

# Land question: Significant ideological and policy shifts

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While land ownership and redistribution will feature as the key political issue of the next few decades, there is mounting evidence, say experts, of an elite capture of the redistribution programme, with politically connected businessmen and agri-business cashing in on how resources are redistributed. This creates an even greater urgency for the permanent appointment of a Judge President to the country's Land Claims Court.

The day before the newly constituted Judicial Services Commission (JSC) was due to begin interviews for seven judicial vacancies in Cape Town this week, it announced that hearings for the crucial position of Judge President for the Land Claims Court were being put on hold.

The two nominees for the position were current Acting Judge President Yasmin Meer and Judge Keoagile Matojane. The JSC's reasoning for the postponement is that a pending Constitutional Court challenge of a recent amendment to the Restitution of Land Rights Act by land rights activists - concerning the manner in which it was hastily passed through Parliament - might jeopardise any appointments made before the matter is heard.

The amendment was signed into law by President Zuma in June last year, and is intended to allow those who missed the original 1998 cut-off date for claims a further five years to do so. Prior to the passing of the amendment, civil society groups had made submissions to Parliament warning that unless outstanding land claims (around 8,500) were ring-fenced from new claims, these would be further delayed for several more years. Apart from this is the complexity that new claims could overlap with unresolved claims on the same land. The Land Claims Commission reported that over 12,500 new claims had already been lodged.

After the original establishment of the court under the Restitution of Lands Right Act 1994, judges were appointed for five years, but an amendment resulted in years of acting and semi-permanent appointments. The June amendment regularises the system and requires that Land Claims Court judges should also be high court judges.

The land issue will feature as a crucial component of the South African political landscape. Therefore, prior to the announcement by the JSC that interviews had been put on hold, The Judges Matter Coalition, a community organisation including civil society organisations which hope to support transformation in the judiciary, arranged a meeting in Cape Town titled "Do judges matter to people who want land?"

Some of the issues discussed included how judges come to be appointed, how women are still systemically denied access to JSC processes, controversial policy positions and political statements – including President Zuma’s recent off-the-cuff urging of traditional leaders to claim land on behalf of “subjects” – as well as the fact that current land tenure is regarded as “conditional” rather than a Constitutional or human right.

Professor Ruth Hall, Associate Professor and researcher with the Institute for Poverty, Land and Agrarian Studies (PLAAS) at the University of the Western Cape, presented an overview of land reform policy and implementation over the past 20 years that revealed significant ideological and policy shifts.

She said while the “land issue” had taken centre stage in political rhetoric and as part of government’s agenda – in relation to foreign ownership, limits on size of land and equity for farm workers and dwellers – “many of the longstanding problems within the land programme are not being addressed.”

“My colleague Mazibuko Jara characterised this as a ‘populist patch-up’. There are huge issues that need to be addressed, including by the courts, while at the same time there are a whole lot of new policy proposals and possible new bills coming to Parliament that address other aspects rather than addressing the core of the issue.”

The Land Claims Court had been specifically established in the early 1990s because of a mistrust of the judiciary and the belief that the courts could not be trusted to address land issues.

“There was a need for a specialist court, people who had a specialist understanding and knowledge and that it would have to function in a different way from normal courts. So we are talking about a specialist court that was set up to deal with the complex and highly contested political issue and to not behave in an ordinary way. This is an important context.”

She questioned whether the Land Claims Court was living up to the expectation of being, on the one hand, politically more engaged with issues around transformation and, on the other, issues of law.

“To what extent are you adjudicating the law or making the law? This is an area of law that needs to be developed so judgments are incredibly important in providing an expansionary interpretation of what lives in the statute.”

She added that part of the shift in government policy around land had been away from the “rights-based” framework on which the Land Reform Programme was founded and that this was increasingly evident in policy and legal amendments.

“There is an idea that people should not have ‘unfettered entitlements’ or rights, but that they should earn those through productive use of the land, through behaving well, not saying bad things about your chief, for example, or causing trouble on the farm, if you are a farm worker. These are at odds with our legal framework, but these ideas are coming through in policy and some amendments in the law could give effect to those.”

In fact, President Zuma had told traditional leaders to evict people in traditional areas who were not using the land productively.

“At the same time, in the redistribution process and in the land claims process, we see increasing power being vested in the hands of strategic partners, and this is a response to widespread worries about the fact that land that is being restored or redistributed if not being adequately used,” said Hall.

Government priorities, she said, had changed over time, and three different programmes had been implemented in the past 20 years. The first was part of the RDP, a market-based one in which the state would assist poor people to buy land on the market by giving them subsidies that would give them titles.

“It was only for the poor, and the aim was to provide people with a secure place to live or on which to farm or do other things.”

The focus shifted with the tenure of President Thabo Mbeki, who began to focus on black commercial farmers and removed the means test that resulted in available money for redistribution being shared between those who had their own money and those who did not.

“In 2006, government phased out all transfer of title under redistribution. The state is now the willing buyer, holds the land and decides whom to lease it out to. Through redistribution you cannot become the owner of land anymore in South Africa.”

A significant amount of transfers were dependent on people entering into a commercial strategic partnership – with a commercial farmer or big agri and the state is acquiring land and transferring it to the trusteeship of agri-business under the name of community.

“Again huge questions arise about what are the entitlements of people in the context of corporate control,” she said.

Another contested area was that of traditional authorities and civil society groups in communal areas, like the Alliance for Rural Democracy, a lobby group of women in rural areas, are challenging the notion of that chiefs own land rather than holding “trusteeship” of it.

There is also discussion, she added, about whether there should be a legal challenge around the interpretation of Section 25 (5) (of the Constitution) and what constitutes “equitable access”.

“Have reasonable measures been taken with regard to this, particularly given mounting evidence of the elite capture of the redistribution programme with urban politically connected businessmen getting large going concerns in partnership with agri-business? So this is a process of people cashing in. How these resources are to be distributed is totally closed from the public view. Since 2006, we have not been able to get a programme list from the Department of Agriculture to see how money is distributed across projects and across people,” said Hall.

Meanwhile, there was a new “recapitalisation” programme aimed at fixing failed projects and which is diverting half of the redistribution budget away from acquiring land towards the paying of strategic partners to farm the land.

“This also means that commercial farmers and agri-business are using this as a route to accessing state funds for their own farming enterprises without having to sink capital in to acquiring land,” she said.

The Land Claims Court played a central role in farm tenure and The Extension of Security of Tenure Act regulated evictions and allowed the extension of long-term rights.

“Despite this, there have been ongoing evictions across the country. In probably the largest category of post-Apartheid dispossession, more than two million people were displaced from farms in first 10 years of democracy and nearly one million forcibly evicted. Even so, some of these cases do go to court but probably the minority. Effectively the legal system has not managed to give effect to the rights of people in this category. Here magistrates’ courts are crucial as they deal with farm evictions.”

South Africa, she said, did not have just one land issue but several.

“In every area there are contestations about land, so while there are these political slogans around land, that it must be shared, that it must be nationalised, it must be redistributed, in fact there is huge contestation about which land are we talking about. And who should be sharing it? Who has entitlement? What do we mean by sharing? What is that status of different rights and competing rights and what are the outcomes we are trying to achieve? It is still all rather murky 20 years on.”

While the Land Claims Court had made a number of important rulings giving effect to areas of the Constitution, many areas of the law are yet to be tested.

“In fact, some areas of the Constitution that were most hard fought for, for instance around appropriation and compensation, have not been tested in the courts. And we have this land reform toddling along far from what was projected and anticipated both in terms of its pace, but also the quality and outcome. While this is happening, and in the face of depleting budgets, a more powerful process of anti-agrarian reform is occurring in which mass evictions continue. While we are doing this, there are economic and other factors that are undermining the possibilities of creating a durable new dispensation around access to land.”