

# 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

KWAZULU-NATAL, 19-20 October 2016

### DAY ONE:

#### ROUNDTABLE ON INGONYAMA TRUST

##### 1. INTRODUCTION

Day One was configured in Roundtable format, with invited speakers making submissions to the whole Panel, based on written presentations. Although the session involved the Panel as a whole, the material was obviously directly relevant to the mandate of Working Group 2. The invited speakers were: **Judge SJ Ngwenya**, Chairperson of the Ingonyama Trust Board (ITB); **Dr FB Madlopha**, CEO of the Ingonyama Trust (IT); and **Mrs Sizani Ngubane**, Director of the Rural Women's Movement (RWM). Most of the day was spent interrogating the role of the Ingonyama Trust and the Ingonyama Trust Board and the impact of their role and activities on the land question in KZN.

##### 2. PRESENTATION BY JUDGE SJ NGWENYA

- The Ingonyama Trust Act came into effect two days before the 1994 elections. Its sole purpose was to warehouse the land owned by KwaZulu Natal into a trust, with the King as sole trustee. In terms of the Interim Constitution (Act 200 of 1993) the land was to be transferred to traditional councils, all 252 of them. The measure was thus an attempt to solve a problem resulting from the conflicts of the 1980s and mid-90s in KZN.
- However, the final Constitution of 1996 vested land matters in national Government. Thus, land owned by traditional communities in all other provinces is state land.
- Whilst the Ingonyama Trust Act was intended to be a transitional measure to protect the rights and culture of people in KwaZulu Natal, there were consultations in 1994-1997 and agreement was reached (between the ANC and the IFP) that the Act should remain in place, but that it should be aligned with the Constitution of 1996. Consequently, the Act was re-written (though labelled an Amendment) in 1997 and came into effect in 1998. The delay was also attributable in part to CLARA and the litigation it spawned on the question, for instance, of municipal rates on tribal land (eg, *EThekweni Municipality v Ingonyama Trust*)
- In terms of the Act, the mandate of the Trust is to administer the land for the benefit, material welfare and social wellbeing of the members of the tribes and communities.
- The Act also introduced the Ingonyama Trust Board (ITB) to administer the land, whilst retaining the King as Trustee, with the Trust owning the land on behalf of the people.
- Section 2(8) of the Act acknowledges the people's ownership of tribal land by providing that existing rights in land shall not be interfered with.
- Whilst the role of the Board is to administer the trust land on behalf of the people, this role is often misunderstood. In the absence of the Trust all tribal land would have been attached by municipalities in the rates debate.
- A discussion was started on the nature of the deeds held in Trust, but a programme is needed to educate people about the nature of title deeds and what they represent.
- The celebrated case of *Alexkor v Richterveld Community* was not as ground-breaking as generally believed. Ownership of land under customary law without documents has always been possible. William Stanger was appointed to the Office of the Surveyor General in 1842 but, contrary to popular myth, this was **not** the beginning of the capacity for Africans to own land. The leases and title deeds that the Office introduced were a device to steal the land from Africans.
- IT gives leases to satisfy a need expressed by the people themselves. They approach the ITB when they need documentary evidence, such as when they need land for business purposes or when they negotiate with a utility such as Eskom which seeks a servitude on their property.

- The mandate of the ITB is to administer land, though in practice it is the traditional leaders who do so in their areas, according to “Zulu customary law or any other law” as provided in the statute.
- The Trust also enjoys trading status, negotiated through the Trust’s initiative despite the constraints of Schedule 3 of the PFMA

### 3. PRESENTATION BY DR. FB MADLOPHA

- The presentation sketched the background to the establishment of the Ingonyama Trust Board (ITB) and its legislative mandate derived from the Ingonyama Trust Amendment Act, No. 9 of 1997.
- The objective of the ITB is to hold the land in title to ensure that it is used for the benefit of communities, as well as for their material wellbeing.
- The Ingonyama Trust (IT) is a corporate body that was established to manage the land from the communities within the tribes and clans, as listed in the schedule of tribes to whom the Act applies.
- However, the Trust is separate from the Board, with the Board serving as the administrative arm of the Trust. Thus, in addition to the Ingonyama Trust Amendment Act, the Board is also subject to other national and provincial laws, such as the National Environmental Management Act (NEMA) and Minerals and Petroleum Resources Development Act.
- The Trust never acquired the land; the land vested in the Trust in terms of the Act (a distinction that has sometimes led to exchanges with the Auditor General).
- The Board manages the land by developing policies; facilitating access of communities to economic opportunities; promoting food security; issuing leases (mainly commercial but also residential); and issuing educational awards.
- The work of the Board does not affect existing land rights, and thus has no negative impact on beneficiaries of clans. Also, the Board does not issue or administer Permission to Occupy (PTO) agreements. There is thus no conflict between the view expressed in *Alexkor* and the ITB approach.
- Land is held by communities in terms of PTOs, leaseholds and servitudes.
- The Board promotes economic development and reduces unemployment and inequality through four models, namely multiple financial benefit for the community (retail, mining and lodges); single financial benefit for the community (old leases); direct community benefit (community-owned businesses with the help of the Board eg, agriculture); and collaborative arrangements with financial and social benefits.
- The mandate of the Board is financed through the Department of Rural Development and Land Reform by means of transfers. Although this allocation has been declining since 2012, the Board is moving forward towards fulfilling its mandate. Also, the Board has new targets that have to be achieved with less funding. Trust funds are used for Trust related matters.
- The Board has a flat structure and limits expenditure on human resources to ensure that its project targets are met.

### 4. PRESENTATION BY MRS S NGUBANE, Director of the Rural Women’s Movement ( rendered in isiZulu)

- The input was primarily about the plight of women living in rural areas under traditional leaders, and how their lives are affected by developments in their areas, such as mining and game lodges – all in the context of their attempts to pull themselves out of poverty.
- The Rural Women’s Movement (RWM) boasts a coalition of over 300 CBOs, all striving to reduce poverty and to give rural women a voice, for instance, in Traditional Councils.
- On land allocation and tenure security, women in rural areas suffer. Land can only be allocated through a man. Only two traditional leaders in KZN allocate land to women in their own right. The Panel should note this. In particular, women should own land because when a husband dies, the widow invariably gets expelled, a phenomenon that has been prevalent since the onset of HIV-AIDS, where a husband’s death was automatically blamed on the woman.
- RWM was instrumental in the litigation that saw the invalidation of CLARA in 1910 by the ConCourt, yet despite this victory the women’s lot has not changed since, six years down the line CLARA has yet to be replaced by constitutionally compliant legislation.

- Single women are particularly hard-hit; their rights are trampled on daily in a cycle that sometimes involves collusion between traditional leaders and the woman's male relatives. (Anecdotal accounts are given of the cases of Duduzile Xaba who could not take ownership of a sugar farm willed to her by her father simply because she was a woman, and Cezile Hadebe who was refused a remedy for illegal grazing on her field by a magistrate who on the same day approved compensation of R5000-R9000 to a group of men in the same court session who were in exactly the same situation).
- Investment deals are concluded by the traditional leader without consulting with, or even informing, the community, who simply see bulldozers and trucks on the job. Dynamiting operations crack the walls of houses; coal dust covers roofs so that it becomes impossible to harvest rain water; the same soot covers grass and renders it unfit for grazing. Traditional leader does not want to account, refuses to attend meetings.
- These deals are touted as "development" but the community gains nothing from them.
- Lower echelon traditional functionaries (eg, izinduna) are on the side of the oppressed, frequently expressing their dissatisfaction with the excesses of traditional leaders.

#### **5. LAND ISSUES RAISED BY MS MARY DE HAAS (in her presentation to WG3)**

- There is a need to look at land reform legislation. Claimants and farmers have suffered violence due to gross maladministration, which has impacted race relations negatively. For example, Mangethe north of Tugela and the role of traditional leaders in this. No further powers should be given to traditional leaders.
- The Department of Rural Development and Land Reform failed to implement the Constitutional Court judgement in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (CCT20/04) [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) (13 May 2005)*, which ruled in favour of the Modderklop farmers whose land was invaded. It is the duty of the State, and not farmers, to find mutually benefiting solutions to land invasion.
- It was alleged that the Ingonyama Trust Act was engineered by the late Mr Ambrosini and an Afrikaner academic, and that the IT is in effect a component of the resurgence of Zulu nationalism, especially if it is linked to the land. The Act has no place in a constitutional democracy.
- The question was thus raised as to why the Ingonyama Trust Act is not being repealed, given that it is clearly unconstitutional (as it allegedly discriminates against black people in the province, together with the Natal and KwaZulu Codes). An example was cited of the Mabaso game reserve where people were forcibly removed, as a permit was issued to a local traditional leader to run a private game reserve.

#### **6. Q&A AND DISCUSSION**

- Residential leases and the conditions to which these are subject are concerning, as these contradict the acknowledgement of people's ownership of land. These leases include conditions such as that any improvements to property be forfeited when a tenant vacates a property, as well as exponential annual increases in rentals. It seems to be a contradiction to say that the ITB administers land on behalf of the people when it is acting as the owner of land and people can only secure tenure by leasing land from it. Moreover, these leases are all drafted in English, and language thus becomes another barrier.
- Whilst the presentation states that most of the leases entered into by the ITB are commercial, the Annual Report of the Trust shows that an overwhelming number of these leases are residential. If people fail to pay their leases, they forfeit the land.
- In its response, the ITB stated that:
  - Permissions to Occupy (PTOs) were never residential, but only institutional in nature, involving schools, churches, etc. Nobody has ever been evicted, contrary to the view of some NGOs.
  - With regard to residential leases, these assist people who only have oral titles to land, as they are still discriminated against by financial institutions
  - For example, 98% of homesteads have no formal title documents. Whilst leases entered into by the Trust assume the form of residential, institutional and commercial leases, the people with residential leases are those without documents who come to the Trust for a document (title) but the only instrument the Trust can issue is a lease. So, whilst there are residential leases, these are small in number. Residential leases have, however,

- increased over recent years due to the requirements of legislation such as the **Liquor Act** and **FICA**. There has been a rise in applications to have leases cancelled or the size of leased ground reduced.
- The management and ownership of land comes with responsibilities. Whilst people have had to sign leases, no one has ever been evicted.
  - Moreover, the Ingonyama Trust was created by Government through statute. Thus, if there are problems with the law, Government should address those problems, not the Trust.
  - The Ingonyama Trust is governed by traditional customary law and other laws of the country.
  - The ITB conceded that the fact that leases are drafted in English is problematic, but noted that if they were drafted in Zulu the document would be useless for bank, and other official, purposes.
  - Government must finalise its mandate in terms of section 25(6) of the Constitution to guarantee people's rights.
  - The conclusion of contracts over Trust land leads to tension between business and the needs of the communities. Are communities consulted? The ITB responded by saying that the duty to consult does not reside with the Trust, but with the Department of Minerals and Energy which allocates mining permits. The Trust would only sign leases with companies if all requirements are met. These requirements include written proof that the Traditional Council is satisfied with the agreement. For example, at the time of reporting, the Board had not signed an agreement with a mining company (RBM) in Richards Bay, as it first has to satisfy itself that the necessary consultation had taken place. Thus, contrary to popular belief, the IT currently has no contracts with mining houses.
  - A question was raised as to whether it was true that state owned traditional land is exempt from rates. If so, can the ITB assist to ensure that people in the area do not pay property rates? In response the ITB noted that the **Local Government Municipal Property Rates Act**, which provided for exemptions and rebates in respect of certain categories of rates payers, ceased to exist in 2005. Thus, currently, no property is exempt from rates.
  - Can the ITB implement projects anywhere else or is it limited to a certain area? The ITB responded by noting that all development institutions should develop mechanisms to improve things where they are.
  - With regard to the matter relating to the Smangaliso Wetland World Heritage Area, the ITB noted that it is important to consider the implications of international law on local people. The IT was approached to assist, but it needs the founding documents to ascertain which land was declared a world heritage site and whether there was any institutional arrangement agreed upon between Government and the international body. For example, what institutional arrangements were agreed upon in terms of the management of the site or, was the site supposed to be a buffer zone? However, the relevant documentation is not forthcoming. Whilst the IT has been in contact with the provincial and national departments of Environmental Affairs, it can only intervene if the founding documents are made available.
  - A number of questions were raised by members of the panel. These included:
    - What makes the Ingonyama Trust Act unconstitutional? Is it merely the fact that it only applies to black people in KZN and not in any other province, although other provinces also have traditional authorities?
    - How can one address the issue of black people believing in their own inferiority? Need to get people out of this way of thinking. Should perhaps start with the youth.
    - How can the issue of resources allocated to a few (Indians and whites) be balanced to ensure that resources are not allocated on the basis of race and ethnicity? The issue is not just about mode of production (large scale agriculture vs small scale agriculture), but about redistribution. There is a need to address corruption in the process.
  - In response, the ITB stated that, with regard to the mining onslaught, a lot of opposition has not gone beyond the community level, but communities are often divided. The Department of Minerals and Energy needs to inform land owners if mining permits are awarded but it fails to do so.
  - Government needs to find a way to make legislation accessible for the people, as the Government Gazette is too expensive for the ordinary person. Consideration should be given to other forms of ownership that can be advocated to advance equitable ownership of land
  - On the question of the unconstitutionality of the ITA, Ms de Haas re-iterated her view that the Act was discriminatory in that only the Zulu king had been favoured with this kind of land-holding: why not the kingships in the Eastern Cape, for instance