South African Institute of Race Relations NPC (IRR)

Objections to procedural and substantive flaws
as regards the
Restitution of Land Rights Amendment Bill of 2017
Johannesburg, 28th June 2018

1 Introduction

This objection is lodged by the South African Institute of Race Relations (IRR), a non-profit organisation established in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, development, human rights, and reconciliation between the different peoples of South Africa.

What appears to be the most recent version of the Restitution of Land Rights Amendment Bill of 2017 was released on 16th August 2017 and is thus referred to as the August 2017 Bill. This Bill is intended to replace the Restitution of Land Rights Amendment Act of 2014 (the 2014 Act), which had sought to amend the Restitution of Land Rights Act of 1994 (the 1994 Act) by re-opening the land claims process for a fresh five-year period. The August 2017 Bill has essentially the same purpose – and seeks to re-open the land claims process for five years from the date on which the measure takes effect. [Clause 1, Restitution of Land Rights Amendment Bill of 2017 (August 2017 Bill)]

The 1994 Act gave people four years, until 31st December 1998, to lodge claims with the Land Claims Commission for the return of land of which they had been dispossessed under racial laws dating back to 1913. Some 79 700 land claims were lodged before this deadline, but many of these claims have yet to be resolved. The High Level Panel on Key Legislation reported in November 2017 that more than 7 000 of these claims remained unsettled, that more than 19 000 still had to be finalised, and that it would take at least 35 years to deal with all the unresolved claims lodged before the 1998 cut-off date. [Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, November 2017, p233]

Despite the large number of claims still needing to be resolved, the 2014 Act nevertheless sought to re-open the land claims process for a further five-year period, from July 2014 to July 2019. Other problems in the initial land claims process have also been legion, with some claims wrongly gazetted and many others wrongly inflated by officials. Inefficiency within the Commission has been rife, while some 73% of restored land has since fallen out of production. Land restitution has thus generally failed to bring any real benefit to successful claimants, who have effectively been 'dumped' on farms without adequate title, access to finance, or technical support. [Anthea Jeffery, *BEE: Helping or Hurting?* Tafelberg, Cape Town, 2014, pp314-315; Cherryl Walker, 'Land claims a Sisyphean task for the state', 19 March 2015, https://mg.co.za/article/2015-03-19]

At the same time, many of the people who lodged claims before the 1998 cut-off date are worried that the re-opening of the process could result in their claims being overturned by new claimants. (Land activists have pointed out, for example, that traditional leaders hostile to the communal property associations in which restored land is often vested may claim the same land once again, so that it vests in them instead.) In addition, the re-opening of the land claims process will greatly increase the burden on the Commission and make it harder still for the original claimants to have their claims resolved within the next 35 years. If close on 400 000 new claims are lodged, as the government anticipates, the resolution of both 'old' and 'new' claims could take hundreds more years to finalise, with estimates of the time required ranging from 250 to 700 years. [Walker, 'A Sisyphean task'; Report of the High Level Panel, p233]

In response to these concerns, various organisations challenged the constitutional validity of the 2014 Act, saying that its terms were too vague and that public consultation on its provisions had been inadequate. In July 2016 the Constitutional Court of South Africa upheld these concerns. It found that the National Council of Provinces – and hence Parliament as a whole – had failed to facilitate adequate public involvement in the legislative process leading up to the statute's adoption, as the Constitution requires. It thus struck down the 2014 Act and gave Parliament two years to re-enact it.

2 The public involvement required by the Constitution

Public participation in the legislative process is a vital aspect of South Africa's democracy, as the Constitutional Court has repeatedly reaffirmed in judgments spanning a decade or more. These include *Matatiele Municipality and others* v *President of the Republic of South Africa and others*; [(2006) ZACC 12; 2007 (1) BCLR 47 (CC)] *Doctors for Life International* v *Speaker of the National Assembly and others*; [2006 (6) SA 416 (CC)] and *Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others.* [(2016) ZACC 22]

The key constitutional provisions in this regard are Sections 72, 118, and 59. According to Section 72(1) of the Constitution, the National Council of Provinces (NCOP) 'must facilitate public involvement in the legislative…processes of the Council and its committees'. Under Section 118 of the Constitution, essentially the same obligation (the word used is again 'must') is imposed on every provincial legislature to 'facilitate public involvement in the legislative and other processes of the legislature and its committees'. The National Assembly is also placed under the same obligation, this time under Section 59 of the Constitution. [Sections 72(1)(a), 118(1)(a), 59(1)(a), Constitution of the Republic of South Africa, 1996]

The 2017 August Bill has been tagged, apparently by Mr Pumzile Mnguni MP (ANC), the sponsor of this private member's bill, as a measure that affects the provinces and needs to be dealt with in terms of Section 76 of the Constitution. [Para 5.1, Memorandum on the Objects of the August 2017 Bill] Where a bill has been tagged as a Section 76 measure, it is particularly important for the NCOP and all the provincial legislatures represented in it to ensure that provincial perspectives are fully canvassed and taken into account.

Various decisions of the Constitutional Court have elaborated on what the Constitution requires of Parliament and the nine provincial legislatures:

- In the *Matatiele* case, the court said that a provincial legislature must 'act reasonably' in facilitating public involvement in the legislative process. Whether a provincial legislature has in fact done so will depend on all the relevant factors, including the intensity of the impact of the legislation on the public; [*Matatiele* case, Media summary, p1]

- In *Doctors for Life*, the court held that 'Parliament and the provincial legislatures have a broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case', so long as what they do is 'reasonable'. 'This duty will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of laws that will govern them.' [*Doctors for Life*, Media summary, p2]

- In the *New Clicks* case, Mr Justice Albie Sachs noted that there were very many ways in which public participation could be facilitated. He added: 'What matters is that…a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say'. This passage was quoted with approval in both *Doctors for Life* and the *Land Access* case. [*Minister for Health and another* v *New Clicks South Africa (Pty) Ltd and others*, [2005] ZACC 14, at para 630; *Doctors for Life*, at para 145; *Land Access*, at para 59]

Among the factors relevant to reasonableness, as the Constitutional Court stated in the *Land Access* case, is 'the nature of the legislation in question' and 'any need for its urgent adoption'. The court also stressed that 'a truncated timeline' for the adoption of a bill by the NCOP and provincial legislatures may itself be 'inherently unreasonable'. If the period allowed is too short (as it was in the *Land Access* case), then 'it is simply impossible for the NCOP – and by extension the Provincial Legislatures – to afford the public a meaningful opportunity to participate'. [*Land Access*, paras 61, 67]

In the *Doctors for Life* case, where the timeline for adoption of the Bill was also short, the Constitutional Court further emphasised that legislative timetables cannot be allowed to trump constitutional rights. Said the court: 'The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.' [*Doctors for Life*, para 194]

In the *Land Access* case, the Constitutional Court endorsed this statement and went on to say: 'In drawing a timetable that includes allowing the public to participate in the legislative process, the NCOP cannot act perfunctorily. It must apply its mind taking into account: whether there is real – and not merely assumed – urgency; the time truly required to complete the process; and the magnitude of the right at issue'. [*Land Access*, para 70]

The Constitutional Court's judgment in the *Land Access* case also makes it clear that:

- public participation must be real, in that it must provide the public with an opportunity to be heard which is 'capable of influencing the decision to be taken'; [*Land Access*, para 71, citing *Moutse Demarcation Forum and others* v *President of the Republic of South Africa and others*, 2011 (11) BCLR 1158 (CC), para 62]

- a notice of a public hearing regarding a bill must 'not only provide details of the place, time and purpose of a public hearing' but must 'also assist in building awareness' of what the bill proposes; [*Land Access*, para 76]

- notices of public hearings must be published timeously and should give people more than seven days' warning, as a shorter period may deprive them of an opportunity to participate; [*Land Access*, para 77]

- the notice given must be sufficient to 'allow the public to study the bill and prepare for the hearings adequately', as this could otherwise have 'an adverse impact on the quality of submissions to the Provincial Legislatures'; [*Land Access*, para 77]

- provincial legislatures are not obliged simply to accept the unrealistic timelines that the NCOP may set. On the contrary, these legislatures are 'constitutionally created entities with their own separate existence and powers'. The NCOP may 'facilitate the public participation process through them', but this by no means 'subordinates them to the authority of the NCOP'. On the contrary, provincial legislatures 'have a duty to play their part properly in affording the public an opportunity to participate in the legislative process'. [*Land Access*, para 80]

3 The Constitutional Court's substantive concerns regarding the content of the 2014 Act

In striking down the 2014 Act, the Constitutional Court also called on Parliament to resolve the uncertainties arising from the wording of this statute. It was particularly concerned about the issue of competing 'old' and 'new' claims: ie, those arising from the original and the re-opened land claims processes. It warned that the wording of the 2014 Act was ambiguous in stating that 'priority' had to be given to 'old' claims (those lodged before 31st December 1998), as the relevant provision could be interpreted in five different ways – as the applicants in the *Land Access* case had pointed out.

In the end, the court declined to decide which of these conflicting interpretations should prevail. Instead, it ruled that 'the question of how new claims should be dealt with when there were outstanding old claims was fraught with imponderables' and was 'best left to the Legislature to resolve'. [Land Claims, para 89]

4 The Constitutional Court's mandate to Parliament

The Constitutional Court gave Parliament two years (until 27th July 2018) to re-enact legislation dealing the re-opening of land claims. Any new legislation must deal clearly – and

in a way that does not result in fresh ambiguities – with the issue of competing claims. It must also be the outcome of a proper public consultation process, in which all the relevant criteria laid down by the Constitutional Court (as set out in the judgments outlined above) have been fulfilled.

5 Problems with the public participation process on the August 2017 Bill

The government has done little, since the Constitutional Court handed down its judgment in July 2016, to craft a new bill that meets the court's substantive and procedural concerns. The deadline of 27th July 2018 is also now fast approaching. The upshot is that Parliament is frantically convening public hearings in the nine provinces in double-quick time, so that the August 2017 Bill can be adopted in the limited period still available.

However, as the Constitutional Court stressed in the *Land Access* case, a 'truncated timeline' for the adoption of a bill can itself be 'inherently unreasonable'. If the period allowed is too short, then 'it is simply impossible' for Parliament 'to afford the public a meaningful opportunity to participate'. [*Land Access*, paras 61, 67] Moreover, legislative timetables cannot be allowed to trump the constitutional right to proper public involvement in the legislative process. Rather, it is the timetable that must yield to this right, and not the right to the timetable. [*Doctors for Life*, para 194; *Land Access*, para 70]

In trying to push the August 2017 Bill through the legislative process in the 'truncated' period that remains before 27th July 2018, Parliament is once again ignoring the Constitution. It is also again attempting to make its timetable more important than the right to adequate public participation in the law-making process. In addition, Parliament has failed: [*Land Access*, paras 76-77, 71]

- to give the public sufficient notice of planned meetings;
- to 'build awareness' of all the complex issues raised by the bill;
- to give the public adequate time to 'study the bill and prepare for the hearings adequately', which is sure to have 'an adverse impact on the quality of the submissions' received; and
- to give people an opportunity to be heard which is 'capable of influencing' the decisions to be taken.

Overall, Parliament has failed 'to provide citizens with a meaningful opportunity to be heard' on the August 2017 Bill. [*Doctors for Life*, Media summary, p2] This is more than evident from the fact that not even Agri SA had any advance knowledge of the public hearings which are now being held in different parts of the country, with 'six provinces covered thus far', according to a statement issued by the Parliamentary Communication Services on 27th June 2018. [Statement issued by the Parliamentary Communication Services on behalf of the whip of the Portfolio Committee on Rural Development and Land Reform, Mr Pumzile Mnguni, 27 June 2018] Yet Agri SA, as the voice of organised agriculture, has a particular interest in the land claims issue – and a far greater capacity than most members of the public to follow the parliamentary process and to know what public hearings are being planned or conducted.

The IRR, which demonstrated its interest in the re-opening of the land claims process via the submission it made on an earlier version of the August 2017 Bill, has also been left in the dark regarding the public consultation process. The IRR is also a reasonably well-resourced civil society organisation with far more capacity to follow the legislative process than most members of the public. Hence, if the IRR lacks necessary knowledge about the public hearings on the August 2017 Bill, Parliament can be sure that most members of the public have even less information regarding this public participation process.

What notice has been provided of the public hearings being held in six of the nine provinces remains uncertain. What is clear, however, is that the notice the Parliamentary Communication Services (PCS) has provided of the hearings being held in North West, the Eastern Cape and Gauteng is entirely inadequate.

On Sunday 24th June 2018 the PCS gave notice of the public hearing to be held in Taung in North West on the following day, Monday 25th June 2018. The PCS statement issued on 27th June 2018 gives notice of the Eastern Cape public hearings, which are being held in Port St Johns on 28th June 2018 and in Butterworth on the following day. The Gauteng hearings are also scheduled for 28th and 29th June 2018: the 28th June one in Vereeniging and the 29th June one in Pretoria. [www.parliament.gov.za/press-releases/north-west-public-hearings-restitution-land-rights-amendment-bill, 24 June 2018; Statement issued by the Parliamentary Communication Services, 27 June 2018]

These PCS statements give the public one or two days' notice of the relevant public hearings, rather than the minimum of seven days the Constitutional Court spelt out as necessary in the *Land Access* case. Its notices provide bare details of venues and dates, but they do not make the August 2017 Bill available to the public or give people an opportunity to study it. In addition, since most amendment bills are difficult to understand unless they can be read in conjunction with the principal statutes they are intended to change, the 1994 Act should have been made available to the public as well. Without having access to this information, at the very least, people cannot 'adequately prepare' for the public hearings. This is sure to undermine the 'quality of the submissions' that they can make and reduce their capacity to 'influence' the decisions to be made. [*Land Access* case, paras 76-77, 71]

The August 2017 Bill also fudges the key question of what the re-opening of the land claims process is likely to cost. All it says is that 'it is not possible to determine what the financial implications' of the measure might be, 'as this will be directly influenced by the number of claims lodged as well as the extent of such claims'. [Clause 4, Memorandum on the Objects of the August 2017 Bill] But the government does in fact have some insight into what the costs are likely to be, for a regulatory impact assessment carried out for it in 2013 indicated that it would cost some R180bn to settle the 379 000 new claims likely to be lodged. This information has been denied to the public, making it harder still for people to assess the likely ramifications of a measure which could greatly push up public debt at a time when South Africa remains vulnerable to further damaging ratings downgrades. People also need to know

that more than 70% of the land restored has since fallen out of production, leaving successful claimants little better off than before. Hence, the major expenditure the August 2017 Bill will require is likely to do little to help the disadvantaged get ahead.

Parliament has a constitutional obligation to ensure that 'public involvement in the legislative processes' is properly facilitated. Parliament has failed to discharge that obligation. The public participation process on the August 2017 Bill has been so deeply flawed that it cannot begin to pass constitutional muster.

6 The Constitutional Court's substantive concerns remain unaddressed

As earlier noted, the Constitutional Court also gave Parliament the task of providing clear directions on how competing 'old' and 'new' claims are to be resolved. However, the August 2017 Bill fails to provide the necessary clarity on this key issue.

The August 2017 Bill begins by stating, in Clause 16A(1), that the Land Claims Commission will start to process new claims only 'upon the finalisation or referral to the Land Claims Court of all claims lodged on or before 31 December 1998'. [Clause 16A(1), August 2017 Bill] This wording is flawed in two key ways. First, it deals only with timing and does not provide the necessary clarity as to how competing claims are to be treated. Does it mean, for instance, that a new claim cannot succeed if it competes with an old claim which has been 'finalised', or does it allow a 'finalised' old claim to be reopened and then decided differently?

Second, even what it says about timing is not clear enough. The clause purports to lay down a test for determining when old claims have been 'finalised', but is confusing in the way it does so. Claims which have been referred to the Land Claims Court have not been 'finalised' in any real sense. Until the Land Claims Court has handed down its ruling, no one knows whether the disputed claim will succeed or not. In addition, with the necessary leave (or permission), an appeal can always be lodged against a ruling of the Land Claims Court – at first to the Supreme Court of Appeal and thereafter to the Constitutional Court. Hence, until all possible appeals have been dealt with, the relevant claim will still not have been 'finalised'.

The August 2017 Bill then introduces yet more uncertainty by stating that, despite the general rule regarding timing laid down in Clause 16A(1), the Land Claims Commission may nevertheless 'on a case by case basis, and where it would be in the interest of justice to do so, consider a [new] claim to determine whether a claimant who lodged a claim on or before 31 December 2018 has a valid claim'. [Clause 16A(2), August 2017 Bill]

This clause is impermissibly vague. It provides no objective guidance on how commissioners are to exercise their discretion from one case to the next. To say that they must decide 'in the interest of justice' is far too vague. In addition, the wording used is open to many different interpretations. Must the Commission effectively rule on a new claim in order to decide if an old claim is valid? Must it not rather rule on the old claim to decide whether the new claim

has sufficient validity to be taken into account? Does it mean that competing old and new claims must generally be processed simultaneously, 'in the interest of justice', in order to resolve such questions? Does it mean that the principle of giving priority to old claims has effectively been jettisoned, even though the thousands of people who lodged (as yet unresolved) claims before 31st December 1998 have already been left hanging for some 20 years?

That Clause 16A is open to all these different interpretations means that the provision is also in conflict with the rule of law. The rule of law requires that legislation must be certain and clear, so that people know their rights and can order their affairs on the basis of this knowledge. Any clause which is in conflict with the rule of law is also unconstitutional. This is because the founding provisions of the Constitution recognise the 'supremacy of the rule of law' and demand that its requirements be upheld at all times. [Section 1(c), Constitution]

The Constitutional Court gave Parliament the task of providing clear directions regarding competing claims. The August 2017 Bill fails to do so. In seeking to adopt it, Parliament is disregarding the court's judgment. In overlooking the requirements of the rule of law, it is also acting inconsistently with the Constitution. The August 2017 Bill thus cannot stand and must be redrafted to put an end to these grave substantive defects.

7 The way forward

The August 2017 Bill is too flawed, on both procedural and substantive grounds, to proceed. It should thus be abandoned. The looming 27th July 2018 deadline cannot be used by Parliament as an excuse to overlook either the *Land Access* judgment or the Constitution's requirements regarding proper public consultation and the formulation of provisions that are sufficiently certain to comply with the rule of law.

Rather than trying to rush a deeply flawed measure through a deeply flawed public participation process, Parliament should withdraw the August 2017 Bill and acknowledge that it has missed the deadline set by the Constitutional Court. As that court instructed, the Chief Land Claims Commissioner should instead approach the court for an appropriate order as to how the 75 000 to 80 000 new claims which had already been lodged under the 2014 Act, before it was struck down in July 2016, should now be processed. [Para 2.5, Memorandum; *Land Access* judgment, para 93.7]

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