LAWYERS FOR
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Your Ref: B [6-2020]

Our Ref: LHR/LOU/A9

7 August 2020

Ms Phumla Nyamza
Portfolio Committee on Agriculture, Land Reform and Rural Development
pnyamza@parliament.gov.za

Dear Sir/Madam,

SUBMISSIONS ON THE UPGRADING OF LAND TENURE RIGHTS AMENDMENTS BILL [B6-2020]

1. In this document, the Lawyers for Human Rights ("LHR") submits comments in our own name and on behalf of our client, Mantshabelle Mary Rahube, on the draft Upgrading of Land Tenure Rights Amendment Bill, [B6 – 2020] published for comment on 25 February 2020 (Notice 116 of 2020, Government Gazette No. 43045, 25 February 2020) ("the Amendment Bill").

2. LHR is an independent non-profit, non-governmental human rights organisation with a foot print in human rights advocacy and litigation spanning over 40 years. Ms. Rahube has been a client at LHR for 11 years.

3. Thank you for the invitation to make submissions on the Amendment Bill. Our overall submission is that the Amendment Bill should not proceed in its current form and propose for a redrafting of the Bill. Our main submissions are summarised below:

3.1. The Amendment Bill in its current form perpetuates the invalidity declared in the Rabube judgment as it fails to consider that from ULTRA's inception all properties affected by the Act have already been upgraded into title.

3.2. Crucial objectives of the Rahube judgment are not actualised as the Amendment Bill places an obligation on the general public to request investigation which should be the obligation of the state.

3.3. The Minister has failed to consider the implications of the Amendment Bill in the context of the burden it places on possible affected individuals or families through the lack of a consultation process. It is the government's constitutional imperative to ensure just administrative processes. In our view this entails investing in an investigative process and putting frameworks in place that facilitate or accelerate the implementation of the Rabube judgment.

3.4. The Amendment Bill does not make adequate provision for consultation with parties interested in and affected by the activities contemplated by the Amendment Bill, or for access to information by those parties, and therefore fails to give effect to the constitutional rights to fair administrative action and access to information. This will lead to a range of problems, including exposing the Amendment Bill to a number of legal challenges such it be adopted.

3.5. The powers and obligations afforded/imposed on the Minister under the Bill are problematic as he has the sole responsibility of conducting the whole investigative process, we submit that this process should vest in the local municipalities alternatively, the provincial level of government.

AMENDMENT OF SECTION 2(1)

4. As you know section 2(1) of ULTRA aimed to provide for the automatic conversion of a deed of grant into full ownership and vested exclusive ownership on the person registered as the head of the household in the deed of grant. In the Rabube judgment the constitutional court found that it failed to protect – or even to notify and consult with – the occupants of property who were not registered on the deed of grant. The conversion process was intended to protect and promote tenure which is legally secure. To the extent that section 2 failed to protect occupants of property who were not registered on a deed of grant at all, it failed to fulfill its mandate and is was therefore found to be unconstitutional.

5. The Amendment Bill in its current form aims to cure the constitutional invalidity of section 2(1) by making provision for a compulsory public notification process of an application for conversion of land tenure rights to ownership. This is done with the aim of allowing interested persons to object as well as provide avenues of relief for aggrieved persons. We submit that the process of notification is insufficient, publication in a government gazette will not ensure awareness to all possible aggrieved people.

6. The draft Bill in section 2(1) (c) provides for notification through the standard notification process, which is done by way of notice in a government gazette. It is our submission that this is an inadequate form of notice as it is not accessible to the majority of communities or people who might be affected by conversion of a deed of grant into title. The Amendment Bill only states that a notice will be placed in a government gazette and affords a notice period of 1 (one) month.[1]

7. We submit that this is an inadequate method of notification, the aim of having a consultation process is to ensure that information reaches a maximum number of people and they are afforded sufficient time to make comment, in order to ensure the process embodies the principles of fairness. We propose that you draw inspiration from the National Environmental Management Act consultation process.

8. This process should embody the consultation process in the National Environmental Management Act, Environmental Impact Assessment regulations (EIA). The EIA regulations provide for a detailed description of what adequate notice entails alternative forms of notice that ensure that barriers to participation including disability or literacy are lifted. Furthermore, notice entails affixing a notice board on the cite for mining; publishing government gazettes in both provincial and national newspapers where the activity might have an impact beyond municipality; placing advertisements in government gazettes or local newspapers and personal

[1] Section 2 (1) (c) of the draft Upgrading of Land Tenure Rights Bill, 2020

notification of parties such as landowners, lawful occupiers and holders of informal land rights.[2]

9. We are concerned with the substitution of “automatic conversion” to “application for conversion” as the Bill fails to give clarity in its explanatory note whether it reverses all titles that were automatically converted at the inception of ULTRA in 1991. More importantly, we submit that this is a radical change of legal principle and administrative procedure which precludes public engagement, to a process that must meet the consent of interested parties. The shift from an automatic to application-based process in Amendment Bill requires further clarity therefore we propose a redrafting of the provision to provide clarity on the just administration process required in curing the invalidity of section 2(1) of ULTRA.

AMENDMENT OF SECTION 4 AND INCLUSION OF SECTION 14A

10. The previous operation of section 4 of the Upgrading act vested the person who according to the register of land rights was the holder thereof with “all rights and powers as if he is the owners of the erf or land”. This meant that the person who appeared on the register of land rights could mortgage, alienate, or bequeath “title” to the property prior to the opening of the township register without any notification to a putative holder who would be the rightful holder of the title.

11. The proposed amendment of Section 4 would make proviso of previously disadvantaged individuals. In the event of an upgrade in terms of section 2(1)(c) of the Upgrading act, which takes place at the commencement of the Act for any piece of land or erf which does not form part of a township and vests ownership exclusively once upgraded to the person who according to the register of land rights was the holder of that land right.

[2] Regulation 41 of the Environmental Impact Assessment Regulations, 2014 as amended.

11. As set out above the operation of section 2(1) of the Upgrading Act results in the automatic conversion of ownership at the commencement of the Act or the opening of a township register. Without clarity on the administrative processes of the proposed amendment of section 2(1) the reading of section 4 would still perpetuate the discrimination of women as it still reads and is interpreted that any conversion of a deed of grant has already occurred and has taken place without notification to potential putative holders or other interested parties.

12. The proposed amendment to section 4, notwithstanding anything to the contrary contained in any law, still bestows on the person who according to the register of land rights is the holder of a schedule 1 right, all rights and powers as if he is the owner of the property.

13. We submit that any upgrading would have occurred on the commencement of the act that is when ULTRA became applicable in in 1991. The conversion of any deed of grant into ownership would have occurred then.

14. Our submission is that the amendment by itself, although necessary, is not sufficient to solve the far more substantive problems in the principal Act itself and cure the constitutional invalidity of section 2(1). We note that the following: The change of emphasis from automatic conversion to ‘application for’ conversion; The compulsory public notification of an application to allow interested parties to object to, or raised concerns with conversion; and The call by the Portfolio Committee to study the principal Act to review other aspects of its constitutionality will not provide the remdy sought by the Rahube judgment.

15. While noting that the Amendment Bill will have a significant impact on the principal Act with respect to some of our concerns. It is imperative that consideration is taken to the administrative questions the proposed amendments have and whether the interpretation of the draft Bill is that all automatic conversions are set aside with the preclusion outlined in the Rahube judgment and if indeed that is the provision, what are the administrative requirements that stem from such declaration. Nevertheless, while the cause of concern that led to the Amendment Bill goes to the heart of the

problems in the principal Act, the amendments merely paper over the cracks and fail to resolve them.

AMENDMENT OF SECTION 25A

16. The proposed amendment to Section 25A seeks to extend the application of ULTRA to the whole of South Africa. This wide application of the Act is done without the consideration of the application of the Conversion of Certain Rights into Leasehold Act, no. 81 of 1988 (Conversion Act). The general object of the Conversion Act was to bring in line occupational rights of black people living in white areas who had certificates, site permits, trading site permits with the general practice of the South African law system in white areas.

17. The Conversion Act in its application strives to convert all occupational rights that blacks have (meaning all blacks who own the building they live in or have a trading in) into those rights of leasehold however in 1993 the Act was finally amended by the General Law Second Amendment Act; from that time occupational rights of people who stay in townships that have been formalised and for which a township has been opened, would convert into rights of ownership. The conversion Act makes provision for a process of inquiry which in practice we had seen to be conducted by the local municipality and in some instances by the provincial Department of Human Settlements.

18. It is unclear from the Amendment Bill together with the explanatory note of the bill if the wide application of ULTRA is intended to function together with the Conversion Act and if there will be a process of ensuring that investigative processes intended by both Acts will be aligned and uniformed. For this reason, we submit that consideration be given to how this two Acts will work together and how the processes can be aligned unless the purpose of the amendment of 25A is to replace the application of the Conversion Act.

19. It is also unclear from the Amendment Bill whether by extending the application of the Act to tribal rights, if the intention is to replace the Communal Land Rights Act, which was declared unconstitutional in 2011, this then brings into question where

the Interim Protection of Informal Land Rights Act fits into this particular proposed inclusion together with the wider scope of application.

20. It is clear that the Amendment Bill does not address fundamental challenges in the intended application of the Act or the curing of the declaration of invalidity. We submit that the flaws in the principal Act will continue to obstruct the state's intention to provide security of tenure by means of ULTRA, i.e. conversion to ownership. We submit that the process set out in ULTRA, even after the amendment, omits a wide range of other problems that must be addressed to upgrade and strengthen tenure rights. For this reason, we call for a complete review of Act in the alternative a complete redrafting of the Amendment Bill taking into consideration the challenges addressed above.

21. Kindly note that we are willing to make more detailed submissions on any of the issues raised above should this be useful.

22. We thank you for the opportunity to comment on the Amendment Bill and trust that our comments will be addressed.

Yours Sincerely,

LAWYERS FOR HUMAN RIGHTS
LOUISE DU PLESSIS