'claimants' (who must either waive their rights or accept some other form of restitution). Claimants may also be granted compensation, 'appropriate rights in alternative state-owned land', state support of various kinds (via housing programmes, for instance), and such costs awards as the Court 'deems just'.[20]

The Court also has the power to 'vary or rescind' its own prior decision or order if this was 'erroneously granted in the absence' of any affected party, has 'an obvious error or omission', or was handed down 'as a result of a mistake common to all the parties in the proceedings'.[21]

2.5.2 Costs

The Court has extensive but vague powers to make orders regarding costs, which must be based on 'the requirements of the law and fairness'.[22] Since the law has long required fairness in the award of costs, the introduction of a separate 'fairness' requirement simply promotes uncertainty and creates an ambiguous basis on which established rules can be undermined or bypassed.

[19] Section 28(1), Bill
[20] Section 28(3), Bill
[21] Section 29, Bill
[22] Section 30, Bill

In deciding on costs, the Court is expressly enjoined to consider:[23]

(a) whether the matter ought to have been referred to mediation or arbitration (see below), rather than to expensive litigation before it; and
(b) how the parties have conducted themselves in pursuing or defending claims and during the Court proceedings.

The Bill further empowers the Court to 'order costs [not only] against a party to the dispute [but also] against *any person who represented that party*' in the proceedings before the Court.[24]

That costs orders may be made in vague and wide-ranging circumstances against the legal representatives of the parties will make it difficult for people to find lawyers willing to act for them in land disputes before the Court. If lawyers are then generally absent from such litigation, this will help promote a shift towards rapid, informal, and inquisitorial proceedings, unhampered by the normal rules of evidence and procedural fairness. However, this situation will also undermine the rule of law and the constitutional right of access to court.

Where lawyers use abusive 'Stalingrad' tactics to delay litigation (for example, by raising a succession of poorly substantiated procedural objections to progress) then adverse costs orders against such tactics may be appropriate. However, the wording in the Bill makes no attempt to limit costs orders against lawyers to 'Stalingrad' instances – and is far too broad to pass constitutional muster.

2.6 Mediation and arbitration

The Bill has many provisions on mediation and arbitration, some of which seem inconsistent with one another. The most important of these clauses are summarised below.

2.6.1 Mediation

Under the Bill, any person 'wishing to institute proceedings' in the Court must inform the registrar, who must in turn refer the matter to the Judge President. The Judge President – his deputy, or any other judge of the Court – must then decide, within a prescribed period, whether 'the matter is to be heard in the Court or whether it should be referred to mediation or arbitration'.[25]

If no such referral is made, the Court may nevertheless at any time 'prior to judgment' order that the parties attempt to settle a specific issue through mediation and that the proceedings be stayed during the mediation process.[26] The Court will then 'appoint a fit and proper person

[23] Section 30(2), Bill
[24] Section 30(3), Bill, emphasis supplied by the IRR
[25] Section 13(3), (4), (5), Bill
[26] Section 31(1), Bill

as mediator to chair the first meeting between the parties'. This person will continue to serve as the mediator, moreover, unless the parties can agree on an alternative.[27]

However, if the parties fail to reach agreement or if any one of them so requests, the mediator must refer the matter back to the Court for adjudication.[28] All discussions and disclosures made during the mediation process remain privileged, however, unless all the parties agree to the contrary.[29]

If mediation yields an agreement, this will have no force or effect unless it is confirmed by the Court's own order.[30] The Court may also propose technical variations to the agreement reached, though it must 'consider any comments from the parties' before deciding to include any such variation in its order.[31]

2.6.2 Arbitration

Similar rules apply to arbitration. If the Court does not order a referral to arbitration at the outset, it can still do so at any time prior to judgment. The Court will again choose the arbitrator, who may be replaced only if the parties can agree on an alternative. Again, however, any party may apply to the Court to stop the arbitration process and resume adjudication.[32]

The Bill has conflicting provisions on the status of an arbitration award. According to Section 32(7), 'an arbitration award issued by an arbitrator is final and binding and may be enforced as if it were an order of the Court'.[33] Yet the Bill also provides that a party who alleges a defect in any arbitration proceedings may apply to the Court for an order setting aside the arbitration award.[34] Moreover, if a matter is settled out of Court by means of arbitration, the Court may simply reject the settlement agreement and require that the matter proceed in the Court instead.[35]

The Bill thus negates the key purpose of arbitration. Arbitration is supposed to offer disputing parties the opportunity to obtain a binding decision from an expert whose independence and knowledge they trust. Under the Bill, however, the Court effectively chooses the arbitrator and can also reject the award made (for some alleged defect) or any settlement reached (on any ground whatsoever).

Hence, though the Bill claims that part of its purpose is to encourage alternative dispute resolution through arbitration, it will in practice often put paid to this option. Under the Bill,

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[27] Section 31(2), Bill
[28] Section 31(5), Bill
[29] Section 31(7), Bill
[30] Section 33 Bill
[31] Section 31(8), (9), Bill
[32] Sections 13(3), 32(1) (2) (5), Bill
[33] Section 32(7), Bill
[34] Section 32(9), Bill
[35] Section 33, Bill

the state will have 'the right to intervene as a party in all proceedings before the Court'.[36] If the Court then decides to refer the matter to arbitration before an arbitrator of its choice, the state will be able to veto any change of arbitrator to a more independent and expert individual. Moreover, if the state alleges some defect in the arbitration award subsequently made, this award will no longer have binding effect and may instead be set aside by the Court.

2.7 Land Court of Appeal

The Bill establishes a Land Court of Appeal which is, except for the Constitutional Court, to be the final court of appeal from all judgments of the Court on matters within its exclusive jurisdiction.[37]

The Supreme Court of Appeal (SCA) will thus be barred from hearing appeals from the Court, despite the great expertise and experience of SCA judges. The Constitutional Court will still be able to hear appeals made directly to it, but only 'if such an appeal is allowed by national legislation and by the rules of the Constitutional Court'.[38] This wording in the Bill gives the executive and legislature a blank cheque to exclude any appeal to the Constitutional Court under any number of statutes still to be enacted into law.

2.7.1 Composition of and appointments to the Land Court of Appeal

Under the Bill, the Land Court of Appeal (LCA) is to comprise a President, Deputy President, and 'as many judges as the President [of the country] may consider necessary'.[39]

Though the President of the LCA and his deputy 'may be judges of the Supreme Court of Appeal',[40] there is no requirement that they should be. Nor is there any requirement that they even be judges at the time of their appointment.

According to the Bill, the President of the LCA and his deputy will be appointed by the President of South Africa 'on the advice of the JSC' and after consultation with the justice minister. The remaining judges are to be appointed by the country's President 'on the advice of the JSC' and after consulting the minister, the Chief Justice, and the President of the LCA.[41] Again, there is no requirement that any of the LCA judges should already be judges at the time of their appointment.

The LCA will be constituted by any three of its judges,[42] while its decisions will require the agreement of two of them.[43]

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[36] Section 16(2), Bill
[37] Section 34(1), Bill
[38] Section 43(9), Bill
[39] Section 35(1), Bill
[40] Section 36(1), Bill
[41] Section 36(3), Bill
[42] Section 35a(2), Bill
[43] Section 42(3), Bill

2.7.2 Jurisdiction of the Land Court of Appeal

Either the Court or the LCA must give leave for any appeal to the LCA. However, 'the power to grant leave to appeal [by either body] is subject to the provisions of any other law which specifically limits it or specifically…excludes any right of appeal'.[44] Again, this provision in the Bill gives a blank cheque to the executive and legislature to prevent any appeal from the Court to the LCA simply by enacting legislation excluding such an option. Since appeal to all other courts may be excluded too, this is prima facie contrary to the rule of law and inconsistent with Section 1(c) of the Constitution.

2.7.3 Powers of the LCA

On hearing an appeal from the Court, the LCA has the power to receive further evidence, remit the case back to the Court for further hearing, or confirm, amend or set aside the Court's ruling.[45]

The LCA may make any order as to costs as it deems fit, including an order that the unsuccessful party pay the costs of review to the successful one. Whether the LCA, like the Court itself, can also make a costs order against the legal representatives of one or more parties is not addressed.[46]

2.8 Minister's regulatory powers

The minister may make regulations on many issues, including:[47]

- the manner of appointment of assessors;
- the fees and allowances to be paid to assessors not in full-time state employment;
- the matters to be 'contemplated' in the Court's deciding whether to refer a dispute to mediation or arbitration under Section 13 of the Bill; and
- any matters 'required or permitted to be prescribed by regulation' under the Bill or to achieve its objects.

There is thus nothing in the Bill or envisaged in the regulations to specify the criteria to be applied in appointing assessors. This lacuna is likely to erode the independence and capacity of the Court and undermines the rule of law.

The minister may also make regulations 'to facilitate the resolution of disputes through mediation and arbitration'.[48] In addition to prescribing the processes and forms to be used in mediation and arbitration proceedings, he may also make regulations:[49]

- 'limiting' the right of any party to be represented by any other person, including a lawyer, in mediation or arbitration proceedings; and

[44] Section 43(3)(b), Bill
[45] Section 43(8), Bill
[46] Section 47, Bill
[47] Section 53(1) (d) (f) (h), Bill
[48] Section 53(2), Bill
[49] Section 53(2)(e), (g), Bill

- setting out ‘criteria’ for the appointment of a mediator or arbitrator and specifying what ‘powers, functions…[and] remuneration’ they are to have.

Parties to compulsory mediation or arbitration may thus find themselves barred from obtaining legal representation to help them through these alternative processes. The minister’s power to set the ‘criteria’ that mediators and arbitrators must fulfil will further undermine the independence of these processes, as will his capacity to determine their ‘remuneration’. Again, these provisions undermine the rule of law and are contrary to Section 1(c) of the Constitution.

2.9 Exclusive jurisdiction for the Court under nine Acts at the start

Nine Acts are amended, to the extent set out in a Schedule to the Bill, so as to give the Court exclusive jurisdiction over disputes arising in these spheres.[50] These nine statues are the Upgrading of Land Tenure Rights Act (Ultra) of 1991; the Land Reform: Provision of Land and Assistance Act of 1993, the KwaZulu-Natal Ingonyama Trust Act of 1994; the Restitution of Land Rights Act of 1994; the Land Reform (Labour Tenants) Act of 1996; the Communal Property Associations Act of 1996; the Interim Protection of Informal Rights Act of 1996; the Extension of Security of Tenure Act (Esta) of 1997; and the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act (PIE) of 1998.[51]

According to the Memorandum on the Objects of the Bill, ‘the Schedule lists only nine Acts for now, so as not to inundate the Court with many pieces of legislation all at once, especially when it is established for the first time. However, further Acts may be amended in due course to confer exclusive jurisdiction on the Court.’[52]

3 Ramifications of the Bill

3.1 No solution for the problems of land reform

According to Section 2, the purpose of the Bill is to ‘promote the ideal of access to land on an equitable basis’, and also to ‘promote land reform as a means of redressing the results of past discrimination and facilitate land justice’.[53]

The Bill seeks to achieve these goals by establishing specialist courts with the capacity, among other things, to sidestep the normal rules of evidence, appoint land activists as judges and assessors, give assessors the power to overrule judges in deciding on questions of fact, open the way to informal and expedited procedures, and use costs orders to penalise people (and their legal representatives) who decline to participate in state-controlled mediation and arbitration processes.

Clearly, the underlying objective is to use the new courts to help speed up the redistribution of land from private owners to the state. Erstwhile owners, along with those who have yet to

[50] Section 52, Bill
[51] Schedule, Laws Amended (Section 52), Bill
[52] Para 2.11, Memorandum
[53] Section 2(1), Bill

enjoy the benefits of individual title, will then be confined to revocable leases or land-use rights that may give them 'access' to land, as the Bill envisages, but will prevent them from obtaining the ownership rights vital to inclusive growth, rising prosperity, and reduced poverty.

The Bill is based on the (short-sighted) view that major land redistribution of this kind will suffice to 'redress the results of past discrimination and facilitate land justice'. But this ignores the many reasons why land reform has so signally failed – and why a greater volume of land transfers will do little to help the disadvantaged.

As the government has previously acknowledged, between 50% and 90% of land reform projects have failed, with once thriving farms now lying fallow or producing only at subsistence levels. What this means, says journalist Stephan Hofstatter, is that the government, 'by its own admission, has spent billions of rands in taxpayers' money to take hundreds of farms out of production, costing thousands of jobs and billions more in lost revenue'.[54]

Five reasons for these failures are particularly salient. First, the budget for land reform has rarely exceeded 1% of total budgeted expenditure and has often been less. In the 2020/21 financial year, for instance, R3.4bn was allocated to land restitution and R1.7bn to land reform. Together these sums, at R5.1bn, amounted to a mere 0.26% of the R1.95 trillion the government budgeted to spend in 2020/21.[55]

Second, in keeping with its ultimate socialist objectives, the ANC does not allow individual ownership for land reform beneficiaries. Restitution land is transferred either to traditional leaders or to communal property associations (CPAs), which often find themselves paralysed by internal divisions. Redistribution land is now kept in state ownership and leased to disadvantaged farmers, which leaves them without collateral to raise working capital.[56]

Third, the government commonly assumes that access to land is sufficient for success in farming. In fact, as IRR policy fellow John Kane-Berman points out, land is only the first in a long list of requirements. No less important are entrepreneurship and working capital, along with know-how, machinery, labour, fuel, electricity, seed, chemicals, feed for livestock, security, and water. Yet little has been done to meet these essential needs.[57]

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[54] Minister Gugile Nkwinti, 'Debate of the State of the Nation Address', *Politicsweb.co.za,* 14 February 2017, p2; *Business Report* 29 June 2011; Ernst Roets, 'The real state of land ownership', *Politicsweb.co.za,* 24 April 2018; Zille, 'What parallel universe?'

[55] *2019 Budget Review*, p62; IRR, *Fast Facts*, February 2019, p3; National Treasury, *2020 Budget Review*, pp72,

[56] IRR, Full Submission on EWC, p8; Department of Rural Development and Land Reform, *State Land Lease and Disposal Policy of 2013*

[57] John Kane-Berman, 'From land to farming: bringing land reform down to earth', *@Liberty*, IRR, Issue 25, May 2016, p7

Fourth, many of the inexperienced people to whom land has been transferred have simply been dumped on farms with little effective support from the state. According to Salam Abram, an ANC MP who is himself a farmer, land reform has been a 'dismal failure' because no proper 'after-settlement' support has been provided to beneficiaries. White commercial farmers have often made great efforts to help, but their support has 'never really been accepted by the government'.[58]

Fifth, the restitution process, in particular, has been dogged by so much inefficiency and corruption that officials do not know how many claims they have received, how many they have gazetted, how many have been wrongly gazetted (and should be delisted), and how many have yet to be resolved. Moreover, once claims have been lodged, farmers are often reluctant to invest in land which they are likely to lose in due course. Hence, much of the land under claim – some of it for more than 20 years – is no longer fully worked. Agri SA comments that this flawed restitution process has probably been 'done more damage to commercial agriculture than the Anglo Boer War'.[59]

The land reform process has also been abused to benefit ANC insiders, who use their political connections to get the state to buy them farms and then sell off cattle and other assets while allowing crop land to fall fallow. What Parliament's High Level Panel criticised as 'elite capture' of the land reform process[60] is illustrated by the case of the Bekendvlei Farm in Limpopo.

As the *Sunday Times* reports, two ANC members (one of whom had worked at Luthuli House for ten years), wanted to buy the farm but could not afford it. After they had spoken to land reform minister Gugile Nkwinti (who may have received R2m in return for his help), the farm was bought by the land department in 2011 for R97m. It was then leased to the two men, even though they had no farming experience and were not listed on the department's data base of possible land reform beneficiaries.[61]

Adds the *Sunday Times* report: 'Soon after the [two] men took over, there was no money to pay 31 workers on the farm. No wages were paid for five months and the farm became run down. Despite the department bankrolling an additional R30m for machinery, salaries, and construction, the once-thriving farm quickly fell into disrepair. About 3 000 cattle, worth R18m, were sold off, machinery disappeared and crops died... After four years of lavish spending and regularly failing to pay farm workers or make lease-agreement payments, Mr Nkwinti was forced to take legal action to evict the men.'[62]

[58] Ibid, p14
[59] Theo de Jager, 'Legacy of the 1913 Natives Land Act – taking up the challenge', *Focus*, Helen Suzman Foundation, Issue 70, pp44-45
[60] Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, www. Parliament.gov.za, November 2017, p37
[61] *Sunday Times* 12 February 2017
[62] Ibid

The High Level of Panel of Parliament, which was established in 2015 to investigate the impact of the thousand laws adopted by the ANC since 1994, has acknowledged many of these fundamental obstacles to successful land reform. In its November 2017 report on its findings, it also stressed that the cost of land acquisition is not a major factor in land reform failures – and advised against amending the Constitution to allow the expropriation without compensation (EWC) the government is continuing to pursue under the draft Constitution 18th Amendment Bill of 2021 and the Expropriation Bill of 2020 (as further described below).

According to the High Level Panel, the compensation provisions in Section 25 are not the main reason for land reform failures. Rather, the 'key constraints' on land reform are 'a lack of capacity, inadequate resources, and failures of accountability'. Added the panel:[63]

> The High Level Panel is reporting at a time when some are proposing that the Constitution be amended to allow for expropriation without compensation to address the slow and ineffective pace of land reform. This at a time when the budget for land reform is at an all-time low at less than 0.4% of the national budget, with less than 0.1% set aside for land redistribution. Moreover, those who do receive redistributed land are made tenants of the state, rather than owners of the land. Experts advise that the need to pay compensation is not the most serious constraint on land reform in South Africa to date – other constraints, including increasing evidence of corruption by officials, the diversion of the land reform budget to elites, lack of political will, and lack of training and capacity, have proved far more serious stumbling blocks to land reform.

One of the most significant barriers to land reform, as the High Level Panel points out, lies in the fact that 'those who receive redistributed land are made tenants of the state, rather than owners of the land' (see above). In 2019 the report of the Presidential Panel on Land Reform and Rural Development also emphasised the importance of individual ownership, saying that this is an essential foundation for the success of both smallholder and commercial farming operations.[64]

Individual smallholders operating on land owned by the state are unlikely to succeed, notes the report in an appendix, unless leases are long enough (at least five years) for farmers to be able to borrow working capital from banks. However, even this is not the best arrangement. Rather, 'the most prevalent and successful small farmer model around the world' is the one in which the smallholder is 'also the landowner'.[65]

Group operations – in which ownership is likely to be collective rather than individual – also generally fail, the report adds. This is partly because 'projects are poorly designed' and 'problems arise with managing labour, input and investment', which leads to 'conflicts within communities'. Research into land reform projects in North West, it adds, has shown that

[63] Report of the High Level Panel, pp38, 50-51
[64] Report of the Presidential Advisory Panel on Land Reform and Agrarian Development, July 2019, p119
[65] Ibid, pp 121, 122

smaller groups (<5) are the most successful, that success rates decline as the number of participants increases, and that only a third of projects with 50 or more members succeed.[66]

The report further acknowledges that 'commercial operations on privately owned land are the most successful' in global experience. 'The reason is that work, management and investment incentives are all aligned because of the private profit objective of the model and the farmers who use it. It is also the model of the large-scale commercial farming sector in South Africa, which has been a high performing sector in the past 20 years', despite the removal of the subsidies and policies that previously helped support it.[67]

3.2 Expanded commercial farming as the key to success in land reform

In rural areas, as the IRR has pointed out in its *Ipulazi* policy proposal, the success of land reform lies not in increasing the scale and speed of land transfers – as the Bill seeks to facilitate – but rather in increasing the number of successful commercial farmers. Disadvantaged farmers wanting to expand into large-scale production must be helped to do so. However, no one should be encouraged to believe that farming is an easy option, for agriculture is an exceptionally high-risk sector – and all the more so in a water-stressed country such as South Africa.

What of necessary financing for disadvantaged farmers? The first step is to quantify what is needed and then find innovative ways to provide it. A Commercial Farming Fund (CFF) should be established within the Land Bank, which should be responsible for issuing Farming Empowerment Bonds (FEBs) backed by Treasury guarantees. People and organisations that invest in these bonds will receive tax benefits and will also be entitled to CFF empowerment points (preferably in terms of a wider 'economic empowerment for the disadvantaged' or 'EED' empowerment strategy, as recommended by the IRR).

The Commercial Farming Fund will use the monies thus raised from investors and donors, both domestic and foreign, to lend to established and disadvantaged commercial farmers. However, those who are disadvantaged – as identified on a socio-economic test – will benefit from preferential interest rates. Differences between prime and preferential interest rates will be financed by the state out of tax revenues, while capital repayments over time will help expand the monies available.

Disadvantaged farmers operating on their own would be able to borrow at particularly advantageous rates, set at between 0% and 2%. Established commercial producers who enter into joint ventures with disadvantaged farmers would be able to borrow at, say, between 3% and 6%. All other commercial farmers would pay market-related rates and would generally borrow at prime. Loans for land purchases should be repayable over lengthy periods (of 50 years or more), so as to reduce the burden of repayments. Such interest as is payable should be deferred (but capitalised) in the crucial early years, when new enterprises face particularly

[66] Ibid, p120
[67] Ibid, p122

heavy start-up costs. Loans for capital spending should also have the benefit of extended repayment periods.

Production capital should also be made available by the Commercial Farming Fund. Interest rates on loans of this kind would be reduced to the same preferential rates for disadvantaged farmers operating either on their own or in conjunction with established commercial producers.

Financial help of this kind would be far more helpful than the R2bn agri-parks the state is intent on establishing to buttress its One Household One Hectare (1HH1HA) policy. Such assistance would also be a far better use of tax revenues than repeatedly providing billions in bail-outs to Eskom, South African Airways (SAA), and other poorly managed state-owned enterprises. Instead, SAA and various other SOEs should be privatised – and a goodly part of the proceeds paid into the Commercial Farming Fund to help provide finance to disadvantaged commercial farmers.

To illustrate what could be achieved, the IRR has calculated how many new commercial farmers could be established with the help of R59bn (this being a portion of the overall bailout the state set aside for Eskom in 2019). Assume that this R59bn is instead paid into the Commercial Farming Fund. Assume also that a disadvantaged commercial farmer needs to borrow R20m from this Fund to buy land and have enough start-up capital, and that this sum is to be repaid over 50 years at an interest rate of 0% a year. On this basis, the Commercial Farming Fund could finance roughly 2 950 new commercial farmers in a single year – and without having to raise any additional funding through its Farming Empowerment Bonds.

Since there are only some 32 500 established commercial farmers in the country, this is a significant figure for new entrants. In addition, a 10% cut in the public sector wage bill (which amounted to R585bn in 2019/20) could save the fiscus R58bn in this financial year alone and so fund the establishment of another 2 900 commercial farmers. A further R100bn could be saved from both public service and SOE salaries over the next four years, which could finance another 5 000 new commercial farmers. Between the initial R59bn outlay and these additional tax monies, the country could have at least 10 850 additional and well-funded commercial farmers within five years. Combined with the further monies made available through Farming Empowerment Bonds, new entrants could make up half the country's current commercial farmers by 2024.

Many other inputs would be needed to promote the success of these new farmers, as further outlined below. In addition, policy should not aim simply at expanding the overall number of commercial farmers, as economies of scale are increasingly vital and will require consolidation into a smaller number of larger and more sophisticated farming units over time. What is essential, however, is to increase the farming opportunities available to the disadvantaged. What these broad figures demonstrate, moreover, is that innovative ways of meeting the vital financing requirement can indeed be found – and that this can often be achieved simply by cutting the fat out of current state spending.

The next requirement is to identify and upskill beneficiaries. Necessary mentoring and agricultural extension services should be provided, not by inexperienced officials, as now, but rather by existing farming organisations, such as Grain SA and the Milk Producers Association. These organisations, together with purchaser groups, can together fund these extension services, as many already do. New entrants will thus be able to obtain the extension services and other help they need from experts with unparalleled practical knowledge and experience.

As for the land required, the state should not provide 'free' land to farmers (as it does not do the same for entrepreneurs in retail, manufacturing, and other spheres). Instead the government should sell much of the land it already owns – including all it has acquired for redistribution purposes – to disadvantaged farmers at market prices. Other disadvantaged individuals could buy the land they need from the 20 000 or so farms already on the market.

For the rest, the state should focus on the critically important task of augmenting rural infrastructure and essential services in the form of roads, railways, dams, safety, and bio-security (to safeguard both domestic and export markets). Solar electricity, abattoirs, produce markets, milling and storage facilities could be provided either by the state or the private sector. Where the state is responsible for provision, it should enter into public/private partnerships so as to take advantage of private sector efficiencies. Such partnerships must be concluded through open, non-racial, and competitive tendering processes.

Also essential is a zero-tolerance approach to land grabs, farm attacks, and threats to property rights. This will encourage South Africa's current commercial farmers to stay on the land and keep producing. This will help feed the nation, contribute to export earnings, and provide the necessary mentoring to new entrants. The 7% of farmers who produce most of the country's food are particularly vital in maintaining food security and must be assured that their continued farming investments will be secure. South Africa's population is expanding – from 40 million in 1994 to a projected 67 million in 2030 – and will soon be more than 70% urbanised. Its need for secure and affordable food supplies cannot be met in any other way.

In addition, all commercial farmers, whether established or emergent, must have secure and registered individual title to their land. This is the essential foundation for their business confidence as well as their capacity to borrow and in time expand their operations.

Individual title should also be introduced wherever land is held in collective or communal ownership. This is particularly important for the generally high potential but generally unused farmland held in customary communal tenure in former homeland areas. This land cannot be made more productive without the benefits of secure individual title. Such title should therefore be transferred at reasonable prices to present occupants – including the women who often labour under significant disadvantage under customary tenure rules.

With the future of commercial farming safeguarded in these ways, there will be many more job opportunities on farms and in revitalised small towns. However, many South Africans will still want to move to urban areas. This urbanisation process is already well in train and echoes developments all around the world, where people have generally preferred to move off the land and into jobs in towns and cities. South Africa's problem is that the necessary urban houses and jobs are not being generated on anything like the scale required.

Neither EWC nor the wider expropriation policies the Bill is intended to help implement any solution to these major challenges. Constructive policy reforms are instead required to help overcome the housing backlog and generate the millions more jobs so urgently needed. The IRR's *'Indlu'* proposal shows how the housing challenge can be overcome. Its *Growth and Recovery Strategy* of August 2020 outlines the further reforms that must be implemented to promote investment, encourage the creation of millions more jobs, and unleash South Africa's enormous growth potential. None of these gains will be achieved, however, without upholding private property rights and helping to extend them to all South Africans.

3.3 The need for private property rights for all South Africans

Private property rights are vital to direct investment, economic growth, and the generation of new jobs. They thus provide an essential foundation for the upward mobility and rising prosperity of individuals. They also maintain economic independence from the state, which in turn fosters political freedom and respect for fundamental civil liberties.

This explains why the racially discriminatory laws that earlier barred black South Africans from owning land, houses, and other property were so fundamentally unjust. It also explains why a key purpose of the struggle against National Party rule was not simply to end racial discrimination but also to extend to black people the private property rights that whites had long enjoyed.

Significant progress towards that goal is now evident. Helped by major redistribution via the budget, black property ownership has been growing steadily since 1975, when a 30-year leasehold option for township houses was introduced. This was soon replaced by 99-year leasehold; and then, in the 1980s, by freehold rights. Today, close on 8.8 million black South Africans own their homes, as do almost 1.2 million so-called 'coloured' and Indian people and roughly 1 million whites. Since 1991, when the National Party government repealed the notorious Land Acts, black people have also bought an estimated 6.1 million hectares of rural and urban land on the open market, without the intervention of the state.[68]

Though private property ownership is still racially skewed, black ownership of land, houses, and other assets has been growing steadily for many years. To accelerate this process, the country needs an annual average growth rate of 5% of GDP, accompanied by an upsurge in investment and employment. Black home ownership also needs to be formalised in many instances through the issuing of proper title deeds, which would help unlock the full

[68] IRR, *2021 South Africa Survey*, p350; Agri SA, 'Land Audit: A Transactions Approach', *Politicsweb.co.za*, 1 November 2017, p9

economic value of these houses. In addition, some 18 million black people living on roughly 13 million hectares of land in customary tenure in the former homelands need individual title to the plots they occupy, which again would help to bring this dead capital to life.

Instead, however, the Bill will be used to help strip all South Africans, both black and white, of the ownership rights they already enjoy or could otherwise obtain in a rapidly growing economy. The Bill will thus help confine the population to rights of 'access' on land either owned by the state or controlled by it under the rubric of 'custodianship'. Yet these access rights will be revocable and inherently uncertain – and far less valuable to people than the individual ownership which now pertains.

Two bills currently before Parliament will be particularly important in ending individual ownership and expanding state ownership or custodianship over land. These are the draft Constitution Eighteenth Amendment Bill of 2021 (the EWC Bill) and the Expropriation Bill of 2020 (the Expropriation Bill). The Land Court Bill (the Bill) will complement these two measures by introducing specialist land courts with the capacity, as earlier noted, to speed up proceedings and skew their outcomes by sidestepping many of the usual rules of evidence and adjudication.

3.4 The Bill will be used to accelerate expropriation, often for nil compensation

Both the EWC Bill and the Expropriation Bill give the state sweeping powers to take ownership or custodianship of land and any improvements on it. They also give the courts the task of 'deciding or approving' the compensation, if any, to be paid on any land expropriation. Though this has yet to be spelt out, the courts to be charged with deciding on this compensation are likely to be the new Land Court (the Court) and the Land Appeal Court (LCA) to be established under the Bill.

As earlier noted, the Bill gives the Court exclusive jurisdiction to deal with all future disputes under nine statutes, which range from the Restitution of Land Rights Act of 1994 to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) of 1998. However, the nine statues currently listed are to be expanded over time, as the Memorandum on the Objects of the Bill makes clear. The Court will thus be given exclusive jurisdiction in many other spheres under other legislation yet to be amended or adopted.[69]

Under the EWC Bill, if the state and the expropriated owner cannot agree on the amount of compensation to be paid, a court must 'decide or approve' this amount. This amount may also be set at 'nil' where land is 'expropriated for purposes of land reform'[70] and 'national legislation' authorises this.[71]

The EWC Bill must thus be read together with the Expropriation Bill, which gives a host of expropriating authorities at all three spheres of government the capacity to expropriate both

[69] Para 2.11, Memorandum
[70] Clause 1(a), EWC Bill
[71] Clause 1(c), EWC Bill

land and other property for land reform purposes. The Expropriation Bill also gives the courts the power to 'decide or approve' the amount of compensation which is to be paid.[72]

The compensation payable must generally be 'just and equitable' in the light of all relevant factors. These include the market value of the land, along with factors such as 'the history of its acquisition' and 'the purpose of the expropriation'.[73]

However, under Section 12(3) of the Expropriation Bill, 'it may [also] be just and equitable for nil compensation to be paid where land is expropriated in the public interest having regard to all relevant circumstances'. Such circumstances 'include, but [are] not limited to':

a) where the land is 'not being used' and the owner's 'main purpose is not to develop the land or use it to generate an income but [rather] to benefit from appreciation of its market value';[74]
b) where land is owned by an organ of state which is not using it for its core functions, is unlikely to use it for its future activities, acquired it 'for no consideration' and consents to its expropriation;[75]
c) where 'an owner has abandoned the land by failing to exercise control over it', even though it is still registered in his name under the Deeds Registries Act;[76]
d) where 'the market value of the land is equivalent to or less than the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land';[77] and
e) when 'the nature or condition of the property is such that it poses a health, safety, or physical risk to persons or other property'.[78]

Under Clause 12(4) of the Expropriation Bill, moreover, where 'a court or arbitrator determines the amount of compensation under Section 23 of the Land Reform (Labour Tenants) Act, 1996, it may be just and equitable for nil compensation to be paid, having regard to all relevant circumstances'.[79]

In practice, the Expropriation Bill will make it both difficult and risky for most expropriated owners to embark on litigation contesting the amount of compensation offered by the state. In addition to other various obstacles, expropriated owners will probably bear the onus of proof in such litigation – and will therefore have to pay many of the government's legal costs (in addition to their own) if they fail to convince the courts of the validity of their compensation claims.[80]

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[72] Section 21, Expropriation Bill
[73] Section 12, Expropriation Bill
[74] Clause 12(3)(a), Bill
[75] Clause 12(3)(b) read together with Clause 2(2), Bill
[76] Clause 12(3)(c), Bill
[77] Clause 12(3)(d), Bill
[78] Clause 12(3)(e), Bill
[79] Clause 12(4), Bill
[80] Section 21, Expropriation Bill

This risk will be a major deterrent to most people, who will find themselves with little choice but to accept whatever compensation the state has offered. Some owners, however, will nevertheless have the means and the will to resort to litigation – which helps explain why the Land Court Bill is currently being ushered through Parliament.

On its current wording, the Expropriation Bill makes no reference to the Land Court Bill and there is no obvious connection between the two. However, the Expropriation Bill could in time be changed to provide that the only courts with jurisdiction to decide on the compensation, if any, to be paid on expropriation are the Land Court (the Court) and the LCA.

This situation would be particularly advantageous to all expropriating authorities. Decisions on the amount of compensation to be paid would doubtless be tagged as questions of fact to be decided either by activist judges on the Court with little or no experience on the Bench, or by two activist assessors with the capacity to overrule a presiding judge who demurs. Whether the criteria for the payment of 'nil' compensation have been met – for example, whether the owner has 'abandoned' the land by 'failing to exercise control over it' – would doubtless also be regarded as questions of fact to be decided in the same way.

Complex issues regarding the 'history of the acquisition' of the land could be decided on the basis of hearsay and other unreliable evidence that would normally be barred from admission. If necessary, particularly tricky issues could be referred to mediation or arbitration before people who may meet the minister's criteria (as set down in regulation) but who nevertheless lack the necessary expertise, institutional autonomy, and individual independence to do a proper job. Litigants (and their legal representatives) who resist flawed mediation or arbitration of this kind could also be penalised via adverse costs orders for supposedly wasting the Court's time on unnecessary litigation.

All of which would so tilt the scales of justice in favour of the state and against the expropriated owner that very few would see any point in trying to contest the compensation payable, even where this has been set at nil.

Successful appeals would be difficult to mount, moreover, as the only court with jurisdiction would generally be the LCA. Appeals to the LCA – and even to the Constitutional Court – could also be excluded through the insertion of suitable wording in the Expropriation Bill, as envisaged in Section 43 of the Land Court Bill.

3.5 The fatally flawed ideology underpinning the Land Court Bill

The EWC Bill and the Expropriation Bill, along with the Land Court Bill itself, are aimed at undermining private property rights, reversing the home- and other ownership that millions of black people have gained since 1970s, and confining all South Africans over time to uncertain rights of 'access' to state land that will be far less valuable to them than individual title.

At the root of all three bills – along with a host of other damaging policies – lies the ideological commitment of the African National Congress (ANC) and its communist allies to the National Democratic Revolution (NDR) the ANC first endorsed at its Morogoro national conference in 1969, more than 50 years ago.

Both the Congress of South African Trade Unions (Cosatu) and the South African Communist Party (SACP) openly describe the NDR as providing 'the most direct path' to a socialist and then communist future. Though the ANC is more circumspect about overtly embracing these goals, it has nevertheless recommitted itself to the NDR at every one of the five-yearly national conferences it has held since 1994.

In pursuing the NDR, one of the ANC's key objectives, also regularly reaffirmed, is to bring about the 'elimination of apartheid property relations'. However, the word 'apartheid' is essentially a red herring. Replace it with the word 'existing' and the real meaning of this goal becomes apparent.

Socialist and communist countries are notorious for abusing the fundamental civil liberties of their citizens. Pervasive state ownership and centralised economic controls within these countries have generally also undermined efficiency and crippled production, leading to major shortages of food and other essentials: and impoverishing everyone except a small political elite. Socialist and communist countries – along with states that have nationalised or expropriated land, mines, banks, oil, and other assets without adequate compensation – are thus among the poorest in the world. By contrast, those countries that limit state intervention and safeguard private property rights are among the richest in the world.

The practical importance of private property rights and limited state controls has been evaluated for many years by the Fraser Institute in Canada, a think tank. The Fraser Institute's research shows that the countries which do the best in upholding private property rights and limiting state power are the 'most free', in the economic sense. They are also by far the most prosperous. Moreover, the poorest 10% of people in the most free countries have a much higher standard of living than their counterparts in the 'least free' countries, where state ownership of land and assets is pervasive and private property rights are tenuous at best.

In 2017, for example, nations in the top quartile for economic freedom had average per-capita GDP of $37 770, as compared to $6 140 for countries in the bottom quartile (as measured in PPP constant US$). In the top quartile, moreover, the average income of the poorest 10% was roughly $10 650, as opposed to $1 500 for the poorest 10% in nations in the bottom quartile. The average income of the poorest 10% in the most free countries was thus two-thirds higher than the average per-capita income in the least free nations.[81]

In addition, for countries in the top quartile, only 1.8% of the population lived in extreme poverty (on less than US$1.90 a day), as compared to 27.2% in the bottom quartile. Among

[81] Fraser Institute, *Economic Freedom of the World*, 2019 Annual Report, p vi

the most free nations, infant mortality stood at 6.7 per 1 000 live births, as opposed to 40.5 in the least free countries. In addition, life expectancy, gender equality, happiness levels, and political and civil liberties were all significantly higher for people living in the most free countries than for those living in the less free nations.[82]

The importance of property rights is further confirmed by the experience of both Zimbabwe and Venezuela. In Zimbabwe the expropriation of farmland has led to economic collapse, pervasive hunger, extraordinarily high inflation, a 90% unemployment rate, and the flight of millions of impoverished people.

Much the same is true in Venezuela, where GDP has halved in recent years, hunger is widespread, hyperinflation has soared, and millions of people have also been forced to flee. Many families in Venezuela, which used to be the richest country in Latin America, must now try to survive on US$5 to US$10 a month, and sometimes less. (These amounts are equivalent to between R75 and R150: far less than South Africa's monthly child support grant or old age pension.)

South Africans could suffer a similar fate if the EWC and Expropriation Bills are adopted – and the Land Court Bill is then used to help ensure that nil (or inadequate) compensation is paid for the large quantities of land likely to be taken into state ownership or custodianship. The ideological premise underpinning the Land Court Bill – that private property rights are the problem and state ownership the solution – is fatally flawed. This is sufficient reason in itself for the Bill to be abandoned, rather than enacted. There is also no need for specialist courts to take the place of the existing Land Claims Court.

3.6 No need to replace the Land Claims Court or oust the jurisdiction of other courts on land issues

South Africa already has a specialist court to deal with the most important issues regarding land. This is the Land Claims Court, which was established under the Restitution of Land Rights Act of 1994 (the 1994 Act) to resolve disputes over land restitution claims submitted under that statute.[83]

The 1994 Act was adopted soon after the political transition and gave people four years, until 31st December 1998, to lodge land claims with the Commission. Some 79 700 land claims were lodged in this period. Of these, some 76 200 were settled by March 2011, as the Land Claims Commission then reported. These figures suggested that 96% of restitution claims had been finalised, leaving only some 3 500 claims to be resolved.[84]

However, it has since emerged that these figures are incorrect. According to Dr Theo de Jager, then deputy president of Agri SA, the Commission's administrative processes are so

[82] Ibid
[83] Para 1.1, Memorandum on the Objects of the Land Court Bill
[84] 2012 *South Africa Survey*, IRR, Johannesburg, p600

deficient that it does not know how many claims have been gazetted, how many have been processed in full, or how many have been degazetted as invalid.[85]

In 2014 the Commission put the number of claims still needing to be resolved at more than 8 500. However, more recent estimates have put that number at 13 000, or even at 20 500.[86] In November 2017 the High Level Panel on Key Legislation reported that more than 7 000 of the pre-1998 claims remained unsettled, that more than 19 000 still had to be finalised, and that it would take at least 35 years to deal with all these unresolved claims. [87]

Other problems in the restitution process have been legion. Some of the claims lodged have no historical foundation, while some of the officials employed by the Commission have inflated claims on occasion: perhaps most notably in Magoebaskloof (Limpopo), where the six claims in fact lodged by local communities spiralled to more than 600 as gazetted by bureaucrats. In other instances, officials have used vague property descriptions from claimants to enlarge areas under claim or have gazetted claims for which no clear basis exists.[88]

In 2009 the Commission acknowledged that its officials had falsely inflated some claims. It also admitted that some claims had been gazetted against properties without sufficient prior investigation.[89] The Commission pledged to rectify these mistakes, the Chief Land Claims Commissioner, Blessing Mphela, saying: 'Where there is no evidence of dispossession, we will degazette. It's not the role of the Commission to make claims out of non-claims.' He declined to say when the first delisting would take place or to speculate on the number of farms which might be delisted, but pledged that the matter was being treated 'as extremely urgent'.[90] However, by October 2009 only 29 farms had been delisted,[91] and little progress has since been made.

According to organised agriculture, thousands of farms qualify for delisting. However, the expectations of claimants have also been aroused, and the dashing of their hopes could lead to conflict. The degazetting of claims is also likely to place a major additional burden on bureaucrats already battling to do a proper job. Yet, in the words of the Legal Resources Centre (LRC), a civil society organisation that provides legal advice and sometimes also litigates in the public interest, it is vital that the Commission should find a way of 'fixing the colossal errors that have been made in the claims verification process'.[92]

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[85] *Farmer's Weekly* 22 June 2012; Cherryl Walker, 'Land claims a Sisyphean task for the state', 19 March 2015, https://mg.co.za/article/2015-03-19, p2
[86] Anthea Jeffery, *BEE: Helping or Hurting?* Tafelberg, Cape Town, 2014, pp314-315; Walker, 'Land claims a Sisyphean task for the state', p5
[87] Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, November 2017, p233
[88] *Farmer's Weekly* 15 May 2009
[89] *Business Day* 29 July 2009
[90] *Farmer's Weekly* 15 May 2009
[91] *Business Day* 7 October 2009; 2010/11 *Survey*, p615
[92] *Business Day* 26 May 2009

Mismanagement within the Commission and the land reform department has compounded the difficulties. Organised agriculture cites dozens of cases where farmers have agreed to transfer part of their land to claimants and then mentor them to help them make a success of their new farming operations. But these agreements have to be endorsed by officials – and sometimes their consent has taken so many years to secure that agreements have simply foundered along the way. Revenue constraints also play a part in the malaise, but long delays have mainly occurred, says Agri SA, 'because we sit with activists and revolutionaries in senior positions, who do not make good administrators'.[93]

Also worrying – especially given all the problems that have dogged the restitution process – is the fact that few claimants want land at all. In April 2013 the then minister of Rural Development and Land Reform, Gugile Nkwinti, finally acknowledged this, saying that 92% of successful land claimants (some 71 000 out of the 76 000 whose claims had been finalised by 2011) had opted for financial compensation in lieu of land. Said Mr Nkwinti: 'We thought everybody when they got a chance to get land, they would jump for it. Now only 5 856 have opted for land restoration.' People had chosen money instead, partly because of poverty and unemployment, but also because they had become 'urbanised' and 'de-culturised' in terms of tilling land. 'We no longer have a peasantry; we have wage earners now,' he said.[94]

Despite all these problems – and the large number of pre-1998 claims still needing to be resolved – the government nevertheless decided to re-open the land claims process for a further five-year period, from July 2014 to July 2019, under the Restitution of Land Rights Amendment Act of 2014 (the 2014 Act). However, many of the people who had lodged claims before the 1998 cut-off date were worried that the re-opening of the process could result in their claims being overturned by new claimants. (Land activists pointed out, for example, that traditional leaders hostile to the communal property associations in which restored land is often vested were likely to claim the same land once again, so that it would vest in them instead.)

It was clear, moreover, that the re-opening of the land claims process would greatly increase the burden on the Commission and make it harder still for the original claimants to have their claims resolved (even within the 35-year period of which the High Level Panel has warned). In addition, if close on 400 000 new claims were lodged, as the government anticipated, the resolution of both 'old' and 'new' claims would take hundreds more years to finalise, with estimates of the time required ranging from 250 to 700 years.[95]

In response to these concerns, various organisations challenged the constitutional validity of the 2014 Act, saying that its terms were too vague and that public consultation on its provisions had been inadequate. In July 2016 the Constitutional Court of South Africa upheld these concerns, finding that the National Council of Provinces had failed to facilitate

[93] *Farmer's Weekly* 22 June 2012
[94] *Mail & Guardian* 5 April 2013
[95] Walker, 'A Sisyphean task'; Report of the High Level Panel, p233

adequate public involvement in the legislative process leading up to the statute's adoption, as the Constitution requires. It therefore struck down the 2014 Act and gave Parliament two years to re-enact it.[96] Parliament missed this deadline,[97] and new legislation re-opening the land claims process has yet to be adopted.

The best solution to these problems is not to replace the Land Claims Act with a new specialist land court, as the Land Court Bill proposes, but rather to abandon any attempt to re-open the land claims process. There are major flaws in the rationale the government has provided for re-opening land claims,[98] while those who met the 1998 deadline remain fearful that they will in time be dispossessed under new claims that may not in fact be valid.
In addition, re-opening land claims will cost an estimated R180bn – and this at a time when the economy has been enormously damaged by the Covid-19 lockdown and the recent riots, public debt is already approaching 90% of GDP, and government spending on education and other essentials is having to be curtailed. More than 70% of the land restored has also fallen out of production, leaving successful claimants little better off than before and doing very little to help overcome poverty and unemployment.

Any re-opening of the land claims process will also have many other negative outcomes. Property rights will be further eroded, thereby deterring investment, reducing growth, and adding to unemployment. Agricultural production will falter, leading to higher food prices and worsening hunger, especially for the poor. Destitution and desperation will increase, while the ANC could pay a heavy price for this in lost electoral support. At the same time, there will be few compensating benefits for anyone and little effective redress for past injustices.

Once it is accepted that the land claims process should not be re-opened, any rationale for replacing the existing Land Claims Court with a new land court falls away. The present Land Claims Court is more than capable of resolving the pre-1998 claims that have yet to be finalised, while its capacity could be enhanced by appointing a number of retired judges to serve on it until such time as all existing claims have been dealt with. The key need, moreover, is not so much to boost the capacity of the Court as to ensure that the Commission does a proper job of investigating claims. The Commission's ability to do so must therefore be increased by ending cadre deployment, making appointments on merit, and holding staff accountable for poor performance.

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[96] *Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others*, [2016] ZACC 22
[97] *Speaker of the National Assembly and another* v *Land Access Movement of South Africa and others*, CCT 40/15, 19th March 2019
[98] *Farmer's Weekly* 22 June 2012; Cherryl Walker, 'Land claims a Sisyphean task for the state', 19 March 2015, https://mg.co.za/article/2015-03-19, p2; Joanne Yawitch, *Betterment*, IRR, Johannesburg, 1982, pp48-51, 94, 9-15, 50-51, 18, 22-24, 27, 42; Department of Land Affairs, *White Paper on South African Land Policy*, April 1997, p79; John Kane-Berman, 'Population Removal, Displacement and Divestment in South Africa', *Social Dynamics*, Vol 1, Issue 2, December 1981, University of Cape Town, pp28-46, at pp30, 32-33; IRR, Submission on the Restitution of Land Rights Amendment Bill, May 2017

The 75 000 to 80 000 new claims that, according to the *Land Access* judgment, had already been filed under the invalid 2014 Act before the Constitutional Court struck it down,[99] should be recognised as invalid too. No valid claims can flow from a statute that was fatally flawed and thus void from the start. There will then be no need to adjudicate these claims, or to try and find satisfactory solutions to the difficult problem of competing 'old' and 'new' claims. That the government made fundamental mistakes in its attempts to re-open the land claims cannot be fudged and should be openly acknowledged – even if people are then angered or disappointed.

Land reform has also faltered in the labour tenants' sphere – but again the fault lies in bureaucratic inefficiency rather than with the existing courts. This was made clear by the Constitutional Court stressed in the *Mwelase* case in 2019: in a judgment also highly relevant to the question whether there is any real need for a new specialist land court.[100]

As the Constitutional Court explained in handing down the *Mwelase* ruling, labour tenants generally live on commercial farms, where they engage in cropping or grazing on a portion of the land. They do so partly for their own benefit and partly for that of the farm owner, to whom they must generally transfer a percentage of their produce. Under the Land Reform (Labour Tenants) Act of 1996, labour tenants have been given the right to claim ownership of those portions of land they have long been farming in this way.

Some 19 400 labour tenant claims were submitted before the 2001 deadline laid down in the 1996 Act. However, as the Constitutional Court describes it, 'administrative lethargy' then set in and 'the great majority of labour tenant applications were simply not processed'.[101]

A complaint about slow progress went first to the Land Claims Court, which in 2014 ordered the land department to provide it with updated data on the status of these claims. But this was still not done, seemingly because the relevant records were 'non-existent or shambolic'. In 2016 the department finally acknowledged that nearly 11 000 labour tenant applications still needed to be dealt with.[102]

Commented the Constitutional Court: 'Over nearly two decades...the department has manifested and sustained what has seemed to be an obstinate misapprehension of its statutory duties. It has shown unresponsiveness, plus a refusal to account to those dependent on its cooperation... And, despite repeated promises, plans and undertakings, it has displayed a patent incapacity or inability to get the job done.' [103]

[99] *Land Access* judgment, para 93.7; Para 2.5, Memorandum on the Objects of the Restitution of Land Rights Amendment Bill of 2017
[100] *Mwelase and others* v *Director General of Rural Development and Land Reform and another*, CCT232/18, paragraphs 101, 102
[101] Ibid, paragraph 12
[102] Ibid, paragraph 18
[103] Ibid, paragraph 40

Added Judge Edwin Cameron: 'In this, the Department has jeopardized not only the rights of land claimants but the constitutional security and future of all. South Africans have been waiting for more than 25 years for equitable land reform. More accurately, they have been waiting for centuries before. The Department's failure to practically manage and expedite land reform measures in accordance with constitutional and statutory promises has profoundly exacerbated the intensity and bitterness of our national debate about land reform. *It is not the Constitution, nor the courts, nor the laws of the country that are at fault. It is the institutional incapacity of the Department to do what the statute and the Constitution require of it that lies at the heart of this colossal crisis*.' [104]

In response to this bureaucratic malaise, the Constitutional Court took the extraordinary step of confirming the appointment of a special master to oversee the processing of the outstanding claims. This was necessary, it said, to remedy the Department's 'failing institutional functionality', which had long been 'of an extensive and sustained degree'.[105]

What this intervention signalled, thus, was that land officials could no longer be trusted to do a proper job and had to have their work supervised by the courts in order to make progress.[106] As the *Mwelase* case once again confirms, the many problems with land reform stem from bureaucratic failures, not the existing courts or the existing laws. The current minister of agriculture, land reform, and rural development, Thoko Didiza, has recently reiterated the same point, saying that 'public servants do not have the appropriate skills to adequately deal with land administration issues, which hampers government's land reform programme'.[107] Again, that bureaucrats are primarily to blame obviates any need for a new specialist land court to replace the Land Claims Court and prevent all other courts from adjudicating on land issues.

4 Unconstitutionality of many provisions in the Land Court Bill

The many ways in which the Land Court Bill undermines the rule of law have already been set out in *Section 2* above, dealing with the *Content of the Bill*, and need not be repeated here.

According to the Constitution's founding provisions, 'the supremacy of the rule of law' is one of the key founding values underpinning South Africa's democratic order. The founding provisions also state that 'the Constitution is the supreme law of the Republic', that 'law or conduct inconsistent with it is invalid' and that 'the obligations imposed on it must be fulfilled.[108]

All provisions in the Land Court Bill that undermine the rule of law must therefore be excised before the Bill can lawfully be enacted into law. Given the Bill's many negative ramifications

[104] Ibid, paragraph 41, emphasis supplied by the IRR
[105] Ibid, paragraph 69
[106] Ibid, paragraph, 26,27
[107] https://www.timeslive.co.za/politics/2021-03-23-lack-of-skills-is-hampering-land-reform-thoko-didiza/
[108] Sections 1(c), 2, Constitution

– and the absence of any need for a new specialist land court, as earlier outlined – the Bill should simply be abandoned as it serves no constructive purpose.

5 No proper SEIAS assessment

Since September 2015, all new legislation in South Africa has had to be subjected to a 'socio-economic impact assessment' before it is adopted. This must be done in terms of the Guidelines for the Socio-Economic Impact Assessment System (SEIAS) developed by the Department of Planning, Monitoring, and Evaluation in May 2015. The aim of this new system is to ensure that 'the full costs of regulations and especially the impact on the economy' are fully understood before new rules are introduced.[109]

According to the Guidelines, SEIAS must be applied at various stages in the policy process. Once new legislation has been proposed, 'an initial assessment' must be conducted to identify different 'options for addressing the problem' and making 'a rough evaluation' of their respective costs and benefits. Thereafter, 'appropriate consultation' is needed, along with 'a continual review of the impact assessment as the proposals evolve'.[110]

A 'final impact assessment' must then be developed that 'provides a detailed evaluation of the likely effects of the [proposed law] in terms of implementation and compliance costs as well as the anticipated outcome'. This final assessment, with its comprehensive assessment of likely economic and other costs, must be attached to a bill when it is published 'for public comment and consultation with stakeholders'.[111]

According to the Guidelines, it is particularly important that the final SEIAS report should 'identify' and caution against proposed legislation where 'the burdens of change loom so large that they could lead to excessive costs to society, for instance through disinvestment by business or a loss of skills to emigration'.[112]

The Land Court Bill is clearly intended to facilitate major land redistribution from private owners to the state, as earlier described. It will therefore help trigger precisely the kind of 'excessive costs' against which the Guidelines warn. The Bill will do so, moreover, at a time of great economic crisis, marked by seven years of declining GDP per capita, unprecedented youth unemployment, rapidly rising public debt, a heavy interest burden, and a steadily declining tax base. Already, the government is having to cut back its spending on infrastructure, education, and other essential needs – and therefore cannot afford additional legislative interventions likely to deepen the country's economic malaise.

However, no SEIAS assessment of the Bill has been carried out. Nor has a final SEIAS report been appended to the Bill to help inform the public and so empower it to 'know about' the issues raised by the Bill and so have a reasonable opportunity to influence the decisions to be

[109] [Sections 1(c), 2, Constitution
[110] *SEIAS Guidelines* p7
[111] Ibid
[112] Ibid, p11

made. This is a fundamental shortcoming which has eroded the constitutional right to appropriate public involvement in the legislative process.

6 The importance of proper public consultation

The Constitutional Court has repeatedly stressed that proper public participation in the law-making process is a vital aspect of South Africa's democracy. Relevant rulings here include *Matatiele Municipality and others* v *President of the Republic of South Africa and others*; [(2006) ZACC 12] *Doctors for Life International* v *Speaker of the National Assembly and others*; [2006 (6) SA 416 (CC)] and *Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others*. [(2016) ZACC 22]

In these judgments, the Constitutional Court has elaborated on what is needed for proper public consultation. According to the court, citizens must be given 'a meaningful opportunity to be heard in the making of laws that will govern them'. They must also be given 'a reasonable opportunity to know about the issues and to have an adequate say'.[113]
A proper SEIAS assessment would have helped the public to understand the many risks raised by the Bill and to make informed comments on it to the committee. In the absence of interim and final SEIA reports, the time allowed for public consultation on the Bill has been too short to pass constitutional muster.

7 The way forward

For all the reasons earlier outlined, the Land Court Bill will not achieve its stated purpose of promoting land reform and achieving land justice. Instead, it will help erode vital private property rights, thereby adding to the country's economic crisis and pushing people further into poverty. Like the EWC and Expropriation Bills it is intended to help implement, it is based on a flawed socialist and NDR ideology which has comprehensively failed wherever it has been tried. This ideology has also brought enormous suffering to many millions of people – most recently in Zimbabwe and Venezuela.

The solution lies rather in upholding private property rights and limiting the power of the state. Empirical evidence shows that the 'most free' countries – those which do the best in these two key spheres – have far higher GDP per capita than the 'least free' countries (the ones that do worst in these essential areas). The most free countries also have much less poverty, much lower infant mortality, and much higher life expectancy, gender equality, and happiness levels.

The formula for inclusive growth and rising prosperity, in short, is well-proven and well-known. What is most needed, thus, is for South Africa to embrace this formula and embark on the substantial reforms that this requires.

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[113] *Matatiele Municipality and others* v *President of the Republic of South Africa and others*; [(2006) ZACC 12] *Doctors for Life International* v *Speaker of the National Assembly and others*; [2006 (6) SA 416 (CC)] and *Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others*. [(2016) ZACC 22]; *Minister for Health and another* v *New Clicks South Africa (Pty) Ltd and others*, [2005] ZACC 14, at para 630

Instead of continuing to push a deeply flawed measure through a profoundly flawed public participation process, the Committee should recognise that a new specialist land court is not required, that the Bill will worsen the economic crisis already confronting the country, and that many of the Bill's provisions are in conflict with the rule of law. Since Parliament cannot lawfully enact any statute inconsistent with the Constitution, the Committee should decline to adopt the Bill and so help bring about its withdrawal.

South African Institute of Race Relations NPC (IRR) **23rd July 2021**