

MCA 91-113-3-5

PROPOSAL FOR A  
LAND CLAIMS COMMISSION

This document assumes that readers already have read the report of the Working Group on Land Claims Court, and are familiar with the concepts of a Land Claims Court (LCC), and the broad idea of a Commission to serve as a secretariat to the LCC.

It must also be emphasized that the proposals contained in this document only deal with the internal organisation of the LCC and its Commission. It might contribute to the regulations which a Land Claims Commission would adopt, rather than the legislation establishing the LCC.

The work of the LCC will only be successful if it occurs in the context of other, parallel processes of land reform, for example farmer settlement programmes, land redistribution programmes, rural and urban housing schemes, subsidy schemes, agricultural support programmes, etc. Plans for such programmes do not exist yet. However good the internal organisation of the LCC may be, it is unlikely to survive, if all the pressure of land needs is placed upon it alone.

1. Process of a claim

1.1. Receiving a claim and assessing it

On receiving a claim, the Commission should assess whether the claim meets the basic entry criteria:

- long occupation & birthright
- forcibly removed under Apartheid
- suffered loss

If the case is an undisputed one of forced removal, and the land is State-owned, it should be referred to a fast-track administrative process (see below). In other words, the land should be given back quickly.

If the case meets the criteria, but there is an element of dispute (e.g. the land is now privately owned; or there are rival claimants), then the Commission would need to go through the whole process -- investigating the claim, setting up a hearing with the Court, producing a final decision, and the implementing that decision.

If the claim does not meet the basic entry criteria, it should be referred to other land reform processes. The presence of an overarching Land Reform Secretariat would be helpful in

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channeling cases to the right body.

Where there is reasonable fear that the land and property being claimed might be damaged by present owners or occupants, the Commission should take an inventory of what exists on the farm. This should help as a deterrent against destruction of property to frustrate land claims.

#### 1.2 Onus of providing information

The onus of providing information should be divided between the claimants and the Commission.

The Commission must have access to government documents (this is not an easy task). It must have the legal powers to search for evidence. The information they gather should include

- Farm name, number and extent (hectares)
- Present legal owner (Deeds Office)
- Documentary proof relating to past ownership -- title deeds, land grants, Trust arrangements, permissions to occupy
- Records of compensation paid for land and houses

The claimant can be expected to provide basic information to the Commission

- the land being claimed (traditional names, if possible also farm names and numbers)
- who is making the claim & their representatives
- the history of the community
- history of the forced removal
- the basis of the claim
- the number of people that can be expected to return
- what happened to the land after the dispossession
- broad principles of intended land use (not detailed plans, but an indication of farming, or township, or in between)

#### 1.3 advertising

Advertising is important in order to ensure that all possible claimants are aware of the case, and submit their claim within a reasonable period. Suggestions for advertising include local newspapers, radio, magistrate's offices, schools, churches.

Care should be taken to identify the land not only by its official name (mostly in Afrikaans), but that alternative, traditional names are also prominently visible (e.g. the farm "Kaffirskraal 453" should also be advertised as "Magogoane").

#### 1.4 Difficult question of time

The problem of unacceptable delays was one of the most common criticisms of CLA. Communities want a decision to be reached and implemented as quickly as possible. This proved impossible, even in the seemingly most clear-cut cases of restoration of vacant state land. Horatius Mabaso put it as follows:

"We realise that ACLA is delaying communities in getting back their land. While we are talking to ACLA, the government is selling land and giving land to the Bantustans.

If the new Commission does not want to be criticised in the same way, it will have to find mechanisms to address the problem of delays.

The question of time raises a tension between the urgency for quick solutions, and the need for lasting solutions. The land claims procedure should be designed in such a way that cases are settled as finally as possible. After 10 years, one would want to know that most land claims in terms of Apartheid policies have been addressed. This is important for the security of all those working on the land, and is a critical factor to stimulate productivity in the rural economy.

There seems to be no solution to this dilemma in terms of time. Communities want solutions quickly; yet society at large must demand that solutions are lasting, even if it takes more time to find those solutions.

Perhaps the answer lies not so much in the question of time, but in keeping the claimants well informed of the process, and where possible even involved in the process. If a community submits its claim, and hears nothing again for the next 6 months, they are likely to pressurise for more action. If they are kept informed of investigations going on, and meetings between the Commission staff and the community are held, such problems are less likely to arise.

If one divides the process of a claim into three broad time periods, from submission to hearing to decision to implementation, then possible delays might be addressed in the way suggested below:

The other potential solution to this question of delays must lie in the possibility of introducing fast track and slow track procedures.

**Fast track:** Those claims which clearly involved the removal of a relatively homogenous community, and where the land is still owned by the State, should be able to be dealt with by a shorter procedure than the Commission. In such cases, there should be no dispute between rival claimants, or between claimants and

#### Submission of claim

Delay: No indication given of process of investigation, community not involved --> secretariat

#### Date of hearing

Delay: Community presents its case, delays surrounding vetting of decision by different departments, the President's Office, the Minister, etc. --> give power to LCC

#### Decision by LCC

Delay: Lack of clarity which Govt. dept. is involved, lack of political will to give back land --> secretariat to tell community which right dept/official to go to

#### Implementation of decision

present land owners. These cases should be dealt with in a speedy administrative process. The Commission's only role would be to assess which cases fell into this category, and to advertise for other claimants. The Bakubung, for example, should have been able to get their land back through such a process.

There will need to be some further definition of cases qualifying for this fast-track treatment. If defined tightly, there will be hardly any cases. Two further definitions might help:

If there are lease-holders on otherwise vacant State land, this land should be considered for the fast-track method; this is the case where the State has leased the land as additional grazing land to farmers;

If a strong historical claim is submitted, and rival claimants are only claiming the land on the basis of need (for development), the Commission should be able to deal with this land by the fast-track method.

Slow track: Most cases will involve some sort of dispute -- most commonly between a black community claiming the land, and a white farmer or company who bought the land after the removal. Disputes may also arise between different groups of black claimants. Here, the full process outlined in this document should take place.

Overall, the process of settling land claims should not take more

than 10 (or 5?) years. A difficult question which remains is whether within this period, cases can be re-opened if new claimants emerge.

1.5 Preparing for a Land Claims Court Hearing

One of the key tasks of the Commission would be to prepare a consolidated document outlining the background of the case for the Land Claims Court. This would include the information provided by the claimants, and additional information gathered by the Commission from Government files, site visits, and meetings with the community.

The Commission should also attend to the translation which will be required, and arrange that -- either by allowing the community's own translators, or provide translators.

The Commission should also make provision for oral evidence to be allowed in the hearing. Where claimants have difficulty in writing down their history in detail, oral evidence should be considered with the same weight as written evidence. Claimants must be allowed to speak in their own language. Their testimony should become part of the Court record.

The Interim Constitution requires that the state certify that restoration is feasible, i.e. practically achievable. The Commission will have to ensure that such a certificate is obtained before any hearing. The easiest procedure seems to be that the Commission itself should recommend to the Minister of Land Affairs to certify feasibility. This would avoid duplication of investigations into the facts around the claim.

1.6 Getting decision ratified

Presumably the Land Claims Court will have the necessary power to make decisions. This should deal with problems experienced with CLA, where there were lengthy delays between CLA's recommendations, and the final decision by the State President or Minister of Land Affairs.

Decisions on the fast-track cases should be ratified by the Court (presuming the Commission is not given this power itself?). There should be regular reporting times on these fast-track cases. Assuming that these would not occupy much of the Court's time, one could suggest that half a day is set aside every two weeks (or month) to process these cases.

As soon as the Land Claims Court has made a decision, the Commission should immediately inform the community of the decision. The Commission should then also publish its full finding, together with reasons. This could be done in the Government Gazette, and these findings should be made available to all interested parties on request (perhaps at cost price?). Claimants should receive these as a matter of course, and free of charge.

The responsibility of informing claimants of the decision the Land Claims Court should lie with the Commission (CLA refused to accept this responsibility). The Commission should go further than this, and make sure that it liaises with communities on an on-going basis throughout the passage of the claim through the Land Claims Court process.

### 1.7 Implementation

The LCC and its Commission are not bodies designed to plan the resettlement of communities, or their subsequent development. CLA has made quite detailed recommendations at times, attaching conditions regarding development to the return of the land. This should be avoided.

The LCC and the Commission should have the power to award the land to the claimants, not merely offer options to buy. As community reps at the Restoration Workshop (Sept. 1991) said

*"The Commission should have the power to give us our land back. It should deal with each community's claim as quickly as possible."*

The Commission should follow up whether decisions of the Court have been implemented by government departments. Transfers of title should be implemented within a period of 6 months. Where a government department fails to carry out a Court order within the time specified, the Commission should first remind them of the case, and failing compliance, institute proceedings for contempt of Court against the department concerned.

The Commission should immediately inform claimants of Court decisions. Claimants would then be free to publicise these decisions. Where appropriate, the Commission should consider publicising the decisions itself through press statements and conferences.

### 1.8. General Issues

#### 1.8.1 Community Liaison Office for Land Reform

For a number of reasons (time delays, liaison with communities, embedding the process in the context of broader land reform) motivated above, it would seem helpful to have one over-arching body which is familiar with all land reform processes. Such a body would be a contact point and resource agency for any person needing land, whether in terms of historical claims, or simply for development needs. This body should employ fieldworkers, and set up good channels of communication with claimants and the various government agencies. There should be a toll-free number which people can phone.

The role of this Office would be to be the first contact (the

"public face" of land reform), to direct applicants to the appropriate body (LCC, farmer settlement programme, etc.), and should follow the progress of cases through the various bodies dealing with land reform. Such a secretariat would need to be in a position to give responses to claimants on the status of their case. This role should continue beyond the court ruling, right up to the time the land is registered in the name of the claimant, i.e. the secretariat should also follow the case through implementing agencies such as the Dept. of Land Affairs, provincial governments, Agricultural Credit Board, Agricultural Department, and any other bodies who may be involved.

The role envisaged for this office is a resource role, not a decision-making one. However, in order to be able to assist claimants effectively, the Office would need to have channels of reporting undue delays or other problems. One possible mechanism would be that the Office could report problems to the Minister of Land Affairs on a monthly basis, with copies to the responsible departments. The Minister would have the power to solve the problems.

Such an office would have to define its relation to a future Department of Land Affairs. The Liaison Office should not duplicate the work of such a department. It will be important for the Commission to be allied to as powerful a department as possible.

#### 1.10 Group Areas Sub-Committee

Given the complexity of GAA cases, they would probably require a special sub-committee of the Commission. GAA claims need to take into account the national economic plan, and urban renewal projects more strongly than other claims. The participation of civic bodies is also likely to be stronger in this area.

Ask Dave Mayson (SPP) for a more detailed proposal here.

#### 1.11 Nature of the Court

The Land Claims Court and the Commission should be de-centralised to the regions. Within the regions, the Commission should be able to travel around and hold meetings at local centres, and in affected communities. Court hearings too should be mobile. One single mobile court, however, would be insufficient to deal with the case load to be expected; there should be several mobile courts.

The members of the commission should not be exclusively, or even predominantly, drawn from the legal profession. They should include people with knowledge of land issues, land use planning, and rural communities.

Given that the Judge presiding over the Court is likely to be appointed by the state, it would lend legitimacy to the

Commission if key members were elected or nominated by a popular process, similar to those for the SABC Board. At the National Restoration Meeting in September 1991, delegates said:

"A proper Land Commission should represent us, the affected communities. The Commission should be comprised of representatives of farming communities, political organisations, service organisations, churches and lawyers, not only of state appointed officials." (My emphasis)

How could this be done? If the Commission is divided into regional sections, it would for instance be feasible to advertise for nominations to these positions, both publicly and among interest groups. Once a list of nominations has been received, applicants could be interviewed. Alternatively, the process could be reversed, with the state/provincial govt making a list of nominees available, and seeking approval from various interest groups. [In both cases, the question remains: Who would make the final decision, and how would it be made?]

#### 1.12 Other general things the Commission should do

The Commission would probably be well advised to employ a number of fieldworkers to liaise with claimants.

The Commission should establish a procedure within its first year of operation, and then be consistent in applying it. Its procedures should be public knowledge. One of the more frustrating aspects of CLA was that each time a process came to its supposed end, new requirements would appear.

In order to explain its procedure, the Commission should produce accessible material, e.g. in cartoon form, in video form, in poster form, in all languages, explaining what the LCC is, and how people can go about making a claim, also giving contact addresses of local service organisations who can help.

The Commission should be able to intervene to prevent evictions of farmworkers and labour tenants, and to prevent the further alienation of state land. (Will it have the power to do so?)

#### 1.13 What the Land Claims Commission should NOT do

The Commission should avoid secret deals of any kind, and the withholding of information "while other parties are consulted". CLA and the DRLA frequently refer questions to the other, and refuse to give information regarding a case. The Commission should aim at as much transparency as possible. This would be assisted by an overarching Land Reform Secretariat.

The Commission, and the Court, should avoid making detailed recommendations regarding the land use and development of the land (GAA cases may be an exception to this). The role of the



LCC is to make a decision about land ownership, based on justice.

The Commission should avoid being bogged down with "claims" brought by white farmers to delay the Court, or by black communities seeking land for development. The Commission should be directed to give priority to cases resulting from the Apartheid policies of forced removals, homeland incorporation, and evictions.

The last word should go to the representatives of 60 communities who issued a press statement in August 1993 about the Land Claims Court and Commission:

"We demand that a representative land claims court is set up to deal with land claims. The Commission on Land Allocation is slow, unrepresentative and toothless ... we need a land claims court which is representative of the people. We need a court which can take decisions. We need a speedy process.

When we were removed, no-one came to us to negotiate the terms in lengthy legal processes, why can't the process be reversed just as speedily?"

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