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 6B

"TENURE SECURITY: URBAN EVICTIONS"

(Parliament, Cape Town, 30 November 2016)

1. INTRODUCTION

Roundtable 6B was held at the Houses of Parliament in Cape Town on 30 November 2016 on the theme of Tenure Security and the Question of Urban Evictions. The Working Group was addressed by five invited experts who presented written papers on different aspects of the theme and then participated in subsequent discussion sessions. The presentations were as follows: **Ms Lauren Royston** of the Socio-Economic Rights Institute on the Urban Areas and Informal Settlements aspects of the commissioned report; **Inkosi Xolile Ndevu** on Title Deeds and Security of Tenure; **Mr Siyabulela Manona** of Phuhlisani NPC on Urban Tenure Arrangements including Land Markets**; Dr Thandi Ngcobo** of the John Langalibalele Dube Institute on A Suggested Review of section 25(7) of the Constitution; and Mr **Leon Louw** of the Free Market Foundation on the Cost and Impact of the Free Market Foundation's pilot to upgrade title in Parys.

Presented below is a consolidated summary of the issues raised by the presenters, and which emerged during the discussions, arranged by sub-theme rather than by designated speaker. The summary is followed by a brief assessment of the discussion trends and interlinkages between sub-themes, followed by a listing of the legislation (including draft legislation, and policy documents) referred to in the discussion. The report concludes with a collated list of conclusions and recommendations.

2. ISSUES RAISED

- The issue of tenure security and urban evictions revolves around the question of people living in urban areas and in informal settlements whose rights are legally insecure because of past discrimination, and involves an examination of past and current drivers of insecurity. As such the discussion grapples with issues of spatial inequality and urbanisation, and the response of the state to these critical questions, especially in the form of policy and legislative interventions. Land and housing are at the centre of the debate, which brings in issues of the breakdown in land administration systems and other drivers including poverty, inequality and cultural considerations. In respect of this last factor, a lively debate ensued during the Roundtable, stimulated by questions raised about indigenous versus Western conceptions of landholding.
- The number of laws, policy documents and administrative arrangements with an impact on urban tenure security is vast. Key amongst the pieces of legislation in the area are the **Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE**); the **Spatial Planning and Land Use Management Act (SPLUMA**); the **Housing Act 107 of 1997;**
- **PIE** gives effect to section 26 of the Constitution (the right to housing) and aims to protect people from evictions which render them homeless. Due to the fact that this right is one of the most frequently litigated, there has developed a rich body of case law on which to draw, and principles have emerged around evictions and the government's obligation to provide alternative accommodation where evictions lead to homelessness. **PIE** is working relatively well and concern must be expressed at the process currently underway to amend the Act, in case such interference undermines 16 years of judicial pronouncements, going all the way back to the *Grootboom* case right up to the recently-decided *Blue Moonlight* case.
- The case law has established some key principles:

    - procedural requirements must be observed for an eviction
    - there is an obligation to engage meaningfully

- consideration of the rights of private property owners
- municipal provision of alternative accommodation (applies even on property privately owned)
- adequate alternative accommodation (though courts have been hesitant to spell out 'adequate')
- accountability of municipal officers to enforce court orders
- guidelines for new land occupations and the use of land occupation interdicts

- The Municipality has an important role to play in providing accommodation for people who are at risk of homelessness resulting from eviction. Municipalities, especially the smaller ones, should be supported with resources to respond effectively and in a proactive manner to deliver alternative accommodation to evictees. **SPLUMA** has its good points: it includes informal settlements for the first time, and also land held under customary law tenure. It represents an important shift from titling to securing tenure but again its implementation needs to go hand-in-hand with the strengthening of the capacity of municipalities and, in any case, it is often asserted by critics that the Act in its present form will never work in rural areas.
- The **Housing Act** has a history that goes back to the early 90s and based on a housing code, it operationalises housing policies and programmes. It is within the housing code that the RDP housing programmes are found, as are also the programmes underpinning informal settlement upgrading. The implementation of the latter has been limited. A significant legal victory for the upgrading programme was won by the residents of Slovo Park when the court ordered the City of Johannesburg to apply for provincial funding earmarked for upgrading. In somewhat similar vein Abahlali Basemjondolo successfully used the courts to enforce the upgrading of an informal settlement, rolling back an initial decision to eradicate it under the Breaking New Ground Programme (BNG). There are processes underway to replace the Housing Act with a more comprehensive **Human Settlements Act.**

- It is very important to note that statute is not the only source of tenure, nor are legal forms such as title, leasehold, freehold, communal property associations or trusts the only authority for tenure. There are other sources of authority: customary law, informal arrangements, and even hybrid systems that amalgamate statute and customary law, for instance. This has led to writers employing labels such as neo-customary law, or informal land tenure, or social tenures, where social relations and identities directly inform the recognition of rights and where need is the key criterion, rather than ability to pay. These tenure systems have been described as being oriented more to processes than to well-defined rules: they are also flexible, and they confer *de facto* tenure security to a great number of people. In this respect, attention was drawn to the UN-Habitat inspired Global Land Tools Network (GLTN) which has developed the notion of the "Continuum of land rights" to counter the fixation with individual title as the best and only form of tenure security, preferring instead to see security as located along a range of different rights, some statutory and others not.
- Amongst many critics of the notion of social tenure is a strong lobby that argues that the only answer to some of the weaknesses of these tenures ('second class' legal status, uncertainty, etc) is private property rights, registered formally in a system such as the Deeds Registry. Drawing on de Soto's arguments, the assertion is made that secure titles allow the poor to use their land or housing as collateral for bank loans to finance enterprises that will lead them out of poverty. This is often strongly rebutted by pro-poor arguments which emphasise that, in reality, individual titling is an option only for those who can afford the high costs involved, and that – for the majority of poor people, social tenure is more likely to offer the security they need, especially if it were to be formally recognised.
- A different aspect to the titling vs alternative-tenures debate involves rural land, where traditional leaders believe that the situation has been neglected since 1994. Where in the past they used to issue PTOs, now there is a vacuum and they are unable to guarantee the tenure rights of their communities. But many chiefs do not believe that titling is the answer. In the first place, the people are poor and invariably they will either sell the

land or it will get repossessed when the ventures they mortgaged it for begin to flounder, or when they lose their jobs. The answer, they contend, is for the government to survey the land and then give title deeds to it to the Traditional Council, which will have jurisdiction to allocate land within its boundaries.

3. DISCUSSION

- The issue of urban tenure proved to be multi-faceted and complex, and the discussion reflected this. The exchanges on titling, in particular, brought out the many layers of the problem and cautioned specifically against oversimplification. (This in response to an assertion: “Anything less than full freehold is apartheid”). A related caution was the advice to avoid the fixation with titling, when the issue was one of securing tenure.
- Other strands of the debate involved the question of the 1913 cut-off date, with one presenter strongly arguing that the date (which is prescribed by the Constitution) be altered because dispossession took place centuries before that date. Again here, questions were not easy to answer. If the date was a pragmatic compromise to try and regulate in an orderly fashion any claims arising from forced removals, what criteria would be used to set a different cut-off point? Go all the way back to the very first arrivals on South African soil? How to deal with historically nomadic migration patterns? Or with wars and with Mfecane upheavals?
- A linked set of questions, aimed at both the issue of the cut-off date as well as the debate over titling was whether any of these discourses accommodate African values surrounding land and land ownership. A plea was made that the legal system should make space for African conceptions of what it means to belong to the land, as opposed to the western notion of land belonging to people. Again a caution was expressed against oversimplification: polarising the discussion as if title *per se* was under attack when the objection was to exclusive title, as conceived in western legal thought, which then shuts out the African view of property ownership

which is essentially inclusive. The wholesale sidelining of the African reality of household-based property ownership as opposed to individual title was seen by some as not only unworkable but also arrogant and culturally insulting.

- Yet the assertion by chiefs that the answer to this problem was that title deeds to communal land should be given to Traditional Councils also failed to garner consensus. Assurances that traditional leaders were aware that that their obligation was to hold the land on behalf of the people were met with scepticism in the face of concrete examples (Xolobeni; the platinum belt; KZN and Ingonyama Trust) that the property rights of communities were left unprotected where traditional leaders failed to consult their people before far-reaching commercial decisions were made. In these examples, residents are locked in conflict and litigation with traditional leaders in efforts to enforce accountability. The prospects of the communities succeeding in such contests would dwindle considerably if Traditional Councils actually held title deeds to the land. Proposals in the TKLB to grant powers to chiefs to conclude "partnership" agreements with commercial enterprises without an obligation to consult their subjects simply increase these anxieties about accountability.
- In the end it was partly conceded that the 1913 cut-off was a compromise forced on the Constitution-makers by circumstances; that title could be given rein where it was working though the objective should be to strengthen urban **tenure**, not necessarily urban **titling,** and that at the end of the day the push should be towards affording South Africans a system of ***enforceable*** property rights, which itself implies the keeping of records.

4. LEGISLATION REFERRED TO IN SUBMISSIONS

Constitution of the RSA, s25, s26, s211; Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; Housing Act 107 of 1997; Spatial Planning and Land Use Management Act 2013 (SPLUMA); Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA); Communal Land Rights Act 11 of 2004 (CLARA, now repealed);

Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA); Traditional and Khoisan Leadership Bill (B23-2015, which would replace the TLGFA); KwaZulu Ingonyama Trust Act KZ4 of 1994; Deeds Registry Act 47 of 1937; Communal Property Associations Act 28 of 1996 (CPA Act); Upgrading of Land Rights Act 34 of 1991 (ULTRA); Transkei Decree of 1991; Land Act 1913; Restitution Act 22 of 1994; Land Reform Property Valuations Act 17 of 2004; Expropriation Act 63 of 1975; Expropriation Amendment Act 2014; Promotion of Administrative Justice Act 3 of 2000 (PAJA); Mineral and Petroleum Development Act 28 of 2002.

5. CONCLUSIONS AND RECOMMENDATIONS

- **ULTRA** should be reconceptualised and reframed to be in line with the new constitutional order. Simplistic repeal of **ULTRA** that may result in vacuum in the broader land administration system should be avoided. Any reconceptualisation of this piece of legislation should be in line with the continuum of land rights metaphor. Much of what should be done with this piece of legislation should be considered as part of a new vision for land administration in the country. The amendments should set out a legal environment which enables movement in both directions of the continuum, rather than in a single direction towards titling.
- Where tenure rights are to be moved along the continuum, that should be preceded by a land rights inquiry and some adjudication when necessary. The purpose of the land rights inquiry should be to avoid pre-existing land rights being trumped by the change of tenure. In this process due consideration should be given to providing cheap forms of tenure for the poor, and not only titling.
- The **HLP** is exhorted to to use its influence to initiate a proper contextualisation of the problems of urban tenure reform so that the layers of complexity can be be appreciated: such as where there is a housing

subsidy programme but it is about title and works for some people but does not help the majority to access property. Promote urban tenure reform, not urban titling.

- **IPILRA** should be made permanent, enhanced, and regulations developed. Lessons should be drawn from the international system for consideration in the proposed enhancements to the current Act - ie, the *UN-FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land (VGGTs)* and the philosophy of the *Continuum of Land Rights* that was developed by the Global Land Tenure Network, an initiative of UN-Habitat).
- The **Promotion of Administrative Justice Act 3 of 2000** should be integrated within the broader body of land law
- The **Expropriation Bill,** in its attempt to align with the Constitution, is a welcome development (subject to attention being paid to the critical matters raised by the SAHRC). In amending the proposed statute, alignment with other legislation would require some careful consideration. Some of those would include;
    - Expropriation of communal land, for example for mining and infrastructure development under the MPRDA and the IDA
    - Expropriation of land successfully claimed under the Restitution Act.... e.g. the investigation and notice phases of expropriation would have been well covered under the restitution process by the time the land claims court
      orders acquisition or expropriation for restitution purposes.

        - There is also a strong case to rationalise compulsory acquisition under a single piece of legislation that is backed up by solid regulations, which make provision for land acquisitions by different entities and for different purposes.

        - Specific amendments need to be considered in the process of finalising the **Expropriation Bill B4-2015.** Such amendments

include processes to achieve alignment of the **Expropriation Bill** with **MPRDA** and land claimed under the **Restitution Act.**

- Compulsory acquisition processes should be removed from all other legislation (such as the Housing Act) and all Acts should be cross-referenced to the new legislation. Regulations should then be carefully crafted to take care of different circumstances.

- With regard to the **Housing Act**, a policy review and reformulation process is currently underway in the human settlements sector. A draft white paper has been developed and will lead to the promulgation of a new Act. From an urban tenure perspective, the following questions should be asked of the new white paper and ultimately the new Act:

    - Does the principle of tenure choice translate more meaningfully into practice than has been the case to date? Or, does the policy continue to privilege individual, registered ownership above all else?
    - Alternative tenure options in the Upgrading of Informal Settlements Programme will be a key consideration in this regard. Others include a national instrument for public rental tenure and a programme of temporary alternative accommodation.
    - More fundamentally however, stronger legal recognition of informal occupation rights in an urban context should be addressed.
    - There should be alignment between the **Housing Act** and the Redistribution component of the land reform programme.

- **SPLUMA** is not properly located the DRDLR and should be moved to COGTA. The Act on its own is not sufficient to change the spatial landscape and inequality. There is critical need to consider background legislation.
- In order to fulfil **SPLUMA's** potential regarding the inclusion of informal settlements, a programme of municipal support is required regarding

SPLUMA and informal settlements in relation to land use management, SDFs, by-Laws and land use management schemes.

- An informal settlement land use zone should be promoted to legalise the land use and address urban tenure security more directly from within the planning sector. If municipalities are to take this on, then guidelines and model zoning categories should be developed to support them.
- More technical work should be done on the recognition of occupation rights via the planning sector, building on the work in the cities of Cape Town and Johannesburg and the work of Urban LandMark, Afesis-Corplan and VPUU.
- The potential for land use management schemes to legalise informal settlement land use through the declaration of special zones should be promoted. In the SPLUMA review process that is currently underway, consideration should be given to making special zones a requirement instead of an option. In order to protect the occupation rights of informal settlement residents, the special zones mechanism should be specified to apply to informal settlement land use.
- A more rational institutional location for municipal planning should be investigated, especially if municipalities are to be supported on the urban informal settlement issues (identified in the preceding points). These has a bearing on the recommendation to more appropriately locate **SPLUMA**, outside of Rural Development.
- The legal standing of non-owners should be investigated in the **SPLUMA** review process that we understand is currently underway, in a manner that aligns with the PIE Act.
- There is a need for a broader consideration of the origins, intention and impact of the wider body of 'background legislation' and how this fabric enhances or frustrates the goals of breaking down the legacy of apartheid and colonialism. On its own, there is little chance that **SPLUMA** will curb the spatial inequality trajectory.
- The **PIE Act** has swayed the balance of forces in favour of occupiers. The constitutionality of that tilt is questioned. **PIE provides** that the court, hearing an eviction application, has a discretion to refuse an eviction order

despite the fact that an applicant is the registered owner and the respondent is an unlawful occupier of the property. It is proposed here that a court should not have a discretion to grant or refuse an eviction order, but only retain its discretion created by s 4(8) and s 4(9) of the **PIE Act** regarding the time afforded to the respondent to vacate the property.

- that a court should not have a discretion to grant or refuse an eviction order, but only retain its discretion created by s 4(8) and s 4(9) of the **PIE Act** regarding the time afforded to the respondent to vacate the property.
- The Human Settlements White Paper, currently in development, should address the principles that must be upheld in terms of the housing rights case law. This will provide constitutionally compliant policy guidance to municipalities, property owners and other role players.
- A more proactive, programmed and coherent approach to the provision of alternative accommodation should be developed, in compliance with Section 26, **PIE** and the legal principles in the case law. Instead of reactive, ad hoc and uncoordinated responses, often as a result of one or several court orders, municipalities should develop a programmed approach to the provision of temporary alternative accommodation
- A key consideration should include what constitutes "adequate" alternative accommodation in different settlement contexts ranging from inner cities to suburbs and new developments; the nature of temporary accommodation in the absence of sufficient affordable permanent alternatives; protection of other rights including dignity, privacy and family life; the supply of affordable rental accommodation to address the underlying housing needs of occupiers; and incorporating the requirement to proactively plan and budget in IDPs, housing chapters and BEPs.
- The cumbersome legal processes associated with **PIE** require some consideration of built in administrative procedures, which are less reliant on complex court procedures. This will go a long way in empowering smaller municipalities.
- The need to align **PIE Act** with **SPLUMA** in respect on non-owners is also highlighted.

- All indications are that the **Property Valuation Act, 2014 (Act No. 17 of 2014)** is redundant, adding an unnecessary bureaucracy to the system. The recommendation is that this legislation be scrapped and efforts be directed at refining and effectively using **the Expropriation Act.** The costs of the new bureaucracy should rather be redirected to augment IPILRA by setting up a land rights
- It is proposed that a renewed policy discourse be undertaken on the future of the Restitution programme, in light of the *LAMOSA* judgment and current economic realities.
- Provincial laws must include provisions that promote access to secure tenure and the incremental upgrading of informal settlements
- The Constitution should be amended to correct the conflation in section 211 of customary law with traditional leaders, and also to clarify the powers of traditional leaders over land administration
- The disintegrating land records system should be rescued.
- The South African legal system should be purged of the remnants of colonialism. This should be done by tasking the SALRC to clean up the statute book, but this time with a set of transformative Terms of Reference.
- The **HLP** is reminded again that the deficit of implementation of available laws continues to be a recurring theme, to be kept in mind.