

Natural Justice

63 Hout Street
Mercantile Building
Cape Town, 8000
South Africa

Tel: +27 21 426 1633

Email: Sobantu@naturaljustice.org
<https://naturaljustice.org>

23 July 2021

Vhonani Ramaano
Portfolio Committee on Justice and Correctional Services
Parliament Street, Cape Town

PO Box 15, Cape Town, 8000
Email: vramaano@parliament.gov.za
Cell: 083 709 8427

To Whom it May Concern,

Comments on the Land Court Bill [B11 – 2021]

1. Introduction

The Portfolio Committee on Justice and Correctional Services requested stakeholders and interested parties to make written submissions on the Land Court Bill [B11 – 2021] on May 26, 2021.

The bill proposes that a Land Court and a Land Court of Appeal be established.

Natural Justice: Lawyers for Communities and the Environment (NJ) appreciates the opportunity to offer a written comment in response to the Committee's invitation.

NJ has read and considered the implications of the Land Court Bill and submits the following comments and recommendations to the Committee. NJ's submission sets out a) background to the organisation and its work; b) comments on Land Court Bill and c) makes recommendations for amendments. Also, makes a request for a verbal submission.

2. Introducing Natural Justice

Natural Justice: Lawyers for Communities and the Environment is a non-profit organization, registered in South Africa since 2007.

Our vision is for indigenous peoples and local communities to have self-determination in the conservation and sustainable use of land and biodiversity.

Our mission is to make it easier for Indigenous peoples and local communities to participate fully and effectively in the formation and implementation of laws and policies that affect their land and tenure rights, biodiversity conservation, and cultural heritage protection.

Natural Justice work at the local, national, regional, and international levels with a wide range of communities and partners. We strive to ensure that community rights and responsibilities are represented and respected at the broader scales and that gains made in international fora are fully upheld at lower levels.

Given the importance of the Land Court Bill, also within the context of land reform, NJ wishes to submit its comments to the Committee.

We further express our request to make a verbal submission or participate in any meaningful engagements with the department when an opportunity arises

3. Comments – positive aspects of the Bill.

Natural Justice would like to draw attention to the widespread public outrage over the Land Claims Courts' and Land Appeals Courts' restrictions and shortcomings. On the two commissioned reports, the High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change (HLP) and the Expert Advisory Panel on Land Reform and Agriculture (PAP), the Presidency and parliament received written and verbal testimonials from all sectors of South African society.

The HLP and PAP reports reaffirmed the dismal outcomes and slow pace of Land Claims Court and Land Appeals Court. The divisions and disappointments that these courts have sowed on the ground were evident in their public hearings.

According to a 2017 HLP report, the decision to speed up the process of settling land claims by granting the Commission the ability to decide disputes admiratively in 1996 had unforeseen consequences. The process became "personality driven," ad hoc, and prone to corruption as a result of the administrative settlement. Many speakers at the public hearings mentioned corruption as a major issue, describing government officials as "vultures." Claims were "bunched" together, and fictitious Communal Property Associations (CPAs) were formed as a result, ignoring the definition of "community" eligible to apply for restitution. CPAs are quite often dysfunctional, as exhibited by the public hearings. Furthermore, the Commission has been ineffective in researching claims, frequently settling claims despite a lack of credible research.

Unsurprisingly, there are many unresolved overlapping and conflicting claims, which contribute to

ethnic and tribal tension, and xenophobic attitudes. Because of extremely poor information systems, overlapping claims are even discovered after claims to the same land have been “settled”. As a result, claimants cannot develop the land and often have to hire their own lawyers to fight the case, which is a significant financial burden. Unable to adequately process claims despite their legal powers, the Commission has referred many cases to court. The Land Claims Court is overwhelmed with cases regarding the validity of claims, the nature of just and equitable compensation and feasibility. Despite the enormity of the task, there are no permanent judges of the Land Claims Court.

According to the PAP report, one of the major causes of the backlog is that the Land Claims Court lacks permanent judges as well as sufficient capacity and staff to process land claims efficiently and on time.

Another issue (not addressed in the memorandum to Land Court Bill or the PAP) is that an appeal against a Land Claims Court judgment can only be decided by the Supreme Court of Appeal (SCA). In practice, a SCA appeal is a timeous process and finalising an appeal can take a long time to resolve.

Thus, the HLP recommended that the Claims Court be stabilized by the appointment of permanent Land Claims Court judges, and that the Commission's capacity be rationalized.

The Land Claims Court is one institution that already functionally understands the processes, and the panels propose that it be combined with a new Land Court to adjudicate on all land-related matters, not just restitution. This Land Court could be given new responsibilities, both judicial and non-judicial.

The HLP and PAP reports are all part of the public memory of the Land Court and the Land Claims Court, and it is Parliament's responsibility to ensure that previous public input on the Land Court is respected throughout the upcoming parliamentary process. It is essential that Parliament does not return South Africa to earlier versions of the Land Court.

Many positive changes have been implemented by the Department of Justice and Correctional Services, demonstrating an acknowledgment of the serious flaws identified in the Land Court and Land Claims Court.

Natural Justice highlights the following changes:

The jurisdictional structure and the policy framework that informs courts adjudicating land matters

3.1 The establishment of a specialist Land Court and Land Court of Appeal as a High Court is established under Clause 2 of the Bill, with the authority, inherent powers, and standing, the former having the status equivalent to that of a high court and the Land Court of Appeal having the status equivalent to that of the Supreme Court of Appeal. The establishment of a specialist Land Court of Appeal is an exciting prospect for legal practitioners because it will result in the development of land-specific jurisprudence that can be used as precedent. This should result in greater uniformity, consistency, and quality in land-reform court decisions, which should promote expediency in the adjudication process. In contrast, while the existing Land Claims Court has the same status as a high court, any appeal against Land Claims Court decisions is referred to the Supreme Court of Appeal, which does not specialize in land-reform matters and is thus frequently guided by the Land Claims Court's

decision. Clause 5 asks for a permanent 'Judge President, Deputy Judge President, and a so many other judges.' The Land Claims Court currently has one judge as president and three judges. The advisory panel's recommendations are based on the idea that having a permanent sitting of judges dedicated to land-related matters will result in stronger judicial oversight, reduced corruption, and improved settlement agreements that reflect equitable and just compensatory outcomes. Acting judges are to be appointed by the Minister of Justice (rather than the President, as is currently the case), which may help to address vacancy issues, and this can be for an unspecified period of time. This is most likely a good idea.

- 3.2 If passed, the Bill would give the Land Court and Land Court of Appeal more jurisdiction than the Land Claims Court currently has. The Land Claims Court's rules, as a creation of the Land Restitution Act, which primarily deals with restitution issues, only allow for arbitration as an alternative dispute resolution mechanism. The Land Court, on the other hand, will have broad jurisdiction because it will be able to address all three pillars of land reform: restitution, redistribution, and security of tenure. This broadening of jurisdictional authority also includes a wide range of non-judicial powers, such as mediation, which may reduce instances of unnecessary or frivolous litigation.
- 3.3 According to clause 6, the Court's seat is in Johannesburg, but whenever it appears to the Judge President that it is expedient or in the interests of justice to hold its sitting for the hearing of any matter somewhere other than the Court's seat, it may do so. In addition, the Court may sit in as many separate courts as the available judges permit. This will help to make courts more accessible.
- 3.4 Clause 16 encourages anyone to apply to the Court for leave to intervene in the Court's proceedings. At their own expense, a party to the proceedings may self-represent or be represented in Court by their own legal practitioner. However, if a party cannot afford legal representation and it is in that party's best interests to be represented, the Court must refer the matter to Legal Aid South Africa for consideration of granting legal representation in accordance with its protocols.
- 3.5 The Bill also proposes that the Land Court be given the authority to direct the Commission for the Restitution of Land Rights to conduct an investigation and report on any case referred to it.
- 3.6 According to the Bill, Legal Aid must provide a lawyer if a significant injustice would result otherwise. Parliament must also provide sufficient funding to Legal Aid to ensure that unrepresented people receive legal representation in appropriate cases.
- 3.7 Clause 22 deals with the admissibility of evidence in court, and certain ordinary rules of evidence are relaxed as a result. The Court has the authority to admit evidence, including oral evidence, that it considers relevant and cogent to the matter under consideration, regardless of whether such evidence would be admissible in any other court of law. The Court may accept hearsay evidence concerning the circumstances surrounding the dispossession of a land right or rights, as well as the rules governing the allocation and occupation of land within a claimant community at the time of such dispossession, as well as expert evidence concerning the historical and anthropological facts pertinent to any particular land claim. Several provisions that already govern proceedings in the Land Claims Court are retained in the bill. For example, the Land Court (like the Land Claims Court) can accept evidence that would not normally be admissible in court, such as hearsay evidence or expert evidence on land dispossession from anthropologists or historians.

4. Recommendation

- 4.1 The Portfolio Committee on Justice and Correctional Services must revise Clause 4 of Composition of Act to read as follows: The phrase 'as many other judges as may be' is much more permissive in the Bill. Natural Justice opposes this because it is too broad and will most likely conflict with the provisions, which will then be subject to any interpretation. Due to the lack of a specific minimum number of judges, the current Land Courts Bill was easily diverted from dealing with the initial mandate to dealing with farm evictions. Without consequence, Land Claims Court went from having five judges to having only acting judges over the years.
- 4.2 Amend Clause 8 to make it clear that the President of the Republic, acting on the advice of the Judicial Service Commission, must appoint the Judge President and Deputy Judge President of the Court, who must be judges of the High Court and have, in the appointment of 5 or more judges of court, should not be judges of the High Court.
- 4.3 Amend Clause 8 to make it explicit that that the President of the Republic, acting on the advice of the Judicial Service Commission, when appointing the Judge President and Deputy Judge President of the Court, who must be judges of the High Court and have, in the appointment of 5 or more judges of court should not on be the judges of High Court. Be any other appropriately qualified, fit, and proper person with knowledge, experience, and expertise in land rights matters. According to the bill, there must be judges and a Judge President, all of whom must be High Court judges. This is a reversal of the existing provisions, which allow any person deemed to have relevant experience to sit on the Land Court, effectively jettisoning the notion that adjudication of land claims must draw on a wide range of contextual knowledge, not just technical interpretation of the law. There has been widespread criticism that the Land Claims Court has produced 'anti-poor outcomes,' and as a result, trust in the Court has eroded, calling the Court's role into question. The current proposals are likely to isolate this specialist Court even further from relevant contextual expertise. This is not recommended, and no justification is provided in the Bill's memorandum. The Court's other proposals follow from this. It is unclear whether the judges will sit on both the High Court and the Land Claims Court; this dual appointment could mean that, unlike the Labour Court, they will work on a variety of cases rather than focusing solely on land law. Furthermore, if all Land Court judges are not to be High Court judges, NJ proposes that all sections of the Bill dealing with their employment and remuneration be revisited to be explicit. This broadening of jurisdictional authority, which includes a wide range of non-judicial powers such as mediation, may reduce instances of unnecessary or frivolous litigation. It is not stated explicitly in the Bill whether the judges are to act as mediators in disputes.
- 4.4 This is permissible in foreign jurisdictions such as Germany, as long as the same judge does not then adjudicate a case in which he served as a mediator. Before the Bill is finalized, this should be carefully considered.
- 4.5 Furthermore, in keeping with the Land Court Bill, which already advocates conflict resolution and mediation, the proposed functional Approach in the Expropriation Bill of 2021 should be on negotiation before litigation.
- 4.6 More consideration should be given to how the two institutions – the Commission and the Court – can collaborate more closely and effectively. Community members have frequently expressed concerns about the restitution claims process, particularly the lack of feedback and engagement

following the submission of their claims. This is related to administrative justice issues because community members are expected to wait for long periods of time without receiving any indication of the status of their claim. Furthermore, community members have expressed the need for an internal appeals mechanism that would allow communities to be informed of missing documentation or additional supporting information that would be required to process their claims, rather than claims being rejected and communities being forced to use the Land Claims Court, which can prolong the process of finalizing their claims. Furthermore, administrative justice is better served when community members have access to officials who can provide additional information to assist them in resolving claims.

5 Conclusion

It is clear that the process outlined in the Bill for the Land Court and Land Court of Appeal could be critical to the future success of the land reform program.

Natural Justice recommends rethinking the Bill's provisions on the composition of the Land Claims Court, as well as giving more thought to how the Commission and the Land Claims Court can better coordinate their efforts.

If the Land Court Bill, specifically the proposed provisions and recommendations by Natural Justice, is properly implemented, it may prove to be an important step toward increasing the effectiveness of land reform and alleviating socioeconomic challenges that are closely linked to unequal distribution of land and land resources.
