South African Institute of Race Relations NPC
SUBMISSION
to the
Speaker of the National Assembly
regarding the proposed
Restitution of Land Rights Amendment Bill
Private Member's Bill,
proposed by Mr P J Mnguni MP (African National Congress)
Johannesburg, 19th May 2017

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1 Introduction

Mr Pumzile Justice Mnguni MP (African National Congress), who is also the whip of the Portfolio Committee on Rural Development and Land Reform in the National Assembly,

intends to introduce the Restitution of Land Rights Amendment Bill of 2017 during the second quarter of 2017. He will introduce the measure as a private member's bill under Section 73(2) of the Constitution, which allows any member of the National Assembly to introduce a bill in this legislative chamber. However, why this particular measure is to be enacted as a private member's bill has not been explained. A committee concerned with members' legislative proposals will have to decide whether his proposed bill satisfies various criteria (the content of which seems difficult for the public to ascertain). If the committee is satisfied, then Mr Mnguni will be able to introduce his private member's bill in the National Assembly.

An explanatory summary of Mr Mnguni's proposed bill was published in the *Government Gazette* on 7th April 2017. Interested parties and institutions were invited to submit representations on this explanatory summary to the Speaker of the National Assembly by '31 (sic) April 2017'. The period for public comment was subsequently extended – though without adequate notice or publication in the *Government Gazette* – to 19th May 2017. The explanatory summary has now been followed by the publication of the Restitution of Land Rights Amendment Bill (undated Private Member's Bill) (the Amendment Bill). As Mr Mnguni explains, the Amendment Bill was posted on the website of the ANC Parliamentary Caucus on 13th April 2017. [P Mnguni, e-mail to the IRR, 28 April 2017]

This submission on the Amendment Bill is made by the South African Institute of Race Relations NPC (the 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.

2 Inadequate public consultation on the Amendment Bill

2.1 What the Constitution requires

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*; [(CCT73/05A) [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 59, 72, and 118. According to Section 59(1) of the Constitution, the National Assembly 'must facilitate public involvement in the legislative…processes of the Assembly and its committees'. In the *New Clicks* case in the Constitutional Court, 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 in the *Land Access* case, as further described in due course. [Section 59(1), Constitution of the Republic of South Africa, 1996; *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* judgment, at para 59]

2.2 Too short a period

The period for public comment on the explanatory summary opened on 10th April 2017, and initially expired on 30th April 2017 (rather than on 31st April, as mistakenly stated in the *Government Gazette*). [Parliamentary Monitoring Group, Restitution of Land Rights Amendment Draft Bill [PMB-2017, https://pmg.org.za/call-for-comment/536/] The period allowed for the making of written submissions on this summary thus amounted to a mere 20 days, of which no fewer than nine days fell on public holidays or over weekends. This left 11 working days for the public to get to grips with the explanatory summary, which was also unclear on precisely what changes were to be made to which statutory provisions. This period was far too short to allow meaningful public consultation. It may also have dissuaded many people from even attempting to make written submissions on either the explanatory summary or the Amendment Bill which superseded it.

Mr Mnguni's decision to extend the period for comment till 19th May has done little to resolve this problem, especially as this extension has not been adequately publicised. It has also seemingly not been officially notified in the *Government Gazette*, which raises questions as to the validity of the extension. Clearly, more time should have been allowed from the start so as to comply with the constitutional obligation to 'facilitate public involvement in the legislative…processes' of the National Assembly, as required by Section 59 of the Constitution. [Section 59(1), 1996 Constitution]

2.3 Too little clarity on content

In addition, many people may have battled to obtain a copy of the Amendment Bill. The explanatory summary, as published in the *Government Gazette* on 7th April 2017, referred to a bill which had still to be posted on the website of the ruling ANC at some point in the future. The explanatory summary gave a general outline of the changes envisaged, but was inconsistent and confusing as to whether these changes would be made to the Restitution of Land Rights Amendment Act of 2014 (the 2014 Amendment Act) or the Restitution of Land Rights Act of 1994 (the Act). [*Government Gazette*, No 40774, 7 April 2017, pp8, 6]

As earlier noted, the Amendment Bill was posted on the website of the ANC Parliamentary Caucus (the website) on 13th April 2017. However, not enough was done to publicise this posting, leaving the IRR (and doubtless many others) unaware that this had been done. The public and interested stakeholders should not have to battle in this way to obtain a bill on which they wish to comment. Again, these shortcomings demonstrate a disregard for the right of citizens to have 'a meaningful opportunity to be heard in the making of laws that will govern them', as the Constitutional Court put it in the *Doctors for Life* case. [*Doctors for Life International* v *Speaker of the National Assembly and others*, 2006 (6) SA 416 (CC), Media summary, p2]

2.4 No accompanying initial SEIAS assessment

The Amendment Bill should have been accompanied by initial and final socio-economic assessments, as required by the Socio-Economic Impact Assessment System (SEIAS) adopted by the government in 2015. Now that the SEIAS system is in place, a proper SEIAS assessment is, of course, needed to give the public 'a reasonable opportunity…to *know about the issues* and to have an adequate say', as Mr Justice Albie Sachs put it in the *New Clicks* case in 2006. [*Minister of health and another* v *New Clicks South Africa (Pty) Ltd and others*, 2006 BCLR 872 (CC) at para 630, per Sachs J, emphasis supplied by the IRR]

2.5 A fatal flaw

In inviting public comment on the Amendment Bill in this flawed way, Mr Mnguni has failed to facilitate public involvement in the legislative process, as the Constitution requires. Yet it was precisely because of such a fatal flaw that the Constitutional Court (the court) struck down the 2014 Amendment Act in the *Land Access Movement* case in July 2016. As the court stressed, the public participation process in the National Council of Provinces (NCOP) on the 2014 Amendment Act had been 'unreasonable' and was thus 'constitutionally invalid'. Moreover, this had 'tainted the entire legislative process' and meant that the 2014 Amendment Act had to be struck down in its entirety. [*Land Access* judgment, para 82] On the record of public consultation to date, the Amendment Bill, if it is indeed adopted in the face of all these flaws, should also be struck down on this basis.

3 An unconvincing rationale for re-opening land claims

The key aim of the Amendment Bill is to re-open the period for the lodgement of land restitution claims, from an unspecified (and thus uncertain) date until 30th June 2021. The Memorandum on the Objects of the Amendment Bill (the Memorandum) explains the need for this on the basis that the initial deadline for the lodging of land claims (31st December 1998) excluded two categories of potential claimants. First, it excluded those who were unable to meet the deadline for various reasons. Second, it excluded those who had been dispossessed of land under 'betterment' schemes in the former homeland areas. [Para 2.1, Memorandum] However, there are doubts as to the validity of this argument, as further described below.

(The Memorandum also speaks of people who were dispossessed before 13th June 1913, the date on which the Natives Land Act of 1913 came in effect. It notes that 'their claims are excluded from the land restitution programme by section 25(7) of the Constitution', which confines the right to restitution to those dispossessed after that date. The Memorandum adds that research is being conducted into 'the exact scope and quantity of such excluded persons dispossessed before 1913', and says that exceptions to the current constitutional provisions will be dealt with separately.) [Paras 2.1, 2.6, Memorandum, Section 25(7), 1996 Constitution]

3.1 Those who missed the 1998 deadline

According to the minister of rural development and land reform, Mr Gugile Nkwinti, the land claims process needs to be re-opened to help the many prospective claimants who found the

initial four-year period for lodging claims under the Act unreasonably short. However, the four years thus allowed was in fact a substantial period, which should have sufficed to meet the needs of would-be claimants.

According to Dr Theo de Jager, deputy president of Agri SA, the voice of commercial agriculture in the country, the real reason for the pressure to re-open land claims lies in the fact that the Land Claims Commission (the Commission) has largely abandoned any attempt to verify fresh claims. In the past, when people expected the Commission to do a proper investigation, they would have hesitated to put forward uncertain or bogus claims. But now that it has become apparent that the Commission has 'given up altogether' on investigating the validity of claims, this has turned the land claims process into 'a free-for-all, in which the only criterion is a claim form in a file', he says. [*Farmer's Weekly* 22 June 2012]

So chaotic has the situation become that the Commission had substantially more outstanding claims before it in 2012 than the total number of claims it reported as having received in 2009. It also now has more claims before it than it previously reported receiving before the 1998 cut-off date. It cannot account for this anomaly (though re-opening the claims process would in time help provide an explanation). In addition, its administrative processes are so deficient that it does not know how many claims have been gazetted, how many have been processed in full, or how many have been degazetted as invalid, states Dr de Jager. [*Farmer's Weekly* 22 June 2012; Cherryl Walker, 'Land claims a Sisyphean task for the state', 19 March 2015, https://mg.co.za/article/2015-03-19, p2]

3.2 Victims of 'betterment'

'Betterment' was a National Party policy which aimed at halting soil erosion, rehabilitating land, and improving crop yields in the former homelands. This was done mainly by culling cattle and dividing communal land into residential, arable, and grazing zones. Often the result was to reduce the plots allotted households to one or two morgen, leaving families with too little land to sustain themselves through subsistence farming. Many households were also left landless altogether. Land deprivation added greatly to suffering within the overcrowded homelands and evoked significant resistance. [Joanne Yawitch, *Betterment*, IRR, Johannesburg, 1982, pp48-51, 94, 9-15, 50-51, 18, 22-24, 27, 42]

The government's initial recommendation, as set out in 1997 in a *White Paper on South African Land Policy*, was that the victims of betterment should be helped through the redistribution of land rather than via the restitution process. [Department of Land Affairs, *White Paper on South African Land Policy*, April 1997, p79] This made sense, as restitution would require the return of land from some poor residents of the former homelands to other residents in a similar situation. Such transfers would be particularly damaging to those poor people whose meagre land holdings were thus reduced or taken away.

Why the wrongs resulting from betterment should in future be redressed via restitution, rather than redistribution (as earlier envisaged), is not explained in the Amendment Bill.

3.3 A flawed rationale

In urging the re-opening of the land claims process, the Department of Rural Development and Land Reform (the Department) now estimates that forced removals affected some 7.5 million people. The Department goes on to stress that only about 60 000 claims have thus far been finalised. This has benefited about 368 000 households and (assuming an average of five people per household) some 1.8 million individuals. The Department thus concludes that only about 22.7% of the 7.5 million people affected by forced removals have benefited from the restitution process. 'This glaring shortfall is presented as a major motivation for re-opening the restitution programme,' as land expert Ms Cherryl Walker points out. [Walker, 'Land claims a Sisyphean task for the state', pp2-3]

However, there are two major problems with the 7.5 million figure on which the Department's argument is based. First, the 7.5 million total includes the roughly 4 million victims of betterment. However, as earlier described, the 4 million people who suffered under betterment should be helped via the redistribution leg of land reform, rather under than the restitution one, as the 1997 *White Paper* earlier urged.

Second, the remainder of the 7.5 million total seems to have been drawn from the oft-cited figure of 3.5 million forced removals calculated by the Surplus People's Project (SSP) for the period from 1960 to 1983. However, the SPP figure of 3.5 million refers to *removals*, not to individuals, as the SPP knew that many black people had been moved more than once. (For example, people moved from so-called 'black spots' in the 'white' rural areas to the townships could have suffered further removals as a result of homeland consolidation.) [Walker, 'Land claims a Sisyphean task for the state', pp3-4]

John Kane-Berman, now a policy fellow at the IRR, has carefully calculated the number of African people affected by forced removals and puts this figure at 2.1 million. On this more accurate basis, the number of people who have already benefited from restitution (some 1.8 million) is not far off the total number affected by forced removals. The 1.8 million figure will also increase once all the unresolved claims from the first window period, which number as many as 20 500, have been finalised. [John Kane-Berman, 'Population Removal, Displacement and Divestment in South Africa', *Social Dynamics*, Vol 1, Issue 2, December 1981, University of Cape Town, pp28-46, at pp30, 32-33; Walker, 'Land claims a Sisyphean task for the state', p5]

Moreover, as Ms Walker notes, 'many rural dispossessions involved large numbers of households who, depending on the underlying land rights and community dynamics, could today be collected under a single group claim or divided across many small group or individual claims, or some complicated combination of the two.' This also makes it difficult to assess how adequately the number of claims already lodged mirrors the number of people who were affected by forced removals. [Walker, 'Land claims a Sisyphean task for the state', p4]

In addition to these complications, the land claims process that began in 1994 has been marred by a host of major problems. These problems need to be resolved before new land claims are invited under the Amendment Bill. Some of the relevant challenges are summarised below.

4 Problems with land restitution to date

Restitution is an important part of the land reforms mandated by the Constitution. It involves the return of land to black people who were wrongly dispossessed of it after June 1913, under the Land Acts, the Group Areas Act of 1950, and other racial laws. This element in land reform has long been broadly endorsed as it is seen as necessary to redress a deep historical injustice. In practice, however, restitution has been carried out very badly and has brought few benefits to black South Africans.

The Restitution of Land Rights Act of 1994 (the Act) was adopted soon after the political transition and gave people four years, until 31st December 1998, to lodge land claims with the Commission. Some 79 700 land claims were lodged in this period. Of these, some 76 200 were settled by March 2011, as the Commission then reported. These figures suggested that 96% of restitution claims had been finalised, leaving only some 3 500 claims to be resolved. [2012 *South Africa Survey*, IRR, Johannesburg, p600]

However, it has since emerged that these figures are incorrect. As earlier noted, the process of lodging claims has become so chaotic that the Commission is unable to compile a complete list of the claims ostensibly filed before the December 1998 deadline. It has, however, begun to acknowledge that the number of claims still needing to be resolved is much larger than the roughly 3 500 of which it spoke in 2011. In 2014 it put the number of claims still needing to be resolved at more than 8 500. However, more recent estimates have put that number at 13 000, or even at 20 500. [Anthea Jeffery, *BEE: Helping or Hurting?* Tafelberg, Cape Town, 2014, pp314-315; Walker, 'Land claims a Sisyphean task for the state', p5]

Other problems in the restitution process have been legion. Some of the claims lodged have no historical foundation, while sometimes the same parcel of land has been claimed by more than one community, making the verification of competing claims a difficult exercise. Officials employed by the Commission have also inflated claims on occasion: perhaps most notably in Magoebaskloof (Limpopo), where the six claims in fact lodged by local communities spiralled to more than 600 as gazetted by bureaucrats. In other instances, officials have used vague property descriptions from claimants to enlarge areas under claim, or have gazetted claims for which no clear basis exists. [*Farmer's Weekly* 15 May 2009] Partly because of such mistakes, land claims have expanded to embrace 70% of Limpopo, half of all sugar farms, and between 30% and 40% of all land under timber. [Jeffery, *Chasing the Rainbow*, p291; *Business Day* 31 July 2009]

In 2009 the Commission acknowledged that its officials had falsely inflated some claims. It also admitted that some claims had been gazetted against properties without sufficient prior investigation. [*Business Day* 29 July 2009] The Commission pledged to rectify these

mistakes, the Chief Land Claims Commissioner, Blessing Mphela, saying: 'Where there is no evidence of dispossession, we will degazette. It's not the role of the Commission to make claims out of non-claims.' He declined to say when the first delisting would take place or to speculate on the number of farms which might be delisted, but pledged that the matter was being treated 'as extremely urgent'. [*Farmer's Weekly* 15 May 2009] However, by October 2009 only 29 farms had been delisted, [*Business Day* 7 October 2009; 2010/11 *Survey*, p615] and little progress has since been made.

According to organised agriculture, thousands of farms qualify for delisting. However, the expectations of claimants have also been aroused, and the dashing of their hopes could lead to conflict. The degazetting of claims is also likely to place a major additional burden on bureaucrats already battling to do a proper job. [*Business Day* 26 May 2009] Yet, in the words of the Legal Resources Centre (LRC), a civil society organisation that provides legal advice and sometimes also litigates in the public interest, it is vital that the Commission should find a way of 'fixing the colossal errors that have been made in the claims verification process'. [*Business Day* 26 May 2009]

Another major problem has arisen from a clause in the Act stating that land restored to a community does not vest in the members of the community as co-owners, but rather in the community itself. The community, often as represented by a communal property association, becomes the sole owner and must then decide how its members should be allowed to use the land. [*Business Day* 31 July 2009] Not surprisingly – and especially where relative outsiders have been included in communities – the upshot has often been 'massive conflict', as the LRC puts it. [*Business Day* 26 May 2009]

Mangaliso Kubheka, leader of the Landless People's Movement, sees this as a major blunder. Instead of the Commission spelling out the rights and duties of community members, 'they just say: here is your land, sort it out yourselves,' he notes. By contrast, 'millions of landless peasants in Brazil were given title to individual plots', says Mr Kubheka. [*Business Day* 6 August 2009]

The vesting of land in communities rather than in individuals has also been criticised by some new black farmers. In May 2011, for instance, Andy Tlali – the only black farmer in a group of 45 South African farmers planning to move to the Republic of Congo (Brazzaville) – said: 'The Government lets new black farmers down. They give land to a community, not to individual farmers. You can't farm commercially if you have more than 200 people living on a farm.' [*City Press* 22 May 2011]

Mismanagement within the Commission and the Department has compounded the difficulties. Organised agriculture cites dozens of cases where farmers have agreed to transfer part of their land to claimants and then mentor them to help them make a success of their new farming operations. But these agreements have to be endorsed by officials – and sometimes their consent has taken so many years to secure that agreements have simply foundered along the way. Revenue constraints also play a part in the malaise, but long delays have mainly

occurred, says Agri SA, 'because we sit with activists and revolutionaries in senior positions, who do not make good administrators'. [*Farmer's Weekly* 22 June 2012]

Some officials have also acted fraudulently, inflating the prices which farmers are in fact prepared to accept for their land and then, when the state pays out the larger sums, pocketing the difference. (In one instance, the difference amounted to R12m, for the farmer's asking price was R8m while the inflated claim put forward by officials was R20m.) [*Business Report* 29 June 2011] In addition, the processing of restitution claims has often been dogged by gross inefficiency. Writes journalist Stephan Hofstatter: 'A community leader who had to wait eight years for a reply to a [letter] sums it up for me.' [*Business Day* 15 October 2009]

Even where farmers have reached agreement with the state on the purchase of their farms, they often face further delays in obtaining payment for their property. Some have waited as long as six years. [*Farmer's Weekly* 9 September 2011] In one case in Mpumalanga, the government was so slow in making payment that the North Gauteng High Court ordered it to pay out an additional R23m in interest on an original selling price of R200m. [*Farmer's Weekly* 12 October 2012]

Long delays in the settling of claims have also had a major economic impact on rural areas, for the gazetting of claims may inhibit the farmers affected from selling, mortgaging, or investing in their land. (There is no outright prohibition on the disposal of land under claim, but the Act states that any farmer wishing to sell or mortgage such land must first notify the regional land claims commissioner, who may seek an interdict preventing this.) The uncertainty thus created makes it difficult for many farmers to borrow the working capital needed to plant crops and the like. Hence, many farms under claim are no longer worked, and large areas of productive farmland have effectively been frozen. Moreover, once farms have deteriorated beyond a certain point, the costs of rehabilitation become too heavy to be economic. The upshot, says the Centre for Development and Enterprise, a civil society organisation, is that some 'rural areas are dying from a lack of investment and a lack of economic activity'. [Jeffery, *BEE: Helping or Hurting?* p312]

Adds Dr de Jager of Agri SA: 'The way the restitution process has been handled has probably done more damage to commercial agriculture in South Africa than the Anglo-Boer War. It has created massive uncertainty, with thousands of farms (often whole districts or industries) caught up in the grip of unfinished claims. No one – neither the current owner nor the claimants – knows who will own the farm in a year from now. So for years no further investment or development takes place.' [Jeffery, *BEE: Helping or Hurting?*, p312]

Worse still, by the Government's own admission, between 50% and 90% of all land reform projects have failed, the recipients of formerly successful farms failing to produce any marketable surplus. [*Business Report* 29 June 2011] As regards restitution land, Mr Nkwinti has put the failure rate at more than 70%. Such failures stem from a lack of farming experience, a shortage of capital, inadequate mentoring and support, and the difficulty of joint decision-making in the many instances where land has been transferred to communities rather

than individuals. It also means (writes Mr Hofstatter) that the government, 'by its own admission, has spent billions in taxpayers' money to take hundreds of farms out of production, costing thousands of jobs and billions more in lost revenue'. [*Business Day* 12 November 2009; Democratic Alliance (DA), 'SA Today: 17 million hectares that could change our economy for ever', *Bokamoso News*, 29 June 2014]

Also worrying – especially so given all the problems that have dogged the restitution process – is the fact that few claimants want land at all. In April 2013 Mr Nkwinti finally acknowledged this, saying that 92% of successful land claimants (some 71 000 out of the 76 000 whose claims had been finalised by 2011) had opted for financial compensation in lieu of land. Said Mr Nkwinti: 'We thought everybody when they got a chance to get land, they would jump for it. Now only 5 856 have opted for land restoration.' People had chosen money instead, partly because of poverty and unemployment, but also because they had become 'urbanised' and 'de-culturised' in terms of tilling land. 'We no longer have a peasantry; we have wage earners now,' he said. [*Mail & Guardian* 5 April 2013]

5 Problems in re-opening the land claims process

5.1 Existing problems unresolved and fresh problems added

In seeking to re-open the land claims process, the Amendment Bill overlooks the myriad of problems identified in *Section 4*. However, before new claims are invited, all the problems that have long beset the land claims process must first be overcome. If this cannot be achieved – and experience suggests it will be difficult to do – then other ways to compensate those dispossessed of land in the apartheid era should instead be sought. The ruling party should also acknowledge that, under the current settlement rate, it will take the Commission some 35 years to resolve the pre-1998 claims that are still outstanding. Finalising these 'old' claims must be the priority. [Walker, 'Land claims a Sisyphean task for the state', p5]

Worse still, the proposed re-opening of the land claims process will generate a host of additional problems. It will further unsettle property rights. It will further undermine agricultural production, putting more of the rural economy at risk. It will also stir up what the government itself describes as a 'hornet's nest' of competing land claims. [*City Press* 2 June 2013]

5.2 The matter of competing claims

Many people have expressed great concern that the re-opening of the window for lodging claims will gravely prejudice claimants who filed their claims before 31st December 1998, but have still not had their 'old' claims resolved. If 'new' land claims are now to be allowed, new claimants will be free to claim against land that has already been claimed or awarded to existing claimants.

Land activists have pointed out, for example, that traditional leaders hostile to the communal property associations in which restored land has often been vested may claim the same land once again, so as to ensure that it vests in them instead. [See *Land Access* judgment, para 13] People to whom land has been returned and who have invested significant resources in it in

an attempt to maintain or expand production could also find themselves severely prejudiced if their land is now to be claimed by others.

The scale of the potential problem is significant, as some 3.4 million hectares of land have thus far been transferred to restitution beneficiaries. [Minister Gugile Nkwinti, 'Debate of the State of the Nation Address', *Politicsweb.co.za*, 14 February 2017] This gives considerable scope for new claims to be lodged on land that has previously been awarded to those who claimed it in the first window period.

It is also clear that the Commission lacks capacity to manage even the old claims which have already been lodged. This creates a further risk, as many people have pointed out, that if more claims are added under the Amendment Bill, this will further burden the Commission and exacerbate a situation which is already intolerable. [See *Land Access* judgment, para 4] Already low standards of efficiency within the Commission will decline even further – and both old and new claimants are likely to wait many decades for their claims to be resolved. On Ms Walker's analysis, if close on 400 000 new claims are indeed lodged (as the ANC anticipates) than at least 230 years will be needed to resolve all of these. This will be on top of the 35 years that will be needed to finalise all existing claims. [Walker, 'Land claims a Sisyphean task for the state', p5]

5.2.1 The Constitutional Court's concerns about competing claims

In the *Land Access* case, the Constitutional Court expressed considerable concern about the problems likely to arise from competing claims. It was also this concern that helped prompt the Land Access Movement (and other applicants) to seek an order striking down the 2014 Amendment Act as invalid. The applicants argued that the statute was incurably tainted by a lack of proper public consultation, but they also wanted the Constitutional Court to help resolve the issue of competing claims. They thus asked the court to suspend its declaration of invalidity for 18 months, and to issue a *mandamus* or instruction that would oblige the Commission, within this 18-month period: [*Land Access* judgment, para 87]

- to 'settle or refer to the Land Claims Court all land restitution claims filed by 31st December 1998', irrespective of whether new claims had been lodged against the same land in the second window period under the 2014 Amendment Act;
- to continue accepting new applications under the 2014 Amendment Act; and
- not to investigate or process any of the claims lodged under the 2014 Amendment Act until all the old claims had been finalised.

However, the court was 'loath' to accede to this request, saying 'it would have the effect of heaping more new applications on the Commission when there are difficulties regarding how to handle those that have been lodged already'. Instead, the court declared the 2014 Amendment Act invalid with immediate, but prospective, effect. This meant that no new claims could be accepted, but that the validity of the 75 000 to 80 000 new claims that had

already been lodged after 1st July 2014 would be preserved. [*Land Access* judgment, paras 88, 85]

At the same time, the court instructed the Commission not to attempt to process any of the new claims that had already been lodged, irrespective of whether these new claims competed with old claims or not. In doing so, the court stressed that 'the question how new claims should be dealt with while there are outstanding old claims is fraught with imponderables'. It recommended that this difficult issue should be left to the legislature to resolve. [*Land Access* judgment, para 89, 93]

The court also gave Parliament two years (until 27th July 2018) to re-enact legislation re-opening the lodgement of land claims. It added that, if the legislature failed to do so within this period, then the Chief Land Claims Commissioner should approach the court for an appropriate order as to how the 75 000 to 80 000 new claims that had already been lodged after 1st July 2014 should be processed. [Para 2.5, Memorandum; *Land Access* judgment, para 93.7]

The court further ruled that, 'should the processing, including referral to the Land Claims Court, of all land claims lodged by 31st December 1998 be finalised' before the re-enactment of this legislation, then the Commission might start to process the 75 000 to 80 000 new claims that had already been lodged. [*Land Access* judgment, para 93.7]

However, the court also stressed that the question as to how competing old and new claims was to be resolved was a very difficult one. This was also a key concern for the applicants in the case, who argued that it was not enough to say, as the 2014 Amendment Act did in Section 6(1)(g), that the Commission must 'ensure that priority is given' to claims lodged before 31st December 1998. The applicants pointed out that this provision was impermissibly vague, as it was open to a number of different interpretations. It could plausibly mean: [*Land Access* judgment, para 4, note 6]

(a) old claims have substantive priority over new claims competing for restoration of the same land;
(b) land already restored to an old claimant cannot be expropriated and restored to a new claimant;
(c) all old claims must be finalised before new claims can be processed;
(d) old and new claims competing for the same land must be processed simultaneously, but non-competing new claims must only be dealt with after all old claims are finalised; or
(e) a competing new claim will only be treated as an interested party in respect of a corresponding existing claim.

In striking down the 2014 Amendment Act with prospective effect (so as to preserve the validity of the 75 000 to 80 000 new claims already lodged), the court recognised that 'a question arises as to when and how the preserved new claims that compete with the old

claims will be considered'. The court went on to state (in words that have been summarised to some extent above, but are worth quoting here in full): [*Land Access* judgment, Para 89]

> 'The effect of the prospective nature of the declaration of validity is to keep alive the contentious section 6(1)(g) of the Amendment Act insofar as the disposal of the old and preserved new claims is concerned. In terms of this section, the Commission must "ensure that priority is given" to old claims. This raises all the problems that the applicants are complaining about and brings about uncertainty that may be prejudicial to claimants whose claims were lodged by 31st December 1998. Because the Amendment Act has been declared invalid in its entirety, [we] do not find it necessary to grapple with what exactly Section 6(1)(g) means merely for purposes of how it should apply to old and preserved claims. It seems to [us] that a just and equitable remedy is to interdict the settlement, and referral to the Land Claims Court, of all new claims, whether competing with the old or not. Our wide remedial power under Section 172(1)(b) of the Constitution permits us to do so. Even though the new claims have been kept alive, the reality is that the Amendment Act under which they were lodged has been found to be invalid. The interdict is consonant with this reality. In the face of the declaration of invalidity, there cannot be much cause for complaint for keeping the new applications in abeyance. Also, the question how new claims should be dealt with when there are outstanding old claims is fraught with imponderables. It is best left to the Legislature to resolve.'

There is something of a contradiction in this passage. Initially, the court seems to be saying that the effect of its prospective order of invalidity is to 'keep alive the contentious Section 6(1)(g) of the Amendment Act insofar as the disposal of the old and preserved new claims is concerned'. Shortly afterwards, however, the court goes on to say that 'because the Amendment Act has been declared invalid in its entirety, [it is] not necessary to grapple with what exactly Section 6(1)(g) means merely for purposes of how it should apply to old and preserved new claims'. Against this background, the court goes on to interdict the processing of the new claims, and leaves it to the legislature to resolve the tension between old and new claims in enacting new legislation. [*Land Access* judgment, para 89]

5.3 Insufficient clarity in the Amendment Bill

As the *Land Access* judgment shows, the Constitutional Court made no attempt to resolve the complex issues raised by competing old and new claims. This difficult matter must thus be settled by Parliament – but the Amendment Bill overlooks or fudges this need.

The explanatory summary gazetted on 7th April 2017 said that the new legislation still to be unveiled would 'allow new claims to be lodged' but would not allow 'these new claims to be processed until the claims lodged before 31st December 1998 had been finalised'. The explanatory summary also said that the Chief Land Claims Commissioner would have to 'certify in writing that all claims lodged [before] 31st December 1998 had been finalised', and would have to 'publish in the *Government Gazette* a date from when new claims would be processed'. [*Government Gazette*, pp6, 7]

The Amendment Bill contradicts this proposed scheme in two important respects. First, the definition clause in the Amendment Bill suggests that new claims (apart from the 75 000 to 80 000 that have already been lodged under the 2014 Amendment Act) may be *lodged* only after the date certified by the Chief Land Claims Commissioner as the date on which all old claims have been finalised. [Clause 1(a)(i), Amendment Bill] But Clause 16A of the Amendment Bill makes it clear that this date is the date from which the Commission will *'start processing'* all the new claims that have already been lodged: whether under the 2014 Amendment Act or under the Amendment Bill itself. [Clause 5, Amendment Bill introducing Clause 16A into the 1994 Act] This creates a fundamental ambiguity as to the date from which new claims may be submitted under the Amendment Bill.

Second, the Amendment Bill states that new claims may be processed once all old claims 'have been finalised or referred to the Court'. [Clause 5, Amendment Bill, introducing Clause 16A] This is, of course, the wording which the applicants in the *Land Access* case urged the Constitutional Court to endorse. However, this is different from what the explanatory memorandum says, for this document speaks only of old claims having first to be 'finalised'. The wording used in the Amendment Bill is also inherently uncertain and contradictory.

Claims which have been referred to the Land Claims Court have not in fact 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 – initially 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 not have been 'finalised'.

In addition, the Amendment Bill makes no attempt to deal with the key objection to the 2014 Amendment Act – that reopening the land claims process would render those who had successfully reclaimed land in the initial window period vulnerable to the loss of their land to new land claimants. The 2014 Amendment Act tried to deal with this problem by saying that old claims should be given 'priority' over new ones. This wording was ambiguous and had five possible meanings, as set out above. It did, however, suggest that old claimants were not to be displaced by new ones.

The Amendment Bill has no equivalent provision. If old claimants are to be protected in some way, it is not enough to say that new claims cannot be processed until old claims have been finalised (or referred to the court). Once this date has arrived and processing begins, old claimants will have no protection at all from the new claims the Commission will then start to handle. So traditional leaders will be able to reclaim restored land from the communal property associations in which it has already been vested. And communities which have put significant resources into their restored land could nevertheless lose it to new claimants whose claims may not (given the Commission's reportedly lackadaisical approach to probing claims) ever have been properly investigated by the Commission. More accurate investigation

might be mounted where new claims are referred to the Land Claims Court, but old claimants might often lack the means to embark on litigation against new ones.

Does the Amendment Bill intend to allow new claims to trump old ones, thereby undermining the rights of those who had land returned to them in the first period? If so, then Mr Mnguni, in putting forward the Amendment Bill in this format, is once again disregarding all the objections to any such outcome that were voiced during the flawed process of public consultation on the 2014 Amendment Act.

The Amendment Bill must deal clearly and plainly with the issue of competing claims. If it intends new claims to trump earlier successful ones, it must say so. If it intends to give 'priority' to old claims, as the 2014 Amendment Act said, then it must clarify what it means by this. It must choose among the five possible meanings of this phrase (as set out at *points (a) to (e)* in *Section 5.2.1* above) and make it clear which one it is selecting.

5.4 The doctrine against 'vagueness of laws'

If clarity is not provided, then the Amendment Bill will be impermissibly vague on three key issues: when the lodging of new claims is to commence, when old claims can truly be regarded as having been 'finalised', and how new claims which compete with old ones are to be treated. The Amendment Bill will also then be unconstitutional. The founding provisions of the Constitution recognise 'the supremacy' of the Constitution itself and also of 'the rule of law'. [Section 1(c), Constitution] The rule of law must thus be upheld at all times. This in turn requires that legislation must be certain and clear, so that people know their rights and can order their affairs and adjust their conduct on the basis of this knowledge.

From this core principle has come 'the doctrine against vagueness of laws'. According to the Constitutional Court in the *Affordable Medicines Trust* case, this doctrine 'requires that laws must be written in a clear and accessible manner'. [*Affordable Medicines Trust and others* v *Minister of Health and others*, 2005 BCLR 529 (CC) at para 108] Legislation is not sufficiently clear if administrative officials can give the same provision different meanings, all of which are plausible. This is precisely what had happened with Section 6(1)(g) of the 2014 Amendment Act, for various organs of state (as the applicants pointed out) had 'adopted different interpretations of the provision, none of which was outright correct, as they were all plausible'. [*Land Access* judgment, para 4, note 6] The profound uncertainty around the issue of competing claims must be resolved if the Amendment Bill is to pass constitutional muster.

5.5 Increasing the burden on the Commission

Another major problem with the Amendment Bill is that re-opening the lodgement window will bring about precisely the situation against which the Constitutional Court warned in the *Land Access* judgment. The new legislation 'will have the effect of heaping more new applications' on the Commission, even though this body clearly lacks the capacity to deal with the claims it already has. Moreover, because land claims raise doubts as to ownership and so inhibit agricultural (and other) investment, all South Africans will suffer from a prolonged extension of the land claims process.

At the same time, a lack of proper investigative capacity within the Commission, coupled with insufficient penalties for fraud, could encourage the lodging of a plethora of false claims. This would further delay the process and wrongly unsettle the property rights of many South Africans, both black and white.

5.6 The danger of false claims

As earlier noted, the Commission's administrative processes are already so chaotic (in Dr de Jager's words) that it does not know how many claims have been gazetted, how many have been processed in full, or how many have been degazetted as invalid. In these circumstances, the Commission clearly lacks the capacity properly to investigate the claims it already has before it, let alone the 400 000 or so new claims which the government expects to be submitted. Moreover, the more claims are lodged – and the longer the period needed for their proper investigation – the greater the risk that the Commission will start to wave claims through, even where their validity is doubtful. This situation will encourage the lodging of false claims, as the likelihood of detection will be small.

The country's economic malaise will also give impetus to the lodging of false claims. South Africa's economic growth rate has been negative in per capita terms for the past three years. At the same time, the inflation rate is high (at 6.1% a year) and unemployment has more than doubled since 1994. In these circumstances, jobless people lacking income may be desperate enough to seek cash payouts through the lodging of land claims which they know to be false.

The risk of false claims will be further compounded by the lack of an adequate statutory prohibition against this. The 2014 Amendment Act made it an offence to 'lodge a fraudulent claim' for land restitution. However, the penalty laid down was far too limited to provide much of a deterrent, for the maximum punishment that could be imposed was 'a fine or imprisonment not exceeding three months'. This statutory provision was apparently intended to replace common law penalties for fraud, which are generally more severe. Hence, the terms of the 2014 Amendment Act were more likely to encourage fraudulent land claims than reduce them.

The Amendment Bill seeks to preserve the common law punishment for fraud, which is an improvement on the terms of the 2014 Amendment Act. However, the Amendment Bill also makes it clear that an offence will be committed only where a false claim is lodged 'with the intention of defrauding the state'. [Clause 6, Amendment Bill, amending Section 17, 1994 Act] But there may be many false claimants whose aim is not to defraud the government. Rather, their intention may rather be to defraud the current owners of the land, who may be forced to surrender some or all of their land to people with no genuine claim to it. The current owners of the land could also, of course, be 'old' claimants, who succeeded in regaining their land during the initial claims period – and who may now find that their rights have been largely or wholly set at naught.

The more false claims are lodged, the more the property rights of South Africans will unjustifiably be undermined. Moreover, even without the complication of false claims, the

Amendment Bill will conflict with the National Development Plan, which not only emphasises the need for growth and jobs but also stresses the importance of secure land tenure.

5.7 Conflict with the National Development Plan

Re-opening the land claims process will generate prolonged uncertainty regarding the ownership of all land which has already been claimed or may in future come under claim. This goes against the National Development Plan (NDP), which stresses the need for tenure security for both commercial farmers and emergent ones. As the NDP says: 'Farmers will only invest…if they believe that their income streams from agriculture are secure. Tenure security will secure incomes for existing farmers at all scales, for new entrants into agriculture, and for the investment required to grow incomes.' [National Planning Commission, *National Development Plan*, August 2012, p145]

Instead of enhancing tenure security, the Amendment Bill will generate major uncertainty regarding property rights for all land owners and especially for commercial and emergent farmers. This uncertainty is likely to last for at least 30 years (the current land claims process is still incomplete after 23 years) and probably for very much longer. As earlier noted, Ms Walker says it could take the Commission 'more than 35 years to finalise the outstanding claims from 1998'. Moreover, if close on 400 000 new claims are also to be lodged, the process of resolving these could take a further 230 years. On this basis, uncertainty as to title could persist for more than 250 years. [Walker 'Land claims a Sisyphean task for the state', p5]

Such uncertainty will inevitably deter investment in agricultural and other land for a very long period (even if not for the full 250 years that Ms Walker suggests). It will also make it much harder to generate the one million new agricultural jobs which the NDP envisages. At the same time, it will greatly undermine the NDP's overall goals of raising the average economic growth rate to 5.4% of GDP and so reducing the unemployment rate to 6%.

The NDP has been approved by the Cabinet and was endorsed by the ANC at its national conference at Mangaung (Bloemfontein) in December 2012. It is thus still the ruling party's 'overriding policy blueprint'. Moreover, in the words of Trevor Manuel, a former minister in the presidency: national planning commission: 'History will judge government leaders and MPs harshly if they fail to implement the NDP.' [*Business Day, The Times* 13 June 2013]

President Jacob Zuma has often called on MPs and the nation to rally behind the NDP. The economic transformation discussion document drawn by the ANC in preparation for its national conference in December 2017 also calls for more rapid progress in implementing the NDP. The Memorandum on the Amendment Bill likewise recognises the importance of the NDP, for it states that the Bill is intended to 'align the restitution programme with the broad goals of the National Development Plan'. [African National Congress, *Economic Transformation: ANC discussion document 2017, Strengthening the Programme of Radical Economic Transformation*, 12 March 2017, pp12-14; Para 2.1, Memorandum]

However, unless the many problems in both the restitution process and the terms of the Amendment Bill can be overcome, the re-opening of the land claims process will in fact comprehensively contradict the NDP. By undermining property rights far into the future, the new statute will make it far harder for South Africa to attain the NDP's key goals of increased economic growth and reduced unemployment. It will also erode the tenure security the NDP identifies as vital, making it difficult for all farmers to succeed. In addition, it is likely to see yet more farming land fall out of productive use, thereby pushing food prices up and putting food security at risk.

5.8 More land falling out of productive use

The 2014 Amendment Act sought to safeguard agricultural output by stating that land would be returned only to those able to use it 'productively'. The Amendment Bill contains no equivalent provision. However, even if such a criterion were to be introduced, it would be difficult to apply in practice. It would also by no means guarantee that restored land would in fact be kept productive.

The more probable scenario (especially given the extent of past failures on restored land) is that much of the land returned to claimants will likewise fall out of production. As Mr Nkwinti has acknowledged, farming has effectively collapsed on some 73% of the land that has thus far been transferred via restitution. [DA, 'SA Today: 17 million hectares that could change our economy for ever', pp1, 2] The lodging of some 400 000 new claims, followed in time by many more land transfers, is thus likely to result in yet more 'assets dying in the hands of the poor' (as a former director general of land, Tozi Gwanya, earlier warned). [John Kane-Berman, 'Bad-faith Expropriation Bill not grounded in South Africa's land realities', *Fast Facts*, May 2008, p7]

Such an outcome will do nothing to redress past injustice or help those earlier dispossessed of land. As *Business Day* commented in an editorial in June 2013: 'The warm glow that comes from having your ancestral land restored fades fast when crops fail, animals die, bills start mounting, and your family is going hungry.' [*Business Day* 4 June 2013]

Land reform failures have also contributed to the loss of farming jobs. Official figures show that employment in agriculture has dropped from the 1.15 million jobs recorded in 2002 to the 825 000 jobs reported in 2016. [2017 *South Africa Survey*, p279] Some 328 000 farming jobs have thus been lost over the past 15 years. Since a considerable quantity of land (8.2 million hectares) has now been transferred, a significant proportion of these job losses must stem from failed land reform initiatives. Re-opening the land claims process is likely to put an end to many more farming jobs, while the economic benefits to claimants are likely to be few. This will worsen rural destitution, rather than reduce it.

In recent years, the Government has been trying to return failed farms to production, but recapitalisation costs have been high and results often unimpressive. As Mr Nkwinti noted in June 2013, the Government had by then spent some R2.14bn over the past three years on

recapitalising dysfunctional farms, but restored farms had generated a net income of only R126m. [*Business Report* 3 June 2013] This limited income is hardly an adequate return on the State's major capital investment.

These figures underscore the difficulty of returning failed farms to production and profitability. Part of the problem is that many failed farms have been stripped of livestock, irrigation systems, and other key equipment. [*Business Day* 3 June 2013] In addition, it is not easy for the Government to impart necessary skills to emergent farmers. Mr Nkwinti acknowledged the training gap in June 2013, when he said: 'New black farm owners were given the land without the necessary skills to maintain its productivity… They were just labourers. There's a big difference between being a labourer and being a manager of a farm, so really that's the big gap we are trying to close with the recap strategy.' However, the shortage of necessary skills has still not been resolved, as Mr Nkwinti acknowledged in April 2017. [*Business Report* 3 June 2013, *SAfm Morning Live* 24 April 2017]

Agricultural extension services have been put in place, with South Africa (according to the Development Bank of Southern Africa) now spending three times as much on such services, as a proportion of agricultural GDP, as the global average (2.7% versus 0.9%). Often, however, extension officers have less knowledge than the farmers they are supposed to be helping. In addition, extension officers (according to the Agricultural Policy Action Plan approved by the Cabinet in March 2015) visit only 13% or 14% of small farmers. This means that their reach is also very limited. [John Kane-Berman, 'From land to farming: bringing land reform down to earth', *@Liberty*, July 2016]

Salam Abram, an ANC MP who is himself a farmer and who served on the parliamentary committee for agriculture for twelve years, notes that 'the best mentors in South Africa are commercial farmers'. Commercial farmers have also done a great deal to help emergent ones, but their assistance and 'tremendous goodwill' (in Mr Abram's words) have seldom been acknowledged by the government. [Kane-Berman, From land to farming, ibid]

However, unless effective mentoring, individual ownership, and all the other necessary ingredients for successful farming are first put in place, new claimants to whom land is restored are unlikely to be able to maintain production. The Amendment Bill overlooks this reality. Like many other ANC policy interventions, it seems to be based on the belief that providing access to land is enough to give poor people the chance to earn incomes and generate farming jobs. However, this is not so. Rather, land is only one out of a host of factors that are needed for success in farming. No less important are experience and entrepreneurship, along with 'working capital, know-how, machinery, labour, fuel, electricity, seed, chemicals, feed for livestock, security, and water'. [Kane-Berman, 'From land to farming', ibid]

To put poor people on restored land without ensuring that all these needs are met is to set them up for failure. This helps explain why (in the words of Professor Ben Cousins, chair of the Institute for Poverty, Land and Agrarian Studies or Plaas at the University of the Western

Cape) 'more than R80bn has been spent on land reform since 1994' and yet the country has 'nothing to show for it'. [*Farmer's Weekly* 13 January 2017] Like other land reform measures in the past, the Amendment Bill simply ignores these vital issues.

5.9 Food security at increased risk

South Africa needs successful commercial farming to feed its population of 56 million people. The country is also already 65% urbanised, and the millions of people residing in the towns and cities have even less capacity to feed themselves through farming than do the 35% living in the rural areas. In addition, the country's population is projected to reach 67 million by 2030. Of this total, 71% or 48 million people will be living in the towns and cities. [*Landbouweekblad* 31 March 2017]

At present, some 90% of the food produced within South Africa comes from the country's roughly 35 000 commercial farmers. However, once the Amendment Bill takes effect, many of these farmers are likely to find their land under claim. Land under claim is unlikely to be worked as productively as in the past, as farmers have little incentive to invest in it. [*Business Day* 2 April 2013] In addition, much of the land transferred to new claimants is likely to fall out of production altogether.

The government sometimes seems to think it matters little if domestic food production declines, as the country's food needs can always be met via imports. However, food imports could become more costly if the rand weakens further. This could easily happen if the country suffers further credit downgrades to sub-investment (or junk) status by international ratings agencies. Two downgrades to junk status have recently been announced (by Fitch as well as Standard & Poor's), while Moody's currently has South Africa's investment status on review and could yet decide to downgrade it. [*Financial Mail* 13 April 2017] Moreover, if food inflation accelerates, this will put great pressure on the poor, in particular. (Since the poor spend a higher proportion of their income on food than those who are better off, it is they who will primarily bear the brunt of rising food costs.)

If food prices increase significantly under the impact of the Amendment Bill, then so too will the proportion of households lacking adequate access to food. That proportion already stands at a worrying 23%. [2017 *Survey*, p630] The Amendment Bill may be intended to help the poor and provide redress for past land injustices, but its practical impact is likely to be the opposite.

5.10 An impetus to expropriation

Despite its supposed commitment to providing redress for the historical land injustice, the government has never allocated more than a tiny proportion of its annual budget to land restitution. In the 2017/18 financial year, for instance, the total allocated for this purpose is a paltry R3.2bn. This is a tiny fraction (roughly 0.2%) of total budgeted expenditure amounting to R1 557bn. [Minister Gugile Nkwinti, 'Debate on the State of the Nation Address', *Politicsweb.co.za*, 14 February 2017; *Fast Facts*, February 2017] It is also far too little to finance the settlement of the 8 500 to 20 500 old claims still needing to be resolved.

According to the government's own regulatory impact analysis (RIA), which was carried out in October 2013, the 2014 Amendment Act was expected to generate some 379 000 new land claims. Settling these claims, the RIA added, was likely to cost between R129bn and R179bn over the next five years. These are enormous sums – and especially so in comparison with the small amounts being budgeted for land restitution. [Jeffery, *BEE: Helping or Hurting?* pp315-316]

The government also has little capacity to increase its budget for land purchases. South Africa's growth rate has stagnated over the past three years and came in at a scant 0.3% of GDP in 2016. Public debt has soared from R627 billion in the 2008/09 financial year to R2.2 trillion in the current financial year, an increase of some 250%. Tax revenues are flagging, while interest payments on public debt are already budgeted at R162 billion. (This is far more than the R138 billion the Government has been able to allocate this year to policing, prisons, and the courts, for example.) Interest payments on public debt will also increase more rapidly than was earlier projected, now that South Africa's sovereign debt has been downgraded to junk status by two ratings agencies. At the same time, there are many other demands on the public purse – which confirms that little additional revenue can be made available for land restitution. [2017 *South Africa Survey*, p216; *Fast Facts*, February 2017]

This situation is likely to encourage the government to expropriate land under claim for amounts significantly below market value. This outcome will also be facilitated by the Expropriation Bill of 2015, which is currently back before Parliament for re-enactment (as it was previously adopted without proper public consultation). It could also encourage the ANC to endorse recent suggestions, made both by Mr Zuma and by Mr Nkwinti, that the Constitution should be amended to allow expropriation without compensation. [*Legalbrief* 20 February 2017] However, any widespread use of expropriation – especially if compensation is limited or non-existent – is likely to cripple the already struggling economy. Again, the effect will be to deepen poverty, inequality and unemployment, rather than help to overcome these ills.

5.11 An increased risk to the ruling party's electoral support

The more unemployment rises, inflation soars, and hunger spreads in the wake of widespread land expropriation, the more popular anger is likely to be directed against the ruling party. The result, as has happened in Venezuela, could well be a host of angry demonstrations against the ANC, followed by the loss of the ruling party's current majority in Parliament.

The ANC won its present 62% majority in the National Assembly in the 2014 general election with the support of only 36% of all eligible voters. By contrast, roughly 40% of those voters stayed away from the polls, preferring not to vote at all. Should this large bloc of potential voters decide to shift their support to opposition parties, the ANC will no longer be able to command a 50% majority in Parliament. This risk has been confirmed by the outcomes of the local government elections in 2016, in which the ANC won only 54% of the

vote. [2017 *South Africa Survey*, pp902-904] The ruling party can thus no longer be confident of its hegemony.

The ANC may believe that popular endorsement of land reform will shield it from any major loss of electoral support, but this is not so. On the contrary, public demand for farming land in this highly urbanised society is very limited. This is evident from an opinion survey carried out in 2005, and has recently been reconfirmed by two comprehensive opinion polls commissioned by the IRR.

In 2005 an opinion poll carried out for the Centre for Enterprise and Development, a non-governmental organisation, found that only 9% of black South Africans wanted land to farm. The remaining 91% were keen to leave the harsh demands of farming to find easier jobs in the towns and cities. They thus had no interest in farming land, but instead wanted urban land suitable for housing and the building of communities. [Jeffery, *BEE: Helping or Hurting?* p305]

Two comprehensive opinion polls commissioned by the IRR have since confirmed that there is little popular demand either for farming land or for widespread land redistribution. These field surveys (the first conducted in September 2015 and the second a year later, in September 2016) began by asking respondents to identify 'the two most serious problems unresolved since 1994'. In 2015, a mere 0.4% identified skewed land ownership as a problem of this kind. In 2016, the proportion flagging this issue as a serious unresolved problem was much the same, at 0.6%. In addition, when people were asked to list 'the two main causes of inequality', only 1% of the respondents canvassed in 2015 identified land as such a cause. In 2016, that proportion was lower still at 0.3%. [Anthea Jeffery, 'BEE doesn't work, but EED would', *@Liberty*, April 2016; Anthea Jeffery, 'EED is for real empowerment, whereas BEE has failed', *@Liberty*, April 2017]

Moreover, when respondents in the 2015 survey were thereafter expressly asked whether 'more land reform' was 'the most important thing that the government could do to improve the lives of people in their communities, a mere 2% endorsed this option. In 2016, in response to the same question, this proportion was lower still at 1%. [Ibid]

The IRR's 2016 field survey also asked respondents whether they would 'prefer a political party which focuses on faster growth and more jobs, or one which focuses on land expropriation to redress past wrongs'. In reply, 84% of black South Africans opted for the former and a mere 7% for the latter. [Jeffery, 'EED is for real empowerment', *@Liberty*, April 2017]

These results confirm that few people want radical land redistribution. Hence, if the ANC uses the Amendment Bill (or other measures) to bring this about, it is likely to pay a heavy electoral price for the resulting damage to the economy.

6 No socio-economic assessment of the Amendment Bill

Since September 2015, all new legislation in South Africa has had to be subjected to a 'socio-economic impact assessment' before it is adopted. This must be done in terms of the Guidelines for the Socio-Economic Impact Assessment System (SEIAS) developed by the Department of Planning, Monitoring, and Evaluation in May 2015. The aim of this new system is to ensure that 'the full costs of regulations and especially the impact on the economy' are fully understood before new rules are introduced. [SEIAS Guidelines, p3, May 2015]

According to the May 2015 Guidelines (the Guidelines), SEIAS is also intended to ensure that 'government policies do more to support [four] core national priorities'. These are 'social cohesion, economic inclusion, economic growth, and environmental sustainability'. [Guidelines, p6] The Guidelines state: 'A common risk is that policy/law makers focus on achieving one priority without assessing the impact on other national ones.' What is needed, however, is for 'a balance to be struck between protecting the vulnerable and supporting a growing economy that will ultimately provide them with more opportunities'. [Guidelines, p6]

The Guidelines expressly deal with proposed new legislation that aims to 'achieve a more equitable and inclusive society', but which 'inevitably imposes some burdens on those who benefited from the pre-existing laws and structures'. The document notes that 'relatively small sacrifices on the part [of past beneficiaries] can lead to a significant improvement in the conditions of the majority'. However, it adds, 'the challenge is to identify when the burdens of change loom so large that they could lead to excessive costs to society, for instance through disinvestment by business or a loss of skills to emigration'. [Guidelines, p11] It is, of course, precisely such major economic risks that the Amendment Bill raises.

According to the Guidelines, SEIAS must be applied at various stages in the policy process. Once new legislation has been proposed, 'an initial assessment' must be conducted to identify different 'options for addressing the problem' and making 'a rough evaluation' of their respective costs and benefits. Thereafter, 'appropriate consultation' is needed, along with 'a continual review of the impact assessment as the proposals evolve'. [Guidelines, p7]

A 'final impact assessment' must then be developed that 'provides a detailed evaluation of the likely effects of the [proposed law] in terms of implementation and compliance costs as well as the anticipated outcome'. When a bill is published 'for public comment and consultation with stakeholders', this final assessment must be attached to it. Both the bill and the final assessment must then be revised as required, based on the comments obtained from the public and other stakeholders. Thereafter, when the bill is submitted for approval to the Cabinet, the final assessment, as thus amended, must be attached to it. [Guidelines, p7]

However, no SEIAS assessment of the Amendment Bill, either initial or final, has been carried out and made public. An initial assessment should have been conducted to sketch different options and provide 'a rough evaluation' of their respective costs and benefits. This

should then have been made available to help inform and guide public comment, as the Guidelines require. Thereafter, a final assessment should have been developed, which should have included a 'detailed evaluation' of likely effects, compliance costs, and anticipated outcomes. This final evaluation should have been attached to the Amendment Bill when it was published for public comment.

Instead, however, the SEIAS requirements have been ignored. In addition, as the Memorandum on the Objects of the Amendment Bill makes clear, no attempt has been made to 'determine the financial implications' of extending the period for the lodgement of claims to 30th June 2021. It is not permissible to duck the issue (as the Memorandum does) by saying that these financial implications cannot be determined because they will be 'directly influenced by the number of claims lodged as well as the extent of such claims'. [Para 3, Memorandum]

These failures confirm yet again that the process of public consultation on the Amendment Bill has been fatally flawed. As Mr Justice Albie Sachs stressed in the *New Clicks* case before the Constitutional Court: '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' (emphasis supplied by the IRR). It is not possible for the public and interested parties to have an adequate knowledge of the relevant issues in the absence of the necessary SEIAS assessments – or even of any realistic attempt to determine the financial implications of extending the lodgement period. These defects must also be remedied.

Hence, an initial SEIAS assessment should be drawn up and made available, in precisely the way the Guidelines require, before any further step towards new legislation can be taken. Such an initial assessment should take full account of all the issues that have been raised in this submission. It should also not simply be assumed that this initial evaluation will support the re-opening of the land claims process, as the Amendment Bill posits. Any such assumption would make a mockery of the SEIAS process and the rigorous exploration of options and likely outcomes that it is intended to ensure.

Once these steps in the SEIAS process have been taken, it may be possible to proceed with the drawing up of further legislation – unless, of course, the initial SEIAS assessment warns against this. Any further legislation must then be accompanied by a 'final' SEIAS assessment, which must provide the various 'detailed evaluations' required. This final assessment must be attached to the new bill when it is published for comment and consultation with stakeholders. Necessary changes both to this bill, and to the final SEIAS assessment of its likely impact, must be made before the new measure is submitted to the Cabinet for approval, with the amended final SEIAS assessment appended to it.

Unless and until these steps have been taken, not only the government's SEIAS rules but also the constitutional imperative to 'facilitate public involvement in the legislative process' will be fatally undermined. This in itself will provide good reason for any legislation re-opening the land claims process to be struck down in its entirety by the Constitutional Court. [See

Section 59(1)(a), 1996 Constitution and relevant Constitutional Court judgments, as previously described.]

7 Incorrect procedural 'tagging' of the Amendment Bill

The Memorandum to the Amendment Bill states that the Bill must be dealt with by Parliament under 'the procedure established by Section 75 of the Constitution', as it contains 'no provision to which the procedure set out in...section 76 of the Constitution applies'. [Para 7.1, Memorandum] The Section 75 procedure applies to 'ordinary Bills not affecting provinces', whereas the Section 76 procedure is required for ordinary Bills that do affect the provinces. [Sections 75, 76, 1996 Constitution]

The Amendment Bill has major implications for agriculture, which is a matter of concurrent national and provincial jurisdiction under Schedule 4 of the Constitution. It is thus an ordinary Bill which affects the provinces and must be dealt with under Section 76 of the Constitution. Tagging it as a Section 75 measure is incorrect and provides a further basis on which the Amendment Bill can be struck down.

The Amendment Bill has also been incorrectly tagged as having no 'provisions pertaining to customary law or customs of traditional communities' and hence as not needing to be referred to the National House of Traditional Leaders under Section 18(1)(a) of the Traditional Leadership and Government Framework Act of 2003. [Para 7.2, Memorandum] However, the Amendment Bill (in combination with exhortations from Mr Zuma) is likely to lead to substantial land claims being submitted by various traditional leaders, such as the Zulu monarch, King Goodwill Zwelithini. Such claims are likely to generate major disputes as to which traditional communities and leaders have historical claims to particular parcels of land. The Amendment Bill thus has major implications for customary law and the customs of traditional communities and needs to be referred to the National House of Traditional Leaders for comment before Parliament adopts it.

8 Finding effective solutions to poverty

Though major progress has been made in many spheres since 1994, South Africa still has high levels of unemployment, poverty, and inequality. These need urgently to be addressed. Often, these evils have been made worse by the Government's own policies – and particularly by the ANC's commitment to a 'national democratic revolution' (NDR) which aims to take the country to a socialist and then communist future. These NDR policy interventions must be reversed if unemployment, poverty, and inequality are to be overcome.

These triple ills will be exacerbated if the deeply flawed land claims process is re-opened in the way the Amendment Bill envisages. The ANC needs also to acknowledge that its oft-repeated assertion that access to land will bring incomes and jobs to the poor has no basis in reality. Ordinary people have long been voting with their feet against this idea by moving to town. The money that would have to be spent under the Amendment Bill on investigating and settling some 400 000 new land claims would thus be far better used in buying land for housing in the cities and towns.

The ANC also needs to shift its focus from bringing about ever more redistribution to promoting rapid economic growth. As is now increasingly evident, a different way of dividing up a stagnant economic pie will never be enough to meet the needs of an expanding population. By contrast, if the growth rate could be pushed up to 5.4% of GDP, as the National Development Plan envisages, the size of the economy would double in roughly a decade. Nothing could be more effective in expanding opportunities for the disadvantaged and helping them to climb the economic ladder.

By contrast, if the land claims process is re-opened in the way the Amendment Bill envisages, all the negative outcomes earlier outlined are likely to materialise. Property rights will be fundamentally eroded, deterring investment, reducing growth, and adding to unemployment. Agricultural production will falter, leading to higher food prices and worsening hunger, especially for the poor. Destitution and desperation will increase, while the ruling party could also pay a heavy price for this in lost electoral support. At the same time, there will be few compensating benefits for anyone and little effective redress for past injustices. The Amendment Bill should therefore be abandoned, rather than enacted into law.

South African Institute of Race Relations NPC (IRR) **19th May 2017**