**SUMMARY OF SUBSTANTIVE COMMENTS ON THE LAND COURT BILL**

**SELECT COMMITTEE ON SECURITY AND JUSTICE**

**7 FEBRUARY 2023**

Comments were received from the following:

1. Agri SA
2. Agri Western Cape
3. Mpumalanga Agriculture
4. Kwazulu Natal Agricultural Union (Kwanalu)
5. Land Claims Court
6. Afriforum
7. Free State Agriculture
8. Legal Resource Centre (LRC)
9. Land Access Movement (LAMOSA)
10. Socio Economic Rights Institute (SERI)
11. Cilliers and Geldenhuys Attorneys: on behalf of the Institute for Race Relations (tagging of Bill)

**Table 1: Specific comments**

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| **NAME OF INSTITUTION/INDIVIDUAL**  **COMMENTS/RECOMMENDATIONS** | **DoJ&CD RESPONSE** |
| **Preamble** | |
| **Agri SA, Agri SA – Mpumalanga, AfriForum, Free State Agriculture**  It is submitted that the preamble should not create the impression that a Land Court in itself will ensure speedy and sustainable land reform. Various reports such as the High-Level Panel Report on Key Legislation, have also pinpointed the problems causing the slow pace of land reform and these have little to do with the courts. | The Land Court is established to remove the challenges experienced by the Land Claims Court through capacitating the judicial officers of the Land Court. The Land Court is intended to accelerate the process of land reform in relation to matters that are before the Court, created by the backlogs which were caused by the lack of sufficient judges to deal with many land matters that are before the Land Claims Court. |
| **LAMOSA**  A proposal is made for the insertion of an expression in the preamble to read: “AND SINCE the Constitution and our Courts recognise customary property rights, customary land and resource governance, and customary rules of evidence.”. | The first paragraph of the preamble makes reference to section 25 of the Constitution which obliges the State to take reasonable legislative and other measures to foster conditions which enable citizens to gain access to land on an equitable basis. This recognizes the need to ensure access to land in general, and will include customary property rights. Also the second paragraph makes reference to section 7 of the Constitution which obliges the State to respect, protect, promote and fulfil the rights in the Bill of Rights, and this includes protection of the right to customary land. |
| **Clause 1: Definitions** |  |
| **Agri SA, Free State Agriculture**  (a) It is submitted that the definition of Act should not include “regulations”.  (b) The definitions of "claim", "claimant" and "Commission" will be better placed in the Restitution of Land Rights Act.  (c) The definition of "rules" should be amended to mean rules made for the Court by the Judge President and/or the Rules Board. | (a) The submission is not supported as it is intended that where reference is made to the Act, that should be read to include the regulations, depending on the context. It is trite that where the substantive provisions of an Act should be supplemented by means of regulations that the definition of “Act” will include reference to regulations.  (b) The submission is not supported as there is reference to these terms elsewhere in the Bill, hence the need to define them.  (c) The submission is not supported as the intention is to have only the Rules Board making the rules for the Land Court. Section 14(1) gives the Rules Board the power to make rules. |
| **Legal Resources Centre**  The definition of “claim” refers to a claim for restitution of a right in land in terms of the Restitution of Land Rights Act 22 of 1994. It is submitted that this should be extended to all claims made in terms of any land related legislation. | The submission is noted but not supported as the “claim” as dealt with in the Bill relates specifically to a claim under the Restitution of Land Rights Act 22 of 1994 (“the Restitution Act”). |
| **Clause 2: Purpose and objects of Act** | |
| **Agri SA, Free State Agriculture, Agri SA – Mpumalanga**  It is submitted that clause 2(1) is misleading and should be deleted or amended, as a court cannot enhance and promote access to land. This legislation should focus on the establishment, powers and functions of the court, which is to adjudicate land disputes in an equitable manner. | The proposal is not supported as access to land is intended to be enhanced and promoted through adjudication in the Land Court. By being a dedicated permanent Court, the Court will adjudicate on and resolve land disputes, and thereby contributing towards the ideal or goal of access to land. |
| **Clause 3: Establishment of Court** | |
| **Agri SA, AfriForum, Free State Agriculture, Agri SA – Mpumalanga**  (a) It is not clear what a “court of equity” is. It is not clear how a court can be both a court of law and a court of equity. The words "and equity" should be deleted. Judges must apply the law and should not be entitled to disregard the law in favour an outcome to litigation which he or she deems to be "equitable".  (b) The proposed Land Court is not a High Court. It is doubtful whether national legislation can bestow "inherent powers" on it. The first line of 3(2)(a) should be replaced by the following: " ... has a status similar to the High Courts, with powers in relation .....". | (a) Land issue is a matter that requires equity considerations in some instances, as is the case with section 33*(c)* of the Restitution of Act which requires equity to be a factor to be taken into account by a court when making a decision. Therefore, the court should not be confined to being a court of law, but must follow equitable considerations where necessary. Section 151(1) of the Labour Relations Act, 1995 establishes the Labour Court as a court of law and equity.  (b) The Land Court is established as a Superior Court, which has authority and standing equal to that of a High Court as contemplated in section 166(e) of the Constitution, and has inherent powers as a High Court as contemplated in section 173 of the Constitution. |
| **Legal Resources Centre**  It is unclear whether the provision relating to a court of ‘law and equity’ applies only to the Restitution of Land Rights Act and other legislation which expressly provides for ‘law and equity’. It is suggested that the reference to the Restitution of Land Rights Act be removed and that the provision simply state that “*the Land Court is hereby established as a court of law and equity.”* | Comments previously received were opposed to the Court being established as also a court of equity. Certain legislation such as the Restitution Act requires equity to be considered. As such the Restitution Act requires the Court to consider equity, as well as any other legislation that requires equity to be considered. |
| **Clause 6: Seat of Court** | |
| **AfriForum**  A court that deals with land related matters should rather be situated in Pretoria where all the Ministers are. | The Bill follows the seat of the Land Claims Court as it currently stands. The seat of the Court is not dependent on the location of Ministers’ offices. |
| **Agri SA, Free State Agriculture**  (a) It is unclear what is intended by clause 6(2) regarding the reference to “may sit in many different courts”. This sub-clause should be deleted, as clause 6(1) already provides for sittings of the Court at venues elsewhere than at the seat of the Court. If the Court sits at a venue elsewhere than at the seat of the Court, it is not a separate court. It remains the same Court.  (b) Not all litigants are able to travel to Johannesburg and the fact that the seat of the Court is situated in Johannesburg, will place a financial burden on parties to a dispute resorting within the Court’s jurisdiction. Ease of access and administration should be on the forefront. | (a) & (b) Clause 6(2) permits the Land Court to hold its sittings in separate courts all at the same time (see section 33 of the Superior Courts Act), and is different from clause 6(1) which permits a matter to be held elsewhere than at the seat of the Court. |
| **Clause 7: Jurisdiction of Court** | |
| **AfriForum**  (a) Expresses the view that the scope of Court’s jurisdiction must be clarified and points out that the flexible scope of the Court’s jurisdiction is vague and overbroad.  (b) A concern is expressed that the executive, acting through the Minister, may increase the scope of jurisdiction in its discretion.  (c) Should eviction matters falling outside the scope of ESTA be heard by the Court for example, as has been referred to in the media, the consequences would be catastrophic given the uniquely relaxed evidentiary standards of the proposed Land Court. | (a) The Bill is sufficiently clear as to the jurisdiction of the Court, read with the proposed amendments in the schedule to the Bill. The jurisdiction of the Court will be incrementally expanded by means of the amendment of other principal Acts.  (b) The Minister will not be empowered by clause 7(3) of the Bill to increase the “scope” of the jurisdiction of the Court. Clause 7(3) aims to empower the Minister to only determine the “area” of jurisdiction of the Court. The provision is necessary to enable the Minister to establish, increase or decrease areas of jurisdiction of the Court.  (c) Only if the principal legislation dealing with eviction matter falling outside the scope of ESTA affords the Court jurisdiction. |
| **Agri SA, Free State Agriculture**  It is not clear what is meant by "each Court" in clause 7(3). If it is the intention to establish separate divisions or satellite seats of the Land Court, each with its own area of jurisdiction, judges and administrative staff, it should be clearly stated. Particulars should be given on how each division or satellite seat will operate. | The intention is to establish a Land Court which may hold its sitting elsewhere other than at the main seat, and the Court established elsewhere should have the area of jurisdiction that it serves. No satellite courts are intended. |
| **Free State Agriculture**  It is submitted that not only the Minister should determine where sittings of the Court should take place. Although the Chief Justice will be consulted, it may be necessary that the Judge President for the Court is also delegated the authority to make such decisions. | It stands to reason that the Minister and Chief Justice will be advised by the Judge President as and when necessary. |
| **Land Claims Court**  It is proposed that clause 7(1) be amended to read: “Subject to the Constitution and except where this Act or the Restitution of Land Rights Act 22 of 1994 provides otherwise, the Court and the Magistrate's Court within whose area of jurisdiction the land forming the subject matter before that court is situated, have concurrent jurisdiction in respect of all matters that in terms of this Act or in terms of any other law are to be determined by the Court.” | The Restitution of Land Rights Act is amended in the schedule to the Bill to grant only the Land Court jurisdiction to deal with restitution matters. To insert the Restitution Act in the clause as proposed could likely give the impression that Magistrates’ Courts are granted jurisdiction to deal with expropriation matters, which is not the intention. It would also beg the question as to why the Restitution Act is specified in the clause, and not other Acts. |
| **Socio-Economic Rights Institute (SERI)**  (a) The legal issues that arise in matters concerning the land and housing legislation over which the Land Court has jurisdiction are likely often to raise related legal questions about the common law, customary law, contracts, administration of estate and other legislation and regulations not listed in the Bill. The Equality Court and Labour Court have both faced such challenges relating to jurisdiction in mixed-issue matters at the intersection of different areas of law.  (b) It is proposed the insertion of a ‘**reasonably ancillary**’ clause to give the Land Court jurisdiction over issues connected to those issues over which the Bill gives it jurisdiction, in the same case.  (c) It is proposed the inclusion of a ‘**transfer**’ provision that would enable the Magistrate’s Court, High Court or Land Court – in the event that it finds that it lacks jurisdiction – to transfer the matter to the appropriate court. This would avoid the need to dismiss matters for lack of jurisdiction and force parties to start again in the correct forum. In this regard, the drafters could look to s 20 of the Equality Act, which contains a provision dealing with transfer.  (d) The following are proposed:  (i) retaining the High Court jurisdiction in PIE matters for a transitional period until the Land Court has sufficient number of judges to manage the massive PIE caseload currently managed by the High Court across the country;  (ii) amending the Bill to guarantee the appointment of a sufficient number of dedicated Land Court judges, sitting across the country, to adjudicate PIE matters at first instance and on appeal; and  (iii) providing for the appointment of a sufficient number of High Court judges, in every High Court division, as Land Court judges, so as to ensure sufficient capacity. | (a) The submission is noted, and clause 24(1)*(c)* enables the Court to decide any issue in terms of any other law, which is not ordinarily within its jurisdiction but is incidental to an issue within its jurisdiction, if the Court considers it to be in the interests of justice to do so.  (b) Clause 24(1)*(c)* covers this proposal, except that the word “reasonably” is not supported as that would unnecessarily qualify the ancillary/incidental nature of the issue. An issue will be ancillary/incidental or not, and the Court will not decide it if it is not.  (c) The proposal is not supported. Transfer is allowed in certain circumstances as contemplated in section 27 of the Superior Courts Act which will be applicable under the Bill. The transfer clause should not be used to cure the error by a litigant in choosing the wrong forum. The transfer contemplated in section 20 of the Equality Act is where the clerk of the equality court has received a notice of intention to institute proceedings, and not where the proceedings have been instituted already.  (d) The proposals are noted:  (i) to (iii) this will defeat the purpose of having the Land Court ultimately dealing with all land related matters. The Land Court will, upon inception, be fully capacitated with enough judges to manage the caseload. |
| **Legal Resources Centre**  (a) It is submitted that many legal disputes that relate to land rights do not necessarily arise from the legislation listed in the Bill. The proposed Land Court should be empowered to deal with disputes arising from other pieces of legislation in as far as they may threaten the land rights of customary communities and land reform beneficiaries. The Land Court should include matters which are reasonably ancillary to the listed legislation.  (b) It is submitted that the expansion of the Land Claims Court’s jurisdiction will increase the case load of the Land Court significantly. At the moment, the Land Claims Court has four judges, but the judicial and administrative capacity of the court will have to be expanded in order to manage the potential case load.  (c) The Bill confers concurrent jurisdiction on the Land Court and Magistrates’ Court for cases under a range of legislation to the exclusion of the High Court. There are difficulties which may arise in practice with this concurrent jurisdiction:  (i) There is currently limited capacity in the Magistrates’ Courts to deal with all PIE and ESTA cases;  (ii) It is unclear which rules will apply where cases are heard in Magistrates’ Courts, particularly where there is a need for the hearing of oral evidence;  (iii) It is unclear whether any specific training will be provided to Magistrates, particularly those who have no experience in land matters to capacitate them to be able to deal with such matters effectively.  (d) It is further suggested that the High Court retain jurisdiction to hear PIE and ESTA cases until such time as the Land Court is sufficiently capacitated to be in a position to hear such cases. | (a) The intention is to adopt an incremental approach in terms of which the Land Court will deal with certain land related matters for now, and other land related matters will be placed under the jurisdiction of the Land Court at a later stage. The Land Court should not be burdened with all land related matters at this stages. The Land Court is not deprived of the power to deal with matters under legislation that is not listed in the Bill.  (b) The submission is noted, hence the Bill has been drafted to provide for the appointment of the judiciary and staff that will be sufficient to deal with the anticipated case load.  (c) The submission is noted but not supported as explained below:  (i) The Bill only removes the jurisdiction of the High Courts in dealing with PIE and ESTA matters, and places it under the Land Court, but retains that of the Magistrates’ Courts. The lack of capacity in the Magistrates’ Courts is not created by the Bill;  (ii) The rules of the Magistrates’ Courts will apply in that court like they apply in all other matters;  (iii) The training of Magistrates will continue in the normal course and is not a matter for incorporation in the Bill.  (d) The proposal is not supported as to do so will defeat the purpose of having the Land Court ultimately dealing with all land related matters. The Land Court will, upon inception, be fully capacitated with enough judges to manage the caseload. |
| **Clause 8: Appointment of Judges of Court** | |
| **AfriForum**  A view is expressed that there should not be an over-emphasis of race or gender when it comes to the appointment of judicial officers. | The intention of clause 8(4) is to require that race and gender are considered, but not to be a determining factor. Three categories are to be taken into consideration, namely, “expertise”, “race and gender” and “appropriately qualified”. |
| **Agri SA**  The requirement of training and experience in the field of land rights matters will significantly limit the pool of potential appointees to the bench of the Land Court. It is suggested that this requirement be removed as an essential requirement, although it could be retained as a factor to be considered in the selection of suitable appointees. | The intention is to appoint persons on the bench who are experienced in land matters, similar to the LRA which requires the appointment of judges from those with knowledge, experience and expertise in labour law. |
| **Institute of Race Relations**  (a) The requirement that judges ‘must…be representative in terms of race and gender’ is inconsistent with section 174 of the Constitution and invalid, as that section requires that judges must first and foremost be ‘appropriately qualified’ people who are ‘fit and proper’ to serve on the bench.  (b) 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.  (c) The Bill states that all the judges appointed must ‘have expertise in the field of land rights matters’. 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. | (a) Section 174(2) of the Constitution provides that the judiciary must reflect broadly the race and gender composition of South Africa. It is submitted that clause 8(4)*(b)* is similar to section 174(2) which requires race and gender representation. However, it is proposed that the word “broadly” be inserted in sub-clause (4)*(b)* after the word “be” to fully align with section 174(2).  (b) The intention is to appoint persons on the bench who are experienced in land matters, similar to the LRA which requires the appointment of judges from those with knowledge, experience and expertise in labour law.  (c) The intention of the Bill is to ensure that, as provided for in clause 8(3), persons appointed in the bench are also experienced judges, so that not all of the appointees are taken only from a pool of Magistrates, Advocates or Attorneys. However, it is difficult to see how the President on the advice of the JSC will make reckless appointments. |
| **Land Claims Court**  It is proposed that clause 8(3) be amended to read: “The President, acting on the advice of the Judicial Service Commission, and the Judge President of the Court may, subject to subsection (4), appoint as many judges as is necessary as judges of the Court, who are judges of the High Court at the time they are appointed to the Court and such judges shall hold concurrent appointment in the Court and a relevant Division of the High Court.”. | The proposal is not supported as the intention is to appoint judges solely to the Land Court without the judge exercising concurrent appointment to the Land Court and the High Court. |
| **Socio-Economic Rights Institute (SERI)**  (a) It is proposed that in addition to “expertise in the field of land rights matters” in clause 8(4)*(a)* of the Bill, that a requirement be inserted that there should be a “**demonstrable commitment to land reform**”. This would ensure that Land Court judges not only have technical expertise, but a commitment to the overall constitutional imperative of land reform that can be demonstrated by their professional background.  (b) It is further proposed that to ensure their security of tenure, independence and status, and to ensure that enough judges are appointed as Land Court judges, that all Land Court judges should concurrently serve as High Court judges.  (c) It is submitted that clause 8(3) of the Bill provides that persons appointed as Land Court judges “may have been judges of the High Court”. This entails that Land Court judges are not required to have been High Court judges, and it is not clear if, when appointed, Land Court judges are also appointed as judges of the High Court.  (d) Clauses 8 and 9 should be reviewed to ensure that all judges appointed to the Land Court are also High Court judges, whether they are new appointments to the bench or appointed from among existing High Court judges. | (a) The proposal is not supported as this is not necessary and may be too restrictive to the appointment of suitable judges.  (b) The intention of the Bill is to require expertise in the field of land rights, for appointment in the Land Court only and not concurrently with the High Court.  (c) and (d) The aim is that persons not being judges may also be considered for appointment to the Land Court but will be appointed as judges of the High Court and simultaneously deployed to the Land Court. |
| **Legal Resources Centre**  (a) It is submitted that whilst there are clear criteria for the appointment of Land Court judges in the Bill, there is no corresponding criteria for magistrates who will be called to adjudicate land disputes. It is suggested that the Bill be amended to include such criteria for magistrates who will specifically deal with land matters.  (b) The Bill should stipulate a minimum number of permanent judges for the Land Court to ensure that the Court is sufficiently capacitated.  (c) The decision on the number of the required judges should not be taken in a vacuum, but has to take cognisance of the actual number of cases that the court could potentially adjudicate. Too few judges tasked with too many cases, could negate the objectives of the Land Court and the Act. | (a) It is not possible to provide for the criteria for the appointment of Magistrates in the Land Court Bill. The said criteria must be contained in the legislation regulating Magistrates.  (b) & (c) The clause empowers the President of the country to appoint as many judges as is necessary as judges of the Court. This will enable the Land Court to be sufficiently capacitated. There is an already established criteria in terms of section 49(1)*(b)* of the Superior Courts Act. |
| **Clause 11: Appointment of officers and staff** | |
| **AfriForum**  Objects to the Minister’s power to appoint officers and staff of the Court and argues that the Court should be insulated from accusations of influence. | This approach is standard and an administrative function to be performed by the Minister. What is important is that clause 11(1)*(c)* provides that the Court Manager exercises administrative control over other officers and staff and does so under control and direction of the Judge President. |
| **Socio-Economic Rights Institute (SERI)**  It is proposed that amendments be made so that the appointment of the officers and staff of the court (though made in consultation with the Judge President of the Court) be removed from the executive control and placed under judicial control. | The Minister makes these appointment in accordance with the public service law, and the fact that they are made in consultation with the Judge President of the Court ensures that the appointments do not interfere with or hamper the judicial independence. |
| **Clause 12: Appointments of Assessors** | |
| **Agri SA, Agri SA – Mpumalanga, Free State Agriculture**  (a) It is not clear what is meant by the words that assessors "must be appointed in the prescribed manner" in sub-clause (2). Assessors should be persons who, in the opinion of the judge who presides in the trial, has experience in the administration of justice or skill in any matter which may be considered at the trial, and should be selected and appointed by the presiding judge.  (b) It is further proposed that the role given to the Rules Board in relation to mediators be extended to assessors, and that all aspects of both mediators and assessors be governed by rules made by the Rules Board and/or practice directions of the Land Court’s Judge President, and not by the regulations made by the Minister. | (a) It is envisaged that the regulations or rules will set out general provisions for the appointment of assessors – clause 36(1). The provision simply means that the Minister will be empowered in terms of clause 36(1)*(d)* and *(e)* to prescribe the manner of appointment of assessors and the form of the oath or affirmation applying to them.  (b) The proposal is supported. The Rules Board is given the mandate to make rules for mediators, interpreters, and may be better placed to make rules for assessors as well. |
| **Institute of Race Relations**  (a) The Bill requires, ‘not more than two assessors may be appointed’ together with the single Court judge who will normally preside. 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 is important because assessors become ‘members of the Court’. Where two assessors are appointed in a case, they have the power to overrule the presiding judge on all questions of fact.  (b) In very many instances, the disputes before the Court will be 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 tribunals.  (c) It also makes a mockery of section 174 and its demanding requirements for appointments to the Bench. | (a) The regulations (or the rules if so decided) will provide for qualifications for appointment of assessors.  (b) The appointment of an assessor to the Court does not make the Court less of a Court, but to assist the Court on questions of facts. Parties are not deprived of the right of access to the Court by the appointment of an assessor. To provide for assessors is permitted by section 180 of the Constitution, which enables national legislation to provide for matters concerning the administration of justice that are not dealt with in the Constitution.  (c) Assessors are not appointed to the bench as judges, but only sit to assist the Court on a particular matter that is before the Court. |
| **Legal Resources Centre**  While the current formulation of the clause makes provision for the appointment of an assessor, it does not speak to the expertise that is required by the assessor. 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. | It is envisaged that the regulations or rules will set out general provisions for the appointment of assessors – clause 36(1)*(d)*. |
| **Socio-Economic Rights Institute (SERI)**  It is proposed that amendments be made so that the appointment of assessors and the determination of their fees be removed from the executive control and placed under judicial control. | The Minister prescribes through the regulations or rules the manner of appointment of assessors and their fees, but the presiding judge will choose the assessors to sit with in Court on a particular matter. This has been the practice for a long time, and does not interfere with or hamper the judicial independence. |
| **Kwanalu**  (a) Assessors as an aid to the courts are not widely used in South Africa. Rather they are limited to extreme cases. The origin of the use of assessors to support a case is based in specific, technical case law, such as maritime or digital litigation. They are not typically used for general, applied day-to-day litigation. In the case of the Land Court, it is proposed that there would (a) be insufficient skilled and independent assessors to adequately support the office, and (b) that within South Africa, the assessor system is not structured in a way that sufficiently safeguards and promotes the effective adjudication of cases.  (b) It is therefore recommended that clause 12 be removed from the Bill. Although this omission would not entirely prevent the use of assessors, it would reflect the use of assessors on wider case law so that their use is consistent with the general application of the law in South Africa rather than unique to the land courts. | (a) and (b) The submission is noted but not supported. The Court is not obliged to use assessors in all cases. The total deletion of the clause will deprive the Court of the power to make use of assessors in deserving cases. It is not supported the view that assessors in land court matters will be insufficiently skilled, when judging from research done by academia, civil society and individuals, as the issue of land is a long standing matter, both in SA and internationally. |
| **LAMOSA**  It is proposed the insertion of the following sub-clause:  “(7) The Judge President may, when deciding that a matter is to be heard in Court as contemplated in section 13(2)*(a)*, direct that an assessor knowledgeable of the content of relevant customary law be appointed to sit in the matter.”. | The appointment of an assessor is, in terms of clause 12(4), to assist the Court on a question of fact, and the Court decides a question of law. The power to so appoint is given to the judge who will be hearing the matter, and not the Judge President. The presiding judge will be better placed than the Judge President to decide on the need to use an assessor. |
| **Clause 13: Institution of proceedings** | |
| **Agri SA, Agri SA – Mpumalanga**  (a) It will be impossible for the Judge President to decide whether a matter should be referred to arbitration or mediation merely upon receipt of a notification from a claimant that proceedings will be instituted. The Judge President will not be aware of what defenses will be raised by the defendants or respondents, or whether the matter will be defended at all. Referring a matter for arbitration or mediation without hearing the other side might well constitute a breach of the *audi alteram partem* rule.  (b) Mediation, in contrast to arbitration, can be and should be ordered in suitable circumstances. However, mediation will not work if one or more of the parties are intractable in the positions that they have adopted and unwilling to deviate therefrom. In such cases, mediation will be futile and the matter should be adjudicated by the Court.  (c) A hearing date can only be allocated after the papers have been served on the defendants or the respondents, and after the pleadings have been closed in an action, or all affidavits have been filed in motion proceedings. The allocation of hearing dates should be subject to the rules of the Court and not be prescribed in legislation or regulations. | (a) The procedure will be provided for in the rules of court in this regard. There would have been the exchange of documents in the process of litigation, before the matter could be referred for mediation. Arbitration provisions have been removed from the current Bill.  (b) A matter will be assessed by the Judge President to determine if it is suitable for mediation. Although mediation is a voluntary process, if it is court ordered, it must be attended. Any party can request the mediator to refer the matter to Court for adjudication if the other party is intractable or if the parties are not able to resolve the dispute.  (c) There would have been the exchange of documents in the process of litigation, before the matter could be allocated a hearing date. The current version of the Bill is clear that the procedure will be provided for in the rules of court in this regard. |
| **Clause 14: Rules governing procedure of Court** | |
| **AfriForum**  The Court should not operate on an informal basis. | There may be instances where it may be necessary for the Court to conduct any part of the proceedings on an informal basis. Clause 14(2) does not empower the Court to conduct the process of adjudication on an informal basis, but rather any part of any proceedings. |
| **Agri SA**  (a) The Land Court should have its own Rules. There is no provision in the Bill for the Judge President or anybody else to make Rules for the Court. Much of the Land Court's work will be peculiar to its functions as a specialist court and is not catered for in the Uniform Rules. Since the members of the Rules Board may not have had the requisite exposure to the work of the Land Court, the Judge President of the Land Court may be better equipped to draft the Rules, but subject to approval thereof by the Rules Board.  (b) It might cause confusion if the Court's procedures are subject to both the Uniform Rules and its own rules. There could, however, be a provision in the Bill that the Uniform Rules will apply where the Land Court Rules are silent on a particular issue.  (c) The Superior Courts Act, the Uniform Rules and the regulations which the Minister might make, do not cater for all procedures of the Land Court. The Labour Court, which is also a specialist court, has its own rules, tailored to its particular needs. The Land Claims Court also has its own rules, which can serve as a model in preparing rules for the Land Court. The Land Claims Court rules should, however, apply until such time as the Land Court rules have been promulgated.  (d) It is proposed that the Land Court Bill should also authorise the Judge President of the Court to issue Practice Directions from time to time, as circumstances may require. | (a) Clause 14 mandates the Rules Board to make rules for the Court. The Rules Board is statutorily established to make rules for the courts of the Republic, and is capable of doing so.  (b) The Court will have its own rules and Uniform Rules will apply to the Land Court where no provision is made in the rules.  (c) The Court will have its own rules and Uniform Rules will apply to the Land Court where no provision is made in the rules. The intention is that the rules should be in place when the Bill comes into operation, and therefore there is no need for the existing Land Claims Court rules to apply in the interim.  (d) The directives are issued by the Chief Justice under section 8(3) of the Superior Courts Act, who can under section 8(4) delegate this power to any other judicial officer of the court concerned, including the Judge President. |
| **Institute of Race Relations**  The Bill 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’. The established rules of procedure in the High Court have been developed over a very long time to help ensure that issues are properly aired and justice is done to both parties. | It is submitted that the Rules Board will, among others, develop the rules that are aimed at assisting the Court in providing or implementing a fair and just approach when it comes to an inquisitorial system of adjudication as and when necessary. |
| **Legal Resources Centre**  (a) 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 are to be used, it must be made very clear which rules will apply, and how they will apply to take into account the specific context of land issues.  (b) The Bill does not confer a power on the Land Court to make its own rules, and therefore 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.  (c) It is submitted that where there is concurrent jurisdiction with the Magistrates’ Courts, it is unclear which set of Rules will apply – the High Court rules, amended Land Court rules, or Magistrates’ Courts rules.  (d) The Rules of the Land Claims Court should be retained and amended to reflect any changes in the 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. It is stressed that court procedures should be kept as simplified and easily accessible as possible. | (a) The aim of the provision is that whilst the Rules Board will make all rules for the Land Court, if the rules do not cover a certain aspect of the process then the Court can simply apply the Uniform rules in those particular circumstances.  (b) The power to make rules for the Court is conferred on the Rules Board. If the Uniform rules are insufficient to cover a certain aspect, the Court will use inherent powers in terms of clause 3(2)*(a)* of the Bill.  (c) A matter before a Magistrate’s Court will follow the Magistrate’s Court rules, and the Land Court will apply its rules which will be developed by the Rules Board or in case of these rules being insufficient, the Uniform rules will be applied. The Land Claims Court rules will be repealed by the Land Court rules.  (d) It is anticipated that some or most of the current Land Claims Court rules will be retained, so as not to reinvent the wheel. However, this is an anticipatory position which cannot be dictated upon the Rules Board. The Rules Board has the prerogative to decide how these rules should be drafted. |
| **Free State Agriculture**  The Bill should authorise the Judge President of the Court to issue Practice Directions from time to time and when circumstances may require. | The directives for all courts are issued by the Chief Justice under section 8(3) of the Superior Courts, who can under section 8(4) delegate this power to any other judicial officer of the court concerned, including the Judge President. |
| **Land Claims Court**  (a) It is proposed that clause 14(1) be amended to read: “Except as is otherwise provided for in this Act the provisions of the Land Claims Court Rules promulgated under S 32 of the Restitution of Land Rights Act 22 of 1994 and where such rules are silent the provisions of the Superior Courts Act, and of the Rules regulating the conduct of the proceedings of the several Provincial and Local divisions of the High Court of South Africa made under the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), apply with the necessary changes required by the context to the Court in so far as these provisions relate to—”.  (b) It is proposed the insertion of sub-clause (5) to read: “The President of the Court may make rules to govern the procedure of the Court including rules providing for—”.   * 1. Any of the matters listed in paragraphs (a) to (s) of subsection (1) of section 6 of the Rules Board for Courts of law Act, 1985 (Act No. 107 of 1985), insofar as they are appropriate to the functions of the Court;   2. The circumstances under which opinion and oral evidence may be submitted to the Court;   3. The suspension or execution of judgments, orders or sentences of the Court pending —   Applications or petitions for leave to appeal; and  (ii) The prosecution of appeals;  (CA) the practice and procedure of the Court in applications in terms of Chapter IllA; and  (d) generally, any matter which may be necessary or useful to be prescribed for the proper despatch and conduct of the functions of the Court.   1. The rules contemplated in subsection (1) shall be published in the Gazette. 2. Notwithstanding anything to the contrary in this Act or in the Rules contemplated in subsection (1) —   (a) the Court may, at any stage after a claim has been referred to it, refer the claim back to the Commission with directives as to matters which are to be investigated and reported on by the Commission; | (a) The proposal is not supported. The Rules Board will make rules for the Court, which rules will replace the current Land Claims Court rules. It is however, proposed the insertion of “the Court processes including”, after the words “relating to”. This will ensure that the rules to be developed by the Rules Board are not restricted to the listed items.  (b) The proposal is not supported. The intention is to entrust the Rules Board with the duty of making rules for the Court.  (a) The Rules Board has the power in general to make any rule on the listed aspects in terms of section 6(1);  (b) This is covered by clause 14(1)*(a)*;  (c) This is covered by clause 14(1)*(b)*;  (CA) The proposal is accepted, as it is a proposal to reinstate section 32(1)*(c*A*)* of the Restitution Act. This will be considered for incorporation as a substitute of clause 14(1)*(d)* to read: “the practice and procedure of the Court in applications in terms of Chapter IIIA of the Restitution Act;”, the current sub-clause (1)*(d)* becoming sub-clause (1)*(e)*. Chapter IIIA deals with direct access to court, and section 32(1)(cA) requires that rules be made for practice and procedure for applications for direct access under chapter IIIA.  (d) This is covered by clause 14(1)*(d)*;  (2) Section 6(4) of the Rules Board Act requires that any rule made by the Rules Board be *gazetted* one month before coming into operation.  (3) The proposal is accepted as it is a proposal to reinstate section 32(3) of the Restitution Act. This will be considered for incorporation as a substitute of clause 14(2) to read:  “(2) Notwithstanding anything to the contrary in this Act or in the rules contemplated in subsection (1)—  *(a)*   the Court may, at any stage after a claim has been referred to it, refer the claim back to the Commission with directives as to matters which are to be investigated and reported on by the Commission; and  *[(b)](http://dojcdnoc-jutas/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bstatreg%7d&xhitlist_q=%5bfield%20folio-destination-name:'LJC_a22y1994s32(3)(b)'%5d&xhitlist_md=target-id=0-0-0-405655" \t "main)*   the Court may conduct any part of any proceedings on an informal or inquisitorial basis.”. |
| **Clause 15: Powers and functions of Court under other legislation** | |
| **Agri SA, Agri SA – Mpumalanga**  It is submitted that all powers and functions of the court should be consolidated in the Bill and should not have to be sought in other pieces of legislation. | The Court will in future, though not immediately, deal with all land related matters as regulated by different pieces of legislation. The Court will have to consider the powers that it has under the legislation in question, and those powers need not be contained in the Bill. |
| **Legal Resources Centre**  It is submitted that the clause is unclear and may give rise to various jurisdictional disputes. It does not provide clear direction as to what context requires the application of the Land Court Act when compared with the provisions of other laws. | The aim of the provision is essentially to say that the Land Court will apply the powers and functions that it has as contained in the Bill, unless the legislation governing the subject matter before the Court excludes such application. This is to resolve a dispute that the Court may be faced with in future where there is conflict between a provision in the Bill and in the other legislation. |
| **Clause 16: Intervention to proceedings before Court, right to appear and legal representation** | |
| **AfriForum**  Sub-clause (2) is objected to. It is argued that since the parties are equal before the law, the State should be allowed an automatic right to intervene. | Sub-clause (2) does not allow the State an exclusive right to intervene in proceedings. Sub-clause (1) provides that any person with legal standing may intervene in proceedings. However, there are instances where the State, like any other person with legal standing, may have a direct interest in proceedings and should therefore be allowed to intervene. |
| **Agri SA**  The question arises as to whether Legal Aid South Africa has enough protocols that will allow a party to seek assistance for the matters within the expanded jurisdiction of the Land Court. | It is anticipated that Legal Aid SA will provide sufficient personnel to deal with extra work load. Resources has been made available by the DALRRD through the transfer of the Land Rights Management Facility to Legal Aid SA. This facility was the mechanism through which the indigent were provided legal representation in cases involving security of tenure. |
| **Free State Agriculture**  Given the importance of matters that resort under the Court’s jurisdiction, the scope of Legal Aid South Africa should be able to handle matters referred to it by the Court. It might also be necessary to broaden the provision of services rendered by Legal Aid. | Legal Aid SA will provide sufficient personnel to deal with extra work load. |
| **Legal Resources Centre**  The requirement of “substantial injustice” for Legal Aid is quite cumbersome and parties may be denied legal representation if they are unable to meet this strict requirement. 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. | This is a requirement set by section 4(1)*(f)* of the Legal Aid South Africa Act, 2014 and applies to all cases where legal aid is granted. These are established principles and it is unlikely that indigent persons will be prejudiced by this clause. |
| **LAMOSA**  (a) It is submitted that the obvious policy gap is legal representation to a land claimant or land reform applicant to approach the Land Court for interdictory or declaratory relief. They can only get legal aid once they are already a party before the Land Court. But first they would need assistance to prepare pleadings to institute proceedings.  (b) It is proposed the insertion of a proviso to clause 16(3) to read as follows: “Provided that application for legal aid may be made to the Court if the applicant or respondent cited is not likely to be able effectively to present his or her case unrepresented, having regard to the complexity of the case, the legal procedure, and the education, knowledge and skills of the person concerned.”. | (a) A party need not to have commenced legal proceedings to be entitled to legal representation. If a party qualifies for legal representation, they will be assisted with the drawing of papers and the issuing thereof at Court.  (b) The proposal is covered by clause 16(4)*(a)* in that it will be in the interest of a party to be legally represented if they cannot effectively present their cases, if the case is complex (almost all land related matters are complex), if they have low level of education, they would have no knowledge and skill with regards to legal processes. The application is not made to Court but to Legal Aid SA, which will assess if that person qualifies for legal representation. The practice is to steer away from court granted legal aid, given the impact on management of funds of Legal Aid SA. |
| **Clause 17: Powers of Court on hearing appeals** | |
| **Agri SA**  The Magistrates' Courts presently have non-exclusive jurisdiction to make orders under ESTA and PIE. In terms of the Bill, the jurisdiction of the Magistrate's Court is removed, and the Land Court will have exclusive jurisdiction under these two Acts. There exists no other legislation that provides for an appeal to the Land Court. Clause17 therefore appears to be redundant and should be deleted. | The current version of the Bill re-instates the jurisdiction of the Magistrates’ Courts. Appeals from other lower courts will be heard by the Land Court, if the legislation regulating the dispute before the court is under the jurisdiction of the Land Court. |
| **Legal Resources Centre**  There is no provision made for reviews or procedures relating to reviews. It is suggested that reviews from the Magistrates’ Court to the Land Court be allowed in all cases. | Reviews of all Magistrates’ Courts proceedings are governed by section 21(1) of the Superior Courts Act, 2013 and the Land Court has inherent power to review its processes similar to the High Court. |
| **Clause 21: Admissibility of evidence** | |
| **Agri SA, Legal Resources Centre**  It is submitted that although the admissibility of hearsay evidence is not new, it remains challenging to adjudicate on the credibility of such evidence. The rules should provide some guidance on the kind of hearsay evidence that is admissible and how it should be evaluated. | Clause 21(3), affording the Court the power to decide what weight should be placed on hearsay evidence, is sufficient for the Court to make such a decision on a case by case basis. It is not necessary to include guidance in the rules for judges. |
| **Institute of Race Relations**  (a) The Bill provides only one example of the type of hearsay evidence that may be admitted. 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.  (b) 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 be 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 the muster. | (a) Restitution cases are unique to the extent that land claims exist where most witnesses with firsthand knowledge of the matter may not be alive anymore or other persons are old and may not remember certain facts anymore. Regarding other legislation, evidence will be admitted in terms of the Law of Evidence Amendment Act.  (b) Evidence submitted will be question of fact. The Court will not hear evidence on question of law, as that would be legal submissions presented to the Court. |
| **Legal Resources Centre**  It is unclear why hearsay evidence can only be admitted when dealing with claims brought under the Restitution of Land Rights Act. The clause should be redrafted to deal with evidence relevant to the range of legislation under the jurisdiction of the Court. | This clause is imported from the Restitution Act. Land restitution claims emanate from a long time ago and strict admissibility of evidence could lead to injustice in some cases. Most witnesses with firsthand knowledge of the matter could have passed on, and others could be so aged that they cannot testify in court, or have memory of certain facts that may assist the Court. The clause is applicable to restitution matters only, and in respect of other legislation, evidence will be admissible as per the Law of Evidence Amendment Act. |
| **Clause 24: Powers of Court** | |
| **Agri SA, Agri SA – Mpumalanga**  The application of subsection 24(2) should be restricted to cases where all parties consent to the referral of a question of law to the court of appeal, or the clause should be removed in its entirety. The referral of an issue to the court of appeal could have serious cost implications for the parties, which they should not be compelled to incur without their consent. It is part of the work of the Land Court judges to decide legal issues, even if the issues are difficult. If they were allowed to refer them to the court of appeal of their own accord, it could inundate the court of appeal with work which should be performed by the judges of the Land Court. | Section 158(4) of the Labour Relations Act, 1995, has similar provision where a question of law is referred to the Labour Appeal Court. The Land Court can of its own accord make or any party may request such referral. However, the Court would likely hear submissions from the parties regarding the referral. Although, a referral may have costs implications, such referral may also save costs (and time) where the question is referred directly to the Supreme Court of Appeal, rather than it being heard by the Land Court itself. |
| **Land Claims Court**  It is proposed that clause 24(1)*(c)* be amended to read:  “the power to decide any matter in terms of any other law, which is not ordinarily within its jurisdiction but is **[incidental to an issue]** sufficiently connected to matters within its jurisdiction if the Court considers it in the interests of justice to do so.”. | The proposal is not supported as that clause has been in existence in section 22(2)*(c)* of the Restitution Act. The proposal amounts to a change in the semantics, rather than substance of the clause. |
| **LAMOSA**  (a) It is proposed that a proviso be inserted under subsection (1)*(c)* to read:  “Provided that unless the President of the Court directs otherwise or the Court decides otherwise, the Court has the power to decide on:  (i) disputes arising from the MPRDA, MLRA, National Forest Act, NWA, Infrastructure Development Act, PDALFB/A, Expropriation B/A, and where the matter or matters in dispute in substantial measure affects—  *(aa)* land acquired in terms of the Restitution Act, LR:LTA, LR:PLAA, ESTA, or  *(bb)* rights in land confirmed or transferred in terms of the CLTB/A, TRANCRAA, CSLA, LTA  *(cc)* land governed or administered in terms of the TKLA, CPAA, Ingonyama or  *(dd)* rights in land protected in terms of customary law and the IPILRA;…”.  (b) It is further proposed the insertion of the following provision in clause 25: “(4) The Court, of its own accord or at the request of any party to the proceedings before it, may request, direct or order any party, the Commission, the SAHRC or the Gender Commission to conduct an investigation and produce evidence of assistance to the Court to determine the content of relevant customary law.”. | (a) The proposal is not supported as it is aimed adding other Acts under the jurisdiction of the Court immediately. The Court is not to be inundated with many laws under its jurisdiction, especially when it is so newly established, until the time is right for further Acts to be placed under its jurisdiction. Further clauses suggested in the proposal are already covered in the Bill, the Superior Courts Act and the Constitution, and therefore no need to insert them as proposed.  (b) The proposal is not supported. Customary law is presented to court by way of evidence and where necessary, expert evidence may be presented before the Court. In addition, the proposal is covered by section 38(1) of the Superior Courts Act which empowers the Court to appoint a referee to conduct an investigation on any matter arising from the proceedings before the Court. This will include an investigation of the applicable customary law. |
| **Clause 25: Conferences** | |
| **Land Claims Court**  It is proposed the insertion of a provision similar to section 31(2) as section 25(6) to read: “(2) The Court may, after the holding of such a pre-trial conference, issue such orders and directions as to the procedure to be followed before and during the trial as it deems appropriate.”. | The proposal is accepted and may be considered for incorporation by substituting clause 25(5) to read:  “(5) The Court may, after the holding of such a conference—  *(a)* issue such orders and directions as to the procedure to be followed before and during the trial as it deems appropriate; and  (b) make such order as to the costs of any proceedings under this section as it deems fit.”. |
| **Clause 26: Court orders** | |
| **Agri SA**  Clause 28(1)*(a)* - *(g)* could be replaced by a clause stating that the Court may make any appropriate order which a High Court is competent to make and which relates to a matter under the jurisdiction of the Court. The list of permissible orders listed in sub-clause *(a)* to *(g)* is incomplete. It does not, for example, include interlocutory orders and orders relating to contempt of court. | The current version of the Bill does accommodate the submission and a ‘catch all’ provision has been inserted as paragraph *(i)* to read “any appropriate order which a High Court is competent to make and which relates to a matter under the jurisdiction of the Court.”. This covers what is being proposed. |
| **Land Claims Court**  It is proposed the insertion of sub-clause (10) to read: “A direction or ruling by the Court shall have the force and effect of a Court order.”. | The proposal is supported in will be considered for incorporation. |
| **Clause 27: Variation and rescission of orders of Court** | |
| **Land Claims Court**  It is submitted that the clause appears to be more restrictive than the existing provisions of section 35(11) and (12) of the Restitution Act. It is proposed that those provisions should be retained and incorporated under clause 27 and that the reference in section 35(11) to "subject to the rules made under section 32" should simply read "subject to the rules". | The submission is supported, and consideration will be given to re-inserting section 35(11) and (12) of the Restitution Act as proposed. |
| **Clause 28: Costs** | |
| **Agri SA, Agri SA – Mpumalanga, Free State Agriculture**  (a) The general rule in constitutional litigation between a private party and the state is that if the private party is successful, its costs should be paid by the state, but if unsuccessful, each party should pay its own costs. The litigation before the Land Court will mainly be constitutional litigation, giving effect to section 25(5), (6) or (7) of the Constitution.  (b) Clause 28(2)*(b)* should be deleted because it is the Judge President or presiding judge who decides on mediation and not the parties, and because it will be very difficult to quantify the "extra costs".  (c) It should be stated in clause 28(3) that the Court may make a cost order against a person who represented a party only in circumstances where the conduct of the representative justifies such an order. It should also be added that the Court may make an order that a representative may not be entitled to any remuneration for all or some of his or her services if the conduct of the representative justifies such an order. | (a) The court must make a cost order in light of the facts of the case before it, considering the requirements of law and fairness.  (b) The provision is necessary as it requires the Court to consider if an unfounded action or unsustainable defense has been put up, and also how the parties conducted themselves during the proceedings. The extra costs are those incurred which would have been avoided if the matte was not brought to Court.  (c) The Court is entitled to make a costs order in light of the facts of the case before it, considering the requirements of law and fairness. Courts have been depriving legal representatives of the fees that they would be entitled to, as part of penalizing that representative due to their conduct in handling the matter. |
| **AfriForum**  Objects that fairness should play a role in granting cost orders. It is pointed out that many land owners are out of pocket by the time a case reaches the court. | Fairness is an appropriate criterion for costs orders. Costs orders are necessary but will not be made by the Court lightly. |
| **Institute of Race Relations**  (a) The Court has extensive but vague powers to make orders regarding costs, which must be based on ‘the requirements of the law and fairness’. 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 the established rules can be undermined or bypassed.  (b) 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.  (c) 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 does not attempt to limit costs orders against lawyers to ‘Stalingrad’ instances – and is far too broad to pass constitutional muster. | (a) It is not clear how the requirement of “fairness” could promote uncertainty and ambiguity. However, the court must make a costs order in light of the facts of the case before it, considering the requirements of law and fairness.  (b) All courts have been empowered to issue punitive costs orders against legal practitioners, where warranted, and this has never deterred attorneys from acting for litigants in courts.  (c) It would not be proper legislative drafting to restrict the punitive costs orders to specific instances as suggested. The Court will be better placed to determine the need for and the extent of punitive costs orders, being guided by the circumstances of each case. |
| **Clause 29: Mediation** | |
| **Agri SA, Agri SA – Mpumalanga, Free State Agriculture**  (a) It is unclear what is meant by "transfer the matter" in clauses 29(2)*(a)*(i). The registrar should retain the Court file, and make copies of the relevant documents available to the mediator.  (b) Clause 29(7) raises two questions. Firstly, who is responsible for the fees and disbursements of a mediator who mediates an issue in terms of sub-clause (1) and secondly, who is responsible for the fees and disbursements of a mediator appointed by the parties in terms of the proviso to clause 29(2)(a)(iii)? This should be clarified. It is suggested that the State (acting through the Department of Agriculture, Rural Development and Land Reform) should be responsible for the mediator's fees and disbursements. | (a) Transfer in this regard means to remove the matter from the Court roll and submit it to the appointed mediator for mediation. The registrar will retain the original court documents.  (b) Mediation is a process intended to amicably resolve the dispute between the parties. The settlement reached by the parties will settle the question of fees. Furthermore, in terms of clause 29(3)*(j)* the rules will make provisions for the fees to be paid. The Department cannot be liable for fees between private parties. |
| **Socio-Economic Rights Institute (SERI)**  It is proposed that amendments be made so that the remuneration of mediators be removed from the executive control and placed under judicial control. | The Minister has been assigned the duty to determine the remuneration of mediators for a long time, and this power does not interfere with or hamper the judicial independence. |
| **Legal Resources Centre**  (a) The registrar or an alternative administrative body should be able to refer parties to mediation, should they voluntarily choose this process.  (b) Clause 29(3) provides for the Rules to determine the fees payable for mediation. 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 will increase 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. Failure to properly cost the Bill, and budget for these expenses, will result in further delays in the process and frustrate parties that must undergo mediation. | (a) If parties decide to mediate, they can do so before they approach the Court. Therefore, the registrar need not be given this responsibility. If they decide to go for mediation after they have commenced proceedings in Court, they may request that the matter be stayed for mediation purposes.  (b) The costs of mediation will come from the parties themselves. If the matter is settled, there would be an agreement as to who is liable to refund the fees paid for mediation, and if the matter goes to Court, the party who is ordered to pay the costs will be liable for the costs of mediation, unless the Court orders otherwise. |
| **LAMOSA**  (a) It is submitted that what is missing from clause 29(2)*(a)*, which cannot be cured by regulations or rules, are specific provisions to enhance the legitimacy and status of mediation and ensuring that the mediation process and progress is monitored by the Land Court.  (b) It is proposed the addition of paragraph (2)*(a)*(iv) and sub-clause (11) as follows:  “(iv) directing that the terms of reference for the mediation be finalised by no later than a fixed date after the commencement of the mediation;  (v) directing the mediator to file a report with the Registrar on or before the first day of every month, detailing the progress made in the mediation process.  (11) If, at any stage during proceedings, but prior to judgment, it becomes evident to the presiding judge that there is an issue which requires further factual investigation by an independent fact finder, the presiding judge may order independent fact finding: Provided that the provisions of this section will apply where applicable to such fact finding.”. | (a) The submission is not clear as to how the legitimacy and status of mediation is not enhanced. Mediation, if Court ordered, is a separate process which should not be judicially interfered with by the Court. The Court gets involved if the matter is settled and it is agreed between the parties that settlement be made an order of Court.  (b) The proposals are not supported:  (iv) Clause 31(5) requires the mediator to deal with the matter expeditiously, but to fix the date for completion of mediation may unnecessarily interfere with the process.  (v) It is unnecessary to report to the Court as suggested as it would be burdensome to the mediator to report and to the judge to read the reports on progress made in relation to mediation. If mediation fails or succeeds, the matter will go to Court for adjudication or settlement agreement to be made an order of Court.  (11) The proposal is covered by section 38(1) of the Superior Courts Act which empowers the Court to appoint a referee to conduct an investigation on any matter arising from the proceedings before the Court. |
| **Clause 34: Transitional arrangements** | |
| **Land Claims Court**  (a) It is proposed the addition of clause 34(2)*(c)* to read: “Officers and staff of the Land Claims Court who were appointed on the date of the commencement of this Act shall become officers and staff of the Court.”.  (b) It is proposed the addition of clause 34(4) to read: “Until regulations are promulgated under section 12 and the Rules Board has made rules under section 29(3), the manner of appointments of assessors and mediators shall remain as provided for in the Restitution of Land Rights Act 22 of 1994.”. | (a) The proposal is not supported as capacitation of courts must be determined in line with existing norms and standards as with other high courts.  (b) The proposal is supported and consideration will be given to incorporating such a clause with necessary amendments to read: “Until the rules contemplated in section 29(3)*(a)* and the regulations contemplated in section 36(1)*(d)* have been made, mediators and assessors must be appointed in the manner provided for in the Restitution of Land Rights Act.”. |
| **Clause 35: Amendment of Laws** | |
| **Institute of Race Relations**  (a) Nine Acts are amended, to the extent set out in a Schedule to the Bill, so as to give the Court and Magistrates’ Courts concurrent jurisdiction over disputes arising in these spheres.  (b) 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 either exclusive jurisdiction on the Court, or concurrent jurisdiction to the Court and Magistrate’s Court [sic].’ | (a) and (b) Initially 33 principal Acts dealing with land matters have been identified during the development of the draft Bill. Only nine Acts have been included in the schedule to the Bill, ESTA being one of them, to be placed under the jurisdiction of the Court. An incremental approach will be adopted in terms of which other pieces of legislation will be amended, by the departments concerned, to ensure that the jurisdiction of the Court systematically expands. |
| **Clause 36: Regulations** | |
| **AfriForum**  A concern is expressed that clause 36(1)(h) and (i) is extremely wide and will allow the Minister to interfere with the processes of the Court. | It is submitted that paragraphs like sub-clause (1)(h) and (i) are standard in many pieces of legislation where a Minister is given the power to promote subordinate legislation. It should also be kept in mind that the Minister’s powers relate primarily to the administrative functioning of or administrative support to be afforded to the Court. The Minister may only make regulations within what is empowered in the Act, otherwise the regulations can be declared *ultra vires*. This is an established principle. |
| **Institute of Race Relations**  There is 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. | It is not necessary to specify the criteria for the appointment of assessors, as the regulations or rules will provide for that aspect. |
| **LAMOSA**  (a) It is proposed the addition of sub-clauses (3) and (4) in clause 37 to read:  “(3) The President must determine the dates referred to in subsection (2) on the recommendation of the Minister.  (4) The Minister will at least every six months report to Parliament on the proposed timetable for the amendment of each of the laws referred to in clause 35, and steps taken towards the implementation of such amendment. ”. | The proposal is not supported as it dilutes the power of the President to determine the commencement date. However, in practice, the President exercises the power to proclaim commencement dates for Acts of Parliament usually on advice of the Cabinet member who is responsible for the administration of the legislation concerned. The Acts listed in the schedule are administered by other Departments. This is a once-off amendment of those Acts. Future amendments of those Acts will be made the Minister of those Department and not of Justice. |
| **Schedule:** | |
| **LAMOSA**  It is submitted that the intention of the Bill is to bring 9 statutes under the jurisdiction of the Land Court, but there is no motivation for the inclusion of certain statutes and the exclusion of certain other statutes. There are four obvious candidates excluded from the list, being LTA, CSLA, TRANCRAA and PVA. There is no reason why their inclusion for amendment should have to await formal amendment of the Land Court Act and a lengthy parliamentary procedure to have them included in the schedule. | The intention is to not inundate the Court with many pieces of legislation all at once, especially when it is established for the first time. Other Acts may be included under the jurisdiction of the Court in due course, if so decided. Such inclusion will not be through the amendment of the Land Court Act, but the amendment of the relevant legislation to specifically give the Land Court jurisdiction over them. |
| **Land Claims Court**  Item 4 – Restitution Act  (a) It is proposed that as the Bill envisages the complete repeal of Chapter 3, it is necessary to retain:  (i) the existing rules that were regulated under s 32 of the Restitution Act; and  (ii) appointment of assessors and mediators under sections 27 and 35A of the Restitution Act at least until new rules are promulgated or other legislation is introduced specifically for mediation.  (b) An audit to ensure that everything that needs to be carried over to the Bill from Chapter Ill of the Restitution Act has been carried over.  Item 9 – PIE Act  (a) It is opposed the giving of the Land Court exclusive jurisdiction to deal with PIE evictions. The Court will not have the capacity and resources to adjudicate all the nationwide PIE cases currently adjudicated by the High Courts. If all these cases were to fall under the Court's jurisdiction, to the exclusion of the High Court, the Court would simply not be able to cope, and its workload would become dominated by PIE matters.  (b) This will severely compromise its capacity to deal with some 7000 restitution cases which the Land Claims Commission advises are to be referred to the Court, the many labour tenant cases and ESTA matters. The 5 Judges of the land Claims Court who will be judges of the Court at inception, and the court staff will simply not be able to take on the national load of High Court PIE cases.  (c) Litigants who would normally approach their high court would either have to travel to the Court in Randburg or the Court would have frequently to be on circuit to hear PIE matters leaving time for little else.  (d) It will be necessary to access court rooms across the country far more regularly and incur S&T allowances for judge and personnel. Most courts do not have court rooms to accommodate the Land Claims Court, functioning recording systems or rooms for judges and support staff. These problems would be tenfold if PIE were to be added to the already difficult logistics.  (e) It is strongly urged as a matter of extreme importance that the Court not be conferred PIE jurisdiction to the exclusion of the High Court. However, if Item 9 is not deleted in its entirety then the High Court should retain concurrent jurisdiction over PIE matters and section 34(5) should be inserted as follows: “The provisions of Item 9 of the Schedule insofar as it confers jurisdiction on the Court, shall only come into force on a date to be determined by the Minister in consultation with the Judge President of the Court and the Heads of Court. | (i) section 32 (dealing with Rules governing procedure) needs not be retained in the Restitution Act, as it is incorporated in the Bill as clause 14 (dealing with Rules governing procedure of Court)  (ii) This proposal is supported and consideration will be given to make provision for the appointment of mediators and assessors as in the Restitution Act until the rules and the regulations have been made. (See response to Land Claims Court under clause 34 above).  (b) The proposal in supported and will be followed.    (a) The Land Court will exercise concurrent jurisdiction with Magistrates’ Courts on PIE evictions. From the Magistrates’ Courts, PIE eviction matters will go to the Land Court by way of an appeal. To provide for concurrent jurisdiction of the Land Court and High Court in the Bill would inadvertently open doors for forum shopping.  (b) The Land Court will be capacitated with sufficient judges to deal with the case load of restitution, labour tenants and ESTA cases. In addition, the Bill provides for acting appointments of judges if there is sufficient reasons to do so. Shortage of capacity will be a sufficient reason to appoint acting judges. Criteria for capacitation has been set out in the regulations under section 49(1)*(b)* of the SCA.  (c) The Minister will in terms of clause 7(3)*(c)* appoint one or more places for the holding of the sittings of the Court.  (d) In addition to the powers given to the Minister under clause 7(3)*(c)*, the Judge President is empowered by clause 6(1) to hold a sitting of the Court elsewhere, than at the seat of the Court. The Bill is mindful of the need to capacitate that court or any place determined by the Judge President.  (e) Although the item grants the Land Court concurrent jurisdiction with the Magistrates’ Courts, the submission is supported as it would enable the stock-taking of the progress of the Court when it starts to operate, and determining a suitable date for the coming into operation of the provision. |

**Table 2: General comments**

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| **NAME OF INSTITUTION/INDIVIDUAL**  **COMMENTS/RECOMMENDATIONS** | **DoJ&CD RESPONSE** |
| **AfriForum**  AfriForum urges the NCOP to reject the Bill in that the Bill—  (a) represents a “disingenuous, costly, and potentially unconstitutional attempt” to address the adjudication of land-related disputes; and  (b) will not address the concerns associated with land restitution, the processing of claims and land reform. | (a) The approach that was decided on was to establish the Land Court in terms of its own dedicated legislation that will, in terms of the amendment of other principal Acts, eventually deal with all land related legislation as a specialist court, similar to the Labour Court.  (b) The biggest hurdle in land restitution matters is the lack of permanency of the Land Claims Court and lack of permanent judges. The Bill aims to remedy these hurdles by establishing a permanent court with sufficient capacity of judges to deal with all land related matters. |
| **Agri SA, Agri SA – Mpumalanga**  (a) Agri SA stands firm on the principle of full access to the courts to adjudicate on the merits of expropriation as well as the amount of compensation, should there be any dispute. The court should also determine any disputes on the validity of restitution and labour tenant claims and any ESTA disputes, where mediation has failed.  (b) Creating a new court will be an expensive exercise. It is important to be clear about the failings of the Land Claims Court and the reasons for that. It needs to be recognised that the slow pace of land reform is not caused by the Land Claims Court, but rather by poor implementation, inadequate budgets and corruption of land reform programmes.  (c) All cases previously adjudicated by the Land Claims Court and the Magistrates' Court under ESTA, and all cases adjudicated by the High Court and the Magistrates' Court under PIE, will now fall within the exclusive jurisdiction of the Land Court. This will result in a substantial increase of its case load.  (d) Every Act under which the Land Court will have jurisdiction confer powers on the Court which are relevant only to the Court's jurisdiction under that specific Act, and are not of general application provisions that are better placed in the enabling Act, and not incorporated into the Land Court Act. | (a) The submission is noted. In terms of section 34 of the Constitution everyone has right to approach the courts for resolution of any dispute that they may have. The Bill accords the Land Court jurisdiction to deal with disputes arising from the listed Acts.  (b) The Bill aims to establish a Land Court which will resolve the challenges experienced in the Land Claims Court. The challenges with the Land Claims Court are, *inter alia*, that it was not established as a permanent court, hence it was not fully capacitated with sufficient judges to manage the case load. The costs are warranted when viewed against the benefits.  (c) The Bill provides for the appointment of permanent judges of the Land Court, and this will enable the Court to manage the case load. The Minister is also empowered by clause 8(5) to appoint certain persons as acting judges of the Court in case of vacancy in the posts of judges, if there is sufficient reason to do so.  (d) The Bill contains provisions of general application, and provisions of specific application are contained in the legislation concerned. It is only clause 26(3) to (8) dealing with court orders on restitution matters that have been imported from the Restitution Act into the Bill. These provisions are orders of court which should ideally be in the Bill itself, and not the Restitution Act. |
| **Institute of Race Relations**  (a) Expresses the view that the Bill should be tagged as a section 76 and not a section 75. The institute argues, amongst others, that—  \* the Bill affects provinces;  \* provinces have a clear interest in land reform;  \* a section 75 Bill cannot amend legislation that were introduced as section 76 Bills.  (b) No SEIAS assessment of the Bill has been carried out. The final SEIAS report was not attached to the Bill. The final report helps to inform the public in order to identify the issues raised by the Bill. This fundamental shortcoming has eroded the constitutional right to appropriate public involvement in the legislative process. | (a) The approach during the introduction of the Bill into Parliament was to recommend that the Bill should be tagged as a section 75 Bill, in that it creates the Land Court to adjudicate disputes between parties. It is a Bill that relates substantively to the administration of justice which is not a provincial competence. The Bill does not amend provincial legislation. This view is supported by the Chief State Law Adviser.    (b) The Department has followed the necessary SEIAS protocols during the development of the Bill and received a final sign off. There is no requirement that the SEIAS report be attached to the Bill. Cabinet would also have not approved the introduction of the Bill in Parliament if there was no SEAIS report. |
| **Land Claims Court**  (a) In order to advance access to courts and justice, it is proposed that Parliament introduce a transfer (removal) power between the Land Court and Divisions of the High Court that can operate in either direction. The current absence of such a provision, equivalent to section 27 of the Superior Courts Act, can result in litigants erroneously instituting proceedings in either Court, and being non-suited as a result.  (b) At best proceedings need to be reinstituted in such cases, e.g. where prescription does not preclude this.  (c) In circumstances where both the High Court and the Land Court will inevitably enjoy multiple points of overlapping jurisdiction it is vital that litigants are able to procure a transfer of proceedings by removing matters to the suitable Court.  (d) In context of the Land Court it is proposed that the power should be exercisable not only on application but *mero motu*. Moreover it is important that the High Court can transfer Land Court matters to this Court.  (e) It is proposed the addition of a new subsection (section 33(2)) which states that when the Land Court exercises powers in terms of section 27 of the Superior Courts Act it may do so *mero motu*. This would be a simple solution and would simultaneously make it clear that those powers are now conferred on the Land Court. However, the difficulty would remain that a High Court requires the power to transfer.  (f) It accordingly may ultimately be necessary to introduce an amendment to section 27 of the Superior Courts Act 10 of 2013 by simply adding item 10 to the Schedule to the Bill. Whether the section would need to cater for a removal by a Land Court to a High Court depends on the legislature's intention in section 33 of the Bill. | (a) – (f) The proposal is not supported. Section 27 envisages a situation where the High Court ordinarily has jurisdiction to deal with the matter, which later transpires that it would be convenient to adjudicate that matter in another division. In terms of the Bill, a matter will be instituted in the Land Court where the disputer falls within the jurisdiction of the Land Court. A litigant who chooses a wrong forum will have to withdraw the matter and commence litigation out of the correct forum, rather than being able to transfer the matter to another court as proposed. The proposal will likely enable the transfer of matters from the High Courts to the Land Court, thereby flooding the Land Court, when those matters could still be dealt with by the High Court. This would not be an ideal situation. The schedule list all land related legislation over which the Land Court will exercise jurisdiction. The superior Courts Act cannot be listed there as suggested, as it establishes courts and does not regulate land. The proposal for removal of a matter from the Land Court to the High Court is not supported. |
| **Socio-Economic Rights Institute (SERI)**  (a) The Bill in its new form confers exclusive jurisdiction under both the Extension of Security of Tenure Act, 1997 (ESTA) and PIE on the Magistrates’ Courts and the Land Court, but to strip the High Court of the jurisdiction that it currently enjoys.  (b) It is proposed that there be automatic review by the Land Court of Magistrate’s Court eviction decisions under PIE. This would match the provision for automatic review under ESTA, which currently provides for automatic review of Magistrate’s Court eviction decisions by the Land Claims Court.  (c) It is proposed that the Bill be amended to provide the capacity to deal with PIE matters at High Court level. This can be done by retaining High Court jurisdiction in PIE matters for a transitional period until the Land Court has sufficient capacity (number of judges) to manage the massive PIE caseload currently borne by the High Court across the country, or by amending the Bill to guarantee the appointment of a sufficient number of dedicated Land Court judges, sitting across the country, to adjudicate PIE matters at first instance and on appeal or by providing for the appointment of a sufficient number of High Court judges, in every High Court division, as Land Court judges, so as to ensure sufficient capacity. | (a) The intention is to have the Land Court ultimately dealing with all land related matters. To retain the High Court jurisdiction does not give effect to that intention.  (b) The proposal is supported as it will be in line with the automatic appeal provisions (section 13(2)) under the Labour Tenants Act and the automatic review provisions (section 19(3)) under ESTA.  (c) The intention to have the Land Court ultimately dealing with all land related matters. To retain the High Court jurisdiction does not give effect to that intention, even on a temporary basis. The Court will be fully capacitated to deal with the caseload, and acting appointments can be made to deal with same if there is a need. |
| **Legal Resources Centre**  (a) It is submitted that the Memorandum on the Objects of the Bill contains a list of stakeholders consulted on the Bill, but the list does not include any representative body of Magistrates. It is suggested that given the expanded role of the Magistrates’ Courts, that Magistrates be consulted on the impact this would have on the functioning of such courts.  (b) All decisions taken by the Magistrates’ Courts must be subject to review by the Land Court and that all decisions taken in terms of ESTA be subject to automatic review, as currently required by ESTA. The Bill currently does not make any provision for review proceedings.  (c) The Arbitration clause that was in the previous version of the Bill has been removed in its entirety. It is submitted that arbitration itself would not have any negative impact on the functioning of the court. However, there were difficulties with the way in which the provisions dealing with Arbitration were articulated in the Bill.  (d) It is enquired as to whether there is any intention by the legislature to set up an administrative body to deal with arbitration proceedings for land matters at a later stage.  (e) It is submitted that there is no costing of the Bill that has been published for public comment. Neither has there been a Social and Economic Impact Assessment (SEIAS) Report which is required for all new legislation. Therefore, it is impossible to know if or how the Bill has been costed by Treasury so that it may be effectively implemented. | (a) The Bill does not expand the role of the Magistrates’ Courts as submitted. The role of these courts in relation to PIE and ESTA matters is as it currently is. The Bill was published in the *Gazette* for public comments, and was submitted directly to the Chief Justice as the head of the entire judiciary, and to the Magistrates Commission as the regulatory body of the Magistrates.  (b) The proposal is supported as it will be in line with the automatic appeal provisions (section 13(2)) under the Labour Tenants Act and the automatic review provisions (section 19(3)) under ESTA.  (c) Many comments that were received at that stage were opposed to the arbitration clause, as a result of which the Department decided to delete the clause in its entirety. The main concerns against arbitration was that the arbitration clause empowered the Judge President to direct the parties to resolve their disputes through arbitration, and that was unconstitutional as it interferes with the parties’ rights to access to the court.  (d) The arbitration clause was deleted to let the parties decide if they prefer to go for voluntary arbitration before going to court.  (e) The Bill has been costed and the Department followed the necessary SEIAS protocols during the development of the Bill and received a final sign off. |
| **LAMOSA**  (a) It is proposed that, in pursuit of the purpose of the Bill, Parliament must also consider the impact of other statutes that bear on disputes relating to land reform and their resolution. These include MPRDA, Traditional Leadership and Governance Framework Act, Government Immovable Asset Management Act No 19 of 2007 (GIAMA) and SPLUMA.  (b) The Land Court’s jurisdiction must prevail even if recalcitrant respondents claim that they rely on rights and interests afforded by statutes not ordinarily classified as land reform statutes listed in the schedule.  (c) It is proposed the insertion of a full new Chapter in the Bill headed “POSITIVE OBLIGATIONS TO PROMOTE LAND REFORM”. The chapter is proposed to have clauses dealing with the duty and responsibility that the State has to promote and achieve land reform, and that all persons have a duty and responsibility to promote land reform, that Minister must, where necessary with the assistance of the Minister responsible for DALRRD and the relevant constitutional institutions develop and implement awareness and implementation programs to promote land reform and the dispute resolution instruments in the Bill.  (d) A SEIAS report was dearly needed for Parliament to adequately prepare for a Bill deserving of the land reform imperative in our constitution. It remains a mystery why the DoJ did not prepare the necessary instrument for the Parliamentary process and the public. | (a) The Bill cannot deal with the substance that is regulated by these Acts, as it only establishes a Court that will be interpreting the provisions of those Acts, once the Court is given jurisdiction in respect thereof.  (b) The Court has jurisdiction over the Acts listed in the schedule or that are later placed under the jurisdiction of the Court. However, clause 24(1)*(c)* enables the Court to decide any issue in terms of any other law, which is not ordinarily within its jurisdiction but is incidental to an issue within its jurisdiction, if the Court considers it to be in the interests of justice to do so.  (c) The chapter that is proposed is not for incorporation in the Bill as it deals with the substance of the land reform programme, which belong to land related legislation and not this Bill that establishes a Court to adjudicate disputes emanating from that land reform legislation.  (d) The Department followed the necessary SEIAS stages during the development of the Bill and received a final sign off. |
| **Cilliers & Gildenhuys, Institute of Race Relations**  (a) It is submitted that the proposed Bill has been erroneously tagged under section 75 of the Constitution when the Bill must be classified under section 76 of the Constitution. This is because the Bill clearly affects provinces. | (a) The approach during the introduction of the Bill into Parliament was to recommend that the Bill should be tagged as a section 75 Bill, among others, in view thereof that the Bill aims to create the Land Court which aims to adjudicate disputes between parties, among others, by introducing a Bill that relates substantively to the administration of justice which is not a provincial competence. The Bill does not amend provincial legislation. This view is supported by the Chief State Law Adviser. The test for tagging has been explained in the ***Tongoane[[1]](#footnote-1)*** judgment. |

1. The crux of tagging has been explained by the courts, especially the Constitutional Court in the case of *Tongoane and Others v Minister of* *Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC). The Court, in its judgment, stated as follows:

   ‘‘**[58]** What matters for the purpose of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill ‘‘in substantial measure fall within a functional area listed in schedule 4’’. This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this court to characterise a Bill in order to determine legislative competence. This ‘‘involves the determination of the subject matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about.

   **[60]** The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.”. [↑](#footnote-ref-1)