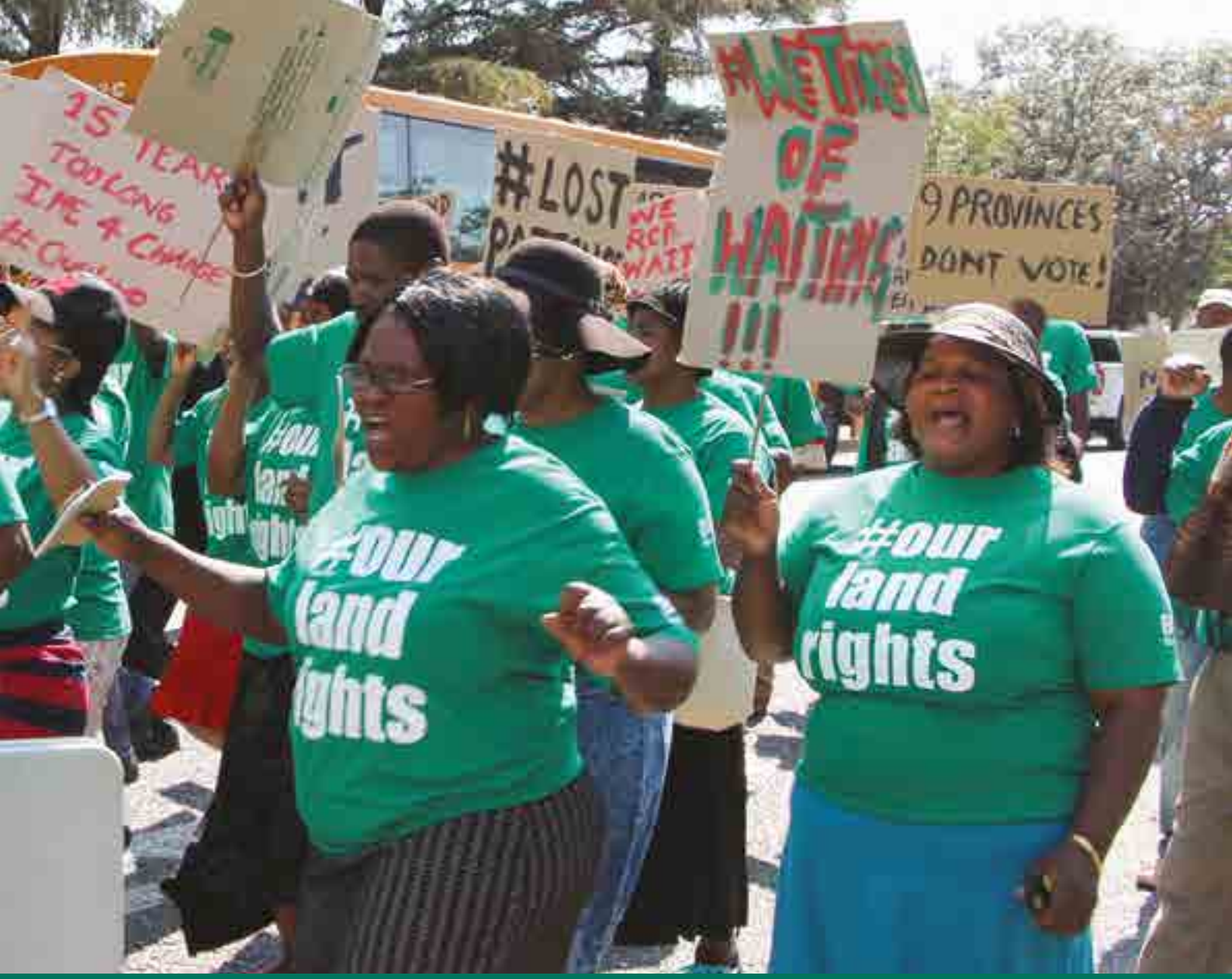


LAND RESTITUTION IN 2016: WHERE TO FROM HERE?

THE LAMOSA JUDGMENT, THOUGHT PIECES AND RESOURCES FOR COMMUNITIES AND NGOS

LRC Legal Resources Centre

TSHINTSHA AMAKHAYA

PLAAS Institute for Poverty, Land and Agrarian Studies School of Government • EMS Faculty

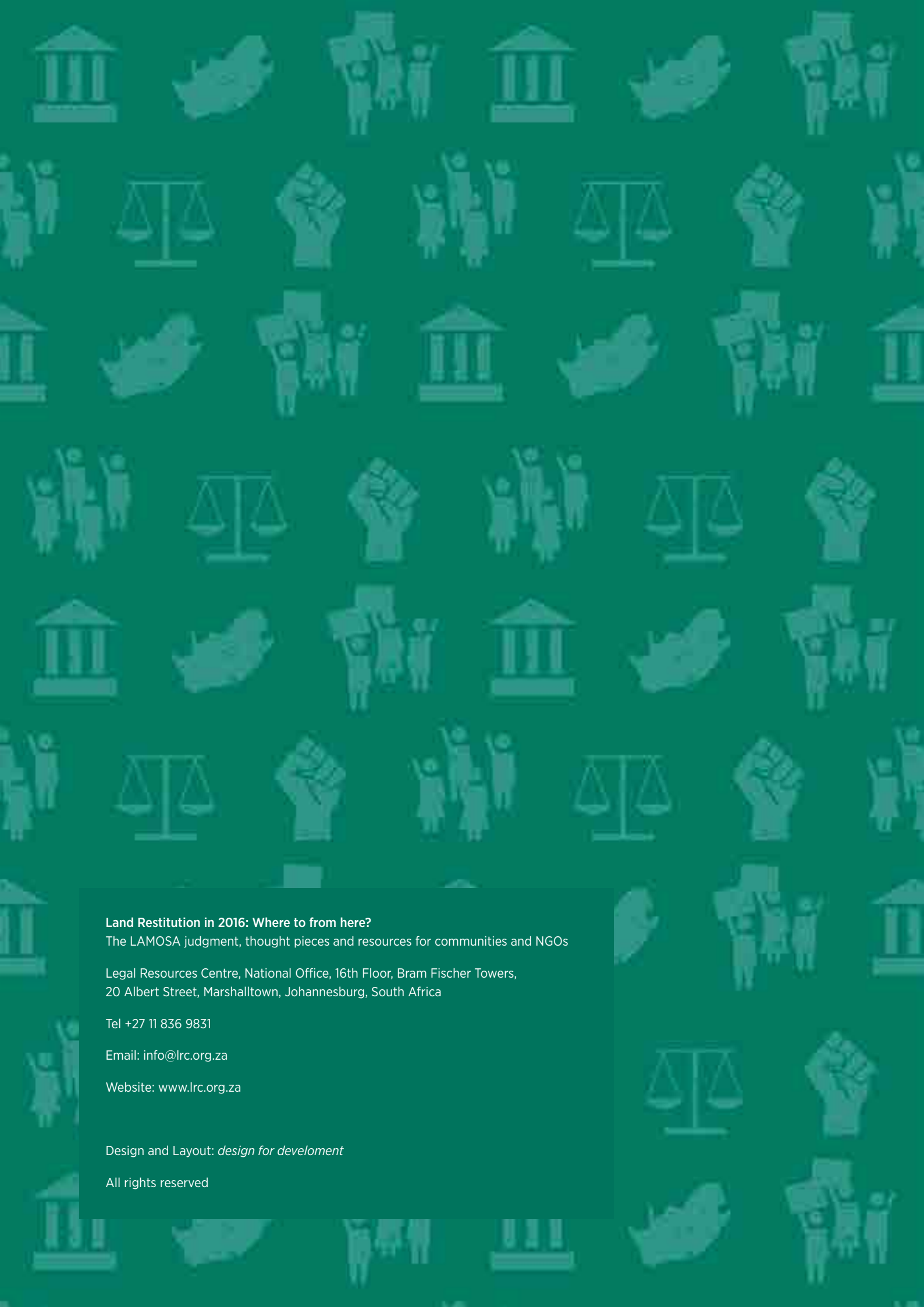
WEBBER WENTZEL in alliance with > Linklaters

AFRA

MAKULEKE

NKUZI DEVELOPMENT ASSOCIATION

LAMOSA



Land Restitution in 2016: Where to from here?
The LAMOSA judgment, thought pieces and resources for communities and NGOs

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LAND RESTITUTION IN 2016: WHERE TO FROM HERE?

The LAMOSA judgment, thought pieces and resources for communities and NGOs

AFRA supporters and staff outside the Land Claims Court during the labour tenants case

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Constance Mogale in the Constitutional Court.

INTRODUCTION

The following is an account of a grassroots movement led by a group of NGOs and communities who went to the Constitutional Court, the highest court in South Africa, to challenge the law dealing with land claims.

They wanted the Court to declare the Restitution of Land Rights Amendment Act 15 of 2014 unconstitutional; and they won!

The court case deals with an emotive issue – land reform in South Africa. Historically, many thousands of people were removed from their land by the apartheid government, as early as 1913. After the country's democratic elections, the government developed the Land Reform Programme to fix the resulting unequal land ownership pattern, allow people to make claims for land they were removed from and allow for compensation to be paid out for the wrongs of the past. Various pieces of legislation came about which directed how this programme would be implemented in South Africa.

In 1994, the Restitution of Land Rights Act 22 of 1994 was introduced to direct how land claims are made and processed in South Africa. This legislation allowed communities to apply for the return of their land or to be paid compensation for the land they had been removed from.

However, the pace of settling land claims has been slow. Despite making land claims before the cut-off date in 1998, almost two decades ago, many communities and individuals continue to wait for land to be returned to them or for compensation to be paid out for the loss of their land. Despite this, in 2014, the government decided to reopen the land claims process through the Restitution of Land Rights Amendment Act 15 of 2014.

Three land non-governmental organisations (NGOs) and three Communal Property Associations (CPAs) decided to challenge the constitutionality of the Amendment Act because they did not feel that they were adequately consulted on the proposed re-opening and were concerned about how the new process would affect their existing land claims, which were in different stages of being finalised.

They approached the Legal Resources Centre and Webber Wentzel Attorneys to represent them in the Constitutional Court.

This account will detail what happened in the Court and show how the final judgment has made it known to government that is it important for the voices of the people to be heard when laws are made that affect them.

THIS REPORT IS SET OUT AS FOLLOWS

The first section will give a background and overview of the court action; the parties in the court action and what they wanted from the Court. It will also give more details on the three communities and the three NGOs who made up the parties.

The second section will give a summary of the judgment.

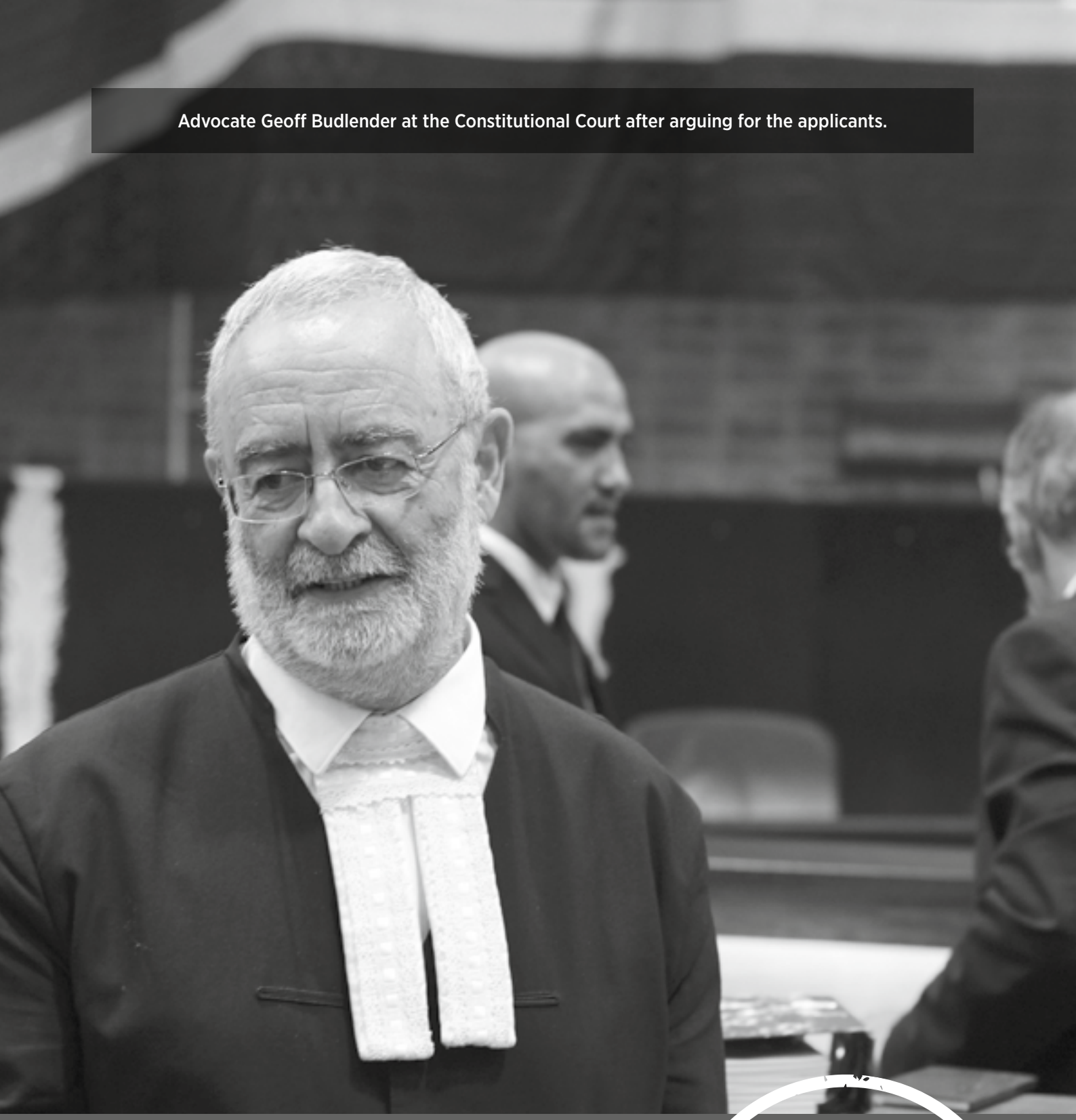
The third section deals with the consequences of the judgment on communities; particularly land claimants who made claims during the period 1994-1998 and people making land claims under the Amendment Act.

It will also provide a summary of a case in the Land Claims Court which will deal with the implications of the Constitutional Court judgment on conflicting land claims.

The fourth section will provide more details about the day before the court hearing in the Constitutional Court, where individuals were given an opportunity to tell a High Level Panel, chaired by President Kgalema Motlanthe, about their concerns with the land reform programme.

This section will also give a summary of what happened in the court room.

The fifth section will provide supplementary materials; including media articles, press releases and translations.



Advocate Geoff Budlender at the Constitutional Court after arguing for the applicants.

SECTION 1

BACKGROUND

In 2014, South Africa's Parliament passed the Restitution of Land Rights Amendment Act 15 of 2014. This Act amends the Restitution of Land Rights Act which directs the land restitution programme. The restitution programme gives individuals and communities an opportunity to make claims for their rights in land on the basis that they have been dispossessed of their land after 19 June 1913. This includes giving communities the opportunity to be compensated for the loss of the land.

Prior to the amendment, the final date for lodging claims was 31 December 1998. The Amendment Act reopened the restitution process for another five years, from 2014, giving more individuals and communities an additional opportunity to lodge land claims.

This report gives an overview of the judgment that was received in the Constitutional Court on 28 July 2016 which found that the Amendment Act is invalid and gives Parliament two years to enact new legislation.

The case was brought by Land Access Movement of South Africa (LAMOSA), Nkuzi Development Association (Nkuzi) and the Association for Rural Advancement (AFRA), as well as three communal property associations, Makuleke, Moddervlei and Popela. These applicants were represented by the Legal Resources Centre and Webber Wentzel Attorneys.

In asking the Constitutional Court to declare the Restitution Amendment Act they argued the following in the Constitutional Court:

That Parliament and the Provincial Legislatures failed to comply with their constitutional obligation to ensure a meaningful and inclusive public involvement process before passing the Restitution of Land Rights Amendment Act.

That Section 6(1)(g) of the Amendment Act states that prior land claims must be "prioritised" but this is vague and gives little guidance on how new claims will affect older claims. The applicants argued that this section should be declared unconstitutional and invalid.

The hearing took place at the Constitutional Court on the 16 February 2016.

THE CONCERNS OF THE APPLICANTS

Let's visit in more detail the concerns of the applicants. The applicants instituted the court action due to their concerns about how the Amendment Act will affect their existing land claims. At the time that the applicants filed their papers for the court action, there were still approximately 8000 **claims that had not been finalised** – and these were just the claims that had been filed before 1998.

These land claimants have been waiting for over 17 years to have their land rights restored to them. With the reopening of the land claims, they were concerned that new land claims would affect the existing ones, leading to further delays, opportunistic counterclaims and confusion about who has rights to the land.

The applicants were also concerned about the capacity of the Commission on Restitution of Land Rights to process the new claims. The Commission is already burdened by limited resources and has struggled to process prior claims.

In addition, the applicants were concerned about the rights of those who had already had their claims finalised or whose claims were still waiting to be finalised. The Amendment Act failed to give clear guidance on how to deal with new claims over this land. It also meant that new claims might be lodged against land that has already been restored to land claimants. The Restitution Act states that if there is another claim lodged against land, that the order or agreement restoring the land can be set aside or changed. This could have resulted in conflicts between the communities and individuals claiming land as there would be overlapping claims.

WHAT ABOUT PUBLIC PARTICIPATION?

Every piece of legislation enacted in South Africa must go through a process of consultations before it is approved and signed by the President. These public consultations take place at both national and, in some cases, at provincial level through the Provincial Legislatures and give the public a chance to make representations on the proposed law and how they feel it could affect them.

Prior to the Amendment Act being introduced to Parliament as a bill, the process of public participation began, but we now recognise that this process was flawed. It was recognised that the existing land claimants who made claims prior to 1998 would have a powerful interest in making submissions to Parliament and the Provincial Legislatures because of the effect that the Act could have on their claims.

That importance of land claimants' voices being heard in the public participation process was recognised by the Department of Rural Development and Land Reform when it held extensive consultations prior to introducing the Bill in Parliament. The National Assembly also held a reasonable, if imperfect, process of public participation, which also gave some recognition to this.

However, their important voices were ignored in the National Council of Provinces (NCOP) and the Provincial Legislatures (PLs). The NCOP created artificial urgency by insisting the Bill should be passed before the 2014 elections. This meant that the Provincial Legislatures had insufficient time to enable public participation and to adequately consider the Bill.

The hearings themselves were inadequate because they were not properly advertised, there was insufficient time to prepare submissions, translated versions of the Bill were not available, the Bill was not properly explained, and people's comments were not accurately recorded.

Moreover, members of the NCOP failed to attend the public hearings in their provinces, and the reports of public hearings prepared by the Provincial Legislatures were not distributed to the other members of the NCOP Committee. Finally, the NCOP failed to properly consider amendments proposed by several provincial legislatures as a result of the public hearings.

Perhaps as a result of the flawed legislative process, the Act that emerged from Parliament had at least one serious flaw. Section 6(1)(g) of the amended Restitution Act requires the Commission and its officials to "give priority" to existing claims. But what does this mean and how will the Department do this?

While it is appropriate to give prior land claimants priority, the phrase is not precise. The section failed to provide the necessary guidance to government and land claimants about how old and new claims will be processed and the government departments all disagreed amongst themselves about what the provision means.

THE APPLICANTS

NON-GOVERNMENTAL ORGANISATIONS

The three institutional clients are non-profit organisations working to support and promote the land rights of rural communities through stakeholder engagement, capacity building, policy reforms and research and legal support. They represent the interests of thousands of land claimants, farm dwellers and labour tenants. They joined the court action because they believed that land claimants required clarity on how the implementation of the Restitution of Land Rights Amendment Act, 2014 would affect their claims; many of which had not been finalised.

Land Access Movement of South Africa (LAMOSA)

LAMOSA is a federation of Community-Based Organisations (CBOs) which advocates for land and agrarian reform. LAMOSA operates as a non-profit and has a network of affiliates in Gauteng, Mpumalanga, North West, and Limpopo. Although only registered in 2001, LAMOSA has a long history, dating back to 1991, supporting rural communities who were forcibly removed under apartheid legislation to lodge claims to access their land. In addition, LAMOSA is a member of the Alliance for Rural Democracy (ARD) which has worked to strengthen the role of rural communities, especially women, in defining living customary law.

Nkuzi Development Association

Nkuzi is a non-profit land rights organisation operating in Limpopo Province. It was established in 1997 in response to the need to support land claimant communities around the Bungeni and Elim areas in Limpopo Province. At the time, Nkuzi served a pivotal role in assisting people to lodge land claims as they had a strong geographic footprint in the province. Since then, Nkuzi has extended its work to support farm dwellers and land acquisition applicants (through land restitution, land redistribution and tenure reform). Nkuzi provides legal and para-legal support to communities, as well as undertaking research on policy reform and implementation of legislation.

Association for Rural Advancement (AFRA)

AFRA is a non-profit organisation operating in KwaZulu-Natal with a focus on promoting land and agrarian reform. AFRA was founded in 1979 and has worked to support communities through advocating for socio-economic rights, poverty reduction, as well as strengthening the implementation of land reform. AFRA works primarily in the uMgungundlovu District Municipality in KwaZulu-Natal, offering legal support and advice, and advocates for tenure security for farm dwellers, including labour tenants.

COMMUNAL PROPERTY ASSOCIATIONS

The three applicant communal property associations (CPAs) were all communities that lodged land claims before 31 December 1998, but whose claims were either not yet finalised, or had been finalised but were potentially negatively affected by the Amendment Act. They all felt that the public participation process failed to give them a meaningful opportunity to participate in the drafting of the Amendment Act. As a representative of one of those communities said:

> *"The restitution process must be legitimate and its legitimacy is undermined by the inadequate and unconstitutional public consultation process. The integrity of the land claims process would have been assured if successful claimants like the Makuleke [community] were given appropriate recognition in the debate about changes to the process. This we were denied in a manner that does not comply with the Constitution."*

The Moddervlei community

The Moddervlei CPA represents the Moddervlei community in the restitution claim. The people of Moddervlei were gradually

dispossessed of their land over many decades. They went from being owners of the land to labour tenants of the Henning family. Several communities lodged a restitution claim which was dealt with by the Commission. It was supposedly settled on 10 November 2004.

Despite the settlement, the land had still not been transferred to the Moddervlei CPA, which was established to manage the land. Despite long-running proceedings in the Land Claims Court, and letters to both the Commission and the Limpopo Provincial Legislature, the claim was still not finalised when the Amendment Act came about.

Mr Mack Nkuna, the Chairperson of the Moddervlei CPA, is disappointed with the Land Claims Commission:

> *"The experience of the Moddervlei Community is that the Commission has been very slow [to assist claimants and claimant communities]. In fact, it seems to be doing little or anything at all. In my view, the Commission avoids doing anything, shirks its responsibility and tries to leave it to the Land Claims Court to take matters further. This has been happening despite the fact that the Land Claims Court gave the Commission specific instructions on what is expected of the Commission."*

The re-opening of the claims process had threatened the Moddervlei's community's claim. They feared that the local traditional leader, as well as a previous claimant whose claim was rejected, would lodge new claims under the Amendment Act. This would delay the finalisation of their claim, which has been in limbo for more than a decade.

The Makuleke community

The Makuleke CPA represents the Makuleke community, and is the owner of a large of part of the Kruger National Park, which it now co-manages with South African National Parks (SANParks). The community occupied land in what is known as the Pafuri Triangle in Limpopo since the end of the 1700s. In 1969, they were forcibly removed from Pafuri and taken to land known as Nthlaveni which fell under the jurisdiction of Chief Adolf Mhinga, who served for a time as the Minister of Justice of the Gazankulu homeland. As Mr Humphrey Mugukula explains:

> *"The Makuleke community had, as a direct result of the discriminatory laws, policies and practices of the apartheid government, been incorporated into the Mhinga Tribal Authority and placed under the jurisdiction and control of a rival chieftaincy."*

Despite numerous attempts to be recognised as an independent traditional community, the Makuleke Community in Nthlaveni remains under the authority of Chief Mhinga.

The Makuleke Community managed to reclaim the Pafuri land in the Kruger Park through a land claim which was settled in 1999. It was a condition of the settlement that the community not re-occupy the land because of its ecological importance. The land is to be used for eco-tourism projects to alleviate poverty and provide employment to the community. Because they could not return to Pafuri, the settlement agreement required the state to secure the community's tenure at Nthlaveni.

The Makuleke CPA was concerned that the re-opening of the claims process would threaten their rights to both Pafuri and Nthlaveni. They expected Chief Mhinga to lodge a claim for the land at Nthlaveni and Pafuri. They believe that the Commission and government's attitude to land claims is to support traditional leaders, as opposed to CPAs, and this will undermine their rights if a new claim is lodged.

The Popela community

Prior to 1913, the Popela community were forced to become labour tenants on land known as Boomplaats. Between 1969 and 1971, the owners terminated their labour tenancies and removed them from the land. The Popela community brought a restitution claim which was ultimately successful following the judgment of the Constitutional Court in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd.*

Despite the Court's decision in 2007, the Popela community had still not returned to its land at the time that the Amendment Act came about. The delay was a result of a series of failures by the Commission. Mr Ali Maake describes the effect of this delay on the community as follows:

> *"The more than seven-year delay has caused the Popela Community deep disillusionment. Many in my community suspect that certain individuals - such as the white [land] owners - are above our present laws much as they were privileged under apartheid laws, while our own community members are treated by our own government as second-class citizens. The delay has also led many of my community to assume that something deliberate is preventing our land from being restored to us. They are losing faith that the Commission has the will or the ability to give us the rights we have already won."*

The community feared that the Amendment Act would further delay or threaten their claim. It viewed the Act as, "yet another example of the executive's willingness to squash our rights in order to promote the interests of those it politically favours. The new lodgement process will, at best, delay our claim even further and, at worst, allow for other competing claims to be lodged."

THE RESPONDENTS

The respondents (the parties against whom the court action was being brought) in the Constitutional Court were:

- Chairperson of the National Council of Provinces
- The Speaker of the National Assembly
- Speaker of the Eastern Cape Provincial Legislature
- Speaker of the Free State Provincial Legislature
- Speaker of the Gauteng Provincial Legislature
- Speaker of the KwaZulu-Natal Provincial Legislature
- Speaker of the Limpopo Provincial Legislature
- Speaker of the Mpumalanga Provincial Legislature
- Speaker of the North West Provincial Legislature
- Speaker of the Northern Cape Provincial Legislature
- Speaker of the Western Cape Provincial Legislature
- Minister of Rural Development and Land Reform
- The Chief Land Claims Commissioner
- The President of the Republic of South Africa

At the pre-hearing workshop with community members and organisational staff.

Henk Smith from the LRC at the Constitutional Court on the day of the hearing. *Photo by Tshediso Phahlane*

SECTION 2

THE JUDGMENT OF THE CONSTITUTIONAL COURT

On the 28 July 2016, the Constitutional Court declared the Restitution of Land Rights Amendment Act 15 of 2014 invalid. This is a major victory for the applicants!

The Court also stopped the Commission on Restitution of Land Rights from processing the land claims lodged from 1 July 2014 (when the Amendment Act was enacted and reopened the land claims process), pending the enactment of new legislation.

The Court upheld almost all of the applicants' complaints about the public participation process followed by the National Council of Provinces and the Provincial Legislatures.

The Court held that the re-opening of land claims in South Africa, *"touches nerves that continue to be raw after many decades of dispossession. The importance of the right to restitution, therefore, cannot be overstated. Restitution of land rights equals restoration of dignity."* (para 63)

The Court also found that there was no urgency that justified shortening the time for public participation in order to pass the Bill before the 2014 election. *"Objectively, on the terms stipulated by the timeline, it was simply impossible for the NCOP – and by extension the Provincial Legislatures – to afford the public a meaningful opportunity to participate."* (para 67)

The failure of members of the NCOP to attend the hearings in the provinces, the failure to distribute the reports of those hearings, and the failure to consider amendments proposed by the Provincial Legislatures meant that, *"the views and opinions expressed by the public at the provincial hearings did not filter through for proper consideration when the mandates were being decided upon. This deprived the process of the potential to achieve its purpose."* (para 71)

The Court found that the hearings in the Provincial Legislatures suffered from manifest flaws. Most importantly, they were not advertised widely enough and people were not given sufficient notice of the hearings to make meaningful submissions.

The Court emphasised that the Provincial Legislatures could and should have objected to the unreasonably short timeline the NCOP gave for the public participation process. The Court also emphasised that the Provincial Legislatures are not subordinate and that, *"they too have a duty to play their part properly in affording the public an opportunity to participate in the legislative process."* (para 80)

The Court concluded that the NCOP had not acted reasonably in facilitating public involvement. It declared the Amendment Act invalid from the date of the judgment (28 July 2016).

The Court also made a number of additional orders to deal with the claims that had already been lodged under the Amendment Act. It ordered that, pending the enactment of new legislation to replace the Amendment Act and re-open the claims process, all land claims made before 31 December 1998 should be processed first, before new claims.

The Commission was ordered not to process any new land claims, but only to acknowledge receipt of the claims. The Commission can only start processing new claims if it finalised all the old order claims. Lastly, the Court also ordered the Chief Land Claims Commissioner to approach the Constitutional Court if Parliament does not re-act the Amendment Act within 24 months. This will allow the Court to give an order on processing land claims lodged from 1 July 2014, under the now invalid Amendment Act.

Advocate Alan Dodson at the Constitutional Court after arguing for the applicants.

SECTION 3

IMPLICATIONS OF THE JUDGMENT

CURRENT LAND CLAIMANTS WHO LODGED BEFORE 1998

The Constitutional Court judgment explains that the land claims that were lodged before 1998, but have not yet been finalised, must be given first priority and be processed first. What this means is that the Department of Rural Development and Land Reform must give these land claims first priority – this way, the claimants who have been waiting for their claims to be finalised will not be made to wait while the Department accepts new claims.

The final stage of implementation (either the transfer of title or transfer of financial compensation) needs to be concluded before any new claims can be investigated or finalized.

INDIVIDUALS AND COMMUNITIES WHO HAVE LODGED CLAIMS AFTER 2014

Land claims that were lodged under the Amendment Act have not been declared invalid. The judgment states that Parliament can re-introduce the Amendment Act after the existing claims lodged before 1998 have been finalised or implemented. The Department should not start investigating any new claims that were lodged since 2014 until they finalise the older claims. In the meantime, the Department can acknowledge receipt of the land claims lodged thus far but it cannot investigate further. The judgment was made with the understanding that land restitution is an important programme so it is important that the Department gives first priority to the people who have lodged their claims before December 1998.

The judgment is clear that the newer claims can be dealt with after the Amendment Act is re-introduced. In addition, Parliament must re-introduce the Amendment Act within 2 years from the date of the judgement – after this period, only then can the Department start to process the newer claims lodged after 2014. The judgment also acknowledges that the newer claims lodged after 2014 should not fall away because the Department has a duty to assist all people who have lodged claims or want to lodge claims.

INDIVIDUALS AND COMMUNITIES WHO WISH TO LODGE LAND CLAIMS

If you are a member of a community that has not ever lodged a land claim and you still want to lodge a claim, you may do so after the Department re-introduces the Amendment Act. The reason that you cannot lodge the claim right now is that the way the Amendment Act was introduced into law was not constitutional. The judgment states that the way a new law is introduced must be done with proper consultation of people who will be affected by that law. The judgment also gives an instruction to the Chief Land Claims Commissioner stating that, if Parliament does not re-introduce the Amendment Act within 2 years from the date of the judgment, then the Chief Land Claims Commissioner can return to Constitutional Court to seek clarity on how to deal with new claims.

GOING TO THE LAND CLAIMS COURT TO INTERPRET THE CONSTITUTIONAL COURT JUDGMENT

An important opportunity has arisen for those who took part in the Constitutional Court challenge to further give evidence on how to implement the judgment and, thereby, protect the interests of land claimants who have waited for almost two decades for their land to be returned to them and whose claims may be threatened by new land claims on the same land.

On the 29 July 2016, following the successful judgment in the Constitutional Court which has been spoken about extensively in this publication, the Acting Judge President in the Land Claims Court (LCC) indicated that she wanted to go ahead with a matter in the court where two land claims were made on the same piece of land in Camperdown. The two communities who made claims are the Amaqamu and Emakhasaneni communities.

In this matter, the LCC will be able to apply the Constitutional Court judgment to decide how to deal with competing land claims. The outcome is therefore an important one!

The Acting Judge President also invited parties to apply as friends of the court to supply evidence in the LCC that will ensure that how the judgment is applied is correct. This is an important opportunity for the LRC and its clients to provide the LCC will valuable information that will help the court make a decision. Therefore, they have applied to the LCC to become a friend of the court.

Not only do LAMOSA, AFRA, Nkuzi and the CPAs have an interest in the interpretation and application of the judgment because they were part of the initial Constitutional Court application to have the Restitution Amendment Act declared invalid, but they also represent the interests of land claimants and/or communities with land claims.

For example, the Popela community already have a successful land claim, but have not been able to return to the land yet! Mr Maake who represents the community has stated that this has caused the community deep disillusionment. They took part in

the Constitutional Court application because they feared that competing claims might threaten and delay the process further.

The land NGOs and CPAs believe that there are clear answers to the question of what to do in the case of competing land claims. They interpret the judgment as follows:

- Claims lodged between 1 July 2014 and 28 July 2016 (new order claims) should be held off from being processed until either the old order land claims (made before the cut-off date in 1998) are finalised or until new legislation comes into being. If no new legislation is enacted, then they must be processed according to an order by the Constitutional Court.
- Old order claims must continue to be processed as if there were no new claims made under the Amendment Act. If there are conflicts at a later stage between old and new order claims, the legislature or the Constitutional Court must direct how these conflicts will be settled.

It is important to note that even though the Amendment Act was found invalid, land claims made since 1 July 2014 are not also invalid. However, it is important that old order claims made before the cut-off date in 1998 be quickly and efficiently processed.

LRC attorneys and staff outside the Constitutional Court after the hearing.

President Kgalema Motlanthe and members of the land organisations. *Photo by Tshediso Phahlane*

SECTION 4A

HIGH LEVEL PANEL ON LAND REFORM

BACKGROUND

On the eve of the above-mentioned Constitutional Court challenge on the Restitution of Land Rights Amendment Act, the LRC invited a number of community representatives to make presentations to the High Level Panel on the Assessment of Key Legislation & the Acceleration of Fundamental Change (herein after referred to as the High Level Panel).

The session was held at Stay City (Berea, Johannesburg) on 15 February 2016 and was attended by community representatives from across Gauteng, Limpopo, KwaZulu-Natal, Eastern Cape, North West and Mpumalanga.

The session provided a unique opportunity for communities to meaningfully reflect on their experiences of land reform. At the time, the High Level Panel had not yet begun the call for written and oral submissions. However, the LRC was able to facilitate this process for more than 80 community representatives.

Members of the following communities were in attendance:

Gongolo
Moreipuso
Moletele
Eden Agri
Goedgevonden
Moretele
Wonderkop
Molele
Matshesi
Lechabile Letsatsi Co-operative
Matlala-Ramoshebo
Mounoung
Barologadi
Moddervlei
Uitkyk
Moletele
Magokgwane
Baphalane ba Mantserre
Moreipuso
Kokosi
Ga-Mabohlajana
Baphiring Phago
Chiawelo
Baphalane ba Schilpadnest
Koka Matlou
Lebelo
Makuleke Mapindani
Popela
Mashilane
Mphutiusela
Dube
Makubyana (Vlaaklagte)
Letsema Tlala NPO

The hearing was also conducted with representatives from civil society; namely LAMOSA, Nkuzi, AFRA, Ntinga Ntaba kaNdoda, and the LRC. In addition, LARC (Land and Accountability Research Centre) and MISTRA (Mapungubwe Institute for Strategic Reflection) were present in their capacity as research institutions, as well as the SAHRC (South African Human Rights Commission).

MANDATE OF THE HLP

The High Level Panel was established to probe whether the laws made by Parliament are working to advance the rights of people living in South Africa and to assess if there are any unintended consequences in the implementation of these laws. The 17-person Panel is funded by the United Nations Development Programme and Panel members are drawn from their respective areas of expertise. Broadly speaking, the High Level Panel will review laws that were introduced after 1994 as they relate to:

1. Poverty, inequality and unemployment

2. Wealth distribution

3. All questions related to land

4. Nation building and national cohesion

One of the key areas of focus for the High Level Panel is land reform legislation and policy. Part of the Panel's mandate is to identify reasons for delays in land reform and the lack of implementation of certain legislation, and to find solutions to these failures. The panellists accepted the invitation in order to listen to the stories of the communities present and to consider ways to identify solutions to the challenges encountered by communities in attendance.

The panellists who participated on the 15 February 2016 were:

- President Kgalema Motlanthe, Panel Chair
- Dr Aninka Claassens, Committee Head: Land Reform
- Mr Heindri Bailey, Member of Secretariat
- Mr Alfred Mahlangu, Member of Secretariat

The panellists were also joined by Commissioner Janet Love of the South African Human Rights Commission (SAHRC) and Chair of the SAHRC Portfolio on Environment, Natural Resources and Rural Development.

SUMMARY OF PROCEEDINGS

The community representatives, civil society, and members of the LRC made submissions and recommendations to the Panellists on an array of issues, as follows:

- The role of the Commission on the Restitution of Land Rights;
- How officials in the Department of Rural Development and Land Reform (DRDLR) and the Commission communicate with claimants (frequency, type of information shared, and commitment to timelines or deliverables);

- The composition of claimant groups and the causes of divisions amongst claimants;
- The number of claims that have been finalised to date, and the number of claimants who have received title deeds;
- The reasons that claimants may opt for financial compensation, as opposed to opting to have the land returned to them;
- The implications of new claims being lodged on land that has already been awarded to claimants or the implications for claimants who are still awaiting finalisation of their existing claims;
- The manner in which the implications of the Amendment Act was and should be communicated to existing claimants who are still awaiting the finalisation of their land claims;
- The budget allocation for land reform, including post-settlement support for restitution;
- Capacity constraints experienced by the DRDLR and the Commission;
- Section 25 of the Bill of Rights (For the expropriation of land in the interests of the public) and its implications on land claimants;
- The failure of the DRDLR to implement the Labour Tenants Act, 1996;
- Unlawful evictions of farm dwellers in spite of the protections of the Extension of Security of Tenure Act, 1997;
- The challenges experienced by farm dwellers regarding access to basic services, grazing and ploughing land, and the right to bury their relatives or visit the graves;
- The experience of legal support provided to communities and individuals through the Land Rights Management Facility;
- The manner in which land restitution can contribute to the redistribution of wealth for claimants that have claimed land on which mining activities are in progress;
- Recommendations to the Panellists on how to overcome these challenges.

Community representatives made oral submissions to the High Level Panel, and were asked to provide the Secretariat members with any supporting documents. The panellists were invited to ask questions of the representatives to seek clarity. The session lasted a total of 3 hours and the LRC documented the proceedings on audio, video and electronically.

SUBMISSIONS FROM COMMUNITY MEMBERS

Community representatives were given an opportunity to make presentations to the Panel. Three of the communities were involved directly in the challenge to the Restitution Amendment Act at the Constitutional Court, while others were invited to bring other perspectives.

MACK NKUNA, CHAIRPERSON OF THE MODDERVLEI CPA (LIMPOPO)

Mr Nkuna cited the challenges that the community have encountered since 2005 in finalising the land claims and his thoughts on the reasons for these challenges:

- The current landowner appears to be dividing the claimants by encouraging some to opt for financial compensation, as opposed to restoration to the land, which has also contributed to delays in implementation.
- As a direct result of the Amendment Act of 2014, the claimant community is further divided with some claimants now seeking to lodge competing claims as individual families, whilst other claimants have begun to align themselves to a chief (traditional authority) in an effort to have the claim advanced. This has given the chief unprecedented powers to interfere in the affairs of the CPA.
- The claimants are currently denied access to the communal graveyard on the farm, and often encounter long delays when they have to seek permission to bury families.
- The remaining claimants, who have continued to reside on the land because they had refused to be forcibly removed, do not enjoy any security of tenure.
- Whilst the Commission has appointed attorneys for the claimants, these attorneys do not prioritise the Moddervlei claimants. Rather, the claimants have experienced that the Commission appears to prioritise new claims, as opposed to finalising pre-existing land claims.

ALI MAAKE, CHAIRPERSON OF THE POPELA CPA (LIMPOPO

Mr Maake provided an overview of his family's land claim and emphasised that, since 2007, the claimants have been awaiting the implementation of the court order. He cited the following challenges:

- The Popela claimants continue to regard themselves as a community and, as such, they encounter challenges when the Regional Land Claims Commission (RLCC) in Limpopo continues to engage with the individual families and not representatives of the community.

- The RLCC has on occasion stated that they are **unsure of how to implement the court order** given that the community claim was dismissed but the individuals' claim was successfully accepted.
- In spite of this uncertainty, the RLCC has advised the claimants that they should opt for financial compensation so that their claim can be finalised within 3 months, as opposed to waiting for the restoration of the land.
- The claimants believe that the RLCC has been engaging with the current landowners and yet the RLCC has not been in communication with the claimants since 2015.

HUMPHREY MUGUKULA, CHAIRPERSON OF THE MAKULEKE CPA (LIMPOPO)

Mr Mugukula reflected on the experiences of the Makuleke community and highlighted that this claim can be regarded as a success story. After having been forcibly removed in 1969 when their land was earmarked to be incorporated into the now Kruger National Park, the Makuleke community was awarded restitution as early as 1998. However, the Makuleke claimants expressed the following concerns regarding the re-opening of the claims process:

- "It is our ancestral land; that is why it was given to us by the Land Claims Commission...." Whilst the claimants are in possession of title deeds for the land, unlike other communities, they still **fear that new claims can be lodged on this land** because the newly re-opened claims process does not guarantee old order claimants security of tenure.
- The claimants are seeking the assurance that no new counter-claims will be accepted on land that has already been restored to communities, as these claims have been finalised.
- The claimants are more concerned that they, as existing rights holders, were not properly consulted on how the DRDLR intends to manage new claims through the re-opening process.

OPENING REMARKS FROM CHAIR OF THE HIGH LEVEL PANEL, PRESIDENT MOTLANTHE

The Panel aims to identify the holdups and challenges to the implementation of the land reform programme. This process will include oral and written submissions from individuals, communities and those who represent the interests of communities that have been impacted by specific legislation relating to access to land and land-related matters.

However, President Motlanthe added that the Panellists are not in the position to give immediate responses to some of the issues that will be tabled, and that participation in this session will enable them to take note of the concerns, before they can make concrete recommendations.

ADDITIONAL SUBMISSIONS FROM COMMUNITIES AND ORGANISATIONS

Mr Shirhami Shirinda, LRC Researcher (Limpopo) added that he often interacts with claimants in his work, and as such he has insights into how the RLCC undertakes their work. In his observations, Mr Shirinda noted that some of the officials employed in the RLCC do not fully understand how to implement the legislation which impacts on how services are rendered on the ground.

Similarly, Mr Franz Molele from Molele Community (Limpopo) cited his concerns that he had observed that the landowner had conducted his own **research into the land claim** and yet Mr Molele believed that this was the mandate of the RLCC. Mr Molele was worried that, due to the capacity constraints, the RLCC would rely on the research provided by the landowner, which would possibly be biased in favour of the landowner. As a result, Mr Molele stated that women from 66 female-headed households in the community have been denied the right to claim land because they are the daughters-in-law to the originally dispossessed individuals and not the direct descendants. The Panellists concurred that in such instances, these **women should continue to enjoy rights in land** and that their claims should be investigated in line with the provisions of the Constitution.

In response to the challenges raised by fellow community representatives, Mr Chauke from Mapindani Community (Limpopo) suggested that an **Ombudsman** be established to investigate delays in the handling of land claims. President Motlanthe remarked that this was the kind of suggestion that the Panellists can draw on when they continue to engage with other stakeholders.

Mr Sthembiso Mahlaba from Gongolo Community (KwaZulu-Natal) outlined their land claim experiences. The DRDLR had only transferred one portion of the land under claim and the community had not received any form of **post-settlement support** to allow them to develop the land. He also noted that **financial compensation, as opposed to restoration to the land, appeared to be the priority for the DRDLR.** Mr Mahlaba argued that land should be the first priority, and it should be the "first language spoken by all government departments".

Similarly, other communities (such as Makuleke) also requested that they be provided with post-settlement support to effectively hold and manage their land after finalisation of their claims. The Panellists concurred that it was necessary to promote co-management of natural resources, which also constitutes the realisation of the redistribution of wealth for land claimants.

Although they had finally been awarded their land, Mr Boy Dipudi of Baphiring Community (North West) expressed his concerns regarding the **continued delays in the finalisation** of the claim. This has led the community to question the commitment of the RLCC to fulfilling their mandate to serve communities. The Panellists remarked that, in such instances, they would further investigate the inefficiency and recommend

to the officials that they accelerate this process, given the many delays that the community has already encountered.

The challenge of **redistribution of wealth** is most evident in claimant communities where **mining and mining-related activities** appear to take precedence over the land rights of claimants. Mr Morris Matjeke of Koka Matlou Community (Limpopo) highlighted that his community initially claimed five farms but, due to mining interests, the DRDLR has only handed over one farm, despite the fact that the community's additional claims were successful. In the interim, although they are in possession of a title deed, the community have been offered financial compensation as an alternative to the land because the land they have claimed has been earmarked for mining.

Mr Petrus Modibedi of Baphalane ba Schilpadnest Community (Limpopo) showed that his community had similar challenges with regards to mining. In his community, mining activities have been taking place since 1973 and, even though the community has registered a Trust to manage the royalties, they have **not received any financial reports** from 2003 to date. And even with a title deed, this community does not enjoy any real rights in land. Mr Modibedi stated: "There are companies that are operating on our land and [yet] we do not know where the profits from the mining company have now gone." Mr Modibedi expressed his frustrations at the lack of support from the DRDLR in helping the community to manage their finances and to **hold the mining companies accountable.**

Ms Elizabeth Monareng from Dube Community (Mpumalanga) added that the Panel should make recommendations on investigating the allegations of corruption, as her family have been waiting more than 10 years for the finalisation of their land claim. Ms Monareng shared that her community, like many others, did **not receive title deeds,** which has further limited their ability to enforce their rights as claimants.

SUBMISSION ON FARM DWELLERS AND LABOUR TENANTS

As an organisation that has been working in rural Limpopo since 1997, Mr Vasco Mabunda from Nkuzi (Limpopo) flagged the issue of **evictions of farm dwellers** who are not considered residents and, as such, are not provided with basic services on farms. In addition, Mr Mabunda raised the high incidence of farm dwellers evicted without a court order; even though the Extension of Security of Tenure Act, 1997 (ESTA) prevents evictions without a court order. He further stated that the police do not appear to consider this a crime. Nkuzi also observed that the **eviction of the male occupier (when he is the head of the household) oftentimes leads to the evictions of women and children** as their independent rights as occupiers are seldom recognized. However, the recent judgment handed down in the Constitutional Court (case 23/15) in July 2016, provides for women occupiers to enjoy rights in land independent of the male occupier *(Jan Klaase and Another v Jozia Johannes van der Merwe N.O and Others).*

Mr Siyabonga Sithole from AFRA (KwaZulu-Natal) elaborated on the experiences of **labour tenants and the failure of the DRDLR to implement the Labour Tenants Act,** 1996 (LTA). Under this legislation, an estimated 22 000 claims were lodged, but there has been little progress in finalising these claims, which has left labour tenants without security of tenure. This led Mr Sithole to remark that: "The resistance to the Labour Tenants Act is creating wasted expenditure." After a failure by the Department to act, AFRA had no choice but to go to court on behalf of labour tenants to get the Department to implement the Act. The case is still underway at the Land Claims Court (case 1327/2012). Mr Sithole noted that many claims have been made by heads of families, and these claims have not been settled or the Department has made the suggestion that they use other land reform programmes.

President Motlanthe responded by stating that the plight of farm dwellers speaks to the heart of the matter regarding land reform. **People who live and work on land for generations are thrown off the land on ownership changes.** President Motlanthe shared that he has never forgotten one old man who lived and worked on a farm all his life and did not have an identity document. Speaking in isiXhosa, this man shared with him that when property changes names, all of the notices are in English, the farm dwellers never know that the land they live on is up for sale, and they are not aware of plans to change the land use even though they (the farm dwellers) know how to work the land better. This old man expressed to President Motlanthe that **he (and farm dwellers elsewhere) is like the ticks on the back of a bull that is being led to the abattoir** in this way. The panellists were in agreement that the work to improve conditions for farm dwellers and labour tenants needs to be prioritised by the DRDLR.

SUBMISSIONS ON POLICY REFORM AND LEGISLATIVE CHALLENGES

In the next session, the representatives from civil society, research institutes and the SAHRC were also given the opportunity to present their observations to the Panel. Accordingly, the Panellists were also provided with the opportunity to respond on how they can take these submissions forward.

COMMISSIONER JANET LOVE, SAHRC

Commissioner Love summarised many of the issues and concerns that were raised by community representatives. Commissioner Love observed that, based on the above-mentioned submissions, the respective Regional Land Claims Commissions are not **consistent in their record-keeping**, nor do the respective offices consistently follow up with claimants in a way that inspires confidence in the process of restitution. She also noted that there is a potential conflict when land claims are submitted by communities and individuals, as opposed to

claims submitted under the name of a traditional community. In such instances, the **process of restitution is vulnerable to manipulation** if the claim for the concerned Traditional Authority wields greater authority than the claim submitted by the individual or community.

Given her scope of work at the SAHRC, Commissioner Love stated that the **question of mining cannot be divorced from land reform.** She cited that it is a common occurrence that the holder of mining rights appears to enjoy greater rights than the affected community. Even after restitution, the community cannot benefit from the natural resources on their land in spite of the fact that the claimants are now the registered owners of the land. Thus, she remarked that the nature of the extractives industry is that it will **benefit the mining company and not the landowner.**

Commissioner Love concluded that the work of the Panel is important to **promote reflection** on the implementation of legislation. However, the officials who work on restitution matters should ultimately be responsible for improving how they service claimants' requests for assistance. The Panel noted these observations, and emphasised that it does not seek to reinvent the wheel, that is to replace the work of Parliament but rather to enhance the implementation of legislation.

WILMIEN WICOMB, LRC ATTORNEY

Wilmien Wicomb from the LRC presented on some of the problems experienced with the legislation related to the different aspects of the land reform programme in South Africa: restitution, redistribution and tenure reform. She noted that the Department of Rural Development and Land Reform recognised that the Labour Tenants Act was not working, so the Department began trying to accommodate labour tenants under different land reform mechanisms. However, the **restitution process is completely overburdened** and cannot "carry" the other legs of land reform. A community or individual who has a restitution claim has a legal right - this is not discretionary.

The **Recapitalisation and Development Fund (RECAP)** initially propped up the restitution programmes that were failing. But it came to replace all other programmes that are intended to provide claimants with much-needed support and much of the funding ended up going to large-scale farmers and communities lost out. Many communities are struggling to get title deeds under the RECAP system, as they are expected to demonstrate the viability and commercial success of their land claim. And whilst the **Constitution protects the right to development** for communities, this does not seem to be a reality as expressed in the community submissions in the earlier session.

Lastly, Ms Wicomb noted that **communities are not part of law-making** as you would expect in a representative democracy such as South Africa. She cited many examples of Parliamentary hearings that illustrated how land legislation has sometimes been drafted without sufficient consultation and input of affected communities. This led Ms Wicomb to remark that: ***"The only way that Parliament will ever know how to make laws to serve the communities, is if they start law making at a community level."***

MAZIBUKO JARA, NTINGA NTABA KANDODA (EASTERN CAPE)

Mr Jara spoke of the **role of the Parliament and the Constitution in land reform.** He cited the overlapping similarities in the provisions of the Communal Land Rights Act (CLRA) and the Traditional Courts Bill (TCB); both of which were struck down. Mr Jara noted that if you look at public submissions on legislation that affects rural people, you will find **one consistent voice from rural people.** They (people living in rural South Africa) are **respecting and applying their living customary law** as it is on the ground. But, in his view: *"Parliament still imposes colonial and apartheid style laws that go against living customary law."*

Mr Jara was critical of the legislative framework on land reform; he echoed the sentiments of the other attendees that the implementation of land reform has failed to meet the interests and needs of rural communities. He asked the Panel to address three issues:

- Will the Panel enquire into the validity of the traditional leadership structures in place?
- The Constitution protects the right to property, but property is not limited to land. To what extent does the omission of a right to land in the Constitution affect the right of access to land?
- Will the Panel consider possibility of **expropriating unused land** for the purpose of providing land to the landless?

RALPH MATHEKGA, MISTRA

Ralph Mathekga from Mapungubwe Institute for Strategic Reflection (MISTRA) noted that, in reviewing post-apartheid legislation governing land reform, the Panel has an opportunity to recommend specific policy gaps and to re-imagine how the land reform programme can be implemented in future. Thus, Mr Mathekga questioned if a multitude of **land laws is necessary when policy reforms could be better placed to effect change.** In response to this, President Motlanthe concurred that **legislation sometimes hinders change if it is poorly implemented;** thus, it may be worthwhile to consider a shift toward policy reforms as opposed to being overly reliant on the implementation of legislation.

CONCLUSION

The Panellists noted the submissions received thus far, and gave their assurances that, if they were furnished with more information, they would be able to better assess how to take forward the specific requests and recommendations given by the attendees. In addition, the Panellists noted that the National Council of Provinces (NCOP) has a practice of taking parliament to the people, where they interact with communities and collaboratively undertake to problem-solve. Thus, the Panel will also be reviewing the reports from the interactions with the NCOP to determine if this vehicle is more responsive to the needs of communities and if not, to identify the reasons why it is not.

The Panel will be compiling a report with strong recommendations of what should be done to address the concerns of the affected communities. When a relevant government department is underperforming they aim to recommend ways to address this. The Panel have a mandate to compile an interim report within the next 6 months and a final report by the end of the year. They encouraged communities to send more details of complaints to them and appealed to civil society to also assist in facilitating the process of submissions.

HOW TO MAKE A SUBMISSION

Your submission must be a maximum of 2 pages in length. Include key information such as your contact details, address, name of community and land claim details; and your suggestion for how the High Level Panel can assist you to resolve your problem.

You must state which committee you are writing to – the Committee on Land Reform.

YOU CAN SEND YOUR SUBMISSION TO

EMAIL highlevelpanel@parliament.gov.za

Attention to Leanne Morrison (EPMO – Assessing the Impact of Legislation Project)

OR YOU CAN POST YOUR SUBMISSION TO

P.O.Box 2164, Cape Town, 8000

Attention: Leanne Morrison

AFRA supporters and staff outside the Land Claims Court during the labour tenants case.

COURT ACTION FOR LABOUR TENANT LAND CLAIMS

The Legal Resources Centre represents the Association for Rural Advancement (AFRA) in another court case which is aimed at ensuring that labour tenants who made land claims have the land claims processed. The court case has been ongoing since 2011 with no final resolution. A quick overview of the court case is provided below.

BACKGROUND

On 22 March 1996, the Land Reform (Labour Tenants Act) was signed into law by President Nelson Mandela, symbolically acknowledging the link between the legislation, the Constitution and the struggle for human rights in South Africa; as typified by the Sharpeville Massacre on the 21 March 1960, which we now celebrate as Human Rights Day.

The law promotes security of tenure and portions of land to a group of people called labour tenants. People were classified as labour tenants if they had in the past worked on a farm, without compensation, in exchange for tenancy on the farm, usually being allowed to work a small portion of that farm themselves through grazing and/crop production. Many labour tenants were long term, inter-generational occupiers on the farms they worked. This arrangement allowed white farmers access to free labour where no wages were paid.

By the cut-off date of 31 March 2001, tens of thousands of labour tenants lodged claims with the Department of Rural Development and Land Reform (the Department). A particularly large group of labour tenants who live in the back yard of the richest school in South Africa, Hilton College, were identified by AFRA.

AFRA took up their case in 2011 when it was realised that their plight was no different from that of thousands of other labour tenant applicants. It was decided to bring a class action on behalf of all outstanding claimants, and in July 2013, AFRA with the assistance of the LRC, filed a class action lawsuit against the Director-General of the Department.

THE LABOUR TENANTS CLASS ACTION IS LAUNCHED

From 2013 onwards, the Department repeatedly failed to comply with court ordered deadlines. The ongoing and persistent failure to do so was not only breaching the court orders, but directly inconsistent with the Constitution.

Further failures of the Department necessitated legal action in the form of a structural interdict aimed to force the Department to process the rest of the claims in a one-year period. On 19 September 2014, the application was heard in the Land Claims Court in Randburg, Johannesburg. AFRA brought 70 labour tenants and community activists from KZN to Johannesburg for the hearing in order to add physical support to the process.

The court order further compelled the Department to provide the statistics pertaining to the current status of all labour tenant applications that were lodged in terms of the Labour Tenant Act, together with a schedule indicating the status of each individual labour tenant claim. In addition, the Department was to provide a report outlining the plans that it has developed for the processing of all outstanding labour tenant claims. This information was to be submitted to AFRA by 31 March 2015.

The Department thereafter submitted a wholly inadequate report in August 2015, once more missing the deadline 31 July 2015. It subsequently failed to submit any report on the 30 October 2015 prompting AFRA to instruct the LRC to bring the matter before Court once more on 29 January 2016.

The Department's continuous systemic failure encouraged AFRA to further legal action. AFRA and the LRC believed that a Special Master would be the only mechanism powerful enough to oversee the implementation of the Labour Tenants Act. AFRA returned with labour tenants to court once again, staging a mass demonstration outside the land claims court which attracted media attention. However, the case was delayed as the Department indicated that they had more evidence to present.

A new court date was set for the 24 March 2016. Once again, AFRA had to raise funds to mobilise labour tenants to attend the court hearing. The media presence was even more prominent, with multiple television channels covering the event. The judge on the day was late for court and labour tenants who had travelled until late the previous night had to wait hours for the judge to arrive. Once again, the case was delayed.

NEGOTIATIONS

On 17 May 2016, after extensive consultation, AFRA entered a period of negotiations with the Department and the Minister of Rural Development and Land Reform. In March 2016, the Minister had unexpectedly entered the court proceedings with his own legal representative, separating himself from the legal representation of the Department. The legal teams of the Minister, the Department and AFRA agreed to terms for the negotiations, with the aim of agreeing to a Memorandum of Understanding before the end of June 2016, which were approved by the judge of the Land Claims Court.

However, AFRA still had several serious reservations and tabled these to the court. After a constructive start to negotiations, AFRA was hopeful that a more beneficial outcome for labour tenants could be achieved through a mutual understanding and partnership.

BACK TO COURT

However, the negotiations broke down after Minister Gugile Nkwinti made a unilateral decision on the 10 June 2016 to announce his intention to convene a "National Forum of NGOs", The NGO forum would determine the terms of reference for a programme for farm dwellers (labour tenants and occupiers). This decision was made despite the premise of the court order being that all items contained within the scope of the Memorandum of Understanding were for negotiation, including the possible establishment of such a forum. This decision was made without consulting AFRA.

Consequently, on 8 August 2016, with the assistance of the Legal Resources Centre, AFRA brought an application for an interdict against the Minister of Rural Development and Land Reform. AFRA also seeks a court order stating the Minister was in contempt of court by going forth with the establishment of the NGO Forum, despite it being an item for negotiation.

Due to the negotiations breaking down, AFRA will return to court on the 10-11 October 2016 to, once again, argue for the appointment of a Special Master to ensure the implementation of the rights of labour tenants.

AFRA supporters and staff outside the Land Claims Court during the labour tenants case.

Applicants in the Constitutional Court waiting for the hearing to begin.

SECTION 4B

CONSTITUTIONAL COURT HEARING

SUMMARY OF THE DAY

During the Constitutional Court hearing, where the arguments of the parties where presented to the judges (known as Justices of the Constitutional Court), many representatives of the applicant organisations and communities were seated in the audience to hear what was said. This is a brief summary of some of the key arguments made by the lawyers representing the Applicants and Respondents and the responses by the Justices.

The lawyers presenting the Applicants (LAMOSA and others) and the Respondents (National Council of Province and others) are listed below.

LAMOSA, Nkuzi, AFRA and the CPAs were represented by Advocate Budlender and Advocate Dodson.

The Respondents were represented by the following:

- Advocate Potgieter - NCOP, National Assembly and Provincial Legislatures (1-11 respondents)
- Advocate Gauntlett - Minister of Rural Development and the President of South Africa (12 and 14 respondents)
- Advocate Chaskalson - Chief Land Claims Commissioner (13 respondent)
- Advocate Jansen - Matabane and Maphari Communities and the Mlungisi and Ezibeleni Disadvantaged and Lady Selborne Groups (15-18 respondents)

APPLICANTS' MAIN ARGUMENTS

There were two parts to the Applicants' argument which were presented by Advocates, Budlender and Dodson. First, that there was no proper consultation when the Amendment Act was passed through the provincial and national legislatures and, second, section 6(1)(g) of the Amendment Act is too vague (this section states that old order claims under the first Act should be "prioritised").

The counsel for the Applicants then argued that the Court should order the legislature to fix this vagueness in the Amendment Act, and suspend the Act temporarily until this is done. However, the Applicants also argued that while the Act is temporarily suspended, an interim order should be granted, giving priority to old order land claimants who are still waiting for their claims to be processed. In this way, land claims can continue to be processed to the benefit of those who had been waiting for almost two decades for their claims to be processed.

However, it was also argued, if no interim relief is granted while the defective legislative process is remedied, then old order claimants would be faced with uncertainty and this would prejudice those still waiting for their land claims to be processed.

The Justices of the Constitutional Court then directed questions at the counsel of the Applicants. Many questions related to the appropriate remedy which had been argued. The Justices asked whether granting interim relief would constitute the Court taking the place of Parliament, as courts do not have the mandate to make legislation – this is the job of Parliament.

The court also asked whether the Commission on Restitution of Land Rights, who are charged with processing land claims, would be able to notice if there are competing claims (both old order and new order claims) and be able to work effectively to deal with these competing claims. The advocates for the applicants explained that, while this must be possible, a complexity arises because land claims are ranked equally and there is still a period up until June 2019 when all claims should be lodged. This would effectively mean that old order claims would have to wait a significant amount of time before being processed; even more time than the claimants have waited so far.

RESPONDENTS' MAIN ARGUMENTS

NATIONAL COUNCIL OF PROVINCES, NATIONAL ASSEMBLY AND PROVINCIAL LEGISLATURES

Advocate Potgieter, representing NCOP, National Assembly and Provincial Legislatures, was questioned extensively on the public participation process adopted by the NCOP and Provincial Legislatures. He was asked whether or not the NCOP could delegate its responsibilities during the public participation process to the provinces. Adv. Potgieter argued that there had been compliance on the part of the provinces in terms of what was required of them during a public participation process.

He was then questioned on why there was a rush to pass the Amendment Bill into law, as this urgency then meant that the public participation processes were "short-circuited" (shortened). The Justices highlighted that, at the heart of South Africa's democracy are the people who should be listened to, particularly during the legislative process.

The Justices also asked whether the NCOP had looked for and invited specific "interested and affected parties", such as NGOs and organisations such as those represented in the Applicants list, to the public participation events. The Justices of the Court also pointed out that, during the limited public participation that did take place, the Bill was not translated into other South African languages which would have made it more understandable to all the parties concerned.

MINISTER OF RURAL DEVELOPMENT AND THE PRESIDENT OF SOUTH AFRICA

Advocate Gauntlett, on behalf of the Minister of Rural Development and the President of South Africa, argued that the test as to when a piece of legislation is "vague" is to look at whether it is workable or not. Thus, he argued that the legislation is still "workable". When asked about the question of giving priority to old order claims, Adv. Gauntlett argued that what matters is whether a new order claimant is placed ahead of old

order claimants. He argued that new order claimants would not be able to elbow out old order ones.

CHIEF LAND CLAIMS COMMISSIONER

Adv. Chaskalson, on behalf of the Chief Land Claims Commissioner, argued that section 6(1)(g) is not overly vague and that the interpretation of section 6(1)(g) by the Chief Land Claims Commissioner was that existing claims should not be processed to finality before any new order claims were processed. Instead, the key submissions made by Adv. Chaskalson were that the obligation to prioritise old order claims contained in 6(1)(g) rests only on the Commission and that there is no parallel obligation in the Land Claims Court or by the Minister.

This is a significant argument in the case because the Commission cannot award land claims, it can only process land claims. The decision-makers that would finalise a land claim are either the Land Claims Court (LCC) or the Minister. So the argument made by Adv. Chaskalson on behalf of the Land Claims Commission is that, if the obligation to "give priority" only rests on the body that processes claims, it can only be an obligation to give priority of process and not award. The Amendment Act, therefore, does not distinguish between old order and new order claimants.

Thus, Adv. Chaskalson argued that there is nothing in the Act that prevents the Land Claims Court (LCC) from awarding land to a new claimant, but this would be exceptional. The LCC has to operate having regard to "equity and justice", and that would demand that the LCC assist the land claimant who has waited for 20 years first.

Adv. Chaskalson further argued that there may be cases where a new order claimant can show circumstances which would mean that they should be given priority over an old order claimant. It would not be just and equitable for the Land Claims Court to order the removal of a community from land.

He concluded his argument stating that the legislature could not have intended to afford absolute priority to old order claims when it enacted the Amendment Act.

Matabane and Maphari Communities and the Mlungisi and Ezibeleni Disadvantaged and Lady Selborne Groups

Adv. Jansen, on behalf of the Matabane and Maphari Communities and the Mlungisi and Ezibeleni Disadvantaged and Lady Selborne Groups, argued that the administrative body dealing with disputes of old and new order claims should be able to give meaning to the word "prioritise" – in other words, the Commission on Restitution of Land Rights should determine how they would go about prioritising land claims.

Central to Adv. Jansen's argument was that the Court should not grant the order of suspension of the Amendment Act, which is what the applicants were asking the court to do.

REPLIES TO RESPONDENTS' ARGUMENTS

The applicants were given a chance to reply to the arguments given by the Respondents to the Court. Adv. Budlender gave more information on the current situation of land claims in South Africa and indicated that there are 77 831 settled land claims but only 60 319 finalised claims, which are those where people have received land or the compensation for the land. Thus, there is a difference of approximately 17 000 claims which have been settled but not finalised. In addition, there are a further 8 257 outstanding claims, which have not yet been settled. Thus, there are 25 769 pending claims out of a total of approximately 86 000 that were lodged by the end of 1998 and are still waiting for finalisation.

Adv. Dodson, for the Applicants, now stood up to address the interpretation of the vague section of the Amendment Act. He noted that during the arguments in the Court, each of the counsel for the Respondents had provided the Court with another version of the interpretation of what it means to prioritise old order land claims. He argued that their disagreement on the interpretation strengthened the argument of the applicants.

Adv. Dodson further argued that when the Applicants attended the hearings at the Provinces, they asked that their land claims be prioritised. If they had been properly heard at that stage, it is highly possible that the NCOP may have listened to them and ensured that their claims were prioritised. To not grant interim of prioritising old order claims, the Court would be failing them.

The Court reserved judgment and adjourned. As can be seen from the final judgment, the court agreed that the public participation process was inadequate. However, it did not comment on the vagueness of section 6(1)(g) because, by declaring the Restitution Amendment Act invalid, it made the entire Act void and impossible to implement. Parliament is now expected to undergo an adequate public participation process before it enacts a new piece of legislation to replace the Restitution Amendment Act. We hope that this will help to address any confusion in processing land claims, address challenges in the Restitution programme and give communities a voice in their own development.

At the pre-hearing workshop with community members and organisational staff.

Pre-court hearing at Stay City to discuss the case. *Photo by Tshediso Phahlane*

SECTION 5

SUPPLEMENTARY ARTICLES

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others

Case CCT 40/15 [2016] ZACC 22 | *Hearing Date:* 16 February 2016 | *Judgment Date:* 28 July 2016

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today, the Constitutional Court handed down judgment in a matter concerning the obligation on Parliament to facilitate public participation in its legislative process, and its effect on the validity of the Restitution of Land Rights Amendment Act (Amendment Act), which amended the Restitution of Land Rights Act (Restitution Act). The Restitution Act was enacted in 1994 to give effect to the constitutional imperative of restitution of land. Section 25(7) of the Constitution provides that persons or communities dispossessed of land after 19 June 1913 as a result of past racially discriminatory laws or practices are entitled to restitution or equitable redress. The Restitution Act provided that all claims for restitution were to be lodged by 31 December 1998.

In 2014, a draft Restitution of Land Rights Amendment Bill (Bill) providing for, amongst other things, the re-opening of claims, was tabled and passed by the National Assembly. The Bill was subsequently referred to the National Council of Provinces (NCOP), which sent the Bill to the Provincial Legislatures to facilitate public participation on its behalf. Less than two weeks were made available to the Provincial Legislatures to advertise and hold public hearings, invite and consider all oral and written submissions from members of the public, and provide negotiating and final mandates. By the end of March 2014, all but one of the Provincial Legislatures had approved the Bill. The NCOP passed the Bill in the same month; it was assented by the President on 29 June 2014 and duly enacted into law as the Amendment Act on 1 July 2014.

In their primary challenge, the applicants – organisations with interests in land rights and agrarian reform, and communal property associations – alleged that the curtailed timeline resulted in a failure by the NCOP and Provincial Legislatures to comply with the duty imposed by sections 72(1)(a) and 118(1)(a) of the Constitution to facilitate public participation. As the Amendment Act was national legislation, Parliament – of which the NCOP is one house – had failed in a constitutional obligation, and therefore the Constitutional Court's exclusive jurisdiction was engaged. An alternative challenge impugned a provision introduced by the Amendment Act (section 6(1)(g)), which compelled the Land Claims Commission, when considering claims for restitution, to "ensure that priority is given to claims lodged not later than 31 December 1998 and which were not finalised at the date of the commencement of the Amendment Act". The applicants argued that the provision was impermissibly vague, being open to multiple interpretations as to what "priority" meant in respect of claims lodged before 31 December 1998 (old claims) and those lodged after the re-opening (new claims).

The NCOP, National Assembly and eight Provincial Legislatures opposed the primary challenge, averring that the public participation process passed constitutional muster. The Western Cape Provincial Legislature merely argued that it had acted reasonably within the timeline imposed upon it by the NCOP. The Minister for Rural Development, the Chief Land Claims Commissioner and the President of South Africa opposed the alternative challenge, and contended that section 6(1)(g) is clear in the context of the amended Restitution Act if interpreted purposively. The Matabane and Maphari Communities, the Mlungisi and Ezibeleni Disadvantaged Groups, and the Lady Selborne Concerned Group, submitted that section 6(1)(g) is procedural in nature and thus not susceptible to the applicants' vagueness argument.

A unanimous judgment by Madlanga J (concurred in by Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mhlantla J, Nkabinde J and Zondo J) upheld the primary challenge.

The Court reiterated that the right to restitution in land plays a pivotal role in South Africa's constitutional democracy, and is a means to achieving the guarantee of dignity for those who continue to suffer from the racist practices and laws of the past. The legislative processes which resulted in the Amendment Act, enacted to give effect to the right, by implication needed to include comprehensive public participation.

The truncated timeline – of two weeks – in which the Provincial Legislatures had to hold public hearings, was found to be objectively unreasonable. The Court pointed out the following in respect of the provinces: notices were given only a few days prior to the hearings; hearings were held in certain municipalities excluding many affected individuals; and at the hearings themselves, members of the public affected were not afforded an opportunity to share their views in relation to the Amendment Act. These failures meant that the Provincial Legislatures, and – by extension – the NCOP failed to facilitate adequate public participation.

As a result, the Amendment Act was declared invalid. However, the Court made the declaration prospective, as without the Amendment Act, the new claims lodged would cease to exist. This way new claims lodged by the date of the judgment, continue to exist, but none can be lodged in future under the

impugned legislation. Moreover, the Court interdicted the Land Claims Commission from considering, processing and settling new claims for a period of 24 months, pending the re-enactment by Parliament of the Amendment Act or finalisation of those claims filed by 31 December 1998, whichever occurred first. In this way, Parliament is afforded time to facilitate a constitutionally compliant public participation process, and consider how best to deal with the new claims lodged to date of the judgment. The Chief Land Claims Commissioner was also directed to approach the Court for further relief should Parliament fail to re-enact the Amendment Act within the 24 month period. As the NCOP was the primary cause of the failed public participation process, it was ordered to pay the costs of the applicants.

IN DIE GRONDWETLIKE HOF VAN SUID AFRIKA

LAND ACCESS MOVEMENT OF SOUTH AFRICA EN ANDERE vs VOORSITTER VAN DIE NASIONALE RAAD VAN PROVINSIES EN ANDERE – SAAK NR. CCT40/15 [2016] ZACC 22

VERHOOR DATUM: 16 FEBRUARIE 2016
DATUM VAN UITSPRAAK: 27 JULIE 2016

Media Opsomming Opgestel deur die Grondwetlike Hof en Vertaal deur die LRC

Die volgende verklarende nota is aan die media verskaf vir die doeleindes van verslagdoening oor hierdie saak en is nie bindind op die Grondwetlike Hof of enige lid van die hof nie.

Vandag, het die Grondwetlike Hof ‘n uitspraak gelewer in ‘n saak betreffende die verpligting op die Parlement om openbare deelname in sy wetgewende prosess te fasiliteer, en die effek daarvan op die geldigheid van die Wysigingsset op die Herstel van Grondregte (die Wysigings wet). Die Wysigingswet het die Wet op Herstel van Grondregte, (die Restitusie Wet) gewysig. Die Restitusie Wet is in 1994 gepromulgeer om uitvoering te gee aan die grondwetlike imperatief en opdrag vir die herstel van grondregte. Artikel 25(7) van die grondwet voorsien dat persone of gemeenskappe wat ontneem is van hul grond of regte na 1913 as gevolg van historiese rasse-diskriminerende wette of praktyke, geregtig is op restitusie or regverdige reparasie. Die Restitusie Wet het voorsien dat alle eise vir restitusie ingehandig moes word teen 31 Desember 1998.

In 2014 is ‘n konsep Wetsontwerp op die Herstel van Grondregte (die wetsontwerp) in die Nasionale Vergadering ter tafel gelê en oorweeg. Die wetsontwerp het onder ander voorsiening gemaak vir die heropening van grond eise. Die wetsontwerp is daarna verwys na die Nasionale Raad vir Provinsies. Die Nasionale Raad vir Provinsies het die wetsontwerp aangestuur na die provinsiale wetgewers om namens die Nasionale Raad openbare deelname te fasiliteer. Minder as twee weke is toegelaat vir die provinsiale wetgewers om die wetsontwerp te adverteer en om openbare aanhorings of verhore te reel, om verbale en geskrewe insette van lede van die publiek uit te nooi en te oorweeg en om onderhandelings mandate te voorsien. Teen die einde van Maart 2014 het al die provinsiale wetgewers behalwe een die wetsontwerp aanvaar. Die NRP het die wetsontwerp dieselfde maand aanvaar en dit is deur die President onderteken op 29 Junie 2014 en daarna as wetgewing gepromulgeer op 1 Julie 2014.

In hul primere aanspraak het die applikante, organisasies wat ‘n belang het by grondregte en landelike hervorming en verenigings vir gemeenskaplike eiendom, aangevoer dat die verkorte tydlyn veroorsaak het dat die NRP en die provinsiale wetgewers nie daarin geslaag het om te voldoen aan die vereistes wat gestel word in Artikel 72(1)(a) en 118(1)(a) van die grondwet om openbare deelnamete fasiliteer nie. Aangesien die Wysigingswet nasionale wetgewing was het die parlement waarvan die NRPP een afdeling of huis is, nie in sy grondwetlike verantwoordelikhede voldoen nie en daarom het die grondwetlike hof eksklusiewe jurisdiksie. In ‘n alternatiewe aanspraak van die aansoekers of applikante het gehandel oor een van die bepalings van die wysigingswet (Artikel 6(1)(g)) wat van die grond eiese kommissie vereis het dat wanneer grondeise oorweeg word daar voorsien moet word dat prioriteit gegee word aan eise wat voor 31 Desember 1998 ingedien is en wat nognie gefinaliseer is op die datum van die inwerkingstelling van die wysigingswet nie. Die applikante het aangevoer dat hierdie bepaling onvergeeflik vaag is, dat dit oop is vir ‘n wye verskydenheid van interpretasies wat betref die betekenis van prioritiseringr ten opsigte van eise wat voor 31 Desember 1998 ingedien is (ou eise) en eise wat na die heropening ingedien is (nuwe eise).

Die NRP die Nasionale Vergadering en agt provinsiale wetgewers het die primere aanspraak ge-opponeer en aangevoer dat die openbare deelname proses voldoen aan die vereistes van die grondwet. Die Weskaap provinsiale wetgewer het aangevoer dat die wetgewer redelik opgetree het gegewe die tydlyn wat deur die NRP verskaf is. Die Minister van Landelike Ontwikkeling en Grondhervorming, die hoof grondeise kommissaris en die President van Suid Afrika het die alternatiewe aanspraak ge-opponeer en aangevoer dat artikel 6(1)(g) duidelik is in die konteks van die gewysigde Restitusie wet indien dit op ‘n doelmatige wyse ge-intepreteer word. Die Matabane en Maphari gemeenskappe, die Mlungisi en die Ezibeleni Benaaldeelde

Groepe en die Lady Selbourne Belange Groep het aangevoer dat artikel 6(1)(g) prosidureel van aard is en dat dit dus nie nie onredelik sal wees soos aangevoer deur die applikante met hul vaagheids argument nie.

In 'n eenparige uitspraak deur regters Madlanga (welgeuitspraak ondersteun is deur Mogoeng, Moseneke, Bosielo, Cameron, Froneman, Jafta, Khampepe, Mhlantla, Nkabinde en Zondo) is die primere aanspraak toegestaan.

Die hof het herhaal dat die reg op herstel van grond regte 'n baie belangrike rol speel in die Suid Afrikaanse grondwetlike demokrasie en dat die 'n middel is om die waarborg van waardigheid te bereik vir diegene wat steeds ly onder rassistiese praktyke en wette van die verlede. Die wetgewende prosese wat gely het tot die Wysigingswet wat uitvoering gee aan die reg, moet by implikasie voldoen aan uitvoerige openbare deelname.

Die verkorte tydlyn van twee weke waar binne die provinsiale wetgewers openbare verhore en aanhorings moes hou is beskou as objektief onredelik. Die hof het daarop gewys dat wat betref die provinsies, kennisgewings gegee is 'n paar dae voor die openbare aanhorings, dat aanhorings gereel is in sekere munisipaliteite wat baie geaffekteerde individuele persone uitgesluit het, en dat by die aanhorings self die lede van die publiek wat geraak is nie die geleentheid gegee is om hul menings betreffende die Wysegingswet te deel nie. Hierdie probleme beteken dat die provinsiale wetgewers en by implikasie die NRP self, gefaal het om voldoende openbare deelname te fasiliteer.

Die Wysigingswet is gevolglik as ongeldig en nietig verklaar. Die Hof het die verklaring prospektief of toekoms gerig gemaak aangesien die nuwe eise, indien daar nie 'n Wysigingswet was nie, sou ophou bestaan. Op hierdie wyse is voorsien dat nuwe eise wat ingedien is voor die datum van die uitspraak, sal voortbestaan maar geen verder nuwe eise kan in die toekoms ingedien word onder die geaffekteerde wetgewing nie. Hierbenewens het die Hof die Grond Eise Komitee belet om enige nuwe eise te oorweeg, te prosesseer of te skik vir 'n tydperk van 24 maande totdat 'n nuwe Wysigingswet aanvaar word of totdat al die eise wat voor 31 Desember 1998 ingedien is gefinaliseer is, welke datum ook al eerste plaasvind. Op hierdie wyse is die Parlement die geleentheid gegee om 'n proses van openbare deelname te fasiliteer wat voldoen aan die Grondwet en om te oorweeg op watter wyse voorsien moet word vir nuwe eise wat ingedien is tot op die datum van hierdie hof bevel. Die hoof grond eise kommissaris is ook aangese om die hof te nader vir enige verder bedes indien die parlement nie daarin so slaag om die Wysigings Wet te herbevestig binne 'n tydperk van 24 maande nie. Aangesien die NRP se optrede die primere oorsaak was van die gebrekige openbare deelname proses, moet die NRP die hofkostes van die applikante betaal.

LRC
Legal Resources Centre

Press Release

Land claims on hold after Restitution Amendment Act declared invalid

For Immediate Release: 28 July 2016

Today, the Constitutional Court declared the Restitution of Land Rights Amendment Act 15 of 2014 invalid. The Court also interdicted the Commission on Restitution of Land Rights from processing in any manner the land claims lodged from 1 July 2014 (when the Amendment Act was enacted and reopened the land claims process), pending the enactment of new legislation.

The challenge to the Amendment Act was brought by the Legal Resources Centre and Webber Wentzel on behalf of the Land Access Movement of South Africa (LAMOSA), Nkuzi Development Association (Nkuzi) and the Association for Rural Advancement (AFRA), as well as three communal property associations representing the affected communities of Makuleke, Moddervlei and Popela.

The Amendment Act amended the Restitution of Land Rights Act, 22 of 1994, and was signed into law by President Jacob Zuma on 30 June 2014. It allowed people who had not lodged land claims by the original cut-off date in 1998 a new chance to lodge claims for restitution of land.

Our clients challenged the Amendment Act on the basis that Parliament and the Provincial Legislatures had failed to comply with their constitutional obligation to facilitate public involvement before passing the Amendment Act.

The National Council of Provinces (NCOP) and the Provincial Legislatures failed to afford people affected by the Amendment Bill a meaningful opportunity to comment on it. The NCOP created artificial urgency by insisting the Bill should be passed before the 2014 elections. This meant that the Provincial Legislatures had insufficient time to enable public participation and to adequately consider the Bill.

The hearings themselves were inadequate because they were not properly advertised, there was insufficient time to prepare submissions, translated versions of the Bill were not available, the Bill was not properly explained, and people's comments were not accurately recorded. Moreover, members of the NCOP failed to attend the public hearings in their provinces, and the reports of public hearings prepared by the Provincial Legislatures were not distributed to the other members of the NCOP Committee. Finally, the NCOP failed to properly consider amendments proposed by several provincial legislatures as a result of the public hearings.

The Court upheld almost all of our clients' complaints about the process the NCOP and the Provincial Legislatures followed. It held:

The re-opening of land claims "touches nerves that continue to be raw after many decades of dispossession. The importance of the right to restitution, therefore, cannot be overstated. Restitution of land rights equals restoration of dignity." (Para 63) Restitution also facilitates the achievement of other rights such as privacy, housing and a healthy environment. The Amendment Bill was "of paramount importance and public interest." (Para 63)

There was no urgency that justified abridging the time for public participation in order to pass the Bill before the 2014 election. Madlanga J wrote: "Given the gravitas of the legislation and the thoroughgoing public participation process that it warranted, the truncated timeline was inherently unreasonable. Objectively, on the terms stipulated by the timeline, it was simply impossible for the NCOP – and by extension the Provincial Legislatures – to afford the public a meaningful opportunity to participate." (Para 67)

The failure of members of the NCOP to attend the hearings in the provinces, the failure to distribute the reports of those hearings, and the failure to consider amendments proposed by the Provincial Legislatures meant that "the views and opinions expressed by the public at the provincial hearings did not filter through for proper consideration when the mandates were being decided upon. This deprived the process of the potential to achieve its purpose." (Para 71)

The hearings in the Provincial Legislatures suffered from manifest flaws. Most importantly, they were not advertised widely enough, and people were not given sufficient notice of the hearings to make meaningful submissions.

The Court emphasised that the Provincial Legislatures could and should have objected to the unreasonably short timeline the NCOP sought to impose. The Provincial Legislatures, Madlanga J held, are not subordinate, "to the authority of the NCOP. They do not exist to be at the beck and call of the NCOP. They too have a duty to play their part properly in affording the public an opportunity to participate in the legislative process." (Para 80)

The Court therefore concluded that the NCOP had not acted reasonably in facilitating public involvement. It therefore declared the Amendment Act invalid from the date of the judgment.

The Court also made a number of supplementary orders to regulate the claims that had already been lodged while the Amendment Act was in force. It ordered that, pending the enactment of new legislation to replace the Amendment Act and re-open the claims process, all land claims made before 31 December 1998 should be processed first, before new claims.

The Commission was ordered not to process any new land claims, other than to acknowledge receipt of the claims. The Commission can only start processing new claims if it finalised all the old order claims. Lastly, the Court also ordered the Chief Land Claims Commissioner to approach the Constitutional Court in the event that Parliament does not re-act the Amendment Act within 24 months. This will allow the Court to give an order on processing land claims lodged from 1 July 2014, under the now invalid Amendment Act.

The LRC and Webber Wentzel welcome the Court's judgment. It vindicates the right to public participation in the legislative process, and the importance of urgent action to finalise the thousands of outstanding restitution claims that were lodged before 1998. Our clients will now be able to meaningfully participate in the public participation processes leading up to the enactment of an Amendment Act. This judgment sends a clear message to Parliament to facilitate meaningful and reasonable public participation processes in its legislative process.

As the judgment notes; "It is beneath the dignity of those entitled to be allowed to participate in the legislative process to be denied this constitutional right." (Para 58)

LRC
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DIKGOPELO TSA PUŠETSO YA NAGA DI BEETŠWE KA THOKO MORAGO GA GORE MOLAO WA PUŠETSO YA MABU O HWETŠWE E SE WA MALEBA

Phatlalatšo ya thoganeto: 28 July 2016

Lehono kgorotsheko ya molaotheo e ahlotše gore molao katološwa wa pusetšo ya ditokelo tša mabu wa bo lesomehlano wa 2014 (Act 15 of 2014)gore ga se wa maleba. Kgorotsheko e laetetše Khomisheni ya pušetso ya ditokelo tša mabu go emiša ka go sepediša dikgopelo tsa pušetšo tša dinaga tšeo di dirilwego go tloga ka di 1 July 2014 (nako yeo molao katološwa o thomilego go šoma le go bulela dikgopelo tše diswa), go fihlela molao wo moswa o ka ba gona.

Tlhotlo ya molao katološwa e dirilwe ke Legal Resource Centre le Wentzel legatong la Land Access Movement of South Africa (LAMOSA), Nkuzi Development Association (Nkuzi) le Association for Rural Advancement (AFRA), go tee le mekgahlo y ye meraro ya kopanelo ya thoto yeo e emetšego ditšhaba tša Makuleke, Moddervlei le Popela.

Molao katološwa o katološitše molao wa pušetšo ya ditokelo tša naga, wa bomasomepedipedi wa 1994(Act 22 of 1994) ebile o saennwe go ba molao ke mopresidente Jacob Zuma ka di 30 June 2014. O dumeletše batho bao ba paletšwego go dira dikgopelo tša pušetso ya ditokelo tša naga pele ga letšatši 31 December 1998 go dira dikgopelo

Batho bao re ba emelago ba tlhotlile molao katoloŝwa ka lebaka la ge Palamente le Makgotlatheramelaoa diprofense a paletŝwe ke go latela maikarabelo a ona a molaotheo go hlahla go tŝeakarolo ga setŝhaba pele molaokatoloŝwa o ka fetiŝwa.

Lekgotla la bosetŝhaba la diprofense (NCOP) le makgotlatheramolao a diprofense ba paletŝwe ke go ka fa batho bao molao katoloŝwa o ba amago monyetla wa go dira ditshwaotshwao. Lekgotla la bosetŝhaba la diprofense le dirile sekatŝhoganetso sa ka go gatelela gore molao kakanywa o fetiŝwe. Ditheeletšo ka botšona di bile tše di sa lekanago ka ge di sa kwalakwatŝwa ka maleba, ga gwa ba le nako ye e lebanego go dira ditshwaotshwao, go be go sena phetolelo ya molao kakanywa go maleme a profense, molao kakanywa ga se wa hlaloŝwa ka maleba le gore maikutlo a batho ga se a ngwalwe.

Gape maleloko a Lekgotla la bosetŝhaba la diprofense a paletŝwe ke go tla ditheeletšong diprofenseng tŝa bo bona le dipego tše di beakantŝwego ke makgotla theramelao a diprofense ga se di phatlalatŝwe go maloko a Lekgotla la bo setŝhaba la diprofense. Sa bofelo, Lekgotla la bosetŝhaba la diprofense le paletŝwe go lebeledišiša ka maleba ditŝhitŝhinyo tŝa makgotlatheramelao tšeo di bilego gona go tŝwa ditheeletšong. Kgorotsheko e thekgile dillo tšohle tŝa batho bao re ba emelago (balli) mabapi le tshepidišo ya NCOP le makgotlatheramelao a diprofense.

Go bulelwa ka leswa ga dikgopelo tŝa ditokelo tŝa naga go kgwatha tŝhika/mothopo wa mengwagangwaga ya tŝeelo ya ditokelo tsa naga. Bohlokwa bja pušetšo ya mabu, bo ka se gatelelwe go fetišiša. Pušetšo ya ditokelo tŝa mabu e lekana le go bušetŝwa ga seriti (para 63). Pušeletšo ya naga e hlahla phihlelelo le hlweko ya tikologo (para 63).

Go be go sena tŝhoganetšo ye e bego e ka gapeletŝa gore nako ya go boledišana le setŝhaba molao kakanywa e be pele ga dikgetho tŝa 2014, Madlanga J. o ngwadile. Ge re lebelela tlolo ya molao le tshepidišo ya poledišano le setŝhaba ye e hlokegago, nako ye e latetŝwego ga se ya hlaka. Go be go sa kgonege gore Lekgotla la bosetŝhaba la diprofense le ka go katološetŝa go makgotlatheramelao a diprofense a go fa maloko a setŝhaba go tswayaswaya ka molao kakanyo ka nako ye nnyane yeo e latetŝwego (para 67).

Go palelwa ga maloko a Lekgotla la bosetŝhaba la diprofense go ba gona ditheeletšong go diprofense, go palelwa go phatlalatŝa dipego tŝa ditheeletšo le go palelwa go naganiša ka ditŝhitŝhinyo tŝa makgotlatheramolao a diprofense, seo se ra gore ditŝhitŝhinyo tŝa setŝhaba ga se dikgone go tsitsinkelwa ge diphetho di tšewa. Seo se šitišitše tshepišo go fihlelela maikemisetšo a yona.

Ditheeletšo tsa makgotlatheramelao di bile bošaedi kudu ka ge di se tŝa tsebiŝwa ka bophara, le gore setŝhaba ga se se fiwe tsebišo ye e lekanego gore se dire ditshwaotshwao. Kgorotsheko e gateletše gore makgotlatheramelao a diprofense a be a swanetše go ba kgahlanong le nako ye nnyane yeo e beilwego ke lekgotla la bo setŝhaba la diprofense, Madlanga o laeditše. “Makgotlatheramolao ga a laelwe ke lekgotla la bo setŝhaba la diprofense. Le ona a na le maikarabelo a go kgonthišiša gore setŝhaba se tšea karolo go lenaneo la go dira melao” (para 80).

Kgorotsheko e feditše ka gore Lekgotla la bosetŝhaba la diprofense le tšeere kgato ya go se naganišiše ge le be le tšweletŝa morero wa go tšea karolo ga setŝhaba. Kgoro e feditše ka gore molaokatoloŝwa ga se wa maleba go tloga ka letšatši la kahlolo, elego 28 July 2016.

Kgorotsheko e file le ditaelo tŝa tlaleletšo go hlahla dikgopelo tšeo di dirilwego ge molao katoloŝwa o le tirišong. E laetše gore go fihlela go e ba le molao o moswa legatong la molao-katoloŝwa, dikgopelo ka moka tŝa go dirwa pele ga di 31 December 1998 di phethagatŝwe pele ga dikgopelo tše diswa. Khomishene e laetŝwe go se šome ka dikgopelo tše dimpša ntle le go dira mangwalo a kamogelo ya dikgopelo. Khomishene e ka šoma ka dikgopelo tše dimpša fela ge e phethile ka tŝa kgale. Kgorotsheko e laetše Chief Land Claims Commissioner go tliša boipobolo go kgorotsheko ya molaotheo ge palamente e ka palelwa ke go fetiša molao katološo wo mongwe bakeng la dikgwedi tše 24. Se se tla dumelela kgorotsheko go fa tumelelo/taelo ya go sepetša dikgopelo tŝa go dirwa go tŝwa ka la 1 July 2014 ka fase ga molao woo e sego wa maleba ga bjale.

Legal Resource Centre le Webber Wentzel di amogela kahlolo ya Kgorotsheko. Kahlolo e tiišetša bohlokwa bja tŝhoganetšo go dikgopelo tŝa kgale tše di dirilwego ka 1998 le go tšeakarolo ga setŝhaba ge go dirwa melao. Batho bao re ba emelago ba tla kgona go tšea karolo ya kgonthe ge go dirwa molaokatoloŝwa. Kahlolo ye e iša molaetša wo o lego nyanyeng/wo o hlwekilwego go palamente gore tshepedišo ya nnete yeo e nago le moko e latelwe ge go dirwa melao.

Bjalo ka ge kahlolo e bontšha: “Ke nyenyafatšo ya seriti sa bao ba bego le maswanedi a go tšea karolo go tshepedišo ya go dira melao gore ba ganetŝwe ditokelo tŝa bona tŝa molaotheo”.

LRC
Legal Resources Centre

Zwo vaho kha vhoramafhungo : Mbilo dza mavu dzo imiswa nga murahu ha u wanululwa uri mulayo wo khakhea.

Namusi khothe ya ndayotewa yo khwathisedza uri mulayo wa pfanelo yau vhuedzedzwa ha mavu murahu wa 15 wa 2014 wo khakhea. Khothe ya dovha hafhu ya imisa khoro ya mbuedzedzo ya vhune ha mavu khau tshimbidza nga ndila ifhio na ifhio ha mbilo ya shango he ha swikisiwa khayo u bva nga dzi wani 1 July 2014, uya nga mulayo wo thomaho muswa.

Khaedu kha mulayo muswa yo diswa nga vha dzangano la The Legal Resources Centre and Webber Wentzel vho imela Land Access Movement of South Africa

(LAMOSA), Nkuzi Development Association (Nkuzi) na Association for Rural Advancement (AFRA), ha do vha hafhu ha vha na vhaimeleli vhararu vha zwigwada zwo kwameaho zwa Makuleke, Moddervlei na Popela.

Mulayo nyengedzedzwa wo khwathisedza pfanelo ya u vhuedzedzwa ha mavu wo vhewaho kha tshipida tsha 22 tsha 1994, wa dovha wa saiiniwa uri u vhe mulayo nga muphirisidende vho- Jacob Zuma nga dzi 30 Fulwi /June 2014. Mulayo uyo u tshi khou nea vhathu vhe vha si kone u swikelela mbilo dza mavu nga 1998 tshikhala tshiswa uri vha dovhe vha swikise mbilo dza u vhuedzedzwa ha mavu.

Vhathu ri vha imelelaho vho itela khaedu milayo-tewa uyu vho ditika nga uri phalamennde na dzulo la vundu vho balelwa u tshimbidza zwithu uya nga mulayo wo vhewaho wa ndayotewa wa u davhidzana na tshitshavha nga murahu ha musi mulayo u tshi nga phasiswa/ u rwelwa tari.

Dzulo la lushaka la mavundu (NCOP) na milayotibe ya mavundu (provincial legislatures) yo balelwa u swikelela vhathu vho kwameaho nga uyo mulayonyengedzedzwa tshikhala tsho teaho uri vha vhe na vhupfiwa kha mulayo. Dzulo la lushaka la mavundu (NCOP) na milayotibe ya madzingu (provincial legislatures) dzo diitela tsutsumedzo ya tshihadu ya u kombetshedza uri mulayo u phasiswe phanda ha khetho dza 2014 . Zwi amba uri Milayotibe ya mavundu a yo ngo vha na tshifhinga tsho linganaho tsha u tendela u dzhenelela ha tshitshavha na u sedzulusa mulayo. U thetsheleswa havho ho vha hu songo dzudzanyeaho ngauri a hu ngo itwa khunguwedzo dzo teaho, ho vha na tshifhinga tshi songo linganaho tsha u dzudzanya maswikiswa, thalutshedzo dzinwe dza mulayo dzo vha dzisiho, mulayo wo vha u songo talutshedzwa lwo teaho, vhupfiwa ha vhathu vhu songo nwalwa nga ndila yone. Ntha ha izwo, mirado ya NCOP yo balelwa u dzhenela u thetsheleswa ha tshitshavha kha madzingu a havho, na mivhigo ya u thetsheleswa ha tshitshavha yo dzudzanywaho nga milayotibe ya madzingu a yongo swikiswa kha minwe mirado ya komiti ya NCOP. Tsha u fhedzisa, NCOP yo balelwa u tevhedza zwavhudi khwathisedzo dzo itwaho nga manwe madzingu.

Khothe yo tikedza zwililo zwothe zwa vhathu vhane ra vhaimelela malugana na matshimbidzele a NCOP na milayotibe ya mazdingu ngau dodombedza uri:

- U vulwa ha mbilo ya mavu zwi kwama zwipfi zwine zwa ya bvelaphanda lwa minwahanwaha ya u shaya/thoga vhune. Ngauralo vhuthongwa ha pfanelo ya mbiedzedzo vhunga si fanyiswe na u vhuedzedzwa ha ndinganyelo ya pfanelo dza u vhuedzedzwa ha tshirudzi (phara 63), mbuedzedzo ya shango i laedza hafhu u swikelelwa ha pfanelo dzingaho dza vhune, thogomelo ya vhupo na mutakalo wa vhudi, mulayo uyu wo vha wa ndeme na dzangalelo la tshitshavha (phara 63).

- Ho vha husina tshihadu u nga kombetshedza u phasisa mulayo muswa hu songo vha u thetsheleswa nga tshitshavha phanda ha dzikhetho dza 2014, Madlanga. J o nwala nga u bveledza ha mulayo na u tshimbidzwa na u davhidzana na tshitshavha nga thodea ya u dzhenelela kha tshifhinga tsho newaho, tshone tshifhinga tsha ngoho tshi songo vha tsho pfeseseaho, fhedzi lwa zwipikwa milayo yo vhewaho nga kha tshifhinga, yo vha i songo leluwa kha NCOP na kha u fhiriselwa kha dzingu uri li kone u swikelela lwo teaho tshikhala u dzhenelela ha tshitshavha (phara 67).

- U balelwa ha mirado ya NCOP u dzhenela u thetsheleswa ha mavundu na u balelwa u swikisa mivhigo ya u thetsheleswa uho na u balelwa u tevhedzela milayo wo dzinginywaho nga ndayotewa ya madzingu zwiamba uri kuvhonele na mihumbulo yo tahiswaho nga lushaka kha u thetsheleswa ha dzingu a kungo tsha swikelela kha u sedzwavho musi hu tshi tshewa kana hu tshi vhewa maga o dzhiiwaho. Izwi zwo ima phanda vhukoni ha matshimbidzele a u swikelela ndivho (phara 71).

- U thetsheleswa ha milayotibe ya mavundu ho kundelwa nga kha mveledziso, zwihulusa a zwo ngo andadzwa zwoteaho nga vhuphara, na vhathu a vho ngo newa ndivhadzo lwo linganaho kha u thetsheleswa uri vha kone u swikisa makumedzwa a pfalaho.

Khothe yo khwathisedza uri Milayothibe ya mavundu itea na u fanela u hana tshifhinga tshi sa pfaliho tshipfufhi tshine NCOP ya vha nekedza. Madlanga .J, o laedza kha ndango ya NCOP uri a vhaho/ avhongo vha hone uri vha sokou peta-zwanda kana u dzulela murahu vha shuma u vhidza NCOP, na vhone vha tea u dzhia mushumo vha ite wavho u swikelelisa tshitshavha tshikhala tsha u dzhenelela kha matshimbidzele a milayo (phara 80)

Khothe ya fhedzisa ngauri NCOP a yo ngo sumbedza vhudifhinduleli i tshi tshimbidza zwa u dzhenelela ha tshitshavha zwine zwa khwathisedza uri mulayo wo gaganywaho a si wone u bva nga duvha la khathulo.

Khoro yo dovha ya vhumba/bveledzo ita mbalo ya u tikedza ndayo/mulayo wa u tshimbidza mbilo dze dza vha dzo no

swikiswa musi mulayotewa u tshi khou shuma, ya laela uri, hu tshi tevhelwa mulayo-gaganywa muswa wo imelaho mulayo nyengedzedzwa, na u vulela hafhu u tshimbidzwa la dzimbilo, mbilo dzothe dzo itwa phanda ha dzi 31 Nyendavhusiku 1998 dzi tea u tshimbidzwa u thoma, hu saathu sedzwa ntswa, khoro yo laedzwa uri i songo tshimbidza dzinwe mbilo ntswa dza mavu, arali hu si u dzhiela ntha tanganedza mbilo, khomishini inga konaha u tshimbidza mbilo ntswa musi yo no fhedza nga dza kale , tsha u fhedza, khothe yo nea ndaela, mudzulatshidulo-muhulwane wa zwambilo ya mavu uri a kwame khothe ya ndayotewa musi phalamennde isa khou ita nyito nga mulayo moswa uyu hu saathu fhela minwaha mivhili Izwi zwi do tendela khothe u nea ndaela ya u tshimbidzwa ha mbilo ya mavu dzo swikiswaho u bva nga dzi one Fulwana 2014 nga fhasi ha mulayo we wa pfi wo khakhea.

LRC na Webber Wentzel yo tanganedza khathulo ya khothe, ya dovha ya khwathisedzwa pfanelo ya u dzhenelela ha tshitshavha kha matshimbidzele a mulayotewa na vhuthogwa ha tshihadu kha u fhedza nga zwigidi zwo sokou litswa ho zwa dzimbilo zwo swikiswaho phanda ha 1998.Vhathu ri vhaimelelaho vha do kona u dzhenelela lwo linganelaho kha u didzhenisa ha tshitshavha kha tshimbidzo i livhisaho kha u thonwa ha mulayo. Khathulo iyi i rumela mulaedza ure khagala kha phalamennde uri i tea uvha na matshimbidzele a pfadzaho na hone a tendiseaho kha u tshimbidza zwau dzhenelela ha tshitshavha kha matshimbidzele a zwa mulayo.

Sa zwine khathulo ya amba “zwi tsitsa tshirunzi tsha avho vho tendelwaho u dzhenelela kha matshimbidzele a zwa mulayo u vha hanela ndugelo iyi ya ndatotewa” (phara 58)

LRC
Legal Resources Centre

Khoto Ya Huvo Ya Vumbiwa yi yimisa swikoxo hinkwaswo swa misava hikokwalaho ko tsandzeka ku landzelela nawu hitaku tivisiwa ka vaaka tiko.

28 July 2016

Hi siku ra Makume-Mbiri Nhungu, hi N’hweti ya Mhawuri eka lembe ra Magidi-Mbirhi na Khume-Nstevu (28 July 2016), Khoto Ya Huvo ya Vumbiwa ya Afrika-Dzonga yi teke xiboho xa leswaku nawu lowu tivekaka hi Land Rights Amendment Act 15 of 2014, lowu pasiseke swikoxo leswitshwa swa misava awungari enawini. Khoto yi tlhele yi teka xiboho xa ku yimisa swikoxo hinkwaswo swa misava hi Khomixini ya swikoxo swa misava (kumbe Commission of Restitution of Land Rights), ku fikela loko ku pasisiwile nawu wuntshwa lowu nga enawini.

Swivilelo eka nawu lowu yimisiweke swi yisiwile hi minhlangano yo tirhana na timhaka ta milawo leyi ku nga Legal Resources Centre na Webber Wentzel hi ku yimela minhlangano leyi yimelaka matiko leyi tivekaka hi vito ra Land access Movement of South Africa (LAMOSA), Nkuzi Development Association (Nkuzi), na Association for Rural Development (AFRA), xikan’we ni vaaka tiko ku suka eka Makuleke, Moddervlei na Popela.

Nawu lowu wa swikoxo swa misava wu pasisiwile xinawu hi Presidente wa Afrika-Dzonga Jacob Zuma hi suku ra makume-nharhu hi n’hweti ya Khotavuxika hi lembe ra magidi-mbirhi na khume-mune (30 June 2014). Nawu lowuntshwa wu nikile vanhu ku endla hi vuntshwa swikoxo swa vona swa misava. Vanhu lava hi lava hlulekeke ku endla swikoxo swa misava hi lembe ra Gidi na Madzana-Nkaye Makume nkaye nhungu (1998) eka nawu lowu awuri kona eka nkarhi wolowo.

Ku yimisiwa ka nawu wuntshwa wa swikoxo swa misava swita endzhaku ka loko minhlangano ya vaaka tiko yi yise swivilelo swa leswaku Palamende na Vulawuri bya swifundzha va tsandzekile ku landzelela milawu ya Vumbiwa leyi fambelanaka naku tivisa vanhu hitaku pasisiwa ka nawu wuntshwa.

Vutshamo bya Palamende swifundzha (NCOP) va tsandzekile ku nika vanhu lava khumbhekaka nkarhi leswaku va yisa swibuma-bumelo na swisolo eka nawu lowuntshwa wa swikoxo swa misava. Hikokwalaho, mbulavurisano wu boxiwe kuka wunga ri eka xiyimo xa kahle hikokwalaho ka leswi ku pfumaleke na switiviso eka vanhu, na nawu-mbisi lowu a wunga hlamuseriwanga hi vuenti eka vanhu. Eka timhangu tin’wana, Huvo Ya Milawo Ya Swifundzha yi tsandzekile ku fikelela vanhu hiku angarhela eswifundzheni.

Khoto Ya Huvo Ya Vumbiwa yo boxe leswaku:

- Ku endla pfula hi vuntshwa swikoxo swa misava I mhaka ya nkoka swinene eka vanhu endzhaku ka loko va xanisiwile hiku tekeriwa misava ya vona. Hikokwalaho, ku vuyiseriwa ka misava swi ringana naku vuyiseriwa ka timfanelo ta ximunhu leti khumbhaka timhaka ta malunghelo kufana na vumunhu (privacy), tiyindlu na mbangu lowu ngana rihanyo lerinene.
- Aswingari na nkoka leswaku nawu-mbisi wa swikoxo swa misava wu pasisiwa hi ku hatlisa.
- Ku tsandzeka ka Huvo ya Milawo ya Swifundzha ku fikelela mihlengeletano yo burisana na vanhu hi nawu-mbisi wa swikoxo swa misava, na ku tsandzeka ku tivisa vanhu hi tinhlengeletano leti, na ku tsandzeka ku tekela enhlokweni swibuma-bumelo swa va Swifundzha, swi endle leswaku swibuma-bumelo na swisolo swa vaaka tiko hiku angarhela swinga tekeriwi enhlokweni
- Hikokwalaho, vaaka tiko va tsandzekile ku nika mavonelo ya vona kumbe swibuma-bumelo hikokwalaho ka leswi vanga tivisiwangiku hiti nhlengeletano na mbulavulo mayelana na nawu-mbisi wa swikoxo swa misava.

Ku yisa emahlweni hi anhlulo, Khoto yi tiyisisile leswaku Huvo ya Milawo ya Swifundzha (Provincial Legislators) yina matimba ku

kanetana na Vutshamo bya Palamende ya Swifundzha (National Council of Provinces). Leswi switа endzhaku ka loko ku boxiwe leswaku nkarhi wo tivisa vaaka tiko hi swikoxo swa misava awunga ringanelangi.

Khoto yi hetelele hiku boxa leswaku Vutshamo bya Palamende ya Swifundzha (NCOP) yi tlurile nawu naswona ayi fambisangi kahle ku tivisiwa ka vaaka tiko hi nawu-mbisi wa swikoxo swa misava. Hikokwalaho, nawu lowu wa swikoxo swa misava (Amendment Act) awu tshamisekangi naswona awule enawini.

Khoto Ya Huvo yi tlhele yi ahlula leswaku hinkwaswo swikoxo swa misava leswi endliweke nova kona hi mhaka ya nawu lowu swi yimisiwa. Kambe, hinkwaswo swikoxo swa misava leswi endliweke kungase hela lembe ra 1998, swi fanele ku hetisisiwa, kungase langutiwa leswintshwa.

Ku suka kwalaho, Khomixini ya swikoxo swa misava yi leteriwile leswaku yi yima ku tirhana na swikoxo leswintshwa handle ko kombisa ntsena leswaku swikoxo swi amukeriwile. Khomixini yita sungula ku tirhana na swikoxo leswintshwa ntsena loko yi hetile ku tirhana na swikoxo swa khale.

Khoto yi tlhele yi nika vulawuri bya Khomixini ya swikoxo swa misava (Chief Land Claims Commissioner) ku tlhelela eka Khoto ya Vumbiwa loko Palamende yo hluleka ku lulamisa nawu lowu eka tin'hweti ta makume-mbirhi mune (24 months). Leswi switа nika Khoto matimba yaku letela ku yisa emahlweni swikoxo swa misava leswi endliweke ku suka hi siku ro sungula ra Mhawuri hi lembe ra Magidi-Mbirhi na Khume Mune.(1 July 2014).

Minhlangano ya LRC na Webber Wentzel va amukerile xiboho xa Khoto ya Huvo ya Afrika-Dzonga. Va vula leswaku xiboho lexi xina nkoka swinene hikuva xi veka emahlweni nkoka wa ku landzelela nawu mayelana naku tivisiwa ka vaaka tiko himilawu leyi vekiwaka laha etikweni.

AFRA | Association For Rural Advancement

Press Release

AFRA welcomes ruling Restitution Amendment Act as "invalid"

Today, the Constitutional Court recognised that the National Council of Provinces (NCOP) and Provincial Legislature violated sections 72(1)(a) and 118(1)(a) of the Constitution by failing to conduct adequate public participation processes in the passing of the Restitution Amendment Act.

The Constitutional Court found the amendment unconstitutional and invalid. This is a significant step in processing the original land claims which the Association For Rural Advancement (AFRA) believes were prejudiced in the Restitution Amendment Act of 2014.

The Amendment Act amended the Restitution of Land Rights Act, 22 of 1994, and was signed into law by President Jacob Zuma on 30 June 2014. It allowed people who had not lodged land claims by the original cut-off date in 1998 a new chance to lodge claims for restitution of land.

AFRA's Programmes Manager Glenn Farred noted that although the legal victory is an important step in the right direction the overall issue still remains.

"The Department responsible for discharging this judgment is in urgent need of a coherent and comprehensive strategy that gives practical effect to the law. We hope that progress can now be made but we remain deeply concerned that the required action will be taken by the Department. AFRA, LAMOSA and other land rights NGOs and affected communities will continue to mobilise and monitor compliance with the judgment," said Farred.

In 2015 the Land Access Movement of South Africa (LAMOSA), Nkuzi Development Association (Nkuzi), AFRA and three communal property associations representing the affected communities of Makuleke, Moddervlei and Popela brought a direct challenge to the Constitutional Court regarding the Amendment Act on the basis that Parliament and the Provincial Legislatures had failed to comply with their constitutional obligation to facilitate public involvement before passing the Amendment Act. AFRA is pleased with the judgment and hopes it will be a major stepping stone to processing the claims made under the original Restitution Act, and to ensure meaningful public engagement in the future.

A victory to the rural population! By Alliance for Rural Democracy (ARD)

29 July 2016

The Alliance for Rural Democracy welcomes the judgment handed down by the Constitutional Court yesterday declaring the Restitution of Land Rights Amendment Act 15 of 2014 invalid.

The case, brought by civil society and community-based organisations, including affiliates of the ARD, concerned Parliament's obligation to facilitate public participation in its legislative process. In finding that the National Council of Provinces had failed to allow enough time for proper consultation on this Amendment Act, the Court said:

"Given the gravitas of the legislation and the thoroughgoing public participation process that it warranted, the truncated timeline was inherently unreasonable. Objectively, on the terms stipulated by the timeline, it was simply impossible for the NCOP – and by extension the Provincial Legislatures – to afford the public a meaningful opportunity to participate."

The Court ordered that all claims lodged after 1 July 2014 should be put on hold until earlier claims are settled. This is an important victory for rural people who have been kept waiting for a decade and more to take ownership of land awarded to them in terms of the original Restitution of Land Rights Act 22 of 1994.

By preventing renewed claims for land already claimed under the original Restitution Act, the Constitutional Court has put an end to continued contestation over the same small parcels of land.

This important judgment must now encourage the government to use other means to achieve land reform and justice, without relying only on restitution.

The Constitutional Court's orders should also encourage the Department of Rural Development and Land Reform to redirect resources that were diverted to handle new claims after 2014 back to the original purpose of settling the backlog of claims already in process.

The people and offices set up to manage the expected flood of new claims should be used to fast-track the delivery to those who have already waited so long. The Department must use the people and the money it has to finish the job it started in 1994 before it takes on any new restitution claims. This would show a true commitment to making the promise of restitution real in the lives of the communities who lodged their claims around twenty years ago.

The court's order included:

- The Land Restitution Amendment Act 15 of 2014, which allowed a further five years in which to lodge claims, is invalid;
- Claims lodged before the December 1998 deadline set in the original Act must be settled; and
- Claims lodged after the window was reopened in July 2014 will remain on record, but will not be processed.
- Hope for the marginalised population living on communal land

This process will strengthen and hopefully fast-track land redistribution in South Africa. Dispossessed communities that have been waiting for their claims to be fully resolved can look forward to accelerated action from the Department to return them to the land they lost. As the Court said:

> *"(this case) touches nerves that continue to be raw after many decades of dispossession. The importance of the right to restitution, therefore, cannot be overstated. Restitution of land rights equals restoration of dignity."*

THE RULING PUTS AN END TO "CHERRY PICKING"

Faced with a backlog of claims from the first round and an avalanche of new claims under the second round, the under-funded Commission on Restitution of Land Rights was vulnerable to pressure to "cherry pick" and prioritise claims by politically connected individuals, including Traditional Leaders seeking to trump claims already in the pipeline.

After the enacting of the Restitution of Land Rights Amendment Act, President Jacob Zuma encouraged Traditional Leaders to hire lawyers and to lodge large claims to land that they would hold on behalf of the people. We have been against that view. The government cannot give land that rightfully belongs to people with historical linkages to it to Traditional Leaders.

The Constitutional Court's ruling will ensure tenure rights for the rural population for both men and women, without giving priority to claims by Traditional Leaders.

Furthermore the ruling requires that the Commission proves itself capable of resolving the outstanding existing claims before opening up further opportunities for new claims. This is an assurance to both existing and prospective claimants of a real commitment to restitution and a rejection of restitution as an empty promise.

Isitatimende Sabezindaba Masikhishwe Ngokushesha

4 August 2016

Impumelelo Yezakhamuzi ZaseMakhaya Ngokubuyiselwa Kwemihlaba

Inhlangano i-Alliance for Rural Democracy (ARD) iyasamukela isinqumo esethulwe yiNkantolo yoMthethosisekelo ngomhlaka 28 ku Ntulikazi 2016, sokuchitha inqubo-mgomo iRestitution of Land Rights Amendment Act 15 of 2014 emayelana nokubuyiswa kwemihlaba eyathathwa ngezikhathi zobandlululo.

Loludaba ebelwethulwe eNkantolo yizinhlangano zeMiphakathi kanye namalunga eARD beluthinta isibophezelo sePhalamende ekuqinisekiseni ukuba imiphakathi iphiwa ithuba elanele lokubamba iqhaza ekwakhiweni kwemithetho yezwe.

Ekutholeni ukuthi iNational Council of Provinces (NCOP) yehlulekile ukunikeza izakhamuzi ithuba elanele lokuzibandakanya ekwakhiweni nokucutshungulwa kwalomthetho, iNkantolo ithe:

"Ngesimo sokubamqoka kwaleNqubo-mgomo, nokuqonda ngokugcwele indlela umphakathi okumele ubambe ngayo iqhaza nokuqinisekiseka ekwakhiweni kwayo, isikhathi esanqanyulelwa imiphakathi saba sifishane. Ubufishane besikhathi benza kwaba nzima ukuqinisekisa ukwenziwa komsebenzi ngendlela eqondile nenobulungiswa. Empeleni, ngokwemibandela ebekiwe, ubufishane balesisikhathi senza kungabi lula nhlobo ukuba iNCOP kanye neziShayamithetho zeziFundazwe zinikeze imiphakathi ithuba elanele lokubamba iqhaza ngendlela egculisayo"

Inkantolo inqume ukuba zonke izicelo zokubuyiswa komhlaba ezafakwa emuva kukamhlaka 1 kuNtulikazi 2014 zimiswe ukuze kulungiswe izicelo ezafakwa ngaphambi kwazo. Lokhu kuyimpumelelo enkulu kubantu basemakhaya asebelindiswe iminyaka engaphezu kweyishumi ukuba babuyiselwe imihlaba engeyabo ngaphansi komthetho wokuqala wokubuyiswa kwemihlaba iRestitution of Land Rights Act 22 of 1994.

Ngokuvimba ukufakwa kwezicelo ezintsha, iNkantolo yoMthethosisekelo igweme futhi yaqeda ukulwisana phakathi kwabantu abafaka izicelo phambilini nalaba abazifake kabusha phezu komhlama omunye.

Lesisinqumo esibaluleke kangaka kumele sikhuthaze uHulumeni ukuba asebenzise ezinye izindlela zokubuyisela umhlaba, ngaphezu kohlelo lwezinxephezelo. Ngakhoke lesisinqumo kumele sikhuthaze uMnyango wokuThuthukiswa kwezaseMaphandleni nokuBuyiswa koMhlaba ukuba amahhovisi, abasebenzi kanye nezimali ebese zinikelwe kulomthetho omusha ka 2014 zibuyiselwe emuva ziyobhekana nezicelo zemihlaba ezingakalungiswa ngokohlelo lokuqala olwavalwa ngo 1998. uMnyango kumele uqedele umsebenzi ewuqale ngo 1994 ngaphambi kokuthi uthathe izicelo ezintsha. Lokhu kuzokhombisa ukuzibophezela ngokweqiniso ekwenzeni izethembiso kubantu abafake izicelo zokubuyiselwa komhlaba eminyakeni engaphezu kwamashumi amabili eyedlule.

Ngakhoke lesi sinqumo seNkantolo sibandakanya:

Ukuchithwa kwe Land Restitution Amendment Act (15 of 2014), ebivumela ukuqhubeka noma ukwengezwa kweminyaka emihlanu yokufakwa kwezicelo zemihlaba;

Iphalamende linikezwe izinyanga ezingamashumi amabili nane (24) ukubuyisa omunye umthetho ofana nalo ochithiwe, kodwa ozohambisana nentando yeningi;

Izicelo zokubuyiswa komhlaba ezafakwa ngaphambi kuka m'nqamula-juqu ka Zibandlela 1998 kumele ziphothulwe;

Izicelo ezifakwe emuva kokuvulwa kwesikhathi sikashwele ngo Ntulikazi 2014 zizohlala emabhukwini kepha azizusetshenzwa;

Azikho izicelo zomhlaba izintsha ezingafakwa ngaphambi kokuba iPhalamende lakhe umthetho omusha.

Lesisinqumo Sinika Imiphakathini Enganakekeliwe Ezindaweni Zezabelo Ithemba

Lesisinqumo kanye nohlelo olubekiwe luzoqinisa luphinde lusheshise ukubuyiselwa komhlaba wabantu kubanikazi bawo eNingizimu Afrika. Imiphakathi esilinde iminyaka engaphezu kwamashumi amabili ukuba izicelo zayo zokubuyiswa kwomhlaba ziphothulwe ngokugcwele zingaba nethembe lokuba uMnyango uzokwenza ngesivinini ukubuyisela kubo umhlaba owabalahlekela, njengoba iNkantolo ishilo:

"(Lolu daba) luthinta izinhlungu zomoya ezisazwakala namanje emuva kweminyakanyaka yokuphucwa kwabantu imihlaba. Ngakho ke ukubaluleka kwelungelo lokubuyiselwa komhlaba akukwazi ukwenziwa ihaba noma ukubatshazwa. Amalungelo okubuyiselwa umhlaba ayafana nokuchelelwa kwesithunzi somuntu."

Isinqumo Sikuqeda Nya "Ukukhetha"

Ukushoda kwesikhathi, abasebenzi kanye nezimali zokuphothula umsebenzi osalele emuva wezicelo zokuqala ezavalwa ngo 1998, kanye nokusinda kwezicelo ezintsha zangohlelo lwesibili olwavulwa ngo 2014, bese kufaka ingcindezi kwiKhomishana yokuBuyiselwa kwaMalungelo ukuba ikhethe futhi isheshise izicelo zalabo abaxhumene noSopolitiki kanye nabaholi bendabuko ngaphezu kwezicelo zeminye imiphakathi ebese zivele zicutshungulwa.

Emuva kokuphasiswa kwalomthemtho i-Restitution of Land Rights Amendment Act ngo 2014, uMongameli uJacob Zuma wakhuthaza abaholi bendabuko ukuba baqashe abameli bafake izicelo zemihlaba eminingi abazoyibamba egameni lemiphakathi. Thina asikaze sihambisane nalowo mubono. UHulumeni akakwazi ukuthatha umhlaba wabantu ngokusemthethweni awunikezele kubaholi bendabuko. Lesinqumo seNkantolo yoMthethosisekelo sizoqinisekisa ukuzibophezela kumalunga emiphikathi

yasemakhaya ngaphandle kokuthi izicelo zabo ziqhakambiselwe abaholi bendabuko kuqala.

Ngaphezu kwalokho, lesinqumo sidinga ukuba iKhomishana izibonise ukuba ikulungele ukuxazulula udaba lwezicelo zomhlaba ezisasalele emuva ezingakaxazululeki ngaphambi kokuba kuqalwe izicelo ezintsha zokubuyiselwa komhlaba kubantu. Lokhu kuyisiqinisekiso ezicelweni ezivele ziyasetshenzwa kanye nakulezo ezisazofakwa. Lesinqumo futhi siyisiqiniseko kubantu sokuthi uhlelo lokubuyiswa komhlaba alusona nje isithembiso esingekho.

I Alliance for Rural Democracy (ARD) iyisigaba esiyinxenye yezinhlangano zeMiphakathi ezabelana ngazwi linye nesifio sokusebenza ezakhiweni zasemakhaya abazihlinzekelayo nabazelekelelayo ekuvikeleni amalungelo abahlali basemakhaya.

All land claims after ’98 on hold

Franny Rabkin

29 July 2016: Business Day

ALL land restitution claims made after December 1998 have been put on hold by the Constitutional Court, after the court found that Parliament did not properly consult the public before deciding to reopen the window for claims.

The Restitution of Land Rights Amendment Act — which reopened the window for claims — was rushed through Parliament in 2014 ahead of national and provincial elections.

At the time, concerns were raised that the government had not sufficiently taken into account the huge budgetary burden it would place on the state to deal with an anticipated huge number of new claims.

Critics said the new claims would affect the capacity to finalise the old claims, some of which had been languishing for more than a decade.

Some viewed the legislation as a last-minute effort to ingratiate the government with the electorate on an emotive issue.

In a unanimous judgment, the Constitutional Court found that the “truncated timeline” for public consultation was inadequate, particularly given the importance of the legislation.

Justice Mbuyiseli Madlanga found that, while the National Assembly’s consultation process was constitutional, the timeline of process undertaken by Parliament’s second house, the National Council of Provinces, was “inherently unreasonable”.

The National Council of Province’s failure “taints the entire legislative process and is a lapse by Parliament as a whole”, he said.

The court invalidated the new amendment and interdicted the Commission on Restitution of Land Rights from processing “in any manner” any new claim made after the amendment came into force.

But claims that have already been lodged under the new law do not disappear: they can be dealt with if and when Parliament re-enacts the legislation.

The court’s order also allows for the new claims to be processed once all the old ones — those made before the original closing date of December 31 1998 — have been finalised.

If Parliament does nothing to revive the legislation within two years, the Constitutional Court may be approached once again “for an appropriate order”.

Madlanga said no cogent reason was given for the rush to pass the bill — besides the desire to finalise it before the end of term. The timeline was the root cause of all the deficiencies in the process, he said.

Madlanga was scathing about some of the public participation efforts undertaken by the provincial legislatures.

The Northern Cape process was a “complete disaster” he said. He also criticised the fact that seven provinces accepted the timeline set by the National Council of Provinces “without demur”.

Madlanga said the importance of the right to restitution could “not be overstated”.

“Restitution of land rights equals restoration of dignity,” he said.

This was why the reopening of the land claims process was of paramount public interest.

The Department of Rural Development and Land Reform said Minister Gugile Nkwinti and the Commission on Restitution of Land Rights had “noted” the judgment.

The Legal Resources Centre, which brought the case to court on behalf of the Land Access Movement of SA, Nkuzi Development Association, the Association for Rural Development and three communal property associations welcomed the judgment.

Die hof red die ANC van sy eie onbekwaamheid

Editorial

02 Augustus 2016: Die Beeld

Dat die Wysigingswet op die Herstel van Grondregte pas deur die konstitusionele hof ongeldig verklaar is, moet nie deur die regering as 'n nederlaag beskou word nie. Dis eerder 'n geval dat die hof hom en die ANC van hul eie onbekwaamheid gered het.

Die wet, wat grondeise vir 'n tydperk van vyf jaar heropen vir diegene wat die sperdatum van Desember 1998 misgeloop het, was van meet af aan 'n onbekookte idee.

In die eerste plek wou die ANC en die regering eenvoudig nie luister dat daar eenvoudig nie geld hiervoor beskikbaar is nie. Dit sou aanleiding gee tot 397 000 nuwe ¬eise wat die regering tot R179 miljard kon kos. Gugile Nkwinti, minister van landelike ontwikkeling en grondhervorming, het skouerophalend gesê dat indien die regering 'n beleid aanvaar het, daar genoeg geld sál wees. Dit is soos as iemand sê ómdat hy 'n huis wil koop, sál daar genoeg geld wees.

Tweedens is dit duidelik dat die staatskapasiteit om die eise te verwerk eenvoudig nie bestaan nie. Sou die kommissie vir grondeise met sy huidige pas van verwerking voortgaan, sou dit nog 144 jaar duur om al die eise te verwerk.

Derdens sou dit onregverdig wees teenoor diegene wat wel die sperdatum vir eise gehaal het, en onnodige regsonsekerheid bring vir diegene wie se eise suksesvol afgehandel is.

Die belangrikste gedeelte van die uitspraak is egter die pertinente wyse waarop die hof uitgewys het dat daar nie genoeg geleentheid vir openbare deelname in die wetgewende proses geskep is nie. Anders gestel: die publiek en belanghebbendes het nie voldoende kans gekry om hul mening oor die wetsontwerp te lug nie.

Hierin lê een van die land se grootste probleme opgesluit, want die ANC-regering reken sy meerderheid in die parlement gee hom alle wysheid en pag om oor landsake te besluit en dat die parlement eintlik maar net dien as Luthuli-huis se rubberstempel.

Te midde van ernstige vrae wat hang oor die openbare deelnameproses met die rampspoedige wetsontwerp oor onteiening, is hier 'n belangrike les vir die ANC: As jy dalk 'n slag na kundiges en die publiek luister, maak jy dalk beter wetgewing.

DISK INDEX

This publication includes a disk containing more information, reports and documents. The following index applies:

Land Restitution 2016: Where to from here?

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   a. Court papers

2. Judgment in the Constitutional Court
   a. Judgment

3. High Level Panel with President Motlanthe
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4. Press releases and news articles – with translations
   a. Alliance for Rural Democracy press release – English
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   d. Constitutional Court media summary – Afrikaans
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   h. Legal Resources Centre press release – English
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   m. News Article – The Business Day
   n. Paper by Ben Cousins on Land Reform in South Africa

5. Publications
   a. Community Guide: Restitution Amendment Act Constitutional Court Challenge

6. Photographs

7. LAMOSA in the Land Claims Court
   a. Directive from the Land Claims Court
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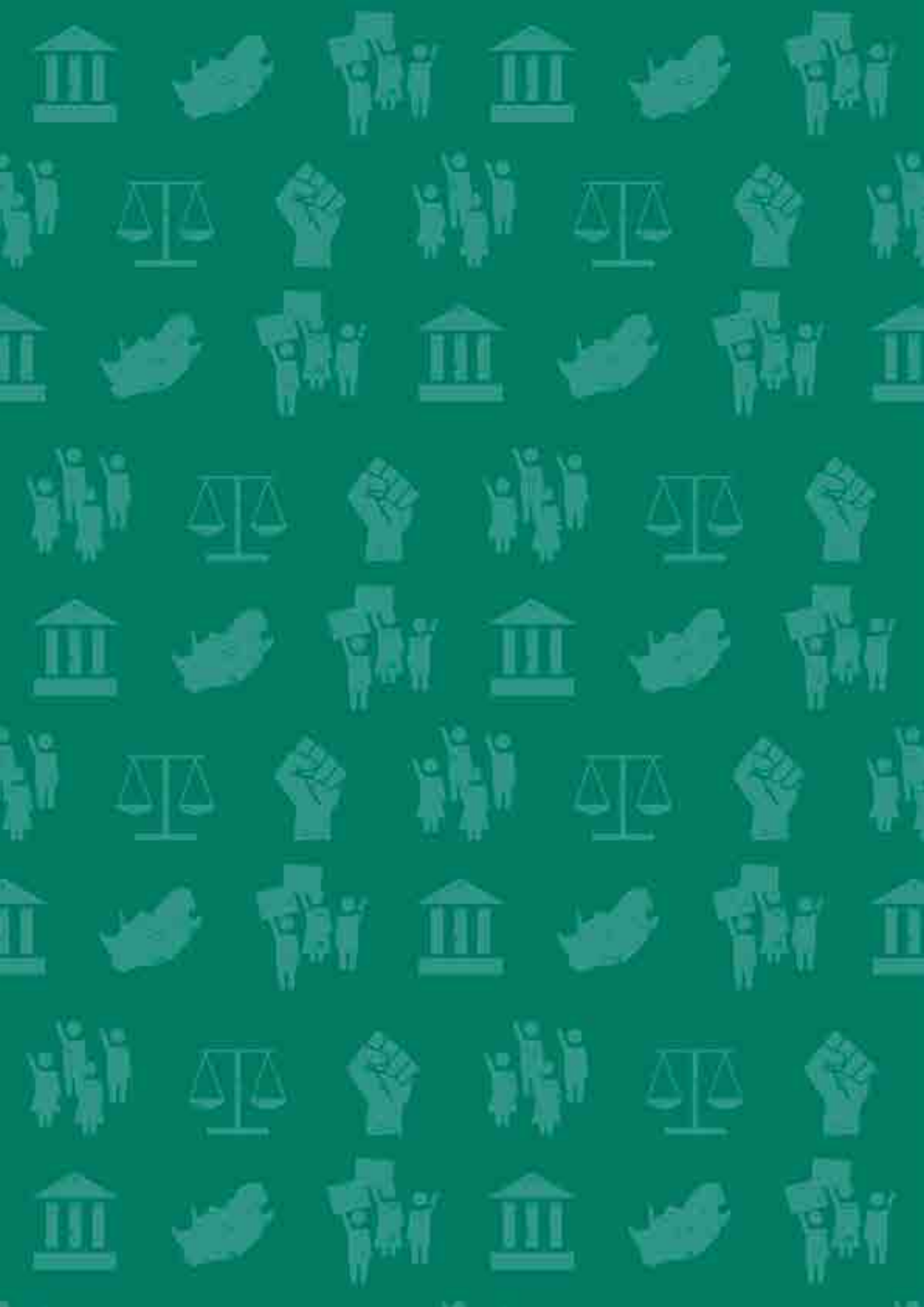
8. Bills and draft bills relating to land and customary law
   a. Traditional and Khoi-san Leadership Bill
   b. Communal Property Association Bill
   c. Traditional Courts Bill (draft)
   d. Communal Land Tenure Bill
   e. Expropriation Bill
   f. Mineral and Petroleum Resources Development Amendment Bill
   g. Restitution of Land Rights Act 1994
   h. Restitution of Land Rights Amendment Act 2014

9. Labour Tenant Class Action Update



Members of land organisations and Communal Property Associations in the Constitutional Court challenging the Restitution of Land Rights Amendment Act

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