

REPUBLIC OF SOUTH AFRICA

**LAND RESTITUTION AND
REFORM LAWS
AMENDMENT BILL**

(As amended by the Portfolio Committee on Land Affairs (National Assembly))

(MINISTER FOR AGRICULTURE AND LAND AFFAIRS)

[B 64B—97]

REPUBLIEK VAN SUID-AFRIKA

**WYSIGINGSWETSONTWERP OP
GRONDHERSTEL- EN
GRONDHERVORMINGSWETTE**

(Soos gewysig deur die Portefeuljekomitee oor Grondsake (Nasionale Vergadering))

(MINISTER VIR LANDBOU EN GRONDSAKE)

[W 64B—97]

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GENERAL EXPLANATORY NOTE:

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

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

BILL

To amend the Restitution of Land Rights Act, 1994, so as to bring the provisions thereof into line with the Constitution of the Republic of South Africa, 1996; to define certain expressions and to amend certain definitions; to effect certain textual improvements; to provide that a regional land claims commissioner or an interested party may under certain circumstances apply for an interdict prohibiting the development of land; to provide for the election of one or more persons to represent a community for the purposes of a claim; to prohibit a person from developing land in respect of which a notice in terms of section 11(1) has been published without having given the regional land claims commissioner notice of his or her intention to do so; to repeal the requirement that the Minister of Land Affairs shall issue a certificate of feasibility when a claim is referred to the Land Claims Court; to extend the powers of the Court; to provide that the assistance of an assessor shall not be necessary in proceedings dealing with contempt of the Court; to extend the factors which the Court has to take into account in considering any particular matter; to clarify the provisions relating to the powers of the Commission on Restitution of Land Rights for the purposes of an investigation in terms of section 34(2); to provide that, unless the Court orders otherwise, an applicant making an application in terms of section 34(1) shall not be entitled to any order for costs against any other party; to provide for direct access to the Court by any person entitled to claim restitution of a right in land; to provide for the registration of land restored or awarded to a claimant; to empower the Minister to grant financial aid for the development of land in certain circumstances; to provide for the powers of the Minister in the case of waiver of rights to relief; and to repeal certain obsolete provisions; to amend the Land Reform (Labour Tenants) Act, 1996, so as to regulate onus of proof where it is proved that a person falls within certain provisions of the definition of "labour tenant"; to provide for the transfer of certain cases to the Court; to grant a discretion to the Director-General to submit certain agreements to the Court; to empower the Court to hear applications for the acquisition of land and servitudes; to further regulate the appointment of arbitrators; and to provide that transfer duty shall not be payable in respect of the acquisition of land or a right in land in terms of the Act; to amend section 24 of the Land Restitution and Reform Laws Amendment Act, 1996, so as to bring the provisions thereof into line with the Constitution of the Republic of South Africa, 1996; and to provide for matters connected therewith.

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

Substitution of preamble to Act 22 of 1994

1. The following preamble is hereby substituted for the preamble to the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994) (hereinafter referred to as the principal Act): 5

“WHEREAS the Constitution of the Republic of South Africa, [1993 (Act No. 200 of 1993)] 1996 (Act No. 108 of 1996), provides for restitution of [a right in land] property or equitable redress to a person or community dispossessed [under or for the purpose of furthering the objects of any racially based discriminatory law] of property after 19 June 1913 as a result of past racially discriminatory laws or practices; 10

AND WHEREAS [legislation for this purpose is to be designed to promote the protection and advancement of persons, groups or categories of persons disadvantaged by unfair discrimination, in order to promote their full and equal enjoyment of rights in land] legislative measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken to promote the achievement of equality;” 15

Amendment of section 1 of Act 22 of 1994, as amended by section 1 of Act 78 of 1996

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

(a) by the substitution for the definition of “claim” of the following definition: 20

“ ‘claim’ means—

(a) any **[application]** claim for restitution of a right in land lodged with the Commission in terms of this Act; or

(b) any application lodged with the registrar of the Court in terms of Chapter IIIA for the purpose of claiming restitution of a right in land;” 25

(b) by the substitution for the definition of “claimant” of the following definition: “ ‘claimant’ **[includes a community]** means any person who has lodged a claim;”;

(c) by the insertion after the definition of “direct descendant” of the following definitions: 30

“ ‘equitable redress’ means any equitable redress, other than the restoration of a right in land, arising from the dispossession of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices, including— 35

(a) the granting of an appropriate right in alternative state-owned land;

(b) the payment of compensation;

‘High Court’ means any High Court referred to in section 166(c) of the Constitution, excluding a high court of appeal;”;

(d) by the insertion after the definition of “organisation” of the following definition: 40

“ ‘organ of state’ means an organ of state as defined in section 239 of the Constitution;”;

(e) by the substitution for the definition of “public land” of the following definition: 45

“ ‘public land’ means all land owned by any organ of state **[as defined in section 233 of the Constitution]**, and includes land owned by **[a local authority,]** the Land Bank and any institution in which the State is the majority or controlling shareholder;”;

(f) by the insertion after the definition of “public land” of the following definitions: 50

“ ‘racially discriminatory laws’ include laws made by any sphere of government and subordinate legislation;

‘racially discriminatory practices’ means racially discriminatory practices, acts or omissions, direct or indirect, by— 55

(a) any department of state or administration in the national, provincial or local sphere of government;

- (b) any other functionary or institution which exercised a public power or performed a public function in terms of any legislation; ‘restitution of a right in land’ means—
- (a) the restoration of a right in land; or
- (b) equitable redress;
- ‘restoration of a right in land’ means the return of a right in land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices;”;
- (g) by the insertion after the definition of “right in land” of the following definition:
- “ ‘the Constitution’ means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);”;
- (h) by the deletion of the definition of “Supreme Court”.

Substitution of section 2 of Act 22 of 1994, as amended by section 2 of Act 78 of 1996

3. (1) The following section is hereby substituted for section 2 of the principal Act:

“Entitlement to restitution

2. (1) A person shall be entitled to [enforce] restitution of a right in land if—

- (a) he or she is a person or community [contemplated in section 121(2) of the Constitution] dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices or a direct descendant of such a person; and

[(b) the claim is not precluded by section 121(4) of the Constitution; and]

- (c) the claim for such restitution is lodged [within three years after a date fixed by the Minister by notice in the Gazette] not later than 31 December 1998.

(1A) No person shall be entitled to [enforce] restitution of a right in land if—

- (a) just and equitable compensation as contemplated in section [123(4) 25(3) of the Constitution; or

(b) any other consideration which is just and equitable, calculated at the time of any dispossession of such right, was [paid] received in respect of such dispossession.

[(2) The date contemplated in subsection (1), shall be a date not earlier than the earliest of the dates contemplated in section 43.

(3) The date contemplated in section 121(2)(a) of the Constitution is 19 June 1913.]”.

- (2) Subsection (1) shall be deemed to have come into operation on 2 December 1994.

Amendment of section 3 of Act 22 of 1994

4. Section 3 of the principal Act is hereby amended by the substitution for paragraph (a) of the following paragraph:

- “(a) was prevented from obtaining or retaining title to the claimed land because of a law which would have been inconsistent with the prohibition of racial discrimination contained in section [8(2)] 9(3) of the Constitution had that subsection been in operation at the relevant time; and”.

Amendment of section 6 of Act 22 of 1994, as amended by section 3 of Act 78 of 1996

5. Section 6 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:
 “(1) The Commission shall, at a meeting or through the Chief Land Claims Commissioner, a regional land claims commissioner or a person designated by any such commissioner—
- (a) subject to the provisions of section 2, receive and acknowledge receipt of all claims for the restitution of rights in land lodged with or transferred to it in terms of this Act; 5
 - (b) take reasonable steps to ensure that claimants are assisted in the preparation and submission of claims; 10
 - (c) advise claimants of the progress of their claims at regular intervals and upon reasonable request; 10
 - (cA) investigate the merits of claims contemplated in paragraph (a);
 - (cB) mediate and settle disputes arising from such claims;
 - (d) subject to the provisions of section 14, report to the Court on the terms of settlement in respect of successfully mediated claims; 15
 - (e) define any issues which may still be in dispute between the claimants and other interested parties with a view to expediting the hearing of claims by the Court; 15
 - (eA) draw up reports on unsettled claims for submission as evidence to the Court and present any other relevant evidence to the Court; 20
 - (f) at regular intervals, take appropriate steps to make public information regarding the persons entitled to claim restitution of rights in land **[in terms of section 121 of the Constitution]**, the limitations imposed by section 2, and the manner in which claims may be lodged with the Commission.”; and 25
- (b) by the substitution for subsection (3) of the following subsection:
 “(3) Where the regional land claims commissioner having jurisdiction or an interested party has reason to believe that the sale, exchange, donation, lease, subdivision **[or]**, rezoning or development of land which may be the subject of any order of the Court, or in respect of which a person or community is entitled to claim restitution of a right in land, will defeat the achievement of the objects of this Act, he or she may—
- (a) after a claim has been lodged in respect of such land; and
 - (b) after the owner of the land has been notified of such claim and referred to the provisions of this subsection**]; and** 35
 - (c) **with the approval of the Chief Land Claims Commissioner, which approval may be granted either in general or in particular],**
- on reasonable notice to interested parties, apply to the Court for an interdict prohibiting the sale, exchange, donation, lease, subdivision **[or]**, rezoning or development of the land, and the Court may, subject to such terms and conditions and for such period as it may determine, grant such an interdict or make any other order it deems fit.”. 40

Substitution of section 10 of Act 22 of 1994

6. The following section is hereby substituted for section 10 of the principal Act: 45

“Lodgement of claims and representation of community

10. (1) Any person who or the representative of any community **[who] which [is of the opinion that he or she or the community which he or she represents]** is entitled to claim restitution of a right in land **[as contemplated in section 121 of the Constitution]**, may lodge such claim which shall include a description of the land in question, the nature of the right in land of which he, she or such community was dispossessed and the nature of the right or equitable redress being claimed, on the form prescribed for this purpose by the Chief Land Claims Commissioner under section 16. 50

- (2) The Commission shall make claim forms available at all its offices.
- (3) If a claim is lodged on behalf of a community the basis on which it is 55

contended that the person submitting the form represents such community, shall be declared in full and any appropriate resolution or document supporting such contention shall accompany the form at the time of lodgement: Provided that the regional land claims commissioner having jurisdiction in respect of the land in question may permit such resolution or document to be lodged at a later stage. 5

(4) If there is any dispute as to who legitimately represents a community for the purposes of any claim under this Act, the regional land claims commissioner having jurisdiction may in the manner prescribed in rules made by the Chief Land Claims Commissioner in terms of section 16, in order to have a person or persons elected to represent the community— 10

(a) take steps for drawing up a list of the names of the members of the community;

(b) direct that a meeting of such community be convened and an election be held at that meeting; 15

(c) take such other steps as may be reasonably necessary for the election.

(5) In any election in terms of subsection (4) all members of the community of 18 years or older shall be entitled to vote.

(6) In making the rules contemplated in subsection (4), the Chief Land Claims Commissioner shall have regard to the cultural values of the community.”. 20

Amendment of section 11 of Act 22 of 1994, as amended by section 5 of Act 78 of 1996

7. Section 11 of the principal Act is hereby amended—

(a) by the substitution for subsection (5) of the following subsection: 25

“(5) If an order has been made by the Court as contemplated in section **[123 of the Constitution]** 35 in respect of a right or rights in land, no person may lodge a claim in respect of that land without the leave of the Court.”; and

(b) by the substitution for subsection (7) of the following subsection: 30

“(7) Once a notice has been published in respect of any land—

(a) no person may in an improper manner obstruct the passage of the claim;

(aA) no person may sell, exchange, donate, lease, subdivide, **[or]** rezone or develop the land in question without having given the regional land claims commissioner one month’s written notice of his or her intention to do so, and, where such notice was not given in respect of— 35

(i) any sale, exchange, donation, lease, subdivision or rezoning of land **[in respect of which such notice was not given, may be set aside by]** and the Court **[if it]** is satisfied that such sale, exchange, donation, lease, subdivision or rezoning was not done in good faith, **[or]** the Court may set aside such sale, exchange, donation, lease, subdivision or rezoning or grant any other order it deems fit; 40 45

(ii) any development of land and the Court is satisfied that such development was not done in good faith, the court may grant any order it deems fit;

(b) no claimant who **[was resident on]** occupied the land in question at the date of commencement of this Act may be evicted from the said land without the written authority of the Chief Land Claims Commissioner; 50

(c) no person shall in any manner whatsoever remove or cause to be removed, destroy or cause to be destroyed or damage or cause to be damaged, any improvements upon the land without the written authority of the Chief Land Claims Commissioner; 55

- (d) no claimant or other person may enter upon and occupy the land without the permission of the owner or lawful occupier.”.

Amendment of section 12 of Act 22 of 1994

8. Section 12 of the principal Act is hereby amended by the substitution for subsections (4) and (5) of the following subsections, respectively: 5

“(4) If at any stage during the course of an investigation by the Commission, the Chief Land Claims Commissioner is of the opinion that the resources of the Commission or the Court would be more effectively utilised if all claims for restitution in respect of the land, or area or township in question, were to be investigated at the same time, he or she shall cause to be published in the *Gazette* and in such other manner as he or she deems appropriate, a notice advising potential claimants of his or her decision and inviting them, subject to the provisions of section [2(1)] 2, to lodge claims within a period specified in such notice. 10

(5) No claim in respect of a matter contemplated in subsection (4) shall be lodged after the expiry of the period specified in the said notice: Provided that the Commission may allow a claimant on good cause shown, to lodge a claim after the expiry of such period, but not later than [three years after the date fixed in terms of section 2(1)(b)] 31 December 1998.”. 15

Amendment of section 13 of Act 22 of 1994

9. Section 13 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph: 20

“(a) there are two or more competing claims [to a particular right in] in respect of the same land;”.

Amendment of section 14 of Act 22 of 1994, as amended by section 7 of Act 78 of 1996

10. (1) Section 14 of the principal Act is hereby amended—

(a) by the deletion of subsection (5A); and

(b) by the substitution for subsection (6) of the following subsection: 30

“(6) [The] Subject to the provisions of Chapter IIIA, the Court shall not make any order in terms of section 35 unless the Commission has, in respect of the claim in question, acted in accordance with the provisions of this section.”. 30

(2) Subsection (1)(a) shall be deemed to have come into operation on 2 December 1994. 35

Repeal of section 15 of Act 22 of 1994, as amended by section 8 of Act 78 of 1996

11. (1) Section 15 of the principal Act is hereby repealed.

(2) Subsection (1) shall be deemed to have come into operation on 2 December 1994.

Amendment of section 17 of Act 22 of 1994

12. Section 17 of the principal Act is hereby amended— 40

(a) by the substitution for paragraph (a) of the following paragraph:

“(a) contravenes the provisions of section 11(7)(a), (aA), (b), (c) or (d);”; and

(b) by the substitution for paragraph (d) of the following paragraph: 45

“(d) prevents or attempts to prevent a duly authorised officer contemplated in section 8, or a person or organisation appointed in terms of section 9, from performing a function in terms of this Act,”. 45

Amendment of section 22 of Act 22 of 1994, as amended by section 1 of Act 84 of 1995 and section 10 of Act 78 of 1996

13. Section 22 of the principal Act is hereby amended— 50

(a) by the substitution for subsections (1) and (2) of the following subsections, respectively:

- “(1) There shall be a court of law to be known as the Land Claims Court which [**in addition to the powers contemplated in section 123 of the Constitution,**] shall have the power, to the exclusion of any court contemplated in section 166(c), (d) or (e) of the Constitution—
- (a) to determine a right to restitution of any right in land in accordance with this Act; 5
 - (b) to determine or approve compensation payable in respect of land owned by or in the possession of a private person upon expropriation or acquisition of such land in terms of this Act;
 - (c) [**in respect of a claim in terms of section 3,**] to determine the person entitled to [**ownership**] title to land contemplated in section 3; 10
 - (cA) at the instance of any interested person and in its discretion, to grant a declaratory order on a question of law relating to section [**121, 122 or 123**] 25(7) of the Constitution or to this Act or to any other law or matter in respect of which the Court has jurisdiction, notwithstanding that such person might not be able to claim any relief consequential upon the granting of such order; 15
 - (cB) to determine whether compensation or any other consideration received by any person at the time of any dispossession of a right in land was just and equitable; 20
 - (cC) to determine any matter involving the interpretation or application of this Act or the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996);
 - (cD) to decide any constitutional matter in relation to this Act or the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996). 25
 - (d) to determine all other matters which require to be determined in terms of [**sections 121, 122 and 123 of the Constitution**] this Act.
- (2) Subject to Chapter [7] 8 of the Constitution, the Court shall have jurisdiction throughout the Republic and shall have— 30
- (a) all such powers in relation to matters falling within its jurisdiction as are possessed by a [**provincial division of the Supreme**] High Court having jurisdiction in civil proceedings at the place where the land in question is situated, including the powers of [**such**] a [**division**] High Court in relation to any contempt of the Court; 35
 - (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
- (b) by the substitution in subsection (6) for the expression “provincial or local division of the Supreme Court” of the expression “High Court”. 40

Amendment of section 23 of Act 22 of 1994

14. Section 23 of the principal Act is hereby amended by the substitution in subparagraph (i) of paragraph (c) for the expression “the Supreme Court” of the expression “a High Court”.

Repeal of section 24 of Act 22 of 1994

15. Section 24 of the principal Act is hereby repealed.

Amendment of section 25 of Act 22 of 1994, as substituted by section 11 of Act 78 of 1996

16. Section 25 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 50

“(1) The provisions of [**section 104**] sections 174(8) and 177 of the Constitution

with regard to making of an oath or a solemn affirmation and the removal or suspension of judges shall apply *mutatis mutandis* to judges of the Court.”.

Amendment of section 26 of Act 22 of 1994, as substituted by section 2 of Act 84 of 1995 and amended by section 12 of Act 78 of 1996

17. Section 26 of the principal Act is hereby amended by the substitution in subsection (1) for the expression “the Supreme Court of South Africa” of the expression “a High Court”. 5

Amendment of section 28 of Act 22 of 1994, as amended by section 14 of Act 78 of 1996

18. Section 28 of the principal Act is hereby amended by the substitution for subsection (4) of the following subsection: 10

“(4) At least one assessor shall assist the Court at a contested hearing of—

(a) any claim [**contemplated in section 121 of the Constitution**] which has been referred to the Court in terms of section 14; [**and**]

(b) any application in terms of section 34; and 15

(c) any application in terms of Chapter IIIA;

Provided that this requirement shall not apply in respect of—

(i) any hearing where the only matters in dispute are questions of law; [**or**]

(ii) any interlocutory or preliminary hearing or pre-trial proceedings;

(iii) any proceedings dealing with contempt of the Court.”. 20

Amendment of section 28D of Act 22 of 1994, as inserted by section 15 of Act 78 of 1996

19. Section 28D of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for the expression “the provincial division of the Supreme Court” of the expression “a High Court”; and 25

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

“(3) For the purposes of subsection (1) ‘lower court’ means any court, other than the Constitutional Court, the Supreme Court of Appeal or a [**court of a division of the Supreme**] High Court, which is required to keep a record of its proceedings, and includes a court of a regional division and a magistrate’s court established in terms of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944).”.

Amendment of section 28I of Act 22 of 1994, as inserted by section 15 of Act 78 of 1996

20. Section 28I of the principal Act is hereby amended by the substitution for the proviso to subsection (2) of the following proviso: 35

“Provided that when any such vacancy has remained unfilled for a continuous period exceeding six months that fact shall be reported to the Public Service Commission established by section [**209**] 196 of the Constitution.”.

Amendment of section 28J of Act 22 of 1994, as inserted by section 15 of Act 78 of 1996 40

21. Section 28J of the principal Act is hereby amended by the substitution in subsection (3) for paragraph (b) of the following paragraph:

“(b) cause the necessary accounting and other related records to be kept, which records shall be audited by the Auditor-General appointed in terms of section [**191**] 193 of the Constitution.”. 45

Amendment of section 32 of Act 22 of 1994, as amended by section 18 of Act 78 of 1996

22. Section 32 of the principal Act is hereby amended by the deletion in subsection (1) of the word “and” at the end of paragraph (c) and the insertion after that paragraph of the following paragraph: 5

“(cA) the practice and procedure of the Court in applications in terms of Chapter IIIA; and”.

Substitution of section 33 of Act 22 of 1994

23. The following section is hereby substituted for section 33 of the principal Act:

“Factors to be taken into account by Court” 10

33. In considering its decision in any particular matter [, **excluding the review of a decision in terms of section 15,**] the Court shall [, **in addition to the matters referred to in sections 121, 122 and 123 of the Constitution,**] have regard to the following factors:

- (a) The desirability of providing for restitution of rights in land [**or compensation**] to [**people who where dispossessed of their rights in land as a result of or in pursuance of racially based discriminatory laws**] any person or community dispossessed as a result of past racially discriminatory laws or practices; 15
- (b) the desirability of remedying past violations of human rights; 20
- (c) the requirements of equity and justice;
- (cA) if restoration of a right in land is claimed, the feasibility of such restoration;
- (d) the desirability of avoiding major social disruption;
- (e) any provision which already exists, in respect of the land in question in any matter, for that land to be dealt with in a manner which is designed to [**achieve the goals contemplated in section 8(3)(a) of the Constitution**] protect and advance persons, or categories of persons, disadvantaged by unfair discrimination in order to promote the achievement of equality and redress the results of past racial discrimination; 25
- (eA) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession; 30
- (eB) the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land; 35
- (eC) in the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money;
- (f) any other factor which the Court may consider relevant and consistent with the spirit and objects of the Constitution and in particular the provisions of section [8] 9 of the Constitution.”. 40

Amendment of section 34 of Act 22 of 1994, as amended by section 19 of Act 78 of 1996

24. Section 34 of the principal Act is hereby amended—

- (a) by the substitution for subsections (2) and (3) of the following subsections, 45 respectively:

“(2) Notice of any such application shall be given to the Commission, which shall investigate and submit a report to the Court on the desirability of making an order referred to in subsection (1): Provided that the provisions of sections 12 and 13 shall not be so construed that it 50

prohibits the Commission from exercising the powers conferred by those sections for the purposes of such investigation.

(3) Any party making an application to the Court in terms of subsection (1) shall, at its own expense, take such steps as the relevant regional land claims commissioner (or in the case of proceedings in terms of Chapter IIIA, the Court) may direct in order to bring the application to the attention of other persons who may have an interest therein, in order that they may make submissions to and appear before the Court on the hearing of the application.”;

(b) by the substitution for subsection (5) of the following subsection: 10

“(5) After hearing an application contemplated in subsection (1), the Court may—

(a) dismiss the application; [or]

(b) order that when any claim in respect of the land in question is finally determined, the rights in the land in question, or in part of the land, or certain rights in the land, shall not be restored to any claimant; 15

(c) make any other order it deems fit.”; and

(c) by the addition of the following subsection:

“(9) Unless the Court orders otherwise, the applicant shall not be entitled to any order for costs against any other party.” 20

Amendment of section 35 of Act 22 of 1994, as amended by section 20 of Act 78 of 1996

25. Section 35 of the principal Act is hereby amended—

(a) by the substitution for subsections (1) and (2) of the following subsections, respectively: 25

“(1) **[A person in whose favour an order contemplated in section 123(3)(c) of the Constitution has been made may, instead of accepting such alternative relief, within 30 days after the date on which the order was made, apply in writing to the Minister to be registered as a preferential claimant to benefit from any State support programme for housing and the allocation and development of rural land.]** The Court may order— 30

(a) 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 shall not be awarded land, a portion of land or a right in land dispossessed from another claimant, unless such other claimant is or has been granted restitution of a right in land or has waived his or her right to restitution of the right in land concerned; 35

(b) the State to grant the claimant an appropriate right in alternative state-owned land and, where necessary, order the State to designate it; 40

(c) the State to pay the claimant compensation; 45

(d) the State to include the claimant as a beneficiary of a State support programme for housing or the allocation and development of rural land; 50

(e) the grant to the claimant of any alternative relief.

(2) The Court may in addition to the orders contemplated in **[section 123 of the Constitution]** subsection (1)—

(a) determine conditions which must be fulfilled before a right in land can be restored or granted to a claimant;

(b) if a claimant is required to make any payment before the right in question is restored or granted, determine the amount to be paid and the manner of payment, including the time for payment; 55

(c) if the claimant is a community, determine the manner in which the rights are to be held or the compensation is to be paid or held;

- [(d) recommend to the Minister that a claimant be given priority access to State resources in the allocation and development of housing and land in the appropriate development programme;]
- (e) 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; 5
- (f) make an order in respect of compensatory land granted at the time of the dispossession of the land in question;
- (fA) make appropriate orders to give effect to any agreement between the parties regarding the finalisation of the claim; 10
- (g) make such order for costs as it deems just, including an order for costs against the State or the Commission.”;
- (b) by the substitution for subsection (5) of the following subsection:
- “(5) If the Court orders the State to expropriate land or a right in land in order to restore it to the claimant, the Minister shall expropriate such land or right in land in accordance, *mutatis mutandis*, with the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975): Provided that the owner of such land or right shall be entitled to the payment of just and equitable compensation, determined either by agreement or by the Court according to the principles laid down in section [28(3)] 25(2) and (3) of the Constitution: Provided further that the procedure to be followed by the Court in the determination of such compensation shall be as provided in sections 24 and 32 of this Act.”; and 15 20
- (c) by the substitution for subsection (9) of the following subsection:
- “(9) Any state-owned land which is held under a lease or similar arrangement shall be deemed to be in the possession of the State for the purposes of [section 123(1)(a) of the Constitution] subsection (1)(a): Provided that, if the Court orders the [restitution] restoration of a right in such land, the lawful occupier thereof shall be entitled to just and equitable compensation determined either by agreement or by the Court [according to the principles laid down in section 28(3) of the Constitution].” 25 30

Insertion of section 35A in Act 22 of 1994

26. The following section is hereby inserted in the principal Act after section 35:

“Mediation 35

35A. (1) If at any stage during proceedings under this Act it becomes evident that there is any issue which might be resolved through mediation and negotiation, the Court may make an order—

(a) directing the parties concerned to attempt to settle the issue through a process of mediation and negotiation; 40

(b) that such proceedings be stayed pending such process.

(2) (a) An order contemplated in subsection (1) shall specify the time when and the place where such process is to start.

(b) The Court shall appoint 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 or negotiation by agreement appoint another person to mediate the dispute. 45

(3) A mediator appointed in terms of subsection (2)(b) who is not in the full-time service of the State may be paid such remuneration and allowances in respect of the services performed by him or her as may be determined by the Minister in consultation with the Minister of Finance and the President of the Court. 50

(4) All discussion taking place and all disclosures and submissions made during the mediation process shall be privileged, unless the parties agree to the contrary.”. 55

Amendment of section 37 of Act 22 of 1994, as substituted by section 37 of Act 78 of 1996

27. Section 37 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) No appeal shall lie against a judgment or order of the Court except with leave of the Court or, where such leave has been refused, with the leave of the [Appellate Division of the Supreme Court (hereinafter referred to as the Appellate Division)] Supreme Court of Appeal.”;

(b) by the substitution in subsections (2), (3), (5), (6), (7) and (8) for the expression “Appellate Division” of the expression “Supreme Court of Appeal”; and

(c) by the addition of the following subsection:

“(10) For the purposes of this section “Supreme Court of Appeal” means the Supreme Court of Appeal referred to in section 168 of the Constitution.”.

Amendment of section 38 of Act 22 of 1994

28. Section 38 of the principal Act is hereby amended by the substitution for the expression “the Supreme Court” of the expression “a High Court”.

Insertion of Chapter IIIA and sections 38A, 38B, 38C, 38D and 38E in Act 22 of 1994

29. The following chapter is hereby inserted after Chapter III of the principal Act:

“CHAPTER IIIA

DIRECT ACCESS TO COURT

Definitions

38A. In this Chapter, unless the context indicates otherwise—

‘Director-General’ means the Director-General of Land Affairs;

‘registrar’ means the registrar of the Court;

‘the regional land claims commissioner’ means the regional land claims commissioner having jurisdiction in respect of the land to which an application in terms of this Chapter relates.

Application to Court for restitution of right in land

38B. (1) Notwithstanding anything to the contrary contained in this Act, any person who or the representative of any community which is entitled to claim restitution of a right in land may apply to the Court for restitution of such right: Provided that leave of the Court to lodge such application shall first be obtained if—

(a) an order has been made by the Court in terms of section 35 in respect of a right relating to that land; or

(b) a notice has been published in the *Gazette* in terms of section 12(4) or 38D(1) in respect of that land and the period specified in the said notice has expired.

(2) An application contemplated in subsection (1) shall be in the form prescribed by the rules.

(3) The regional land claims commissioner may at any stage after the lodgement of an application contemplated in subsection (1) suspend the investigation of any claim lodged in terms of section 10 in respect of the land in question until—

(a) the Court has ordered that the suspension be lifted; or

(b) the application has, in accordance with the rules, been withdrawn, and the applicant has informed the regional land claims commissioner accordingly.

(4) The Court may at any stage of the proceedings order that all claims

lodged in terms of section 10 in respect of the land in question be transferred to the Court, whereupon the regional land claims commissioner shall forward without delay all documents in his or her possession pertaining to such claims to the registrar.

(5) Where all interested parties have reached agreement as to how the claim should be finalised, the Court may make the agreement an order of the Court.

(6) After hearing the application, the Court may—

- (a) make any order in terms of section 35;
- (b) dismiss the application;
- (c) transfer all the claims before the Court in respect of the land in question to the regional land claims commissioner: Provided that the regional land claims commissioner shall not by virtue of such transfer be obliged to give priority to any claim so transferred;
- (d) make no order thereon but grant leave for the applicant to renew the application on the same papers supplemented by such further affidavits and documents as the case may require.

Reports by regional land claims commissioner or Director-General

38C. The regional land claims commissioner or the Director-General may, of his or her own accord, file a report in any application in terms of this Chapter and shall do so if so directed by the Court.

Time limit for applications for leave to intervene under certain circumstances

38D. (1) If at any stage during proceedings under this Chapter the Court is satisfied that it is necessary or appropriate that all claims for restitution in respect of the land in question be considered at the same time, it may direct the applicant to publish in the *Gazette* and in such other manner as it deems appropriate, a notice advising potential claimants of its decision and inviting them to apply for leave to intervene in the application or action within the period specified in such notice.

(2) After the expiry of the period contemplated in subsection (1)—

- (a) no claim in respect of the land in question shall be lodged with the regional land claims commissioner;
- (b) no application for leave to intervene in order to enforce restitution of a right in such land shall be lodged with the registrar;
- (c) no application to the Court in terms of section 38B shall be lodged with the registrar in respect of the land in question:

Provided that the Court may allow a claimant or applicant on good cause shown, to lodge such a claim or application after the expiry of such period, but not later than 31 December 1998.

Additional powers of Court

38E. The Court may, during proceedings under this Chapter and subject to such terms and conditions as it may determine—

- (a) make an order—
 - (i) prohibiting or setting aside the sale, exchange, donation, lease, subdivision, rezoning or development of land to which an application relates, if it is satisfied that such sale, exchange, donation, lease, subdivision, rezoning or development—
 - (aa) defeats or will defeat the achievement of the objects of this Act;
 - (bb) was not or will not be done in good faith;
 - (ii) prohibiting the eviction of any claimant who was resident on the land in question at the date of commencement of this Act;

- (iii) prohibiting the removal, destruction or damaging of improvements upon the land in question;
- (iv) prohibiting the entering upon and occupation of the land in question without the permission of the owner or lawful occupier;
- (b) direct the Commission or the Director-General to perform any function necessary or expedient for the exercise of its powers in terms of this Chapter; 5
- (c) on good cause shown condone any deviation from or noncompliance with the provisions of this Chapter or the rules;
- (d) make recommendations to the Minister regarding the most appropriate form of alternative relief, if any, for those claimants who do not qualify for the restitution of rights in land in terms of the Act; and 10
- (e) make such other order as in the circumstances appears to be just.”.

Insertion of sections 42A, 42B, 42C and 42D in Act 22 of 1994

30. The following sections are hereby inserted in the principal Act after section 42: 15

“Registration of land in name of claimant

42A. (1) Where, in terms of this Act, the Court orders the State to acquire or expropriate land in order to restore or award the land to a claimant, the claimant shall become owner thereof on the date of such acquisition or expropriation. 20

(2) No duty, fee or other charge is payable in respect of any registration in terms of subsection (1).

Certain laws not applicable in respect of land restored or awarded

42B. (1) The laws governing the subdivision of agricultural land shall not apply in respect of any subdivision undertaken in order to restore or award land to any claimant in terms of this Act. 25

(2) The laws governing the establishment of townships shall not apply to land restored or awarded to any claimant in terms of this Act, as long as that land is predominantly occupied by that claimant.

Financial aid 30

42C. (1) The Minister may from money appropriated by Parliament for this purpose and on such conditions as he or she may determine, grant an advance or a subsidy for the development of land which is the subject of an order of the Court in terms of this Act to—

- (a) any claimant to whom restoration or the award of a right in land has been ordered; 35
- (b) any person who has waived any or all of his or her rights to relief in terms of section 42D;
- (c) any person resettled as a result of the order of the Court. 40

(2) For the purposes of subsection (1) ‘development of land’ includes the facilitation of the planning of any development of land. 40

(3) The Minister may, either in general or in a particular case or in cases of a particular nature and on such conditions as he or she may determine, delegate any power conferred by subsection (1)—

- (a) to any officer in the Department of Land Affairs; 45
- (b) to a Premier of a province;
- (c) with the concurrence of the Premier of a province, to another member of the Executive Council of that province;
- (d) with the concurrence of a Municipal Council, to any member of that Municipal Council; or 50

- (e) with the concurrence of the relevant Minister, to any officer in any other organ of state.
- (4) Any delegation of a power under subsection (3)—
- (a) shall be done in writing;
- (b) shall not prevent the Minister from exercising that power himself or herself; and
- (c) may at any time be withdrawn in writing by the Minister.
- (5) The Minister may in writing for the purposes of the development of land contemplated in subsection (1) transfer funds contemplated in that subsection to any organ of state.

Powers of Minister in case of waiver of rights to relief

- 42D.** (1) Where a person who is entitled to restitution of a right in land has, in terms of an agreement between such person and the Minister, waived any or all of his or her rights to relief under this Act, the Minister may, after consultation with the Commission, taking into account the principles of equity and justice, and on such conditions as he or she may determine—
- (a) award to the claimant land, a portion of land or any other right in land and, where necessary, acquire such land, portion of land or other right in land; or
- (b) pay compensation to such person; or
- (c) make both an award and pay compensation to such person.
- (2) Expenditure in connection with the exercise of the powers conferred by subsection (1) shall be defrayed from moneys appropriated by Parliament for that purpose.”.

Substitution of long title of Act 22 of 1994

- 31.** The following long title is hereby substituted for the long title of the principal Act: “To provide for the restitution of rights in land **[in respect of which]** to persons or communities **[were]** dispossessed **[under or for the purpose of furthering the objects of any racially based discriminatory law]** of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices; to establish a Commission on Restitution of Land Rights and a Land Claims Court; and to provide for matters connected therewith.”.

Amendment of section 2 of Act 3 of 1996

- 32.** Section 2 of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996), is hereby amended by the addition of the following subsections:
- “(5) If in any proceedings it is proved that a person falls within paragraphs (a), (b) and (c) of the definition of ‘labour tenant’, that person shall be presumed not to be a farmworker, unless the contrary is proved.
- (6) For the purpose of establishing whether a person is a labour tenant, a 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.”.

Substitution of section 13 of Act 3 of 1996

- 33.** The following section is hereby substituted for section 13 of the Land Reform (Labour Tenants) Act, 1996:

“Proceedings in other courts

- 13.** (1) The provisions of sections 7 to 10 shall apply to proceedings pending in any court at the commencement of this Act.

- (1A) If an issue arises in a case in a magistrate's court or a High Court which requires that court to interpret or apply this Act and—
- (a) no oral evidence has been led, such court shall transfer the case to the Court and no further steps may be taken in the case in such court;
 - (b) any oral evidence has been led, such court shall decide the matter in accordance with the provisions of this Act.
- (2) Any decision or order made by a magistrate's court in proceedings referred to in subsection (1) or (1A), shall in its entirety be subject to appeal to the Court **[in the manner provided in the rules]** if any of the grounds of appeal relates to the application or interpretation of this Act in such decision or order.
- (3) The Court shall have exclusive jurisdiction to hear any appeal **[against any such decision or order]** contemplated in subsection (2), notwithstanding the provisions of any other law to the contrary.
- [(4) The Court may, on the hearing of an appeal in terms of this section, confirm the decision or order or allow the appeal in whole or in part.]”.**

Amendment of section 17 of Act 3 of 1996, as amended by section 27 of Act 78 of 1996

34. Section 17 of the Land Reform (Labour Tenants) Act, 1996, is hereby amended by the substitution for subsection (5) of the following subsection:
- “(5) If the owner fails to inform the Director-General within the period referred to in subsection (4) that he or she denies that the applicant is a labour tenant, **[such failure shall constitute rebuttable evidence that]** the applicant **[is]** shall be presumed to be a labour tenant, unless the contrary is proved.”.

Amendment of section 18 of Act 3 of 1996, as amended by section 28 of Act 78 of 1996

35. Section 18 of the Land Reform (Labour Tenants) Act, 1996, is hereby amended by the substitution for subsection (6) of the following subsection:
- “(6) The Director-General **[shall]** may submit any agreement certified by him or her in terms of subsection (5), to the Court.”.

Substitution of section 19 of Act 3 of 1996, as amended by section 29 of Act 78 of 1996

36. The following section is hereby substituted for section 19 of the Land Reform (Labour Tenants) Act, 1996:

“Hearing of application by Court or referral to arbitration

19. (1) On referral of an application by the Director-General, the President of the Court or a judge of the Court nominated by him or her **[shall]** may direct either that the application be heard by the Court or that it be referred to arbitration.
- (2) If the matter is referred to arbitration, the President of the Court or a judge of the Court nominated by him or her, shall appoint an arbitrator to hear the application and may give such directions as he or she considers appropriate as to the procedure to be followed.
- [(a) appoint an arbitrator to hear the application;**
 - (b) set a date and venue for the hearing of the application;**
 - (c) give such directions as he or she considers appropriate as to the procedure to be followed or steps to be taken before the hearing takes place; and**
 - (d) take steps to ensure that the parties are notified accordingly, and may order any party—**
 - (i) to make discovery under oath of documents in his or her possession; or**

- (ii) to furnish such particulars to his or her application or reply as any other party may reasonably require; or
 (iii) to furnish summaries of any expert testimony which he or she wishes to present at the hearing,
 in such manner as may be provided in the rules. 5
- (2) (3) The President of the Court or the judge nominated by him or her may appoint as arbitrator—
 (a) a person nominated by the parties in terms of section 18(8); or
 (b) a person on the panel of arbitrators referred to in section 31, but shall not be obliged to appoint a person nominated by the parties.” 10

Substitution of section 25 of Act 3 of 1996

37. The following section is hereby substituted for section 25 of the Land Reform (Labour Tenants) Act, 1996:

“Land subject to mortgage bonds or deeds of sale

25. (1) If any land [acquired] awarded under this [Act was, immediately prior to the date of such acquisition,] Chapter is encumbered by a registered mortgage bond or subject to a deed of sale, the applicant shall not pay to the owner of the affected land any part of the compensation money except on terms agreed to by the owner and the mortgagee or buyer, or in accordance with an order of the Court in terms of subsection (2). 15 20
- (2) If the owner of the affected land and the mortgagee or buyer fail to conclude an agreement in terms of subsection (1), [any of the said persons may apply to] the Court [for] may make an order [whereby the applicant is directed to pay out] giving directions as to the payment of the compensation money [as the Court may determine]. 25
- (3) [The Court may, on hearing an application in terms of subsection (2), make such order, including an order for costs, as it deems fit] An order in terms of subsection (2) may be made by the Court of its own accord after affording the interested parties a hearing or on application by any interested person.” 30

Amendment of section 28 of Act 3 of 1996

38. Section 28 of the Land Reform (Labour Tenants) Act, 1996, is hereby amended by the substitution for subsection (2) of the following subsection:

- “(2) Any land awarded to the applicant and real rights in respect of any servitudes awarded to the applicant shall vest in the applicant released from all mortgage bonds when the order of the Court is noted against the registers of the land concerned as referred to in subsection (1).” 35

Substitution of section 31 of Act 3 of 1996

39. Section 31 of the Land Reform (Labour Tenants) Act, 1996, is hereby amended by the substitution for subsections (1) and (2) of the following subsections, respectively: 40

- “(1) The Minister shall in consultation with the Minister of Justice compile a panel of persons from whom arbitrators shall be appointed in terms of section [19(2)(b)] 19(3)(b).
 (2) An arbitrator shall be a person who, by virtue of his or her training or experience, has skills and knowledge relevant to [issues which are to be determined in terms of Chapters III and IV] land matters and the resolution of disputes.” 45

Amendment of section 33 of Act 3 of 1996

40. Section 33 of the Land Reform (Labour Tenants) Act, 1996, is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) The 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 **[for the eviction of a labour tenant or his or her associate]** shall take place before an arbitrator appointed by him or her.”. 5

Substitution of section 38 of Act 3 of 1996

41. The following section is hereby substituted for section 38 of the Land Reform (Labour Tenants) Act, 1996: 10

“Deeds registration

38. (1) As soon as possible after an order of the Court has been noted by the Registrar in his or her registers in respect of the land units concerned, the Director-General shall— 15

(a) cause any diagrams necessary for the registration of a deed of transfer of the awarded land and the registration of a notarial deed of the awarded servitudes to be prepared and approved by the relevant Surveyor-General;

(b) cause a deed of transfer of any land awarded **[land]** to the applicant to be **[transferred to the applicant]** registered in terms of section 31 of the Deeds Registries Act, 1937 (Act No. 47 of 1937), which section shall *mutatis mutandis* apply: Provided that— 20

(i) all references to “transferee” shall be deemed to be references to the applicant; 25

(ii) all references to “notice of expropriation” shall be deemed to be references to the relevant order of the Court containing the award;

(iii) the Director-General may perform all functions and sign all documents required in terms of section 31 of the Deeds Registries Act to achieve the registration of a deed of transfer of the land on behalf of the applicant; 30

(c) cause a deed of cession of any awarded servitude to be registered in favour of the applicant in terms of section 32 of the Deeds Registries Act, 1937, which section shall *mutatis mutandis* apply, provided that— 35

(i) all references to “cessionary” shall be deemed to be references to the applicant;

(ii) all references to “notice of expropriation” shall be deemed to be references to the relevant order of the Court containing the award; 40

(iii) the Director-General may perform all functions and sign all documents required in terms of section 32 of the Deeds Registries Act to achieve registration of the servitude on behalf of the applicant. 45

(2) The Minister may direct that any **[transfer duty,]** stamp duty or fees in respect of—

(a) the preparation and approval of survey diagrams; or

(b) the transfer of land; or

(c) the registration of servitudes, 50

in terms of this Act, shall be defrayed in full or in part from money appropriated by Parliament for that purpose.

(3) The Minister may, in consultation with the Minister of Finance, direct that no **[transfer duty or]** stamp duty contemplated in subsection (2) shall be paid in respect of a particular transaction under this Act.”. 55

Insertion of section 38A in Act 3 of 1996

42. The following section is hereby inserted in the Land Reform (Labour Tenants) Act, 1996, after section 38:

“Transfer duty not payable

38A. Transfer duty shall not be payable in respect of the acquisition of land or a right in land in terms of this Act. 5

Amendment of section 24 of Act 78 of 1996

43. Section 24 of the Land Restitution and Reform Laws Amendment Act, 1996 (Act No. 78 of 1996), is hereby amended by the substitution for the expression “the Supreme Court” of the expression “a High Court”. 10

Short title

44. This Act shall be called the Land Restitution and Reform Laws Amendment Act, 1997.

MEMORANDUM ON THE OBJECTS OF THE LAND RESTITUTION AND REFORM LAWS AMENDMENT BILL, 1997

The principal objects of the Bill are to bring the provisions of the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994) ("the Restitution Act") in line with the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) ("the Constitution"), to provide for direct access to the Land Claims Court ("the Court") and otherwise to expedite and promote the restitution process. The Bill further seeks to deal with practical problems relating to the application of the Restitution Act, to extend the powers of the Court, the Minister of Land Affairs, and regional land claims commissioners, and to effect textual improvements. Provision is also made for certain amendments to the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996) ("the Labour Tenants Act") and the Land Restitution and Reform Laws Amendment Act, 1996 (Act No. 78 of 1996).

AMENDMENTS TO THE RESTITUTION OF LAND RIGHTS ACT, 1994

The substitution of the preamble to the Restitution Act and the bulk of the amendments to section 1 are necessitated by the enactment of the Constitution and the proposed provisions of the Restitution Act providing for direct access to the Court. The expressions "equitable redress", "High Court", "organ of state", "racially discriminatory laws" and "racially discriminatory practices", which appear in the Restitution Act as well as in the Constitution are defined for the purposes of the Restitution Act. The definitions of the expressions "restitution of a right in land" and "restoration of a right in land" are also inserted in the Restitution Act in order to clarify the meaning of the expressions.

In addition to amendments bringing section 2 of the Restitution Act in line with the Constitution, clause 3 seeks to substitute the present section 2(1A). The proposed section 2(1A) excludes from restitution also those cases where any consideration, other than just and equitable compensation as contemplated in section 25(3) of the Constitution, was received in respect of the dispossession of a right in land. At the moment the wording of section 2(1A) creates doubt whether, for instance, the receipt of a purchase price in the case of a forced sale of the right in land or the receipt of compensatory land as consideration for the dispossession concerned could exclude a claim for restitution. The intention of the legislature was undoubtedly that any consideration shall be taken into account when considering entitlement to restitution.

Clause 5(a) seeks to substitute section 6(1) of the Restitution Act in order to include therein the powers of the Commission on Restitution of Land Rights ("the Commission") which were contained in the interim Constitution but not referred to in the Constitution. Clause 5(b) proposes to provide for the substitution of section 6(3). Section 6(3) at present only provides for an interdict prohibiting the sale, exchange, donation, lease, subdivision or rezoning of land in the case where the achievement of the objects of the Act will be defeated. It is clearly necessary that there should also be provision for an interdict prohibiting the development of land in such a case. The amended section 6(3) contains the necessary provision and also entitles an interested party to apply for an interdict. The rights of an interested party may be affected and it is therefore in the interests of justice that he or she should be entitled to make such an application. In order to expedite applications it is proposed in the amended section 6(3) that the required approval of the Chief Land Claims Commissioner for an application under that section be omitted.

Section 10(3) of the Restitution Act provides that if a claim is lodged on behalf of a community the basis on which it is contended that the person submitting the form represents the community shall be declared in full. There is, however, no provision for the situation where there is a dispute as to who legitimately represents the community. Such disputes have arisen in practice and have caused lengthy delays. Provision is therefore made in a new section 10(4) that a regional land claims commissioner may direct that an election of a community be held for the election of a person or persons to represent the community.

Clause 7(b) seeks to substitute section 11(7)(aA) of the Restitution Act and provides for the prohibition of the development of land where notice of the intention to do so was not given. The amendment is in line with the initial intention of the section and clearly necessary.

It is proposed in clause 11 that the requirement concerning the issue of certificates of feasibility (as contained in section 15 of the Restitution Act) be repealed. The Minister at present has the right to be heard in every restitution case, and can therefore make submissions on feasibility with regard to every case in which land is to be acquired or transferred, where he or she deems this appropriate. For that purpose the Department of Land Affairs has to conduct feasibility studies. To make the issue of a certificate of feasibility obligatory in every case, is an unnecessary procedure and a cause of considerable delay.

The proposed section 17(d) is a consequential amendment arising from the granting of the power to the Chief Land Claims Commissioner during 1996 to appoint an organisation in terms of section 9(1) to assist the Commission on an *ad hoc* basis. It will in future be an offence if such an organisation is prevented from performing work incidental to the performance of the functions of the Commission.

Several provisions are necessary to include the powers of the Court contemplated in section 123 of the interim Constitution in the Restitution Act. These provisions are contained in clauses 13 and 25. It is further necessary to extend the powers of the Court. In *Transvaal Agricultural Union v Minister of Land Affairs and Another (Case CCT 21/96 decided on 18 November 1996)* it was accepted by the Constitutional Court that a challenge to the Restitution Act based on the principle *audi alteram partem* (hear the other side) would first have to go to the High Court and not to the Land Claims Court. This is not a desirable state of affairs. The Court has, in terms of section 22(2) of the Restitution Act, all such powers in relation to matters falling within its jurisdiction as are possessed by a High Court having jurisdiction in civil proceedings at the place where the land in question is situated. The proposed section 22(1)(cC) now expressly states that the Court has the power to determine any matter involving the interpretation or application of the Restitution Act or the Labour Tenants Act. The proposed section 22(1)(cD) furthermore provides that the Court shall have the powers of constitutional review of legislation in relation to any challenge to the validity of the Restitution Act or the Labour Tenants Act. To have two courts of the same status adjudicating legislation which was meant to have been the preserve of the Land Claims Court is, however, likely to lead to confusion. The introductory words to section 22(1) therefore seeks to provide that the Court shall exercise its powers to the exclusion of any other court of a status similar to the Court or the Magistrates' Courts.

Section 24 of the Restitution Act provides, as an interim measure, that the High Court rules apply to the Court until rules of Court have been made in terms of section 32. Such rules were promulgated by Government Notices Nos. 299 and 300 in *Government Gazette* No. 17804 dated 21 February 1997. The need for the section has therefore fallen away. Clause 15 repeals section 24.

After the substitution of section 28(4) by clause 18 it will not be necessary for the Court to be assisted by an assessor in proceedings dealing with contempt of the Court. The role of an assessor is primarily to assist the Court in decisions regarding the merits of a claim referred to the Court in terms of section 14 or an application in terms of the proposed Chapter IIIA, and it is therefore not necessary or appropriate that there should be a requirement that he or she shall also participate in proceedings dealing with contempt of the Court.

Clause 24 seeks to provide for the amendment of section 34 of the Restitution Act. The proposed section 34(2) makes it clear that the powers conferred by sections 12 (Commission's power of investigation) and 13 (Commission's power regarding mediation), can be exercised when the Commission investigates the desirability of making an order that land or any rights in it shall not be restored to any claimant or prospective claimant (see section 34(1)). Clause 24(b) proposes to empower the Court to make any order it deems fit in section 34 applications. Experience in recent section 34 applications has shown that a blanket granting of such an application, or even partial granting in terms of section 34(5)(b), does not necessarily serve the interests of

applicants, nor would a blanket refusal necessarily serve the interests of respondents. The proposed section 34(5)(c) will enable the Court to grant more creative orders, for instance an order subject to such conditions as the Court may consider appropriate. In its present form, the section does not specifically provide for such orders, where required. A new subsection (9) prescribes that, unless the Court orders otherwise, an applicant making an application in terms of section 34(1) shall not be entitled to any order for costs against any other party. It is possible that potential objectors to a section 34 application may decide not to object because the Court may order them to pay the costs of the applicant. This is unfair, and the proposed section 34(9) will ensure that such objectors will be heard.

In addition to amendments necessary to include the powers of the Court contemplated in section 123 of the interim Constitution in the Restitution Act, clause 25(a) makes provision for a new section 35(1)(a) granting the Court the power to order the award to a claimant of a portion of the land or any right in the land which was dispossessed. It happens that the land dispossessed changes in character and becomes worth much more. If the entire land is restored in such a case the claimant may receive more than he or she lost originally and he or she may be required to pay the difference without being able to afford it. It is also possible that it is feasible to award the claimant a portion of the land but not the entire land because an award of the balance is unfeasible. The proposed section 35(1)(a) will empower the Court to deal with these situations.

In terms of the proposed section 35A the Court is empowered to make an order directing the parties to any proceedings under the Restitution Act to attempt to settle a dispute through a process of mediation and negotiation. The Court has found, from time to time, especially in applications under section 34, that mediation proceedings might be beneficial in resolving disputes.

The proposed Chapter IIIA provides for direct access to the Court by any person entitled to claim restitution of a right in land. Such direct access is an important measure to expedite the restitution process by allowing claimants with straightforward claims, or with access to the necessary resources, to approach the Court. In terms of the proposed section 38B such application must be in the form prescribed by the rules, which rules are made by the President of the Court. The intention is that the applicant will obtain the information necessary for such application. The regional land claims commissioner may under certain circumstances suspend an investigation of an application which concerns land affected by the direct access application lodged in terms of section 10. The Court may order that all claims lodged in terms of section 10 in respect of land relating to the application concerned be transferred to the Court. The Court may make any order in terms of section 35 and may also make certain other orders. The proposed chapter also makes provision for reports by a regional land claims commissioner and the Director-General to the Court, applications for leave to intervene by other potential claimants, additional powers of the Court and other matters. The powers of the President of the Court to make rules for the Court are extended by clause 22 to deal with the practice and procedures where direct access to the Court is sought.

Clause 30 seeks to insert sections 42A, 42B, 42C and 42D in the Restitution Act. Provision is made in the proposed section 42A that a claimant shall become owner of land acquired or expropriated by the State on the date of such acquisition or expropriation. This provision will eliminate the need for double transfers in land acquisitions for restitution purposes (i.e. first to the State and then to the claimants), and will therefore prevent unnecessary expenses. Section 42B seeks to provide that the laws governing the subdivision of agricultural land and the establishment of townships shall not apply in certain circumstances where land is restored or awarded to a claimant. The Minister is empowered by the new section 42C to grant financial aid for the development of land which is the subject of an order of the Court. This provision will allow financial aid for the development of land to take place within the ambit of the Restitution Act. The Minister may, in terms of section 42D, award land, a portion of land or any other right in land or pay compensation (or may make both an award and pay compensation) in the case of a waiver of rights to relief under the Restitution Act.

AMENDMENTS TO THE LAND REFORM (LABOUR TENANTS) ACT, 1996

Several amendments to the Labour Tenants Act are necessary to deal with the practical problems which have arisen since the implementation of the Act. The proposed amendments will facilitate and speed up the implementation of the Act, and ensure that the goals of the Act are achieved more effectively.

The definition of "labour tenant" contains two elements:

- (a) that the person concerned provides labour in return for the use of land, and that his or her parent or grandparent also did so;
- (b) that the payment which is made in return for labour is not predominantly in cash or some other form of remuneration, but predominantly in the form of the right to use and occupy land.

In *Mahlanga v De Jager 1996(3) SA 235 (LCC)* the Court decided that to succeed in an application for reinstatement as a labour tenant the alleged labour tenant bears the onus to prove both of these elements. This causes difficulty because labour tenants do not have access to financial records, valuers and other experts who can prove the value of the different forms of payments. The amendment of section 2 provides for a shift of the onus from the alleged labour tenant to the land owner once the alleged labour tenant has proved that he or she provides labour in return for the use of land and that his or her parent or grandparent also did so.

The Labour Tenants Act provides that, except where proceedings were pending in a court other than the Land Claims Court at the commencement of the Labour Tenants Act, only the Land Claims Court can order the eviction of a labour tenant. However, many cases involving alleged labour tenants are brought in the Magistrates' Court and appeals against orders in such cases are made to the High Court. This results in the Magistrates' or High Court deciding who is a labour tenant and who is not. This can lead to conflicting interpretations of the Act by the Land Claims Court on the one hand, and the Magistrates' and High Court on the other hand. The new section 13(1A) provides that if an issue arises in a court other than the Land Claims Court which requires that other court to interpret or apply the Labour Tenants Act and no oral evidence was led before the commencement of the Amendment Act, the case must be transferred to the Land Claims Court. If oral evidence was led under these circumstances such other court must decide the relevant matter in accordance with the provisions of the Labour Tenants Act, but any appeal against a decision so reached will be to the Land Claims Court.

All agreements reached by labour tenants and landowners on the resolution of claims by labour tenants to land ownership must at present be submitted to the Court. This is sometimes purely a formality and unnecessary and slows down implementation. The proposed amendment of section 18 provides that where agreement has been reached between the parties the Director-General of Land Affairs will have a discretion whether or not to refer the agreement to Court.

Currently it is compulsory for the Court to refer to arbitration all matters that come before it. There may be circumstances where it is appropriate for the Court to hear the matter itself, without referring it to arbitration. After the substitution of section 19 the Court will have a discretion to decide whether to refer the case to arbitration, or to deal with the case itself.

Section 31(2) of the Labour Tenants Act currently provides that an arbitrator appointed for the hearing of an application for the acquisition of land and servitudes must have skills and knowledge relevant to issues which are to be determined in terms of Chapters III and IV of that Act. Such arbitrators should however have skills and knowledge relevant to land matters and the resolution of disputes and not only to the issues currently mentioned in section 31(2). Clause 39 therefore seeks to amend section 31 appropriately.

Transfer duty is currently paid from the R15 000 Settlement/Land Acquisition Grant provided by the government and the capital amount available for land purchase is thus reduced. The effect is that the State makes the grant available to the labour tenant, and then takes back a percentage of this amount. If the purchaser is an individual, the transfer duty is between 5% and 8% whilst if it is a joint enterprise or trust the transfer duty can be as high as 10%. The proposed section 38A provides that transfer duty is not payable in respect of acquisition of land or a right in land in terms of the Labour Tenants Act.

**AMENDMENT TO THE LAND RESTITUTION AND REFORM LAWS
AMENDMENT ACT, 1996**

Clause 43 merely proposes to effect a technical amendment in order to bring section 24 of the Land Restitution and Reform Laws Amendment Act, 1996 (Act No. 78 of 1996), in line with the Constitution.

PERSONS AND BODIES CONSULTED

The President and judges of the Land Claims Court
The Commission on Restitution of Land Rights
The Department of Justice

In the opinion of the Department and the State Law Advisers this Bill should be dealt with in terms of section 75 of the Constitution.