



rural development  
& land reform

Department:  
Rural Development & Land Reform  
REPUBLIC OF SOUTH AFRICA

**RESPONSE TO PROPOSED AMENDMENTS TO THE RESTITUTION OF LAND RIGHTS  
AMENDMENT BILL [B35B – 2013] (sec – 76):**

On 18 March 2014, Provinces presented negotiating on the Restitution of Land Rights Amendment Bill [B35B of 2013] (“the Bill”) to the Select Committee on Land and Environmental Affairs (“the Committee”). Amendments to the Bill were proposed by the following provinces: Eastern Cape, Free State, KwaZulu-Natal, and Western Cape. The Department of Rural Development and Land Reform (“DRDLR”) considered each proposed amendment and responds as follows:

**1. EASTERN CAPE**

- 1.1 The Eastern Cape Legislature recorded its support for the Bill, but referred to submissions, which are not against the Bill, from the Democratic Alliance and Legal Resources Centre containing proposals for the amendment of several clauses. The submissions were, however, not attached to the Bill, and were therefore not considered by the Committee.
- 1.2 The negotiating mandate, however, refers to a recommendation that clause 5 of the Bill should provide that *“the President be allowed to appoint judges which are recommended by both the JSC and NEDLAC”*.

**Response:** In terms of section 174 (6) of the Constitution of the Republic of South Africa, 1996 judges are appointed by the President on the advice of the Judicial Services Commission (“JSC”). None of the objects or functions of NEDLAC in the Nation Economic Development and Labour Council Act, 1994 (Act No 35 of 1994) or in its Constitution empower it to participate in the process for the appointment of Judges; and no reasons were provided for the proposal that National Economic Development and Labour Council (“NEDLAC”) should also advise the President in the appointment of judges to the Land Claims Court.

The DRDLR therefore rejects the proposed amendment.

**2. FREE STATE**

- 2.1 The Free State Legislature recorded its support for the Bill, but proposed *“the insertion of a sub section in the amendment of section 22 (4) to allow the President to appoint also the retired judges with knowledge, experience and expertise in land matters.”*

**Response:** Clause 6 of the Bill proposes the amendment of section 22 (4) of the Restitution of Land Rights Act, 1994 (Act 22 of 1994). Subsection (7) in clause 6 of the Bill aligns the tenure of office, the remuneration and the terms and conditions of

service of Judges of the Land Claims Court to those applicable to a judge of the High Court as set out in the Judges Remuneration and Conditions of Employment Act, 2001 (Act 47 of 2001). The latter Act regulates also regulates the discharge of judges from active service, and continuation of active service by judges. It shall therefore not be necessary to make a provision relating to retired judge as proposed as the matter is already provided for in clause 6 (subsection 7) of the Bill.

The DRDLR therefore rejects the proposed amendment.

### 3. KWAZULU-NATAL

3.1 The KwaZulu-Natal Legislature recorded its' support for the Bill, but requested the Committee to consider certain amendments. The amendments and the DRDLR's response thereto are as follows:

3.1.1 Amendments to clause 1 of the Bill by changing the cut-off date for the lodgement of claims from 30 June 2019 to 30 June 2015, and the insertion of the words "*No claims will be entertained after this date, and no further window for the restitution of land claims shall be opened*".

**Response:** The re-opening of lodgement of claims for a period of five years is a policy decision of Government. The five year period is informed by the high volumes of claims expected and the information required from each claimant, which is necessary to lodge a claim and the requirements that the Commission on Restitution of Land Rights to assist each claimant to lodge their claim. The Courts have interpreted the requirements for lodging a claim to mean that all the information must be provided at lodgement of the claim which must be before the cut-off date. Addition or amendment of information is not permitted after the cut-off date for lodgement of claims has passed, and therefore sufficient time must be given to claimants to submit information that may be outstanding when lodge their claims, which information must be received by the cut-off date for lodgement.

The re-opening of lodgement of claims is a policy matter, which is implemented through legislation. The insertion of the words "*No claims will be entertained after this date, and no further window for the restitution of land claims shall be opened*" shall not stop the Legislature from amending the Restitution of Land Rights Act, 1994 in the future by re-opening the lodgement of claims as those words may be deleted. Inserting them will therefore make no difference to the Bill.

The DRDLR therefore rejects the proposed amendments.

3.1.2 Amendments to clause 1 of the Bill by insertion of a new clause 2 (5) which shall read as follows "*2 (5) A claim submitted after 31 December 1998 but before the date specified in section 2 (1) (e) will be considered invalid, unless the claimant can show good cause as to why the claim was not lodged during the window period ending 31 December 1998*".

**Response:** Those who did not lodge claims have already provided reasons, which include that:

- they did not know of the requirement to lodge land claims;
- the information about lodgment did not reach them on time;
- the window period for lodging claims was too short;
- the verification systems of the Commission on Restitution of Land Rights ("Commission"), tasked with processing land claims, are not adequate and led to deserving persons being excluded from claims that were lodged; and
- those dispossessed through betterment planning were not allowed to lodge claims in the Eastern Cape.

The DRDLR is of the opinion that it is not necessary to require each claimant to set out reasons they did not lodge claims.

The DRDLR therefore rejects the proposed amendment.

- 3.1.3 Amendment of the Bill by inserting a new clause 2A which shall amend section 4 (3) of the Restitution of Land Rights Act, 1994 by inserting the words "*on recommendation from a multi-party committee of Parliament and approved by the National Assembly and the NCOP*" after both instances of the word "*Minister*".

**Response:** Section 4 (3) of the Restitution of Land Rights Act, 1994 states that "*The Commission shall consist of a Chief Land Claims Commissioner appointed by the Minister, after inviting nominations from the general public, a Deputy Land Claims Commissioner similarly appointed and as many regional land claims commissioners as may be appointed by the Minister.*" The Commissioners are assisted by staff seconded to the Commission in terms of the Public Service Act.

The Commission (i.e. Commissioners) reports, through the Minister, to Parliament. Section 20 of the Restitution of Land Rights Act, 1994 states that "*the Commission shall annually not later than the first day of June submit to Parliament a report on all its activities during the previous year, up to 31 March.*"

Parliament therefore has an oversight role over the Commission, and the Commission performs their functions under the strategic and policy direction of the Minister. It is therefore not necessary for the Commissioners to be appointed on recommendation of Parliament.

The DRDLR therefore rejects the proposed amendment.

- 3.1.4 Amendment of the Bill by insertion in section 6 (1) (cA) in the Restitution of Land Rights Act, 1994 the words "*appoint through a competitive bidding process an independent service provider, registered with the Independent Regulatory Board for Auditors to*" before the word investigate.

**Response:** Section 6 (1) of the Restitution of Land Rights Act, 1994 provides the general functions of the Commission. Section 6 (1) (cA) currently provides that the

Commission must investigate the merits of claims lodged with it. In interpreting the mandate of the Commission, the Supreme Court of Appeal stated that *"the function of the commission, broadly speaking, is to receive and to investigate claims for restitution and to attempt to resolve them through mediation and negotiation. If a claim cannot be resolved by those means it must be referred by the commission to the LCC for the LCC to exercise its wide powers of adjudication."* See *Mahlangu N.O. v Minister of Land Affairs & Others* 2005(1) SA 451 (SCA) at paragraph 1. The investigation of claims is therefore a core function of the Commission.

It must be pointed out, however, that Section 9(1) (a) of the Restitution of Land Rights Act, 1994 provides that *"the Chief Land Claims Commissioner may from time to time- (a) appoint one or more persons or organisations with particular knowledge or specific expertise relevant to the achievement of the Commission's objects to advise the Commission regarding any matter connected with the performance of its functions."*

Where there is a need to 'outsource' the investigation of a claim the appointment of a competent person or organization to conduct the investigation on behalf of the Commission will be made through that section, read with the Public Finance Management Act, 1999 and Regulations thereto (which also regulate supply chain management processes).

The DRDLR therefore rejects the proposed amendment.

- 3.1.5 Amendment of clause 3 of the Bill by the insertion of a new subsection (7) in section 10 of the Act to provide that *"prior to accepting any claim, the Commission shall ensure that the land claims process is properly communicated through national and regional media, and through provincial and regional workshops."*

**Response:** The re-opening of lodgment of claims shall be supported by a comprehensive communication campaign which is aimed at ensuring that the relevant information on restitution is received by all our people. A communication strategy is being finalised by the DRDLR and Government Communication and Information System, as was directed by Cabinet when it approved the introduction of the Bill to Parliament.

Central to the communication campaign will be dissemination of key facts to inform citizens about their rights to restitution and how to go about lodging a claim, and what happens once a claim is lodged through all forms of media and other methods of communication. There will also be a citizen's manual on land claims, which will be translated in the 11 official languages, sign language and the main languages spoken by the Khoi and the San.

Trained members of the Department's youth program, NARYSEC, municipalities, non-governmental organisations, community development workers and other stakeholders shall assist to distribute the citizen's manual.

The DRDLR is of the view that it is not necessary to legislate an operational requirement such as communication.

The DRDLR therefore rejects the proposed amendment.

- 3.1.6 Amendment of clause 3 in the Bill to include the words "*within 6 months of the date of the commencement of this Act*", immediately after the word "*situated*".

**Response:** Clause 3 provides for the amendment of section 11 which requires the Regional Land Claims Commissioner after being satisfied that the claim has been lodged in the prescribed manner, is not precluded by the provisions of section 2 and the claim is not frivolous or vexatious must publish the claim in the Government Gazette and in the media circulating nationally and in the relevant provide, and must take steps to make in known in the district in which the land in question is situated. The proposed amendment requires that all this be done within a period of six months.

The Regulatory Impact Assessment conducted by the DRDLR concluded that approximately 397 000 claims valid claims would be lodged with the Commission. It shall therefore not be possible for the Commission to investigate the claims and publish in the Government Gazette within six months of the commencement of the Restitution of Land Rights Amendment Act, 2013.

The DRDLR therefore rejects the proposed amendment.

- 3.1.7 Amendment of the Bill by insertion of a new section 14 (7) in the Restitution of Land Rights Act, 1994 providing that "*The costs associated with referring any matter to the Land Claims Court, whether by the Commission, the claimant or the landowner, shall be borne by the State at the scale of attorney-and client costs*".

**Response:** All land claims are lodged against the State, as represented by the Minister of Rural Development and Land Reform. Current owners of the claimed land are entitled to compensation that is just and equitable where their land is required for the purposes of settling a claim. Where the current owner of the claim disputes the validity of the claim they do so at their own choice.

Section 29 (4) of the Restitution of Land Rights Act, 1994 provides that "*where a party cannot afford to pay for legal representation itself, the Chief Land Claims Commissioner may take steps to arrange legal representation for such party, either through the State legal aid system or, if necessary, at the expense of the Commission*".

Parties that cannot afford to pay for legal representations themselves (claimants, current owners of claimed land or other stakeholders that a party to litigation in a matter concerning the Restitution of Land Rights Act, 1994) are provided legal representation at the expense of the Commission. The requirement is that applicants for assistance with legal representation must be indigent. The test applied by the Legal Aid Board to determine indigence is used.

Current owners of claimed land and claimants have been provided with legal representation at the expense of the Commission. To require that the costs payable must be at a scale of attorney-and client costs and that every claimant and every

landowner must be provided with legal representation, whether they can afford it or not, will make the Act unworkable.

The DRDLR therefore rejects the proposed amendment.

- 3.1.8 Amendment of clauses 11 and 12 by changing the cut-off date for lodgement of claims to 30 June 2015 are consequential amendments.

**Response:** The response of the DRDLR set out in 3.1.1 above is applicable to these proposals.

The DRDLR therefore rejects the proposed amendment.

- 3.1.9 Amendment of the Bill by insertion in section 42E of the Restitution of Land Rights Act, 1994 new subsections (5) and (6)

- 3.1.9.1 *It is proposed that the new subsection 5 must read as follows "(5) No provision of this Act shall give rise to any power on the part of the State to take into custodianship any land upon which a claim has been made"*

**Response:** Section 42A (1) of the Restitution of Land Rights Act, 1994, which is not being amended by the Bill or proposed amendments to the Bill states that *"Where, in terms of this Act, land is acquired or expropriated in order to restore or award the land to a claimant, such land vests in the State, which must transfer it to the claimant."*

The Restitution of Land Rights Act, 1994 therefore provides for the vesting of the land acquired in terms of the Restitution of Land Rights Act, 1994 to the state and its transfer to the claimant. No claimant lodges a claim so that the State can take custodianship of the land, unless the land shall thereafter be transferred to the claimant.

The proposed amendment contradicts what is provided for in section 42A (1) of the Restitution of Land Rights Act, 1994, without amending it, and therefore cannot be supported.

The DRDLR rejects the proposed amendment.

- 3.1.9.2 It is proposed that the new subsection 6 must read as follows *"(6) Where productive agricultural land is the subject of a land claim:*

- i. and, within 6 months of the claim being gazetted, the landowner is willing to sell the land, restitution of an appropriate right in such land, restitution of an appropriate right in such land shall be transferred to the claim/s only if a business plan approved by the Department and adequate funds, equipment, and other resources for ensuring the continued productivity of the land are provided by the Department and/or the claimant/s; or*

- ii. *The landowner is unwilling to sell the land, restitution shall be made*
- (a) *By transferring to the claimant's an appropriate right in state-owned land or such land as the State may acquire; or*
  - (b) *Through financial compensation to the claimant/s"*

**Response:** The proposed clause subjects the restoration of agricultural land to a business plan, the availability of funds and equipment to continue farming operations, in instances where the current owner of the claimed land is willing to sell it within 6 months of the acceptance of the claim and its publication in the government gazette; or where the current owner is not willing to sell the land alternative redress must be provided to the claimants.

A clause subjecting the restoration of land to the claimant's ability to use the land productively and the cost of the land was contained in initial drafts of the Bill, but was removed following representations from the public that such clause was unconstitutional.

The limitation of the right to restitution as set out in section 25 (7) of the Constitution by the above clause is not reasonable and justifiable in an open, democratic society based on human dignity, equality and freedom as required by section 36 of the Constitution.

The DRDLR therefore rejects the proposed amendment.

### 3.1.10 Amendment of the Bill by insertion of section 42F in the Restitution of Land Rights Act, 1994 the following:

***"Financial Arrangements***

*42F No provision of this Act shall be of any force or effect unless a budget has been allocated to the Department in terms of the Medium Term Expenditure Framework which is sufficient to settle all claims arising from this Act within 6 years of the date referred to in s 2(1)(e)."*

**Response:** At present it is not possible to determine, with certainty, the number of claims to be lodged, which land will be claimed and which land will be not. Therefore to subject the operation of the Restitution of Land Rights Act, 1994 to the provision of funds sufficient to settle all claims is unreasonable.

The proposed amendment also limits of the right to restitution as set out in section 25 (7) of the Constitution. This limitation is not reasonable and justifiable in an open, democratic society based on human dignity, equality and freedom as required by section 36 of the Constitution and would therefore be unconstitutional.

Furthermore, the Constitutional Court has held that rights contained in the Bill of Rights (which include the right to land) will be dealt with in a progressive manner, within the available resources of the State. See *Government of the Republic of South Africa and others vs Grootboom and others*, 2000 (11) BCLR 1169 (CC).

The re-opening of lodgement of claims is a policy of government. It will be funded, like any other programme, from the fiscus.

The DRDLR therefore rejects the proposed amendment.

#### **4. WESTERN CAPE**

The Western Cape Legislature recorded its' support for the Bill with amendments. However, the Western Cape Legislature did not set out the exact clauses to be amended. It must be pointed out, however, that the proposed amendments by the Western Cape are similar to those proposed by KwaZulu-Natal Legislature in that:

- 4.1 There is a proposal for public awareness. The response of the DRDLR is similar to that set out in 3.1.1 above;
- 4.2 There is a proposal for the nomination of Commissioners by Parliament. The response of the DRDLR is similar to that set out in 3.1.3 above;
- 4.3 There is a proposal for the outsourcing of an investigation of the claims to an independent service provider. The response of the DRDLR is similar to that set out in 3.1.4 above;
- 4.4 There is a proposal that the Commission should carry the costs for landowners where matters are referred to the Land Claims Court. The response of the DRDLR is similar to that set out in 3.1.7 above;
- 4.5 There is a proposal that funding for new and old claims should be provided in the Medium Term Expenditure Framework. The response of the DRDLR is similar to that set out in 3.1.10 above;
- 4.6 There is a proposal for the imposition of a six year deadline to finalise claims, and that where productive agricultural land is claimed and the landowner is unwilling to sell restitution must be through the provision of alternative land or financial compensation. The response of the DRDLR is similar to that set out in 3.1.6, 3.1.9 and 3.1.10 above; and
- 4.7 There is a proposal that the state should not take into custodianship any land upon which a claim is made. The response of the DRDLR is similar to that set out in 3.1.9 above.

**RESPONSE COMPILED BY THE DEPUTY CHIEF LAND CLAIMS COMMISSIONER**