

Maduna  
 Strategic  
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 Priorities  
 Drafting  
 (Structure)  
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 Forced removals  
 Injustices - state  
 Principles  
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 Min (Ref)  
 Legal/Pol

**LAND CLAIMS COURT MEETING**  
**18 February 1994**

MCH91-113-3-4

- Penuel Maduna
- Mathew Phosa
- Aninka Claassens
- Geoff Budlender
- Ezra Sigwela
- Albie Sachs
- Brendan Pearce
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- Freddie Bosman
- John Nkadimeng
- Ray Mabope
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Apologies:

- Zola Skweyiya
- Pius Langa (to be replaced by a NADEL JHB delegate)
- Bahle Sibisi
- Glenn Thomas
- Cawe Mahlali
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- Mamlydia Kompe
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## LAND RESTORATION AND A LAND CLAIMS COURT

### Introduction

In order to build secure property rights in a democratic South Africa, it is necessary to deal equally with existing property and with the rights of those whose property was confiscated under apartheid. Ready to Govern states "Priority will be given to victims of forced removal who, wherever possible, should get land back taken from them by the apartheid state."

People who were dispossessed of their land and homes are entitled to restitution. The ANC is committed to an independent, open and accessible process to give effect to this right and to resolve conflicting claims. This will be achieved through a land claims court.

The nature of the right will be defined by law. The remedy may take different forms depending on the nature of the removal and the property which was lost. Wherever possible, the remedy will be to restore the land to the people who lost it. In cases where this is not feasible, the remedy may take various forms including compensation, the award of alternative land, or priority access to state resources in appropriate development processes. Access to these resources will be structured to reflect this entitlement.

This commitment is potentially endangered by constitutional principles which protect existing (usually white) property rights while ignoring past claims of property rights (usually of black people). The ANC is committed to creating a constitutional environment in which this imbalance can be corrected.

It needs to be recognised that restoration of land is not primarily about looking backwards - although there is certainly a need to deal with the injustices of the past. The restoration process can and should be forward-looking:

- (a) Restoration of land is essential for the very survival of landless people whose lives were devastated by the loss of their land.
- (b) Restoration of land is a necessary element of building a system of secure property rights for all.

The legislation should be structured to achieve these forward-looking goals.

#### I. The underlying principle:

People who lost land or rights to land as a result of apartheid policies, practices or laws, and who were not adequately or effectively compensated, are entitled to the restoration of their land.

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In cases where apartheid laws prevented people who were living on land from obtaining secure title to that land, the people concerned are entitled to secure title to the land.

**II. The method:**

Parliament will create a land claims court by statute. The membership of the court will not be limited to lawyers, as other forms of expertise will also be relevant to the determination of claims and the making of awards.

Although there is a common basic principle of restoration, there are different categories of removal or deprivation which may require different forms of reparation. These will be spelt out in the law.

It is critical that the process of the land claims court should be speedy, accessible and effective.

- (a) **Speedy:** The experience of the past two years with the Advisory Commission on Land Allocation has demonstrated that unless the court is appropriately structured and funded, with appropriate terms of reference, the land claims process can be so slow that it does not produce effective results. People who lost their land through forced removal legitimately demand that their land should now be returned to them, without further delay.
- (b) **Accessible:** Rural people should have easy access to the land claims process. The notion of accessibility has a number of dimensions. The court must itself be physically accessible, and will need to sit in panels which conduct hearings around the country. The process of the court must not be so technically complex that it in effect excludes or discriminates against people who have little formal education. And the court must be able to receive all evidence which it considers relevant and cogent.
- (c) **Effective:** The international experience demonstrates the risk of obstruction of a land claims process through delay, pre-emptive action, and abuse of the legal system. The court process must be structured so that this is not possible.

**III. What claims?**

It will be necessary to establish a historical cut-off date to determine what removals will be dealt with by the court. Two dates which have been suggested are 1913 (the date of the Native Land Act, which laid the foundations for the removal and eviction policies which were to follow) and

1948 (the date when apartheid in its modern form became government policy). Whatever date is finally adopted, it is not intended to include claims based on removals which took place before 1913.

**Rural "black spot" removals:** The law will provide that the usual solution will be that the land will be returned to the people who occupied it, or had a right to occupy it, at the time of the removal. It will make provision for appropriate democratic community-based institutions for holding and managing land.

**Urban removals:** In principle, there is no difference between urban and rural removals. However, there are practical differences. These include the following factors: urban land is more likely to have been transformed, and its use may have been changed, with the result that in more cases it is not possible to restore what was removed; urban land-owners usually received at least some compensation, although inadequate, for what was taken from them; whereas there is a relatively limited number of community-based rural claims, there is potentially an enormous number of individual urban claims, which could overwhelm the capacity of the court; and restoration of rural land is generally possible at a manageable cost and with limited social disruption.

However, the differences between urban and rural removals are not sufficient reason for excluding urban claims. The underlying unifying principles remain valid. The differences are reason for recognising that while in a substantial number of cases the restoration process will be the same, in others it will be necessary to find different sorts of solutions. These different solutions will be created by the law, and applied by the court.

**"Betterment" schemes:** Through apartheid "betterment" schemes, large numbers of people in the rural areas lost their land. In principle, the people affected have a right to restoration. However, in most cases restoration of that particular land will cause major social disruption, because large numbers of rural people were awarded the land. In those cases, the court will enquire into what remedy would be appropriate to give effect to the entitlement of the people concerned to restoration. In many cases, the most suitable remedy would be the allocation of alternative land to communities which lost their land through "betterment", with provision in the award for an inclusive and democratic allocation process to ensure that the land reaches the landless.

**Labour tenants:** The law will provide a procedure for labour tenants to obtain secure real rights to the land which they occupy and use. The legal confirmation of existing practices need not imply that existing (white) owners lose their farms. Rather, the likely solution is

that the rights of the tenant family will be registered against the title deeds, so that all future transactions of the land do not threaten the continuing land use rights of the tenant farmers.

#### IV. Compensation

The issue of compensation is fundamental to the land claims process. On the one hand, existing owners are worried that their land will be expropriated without fair compensation. On the other hand, if the compensation formula makes restitution prohibitively expensive, it shuts out claims by people whose property rights were confiscated without adequate compensation in the past.

Care must be taken not to burden unfairly one or the other side in this dispute with the costs created by forced removals. It is not constructive to provide guarantees to one side only. The most constructive approach is to ensure that the costs are borne by the society at large (which should pay the cost of solving this social problem) - or if necessary shared proportionately by the parties affected. The setting aside of adequate state resources is fundamental to the success of the land claims court process.

#### V. Procedure

In disputed cases, where existing rights are affected by historical claims - for example where people acquired land from which others had been removed, or in the case of claims by labour tenants - all parties will be able to make submissions and appeal against awards. However, in order to ensure that the process is not obstructed through filibustering tactics, the law will provide that while persons affected have a right to make representations, this will not include the right to make oral representations unless the court so decides.

The law will provide an expedited "fast-track" procedure for restoration of land lost through black spot removals.

The court will be empowered to decide to deal with all claims within a particular area, rather than waiting for each individual claim to be lodged. In such cases, appropriate notice will have to be given to all those potentially affected.

The process will be structured so as to encourage local solutions rather than litigation, so that the parties are enabled to reach a solution amongst themselves. Where they reach such a solution, the court will have the power to register this as an award. Conversely any action taken to pre-empt claims, such as the eviction of labour tenants,

will create the circumstances which make court adjudication of the dispute the only solution.

People claiming restoration of land will be entitled to lodge their claims at regional offices, which will forward claims to a central office. On the lodging of the claim, notice of the claim will be given to all interested parties, and steps will be taken to ensure that pre-emptive action is not taken to frustrate the process of the court, for example by evicting or harassing potential claimants (particularly labour tenants); by attempting to sell it or burdening it with additional real rights; or by destroying its productive potential. International experience has shown that these fears are not far-fetched.

LAND CLAIMS COURT WORKING GROUP

14th June 1993

REPUBLIC OF SOUTH AFRICA

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**CONSTITUTION OF THE  
REPUBLIC OF SOUTH AFRICA  
BILL**

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*(As amended by the Joint Committee on Constitutional Affairs)*

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**(MINISTER OF CONSTITUTIONAL DEVELOPMENT)**

**[B 212B—93 (GA)]**

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- + Indicates amendments to the Seventh Report. Insertions are underlined and deletions are struck through and shaded.
- \* Indicates matters dealt with in deliberation with the Ad Hoc Committee.
- # Indicates provisions which have been reconsidered by the Technical Committee but have not been amended.
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[Comment: See the comment to clause 34(1)(a)(ii).]

### Labour Relations

27. (1) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.
- (2) Workers and employers shall have the right to organise and bargain collectively.
- (3) Workers shall have the right to take collective action, including the right to strike, and employers shall have the right to lock out workers.

### Property

- + \*28 (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.

[Comment: This formulation caters for property rights which are held communally as well as for the rights of individuals held in such property.]

- (2) Expropriation of rights in property by the State shall be permissible in the public interest and shall be subject to the expeditious payment either of agreed compensation or, failing agreement, of compensation to be determined by a court of law as just and equitable, taking into account all relevant factors. ~~including the use to which the property is being put, the history of its~~



- Indicates amendments to the Seventh Report. Insertions are underlined and deletions are struck through and shaded.
  - \* Indicates matters dealt with in deliberation with the Ad Hoc Committee.
  - # Indicates provisions which have been reconsidered by the Technical Committee but have not been amended.
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~~acquisition, its market value, the value of the owner's investment in it and the interests of those affected.~~

[**Comment:** The deletion indicated above was requested by the Ad Hoc Committee.]

- (3) Expropriation of rights in property aimed at for the purpose of restoring rights in land to or compensating persons who have been dispossessed of these rights as a consequence of any racially discriminatory policy, shall for the purposes of subsection (2) be deemed to be expropriation in the public interest.

[**Comment:** This subclause was reformulated as a result of discussions with the Ad Hoc Committee.]

- (4) Subject to subsection (2), every person who was dispossessed of rights in land as a consequence of any racially discriminatory policy within a period to be fixed by Parliament shall have the right to the restoration of such rights in land according to law or to compensation or any other remedy according to law where such restoration is not feasible: Provided that Parliament shall first have enacted the conditions under which and the procedures and mechanisms by which this right may be enforced, and the method by which the amount of compensation is to be determined.

[**Comment:** In its deliberations the Ad Hoc Committee arrived at a set of principles to find common ground between the different parties as to the issue of restoration. Alternative ways of wording subclause (4) were submitted and have been considered by the Technical Committee. The proposed subclause (4) as it stands above, meets the majority of the principles arrived at. The

- (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
- (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened. 5

#### Detained, arrested and accused persons

25. (1) Every person who is detained, including every sentenced prisoner, shall have the right—
- (a) to be informed promptly in a language which he or she understands of the reason for his or her detention; 10
- (b) to be detained under conditions consonant with human dignity, which shall include at least the provision of adequate nutrition, reading material and medical treatment at state expense;
- (c) to consult with a legal practitioner of his or her choice, to be informed of this right promptly and, where substantial injustice would otherwise result, to be provided with the services of a legal practitioner by the state; 15
- (d) to be given the opportunity to communicate with, and to be visited by, his or her spouse or partner, next-of-kin, religious counsellor and a medical practitioner of his or her choice; and
- (e) to challenge the lawfulness of his or her detention in person before a court of law and to be released if such detention is unlawful. 20
- (2) Every person arrested for the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right—
- (a) promptly to be informed, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement; 25
- (b) as soon as it is reasonably possible, but not later than 48 hours after the arrest or, if the said period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an ordinary court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released; 30
- (c) not to be compelled to make a confession or admission which could be used in evidence against him or her; and
- (d) to be released from detention with or without bail, unless the interests of justice require otherwise. 35
- (3) Every accused person shall have the right to a fair trial, which shall include the right—
- (a) to a public trial before an ordinary court of law within a reasonable time after having been charged; 40
- (b) to be informed with sufficient particularity of the charge;
- (c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;
- (d) to adduce and challenge evidence, and not to be a compellable witness against himself or herself; 45
- (e) to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights;
- (f) not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed; 50
- (g) not to be tried again for any offence of which he or she has previously been convicted or acquitted;
- (h) to have recourse by way of appeal or review to a higher court than the court of first instance; 55
- (i) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her; and
- (j) to be sentenced within a reasonable time after conviction.

#### Economic activity

26. (1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.
- (2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality. 5

#### Labour relations

27. (1) Every person shall have the right to fair labour practices. 10
- (2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.
- (3) Workers and employers shall have the right to organise and bargain collectively.
- (4) Workers shall have the right to strike for the purpose of collective bargaining. 15
- (5) Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to section 33(1).

#### Property

28. (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights. 20
- (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.
- (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected. 25 30

#### Environment

29. Every person shall have the right to an environment which is not detrimental to his or her health or well-being.

#### Children

30. (1) Every child shall have the right— 35
- (a) to a name and nationality as from birth;
- (b) to parental care;
- (c) to security, basic nutrition and basic health and social services;
- (d) not to be subject to neglect or abuse; and 40
- (e) not to be subject to exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to his or her education, health or well-being.
- (2) Every child who is in detention shall, in addition to the rights which he or she has in terms of section 25, have the right to be detained under conditions and to be treated in a manner that takes account of his or her age. 45
- (3) For the purpose of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interest shall be paramount.

**Staff and expenditure**

117. (1) The Commission shall appoint a director, who shall be the chief executive officer of the Commission and who shall be empowered to appoint staff subject to the approval of the Commission and on such terms and conditions of service as may be determined by or under an Act of Parliament. 5

(2) Expenditure incidental to the exercise and performance of the powers and functions of the Commission in terms of this Constitution or any other law shall be defrayed from money appropriated by Parliament.

**Reports**

118. The Commission shall report to the President at least once every year on its activities, and the President shall cause such report to be tabled promptly in the National Assembly and the Senate. 10

**COMMISSION ON GENDER EQUALITY****Establishment**

119. (1) There shall be a Commission on Gender Equality, which shall consist of a chairperson and such number of members as may be determined by an Act of Parliament. 15

(2) The Commission shall consist of persons who are fit and proper for appointment, South African citizens and broadly representative of the South African community. 20

(3) The object of the Commission shall be to promote gender equality and to advise and to make recommendations to Parliament or any other legislature with regard to any laws or proposed legislation which affects gender equality and the status of women. 25

**Composition and functioning**

120. The Act of Parliament referred to in section 119 shall provide for the composition, powers, functions and functioning of the Commission on Gender Issues and for all other matters in connection therewith.

**RESTITUTION OF LAND RIGHTS****Claims**

121. (1) An Act of Parliament shall provide for matters relating to the restitution of land rights, as envisaged in this section and in sections 122 and 123. 30

(2) A person or a community shall be entitled to claim restitution of a right in land from the state if—

- (a) such person or community was dispossessed of such right at any time after a date to be fixed by the Act referred to in subsection (1); and 35
- (b) such dispossession was effected under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2), had that section been in operation at the time of such dispossession. 40

(3) The date fixed by virtue of subsection (2)(a) shall not be a date earlier than 19 June 1913.

(4) (a) The provisions of this section shall not apply to any rights in land expropriated under the Expropriation Act, 1975 (Act No. 63 of 1975), or any other law incorporating by reference that Act, or the provisions of that Act with regard to compensation, if just and equitable compensation as contemplated in section 123(4) was paid in respect of such expropriation. 45

(b) In this section "Expropriation Act, 1975" shall include any expropriation law repealed by that Act.

(5) No claim under this section shall be lodged before the passing of the Act contemplated in subsection (1).

(6) Any claims under subsection (2) shall be subject to such conditions, limitations and exclusions as may be prescribed by such Act, and shall not be justiciable by a court of law unless the claim has been dealt with in terms of section 122 by the Commission established by that section. 5

**Commission**

122. (1) The Act contemplated in section 121(1) shall establish a Commission on Restitution of Land Rights, which shall be competent to—

- (a) investigate the merits of any claims; 10
- (b) mediate and settle disputes arising from such claims;
- (c) draw up reports on unsettled claims for submission as evidence to a court of law and to present any other relevant evidence to the court; and
- (d) exercise and perform any such other powers and functions as may be provided for in the said Act. 15

(2) The procedures to be followed for dealing with claims in terms of this section shall be as prescribed by or under the said Act.

**Court orders**

123. (1) Where a claim contemplated in section 121(2) is lodged with a court of law and the land in question is— 20

- (a) in the possession of the state and the state certifies that the restoration of the right in question is feasible, the court may, subject to subsection (4), order the state to restore the relevant right to the claimant; or
- (b) in the possession of a private owner and the state certifies that the acquisition of such land by the state is feasible, the court may, subject to subsection (4), order the state to purchase or expropriate such land and restore the relevant right to the claimant. 25

(2) The court shall not issue an order under subsection (1)(b) unless it is just and equitable to do so, taking into account all relevant factors, including the history of the dispossession, the hardship caused, the use to which the property is being put, the history of its acquisition by the owner, the interests of the owner and others affected by any expropriation, and the interests of the dispossessed. Provided that any expropriation under subsection (1)(b) shall be subject to the payment of compensation calculated in the manner provided for in section 28(3). 30

(3) If the state certifies that any restoration in terms of subsection (1)(a) or any acquisition in terms of subsection (1)(b) is not feasible, or if the claimant instead of the restoration of the right prefers alternative relief, the court may, subject to subsection (4), order the state, in lieu of the restoration of the said right— 35

- (a) to grant the claimant an appropriate right in available alternative state-owned land designated by the state to the satisfaction of the court, provided that the state certifies that it is feasible to designate alternative state-owned land; 40
- (b) to pay the claimant compensation; or
- (c) to grant the claimant any alternative relief.

(4) (a) The compensation referred to in subsection (3) shall be determined by the court as being just and equitable, taking into account the circumstances which prevailed at the time of the dispossession and all such other factors as may be prescribed by the Act referred to in section 121(1), including any compensation that was paid upon such dispossession. 45

(b) If the court grants the claimant the relief contemplated in subsection (1) or (3), it shall take into account, and, where appropriate, make an order with regard to, any compensation that was paid to the claimant upon the dispossession of the right in question. 50