

## *Introduction*

This paper examines the jurisprudence of the Land Claims Court in land reform against the backdrop of the current calls for the amendment of section 25 of the Constitution to effect land

The land question has always occupied centre stage in the South African politics even in the face of urgent need for economic growth and job opportunities, delivery of basic services and pressing urban housing needs, as more people migrate from the rural hinterlands into the cities. Discussions around the rural agrarian revolution fail to take into account effects of conquest, colonialism, apartheid and climate change on rural agriculture thus reflecting a nostalgic yearning for a return to a way of life that was disrupted with long-lasting effects.<sup>1</sup> Land is the archetypal exhibition of the disjunctures in the confrontation of the pressing challenges to our democracy. The budget allocation for land reform arguably indicates that land reform lies further from the heart of the liberation quest. Growing calls for urban land and the government's lack of response to these needs has forced many people to resort to what Budlender in 1992 warned us of saying:

‘the scale of landlessness and homelessness in our country is enormous. The expectations under a new government will be high. If the property structure of the constitution does not respond adequately to those needs and expectations, people will find themselves compelled to revert to the traditional South African land claims process – Land occupation.

Indeed 26 years after Budlender's prophetic observations, South Africa has reverted to its traditional land claims process. It appears to be working. Its shape has not changed:

‘...the most effective way for the homeless to make a land claim and establish a right is to group together and erect their homes on a piece of vacant land. It seems that once you reach a certain critical mass, you become a player, and you can effectively establish a right. If you are a very small group, your homes may be bulldozed without anyone in authority taking you very seriously. But if can reach a critical mass- perhaps a hundred families – the authorities may

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<sup>1</sup> (A 1999 survey found only 1,3% of South African respondents listing land among the top three problems that the government should address, yet a 2001 survey found 68% of black respondents agreeing with the statement that ‘Land must be returned to blacks in South Africa, no matter what the consequences are for the current owners and for political stability’ Aliber, Michael and Reuben Mokoena (2003). ‘The Land Question in Contemporary South Africa’ in John Daniel, Adam Habin and Roger Southall (eds) State of the Nation. South Africa 2003-2004. HSRC Press, Human Sciences Research Council, Cape Town.

accept that you can not be removed until a suitable piece of land has been made available to you.’

The rapid return to this traditional land claims process demonstrates that the South African land reform project is in crisis. Jurisprudence from the Land Claims Court provides a picture of a programme riddled with corruption, bureaucratic failures, lack of coordination between the key stakeholders and government’s non-compliance with court orders. Notwithstanding the overwhelming evidence on the source of the failure of the land reform programme, the ANC endorsed the EFF’s motion pointing the dagger at section 25 of the Constitution. And so it is that the South African parliament in July 2018 embarked on a process of public hearings in order to hear people's views on whether or not Section 25 of the Constitution should be amended to allow for land expropriation without compensation. This process followed a parliamentary motion by the EFF and endorsed by the ANC ostensibly because of the slowpace of land reform.

It is not necessary to amend the Constitution in order for the government to compulsorily acquire land without compensation. However, even if an amendment is necessary, the process of consultation with the South African citizens should be founded on meaningful participation by the landless. The process embarked by the Constitutional Court Review Committee may not gather meaningful inputs given the disconnect between the question posed and the discourse emanating from the Constitutional Review Committee public hearings. The question posed to the citizenry rests on a number of flawed premises; that is that the citizens have a nuanced understanding of section 25 of the Constitution, that they appreciate the ‘limits’ imposed by section 25 on the government’s ability to respond to the land hunger and needs, both in urban and rural settings. This approach to the resolution of the land question repeats the cycle

The argument that the slowness of the land reform process results from the limitations imposed on government by section 25 of the Constitution does not find support from a recent report from the High Level Review Panel on Key pieces of legislation in South Africa. It is arguable that this motion may be motivated by politicking ahead of the 2019 elections. But at whose expense is this politicking taking place and how and what should we read into these public hearings?

The public hearings are an important part of the public participation component of our constitutional democracy. The State is called upon to engage with its citizenry on any legislation it intends to adopt. Yet the question posed evidences a fatal crack in our constitutional democracy that undermines its foundations – the lack of understanding of the Constitution by ‘We, the People’. What are the implications of this ignorance on the requirement for meaningful engagement on this very important question for South Africans? How do we engage meaningfully when we are not on the same page about the question posed? Listening to the participants during these public hearings, it is quite evident that the land question requires urgent attention. There is immense suffering flowing from landlessness, homelessness and lack of tenure security. The citizens are angry. The discussion is polarised. Engaging with the question of land reform, property and section 25, necessitates engagement with complex polycentric issues. As Walker points out:

‘...beyond the poetic, rallying phrases, political leadership and solid popular education is required [among other things - around the history of South Africa, the transition into the new Constitutional dispensation, the Constitution, the property clause to enable the citizens to meaningfully engage on the section] to drive home the understanding that effective land reform cannot be achieved quickly. This involves serious engagement with potential beneficiaries waiting impatiently in land reform queues, as well as with farmers affected by land claims, and with organized agriculture. It requires an open engagement with critics on the left as well as the right, and a willingness to explore alternatives. At the same time, the state needs to expand the capacity of the DLA and Commission and use the full range of mechanisms already provided for in the Constitution to acquire suitable land for settlement and for agricultural development, at ‘just and equitable’ prices. Land issues in the communal areas have to become the focus of much more sustained attention, along with urban and especially peri-urban land issues. Above all, we need to recognize that South Africa is not the agrarian country that it was ninety years ago when the Natives Land Act was passed. The answer to the land question must today be sought also in jobs, education, urban housing and a dramatic escalation in the provision of public health services to combat the scourge of AIDS [and other diseases]

The terrain of the South African land reform programme is vast. This paper focuses on land restitution for purposes of this paper I focus on the land restitution programme and the jurisprudence of the Land Claims Court.

The jurisprudence of the Land Claims Court, a court whose very birth coincided with the democratic transition period of South Africa's history and the imperative for social transformation particularly in the context of land reform; is generally characterised as untransformative in its outcomes.<sup>2</sup> Its early-on impact on the land reform programme earned it forlorn disdain from policy-makers and, prompted the legislature to effect amendments to legislation effectively ousting its jurisdiction.<sup>3</sup> Commentary from leading academics on land reform offers the Land Claims Court little comfort as their criticism raises questions around the courts' appreciation of its transformative role. In the public interest litigation space, non-governmental organisations working in land reform charge it with complacency on the wave of evictions of farm-workers, occupiers and labour tenants, a charge grounded in its interpretation of legislation securing tenure.<sup>4</sup> This appraisal of the Land Claims Courts'

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<sup>2</sup> T Roux in *Pro-Poor Court, Anti-Poor Outcomes: Explaining the Performance of the South African Land Claims Court*, 20 SAJHR 511 (2004) notes that ten years after the Land Claims Courts' establishment it plays no meaningful role in the restitution process and in fact accuses the court of facilitating a new wave of farm evictions through its interpretation of the Security of Tenure Act and the Labour Tenants Act. R Hall reference, expressing disappointment on the performance of the Land Claims Court says that it has missed the context of its existence, in that "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." Hall accordingly states that the LCC has completely missed this mandate.

<sup>3</sup> B Atuahene *We Want What's Ours: Learning from South Africa's Land Restitution Program* (2014) Chapter 3 'Dignity restoration: The Importance of process. In an interview with Alan Dodson, a former judge of the LCC, Dodson acknowledges to Atuahene that the chasm that led to the amendment of the Restitution Act effectively ousting the jurisdiction of the Court flowed from the Courts' role in the case of *Macleantown Residents Association, In re: Re Certain Erven Commonage in Mcleantown* 1996 (4) SA 1272 (LCC), where the LCC on technical grounds refused to ratify a settlement agreement where parties had reached consensus after a lengthy period of negotiations and mediation by the Land Claims Commission. The Land Claims Court at para1275C-1281E found that 'the papers submitted to the Court [did] not contain a list of individual claimants', there were no resolutions filed authenticating the representative capacity of the representatives of the land claiming community and ratepayer's association to sign the settlement agreement on behalf of their constituents, there was no proof that the local government officials were legally authorised to transfer the land in question to the land claiming community, the involvement of the land claiming community in the original land dispossession had not been made out on the papers and, the description of the property in accordance with the records of the Deeds Office was not submitted to the court. The former Director General of the Department of Rural Development and Land Reform, Thozile Gwala felt that 'even though the issues were clear, the court process dragged on unnecessarily'. At 6; Ria De Vos, the Director of Planning and Policy at the Central Land Claims Commission confirmed that the commission 'viewed the court as an impediment to its efficiency and a threat to its authority, and thus it shunned the court's involvement.' At 62. The Commission then began exploring alternatives from international sources on how to best implement the restitution programme in the face of what was then deemed an 'uncooperative and obstructive court'. In Germany they found an administrative model that enabled the German government to settle 80% of the lodged restitution of rights in land claims. This led to the *Land Restitution and Reform Laws Amendment Act* No.63 of 1997 through the insertion of section 42D. The effect of section 42D is that the Minister is now the approver of settlement agreements and no longer the LCC. Roux says that 'the LCC which was originally conceived as the main institution through which restitution claims would be adjudicated, has been virtually legislated out of the restitution process.

<sup>4</sup> Wegerif M and Russell B et al *Still Searching For Security: The reality of farm dweller evictions in South Africa* (2005) states that 'the perception of many that one cannot get justice from the courts also discourages farm dwellers and those assisting them from trying to legally enforce rights'. At 75 The authors argue that the

performance persuaded this project. The paper picks up the baton from Theunis Roux's institutional critique of the Land Claims Court in 2004<sup>5</sup> and, seeks to answer the question posed by Karl Klare whether it is possible to achieve dramatic societal change through law-grounded processes, using the Land Claims Court as a case study. This enquiry is conducted against the backdrop of neo-institutionalism<sup>6</sup> as a theoretical framework that may arguably explain the decisions of the Land Claims Court through its paradigm of institutional development and legitimacy. The aim is to provide a neo-institutional perspective on the transformative impact of the jurisprudence of the Land Claims Court on land reform through an investigation of the extent to which neo-institutionalism can offer alternatives for the Land Claims Court to engage more meaningfully as an institution in the land reform programme.

*The importance of grounding performance assessments of the Land Claims Court on the empowering legislation.*

The argument made here is that the Land Claims Court derives its mandate from the empowering provisions in the key pieces of legislation dealing with land reform. Accordingly it is important when evaluating the Land Claims Court to fully appreciate the extent of its powers within the relevant legislation. This is crucial, particularly in the context where popular expectations of the land restitution programme mistakenly locate land restitution and the role of the Land Claims Court as 'the heartbeat' of South Africa's land reform programme.<sup>7</sup> Land restitution is a very circumscribed, time-bound and backward looking programme with specific set requirements.

The Land Claims Court was established in 1996 as a specialist court to deal with land claims under the Restitution Act, provision having been made for its establishment under the Interim

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jurisprudence of the LCC is incoherent and un-transformative. They cite the LCC's transformative stance in ensuring that government provides legal representation for indigent farm dwellers in *Nkunzi Development Association v The Government of the Republic of South Africa and The Legal Aid Board* and the empirical evidence from the Worcester Magistrates Court in 2005 indicating that six out of the seven eviction orders were confirmed by the LCC despite these being default judgments because the people being evicted were not present and had no form of representation in court. The Rural Legal Trust further confirms that it has received no referrals from the LCC despite offering legal assistance to unrepresented farm dwellers facing eviction. This incoherency is also present in the Klaasen case which treated women as secondary occupiers denying the right to be classified as 'occupiers' in their own right, in the face of a progressive precedent of *Conradie*. (still to fix, proper citation)

<sup>5</sup> Roux T 'Pro-Poor Court, Anti-Poor Outcomes': Explaining the Performance of South African Land Claims Court, (2004) Vol.20 *South African Journal On Human Rights* 51.

<sup>6</sup> RL Jepperson 'Institutions, Institutional Effects, and Institutionalism' in *The New Institutionalism in Organisational Analysis* defines neo-institutionalism as a study of institutions as "socially constructed, routine reproduced, program or rule systems". A legitimate organisation is shaped by the discourse and social realities of that environment.

<sup>7</sup> Mostert H 'Change through Jurisprudence' at 61 See Roux T where the author argues that the Land Claims Court was tasked with reversing eighty years of land injustices.

Constitution. This was because of the importance and urgency of land reform. Its mandate was extended with the passing of the Labour Tenants Act and the Security of Tenure Act.<sup>8</sup> The Court has exclusive jurisdiction over the Restitution Act and Labour Tenants Act and shares jurisdiction over the Security of Tenure Act with the magistrates' courts and the High Court.

Section III of the Restitution Act provides for the establishment of the Court, defines its role and function and determines its composition. The foundational jurisdiction of the Land Claims Court is contained in section 22 of the Restitution Act and its main functions are set out in section 21(1), in terms of which the Court essentially plays an interpretive, approval and determining of rights role. Under section 22, the court may determine whether a right to restitution of any right in land exists. The court will determine this having regard to section 2 of the Restitution Act which sets out the requirements for a valid claim for the restitution of rights in land. Essentially a claimant needs to prove that they are a person who was dispossessed of their right in land, after 19 June 1913 as a result of past discriminatory laws or practices, that they lodged the claim before 31 December 1998 and that at the time of dispossession they were either not compensated or under-compensated. If successful, the claimant will be entitled to either restitution or equitable redress in the form of alternative land and/ or financial compensation. There is no automatic right to restitution as actual restitution depends on feasibility.<sup>9</sup> The question of feasibility depends on the current use of the land, the history of its acquisition and as Pienaar argues, '...what has happened in reality is that the use to which the land is to be put after restoration as well as the capabilities of the claimants to use the land effectively, productively and sustainably have in fact been considered as well.'<sup>10</sup> A very important function of the Land Claims Court under the Restitution Act is the determination or approval of compensation payable to private land owners where land has been expropriated or acquired from them. The test used to determine the compensation is the 'just and equitable' compensation test. This test together with the test for 'equitable redress' used to determine the compensation to be paid to previously dispossessed persons where actual restoration is not feasible, forms an important aspect of the argument made in this paper that the jurisprudence of the Land Claims Court impacts on land reform. Further powers of the Land Claims Court include declaratory orders on questions of law, pronouncements on the interpretation, validity

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<sup>8</sup> Pienaar J 'Restitution Programme' in Land Reform (2014) 576

<sup>9</sup> PienaarJ

<sup>10</sup> Pienaar J at 584

or enforcement of settlement agreements under section 14(3) of the Restitution Act and any other incidental matters relating to the Restitution Act.<sup>11</sup>

The provision founding jurisdiction of the Land Claims Court under the Labour Tenants Act is section 13. In its first ten years the Land Claims Court heard very few cases under the Labour Tenants Act even though the section mandates that all labour tenants matters in other courts be referred to the Land Claims Court save where oral evidence has already been heard. Interestingly though two of the four judgments delivered in the first year of the Land Claims Court, involved issues of labour tenancy.<sup>12</sup>

Section 19(3) of the Security of Tenure Act outlines the Land Claims Courts' powers of automatic review of the magistrates' courts decisions to evict a person who qualifies as an occupier under the Security of Tenure Act.<sup>13</sup> The Security of Tenure Act prohibits the eviction of persons from land where they had permission to live on the land. The Act applies in all rural land save for proclaimed townships. It creates a procedure to be followed when applying for an order to evict people. If a person has been living on the farm for 10 years and they are over 60 years of age, then they may not be evicted unless they have breached any of the provisions mentioned under the Act or a contractual term of the living arrangements.<sup>14</sup> An notice of intention to evict must be served on the local municipality and the Department of Rural and Land Affairs. Provision is made under the Act for the supply of alternative accommodation where persons are evicted under the Act.<sup>15</sup> Notwithstanding the protection under ESTA, the security of tenure of farm workers continues unabated. The Land Claims Court is accused for being complicit, especially where eviction orders granted following a default judgment by the magistrates courts are confirmed by the Court.<sup>16</sup> In this context the Court, confirmed the right of farm dwellers to legal representation in eviction matters, following a case brought by the Nkunzi Development.

It was important that the judges of the Land Claims Court reflect a pro-poor outlook so as to be best placed to give effect to the transformative mandate of the land reform legislation. The

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<sup>11</sup> Pienaar

<sup>12</sup> The land claims court judgments

<sup>13</sup> Security of Tenure Act, Roux 517

<sup>14</sup> Security of Tenure Act

<sup>15</sup> Security of Tenure Act

<sup>16</sup> Nkunzi

task could not be handed to judges of the apartheid era who were largely not trusted with delivering.

*The centrality of the history of South Africa's democratic transition and land reform programme in providing perspective on the LCC's jurisprudence.*

The jurisprudence of the Land Claims Court cannot be fully appraised outside of the history of South Africa's transition from the colonial and apartheid past to a democratic future premised on the imperative to redress the effects of the atrocities; chief among which is land disposessions and denial of access to land.

Nowhere is the evidence of the cruel, degrading and inhumane effects of colonialism, conquest and apartheid as pronounced as in the effects of land disposessions.<sup>17</sup> The reduction of black people's rights in land from those akin to ownership to labour tenancy, farm-dweller, occupier and in some cases extinction indicates the depth of these effects.<sup>18</sup> The history of black land disposessions does not originate from the Black Land Act of 1913; the Land Act was in fact a legislative consolidation of dispossession that occurred centuries earlier and served to racialize land relations and prohibited black South Africans from acquiring, leasing, or transacting land outside small "native reserves", later formalised as ethnic "homelands" or Bantustans", which were scattered across the country.<sup>19</sup> Chief amongst its purposes was the need to respond to the demand of cheap labour by the agricultural and mining sector. Land disposessions and 'hut taxes' forced black peasant farmers to the cities as miners and to work as farm labourers to respond to the need to pay 'hut taxes' and survive in a world where peasant

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<sup>17</sup> Hall, R 'Reconciling the Past, Present, and Future: The Parameters and Practices of Land Restitution in South Africa' in Land, Memory, Reconstruction, and Justice: Perspectives on Land Claims in South Africa (2010) 1ed where she points to the protracted and complex nature of loss of Black Land rights in South Africa spanning more than three centuries. At p 18. Walker et al in the introduction to the same volume remark that state-sponsored forced removals were among the most flagrant human rights violations of the apartheid era, Terblanche S in A history of Inequality in South Africa 1652-2002 (2002) 1ed The University of Natal Press impresses upon us that 'any attempt to re-examine South Africa's modern history can do no better than to do so from one of the following three perspectives: firstly, the perspective of white political and economic domination; secondly, the perspective of land deprivation; and thirdly, the perspective of unfree black labour'. At p6. In Popela, Moseneke notes the same (add dictum).

<sup>18</sup> *Goedgeleggen v Popela Community*

<sup>19</sup> Delius P and Beinart W 'The Natives Land Act of 1913: A template but not a turning point' in Walker C and Cousins B *Land Divided, Land Restored: Land Reform in South Africa for the 21<sup>st</sup> Century* (2015) 1<sup>st</sup> ed, Jacana Media (Pty) (Ltd) where the authors argue that 'land dispossession had largely taken place before the Land Act of 1913' and that the Act merely consolidated disposessions in law and that the Act was an interim measure to maintain the status quo of land occupation and ownership and also called for the establishment of a commission to set aside land for Africans. P24,25 and see also Bundy, C *The rise and fall of the South African peasantry*. 2<sup>nd</sup> edition. London: Heinemann at 45 where the same claim is made.



farming was proving no longer viable.<sup>20</sup> Those who were not employed in the mines or the agricultural sector were defined as the ‘discarded’ or ‘surplus’ people.<sup>21</sup> The Group Areas Act of 1950 entrenched spatial apartheid through the removal of black people from the centre of cities to the periphery, in townships or far away homelands. It is thus not surprising that the origins of black political and social resistance are premised on land.<sup>22</sup> Derek Hanekom, South Africa’s first Minister of Land Affairs (now Department of Rural and Land Development) expressed this primacy of land in the liberation movement’s struggle against apartheid when he stated that ‘[t]he resolution of the land question... lies at the heart of our quest for liberation from political oppression, rural poverty and under-development’.<sup>23</sup>

Property in the form of land featured prominently in the negotiation process and the Restitution Act was the first piece of ‘transformative’ legislation to be passed by South Africa’s first democratic parliament. There was also a concern around the security of tenure for farm-dwellers, occupiers and farm workers, especially around the negotiation process where farm dwellers were evicted in droves. This prompted the enactment of the Interim Protection of Labour Tenants and the Informal Occupiers Act, over which the Land Claims Court presides<sup>24</sup>

The outcome of the negotiated transformative process had no victors. It was a compromise where the National Party secured the interests of private property owners and a capitalist economy and where the ANC compromised on its initial stance of nationalisation and adopted a market led land reform programme influenced by the World Bank.<sup>25</sup> In this context, the Land Claims Court was conceived from different perspectives by parties on opposite sides of the negotiating table. For the National Party it was important to place ‘private property out of the

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<sup>20</sup> Bundy *The Rise and Fall* at 112, Cheryl Walker *Landmarked: Land Claims & Land Restitution in South Africa* (2008) Hut taxes were levelled at each house-hold by the colonial and apartheid regimes and Africans were compelled to pay this tax which required the currency they did not possess or face imprisonment. It thus became important to gain employment either in the mines or farms.

<sup>21</sup> Walker C *Landmarked*

<sup>22</sup> Hanekom D, Speech to be Delivered by Mr Derek Hanekom MP, Minister of Land Affairs, on the Occasion of the Budget Presentation of the Department of Land Affairs: National Assembly, 9 September 1994’ (unpublished document, copy in Legal Resources Centre Library, Cape Town) cited from Walker, C ‘*The Limits to Land Reform: Rethinking ‘the Land Question’*’ *Journal of Southern African Studies*, (2005) Vol 31, No.4 at p 804.

<sup>23</sup> *Ibid* at 804, Insightfully, Walker questions the position occupied by land reform in the social transformative space, an insight that may shed perspective on the mismatch between ‘the political aspirations and popular expectations that surround the land question on the one hand and the transformative potential of land reform itself on the other. It is this mismatch, rather than the modest achievements of the programme per se, that constitutes the major faultline of land reform at the end of the first decade of democratic government in South Africa’. At 806 This analysis, to the extent that it addresses mismatches in the land question is instructive to an appreciation of the limits of the jurisprudence of the LCC.

<sup>24</sup> Nkunzi Development Association research

<sup>25</sup> Walker C & Cousins *Land Divided, Land Restored*. See also Terreblanche S ‘A history of Inequality incomplete.

purview of political influence and for an ANC accustomed to lack of political power the court was its sanctuary'<sup>26</sup>. This reflects Nedelsky's interpretation of the historical development of the constitutional guarantee of property, focused on the struggle between democratic government in the spirit of Rousseau and Hobbesian fear of such popular sovereignty.<sup>27</sup> In the context of the American Constitution and its property clause, (a parallel can be drawn here with the South African Property Clause and the position occupied by the Courts in its enforcement), Nedelsky states that:

'the law-politics distinction and the ideal of constitutionalism and judicial review were specifically drafted into the discussion by the Federalist in order to ensure the further guarantee of basic individual rights such as property. In this regard the idea was that property belonged to a distinctly legal (as opposed to political) realm, where the non-democratic and unrepresentative courts themselves could take decisions on the seemingly neutral and rational basis of the time-honoured common law tradition (based on the ideas of natural law). This empowered courts to overrule the democratic will of the people, as embodied in parliamentary legislation, as a matter of law, while covering up the real political struggle between the democratic will of popular sovereignty and the enshrined veto.'<sup>28</sup>

The Nedelsky narrative of the law-politics divide in the Constitutional property clause mirrors the circumstances under which the Land Claims Court was conceived as described by Aninka Claassen in an interview with Cheryl Walker<sup>29</sup> on the genesis of the centrality of the Land Claims Court to the land reform programme. In what may be characterised as a comedy of errors and a metaphor for the Land Claims Courts' institutional legitimacy and the impact of its jurisprudence on land reform, Claassen describes a moment during a heated debate in the Land Claims Working Group meeting. An agreement was reached on the institutional arrangements for land restitution as a bifurcated system consisting of both a Land Claims Commission and a Land Claims Court. The land-rights lobby group had initially supported a rights-driven and court overseen process because of the lessons from the bitter struggles in the 1980's which informed their understanding that 'unless rural people's rights to land were

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<sup>26</sup> Walker 'The limits to Land-Reform: Rethinking "the Land Question"' ' Journal of Southern African Studies, vol. 31, no. 4, (2005) Reference incomplete and not according to style guide.

<sup>27</sup> Nedelsky 'American Constitutionalism and the Paradox of Private Property', in Constitutionalism and Democracy, 241 252 (1988).

<sup>28</sup> Ibid

<sup>29</sup> Walker supra note 15 above

enforceable in court, their tenure would remain vulnerable'. This view was challenged by a voice of experience from an international adviser from New Zealand who 'cautioned against an overly judicial process, arguing that poor uneducated people would be disadvantaged by the expense and formal legalism of the process'<sup>30</sup>. The NP had by then fervently adopted the idea of the Land Claims Court as a 'bulwark against what it feared might yet be a rampantly socialist ANC government'. In what Claassen describes as one of the great ironies of the negotiations, the NP came down strongly in favour of a court-driven process, just as proponents of a court in the ANC camp wanted to reconsider:

'Suddenly we all shifted sides. We had wanted the process to be court-driven because we were so used to people being weak that they needed the law to defend them. And suddenly [the NP] were scared about anything that was going to be politically motivated and they made it conditional, the whole restitution/property clause deal, that it must be a court-driven process... We heard about that [the ANC negotiators] had agreed to those terms and we were hoping ... that it could be renegotiated because by then we were all convinced, we had seen that it was going to backfire. The irony is just extraordinary. It became apparent that, actually, the people were going to be in government and the rights were going to be against the government, and suddenly the Nats were saying: *Ja* ... And you got this shifting of positions to do with the fact that people just weren't used to where the power was going to fall.

Understanding this context of South Africa's democratic transition and the institutionalisation of the land-reform programme is key to appreciating the Land Claims Court as an institution founded on a compromise and its conflicting mandate- to protect existing property rights and transform the property landscape. The crux of the argument here is that the history of land dispossessions and denial of access to land, the context leading up to the negotiated settlement as well as the political compromise that married democracy and capitalism is an important factor in the analysis of the Land Claims Courts' performance as an institution and its jurisprudence. A neo-institutional perspective argument in this context would be that for social transformation to occur, it is this context that should be the subject of analysis, rather than the institution itself (in the case of this paper, the Land Claims Court).

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<sup>30</sup> Walker note 15

*The influence of South African legal culture and formalism on the social transformative potential of the jurisprudence of the Land Claims Court on land reform.*

The crux of this argument is that because land reform legislation has left a number of issues open to interpretation, South African legal culture and legal formalism has filled-in the gaps left open by the legislation. This section analyses the extent to which legal culture and formalism has influenced the Land Claims Court's interpretation of land reform legislation.

Roux's analysis of the performance of the Land Claims Court in its first ten years concludes that legal culture and formalism explains jurisprudence of the court. Since the paper takes the baton from Roux's argument, it is necessary here to provide a background to his argument. Roux's argument draws from the scholarship of the transformative role of courts in new democracies.<sup>31</sup> In this scholarship courts are assessed in terms of their performance in holding the executive and parliament accountable and, as agents of social transformation. It is the latter that Roux and this paper is concerned with. Social transformation is defined within this discourse as 'the altering of structural inequalities and power relations in society in ways that reduces the weight of morally irrelevant circumstances, such as socio-economic status/class, gender, race religion or sexual orientation.'<sup>32</sup> The scholarship identified a number of indicators that influence a courts' role as an agent of social transformation. With regard to the Land Claims Court, this is as an agent of land reform. The variables identified by the scholarship include institutional indicators (the legislative framework enabling the courts to transform and the social composition of the judiciary that should ensure this social transformation, the resource indicators reflected in the ability of the litigants to approach the courts, the location of the court, the access to courts as informed by the cost of litigation and the pro-poor voice representation flowing from the extent to which poor people's voices are represented in the matters brought before the courts. Roux's assessment of the performance of the Land Claims Court is able to eliminate most of the variables that generally influence a courts' ability to act as an agent for social transformation. This is because the cases identified under the study involve matters where poor people are the subjects approaching the courts for a remedy under a pro-poor transformative legislation and represented by one of the most able senior counsel in the country and most influential and experienced public interest litigation organisation; the Legal Resources Centre. Indeed the legislation is a vehicle for the poor to claim rights in land

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<sup>31</sup> Roux T 'Pro-Poor Court, Anti-Poor Outcomes:

<sup>32</sup> Gloppen S 'Courts and Social Transformation: An Analytical Framework' in Gargarella R et al *Courts and Social Transformation in New Democracies* (2006) 35-59 at 37-38.

under very circumscribed circumstances. These cases indicate how the court ignored and/or failed to engage with plausible arguments brought before it on behalf of the poor to rule untransformatively and contrary to the expectations of the legislature. This is evident from the enactment of amendment legislation following the *McLeantown* decision, which amendment ousted the jurisdiction of the Land Claims Court from the restitution process. In another instance, following the *Serole* and the *Burhman v Nkosi* matter, concerning the interpretation of the Security of Tenure Act, the legislature amended the legislation to clarify the burial rights of farm-dwellers. Even the appeal courts have expressed displeasure with the Land Claims Court interpretation of land reform legislation. The dictum in the case of *Popela and Richterveld* illustrate this displeasure.<sup>33</sup> the legislature amended the Restitution Act because of the response of the legislature following some of the key judgments of the Land Claims Court and the outcomes of the appeal courts' decision. In the one case, the legislature effected amendments to the Restitution Act ousting the jurisdiction of the Land Claims Court and in another it introduced provisions in the legislation contrary to how the Land Claims Court had ruled. The appeal courts in less than charitable reference to the Land Claims Court, overturned the decision of the court.

Since the land-reform legislative framework is an enabling one, the cases involved poor black people claiming for their rights under the empowering legislation (which legislation is clearly intended for the benefit of poor black people under specifically defined circumstances), Roux concludes that the outcomes of these decisions may be only attributable to institutional indicators. These institutional indicators are the prevailing legal culture (which is predominantly formalistic), the doctrinal force of the common law and Land Claims Court judges' concern about their professional standing and reputation. Roux then sets out to illustrate his proposition through an analysis of certain Land Claims Court judgments. In doing so he is aware of the limitations of such an exercise. Indeed, any attempt to appraise the jurisprudence of the Land Claims Court will be limited insofar as it represents only a percentage of the judgments of the court. This paper admits the same constraints. However, the decisions that Roux and the paper engages with are important insofar as they generated a response from the legislature through an amendments either ousting the jurisdiction of the court or clarifying legislative intent and, appeal courts overturning the decisions and engaging quite harshly with the reasoning of the Land Claims Court. There are however many other decisions of the Land Claims Courts that demonstrated the commitment of the court to social transformation, even in

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<sup>33</sup> *Popela and Richterveld*.

the context of the constraints of the prevailing legal culture and formalism. Roux looks at the impact of the jurisprudence of the Land Claims Court in four areas of land reform, namely in the confirmation of settlement agreements made under the Restitution Act,

### Legal culture

The very first decision of the Land Claims Court to engage with policy considerations and purposive approach to the interpretation of legislation Dodson ruled that ‘what the becomes a disqualifying criterion is the fact that past evictions, the very problem which the Act sought to deal with... It is clear that the legislature intended to protect a particular class of persons whose way of life had been based, over the generations, on labour tenancy, without confining it to that part of the class who had not been subjected to eviction. Para 25; paragraph 40

### *Neo-institutionalism and the jurisprudence of the Land Claims Court*

Neo-institutionalism is part of the broader theory of institutionalism within the discipline of Sociology. This theoretical framework studies institutions, their development and how they gain legitimacy within the environment in which they function.<sup>34</sup> There are many definitions of institutions within this broader school, however, for purposes of this paper, McGill’s definition is more useful in the analysis of the Land Claims Court as an institution. McGill defines an institution as ‘an instrument for action’<sup>35</sup>. The Land Claims Court was indeed established to perform certain action within the confines of the enabling legislation. A neo-institutional perspective to the study of institutions views institutions as a reflection of the socio-political values that surround them; ‘a reflection of a larger social climate that should be the basis for analysis instead of the institutions themselves’.<sup>36</sup> In the neo-institutionalist tradition, ‘a legitimate organization is not established to achieve a particular task but can reflect the norms of a larger environment it is a part of – ultimately it is an entity that is shaped by the discourse and social realities of that environment’<sup>37</sup>. The paper adopts this framework, to

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<sup>34</sup> DiMaggio and Powell, Meyer and Rowan, Goldsmith, Tolbert and Zucker

<sup>35</sup> McGill R Institutional Development and the Notion of Sustainability. *International Journal of Public Sector Management* 7(6): 26-40 (1994); Institutional Development: A Review of the Concept. *International Journal of Public Sector Management* (1995)

<sup>36</sup> Jepperson RL ‘Institutions, Institutional Effects, and Institutionalism’ in *The New Institutionalism in Organizational Analysis* (1991) edited by Walter Powell and Paul DiMaggio, Chicago:University of Chicago Press 143-163 at 149

<sup>37</sup> Jepperson, Meyer and Rowan and Di Maggio and Powell

analyse the Land Claims Court as a court that is an instrument for particular action; the restitution of rights in land and securing tenure. In doing so, the outcomes of its decisions reflect the South African socio-political approach to land reform. Thus contextualised, the paper argues, the impact of the Land Claims Courts' jurisprudence on land reform should be viewed from the perspective of the larger socio-political climate in which land reform plays out, its role shaped by the political and socioeconomic discourse of the time and serves as an actor engaged in shaping that action-driven discourse. The judgment of the Land Claims Court in *Conradie* where the court decided that the dismissal of a woman's husband who was a labour tenant did not automatically result in the eviction of the same woman. The case for her eviction had to be determined in its own right since the woman was also an employee in her own right. Further, her husband although lawfully dismissed and evicted could not be denied access because of the wife's rights to family life. Although anomalous, this decision demonstrates the Land Claims Court as an action oriented-court that can impact on social transformation by dismantling patriarchal norms of viewing women as secondary citizens and vindicating women's rights. This is **actually** in accordance with the jurisprudence affirming gender equality which society is called upon to embrace at the non-contentious public space. The reversal of this decision in *Klaassen* without any deliberate engagement with *Conradie* in favour of the farm-owners and to the detriment of female farm workers who were again punished for the behaviour of their husbands was lamentable. Thankfully, the Constitutional Court in the recent *Daniels* decision has reinforced the transformative impact of the legislation by reverting to the *Conradie* position. The recent judgment by the Land Claims Court in [case name] is another example of the action-orientated nature of the Land Claims Court as an institution that can reflect the prevailing hegemonic view on the role of 'market value' in land reform in general and the calculation of 'just and equitable compensation in particular. The case of *Msiza*<sup>38</sup> is perfectly situated for this analysis. The judgment takes place in the context where 'market value' is used as an entry point for determining what constitutes 'just and equitable' compensation in the case of expropriation for land reform purposes. The judgment comes at a time when the current socio-political environment is critical of the use of 'market value' as entry point for determining 'just and equitable compensation'. This is a different context from the one which prevailed at the time when context different from Contrasted with the Gildenhuys judgment that established the principle of the use of the market value as entry point at a time when the socio-political discourse was in line with such an approach. The LCC and

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<sup>38</sup> *Msiza v Director-General for the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC)

the SCA judgment in the Msiza case in fact reflect the current pull-push aspects of the discourse around land reform.

The success trajectory of the LCC is influenced by the goals of the transition, that will inevitably play out in the outcomes and the direct impact on the litigants before the Court. South Africa's transition is premised on three fundamental tenets; reconciliation, social equality, support for a market-driven development. The inevitable tension between these competing interests affected the jurisprudence of the LCC. The argument here is that neo-institutionalism provides a perspective on the jurisprudence of the LCC that goes beyond an analysis of the professional legal culture to an examination of the socio-political context within which the jurisprudence takes place. It is this context rather than the jurisprudence itself that will provide transformation in the land/property space.

LCC oversees three pieces of legislation key to South Africa's land reform programme; the Restitution of Land Rights Act, the Land Reform (Labour Tenants') Act and the Extension of Security of Tenure Act. The role of the CourtThe purpose of the Restitution Act is to return the land to those dispossessed of their rights in land after 19 June 1913. The LCC is mandated by the Act to adjudicate disputes flowing from the various land reform legislation. If we accept the centrality of the LCC to the land reform project, then understanding its jurisprudence is vital

This paper is a critical reflection of the transformative potential of the LCC in light of the legal culture and in the context of land reform. The aim is to evaluate the impact of the LCC as a tool for transforming land ownership patterns and securing tenure through an analysis of its jurisprudence.