REPUBLIC OF SOUTH AFRICA

UPGRADING OF LAND TENURE RIGHTS AMENDMENT BILL

(As introduced in the National Assembly (proposed section 76); explanatory summary of Bill and prior notice of its introduction published in Government Gazette No. 43045 of 25 February 2020)
(The English text is the official text of the Bill)

(MINISTER OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT)

[B 6—2020]

ISBN 978-1-4850-0640-4

No. of copies printed 500

GENERAL EXPLANATORY NOTE:

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Upgrading of Land Tenure Rights Act, 1991, so as to provide for the application for conversion of land tenure rights to ownership; to provide for the notice of informing interested persons of an application to convert land tenure rights into ownership; to provide for an opportunity for interested persons to object to conversion of land tenure rights into ownership; to provide for the institution of inquiries to assist in the determination of land tenure rights; to provide for application to court by an aggrieved person for appropriate relief; to provide for the recognition of conversions that took effect in good faith in the past; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 2 of Act 112 of 1991, as amended by section 30 of Act 139 of 1992

1. Section 2 of the Upgrading of Land Tenure Rights Act, 1991 (hereinafter referred to as the "principal Act"), is hereby amended—

(a) by the substitution for the heading of the following heading:

"**[Conversion]** Application for conversion **of land tenure rights mentioned in Schedule 1**;";

(b) by the substitution for subsection (1) of the following subsection:

"(1) **[Any land tenure right mentioned in Schedule 1 and which was granted in respect of]** Any person who is the registered holder of a land tenure right according to the register of land rights in which that land tenure right was registered in terms of the provisions of any law, or could have been a holder of that land tenure right had it not been for laws or practices that unfairly discriminated against such person, may apply to the Minister, in the manner prescribed, for the conversion of such land tenure right into ownership in respect of—

(a) any erf or any other piece of land in a formalized township for which a township register was already opened at the commencement of this Act **[, shall at such commencement be converted into ownership]**;

(b) any erf or any other piece of land in a formalized township for which a township register is opened after the commencement of this Act **[,shall at the opening of the township register be converted into ownership]**; or

(c) any piece of land which is surveyed under a provision of any law and does not form part of a township **[, shall at the commencement of this Act be converted into ownership,**

and as from such conversion the ownership of such erf or piece of land shall vest exclusively in the person who, according to the register of land rights in which that land tenure right was registered in terms of a provision of any law, was the holder of that land tenure right immediately before the conversion].''; and

(c) by the insertion after subsection (1) of the following subsections:

''(1A) The Minister shall on receipt of such application cause to be published in the *Gazette* a notice, as prescribed, which informs all interested persons of the application for conversion.

(1B) The notice as contemplated in subsection (1A) must provide all interested persons—

(a) with an opportunity to object to the conversion; and

(b) time frames within which to object to the conversion, which must not be less than one calendar month.

(1C) An objection to a conversion may be lodged in the prescribed manner with the Minister.

(1D) The Minister must, upon receipt of an application or objection contemplated in subsections (1A) and (1B) institute an inquiry, in the prescribed manner, in order to assist the Minister in determining the facts and to make a decision relating to the conversion of land tenure rights, the objection thereto and the vesting of ownership.''.

Amendment of section 4 of Act 112 of 1991

2. Section 4 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

''(1) Notwithstanding anything to the contrary contained in any law but subject to subsections (2) and (3), a land tenure right mentioned in Schedule 1 and which has been granted in respect of any erf or any other piece of land in a formalized township for which a township register has not yet been opened shall bestow, pending the conversion thereof into ownership in terms of section 2 (1)*(b)* as soon as a township register is opened, on the person who is, according to a register of land rights of the township, the holder thereof, or could have been the holder thereof but for laws or practices that unfairly discriminated against such person, all rights and powers as if he or she is the owner of the erf or the land in respect of which the land tenure right has been granted.''.

Insertion of section 14A in Act 112 of 1991

3. The following section is hereby inserted in the principal Act after section 14:

''**Court applications**

14A. (1) Notwithstanding the provisions of this Act or any other law, any person aggrieved by a conversion of a land tenure right which took effect from 27 April 1994 may approach the court for an order—

(a) setting aside such conversion and registration of land tenure right; or

(b) that is just and equitable.

(2) Transfers of ownership of any erf or any other piece of land from 27 April 1994 in which a land tenure right had been converted in respect of—

(a) any erf or any other piece of land purchased by third parties acting in good faith;

(b) any erf or any other piece of land which has been inherited by a third party acting in good faith and the estate has been finalized in terms of the law of succession and the Reform of Customary Law of

Succession and Regulation of Related Matters Act, 2009 (Act No. 11 of 2009), has been applied; or

(c) any erf or any other piece of land which has been converted to ownership in favour of a woman in terms of this Act acting in good faith, remain valid.''.

Substitution of section 25A of Act 112 of 1992, as inserted by section 1 of Act 61 of 1998 and substituted by section 46 of Act 11 of 2004

4. The following section is hereby substituted for section 25A of the principal Act:

''**Application of Act**

25A. This Act applies throughout the Republic.''.

Short title and commencement

5. This Act is called the Upgrading of Land Tenure Rights Amendment Act, 2020, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE UPGRADING OF LAND TENURE RIGHTS AMENDMENT BILL, 2020

1. BACKGROUND

1.1 The Upgrading of Land Tenure Rights Act, 1991 (Act No. 112 of 1991) (''the Act''), was enacted to enable the upgrading and conversion into ownership of certain rights granted in respect of land, for the transfer of tribal land in full ownership to tribes and for related matters.

1.2 Land rights earmarked for upgrading and conversion into ownership include the following, which are listed in the two Schedules to the Act:

(a) Any deed of grant or any right of leasehold as defined in regulation 1 of Chapter 1 of the Regulations for the Administration and Control of Townships in Black Areas, 1962 (Proclamation No. R.293 of 1962);
(b) any quitrent title as defined in regulation 1 of the Black Areas Land Regulations, 1969 (Proclamation No. R.188 of 1969);
(c) any right of leasehold as defined in section 1(1) of the Black Communities Development Act, 1984 (Act No. 4 of 1984);
(d) any right of leasehold within the meaning of the Conversion of Certain Rights to Leasehold Act, 1988 (Act No. 81 of 1988);
(e) deed of grant rights or rights of leasehold as defined in regulation 1(1) of the Regulations concerning Land Tenure in Towns, 1988 (Proclamation No. R.29 of 1988);
(f) deed of grant rights or rights of leasehold within the meaning of the Regulations for the Disposal of Trust Land in Towns, 1988 (Government Notice No. R.402 of 1988);
(g) any permission granted in terms of regulation 5(1) of the Irrigation Schemes Control Regulations, 1963 (Proclamation No. R.5 of 1963), to occupy any irrigation and residential allotment;
(h) any permission to occupy any allotment within the meaning of the Black Areas Land Regulations, 1969 (Proclamation No. R.188 of 1969); and
(i) any right to the occupation of tribal land granted under the indigenous law or customs of the tribe in question.

1.3 Since the coming into operation of the Act on 1 September 1991, individuals have been converting some of the rights referred to in the Schedules to the Act into ownership. One such conversion was however challenged in the courts for discriminating against women, on the basis that Proclamation No. R.293 only made provision for men to be heads of the family. At issue was a conversion of a deed of grant granted in terms of Proclamation No. R. 293 of 1962 in the township of Mabopane, North West Province, which in 1991 fell under the former Republic of Bophuthatswana territory. The matter resulted in litigation and the Constitutional Court in *Rahube v Rahube and Others* [2018] ZACC 4, found section 2(1) of the Act constitutionally invalid insofar as it automatically converted holders of any deed of grant or any right of leasehold into holders of rights of ownership in violation of women's rights in terms of section 9 of the Constitution of the Republic of South Africa, 1996 (''the Constitution'').

1.4 The Constitutional Court set aside section 2(1) of the Act and allowed Parliament an opportunity to introduce a constitutionally permissible procedure for the determination of rights of ownership and occupation of land to cure the constitutional invalidity of the provisions of section 2(1) of the Act by 29 April 2020.

2. OBJECTS OF BILL

The objects of the Bill are to provide for—

(a) applications for conversion of land tenure rights to ownership;
(b) the publication of a notice informing all interested persons of the application for conversion;
(c) an opportunity for interested persons to object to conversion;

(d) an inquiry instituted by the Minister in order to assist the Minister in the determination of the facts and to make decisions relating to the conversion of land tenure rights, the objection thereto and the vesting of ownership;
(e) recognition of conversions that took effect in good faith in the past; and
(f) matters related to the above.

3. CLAUSE BY CLAUSE ANALYSIS

3.1 Clause 1

3.1.1 Clause 1 of the Bill seeks to amend section 2 of the Act, which provides for the conversion of land tenure rights mentioned in Schedule 1. This is the section that has been declared unconstitutional by the Constitutional Court in *Rahube v Rahube and Others*.

3.1.2 Amendments to section 2 seek to provide for the following:
(a) Applications for conversions of land tenure rights;
(b) notice by the Minister to interested persons of the application for conversion;
(c) an opportunity interested persons to object to the conversion; and
(d) an inquiry to assist the Minister to determine facts relating to the application for conversion or objection to the conversion.

3.2 Clause 2

Clause 2 of the Bill seeks to amend section 4 of the Act which provides for the contents of land tenure rights mentioned in Schedule 1 pending conversion. This amendment will ensure that persons, who have been discriminated against in the past, could also become the holder of land rights pending conversions contemplated in section 2 of the Act.

3.3 Clause 3

Clause 3 of the Bill seeks to insert section 14A, which provides an opportunity for persons aggrieved by conversions that took place from 27 April 1994 to approach the courts for appropriate relief. The proposed section also seeks to recognise conversions that took effect in the past and which favored women and those that were made in good faith.

3.4 Clauses 4

Clause 4 seeks to amend section 25A of the Act by providing that the Act applies throughout the Republic. The amendment to section 25A of the Act is aligned to *Herbert N.O. and Others v Senqu Municipality and Others* [2019] ZACC 31.

4. FINANCIAL IMPLICATIONS FOR STATE

4.1 Initial implementation of the proposed amendments will be accommodated within the current budget of the Department in terms of the Medium Term Strategic and Operational Plans. Additional funds will be required in the outer years.

4.2 A Socio-Economic Impact Assessment on the Bill provides estimate amounts that may be required per annum in the implementation of the Act.

5. DEPARTMENTS / BODIES / PERSONS CONSULTED

The Bill was developed as a result of a Constitutional Court case that was specific about provisions to be amended. The Court gave the Department and Parliament 18 months to enact the amendment Bill. Consequently, the Department has not consulted widely on the Bill. However, there has been consultation with other state departments.

6. CONSTITUTIONAL IMPLICATIONS

6.1 Both the Department and the State Law Advisers are of the considered opinion that the provisions of the Bill are not in conflict with the Constitution. In fact, the Bill seeks to remedy sections that were declared unconstitutional.

6.2 The legal implications of the Constitutional Court judgement relating to conversions of rights into ownership have specifically been taken into account.

7. COMMUNICATION IMPLICATIONS

The Bill was not published for comment. Once enacted, the Department will communicate the provisions of the Amendment Act to all institutions that will be affected by the implementation of the Act.

8. PARLIAMENTARY PROCEDURE

8.1 The State Law Advisers and the Department are of the opinion that the Bill must be dealt with in accordance with the procedure established in section 76 of the Constitution.

8.2 Chapter 4 of the Constitution specifies the manner in which legislation must be enacted by Parliament. It prescribes different procedures for Bills, including ordinary Bills not affecting provinces (section 75 procedure), and ordinary Bills affecting provinces (section 76 procedure). The determination of the procedure to be followed in processing the Bill is referred to as tagging.

8.3 In terms of section 76(3) of the Constitution, a Bill must be dealt with in accordance with section 76 if it falls within a functional area listed in Schedule 4. Schedule 4 to the Constitution lists functional areas of concurrent national and provincial legislative competence. In the Constitutional Court judgment of *Ex-Parte President of the Republic of South Africa In Re: Constitutionality of the Liquor Bill*[1] (''*Liquor Bill* judgment''), Cameron AJ held the following:

> ''[27] It must be borne in mind that section 76 is headed 'ordinary Bills affecting provinces'. This is my view, a strong textual indication that section 76(3) must be understood as requiring that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 be dealt with under section 76.
>
> [29] Once a Bill falls within a functional area listed in Schedule 4, it must be dealt with not in terms of section 75, but by either the section 76 (1) or the section 76(2) procedure . . .''.

8.4 Following the *Liquor Bill* judgment, the Constitutional Court in the judgment of *Tongoane and Others vs Minister for Agriculture and Land Affairs and Others*[2] (''*Tongoan***e** judgment'') confirmed the following:

> ''[59] . . . the tagging test focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4, and not on whether any of its provisions are incidental to its substance.''.

8.5 Furthermore, the Constitutional Court held that*:*

> ''[66] . . . procedural safeguards are designed to give more weight to the voice of the provinces in legislation substantially affecting them . . . they are fundamental to the role of the NCOP in

[1] (CCT/12/99) [1999] ZACC 15.
[2] 2010 (8) BCLR 741 (CC).

ensuring that provincial interests are taken into account in the national sphere of government . . .''.

8.6 As the Court held in the *Tongoane* judgment, a Bill must be tagged as a section 76 Bill if its provisions in substantial measure deal with a Schedule 4 functional area. We are therefore of the view that the Bill should be classified as a section 76 Bill, which is an ordinary Bill affecting provinces, as its provisions fall within a functional area listed in Schedule 4 to the Constitution, namely ''Indigenous law and customary law, subject to Chapter 12 of the Constitution'', ''Regional planning and development'' and ''Urban and rural development.''.

8.7 The State Law Advisers and the Department are of the further opinion that it is necessary to refer the Bill to the National House of Traditional Leaders in terms of section 18(1)*(a)* of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it contains provisions that pertain to customary law or customs of traditional communities.

Printed by Creda Communications

ISBN 978-1-4850-0640-4