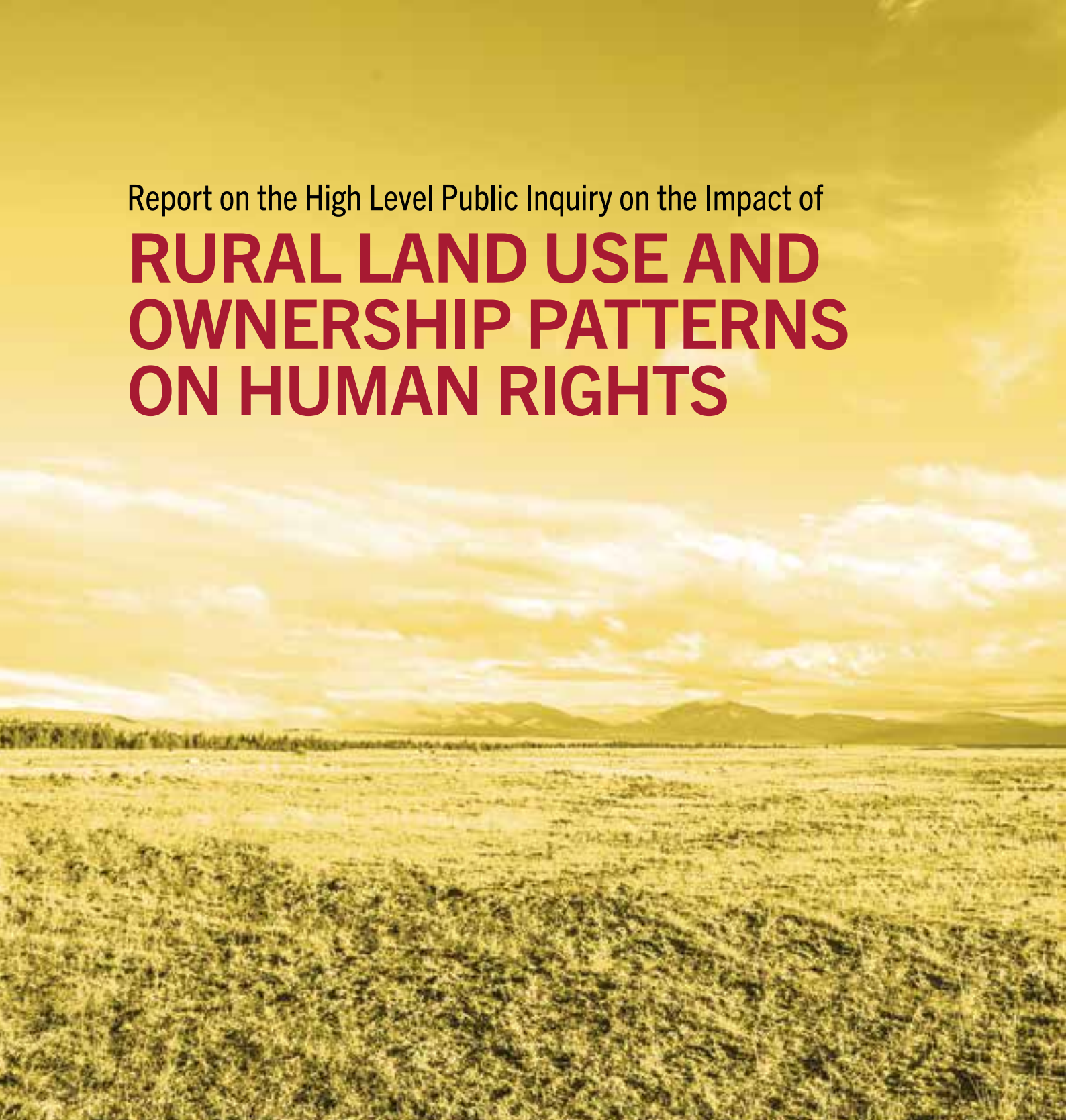


Report on the High Level Public Inquiry on the Impact of

RURAL LAND USE AND OWNERSHIP PATTERNS ON HUMAN RIGHTS





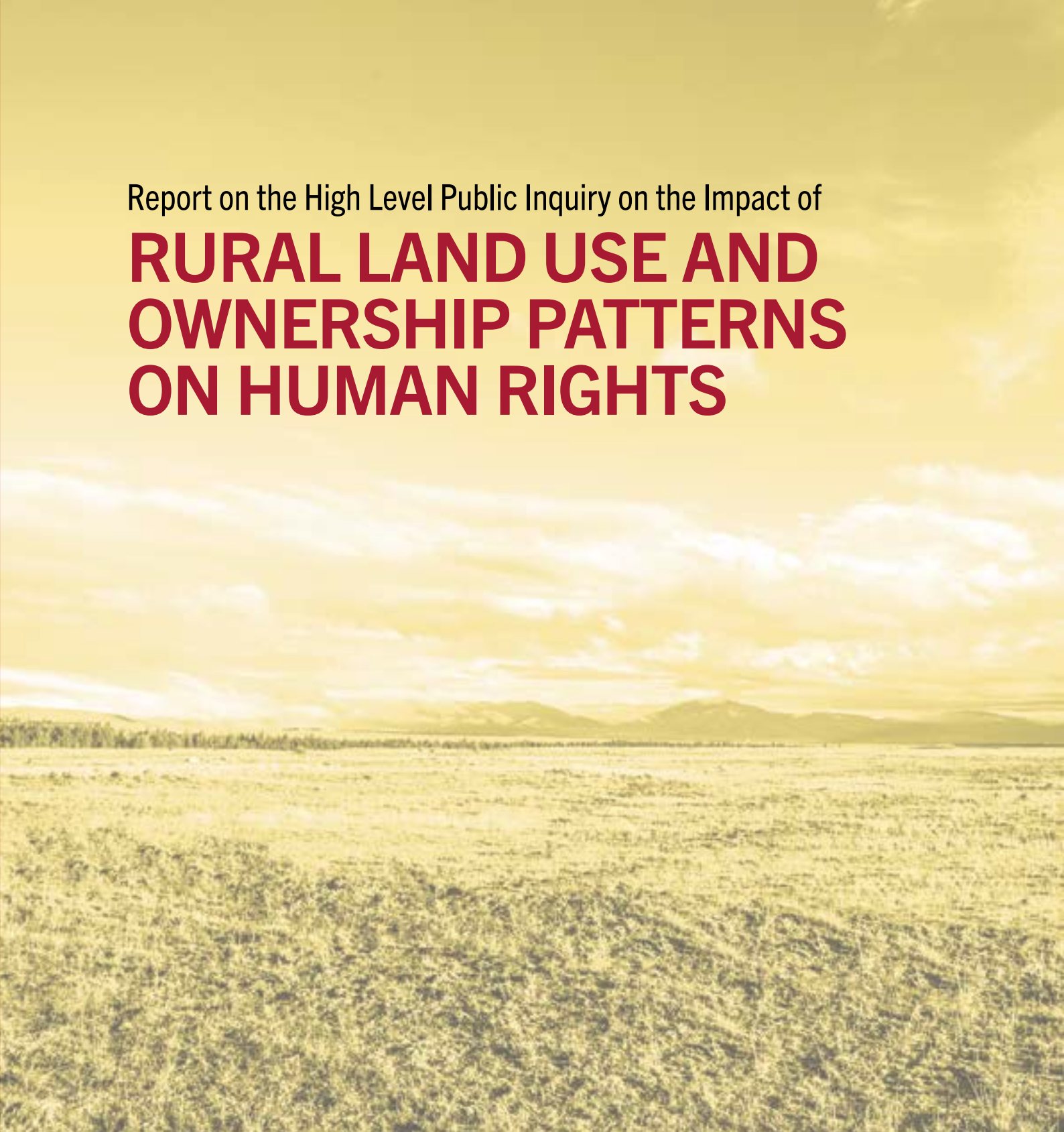
ACKNOWLEDGEMENTS

The South African Human Rights Commission (“Commission”) wishes to acknowledge the contribution of the many individuals who assisted in the successful completion of this investigation. Firstly, the Commission would like to extend its gratitude for the guidance and expertise offered throughout the process by the Hearing Panel, chaired by Commissioner Chris Nissen, with Dr. Shanelle van der Berg and Professor Ruth Hall of the Institute for Poverty, Land, and Agrarian Studies (PLAAS). The Commission is thankful for their contributions in conducting the Hearing and in finalising this Report, particularly our external panellist Professor Hall.

Ms Alex Fitzgerald of the Legal Services Unit should also be recognised for her invaluable contribution in managing the hearing process. The Commission further expresses its appreciation to all civil society organisations, community-based organisations, and academics that provided information and assisted in the process.

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LIST OF ACRONYMS AND ABBREVIATIONS

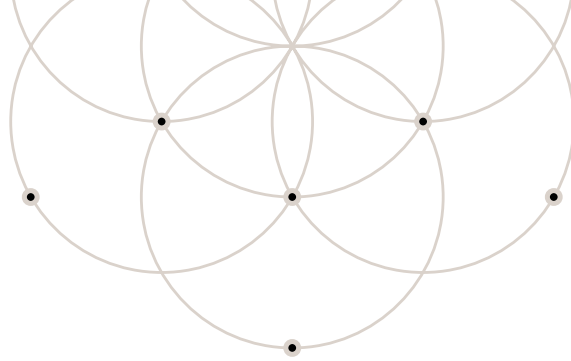
BMF	Bench Marks Foundation
CAS	Criminal Administration System
CCMA	Commission for Conciliation, Mediation and Arbitration
CPAs	Communal Property Associations
DOJ	Department of Justice and Constitutional Development
DLA	Department of Land Affairs
DMR	Department of Mineral Resources
DRDLR	Department of Rural Development and Land Reform
ESTA	Extension of Security of Tenure Act 62 of 1997
FHR	Foundation for Human Rights
FPIC	Free, Prior, and Informed Consent
HLP	High Level Panel
IRISA	Institution for the Restoration of the Aborigines of South Africa
IDP	Integrated Development Plan
IFNSA	Indigenous First Nation Advocacy South Africa
IPILRA	Interim Protection of Informal Land Rights Act 31 of 1996
KZN	Kwazulu-Natal
LRC	Legal Resources Centre
LRAD	Land Redistribution for Agricultural Development
LRMF	Land Rights Management Facility
LRP	Land Redistribution Programme
LRLTA	Land Reform (Labour Tenants) Act 3 of 1996.
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
Nkuzi	Nkuzi Development Association NPC
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000
PLAS	Proactive Land Acquisition Strategy
PTO	Permission to Occupy
RLRA	Restitution of Land Rights Act 22 of 1994
SAPS	South African Police Service
SLAG	Settlement Land Acquisition Grant
SAHRC/Commission	South African Human Rights Commission
SPP	Surplus People Project
TRANCRAA	Transformation of Certain Rural Areas Act 94 of 1998
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

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1. INTRODUCTION AND BACKGROUND





Access to land is explicitly provided for under the Constitution of the Republic of South Africa, 1996 (Constitution).¹ This is in accordance with the constitutional vision which seeks to redress the injustices of the past, especially for the indigenous Black people who “suffered under the daily, soul-destroying indignities of apartheid.”² Furthermore, the Constitution seeks to create a society based on democratic values, social justice and fundamental human rights.³

For the dispossessed in South Africa and elsewhere across the world, land “is both material and symbolic, a factor of production and a site of belonging and identity.”⁴ Not surprisingly, return of the land was a rallying cry of the anti-apartheid struggles, and in the 1990s, as the transition was made towards a democratic South Africa, hopes were high that dispossessed lands would be returned.⁵

The post-apartheid government has engaged in an ambitious programme of land redistribution and restitution. The approach is predicated on an acknowledgement that the legacy of land dispossession continues to shape the life chances of those affected and their descendants.⁶ Apart from land dispossession, Black people in South Africa were subjected to systemic deprivation and discrimination in their access to socio-economic needs such as water, healthcare, food, housing, social security and education because of apartheid policies.⁷ The land redistribution and restitution programmes thus are aimed at enabling former landholders or their descendants to reclaim spaces and territories which formed the basis of earlier identities and livelihoods.⁸

Significantly, the 1997 White Paper on South African Land Policy (White Paper) set out the rationale for land reform, and outlined how it would seek to achieve its ambitious goals. The White Paper’s goals included: addressing the injustices of past land dispossession; creating a more equitable distribution of land-ownership; reducing poverty and contributing to economic growth; providing security of tenure for all and establishing a sound system of land management. The White Paper’s vision was of a land reform “which promotes both equity and efficiency through a combined agrarian and industrial strategy in which land reform is a spark to the engine of growth.”⁹

Despite these noble ambitions, the trajectory of land redistribution over the past twenty four years reflects changing policy agendas. Not only has land redistribution fallen far short of official government targets and public expectations, its focus, criteria and *modus operandi* have also undergone several significant shifts.¹⁰ Although all policies relating to land redistribution emphasise gender equity as a goal, people with disabilities, the youth and women’s land rights are generally still more insecure. Communal areas remain sites of persistent and gendered poverty and inequality. Far from recent law and policy enhancing security of tenure, practices on the ground have rendered people living in the former homelands, who bore the brunt of forced removals, vulnerable to dispossession.

¹ See section 25(5) of the Constitution.

² Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) xxi.

³ See preamble to the Constitution.

⁴ Shipton “Land and Culture in Tropical Africa: Soils, Symbols and the Metaphysics of the Mundane” 1994 *Annual Review of Anthropology* 347-77.

⁵ Barry “Now Another Thing Must Happen: Richtersveld and the Dilemmas of Land Reform in Post-Apartheid South Africa” 2004 *South African Journal On Human Rights* 355-356.

⁶ Hart *Disabling Globalization: Places of Power in Post-Apartheid South Africa* (2002) 39.

⁷ Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) xxi.

⁸ 5 Fay and James “Giving Land Back or Righting Wrongs? Comparative Issues in the Study of Land Restitution” in Walker et al (eds.) *Land, Memory, Reconstruction, and Justice: Perspectives on Land Claims in South Africa* (2010) 1-9

⁹ Department of Land Affairs *White Paper on South African Land Policy* (2007) 7.

¹⁰ See Government of the Republic of South Africa *High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 207. Available at https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf.

The Commission thus sought to facilitate a broad exploratory inquiry into the impact of rural land use and ownership patterns on human rights by convening an investigative hearing on this issue. This inquiry constituted an exploratory hearing hosted by the Commission. The hearing, which was held on 28 March 2018, sought to explore a series of three broad, interrelated, and overlapping themes related to the impact of rural land use and ownership patterns on human rights, specifically:

- Civil and political rights;
- Economic and social rights; and
- Equality.

1.1 EARLIER INITIATIVES BY THE SAHRC

The Commission has continuously been involved in monitoring the issue of land through public hearings as well as through the resolution of individual complaints. In June 2001, following complaints over reports of human rights abuses in the farming sector, the Commission instituted a *National Inquiry into Human Rights Violations in Farming Communities* which culminated in a report of the same name published in August 2003.¹¹ The principal recommendation of the report was the formation of a Farming Community Forum (Forum) in the Office of the Presidency. The Forum was to enable farm dwellers, farm owners and the government to interact and address the many issues facing people within farming communities. The report also tabled numerous recommendations relating to land rights, labour, safety and security, and economic and social rights.

In 2007, the Commission held an investigative hearing which resulted in a 2008 report titled *Progress made in terms of Land Tenure Security, Safety and Labour Relations in Farming Communities since 2003*.¹² The 2008 Report represented the Commission's endeavour to assess the progress which has been made with respect to rights associated with tenure security, safety and labour since the release of the 2003 Report. With respect to tenure security, the Commission found that there had been little progress towards achieving security of tenure for farm dwellers and labour tenants.¹³ With respect to safety on farms, the Commission found that there continued to be unacceptably high levels of violent crime in farming areas, with serious consequences for farm owners and dwellers.¹⁴ One of the key recommendations from the 2008 report was for the then Department of Land Affairs to enter into an urgent dialogue with its social partners to review, clarify and reform its policy on tenure security for farm workers and occupiers.¹⁵

In November 2013, the Commission held an investigative hearing on *Monitoring and Investigating the Systemic Challenges Affecting the Land Restitution Process in South Africa* which culminated in a report published in November 2014.¹⁶ The 2013 hearing sought to investigate the systemic challenges affecting land restitution process in South Africa. Some of the key challenges highlighted as bedeviling the land restitution process are the Commission on the Restoration of Land Rights (CRLR)'s limited research capacity as well as competing and overlapping claims. Other impediments highlighted are the restraints regarding the development of claimed land, ineffective utilisation of restored land, and insufficient State support.¹⁷ This necessitated one of the key recommendations which emphasised the importance of capacitating the CRLR to enable that institution to effectively and expeditiously process land claims lodged with it. The importance of State funding for beneficiaries of the land restitution process was also highlighted.

¹¹ See South African Human Rights Commission *National Inquiry into Human Rights Violations in Farming Communities (2003)*. Report available at https://www.sahrc.org.za/home/21/files/farming_inquiry_2003.PDF.

¹² See South African Human Rights Commission *Progress made in terms of Land Tenure Security, Safety and Labour Relations in Farming Communities since 2003 (2008)*. Report available at https://www.sahrc.org.za/home/21/files/Reports/Farming%20Inquiry%20Report_2008.pdf.

¹³ Ibid 9.

¹⁴ Ibid 10.

¹⁵ Ibid 10.

¹⁶ See South African Human Rights Commission *Monitoring and Investigating the Systemic Challenges Affecting the Land Restitution Process in South Africa (2014)*. Available at <https://www.sahrc.org.za/home/21/files/Land%20Restitution%20Report%20Proof%202.pdf>.

¹⁷ Ibid 32.

A brief reflection on the implementation of the Commission's recommendations indicates that there appears to be minimal progress. Far-reaching recommendations that have emerged from previous inquiries have not been implemented. The same issues are still manifesting themselves largely to the detriment of the poor rural dwellers, farm workers and farm dwellers.

Taking into account these issues surrounding the contested issue of land, the Commission decided to embark on an exploratory high level public inquiry into the impact of rural land use and ownership patterns on human rights in South Africa.

1.2 THE MANDATE OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

The SAHRC is a National Human Rights Institution established in terms of section 181 of the Constitution of the Republic of South Africa, 1996 (the Constitution). In terms of section 184 (1) of the Constitution, the SAHRC must:

- a. promote respect for human rights and a culture of human rights;
- b. promote the protection, development and attainment of human rights; and
- c. monitor and assess the observance of human rights in the Republic.

In carrying out this mandate, the Commission is empowered by section 184 (2) of the Constitution:

- a. investigate and to report on the observance of human rights;
- b. take steps to secure appropriate redress where human rights have been violated;
- c. carry out research; and
- d. to educate.

Further powers and functions of the Commission are derived from, among others, the South African Human Rights Commission Act, 40 of 2013 (the SAHRC Act), section 13(3)(a) of which provides that the Commission is competent:

- a. to investigate on its own initiative or on receipt of a complaint, any alleged violation of human rights.

These provisions are further strengthened by the specific competencies contained in section 15(1) of the SAHRC Act, which provides that the Commission may:

- a. conduct or cause to be conducted any investigation that is necessary for that purpose;
- b. through a commissioner, or any member of staff duly authorised by a commissioner, require from any person such particulars and information as may be reasonably necessary in connection with any investigation;
- c. require any person...to appear before it...and to produce to it all articles or documents in the possession or custody or under the control of any such person and which may be necessary in connection with that investigation;
- d. through a commissioner, administer an oath or take an affirmation from any person referred to in paragraph (c) ... and question him or her under oath or affirmation.

In terms of section 15 of the SAHRC Act:

- (6) ...the procedure to be followed in conducting an investigation must be determined by the Commission with due regard to the circumstances of each case.
- (7) The Commission must make known publicly the particulars of the procedure which it has determined.

Thus, the Commission has developed a set of Complaints Handling Procedures available on its website.¹⁸ These procedures allow for the convening of hearings in the event, *inter alia*, that it may be deemed to be in the public interest or that the request for a hearing might be deemed to be based on reasonable grounds.

¹⁸ See Complaints Handling Procedures of the Human Rights Commission (2018) available at <https://www.sahrc.org.za/home/21/files/Complaints%20Handling%20Procedures%20-%20SAHRC%20-%20Public%20-%201%20January%202018.pdf>.

Finally, section 13(1)(b)(vii) of the SAHRC Act envisages a role for the SAHRC in respect of South Africa's compliance with international human rights norms and standards, requiring the Commission to report to the National Assembly on the country's progress in meeting commitments made under international law. It is within the ambit of this framework that the SAHRC resolved to hold a national investigative hearing on the impact of rural land use and ownership patterns on human rights in South Africa.

1.3 PURPOSE OF THE HEARING

The Hearing sought to explore the following questions regarding the impact of rural land use and ownership patterns on human rights through engaging with the following questions:

- a. What is the impact of slow land reform on civil and political rights, with particular reference to forced rural evictions and 'land grabs'?
- b. What is the role of the State, civil society, and the private sector in implementing rural land reform?
- c. To what extent has the State adopted reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis, in terms of section 25(5) of the Constitution?
- d. Why has land policy and legislation not succeeded in addressing the urgent concerns of the majority of (landless) South Africans thus far?
- e. What is the potential and challenges of using land to address unemployment and poverty in South Africa?
- f. What formal mechanisms are necessary to recognise the property rights of the poor and previously excluded, and which actors are best-placed to implement them?
- g. How should we address rural land ownership patterns that exclude black women?
- h. How do we assess whether land law and policy are enabling citizens to gain access to land on an equitable basis?
- i. Do the legislative gaps that persist in respect of security of tenure demonstrate an anti-poor stance in respect of rural dwellers?
- j. Why has the approach to land shifted away from a rights-based one that prioritises equitable access to land, towards a State ownership model?
- k. What is the role of land in achieving substantive equality in South Africa?
- l. To what extent can addressing land ownership inequality address socio-economic exclusion in South Africa? and
- m. What is the potential significance of land transformation to broader transformational objectives and to address the triple challenges of poverty, inequality and unemployment?

1.4 METHODOLOGY

1.4.1 NATIONAL INVESTIGATIVE HEARING

The SAHRC convened a national investigative hearing on the 28 March 2018. The hearing sought to reach a wide range of identified civil society stakeholders to secure diverse experiences and perspectives on the impact of rural land use and ownership patterns on human rights. On that basis, the Commission invited civil society stakeholders deemed to have experience and expertise on land reform, land tenure and human rights. Stakeholders included civil society organisations, communities, researchers, academics and social commentators. For the purposes of the hearing, identified stakeholders were invited to present information, by providing both oral and written submissions to the SAHRC.

Although the Commission has in the past dealt with the land-related issues through public hearings and individual complaints, systemic challenges persist. As such, the Commission decided not to replicate what it has done in the past or what other entities are currently doing, but instead sought to complement these efforts by adopting a rights-based approach. In this

inquiry, the Commission sought to apply a human rights lens to the issue of land to identify the human rights impact that current land use and ownership patterns have on individuals and communities in rural areas.

1.4.2 PROCEDURES AT THE SAHRC HEARING

The panel was composed as follows:

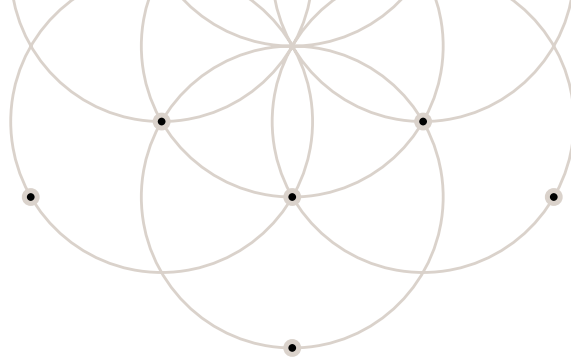
- a. Mr Chris Nissen, Commissioner of the South African Human Rights Commission and Panel Chair;
- b. Dr Shanelle van der Berg, Acting Head of Research, South African Human Rights Commission; and
- c. Professor Ruth Hall, Institute for Poverty, Land & Agrarian Studies, University of the Western Cape (External Panellist).

1.4.3 NATURE AND STRUCTURE OF THE PROCEEDINGS

The proceedings were inquisitorial in nature. Respondents were requested to make written and oral submissions. The submissions made by the respondents were in response to the questions posed in their respective invitations. After hearing the oral submissions, the panellists had the opportunity to ask further questions of clarity pertaining to the submissions.

2.

SUBMISSIONS FROM THE RESPONDENTS



2.1 LEGAL RESOURCES CENTRE

The Legal Resources Centre (LRC)'s presentation focused mainly on the key issues which the LRC views as impacting on rural land use and ownership patterns on human rights, particularly the rights of rural communities, farm dwellers, farm workers and women in general. Whilst some of these issues had already been addressed in the *High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (High Level Panel report),¹⁹ it was deemed necessary to raise to engage with them. This is because the Commission's approach was distinguishable from that of the High Level Panel. The Commission's hearing was thus different as it adopted a human rights approach, but also more limited to the extent that it did not aim to re-consider restitution holistically as was purported in the High Level Panel report.

2.1.1 THE CONCEPT OF OWNERSHIP

The LRC's submission first sought to address the complex concept of ownership in the context of land. It was pointed out that the South African legal system inherited a singular understanding of what ownership means from the common law. Legal scholars have, for a long time, advocated for a need to move beyond this singular common-law understanding of ownership which defines ownership to be absolute ownership. LRC further pointed out that the South African legal system and government have failed to successfully evolve beyond that understanding.

To demonstrate this, the presenter gave an example of how the Director General of the Department of Mineral Resources (DMR), during the Parliamentary Committee negotiations on the amendment to the minerals legislation, stated that no community in South Africa owns the land that it lives on. Accordingly, this means that the only owners in South Africa are the minority common-law owners and that view is supported by the minerals legislation. This example proves that the idea of ownership in South Africa is largely seen through the lenses of the common-law model. Consequently, this is creating considerable insecurity for rural communities.

According to LRC, the need to look beyond the common law model is not only an academic exercise but a constitutional imperative. The Constitution specifically recognises customary rights. Furthermore, the Constitutional Court has handed down landmark judgments recognising property rights arising from customary law. In practice, however, it has been difficult to protect people who have customary rights to access, use and own land. This is largely due to the fact that ownership is thought of in only one way, namely the common-law model.

2.1.2 SECURITY OF TENURE

LRC pointed out that in terms of section 25(6) of the Constitution, the government must adopt legislation that will provide tenure security for people on communal land. However, such legislation has not yet been enacted. There have been attempts to promulgate such legislation through the Communal Land Rights Act 11 of 2004 (now struck down) and currently there is a Communal Land Tenure Bill, however, these attempts have failed. This failure has been attributed to the attempt at protecting customary land rights by adopting a common-law property approach. The model that the State prefers is that ownership vests at the level of the traditional leader or the level of the Communal Property Associations, if the latter, more democratic model is elected. However, that is not how property rights can and should be protected in rural areas and this renders rural tenure even more insecure rather than making it more secure.

¹⁹ See Government of the Republic of South Africa *High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change*.

There is an existing legal framework that is supposed to protect the customary land rights of rural communities, the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA). It was however pointed out that IPILRA is an outdated Act, which was promulgated in 1996. It was supposed to be in force for one year to allow for the promulgation of a new legislative instrument that would eventually protect rural land rights. However, to this day, this Act is still in force and is renewed annually. In terms of IPILRA, the Minister of Rural Development and Land Reform is the trustee of all rural land. However, individuals or households with informal rights or customary rights on land, must consent to any development or any action that will deprive them of their customary rights. LRC argued that IPILRA is an incredibly strong piece of legislation and if properly implemented may provide tenure security to rural communities. The challenge, however, is that the protective prescripts under IPILRA are not being complied with.

2.1.3 CHALLENGES RESULTING FROM THE IPILRA

- a. In 2016 the Premier of the North West appointed a commission of inquiry into three traditional communities in that province, one of which is the *Bakgatla Ba Kgafela*, which sits on very valuable platinum land. For years, there have been allegations of money disappearing by some form or another and this inquiry was instituted to investigate these allegations. The inquiry shed light into how the community's land is being grabbed.

In terms of IPILRA, communities with informal rights or customary rights on land must consent to any development or any action that will deprive them of their customary rights. In that regard, the affected community must pass a resolution. It is, however, difficult to imagine a community comprised of many members participating in the decision to pass a community resolution. What normally happens in practice is that the chief and his close followers make the decisions and often pass the resolution without proper community participation.

There is normally an official from the DRDLR present and sometimes the chief alone signs a resolution stating that the whole community has consented. It was explained that in some cases there is an attendance register attached of some 100 out of the 300 000 people constituting the community. Through that resolution, which the Minister then authorises as a proper IPILRA process, the community has been stripped of assets worth billions of Rands. To exacerbate the problem, the mines pay nominal fees for such land.

The above example demonstrates how large scale expropriation without compensation is happening every day. Unfortunately, it is taking place in areas that do not receive sufficient public or media attention. This, the LRC submitted, is a crucial blind spot to the current debate on land expropriation without compensation.

- b. The LRC further provided an example of how *de facto* expropriation without compensation happens inside customary communities due to a lack of protection for customary property rights within communities. The LRC explained that in Limpopo, the only province where it is legal for traditional leaders to tax their followers, a man who had refused to pay such tax, passed away. Upon the man's death, his son went to the headman to report the death, as he should. The headman advised him that he did not know who he was and that he did not know his family either, including his now deceased father, but of course he did. However, what he meant was that, "you are dissenters and therefore I do not recognise you". This meant this boy, 17 years old at the time, had his right to reside in the house where his father, his grandfather and his great-grandfather had lived taken away and was left destitute.

These above cases highlight how *de facto* expropriation is taking place in communities internally and externally and communities are left powerless as such issues are hardly reported in the mainstream media. IPILRA should have helped them but similar to ESTA, it is hardly implemented and magistrates shy away from it. Magistrates are mostly not even willing to deal with IPILRA issues as they see those matters as tribal issues which should be dealt with internally within the community.

2.1.4 COMMONAGE

A second issue discussed was that of commonage. It was explained that during the time of the crown, the crown gave to each municipality in South Africa big pieces of municipal land which is known as commonage. This land was supposed to be used in the interest of the community, which of course at the time meant the white community. In 1997 the DRDLR adopted a Municipal Commonage Policy, because commonage, as State-owned municipal land, was identified as ideal for land reform. It remains State land but it was seen as the kind of land that could be made available for the incubation of small-scale farmers. Municipal commonage projects have been relatively successful, and provided a way for poor people to access land cheaply and with the support of local government. However, 21 years later, the commonage programme has come to a standstill, and it is very difficult to find new commonage projects. Instead, most municipalities that hold commonage land continue to rent it out to commercial farmers, rather than making it available to small-scale farmers and poor residents.

Small scale farmers in the Western Cape, Northern Cape and Southern Cape are fighting for access to commonage land from municipalities. The greatest obstacle encountered by these individuals is that the land belongs to the municipalities. Municipalities have however taken a view that land reform is not their competency. Municipalities further argue that participating in land reform would entail an exercise of an unfettered mandate which would be unlawful. The LRC submitted that the real reason why municipalities are unwilling to make land available to small-scale farmers is the financial benefits accruing to them. Commonage land is being rented out on long-term leases to commercial farmers, which is a big source of revenue for municipalities.

The LRC cited Stellenbosch Municipality as one of the best examples. It was pointed out that there are thousands of hectares of municipal land but no one knows exactly how much of such land exists. The municipality has refused to publicly release the results of an audit that was recently carried out. Nevertheless, the land is there and there is a complete refusal by the municipality to make the land available to small-scale farmers. In the circumstances, the LRC recommended that the SAHRC to investigate the validity of the municipalities' argument that it would be unlawful for municipalities to participate in land reform.

The Department of Rural Development used to have a fund known as the commonage infrastructure fund (Municipal Infrastructure Grant) that was specifically made available for commonage land that municipalities could apply for. This is no longer the case. It was all subsumed into the Recapitalisation and Development Programme. Consequently, the little support that was there is now hard to come by from the department, yet it is such an important and obvious mechanism to use to make land available to small scale farmers. There is enormous potential to provide access to land for the poor on municipal commonage land, and this should be prioritised.

2.1.5 DISCUSSION

The following points emerged from the LRC's engagement with the panel:

- a. It is complicated to balance the interests of the directly affected members of the community and those of the indirectly affected members. The latter would argue that as members of the same community, they too should benefit as they are affected by mining projects. However, where a mining project is proposed in a community, it is the people whose houses, land, grazing rights, access rights, livelihood rights that will be lost. These, it was submitted, are the directly affected people whose consent should be obtained.
- b. The key issue when it comes to compensation is understanding the right to **consent**. Currently the legal requirement for consent means very little. It means that one must be consulted about how one will be removed. The consultation is not aimed at asking whether or not the community wants to be moved. The right to consent and to decline is of fundamental importance to the community as it is the only leverage which the community has in order to bargain for better compensation. This hinges on the global human rights standard of 'free, prior and informed consent'.

- c. Currently, **compensation** is paid, literally, for what is on top of the soil. In practice, this basically means that a community member will only be compensated for exactly what the affected person had. Land and what lies under the land are thus not compensated. This means that people are losing land rights without compensation.
- d. The other problem is that the decision to avail community land for a **mining project** for example, is treated as a once-off event, done at a single meeting. If there is the possibility of a community overriding decisions of the directly affected members, then there must be time and space for those community-negotiation processes to take place in a structured manner. However, there is no suggestion of that being made possible by government or developers who see decisions as once-off moments in time.
- e. Because **customary law and practices** are not recognised by the IPILRA, people are excluded from consultative processes. Affected rights holders often need to make decisions in terms of customary law, thus often require time and the space for those processes to be followed. Thus communities need to negotiate and reach a consensus as a community and not have someone going around with a clipboard from one house to the next and asking people to tick a box. What is needed is meaningful consultation.
- f. **Independent experts** need to be made available to advise communities, including the establishment of a fund to remunerate such experts, especially in mining-related projects proposed on community-owned land. Such an initiative will provide the communities with adequate and relevant information which will empower them to make informed decisions. This, it was submitted by the LRC, would prevent a situation similar to the *Bakgatla* community which entered into deals worth billions of Rands. The community had absolutely no idea what it was signing and as a result was materially prejudiced.
- g. Regarding the question on **internal relations** and women's access to land the respondent submitted that it is not possible to provide a blanket answer. Experiences differ across the country and it is also vastly different in certain situations. However, the presenter pointed out that the most problems with women accessing land is in KwaZulu-Natal (KZN).
- h. With respect **women's access to land**, the bigger problem, it was submitted, is decision making in these communities. Decisions over the land and resources are key in these communities. However, women still play a very limited role in decisions being taken over land at the level of the community. It appears that the decision-making role in most communities is extremely male-dominated.
- i. On the issue of the **Ingonyama Trust**, it was explained that the Ingonyama Trust is a massive issue. Its members, members of the community in KZN, are customary owners of their land and they have customary rights to access and to use the land as owners. It was pointed out that the idea of converting those rights into leasehold and the idea of the Ingonyama Trust asking people to sign leases for their land amounts to *de facto* expropriation without compensation. At the time it tried to do so, the Ingonyama Trust received a threat of legal action on the grounds that this amounted to expropriation without compensation, and the trust retreated. It was pointed out that there can be no reason to justify the survival of the Ingonyama Trust.
- j. Consequently, it was submitted that creating a **land registry** to record the rights of land holders, as recommended in the *High Level Panel* report, is an important initiative. That registry would identify the rights of land holders, for example identify who has the right of access to land and who has the right to graze. While this will be a painstaking exercise, lessons could be drawn from the work of *Namati*, an organisation that maps rights within communities in various African countries.
- k. On the question of **commonage**, it was submitted that the Department of Rural Development and Land Reform should resuscitate the municipal commonage policy. In that regard, a summit must be held with all municipalities to educate them on commonage and provide the resources to resuscitate the policy and maintain oversight on the commonage policy to ensure compliance.

- i. On the issue of **gender** and access to land by women raised by the panel, it was explained that in terms of customary law, the rights to access and use of land are distinct. Women have rights to use of the land whilst men have access rights. What this means is that a woman's right to use is dependent on her association to a household or a man. Thus, one of the big criticisms of trying to give individual titles to people in rural areas is that it would normally then go to the man and that separate right that women hold then disappears.
- m. On the issue of roping in **strategic partners** to help newly resettled communities, it was submitted that, from experience, strategic partners are imposed on farmers. The Stellenbosch case illustrates how the policy is implemented in such a manner that government does not consider the identity of the farmer, her area of specialisation or level of experience. The department's focus is to pay someone to teach the farmers how to farm from their list of accredited strategic partners, which is not a long list. Some of these strategic partners are recycled and in most cases these individuals make an enormous amount of money out of providing these services. It was argued that there have not been any real success stories coming out of this engagement with strategic partners. It was explained that communities are never afforded the opportunity for input and decision-making in choosing a strategic partner. Rather, the strategic partner is simply imposed on the farmer. As an example, farmers in Stellenbosch did not like the strategic partner that was given to them for very good reasons. However, once one refuses a strategic partner they are dropped from the programme for good as they will be deemed as being difficult to work with. For this reason, the whole model of requiring strategic partners should be critically assessed and possibly amended or ended.

2.2 INDIGENOUS FIRST NATION ADVOCACY SOUTH AFRICA

The Indigenous First Nation Advocacy South Africa (IFNSA) expressed its displeasure at the Traditional Khoisan Leadership Bill and labelled the Bill as nothing but a miscarriage of justice. The following were raised as issues that gravely concerned the IFNSA.

- a. The Bill merely attempts to provide the Khoisan some form of representation in terms of the so-called leaders of the Khoisan. Yet, it fails to provide a means by which the rest of the Khoisan can be accommodated and brought on board.
- b. The Bills fails to recognise the legacy issue and what the Khoisan have lost and where they are coming from.
- c. The majority of the Khoisan remain landless. Consequently, they enquired as to how the Khoisan as a community can be part of this discussion as the Khoisan felt as though they have been excluded from mainstream South African life.

2.3 BENCH MARKS FOUNDATION

The Bench Marks Foundation (BMF) highlighted the following points in its presentation.

- a. The BMF expressed concern at the failure by mining companies, after the closure of their operations, to rehabilitate the land as required by the law.
- b. Mining companies are required to either improve the land or to rehabilitate to what it was before. Consequently, the BMF recommended to the SAHRC that it investigates and follow up on why the companies never do so.
- c. Customary communities tend to suffer disproportionately from the impacts of mining. Such communities are directly affected by environmental pollution, air borne diseases, loss of their farmland and grazing land, and forced displacement.
- d. While mining can provide benefits, communities are vulnerable to grievous harm that often outweighs any gains.

- e. Mining rights are being granted to companies that make no effort to comply with the IPIRLA. Mining often commences without this compliance, in the face of requests for the suspension of mining rights and pending the adjudication of appeals.
- f. Communities should be empowered to determine whether mining should occur on their land. This would enable communities to decide whether mining should occur, and to level the playing field for communities to negotiate the terms of mining, relocation and compensation, should it be embraced.
- g. For this right to be meaningful, communities' decisions should be made without political pressure on the basis of full information on the costs of the proposed mining, including alternative development paths.
- h. This requires free, prior and informed consent before extractive activities occur on community land.

2.4 NKUZI DEVELOPMENT ASSOCIATION NPC

Nkuzi Development Association NPC's (Nkuzi) submissions were based on work done with farm dwellers and farm workers in Limpopo province, land claim groups and a few communal property association beneficiaries of the land reform programme. The submission highlighted issues which farm workers, farm dwellers and the rural communities encounter regularly. These are highlighted below.

- a. On the issue of rural land reform, Nkuzi submitted that currently, there is not much development regarding land reform. Nkuzi has witnessed widespread evictions of farm dwellers in Limpopo. It was pointed out that whenever farm dwellers are evicted, they are often dumped in rural settlements in the communal areas. This often creates tensions between the receiving community and the dumped farm dwellers.

The tension emanates from the fact that in most instances the evicted farm dwellers are placed in RDP houses which are already registered in the names of people whom the municipality would have struggled to locate. When these people eventually show up, it becomes a big issue for farm dwellers accommodated in the houses. A further challenge arises in situations where the municipality promises to make available alternative plans to accommodate the evictees. The evictees often find that the form of accommodation that is being offered is of inhumane standards.

Nkuzi narrated the ordeal of a family of about 14 people that was evicted five years ago from a farm around Vaalwater. The municipality volunteered to help with alternative accommodation and the family was placed in a community hall. That alone has created tensions between the family on one hand and the community on the other because the community hall is meant to be used for community and public purposes. Notably, the family comprises of elderly men and women, thus privacy is compromised. The family also has livestock and there are challenges to find grazing land for the livestock, which often has to linger around the community hall.

- b. In other instances where land reform has been stagnant, it appears that government has left a lot of control and discretion in the hands of the current landowners, regard being had to the principle of the willing buyer, willing seller. It was submitted that this alone perpetuates the current *status quo* and in places such as Limpopo, justifies the call for expropriation without compensation being a necessity going forward. It was submitted that it is ill-advised to allow the current land owners to dictate how land should be managed by Black land reform beneficiaries. Nkuzi cited the *Popela*²⁰ case in Limpopo, where the owner has been compensated as a consequence of a successful land claim, that went all the way to the Constitutional Court. The same individual, the farm owner, despite being compensated for the land, to this day still resides on the farm and utilises its resources without formal documentation to place him as a caretaker for that piece of land.

²⁰ *Department of Land Affairs v Goedgelegen Tropical Fruits* 2007 (6) SA199 (CC).

- c. Other causes of tension result from the way in which restitution cases are being treated. There are instances in Limpopo where restitution of land rights is done by way of restoration. However, such processes fail to incorporate the farm dwellers who are currently on the restituted land, and that creates problems. It was further highlighted that permission to continue occupying such lands can be easily withdrawn at any time by the traditional leaders. Further, even where farm dwellers are allowed occupation, there is no guarantee for access to land for ploughing, grazing and burial rights.
- d. There is also a growing trend that to access land in rural areas, one has to be financially well-off. Only the elite seem to access land and mainly it is multinational corporations and mining companies.
- e. There are also many instances where access to land is granted without following the procedures set out in the IPILRA. An example is the case in Mokopane where it was discovered that there is a mining company which has been in operation for about three years. There is however not even a single community resolution adopted in line with IPILRA to signify consent by the community for such development.
- f. Regarding ownership, there have been instances where the government has attempted to procure land for the benefit of farm dwellers, especially in Blouberg Municipality. This was done sometime in 2011 but, to date, that land is not developed and is not even in the name of the group that the land was procured for. The land in question, at the moment, is a target for opportunistic invasion and unscrupulous traditional leaders attempting to extend their jurisdiction over that land.
- g. Although government has adopted legislation and policies meant to facilitate access to land for the rural poor, the challenge is with implementation. The government often fails to implement the progressive provisions of the legislation that it has put in place. A good example is one involving farm dwellers in Limpopo. There is not a single case where section 4 of ESTA has been implemented. This section is meant to provide long-term secure tenure for farm dwellers, including upgrading of tenure rights to full ownership. Section 4 of ESTA provides for subdivision of farms and upgrading of tenure as an alternative to eviction – yet it has not been done. Most of the time when there are eviction threats, government only intervenes by attempting to resolve the issues through mediation. Sadly, in most cases, before mediation even begins, the position often changes and farm dwellers are forced into agreeing to vacate the land and this creates its own challenges.
- h. In cases where farm dwellers benefit from housing, they normally do so after a very long struggle and protracted engagements with the authorities. The assistance they receive is that of developments similar to RDP houses which do not have grazing land for their livestock and land to grow food.
- i. Women make up the majority of the rural population and labour force in commercial farms, yet they are deprived of land ownership. Women who benefited from land reform projects are in most cases excluded from the decision-making processes on issues regarding the land or related issues. Men often decide what has to be cultivated and often what is cultivated fails to contribute to food security for the women and yet the latter are still required to work the lands.
- j. Women farm dwellers are in an even worse position as their rights to land often depend on the presence of a male counterpart. Where a woman resides on the farm with her husband, who is also working on the same farm, and his employment is terminated, whether because of old age, death or dismissal, it means the wife's services, privileges and rights are also terminated. The woman, together with any children, vacate the farm.
- k. It was submitted that efforts should be made to elevate women's land rights in rural areas to a similar status as that of their male counterparts.

2.4.1 DISCUSSION

- a. Regarding the **housing policy**, the challenging issue is the position adopted by municipalities regarding their role in land reform. Municipalities maintain the view that they have no role to play in land reform. When the need for alternative accommodation arises for evictees, municipalities do not have a strategy in place to deal with the sudden and pressing need to provide accommodation. Integrated development plans (IDPs) should address this, rather than municipalities excluding themselves from national programmes, and failing to include the farm-dweller communities in their development plans. Consequently, it would be very helpful to explore ways in which municipalities can be pushed into playing a role in land reform through their **IDP processes**. Such an approach will ensure a holistic approach to planning in rural areas. It was submitted that the developments which municipalities plan do not happen in a vacuum. Development takes place on land and it is land in totality including the people who live on the land. This will ensure that whenever the municipalities formulate plans and strategies, they will also involve farm dwellers. Farm dwellers are not the beneficiaries of any development within a municipal area and they are treated as third class citizens and thus excluded from IDP planning processes.

Nkuzi further pointed out that where farm dwellers are receiving **services** such as housing, electricity and schooling, it is often at the mercy of landowners. If, for example, landowners do not want the farm dwellers to have a mobile clinic or schools in their area, they will not get them. This explains why most of the children or people on farms are not even documented and do not even get social grants. Further, it is disturbing that nationally, most of the schools earmarked for closure are mostly farm schools which will obviously affect farm dweller children's right to education. **Although ESTA states that alternative accommodation should always be better** than the current (or previous) accommodation, farm dwellers in Limpopo are almost always accommodated in deplorable conditions, often worse than the prior situation.

- b. Regarding **prosecutions** for illegal evictions, at a Provincial Magistrate Forum held 2018 in Mankweng, magistrates admitted that they were not aware of ESTA. This demonstrates that the judiciary needs to educate magistrates and officials about ESTA. The lack of knowledge of ESTA has resulted in a serious lack of prosecutions in line with section 23 of ESTA. Whilst this example is specific to Limpopo, there is a strong possibility that same is true nationally. There is no evidence of a single successful prosecution for illegal eviction under section 23 of ESTA.
- c. Regarding commonage in Limpopo province, most of the municipalities do not own land. Most of the available land is tribal land or communal land which falls under the Department of Rural Development and Land Reform. However, there should be a national audit of all State lands per municipal area. Such audit should determine what the current use or status of the land is in order to determine if it can be made available for landless rural people. Another audit could also focus on the land owned by the Department of Public Works as the latter owns land that can also be made available for redistribution.
- d. Nkuzi is aware of the **District Land Reform Committees** and its experience is that non-governmental organisations are being deliberately excluded from their dialogues and meetings. Despite being side-lined, Nkuzi submitted that it, with other organisations, were mobilising local communities to attend the meetings to participate in the processes. Sadly though, it appears that the District Land Reform Committees do not seem to have policies or strategies aimed at the betterment of the people in rural areas with respect to land reform. Rather, one cannot help but conclude that the committees are a scheme aimed at justifying the expenditure of funds by the Department of Rural Development and Land Reform.
- e. The **Land Rights Management Facility (LRMF)** was established to provide specialised legal skills and to assist land dwellers and evictees with legal advice. It was explained that this programme is an Nkuzi initiative in which it sought legal assistance for the beneficiaries of land reform after the courts ruled that indigent farm dwellers are entitled to legal defence of ESTA rights at State expense. It was submitted that the programme has *not* been a success. Instead

of these legal practitioners assisting in curbing illegal evictions, they intervene through pretending to conduct mediation between the parties. However, in most cases, they attend the mediation proceeding with an outcome in mind before they begin the mediation process. In all of the cases, the outcome is to facilitate the eviction process rather than stop it.

- f. Where the intervention of the **LRMF** fails to facilitate the eviction, farm owners engage in ill practices to evict the land occupiers. This can be done by way of harassment or the payment of bribes which sees land dwellers being offered as little as R10 000 to leave the land.
- g. The reason behind the challenges or failures of the **LRMF** initiative is that most of the legal firms on the LRMF database lack specialised knowledge in the field of land legislation. Consequently, for this initiative to succeed, the department will need to train and educate the legal firms on their database so they acquaint themselves with the land reform legislation, its detail and its purpose.
- h. On the possibility of imposing a **moratorium on evictions**, it was argued that a moratorium, without putting measures in place that ensure that it is properly implemented and monitored, will not be of assistance. Provincial offices and the regional offices of DRDLR and the various Premiers' offices in every province must have a role to play to ensure that there is implementation and compliance.
- i. On **expropriation without compensation**, Nkuzi's position is that it supports expropriation without compensation. There is a need to override the interests of property owners, for instance where there are land claims, so as not to allow a situation where landowners hold the process to ransom. However, prior to such expropriation, an investigation should be conducted to determine how the land was originally acquired. If the land was not purchased, then there should be no compensation. Compensating the landowner would be unjustified enrichment where land was obtained for free. The land owner should however be compensated for any developments effected on the land.
- j. On the issue of **farm schools**, Nkuzi's recommendation is that all land where there are farm schools must be expropriated and given to government. This is because education is not a private service. Thus the land on which the facility is situated should similarly be a public good.

2.5 FOUNDATION FOR HUMAN RIGHTS

The Foundation for Human Rights (FHR) presentation was based on findings and recommendations of a National Dialogue report published by FHR in 2015 on farm dwellers and farm workers. The dialogue attracted 138 delegates with 86 delegates from civil society organisations, 29 delegates from 14 government departments and four delegates from Chapter 9 institutions as well as representatives from Legal Aid South Africa and the Commission for Conciliation, Mediation and Arbitration, among other organisations. The following points were highlighted from the FHR's presentation.

- a. The idea was to bring all the stakeholders together especially in relation to ESTA because of the high number of evictions that were taking place under ESTA. It was clear that the ESTA was not being applied properly to stop evictions. Instead, ESTA was being used for mediation. Such mediation is supposed to be a win-win situation yet it was not a win-win situation for farm workers or farm dwellers.

ESTA was applied in such a way that descendants over 18 were not allowed to stay on the farms with their families, but were asked to leave. That resulted in families being split. Additionally, people considered to be no longer productive and not able to work on the farms, are also asked to vacate the farm. Thus, ESTA has not really helped farm workers and farm dwellers even though it is meant to provide security of tenure.

- b. The National Dialogue report defines a **farm worker** as a person who lives and works on the farm or who travels to work on farms from nearby settlements or townships. A **farm dweller** is defined as a person who lives on farms but does not necessarily work there. In the dialogue, it was recommended that farm workers needed legal support when

faced with evictions. As a result, it was imperative for the organisations that provide free legal services like Legal Aid to train their lawyers to assist people facing evictions. However, Legal Aid stated that it is unable to do so as that would be an unfunded mandate as the organisation only receives funding for criminal defence.

- c. FHR argued that such is an incorrect position taken by **Legal Aid** as everyone is entitled to a fair hearing and Legal Aid should provide legal assistance, including to persons facing evictions from land. The Constitutional Court, in a case where Nkuzi was the plaintiff, held that Legal Aid was under a duty to provide legal representation for people facing evictions, such as farm workers and farm dwellers. Unfortunately, there has been no progress in that regard as free legal services institutions always use the fact that they have a limited budget as an excuse not to provide these services.
- d. With regard to farmers having a **right to evict** farm workers and farm dwellers, farmers argue that they need to make a profit and they cannot retain people who are not productive. Yet, in most cases it appears that the real reason why these people are evicted is that farmers either want to mechanise or convert the farms into game farms. Thus ESTA must be explored to find out how it can assist farm workers in such instances.
- e. At many of the farms, workers and farm dwellers spoke openly about the **conditions on farms** and the fact that they were being denied their human rights. An issue that came to the fore was the denial of access to clean drinking water and to sanitation.
- f. Other issues included the issue of farm dwellers and farm workers' **livestock** being impounded resulting in such vulnerable groups being arbitrarily deprived of their property. The Constitutional Court has held that such a practice was unfairly depriving farm workers and farm dwellers of their livestock. Even though there are Constitutional Court judgments which one can rely on, farm workers are not aware of them, farm dwellers are not aware of them and many lawyers who assist farm workers are not aware of these judgments.
- g. The Dialogue made a recommendation to the Department of Justice and Constitutional Development (DOJ&CD) that there should be **training** for lawyers at Legal Aid and for other lawyers, including paralegals. The training will better equip them with the knowledge and skills to assist farm dwellers.
- h. The other challenge related to certain customary norms and practices impacting negatively on women's rights and thereby in conflict with constitutional norms on equality. It was recommended that there should be a **dialogue** between institutions like CONTRALESA, traditional leaders and women and civil society organisations that work on gender issues. Such institutions can engage with each other to find a way of securing and strengthening women's rights over and access to land.
- i. The FHR pointed out that the *Bhe and Others v Khayelitsha Magistrate and Others*.²¹ case, like the *Grootboom* case, is a **progressive judgment** but its influence on the ground (especially in rural areas) is non-existent. These cases are relied on in the urban areas where lawyers are aware of them, but in the rural areas it is the opposite because people, including lawyers in some cases, are not aware of these precedents. Another disadvantage was the magistrates' courts' lack of jurisdiction to adjudicate on constitutional matters, which are the courts most accessible to people resident in rural areas, including farm workers and farm dwellers.
- j. Another issue is the slow pace of **land redistribution**. One of the key recommendations that came out of the Dialogue was for the DRDLR to hold a national consultative meeting with civil society organisations and farmers' organisations on the future of land reform, its prospects and challenges and to explain how the 50/50 policy framework would work in practice.

²¹ 2005 (1) SA 580 (CC).

- k. **Labour laws** must be reviewed in order to find ways to incorporate provisions that protect the interests of farm workers and farm dwellers. Farm workers are generally seasonal workers, and as such have limited protection under the Basic Conditions Employment Act.
- l. Commission for Conciliation, Mediation and Arbitration (**CCMA**) commissioners are often not familiar with the plight of farm workers and farm dwellers. In many instances the CCMA offices are located a considerable distance from where farm workers and farm dwellers reside and work. Even where they manage to access a CCMA office, farm workers often do not know how to navigate the process and often lack the necessary resources to do so successfully.
- m. Even though section 23 of the ESTA has criminalised **unlawful eviction**, this category is not listed as a criminal offence on the SAPS' crime administration system CAS system. It is concerning to note that 98% of the evictions are unlawful, yet there have been no prosecutions or convictions for any unlawful eviction.
- n. The FHR recommended SAHRC to **call for a conference** with the DRDLR and the relevant stakeholders who would ordinarily include civil society organisations, farm dwellers and farm workers. The purpose of the conference would be to provide the department an opportunity to shed light on the 1 Hectare 1 Household and 50/50 policies, specifically how they are going to be implemented.

2.6 SURPLUS PEOPLE PROJECT

The Surplus People Project (SPP) responded to the questions posed by the Commission. SPP's responses are captured below.

2.6.1 THE IMPACT OF SLOW LAND REFORM ON CIVIL AND POLITICAL RIGHTS, WITH PARTICULAR REFERENCE TO FORCED RURAL EVICTIONS AND 'LAND GRABS'.

SPP explained that land grabbing, in violation of people's civil and political rights and the principle of free, prior, and informed consent, is a serious issue in rural areas. The Northern Cape, and in particular the Namaqua District, is affected by this phenomenon. The Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRDA) does not fully recognise the rights of mining-affected communities and does not give them an adequate voice in mining decisions, sufficient protection or adequate access to valid compensation.

This concern has been raised in current debates about the proposed amendments to the MPRDA. In terms of the MPRDA, prospective mining companies/ individuals can apply for mining permits and licences on communal land which cannot be vetoed by the affected community. As a result, substantial portions of communal land in Namaqualand have been rendered sterile to community use and development. This form of land grabbing, aside from resulting in the loss of land, leads to an overall lack of resources that impacts a community's ability to enjoy the benefits of the land.

To combat this challenge, the SPP recommended that the IPILRA should be used as a mechanism to protect vulnerable communities against land grabs. SPP has used IPILRA in the communal area of Steinkopf to provide community approval for the development of a multimillion rand irrigation project on communal land.

2.6.2 UNDERSTANDING LAND USE AND OWNERSHIP PATTERNS (TENURE SYSTEMS) IN RURAL AREAS

SPP explained that the tenure system in rural areas can be characterised as evolving and nested systems in line with the broad features of land tenure systems derived from customary norms and values. For example, the municipal regulations that were developed in the municipalities in Namaqualand were derived from the customary norms and values of the respective communities.

Therefore, the SAHRC should take cognisance of both individual rights and community rights. However, this should not occur at the expense of community ownership and community management.

2.6.3 STATE DUTY TO ADOPT REASONABLE LEGISLATIVE AND OTHER MEASURES IN TERMS OF SECTION 25(5) OF THE CONSTITUTION

Over the last number of years there have been concerning policy developments with regard to access to land and land rights. SPP used the Municipal Commonage Policy as an example to respond to the issue of access to land. The issue of land rights was addressed through the proposed amendments to the Communal Property Associations Act by demonstrating how land rights will be eroded in the proposed amendment.

The Municipal Commonage Policy afforded poor people in municipalities access to agricultural land on an equitable basis. Through this process hundreds of poor households in Namaqualand, the Hantam-Karoo and the West Coast towns and elsewhere in South Africa could get access to agricultural land. The advantages of the Commonage Policy are:

- a. Individuals in communities are still able to access the Housing Subsidy which many people need as they are inadequately housed.
- b. There is no need to set up new legal entities as the land is transferred to the local authority.
- c. Local authorities have the infrastructure to administer the commonage.
- d. Local authorities are subject to legal checks and balances through the Department of Local Government and Housing and can only use the land for the purpose for which it was given.
- e. Land which would have been claimed by a community, had it not been removed before 1913, can now be returned to the community as a whole rather than only to those who qualify for a subsidy.

In August 2001, the then Department of Land Affairs (DLA) (now DDRLR) introduced the Land Redistribution for Agricultural Development (LRAD) policy: a sub-programme of the Land Redistribution Programme (LRP). The DLA introduced this policy to stimulate development and to encourage commercial farming by African farmers. With the introduction of LRAD it effectively limited the rights of poor people to get access to public agricultural land. The municipal commonage programme was disbanded in favour of this new policy, despite its good outcomes in the prior five years.

In the past few years, no budgetary allocation has been made to this program which limited access by poor people, particularly women, to agricultural land. In light of the above, the SPP made a number of recommendations that are captured at the end of this report. The SPP suggested that the SAHRC investigate the status of municipal commonage land and ask the DRDLR to clarify its policy on land redistribution via making available municipal commonage land.

2.6.4 POTENTIAL CHALLENGES OF USING RURAL LAND TO ADDRESS AND ALLEVIATE UNEMPLOYMENT AND POVERTY IN SOUTH AFRICA

There is enormous potential for using rural land to address unemployment and alleviate poverty, however, our experience over the last 20 years suggests that land reform (the transfer of land from white people to black people) is insufficient. What is required is a comprehensive agrarian reform policy/strategy which will address broader issues of the rural economy (for example housing, infrastructure, roads, health care, education, inputs, research, extension, markets, processing and infrastructure).

One of the key challenges in rural areas is the way that people's land rights are violated in developing large scale projects. The SPP recommended that IPILRA should be used as an instrument to regulate development projects on communal land. SPP submitted recommendations to the DRDLR for the tenure reform process in terms of the Transformation of Certain Rural Areas Act 94 of 1998 (TRANCRAA) to state that the state should provide support for the administration of the land rights of communities. In addition, they should also provide infrastructural support to the coloured rural areas.

2.6.5 INCLUSIVE RURAL LAND OWNERSHIP PATTERNS

SPP suggested that rural land ownership patterns can be addressed through social mobilisation and direct forms of action, for example land occupation, appropriation of land parcels and use of land parcels by women. Women and men can start challenging the institutional systems that contribute to rural land ownership patterns that exclude women. This is a very complex institutional issue that is deeply rooted in the traditions and practices that needs to be challenged. In this regard, solidarity from men is required. The same should be done regarding legislative instruments that exclude women, for example, the Traditional Courts Bill which discriminates against women.

2.6.6 ADDRESSING LEGISLATIVE GAPS TO STRENGTHEN SECURITY OF TENURE FOR THE RURAL DWELLERS

In SPP's view, the only comprehensive tenure legislation that has been successfully promulgated and partially implemented is TRANCRAA. Thus far, no trust land has been transferred to the affected communities. The 2004 Communal Land Rights Act was challenged by four rural communities in 2006, arguing that it would undermine their right to tenure security as set out in the South African Constitution. The Communal Land Rights Act gave these traditional councils wide-ranging powers, including control over the occupation, use and administration of communal land. In 2010 it was declared unconstitutional by the Constitutional Court.²²

2.6.7 THE ROLE OF LAND IN ACHIEVING SUBSTANTIVE EQUALITY IN SOUTH AFRICA

Land has the potential to transform the lives of people as has been evident over the last 20 years. Access to land has created livelihood opportunities for the poor and vulnerable communities. Thus, land should be used for social and economic transformation. Land should be used to address historical injustices. It should not be restricted to land for productive purposes, but should address the housing needs of people in rural areas and informal settlements. Land should also be used to address issues of inequality and segregation and the marginalisation of black people, farm workers, farm dwellers, women, youth, people with disabilities and rural dwellers and to provide for futures characterised by social justice, dignity, and equal opportunity regardless of gender.

Rights to land, housing and property are essential to women's equality and well-being. Women's rights in access to, and control over land, housing and property are a determining factor in women's living conditions especially in rural economies, essential to women and their children's daily survival, economic security and physical safety. Despite the importance of these rights for women and women-headed households, women still disproportionately lack security of tenure.

2.7 INSTITUTE FOR THE RESTORATION OF THE ABORIGINES OF SOUTH AFRICA

The Institute for the Restoration of the Aborigines of South Africa (IRISA) provided written submissions which addressed issues of concern for the aborigines of South Africa. The submissions focussed on the impact of current land use and ownership patterns on the rights of the aborigines which include equality, as well as the enjoyment of socio-economic rights and civil and political rights. The submissions also focused on the rights of the indigenous communities pertaining to land restitution, redistribution and tenure security and these are reflected below.

²² *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC).

It was pointed out that article 1 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) states that:

Indigenous Peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognised in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

At the World Conference on Indigenous Peoples, South Africa along with 144 other countries reaffirmed their solemn commitment to respect, promote and advance the rights of indigenous peoples and to uphold the principles of the UNDRIPs. Globally, there is a growing recognition of the importance of protecting indigenous peoples' rights as an integral element of the promotion of human rights, democracy, good governance, sustainable development, and environmental protection.

However, some governments, particularly in parts of Africa and Asia, are still reluctant to acknowledge the existence of indigenous peoples within their states. This constitutes a denial of indigenous peoples' human rights.

The protection of the aboriginal rights is an underlying constitutional principle and value. Human rights, the rule of law and democracy are interlinked and mutually reinforcing and should be the underlying principles that guide the democratic project.

2.7.1 LAND DISPOSSESSION: THE KHOISAN

The Khoisan people have been systematically alienated and pushed from their ancestral lands. The Khoisan's concerns are based on the extreme vulnerability as they are victims of land grabbing and criminalisation of customary forms of land and natural resource use, particularly in contexts of extractive industries, conservation areas and commercial agriculture.

2.7.2 MECHANISMS FOR PROTECTION

As a signatory, South Africa has a duty to effectively protect indigenous peoples' land and resource rights. The UNDRIP and Convention No. 169 provide for States to comply with certain duties. Effective protection of indigenous peoples' rights to ownership and possession will require a number of measures. These include identification, demarcation, titling, or other legal recognition, along with adequate access to justice and penalties for unauthorised intrusion.

Importantly, States have a duty to prevent non-indigenous persons from securing ownership, possession, or use of indigenous peoples' lands or territories. Experience shows that many indigenous peoples have been tricked or forced to give up their lands to outsiders through fraud or other dishonest means. Additional protective measures include: access to redress; indigenous peoples' right to free, prior, and informed consent on issues relating to their land; right of return; and the right to not be removed from lands or territories.

2.7.3 INDIGENOUS WOMEN'S RIGHTS AND ACCESS TO LAND AND RESOURCES

When land is lost or degraded, women's daily lives are seriously affected, as the burden of providing for the family's subsistence becomes heavier. Land is central to the livelihoods and cultures of indigenous peoples, and to secure rights to them provides a foundation for poverty reduction, increased food security, gender equality, cultural survival and environmental sustainability.

Under the conditions of widespread tenure insecurity that exist in many developing countries, development interventions can inadvertently cause rural communities to lose rights to lands and resources, triggering a range of negative social impacts. These may include loss of livelihoods, increased food insecurity, threats to the cultural survival of the community concerned,

disproportionate harms to women and girls, and loss of access to water. Concrete measures to safeguard against potential adverse social impacts of development interventions include the need to:

- a. Define and communicate safeguard standards.
- b. Assess social impacts as part of project design.
- c. Ensure effective community engagement and participation in decision-making, including securing FPIC where actions may affect indigenous peoples.
- d. Develop dedicated plans to address social impacts.
- e. Proactively strengthen land tenure and resource governance.
- f. Monitor social impacts as part of project interventions and adapt accordingly.
- g. Establish accessible and effective grievance mechanisms

The above elements constitute minimum good practices that should be observed across all types of development projects. As such, they may support but do not take the place of broader programming dedicated to achieving tenure security, indigenous rights, women's empowerment, and community livelihoods objectives.

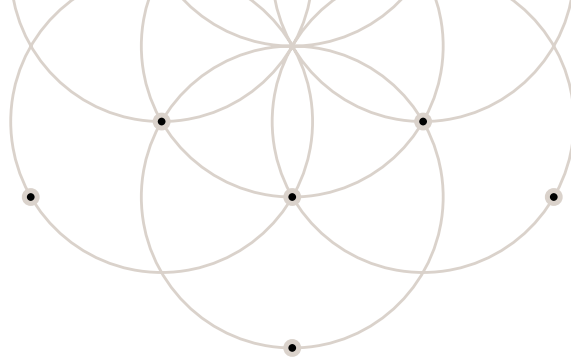
2.8 MR AUBREY LANGA

Mr Aubrey Langa's presentation focused on the absence of consultation with mining affected communities in the context of mining-related developments. The presenter highlighted the following issues.

- a. The free, prior and informed consent principle is not being recognised in the context of mining and commercial developments that take place on community land. The mining companies tend to only engage the Chief and the community is excluded from the decisions about developments on the land.
- b. As far as mining companies are concerned, there are issues regarding the relocation of communities without their consent and other human rights abuses that are perpetrated by the mining companies.
- c. The mining company (Ivan Platts) has constructed a drain that passes through the village. This has resulted in the forcible relocation of communities. The community approached the Public Protector and so far there has not been any relief. Additionally, the community approached the Commission's provincial office in Polokwane regarding the relocation of graves by the mining company where there was no consent of the community to move the graves. Since 2013, communities have been reporting the location of their graves to the mining company but the company is already operating within those areas, even though its mining licence does not extend to the areas that the company is operating in.
- d. The mining company is surrounded by about 7 villages located within 500m of the mine, which in and of it itself is in contravention of mining legislation and international best practice. Significantly, the mining company did not comply with the consultation obligations of IPILRA. This was essentially a land grab because there was no approval by the community and no ministerial consent.

3. FINDINGS





LANDOWNERSHIP AND CUSTOMARY RIGHTS

- i. Even though the Constitution protects customary rights, it has been difficult in practice to protect people who have customary rights to access, use and own land. This is largely due to the fact that ownership is thought of through a common-law model which privileges private title and fails to recognise informal and customary property rights.
- ii. The property ownership system based on a common-law model perpetuates the discrimination against mining affected communities that cannot assert ownership in order to mitigate the adverse impacts of mining on their rights.

SECURITY OF TENURE ON COMMUNAL LAND

- iii. Even though section 25(6) of the Constitution enjoins the State to adopt legislation that will provide tenure security for people on communal land, no comprehensive legislation has been enacted. Only an interim law, IPILRA, exists, and provides only minimal procedural safeguards that are inadequate in the face of commercial pressures on communal land.
- iv. Evidence suggests that many magistrates are not aware of ESTA. The lack of knowledge of ESTA has resulted in a lack of prosecutions for illegal evictions in line with section 23 of ESTA which criminalises illegal evictions.
- v. ESTA violations are not listed as a criminal offence on the SAPS' CAS system.
- vi. If effectively implemented, ESTA has the potential to enable dwellers to own pieces of land where they stay.

FARM DWELLERS

- vii. Although some farm dwellers get access to legal representation through the LRMF, lawyers on the panel are not sufficiently skilled on land issues and therefore do not provide specialist representation.

LAND REDISTRIBUTION AND RESTITUTION

- viii. There are significant problems in the conception and implementation of the land reform programme. A key gap in the legislative framework for land reform, and especially in relation to land redistribution is the absence of an overarching framework law that guides and directs the programme as a whole.
- ix. There is a worrying lack of comprehension and knowledge of the various statutes governing land use and land tenure by stakeholders responsible for the implementation of such legislation.
- x. There is no public record or information specifying how much land is under commonage or delineating government roles and responsibilities in respect of commonage land.
- xi. Land redistribution has been slow when assessed against both its own targets and those of society's expectations, and benefitted women much less than men.
- xii. In cases of successful land claims or land redistribution as part of land reform, post-transfer support has generally been inadequate, in part because of poor coordination among government departments.

DEVELOPMENT PROJECTS ON COMMUNITY-OWNED LAND

- xiii. Independent experts are needed to advise communities, alongside the establishment of a fund to remunerate such experts, especially in mining-related projects proposed on community-owned land. Such an initiative will assist communities to make informed decisions on development projects on their lands.
- xiv. The MPRDA does not fully recognise and protect the rights of mining-affected communities. It does not give them an adequate voice in mining decisions, sufficient protection nor adequate access to appropriate compensation.

PROTECTION OF COMMUNITY LAND RIGHTS

- xv. The Communal Land Tenure Bill takes a commendable approach towards the mapping of communal rights. However, whilst a community-based approach is certainly the best way, caution should be exercised to ensure that the process of mapping communal rights is not captured by anyone.
- xvi. Identifying and recording communal rights goes against the very nature of customary rights, that is, it would lose its flexibility and restrict the continuous development of customary law. However, capturing the rights has become imperative and such capturing would allow for the protection such rights.

WOMEN'S ACCESS TO LAND AND SECURITY OF TENURE

- xvii. Women make up the majority of the rural population and labour force in commercial farms, yet they are deprived of land ownership. Women who benefited from land reform projects are in most cases excluded from the decision-making processes on issues regarding land use.
- xviii. Rights to land, housing and property are essential to women's equality and well-being and essential to their children's daily survival, economic security and physical safety. Despite the importance of these rights for women and women-headed households, women still disproportionately lack security of tenure.
- xix. These challenges to women's access to land and security of tenure persist notwithstanding the progressive decision-making in *Bhe*. The Constitutional Court's decision was intended to fundamentally change the way deceased estates are administered and distributed across South Africa to prevent discrimination on the basis of gender. However, its actual influence has been limited especially in rural areas where people, including legal professionals, are unaware of this judicial precedent.

RURAL LAND REFORM AND POVERTY ALLEVIATION

- xx. The rural land policy has failed because there is a lack of political will, particularly coming from the ruling party which has never looked at land reform as a priority. Its priority and focus was always a non-racial society, irrespective of the circumstances of the landless. The implication is perpetual poverty and landlessness, with those who benefited from apartheid continuing to wield socio-economic power, and by default political power.
- xxi. There is enormous potential for using rural land to address unemployment and alleviate poverty. However, land reform on its own is insufficient. What is required is a comprehensive agrarian reform policy/strategy which addresses broader issues of the rural economy. This includes housing, infrastructure, roads, health care, education, inputs, research, extension and markets.

- xxii. Although the government has adopted legislation and policies meant to facilitate access to land for the rural poor, the challenge is with implementation. The government often fails to implement the progressive provisions of the legislation that it has put in place. The requirement in section 25(5) of access to land on an equitable basis has not been realised.
- xxiii. Land is central to the livelihoods and cultures of local communities and indigenous peoples, and to secure rights to them provides a foundation for poverty reduction, increased food security, gender equality, cultural survival and environmental sustainability.

4. ADVISORY RECOMMENDATIONS



The Commission elected to engage only civil society during the course of this investigation. Consequently, although the following recommendations are directed towards various authoritative state entities, they should be understood as being of a purely advisory nature. Nonetheless, the Commission considers the proposed actions advisable for the adoption of progressive measures for the promotion of human rights within the framework of the Constitution and the law and expects its recommendations to be received within that broader context of the Commission’s mandate and looks forward to engaging with relevant stakeholders in respect thereof within a reasonable period of time.

PARLIAMENT

- i. Parliament should prioritise ensuring that meaningful legal protection is provided to vulnerable communities faced with external mining or other investment projects that are likely to negatively impact on such communities’ land rights. In that regard, MPRDA and IPILRA should be strengthened to protect vulnerable communities against land grabs.
- ii. Parliament should strengthen IPILRA in order to make it permanent legislation, and to better protect communities who have customary rights of access, use and ownership of land. IPILRA in its current form permits community override in instances where a right is being regulated in the interests of the wider community.
- iii. Parliament should ensure that the Communal Land Tenure Bill has been finalised in consultation with affected communities to ensure effective protection of community land rights.
- iv. Parliament should adopt an overarching framework law that guides and directs the land reform programme as a whole. Such a law should clarify who the key beneficiaries of land reform are, and provide a clear set of principles to guide the detail of policy and programme design.
- v. Parliament should strengthen the MPRDA to ensure that the rights of mining-affected communities to adequate consultation in mining decisions and provision of sufficient compensation are strengthened.
- vi. Parliament should ensure that the Communal Property Association Amendment Bill is not passed in its current form due to various concerns raised by many stakeholders.

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

- vii. The DoJ&CD should ensure that a training programme for the SAPS, prosecutors and magistrates on the interpretation and implementation of ESTA is developed and implemented.

SOUTH AFRICAN POLICE SERVICE

- viii. SAPS should ensure that ESTA violations are listed as a criminal offence on the SAPS’ CAS system.

RURAL DEVELOPMENT AND LAND REFORM

- ix. The DRDLR should investigate the status of municipal commonage land, in collaboration with CoGTA advise local government on its roles and responsibilities in respect of land reform, and conduct an audit on the land held as commonage land and land held by the Department of Public Works. The DRDLR should publicise the status of the 1997 national Commonage Land Policy.
- x. The DRDLR along with the CoGTA and DoJ&CD should interrogate the validity of the argument that it would be unlawful for municipalities to participate in land reform. The DRDLR, in consultation with CoGTA, should explore ways in which municipalities can be compelled to play a meaningful role in land reform through their IDP processes.
- xi. The DRDLR should seek to clarify the procedures for invoking section 4 of ESTA and prioritise the implementation of this section.
- xii. The Department should ensure that in cases of successful land claims or land redistribution as part of land reform, adequate post-transfer support is provided to beneficiary communities.

DEPARTMENT OF MINERAL RESOURCES

- xiii. The Department should ensure that independent experts are appointed to advise mining communities, alongside the establishment of a fund to remunerate such experts, in mining projects proposed on community-owned land. Such an initiative will assist communities to make informed decisions on mining development projects on their lands.

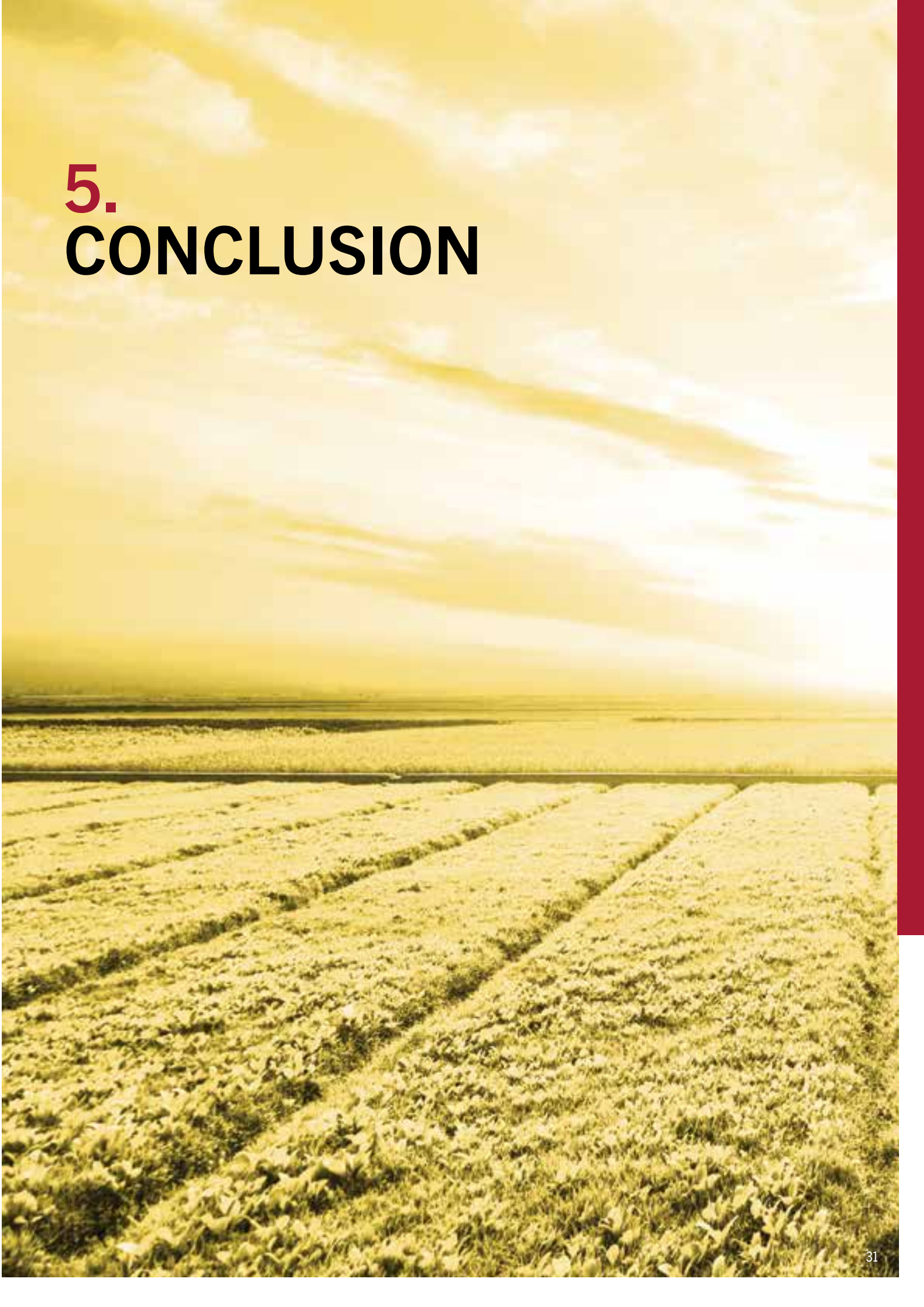
COMMISSION ON THE RESTITUTION OF LAND RIGHTS

- xiv. The Commission on the Restitution of Land Rights should ensure that communities do not have to wait for more than twenty years to have their claims finalised. The delay has the effect of compromising land restitution claims because information necessary for the passage of a land claim is lost.

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

- xv. The Commission should investigate the extent of the implementation of its recommendations emanating out of its 2007, and 2013 national hearing which sought to investigate the systemic challenges affecting farming communities and the land restitution process in South Africa.

5. CONCLUSION



The SAHRC's inquiry demonstrated problems in the conception and implementation of the land reform programme. A key gap in the legislative framework for land reform, and especially in relation to land redistribution is the absence of an overarching framework law that guides and directs the programme as a whole. A key object of a framework law would be to clarify who the key beneficiaries of land reform should be, so that the goal of ensuring equitable access is achieved. A framework law should also provide a clear set of principles to guide the detail of policy and programme design, and ensure good governance.

Significantly, the hearing laid bare the vulnerability of communities to land dispossession, and the problem is especially acute in rural areas where mining is taking place, as well as in former homeland areas. Rural communities remain structurally vulnerable to dispossession. Of particular concern is that the protections set out in IPILRA and ESTA are not enforced and this has meant that evictions have continued despite laws intended to curtail them. Not only has Parliament failed to enact a proactive law to secure tenure as required by the Constitution, the government has failed to enforce the basic protective rights set out in IPILRA.

The unintended consequence of the lack of legislative protection for the land tenure of rural people is that powerful players have been able to strategically exploit their vulnerability. These actors include transnational mining companies, foreign investors, traditional leaders, traditional councils, and commercial farmers, who continue to benefit from the lack of State regulation to address structural inequalities. It is particularly notable that the MPRDA does not fully recognise the rights of mining-affected communities and does not give them an adequate voice in mining decisions, sufficient protection nor adequate access to valid compensation. This concern has been raised in current debates about the proposed amendments to the MPRDA.

Although government has adopted legislation and policies meant to facilitate access to land for the rural poor, the challenge is with implementation. The State often fails to implement the progressive provisions of the legislation that it has put in place. Another key concern raised at the inquiry is that relatively few people who acquire land through redistribution and restitution are actually vested with secure rights to the land they acquire. Current policy seems to indicate that people will not gain ownership of redistributed land. Instead the land remains the property of the State and beneficiaries enter into leases or are granted 'conditional use rights'. This makes it very difficult, if not impossible, for them to develop the land or protect their rights to it.

There is enormous potential for using rural land to address unemployment and alleviate poverty. However, land reform on its own is insufficient. What is required is a comprehensive agrarian reform policy/strategy which addresses broader issues of the rural economy. This includes housing, infrastructure, roads, health care, education, inputs, research, extension and markets.



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