Commission for Gender Equality
A society free from gender oppression and inequality

Submission to the Portfolio Committee on Agriculture, Land Reform and Rural Development:

Upgrading of Land Tenure Rights Amendment Bill [B6-2020]

7 August 2020

For queries, contact:

Ms M Van Niekerk

Director: Legal Services

Email: Marissa@cge.org.za

Tel: 011 403 7182

1. Introduction

The Commission for Gender Equality (CGE) welcomes this opportunity to make written submission to the Portfolio Committee on Agriculture, Land Reform and Rural Development (the Committee), on the **Upgrading of Land Tenure Rights Amendment Bill [B6-2020]** (the Bill).

The CGE, as an independent statutory body created in terms of Chapter 9 of the Constitution of the Republic of South Africa Act, 108 1996 (the Constitution), is mandated to promote and protect gender equality in government, civil society and the private sector.

The Commission for Gender Equality Act 39 of 1996, as amended (the CGE Act) gives the Commission the power to:

- monitor and evaluate policies and practices of organs of state at any level;
- monitor and evaluate statutory bodies and functionaries;
- monitor public bodies and authorities and private businesses, enterprises and institutions to promote gender equality;
- make any recommendations that the CGE deems necessary.

The Commission also has the powers to evaluate any act of Parliament, and to make recommendations to Parliament or any legislature with regards to any law affecting gender equality or the status of women. It may also recommend to Parliament the adoption of new legislation which will promote gender equality and the status of women.

The CGE makes this written submission to you against this backdrop.

2. General Comments

The CGE congratulates the Department of Agriculture, Land Reform and Rural Developments on the introduction of this draft Bill, which aims to bring the Upgrading of Land Tenure Rights Act 112 of 1991 (the Act) in line with the judgment and order of the Constitutional Court in *Rahube v Rahube and Others*.

Ms Rahube and several family members, including her brother, moved into a property located at Stand 2328 Block B, Mabopane, North West Province in the 1970s. It was understood that this property belonged to Ms Rahube's grandmother. Ms Rahube moved out briefly in 1973, but returned in 1977, and has been living in the house on the property ever since. Her brothers moved out of the property between the 1980s and 1990s and her uncle moved out in 2000.

In 1987, Ms Rahube's brother (the first respondent in court) was nominated by the family to be the holder of a certificate of occupation for the property, and in 1988 he received a deed of grant in accordance with apartheid laws.[1] With the promulgation of the Act, Ms Rahube's brother **automatically** became the owner of the property in terms of section 2(1). This happened by operation of law, **irrespective of whether he was residing at or using the property**, and even though Ms Rahube herself had been permanently living in and using this family home since 1977.

[1] Proclamation R2937 (Proclamation), which was promulgated in terms of the Native Administration Act, that was later renamed the Black Administration Act.

Ms Rahube clearly had a competing claim to the property, given that her brother had not lived in or used the home for decades, but the law did not allow for competing claims to even be considered, and she remained at the mercy of her brother who could evict her at any time.

Ms Mary Rahube argued in the South Gauteng High Court, that section 2(1) of the Act was unconstitutional insofar as it **automatically** converted land tenure rights (first granted through sexist and racist apartheid laws) into ownership rights, **without any procedures to hear and consider competing claims. The High Court agreed with her.**

This finding of unconstitutionality was confirmed by the Constitutional Court in its own judgment, which was handed down on 30 October 2018. The Constitutional Court made the following order:

'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 is 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 section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 through: finalised sales to third parties acting in good faith; inheritance by third parties in terms of finalised 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 applicant, including the costs of two counsel."

The celebrated judgment affirms the equality and dignity rights of Black African women and reiterates the intrinsic link between property ownership and access to housing on the one hand, and the right to equality and dignity on the other. The court expressly recognised its obligation to "establish whether enough has been done to eradicate the discrimination and inequality that so many women face daily," and found

that "(l)aws and policies must seek to do more than merely regulate formalistically."

The legislature, the court found, "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 question then becomes whether this Bill meets not only the requirements of the order of court, but also successfully promotes women's participation in social, economic, and political spheres.**

3. Clause 1 of the Bill

In terms of the court order, the legislature is charged with creating 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)."

The CGE supports the proposed substitution of the heading of section 2 of the Act, which makes it clear that the conversion of land tenure rights can no longer happen automatically, but must instead be achieved **through an application process.**

The CGE also supports express mention of those persons **who could have been a holder of a land tenure right, had it not been for laws or practices that unfairly discriminated against such person.**

However, the CGE submits that the proposed insertion of **section (1A)** constitutes the kind of formalistic regulation against which the

Constitutional Court has cautioned in its judgment. Specifically, the legislative proposal of **publishing a notice of application in the Government Gazette does not constitute the kind of notice that ordinary people in South African would routinely encounter or access.**

The CGE strongly submits that the Government Gazette is not a suitable way to provide this critical notice that will significantly affect people's lives, particularly the lives of Black African women. It is not available widely enough in the every-day environment, nor is it written in a manner that is accessible and easy for the intended audience (of a notice of application in terms of the Bill) to understand. This would especially be the case where rural Black African women are concerned, who are even less likely than urban women to have access to legal advice and assistance, or even a public library – one of the very few places where the Government Gazette can be accessed physically on request.

The Government Gazette is almost exclusively the purview of legal professionals, academics, and government officials. To publish a notice of application in terms of the Bill in the Government Gazette, **will only lead to such notices being totally missed by those most affected, and those who would most need an opportunity to object to a conversion. This notification system will fail to "promote the participation of women in social, economic and political spheres while also advancing the spirit, purport and objects of the Constitution."** It would honour the Constitutional Court's order in form alone, but not in any substance, and the very women who are intended to benefit from the Bill will only continue to be excluded from the benefit of the new law.

4. Alternative ways of proving public notice of an application for conversion of rights

The CGE would urge the Department and the Committee to explore alternative ways of giving public notice of an application for the conversion of tenure rights into ownership rights, that take into account the manner in which information is most commonly communicated and accessed in this time.

Alternative methods could include a combination of the following:

- National, provincial and (perhaps most importantly) local **print media**
- **Electronic media**
- Government **websites**
- **Social media** such as Facebook and Twitter (which could prompt users to click through to a notice)

5. Clause 2 of the Bill

The CGE supports the suggested insertion, that would amend section 4 of the Bill.

6. Clause 3 of the Bill

While the CGE supports provision for aggrieved parties to approach the civil courts in section 14(A)(1), we remind the Committee and the Department that access to legal representation (which would presumably be required in a formal court hearing) in civil law matters is extremely rare

for those who cannot afford private legal services. This is doubly true for Black African women in South Africa, who bear the overwhelming brunt of poverty with an expanded unemployment rate of over 43.2%.[2] Additionally, when women are gainfully employed, they earn considerably less than men.[3] This trend becomes exacerbated as women age, with women between the ages of 45 and 54 earning only 61% of what men earn, and women ages 55 to 64 earning only 61% of what men earn.[4]

The Legal Aid Board of South Africa allocates the vast majority of its budget to free legal representation for the criminally accused, in accordance with its Constitutional mandate. This means that little remains for free legal representation in civil matters of any kind, and this already small amount must then be divided between vulnerable groups, including children.

By way of illustration, the integrated Annual Report for 2018/19 shows that the Legal Aid Board allocated:

- R1 219 450 130.00 to free legal representation in criminal matters
- R 148 914 411.00 to free legal representation in civil matters

Non-governmental legal centres and organisations tend to focus only on impact litigation and specialised legal advice, due to limited donor funds. University clinics likewise have limited resources. Applications for pro bono services provided through the Legal Practice Council are means tested, leading to a "missing middle" phenomenon.

[2] Statistics South Africa, presentation by the Statistician General on 15 July 2020
[3] Ibid.
[4] Ibid

In these circumstances, it would be naive to think that Black African women will easily be able to enforce their rights in the manner envisaged in this Bill. For this reason, the CGE submits that if a woman aggrieved by a land rights conversion can only have recourse to the courts, this may constitute yet another real-world barrier to fair access to land and housing.

Instead, the CGE submits that an administrative appeals process, through the Department, may present a better opportunity for women to exercise their rights in this context. Access to civil courts will then still be possible, in accordance with the constitutional right to administrative justice and once an internal appeals process is exhausted, but will no longer be the first and only port of call for an aggrieved party who cannot afford legal representation.

7. Conclusion

The CGE thanks the Portfolio Committee for the opportunity to make a submission in this regard, and will present to the Portfolio Committee should it wish to engage further on the submission.