

REPUBLIC OF SOUTH AFRICA

LAND COURT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary
of Bill and prior notice of its introduction published in Government Gazette No. 44480 of
23 April 2021)
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 11—2021]

ISBN 978-1-4850-0715-9

No. of copies printed250

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 provide for the establishment of a Land Court and a Land Court of Appeal; to make provision for the administration and judicial functions of the Land Court and Land Court of Appeal; to make provision for budgetary matters; to provide for the exclusive jurisdiction of the Land Court and Land Court of Appeal for certain matters; to provide for mediation and arbitration procedures; to amend certain laws relating to the adjudication of land matters by other courts; and to provide for matters connected therewith.

PREAMBLE

NOTING THAT section 25 of the Constitution of the Republic of South Africa, 1996, which is enshrined in the Bill of Rights—

- (a) obliges the State to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis; and
- (b) envisages the State taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination;

NOTING FURTHER that section 7 of the Constitution of the Republic of South Africa, 1996—

- (a) proclaims that the Bill of Rights is a cornerstone of democracy in South Africa and that it enshrines the rights of all people in the country and affirms the values of human dignity, equality and freedom;
- (b) obliges the State to respect, protect, promote and fulfil the rights in the Bill of Rights;

AND ALSO NOTING THAT section 166(e) of the Constitution of the Republic of South Africa, 1996, recognises courts established in terms of an Act of Parliament with a status similar to either the High Court of South Africa or the Magistrates' Courts;

AND RECOGNISING that, with the advent of the democratic constitutional dispensation in 1994, South Africa inherited a fragmented, unequal and divisive dispensation relating to all aspects of land, which was derived from our colonial history and further structured to serve the segregation objectives of the apartheid dispensation;

AND SINCE land reform initiatives to address the destructive impact of colonialism and apartheid have not progressed at the desired pace, sometimes giving rise to expensive and protracted litigation, to the detriment of the poorest of the poor and most vulnerable in society;

AND SINCE THEREFORE IT IS necessary that land reform in its entirety be accelerated in a lawful and equitable manner, guided by progressive jurisprudence;

AND SINCE IT IS FURTHERMORE necessary and desirable that there should be specialised, well-resourced, accessible and streamlined adjudication structures in place with the institutional, transformative and social justice wherewithal in land matters, in order to enhance and promote fairness and equity at all stages of the adjudication processes before and during court proceedings,

PARLIAMENT of the Republic of South Africa enacts, as follows:—

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CHAPTER 1**DEFINITIONS, PURPOSE AND OBJECTS****Definitions**

1.	In this Act, unless the context indicates otherwise—	25
	“ claim ” means—	
	(a) any claim for restitution of a right in land lodged with the Commission in terms of the Restitution of Land Rights Act; or	
	(b) any application lodged with the registrar of the Court for the purpose of claiming restitution of a right in land;	30
	“ claimant ” means any person who has lodged a claim;	
	“ Commission ” means the Commission on Restitution of Land Rights established by section 4 of the Restitution of Land Rights Act;	
	“ Constitution ” means the Constitution of the Republic of South Africa, 1996;	
	“ Court ” means the Land Court established by section 3;	35
	“ dispute ” means a dispute arising from a matter in respect of which the Court has jurisdiction, and includes an alleged dispute;	
	“ High Court ” means the High Court of South Africa referred to in section 6(1) of the Superior Courts Act;	
	“ Judicial Service Commission ” means the Judicial Service Commission contemplated in section 178 of the Constitution;	40
	“ Land Court of Appeal ” means the Land Court of Appeal established by section 34;	
	“ Minister ” means the Cabinet member responsible for the administration of justice;	
	“ prescribed ” means prescribed by regulation;	
	“ President ” means the President of the Republic;	45
	“ registrar ” means the registrar of the Court contemplated in section 11, and includes the assistant registrar;	
	“ Restitution of Land Rights Act ” means the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994);	
	“ rules ” means the applicable rules of the Court or the Land Court of Appeal;	50
	“ Rules Board ” means the Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985);	

“**Superior Courts Act**” means the Superior Courts Act, 2013 (Act No. 10 of 2013);
and
“**this Act**” includes any regulation.

Purpose and objects of Act

2. (1) The purpose of this Act is to enhance and promote the ideal of access to land on an equitable basis, promote land reform as a means of redressing the results of past discrimination and facilitate land justice. 5
- (2) In fulfilling the purpose of this Act as contemplated in subsection (1), the objects of this Act are to—
- (a) establish a Court with jurisdiction to grant any order, appropriate relief or impose any sanction, as provided for in this Act or any other law that confers jurisdiction on the Court; 10
 - (b) establish a Land Court of Appeal to hear and determine appeals emanating from the judgments and orders of the Court; and
 - (c) provide for Court ordered mediation or arbitration. 15

CHAPTER 2

ESTABLISHMENT, COMPOSITION, SEAL, SEAT AND JURISDICTION OF COURT

Establishment of Court

3. (1) The Land Court is hereby established as a court of law and equity. 20
- (2) The Court—
- (a) is a High Court that has the authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a Division of the High Court of South Africa has in terms of the Superior Courts Act in relation to matters under its jurisdiction; 25
 - (b) is a court of record and all hearings in the Court must, except in so far as the Court may in special cases direct otherwise, be conducted in an open court; and
 - (c) decisions are a matter of public record on the same basis as decisions of a High Court. 30

Composition of Court

4. (1) The Court consists of—
- (a) a Judge President;
 - (b) a Deputy Judge President; and
 - (c) so many other judges as may be determined in accordance with the prescribed criteria, and approved by the President. 35
- (2) A hearing before the Court must be before a single judge, unless the Judge President of the Court decides to the contrary.

Seal of Court

5. (1) The Court, for use as occasion may require, must have an official seal of a design determined by the President by proclamation in the *Gazette*. 40
- (2) The registrar of the Court must keep custody of the official seal of the Court.

Seat of Court

6. (1) The seat of the Court is in Johannesburg, but whenever it appears to the Judge President that it is expedient or in the interests of justice to hold its sitting for the hearing of any matter at a place elsewhere than at the seat of the Court, it may hold such sitting at that place. 45
- (2) The Court may sit in as many separate courts as the available judges may allow.

Jurisdiction of Court

7. (1) Subject to the Constitution and section 42 of this Act, and except where this Act provides otherwise, the Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Court. 5

(2) The Court has jurisdiction in the area of jurisdiction of each Division of the High Court.

(3) The Minister, after consultation with the Chief Justice for the purposes of adjudicating land disputes, by notice in the *Gazette*—

- (a) may define a specific area of jurisdiction of each Court, if the need so arises; 10
- (b) may increase or reduce the area of jurisdiction of each Court referred to in paragraph (a), when necessary to do so;
- (c) must appoint one or more places within the area of jurisdiction of the Court for the holding of sittings of the Court, other than the seat of each Division of the High Court, to make the Court accessible to the people; and 15
- (d) may withdraw or vary any notice made under this subsection.

CHAPTER 3

JUDGES, OFFICERS AND ASSESSORS OF COURT

Appointment of judges of Court

8. (1) The President, acting on the advice of the Judicial Service Commission, must, subject to subsection (4), appoint a Judge President and a Deputy Judge President of the Court.

(2) The Deputy Judge President must act as Judge President of the Court whenever the Judge President is unable to do so for any reason.

(3) The President, acting on the advice of the Judicial Service Commission, and the Judge President of the Court may, subject to subsection (4), appoint as many judges as is necessary as judges of the Court. 25

(4) The Judge President, Deputy Judge President and judges of the Court must—

- (a) be judges of the High Court, at least half of whom at any given time must, as far as is practicable, have been judges at the time they were appointed to the Court; 30
- (b) by reason of their training and experience, have expertise in the field of land rights matters; and
- (c) be representative in terms of race and gender.

(5) In case of a vacancy in the office of the Deputy Judge President or a judge of the Court, or if there is sufficient reason for the appointment of an acting judge, the Minister may, after consultation with the Judge President of the Court, in accordance with section 175(2) of the Constitution, appoint an acting judge of the Court for such term as the Minister may determine. 35

Tenure, remuneration and terms and conditions of appointment of judges 40

9. (1) For purposes of this section “judge” includes the Judge President and Deputy Judge President of the Court.

(2) A judge of the Court holds office until discharged from active service in terms of the Judges’ Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001). 45

(3) A judge of the Court who is also a judge of the High Court may resign as a judge of the Court by giving written notice to the President.

(4) Neither the tenure of office nor the remuneration and terms and conditions of appointment applicable to a judge of the High Court in terms of the Judges’ Remuneration and Conditions of Employment Act, 2001, is affected by that judge’s appointment and concurrent tenure of office as a judge of the Court. 50

(5) Despite the expiry of the period of a judge’s appointment as a judge of the Court that judge may continue to perform the functions of a judge of that Court, and must be regarded as such in all respects, only—

- (a) for the purposes of disposing of any proceedings in which that judge has taken part as a judge of that Court and which are still pending upon the expiry of that 55

judge's appointment or which, having been so disposed of before or after the expiry of that judge's appointment, have been reopened; and

(b) for as long as that judge is necessarily engaged in connection with the disposal of the proceedings so pending or reopened.

(6) The provisions of subsections (4) and (5), read with the changes required by the context, apply to acting judges appointed in terms of section 8(5). 5

No process to be issued against Judge President, Deputy Judge President or judge of Court except with consent of Court

10. (1) Except for an application made in terms of the Domestic Violence Act, 1998 (Act No. 116 of 1998), no civil proceedings by way of summons or notice of motion may be instituted against the Judge President, Deputy Judge President or any other judge of the Court, and no subpoena in respect of civil proceedings may be served on the Judge President, Deputy Judge President or any other judge of the Court, except with the consent of the Judge President of the Court or, in the case of the Judge President of the Court, with the consent of the Chief Justice. 10 15

(2) Where the issuing of a summons or subpoena against the Judge President, Deputy Judge President or judge to appear in a civil action has been consented to, the date upon which the Judge President, Deputy Judge President or judge must attend court must be determined in consultation with the Judge President or, in the case of the Judge President, with the Chief Justice. 20

Appointment of officers and staff

11. (1) (a) Subject to paragraph (b), the Minister must appoint for the Court a court manager, one or more assistant court managers if necessary, a registrar, one or more assistant registrars, if necessary, and other officers and staff whenever they may be required for the administration of justice or the execution of the powers and authorities of the Court. 25

(b) Any appointment by the Minister in terms of paragraph (a) must be made in—

(i) consultation with the Judge President of the Court; and

(ii) accordance with the laws governing the public service.

(c) A court manager is the senior executive officer of the Court, and exercises administrative control over other persons referred to in paragraph (a), and, under the control and direction of the Judge President of the Court, performs such other functions as may be determined by the Secretary-General of the Office of the Chief Justice and the Chief Justice. 30

(2) Whenever by reason of absence or incapacity an official referred to in subsection (1) is unable to carry out the functions of his or her office, or if his or her office becomes vacant, the Minister may, after consultation with the Judge President of the Court, authorise any other competent officer in the public service to act in the place of the absent or incapacitated officer during such absence or incapacity, or to act in the vacant office until the vacancy is filled. 35 40

(3) Any person appointed under subsection (1) may hold more than one of the offices mentioned in that subsection, simultaneously.

(4) The Minister may delegate any of the powers vested in him or her under this section to the Secretary-General of the Office of the Chief Justice.

Appointment of assessors 45

12. (1) The Court may, when adjudicating on any matter in terms of this Act, sit with or without assessors in accordance with the provisions of this section: Provided that not more than two assessors may be appointed in any matter.

(2) The assessors contemplated in subsection (1) must be appointed in the prescribed manner. 50

(3) No assessor may hear any evidence unless he or she first takes the prescribed oath or affirmation, administered by the judge.

(4) An assessor who takes an oath or makes an affirmation under subsection (3) is a member of the Court: Provided that—

(a) subject to the provisions of paragraph (b) of this proviso, the decision or finding of the majority of the members of the Court upon any question of fact is the decision or finding of the Court, except when the judge or judges sit with 55

- only one assessor, in which case the decision or finding of the judge or judges is, in the case of a difference of opinion between the assessor on the one hand and the judge or judges on the other, the decision or finding of the Court; and
- (b) the judge or judges alone decide on any question of law or upon any question whether any matter constitutes a question of law or a question of fact, and the judge or judges may, for this purpose, sit alone. 5
- (5) If an assessor dies or, in the opinion of the judge or judges, becomes unable to act as assessor at any time, the judge or judges may direct that the matter—
- (a) be proceeded with before the remaining member or members of the Court; or
- (b) start afresh and, for that purpose, may summon an assessor in the place of the assessor who has died or has become unavailable to act as assessor. 10
- (6) If an assessor is not in the full-time employment of the State, he or she is entitled to such fees as prescribed.

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Part 1

Institution of proceedings in Court

Institution of proceedings

13. (1) Proceedings under this Act may be instituted by—
- (a) the Commission; 20
- (b) any person acting in his or her own interest;
- (c) any person acting on behalf of another person who cannot act in his or her own name;
- (d) any person acting as a member of, or in the interests of, a group or class of persons; 25
- (e) any person acting in the public interest; or
- (f) any association acting in the interests of its members.
- (2) A person wishing to institute proceedings in terms of or under this Act must, in the prescribed manner, notify the registrar of his or her intention to do so.
- (3) (a) The registrar must, in the prescribed manner and within the prescribed period of receiving such notification, refer the matter to the Judge President of the Court, who must, within the prescribed period, decide whether the matter is to be heard in the Court or whether it should be referred for—
- (i) mediation in terms of section 31 of this Act; or
- (ii) arbitration in terms of section 32 of this Act, 35
- which, in the Judge President's opinion, can deal more appropriately with the matter.
- (b) If the Judge President decides that the matter is to be heard in the Court, he or she must refer the matter to the registrar, who must within the prescribed period of such referral assign a date of hearing of the matter.
- (4) The Judge President, before making a decision to refer a matter as contemplated in subsection (3)(a), must take all relevant circumstances into consideration, including the following: 40
- (a) If mediation or arbitration in terms of any legislation took place before the institution of proceedings in the Court and the outcome thereof;
- (b) the personal circumstances of the parties; 45
- (c) the needs of and relief sought by the parties; and
- (d) the nature of the intended proceedings and whether the outcome of the proceedings could facilitate the development of judicial precedent and jurisprudence in this area of the law.
- (5) The Judge President may delegate any of the powers vested in him or her under this section to the Deputy Judge President or any other judge of the Court. 50

Part 2***Rules, powers and functions of Court under other legislation, intervention, right to appear, legal representation, appeals and judgment by default*****Rules governing procedure of Court**

14. (1) Except as is otherwise provided for in this Act, the provisions of the Superior Courts Act, and of the Rules regulating the conduct of the proceedings of the several provincial and local divisions of the High Court of South Africa made under the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), and published by Government Notice R. 48 of 12 January 1965, as amended, apply with the necessary changes required by the context to the Court in so far as these provisions relate to— 10

- (a) the circumstances under which opinion and oral evidence may be submitted to the Court;
- (b) the suspension or execution of judgments, orders or sentences of the Court pending applications, or petitions for leave to appeal and the prosecution of appeals; 15
- (c) the manner and circumstances under which a judgment by default contemplated in section 18 of this Act can be made; and
- (d) generally, any matter which may be necessary or useful to be regulated for the proper despatch and conduct of the functions of the Court, 20

and in so far as no other provision has been made in the regulations under section 53 of this Act.

(2) Notwithstanding anything to the contrary in this Act or in the rules contemplated in subsection (1), the Court may conduct any part of any proceedings on an informal or inquisitorial basis.

(3) The rules contemplated in subsection (1) must facilitate the expeditious handling of disputes and the minimisation of costs involved. 25

Powers and functions of Court under other legislation

15. The provisions of this Act regulating the procedures, powers and functions of the Court apply, with the necessary changes required by the context, to the performance by the Court of its powers and functions in terms of any other law in respect of which it has jurisdiction, unless such application is excluded expressly or by necessary implication. 30

Intervention to proceedings before Court, right to appear and legal representation

16. (1) Any interested person, including an organisation, may apply to the Court for leave to intervene as a party to any proceedings before the Court.

(2) The State has the right to intervene as a party to all proceedings before the Court. 35

(3) Any party appearing before the Court may do so in person or may be represented by a legal practitioner as contemplated in the Legal Practice Act, 2014 (Act No. 28 of 2014), of his or her own choice and at his or her own expense.

(4) (a) Where a party involved in a matter before the Court is not represented by a legal representative because such party cannot afford to pay for legal representation, and the Court is of the opinion that it would be in the best interests of the party to have legal representation, the Court must refer the matter to Legal Aid South Africa as contemplated in section 2 of the Legal Aid South Africa Act, 2014 (Act No. 39 of 2014). 40

(b) Legal Aid South Africa must deal with a matter referred to in paragraph (a) in accordance with section 4(1)(f) of the Legal Aid South Africa Act, 2014, to provide legal representation at State expense, where substantial injustice would otherwise result. 45

(c) Expenditure in connection with the implementation and application of paragraph (a) must be defrayed from money appropriated by Parliament for this purpose and monies appropriated by Parliament for this purpose constitute earmarked funds on the vote of Legal Aid South Africa, and may not be used for any other purpose. 50

Powers of Court on hearing of appeals

17. The Court, at the hearing of any appeal in terms of any law conferring upon it any appellate jurisdiction, has the power—

- (a) to receive further evidence;

- (b) to remit the case to the court or other tribunal of first instance or to an arbitrator, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Court considers necessary; or
- (c) to confirm, amend or set aside the judgment, order or decision which is the subject matter of the appeal and to give any judgment, order or decision which the circumstances may require, unless such law provides otherwise. 5

Judgment by default

18. A judgment by default may be granted by the Court in the manner and in the circumstances determined in the rules: Provided that the Court must be satisfied that there was proper service of the process by which the case was initiated. 10

Part 3

Witnesses, examination by interrogatories and admissibility of evidence

Witnesses

- 19.** (1) The registrar must, in the prescribed manner, and on the prescribed form subpoena a person to appear as a witness in a matter before the Court to give evidence or to produce a book, document, written instrument or any item on request by— 15
- (a) the judge in the matter;
 - (b) a person whose rights may be affected by an order that may be made by the Court in those proceedings; or 20
 - (c) the legal practitioner of a person referred to in paragraph (b).
- (2) Sections 35(2), (3), (4) and (5) and 36 of the Superior Courts Act, read with such changes as the context may require, apply to a person who has been subpoenaed in terms of subsection (1) or required by the judge to give evidence.
- (3) A person subpoenaed in terms of subsection (1) and who complied with the subpoena, is entitled to an allowance from State funds as contemplated in section 20. 25

Witness fees

- 20.** (1) A witness in any proceedings of the Court and any person who accompanies any such witness on account of the youth or infirmity of such witness, must be paid such allowances as may be prescribed in terms of section 42 of the Supreme Court Act, 1959 (Act No. 59 of 1959). 30
- (2) Notwithstanding anything to the contrary contained in any other law, the Court may order that no allowances or only a portion of the prescribed allowances must be paid to any witness.

Examination by interrogatories of persons whose evidence is required in proceedings before Court 35

- 21.** (1) (a) For purposes of this section “Commissioner of the Court” means every person duly appointed as a commissioner of any Division of the High Court of South Africa for taking affidavits in any place outside the Republic and must, by virtue of such appointment— 40
- (i) become a commissioner of the said High Court; and
 - (ii) as such, be entitled to be enrolled by the registrar of every other division as a commissioner thereof.
- (b) For the purpose of facilitating such enrolment the registrar of each division must transmit the names of those who are appointed as commissioners of such division, as well as their respective addresses, to the registrars of all the other divisions: Provided that no person residing within the Republic must hereafter be appointed as such commissioner. 45
- (2) The Court may, in connection with any proceedings pending before it, order that the evidence of a person who resides or is for the time being outside the area of jurisdiction of the Court, be taken by means of interrogatories. 50
- (3) Whenever an order is made under subsection (2), the registrar of the Court must certify that fact and transmit a copy of his or her certificate to a Commissioner of the

Court contemplated in subsection (1), together with any interrogatories duly and lawfully framed which it is desired to put to the said person and the fees and the amount of the expenses payable to the said person for his or her appearance as hereinafter provided.

(4) Upon receipt of the aforesaid certificate and of the interrogatories and amounts aforesaid, the Commissioner of Court must— 5

- (a) summon the said person to appear before him or her, and upon his or her appearance must take his or her evidence as if he or she were a witness in proceedings before the Court;
- (b) put to him or her the interrogatories aforesaid with any other questions calculated to obtain full and true answers to the said interrogatories; 10
- (c) take down or cause to be taken down the evidence so obtained; and
- (d) transmit the same, certified as correct, to the registrar of the Court.

(5) The Commissioner of Court must further transmit to the said registrar a certificate showing the amount paid to the person concerned in respect of the expenses of his or her appearance, and the cost of the issue and service of the process for summoning such person before him or her. 15

(6) Any person summoned to appear as provided in this section who, without reasonable excuse, fails to appear at the time and place mentioned in the summons, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months. 20

(7) Any interrogatories taken and certified under this section, must, subject to all lawful exceptions, be received as evidence in the aforesaid proceedings.

Admissibility of evidence

22. (1) The Court may admit 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. 25

(2) Without derogating from the generality of subsection (1), it is competent for any party before the Court to adduce—

- (a) hearsay evidence regarding the circumstances surrounding the dispossession of a land right or rights and the rules governing the allocation and occupation of land within a claimant community at the time of such dispossession; and 30
- (b) expert evidence regarding the historical and anthropological facts relevant to any particular land claim.

(3) The Court must give such weight to any evidence adduced in terms of subsections (1) and (2) as it deems appropriate. 35

(4) Whenever a judgment, order or other record of the Court is required to be proved or inspected or referred to in any manner, a copy of such judgment, order or other record duly certified as such by the registrar of the Court under its seal is *prima facie* evidence thereof without proof of the authenticity of such registrar's signature. 40

Part 4

Processes of Court and Offences

Scope and execution of process of Court

23. (1) The process of the Court runs throughout the Republic and its sentences, rulings, judgments, writs, summonses, orders, warrants, commands and other processes, excluding a subpoena referred to in section 19 of this Act, must be executed in any area in like manner as if they were processes of the Provincial Division of the High Court having jurisdiction in such area. 45

(2) A sheriff or a deputy sheriff of the High Court appointed for the area in which any process is to be served, must execute all sentences, rulings, judgments, writs, summonses, orders, warrants, commands and other processes of the Court directed to him or her, and any reference in this Act to a sheriff or a deputy sheriff is deemed to be a reference to a sheriff or deputy sheriff of the Provincial Division of the High Court acting in terms of this section. 50

(3) A sheriff or deputy sheriff performing his or her duties in terms of this Act has all the powers and rights and is subject to all the obligations and duties applicable to the 55

execution by such sheriff or deputy sheriff of the process of the Provincial Division of the High Court for which he or she is appointed.

(4) The return of a sheriff or a deputy sheriff of what has been done in connection with any process of the Court is *prima facie* evidence of the matters therein stated.

(5) A refusal by the sheriff or any deputy sheriff to perform any act which he or she is, in terms of this Act, empowered or obliged to do, is subject to review by the Court on application *ex parte* or on notice as the circumstances may require. 5

(6) Any warrant or other process for the execution of a judgment given or order issued against any association of persons, corporate or unincorporated, partnership or firm may be executed by attachment of the property or assets of such association, partnership or firm. 10

Offences relating to execution

24. Any person who commits any conduct referred to in section 46 of the Superior Courts Act, in relation to the execution by a sheriff or deputy sheriff of his or her duties in terms of this Act, commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding one year. 15

Part 5

Powers of Court, referral for investigation by referee, pre-trial conference, Court orders, variation, rescission and costs

Powers of Court 20

25. (1) Subject to Chapter 8 of the Constitution, the Court has—

- (a) all such powers in relation to matters falling within its jurisdiction as are possessed by a Division of the High Court having jurisdiction in civil proceedings at the place where the land in question is situated, including the powers of the High Court in relation to any contempt of the Court; 25
- (b) all the ancillary powers necessary or reasonably incidental to the performance of its functions, including the power to grant interlocutory orders and interdicts; and
- (c) the power to decide any issue in terms of any other law, which is not ordinarily within its jurisdiction but is incidental to an issue within its jurisdiction, if the Court considers it to be in the interests of justice to do so. 30

(2) (a) The Court, of its own accord or at the request of any party to the proceedings before it, may reserve, for the decision of the Land Court of Appeal, any question of law that arises in those proceedings.

(b) A question may be reserved only if it is decisive for the proper adjudication of the dispute. 35

(c) Pending the decision of the Land Court of Appeal on any question of law reserved in terms of paragraph (a), the Court may make any interim order.

(3) A judgment of the Court must be handed down as soon as reasonably possible.

Referral of particular matters for investigation by referee 40

26. (1) In any proceedings before the Court, the Court may at any stage refer—

- (a) any matter which requires extensive examination of documents or scientific, technical or local investigation which cannot be conveniently conducted by the Court;
 - (b) any matter which relates wholly or in part to accounts; or 45
 - (c) any other matter arising in such proceedings,
- for enquiry and report to a referee appointed by the parties.

(2) The Court may, after hearing such evidence or arguments as may be adduced or presented by the parties—

- (a) adopt the report of any such referee, either wholly or in part, and either with or without modifications; 50
- (b) remit such report for further enquiry or report or consideration by such referee; or
- (c) make any other order in regard thereto as may be necessary or desirable.

(3) Any such report or any part thereof which is adopted by the Court, whether with or without modifications, has effect as if it were a finding by the Court in the proceedings in question.

(4) Any such referee has, for the purpose of such enquiry, such powers and must conduct the enquiry in such manner as may be determined by a special order of the Court or by the rules of the Court. 5

(5) For the purpose of procuring the attendance of any witness, including any witness detained in custody under any law, and the production of any book, document, written instrument or item before a referee, an enquiry under this section is deemed to be civil proceedings. 10

(6) Any person summoned to appear and give evidence or produce any book, document, written instrument or any item before a referee, and who, without sufficient cause—

(a) fails to attend at the time and place specified or to remain in attendance until the conclusion of the enquiry or until he or she is excused by the referee from further attendance; 15

(b) refuses to be sworn or to make affirmation as a witness;

(c) having been sworn or having made affirmation as a witness, fails, without just excuse, to answer fully and satisfactorily any question put to him or her;

(d) fails to produce any book, document, written instrument or any item in his or her possession or custody or under his or her control which he or she was summoned to produce, 20

is guilty of an offence and liable on conviction, either by the Court by way of the procedures set out in section 19(2) or by a criminal court having jurisdiction, to a fine or to imprisonment for a period not exceeding three months. 25

(7) Any person who, after having been sworn or having made affirmation, gives false evidence before a referee at any enquiry, knowing such evidence to be false or not knowing or believing it to be true, is guilty of an offence and liable on conviction to the penalties prescribed by law for perjury.

(8) Any referee is entitled to such fees as may be determined by the rules or, if no such fees have been so determined, to such fees as the Court may determine and to any reasonable expenditure incurred by him or her for the purposes of the enquiry, and any such fees and expenditure must be taxed by the taxing master of the Court and must be costs in the cause: Provided that the Court may order the State to pay the said fees and expenditure. 30 35

Pre-trial conference

27. (1) The Court may, at its own instance or at the request of any party before it, at any stage prior to the hearing of a matter convene a pre-trial conference of the parties with a view to—

(a) clarifying the issues in dispute; 40

(b) identifying those issues on which evidence will be necessary; and

(c) in general, expediting a decision on the matter in question.

(2) The Court may, after the holding of such a pre-trial conference, issue such orders and directions as to the procedure to be followed before and during the trial as it deems appropriate. 45

Court orders

28. (1) The Court may make any appropriate order, including—

(a) the grant of urgent interim relief;

(b) an interdict;

(c) an order directing the performance of any particular act, which order, when implemented, must remedy a wrong and give effect to the primary objects of this Act; 50

(d) a declaratory order;

(e) an award of damages in any circumstances contemplated in this Act;

(f) an order for costs; 55

(g) make any arbitration award or any settlement agreement an order of the Court; and

(h) request the Commission to conduct an investigation to assist the Court and to submit a report to the Court.

(2) If at any stage after a dispute has been referred to the Court, it becomes apparent that the dispute ought to have been referred to mediation or arbitration, the Court may, if the Judge President did not make an order contemplated in section 13(3)(a) stay the proceedings and refer the dispute to mediation or arbitration in terms of sections 31 and 32 of this Act. 5

(3) The Court may in addition to subsection (1) make an order—

- (a) for the restoration of land, a portion of land or any right in land in respect of which the claim or any other claim is made to the claimant or award any land, a portion of or a right in land to the claimant in full or in partial settlement of the claim and, where necessary, the prior acquisition or expropriation of the land, portion of land or right in land: Provided that the claimant must not be awarded land, a portion of land or a right in land dispossessed from another claimant or the latter's ascendant, unless—
 - (i) such other claimant is or has been granted restitution of a right in land or has waived his or her right to restoration of the right in land concerned; 15
 - or
 - (ii) the Court is satisfied that satisfactory arrangements have been or will be made to grant such other claimant restitution of a right in land;
- (b) for the State to grant the claimant an appropriate right in alternative state-owned land and, where necessary, order the State to designate it; 20
- (c) for the State to pay the claimant compensation;
- (d) for the State to include the claimant as a beneficiary of a State support programme for housing or the allocation and development of rural land;
- (e) for the grant to the claimant of any alternative relief;
- (f) to determine conditions which must be fulfilled before a right in land can be restored or granted to a claimant; 25
- (g) if a claimant is required to make any payment before the right in question is restored or granted, to determine the amount to be paid and the manner of payment, including the time for payment;
- (h) if the claimant is a community, to determine the manner in which the rights are to be held or the compensation is to be paid or held; 30
- (i) or give any other directive as to how its orders are to be carried out, including the setting of time limits for the implementation of its orders;
- (j) in respect of compensatory land granted at the time of the dispossession of the land in question; 35
- (k) to give effect to any agreement between the parties regarding the finalisation of the claim; and
- (l) for costs as it deems just, including an order for costs against the State or the Commission.

(4) An order contemplated in subsection (3)(h) must be subject to such conditions as the Court considers necessary to ensure that all the members of the dispossessed community must have access to the land or the compensation in question, on a basis which is fair and non-discriminatory towards any person, including a tenant, and which ensures the accountability of the person who holds the land or compensation on behalf of the community to the members of such community. 40 45

(5) The Court's power to order the restitution of a right in land or to grant a right in alternative state-owned land must include the power to adjust the nature of the right previously held by the claimant, and to determine the form of title under which the right may be held in future.

(6) In making any award of land, the Court may direct that the rights of individuals to that land must be determined in accordance with the procedures set out in the Distribution and Transfer of Certain State Land Act, 1993 (Act No. 119 of 1993). 50

(7) An order of the Court has the same force as an order of a court for the purposes of the Deeds Registries Act, 1937 (Act No. 47 of 1937).

(8) Any state-owned land contemplated in the Restitution of Land Rights Act, which is held under a lease or similar arrangement, must be deemed to be in the possession of the State for the purposes of subsection (1)(a): Provided that, if the Court orders the restoration of a right in such land, the lawful occupier thereof is entitled to just and equitable compensation determined either by agreement or by the Court. 55

(9) An interested party who is of the opinion that an order of the Court has not been fully or timeously complied with may make application to the Court for further directives or orders in that regard. 60

Variation and rescission of orders of Court

- 29.** The Court, acting of its own accord or on the application of any affected party, may vary or rescind a decision, judgment or order—
- (a) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order; 5
 - (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
 - (c) granted as a result of a mistake common to the parties to the proceedings.

Costs

- 30.** (1) The Court may make an order for the payment of costs, according to the requirements of the law and fairness. 10
- (2) When deciding whether or not to order the payment of costs, the Court may take into account—
- (a) whether the matter referred to the Court ought to have been referred to mediation or arbitration, and, if so, the extra costs incurred in bringing the matter to the Court directly; and 15
 - (b) the conduct of the parties—
 - (i) in proceeding with or defending the matter before the Court; and
 - (ii) during the proceedings before the Court.
- (3) The Court may order costs against a party to the dispute or against any person who represented that party in those proceedings before the Court. 20

Part 6

Mediation, arbitration and settling of matters

Mediation

- 31.** (1) Notwithstanding the provisions of section 13(3)(a)(i) of this Act, if, at any stage during proceedings, but prior to judgment, it becomes evident to the Court that there is any issue which might be resolved through mediation, the Court may make an order— 25
- (a) directing the parties to attempt to settle the issue through a process of mediation; and 30
 - (b) that the proceedings be stayed pending such process.
- (2) (a) If the Judge President as contemplated in section 13(3)(a)(i), or the Court in terms of subsection (1), decides that the matter must be referred for mediation, he or she or the Court must make an order—
- (i) directing the registrar to transfer the matter in the prescribed manner to the mediator contemplated in subparagraph (iii); 35
 - (ii) specifying the time, date and the place where such process is to start; and
 - (iii) appointing a fit and proper person as mediator to chair the first meeting between the parties: Provided that the parties may at any time during the course of mediation, by agreement, appoint another person to mediate the dispute. 40
- (b) When making an order contemplated in paragraph (a), the Judge President or the Court may attach to the order any comments he or she or the Court deems necessary for the attention of the mediator.
- (3) On receipt of an order referred to in subsection (2), the registrar must transfer the matter and notify the parties to the matter of the transfer in the prescribed manner. 45
- (4) On receipt of a matter, the mediator must deal with the matter expeditiously in terms of his or her powers and functions as prescribed.
- (5) If—
- (a) the parties to the mediation are not able to resolve the matter to the satisfaction of all the parties; or 50
 - (b) one or more of the parties to the mediation so request,
- the mediator must, in the prescribed manner, refer the matter to the Court for adjudication.
- (6) A mediator appointed in terms of subsection (2)(a)(iii) who is not in the full-time service of the State, may be paid such remuneration and allowances as prescribed. 55

(7) All discussions taking place and all disclosures and submissions made during the mediation process are privileged, unless the parties agree to the contrary.

(8) The Court may make the agreement reached between the parties an order of the Court, with or without such technical variations as may be appropriate.

(9) If the Court proposes to make any technical variation to the agreement, it must give the parties to the proceedings in the prescribed manner notice of such intention, and before making such variation, it must receive and consider any comments from the parties. 5

(10) Nothing contained in this section must be construed as preventing the Court from directing the parties to attempt to resolve the issue or dispute through other processes as provided for in this Act. 10

Arbitration

32. (1) Notwithstanding the provisions of section 13(3)(a)(ii) of this Act, if, at any stage during proceedings, but prior to judgment, it becomes evident to the Court that there is any issue which might be resolved through arbitration, the Court may make an order that— 15

(a) the dispute be settled through a process of arbitration, in the prescribed manner; and

(b) the proceedings be stayed pending such process.

(2) (a) If the Judge President as contemplated in section 13(3)(a)(ii), or the Court in terms of subsection (1), decides that the matter must be referred for arbitration, he or she or the Court must make an order— 20

(i) directing the registrar to transfer the matter in the prescribed manner to the arbitrator contemplated in subparagraph (iii);

(ii) specifying the time, date and place where such process is to start; and 25

(iii) appointing a fit and proper person as arbitrator to chair the first meeting between the parties: Provided that the parties may at any time during the course of the arbitration, by agreement, appoint another person as arbitrator.

(b) When making an order contemplated in paragraph (a), the Judge President or the Court may attach to the order any comments he or she or the Court deems necessary for the attention of the arbitrator. 30

(3) On receipt of an order referred to in subsection (2), the registrar must transfer the matter and notify the parties to the matter of the transfer in the prescribed manner.

(4) The remuneration and powers and functions of an arbitrator are as prescribed.

(5) Any party to an arbitration may apply to the Court at any time in the prescribed manner to— 35

(a) stop the arbitration process and to proceed in the Court; or

(b) vary or set aside a settlement agreement, which the Court may consider on good cause shown.

(6) (a) If any party to an arbitration agreement commences proceedings in the Court against any other party to that agreement about any matter that the parties agreed to refer to arbitration, any party to those proceedings may request the Court— 40

(i) to stay those proceedings and refer the dispute to arbitration; or

(ii) with the consent of the parties and where it is expedient to do so, continue with the proceedings with the Court acting as arbitrator, in which case the Court may only make an order corresponding with the award that an arbitrator could have made. 45

(b) If the Court is satisfied that there is sufficient reason for the dispute to be referred to arbitration in accordance with the arbitration agreement, the Court may stay those proceedings, on any conditions it deems fit. 50

(7) An arbitration award issued by an arbitrator is final and binding and it may be enforced as if it were an order of the Court in respect of which a writ has been issued.

(8) If a party fails to comply with an arbitration award that orders the performance of an act, other than the payment of an amount of money, any other party to the award may, without further order, enforce it by way of contempt proceedings instituted in the Court. 55

(9) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the arbitrator, may apply to the Court in the prescribed manner for an order setting aside the arbitration award.

(10) The provisions of the Arbitration Act, 1965 (Act No. 42 of 1965), apply insofar as an arbitration is not specifically regulated in terms of this Act. 60

Settling of matters

- 33.** (1) If a matter is settled out of Court, either by means of negotiation, mediation or arbitration, and the settlement agreement is accepted by all parties involved in the matter, the registrar of the Court must submit the settlement agreement to the Court for confirmation or rejection. 5
- (2) The Court must consider the settlement agreement and may—
- (a) confirm the settlement agreement and make it an order of the Court;
 - (b) before deciding the matter, refer the settlement agreement to the parties for reconsideration of any specific issues; or
 - (c) reject the settlement agreement. 10
- (3) If a settlement agreement is rejected, the matter must proceed in the Court.

CHAPTER 5

LAND COURT OF APPEAL

Part 1

*Establishment and status, composition, appointment of other judges,
tenure, remuneration and terms and conditions of appointment of judges, officers,
seal and seat of Land Court of Appeal* 15

Establishment and status of Land Court of Appeal

- 34.** (1) The Land Court of Appeal is hereby established as a court of law and equity.
- (2) The Land Court of Appeal is, except for the Constitutional Court, the final court of appeal in respect of all judgments and orders made by the Court in respect of the matters within its exclusive jurisdiction. 20
- (3) The Land Court of Appeal is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which the Supreme Court of Appeal has in relation to matters under its jurisdiction. 25
- (4) The Land Court of Appeal is a court of record.

Composition of Land Court of Appeal

- 35.** (1) The Land Court of Appeal consists of—
- (a) a President of the Land Court of Appeal;
 - (b) a Deputy President of the Land Court of Appeal; and 30
 - (c) as many judges as the President may consider necessary.
- (2) The Land Court of Appeal is constituted before any three judges who the President of the Land Court of Appeal designates from the panel of judges contemplated in subsection (1)(c).
- (3) No judge of the Land Court of Appeal may sit in the hearing of an appeal against a judgment or an order given in a case that was heard before that judge. 35

Appointment of other judges of Land Court of Appeal

- 36.** (1) The President, acting on the advice of the Judicial Service Commission and after consultation with the Minister, must appoint a President of the Land Court of Appeal and a Deputy President of the Land Court of Appeal, who may be judges of the Supreme Court of Appeal. 40
- (2) The Deputy President of the Land Court of Appeal must act as President of the Land Court of Appeal whenever the President of the Land Court of Appeal is unable to do so for any reason.
- (3) The President, acting on the advice of the Judicial Service Commission, after consultation with the Minister, the Chief Justice and the President of the Land Court of Appeal, must appoint the judges of the Land Court of Appeal. 45
- (4) The Minister, after consultation with the Chief Justice and the President of the Land Court of Appeal, may appoint one or more judges of the Court or High Court to serve as acting judges of the Land Court of Appeal. 50

Tenure, remuneration and terms and conditions of appointment of Land Court of Appeal judges

- 37.** (1) A judge of the Land Court of Appeal must be appointed for a fixed term determined by the President at the time of appointment.
- (2) A judge of the Land Court of Appeal may resign from that office by giving written notice to the President. 5
- (3) A judge of the Land Court of Appeal holds office until—
- (a) the judge's term of office in the Land Court of Appeal ends;
 - (b) the judge's resignation takes effect;
 - (c) the judge is discharged from active service; or 10
 - (d) the judge dies.
- (4) Neither the tenure of office nor the remuneration and terms and conditions of appointment applicable to a judge of the High Court in terms of the Judges' Remuneration and Conditions of Employment Act, 2001, is affected by that judge's appointment and concurrent tenure of office as a judge of the Land Court of Appeal. 15

Officers of Land Court of Appeal

- 38.** (1) (a) Subject to paragraph (b), the Minister must appoint for the Land Court of Appeal a registrar or one or more assistant registrars, if necessary.
- (b) Any appointment by the Minister in terms of paragraph (a) must be made—
- (i) in consultation with the President of the Land Court of Appeal; and 20
 - (ii) in accordance with the laws governing the public service.
- (2) Each of the other officers of the Court also hold the corresponding office in relation to the Land Court of Appeal.
- (3) (a) The officers referred to in subsection (2) must, under the supervision and control of the registrar of the Land Court of Appeal, perform the administrative 25 functions of the Land Court of Appeal.
- (b) An assistant registrar of the Land Court of Appeal may perform any of the functions of the registrar of that Court that have been delegated generally or specifically to the assistant registrar.
- (4) The assistant registrar of the Land Court of Appeal or, if there is more than one, the 30 most senior, must act as registrar of the Land Court of Appeal whenever—
- (a) the registrar is absent from the Republic or from duty, or for any reason is temporarily unable to perform the functions of registrar; or
 - (b) the office of registrar is vacant.
- (5) The Minister may delegate any of the powers vested in him or her under this 35 section to the Secretary-General of the Office of the Chief Justice.

Seal of Land Court of Appeal

- 39.** (1) The Land Court of Appeal, for use as the occasion may require, must have an official seal of a design determined by the President by proclamation in the *Gazette*.
- (2) The registrar of the Land Court of Appeal must keep custody of the official seal of 40 the Land Court of Appeal.

Seat of Land Court of Appeal

- 40.** The seat of the Court is also the seat of the Land Court of Appeal.

Part 2

Rules, jurisdiction, appeals, representation, binding judgments, final court of appeal, costs, service and enforcement of orders 45

Rules for Land Court of Appeal

- 41.** (1) The Rules Board, in consultation with the President of the Land Court of Appeal, must make rules to govern the procedure of the Land Court of Appeal and any matter which may be necessary or useful to be determined for the proper despatch and 50 conduct of the functions of the Land Court of Appeal.

(2) The rules must provide for direct access to the Land Court of Appeal for an appeal contemplated in section 13(2) of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996).

(3) The rules that have been made, altered or repealed must be published in the *Gazette*. 5

(4) Until such time as rules for the Land Court of Appeal are made in terms of subsection (1), the rules applicable in the Supreme Court of Appeal apply with such changes as the context may require in respect of any matter before the Land Court of Appeal in terms of this Act.

Jurisdiction of Land Court of Appeal and power to hear appeals 10

42. (1) Subject to the Constitution and despite any other law, the Land Court of Appeal has exclusive jurisdiction—

(a) to hear and determine all appeals against the judgments and orders of the Court; and

(b) to decide any question of law reserved in terms of section 25(2)(a). 15

(2) The Land Court of Appeal may, in addition—

(a) dispose of an appeal without the hearing of oral argument;

(b) receive further evidence;

(c) remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Land Court of Appeal deems necessary; or 20

(d) confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require.

(3) A decision to which any two judges of the Land Court of Appeal agree is the decision of the Court. 25

(4) The functions of the Land Court of Appeal may be performed at any place in the Republic.

Appeals against judgment or order of Court

43. (1) No appeal lies against a judgment or order of the Court except with leave of the Court or, where such leave has been refused, with leave of the Land Court of Appeal. 30

(2) An appeal from a judgment or order of the Court must be heard by the Land Court of Appeal in open court.

(3) The Land Court of Appeal may, in granting leave to appeal, vary any order for costs made by the Court in refusing leave to appeal. 35

(4) The power to grant leave to appeal as contemplated in subsection (1)—

(a) is not limited by reason only of the value of the matter in dispute or the amount claimed or awarded in the suit or by reason only of the fact that the matter in dispute is incapable of being valued in money; and

(b) is subject to the provisions of any other law which specifically limits it or specifically grants, limits or excludes any right of appeal. 40

(5) Leave to appeal may be granted subject to such conditions as the Court or the Land Court of Appeal, as the case may be, considers appropriate, including a condition that the applicant files security for the costs of the appeal.

(6) The Land Court of Appeal may grant leave to appeal on application made to it within 15 days, or such longer period as may on good cause be allowed, after the Court has refused leave to appeal. 45

(7) (a) An application to the Land Court of Appeal in terms of subsection (6) must—

(i) be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief; and 50

(ii) be addressed to the registrar of the Land Court of Appeal, to the registrar of the Court and to all other parties in the proceedings before the Court.

(b) The application must be considered by two judges of the Land Court of Appeal designated by the President of the Land Court of Appeal, and in the case of a difference of opinion, also by the President of the Land Court of Appeal or any other such judge so designated. 55

(c) The judges considering the application may order that the application be argued before them at a time and place appointed, and may, whether or not they have so ordered—

- (i) grant or refuse the application; or
 - (ii) refer the application to the Land Court of Appeal for consideration, whether upon argument or otherwise,
- and where an application has been so referred, the Land Court of Appeal may thereupon grant or refuse the application. 5
- (d) The decision of the majority of the judges considering the application, or the decision of the Land Court of Appeal, as the case may be, to grant or refuse the application, is final.
- (e) Notice of the date and place fixed for the hearing of the application must be given to the applicant and the respondent by the registrar of the Land Court of Appeal. 10
- (8) The Land Court of Appeal, on the hearing of any appeal from the Court, has the power to—
- (a) receive further evidence;
 - (b) remit the case to the Court for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Land Court of Appeal considers necessary; or 15
 - (c) confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require.
- (9) Nothing in this section contained may be construed as preventing an appeal from a judgment or order of the Court being made directly to the Constitutional Court, if such an appeal is allowed by national legislation and by the rules of the Constitutional Court. 20

Representation before Land Court of Appeal

44. (1) Any person who, in terms of section 13, may appear before the Court has the right to appear before the Land Court of Appeal. 25
- (2) The provisions of section 16, read with the changes required by the context, apply to an appeal contemplated in section 43.

Judgments of Land Court of Appeal binding on Court

45. A judgment of the Land Court of Appeal is binding on the Court.

Land Court of Appeal final court of appeal 30

46. Subject to the Constitution and despite any other law, no appeal lies against any decision, judgment or order given by the Land Court of Appeal in respect of—
- (a) its decision on any question of law in terms of section 25(2)(a);
 - (b) any appeal in terms of section 34(2); or
 - (c) any judgment or order made in terms of section 42(1). 35

Costs

47. The judge, judges or Land Court of Appeal deciding the matter may make such order as to costs of the case as deemed fit, including an order that the unsuccessful party pay to the successful party the costs of review in a sum fixed by the judge, judges or Land Court of Appeal. 40

Service and enforcement of orders

48. Any decision, judgment or order of the Land Court of Appeal may be served and executed as if it were a decision, judgment or order of the High Court.

CHAPTER 6

GENERAL PROVISIONS 45

General provisions applicable to courts established by Act

49. The provisions of the Superior Courts Act, read with the changes required by the context, apply in relation to the Court and the Land Court of Appeal, to the extent that they are not inconsistent with this Act.

Finances and accountability

50. Expenditure in connection with the administration and functioning of the Court and Land Court of Appeal must be defrayed from monies appropriated by Parliament for such purpose.

Transitional arrangements 5

51. (1) (a) Any proceedings arising out of the application of this Act or any other law conferring jurisdiction on the Court, pending in any court other than the Land Claims Court established by section 22 of the Restitution of Land Rights Act, at the commencement of this Act must be continued and concluded in every respect as if this Act had not been passed. 10

(b) Any proceedings arising out of the application of this Act or any other law conferring jurisdiction on the Court, pending in the Land Claims Court, at the commencement of this Act must be continued and concluded in terms of this Act in the Court and, for that purpose—

(i) those proceedings are deemed to have been instituted in terms of this Act in the Court; and 15

(ii) anything done under any provision of any law amended by this Act is deemed to have been done under the corresponding provision of this Act, unless the Court is of the view that this would not be in the interests of justice, in which event the Court must conclude the proceedings in the Court as if this Act had not been passed. 20

(c) Proceedings for purposes of paragraphs (a) and (b) of subsection (1), are deemed to be pending if, at the commencement of this Act—

(i) a civil summons had been issued but judgment has not been passed; or

(ii) an accused person had pleaded but judgment or sentence has not been passed. 25

(d) Any proceedings arising out of the application of any law pending in any tribunal or forum at the commencement of this Act must be continued and concluded in every respect as if this Act had not been passed.

(2) Any period of time served by a person as a judge or an acting judge of the Land Claims Court established in terms of section 22 of the Restitution of Land Rights Act, is deemed to have been served by that person, as a judge appointed in terms of section 8 of this Act. 30

(3) Any money available from the budget allocation for purposes of section 29(4) of the Restitution of Land Rights Act, before its amendment by this Act, forms part of the budget allocation of Legal Aid South Africa for purposes of giving effect to section 16(4) of this Act. 35

Amendment of laws

52. The laws mentioned in the Schedule are amended to the extent indicated in the third column of the Schedule.

Regulations 40

53. (1) The Minister may make regulations regarding—

(a) the form of the oath or affirmation of a person who has been appointed as a judge of the Court and who is not a judge of the High Court;

(b) the manner and conditions of appointment for officers of the Court;

(c) functions to be performed by officers of the Court; 45

(d) manner of appointment of assessors;

(e) the form of the oath or affirmation of an assessor;

(f) fees and allowances of an assessor not in full-time employ of the State;

(g) the form and manner of instituting proceedings in the Court;

(h) matters contemplated under section 13(3)(a); 50

(i) the period of referral as contemplated under section 13(3)(b);

(j) the manner in which the matter is referred back to the Court in terms of section 31(5) or 32(5);

(k) the period within which the matter must be set for hearing in the Court;

- (l) the manner in which a person is subpoenaed to appear as a witness in a matter before the Court to give evidence or to produce a book, document or other written instrument or any item;
 - (m) any matter required or permitted to be prescribed by regulation under this Act; and 5
 - (n) any other matter which is necessary to prescribe in order to achieve the objects of this Act.
- (2) The Minister must make regulations to facilitate the resolution of disputes through mediation and arbitration, including—
- (a) the process by which mediation proceedings are initiated, and the form, manner and use of that process; 10
 - (b) the process by which arbitration proceedings are initiated, and the form, manner and use of that process;
 - (c) the form and manner of a joinder of any person having an interest in the dispute in the mediation or arbitration proceedings; 15
 - (d) the prescribed forms to be used by parties in respect of mediation or arbitration;
 - (e) the right of any party to be represented by any person or category of persons in any mediation or arbitration proceedings, including the regulation or limitation of the right to be represented in those proceedings; 20
 - (f) penalties payable by any party to mediation or arbitration proceedings for wilfully failing to attend such proceedings;
 - (g) criteria for appointment, appointment process, powers and functions and remuneration for a mediator and arbitrator;
 - (h) fees that are payable for mediation and arbitration; 25
 - (i) the form and manner in which a party to an arbitration may apply to the Court to—
 - (i) stop the arbitration process and to proceed in the Court;
 - (ii) vary or set aside a settlement agreement; or
 - (iii) set aside an arbitration award; 30
 - (j) legal assistance that Legal Aid South Africa may provide to parties who wish to exercise their right to have a dispute resolved through mediation or arbitration, and any expenditure related thereto;
 - (k) duties to be performed by the registrar or officer of the Court in assisting parties who wish to exercise their right to have a dispute resolved through mediation or arbitration. 35
- (3) Any regulation under this section which results in State expenditure, must be made with the concurrence of the Cabinet member responsible for finance.

Short title and commencement

- 54.** (1) This Act is called the Land Court Act, 2021, and commences on a date 40 determined by the President by proclamation in the *Gazette*.
- (2) For purposes of subsection (1) different dates may be proclaimed in respect of different provisions of the Act and the different items of the Schedule to the Act.

SCHEDULE

LAWS AMENDED

(Section 52)

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Item No.	No. and year of law	Short title	Extent of repeal or amendment	
1.	Act No. 112 of 1991	Upgrading of Land Tenure Rights Act, 1991	<p>1. The insertion in section 1 before the definition of “Deeds Act” of the following definition: “‘Court’ means the Land Court established by section 3 of the Land Court Act, 2021;”.</p> <p>2. The substitution in section 20(4) for paragraph (f) of the following paragraph: “(f) on the authority of a warrant issued by a [magistrate or a] judge of the Court [having jurisdiction] at any reasonable time enter upon such land or any contiguous land.”.</p> <p>3. The substitution in section 21 for the words preceding paragraph (b) of the following words: “[(1)] Whenever in any [judicial] proceedings before the Court the question arises—”.</p> <p>4. The substitution in section 24D(6) for paragraph (d) of the following paragraph: “(d) if it is necessary for the purposes of paragraph (a), (b) or (c), at any reasonable time, on the authority of a warrant issued by a [magistrate or] judge [having jurisdiction] of the Court, enter upon any erf or other land in the area concerned.”.</p> <p>5. The substitution in subsection 24(D) for subsection (7) of the following subsection: “(7) If any person refuses to answer a question put to him or her under subsection (6)(a) or to deliver or submit anything required under subsection (6)(b), the person acting under subsection (6)(a) or (b) may apply to the [magistrate’s court for the district in which the erf or piece of land in question is situated] Court for an order compelling the former person to answer the question or deliver or submit the thing and the [court] Court may make such order as it deems fair and just under the circumstances, including an order for costs, having regard to the public interest and the right to privacy of the respondent.”.</p> <p>6. The insertion of the following section after section 24D: “Jurisdiction of Court 24E. The Court has jurisdiction to resolve any dispute arising from the application of this Act.”.</p>	10 15 20 25 30 35 40
2.	Act No. 126 of 1993	Land Reform: Provision of Land and Assistance Act, 1993	The insertion of the following section after section 12: “ Jurisdiction of Land Court 12A. The Land Court established by section 3 of the Land Court Act, 2021, has jurisdiction to resolve any dispute arising from the application of this Act.”.	45
3.	Act No. 3KZ of 1994	KwaZulu-Natal Ingonyama Trust Act, 1994	The insertion of the following section after section 4A: “ Jurisdiction of Land Court 4B. The Land Court established by section 3 of the Land Court Act, 2021, has jurisdiction to resolve any dispute arising from the application of this Act.”.	
4.	Act No. 22 of 1994	Restitution of Land Rights Act, 1994	<p>1. The substitution in section 1 for the definition of “Court” of the following definition: “‘Court’ means the Land [Claims] Court established by section [22] 3 of the Land Court Act, 2021;”.</p> <p>2. The deletion in section 1 of the definitions of “High Court” and “presiding judge”.</p>	50 55

Item No.	No. and year of law	Short title	Extent of repeal or amendment
			<p>3. The substitution in section 1 for the definition of “the rules” of the following definition: ““the rules” means the rules made under [sections] section 16 [and 32] of this Act;”.</p> <p>4. The deletion of Chapter 3.</p> <p>5. The substitution in section 38B(1) for paragraph (a) of the following paragraph: “(a) an order has been made by the Court in terms of section [35] 28(3) of the Land Court Act, 2021, in respect of a right relating to that land; or”.</p>
5.	Act No. 3 of 1996	Land Reform (Labour Tenants) Act, 1996	<p>1. The substitution in section 1 for the definition of “Court” of the following definition: ““Court” means the Land [Claims] Court established by section [22 of the Restitution of Land Rights Act, 1994 (Act 22 of 1994)] 3 of the Land Court Act, 2021;”.</p> <p>2. The substitution in section 1 for the definition of “the rules” of the following definition: ““the rules” means rules made [by the President of the Court] under section 14 of the Land Court Act, 2021.”.</p> <p>3. The substitution in section 2 for subsection (6) of the following subsection: “(6) For the purpose of establishing whether a person is a labour tenant, [a court] the Court shall have regard to the combined effect and substance of all agreements entered into between the person who avers that he or she is a labour tenant and his or her parent or grandparent, and the owner or lessee of the land concerned.”.</p> <p>4. The substitution in section 13 for subsection (1) of the following subsection: “(1) The provisions of sections 7 to 10 shall apply to proceedings pending in any court, before the commencement of the Land Court Act, 2021, and must be <u>continued and concluded in every respect as if the Land Court Act, 2021, had not been passed [at the commencement of this Act].</u>”.</p> <p>5. The substitution in section 15A for subsection (1) of the following subsection: “(1) No person shall remove or evict a labour tenant or an associate except on the authority of an order of [a competent court] the Court.”.</p> <p>6. The deletion in section 18 of subsections (8) and (9).</p> <p>7. The substitution for section 19 of the following section: “Referral of application 19. On referral of an application by the Director-General, the Judge President of the Court or a judge of the Court nominated by him or her may direct either that the application be heard by the Court or that it be referred to arbitration as contemplated in section <u>32 of the Land Court Act, 2021.</u>”.</p> <p>8. The deletion of section 20.</p> <p>9. The substitution in section 21 for subsection (1) of the following subsection: “(1) The Court may make the determination of an arbitrator [referred to in section 20(6),] an order of the Court with or without such technical variations as may be appropriate.”.</p>

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Item No.	No. and year of law	Short title	Extent of repeal or amendment
			<p>10. The substitution in section 24 for subsection (2) of the following subsection: “(2) If the applicant fails to make the payment within three calendar months of receipt of the notice referred to in subsection (1), the owner of the affected land may apply to the Court for an order to declare the settlement agreement, previous order of the arbitrator or the Court null and void.”. 5</p> <p>11. The substitution in section 24 for subsection (3) of the following subsection: “(3) The Court may, after hearing an application in terms of subsection (2), make such order as it deems just and equitable: Provided that the settlement agreement, previous order made by the arbitrator or the Court shall not be declared null and void unless the owner of the affected land and any other person who has received compensation from the applicant in respect of the affected land has paid or has given security for the payment of the amounts which he or she has received from the applicant and the Minister, respectively.”. 10 15</p> <p>12. The deletion of sections 29, 30 and 31. 20</p> <p>13. The substitution for section 32 of the following section: “Powers of review 32. The Court shall have the same powers as the [Supreme] High Court to review an act, omission or decision of any functionary acting in terms of this Act or purporting to act in terms of this Act or of any court in respect of proceedings contemplated in section 13 or of any arbitrator in respect of proceedings taking place before him or her in terms of section 33(3), and shall exercise such powers to the exclusion of the provincial and local divisions of the [Supreme] High Court.”. 25 30</p> <p>14. The substitution in section 33 for subsections (3) of the following subsection: “(3) The Judge President of the Court or a judge of the Court nominated by him or her may determine that proceedings for the eviction of any person which have been instituted in or transferred to the Court shall take place as contemplated in section 32 of the Land Court Act, 2021 [before an arbitrator appointed by him or her].” 35</p> <p>15. The deletion in section 33 of subsection (4). 40</p> <p>16. The substitution for section 35 of the following section: “Effect of order of Court 35. For the purposes of the Deeds Registries Act, 1937 (Act No. 47 of 1937), an order of the Court shall have the same force as an order of the [Supreme] High Court.”. 45</p>
6.	Act No. 28 of 1996	Communal Property Associations Act, 1996	<p>1. The insertion in section 1 before the definition of “Director-General” of the following definition: “‘Court’ means the Land Court established by section 3 of the Land Court Act, 2021;”. 50</p> <p>2. The substitution in section 2(1) for paragraph (a) of the following paragraph: “(a) which by order of the [Land Claims] Court is entitled to restitution under the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994), where that Court has ordered restitution on condition that an association be formed in accordance with the provisions of this Act;”. 55</p>

Item No.	No. and year of law	Short title	Extent of repeal or amendment
			<p>3. The substitution in section 13 for subsection (1) of the following subsection: “(1) [A division of the Supreme Court or a magistrate’s court having jurisdiction in respect of the area in which the property of the association is situated or the area in which the land which may be acquired by a provisional association is situated] The Court, may, on application made by the Director-General, an association or provisional association or any member thereof, or any other interested person, place the association or provisional association under the administration of the Director-General or grant a liquidation order in respect of an association or provisional association, where the association or provisional association, because of insolvency or maladministration or for any other cause is unwilling or unable to pay its debts or is unable to meet its obligations, or where it would otherwise be just and equitable in the circumstances.”.</p>
7.	Act No. 31 of 1996	Interim Protection of Informal Land Rights Act, 1996	<p>The insertion of the following section after section 5: “Jurisdiction of Land Court 5A. The Land Court established by section 3 of the Land Court Act, 2021, has jurisdiction to resolve any dispute arising from the application of this Act.”.</p>
8.	Act No. 62 of 1997	Extension of Security of Tenure Act, 1997	<p>1. The substitution in section 1 for the definition of “court” of the following definition: “[‘court’] ‘Court’ means [a competent court having jurisdiction in terms of this Act] the Land Court established by section 3 of the Land Court Act, 2021, including a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996);”.</p> <p>2. The deletion in section 1 of the definition of “Land Claims Court”.</p> <p>3. The substitution in section 8(7) for paragraph (b) of the following paragraph: “(b) the owner or person in charge may institute proceedings in [a court] the Court for a determination of reasonable terms and conditions of further residence, having regard to the income of all the occupiers in the household.”.</p> <p>4. The substitution in section 9 for subsection (1) of the following subsection: “(1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of [court] the Court issued under this Act.”.</p> <p>5. The substitution in section 9(2) for the words preceding paragraph (a) of the following words: “(2) [A court] The Court may make an order for the eviction of an occupier if—”.</p> <p>6. The substitution in section 9(2) of paragraph (d) for the Proviso of the following Proviso: “Provided that if a notice of application to [a court] the Court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Rural Development and Land Reform not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with.”.</p> <p>7. The substitution in section 10 for subsection (2) of the following subsection: “(2) Subject to the provisions of subsection (3), if none of the circumstances referred to in subsection (1) applies, [a court] the Court may grant an order for eviction if it is satisfied that suitable alternative accommodation is available to the occupier concerned.”.</p>

Item No.	No. and year of law	Short title	Extent of repeal or amendment
			<p>8. The substitution in section 10(3) for the words following paragraph (c) of the following words: “[a court] the Court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to—”.</p>
			<p>9. The substitution in section 11 for subsections (1) and (2) of the following subsections: “(1) If it was an express, material and fair term of the consent granted to an occupier to reside on the land in question, that the consent would terminate upon a fixed or determinable date, [a court] the Court may on termination of such consent by effluxion of time grant an order for eviction of any person who became an occupier of the land in question after 4 February 1997, if it is just and equitable to do so. (2) In circumstances other than those contemplated in subsection (1), [a court] the Court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997 if it is of the opinion that it is just and equitable to do so.”.</p>
			<p>10. The substitution in section 12(1) for the words preceding paragraph (a) of the following words: “(1) [A court] The Court that orders the eviction of an occupier shall—”.</p>
			<p>11. The substitution in section 12 for subsection (3) of the following subsection: “(3) [A court] The Court may, at the request of the sheriff in question, authorise any person to assist the sheriff to carry out an order for eviction, demolition or removal, subject to the conditions determined by the court as to the execution thereof: Provided that the sheriff shall at all times be present during such eviction, demolition or removal.”.</p>
			<p>12. The substitution in section 12 for subsection (5) of the following subsection: “(5) [A court] The Court may, on good cause shown, vary any term or condition of an order for eviction made by it.”.</p>
			<p>13. The substitution in section 13(1) for the words preceding paragraph (a) of the following words: “(1) If [a court] the Court makes an order for eviction in terms of this Act—”.</p>
			<p>14. The substitution in section 13 for subsection (3) of the following subsection: “(3) No order for eviction made in terms of section 10 or 11 may be executed before the owner or person in charge has paid the compensation which is due in terms of subsection (1): Provided that [a court] the Court may grant leave for eviction subject to satisfactory guarantees for such payment.”.</p>
			<p>15. The substitution in section 14 for subsection (1) of the following subsection: “(1) A person who has been evicted contrary to the provisions of this Act may institute proceedings in [a court] the Court for an order in terms of subsection (3).”.</p>
			<p>16. The substitution in section 14(2) for the words following paragraph (b) of the following words: “may institute proceedings in [a court] the Court for an order in terms of subsection (3).”.</p>

Item No.	No. and year of law	Short title	Extent of repeal or amendment
			<p>17. The substitution in section 13(4) for the words preceding paragraph (a) of the following words: “(4)Where the person contemplated in subsection (2) was evicted in terms of an order of [a court] <u>the Court</u>—”.</p> <p>18. The deletion in section 17 of subsections (1), (3) and (4).</p> <p>19. The deletion of section 19.</p> <p>20. The substitution in section 20 for the heading of the following heading: “Land [Claims] Court”.</p> <p>21. The substitution in section 20 for subsections (1) and (2) of the following subsections: “(1) The [Land Claims] Court shall have jurisdiction in terms of this Act throughout the Republic and shall have all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act, including the power to— (a) [to] decide any constitutional matter in relation to this Act; (b) [to] grant interlocutory orders, declaratory orders and interdicts; (c) [to] review an act, omission or decision of any functionary acting or purporting to act in terms of this Act; [and] (d) [to] review an arbitration award in terms of the Arbitration Act, 1965 (Act No. 42 of 1965), in so far as it deals with any matter that may be heard by [a court] <u>the Court</u> in terms of this Act; (e) <u>direct how the order of the Court shall be executed, including the setting of time limits for the implementation of such orders; and</u> (f) <u>make such orders for costs as it deems just.</u> (2) [Subject to sections 17(2) and 19 (1), the Land Claims] The Court [shall have] has the powers set out in subsection (1) to the exclusion of any court contemplated in section 166(c), (d) or (e) of the Constitution.”.</p> <p>22. The deletion in section 20 of subsections (3) and (4).</p> <p>23. The substitution in section 23 for subsection (1) of the following subsection: “(1) No person shall evict an occupier except on the authority of an order of [a competent court] <u>the Court</u>.”.</p> <p>24. The substitution in section 25 for subsection (1) of the following subsection: “(1) The waiver by an occupier of his or her rights in terms of this Act shall be void, unless it is permitted by this Act or incorporated in an order of [a court] <u>the Court</u>.”.</p> <p>25. The substitution in section 25 for subsection (2) of the following subsection: “(2) [A court shall] <u>The Court</u> must have regard to, but not be bound by, any agreement in so far as that agreement seeks to limit any of the rights of an occupier in terms of this Act.”.</p>
9.	Act No. 19 of 1998	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998	<p>1. The substitution in section 1 for the definition of ‘court’ of the following definition: “‘court’ ‘Court’ means [any division of the High Court or the magistrate’s court in whose area of jurisdiction the land in question is situated] <u>the Land Court established by section 3 of the Land Court Act, 2021</u>.”.</p>

Item No.	No. and year of law	Short title	Extent of repeal or amendment
			<p>2. The amendment of section 4 by—</p> <p>(a) the substitution for subsections (3) and (4) of the following subsections:</p> <p>“(3) Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the [court in question] Court.</p> <p>(4) Subject to the provisions of subsection (2), if [a court] the Court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the court, service must be effected in the manner directed by the court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.”;</p> <p>(b) the substitution for subsections (6) and (7) of the following subsections:</p> <p>“(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, [a court] the Court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.</p> <p>(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, [a court] the Court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.”; and</p> <p>(c) the substitution for subsection (11) of the following subsection:</p> <p>“(11) [A court] The Court may, at the request of the sheriff, authorise any person to assist the sheriff to carry out an order for eviction, demolition or removal subject to conditions determined by the court: Provided that the sheriff must at all times be present during such eviction, demolition or removal.”.</p> <p>3. The substitution in section 8 for subsection (1) of the following subsection:</p> <p>“(1) No person may evict an unlawful occupier except on the authority of an order of [a competent court] the Court.”.</p> <p>4. The deletion of section 9.</p>

MEMORANDUM ON THE OBJECTS OF THE LAND COURT BILL, 2021

1. PURPOSE OF BILL

- 1.1 Section 22(1) of the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994) (“the Restitution Act”), established the Land Claims Court (“the LCC”) which has exclusive jurisdiction and power in respect of a number of aspects which have a bearing on land, more specifically on restitution claims arising from the Restitution Act. It also currently has exclusive jurisdiction to deal with matters arising from the application of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996), and it shares jurisdiction with the magistrates’ courts in respect of matters arising from the application of the Extension of Security of Tenure Act, 1997 (Act No. 62 of 1997).
- 1.2 The current legislative framework under the Restitution Act exists due to the initial point of departure that a dedicated court be established with a limited lifespan to deal with claims for restitution of land. As such there was no need at that time to establish a permanent court and permanent judges for this purpose. It turned out that in reality the restitution process became protracted and is still not completed. A lack of permanency of judges presiding over matters before the LCC and the absence of a permanent seat of the LCC resulted in slow processing of and backlogs in land restitution claims to the dissatisfaction of land claimants.
- 1.3 In order to improve the current legislative framework and address its weaknesses comprehensively and holistically, the Bill seeks to establish a specialist Land Court, with its judgments, orders and decisions appealable at a specialist Land Court of Appeal. It seems appropriate that a properly constituted and capacitated “Land Court”, and not a “Land Claims Court” under the Restitution Act, should be the forum to deal with all land-related matters as regulated by various Acts of Parliament. This will also facilitate the expeditious disposal of cases and contribute towards the development of appropriate jurisprudence in relation to land matters. This is coupled with the cheaper and speedier alternative dispute resolution mechanism in the form of mediation and arbitration. The Bill, however, makes provision for future legislation (new or amending legislation) to confer jurisdiction on the Land Court as and when the need arises.

2. OBJECTS OF BILL

- 2.1 The Bill is divided into six Chapters, with other chapters subdivided into several Parts. The definitions are set out in **clause 1** as contained in Chapter 1 of the Bill to facilitate interpretation of the Act.
- 2.2 **Clause 2** determines the purpose and objects of the Bill as being to enhance and promote the ideal of access to land on an equitable basis, to promote land reform as a means of redressing the results of past discrimination and to facilitate land justice. The objects of the Bill are to—
 - (a) establish a Land Court with jurisdiction to grant any order, appropriate relief or impose any sanction, as provided for in the Bill or any other law that confers jurisdiction on the Court;
 - (b) establish a Land Court of Appeal to hear and determine appeals emanating from the judgments and orders of the Court; and
 - (c) provide for court ordered mediation or arbitration.
- 2.3 Chapter 2 deals with the establishment, composition, seal, seat and jurisdiction of the Land Court (“the Court”). The salient features of Chapter 2, that is **clauses 3 to 7** of the Bill, can be summarised as follows:
 - 2.3.1 **Clause 3** establishes the Court as a High Court that has the authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a Division of the High Court of South

Africa has in terms of the Superior Courts Act in relation to matters under its jurisdiction. Since the Court is a court of record, all its hearings must be conducted in an open court, unless the Court directs otherwise in special cases.

- 2.3.2 **Clause 4** provides that the Court will consist of a Judge President, Deputy Judge President and so many other judges as may be determined in accordance with the prescribed criteria, and approved by the President. The Judge President, Deputy Judge President, and other judges must have knowledge, experience and expertise in the field of land rights matters. The Court is constituted before a single judge unless the Judge President decides to the contrary.
- 2.3.3 **Clause 5** provides that the Court must, for use as occasion may require, have an official seal of a design determined by the President by proclamation in the *Gazette*. Custody of the seal of the Court is kept by the registrar.
- 2.3.4 In terms of **clause 6** the seat of the Court is in Johannesburg, but whenever it appears to the Judge President that it is expedient or in the interests of justice to hold its sitting for the hearing of any matter at a place elsewhere than at the seat of the Court, it may hold such sitting at that place. Also the Court can sit in as many separate courts as the available judges may allow.
- 2.3.5 **Clause 7** provides that the Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of the Bill or in terms of any other law are to be determined by the Court. The Court has jurisdiction in the area of jurisdiction of each Division of the High Court. The Minister, after consultation with the Chief Justice for the purposes of adjudicating land disputes and by notice in the *Gazette*, may define a specific area of jurisdiction of each Court, if the need arises, and may increase or reduce the area of jurisdiction of each Court, when necessary, and must appoint one or more places within the area of jurisdiction of the Court for the holding of sittings of the Court, other than the seat of each Division of the High Court, to make the Court accessible to the people, and may withdraw or vary any notice made under this clause. This provision enables the Minister to determine any place for the holding of the Court, such as a school, town hall or any other public place which can be equipped with necessary facilities for the hearing of matters especially in rural areas which are far away from the courts, even the magistrates' courts.

2.4 Chapter 3 deals with judges, officers and assessors of the Court.

- 2.4.1 **Clause 8** provides that the President of the Republic, acting on the advice of the Judicial Service Commission, appoints the Judge President and Deputy Judge President of the Court, who must be judges of the High Court and have knowledge, experience and expertise in the field of land rights matters. The Deputy Judge President acts as the Judge President whenever the Judge President is unable to do so for any reason. The President of the Republic, acting on the advice of the Judicial Service Commission, and the Judge President of the Court may appoint as many judges as is necessary as judges of the Court. The Minister is also empowered to make acting appointments in case of vacancies in the office of the Deputy Judge President or a judge of the Court, or if there is sufficient reason to do so.
- 2.4.2 **Clause 9** provides that the tenure, remuneration, terms and conditions of service applicable to a judge of the High Court 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. The judges are appointed for a fixed term determined by the President of the Republic at the time of appointment and they hold office until the expiry of the term, the date on which the judge ceases to be a judge of the High Court or the judge resigns by giving written notice to the President. The judge of the Court must continue to hear a matter even after his or her term has expired in order to ensure continuity of court processes. In terms of **clause 10** no summons or notice of motion may be issued against and no subpoena in respect of civil proceedings may be served on the Judge President, Deputy Judge President or any other judge of the Court except with the consent of the Judge President of the Court. However, consent of the Judge President of the Court or the Chief Justice is not required in relation to the application in terms of the Domestic Violence Act, 1998 (Act No. 116 of 1998).

- 2.4.3 With regard to the officers and staff of the Court, **clause 11** provides that the Minister must appoint a court manager, one or more assistant court managers if necessary, a registrar, one or more assistant registrars and other officers of the Court. The appointment of officers by the Minister is made in consultation with the Judge President of the Court and in accordance with the law governing the public service.
- 2.4.4 **Clause 12** makes provision that the Court may sit with or without assessors, who may not be more than two, to assist the Court in contested hearings. Assessors are appointed as prescribed, and must first take an oath or make an affirmation administered by the judge.
- 2.5 Part 1 of Chapter 4 deals with Court proceedings and the salient features thereof may be summarised as follows:
- 2.5.1 **Clause 13** provides as to who has *locus standi* to institute Court proceedings, and such person must notify the registrar in the prescribed manner of an intention to institute the proceedings. The registrar is required to refer the matter to the Judge President who must decide whether the matter is to be heard in Court or must be referred for mediation or arbitration. If the matter is to be heard in Court, the Judge President refers the matter to the registrar for the allocation of the date of hearing.
- 2.5.2 If the matter is to go for mediation or arbitration, the Judge President must make an order directing the registrar to transfer the matter, in the prescribed manner, to the mediator contemplated in clause 31 or the arbitrator contemplated in clause 32. Clause 13 also sets out some of the relevant circumstances that the Judge President must take into account before making a decision to refer the matter.
- 2.6 Part 2 of Chapter 4 deals with the rules, powers and functions of court under other legislation, intervention, right to appear, legal representation, appeals and judgment by default. The salient features of this part may be summarised as follows:
- 2.6.1 **Clause 14** provides that the provisions of the Superior Courts Act and the Uniform Rules made thereunder apply to the Court, in so far as those provisions relate to the circumstances under which opinion and oral evidence may be submitted to the Court, the suspension or execution of judgments, orders or sentences of the Court pending applications, or petitions for leave to appeal and the prosecution of appeals, the manner and circumstances under which a judgement by default can be made, and generally, any matter which may be necessary or useful to be regulated for the proper despatch and conduct of the functions of the Court. These provisions do apply in so far as no other provision has been made in the regulations.

- 2.6.2 **Clause 15** determines that the provisions of the Bill apply in respect of performance by the Court of its powers and functions under other legislation in respect of which it has jurisdiction.
- 2.6.3 **Clause 16** empowers any person to apply to the Court for leave to intervene in the proceedings before the Court. A party to the proceedings may self-represent or be represented in Court by their own legal practitioner at their own costs. However, if a party cannot afford legal representation and if it is in the interest of that party to have legal representation, the Court must refer the matter to Legal Aid South Africa to consider granting legal representation in accordance with its protocols. The expenditure for the provision of legal aid must be defrayed from money appropriated by Parliament for this purpose, and monies appropriated by Parliament for this purpose constitute earmarked funds on the vote of Legal Aid South Africa and may not be used by for any other purpose. These funds are currently managed by the Land Rights Management Facility which is faced with challenges.
- 2.6.4 **Clause 17** sets out the powers of the Court on the hearing of appeals in terms of any law that confers jurisdiction on the Court. The Court can receive further evidence, remit the case to the court or tribunal of first instance for further hearing or to confirm, amend or set aside the judgment, order or decision which is the subject matter of the appeal and to give any judgment, order or decision which the circumstances may require.
- 2.6.5 In terms of **clause 18** the Court may grant judgment by default in the manner and in the circumstances determined in the rules.
- 2.7 Part 3 of Chapter 4 deals with the witnesses, examination by interrogatories and admissibility of evidence.
- 2.7.1 **Clauses 19 to 21** deal with issues related to the adjudication of disputes. These provisions are standard and deal with matters such as securing the attendance of witnesses through a subpoena and how they should be dealt with on refusal to give evidence, witness fees, the taking of the evidence of a person who resides or is for the time being outside the area of jurisdiction of the Court. Witness fees are payable in terms of section 42 of the repealed Supreme Court Act, 1959, as the corresponding section 37 of the Superior Courts Act, 2013, is yet to be put into operation.
- 2.7.2 **Clause 22** deals with the admissibility of evidence in Court, in terms of which certain ordinary rules of evidence are relaxed. The Court is entitled to admit 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 Court can admit hearsay evidence regarding the circumstances surrounding the dispossession of a land right or rights and the rules governing the allocation and occupation of land within a claimant community at the time of such dispossession, and expert evidence regarding the historical and anthropological facts relevant to any particular land claim.
- 2.8 Part 4 of Chapter 4 deals with the processes of Court and Offences. In terms of **clause 23**, the process of Court runs throughout the Republic and its sentences, rulings, judgments, writs, summonses, orders, warrants, commands and other processes must be executed by the sheriff or deputy sheriff in any area in the same manner as if they were processes of the Provincial Division of the High Court having jurisdiction in such area. **Clause 24** creates offences punishable by a fine or imprisonment of up to one year for a person who commits a conduct referred to in section 46 of the Superior Courts Act, in relation to the execution by a sheriff or deputy sheriff of his or her duties in

terms of the Bill. The said section 46 makes certain conduct an offence, such as obstructing the sheriff or deputy sheriff in executing their duties or destroying or disposing of goods under attachment or interdict by the court *etc.*

- 2.9 Part 5 of Chapter 4 deals with the powers of Court, referral for investigation by referee, pre-trial conference, Court orders, variation, rescission and costs. The salient features of this part may be summarised as follows:
- 2.9.1 **Clause 25** provides that the Court has all such powers that a Division of the High Court has in civil proceedings at a place where the land in question is situated. Of great importance is that the Court has the power to decide any issue in terms of any other law, which is not ordinarily within its jurisdiction but is incidental to an issue within its jurisdiction, if the Court considers it to be in the interests of justice to do so. The Court also has the power to reserve any question of law that arises in the proceedings for the decision of the Land Court of Appeal, and pending that decision the Court may make an interim order.
- 2.9.2 **Clause 26** empowers the Court to at any stage refer any matter which requires extensive examination of documents or scientific, technical or local investigation which cannot be conveniently conducted by the Court, any matter which relates wholly or in part to accounts or any other matter arising in such proceedings, for enquiry and report to a referee appointed by the parties. The Court has options in dealing with the report, such as adopting the report, either wholly or in part, and either with or without modifications, or remitting such report for further enquiry or report or consideration by such referee, or even making such other order in regard thereto as may be necessary or desirable.
- 2.9.3 **Clause 27** entitles the Court on its own or at the request of any party at any time before the hearing to convene a pre-trial conference for the purpose of clarifying the issues in dispute, identifying those issues on which evidence will be necessary and in general, expediting a decision on the matter in question.
- 2.9.4 **Clause 28** sets out the various orders that the Court can make, and importantly may at any stage after a dispute has been referred to it, if it becomes apparent that the dispute ought to have been referred to mediation or arbitration, stay the proceedings and refer the dispute to mediation or arbitration.
- 2.9.5 **Clause 29** provides for the variation and rescission of decisions, judgments or orders of the Court.
- 2.9.6 In terms of **clause 30**, the Court may make an order for the payment of costs according to the requirements of the law and fairness. When deciding the issue of costs, the Court may take into account factors such as whether the matter ought to have been referred to mediation or arbitration, and the conduct of the parties during the proceedings.
- 2.9.7 Part 6 of Chapter 4 deals with mediation, arbitration and settling of matters. **Clauses 31** and **32** deal with mediation and arbitration, respectively, determining that if the Judge President or the Court decides to refer the matter for mediation or arbitration, he or she or the Court must make an order directing the registrar to transfer the matter to the mediator or arbitrator and specify the time, date and the place where the process is to start and appoint a fit and proper person as mediator or arbitrator to chair the first meeting between the parties. However, the parties may at any time during the course of mediation or arbitration by agreement appoint another person to mediate or arbitrate the dispute. In terms of **clause 33**, if a matter is settled out of

Court, either through negotiation, mediation or arbitration and the settlement agreement is accepted by all the parties involved in the matter, the registrar of the Court must submit the settlement agreement to the Court for confirmation or rejection. The Court may confirm the settlement agreement and make it an order of Court or refer the settlement agreement back to the parties for reconsideration on any specific issues or reject the settlement agreement, in which latter event the matter must proceed in the Court.

2.10 Chapter 5 deals with the Land Court of Appeal. The salient features of Part 1 thereof may be summarised as follows:

- 2.10.1 **Clause 34** establishes the Land Court of Appeal as a court of law and equity. The Land Court of Appeal is the final court of appeal in respect of all judgments and orders made by the Land Court in respect of the matters within its exclusive jurisdiction. It is a superior court with authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which the Supreme Court of Appeal has in relation to matters under its jurisdiction and is a court of record.
- 2.10.2 **Clause 35** determines that the Land Court of Appeal consists of the President of the Land Court of Appeal, the Deputy President of the Land Court of Appeal, and as many judges as the President of the Republic may consider necessary. The Land Court of Appeal is constituted before any three judges who the President of the Land Court of Appeal designates from the panel of judges of the Land Court and High Court. However, no judge of the Land Court of Appeal may sit in the hearing of an appeal against a judgment or an order given in a case that was heard before that judge.
- 2.10.3 In terms of **clause 36** the judges of the Land Court of Appeal are appointed by the President of the Republic who, acting on the advice of the Judicial Service Commission and after consultation with the Minister, must appoint a Judge President and a Deputy Judge President of the Land Court of Appeal, who may be a judge of the Supreme Court of Appeal. The Deputy Judge President of the Land Court of Appeal acts as Judge President of the Land Court of Appeal whenever the Judge President of the Land Court of Appeal is unable to do so for any reason. The President, acting on the advice of the Judicial Service Commission, after consultation with the Minister, the Chief Justice and the Judge President of the Land Court of Appeal, must appoint the judges of the Land Court of Appeal. Acting judges of the Land Court of Appeal are appointed from the judges of the Land Court or High Court by the Minister, after consultation with the Chief Justice and the Judge President of the Land Court of Appeal.
- 2.10.4 The remaining clauses of Part 1 deal with the tenure, remuneration and terms and conditions of appointment of the Land Court of Appeal judges (**clause 37**); officers of the Land Court of Appeal (**clause 38**) being a registrar, one or more assistant registrars if necessary and the officers of the Land Court hold the corresponding office in relation to the Land Court of Appeal; the seal of the Land Court of Appeal (**clause 39**), the design of which is determined by the President of the Republic by proclamation in the *Gazette*; and the seat of the Land Court of Appeal (**clause 40**), which is the same seat as that of the Land Court.
- 2.10.5 Part 2 deals with the rules for the Land Court of Appeal (**clause 41**), which are made by the Rules Board, in consultation with the Judge President of the Land Court of Appeal; the jurisdiction of the Land Court of Appeal and power to hear appeals (**clause 42**); appeals against judgment or order of the Court (**clause 43**), determining that the appeal must be made with leave of the Court and if refused with the leave of the Land Court of appeal; representation before the Land

Court of Appeal (**clause 44**), determining that any person who may appear before the Land Court has the right to appear before the Land Court of Appeal; judgments of the Land Court of Appeal binding on the Land Court (**clause 45**); the Land Court of Appeal as final court of appeal (**clause 46**); costs (**clause 47**), determining that the judge, judges or Land Court of Appeal deciding the matter may make such order as to costs of the case as deemed fit, including an order that the unsuccessful party pay to the successful party the costs of review in a sum fixed by the judge, judges or Land Court of Appeal; and service and enforcement of orders (**clause 49**), providing that any decision, judgment or order of the Land Court of Appeal may be served and executed as if it were a decision, judgment or order of the High Court.

- 2.11 Chapter 6 deals with the general provisions applicable to the courts established by the Bill (**clause 49**); finances and accountability (**clause 50**); transitional arrangements (**clause 51**); amendment of laws (**clause 52**); regulations (**clause 53**) and the short title (**clause 54**), which provisions are standard. The laws referred to in clause 52 are sought to be amended by means of the Schedule to give the Court exclusive jurisdiction to adjudicate the disputes emanating from the application of those laws. The Schedule lists only nine Acts for now, so as not to inundate the Court with many pieces of legislation all at once, especially when it is established for the first time. However, further Acts may be amended in due course to confer exclusive jurisdiction to the Court.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

- 3.1 The Bill was consulted upon with the Departments constituting the Inter-Ministerial Committee on Agriculture (“IMC”), being the Departments of Agriculture, Land Reform and Rural Development; Trade, Industry and Competition; Cooperative Governance and Traditional Affairs; Human Settlements, Water and Sanitation; Public Works and Infrastructure and Public Enterprises.
- 3.2 Inputs were received from the Reference Group of Experts appointed by the Minister, the mandate of which is to advise the Minister on how the Department can assist and contribute to the deliberations of the IMC in its quest to give flesh to the land reform programme of Government, with particular reference to the development and promotion of the Bill.
- 3.3 The Department has had one-on-one presentations of the Bill to the Departments of Agriculture, Land Reform and Rural Development, Public Works and Infrastructure, and Trade, Industry and Competition. A workshop was held on 12 and 13 March 2020 between the officials of the IMC Departments for discussion on the Bill, and the Bill was improved after consideration of comments received from that workshop.
- 3.4 The submission of the Bill to Cabinet was approved by the IMC on 4 September 2020. A further meeting was held on 12 November 2020 with officials from the IMC Departments for final engagement on the Bill, and the Minister’s Reference Group was also invited to submit written comments before the Bill was submitted to Cabinet. Comments received were incorporated in the Bill to the extent necessary. The Bill was presented at the Development Committee (DevComm) on 18 November 2020 and at the Justice, Crime Prevention and Security (JCPS) Directors-General cluster on 26 November 2020. Both the DevComm and JCPS cluster approved that the Bill be processed further.

4. IMPLICATIONS FOR PROVINCES

There are no implications for provinces.

5. FINANCIAL IMPLICATIONS FOR STATE

The Bill has been sent for costing as it involves the establishment of the Land Court and Land Court of Appeal. The main financial implications will be in the form of additional human resources relating to the appointment of judges, officers of the Court, and the appointment of mediators and arbitrators who are not in the full-time employ of the State.

6. PARLIAMENTARY PROCEDURE

- 6.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill should be dealt with in accordance with the procedure set out in section 75 of the Constitution, since it contains no provisions to which the procedure set out in section 74 or 76 of the Constitution applies.
- 6.2 The Constitution distinguishes between four categories of Bills as follows: Bills amending the Constitution (section 74); Ordinary Bills not affecting provinces (section 75); Ordinary Bills affecting provinces (section 76); and Money Bills (section 77). A Bill must be correctly classified or tagged, otherwise it would be constitutionally invalid.
- 6.3 The Bill has been considered against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4 to the Constitution.
- 6.4 The Constitutional Court stated in the case of *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC), that the test for the tagging of Bills essentially entails that “any Bill whose provisions in substantial measure” affects the provinces must be classified to follow the section 76 procedure.
- 6.5 The Bill seeks to establish a Land Court with jurisdiction to grant any order, appropriate relief or impose any sanction, as provided for in the Bill or any other law that confers jurisdiction on the Court, and a Land Court of Appeal to hear and determine appeals emanating from the judgments and orders of the Land Court and to provide for court ordered mediation or arbitration. In the final analysis, it is our view that the subject matter of the Bill does not fall within any of the functional areas listed in Schedule 4 or Schedule 5 to the Constitution. Consequently, we are of the opinion that the Bill is an ordinary Bill not affecting provinces and that it must be dealt with in accordance with the procedure set out in section 75 of the Constitution.

7. REFERRAL TO NATIONAL HOUSE OF TRADITIONAL AND KHOI-SAN LEADERS

The Office of the Chief State Law Adviser is of the preliminary view that the Bill would affect the customary law or customs of traditional communities, and therefore it is necessary to refer the Bill to the National House of Traditional and Khoi-San Leaders.