

HIGH LEVEL PANEL ON THE ASSESSMENT OF KEY LEGISLATION AND THE ACCELERATION OF FUNDAMENTAL CHANGE

REPORT OF WORKING GROUP 2 ON LAND REFORM, REDISTRIBUTION, RESTITUTION AND SECURITY OF TENURE

ROUNDTABLE 1A

“THE LAND QUESTION IN SOUTH AFRICA IN BROADER POLITICAL AND HISTORICAL PERSPECTIVE”

(Premier Hotel, OR Tambo International Airport, 14 July 2016)

1. INTRODUCTION

This was the very first Roundtable of Working Group 2 (WG2). It had long been acknowledged that national consultations in the form of county-wide public hearings would be crucial to the work of the High Level Panel (HLP). In addition to these hearings, there would be Roundtables, which were conceived as more intense intellectual encounters in which the Panel would benefit from the prepared inputs of experts in various fields relevant to the work of the different Working Groups. The advantage of the Roundtable as a complement to the more general public hearing was to be its intimacy, offering an opportunity for the Panel to ask questions, to probe deeply into issues and to engage in debate with the experts - all with the aim of gaining quality insights into the various aspects of the Panel's overall task.

The Chairperson of the Working Group, Dr Aninka Claassens, made some preliminary remarks and then introduced Dr Terence Nombembe (Panel member and member of WG2) as Chair for the day who, in turn, called on the Chairperson of the Panel (and member of WG2), the Hon Kgalema Motlanthe, to welcome the participants formally and to introduce the HLP and its work. Mr Motlanthe gave the background to the formation of the 17-member High Level Panel and explained its mandate and working methods. In particular, he described the creation of 3 working groups (amongst which all 17 panellists were allocated) and the aspects of the overall mandate for which they were responsible. The mandate, as the name of the Panel suggested, was to assess the legislation passed by Parliament since 1994 with a view to identifying those instances where the laws were benefitting the objectives of the new democracy, and where they were failing to do so, and to formulate recommendations as appropriate

The Roundtable was scheduled to hear the presentations of two experts, Dr Sam Motsuenyane from the Dr Sam Motsuenyane Rural Development Foundation, and Ms Nomboniso Gasa, a gender and land activist. The list of presenters had been longer, but many were unable to make the date (leading to the scheduling of a second Roundtable on the same topic for later in the year). Mr Motlanthe called on Mrs Angie Makwetla, Chairperson of the Board of the Motsuenyane Foundation, who was standing in for Dr Motsuenyane, to make her presentation.

2. OVERVIEW OF ISSUES RAISED: MRS ANGIE MAKWETLA

- One cannot discuss the land issue without talking about re-distribution of land. This renders the effects of the 1913 Land Act particularly important. Despite attempts by the Beaumont Commission, measures to add to the 13% of land area reserved for blacks never took off and were finally abandoned at the start of World War 2 in 1939 resulting in increased land pricing and in unwillingness from white farmers to implement amendments.
- Tribal land gives problems to issue of title ownership. Buildings on tribal land are not accepted as collateral for credit. What is needed is title ownership even on tribal land. Title ownership is linked to economic resources and access to resources.
- A key issue that requires attention is the maldistribution of water rights between black and white farmers.
- An example of the ill effects of inequitable access to water is found in the *Winterveld Citrus Project* where black farmers are in dire need of water for the orange trees, despite the Sand River being located only 2 km away. The canals from the dam stop before they reach the black farming areas. However, the Department indicated that as a precondition to extending the canals to black areas, they should purchase water rights. This was achieved in 2009, but black farmers still lack access to the water canals. Attempts to engage the Department have yielded no results.
- Water rights are still controlled by white farmers and the question is raised as to what legislation is required to remedy this situation.

- Land transferred to black farmers, to date, is not thriving due to limited training and experience, as well as lack of funds. The Winterveld Citrus Project is currently unable to remunerate workers due to limited harvesting caused by lack of water. Resources set aside by government are not reaching the intended recipients, who are in need of capacity development and skills transfer. Resources set aside by government are not reaching the intended recipients, who are in need of capacity development and skills transfer.
- The state should expand its current focus on additional land for housing development to include a focus on supporting emerging farmers.
- Government bureaucracy, inefficiency and lack of empathy serve as serious impediments to encouraging emerging farmers.

3. OVERVIEW OF ISSUES RAISED: MS NOMBONISO GASA

- What is the real meaning of land? The Panel should be prepared to engage with controversial answers to this question.
- It is important to talk about land beyond agricultural production: in the African tradition land has a different meaning. It serves as a spiritual connection which, at bottom, is inextricably intertwined identity. Land is about dignity (quoting Fanon).
- Within the market approach to land there is considerable pressure on blacks to make land profitable or to lose it. Thus conversations about land and identity tend to be lost in conversations about markets.
- The problematic understanding of the meaning of land goes back to Section 25 of the Constitution where land is understood as "property", with a monetary value and capacity to be alienated. This casts grave doubts as to officialdom's understanding about land. It also explains the unsustainable cost of redistribution
- We are all products of the social and structural conditions in society. In this regard, it can be argued that our political leaders are all influenced by our colonial past, which they appear to reconstruct, even when they are trying to "deconstruct". We are thus reproducing some of the colonial structures, as reflected in legislation such as the TLGFA. The conflation of customary law with traditional leaders suggests that we are not able to conceive beyond the inherited colonial frameworks.
- It is thus important to identify what has been distorted, as portrayed by the following underlying assumptions:
 - The assumption that all Africans had one particular type of land ownership.
 - The assumption that to provide for Africans is to provide what was in former Bantustans.

What is needed is a discourse to *disrupt* the apartheid narrative. Essentially the task would be to review which laws serve to reproduce a colonial ideology, and which laws disrupt it.

- This suggests a need to define a problem statement for the Panel's Roundtables, for example, a question on reconstructing the colonial model.
- What is also needed is for us to ask the following question: At the core of each piece of legislation, how does it enhance the dignity of the people?
- We need to look at the way in which the past is reproduced in the present. For example, Traditional Councils correspond with previous homeland borders, including their corresponding high poverty levels.
- Section 25(6) – but this begs the question as to what does it mean to reform communal land tenure that give people real rights.
- Within the current context, there is the persistence to link traditional leaders to land. It is assumed that a traditional leader has land, people and resources. However, people living in rural areas are South African citizens and are entitled to resources directly from government, instead of another tier. The TLGF Act essentially creates dual centres of power, i.e. the traditional leader and elected officials.
- This duality thus plays itself out in the issue of communal land. The Communal Land Bill makes the same mistake. There is no legislation currently in South Africa that recognises the individuality and rights of people living on communal land. As such the Communal Land Bill and the TLGF Act creates subjects in a constitutional democracy.
- The Ingonyama Trust Act was signed into law a mere three days before the 1994 elections, and all land is thus controlled by the Ingonyama Trust Board. However, given the power dynamics, the question remains which member of the local community will challenge the King on decisions with respect to communal land.
- Proposed changes to the legislation only extend to titles of homesteads, but not to communal (customary) land. Even in the event that more land is made available for communal use, it still means that the rights of individual (or subjects) are shrinking.
- There have been suggestions that the focus on 13% of the land is insignificant, when 87% is still controlled by previously advantaged individuals. However, the value of land in the previous homelands is increasing due to the discovery of valuable minerals. This means the stakes are much higher now..
- Some of the key conversations needed are on the following:
 - We should have a sober conversation about what the 1913 cut-off date means. The year 1913 is really a matter of political expediency, and has implications about what is possible and what is put beyond the reach of claimants.. However, we should also consider that if we review the 1913 cut-off date for land claims we possibly open ourselves to permanent and insoluble conflicts. What is it that the State can rightfully expropriate?
 - Our restitution and re-distribution policy focus to date has not really assisted us as a nation.
 - Is it proper to vest communal land in particular institutions?
 - Spatial boundaries should be recognised, but should not be linked to the rights of individuals.

4. DISCUSSION

The two presentations provided much food for thought, from different angles. Where Mrs Makwetla was concerned to raise, from the perspective of a rural development practitioner, the practical pitfalls involved, Ms Gasas objective was to subject the Government's policy approach to serious intellectual scrutiny. Both reach the conclusion that things are not well, whether one is looking at implementation of existing legislation or or attempts at "big picture" thinking by officialdom.

For the Motsuenyane Foundation, bureaucratic lethargy, incompetence, bad policies and downright corruption have put paid to the chances of success of the land reform, redistribution and restitution programmes. They highlight the issue of water rights in particular, calling for legislation to redress the inequality between black and white farmers in respect of access to water. They link this to other government failures to support black farmers with capacity development, skills transfer and financing.

Ms Gasas, on the other hand, was seeking to explain the fundamental flaws in the government's whole approach to the land issue. Starting with the appearance of land issues under the Property Clause (section 25 of the Constitution), Ms Gasas sees a problematic failure to understand that, in the African cultural context, land is much more than property. It is also about spirituality, ancestral connectedness, family solidarity, identity and dignity. She also highlights the notion of "citizens versus subjects" which decries that fact that rural residents under traditional leaders are subjects whose human rights entitlements are sifted through an extra "tier" of governance, while their urban counterparts suffer no such screening, enjoying their citizenship rights to the full.

Ms Gasas, however, reserves her most pungent criticism for the government's failure to re-imagine the new South Africa outside of familiar apartheid frameworks. She criticises the thinking behind the TKLB and CLARA, pointing out that it reflects a distorted sense of history and of customary law, as exemplified in the erroneous assumptions that Bantustan boundaries are legitimate way of conceiving of cultural identity; that traditional leaders are the founts and custodians of customary law; that there is anything "African" about vesting land in Traditional Councils; and that Africans historically knew only one form of tenure.

Upon questioning by the Panel, Ms Gasas elaborated on her views on communal land, explaining that the current legislative approach undermines customary law rights, which included: shelter, grazing, food, burial spaces, firewood, thatch, water and medicines. Developments where land is granted only for residential purposes (citing Ingonyama Trust practices in KZN) come nowhere near the "web of rights" that are legitimate customary expectations on communal land.

The Chairperson of the Panel thanked both presenters for their time and input and assured them that many of the matters raised would be brought to the attention of the Ministers concerned.

5. LEGISLATION REFERRED TO IN SUBMISSIONS

Constitution of South Africa, section 25; Land Act 1913; Traditional Leadership and Governance Framework Act 2008; CLARA; Ingonyama Trust Act 1994

6. RECOMMENDATIONS

- **Enact legislation to facilitate access to water rights for black farmers**
- **The state should expand its current programme on additional land for housing development to include a focus on supporting emerging farmers.**
- **The HLP should review how the TLGFA 2003 and the Communal Land Rights Act (CLaRA) 2004 empower the new elite, denying rural people their rights under customary law**
- **Working Group 2 should consider a joint Roundtable with WG 1 on Dispossession**

7. ISSUES TO REFER TO OTHER GROUPS

- **None**