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INFORMATION DOCUMENT

HOW TO DEAL WITH LAND CLAIMS

There are two possible types of claims that can be made on land namely a restitution claim or a labour tenantôs claim. Labour tenant claims are mostly limited to the provinces of Mpumalanga and Kwazulu-Natal. Restitution may be claimed anywhere in the country. The cut-off date for the lodging of restitution claims was initially 31 December 1998, however the new Restitution of Land Rights Amendment Bill recently passed by Parliament extended the cut-off date to 30 June 2019. Individuals or communities who failed to submit their claims prior to the initial cut-off date or claimants whose claims were incorrectly rejected because they arise out of the so-called ôbetterment schemesôwill again be given the opportunity to lodge their claim with the Commission before 30 June 2019. A total number of almost 64 000 claims were lodged before the initial cut-off date and several thousand have already been lodged since the reopening. About 20% of these are claims to rural land. Restitution claims should be dealt with differently from labour tenant claims and the two types will therefore be discussed separately.

1. <u>Restitution claim</u>

1.1 Introduction

There are currently around 7000 outstanding claims lodged before the 1998 cut-off date that have still not been finalised. Due to the research that must be done to determine the validity of each claim, it takes time to investigate and publish all the claims. The mere fact that a claim has been lodged does not mean that it is a valid claim. Claims first need to be researched go through a vetting process whereby the Commission may throw out frivolous or vexatious claims. In addition, the reopening of the claims process currently envisioned for the next 5 years will further frustrate the finalization of the investigation process. This means that a farmer may be unaware of claim lodged against his property, or any future claims that may be lodged before the amended cut-off date.

The Practice directive of the Land Claims Court requires all affected parties to be joined in the proceedings before the Court can make a final ruling on the award of a restitution claim. With the reopening of the claims process for a further 5 years, the possibility exists that old claims may not be settled in a haste as that competing claims can still be submitted over the same land. The amended Act does make provision for the prioritisation of old claims, however it is still unclear how this will be managed in practice as a settled claim could be the subject of a new claim lodged before the lodgement period closes again. It is therefore possible that valid, outstanding claims will not be awarded by the court until all possible claims over the property have come to light. With the possibility of new claimants coming to the fore, adjudication on the outstanding claims may be stalled for the duration of the 5 year period. There is a provision in the Act that permits the Land Claims Commission to shorten the period by requiring all interested parties to submit

claims within a certain period of time specified in the notice. Landowners can attempt to lobby their Regional Commissioner to exercise this power on an ad hoc basis.

1.2 What qualifies as a valid claim?

In order to decide for him/herself whether or not the claim is a valid one, the landowner will have to do a bit of homework. The landowner will have to establish independently whether the claim is valid, the Land Claims Commissioner's evaluation in this regard should not simply be accepted. Land owners are advised to obtain affidavits from previous owners and people people who lived on the farm during the time of the alleged dispossession as soon as possible. Arial photographs and historical records such as title deeds etc. should also be collected as this can serve as good evidence if the matter needs to be decided by a court. Where other landowners disputed land claims in the first round of submissions, they should be contacted to ascertain whether or not they already gathered information relating to the area in question. The structures of organised agriculture can be used as a means of communication between landowners. Where the capacity exists, the structures of organised agriculture may even be able to assist the landowner in obtaining information, however this will need to be addressed on a case by case basis depending on the resources available.

A claim will be valid if:

1) The claimants were deprived of rights in land (not necessarily ownership) after 1913;

2) The purpose of the deprivation was racial discrimination;

3) The claimants did not receive just and equitable compensation when they lost the land. In many cases the claimants or their ancestors were given compensatory land. If this was the case the quantity and quality of land which they lost must be compared to that of the compensatory land in order to decide whether it was just and equitable. The nature of the rights which they lost and which they were given to the compensatory land will also have to be taken into consideration.

There is no claim until the Commission has certified that the claim, as alleged by the claimant, meets the minimum requirement outlined above. The Commission cannot settle a dispute regarding the factual status of the above, but must merely accept a claim if it meets the requirements on face value, if not, the Commission may dismiss the claim as frivolous.

It is furthermore important to note that the landowner is entitled to all information held by the Land Claims Commission or the Department of Rural Development and Land Reform if he/she can show that the information is needed in order to protect or exercise his/her rights. A landowner is thus entitled to request a copy of the claim form from the Land Claims Commission when he or she has been notified that a claim was lodged over his or her land. If his/her property is being claimed the landowner should have no difficulty in showing that certain information is needed to protect his/her right to property.

Take note that any attempt to unlawfully prevent, obstruct, or unduly influence another party from exercising his or her rights in terms of the Restitution of Land Rights Act is regarded as an offense in terms of the amendment Act. Should a landowner or a claimant be convicted of this offense, a court may impose a period of imprisonment not less than 5 months or an appropriate fine.

Restitution claims are often settled when the owners and claimants meet. Section 13 of the Act makes provision for mediation and all discussions that take place are privileged.

1.3 Process

The Commission will only publish claims which it considers to be valid; this means that not all the claims which were lodged will necessarily be published. Once a claim is lodged, the Commission must first do some research and determine whether or not it is frivolous or vexatious and the Commission has the authority to throw out frivolous or vexatious claims. We therefore caution against attaching too much weight to reported figures of claims ólodgedô as it is no guarantee that all of those claims will be adjudicated to be óvalidô claims.

The ñvalidò claims are published in the Government Gazette which appears every Friday. Publication has an immediate and direct effect on the land ownerôs rights as he or she is obliged to provide the Regional Land Claims Commissioner with one monthôs prior written notice if he or she intends to sell, exchange, donate, lease, subdivide, rezone or develop any portion of the land in question. It is important to note that the land owner does not require the consent or permission of the regional land claims commissioner, but must merely provide him or her with written notice. Should the landowner have reason to believe that the claim is in no way compliant with the above requirements, the landowner can take the Commissionôs decision to accept the claim on judicial review. However, it should be noted that there is some risk involved as failure to prove that the decision was rational could result in a cost order against the land owner.

Claimants can elect whether they wish to claim restoration of the land or financial compensation. If the claimant opts for financial compensation, then there is little reason for the farmer to become involved as the dispute is purely between the state and the claimant, even if the factual history of dispossession relates to the ownerôs land. A landowner should therefore attempt to ascertain this from the Commission as soon as possible to avoid unnecessary disputes

In terms of the Act, the landowner must be notified in writing of the claim as soon as it has been gazetted. The landowner will then have 60 days to indicate whether he/she admits that it is a valid claim or whether he/she opposes the claim. All claims are supposed to be recorded in a register but to date the claim register is not universally and easily accessible.

Supposing, after examining the information and possibly collecting some information on his/her own, the landowner concludes that the claim is not valid, the Land Claims Commissioner should be notified that the owner opposes the claim and the basis for the opposition should be briefly set out. Before formalised legal processes are perused, the Act makes provision for two informal mechanisms by which the dispute could potentially be resolved or at least reduce the number of issues in dispute, namely mediation and a section 11A presentation.

Mediation is an informal, non-binding process whereby an independent party acts as a facilitator to help the parties reach common ground. Although mediation is a valuable tool, it is entirely reliant on the goodwill of the parties as the mediator cannot make rulings or decisions. Secondly, section 11A of the Act permits the landowner to make a presentation to the effected parties. Unfortunately these presentations are reportedly not considered in earnest by some officials from the Commission.

Should the alternative, informal process not succeed in resolving the dispute, and if it appears that there is no progress with the claim the owner can take the Commission to Court and compel it to refer the matter to court for adjudication. The Land Claims Commissioner may then decide to withdraw the claim. If he/she decides not to do so the owner can appeal to the Chief Land Claims Commissioner. If she too, decides that the claim should proceed, the landowner will have to convince the Court that the claim is not valid. It is important to remember that neither the Commission nor the Minister has the authority to decide on the merits of a claim, Only the Court is empowered to do so. Unfortunately legal costs are high and it may cost in excess of R200 000 to participate in the court case. If a number of landowners are affected they can pool their resources and jointly pay the legal fees. If a landowner(s) decide to go this route, he/they should select their legal team carefully. Experience in restitution matters is a must for any attorney or advocate handling such a case. It may be advisable to make use of a reputable firm of attorneys who can afford to specialise in matters such as this.

1.4 Negotiations to sell land to the state

If the landowner comes to the conclusion that the claim is valid, or for whatever reason decides not to oppose the claim, he/she should indicate that he/she will not oppose the claim provided that he/she receives fair compensation. The Commission must now certify that there are no other competing claims over the same property. Section 12 provides a possible remedy to as it allows the Chief Land Claims Commissioner to issue a notice requiring all claims over the land to be settle at once. Section 34 allows a declaratory order that certain land cannot be restored but unfortunately application must be brought by a government department.

Farmers are cautioned against entering into negotiations too early. A farmer should not feel pressured to enter into negotiations before it is established that the claim is not frivolous. Once you become aware of a claim, inform the provincial affiliation of the claim and inform the Commission if you dispute the claim, then proceed with caution, but do not feel pressured to enter into negotiations prematurely. If you have any doubts as to the validity of the claim, we advise that you inform the Commission that you dispute the claim. Should information come to light at a later stage that may persuade you that the claim is indeed valid, there is nothing preventing the land owner from conceding the merits of the claim at a later stage even if he/she initially disputed it.

Be that as it may, if the owner is satisfied that they do not wish to oppose the merits of the claim, they may enter into negotiations to sell the land to the Department of Rural Development and Land Reform. At this stage it is absolutely crucial to remember that even though the buyer is the state, it remains an ordinary purchase and sale contract. A landowner is therefore not obliged to agree to any conditions or purchase price that he or she would not ordinarily agree to in a purchase and sale between private parties. The state cannot force the landowner to sell or agree to anything which he or she does not feel comfortable with and can walk away from the sale at any point. The mere fact that claim is not disputed, does not mean that the owner is compelled to sell.

The process that is typically followed entails the state sending a valuer to value the land. Landowners are entitled to access the valuation report, however it should be remembered that this valuation is not binding and merely serves to inform the state of the offer it should make. In the recent case of *GS Pienaar v The Minister of Rural Development and Land Reform*, the Land Claims Court confirmed that the land owner is not automatically entitled to receive the amount stipulated in the valuation (which may be market value) nor is he or he entitled to receive just and equitable compensation. Instead, the seller is merely entitled to accept whatever amount he or she agreed to as the nature of the transaction is

an ordinary purchase and sale. The mere fact that the state is in a position of power, does not make it an expropriation. It is therefore very important that a land owner does not agree to an amount that he or she is not comfortable with, and the landowner should not sign any agreement without making sure that his/her rights are well protected.

A number of problems have been experienced with the payment of the purchase price ï in one case, the farmers only received the purchase price a year after the agreed-upon date. To avoid this, the farmer should insist on an interest-clause. Other penalty clauses can also be built into the agreement in case the state does not perform as agreed. It is advisable to have an experienced attorney go through the agreement before signing.

If an agreement regarding the purchase price cannot be reached with the state, then the Act does empower the Minister to expropriate the land. In this instance the constitutional formula will be applied to calculate just and equitable compensation. Especially first generation owners who bought directly from the state will be prejudiced by this. Any soft loans as well as the fact that the price which was paid may have been below market value, will be taken into account. If the landowner is dissatisfied with the amount of compensation offered to him/her, he/she can appoint his/her own valuer to do a second valuation. If the valuations or the calculation of just and equitable compensation differ greatly the state can be requested to arrange for the two valuers to meet and attempt to reach consensus. If they are unable to do so, the Court will have the final say. Once again the landowner will incur legal costs in an attempt to prove his/her case.

Be that as it may, landowners should not be unduly scared of expropriation. Expropriation must be carried out according to the procedures contained in the Expropriation Act, which makes provision for a number of valuations and extensive consultations. The process of expropriation is very onerous for the state, as such it is unlikely that the state would resort to expropriation if a sale agreement can be reached on reasonable terms.

In the hypothetical event that an unscrupulous official used the treat of expropriation in an attempt to force the land owner to agree to a very low price, the land ownerôs interests would be better served if he or she rejected the offer and waited for the state to expropriate. One should also bear in mind that the compensation afforded must be just and equitable to both the land owner and the public. Although this principle has not been confirmed by the Land Claims Court, landowners are probably entitled to be compensated for financial loss resulting from the expropriation or loss of the land. This would include moving costs and resettlement costs.

1.5 Land owner's rights in the restitution process

There is a number of cases which definitively lays out the rights of a land owner in the restitution process. Agri SA is currently working towards a guideline on these rights which should be consulted in order to safeguard the land ownerôs interests.

2. <u>Labour tenant claims</u>

Often labour tenant claims follow from some kind of dispute between the landowner and labour tenants. For example, there have been cases where an owner applied for a declaratory order limiting the number of cattle being kept by labour tenants, where their defence was that they are labour tenants. In many instances, this is also the defence to an eviction application.

Labour tenant claims do not always flow from litigation. A claim can be lodged even where no dispute exists between the owner and labour tenants. A labour tenant or his/her attorney can lodge a claim with the Director-General who is obliged to inform the landowner of such claim without delay. The owner can be notified by registered post or by the sheriff of court physically serving a notice on him/her. In the notice the owner will be requested to supply the Director-General with certain information regarding the land. The owner must then notify the Director-General in writing and within 30 days after receiving the notice whether he/she admits or denies that the person(s) concerned is/are (a) labour tenant(s). If the landowner denies this, he/she must motivate why the person(s) is/are not (a) labour tenant(s). Should the landowner fail to deny within the 30 days that the person(s) is/are (a) labour tenant(s) the person will be deemed to be a labour tenant. If he/she denies that the person is a labour tenant, any of the parties may request that the matter be referred to court. If the owner admits that the person is a labour tenant, he/she may propose alternative ways to settle the matter, e g that the labour tenant obtain rights on another part of the farm or in the same area. Such a proposal must be made within a month from the date of the owner admitting that the person is a labour tenant. A mediator can then be appointed by the Department to assist the parties in discussing the proposal and possible reaching agreement. If no agreement can be reached, the claimant may proceed with his/her original claim. An agreement will only be valid if the Director General certifies that it is a fair agreement. If no agreement can be reached the matter can either be decided by Court or an arbitrator can be appointed.

If the court or arbitrator decides to award the land claimed to the labour tenant, the landowner will be compensated. The Court or arbitrator will determine the amount, time and nature of the compensation. If the compensation is not paid as agreed a notice will be issued to the labour tenant to pay. If he/she still has not paid three months later, the owner may apply to the court to nullify the order that the land is awarded to the labour tenant.

When is a person a labour tenant?

A person who resides on a farm in Mpumalanga and Kwazulu-Natal and who qualifies in terms of the definition of a labour tenant in the Act, is a labour tenant. The definition contains three elements and a person must satisfy all three to qualify as a labour tenant.

The elements are:

1) the person must reside on the land or at least have the right to reside there;

2) the person must have the right to use cropping or grazing land on the farm and in consideration of such right provide or has provided labour to the owner or lessee of the farm;

3) the personôs parent or grandparent must have resided on a farm where he/she had cropping or grazing rights and provided labour to the owner or lessee. The definition specifically excludes farm workers. If the landowner can prove that the person is a farm worker, then he/she cannot also be a labour tenant. A farm worker is, defined as a person who is employed on a farm in terms of a contract of employment which provides that he/she must render his/her services personally and who is paid predominantly in cash and kind and not predominantly in the rights to occupy and use the land. The definition implies that the value of the cash and kind payment must be balanced against the value of the rights of residence, grazing and/or cropping. It is notoriously difficult to value the right of residence and cropping and grazing rights. In Mahlangu v De Jager the court held that the rights had a certain subjective value to the occupier. It was argued that factors

such as the fact that the labour tenant stayed right next to his place of employment and had no need for transport and that he could generate much of his own food had to be taken into account when calculating what the right of residence was worth to him.

In an Appeal Court case, that of Ngcobo v Salimba CC, it was held that the court will consider the remuneration of the applicant during the whole period that he/she resided on the land to determine whether he/she was paid predominantly in cash and kind or predominantly in the rights of use of and residence on the land.
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