Alliance for Rural Democracy

Office 1106 Braamfischer towers,
20 Albert Street, Marshalltown
010 021 0572
Email: ruraldemocracytrust@gmail.com

Alliance for Rural Democracy (ARD) Submission on the

Upgrading of Land Tenure Amendment Bill(B6-2020)

30 July 2020

Introduction

The Department of Rural Development and Land Reform published the Upgrading of Land Tenure Amendment Bill ("the Bill") B6-2020 for public comment. The Bill was set to be tabled in parliament during the first quarter of 2020. It seeks to amend two provisions of the master Act, the Upgrading of Land Tenure Rights Act 112 of 1991 ("the Act") by providing for a constitutionally permissible procedure for the determination of rights of ownership and occupation of land, to remedy the constitutional invalidity of the sections.

The Act in its current form excluded black communities as it was applicable to certain areas only and discriminated against women as it didn't recognise their hereditary rights in respect of conversion of the land tenure rights into ownership. The Bill will also be applicable to the entire Republic, as the previous Act did not apply to independent states.

The aim of the Bill:

According to the explanatory summary, the Bill aims to amend at the Act, as to:

- Provide the application for conversion and land tenure rights to ownership.
- Provide for an opportunity for interested persons to object to conversion of land tenure rights into ownership.
- Provide for the institution of inquiries to assist in the determination of land tenure rights.
- Provide for the recognition of conversions that took effect in good faith in the past.

Proposed Amendments to be made:

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.

The Bill inserts section 14A into the Act which will appear after section 14. The section makes provision for any person aggrieved by the conversion of a land tenure right from 27 April 1994 to approach a court for an order that sets aside the offending land tenure right, or for an order that is just and equitable. Section 14A (2) states that any of the following transfers of ownership of property from the abovementioned date in which a land tenure right had been converted shall remain valid:

- Property purchased by third parties in good faith;
- Property inherited by a third party in good faith and the estate has been finalized;
- Property which has been converted to ownership in favour of a woman in good faith in terms of the Act.

In *Rahube v Rahube and Others* the court stated that "Laws and policies must seek to do more than merely regulate formalistically. The Legislature is enjoined to ensure that laws and policies promote the participation of women in social, economic and political spheres while also advancing the spirit, purport and objects of the Constitution. The Bill is a step in the right direction to secure land tenure rights to women previously marginalised by discriminatory policies.

Who is ARD

The Alliance for Rural Democracy (ARD) herein after referred to as the Alliance, is a voluntary coming together of civil society organizations and community groupings to engage in the policy formulation and policy implementation processes aimed towards the realization of restorative land justice. The Alliance members believe that the legislative framework regulating land governance in South Africa is fragmented and that to this day, a number of laws enacted in democratic South Africa created a different set of rules for those who reside in rural areas to those who reside in urban areas what is referred to as the 'otherness' or the 'other-ing' of people in rural areas. The membership of the Alliance is made up of organized community groups spread across all nine provinces in the country who are supported by technical resource organizations.

This Amendment bill is relevant to my personal life as a rural activist, and to my work in the land sector. I have been involved in land related matters ever since the inception of the land reform work in South Africa, from 1993 Land Tenure Conference in Bloemfontein, to the development of White Pater in Land Reform. I made my first submission in 3rd Parliament on Slow Pace of Land Reform, chaired the 2005 Land Summit in Nasrec, and made many oral submissions on land and agricultural matters, as well as other related laws in the past.

Given that experience, I share the view of many other rural comrades who are of the opinion that law making processes and legislators in this country have failed us. The land question is fundamental for many rural South Africans,

Concerns and Proposals.

We as the Alliance applaud the fact that the bill will be applicable to the whole country, urban and rural. The Alliance is premised on the belief that there is one South Africa and one democracy with principles and rules that apply to all South Africans equally, irrespective of where they reside. Alliance members believe that central in a democracy is a right to land and the right to choose. This right is intrinsic in a democracy and lies at the core of the Constitution. It is the belief of the Alliance therefore, that any law that establishing a separate governance structure anywhere in South Africa in ways that deviate from the fundamental right of community groups to choose their leaders is in conflict with the core tenet of a democracy.

At the Rahube case in the constitutional court, the judge expressed his contempt against the master bill, and labelled it as the most racist and sexist piece of law ever. He further expressed his view "It is concerning, if not disturbing, that the majority of rural communities are still not the owners of their land. Like the applicant they rely on the mercy of the Minister for Rural Development and Land Reform by signing the Interim Protection Act for them to remain in occupation of their land legally. Mot of these communities might not even know that they are not owners of the land that they are occupying "

Interestingly, the provisions of section 25, (5), (6) and (9) of the Constitution are there for the Parliament to correct the anomalies created by apartheid laws, yet our parliament has done nothing so far to legislate in favour of communal tenure. Rural people have no choice but to fight to defend their land rights against elites. Since 1994 all we are seeing are mega projects like shopping malls and hotels but nothing for social needs such as housing that prioritized the aged, the orphans and widows and Black women particularly. This must change. Two major concerns that could delay the well-intended functions of the bill

- **Empower and Strengthen Rural Governance:** The national Government has neglected governance of the rural areas and diverted it to pollical councillors who are popular elected representatives with no Governance experience. The diversion of social responsibilities to Traditional Leaders without proper checks and balances is also a concern, in an absence of Good Land Governance paralyses every livelihood strategy in the area.
- **Avoid Bureaucratic red tapes, we need land now! Application to the Minister?**
  The fact that cumbersome application processes to the Minister, like current ones that caused delays in finalising the claims.
- **Surveyed Land and Recognition of Customary Land Rights:** Most of the communal land is not surveyed and therefore it will be impossible for beneficiaries to apply. We

appeal that the bill should also recognise customary institutions that can confirm a land right.

- **Ownership vs Access:** South Africa has a dual system which recognise only 2 types of tenure, Private and Public. This is not adequate for rural south Africans who still share access to the commons, for example the river steams, grazing land and farming or herb harvesting and hunting rights. We need a communal tenure law that will recognise access rights for all these livelihoods stream.

We believe that the fragmented nature of land governance in South Africa could inhibit the well-intended provisions of this bill.. It is our belief and request that government should make concerted effort to harmonize land governance in South Africa. We are of the view that the fragmented approach to land governance is intentional; it is meant to confuse, to delay, to send civil society from pillar to post and from one department to the other such that their energy and resources are spent running around with little success. We are of the view that this fragmentation is at the heart of the delays in the land redistribution and restitution process and the slow turning of the wheel of restorative land justice.

In conclusion.

Alliance for Rural Democracy believes that situations are unique, and therefore we need appropriate and flexible legislations to address the scenarios. the Alliance for Rural Democracy is calling on Parliament to publish the Socio-Economic Impact Assessment (SEIA) as demanded by LAMOSA. We also call on fair public Participation processes and request that Parliament to put make resources available for public consultation and participation. Adequate resources are needed to educate ordinary rural people and ensure enforcement of their rights under an improved bill.

Submitted by Constance Mogale- National Coordinator

Alliance for Rural Democracy

E: constance.mogale@gmail.com

C: 0825590632

1. https://www.wylie.co.za/articles/writing-the-wrongs-of-the-past-of-the-upgrading-of-land-tenure-act/ Motlanthe HLP, 2017
2. LAMOSA Submission on adhoc committee – Hsmith
3. 2020 ARD Strategic Planning
4. two faces of custom Socio-Economic Rights in South Africa: Symbols or Substance? A.Claasens
5. Aninka Claassens and Ben Cousins (eds.), Land, power and custom: Controversies generated by South Africa's Communal Land Rights Act (Cape Town: University of Cape Town Press; Athens: Ohio University Press), pp.
6. 2016ww.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Diagnostic_Report_on_Land_Reform_in_South_Africa.pdf