

# Land claims court -

AS South Africa moves closer to a post-apartheid era, the debate around land reform become increasingly important. This is especially so since it appears that the government-appointed Advisory Commission on Land Allocation has so far been unable to speedily address land claims. The concept of a land claims court to settle land claims is one of the options for land reform. At a recent Five Freedoms Forum seminar held in Pietermaritzburg, this issue was discussed in some depth. Here we present the views of the three speakers on the question of a land claims court - a member of a land claiming community, a land rights specialist and a member of the Natal Agricultural Union.

*The Five Freedoms Forum was formed in 1988 as an independent body to mobilise against apartheid. Today it sees itself playing a facilitative role in working towards a new South Africa.*

## Horatius Mabaso - Alcockspruit Community



"PEOPLE who are claiming land are those who originally owned land.

Because of apartheid they lost their rights to that land. Many people have made claims to the government, but they have not been successful.

"The government has also appointed an Advisory Commission on Land Allocation (ACLA). People did not have hope in this Commission because they had problems with the way this Commission was formed, its powers and rights. But when this Commission started to operate, people gave in and said, let's try it because there is no other channel for our claims. Then, as time passed, people realised that their doubts about the Commission were justified.

"As the Commission was working, the government started to sell land, such as that of the Majeng community. People were also still being removed because of apartheid - by the same government that tells the outside world apartheid has disappeared. An example of this is the removal of the Khosis community.

"Now people have really lost hope in the Commission. We want to try other ways to get back our land. We realise that a mechanism such as a land claims court could help.

"From a land claims court we expect land to be given back to those who had land taken away from them. We also expect a land claims to accommodate the landless. It should consider people who are evicted from farms.

People who stay on farms, stay there for years in the hope that the place will belong to them. When it is decided they should move, where should they go. Are they not also citizens of South Africa? They deserve a place to stay.

"People who have more land than they need should have that land expropriated. We believe the land that we had should be returned because that land was taken through apartheid laws and by force, but we are not talking with guns.

"We also believe that the people who are part of such a land claims court should be trusted by the community. We do not believe they should be appointed by the government.

"A land claims court must be able to make final decisions

# land reform option

and must do its work quickly.

"We realise that ACLA is delaying communities getting back their land. While we are talking to ACLA, the government is selling land and giving land to the bantustans. These bantustans didn't put their case to ACLA but we are told to do so. When the government removed us, they didn't establish a commission. We were removed within 60 days. There was no commission, no court.

"We believe a land claims court is the only way to address the issues of land claims. The aspirations of the people cannot be suppressed indefinitely.

"Black people were not given the opportunity to be trained to use land - as a result of apartheid. And this lack of training should not be used as an obstacle to getting land.

"The government should see to it that communities who want land are able to use land well. We do not seek confrontation, but want to live in cooperation and have reconciliation. Therefore, those who have something must be prepared to work with and share with those who have nothing. If it carries on that people continue to have nothing, then we will have problems."

## Anninka Claassens Centre for Applied Legal Studies (CALS)



"IN broad terms, a land claims court would apply non-racial criteria and, when appropriate, would award restitution.

"A model of a land claims court, which has not yet been finalised, would work as follows. The claim would be started by people who believed they have a right to go to the land claims court. They would go to the commission and the commission would investigate the claim and decide whether it should go to the land claims court. The commission would decide this by looking at certain entry criteria.

"In the case of a claim based on forced removal, the commission would first ask if the people occupied the land for a substantial time before the removal. Secondly, the commission would determine whether the people were removed because of apartheid land policies. This would include people who could not enter into proper agreements or contracts because of apartheid. Finally, the commission would determine whether the claimants suffered a loss as a result of the removal

or whether they were compensated.

"People who were not removed but who are threatened with removal could also bring a claim. The commission would look at how long they had occupied the land and if the owner of the land opposed their getting secure tenure.

"So, the commission would decide if the claim goes to court on these criteria. If the commission decided that the claim should not go to the land claims court, then people bringing the claim could appeal to the court directly. If people are evicted before the land claims court hears their claim, then their case would have to go to the court. In most other cases, though, the commission would try to settle the claim through mediation.

"If it was decided that the claim would go to the land claims court, then the commission would ensure that nothing happened to the land while the claim was being made.

"After the case has been referred to the land claims court, the commission would notify all possible parties who might have a claim to the land being considered. This notice is important because a claim

## ▼ **Land claims court -**

on a piece of land would be heard only once.

"The commission would then help all the claimants to investigate ways of settling their claim. It would encourage the parties to reach a negotiated settlement. Various incentives would be built into the system to encourage this, for example, compensation.

"If settlement was reached through negotiation, then the commission would send a report of the outcome of this to the land claims court. The land claims court would then make decisions based on this report.

"If the parties were unable to settle through negotiation and a dispute was declared, the land claims court would take up the issue and would hear evidence from the parties. On the basis of this evidence the land claims court would make a decision and an award. In doing so, it would consider five criteria:

- length of time of physical occupancy
- birthright (a person born on the land should be favoured)
- investment (broadly defined)
- loss (including: financial loss resulting from removal, loss for the present owner of the land and impact of loss)
- social benefit

Title deeds are absent from the above criteria. This does not mean they would be completely ignored but they would not be the strongest case for land. This is because it is important for the land claims court that the claimants compete on an equal footing.

"In making its decision, the land claims court would act as a court of equity - it would balance different criteria (not giving particular weight to any one) to work out what is fairest. The court would have power to make a broad range of awards, for example, it could:

- award contested land in whole or part
- award compensation from the state
- provide funding to buy neighbouring land if such a possibility exists
- compensate people who were dispossessed as a result of an award made by the land claims court

"After a decision is announced, the parties may ask for review of this by the appellate division of the land claims court. However, the review process would have to be very quick.

"This is the model, but there are a number of remaining questions and problems:

- the land claims court needs funding - where will this come from?
- what will be the historical cut-off date for claims

- who should sit on the land claims court and who should sit on the commission? We believe the commission should be made up of people from different land related interest groups. The land claims court, we believe, should be chaired by a supreme court judge and be made up of four others - not necessarily lawyers.

From the work that has been done on the land claims court we can conclude two things:

- It is possible to have a workable land claims court.
- The land claims court would be limited to a small category of people (rural, African, dispossessed). There are obvious dangers to this. Unless there are other mechanisms for those not covered by the land claims court, they will try to use the land claims court.

"For the land claims court to have benefit, it must be introduced with or after other land reform measures. There must be a meaningful land reform process in place to handle the issue of landlessness. There must also be processes for people who need greater security of tenure and for compensation for Group Areas Act removals."



## William Mullins - President, Natal Agricultural Union (NAU)



"WE are willing to listen to other people's claims, if necessary. The most important human right is the right to a full stomach. Whatever process takes place must ensure that there is enough food production. And I ask that you see my presentation against this background.

"The NAU believes that there should be a judicial process, if necessary a land claims court. We also believe that all legal costs should be borne by the state, so that everyone can have access to this judicial process. Regarding this judicial process, we must bear the following in mind:

- How far back should we go in history? We believe that claims should not go further back than 1913, which we see as the start of racial landownership.
- Was there compensation when expropriation occurred? If there was, then it should have been market oriented. It is

important to remember that the 500 000 hectares of land available in Natal was expropriated from white farmers.

- Who qualifies to make a claim? Original landowners? How far down the family tree do you go?
- Which claimants have proof of legitimacy - who can prove that they possessed land?
- What will happen to the land once the claim is settled?

"The NAU recognises the rights of people who were expropriated under racial laws. We believe these claims must be addressed by a judicial process or land claims court. According to the NAU, farmworkers and labour tenants do not qualify as potential claimants. We don't recognise their right just because they have been living on the land.

"We believe there is a bright future for the rural areas of Natal, provided we don't destroy the present infrastructure. We believe there is a place for the commercial farmer and the smaller farmer, who, through the free market system, will also develop into big commercial farmers in a few years time."

## Disposing of our future

A LAND claims court could play a key role in speedily addressing one of the main aspects of a future land reform process - land claims. But while debate continues around various options for land reform, the government is speedily implementing measures, which, if left unchecked, will severely limit future land reform possibilities. The government is aware that state land is one of the few categories of land which is relatively non-contentious and therefore most suited to meeting immediate and pressing land reform needs.

Besides pressing ahead with the current transfer of about 1.2 million hectares of state land to the homelands, the government transferred 3 million hectares of state land to the homelands in March this year. In addition, the government is quietly selling off state land. Examples of sales this year are:

- about 7 885 hectares of land in the Trichardtsdal District, near Lebowa
- about 6 000 hectares of land. The land is being claimed by the Majeng community.
- 1 759 properties in Cape Town, sold by the House of Representatives over the past year. The properties were originally bought from owners who were forced to move in terms of the Group Areas Act.