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LRC
Legal Resources Centre

Your Ref: Hon. Magwanishe and Mr Ramaano 23 July 2021
Our Ref: S Samuel/LRC Land Programme

The Chairperson

Portfolio Committee for Justice and Correctional Services

Parliament of the Republic of South Africa

Attention: Hon. Magwanishe and Mr Ramaano

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SUBMISSIONS ON THE LAND COURT BILL, 2021 [B11 – 2021]

I INTRODUCTION

1. On 23 April 2021, the Portfolio Committee for Justice and Correctional Services published the Land Court Bill, 2021 **("the Bill")** for comment. The Bill provides for the establishment of a Land Court and a Land Court of Appeal, and the administrative and judicial functions associated with these courts. The Bill also establishes certain mediation and arbitration procedures in the Land Court and Land Court of Appeal.

2. The purpose of the Land Court Bill is to give effect to section 25 of the Constitution and accelerate the land reform process in a lawful and equitable manner by providing for a specialised, well-resourced, accessible, and streamlined adjudication structure to enhance the fairness and equity of the adjudication process before and during court proceedings.

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3. The Legal Resources Centre (LRC) represents the Association for Rural Advancement (AFRA) and Qina Mbokodo in making joint submissions on the Bill. The submissions are reflective of the LRC, AFRA's and Qina Mbokodo's experiences in the land rights sector and in particular in litigating before the Land Claims Court.

4. These submissions are therefore structured as follows:

    a. The interests of our clients
    b. General Comments
    c. Specific Comments on clauses in the Bill
    d. Opportunity for oral submissions

II THE INTEREST OF OUR CLIENT

Association for Rural Advancement (AFRA)

5. The Association for Rural Advancement (AFRA) is a leading land rights non-profit organization based in Pietermaritzburg, KwaZulu-Natal. AFRA was started in 1979 to support the struggles of black landowners, labour tenants and farm workers living on farms against the injustices of apartheid land dispossessions.

6. AFRA's current work supports marginalised black rural people, with a particular focus on farm dwellers, including labour tenants to regain the land from which they were dispossessed, and to ensure that their land and development rights are upheld during these processes. AFRA works intensively with farm communities in and around the uMgungundlovu District Municipality in KwaZulu-Natal, and extensively across the province giving support and advice to farm dweller structures, and across South Africa through participation in civil society networks such as Tshintsha Amakhaya and LandNESS.

7. AFRA's mandate accordingly necessitates that it ensures that the interests and voices of marginalized rural people, particularly labour tenants and farm dwellers, are heard in legislative and policy making processes.

8. AFRA has extensive experience in litigating in the Land Claims Court. In particular, AFRA was the institutional client in the precedent-setting judgment in *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another*[1] where the Constitutional Court upheld the Land Claims Court's order to appoint a special master to administer the claims of labour tenants under the Land Reform (Labour Tenants) Act 3 of 1996. The LRC represented AFRA in this case.

Qina Mbokodo

9. Qina Mbokodo (QM) is a group of women on farms in the uMgungundlovu District, KwaZulu-Natal, working towards strengthening the voices of women living on farms to ensure that their voices are heard in current discussions on land policy and associated legislative framework in South Africa. They are supported by AFRA in their work.

III GENERAL COMMENTS

10. The submissions will first address some general aspects related to the Bill as a whole, before focussing on specific provisions.

The need for the Land Court Bill

11. The purpose of the Bill is to provide for the acceleration of the land reform process by providing for a specialised, well-resourced, accessible, and streamlined adjudication structure. The Land Claims Court that was established in terms of section 22 of the Restitution Act, is currently tasked

[1] 2019 (6) SA 597 (CC) (20 August 2019).

with fulfilling this role, albeit with a significantly narrower mandate. It was never envisioned to be a permanent court with permanent judges. While we thus welcome this Bill as attempting to provide for a permanent structure to adjudicate land matters, we do not believe that this will necessarily result in the acceleration of the land reform process.

a) What is delaying land reform?

12. In the experience of the LRC and AFRA, the delayed land reform process is not the fault of the court. Rather, it is the failure of supporting government structures to fulfill their duties in terms of existing land legislation on the one hand, and the legislature's failure to enact enabling legislation for redistribution and land rights adjudication and administration on the other hand.

    a. The Commission on the Restitution of Land Rights

13. The Commission on the Restitution of Land Rights **("Commission"),** for example, is ineffective, under-resourced, and have been marred by allegations of corruption. In our experience, the Commission is often responsible for the fact that land claims are not settled and finalized. During litigation proceedings, they are often unprepared to meet the case of the parties, have failed to fulfil their duties under the Restitution Act, and frustrate the parties and the court with their lack of skill and knowledge in relation to the land reform process.

14. For example, in the case of *Mazizini and Others v Minister of Rural Development and Land Reform and Others,*[2] the court commented on the incompetence of the Commission. It stated that:

    "The litigation in this matter has been dogged by delay. The land claims of the first and second plaintiffs are being adjudicated 20 years after

[2] [2018] 3 All SA 164 (LCC) (10 April 2018).

they were lodged. This is extremely disquieting. Much of the delay has, regrettably, been the fault of the Commission, as appears below."[3]

15. In this case the Commission firstly failed to place before the court the fact that there were competing land claims between the Mazizini Community, and the Prudhoe Community (represented by the LRC). On this the court found that:

"The Commission's failure to alert the Court to the competing land claims was extremely prejudicial. Despite this, as alluded to above, the Commission's omission has never been adequately explained. This lapse by the Commission has been the direct cause of the delay in the adjudication of the present claims."[4]

16. Once the court case commenced, it however became clear that the Commission had again failed to abide by its legislative duties to notify all the interested landowners and parties of the commencement of the trial. This resulted in a further delay, which the court described as follows:

"The Court expressed its extreme displeasure given that it had, on a number of occasions during pre-trial conferences, directed the Commission to ensure that all interested parties were properly served and notified of the proceedings, and the Commission had assured the Court that this had been done. This constituted a further instance of dilatory and inept conduct on the part of the Commission, which also went unexplained. The result was the postponement of the trial to October 2017 and another delay of several months."[5]

17. The court concluded as follows:

[3] Para 19.
[4] Para 27.
[5] Para 39.

"As noted above, the present land claims are being adjudicated 20 years after they were lodged, a fact which is extremely disquieting. The bulk of the delay has, regrettably, been the fault of the Commission. The Commission's failure to refer the claims of all three plaintiffs to the Court in 2008, resulted in the rescission of Bam JP's judgment, and the delay and additional expense of a new trial. Thereafter, the Commission's failure to notify all interested parties, including the relevant landowners of the land claims and of the fact that the trial was proceeding necessitated a further postponement of several months.

[…] There is another area of concern pertaining to the Commission's work in this matter and that is the poor quality of its Referral Reports in respect of the first and second plaintiffs' claims. The relevant portions of those Reports have been quoted above.

As an Organ of State, the Commission is bound by section 195 of the Constitution which requires its work to be conducted according to democratic values and principles including, inter alia, a high standard of professional ethics, efficient, effective, and economic use of resources and the provision of services impartially, fairly, equitably and without bias. In this case, the Commission's handling of the land claims in question fell far short of these standards. In these circumstances, and especially given its culpability for the delay in the proceedings, had there been a request for a costs order to be made against the Commission, such request would have been considered favourably."[6]

18. This was also emphasised in the *LAMOSA*[7] judgment that dealt with the challenge to the reopening of the land claims process. The Constitutional Court in *LAMOSA* revealed that during the public participation process on

[6] Paras 319 to 324.
[7] *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* (CCT40/15) [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC) (28 July 2016).

the reopening of the claims process, comments were received on the inadequacy of the Commission. The court stated as follows:

> *"First, it invited public comment on the Bill during the 30 day period following publication. Written submissions received during this period raised concerns with the Bill and the claims process in general. These included the backlog in the finalisation of claims already lodged, continuing capacity problems within the Commission and potential conflicts between traditional leaders – who sought to claim separately from communities – and the communities concerned*.[8]
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> […]
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> *"Members of the public raised a number of concerns. The issues articulated included: a desire that the re-opening of the claims process be subject to the ring-fencing of old claims; concerns that traditional leaders would exploit the re opened process to lodge claims on land that had already been restored to CPAs; and a view that the Commission lacked capacity. In January 2014 the Portfolio Committee held two days of public hearings in Parliament. In addition to some of the concerns raised before, members of the public complained about the length of time that had already elapsed to finalise outstanding old claims and corruption and maladministration at the Commission."*[9]

ii. The Department of Rural Development and Land Reform

19. This general lack of care and diligence in the handling of land issues, is also evident in the work of the Minister of Rural Development and Land Reform **("Minister")**, the ministry responsible for administering the process. As stated above, the Constitutional Court in the *Mwelase* case ordered the appointment of a special master to assist with the adjudication

[8] Para 10.
[9] Para 13.

of labour tenant claims under the Labour Tenant Act, when it became clear that the Minister had not taken any steps to adjudicate these claims since 2001.

20. The LRC alone represents four client communities, in four different provinces, that have been the beneficial occupiers, in terms of the Interim Protection of Informal Land Rights Act of 1996, of state land for decades and have the constitutional right to security of tenure on that land. However, in each case, they have been waiting in vain for decades for the Department to secure their rights, because of confusion within the Department as to which piece of legislation to use.

21. Unfortunately, these are not isolated incidents. The inefficiency of government in relation to land and specifically the land reform process, has resulted in the process being slow, cumbersome, and frustrating. This has not been the fault of the court. In the LRC's experience, the Land Claims Court has always attempted to ensure that litigation move as quickly as possible through the courts. The judges have driven pre-trial conferences, the setting of court dates, and even assisted in ensuring that the Commission pay the legal representatives to ensure that their work can continue. They have been the most effective cog in the land reform apparatus, and a reform of this court will not result in a more effective land reform process without simultaneously reforming the Commission and the department. The court is only as effective as the system within which it functions and that supports its work. If these institutions are not reformed, the Land Court will not be affective in accelerating the land reform process.

iii. The lack of an appropriate land administration and adjudication system

22. Moreover, neither the Department nor the legislature has sought to respond to the critical challenge of land rights adjudication and administration in South Africa. Residents on communal land, members of Communal Property Associations and community trusts, residents of informal settlements – that is, millions of South Africans in rural and urban

areas – remain the holders of so-called 'off-register rights'. These rights are not and cannot be captured in our entrenched deeds registry system which is completely at odds with indigenous and communal systems of ownership. Yet, existing land legislation and land administration systems persist in only regulating land holding and rights at the communal level. There is no system for adjudicating and registering the rights of members of communal structures or informal settlements. This, we suggest, is perhaps the single greatest challenge in addressing the constitutional obligation of section 25(6) to secure insecure tenure.

23. The Land Court Bill does not address this issue at all. We would suggest that it could not: the sheer number of required adjudications would overwhelm any court. But if the legislature seeks to truly accelerate true land reform in South Africa – not just the redistribution of land but, more critically, the security of tenure of those on land, it must act with urgency to develop a workable model of land adjudication and administration for South Africa in parallel with the development of this Court. In this regard, we respectfully refer the committee to concrete proposals in this regard previously presented to parliament in the 2017 High Level Panel Report.[10]

iv. Corruption

24. The role that corruption has played in the slow delivery of land reform, cannot be underestimated. Openness, accountability, and transparency are essential to land and agricultural projects, particularly in cases where large amounts of money are spent by government towards assisting emerging farmers with equipment, livestock, and other agricultural products necessary for sustainable agriculture. Properly run agricultural projects and government support for emerging black farmers are essential to sustainable development in low-income rural communities. However, many land reform projects, including restitution and redistribution projects

[10] High Level Panel Report (2017) page 455.

have been heavily tainted by corruption. A good example of this is the failed Estina Dairy Project in the Free State.

25. In 2012, the Free State Department of Agriculture launched a provincial policy intervention, intended to revitalize the Free State agricultural sector through investment in various initiatives. The Vrede Dairy Project was identified as a flagship project and was intended to uplift the Vrede community through sustainable job creation opportunities. The Free State Department of Agriculture presented the project to the media as being an initiative to create jobs in the Vrede area and to benefit emerging small farmers. The Free State government even claimed at council meetings that the project would "lure dairy farmers back to Vrede and its surrounding area." Residents in the area were told by the Provincial Department of Agriculture that hundreds of cows would be bought and distributed to farmers in the local township of Thembalihle. Residents were told that they would each get a few cows and the milk would go to the diary.

26. In April 2012, Estina (Pty) Ltd, which presented itself – falsely, it would turn out – as being in partnership with an Indian company with technical expertise, submitted a business proposal for the establishment and management of the Vrede Dairy Project. In early July 2012, the Department appointed Estina to establish and manage the Vrede Dairy Project. The dairy project intended to empower black farmers, became marred by corruption and maladministration and in reality, delivered nothing to the farmers. In 2017, hundreds of thousands of emails revealed the Gupta family's seemingly corrupt business dealings with the South Africa state and its politicians ("the #GuptaLeaks"). These emails corroborated the earlier 2013 reports by the then Public Protector, Thuli Madonsela, Busisiwe Mkhwebane's predecessor, that the Vrede Dairy Project was marred by corruption and illustrated how the Gupta family exercised control over the Vrede Dairy Farm contract to pilfer millions of taxpayers rands from the public purse and how senior provincial officials –

including HOD Peter Thabethe, MEC Mosebenzi Zwane and Premier Ace Magashule – may have been complicit.

27. The history of the project and the subsequent litigation around the case is captured more fully in *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector,*[11] but what this case illustrates is that corruption is often the cause of the slow delivery of land reform. The intended beneficiaries of the Estina Dairy Project have not benefited at all through the project and none of the money that was spent on the project resulted in any land reform processes. Unless the scourge of corruption in land reform processes are addressed, land reform will always be slow, ineffective, and fail to achieve tangible change in South Africa.

b. The proposed Bill could accelerate some aspects of land reform if it is granted extended jurisdiction

28. It is our submission that for the proposed Bill to be effective in accelerating land reform on its own terms, its jurisdiction should be expanded. Land reform as defined in section 25 the Constitution, consists of three legs: redistribution (subsection 5), restitution (subsection 7) and tenure security (subsection 6). Currently, the Bill is inconsistent as to what aspects of land reform it seeks to address: the Preamble, at the same time refers to "land reform in its entirety", but then only refers to section 25(5) of the Constitution, relating to 'redistribution'. Then, the legislation identified as within the jurisdiction of the Court, does not encompass nearly all the legislation relevant to redistribution alone. The State Land Disposal Act, for example, and the Land Titles Adjustment Act are not mentioned.

29. Despite omitting it from the Preamble, the rest of the Bill appears pre-occupied with the second leg of land reform, namely restitution. The definitions in clause 1, permissible evidence in clause 22 and the court

[11] (11311/2018; 13394/2018) [2019] ZAGPPHC 132; [2019] 3 All SA 127 (GP); 2019 (7) BCLR 882 (GP) (20 May 2019).

orders listed in clause 28 are all specific to restitution only and must be redrafted

30. It should also be said that on-going dispossession of land and rights in land occur as a result of a range of legislative and regulatory mechanisms, including legislation related to mining, infrastructure development, planning, traditional governance and environmental management. It is our submission that the proposed Land Court should be empowered to deal with disputes arising from these and other pieces of legislation in as far as these may threaten the land rights of land reform beneficiaries.

31. Crucially, the Bill should also include in its ambit powers relating to corruption in land reform. We submit that the Court must have powers to refer suspected corruption to the National Prosecuting Authority for prosecution.

32. It bears repeating that the third leg of land reform, namely tenure security in section 25(6) of the Constitution, is entirely excluded. As already explained, it is our submission that no court system, including the proposed Land Court, could feasibly deal with the scale of adjudication that a proper land administration and tenure security system would require, the fact that the Bill is silent on it signals the complete indifference from both the legislature and the executive to this most crucial aspect of land reform.

Referral of the Bill to the National Council of Provinces

33. The Department of Justice and Correctional Services is of the opinion that the Bill should be dealt with in terms of section 75 of the Constitution, which is a Bill that does not affect the provinces. We submit that the Bill and its implementation may have an impact on provinces. Section 7 of the Memorandum of the Objects of the Bill states that the Bill would affect the customary law or customs of traditional communities and therefore should be referred to the National House of Traditional Leaders.

34. The correct tagging of bills was addressed by the Constitutional Court in *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others,*[12] which dealt with the Communal Land Rights Act 11 of 2004 (CLARA). CLARA was enacted in accordance with section 75 of the Constitution - the procedure for "[B]ills not affecting the provinces". The applicants in this case argued that the enactment in accordance with this procedure was incorrect and invalid and that CLARA was incorrectly tagged as a section 75 bill, rather than a section 76 bill.

35. Ngcobo CJ found that while the main subject-matter of a bill may not affect provinces, some of its provisions may nevertheless have a substantial impact on the interests of provinces. The test for the tagging of bills must be informed by the need to ensure that the provinces exercise their appropriate role, fully and effectively, in the process of considering national legislation that substantially affects them. After analysing the provisions of CLARA Ngcobo CJ held that the inescapable conclusion is that various provisions of CLARA affected, in substantial measure, indigenous law and traditional leadership – areas of concurrent national and provincial competence. He found that CLARA replaces the living indigenous law regime which regulates the occupation, use and administration of communal land. It further replaces both the institutions that regulated these matters and their corresponding rules.

36. It is clear from the judgment in the *Tongoane* case, that where a bill purports to deal with indigenous law and traditional leadership, particularly over the use and administration of communal land, it has an impact on the provinces and should be tagged as a section 76 bill.

37. We submit that this Bill does affect the provinces and should be tagged as a section 76 Bill that has to be sent to the National Council of Provinces

[12] (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010).

for consideration and input. The Bill seeks to create a court that will adjudicate over land matters, customary matters, and traditional leadership issues in relation to the land. These are matters that affect the provinces and require their input. The customary laws and customs of traditional communities are complex and vary between communities and provinces and obtaining their input on the functioning of the Land Court will undoubtedly be necessary.

IV SPECIFIC COMMENTS ON CLAUSES IN THE BILL

Clause 1 - Definitions

38. The definition of “claim” in Clause 1 currently refers to a claim for restitution of a right in land in terms of the Restitution of Land Rights Act 22 of 1994. We submit that this should be extended to claims made in terms of the Land Reform (Labour Tenants) Act. The Land Reform (Labour Tenant) Act defines the word “court” as referring to the Land Claims Court established by section 22 of the Restitution Act. In the Schedule to the Bill, it is proposed that the definition of “court” in the Labour Tenants Act be amended by substituting section “22 of the Restitution of Land Rights Act, 1994 (Act 22 of 1994)” with section “3 of the Land Court Act 2020.”

39. It is thus clear that it is the intention of the lawmakers that the Bill must also apply to labour tenants in terms of the Labour Tenants Act. Therefore, this group must be included under the definition of a claim in Clause 1, as the Bill also applies to these claims.

40. As set out above, the Land Court should have jurisdiction to cover all the aspects of section 25 of the Constitution and address all three legs of the land reform process.

Clause 3 – Establishment of the court

41. Clause 3(1) speaks of the court being one of “law and equity”. We submit that this is a problematic formulation that must be reconsidered. This clause creates the impression that “law” is something opposed to “equity.” Equity is also not part of South African law, and its inclusion in clause 3 could cause confusion as to the role that equity will play in the court.

42. While there has historically been a divide between law and justice in South Africa, the Constitution seeks to create a legal system that will ensure justice for all who live in the country. Section 39 of the Constitution specifically provides for legislation to be interpreted in line with the values of the Constitution, which includes a commitment to justice and healing the history of injustice in South Africa.

43. In light of this we suggest that the word “equity” is removed from the Bill to avoid confusion as to the legal nature of the term. We rather suggest that it is clearly stated that the Land Court is needed to enhance the courts’ ability to heal past injustices.

Clause 6 – Seat of Court

44. The LRC and AFRA takes note of the fact that the seat of the court will be in Johannesburg and welcomes that the Bill allows for the sitting of the hearing to be held at a place elsewhere than at the seat of the court, if it appears to the Judge President that it is expedient or in the interest of justice.

45. This is important to ensure that the court is accessible as the majority of land disputes are in rural areas and farming communities. Litigation is often lengthy and expensive which prejudices under-resourced individuals and communities. We therefore suggest that in the application of clause 6, the court sits as closely to where the parties are situated, or where the dispute arises. This would allow parties such as farm dwellers, and people

living in rural areas, access to the court to enhance their understanding of the case, allow for instructions to be given more clearly, and for justice to be seen to be done.

Clause 8 – Appointment of Judges of Court

46. The LRC and AFRA welcomes the appointment of permanent judges to the Land Court. Parties will benefit from judges who specialise in land matters and develop specific skills in relation to land issues.

47. However, it is unclear why it is a prerequisite that judges of the Land Court be judges of the High Court. There may be other suitable practitioners with experience in land rights matters who may be suitable to be appointed as Land Court Judges. If it is the intention of the legislature to limit the appointment of judges of the Land Court to judges that have already served as judges of the High Court, it may be impossible to find high court judges that have the expertise in land matters to comply with this provision of the Bill. It is therefore necessary to also consider appointing people as judges who have not worked as high court judges, but have expertise in land matters.

Clause 12 – Appointment of assessors

48. The LRC and AFRA supports the use of assessors in the Land Court. Assessors can play an important role in the Land Court, particularly in the context of traditional and customary law disputes related to land. While the current formulation of clause 12 makes provision for the appointment of an assessor, it does not speak to the expertise that is required by the assessor.

49. The role of the assessor in court proceedings is to assist the judge(s) in understanding complex factual issues that may arise due to the nature of

the case.[13] For example, advances in medical science and technology, may require a court to appoint an assessor with expertise in these fields to assist the court in understanding some of the evidence that may be led in a case dealing with medical science and technology.

50. It is submitted that an assessor in the Land Court must have knowledge, expertise, or experience related to the claim that they are called to adjudicate. Land matters can be incredibly complex. It can require an understanding of the history of a particular piece of land and the factors that resulted in the land possession. It can also require an understanding of the traditions, customs, language, and history of the litigants and their forefathers. It cannot be expected of judges of the Land Court to know and understand the context of all the cases that come before them, which is why the role of the assessor is critical to provide insight into the facts before the court.

51. For example, a dispute about competing land claims in the Eastern Cape Province, may require an assessor who has knowledge of the history of the competing claimants and the land dispossession in the province as well as the specific customs and traditions of the competing claimant communities. This will assist the court in answering whether the community constitutes a "community" for purposes of the Restitution Act and have complied with all of the requirements for a successful land claim.

52. Unfortunately, assessors in the Land Claims Court, are often attorneys or simply individuals with legal training. Their expertise relates to the law, but not necessarily to the facts in front of them, and the assistance that they can provide the court is limited.

53. It is submitted that the Bill must specify that the assessor appointed in terms of clause 12, must have some expertise in a field related to the facts in front of the Land Court. This will assist both the court and the claimants,

[13] H Lerm "Two heads are better than one: assessors in high court civil cases" (2012) *De Rebus* 34.

and result in a broader understanding of the context, history, and specific traditions and customs that the court is called on to adjudicate.

Clause 13 - Institution of Proceedings

54. Clause 13 appears to envisage that when a matter is instituted, the Judge President has the discretion to decide whether the matter is to be heard in the Court or whether it should be referred for mediation or arbitration. Although Clause 13(4) lists certain factors which must be considered when deciding whether or not to refer the matter to arbitration or mediation, we suggest that in order for more effective and expeditious resolution of disputes there should be certain categories of cases which are automatically referred to mediation/arbitration before it is heard before the court. Some examples include:

    b. Evictions of labour tenants and resolution of claims made by labour tenants in terms of section 18(3) of the Land Reform (Labour Tenants) Act 3 of 1996;

    c. Evictions in terms of the Extension of Security of Tenure Act 62 of 1997; and

    d. Claims referred to in section 13(1) of the Restitution of Land Rights Act, that allows for the Chief Land Claims Commissioner to direct parties to attempt to settle a dispute through mediation, namely:

        i. There are two or more competing claims in respect of the same land;[14]

[14] Section 13(1)(a) of the Restitution Act.

ii. in the case of a community claim, there are competing groups within the claimant community making resolution of the claim difficult;[15]

iii. where the land which is subject to the claim is not state-owned land, the owner or holder of rights in such land is opposed to the claim.[16]

55. Clause 13(1)(b) provides that *"proceedings under this Act may be instituted by any person acting in his or her own interest."* Clause 13 (2) provides that *"a person wishing to institute proceedings in terms of or under this Act must, in the prescribed manner, notify the registrar of his or her intention to do so".*

56. We submit that if a party is approaching the court and is unrepresented, that the institution of the proceedings must be as simple as possible and available in the language of the party. Section 6(1) of the Constitution of the Republic of South Africa[17] provides that *"[t]he official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu."* Section 6(2) provides that *"[r]ecognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages."*

57. In terms of clause 13(3), the Judge President must decide whether the matter is to be heard in court or whether it should be referred for mediation in terms of clause 31, or arbitration in terms of clause 32, which, in the Judge President's opinion, can deal more appropriately with the matter. It therefore follows that the person instituting proceedings must set out prima

[15] Section 13(1)(b) of the Restitution Act.
[16] Section 13(1)(c) of the Restitution Act.
[17] Constitution of the Republic of South Africa, Act 108 of 1996

facie evidence in order for the matter to proceed or to warrant consideration by the Judge President. It is therefore important that ordinary people understand what it is they need to prove for their matter to be considered. The Bill must take into account the realities of all people in South Africa and make the procedure accessible to all considering everyone's language proficiency. In this regard, the process must be as simple as possible, with the Registrar providing assistance to potential parties to ensure that their cases are dealt with by the court.

Clause 14 – Rules

58. Clause 14 envisions that the provisions of the Superior Courts Act, and the Uniform Rules of the High Court of South Africa apply with the necessary changes required by the context of the Land Court. This clause is problematic for a number of reasons.

59. Firstly, the provision is extremely vague and unclear as to which rules of the high courts will apply, and if so, how they will be changed to reflect the context of the Land Court. If the rules of the high court is to be used,[18] it must be made very clear which rules will apply, and how they will apply to take into account the specific context of land claims.

60. Secondly, the Bill does not confer a power on the Land Court to make its own rules, so where the high court rules are insufficient or has to be changed for the Land Court, there is no provision allowing for the court to make those rules.

61. This was not the case under the Restitution Act. Section 32 of the Restitution Act provides for the President of the Land Claims Court to make rules to govern the procedure of the Court. The Rules of the Land

[18] For example, the introduction of Rule 41A of the Uniform Rules of Court could be useful in the Land Court as it obliges the parties to indicate whether they are willing to have the matter referred to mediation or not, together with reasons thereof. This may assist the court in deciding whether to refer a dispute to mediation or not.

Claims Court[19] deals extensively with the procedures in the court and have been used since the establishment of the court to deal with disputes related to land. The Rules of the Land Claims Court were carefully drafted to specifically deal with land matters. They are written in plain language, are simple to understand, and were designed to allow claimants to easily navigate the court process and access justice.

62. It is not clear what has inspired the decision to defer to the rules of the high court, but it is often argued that the Land Claims Court in its current format is slow to adjudicate claims. As discussed above, in the experience of the LRC and AFRA, this is not the result of the Rules of the Land Claims Court being insufficient to dispense with cases efficiently, but rather the incompetence of government entities such as the Commission on Land Restitution, and the Department of Rural Development and Land Reform, and sometimes parties, that results in multiple delays and postponements of cases.

63. It is submitted that changing the rules to reflect the rules of the high courts, will not result in the Land Court functioning more effectively, or dispensing with cases quicker. The Rules of the Land Claims Court should be retained and amended to reflect any changes in this Bill but should continue to form the backbone of the procedures in the Land Court. It has been tailored specifically for cases related to land, works effectively and is easy to navigate. Any qualms about cases taking years to dispose of, must be addressed by the Commission and the Department as the main culprits that contribute to these delayed outcomes.

Clause 16 - Legal Representation

64. If a party is unable to afford to pay for legal representation, the Bill provides for the Court to refer the matter to Legal Aid South Africa if a 'substantial

[19] Published under Government Notice R300 in Government Gazette 17804 of 21 February 1997.

injustice' would otherwise occur. There are several difficulties that have to be addressed regarding this provision.

65. Firstly, the requirement of a "substantial injustice" for Legal Aid is quite cumbersome and parties may be denied legal representation if they are unable to meet this strict requirement. In the experience of AFRA and the LRC, parties to disputes in the Land Claims Court, and consequently, the Land Court, are legally unsophisticated and will not be able to represent their own interests in the case. They are often illiterate or have no knowledge of the legal processes that govern proceedings in the court. It is submitted that all parties before the court who cannot afford legal representation, must be provided with the option of Legal Aid, without the burden of first having to prove that a "substantial injustice" will occur.

66. Secondly, the referral to Legal Aid may cause delays in resolving disputes. Legal Aid is often overburdened and under-resourced, and struggle to meet the legal needs of people in South Africa. For example, in Makhanda in the Eastern Cape, it takes approximately four months for an attorney from Legal Aid to be assigned to a client's case, even in urgent cases in the Children's Court. Staff shortages, lack of funding, and a lack of expertise within Legal Aid results in this delay.

67. It must also be taken into account that land matters often require vast resources to litigate and may take years to finalise. It may also require specific knowledge and skills. For example, the *Mwelase* case referred to above, took nearly 8 years to finalise, while the *Mazizini* litigation lasted almost 10 years. The litigation cost vast amounts of money, and required immense resources, time, and commitment to finalise. The reality of attorneys at Legal Aid managing hundreds of cases, does not allow for optimum capacity required for complex and lengthy disputes before the Land Court. It is submitted that if Legal Aid is to be a viable option for referrals from the Land Court, it should be specifically resourced and

capacitated with land expertise to serve the needs of parties in front of the court.

68. Thirdly, it is not clear how clause 14 will interplay with the existing section 29 of the Restitution Act. Section 29(4) of the Restitution Act makes provision for the Chief Land Claims Commissioner to take steps to arrange legal representation for a party who cannot afford legal representation, either through the state's legal aid system, or at the expense of the Commission. This is ordinarily done through the Land Rights Management Facility (LRMF) which was set up in 2012 in terms of section 29 of the Restitution Act by the Department of Rural Development and Land Reform to provide legal representation and mediation services in land related disputes. The LRMF currently provides legal, mediation, judicial administration, as well as financial management services to land reform beneficiaries under the Labour Tenant Act, the Extension of Security of Tenure Act, the Restitution Act, and the Communal Property Act 28 of 1996 (CPA). Claimants under the Restitution Act and other beneficiaries under any act or policy administered and implemented by the Department can access the LRMF. The Department has set up a judicare system in terms of which they contracted Nkosi Sabela Incorporated to recruit attorneys all over South Africa to deal with land matters. The LRMF acts as an administrative system distributing work to this panel of attorneys.

69. On 1 March 2021, Minister Ronald Lamola announced that the work of the LRMF will shift to Legal Aid. As set out above, this shift may be problematic, and the retention of the LRMF, or a similar body must be considered. The LRC has been appointed by the Commission to act on behalf of claimant communities in front of the Land Claims Court through the LRMF. It is submitted that given the constraints on Legal Aid set out above, this option must be retained, or incorporated into the Bill. It has previously allowed for attorneys and advocates with expertise in land matters to be appointed to litigate on behalf of claimants. This has assisted the court and the parties and resulted in justice being served.

70. It must be mentioned however, that this system can also be exploited by legal representatives, who may litigate unnecessarily to benefit from payment from the Commission. For example, in the *Mazizini* case, the legal representatives of the Mazizini Community, bought multiple frivolous and baseless applications, appeals, and petitions. While it was very clear from the outset that these attempts had no prospects of success and were designed to frustrate and prolong the legal proceedings, the Commission continued paying them for their work. While legal representatives work on the instructions of clients, it must also be stated that the state is footing the bill for these legal processes. There is an obligation on legal representatives to not pursue every baseless instruction, and provide their clients with responsible legal advice that will not see them waste the time of the court, and the money of the state. Where the system is being abused in order to raise litigation costs, the Commission needs to step in and put a stop to it. It is therefore submitted that if this system is to be retained, that changes be made to ensure that it is not abused by legal representatives.

71. It is submitted that if it is the intention that section 29 of the Restitution Act be nullified by clause 14, and Legal Aid is unable to assist a party, a separate panel of legal practitioners should be considered to represent such parties at a reduced rate from monies appropriated from parliament for this purpose.

72. Should this happen, some of the concerns with the LRMF must be addressed. This system does not always respond to the problems of farm dwellers and they tend to be unaware of this option when facing evictions or any other issues related to the land. Some of the other concerns regarding the LRMF are that most of the attorneys who are part of this judicare system lack knowledge and expertise in land matters. This is problematic as it impacts on the quality of the legal services provided by the legal representatives and the outcomes that are achieved for vulnerable farm dwellers, claimants, and people facing eviction.

73. It is also of great concern that LRMF is entirely funded by the Department of Rural Development and Land Reform. This can be problematic. The department is often the wrongdoer but the LRMF's legal panel is not willing to challenge them in court. They therefore escape the claws of litigation, to the detriment of the farm occupiers, labour tenants, and land claimants. In fact, the department has the power to advise the service provider to remove attorneys from the panel if they do not comply with the instructions of the Department. This undoubtedly has a negative impact on the independence of the panel of attorneys and the legal advice that they provide their clients.

Clause 18 - Judgment by Default

74. The ordinary rules of service are relied upon to prove proper service before default judgment may be granted. We submit that in instances where a party comprises of a community or persons who may not be easily ascertainable, the ordinary rules of service should not apply and there should be greater measures to ensure that members of the community are made aware of the legal proceedings in a language which is widely spoken in the area of the particular community.

75. This may include placing notices at the communal areas, informing the community of the proceedings via load speaker, or hosting a community meeting to inform them of the legal proceedings.

Clause 22 – Evidence

76. Clause 22(1) allows for the admissibility of oral evidence, while clause 22(2) deals with hearsay evidence and expert evidence. However, clause 22(2) seems to only deals with hearsay and expert evidence only in the context of restitution cases. It refers explicitly only to dispossession and facts relating to land claims, which in turn are defined in the same Bill as only referring to restitution claims. The clause should be redrafted to deal

with evidence relevant to the range of legislation under the jurisdiction of the Court, to ensure that oral evidence can be led in all cases before the Court.

77. The LRC and AFRA supports the admissibility of hearsay evidence. Many claimants, or parties to land disputes, must rely on oral history and the existence of elders with knowledge of the history of the land, the community, cultural and customary practices and laws, and anthropological facts. People often do not have recorded histories of the land, or their struggles in relation to the land and they rely on information being passed on to younger generations through stories and by word of mouth. Allowing for this evidence to be led, will mean that parties can present evidence of their histories on an equal footing with landowners who often present recorded histories that disadvantages those parties relying on oral histories and hearsay evidence.

Clause 26 - Referral of matters for investigation by referee

78. Currently the Bill provides for a referee to be appointed in order to examine particular matters. The provision requires that the referee be appointed by the parties. We suggest that the court be able to appoint a referee if the parties are unable to agree on a referee.

Clause 28 - Court Orders

79. As noted above, this clause requires some redrafting to include orders beyond those that pertain to restitution claims only.

80. We specifically note that an order regarding the determination of compensation for expropriation of land is not included in the orders which the court may make and suggest that the court specifically be able to deal with such matters. We further suggest that the court be able to deal with constitutionality of the legislation relating to land rights.

Clause 31 – Mediation

81. AFRA and the LRC welcomes the inclusion of a mediation process as part of the Bill. Mediation is generally a voluntary process that parties engage in to try and settle a dispute, without the court having to intervene and issue a judgment. Article 33(1) of The United Nations Charter on Human Rights states that *"the parties to any dispute, the continuation of which is likely to endanger the maintenance of international peace and security shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."*

82. The above article of the UN Charter bears repeating in the South African context and particularly the context of disputes about land. Land is a highly contentious issue in South Africa and there have been instances where disputes have reached a point where violence broke out between parties to litigation, resulting in injury or death. This disrupts the social cohesion between or within communities and have a lasting impact on personal relations between competing groupings.

83. The benefits of mediation in general can be found in the case of *MB vs NB*[20] where the court stated that:

> *"mediation can produce remarkable results in the most unpropitious of circumstances, especially when conducted by one of the several hundred people in this country who have been trained in the process. The success of the process lies in its very nature. Unlike settlement negotiations between legal advisers, in themselves frequently fruitful, the process is conducted by an independent expert who can, under conditions of the strictest confidentiality, isolate underlying interests,*

[20] 2010 (3) SA 220 (GSJ).

use the information to identify common ground and, by drawing on his or her own legal and other knowledge, sensitively encourage an evaluation of the prospects of success in the litigation and an appreciation of the costs and practical consequences of continued litigation, particularly if the case is a loser."

84. Some of the most important benefits of mediation include:
    73.1. High rates of settlement
    73.2. Greater compliance with the settlement agreement
    73.3. Cost saving
    73.4. Optimal terms of settlement
    73.5. Satisfaction of the parties
    73.6. Looking forward rather than backward[21]
    73.7. Narrowing of the issues in dispute
    73.8. It is an opportunity to gather oral evidence without prejudice
    73.9. It is more aligned with historical and cultural methods of problem solving.

73. Furthermore, mediation allows all parties to the dispute to air out their grievances, speak their mind and express their emotions, whilst still retaining control over the outcome of the meditation. The LRC and AFRA submit that mediation must mostly be voluntary and that the parties to the dispute must agree to try mediation. However, the court must strongly encourage parties to mediate the dispute. One way of doing this is to allow for court annexed mediation – requiring a court, before considering a case, to direct that the parties must first try to mediation their dispute. If mediation fails, then the matter may advance to arbitration or come back to court for adjudication.

74. Mediation is however not the answer to all the problems that parties may experience and will not always have a favourable outcome in land matters.

[21] J Brand *Commercial Mediation: A Users Guide*, JUTA.

There are a number of considerations to take into account when a court orders mediation under clause 31 of the Bill.

75. Firstly, land matters are often complex with a long history and require critical analysis of the law and an understanding of the history and competing rights in relation to the land in question. One of the pitfalls in mediation in relation to land claims is that the mediator may be good at mediation but falls short of his/her knowledge in respect of land rights issues.[22] The role of the mediator is key to the success of any mediation, and it is essential that the mediator is acceptable to and trusted by both parties. Therefore, the mediator must be a truly neutral person having no association with either of the parties nor any interest in the outcome.

76. In the experience of the LRC it is incredibly difficult to secure the services of a skilled mediator in the context of land. There are certain considerations that must be considered as the success of mediation, or any ADR process would largely be dependent upon the nature of disputes and the legal mechanisms or institutions in place to implement ADR:

    76.1. The mediator must have knowledge and skills in the context of settling land disputes;
    76.2. The mediator must be proficient in the language spoken by the parties to the dispute. Communities and individuals are not always proficient in English, and it will be necessary for the mediator to speak and understand the language in which the mediation will be conducted;
    76.3. The mediator must have some understanding of the history of land dispossession in South Africa, the history of the people whose dispute that are called to settle, and an understanding of the customs and traditions practiced in the community, or by the individuals.

[22] D Bosch "Land Conflict Management in South Africa: Lessons Learned from a Human Rights Approach" http://www.fao.org/3/j0415t/j0415t0a.htm.

77. This can be nearly impossible to achieve. For example, in the *Mazizini* case, the parties were advised by the court to approach a mediator to settle the dispute. The responsibility of finding a mediator was left to the parties. After multiple efforts to secure an appropriate mediator, the parties could only find one suitable person for appointment, who met the above requirements. The LRC contacted mediators through some of the registered mediation bodies, but they did not have a suitable mediator for appointment. We ultimately approached someone who had been referred to us by one of the mediation organisations, but was not officially affiliated with them. The reality is that there are very few trained mediators that have the knowledge and skill to mediate land matters.

78. Secondly, it is important for the court to understand when mediation would be appropriate, and when it would simply result in a waste of time, or an unequal settlement outcome. Mediation is an interest-based process, where parties with competing interests are attempting to settle their dispute. It is most effective in cases where both parties have equal rights, and they use the mediation process to settle the dispute about their interests as opposed to their rights. Where the issues between the parties turn on the interpretation of legal provisions and is essentially a purely legal argument, mediation may not be appropriate. In these instances, it may be faster for the court to simply hear the matter and make a pronouncement on the correct legal position, rather than expect of parties to mediate an issue that is essentially up to legal argument, and not based on the weighing of competing interests. In this regard, it is submitted that the court must do a preliminary investigation into the issues in dispute, before ordering mediation, when litigation will be more appropriated.

79. It is also important to remember that in some cases, the nature of the dispute between the parties are so contentious, that mediation is simply not possible. For example, in the *Mazizini* case, relations between the two communities were fraught. The parties were advised to enter into mediation, and attempted the process, but it was ultimately unsuccessful. Here the

court was called to decide the exact legal and factual disputes that existed before the mediation. It was clear from the outset that mediation was unlikely to achieve anything in resolving the dispute, and it ultimately delayed the speedy resolution of the claim.

80. Sometimes a court must also consider settling a rights-dispute before ordering mediation of the remaining issues. The possibility of a settlement agreement must at minimum exist for parties to enter a mediation process, and this can sometimes be derailed because of an existing rights dispute that must be resolved first. Therefore, in the Makuleke land claim, an unresolved dispute relating to the authority of the chief to act on behalf of the community needed to be resolved before mediation processes could be used.

81. Thirdly, mediation is only possible where parties have similar bargaining powers. Power relations play an important part in the outcome of mediation and if not adequately addressed at the outset, they could lead to settlements that favour the powerful party. Here it is also important to consider the role that the Commission and the department play in the mediation process. Where they are involved as part of the mediation, they may often be seen to choose the side of one of the communities or parties and support their position over that of the other party, resulting in an unequal outcome.

82. For example, during the mediation process in the *Mazizini* case, the Minister of the Department of Rural Development and Land Reform also attended the mediation process. His clear preference for the Mazizini Community over the Prudhoe Community was abundantly clear throughout the process, despite the fact that the court ultimately found in favour of the Prudhoe Community and dismissed the Mazizini's claim. This skewed power relations during the mediation process placed pressure on the Prudhoe Community to potentially agree to a settlement that would not have vindicated their rights and benefited a community that had no valid land claim.

83. Fourthly, mediation is only effective when clear parameters are set for the process. Parameters could include setting aside a specified number of days for the process,[23] ensuring that all parties are treated equally, and that the mediator remains impartial throughout the process. The mediation must also be closely monitored by the Land Court. In many instances unmonitored mediations can be delayed by recalcitrant parties. However, as mediation is a court mandated process, the court must be able to oversee the process albeit only with regard to ensuring that the processes are not allowed to be delayed.

84. Sixthly, it is important that the issue of the cost of the mediators be addressed. Clause 31(6) provides for mediators who are not in the full-time service of the state, to be paid such remuneration and allowances as prescribed. Mediation is by its very nature a costly process. It requires a skilled mediator who charges fees for their service, travel and accommodation costs, and possibly venue and catering fees, depending on the nature of the mediation. It may involve large communities which increases the cost. It is submitted that this process will only be successful if it has been effectively costed and money is set aside specifically for purposes of mediation. There must also be a transparent process in appointing a body/panel of expert independent land mediators supported by legislation from which they derive their powers Failure to properly cost the Bill, and budget for these expenses, as well as put the structures in place for mediation, will result in further delays in the process and frustrate parties that must undergo mediation.

85. Lastly, it currently appears that the Judge President has the sole discretion to decide whether or not to refer a matter to mediation. The registrar should be able to refer parties to mediation if they voluntarily choose this process. Section 31(4) states that the mediator must deal with the matter "expeditiously" in terms of his or her powers as prescribed and referring

[23] D Bosch "Land Conflict Management in South Africa: Lessons Learned from a Human Rights Approach" http://www.fao.org/3/j0415t/j0415t0a.htm.

parties to mediation where they choose this option, should be one of those powers.

Clause 32 - Arbitration

86. The same considerations in relation to resources and capacity raised in the context of mediation is applicable to the arbitration process. There are however, a number of additional issues that have to be raised in relation to clause 32.

87. Firstly, clause 32 should provide for parties to voluntarily choose arbitration, as with mediation. Arbitration is mostly voluntary process, and this clause implies that parties can be forced to participate in arbitration proceedings if ordered to do so by the court. It is submitted that this process should be voluntary, and that parties may choose to follow this route when they wish to do so, but that the court decide all issues in relation to the dispute if the parties do not opt for arbitration.

88. Secondly, we suggest that there be a panel of arbitrators appointed as envisioned in section 31 of the Land Reform (Labour Tenants) Act with funds appropriated for this purpose. Training on land rights legislation and dispute resolution should be provided to these arbitrators before they are appointed to the panel.

89. Thirdly, clause 33(7) is confusing as it seems to say that an arbitration award is binding if a writ is issued. We suggest that the word “in respect of which a writ has been issued” be removed from the clause to avoid confusion.

90. Lastly, arbitration awards should be subject to automatic review proceedings in the Land Court. This will ensure that the court retains a measure of control over the arbitration process and that the court can step in where the arbitration has resulted in a miscarriage of justice.

Clause 34 - Land Court of Appeal

91. The LRC and AFRA supports the establishment of the Land Court of Appeal. Land disputes will benefit from a court that has specific expertise in land matters and is dedicated to resolving only these disputes.

92. It is suggested that in order to expedite land disputes, the Land Court of Appeal be equivalent to the Supreme Court of Appeal which would mean that disputes that are not resolved in the Land Court of Appeal, are then appealed or referred to the Constitutional Court, without the need to approach the Supreme Court of Appeal. This will result in the process being expedited.

Clause 53 - Regulations

93. Clause 53(2) details the regulations which the Minister should devise to regulate mediation and arbitration, including criteria for the appointment, appointment process, powers, and functions of a mediator and arbitrator. These provisions should be included in the content of the Act, and not left to the Minister to regulate.

94. Clause 53(2)(j) leaves it to the Regulations to determine the extent to which legal aid is provided to parties in mediation or arbitration processes. We submit that legal representation in court proceedings as provided for in Clause 16 should extend to legal representation in arbitration proceedings. Arbitrations may have a significant impact on the rights and interests of parties and is essentially an exercise in which the main disputes between the parties can be determined with finality. It is therefore imperative that parties have access to legal representation.

V OPPORTUNITY FOR ORAL SUBMISSIONS

95. The LRC and AFRA would like to request that it be provided with an opportunity to make oral submissions on the Bill, should the legislative process allow for it in the future.

We appreciate the opportunity to make submissions on the Bill and your consideration of the submissions.

Kind regards,

LEGAL RESOURCES CENTRE
Per: SHARITA SAMUEL

THESE SUBMISSIONS HAVE BEEN COMPILED WITH INPUT FROM THE FOLLOWING INDIVIDUALS ON BEHALF OF THE LRC:

- Ektaa Deochand
- Nokuthula Mbele
- Saadiyah Kadwa
- David Mtshali
- Sipesihle Mguga
- Wilmien Wicomb
- Cecile van Schalkwyk