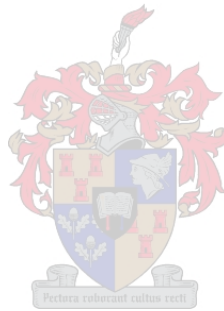


COMMUNAL LAND AND TENURE SECURITY

Analysis of the South African Communal Land Rights Act 11 of 2004

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Thesis presented in partial fulfillment of the requirements for the degree of
Master of Laws at Stellenbosch University



Supervisor: Prof. H. Mostert

December 2009

Declaration

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the owner of the copyright thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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Ebrezia Johnson
Stellenbosch
September 2009

Dedication

FOR my GRANDMA

Caroline Johnson

- 21st of May 1932 - 23rd of November 2008

*For always inspiring me to be the best person I can be!
For always motivating me to achieve all my goals, regardless of
how absurd they were!*

*I owe you my life, my zest for life and the person that I have
become!*

You are truly and deeply missed!

e

ABSTRACT

In this thesis, the Communal Land Rights Act 11 Of 2004 is analysed in order to determine whether it can give effect to the constitutional mandate in terms of which it was promulgated, namely section 25(5), (6) and (9) of the Constitution. Land policy pertaining to land tenure reform is discussed to see how and to what extent it finds application in the Act. The time-consuming process pertaining to the registration of the community rules is investigated, and the implications where a community fails to adhere to this peremptory provision in the Act are explained.

The thesis also analyses and discusses the functions of statutorily created institutions, like the land administration committee and the land rights boards, in the efficient management of land in rural areas. The aforementioned land administration committee is particularly problematic, since the Act provides that in cases where a recognised tribal authority exist, that institution “may” be considered as the land administration committee, subject to prescribed composition requirements as contained in the Act. The Traditional Leadership and Governance Framework Act will also be discussed since it intersects with the Communal Land Rights Act in this regard.

The pending constitutional challenge which relates to this potentially problematic issue, will be discussed. The constitutional challenge of the Act by four communities’ is explored in order to indicate just how potentially problematic the institution of traditional leadership could be.

This study also discusses and analyses the compromise contained in the Act, regarding the registration of the land title of a community and the registration of “new order rights” in the name of individuals. In this context the impact of this process on the efficacy on the current Deeds registration system is investigated. The Ministerial determination and its constitutional implications is yet another issue, examined in this study. All of these issues will have a negative impact on the implementation of the Communal Land Rights Act and especially on achieving tenure security.

OPSOMMING

In hierdie tesis word die Wet op Kommunale Grondregte 11 van 2004 geanaliseer om te bepaal of dit inderdaad voldoen aan die grondwetlike mandaat soos voorsien in art 25(5), (6) en (9) van die Grondwet. Die beleid van toepassing op grondbeheerhervorming word bespreek om te bepaal tot watter mate dit wel in die Wet aanwending vind. Die tydwende prosedure van die registrasie van gemeenskapsreëls word ondersoek, asook die implikasies indien 'n gemeenskap nie aan die voorskriftelike bepaling voldoen nie.

Die tesis bespreek en evalueer ook die funksies van die twee instellings wat statutêr geskep is, naamlik grond administrasie komitees en grondregte rade. Die twee instellings is geskep met die doel om van hulp te wees in die effektiewe administrasie van grond in die kommunale areas. Dit is veral die grond administrasie komitee wat problematies is, omdat die Wet op Kommunale Grondregte bepaal dat waar 'n gemeenskap 'n erkende tradisionele owerheid het, hierdie owerheid beskou sal word as die grond administrasie komitee van daardie spesifieke gemeenskap. In hierdie konteks is 'n bespreking van die Wet op Tradisionele Leierskap en Regeringsraamwerk, noodsaaklik.

Die betwiste grondwetlike kwessie wat tot op hede nog onbeslis is wat hiermee verband hou, sal ook bespreek word. 'n Kort uiteensetting word gedoen van die vier gemeenskappe wat die Wet op grondwetlik gronde aanveg om presies te probeer aantoon hoe problematies die instelling van tradisionele leierskap is.

Hierdie studie bespreek en analiseer verder ook die kompromis wat getref is tussen registrasie van die titelakte in die naam van 'n gemeenskap en die

registrasie van sogenaamde “nuwe orde regte” in die naam van individue. Die impak van hierdie magdom registrasies op die bestaande registrasiesisteem word ook oorweeg.

Die grondwetlikheid van die ministeriële besluitnemingsbevoegdheid word breedvoerig bespreek in hierdie studie. Al hierdie genoemde kwessies mag ’n nadelige impak hê op die implementering van die Wet op Kommunale Grondregte en spesifiek ook op grondbeheerhervorming.

ABBREVIATIONS

ANC	: African National Congress
CLARA	: Communal Land Rights Act
CLRB	: Communal Land Rights Bill
CGE	: Commission for Gender Equality
CPA	: Communal Property Association
CPAA	: Communal Properties Associations Act
DLA	: Department of Land Affairs
DRA	: Deeds Registries Act
LAC	: Land Administration Committee
LEAP	: Legal Entity Assessment Project
LRB	: Land Rights Board
IPILRA	: Interim Protection of Informal Land Rights Act
MEC	: Member of the Executive Council
NA	: National Assembly
NCOP	: National Council of Provinces
NGO's	: Non-governmental organisations
NP	: National Party
PLAAS	: Programme for Land and Agrarian Studies
SADT	: South African Development Trust
SAHRC	: South African Human Rights Commission
TLGFA	: Traditional Leadership and Governance Framework Act
UPLTRA	: Upgrading of Land Tenure Rights Act

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PART ONE: BACKGROUND

CHAPTER 1: INTRODUCTION

1 1 Research Question

In this thesis, the tenure leg of the South African land reform program is analysed with reference to the Communal Land Rights Act.¹ The purpose is to determine whether the current government is on the right track in providing for the needs of the landless majority in relation to communal land only.²

1 2 Background

South African land law has always been controversial on account of its divisive nature.³ Apartheid brought about patterns of landownership that were foreign to traditional land arrangements among African groups.⁴ Blacks were not allowed to become lawful landowners in a large part of South Africa.⁵ Because of the history of discrimination, many South Africans still lack secure title to the land on which they live or which they have occupied for a long time.⁶

¹ 11 of 2004.

² Mostert & Pienaar “Formalisation of South African Communal Land Title and Its Impact on Development” in Cooke (ed) *Modern Studies in Property Law III*, (2005) 317 317-318. According to Mostert & Pienaar tenure reform in South Africa is “lagging behind”. Cousins “Reforming Communal Land in South Africa” 2002 *ESR Review* 7 7-9. While Mostert & Pienaar do not offer any explanation as to why tenure reform is “lagging behind”, Cousins ascribes it to the complexity of tenure that exists in the former homelands. See Cousins “Contextualising the Controversies: Dilemmas of Communal Tenure Reform in Post-Apartheid South Africa” in Claassens & Cousins (eds) *Land, Power and Custom* (2008) 3 4-5. Bennett “*Customary Law in South Africa*” (2004) 370 374.

³ This includes legislation such as the following: the Black Land Act of 1916; the Group Areas Act 36 of 1966; Black Administration Act 38 of 1927 and the Proclamation succeeding the Regulations for the Administration and Control of Townships in Black Areas R293 in Government Gazette 373 of 1962/116, to name but a few. According to Mostert & Pienaar “Formalisation of South African Communal Land Title” in *Modern Studies III*, the 1916 Black Land Act, the first racially motivated piece of legislation resulted in the exclusion of “black South Africans from dealings with approximately 87% of the country’s land.” Van der Merwe & Pienaar “Land Reform in South Africa” in Jackson & Wilde (eds) *The Reform of Property Law* (1997) 338 334-380.

⁴ Badenhorst, Pienaar & Mostert *The Law of Property* 5th ed (2006) 481-483. Nonyana “The Communal Land Rights Bill 2000 and Related Legislation” 2003 *Butterworths Property Law Digest* 7 7-9. Surplus People’s Project *Forced Removals in South Africa, vol 1-5* (1983). Beinart & Dubow (eds) *Segregation and Apartheid in Twentieth Century South Africa* (1995). De Villiers *Land Reform: Issues and Challenges* (2003) at 45-47.

⁵ Cousins 2002 *ESR Review* 7-9.

⁶ Cousins 2002 *ESR Review* 7 7-9. Van der Walt *Constitutional Property Law* 2nd ed (2005) at 334.

Both the Final Constitution⁷ and the *White Paper on South African Land Policy* of 1997⁸ recognise these injustices of the past. They stress the government's commitment to the redistribution of land,⁹ restitution¹⁰ and tenure reform.¹¹ Section 25(5) of the 1996 Constitution¹² imposes the duty on the State to "take reasonable legislative and other measures within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis,"¹³ while section 25(6) provides that "a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure, or to comparable redress."¹⁴ Section 25(9) places a positive duty on the State to promulgate legislation in order to give effect to section 25(5) and (6). Since these three constitutional guarantees form the mandate for the Communal Land Rights Act,¹⁵ the provisions for tenure contained in the Act must necessarily also adhere to them.

⁷ 108 of 1996.

⁸ *White Paper on the South Africa Land Policy* 1997 v-xvi, in the Executive Summary of this policy document it is eloquently stated that that the current land ownership and land development patterns in South Africa are a strong reflection of the political and economic conditions of the apartheid era. The racially based land policies were the primary cause of insecurities, landlessness and poverty amongst black people and at the same time it was also the cause for insufficient and unsustainable land administration and land use.

⁹ In the *White Paper* the purpose of the redistribution programme is said to provide the poor with land for residential and productive purposes in order to improve their livelihoods. It is specifically aimed to assist the urban and rural poor; farm workers labour tenants en also emergent farmers. Badenhorst et al *The Law of Property* at 594 also regards the redistribution as a facilitative programme that provides financial assistance in the form of grants and subsidies. Another main aim of this programme is the broadening of access to land.

¹⁰ The purpose of restitution programme according to the *White Paper* is the restoration of land and the provision of remedies to people who has been disposed of property due to racially discriminatory legislation and practices. Restitution as such can take any of the following forms: the restoration of the land from which the claimants were disposed; provision of alternative land; payment of compensation; alternative relief comprising a combination of the above mentioned or priority of access to government housing and land development programmes.

¹¹ According to Badenhorst et al *The Law of Property* at 607 tenure reform relates to the amendment or reforming the specific form of land holding, where the emphasis are placed on the movement away from permits based approach to a rights based approach and by allowing persons to choose the specific form of tenure which is appropriate for specific individuals and lastly by the recognition and protection of *de facto* rights. This is also discussed in the *White Paper on SA Land Policy* vi and in Carey-Miller & Pope *Land Title in South Africa* (2000) at 456-458.

¹² 108 of 1996.

¹³ S 25(5) of the 1996 Constitution of the Republic of South Africa.

¹⁴ Bennett *Customary Law in South Africa* 1st ed (2004) at 423.

¹⁵ B67D of 2003.

Legislation enacted to give effect to the objective expressed in section 25(5) of the Constitution includes the Land Reform (Labour Tenants) Act,¹⁶ the Extension of Security of Tenure Act,¹⁷ the Development Facilitation Act,¹⁸ the Upgrading of Land Tenure Rights Act,¹⁹ the Interim Protection of Informal Land Rights Act²⁰ and the Communal Property Associations Act.²¹ These acts share a similar purpose. They secure land rights for the people who were previously deprived of land. They all refer to “disadvantaged communities and vulnerable groups.”²² People without secure title to land, are unable to obtain loans from financial institutions, as they do not have anything to give as security.²³ In this way, the lack of access to land has severely increased poverty in rural areas.²⁴ Indigenous traditions with regard to the status of women and their ability to control and use land aggravate the situation, particularly for vulnerable groups within communities already impoverished as a result of the unfair land distribution policies of the past.²⁵

Millions of people in the former homelands,²⁶ “black spots” and independent states²⁷ suffer unspeakable poverty due to their insecure tenure rights.²⁸

¹⁶ S 1 of the Land Reform (Labour Tenants) Act 31 of 1996.

¹⁷ S 1 of the the Extension of Security of Tenure Act 62 of 1997.

¹⁸ S 1 of the Development Facilitation Act 67 of 1995.

¹⁹ S 1(1) of the Upgrading of Land Tenure Rights Act 112 of 1993.

²⁰ S 1 of the Interim Protection of Informal Land Rights Act 31 of 1996.

²¹ S 1 of the Communal Property Associations Act 28 of 1996.

²² See s 1(vi)(a), (b) and (c) of the 2002 Communal Land Rights Bill and Mokgope *Land Reform, Sustainable Rural Livelihood and Gender Relations*, Research Project of the Programme for Land and Agrarian Studies (PLAAS) (2001) 14-22.

²³ Van der Walt “Property Rights and Hierarchies of Power: A Critical Evaluation of Land-Reform Policy in South Africa” 1999 *Koers* 259 261-263. De Soto *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000) 35.

²⁴ Turner *Sustainable development: What’s land got to do with it?* Programme for Land and Agrarian Studies (PLAAS) Policy Brief 2 (Nov 2002) 1-4.

²⁵ Pienaar “Broadening access to land: The case of African rural women in South Africa” 2002 *TSAR* 177 182-192. Cross & Friedman “Women and Tenure: Marginality and The Left-Hand Power” in Meer (ed) *Women, Land and Authority: Perspectives from South Africa* (1997) 17 17-34. This point is also confirmed by Cousins (2002) *ESR Review* at 8.

²⁶ The so-called homelands refer to Transkei, Bophuthatswana, Venda and Ciskei and it also included the old self-governing territories. These homelands were created in terms of the Black Land Act 27 of 1913 and the South African Development Trust and Land Act 18 of 1936.

²⁷ The six self-governing territories comprises of KwaNdebele, QwaQwa, Gazankulu, Lebowa, KwaZulu-Natal and KaNgwane. The self-governing territories was established by the Self-governing Territories Constitution Act 21 of 1971, which was responsible for transferring certain and schedules and released land to the various territories.

²⁸ See Cross et al “Women and Tenure” in *Women, Land and Authority* at 19-20.

Despite this, the original attempts to reform land control in these areas drew severe criticism from all spheres of the South African society, including affected communities, academics and also non-governmental organisations (NGO's)²⁹ Up to at least 2004, the land tenure situation was much the same as it had been before 1994, especially with regard to communal tenure security. Many black South Africans still did not have title to the land on which they resided. By that time several possibilities were created to enable the acquisition of state land. For instance a Community Development Trust,³⁰ or a Communal Property Association³¹ could be established. Yet, these options remained inaccessible to the majority. The requirements that had to be met in terms of these entities were tiresome and time-consuming. Most communities also lacked the ability to establish such entities without sophisticated support. Thus, most communal land in the former homelands still vested in the State. The people who were in peaceful occupation of the land merely had unformalised, *de facto* rights to it. More effective legislation was therefore needed to effect registration in the name of the beneficial occupiers and provide *de iure* rights.³²

The Communal Land Rights Act is the most recent addition to the legislation drafted in terms of section 25(5) of the 1996 Constitution.³³ It is an instrument of the State that gives effect to section 25(5), (6) and (9) of the Constitution. Through this piece of legislation the Department of Land Affairs (DLA) attempts to give effect to tenure security, and redistribute state-owned land to its current occupiers. It specifically aims to provide access to land and secure title for those who live in rural areas, specifically in respect to land that is vested in the

²⁹ See e.g the responses to the 2002 Communal Land Rights Bill.

³⁰ The said community development trust was to be established in terms of the South African Development Trust and Land Act 18 of 1936. Mostert & Pienaar "Formalisation of South African Communal Land Title" in *Modern Studies* at 319.

³¹ A Communal Property Association is to be established in terms of the Communal Property Association Act 28 of 1996. Bennett *Customary Law in South Africa* at 426-429.

³² Pienaar "The Need for a Comprehensive Land Administration System for Communal Property in South Africa" 2007(70) *THRHR* 557 556-570.

³³ 108 of 1996.

Development Trust.³⁴ This admirable aim, which is set out in very specific terms in the Preamble of the Act, reads as follows:

“To provide for legal security of tenure by transferring communal land, including KwaZulu-Natal Ingonyama land, to communities.”

Although the above quote from the Preamble of the Communal Land Rights Act merely refers to tenure security, it is still evident that there is an element of redistribution to the process of transfer. By transferring land to communities their rights and vested interests in land become secure because of the registration of it in the name of the lawful owners and occupiers of the land in question.³⁵

Tenure reform in this context relates to what Carey-Miller and Pope refer to “as the reform of the legal basis of landholding, usually directed towards the implementation of social change.”³⁶ According to Mostert and Pienaar, tenure reform “refers to the reform of particular types of land holding and control, by moving away from apartheid’s permits-based approach to black land holding, towards a rights-based approach in terms of which persons should be able to choose the most suitable form of tenure for their own situations.”³⁷ Van der Walt takes this definition further by stating that tenure reform is necessary especially because of the legacy of apartheid. The mere abolition of the various apartheid land laws, or restitution or attempts to improve access to land will be insufficient to address the inequalities of the South African land regime.³⁸ Tenure reform according to Van der Walt is “aimed at land users who already have access to land, but whose land rights and interests remain weak or insecure because of

³⁴ The South African Development Trust and Land Act 18 of 1936 was the successor to the notorious Black Land Act 27 of 1913. The latter made reference to the so-called ‘scheduled areas’ for the first time, which made exclusive provision for black occupation. The Development Trust and Land Act also provided for land for black occupation only, however these areas were now referred to as ‘released areas.’ See Davenport *South Africa : A Modern History* 4th ed (1991) at 176.

³⁵ The process of validation and transfer of communal land in the name of individuals and communities will be discussed in detail in Chapter 5 of the study.

³⁶ Carey-Miller (with A Pope) *Land Title in South Africa* at 456.

³⁷ Mostert and Pienaar “Formalisation of South African Communal Land Title” in *Modern Studies* III at 319.

³⁸ Van der Walt “*Constitutional Property Law*” at 309. Van der Walt 1999 *Koers* 262-265. Van der Walt “Towards the Development of Post-Apartheid Land Law: An Exploratory Survey” 1990 *De Jure* 14.

apartheid laws and practices, including apartheid laws and policies that created or deepened problematic power structures in communal land use systems.” Proper legal recognition and protection is therefore required to render these insecure rights legally more secure and protected.³⁹

1 3 Purpose of the Inquiry

South Africa was obviously in dire need of a revision of the inequalities relating to insecure and conflicting landholding.⁴⁰ The Communal Land Rights Act was meant to be the main vehicle to achieve such a revision in relation to specific areas. However, this Act has proved to be controversial in many respects.⁴¹ For instance, the Act provides for communities who can achieve tenure security without focussing on the difficulty of defining a community in the communal context. The Act awards the Minister of Land Affairs or his or her delegates with sweeping powers in relation to the allocation of land or comparable redress to communities. All these problematic issues and more will be discussed in detail in the rest of this study, to offer more workable solutions.

The main aim of this research is to analyse the Communal Land Rights Act, to determine whether it in fact can be an effective blue-print for achieving more equitable access to land and better tenure security for rural people. Essentially, the analysis attempts to establish whether the Communal Land Rights Act lives up to the constitutional demands from which it originated. The compromise

³⁹ Van der Walt *Constitutional Property Law* at 309.

⁴⁰ See Badenhorst et al *The Law of Property* at 585. It is estimated that about 17 000 statutory measures pertaining to land holding have been issued until 1991 in order to regulate land control in relation to racial diversity. Fourteen different land control systems were in operation in the previous four national states, the said six self-governing territories and the four provincial governments alone. This explains the complexity of the conflicting land rights in the communal areas.

⁴¹ Moos “Verblyfreg vir miljoene - Beplande wet sal tuisland-mense help” *Beeld* (2002-07-08) 6; Paton “New law to loosen tribal leader’s control of land” *Sunday Times* (2002-08-25) 8; Gerardy “Communal land rights laws rattle EC chiefs” *Daily Dispatch* (2002-12-09) 8; Cook “Land rights draft bill draws concern from some quarters” *Business Day* (2002-04-26) 3; Seria “Land bill no closer to resolution” *Business Day* (2002-08-29) 3; Mkhabela “Tension over land rights bill” *City Press* (2002-08-25); Gutto “Rule of law crucial in land reform policy” *Sowetan* (2002-09-02) 12; Naki “Land Bill assures land tenure rights” *Daily Dispatch* (2002-09-02) 3.

between the titling paradigm and fragmented use-rights as adopted by the Act will also be investigated, to determine its viability and efficacy.

The premise for this study is the assumption that a legislative framework by itself cannot sufficiently achieve the objectives of the land reform program. Laws need to be backed up by effective government support as concerns funding, implementation and integrated development. On first blush, it does not seem as if the situation changed significantly since the advent of the new land regime. The annual budget for land reform is altogether insufficient.⁴² Hence the pace of delivery is not likely to increase.⁴³

1 4 Sequence of Chapters

This study comprises of four parts. Part One consists of this introductory chapter and the following chapter, which discusses the framework, need and the criteria for reform legislation. This serves as the canvas against which the Communal Land Rights Act can be analysed. In Chapter Two the analysis will focus on the policy that gave rise to the Act. The Act's drafting history and parliamentary process will also be discussed.

Chapters Three to Six make up Part Two, which deals with the system put in place by the Communal Land Rights Act. Chapter Three provides a preliminary overview of the Communal Land Rights Act. It aims to establish the purpose; geographic coverage and legislative context of the Communal Land Rights Act. Chapter Three also investigates the link between the policy that gave rise to the Communal Land Rights Act and the procedure set out in the Act to achieve

⁴² Hall and Lahiff "Budgeting for land reform" *PLAAS Policy Brief No 5* (2005) 1 1-5. Claassens *The Communal Land Rights Act and Women: Does the Act Remedy or Entrench Discrimination and the Distortion of Customary?* 2005 *Land Reform and Agrarian Change in Southern Africa* No 28 1 33. The National Treasury has allocated the Department of Land Affairs R11 million for 2005/2006, R25 million for 2007/2008 and R27 million for 2007/2008 for the implementation of the Communal Land Rights Act.

⁴³ Cousins "'Embeddedness' versus Titling: African Land Tenure Systems and the Potential Impacts on the Communal Land Rights Act 11 of 2004" 2006 *Stell LR* 488 488-513.

tenure security. The policy choices referred to here are contained in the *1997 White Paper on South African Land Policy*, which are still relevant for land reform and especially tenure security in the context of the Communal Land Rights Act. Chapter Four discusses the acquisition of juristic personality by a community in terms of the Act. Chapter Five focuses and discusses the statutorily created structures in terms of the Act in relation to security of tenure. The Land Administration Committee is referred to as the “internal” administrative structure, while the Land Rights Board is referred to as the “external” administrative structure. The effect of the Traditional Leadership and Governance Framework Act⁴⁴ on the creation of said Land Administration Committee will also be discussed here. Chapter Six entails a study of the procedures for securing tenure.

The substantive issues are discussed in Part Three of this study. It comprises a discussion of security of title, the registration procedure and the compromise between the titling paradigm and the fragmentation of land rights paradigm in Chapter Seven. Chapter Eight analyses the constitutional issues in relation to the Communal Land Rights Act.

A summary of the conclusions and recommendations for giving effect to more efficient tenure security are contained in Chapter Ten and this constitutes Part Four of this study.

⁴⁴ 41 of 2003.

CHAPTER 2: NEED AND CRITERIA FOR REFORM

2 1 Framework for Reform

The dire need for reform appears obvious from the *preceding* discussion, but will be conceptualised in greater detail in the following paragraphs. In order for tenure reform legislation to be consistent with the Bill of Rights, it must include measures which can address the deeply entrenched gender inequalities with regard to communal land in the rural areas.⁴⁵ This chapter explores some of the policies that marginalised women in relation to land rights. The discussion then also deals with the criteria to which tenure reform must adhere, for the Communal Land Rights Act, which was mandated by the constitutional goal of tenure reform, to be implemented successfully. Security of tenure was the last part of the government's land reform programme to receive attention; government was under considerable pressure to enact the much contested Communal Land Rights Act.⁴⁶

2 2 Need for Tenure Reform

The submissions⁴⁷ in respect of the draft Communal Land Rights Bill of 2002 demonstrate the urgent need to address tenure problems well. Tenure reform in communal areas relates not only to social and economic development,⁴⁸ but also to the eradication of poverty in these areas. Back in 2002, the uncertain,

⁴⁵ Claassens "Women, Customary Law and Discrimination: The Impact of the Communal Land Rights Act" in Murray & O'Sullivan (eds) *Advancing Women's Rights* (2005) 42-43. Cousins "Contextualising the Controversies" in *Land, Power and Custom* at 7.

⁴⁶ 11 of 2004. Cook "Land rights draft bill draws concern from some quarters" *Business Day* (2002-04-26) 3; Seria "Land bill no closer to resolution" *Business Day* (2002-08-29) 3; Mkhabela "Tension over land rights bill" *City Press* (2002-08-25).

⁴⁷ Representatives from over 70 rural communities, rural NGO's, the South African Human Rights Commission, the Commission on Gender Equality, the Congress of South African Trade Unions, the National Union of Mineworkers, the Legal Resources Centre, the South African Council of Churches, the Women's Legal Centre, the Programme for Land and Agrarian Studies and the National Land Committee all made submissions on the 2003 Communal Land Rights Bill.

⁴⁸ Andrew, Shackleton & Ainslee "Land use and Rural Livelihoods: Have they been Enhanced through Land Reform" *Policy Brief No 5* (2003) PLAAS 1 1-4. May "The Structure and Composition of Rural Poverty and Livelihoods in South Africa" in Cousins (ed) *At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century* (2000) 21-21.

insecure and conflicted tenure rights were constraints on investment and development.⁴⁹ They also limited land rental and sharecropping arrangements and undermined the management of common property resources such as grazing fields, water resources and forests, which led to the unsustainable use of natural resources.⁵⁰ The situation has not changed much in the mean time.

Another reason why tenure reform legislation was needed, was the lack of clarity underlying land rights.⁵¹ This led to major conflicts between local government bodies, traditional leaders and communities.⁵² Traditional leaders, on the one hand regard communal land as land that they control, and development projects as a means to secure support from those under their authority.⁵³

Communities residing on the land in question, on the other hand, regard it as theirs. They want to be centrally and equally involved in decisions relating to the use and development of the land.⁵⁴ Since the communities are the beneficial occupiers and users of the land, it is only just and fair that the land be developed in their best interest.

The inherited land administration system, which was “in a state of near-total collapse in many parts of the country”,⁵⁵ was another factor demonstrating the

⁴⁹ Adams, Cousins & Manona “Land Tenure and Economic Development in Rural South Africa: Constraints and Opportunities” in Cousins (ed) *At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century* (2000) 111 111-128.

⁵⁰ The failed Wild Coast Spatial Development Initiative was a case in point. The Department of Trade and Industry was responsible for the said initiative. In the Wild Coast initiative the various role-players all had their own agendas, the development was to entail enterprises of tourism, agriculture and forestry. However the communities involved felt that despite the fact that the area was eco- one, the many conflicting rights on the land were not sufficiently solved, and as a result of this deals were never concluded between the various communities and the investors. Kepe “Clearing the ground in the Spatial Development Initiatives (SDI’s): Analysing ‘process’ on South Africa’s Wild Coast” in Cousins (ed) *At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century* at 254-263 at 256.

⁵¹ Van der Walt “*Constitutional Property Law*” at 309. Dlamini “Landownership and Customary Law Reform” in Van der Walt (ed) *New Patterns of Landownership in South Africa* 37 39-42.

⁵² Andrew et al “Land use and Rural Livelihoods” *PLAAS Policy Brief* at 3.

⁵³ Adams et al “Land Tenure and Economic Development” in *At the Crossroads* 118.

⁵⁴ Claassens & Ngubane “Rural Women: Land Rights and the Communal Land Rights Bill” 2003 *Indonsa* (3) 13 13-15. Pienaar “Broadening Access to Land” at 187. Adams, Cousins & Manona “Land Tenure and Economic Development” in *At the Crossroads* 118.

⁵⁵ Claassens et al in “Rural Women” at 13.

urgency of tenure reform in communal areas. It is quite evident that a complex mixture of dysfunctional land holding systems is in operation in the communal areas.⁵⁶ Although rural inhabitants are in beneficial occupation of the land, they are still uncertain about the extent as well as the nature of their rights. Local and national political conflicts are an issue that is also clouding the land administration system in these areas.⁵⁷

2 3 Criteria for Land Tenure Reform

Most importantly for tenure legislation to be successful, it must address the underlying problems with regard to communal land, tenure reform and the land rights of vulnerable groups.⁵⁸ Its contents also have to be appropriate and its implementation effective. To confirm the Department of Land Affairs' commitment to tenure reform, tenure legislation must also contain measures to back up the omission of or non-compliance with a provision of the legislation.⁵⁹

Several further criteria for assessing tenure legislation can be entertained.⁶⁰ The Bill of Rights requires that tenure reform legislation must include measures which address the deeply entrenched gender inequalities with regard to communal land in the rural areas.⁶¹ As indicated previously, past policies have also impacted negatively on the land rights of women in rural areas.⁶²

Another criterion is that communal land rights and land administration systems must be consistent with the Bill of Rights.⁶³ This means that tenure legislation

⁵⁶ Badenhorst et al *The Law of Property* at 585.

⁵⁷ Adams et al "Land Tenure and Economic Development" in *At the Crossroads* at 118.

⁵⁸ Van der Walt "*Constitutional Property Law*" at 808. Van der Walt (1990) *De Iure* 2-3.

⁵⁹ Cousins, Hornby, Kingwell, Royston & Trench "Perspectives on Land Tenure Security in Rural and Urban South Africa: An Analysis of the Tenure Context and a Problem Statement for LEAP" (2005) available online at <http://www.uwc.ac.za/plaas>. Last visited on 2009-29-09.

⁶⁰ Cousins "Submissions to the Portfolio Committee on Agriculture and Land Affairs" – November 2003, also available at <http://www.uwc.ac.za/plaas>. Last visited on 2009-29-09.

⁶¹ Van der Walt "*Constitutional Property Law*" at 309.

⁶² Claassens et al "Rural Women" at 13. Claassens "Land Rights and Local Decision-Making Processes: Proposals for Tenure Reform" in Cousins (ed) *At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century* (2000) 134 129-142. Claassens & Ngubane "Women, Land and Power: the Impact of the Communal Land Rights Act" in *Land, Power and Custom* at 154 154-155. Lahiff "Land Tenure in South Africa's Communal Areas: A Case Study of the Arabie-Olifants Scheme" (2000) *African Studies* (59) 45 47-48.

⁶³ Claassens "Land Rights and Local Decision-Making Processes" in *At the Crossroads* at 137.

has to adhere to equality by outlawing discrimination in whatever form and creating transparency and accountability in all decision-making matters. Transparency and accountability should be entrenched in the community rules and even traditional leaders should adhere to it.

Tenure reform legislation should in essence be able to “create the basis for an effective and sustainable land administration system.”⁶⁴ This will give rights holders, who are in the process of claiming, recording, enforcing and protecting their land rights, more effective support. The entire tenure security process must therefore be transparent to the holders of land rights in the area being administered. In general, the land administration system should be able to “reconcile and work co-operatively with local government bodies in relation to development, planning, infrastructural development and also the provision of much needed basic services in these rural areas.” Currently basic services are not provided to the communities in the said rural areas, impacting not only on their quality of life but also on their dignity.⁶⁵

The final criterion against which tenure legislation should be measured is its ability to be implemented on a large scale and to secure the land rights of the affected communities and individuals within a reasonable time.⁶⁶ The Communal Land Rights Act will have an impact on millions of rural dwellers. The Act has been promulgated in 2004 already, yet it has not been implemented. Those in need of tenure security are still without it. The commitment of the Department of Land Affairs to the securement of insecure land tenure rights is for all the rural inhabitants, still merely a dream.

⁶⁴ Claassen “Land Rights and Local Decision-Making Processes” in *At the Crossroads* at 132-133.

⁶⁵ Claassens “Land Rights and Local Decision-Making Processes” in *At the Crossroads* at 135.

⁶⁶ Cousins “Submissions” at 38. Pienaar “The Meaning of the Concept Community in South African Land Tenure Legislation” *Stell LR* 65. Claassens “The Communal Land Rights Act and Women” in *Land Reform and Agrarian Change in Southern Africa* at 32.

2 4 Attempts to Address Need for Tenure Reform

This section will entail a discussion of the efforts of the Department of Land Affairs to address the need for tenure reform. The relevant policy relating to land tenure reform will be analysed as well as the drafting history of the Communal Land Rights Act.

2 4 1 Land Policy pertaining to Land Reform

As already mentioned, the mandate for the Communal Land Rights Act is found in both the *1997 White Paper on South African Land Policy*⁶⁷ and section 25(5) and (6) of the Constitution.⁶⁸ The preceding chapter of this thesis provided an historical view of the tenure problems facing South Africa and the need and criteria for security of tenure legislation. This subsection now analyses the efficacy of the said land policy in more detail. This is necessary in order to determine in the following chapters whether the policy behind tenure reform indeed manifests in crucial legislation such as the Communal Land Rights Act.

In the executive summary of the *White Paper*, much emphasis is placed on matters that must be dealt with in both urban and rural environments. These matters include the need for security of tenure for all, the need for sustainable use of land and also the need for the rapid release of land for developmental purposes. Other matters that need attention are the need for recording and registering all rights in property and the need for the administration of public land in an effective manner. All these matters receive some degree of attention and recognition in the Communal Land Rights Act.

The aim of the Communal Land Rights Act is to provide tenure security to rural communities and individuals. It is hoped that by securing and registering land in the name of its occupiers, some degree of economic development can be achieved. The envisaged development can take a variety of forms, namely

⁶⁷ RSA *White Paper on South Africa's Land Policy* at 60.

⁶⁸ 108 of 1996.

eco-tourism in some areas, and fishing and agricultural activity in others. Regardless of the type of development, the beneficiaries must remain the rural communities and it needs to be sustainable. However the Communal Land Rights Act does not adequately focus on developmental issues, which the *White Paper* renders crucial in the alleviation of poverty and economic growth.⁶⁹

Furthermore the administration of public land, especially in rural areas needs to be monitored in an effective way. It has been recognised that since nested systems of land control exist in rural areas, abuse by powerful traditional leaders is a reality.⁷⁰ 'Nested systems' of land holding refers to land holding practice in communal areas, where there is a degree of community control with regard to the allocation of land and landholding in itself. The household in communal tenure arrangements usually forms the basic unit of production.⁷¹ Usually families and larger social groups have preferential rights to certain common resources, as derived from past practices. The tribal authority will usually be responsible for the allocation of land to new families within the larger social group or tribe. Despite the fact that communal tenure systems might result in strong rights in the larger social group, conflicting tenure rights also exist. Cousins and Claassens regard "communal tenure' systems as mixed tenure regimes, which very often comprise of bundles of individual, family, sub-group and larger group rights and duties." The type and content of the bundle of rights differ and depend on the natural resources available to that specific community and area. Nested systems in terms of communal tenure arrangements also imply that rights to land and natural resources are shared and relative. As such flexible boundaries between the various social units exist⁷² and this renders communal tenure even more unique.

⁶⁹ This will be discussed in Chapter 8 of this study.

⁷⁰ Cousins *Reforming Communal Land Tenure in South Africa – Why Land Titling is Not the Answer: Critical Comments on the Communal Land Rights Bill*, 2002 at 1. Also available at <http://www.uwc.ac.za/PLAAS>. Last visited at 2009-29-09.

⁷¹ Claassens "Land Rights and Local Decision-Making Processes" in *At the Crossroads* at 134.

⁷² Cousins & Claassens *Communal Tenure "From Above" and "From Below"*, Paper presented at the Conference on "Competing Jurisdictions: Settling Land Claims in Africa" at Vrije Universiteit, Amsterdam, 24-26 September 2003.

The *White Paper* also recognises that tenure reform, and therefore also the attempt to provide tenure security to millions of rural dwellers,⁷³ is a rather complex process due to past policies relating to land.⁷⁴ The following principles guided the policy development process, namely: the movement of tenure reform away from permits towards the legal recognition of rights in land. Land tenure policy must also focus on building a unitary non-discriminatory system of land rights and at the same time allowing affected communities and individuals to choose the appropriate tenure system. The Communal Land Rights Act adheres to a certain extent to this policy, without relying fully on existing structures of land law.⁷⁵ These relate specifically to the established registration system and the unitary concept of property. This is a rather critical omission, because both the *White Paper* and the Communal Land Rights Act assume that communities will know what the different tenure systems are and what it comprises of, but since communal tenure is so unique in the different affected communities, this assumption could have far-reaching implications. It can however be assumed that the reference to the different tenure system relates to the choice between individual tenure or communal tenure.

Another important principle of tenure reform ensures that tenure legislation is in unity with basic constitutional principles.⁷⁶ Providing that tenure systems must at all times be consistent with basic human rights and equality achieves this.⁷⁷ Other principles include the adoption of a rights-based approach and the adoption of adjudication principles for the recognition and accommodation of

⁷³ It is estimated that about 2.4 million rural households or about 12.7 million people are residing in the communal areas. Adams, Cousins & Manona “Land Tenure and Economic Development” in *At the Crossroads* 111. Claassens “Land Rights and Local Decision-Making Processes” in *At the Crossroads* at 134.

⁷⁴ Further detail at 3.3 below.

⁷⁵ Claassens “Land Rights and Local Decision-Making Processes” in *At the Crossroads* 134. Adams, Cousins & Manona “Land Tenure and Economic Development” in *At the Crossroads* at 111.

⁷⁶ Claassens & Ngubane “Rural Women: Land Rights and the Communal Land Rights Bill” 2003 *Indonsa* (3) 13 13-15. Pienaar “Broadening Access to Land” at 187. Adams, Cousins & Manona “Land Tenure and Economic Development” in *At the Crossroads* at 118.

⁷⁷ Claassens & Ngubane “Rural Women: Land Rights and the Communal Land Rights Bill” 2003 *Indonsa* (3) 13 13-15. Pienaar “Broadening Access to Land” at 187. Adams, Cousins & Manona “Land Tenure and Economic Development” in *At the Crossroads* at 118.

“*de facto*” rights.⁷⁸ One last principle guiding the tenure reform was that new tenure systems and laws must reflect current practices.⁷⁹

Most of these principles find application in the Communal Land Rights Act. However, there is room for improvement. In the following discussion, these policy choices of the Department of Land Affairs and how it manifests itself in the Communal Land Rights Act are discussed.

2 4 2 Drafting History of the Communal Land Rights Act

The Communal Land Rights Act was drafted with security of tenure in mind. It nevertheless also has an element of redistribution. Comparable redress can also be given in cases of conflicting rights which cannot be made secure due to circumstances. Many problems were experienced during the drafting stage. The concept of the Communal Land Rights Act was first introduced in 1995/1996, when the Department of Land Affairs still resorted under Minister Derek Hanekom. The initial goal was to transfer state-owned land to the communities and individuals who were residing on it, but did not have secure title.⁸⁰ The bills that were drafted during this time were highly contested.⁸¹

In 2000 Thoko Didiza took office as Minister of Land Affairs, which resulted in a new Communal Land Rights Bill in 2001. During a conference held in Durban on land reform issues in that year, the previous Communal Land Rights Bill was

⁷⁸ Claassens & Ngubane “Rural Women: Land Rights and the Communal Land Rights Bill” 2003 *Indonsa* (3) 13 13-15. Pienaar “Broadening Access to Land” at 187. Adams, Cousins & Manona “Land Tenure and Economic Development” in *At the Crossroads* at 118.

⁷⁹ Claassens & Ngubane “Rural Women: Land Rights and the Communal Land Rights Bill” 2003 *Indonsa* (3) 13 13-15. Pienaar “Broadening Access to Land” at 187. Adams, Cousins & Manona “Land Tenure and Economic Development” in *At the Crossroads* at 118.

⁸⁰ Van der Walt *Constitutional Property Law* 308. Badenhorst et al *The Law of Property* at 607. Makopi “Awards to Provide Security of Tenure and Comparable Redress” in Cousins (ed) in *At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century* 144 143-162.

⁸¹ Moos “Verblyfreg vir miljoene - Beplande wet sal tuisland-mense help” *Beeld* (2002-07-08) 6; Paton “New law to loosen tribal leader’s control of land” *Sunday Times* (2002-08-25) 8; Gerardy “Communal land rights laws rattle EC chiefs” *Daily Dispatch* (2002-12-09) 8; Cook “Land rights draft bill draws concern from some quarters” *Business Day* (2002-04-26) 3; Seria “Land bill no closer to resolution” *Business Day* (2002-08-29) 3; Mkhabela “Tension over land rights bill” *City Press* (2002-08-25).

discussed by various stakeholders and interested NGOs. Afterwards the attendants claimed that the consultation period with the drafters and the Department of Land Affairs had been insufficient, as they had not had adequate time to voice their criticisms against the Bill.⁸² The consultation process had also not included the potentially affected communities, but only the traditional leadership and other governmental departments.⁸³ This led to intense unhappiness amongst affected communities, as they felt they were in the best position to discuss their rights.⁸⁴

Due to this criticism, a new bill was drafted and published for public comments in August 2002. However, because of the reservations expressed by academics and NGOs that this version of the Bill would not improve insecure land rights and because of the confusing administration arrangements it contained, no consensus was reached in Parliament. The Bill subsequently led to heated debates in both Parliament and the media. Consultations were also held with various potentially affected communities in Cape Town during the period of 12 to 14 November 2002.⁸⁵

In 2003, these deliberations resulted in a shorter version of the Communal Land Rights Bill. Despite the fact that it differed drastically from the previous version, no further consultation processes were held with the affected communities or any other interested parties.⁸⁶ This gave rise to great unhappiness and claims by the Legal Resources Centre acting on behalf of affected communities that the Communal Land Rights Bill was unconstitutional, as it did not give effect to the constitutional guarantee of public consultation processes. Despite this, the 2003 version of the Communal Land Rights Bill was passed by Parliament early in 2004.

⁸² Claassens “Community Views on the Communal Land Rights Bill” Research Report no 15 (2003) 15.

⁸³ Claassens “Community Views on the Communal Land Rights Bill” Research Report no 15 (2003) 17.

⁸⁴ Claassens “Community Views on the Communal Land Rights Bill” Research Report no 15 (2003) 17.

⁸⁵ Olivier “Communal Land Rights Act 11 of 2004: Overview, Institutional Arrangements and Implementation Guidelines” 2006 *Obiter* 304 307.

⁸⁶ Claassens “Community Views” at 42. Olivier 2006 *Obiter* 307-308.

Some scholars⁸⁷ have commented on the fact that the Act was rushed through Parliament, as an attempt by the ANC-led government to get the traditional leadership in the former homelands, self-governing territories and the former Ingonyama Trust land on their side for the elections of 2004.

2 4 3 Parliamentary Process of the Communal Land Rights Act

Dissatisfaction was also expressed about the Parliamentary process followed in the promulgation by the Communal Land Rights Bill.⁸⁸ This is important in the context of the Communal Land Rights Act, especially since the Constitution provides for procedures that Parliament must follow for a Bill to get enacted. If Parliament follows an incorrect procedure, this would render the Bill invalid. The Constitution sets out three different procedures for the adoption of laws. The adoption of a constitutional amendment by Parliament is firstly prescribed in section 74 of the Constitution. Secondly, section 75 of the Constitution provides for procedures to be followed in the case of ordinary Bills not affecting provinces. Lastly, section 76 dictates the procedure for ordinary Bills which will affect provinces. It is the latter two procedures which are relevant in the determination of whether the correct Parliamentary process was followed in the enactment of the Communal Land Rights Act. The difference between said two procedures is how the National Council of Provinces deals with Bills.⁸⁹ In the case of such a section 76-Bill, upon consideration in the National Council of Provinces, each of the nine provincial delegations to the NCOP has a single vote which must be cast as directed by the provincial legislature. Five votes are required for a Bill to pass. Where the NCOP considers a section 75-Bill each of the delegates has an individual vote. According to Murray and Stacey a further difference between a section 75 and 76 Bill, is that provinces have more influence over section 76-Bills and if the NCOP rejects a section 76-Bill, it can only become law if it is approved by the National Assembly by a two-thirds

⁸⁷ Pienaar & Mostert "Formalisation of South Africa's Communal Land Title" in *Modern Studies III* at 7. Claassens "Community Views" at 42. Cousins "Submission to Portfolio Committee".

⁸⁸ Murray & Stacey "Tagging the Bill, Gagging the Provinces: The Communal Land Rights Act in Parliament" in *Land, Power & Custom* 72-91. Olivier 2006 *Obiter* 307-308.

⁸⁹ Olivier 2006 *Obiter* 307-308.

majority. However if the NCOP rejects a section 76-Bill, it becomes law if the National Assembly passes it with a majority.

It is common knowledge that every Bill must be considered by the two different Houses in Parliament; namely the National Assembly and the National Council of Provinces. In the instance of the Communal Land Rights Act, it was tagged as a section 75-Bill by using the Canadian pith and substance test.⁹⁰ Parliament tagged the Bill as a section 75-Bill, because they found its pith and substance to be the provision of legally secure tenure by transferring communal land to communities or by awarding comparable redress.

However it is evident from the Act itself that in essence it will be dealing with land and customary law, matters explicitly provided for in Schedule 4 of the Constitution. In the said Schedule 4 of the Constitution matters are listed that will fall within the “Functional Areas of Concurrent National and Provincial Legislative Competence” and which provide for land and customary law. As such the Act should have been tagged as a section 76-Bill instead. However Parliament only looked at the long title of the Act to guide them in deciding in terms of which section the Bill should be tagged.⁹¹ The tagging of the Bill as a section 76-Bill was proposed by the then Speaker of Parliament, Dr Frene Ginwala and the then Chairperson of the National Council of Provinces, Naledi Pandor.⁹² This would result in more extensive consultation with the provinces and it also would have meant a delay in the passing of the Bill, until after the

⁹⁰ Murray & Stacey “Tagging the Bill, Gaggling the Provinces: the Communal Land Rights Act in Parliament” in *Land, Power & Custom* at 73-85. The “pith and substance” test aims to resolve jurisdictional disputes. The Privy Council used it to determine the “true nature and character of the legislation in order to ascertain the class of subject to which it really belongs.” If it is found in Canada that the pith and substance of a law falls within the jurisdiction of a particular legislature, other relating matters may not ordinarily fall within the legislature’s jurisdiction and will be considered to be ‘incidental’ and will therefore not be covered by the law.

⁹¹ Murray & Stacey “Tagging the Bill, Gaggling the Provinces: the Communal Land Rights Act in Parliament” in *Land, Power & Custom* at 73-85.

⁹² Murray & Stacey “Tagging the Bill, Gaggling the Provinces: the Communal Land Rights Act in Parliament” in *Land, Power & Custom* at 73-85.

2004 national government elections. Despite this public outcry, the Bill was unanimously adopted by Parliament and passed using the section 75 route.

The following chapter contains a preliminary overview of the Communal Land Rights Act, the structures it creates, its scope and the rights and relations it targets. It also places the Communal Land Rights Act in the context of other tenure security related legislation.

PART TWO: SYSTEM OF THE COMMUNAL LAND RIGHTS ACT

CHAPTER 3: PRELIMINARY OVERVIEW OF THE COMMUNAL LAND RIGHTS ACT

3 1 Introduction

The Communal Land Rights Act contains an exposition of the mandate to be found in section 25(5) and (6) of the 1996 Constitution. In the Preamble of the Communal Land Rights Act the following goals are mentioned:

“To provide for legal security of tenure by transferring communal land, including KwaZulu-Natal Ingonyama land, to communities, or by awarding comparable redress; to provide for the conduct of a land rights enquiry to determine the transition from old order rights to new order rights; to provide for the democratic administration of communal land by communities; to provide for Land Rights Boards; to provide for the co-operative performance of municipal functions on communal land; to amend or repeal certain laws; and to provide for matters incidental thereto.”

The aim of the Communal Land Rights Act is admirable and noble, but it is not problem-free. The Preamble of the Communal Land Rights Act is in line with the *White Paper on South Africa's Land Policy*, especially in the context of securing tenure. In the following chapters, the compliance of the current Communal Land Rights Act with the need and criteria for reform will be evaluated in greater detail. This chapter introduces that analysis.

3 2 Geographic Coverage of the Communal Land Rights Act

Section 2 of the Communal Land Rights Act deals with matters of application. The wording and structure is more concise and straightforward than that of the 2002 Communal Land Rights Bill. It provides a clear indication as to exactly what geographic areas the Act applies.

Section 2(1)(a)(i) of the Act provides that the Communal Land Rights Act applies to State land, which is beneficially occupied and State land which vests in the self-governing territories⁹³ or in any of the former Republics of Transkei, Bophuthatswana, Venda or Ciskei⁹⁴ or in the South African Development Trust.⁹⁵ The Act also applies to land that has been disposed of in terms of the State Land Disposal Act.⁹⁶

Section 2(1)(a)(ii) continues to provide that the Act applies to state land, as listed in the Schedules to the Black Land Act⁹⁷ or the Schedules of released areas in terms of the Development Trust and Land Act.⁹⁸ Section 2(b), (c) and (d) of the Act provides for the application of the Act also to the Kwa-Zulu-Natal Ingonyama Trust Land⁹⁹ and also land acquired by or for a community irrespective of whether the land is registered in the name of a community or not.

Section 2(2) is an umbrella provision with reference to the applicability of the Act. It states that “the Minister may by notice in the Gazette, determine land contemplated in subsection (1)(d) and may in such notice specify which provisions of this Act apply to such land.”

Section 2 in its entirety is of a compulsory nature. If an area falls within the above-mentioned geographic legislatively regulated area, the Act applies. According to Mostert and Pienaar¹⁰⁰ where the Act is applicable, the affected communities have no other choice but to adhere to its requirements in order to obtain secure and registered tenure rights.

⁹³ The self-governing territories were created in terms of the Self-Governing Territories Constitution Act 21 of 1971. It included the following areas: Qwa-Qwa, KwaNdebele, Kwa-Zulu, Gazankulu, GaNkwane and Lebowa.

⁹⁴ These former Republics were also referred to as the TBVC-states. It was created in terms of the

⁹⁵ The SADT was established by section 4 of the Development Trust and Land Act 18 of 1936.

⁹⁶ 48 of 1961.

⁹⁷ 27 of 1913.

⁹⁸ 18 of 1936.

⁹⁹ 18 of 1936.

⁹⁹ 3 of 1994.

¹⁰⁰ Pienaar & Mostert “Formalisation of South African Communal Land Title” in *Modern Studies III* at 17.

This Act is accordingly applicable to quite a wide geographical area and for purposes of consistency this study will refer to all of the above-mentioned area as state-owned or communal land. Mostert and Pienaar regard the scope of the of the Communal Land Rights Act as very broad; “comprising basically all of the ‘classical’ communal areas addressing the pre-1991 land regime, and applying “to beneficiaries of communal land and land tenure rights in terms of other land reform laws.” They also point out that section 2(1)(d) confuses the scope of both the Communal Land Rights Act and the Communal Property Associations Act.¹⁰¹ Section 2(1)(d) deals with the application of the Act to “any other land, including land which provides equitable access to land to a community as contemplated in section 25(5) of the Constitution.”

The wide scope of the geographical area affected by the Communal Land Rights Act was therefore consciously inserted in the Act. This appears to have been done to aid more, if not all, rural communities and individuals in securing their land tenure rights.

The Communal Property Associations Act is one of those acts attempting to provide equitable access to land to a community through the formation of a communal property association. The mandate for the Communal Property Associations Act is also found in section 25(5) of the Constitution. However, the Minister will still be able to determine exactly what provisions of the Communal Land Rights Act will be applicable to such a community. Practically speaking, this means that there is a possibility that a communal property association, established in terms of the Communal Property Associations Act, might also be subject to Communal Land Rights Act. Mostert and Pienaar opine that the broad ambit of the Communal Land Rights Act established by section 2(1)(c) and (d), can be viewed as an attempt by the legislature “to bring measures relating to tenure security and access to land under one hat.”¹⁰²

¹⁰¹ 28 of 1996.

¹⁰² Pienaar & Mostert “Formalisation of South African Communal Land Title” in *Modern Studies III* at 20.

One can also assume that due to the many dysfunctional communal property associations, a conscious effort by the Department of Land Affairs was needed to address the insecure land tenure rights in a more satisfactory manner. Although the aim of establishing a communal property association was to secure land tenure rights in the communal areas, the drafting of the community rules as a requisite for the acquisition of juristic personality by sophisticated lawyers, who were not always aware of the tenure arrangements of particular communities, did not help to secure tenure arrangements.¹⁰³ The complex and utterly cumbersome process that communities had to go through in order to be regarded as 'disadvantaged', led to constraints on investments.

In cases where a communal property association is indeed fully functional, the application of the Communal Land Rights Act could be to the detriment of the members of such an association, since the community will have to go through the painful procedure of establishing a new juristic personality all over again upon the registration of their community rules. The insertion in the Communal Land Rights Act that if a tribal authority exists in a particular area, they may act as the land administration committee, responsible for the administration and allocation of land in a particular area, may for reasons still to be provided later in this study, also be extremely problematic for affected communal property associations.

3 3 Rights and Relations Targeted

It is essential for purposes of this study to know exactly what the rights are that the Communal Land Rights Act sought to secure. The Communal Land Rights Act mentions "old order rights" and states what these could entail. These rights are insecure¹⁰⁴ as a result of past discriminatory laws and practices.¹⁰⁵ These

¹⁰³ Pienaar "The Land Titling Debate in South Africa" 2006 *JSAL* 435 442-443.

¹⁰⁴ The insecurity of the said old order rights are also addressed and recognised in detail in the Preamble of the 2002 CLRB and in the Memorandum to the 2003 version of the CLRB at 19.

old order rights refer to the current rights of rural dwellers in the communal areas and how they are comprised. The Communal Land Rights Act attempts to secure these rights.¹⁰⁶

Mostert and Pienaar¹⁰⁷ argue that section 4 of the Communal Land Rights Act should be used as a starting point, as the constitutive provision for achieving security of old order rights is set out in this section. Mostert and Pienaar suggest that the term old order rights deals not only with rights that was formed previously and in the 'old' South Africa but also with (all other) land relations. In essence, therefore "old order rights" is a term denoting the insecure rights under the former, discriminatory land regime.¹⁰⁸

The Communal Land Rights Act regards as old order rights any tenure rights in communal land irrespective of whether the rights are registered or not. Currently, these rights relate to beneficial occupancy, usage in a variety of forms and renting of the land from the traditional leadership operating in a particular area. As long as the rights are derived from or recognised by customary law, practice or usage, it will be regarded as old order rights.¹⁰⁹

According to Mostert and Pienaar, the above-mentioned rights fall within the ambit of the Communal Land Rights Act if they existed immediately before the ministerial determination is made in terms of the pivotal section 18 of the Act. The said section 18 specifically deals with the conversion, confirmation or cancellation of old order rights into registrable secure rights, to which the Act refers as "new order rights."

¹⁰⁵ In *Dulabh v Department of Land Affairs* 1997 (4) SA 1108 (LCC) the Court gave an exposition as what discriminatory laws and practices may, entail.

¹⁰⁶ The 2002 Communal Land Rights Bill did not make any reference to old order rights but it did provide an exposition as to what land tenure rights entails.

¹⁰⁷ Pienaar & Mostert "Formalisation of South African Communal Land Title" in *Modern Studies III* at 12.

¹⁰⁸ None of the previous versions of the Communal Land Rights Bills had a name for the insecure rights that were to be secured through the process of registration, which will be discussed in detail in chapter 5.

¹⁰⁹ Van der Walt *Constitutional Property Law* at 334. Pienaar "Security of Communal Land Tenure by Registration of Individualised Title – Is the Communal Land Rights Bill of 2003 the Final Solution" (2004) 67 *THRHR* 244 245.

The Communal Land Rights Act deals with the conversion of old order rights into new order rights. New order rights are defined as “tenure or other rights in communal or other land which has been confirmed, converted, conferred or validated by the Minister in terms of section 8.” As can be seen from this definition, in order for old order rights to become new order rights, they must go through the process of confirmation, conversion or validation by the Minister.¹¹⁰

3 4 The Communal Land Rights Act and Related Legislation

In this section, the legislation that is applied concurrently with the Communal Land Rights Act will be discussed. This is important to understand exactly where the Communal Land Rights Act finds application within the broader land reform framework.

3 4 1 The Upgrading of Land Tenure Rights Act (ULTRA)¹¹¹

The abovementioned act was promulgated in 1991 to provide for the upgrading and conversion of certain rights in tribal (and other) land into the Western notion of ownership.¹¹² The rights that can be upgraded into full ownership are specified in Schedule 1 of the Act and include deeds of grants,¹¹³ rights to leasehold¹¹⁴ and also quitrent.¹¹⁵ In order for the rights to be upgraded, the land still must be surveyed, it must be informally demarcated and shown on a general plan, or it had to form part of a formalised township. It is also the responsibility of the Registrar of Deeds to affect the necessary entries and endorsements. The right to ownership is accordingly granted to a person who is the holder of any one of the specified tenure rights, according to the Registrar. As such, the holder of a land tenure right is regarded to be the owner of the

¹¹⁰ Section 18 of the Communal Land Rights Act 11 of 2004.

¹¹¹ 112 of 1991. This was an Act promulgated by the previous National Party government.

¹¹² Badenhorst et al *The Law of Property* 484. Van der Walt *Constitutional Property Law* 285-289. Van der Merwe & Pienaar “Land Reform in South Africa” in Jackson & Wilde (eds) *The Reform of Property Law* 1997 351 334-380.

¹¹³ Reg 1 Ch 1 of Proc R293 and Proc R29 and GN R402.

¹¹⁴ Reg 1 ch 1 of Proc R293, s 1 of the Black Communities Development Act 4 of 1984; Conversion of Certain Rights into Leasehold Act 81 of 1985; Proc R29 and GN 402.

¹¹⁵ Proc R188 of 1969.

land, pending the conversion of the Schedule 1 rights. The holder will also still be subject to all the previously registered conditions, servitudes, mortgage bonds or township conditions.

Schedule 2 rights such as permission for the occupation of any irrigation or residential allotment,¹¹⁶ permission to occupy¹¹⁷ or the rights of occupation¹¹⁸ will also be converted into full ownership. This will take place when the owner of the land or erf lodge with the Registrar of Deeds a certificate of ownership, in the name of such a holder of the relevant land tenure right. The land here should be situated in a formalised township for which a township register exists. If the land is situated outside a formalised township, it must be surveyed before the conversion to full ownership can take place. Only once the land is registered in the name of the new owner, can ownership be transferred. This is exactly where this Act differs from the Communal Land Rights Act. Section 3 of the Communal Land Rights Act deals with unsurveyed communal land in the former homelands that needs to be surveyed before transfer to any community or individual household can take place.¹¹⁹ No mention is made of whether the land to be transferred in terms of the Communal Land Rights Act should be situated in a formalised township or not. It may, possibly.

The Communal Land Rights Act repeals section 20 of the Upgrading of Land Tenure Rights Act. Section 20 deals with the transfer of tribal land to a tribe. It is Mostert and Pienaar's contention that the Upgrading of Land Tenure Rights Act was amended by the Communal Land Rights Act in three respects. It provided for two additions to Schedule 1. These deal with more statutory forms of quitrent. Also, as already mentioned the whole of section 20 is revoked by the Communal Land Rights Act. According to Mostert and Pienaar the Upgrading of

¹¹⁶ Reg 5(1) of Proc R5 in Government Gazette 415, 11 January 1963.

¹¹⁷ Proc 188 of 1969..

¹¹⁸ Rural Areas Act (House of Representatives) 9 of 1987.

¹¹⁹ Pienaar & Mostert "Formalisation of South African Communal Land Title" in *Modern Studies III* at 12. Badenhorst et al *The Law of Property* 484.

Land Tenure Rights Act will still be nationally applicable upon the commencement of the Communal Land Rights Act.

Despite the fact that the Communal Land Right Act revoked section 20 of the Upgrading of Land Tenure Rights Act, section 19 was kept. This is senseless considering the content of section 19. Section 19 provides that any tribe can acquire ownership in land, subject to a moratorium on the selling of any tribal land for a period of ten years after the commencement of the Upgrading of Land Tenure Rights Act. Since the Upgrading of Land Tenure Rights Act was promulgated in 1991, the moratorium lapsed in 2001. This meant that after 2001, tribal land that was acquired in ownership could be “sold, exchanged, donated, hypothecated or otherwise disposed of.”¹²⁰ Section 19 seems to be unnecessary in the light of the Communal Land Rights Act, as all communal land is now dealt with in the newly promulgated tenure legislation. No other provisions of the Upgrading of Land Tenure Rights Act have either been repealed or amended. Particular focus is placed by Mostert and Pienaar on section 3 of the Upgrading of Land Tenure Rights Act, which deals with the conversion of land tenure rights mentioned in Schedule 2. They state that this provision still stands. The tenure rights mentioned in Schedule 2 are not rights that can automatically be converted into ownership, as they relate to unsurveyed land. There are also additional requirements for title to be individualised. The converted rights in terms of section 3 of the Upgrading of Land Tenure Rights Act into full ownership must be registered. Section 3 also sets out the procedure that needs to be followed for the land to be transferred.

In section 3(1)(a)(ii) and (b) of Upgrading of Land Tenure Rights Act reference is made to the conversions being conditional on the obtaining of a tribal or community resolution. As such, the Communal Land Rights Act also deals with this extensively. Mostert and Pienaar argue that the tribal areas affected by the

¹²⁰ Pienaar & Mostert “Formalisation of South African Communal Land Title” in *Modern Studies III* at 20-21.

Communal Land Rights Act and the Upgrading of Land Tenure Rights Act are identical. Section 39 of the Communal Land Rights Act provides that “this Act (the Communal Land Rights Act) read with the necessary changes, applies to beneficiaries of communal land or land tenure rights in terms of other land reform laws.” Therefore it seems that the Communal Land Rights Act will prevail. To Pienaar and Mostert the continued function of certain provisions of the Upgrading of Land Tenure Rights Act remains unclear, as it currently also provides for the conversion of tribal land rights into ownership. It is illogical, expensive and confusing to have two separate and yet very similar Acts in place. The operation and relevance of the Upgrading of Land Tenure Rights Act only stretches as far as Schedule 1 rights, namely the registrable right of quitrent.¹²¹

3 4 2 The Communal Property Associations Act (CPAA)¹²²

The Communal Property Associations Act was promulgated in 1996 to provide an institutional framework for the registration and functioning of a new form of juristic person to acquire, hold or control property on behalf of and for the benefit of certain communities.¹²³ The Communal Property Associations Act is a unique land reform tool and also a very useful mechanism in the overall land reform framework. Not only can it be utilised with great success in the restitution of land but also in the attempt in broadening access to land. The principles of justice, fairness and equality form the basic principles of the Communal Property Associations Act, as is the case with the Communal Land Rights Act. All communities who are entitled to secure tenure in the form of freehold ownership or only certain land tenure rights can employ the Communal Property Associations Act. Other state-assistance here includes communities that have been approved by the Minister as being disadvantaged for purposes of section 2(1)(d) and (2) of the Communal Property Associations Act.

¹²¹ Pienaar & Mostert “Formalisation of South African Communal Land Title” in *Modern Studies III* at 22. Pienaar “Communal Property Arrangements: A Second Bite” in Cousins (ed) *At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century* (2000) at 322 324-326.

¹²² 28 of 1996.

¹²³ Badenhorst et al *The Law of Property* at 509. Van der Walt *Constitutional Property Law* at 315. Carey-Miller (with A Pope) *Land Title in South Africa* at 467.

The registration of a communal property association (CPA) is dealt with in two phases,¹²⁴ namely the provisional association is firstly registered after all the statutory requirements have been met. Thereafter the communal property association must be registered. The statutory requirements for the registration of both the provisional and the communal property association include the full details regarding the proposed name of the association, clear identification of any land or land tenure right or any other right that the association wishes to acquire and also a list of names and identity numbers of the potential members of the association.¹²⁵ In terms of section 6 of the Communal Property Associations Act, a constitution needs to be drafted by the communal property association before the final registration of the association. This constitution of the communal property association must be consistent with the constitutional principles as set out in section 9 of the Communal Property Associations Act which include the following: fair and inclusive decision-making processes; equality of membership; democratic processes; fair access to the property of the association and accountability and transparency. In this regard the Communal Property Associations Act is very similar to the Communal Land Rights Act, as the latter must at all times also adhere to the said constitutional principles.

The Communal Land Rights Act does not provide for any amendment or repeal of the Communal Property Associations Act. The Communal Land Rights Act has however very broad application, as section 2(1)(d) provides that the Communal Land Rights Act is applicable to “any other land, including land which provides equitable access to land to a community.” This provision therefore does have an influence on the continued operation of the Communal Property Associations Act, according to Mostert and Pienaar.¹²⁶ Section 5(2)(iii) provides further that “despite any other law, when making the determination by

¹²⁴ Badenhorst et al *The Law of Property* at 510.

¹²⁵ Carey-Miller (with A Pope) *Land Title in South Africa* at 470-473.

¹²⁶ Pienaar & Mostert “Formalisation of South African Communal Land Title” in *Modern Studies III* at 22.

the Minister in terms of section 18, the ownership of communal land which is not State land, but which is registered in the name of a communal property association as contemplated in the Communal Property Association Act, vests in the community on whose behalf such land is held or in whose interest such registration was affected, and such land remains subject to limitations and restrictions in relation to and rights or entitlements to such land.” If this section is analysed it appears that the Communal Land Rights Act is also applicable to land that has been redistributed by the establishment of a communal property association.¹²⁷ It is the contention of Pienaar and Mostert that because the Communal Land Rights Act also applies to communal property associations the community in question will for all purposes be the successor of a communal property association. However such a community will still have the same entitlements and limitations it had previously under the Communal Property Associations Act. This means that communities that have organised themselves into communal property associations already have secure title, but they are obliged to still undergo the process for acquiring land in terms of the Communal Land Rights Act.

It is also uncertain whether this provision was meant to be applicable only to communal property associations that failed for some reason or another. Section 5(2)(ii) of the Communal Land Rights Act does, however, make sense if it is kept in mind that many communal property associations have failed for various reasons and thus a new mechanism for attempting to provide communities with secure land title is needed and the Communal Land Rights Act could be just this. It is illogical that a functioning communal property association should adhere to the provisions of the Communal Land Rights Act if the Act in terms of which the communal property association was initially established, still has working force. According to Pienaar and Mostert “the provisions of the Communal Land Rights Act remain vague and nonsensical as far as the continued operation of communal property associations is concerned.” They

¹²⁷ This point is also made by Pienaar & Mostert “Formalisation of South African Communal Land Title” in *Modern Studies III* at 21-22.

mention that it is unclear what the procedure will be that needs to be followed if the community that was originally embedded in a communal property association, wants to amend their original constitution. It is these authors' contention that the section 8(10) amendment procedure as set out in the Communal Property Association Act, cannot be available over and above the provisions of section 20 of the Communal Land Rights Act relating to the amendment of the community rules.

As the discussion above indicates, the role of the Communal Property Association Act is indeed questionable, especially in the context of land communally held under customary tenure, as was originally anticipated by the legislature. The Communal Property Associations Act seems to be only of continued relevance in situations where land is being restored to a community under the Restitution of Land Rights Act ¹²⁸ subject to the formation of a communal property association as such.¹²⁹

3 4 3 The Interim Protection of Informal Land Rights Act (IPILRA)¹³⁰

This is yet another Act that aims to provide security of tenure. Although the protection awarded in terms of the Interim Protection of Informal Land Rights Act is of temporary nature, it is of interest to land that is not adequately protected by any other law for the duration of the land reform process.¹³¹ The Interim Protection of Informal Land Rights Act was firstly intended to be an interim measure as it was supposed to lapse at the end of December 1997. Because of the complexity of the tenure reform process it has been extended on an annual basis. The aim of the Interim Protection of Informal Land Rights Act is to protect insecure rights, for example, unregistered communal land rights, held by blacks in the former homelands and the other affected areas.

¹²⁸ 22 of 1994.

¹²⁹ Badenhorst et al *The Law of Property* at 409.

¹³⁰ 31 of 1996.

¹³¹ Badenhorst et al *The Law of Property* at 619.

The legal basis of these rights differ from those known in conventional South African property law. After the first democratic elections of 1994, it was realised that these *de facto* rights were worthy of legal recognition and protection. These insecure tenure rights are also protected in terms of the Interim Protection of Informal Land Rights Act against deprivation similar to that afforded to traditional property rights. Exactly what these “informal rights” entail, are found in section 1(1)(a)(iii) of the Act. It states that an “informal right means the use of, occupation of, or access to land in terms of any tribal, customary or indigenous law or practice of a tribe or it could mean the right of interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established under an Act of parliament.”

The Communal Land Rights Act does not repeal the Interim Protection of Informal Land Rights Act as a whole but only amended section 5 by deleting subsection 5(2) of the Interim Protection Act. Section 5(2) of the Interim Protection of Informal Land Rights Act deals with the date on which the Act was to lapse. However the applicability of the Interim Protection of Informal Land Rights Act seems to be redundant as the Communal Land Rights Act deals with exactly the same informal, unregistered rights in the same geographic areas.

3 5 Land Policy and the Communal Land Rights Act

As already mentioned the mandate for the Communal Land Rights Act is found in both the 1997 *White Paper on South African Land Policy*¹³² and section 25(5) and (6) of the Constitution.¹³³ Since chapter 1 of this thesis provided an historical view of the tenure problems facing South Africa and chapter 2 addressed the urgent need for security of tenure legislation, this chapter will attempt to analyse the link between the said policy and the Communal Land Rights Act amongst others. This is necessary in order to determine whether the

¹³² RSA *White Paper on South African Land Policy* at 60-70.

¹³³ 108 of 1996.

policy behind tenure reform indeed manifests in crucial legislation such as the Communal Land Rights Act.

In the executive summary of the *White Paper* much emphasis is placed on matters that need to be dealt with in both urban and rural environments and thus also on tenure arrangements existing especially in rural areas in South Africa. These matters include the need for security of tenure for all, the need for sustainable use of land and also the need for the rapid release of land for developmental purposes.¹³⁴ Other matters are the need for recording and registering all rights in property and the need for the administration of public land in an effective manner.¹³⁵ All these matters receive some degree of attention and recognition in the Communal Land Rights Act. The whole aim of the Communal Land Rights Act is to provide tenure security to rural communities and individuals. However, the Communal Land Rights Act does not adequately focus on developmental issues, which the *White Paper* renders crucial in the alleviation of poverty and economic growth.¹³⁶

Furthermore the administration of public land, especially in rural areas, needs to be monitored in an effective way. Since the *White Paper* advocates the movement towards the recognition of a rights-based approach in communal areas, emphasis was in this instance placed on the development of a registration system for informal land rights in urban and rural areas. The following recommendations were set out in the *White Paper*, namely:

- i) the establishment and maintenance of a comprehensive land information system which would include alphanumeric as well as spatial data on land-related matters;¹³⁷
- ii) the collection and maintenance of cadastral and topographic information;¹³⁸

¹³⁴ Pienaar "A Land Administration System For Communal Property" in 2007(70) THRHR 557 558.

¹³⁵ Pienaar 2006 JSAL 439.

¹³⁶ This will be discussed in Chapter 10 of this study. Triergaardt *Poverty and Inequality in South Africa: Policy Options and Consequences for Planning in an Emerging Democracy* (2007) unpublished paper presented at conference on *Living on the Margins* at Stellenbosch, 26–28 March 2007.

¹³⁷ Pienaar 2007(70) THRHR 561.

iii) the establishment of norms and standards to structuring and managing the land information process¹³⁹ and

iv) the compilation of a comprehensive state land register which will be of aid in the management of the land.¹⁴⁰

In order to give effect to this strategy, the current registration system will have to be adapted to provide for the registration of group-rights as well as fragmented use-rights, as set out in the Communal Land Rights Act. A further discussion of the registration process will follow in Chapter 7 of this study.

This overview of the mechanisms and focus of the Communal Land Rights Act serves to introduce the analysis in the following chapters of various elements of the Act that impact on the attempt to achieve legally secure communal tenure. In the following chapters, the land policy is scrutinized, the registration procedure as set out in the Act is analysed and the various statutorily created institutions such as the land administration committee and the land rights boards are examined.

¹³⁸ Pienaar 2007(7) *THRHR* 560.

¹³⁹ Pienaar 2007(7) *THRHR* 560.

¹⁴⁰ Pienaar 2006 *JSAL* 439.

CHAPTER 4: ACQUISITION OF JURISTIC PERSONALITY

4 1 Introduction

Tenure security is one of the Department of Land Affairs' main priorities. This is evident from the policy to replace permits and occupation certificates by individual title deeds and the subsequent registration of the land in the name of the rightful occupants.¹⁴¹ Section 3(1) of the Communal Land Rights Act provides that a community will be established as a juristic person only upon the registration of its community rules. As a juristic entity the community will be able to acquire rights and obligations in its own name in accordance with its community rules.¹⁴² As a juristic entity the community is now also in a position to acquire and dispose of immovable property and real rights¹⁴³ and encumber the immovable property or real rights by mortgage, servitude or lease.¹⁴⁴ It appears that the legislature wanted communities to realize that registering their community rules and the subsequent acquisition of juristic personality will benefit the community as a whole, as they are now entitled to do a lot more than was previously the case. This is also the legislature's way of forcing affected communities to register their community rules, if they actively want to participate in the day-to-day dealings of their residual land. Non-registration of community rules will result in the default rules being applicable to that particular community.

4 2 The Importance of the Community Rules

The definition of the term "community rules" in section 1 of the Communal Land Rights Act is non-explanatory and merely provides that it "means the rules registered in terms of section 19 of the Act." Nowhere in the Act is an adequate

¹⁴¹ The 2004 Communal Land Rights Act sets out lengthy procedures before communities or individuals can become lawful owners of the land they resided on.

¹⁴² S 3(a) of the Communal Land Rights Act.

¹⁴³ S 3(a) of the Communal Land Rights Act.

¹⁴⁴ S 3(b) of the Communal Land Rights Act.

definition of community rules provided.¹⁴⁵ The definition in section 19(2) of the Communal Land Rights Act leaves a great degree of choice to the community with respect to the matters they want to be regulated by the community rules. Section 19(2) is too vague and leaves room for the communities not only to abuse the community rules but to regulate matters that should fall within the scope of the land administration committee or the land rights enquirer for instance. When looking at the policy relating to allowing communities to decide on the tenure arrangements applicable to them, it appears that the legislature intentionally was vague in defining the matters on which a community may decide. This makes it possible for communities to include their preferential tenure system and what it entails in the community rules.¹⁴⁶ Allowing greater community participation in the management of natural resources also would ensure that clear guidelines would have to be established by the communities themselves.

Upon the registration of the community rules, they become binding on the community and its members.¹⁴⁷ At the same time they will also be accessible to the public since they will be considered public knowledge upon its registration.¹⁴⁸ The accessibility of the rules is sensible, since they are binding on an entire community and start functioning immediately. It is therefore only reasonable to expect communities and their members to inform themselves of the relevant community rules applicable to them. This should further not be a problem, especially since the community was indeed actively involved in the drafting of the rules. Relevant government structures such as local municipalities should also inform themselves of the relevant community rules.

¹⁴⁵ In this regard the Communal Land Rights Act falls short of the definition as contained in section 1(vii) of the 2002 CLR. This definition not only defined community rules but at the same time it also provided one with the issues that will be regulated by the said community rules. It provided the following: "community rules mean the rules governing land tenure and the management of natural resources within a community in respect of communal land, as derived from customary law or common law or made applicable to that land in terms of any other law."

¹⁴⁶ Adams, Sbanda & Turner "Land Tenure Reform and Rural Livelihoods in Southern Africa" 1999 Natural Resource Perspectives for the Overseas Development Institute, available online at <http://www.odi.org.uk>. Last visited on 2009-29-09.

¹⁴⁷ S 19(3) of the Communal Land Rights Act.

¹⁴⁸ S 19(3) of the Communal Land Rights Act.

4 3 Content, Making and Registration of the Community Rules

Section 19(1) provides that a community wishing to register communal land in their name must make and register its community rules. These rules will be subject to other relevant laws. The fact that the Act is very unclear on what matters may be regulated by the community rules, gives the community more scope to decide on matters they want to have regulated. Section 19(1) firstly provides that the administration and use of communal land by the community, within the framework of spatial planning and local government laws must be regulated by the community rules. This provision is peremptory and it appears that here the community rules must include rules governing this matter.

The community rules must also regulate “such matters as may be prescribed,” in the regulations to the Act. Section 19(2) provides that the community rules may regulate any matters the community deems necessary. This provision also seems to be in line with the policy principle that communities must have insight and a say in matters that affect them in whatever way.¹⁴⁹ Not only will this streamline the functioning of the community as a juristic entity, but this will eliminate uncertainty in the management of the communal property and other natural resources.

In order for the rules to be registered, the community is obliged to make application to the Director-General of Land Affairs to that effect.¹⁵⁰ This provision places yet another duty on a community, which may not always be adequately informed of the procedures set out in the Communal Land Rights Act. This application for the registration of the community rules will also be time-consuming, since communities will have to wait for the decision of the Director-General before they could function as such. Tenure security at this stage still seems to be a mere distant possibility.

¹⁴⁹ *White Paper on South African Land Policy* at 95-96.

¹⁵⁰ S 19(4)(a) of the Communal Land Rights Act.

The Communal Land Rights Act does not provide any time-frame within which the Director-General must make his or her decision regarding the viability of the community rules. It does not allow the Director-General to refer the community rules to the relevant Land Rights Board with jurisdiction in that specific area.¹⁵¹ At this stage the Director-General need not even consider the rules, he or she only needs to refer it to the relevant Land Rights Board. The Land Rights Board must then consider the “suitability” of the rules and must lodge a report on this matter with the Director-General.¹⁵² Only after the Land Rights Board have considered the community rules and have reported on it, the Director-General is expected to consider the rules.¹⁵³ Why do the community rules then have to be referred to the Director-General if he need not consider it? And why could the rules not be referred straight from the community itself to the Land Rights Board? This once again shows that when this Act was drafted, expediency of procedures was not high on the agenda of the legislature in securing tenure. The community rules will only be registered if the Director-General is content that the rules are in compliance with the Constitution¹⁵⁴ and the Act.¹⁵⁵ The actual registration of the community rules will be done by a Registration Officer of the Department of Land Affairs exclusively designated by the Director-General for this purpose.¹⁵⁶ According to section 19(4)(c) the rules must be registered in the “prescribed manner,” but the Communal Land Rights Act does not provide any indication as to what the prescribed manner entails or where it could be found, neither does it contain any guidelines to this effect. The regulations are furthermore vague on this point.

Section 19(4)(d) of the Act provides for the instance where the Director-General is unsatisfied with the community rules on the ground that the rules do not comply with the requirements of the Constitution and the Act itself. As such

¹⁵¹ S 19(4)(a) of the Communal Land Rights Act.

¹⁵² S 19(4)(a) of the Communal Land Rights Act.

¹⁵³ S 19(4)(b) of the Communal Land Rights Act.

¹⁵⁴ 108 of 1996.

¹⁵⁵ S 19(4)(c) of the Communal Land Rights Act.

¹⁵⁶ S 19(4)(e) of the Communal Land Rights Act.

the Act provides that the Director-General must inform a community of further steps to be taken to amend the rules in order for it to be in compliance with the Constitution and the Act.¹⁵⁷ It is obvious that the Director-General has an advisory role; whether he or she will indeed be aware of the exceptional circumstances of every community wishing to register their community rules is doubtful, especially since this Act is applicable to approximately 2.4 million households.¹⁵⁸ Exceptional circumstances should be a factor that needs to be considered when the Director-General has to consider the suitability of a community's rules. He or she must be made aware of it by the relevant Land Rights Board, having jurisdiction in that area.

Section 19(5) of the Communal Land Rights Act contains yet another problematic provision. It reads: "Should a community fail to adopt and have community rules registered, the standard rules prescribed by regulation as adopted by the Minister to such community are deemed to be the rules of such community and must be registered as the rules of such community." This provision is problematic for two reasons. Firstly it is peremptory. Secondly, it is arbitrary, as no time frame exists within which the community must register their rules. Every community should at least know what the time frame is within which they have to register their own community rules. More so the Communal Land Rights Act should have provided for this. The Minister of Land Affairs might try to justify this section by saying that only when a community fails to adopt the community rules within a reasonable time, will section 19(5) come into operation.

The notion of sectional titles was the first type of formalised communal living and so provides a useful measure of comparison for the Communal Land Rights Act. This analysis does not propose to be full scale comparison with the Sectional Titles Act but where the comparison can aid an understanding of the Communal Land Rights Act, this will be considered. For example, the Sectional

¹⁵⁷ S 19(4)(e) of the Communal Land Rights Act.

¹⁵⁸ Pienaar 2004 *THRHR* 244 245.

Titles Act¹⁵⁹ provides for default management rules where a sectional title scheme does not register its own rules. As is the case with the community rules of the Communal Land Rights Act, the rules in sectional title schemes are essential in achieving harmony in communities.¹⁶⁰ The Communal Land Rights Act provides for one set of default community rules, whereas the Sectional Title Scheme provides for two sets of rules, namely the management rules¹⁶¹ and the conduct rules.¹⁶²

Different communities also might have very distinct circumstances, as mentioned previously. It is therefore doubtful whether the standard set of rules in the regulations will be able to address all of these issues adequately.

4 4 Amending and Revocation of the Community Rules

Section 20 deals with the amendment and revocation of the community rules. More specifically section 20(1) provides that a community may amend or revoke any community rules at a general meeting. The said amendment or revocation will only become effective on the subsequent registration to that effect. Problematic here is the question of whether section 20 applies to scenarios where the community drafted its own rules or where their omission led to the standard rules to be applicable depending on the discretion of the Minister.

If section 20 is applicable to the latter section, section 19(5) is unnecessary as a community may revoke the standard rules at a general meeting. Nevertheless they will have to go through the whole time-consuming procedure of getting their own set of community rules registered. Also the designated registration officer will have to register yet another set of community rules for

¹⁵⁹ 95 of 1986. The notion of sectional titles was the first type of formalised communal living and so provides a useful measure of comparison. This analysis does not propose to be full scale comparison with the Sectional Titles Act but where the comparison can aid an understanding of the Communal Land Rights Act, this will be considered.

¹⁶⁰ Van der Merwe *Sectional Title, Share Blocks and Time-Sharing*, 4th ed, Butterworths, 2001 at 13-3.

¹⁶¹ Annexure 8 of the Sectional Title Act 95 of 1986.

¹⁶² Annexure 9 of the Sectional Title Act 95 of 1986.

the same community. This in itself may lead to uncertainty amongst community members as to exactly what the applicable rules are. At this point in the Communal Land Rights Act the legislature should have included a provision to the effect that if an amendment or revocation of any community rules does occur, it must be published in a local newspaper, in a language understood and spoken by the affected community or by using any other appropriate medium in order for the applicable rules to be regarded as public knowledge.¹⁶³

The Communal Land Rights Act provision relating to the amendment and revocation of community rules differ from that of the provisions in the Sectional Titles Act.¹⁶⁴ This distinction relate to the fact that two types of rules are contained in the latter Act, namely the management rules and the conduct rules. With regard to the substitution, adding to, amendment or revocation of the management rules, this will only be possible by the unanimous resolution of the body corporate of that particular scheme.¹⁶⁵ It will only be possible to substitute, add to, amend or revoke the conduct rules by special resolution of the body corporate.¹⁶⁶

By way of conclusion, it is apparent that the time-consuming nature surrounding the drafting and consideration phase of community rules will not aid tenure security or decrease the vulnerability of rural inhabitants. The illiteracy level of rural inhabitants is yet another factor that should have been given due consideration in drafting the Act; for this may impact on the participation of community members in the drafting process of the community rules. The process can be more expedient if proper time-frames were provided for in the Act, within which the community rules and the subsequent approval have to take place. The Communal Land Rights Act should have included effective sanctions for non-compliance with the time-frames.

¹⁶³ Chapter VII of the 2002 CLRB that dealt with community rules differ from section 19 in that it placed more emphasis on the consistency of the rules with the fundamental human rights the general principles applicable to land tenure rights and other general principles pertaining to fair and inclusive decision-making processes, equality of membership and democracy.

¹⁶⁴ 95 of 1986.

¹⁶⁵ This is according to section 35(2)(a) of the Sectional Titles Act.

¹⁶⁶ S 35(2)(b) of the Sectional Titles Act provides for this.

CHAPTER 5: STRUCTURES GIVING EFFECT TO POLICY BEHIND THE COMMUNAL LAND RIGHTS ACT

5 1 Introduction

This chapter examines the roles and functions of the various administrative structures required by the Communal Land Rights Act.¹⁶⁷ One of these structures is the land administration committee,¹⁶⁸ acting as an executive organ of a particular community. This committee is the body through which communities act, as its members are elected by the community to represent them in all relevant matters in the process of becoming legal landowners.¹⁶⁹

The Communal Land Rights Act introduces the innovation of Land Rights Boards¹⁷⁰ and the Land Rights Enquirer.¹⁷¹ The first-mentioned Land Rights Boards¹⁷² will have input in the decisions of the Minister of Land-Affairs, with regard to certain issues, such as the registration of the community rules. The Land Rights Enquirer will be an official of the Department of Land Affairs and will be responsible for investigating the validity of old order rights, conflicting land rights and for submitting a report about this to the Minister for further determination.

5 2 “Internal” Administrative Organ: Land Administration Committee

This administrative structure is very similar to the body corporate in a sectional title scheme. Through registration as an owner of a sectional title unit,¹⁷³ a person automatically becomes a member of the body corporate. The body

¹⁶⁷ 11 of 2004.

¹⁶⁸ In the 2003 Communal Land Rights Bill, this structure was called the land administrative structure. See also sections 33(1)(a)-(c), 33(1), 34(1), 34(2)(a)(i)-(ii), 34(2)(b)-(o) and s 35 of the CLRB for an exposition of the initial land administration structure.

¹⁶⁹ See s 23(1) of the 2003 Communal Land Rights Bill in this regard.

¹⁷⁰ Chapter VIII of the Communal Land Rights Act introduces the Land Rights Board.

¹⁷¹ Chapter V of the Communal Land Rights Act deals with the Land Rights Inquirer. See 6 1 of this study for a detailed exposition on the Land Rights Enquirer in determining secure tenure.

¹⁷² See chapter VIII of the Communal Land Rights Act.

¹⁷³ The body Corporate is created in terms of s 36(1) of the Sectional Titles Act, 95 of 1986.

corporate is responsible for the control and administration of the common parts of the sectional title development. According to van der Merwe and annexure 8 rule 4(1) and s 39(1) of the Sectional Titles Act,¹⁷⁴ “owners acquire the right to take part in the general meetings of the association and to elect the trustees who act as the executive organ of the association.” Van der Merwe however writes that it is difficult to classify this association from a dogmatic point of view, a problem that relates to the question “whether the body corporate is endowed with legal personality separate from its members.”¹⁷⁵

Like bodies corporate, administrative structures appear to have their own peculiar characteristics, which make them different from other ordinary voluntary associations of the common law.

5 2 1 Establishment of a Land Administration Committee

The definition of land administration committee refers one back to section 21, which is the section establishing the committee. The establishment of a Land Administration Committee is yet another highly contested provision. Section 21(2) provides that if a community has a recognised traditional council, this council *may* exercise and perform the function of the Land Administration Committee. The use of the “may” in this context is ambiguous.¹⁷⁶

Research conducted in communal areas shows that there is an increasing breakdown of customary management arrangements.¹⁷⁷ This leads to even more uncertainty relating to the rights of rural inhabitants and confusion as to exactly who is responsible for the management of communal land: is it the local municipality of that particular area, or unelected traditional authorities? These are only a few of the burning questions attempted to be addressed by the Communal Land Rights Act. Land management is also plagued in the

¹⁷⁴ For a detailed discussion of the nature of the said body corporate see van der Merwe *Sectional Titles, Share Blocks and Time-Sharing* Volume 1 Issue 5 (2003) Chapter 2 19-24.

¹⁷⁵ Van der Merwe *Sectional Titles and Share Blocks* at 19-24.

¹⁷⁶ A more detailed discussion relating to this issue will follow in 5 2 2.

¹⁷⁷ Adams, Sibanda & Turner “Land Tenure Reform and Rural Livelihoods in Southern Africa” 1999 *Natural Resource Perspectives* available online at <http://www.odi.org.uk>. Last visited at 2009-29-09.

communal areas by political conflicts amongst rural dwellers over conflicting land rights. Therefore the creation of a Land Administration Committee¹⁷⁸ in securing tenure comes as no surprise. However, the legislature decided to put the managerial task in the hands of traditional authorities, where they exist in communal areas. This issue will be discussed in greater detail, as it has the potential for causing serious discontent.

According to section 21(1) a community will be responsible for the establishment of a Land Administration Committee. The composition of the said Land Administration Committee will also be discussed in this chapter. No rationale is provided for in the Memorandum to the Act as to why such a Land Administration Committee needs to be established. A possible reason could be that it could promote the restoration of the land management in communal areas as well as the day to day functioning of communities. Section 21(1) deals with the disestablishment of the Land Administration Committee before even discussing the establishment of it. This renders the Act clumsy and ill-considered.

Section 21(1) provides that the Land Administration Committee may only be “disestablished” once its existence is no longer required by the Communal Land Rights Act. The Act does however not say when this will be the case. This raises the question who will be responsible for the management of communal land once the Land Administration Committee is disestablished? It seems here that the legislature incorrectly assumed that all rural inhabitants will in due course acquire individual ownership. In cases where communities wish to abide by traditional arrangements familiar to them, they are allowed to choose the tenure arrangements best suited for them according to the *White Paper*, and this might very well include the nested arrangement of communal landholding.

¹⁷⁸ Smith “An Overview of the Communal Land Rights Act” in *Land, Power and Custom* at 41-42.

5 2 2 Difficulties with provisions relating to the Land Administration Committee

The most problematic arrangement relating to the Land Administration Committee is found in section 21(2), which provides as follows: “If a community has a recognised traditional council, the powers and duties of the land administration committee of such a community may be exercised and performed by such a council.” This is a whole new approach to the management of communal land, compared to the initial provision in the 2003 Communal Land Rights Bill. The latter was not without any criticism; the insertion of section 21(2) in the Act, resulted in fierce criticism from NGO’s and land activists. Not only was this insertion an unexpected surprise for NGO’s and land activists, but it also confirmed government’s insensitivity towards or ignorance of the abuse by traditional authorities. In communal areas control over land has always been seen as the power base of traditional authorities.¹⁷⁹ By strengthening this notion, the system might be prone to more abuse. The main point of criticism levelled against a traditional authority becoming the Land Administration Committee was the fact that they were unelected and that women had no membership or voice in traditional authorities. A discussion on this will follow under the next heading.

In opposing section 21(2) - (4), civil society’s contention was that by allowing traditional council to be the Land Administration Committee where they existed in communal areas, fundamental democratic rights will be undermined.¹⁸⁰ A brief historical overview of the institution of traditional authority in communal areas is necessitated by section 21(2). The functionality in communal areas and why they enjoy the prestige and respect that they have, will be examined. The continued existence of traditional authorities is by no means threatened, but protected by the recently promulgated Traditional Leadership and Governance Framework Act.¹⁸¹

¹⁷⁹ Smith “An Overview of the Communal Land Rights Act” in *Land, Power and Custom* at 41-42.

¹⁸⁰ Claassens “Community Views on the Communal Land Rights Bill” Research Report No 15 at 4. Claassens “The Communal Land Rights Act and Women” in *Land Reform and Agrarian Change in Southern Africa* at 32

¹⁸¹ 41 of 2003.

Section 21(3) is closely linked to section 21(2), in that it provides that in exercising their powers and duties, a traditional council must ensure that the composition satisfies the requirements of representation by women, as set out in the Communal Land Rights Act. However no sanction is introduced should a Land Administration Committee not adhere to this requirement. This could be an indication to traditional authorities that despite the insertion of section 21(2), government is not serious enough about gender equity in achieving tenure security.

5 2 3 Land Administration Committee and Traditional Leaders

The legislature intended to limit the functionality of the traditional leadership, where they were recognised as the relevant Land Administration Committee.¹⁸² Section 21(4) explicitly provides that in the above-mentioned cases the traditional authority functional area of competence will be the administration of land affairs and not that of traditional leadership as set out in the recently enacted Traditional Leadership and Governance Framework Act,¹⁸³ and Schedule 4 of the 1996 Constitution.¹⁸⁴ As an afterthought, the legislature inserted section 21(5), providing that any provision in the Communal Land Rights Act referring to a traditional council has the intention to “establish norms and standards and a national policy with regard to communal land rights, to effect unity across the nation.” How unity is to be affected by the insertion of section 21(2) is unclear, especially since there was great unhappiness when rural inhabitants first became aware of it. This is also evident in the many submissions on the 2003 Communal Land Rights Bill.¹⁸⁵

When discussing or referring to traditional authorities it is important to take note of the rationale for their establishment in the first instance. The Bantu

¹⁸² S 21(2) of the Communal Land Rights Act.

¹⁸³ 41 of 2003.

¹⁸⁴ Schedule 4 of the Constitution deals with functional areas of concurrent national and provincial legislative competence.

¹⁸⁵ Claassens Submission to the Portfolio Committee on the B 67D of the Communal Land Rights Bill 2003.

Authorities Act¹⁸⁶ was introduced in 1951 in an attempt to prepare black South Africans to become self-governing and independent, while still under the authority of these institutions. Prior to 1994 no distinction existed between land ownership, land administration and land management. All these land related matters were vested in and the responsibility of the State. During the Apartheid years however these responsibilities shifted to tribal authorities, who were responsible for service delivery and land allocation in the rural areas, since no local municipalities existed in these areas. However the White Paper on the South African Land Policy are once again shifting this responsibility in a more transparent way to a variety of stakeholders, which includes the respective traditional authorities and local governments, *i.e* municipalities being elected by rural inhabitants.¹⁸⁷

A traditional authority in the context of this study refers to a chief, who has jurisdiction over rural inhabitants in a particular area. These chiefs¹⁸⁸ were responsible for a small to medium size group of people, known as a tribe. Larger groups also exist and are governed by a paramount chief or *inkumnani*. The chiefs could also delegate their responsibilities and certain functions to ‘smaller chiefs’ or headmen.¹⁸⁹ During the late 1980’s, resentment amongst the paramount chiefs, chiefs and headmen arose, and they started to regard these titles as “pejorative,” as it was awarded to them by colonialists during the previous political dispensation. From then onwards they embraced the all encompassing term of “traditional authority.”¹⁹⁰

The recognition of traditional authority was influenced by a range of factors, which includes the following: the rural society is of such a nature that people

¹⁸⁶ 68 of 1951.

¹⁸⁷ Ntsebeza “Tradition Authorities, Local Government and Land Rights” in Cousins (ed) in *At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century* 280 281-284.

¹⁸⁸ Chiefs are also known as *iinkonsi*, *amakhosi* or *kgosi*.

¹⁸⁹ The headmen are also known as *iinkosana*. Ntsebeza “Traditional Authorities” in *At the Crossroads* at 281.

¹⁹⁰ Ntsebeza “Traditional Authorities” in *At the Crossroads* at 282.

grew up with this institution and are accustomed to them.¹⁹¹ For a long time they were the only structures through which rural dwellers were able to access certain benefits including the acquisition of land and the renewal of contracts for migrant workers and also the application of social grants such as pensions for the elderly and grants awarded to children who would qualify for it.¹⁹² A second factor influencing the recognition of traditional authorities was the role the ANC¹⁹³ played in its continued existence in an attempt to secure their support at the forehand of the peace talks in the early 1990's between the then NP¹⁹⁴ ruling government and the majority represented ANC.¹⁹⁵ At the same time the ANC realized that since the majority of black South Africans resided in the communal rural areas, under the chieftaincy of these traditional authorities, due recognition were to be awarded to them in every possible way.

Despite the role traditional authorities are to play in communal areas, recent developments in land tenure policy show that land ownership is to be separated from governance, which was previously one of the key functions of the traditional authority. This is also evident in older legislation such as the Communal Property Associations Act where an accountable land holding institution, a Communal Property Association is to be established, as a model for group ownership. The scope of the Communal Land Rights Act is similar to the Communal Property Associations Act, in that the State will be transferring ownership to communities and individuals, while the land is to be administered according to the wishes of the respective communities. Neither traditional authorities nor local government institutions will be the nominal owner of the land, but will have other functions to fulfil. However, both institutions may allocate land, if they are requested to do so by a community and this notion is recognised by the Department of Land Affairs, according to Thomas.¹⁹⁶

¹⁹¹ Ntsebeza "Traditional Authorities" in *At the Crossroads* at 282-284.

¹⁹² Ntsebeza "Traditional Authorities" in *At the Crossroads* at 290.

¹⁹³ African National Congress.

¹⁹⁴ National Party.

¹⁹⁵ Ntsebeza "Traditional Authorities" in *At the Crossroads* at 291.

¹⁹⁶ Thomas, Sibanda & Claassens Current Developments in South Africa's Land Tenure Policy 1998, Memo issued by the Department of Land Affairs..

5 2 3 1 Role, Powers and Functions of the Traditional Authority: Historical Overview

A brief historical overview of the traditional leadership is necessary to shed some light on their inclusion in administering communal land. Prior to 1994, no distinction existed between land ownership, administration and land management. However all these land related issues were the responsibility of the State. During the Apartheid years it was the responsibility of the infamous traditional authorities.¹⁹⁷ The land administration in the rural areas differed from that in urban areas, in that in the latter areas it was and still is the responsibility of municipalities, who are elected councillors. Municipalities did not exist in rural areas but this changed after 1994, due to section 151(1) of the Constitution, which provides that the local sphere of government consists of municipalities. Municipalities therefore had to be established for the whole of South Africa, including the rural areas.

Before colonial invasion South African traditional authorities inherited their title.¹⁹⁸ After colonial conquests and widespread land dispossessions this changed, since opposing traditional authorities, who were defeated, were then to be ruled by an adapted version of African ruling, namely “native administration” based on chieftaincy.¹⁹⁹ The chiefs, who opposed this move, were replaced by willing and compliant chiefs, who were accordingly selected by the colonial rulers. The hereditary acquisition of the traditional authority title was no longer possible since the ruling government started appointing them.²⁰⁰ After the National Party government came into power in 1948, they introduced

¹⁹⁷ Ntsebeza “Traditional Authorities, Local Government and Land Rights” in Cousins (ed) *At the Crossroads: Land and Agrarian Reform in South Africa Into the 21st Century* 280 280-283.

¹⁹⁸ Mamdani *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* 1996 Princeton University Press at 23-24. Delius “Contested Terrain: Land Rights and Chiefly Power in Historical Perspective” in Claassens and Cousins (eds) *Land, Power and Custom: Controversies Generated by South Africa’s Communal Land Rights Act* 211 225-235.

¹⁹⁹ Ntsebeza “Traditional Authorities” in *At the Crossroads* at 281-283. Delius “Contested Terrain” in *Land, Power and Custom* at 222.

²⁰⁰ Ntsebeza “Traditional Authorities” in *At the Crossroads* at 282. Delius “Contested Terrain” in *Land, Power and Custom* at 222.

the Bantu Administration Act²⁰¹ In order to solve the issue of “native administration” and at the same time, to ensure that the traditional authorities were once again in charge of the land management in the rural areas, at all levels of civil rural society.

The traditional authorities were linked to government by the Department of Native Affairs in the early 1960’s and many regarded them as the “messengers of government will.”²⁰² The Minister of Native Affairs had wide powers. He could demote any chief, or even cancel the appointment of any officer of the traditional authority and he could also allocate any powers he deemed necessary to an appointed chief or officer. Once again, new chieftaincy lineages were created and had to be recognised by rural inhabitants.

Nevertheless, during all this time corruption and repression by the traditional authorities were at the order of the day.²⁰³ This was especially evident in the powers they had relating to land allocation in the rural areas, since no application for land could be lodged without their signature.²⁰⁴ This power was gravely abused by traditional authorities in that they charged “unauthorised fees,”²⁰⁵ because they knew they were the only instrument through which households were able to acquire land in the rural areas. Traditional authorities also abused their powers in state pensions, tribal courts and even migrant labour applications. In the case of state pensions, senior citizens have to be in possession of a letter from a traditional authority stating that they reside in a area under his jurisdiction. When elderly people refused to pay the

²⁰¹ 68 of 1951. In terms of the Bantu Authorities Act, the Native Representative Council was abolished and replaced by Traditional Authorities.

²⁰² Mbeki South Africa: The Peasants Revolt London (1984): International Defence and Aid Fund for Southern Africa 1 40. Claassens “Power, Accountability and Apartheid Borders: The Impact of Recent Laws on Struggles Over Land Rights” in Claassens & Cousins (eds) *Land, Power and Custom: Controversies Generated by South Africa’s Communal Land Rights Act* 262 262-263.

²⁰³ Ntsebeza “Traditional Authorities” in *At the Crossroads* at 288-289.

²⁰⁴ Claassens “Power, Accountability and Apartheid Borders” in *Land, Power and Custom* at 263. Ntsebeza “Chiefs and the ANC in South Africa: The Reconstruction of Tradition?” in Claassens & Cousins (eds) *Land, Power and Custom: Controversies Generated by South Africa’s Communal Land Rights Act* 238 246-256.

²⁰⁵ Claassens “Power, Accountability and Apartheid Borders” in *Land, Power and Custom* at 271.

“unauthorised fees,” the traditional authority would refuse to issue such letters, leaving elderly people to their own devices.²⁰⁶

It is therefore quite surprising that the traditional authorities were recognised after apartheid and during the transition to democracy. In the late 1980’s and early 1990’s widespread mass mobilization occurred. This resulted in pleas for the abolition of these traditional authorities in favour of more democratically elected societies.²⁰⁷ Rural inhabitants started drawing a distinction between, what they called “genuine” traditional authorities and “illegitimate” traditional authorities.²⁰⁸ The former had the best interest of rural inhabitants at heart, whereas the latter were those guilty of corruption and oppression. To a certain extent the unhappiness in the rural areas relating to the traditional authorities also directly resulted in the collapse of the land management in these areas.²⁰⁹

The following factors contribute to the current recognition of traditional authorities. First the traditional authorities were the only mechanism through which members of the rural society could acquire pivotal benefits, and therefore their powers were never questioned. Ntsebeza contends that due to migratory labour practices and lack of job opportunities in these areas, young and educated people were forced to seek better job opportunities outside of these areas. As a result, the only inhabitants left were married women with children and retired elderly men and women. Ntsebeza further contends that since these inhabitants are not always aware of their rights in respect of land and state benefits, they are not willing to challenge the institution of traditional leadership.²¹⁰ Traditional leaders are willing to trample on the land rights of

²⁰⁶ Claassens & Hathorn “Stealing Restitution and Selling Land Allocations: Dixie, Mayaeyane and Makuleke” in Claassens & Cousins “Land, Power and Custom: Controversies Generated by South Africa’s Communal Land Rights Act” 315-317.

²⁰⁷ Ntsebeza “Traditional Authorities” in *At the Crossroads* at 288-289.

²⁰⁸ Ntsebeza “Traditional Authorities” in *At the Crossroads* at 290.

²⁰⁹ Ntsebeza “Traditional Authorities” in *At the Crossroads* at 290.

²¹⁰ Ntsebeza “Traditional Authorities” in *At the Crossroads* at 290.

²¹⁰ Ntsebeza “Chiefs and the ANC in South African” in *Land, Power and Custom* at 239.

beneficiaries, even where they have acquired the land through the restitution process.²¹¹

The second factor that contributed to the current and ongoing recognition of traditional authorities was the position of the ANC towards traditional authorities.²¹² The ANC always fought for a democratic unitary state, so why would they “embrace the institution of traditional leadership?”²¹³ Ntsebeza provides three factors that led to what he calls the re-emergence of the traditional leadership as a political force. Firstly, the policies of the ANC towards traditional authorities were not only ambiguous but also ambivalent. Secondly, the Inkatha Freedom Party’s bloody conflict with the United Democratic Front (UDF) as well as the ANC in the late 1980’s and early 1990’s, also aided their recognition. Lastly, “the political and economic context within which the South African political settlement was taking place,” had to be taken into account.²¹⁴

5 2 3 2 Problems with section 21(2) and 22(2) of the Communal Land Rights Act

Section 21(2) provides that

“if a community has a recognised traditional council, the powers and duties of the land administration committee of such community *may* be exercised and performed by such council.”

Section 21(2) is significant since such a land administration committee is awarded wide powers in relation to the administration of land.²¹⁵ The word “may” in the context of the Act, according to Claassens is potentially ambiguous. Should it be interpreted to mean that a community has a choice as to whether they want to be administered by a traditional council, as created in

²¹¹ Claassens & Hathorn “Stealing Restitution and Selling Land Allocations” in *Land, Power and Custom* at 323-326.

²¹² Ntsebeza “Chiefs and the ANC in South African” in *Land, Power and Custom* at 239.

²¹³ Ntsebeza “Chiefs and the ANC in South African” in *Land, Power and Custom* at 239.

²¹⁴ Ntsebeza “Chiefs and the ANC in South African” in *Land, Power and Custom* at 239-245.

²¹⁵ Claassens “Power, Accountability and Apartheid Borders” in *Land, Power and Custom* 265-267.

terms of the Traditional and Leadership and Governance Framework Act?²¹⁶ Or should it be interpreted to mean the traditional leadership is authorised to exercise land administration powers in terms of the Communal Land Rights Act?

In the light of section 22(2), the second interpretation appears to be the most likely, especially since no mechanism for the exercise of this effective choice is provided for in the Act. In this context section 22(2) might be of assistance:

Section 22(2) provides:

“[s]ubject to section 21(1), the members of a land administration committee must be persons not holding any traditional leadership position and must be elected by the community in the prescribed manner.”

New composition requirements are set out in the Traditional Leadership and Governance Framework Act.²¹⁷ In cases where a traditional authority does not adhere to the new composition requirements, the community would be regarded not to have a traditional council. According to Claassens section 22(2) implies that a community will only have a choice to elect a traditional council in the above-mentioned situation.²¹⁸ On the one hand section 21(2) is the incentive to encourage traditional authorities to meet the composition requirements. Section 22(2) on the other hand, is the “disincentive” for failing to do so.

As is evident from comparing the provisions of the Communal Land Rights Act relating to the Land Administration Committee with that in the 2003 Communal Land Rights Bill, there was a major shift in policy. Various academics have a similar explanation for this. The most probable one is the argument of

²¹⁶ Claassens “Power, Accountability and Apartheid Borders” in *Land, Power and Custom* 265-267. Claassens “The Communal Land Rights Act and Women” Occasional Paper Series at 21.

²¹⁷ 41 of 2003.

²¹⁸ Claassens “Power, Accountability and Apartheid Boundaries” in *Land, Power and Custom* at 266.

Cousins,²¹⁹ Mostert and Pienaar²²⁰ who all are of the opinion that since the Communal Land Rights Act was rushed through Parliament just before the 2004 democratic general elections, the ruling ANC²²¹ government realized that in ensuring the support of traditional authorities and their fair amount of supporters they will have to do something to secure their support. The insertion of section 21(2) appears to be this leverage. Section 21(2) was inserted quite late in the process of drafting the final version of the 2003 Communal Land Rights Bill. As a result almost no consultation with rural communities on this important matter was conducted.

5 2 4 Composition of a Land Administration Committee

Section 22(1) provides that a Land Administration Committee must consist of a total number of members as was determined in the applicable community rules. Although the community can decide in the community rules the number of eligible persons they want on the Land Administration Committee, the Communal Land Rights Act should at least have provided for a maximum number of persons. In cases where a traditional council attains the functionality of the Land Administration Committee, they are under the obligation to ensure that one-third of the total number must be women.²²² This provision was much contested by NGO's and rural women.²²³ They felt that the one-third of women to serve on the land administration committee is not significant enough. This objection was based on research proving that more women than men reside in rural areas. The said research proved that 58,9% of people over the age of 18 years, who live in these areas are women.²²⁴

²¹⁹ Cousins "Grounding Democracy" 2004 at 23.

²²⁰ Mostert & Pienaar "Formalisation of South African Communal Land" in *Modern Studies III* at 326-327.

²²¹ African National Congress.

²²² S 22(3) of the Communal Land Rights Act.

²²³ Claassens & Ngubane "Women, Land and Power: The Impact of the Communal Land Rights Act" in Claassens & Cousins (eds) *Land, Power and Custom* 154 155. Claassens "The Communal Land Rights Act and Women" at 26.

²²⁴ Claassens & Ngubane "Women, Land and Power: The Impact of the Communal Land Rights Act" in Claassens & Cousins (eds) *Land, Power and Custom* 154 155. Claassens "The Communal Land Rights Act and Women" at 27. The Analysis of the raw data of the 10% sample of the 2001 National Census by Debbie Budlender.

Five individuals as designated by various spheres of national land administration must be represented on the Land Administration Committee. This includes one person to be appointed by the Minister of Land Affairs to represent the Department of Land Affairs.²²⁵ The chairperson of a Land Rights Board having jurisdiction in that particular area may also designate a person to serve on the Land Administration Committee.²²⁶ The relevant provincial Member of the Executive Council responsible for agriculture²²⁷ and local government matters may also nominate two people to serve on the Land Administration Committee.²²⁸ The designation of these two individuals by the respective MEC's is a welcome insertion. It is hoped that these designated individuals will be senior members of the Executive Council so that they will be able to inform the Land Administration Committee of any relevant matters involving any agricultural ventures aimed at enhancing the livelihoods of the people the Land Administration Committee wishes to serve. Every municipality in whose area of jurisdiction such a Land Administration Committee is functioning must also designate a suitable individual to serve on the Land Administration Committee. As is the case with the designation of the two individuals by the respective MEC's, it is also hoped that the individual designated by the relevant municipality will be a senior member in order for that person to inform and confirm the Land Administration Committee demands on service delivery and local governmental matters. Lastly one member of the Land Administration Committee must represent the interests of vulnerable community members such as women, children and the youth, the elderly and the disabled.²²⁹ This is yet another welcome provision, especially since child-headed households are becoming a vast reality in communal areas due to the effect of HIV/AIDS.

The composition of the Land Administration Committee achieves a greater degree of inter-departmental co-operation on local government level, as well as

²²⁵ S 22(5)(a) of the Communal Land Rights Act.

²²⁶ S 22(5)(b) of the Communal Land Rights Act.

²²⁷ S 22(5)(c) of the Communal Land Rights Act.

²²⁸ S 22(5)(d) of the Communal Land Rights Act.

²²⁹ S 22(4) of the Communal Land Rights Act.

on provincial level. This is positive in that greater interdepartmental co-operation could lead to more effective service delivery. According to De Villiers,²³⁰ this problem has previously arisen in the restitution process where the Department of Land Affairs was directing the claiming procedures, while excluding other relevant national and provincial government departments such as the Department of Finance, Environmental Affairs, Trade and Industry and also Agriculture. Although greater recognition is given to interdepartmental relations in achieving the goals of the various land reform programmes, a coherent and integrated strategic framework is still needed to enhance effective interdepartmental co-operation.

5 2 5 Powers and Duties of a Land Administration Committee

When a Land Administration Committee has been duly established in terms of section 21, they acquire all the powers as provided for in section 24 of the Act, as well as the community rules. The fact that provision can be made in the community rules for the powers of the Land Administration Committee, means that some kind of restriction may be placed on the functioning of the Land Administration Committee. This provision could be of significant assistance, especially in cases where a traditional authority becomes the Land Administration Committee in a particular community. In the community rules the relevant community can decide to limit the participation of the Land Administration Committee in a certain matter or even to refuse the Land Administration Committee a say in matters of great importance. As such, the community can decide to award the final decision-making power on certain matters solely to the community as a whole, while the Land Administration Committee only acts in a consultative capacity.

Section 24(2) provides that where a Land Administration Committee takes a decision which effectively will result in the disposal of communal land or rights in land, such a decision will only be effective, upon the ratification of it by the

²³⁰ De Villiers *Land Reform: Issues and Challenges* at 69.

relevant Land Rights Board. Such ratification by the said Board must be in writing. This section is somewhat contradictory in that it provides that in the case of the disposal of land, the Land Administration Committee is responsible to the Land Rights Board but not to the community, on whose behalf they are acting. According to Smith, the drafters of the Act intended that disposals of land should be dealt with in the community rules. No authority is however provided in the Act for such a power in the said community rules.²³¹

Section 24(3)(a)(i) and (ii) places an additional obligation on a Land Administration Committee. It states that a Land Administration Committee must take measures to ensure the allocation of “new order rights,” subsequent to the Ministerial determination. It expressly lists particular categories of vulnerable persons who are prioritised as far as the allocation of “new order rights” are concerned, namely: women, the disabled and the youth. Section 24(3)(a)(ii) goes further and states that the Land Administration Committee must also take measures to ensure the registration of communal land as well as the registration of “new order rights.”

In terms of section 24(3)(b) an administrative structure is also expected to take responsibility for the establishment and maintenance of registers, as well as the recording of all newly awarded “new order rights.” The responsibility in this context being placed on the Land Administration Committee, also relates to all transactions with regard to such rights. The promotion and safeguarding of a community’s and individual’s, interests in land by the Land Administration Committee, is provided for in section 24(3)(c). As these rural communities have been gravely discriminated against in the past, social upliftment and empowerment is urgently needed here. The safeguarding of the interests of the community with regard to their land therefore deserves the priority it is receiving in the Act.

²³¹ Smith “An Overview of the Communal Land Rights Act 11 of 2004” in *Land, Power and Custom* at 64. This is in direct contrast with the Interim Protection of Informal Land Rights Act and the Communal Property Associations Act, both of which require community consent for the disposal of communal land.

Further functions of administrative structures are that they must endeavour to promote co-operation amongst community members and all relevant stakeholders,²³² they must play an active role in settlement of disputes concerning land,²³³ and they must compile and maintain records of existing land tenure rights.²³⁴ This latter duty also applies to any land tenure rights that will be conferred on an individual in future. Section 24 deals with the registration of new land allocations or land tenure rights to community members after the opening of the communal land register.²³⁵

The Communal Land Rights Act created the new statutory land administration committee. As mentioned before, it is hoped that since land administration in many of the rural areas in total disarray,²³⁶ this innovation will change the situation for the better. The Land Administration Committee will be responsible for the daily dealings with the land, it is especially commendable that their functions with regard to the disposing of land or a right in land, is severely limited, compared with previous versions of the Communal Land Rights Bill.²³⁷ Despite the limitations provided for in the Act, the Land Administration Committee will still have to be monitored in an effective way. If an individual member of the traditional authority, who is acting as the Land Administration Committee of a particular community, abuses his or her power, he or she

²³² S 24(3)(f) of the Communal Land Rights Act. Smith “An Overview of the Communal Land Rights Act 11 of 2004” in *Land, Power and Custom* at 60. Van der Walt *Constitutional Property Law* 337. Badenhorst et al *The Law of Property* 628. Adams, Cousins & Manona “Land Tenure and Economic Development in Rural South Africa: Constraints and Opportunities” in Cousins (ed) *At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century* 111 125-126.

²³³ S 24(3)(e) of the Communal Land Rights Act. Smith “An Overview of the Communal Land Rights Act 11 of 2004” in *Land, Power and Custom* at 60. Van der Walt *Constitutional Property Law* 337. Badenhorst et al *The Law of Property* 628.

²³⁴ S 24(3)(b) of the Communal Land Rights Act. Smith “An Overview of the Communal Land Rights Act 11 of 2004” in *Land, Power and Custom* at 60. Van der Walt *Constitutional Property Law* at 337. Badenhorst et al *The Law of Property* 628.

²³⁵ S 24 of the Communal Land Rights

²³⁶ Claassens “Land Rights and Local Decision Making Processes: Proposals for Tenure Reform” in Cousins (ed) *At the Crossroads: Land and Agrarian Reform in South Africa in South African into the 21st Century* 129 140-141. Sibanda “Proposals for the Management of Land Rights in Rural South Africa” in Cousins (ed) *At the Crossroads: Land and Agrarian Reform in South Africa in South African into the 21st Century* 306 309.

²³⁷ B 67D of 2003

should be removed from the administration committee. They should be held liable in terms of sections 41 and 42 of the Communal Land Rights Act. These sections respectively deal with situations when a person is guilty of an offence and the possible penalties.

Where a traditional authority acts as the Land Administration Committee, caution must be exercised in the composition of the said committee. This is because in the view of Smith, “the majority of the incumbents of a traditional council under the Traditional Leadership and Governance Framework Act,” will not be elected but appointed in terms of customary law.²³⁸ The Communal Land Rights Act as a whole is in favour of gender equality. However the institution of traditional leadership has a bad track record when it comes to the promotion of women’s land rights and too large representation by traditional council members will undermine this purpose.

5 3 “External” Administrative Organ: Land Rights Board

As mentioned in Chapter Two, the Land Rights Board is another statutory innovation created in the Communal Land Rights Act. A Land Rights Board is defined in section 1 of the Act to mean “a board established in terms of Chapter 8” of the Act. In the case of the KwaZulu-Natal Ingonyama Trust Land, the already established Ingonyama Trust Board will be renamed to be known as the Land Rights Board for KwaZulu-Natal.²³⁹

²³⁸ Smith “An Overview of the Communal Land Rights Act” in *Land, Power and Customs* at 62-65.

²³⁹ Smith “An Overview of the Communal Land Rights Act 11 of 2004” in *Land, Power and Custom* at 66. In previous versions of the Bill, the Ingonyama Trust Act was repealed. The Kwa-Zulu Natal Ingonyama Trust Act 3 KZ of 1994, established the Ingonyama Trust. It excluded 1,2 millions ha of land from the operation of section 229 of the Interim Constitution and placed the jurisdictional area of the former KwaZulu in trust for the Zulu king. Since then, the Act has been amended by the KwaZulu Ingonyama Trust Amendment Act 9 of 1997. This was done to ensure the overall implementation of land reform measures. Sibanda “Proposals for the Management of Land Rights in Rural South Africa” in *At the Crossroads* at 308.

5 3 1 Establishment of Land Rights Boards

Section 25 provides that the Minister of Land Affairs may establish a Land Rights Board²⁴⁰ by the publication of a notice in the Government Gazette.²⁴¹ These boards will have jurisdiction only in the areas prescribed by the Minister.²⁴² The Minister is also empowered to dissolve such boards and to amend their area of jurisdiction.²⁴³

5 3 2 The Composition of a Land Rights Board

According to section 26(1), the Minister of Land Affairs must appoint the board members. This must take place in accordance with the nomination and selection processes, provided for in the Regulations to the Act. This Land Rights Board must consist of a minimum of 11 members,²⁴⁴ who must be duly nominated. One official must be drawn from each of the government departments the Minister shall deem relevant for the purposes of participation in a Land Rights Board.²⁴⁵ This provision gives the Minister of Land Affairs the power to decide which government department will play a vital role in the allocation of land or land tenure rights. In this context, the fact that no definite upper limit is placed on the number of government officials who may be appointed by the Minister is ambiguous. While this may ensure better inter-departmental co-operation, too many members may, on the other hand, hinder the effective functioning of a Land Rights Board. It is also doubtful if so many members will have the necessary knowledge to deal with communal land practices equitably.

²⁴⁰ S 25(a) of the Communal Land Rights Act. Smith “An Overview of the Communal Land Rights Act 11 of 2004” in *Land, Power & Custom* at 65.

²⁴¹ S 25 of the Communal Land Rights Act. Smith “An Overview of the Communal Land Rights Act 11 of 2004” in *Land, Power & Custom* at 65.

²⁴² S 25(a) of the Communal Land Rights Act.

²⁴³ S 25(b) of the Communal Land Rights Act.

²⁴⁴ Badenhorst et al “The Law of Property” at 629. Smith “An Overview of the Communal Land Rights Act 11 of 2004” in *Land, Power & Custom* at 65.

²⁴⁵ S 26(2)(a) of the Communal Land Rights Act.

Two more members may be nominated by the relevant Provincial House of Traditional Leaders.²⁴⁶ A further member must be nominated by institutions or persons in the commercial or industrial sector.²⁴⁷ A further seven members selected by the Minister from the affected communities will make up the rest of a board.²⁴⁸ This provision indicates that the Act is trying to create and promote community involvement. This is further substantiated by the fact that vulnerable people must be included in the seven members selected by the Minister. The Act, for instance provides that one member must represent the interests of child-headed households,²⁴⁹ while another must be representative of disabled persons.²⁵⁰ Yet another member of such a Land Rights Board must represent the youth.²⁵¹ Section 26(2)(d)(iv) of the Communal Land Rights Act states that a member of a particular community must also represent the interest of female-headed households.

Section 26(3) of the Act is an important insertion, as it provides that the Minister must consider certain aspects in appointing the members of such a Land Rights Board. For instance, the Minister must have regard to the required knowledge of land, land tenure rights, old and new order rights and the required capabilities, including relevant skills, expertise and experience. These factors might eliminate certain people from acting as a board member, should the Minister find that he or she is not sensitive enough to the issue at hand, namely the over-arching goal of trying to secure tenure.

The appointment of the chairperson of the Board, as well as the deputy chairperson of the Board, will only occur after the Minister has consulted with all of the members of the Board. The chairperson and deputy-chairperson of the

²⁴⁶ S 26(2)(b) of the Communal Land Rights Act.

²⁴⁷ S 26(2)(c) of the Communal Land Rights Act.

²⁴⁸ S 26(2)(d) of the Communal Land Rights Act.

²⁴⁹ S 26(2)(d)(i) of the Communal Land Rights Act.

²⁵⁰ S 26(2)(d)(ii) of the Communal Land Rights Act.

²⁵¹ S 26(2)(d)(iii) of the communal Land Rights Act.

Board will be appointed from the ranks of the members of the Board.²⁵² A further responsibility is placed on the Minister in that he or she is obliged to publish the names and the position held by each member, in the Government Gazette.²⁵³ This whole section seems to lend publicity to the board members, so that the community they try to help will know exactly who they are and what offices they hold. The date on which the appointment of these board members are to take effect, must also be published in the notice in the Government Gazette.²⁵⁴

According to section 26(4) board members will be appointed for a period of five years.²⁵⁵ The Minister may in his or her discretion extend the term of a member, but only for a period not exceeding six months. During the period of extension a new board or a member must be appointed.²⁵⁶ The Communal Land Rights Act should have contained provisions that would result in consistency in the appointment and functioning of such boards. Since section 26(4) explicitly provides that board members may only be appointed for a period of five years, which may be extended to another six months, this will result in new boards having to be established every five years. Surely this will impact negatively on the land administration in that particular area of jurisdiction. New Land Rights Boards will have to familiarise themselves from scratch with the unique circumstances relating to tenure arrangements in a particular area. Instead the Act could have provided for some sort of continuity in stating that the minimum

²⁵² S 26(5)(a) of the Communal Land Rights Act. The Act are not extensive as the 2003 Bill with regard to the appointment procedure of the members of such a Land Rights Board.

The 2003 Bill (B67 of 2003) provided that the Minister could use his or her initiative to appoint an additional member, especially where insufficient nominations have been received. Here the wording of the Bill again left much to be desired, as it can only be assumed that this member must also be from the relevant community.

At least 30 days before the selection process takes place, the Minister had to call for nominations. This was to be done through the publishing of a notice in the Government Gazette, in at least one national newspaper and in another appropriate medium. An invitation had to be given to all interested persons, communities, institutions and organizations to submit nominations for potential board members. The notice had to indicate the categories (positions) available, the number of representatives to be appointed in each category and the persons or bodies entitled to nominate persons in the specific categories.

²⁵³ S 26(6) of the Communal Land Rights Act.

²⁵⁴ S 26(6) of the Communal Land Rights Act.

²⁵⁵ S 26(7) of the Communal Land Rights Act.

²⁵⁶ S 26(4) of the Communal Land Rights Act.

term of at least one quarter of the members of the board will be for a period of seven years or longer.

When a board member dies or vacates his or her office before the expiry date of his or her appointment, the Minister may appoint someone to fill the vacancy for the rest of the unexpired period.²⁵⁷

The following persons are not qualified to serve on a Land Rights Board:

- (i) A person who is not a South African citizen and who does not have permanent residency in the country or who is not ordinarily a resident in South Africa,²⁵⁸
- (ii) An unrehabilitated insolvent;²⁵⁹
- (iii) A person who has been declared mentally incompetent by a court of law or who is in detainment, under the 1973 Mental Health Act;²⁶⁰
- (iv) A person who has been removed from an office of trust on an account of improper conduct;²⁶¹
- (v) Any person whose name has been removed from a professional register on account of misconduct and has not been reinstated;²⁶²
- (vi) A person who was found guilty of contravening section 7,²⁶³ of the Promotion of Equality and Prevention of Unfair Discrimination Act,²⁶⁴
- (vii) Any person who is an elected political representative at the national, provincial or municipal sphere of government.²⁶⁵

²⁵⁷ S 26(7) of the Communal Land Rights Act.

²⁵⁸ S 27(1)(a) of the Communal Land Rights Act.

²⁵⁹ S 27(1)(b) of the Communal Land Rights Act.

²⁶⁰ S 27(1)(c) of the Communal Land Rights Act.

²⁶¹ S 27(1)(d) of the Communal Land Rights Act.

²⁶² S 27(1)(e) of the Communal Land Rights Act.

²⁶³ S 27(1)(f) of the Communal Land Rights Act.

²⁶⁴ 4 of 2000.

²⁶⁵ S 27(1)(g) of the Communal Land Rights Act.

The disqualified persons mentioned here are persons who are regarded in the South African law to either have limited legal capacity, because they are unable to understand the nature and content of their legal acts and cannot be held liable for it. Some of the grounds for disqualification relates to the unethical behaviour of board members.

A board member will have to vacate his or her office if he/she becomes disqualified in terms of section 27(1).²⁶⁶ If he or she resigns in a written notice to the Minister, he or she must also vacate office.²⁶⁷ A board member must also vacate his/her office if the Minister in his or her opinion and after consultation with the Board thinks that a member is incapable of properly performing his or her function and orders him or her to vacate the office.²⁶⁸ Lastly a member of a Board will have to vacate his or her office, if he or she is absent from two or more meetings of the Board, without permission from the Board. According to section 27(2)(d) such a member must be absent for a continuous period of twelve months.²⁶⁹ This also relates to the continuity argument offered earlier. An absent board member will not be suitable or informed enough to serve the best interests of rural inhabitants. The disqualification of a board member as provided for in section 27(2)(d) therefore seems appropriate.

5 3 3 Powers and Duties of a Land Rights Board

According to section 28(1)(a) a Land Rights Board is responsible for providing general advice to the Minister and specific or general advice to particular communities. The general or specific advice provided to a community must be with regard to sustainable land ownership and use. Developmental initiatives pertaining to land as well as the providing of access to land on a more equitable basis, is listed as additional further matters that the Board must provide advice on.

²⁶⁶ S 27(1)(a) of the Communal Land Rights Act.

²⁶⁷ S 27(2)(b) of the Communal Land Rights Act.

²⁶⁸ S 27(2)(c) of the Communal Land Rights Act.

²⁶⁹ S 27(2)(d) of the Communal Land Rights Act.

Greater liaison initiatives must be proposed by the Board with the national, provincial and municipal spheres of government.²⁷⁰ Liaison with civil and any other institution is also proposed in the Act, especially on matters affecting communities or communal land.²⁷¹ Section 28(1)(c) states that a Land Rights Board must ensure compliance with the Constitution and the Act as a whole. This section is important as it places an even greater responsibility on the Land Rights Board to effect secure tenure. If a Land Rights Board or an individual member does not adhere to this provision, they will be guilty of an offence and will be penalised in terms of the Act. This may even result in the disqualification of a Board or its individual members.

Section 28(2) of the Communal Land Rights Act explicitly provides for additional powers of Land Rights Boards. It states that a Land Rights Board and any member of a board, acting in their official capacity, may at any reasonable time enter upon any land,²⁷² they may investigate any matter relating to land²⁷³ and they may also inspect any document that is in the possession of an administrative structure or any right holder and they may make copies of such a document.²⁷⁴ This situation is very similar to the position in terms of section 44(1)(a) of the Sectional Titles Act where this power is given to the Body Corporate to enter upon the unit of a sectional title owner. According to Van der Merwe,²⁷⁵ a sectional owner “shall allow reasonable access to his section for the purpose of inspecting and maintaining common electrical and plumbing installations and ensuring that the provisions of this Act and the rules are being observed. He must thus on written notice (except in case of an emergency), permit a person to enter his section in order to inspect, maintain, repair or renew communal pipes, wires, cable and ducts inside the section.” However, where in the Sectional Titles Act adequate reasons are provided for the curtailment on sectional ownership, this does not happen in the Communal

²⁷⁰ S 28(1)(b) of the Communal Land Rights Act.

²⁷¹ S 28(1)(b) of the Communal Land Rights Act.

²⁷² Section 28(2)(a) of the Communal Land Rights Act.

²⁷³ Section 28(2)(b) of the Communal Land Rights Act.

²⁷⁴ Section 28(2)(c) of the Communal Land Rights Act.

²⁷⁵ Van der Merwe *Sectional Titles* 8-6

Land Rights Act. It seems therefore that entering upon land in the latter instance could be unjustifiable and could even amount to trespassing. On the other hand, these provisions could have been inserted to be of aid in the effective administration of land management. Land Rights Boards are appointed in an advisory capacity and therefore will have to inform themselves of all related and relevant matters pertaining to communal land.

Meetings may be convened by the Board or any member of it, in his or her official capacity.²⁷⁶ They also have the power to attend meetings of the communities and the administrative structures.²⁷⁷

5 4 Assessment

From the above, it appears that the Administrative Structures could easily carry out the functions and powers of Land Rights Boards. In practice this could be potentially problematic, especially in areas where a recognised traditional authority will be acting as a Land Administration Committee. Since this duplication of structures, is both costly and causes unnecessary delays, it is unclear how it could promote access to land. Nevertheless, the rationale for the creation of these two statutory institutions can hopefully provide some justification. The Land Administration Committee is responsible for the daily management of the communal land whereas the Land Rights Board is responsible for advising the Minister and communities. Since the Land Administration Committee is uniquely positioned in their relationship with a particular community, they could also provide valuable advice to the Minister regarding the sustainable use of communal land. This argument is equally valid in relation to all the functions awarded to the Land Rights Board. Land Rights Boards are not under a legislative obligation to provide effective assistance to the communities where they have jurisdiction. This is despite the fact that influential people are serving on it, namely the various members of the relevant state departments.

²⁷⁶ Section 28(2)(d) of the Communal Land Rights Act.

²⁷⁷ Section 28(2)(e) of the Communal Land Rights Act.

In terms of the Communal Land Rights Act the Minister of Land Affairs will now be advised by two different structures, namely the land rights enquirer as well as the Land Rights Board. The advice of both these structures in reality relates to identical or at least, very similar issues.

CHAPTER 6: PROCEDURES OF THE COMMUNAL LAND RIGHTS ACT IN SECURING TENURE

6 1 Introduction

According to the provisions of the Communal Land Rights Act a land rights enquiry is a prerequisite for securing and transferring old order rights. Section 14 provides as follows: “Prior to securing an old order right in terms of section 4 or transferring communal land to a community or person in terms of section 6 or determining comparable redress in terms of section 12, the Minister must institute a land rights enquiry.” This part of the study will investigate and comment on the nature of the land rights enquiry and the vital determination phase before discussing and analysing the registration procedures and comparable redress.

6 2 The Land Rights Enquiry

From the wording of section 14 it seems as if the land rights enquiry is a prerequisite to a variety of actions by the Minister. It appears from the wording of section 14(1) that the Minister is under an obligation to institute the land rights enquiry, as the word “must” is used to emphasise this. This is one of many obligations the Act places on the Minister. It remains to be seen to what extent the Minister will be able to fulfil these obligations and also to what extent will they be delegated.

According to section 17(1) the land rights enquiry must be conducted in the prescribed manner. Fundamental constitutional principles must be heeded. In particular the enquiry must be open and transparent. The affected communities must also receive an opportunity to participate in the enquiry by making their views known and offering objections. This provision is in line with the idea of

participatory democracy, as envisaged in the *White Paper on South African Land Policy*.²⁷⁸

Section 17(2) provides that the enquirer must adopt measures to ensure well-informed and democratic decisions. The decisions taken should also be a valid reflection of the wishes of the majority of the adult community members, present at community meetings.²⁷⁹ The reference to “adult community members” might be problematic in this context, especially since child-headed households in the areas covered by the Communal Land Rights Act are a reality. The interest of these vulnerable minors should have been included here. Its omission is of great concern and its impact could be far-reaching, something that should have been realised by the legislature and the various stakeholders.²⁸⁰

When a matter is referred to the enquirer for further investigation, he or she is obliged to lodge a report to the Minister. Valid recommendations must be made by him or her and includes matters that ultimately will be decided on by the Minister.²⁸¹ The said report must be made available to the affected community before being submitted to the Minister.²⁸² At the same time the community should also be given the opportunity to scrutinise the report and to make representations relating to matters contained in the report.²⁸³ The final report, including the representations and supporting documents must be handed to the Minister for further consideration and his or her determination will be based on this, in upgrading old order rights into new order rights, or awarding new land.²⁸⁴

²⁷⁸ RSA *White Paper on South African Land Policy* at vii.

²⁷⁹ S 17(2) also provides that a proxy may also represent community members but an adequate notice of 21 days must have been given.

²⁸⁰ Cousins, Hornby, Kingwell, Royston & Trench “Perspective on Land Tenure Security in Rural and Urban SA” *An Analysis of the Tenure Context and a Problem Statement for Leap* June (2005) at 22-26.

²⁸¹ S 17(3)(a) of the Communal Land Rights Act.

²⁸² S 17(3)(b) of the Communal Land Rights Act.

²⁸³ S 17(3)(b) of the Communal Land Rights Act.

²⁸⁴ The provisions regarding the land rights enquirer in the 2002 CLRБ differ substantially from those as they currently stand. In the 2002 CLRБ more emphasis were placed on the power of the enquirer to subpoena persons for a variety of reasons, to appear before him or her.²⁸⁴ The enquirer even had the power to enter upon any land for an in depth inspection and to retrieve any information in whatever form

Section 17(4)(a), (b) and (c) respectively provide for the compiling of written and verbal evidence; the entering and searching of premises and the taking of possession of documents and articles and lastly, for convening and attending meetings by affected parties. In the exercise of any of the above-mentioned functions, it is explicitly stated that the land rights enquirer or his or her delegate, must have regard to the constitutional rights of the affected persons. This insertion aims to ensure that the dignity of the rural occupiers is not adversely affected by the very officers who should be of assistance to them, in securing their tenure.

6 2 2 Matters to be Enquired

Matters that must be investigated by the land rights enquirer is set out in section 14(2) of the Communal Land Rights Act. It provides that the land rights enquirer must investigate the nature and extent of all the constitutional and human²⁸⁵ and other aspects related to land rights.²⁸⁶ These include investigation into old order rights; competing and also conflicting land tenure rights.²⁸⁷ However before the enquiry can officially be conducted, section 16(a) obliges the Minister to publish a notice of the intended enquiry in national, regional and local media. The notice must at the same time also extend an invitation to all interested parties to participate actively in the intended inquiry.²⁸⁸ In the light of the complexity of tenure and related issues, active and progressive participation of the affected communities are vital especially those in urgent need of tenure security.

The interest of the State,²⁸⁹ options available for securing insecure land rights,²⁹⁰ and provisions regarding the accessibility of land on an equitable

kept on the premises. This could be done if the enquirer reasonably believed that this information could be of aid in the enquiry.

²⁸⁵ S 14(2)(a)(i) of the Communal Land Rights Act. Smith “An Overview of the Communal Land Rights Act 11 of 2004” in Claasens & Cousins (eds) *Land, Power and Custom: Controversies Generated by South Africa’s Communal Land Rights Act* 34 47-48.

²⁸⁶ S 14(2)(a)(ii) of the Communal Land Rights Act.

²⁸⁷ S 14(2)(a)(iii) of the Communal Land Rights Act..

²⁸⁸ S 16(a) of the Communal Land Rights Act.

²⁸⁹ S 14(2)(b) of the Communal Land Rights Act.

basis are matters requiring further enquiry.²⁹¹ Provision is also made for enquiring into spatial planning, land use management and land development matters.²⁹² A development or a de-densification or any land reform programme must be additionally considered.²⁹³ The inquiry into any relevant land reform programme makes sense. This is because of the possibility of a restitution claim being instituted for a specific portion of land, where another community is in current occupation. Their title may be insecure, and they might at the same time wish to establish a clear title to that land.²⁹⁴

The enquiry into spatial planning and land use management seems to acquire the co-operation of local government structures, as well as the traditional leadership structures functioning in a specific area.²⁹⁵ It is De Villiers'²⁹⁶ contention that the South African government has not "embarked on a sufficient education information campaign" explaining the complexities of the three main land reform programmes and their sub-programmes. This leads to rural communities having different views and expectations of the programmes applicable to "their" land.²⁹⁷ De Villiers further advocates that the role of the different government institutions in land reform and post-transfer management and support need to be defined more clearly and extensively.²⁹⁸

According to De Villiers the Department of Land Affairs directed the process of land reform in a centralized manner and other national and provincial government departments were thus virtually excluded. For example, the Department of Agriculture, Forestry and Water Affairs should have been

²⁹⁰ S 14(2)(c) of the Communal Land Rights Act.

²⁹¹ S 14(2)(d) of the Communal Land Rights Act.

²⁹² S 14(2)(e) of the Communal Land Rights Act.

²⁹³ S 14(2)(e) of the Communal Land Rights Act.

²⁹⁴ Smith "An Overview of the Communal Land Rights Act" in *Land, Power and Custom* at 48.

²⁹⁵ This is a much more comprehensive function awarded to the land rights enquirer as the previous 2002 CLRБ did not place as much emphasis on spatial planning or even inter-governmental relations. It was exactly this lack of inter-governmental and inter-departmental co-operation that has been criticized previously.

²⁹⁶ De Villiers *Land Reform: Issues and Challenges – A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia*, Occasional Paper, RSA April 2003.

²⁹⁷ De Villiers *Land Reform: Issues and Challenges* at 45.

²⁹⁸ De Villiers *Land Reform: Issues and Challenges* at 45.

involved throughout the process of tenure reform. Lately the Department of Land Affairs is beginning to show greater awareness of involving and consulting other provincial and national government departments. This point is evident in sections 18(1)(b) and 18(4)(a) of the Communal Land Rights Act. The recently promulgated Intergovernmental Relations Bill is another example of this realisation of the government. The Department of Land Affairs also involves land authorities to a greater extent than usual, especially in the pre-acquisition process. Despite this greater involvement of provincial and national government departments, a sufficient integrated and coherent strategy, which specifically sets out the role and functions of the respective government departments, is still lacking.

Section 14(2)(f) of the Communal Land Rights Act also requires the enquirer to investigate into matters regarding comparable redress. The nature and extent of such comparable redress need further investigation. Comparable redress is especially important where conflicting land tenure rights exist on the same portion of land, and it is impossible to solve the matter while at the same time considering the needs of all the affected parties.²⁹⁹ It appears that the land rights enquirer will have to address the matter of comparable redress in his or her report to the Minister, who will have to act further on this matter. The issue regarding comparable redress in cases of conflicting land rights needed to be provided for in more detail in the current Communal Land Rights Act since this is a reality in communal areas. It is common knowledge that when the forced removals occurred in previous years, people were placed on land already occupied and farmed by families, who have been there for centuries. This led to massive discontent and even violence in these areas.³⁰⁰

²⁹⁹ S 8(1), (2), (3) and s 9 of the 2003 CLR. In the 2003 CLR a whole chapter was dedicated to the comparable redress, what it may consist of and when it needed to be considered. In terms of section 10 of the CLR an application for comparable redress was to be lodged with the then called “administrative structure,” they would then apply to the Minister of Land Affairs to consider the application for comparable redress. The report of the land rights enquirer then needed to be considered when making a decision on awarding comparable redress to a specific community.

³⁰⁰ Cousins “Reforming Communal Land Tenure in South Africa: Why the draft Communal Land Rights Bill is not the Answer” 2004 *ESR Review* 77.

Another matter the land rights enquirer must investigate further, is measures ensuring compliance with section 4 and the promotion of gender equality in the allocation, registration and exercise of new order rights.³⁰¹ The 2003 Communal Land Rights Bill placed more emphasis on the achievement of gender equality than the current Communal Land Rights Act.³⁰² It is now the responsibility of the enquirer to ensure that women in rural areas participate in the land rights investigation. The 2002 Communal Land Rights Bill obliged the participation of women in both the land administration structure, as well as in the Land Rights Board.³⁰³ Compared to these provisions, the current Communal Land Rights Act limits the participation of women in land rights issues extensively and this could be an indication of the legislature to uphold the notion of male predominance in decision making. This is despite various studies showing that female-headed households also represent a large group of people in urgent need of secure tenure.³⁰⁴

Section 14(2)(h) and (i) address matters that might be of relevance to the Minister and that are not expressly provided for in the Act. According to Mostert and Pienaar, section 14(2)(i) is an “umbrella provision.”³⁰⁵ This section states that the enquirer must also investigate “any other matter as prescribed or as instructed by the Minister.”³⁰⁶ Section 14(2)(i) coupled with section 17(5) of the Communal Land Rights Act, that determines that the Minister may award the enquirer even more power and duties for the effective conduct of the enquiry, renders the functions of the enquirer even more extensive. Mostert and Pienaar are of the opinion that section 14(2)(i) of the Act is necessary for

³⁰¹ S 14(2)(g) of the Communal Land Rights Act. See also Mostert & Pienaar “Formalisation of South African Communal Land Title” in *Modern Studies III* at 328.

³⁰² Mostert & Pienaar “Formalisation of South African Communal Land Title” in *Modern Studies III* at 328.

³⁰³ Both these structures will be discussed and analyzed in Chapter 8 of this study.

³⁰⁴ Claassens & Ngubane “Rural Women: Land Rights and the Communal Land Rights Bill” 2003 *INDONSA: Planning & Development Update* 13 13-14; Claassens “Community Views on the Communal Land Rights Bill” PLAAS *Research Report No. 15 2*; Thwala “Land and Agrarian Reform in South Africa” available at <http://www.nlc.org.za> at 7. Last visited on 2009-07-07.

³⁰⁵ Mostert & Pienaar “Formalisation of South African Communal Land Title” in *Modern Studies III* at 328.

³⁰⁶ Mostert & Pienaar “Formalisation of South African Communal Land Title” in *Modern Studies III* at 328.

“embodiment of a multi-disciplinary or all-encompassing approach towards the enquiry.” In the light of the movement towards a more inter-departmental approach in government relations this makes sense. Mostert and Pienaar voice the concern that it is strange that no express provision is made for enquiring into agricultural matters, as this is the livelihood of the majority of the rural inhabitants.³⁰⁷ However since both section 14(2)(h) and (i) are formulated to include this, the omission seems to be addressed. The matters that may be enquired into are quite broad and it places a huge task on the enquirer, especially since he or she is obliged by law to conduct the enquiry into the stated matters. However no provision is made for sanctions should he or she fail to enquire into some of these matters.

6 2 3 Completion of the Enquiry

According to section 17(3)(a), once the enquirer has completed the enquiry and after he or she took into account all the factors mentioned in section 14(2), he or she is required to make recommendations for the Minister to consider. The enquiry report must also be made available for inspection by interested or affected communities.³⁰⁸ At the same time affected or interested communities must be given the opportunity to make representations in relation to any matter with which they are not satisfied in the report. Only once this has been done may the enquirer submit the report, as well as the representations together with his or her recommendations with the Minister. In the previous versions of the Act, nothing to this effect was provided for. Section 17(3)(c) attempts to achieve a greater degree of community involvement³⁰⁹ Which is a welcome insertion. It seems that the legislature realized that since vulnerable and

³⁰⁷ Mostert & Pienaar “Formalisation of South African Communal Land Title” in *Modern Studies III* at 328.

³⁰⁸ S 17(3)(b) of the Communal Land Rights Act. Smith “An Overview of the Communal Land Rights Act” in *Land, Power and Custom* at 48. According to Smith it is unclear what aspect of the enquiry and the enquiry’s work requires a community decision. Neither the report nor the recommendations require a community endorsement or decision. The Communal Land Rights Act only require that the “report of the enquirer must be made available for inspection and that representations will be submitted to the minister at the same time as the report is submitted.”

³⁰⁹ The current situation differs drastically of that as set out in the 2003 CLR. No regard or considerations were given in the 2003 CLR to representations made by interested or affected communities and individuals whose livelihood depended on this enquiry.

marginalized citizens are involved, their viewpoints need to be heard in all instances. Participatory democracy is definitely of importance in the enquiry phases, and acknowledgement of it in the Act suggests the realities on the ground will be taken into account to better the livelihoods of thousands of rural dwellers. These realities relate to the fact that despite that Permits to Occupy being traditionally only awarded to men, it is mostly women who are responsible for the cultivation of the land.

The Communal Land Rights Act does not make any provision for an appeal procedure, against the report of the enquirer.³¹⁰ Despite the fact that the communities have the opportunity to make representations on the report before its submission to the Minister, the final drafting of the report is still in the hands of the enquirer, who is under no obligation to take the representations into account. Affected and unsatisfied communities will therefore have to be very involved and active in their representations, and during the whole enquiry phase. This will hopefully ensure that their concerns are voiced and heard at all crucial times, and that their objections are backed by substantial evidence. Compulsory community participation also appears to be an indirect objective of section 17(3)(b) of the Communal Land Rights Act.

Another matter that sorely lacks in the functioning of the enquiry is that no time-frames have been provided in the Communal Land Rights Act within which the enquiry should be conducted and ultimately completed.³¹¹ The omission of realistic time-frames in itself could make tenure security a distant dream. At the same time it could also negatively affect the effectiveness of the Communal Land Rights Act and the fulfilment of its aims.³¹² The Communal Land Rights

³¹⁰ Mostert & Pienaar “Formalisation of South African Communal Land Title” in *Modern Studies III* at 318.

³¹¹ Mostert & Pienaar “Formalisation of South African Communal Land Title” in *Modern Studies III* at 329.

³¹² The 2002 CLRБ did contain a time-frame for the conduction and completion of the enquiry and although it was a rather lengthy period, it created some kind of guideline. Section 18(3) of the 2002 CLRБ provided that the enquiry would have to be completed within a period of 120 days of receipt of the application for the transfer of communal land to communities. In the 2002 CLRБ it was only upon the lodgement of the final land rights enquiry report that the Minister could decide to secure the land rights of

Act provides for only one enquiry and one report having to be lodged with the Minister, as opposed to the previous versions of the Act, which also provided for a preliminary enquiry phase and effective time-frames. The Communal Land Rights Act does not provide for any time-frames within which valid objections against the enquiry report must be lodged. This in itself could be time-consuming in the quest to secure tenure.

According to Smith the obligations of the enquirers are not extensive enough.³¹³ The critical identification and determination of social boundaries of communities are not listed as a task of the enquirer. He or she is only responsible for recommending the location and extent of the land to be transferred. There is no obligation on the enquirer to determine which persons belong to a certain community.

6 3 The Determination Phase

Once the land rights enquirer has lodged his or her report with the Minister, the Minister must exercise his or her ministerial discretion in terms of the cardinal section 10 of the Communal Land Rights Act. Section 18 provides for the possible actions that the Minister may take after considering the land rights report. Section 18 is considered by various academics³¹⁴ as “pivotal” and as

communities and individuals. The preliminary report of the enquirer was merely regarded as a framework, which enquired into the merits of the applications for the transfer of communal land or any incidental rights. In terms of section 19(1)(a) communities could only offer complaints against the preliminary report but not against the final report. Despite the long timeframe provided in the 2002 CLRB, communities would know within which time they had the opportunity to make objections to the preliminary report of the enquirer. Objections were to be made 60 days from the date of publication or display of the report.

³¹³ Smith “An Overview of the Communal Land Rights Act” in *Land, Power and Custom* at 49.

³¹⁴ Smith “An Overview of the Communal Land Rights Act” in *Land, Power and Custom* at 49. Mostert & Pienaar “Formalisation of South African Communal Land Title” in *Modern Studies III* at 329. Claassens & Ngubane “Rural Women: Land Rights and the Communal Land Rights Bill” 2003 *INDONSA: Planning & Development Update* 13 13-14; Claassens “Community Views on the Communal Land Rights Bill” *PLAAS Research Report No. 15 2*; Thwala “Land and Agrarian Reform in South Africa” available at <http://www.nlc.org.za> at 7. Last visited on 2009-07-07.

being the “main thrust” of the Act, as it attempts to identify the best possible solution for every holder of an old order right. Section 18(1) states that if the Minister is content that all the legislative requirements for the report have been met, he or she may start to make certain determinations.³¹⁵ However, regard must be given to other particular issues as well, which include the final report of the enquirer,³¹⁶ and other relevant laws.³¹⁷ These other laws include customary law and especially laws governing spatial planning, local government and agriculture.³¹⁸ Section 18(1)(c), (d) and (e) respectively provides that the Minister must also take into consideration the old order rights of all affected right holders, the need to provide access to land on an equitable basis and the promotion of gender equality in all matters pertaining to the urgent need for land. The Minister is also under the obligation to determine the location and extent of the land to be transferred to a community or an individual, where applicable.

No provision is made as to what must be done if boundary conflicts arise already during the determination phase. It seems that the Communal Land Rights Act assumes that all boundary disputes or conflicting land tenure rights will by this time already have been solved successfully by the enquirer. The only thing here left for the Minister is to determine the amount of comparable redress, based on which community or individual has the strongest claim to the land. Mostert and Pienaar note that there are no provisions relating to this issue in the Communal Land Rights Act compelling the Minister to consult or to gain the co-operation of the affected communities or individuals.³¹⁹ Moreover, no opportunity is given to the affected communities or individuals to make further representations to the Minister based on their right to land or comparable redress. Representations are only made to the Enquirer. Still, the ultimate

³¹⁵ S 18(1) of the Communal Land Rights Act.

³¹⁶ S 18(1)(a) of the Communal Land Rights Act.

³¹⁷ S 18(1)(b) of the Communal Land Rights Act.

³¹⁸ S 18(1)(b) of the Communal Land Rights Act.

³¹⁹ Mostert & Pienaar “Formalisation of South African Communal Land Title” in *Modern Studies III* at 328.

decision will be that of the Minister, who will have to rely solely on the final report of the Enquirer.

Section 18(3) of the Communal Land Rights Act gives an exposition of the options available to the Minister, when having to decide the fate of old order right holders. Section 18(3)(a) provides that the Minister may determine that the whole of an area must be surveyed and registered or remain registered in the name of a specific community. This section is particularly elusive, according to Mostert and Pienaar, since it does not clearly state why a registered right must be redesignated.³²⁰ In attempting to shed some light on this matter, they are of the opinion that the only “plausible solution” appears to be relating to the registration in the name of a particular community, and the subsequent endorsement of the title deed. This may be done to replace predecessors in title effectively, namely individuals, traditional leaders, communal property associations, trusts or other legal entities. However this section is still problematic in that it does not state whether lawfully registered land in the name of a community will have to be reregistered. If the answer to this is in the affirmative, this will not only be time-consuming, it will also be a waste of much needed resources which could have been applied somewhere else more productively, for instance in comparable redress issues. It is also unclear whether the already registered title deed will only have to be endorsed. Despite what will have to be done to the already registered land, section 18 still applies. As such this could lead to lawfully registered owners of land becoming mere “new order right holders,” which is a totally unacceptable outcome.

Section 18(3)(b) provides that the Minister may determine that the whole of an area be subdivided into portions of land. Each of these portions must then be registered in the name of a person and not a community. Section 18(3)(c) however provides that part of an area must be registered or remain registered in the name of a specific community and that only part of the land must be

³²⁰ Mostert & Pienaar “Formalisation of South African Communal Land Title” in *Modern Studies III* at 329.

subdivided and registered in the name of individuals.³²¹ The Minister may also decide that a part of the land must be reserved to the State. The land referred to here must obviously be land rich in valuable resources. This provision therefore aims to ensure the sustainable development, to serve the whole of South Africa.

Section 18(2)(a)-(d) of the Act deals with the subdivision of communal land, and it does so without taking into account the restrictions imposed on the subdivision of land as prescribed by the Prohibition on the Subdivision of Agricultural Land Act.³²² Mostert and Pienaar anticipate that this could be because of the repealing of the Prohibition Act having been proposed for some time now. While the Prohibition Act is still in force, it would be possible for the Minister to make the determination in terms of section 18 of the Communal Land Rights Act, subject to an exemption from the Prohibition Act by the Minister. Yet, according to Mostert and Pienaar, this interpretation would “require a construction about simultaneous application of the Communal Land Rights Act and the Prohibition Act which cannot readily be inferred for either these acts as they currently stand.”³²³

Section 18(3)(d) states what the Minister could do to secure the “old order rights” of vulnerable communities and individuals. This section is of vital importance to most people in the rural areas, as they are the holders of these insecure rights. Mostert and Pienaar are of the opinion that section 18(3)(d) deals with “the destiny of ‘old order rights.’” According to section 18(3)(d)(i) of the Act the Minister may determine whether an “old order right” will be confirmed or not. This apparently clear section seems not to be so clear after all. Further inspection gives rise to the following unanswered question namely, whether the confirmation of ‘old order rights’ means that their status remains

³²¹ S 18(3)(c)(i) of the Communal Land Rights Act.

³²² Mostert & Pienaar “Formalisation of South African Communal Land Title” in *Modern Studies III* at 330.

³²³ Mostert & Pienaar “Formalisation of South African Communal Land Title” in *Modern Studies III* at 330.

the same, or whether they in fact obtain greater recognition and protection in that they will now automatically be converted into stronger ‘new order rights’?”³²⁴ If the latter is the answer to this problematic question, the subsequent question will then relate to the function of section 18(3)(d)(i) since it will inevitably now have the same consequence as section 18(3)(d)(ii). Section 18(3)(d)(i) also provides no indication as to exactly what kind of rights the Minister might decide to confirm or not.³²⁵

A further question relates to what confirmation entails. Does it entail the surveying and registration or re-registration of certain portions of land, in order for the section to be in line with section 18(3)(a)? Or does confirmation mean the inevitable formalization of insecure “old order rights” into registered surveyed “new order rights?” And does confirmation imply that even land rights obtained in terms of the Communal Property Association Act must also go through the determination and re-registration processes of the Act? Should the status of the rights to be confirmed, remain the same, secure tenure will still not be realised. It seems once again that the effect of section 18(3)(d)(i) was not anticipated thoroughly. Nevertheless, the uncertainty around the effect of the confirmation of “old order rights” needs to be addressed urgently, as this one section may undermine the whole aim of the Communal Land Rights Act.

Section 18(3)(d)(ii) states that the Minister may decide to convert “old order rights” into full ownership or a similar “new order right.” The Minister must also determine the nature and extent of the similar right.³²⁶ Although the terms of section 18(3)(d)(ii) are clearer than section 18(3)(d)(i), it still appears to have an undesirable consequence. Section 18(3)(d)(ii) creates the impression that although ownership is an option which can be awarded to holders of “old order rights” following the conversion of the rights, it is still not an entitlement of all

³²⁴ Mostert & Pienaar “Formalisation of South African Communal Land Title” in *Modern Studies III* at 330.

³²⁵ Mostert & Pienaar “Formalisation of South African Communal Land Title” in *Modern Studies III* at 330.

³²⁶ S 18(3)(d)(ii) of the Communal Land Rights Act.

holders of “old order rights.” This is evident from the last part of section 18(3)(d)(ii) which provides that ownership will not necessarily follow upon conversion but that the Minister might award “a comparable new order right.” This part of section 18(3)(d)(ii) seems to be in favour of the idea of the diversification of land rights.³²⁷ With regard to the confirmation and conversion of “old order rights,” the Communal Land Rights Act again lacks the necessary time frames within which “old order rights” must be confirmed or converted.³²⁸ The reason for this ill-considered provision appears to relate to the haste with which the Act was rushed through Parliament and its subsequent promulgation.³²⁹ In this instance the Communal Land Rights Act differs from the recently enacted Mineral and Petroleum Resources Development Act,³³⁰ where adequate provision was made for the conversion of old order mineral rights to new order rights.³³¹

Section 18(3)(d)(iii) of the Act deals with the cancellation of “old order rights,” which must be done in accordance with Chapter 4 of the Act. Chapter 4 deals with comparable redress where tenure cannot be made legally secure. If an “old order right” is cancelled in terms of section 18(3)(d)(iii) the land to which this right relates, must be incorporated into land held or to be held by a community. The holder of such an “old order right” will have to receive comparable redress, by taking into account sections 12 and 13 of the Communal Land Rights Act. The procedure for the award for comparable redress as set out in section 12 differs from that to be followed by section 18(3)(d)(iii). The section 12 procedure will find application in cases where an “old order” land rights holder has applied to the Minister for comparable redress, whereas in section 18(3)(d)(iii) there is no such application procedure. The two sections cross-reference to one another. This is evident from the fact

³²⁷ A discussion on the preferred approach adopted in the Communal Land Rights Act namely an ownership paradigm or a diversification/fragmentation paradigm will follow at 2.3.3.

³²⁸ Mostert & Pienaar “Formalisation of South African Communal Land Title” in *Modern Studies III* at 331.

³²⁹ Mostert & Pienaar “Formalisation of South African Communal Land Title” in *Modern Studies III* at 31.

³³⁰ 28 of 2002.

³³¹ Schedule II of the MPRDA.

that section 12(3) provides that the section 18 procedure will have to be followed, with the retention of the necessary changes. What was apparently not anticipated was the confusion these two sections have as a result. Section 12 deals with an application lodged by the holder of an older right which cannot be made legally secure, whereas section 18 deals with the securing of old order rights, at the initiative of the Minister, after considering the report of the land rights enquirer. Although these two processes are different, the determination phase in terms of section 18 is still relevant in both instances.

The different varieties of redress are set out in section 12(2) of the Act. Section 12(2)(a) provides that comparable redress could be alternative land or monetary compensation or any other form.³³² What “any other form” means is not clear. Lastly, comparable redress can comprise of a combination of alternative land, a right in land or compensation. The Communal Land Rights Act does not indicate when an “old order right” holder will have to apply for an award for comparable redress. Will it be in the course of the enquiry where it is certain that someone or a community has a stronger right to a portion of land than one of the other occupiers? Within what time will the Minister have to consider this application and get back to the applicant on it?

Since stronger claimants may indeed be in occupation of the land, and people were later “dumped” there because of forced racially based removals, the land rights of the aforementioned group may be rendered even less secure. This is a crucial matter that should have been addressed in the enquiry phase. Suitable recommendations regarding this should have been included in the report that was compiled and submitted to the Minister. Since conflicting land rights are a reality in communal areas, the unpacking of these rights, and the subsequent award of comparable redress mean that the budget for tenure reform will have to be increased substantially. Whether the Department of Land Affairs will be able to deliver on this, is questionable, especially if one takes into

³³² S 12(2)(b) of the Communal Land Rights Act.

account that it is estimated that almost 13 million people reside in these communal areas.³³³ An application for comparable redress can only be lodged after all disputes relating to a certain portion of land have been solved adequately and all the interested parties are satisfied with the outcome. This is where section 18(5) also becomes relevant. Section 18(5) provides that a Minister is not allowed to make any determination before any dispute relating to land or a right in land has not been solved by mediation or by traditional or non-traditional means.³³⁴ If necessary a dispute relating to land or a right to land can also be solved by taking the matter to a suitable court.³³⁵ In this scenario the Minister is responsible to ensure that the dispute is resolved. However, no time frames are provided within which the dispute has to be resolved. This omission could once again compromise tenure security, since dispute resolution could become a lengthy process.

Section 13 deals with an additional matter before an old order right in land will be regarded as being cancelled. It provides that the Minister will have to obtain the written agreement of the holder of an “old order right” and take into account the conditions they agreed on, before cancelling the right.

Mostert and Pienaar offer valuable criticism against the cancellation of “old order rights,” as set out in section 12 of the Act. They are of the opinion that it is uncertain and unclear whether a separate procedure is a requisite in terms of section 12 or if the procedure under section 18 should be followed.³³⁶ Section 12 does not provide any time frame to the interested parties as to when an application for the cancellation of an “old order right” should be lodged, whereas the determination phase in terms of section 18 is being preceded by the land rights enquiry.³³⁷ The Act further omits giving factors which determine

³³³ Pienaar 2004 *THRHR* 244 245. According to Pienaar this amount could also manifest itself in about 2.4 million households residing in communal areas. Nonyana “The Communal Land Rights Bill and Related Legislation” 2004 *Lexis Nexis Butterworths Property Law Digest* 7 7.

³³⁴ Nonyana 2004 *Lexis Nexis Butterworths Property Law Digest* 4-5.

³³⁵ S 18(5) of the Communal Land Rights Act.

³³⁶ Mostert and Pienaar “Formalisation of South African Communal Land Title” in *Modern Studies III* at 331.

³³⁷ Mostert and Pienaar “Formalisation of South African Communal Land Title” in *Modern Studies III* at 331.

when rendition of security will be regarded as impossible, how comparable redress must be determined if redress consists in the payment of money, when it will be paid and to whom it will be payable, namely to the nested community or to individuals.³³⁸

Section 18(4)³³⁹ of the Communal Land Rights Act provides that when the Minister makes a determination in terms of the said section, he or she must take into account the Integrated Development Plan of each municipality where there is communal land and where the Communal Land Rights Act will subsequently be applicable.³⁴⁰ The Minister is also obliged to consult with the Minister of Local Government, municipalities and other important land-use regulators acting in a specific geographical area.³⁴¹ The consultation with the abovementioned institutions and individuals is of utmost importance since in many cases they are more aware of the realities on the ground than the officials of the Department of Land Affairs or the Minister him or herself. Local municipalities, who have to render much needed services such as water supply, electricity and sanitation, should also be aware of the estimated land needed to render these basic services or how much land is needed to erect other amenities such as schools or clinics.

Following the said consultations the Minister may decide to reserve a right to the State or a municipality.³⁴² At the same time the Minister may reserve any

³³⁸ This is how and where the 2002 CLRB differ from the Act. The 2002 CLRB provides clear answers to the abovementioned uncertainties. For instance it provided that land tenure rights will be regarded as insecure where irreconcilable conflicting tenure rights exist as a result of past racially discriminatory laws or practices. Section 11 of the 2002 CLRB also gives an exposition as to what the factors are that must be taken into account in determining the prioritisation of comparable redress. In terms of the 2002 CLRB the Minister are also granted the capacity to acquire communal land through purchasing it or by expropriating land in terms of section 25 of the Constitution and the Expropriation Act 63 of 1975. Section 15(1)(a) of the 2002 CLRB provided that he Minister may also take any other reasonable programme of action to facilitate the granting of comparable redress.

³³⁹ Since section 18(4)(a) appears to have implications for development initiatives in the communal areas, this will be discussed in detail in Chapter 4 of this thesis.

³⁴⁰ Mostert & Pienaar "Formalisation of South African Communal Land" in *Modern Studies* at 322. See also Thwala "Land and Agrarian Reform in South Africa" published on the website of the National Land Committee, available online at <http://www.nlc.org.za>. Last visited on 2009-07-07.

³⁴¹ S 18(4) of the Communal Land Rights Act.

³⁴² S 18(4)(a) of the Communal Land Rights Act.

additional land-use or condition to the State or a relevant municipality.³⁴³ When taking into account that service delivery in these areas is not up to standard, these provisions are indeed necessary. This is evident in section 18(4)(a)(i) which so eloquently provides that where the Minister has determined to reserve land on behalf of the State or a municipality, it must be done for a public purpose or in the interest of the public or community.

Another reason provided by the Communal Land Rights Act why rights in land need to be reserved by the State, is to provide protection for “the affected land, rights in such land, an owner of such land and a holder of such rights.”³⁴⁴ Exactly what the rationale is behind this is, is unclear.

Section 18(4)(b)(i) of the Communal Land Right Act contains a much awaited provision. It provides that the Minister may confer a “new order right” on a woman who is a spouse of a male holder of an “old order right.” The married couple will be regarded as holding the “new order right” jointly. This provision was much debated and contested.³⁴⁵ A widow of a deceased male holder of an “old order right” or to whom a “new order right” succeeds will also be able to hold that right solely as the successor of it.³⁴⁶ The Minister also has the power in terms of section 18(4)(b)(iii) of the Act to confer a “new order right” on women. Section 18(4)(b) as a whole is a victory for women in the rural areas, since the amelioration of their plight was already highlighted in the initiating phases of this legislation. Especially section 18(4)(b)(ii) is now in line with the provisions as contained in the Recognition of Customary Marriages Act.³⁴⁷ Before the promulgation of the Recognition Act women were unable to inherit land intestately from their husbands, despite the fact that the majority of the black population are women.³⁴⁸ Various communities and NGO’s in their

³⁴³ S 18(4)(a) of the Communal Land Rights Act.

³⁴⁴ S 18(4)(a)(ii) of the Communal Land Rights Act.

³⁴⁵ Thwala “Land and Agrarian Reform in South Africa” at 8-9; Claassens “Community Views” at 7.

³⁴⁶ S 18(4)(b)(ii) of the Communal Land Rights Act.

³⁴⁷ 120 of 1998. Hereafter referred to as the Recognition Act.

³⁴⁸ Janse van Rensburg “ The True Capacity of Women Under Customary Rule to Acquire Land: An expose on the Law, Land and the Rules of Succession” 2003 (2) *Stell LR* 282 at 283. See also Thwala

submissions called for the status of women in acquiring land and rights in land to be expressed in clearer terms.³⁴⁹ It appears that section 18(4)(b) is also in line with policy relating to women and land, as envisaged in the *1997 White Paper*.³⁵⁰

Section 4 of the Communal Land Rights Act underscores the importance of the land rights of women. Section 4(a) provides that a community or person is entitled either to tenure security or to comparable redress. Women are no doubt included in this section and this is even more evident from the wording of section 4(b) and (c). The construction and the wording of section 4(b) is very similar to section 18(4)(b)(i) and accordingly so is the impact. Section 4(b) however goes further than section 18(4)(b)(i). It provides that an “old order right” held by a married person is, despite any law, practice, usage or registration to the contrary, deemed to be held by all spouses in a marriage in which such person is a spouse, jointly in undivided shares irrespective of the matrimonial property regime applicable to such marriage and must, on confirmation or conversion in terms of section 18(3), be registered in the names of *all* such spouses.” Since customary marriages are potentially polygamous in nature, this section secures the tenure right of all spouses in such a marriage.

Section 18(4)(c) also provides for the validation of putative “old order rights,” which were acquired in good faith. If it is clear that such a right was indeed acquired in bad faith, it will have to be invalidated. This decision on validation or invalidation is once again that of the Minister who will have to determine the lawful holders of that right.³⁵¹ The validation of a putative “old order right” will

“Land and Agrarian Reform in South Africa” at 4-9 for a socio-economic profile on the population composition, especially with reference to Blacks in the rural areas.

³⁴⁹ Claassens “Community Views on the Communal Land Rights Bill” *PLAAS, Research Report No 15*, (August 2003) 2. Claasens who attended community meetings together with about 700/800 rural dwellers with regard to the 2002 CLR, states that women’s land rights was on the agenda in quite a few of these meetings. In some of these meetings it was the primary focus and this provides one with a slight idea that women’s land rights was indeed a contentious issue.

³⁵⁰ *RSA White Paper* at 60.

³⁵¹ S 18(4)(c) of the Communal Land Rights Act.

have the effect of the right being converted into a “new order right”, although this is merely implied by the wording of section 18(4)(c) of the Act.³⁵² It is unclear exactly what putative rights entail, as there is no definition in the Act to shed some light on this term. It is, however, possible that by validating putative “old order rights,” the Act aims to address particular informal rights.³⁵³ These informal rights might have been granted *de facto* and in the absence of any explainable legal basis. As such, it is also possible that these rights receive protection in the earlier mentioned Interim Protection of Informal Land Rights Act.³⁵⁴

Lastly, section 18(5) provides that the Minister may not make any determination to land or a right in land, if that land is affected by a dispute. The dispute first needs to be resolved either by mediation or any traditional or non-traditional alternative dispute resolution.

6 4 Assessment

It is Mostert and Pienaar’s contention that although section 18 is of utmost importance for the operation of the Act, it is still rather lengthy, vague and ambiguous. The Act also gives no indication as to exactly what “new order rights” entail. Although a “new order right” may sometimes be ownership, this appears not always to be the case. This is evident since the provision dealing with the conversion of “new order rights” into freehold would then have an illogical impact. Upon closer analysis, this insertion also seems to be in line with the White Paper’s idea of fragmented use-rights and the protection thereof through registration. This is also evident from section 9(1) of the Act which

³⁵² Mostert & Pienaar “Formalization of South African Communal Land Title” in *Modern Studies III* at 331.

³⁵³ Mostert & Pienaar “Formalization of South African Communal Land Title” in *Modern Studies III* at 331.

³⁵⁴ 112 of 1991. Mostert & Pienaar “Formalization of South African Communal Land Title” in *Modern Studies III* at 331.

provides that the “holder of a registered new order right may apply to the community owning the land to which such right relates for the conversion of such right into freehold.” It is therefore obvious that a difference indeed exists between “new order rights” on the one hand and freehold on the other hand. It can be inferred that the conversion of “old order rights” into “new order rights” is are in fact very similar, the distinction lies in the fact that the latter will be formalised and registered rights, therefore rendering it as secure. The aforementioned result therefore in an insecure and therefore unprotected right in land.

PART THREE: SUBSTANTIVE ISSUES

CHAPTER 7: SECURITY OF TITLE, THE REGISTRATION PROCEDURE AND THE FRAGMENTATION OF LAND RIGHTS

7 1 Introduction

As mentioned in Chapter 1 of this study, one of the aims of the Communal Land Rights Act is to address tenure insecurity in rural areas. This aim is also well articulated in section 4 of the Communal Land Rights Act. The Communal Land Rights Act attempts to achieve this security of tenure through the registration of “new order rights,” in the name of communities and individuals. The discussion in this part of the study will therefore comprise of a comparison between existing registration procedures and those adopted in the Act. Reference in this context will also be made to how policy choices have influenced the registration procedures in the Communal Land Rights Act and also the effectiveness of the adapted registration procedures. This will then be followed by a comparison between the titling approach and the fragmentation of land rights approach in achieving tenure security, as they find application in the previous 2002 Communal Land Rights Bill and the current Act. In this discussion, the viewpoints of various academics will be analysed and discussed.

7 1 1 Transfer and Registration of Communal Land

The Communal Land Rights Act registration procedure differs somewhat from the conventional way of registration. This is, however no surprise, since communal tenure has its own unique characteristics and contents.³⁵⁵ The legislature had to take these factors into account in its attempt to adhere to section 25(6) and (9) of the Constitution. Section 5 of the Communal Land Rights Act, coupled with the above-mentioned section 4, is regarded as “imperative,” as both these sections attempt to realise security of tenure.³⁵⁶

³⁵⁵ Cousins & Claassens “Communal Tenure Systems in South Africa: Past, Present and Future”, article for Development Update online available at <http://www.uwc.ac.za/plaas>. Last visited on 2009-29-09.

³⁵⁶ Mostert & Pienaar “Formalization of South African Communal Land Title” in *Modern Studies III* at 332.

This is done through the registration procedure as set out in section 5. Section 5(1) of the Act provides that “communal land and new order rights are capable of being registered and must be registered in the name of the community, including women, entitled to such land or right in terms of this Act and the relevant community rules.” From this section it is apparent that only new order rights are capable of being registered. Therefore section 5(1) also implies that “old order rights” first have to go through the process set out in section 18 of the Act. Section 5(1) also expressly provides that land and a “new order right” may be registered in the name of women. This is yet another much appreciated insertion in the Act.³⁵⁷

The Communal Land Rights Act does not provide however, for a community or individuals to apply to the Minister for the transfer and registration of land. Transfer and registration will take place, after the conversion, confirmation or cancellation of “old order rights.” This whole process falls within the prerogative of the Minister. The wide discretionary powers awarded to the Minister in terms of the discussed section 18, is still relevant. At least in terms of the transfer and registration of land, there is a limitation. Transfer and registration will only take place after the conduct of a land rights enquiry and only when it is recommended by the enquirer.

Section 5(2) of the Communal Land Rights Act provides for transfer of land to communities or individuals, irrespective of how they acquired the initial title. The Act, as a whole, attempts to award state-owned land to communities or individuals and at the same time it confirms the ideal of providing land to

³⁵⁷ S 16(1)(a) and (b) of the 2002 CLR. The 2002 CLR did not contain such a clear attempt to effect registration of land in the name of women. Section 16 of the 2002 CLR only contained general terms with regard to the registration of land. It merely provided that the Minister shall cause the transfer of communal land or any parts thereof to individual households, individual family or individual persons in the form of Deeds of Transfer. In terms of the 2002 CLR registration would only take place after a community or individual family or person have applied to the Minister for transfer. The CLR also provided that the Minister could initiate the transfer and registration of land on behalf of a community or a community would have to lodge an application to that effect to the Minister.

women. Section 5(2) of the Act provides that if communal land is registered in the name of a person,³⁵⁸ or a traditional leader,³⁵⁹ or traditional leadership,³⁶⁰ a communal property association³⁶¹ or a trust or legal entity,³⁶² ownership of the land will still vest in the community on whose behalf such land was held. This provision attempts to rectify perception of traditional leaders that communal land belong to them, despite the fact that they are truly only administering it on behalf of a specific community.³⁶³ By inserting this section into the Act, the legislature wanted to make sure that any of the mentioned parties will no longer lay personal claim to land that they are merely controlling on behalf of the larger community.³⁶⁴ However, the limitations and restrictions that have been placed on land or the rights in land will remain as such. This is to ensure the consistent use, enjoyment and occupancy of said land.

Since the community on whose behalf the land was held remains the lawful owners of the land, it is necessary that the existing title deed or any mortgage bond or other registered deed, be endorsed by the Register of Deed to reflect the real title holder. This is exactly what is provided for in section 5(2)(b) of the Act. By doing this, tenure security is awarded to previously disadvantaged communities and individuals.

As mentioned before, the transfer and subsequent registration of land will only occur after the relevant provisions of section 18(4) have been taken into account by the Minister. Section 18(4) provides that during the determination phase and before the actual determination, the Integrated Development Plan of each relevant municipality must be taken into account.³⁶⁵ Gender equality is yet

³⁵⁸ S 5(2)(a)(i) of the Communal Land Rights Act.

³⁵⁹ S5(2)(a)(ii) of the Communal Land Rights Act.

³⁶⁰ S 5(2)(a)(iii) of the Communal Land Rights Act

³⁶¹ S 5(2)(a)(iv) of the Communal Land Rights Act.

³⁶² S 5(2)(a)(iv) of the Communal Land Rights Act.

³⁶³ Cousins & Claassens “Communal Tenure Systems in South Africa” at 123.

³⁶⁴ Cousins “Contextualising the Controversies” in *Land, Power & Custom* at 20-21.

³⁶⁵ Mostert & Pienaar “Formalization of South African Communal Land Title” in *Modern Studies III* at 333. Section 5(3)(a) of the Communal Land Rights Act provides that documents that are evident to contain “old order rights,” which is cancelled or replaced by a “new order right” must be lodged with the Registrar of Deeds. He or she will then be obliged to endorse the document as either being cancelled or

another issue to be taken into account, as well as which land will be reserved by the State, including local municipalities. The said reserved right or land must be either for a public purpose or in the interest of the general public³⁶⁶ or it must be necessary for the protection of affected land or rights in land.³⁶⁷

The above-mentioned discussion and criticism show that registration of land or “new order rights” will only follow after the ministerial determination. Upon the registration of land or “new order rights” in the name of a community, the holders will become the lawful owners of that land. The community will also be indicated as such in the title deed. In the South African property law the Deeds Registry is regarded as indicating the true owner of land and as a way of recording derivative acquisition of land. What is interesting here is that the Deeds Registries Act³⁶⁸ has recently been amended. Specifically, the definition of “person” as contained in section 102 of the Deeds Registries Act has been amended, to include a community. As registered and lawful owners of land, reference in this context must be made to section 3 of the Communal Land Rights Act. Section 3 provides that a community acquires juristic personality with perpetual succession, upon the registration of their community rules. As an entity with juristic capacity, the community is now able to “acquire and hold rights and incur obligations”, according to section 3(a) of the Communal Land Rights Act. The said community is also able to own, encumber by mortgage, servitude or otherwise or to dispose of movable or immovable property.³⁶⁹ All these powers or entitlements of a newly registered community are in line with

either as being replaced. Since most “old order rights” are of a *de facto* nature, it probably is not properly recorded and registered and therefore no document evidencing that right exists. Provisions for this type of scenarios are being intercepted by section 5(3)(b). In short section 5(3)(b) provides that where no documents evidencing “old order rights” exists, the Registrar of Deed is under the obligation to accept an appropriate affidavit to that effect by the holder of such right or the Minister. According to Mostert and Pienaar the nature of communal tenure under previous regimes was based on the insecurity. Consequently proof of people’s or communities titles was not always evident from any form of documentation, as they were very seldom issued. This is also the route to be followed where a document evidencing an “old order right” was either destroyed or lost.

³⁶⁶ S 18(4)(a)(i) and (ii) of the Communal Land Rights Act.

³⁶⁷ S 18(4)(a)(iii) of the Communal Land Rights Act.

³⁶⁸ 47 of 1937. Hereafter refer to as the DRA.

³⁶⁹ S 3(b) of the Communal Land Rights Act. Cilliers & Benade *Corporate Law* 3rd ed 2000 4-15.

the juristic personality awarded to a company in terms of the Companies Act.³⁷⁰ According to Cilliers and Benade³⁷¹ a company as a legal entity with juristic personality must be regarded as an independent entity, equipped with legal personality from the moment of registration.

After the Minister has made the section 18 determination, he or she is obliged to transfer the communal land concerned to the community.³⁷² This transfer is however subject to section 18(4), which deals with the external but necessary factors the Minister has to take into account when making the said determination. In order to affect proper transfer of the land in question, the Communal Land Rights Act also provides that the Minister is responsible for the preparation and approval of a communal general plan³⁷³ in terms of the Land Survey Act.³⁷⁴ The said communal general plan needs to be registered and a communal land register needs to be opened in terms of the Deeds Registries Act.³⁷⁵ This part of the Communal Land Rights Act seems to be in accordance with the requirements for the establishment sectional title scheme,³⁷⁶ as well as the procedure for the subdivision of land for the development of a new township, according to section 46 of the Deeds Registries Act.³⁷⁷ In the case of sectional titles, a sectional register also needs to be opened, but only after the draft sectional plan of the Surveyor-General has been approved.³⁷⁸ The developer must apply for the opening of a sectional title register to the Registrar of Deeds in the area where the land to be transferred is situated for the opening of a sectional title register and also for the registration of the said sectional title plan. The developer of such a scheme will have to lodge separate certificates of registered sectional title for each unit

³⁷⁰ 61 of 1973.

³⁷¹ Cilliers & Benade *Corporate Law* at 4-15.

³⁷² S 6(a) of the Communal Land Rights Act.

³⁷³ S 6(a)(i) of the Communal Land Rights Act.

³⁷⁴ 8 of 1997. Badenhorst et al *The Law of Property* at 627. Badenhorst et al are of the opinion that since no provision in the Deeds Registries Act deals with communal land, section 6(b)(ii) of the Communal Land Rights Act will be relevant in this context.

³⁷⁵ 47 of 1937. S 6(b)(ii) of the Communal Land Rights Act.

³⁷⁶ Sectional Titles Act 95 of 1986.

³⁷⁷ 47 of 1986. Van der Merwe *Sectional Titles, Share Blocks & Time-Sharing* 4th ed (2001) 6-19.

³⁷⁸ Van der Merwe *Sectional Titles* 6-19.

with the application. The Register will then be responsible for closing the entry for the developer's title deed of the land in the relevant register.³⁷⁹

Subsequent to the preparation and approval of the communal general plan and the registration and opening of the communal land register, the Minister can transfer a right in land to entitled beneficiaries, which could comprise of either individuals or communities.³⁸⁰ It is evident from this section that the Department of Land Affairs realised that not all rural dwellers are in favour of individualised ownership. Such members would then rather choose to have a secure statutory right to land but in the context of the wider community.³⁸¹ In terms of the Act in the scenario described above, the Registrar of Deeds will then have to issue a Deed of Communal Land Right or any other appropriate deed to these individuals. The Act defines a "Deed of Communal Land Right" as a deed in terms of which a "new order right" is registered in the name of a person.³⁸² The Communal Land Rights Act also makes provision for individuals who initially wanted to acquire a secure right in the context of the broader community, to apply to the community for the conversion of a registered "new order right" into freehold ownership.³⁸³

Freehold ownership in this instance is individual ownership of the land, which first was secured in terms of the Deed of Communal Land Right. The community will have to consider this application, subject to relevant provisions in the community rules and title conditions.³⁸⁴ Based on these provisions, the relevant community may approve or reject the application for the conversion. Should a community decide to approve an application for the conversion of a registered "new order right" into freehold, it has the authority to impose any condition on the said land, or reserve any right in favour of that particular

³⁷⁹ See Van der Merwe *Sectional Titles* at 6-19 for a detailed exposition on the documents needed to apply for the opening of a sectional title register and the lodgement of a sectional plan.

³⁸⁰ S 6(b)(iii) of the Communal Land Rights Act.

³⁸¹ Pienaar "Security of Communal Land Tenure" *supra* note 2 at 249. Pienaar "Registration of Informal Land-Use Rights in South Africa – Giving Teeth to(Toothless?) Paper Tigers" 2000 *TSAR* 442 443.

³⁸² S 1 of the Communal Land Rights Act.

³⁸³ S 9(a) of the Communal Land Rights Act.

³⁸⁴ S 9(2) of the Communal Land Rights Act.

community.³⁸⁵ The reservation of a right in land could lead to unfair practices. The question that arises here is why more rights should be reserved in the name of a community, as provisions for this is already made in section 18(4)(a) of the Act. In this instance a right may be reserved by the State for public purposes, but this reservation may not be beneficial to a particular community.

The Act also does not provide for an appeal procedure, which the applicant for the conversion can follow, if the application is rejected. This in itself could lead to unfair decision-making, since the community is under no obligation to justify their decision to anyone, except maybe to the applicant. However, the Act does not even provide that the applicant is entitled to written or oral reasons in case of the rejection of the application for conversion. Accordingly where a “new order right” is indeed converted to freehold, this should also be indicated and recorded as such. This will be done in the Deeds Registries and in the Communal Land Register and need to be endorsed as such.

The Act contains yet another problematic innovation set out in section 7. According to section 7 an official employed by the Department of Land Affairs may perform the functions of a conveyancer. Traditionally this has not been allowed in the transfer of ownership and registration. Only admitted attorneys, who have passed a specialised conveyancing examination, have until now been permitted to perform these functions to effect registration on behalf of their clients.³⁸⁶ Since a conveyancer is responsible for the accuracy of certain facts in terms of section 15A of the Deeds Registries Act, read with Regulation 44 of the same Act, the question arises whether the same responsibilities can be placed on the official of the Department of Land Affairs. The concession to give an official of the Department of Land Affairs the power to perform the functions of a conveyancer, is a rather unorthodox notion. One cannot help but wonder who will bear the risk of responsibility for mistakes in the registration

³⁸⁵ S 9(3) of the Communal Land Rights Act.

³⁸⁶ Badenhorst et al *The Law of Property* at 201-203; Carey-Miller & Pope *Land Title in South Africa* at 71-91; Van der Merwe *Sakereg* 337.

procedure: will it be the Department of Land Affairs or the official in his or her personal capacity? This seems like yet another provision where the consequences were not fully considered by the legislature.³⁸⁷

The Act provides that all the costs intrinsically related to the surveying and transfer of the land will be carried by the State,³⁸⁸ since transfer and registration costs in general are usually substantial. This insertion was needed, especially in the light of severe poverty in communal areas.³⁸⁹

It is doubtful whether the true owners will always be indicated as such in the recording procedures of “new order rights” in the Communal Land Register. Since these are only rights in land, it could exchange hands within a said community, without being properly recorded in the Communal Land Register of a particular community. Rural inhabitants will have to be informed properly as to why recording of rights are necessary, especially where there is a change of ownership of the said rights in land.

Another problematic issue is the perception that registered land or a registered right in land will facilitate the provision of loans in that the title deeds can be used in securing loans from financial institutions.³⁹⁰ This was also the assumption when the Communal Property Associations Act³⁹¹ was promulgated. Currently this goal has not been realised as many of the Communal Property Associations are dysfunctional for a variety of reasons, one of which relates to the incapability of Communal Property Associations’ to secure investment from the State or the private sector.³⁹² Another reason for the dysfunctionality of Communal Property Associations is that these bodies

³⁸⁷ Badenhorst et al *The Law of Property* at 628.

³⁸⁸ S 10 of the Communal Land Rights Act.

³⁸⁹ Chronic Poverty Research Centre *The Chronic Poverty Report 2004-05*” at 65-68.

³⁹⁰ Pienaar “Security of Communal Land Tenure” at 245; Rutsch *South African Experiences in Communal Property Associations, Community Land Trusts and Other Forms of Group Ownership* (1997) 13-14; Pienaar 2000 TSAR 442 443.

³⁹¹ 28 of 1996.

³⁹² Pienaar “Security of Communal Land Tenure” at 245. Pienaar 2000 TSAR 442 443.

are unable to derive profit.³⁹³ The financial progress envisaged in securing Communal Property Association's has not materialised and it seems as if some of these mistaken projections have repeated itself in the Communal Land Rights Act.³⁹⁴

With regard to the actual registration mechanism of "new order rights," if the accuracy and reliability of the current registration system in South Africa is to be maintained and at the same time unknown numbers of "new order rights" have to be registered, the current system will with no doubt have to be amended. Restricted volumes of deeds registrations currently take place, due to the exclusive nature of the registration of title by way of deeds and the thorough examination procedure conducted before any registration.³⁹⁵ Consequently, not only the reliability of the registration system but also the accuracy of the deeds registry are ensured. The current registration system is however still problematic. It is relatively slow, time-consuming and expensive.³⁹⁶ The *White Paper* made valuable recommendations in this regard,³⁹⁷ but to date none of it has surfaced in practice. Some of these recommendations however seem to find application in the Communal Land Rights Act and include the establishment and maintenance of a comprehensive land information system, as well as the compilation of a comprehensive state land register which would improve the management of communal land.³⁹⁸ In the Communal Land Rights Act this is done by the creation of a Deed of Communal land register.

Collecting and maintaining cadastral and topographic information is also recommended. The Communal Land Rights Act requires that a communal general plan be prepared and approved in terms of the Land Survey Act.³⁹⁹

³⁹³ Pienaar "Security of Communal Land Tenure" at 245. Pienaar 2000 *TSAR* 442 443.

³⁹⁴ Pienaar "Security of Communal Land Tenure" at 251.

³⁹⁵ Badenhorst et al "*The Law of Property*" at 206-219.

³⁹⁶ Badenhorst et al "*The Law of Property*" at 219.

³⁹⁷ *RSA White Paper on South African Land Policy* at 108.

³⁹⁸ *RSA White Paper on South African Land Policy* at 108

³⁹⁹ 8 of 1997.

This recommendation is adhered to sufficiently. The costs of surveying communal land will be borne by the Department of Land Affairs, as no express provision is made for this.

Since registration in the context of communal land plays such an important role with regard to publicity and tenure security, the process will have to be expedited. For some time now the Department of Land Affairs has been investigating the possibility of a fully computerised registration system. It was envisaged in the *White Paper*.⁴⁰⁰ This electronic transfer of deeds will accommodate more registrations, without the loss of reliability and accuracy. It will also be able to cater for the registration of “new order rights.” Pienaar contends that conveyancers who are electronically linked to the central Deeds Registry will be able to make paperless lodgings, while at the same time it will be possible to verify electronic information in order to effect transfer of real rights.⁴⁰¹ Simultaneous electronic transactions, for example the cancellation of existing mortgage bonds and the registration of new ones, are anticipated, without having to resort to the time-consuming procedure of investigation. There are many advantages to having such an electronic registration system. These include the speeding up of the process of registration and the handling of a large number of transactions within a relatively short period of time. The duplication of functions between the various role players in the registration process⁴⁰² will also be avoided. This electronic registration process will also most likely lead to a reduction of registration costs, since it is currently an expensive endeavour.⁴⁰³

Possible obstacles faced by the registration of fragmented use-rights seem to be addressed by the Communal Land Rights Act. The Act provides for the preparation and approval of a communal general plan in terms of the Land

⁴⁰⁰ RSA *White Paper on South African Land Policy* at 106-107.

⁴⁰¹ Pienaar 2004 *THRHR* 256-258.

⁴⁰² Radloff “Electronic Land Registration Progress Report” 1999 *De Rebus* 34 34.

⁴⁰³ Radloff “Electronic Land Registration Progress Report” 1999 *De Rebus* 34 34. Pienaar 2004 *THRHR* 256-258.

Survey Act.⁴⁰⁴ This suggests that prior to the transfer of communal land or a right in land it will have to be surveyed in order to be indicated in the communal general plan. The Communal Land Rights Act also provides for the resolution of conflicting land tenure rights before any registration can take place and that costs relating to the survey of communal land and the subsequent registration of it will be borne by the State. This is an important insertion, especially in the light of what has been said previously about poverty in these rural areas.

7 1 2 Securing Women's Land Rights

The Act provides for tenure security for women in section 4(2) and (3). Section 4(2) states:

“An old order right held by a married person, is despite any law, practice, usage or registration to the contrary, deemed to be held by all spouses in a marriage in which such person is a spouse, jointly in undivided shares irrespective of the matrimonial property regime applicable to such marriage and must, on confirmation or conversion in terms of section 18(3), be registered in the names of all such spouses.”

Section 4(3) states:

“A woman is entitled to the same legally secure tenure, rights in or to land and benefits from land as is a man, and no law, community or other rule, practice usage may discriminate against any person on the ground of the gender of such person.”

Despite the fact that these two provisions are so explicit in awarding security of tenure to women, experience and community workshops in communal areas have proven otherwise.⁴⁰⁵ Land in customary tenure, is

⁴⁰⁴ S 6(b)(i) and (c) of the Communal Land Rights Act.

⁴⁰⁵ A range of workshops was held in five different provinces during 2002 and 2003 to inform rural people about the Communal Land Rights Bill. At these workshops discussions also focused on tenure problems faced by rural communities, despite the equality guarantee as entrenched in the 1996 Constitution. Claassens “The Communal Land Rights Act and Women” in *Advancing Women Rights* at 42-81. Claassens “*Community Views on the Communal Land Rights Bill*” Research Report 15 PLAAS. Cross & Friedman “Women and Tenure” in *Women, Land and Authority* at 17-34.

seen as a family asset and it is doubtful whether the insertion of section 4(2) and (3) will have the desired effect, which is to provide tenure security to women. During the consultative processes concerning the 2002 and the 2003 Communal Land Rights Bill, women fiercely voiced their concern and the problems they face in these communal areas.⁴⁰⁶ Section 4(2) of the Communal Land Rights Act does not provide that rights previously reserved for men only must now be shared by their wives. What it does provide for is that old order rights held by a married person is now deemed to be held jointly by his or her spouse. To a lesser extent and only in very few communities were single women allocated land. These land rights then qualify as old order rights in the terminology of the Act. If section 4(2) is applied in these circumstances, it means that upon the marriage of a single lady, her land rights will be held in joint terms with her new husband. In the few rural areas where land has been allocated to women, despite the concern of the traditional authorities in these areas, that the land will belong to outsiders upon the death of such a single lady, the wording of section 4(2) may impact negatively on women's rights in these areas. It will have a negative impact both on future land allocations to other single women in rural areas, and it will also have a negative impact on the partial and uneven processes of change, currently and slowly taking place in rural areas.⁴⁰⁷ The relationship between the children and the stepfather will also be adversely affected, since he is now the co-owner of the allocated land together with their mother, but to their exclusion. Section 4(2) is indeed a victory for women's land rights but as is clear from the above discussion, the Act should have taken greater cognisance of the potential negative effect of this section on children born to a single mother who received land, and the new husband.

⁴⁰⁶ Claassens "Community Views on the Communal Land Rights Bill" Research Report 15 PLAAS. Cross & Friedman "Women and Tenure" in *Women, Land and Authority* at 17-34.

⁴⁰⁷ Claassens "Women, Land and Power" in *Land, Power and Custom* at 171. Claassens "Community Views on the Communal Land Rights Bill" Research Report 15 PLAAS. Cross & Friedman "Women and Tenure" in *Women, Land and Authority* at 17-34.

7 2 The Paradigm Shift: “Titling” v “Tenure”

The policy behind tenure reform manifested itself in the Communal Land Rights Act in a fairly unknown way. It entails a compromise between the registration of communal title in the name of a community and the registration of fragmented use-rights in an attempt to secure tenure. Previous versions of the Act did not adhere to this compromise and only focussed on the titling paradigm.⁴⁰⁸ This approach was criticised severely. In order to understand the current approach adopted in the Communal Land Rights Act this approach will be discussed in detail. Many academics⁴⁰⁹ however agree that the policy as entailed in the 2004 Act is the more obvious method to secure tenure.

The registration and subsequent protection of “new order rights” are expressly provided for in the *White Paper on South African Land Policy* and also in the property clause of the 1996 Constitution. In the *White Paper* it is stated that “tenure reform must move towards rights and away from permits.”⁴¹⁰ In even clearer terms the *White Paper* provided that a “rights-based approach and adjudicatory principles have to be adopted, which recognise and accommodate *de facto* vested rights (i.e. those which exist on the ground).” In the case of the Constitution, section 25(1) provides for the protection of different rights in property. This caters not only for ownership, but also for other informal use-rights.⁴¹¹

The following principles guided the development of policy decisions behind tenure reform⁴¹² and as stated already, most of these principles surface in the

⁴⁰⁸ Cousins Submission made to the Portfolio Committee on Agriculture and Land Affairs “*Comments on the Communal Land Rights Bill (B67-2003)*” 10th Nov. 2003, available at <http://www.uwc.ac.za/plaas>. Last visited on 2009-29-09. Especially the 2002 CLRB only focussed on registration of title in the name of beneficiaries in achieving tenure security.

⁴⁰⁹ Cousins Submission made to the Portfolio Committee on Agriculture and Land Affairs “*Comments on the Communal Land Rights Bill (B67-2003)*” 10th Nov. 2003, available at <http://www.uwc.ac.za/plaas>. Last visited on 2--09-29-09. Claassens “Community Views on the Communal Land Rights Act” at 42. Pienaar “Security of Communal Land Tenure” 2004 *THRHR* at 245.

⁴¹⁰ *White Paper* at xii.

⁴¹¹ Van der Walt “Towards a Theory of Rights in Property” 1995 *SAPL* 298 298-345; Mostert 2002 *SALJ* 400-428.

⁴¹² *White Paper* at 60.

Act. The *White Paper*⁴¹³ proposes that tenure reform must move towards the recognition of land rights and that the current system of permits to occupy should be abolished. A unitary non-racial system of land rights for all South African must be achieved through tenure reform. People who will be affected by tenure legislation “must” be allowed to decide on the most appropriate tenure system to be applicable to their exceptional circumstances. This provision is contained in the Communal Land Rights Act,⁴¹⁴ yet no indication is provided as to what the different tenure systems are and what the content of each tenure system is. This amounts to a choice by affected communities or individuals to either hold land communally with respect to the available resources or to award each household sole ownership of an allocated piece of land or a right in land, with the option to upgrade the land right into freehold at a later stage. A right in land indicates that it might be something less than ownership, a *fragmented right* not to be equated with ownership but which will still be protected in terms of the Communal Land Rights Act. This fragmented right could either be a right to use, enjoy, occupy or cultivate the land or a combination of these.

It is evident from these policy principles guiding tenure reform that the legislature and the drafters of the *White Paper* recognised that freehold ownership should not be the only choice in securing the land rights. Fragmented land rights as they are currently exercised should also receive the recognition and protection through the process of registration. However, this approach is not sufficiently obvious in previously promulgated legislation, although protection and recognition were awarded to certain categories of land rights in the Communal Property Associations Act (CPAA)⁴¹⁵ and the Extension of Security of Tenure Act (ESTA)⁴¹⁶ respectively.⁴¹⁷

⁴¹³ *White Paper* at 108.

⁴¹⁴ S 9 of the Communal Land Rights Act.

⁴¹⁵ 28 of 1996.

⁴¹⁶ 62 of 1997.

⁴¹⁷ Pienaar 2004 *THRHR* at 246-247.

According to Van der Walt it is exactly these policy choices relating to land reform that have been central to transformation in South Africa.⁴¹⁸ Leading South African academics such as Van der Walt,⁴¹⁹ Pienaar,⁴²⁰ Mostert,⁴²¹ and Cousins⁴²² are of the opinion that fragmented use-rights should receive greater explicit recognition in appropriate legislation and coupled with the registration of these rights. Van der Walt is of the opinion that policy decisions relating to land are often not only unclear but also inconsistent. Although this statement was made back in 1999, it is still very relevant today in relation to the Communal Land Rights Act. It is Van der Walt's contention that the policy choices relating to land reform in general have important and essential implications for both the efficacy of the process, as well as for the course and the effectiveness of "transformation in the legal, social, economic and political spheres in general."⁴²³ In the South African context of tenure reform, provision was made in the *White Paper* for freehold ownership as well as for the upgrading of insecure second-class black land rights.⁴²⁴

Previously only ownership and limited real rights were protected by their eligibility to be registered. This is largely due to the traditional civil-law hierarchy, concepts and institutions, underpinning the South African law of property.⁴²⁵ As such registered land title was the ultimate privilege on which the system of apartheid was built, as a result of political choices.⁴²⁶ The hierarchical civil-law property system operating in South Africa had the effect that black land rights were weak and insecure as opposed to ownership. This left black residents largely unprotected. The division between black land rights and white land rights was not only based on racial-political choices and

⁴¹⁸ Van der Walt "Property Rights and Hierarchies of Power: A Critical Evaluation of Land Reform Policy in South Africa" 1999 *Koers* 259-260.

⁴¹⁹ Van der Walt *Koers* 259-260.

⁴²⁰ Pienaar 2004 *THRHR* at 246-247.

⁴²¹ Mostert "The Diversification of Land Rights and Its Implications for a New Land Law in South Africa" in Cooke (ed) *Modern Studies In Property Law II* at 33. Mostert & Pienaar "Formalization of South African Communal Land Title" in *Modern Studies III* at 333.

⁴²² Cousins "Reforming Communal Land Tenure in South Africa" *ESR Review* (3) at 7-9.

⁴²³ Van der Walt 1999 *Koers* at 260.

⁴²⁴ Pienaar 2004 *THRHR* at 251-252.

⁴²⁵ Van der Walt 1999 *Koers* at 263.

⁴²⁶ Van der Walt 1999 *Koers* at 263.

decisions, but it was also strengthened by the traditional civil-law hierarchy of property rights.⁴²⁷ The tenure leg of the land reform programme therefore has to address the inequalities in land allocation and the various degrees in which ownership and mere rights were protected, but it will also have to “overcome the structural inequalities in land distribution that were built into this hierarchical system of land rights, as it appeared from the relative strength and weaknesses of white and black land rights and the unequal distribution of wealth and power supported by them.”⁴²⁸ The 1997 *White Paper on Land Policy* recognised that land rights awarded to blacks during the previous political dispensation urgently needed legal recognition and protection through registration. This was not evident in the initial Land Rights Bill or the much criticised 2003 Communal Land Rights Bill. It appeared that tenure legislation such as the Conversion of Certain Rights into Leasehold or Ownership Act,⁴²⁹ the Upgrading of Land Tenure Rights Act,⁴³⁰ the Land Reform (Labour Tenants) Act,⁴³¹ ESTA and the Communal Property Associations Act still favour the notion of ownership.⁴³² By doing this the current hierarchical structures that formed the basis of Apartheid are upheld.⁴³³ It is therefore of utter importance that the policy behind tenure reform should rather be in favour of the fragmentation or diversification of land rights. Fragmentation in the context of tenure reform implies the following: The traditional civil-law hierarchy of land rights should be abolished and should be replaced by creating legally strong and recognised land rights that can be registered.⁴³⁴ These newly created land rights should be able to accommodate certain and specific needs and requirements.

⁴²⁷ Van der Walt 1999 *Koers* at 263.

⁴²⁸ Van der Walt 1999 *Koers* at 264.

⁴²⁹ 81 of 1988.

⁴³⁰ 112 of 1991.

⁴³¹ 3 of 1996.

⁴³² Mostert “The Diversification of Land Rights and its Implications for a New Land Law in South Africa: An Appraisal Concentrating on the Transformation of the South African System of Registration” in Cooke (ed) *Modern Studies in Property Law II* 3-25.

⁴³³ Van der Walt 1999 *Koers* at 264.

⁴³⁴ Van der Walt 1999 *Koers* at 264. Pienaar 2004 THRHR at 251-253.

This titling or ownership-paradigm was favoured by the 2003 Communal Land Rights Bill, whereby land titles were to be issued to either communities or individuals. As was mentioned previously, apartheid land laws were promulgated to exclude blacks from becoming lawful owners of land in the country, and the basis for this exclusion was by way of issuing title deeds which awarded ownership of land to whites only. Ownership was upheld through the civil-law hierarchical paradigm. In terms of this, it meant that ownership was exclusive and was enforceable against anyone attempting to interfere with the rights and benefits flowing from it.⁴³⁵ In the South African law of property, ownership is often described as being a “mother right,” while limited real rights such as mortgage and servitudes are described as deriving from ownership.⁴³⁶

It has been argued that an effective land reform policy needs to move away from its traditional western ownership paradigm.⁴³⁷ If this is not done, a system based on ownership as the paradigmatic right, will necessarily have a hierarchy of stronger and weaker rights.⁴³⁸ Instead the land reform policy should move towards a system that will inevitably lead to the promotion and development of stronger use rights. A fragmented use-rights paradigm will also result in a variety of land rights, which will be incapable of being classified as stronger or weaker rights, since each right will now be recognised. These rights will also have legislative protection based on merit and the contents of each right. The acceptance of a use-rights paradigm will also be weaken or even restrict the scope and protection awarded to ownership and this, according to Van der Walt,⁴³⁹ might lead to the redistribution of wealth and power.⁴⁴⁰

⁴³⁵ Badenhorst et al *The Law of Property* at 93-96. Carey-Miller (with A Pope) *Land Title in South Africa* at 48-49.

⁴³⁶ Badenhorst et al *The Law of Property* at 94; Pienaar 2004 *THRHR* 251.

⁴³⁷ Van der Walt 1999 *Koers* at 264. Pienaar 2004 *THRHR* at 251-253.

⁴³⁸ Van der Walt 1999 *Koers* 267.

⁴³⁹ Van der Walt 1999 *Koers* 267.

⁴⁴⁰ Van der Walt 1999 *Koers* 267.

It is exactly at this point that De Soto⁴⁴¹ crosses swords with Van der Walt and Pienaar.⁴⁴² Van der Walt and Pienaar are in favour of a use-rights paradigm in order to achieve wealth and power, whereas De Soto opines that ownership as the opposing paradigm in third world countries such as South Africa is the way to achieve wealth and power. The aforementioned academics also feel that since the use-rights paradigm is incorporated in land reform policy, it will have to be incorporated in the promulgation of new laws attempting to achieve a greater degree of equal distribution of land. This is exactly what is done in the Communal Land Rights Act.

De Soto on the other hand is of the opinion that ownership should be awarded to those who are in beneficial occupation of land, but who have for many decades lacked secure title to that land. He argues that assets being held as “extra-legal property” need to be mobilized, since only formal legal property has the properties and functions that can lead to development and wealth distribution. This is done through fixing the economical potential of assets; by integrating dispersed information in one system that will be able to transcend the typically local operations of extra-legal assets; by making people accountable and last but not least by networking people and protecting their transactions.⁴⁴³ It is this kind of formal property, as they are held in the West that has led to capitalism and wealth. According to De Soto, the poor are in possession of “vast hectares of land in defective form.”⁴⁴⁴ The land is defective in that it is not “sufficiently” codified and fungible to have a broad range of applications, aside from its own geographic parameters.⁴⁴⁵ He therefore classifies these assets being held in defective form as “dead capital,” because they cannot be turned into liquid capital.⁴⁴⁶ The “dead capital” can neither be traded outside its narrow confines, nor can it be used as collateral for

⁴⁴¹ De Soto *The Mystery of Capital* at 33-37.

⁴⁴² Pienaar 2004 *THRHR* at 251.

⁴⁴³ De Soto *The Mystery of Capital* at 49.

⁴⁴⁴ De Soto *The Mystery of Capital* at 5.

⁴⁴⁵ De Soto *The Mystery of Capital* at 180.

⁴⁴⁶ De Soto *The Mystery of Capital* at 210.

productive investment.⁴⁴⁷ Despite third world governments' attempts to formalise their property laws, in order to make it more accessible for the poor, most citizens still cannot get access.⁴⁴⁸ This is the result of bad, cumbersome and over-bureaucratized legal and administrative systems, according to De Soto.⁴⁴⁹ New property law must therefore be in line with existing social contracts and legitimacy⁴⁵⁰ and capable of being codified.⁴⁵¹ Governments must create a social contract with holders of extra-legal property and capital, in order to achieve wealth. Only then, he argues, the globalization of capital, which has failed throughout the Third World and the former communist states, can become complete. This ownership-paradigm advocated by De Soto was attempted in Kenya. It failed dismally because of the distinct nature of African communal tenure, the flexibility of boundaries and the fact that land rights ingrained in African society were not taken into account.⁴⁵²

The said ownership-paradigm favoured by De Soto is based on a hierarchy of rights, whereas in the case of the fragmented use-rights paradigm no such hierarchy exists.⁴⁵³ In the latter instance this is because rights are recognised and protected in terms of legislation. In the case of the ownership-paradigm title and use almost always vests in one person. Although restrictions or limited real rights can exist in favour of other parties, once they lapse or fall away, ownership reverts to its full extent. In the case of limited real rights being awarded to another person in terms of a piece of land, this implies that ownership is the principal right and that other rights "derive from, depend upon and are weaker than ownership."⁴⁵⁴ This point also illustrates the hierarchy of power, in terms of which an owner's tenure security are recognised in law through the title it held. The security of the lesser rights is either because of their status and title as being limited real rights, or because they have no

⁴⁴⁷ De Soto *The Mystery of Capital* at 7.

⁴⁴⁸ De Soto *The Mystery of Capital* at 153.

⁴⁴⁹ De Soto *The Mystery of Capital* at 156.

⁴⁵⁰ De Soto *The Mystery of Capital* at 172.

⁴⁵¹ De Soto *The Mystery of Capital* at 57 and also at 158.

⁴⁵² Pienaar (2006) TSAR at 446-447

⁴⁵³ Van der Walt (1999) *Koers* at 268. Pienaar (2006) TSAR at 446-447.

⁴⁵⁴ Van der Walt (1999) *Koers* at 268.

legally defined title. The above discussion once again proves how the civil-law hierarchy of ownership will be upheld, if ownership should be retained as the ultimate paradigm in securing tenure.

Where tenure legislation is based on fragmented use rights, it necessarily implies that title and use will be separated most of the time and that the amount of security awarded to the use-rights is regulated by legislation.⁴⁵⁵ Since the use-rights are awarded and protected by legislation, they will be flexible in nature and in content. At the same time it will also be possible to create infinite new rights depending on the needs of the landless.⁴⁵⁶ This is exactly what is needed in the rural areas in South Africa, since there are hundreds of conflicting and overlapping land rights that need flexibility to secure each right according to its contents. In this way more rights will be created and secured at the same time.

Van der Walt and Pienaar⁴⁵⁷ opine that the above-mentioned fragmented use rights model is the most logical one for South Africa, given the diverse forms of existing land tenure rights. However the fragmented use rights model has inherent problems. The primary problem relates to the fact that title and land use are separated and that security are awarded by legislation only.⁴⁵⁸ The Land Reform (Labour Tenants) Act,⁴⁵⁹ the Interim Protection of Land Rights Act⁴⁶⁰ and the Extension of Security of Tenure Act⁴⁶¹ all follow this approach, where use rights are recognised and protected by legislative measures. These use rights can sometimes only be protected by way of a court order, arbitration or mediation, which in itself can be a time-consuming process. For the duration of a dispute, the property will be taken from the property market.

⁴⁵⁵ Van der Walt (1999) *Koers* 268-278; Pienaar (2002) *THRHR* 10.

⁴⁵⁶ Van der Walt (1999) *Koers* 268-278; Pienaar (2002) *THRHR* 10.

⁴⁵⁷ Pienaar "The Registration of Fragmented Use-Rights as a Development Tool in Rural Areas" 2000 *Constitution and Law IV: Developments in the Contemporary Constitutional State* at 110.

⁴⁵⁸ Pienaar "The Registration of Fragmented Use-Rights as a Development Tool in Rural Areas" 2000 *Constitution and Law IV: Developments in the Contemporary Constitutional State* at 110.

⁴⁵⁹ 3 of 1996.

⁴⁶⁰ 31 of 1996.

⁴⁶¹ 62 of 1996.

The objectives of land tenure reform should at all times be kept in mind. This relates for instance to the reduction of poverty, the promotion of economic growth and the establishment of a land management system supporting sustainable land-use patterns. Where a dispute relating to the legitimacy of a land right or use-rights exists in terms of the said legislation, the objectives of tenure reform will be achieved. Pienaar states that the main reason why these rights are insecure is that the rights conferred by legislation do not comply with the publicity principle.⁴⁶² The use rights is only certain once it is confirmed by a court order, arbitration, mediation or a mere agreement between the disputing parties. According to Pienaar “some kind of individualisation has to take place” in order for tenure security in communal areas to become a reality.⁴⁶³ This individualisation needs to be confirmed in the form of the registration of title, as legislation is insufficient to obtain security of tenure. In this instance Pienaar states that separating title and use often leads to insecurity of tenure. If the use rights of occupiers of communal land were not only protected by legislation, but also through registration, stronger security of tenure would be accomplished. In this way the use-rights of individuals and communities will become concrete and individualised by an applicable system of governance.⁴⁶⁴

Pienaar further highlights a more practical problem. He predicts that financial institutions will be less willing to provide loans against security of a use-right awarded by legislation only, since this right might be the object of future disputes. This will in effect lead to the State having to fund any potential development projects, by its already limited resources and inadequate budget.⁴⁶⁵ This will result in use rights still being regarded as weak and even as possible second-class rights. Financing must therefore not only come from the State but also from the private sector or maybe even the international community, in order to facilitate and encourage sustainable development in

⁴⁶² Pienaar “The Registration of Fragmented Use-Rights as a Development Tool in Rural Areas” 2000 *Constitution and Law IV: Developments in the Contemporary Constitutional State* at 110.

⁴⁶³ Pienaar “The Registration of Fragmented Use-Rights as a Development Tool in Rural Areas” (2000) *Constitution and Law IV: Developments in the Contemporary Constitutional State* at 110.

⁴⁶⁴ Pienaar “The Registration of Fragmented Use-Rights as a Development Tool in Rural Areas” (2000) *Constitution and Law IV: Developments in the Contemporary Constitutional State* at 110.

⁴⁶⁵ Hall & Lahiff “*Budgeting for Land Reform*” PLAAS Policy Brief No 5 (2005) 1-5.

rural areas.⁴⁶⁶ This in itself could be a result of use rights being awarded to occupiers and the fact that they are individualised and registered in the name of the lawful owner of the right.

Cousins⁴⁶⁷ agrees with Van der Walt⁴⁶⁸ and Pienaar⁴⁶⁹ to a certain extent. Tenure security will succeed by awarding legislative protection of fragmented use-rights.⁴⁷⁰ Cousins is however, not in favour of registering the fragmented use-rights (or new order rights as they are envisaged in the Communal Land Rights Act.). Cousins opine that the protection awarded to these rights in legislation is sufficient to secure tenure. He backs up his arguments by relying on lessons learned from Communal Property Associations in South Africa.⁴⁷¹ Since 1996 over 500 group titles have been issued to Communal Property Associations. Many are currently dysfunctional for a variety of reasons, for instance because the constitutions of these associations were too sophisticated for intended beneficiaries and because they lacked continued financial support from the relevant government bodies.⁴⁷²

As indicated above, the Communal Land Rights Act attempts to strike a compromise between the ownership-paradigm and a fragmented use-rights paradigm. At the same time it also adheres to the policy regarding tenure security as set out in the *White Paper*. The Department of Land Affairs however will have to conduct more research on the feasibility of this, especially with reference to other African countries such as Tanzania and Mozambique, where this compromise was applied with success.⁴⁷³ In these two countries securing tenure was also a lengthy and painstaking process, but according to Cousins, this compromise provided a much better option than titling. In

⁴⁶⁶ Pienaar (2004) *Stell LR* at 111.

⁴⁶⁷ Cousins (2002) *ESR Review* at 7-9.

⁴⁶⁸ Van der Walt (1999) *Koers* 268-278.

⁴⁶⁹ Pienaar (2002) *THRHR* at 10-15.

⁴⁷⁰ Cousins Submission made to the Portfolio Committee on Land Affairs on B 67D of the 2003 Communal Land Rights Bill.

⁴⁷¹ See 3 4 2 of the study for an exposition of the Communal Property Association Act.

⁴⁷² Cousins (2002) *ESR Review* at 7. Nonyana "The Shortcomings in the Delivery of Land Reform in South Africa" 2004 *LexisNexis Butterworths Property Law Digest* 12 14.

⁴⁷³ Cousins (2002) *ESR Review* at 7-9. Adams et al "Land Tenure and Economic Development in Rural South Africa" in *At the Crossroads* at 11-128.

Tanzania and Mozambique the use of communal land is recognised and protected. At the same time the communal land rights are statutorily awarded the status of property rights, without conversion into private ownership rights as they are known in the West. In these two countries it is also recognised that the land should vest in the people who have been occupying it for centuries. Right-holders are enabled by a general applicable law to define and record their own land rights on a local level. Government however still supports and facilitates the recording of the rights at local level, to maintain the continuing different levels of social organisation. Although the South African Communal Land Rights Act shows some similarities to security of tenure as applied in the said two countries, their tenure reform mechanisms are simplified and outcomes-based.

7 3 Assessment

It is evident from this discussion that the Legislature tried to give effect to the *White Paper on South Africa's Land Policy*. It is also clear that the securing of *de facto* weak and insecure rights in land, into *de iure* secure ones, is a priority of the Department of Land Affairs. The compromise between titling and fragmentation is a useful tool in this regard, although the content of new order rights will still have to be addressed sufficiently in the regulations to the Communal Land Rights Act. This chapter aimed to provide the reader with an understanding as to the efforts to secure current insecure land tenure rights.

CHAPTER 8: CONSTITUTIONAL ISSUES

8 1 Background

The constitutionality of the Communal Land Rights Act has come under scrutiny in a pending lawsuit involving the Legal Resources Centre,⁴⁷⁴ acting on behalf of the affected communities and the Department of Land Affairs.⁴⁷⁵

The Legal Resources Centre represents four communities in their bid to have the Communal Land Rights Act declared invalid. The communities concerned are the community living in Dixie village in Limpopo province, the Mayaeyane community which falls within the broader Makgobistad area in the North West Province, and the Makuleke community, which is located in the far north-east of South Africa near the Kruger National Park.⁴⁷⁶ The Kalkfontein community is the first applicant in this constitutional challenge.⁴⁷⁷ The LRC is of the opinion that the Communal Land Rights Act gives too wide powers to the Minister of Land Affairs which in itself might prejudice affected communities, since the communities were not allowed to make any submissions with regard to the last version of the ultimate Act.⁴⁷⁸

The focus in this chapter is on the pivotal provisions of section 18 of the Act, which lie at the heart of the constitutionality debate. Section 18 grants the Minister of Land Affairs⁴⁷⁹ broad discretionary powers in the award of land rights to rural communities. The content of these provisions will be explained

⁴⁷⁴ Hereafter referred to as the LRC. *Tongoane and others v The Minister of Agriculture and Land Affairs and others* (TPD 11678/06, pending).

⁴⁷⁵ Marcus Submission made on behalf of the *Human Rights Commission and the Legal Resources Centre: The Communal Land Rights Bill* 20 October 2003.

⁴⁷⁶ Claassens & Gilfillan "The Kalkfontein Land Purchases: Eighty Years On and Still Struggling for Ownership" in Claassens and Cousins (eds) *Land, Power and Custom* 295 297-313.

⁴⁷⁷ Claassens & Hathorn "Stealing Restitution and Selling Land Allocations: Dixie, Mayaeyane and Makuleke" in Claassens and Cousins (eds) *Land, Power and Custom* 315 316.

⁴⁷⁸ Claassens "Community Views on the Communal Land Rights Bill" 2003 *Programme for Land and Agrarian Reform Research Report* 15 1 4-38; Cousins & Claassens "*Communal Tenure 'From Above' and 'From Below': Land Rights, Authority and Livelihoods in Rural South Africa*" (2003) Unpublished paper read at an international conference on *Competing Jurisdictions: Settling Land Claims in Africa* hosted by the Vrije Universiteit, Amsterdam, 2003-10-24.

⁴⁷⁹ Or his or her delegates

against the backdrop of the constitutional mandate for the Communal Land Rights Act, and its goals in relation to the system to be established in terms of the Act. The basis upon which the constitutionality of the Communal Land Rights Act is contested will then be considered.

8 2 Summary of Different Communities' Constitutional Challenges

The constitutional challenge is brought by the communities of Kalkfontein, Dixie, Mayaeyane and Maluleke.

8 2 1 The Kalkfontein Community

The forbearers of the Kalkfontein community clubbed together to buy rural land north of Pretoria.⁴⁸⁰ In 1979 the National Party government created a tribal authority in constructing the KwaNdebele homeland.⁴⁸¹ The three privately owned Kalkfontein farms became part of the area over which the tribal authority gained jurisdiction. The said community was not a heterogeneous group of people. They were ethnically mixed.⁴⁸² The tribal authority was fiercely resisted by the descendants of the initial Kalkfontein purchasers and as a result a commission of enquiry was instituted. As a result of the enquiry the newly "created" chief was deposed and replaced and his successor's powers were curtailed by a court order. However, despite the recommendations of the commission, the tribal authority was never disbanded. A court order of fifteen years ago which also provided for the disbanding of the tribal authority and the transfer title to the Kalkfontein community as owners from the Minister of Land Affairs, has been adhered to. The Minister therefore still holds the land in trust on behalf of the Kalkfontein community.⁴⁸³ Claassens and Gilfillan state that the opposition of this particular community to the "unilateral actions of an imposed

⁴⁸⁰ The first of the Kalkfontein farms were bought in 1923, this farm is known as Kalkfontein A. In 1924 another diverse ethnic group bought Kalkfontein B. in 1925, the second group also bought the last Kalkfontein farm, known as Portion C.

⁴⁸¹ Claassens & Gilfillan "The Kalkfontein Land Purchases" in *Land, Power and Custom* at 297.

⁴⁸² Claassens & Gilfillan "The Kalkfontein Land Purchases" in *Land, Power and Custom* at 295.

⁴⁸³ Claassens & Gilfillan "The Kalkfontein Land Purchases" in *Land, Power and Custom* at 295-302.

chief does not imply a rejection of indigenous values or institutions.”⁴⁸⁴ This is evident because for over eighty years this community has chosen to exercise their ownership rights through familiar and valued indigenous systems. These practices have supported accountability in these areas and have led to flexible responses for change, especially from women.

The Kalkfontein community’s constitutional challenge relates to the fact that the Communal Land Rights Act, together with the Traditional Leadership and Governance Framework Act,⁴⁸⁵ entrench the status and power of disputed tribal authorities. The Kalkfontein communities are therefore afraid that the Communal Land Rights Act may result in the opposed tribal authority being vested with the power to allocate land rights and to represent the residents as the “owner” of the communal land, if they are reconstituted as a traditional council, as required by the Act. According to the Kalkfontein community, these were the very powers that were used and abused by the tribal authority once created, to undermine the ownership rights of the Kalkfontein residents. According to Claassens and Gilfillan the Kalkfontein community fears that the Communal Land Rights Act will lead to a reversal of their “hard-fought efforts to contain abuse of power by the tribal authority, and that the Act jeopardises their ongoing efforts to exercise their ownership rights independently.”⁴⁸⁶

8 2 2 The Dixie Community

In the case of the Dixie community the focus is on the decision-making power at village level relative to the power of the larger Mnisi Traditional Council to make unilateral decisions about the land used by the community. The Dixie community was almost evicted as a result of a development of a tourism lodge. Court papers in a land restitution dispute involving the same land exposed and

⁴⁸⁴ Claassens & Gilfillan “The Kalkfontein Land Purchases” in *Land, Power and Custom* at 296.

⁴⁸⁵ 41 of 2003.

⁴⁸⁶ Claassens & Gilfillan “The Kalkfontein Land Purchases” in *Land, Power and Custom* at 296. The first applicant, Stephen Tongoane is acting on behalf of the Kalkfontein Community Trust.

proved the traditional councils underhand dealings with unscrupulous investors in anticipation of a restitution award.⁴⁸⁷

In April 2001 residents of Dixie heard for the first time of a 99-year lease agreement between Curato Investments and the Mnisi Tribal Authority. This agreement was concluded to develop a tourism lodge on part of the Dixie land. This would result in the relocation of some of the residents. Moreover their access to a river, used for domestic purposes and watering livestock, would be limited.⁴⁸⁸ Reckson Ntimane, the Dixie community leader repeatedly requested information about payment and compensation arrangements and he also wanted to know why those affected have not been consulted. A community meeting was arranged by the Mnisi Tribal Authority, and when Mr Ntimane posed these questions again, he was arrested and briefly incarcerated.⁴⁸⁹ The development of the tourism lodge on part of the Dixie land later appeared to have been supported by the provincial Department of Land Affairs as various meetings had already taken place between the department and the Mnisi Tribal Authority, but without the participation of the Dixie community.

The Dixie community approached the Legal Resources Centre, who on their behalf wrote to the Minister of Land Affairs. This was done since the community knew that as long as the land remained registered as “state-owned former SADT land,” any transactions pertaining to such land will be invalid unless it is signed off by the Minister of Land Affairs. After receiving this letter, the Department of Land Affairs replied in writing and admitted that no consultation had taken place with the affected Dixie community. Based on this, the department agreed to arrange a meeting between the Chief Mnisi, the Mnisi Tribal Authority and the Dixie community.

⁴⁸⁷ Claassens & Hathorn “Stealing Restitution and Selling Land Allocations” in *Land, Power and Custom* at 316.

⁴⁸⁸ Reckson Ntimane is the community leader of the Dixie villagers and is also the Dixie applicant in the pending constitutional challenge.

⁴⁸⁹ The South African Police Services was at the meeting at the request of an official of the provincial Department of Land Affairs, Joas Mogashoa.

This meeting was never scheduled. Instead the village headmen and two other Dixie residents were summoned to the offices of the Mnisi tribal authority. Here they were summarily informed of the long term lease agreement, concluded with Curato Investments in respect of the lodge. Since the information was presented as a *fait accompli*, the Dixie community applied for an urgent interdict against Curato Investments, the Mnisi Tribal Authority and the Department of Land Affairs. The lawyers of the investors then replied and informed the community that the lease agreement had not been signed and as a result of their experience with the community, they want nothing further to do with the community.⁴⁹⁰

The Dixie community is challenging the Communal Land Rights Act because of their experience with the traditional authority. According to Reckson Ntimane, their constitutional challenge relates to the powers allocated to the land administration committee. He states that the Dixie villagers would not have been able to stop the deal if the Mnisi Tribal Authority had the powers of a land administration committee or been able to represent the community “as the owner of the land” as proposed by the Communal Land Rights Act. Ntimane also contended that the powers awarded by the Act to traditional councils acting as a land administration committee will undermine existing decentralised participatory decision-making processes in the villages. Currently decisions in the Dixie community are taken at village meetings convened by the headmen in consultation with the development forum which included the water committee, the policing forum, the school governing body and representatives of women and the youth.⁴⁹¹

The Dixie villagers furthermore question the fact that they are part of the Mnisi Tribal Authority, especially since the Dixie farm is not among the list of farms referred to in the 1962 *Government Gazette Notice*, which established the Mnisi Tribal Authority. This contention of the Dixie community was strongly opposed

⁴⁹⁰ Claassens & Hathorn “Stealing Restitution and Selling Land Allocations” in *Land, Power and Custom* at 321-322.

⁴⁹¹ Claassens & Hathorn “Stealing Restitution and Selling Land Allocations” in *Land, Power and Custom* at 322-323.

by Chief Mnisi. In itself the jurisdiction of the Mnisi Tribal Authority over Dixie is legally tenuous.

8 2 3 The Mayaeyane Area near Makgobistad

Unlike the Dixie case, the applicants from this area are not questioning the legitimacy of the tribal council or that the community falls within its boundaries.⁴⁹² What they are opposing is the fact that they have inherited land rights in a relatively isolated agricultural area called Mayaeyane, which is far away from Makgobistad. The young chief of Makgobistad appointed his uncle, as the unofficial headmen of Mayaeyane. The Mayaeyane community is also accusing this unofficial headman for spearheading the development of a housing project in the area without consulting them. Mayaeyane is surrounded by a previously white-owned farm, which has recently been awarded to them in settlement of a restitution claim. The broader community has not been informed about any developments regarding the settlement of the restitution claim and are opposing the Restitution Commission's requirement that the land be transferred to a legal entity such as a trust or a communal property association. The traditional council in this case proposed that title of the land must be transferred to the chief or the traditional council. This proposal is strongly contested by the Mayaeyane community.

In the Mayaeyane case, the applicants are challenging the right of the chief and his uncle to make unilateral decisions relating to land that have been in possession of Mayaeyane families from time immemorial. They are also challenging the chief's right to appoint a headman without consulting them. In essence the Mayaeyane applicants fear that the Communal Land Rights Act and the Traditional Leadership and Governance Framework Act will exacerbate the tendency towards high-handed and self-serving behaviour by traditional leaders.⁴⁹³ In this instance, the Constitutional Court will have to shed some light

⁴⁹² Claassens & Hathorn "Stealing Restitution and Selling Land Allocations" in *Land, Power and Custom* at 327-329

⁴⁹³ Claassens & Hathorn "Stealing Restitution and Selling Land Allocations" in *Land, Power and Custom* at 327-328.

on what the status of family-held land rights is relative to the power of chiefs over land. The sale of land acquired in terms of successful restitution claims will have to be properly sanctioned and the Constitutional Court will have to take a firm stance on this.

8 2 4 The Makuleke Community

The Makuleke community was forcibly removed from the land that they had historically occupied at Pafuri and was resettled at Ntlaveni. The Pafuri land was later incorporated into the Kruger National Park. The Makuleke community instituted a successful restitution claim in 1998 for this land based on an agreement that the land would be transferred to their CPA to be used for eco-tourism development.⁴⁹⁴ The community will remain resident in the resettlement area of Ntlaveni, administered as an SADT “betterment” scheme.⁴⁹⁵ Ntlaveni falls within the jurisdictional boundaries of the Mhinga Tribal Authority as created in terms of the Bantu Authorities Act.⁴⁹⁶ The restitution claim was opposed by the new chief Cydrick, but was unsuccessful.

The Makuleke community is challenging the Communal Land Rights Act based on concerns that this Act together with the Traditional Leadership and Governance Framework Act, would enable Mhinga, to undo their successful restitution claim. According to them, title to Pafuri has already been transferred to the Makuleke Communal Property Association, and they have entered into eco-tourism ventures with investment partners.⁴⁹⁷ These ventures are respectively managed by the Makuleke Development Trust and the Makuleke

⁴⁹⁴ *Makuleke Community v Pafuri Area of the Kruger National Park and Environs, Soutpansberg District, Limpopo Province* 1998 JOL 4264 (LCC) at para 7.

⁴⁹⁵ This betterment scheme was laid out in three closer settlement residential blocks with designated areas of arable land and strictly controlled grazing camps. Claassens & Hathorn “Stealing Land Restitution and Selling Land Allocation” in *Land, Power and Custom* at 334-349.

⁴⁹⁶ 68 of 1951. According to the Makuleke community the Mhinga chiefdom have always asserted hegemony over them, but they were able to establish and maintain an independent and separate identity, until they were forcibly removed from the Pafuri land. They are also convinced that their removal are a result of the previous chief, Adolf Mhinga and that he used the Bantustan political context to enhance his land and revenue base. Claassens & Hathorn “Stealing Land Restitution and Selling Land Allocation” in *Land, Power and Custom* at 336-337.

⁴⁹⁷ Claassens & Hathorn “Stealing Land Restitution and Selling Land Allocation” in *Land, Power and Custom* at 336-337.

Empowerment Trust. Since section 5 of the Communal Land Rights Act, enables the Minister to endorse title deeds of Communal Property Association's and trusts to communities administered by traditional councils acting as a land administration committee, this may render their tenure insecure all over again.⁴⁹⁸

The Makuleke community also contests their forced removal to an area which effectively placed them within the jurisdictional boundaries of the Mhinga Tribal Authority. Their efforts paid off when the Ralushai Commission recommended that the separate status of the Makuleke community be restored. This was however to no avail. In the current constitutional challenge this restoration of the Makuleke as a separate community, not falling under the jurisdictional boundaries of the Mhinga Tribal Authority, will be vital. The answering affidavits of the Mhinga Tribal Authority reiterate this, as it underlines the validity of the community's concerns.

8 2 5 Assessment of the Claim

From the above discussion it is clear that the Communal Land Rights Act is contested because of fears that traditional leaders will abuse their powers and undermine the land rights of women in the communities. The arguments of the appellants are interesting, but do not place enough emphasis on the failure of the Department of Land Affairs to give effect to the constitutional guarantee as entrenched in section 25(6) and (9) of the Constitution. Emphasis should also have been placed on the failure of government to provide more effective guidance in meeting the said constitutional objectives. These two grounds will subsequently be analysed and discussed to show how effective it could have been applied in the constitutional challenge of the Communal Land Rights Act.

⁴⁹⁸ Claassens & Hathorn "Stealing Land Restitution and Selling Land Allocation" in *Land, Power and Custom* at 336-337.

8 3 Grounds for Constitutional Evaluation

Grounds for contesting the constitutionality of the Communal Land Rights Act have been proposed by various institutions, including the Commission on Gender Equality (CGE),⁴⁹⁹ the Programme for Land and Agrarian Studies (PLAAS) in co-operation with the National Land Committee (NLC) and the South African Human Rights Commission (SAHRC).⁵⁰⁰

For purposes of our discussion, the main objections against the Act may be classified as follows: First, the Communal Land Rights Act fails to give effect to the underlying constitutional right entrenched in section 25(6) and (9) and to determine the extent and nature of the right. Secondly, the Communal Land Rights Act fails to give constitutionally consistent guidance in the process of decision-making espoused by the Act. These contentions are analysed and evaluated in this part.

8 3 1 Failure to Give Effect to the Underlying Constitutional Right Entrenched in Section 25(6) and (9)

In respect of the first mentioned category of objections, section 25(6) and (9) of the Constitution obliges Parliament to adopt legislation to determine the extent to which a person or community will be entitled to legally secure tenure or to comparable redress. This point was also confirmed in *Dawood and another v Minister of Home Affairs and Another; Shalabi and another v Minister of Home Affairs and Another*.⁵⁰¹ However, section 18(3) of the Communal Land Rights Act grants extensive discretionary powers to the Minister to give effect to this task. If the Minister decides to convert old-order rights into new-order rights, he or she may determine what the content and extent of the newly awarded right or rights will be, or cancel them, whatever the case may be. The Minister's discretion is even extended as far as it affects a decision on whether or not

⁴⁹⁹ Budlender *Submission made to the Commission to Gender Equality on behalf of the Legal Resources Centre* November 2003, also available at <http://www.uwc.ac/plaas>.

⁵⁰⁰ Marcus *Submission made to the Human Rights Commission: The Communal Land Rights Bill* 20 October 2003, also available at <http://www.uwc.ac.za/plaas>.

⁵⁰¹ 2000 (3) SA 936 (CC).

rights may be made legally secure at all. In addition, where comparable redress to a holder of an old order right is envisaged, the content and nature thereof is also in the discretion of the Minister.⁵⁰²

Marcus is of the opinion that the Communal Land Rights Act does not give effect to the basic requirement of section 25(6) of the Constitution.⁵⁰³ In fact, both he and Budlender⁵⁰⁴ argue that the Communal Land Rights Act does not confer any entitlement to secure tenure or comparable redress on the intended beneficiaries. The Act does also not determine or provide the extent to which tenure is to be made legally secure or the extent to which comparable redress should be awarded.⁵⁰⁵ The main points of consideration in support of this argument may be summarized as follows: Whether a person is entitled to legally secure tenure, and the extent of such an entitlement remains entirely within the Minister's discretion. Despite the fact that section 25(6) of the Constitution confers a constitutional right on people whose tenure is insecure, the Act provides that the effect that may be given to that right is entirely within the Minister's discretion. In effect, the Communal Land Rights Act reduces a constitutionally entrenched right to a "nebulous something" dependent on the goodwill and/or convictions of the Minister. Should the reasoning of O'Regan J in *Dawood* be applied to the matter at hand, it would amount to the following, namely where an administrative discretion is given to an official by law, and that discretion might affect constitutional rights of a person, the law must also provide instructions to that official as to the manner in which the discretion must be exercised. This is to ensure that the discretion does indeed achieve the realization of the concerned rights.⁵⁰⁶

⁵⁰² S 18(3)(d)(iii)(bb) of the Communal Land Rights Act.

⁵⁰³ Marcus *Submission made to the Human Rights Commission on the 2003 Communal Land Rights Bill* at 5.

⁵⁰⁴ Budlender *Submission made to the Commission for Gender Equality on behalf of the Legal Resources Centre* on the 2003 Communal Land Rights Bill at par 31.

⁵⁰⁵ S 18(3)(d)(iii)(bb) of the Communal Land Rights Act.

⁵⁰⁶ *Dawood* at par 48

8 3 2 Failure to Provide Guidance in Meeting the Constitutional Objectives of the Communal Land Rights Act

The second ground for contesting the validity of the Communal Land Rights Act is the fact that the Act makes the realization of constitutional rights subject to the exercise of official discretion. This is done in a manner that does not give adequate guidance, in constitutional terms, to officials as to how they should exercise that discretion. In *Janse van Rensburg v Minister of Trade and Industry*⁵⁰⁷ the Constitutional Court confirms this notion of constitutionally consistent guidance, by providing in clear terms that “the constitutional obligation on the Legislature to promote, protect and fulfill the rights entrenched in the Bill of Rights entails that where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised.” In *Janse van Rensburg* the Constitutional Court confirmed what has already been said in the *Dawood and Shalabi*-case⁵⁰⁸ namely that laws should provide clear guidelines when constitutional rights are concerned and that constitutional right should not be dependent on the discretion of a Minister or a competent state functionary. In *Janse van Rensburg* Chaskalson CJ eloquently states that it is in the public interest that there should be certainty about the constitutionality of all legislation. Where no guidelines exist in leading the discretion of Ministers where constitutional rights are concerned, the law will not pass the test of constitutionality. A constitutional right cannot be dependent on Ministerial discretion. If this were allowed, the consequences would be disastrous. In the case of the Communal Land Rights

⁵⁰⁷ 2001 (1) SA 29 (CC) at par 25. *Janse van Rensburg v Minister of Trade and Industry* deals with the section 8(5)(a) of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988. Section 8(5)(a)(i) of the Act empowers the Minister to (i) stay or prevent any unfair business practice, for a period not exceeding six months while an investigation is being undertaken into the alleged unfair business practice. This stay or prevention of unfair business practice by the Minister could only take place on the recommendation of the Consumer Affairs Committee. The Committee could also recommend (ii) the attachment of any money or property relating to the investigation. Both (i) and (ii) could be effected by way of a notice to the parties involved. According to a High Court section 8(5)(a) violated ss 22, 25 and 33 of the 1996 Constitution and therefore it was unconstitutional. In confirming the High Court decision the CC confirmed that the ministerial discretion of the Minister of Trade and Industry in terms of section 8(5)(a)(i) of the Act “could be fatal” to businesses. Chaskalson CJ also held in par 25 that the powers given to the Minister in terms of section 8(5)(a) were “sweeping and drastic,” and the Legislature had failed to in providing sufficient guidance in exercising the discretion. Although Chaskalson CJ considered the interim guidelines he concluded that the measures were never intended to be a guide to the Legislature in considering the remedial legislation and neither should it be used as precedents.

⁵⁰⁸ See *Janse van Rensburg v Minister of Trade and Industry* paras 42-48 in this regard.

Act, the impoverished rural dwellers who have been in urgent need of tenure security for decades will be the ones suffering detriment.

Section 14(2) lists those issues which must be attended to by the land rights enquirer submitting a report to the Minister, on the basis of which the Minister then makes the determination envisaged in terms of section 18(1) and (4) of the Act. Although the list of matters to be considered are already rather long, thus making the process prone to lengthy delays, critically important factors have been omitted. The need to give effect to the constitutional right to legally secure tenure or comparable redress is not mentioned expressly, but may be read into the list of requirements due to the important provision in section 4 of the Act. However, if the list is extended further through a process of cross-reading, the factors the Minister must take into account when making a decision are rendered even more open-ended than it already is. In view of the fact that the law is supposed to instruct officials to exercise their administrative discretion which may affect the constitutional rights of individuals in a manner that achieves the realization of the rights concerned,⁵⁰⁹ this omission might lead to inconsistencies in decision-making. Although judicial review of the Minister's decision is possible, it is no substitute for a constitutionally enforceable right.⁵¹⁰

The abovementioned arguments have merit for contesting the constitutional validity of the Act. Our judiciary has already had the opportunity to consider some of these aspects in different contexts.

8 3 3 1 First Contention: Meeting the Objectives of Section 25(6) and (9) of the Constitution

With regard to the contention that the Communal Land Rights Act does not give effect to the constitutional right underlying section 25(6) read with (9) of the Bill of Rights, the Constitutional Court's dictum in *S v Mbatha; S v Prinsloo*⁵¹¹ is

⁵⁰⁹ See para 46-48, 50 and 54-55 of the Dawood-case on this issue, as well as 2000(3) SA 963 (CC) and 2000(8) BCLR 837 (CC). The judgment in the Dawood-case was delivered by Justice Kate O'Regan and was also unanimous.

⁵¹⁰ This was held in *Bel Porto School Governing Body and Others v Premier, Western Cape and Another* 2002 (3) SA 265 at para 83- 90.

⁵¹¹ 1996 (2) SA 464 (CC) at para 23. These two cases dealt with a reverse onus in the Arms and Ammunition Act 75 of 1969.

important. There it was held that constitutionally entrenched rights cannot be dependent upon the exercise of discretion.⁵¹² This case involved a reverse onus in the Arms and Ammunition Act.⁵¹³ The applicants in both cases challenged the constitutionality of section 40(1) the Arms and Ammunition Act. This section contained a presumption to assist the state to prove unlawful possession of arms and ammunition. The presumption shifted the burden of proof from the State to the accused. The Constitutional Court held that this presumption infringed the right of an accused to be presumed innocent in terms of section 25(3)(c) of the Interim Constitution.⁵¹⁴ The Constitutional Court further held that the presumption could easily lead to the conviction of innocent people. In particular, it was stated that the rights of accused persons “are enshrined in the Constitution *and do not depend on the discretion* of the police or the Attorney-General to prosecute only in cases where the accused are in fact guilty.”⁵¹⁵

Upon more or less the same considerations, it may be argued that the Communal Land Rights Act is inconsistent with the Constitution. It seeks to transform a constitutionally guaranteed right into a discretionary benefit. The granting of such a benefit is, on the basis of section 18 of the Communal Land Rights Act, entirely subject to the discretion of the Minister.⁵¹⁶ As such, it stands in direct contrast with section 25(6), which determines that legislation, and legislation alone, can determine the extent of the rights to legally secure tenure or comparable redress.⁵¹⁷

⁵¹² See also *S v Zuma* 1995 (2) SA 642 (CC) at para 28 where the Constitutional Court made reference to the exercise of a discretion in the presumption of innocence.

⁵¹³ 75 of 1969.

⁵¹⁴ 200 of 1993.

⁵¹⁵ *S v Mbatha* at par 23.

⁵¹⁶ Legal Resources Centre *Submission to the Portfolio Committee for Land and Agriculture* on the Communal Land Rights Bill [B67-2003] 10 Nov 2003 at 5. Also available at <http://www.uwc.ac.za/PLAAS>. Last visited on 2009-29-09.

⁵¹⁷ PLAAS and the National Land Committee *Submission to the Portfolio Committee for Land and Agriculture* on the Communal Land Rights Bill, 10 Nov 2003. Also available at online <http://www.uwc.ac.za/PLAAS>. Last visited on 2009-29-09.

In addition, the provisions dealing with comparable redress in the current Act give no indication of the factors or criteria to be considered in determining who will be entitled to comparable redress and to what extent. Section 18(3)(d)(iii) of the Act merely provides for conversion of so-called “old order rights” into either ownership or comparable new order rights, and that the Minister must determine the nature and extent of such rights. Apart from the fact that this is both vague and insufficient, it leaves the Minister to his or her own devices in deciding upon conversion, and the public in the dark as to the reasoning and processes behind such a decision-making effort.

A further objection may be levelled at the ambiguity resulting from the ministerial discretion, based on a comparison between the restitution clause and the tenure security clause of the Constitution. According to Marcus, the structure of section 25(7), which deals with restitution, is similar to section 25(6) of the Constitution. However, section 25(7) confers an entitlement to restitution or to comparable redress on the class of people who qualify for it, to the extent provided by an Act of Parliament, which is the Restitution of Land Rights Act.⁵¹⁸ Section 2 of the Restitution Act sets out the circumstances under which people may be entitled to restitution of a right in land. It describes the extent of that right, the manner in which the right is to be exercised and how it is to be determined whether a particular individual falls within the class of persons who hold these rights.⁵¹⁹

By contrast, the Communal Land Rights Act does not set out any method for objectively determining whether an individual falls within the class of person who are to receive secure tenure or comparable redress, or even the extent of that tenure or redress. In fact, from the types of rights affected by the Communal Land Rights Act, it is evident that the Act caters for various types of “communal land.” In general, “communal land” is understood to be land occupied or used by a community or members thereof subject to the rules and

⁵¹⁸ 22 of 1994.

⁵¹⁹ *Dulabh v Department of Land Affairs* 1997 (4) SA 1108 (LCC); *Richtersveld Community v Alexkor Ltd* 2001 (3) SA1293 (LCC); *Chief Nchalbeleng v Chief Phasa* 1998 (3) SA 578 (LCC) and also *Abrams and Another v Alie and Another* 2004 (4) SA 537 SCA.

customs of that community. Many of the types of “communal land” catered for in the Act relate to pre-1991 land-control forms. These types of land can be described as “classic” communal areas.⁵²⁰ However, the Communal Land Rights Act also goes beyond addressing the pre-1991 land regime, by being made explicitly applicable to “beneficiaries of communal land or land tenure rights in terms of other land-reform laws” and by catering for a number of “new” categories of communal land. It incorporates “land acquired by or for a community whether registered or not” and applies to “any other land, including land which provides equitable access to land to a community as contemplated in section 25(5) of the Constitution.” It hence apparently applies for instance also to land held by established communal property associations in terms of the Communal Property Associations Act (CPAA), to the extent to which the Minister may determine.

Even the scope of the Communal Land Rights Act is therefore apparently intentionally formulated vaguely, to leave room for treatment of the many diverse types of communal rights that might need protection. The disadvantage of this approach is that it perpetuates the already broad discretionary powers of the Minister. Hence most matters are left to the discretion of the Minister, thus propagating patent disregard for the basic requirements of section 25(6) of the Constitution.

8 3 3 2 Second Contention: Failure to Provide Consistent Guidance in Decision-Making

With regard to the second contention mentioned above, i.e. the failure of the Communal Land Rights Act to provide constitutionally consistent guidance to decision-makers, some judicial authority already exists upon which to argue against the constitutionality of the Communal Land Rights Act. In *Dawood and Another v Minister of Home Affairs and Another*; *Shalabi and Another v Minister*

⁵²⁰ These include (i) state land which is beneficially occupied and at any time vested in the governments of the former self-governing territories or national states (ii) undisposed state land that vested in the SA Development Trust; (iii) land that was listed in the Schedule to the Black Land Act before it was repealed; (iv) land listed as “released areas” under the Development Trust and Land Act; and (v) land subject to the KwaZulu-Natal Ingonyama Trust.

of *Home Affairs and Another*,⁵²¹ the Constitutional Court was expected to pronounce on a similar argument, in a situation where a statute afforded an administrative official broad discretionary powers. The discretion in this context vested in officials from the Department of Home Affairs,⁵²² who had to decide on the award of residence permits on a permanent or temporary basis. This discretion, it was argued, indirectly affected the right to family life of the relevant permit holder from her home country. This would effectively remove her from her family who was resident in South Africa.⁵²³ Hence it was argued that the discretion of the officials in relation to the issuing of residence permits was potentially detrimental to the applicant's constitutional rights.

Commenting upon the impact of such statutorily conferred discretionary powers on constitutional rights, the Constitutional Court distinguished, in an *obiter dictum*, between requiring a court or tribunal in exercising a discretion to interpret legislation in a manner that is consistent with the Constitution, and placing a broad discretion to the same effect on an official.⁵²⁴ Whereas legislative interpretation is one of the main functions of the judiciary, an administrative official may be untrained in law and in constitutional interpretation.⁵²⁵ It would therefore be unfair to assume that administrative officials can be expected to exercise a discretion conferred on them in a manner consistent with the Bill of Rights.⁵²⁶ Since officials are extremely busy and it is often expected of them to respond quickly and effectively to the many requests and applications for social grants or residential permits (temporary or permanent), the nature of their work does not always allow them to reflect carefully on the scope of constitutional rights or the circumstances in which a limitation of such rights would be justifiable.⁵²⁷

⁵²¹ 2000 (3) SA 936 (CC); 2000 8) BCLR 337 (CC) at par 46.

⁵²² *Dawood* at par 5. The Dawoods contested section 25(9)(b) of the Aliens Control Act 96 of 1991.

⁵²³ *Dawood* par 5.

⁵²⁴ *Dawood* at par 46.

⁵²⁵ *Dawood* at par 46.

⁵²⁶ *Dawood* at par 46.

⁵²⁷ *Dawood* at par 46.

Accordingly, it is necessary in the eyes of the judiciary that sufficient guidelines be provided in legislation where administrative officials are expected to exercise statutorily conferred discretions. The Constitutional Court supported this view by stating that “it is an important principle of the rule of law that rules be stated in a clear and accessible manner.”⁵²⁸ It is because of this principle that section 36 of the Constitution requires that limitations of rights may be justifiable, only if they are authorized by law of general application.⁵²⁹ Therefore if broad discretionary powers contain no constraints, affected people will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. In essence, therefore, the rule-of-law or constitutional-state principle must ensure legal certainty, also in the context of discretionary powers to be exercised by administrative officials.

In the same vein as the argument supported in the *Dawood* case, the discretionary powers of the Minister and his/her delegates in terms of the Communal Land Rights Act are too vague and broad to adhere to the fundamental constitutional principle of the rule of law / constitutional state.⁵³⁰ As indicated, the Communal Land Rights Act does not give adequate guidance to decision-makers to exercise their powers in a manner that would protect the constitutional rights of the affected people. A wide range of factors must be taken into account when the Minister (or his or her delegate) makes his or her decision in awarding ownership of land or a so-called new order right.⁵³¹ Yet, as indicated, these factors are still very open-ended in nature and this might lead to inconsistencies in the decision-making process.

8 4 Assessment

On the basis of the considerations discussed, the challenges against the constitutionality of the ministerial discretion and the lack of adequate guidelines

⁵²⁸ *Dawood* at para 47-49.

⁵²⁹ *Dawood* at par 47-49.

⁵³⁰ Sec 1 (c).

⁵³¹ See Chapter 7 of this study.

in the Communal Land Rights Act indeed bear merit. On the basis of the *Mbatha* dictum relating to the broad discretionary powers awarded to administrative officials, the Constitutional Court may well issue an order to the effect that the legislature should redraft the relevant sections of the Communal Land Rights Act. *Mbatha* further seems to imply that the constitutional rights of vulnerable sections of society necessarily outweigh the capacity of State officials in decision-making processes. This means that where constitutional rights have limited application only, the parameters of such rights and their limitations should be clearly defined and indicated in relevant laws.

On the basis of the precedent set by the *Dawood*-decision with regard to the second challenge, it seems that the Constitutional Court might very well order that the guidelines given to decision-makers in the Communal Land Rights Act are vague and therefore unconstitutional. If the Communal Land Rights Act lacks clear and consistent guidelines to aid the decision-makers, an order forcing the legislature back to the drawing board may very well be expected.

Indeed the Communal Land Rights Act should have contained clearer and more consistent legislative provisions, especially as far as the determination phase of the inquiry is concerned. However, the difficult question which then arises is how detailed the legislative instructions to the Minister can be in view of the very broad range of land rights and communities that may be affected by the Act. The text of the Act as such need not be too detailed since many of the instructions may be embodied in regulations issued under the Act. Nevertheless, simply to leave the difficult decisions arising from the Communal Land Rights Act's broad scope to an administrative official is too soft an option for the legislature.

Simply judging by the parameters already imposed by the Communal Land Rights Act, it seems as if the most obvious requirements for a determination must be that (i) the award can only be made to (traditional) communities or its members and (ii) only rural land can be affected. If the open-ended land rights inquiry is subject to further scrutiny, it may help clear up much of the uncertainty

that could arise in the context of the current broad discretionary powers of the Minister. The “scorecard” method that now so frequently features in determining the BEE profile of specific sectors could, similarly for instance be used here (in a completely different context) to determine the eligibility of a community for awards of a specific kind, ambit and content. A similar approach could be followed in relation to the identification of land to fall within the ambit of the Act. This would require intricate assessment on the part of the legislature, but once such a "scorecard" or similar evaluative instrument has been drafted, it would contribute considerably to establishing legal certainty to enhance the effect of this very important piece of tenure security legislation that is the Communal Land Rights Act.

PART FOUR: CONCLUSIONS AND RECOMMENDATIONS

CHAPTER 9: CONCLUSION AND RECOMMENDATIONS

9 1 Introduction

This chapter contains a discussion of the key problems identified in the analysis of the Communal Land Rights Act, followed by recommendations relating to these.

9 2 Identification of Problematic Key Aspects and Recommendations

It is clear from this study that the Act does not provide adequate tenure security for certain categories of women,⁵³² namely daughters, widows and single sisters of men, because women have been awarded tenure security only together with their spouses. This was evident from the testimonies of many rural female dwellers who testified that their rights in land are seldom respected by some traditional authorities. Gender equality is one of the key principles in the South African Bill of Rights and regardless of whether people reside in rural settings, this principle should at all times be respected and heeded. Only then, will tenure security for vulnerable groups of people become a reality. This is also one of the stronger arguments in contesting the constitutional validity of the Communal Land Rights Act, although it is not used to its full potential by the communities contesting the Act.⁵³³

The Parliamentary process in promulgating the Communal Land Rights Act is yet another highly contentious issue.⁵³⁴ If the court finds that the incorrect procedure as set out in section 75 of the Constitution was followed to pass the Bill, this might render the Act unconstitutional. Section

⁵³² Submission of the Commission for Gender Equality to the Portfolio Committee on Agriculture and Land Affairs on the Communal Land Rights Bill (B67 D of 2003).

⁵³³ See chapter 8 of this study.

⁵³⁴ Murray and Stacey "Tagging the Bill, Gaggling the Provinces" in *Land, Power and Custom* at 73-85.

75 deals with ordinary Bills which will not affect provinces. However it is clear from the geographic coverage of the Communal Land Rights Act, that it indeed affects numerous provinces and therefore the correct procedure to be followed was that as set out in section 76 of the Constitution.

The analysis above has shown that the drafting and the registration of the community rules before a community can be regarded as a juristic person, will also be an impediment for securing tenure for rural communities because of its time-consuming and tedious character. Although communities have wide discretionary power in relation to the matters that they want to be regulated in the rules,⁵³⁵ caution will have to be exercised to counter abuse by unscrupulous inhabitants and the local Traditional Authority. This can be done by building in a veto power in the Regulations to the Act that can be exercised by the majority of rural occupiers at convened meetings.

Although the Communal Land Rights Act adheres to some of the policy principles as set out in the *South African White Paper on Land Policy*, namely the effective management of communal land and the move towards a rights-based approach of holding land rights, the way the first policy choice manifests itself in the Communal Land Rights Act, is still problematic. This is because traditional authorities functioning as a traditional council in communal areas, may act as the designated Land Administration Committee. Claassens and Cousins estimate that over 800 traditional authorities operate back-to-back in these areas not all of them having the co-operation and respect of local communities.⁵³⁶ Rural inhabitants are especially afraid that the Traditional Council, re-constituted as Traditional Authority, will, despite the new composition requirements as

⁵³⁵ S 19(2) of the Communal Land Rights Act.

⁵³⁶ Claassens "Power, Accountability and Apartheid Borders" in *Land, Power and Custom* at 262-292. Cousins "Contextualising the Controversies" in *Land, Power and Custom* at 3-31.

set out in the Traditional Leadership and Government Framework Act,⁵³⁷ still abuse their power. According to rural dwellers this will be the case in allowing them to allocate land in communal areas. The Traditional Leadership and Governance Framework Act provides that one-third of a Traditional Authority must be women and other vulnerable people, such as the elderly or the youth.

Even where the functions of the day-to-day management of communal land are the responsibility of the Traditional Authority, the Communal Land Rights Act or its regulations should contain stronger sanctions to counter possible abuse by the Traditional Authority. These measures will have to be of a drastic nature, such as removal from office without the possibility of reinstatement at a later stage. The payment of a hefty fine together with the removal from office is yet another option. Sanctions such as these might deter Traditional Authority from abusing their powers.

The accountability of the traditional authority, who acts as the land administration committee of a particular community, is yet another problematic issue.⁵³⁸ In instances where a traditional authority will function as a land administration committee, stricter measures regarding their accountability towards the very community they represent, should have been provided for in the Act. Coupled with this concern is the fact that the Act does not provide for any appeal procedure when a Land Administration Committee decides not to convert or confirm an old order right or to award a new order right. The Act does not stipulate to whom a traditional authority is accountable in exercising its functions. This raises the question whether traditional authorities are only accountable upwards, that is the Minister of Land Affairs; and not downwards, that is, to the people whose land rights they administer? It is hoped that the

⁵³⁷ 41 of 2003.

⁵³⁸ Alcock & Hornby "Traditional Land Matters – A Look Into Land Administration in Tribal Areas in KwaZulu-Natal" research conducted for the Legal Entity Assessment Project, report available online at http://www.oxfam.org.uk/what_we_do/issues/livelihoods/landrights/download/leap. Last visited on 2009-29-09.

judiciary will address this aspect sufficiently in the pending constitutional challenge.

The second “external” administrative organ namely the Land Rights Board, might also prove to be problematic. The Land Rights Board is the body which will advise the Minister and communities on matters of general and specific importance. A Land Rights Board will have eleven members, from various government departments and from all sectors of a particular community. The fact that community members are part of the Land Rights Board is commendable; but it is doubtful whether the other members will have the interest of rural inhabitants at heart. It is however clear that all the members of such a Land Rights Board will have to be gender sensitive as well as transparent in exercising their functions. Greater liaison between the Land Administration Committees and the Land Rights Boards is also proposed, in achieving tenure security. By allowing for this they can check and balance each other’s functions and duties.

The efficacy of South Africa’s current deed registration system will be tested to its limits, especially since almost a third of the population resides in these areas. The proposed electronic deeds registration system, if implemented in time, will hopefully be of assistance in registering new land allocations to communities and individuals, as well as in registering new order land rights for to beneficiaries.

The surveying and registration of land is by no means inexpensive, and since the Act proposes the surveying and registration of vast hectares of communal land, this exercise will be a costly affair. Budgetary allocation by the National Treasury for land reform has proven to be insufficient over the past couple of years, as it has never amounted to more than a third of the annual budget. If the

Communal Land Rights Act is to be implemented at scale, National Treasury will have to be able to award substantially more money for land reform.⁵³⁹

The Department of Land Affairs will have to initiate legislative amendment to define the content of “new order rights” since this is a critical omission in the Act. Provision is made in the Communal Land Rights Act for the conversion of “old order rights” into “new order rights.” This is indicative of the movement away from the common law notion of ownership as the most absolute right suitable for registration, together with a few limited real rights which are clearly defined. This is not the case with the so-called “new order rights.” In order to create legal certainty as to what a “new order right” entails, this will either have to be substantiated in an amendment to the Communal Land Rights Act or in the Regulations to the Act.⁵⁴⁰

The Department of Land Affairs is currently busy with two pilot projects to review the implementation of the Communal Land Rights Act in the North-West Province and Limpopo. These projects were launched already in 2006. Attempts to obtain more information as to the aims and objectives of these projects from the Department of Land Affairs, were unsuccessful.

The noble aspirations of the Communal Land Rights Act will have to be effective in the long term. This entails that the Department of Land Affairs and other government departments will have to liaise to ensure that communities have sustainable use of their land.⁵⁴¹ Sufficient post-transfer and continuous financial support as well as empowerment strategies will have to be provided. Olivier also proposes that a pre-transfer survey must be conducted to determine the current use of communal land as a starting point also for dismantling

⁵³⁹ Hall and Lahiff “Budgeting for Land Reform” PLAAS *Policy Brief No 5* 2005.

⁵⁴⁰ Olivier “Communal Land Rights Act 11 of 2004: Overview, Institutional Arrangements and Implementation Guidelines” (2006) *Obiter* 304 304-315.

⁵⁴¹ De Villiers “Land Reform In South Africa: Critical Issues” (2003) *Indonsa* available at http://www.kznplanning.co.za/docs/Indonsa/October_2003/03_10_02.html. Olivier “Communal Land Rights Act” (2006) *Obiter* 312-313.

conflicting land rights in these areas.⁵⁴² Furthermore, the attempts of the Communal Land Rights Act to achieve greater intergovernmental co-operation call for a better definition of the role of the various departments. Currently the Department of Land Affairs is not adequately geared to oversee the implementation of the Act. Often the skills required to assist the new land owners, are not found in one state department only but may involve various other departments. Consequently, there is an urgent need to define and clarify the role of the various state department involved in effective land tenure reform.⁵⁴³

9 3 Concluding remark

There certainly is no question about the need for legislation to foster tenure security in respect of communal land in South Africa. The legislature's attempt at providing this through the Communal Land Rights Act should be applauded. Yet, as was shown in this thesis, the provisions of the Act are fraught with difficulties and controversies, which goes some way to explaining why the Act has not yet been implemented. Until these difficulties and controversies are resolved, tenure insecurity is likely to be exacerbated, rather than reduced.

⁵⁴² Olivier "Communal Land Rights Act" (2006) *Obiter* 312-313.

⁵⁴³ Olivier "Communal Land Rights Act" (2006) *Obiter* 312-313.

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