

REPUBLIC OF SOUTH AFRICA

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# LAND COURT BILL

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*(As amended by the Portfolio Committee on Justice and Correctional Services  
(National Assembly))*

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**[B 11B—2021]**

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## GENERAL EXPLANATORY NOTE:

[                    ]     Words in bold type in square brackets indicate omissions from existing enactments.

\_\_\_\_\_                Words underlined with a solid line indicate insertions in existing enactments.

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# BILL

**To provide for the establishment of a Land Court and appeals against decisions of the Land Court; to make provision for the administration and judicial functions of the Land Court; to provide for the concurrent jurisdiction of the Land Court and Magistrates' Courts for certain land related matters; to provide for mediation procedures; to amend certain laws relating to the adjudication of land matters by other courts; and to provide for matters connected therewith.**

## PREAMBLE

**NOTING THAT** section 25 of the Constitution of the Republic of South Africa, 1996, which is enshrined in the Bill of Rights—

- (a) obliges the State to 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) envisages the State taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination;

**AND NOTING THAT** section 34 of the Constitution of the Republic of South Africa, 1996, accords everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum;

**NOTING FURTHER THAT** section 7 of the Constitution of the Republic of South Africa, 1996—

- (a) proclaims that the Bill of Rights is a cornerstone of democracy in South Africa and that it enshrines the rights of all people in the country and affirms the values of human dignity, equality and freedom;
- (b) obliges the State to respect, protect, promote and fulfil the rights in the Bill of Rights;

**AND ALSO NOTING THAT** section 166(e) of the Constitution of the Republic of South Africa, 1996, recognises courts established in terms of an Act of Parliament with a status similar to either the High Court of South Africa or the Magistrates' Courts;

**AND RECOGNISING THAT** with the advent of the democratic constitutional dispensation in 1994, South Africa inherited a fragmented, unequal and divisive dispensation relating to all aspects of land, which was derived from our colonial history and further structured to serve the segregation objectives of the apartheid dispensation;

**AND SINCE** land reform initiatives to address the destructive impact of colonialism and apartheid have not progressed at the desired pace, sometimes giving rise to expensive and protracted litigation, to the detriment of the poorest of the poor and most vulnerable in society;

**AND SINCE THEREFORE IT IS** necessary that land reform in its entirety be accelerated in a lawful and equitable manner, guided by progressive jurisprudence;

**AND SINCE IT IS FURTHERMORE** necessary and desirable that there should be specialised, well-resourced, accessible and streamlined adjudication structures in place with the institutional, transformative and social justice wherewithal in land matters, in order to enhance and promote fairness and equity at all stages of the adjudication processes before and during court proceedings.

**P**ARLIAMENT of the Republic of South Africa enacts, as follows:—

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## SCHEDULE

Laws amended.

### CHAPTER 1

#### DEFINITIONS, PURPOSE AND OBJECTS

|  |    |
|--|----|
| <b>Definitions</b>   | 5  |
| <p><b>1.</b> In this Act, unless the context indicates otherwise—</p>  |    |
| <p>“<b>claim</b>” means—</p>   |    |
| <p>(a) any claim for restitution of a right in land lodged with the Commission; or</p>   |    |
| <p>(b) any application lodged with the registrar of the Court for the purpose of claiming restitution of a right in land,</p>  | 10 |
| <p>in terms of the Restitution of Land Rights Act;</p>   |    |
| <p>“<b>claimant</b>” means any person who has lodged a claim in terms of the Restitution of Land Rights Act;</p>   |    |
| <p>“<b>Commission</b>” means the Commission on Restitution of Land Rights established by section 4 of the Restitution of Land Rights Act;</p>  | 15 |
| <p>“<b>Constitution</b>” means the Constitution of the Republic of South Africa, 1996;</p>   |    |
| <p>“<b>Court</b>” means the Land Court established by section 3;</p>   |    |
| <p>“<b>day</b>” means a day that is not a public holiday, Saturday or Sunday;</p>  |    |
| <p>“<b>dispute</b>” means a dispute arising from a matter in respect of which the Court has jurisdiction, and includes an alleged dispute;</p>   | 20 |
| <p>“<b>full court</b>” means a court consisting of three judges of the Court;</p>  |    |
| <p>“<b>High Court</b>” means the High Court of South Africa referred to in section 6(1) of the Superior Courts Act;</p>  |    |
| <p>“<b>Judicial Service Commission</b>” means the Judicial Service Commission contemplated in section 178 of the Constitution;</p>   | 25 |
| <p>“<b>Magistrate’s Court</b>” means any court established in terms of section 2 of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944);</p>  |    |
| <p>“<b>Minister</b>” means the Cabinet member responsible for the administration of justice;</p>   |    |
| <p>“<b>prescribed</b>” means prescribed by regulation;</p>   |    |
| <p>“<b>President</b>” means the President of the Republic;</p>   | 30 |
| <p>“<b>registrar</b>” means the registrar of the Court contemplated in section 11, and includes the assistant registrar;</p>   |    |
| <p>“<b>Restitution of Land Rights Act</b>” means the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994);</p>  |    |
| <p>“<b>rules</b>” means the applicable rules of the Court;</p>   | 35 |
| <p>“<b>Rules Board</b>” means the Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985);</p>   |    |
| <p>“<b>Superior Courts Act</b>” means the Superior Courts Act, 2013 (Act No. 10 of 2013);</p>  |    |
| <p>and</p>   |    |
| <p>“<b>this Act</b>” includes any regulation.</p>  | 40 |
| <b>Purpose and objects of Act</b>  |    |
| <p><b>2.</b> (1) The purpose of this Act is to enhance and promote the ideal of access to land on an equitable basis, promote land reform as a means of redressing the results of past discrimination and facilitate land justice.</p> |    |
| <p>(2) In fulfilling the purpose of this Act as contemplated in subsection (1), the objects of this Act are to—</p>  | 45 |
| <p>(a) establish a Court with jurisdiction to grant any order, appropriate relief or impose any sanction, as provided for in this Act or any other law that confers jurisdiction on the Court;</p>                                     |    |
| <p>(b) establish an appeal process to hear and determine appeals emanating from the judgments and orders of the Court; and</p>   | 50 |
| <p>(c) provide for mediation.</p>  |    |

## CHAPTER 2

### ESTABLISHMENT, COMPOSITION, SEAL, SEAT AND JURISDICTION OF COURT

#### Establishment of Court

3. (1) The Land Court is hereby established as a court of law and, in relation to matters arising from the application of the Restitution of Land Rights Act or any other legislation expressly providing therefor, as a court of law and equity. 5

(2) The Court—

- (a) is a Superior Court that has the authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a Division of the High Court of South Africa has in terms of the Superior Courts Act in relation to matters under its jurisdiction; 10
- (b) is a court of record and all hearings in the Court must, except in so far as the Court may in special cases direct otherwise, be conducted in an open court; and 15
- (c) decisions are a matter of public record on the same basis as decisions of a High Court.

#### Composition of Court

4. (1) The Court consists of—

- (a) a Judge President; 20
- (b) a Deputy Judge President; and
- (c) so many other judges as may be determined in accordance with the prescribed criteria, and approved by the President.

(2) A hearing before the Court must be before a single judge, unless the Judge President of the Court decides to the contrary. 25

#### Seal of Court

5. (1) The Court, for use as occasion may require, must have an official seal of a design determined by the President by proclamation in the *Gazette*.

(2) The registrar of the Court must keep custody of the official seal of the Court.

#### Seat of Court 30

6. (1) The seat of the Court is in Johannesburg, but whenever it appears to the Judge President that it is expedient or in the interests of justice to hold its sitting for the hearing of any matter at a place elsewhere than at the seat of the Court, it may hold such sitting at that place.

(2) The Court may sit in as many separate courts as the available judges may allow. 35

#### Jurisdiction of Court

7. (1) Subject to the Constitution, and except where this Act 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. 40

(2) The Court has jurisdiction in the area of jurisdiction of each Division of the High Court.

(3) The Minister, after consultation with the Chief Justice for the purposes of adjudicating land disputes, by notice in the *Gazette*— 45

- (a) may define a specific area of jurisdiction of each Court, if the need so arises;
- (b) may increase or reduce the area of jurisdiction of each Court referred to in paragraph (a), when necessary to do so;
- (c) must appoint one or more places within the area of jurisdiction of the Court for the holding of sittings of the Court, other than the seat of each Division of the High Court, to make the Court accessible to the people; and 50
- (d) may withdraw or vary any notice made under this subsection.

## CHAPTER 3

### JUDGES, OFFICERS AND ASSESSORS OF COURT

#### Appointment of judges of Court

**8.** (1) The President, acting on the advice of the Judicial Service Commission, must, subject to subsection (4), appoint a Judge President and a Deputy Judge President of the Court. 5

(2) The Deputy Judge President must act as Judge President of the Court whenever the Judge President is unable to do so for any reason.

(3) 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 may have been judges of the High Court at the time they were appointed to the Court. 10

(4) The Judge President, Deputy Judge President and judges of the Court must—

(a) by reason of their training and experience, have expertise in the field of land rights matters; 15

(b) be representative in terms of race and gender; and

(c) be fit and proper persons who are appropriately qualified.

(5) In case of a vacancy in the office of the Deputy Judge President or a judge of the Court, or if there is sufficient reason for the appointment of an acting judge, the Minister may, after consultation with the Judge President of the Court, in accordance with section 175(2) of the Constitution, appoint an acting judge of the Court for such term as the Minister may determine. 20

#### Tenure, remuneration and terms and conditions of appointment of judges

**9.** (1) For purposes of this section “judge” includes the Judge President and Deputy Judge President of the Court. 25

(2) A judge of the Court holds office until discharged from active service in terms of the Judges’ Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001).

(3) A judge of the Court may resign as a judge of the Court by giving written notice to the President. 30

(4) Neither the tenure of office nor the remuneration and terms and conditions of appointment applicable to a judge of the High Court in terms of the Judges’ Remuneration and Conditions of Employment Act, 2001, is affected by that judge’s appointment and concurrent tenure of office as a judge of the Court.

(5) Despite the expiry of the period of a judge’s appointment as a judge of the Court that judge may continue to perform the functions of a judge of that Court, and must be regarded as such in all respects, only— 35

(a) for the purposes of disposing of any proceedings in which that judge has taken part as a judge of that Court and which are still pending upon the expiry of that judge’s appointment or which, having been so disposed of before or after the expiry of that judge’s appointment, have been reopened; and 40

(b) for as long as that judge is necessarily engaged in connection with the disposal of the proceedings so pending or reopened.

(6) The provisions of subsections (4) and (5), read with the changes required by the context, apply to acting judges appointed in terms of section 8(5). 45

#### No process to be issued against Judge President, Deputy Judge President or judge of Court except with consent of Court

**10.** (1) Except for an application made in terms of the Domestic Violence Act, 1998 (Act No. 116 of 1998), no civil proceedings by way of summons or notice of motion may be instituted against the Judge President, Deputy Judge President or any other judge of the Court, and no subpoena in respect of civil proceedings may be served on the Judge President, Deputy Judge President or any other judge of the Court, except with the consent of the Judge President of the Court or, in the case of the Judge President of the Court, with the consent of the Chief Justice. 50

(2) Where the issuing of a summons or subpoena against the Judge President, Deputy Judge President or judge to appear in a civil action has been consented to, the date upon

which the Judge President, Deputy Judge President or judge must attend court must be determined in consultation with the Judge President or, in the case of the Judge President, with the Chief Justice.

### **Appointment of officers and staff**

**11.** (1) (a) Subject to paragraph (b), the Minister must appoint for the Court a court manager, one or more assistant court managers if necessary, a registrar, one or more assistant registrars, if necessary, and other officers and staff whenever they may be required for the administration of justice or the execution of the powers and authorities of the Court. 5

(b) Any appointment by the Minister in terms of paragraph (a) must be made in— 10

(i) consultation with the Judge President of the Court; and

(ii) accordance with the laws governing the public service.

(c) A court manager is the senior executive officer of the Court, and exercises administrative control over other persons referred to in paragraph (a), and, under the control and direction of the Judge President of the Court, performs such other functions as may be determined by the Secretary-General of the Office of the Chief Justice and the Chief Justice. 15

(2) Whenever by reason of absence or incapacity an official referred to in subsection (1) is unable to carry out the functions of their office, or if their office becomes vacant, the Minister may, after consultation with the Judge President of the Court, authorise any other competent officer in the public service to act in the place of the absent or incapacitated officer during such absence or incapacity, or to act in the vacant office until the vacancy is filled. 20

(3) Any person appointed under subsection (1) may hold more than one of the offices mentioned in that subsection, simultaneously. 25

(4) The Minister may delegate any of the powers vested in the Minister under this section to the Secretary-General of the Office of the Chief Justice.

### **Appointment of assessors**

**12.** (1) The Court may, when adjudicating on any matter in terms of this Act, sit with or without assessors in accordance with the provisions of this section: Provided that not more than two assessors may be appointed in any matter. 30

(2) The assessors contemplated in subsection (1) must be appointed in the prescribed manner.

(3) No assessor may hear any evidence unless that assessor first takes the prescribed oath or affirmation, administered by the judge. 35

(4) An assessor who takes an oath or makes an affirmation under subsection (3) is a member of the Court: Provided that—

(a) subject to the provisions of paragraph (b) of this proviso, the decision or finding of the majority of the members of the Court upon any question of fact is the decision or finding of the Court, except when the judge or judges sit with only one assessor, in which case the decision or finding of the judge or judges is, in the case of a difference of opinion between the assessor on the one hand and the judge or judges on the other, the decision or finding of the Court; and 40

(b) the judge or judges alone decide on any question of law or upon any question whether any matter constitutes a question of law or a question of fact, and the judge or judges may, for this purpose, sit alone. 45

(5) If an assessor dies or, in the opinion of the judge or judges, becomes unable to act as assessor at any time, the judge or judges may direct that the matter—

(a) be proceeded with before the remaining member or members of the Court; or

(b) start afresh and, for that purpose, may summon an assessor in the place of the assessor who has died or has become unavailable to act as assessor. 50

(6) If an assessor is not in the full-time employment of the State, that assessor is entitled to such fees as prescribed.



**CHAPTER 4**  
**COURT PROCEEDINGS**

*Part 1*

*Institution of proceedings in Court*

- Institution of proceedings** 5
- 13.** (1) Proceedings under this Act may be instituted by—
- (a) the Commission;
  - (b) any person acting in their own interest;
  - (c) any person acting on behalf of another person who cannot act in their own name; 10
  - (d) any person acting as a member of, or in the interests of, a group or class of persons;
  - (e) any person acting in the public interest; or
  - (f) any association acting in the interests of its members.
- (2) The registrar must, in the manner and within the period provided for in the rules, refer the matter to the Judge President of the Court, who must decide whether the matter— 15
- (a) is to be heard in Court; or
  - (b) should be referred for mediation in terms of section 29 of this Act, which, in the Judge President’s opinion, can deal more appropriately with the matter. 20
- (3) The Judge President, before making a decision to refer a matter as contemplated in subsection (2), must take all relevant circumstances into consideration, including the following:
- (a) If mediation or arbitration in terms of any legislation took place before the institution of proceedings in the Court and the outcome thereof; 25
  - (b) the personal circumstances of the parties;
  - (c) the needs of and relief sought by the parties; and
  - (d) the nature of the intended proceedings and whether the outcome of the proceedings could facilitate the development of judicial precedent and jurisprudence in this area of the law. 30
- (4) The Judge President may delegate any of the powers vested in the Judge President under this section to the Deputy Judge President or any other judge of the Court.

*Part 2*

***Rules, powers and functions of Court under other legislation, intervention, right to appear, legal representation, appeals and judgment by default*** 35

**Rules governing procedure of Court**

- 14.** (1) Except as is otherwise provided in this Act, 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— 40
- (a) the circumstances under which opinion and oral evidence may be submitted to the Court;
  - (b) the suspension or execution of judgments, orders or sentences of the Court pending applications, or petitions for leave to appeal and the prosecution of appeals; 45
  - (c) the manner and circumstances under which a judgment by default contemplated in section 18 of this Act can be given; and
  - (d) generally, any matter which may be necessary or useful to be regulated for the proper despatch and conduct of the functions of the Court. 50
- (2) Notwithstanding anything to the contrary in this Act or in the rules contemplated in subsection (1), the Court may conduct any part of any proceedings on an informal or inquisitorial basis.

- (3) The Rules Board for Courts of Law must make rules in respect of the form and manner in which a party to an arbitration may apply to the Court to—
- (a) stop the arbitration process and to proceed in the Court;
  - (b) vary or set aside a settlement agreement; or
  - (c) set aside an arbitration award. 5
- (4) The rules contemplated in subsection (1) must facilitate the expeditious handling of disputes and the minimisation of costs involved.

### **Powers and functions of Court under other legislation**

15. The provisions of this Act regulating the procedures, powers and functions of the Court apply, with the necessary changes required by the context, to the performance by the Court of its powers and functions in terms of any other law in respect of which it has jurisdiction, unless such application is excluded expressly or by necessary implication. 10

### **Intervention to proceedings before Court, right to appear and legal representation**

16. (1) Any person or body with legal standing may apply to the Court for leave to intervene as a party to any proceedings before the Court. 15
- (2) The State has the right to intervene as a party to all proceedings before the Court.
- (3) Any party appearing before the Court may do so in person or may be represented by a legal practitioner as contemplated in the Legal Practice Act, 2014 (Act No. 28 of 2014), of their own choice and at their own expense.
- (4) (a) Where a party involved in a matter before the Court is not represented by a legal representative because such party cannot afford to pay for legal representation, and the Court is of the opinion that it would be in the best interests of the party to have legal representation, the Court must refer the matter to Legal Aid South Africa as contemplated in section 2 of the Legal Aid South Africa Act, 2014 (Act No. 39 of 2014). 20
- (b) Legal Aid South Africa must deal with a matter referred to in paragraph (a) in accordance with section 4(1)(f) of the Legal Aid South Africa Act, 2014, to provide legal representation at State expense, where substantial injustice would otherwise result. 25
- (c) Expenditure in connection with the implementation and application of paragraph (a) must be defrayed from money appropriated by Parliament for this purpose and monies appropriated by Parliament for this purpose constitute earmarked funds on the vote of Legal Aid South Africa, and may not be used for any other purpose. 30

### **Powers of Court on hearing of appeals**

17. (1) Any person who is aggrieved by a judgment or order of a Magistrate's Court may appeal to the Court against that judgment or order in accordance with—
- (a) any land related legislation conferring appellate jurisdiction on the Court; and 35
  - (b) the rules contemplated in section 32.
- (2) The Court, at the hearing of any appeal this Act or any law conferring upon it any appellate jurisdiction, has the power—
- (a) to receive further evidence;
  - (b) to remit the case to the court or other tribunal of first instance for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Court considers necessary; or 40
  - (c) to confirm, amend or set aside the judgment, order or decision which is the subject matter of the appeal and to give any judgment, order or decision which the circumstances may require, 45
- unless such law provides otherwise.

### **Judgment by default**

18. A judgment by default may be granted by the Court in the manner and in the circumstances determined in the rules: Provided that the Court must be satisfied that there was proper service of the process by which the case was initiated. 50

### Part 3

#### *Witnesses and admissibility of evidence*

##### **Witnesses**

- 19.** (1) The registrar must, in the form and manner provided for in the rules subpoena a person to appear as a witness in a matter before the Court to give evidence or to produce a book, document, written instrument or any item on request by— 5
- (a) the judge in the matter;
  - (b) a person whose rights may be affected by an order that may be made by the Court in those proceedings; or
  - (c) the legal practitioner of a person referred to in paragraph (b). 10
- (2) Sections 35(2), (3), (4) and (5) and 36 of the Superior Courts Act, read with such changes as the context may require, apply to a person who has been subpoenaed in terms of subsection (1) or required by the judge to give evidence.
- (3) A person subpoenaed in terms of subsection (1) and who complied with the subpoena, is entitled to an allowance from State funds as contemplated in section 20. 15

##### **Witness fees**

- 20.** (1) A witness in any proceedings of the Court and any person who accompanies any such witness on account of the youth or infirmity due to old age or any disability of such witness, must be paid such allowances as may be prescribed in terms of section 37 of the Superior Courts Act. 20
- (2) Notwithstanding anything to the contrary contained in any other law, the Court may order that no allowances or only a portion of the prescribed allowances must be paid to any witness.

##### **Admissibility of evidence**

- 21.** (1) The Court may, in the case of claims under the Restitution of Land Rights Act admit evidence, including oral evidence, which it considers relevant and cogent to the matter being heard by it, whether or not such evidence would be admissible in any other court of law. 25
- (2) Without derogating from the generality of subsection (1), it is competent for any party before the Court to adduce— 30
- (a) hearsay evidence regarding the circumstances surrounding the dispossession of a land right or rights and the rules governing the allocation and occupation of land within a claimant community at the time of such dispossession; and
  - (b) expert evidence regarding the historical and anthropological facts relevant to any particular land claim. 35
- (3) The Court must give such weight to any evidence adduced in terms of subsections (1) and (2) as it deems appropriate.
- (4) Whenever a judgment, order or other record of the Court is required to be proved or inspected or referred to in any manner, a copy of such judgment, order or other record duly certified as such by the registrar of the Court under its seal is *prima facie* evidence thereof without proof of the authenticity of such registrar's signature. 40

### Part 4

#### *Processes of Court and Offences*

##### **Scope and execution of process of Court**

- 22.** (1) The process of the Court runs throughout the Republic and its sentences, rulings, judgments, writs, summonses, orders, warrants, commands and other processes, excluding a subpoena referred to in section 19 of this Act, must be executed in any area in like manner as if they were processes of a Division of the High Court having jurisdiction in such area. 45
- (2) A sheriff or a deputy sheriff of the High Court appointed for the area in which any process is to be served, must execute all sentences, rulings, judgments, writs, summonses, orders, warrants, commands and other processes of the Court directed to 50

them, and any reference in this Act to a sheriff or a deputy sheriff is deemed to be a reference to a sheriff or deputy sheriff of a Division of the High Court acting in terms of this section.

(3) A sheriff or deputy sheriff performing their duties in terms of this Act has all the powers and rights and is subject to all the obligations and duties applicable to the execution by such sheriff or deputy sheriff of the process of the Division of the High Court for which they are appointed. 5

(4) The return of a sheriff or a deputy sheriff of what has been done in connection with any process of the Court is *prima facie* evidence of the matters therein stated.

(5) A refusal by the sheriff or any deputy sheriff to perform any act which they are, in terms of this Act, empowered or obliged to do, is subject to review by the Court on application *ex parte* or on notice as the circumstances may require. 10

(6) Any warrant or other process for the execution of a judgment given or order issued against any association of persons, corporate or unincorporated, partnership or firm may be executed by attachment of the property or assets of such association, partnership or firm. 15

### Offences relating to execution

23. Any person who commits any conduct referred to in section 46 of the Superior Courts Act, in relation to the execution by a sheriff or deputy sheriff of their duties in terms of this Act, commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding one year. 20

## Part 5

### *Powers of Court, conferences, Court orders, variation, rescission and costs*

#### Powers of Court

24. (1) Subject to Chapter 8 of the Constitution, the Court has— 25

(a) all such powers in relation to matters falling within its jurisdiction as are possessed by a Division of the High Court having jurisdiction in civil proceedings at the place where the land in question is situated, including the powers of the High Court in relation to any contempt of Court;

(b) all the ancillary powers necessary or reasonably incidental to the performance of its functions, including the power to grant interlocutory orders and interdicts; and 30

(c) the power 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. 35

(2) (a) The Court, of its own accord or at the request of any party to the proceedings before it, may reserve, for the decision of the Supreme Court of Appeal, any question of law that arises in those proceedings.

(b) A question may be reserved only if it is decisive for the proper adjudication of the dispute. 40

(c) Pending the decision of the Supreme Court of Appeal on any question of law reserved in terms of paragraph (a), the Court may make any interim order.

(3) A judgment of the Court must be handed down as soon as reasonably possible.

(4) To the extent necessary, the Court may refer any suspicion or allegation of corruption in any proceedings before the Court to any relevant authority for investigation. 45

#### Conferences

25. (1) The Court may at any stage on its own accord or upon the request in writing of either party direct the parties or their representatives to appear before it in chambers for a conference to consider— 50

(a) the simplification of the issues;

(b) the necessity or desirability of amendments to the pleadings;

(c) the possibility of obtaining admissions of fact and of documents with a view to avoiding unnecessary proof;

(d) the limitation of the number of expert witnesses; or 55

(e) such other matters as may aid in the disposal of the action in the most expeditious and least costly manner.

(2) The Court must make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of the parties or their representatives. 5

(3) The order so made by the Court is binding on the parties unless altered at the trial to prevent manifest injustice.

(4) If a party refuses or neglects to appear at the conference the Court may, without derogation from its power to punish for contempt of court, make such order as it considers equitable in the circumstances and upon conclusion of the proceedings may order the party who was so absent to pay such costs as in the opinion of the Court were incurred as a result of the said absence. 10

(5) The Court may make such order as to the costs of any proceedings under this section as it deems fit. 15

### Court orders

**26.** (1) The Court may make any appropriate order, including—

- (a) granting of urgent interim relief;
- (b) an interdict;
- (c) an order directing the performance of any particular act, which order, when implemented, must remedy a wrong and give effect to the primary objects of this Act; 20
- (d) a declaratory order;
- (e) an award of damages in any circumstances contemplated in this Act;
- (f) an order for costs; 25
- (g) making any arbitration award or any settlement agreement an order of the Court;
- (h) requesting the Commission to conduct an investigation to assist the Court and to submit a report to the Court; and
- (i) any other appropriate order which a High Court is competent to make, and which relates to a matter under the jurisdiction of the Court. 30

(2) If at any stage after a dispute has been referred to the Court, it becomes apparent that it would advance the finalisation of the case if some or all of the disputes between the parties are referred to mediation, the Court may, if the Judge President did not make an order contemplated in section 13(2)(b) stay the proceedings and refer the dispute to mediation in terms of section 29 of this Act. 35

(3) The Court may in addition to subsection (1) make an order—

- (a) for the restoration of land, a portion of land or any right in land in respect of which the claim or any other claim is made to the claimant or award any land, a portion of or a right in land to the claimant in full or in partial settlement of the claim and, where necessary, the prior acquisition or expropriation of the land, portion of land or right in land: Provided that the claimant is not awarded land, a portion of land or a right in land dispossessed from another claimant or the latter's ascendant, unless— 40
  - (i) such other claimant is or has been granted restitution of a right in land or has waived the right to restoration of the right in land concerned; or 45
  - (ii) the Court is satisfied that satisfactory arrangements have been or will be made to grant such other claimant restitution of a right in land;
- (b) for the State to grant the claimant an appropriate right in alternative state-owned land and, where necessary, order the State to designate it; 50
- (c) for the State to pay the claimant compensation;
- (d) for the State to include the claimant as a beneficiary of a State support programme for housing or the allocation and development of rural land;
- (e) for the grant to the claimant of any alternative relief;
- (f) to determine conditions which must be fulfilled before a right in land can be restored or granted to a claimant; 55
- (g) if a claimant is required to make any payment before the right in question is restored or granted, to determine the amount to be paid and the manner of payment, including the time for payment;
- (h) if the claimant is a community, to determine the manner in which the rights are to be held or the compensation is to be paid or held; 60

- (i) to give any other directive as to how its orders are to be carried out, including the setting of time limits for the implementation of its orders;
- (j) in respect of compensatory land granted at the time of the dispossession of the land in question;
- (k) to give effect to any agreement between the parties regarding the finalisation of the claim; and
- (l) for costs as it deems just, including an order for costs against the State or the Commission.

(4) An order contemplated in subsection (3)(h) must be subject to such conditions as the Court considers necessary to ensure that all the members of the dispossessed community have access to the land or the compensation in question, on a basis which is fair and non-discriminatory towards any person, including a tenant, and which ensures the accountability of the person who holds the land or compensation on behalf of the community to the members of such community.

(5) The Court's power to order the restitution of a right in land or to grant a right in alternative state-owned land must include the power to adjust the nature of the right previously held by the claimant, and to determine the form of title under which the right may be held in future.

(6) In making any award of land, the Court may direct that the rights of individuals to that land be determined in accordance with the procedures set out in the Distribution and Transfer of Certain State Land Act, 1993 (Act No. 119 of 1993).

(7) An order of the Court has the same force as an order of a court for the purposes of the Deeds Registries Act, 1937 (Act No. 47 of 1937).

(8) Any state-owned land contemplated in the Restitution of Land Rights Act, which is held under a lease or similar arrangement, must be deemed to be in the possession of the State for the purposes of subsection (3)(a): Provided that, if the Court orders the restoration of a right in such land, the lawful occupier thereof is entitled to just and equitable compensation determined either by agreement or by the Court.

(9) An interested party who is of the opinion that an order of the Court has not been fully or timeously complied with may make application to the Court for further directives or orders in that regard.

#### **Variation and rescission of orders of Court**

**27.** The Court, acting of its own accord or on the application of any affected party, may vary or rescind a decision, judgment or order—

- (a) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order;
- (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
- (c) granted as a result of a mistake common to the parties to the proceedings.

#### **Costs** 40

**28.** (1) The Court may make an order for the payment of costs, according to the requirements of the law and fairness.

(2) When deciding whether or not to order the payment of costs, the Court may take into account—

- (a) whether the matter referred to the Court ought to have been referred to mediation or arbitration, and, if so, the extra costs incurred in bringing the matter to the Court directly; and
- (b) the conduct of the parties—
  - (i) in proceeding with or defending the matter before the Court; and
  - (ii) during the proceedings before the Court.

(3) The Court may order costs against a party to the dispute or against any person who represented that party in those proceedings before the Court.



*Part 6**Mediation and settling of matters***Mediation**

29. (1) Notwithstanding the provisions of section 13(2)(b) of this Act, if, at any stage during proceedings, but prior to judgment, it becomes evident to the presiding judge that there is any issue which might be resolved through mediation, the presiding judge may make an order— 5

(a) directing the parties to attempt to settle the issue through a process of mediation; and

(b) that the proceedings be stayed pending such process. 10

(2) (a) If the Judge President as contemplated in section 13(2), or the presiding judge in terms of subsection (1), decides that the matter must be referred for mediation, the Judge President or presiding judge must make an order—

(i) directing the registrar to transfer the matter in the manner provided for in the rules to the mediator contemplated in subparagraph (iii); 15

(ii) specifying the time, date and the place where such process is to start; and

(iii) appointing a fit and proper person as mediator to chair the first meeting between the parties: Provided that the parties may at any time during the course of mediation, by agreement, appoint another person to mediate the dispute.

(b) When making an order contemplated in paragraph (a), the Judge President or the presiding judge may attach to the order any comments the Judge President or the presiding judge deems necessary for the attention of the mediator. 20

(3) The Rules Board must make rules for the—

(a) appointment of a mediator;

(b) procedure for referral of matters to the mediator; 25

(c) process by which mediation is initiated, and the form, content and use of that process;

(d) joinder of any person having an interest in the dispute in any mediation proceedings;

(e) proceedings of mediation; 30

(f) prescribed forms to be used by parties in respect of mediation proceedings;

(g) right of any party to be represented by any person or category of persons in any mediation proceedings, including the regulation or limitation of the right to be represented in those proceedings;

(h) consequences for any party to mediation proceedings for not attending those proceedings; 35

(i) qualification for appointment as mediator;

(j) fees that are payable for mediation;

(k) appointment, powers and functions of a mediator; and

(l) issuance of an order at the conclusion of the proceedings. 40

(4) On receipt of an order referred to in subsection (2), the registrar must transfer the matter and notify the parties to the matter of the transfer in the manner provided for in the rules.

(5) On receipt of a matter, the mediator must deal with the matter expeditiously in terms of their powers and functions as provided for in the rules. 45

(6) If—

(a) the parties to the mediation are not able to resolve the matter to the satisfaction of all the parties; or

(b) one or more of the parties to the mediation so request,

the mediator must, in the manner provided for in the rules, refer the matter to the Court for adjudication. 50

(7) A mediator appointed in terms of subsection (2)(a)(iii) who is not in the full-time service of the State, may be paid such remuneration and allowances as prescribed.

(8) All discussions taking place and all disclosures and submissions made during the mediation process are privileged, unless the parties agree to the contrary. 55

(9) The Court may make the agreement reached between the parties an order of the Court, with or without such technical variations as may be appropriate.

(10) If the Court proposes to make any technical variation to the agreement, it must give the parties to the proceedings in the manner provided for in the rules notice of such intention, and before making such variation, it must receive and consider any comments from the parties.

### **Settling of matters** 5

**30.** (1) If a matter is settled out of Court, either by means of negotiation or mediation, and the settlement agreement is accepted by all parties involved in the matter, the registrar of the Court must, if the parties agree thereto, submit the settlement agreement to the Court for confirmation or rejection.

- (2) The Court must consider the settlement agreement and may— 10
- (a) confirm the settlement agreement and make it an order of the Court; or
  - (b) before deciding the matter, refer the settlement agreement to the parties for reconsideration of any specific issues.

## **CHAPTER 5**

### **APPEALS AGAINST JUDGMENT OR ORDER OF COURT AND OF OTHER COURTS** 15

#### **Appeals against judgment or order of Court**

**31.** (1) Subject to section 15(1) of the Superior Courts Act, the Constitution and any other law—

- (a) an appeal against any decision of the Court of first instance lies, upon leave 20 having been granted—
  - (i) if the Court consisted of a single judge, either to the Supreme Court of Appeal or to a full court, depending on the direction issued in terms of section 17(6) of the Superior Courts Act; or
  - (ii) if the Court consisted of more than one judge, to the Supreme Court 25 of Appeal; and
- (b) an appeal against any decision of a full court on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal.

(2) No judge may sit at the hearing of an appeal against a judgment or an order given 30 in a case that was heard before that judge.

#### **Appeals against judgment or order of other courts**

**32.** (1) No appeal lies against a judgment or order of the Court except with leave of the Court or, where such leave has been refused, with the leave of the full court and failing that with leave of the Supreme Court of Appeal. 35

(2) An appeal from a judgment or order of the Court must be heard by a full court in open court.

(3) The full court or the Supreme Court of Appeal may, in granting leave to appeal, vary any order for costs made by the Court or the full court in refusing leave to appeal.

- (4) The power to grant leave to appeal as contemplated in subsection (1)— 40
- (a) is not limited by reason only of the value of the matter in dispute or the amount claimed or awarded in the suit or by reason only of the fact that the matter in dispute is incapable of being valued in money; and
  - (b) is subject to the provisions of any other law which specifically limits it or specifically grants, limits or excludes any right of appeal. 45

(5) Leave to appeal may be granted subject to such conditions as the Court, the full court or the Supreme Court of Appeal, as the case may be, considers appropriate, including a condition that the applicant files security for the costs of the appeal.

(6) The full court may grant leave to appeal on application made to it within 15 days, or such longer period as may on good cause be allowed, after the Court has refused leave 50 to appeal.

(7) (a) An application to the full court in terms of subsection (6) must—

- (i) be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief; and
- (ii) be addressed to the registrar of the Court and to all other parties in the 55 proceedings before the Court.



(b) The application must be considered by two judges of the Court designated by the Judge President of the Court, and in the case of a difference of opinion, also by the Judge President of the Court or any other judge so designated.

(c) The judges considering the application may order that the application be argued before them at a time and place appointed, and may, whether or not they have so ordered— 5

- (i) grant or refuse the application; or
- (ii) refer the application to the full court for consideration, whether upon argument or otherwise,

and where an application has been so referred, the full court may thereupon grant or refuse the application. 10

(d) The decision of the majority of the judges considering the application, or the decision of the full court, as the case may be, to grant or refuse the application, is final.

(e) Notice of the date and place fixed for the hearing of the application must be given to the applicant and the respondent by the registrar of the Court. 15

(8) The full court, on the hearing of any appeal from the Court, has the power to—

- (a) receive further evidence;
- (b) remit the case to the Court for further hearing, with such instructions as regards the taking of further evidence or otherwise as the full court considers necessary; or 20

- (c) confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require.

(9) Nothing in this section may be construed as preventing an appeal from a judgment or order of the Court being made directly to the Constitutional Court, if such an appeal is allowed by national legislation and by the rules of the Constitutional Court. 25

## CHAPTER 6

### GENERAL PROVISIONS

#### General provisions applicable to Court

33. The provisions of the Superior Courts Act, read with the changes required by the context, apply in respect of any matter not provided for in this Act, to the extent that they are not inconsistent with this Act. 30

#### Transitional arrangements

34. (1) (a) Any proceedings arising out of the application of this Act or any other law conferring jurisdiction on the Court, pending in any court other than the Land Claims Court established by section 22 of the Restitution of Land Rights Act, at the commencement of this Act must be continued and concluded in every respect as if this Act had not been passed. 35

(b) Any proceedings arising out of the application of this Act or any other law conferring jurisdiction on the Court, pending in the Land Claims Court, at the commencement of this Act must be continued and concluded in terms of this Act in the Court and, for that purpose— 40

- (i) those proceedings are deemed to have been instituted in terms of this Act in the Court; and
- (ii) anything done under any provision of any law amended by this Act is deemed to have been done under the corresponding provision of this Act, 45

unless the Court is of the view that this would not be in the interests of justice, in which event the Court must conclude the proceedings in the Court as if this Act had not been passed.

(c) Proceedings for purposes of paragraphs (a) and (b), are deemed to be pending if, at the commencement of this Act— 50

- (i) a civil summons had been issued or an application has been lodged, but judgment or an order has not been given; or
- (ii) an accused person had pleaded but judgment or sentence has not been passed.

(d) Any proceedings arising out of the application of any law pending in any tribunal or forum at the commencement of this Act must be continued and concluded in every respect as if this Act had not been passed. 55

(2) (a) Any period of time served by a person as a judge or an acting judge of the Land Claims Court established in terms of section 22 of the Restitution of Land Rights Act, is deemed to have been served by that person, as a judge appointed in terms of section 8 of this Act.

(b) A judge of the High Court who, on the date of commencement of this Act, was seconded or appointed as a judge of the Land Claims Court becomes a judge of the Court except where such judge indicates in writing to the Secretary of the Judicial Service Commission, that such judge does not wish to hold a concurrent appointment as a judge of the Court. 5

(3) Any money available from the budget allocation for purposes of section 29(4) of the Restitution of Land Rights Act, before its amendment by this Act, forms part of the budget allocation of Legal Aid South Africa for purposes of giving effect to section 16(4) of this Act. 10

### **Amendment of laws**

35. The laws mentioned in the Schedule are amended to the extent indicated in the third column of the Schedule. 15

### **Regulations**

36. (1) The Minister may make regulations regarding—

- (a) the form of the oath or affirmation of a person who has been appointed a judge of the Court and who is not a judge of the High Court; 20
- (b) the manner and conditions of appointment for officers of the Court;
- (c) functions to be performed by officers of the Court;
- (d) manner of appointment of assessors;
- (e) the form of the oath or affirmation of an assessor;
- (f) fees and allowances of an assessor not in full time employ of State; 25
- (g) legal assistance that Legal Aid South Africa may provide to parties who wish to exercise their right to have a dispute resolved through mediation and any expenditure related thereto;
- (h) any matter required or permitted to be prescribed by regulation under this Act; and 30
- (i) any other matter which is necessary to prescribe in order to achieve the objects of this Act.

(2) Any regulation under this section which results in State expenditure, must be made with the concurrence of the Cabinet member responsible for finance.

### **Short title and commencement** 35

37. (1) This Act is called the Land Court Act, 2022, and commences on a date determined by the President by proclamation in the *Gazette*.

(2) For purposes of subsection (1) different dates may be proclaimed in respect of different provisions of the Act and the different items of the Schedule to the Act.

## SCHEDULE

## LAWS AMENDED

(Section 35)

| Item No. | No. and year of law | Short title   | Extent of repeal or amendment  |
|----------|---------------------|---|--|
| 1.       | Act No. 112 of 1991 | Upgrading of Land Tenure Rights Act, 1991               | <p>1. The insertion in section 1 before the definition of “<b>Deeds Act</b>” of the following definition:<br/> “<b>Court</b>” means the Land Court established by section 3 of the Land Court Act, 2022 or a Magistrate’s Court in whose area of jurisdiction the land in question is situated;”.</p> <p>2. The substitution in section 21 for the words preceding paragraph (b) of the following words:<br/> “<b>[1]</b> Whenever in any <b>[judicial]</b> proceedings before the Court the question arises—”.</p> <p>3. The substitution in subsection 24(D) for subsection (7) of the following subsection:<br/> “(7) If any person refuses to answer a question put to him or her under subsection (6)(a) or to deliver or submit anything required under subsection (6)(b), the person acting under subsection (6)(a) or (b) may apply to the <b>[magistrate’s court for the district in which the erf or piece of land in question is situated]</b> Court for an order compelling the former person to answer the question or deliver or submit the thing and the <b>[court]</b> Court may make such order as it deems fair and just under the circumstances, including an order for costs, having regard to the public interest and the right to privacy of the respondent.”.</p> <p>4. The insertion of the following section after section 24D:<br/> “<b>Jurisdiction of Court</b><br/> <b>24E.</b> The Court has jurisdiction to resolve any dispute arising from the application of this Act.”.</p> |
| 2.       | Act No. 126 of 1993 | Land Reform: Provision of Land and Assistance Act, 1993 | <p>The insertion of the following section after section 12:<br/> “<b>Jurisdiction of Land Court</b><br/> <b>12A.</b> The Land Court established by section 3 of the Land Court Act, 2022, has jurisdiction to resolve any dispute arising from the application of this Act.”.</p>  |
| 3.       | Act No. 3KZ of 1994 | KwaZulu-Natal Ingonyama Trust Act, 1994                 | <p>The insertion of the following section after section 4A:<br/> “<b>Jurisdiction of Land Court</b><br/> <b>4B.</b> The Land Court established by section 3 of the Land Court Act, 2022, has jurisdiction to resolve any dispute arising from the application of this Act.”.</p>   |
| 4.       | Act No. 22 of 1994  | Restitution of Land Rights Act, 1994                    | <p>1. The substitution in section 1 for the definition of “<b>Court</b>” of the following definition:<br/> “<b>Court</b>” means the Land <b>[Claims]</b> Court established by section <b>[22]</b> 3 of the Land Court Act, 2022;”.</p> <p>2. The deletion in section 1 of the definitions of “<b>High Court</b>” and “<b>presiding judge</b>”.</p> <p>3. The substitution in section 1 for the definition of “<b>the rules</b>” of the following definition:<br/> “<b>the rules</b>” means the rules made under <b>[sections]</b> section 16 <b>[and 32]</b> of this Act;”.</p> <p>4. The deletion of Chapter 3.</p> <p>5. The substitution in section 38B(1) for paragraph (a) of the following paragraph:<br/> “(a) an order has been made by the Court in terms of section <b>[35]</b> 26(3) of the Land Court Act, 2022, in respect of a right relating to that land; or”.</p>   |

| Item No. | No. and year of law | Short title                            | Extent of repeal or amendment   |
|----------|---------------------|--|---|
| 5.       | Act No. 3 of 1996   | Land Reform (Labour Tenants) Act, 1996 | <p><b>1.</b> The substitution in section 1 for the definition of “<b>Court</b>” of the following definition:<br/> “<b>‘Court’</b> means the Land [<b>Claims</b>] Court established by section [22 of the Restitution of Land Rights Act, 1994 (Act 22 of 1994)] 3 of the Land Court Act, 2022;”.</p> <p><b>2.</b> The substitution in section 1 for the definition of “<b>the rules</b>” of the following definition:<br/> “<b>‘the rules’</b> means rules made [<b>by the President of the Court</b>] under section 14 of the Land Court Act, 2022.”.</p> <p><b>3.</b> The substitution in section 2 for subsection (6) of the following subsection:<br/> “(6) For the purpose of establishing whether a person is a labour tenant, [<b>a court</b>] the Court shall have regard to the combined effect and substance of all agreements entered into between the person who avers that he or she is a labour tenant and his or her parent or grandparent, and the owner or lessee of the land concerned.”.</p> <p><b>4.</b> The deletion of section 13.</p> <p><b>5.</b> The substitution in section 15A for subsection (1) of the following subsection:<br/> “(1) No person shall remove or evict a labour tenant or an associate except on the authority of an order of [<b>a competent court</b>] <u>the Court</u>.”.</p> <p><b>6.</b> The substitution in section 18 for subsections (7), (8) and (9) of the following subsections:<br/> “(7) If—<br/> (a) the owner does not submit proposals in terms of subsection (1); or<br/> (b) the applicant rejects a proposal in terms of subsection (4); or<br/> (c) the parties reach an agreement but the Director-General is not satisfied that it is reasonable and equitable,<br/> the Director-General shall, at the request of any party, refer the application for arbitration or to the Court for adjudication, and inform the other parties that he or she has done so.<br/> (8) The parties may, within 30 days of the referral of the application [<b>to the Court</b>] for arbitration, make a joint recommendation to the [<b>Court</b>] Director-General as to who should be appointed as the arbitrator.<br/> (9) Any nomination referred to in subsection (8) shall be in writing, signed by all the parties, and submitted to the [<b>President of the Court</b>] Director-General.”.</p> <p><b>7.</b> The substitution for section 19 of the following section:<br/> “<b>Hearing of application by Court or referral to arbitration</b><br/> <b>19.</b> (1) On referral of an application by the Director-General, the Judge President of the Court or a judge of the Court nominated by him or her may [<b>direct either that</b>] give such directions as he or she considers appropriate as to the procedure to be followed for the application be heard by the Court [<b>or that it be referred to arbitration</b>].<br/> [(2) <b>If the matter is referred to arbitration, the President of the Court or a judge of the Court nominated by him or her, shall appoint an arbitrator to hear the application and may give such directions as he or she considers appropriate as to the procedure to be followed.</b>]<br/> (3) The [<b>President of the Court or the judge nominated by him or her</b>] Director-General may appoint as arbitrator [—<br/> (a) a person nominated by the parties in terms of section 18 (8);] <b>or</b><br/> (b) <b>a person on the panel of arbitrators referred to in section 31;</b><br/> but shall not be obliged to appoint a person nominated by the parties.”.</p> |

| Item No. | No. and year of law | Short title | Extent of repeal or amendment  |
|----------|---------------------|-------------|--|
|          |                     |             | <p><b>8.</b> The deletion in section 20 of subsections (1) and (2).</p> <p><b>9.</b> The substitution in section 20(3) for the words preceding paragraph (a) of the following words:<br/> “(3) Notwithstanding anything to the contrary in this Act <b>[or in the rules referred to in subsection (1)]</b>, the arbitrator may—”.</p> <p><b>10.</b> The substitution in section 20 for subsection (6) of the following subsection:<br/> “(6) The arbitrator shall make a determination and submit that determination and a written report to the <b>[Court] Director-General.</b>”.</p> <p><b>11.</b> The substitution in section 21 for subsection (1) of the following subsection:<br/> “(1) <u>The Director-General shall submit the determination of an arbitrator referred to in section 20(6) to the Court, and the Court may make the determination an order of Court with or without such technical variations as may be appropriate.</u>”.</p> <p><b>12.</b> The substitution in section 24 for subsection (2) of the following subsection:<br/> “(2) If the applicant fails to make the payment within three calendar months of receipt of the notice referred to in subsection (1), the owner of the affected land may apply to the Court for an order to declare the settlement agreement or previous order of the arbitrator or the Court null and void.”.</p> <p><b>13.</b> The substitution in section 24 for subsection (3) of the following subsection:<br/> “(3) The Court may, after hearing an application in terms of subsection (2), make such order as it deems just and equitable: <u>Provided that the settlement agreement or previous order made by the arbitrator or the Court shall not be declared null and void unless the owner of the affected land and any other person who has received compensation from the applicant in respect of the affected land has paid or has given security for the payment of the amounts which he or she has received from the applicant and the Minister, respectively.</u>”.</p> <p><b>14.</b> The deletion of sections 29, 30 and 31.</p> <p><b>15.</b> The substitution for section 32 of the following section:<br/> <b>“Powers of review</b><br/> <b>32.</b> The Court shall have the same powers as the <b>[Supreme] High Court</b> to review an act, omission or decision of any functionary acting in terms of this Act or purporting to act in terms of this Act or of any court in respect of proceedings contemplated in section 13 or of any arbitrator in respect of proceedings taking place before him or her in terms of section 33(3), and shall exercise such powers to the exclusion of the provincial and local divisions of the <b>[Supreme] High Court.</b>”.</p> <p><b>16.</b> The substitution in section 33 for subsections (3) and (4) of the following subsections:<br/> “(3) <b>The [President of the Court or a judge of the Court nominated by him or her] Director-General</b> may determine that proceedings for the eviction of any person <b>[which have been instituted in or transferred to the Court]</b> shall take place before an arbitrator appointed <b>[by him or her]</b> in terms of section 19(3).<br/> (4) If the <b>[President of the Court or a judge of the Court] Director-General</b> makes a determination in terms of subsection (3) the arbitrator so appointed shall have all of the powers of the arbitrator under this Act.”.</p> |

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|          |                     |  | <p>17. The substitution for section 35 of the following section:</p> <p><b>“Effect of order of Court</b></p> <p>35. For the purposes of the Deeds Registries Act, 1937 (Act No. 47 of 1937), an order of the Court shall have the same force as an order of the [Supreme] High Court.”.</p>  |
| 6.       | Act No. 28 of 1996  | Communal Property Associations Act, 1996             | <p>1. The insertion in section 1 before the definition of <b>“Director-General”</b> of the following definition:</p> <p><b>“‘Court’</b> means the Land Court established by section 3 of the Land Court Act, 2022, or a Magistrate’s Court in whose area of jurisdiction the land in question is situated;”.</p> <p>2. The substitution in section 2(1) for paragraph (a) of the following paragraph:</p> <p>“(a) which by order of the Land [Claims]Court is entitled to restitution under the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994), where that Court has ordered restitution on condition that an association be formed in accordance with the provisions of this Act;”.</p> <p>3. The substitution in section 13 for subsection (1) of the following subsection:</p> <p>“(1) [A division of the Supreme Court or a magistrate’s court] The Land Court or the Magistrate’s Court having jurisdiction in respect of the area in which the property of the association is situated or the area in which the land which may be acquired by a provisional association is situated, may, on application made by the Director-General, an association or provisional association or any member thereof, or any other interested person, place the association or provisional association under the administration of the Director-General or grant a liquidation order in respect of an association or provisional association, where the association or provisional association, because of insolvency or maladministration or for any other cause is unwilling or unable to pay its debts or is unable to meet its obligations, or where it would otherwise be just and equitable in the circumstances.”.</p> |
| 7.       | Act No. 31 of 1996  | Interim Protection of Informal Land Rights Act, 1996 | <p>The insertion of the following section after section 5:</p> <p><b>“Jurisdiction of Land Court</b></p> <p>5A. The Land Court established by section 3 of the Land Court Act, 2022, has jurisdiction to resolve any dispute arising from the application of this Act.”.</p>   |
| 8.       | Act No. 62 of 1997  | Extension of Security of Tenure Act, 1997            | <p>1. The substitution in section 1 for the definition of <b>‘court’</b> of the following definition:</p> <p><b>“[‘court’] ‘Court’</b> means [a competent court having jurisdiction in terms of this Act] the Land Court established by section 3 of the Land Court Act, 2022, or a Magistrate’s Court in whose area of jurisdiction the land in question is situated, including a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996);”.</p> <p>2. The deletion in section 1 of the definition of <b>‘Land Claims Court’</b>.</p> <p>3. The substitution in section 8(7) for paragraph (b) of the following paragraph:</p> <p>“(b) the owner or person in charge may institute proceedings in [a court] the Court for a determination of reasonable terms and conditions of further residence, having regard to the income of all the occupiers in the household.”.</p> <p>4. The substitution in section 9 for subsection (1) of the following subsection:</p> <p>“(1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of [court] the Court issued under this Act.”;</p>  |

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|          |                     |             | <p><b>5.</b> The substitution in section 9(2) for the words preceding paragraph (a) of the following words:<br/>“(2) [A court] The Court may make an order for the eviction of an occupier if—”;</p> <p><b>6.</b> The substitution in section 9(2) of paragraph (d) for the Proviso of the following Proviso:<br/>“Provided that if a notice of application to [a court] the Court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Rural Development and Land Reform not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with.”.</p> <p><b>7.</b> The substitution in section 10 for subsection (2) of the following subsection:<br/>“(2) Subject to the provisions of subsection (3), if none of the circumstances referred to in subsection (1) applies, [a court] the Court may grant an order for eviction if it is satisfied that suitable alternative accommodation is available to the occupier concerned.”;</p> <p><b>8.</b> The substitution in section 10(3) for the words following paragraph (c) of the following words:<br/>“[a court] the Court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to—”.</p> <p><b>9.</b> The substitution in section 11 for subsections (1) and (2) of the following subsections:<br/>“(1) If it was an express, material and fair term of the consent granted to an occupier to reside on the land in question, that the consent would terminate upon a fixed or determinable date, [a court] the Court may on termination of such consent by effluxion of time grant an order for eviction of any person who became an occupier of the land in question after 4 February 1997, if it is just and equitable to do so.<br/>(2) In circumstances other than those contemplated in subsection (1), [a court] the Court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997 if it is of the opinion that it is just and equitable to do so.”.</p> <p><b>10.</b> The substitution in section 12(1) for the words preceding paragraph (a) of the following words:<br/>“(1) [A court] The Court that orders the eviction of an occupier shall—”.</p> <p><b>11.</b> The substitution in section 12 for subsection (3) of the following subsection:<br/>“(3) [A court] The Court may, at the request of the sheriff in question, authorise any person to assist the sheriff to carry out an order for eviction, demolition or removal, subject to the conditions determined by the court as to the execution thereof: Provided that the sheriff shall at all times be present during such eviction, demolition or removal.”.</p> <p><b>12.</b> The substitution in section 12 for subsection (5) of the following subsection:<br/>“(5) [A court] The Court may, on good cause shown, vary any term or condition of an order for eviction made by it.”.</p> <p><b>13.</b> The substitution in section 13(1) for the words preceding paragraph (a) of the following words:<br/>“(1) If [a court] the Court makes an order for eviction in terms of this Act—”;</p> |



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|          |                     |             | <p><b>14.</b> The substitution in section 13 for subsection (3) of the following subsection:<br/>“(3) No order for eviction made in terms of section 10 or 11 may be executed before the owner or person in charge has paid the compensation which is due in terms of subsection (1): Provided that <b>[a court]</b> the Court may grant leave for eviction subject to satisfactory guarantees for such payment.”.</p> <p><b>15.</b> The substitution in section 14 for subsection (1) of the following subsection:<br/>“(1) A person who has been evicted contrary to the provisions of this Act may institute proceedings in <b>[a court]</b> the Court for an order in terms of subsection (3).”;</p> <p><b>16.</b> The substitution in section 14(2) for the words following paragraph (b) of the following words:<br/>“may institute proceedings in <b>[a court]</b> the Court for an order in terms of subsection (3).”;</p> <p><b>17.</b> The substitution in section 13(4) for the words preceding paragraph (a) of the following words:<br/>“(4) Where the person contemplated in subsection (2) was evicted in terms of an order of <b>[a court]</b> the Court—”.</p> <p><b>18.</b> The deletion in section 17 of subsections (1), (3) and (4).</p> <p><b>19.</b> The deletion of section 19.</p> <p><b>20.</b> The substitution in section 20 for the heading of the following heading:<br/>“<b>Land [Claims] Court</b>”</p> <p><b>21.</b> The substitution in section 20 for subsections (1) and (2) of the following subsections:<br/>“(1) The <b>[Land Claims]</b> Court shall have jurisdiction in terms of this Act throughout the Republic and shall have all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act, including the power to—<br/>(a) <b>[to]</b> decide any constitutional matter in relation to this Act;<br/>(b) <b>[to]</b> grant interlocutory orders, declaratory orders and interdicts;<br/>(c) <b>[to]</b> review an act, omission or decision of any functionary acting or purporting to act in terms of this Act; <b>[and]</b><br/>(d) <b>[to]</b> review an arbitration award in terms of the Arbitration Act, 1965 (Act No. 42 of 1965), in so far as it deals with any matter that may be heard by <b>[a court]</b> the Court in terms of this Act;<br/>(e) direct how the orders of the Court shall be executed, including the setting of time limits for the implementation of such orders; and<br/>(f) make such orders for costs as it deems just.<br/>(2) <b>[Subject to sections 17(2) and 19 (1), the Land Claims]</b> The Court shall have the powers set out in subsection (1) to the exclusion of any court contemplated in section 166(c), (d) or (e) of the Constitution.”.</p> <p><b>22.</b> The deletion in section 20 of subsections (3) and (4).</p> <p><b>23.</b> The substitution in section 23 for subsection (1) of the following subsection:<br/>“(1) No person shall evict an occupier except on the authority of an order of <b>[a competent court]</b> the Court.”.</p> <p><b>24.</b> The substitution in section 25 for subsection (1) of the following subsection:<br/>“(1) The waiver by an occupier of his or her rights in terms of this Act shall be void, unless it is permitted by this Act or incorporated in an order of <b>[a court]</b> the Court.”;</p> |



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|          |                     |   | <p><b>25.</b> The substitution in section 25 for subsection (2) of the following subsection:<br/> “(2) <b>[A court shall]</b> <u>The Court</u> must have regard to, but not be bound by, any agreement in so far as that agreement seeks to limit any of the rights of an occupier in terms of this Act.”.</p>  |
| 9.       | Act No. 19 of 1998  | Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 | <p><b>1.</b> The substitution in section 1 for the definition of ‘<b>court</b>’ of the following definition:<br/> “<b>[‘court’]</b> ‘<b>Court</b>’ means <b>[any division of the High]</b> <u>the Land Court established by section 3 of the Land Court Act, 2022, or the [magistrate’s court] Magistrate’s Court</u> in whose area of jurisdiction the land in question is situated;”.</p> <p><b>2.</b> The substitution in section 4—<br/> (a) for subsections (3) and (4) of the following subsections:<br/> “(3) Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the <b>[court in question]</b> Court.<br/> (4) Subject to the provisions of subsection (2), if <b>[a court]</b> <u>the Court</u> is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the <b>[court]</b> Court, service must be effected in the manner directed by the <b>[court]</b> Court: Provided that the <b>[court]</b> <u>Court</u> must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.”;<br/> (b) for subsections (6) and (7) of the following subsections:<br/> “(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, <b>[a court]</b> <u>the Court</u> may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.<br/> (7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, <b>[a court]</b> <u>the Court</u> may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.”; and<br/> (c) for subsection (11) of the following subsection:<br/> “(11) <b>[A court]</b> <u>The Court</u> may, at the request of the sheriff, authorise any person to assist the sheriff to carry out an order for eviction, demolition or removal subject to conditions determined by the <b>[court]</b> Court: Provided that the sheriff must at all times be present during such eviction, demolition or removal.”.</p> <p><b>3.</b> The substitution in section 8 for subsection (1) of the following subsection:<br/> “(1) No person may evict an unlawful occupier except on the authority of an order of <b>[a competent court]</b> <u>the Court</u>.”.</p> <p><b>4.</b> The deletion of section 9.</p> |

## MEMORANDUM ON THE OBJECTS OF THE LAND COURT BILL, 2021

### 1. PURPOSE OF BILL

- 1.1 Section 22(1) of the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994) (“the Restitution Act”), established the Land Claims Court (“the LCC”) which has exclusive jurisdiction and power in respect of a number of aspects which have a bearing on land, more specifically on restitution claims arising from the Restitution Act. It also currently has exclusive jurisdiction to deal with matters arising from the application of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996), and it shares jurisdiction with the magistrates’ courts in respect of matters arising from the application of the Extension of Security of Tenure Act, 1997 (Act No. 62 of 1997).
- 1.2 The current legislative framework under the Restitution Act exists due to the initial point of departure that a dedicated court be established with a limited lifespan to deal with claims for restitution of land. As such, there was no need at that time to establish a permanent court and permanent judges for this purpose. It turned out that in reality the restitution process became protracted and is still not completed. A lack of permanency of judges presiding over matters before the LCC and the absence of permanent seat of the LCC resulted in slow processing of and backlogs in land restitution claims to the dissatisfaction of land claimants.
- 1.3 In order to improve the current legislative framework and address its weaknesses comprehensively and holistically, the Bill seeks to establish a specialist Land Court, with its judgments appealable to the full bench of that Court. It seems appropriate that a properly constituted and capacitated “Land Court”, and not a “Land Claims Court” under the Restitution Act, should be the forum to deal with all land related matters as regulated by various Acts of Parliament. This will also facilitate the expeditious disposal of cases and contribute towards the development of appropriate jurisprudence in relation to land matters. This is coupled with the cheaper and speedier alternative dispute resolution mechanism in the form of mediation. The Bill, however, makes provision for future legislation (new or amending legislation) to confer jurisdiction on the Land Court as and when the need arises.

### 2. OBJECTS OF BILL

- 2.1 The Bill is divided into six Chapters, with other chapters subdivided into several Parts. The definitions are set out in **clause 1** as contained in Chapter 1 of the Bill to facilitate the interpretation of the Bill.
- 2.2 **Clause 2** determines the purpose and objects of the Bill as being to enhance and promote the ideal of access to land on an equitable basis, to promote land reform as a means of redressing the results of past discrimination and to facilitate land justice. The objects of the Bill are to—
  - (a) establish a Land Court with jurisdiction to grant any order, appropriate relief or impose any sanction as provided for in the Bill or any other law that confers jurisdiction on the Court;
  - (b) establish an appeal process to hear and determine appeals emanating from the judgments and orders of the Court; and
  - (c) provide for mediation.
- 2.3 Chapter 2 deals with the establishment, composition, seal, seat and jurisdiction of the Land Court (“the Court”). The salient features of Chapter 2, that is **clauses 3 to 7** of the Bill, can be summarised as follows:
  - 2.3.1 **Clause 3** establishes the Court as a Superior Court that has the authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a Division of the High Court of South Africa has in terms of the Superior Courts Act, 2013 (Act No. 10 of

2013), in relation to matters under its jurisdiction. Since the Court is a court of record, all its hearings must be conducted in an open court, unless the Court directs otherwise in special cases. The Court is established as a court of law and, in relation to matters arising from the application of the Restitution Act or any other legislation expressly providing therefor, is a court of law and equity.

- 2.3.2 **Clause 4** provides that the Court will consist of a Judge President, Deputy Judge President and so many other judges as may be determined in accordance with the prescribed criteria, and approved by the President. The Judge President, Deputy Judge President, and other judges must have knowledge, experience and expertise in the field of land rights matters. The Court is constituted before a single judge unless the Judge President decides to the contrary.
- 2.3.3 **Clause 5** provides that the Court must, for use as occasion may require, have an official seal of a design determined by the President by proclamation in the *Gazette*. Custody of the seal of the Court is kept by the registrar.
- 2.3.4 In terms of **clause 6** the seat of the Court is in Johannesburg, but whenever it appears to the Judge President that it is expedient or in the interests of justice to hold its sitting for the hearing of any matter at a place elsewhere than at the seat of the Court, it may hold such sitting at that place. Also the Court can sit in as many separate courts as the available judges may allow.
- 2.3.5 **Clause 7** provides that 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 the Bill or in terms of any other law are to be determined by the Court. The Court has jurisdiction in the area of jurisdiction of each Division of the High Court. The Minister, after consultation with the Chief Justice for the purposes of adjudicating land disputes and by notice in the *Gazette*, may define a specific area of jurisdiction of each Court, if the need arises, and may increase or reduce the area of jurisdiction of each Court, when necessary, and must appoint one or more places within the area of jurisdiction of the Court for the holding of sittings of the Court, other than the seat of each Division of the High Court, to make the Court accessible to the people, and may withdraw or vary any notice made under this clause. This provision enables the Minister to determine any place for the holding of the Court, such as a school, town hall or any other public place which can be equipped with necessary facilities for the hearing of matters especially in rural areas which are far away from the courts, even the magistrates' courts.

#### 2.4 Chapter 3 deals with judges, officers and assessors of the Court.

- 2.4.1 **Clause 8** provides that the President of the Republic, acting on the advice of the Judicial Service Commission, appoints the Judge President and Deputy Judge President of the Court. The Deputy Judge President acts as the Judge President whenever the Judge President is unable to do so for any reason. The President, acting on the advice of the Judicial Service Commission, and the Judge President of the Court may appoint as many judges as is necessary as judges of the Court. The Judge President, Deputy Judge President and judges of the Court must, due to their training and experience, have expertise in the field of land rights matters, be broadly representative in terms of race and gender and be fit and proper persons who are appropriately qualified. The Minister is empowered to make acting appointments in case of vacancy in the office of the Deputy Judge President or a judge of the Court, or if there is sufficient reason to do so. This acting appointment

is made after consultation with the Judge President of the Court and for such term as the Minister may determine.

- 2.4.2 **Clause 9** provides that the tenure, remuneration, terms and conditions of service applicable to a judge of the High Court in terms of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001), are not affected by the appointment and concurrent tenure of office of that judge who is appointed as a judge of the Court. The judges are appointed for a fixed term determined by the President of the Republic at the time of appointment and they hold office until the judge resigns by giving written notice to the President. The judges of the Court must be regarded as such, despite the period of their appointment, for the purposes of disposing of any proceedings in which they took part as judges of that Court and which are still pending upon the expiry of their appointment or any proceedings which, having been so disposed of before or after the expiry of the appointment, have been reopened, and for as long as they are necessarily engaged in connection with the disposal of the proceedings so pending or reopened. In terms of **clause 10** no summons or notice of motion may be issued against and no subpoena in respect of civil proceedings may be served on the Judge President, Deputy Judge President or any other judge of the Court except with the consent of the Judge President of the Court. However, consent of the Judge President of the Court or the Chief Justice is not required in relation to the application in terms of the Domestic Violence Act, 1998 (Act No. 116 of 1998).
- 2.4.3 With regards to the officers and staff of the Court, **clause 11** provides that the Minister must appoint a court manager, one or more assistant court managers if necessary, a registrar, one or more assistant registrars and other officers of the Court. The appointment of officers by the Minister is made in consultation with the Judge President of the Court and in accordance with the law governing the public service.
- 2.4.4 **Clause 12** makes provision that the Court may sit with or without assessors, who may not be more than two, to assist the Court in contested hearings. Assessors are appointed as prescribed, and must first take an oath or make an affirmation administered by the judge.
- 2.5 Part 1 of Chapter 4 deals with the institution of proceedings in Court, and the salient features thereof may be summarised as follows:
- 2.5.1 **Clause 13** provides as to who has *locus standi* to institute Court proceedings. The registrar is required to refer the matter to the Judge President who must decide whether the matter is to be heard in Court or must be referred for mediation.
- 2.5.2 If the matter is to go for mediation, the Judge President must make an order directing the registrar to transfer the matter and within the period provided for in the rules, to the mediator contemplated in clause 29. Clause 13 also sets out some of the relevant factors that the Judge President must take into account before making a decision to refer the matter. These include a factor such as whether mediation or arbitration in terms of any legislation took place before the Court was approached, and the outcomes thereof.
- 2.6 Part 2 of Chapter 4 deals with the rules, powers and functions of the Court under other legislation, intervention, right to appear, legal representation, appeals and judgment by default. The salient features of this part may be summarised as follows:
- 2.6.1 **Clause 14** provides that the provisions of the Superior Courts Act, 2013, and the Uniform Rules made thereunder apply to the Court, in so

far as those provisions relate to the circumstances under which opinion and oral evidence may be submitted to the Court, the suspension or execution of judgments, orders or sentences of the Court pending applications, or petitions for leave to appeal and the prosecution of appeals, the manner and circumstances under which a judgment by default can be given, and generally, any matter which may be necessary or useful to be regulated for the proper despatch and conduct of the functions of the Court. The clause also empowers the Rules Board for Courts of Law to make rules for a party to arbitration proceedings to apply to Court to stop the arbitration process and to proceed in the Court, vary or set aside a settlement agreement or set aside an arbitration award.

- 2.6.2 **Clause 15** determines that the provisions of the Bill apply in respect of performance by the Court of its powers and functions under other legislation in respect of which it has jurisdiction, except where such application is excluded expressly or by necessary implication.
- 2.6.3 **Clause 16** empowers any person or body with legal standing to apply to the Court for leave to intervene in the proceedings before the Court. A party to the proceedings may self-represent or be represented in Court by their own legal practitioner at their own costs. However, if a party cannot afford legal representation and if it is in the interest of that party to have legal representation, the Court must refer the matter to Legal Aid South Africa to consider granting legal representation in accordance with its protocols. The expenditure for the provision of legal aid must be defrayed from money appropriated by Parliament for this purpose and monies appropriated by Parliament for this purpose constitute earmarked funds on the vote of Legal Aid South Africa, and may not be used for any other purpose. These funds are currently managed by the Land Rights Management Facility, but are being transferred to Legal Aid South Africa to manage for the purposes of providing legal aid to the indigent going forward.
- 2.6.4 **Clause 17** sets out the powers of the Court on the hearing of appeals and grants the right to any person aggrieved by a judgment or order of a Magistrate's Court to appeal to the Court in accordance with any land related legislation conferring appellate jurisdiction on the Court, and also in accordance with the rules contemplated in clause 32. The Court can receive further evidence, remit the case to the court or tribunal of first instance for further hearing or to confirm, amend or set aside the judgment, order or decision which is the subject matter of the appeal and to give any judgment, order or decision which the circumstances may require.
- 2.6.5 In terms of **clause 18** the Court may grant judgment by default in the manner and in the circumstances provided for in the rules.
- 2.7 Part 3 of Chapter 4 deals with the witnesses and admissibility of evidence.
- 2.7.1 **Clauses 19 and 20** deal with issues related to the adjudication of disputes. These provisions are standard and deal with matters such as securing the attendance of witnesses through a subpoena, and how they should be dealt with on refusal to give evidence and witness fees. Witness fees are payable in terms of section 37 of the Superior Courts Act, 2013.
- 2.7.2 **Clause 21** deals with the admissibility of evidence in Court, in terms of which certain ordinary rules of evidence are relaxed. The Court is entitled to, in case of claims under the Restitution Act, admit evidence, including oral evidence, which it considers relevant and cogent to the matter being heard by it, whether or not such evidence would be admissible in any other court of law. The Court can admit hearsay

evidence regarding the circumstances surrounding the dispossession of a land right or rights and the rules governing the allocation and occupation of land within a claimant community at the time of such dispossession, and expert evidence regarding the historical and anthropological facts relevant to any particular land claim.

- 2.8 Part 4 of Chapter 4 deals with the processes of Court and Offences. In terms of **clause 22**, the process of Court runs throughout the Republic and its sentences, rulings, judgments, writs, summonses, orders, warrants, commands and other processes must be executed by the sheriff or deputy sheriff in any area in the same manner as if they were processes of a Division of the High Court having jurisdiction in such area. **Clause 23** creates offences punishable by a fine or imprisonment of up to one year for a person who commits a conduct referred to in section 46 of the Superior Courts Act, 2013, in relation to the execution by a sheriff or deputy sheriff of their duties in terms of the Bill. The said section 46 makes certain conduct an offence, such as obstructing the sheriff or deputy in executing their duties or destroying or disposing of goods under attachment or interdict by the Court *etc.*
- 2.9 Part 5 of Chapter 4 deals with the powers of Court, conferences, Court orders, variation, rescission and costs. The salient features of this part may be summarised as follows:
- 2.9.1 **Clause 24** provides that the Court has all such powers that a Division of the High Court has in civil proceedings at a place where the land in question is situated. Of great importance is that the Court has the power 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. The Court also has the power to reserve any question of law that arises in the proceedings for the decision of the Supreme Court of Appeal, and pending that decision the Court may make an interim order. Any suspicion or allegation of corruption during the Court proceedings may be referred to the relevant authority for investigation.
- 2.9.2 **Clause 25** entitles the Court on its own or at the request of any party at any stage of the proceedings to convene a conference for the purpose of, *inter alia*, the simplification of the issues in dispute, the limitation of the number of expert witnesses to be called at Court or such other matters as may aid in the disposal of the action in the most expeditious and least costly manner. Any party who refuses or neglects to attend the conference may be subjected to an order as may be equitable in the circumstances, including an order that the party who was so absent is liable to pay such costs as in the opinion of the Court were incurred as a result of the said absence.
- 2.9.3 **Clause 26** sets out the various orders that the Court can make, and importantly may at any stage after a dispute has been referred to it, if it becomes apparent that it would advance the finalisation of the case if some or all of the disputes between the parties are referred to mediation, stay the proceedings and refer the dispute to mediation.
- 2.9.4 **Clause 27** provides for the variation and rescission of decisions, judgments or orders of the Court, and this provision is standard.
- 2.9.5 In terms of **clause 28** the Court may make an order for the payment of costs according to the requirements of the law and fairness. When deciding the issue of costs, the Court may take into account factors such as whether the matter ought to have been referred to mediation or arbitration, and the conduct of the parties during the proceedings.
- 2.9.6 Part 6 of Chapter 4 deals with mediation and settling of matters. **Clause 29** deals with mediation and provides that if, at any stage



during proceedings, but prior to judgment, it becomes evident to the presiding judge that there is any issue which might be resolved through mediation, the presiding judge may make an order directing the parties to attempt to settle the issue through a process of mediation, and that such proceedings be stayed pending such process. The Rules Board is empowered to make rules relating, *inter alia*, to the appointment of a mediator, procedure for referral of matters to the mediator, process by which mediation is initiated, and the form, content and use of that process, fees that are payable for mediation, appointment, powers and functions of a mediator and issuance of an order at the conclusion of the proceedings. If the parties are not able to resolve the dispute, or one or more of the parties to mediation so request, the mediator must refer the matter to the Court for adjudication, by following the processes determined in the rules.

2.9.7 **Clause 30** provides that if a matter is settled out of Court, either through negotiation or mediation, and the settlement agreement is accepted by all the parties involved in the matter, the registrar of the Court must submit the settlement agreement to the Court for confirmation or rejection. The Court may confirm the settlement agreement and make it an order of Court or refer the settlement agreement to the parties for reconsideration on any specific issues.

2.10 Chapter 5 deals with appeals against judgment or order of Court and of other courts.

2.10.1 **Clause 31** provides for appeals against judgment or order of the Court. An appeal against a decision of the Court sitting as a court of first instance lies, upon leave having been granted—

- (a) if the Court consisted of a single judge, either to the Supreme Court of Appeal or to a full court; or
- (b) if the Court consisted of more than one judge, to the Supreme Court of Appeal.

An appeal against any decision of a full court on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal. A judge is prohibited from sitting at the hearing of an appeal against a judgment or an order given in a case that was heard before that judge.

2.10.2 **Clause 32** deals with appeals against judgment and order of other courts, and provides that the rules must provide for the manner of lodging the appeal with the Court, and the process that the Court must follow in hearing appeals against judgments and orders of other courts.

2.11 Chapter 6 deals with the general provisions applicable to Court (**clause 33**); transitional arrangements (**clause 34**); amendment of laws (**clause 35**); regulations (**clause 36**) and the short title of the Bill (**clause 37**), which provisions are standard. As one of the transitional measures, a judge of the High Court who, on the date of commencement of the Act, was seconded or appointed as a judge of the Land Claims Court becomes a judge of the Court, unless if such judge indicates in writing to the Secretary of the Judicial Service Commission, that such judge does not wish to hold a concurrent appointment as a judge of the Court. The laws referred to in clause 35 are sought to be amended by means of the Schedule to the Bill to give the Court exclusive jurisdiction, or in some instances the Court and Magistrate's Courts concurrent jurisdiction to adjudicate the disputes emanating from the application of those laws. 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 to the Court, or concurrent jurisdiction to the Court and Magistrate's Court.

### **3. DEPARTMENTS/BODIES/PERSONS CONSULTED**

- 3.1 The Bill was consulted upon with the Departments constituting the Inter-Ministerial Committee on Agriculture (“IMC”), being the Departments of Agriculture, Land Reform and Rural Development; Trade, Industry and Competition; Cooperative Governance and Traditional Affairs; Human Settlements, Water and Sanitation; Public Works and Infrastructure and Public Enterprises.
- 3.2 Inputs were received from the Reference Group of Experts appointed by the Minister, the mandate of which is to advise the Minister on how the Department can assist and contribute to the deliberations of the IMC in its quest to give flesh to the land reform programme of Government, with particular reference to the development and promotion of the Bill.
- 3.3 The Department has had a one-on-one presentations of the Bill to the Departments of Agriculture, Land Reform and Rural Development, Public Works and Infrastructure, and Trade, Industry and Competition. A workshop was held on 12 – 13 March 2020 between the officials of the IMC Departments for discussion on the Bill and the Bill was improved in consideration of comments received from that workshop.
- 3.4 The submission of the Bill to Cabinet was approved by the IMC on 4 September 2020. A further meeting was held on 12 November 2020 with officials from the IMC Departments for final engagement on the Bill, and the Minister’s Reference Group was also invited to submit written comments before the Bill is submitted to Cabinet. Comments received were incorporated in the Bill to the extent necessary. The Bill was presented at the Development Committee (DevComm) on 18 November 2020 and at the Justice, Crime Prevention and Security (JCPS) Directors-General cluster on 26 November 2020. Both the DevComm and JCPS cluster approved that the Bill be processed further.

### **4. IMPLICATIONS FOR PROVINCES**

There are no implications for provinces.

### **5. FINANCIAL IMPLICATIONS FOR STATE**

The Bill has been sent for costing as it involves the establishment of the Court. The main financial implications will be in the form of additional human resources relating to the appointment of judges, officers of the Court, and the appointment of mediators who are not in the full time employ of the State.

### **6. PARLIAMENTARY PROCEDURE**

- 6.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill should be dealt with in accordance with the procedure set out in section 75 of the Constitution, since it contains no provisions to which the procedure set out in section 74 or 76 of the Constitution applies.
- 6.2 The Constitution distinguishes between four categories of Bills as follows: Bills amending the Constitution (section 74); Ordinary Bills not affecting provinces (section 75); Ordinary Bills affecting provinces (section 76); and Money Bills (section 77). A Bill must be correctly classified or tagged, otherwise it would be constitutionally invalid.
- 6.3 The Bill has been considered against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4 to the Constitution.



- 6.4 The Constitutional Court stated in the case of *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC), that the test for the tagging of Bills essentially entails that “any Bill whose provisions in substantial measure” affects the provinces must be classified to follow the section 76 procedure.
- 6.5 The Bill seeks to establish a Court with jurisdiction to grant any order, appropriate relief or impose any sanction, as provided for in the Bill or any other law that confers jurisdiction on the Court, appeal process and to provide for mediation. In the final analysis, it is our view that the subject matter of the Bill does not fall within any of the functional areas listed in Schedule 4 or Schedule 5 to the Constitution. Consequently, we are of the opinion that the Bill is an ordinary Bill not affecting provinces and that it must be dealt with in accordance with the procedure set out in section 75 of the Constitution.

## **7. REFERRAL TO NATIONAL HOUSE OF TRADITIONAL LEADERS**

The Office of the Chief State Law Adviser is of the preliminary view that the Bill would affect the customary law or customs of traditional communities, and therefore it is necessary to refer the Bill to the National House of Traditional and Khoi-San Leaders.





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