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**LEGAL OPINION**  
[REDACTED]

**TO** : Hon Adv. S.P. Holomisa and Hon Mr B. A. Mnguni  
Co-Chairpersons of the Constitutional Review Committee

**COPY** : Secretary to Parliament

**DATE** : 3 August 2011

**SUBJECT** : REQUEST TO REVIEW SECTION 25 OF THE CONSTITUTION

**LEGAL ADVISER** : P. Ngema

**COMMITTEE REF** : CR 3/11

**REFERENCE** : 136 / 2011



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**LEGAL OPINION**

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**SUBJECT** : REQUEST TO REVIEW SECTION 25 (PROPERTY CLAUSE) OF THE  
CONSTITUTION

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1. Our Office was requested to advise the Constitutional Review Committee on the submission received from Mr John Mokoena to review section 25 of the Constitution.
2. Mr Mokoena, writing on behalf of Bathlakoane Ba Manzimnyama, submitted a request to have a new clause inserted within section 25 of the Constitution "to the effect that each government administration must have a window period to lodge land claims until everyone has been covered." We understand Bathlakoane Ba Manzimnyama's submission to be requesting the Constitutional Review Committee (the Committee) to consider amending section 25 of the Constitution in order to empower each administration, in its five year term, to give a window period for the lodgement of new restitution claims. According to Mr Mokoena this arrangement must persist until "everyone has been covered".
3. There are two major purposes of the property clause<sup>1</sup>. The first one is to ensure the insulation of land reform from constitutional attack. The second one is to provide a constitutional framework for land reform. These purposes are relevant to the argument on what programmes

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<sup>1</sup> South African Constitutional Law, The Bill of Rights, Cheadle, Davis and Hayson on Property, Chapter 20.

are put in place to address land reform and the constitutionality of the measures that government take in order to fulfil its constitutional obligations.

4. The Department of Land Affairs White Paper dated April 1997 set out three components of the government's land reform programmes. These components are redistribution, tenure reform and land restitution. This is adumbrated in section 25(5)<sup>2</sup>, (6)<sup>3</sup> and (7)<sup>4</sup> where the state is obliged to actively pursue land reform. Section 25 (5) enjoins 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.
5. Section 25 (7) of the Constitution prescribes that persons or communities dispossessed of property after 19 June 1913 as a result of racially discriminatory laws or practices are entitled to restitution of that property or to equitable redress. In terms of the Constitution there is no cut-off date for the lodgement of restitution claims.
6. The Restitution of Land Rights Act, 1994 (Act No. 22 of 1994), (the Restitution Act) was promulgated and commenced on 2 December 1994. The purpose of enacting the Restitution Act was, amongst others, to provide for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices. Section 2 of the Restitution Act provides the following:

**2. (1) A person shall be entitled to restitution of a right in land if—**

**(a) he or she is a person dispossessed of a right in land after 19 June, 1913 as a result of past racially discriminatory laws or practices; or**

**(b) it is a deceased estate dispossessed of a right in land after 19 June, 1913 as a result of past racially discriminatory laws or practices; or**

**(c) he or she is the direct descendant of a person referred to in paragraph (a) who has died without lodging a claim and has no ascendant who—**

**(i) is a direct descendant of a person referred to in paragraph (a); and**

**(ii) has lodged a claim for the restitution of a right in land; or**

**(d) it is a community or part of a community dispossessed of a right in land after 19 June, 1913 as a result of past racially discriminatory laws or practices; and**

<sup>2</sup> 25(5): The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on equitable basis.

<sup>3</sup> 25(6): A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

<sup>4</sup> 25(7): A person or community disposed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(e) *the claim for such restitution is lodged not later than 31 December, 1998.* [Our emphasis]

7. The Restitution Act recognises restitution claims in respect of dispossession that occurred after 19 June 1913. It further provides a cut-off date for the lodgement of restitution claims. According to the Department of Rural Development and Land Reform the reason for the cut-off date was to ensure legal and economic certainty whilst maintaining public confidence in the land market and closure of restitution claims<sup>5</sup>.
8. Item 3 of the Rules Regarding Procedure of Commission drafted in terms of the Regulations issued under the Restitution Act and published in GNR 703 dated 12 May 1995 provided timeframes within which restitution claims may be submitted to, and for investigation by the land claims commissioners. Item 3 provides as follows:

**3. Acceptance of claim for investigation.**

(1) *A regional land claims commissioner having jurisdiction over the land in respect of which a claim is instituted shall accept the claim for investigation where he or she is satisfied—*

(a) *subject to the provisions of section 11 (2) of the Act, that the claim was lodged—*

(i) *substantially in the form of Annexure A together with such additional documents as are relevant to substantiate the claim; and*

(ii) *with any regional office or the Head Office of the Commission or the Department of Land Affairs not later than 31 December 1998;*

(b) *that the claimant has reasonable grounds for arguing that the claim meets the criteria set out in section 2 of the Act; and*

(c) *that the claim is not frivolous or vexatious, whereupon he or she shall advise the claimant accordingly.*

(2) *In the case of an informal land right, the documents contemplated in paragraph (a) (i) of subrule (1) may include a sworn statement by the claimant, giving a full description of the land in question and the nature of the right being claimed.* [Our emphasis]

9. The Supreme Court of Appeal found in *Gamevest (Pty) Ltd v Regional Land Claims Commission, Northern Province and Mpumalanga, and Others* 2003 (1) SA 373 (SCA) that there are four phases to the determination of a restitution claim. The first phase is lodging of a claim which had to be done within set timeframes. The second phase is the consideration of the claim by the Commission, acceptance and publication. The third phase is the investigation

<sup>5</sup> See the Department of Land Affairs White Paper on Land Policy, 1997 at heading 3.2.

of the claim. The last phase is the referral of the fully investigated claim to the Land Claims Court. The Land Claims Court has the status and powers of a High Court.

10. It is our view that the requester based the request to amend section 25 of the Constitution on the analysis and interpretation of the provisions of the Restitution Act and Rules Regarding Procedure of the Commission. Section 2(1)(e) of the Restitution Act provide a closed window period in terms of which applications for restitution claims may be lodged. The net effect of section 2(1)(e) of the Restitution Act is that after 31 December 1998 no restitution claims, resulting from the discriminatory laws or practices from after 19 June 1913, could be lodged and accepted by the land claims Commissioners. Therefore restitution claims that arose after 19 June 1913 could be submitted from when the Restitution Act came into effect, namely 2 December 1994 until 31 December 1998. A period of just more than four years was set aside for the lodgement of restitution claims.
11. It is our view that if the Committee considers the amendment of the Constitution due to the submissions based on the timeframes set by the Restitution Act that would be bypassing legislation within which the impasse is created. The Constitutional Court in *Minister of Health and Another v New Clicks SA (Pty) Ltd and others 2006 (1) BCLR 1 (CC) at para 436<sup>6</sup>* found it inappropriate to bypass the statute that gives effect to a provision in the Constitution and rely on or attack the Constitution without challenging the constitutionality of the relevant piece of legislation. Ngcobo J, as he then was, at para 437 said:

*"Where the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides."*

12. Section 25(8) of the Constitution provides that:

*No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).*

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<sup>6</sup> The court in the judgement of Judge Ngcobo said the following, "In my view, there is considerable force in the view expressed in *NAPTOSA*. Our Constitution contemplates a single system of law which is shaped by the Constitution. To rely directly on section 33(1) of the Constitution and on common law when *PAJA*, which was enacted to give effect to section 33 is applicable, is in my view inappropriate. It will encourage the development of two parallel systems of law.

13. It is our view that section 25(8) is sufficiently wide to accommodate further legislative or other measures aimed at achieving, amongst others land reform.

14. Whilst the submission by Mr Mokoena requires a policy decision by the Committee, we are of the view that it is not desirable to amend the Constitution for mainly two reasons.

14.1 The closing date for lodgement of restitution claims was set, not by the Constitution, but in terms of section 2(1)(e) of the Restitution Act. If the date for lodgement of restitution claims is to be changed, we submit that the ideal approach would be to amend section 2(1)(e) of the Restitution Act.

14.2 Section 25(8) of the Constitution is sufficiently wide to accommodate further legislative or other measures aimed at achieving, amongst others, land reform.



**Phumelele Ngema (Miss)**  
**Parliamentary Legal Adviser**

CR 3/11

# BATHLAKOANE BA MANZIMNYAMA

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4 May 2011

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Sir/Madam

PUBLIC SUBMISSIONS TO THE CONSTITUTION REVIEW COMMISSION: REVIEW OF SECTION 25 OF THE CONSTITUTION

**Purpose**

The purpose of this letter is to request the CRC to review section 25 of the constitution of the Republic of South Africa, 1996.

**Discussion**

It was unfair that the window period of land claims was limited to one government administration (1994-1998); it is unfair to us and it is unfair to future generations that still have to claim but rights have not vested on them yet;

**THEREFORE WE RECOMMEND THAT A SUB CLAUSE BE INSERTED UNDER SECTION 25 THAT PROVIDES THAT EACH GOVERNMENT ADMINISTRATION MUST HAVE A WINDOW PERIOD TO LODGE LAND CLAIMS UNTIL EVERYONE HAS BEEN COVERED;**

Kindly acknowledge receipt of our letter to ensure that you have received it and you are considering our submission.



Kind Regards  
John Mokoena (021 461 1335)