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LRC

LEGAL RESOURCES CENTRE

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6 December 2013

The Honourable Chair
The Portfolio Committee on Economic Development
Ms EM Coleman, MP

For attention:
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Per email: nskaka@parliament.gov.za

SUBMISSIONS ON THE INFRASTRUCTURE DEVELOPMENT BILL B 49-2013

1.1. The Legal Resources Centre (LRC) is an independent non-profit public interest law clinic which uses the law as an instrument of justice. It works for the development of a fully democratic South African society based on the principle of substantive equality, by providing free legal services for the vulnerable and marginalised, including the poor, homeless, and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social economic or historical circumstances. The LRC, both for itself and in its work, is committed to:

1.1.1. Ensuring that the principles, rights and responsibilities enshrined in the Constitution are respected, promoted, protected, and fulfilled;

1.1.2. Building respect for the rule of law and constitutional democracy;

1.1.3. Enabling the vulnerable and marginalised to assert and develop their rights;

1.1.4. Promoting gender and racial equality and opposing all forms of unfair discrimination;

1.1.5. Contributing to the development of a human rights jurisprudence; and

1.1.6. Contributing to the social and economic transformation of society.

1.2. The LRC has been in existence since 1979 and operates throughout the country from its offices in Johannesburg, Cape Town, Durban and Grahamstown.

1.3. The LRC represented and continues to represent citizens and communities in litigation involving:

- customary law and its status
- communal land and new development on communal land including mining
- environmental regulation and mining.

1.4. We appeared on behalf of clients in the Constitutional Court in the matters of *Bhe*,[1] *Richtersveld*[2] and *Shilubana*.[3] Our clients include the communities that successfully challenged the constitutionality of the Communal Land Rights Act of 2004.[4]

1.5. The LRC also represents a number of communities in court litigation and administrative representations concerning the impact of the Traditional Leadership and Governance Framework Act including the communities of Daggakraal, Pilane and Xalanga. Client communities concerned with the award of mining rigts without community consent include Sekuruwe, Xolobeni and Wonderfontein/Umsimbithi.

1.6. We also made representations to the Portfolio Committee on Mineral Resources in September this year on the Minerals and Petroleum Resources Development Amendment Act Bill B15-2013. Those submissions, which we believe are directly relevant to the Infrastructure Bill currently under consideration, pointed to the following key concerns:

- The failure to recognise the historical impact mining has had on rural communities in South Africa, which creates a need for the legislator to make special consideration and measures to advance directly affected

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1 *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).

2 *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003).

3 *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008).

4 *Tongoane and Others v The Minister of Agriculture and Land Affairs and Others* CCT 100-09. The Legal Resources Centre, with Webber Wentzel attorneys, represented four communities Kalkfontein, Makuleke, Makgobistad and Dixie in a challenge on the constitutionality of the Communal Land Rights Act of 2004. The Act was declared unconstitutional by the Constitutional Court in May 2010. Prior to the institution of legal proceedings on the CLRA, the LRC and its clients made extensive written and oral representations to the department and to parliament on the problematic and unconstitutional aspects, both procedural and substantive, of the CLRA Bill.

communities on communal land in respect of historic, current and future mining on their land;

- The failure to address the status of customary tenure and the rights of customary communities to consent as provided for in the Constitution and the Interim Protection of Informal Land Rights Act. The mining laws as they currently stand purports to override the limited protection afforded by land tenure law;
- The failure of the Bill to recognise the tension of opposing development paradigms and community participation in this regard as provided for in regional and international law.

1.7 Our submissions here will deal in brief with three central concerns with the Bill, namely:

- The lack of any protection afforded to rural communities on communal land who may well be disproportionately impacted by the Bill;
- The impermissible discretion afforded by the Bill to the Presidential Infrastructure Coordinating Commission; and
- The tagging of the Bill.

2. <u>The requirements to protect rural communities on communal land</u>

2.1. We submit that the Infrastructure Development Bill will have a major and even disproportionate impact on the rural communities of South Africa and in particular those living on communal land. This is motivated by at least two reasons:

2.1.1. The vast majority of recent mining expansion in South Africa (as in Africa and other southern continents) has been in the rural areas previously unexplored, in particular the former homelands.

2.1.2. The Memorandum on the Objects of the Infrastructure Development Bill point out, in paragraph 1.2, that one of the central motivations of the Bill is the fact that "investment in infrastructure is a particular imperative for South Africa because apartheid was characterised by underinvestment in infrastructure in black communities, especially in rural areas".

2.2. This means that the effect of the Infrastructure Development Bill on rural communities may be for them to, at the same time, **bear the brunt** of large scale infrastructure development for mega-projects while also **potentially benefitting** from local infrastructure development catered for their needs.

2.3. These two major objectives of the Bill thus largely target the same space – the former homelands, or just more than 13% of South Africa's territory. A territory that is inhabited by between 16 and 21 million (formerly disadvantaged) South Africans.

2.4. Given this reality, it is our submission that the Bill will fail in its objective of investing in rural black communities in its current form as it provides for no mechanisms whatsoever to ensure that (a) the rights in land of these communities are protected and (b) the decision-making processes and input of these communities are respected in determining development priorities.

2.5. We contend that rural communities require special mechanisms contained in the Bill to ensure that they are treated as rightsholders in terms of Infrastructure Development Bill.

2.5.1. The majority of rural black communities reside on communal land governed in terms of customary law. This continues to translate into insecure tenure – in particular in the absence of the legislation to secure communal tenure as envisioned by ss25(6) and (9) of the Constitution.[i] As a result, rural communities on communal land do not enjoy the legal protection and bargaining power of common law owners faced with development potential on their land.

2.5.2. The Bill further facilitates the insecurity of tenure of rural communities by only dealing with the existence of common law owners (in the expropriation section) and ignoring the other forms of ownership in South Africa that in fact affects the majority of South Africans. The provision of expropriation will in effect provide common law owners with the legal mechanisms to negotiate fair terms for themselves (as lawful expropriation requires it). <u>The same does not apply to customary rights holders.</u>

2.5.3. Protection and recognition of customary forms of ownership and rights are provided for in the Interim Protection of Informal Land Rights Act 31 of 1996. However, the Bill overrides those protections in the absence of explicit recognition of the provisions of that Act. This, we submit, is a central failure of the Bill.

2.6. Furthermore, we contend that similar mechanisms must ensure that the participation of rural communities in the decisions that will lead to the implementation of projects that affect them, is effective:

2.6.1. The communities inhabiting the former homelands suffered complete marginalisation from the development discourse in apartheid South Africa, as this Bill acknowledges. Such marginalisation is systemic, however, and could never be overturned simply by South Africa's transition to a constitutional democracy. As much is recognised by the transformative agenda of our Constitution which requires, amongst other things, special measures to ensure that the marginalised is given sufficient **advantage** so as to attain a position of equality. These communities remain some of the poorest in the country, and as such they are inevitably not part of the development discussions dominated by powerful interests.

2.6.2. In the context of the development discourse that will inform infrastructure development, it means that special mechanisms must ensure that marginalised communities at least **participate meaningfully** in decisions that will affect them. That is a principle established by the Constitutional Court in the context of public participation: *Participatory democracy is of special important to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.*

2.6.3. The historic marginalisation of rural communities was facilitated, in part, by reducing the status of customary/indigenous law to that of localised rules with no legal force outside the boundaries of the community. That discriminatory attitude towards customary law was decisively overturned by the Constitution (in recognising customary law as an independent source of law) and subsequently reinforced by the Constitutional Court. As a result, and as a constitutional imperative, the decision making processes of rural communities in terms of their own customary law must at a minimum be respected by any competing legislation.

2.7. How does the Infrastructure Development Bill fare in ensuring the meaningful participation of communities in decisions that will affect them?

2.7.1. S15(1) provides that applicants [for strategic integrated projects] must "submit all applications [for approvals, authorisations, licences, permissions and exemptions] simultaneously for consideration";

2.7.2. S17(1) requires that "any consultations and participation must, as far as it is possible and in order to expedite the matter, run concurrently"; and

2.7.3. Schedule 2 envisions the entire "public consultation process on the application and project plan" to last no longer than 30 days.

2.8. The Bill thus:

2.8.1. makes no special provision to ensure that marginalised rural communities who will be affected by any potential projects will be allowed meaningful participation in the decision to allow the project, the decision to designate the project in terms of the Bill or the implementation process; rather the Bill endorses the fiction that the 'public' is a collection of equal citizens all equally able to participate in such important decisions.

2.8.2. makes decision-making in terms of customary law impossible in that it provides for only 30 days for all consultations with the 'public'. Customary decision-making is layered and participatory and thus requires time.

2.8.3. Finally, in aligning all participation processes – whether about the nature, feasibility or desirability of the project, the proposed impact of the project (social, environmental or otherwise), the implementation process – the Bill presupposes a successful outcome for every participation process. Nothing in the Bill suggests that communities may stop a proposed project if they are in disagreement with it. This, we submit, is contrary to South Africa's international and regional human rights obligations.[ii]

3. Unlawful parameters of the discretion of the Presidential Infrastructure Coordinating Commission

3.1. The Commission is, in terms of section 4(c) of the Bill, mandated to "designate strategic integrated projects".

3.2. Such designation is regulated by section 7 of the Bill which provides that a project qualifies as a strategic integrated project if "it would be of significant economic or social importance to the Republic" or "it would contribute substantially to any national strategy or policy relating to infrastructure development".

3.3. We submit that these criteria provide insufficient constraints to the discretion of the Commission as decision-maker:

3.4. As the phrase itself suggests, "the rule of law" requires that there must be rules of law which operate at some level of generality in order to indicate what conduct is proscribed. If conduct is to be subjected to the governance of law, then the "rule of law" requires that this control must occur by virtue of the operation of rules rather than by virtue of a series of ad hoc determinations on the part of administrators.

3.5. The principle reiterated by O'Regan J in *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 47:

"It is an important principle of the rule of law that rules be stated in a clear and accessible manner."

3.6. The jurisprudence of the Constitutional Court indicates that Parliament must furnish adequate guidelines in order to indicate how officials are required to exercise their discretionary powers. In *Dawood*, Parliament had conferred an administrative discretion on functionaries without providing any guidelines regarding the circumstances in which the discretion should be issued. The Constitutional Court held that this was constitutionally impermissible since "no attempt has been made by the legislature to give guidance to decision-makers in relation to their power" (para 55).

3.7. In *Janse van Rensburg NO v Minster of Trade and Industry* 2001 1 SA 29 (CC) para 25, Goldstone J held as follows for the South African Constitutional Court:

3.8. "[A]s this Court has already held (in the context of a limitation analysis), the constitutional obligation on the Legislature to promote, protect and fulfil the rights entrenched in the Bill of Rights entails that, where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised. The absence of such guidance [renders] the procedure provided in s 8(5)(a) [of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988] unfair and a violation of the protection afforded by s 33(1) [of the Constitution]".

3.9. In footnote 29, Goldstone J indicated that other provisions of the legislation under consideration "may also be of concern because they confer a wide discretion without any guidance as to their exercise by the Minister".

3.10. The Constitutional Court reiterated this principle in *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) para 34: "...the delegation must not be so broad or vague that the authority to whom the power is delegated is unable to determine the nature and the scope of the powers conferred. For this may well lead to the arbitrary exercise of the delegated power. Where broad discretionary powers are conferred, there must be some constraints on the exercise of such power so that those who are affected by the exercise of the broad discretionary powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision."

3.11. The above-mentioned judgments indicate that, in circumstances where Parliament confers a wide discretion on an administrative body, it must provide adequate guidance as to the manner in which those powers should be exercised failing which the law might arguably violate the constitutional guarantee of just administrative action.

3.12. We submit that the guidance given the Commission in designating strategic projects is so vague as to give insufficient guidance as to how this power should be exercised. It is hard to imagine how any project can definitively be described as NOT 'of social or economic importance', for example. As such, the provision provides impermissible discretion to the Commission and will thus hardly withstand constitutional muster.

3.13. In the same vein, it is of concern that the Bill is so adamant to 'expedite' infrastructure development projects and to avoid unnecessary delays that it is in danger of completely overriding the legislative constraints set in place by other relevant pieces of legislation. This is certainly the case when the Bill aligns all application and consultation procedures. It is our submission that the drafters of the Bill are conflating the slowness of bureaucracy with the very necessary constraints on administrative power. This is a fatal conflation and, in the final analysis, constitutionally impermissible.

4. <u>The tagging of the Bill</u>

4.1. We were pleased to be informed by the secretary of your portfolio committee that the proposed tagging of the Bill is no longer that of a section 75 Bill, but of section 76. In the circumstances and pending the formalisation of the tagging proposal, we simply reiterate our submission as to why this Bill should follow the section 76 procedure:

4.1.1. For the purposes of determining the correct tagging of bills, the Joint Rules of Parliament created the Joint Tagging Mechanism ('JTM'). The JTM consists of the Speaker and Deputy Speaker of the NA and the Chairperson and Deputy Chairperson of the National Council of Provinces ('NCOP').

4.1.2. Section 75 deals with 'ordinary Bills not affecting provinces' and section 76 with 'ordinary Bills affecting provinces'. In terms of s 76(3), a bill within a functional area listed in Schedule 4 to the Constitution must be passed using s 76 procedures. The meaning of 'within a functional area' and what it means for the tagging of a bill has been the subject of litigation.

4.1.3. The Constitutional Court has found that the tagging of a bill for the purposes of procedure should not be conflated with the legislative competence of the various legislatures. Thus, while Schedule 4 lists areas of concurrent competence, the reference to Schedule 4 in the context of determining the correct procedure for the passing of a bill does not mean that the provinces may only provide input into legislation which falls within their competency. Rather, provincial input extends to all 'legislation that substantially affects the interests of provinces'.

4.1.4. In *Tongoane*, the Constitutional Court confirmed the 'substantial measure' test for determining the correct tagging of Bills.

"What matters for the purposes of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill "in substantial measure fall within a functional area listed in Schedule 4". This statement refers to the test to be adopted when tagging Bills.[...] It focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4 and not on whether any of its provisions are incidental to its substance."

4.1.5. It is suggested that if this test is applied to the Infrastructure Development Bill, then it should be tagged as a section 76 Bill. At least the following areas listed in Schedule 4 of the Constitution are implicated by the Bill in its current form:

- Regional planning and development
- Urban and rural development
- Indigenous and customary law
- Industrial promotion

We look forward to hearing from you regarding our proposals. We hereby request to be given and opportunity to present an oral presentation to your committee when it meets in January 2014. We shall then present appropriate wording to address the lack of protection of land rights on communal land.

Your faithfully

LEGAL RESOURCES CENTRE
Per:

WILMIEN WICOMB

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[i] Upon independence, most African countries adopted the colonial legal framework wholesale – especially, as Okoth-Ogendo points out, in view of the development framework's "general ambivalence as regards the applicability of indigenous law". Indigenous law and customary legal systems were regarded as inferior, were never extended to areas covered by colonial laws and, when applied, it was done only to the extent that it was not repugnant to Western justice and morality or inconsistent with any written law.

It is trite that the post-colonial era sadly continued the relegation of customary law to a separate and unequal system of law that rarely found its way into the formal, 'Western' courts. Whereas many African countries adopted constitutions towards the end of the twentieth century which in many cases recognise customary law as an equal source of law to be applied by the courts 'where appropriate', the application of customary law in the formal courts remains almost exclusively limited to issues of personal law, and rights claimed by individuals.

The South African courts are a notable and significant exception.

The seminal case with regards to customary forms of tenure was that of the *Richtersveld* community which reached the Constitutional Court in 2003. This judgement confirmed the constitutional recognition and protection of customary law as found in sections 39(3) and 211 of the Constitution.

As customary communities across the continent remain largely unable to assert their tenure rights within the formal courts precisely because the mainstream legal system struggles to accommodate the customary legal concepts foreign to common law, any development framework that pretends that the separation between the status of the customary/communal tenure and the common law property system will only entrench the undermining of the former.

The question of communal tenure is inextricably linked to the legacy of the homelands which not only created clusters of Africans with no citizenship rights, but denied people any rights to resources thereby facilitating extreme poverty and inequality. The deep structural entrenchment of such inequality will inevitably remain a challenge for decades to come.

There can be little doubt that the crisis of a lack of common citizenship status and the associated civil and political rights during apartheid were felt most acutely in the former homelands. The focus on creating a shared citizenship must therefore start with these former 'subjects'. These are precisely the people largely residing on communal land. We submit that the exclusion of the people on communal land from the discussion on their development and equality can only perpetuate the current state of affairs.

[ii] The African Charter on Human and Peoples' Rights, to which South Africa acceded to on 9 July 1996. provides that 'all peoples' shall pursue their economic and social development according to the policy they have freely chosen. This instrument is binding upon South Africa. In this instance, the country's obligation is to give legislative effect to the rights contained in the Charter. Article 1 of the Charter provides: *The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.* Charter (but for the notable exclusion of group rights). The African Commission on Human and Peoples' Rights has given a definitive interpretation of the socio-economic rights contained in the Charter. The Commission has found that the notion of 'peoples' can denote a community within the geographical boundaries of a country. The right to development has been found to belong to communities as peoples – in particular where such a community finds itself outside the mainstream development paradigm.

There can be no doubt that South Africa is inhabited by various different cultural groupings with different notions of development, both in the former homelands and beyond. While this Bill cannot ignore such a discussion and the impact it should have on development-related decisions at all levels of government, we suggest that its international obligations requires it to go further. These obligations include to:

- Bear in mind that the implementation of economic, social and cultural rights in Africa requires taking into account the totality of the way of life and the positive cultural values of individuals and peoples in Africa to ensure the realisation of the dignity of all persons;
- Regard as vulnerable and disadvantaged all 'landless and nomadic pastoralists, workers in the informal sector of the economy and subsistence agriculture'; and
- Devise national plans and policies and periodically reviewed these, on the basis of a participatory and transparent process. They should take into account all other national plans,

including where appropriate, poverty alleviation plans and policies whilst also ensuring that the special needs of members of vulnerable and disadvantaged groups are met.

The Principles and Guidelines emphasise that all rights recognised in the African Charter must be made effective under national legal systems.