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 1B

"THE LAND QUESTION IN SOUTH AFRICA IN BROADER POLITICAL AND HISTORICAL PERSPECTIVE"

(Gauteng Provincial Legislature, Johannesburg, 14 September 2016)

1. INTRODUCTION

This Johannesburg Roundtable was a continuation of the one held at the Premier Hotel, OR Tambo Airport on 14 July 2016, rescheduled to accommodate the experts who were not able to make the first date. The Roundtable heard presentations from Bishop Malusi Mpumlwana, former Deputy Chief Justice Dikgang Moseneke, Advocate Tembeka Ngcukaitobi, and Professor Somadoda Fikeni of UNISA.

The Chairperson of the Panel (and member of WG2), the Hon Kgalema Motlanthe, welcomed the participants and made some preliminary remarks to introduce the HLP and its work and to elaborate a little on the mandate of WG2 in particular. He then invited Bishop Mpumlawana to address the Panel.

2. OVERVIEW OF ISSUES RAISED: BISHOP M MPUMLWANA

- The history of the land question in South Africa is essentially a question of conquest – evidenced through the historical exploits of the likes of Colonel Graham and Lord Somerset.
- This invasion and colonial agenda related to the land and its resources and led to long-term dominance of the country.
- The expansion and gathering of land for agricultural production and mineral resources were intended for the benefit of the colonialist, as well as the mother country.
- This constituted the "engineered impoverishment" of the local peoples, which was not an accident but a deliberate strategy to enforce a labour culture.
- The 1913 land Act, which assigned 7% of the land to Africans, and the subsequent 1936 Land Act which sought to increase this to 13%, solidified this and laid the foundations for the establishment of Bantustans.
- This was further entrenched through the **Black Administration Act of 1927**, which essentially changed the role of traditional leaders as defenders of the people to servants of the state, doing the state's bidding. Thus the underlying assumption that communal land rights are protected in the hands of chiefs is questionable, as they form part of the 13% of land allocated to Africans.
- In an attempt to escape rural poverty, people migrated to urban areas in order to access greater opportunities and resources, but instead encountered urban squalor, which is a further entrenchment of the process of engineered poverty.
- The perception amongst rural people is thus that not much has changed sinc 1994; in fact the people who remained in the rural areas are worse off as government projects are mostly urban and not oriented towards the rural sector.
- The Interim Constitution (1993) and Final Constitution (1996 in effect did not introduce any new protection for property rights, but instead retained the status quo applicable before 1994.

- Land law appears to have been developed on the underlying assumptions that:

    1) There is no expectation of a fundamental redistribution of the land spatial patterns;
    2) Social grants as a safety net constitute an adequate response to entrenched and persistent poverty.

- Fundamentally, the key shortcoming in the government's approach to land reform is that it lacks a coherent vision, resulting in disparate, incoherent projects, instead of a comprehensive land reform programme for entire communities. For example, it is not clear whether the purpose of government's land reform policy is to achieve social, cultural or economic objectives. Is restitution largely to ameliorate forced removale, and for what purpose – as an apology or to empower beneficiaries economically? As a result of this lack of vision, government tends to "projectise" land reform, instead of employing a coherent strategy and comprehensive programming.
- The lack of a paradigm shift in the use of land reinforces the notion that Africans are not intended to be land owners nor producers, but merely labourers and consumers. Even where land is redistributed to the historically disadvantaged people, government does not provide sufficient support to ensure that the productive use of land becomes sustainable.
- Government's preferred model of successful and productive land use appears to lean towards large-scale commercial farming (such as the system applied in the US). This is evident in policy thrusts such as the encouragement of co-operatives and emerging farmers instead of small-scale forms of production, such as household production (as practiced in the People's Republic of China).
- There is a need for government to make a distinction between land restitution, redistribution, reform and addressing the economic impact of property rights.
- Ultimately, the aim of land reform should be to empower the previously disadvantaged to bring them on par with their white counterparts with respect to their quality of life.

3. OVERVIEW OF ISSUES RAISED: JUSTICE D MOSENEKE

- The revolution has not started (agreeing with Bishop Mpumlwana). The effects of dispossession have yet to be tackled, let alone reversed.

- Union in 1910 was meant to consolidate colonial conquest, after 8 wars of dispossession (Natal, Orange Free State, Lesotho, Sekhukhune): valiantly resisted but eventually lost. Conquest was then given the "colour of law" by the use of the language of rights. 1913 was part of this process, followed by 1927 which introduced the concept of "Supreme Chief of the Natives" which achoes to this day in the Ingonyama Trust

- The Black Urban Areas Act created a landless class when it deprived blacks any rights to title, urban or rural. Under the Prevention of Illegal Squatting Act a farmer could evict without recourse to any law. These and other laws formalised conquest with the deployment of the language of rights. (Leading in 1912 to the formation of the ANC – in 1951, the PAC, for whom land was crucial).

- The Interim Constitution in 1993 was almost silent on land and socio-economic rights (the "elephant in the room"). The Final Constitution in 1996 included far-reaching provisions: *the property clause was located *within* the Bill of Rights; *s25 provides "no one may be deprived" thus avoiding granting a positive property right;*despite s25(2) there has been *no* expropriation in the public interest.

- In summary: the policy framework is vacuous. Legislation passed has not achieved the required outcomes. There has been no "Marshall Plan" around – *restitution, reform, urban landlessness, productivity by the underclasses.* State has promoted "delivery" in place of productivity. It has disempowered people.

- The Panel should, in execution of its mandate, provide fresh policy thinking on matters of land; should feel free to make vigorous interventions, and even to adopt an invasive approach such as revisiting s25 of the Constitution to provide for a de-linking of compensation from market value.

4. OVERVIEW OF ISSUES RAISED; ADVOCATE T NGCUKAITOBI

- Two pieces of legislation bear scrutiny because of their problematic provisions: the **Communal Land Rights Act 11 of 2004** and **the Traditional Leadership and Governance Framework Act 41 of 2003.**

- Section 25(6) of the Constitution obliges Parliament to enact legislation to ensure either legally secure tenure or comparable redress for persons or communities whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices. However, Parliament has failed to enact this law and it thus in violation of the Constitution

- Although Parliament passed the Communal Land Rights Act in 2003 (CLARA), this Act was declared inconsistent with the Constitution in 2010 (did not comply with the procedures set out in section 76 of the Constitution), and thus invalid. The court ordered the government to pass replacement legislation urgently'

- There is an intolerable delay by Parliament to pass the required legislation, six years after the court order. Parliament's failure to enact the legislation does not only constitute a violation of the Constitution, but also a violation of people's rights by failing to comply with people's rights contrary to the the provisions of section 7(2) of the Constitution (which provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights).

- As to the TLGFA, it effectively retains traditional structures from 1951 by entrenching traditional councils.The powers of traditional councils are conferred by section 21 of CLARA (now invalidated), which gave them the authority to administer communal land. This provision is replicated in recent draft legislation. The legitimacy of these traditional councils is highly contested.

- Most of the land involved in the 1913 and 1936 Acts is communal land, owned largely by the state (except in KZN and some pockets in places such as Pondoland, where it is owned by communities). Whoever the owner is, the question of customary law arises, as the law that governs occupation, allocation, grazing, succession. But traditional leaders are also in the mix (because of the 1937 and 1951 Acts. This raises sharply the question: *what version of customary law?* In this contested legal system, TLs claim powers over land, which are disputed by their communities.

- The revolution required in communal tenure is around these questions: *How to alter the boundaries. How to fight TL authority. How to shift power to the people*.

5. OVERVIEW OF ISSUES RAISED: PROFESSOR S FIKENI

- When considering the issue of poverty, and the current socio-economic challenges in South Africa, it comes down to the issue of land; land ownership, land use, etc.
- There is a sense amongst people that since 1994, the setting up of institutions of democracy and a social security network has been largely successful, but this level of success did not extend itself to the issue of socio-economic transformation. Current levels of political agitation in communities about radical transformation are centred around the issue of land and the ownership or distribution of wealth.
- While both the Interim and Final Constitutions affirm property rights and redress, the balance of forces which gives effect to these rights that is problematic.
- The track record of the land reform process, to date, has been incremental and generally unsuccessful, as the programme lacks the political or sustained support to land reform beneficiaries, who have been

known in some cases to approach previous owners who were reimbursed for their land to return to manage the land, once farming collapses.

- Government's focus is on commercial farming, to the exclusion of a diversified approach with the intention of using land for other commercial use – as not all beneficiaries are keen on farming.
- Where communities are given money, once this is gone, they are back to where they started.
- Corruption in the land reform process hampers the programme – especially where it involves government officials who advise owners to ask for higher rates than initially intended so that the officials can benefit personally.
- The period after 1994 has seen a focus on urban areas, with land issues in urban spaces receiving the necessary attention and speedy resolution, to the detriment of rural areas (with some exceptions)
- There is a need for the Commission on Restitution of Land Rights to look at the various pockets of land available in order to achieve a consolidated view what is available. Areas that require focus include:
    - State-owned land handed over to the Department of Public Works after 1994.
    - Land granted by the former Monuments Council to white communities prior to 1994: with 99-year lease agreements at ridiculously nominal rates, while the government is saddled with rates and electricity bills for such properties.
    - Land in former Bantustans administered by traditional authorities which are reserved for grazing is rapidly disappearing, as it gets allocated for other, more lucrative, uses which poses a danger for the availability of space for agricultural use and food security.

- There is a perception of "untransformed judges" presiding over land restitution whose interpretation of the relevant laws sabotages the process, which opens the door to delaying tactics by well resourced interest groups intent on holding the process to ransom.

6. DISCUSSION

- It is important to revisit the intention of the land reform laws and policy, as the purpose ultimately determines what gets implemented and who benefits. Once the purpose has been clarified, Government must feel free to expropriate as necessary.
- The Land Claims Court has a chequered track record if one considers its judgements; as at times the legalism has far exceeded common sense. However, the courts are the least of the problem, as they generally tend to side with the most vulnerable. The legislature has also passed progressive legislation since 1994. The problem is that the land reform approach in the country lacks a clear vision – no coherent strategy with respect to land restitution and land reform The issue has always been land equity or land justice, irrespective of whether this applies to an urban or rural setting. Poverty cannot be solved without thinking creatively about how to put productive resources in the hands of the poor.
- Consideration should be given to re-thinking laws that assign land based on traditional affiliation to a culture and instead create an unambiguous line between revenue collection, development, etc., that is available to every community, with Integrated Development Plans for every area to ensure even development across the country. In such a scenario, affiliation on the ground of culture becomes optional. An example to consider in this regard is the option provided for Khoisan people in the **Traditional and Khoisan Leadership Bill**, which provides for an affiliation-based opt-in system for Khoisan people. On the other

hand, the **Traditional Leadership and Governance Framework Act** locks people within certain boundaries. It is not clear why the same option could not be provided in the latter Act.

- Extending the cut-off date for land claims to before 1913 should be carefully considered. Whilst extending the date may not require a constitutional amendment, finding evidence to prove ownership beyond this date may prove challenging. There is also no guarantee that extending the date will significantly increase the number of claims.
- The definition of market-based compensation for expropriated land needs to be revisited, as this is interpreted differently by different role-players. To date, the jurisprudence of the Land Claims Court has been to look at market value to compensate land, to the exclusion of other measures identified in section 25 of the Constitution. However, it should be noted that the Constitution states that compensation must be just and equitable, reflecting an equitable balance between public interest and interest of affected parties, having regard to a number of relevant circumstances, of which market value is but one area.
- Consideration should be given to strengthening legislative provisions contained in the **Restitution of Land Rights Act** relating to the appointment of judges of the Land Claims Court and the functioning of the Land Claims Commission. At present the Land Claims Court faces the institutional challenge of a lack of leadership, with only one permanent judge and a number of acting judges. Also, the Land Claims Commission needs to be strengthened to ensure its independence to enable it to address challenges such as high staff turnover, corruption, etc. One way to ensure greater independence is to remove the Land Claims Commission from the Department of Rural Development and Land Reform.
- The geographical lines provided for in CLARA are identical to those that existed before 1994. Due to this and various other issues in the legislation (e.g. impact on women, wall to wall municipalities, etc.) the Act was inherently unconstitutional and would thus not pass constitutional muster. If Government is serious about urban development, it cannot through legislation revert to the retrogressive arrangements that were deeply colonial, repressive and demeaning. Through CLARA Government is choosing traditional leaders over people. Whilst this Act has been struck down, the provision has been captured in the **Traditional Leadership and Governance Framework Act**. This needs to be reviewed with a view to breaking from the status quo that prevailed before 1994.
- The issue with traditional leaders goes beyond the fact that they wield too much power (which they do), but also that some are treated differently from others. There appears to be collusion between some traditional leaders and highly placed political role players, which accounts for their intransigence in the face of protests from their own people, and also for the fact that current legislative policy seems hell-bent on giving them control of the land..
- In the interest of social justice, Government should consider an approach where redistribution plays a more important role. What is needed is possibly an approach where Government proactively identifies (and possibly expropriates) land for needy communities, instead of relying on restitution claims, which are both time consuming and an administrative and resource burden on applicants. This would also simplify the land reform process, and assist with changing the inherited apartheid spatial landscape.
- Initially, the idea was that land reform would encompass an equal focus on tenure security, restitution and redistribution, and it was envisaged that restitution would constitute a smaller segment of the entire land reform process. However, after1994 new laws were enacted to support only tenure security and restitution, while a pre-existing law was retained for redistribution. The result was that people chose to invoke the rights created by new laws in order to benefit from the land reform process, to the detriment of redistribution, which was envisaged initially to play a more important role. This has created serious backlogs in restitution

claims, as well as significant budgetary implications for the State. There is, however, still the scope to enact relevant legislation for land restitution, with some overt needs-based criteria.

- **Further questions and contributions from the Panel led to the following points being made:**
  .1 People are rejecting the claims of the chiefs, on the basis of living customary law. A way should be found to revise the boundaries and to dilute the unbridled powers of traditional leaders, who are staging a push-back apparently because of closeness to the highest offices in the land.
  .2 The majority living on communal land are women. Ways of addressing gender stereotypes must be devised.
  .3 One major problem with communal tenure has sought to be alleviated by the creation of CPAs, but recent government policy ignores this, even in the face of judicial decisions. This foregrounds other issues of tenure security – an example is Xolobeni, where Baleni is still interdicting community meetings despite the judgement in *Pilane.*
  .4 Another view of the TL issue is that chiefs are in fact not that powerful a lobby, it is only the "connected" ones. Differential treatment is the key (Fikeni quote: "One king is in jail; another is unpunishable"). It is a big problem – sanity will be restored only when a uniform approach is adopted, which currently appears unlikely as the network of elites is in the ascendancy.
- **Summary of discussion:** all four papers highlighted the complexities of the Land Question. The absence of vision in the government's approach was a common thread – result was a series of failed programmes, inexplicable policy changes, wasteful expenditure, marginalising the very people the Constitution was trying to uplift. This has opened the door to unbridled corruption, continued poverty, and a state of near-mutiny in many rural communities where frustrated residents were fighting without success to enforce accountability from their traditional rulers. An interesting debate between members of the Panel and the expert presenters gave a glimpse of a possible future when the group discussed Justice Moseneke's proposal (supported by Advocate Ngcukaitobi) that one way to go was to imagine rural development that had nothing to do with ethnic affiliation. In this model the state would commit unambiguously to a development thrust and would apply funding (including rural revenues) to a menu of agreed people-oriented programmes regardless of boundaries and tribal affiliations. Done correctly, this could lead to impulses of identity and belonging transmuting (over time) into mere *cultural affiliations,* assumed voluntarily and optionally by citizens – rather like religion – as people enjoyed a visible improvement in their material situation.

7. LEGISLATION REFERRED TO IN SUBMISSIONS

Land Act 1923; Land Act 1936; Black Administration Act 1927; Black Urban Areas Act 1923; Prevention of Illegal Squatting Act 1951;TLGFA; CLARA

8. RECOMMENDATIONS

• Legislation is required to revise the 1951 boundaries. Any such law to be passed by Parliament needs to reflect the will of the people (ie, living customary law).
• Consideration needs to be given to how the powers of chiefs can be diluted, as there appears to be a lack of political will to deal directly with the issue.

• Consideration should be given to how old gender stereotypes and patriarchal systems that exclude women from decision-making can be addressed. This should include consideration of whether women should be entitled to hold title in land or not.

• Consideration should be given to building a mechanism into law that will sanction departments that constantly relegate CPAs and replace them with traditional councils. (Of the various forms of tenure - individual, customary, communal - communal tenure appears to be the most challenging. To this end, the Communal Property Associations Act of 1996 provides for the establishment of legal entities called Communal Property Associations (CPAs) to enable communities to acquire, hold and manage land on a basis agreed to by the members of a community in terms of a written constitution. However, current policy disregards CPAs, whilst the real power is transferred to traditional councils).

• Parliament should urgently pass a new Communal Land Rights Act.

• Parliament should consider amending the Traditional Leadership and Governance Framework Act by removing the provisions that confirm Bantustan boundaries.

• Parliament should accelerate the amendment of the Restitution of Land Rights Act to: (i) deal with the appointment of judges, as there is currently a lack of permanently appointed judges to adjudicate and finalise matters before the Land Claims Court; and (ii) strengthen the powers of the Land Claims Commission to ensure its independence and enable it to drive land reform.

• Government should create a neutral body to provide legal and research capacity and funding to claimants in the land restitution process. Often it is the lack of this capacity that leads to failed claims.

Government should search for and find the pockets of land transferred to individuals and organisations for a pittance immediately before a majority government took over.

Government should address the problem of judges hostile to the return of land to black people.

The Panel should consider ways to express how corruption works and how budget is hijacked by elites.

Provinces should be abolished.