

STRIKING A BALANCE BETWEEN PROCESSING LAND CLAIMS AND ENACTING LEGISLATION THAT MEETS CONSTITUTIONAL MUSTER

SPEAKER OF THE NATIONAL ASSEMBLY AND ANOTHER V LAND ACCESS MOVEMENT OF SOUTH AFRICA AND OTHERS

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On 19 March 2019, the Constitutional Court (the Court) handed down judgment in *Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others* (LAMOSHA 2). The matter was an application brought by the Speaker of the National Assembly (NA) and the Chairperson of the National Council of Provinces (NCOP) for an extension of an interdict granted by the same Court in *Land Access Movement of South Africa v Chairperson, National Council of Provinces* (LAMOSHA 1).

In LAMOSHA 1, LAMOSHA brought an application challenging the constitutionality of the (now repealed) *Restitution of Land Rights Amendment Act* (Amendment Act) on the grounds that Parliament had failed to meet its constitutional obligation to facilitate adequate public participation when promulgating the Amendment Act.

The Court granted an interdict against the processing of any land claims by the Commission on Restitution of Land Rights (Commission) that were lodged between 1 July 2014 and 28 July 2016 (interdicted claims) in terms of the Amendment Act. The Amendment Act sought to re-open the restitution process, permitting new claims to be lodged until 30 June 2019. The effect of the interdict was that none of the claims could be processed until Parliament enacted new and constitutional legislation governing the processing of any new claims.

The Court declared the Amendment Act invalid and gave Parliament 24 months from the date of declaration of invalidity within which to enact new legislation that met constitutional muster (the meaningful public participation criteria). The Court stipulated that should Parliament fail to meet the deadline, the Chief Land Claims Commissioner (Commissioner) was to apply to the Court within two months of the lapsing of the initial 24 months for the appropriate order regarding the processing of the interdicted claims.

Parliament failed to enact the legislation within the given period and launched an application (LAMOSHA 2) seeking an extension of the deadline as per the LAMOSHA 1 judgment. Parliament requested an extension of eight months, to 29 March 2019, stating that this would give it enough time to allow the new Amendment Act to pass through both the NCOP and NA. Parliament further argued that it had already taken steps towards the expeditious processing of the legislation. The extension would extend the interdict on the processing of any new claims lodged with the Commission. Parliament said that its failure to enact a new Amendment Act timeously was not due to its laxness but, rather, due to insufficient time allocated, considering all its other programmes.



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LAMOSA opposed the application for extension and said that the responsibility for determining the fate of the interdicted claims vested with the Court once the 24-month period had lapsed. In addition, LAMOSA argued that the LAMOSA 1 ruling was final and binding and that the Constitutional Court did not have the authority to vary its own order. However, should the Court find that that it did have the power to vary its own order, such power would be discretionary and be exercised only in exceptional circumstances. LAMOSA said that Parliament had not shown that such circumstances prevailed.

The Court dismissed the application and held that it reserved the right to vary its decisions as afforded it by the Constitution. Further, the premise of the findings would be the most just and equitable compromise catering for all the parties involved. The Court found that Parliament had delayed in bringing an application for extension, despite evidence that it knew it would not meet the 24-month deadline. The failure to provide sufficient reasons for this failure to both meet the deadline and apply for the extension in time was considered by the Court. The Court agreed with LAMOSA to the extent that Parliament had failed to show that exceptional circumstances existed to justify the order it sought. Furthermore, the Court held that Parliament had failed to show that a new Amendment Act would be enacted with the required public participation process by the proposed date (29 March 2019).

The Court upheld LAMOSA's counter application and granted the alternative relief sought. The Court ordered that the Commission was interdicted from processing the interdicted claims until the old claims had been processed i.e. settled or referred to the Land Claims Court, or unless the Land Claims Court granted permission for the Commission to begin processing the interdicted claims. The Land Claims Court could also address interdicted claims to the extent that such involvement affected the processing of an old claim in the interests of justice. In addition, the Commissioner is required to file reports on a range of aspects concerning the processing of the claims, at regular intervals, to allow for the Land Claims Court to exercise a judicial oversight role over the process. Finally, the Land Claims Court was granted the authority to make whatever orders it deems necessary to allow for the expedited closure of old claims. This compromise created a means by which to regulate both the old claims, as well as the interdicted ones.

The compromise in the order made was the most just and equitable path to be taken for all parties, particularly for the dispossessed communities. It is common knowledge that the restitution process in South Africa has been arduous, and the slow pace has meant long waiting periods for claimants. The delay in the enactment of the Amendment Act serves to further hinder access to land for this demographic. The restitution of land is an emotional and important issue. It requires concerted effort, a constitutionally-irreprehensible process and the visible determination to see land and the intertwined dignity of people who were removed forcibly from the land of their forebears, restored. The compromise allows for a constitutionally-sound piece of legislation to be enacted, while allowing the restitution process to continue.

There is an imperative on the government to settle old claims, with urgency.



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The Institute for Poverty Land and Agrarian Studies (PLAAS) estimates that resolving existing claims may well take more than 140 years. This statistic highlights the necessity to process and close claims, to allow for the mandate given by section 25 of the Constitution to be fully met.