Supplementary Submission by the Ingonyama Trust Board (ITB) on the upgrading of Land Tenure Rights Amendment Bill

1. Introduction

In the case of Rahube v Rahube and others [2018] ZACC 42; 2019(2)S.A.54 (cc); 2019 (1) BCLR 125 (cc), the constitutional court made the following order:

1) *The order of constitutional invalidity made by the High Court of South Africa, Gauteng Division, Pretoria (High Court) on 26 September 2017 in respect of section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 is confirmed subject to the variations set out in paragraph 2.*

2) *The order of the High Court is varied to read:*

   a) *Section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 is declared constitutionally invalid insofar as it automatically converted holders of any deed of grant or any right of leasehold as defined in regulation 1 of Chapter 1 of the Regulations for the Administration and Control of Townships in Black Areas, 1962 Proc R293 GG 373 of 16 November 1962 (Proclamation R293) into holders of rights of ownership in violation of women's rights in terms of section 9(1) of the Constitution.*

   b) *The order in (a) above in made retrospective to 27 April 1994.*

   c) *In terms of section 172(1)(b) of the Constitution, the order in paragraph 2(a) and (b) shall not invalidate the transfer of ownership of any property which title was upgraded in terms of the section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 through: finalized sales to third parties acting in good faith ; inheritance by third parties in terms of finalized estates; and the upgrade to ownership of a land tenure right prior to the date of this order by a woman acting in good faith.*

   d) *The order in 2(a) above is suspended for a period of 18 months to allow Parliament the opportunity to introduce a constitutionally permissible procedure for the determination of rights of ownership and occupation of land to cure the constitutional invalidity of the*

provisions of section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991.

e) The first respondent is interdicted from passing ownership, selling, or encumbering the property known as Stand 2328 Block B, Mabopane in any manner whatsoever, until such time as Parliament has complied with the order in 2(a) above.

f) The third respondent is ordered to pay the costs of the applicants including the cost of two counsel."

3) The third respondent is ordered to pay the costs of the application in this Court, including the costs of two counsel.

2. Background

The applicant is the sister to the first respondent. During the 1970's applicant's family moved into a property owned by her grandmother described as Stand Number 2328, Block B, Mabopane. This part of South Africa was later incorporated to the Bophuthatswana homeland under the grand scheme of apartheid. In the modern day democratic South Africa it is a part of the North West Province.

The owner of the property and the grandmother to the applicant and first respondent died in 1978. There was before Court no documentary proof the deceased rights to the property. Apparently the deceased estate was reported in 1987. It was during this time that the first respondent was nominated by the family members to hold the certificate of occupation in respect of the said property in his personal name. The Court found that this was as a result of him being a male and that the rights to property of the applicant as a woman was not recognized under various apartheid legislation and practices. The certificate of occupation awarded to the first respondent was itself a lesser and racist right awarded only to Africans under apartheid system

During transition to democracy the Upgrading of Land Tenure Rights Act 112 of 1991 (ULTRA, was passed by the outgoing apartheid parliament. Section 2(1) of this Act reads as follows:

"Any land tenure right mentioned in Schedule 1 and which was granted in respect of-

a) any erf or any piece of land in a formalized township for which a township register was already opened at the commencement of this Act, shall at shall commencement be converted into ownership;

b) any erf or any other piece of land in a formalized township for which a township register is opened after the commencement this Act, shall at the opening of the township register be converted into ownership;

c) any piece of land which is surveyed under a provision of any law and does not form part of a township, shall at the commencement of this Act be converted into ownership,

and as from such conversion the ownership of such erf or piece of land shall vest exclusively in the person who, according to the register of land rights in which that land tenure right was registered in terms of a provision of any law, was the holder of that land tenure right immediately before the conversion."

This Act automatically converted rights in property, such as deeds of grant, to ownership rights. First respondent, by virtue of the nomination as the holder of the certificate of occupation was subsequently issued with a deed of grant under the Regulations contained in Proclamation R293 of 1963, as amended issued in terms of the Black Administration Act 13 of 1927, as amended.

Pursuant the provisions of section 2(1) of ULTRA had his deed of grant converted into a full right to ownership of the subject property. The applicant challenged the constitutionality of section 2(1) of ULTRA. Applicant raised a number of claims on the property. The High Court and Constitutional Court confirmed the constitutional challenge to section 2(1) of ULTRA in so far as it provides for the automatic conversion of land tenure rights into ownership without any procedures to hear and consider competing claims. The court order was made retrospective to 27 April 1994.

Furthermore, the order was suspended for a period of eighteen months to allow Parliament to introduce a constitutionally permissible procedure for the determination of rights of ownership and occupation of land to cure the constitutional validity of the provisions of section 2(1) of ULTRA. The judgment date is 18 October 2018.

3. Compliance with the Court order by the Government

Pursuant the Rahube judgment above, Parliament has taken the necessary steps and introduced the Upgrading of Land Tenure Rights Amendment Bill (the Amendment Bill). The Portfolio Committee on Agriculture, Land Reform and Rural Development has invited interested people and relevant stakeholders to submit written comments on the Amendment Bill. The closing date was the 31st July 2020. Ingonyama Trust Board (ITB) submitted a preliminary comment on this closing date but asked for an extension to furnish a more elaborate submission. Extension was granted until the 15th August 2020. The ITB wishes to extend its sincere gratitude to the Portfolio Committee for its indulgence.

4. The critical input to the Amendment Bill

The right to property is sacrosanct under the South African Constitution. Therefore any move by the Government to secure rights to property and in particular to land should be welcome. At the same any move that is potentially disharmonious should be guarded against. As the Constitutional Court has pointed out in the Rahube judgment, African women have been the victimS of a double edge sword under colonial and apartheid system.

The preliminary input on behalf of the Ingonyama Trust recommended that the Bill be withheld for further reconsideration of at least four factors. These are:

a. The possibility of unintended social disharmony.

b. The possibility of a conflict of laws, which might lead to prolonged and expensive litigation.

c. The examination of what specific provisions could be formulated to give legal expression to the points made in the (2016) report by His Majesty the Zulu King.
d. A more thorough analysis of the financial implications at this time of financial stringency, bearing in mind the risk of creating financially unattainable false hopes.

Having noted the time limit extended by the Constitutional Court to grant Parliament the opportunity to consider the amendment to section 2(1) of ULTRA, it is conceded that the Amendment Bill cannot be held in abeyance for unspecified period of time.

5. ULTRA has always been urban areas focus

The provisions of ULTRA were meant and remain so meant for rights of land that is surveyed and situated in an urban area and primarily held in individual tenure regime. Ordinarily these rights at best to the extent that they could involve a group or collective, this would be limited to a family. The Rahube case is a typical example.

On the other hand land which is administered in terms of customary law and tradition falls into a different space. It would be noted that such land is largely unsurveyed and administered by Traditional Leaders. Its title deed is held in trust by the Minister in large and most parts of the country. She or he remains a trustee and thus owes a substantial number of Traditional Leaders especially outside KwaZulu-Natal, a fiduciary duty as a trustee. On this point alone the Minister cannot be seen to subject such vast tracts of tribal land to the new legal tenure regime without at least meeting the following:

a) Adequate consultation with the Traditional Leaders and beneficiaries of such land.

b) Ensuring that her role as the trustee is not compromised.

c) Providing a guarantee that the existing rights are protected.

d) Having clear guidelines of how the Amendment will be effected on the ground.

e) How a compensation process will work.

In the Province of KwaZulu-Natal, the King is the sole trustee of the Ingonyama Trust which holds sizeable tribal land in trust for the Zulu Nation. As things stand currently he has not been consulted in as much as the Traditional Leaders under him have not. By the same token consultation is not the monopoly of the leaders and governors. It is as much an equal right of all the beneficiaries and the governed. Likewise these have not been consulted.

Another point that needs to be fully interrogated is that with the African women having been at the receiving end of colonial and apartheid system on the one hand and Traditional and indigenous system on the other, how does the democratic evolution extricate her rights to land without placing her in an even more disadvantageous position. We make this submission because we are

mindful that for an African woman under tribal set up having rights to land in her own right has and is an exception rather than a rule. This no doubt is the challenge to all modern day governors of land. It is among others for this reason that we submit there would be a need to consider compensation in some instances. For the view we take on this submission we are not going to elaborate further on this point. Suffice for now to make at least two points here. Firstly, the Constitutional Court has warned that customary law should not be viewed with common law lenses. Secondly it is our respectful view that if there is any lesson to be learnt from a similar approach to the one being adopted in this Amendment Bill, let us look at the Recognition of the Customary Marriage Act. Our observation of the effects of this Act is that it has destroyed African Customary Marriage instead of improving and protecting it. It has disenfranchised the woman in that marriage and delegitimized her offspring in many respects.

The Rahube judgment did not touch on tribal land. The draft Amendment Bill clearly admits to the shortcomings with regards to consultation. In this regard it states "...the Department has not consulted widely on the Bill. However there has been consultation with other state departments." Notwithstanding this open and public admission both the Department and State Law Advisors are of the considered opinion that the provisions of the Bill are not in conflict with the Constitution. We respectfully differ on this. It is our considered view that to the extent that the Bill seeks to regulate customary law land tenure without any form of consultation whatsoever is profoundly flawed. It is conceded by the State that the Bill was not published for comment. It is stated that once enacted, the Department will communicate the provisions of the Amendment Act to all institutions that will be affected by the implementation of the Act. Our respectful view is that this will be a negation of democracy and a serious violation of the Constitution.

6. RECOMMENDATION

With all that we state above we submit that consultation is fundamental to any changes to the indigenous law on land tenure. In the present Amendment Bill this has not happened. We have not seen any version of this Bill in any vernacular language. We therefore assume there is none. The Amendment Bill has thus excluded the very people it seeks to protect from participating in its making.

We respectfully recommend that section 1.2(i) on the memorandum to the Amendment Bill which reads are follows " any right to the occupation of tribal land granted under indigenous law and custom of the tribe in question," and any similar reference in the Amendment Bill be removed. It should be specifically

spelt out that the Amendment Bill shall not apply to any tribal land and Ingonyama Trust owned land.

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Prepared on behalf of Ingonyama Trust by
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