

The Land Claims Court



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Introduction

IT is a great irony of the new South Africa that one finds the Land Claims Court just off Hendrik Verwoerd Drive in the Trust Bank Centre in Randburg. The court will preside over the realignment of property rights in South Africa to take account of our history of racially based dispossession. It consists of five members: the president and four other judges. Hearings of the court are ordinarily considered by a single judge and an assessor or assessors who have jurisdiction over issues of fact.

Although it is based in Randburg, it has jurisdiction throughout the country and will frequently operate as a circuit court.

Jurisdiction of the court

The court is a product of the Interim Constitution and the Restitution Act. Sections 121–123 of the Interim Constitution promised restitution or equitable redress to individuals and communities who were dispossessed of rights in land under racially discriminatory laws in force in South Africa at any time since 1913. The Restitution Act established the court to achieve this constitutional purpose. Originally the jurisdiction of the court was limited to claims brought under sections 121–123 of the Constitution and related matters. Since 1996, however, the jurisdiction

of the court has been extended by the Land Reform (Labour Tenants) Act. The Labour Tenants Act aims to provide security of tenure to labour tenants and grants labour tenants the right to acquire the land upon which they reside. Section 29 of the Labour Tenants Act vests the court with jurisdiction to hear all disputes arising out of the provisions of the Act. This jurisdiction includes the power to grant interlocutory relief. Section 32 gives the court exclusive jurisdiction to review decisions purportedly taken in terms of the Act.

The jurisdiction of the court is likely to be extended further by additional legislation enacted by Parliament to give effect to the new land rights created by section 25 of the 1996 Constitution. Thus section 18 of the draft Extension of Tenure Security Bill, 1997 grants the court jurisdiction to decide on disputes arising out of the measures it introduces to extend security of tenure in rural areas.

Procedure before the court

Procedures in matters coming before the court are governed by the court's Rules. Given the subject matter with which the court will deal and the claimants who are likely to appear before it, one may have expected the court to adopt a less formal procedure than that of the High Court. Despite this, most of the court's rules appear to be based on the Uniform Rules of Court and, in fact, the rules expressly provide that the Uniform Rules are to be used to regulate any matters which they do not cover. An attempt has, however, been made to simplify the forms corresponding to those found in the schedules to the Uniform Rules. There are also several rules which have no precedent in the Uniform Rules but are designed specifically to cater for

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administrative procedures which are set out in the Restitution and Labour Tenants Acts. For example, there are rules regulating the referral of settlement agreements or disputes by land claims commissioners under the Restitution Act, and rules regulating the relationship between the court and arbitrators appointed under the Labour Tenants Act.

A noteworthy addition to the Uniform Rules is rule 14. This rule provides for the admission of an *amicus curiae* in a matter and appears to have been modelled on rule 9 of the Constitutional Court Rules. The court will have to confront difficult questions of policy and the presence of *amici* is likely to be of assistance in many cases. However, an unfortunate omission in rule 14 is the absence of any time limits for the admission of an *amicus*. Experience in the Constitutional Court has shown that even with time limits the admission of an *amicus* can frequently cause prejudice to one of the parties by allowing the introduction of new arguments or evidence at a stage in proceedings where it is difficult to respond properly to such arguments or evidence. The absence of time limits for the admission of an *amicus* in the Land Claims Court Rules seems to increase the potential for such prejudice.

Matters before the court will frequently present disputes of fact relating to events which took place in the distant past. In terms of the Restitution Act, the court will hear claims relating to forced removals which may have taken place as long ago as 1913. To determine whether a person claiming to be a labour tenant on a particular farm actually qualifies as such under the Labour Tenants Act, the court has to establish whether the parent or grandparent of that person was also a >

labour tenant of the owner of the farm or one of the owner's predecessors in title. It is quite possible that such an enquiry will relate to facts existing prior to 1913. In these circumstances the court must be able to adopt a flexible approach to the admissibility of evidence. The Restitution Act makes provision for this by stating that "the Court may admit any 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". The Act specifically contemplates the admission of hearsay evidence relating to the circumstances of dispossession of land and the rules relating to allocation of land within a dispossessed community at that time, as well as the admission of expert anthropological and historical evidence in support of restitution claims.

The equitable jurisdiction of the court

A striking feature of the jurisdiction of the court is that it is an equitable jurisdiction. Section 33(c) of the Land Restitution Act enjoins the court to have regard to "the requirements of equity and justice" in any matter which it decides while the Labour Tenants Act is replete with references to the "just and equitable." It is not possible to predict how this equitable jurisdiction is likely

to develop on the basis of the few judgments which the court has handed down thus far. What is clear, however, is that significant aspects of the law relating to land restitution and land tenure reform will be developed by judges through the exercise of this equitable jurisdiction. Questions likely to confront the Land Claims Court judges in this regard include the following:

- When is it appropriate to award compensation to successful claimants rather than to restore land to them?
- To what extent should the ability of claimants to use the claimed land productively affect the decision whether or not to restore the land to them?
- How should competing claims in respect of the same land be approached?
- What principles should guide the expropriation of land for the purposes of restoration of land rights?
- How should compensation be quantified and what forms should it take?
- Should rural and urban land claims be treated differently?
- How are the tenure rights of labour tenants (and possibly other rural residents) to be balanced against the rights of rural landowners for the purposes of determining when an eviction is just and equitable?

The equitable jurisdiction of the court has no obvious precedents in

South African land law but the court may be able to draw on the experience of other countries in deciding how to exercise its jurisdiction. One obvious comparative jurisdiction is England where the Chancery Courts developed the principles of Equity in response to the formalistic shortcomings of the English common law. Another country whose experience may prove instructive for the court is Germany. Germany shares with South Africa a recent history of arbitrary dispossession, land seizures and forced removals. German courts have been grappling with issues of reparation and restitution since the 1950s, first in the context of Nazi confiscations and more recently in the context of expropriations in the former GDR.

Conclusion

The Land Claims Court confronts a difficult challenge. It must balance the protection of private property rights against the need for restitution. It will hear demands for stability and security from existing property owners and demands for justice and reparation from the dispossessed.

The legislature has seen fit to give the court the broadest possible equitable jurisdiction with which to meet this challenge. How it decides to develop this jurisdiction will be a most interesting legal process to follow. 

The Land Claims Court in session in the new court building in Randburg.

(See the report on the appointments to the court on pages 23 and 24 of this issue.)



From left to right: Judges Gildenhuys, Meer, Bam (president), Moloto and Dodson.