

# Court judgment provides clarity on land claim evaluation process

By [Samantha Robb](#)

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In a Land Claims Court judgment on 19 October 2020, Judge Spilg established a precedent for evaluating land claims that places the onus on the Land Claims Commission to ensure that the land intended to be described on the land claim form, and not what was written, is the claim that is investigated.



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A recent Land Claims Court decision has provided much-needed clarity on the obligations of the Land Claim Commission when interpreting land claim forms.

When filling out its land claim form, the Nyavana Traditional Authority (Nyavana) wrote three names – a river and two farms. With these three names, it intended to mark the outer boundaries of the land it was claiming.

After the 31 December 1998 cut-off date for land claims, the Nyavana sent the Regional Land Claims Commission (RLCC) a letter indicating that it had written an incorrect name on the claim form, having mistakenly believed that the name it had used referred to a larger area. The letter also listed the cadastral names of the farms that it intended to claim.

Although it initially recognised these farms in its research report, the RLCC later refused to gazette the farms, as required by section 11 of the Restitution of Land Rights Act (the Act). The RLCC adopted a narrow reading of the Nyavana's land

claim form, indicating that the Nyavana had not properly claimed all the farms it later claimed in its letter. The Nyavana brought an application to, amongst other things, compel the RLCC to gazette all the farms that it intended to claim by setting out the three borders in the land claim form.

Judge Spilg, in a judgment handed down on 19 October 2020, set precedent on how to characterise the legal question which arises when the land described on the land claim form lodged under section 10 of the Restitution of Land Rights Act (the Act) is not identified with specific reference to the cadastral system of deeds registration.

### Judge Spilg considered the following:

- Section 11 of the Act sets out the procedure to be followed by the Land Claims Commission after a claim is lodged. Spilg referred to the important purpose of gazetting a land claim form, highlighting that the consequences of a section 11 publication affects real rights and sterilises the gazetted land in issue.
- He also considered the prescribed manner for lodging a form, which is governed by section 11(2) of the Act and the Rules. The Rules provide that the claim must be lodged substantially using the form on Annexure A, which is the land claim form. He emphasised that the wording on the land claim form states:

*“ Please supply as much information as possible. Please indicate where the information is not available. The more information you can supply, the more helpful it will be. Please note that the Commission is there to assist you, where needed. ”*

Spilg said the legislature, in what he phrased "the clearest terms", accepted that the details provided on a claim form may be incomplete; that some information may not be available to the claimant when filling in the form; that the completed form may only contain limited information which may be based on the claimant's knowledge or perspective; and that the RLCC's personnel can assist in completing the form. The engagement between the RLCC and the claimant, he concluded, is facilitative, not adversarial.

- Very importantly, Spilg addressed the object of the Act. He said: "The Act is one of the most significant pieces of post-apartheid remedial legislation. It was enacted to redress the past injustices of apartheid which stripped people of their dignity and rights by forcibly removing them from land through racially-discriminatory laws and practices." This sentiment is the crux of Spilg's decision in this judgment. It was apparent to the drafters of the Act that land may have been described differently at the time of dispossession, particularly as claimants may have known the land through ancestral description, rather than the cadastral system of land surveying.

Spilg emphasised that the legislature would have been aware that "the debasement of human dignity and values wrought by apartheid brought with it a fundamental curtailment of opportunities" and the result might be that claimants would not have the financial means to obtain professional assistance to complete the land claim form, nor might they be literate enough to do so. It is essential to understand that the legislature envisaged that assistance would be provided to claimants when they filled out land claim forms.

The judgment makes it clear that the onus lies on the RLCC, not the claimant, to undertake detailed research on what land is actually being claimed on the land claim form and ensure that the correctly described land is claimed and gazetted. The Act imposes a positive duty on the RLCC to take reasonable steps to ensure that claimants are assisted in preparing and submitting claims.

Accordingly, the court ordered that the RLCC was wrong to adopt a narrow interpretation of the Nyavana's land claim, because the form did not accurately describe each farm it was claiming. The Court ordered the RLCC to gazette each farm within the borders that were described in the Nyavana's land claim form so that the land claim would be accurately reflected in the gazette. The Court even went so far as to include an additional farm that was included in the application but not listed in the letter to the RLCC, because it fell within the boundary of the three names in the original land claim form. This is an important victory for land claimants whose claims have been stifled by a narrow and restrictive approach by the RLCCs.

Spilg described the question for the RLCC (to help exclude false claims) as "not whether the form sufficiently describes the land but rather whether the land so described in the form was intended to mean the land which the claimant now contends for."

The judgment serves as an important reminder that we should not lose sight of the purpose for which certain post-apartheid legislation was enacted, and how important it is to ensure that the object of this legislation is fulfilled.

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## ABOUT THE AUTHOR

Samantha Robb is an Associate at Webber Wentzel.

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