



MEMORANDUM

To: **Mr A Masondo, MP**
Chairperson of the NCOP

Ms S Shaikh, MP
Chairperson of the Select Committee on Security and Justice

Copy: **Joint Tagging Mechanism**

Mr X George
Secretary to Parliament

From: **Adv Z Adhikarie**
Chief Parliamentary Legal Adviser
Constitutional and Legal Services

Date: **11 November 2022**

Lit Ref No: **201/2022**

Subject: **Public Submission Questioning Tagging of the Land Court Bill**

INTRODUCTION

1. The Constitutional and Legal Services Office ('our Office') has been requested to provide an opinion in response to a public submission received challenging the tagging of the Land Court Bill [B11 – 2021] ('the Bill').

LEGAL QUESTION

2. Our Office has been asked to provide guidance on the following: Was the Land Court Bill correctly tagged as a section 75 Bill?

BACKGROUND

3. The Bill was introduced in the National Assembly as a proposed section 75 by the Minister of Justice and Correctional Services on 19 May 2021. It was subsequently tagged by the Joint Tagging Mechanism ('the JTM') as a section 75 Bill due to the content of the Bill not substantially speaking to matters that impact on areas reflected in Schedule 4 of the Constitution of the RSA, 1996. (A copy of the original tagging opinion to the JTM is attached for ease of reference.)
4. This decision of the JTM was informed by the fact that the Bill is aimed at streamlining the legislation as far as it relates to the jurisdiction of various judicial fora (namely the Land Claims Court, which shares jurisdiction with the Magistrates' Courts) that can consider land related matters. The Bill accordingly seeks to allow for land related matters to be brought the Land Court. The Bill also addresses the lack of permanency of judges dealing with land related matters in the relevant fora, as well as the lack of permanency of the Land Claims Court itself. These administrative issues have resulted in the slow finalisation of matters, resulting in a backlog.
5. The Bill seeks to address these issues by establishing a Land Court, Land Court of Appeal and dispute resolution mechanisms to deal with land related matters. As such the content of the Bill speaks to the following:
 - a. establishes and sets out the jurisdiction the Land Court and Land Court of Appeal;
 - b. allows for the appointment of judicial officers, with relevant clauses addressing issues of tenure, remuneration and conditions of service as applicable to Judges of the High Court;

- c. allows for the appointment of assessors;
 - d. aligns the Bill with the Superior Courts Act on the issue of the institution of proceedings;
 - e. provides for the rules of the court and legal representation, to allow for the provisions of the Superior Courts Act and the Uniform Rules of Court to find application unless regulations provide otherwise;
 - f. provides for intervention applications, self-representation and referral to Legal Aid, as well as related funding through money appropriated by Parliament for that purposes;
 - g. addresses rules relating to the securing of witnesses and evidence, including admissibility of evidence;
 - h. provides for the Court to, at any stage, stay proceedings if mediation or arbitration is required, as well as making provision for such mediation and arbitration process and the settlement agreements that may result; and
 - i. addresses general provisions applicable to the establishment of the courts, namely matters regarding finance and accountability, regulations transitional arrangement and the incidental amendment of laws in the Schedules.
6. The Portfolio Committee on Justice and Correctional Services made amendments to the Bill as introduced and adopted an amended Bill on 20 September 2022. The B-Bill was read a second time by the National Assembly on 27 September 2022 and the B-Bill was accordingly passed.
 7. The Bill was subsequently transmitted to the National Council of Provinces for concurrence and referred to the Select Committee on Security and Justice ('the Select Committee') for consideration and support.

8. The Select Committee received a briefing on the Bill by the Department of Justice and Correctional Services on 12 October 2022, and called for public submissions, which call for submissions closed on 11 November 2022.
9. One of the submissions ('the Submission') so received is that of the South African Institute of Race Relations, as represented by Cilliers and Gildenhuys Attorneys, who object to the tagging of the Bill and argues that due to the content of the Bill it should be processed in terms of section 76. (A copy of the Submission is attached for ease of reference.)

OVERVIEW OF TAGGING CHALLENGE

10. The Submission sets out the following claims in support of the argument that the Bill should be tagged as a section 76 Bill:
 - a. "[P]rovinces have a clear constitutional interest in land reform", placing reliance on the general constitutional provisions of sections 7(2) and 8(1) calling on the State to promote the Bill of Rights, as well as section 25(5) of the Constitution which places an obligation on the State to take reasonable legislative and other measures to enable access to land on an equitable basis.¹
 - b. "[A]griculture, housing, regional planning and development, and urban and rural development are functional areas of concurrent national and provincial legislative competence under Schedule 4 of the Constitution" and "[p]rovincial planning is a functional area of exclusive provincial legislative competence under Schedule 5". Within this context, "[l]and reform interlinks with each of these functional areas".²
 - c. The Bill brings 'substantive changes to the legislative environment surrounding land reform, inserts the proposed Land Court in the place of the old Land Claims Court and the ordinary High Court when it comes to

¹ See paragraph 5 of the Submission.

² See paragraph 6 of the Submission.

land reform and related matters like restitution, evictions, and expropriations' resulting in the proposed court playing 'a decisive role in how land reform is approached in South Africa in future.'³

- d. The Bill should be tagged as a section 76 Bill as the Bill, through its schedule, seeks to amend legislation which were processed as section 76 Bills: Community Property Association Act, Upgrading of Land Tenure Rights Amendment Act, Kwa-Zulu Natal Ingonyama Trust Act and Restitution of Land Rights Act.

LEGAL ADVICE

- 11. **The Bill does not seek to give effect to section 25 of the Constitution**, as it does not contain any provision that puts in place requirements or conditions for equitable access to land. The Bill deals with the regulation of administrative consideration relating to the setting up and regulation of court structures. Even if such a connection between the Bill of Rights and the Bill could be made, it does not place the Bill within the ambit of subsections 76(3) and (4), which limits the areas of consideration that would render a Bill subject to a section 76 process. Section 76(3) of the Constitution, reads as follows:

“(3) A Bill must be dealt with in accordance with the procedure established by either subsection (1) or subsection (2) if it falls within a functional area listed in Schedule 4 or provides for legislation envisaged in any of the following sections:

- (a) Section 65(2);
- (b) section 163;
- (c) section 182;
- (d) section 195(3) and (4);
- (e) section 196; and
- (f) section 197.

³ See paragraph 7 of the Submission.

- (4) A Bill must be deal with in accordance with the procedure established by subsection (1) if it provides for legislation—
- (a) envisaged in section 44(2) or 220(3); or
 - (b) envisaged in Chapter 13, and which includes any provisions affecting the financial interest of the provincial sphere of government.”⁴

12. From the above quoted provisions, it is clear that reliance placed on sections 7, 8 and 25 of the Constitution in the Submission is therefore misplaced.
13. As to **the argument that land reform consideration triggers and interlinks areas set out in Schedules 4** (agriculture, housing, regional planning and development, urban and rural development) **and 5** (provincial planning) of the Constitution, that is similarly **misplaced, as it is clear from** the above outline of **the Bill’s aim and content that it does not address any of these issues in a substantial measure** (which is the standard applied when considering a Bill for purposes of tagging). Even if the argument could be made that the provisions of the Bill could have a knock on effect on land reform, such is not relevant for purposes of tagging, as was made clear in the case of *Democratic Alliance v President of South Africa and Other*.⁵ The Court in that matter clarified that the substantial measure analyses approach confirmed by the Constitutional Court in *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*⁶ did not carry the intention of adopting a test for tagging that includes an enquiry into knock-on effects.
14. Similarly, **the fact that the Bill aims to replace the Land Claims Court with the Land Court, does not in a substantial measure affect the interest of provinces reflected in schedule 4**. The argument as to a possible knock-on effect (in that the Land Court will play a decisive role in land reform in the exercise of its jurisdiction), falls outside the test for tagging, as explained above.

⁴ Underlining added for emphasis.

⁵ 2014 (4) SA 402 (WCC) at paras 76 – 86.

⁶ 2010 (8) BCLR 741 (CC) at par 72.

15. The amendments to other legislation reflected in the schedule of the Bill affects consequential technical amendments, and does not deal with any substantive consideration of land restitution. **The argument that the Bill should be tagged as a section 76 Bill as the Bill, through its schedule, seeks to amend legislation which were processed as section 76 Bills is misplaced** and based on a misunderstanding of the impact of the amendments reflected in the schedule of the Bill.
16. It must be emphasised **that the provisions of the Bill** (including the amendments envisaged to other pieces of legislation through the schedule of the Bill) **is aimed at creating the Land Court and putting in place the administrative structures required** to allow that court (and the associated appeal court) to function within the justice system. **It does not in a substantial measure impact on the interest of provinces as per the parameters set out in subsections 76(3) or (4).** It can further be noted that the Bill does not require the provinces to provide any funding or resources for the establishing of the Land Court and Land Court of Appeal, nor does it add to or diminish the obligation of provinces.

CONCLUSION

17. Our Office respectfully disagrees with the proposition that the Bill should be processed in terms of section 76. In our opinion the tagging of the JTM of the Bill as a section 75 Bill is correct.



Adv Z Adhikarie

Chief Parliamentary Legal Adviser



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

LEGAL SERVICES

PO Box 15 Cape Town 8000 Republic of South Africa
Tel: 27 (21) 403 2911
www.parliament.gov.za

Tel: (021) 403-2626
Direct: (021) 403-8305
Fax (021) 403-3888
E-mail: snjikel@parliament.gov.za

TAGGING OPINION
[Confidential]

TO: Joint Tagging Mechanism

COPY: Ms PN Tyawa
Acting Secretary to Parliament

FROM: Constitutional and Legal Services Office

DATE: 04 June 2021

REF: B11—2021

SUBJECT: RECOMMENDATION ON THE CLASSIFICATION OF THE LAND
COURT BILL B11—2021

Message: Attached please find a tagging recommendation memorandum
for your attention



Adv. Z Adhikarie
Chief Parliamentary Legal Advisor

CLASSIFICATION OF THE LAND COURT BILL B11—2021

LEGAL OPINION

1. The Land Court Bill B11—2021 ('the Bill') was introduced as a proposed section 75 Bill.
2. In terms of Joint Rule 160(1), when a bill is introduced, it must be referred to the Joint Tagging Mechanism (JTM) for classification. A bill may be classified as a constitutional amendment bill, section 75, section 76 or money bill. The Constitution of the RSA, 1996 ('the Constitution') stipulates that section 75 deals with the legislative process relating to ordinary bills and section 76 with that of ordinary bills *affecting* provinces.
3. In *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*¹ the Constitutional Court determined that, in deciding which process is to be followed, one must consider not a bill as a whole, but the provisions of a bill in relation to the area of impact. Consequently, the Constitutional Court indicated that the test for tagging should be informed by its purpose and articulated the **substantial measure** test, in terms of which –

"any Bill whose provisions substantially affect the interest of the provinces must be enacted in accordance with the procedure stipulated in section 76... Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3)(a)-(c),² and second by whether the provisions of a Bill in

¹ 2010 (8) BCLR 741 (CC).

² These include decisions where the Constitution so specifies (section 65), matters of organised local government (section 163), functions of the Public Protector (section 182), basic values and principles governing the public administration, the Public Service Commission (section 196), and the public service (Section 197).

substantial measure fall within a [Schedule 4] concurrent provincial legislative competence.”³ [Emphasis added]

4. In *Democratic Alliance v President of South Africa and Others*⁴ the High Court, with due regard to the *Tongoane*-judgement, elucidated that –

*“Tagging is concerned with the extent of the voice that the provinces have on the content of legislation... Tongoane was **not** intending to adopt, as a test for tagging, **an enquiry into knock-on effects**... the court was not intending to say that a bill whose provisions regulate matters falling within Parliament’s exclusive legislative competence (i.e. matters outside of both Schedules 4 and 5) must be tagged in terms of section 76 if the implementation of that legislation will give rise to knock-on effects on matters which provinces can regulate in terms of Schedule 4. In context, **the substantial effects contemplated in Tongoane have reference to the extent to which the provisions of the legislation actually regulate a functional area listed in Schedule 4**... one examines the provision of the bill to see what they actually regulate; if any of the provisions regulate Schedule 4 functional areas, **a value judgment must be made as to whether they do so in substantial measure.**”⁵ [Emphasis added]*

The Land Court Bill is pursuant to section 25 of the Constitution which provides that –

- (a) The State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis; and
- (b) The State must take legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination.

³ *Tongoane* 2010 (8) BCLR 741 (CC) at par 72.

⁴ [2014] 2 All SA 569 (WCC).

⁵ *Democratic Alliance* [2014] 2 All SA 569 (WCC) at paras 76 – 86.

5. The Bill seeks to provide for —
- a. the establishment of a Land Court and a Land Court of Appeal;
 - b. the administration and judicial functions of the Land Court and Land Court of Appeal;
 - c. budgetary matters;
 - d. the exclusive jurisdiction of the Land Court and Land Court of Appeal for certain matters;
 - e. mediation and arbitration procedures; and
 - f. to amend certain laws relating to the adjudication of land matters by other courts; and provide for matters connected therewith.
6. In considering the purpose and effect of the Bill's provisions, our Office is in agreement with the recommendation of the Department of Justice & Correctional Services and the view of Office of the State Law Adviser ('OCSLA') that the Bill be dealt with in accordance with the procedures set out in section 75 of the Constitution, as it does not—
- a. fall within the context of section 76(3) of the Constitution; and
 - b. contains no provisions that in a substantial measure fall within a Schedule 4 concurrent provincial legislative competence, and therefore, carries no risk of implications for the provinces.
7. Our Office further finds that the Bill contains provisions pertaining to customary law or customs of traditional and Khoi-San communities and therefore must be referred to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)(a) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019).
8. The Bill is constitutionally and procedurally in order within the meaning of Joint Rule 161.


CLASSIFICATION RECOMMENDATION

9. Our Office recommends that the JTM finds that—
- a. In terms of Joint Rule 160(3), the Bill—

- i. is a section 75 Bill.
- ii. includes no provision to which the procedure prescribed in section 76 of the Constitution applies; and
- iii. is constitutionally and procedurally in order.

b. In terms of Joint Rule 160(5A) the Bill contains provisions pertaining to customary law or customs of traditional or Khoi-San communities in accordance with section 39(1)(a) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019); and

c. In terms of Joint Rule 160(6) the Bill is classified as a section 75 Bill.



ADV Z ADHIKARIE
CHIEF PARLIAMENTARY LEGAL ADVISER

04 June 2021

RECOMMENDATION TO CLASSIFY AS A SECTION 75 BILL AGREED TO:



SPEAKER OF THE NATIONAL ASSEMBLY

08. 06. 2021

DATE

CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES

DATE

DEPUTY SPEAKER OF THE NATIONAL ASSEMBLY

DATE

**DEPUTY CHAIRPERSON OF THE NATIONAL COUNCIL
OF PROVINCES**

DATE

- i. is a section 75 Bill.
 - ii. includes no provision to which the procedure prescribed in section 76 of the Constitution applies; and
 - iii. is constitutionally and procedurally in order.
- b. In terms of Joint Rule 160(5A) the Bill contains provisions pertaining to customary law or customs of traditional or Khoi-San communities in accordance with section 39(1)(a) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019); and
- c. In terms of Joint Rule 160(6) the Bill is classified as a section 75 Bill.




ADV Z ADHIKARIE
CHIEF PARLIAMENTARY LEGAL ADVISER

04 June 2021

RECOMMENDATION TO CLASSIFY AS A SECTION 75 BILL AGREED TO:

SPEAKER OF THE NATIONAL ASSEMBLY

DATE



CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES



DATE

DEPUTY SPEAKER OF THE NATIONAL ASSEMBLY

DATE

DEPUTY CHAIRPERSON OF THE NATIONAL COUNCIL
OF PROVINCES

DATE

Our ref: Gildenhuys/MAT1008

Your ref: -

07 November 2022

CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCE

Mr Nkosiyakhe Amos Masondo

By email: ljiyane@parliament.gov.za
mphindela@parliament.gov.za
chairpersonsoffice@parliament.gov.za

Dear Mr Masondo,

**SOUTH AFRICAN INSTITUTE OF RACE RELATIONS // NATIONAL COUNCIL OF PROVINCES – THE
ERRONEOUS CLASSIFICATION OF THE LAND COURT BILL AS A SECTION 75 BILL**

1. We confirm that we act on behalf of the South African Institute of Race Relations (“our client”) who has instructed us to direct this letter to you. The South African Institute of Race Relations is an advocacy organisation, founded in 1929, that advocates for individual liberty, limited government, and the rule of law.
2. This letter is directed to the National Council of Provinces (hereafter “the NCOP”) as well as the NCOP’s Committee on Justice and Security. Moreover, this letter is sent on behalf of our client’s members as well as in the public interest.
3. We write to you regarding Land Court Bill (“the Bill”) which was recently passed in the National Assembly, and which has now been sent to the National Council of Provinces.
4. After careful study of the applicable law, our client has concluded that the proposed Land Court Bill (B11-2021) has been erroneously classified (“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.

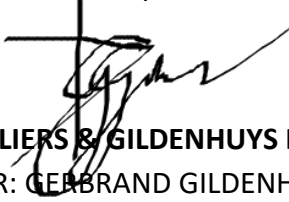
5. Our client submits that provinces have a clear constitutional interest in land reform. Section 8(1) of the Constitution provides that all organs of State (including provincial governments) are bound by the Bill of Rights, in turn providing in section 7(2) that the State *“must respect, protect, promote and fulfil the rights in the Bill of Rights.”* Section 25(5) of the Constitution, the provision dealing with the right to property, provides that the State (including provincial governments) *“must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”*
6. Furthermore, agriculture, housing, regional planning and development, and urban and rural development are functional areas of concurrent national and provincial legislative competence under Schedule 4 of the Constitution. Provincial planning is a functional area of exclusive provincial legislative competence under Schedule 5. Land reform interlinks with each of these functional areas. It is clear that land reform cannot be laid exclusively at the feet of the central national government. It is a matter in which South Africa’s provinces have a clear constitutional interest.
7. The Land Court Bill, among other substantive changes to the legislative environment surrounding land reform, inserts the proposed Land Court in the place of the old Land Claims Court and the ordinary High Court when it comes to land reform and related matters like restitution, evictions, and expropriation. The proposed court will play a decisive role in how land reform is approached in South Africa in the future.
8. Our client submits that the Land Court Bill should correctly be tagged and/or classified as a section 76 Bill due to the following considerations:
 - 8.1. The Land Court Bill amends the Community Property Associations Act to insert the Land Court into the definition of “Court” in that Act. When the Community Property Associations Amendment Bill of 2017 was adopted, it was tagged as a section 76 bill.

- 8.2. The Land Court Bill amends the Upgrading of Land Tenure Rights Amendment (hereafter “the ULTRA Act”) Act to insert the Land Court into the definition of “Court” in that Act, it shifts the jurisdiction to resolve any dispute arising from application of the ULTRA Act to the Land Court, and causes calls for court orders of compliance in relation to the ULTRA Act to be made not to Magistrates courts, but instead to the Land Court. The ULTRA Act was amended in 2021, once again, tagged under Section 76.
- 8.3. The Land Court Bill amends the Kwa-Zulu Natal Ingonyama Trust Act (1994), by placing disputes that arise from the latter under the jurisdiction of the Land Court. In this instance the Bill affects traditional leadership structures in particular provinces and therefore in this instance the KwaZulu-Natal province in particular has an interest in the Bill.
- 8.4. Additionally, the Restitution of Land Rights Act established the Land Claims Court in 1995. The Land Claims Court is to be replaced by the Land Court if the Land Court Bill is adopted. The Restitution of Land Rights Amendment Bill of 2014 was tagged as a section 76 bill. This means that the Land Court bill, which affects the same points of interest, must also be tagged as a section 76 bill.
- 8.5. It is worth noting that the Restitution of Land Rights Amendment Bill was challenged in the Constitutional Court, which delivered judgment in *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* 2016 (5) SA 635 (CC). In that judgment, the Court held that the National Council of Provinces had failed to adhere to the requisite public participation prescripts in the Constitution. The result was that the Amendment Bill could not become law.

9. It would likewise be inappropriate for the Land Court Bill which changes the legislative and judicial environment around land reform which was in the first instance set in place by a variety of section 76 bills, to be adopted according to a section 75 procedure. Since it was necessary to amend the Land Rights Amendment Act dealing with the Land Claims Court with a section 76 bill the Land Claims Court cannot be abolished with a section 75 bill. The attitude of the Constitutional Court to following the proper constitutional process for adopting legislation is clear and commands respect.
10. Given these realities, it cannot be maintained that the Land Court Bill is an “*ordinary bill not affecting provinces*” in terms of section 75 of the Constitution. The Bill is manifestly an “*ordinary bill affecting provinces*” in terms of section 76.
11. It is not merely of cosmetic significance to be correct in the tagging of bills. Depending on how a bill is tagged, a substantively different process must take place in the National Council of Provinces. For section 75 bills, delegates in the National Council vote as (90) individuals, whereas for section 76 bills, delegates vote as (9) provincial delegations. Different procedures also apply where the National Council makes amendments to section 76 bills, as opposed to section 75 ones. Furthermore, the public consultation process is tainted if the public are misled into believing that a particular bill does not affect provinces when in fact it does. Public participation is predicated on the public having been properly informed on the nature of the bill to which they are responding.
12. Our client submits that the Bill does not merely contain “knock-on effects” which affect provinces, but rather substantive issues which directly impact provinces and their ability to fulfil their constitutional obligations. Moreover, our client submits that it would be prudent to rather err on the side of caution and recommend a reclassification of the Bill as a Section 76 bill.

13. The IRR urges the NCOP to send the Bill back for reclassification in the interest of constitutional compliance and reserves its right to seek a judicial remedy should the respondents fail to do so.
14. We look forward to hearing from you in this regard.
15. Our client's rights remain reserved.

Yours sincerely,



CILLIERS & GILDENHUYS INC

PER: GERBRAND GILDENHUYS

CC: Deputy Chairperson of the National Council of Provinces

Email: zdebruyn@parliament.gov.za

CC: Chairperson of the National Council of Provinces Committee on Security and Justice

Email: gdixon@parliament.gov.za

zrento@parliament.gov.za

LandCourtBill11Bof2021@parliament.gov.za

sshaikh@parliament.gov.za

CC: NCOP Select Committee on Security and Justice

Email: carinvisser@sannieshof.com

georgem@da.org.za

motsamaikenny1963@gmail.com

isileku@parliament.gov.za

clabuschagne@parliament.gov.za

hboshoff@parliament.gov.za

CC: Speaker of the National Assembly

Email: speaker@parliament.gov.za

mxaso@parliament.gov.za

vabrahams@parliament.gov.za

CC: Deputy Speaker of the National Assembly

Email: pmasiza@parliament.gov.za

zngoma@parliament.gov.za