



**IMPLICATIONS OF THE CONSTITUTIONAL COURT JUDGMENT ON THE  
COMMISSION ON RESTITUTION ON LAND RIGHTS: IN LIGHT OF 1<sup>ST</sup>  
AND 2<sup>ND</sup> CONCOURT JUDGMENTS BY LAND ACCESS MOVEMENT OF  
SOUTH AFRICA (LAMOSA) AND THE SPEAKER OF THE NATIONAL  
ASSEMBLY AND OTHERS**

# BACKGROUND

- In 1994, Parliament passed the Restitution of Land Rights Act (Restitution Act), being the legislation envisaged by section 25(7) of the Constitution to address evictions, forced removals and past dispossession of land. The Restitution Act established a system allowing people and communities who were, as a result of racially discriminatory laws or practices, dispossessed of their land rights to claim either restitution of the land or equitable redress.
- The Restitution Amendment Act No. 15 of 2014, was signed into law by the President, allowing for the lodgement of new claims. A total of 163 383 new order claims were lodged as at 27 July 2018, before the Constitutional Court declared the Restitution Amendment Act to be un-constitutional.
- On 28 July 2016 the Constitutional Court handed down a unanimous judgment in the matter of Land Access Movement of South Africa and Others vs Chairperson of the National Council of Provinces and Others (CCT40/15) [2016] ZACC 22 (28 July 2016) (“the Judgment”), basically interdicting the State from processing all new order land claims received during the 2014 (Commonly referred as “LAMOSA 1”).



# BACKGROUND....

- On 19 March 2019 the Constitutional Court handed down another unanimous judgment in the matter of, the Speaker of the National Assembly and Chairperson of the National Council of Provinces vs LAMOSA and Others, on their application seeking an extension of the interdict against the processing of the interdicted land claims until 29 March 2019. The Constitutional court dismissed the extension application, as there were no exceptional circumstances justifying the order as requested by the applicants (“Parliament”).
- Further, the Constitutional Court held that the in the alternative relief, while lifting the supervisory role of the Court, makes provision for appropriate judicial oversight by the Land Claims Court. This entails that the Chief Land Claims Commissioner will be required to file reports on a range of aspects, including both constraints and the solutions hereto and the Land Claims Court will have the necessary expertise to assist where need be.



# 1<sup>ST</sup> JUDGMENT (LAMOSA 1) 28 JULY 2016

- On 28 July 2016 the Constitutional Court handed down a unanimous judgment in the matter of Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others (CCT40/15) [2016] ZACC 22 (28 July 2016) (“the Lamosa Judgement”). A copy of the judgment is attached.
- LAMOSA and Others challenged the public participation process conducted by the National Council of Provinces in the process of passing the Restitution of Land Rights Amendment Act, 2014 (Act No 15 of 2014) (“the Amendment Act”). The Amendment Act amended the Restitution of Land Rights Act, 1994 (Act No 22 of 1994) (“the Restitution Act”) and provided, *inter alia*, for the re-opening of lodgement of land claims for a period of five years, calculated from 1 July 2014 to 30 June 2019. In the alternative LAMOSA and Others challenged the validity of section 6 (1) (g) of the Restitution Act which was inserted by the Amendment Act. That section required the Commission to ensure that priority is given to claims lodged by 31 December 1998 but which were not finalised on 1 July 2014.



# 1<sup>ST</sup> JUDGMENT (LAMOSA 1) 28 JULY 2016...

- The Court in *LAMOSAS 1* has given credit to the importance of the restitution process and linked it to the “restoration of dignity”. This matter is a sequel to *LAMOSAS 1*. In *LAMOSAS 1*, this Court prospectively struck down the Restitution of Land Rights Amendment Act (repealed Amendment Act) from the date of the judgment on 28 July 2016. In paragraph 4 of the Order, this Court interdicted the Commission on Restitution of Land Rights (Commission) from processing any claims lodged between 1 July 2014 and 28 July 2016 pursuant to the repealed Amendment Act (the interdicted claims), pending the enactment of a new Act re-opening the lodgement of land claims. Paragraph 7 of the Order provided that, should Parliament not enact an Act within 24 months of the date of judgment in *LAMOSAS 1*, the Chief Land Claims Commissioner (Commissioner) must, and any other interested party to *LAMOSAS 1* or person with a direct and substantial interest may, apply to this Court within two months of the elapsed period for an appropriate order on the processing of those interdicted claims.



# 1<sup>ST</sup> JUDGMENT (LAMOSA 1) 28 JULY 2016...

- The effect of the Order was that, first, the repealed Amendment Act was declared invalid immediately from 28 July 2016. Simply put, the repealed Amendment Act was struck down finally and irrevocably. Second, the Commission was interdicted from processing any interdicted claims. Third, the interdict would endure until (1) Parliament enacted a new Amendment Act (new Amendment Act) re-opening the period of lodgement of land claims; (2) the processing of all claims lodged before 31 December 1998 (old claims) was finalised before the enactment of a new Amendment Act; or (3) if Parliament were to fail to enact a new Amendment Act within 24 months of the date of the Order, until the Commission, or any other interested party, applied to this Court for an appropriate order on the processing of the interdicted claims.



# 2<sup>ND</sup> JUDGEMENT (LAMOSA 2) HENDED DOWN ON 19 MARCH 2019

- The applicants, the Speaker of the National Assembly and the Chairperson of the National Council of Provinces (Parliament), seek an extension of the period of 24 months mentioned in paragraph 7 of the previous Order until 29 March 2019, in order to enable Parliament to finalise the process of enacting a new Amendment Act. The extension would, if granted, extend the interdict in paragraph 4 of the previous Order and, consequently, paragraph 7 will not be activated until 29 March 2019. The First to the Sixth respondents opposed the application, and the Seventh to tenth respondents (collectively, the Communities) support Parliament's request for the extension.

## THE FOLLOWING ORDER WAS HANDED DOWN ON LAMOSA 2:

1. The application by the applicants for an extension is dismissed.
2. The counter-application by the first to sixth respondents is upheld to the following extent, subject to the Parliament of the Republic of South Africa legislating otherwise:



# 2<sup>ND</sup> JUDGEMENT (LAMOSA 2) HENDED DOWN ON 19 MARCH 2019...

- a) The Commission on Restitution of Land Rights (Commission) is prohibited from processing in any way any claims lodged in terms of section 10 of the Restitution of Land Rights Act 22 of 1994 (Restitution Act) between 1 July 2014 and 28 July 2016 (Interdicted Act) until the earlier of the dates when-
  - i. It has settled or referred to the Land Claims Court all claims lodged on or before 31 December 1998 (Old claims) by way of a referral of the claim in terms of section 14; or
  - ii.
  - iii. The Land Claims Court, upon application by any interested party, grants permission to the Commission to begin processing interdicted claims, whether in respect of the whole or part of the Republic of South Africa and whether in respect of part or all of the process for administering an interdicted claim.
  
- b) Until the date referred to in paragraph (a), no interdicted claim may be adjudicated upon or considered in any manner whatsoever by the Land Claims Court in any proceedings for the restitution of rights in land in respect of old claims, provided that interdicted claimants may be admitted as interested parties before the Land Claims Court solely to the extent that their participation may contribute to the establishment or rejection of the old claims or in respect of any other issue that the presiding judge may allow to be addressed in the interest of justice.



# 2<sup>ND</sup> JUDGEMENT (LAMOSA 2) HENDED DOWN ON 19 MARCH 2019...

- c) Notwithstanding the provisions of section 11(5) and 11(5A) of the Restitution Act, no interdicted claimant shall be entitled to any relief having the effect of-
  - (i) Altering or varying-
    - a) The relief granted to any claimant in terms of section 35 of the Restitution Act in respect of a finalised old claim;
    - b) The terms of an agreement concluded in terms of section 42D of the Restitution Act; or
    - c) An award in terms of section 42E (1)(a) or (b) of the restitution Act, unless the Land Claims Court in exceptional circumstances orders otherwise; and/ or
  - (ii) Awarding to such interdicted claimant land or a right in land that is subject to a pending claim for restoration by an old claimant.



# 2<sup>ND</sup> JUDGEMENT (LAMOSA 2) HENDED DOWN ON 19 MARCH 2019...

- (d) The Chief Land Claims Commissioner must file a report with the Land Claims Court, to be dealt with as the Judge President of that Court may deem fit, at six monthly intervals from the date of this order, setting out-
- i. The number of outstanding old claims in each of the regions on the basis of which the Commission's administration is structured;
  - ii. The anticipated date of completion in each region of the processing of old claims, including short-term targets for the number of old claims to be processed;
  - iii. The nature of any constraints, whether budgetary or otherwise, faced by the Commission in meeting its anticipation completion date;
  - iv. The solutions that have been implemented or are under consideration for addressing the constraints; and
  - v. Such further matters as the Land Claims Court may direct; until all old claims have been processed.



# 2<sup>ND</sup> JUDGEMENT (LAMOSA 2) HENDED DOWN ON 19 MARCH 2019...

(e) The Land Claims Court may make such order or orders as it deems fit to ensure the expeditious and prioritised processing of old claims.

3. The applicants are jointly and severally ordered to pay the costs of the first to sixth respondents, including the costs of two counsel.

## 4. IMPLICATIONS ON THE COMMISSION'S OPERATIONS

(a) This circular should be read in tandem with circular No. 05 of 2016, and all the provisions on paragraphs 14 to 29 remain in place.



## ACTIVITIES THE CHIEF LAND CLAIMS COMMISSION IS REQUESTING FROM THE PROVINCIAL RESTITUTION OFFICES BEFORE THE 12<sup>TH</sup> APRIL 2019 IN ORDER TO COMPLY WITH THE CONSTITUTIONAL COURT JUDGEMENT HANDED DOWN ON THE 19<sup>TH</sup> MARCH 2019

1. Restitution Provincial heads, to submit an audited total number of all old order outstanding land claims lodged per Province, by the end of April 2019. The report must indicate the ff:
  - i. The anticipated date of completion in each region of the processing of the old claims.
  - ii. The annual financial targets for the number of old claims to be processed at a given financial year.
  - iii. The above reports must identify the nature of any constraints, whether budgetary or otherwise, faced by each office in meeting its anticipated completion date.
  - iv. The solutions that have been implemented or are under consideration for addressing the constraints;
  - v. The order of priority informed by the circumstances of each Province.
  - vi. Communication to issue Communiqué of the Judgement. A standard letter for the Provinces should be drafted in this regard.



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2. List of all matters in active and pending before the Land Claims Court with detailed information and clear status of each matter.
3. Each Province to submit a list of all active litigation matters with high impact/implication on policy and other government legislation.
4. A list of all old order active court matters with a competing land claim lodged during the period of 01 July 2014 to 28<sup>th</sup> July 2016, and with a dispute to be referred by Province to the CLCC's office via Director National Legal on or before the end of May 2019.
5. All old order land claims with a dispute, either on validity or purchase price must be referred to CLCC via the RLCC's office, to immediately implement Sec13 of the Restitution Act, and failing that be referred in terms of section 14 to the Land Claims Court for adjudication.
6. The Chief Director: Service Delivery Coordination and Chief Director Gauteng Province to facilitate the use of the Phakisa Project to determine to develop intervention plans for various Provincial Operations Directorates and the reinforced strategies for support by both Legal and Finance within Commission. This is part of the Fever Tree initiative.



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7. National Legal to develop a plan which must be discussed with the DoJ: National State Attorney head to bring on board candidate attorneys to work jointly between Commission on Restitution of Land Rights and the Office of the State Attorney in ensuring swift referrals, in compliance will all legal prescripts, and place attention to all pending matters at the Land Claims Court.
8. All reports must be signed off by the Chief Directors.
9. The National Quality Assurance, with its counterparts under the CD: SD to develop a monitoring and evaluation, off all the above and compiling of the final report which will be signed off, via the RLCC, DLCC and approved for submission at Land Claims Court by CLCC.



# THANK YOU

