

**Is the Restitution of Land Rights Amendment Act aligned with the Constitution of South
Africa?**

by

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Introduction:

The Native Land Act no.27 of 1913 was introduced after the Boer War against the English, by General Louis Botha's government. This Act stipulated how land was going to be divided between black and white people. This Act was promulgated to prevent black and white people from living together and the policy was known as the segregation policy.

Originally the Act provided that black people were entitled to own 7% of land, and white people were entitled to 93% of land. This later broadened to 13%, which black people could own in terms of the Native Trust and Land Act.¹ Separate development, also known as Bantustans or Homelands were created under the Apartheid Government, in terms of which black people were displaced. These areas were on the outskirts of urban areas and Homelands, where black people were forced to stay and were not allowed in urban/ white areas at certain times, without permission. This land afforded to black people was frequently infertile, overcrowded and equipped with inferior facilities. To produce and grow as a community was generally difficult or impossible.

In 1990 the Government admitted failure, and under the leadership of Nelson Mandela, and FW De Klerk began to draft an Interim Constitution for a democratic vote for government, whereafter the ANC took office. In 1994 the Restitution of Land Rights Act² (The Restitution Act) was promulgated and specified that 30% of cultivated white owned land would be restituted to black people within the coming 5 years.

In 2004, President Thabo Mbeki amended The Restitution Act to give effect to restitution of white owned land without a court order as the original Act required, amongst six other amendments made to the Act.

The effect of the 1913 Act is still prevalent in South Africa especially when looking at the divided areas originated by racial inequality.

¹ Native Trust and Land Act No.19 of 1936.

² Restitution of Land Rights Act No. 22 of 1994.

According to the preamble of The Restitution of Land Rights Amendment Act³ (Amendment Act) its main purpose is to re-open the window for restitution claims to allow people dispossessed of their land through past racial discrimination, to have the opportunity to lodge a claim not later than 30 June 2019. It is anticipated that over 400 000 new claims will be lodged at a potential outlay of R130 – R179 billion before the new window for claims closes on 30 June 2019. Thus the Restitution of Land Rights Amendment Act 15 of 2014 gives further effect to the provisions contained in Sections 25(6) and 25(7) of The Constitution.

The core value of The Amendment Act, including the purpose thereof is of fundamental importance for land rights as protected by The Constitution of South Africa in terms of the said Sections 25(6) and (7) thereof, which states;

“(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.”

There is no denying the importance of this act, and the fact that it comes at a time where land reform and tenure is failing, and has failed many South African communities who are still without the security that land should offer, especially those people who are living in rural, informal settlements including the former Bantustans or Homelands. This position needs redress in the form of restitution in order to ensure the manifestation of the constitutional commitment to enforce and strive towards equality. The basic goal of the Amendment Act is commendable.

Some of these communities include the Modderveli, Makuleke and Popela communities, to which I will refer to hereunder. People were reduced from owners of land to labourers, and others forcibly removed from their land and forced to settle in other areas where they were placed.

³ The Restitution of Land Rights Amendment Act 15 of 2014.

The question I will deal with in this dissertation is whether the Amendment Act was promulgated in line with the Constitution. I am of the opinion that the Amendment Act does not pass the test of constitutionality on the basis that it does not comply with the 'Rule of Law' principle, and/ or that it has been enacted without the constitutional requirement of Public involvement as required in Sections 59, 72 and 118 of the Constitution.

The Rule of Law

The Rule of Law's basic principle is that no one is above the law. The Rule of Law implies a transparent and independent government which respects law in the public interest. A fundamental principle thereof is that law cannot follow from an act of pure will or arbitrarily. The Rule of Law in its basic application is that governmental authority can only be exercised legitimately where such laws/ regulations or rules are captured in clear writing and have gone through the correct process of establishing such laws or regulations. These procedural steps are known as due process, and without for example publicly disclosing laws, the state cannot pass such laws legitimately. This principle acts as a safeguard against arbitrary governance, for instance by a totalitarian leader or a mob group, thus requiring a rational and non-arbitrary exercise of power. In other words a rationale must be present with regard to the exercise of power and the goal or purpose for which that power had been given.

The Rule of Law as contemplated in Pre-democratic South Africa, by two eminent South African writers can be summarised in my view as follows:

- a) Wiechers. M⁴ : The truly juridical state is the state which in its destination and nature of existence respects and promotes the liberty of its subjects and their physical and mental well-being.

The above is the basis for the normative contents to the principle of the Rule of Law and its function within the state.

- b) Carpenter. G: Rule of Law should amount to a *“practical system of individual rights which takes the interest of both community (state) and individual into account and which provides for a greater degree of equilibrium.”*⁵

⁴ Verloren van Themaat *“Staatsreg”* 3rd Edition (1981), p.141.

⁵ Carpenter. G *“Introduction to South African Constitutional Law”* 1st Edition (1987), p.100.

The Rule of Law principle, and the different components thereof have been dissected, intensified and integrated in the Constitution of the Post-Democratic South Africa as discussed hereunder.

Section 6(1)(g) of The Amendment Act reads as follows:

“6. General functions of Commission;

(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—

(g) ensure that priority is given to claims lodged not later than 31 December 1998 and which were not finalised at the date of the commencement of the Restitution of Land Rights Amendment Act, 2014.”

At first sight this Section of the Amendment Act seems without fault, but in practice it is vague. What does ‘given priority’ entail precisely, and how does it apply to existing claims?

Section 25(7) is limited to the extent that restitution and the extent thereof, must be determined by an Act of Parliament. This places a duty upon the legislature to ensure that the legislation is watertight and addresses the process one needs to rely on whilst processing restitution claims.

Section 6(1)(g) fails totally in providing guidance to administrators in a mass claims process which gives effect to constitutional rights. The fact is that legislation performing the function that the Amendment Act is aimed at must portray greater precision. This mass claims process should become a co-ordinated process of processing an immensely large number of claims which arose from specific events.

This section forms a foundational pillar of the Amendment Act, and without it the Act falls apart. It is impossible to extract it from the Amendment Act and without it the Act would be meaningless and create confusion.

The Rule of Law is interwoven with, and underlies our Constitution. It entails, amongst others, the applicability of the principles discussed hereunder as confirmed by the Constitutional Court.

As Ngcobo J states in the *Masethla* case: "*The crisp question for decision is whether the rule of law, in particular, the doctrine of legality, has a procedural component*" and that "*it refers to a wider concept and deeper principle: fundamental fairness.*"⁶ This statement by Ngcobo J links the fundamental principles of democracy and the Constitution, accountability, openness and responsibility with the Rule of Law. Adherence to these rules can only be established once rules and procedure regarding participation of the public has been granted. This aspect, which links to the principle of the Rule of Law will be dealt with later on.

The rule qualifies our law and regulations by requiring consistency with the principle that rules must be clear to, and understood by, the reasonable man. This means that laws that are vague or inaccessible are not in line with Constitutional values, and specifically the Rule of Law. It does not require absolute certainty, but reasonable certainty. A person needs to understand the order to enable him to follow it.

In the case of *Affordable Medicines Trust v. The Minister of Health* the court held "*The doctrine of vagueness ... requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.*"⁷

The court held in the *South African Liquor Traders* case that a 'shebeen' which is defined under the Provincial Act as an unlicensed operation if it sells less than 10 cases of beer, without properly referring to a timeframe in which this has to be calculated, was unconstitutionally

⁶ *Masethla v President of the Republic of South Africa* (2008) (1) BCLR 1 (CC), para 178-179.

⁷ *Affordable Medicines Trust and Others v Minister of Health and Another* (2006) (3) SA 247 (CC), para 108.

vague; *“It’s meaning cannot be ascertained with any precision. It is simply not clear which unlicensed liquor traders will fall within the definition and which without.”*⁸

Discretionary rights given to an executive by way of legislation, which could possibly interfere with constitutional rights, must provide with relative certainty how this discretion must be exercised. In *Dawood* the court made the following point: *“It is... not ordinarily sufficient for the legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport the objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given.”*⁹

The prioritization of claims are vague and at stake as the Land Claims court as well as the Commission have already stated that they are confronted with issues regarding old and new claims. This requires a legal framework in order to provide a legal remedy with certainty from an early stage in the process. As J Crook explains; *“Experience shows the need for care and deliberation in the initial design of mass claims systems... Claims collection will often be a one-shot process; it is difficult and costly to go back to tens of thousands of claimants for additional information if the initial claims questionnaire was badly designed. Similarly, adding additional claimants to a process underway will add delay, confusion and prejudice. Claims processes are like great ships. Once underway, it is difficult to change their course.”*¹⁰

J Crook shines light on the subject of ‘upfront certainty’ which relates to the matters relevant in respect of the land claims process. This is best managed by certainty before the process, which land claims are adherent to, commences. The process of mass claims are not gradually developed as jurisprudence ordinarily sets course, but in these events claims should be

⁸ *South African Liquor Traders Association and Others v Chairperson Gauteng Liquor Board and Others* (2009) (1) SA 565 (CC), para 26.

⁹ *Dawood and Another v Minister of Home Affairs and Others* (2002) (3) SA 936 (CC), para. 54.

¹⁰ J Crook *“Thoughts on Mass Claims Processes”* (2005) 99 American Society of International Law Proceedings 80 at 84.

processed in accordance to carefully written procedural rules in order for this process to be fair and reasonable.

Section 6(1)(g) grants the executive discretionary powers, in terms of which it may decide which claims are prioritised over certain other claims. It does not specify how the executive must go about exercising this discretion. In the case where certain rights might be infringed by such a discretion, the Act must provide adequate guidance on how the executive must go about it.

This section has the potential to infringe upon the constitutional rights contained in: (a) Section 25(7) namely the right to restitution of property (as referred to above), (b) Section 9(1) namely the right to equal treatment, which reads: *“9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.”*, and (c) Section 33(1), the right to administrative justice which reads *“Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.”* (d) Section 34 which provides the right to access to court in terms of the Constitution; *“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”*

Since there are no guidelines to how the executive must go about exercising its discretion and determine what “priority claims” are, it opens up the possibility of existing claimants to be impacted negatively by new claims. This may impact the timeframe extension as a result of the influx of new claims and the claim itself. Without clear guidance as to how the officials should exercise their discretionary powers in this regard, it poses a threat of limiting the rights of claimants with existing claims pending.

In this instance where the Act does not state how the executive must determine priority, Section 25(7) as in the Constitution is not fulfilled. Section 25(7) must be read in light thereof that it needs to address the right of people who were previously dispossessed of land to be justified by way of restitution. The Act currently seems to undermine the Rule of Law in the manner that it gives the Commission, several other parties and its officials the right to determine the extent and priority of the core rights afforded by the Constitution. This position

poses a retrogressive nature, and by amending this clause and structuring it properly in order that new claimants could be excluded from exercising their right to restitution, whilst affording the necessary certainty and rights to existing claimants.

“Parliament may only delegate subordinate regulatory authority to the Executive and may not assign plenary legislative power to another body.”¹¹

The vague nature of Section 6(1)(g) and its retrogressive nature delays and possibly denies the right to the restitution of dispossessed land. The Amendment Act is so vague that it grants powers to decide whether to grant procedural or substantive priority to the executive.

Section 6(1)(g) provides that the Commissioner, Chief Land Claims Commissioner, a regional land claims commissioner or a person designated by any such commissioner may carry out the function of this Act. This will lead to confusion of claims within the same structure of governance resulting to conflicting opinions by different officials at different times with regard to different claims. The restitution process demands clarity and certainty where people who are claiming in terms of Section 25(7) may have their constitutional rights unfairly discriminated against.

The stipulation in terms of the Amendment Act to give priority to existing claims has no assertive meaning, and can be interpreted in a range of different ways. This will result in conflicting interpretations of this section of the Act and also in conflicting decisions.

The Commission takes multiple administrative decisions whilst processing restitution claims. Section 42(D) of the Constitution allows the Minister discretionary powers to settle claims accordingly. This task is impossible to define with regard to existing claims, and large amounts of new claims to assess, which will continue for the remaining four years. Political considerations may also be allowed to interfere.

¹¹ *South Africa Reserve Bank and Another v Shuttleworth and Another (2015) ZACC 17*, para 65.

With reference to the clear uncertainty with regard to Section 6(1)(g), the new and existing claimants cannot say for a fact what their rights and obligations are in view of the situation which they face.

There are currently more than 20 000 unsettled claims, some of which have been awaiting settlement for over 17 years and other claims have been allowed, but transfer has not yet been effected.¹² The influx of new claims will eclipse the existing claims and deplete the already exhausted resources that the Commission and the State have at its disposal. Further, the Amendment Act does not account for land that has already been claimed and transferred, which is now left open in respect of new claims to be lodged. The Amendment Act allows for an agreement or order restoring land to be rescinded, set aside or varied in instances where another new claim is lodged and granted for that same land.

The claimants who had claims to land existing prior to the Amendment Act (existing claims) had a significant interest, to a greater or lesser extent and asserted rights in respect of such land. The said Section 6(1)(g) illustrates that there is no real contents or merit in “prioritization” of existing claims v. new claims. Section 6(1)(g) states that it will “give priority” to existing claims, but this has a meaningless effect although it may seem harmless at first sight.

A cumbersome past administrative process of land restitution has done little to support the racially skewed patterns of land ownership. One wonders if this pit of claimants won’t open the door for traditional leaders and other prominent or favourite political figures from communities to take advantage of the situation and jump the queue.

While some laws are open for more than one interpretation, Section 6(1)(g) is capable of a number of different interpretations by different bodies or persons, which exceed constitutional limits to exclude vagueness. This Section is already subject to a number of conflicting interpretations and there is at present no certain preferable interpretation held. Certainty is definitely required.

¹² <http://www.plaas.org.za/sites/default/files/publications-pdf/Policy%20Brief%2034%20Web.pdf>.

In view of the foregoing, the Commission cannot be judged on ultra vires, as it will be impossible to determine what ultra vires entails, given the nature of Section 6(1)(g). This position has to be addressed to halt unauthorised actions or decisions.

Public Participation

The Freedom Charter, as adopted in 1955,¹³ declared that “the people shall govern”. This in my opinion forms part of the initiative to the Constitutional Principles of Democracy and its representative and participatory nature. Representation means freedom to vote for a representative of your choice in any given election. Public participation on the other hand deals with the day to day governing of the country and in other words, amongst others, the involvement of each citizen in the law making process. These two aspects are not contradictory, but in actual fact complement the other. Political participation and public participation is thus interlinked and democracy recognises the right of the public’s active participation in the legislative process. This enables the law to keep in touch with the public’s opinion, best interest and evolving nature. Without the two complementing and interchanging it is not a proper democracy.

The Constitution states that the National Assembly, who is elected through democratic process by the public, must ensure “*government by the people under the Constitution. It does this by ...providing a national forum for public consideration of issues.*”¹⁴ The participation in the law making process is further provided for and required in the Constitution in Sections 59, 72 and 118.

To judge whether the Amendment Act complies with the Public Participation requirement in the Constitution, one will have to study Sections 59, 72 and 118 of the Constitution to establish whether the public participated during the legislative process in a reasonable and sufficient manner. In order for their concerns to be raised, after proper consideration by and proper representation of the public and thereafter properly considered by the relevant authorities.

Section 59 reads:

“(1) The National Assembly must—

(a) facilitate public involvement in the legislative and other processes of the

¹³ The Freedom Charter, adopted by the Congress of the People, Kliptown 1955.

¹⁴ The Constitution of South Africa of 1996, Section 42(3).

Assembly and its committees; and

(b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—

(i) to regulate public access, including access of the media, to the Assembly and its committees; and

(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.”

Section 72 reads:

“Public access to and involvement in National Council.

(1) The National Council of Provinces must;

(a) facilitate public involvement in the legislative and other processes of the Council and its committees; and

(b) conduct its business in an open manner and hold its sittings, and those of its committees, in public, but reasonable measures may be taken -

(i) to regulate public access, including access of the media, to the Council and

(ii) to provide for the searching of any person and, where appropriate, the committees, in public, but reasonable measures may be taken by its committees; and refusal of entry to, or the removal of, any person.

(2) The National Council of Provinces may not exclude the public, including the media from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.”

Section 118 reads:

“(1) A provincial legislature must —

(a) facilitate public involvement in the legislative and other processes of the legislature and its committees; and

(b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken —

(i) to regulate public access, including access of the media, to the legislature and its committees; and

(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) A provincial legislature may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.”

In the above-mentioned Sections of The Constitution, it, in short provides that The National Assembly, The National Council of Provinces and The Provincial Legislature has to facilitate public involvement/ participation when dealing with legislative and administrative procedures. This places a positive duty on the Legislature to ensure that the public participation criteria is met before passage of laws and regulations in order for the community to voice its opinion.

The Provincial Legislature and the National Council of Provinces should fulfil their constitutional duty to allow and facilitate public participation. One has to consider whether their efforts in this regard were ‘reasonable’.

Reasonableness is the fundamental principle.

The concept of reasonableness, as discussed in the case of *Doctors for life International v. Speaker of the National Assembly* case¹⁵ is important. In it is stated, in relation to our participatory democracy:

“The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and be taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling.”¹⁶

And;

“The democratic Government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law making process.”¹⁷

The South African democracy requires of the legislature more than power derived from only its representative status. It also requires authority derived from participation by the public, or at least that part of the public affected by the legislation concerned.

“All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The object is both symbolical and practical: the persons concerned must

¹⁵ *Doctors for Life v Speaker of the National Assembly and others* (2006) (6) SA 416 (CC).

¹⁶ *Doctors for life* case supra p.464, para 115.

¹⁷ *Doctors for Life* case supra p.466, para 122.

be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws.”¹⁸

This judgment also draws attention to the fact that participatory democracy has to be given special attention where laws are developed in a country like South Africa where disparities between wealth and influence exist.

The case specifies the Sections of the Constitution which are applicable in matters with similar merits to the merits discussed herein, and the discretion of the Lawmaker in determining reasonableness:

- a) The constitution does not expand on how the State must go about this, but this discretion is subject to constitutional control in that the standard of public participation is measured by reasonableness. Reasonableness is connected to the merits of the case and takes into consideration the particularity of each case. It was reiterated in the case that the public had to be afforded reasonable opportunity to *“participate effectively in the law making process”* and *“given the meaningful opportunity to be heard in the laws that will govern them.”*

“It is apparent that the Constitution contemplates that Parliament and the Provincial Legislatures would have considerable discretion to determine how best to fulfil their duty to facilitate public involvement.”¹⁹

“Yet however great the leeway given to the legislature, the Courts can, and in appropriate cases will determine whether there has been the degree of public involvement that is required by the Constitution.”²⁰

The court, in the *Doctors for Life* case, then proceeds to discuss reasonableness as the required test in terms of Section 72 of the Constitution, applicable to the NCOP. It is an objective standard which will vary from case to case.

¹⁸ *Doctors for Life* case supra p.498, para 235.

¹⁹ *Doctors for Life* case supra p.466, para 123.

²⁰ *Doctors for Life* case supra p. 467, para 124.

Reasonableness will depend on a number of factors, being the following:

- a) The nature and importance of the legislation, and the intensity of its impact.
- b) Account be paid to practicalities such as time and exposure, although saving of time and money in itself is not sufficient to justify inadequate public involvement.
- c) In evaluating Parliaments' conduct to be reasonable, regard has to be taken of what Parliament itself considers to be appropriate public involvement in the context of the legislation, its importance and urgency.
- d) Ultimately important is that the legislature took steps to afford public a reasonable opportunity to "*participate effectively in the law-making process.*"²¹

The abovementioned criteria to determine whether the public participation in question was reasonable under the circumstances mean that there has to be meaningful opportunity provided for the public to participate, and secondly whether the public was reasonably able to take advantage of the opportunities which were provided. This ensures some accountability to the citizens of the country.

There is no standard for reasonable participation of interested parties during the law making process. One must look into the merits applicable to the specific case and decide and address on how big a section of the community will be affected and the intensity of the impact on that part of the community.

The Supreme Court of Appeal in *King and Others v Attorneys Fidelity Fund Board of Control and Another* expressed itself as follows in relation to the National Assembly; "*It also finds expression in the National Assembly's power to receive petitions, representations or submissions from any interested persons or institutions, its duty to facilitate public involvement in its legislative and other processes and of those of its committees, its duty generally to conduct its business in an open manner and hold its sittings and those of its committees in public, and its duty, generally, not to exclude the public or the media from sittings of its committees.*"²²

²¹ *Doctors for Life* case supra p.467 – 468, para 128 – 129.

²² *King and Others v Attorneys Fidelity Fund Board of Control and Another* (2005) ZASCA 96, para 19.

Furthermore, one should consider the amount of money that is involved. Billions are at stake in this matter.

The extension of the claim period for restitution of land would have the effect that existing claims might stagnate as a result of the claim-flood that the State has to manage. It follows that existing claims before the Commission will take even longer to finalize.

It is estimated that the period for new claims and existing claims to be finalised will be in approximately 100 years, at the rate applicable presently, taking into account the amount of claims which the Commission anticipates. This effectively means that claimants will not be alive to witness their claims being successfully processed or dismissed.

What is at stake? If the state later realises that they have made an error in the drafting and prioritization of previous claims there would be millions lost already. Seeing as some already existing claimed land could possibly be claimed once again, by way of this new legislation, hundreds of millions are lost in purchasing/ financing the same property twice. This also reiterates the danger that groups or people in power could abuse this system.

Taking the abovementioned facts into consideration one has to put emphasis on the importance of participatory democracy in this case. As recognised in the *Doctors for Life* case²³, that where a specific law will target a specific group of people in particular, those groups of people have to be consulted themselves. Here, the groups affected were easily identifiable groups of people, easily accessible and if produced a meaningful opportunity would make representations accordingly.

In the *Moutse Demarcation Forum and Others* case the judge emphasised: “*For the opportunity afforded to the public to participate in a legislative process to comply with section 118(1), the invitation must give those wishing to participate sufficient time to prepare.*”

²³ *Doctors for Life* case supra.

Members of the public cannot participate meaningfully if they are given inadequate time to study the Bill, consider their stance and formulate representations to be made.”²⁴

To consider whether the State acted reasonable, one must consider the timeframe given for public participation, comments and deliberation which precedes promulgation.

In an application presently pending before the Constitutional Court, namely *Land Access Movement of South Africa and Five others v. Chairperson of The National Council of Provinces and Seventeen Others*²⁵ the constitutionality of the Amendment Act is challenged.

The timeline in respect of the Amendment Act as alleged in this matter, was as follows:

- a) Bill introduced to National Assembly on; 13 October 2013
- b) Restitution of Land Rights Amendment Bill [B35-2013]: public hearings Day 1; 29 January 2014
- c) Restitution of Land Rights Amendment Bill [B35-2013]: public hearings Day 2; 3 February 2014
- d) Land Restitution Amendment Bill: Minister Rural Development & Commission for Restitution of Land Rights responses to public submissions; 4 February 2014
- e) Restitution of Land Rights Amendment Bill [B35-2013]: deliberations; 5 February 2014
- f) Bill passed by National Assembly; 11 February 2014
- g) Passed by National Council of Provinces; 27 March 2014
- h) Signed by President and becomes Act 15 of 2014; 29 June 2014
- i) Act commenced on 01 July 2014

Judged upon the allegations in the aforementioned case, the time from introduction from the Amendment Act to its passing, inclusive of public participation and deliberations by the different sections of the Legislature, inevitably leads to the conclusion that the Amendment Act failed to allow for proper public participation, meaningful deliberation and had been unduly rushed through Parliament. Minds need to be applied seriously.

²⁴ *Moutse Demarcation Forum and Others v President of the Republic of South Africa and Others (2011) (11) BCLR 1158 (CC)*, para 61.

²⁵ Case no CCT 40/15.

In *The South African Broadcasting Corporation* case the court stated that “promptitude by public functionaries is ordinarily meritorious, but not where that is at the cost of neglecting the task.”²⁶

A factor that should be considered when addressing the question, is whether or not the Legislature passed the legislation with a sense of urgency. In many instances passing might be a lengthy and costly process, which, in certain circumstances may not fit the legislature’s schedule. The *Doctors for Life* case explains;

*“When it comes to establishing legislative timetables, the temptation to cut down on public involvement must be resisted. Problems encountered in speeding up a sluggish timetable do not ordinarily constitute a basis for inferring that inroads into the appropriate degree of public involvement are reasonable. The timetable must be subordinate to the rights guaranteed in the Constitution, and not the rights to the timetable.”*²⁷

With last mentioned in mind one cannot argue that Parliament’s legislative timetable and those of the National Council of Provinces and the Provincial Legislature allowed sufficient time to facilitate and effect public involvement which is constitutionally required. There are no valid grounds for non-compliance.

The NCOP and the PL’s roles are integrated, and these two bodies should in practice work together to fulfil its constitutional responsibility. The NCOP’s role is to ensure unity as far as possible, distribution and reflection of all opinions and gatherings held by the PL in each province, and it should ensure that other provinces receive the information as gathered during the different gatherings of each province.

If these meetings were not attended by any members of the NCOP as alleged, and neither of these bodies’ functions in the law making process were fulfilled as alleged and required by Section 72 and 118 of the Constitution respectively, the public did not properly participate.

²⁶ *South African Broadcasting Corporation v Democratic Alliance* (2015) ZASCA 156, para 56.

²⁷ *Doctors for Life* case supra, para 194.

Furthermore if the minutes/ decisions taken during the meetings were not distributed amongst interested parties, the conclusion is the same. In the case of the NCOP relying on the information provided by the PL it must be certain that the PL took the necessary steps to properly involve and facilitate public participation. The NCOP would in such a case be ultimately disconnected from this public participation process, on the PL level.

If the NCOP could not rely on documents provided by the PL it would have been unable to apply its mind to the matter. This would be unreasonable. The opinions and minutes of these meetings are of great importance as they offer a practical outlook and an assessment on the needs and merits of a Bill, could indicate relevant changes or amendments to the proposed Bill and prevent ambiguity and vagueness.

The importance of considering the public's input is again accentuated in the *Merafong Demarcation Forum* case as follows: "*Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public.*"²⁸ Consideration is the key in this respect. Taking the merits of this matter into consideration and the timeframe in which the Act was passed one can conclude that there wasn't reasonable consideration of the public's views regarding the Amendment Act.

The result of the failure to properly consider the essence of submissions made by the public in the provinces as alleged would have the effect of a total lack of public participation. Although detail may differ, the essence may be similar.

The reason that this is essential is because of the fact that if all or several provinces had similar concerns, voiced differently, it should raise a red flag that the Amendment Act is flawed or lacking in some way. Taking account of the submissions, it is alleged that the concerns voiced by the different provinces were similar in essence but differentiated in the amendment proposals. Thus concerns shared by the majority of the provinces went unattended. A problem with participating in the debate of the promulgation of any Bill is the fact that any amendments must be drafted in legal language, which hinders the public to make free

²⁸ *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others (2008) (10) BCLR 968 (CC)*, para 51.

submissions without being limited when amendments are concerned. This, in the end, limits the NCOP to do what it is meant to do, which is to cypher through what the public voices as possible concerns. The limitation ultimately undermines the value of the public participation process.

The allegations in relation to lack of time and unreasonable pressure in the *Land Access Movement* case on the level of the PL's are as discussed hereunder. Should these allegations be accepted by the Constitutional Court, the meetings or the public participation in the meetings, were insufficient to comply with the necessary standard of reasonableness.

The crunch in time can be blamed on the artificial timeline which was created and enforced upon the PL's. The timeframe put forward was simply not possible before the end of Parliaments' term. This would've resulted in the new Members of Parliament deliberating the necessity of the Amendment Act in the following term. Provision exists for a Bill to be held over to the following term of Parliament to be proceeded with in the following term. The Government was unwilling to proceed with the correct process, as this would not have been to their benefit. The NCOP and PL's neglected the proper participation process it had to follow, and as a result rendered the process meaningless.

The timeframe in which the public had to consider the legislation proposed to them, and the short notice of meetings, with an average of 2 working days given before meetings were held.

In the *Doctors for Life* case the court held that the time given to traditional healers to participate in the public hearings were insufficient: *"They did not have time to study the Bill or to consult with their members in advance of the meeting. This evoked strong protest from some leaders of the traditional healers who protested that the oral hearings were a "very critical submission" to their cause and they should have been given sufficient time "to study and understand, get the comments and ensure that they have all the facts together" before attending the hearing. What happened in the Gauteng legislature cannot be said to amount to an adequate opportunity to participate in the legislative process."*²⁹

²⁹ *Doctors for Life* case supra, para 170.

Priority should be given for specific special stakeholders to be present at meetings. For the public hearings, as organised by the PL's, there was a list of stakeholders who were invited to the public meetings. The list however, did not include "existing claimants", who are predominantly and primarily the stakeholders which would be affected the most under the circumstances. The details of these stakeholders were also readily available from the Commission, and could've been provided effectively without hassle. This indicates that important interested parties were ignored in the participation process.

The involvement in amendments and participation can be directly linked with the language in which the Amendment Act was made available during the public meetings. The allegations are that the Bill was not made available in any other language except for English, and no comment to the contrary has been made, namely that it had been available in other languages. This naturally causes the participation process to not flow effectively, if the stakeholders who are allowed to comment on the Bill are unable to understand the contents properly. This does not imply that each Bill must be available in all 11 official languages, but rather that the appropriate affected parties be notified, and be able to request that the Bill be made available in a language which they can properly understand. The failure to do the above combined with the flawed proceedings and lack of proper notification to join in this process, entails that the process followed by the PL's is deemed to be unreasonable.

The PL's did in fact provide a meeting opportunity, but the substance of the meetings was lacking. The submissions made by the public, and the answers given by the chairpersons does not correspond to what the Amendment Act reflects after promulgation. Furthermore, the public proceedings lacked presence and did not offer the information in a language which they could associate with as aforementioned. The timeframe in which these proceedings took place points to an unorganised plan, where necessities were squeezed into a timeframe to "tick a box" and carried no weight in addressing key issues which relevant stakeholders might have had, in a manner which was reasonably to be expected under the circumstances.

Existing Claims: The practical problem to an Act of which the Constitutionality is in question

The presence of existing claims following the Restitution Act of 1995, forms the root of the criticism levelled against the Amendment Act of 2014. Because of existing claims, Section 6 of the Amendment Act is under attack on the basis of non-compliance with the Rule of Law principle. Further because of existing claims, the Amendment Act comes under attack on the basis of a lack of proper public participation.

There are, as mentioned earlier, more than 20 000 existing unsettled claims. This effectively causes, amongst others, that finalization of claims and security of individuals and communities in respect of more than 20 000 claims may now again be in limbo for another hundred years.

The *Land Access Movement* case, supra, illustrates the problem in practice. Three of the Applicants in that case, are for instance communities with so-called 'existing claims'. The communities are the following, who have lodged claims before 31 December 1998.

Firstly the Moddervlei community, who was forcefully removed from their land as a result of Apartheid legislation, and forced to work as labourers, who claimed the land thereafter. This case before the Commission was reportedly settled in November of 2004, however the transfer of the property into the Moddervlei community has, to this day, not been finalised. Despite dragged out hearings and proceedings, this matter has not been finalised up to date. The Moddervlei community has been advised to consult the Land Claims Court, which has also lead to a dead end. The re-opening of land claims, without proper ring-fencing of this type of existing claims threatens communities like the Moddervlei community, who are fearful of what the future might hold regarding their property rights. Other claimants are now entitled to claim the very same land they have already successfully claimed, but which process has not been finalised due to slow progress and an 'overload of work' by the Commission.

Secondly the Makuleke community. This community occupied land in Limpopo since the 1700's and were removed from their land in Pafuri in 1969, at gunpoint. They were placed under the jurisdiction of a rival chieftaincy, in an area called Nthlaveni. Despite numerous

attempts by the Makuleke community to be recognised as their own community, they remain under the authority of a rival chieftaincy. The Makuleke community successfully reclaimed the Pafuri land, which was allocated to them in 1999, but as a result of the eco-importance of the land they were unable to relocate. Instead the land is used for tourism and profits go to the Makuleke community. The Commission was to ensure the communities tenure in the Nthlaveni region. With the Amendment Act in place this community fears that the rival chieftaincy may lodge a claim for the Pafuri region and the Nthlaveni land, which they are occupying. This will effectively result in a reversal of their rights, placing them in the same position as they had been during the Apartheid regime.

Finally the Popela community were forced to become labour tenants on land called Boomplaats. During 1969 and 1971 their rights as labour tenants were disregarded and they were removed from the land. They succeeded in their land claim following a judgment in the Constitutional Court in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*.³⁰ Despite their claim being finalised in 2007, the community has still not been reunited with their Land, as a result of inefficiency of the Commission. This community fears that the Amendment Act poses a great threat in further slowing down their claim.

³⁰ *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd (2007)(10) SA 199 (CC)*.

Conclusion

South Africa made history by rising peacefully and without violence or revolution from the ashes of the infamous Apartheid system where different groups of people were treated differently on the ground of race. The Rule of Law did not apply to all its citizens and no real representative or participative democracy existed.

Public participation in the true sense, in the making of law, was unheard of. A Constitution and a Constitutional Court by which National Laws, Provincial Legislation and Regulations promulgated by authorities are subject to challenge and testing was a far-fetched idea. The discussion in this dissertation would have no application.

The principles and purpose which underlie both the Restitution Act and the Amendment Act are noble, democratic, and just. They align with the principles contained in our negotiated Constitution.

The Amendment Act, however, comes along approximately 20 years after the Restitution Act. Both these acts were passed to right the wrongs of the past by restituting property to its rightful owners after a process of institution of a claim and award of such claim. This entails a costly and timeous process as the purchasing of land for claims awarded or compensation in lieu of an award is funded by government and ultimately by the taxpayer.

The Amendment Act falls short of Constitutional requirements. The whole act falls apart because an essential section being Section 6(1)(g) violates the Rule of Law as a result of vagueness.

Secondly, or alternatively the Amendment Act falls short of the Constitutional requirement of public participation, and specifically for lack thereof.

Apart from the question in relation to constitutionality, I feel compelled to forward a suggestion or two in relation to ring-fencing of existing claims, and comment on certain practicalities of the Amendment Act.

My proposal is to protect existing claims with the aid of the principle underlying the ‘qui prior est in tempore, potior est in iure’ rule. This will effectively exclude new claims in terms of the Amendment Act to compete or override existing awarded claims.

The absolute enforcement of the said rule may be qualified by excluding existing claims which are proved to have been awarded or sought fraudulently, as a result of a clear misdirection or prejudice.

In relation to practicalities, the following are evident:

The cost of implementing restitution in respect of new claims will be astronomical. The government has already run out of funds to finalise or implement restitution in terms of the Restitution Act, as is perfectly clear in the *Crookes* case³¹ where the State, through the Land Claims Court facilitated a claim for land situated in Mpumalanga. The claim was processed successfully, although the agreed selling price had not been transferred to the owners, or Appellants in this case. After much effort from the Appellants, the State paid them the capital amount, but failed to pay mora interest.

The court was faced with the task of deciding whether the prescribed mora interest was payable in respect of failure to pay the capital amount timeously.

Judgment was given in favour of the Appellants. The State accordingly had to pay the Appellants mora interest, calculated at 15.5% per annum. The court described the defence of the Respondents (the State) as ‘unconscionable’, insofar as the State relied upon inability to pay.

This is a classic case of the State biting off more than it can chew. This error on the State’s part costs the tax payers millions of Rands, which could have been used for proper restitution

³¹ *Crookes Brothers Ltd v Regional Land Claims Commission for the Province of Mpumalanga and Others (2013)(2) SA 259 (SCA)*.

in respect of previous disadvantaged communities. The problem of paying a hundred or more thousand successful claims, seems insurmountable.

Claims may be limited by requiring some form of condonation for not submitting claims timeously in terms of the Restitution Act.

Fraudulent claims or claims flowing from political favouritism or greed should be identified by prescribed mechanisms at an early stage and immediately excluded.

Obtaining the funds to effect restitution in respect of proven claims awarded and the time within which new claims will be finalised, remain a problem. Perhaps one should accept that the necessary finances will become available as time passes and that the ultimate goal will be reached within the next century, should circumstances remain unchanged. Great grandchildren will reap the benefits of the restitution process.

But, to return to the topic discussed by me, I am of the opinion that the Amendment Act is unconstitutional.

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