

## 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 a 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, orders and decisions appealable at a specialist Land Court of Appeal. 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 and arbitration. 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 interpretation of the Act.
- 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 a Land Court of Appeal to hear and determine appeals emanating from the judgments and orders of the Court; and
  - (c) provide for court ordered mediation or arbitration.
- 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 High 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. 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.

- 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 has exclusive jurisdiction in respect of all matters that elsewhere 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, who must be judges of the High Court and have knowledge, experience and expertise in the field of land rights matters. The Deputy Judge President acts as the Judge President whenever the Judge President is unable to do so for any reason. The President of the Republic, 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 Minister is also empowered to make acting appointments in case of vacancies in the office of the Deputy Judge President or a judge of the Court, or if there is sufficient reason to do so.
- 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 expiry of the term, the date on which the judge ceases to be a judge of the High Court or the judge resigns by giving written notice to the President. The judge of the Court must continue to hear a matter even after his or her term has expired in order to ensure continuity of court processes. 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 regard 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 Court proceedings 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, and such person must notify the registrar in the prescribed manner of an intention to institute the 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 or arbitration. If the matter is to be heard in Court, the Judge President refers the matter to the registrar for the allocation of the date of hearing.
  - 2.5.2 If the matter is to go for mediation or arbitration, the Judge President must make an order directing the registrar to transfer the matter, in the prescribed manner, to the mediator contemplated in clause 31 or the arbitrator contemplated in clause 32. Clause 13 also sets out some of the relevant circumstances that the Judge President must take into account before making a decision to refer the matter.
- 2.6 Part 2 of Chapter 4 deals with the rules, powers and functions of 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 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 judgement by default can be made, 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. These provisions do apply in so far as no other provision has been made in the regulations.

- 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.
- 2.6.3 **Clause 16** empowers any person 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 by for any other purpose. These funds are currently managed by the Land Rights Management Facility which is faced with challenges.
- 2.6.4 **Clause 17** sets out the powers of the Court on the hearing of appeals in terms of any law that confers jurisdiction on the Court. 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 determined in the rules.
- 2.7 Part 3 of Chapter 4 deals with the witnesses, examination by interrogatories and admissibility of evidence.
- 2.7.1 **Clauses 19 to 21** 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, witness fees, the taking of the evidence of a person who resides or is for the time being outside the area of jurisdiction of the Court. Witness fees are payable in terms of section 42 of the repealed Supreme Court Act, 1959, as the corresponding section 37 of the Superior Courts Act, 2013, is yet to be put into operation.
- 2.7.2 **Clause 22** deals with the admissibility of evidence in Court, in terms of which certain ordinary rules of evidence are relaxed. The Court is entitled to 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 23**, 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 the Provincial Division of the High Court having jurisdiction in such area. **Clause 24** 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, in relation to the execution by a sheriff or deputy sheriff of his or her duties in

terms of the Bill. The said section 46 makes certain conduct an offence, such as obstructing the sheriff or deputy sheriff 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, referral for investigation by referee, pre-trial conference, Court orders, variation, rescission and costs. The salient features of this part may be summarised as follows:

- 2.9.1 **Clause 25** 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 Land Court of Appeal, and pending that decision the Court may make an interim order.
- 2.9.2 **Clause 26** empowers the Court to at any stage refer any matter which requires extensive examination of documents or scientific, technical or local investigation which cannot be conveniently conducted by the Court, any matter which relates wholly or in part to accounts or any other matter arising in such proceedings, for enquiry and report to a referee appointed by the parties. The Court has options in dealing with the report, such as adopting the report, either wholly or in part, and either with or without modifications, or remitting such report for further enquiry or report or consideration by such referee, or even making such other order in regard thereto as may be necessary or desirable.
- 2.9.3 **Clause 27** entitles the Court on its own or at the request of any party at any time before the hearing to convene a pre-trial conference for the purpose of clarifying the issues in dispute, identifying those issues on which evidence will be necessary and in general, expediting a decision on the matter in question.
- 2.9.4 **Clause 28** 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 the dispute ought to have been referred to mediation or arbitration, stay the proceedings and refer the dispute to mediation or arbitration.
- 2.9.5 **Clause 29** provides for the variation and rescission of decisions, judgments or orders of the Court.
- 2.9.6 In terms of **clause 30**, 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.
- 2.9.7 Part 6 of Chapter 4 deals with mediation, arbitration and settling of matters. **Clauses 31** and **32** deal with mediation and arbitration, respectively, determining that if the Judge President or the Court decides to refer the matter for mediation or arbitration, he or she or the Court must make an order directing the registrar to transfer the matter to the mediator or arbitrator and specify the time, date and the place where the process is to start and appoint a fit and proper person as mediator or arbitrator to chair the first meeting between the parties. However, the parties may at any time during the course of mediation or arbitration by agreement appoint another person to mediate or arbitrate the dispute. In terms of **clause 33**, if a matter is settled out of

Court, either through negotiation, mediation or arbitration 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 back to the parties for reconsideration on any specific issues or reject the settlement agreement, in which latter event the matter must proceed in the Court.

2.10 Chapter 5 deals with the Land Court of Appeal. The salient features of Part 1 thereof may be summarised as follows:

- 2.10.1 **Clause 34** establishes the Land Court of Appeal as a court of law and equity. The Land Court of Appeal is the final court of appeal in respect of all judgments and orders made by the Land Court in respect of the matters within its exclusive jurisdiction. It is a superior court with authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which the Supreme Court of Appeal has in relation to matters under its jurisdiction and is a court of record.
- 2.10.2 **Clause 35** determines that the Land Court of Appeal consists of the President of the Land Court of Appeal, the Deputy President of the Land Court of Appeal, and as many judges as the President of the Republic may consider necessary. The Land Court of Appeal is constituted before any three judges who the President of the Land Court of Appeal designates from the panel of judges of the Land Court and High Court. However, no judge of the Land Court of Appeal may sit in the hearing of an appeal against a judgment or an order given in a case that was heard before that judge.
- 2.10.3 In terms of **clause 36** the judges of the Land Court of Appeal are appointed by the President of the Republic who, acting on the advice of the Judicial Service Commission and after consultation with the Minister, must appoint a Judge President and a Deputy Judge President of the Land Court of Appeal, who may be a judge of the Supreme Court of Appeal. The Deputy Judge President of the Land Court of Appeal acts as Judge President of the Land Court of Appeal whenever the Judge President of the Land Court of Appeal is unable to do so for any reason. The President, acting on the advice of the Judicial Service Commission, after consultation with the Minister, the Chief Justice and the Judge President of the Land Court of Appeal, must appoint the judges of the Land Court of Appeal. Acting judges of the Land Court of Appeal are appointed from the judges of the Land Court or High Court by the Minister, after consultation with the Chief Justice and the Judge President of the Land Court of Appeal.
- 2.10.4 The remaining clauses of Part 1 deal with the tenure, remuneration and terms and conditions of appointment of the Land Court of Appeal judges (**clause 37**); officers of the Land Court of Appeal (**clause 38**) being a registrar, one or more assistant registrars if necessary and the officers of the Land Court hold the corresponding office in relation to the Land Court of Appeal; the seal of the Land Court of Appeal (**clause 39**), the design of which is determined by the President of the Republic by proclamation in the *Gazette*; and the seat of the Land Court of Appeal (**clause 40**), which is the same seat as that of the Land Court.
- 2.10.5 Part 2 deals with the rules for the Land Court of Appeal (**clause 41**), which are made by the Rules Board, in consultation with the Judge President of the Land Court of Appeal; the jurisdiction of the Land Court of Appeal and power to hear appeals (**clause 42**); appeals against judgment or order of the Court (**clause 43**), determining that the appeal must be made with leave of the Court and if refused with the leave of the Land Court of appeal; representation before the Land



Court of Appeal (**clause 44**), determining that any person who may appear before the Land Court has the right to appear before the Land Court of Appeal; judgments of the Land Court of Appeal binding on the Land Court (**clause 45**); the Land Court of Appeal as final court of appeal (**clause 46**); costs (**clause 47**), determining that the judge, judges or Land Court of Appeal deciding the matter may make such order as to costs of the case as deemed fit, including an order that the unsuccessful party pay to the successful party the costs of review in a sum fixed by the judge, judges or Land Court of Appeal; and service and enforcement of orders (**clause 49**), providing that any decision, judgment or order of the Land Court of Appeal may be served and executed as if it were a decision, judgment or order of the High Court.

- 2.11 Chapter 6 deals with the general provisions applicable to the courts established by the Bill (**clause 49**); finances and accountability (**clause 50**); transitional arrangements (**clause 51**); amendment of laws (**clause 52**); regulations (**clause 53**) and the short title (**clause 54**), which provisions are standard. The laws referred to in clause 52 are sought to be amended by means of the Schedule to give the Court exclusive 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 exclusive jurisdiction to the 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 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 and 13 March 2020 between the officials of the IMC Departments for discussion on the Bill, and the Bill was improved after 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 was 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 Land Court and Land Court of Appeal. 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 and arbitrators 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 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, and a Land Court of Appeal to hear and determine appeals emanating from the judgments and orders of the Land Court and to provide for court ordered mediation or arbitration. 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 AND KHOI-SAN 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.