LAND COURT BILL OF 2021:

Oral presentation by the South African Institute of Race Relations NPC (IRR) to the Portfolio Committee on Justice and Correctional Services, 1 March 2022

1 Introduction

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

Given time constraints, this presentation cannot deal with all the points raised by the IRR in its written submission of 23rd July 2021. It therefore highlights only some of the most disturbing clauses in the Land Court Bill of 2021 (the Bill). However, there are many other problems with the Bill, as earlier highlighted by the IRR, that Parliament must also consider.

2 Purpose of the new Land Court

The Memorandum on the Objects of the Bill states that the new Land Court will replace the current Land Claims Court. It will be a specialist court mandated to 'deal with all land-related matters as regulated by various Acts of Parliament'. The nine Acts already listed in the Bill include those dealing with restitution, labour tenants, and the prevention of illegal evictions.

The Expropriation Bill of 2020 (still to be adopted by Parliament) is not yet listed. However, one of the core purposes of the Land Court Bill is undoubtedly to facilitate the provision of 'nil' (or otherwise inadequate) compensation under the Expropriation Bill. The Land Court Bill will achieve this by ousting the jurisdiction of the ordinary courts to decide on the 'just and equitable' compensation that Section 25 of the Constitution guarantees.

Instead, the new Land Court will be given exclusive jurisdiction over decisions on compensation – but will lack a necessary independence and impartiality. This puts the Bill in breach of the Constitution, which recognises the 'supremacy of the rule of law' as one of its founding values.

The rule of law has many facets, but one of its core requirements is that disputes must be decided by the ordinary courts, not tribunals picked by the government to do its bidding. To comply with the rule of law, both judges and other decision-makers, including assessors, must be both independent and impartial. They must have a clear capacity to decide the disputes before them with an open mind and solely on the merits of each case.

3 Role of assessors

According to Section 12 of the Bill, 'not more than two assessors may be appointed' to deal with any matter, together with the single Land Court judge who will normally preside. These assessors must be 'appointed in the prescribed manner', as set out in the minister's

regulations.[1] However, the Bill is silent as to the qualifications they must have and on what steps will be taken to ensure that only independent and impartial people are brought in as assessors.

This matters a great deal because, where two assessors are appointed, they will have the power to overrule the presiding judge on all questions of fact.[2] Questions of law will need to be decided by the presiding judge, who will also rule on whether any given question is one of law or one of fact.[3] In very many instances, however, the disputes before the Court will turn primarily on questions of fact – which inadequately qualified and potentially partisan assessors will be empowered to decide.

Decisions on the amount of compensation payable on expropriation are likely to be tagged as questions of fact to be decided by these assessors. Whether the criteria for the payment of 'nil' compensation under the Expropriation Bill have been met – for example, whether owners have 'abandoned' their buildings by 'failing to exercise control' over them – will most likely also be regarded as questions of fact to be decided in the same way.

Yet finding and evaluating facts is a difficult task. It involves sifting through possible falsehoods, weighing up credibility, assessing probabilities, and making deductions. All this requires a great deal of experience, which assessors are unlikely to have. Hence, the normal role of assessors in court proceedings is to advise judges, not to make decisions.

Vesting the fact-finding function in assessors lacking independence and impartiality also breaches the rule of law, as guaranteed by Section 1(c) of the Constitution.

4 Court procedures

According to Section 14 of the Bill, the Court must generally follow the rules of procedure laid down for all divisions of the High Court of South Africa.[4] These rules provide for a formal and adversarial system of adjudication, yet Section 14 also allows the Land Court to 'conduct any part of any proceedings on an informal or inquisitorial basis'.[5] In addition, the Court is to follow only those procedural rules that 'facilitate the expeditious handling of disputes and the minimisation of costs'.[6]

Though unnecessary delays in litigation should be avoided, the adjudication of complex issues requires detailed investigation and minimum standards of fairness. The established rules of procedure have been developed over centuries to help ensure this and are vital to the rule of law. In addition, an inquisitorial system gives the presiding judge the task of actively driving and controlling the search for the truth. In this situation, the judge cannot remain

[1] Sections 12(1), 53(a), Land Court Bill
[2] According to the Bill, the assessors become 'members of the Court' and 'the decision…of the majority of the members of the Court upon any question of fact is the decision of the Court'.
[3] Section 12(4)(b), Bill
[4] Section 14(1), Bill
[5] Section 14(2), Bill
[6] Section 14(3), Bill

above the fray – and this undermines judicial independence in the eyes of both the parties and the public.

5 Admissible evidence

Under Section 22(1) of the Bill, the Court 'may admit evidence, including oral evidence, which it considers relevant and cogent to the matter being heard by it, whether or not such evidence would be admissible in any other court of law'.[7]

In addition – 'and without derogating from the generality' of this provision – the Court may take account of 'hearsay evidence regarding the circumstances surrounding the dispossession of a land right'.[8] The Court must 'give such weight' to any hearsay or otherwise inadmissible evidence as 'it deems appropriate'.[9]

The general principle in South Africa is that hearsay evidence cannot be admitted because the person providing it has no direct knowledge of whether it is true or not – and its credibility cannot be properly tested through cross-examination.[10]

The Bill contradicts Section 3 of the Law of Evidence Amendment Act of 1988 which allows the admission of hearsay evidence only in exceptional circumstances and where the court is satisfied that its admission would be 'in the interests of justice'. This in turn depends on a range of factors including its probative value (the extent to which it proves the facts in dispute), the reason its author cannot testify (threats of harm, for example), and the extent of the prejudice its admission is likely to cause to any party.

The Bill cuts across these established rules by providing a single new test – whether the hearsay evidence is 'relevant and cogent' – and dispensing with the safeguards in the 1988 Act. Under the Bill, the procedural dice are clearly to be loaded against expropriated owners and other rights holders, including successful land claimants from the first window period (prior to December 1998), who now face rival restitution claims from many others.

This loading of the procedural dice undermines the rule of law. So too does the 'relevant and cogent' test, which is vague and uncertain.

Moreover, there are many other rules of evidence that need to be applied, not disregarded. These cautionary principles have likewise been developed over centuries to help winnow out misleading and perhaps false allegations. This helps promote fairness to all parties and to maintain public confidence in the courts.

6 Compulsory arbitration

Under Section 13 of the Bill, any person 'wishing to institute proceedings' in the Land Court must inform the registrar, who in turn must refer the matter to the Judge President – who will

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[7] Section 22(1), Bill
[8] Section 14(2(a), Bill
[9] Section 22(3), Bill
[10] The Law of Evidence Amendment Act of 1988 defines hearsay evidence as 'evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'.

then decide whether 'the matter is to be heard in the Court or whether it should be referred to mediation or arbitration'.[11]

Arbitration is particularly important because its purpose is to generate a decision binding on all parties. Even if arbitration is not ordered at the outset, the Land Court may still, under Section 32 of the Bill, stay the matter and refer it to arbitration at any time prior to judgment.

The Court will choose the arbitrator, who may be replaced only if all the parties agree on an alternative. Since the state will have the right, under Section 16 of the Bill, 'to intervene as a party in all proceedings before the Court',[12] the state will be able to veto any change of arbitrator to a more independent and expert individual.

The Bill has conflicting provisions on the status of arbitration awards. According to Section 32(7), 'an arbitration award issued by an arbitrator is final and binding and may be enforced as if it were an order of the Court'.[13] Yet under Section 33 of the Bill, if a matter is settled out of court by means of an arbitration award which all the parties accept, the registrar must refer the settlement agreement to the Court – which may simply reject that agreement and thereby require that the matter proceed before it instead.[14]

The Bill thus negates the key purpose of arbitration. Arbitration is supposed to offer disputing parties the opportunity to obtain a binding decision from an expert whose independence and knowledge they trust. Under the Bill, however, the Court effectively chooses the arbitrator and can also reject the award on unspecified grounds under Section 33.

As an exception to these coercive provisions, Section 32 of the Bill allows 'any party' to apply to the Court to stop the arbitration process and resume adjudication.[15] However, taking such a step could result in an adverse costs order, not only against that party but also, under Section 30, against his legal representative.

7 Restricted rights of appeal

The Bill establishes a Land Court of Appeal which is, except for the Constitutional Court, to be the final court of appeal from all judgments of the Court on matters within its exclusive jurisdiction.[16]

The Supreme Court of Appeal (SCA) will thus be barred from hearing appeals from the Court, despite its extensive expertise. The Constitutional Court will still be able to hear appeals, but direct appeals to it (bypassing the Land Court of Appeal) will have to be 'allowed by national legislation'.[17] This wording in the Bill gives the government the capacity to exclude any direct appeal to the Constitutional Court in the Expropriation Bill and other legislation – and that will extend the time and costs involved in the appeals process.

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[11] Section 13(3), (4), (5), Bill
[12] Section 16(2), Bill
[13] Section 32(7), Bill
[14] Section 33, Bill
[15] Sections 13(3), 32(1) (2) (5), Bill
[16] Section 34(1), Bill
[17] Section 43(9), Bill

8 The Bill provides no solution to land reform problems

According to Section 2, the purpose of the Bill is to 'promote the ideal of access to land on an equitable basis' and to 'promote land reform as a means of redressing the results of past discrimination and facilitate land justice'.[18]

The Bill seeks to achieve these goals by ousting the jurisdiction of the ordinary courts and establishing a specialist Land Court with the capacity to sidestep the normal rules of evidence, appoint land activists as assessors, give these assessors the power to overrule judges in deciding on questions of fact, and use costs orders to penalise people (and their legal representatives) who decline to participate in state-controlled arbitration processes.

Clearly, the underlying objective is to use the Land Court to help speed up the redistribution of land from private owners to the state, often by means of expropriation for nil or otherwise inadequate compensation. Erstwhile owners will then be confined to revocable leases or land-use rights that may give them 'access' to land, as the Bill envisages, but will prevent them from obtaining the ownership rights vital to inclusive growth and expanding prosperity.

The Bill is based on the false view that major land redistribution of this kind will suffice to provide redress for past discrimination. But it ignores the many reasons why land reform has so signally failed – and why a greater volume of land transfers will do little to help the disadvantaged.

In December 2007 – before the full extent of land reform failures had become apparent – the then director general of land affairs, Tozi Ngwanya, acknowledged that 50% of land reform projects had collapsed, leaving many of their intended beneficiaries worse off than before. This made it essential, he said, to look beyond the number of hectares transferred and to introduce new targets that reflected jobs created, income earned, and productivity. There was little point in redistributing land and 'ending up with assets that are dying in the hands of the poor'. [19]

The High Level Panel of Parliament later explored the reasons for land reform failures and concluded that these had little to do with land acquisition costs – as both the Expropriation Bill and the Land Court Bill assume. According to the panel's November 2017 report, the 'key constraints' on land reform include 'a lack of capacity' and 'failures of accountability'. Other barriers include the government's refusal to grant ownership to land redistribution beneficiaries (who are given leases, rather than title), along with 'increasing evidence of corruption by officials, the diversion of the land reform budget to elites, and a lack of political will'.[20]

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[18] Section 2(1), Bill

[19] John Kane-Berman, 'Bad faith Expropriation Bill not grounded in South Africa's land realities', Fast Facts, May 2008, p7

[20] Report of the High Level Panel, pp38, 50-51

Since land acquisition costs are not the problem, using the Expropriation and Land Court Bills to expropriate land for nil or inadequate compensation will not turn land reform from failure to success.

9. Significant black home and land ownership

Black home ownership has been growing steadily since 1975, when a 30-year leasehold option for township houses was introduced. This was soon replaced by 99-year leasehold and then, in the 1980s, by freehold rights. Today, close on 8.8 million black South Africans own their homes, as do almost 1.2 million so-called 'coloured' and Indian people and roughly 1 million whites. Since 1991, when the National Party government repealed the notorious Land Acts, black people have also bought an estimated 6.1 million hectares of rural and urban land on the open market, without the intervention of the state.[21]

Though private property ownership is still racially skewed, black ownership of land, houses, and other assets has been growing steadily for many years. To accelerate this process, the country needs an annual average growth rate of 5% of GDP, accompanied by an upsurge in investment and employment. Black home ownership also needs to be formalised in many instances through the issuing of proper title deeds, which would help unlock the full economic value of these houses.

Instead, however, the Land Court Bill will be used to help strip all South Africans, both black and white, of the ownership rights they already enjoy or could otherwise obtain. The Bill will help confine the population to rights of 'access' on land either owned by the state or controlled by it under the rubric of custodianship. Yet these access rights will be revocable and inherently uncertain – and far less valuable to people than the individual ownership which already exists and needs to be expanded, rather than curtailed.

The practical importance of private property rights and limited state control have been evaluated for many years by the Fraser Institute in Canada, a think tank. The Fraser Institute's research shows that the countries which do the best in upholding private property rights and limiting state power are the 'most free', in the economic sense. They are also by far the most prosperous.

In 2019, for example, nations in the top quartile for economic freedom had average per-capita GDP of $50 600, as compared to $5 900 for countries in the bottom quartile. In the top quartile, moreover, the average income of the poorest 10% was roughly $14 400, as opposed to $1 500 for the poorest 10% in the bottom quartile.[22] In addition, for countries in the top quartile, only 1% of the population lived in extreme poverty, as compared to 34% in the bottom quartile.

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[21] IRR, *2021 South Africa Survey*, p350; Agri SA, 'Land Audit: A Transactions Approach', *Politicsweb.co.za*, 1 November 2017, p9

[22] Fraser Institute, *Economic Freedom of the World*, 2021 Annual Report

The importance of property rights is further confirmed by the experience of both Zimbabwe and Venezuela. In Zimbabwe the expropriation of farmland has led to economic collapse, pervasive hunger, hyperinflation, a 90% unemployment rate, and the flight of millions of impoverished people. Much the same is true in Venezuela, where GDP has halved in recent years, hunger is widespread, inflation has soared, and millions of people have also been forced to flee.

10 The Land Court Bill should be abandoned

The Land Court Bill is in breach of the founding values of the Constitution and cannot lawfully be adopted. Its ideological premise – that private property rights are the problem and state ownership the solution – is also fatally flawed. For both these reasons, the Land Court Bill should be abandoned, not enacted into law.

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