

SUBMISSIONS ON THE LAND COURT BILL [B11 – 2021]

(“The Land Court Bill, 2021”)

Introduction

1. Corruption Watch (“CW”) is a non-profit civil society organisation. It is independent, and it has no political or business alignment. CW intends to ensure that custodians of public resources act responsibly to advance the interests of the public. CW’s ultimate objectives include: fighting the rising tide of corruption and abuse of public funds in South Africa; promoting transparency; and accountability to protect the beneficiaries of public goods and services.
2. CW has a vision of a corruption free South Africa, one in which educated and informed citizens are able to: recognise and report corruption without fear; where incidents of corruption and maladministration are addressed without favour or prejudice; and where public and private individuals are held accountable for the abuse of public power and resources.
3. As an accredited Transparency International Chapter in South Africa, core to our mandate is the promotion of transparency and accountability within private sector and state institutions in order to ensure that corruption is addressed and reduced through the promotion and protection of democracy, rule of law and good governance.
4. CW welcomes the opportunity to make submissions on the Land Court Bill, 2021 (**the Bill**).
5. We note that the purpose of the Bill is to: provide for the establishment of a Land Court and a Land Court of Appeal; make provision for the administration and judicial functions of the Land Court and Land Court of Appeal; provide for the exclusive jurisdiction of the Land Court and Land Court of Appeal for certain land matters; provide for mediation and arbitration procedures; amend certain laws relating to the adjudication of land matters by other courts; and provide for matters connected therewith.

6. We further note the Bill is the outcome of the work done by the Inter-Ministerial Committee (IMC) on Land Reform chaired by Deputy President David Mabuza,¹ following recommendations of the Presidential Advisory Panel on Land Reform and Agriculture (the advisory panel).²
7. We understand the recommendations of the IMC are all subsequently incorporated in the Bill, and we specifically note the recommendations relating to: the Bill adjudication on all land related matters, and not only restitution; a functional approach that is modelled on negotiation before litigation on matters such as expropriation without compensation, in line with the proposed Expropriation Bill³ tabled in Parliament; and the Bill provisions which require that compensation in settlement agreements are just and equitable to landowners, in line with Section 25⁴ and the Expropriation Bill, when enacted.
8. Our concern however is that the Bill does not effectively place mechanisms that reduce the scope for corruption, therefore significantly impacting the effective determination of disputes regarding land in our country. Additionally, the Bill fails to clearly illustrate the manner in which the existing systemic hurdles that make it difficult for land claimants to obtain land restitution will be dealt with in adjudication processes and the implementation of the Bill.
9. While we welcome the Bill as a tool that can provide much needed advancements in land reform, it is of critical importance to ensure that the introduction of an adjudication body takes into consideration the lived realities of the people it seeks to assist. We highlight that access to public resources is usually implicated in various social divisions which include wealth and economic status, gender, generation and political affiliation.⁵
10. The above-mentioned is further exacerbated by large-scale corruption in administrative institutions tasked with facilitating land reform policies, and a legislative backdrop which is

¹ <https://www.gov.za/speeches/presidency-outcomes-land-reform-imc-chaired-deputy-president-david-mabuza-9-may-2021-0000> last accessed 19 July 2021.

² The Final Report of the Presidential Advisory Panel On Land Reform and Agriculture May 2019.

³ Act 63 of 1975.

⁴ The Constitution of the Republic of South Africa, 1996.

⁵ F Mtero, N Gumede & K Ramantsima 'Elite Capture in Land Redistribution in South Africa' Institute for Poverty, Land and Agrarian Studies, 2019. PLAAS Research Report No.55, University of Western Cape.

gradually targeted towards limiting the procedural and substantive rights of communities living within traditional authorities.⁶

11. It is with this in mind that we submit that the Bill fails to make sufficient provisions for key parts of its objectives. We unpack these vulnerabilities under the following headings:

- 10.1. Transitional Arrangements of the Land Court and Land Court of Appeal
- 10.2. Non-judicial Powers of the Land Court and Land Court of Appeal Judges
- 10.3. Management of Legal Aid Funding
- 10.4. Multiple Adjudicating Institutions

Transitional Arrangements of the Land Court and Land Court of Appeal

12. We note chapter 2 of the Bill proposes an overhaul of changes to the existing Land Claims Court, including the existing jurisdictional structure and the policy framework that informs courts adjudicating on land matters.

13. The goal of the Land Claims Court, a creature of the Land Restitution Act⁷, was to offer a solution to people who had lost their land as a result of racially discriminatory practices such as forced removals.⁸ The court's primary focus was adjudicating on land restitution and/or land claims cases in the form of referrals from the commissioner's office⁹ or cases brought directly through claimants or affected land owners.¹⁰ The main task of the court in this regard was therefore to determine restitution of any land right, ownership, and compensation.¹¹

14. The backlog of the unresolved land claims by the court is well documented¹², notably the lodgement of the 1994 to 1998 claims which took place not only with the commissioner but also at various departments, police stations, post offices and municipal offices. This

⁶ Corruption Watch 'Unearthing Corruption in the Land Sector' 2019.

⁷ Act 22 of 1994.

⁸ Ibid.

⁹ S6(1).

¹⁰ S10(1).

¹¹ S22(1)(a)(b)(c).

¹² Land Access Movement of South Africa & Others v Chairperson of the National Council of Provinces & Others [2016] ZACC 22; Speaker of the National Assembly & Another v Land Access Movement of South Africa & Others [2019] ZACC 10.

contributed to the challenge of arriving at a definitive figure of 79 696 as the total number of claims lodged, with outstanding claims at 7 743 in 2020.¹³

15. We understand the Bill aims to remedy these inefficiencies with the establishment of a specialist Land Court and Land Court of Appeal, the former having the status equivalent to a high court, with its judgments, orders and decisions appealable at the latter court, whose status is equivalent to that of the Supreme Court of Appeal.¹⁴
16. We welcome the creation of a specialist Land Court of Appeal insofar as it will facilitate the development of land-specific jurisprudence that can be relied upon as precedent. **We submit that this has the potential to foster greater uniformity, consistency and quality in court decisions on land-reform matters, which in turn should promote the expediency in the adjudication process.**
17. However, we raise concerns that the Bill affords the Land Court and Land Court of Appeal greater jurisdiction than that presently enjoyed by the Land Claims Court without any clarity regarding the change processes and the monitoring required to ensure transparency to those most affected.
18. The Bill empowers the Land Court to address all three legs of land reform, namely restitution, redistribution and security of tenure. Given the existing failures of the Land Claims Court mentioned above and the mammoth task of housing all land reform policy directives under a single adjudication body it is imperative that the Bill puts in place transparency and accountability mechanisms to ensure oversight on the existing unresolved matters and the transition period.
19. The corruption risks during this period are very high due to the existing weak administrative institutions, complex nature of the land matters and lack of information sharing to those most vulnerable such as members of rural communities with poor security of tenure and women. **We therefore submit that an expansion of clause 51 include socio-economic considerations to be put in place in the adjudication of unresolved cases. Further, we submit that the parliamentary committee put timeframes for review and targeted**

¹³ Parliamentary Committee Meeting, 17 March 2020, Committee on Agriculture, Land Reform and Rural Development. See <https://pmg.org.za/committee-meeting/30057/> last accessed 19 July 2021.

¹⁴ Chapter 5 of the Bill.

objectives in order to ensure that vulnerable communities and individuals are not left behind during the transitional period.

20. We highlight that there is a need for both political will and independent court process to ensure successful, speedy and progressive land reform in South Africa. As such, we submit that merely replacing the Land Claims Court by a new court will not be sufficient to foster a transparent and corrupt-free land restitution programme. **It is thus our submission that clause 51 include provisions that allow for anonymous reporting channels to facilitate public reporting on the progress of the new court and its impact, including instances of corruption. We further encourage the parliamentary committee to bolster this provision by including accountability mechanisms to address public officials that are found to participate in corrupt conduct.**

Non-judicial Powers of the Land Court and Land Court of Appeal Judges

21. Clause 4 of the Bill states that the Land Court and Land Court of Appeal will each be headed by a Judge President and Deputy Judge President who must both be judges of the High Court at the time of their appointment. Further, every judge on the Land Court and Land Court of Appeal will be permanent. Clause 31 further provides that appointed judges will have non-judicial powers of arbitration and mediation as mechanisms of alternative dispute resolution.

22. **We welcome a permanent sitting of judges dedicated to land-related matters as this will result in stronger judicial oversight, reduce corruption and improve settlement agreements that reflect equitable and just compensatory outcomes. We further support the use of non-judicial processes in resolving land matters.** We believe this will provide a cheaper and quicker alternative for cases to be decided outside of the usual court process which tends to be more costly and adversarial, therefore disadvantageous to vulnerable individuals and communities.

23. However, our concern is that the use of the non-judicial powers is not sufficiently clear so as to afford consistent application. While we accept that each matter must be taken on its merits in order to make a determination of mediation and arbitration rather than litigation, **we submit that the Bill must include guiding principles within the schedule, with a**

simple set of criteria which unpacks which matters would qualify for mediation and/or arbitration. This will assist to create uniformity across all sitting courts and ensure that claimants are provided with sufficient and informed options on how to resolve their matter and advocate for their rights.

Management of Legal Aid Funding

24. We note the Bill indicates that a party to the proceedings may represent themselves or be represented 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 be legally represented, the court must refer the matter to Legal Aid South Africa (LASA) to consider granting legal representation.¹⁵ We understand that expenditure for this provision will be managed by LASA.¹⁶

25. The Bill is however silent on the role of the Land Rights Management Facility (LRMF) which performs the function envisaged in clause 16 within the Land Claims Court as per the Restitution of Land Rights Act, by providing legal and mediation services to claimants. Additionally, the LRMF manages the funding arrangements of legal aid and is responsible for expenditure.

26. **We submit that the Bill must provide clarity with regards to the role of the LRMF and explicitly state whether the LRMF will continue to provide legal aid functions and be the accountable institution to Parliament regarding the legal aid expenditure.**

Multiple Adjudicating Institutions

27. The Bill has an impact on customary law and/or customs, and will therefore have an impact on the many South Africans that live and/or land disputes are within traditional authorities. We note the Traditional Leadership and Khoi-San Act¹⁷ and Traditional Courts Bill¹⁸ as pieces of legislation that will create multiple adjudicating processes on land matters, which may create legal uncertainty, and practical difficulties for litigants.

¹⁵ Clause 16.

¹⁶ Clause 16 (4)(c).

¹⁷ Act 3 of 2019.

¹⁸ Traditional Court Bill B 1B—2017.

28. Given that the Bill creates adjudication authority over all land matters, **we submit the committee consider the overlaps that will result from implementation of this Bill and traditional governance laws. We further submit that the Bill must include provisions that ensure jurisprudential certainty and/or explicitly state a hierarchy of processes.**
29. We hope our submissions are useful to the committee. Further, kindly note our request to participate in the parliamentary hearings and to make oral submissions before the committee.

Submitted by Corruption Watch on 23 July 2021
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