

REPUBLIC OF SOUTH AFRICA

RESTITUTION OF LAND RIGHTS AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 76); explanatory summary of
Bill published in Government Gazette No. 40774 of 7 April 2017)
(The English text is the official text of the Bill)*

(MR PJ MNGUNI, MP)

[B 19—2017]

ISBN 978-1-4850-0386-1

No. of copies printed 800

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Restitution of Land Rights Act, 1994, so as to develop and keep a National Land Restitution Register; to amend the cut-off date for lodging a claim for restitution; to regulate the prioritisation of claims; to further regulate the appointment, tenure of office, remuneration and terms and conditions of service of judges of the Land Claims Court; to make further provision for the advertisement of claims; to create certain offences; to extend the Minister’s powers of delegation; to repeal the Restitution of Land Rights Amendment Act, 2014; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 2 of Act 22 of 1994, as amended by section 2 of Act 78 of 1996, section 3 of Act 63 of 1997, section 2 of Act 18 of 1999 and section 1 of Act 15 of 2014

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1. Section 2 of the principal Act is hereby amended—

(a) by the substitution for the words preceding paragraph (a) in subsection (1) of the following words:

“[A] Subject to section 16A, a person shall be entitled to restitution of a right in land if—”; and

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(b) by the substitution for paragraph (e) in subsection (1) of the following paragraph:

“(e) the claim for such restitution is lodged not later than **[30 June 2019]** five years after the commencement of the Restitution of Land Rights Amendment Act, 2017.”.

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Amendment of section 6 of Act 22 of 1994, as amended by section 3 of Act 78 of 1996, section 5 of Act 63 of 1997 and section 2 of Act 15 of 2014

2. Section 11 of the principal Act is hereby amended by the substitution for subsection (1A) of the following subsection:

“(1A) [(a) **The Commission shall establish and keep a Register which shall be known as the National Land Restitution Register.**”

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(b) The Commission shall enter into the Register the details of all land restitution claims from the date of the commencement of the Restitution of Land Rights Amendment Act, 2014.

(c) The Commission shall keep the Register up to date and the Register shall be open to the public subject to the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).] 5

(a) The Commission shall develop and keep a National Land Restitution Register.

(b) The Commission shall enter into the National Land Restitution Register the details of all land restitution claims lodged from 1 July 2014. 10

(c) The Commission shall keep the National Land Restitution Register up to date, and open it to the public, subject to the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).”.

Amendment of section 11 of Act 22 of 1994, as amended by section 5 of Act 78 of 1996, section 7 of Act 63 of 1997, section 4 of Act 18 of 1999 and section 3 of Act 15 of 2014 15

3. Section 11 of the principal Act is hereby amended by the substitution in subsection (1) for the words following paragraph (c) of the following words:

“he or she shall cause notice of the claim to be published in the *Gazette* and in the media circulating nationally and in the province, and shall take steps to make it known in the district in which the land in question is situated.”. 20

Amendment of section 12 of Act 22 of 1994, as amended by section 8 of Act 63 of 1997 and section 4 of Act 15 of 2014

4. Section 12 of the principal Act is hereby amended by the substitution for subsection (5) of the following subsection: 25

“(5) **[No claim in respect of a matter contemplated in subsection (4) shall be lodged after the expiry of the period specified in the said notice: Provided that the Commission may allow a claimant on good cause shown, to lodge a claim after the expiry of such period, but not later than 30 June 2019.]** No claim in respect of a matter contemplated in subsection (4) shall be lodged after the expiry of the period specified in the said notice: Provided that the Commission may allow a claimant on good cause shown, to lodge a claim after the expiry of such period, but not later than five years after the commencement of the Restitution of Land Rights Amendment Act, 2017.”. 30

Insertion of section 16A in Act 22 of 1994 35

5. The following section is hereby inserted after section 16 of the principal Act:

“Processing of claims

16A. (1) Upon the finalisation or referral to the Court of all claims lodged on or before 31 December 1998, the Chief Land Claims Commissioner shall certify in writing that such claims have been finalised or referred to the Court, and shall publish a notice in the *Gazette* and in the media circulating nationally and in the province, stating the date on which the Commission shall start processing claims lodged— 40

(a) from 1 July 2014 until 28 July 2016; and
(b) in terms of the Restitution of Land Rights Amendment Act, 2017. 45

(2) Notwithstanding anything to the contrary contained in subsection (1), when processing claims lodged on or before 31 December 1998, the Commission may, on a case by case basis and where it would be in the interest of justice to do so, consider a claim contemplated in paragraph (a) or (b) of subsection (1) to determine whether a claimant who lodged a claim on or before 31 December 1998 has a valid claim.”. 50

Substitution of section 17 of Act 22 of 1994, as amended by section 12 of Act 63 of 1997 and section 5 of Act 15 of 2014

6. The following section is hereby substituted for section 17 of the principal Act:

“Offences and penalties

17. (1) Any person who— 5
- (a) contravenes the provisions of section 11(7)(a), (aA), (b), (c) or (d);
 - (b) having been directed to appear before a member of the Commission and to produce documents or objects in terms of section 12(1)(c), fails to appear at the specified time and place or to produce such documents or objects; 10
 - (c) hinders or obstructs the Commission in the performance of its functions;
 - (d) prevents or attempts to prevent a duly authorised officer contemplated in section 8, or a person or organisation appointed in terms of section 9, from performing a function in terms of this Act; or 15
 - (e) prevents, obstructs or unduly influences a claimant or any other person from pursuing his or her rights provided for in this Act, shall be guilty of an offence and liable on conviction to **[a fine or to] imprisonment for a period not exceeding [three] six months or to an appropriate fine determined in terms of the Adjustment of Fines Act, 1991 (Act No. 101 of 1991).** 20
- (2) Any person who lodges a claim with the intention of defrauding the State shall be guilty of an offence and liable on conviction to a fine or imprisonment or both, determined in respect of the offence of fraud.”.

Amendment of section 22 of Act 22 of 1994, as amended by section 1 of Act 84 of 1995, section 10 of Act 78 of 1996, section 13 of Act 13 of 1997, section 7 of Act 18 of 1999, section 4 of Act 11 of 2000 and section 6 of Act 15 of 2014 25

7. Section 22 of the principal Act, is hereby amended—

- (a) by the substitution for subsections (3) to (7) of the following subsections:
 - “(3) **The Court shall consist of a Judge President and so many judges as may be determined by the President.** 30
 - (4) **The Judge President and judges of the Court, each of whom must be a judge of the High Court of South Africa, are appointed by the President acting on the advice of the Judicial Service Commission.** 35
 - (5) **When the office of the Judge President of the Court is vacant, or when the Judge President of the Court is temporarily unable to perform the functions of that office for any reason, the longest serving judge of the Court must perform the functions of Judge President of the Court.** 40
 - (6) **The Judge President and any other judge of the Court is appointed for a fixed term determined by the President at the time of appointment and holds office until—**
 - (a) the expiry of the term;
 - (b) the date the judge ceases to be a judge of the High Court of South Africa; or 45
 - (c) the judge resigns from the Court by giving written notice to the President, 50**whichever occurs first.**
 - (7) **The tenure of office, the remuneration and the terms and conditions of service applicable to a judge of the High Court of South Africa in terms of the Judges’ Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001), are not affected by the appointment and concurrent tenure of office of that judge who is appointed as a judge of the Court.]** 55

(3) The Court shall consist of a Judge President and so many judges as may be determined by the President.

(4) The Judge President and judges of the Court, each of whom must be a judge of the High Court of South Africa, are appointed by the President acting on the advice of the Judicial Service Commission.

(5) When the office of the Judge President of the Court is vacant, or when the Judge President of the Court is temporarily unable to perform the functions of that office for any reason, the longest serving judge of the Court must perform the functions of Judge President of the Court.

(6) The Judge President and any other judge of the Court is appointed for a fixed term determined by the President at the time of appointment and holds office until—

(a) the expiry of the fixed term;

(b) the date the judge ceases to be a judge of the High Court of South Africa; or

(c) the judge resigns from the Court by giving written notice to the President, whichever occurs first.

(7) The tenure of office, the remuneration and the terms and conditions of service applicable to a judge of the High Court of South Africa in terms of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001) are not affected by the appointment and concurrent tenure of office of that judge who is appointed as a judge of the Court.”; and

(b) by the substitution for subsection (8) of the following subsection:

“(8) In case of a vacancy in the office of the Judge President or a judge of the Court or if there is sufficient reason the [President of the Republic] Minister of Justice and Correctional Services may, after consultation with the Judge President of the Court, and in accordance with section 175(2) of the Constitution, appoint an acting judge of the Court for such term as [the President of the Republic] that Minister shall determine [: **Provided that the Minister of Justice, after consultation with the President of the Court, may make such an appointment in respect of a term not exceeding one month].**”.

Amendment of section 22A, as inserted by section 7 of Act 15 of 2014

8. The following section is hereby substituted for section 22A of the principal Act:

“[Transitional arrangements

22A. A judge of a High Court who on 1 July 2014 was seconded to the Court in terms of section 26A, becomes a judge of the Court except where such a judge indicates, in writing to the Secretary of the Judicial Service Commission, that he or she does not wish to hold a concurrent appointment as a judge of the Court.]

Transitional arrangements

22A. A judge of a High Court who on 1 July 2014 was seconded to the Court in terms of section 26A, becomes a judge of the Court except where such a judge indicates, in writing to the Secretary of the Judicial Service Commission, that he or she does not wish to hold a concurrent appointment as a judge of the Court.”.

Repeal of section 23 of Act 22 of 1994

9. Section 23 of the principal Act is hereby repealed.

Repeal of section 26 of Act 22 of 1994

10. Section 26 of the principal Act is hereby repealed.

Repeal of section 26A of Act 22 of 1994

11. Section 26A of the principal Act is hereby repealed.

Amendment of section 38B of Act 22 of 1994, as inserted by section 29 of Act 63 of 1997, and amended by section 10 of Act 18 of 1999 and section 11 of Act 15 of 2014

12. Section 38B of the principal Act is hereby amended by the substitution for the words preceding paragraph (a) of subsection (1) of the following words: 5

“(1) **[Notwithstanding anything to the contrary contained in this Act, any person who or the representative of any community which is entitled to claim restitution of a right in land and has lodged a claim not later than 30 June 1998 may apply to the Court for restitution of such right: Provided that leave of the Court to lodge such application shall first be obtained if—]** Notwithstanding anything to the contrary contained in this Act, any person who or the representative of any community that is entitled to claim restitution of a right in land and has lodged a claim not later than five years after the commencement of the Restitution of Land Rights Amendment Act, 2017 may apply to the Court for restitution of such right: Provided that leave of the Court to lodge such application shall first be obtained if—”. 10 15

Amendment of section 38D of Act 22 of 1994, as inserted by section 29 of Act 63 of 1997 and amended by section 12 of Act 15 of 2014

13. Section 38D of the principal Act is hereby amended by the substitution in subsection (2) for the words following paragraph (c) of the following words: 20

“**[Provided that the Court may allow a claimant or applicant, on good cause shown, to lodge such a claim or application after the expiry of such period, but not later than 30 June 2019.]** Provided that the Court may allow a claimant or applicant, on good cause shown, to lodge such a claim or application after the expiry of such period, but not later than five years after the commencement of the Restitution of Land Rights Amendment Act, 2017.”. 25

Amendment of section 42D of Act 22 of 1994, as amended by section 30 of Act 63 of 1997, section 12 of Act 18 of 1999, section 25 of Act 4 of 2011, section 4 of Act 48 of 2003 and section 13 of Act 15 of 2014 30

14. Section 42D of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

“(1) If the Minister is satisfied that a claimant is entitled to restitution of a right in land in terms of section 2 read with section 16A, **[and that the claim for such restitution was lodged not later than 30 June 2019]** he or she may enter into an agreement with the parties who are interested in the claim providing for one or more of the following:”; 35

(b) by the insertion after subsection (1) of the following subsection:

“(1A) In considering a decision to enter into an agreement contemplated in subsection (1), the Minister shall have regard to the factors set out in section 33.”; and 40

(c) by the substitution for subsection (3) of the following subsection:

“(3) The Minister may delegate any power conferred upon him or her by subsection (1) or **[section] sections 42C and 42E** to the Director-General of Rural Development and Land Reform, **[or any other officer of the State or]** to the Chief Land Claims Commissioner or a regional land claims commissioner.” 45

Repeal of Act 15 of 2014

15. Act 15 of 2014 is hereby repealed. 50

Short title

16. This Act is called the Restitution of Land Rights Amendment Act, 2017.

MEMORANDUM ON THE OBJECTS OF THE RESTITUTION OF LAND RIGHTS AMENDMENT BILL, 2017

1. OBJECTS OF THE BILL

The Restitution of Land Rights Amendment Bill, 2017 (“the Bill”) proposes certain amendments to the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994) (“the Act”), to extend the date for lodging a claim for restitution to five years after the commencement of the Restitution of Land Rights Amendment Bill, 2017; to make it an offence to prevent, obstruct or unduly influence a claimant or any other person from pursuing his or rights as provided for in the Act; to criminalise the lodgement of fraudulent claims; to regulate the appointment, tenure of office, remuneration and terms of conditions of serves of judges of the Land Claims Court (“the Court”), and to further amend certain provisions aimed at promoting the effective implementation of the Act.

2. DISCUSSION OF THE BILL

- 2.1 Section 2(1) of the Act *inter alia* provides that a claim for the restitution of rights in land must be lodged by no later than 31 December 1998. Due to a number of challenges experienced in the application of the restitution programme, and in order to align it to the broad goals of the National Development Plan: Vision 2030 (2012), this restitution programme was evaluated. The evaluation indicated that certain deserving persons and communities dispossessed of rights in land as a result of past racially discriminatory laws and practices did not participate in the process. The following categories were identified as being excluded by the restitution laws and programme, i.e. those who could not lodge claims by the cut-off date of 31 December 1998, and those dispossessed through betterment planning schemes and not allowed to lodge their claims by the Commission on Restitution of Land Rights (“the Commission”).
- 2.2 The evaluation further indicated that the research methodology that informed the restitution process was to large extend inadequate; that the window period that was provided to lodge claims was too short and that the communication campaign to inform citizens about the requirement to lodge claims did not reach every corner of the country.
- 2.3 It is estimated that at least 3.5 million individuals were forcibly removed from their land as a result of racially discriminatory laws and practices implemented after 19 June 1913, especially between 1960 and 1982. It has been argued that this figure excludes dispossessions that were caused by betterment planning and homeland consolidation. When dispossessions that took place as a result of betterment and homeland consolidations (which also included dispossessions of rights in land held by white people) during the same period are taken into account, the figure could be closer to 7.5 million, whilst less than 80 000 claims for restitution were lodged with the Commission before the cut-off date of 31 December 1998. These figures do not take into account the fact that some of the dispossessions of rights in land, particularly in urban areas, did not involve the physical removal of people.
- 2.4 The Restitution of Land Rights Amendment Act, 2014 (Act No. 15 of 2014) (“the Amendment Act”), had sought to reopen the lodgement of land claims for the period of five years ending on 30 June 2019. However, on 28 July 2016 the Constitutional Court (*Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others [2016] ZACC 22*) declared that the National Council of Provinces’ public participation process was unreasonable and therefore constitutionally invalid. The Constitutional Court held that a failure by one of the Houses of Parliament to comply with a constitutional obligation amounts to failure by Parliament as a whole. The Constitutional Court, therefore, held that Parliament failed to satisfy its obligation to facilitate public involvement in accordance with section 72(1)(a)

of the Constitution when it passed the Amendment Act and therefore declared the Amendment Act invalid in its entirety.

- 2.5 The Bill seeks to re-open the lodgement of land claims until five years after the commencement of the Restitution of Land Rights Amendment Act, 2017, and to comply with the Constitutional Court order; to criminalise the lodgement of a fraudulent claim; to further regulate the appointment, tenure of office, remuneration and terms and conditions of service of judges of the Court; and to further amend certain provisions which are aimed at promoting the effective implementation of the Act.
- 2.6 One of the issues before the Constitutional Court was the impact of claims lodged in terms of the Amendment Act on those lodged before 31 December 1998. The Bill proposes that the Commission first finalise all claims lodged by 31 December 1998 (“old claims”) before processing claims lodged in terms of the Amendment Act and those that might be lodged when the Bill is signed into law (“new claims”). However, the Commission may, if it is in the interest of justice to do so, consider new claims, but only in order to ascertain whether a claimant who lodged his or her claim by 31 December 1998 has a valid claim for restitution. The Bill separates the lodgement of a claim from the processing of a claim.
- 2.7 The Bill, therefore, allow new claims to be lodged, but they will not be processed until the old claims have been finalised or referred to the Court. The Bill does, however, provide for instances where the Commission may consider new claims in order to fully deal with a claim lodged on or before 31 December 1998.
- 2.8 In clause 1 of the Bill it is proposed that all new claims be made subject to the finalisation or referral to the Court of all old cases. This clause also seeks to extend the deadline for the lodging of claims to five years after the commencement of the Restitution of Land Rights Amendment Act, 2017.
- 2.9 In clause 2 of the Bill it is proposed that the Commission develop and keep a register where particulars of claims lodged from 1 July 2014 must be inserted, which register will be open to the public.
- 2.10 Clause 3 of the Bill proposes that the claimant, in addition to publishing it in the *Gazette*, also publishes notice of the claim in the media circulating nationally and in the province.
- 2.11 Clause 4 of the Bill proposes a consequential amendment to section 12(5) of the Act as a result of extending the period for lodging a claim.
- 2.12 In clause 5 of the Bill it is proposed that the Commissioner certifies in writing that all claims lodged no later than 31 December 1998 have been finalised or referred to the Court and publishes in the *Gazette* a date from when new claims will be processed. This clause further proposes that the Commission may, in the interest of justice, consider new claims in order to deal with the old claims before it.
- 2.13 Clause 6 of the Bill proposes an amendment to create two additional offences:
 - (a) Making it an offence to obstruct, unduly influence, mislead or engage in any conduct which is designed to prevent, compromise or obstruct any claimant from pursuing his or her rights provided for in the Act.
 - (b) Criminalising the lodgment of a claim with the sole intention of defrauding the State.
- 2.14 Clause 7 of the Bill proposes an amendment to section 22 of the Act to provide for the appointment of an acting judge of the Court when a vacancy arises or for any other sufficient reason, by the Minister of Justice and Correctional Services (“the Minister”) after consultation with the Judge President of the Court, for such term as the Minister may determine.

- 2.15 Clause 8 of the Bill proposes a transitional arrangement to deal with judges whom have been seconded to the Court.
- 2.16 Clauses 9 to 11 of the Bill propose that sections 23, 26 and 26A of the Act be repealed, as the matters dealt with in these sections dealt with by the proposed amendments to section 22 of the Act.
- 2.17 Clauses 12 and 13 of the Bill propose that sections 38B and 38D of the Act be amended to reflect the new cut-off date of 5 years after the commencement of the Restitution of Land Rights Amendment, Act 2017, for the lodging of claims.
- 2.18 Clause 14 of the Bill proposes that the Minister's power to enter into an agreement with certain claimants be made subject to the proposed clause 16A of the Bill; it further proposes that section 42D of the Act be amended to extend the Minister's powers of delegation.
- 2.19 Clause 15 of the Bill repeals Act 15 of 2014.
- 2.20 Clause 16 of the Bill contains the short title.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

The Department of Rural Development and Land Reform; and
The Commission on the Restitution of Land Rights.

4. FINANCIAL IMPLICATIONS FOR THE STATE

It is not possible to determine what the financial implications would be as a result of extending the period for lodging of a claim of restitution to five years after the commencement of the Restitution of Land Rights Amendment Act, 2017, as this will be directly influenced by the number of claims lodged as well as the extent of such claims.

5. PARLIAMENTARY PROCEDURE

- 5.1 The Member is of the opinion that this Bill must be dealt with in accordance with the procedure established by section 76 of the Constitution, since it in a substantial manner falls within the functional area of "indigenous law and customary law, subject to Chapter 12 of the Constitution".
- 5.2 The Member is further of the opinion that the Bill pertains to customary law and should be referred to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003).

Printed by Creda Communications

ISBN 978-1-4850-0386-1