# RESTITUTION OF LAND RIGHTS AMENDMENT BILL

***January 2014***

The Restitution of Land Rights Act (No. 22 of 1994) was passed to great applause in 1994. Its goal was to offer a solution to people who had lost their land as a result of racially discriminatory practices such as forced removals. This included people who were dumped in Bantustans and put under traditional leaders.

It is crucial that we roll back the legacy of land dispossession resulting from colonialism and apartheid. But does the new Restitution of Land Rights Amendment Bill (hereafter the Bill) provide hope for solving these problems?

## THE NEW BILL

### Key Dates

- The draft Restitution of Land Rights Amendment Bill was tabled in Parliament in October 2013.
- Written submissions were due on Friday, November 1st, 2013.
- Provincial public hearings have taken place during November 2013 (Western Cape, Eastern Cape, KwaZulu-Natal, Mpumalanga and Limpopo) and January 2014 (North West, Free State, Northern Cape and Gauteng). They were organised by the parliamentary portfolio committee on Rural Development & Land Reform.
- National public hearings at Parliament in Cape Town will take place on:
  - January 28th 2014 at the Gugulethu Sports Complex
  - January 29th in Parliament
- The National Council of Provinces may hold further hearings later in the year.

According to the Bill's official summary its main purpose is to re-open the window for restitution claims to allow people dispossessed of their land through past racial discrimination to put in claims until 2018.

In addition, the bill may allow people who lost land under Betterment schemes to make claims. A previous Chief Land Claims Commissioner wrongly advised that the Restitution Act of 1994 did not include Betterment.

The Bill cannot be evaluated purely on the basis of its text. It must be read in the context of other laws and policies, especially the **Communal Land Tenure Policy** and the **Recapitalisation and Development Policy**. The Bill comes at a time when

land reform and land redistribution are failing, and millions of South Africans still lack "security of land tenure" - especially those living in rural areas and in the former Bantustans. **Security of land tenure means the legal and practical ability to defend one's ownership, occupation, use of and access to land from interference by others**. Furthermore, many beneficiaries (people whose land claims were settled by the government) of the Restitution of Land Rights Act have still not received their land titles because of delays by the Commission and also as a result of opposition by traditional leaders.

In the current context and in its current form, the Bill is unlikely to meet the needs of rural people, and could well undermine their land rights as protected by Section 25(6) of the Constitution.

## PROBLEMS WITH THE BILL

The main problems with the Bill may be summarised as follows.

1. *There are many outstanding claims that have not been finalised*

The Department has still **not finalised many outstanding and backlogged restitution claims**. According to the Ad Hoc Committee on the Legacy of the 1913 Land Act, **20 592 claims** (or 25.87 per cent of the total land claims registered with the Department) have not yet been finalised or the settlement agreement has not been fully implemented. **Around 50% of the land already acquired for restitution has still not been transferred to the beneficiaries**.

Several claimants have been waiting for over ten years for the implementation of their settlement agreement. At a hearing on the Bill in Middelburg, Mpumalanga in November 2013, old men could not hold back tears when they spoke of **their continued wait for their land**. Livestock owners described how they had been compelled to sell their stock because the **benefits** they were expecting **from their land claims had not yet materialised**.

The backlog of unresolved restitution claims raises concerns that claims filed under the new restitution period might further undermine the fulfilment of existing claims – even those that are already approved but where the land titles and development money have not yet been handed over. The reopening of the restitution process will further **complicate and delay** the processing of existing outstanding claims.

Furthermore, the Act might open the space for numerous **claims by traditional leaders** (as explained in detail below), which could **overlap with and disturb already existing claims** by other community-constituted structures such as CPAs and Trusts.

**Attendees at the hearings** on the Bill in Eastern Cape, KwaZulu-Natal, Limpopo and Mpumalanga in November 2013 **raised concerns about these issues.** In response to parliamentarians saying that a new electronic capture system would resolve the issues of delays, attendees said that the Department needed to address more serious problems like lack of staff capacity on claims, as well as corruption and disorganisation on the part of officials.

2. *In light of current policies and recent judgments, restoration of land will be made contingent on the cost of the land transfer*

In the initial draft of the new Bill, Section 33 was changed to establish new conditions for land to be restored to claimants (people who put in claims). These conditions made land restorations dependent on the feasibility and cost of the land transfer and the claimants' ability to use the land "productively". **Restoration means the return of a right in land or a portion of land** to people dispossessed of their land as a result of past racially discriminatory laws or practices.

**This provision has now been removed from the Bill**, which is a step in the right direction. **Regardless, restoration of land will remain dependent on the criteria of cost of the land transfer and claimants' ability to use the land 'productively'**. This is because the Bill will reopen the restitution process in the context of the *Baphiring* judgment and the new Recapitalisation and Development Policy (July 2013), which replaces previous Restitution Settlement Grants. As a result it will still be difficult for restitution beneficiaries to obtain restoration of land and receive the financial support they need to use the land restored to them.

People with limited resources who put in land claims will face an uphill battle to have their land restored to them in light of a recent decision by the Supreme Court of Appeal (SCA) in *Baphiring Community & Others*. The Restitution Act has always required that restoration of the land be "feasible". In *Baphiring* the SCA found that in deciding whether restoration is feasible, the Land Claims Court must look at the ***cost*** of doing so. The Court set out a list of factors to be considered, most of which relate to the financial implications of restoration. These factors include the:

- *Cost of expropriating the land, including compensation for the current owner's mineral rights.* This means that people claiming land in an area rich in minerals are unlikely to have the land restored because the cost of restoring the land with mineral rights will be incredibly expensive.

- *Institutional and financial support that the government is going to make available to the claimants for them to resettle.* If the state cannot afford/chooses not to give the claimants restitution money, the Land Claims Court will be very unlikely to recommend that the land be restored to the claimants.

- *Whether or not restoring the land to the claimants causes a loss in "food production" or disruption in farming activities.* This implies that if claimants want to use the land for something other than commercial farming, they will not receive the land.

The effect of the SCA judgement is that it puts claimants in a situation whether they have little choice. **Land will not be restored unless** the government provides financial support to restitution beneficiaries. But if **restoration is too costly**, it may not happen anyway. And the financial support claimants can receive may be made conditional on whether or not they develop partnerships and business plans.

**Lack of financial support was one of the biggest issues raised by attendees at hearings on the Restitution Bill**. If the Bill is passed, **restitution claimants will no longer be able to apply for financial support** directly **through** the **restitution** process. Instead, they will have to apply via the Recapitalisation and Development Fund. In order for these funds to be released, applicants must show that they have a business plan and a "strategic partner". Restitution beneficiaries will also be subject to a "use it or lose it clause", which could discriminate against people who can't keep up with the business plan. The requirement of a business plan and strategic partner does not bode well for people with limited resources who are restitution beneficiaries. Business plans for land reform projects have been notoriously inappropriate and strategic partners do not always act in good faith or with competence.

Most seriously, the policies accompanying the new Bill and the SCA's judgement mean that the government can ignore the restitution process' constitutional imperative to offer redress to people who have been discriminated against. Instead, the restitution process and budget may be used to target and support a class of 'commercial farmers'.

*3. The Bill is likely to undermine independent ownership rights acquired through land reform after 1994, and held by CPAs.*

The idea that land restoration should be dependent on cost and productivity is part of a series of measures suggested in new land laws and policies that make the **rights of rural people conditional** on 'good behaviour' while reserving ownership for powerful elite partners such as traditional leaders. The irony is that the restitution programme, which was designed to provide redress to those who suffered forced removal and bore the brunt of the Land Act, is now being reconfigured in way that will **undermine the ability of citizens to acquire land that they could call their own**.

The minister has said that **Communal Property Associations (CPAs) should no longer be allowed to own land** acquired through restitution or redistribution within 'communal areas'. In his view 'a communal area within a communal area' is "wrong". The new Communal Land Tenure Policy states that the "registration of new CPAs on traditional communal tenure areas be *carefully considered and principally discouraged*".

The model of CPAs was developed to allow the beneficiaries of the land restitution process to own land collectively. It provided claimants living in the former Bantustans with the ability to constitute themselves as legal entities to receive land. **If CPAs can no longer own restitution land, the door is open for chiefs to claim ownership of restitution land on behalf of 'tribes'** that were defined in terms of the Bantu Authorities Act of 1951.

This is not just a matter of future policy. It is already happening, at least in the Eastern Cape. One example is the Cata CPA in the Eastern Cape, where claimants have been waiting since 2000 for their land title. The government recently ignored a court order that instructed it to transfer land title to the Cata CPA by May 20th, 2013. According to a 2012 affidavit by a senior government official in the Cata litigation, the Cata CPA did not receive its land because of objections from traditional leaders.

The Department of Rural Development and Land Reform has not transferred title to at least **34 CPAs** where restitution awards and signed agreements are in place. This has caused major suffering and division as CPA members question what happened to the land and grants they were promised. At hearings on the Restitution Bill in Limpopo and Mpumalanga, several attendees from **CPAs and Trusts reiterated to parliamentarians that they were still waiting for the transfer of title deeds**.

4. *The Bill opens the door to traditional leaders to claim ownership of restitution land on behalf of 'tribes' that were defined in terms of the Bantu Authorities Act of 1951.*

In light of other laws, policies and recent statements by Minister of Rural Development and Land Reform Gugile Nkwinti, the Restitution Bill risks opening the floodgates for traditional leaders to claim vast amounts of land. Attendees at hearings on the Bill in KwaZulu-Natal, Limpopo and Mpumalanga said they feared that **traditional leaders would make restitution claims on behalf of 'communities'**. Speakers felt traditional leaders were abusing their power in part because of the government's failure to speak out against them intimidating CPAs and Trusts, and entering into land negotiations without consulting people on the ground.

Within days of the Bill's introduction King Goodwill Zwelithini promised a gathering of 40 traditional leaders in KwaZulu-Natal that the Ingonyama Trust would help traditional leaders to make land claims, including providing legal support. He said, "As your king, I will abide by the law and approach the government to regain all Zulu land."

Chiefs were also often part of Betterment processes, one of the new categories for restitution included in the Bill. Betterment was a form of land dispossession. It is therefore important that people who were dispossessed under Betterment are provided with a form of redress.

However, in the context of new policies that discourage land transfers to CPAs this **new provision** for **Betterment** could also **open room for the abuse of power by chiefs**. If betterment land goes to chiefs instead of entities chosen by the members of the respective communities it will put those who suffered from betterment directly under the authority of the very traditional leaders who may have agreed to betterment in the first place.

There is **no historical basis** for the argument **that traditional leaders have exclusive authority over land**. The colonial and apartheid governments used the idea that chiefs were the only African people who could make decisions respect of 'communal' land as part of its way to dispossess black people of their land. This idea undermined customary practices that recognised the entitlements vesting in ordinary people and the role of groups in making decisions about land.

The intention of the Restitution Act of 1994 was to provide redress for those forcibly removed by 'unpacking' the resettlement areas adjacent to the former Bantustans. But **current laws** (like the Traditional Leadership and Governance Framework Act, or TLGFA) and policies (like the Communal Land Tenure Policy) **strengthen the**

**same Bantustan boundaries** that are the outcome of forced removals. Laws such as the Traditional Courts Bill (TCB) provide traditional leaders with autocratic forms of power over all the people living with the 'tribal' boundaries created by the Bantu Authorities Act of 1951.

The government tried to distinguish the **new traditional councils** from the old tribal authorities by requiring them to be more democratic in order to be legally recognised. Specifically, the TLGFA requires that 40% of traditional councils must be elected and 30% must be women. However, research on the status of traditional councils shows that most traditional councils in South Africa have not met these requirements – which means they do not have legal status. If they **do not have legal status**, the government cannot transfer land to them.

5. *The financial cost of re-opening the restitution programme is going to put a strain on the Department's ability to process existing claims and attend to other land reform matters.*

Since 1995, the restitution programme has cost the state about R15 billion (for land acquisitions) and R7.5 billion in financial compensation (where land restoration was not possible). At the hearings on the Bill, attendees requested clarity on the budget available for re-opening restitution in each province.

The Department conducted a regulatory impact assessment which estimated that it will cost between R129 and R179 billion to settle claims lodged during the proposed new window for making claims. In light of the jump from the R25 billion already spent on restitution to the R179 billion projected for the future, **the new Bill is feasible only in the context of a far-reaching re-allocation of the national budget**. In response to queries, the Minister of Finance has indicated that there is no plan to accommodate this jump in the budget.

To proceed with re-opening restitution without an undertaking from Treasury that this budget is viable risks raising unrealistic expectations that cannot be met, and in the process derailing the finalisation of existing outstanding claims.

6. *The Land Claims Court*

After 1994 the Land Claims Court was created to deal with disputes regarding land claims, the finalization of land claims and other related land issues such as labour tenant and farm- worker evictions. The persons appointed as judges had to have a special knowledge of land law issues. The draft bill, if accepted, will make these claims and other land related matters all the more complicated – requiring more judicial attention and time. The proposed law will, however, **no longer require that judges have specialist knowledge**. In addition, these judges will no longer deal with land claims exclusively, but will have to **share their time with obligations to other courts**.

*7. The Bill reflects lack of consultation (or time available for consultation) with rural people on the ground.*

The Bill was introduced with no comprehensive advance notice on May 23rd, 2013, allowing only 30 days for comment. These timelines **did not allow for widespread consultation** with a wide-range of constituents, especially with rural people who will be affected by it.

**Public hearings on the Bill** thus far have been poorly publicised, leading to low turnout in the provinces. Most of the 143 people who attended the hearings in KwaZulu-Natal for example, came because they had heard about them from the Rural Women's Movement and not through the media or through ward councillors.

The locations of the hearings have also generally been **inaccessible to rural people**. Most people who attended the hearing in Ulundi had to travel over one hour. They were given no financial support to get to the hearings. Furthermore, at the hearings **government representatives did not explain the bill in detail** and **there were no copies of the bill available**.

At the hearings in Ulundi and Emnambithi in KwaZulu-Natal, some **attendees felt intimidated by presentations made by traditional leaders**. In Prince Mbonisi Zulu stood up on behalf of King Goodwill Zwelithini and warned people they had "no right to lodge claims" on land where traditional leaders had also staked a claim. Mandla Mandela, a traditional leader and a member of the parliamentary committee conducting the hearings, regularly interrupted people who spoke about chiefs, arguing against generalisations.

The problems mentioned above reduce the possibility of comprehensively understanding people's concerns about the Bill and ways in which past injustices can possibly be remedied. **They also severely undermine the department's promise to remedy the lack of consultation** that took place during the previous restitution window (1994-1998).

*8. The Department has created confusion with its comments that opening the Restitution process will allow for pre-1913 claims*

Government officials have stated that one of the main goals of the Restitution Bill is to allow people dispossessed prior to 1913, like the Khoi San, to put in claims as part of the restitution process. At a hearing on the Bill in Ulundi, the chairperson of the portfolio committee on Rural Development and Land Reform, Jerry Thibedi, reiterated that the Bill would address pre-1913 claims.

However, **the bill contains nothing about pre-1913 claims**. The Department has not clarified its earlier comments, and has been reluctant to acknowledge that the bill does *not* address the concerns of Khoi San and others who were dispossessed pre-1913.

## RECOMMENDATIONS

*The Restitution of Land Rights Amendment Bill is seriously flawed and should be withdrawn.*

- There are ways of redressing the legacy of land dispossession that are less restrictive than the restitution programme. The Department should focus on alternatives in the form of land redistribution and tenure reform, rather than putting further strain on the already faltering restitution programme.

*The Restitution Bill should be referred back to the Department for further consultation with rural people, and for rethinking and developing a more coherent land reform policy.*

- Immediate interventions to secure the rights of women and vulnerable communities are necessary. Instead of focussing on this Bill the Department should instead amend IPILRA to strengthen the rights of the most vulnerable.

- If the Bill is withdrawn, the Department should pursue a different process from the restitution programme in order to provide redress for people who did not qualify under the previous programme. This includes people dispossessed of their land under Betterment, and people who did not have the opportunity to lodge a claim during the previous programme. People who suffered under Betterment were incorrectly advised by the Land Commissioner at the time that they could not qualify for the Restitution process. The Department should also use the land redistribution programme to provide comprehensive support to communities who suffered under Betterment in order to address the legacy of dispossession and social dislocation brought about by Betterment.

*If the Bill is not withdrawn, significant amendments are necessary to avert the dangers and problems we outlined above.*

- The legislative process must open up a longer period of time for consultation, in order to provide the chance for people dispossessed of their land to be heard, and their needs addressed. This will allow for a more meaningful discussion about land restitution and to plan for the way forward.

- Before the reopening of claims is considered, the current claims must be dealt with in an effective, efficient and transparent manner. There must be clear targets and publically available implementation programmes.

- One way to address the backlog of claims might be to ask for the Bill to be changed to prioritise claims made before the previous Restitution Act's

cutoff date (1998) – that is, to 'ring fence' all claims submitted by 1998 or claims that have already been settled so that new claims cannot interfere with them. Attendees at the Bill's hearing in Ulundi suggested that two committees should be formed – one to focus on new claims and the other on existing claims.

- The restoration of land should not be made conditional on productivity.

- The Bill does not address the poor levels of accountability that characterises the way government officials engage with beneficiaries. It is therefore essential that the Department deal with issues of its own human capacity before reopening the Restitution programme.

- The Department should focus on the urgent and serious problems facing rural communities in relation to the protection of their land rights, including its failure to honour existing commitments and court awards to CPAs, before introducing a measure that will only elicit more claims and further complicate existing problems.

- The Department should fulfil its legal mandate to protect, support and build the capacity of community-constituted structures like CPAs.

- Any bill related to land must take into account the dual legacy of land dispossession and loss of citizenship that took place especially in the former Bantustans. Existing restitution awards need to be protected against counter-claims by traditional leaders relying on the superimposition of the invalid traditional council boundaries derived from apartheid.