Submission on the Upgrading of Land Tenure Rights Amendment Bill [B 6B - 2020] (s76).

Natural Justice: Lawyers for Communities and the Environment (NJ)

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1. Introduction

On 17 February 2021, the Select Committee on Land Reform, Environment, Mineral Resources and Energy invited the interested people and stakeholders to submit written comments on the Upgrading of Land Tenure Rights Amendment Bill [B 6B - 2020] (s76).

The Bill seeks to amend the Upgrading of Land Tenure Rights Act, 1991, so as to provide for the application for conversion of land tenure rights to ownership; to provide for the notice of informing interested persons of an application to convert land tenure rights into ownership; to provide for an opportunity for interested persons to object to conversion of land tenure rights into ownership; to provide for the institution of inquiries to assist in the determination of land tenure rights; to provide for application to court by an aggrieved person for appropriate relief; to provide for the recognition of conversions that took effect in good faith in the past; and to provide for matters connected therewith.

Natural Justice: Lawyers for Communities and the Environment (NJ) welcomes the opportunity to make a submission in accordance with the invitation to submit written comments by the Select Committee.

NJ has read and considered the implications of the Upgrading of Land Tenure Rights Amendment Bill and submits the following comments and recommendations to the Select Committee. NJ's submission sets out a) background to the organisation and its work; b) comments on the Amendment Bill and c) makes recommendations for amendments.

2. Introducing Natural Justice

Natural Justice: Lawyers for Communities and the Environment is a non-profit organization, registered in South Africa since 2007.

Our vision is the conservation and sustainable use of biodiversity through the self-determination of Indigenous peoples and local communities.

Our mission is to facilitate the full and effective participation of Indigenous peoples and local communities in the development and implementation of laws and policies that relate to the conservation and customary uses of biodiversity and the protection of associated cultural heritage.

Natural Justice work at the local, national, regional, and international levels with a wide range of partners. We strive to ensure that community rights and responsibilities are represented and respected at the broader scales and that gains made in international fora are fully upheld at lower levels.

Given the importance of the Amendment Bill, also within the context of land reform NJ wishes to submit its comments to the Select Committee.

We further express our request to make a verbal submission or participate in any meaningful engagements with the department when an opportunity arises.

3. Background, legal-historical context and the purpose of the Amendment Bill

The Upgrading of Land Tenure Rights Act, 1991 (Act No. 112 of 1991) hereinafter referred as a the Act), was enacted to enable the upgrading and conversation into ownership of certain rights granted in respect of land, for the transfer of communal land in full ownership to communities and other related matters.

The purpose of the Bill seeks to amend sections of the Principal Act which were found to be unconstitutional. The conversion was in the matter of Rahube v Rahube and Others (Case No. 101250/2015[2017] which ended up in the Constitutional Court (Case No. CCT 319/17[2018]. At issue was a conversion of a deed of grant granted in terms Proclamation No. R.293 of 1962 in the township of Mabopane in and around Tshwane which in 1991 fell under the then Bophuthatswana territorial authority. Since the coming into operation of the Act on 1 September 1991, individuals have been converting some of the rights referred to above into ownership. One such conversion was however challenged in the courts for discriminating against women in that automatic upgrading of tenure rights into ownership perpetuated Apartheid-era discrimination as tenure rights could only vest in males and not women.

The Bill provides for the land rights earmarked for upgrading and conversion into ownership which are listed in schedule 1 and schedule 2 of the Act.

In February 2020, Department of Agriculture, Land Reform and Rural Development approached Cabinet to obtain approval to gazette the Bill for public comment however, taking into consideration the short timeframes Cabinet held that public comment can only be happen during the Parliamentary hearings.

The objects of the Bill are to-

I. provide for the application for conversion of land tenure rights to ownership,
II. provide for the notice of intention to convert tenure rights into ownership;
III. provide for an opportunity for interested persons to object to conversion of tenure rights into ownership;
IV. provide for the institution of enquiries to assist in the determination of land tenure rights;
V. provide for equality in the conversion of tenure rights into ownership;
VI. provide for recognition of conversions that took effect in good faith in the past; and
VII. to provide for matters related to the above.

Section 1 of the Bill seeks to amend section 2(1) of the Act. The amendment is a result of Rahube v Rahube and Others, where the applicant successfully challenged the constitutionality of section 2(1) of the Act in the Pretoria High Court, which was confirmed by the Constitutional Court. The applicant was evicted from her home by her brother, the first respondent, where she had lived since the 1970s. The grandmother was the ‘owner’ of the property until she passed away in 1978. There is no documentary proof of her ownership. In 1987, the first respondent was nominated by the family to be the holder of a certificate of occupation and was later issued a deed of grant. The deed of grant was issued in terms of Proclamation R293, promulgated in terms of the Native Administrations Act, which only made provision for men to be heads of the family. The Upgrading of Land Tenures Rights Act automatically converted rights in property, as deed of grants to ownership rights. This meant that only men could benefit from the upgrading of tenure rights to ownership.

Section 2(1) was declared constitutionally invalid insofar as it automatically converted any deed of grant or any right of leasehold into holders of ownership which was in violation of women’s rights in

terms of section 9(1) of the Constitution. Section 9(1) prohibits unfair discrimination of any persons. Section(1)(a) of the Bill now states that:

“any person who is, the registered holder of a land tenure right according to the register of land rights in which that land tenure right was registered in terms of the provisions of any law or could have been a holder of that land tenure right could not as a result of laws or practices that unfairly discriminated against such person, may apply, as prescribed, for the conversion of such land tenure right into ownership.”

Section 1(a) and (c) stipulate that the conversion of the ownership of land applies to land that is in a formalized township as well as land which has been surveyed but does not form part of a township.

The Bill further states that on receipt of the application, the Minister shall publish a notice in the Government Gazette, which will inform family members, putative holders and other interested parties of the application for conversion. This gives them an opportunity to object to the application. If an objection arises, the Minister is obligated to institute an inquiry and decide on the matter relating to the conversion of land tenure rights.

Section 2 of the Bill amending section 4 of the Act states that a person who is the holder of a land tenure right or could have been the holder but for the laws or practices that unfairly discriminated against such person, shall be granted all the powers as if they are the owner of the erf or land in respect of which the land tenure is granted in a formalized township for which a township register has not yet been opened.

4. NJ’s Comments and Points of Contention

A. While the change now includes Gazette notification process to notify concerned parties, this approach continues to be entirely out of touch with the reality of most of the women who might be impacted by this Act. It is assumed that women in rural and urban areas have access to Government Gazettes in the first place, and that this access is regular enough for them to spot a notice relevant to them and file an objection within an unspecified period, probably not exceeding one calendar month. With all due consideration, NJ has no reason to assume that this would be a solution open to the vast majority of women who will be impacted by this legislation.
B. NJ contends that any mechanism that relies on the State to make decisions about valid tenure claims rather than local processes based on local expertise would fall short of capturing the true essence of the tenure it seeks to obtain.
C. However, insofar as the law is adamant about the State centralizing this mechanism, more proactive mechanisms for notifying interested parties exist in other pieces of legislation and should, at the very least, be imported here. Whatever path is chosen, the particulars of the new procedure must be focused on the kind of inquiry into the process's consequences that the Constitutional Court envisioned when allowing parliament to properly debate these amendments.
D. The amendment requires the Minister to "make an inquiry" if an objection is received. We have no idea what the nature of such an investigation will be or how the department intends to fund it. Despite promises to provide the Committee with a draft Socio-economic Impact Assessment (SEIA) of the proposed Bill, and despite specific demands from partner organizations to see the SEIA, no one has seen it. Making substantive remarks on a clause as vague as this one is difficult.
E. Most importantly, the amendments' mechanisms do not recognize the current tenure structure on the field, whereby tenure is arranged at the family level. For generations, local processes and knowledge have served as the foundation for localised tenure security. The Act tends to

depend on a person filing an application on his or her own behalf (rather than on behalf of the family), others objecting, and the Minister arbitrating between the different individual claims. That does not represent the majority of tenure agreements on the ground; rather, it serves to elevate one person's rights over the often equal and conflicting rights held by others within a family.

F. Unsurveyed land held under a PTO or customary entitlements is covered by Section 3 of the current legislation. Since this section is so out of touch with the reality of how PTOs are currently held and handled, evidence shows that the people it is supposed to help most frequently neglect it. Where it is used, however, there is no reason to believe that the prejudice perpetuated by section 2 of the Act would not be repeated by section 3. Its widespread implementation would only intensify this potential impact.
G. One of the main reasons why the Act was not implemented throughout the country at first was that the complicated nature of communal tenure agreements was not well known, and an alternative mechanism for recording and registering those rights established. The Communal Land Rights Act's inability to protect these arrangements resulted in its constitutional demise. Making ULTRA law applicable throughout the country now risks undoing all previous efforts to protect these rights, with devastating repercussions for South Africans who have already been harmed by the government's insufficient response to section 25(6) of the Constitution.
H. It is unclear what this amendment to ULTRA means for KwaZulu Natal, where the KwaZulu Natal Land Affairs Act of 1992 provides for tenure upgrading in areas where ULTRA can now apply. Worse, it is unclear if the Ingonyama Trust would be deemed a ‘owner' for the purposes of ULTRA, giving it excessive leverage to obstruct future localized tenure upgrades.

5. Conclusion and recommendation

While amending ULTRA is necessary to reduce the Act's effect on the erasure of certain tenure rights, especially those held by women, it does not provide a long-term solution to securing tenure in South Africa. The legislature should concentrate its efforts on the larger initiative.

In the meantime, NJ recommends that the Interim Protection of Informal Land Rights Act be made permanent, regulations enforced, and its applicability alongside ULTRA made clear in these amendments to help alleviate the harm caused by the absence of an effective land recordal and registration system.

Concerning the proposed ULTRA amendments:

- The proposed amendments maintain a top-down model in which the State determines tenure rights holders. This model is flawed and should be replaced with a method that starts with local processes and knowledge.
- The proposed application, note, and objection model is unworkable and unrealistic.
- There is not enough information on how objections will be treated to provide useful feedback.
- The Department has not specified how these newly developed mechanisms will be paid for.
- There is no indication that the amendment's effect on extending the Act's applicability has been evaluated. Given the magnitude of the potential impact, this is extremely concerning.