Ruling in prominent case **influences land reform**

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The case of *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* (CCT40/15) [2016] ZACC 22 (28 July 2016), also known as LAMOSA1, had a significant impact on restitution claims submitted in terms of the *Restitution of Land Rights Amendment Act*, 2014 (Act 15 of 2014, or the *Amendment Act*).

The *Amendment Act* was declared unconstitutional in the LAMOSA1 case. LAMOSA1 did not, however, rescind the submission of new claims. In terms of the order granted in LAMOSA1, claims submitted from 1 July 2014 to 28 July 2016 ('new claims') will remain in force. Nevertheless, the Constitutional Court granted an interdict against the processing of new claims by the Commission on Restitution of Land Rights (the Commission).

The interdict granted in LAMOSA1 prohibited the Commission from processing new claims pending the enactment of a new *Amendment Act*, which reopens the 'new claims' submitted. Alternatively, this is pending the finalisation of 'old claims' submitted in terms of the *Restitution of Land Rights Act*, 1994 (Act 22 of 1994, or the *Restitution Act*).

Amended legislation

In LAMOSA1 the Constitutional Court ordered Parliament to enact a new *Amendment Act* within 24 months from 28 July 2016 (on or before 28 July 2018) to regulate the imposition of restitution claims.

If Parliament failed to enact a new amendment, the Land Claims Commissioner, and/or anyone with a direct interest in the order could approach the Constitutional Court within two months after the stated 24 months had expired to obtain an appropriate order regarding the handling and settlement of new and outstanding claims.

The period for the enactment of the new *Amendment Act* expired after Parliament failed to enact the *Amendment Act* within the prescribed period.

Extension of prescribed period

On 30 July 2018 (two days after the 24 months granted in LAMOSA1 had expired), Parliament approached the Constitutional Court in the matter of *Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others* (CCT40/15) [2019] ZACC 10 (LAMOSA2) with an application to extend the prescribed period by another eight months (until 29 March 2019).

The Constitutional Court needed to determine whether the period could be extended and, if possible, if it would be fair. The defendants in the LAMOSA2 case argued that the previous order was final and that the court, therefore, could not grant an extension.

The Constitutional Court ruled that Parliament, in all likelihood, would be unable to finalise the process of enacting the new *Amendment Act* within eight months. Therefore, it would not be in the public interest to hurry the process.

Handling of 'new claims'

The Constitutional Court found that it was not in the interest of justice to grant Parliament an extension, and the application failed. The Constitutional Court, however, still had to issue a fair order relating to 'new claims' and how it should be handled in future.

It is noteworthy that the Commission (which in terms of the order in LAMOSA1 was obliged to approach the court after the 24-month period had expired) subjected itself to the court's decision rather than requesting a court order regarding the handling of new claims in its own capacity.

On the contrary, the Commission filed a report at the Constitutional Court detailing its progress in dealing with old claims.

Progress report

In short, the following was evident from the Commission's filed report:

- On 31 March 2018, 5 757 old claims had not yet been handled and processed.
- A total of 4 601 of these outstanding old claims were in the fourth phase, where settlement negotiations take place. If these claims were not settled, they would have to be referred to the Land Claims Court for adjudication.
- During the period from 1 April 2016 to 31 March 2018, the Commission settled a total of 1 654 claims amounting to R5 billion.
- A total of 163 383 new claims had been received but had not yet been processed.

Criticism of the report

The LAMOSA1 defendants criticised the report for several reasons. They argued that the Commission only provided information up to 31 March 2018 and failed to provide reasons as to why the report did not contain the latest information.

According to the defendants, at the time of hearing LAMOSA1, there were a total of 8 257 claims not outstanding and/or not processed. On 31 March 2018 there was a total of 5 757 old outstanding claims, 1 131 of which were still in the evaluation and categorisation phase.

The Commission allegedly failed to handle the 17 000 to 20 000 claims that were settled, but not yet concluded, as the court orders were not implemented.

The Commission failed to provide a timeframe for the settlement of old claims. Assuming the remaining old claims are handled at the same rate as during the period from 1 April 2016 to 31 March 2018, the task will take seven years to complete.

Finalising old claims

According to a report compiled by the High Level Panel on Assessment of Key Legislation and Acceleration of Fundamental Change, it will take 35 to 43 years to finalise all outstanding claims.

The court emphasised that, since it is still uncertain when Parliament will enact the new *Amendment Act*, it would be unfair to prohibit the processing of claims indefinitely.

Subject to the enactment of legislation by Parliament that may stipulate otherwise, the ruling stated that the Commission is prohibited from handling and processing new claims until the following (whichever comes first) occurs:

- The Commission settles all old claims or refers them to the Land Claims Court for adjudication.
- The Land Claims Court, at the request of any interested party, grants permission to the Commission to start processing new claims.
- Before the aforementioned points occur, the Land Claims Court may not consider or adjudicate new claims during proceedings for the restoration of land rights in respect of old claims. New claimants can only be admitted before the Land Claims Court as interested parties if their participation can contribute to the maintenance or rejection of the old claim, or to any other admissible issue.

The Commission is clearly prohibited from handling new claims until old claims have been settled or referred to the Land Claims Court for adjudication. Thus it seems as though no new claims will be dealt with in the near future.

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