

LITIGATION IN THE LAND CLAIMS COURT

TRAINING MANUAL

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ABBREVIATIONS

Constitution	Constitution of the Republic of South Africa, Act 108 of 1996
DALRRD	Department of Agriculture, Land Reform and Rural Development
ESTA	Extension of Security of Tenure Act 62 of 1997
IPILRA	Interim Protection of Informal Land Rights Act 31 of 1996
LCC	Land Claims Court
LRMF	Land Rights Management Facility
LSP	Legal Services Panel
LTA	Land Reform (Labour Tenants) Act 3 of 1996
Restitution Act	Restitution of Land Rights Act 22 of 1994

I INTRODUCTION

- 1 The Legal Resources Centre (LRC) is an independent, client-based, non-profit public interest law clinic that uses the law as an instrument of justice. We provide legal services to previously disadvantaged people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic, and historical circumstances.
- 2 The LRC is committed to the achievement of a fully democratic society based on the principle of substantive equality and seeks to ensure that the principles, rights, and responsibilities enshrined in the Constitution are respected, promoted, protected, and fulfilled.
- 3 In its work, the LRC employs a range of strategies, including impact litigation, legal advocacy, participation in partnerships and development processes, education and networking within South Africa, the African continent and internationally.
- 4 In addition, the LRC also works to build respect for the rule of law and constitutional democracy and enable the vulnerable and marginalised to assert and develop their rights. The LRC's work contributes to the development of human rights jurisprudence and to the social and economic transformation of society.
- 5 The LRC was established in 1979 and operates throughout the country from its regional offices in Johannesburg, Cape Town, Durban, and Makhanda.
- 6 The LRC has represented citizens and communities in litigation involving:
 - 6.1 Restitution, including the land of labour tenants;
 - 6.2 Customary law and its status in relation to property rights;
 - 6.3 Communal land and new development on communal land including mining;
 - 6.4 Housing; and
 - 6.5 Environmental regulation and mining
- 7 The LRC has decided to change the way it operates and shift resources to focus on dismantling two identifiable fundamental bastions of inequality. Going forward the work of the LRC will be focussed on land and education.
- 8 This training manual was made possible through the generous support of Comic Relief and designed to assist litigants in the Land Claims Court.

The Constitution

of the Republic of South Africa, 1996



Act 108 of 1996

II OVERVIEW OF SECTION 25 OF THE CONSTITUTION

- 9 Sections 25 (1) – (3) of the Constitution provide for the protection of existing property rights. However, sections 25 (2) and (3) recognise that expropriation for a public purpose or in the public interest is constitutionally acceptable, provided it is effected in accordance with the requirements of subsections (1) – (3).
- 10 Section 25 (4) provides the bridge to the subsections which follow it. It expressly recognises that “*the public interest includes the nation’s commitment to land reform.*” Juxtaposed with section 25 (1) – (3) are subsections (5) – (9) of section 25 which together constitute the land reform provisions. The inclusion of subsections (4) – (9) was designed to ensure that the apartheid era spatial distribution of land occupation and ownership was not frozen upon coming into force of the Constitution.
- 11 Section 25(6) constitutes a crucial component of that transformative constitutional guarantee. It provides that: “*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.*” Section 25(9) makes it clear that Parliament must enact the envisaged legislation. In fulfilment of that obligation, Parliament has passed the following pieces of legislation to give effect to this right:
 - 11.1 Land Reform (Labour Tenants) Act 3 of 1996 (LTA);
 - 11.2 Extension of Security of Tenure Act 62 of 1997 (ESTA); and
 - 11.3 Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA).
- 12 Section 25(7) of the Constitution provides that: “*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.*”
- 13 The Restitution of Land Rights Act 22 of 1994 (Restitution Act) was promulgated to give effect to the rights in section 25(7) of the Constitution. It promised an end to the cruelty and suffering bought about by the racially divisive laws and practices of the apartheid regime. It promised those who were dispossessed of land or the rights in land after 19 June 1913, as a result of past racially discriminatory laws or practices that they would see the land and their rights restored. As we discuss below, the window for making restitution claims was initially closed on 31 December 1998. It was re-opened for a brief period between 2014 and 2016. It is currently not possible to lodge new restitution claims.

- 14 Except for IPILRA, these key statutes giving effect to Sections 25 (6) and (7) – the LTA, the Restitution Act and ESTA – are within the jurisdiction of the LCC.
- 15 There are also several pre-constitutional statutes that give effect to section 25 (6) of the Constitution, but are within the jurisdiction of the High Court, not the LCC. These include:
- 15.1 Upgrading of Land Tenure Rights Act 112 of 1991
 - 15.2 Land Title Adjustment Act 111 of 1993
 - 15.3 Distribution and Transfer of Certain State Land Act 119 of 1993
 - 15.4 Transformation of Certain Rural Areas Act 94 of 1998
- 16 We do not discuss these directly in this Manual. It focuses on the powers of the LCC under the LTA, ESTA and the Restitution Act.

LAND CLAIMS COURT OF SOUTH AFRICA

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For any after-hours matters, parties are requested to contact Mr Stephen Cindi on 074 156 2640

III THE LAND CLAIMS COURT

The Establishment of the Land Claims Court and its Powers

- 17 The LCC was established by section 22 of the Restitution Act. It has jurisdiction throughout the Republic of South Africa. It has a wide range of important powers. We set out those powers in more detail when we discuss the various disputes that arise under the Restitution Act, the LTA and ESTA.
- 18 Most importantly, it has the exclusive jurisdiction to interpret and apply ESTA,¹ the Restitution Act² and the LTA.³ It also has the exclusive jurisdiction to determine any constitutional matter related to the Restitution Act or the LTA.⁴ The LCC also hears eviction applications under both the LTA and ESTA and is the exclusive court of appeal and review when eviction applications are heard in the Magistrates' Court.
- 19 In this section, we summarise the process followed in the LCC, without focusing on the specific type of application. The following sections address:
- 19.1 Land claims;
 - 19.2 Evictions;
 - 19.3 Burial rights; and
 - 19.4 Appeals and reviews.
- 20 We also deal separately with evidence and legal representation.

The Process

- 21 The LCC has its own processes, rules and practice directions. The Rules of the LCC are published as regulations under the Restitution Act.
- 22 There are three ways in which cases are brought in the LCC. They can be brought in the following ways:
- 22.1 Directly by action or application;

¹ ESTA s 20.

² Restitution Act s 22(1)(cC).

³ LTA s 30.

⁴ Restitution Act s 22(1)(cD).

- 22.2By referral by the Director-General of an LTA claim; or by referral by the Chief Land Claims Commissioner in restitution claims
- 22.3Appeal or review of a Magistrates’ Court decision or an arbitrator’s decision under either the LTA or ESTA.
- 23We deal in this section with actions and applications that occur in a variety of contexts under all three statutes.
- 24Referrals are covered in **Part IV** when we address LTA land claims. Appeals and reviews are covered when we address evictions in **Part V**.

Applications

- 25In application proceedings⁵ the applicant issues the notice of motion⁶ and founding affidavit. Applications are employed for matters where there should not be a factual dispute, and witnesses will not be required to testify. Ordinarily they are used for review applications or declarators where the issues are primarily legal. Urgent matters are ordinarily brought by application.
- 26Where there is a dispute of fact in an application, it will generally be decided in favour of the respondent. Disputed land claims will ordinarily be brought as action proceedings because there will be a factual dispute.
- 27The application may be brought as normal or urgent application depending on the nature and urgency of the application.
- i) *Procedure in the normal application*
- 28The procedure for a normal application is similar to that followed in the High Court.
- 28.1The notice of motion⁷ and founding affidavit are issued and served on the respondents in the normal course.
- 28.2The respondent is given ten days⁸ to oppose the application and fifteen days to file his/her answering affidavit.⁹

5See Rule 33 of the Rules of the LCC and Schedule 1, Form 1.

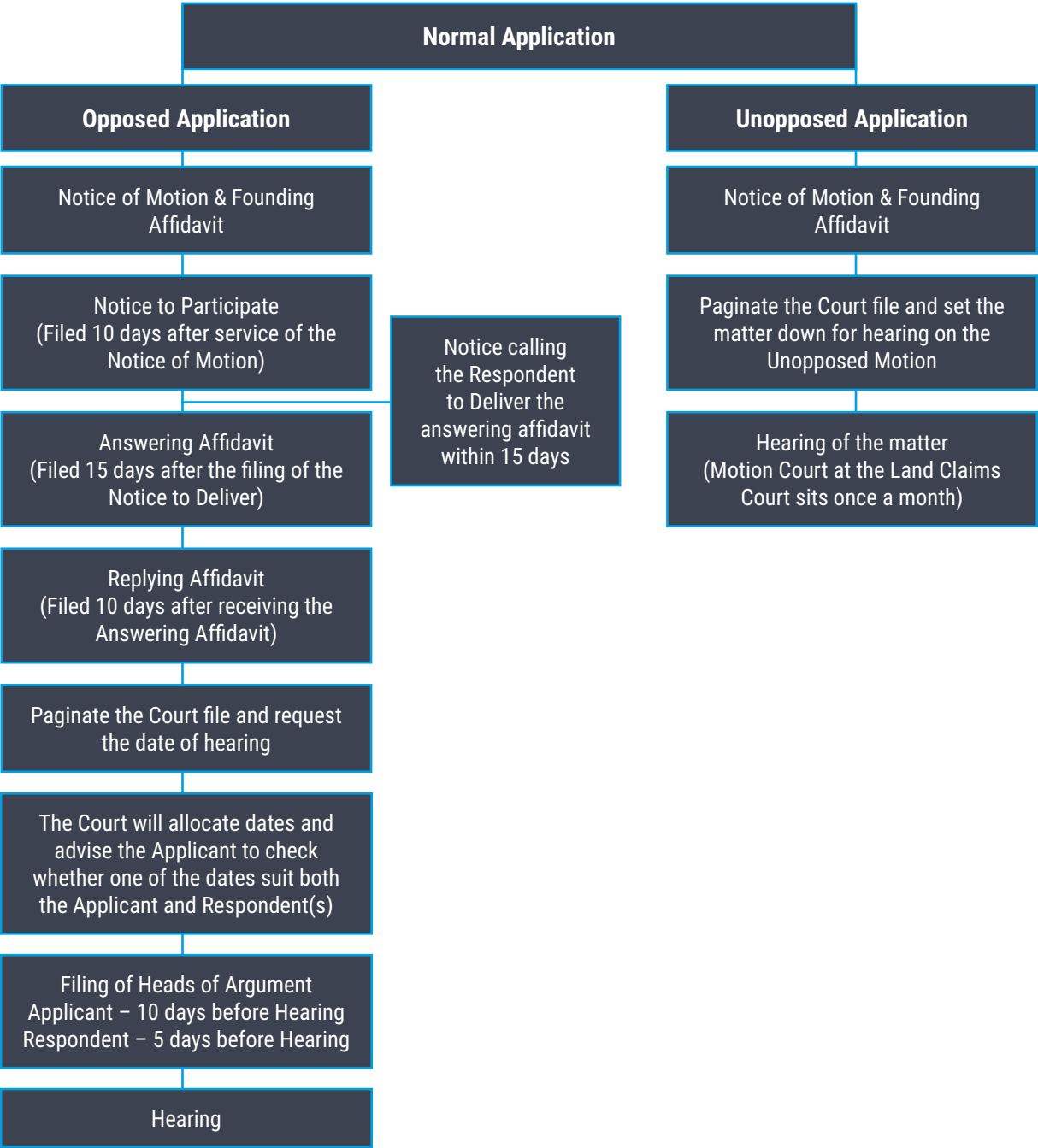
6The format of the Notice of Motion is slightly different from the High Court Notice of Motion.

7In the Notice of Motion the Applicant has to state that: "You must (a) reach the Registrar and the Applicant no later than 10 days after you receive this document in counting the days do not include Saturdays, Sundays and public holidays; (b) contain an address for delivery to you of further documents in the case: The address must be the address of your attorney or a physical address within 8 kilometres of the LCC or the magistrates court for the district where the above land is situated."

8The "days" in the LCC are "court days" which means that Saturdays and Sundays as well as public holidays are excluded in the calculation of the period.

9In terms of Rule 25(3) of the Rules of the LCC it is not compulsory for the Respondent to file his/her answering affidavit after filing his/her Notice to Participate until he/she receives the Notice calling him/her to deliver his/her answering affidavit. The Notice to Deliver is not a Notice of Bar.

- 28.3The applicant has ten days to file the replying affidavit.
- 28.4Then, the applicant can set the matter down for hearing.
- 29The table below sets out all the ordinary steps followed to get an application heard in the LCC.



30 Unopposed applications can be set down for hearing in Motion Court. The Motion Court at the LCC is currently convened once a month on the last Monday of each month during the terms of the LCC.¹⁰

ii) *Procedure in the urgent application*

31 For urgent applications, a different procedure is followed. The procedure requires the Judge President to determine whether the matter is urgent, and then to issue directives. In summary:

- 31.1 The notice of motion¹¹ and the founding affidavit are issued. In the notice of motion it has to be stated that the matter is urgent and shall be treated as urgent and request the Court to condone non-compliance with the Rules of the LCC. In the founding affidavit it should also be stated that the matter is urgent and the reasons for urgency.
- 31.2 The notice of motion and the founding affidavit is then emailed or faxed to the Registrar of the LCC. It must be accompanied by a letter stating that the matter is urgent and that directives be issued.¹²
- 31.3 The judge president will either deal with the matter or allocate it to another judge. The judge will consider the application and if he or she is satisfied that the matter is urgent he or she will issue the directives. If the judge is of the opinion that issuing of an interim order is justified he or she can issue an interim order together with the directives. The matter is then determined according to the directives.

32 The directives shall contain the following:

- 32.1 the manner in which the application must be served on the respondents;
- 32.2 the date of service of the application;
- 32.3 the date in which the return of service must be filed;
- 32.4 the date and the venue of the hearing of the application;
- 32.5 the date in which the notice to participate and the answering affidavit must be filed and served;
- 32.6 the date in which the replying affidavit must be filed;
- 32.7 the date in which the court file must be indexed and paginated;
- 32.8 the date in which the applicant must file his or her heads of argument; and
- 32.9 the date in which the respondent must file his or her heads of argument.

10 Practice Direction No. 9

11 In the notice of motion the Applicant has to state that: "your notice must reach the Registrar and the Applicants' Attorney within the period set out in the attached directives from the LCC (in counting the days do not include Sundays, Saturdays and public holidays)"

12 See Rule 34 of the Rules of the LCC.

Actions

33 In action proceedings:

- 33.1 The plaintiff issues the notice of action and the statement of claim. These are the equivalent of a summons and particulars of claim in the High Court, although the formats are slightly different.
- 33.2 The defendant is given ten days to file his or her notice to participate and fifteen days to file a plea after receiving the notice to deliver.¹³
- 33.3 The plaintiff is given ten days to file his or her replication.

34 Thereafter, the parties exchange further documents, largely in line with the process in the High Court. The parties will file the following documents:

- 34.1 statement of agreed facts and facts in dispute;
- 34.2 lists of witnesses and a brief summary of evidence;
- 34.3 expert notices and reports;¹⁴
- 34.4 joint minutes of experts;
- 34.5 discovery affidavits;¹⁵
- 34.6 request for further particulars;¹⁶
- 34.7 documents, plans, diagrams, photographs or models;¹⁷ and
- 34.8 bundle of documents.

35 When the matter is ripe for hearing (pleadings have been closed, the court file is indexed and paginated) the plaintiff's attorneys or the applicant's attorneys may **apply for a date of hearing** or trial.¹⁸ The application for a trial or hearing date shall be in writing to the Registrar. It shall be accompanied by a short practice note that will be affixed to the file. The note shall state briefly:

- 35.1 the nature of the matter, the issues to be determined as well as the names and telephone numbers of the legal representatives;
- 35.2 the estimated duration of the hearing; and
- 35.3 the estimated number of witnesses to be called.

13 It is not compulsory for the Defendant to file the Plea after filing the Notice to Participate until the Plaintiff delivers the Notice calling the Defendant to deliver his/her Plea within 15 days. Notice to Deliver is not a Notice of Bar. See Rule 25 (3) of the Rules of the LCC.

14 Rule 49 of the Rules of the Land Claims Court

15 Rule 46 of the Rules of the Land Claims Court

16 Rule 45 of the Rules of the Land Claims Court

17 Rule 47 of the Rules of the Land Claims Court

18 Practice Directions No. 8

- 36
- When it comes to **setting the matter down for hearing** there is no difference between the application and action. The presiding judge will, at the request of any party, and may, of his or her own accord, determine a date, time and venue or venues for the hearing of a case, if he or she is of the opinion that the case is sufficiently advanced to make the determination of a hearing date appropriate.¹⁹
- 37
- A notice of set down containing the time, date and venue or venues of any hearing, must be delivered by the applicant or plaintiff within ten days of being informed (at the conference or by the Registrar) of the date.
- 38
- The presiding judge may, of his or her own accord or at the request of any party before or during the hearing of any case, convene one or more **pre-trial conferences** of the participating parties to promote the expeditious, economic and effective disposal of the case. A conference may take place over the telephone by conference call if the presiding judge so directs.²⁰ The conferences shall only be requested where necessary. It shall not be used to enforce compliance with the LCC Rules or to ask for the directions on matters in respect of which the Act and the Rules are clear.²¹

19

Rule 55 of the Rules of the Land Claims Court

20

Rule 30 of the Rules of the Land Claims Court

21

Practice Directions No. 2 and 7



IV LAND CLAIMS

39 A land claim is a claim by a labour tenant or a dispossessed occupier or owner for rights in land, or alternatively, financial compensation. Land claims can be brought under either the **LTA** or the **Restitution Act**. We consider each in turn.

The Labour Tenants Act

40 Section 25(6) of the Constitution provides that: “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.” Section 25(9) makes it clear that Parliament must enact the envisaged legislation. In fulfilment of that obligation, Parliament has passed several pieces of legislation to give effect to this right. One of these is the LTA.

41 The LTA seeks to reverse the effects of discriminatory laws enacted to dispossess Black people of land. The purposes of these discriminatory laws were recently described by Madlanga J in these terms:

“The purpose of it all was, first, the obvious one of making more land available to white farmers. The second “was to impoverish black people through dispossession and prohibition of forms of farming arrangements that permitted some self-sufficiency. This meant they depended on employment for survival, thus creating a pool of cheap labour for the white farms and the mines. White farmers had repeatedly complained that African people refused to work for them as servants and labourers”. The third was the enforcement of the policy of racial segregation, which assumed heightened proportions during the apartheid era.”²²

42 The learned judge went on to vividly explain how labour tenant relationships were used to exploit Black people:²³

“African people found themselves working as labour tenants on land now in the hands of whites. That dispensation subjected them to untold cruelty and suffering.”²⁴ Sol Plaatje cites an example:

‘The baas exacted from him the services of himself, his wife and his oxen, for wages of 30 shilling a month, whereas Kgobadi had been making £100 a year, besides retaining the services of his wife and of his cattle for himself. When he refused the extortionate terms, the baas retaliated [by requiring] him to betake himself from the farm . . . by sunset of the same day, failing which his stock would be seized and impounded, and himself handed over to the authorities for trespassing on the farm.’²⁵”

43 The LTA was enacted both to protect labour tenants’ existing rights,²⁶ and to afford them the opportunity to gain real rights in the land they occupied.²⁷

44 Section 16 of the LTA²⁸ allowed labour tenants to apply to the Director-General to recognise their rights in the land they occupy. If there is a dispute about whether or not the person is a labour tenant, the matter must be referred to an arbitrator or to the Land Claims Court.²⁹ If the Court determines that the applicant is a labour tenant, it must then determine what award to make to the applicant. That can include the award of ownership of the land, or servitudes to either the labour tenant or the owner, or compensation to the labour tenant instead of an award of rights in land.³⁰

45 The LTA was passed by Parliament on 12 March 1996 and came into force on 22 March 1996. According to its long title, the purpose of the Act is to “provide for security of tenure of labour tenants and those persons occupying or using land as a result of their association with labour tenants; [and] to provide for the acquisition of land and rights in land by labour tenants”.

46 The preamble of the LTA recognizes that labour tenancy “is the result of racially discriminatory laws and practices which have led to the systematic breach of human rights and denial of access to land”. According to the preamble, “it is desirable to ensure the adequate protection of labour tenants, who are persons who were disadvantaged by unfair discrimination, in order to promote their full and equal enjoyment of human rights and freedoms”.

25 Plaatje above n 19 at 72. I must make the observation that “baas” (Afrikaans for “boss”) had little to do with being the boss of the African person concerned. It had more to do with white supremacy. In the South Africa of that time all grown white men who subscribed to the notion of white superiority regarded themselves as the baas of every African regardless of whether they were employed or not or who their employer was. And each expected to be addressed as baas by every African he encountered. And it was required to address their little sons as “klein baas” (Afrikaans for “little boss”). Likewise, in her mind each grown white woman of that ilk was the “madam” of all Africans. (original footnote).

26 Labour Tenants Act Chapter II.

27 Labour Tenants Act Chapter III.

28 Labour Tenants Act targets labour tenants, some of the most vulnerable people in South Africa. It protects them from unlawful evictions and allows them to apply to the Director-General of Rural Development and Land Reform for rights over the land that they occupy, including ownership. A number of Thousands of labour tenants took up that invitation and made applications for rights in their land before the cut-off date of 31 March 2001

29 Labour Tenants Act s 17 (6) and 18

30 Labour Tenants Act s 22(4)(b), (c) and (f) Associate is defined in section 1 of the Labour Tenants Act as “a family member of a labour tenant, and any other person who has been nominated in terms of section 3 (4) as a successor of such labour tenant, or who has been nominated in terms of section 4 (1) to provide labour in his or her stead.”

22 Daniels v Scribante and Another [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) at para 16.

23 Ibid at para 18.

24 Lephakga “The Significance of Justice for True Reconciliation on the Land Question in the Present Day South Africa” (Master of Theology thesis, University of South Africa, 2012) at 37 (modified original footnote).

Who is covered by LTA?

- 47 The LTA is only applicable to the issues affecting labour tenants and associates.³¹ In terms of the LTA, a labour tenant is defined in section 1 as a person-
- a) *Who is residing or has the right to reside on a farm;*
 - b) *Who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and*
 - c) *Whose parents or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm."*
- 48 This definition causes many problems. Most labour tenants were paid both through rights in land and in goods or salary. The dispute in most opposed labour tenant matters is not whether a person worked in return for rights in land, but whether those rights were more valuable than the other compensation they received for their labour. That requires detailed expert evidence about the value of various rights in land over several decades, as well as the value of salaries or food over time.

Application for Acquisition of Land

- 49 There are six phases in a labour tenant's application for a right in land:
- 49.1 **The Application Phase:** In terms of s 16, read with s 17(1), a labour tenant must apply to the Director-General for a right in land. Under s 16(1), these applications had to be lodged by 31 March 2001.
 - 49.2 **The Processing Phase:** The Director-General "shall" then forthwith: (a) give the owner of the land (and any other registered right-holders) notice of the application (s 17(2) (a)); and (b) publish the application in the Government Gazette (s 17(2) (c)). The Director-General must draw the owner's attention to ss 17 and 18 (s 17(2) (b)) and request certain information from him to assist in processing the application (s 17(2) (d)).
 - 49.3 **The Response Phase:** The owner must then respond to the application within one calendar month (s 17(4)). She must inform the Director-General: (a) whether she admits or denies that the applicants are labour tenants; and (b) if she denies that they are labour tenants, the reason for her denial.
 - 49.4 **The Agreement Phase:** If the owner admits that they are labour tenants, the owner must then make "proposals as to an equitable means of disposing of the application" to the Director-General (s 18(1)). The Director-General "shall" give a copy of the proposal to the Applicants (s 18(2)). If

³¹ Associate is defined in section 1 of the Labour Tenants Act as "a family member of a labour tenant, and any other person who has been nominated in terms of section 3 (4) as a successor of such labour tenant, or who has been nominated in terms of section 4 (1) to provide labour in his or her stead."

the parties agree on terms, and the Director-General approves those terms, they may be made into an order of court (ss 18(5) and (6)). The Director-General may appoint a mediator to assist the parties to reach agreement (s 18(3)). However, if an agreement is not reached within one month of receiving the proposal, the applicant may continue with the application (s 18(4)).

- 49.5 **The Referral Phase:** If either: (a) the owner disputes that the applicants are labour tenants (s 17(6)); or (b) the owner admits that the applicants are labour tenants, but the parties are unable to agree on "equitable means of disposing of the application" (either because the owner does not make proposals, the applicants reject the proposals, or attempts to mediate fail) (s 18(7)), then the Director-General "shall" at the request of a party, refer the application to the Court.

- 49.6 **The Adjudication Phase:** Once the application has been referred to the Court, the Court may either hear it, or refer it to arbitration (s 19(10)). The arbitrator or the Court must then adjudicate the application and decide: (a) whether the applicants are in fact labour tenants; and (b) if they are, the relief to which the applicants are entitled (s 22).

- 50 As this outline makes clear, there are several points at which the Director-General is obliged to take an administrative step to move the process along. For many years, starting in about 2005, the Department took the view that it would not process labour tenant claims. The Director-General stopped referring applications to the LCC unless compelled to do so by the Court. In 2013, there were thousands of labour tenant applications that were unprocessed.

- 51 This led to the litigation in *Mwelase* – which was driven by the LRC.³² A group of labour tenants on Hilton College in Kwazulu-Natal compelled the Director-General to refer their applications to the LCC. But they also sought systemic relief to ensure that the thousands of other applications would be speedily resolved. This culminated in the Constitutional Court approving the decision of the LCC to appoint the Special Master for Labour Tenants. The Special Master's task is to work with the Department and the LCC to ensure that labour tenant claims are processed as speedily as possible. Any labour tenant who is having difficulty with their claim should approach the Special Master.

How is the referral conducted?

- 52 If the Director General refers the matter to the LCC, what happens next? The notice of referral must be in line with Rules 40 and 41 of the Rules of the LCC.
- 53 The hearing of the referral application can either be done through litigation or arbitration (s 19(1)). The Court will look into combined effect and substance of all agreements entered into between the person who avers that he or she is a labour tenant and his or her parent or grandparent, and the owner or lessee of the land concerned (s 2 (6)).

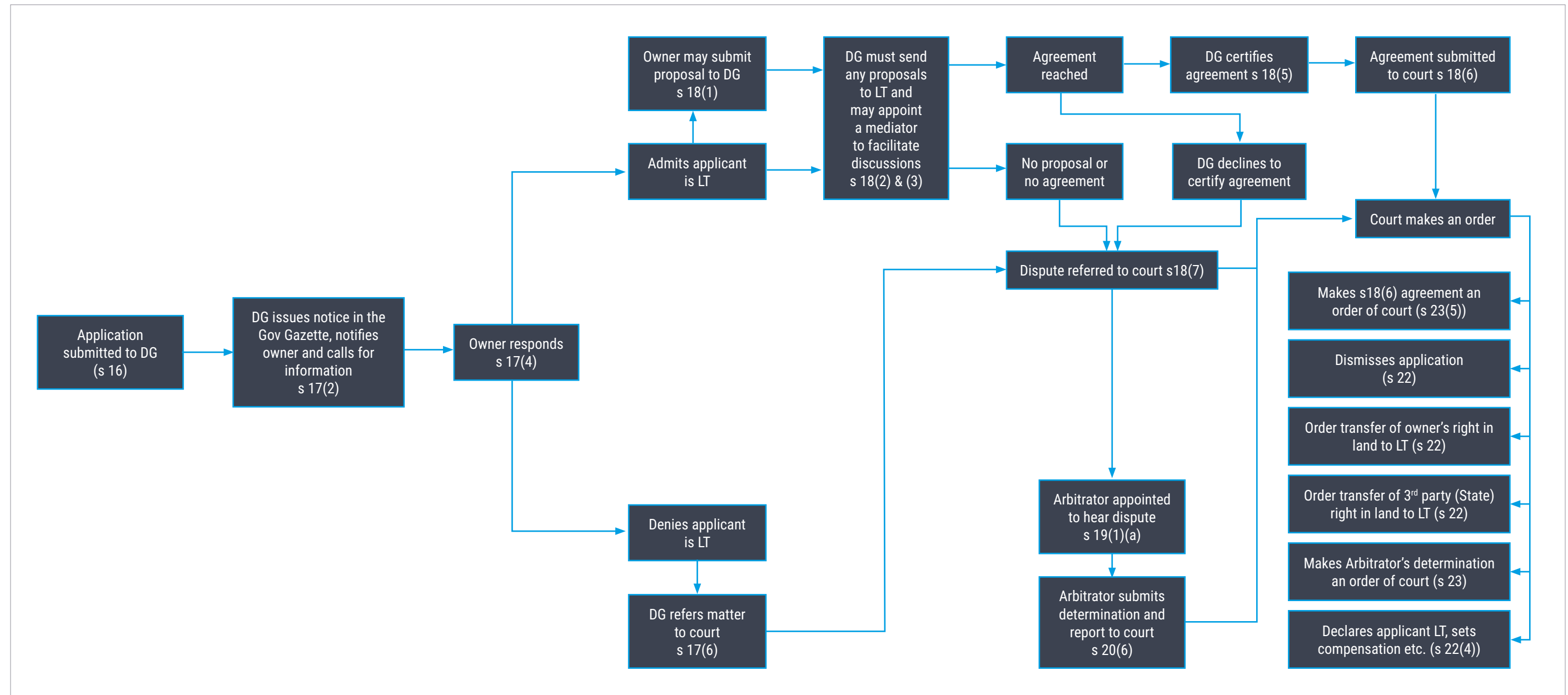
³² *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Others* [2016] ZALCC 23; 2017 (4) SA 422 (LCC); *Director-General for the Department of Rural Development and Land Reform and Another v Mwelase and Others*; *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* [2018] ZASCA 105; 2019 (2) SA 81 (SCA); *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* [2019] ZACC 30; 2019 (11) BCLR 1358 (CC); 2019 (6) SA 597 (CC).

54 The Court can make the following findings:

- 54.1 Declaration that the applicant is a labour tenant;
- 54.2 Declaration that the applicant is not a labour tenant;
- 54.3 An award of land to the labour tenant; and
- 54.4 Refuse to award land to labour tenant.

55 An arbitrator can make a determination under the LTA.

56 Where there is a dispute regarding compensation to be paid by the state to landowner(s) after the award of land has been made by either the Court or Arbitrator. Section 22 of the LTA gives the Court powers to make determination on the compensation to be paid to the owner of the affected land.



- 57 The rules of the LCC are silent on the issue of filing further documents (pleadings) once the matter is referred to this Court by the Director-General. The LRC has suggested that Practice Direction No. 20 is issued by the LCC stating that:
- 57.1 Once the application made by labour tenant(s) for acquisition of land/ownership or right in land in terms of section 16(1) of the LTA is referred to this Court by the Director-General:
- 57.1.1 The applicant(s) shall file to this Court and serve on all interested parties the statement of claim in terms of Rule 44 (1) and (2) of the Rules of this Court. The statement of claim shall be filed with this Court and served on the respondents and all interested parties 15 (fifteen) days after the notice of referral has been served on them;
- 57.1.2 The respondent(s) shall file with this Court and serve on the applicant(s) and all interested parties a plea in terms of Rule 44(3) (b) of the Rules of this Court. The plea shall be filed with this Court and served on the applicants and all interested parties 15 (fifteen) days after the statement of claim has been served on them;
- 57.1.3 The applicant(s) shall file with this Court and serve on the respondent(s) and all interested parties a reply to the respondent(s)' plea in terms of Rule 44(5) of the Rules of this Court. The reply shall be filed with this Court and served on the respondent(s) and all interested parties 10 (ten) days after the plea has been served on them;
- 57.1.4 If any party wishes the other party to discover any documents, that party must follow Rule 46(1) of the Rules of this Court; and
- 57.1.5 If any party wishes to call an expert at the hearing, that party must follow Rule 49 of the Rules of this Court.
- 57.2 The Director-General shall, when filing and serving a referral notice, simultaneously file at Court and serve on all interested parties a certificate stating whether legal representation has been requested by the applicant(s). The certificate shall also indicate whether legal representation has been provided.
- 58 The LCC is considering the proposed Practice Direction, but it had not been adopted at the date of this publication. The LRC has, followed a similar process in labour tenant matters it has litigated, which has been approved by the presiding judges.

The Restitution Act

- 59 Section 25(7) of the Constitution provides that: “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.” The Restitution Act was

enacted to give effect to the right in s 25(7).³³ It was passed by Parliament on 17 November 1994 and came into force on 2 June 1994.

- 60 The Restitution Act creates the Commission which is primarily responsible for processing restitution claims. It is only when the Commission is unable to resolve a restitution claim that it is referred to the LCC.

Who is covered by the Restitution Act?

- 61 Section 2 of the Restitution Act provides that the following people can lodge an application for restitution:
- 61.1 A person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices;
- 61.2 The estate of a person who was dispossessed;
- 61.3 The direct descendant of a person who was dispossessed if no ascendant of that person (who is also a direct descendant of the dispossessed person) has lodged a restitution claim; or
- 61.4 A community or part of a community that was dispossessed.
- 62 Initially, the window to lodge claims for restitution closed on 31 December 1998. However, in 2014, Parliament enacted the Restitution of Land Rights Amendment Act 15 of 2014 which reopened the window to lodge restitution claims for five years from 1 June 2014 to 30 June 2019. Tens of thousands of applications were lodged when the window opened.
- 63 However, it was closed prematurely on 28 July 2016 when the Constitutional Court declared the Amendment Act unconstitutional in *LAMOSHA I* on the basis that Parliament had not facilitated public participation.³⁴ While it suspended the order of invalidity for two years, it prohibited any new claims from being lodged. Parliament has not, to date, passed new legislation to again open the possibility for claims.
- 64 What is the status of those claims lodged in 2014 to 2016? The Constitutional Court was called to determine this question in *LAMOSHA II*.³⁵ It held that the Commission could not process any of the “new” claims until it had either settled all the “old” claims lodged before 1998, or the LCC granted it permission to process new claims. It also made clear that a new claim would not ordinarily be able to affect an award to an old claimant, unless there were exceptional circumstances to justify it. Lastly, the Constitutional Court ordered the Commission to report regularly to the LCC on its progress in processing old claims.
- 65 Like the LTA, the government is effectively under the supervision of the LCC to demonstrate that it is making progress in performing its obligations to restitution claimants under the Restitution Act.

33 Defined as “any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.

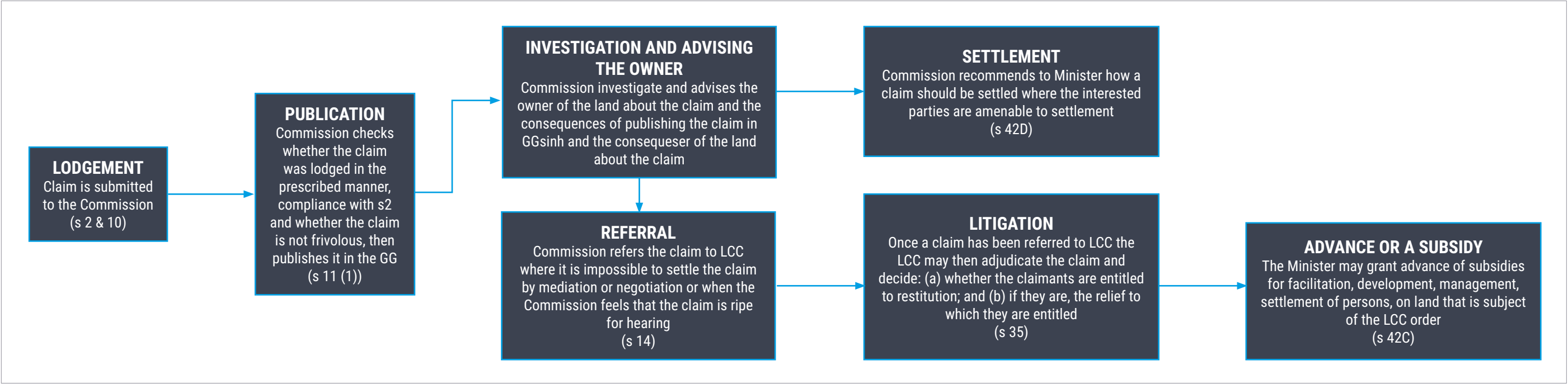
34 *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC).

35 *Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others* [2019] ZACC 10; 2019 (5) BCLR 619 (CC); 2019 (6) SA 568 (CC).

Phases of a claim for restitution

- 66
- As emphasised above, the Commission is primarily responsible for processing claims under the Restitution Act. There are five phases in a claim for restitution. Generally, it is only at the end of that process that a party will approach the LCC. However, it is possible for a dispute to arise at any stage, and for a claimant to need to approach the LCC for relief.
- 67
- The Lodgement Phase:** In terms of section 2, read with section 10, any person who, or the representative of any community which is entitled to claim restitution of a right in land, may lodge such a claim. The Commission at this stage of the process is required to receive and acknowledge receipt of all claims lodged with or transferred to it in terms of the Restitution Act. It must take reasonable steps to ensure that claimants are assisted in the preparation and submission of claims. Note what is set out above about the windows for lodging claims.
- 68
- The Publication Phase:** The second phase commences after lodgement and ends with the publication in the Government Gazette. The Commission, upon accepting the land claim in terms of section 11(1), publishes the land claim in the Government Gazette. The publication only takes place once the Commission is satisfied that (a) the claim has been lodged in the prescribed manner, (b) the claimants have reasonable grounds for arguing that the claim meets the qualifying requirements of section 2 of the Restitution Act, and (c) the claim is not frivolous and vexatious.

- 69
- The Investigation Phase:** The Commission must investigate the land claims.³⁶ The Commission must advise the owner of the land in question of the claim lodged against the land and that it may not dispose, develop, exchange, donate, lease, subdivide, or rezone, the land without notifying the Commission.
- 70
- The Referral or Settlement Phase:** The Commission settles or refers the land claim to Court (section 14 or 42D). In this phase the Commission refers the matter to the LCC in terms of section 14. The referral takes place when it is not possible to settle the claim by mediation or negotiation or when the Commission is of the opinion that the claim is ready for hearing by the LCC.
- 71
- As an alternative to the referral to the LCC, the Restitution Act permits the Commission to recommend to the Minister how a claim should be settled. Upon the Minister being satisfied that the claimant is entitled to restitution of a right in land in terms section 2 of the Restitution Act, the Minister in terms of section 42D enters into an agreement with the interested parties providing for settlement of the claim.
- 72
- The Litigation Phase:** Once the claim has been referred to the Court, the Court may then adjudicate the claim and decide: (a) whether the claimants are entitled to restitution; and (b) if they are, the relief to which the claimants are entitled (section 35). Once the matter is referred to the LCC, the rules for actions or applications as set out above apply.



36 Restitution Act ss 11(6), 11(7), 11(8), 11A, 12 and 13.

V EVICTIONS

- 73 Evictions³⁷ are done by way of application or action depending on whether the applicant anticipates a dispute of fact.
- 74 The LCC can consider eviction applications under both the LTA and ESTA.
- 75 It is important to note that applications or actions for eviction in terms of ESTA can be brought either in the Magistrates Court or LCC. If it is brought in the Magistrates Court, the Rules of the High Court are applicable (section 17 of ESTA) and the decision of the Magistrate is subject to automatic review by the LCC (section 19 of ESTA).
- 76 If an eviction involves a labour tenant, it will have to be done in the LCC in terms of the provisions of LTA.³⁸

ESTA

- 77 ESTA was enacted to give effect to the right in section 25(6) of the Constitution which guarantees those with insecure tenure the right “to tenure which is legally secure or to comparable redress”. ESTA targets occupiers, some of the most vulnerable people in South Africa. It protects them from unlawful evictions and allows them to apply to the Minister for subsidies for the facilitation of on-site or off-site development.
- 78 ESTA applies in the context of rural and farm land and secures tenants’ rights to long-term security of tenure.³⁹ It regulates the conditions of residence on certain land as well as providing for the circumstances and conditions under which the right of persons to reside on land may be terminated. ESTA recognizes that many South Africans do not have secure tenure of their homes and the land that they use. They are therefore vulnerable to unfair eviction. ESTA ensures that if vulnerable occupiers are evicted from land, it must be in a fair manner and landowners must apply to court for an eviction order which considers the full circumstances of the occupiers.

37 Section 1 of the LTA states that: “eviction” includes the deprivation of a right of occupation or use of land” Section 1 of the Extension of Security of Tenure Act No. 62 of 1997 states that: “evict” means to deprive a person against his or her will of residence on land or the use of land or access to water which is linked to a right of residence in terms of this Act, and “eviction” has a corresponding meaning.” This means eviction covers a wide spectrum of events including the deprivation of the use of land and access to water.

38 Section 5 of the LTA states that: “Subject to the provisions of section 13, a labour tenant or his or her associate may only be evicted in terms of an order of the Court issued under this Act.” Section 1 states that: “Court” means the LCC established by section 22 of Restitution of Land Rights Act, 1994 (Act No.22 of 1994)”

39 ESTA s 2(1) provides that the Act applies to all land that has not been declared a township.

- 79 ESTA protects the rights of occupiers in two ways:
- 79.1 Chapter III protects their right to occupy and use land, and Chapter IV limits the ability of the owner to evict them from the land.
- 79.2 Chapter II has measures to provide them with long term secure tenure.
- 80 We focus on the protection from eviction secured by Chapters III and IV.
- 81 A person has the ‘right to reside on and use the land’ only if he or she qualifies as an ‘occupier’ as defined in section 1 of ESTA. An occupier must meet three requirements:
- 81.1 A person residing on land which belongs to another person;
- 81.2 Who had on 4 February 1997, or thereafter, had consent or another right in law to do so; and
- 81.3 Whose income is not above a prescribed threshold. The current threshold is R13 625 per month.

Phases of an ESTA eviction

- 82 There are six phases in the eviction application or action:
- 83 **Termination of Rights Phase:** In terms of section 8(1) an occupier’s right of residence may be terminated on any lawful grounds, provided that such termination is just and equitable, having regard to all relevant factors. This provision is important. It prevents ESTA occupiers from being evicted unless there is a fair reason to permit their eviction. It requires an assessment of the conduct of the parties, the interests of the parties, and the fairness of the procedure followed.
- 84 In terms of sections 8(2) and (3) if the right of residence of an occupier was solely based from an employment agreement, his or her right of residence may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of Labour Relations Act.
- 85 In terms of section 8(4) the right of residence of a long-term occupier⁴⁰ may not be terminated unless he or she has committed a fundamental or material breach of an agreement to occupy. The dependants or spouse of a long-term occupier may be given 12 calendar months written notice to vacate the farm, unless they have committed a fundamental or material breach.
- 86 **Notice Phase:** An eviction order cannot be granted unless the Court has satisfied itself that the owner or person in charge has complied with the requirements of ESTA.⁴¹ Section 9(2)(d) requires the owner or person in charge to send not less than two (2) calendar months’ written notice to an occupier, the provincial office of the DALRRD and the local municipality advising of his or her intention to evict the occupier. The

40 A person is a long term occupier if they have lived on the property for 10 years, and either: (a) has reached the age of 60; or (b) “is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge”.

41 ESTA s 9(1).

purpose of this notice is to alert the occupier as well as the municipality and the DALRRD about the possible eviction. The municipality must be prepared to play its role of the provision of temporary accommodation or emergency housing in terms of section 26 of the Constitution.

87 **Probation Report Phase:** The Court must request a probation officer to submit a report within a reasonable period. The report must address: (a) the availability of suitable alternative accommodation; (b) indicate how an eviction order will affect the constitutional rights of any affected person, including the rights of children, if any, to education; (c) point out any undue hardship which an eviction would cause the occupier; and (d) any other matter as may be prescribed.

88 Notwithstanding s 9(3), the LCC has recently adopted the procedure of hearing the matters in the absence of probation report. The justification is that the officials employed by the DALRRD do not provide the Court with probation reports in time.

89 **Hearing Phase:** It depends whether the eviction is brought by way of application or action. If it is brought by way of action oral evidence will be heard. If it is brought by way of application, oral submissions will be heard. The judge or magistrate hearing the matter will check whether there is compliance with the requirements of ESTA:

- 89.1 Whether the right of an occupier has been validly terminated in terms of section 8; and
- 89.2 whether notices have been sent to the occupier, provincial DALRRD and the municipality (sections 8, 9, 10 or 11 of ESTA).

90 If there is compliance with sections 8 and 9, then the judge or magistrate will check whether it is just and equitable to grant the eviction considering the evidence presented and the oral submissions made. In determining whether it is just and equitable to issue an eviction order, the Court will consider a wide range of factors.

91 The precise factors depend on whether the occupier occupied the property before or after 4 February 1997. If she occupied before, s 10 applies; if she occupied after, s 11 applies. Both require the court to consider factors like the availability of alternative accommodation, the length of occupation, and the reason for the eviction application. The Court must consider the prejudice to each party if the eviction is or is not ordered.

92 **Just and Equitable Eviction Date:** If the Court has decided to issue an eviction order, it will have to determine a just and equitable date on which the occupier shall vacate, and the date on which an eviction order may be carried out if the occupier has not vacated the land on the date determined by the Court (section 12 (1)).

93 **Effect of order for eviction:** In terms of section 13(1)(a) the Court shall order the owner or person in charge to pay compensation for structures erected and improvement made by the occupier and any standing crops planted by the occupier. In terms of section 13(1)(b) the Court shall order the owner or person in charge to pay any outstanding wages and related amount.

94 If an order for the eviction is issued by the Magistrate, the requirements of section 19(3) of the ESTA kicks in.⁴² The Magistrate must send his or her judgment to the LCC for automatic review. The decision cannot be implemented until it is reviewed by the judge of the LCC. The judge of the LCC can confirm or set aside or substitute the order of the Magistrate. The judge can remit the matter to the Magistrate with directions.

Labour Tenants Act

95 While ESTA offers important protection against eviction, it does not ultimately prevent a landowner from evicting an occupier if he or she follows the correct process and it is just and equitable to do so. The LTA grants labour tenants even stronger rights against eviction.

96 Almost all labour tenants will also qualify as ESTA occupiers. A good defence to an ESTA eviction application is that the person is also a labour tenant and that the eviction should have been brought under the LTA. However, as discussed earlier, it is far more difficult to prove that a person is a labour tenant, than to establish that they are an ESTA occupier.

97 Only the LCC can issue an eviction order under the provisions of LTA.⁴³ However, there is an exception to this limitation. Section 13(1A)(b) states that, with the exception of issues concerning the definition of “occupier” in ESTA, “if an issue arises in a case in a Magistrate’s Court or a High Court which requires that court to interpret or apply this Act” that court must refer it to the LCC if no oral evidence has been led. If oral evidence has been led already, the court must decide it and not refer the matter to the LCC. Where another court has decided the issue, there is an exclusive right of appeal to the LCC.

98 Importantly, only the owner or a person with the support on oath of the owner can bring an application for eviction. A tenant of person in charge cannot do so alone (s 6).

99 There are three phases in eviction application under the Labour Tenants Act.

100 **Notice:** in terms of section 11 an owner who intends to evict a labour tenant has to send the labour tenant and Director-General of the DALRRD not less than two (2) calendar months’ written notice of his or her intention to obtain an order for eviction (section 11 (1)). The Director-General shall attempt to mediate or reach a settlement of the dispute between the labour tenant and the owner (section 11(3)).

101 **Litigation:** If the Director-General has failed to mediate or has not taken any steps within two months after he or she has been served with the notice, the owner may issue the application or action for eviction. If it is brought by way of action, oral evidence will be heard. If it is brought by way of application, oral submissions will be heard.

42 Section 19(3) of the Extension of Security of Tenure Act No. 62 of 1997 states that: “An order for eviction by a Magistrate’s Court in terms of this Act, in respect of proceedings instituted on or before a date to be determined by the Minister and published in Gazette, shall be subject to automatic review by the Land Claims Court.....”

43 Section 5 of the Land Reform (Labour Tenants) Act No. 3 of 1996 states that: “Subject to the provisions of section 13, a labour tenant or his or her associate may only be evicted in terms of an order of the Court issued under this Act.”

- 102 The judge or magistrate hearing the matter will check that:
- 102.1 the procedural requirements for eviction (ss 6 and 11) have been met; and
 - 102.2 that there is no pending s 16 application (section 14).
- 103 The judge or magistrate will then decide whether it is appropriate to order an eviction. An eviction can only be ordered if:
- 103.1 the labour tenant, contrary to an agreement, has failed or refused to provide labour – unless the labour tenant is over 60 and has nominated another to perform his labour (s 7(2)(a) read with s 9); or
 - 103.2 the labour tenant or his or her associate has committed such a material fundamental breach of the relationship between the labour tenant or associate and the owner or lessee, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship (section 7(2)(b)).
- 104 There are three circumstances where a court can refuse to grant an eviction order, or where the standard for granting the eviction is higher.
- 104.1 A person who has attained the age of 60 years or as a result of disability is unable to provide labour to the owner or lessee, and has not nominated a person to provide labour in his or her stead shall not be evicted on the ground that he or she has refused or failed to provide labour (section 9 (1) (a) and (b)).
 - 104.2 A person who has lodged a s 16 application cannot be evicted while his or her application is still pending unless the Court is satisfied that special circumstances exist which makes it fair, just and equitable to issue an eviction order (section 14).
 - 104.3 In a case where a labour tenant has died and his or associates have not been given twelve (12) calendar months' notice to leave the farm (section 9(2)).
- 105 **Effect of the Court order:** In terms of s 10(1)(a) if the Court grants an eviction order it shall order the owner to pay compensation to the extent that is just and equitable. In terms of s 10(1)(b) the Court may order the owner to give a labour tenant a fair opportunity to (i) demolish such structures and improvements as were erected by the labour tenant and his or her associates or predecessors, and remove all materials so salvaged; and (ii) tend a crop to which he or she is entitled, until it is ripe and thereafter to reap and remove it. In terms of s 10(2), the compensation must be determined by the Court.

VI BURIAL RIGHTS UNDER ESTA

- 106 This is one of the thorny issues between the owners of farms and occupiers of farms in South Africa. On the one hand, land owners feel that as owners of land they have a right to enjoy undisturbed use and ownership of their land.⁴⁴ On the other hand, occupiers feel that as occupiers of land they have a right to bury their deceased family members on land where they reside.
- 107 Both the landowners and occupiers are protected by s 25 of the Constitution. As a result of ss 25(6) and (9) of the Constitution, s 6(2)(dA) of ESTA was promulgated in order to specify and regulate the rights and duties of occupiers and land owners in relation to burials.
- 108 In order for an 'occupier' to enjoy protection under s 6(2)(dA) of ESTA, he or she must establish on the balance of probabilities that:
- 108.1 he or she is an 'occupier' on the farm where he or she intends burying the deceased;
 - 108.2 the deceased was a member of his or her family;
 - 108.3 the burial sought would be in accordance with his or her religious and/or cultural beliefs;
 - 108.4 the deceased was residing on land, which the occupier resided on at the time of death of the deceased; and
 - 108.5 an established practice on land exists to bury deceased family members on the land.
- 109 The burial of the deceased on land must be done according to an occupier's religion or culture. For example the direction that the deceased's body must face upon burial, the depth and size of the grave, the nature of the ceremony that accompanies the burial, and other cultural practices, must be in accordance with an occupier's religious or cultural beliefs.
- 110 It is important to note that the landowner (or person in charge of the land) may not restrict the nature of the burial, including the ceremony. The landowner cannot reduce the burial to something less than, or different from, what the religion and culture demands. The landowner is protected in the sense that an occupier must practice his or her culture and religion in a reasonable manner.⁴⁵
- 111 As explained above, one of the requirements that an occupier who intends burying the deceased on land must satisfy is that "*an established practice in respect of the land exists*". This requirement, however, is that

⁴⁴ De Rebus in 2015 (Jan/Feb) DR 42 <http://www.derebus.org.za/rest-in-peace-the-occupiers-right-to-bury-on-farmland>.

⁴⁵ *Nhlabathi and Others v Fick* [2003] 2 All SA 323 (LCC) para 36.

the practice must exist for “people living on the land”. There is nothing in the wording of the definition to suggest that it must be peculiar to the family in question and or family of the deceased.⁴⁶

112 Presiding officers such as magistrates and judges are sometimes of the opinion that an “established practice” must be in respect of an occupier’s family who intends burying on land. This is not the intention of the legislature. Balancing the rights of the landowner and the rights of an occupier who intends burying the deceased on land is important. Landowners often raise concerns such as the contamination of water or a reduction in the value of the land should an occupier be permitted to bury his or her deceased family member. These arguments cannot be sustained. Where there is an established practice on land, people have already buried their deceased family members on the land. These concerns cannot therefore be raised anew and only in respect of a particular burial. As Cachalia AJA explained in *Dlamini*:

“The burial right is in the nature of a personal servitude which the occupier has over the property on which he possesses a real right of residence at death of a family member who at the time of death was residing on the land.”⁴⁷

113 There is also a special category of occupiers who enjoy special protection in terms of ESTA. In terms of section 6(5) of ESTA, an occupier who has been on the land for ten years or more and has reached the age of 60 years or was employed by the landowner or person in charge of the farm, but was unable to work due to ill health, is entitled to be buried on land where he or she was residing at the time of his or her death.

114 The term “reside” is currently not defined in ESTA, but it has been interpreted in several judgments. In the recent judgment of the LCC in the case of *Lizzy Mathebula and Another v Mr Harry*, Ngcukaitobi AJ stated that:

“The meaning of the “reside” as used in section 6(2)(dA) should not depend on mathematical formulas, such as how many days in a week does a person spend in a particular farm. Nor should it depend on the subjective views of the owner of the land or the occupier. In determining whether a person is resident, there should at least be a degree of physical presence. But this need not necessarily be continuous. Importantly, the Court should accept that actual physical presence may be interrupted by economic factors, such as employment. Where this is the case, there must at least be an intention – exhibited by conduct – to return on a permanent basis to one’s residence. It is wrong to assume, in all instances, that simply because one lives elsewhere out of economic necessity, that fact should ipso facto exclude their residence of a particular farm.”⁴⁸

115 In this judgment the term “reside” is broadly interpreted. It covers “an intention – exhibited by conduct – to return on a permanent basis to one’s residence.” It recognises that it is not always possible for an occupier to be on the farm on a daily basis.

46 *Dlamini And Another v Joosten And Others* 2006 (3) SA 342 (SCA) at para 19.
47 *Dlamini And Another v Joosten and Others* at paragraph 16
48 *Mathebula and Another v Harry* (LCC72/2015) [2015] ZALCC 6; 2016 (5) SA 534 (LCC) (2 June 2015) at para 21

VII REVIEW OF THE DECISION OR ACTION OF THE MINISTER AND COMMISSION

116 In terms of section 36(1) of the Restitution Act, “[a]ny party aggrieved by any act or decision of the Minister, Commission or any functionary acting or purportedly acting in terms of this Act may apply to have such act or decision reviewed by the Court.” Section 36(2) gives the LCC the exclusive jurisdiction to decide reviews of the exercise of powers under the Act.

117 Similarly, s 37 of the LTA provides that the LCC has the power to review decisions taken in terms of that statute.

118 This is confirmed by Rule 36(1) which recognises that the LCC has a power to review any decision or action of an inferior court, an arbitrator; the commission, the Minister, any tribunal or board, or any functionary.

119 The LCC’s process for reviews is substantially as the process followed under rule 53 of the High Court Rules. It is set out in rule 35:

- 119.1 The person bringing an application for review must clearly state the decision or action that the court must review.
- 119.2 The decision-maker must, within 15 days, dispatch to the Registrar a record of the proceedings and all documents relevant to the decision as well as her reasons for the decision.
- 119.3 The applicant within 20 days:
 - 119.3.1 Must make copies of those portions of the record that are necessary for the purposes of the review and deliver them to the other parties; and
 - 119.3.2 May supplement the founding affidavit and amend the notice of motion to address the contents of the record.
 - 119.3.3 The respondent may, within 15 days of receiving the copies of portions of the record, file an answering affidavit.
 - 119.3.4 The applicant may file a replying affidavit within 10 days.

120 While the LCC has jurisdiction to review decisions taken under the Restitution Act, the grounds on which it can exercise that power are the same that apply in the High Court. If decisions are administrative action, they must be reviewed under the Promotion of Administrative Justice Act 3 of 2000. If they are not administrative action, they are reviewed in terms of the principle of legality.

- 121 If a decision is administrative action, the procedural requirements of PAJA will still apply. These include:
 - 121.1 Exhausting any internal remedies; and
 - 121.2 Lodging the application within 180 days of when the applicant became aware of the decision, or applying for condonation for late filing.
- 122 If the decision is not administrative action as defined in PAJA, the applicant must, ordinarily, exhaust internal remedies, and must bring the application within a reasonable time.
- 123 The LCC has the same remedial powers when reviewing as it would ordinarily, and as the High Court would have when conducting a review. In short:
 - 123.1 The LCC can grant any order that is “*just and equitable*”; but
 - 123.2 If it wishes to grant compensation or to substitute its decision for the decision of the functionary, there must (under PAJA) be exceptional circumstances.

VIII EVIDENCE IN THE LAND CLAIMS COURT

- 124 The rules of evidence in the LCC are not identical to the High Court. They are generally slightly more relaxed, particularly on the issue of hearsay evidence.
- 125 Section 30(1) of the Restitution Act empowers the LCC to admit any evidence which it considers relevant and cogent, regardless of whether such evidence would be admissible in another court. Section 30(2) permits any party before the Court to adduce two types of evidence:
 - 125.1 firstly, hearsay evidence; and
 - 125.2 secondly, expert evidence regarding historical facts.
- 126 Section 30(3) calls upon the Court to give such weight to any evidence adduced in terms of subsections (1) and (2) as it deems appropriate.
- 127 Implicit in section 30(3) is a call for the LCC to assess the hearsay and expert historical evidence that is adduced in order to give it the weight it deems appropriate, rather than to exclude it altogether.
- 128 The specific provision allowing hearsay evidence to be led during a trial in the LCC, is contrary to the general rule on hearsay evidence as set out in section 3(1) of the Law of Evidence Amendment Act 45 of 1988, namely that hearsay evidence is not admissible unless one of the exceptions set out in that section applies.
- 129 The deliberate permission for hearsay and expert historical evidence that is adduced in trials in the LCC points to the *sui generis* nature of the Court. In these cases, reliance must often be placed on oral accounts of history, cultural practices, and land use that were carried over through generations by way of stories, rather than written documents. It is also indicative of the more inquisitorial approach of the LCC.

IX LEGAL AID AT STATE EXPENSE

130 In *Nkuzi*,⁴⁹ the LCC ordered that the state has a duty to provide legal representation to people with a right to security of tenure under ESTA and the LTA. The order reads in full:

1.1 *The persons who have a right to security of tenure in terms of the Extension of Security of Tenure Act 62 of 1997 and the Land Reform (Labour Tenants) Act 3 of 1996, and whose security of tenure is threatened or has been infringed, have a right to legal representation or legal aid at State expense if substantial injustice would otherwise result, and if they cannot reasonably afford the cost thereof from their own resources.*

1.2 *The State is under a duty to provide such legal representation or legal aid through mechanisms selected by it.*

1.3 *The cases in which substantial injustice could result include, but are not limited to, cases where*

1.3.1 *the potential consequences for the person concerned are severe, which will be so if the person concerned might be deprived of a home and will not readily obtain suitable alternative accommodation; and*

1.3.2 *the person concerned is not likely to be able effectively to present his or her case unrepresented, having regard to the complexity of the case, the legal procedure, and the education, knowledge and skills of the person concerned.*

131 As a result of *Nkuzi* and section 29(4) of the Restitution Act, the DALRRD has decided to appoint a service provider to manage the Land Rights Management Facility (LRMF). The LRMF provides legal, mediation, judicial administration as well as financial management services to land reform beneficiaries under the LTA, the ESTA, the Restitution Act, and the Communal Property Act, 28 of 1996 (CPA). Claimants under the Restitution Act and other beneficiaries under any act or policy administered and implemented by the Department can access the LRMF. The Department has set up a judicare system in terms of which they contracted Nkosi Sabela Incorporated to recruit attorneys all over South Africa to deal with land matters. The LRMF acts as an administrative system distributing work to a panel of attorneys.

132 The judicare system does not always address the problems of farm dwellers. Some of the concerns regarding the LRMF are that most of the attorneys who are part of this judicare system lack knowledge and expertise in land matters.

133 It is also of great concern that LRMF is entirely funded by the DALRRD. This can be problematic. The DALRRD is often the wrongdoer but cannot be challenged in court. They therefore escape the claws of litigation, to the detriment of the farm occupiers, labour tenants and land claimants. In fact, the Department has the power to advise the service provider to remove attorneys from the panel if they do not comply with the instructions of the Department.

⁴⁹ *Nkuzi Development Association v Government of the Republic of South Africa and Another* 2002 (2) SA 733 (LCC).

X ALTERNATIVE DISPUTE RESOLUTION

134 The three land statutes – the LTA, the Restitution Act and ESTA – encourage the use of non-litigious methods such as mediation and negotiation to resolve disputes. They also permit the use of arbitration instead of approaching the Court in certain circumstances. This Part considers how these alternative dispute resolution mechanisms can be employed at various stages.

Mediation and negotiation (Litigation Stage)

- 135 The mechanism of alternative dispute resolution (ADR) is permitted in the LCC, but unfortunately it is under-utilised.
- 136 The LCC is empowered by the Restitution Act to recommend ADR. Section 35A(1) of the Act empowers the LCC to stay the proceedings at any stage if *“it becomes evident that there is an issue which might be resolved through mediation and negotiation”*. The court can then order the parties *“to attempt to settle the issue through the process a process of mediation and negotiation”*.
- 137 The LRMF has a component that manages mediation. The mediators who are on the Land Rights Management Facility panel are paid by the State. However, the LCC has never referred cases to the LRMF mediators for mediation (although the DALRRD and the Commission are using that option).

Arbitration (Litigation Stage)

- 138 The LCC is also empowered to refer matters under the LTA to arbitration.
- 138.1 Section 19 of the LTA provides that the LCC may refer a land claim to arbitration.
- 138.2 Similarly, s 33 of the LTA allows the LCC to refer eviction matters under the LTA to arbitration.
- 139 The LCC has not adequately utilised this tool despite the fact that it might assist to alleviate a huge backlog of unresolved cases. However, the Minister of the DALRRD has contributed to this problem. She has failed to perform her duty under s 31 of the LTA to compile a panel of persons from whom arbitrators shall be appointed.

Mediation and Negotiation (Pre-Litigation Stage)

140 The Director-General of the DALRRD and the Chief Land Claims Commissioner are also empowered, before litigation, to refer disputes to mediation and negotiation:

- 140.1 Section 13 of Restitution Act empowers the Chief Land Claims Commissioner to direct the parties to attempt to settle their dispute through a process of mediation and negotiation.
- 140.2 Section 36(1) of the LTA allows the Director-General to *“appoint one or more persons with expertise in relation to dispute resolution to facilitate meetings of interested parties, and to attempt to mediate and settle a dispute”*.
- 140.3 Section 21 of ESTA provides that: *“A party may request the Director-General to appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act.”* And s 22(1) of ESTA allows the parties to a dispute to *“refer the dispute to arbitration in terms of the Arbitration Act”* and to appoint an arbitrator someone from the (non-existent) panel of arbitrators established under the LTA.

141 The Director-General and the Chief Land Claims Commissioner are referring disputes to the LRMF.

XI CONCLUSION

142 The purpose of this manual was to provide practitioners with some practical guidance on how to litigate in the LCC. The LCC, with its own rules and procedures for litigation, may at times be difficult to navigate. The hope is that this manual will be able to assist practitioners to better understand the processes involved and the key land legislation necessary for litigation.

XII READING MATERIAL

Legislation

- 143 Section 25 of the Constitution of the Republic of South Africa, Act 108 of 1996;
- 144 Restitution of Land Rights Act 22 of 1994;
- 145 Land Reform (Labour Tenants) Act 3 of 1996;
- 146 Extension of Security of Tenure Act 62 of 1996;
- 147 Rules of the Land Claims Court; and
- 148 Practice Directions 1 – 15

Case Law

- 149 Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Others [2016] ZALCC 23; 2017 (4) SA 422 (LCC);
- 150 Director-General for the Department of Agriculture, Land Reform and Rural Development and Another v Mwelase and Others [2018] ZASCA 105; 2019 (2) SA 81 (SCA);
- 151 Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another [2019] ZACC 30; 2019 (11) BCLR 1358 (CC); 2019 (6) SA 597 (CC);
- 152 Mbhense v Brown and Another [2006] ZALCC 8 (11 October 2006);
- 153 Brown v Mbhense and Another [2008] ZASCA 57; [2008] 4 All SA 26 (SCA); 2008 (5) SA 489 (SCA);
- 154 Mhlongo v Sesley Farm Trust and Another [2008] ZALCC 2;
- 155 Selsley Farm Trust v Mhlongo [2009] ZASCA 124; [2010] 1 All SA 466 (SCA);
- 156 Msiza v Director-General for the Department of Rural Development And Land Reform and Others [2016] ZALCC 12; 2016 (5) SA 513 (LCC);

- 157 Uys N.O and Another v Msiza and Others [2017] ZASCA 130; 2018 (3) SA 440 (SCA);
- 158 Makhaza v FCL Farming CC and Another (LCC 59/2009) [2010] ZALCC 20;
- 159 Dlamini v Joosten 2006 3 SA 342 (SCA);
- 160 Mathebula and Another v Harry 2016 (5) SA 534 (LCC);
- 161 Chagi v Singisi Forest Products [2007] ZASCA 63; [2007] SCA 63 (RSA)
- 162 Daniels v Scribante and Another [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC);
- 163 Dukuduku Community v Regional Land Claims Commissioner: Kwazulu-Natal and another [2003] ZALCC 14;
- 164 Emfuleni Resorts v Mazizini Community [2011] ZASCA 139; and
- 165 Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others [2019] ZACC 10; 2019 (5) BCLR 619 (CC); 2019 (6) SA 568 (CC);
- 166 Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC);
- 167 Mazizini Community v Minister of Rural Development and Land Reform and Others [2020] ZASCA 57
- 168 Alexkor Ltd and Another v Richtersveld Community and Others [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC)
- 169 Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd [2007] ZACC 12; 2007 (10) BCLR 1027 (CC); 2007 (6) SA 199 (CC)
- 170 Nkuzi Development Association v Government of the Republic of South Africa and Another 2002 (2) SA 733 (LCC)
- 171 In Re Amaqamu Community Claim (Land Access Movement South Africa and others as Amici Curiae) 2017 (3) SA 409 (LCC)

