



SUBMISSIONS ON THE UPGRADING OF LAND TENURE RIGHTS AMENDMENT BILL [B 6B – 2020]

(“The ULTRA Bill, 2020”)

Introduction

1. Corruption Watch (“CW”) is a non-profit civil society organisation. It is independent, and it has no political or business alignment. CW intends to ensure that custodians of public resources act responsibly to advance the interests of the public. Its ultimate objectives include: fighting the rising tide of corruption; the abuse of public funds in South Africa; and promoting transparency and accountability to protect the beneficiaries of public goods and services.
2. CW has a vision of a corruption free South Africa, one in which informed citizens are able to: recognise and report corruption without fear; where incidents of corruption and maladministration are addressed without favour or prejudice; and where public and private individuals are held accountable for the abuse of public power and resources.
3. As an accredited Transparency International Chapter in South Africa, core to our mandate is the promotion of transparency and accountability within private sector and state institutions in order to ensure that corruption is addressed and reduced through the promotion and protection of democracy, rule of law and good governance.
4. CW welcomes the opportunity to make submissions on the ULTRA Bill, 2020.
5. We note that the preamble of the Upgrading of Land Tenure Rights Act, 1991 (“the Act”) states that it seeks “*to provide for the upgrading and conversion into ownership of certain rights granted in respect of land; for the transfer of tribal land in full ownership to tribes; and for matters connected therewith*”.

6. We note further that the objectives of the ULTRA Bill, 2020 is:

- 6.1 “to provide **for the notice of informing interested persons** of an application to convert land tenure rights into ownership;
- 6.2 to provide for an opportunity for **interested persons to object to conversion** of land tenure rights into ownership;
- 6.3 to provide for the **institution of inquiries to assist in the determination** of land tenure rights;
- 6.4 to provide for **application to court by an aggrieved person** for appropriate relief;
- 6.5 to provide for the recognition of conversions that took effect in good faith in the past”.

7. However, CW is concerned that ULTRA Bill, 2020 fails to make sufficient provisions for key parts of its objectives. It places detrimental limitations on the ability of interested persons to object to conversion, as well as to voice their objections.

8. Sections 25(6) and (9) of the Constitution address security of tenure and provide that tenure that is legally insecure as a result of past racially discriminatory laws or practices must be made legally secure in terms of legislation. Our body of work allows us to engage with vulnerable, marginalised and predominantly Black people and communities whose land rights were historically undermined and discriminated against.

9. While these rights are now formally recognised in the Constitution and laws such as the Interim Protection of Informal Land Rights Act (IPILRA)¹ they are, in practice, constantly threatened. These rights are undermined by both the state and private parties through laws,

¹ 31 of 1996.

policies and practices that fail to appropriately recognise these rights as property rights enjoying constitutional and legislative recognition and protection.

10. It is therefore vital that this Bill addresses the key areas, identified below, in order to ensure implementation and compliance with key constitutional court judgements² that relate to securing the tenure rights of the most vulnerable and marginalized South Africans through legislation. To ensure transparency and embedding of democratic best practice across the entire value chain of land governance. We make our submission under the following heading:

- 10.1 Inclusion of women or any person previously disadvantaged,
- 10.2 Vulnerable objections and determination of land tenure rights processes,
- 10.3 Disadvantageous court application processes.

Inclusion of women or any person previously disadvantaged

11. We note the *Rahube v Rahube and Others*³ constitutional court judgement that declared section 2(1) of ULTRA Act 112 of 1991 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.

12. **We therefore welcome the amendment of section 2 insofar as it reflects the *Rahube* judgement and the provision allows for security of land tenure rights to women previously marginalised by discriminatory policies.** As the court stated “[l]aws 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,

² *Rahube v Rahube and Others* 2019 (SA) 54 (CC); *Graham Robert Herbert N.O. and Others v Senqu Municipality and Others* 2019 (6) SA 231 (CC).

³ 2019 (SA) 54 (CC).

economic and political spheres while also advancing the spirit, purport and objects of the Constitution.”⁴

Vulnerable objections and determination of land tenure rights processes

13. We note the ULTRA Bill, make provision for interested persons to object to the conversion as well as an inquiry also referred to as mediation to assist the Minister with determination of facts relating to the application and objection thereby. In light of the objectives of the ULTRA Bill, stating that it seeks to provide for the institution of inquiries to assist in determinations of land tenure right, the bill fails to sufficiently make provision for this.

14. The requirement for the notices of the application for conversion is welcomed. However, the amendments should be clear on whether the notifying body should advertise using all forms of the notices, or whether any of the forms is sufficient. Currently, it appears that **all forms/ methods** of notice listed should be used to inform all interested persons about the conversion application. Although we welcome this approach as is important to ensure that the notice is seen by interested persons, **we submit that it must be made clear that the requirement is for notice to be communicated using all forms listed.**

15. It is important to note that this process is meant to be easily accessible to some of the poorest and most vulnerable people in South Africa, that have historically been unable to have their valid rights to land recognised. Thus, discretionary language related to the nature and form interested and affected parties are notified must be avoided. We emphasise that an intentional approach needs to be taken to ensure that holders of vulnerable rights are able to access the information that relates to processes that will impact their constitutionally protected rights to land.

⁴ Ibid at para 2.

16. Furthermore, we submit that **there should be some flexibility on determinations made without objection. This provision can be made by an allowance to review a determination made without any objections.** This will enable interest and affected persons who may not have had access to the notice an additional avenue for relief.

17. We would further like to bring to the attention of the committee that with the removal of the automatic conversion of land tenure rights, the power to decline and approve conversions lies solely with the Minister. This creates immense discretionary power and can easily be abused to the detriment of ordinary citizens. Additionally, we are concerned about the capacity of the Minister and the Department of Agriculture, Land Reform and Rural Development to manage the applications processes. **We therefore emphasise that the Bill must give every opportunity available to the primary beneficiaries of these provisions by ensuring transparency, accountability and accessibility.**

Disadvantageous Court Applications Processes

18. CW is very concerned section 14A of the Bill. We note that this 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. CW interprets this proposed section as one which also seeks to recognise the exceptions listed in the *Rahube* order to the declaration of invalidity. These generally relate to transfers of converted rights to third parties that were done in good faith and those conversions which already favoured women.⁵

19. Our concern is that by only providing for aggrieved persons to go to court to challenge automatic conversions in terms of ULTRA does not respond to the need for the protection of vulnerable tenure rights. Given the reality that for the majority of South Africans access

⁵ Ibid at para 68.

to justice and to courts is an existing challenge, it is concerning that, the legislature would intend for parties to only have access to courts as the only remedy available if aggrieved by conversions.

20. We submit that the Committee must be cognisant of the reality that the primary beneficiaries of ULTRA are poor and marginalised members of society – most of whom do not have the resources required to embark on a legal challenge or litigious processes. South African courts systems are complex time consuming, very intimidating and expensive. **We suggest the inclusion of dispute resolution mechanisms in relation to these provisions be included as an alternative to approaching a court for relief.**

21. We further **propose that the Bill make provision for the establishment of an oversight structure or body that will be able to consider these applications and make determinations.** We do not specifically object to the aspects relating to previous conversion from 27 April 1994 as the act provides.

22. However, we **submit that this body should have remedial powers and be accessible and equipped to handle disputes and make determinations effective from the effective day of the amendment.** Courts should be the option or remedy of last resort or to appeal decisions that would have been made by the empowered body or structure.

Conclusion

23. We hope our submissions are useful to the Committee. Further, kindly note our request to participate in the parliamentary hearings and to make oral submissions before the Committee.

Submitted by Corruption Watch on 22 March 2021
Mashudu Masutha and Matshidiso Dibakwane

