

**Tenure Security under the Communal
Property Associations Act 28 of 1996:
An Analysis of Establishment and
Management Procedures with
Comparative Reference to the Sectional
Titles Act 95 of 1986**

by
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“For South Africans, land is as precious a commodity as water, and an issue as emotional and as deeply rooted as cultural expression. Perhaps more than any one other thing, the ownership of land symbolises our freedom.”

Neels Blom “New approach to restitution” *The Weekender* (2007-07-07) 3.

DECLARATION

“I, the undersigned, hereby declare that the work in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.”

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ABSTRACT

This thesis discusses the efficacy of procedures involving communal participation in the management of land by communal property associations, and how this contributes to the promotion of security of tenure as envisaged by the South African Land Reform programme. The Communal Property Associations Act 28 of 1996 (CPA Act) is aimed at regulating communal living arrangements to create security of tenure for its respective landholders. However, the general opinion of commentators in the land reform sector has continued to be that communal property institutions are ineffective and generally fail.

Many assert that problems experienced are symptoms of a wider weakness relating to the institutional design of the juristic person, its regulation and the support it receives. To determine the strength of this assertion, the concept and conditions of security of tenure in South African law, and the obstacles hampering it, are investigated. Security of tenure is especially important as it provides a foundation from which land holders can exercise their rights productively.

This is followed by an overview of the existing legal mechanisms for communal living arrangements that are similar to the arrangements catered for in the CPA Act. One of these arrangements, namely the Sectional Titles Act is used to compare mechanisms similar to the establishment and management procedures in the CPA Act. The main

conclusion regarding establishment procedures is that many of the provisions of the CPA Act are not being implemented properly. While some institutional problems exist and must be addressed, negotiation with and guidance by the Department of Rural Development and Land Reform are necessary to overcome such problems. An inadequate establishment process will only lead to problems and conflict in the management phase that could hamper security of tenure.

Communal property associations are managed by an organisation structure comprising of a juristic person, a committee and the community. The thesis shows that committee members often lack the necessary training to fulfil their duties adequately. The CPA Act also allows communal property associations too much discretion in allocating powers and functions of the committee that can lead to paralysis in decision-making processes. The Department of Rural Development and Land Reform has extensive powers to monitor and intervene in matters of the association if problems exist, but in practice such measures are not resorted to. These problems create dysfunction in many communal property associations. While the CPA Act can provide security of tenure for communities, the most significant obstacle is the lack of support from the Department of Rural Development and Land Reform in implementing the provisions of the CPA Act.

OPSOMMING

Hierdie tesis handel oor die doeltreffendheid van die prosedures rondom die deele name van gemeenskaplike aandele bestuur van grond in gemeenskaplike eiendomsverenigings, en hoe dit bydra tot die bevordering van die oonaantasbaarheid van grondregte, soos beoog deur die Suid-Afrikaanse grondhervormingsprogram. Die Communal Property Associations Act 28 of 1996 (CPA Wet) het ten doel om gemeenskaplike bewoning van grond te reguleer ten einde omsekerheid vir houeers van grond in die hand te werk. Die heersende mening van kommentatore in die grondhervormingsektor is nietemin nog steeds dat gemeenskaplike eiendomsinstellings ondoeltreffend is, en oor die algemeen misluk.

Verskeie kommentatore doen aan die hand dat die heersende probleme simptome is van onderliggende tekortkominge in die wyses waarop die regspersoon saamgestel word en hoe dit geregleer en ondersteun word. Ten einde hierdie opvatting te deurgrond, word daar in hierdie tesis gekyk na die omstandighede waaronder oonaantasbaarheid van grondregte bewerkstellig kan word in die Suid-Afrikaanse reg, en na die struikelblokke wat bestaan om hierdie doel te bereik. Oonaantasbaarheid van grondregte is belangrik, veral omdat dit die basis is waarop houeers van grond in staat gestel word om hul regte produktief uit te oefen.

Hierna volg 'n oorsig van die bestaande regsmechanismes vir gemeenskaplike bewoning van grond, wat soortgelyk is aan dié van die

CPA Wet. Een sodanige opset is die Deeltitelswet, wat gebruik word om soortgelyke meganismes vir die totstandkoming van en die bestuursprosedures van die CPA Wet te vergelyk. Die gevolgtrekking met betrekking tot totstandkomingsprosedures is dat die bepalings van die CPA Wet nie behoorlik in werking gestel is nie. Benewens die institusionele probleme wat aangespreek moet word, is onderhandeling met en leiding deur die Departement van Landelike Ontwikkeling en Grondhervorming nodig, om bestaande struikelblokke uit die weg te ruim. 'n Ontoereikende totstandkomingsproses sal slegs lei tot verdere probleme en geskille in die latere bestuur van die skema wanneer die skema bestuur moet word. Dit werk onsekerheid m.b.t. die grondregte in die hand.

Die bestuurstruktuur van gemeenskaplike eiendomsverenigings bestaan uit 'n regs persoon, 'n komitee en die gemeenskap. Die tesis dui aan dat komiteelede dikwels nie voldoende opgelei is om hul funksies behoorlik te vervul nie. Die CPA Wet maak ook voorsiening vir te veel diskresionêre bevoegdhede in die akte van oprigting en die bepalings omtrent die funksies van die komitee, wat die besluitnemingsproses kan lam lê. Die Departement van Plaaslike Ontwikkeling en Grondhervorming het verreikende magte m.b.t. monitering en intervensie in die sake van die verenigings, waar probleme bestaan. In die praktyk word hierdie bevoegdhede egter nie aangewend soos beoog nie. Die probleme versoorsoak dat gemeenskaplike eiendomsverenigings nie na behore funksioneer nie. Die wetsbepalings kan onaantasbaarheid van grondregte vir gemeenskappe in die hand werk, maar die grootste struikelblok is die behoorlike implementering van die wetsbepalings.

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Jacques Jacobs

Stellenbosch, January 2011

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ABBREVIATIONS

CLR Act	: Communal Land Rights Act
CPA Act	: Communal Property Associations Act
CSIR	: Council for Scientific and Industrial Research
DR Act	: Deeds Registries Act
IPILR Act	: Interim Protection of Informal Land Rights Act
LRAD	: Land Redistribution for Agricultural Development
RLR act	: Restitution of Land Rights Act
ST Act	: Sectional Titles Act

CHAPTER ONE

INTRODUCTION

1 1 INTRODUCTION

Restoring dignity and a sense of community to land reform beneficiaries are among the most important challenges South Africa has had to face since the start of transformation more than 15 years ago.¹ South Africa is still in the process of restoring and redistributing land to people deprived of land during the apartheid regime.² A major challenge is ensuring that restoration and distribution remain effective and practical. This means that these processes must instil a renewed sense of community within its beneficiaries, since dignity is in many respects connected to strong communal ties.

This thesis examines the efficacy of procedures involving communal participation in the management of land by communal property associations, and how this contributes to the promotion of security of tenure as envisaged by the South African Land Reform programme. At the centre of investigation are the institutional mechanisms of the Communal

¹ SAPA "BAA 'undermined dignity of blacks'" <http://www.news24.com/SouthAfrica/News/BAA-undermined-dignity-of-blacks-20100720> (Accessed on 20-07-2010); Fakir "Land restitution does not assure economic welfare" *Business Day* (19-01-2005) 8.

² Boyle "Rural areas have unused potential, says Minister" *Herald* (13-09-2010) 4.

Property Associations Act (CPA Act).³ The legislation is aimed at regulating communal living arrangements to create security of tenure for its respective landholders. It is not the only legislative mechanism dealing with communal living. The Sectional Titles Act (ST Act),⁴ for instance, has had a similar function in a different context for more than forty years already. There are other mechanisms that fulfil the same function.⁵

At first blush, the different mechanisms seem similar, and this leads to the question why some mechanism are perceptibly more successful than others in achieving security of tenure for their interest holders. My point in undertaking research is to show that the context and imperatives of communal property associations differ so much from other communal living mechanisms, that any comparison between them can have only limited value. I do so by examining, in this chapter, the historical background of the mechanism of communal property associations, and then in subsequent chapters, analysing whether various aspects relating to the security of tenure have been achieved.

1 2 HISTORICAL BACKGROUND

This section discusses the underlying conditions that made it necessary to provide solutions to address problems concerning security of tenure for people living in communal arrangements. It deals with the history of land law in South Africa, and initiatives to address shortcomings as regards communal living arrangements after the Constitution entered into force.

³ 28 of 1996.

⁴ 95 of 1986.

⁵ See Ch 3 section 3 2 3 below.

1 2 1 Colonial and Apartheid Heritage

Territorial segregation by both colonial and apartheid governments has restricted eighty per cent of the South African population to thirteen per cent of the country's land.⁶ Historical dispossessions denied the majority of black South Africans access to land and, more specifically, the right to purchase land.⁷ Since the beginning of the twentieth century, dispossessions were legitimised by a complex system of racially motivated land laws, resulting in a wide range of insecure land tenure relations and uncertain land rights.⁸ It is estimated that about 17 000 statutory measures (including proclamations, regulations and government notices) to regulate land control and racial segregation were issued until 1991. By 1990, fourteen different land control systems were in place in four national states, six self-governing territories and four provinces.⁹

Black people were marginalised by the double standards accompanying this complex system of land administration that was aggravated by the stance of the apartheid government administration and the judiciary. As a result, the disadvantaged communities occupied land without any security of title or tenure, and were denied the possibility of improving their lives through the utilization of land.¹⁰ At the same time, the indigenous land tenure system that historically existed in these areas was systematically

⁶ Bennett "African Land – A history of dispossession" in Zimmermann & Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 65. Jaichand "Restitution of Land Rights a Workbook" (1997) 1-8.

⁷ Nonyana "Communal property associations and their impact on the formation of small business in the rural sector." February 2000 *PLD* 1. Badenhorst, Pienaar & Mostert *Silberberg and Schoeman's Law of Property* (2006) 586-590.

⁸ Badenhorst et al *Law of Property* 586-590.

⁹ Van der Merwe & Pienaar Land Reform in South Africa" in Jackson & Wilde (eds) *Reform of Property Law* (1997) 348-349.

¹⁰ Badenhorst et al *Law of Property* 586-590.

eroded by a permit-based system of weaker second-class rights during the apartheid years.¹¹ To control the inhabitants of the land, this diverse land holding system was based on customary forms of tenure along cultural and regional lines.¹² By assigning wide powers through the Native Administration Act¹³ and Bantu Authorities Act¹⁴ to compliant traditional leaders loyal to the government of the time,¹⁵ the problem was only compounded. This caused overcrowding, a multiplicity of claims for “exclusive rights of tenure” in certain parcels of land,¹⁶ dire living circumstances, the mismanagement of natural resources and shocking levels of poverty.¹⁷ Since access to and control of land play a critical role in determining economic empowerment, social status and political power,¹⁸ the democratically elected new government was left with the immense task of reforming land tenure.

1 2 2 Tenure reform in a new constitutional land regime

The constitutionally entrenched land reform programme of the new political dispensation attempted, from its inception, to address the inequities of this

¹¹ White Paper on Land Policy April (1997) v.

¹² See Bennett *Human Rights and African Customary Law* (1999) 129-132 on the theoretical differences between “western” legal systems and African indigenous law concerning property rights.

¹³ 1927.

¹⁴ 19 of 1952.

¹⁵ Cousins “Submission to the portfolio committee on agriculture and land affairs: Comments on the Communal Land Rights Bill” (b67-2003) 5.

¹⁶ See also Mostert & Pienaar “Communal land title: An assessment of the efficacy of legislative intervention for tenure security and access to land” in Cooke (ed) *Modern Studies in Property Law Vol III* (2005) 317-340.

¹⁷ Mostert “Land Restitution, Social Justice and Development in South Africa” 2002 *SALJ* 401.

¹⁸ Carey Miller & Pope *Land Title in South Africa* 3.

land control system.¹⁹ Based on the premises that “(a)ccess to land is a basic human need” and “free enterprise and private ownership (is) the appropriate system to fulfil this need”,²⁰ the purpose of the land reform programme is to redress the injustices of apartheid, foster national reconciliation and stability, underpin economic growth, improve household welfare and alleviate poverty.²¹ This includes taking legislative and other reasonable measures to enable access to land on an equitable basis and create security of tenure.²²

Three components of the programme can be distinguished. The first consists of the three interconnected land reform programmes namely land restitution, land redistribution and tenure reform, the second of land regulation and the third of facilitation of land development.²³ Three land reform programmes were subsequently developed: land restitution, land redistribution and tenure reform. Despite criticism of the limited effect that restitution²⁴ and the redistribution programme have had on the old land regime, these two programmes to date have had more visible results than the land tenure programme.²⁵ Since 1994, however, only about 5.2% (5.3

¹⁹ In Badenhorst et al *Law of Property* 588. The reform of South African land law already started in 1991.

²⁰ Badenhorst et al *Law of Property* 588.

²¹ White Paper on Land Policy v.

²² Section 25 (5) & (6) of the Constitution. Smith & Pienaar “Securing Tenure of Groups & Individuals” Feb (2002) *AFRA* 9; Glazewski *Environmental Law in South Africa* (2000) 209.

²³ Badenhorst et al *Law of Property* 593.

²⁴ See Department of Land Affairs *Annual Report, 1 April 2009 - 31 March 2010* (2010) 27 Available at http://www.ruraldevelopment.gov.za/DLA-internet/content/document_library/documents/Publications/Annual_Report/April2009-March2010.pdf (Accessed on 15-10-2010). Out of 79 694 of the valid claims 4527 is restitution claims remain unresolved.

²⁵ Department of Land Affairs *Annual Report, 1 April 2009 - 31 March 2010* 29.

million ha) of South Africa's land surface area has been transferred back to disadvantaged communities through land reform initiatives.²⁶

1 2 3 Tenure Reform and Communal Land Holding

The purpose of tenure reform is to transform the legal basis of landholding. Another aim is to strengthen the legal foundation of the various forms of landholding, which have been entrenched in and are guaranteed by section 25(6) of the Constitution of South Africa.²⁷ Section 25(9) reinforces the government's obligation to create legislation for the upgrading of the insecure rights mentioned in section 25(6). To secure the land rights of 10 to 12 million people effectively and implement them within a reasonable period,²⁸ legislation and other initiatives are necessary on a large scale.

The 1997 White Paper recognized that tenure reform was a complex process with 'far-reaching implications' involving the creation of new systems of 'landholding, land rights and forms of ownership'.²⁹ It nevertheless envisaged a 'unitary non-racial system of land rights' that would be compatible with the spirit of the Constitution and would allow people a choice in the type of landholding that would meet their needs

²⁶ Kleinbooi "Land Barometer" 2009 (7) *Uhlaba Wethu* 1 available at www.plaas.org.za (Accessed on 10-9-2009).

²⁷ This section guarantees that insecure tenure rights will be upgraded to a 'legal(ly) secure tenure or comparable redress'. It also indicates a desire to use legislation in creating "a new social order" See Cousins & Hornby "Communal property institutions: Adrift in the sea of land reform" in Greenberg (ed) *Piecemeal Reforms and Calls for Action* vol 44 *Development Update* 129.

²⁸ Cousins *Submission to the portfolio committee on agriculture and land affairs*. Comments on the Communal Land Rights Bill (b67 -2003) 5. Cousins et al "Will Formalising Property Rights Reduce Poverty in South Africa's 'Second Economy'?" 2005 (18) *Plaas Policy Brief* 1.

²⁹ White Paper on Land Policy para 4.16.

most effectively.³⁰ The White Paper anticipated this to be a slow process driven by initiatives and requests by the right holders and thus did not set any specific time frames for tenure reform.³¹ As a starting point, it recognized that de facto systems of vested rights could deal with existing overlapping and conflicting interests in land.³²

Previously, the Deeds Registries Act³³ (DR Act) allowed the transfer of land only if the parties concerned could be identified.³⁴ Land transfer was limited to natural persons or juristic entities. A community could therefore gain ownership only through joint ownership,³⁵ forming a trust³⁶ or through juristic persons.³⁷ Because of the complex administrative and legal systems involved and the extensive capital resources needed,³⁸ this system did not adequately provide for the people or communities for whom the holding of property rights on a communal basis might be appropriate.³⁹

³⁰ White Paper on Land Policy vi.

³¹ White Paper on Land Policy 4.20.

³² “Recognizing reality as it exists on the ground.” White Paper on Land Policy 4.16 and Carey Miller & Pope *Land Title* 456.

³³ 47 of 1937.

³⁴ S 102 definition of “owner” in the DR Act.

³⁵ S 63 of Deeds Registries Act 47 of 1937. Every name has to be included in the deed of transfer.

³⁶ Although a trust can sometimes be used to provide a form of communal ownership, the community only achieves the status of beneficiaries. The property is held/vests in the trustee, as executive. Opposed to the CPA Act that creates a more broad-based decision-making approach. See Swanby “Communal property associations: the jury is out.” 2001 (July/August) *Land and Rural Digest* 11-13.

³⁷ For example a company or closed corporation.

³⁸ Badenhorst et al *Law of Property* 620; see also Cousins “Communal Property Associations: Who is the on the jury and on what basis are they judging?” 2001 (September/October) *Land & Rural Digest* 24. Here it is argued that registration of communal property associations is in no way user friendly or institutionally more supportive than a trust. It rather reflects the bias of the outsider who works with the community.

³⁹ Carey Miller & Pope *Land Title* 467.

Accordingly, although these traditional common law instruments of ownership are still available to communities, recent legislative activity focused on the creation of new categories of legal instruments to hold property. At present, communities may gain access to land by utilizing a variety of legal entities such as communal property associations and trusts.⁴⁰ The CPA Act is the main instrument the Department of Rural Development and Land Reform⁴¹ employs to drive land reform on a national level. The CPA Act is a legislative attempt to formalise rights that exist on the ground, and to create new communities through corporatisation. The focus of this investigation therefore, is the mechanisms available in terms of the Communal Property Associations Act. As such, extensive analyses of all new types of communal entities fall outside the scope of this thesis. Reference will however be made where appropriate.⁴²

1 3 PROBLEMS WITH COMMUNAL PROPERTY ASSOCIATIONS

Communal living and management of property never are simple matters.⁴³ Since 1994, over 1200 communal property associations have been established mainly by groups benefiting from land restitution and

⁴⁰ See Ch 3 section 3 2 3; Cousins & Hornby "Adrift" in *Piecemeal Reforms and Calls for Action* 128.

⁴¹ The name of this Department has changed recently to Department of Rural Development and Land Reform. Hereafter I would refer to the old name as it corresponds with the legislation under discussion.

⁴² See Ch 3 below.

⁴³ Carey Miller & Pope *Land Title* 491.

redistribution.⁴⁴ However, the general opinion of commentators involved in the land reform sector has continued to be that communal property institutions are ineffective.⁴⁵ This is the focus of the discussion below.

A range of practical and theoretical problems support the opinion that communal property associations are ineffective and generally fail.⁴⁶ Reasons include uncertainty about the status of members,⁴⁷ improper allocation of substantive rights⁴⁸ and mismanagement of the land.⁴⁹ Communal property associations also do not adhere to democratic principles that the CPA Act prescribes.⁵⁰ The constitutional ideal of a more equitable dispensation of access to land, natural resources, and security of tenure is therefore jeopardised. Hence, the government is losing credibility with regard to its promises of delivery.⁵¹

A good example of the effect of these legislative measures is the case of the #Khomani San. This nomadic African community, living off the land through hunting and food gathering, represents one of the oldest cultures in South Africa. To establish the Kalahari Gemsbok Park in 1931, these

⁴⁴ Department of Land Affairs CSIR *Diagnostic Study into the functioning of communal property associations in land reform in South Africa* (2005) Submitted by Environmentek, CSIR, to Tenure Reform Implementation Systems, Department Land Affairs 1.

⁴⁵ Cousins 2001 *Land & Rural Digest* 24; Ziqubu "Community Workshops Report" 2002 *AFRA* 19; CSIR *Diagnostic Study* 52.

⁴⁶ Cousins & Hornby "Adrift" in *Piecemeal Reforms and Calls for Action* 129; CSIR *Diagnostic Study* ii; .Majola "Highs and Lows of States Delivery" *Mail & Guardian* (08-02-2002) 10; Smith "Civil Resistance is Building Again in South Africa" *Mail & Guardian* (01-01-2002) 20; Cousins, "A Return to the Apartheid Era?" *Mail & Guardian* (23-11-2001) 25.

⁴⁷ See Ch 4 section 4 2 below.

⁴⁸ See Ch 4 section 4 3 below.

⁴⁹ See Ch 5 below.

⁵⁰ S 9 of the CPA Act, CSIR *Diagnostic Study* ii.

⁵¹ Mostert "Diversification of land rights and its Implications for a New Land Law in South Africa" in Cooke (ed) *Modern Studies in Property Law vol II* 3.

people were forcibly removed from a vast area in the Northern Cape covering almost 50 000 hectares.⁵² On Human Rights Day, 21 March 1999, the #Khomani San became beneficiaries of the land reform programme, and received six farms on the outskirts of the Kgalagadi National Park covering a combined surface area of 36 000 hectares. This restitution was symbolically effected by the then Deputy-President Thabo Mbeki⁵³ and was hailed as one of the flagship restitution cases of the Department of Rural Development and Land Reform, giving new hope to a culture on the brink of extinction.⁵⁴

Unfortunately, due to lacking management capacity and insufficient government support⁵⁵, the existing infrastructure on the farms collapsed.⁵⁶ This almost resulted in the loss of one of the community's farms in 2002 due to the non-payment of a huge debt.⁵⁷ Also, the game stock was depleted rapidly through poaching and drought, exacerbated by the lack of adequate pipelines. The sale of game for vital emergency funding did not improve matters⁵⁸ as animals do not only play a central role in the exercise of the community's cultural activities, such as hunting, but they are also a potential capital resource through tourism.

⁵² The Kalahari Gemsbok Park was renamed the Kgalagadi Transfrontier Park.

⁵³ Friedman "Putting Life Back into the land" *Mail & Guardian* (28-02-2003) 36. This was done by the government at the cost of R8 million.

⁵⁴ For more information on the San, see <http://www.survival.org>. (accessed 23-08-2010). The San also face other land-related challenges in gaining access to their ancestral lands in Namibia and Botswana.

⁵⁵ Robbins "NGOs, 'Bushmen' and Double Vision: The #khomani San Land Claim and the Cultural Politics of 'Community' and 'Development' in the Kalahari" 2001(4) *JSAS* 834

⁵⁶ Above.

⁵⁷ Friedman *Mail & Guardian* 36. Fortunately the Department was able to intervene and broker a deal between the parties.

⁵⁸ The land settlement of communities included a clause that determined that half of the land be used for traditional life and the other half for commercial farming.

The decline therefore created friction between the traditional members of the community and its more westernised members.⁵⁹ Complaints were heard that the system did not create adequate means to incorporate the minority interests of traditions and cultures.⁶⁰ One group was even reported to have poached the community's game, which had been reserved for hunting tourism that could provide income from the available resources on the land. The remaining profits were swallowed up in repairing infrastructure.⁶¹ By 2004, it seemed that if the Khomani San's fortunes had changed at all, it was for the worse.⁶² Currently the communal property association of the community is not operative and the community still lives in poverty.⁶³

The problems experienced by this community were reflected in many other communities that implemented the CPA Act. To understand these problems, it must be determined what the content of tenure security as mandated by the Constitution of South Africa, is.⁶⁴ Since then, the Mbeki administration initially set targets for the restitution process to be finalised

⁵⁹ There are indications that just about a hundred out of the 1000 members of the community still uphold traditional values.

⁶⁰ The members of the community are supposed to pay special fees for the right to hunt. Gosling "Land returned but we still have nothing" *Cape Times* (14-08-2004) 5; Geldenhuys "Forced to live on scraps" *Sunday Times* (25-07-2004) 8; Gosling "Kruiper Dispirited after frustrating Didiza meeting" *Cape Times* (20-08-2004) 3.

⁶¹ Geldenhuys *Sunday Times* 8.

⁶² Terreblanche "Khomani San still left in the lurch over land" *Sunday Tribune* (21-08-2005) 22.

⁶³ Massyn & Humphrey *Tourism Development Plan* (2010) commissioned by the #Khomani San Boesmanraad available at

<http://www.asl-foundation.org/documents/KhomaniSanTourismDevelopmentPlan-Final-15March2010.pdf> (accessed 15-11-2010)

⁶⁴ See Ch 1 sec 2 c)f above and Ch 2 below.

in 2005,⁶⁵ and the argument for an inquiry into the functioning of and support for communal property associations is compelling. This is especially important as communal property associations is the preferred vehicle that land reform beneficiaries must use when acquiring property through the land reform programme.⁶⁶ Even though this target has been shifted to 2014,⁶⁷ continued support of newly formed communities will demand a sound framework for controlling their newly acquired land in a more sustainable and secure way. In the land reform sector, various commentators have voiced the concern that the problems communal property associations experience are merely symptoms of a wider weakness relating to the institutional design of the juristic person, its regulation and the support it receives.⁶⁸ For this purpose, lessons already learnt and assessments of current land administration systems must be taken into account. New approaches need to be developed to enhance and promote security of tenure using the existing legislation regulating communal property associations.

1 4 COURSE AND NATURE OF THE ENQUIRY

One of the legislative mechanisms assisting communal living that has been in place for decades is the ST Act. Because of the broad similarity between the two forms of property management models, the ST Act provides a

⁶⁵ Hartley "South Africa will meet land restitution deadline, Minister insists" *Business Day* (2004-10-05) 3.

⁶⁶ Department of Rural Development & Land Reform Strategic Plan for 2010 – 2013 (2010) http://www.ruraldevelopment.gov.za/DLA-Internet/content/document_pages/Document_Library_Publications_%20Strategic_Plan.jsp (Accessed on 25-10-2010) 30; s 2(1)(a) of the CPA Act.

⁶⁷ Kleinbooi "Land Barometer" (2009) 7 *Umhlaba Wethu* 1; Jacks "R6bn ploughed into land claims" *Financial Mail* (25-02-2005) 33.

⁶⁸ Lahiff "With what land rights? Tenure arrangements and support" Hall (ed) *Another Countryside* (2009) 99.

handy comparative benchmark; but the premise of this thesis is that the context and imperatives of the two mechanisms vary so significantly, that any conclusions drawn from a comparative analysis must be approached with caution. In this research, the establishment and management procedures of the two Acts are discussed to identify technical as well as theoretical issues that may inform an evaluative assessment of the efficacy of communal property associations in providing security of tenure.

This study is limited to an investigation of the establishment and management procedures of the two Acts because the most significant practical problems in the application of the CPA Act are related to these procedures. The concept and conditions of security of tenure in South African property law, along with obstacles hampering it, are investigated in Chapter Two. Chapter Three presents an overview of the existing legal mechanisms for communal living arrangements. The relevant establishment procedures of the ST Act and the CPA Act are compared in Chapter Four, while Chapter Five evaluates the management provisions of the two Acts. The final chapter concludes with a summary of the general arguments and recommendations for future implementation of the CPA Act to create security of tenure for communities.

CHAPTER TWO

SECURITY OF TENURE

2.1 INTRODUCTION

As stated earlier,⁶⁹ the Government's constitutional mandate is to enact legislation and take any other reasonable steps to advance and create access to land on an equitable and non-discriminatory basis.⁷⁰ Government is also obliged by the Constitution to guarantee that disadvantaged persons or communities that held insecure tenure because of "past racially discriminatory laws or practices" now attain legally secure tenure or other comparable redress by means of legislation.⁷¹ Central to both these constitutional mandates is the duty of the Government to create security of tenure to current insecure tenure holders and to grant property rights and secure tenure to the landless within the limits of available resources.⁷²

This chapter will determine what security of tenure entails and what the parameters are for tenure to qualify as being "secure." Elucidating these important concepts will contribute to the understanding of the ambit of the Government's tenure reform strategies for previously disadvantaged communities. The main frameworks to attain the objectives are set out in policy documents of the Government, specifically the Department of Rural Development and Land Reform.

⁶⁹ See ch 1 section 1.2.2 above.

⁷⁰ S 25(5) of the Constitution of South Africa 108 of 1996.

⁷¹ S 25(6) read with s 25(9).

⁷² S 25(5)(a) of the Constitution of South Africa 108 of 1996.

The Department played an active role in the development of this constitutional mandate. The most important source is the policy set out in the White Paper on South African Land Policy in 1997, published after wide consultation with relevant interest groups.⁷³ According to the White Paper, land use patterns should be reformed to create a more equitable distribution of land ownership in order to reduce poverty and contribute to economic growth.⁷⁴ Another major goal set out by this policy is to create security of tenure for all South African citizens.⁷⁵

Land reform as a whole should lead to sustainable and productive use of land that can contribute to long-term sustainability of development projects. To achieve such sustainability, social equity, economic viability, and the environmental integrity of a project should always be taken into account.⁷⁶ The White Paper envisages that this will be achieved by a policy that makes provision for a system that records and registers property rights, proper land use planning frameworks and efficient government land administration of such rights.⁷⁷ It was acknowledged that access to land is only the beginning of a successful tenure programme requiring adequate support services, the development of infrastructure and other development programmes, contributing to a better quality of life and productive opportunities for the most disadvantaged citizens.⁷⁸ The success of this ambitious programme necessitates efficient coordination of functions between the different spheres of government as well as the creation of public-private partnerships. Thus, the White Paper created the initial principles and frameworks leading to the promulgation of various land reform statutes to achieve the goals of undoing

⁷³ Green Paper on South African Land Policy (1996) 43. White Paper on Land Policy para 1.1.

⁷⁴ White Paper on Land Policy para 2.1.

⁷⁵ Above.

⁷⁶ White Paper on Land Policy para 5.4.1; CSIR *Diagnostic Study* 51.

⁷⁷ White Paper on Land Policy para 2.1.

⁷⁸ Above.

the injustices of the past and creating social stability, equity and economic growth.⁷⁹

It should also be noted that the foremost thrust for development is to focus on developing rural land for mainly agricultural purposes, which will generate opportunities ranging from commercial farming to cultivation of the land only for the production of sustenance for its holders.⁸⁰ To achieve this, government's main policy direction is to provide land to groups of land reform beneficiaries or communities rather than to individual owners.⁸¹ Because of this approach, security of tenure for individual beneficiaries is dependent on the security of tenure of the group as a whole.⁸²

The underlying problems and tensions that hampers the measures envisaged by this policy to create sufficient circumstances for secure tenure, will be discussed. The above mentioned enquiries will provide the context within which crucial strategies for tenure mechanisms to create an adequate environment for security of tenure can be highlighted.

2 2 THE CONCEPT OF LAND TENURE

As a limited natural resource, land is of central importance to property relations in all societies. It is fundamental for an individual's survival needs such as shelter and means of production.⁸³ Land tenure is significant because it deals with the legal relationships that surround land⁸⁴ and identifies the

⁷⁹ White Paper on Land Policy para 2.5.

⁸⁰ Blom "New approach to restitution" *The Weekender* (7-06-2007) 3.

⁸¹ White Paper on Land Policy para 2.1; Box 4.11.

⁸² CSIR *Diagnostic Study* 41.

⁸³ Marcus "National, Class and Gender issues in land reform" in De Klerk (ed) *A Harvest of Discontent: The Land Question in South Africa* (1991) 25. White Paper on Land Policy para 2.1; Blom *The Weekender* (07-07-2007) 3.

⁸⁴ Gray & Gray *Elements of Land Law* 5.

underlying rights that need to be secured to improve the plight of disadvantaged communities.

Land tenure refers to the institutional and legal considerations of how land and its associated natural resources are held and utilized.⁸⁵ It denotes a system of property rights vesting in holders of land. The system operates on entitlements, responsibilities and the limits on the utilisation and exploitation of property.⁸⁶ The system institutionalizes rights for the exclusive use and benefit of a specific holder excluding others. On the other hand, land rights also create duties and responsibilities for the holder towards the property to receive protection from neighbouring holders and authorities.⁸⁷ Land tenure in this sense indicates a form of governance through administrative structures, recognizing rights and mediating conflicts between their holders.⁸⁸

Wealth and power in a society often depend on the access, control, and utilization of land and its natural resources.⁸⁹ The more holders are dependent on land for their vital needs, the more important strategic control of land becomes and the greater the power it confers on those in control of the land.⁹⁰ The power relations in community structures surrounding land therefore

⁸⁵ Bromley & Cernea "The Management of Common Property Natural Resources" 1989 (57) *World Bank Discussion Papers* 5. Claassens & Cousins "Communal land tenure: Livelihoods, rights and institutions" in Greenberg (Ed) *Development Update: Piecemeal Reforms and Calls for Action* 56. Hall, Jacobs & Lahiff "Evaluating land and agrarian reform in South Africa no. 10" in Hall (Ed) *Occasional paper series* 27.

⁸⁶ Barry & Fourie 2002 *International Journal of Geographical Information Science* 23 26.

⁸⁷ Van der Walt "Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law" 1995 *SAJHR* 169 201.

⁸⁸ Claassens & Cousins "Communal Land Tenure" in *Development Update: Piecemeal Reforms and Calls for Action* 56

⁸⁹ Chigara "Land Reform Policy: The Challenge of Human Rights Law" (2004) 1; Christodoulou *The Unpromised Land: Agrarian Reform and the Conflict Worldwide* (1990) 1; Van der Merwe *Sakereg* 2-3; Bennett "African Land – A History of Dispossession" in *Southern Cross: Civil Law and Common Law in South Africa* 65; *Customary law in South Africa* (2004) 381.

⁹⁰ Christodoulou *The Unpromised Land* 1. Marcus *A Harvest of Discontent: The Land Question in South Africa* 25.

create political institutions around land holding.⁹¹ These power relations are embedded in land tenure.⁹² They fulfil important functions, for example, by contributing to protection against survival hazards for people establishing themselves in close proximity to each other and protection against exploitative customs by enemies.⁹³

Land relations contribute to the building and structuring of community identity and culture.⁹⁴ There is a risk, however, that such structures can also entrench inequalities marginalizing minority groups or individuals to their detriment.⁹⁵

Land tenure finally serves as an indicator of the social, political, cultural, and economic dynamics of particular communities, reflecting the specific level of development of such a community.⁹⁶ The type of tenure involved plays a vital role in how communities function and operate.

The term “land tenure” should be clarified in relation to the more general term “property.” The meaning of the property concept plays an important role in legitimizing divergent political theories and values, serving an ideological purpose that can influence its import.⁹⁷ The concept of property, in its simplest

⁹¹ Bromley & Cernea 1989 *World Bank Discussion Papers* 5; Von Benda-Beckman “Mysteries of capital or Mystification of Legal Property” 2003 (41) *Focaal - European Journal of Anthropology* 187-191; Claassens & Cousins “Communal Land Tenure” in *Development Update: Piecemeal Reforms and Calls for Action* 56.

⁹² Cousins “‘Embeddedness’ versus titling: African land tenure systems and the potential impact of the Communal Land Rights Act 11 of 2002” 2005 *Stell LR* 488 497.

⁹³ Cross “An Alternate Legality: The Property Rights Question in Relation to South African Land Reform 1992 *SAJHR* 305 306.

⁹⁴ Cross 1992 *SAJHR* 308.

⁹⁵ Cousins & Hornby “Adrift” in *Piecemeal Reforms and Calls for Action* 141.

⁹⁶ Bennett *Customary Law in South Africa* 380. Carey Miller & Pope *Land Title* 3; Cousins “Grounding democracy: The politics of land in post-apartheid South Africa” First published in *Lessons from the field: A decade of democracy*, (an Idasa supplement to the *Mail & Guardian* (26-11-2004) 12. Barry & Fourie 2002 *International Journal of Geographical Information Science* 23 26. Cross 1992 *SAJHR* 307.

⁹⁷ Gray & Gray *Elements of Land Law* para 2.6; Badenhorst et al *Law of Property* 1.

sense, indicates the existence of a horizontal legal relationship of rights and duties, over an object, among legal subjects reciprocally and between a legal subject and the state.⁹⁸ But as many authors, such as Badenhorst, Pienaar and Mostert as well as Van der Walt⁹⁹ indicated, the definition of property can be problematic within different contexts, implying distinctly different legal concepts.¹⁰⁰

Property can indicate the right of ownership in a legal object.¹⁰¹ Property is generally understood by the lay person as referring to a specific object, rather than a group of corollary rights relating to a specific object.¹⁰² As Gray and Gray pointed out, the use of the term in everyday language is not problematic but might serve to obscure the true meaning and potential of property as an important legal and social institution.¹⁰³ Blomley noted that social relations with regard to property create “invisible” boundaries between holders of land rights, often ignored by land administrators’ focus on the capital value of land.¹⁰⁴

Land tenure is a concept relevant to the part of property law dealing with real relations in land that contributes to security of tenure.¹⁰⁵ Land tenure should however be distinguished from the property law concepts such as “land title” and “ownership” in the sense that it indicates the policy behind the substantive

⁹⁸ Badenhorst et al *Law of Property* 1; Van der Merwe *Sakereg* 5.

⁹⁹ Van der Walt “Rights and Reforms in Property Theory: A Review of Property Theories and Debates in Recent Literature (Part III)” 1995 *TSAR* 493–526.

¹⁰⁰ Badenhorst et al *Law of Property* 1; Gray & Gray *Elements of Land Law* para 2.1.

¹⁰¹ Above.

¹⁰² Gray & Gray *Elements of Land Law* para 2.4; see Badenhorst et al *Law of Property* 1; *Yanner v Eaton* (1999) 201 CLR 351 (Australia). Van der Merwe *Sakereg* 6. Lewis “The Right to Private Property in a New Political Dispensation In South Africa” 1992 *SAJHR* 390–393.

¹⁰³ Gray & Gray *Elements of Land Law* para 2.4. Van der Merwe *Sakereg* 5–6.

¹⁰⁴ Blomley “Good Fences: Restitution and the historical geographies of property” Keynote address, Conference on Land, Memory, Reconstruction and Justice: Perspectives on Land Restitution in South Africa (2006) 10.

¹⁰⁵ Badenhorst et al *Law of Property* 1.

legal provisions regulating rights in land.¹⁰⁶ Tenure is a broad term indicating ways of holding the land,¹⁰⁷ regardless of its legal status. This is shaped by its own social processes.¹⁰⁸ In the South African context, land rights historically consists of in a number of personal and real rights of which the real rights of ownership, perpetual quitrent, and leasehold played a central role.¹⁰⁹ These forms of property rights differ only in the number of restrictive statutory limits and conditions conferred on the type of control over the property. In general, it is important to regard land tenure as an over-arching concept unifying the different types of landholding over immovable property.¹¹⁰

Land tenure as a concept has been researched by various disciplines, ranging from anthropology, sociology, political science, philosophy, law, the environmental sciences and economics.¹¹¹ This is hardly surprising, since land is central to human activity and important to social and commercial interactions.¹¹² This study mainly focuses on the legal implications of land tenure. New research and applications from the aforementioned fields will contribute in clarifying and explaining some of key concepts, related problems, and debates of land tenure. In the following section, the different forms of land tenure are examined and their current relevance discussed.

¹⁰⁶ Carey Miller & Pope *Land Title* 2. Mostert "Diversification" in *Modern Studies in Property Law Vol II* 4. See section below for a further discussion on land title.

¹⁰⁷ Or rights in land.

¹⁰⁸ Macdonald *Assessing common property institutions in the South African countryside* Paper presented to the Eighth Biennial Conference of the International Association for the Study of Common Property (IASCP) Bloomington, Indiana USA 31 May - 4 June 2000 4.

¹⁰⁹ Mostert, Pienaar & Van Wyk "Land Law" in *LAWSA* vol 8, 14 para 14 (Original text by Van Aswegen, Reissue text by Scheepers).

¹¹⁰ Above.

¹¹¹ Bromley & Cernea 1989 *World Bank Discussion Papers* 3.

¹¹² Gray & Gray *Elements of Land Law* para 1.1.

2 3 TYPES OF TENURE

As indicated above, the concept land tenure denotes the system used by occupiers of land, to manage their property within their societies by means of distinct mechanisms. The management of land tenure by communal property associations is one such mechanism. In considering the classification of different land tenure categories, different approaches are possible. In the specific context of land tenure, the focus should be on the holders who control the land as the rights over the property are socially constructed.¹¹³ On the other hand, it should be noted that specific characteristics of resources and objects connected to the land would influence how specific rights of holders will be ascribed.¹¹⁴ Another factor to consider is the broader governing system involved in allocating rights to holders of a certain property. Broadly stated, land tenure can be categorized into four modes of control by indicating the level of authority controlling the property in question, as well as the number of holders who have interests in the property. This will be discussed below.¹¹⁵

2 3 1 Communal Tenure

Firstly, there are corporate or community interests, which allow the property rights to vest in the community as an entity, detached from its members.¹¹⁶ In what is also known as “common” property, the defined community has shared usage rights to land that is simultaneously used and held by the members of the group and is regulated by agreed rules and norms.¹¹⁷ The corporate body

¹¹³ Macdonald *Assessing common property institutions in the South African countryside* 3.

¹¹⁴ Badenhorst et al *Law of Property* 32.

¹¹⁵ Allot “Family Property in Western Africa: Its Juristic Basis, Control and Enjoyment” in Anderson (ed) *Studies in Family Law in Asia & Africa* (1968) 121-121. Bromley & Cernea 1989 *World Bank Discussion Papers* 11.

¹¹⁶ Allot “Family Property” in *Studies in Family Law in Asia & Africa* 124.

¹¹⁷ Claassens & Cousins “Communal Land Tenure” in *Development Update: Piecemeal Reforms and Calls for Action* 57.

acts through mandated representatives and has a defined structure and membership.¹¹⁸

Common property regimes can take on other forms, for example, a group of persons can hold rights jointly but with “inseparable” title based on affiliation. The group would then not be considered to constitute a single entity for the purposes of communal tenure.¹¹⁹ Groups can also hold rights in common, but with each member holding separate title.

Communal tenure is distinguished from private property as holders of this regime cooperate within social units with unique authority systems.¹²⁰ This usually takes the form of nested or hierarchical systems applying to individuals as well as the group/community in general.¹²¹ As Cross pointed out, despite the fact that resources are shared and held in commonage, communal tenure does not necessarily imply group ownership over the property, but indicates a right of “shared oversight over the property”.¹²²

Common property regimes can also take the form of a group of persons holding rights jointly but with inseparable title. This is an example of co-ownership, which is a form of private property.¹²³ Co-owners usually base their affiliation on contracts, marriage or partnerships that cannot be truly regarded a single entity holding property.¹²⁴ Since the new constitutional

¹¹⁸ Allot “Family Property” in *Studies in Family Law in Asia & Africa* 124

¹¹⁹ Above.

¹²⁰ Bromley & Cernea 1989 *World Bank Discussion Papers* 3.

¹²¹ Cousins 2005 *Stell LR* 488 500-501; Fitzpatrick “Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access” 2006 *Yale Law Journal* 1011-1012. Pienaar “The Inclusivity of Communal Land Tenure: A Redefinition of Ownership in Canada and South Africa?” 2008 (12.1) *Electronic Journal of Comparative Law* 2, <<http://www.ejcl.org/121/art121-19.pdf>> (accessed 23-08-2010).

¹²² Cross 1992 *SAJHR* 312.

¹²³ Allot “Family Property” in *Studies in Family Law in Asia & Africa* 124.

¹²⁴ Above.

dispensation, communal property rights are explicitly acknowledged by means of legislation.¹²⁵ The CPA Act allows communities to establish statutory juristic persons to control their relevant properties by means of communal tenure.¹²⁶

2 3 2 Private Property (Freehold)

Another category of land tenure control is private property or freehold. Individual holders or entities can hold separate legal title individually.¹²⁷ Individual ownership or private property is the most common and dominant type of property regime in South Africa and indeed the western world.¹²⁸ Individual ownership is considered the most comprehensive right a person can have over property albeit within the limits of the law.¹²⁹ Private property allows the owner to legally exclude other parties from the property and hence have “exclusive control”.¹³⁰ Such exclusive control is not completely absolute, as third parties such as the state can hold residual rights in property, for example servitudes. It should be noted that entities such as companies could also control land by acquiring private property in the land. The notion of private property has furthermore developed to include co-ownership.¹³¹

The term freehold is sometimes used to indicate full ownership.¹³² Historically, private property was known as freehold in South Africa in order to distinguish it from older, now abolished, forms of colonial tenure such as perpetual

¹²⁵ Pienaar 2006 *TSAR* 442.

¹²⁶ See Ch 1 section 1 2 3 above. See also Pienaar “The Meaning of the Concept Community in South African Land Tenure Legislation” 2005 *Stell LR* 60-74.

¹²⁷ Allot “Family Property” in *Studies in Family Law in Asia & Africa* 124.

¹²⁸ Badenhorst et al *Law of Property* 91.

¹²⁹ Ch 2 section 2 3 2 below; Badenhorst et al *Law of Property* 91; *Gien v Gien* 1979 (2) SA 1113 (T) 1120.

¹³⁰ Badenhorst et al *Law of Property* 92; Bromley & Cernea 1989 *World Bank Discussion Papers* 12.

¹³¹ Badenhorst et al *Law of Property* 92; Van der Merwe *Sakereg* 170–173.

¹³² Van der Merwe & Pope “Servitudes and other real rights” in Du Bois (ed) *Wille Principles* (2007) 591 624-625.

quitrent and leasehold.¹³³ In addition, freehold indicates land tenure held by virtue of ownership,¹³⁴ thus signifying that the land rights held by an owner are only limited by common-law principles, statutory land law and limited real rights that third parties might have over the relevant property.¹³⁵

2 3 3 State or Public Property

Land can be held by the state, and is then called public property.¹³⁶ The Roman legal system, for example, had a specific classification for public property (*res publica*), allocating responsibility for certain objects to the state that were intended for general use by the public.¹³⁷ Such property could not be privately owned by individuals and communities or used by the state for anything else.¹³⁸ This type of tenure was described as *res extra commercium*, or items that cannot be classified as legal objects for the purposes of Roman property law, because they fell outside the scope of commerce.¹³⁹ South African law currently states that property can be divided into two categories, namely state property designated for public use and state property owned by the state for administrative purposes.¹⁴⁰

During the apartheid era in South Africa, areas occupied by black South Africans were mainly controlled by the State as public property. The main reasons advanced for such control were soil conservation and improvement of productivity.¹⁴¹ However, in effect this amounted to political control of black communities and prevention of black farmers to compete with the white

¹³³ Van der Merwe and Pope "Servitudes" in *Wille's Principles* 624.

¹³⁴ Badenhorst et al *Law of Property* 204.

¹³⁵ Badenhorst et al *Law of Property* 99.

¹³⁶ Badenhorst et al *Law of Property* 26.

¹³⁷ Van der Merwe *Sakereg* 31.

¹³⁸ Van der Merwe *Sakereg* 31.

¹³⁹ Badenhorst et al *Law of Property* 33.

¹⁴⁰ Badenhorst et al *Law of Property* 26.

¹⁴¹ Cross 1992 *SAJHR* 308;

agricultural industry.¹⁴² The state controlled these areas by allocating limited tenure rights to landholders.¹⁴³ These tenure rights took the form of betterment land schemes, trust tenure, quitrent, state freehold, state settlement schemes and state development leases.¹⁴⁴ Public property thus is the third type of control that can be exercised over the land.

2 3 4 Open Access

A fourth category signifies an absence of any established rights and duties, suggesting a state of so-called “non-property” and a situation of “open access” to land (*res nullius*).¹⁴⁵ Land not incorporated into the current mechanisms provided by our law is very rare, as land that is not claimed or registered in a person’s name usually vests with the state.¹⁴⁶

Some uncertainty exists over whether land can qualify as *res nullius*¹⁴⁷ and whether an owner actually can abandon land legally.¹⁴⁸ This possibility was implied by the case of *Minister of Landbou v Sonnendecker*.¹⁴⁹ If it were possible for land to be abandoned by an owner, there is also uncertainty as to who would subsequently become owner of the land.¹⁵⁰ In all probability, the land would be declared *bona vacantia* and will accrue to the state if the

¹⁴² Cross 1992 SAJHR 308; Claassens “For Whites Only - Land Ownership in South Africa” in De Klerk (ed) *A Harvest of Discontent: The Land Question in South Africa* (1991) 43.

¹⁴³ Cross 1992 SAJHR 308.

¹⁴⁴ Cross 1992 SAJHR 308-309.

¹⁴⁵ Claassens & Cousins “Communal Land Tenure” in *Development Update: Piecemeal Reforms and Calls for Action* 57; Van der Merwe *Sakereg* 29; Bromley & Cernea 1989 *World Bank Discussion Papers* 20; Van der Walt “Rights and Reforms in Property Theory - A Review of Property Theories and Debates in Recent Literature: Part III” 1995 *TSAR* 493 508-509.

¹⁴⁶ Badenhorst et al *Law of Property* 140; Gildenhuis *Onteieningsreg* (2001) 3.

¹⁴⁷ Van der Merwe *Sakereg* 227.

¹⁴⁸ See the discussion in Badenhorst et al *Law of Property* 140-141.

¹⁴⁹ 1979 2 SA 944 A.

¹⁵⁰ Van der Merwe *Sakereg* 227.

necessary intention of abandonment on the part of the owner could be proved.¹⁵¹

In sociological circles, open access is regarded as an indication of breakdown in communal property structures to control resources on the land.¹⁵² In communal land holding mechanisms the risk of abandonment is always present.¹⁵³ If there is a breakdown in community structures or the land is not maintained properly, community members often abandon such land because of a lack of benefits received.¹⁵⁴ Thus “open access” represents a threat to the security of tenure of land held by communal property associations.

2 4 SECURITY OF TENURE

The previous section dealt with various classification of land tenure. In this part, I explore the idea that land tenure systems and their various manifestations need to function properly to provide landholders with the necessary security. Tenure security is vital for the success of communal property associations as it provides certainty for the community members. In this section, the significance of tenure security is investigated, its advantages discussed and the conditions necessary for security of tenure indicated.

¹⁵¹ Badenhorst et al *Law of Property* 141; Carey Miller *The Acquisition and Protection of Ownership* (1986) 8-9; Van der Merwe *Sakereg* 227; *Lawsa* vol 27 para 326. See, however, Sonnekus “Enkele opmerkings na aanleiding van die aanspraak of *bona vacantia* as sogenaamde regale reg” 1985 *TSAR* 121 ff; “Abandonering van eiendomsreg op grond en aanspreeklikheid vir grondbelasting” 2004 *TSAR* 747 752–753. *Minister of Landbou v Sonnendecker* 1979 2 SA 944 A.

¹⁵² Bromley & Cernea 1989 *World Bank Discussion Papers* 20; Claassens & Cousins “Communal Land Tenure” in *Development Update: Piecemeal Reforms and Calls for Action* 56.

¹⁵³ Ch 2 section 2 3 4 below.

¹⁵⁴ CSIR *Diagnostic Study* 117.

Tenure security is one of the most fundamental conditions shared by all land holders.¹⁵⁵ Security of tenure normally denotes protection of land holders from “involuntary” and arbitrary eviction from or interference with their land, unless by means of an established legal procedure.¹⁵⁶ In addition, it is a necessary condition which shapes the foundation on which a society can build successful social and economic strategies.¹⁵⁷ In this sense, therefore, security of tenure is dependent on the strength of social processes among beneficiaries and towards outsiders with regard to respect for and enforcement of the requirements from tenure rights. This implies that formal legal protection is not always a minimum requirement for security of tenure.¹⁵⁸ Formal protection does, however, significantly contribute to the protection of security of tenure.

The term “tenure security” therefore refers to the legal, administrative, and social framework governing individual or group rights to land or residential property.¹⁵⁹ It also indicates the existence of a recognized set of justifiable and enforceable rules, procedures, and systems facilitating effective utilization of this framework.¹⁶⁰ Security of tenure is thus attained when secure substantive rights exist, with the necessary procedures and authority to enforce these rights. However, these principles must be sufficiently flexible to

¹⁵⁵ Place, Roth & Hazell “Land Tenure Security and Agricultural Performance in Africa: Overview of Research Methodology” in Bruce and Migot-Adholla (eds) *Searching for Land tenure Security in Africa* 15; Cousins & Hornby “Adrift” in *Piecemeal Reforms and Calls for Action* 132.

¹⁵⁶ Durand-Lasserve & Royston “International Trends and Country Context – From Tenure Regularization to Tenure Security” in Durand-Lasserve & Royston (eds) *Holding Their Ground* (2002) 8-9. De Vos “Pious Wishes or Directly Enforceable Human Rights? Social And Economic Rights In South Africa's 1996 Constitution” 1997 *SAJHR* 84; Place et al “Land Tenure Security” in *Searching for Land tenure Security in Africa* 19.

¹⁵⁷ Cousins & Hornby “Adrift” in *Piecemeal Reforms and Calls for Action* 132.

¹⁵⁸ Bromley & Cernea 1989 *World Bank Discussion Papers* 5; Macdonald *Assessing common property institutions in the South African countryside* 4.

¹⁵⁹ Durand-Lasserve & Royston “International Trends” in *Holding Their Ground* 8-9.

¹⁶⁰ Durand-Lasserve & Royston “International Trends” in *Holding Their Ground* 8-9; Cousins “Securing Tenure – Some Principles” July 2003 www.leap.org.za (Accessed on 23-08-2010) 2; Cousins, & Hornby “Adrift” in *Piecemeal Reforms and Calls for Action* 132.

adapt to changing circumstances and the relevant needs of interest holders. If tenure is insecure, it leads inevitably to vulnerability and economic marginalisation of landholders and will cause conflict among them.¹⁶¹

To understand the demands of tenure security, it is necessary to consider the advantages inherent in secure tenure, and to analyse the conditions necessary to achieve tenure security. It strengthens the position of those benefitting from secure tenure and fortifies the types of rights that may need to be secured in the communal context. This will be dealt with in the following subsections.

2 4 1 ADVANTAGES OF SECURE TENURE IN TENURE INSTITUTIONS

Many advantages might be attained from security of tenure. From a legal perspective, security of tenure should provide robustness and certainty that other individuals or the state may not arbitrarily interfere with property.¹⁶² Security of tenure creates a platform to improve the livelihoods of landholders by means of development of educational, infrastructural and service support.¹⁶³

Secure tenure creates various economic advantages compared with insecure rights,¹⁶⁴ including an increase in the value of land, which in turn enhances credit worthiness and incentives for investment.¹⁶⁵ This facilitates a more efficient land transfer system, creating contractual certainty and lower

¹⁶¹ Hall, Jacobs & Lahiff "Evaluating land and agrarian reform" in *Occasional paper series 27*.

¹⁶² Pienaar "The Registration of Fragmented Use-Rights as a Development Tool in Rural Areas" *Seminar Report Constitution and Law IV: Developments in the Contemporary Constitutional State* (2-3 November 2000) 120.

¹⁶³ Mostert & Pienaar "Communal Land Title" in *Modern Studies in Property Law Vol III* 318.

¹⁶⁴ Place et al "Land Tenure Security" in *Searching for Land tenure Security in Africa* 15.

¹⁶⁵ Place et al "Land Tenure Security" in *Searching for Land tenure Security in Africa* 15,17.

transaction costs. If rights are clearly defined and enforced, the prevalence of land disputes will be reduced. Certainty contributes to increased productivity by means of increased agricultural investment and more substantial commercial gains.¹⁶⁶ Greater tenure security furthermore stimulates the land market and enables the leasing of land to others.¹⁶⁷

To achieve such benefits however, certain conditions of security of tenure must be met, as will be discussed in the next section.

2 4 2 CONDITIONS OF SECURE TENURE

As a departure point, it is contended that certainty and clarity should exist over who qualifies to have rights in the land.¹⁶⁸ This would entail procedures to recognize which individuals or family units qualify to hold rights in land in a communal setting.¹⁶⁹ In this section the status of land holders and the types of rights required will be discussed. The types of rights that make up security of tenure, namely usage rights, management rights, exclusionary rights and transfer rights will be treated below.

2 4 3 STATUS AND IDENTITY OF THE INTEREST HOLDER

In determining the status of the holder one must indicate who holds what kinds of rights in relation to the object. In already established forms of tenure, one must know what the rights of an individual are in order to determine if their corollary rights are suitably protected. In communal settings, status indicates the minimum protection of allocated rights that members are afforded within the community.

¹⁶⁶ Above.

¹⁶⁷ Pienaar 2006 *Stell LR* 435. Place et al “Land Tenure Security” in *Searching for Land tenure Security in Africa* 17.

¹⁶⁸ Cousins “Securing Tenure – Some Principles” July 2003 www.leap.org.za (accessed 23-08-2010) 2.

¹⁶⁹ For example s 2 of The RLR Act, S 8 of the CPA Act; Def of “owner” in s 1 of the ST Act; and s 3 of the Extension of Security of Tenure Act 62 of 1997.

Various procedures can be used. In an indigenous setting, it might mean that a member attains status by means of a tribal affiliation.¹⁷⁰ This can take the form of contractual rights and statutory concessions awarded by the institution in control of the property, such as the state.¹⁷¹ Similar to individual ownership, nationality (citizenship)¹⁷² or legal status can confer such status on an individual. If such an individual or family unit qualifies, it will entitle them to recognition and enforcement of such allocated rights.¹⁷³ In the light of the 1996 Constitution,¹⁷⁴ it is important that a secure tenure system does not discriminate unfairly towards its own members individually or against a group of members.¹⁷⁵

The status of the holder can furthermore serve different functions depending on the rights assigned to such a person.¹⁷⁶ This means that within the community, members can receive different benefits depending on the needs and responsibility of members within the community.¹⁷⁷ As such rights may vary, different types of rights may be attached to the status of members. This will be discussed in the next section.

2 4 4 TYPES OF RIGHTS

To assess a tenure system effectively, the rights and obligations of holders should be identified. Certainty of the rights of landholders significantly contributes to the question whether the conditions of tenure security are met.

¹⁷⁰ Cousins 2005 *Stell LR* 490.

¹⁷¹ Bennett *Customary Law in South Africa* 380. Mostert "Diversification" in *Modern Studies in Property Law II* 4.

¹⁷² Van Marle "Critical Reflections on 'Suspect Intimacies' and 'Immanent Subjectivity' in Botha, Van der Walt and Van der Walt "*Rights and Democracy*" (2003) 231 245.

¹⁷³ Bennett *Customary Law in South Africa* 380, 390.

¹⁷⁴ 108 of 1996.

¹⁷⁵ S 9 of the Constitution of South Africa 108 of 1996. Bennett *Customary Law in South Africa* 391.

¹⁷⁶ Bennett *Customary Law in South Africa* 380.

¹⁷⁷ Cousins 2005 *Stell LR* 491.

The rights of holders will depend on the relevant status of the holder, whether this is national or in a community, and on the characteristics of the property in question, as indicated above. The main aim is to determine which entitlements holders have as well as the built-in limitations on such rights.¹⁷⁸ According to Allot, the interest in land can be identified by whether the holder's entitlement signifies use and enjoyment of the land for the "benefit" of the user or whether the interest gives the user "control" or the power to decide who may benefit from the specific right.¹⁷⁹

The main rights required to attain security of tenure can be divided into the following four groups: access and usage rights; land management rights; exclusionary rights and transfer rights.¹⁸⁰

2 4 4 1 Access and usage rights

Access and usage rights pertain to the entitlements of entry into the property and use of the natural resources.¹⁸¹ Use rights are firstly determined by the type of resources available on the land which might for example include the right to draw water, chop wood or gather building materials (for example wood, grass or clay). Secondly, it is determined by the intended usage of the land, such as agriculture, pasturage or shelter.¹⁸² Intended usage of the land can limit other possibilities of use that may exist in a particular parcel of land to ensure effective treatment, because of a particular cultural or historical significance, such as burial grounds.¹⁸³

¹⁷⁸ Bennett "Official' v 'Living' Customary Law: dilemmas of Description and Recognition" in Claassens & Cousins (eds) *Land Power & Custom* (2008) 138-146. Bennett *Customary Law in South Africa* 380.

¹⁷⁹ Allot "Family Property" in *Studies in Family Law in Asia & Africa* 124.

¹⁸⁰ Macdonald *Assessing common property institutions in the South African countryside* 9.

¹⁸¹ Schlager & Ostrom "Property rights regimes and natural resources: A conceptual analysis" 1992 (68) 3 *Land Economics* 249-262.

¹⁸² Cousins 2005 *Stell LR* 491-492.

¹⁸³ Pienaar & Mostert "Balance between burial rights and Landownership in South Africa: Issues of Content, Nature and Constitutionality" 2005 *SALJ* 633-660.

An important role is furthermore played by priorities that exist at a specific time within a land tenure system, as different use rights will apply in different circumstances as societal demands change.¹⁸⁴ It is also possible that users will hold dissimilar rights or “nested” rights to the same parcel of land.¹⁸⁵ Certain users might have stronger rights of access and usage than others, depending on the users’ status in the community, implying that the distribution of resources and power might not be equal among all users.¹⁸⁶ The purpose of determining these substantive rights is to define and limit the objects the holders of the land have rights to and are allowed to utilize. Substantive usage rights are important for security of tenure as it provides income and sustenance for members of a communal property association.

2 4 4 2 *Management rights*

Management rights are essential for secure tenure as they prescribe the manner in which access and use rights are utilized and exploited.¹⁸⁷ Management rights indicate implicitly that a measure of authority over such usage rights must exist in order to create a sustainable, efficient, and a coherent environment for utilization.¹⁸⁸ Management rights should contain procedures to manage disputes between members that might arise over access and usage rights.¹⁸⁹ Management rights therefore create certainty with regard to the manner holders use substantive rights in relation to objects and each other to attain security of tenure.

¹⁸⁴ Cousins 2005 *Stell LR* 491-492.

¹⁸⁵ Cousins 2005 *Stell LR* 498-500.

¹⁸⁶ Von Benda-Beckman 2003 *Focaal - European Journal of Anthropology* 187-188.

¹⁸⁷ Bennett “‘Official’ v ‘Living’ Customary Law” in *Land Power & Custom* 147.

¹⁸⁸ Bennett *Customary Law in South Africa* 380.

¹⁸⁹ McAuslan *Bringing the Law Back In* (2003) 12.

2 4 4 3 *Rights of exclusion*

Another important component relating to the identity of the holder under a tenure system is rights of exclusion which operate on various levels. They determine which of the holders form part of a specific tenure system or community, or on a lesser level, which holders in a tenure system have access to specific resources or parcels of land.¹⁹⁰ Exclusionary rights can serve the purpose of limiting the number of users in a specific system to maximize productivity and minimise overuse and overcrowding. It can maximize the value of resources giving the holder or community political power and an economic advantage.¹⁹¹ In most circumstances, exclusionary rights will determine the cultural behaviour of communities and overlap with the type of status any member of the community holds. Rights of exclusion render land rights valuable and important to protect under the notion of security of tenure.

2 4 4 4 *Transfer rights*

Transfer rights allow for procedures of transfer of all or some of the rights between holders or even outsiders within a tenure setting. Certainty in managing such situations promotes security of tenure. It is imperative that a measure of publicity is required for the transfer of rights in order to protect new holders.

Rights must be conferred by a formalised and reputable transfer system allowing holders to enforce and transfer their rights to others.¹⁹² This indicates that the categories of access and usage rights might overlap with transfer rights.¹⁹³ Although all rights are important in their own way and are

¹⁹⁰ Schlager & Ostrom 1992 *Land Economics* 251.

¹⁹¹ Above.

¹⁹² Bennett *Customary Law in South Africa* 380; Allot "Family Property" in *Studies in Family Law in Asia & Africa* 124.

¹⁹³ Bennett "Description and Recognition" in *Land Power & Custom* 138 147.

interdependent, it is clear from the above that the obligations pertaining to each right should be kept separate in order to avoid confusion among holders.

Tenure security is realised when there is certainty concerning the different rules discussed in the above-mentioned categories. There are, however, certain paradigmatic obstacles that might hamper the successful implementation of the land reform programme as is indicated in the next section.

2 5 PARADIGMATIC OBSTACLES TO SECURITY OF TENURE

Security of tenure for communal property associations can be hampered by a number of paradigmatic obstacles and assumptions. Below the assumption that communal tenure is an unsuitable mechanism for land holding will be considered. Secondly, it will be pointed out that the current policy focus on individual ownership disregards the imperatives peculiar to communal land holding. Thirdly, it will be shown that the relationship between customary tenure and communal land tenure may be problematic. Gender inequality and static conceptions of community are further obstacles discussed below.

2 5 1 TRAGEDY OF THE COMMONS

One of the main obstacles in implementing successful communal tenure systems is the perception that the mechanisms governing communal property regimes are ineffective and lead to resource degradation. Among the most significant arguments in this regard is Hardin's allegory of the so-called "tragedy of the commons".¹⁹⁴ Hardin argued that common property ownership could not be successful, because the decisions of individuals regarding shared resources are driven mostly by inherent self-interest, materialism and

¹⁹⁴ Hardin "The tragedy of the commons" 1968 *Science* 1234-1248.

short-term gains that would prevail whenever there is competition for shared resources.¹⁹⁵ Without any collective will to act in the interest of the whole community to conserve resources, usage will be unsustainable, leading to the so-called “tragedy of the commons”.

In the South African context, this is especially related to the perception that traditional communal farming is responsible for poverty, overgrazing by livestock and degradation of productive land.¹⁹⁶ Implied in this perception, as Bromley pointed out, is the notion that property shared in a communal fashion would lead to a situation of “open access” and an unregulated “free-for-all”.¹⁹⁷ Proponents of this view believe that common property institutions are “undeveloped and underdeveloped” and must evolve to a more individual mode of private property.¹⁹⁸

The effects of this allegory have been wide-ranging in the tenure development community, especially concerning indigenous communal property and conservation policies.¹⁹⁹ This allegory spurred initiatives in various parts of Africa to individualise and privatise communal tenure regimes²⁰⁰ to stimulate improved output and economic advancement.²⁰¹ This view still finds

¹⁹⁵ Hardin 1968 *Science* 1234-1248; Whande; Malasha & Njaya “Challenges and prospects for trans-boundary fisheries in Lakes Chiuta and Kariba” (2006) 21 *Plaas Policy Brief* 2.

¹⁹⁶ Boonzaier et al “Communal Land Use and the ‘Tragedy of the commons’: Some Problems and development Perspectives with Specific Reference to Semi-arid Regions of Southern Africa” June 1990 *J Grassl Soc South Afr* 77.

¹⁹⁷ Bromley & Cernea 1989 *World Bank Discussion Papers* 6ff; Boonzaier et al 1990 *J Grassl Soc South Afr* 77. See also 2 1 1 and 2 1 4 above.

¹⁹⁸ Van der Walt 1995 *TSAR* 508-509. See also Ellickson “Property in Land” 1993 *Yale LJ* 1315-1400; Boonzaier et al 1990 *J Grassl Soc South Afr* 77.

¹⁹⁹ Bromley & Cernea *World Bank Discussion Papers* 6ff; Van der Walt 1995 *TSAR* 493 508-509.

²⁰⁰ Swallow & Bromley “Institutions, Governance, and Incentives in Common Property Regimes for African Rangelands” September 1995 *Environmental and Resource Economics* 99-118. Cross 1992 *SAJHR* 306; Atwood “Land Registration in Africa: The Impact on Agricultural Production” 1990 *World development* 659.

²⁰¹ Pienaar “The Land Titling Debate in South Africa” 2006 *TSAR* 435 436; Cross 1992 *SAJHR* 305 306.

resonance in current South African land reform discourse.²⁰² Proponents argue that equal rights in communal arrangements do not provide enough incentive for investment in and conservation of the property as the possibility always exists that some members will not be willing to share the costs of such incentives or attempts will be made to exclude such free-riders from the eventual benefits.²⁰³ Short-term gains are thus emphasised by such communities, to the detriment of the surrounding environment or existing amenities.²⁰⁴

It might be true that the idea of land titling largely creates in most circumstances improved economic conditions and certainty, but the replacement of communal tenure systems in Africa by private individual tenure has proved to be unsuccessful.²⁰⁵ In some cases where private tenure was put into operation, it plunged landholders into even further poverty and forced them into “over-supplied labour markets”.²⁰⁶ One of the main reasons for this, as Cross pointed out, is that land titling cannot provide the same values for land holders in rural communities as communal property systems do. These values as indicated above,²⁰⁷ include special social community structures, that serve to create a safety net to protect the most vulnerable members against poverty and to facilitate the sharing of information on how to exploit resources in a sustainable manner.²⁰⁸

Hardin’s allegory can be criticized firstly for confusing different types of property regimes, such as communal property and open access. It denies the

²⁰² Blom *The Weekender* (07-07-2007) 3.

²⁰³ Zille “Free-riders drag down the horse” *Business Day* (04-07-2007) 13; Lawry “Tenure Policy Toward Common Property Natural Resources in Sub-Saharan Africa” 1990 (30) *Public Policy and Natural Resources* 403 406-407.

²⁰⁴ Zille *Business Day* (04-07-2007) 13.

²⁰⁵ Cross 1992 *SAJHR* 306.

²⁰⁶ Boonzaier *et al* 1990 *J Grassl Soc South Afr* 79.

²⁰⁷ See ch 2 section 2.2 above.

²⁰⁸ Cross 1992 *SAJHR* 306; Boonzaier *et al* 1990 *J Grassl Soc South Afr* 79.

existence of institutions where landholders act together within set frameworks to manage the land.²⁰⁹ Furthermore, Bromley criticized the allegory for being culturally simplistic, as it ignores actual viable social arrangements between landholders.²¹⁰ The disregard of such aspects in attempting to supplant communal tenure with private property initiatives could therefore undermine already successful systems and partnerships between landholders. Van der Walt and Cross criticised the allegory for perceiving landholders wrongly as essentially self-centred and materialistic, ignoring other factors which drive people to hold land in a communal fashion.²¹¹

It should moreover be noted that the reasons why communal tenure fails, can in most cases be ascribed to other circumstances which cause overuse and natural degradation. The most important reason is the inherent breakdown of communal management systems.²¹² External pressures such as poverty, starvation and overpopulation can distort communal property institutions.²¹³ Solving these issues requires effective organization but, as the White Paper points out, it should have legitimacy in the eyes of the eventual beneficiaries.²¹⁴

Following the motivations explored above, the White Paper on Land Policy approached the reform of land rights in a fashion that would allow landholders to choose what form of control their land holding should take. On the other hand, one of the most important goals of the land reform programme is apparently to use the concept of land titling by means of existing registration

²⁰⁹ Bromley & Cernea 1989 *World Bank Discussion Papers* 6ff

²¹⁰ Bromley & Cernea 1989 *World Bank Discussion Papers* 7. See also Boonzaier *et al* 1990 *J Grassl Soc South Afr* 77-78.

²¹¹ Van der Walt 1995 *TSAR* 508-509; Cross 1992 *SAJHR* 305.

²¹² Bromley & Cernea 1989 *World Bank Discussion Papers* 13.

²¹³ Cross 1992 *SAJHR* 306.

²¹⁴ Department of Rural Development and Land Reform *White Paper on Land Policy* (1997) para 5.8.

procedures to create security of tenure.²¹⁵ The registration system in South Africa therefore needs to be adapted to accommodate communal tenure, in a way that will benefit, rather than disadvantaging holders wishing to utilize communal land holding negatively.²¹⁶

Thus, the assumption “tragedy of the commons” is an important obstacle to the goal of creating security of tenure for communities. Below the role of individual ownership as dominant property holding institution that may hamper security of tenure for communities will be discussed.

2 5 2 HIERARCHY OF PROPERTY RIGHTS

As indicated above,²¹⁷ private ownership or freehold is the dominant form of land holding in South Africa.²¹⁸ Historically, the institution of private ownership was also an important part of the racially based system of apartheid land laws.²¹⁹ This had a detrimental impact on black citizens who could not own land in certain areas,²²⁰ which was exacerbated by the fact that they could only acquire rights based on statutory and tribal land rights that were weaker than ownership rights.²²¹ Black people were effectively excluded from adequate protection of security of tenure and access to real security, in contrast to the benefits bestowed by ownership.²²²

²¹⁵ Mostert “Diversification” in *Modern studies in Property Law Vol II* 12; Pienaar 2006 *TSAR* 439.

²¹⁶ Pienaar 2006 *TSAR* 405.

²¹⁷ See Ch 2 section 2 3 2 above.

²¹⁸ Lahiff “With what Land Rights” in *Another Countryside* 95.

²¹⁹ Van der Walt “Property Rights and Hierarchies of Power: A Critical Evaluation of Land-Reform Policy in South Africa” 1999 *Koers* 261.

²²⁰ Van der Walt 1999 *Koers* 262.

²²¹ Van der Walt 1999 *Koers* 262; Lahiff “With what Land Rights” in *Another Countryside* 95.

²²² Above.

Another reason for the dominance of rights conferred by ownership of immovable property was the fact that ownership rights could be registered in the Deeds Registry.²²³ Ownership rights were further protected by means of real actions such as the *rei vindicatio*²²⁴ and could only be alienated by means of registration at the Deeds Office via derivative acquisition.²²⁵ This conferred various benefits on such titleholders, including the possibility that an owner can use the property as security to obtain loans, and fully exploit the value of the property.²²⁶ Lesser black statutory rights were vulnerable to interference or confiscation by the state or other parties which could lead to abuse by individuals with more money or influence also occupying the land. The weaker rights impaired the ability of black landholders to obtain finance and housing subsidies.²²⁷ To compound matters, such rights were usually allocated in rural areas far removed from economic zones, or on peri-urban zones with weak infrastructural support.²²⁸

Van der Walt argues that the apartheid land system entrenched the power of the traditional Roman-Dutch law of ownership for white people, while black people could only rely on statutory and customary measures of land holding which were weaker than ownership.²²⁹ The inequality of this relationship between white ownership rights and black statutory allocations reflected not only a racially based political choice that could be exploited by the apartheid regime but was also underpinned by the dogmatic justification and dominance of the traditional civil law institutions warranting ownership.²³⁰

²²³ S 63(1) of the Deeds Registries Act 47 of 1937.

²²⁴ Van der Merwe *Sakereg* 170.

²²⁵ Pienaar 2000 *TSAR* 445.

²²⁶ Pienaar 2000 *TSAR* 448.

²²⁷ Pienaar 2000 *TSAR* 444.

²²⁸ Van der Walt 1999 *Koers* 263.

²²⁹ Van der Walt "The Fragmentation of Land Rights" 1992 (8) *SAJHR* 431 447; Van der Walt 1999 *Koers* 263.

²³⁰ Van der Walt 1999 *Koers* 263.

In order for the hierarchy of the ownership model to be supplanted and property rights distributed more justly, Van der Walt suggested that a model of fragmented use rights should be implemented, separating the rights of title and use in a property and security of tenure based on legislation.²³¹ The suggested fragmented use rights model eliminates the power disparities inherent in the conventional, hierarchical model of ownership.²³² This model generally accommodates various types of property interests reflecting specific requirements by different landholders without depending on a notion of ranking different rights in land.²³³

Pienaar, although welcoming this approach, criticised it for separating title and use of the land. He argued that the true advantage of ownership lies in the application of the publicity principle ensuring that land can only be acquired and transferred in normal circumstances by means of registration.²³⁴ The accurate and reliable records provided by the Deeds Office, creates the strong protection and advantages conferred on ownership.²³⁵

On the other hand, other rights that are upgraded to be equal to ownership suffer the weakness of not adhering to the requirements of the publicity principle.²³⁶ If a dispute or an uncertainty arises over such upgraded rights, it needs to be resolved by means of adjudication by a court,²³⁷ arbitration,²³⁸

²³¹ Van der Walt 1992 *SAJHR* 449; Pienaar 2000 *TSAR* 446.

²³² Van der Walt 1999 *Koers* 267-269 Pienaar 2000 *TSAR* 446.

²³³ Van der Walt 1992 *SAJHR* 449-450; Pienaar 2000 *TSAR* 448.

²³⁴ Pienaar 2000 *TSAR* 442 448; s 63(1) of the Deeds Registries Act 47 of 1937

²³⁵ Mostert "Diversification" in *Modern studies in Property Law Vol II* 4.

²³⁶ Pienaar 2000 *TSAR* 449.

²³⁷ See for example s 29 of the Land Reform (Labour Tenants) Act 3 of 1996.

²³⁸ See for example s 31(1) of the Land Reform (Labour Tenants) Act 3 of 1996.

mediation,²³⁹ or a negotiated settlement. Until such rights are confirmed, they remain tenuous from a tenure security perspective.²⁴⁰

Financial institutions and development agencies generally are furthermore reluctant to provide financing for property only protected by legislation, since repeated disputes over rights might undermine the land as security.²⁴¹ The risks involved for financial institutions in financing such landholders who often are small-scale farmers, are compounded by the administrative costs involved in administering such loans, and explain the hesitancy of financial institutions to provide financing.²⁴² In a situation where most of the stakeholders in the property market are not willing to provide financing, the government is forced to provide the bulk of the loans and grants.²⁴³ Lack of financing and the prolonged uncertainty of such rights will result in the newly upgraded rights still being regarded as second-class subservient rights.²⁴⁴ Pienaar suggested that adequate titling mechanisms and publicity should be extended to these newly upgraded rights, while the potency of ownership can be limited by means of limited real rights registered over a property in favour of third parties.²⁴⁵

The White Paper on Land Policy supports a unitary registration system that should be able to accommodate various types of property rights.²⁴⁶ This would require that the Deeds Registry system be expanded to accommodate

²³⁹ See for example s 11(6) of the CPA Act.

²⁴⁰ Pienaar 2000 *TSAR* 449.

²⁴¹ Nonyana "Shortcomings in the Delivery of Land Reform" December 2004 *PLD* para 3.1; Pienaar 2000 (3) *TSAR* 445,449.

²⁴² Pienaar 2006 *TSAR* 438.

²⁴³ Mostert "Diversification" in *Modern studies in Property Law Vol II* 18; White Paper on Land Policy para 4.5.6.

²⁴⁴ Pienaar 2006 *TSAR* 446; Pienaar 2000 *TSAR* 449.

²⁴⁵ Pienaar 2000 *TSAR* 450ff.

²⁴⁶ Lahiff "With what Land Rights" in *Another Countryside* 95; White Paper on Land Policy para 4.19; 6.15.4.

historically neglected rights that could provide novel tenure options in South Africa's new democratic society. The problem however is that despite the accuracy of the South African deeds system, it is still cumbersome, slow, expensive and does not have the capacity to deal with the introduction and influx of new rights that need to be registered.²⁴⁷ This could hamper the goal of creating security of tenure for communities even though their land rights are upgraded to something akin to ownership.

For a number of observers, like Lahiff, this indicates the continuing dominance of the ownership paradigm.²⁴⁸ He argued that, although the measures introduced by the policies and legislation of the new South Africa do seem to address the variety of tenure systems that are required, the protection of these tenure rights is not gaining enough momentum in practice.²⁴⁹ In addition, despite the current diversity of tenure arrangements in South Africa, ownership prevails as the dominant right in conflicts between different categories of landholders.²⁵⁰ Lahiff further contended that the dominance of ownership can be observed in the reluctance of Government to flex its constitutional muscles and utilize expropriation more often.²⁵¹

In addition, the emphasis of the White paper on group rights in the land reform programme, created a combination of private ownership for the transfer of title and "notions of communalism" based on pre-colonial group ownership.²⁵²

²⁴⁷ Mostert "Diversification" in *Modern studies in Property Law Vol II* 24.

²⁴⁸ White Paper on Land Policy para 6.15.4. Lahiff "With what Land Rights" in *Another Countryside* 95. Carey Miller & Pope *Land Title* 48.

²⁴⁹ Lahiff "With what Land Rights" in *Another Countryside* 95.

²⁵⁰ Above.

²⁵¹ Above

²⁵² James *Gaining Ground* 155,157.

When a property is registered in the name of a juristic person within the boundaries of the cadastral system, the rights held by the group are defined by other processes, which are in many instances based on contestation and complex procedures.²⁵³ This creates various problems, especially concerning some of the newly introduced tenure systems. Although communal property is widely used as a mechanism in the land reform programme, inadequate support is provided to communities.²⁵⁴ Despite exemptions from land taxation and other land regulation measures, poor communities are still left to fend for themselves.²⁵⁵ The inherent flexibility and mutual support promised by communal regulation are undermined by the lack of institutional capacity.²⁵⁶ For Lahiff this indicates the State's lack of political will to follow through on promises of upgrading black citizens' land rights and providing adequate access to land.²⁵⁷ While a community then owns a property as "private owners", there is always the threat that they might lose the property through bad debts as they operate with reduced state support.²⁵⁸

Under, current legislation, the paradigmatic obstacle remains until better security is guaranteed for to existing and "new" tenure rights. According to Pienaar, the solution lies in a system of variable land rights recognising individual and group rights.²⁵⁹ Such rights must be supported by an efficient land administration system including surveying, a computerised cadastral and tenure system, decentralised land management boards and accessible dispute resolution measures.²⁶⁰ The system must also accommodate the inherent flexibility of communal tenure systems.²⁶¹

²⁵³ Lahiff "With what Land Rights" in *Another Countryside* 95; James *Gaining Ground* 156.

²⁵⁴ Ch 5 section 5.5 below.

²⁵⁵ See for example s 8(8) of the CPA Act.

²⁵⁶ Ch 5 section 5.5 below.

²⁵⁷ Lahiff "With what Land Rights" in *Another Countryside* 96.

²⁵⁸ James *Gaining Ground* 155.

²⁵⁹ Pienaar 2006 *TSAR* 451.

²⁶⁰ Pienaar 2006 *TSAR* 453-455.

²⁶¹ Pienaar 2006 *TSAR* 451-452.

Flexibility in communal tenure systems can be achieved by identifying the possible rights in the property and creating a system reserving such rights for members in the establishment phase before occupation. This allows members a choice of usage of such rights within a framework acceptable for the whole community and recorded in the title deed, enabling protection by means of publicity. Members should be given the choice of individualisation of certain rights within the boundaries of the communal property even if dependent on the decision of the community.²⁶² Yet, implementation and maintenance of such frameworks still demand a large measure of continued support from government.

2 5 3 CUSTOMARY TENURE

Communities practicing customary tenure often seek to formalise their tenure arrangements by creating communal property associations.²⁶³ The role that customary tenure plays in providing security of tenure for communities needs to be investigated.

Chieftainship continues to be a dominant model of governance in rural areas,²⁶⁴ where traditional customary law systems grant the chief the power to allot land to individuals and to regulate common resources.²⁶⁵ In the now defunct Communal Land Rights Act,²⁶⁶ provision was made for the inclusion of traditional leaders in the governing structures of land boards administering the communal land in terms of the Act.²⁶⁷

²⁶² Pienaar 2006 TSAR 452. S 6(b) of the CLR Act.

²⁶³ Cousins & Hornby "Adrift" in *Piecemeal Reforms and Calls for Action* 130.

²⁶⁴ James *Gaining Ground* 207.

²⁶⁵ Bennett *Customary Law in South Africa* 382-383.

²⁶⁶ 11 of 2004.

²⁶⁷ S 21(2) of the CLR Act.

In many South African regions, customary land tenure is still practiced by traditional communities where traditional leaders (“chiefs”) held the land on behalf of their subjects.²⁶⁸ These leaders had the power of allocating land rights and managing communal farming areas.²⁶⁹ The powers of chiefs were limited in that they had to respect the wishes of the community or face secession or of being deposed.²⁷⁰ Thus, history suggests that customary tenure will not be an obstacle for the creation of security of tenure.²⁷¹ This is because the system, as it has been practiced for many years, created close societal and familial bonds that can successfully protect current members and allow new members in its system from time to time by means of marriage or cultural traditions.²⁷²

Unfortunately, due to the system of patronage and racial division caused by successive apartheid governments, many chiefs have become corrupt and undemocratic, hampering security of tenure of their subjects.²⁷³ Various customary principles also clash with the values of the South African Constitution, such as male primogeniture allowing the patrilineal lineage of traditional communities to continue.²⁷⁴

²⁶⁸ See for example Ashton *The Basuto* (1952) 209.

²⁶⁹ Bennett *Customary Law in South Africa* 381.

²⁷⁰ Prinsloo *Inheemse Publiekreg in Lebowa* (1983) 161; Bennett *Customary Law in South Africa* 105.

²⁷¹ Bennett *Customary Law in South Africa* 390.

²⁷² Bennett *Customary Law in South Africa* 381 ff.

²⁷³ Claassens & Hathorn “Stealing restitution and selling land allocations: Dixie, Mayaeyane and Makuleke” in Smith “An overview of the Communal Land Rights Act 11 of 2004” in Claassens & Cousins (eds) *Land, Power and Custom* (2008) 315 354.

²⁷⁴ See for example *Bhe and Others v Magistrate, Kayelitsha and Others (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole and Others*; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC).

Despite this problem, some traditional communities still favour customary tenure as the main form of land management²⁷⁵ and many occupy parcels of land in the old TBVC-territories comprising of unsurveyed land.²⁷⁶ A temporary solution is provided by the protection granted by the Interim Protection of Land Rights Act²⁷⁷ for communities practising customary forms of tenure.²⁷⁸ Yet, many communities attempt to integrate such principles into modern forms of communal tenure such as communal property associations.²⁷⁹ This can create conflict between the democratically orientated systems of modern communal systems on the one side and powers vested in traditional leaders and councils relating to decision-making processes and the protection of minority members on the other side.²⁸⁰

In some instances, a conflict of laws might arise as was indicated in the recent *Tongoane case*²⁸¹ where the Makuleke CPA fell under the jurisdiction of the Mhinga Tribal Authority.²⁸² The tribal authority undermined the security of tenure of the communal property association, by for example, allocating its property to members of the tribal authority and allowing outsiders to graze on the property of the communal property association.²⁸³ Thus, a conflict arose between the administrative functions vested in the Tribal Authority and the ownership rights of the communal property association.²⁸⁴

²⁷⁵ Bassett and Jacobs "Community-based tenure reform in urban Africa: the community land trust experiment in Voi, Kenya" 1997 *Land Use Policy* 215.

²⁷⁶ Smith "An overview of the Communal Land Rights Act 11 of 2004" in Claassens & Cousins (eds) *Land, Power and Custom* 54.

²⁷⁷ 31 of 1996.

²⁷⁸ See Ch 3 section 3.2.3.1 below.

²⁷⁹ Cousins & Hornby "Adrift" in *Piecemeal Reforms and Calls for Action* 130.

²⁸⁰ James *Gaining Ground* 202.

²⁸¹ 2010 (6) SA 214 (CC) para 30.

²⁸² Above.

²⁸³ para 28.

²⁸⁴ Bennett *Customary Law in South Africa* 420.

In a certain sense, it was expected that the CLR Act would create a uniform system for communal land management to accommodate customary land tenure.²⁸⁵ The recent declaration of the unconstitutionality of this Act has brought attempts of regulation back to square one. The movement supporting customary tenure in South Africa is very powerful and has significant political influence, implying that measures are still needed to address this issue. While communal property associations can be employed to address this issue, the status of chiefs can still be undermined by too many democratic principles. Chiefs, as unelected officials, stand the risk of losing their position in communal property associations through election of new members to the committee governing the land. While this is in line with the notion of accountability according to accepted democratic principles, the structure of a communal property association might become undemocratic due to the significant political power wielded by tribal leaders.

The Constitution and the Traditional Leaders Framework and Governance Act²⁸⁶ furthermore entrench the status of tribal leaders, implying that the disparity between constitutional principles and custom will not be removed without difficulty. It is therefore imperative to find a middle ground between democracy and the vested interests of chiefs and subjects.

2 5 4 GENDER INEQUALITY

Closely related to the paradigmatic obstacle of customary tenure is the obstacle of eradicating gender inequality in communal tenure. According to Nonyana, “hundreds of thousands” of black women in South Africa are still suffering from poverty due to insecure land tenure relations.²⁸⁷ For years, the Black Administration Act²⁸⁸ deprived black women of the necessary legal

²⁸⁵ See Ch 3 section 3 2 3 1 below; s 18 of the CLR Act.

²⁸⁶ 41 of 2003.

²⁸⁷ Nonyana, M “Communal Land Tenure and the Right to Family Life” June 2003 *PLD* 3.

²⁸⁸ 38 of 1927.

capacity to contract without the guardianship of husbands or male relatives.²⁸⁹ The White Paper on Land Policy recognised that the discrimination against women were perpetuated historically by practices in tribal tenure systems, administrative rulings during the colonial and apartheid era and common law provisions pertaining to family and succession law.²⁹⁰ Women play a crucial role in the South African agrarian economy, as over 50% more women than men earn a living by means of agriculture.²⁹¹ To rectify this inequality, special focus was directed at women in most tenure legislation in the land reform programme. For example, the Provision of Land and Assistance Act emphasises the goal of providing land grants to women for the acquisition of property.²⁹² Communal land tenure legislation also provides for gender equality in allocation and decision making processes.²⁹³

Yet despite these goals, gender inequality in land tenure systems remains an obstacle in practice.²⁹⁴ The main impediment seems to be the application of the principles of gender equality in the land reform setting. Pienaar has indicated that in the land reform setting this situation that seems to create an equitable environment for rights and security of tenure in property is not generally regarded by land occupants as problematic for women.²⁹⁵ Macdonald pointed out that women are sometimes only allocated use rights, and not the rights of transfer, exclusion or any other right guaranteeing security of tenure.²⁹⁶ For example, in many indigenous cultures women might not gain access to grazing rights, as traditionally women could not own cattle,

²⁸⁹ Nonyana 2003 *PLD* 3.

²⁹⁰ Para 3.34. See also Cousins and Claassens "Adrift" *Development Update* 60.

²⁹¹ Aliber, Biapheti & Jacobs "Agricultural Employment Scenarios" in Hall R (ed) *Another Countryside* PLAAS Cape Town 133 138.

²⁹² 126 of 1993; White Paper on Land Policy para 4.7.

²⁹³ See for example S 9(1)(b) of the CPA Act; ss 18(1)(e), 22(3), 24 of the CLR Act.

²⁹⁴ Walker "Piety in the Sky: Gender Policy and Land Reform in South Africa" in Razavi(ed.) *Agrarian change, gender and land rights* (2003) 113 114.

²⁹⁵ Pienaar 2005 *Stell LR* 75-76.

²⁹⁶ Macdonald *Assessing common property institutions in the South African countryside* 6.

thus excluding them from rights they might have been allocated in terms of the rules of a communal property.²⁹⁷

Rights can also be assigned in a manner excluding women from decision-making processes, by allocating the land rights to households controlled by males.²⁹⁸ The manner in which the subordinated status of many women in rural areas is addressed in policy and law is problematic, because of multiple layers of authority in traditional structures.²⁹⁹ The problem is compounded by the fact that rural women are not represented strongly on political and organisational levels to pressurise politicians in prioritising their cause.³⁰⁰ The Department of Rural Development and Land Reform, mandated to address this issue, is criticised for failing to prioritise or even properly conceptualise the task at hand of creating gender equality.³⁰¹ Thus, when dealing with the establishment and management processes of communal tenure, it is critical to pay attention to the position of women in the tenure system, and in cases of inequality to attempt to rectify the situation in accordance with the mandates of the Constitution and the White Paper on Land Policy.

2 5 5 COMMUNITY

The notion of community is central to the idea of communal land holding. Yet, the manner in which communities are conceptualised for the purposes of communal tenure systems can complicate security of tenure. Communities often need to legitimise their standing in order to justify the restitution of the property and access to land.³⁰² Community, as used in the CPA Act, therefore

²⁹⁷ Above.

²⁹⁸ Nonyana "Communal property associations and their impact on the formation of small business in the rural sector." February 2000 *PLD* 1.

²⁹⁹ Walker "Piety in the Sky" in *Agrarian change, gender and land rights* 114.

³⁰⁰ Jara & Hall "What are the Political Parameters?" in Hall (ed) *Another Countryside* 216; Walker "Piety in the Sky" in *Agrarian change, gender and land rights* 114.

³⁰¹ Walker "Piety in the Sky" in *Agrarian change, gender and land rights* 126.

³⁰² Pienaar 2005 *Stell LR* 70.

refers to a community in a legal sense, rather than in a wider sense as determined by ancestral bloodlines, people occupying the same land, or by tribal affiliation.³⁰³

The focus, as indicated above,³⁰⁴ of the CPA Act is to create a juristic person for the community to “acquire, hold, and manage the property,” which emphasises the legal focus of the term community.³⁰⁵ It is therefore important that all role-players should be aware of the specific meaning of the term “community” in this context. Pienaar observed that the idea of community is often romanticised as “unitary and harmonious”, underestimating the level of “fragmentation and internal conflicts” existing in many communities.³⁰⁶ Many communities therefore seem to have a united front during the initial stages of pursuit of their claim, especially in restitution.³⁰⁷ Once the reality sets in that a community will be successful with their claim of obtaining land, discord emerges as underlying interests of smaller groups in the community come to the fore.³⁰⁸ Communal property represents such a multitude of interests, ranging from social identity and status of beneficiaries to contest with regard to the land rights involved,³⁰⁹ that discord is almost inevitable.³¹⁰

The static perceptions of community are institutionalised in law and policy in such an inflexible manner that it does not reflect the true realities on the

³⁰³ Pienaar 2005 *Stell LR* 60; CSIR *Diagnostic Study* 68.

³⁰⁴ Ch 1 section 1 2 3 above.

³⁰⁵ Ambit of the CPA Act; Pienaar 2005 *Stell LR* 60 63.

³⁰⁶ Everingham & Jannecke 2006 *JSAS* 545 560; Pienaar 2005 *Stell LR* 63; Du Toit “The End of Restitution: Getting Real About Land Claims” in Cousins (ed) *At the Crossroads* (2000) 75 82.

³⁰⁷ Pienaar “Communal Property Arrangements: A second Bite” in Cousins (ed) *At the Crossroads: Land and Agrarian reform in South Africa into the 21st century* (2001) 322 326.

³⁰⁸ Pienaar “Second Bite” in *At the Crossroads* 326.

³⁰⁹ Above.

³¹⁰ Cousins and Claassens “Adrift” in *Development Update* 141.

ground.³¹¹ Political self-interest in divided communities can be especially destructive and legislation often does not regard the historical context that led communities to utilise communal land management entities.³¹²

In the case of *Department of Land Affairs, Popela Community v Goedgelegen Tropical Fruits*,³¹³ the court developed a two-pronged approach to interpret the term community for restitution purposes. First of all there must be a “sufficiently cohesive group of persons” to indicate that a community existed and secondly that there some measure continuity between the dispossessed community and the claimant community.³¹⁴

The CPA Act focuses mainly on the technical aspects of land management, making it inadequate for dealing with political disharmony in the community.³¹⁵ Communities often abuse the mechanisms of the Act to enforce political views that do not relate to land management, thus reducing the effectiveness of the Act.³¹⁶

2 6 CONCLUSION

This chapter investigated the concept of security of tenure and it was indicated that security of tenure plays a vital role in the creation of sustainable livelihoods for land reform beneficiaries. Security of tenure has been constitutionally mandated as the standard for communal property associations. The chapter also contextualised communal tenure within the

³¹¹ Pienaar “The Inclusivity of Communal Land Tenure: Redefinition of Ownership in Canada and South Africa?” 2008 *Stell LR* 259 262.

³¹² Barry 2010 *Land Use Policy* 141.

³¹³ 2007 (6) SA 199 (CC).

³¹⁴ Par 39.

³¹⁵ CSIR *Diagnostic Study* 67-68.

³¹⁶ See for example Pressly “Richtersveld riven over R190m” *Star* (10-08-2010) 21.

wider system of land tenure. Security of tenure has various advantages especially in contributing to certainty on the part of landholders and providing specific guarantees that rights will not be lost arbitrarily. Security of tenure is based on certainty of access and usage rights, management rights, rights of exclusion, and adequate procedures for transfer.

To attain security of tenure certain paradigmatic obstacles must be overcome to design an efficient system. One of these obstacles relates to the assumption that communal land tenure can lead to destructive practices and degradation of land. Communal tenure as an alternative form of ownership needs to be integrated in a system characterised by individual freehold. This is associated with the creation of an effective publicity system and support from financial institutions and the state. If such support is not institutionalised, communal property is doomed to fail.

The relationship between communal land tenure and customary tenure was investigated, and it was found that although there are similarities between the systems, the CPA Act is inadequate to deal with customary law's governance structures. The proper protection of gender-equality remains a challenge due to prevailing structures of discrimination and lack of state support. Conceptions of communities can create obstacles if they are treated as static.

In the next chapter, various communal land holding mechanisms will be investigated. The main focus is the CPA Act which is discussed in the broader context of other mechanisms such as those employed by the Interim Protection of Informal Land Rights Act, the common law trust construction and, importantly, the Sectional Titles Act. It will be indicated how tenure security is achieved by various means and to varying extents in these different contexts.

CHAPTER THREE

OVERVIEW OF THE EXISTING LEGAL MECHANISMS FOR COMMUNAL LIVING ARRANGEMENTS

3 1 INTRODUCTION

As indicated in earlier chapters,³¹⁷ the notion of communal utilisation of property is not a new phenomenon. Although South African law has not always officially and explicitly acknowledged this concept, measures were available for multiple individuals to have interests in a single property. The Sectional Titles Act (ST Act) and the Communal Property Associations Act (CPA Act) are current examples of attempts to create more user-friendly and accessible means to allow access to various users to exploit a single property.

Among the main aims of both the ST Act and the CPA Act is the creation of democratic structures for the participation of its members in the management of the relevant properties linked to these entities.³¹⁸ This is especially important, since a well-ordered structure will enable all the members in the communal property scheme to have an opportunity to participate in an orderly and predictable manner. If there is certainty in the procedures and rules that regulate the management of the property, it will be easier for members to assert their rights in order to create security of tenure.

In this chapter, the purpose and mechanisms of the communal tenure arrangements in the CPA Act are introduced and contextualised within the

³¹⁷ Ch 1 section 1 2 2 above.

³¹⁸ Van der Merwe *Sectional Titles* 4-9; 4-18; 13-22.; "Allocation of Quotas in a Sectional-Title Scheme" 1987 *SALJ* 70 86.

broader field of law dealing with communal land holding. This exercise is relevant especially in view of recent undertakings to revise land law policy.³¹⁹

3 2 THE COMMUNAL PROPERTY ASSOCIATIONS ACT

The current role of the CPA Act is to ensure reform and the possible consequences flowing from this Act form the particular focus of this investigation. The Act was designed as a tool for implementing both redistribution and tenure reform programmes to create an alternative framework for land control.³²⁰ Precisely because other entities were not tailor-made for the beneficiaries and communities desired to hold land in communal fashion, the primary purpose of the Act is to create a viable and democratic basis of landholding for communities, in situations where communal landholding is the only suitable or appropriate mechanism.³²¹ In terms of the Act, a group or community could acquire land as a legal “people-based” entity.³²²

This legislation attempts to regulate the basic principles of how a community should go about achieving sustainable land use. It also attempts to create a transparent, equal, and democratic framework that has regulative support from government and is simple to implement.³²³ The Act relies on the basic strategy that communities should be able to pool their resources to negotiate,

³¹⁹ Department of Rural Development & Land Reform Strategic Plan for 2010 – 2013 (2010) http://www.ruraldevelopment.gov.za/DLA-Internet/content/document_pages/Document_Library_Publications_%20Strategic_Plan.jsp (Accessed on 25-10-2010) 30.

³²⁰ Mostert “Diversification” in *Modern studies in Property Law Vol II* 18.

³²¹ S 2 of the CPA Act.

³²² Carey Miller & Pope *Land Title* 580. See also Cousins & Hornby “Adrift” in *Piecemeal Reforms and Calls for Action* 128.

³²³ Nonyana “A Trust Instrument given to the Operation of CPAs” June 2002 *PLD* 11.

buy, and jointly hold land under a formal title deed.³²⁴ In the next section the procedural arrangements of the CPA Act will be discussed.

3 2 1 PROCEDURAL ARRANGEMENTS OF THE CPA ACT

The CPA Act mainly focuses on procedural arrangements, to establish a communal property association as a juristic person. It identifies the communities eligible for utilising communal property associations to control their land, as well as individuals who might qualify as members of such a community.³²⁵

The Act sets out the registration procedures³²⁶ to register the community. Principles and procedures are included to prepare and adopt the constitution of the community, which will regulate the management of the land.³²⁷ The Act furthermore regulates the government structures that the Department of Rural Development and Land Reform must provide to support communal property associations.³²⁸ This includes administrative,³²⁹ monitoring³³⁰ and arbitration³³¹ functions.

By creating a purpose-designed legal mechanism, it aims to play an important facilitation role in the implementation of the new land law.³³² These aspirations to upgrade an insecure right into a robust one, and therefore allow

³²⁴ White Paper on Land Policy ix; *Carey Miller & Pope Land Title* 567.

³²⁵ S 2 of the CPA Act.

³²⁶ Ss 5, 8 and Schedule 1 of the CPA Act.

³²⁷ S 9 of the CPA Act.

³²⁸ Ss 5; 8; 10; 11; 12; 13; 14 ;15 ; 16; 17 of the CPA Act.

³²⁹ For example registration of the CPA.

³³⁰ S 11 of the CPA Act enables the Director-General to monitor compliance with the provisions of the CPA Act.

³³¹ S 10(2) of the CPA Act enables the Director-General to appoint a conciliator on own accord or on request of the community to resolve disputes.

³³² All the different forms of ownership should not be seen as opposing forces. It all form part of fragmentation of land rights tailoring for more specific needs. Mostert *Modern Studies in Property Law vol II* 17-18.

marginalized groups, like women, to own land, are praiseworthy. In this way, the legislation recognizes the need for communal property holding to play a broader social and economic role in line with the African tradition.³³³

3 2 2 QUALIFICATION CRITERIA

Communities that could qualify to benefit from the Act need to be identified. The CPA Act defines a community as a “group of persons” aspiring to have its property rights “determined by shared rules under a written constitution and are required to form an association.”³³⁴ According to Carey Miller and Pope, this definition indicates the strong participatory elements and an understanding of democratic principles that the community must maintain.³³⁵

3 2 2 1 Property holding

Communities can qualify if they received property or other grants from the state, which enable them to form a communal property association.³³⁶ The Minister of Rural Development and Land Reform³³⁷ can approve the formation

³³³ Carey Miller & Pope *Land Title* 467. In fact the CPA Act does not mention traditional rights or even traditional leaders explicitly. Indigenous rights are rather presumed to be implied and regulated through s 211 and s 39 of the Constitution of South Africa 108 of 1996 and the White Paper on Land Reform (1997). See also Olivier & Olivier *Inheemse Reg* para 216 ; Van der Walt & Pienaar *Inleiding tot die Sakereg* (1999) 372 indicate that one of the aims of the CPA Act is to strengthen the groups rights in land held according to for example the indigenous law. The indigenous nature is also indicated from s 1 of the RLR Act definition of “right in land”. *Chief Ncahbaleng v Phasha* 1998 (3) SA 578 (LCC) para 27. See also criticism by Budlender, Latsky & Roux *Juta’s New Land Law* (2000) 3-13 to 3-16. The s 1 definition of “communal land” in the Communal Land Rights Act 11 of 2004 did provide for customary tenure but was declared unconstitutional by *Tongoane v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC). Explicit protection is currently provided by s 1 (1)(iii) of the IPILR Act 31 of 1996.

³³⁴ Compare with the similar approach in the CLR Act “community” means a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group; and the more historical and indigenous approach of the definition of a community in s 1 of the Restitution of Land Rights Act 22 of 1994 – “any group of persons whose rights in land are derived from shared rules determining access to land held in common by such a group and includes any part of such group”. See also Ch 2 section 2 5 5 above.

³³⁵ Carey Miller & Pope *Land Title* 468.

³³⁶ S 2(1)(b) of the CPA Act.

³³⁷ S 1 definition of “Minister” in the CPA Act.

of communal property associations when a community receives property by donation, alienation, disposition,³³⁸ or on request of the community.³³⁹

3 2 2 2 *Types of communities that qualify*

Whether a community is disadvantaged lies in the discretion of the Minister. The decision must be in the public interest and take the nature and current usage of the land into consideration.³⁴⁰ Similar entities can also apply to the Minister for conversion, or at least make the provisions of the CPA Act applicable to them. “Similar entity” is defined in section 1 of the CPA Act to mean a trust, an association of persons or a company registered in terms of section 21 of the Companies Act.³⁴¹

The Minister may grant an application, subject to qualifications or conditions, if it is in the public interest, and in line with the objects of the Act, but.³⁴² This provision ensures that entities such as trusts that existed before promulgation of this Act could also make use of the framework of the CPA Act.³⁴³

The CPA Act provides that democratic measures used to establish the particular juristic person must be taken into account when considering the conversion of an existing community to a communal property association.³⁴⁴ This provision exempts such a community from repetitive aspects of the registration procedure of a communal property association, such as the drafting and adoption of a new constitution, to render conversion to the Act more accessible and less burdensome. As indicated above, the CPA Act was

³³⁸ S 2 (1)(c) of the CPA Act.

³³⁹ S 2 (1)(d) of the CPA Act.

³⁴⁰ S 2 (2) of the CPA Act.

³⁴¹ 61 of 1973.

³⁴² The necessary provisions includes s 8 (Registration of associations); s 9 (Principles to be accommodated in constitutions); s 10 (Information, conciliation and other assistance); s 11 (Monitoring and inspection); s 12 (Approval for certain transactions); s 14 (Offences) or s 16 (Appeals).

³⁴³ See s 2(4), which states that such entity will be deemed an association.

³⁴⁴ S 2(5) of the CPA Act.

the first legislation allowing communities to hold title in a manner that might reflect their usage of the property. In that sense, this provision creates a transitional mechanism to accommodate a variety of existing communities.

The CPA Act is also applicable to communities entitled to restitution under the Restitution of Land Rights Act.³⁴⁵ The Court can order the formation of a communal property association as a condition for restitution.³⁴⁶ This is important, because it creates structures enabling the community to take possession of the allocated land, and to negotiate further agreements with the Department of Rural Development and Land Reform or more likely through the Commission on the Restitution of Land Rights with Local Authorities.³⁴⁷ The Commission facilitates special partnerships with the bodies currently controlling the property, such as a para-statal or the community.³⁴⁸

Communities who qualify under the CPA Act are the following: firstly, communities planning to occupy so-called “greenfield” property that can be defined as unbuilt or undeveloped land;³⁴⁹ and secondly, communities already occupying the relevant land, and desiring to convert to communal property associations.³⁵⁰

³⁴⁵ 22 of 1994.

³⁴⁶ S 2(1)(a) of the CPA Act. See for example the case of *Makuleke Community v Pafuri Area of the Kruger National Park and environs Soutpansberg District Northern Province* [1998] JOL 4264 (LCC) paras 7,17.

³⁴⁷ S 6(2)(b) of the RLR Act; Carey Miller & Pope *Land Title* 335-338.

³⁴⁸ White Paper on Land Policy para 4.9.3. See for example the agreements reached between the Richtersveld community and Alexkor in the Richtersveld, and the Makuleke tribe and SANParks over the northern parts of the Kruger National Park. See-in general De Villiers & Van den Berg *Land reform: Trailblazers: Seven successful case studies* (2006) Johannesburg: Konrad Adenauer-Stiftung.

³⁴⁹ Royston “Security of Urban Tenure in South Africa: Overview of Policy and Practice” in Durand-Lasserve & Royston (eds) *Holding Their Ground* 176; CSIR *Diagnostic Study* 54.

³⁵⁰ S 2(1) of the CPA Act.

3 2 2 3 Cohesion

Many different factors will influence the formation of communal property associations in each of these instances, but for the purpose of this section, the focus will be on community cohesion and group identity. These concepts relate directly to the definition of community in the CPA Act.³⁵¹ If a community is not sufficiently cohesive, there is a risk that community members may form factions pursuing different agendas within the community. This could undermine the successful functioning of communal property associations through conflict, marginalisation, and unequal use of available resources.³⁵² Communities qualifying under the Restitution of Land Rights Act³⁵³ are especially vulnerable because it consists of individuals coming together after many years of being apart due to forced removals during the apartheid era.³⁵⁴ Such groups in many instances reflect diverse ethnic and racial groups lacking a sense of shared history.³⁵⁵ According to the Restitution of Land Rights Act, the courts must determine whether a community was successfully constituted to qualify for restitution.³⁵⁶

3 2 3 THE CPA ACT IN RELATION TO THE OTHER TENURE LEGISLATION

In this section other frameworks that regulate communal living arrangements are discussed. These include the Interim Protection of Land Rights Act,³⁵⁷ the Trust Property Control Act³⁵⁸ and the ST Act.

³⁵¹ S 1 def of “community in the CPA Act.

³⁵² See above the example of the #Khomani San Community in ch 1 section 1 3; Everingham & Janneke “Land Restitution and Democratic Citizenship in South Africa” 2006 (32) 3 JSAS 545 552.

³⁵³ 22 of 1994.

³⁵⁴ CSIR *Diagnostic Study* 67-68. See also above Ch 2 section 2 5 5.

³⁵⁵ Pienaar “Second Bite” in *At the Crossroads* 326. See for example *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC) para 72.

³⁵⁶ S 2(1)(d) of the RLR Act.

³⁵⁷ 31 of 1996.

³⁵⁸ 57 of 1988.

3 2 3 1 *Interim Protection of Informal Land Rights Act*

The Interim Protection of Informal Land Rights Act³⁵⁹ (IPILR Act) was enacted under section 25(6) of the 1996 Constitution to create provisional protection for any landholder holding informal rights to land.³⁶⁰ This legislation is specifically focused on landholders with land in terms of tribal, customary, or indigenous law or who exercise land rights on the basis of a tribal connection.³⁶¹ It also protects beneficial occupiers that occupy land as if they are owners but without the permission of a registered land owner.³⁶² This includes land vested in the South African Development Trust and formal homeland governments at the time.³⁶³ Thus, this legislation protects unregistered communal land rights that cannot be registered under the South African deeds registration system³⁶⁴ and provides protection to landholders that historically had no protection.

The main goal of the Act is to regulate the possible deprivation of landholders' rights without fair compensation for the loss of such land rights, until the State enacts land rights legislation specifically aimed at such landholders. That legislation turned out to be the Communal Land Rights Act,³⁶⁵ recently declared unconstitutional.³⁶⁶ Especially relevant here are the procedures for alienation: which includes the manner in which landholders or a tribe may dispose of their informal rights.

³⁵⁹ Above.

³⁶⁰ Bennett *Customary Law in South Africa* 423.

³⁶¹ S 1(1)(a)(i) of the IPILR Act.

³⁶² S 1(c) of the IPILR Act.

³⁶³ S 1(1)(a)(ii) of the IPILR Act.

³⁶⁴ Scheepers *A Practical Guide to Law and Development in South Africa* 71 Badenhorst et al *Law of Property* 619.

³⁶⁵ 11 of 2004.

³⁶⁶ *Tongoane v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC); Smith "Overview" in *Land, Power and Custom* 35.

The Act prescribes specific procedures that require the consent of the majority of the land-users in such communities to dispose of an informal right.³⁶⁷ As Bennett pointed out, the reason for such elaborate procedures was to limit the “old and dubious precedent” of chiefs acting outside the scope of their authority to alienate state land.³⁶⁸ These chiefs act with only the purported authority of their inner councils, and not necessarily in the best interest of the whole tribe.³⁶⁹ Illegal sales of tribal land occurred in the former homeland of Transkei, where land was sold for very little compensation for the purpose of building holiday homes on ecologically sensitive coastal areas.³⁷⁰

The IPILR Act and the CPA Act were enacted at virtually the same time, although their ambits of protection are different. The IPILR Act focuses on the interim protection of customary informal land rights on unsurveyed land and especially in the former homelands of South Africa.³⁷¹ Due to the complexity of formalising and implementing informal land rights, the IPILR Act is renewed every year and is therefore still applicable.³⁷² The IPILR Act serves the important function of providing protection to lesser land rights,³⁷³ whereas the CPA Act, focuses on the establishment of communal tenure on surveyed land, especially as a vehicle to implement restitution in terms of the Restitution of Land Rights Act.³⁷⁴ Thus, it serves the purpose of introducing a new form of landholding to provide for communal ownership on new parcels of property

³⁶⁷ S 2(4) of the IPILR Act.

³⁶⁸ Bennett *Customary Law in South Africa* 424.

³⁶⁹ Above.

³⁷⁰ See for example Kockott “Wild Coast cottages have to go – court” *Sunday Independent* (11-12-2005) 3. “At one stage in the 1990s every Tom, Dick and Harry was putting up cottages, offering a bottle of brandy and small bribes to local chiefs in return for pieces of land”. See also *Wildlife Society of Southern Africa v Minister of Environmental Affairs And Tourism Of The Republic Of South Africa* 1996 (3) SA 1095 (Tks) 1108A; *Barnett v Minister of Rural Development and Land Reform* 2007 (6) SA 313 (SCA).

³⁷¹ Badenhorst et al *Law of Property* 619.

³⁷² Badenhorst et al *Law of Property* 620.

³⁷³ Carey Miller & Pope *Land Title in South Africa* 464.

³⁷⁴ See s 2(1)(a) of the CPA Act.

and on existing land that use a different form of landholding.³⁷⁵ The CPA Act also does not specify whether the relevant tenure involved is in terms of South African common or customary law, thus representing a move away from systems of the past.³⁷⁶

3 2 3 2 Trusts

Before the Communal Properties Associations Act³⁷⁷ was enacted, communities only had recourse to traditional common law instruments to acquire and manage property in a communal fashion on surveyed land.³⁷⁸ In this sense, South African courts have always supported the notion that parties should be able to choose the law which best suits their needs.³⁷⁹ One of these options available to communities was the use of the trust instrument as provided for under the Trust Property Control Act.³⁸⁰

In a trust, property vest in the trustees in their official capacity and assets are administered for the benefit of the trust beneficiaries.³⁸¹ Trust beneficiaries can be individuals or a class of individuals benefitting from the entity.³⁸² Trustees, although in control of the trust assets, are not the owners of the assets.³⁸³ Communities usually employ a specific form of trust, namely a trust *inter vivos* or living trust that is created by a written agreement.³⁸⁴ Although a trust is not inherently a communal land mechanism, the constitutive written agreement can be drafted to accommodate a community as the beneficiary.

³⁷⁵ Carey Miller & Pope *Land Title in South Africa* 467.

³⁷⁶ Bennett *Customary Law in South Africa* 412.

³⁷⁷ Nonyana June 2002 *PLD* para 1.

³⁷⁸ See Ch 1 above; Badenhorst et al *Law of Property* 620.

³⁷⁹ Bennett *Customary Law in South Africa* 413.

³⁸⁰ 57 of 1988.

³⁸¹ Section 1(a) and (b) of the Trust Property Control Act 57 of 1988.

³⁸² Above.

³⁸³ S 1 def. "trustees" of the Trust Property Control Act 57 of 1988, Nonyana June 2002 *PLD* para 4.1.

³⁸⁴ Nonyana June 2002 *PLD* para 4.

Although a detailed analysis of trusts is beyond the scope of this thesis, it is still important to indicate that the trust plays a vital role as a communal land holding mechanism. Communal property associations and trusts are the main vehicles currently used by communities as landholding entities to manage their property communally.³⁸⁵ It is estimated that 2000 land reform projects emanating mainly from the redistribution leg of the land reform programme currently utilise both landholding mechanisms.³⁸⁶ Both these forms of communal living arrangements enables communities to pool their resources and qualify for state funding to acquire land for agricultural and habitation purposes. As indicated the preceding discussion, the choice as to the institution utilised depends on a variety of factors ranging from eligibility criteria for communal property associations, the point at which the institution was created and complexity of the demands of the particular community.

The CPA Act makes provision for entities such as trusts to convert to communal property associations. Trust-based communities wishing to convert to a communal property association are exempted from certain procedural requirements of the CPA Act, as long as similar procedures were followed when the trust was constituted.³⁸⁷

Trusts and CPA's are similar in that both are regulated by founding documents, namely the trust deed and the constitution of a communal property association respectively. A further similarity between trusts and CPA's is the resemblance between the executive functionaries representing the members or beneficiaries living on the property and managing the assets of the legal entities. In both instances, such functionaries are elected usually by a majority of the members of the trust or association.³⁸⁸

³⁸⁵ Smith "Overview" in *Land, Power and Custom* 45.

³⁸⁶ Above.

³⁸⁷ S 2(5) of the CPA Act.

³⁸⁸ Or as determined by the provisions in the trust instrument.

The major difference between these two property-holding mechanisms is the provisions in the CPA Act demanding that democratic principles should be adhered to in all of the functions and structures of the communal property association, while democratic principles are not explicitly provided for in the Trust Property Control Act. If the relevant community does not incorporate such mechanisms into the trust instrument, there might be the risk of marginalisation of certain members of the community and conflict between beneficiaries.³⁸⁹

Trusts utilised in land reform projects are also criticised for the fact that the property and ownership does not vest in the community itself but is managed by the trustees on behalf of the community.³⁹⁰ A trust is also not a juristic person,³⁹¹ which means that the trustees can be personally held liable for any mismanagement or failure of the required due diligence in the exercise of their duties.³⁹² The complexity of administering a trust might also be inappropriate for communities that often do not have the necessary knowledge and training to act as trustees.³⁹³

In practice, the problems experienced by land-holders using trusts seem to be similar to those in communal property associations.³⁹⁴ Yet the trust is still a desirable option for communities that do not qualify in terms of the CPA Act. This is also the most cost-efficient alternative to holding land communally, other than a communal property association.³⁹⁵

³⁸⁹ CSIR *Diagnostic Study* 57.

³⁹⁰ Cousins & Hornby "Adrift" in *Piecemeal Reforms and Calls for Action* 128.

³⁹¹ Honorè and Cameron *South African Law of Trusts* (1992) 117.

³⁹² S 9(2) of the Trust Property Control Act.

³⁹³ Cousins & Hornby "Adrift" in *Piecemeal Reforms and Calls for Action* 128.

³⁹⁴ Nonyana June 2002 *PLD* para 7.1.

³⁹⁵ Nonyana June 2002 *PLD* para 7.1.

3 3 THE SECTIONAL TITLES ACT

The main purpose of this thesis is to determine whether communal property associations provide security of tenure to their members, with comparative reference to the ST Act. The ST Act, as a communal living arrangement, was promulgated by the legislator as an alternative form of title to conventional, traditional ownership.³⁹⁶ The distinguishing feature of the sectional title construction is the fact that it enables a prospective buyer to acquire a component of a building along with a partitioned share of the land and ownership.³⁹⁷ In conventional Roman-Dutch law, co-ownership in a building meant that owners had abstract undivided shares and only separate use could be allocated by agreement to different parts of the building.³⁹⁸ Vertical subdivision was the only way in which a section of a building could be the subject of separate ownership, which referred spatially only to the vertical component of a building.³⁹⁹ Because of the Roman law principle that an owner owns everything beneath and above the land, the three-dimensional horizontal partitioning of a building could not previously find application in our law.⁴⁰⁰ Three dimensional or “air-space” ownership of a flat or building was therefore impossible.⁴⁰¹ By contrast, the ST Act allows for the ownership of part of a building.

To satisfy the desperate need for the effective and flexible utilization of land in urban areas, high-density housing was developed in the vicinity of economic

³⁹⁶ Carey Miller & Pope *Land Title* 208.

³⁹⁷ Above.

³⁹⁸ Badenhorst et al *Law of Property* 445.

³⁹⁹ Carey Miller & Pope *Land Title* 208; Van der Merwe *Sakereg* 247. This was further enforced by the maxim *superfices solo cedit* that determines that any permanent fixture to the land accedes to the property and loses independent legal existence.

⁴⁰⁰ This refers to the so-called “heaven to hell-rule” that was received in our law from the Latin maxim “*cuius est solum eius est usque ad caelum et asque ad inferos*”. See also Van der Merwe *Sakereg* 190.

⁴⁰¹ Carey Miller & Pope *Land Title* 208.

centres.⁴⁰² The ST Act created a mechanism for access to relatively cheap but secure property, satisfying social and psychological needs for home ownership.⁴⁰³ Currently, it is estimated that more than 780 000 sectional title units exist.⁴⁰⁴

The effect of this legal innovation is the creation of a new category of a legal object that extends the law of property and laws regulating associations.⁴⁰⁵ The inherent flexibility of this concept of ownership creates the opportunity for developers to assign very different uses to certain units. A building could, for example, be divided into commercial and residential areas, making it the ideal development tool for urban centres and enabling maximum exploitation of available space.⁴⁰⁶

3 3 1 PROCEDURAL ARRANGEMENTS

A developer motivated largely by financial gain usually initiates the development of a sectional title scheme.⁴⁰⁷ This can involve a building that already exists or is in the process of being built.⁴⁰⁸ The property is then inspected by an architect or land surveyor to determine if the buildings comply with a “local town planning scheme, statutory plans or conditions”.⁴⁰⁹

⁴⁰² Badenhorst et al *Law of Property* 441.

⁴⁰³ Van der Merwe *Sectional Titles* 1-9 to 1-10; Badenhorst et al *Law of Property* 457.

⁴⁰⁴ Nthite “Sectional title - pros and cons” <http://www.moneyweb.co.za/> (accessed on 23-08-2010) Encompassing 50 000 sectional title schemes; Van der Merwe *Sectional Titles* 1-26(5).

⁴⁰⁵ Badenhorst et al *Law of Property* 414.

⁴⁰⁶ Van der Merwe *Sectional Titles* 1-13 & 1-14 where it is indicated that the original aim of the Act was to cater for multi-unit high-rise buildings but does not limit alternative uses for buildings.

⁴⁰⁷ S 1 of the ST Act. The developer is the registered owner of the land which is situated within the area of jurisdiction of a Local Authority.

⁴⁰⁸ S 4(1) of the ST Act.

⁴⁰⁹ S 4(5) of the ST Act.

A sectional plan is then drafted by an architect or land surveyor that creates an accurate diagram of the units and common property of the scheme.⁴¹⁰ Separate ownership vests in a section⁴¹¹ while all the members of a scheme have an undivided share in the common property.⁴¹²

The draft sectional plan must be approved by the Surveyor-General.⁴¹³ After approval, the developer applies to the Registrar of Deeds for the opening of a sectional title register and the registration of the sectional plan.⁴¹⁴ When all the necessary requirements are complied with, the scheme can be registered.⁴¹⁵ Only then can units be transferred to prospective owners.

In comparison with communal property associations, the procedures for the establishment of a sectional title schemes are focused on the buildings of the scheme and the registration procedure. By contrast, the CPA Act focuses on organising the community into a juristic person with less emphasis on the registration procedures. In the next section, the qualification criteria for acquiring a unit will be discussed.

3 3 2 QUALIFICATION CRITERIA

Buyers of a unit in a sectional title scheme become owners of a composite immovable entity that includes the section and an undivided share in the common property.⁴¹⁶ Besides registered owners this includes the trustee of an insolvent estate, the liquidator of a juristic person such as a company, and the executor of a deceased owner that act as representatives of the owner of an

⁴¹⁰ S 1 def “sectional plan” of the ST Act.

⁴¹¹ S 2(b) of the ST Act.

⁴¹² S 2(c) of the ST Act.

⁴¹³ S 7(1) of the ST Act.

⁴¹⁴ S 11 of the ST Act.

⁴¹⁵ S 12 of the ST Act.

⁴¹⁶ Ss 1 def of “owner”; 2(b), 2(c) of the ST Act.

unit.⁴¹⁷ The unit can also be registered in the names either one or both spouses of a marriage in community of property.⁴¹⁸

The ST Act thus focuses on individuals that acquire real rights in the immovable property in the scheme. The CPA Act by contrast, concentrates on disadvantaged communities that acquire rights in terms of the land reform programme.⁴¹⁹

The qualification criteria as such demonstrate the different context in which sectional titles and communal property associations operate. The following section demonstrates that no cohesive community is required at the outset for the establishment of a sectional title scheme whereas this is a prerequisite for the establishment of a communal property association.

3 3 3 COHESION

Generally, sectional title units can be acquired by anyone with the necessary means. When the developer sells the first unit to a buyer, a body corporate is established.⁴²⁰ This is when the sectional title community is born. The body corporate, responsible for the administration and control of the common property of a sectional title development, consists of all of the owners of units which automatically has an undivided share in the common property of the scheme.⁴²¹ This body is, similar to the communal property association, a permanent entity with legal capacity.⁴²² The trustees that are elected by the body corporate usually has the capacity to manage the property and to enter into legal relationships.⁴²³

⁴¹⁷ S 1 def of “owner” of the ST Act.

⁴¹⁸ Above.

⁴¹⁹ Ch 2 section 2 1.

⁴²⁰ S 36(1) of the ST Act.

⁴²¹ S 1 def of “body corporate” and “owner” and s 2 of the ST Act.

⁴²² Van der Merwe *Sectional Titles* 2-19.

⁴²³ S 39 of the ST Act.

Owners that buy into a sectional title scheme usually only become aware of the communal aspects of the scheme when they are exposed to the rules of the scheme.⁴²⁴ The rules of the scheme are necessary to regulate the relationship between the members of the body corporate who are dependent on each other due to the proximity of the units.⁴²⁵ This differs in communal property associations as community members are almost immediately exposed to such inter-dependence by means of the constitution-making process. The constitution-making process forces the community to regulate themselves as the CPA Act only provides general principles which must be adhered to in the constitution of the association of the communal property.⁴²⁶ Thus, community cohesion, by agreement, is focused on explicitly, from the beginning of the establishment of a communal property association.⁴²⁷

3 4 CONCLUSION

This chapter shows that there are various types of communal living arrangements. In comparing the construction of communal property associations with for instance the trust construction or statutorily protected beneficial occupation under the IPILR Act, it is obvious that the communal property association has better control over the property than trust beneficiaries. In respect of the IPILR Act, the aims and measures are very different from the CPA Act. The former guarantees that land rights are not lost under certain conditions. The IPILR Act is not aimed at control of land rights as such.

The value of comparing the establishment and managing mechanisms of the CPA Act and the STA Act lies in the fact that both entities has similar

⁴²⁴ Van der Merwe *Sectional Titles* 13-4.

⁴²⁵ Above.

⁴²⁶ S 9 and Schedule to the CPA Act.

⁴²⁷ Preamble to the CPA Act.

approaches to management of the relevant properties involved. Both entities would face the same type of problems if the management structure fails. An especially important similarity shared by both landholding mechanisms is the interdependence that right holders share to ensure proper administration of the property.⁴²⁸ On the other hand, it is important to remain conscious of the fact that the main goals of the CPA Act and ST Act differ with regard to envisaged outcomes. The ST Act focuses more on the provision of a quality building/structure that will soundly house the units owned by sectional title members. Van der Merwe also noted that the main emphasis of the ST Act is to provide an adequate framework for residential schemes and apartment blocks rather than commercial sectional title schemes and freestanding units.⁴²⁹ The ST Act also provides security of tenure by endowing its members with traditional ownership. While the CPA Act focuses on the creation of equitable and democratic rights of security of tenure, the ST Act mainly focuses on ensuring the safety and durability of the scheme's building before providing a framework for management of the scheme. Especially of value in such a comparison is the difference in approaches followed by both Acts, and the various enforcement mechanisms utilized to create security of tenure.

The main purpose here is not to indicate that one model of legislation is more appropriate than the other, but to determine whether valuable lessons can be gained from the different approaches. It is questionable whether this can contribute to enhancing security of tenure. The following chapter will investigate the establishment procedures in the ST Act and the CPA Act.

⁴²⁸ Van der Merwe *Sectional Titles* 13-3.

⁴²⁹ Van der Merwe *Sectional Titles* 1-17, 13-5.

CHAPTER FOUR

ESTABLISHMENT OF COMMUNAL PROPERTY ASSOCIATIONS AND SECTIONAL TITLE SCHEMES

4 1 INTRODUCTION

The initial establishment process supplies the foundation for security of tenure for members of a communal property association. The establishment process starts with the creation of a juristic person, namely the communal property association that will control the property.⁴³⁰ The membership of the juristic person is based on an agreement, embodied in a constitution, prepared by the members of a communal property association. This constitution is drafted during the establishment phase and allows the members of the community to determine the allocation of substantive rights, the parameters of membership and the manner in which the property shall be managed. Once the constitution is in place, the property can be registered.

The establishment processes are divided into three phases. Firstly, it must be determined whether the community qualifies to become a communal property association.⁴³¹ Secondly, the community must create a constitution and elect a committee that will manage the affairs of the communal property association.⁴³² The constitution reflects the substantive and procedural rights necessary to provide the foundation with security of tenure. Thirdly, the communal property association is

⁴³⁰ Preamble to the CPA Act.

⁴³¹ See above Ch 3 section 3 2 2 2.

⁴³² Ss 6, 7 of the CPA Act.

registered at the Department of Rural Development and Land Reform.⁴³³ The whole process is facilitated by officials of the Department of Rural Development and Land Reform to ensure compliance.⁴³⁴

In comparison, sectional title schemes are dependent on the initiative of the developer, who is responsible for ensuring that existing building structures, or newly built structures on the property conform to local building standards and town planning measures.⁴³⁵ Thus, the establishment procedures are primarily focused on ensuring safe and durable buildings, including financing of the completion of the buildings in the scheme.⁴³⁶ Secondly, plans for the scheme must be submitted to the Surveyor-General for approval⁴³⁷ and thirdly, the developer must apply to the Registrar of Deeds to register the plans and open a sectional title register.⁴³⁸ These processes are supported by conveyancers, surveyors and architects.⁴³⁹ Fourthly, the members of the sectional title scheme only start playing a role in the scheme when they purchase units from the developer and a body corporate is established,⁴⁴⁰ that is responsible for the management of the scheme.⁴⁴¹

In this chapter, aspects of the establishment procedures of communal property associations will be investigated with comparative reference to sectional title schemes. Firstly, the requirements for membership of a community will be explained, as this will determine whether community members qualify to exercise their rights properly. Secondly, the allocation of substantive rights to landholders will be examined. Inadequate attention to such allocation could lead to disputes, potentially

⁴³³ S 8 of the CPA Act.

⁴³⁴ Ss 6, 7 of the CPA Act.

⁴³⁵ See Van der Merwe *Sectional Titles* 6-5 to 6-6.

⁴³⁶ Van der Merwe *Sectional Titles* 6-4 to 6-5.

⁴³⁷ S 7 of the ST Act.

⁴³⁸ S 11 of the ST Act.

⁴³⁹ Badenhorst et al *Law of Property* 447.

⁴⁴⁰ S 11(3)(e) of the ST Act; Van der Merwe *Sectional Titles* 14-7.

⁴⁴¹ Pienaar *Sectional Titles and other fragmented property schemes* (2010) 90, 147.

paralysing the management of the communal property association. The third area focused on its registration and publicity, as this influences the enforceability of substantive rights. Finally, support from the Department of Rural Development and Land Reform is an important consideration.

4 2 MEMBERSHIP

As a juristic person, the communal property association needs systematic organization enabling members of the community to protect substantive individual and common interests in the property. Members should be in a position to participate in the management and control procedures of the land. The valid status of a community member contributes directly to security of tenure, as it indicates in whom the land rights vest to the exclusion of other parties. As indicated above, membership and its concomitant rights need to be exclusive to add value and tenure security.⁴⁴² Thus, the status of community members is especially important in forging community identity and cohesion.⁴⁴³

To be part of the community, members of the community or association must be natural persons.⁴⁴⁴ Juristic persons cannot be members of a communal property association. The names of members should be included in the list submitted at registration.⁴⁴⁵ If all members of the community could not reasonably be included or identified, a clause should be included in the community's constitution explaining the precise principles for the identification of members.⁴⁴⁶ Such a clause should also contain dispute resolution procedures in cases of disputed membership.⁴⁴⁷

⁴⁴² See Ch 2 section 2 4 4 3.

⁴⁴³ See Ch 2 section 2 5 5 above.

⁴⁴⁴ S 1 def of "members" of the CPA Act.

⁴⁴⁵ S 5(2)(d) of the CPA Act.

⁴⁴⁶ Item 5(i) of the CPA Act. See also *In re Kranspoort Community*. 2000 2 SA 124 (LCC) para 47.

⁴⁴⁷ Item 5(ii) of the CPA Act.

An equality provision in the CPA Act prohibits direct or indirect discrimination on the grounds of race, gender, sex, ethnic or social origin, sexual orientation, age, disability, religion, conscience, belief, culture, or language.⁴⁴⁸ The constitution of the association must indicate specific rules relating to a minimum age for members to attend and vote at meetings and to receive allocations to land entitlements.⁴⁴⁹ In practice, such rights' allocation might especially affect women due to the dominant role of men in some communities.⁴⁵⁰ This may have the consequence of excluding women from decision-making processes affecting the management of the land.⁴⁵¹

In principle, membership criteria should be strict, because an "open-ended" scenario will result in the dilution of the potential benefits of membership.⁴⁵² This can especially occur in situations where large numbers of new members acquire rights, for example if the children of restitution beneficiaries gain automatic membership to the communal property association when they reach a certain age while their parents also remain members.⁴⁵³

It is possible to create different classes of membership in the constitution⁴⁵⁴ and to allocate different but equal rights within a class. The CPA Act stipulates that such differentiation must adhere to the principle of equality to ensure adequate resource allocation.⁴⁵⁵ For example, one class of membership can only allocate residential rights to a specific group of members, while other classes can include residential and specific rights to productive use of the common property.

⁴⁴⁸ S 9(1)(b)(i) of the CPA Act.

⁴⁴⁹ S 9(1)(b)(i) of the CPA Act.

⁴⁵⁰ See Ch 2 section 2.5.4 above.

⁴⁵¹ Festus "We are woman, we are land" in Greenberg (ed) *Piecemeal reforms and calls for action: Land reform in South Africa* (2003) *Development Update* 175; CSIR *Diagnostic Study* 30.

⁴⁵² CSIR *Diagnostic Study* 23.

⁴⁵³ CSIR *Diagnostic Study* 46.

⁴⁵⁴ Item 6 of the CPA Act.

⁴⁵⁵ S 9(1)(b)(ii)(aa) to (cc) of the CPA Act.

Membership allows beneficiaries the opportunity to participate in the decision-making processes of the communal property association.⁴⁵⁶ This includes procedural guarantees, such as that adequate notice be given of general meetings of the association,⁴⁵⁷ participation and voting at meetings,⁴⁵⁸ and reasonable access to all relevant documentation of the communal property association.⁴⁵⁹ The members of the communal property association also acquire the right to elect a committee that manages the property of the association.⁴⁶⁰

In terms of the constitution of the communal property association, the membership of any individual may only be terminated if reasonable grounds exist and the matter has been scrutinized at a fair hearing.⁴⁶¹ Such termination is usually the result of misconduct, also leading to criminal sanctions if the constitution is breached or because of incitement among members.⁴⁶² Rights of members can be terminated as a result of death,⁴⁶³ abandonment or alienation of rights.⁴⁶⁴ The constitution should then indicate how such rights should be managed and whether it can vest in new members.⁴⁶⁵ Change in membership can only be brought about if the prospective member is allowed to join the communal property association in accordance with its constitution.⁴⁶⁶

⁴⁵⁶ S 9(1)(a) of the CPA Act.

⁴⁵⁷ S 9(1)(c)(i) of the CPA Act.

⁴⁵⁸ S 9(1)(c)(ii) of the CPA Act.

⁴⁵⁹ Ss 9(1)(c)(iii); 9(1)(c)(iv) & 9(1)(c)(v) of the CPA Act. This includes access to minutes of meetings and the constitution of the CPA Act.

⁴⁶⁰ See Ch 3 section 3.3 below.

⁴⁶¹ S 14(2) of the CPA Act.

⁴⁶² S14(1) of the CPA Act.

⁴⁶³ Item 12 of the CPA Act.

⁴⁶⁴ Item 11 of the CPA Act.

⁴⁶⁵ Above.

⁴⁶⁶ Item 5(i) of Schedule 1 to the CPA Act.

The registered owner of a unit in a sectional title scheme is automatically a member of the body corporate⁴⁶⁷ responsible for the control and administration of the scheme.⁴⁶⁸ Membership allows owners to participate in the general meetings of the body corporate and to elect the trustees in charge of the day-to-day management of the scheme.⁴⁶⁹ Similar to communal property associations, it empowers owners of the units to participate in the decision-making processes of the scheme.⁴⁷⁰ Van der Merwe notes that membership of the body corporate is compulsory, since co-operation between members is essential for the effective management of the common property of the scheme.⁴⁷¹

The definition of “owner” in the ST Act⁴⁷², corresponding to the definition of “owner” in the Deeds Registry Act,⁴⁷³ allows for a wider variety of persons and legal entities to qualify for ownership of a sectional title unit, than in the CPA Act.⁴⁷⁴ As the focus in the ST Act is on individual ownership of the separate units in the sectional title scheme, it provides mechanisms for the persons other than a registered owner to be recognised.⁴⁷⁵ This includes, for example, a trustee of an insolvent estate, a liquidator of a company or close corporation who is an owner, and the executor of a sectional title owner who died.⁴⁷⁶ The ST Act therefore creates efficient methods for dealing with situations where the legal owner might be incapable of controlling the property registered in his or her name due to legal processes requiring representatives to act on behalf of the owner, as in insolvency or death. Membership of the body corporate allows owners to participate in the general meetings and elect

⁴⁶⁷ S 36(1) of the ST Act; Van der Merwe *Sectional Titles* 2-19.

⁴⁶⁸ Van der Merwe *Sectional Titles* 2-19.

⁴⁶⁹ See Annexure 8 r 4(1) and s 39(1) of the ST Act.

⁴⁷⁰ Van der Merwe *Sectional Titles* 2-19.

⁴⁷¹ Van der Merwe *Sectional Titles* 2-20.

⁴⁷² Above.

⁴⁷³ S 102 def of “owner” of the DR Act.

⁴⁷⁴ Van der Merwe *Sectional Titles* 3-26.

⁴⁷⁵ S 1 def of “owner” (a) of the ST Act.

⁴⁷⁶ S 1 def of “owner” (b) of the ST Act.

trustees managing the day-to-day business of the sectional title scheme.⁴⁷⁷ Membership of the body corporate is terminated when an owner alienates his or her unit⁴⁷⁸ or if the body corporate is dissolved by an order of the court.⁴⁷⁹

The main difference between the CPA Act and ST Act is that membership in communal property associations is determined *before* registration of the juristic person. In sectional title schemes owners only become members of the juristic person *when units are transferred in their name*.⁴⁸⁰ Another variation is that communal property associations allow for much wider criteria for the inclusion of new members while the ST Act stipulates that only owners can become members of the body corporate.⁴⁸¹ Due to such wide criteria, the CPA Act explicitly provides for an equality clause to prevent discrimination in the recognition of members and to protect marginalised members. The ST Act is more rigid in its membership criteria as it relates directly to the ownership of a unit. In restitution cases, membership needs to be more open-ended to accommodate family members and descendants of beneficiaries,⁴⁸² which will not always apply, as membership is often restricted by the type of grant a beneficiary receives.⁴⁸³

In the communal property association context, membership can be held by individuals or by families (or households), depending on the exigencies of the specific situation.⁴⁸⁴ Thus, the communal property association can elect the mode of representation at establishment, which is important for security of tenure as it indicates how benefits will be received and rights enforced by members.

⁴⁷⁷ Annexure 8 r 4(1); s 39(1) of the ST Act; Van der Merwe *Sectional Titles* 2-19.

⁴⁷⁸ S 36(2) of the ST Act.

⁴⁷⁹ Ss 36(2); 48(6) of the ST Act. See also Van der Merwe *Sectional Titles* 2-19, 2-21.

⁴⁸⁰ S 36(1) of the ST Act.

⁴⁸¹ Above.

⁴⁸² CSIR *Diagnostic Study* 23.

⁴⁸³ Above.

⁴⁸⁴ Item 8 of the CPA Act.

In the early stages of the land reform programme, grants were allocated to households rather than to individuals.⁴⁸⁵ This gave rise to the so-called “rent-a-crowd” syndrome⁴⁸⁶ whereby applicants applied in large numbers for these government grants in order to amass adequate financing to procure property.⁴⁸⁷ Unfortunately, many of the so-called beneficiaries never intended to reside on or utilize the land, and thus became passive members of communal property associations. This diluted the participation rights vital for the functioning of the communal property association and it diminishes the productive use of land for the whole community. It also created confusion, because it was often assumed that the beneficiaries of such grants were also members of large communal property associations,⁴⁸⁸ causing uncertainty and the possibility of strife in the community.⁴⁸⁹ A further risk of representation by means of households is the marginalization of vulnerable members of the family in participating in community structures and the allocation of substantive and procedural rights. This especially threatens the tenure security of women, who are disadvantaged in customary tenure systems.⁴⁹⁰ If the right does not vest in the individual, it might be more difficult for individuals to assert their rights or gain benefits.

In practice, many communal property associations allocate rights in their constitutions to households.⁴⁹¹ The actual membership rights, however, vest with the head of the household. Alcock and Hornby postulate that the intention of such a formulation in the constitution of communal property associations is to adhere to the

⁴⁸⁵ Hall & Cliffe “Introduction” in Hall *Another Countryside* 26.

⁴⁸⁶ James “‘The Tragedy of the Private’ Owners Communities and the State in South Africa’s Land Reform Programme” in Von Benda-Beckmann, Von Benda-Beckmann & Wiber (eds) *Changing Properties of Property* (2006) 243 257.

⁴⁸⁷ Hall & Cliffe “Introduction” in Hall *Another Countryside* 6.

⁴⁸⁸ Cousins & Hornby “Adrift” in *Piecemeal Reforms and Calls for Action* 137.

⁴⁸⁹ Above.

⁴⁹⁰ See Ch section 2 5 4 above.

⁴⁹¹ CSIR *Diagnostic Study* 25.

principles of customary law.⁴⁹² When the CPA Act was enacted, it was envisioned that many of the users of this Act would incorporate customary principles into their constitutions.⁴⁹³ Giving communities self-regulation ensures that principles familiar to the community are adhered to, resulting in effective procedures. If communities cannot reflect many of their traditional practices in the usage of land, there is a danger that the legal framework created by the CPA Act will be ignored and its democratic values undermined.⁴⁹⁴

On the other hand, in situations where customary law principles are the norm, the incorporation of such principles might perpetuate the marginalisation of members, in particular that of women.⁴⁹⁵ Defining status and representation of members in landholding by means of households should be a possible option, which can also contribute to familial cohesion, provided that the constitution contains specific principles on the devolution of benefits.⁴⁹⁶ It is recommended that the CPA Act be amended to create default provisions for membership in favour of individuals unless coherent terms are contained in the community's constitution in favour of creating households.⁴⁹⁷

In recent communal property associations, a trend has developed of allocating rights to individual members.⁴⁹⁸ This is to be welcomed, as certainty surrounding membership is created and possible marginalisation of women and children is

⁴⁹² Alcock & Hornby "Traditional Land Matters: A Look into Land Administration in Tribal Areas in KwaZulu-Natal" March 2004 *Legal Entity Assessment Project* 19-30 (Available at www.leap.org.za (Accessed on 16-09-2009); CSIR *Diagnostic Study* 25.

⁴⁹³ White Paper on Land Policy par 4.17 Box 4.11; Carey Miller & Pope *Land Title* 467.

⁴⁹⁴ Cousins & Hornby "Adrift" in *Piecemeal Reforms and Calls for Action* 137.

⁴⁹⁵ Claassens & Ngubane "Women, Land and Power: The Impact of the Communal Land Rights Act" in Claassens & Cousins *Land Power & Custom* (2008) 156.

⁴⁹⁶ Walker "Piety in the Sky" in *Agrarian change, gender and land rights* 139.

⁴⁹⁷ Above.

⁴⁹⁸ CSIR *Diagnostic Study* 25.

minimised. If the household family option is used, the parameters of household membership must be explicitly defined.⁴⁹⁹

The ST Act states that a unit must be “registered in the names of both spouses in a marriage in community of property.”⁵⁰⁰ Van der Merwe however, states that the ST Act does not indicate whether this provision applies only to participation of spouses with regards to property transactions, or whether it also applies to owners’ administrative duties as part of the body corporate in the management processes of the common property.⁵⁰¹ The ST Act functions as a land administration entity only and does not go as far as the CPA Act in regulating representation of members in a family context.

Limitations need to be determined to ensure exclusivity of membership of a communal property association. Commentators on the CPA Act often criticise the failure in defining clear parameters for membership in communal property associations.⁵⁰² This problem often occurs when communal property associations form part of a restitution claim, as conflict can develop surrounding the legitimacy of including certain descendants that form part of a claimant community.⁵⁰³

The case of the Elandskloof community provides an example of this obstacle. In the initial submission made by the community in 1992, 125 families were on the register to become part of the communal property association. However, as negotiations with Government gained momentum, more families were added until the number increased to almost 308 families by 1997, which was beyond the capacity of the available land. After much conflict and uncertainty, the community finally determined

⁴⁹⁹ CSIR *Diagnostic Study* 119.

⁵⁰⁰ Def of owner in S 1(b)(ii) of the ST Act.

⁵⁰¹ Van der Merwe *Sectional Titles* 3-27.

⁵⁰² Lahiff “Tenure Arrangements and Support” in Hall (ed) *Another Country-side* (2009) 99; Cousins & Hornby “Adrift” in *Piecemeal Reforms and Calls for Action* 136.

⁵⁰³ CSIR *Diagnostic Study* 23.

that members of the community and all their descendants would qualify for the restitution claim if they were part of the community dispossessed in 1962. Community members who left Elandskloof before 1962 for any reason could also be entitled to membership, but only if they were still alive. If they are deceased, membership would be granted only to one direct descendant of such a member.⁵⁰⁴ In August 2005, the Cape High Court put the Elandskloof communal property association under administration of the Department of Rural Development and Land Reform,⁵⁰⁵ although in March of the same year, the Minister of Rural Development and Land Reform claimed in response to a question in the National Assembly that development for the community was on track and the restitution claim was finalised.⁵⁰⁶ As of 2010, the issue of membership is still not settled, and the communal property association has become completely dysfunctional.⁵⁰⁷

The significance here is that although membership criteria was not the only factor contributing to the dysfunctionality of the Elandskloof communal property association, it contributed to a situation of tension and strife in the community that could be a catalyst for failure and conflict within the community, especially if this issue is not resolved before occupation of the land.⁵⁰⁸

The main difference between communal property associations and sectional title schemes is that members of a sectional title scheme acquires ownership of units in

⁵⁰⁴ Barry & Mayson "Conflicts in a Rural Land Restitution Case: Reconstructing the Elandskloof Mission Community, South Africa" Paper Presented at FIG XXII International Congress Washington DC USA, (April 19-26 2002) 9.

⁵⁰⁵ Barry "Dysfunctional Communal Property Associations in South Africa: The Elandskloof Case" 11. See also Maughan "State moves to take control of first farm redistributed after apartheid" *Cape Argus* (22-08-2005) 3. Gophe "Restitution of Land has not Brought Prosperity to Owners" *Argus* (29-10-2005) 5.

⁵⁰⁶ National Assembly *Question 452* Internal question paper no. 10/2005 (2005/03/18)

http://www.dla.gov.za/publications/parliamentary_questions/nat_assembly2005.htm (accessed 23-08-2010).

⁵⁰⁷ Barry "Land restitution and communal property associations: The Elandskloof case" 2010 *Land Use Policy* 139 145; Nkomo "Frustrated Elandskloofers Languishing in Land of 'Broken Promises'" *Cape Times* (23-06-2010) 6.

⁵⁰⁸ Pienaar "Second Bite" *At the Crossroads* 330.

sectional title schemes, while members of communal property associations only acquire use rights.⁵⁰⁹ This influences the way that membership is terminated in both entities.

Another dissimilarity is that the scope of a member's influence in a sectional title scheme is determined by participation quotas relating directly to the value of a unit or the size of its floor area. In the ST Act, different classes of membership in sectional title schemes are directly linked to the size of a member's participation quota.⁵¹⁰ The participation quota is a numerical calculation of the sectional owner's share in the scheme's common property. The participation quota can be calculated in various ways, for example in residential schemes, based on the floor area size of each unit in the sectional title scheme.⁵¹¹ On the other hand, in non-residential schemes, the determination of the participation quota is left to the discretion of the developer.⁵¹² The participation quota also determines the voting power an owner has in general meetings to decide on important issues. Essentially, the amount an owner must contribute to the administrative costs and maintenance expenses of the common property is also determined by the participation quota.⁵¹³ Due to the nature of the scheme applying to the building, the units are easily discernable and the owners obtain ownership in the units.

The CPA with its broad constitution demands a higher level of participation to ensure the same situation. In the interest of the simplicity promoted by the CPA Act, rights should be determined diagrammatically as an attachment to the constitution of the communal property association, similar to participation quotas.⁵¹⁴ Rights should also

⁵⁰⁹ Van der Merwe *Sectional Titles* 2-11 and S 1 def of "owner" in the ST Act.

⁵¹⁰ S 1 def of participation quota in the ST Act.

⁵¹¹ S 32(1) of the ST Act.

⁵¹² S 32(2) of the ST Act.

⁵¹³ Van der Merwe *Sectional Titles* 4-3. Badenhorst et al *Law of Property* 459.

⁵¹⁴ Item 7, 8 & 10 of the CPA Act.

be defined as explicitly as possible, as ambiguity and vagueness can provide a “ready-made bone of contention”.⁵¹⁵

The powers of participation in both legal entities assigned to members are broadly similar, in that membership allows members to participate in the management of the juristic person. It should also be kept in mind that individual members of a communal property association cannot establish real rights in the assets of the communal property association. Thus, rights cannot be used as collateral to enable a member to use the rights as security for a mortgage or pledge, as the community as a whole owns the communal property.⁵¹⁶

The two most important issues surrounding membership of a communal property association are certainty about the status of members of an association and that members should have equal rights to the greatest extent possible. Membership of an association allows members to participate in the management of the communal property association and provides for the allocation of substantial rights, duties and benefits. The CPA Act gives the communal property association a wide discretion to determine the status of their members. Communities already settled on a property should be able to convert to a communal property association without difficulty as the settlement is already established. In “greenfield” situations, the status of holders can be problematic because the community is still being constituted.⁵¹⁷

In the ST Act, the status of holders is mainly determined by the provisions in the Act and the initial initiatives of the developer of the scheme during the establishment phase. Both legal entities faces the same risk, in that if the participation quota in sectional title schemes, or the criteria of membership in communal property associations are not adequately addressed and worked out at the outset, it could

⁵¹⁵ Van der Merwe *Sectional Titles* 13-12.

⁵¹⁶ Nonyana June 2003 *PLD* para 6.

⁵¹⁷ See Ch 2 section 2 5 5 above.

lead to conflict between members. Closely related to this issue is the question of how substantive rights and benefits vest in both legal entities, which will be addressed in the next section.

4 3 SUBSTANTIVE RIGHTS

Substantive rights in the legal entities indicate the content of land tenure rights.⁵¹⁸ As indicated in Chapter 2, secure tenure is premised on certainty of how rights can be used and enforced. Procedural rights on the other hand, deal with procedures of how substantive rights in the property are adequately managed. In this section, the allocation of substantive rights will be discussed.

The constitution of the communal property association must provide a framework on how the property should be divided into areas of exclusive and communal use.⁵¹⁹ The CPA Act provides the community with wide discretion to determine which substantive rights should vest in the community by a democratic procedure based on equality.⁵²⁰ Item 10 of the Schedule to the CPA Act explicitly states that the constitution of the community should indicate the purpose for which the property may be used.⁵²¹ The stated purpose as regards usage of the property contributes to the limitation of possible rights that can vest in members of the communal property association. There should be an indication of the physical division of the property between members, as well as how rights with regard to the property are allocated.⁵²² Ideally, physical use rights should be indicated diagrammatically. This includes exclusive use areas, for example residences, and common areas for communal usage. If not all members wish to use a resource, rights should be allocated to

⁵¹⁸ Cousins & Hornby "Adrift" in *Piecemeal Reforms and Calls for Action* 195.

⁵¹⁹ S 8(2) read with Item 7 of the CPA Act; Carey Miller & Pope *Land Title* 476.

⁵²⁰ Preamble to the CPA Act.

⁵²¹ Item 10 of the CPA Act.

⁵²² Item 10 of the CPA Act.

different classes to promote efficiency. Importantly, the constitution should also indicate how the rights of members can be transferred.⁵²³

It is possible to assign exclusive use areas to specific members and the CPA Act states clearly that members may not be denied access to such allocated areas.⁵²⁴ The same principle is applicable to areas of communal usage, unless the constitution prescribes otherwise.⁵²⁵ Thus, members' rights and duties towards these areas should be defined clearly, as the limits imposed on a member will determine the extent of access and freedom a member has towards his or her use of such areas. Fair access to members' own exclusive use areas or common property should therefore only be limited through the communal property association's constitution.⁵²⁶

The above-mentioned principles could lead to various permutations of the community's decision about the allocation of substantive rights. For example, the community can allocate specific areas of land to individuals for residential development, while areas used for the whole community could be shared for agricultural purposes or those assigned to till the land.⁵²⁷ As regards the communal areas, these can include rights to various types of resources, namely access to wood used as fuel, grass for hatching, water and grazing of livestock.⁵²⁸ It is also preferable that the community regulates the use of resources in communal areas to avoid overexploitation. For example, each household can be limited with regard to the number of livestock allowed to graze on the common property. Such usage rights can also take the form of rules on how the communal property is to be used.⁵²⁹ If

⁵²³ Item 11 & Item 12 of the CPA Act.

⁵²⁴ Section 9(1)(d)(ii) of the CPA Act.

⁵²⁵ Section 9(1)(d)(ii) of the CPA Act.

⁵²⁶ S 9(1)(d)(ii) of the CPA Act.

⁵²⁷ CSIR *Diagnostic Study* 41.

⁵²⁸ CSIR *Diagnostic Study* 41.

⁵²⁹ Item 7 of the CPA Act.

resources are not allocated on a fair and equitable basis, it might result in unrestricted exploitation, risking degradation of the land.⁵³⁰ According to the CSIR's review on communal property institutions, the consequences of inappropriate allocation result in the effective privatisation of resources in the hands of a few wealthy and powerful individuals, and possible degradation of the resource.⁵³¹ In this instance it is important that either consultants or the Department of Agriculture provides guidance to the community as to the capacity of and the limits on the resource.⁵³²

In some instances, the community does not allocate individual rights in the land at all, but attempts to use the resources of the land for income purposes.⁵³³ Enterprises usually take the form of partnerships with the private sector, or the land is leased out to outsiders or individual members of the association to exploit the resources.⁵³⁴ Resources can include agriculture and tourism. The communal property association could also utilise the land for collective farming purposes.⁵³⁵ The distribution of the proceeds derived from resources must be determined by the community and can take the form of sharing the actual produce of the land, the payment of dividends to each member or the use of profits to further invest in the infrastructure of the communal property association.⁵³⁶ Profit sharing can be limited to certain members of the community, especially if the benefit of the right correlates with the relevant input of such a member.

⁵³⁰ Ch 2 section 2.4.1 above.

⁵³¹ CSIR *Diagnostic Study* 42.

⁵³² *Kranspoort Community Concerning the Farm Kranspoort* 48 LS [2000] JOL 7526 (LCC) para 5.

⁵³³ Chapter 5 section 5.2.1 below.

⁵³⁴ See for example *New Life Communal Property Association v Draigri Boerdery Bpk* (1616/2007) [2007] ZAECHC 101 (22 November 2007).

⁵³⁵ CSIR *Diagnostic Study* 42.

⁵³⁶ Koch "Putting out fires: Does the 'C' in CBNRM stand for Community or centrifuge?" in C Fabricius *Rights, resources and rural development: community-based natural resource management in Southern Africa* (2004) 78-84.

In sectional title schemes, allocation of rights is predetermined by the developer when constructing the scheme and dividing the building and the land into units and common property.⁵³⁷ Prospective owners buy into a ready-made package that defines the content of their rights. The ST Act thus provides mechanisms to enable access and usage rights. Rights of exclusion are automatically created by the fixed boundaries of units, and in other instances by allocation of exclusive use rights indicated on the sectional plan. In order to create separate ownership, the ST Act provides that ownership shall vest in sections, but joint ownership vests in the common property of the scheme.⁵³⁸ The Act expressly states that a purchaser acquires ownership in his or her unit, unlike in communal property associations where ownership only vests in the community as a whole. The ST Act places specific limits on how an owner may use and occupy a unit and the common property.

Similar to communal property associations, the owner's rights in the sectional title context are limited by the "concurrent rights of other sectional owners".⁵³⁹ Therefore, an owner is allowed to use the unit and the common property, provided that other owners are not adversely affected.⁵⁴⁰ Use should furthermore not negatively affect the reputation of a building as it might create adverse conditions for future buyers.⁵⁴¹ Owners are limited by by-laws of municipalities and zoning laws.⁵⁴² In the interest of the structural integrity of the building, owners are not permitted to make any alternations impairing the stability of the building, common property or exclusive use areas.⁵⁴³ There is a duty to properly maintain sections, exclusive use areas and hot-water installations.⁵⁴⁴

⁵³⁷ S 1 def of "unit" of the ST Act.

⁵³⁸ Van der Merwe *Sectional Titles* 8-4.

⁵³⁹ Van der Merwe *Sectional Titles* 8-5.

⁵⁴⁰ Annexure 8 r 68(1) of the ST Act.

⁵⁴¹ Above.

⁵⁴² Badenhorst et al *Law of Property* 447.

⁵⁴³ Annexure 8 r 68(iv) of the ST Act.

⁵⁴⁴ Annexure 8 r 68(2) and r 70 of the ST Act.

Contrary to the ST Act, the CPA Act deliberately regulates substantive rights only in a vague manner.⁵⁴⁵ For example, in the ST Act, the sectional owner is responsible to keep his or her unit in a good condition⁵⁴⁶ and to keep exclusive use areas on the common property clean and neat.⁵⁴⁷ The reason for this vagueness is to allow the association to regulate rights of use and enjoyment specifically in accordance with their particular context. In communal property associations, the most significant obstacle is the fact that rights are not properly identified in the initial stages of the establishment of the association, causing future uncertainty and discontent.⁵⁴⁸ Rights and specific limitations on usage rights should be specified clearly and in detail at that stage.

4 4 REGISTRATION AND PUBLICITY

The registration of communal property associations and sectional title schemes is discussed in this section. An overview of the registration procedure according to the CPA Act will be provided, followed by a description of the ST Act's procedure, and finally, the registration procedures will be compared.

The registration of a CPA may be divided into three phases. Firstly, the community should submit an application to the Director-General of the Department of Rural Development and Land Reform for the registration as a provisional CPA.⁵⁴⁹ Secondly, a constitution needs to be drawn up and adopted by the community.⁵⁵⁰ Finally, the association has to register as a Communal Property Association at the Department of Rural Development and Land Reform.⁵⁵¹ The registration procedure of

⁵⁴⁵ Van der Merwe *Sectional Titles* 8-5.

⁵⁴⁶ S 44(1)(c) of the ST Act.

⁵⁴⁷ S 27 of the ST Act.

⁵⁴⁸ Pienaar "Second Bite" in *At the Crossroads* at 330.

⁵⁴⁹ S 5 (1) of the CPA Act.

⁵⁵⁰ Ss 6; 7 of the CPA Act.

⁵⁵¹ S 8 of the CPA Act.

a communal property association establishes and formalises communal ownership. In a sense, it is the overarching provision recording all the requirements and qualifications of the communal property association.⁵⁵²

Authority vests in the Director-General of Rural Development and Land Reform to consider the association's registration application.⁵⁵³ The physical documents required by the Director-General are the report by an official of the Department on the adoption of the constitution⁵⁵⁴ and the substance of the constitution.⁵⁵⁵ The Director-General may register the association if there is substantial⁵⁵⁶ compliance with the statutory requirements of section 8(2) of the CPA Act.⁵⁵⁷ Additionally, the constitution must reflect the views of the majority of its members,⁵⁵⁸ and the adoption process must have been patently reasonable and inclusive.⁵⁵⁹

If the Director-General is satisfied that the requirements are met, heeded to the satisfaction of the constitution and the application must be referred with written consent to the Registration Officer.⁵⁶⁰ The duty of this official is to register the association in the prescribed manner, allocate a registration number and issue a registration certificate to the association.⁵⁶¹ The registration certificate will contain

⁵⁵² S 8(2)(a)-(f) of the CPA Act. This includes the type of community (s 2), registration of a provisional association (s 5), drafting (s 6) & adoption (s 7) of the constitution.

⁵⁵³ S 8(1) of the CPA Act.

⁵⁵⁴ S 7(2) read with ss 8(1), 8(2)(d), 8(2)(e) of the CPA Act. This includes the minutes and observations made by the Officer.

⁵⁵⁵ S 8(2)(b) to s 8(2)(c) of the CPA Act.

⁵⁵⁶ The term "substantial" means "very large in amount and degree" according to Sinclair *Collins Cobuild Essential English Dictionary* (1989) 800; This allows for some degree of flexibility in the Director-General's discretion. It is submitted that this is advantageous to communities in the sense that small formal defects will be ignored, when considering the registrability of the community. On the other hand, it might lead to lax application of the requirements of the Act by government officials.

⁵⁵⁷ S 8(2)(f)(i) of the CPA Act.

⁵⁵⁸ S 8(2)(f)(ii) of the CPA Act.

⁵⁵⁹ S 8(2)(f)(iii) of the CPA Act.

⁵⁶⁰ The Registration Officer of the Department of Rural Development and Land Reform is appointed by the Director-General. See s 1 read with s 8(3)(a) of the CPA Act.

⁵⁶¹ S 8(3)(a) of the CPA Act.

the impression of the Seal of the Communal Property Association, which enjoys judicial recognition.⁵⁶² The register is maintained by the Department of Rural Development and Land Reform and records the details of all the communal property associations.⁵⁶³ On payment of a prescribed fee, a copy of the constitution of any registered community and information contained in the register is available, on request, to the public.⁵⁶⁴

Section 8(3)(c) thus gives effect to the publicity principle (underlying property law and espoused in the Deeds Registries Act)⁵⁶⁵ that is a fundamental feature of secured property rights according to conventional property law.⁵⁶⁶ A record of the community's ownership is still held at the Deeds Office, and used if the community alienates the land.⁵⁶⁷ In essence therefore, the outer boundaries of the land are still registered at the Deeds Registry Office, indicating that ownership is vested in the community, but the manner in which rights are vested in individuals however is registered and held at the Department of Rural Development and Land Reform.

The CPA Act only deals with the registration of a valid communal property association. The provisional communal property association cannot acquire or dispose of immovable property or any real rights attached to such property.⁵⁶⁸ It also cannot encumber the immovable property or real rights by means of a mortgage, servitude, or lease as they only acquire a right to occupy the land.⁵⁶⁹ Therefore, the capacity of a provisional communal property association to enter into transactions is

⁵⁶² S 3 of the CPA Act.

⁵⁶³ S 8(3)(b) of the CPA Act. At the time of writing, it was still possible for a community to register as a communal property association.

⁵⁶⁴ S 8(3)(c) of the CPA Act.

⁵⁶⁵ 47 of 1937.

⁵⁶⁶ S 16 of the DR Act. See also Mostert "Diversification" in *Modern Studies in Property Law Vol II 4*; Van der Merwe *Sakereg* 3.

⁵⁶⁷ *Nelson Mandela Bay Metropolitan Municipality v Joe Slovo Communal Property Association & others* [2009] JOL 22719 (SE) par 1.

⁵⁶⁸ S 5(4)(b) of the CPA Act.

⁵⁶⁹ S 5(4)(a) of the CPA Act.

limited, despite the fact that the ownership of the property has already been transferred in terms of the Deeds Registries Act.⁵⁷⁰

If the community has not adhered to the above requirements to the satisfaction of the Director-General, the official must not inform the community to take the necessary measures to obtain registration of the association.⁵⁷¹ In these circumstances, the Director-General may assist the community to rectify the problem areas which he or she has identified.⁵⁷²

The registration of the CPA gives life to the association and discloses the nature of the ownership which vests in the association. If a provisional association applied for registration, it firstly needs to be deregistered and its assets transferred to the newly registered association.⁵⁷³ Registration of title establishes the association as a juristic person⁵⁷⁴ with legal⁵⁷⁵ and commercial capacity.⁵⁷⁶ The association is entitled, within the limits of its constitution, to acquire and dispose of immovable property as well as of the real rights attached to the land.⁵⁷⁷ Encumbering of the immovable property or accompanying real rights is also possible by means of normal property law instruments such as mortgage, servitude and lease.⁵⁷⁸ The association has perpetual existence, regardless of changes in its membership, except in the unfortunate events of destruction or deregistration.⁵⁷⁹

⁵⁷⁰ Above.

⁵⁷¹ S 8(4) of the CPA Act.

⁵⁷² S 8(5) of the CPA Act.

⁵⁷³ S 8(6)(f) of the CPA Act.

⁵⁷⁴ Alternatively, a legal entity.

⁵⁷⁵ S 8(6)(a) of the CPA Act.

⁵⁷⁶ S 8(6)(b) of the CPA Act. As far as it is in accordance with the CPA's constitution.

⁵⁷⁷ S 8(6)(c)(i) of the CPA Act.

⁵⁷⁸ S 8(6)(c)(ii) of the CPA Act.

⁵⁷⁹ Dealt with in s 13 of the CPA Act. See also Carey Miller & Pope *Land Title* 484 which notes the similarity of this feature in other types of juristic persons.

Conversely, a sectional title scheme is established through various phases, depending on the existence of the essential physical attributes necessary for an area of land to qualify under the Sectional Titles Act.⁵⁸⁰ The developer of a scheme needs to ensure that the land is properly surveyed, the necessary permissions from the local authorities obtained, and a property sectional plan is drafted. Despite the fact that the scheme pertains to buildings, the sectional title scheme comes into existence only on registration of the sectional plan.⁵⁸¹ A certain number of requirements have to be fulfilled before the sectional title register for a scheme can be opened.⁵⁸²

Once the buildings are substantially completed to obtain actual three-dimensional measurements of the units, a draft sectional plan can be prepared⁵⁸³ by a land surveyor or an architect.⁵⁸⁴

Several provisions in the Sectional Titles Act intend to ensure the accuracy and precision of the measurements of a unit. For example, a prescribed examination on the preparation of draft sectional plans has to be passed by a prospective member of the profession.⁵⁸⁵ The draft sectional plan should be drawn from actual measurements taken on site⁵⁸⁶ and the possibility exists that an architect or land surveyor could be guilty of improper conduct if a defective plan is knowingly signed. These provisions therefore have a strong deterrent effect.⁵⁸⁷

⁵⁸⁰ S 4(5)A read with S 5 and S 6 of the ST Act.

⁵⁸¹ S 13(1) of the ST Act. Badenhorst et al *Law of Property* 449.

⁵⁸² Badenhorst et al *Law of Property* 446-450.

⁵⁸³ The building does not have to be completed sufficiently for occupation, but there rests a certification requirement on the land surveyor or architect to state that the buildings must sufficiently be complete enough for occupation, and that the building was erected according to the sectional plan. S 5(3) of the ST Act.

⁵⁸⁴ The manner of preparation is set out in s 5 of the ST Act.

⁵⁸⁵ S 5(2) read with reg 43 of the ST Act.

⁵⁸⁶ S 6(1) of the STA Act.

⁵⁸⁷ S 8 of the STA Act.

The draft sectional plan must be submitted to the Surveyor-General for scrutiny and approval.⁵⁸⁸ The significance of these procedures is to determine the exact boundaries of every unit and the extent of the common property. The documents by which the floor area of every section is calculated, contains the only authoritative statement on how the participation quota of every unit is determined.⁵⁸⁹ The participation quotas determine the weight of an owner's voting rights at general meetings,⁵⁹⁰ the contribution he or she has to make towards maintenance and administration,⁵⁹¹ and the extent of the undivided share of each owner in the common property of the scheme.⁵⁹² The sectional plan indicates the identity of the owner and ownership certificates are issued on the basis of the plan. The plan reflects any real rights⁵⁹³ or conditions that might curb the scope of ownership.⁵⁹⁴

Sectional title schemes have been part of the urban landscape for more than forty years, and are well integrated (at least on statutory level) with other developmental and planning legislative measures.⁵⁹⁵ A new sectional title scheme has to comply with operative town planning schemes and the following statutory enactments: the objectives of Chapter IV of the Development and Facilitation Act,⁵⁹⁶ the Local Government Transition Act⁵⁹⁷ or any other integrated plan applied locally. The developer therefore has to comply with the necessary zoning restrictions and a proposed development cannot be in conflict with any zoning restrictions or existing leasehold.⁵⁹⁸

⁵⁸⁸ S 7 of the STA Act.

⁵⁸⁹ Van der Merwe *Sectional Titles* 4-3.

⁵⁹⁰ S 32(3)(a) of the ST Act.

⁵⁹¹ S 32(3)(c) of the ST Act.

⁵⁹² S 32(3)(b) of the ST Act.

⁵⁹³ S 1 definition of "statutory plan" of the ST Act.

⁵⁹⁴ Van der Merwe *Sectional Titles* 5-31.

⁵⁹⁵ S 30 of the Sectional Titles Amendment Act 44 of 1997.

⁵⁹⁶ 67 of 1995.

⁵⁹⁷ 209 of 1993; s 10 D(4)(b) or s 2 of Schedule 2A.

⁵⁹⁸ Carey Miller & Pope *Land Title* 211.

In order to comply with these statutory provisions, the developer is obliged to commission an architect or land surveyor to inspect the property.⁵⁹⁹ If any inconsistencies or abnormalities are discovered, the inspecting party may apply to the municipality concerned for condonation of the non-conformity. This can include issues such as building-usage, non-compliance with building by-laws applicable to the land or other related matters.⁶⁰⁰ If the municipality condones and certifies the non-conformity,⁶⁰¹ it may impose conditions on the property by means of a notarial deed.⁶⁰²

Since the local authority also has to approve the building plans⁶⁰³ it plays an important but somewhat limited role in the development of a scheme.⁶⁰⁴ The role of the local authority is effectively replaced by the certification requirements with which a surveyor or architect has to comply. It is the surveyor or architect that must ensure that the scheme fulfils local planning and structural requirements.⁶⁰⁵ The surveyor-general will only approve the draft sectional plan if all the applicable documents have been submitted and are in order.⁶⁰⁶ Since the onus is on the developer to apply for condonation if the scheme is non-compliant, there is always the risk that an unscrupulous developer might just ignore this requirement. This will put land

⁵⁹⁹ S 4(5) of the ST Act.

⁶⁰⁰ For instance the creation of a new entrance to a road, sewage or removal of a power cable. See Van der Merwe *Sectional Titles* 6-8. According to Van der Merwe this provisions deal specifically with usage that may contravene zoning requirements.

⁶⁰¹ S 4(5) of the ST Act.

⁶⁰² Deeds Registries Act and CRC 18 of 1997 in Van der Merwe *Sectional Titles* 6-8.

⁶⁰³ S 4(5) of the ST Act.

⁶⁰⁴ For criticism see Van der Merwe *Sectional Titles* 6-6. The Local Authority's power is further curtailed by the fact that no further particulars can be requested after a condonation application have been received.

⁶⁰⁵ Van der Merwe *Sectional Titles* 6-9.

⁶⁰⁶ S 7(4) of the ST Act.

surveyors and architects in a difficult position and create future difficulties for the owners.⁶⁰⁷

If all the formal requirements are met, the developer or its representatives will submit the draft sectional plan to the Surveyor-General for approval.⁶⁰⁸ Numerous documents have to accompany the application including the necessary certificates pertaining to the adherence to all building and planning restrictions of the building⁶⁰⁹ and the field book that contains all the measurements of sectional plans.⁶¹⁰ A list of coordinates that identifies the permanent features of each building and a median dimension plan should also be included.⁶¹¹

After the draft sectional plan is approved by the Surveyor-General, the developer must apply to the relevant Deeds Registries Office⁶¹² for the opening of a sectional title register.⁶¹³ The developer's conveyancer must include the sectional plan,⁶¹⁴ a certificate indicating the approval of a local authority, other certificates by the conveyancer,⁶¹⁵ and a copy of the rules of the scheme. An application for the opening of a sectional title register and current title deed of the land should also be included.⁶¹⁶ Any bondholders that have mortgages over the land should give their

⁶⁰⁷ Van der Merwe *Sectional Titles* 6-17.

⁶⁰⁸ S 7(1) of ST Act.

⁶⁰⁹ S 7(2) of the ST Act.

⁶¹⁰ Reg 7 of the ST Act.

⁶¹¹ Reg 6(4)(a)-(f) of the ST Act.

⁶¹² S 3(1) of the STA Act makes the DR Act applicable concerning the registration documents used in the Deeds office. Geldenhuys "An overview of the requirements and procedures involved in the Establishment of a Sectional Title Scheme in terms of the Sectional Titles Act NO 95 of 1986, as Amended" (Unpublished) 2.

⁶¹³ S 12(1)(b) of the ST Act.

⁶¹⁴ S 11(3)(a) of the ST Act.

⁶¹⁵ This includes guarantees by the conveyancer that servitudes or conditions burdening the land have been indicated (s 11(3)(b)); that the prescribed rules have been included including special rules the developer might have substituted and that these rules do not clash with any provision of the ST Act (S 35(2)).

⁶¹⁶ S 11(3)(c) of the ST Act. See also Van der Merwe *Sectional Titles* 6-22.

necessary consent for registration of the scheme along with all relevant documentation relating to the bond.⁶¹⁷ The necessary fees should be paid in cash, postal order or check.⁶¹⁸ The function of the officials of the Deeds Office is to determine if the requirements of the Act or any other applicable Acts have been complied with.⁶¹⁹ The Registrar has discretion to reject the plan if it does not conform to the necessary formalities, or if the plan contains incorrect information.⁶²⁰ If all the documents are in order and fall within the ambit of the ST Act, the registrar will register the sectional plan and open a sectional title register.⁶²¹

The registration process entails the allocation of a distinctive number to the sectional plan⁶²² that is stored on a computer or microfilm.⁶²³ The developer also receives a certificate of proof of registration and subdivision of the building into units and common property.⁶²⁴ Once the scheme is registered the land is subject to the scheme, and ceases to be an entity in the land register, being replaced by the subdivided units indicated in the sectional plan.⁶²⁵ This is filed in a special sectional title register in the Deeds Office that removes the land from the ordinary land register.⁶²⁶ The effect of this is that the developer now becomes owner of the fragmented parts of the divided building and is not just the owner of the land anymore.⁶²⁷ Co-ownership of units is now also possible.⁶²⁸ Any conditions, real rights or servitudes that burden the land must be shown on the sectional plan. This binds

⁶¹⁷ S 25(1) of the ST Act. Van der Merwe *Sectional Titles* 6-22. This includes all bond holders.

⁶¹⁸ Reg 35(1) of the ST Act read with reg 84 of the DR Act.

⁶¹⁹ S 12 (1) of the ST Act.

⁶²⁰ Van der Merwe *Sectional Titles* 6-23.

⁶²¹ S 12 of the ST Act.

⁶²² S 12(1)(a) of the ST Act.

⁶²³ S 12(1)(d) of the ST Act.

⁶²⁴ S 12(1)(d) of the ST Act.

⁶²⁵ S 13(1) of the ST Act. Van Der Merwe *Sectional Titles* 5-3.

⁶²⁶ Badenhorst et al *Law of Property* 454.

⁶²⁷ Van der Merwe *Sectional Titles* 6-26.

⁶²⁸ Above.

every unit's separate title deed.⁶²⁹ This also includes registrable conditions created by the developer in terms of S 11(2). These restrictions on the unit limit the ownership of members and will therefore determine the nature of the scheme. Previously registered burdens on the land, for example a real right or condition, continue to burden all the units in the scheme.⁶³⁰

The sectional title register can be equated to a township register. Conditions, real rights, interdicts and all other legal instruments can be recorded, cancelled and enforced against unit like against any other parcel of land. Sectional title registration therefore extended traditional property law without adversely affecting the normal operation of South African law.⁶³¹

While registration of both communal property associations and sectional title schemes in the end depend on the signature of an official, substantial preparation is needed to fulfil all the requirements of registration contained in both Acts.⁶³² The establishment procedures of especially the ST Act demand cumbersome processes that require the professional services of at least three professions, namely architects, land surveyors and conveyancers.⁶³³ Protracted registration with the Surveyor-General and Deeds Registry and a possible condonation process with a local authority is time consuming.⁶³⁴ The entire process can be expensive, and therefore inappropriate for disadvantaged communities wishing to establish themselves on property as cost-efficiently as possible.⁶³⁵ However, part of the creation of a new sectional title scheme demands safe and durable buildings that should be integrated

⁶²⁹ S 13(2) read with s 16(1) of the ST Act. This includes the undivided share in the common property.

⁶³⁰ S 13(3) of the ST Act.

⁶³¹ Van der Merwe *Sectional Titles* 6-26.

⁶³² Ss 6, 7 & 8 of the CPA Act; ss 4-6, 12 & 15 of the ST Act.

⁶³³ Ss 4, 5 & 6 of the ST Act.

⁶³⁴ Van der Merwe *Sectional Titles* 6-9.

⁶³⁵ See Ziqubu 2002 *AFRA* 20 for an example where a community preferred the formation of a communal property association in order to keep costs low.

into an urban environment,⁶³⁶ which explains partly why the registration process for sectional title schemes is so expensive. By contrast, the CPA Act does not contemplate the necessary inclusion of buildings on the land.⁶³⁷ In this regard, the constitutive requirements are less onerous.

The other major difference between the two legal entities is the fact that registration of sectional title schemes takes place in the Deeds Registry Office,⁶³⁸ while communal property associations are registered at the Department of Rural Development and Land Reform.⁶³⁹ The Deeds Registry in South Africa is renowned for its accurate record keeping although it cannot be considered completely correct or comprehensive.⁶⁴⁰ The Deeds Registry is also described as exclusive, due to the expense involved and the fact that it can only register property on surveyed and demarcated property.⁶⁴¹ The Deeds Registry provides, in most instances, security of title to owners because of the principle of publicity.⁶⁴² This enables titleholders to enforce their rights against third parties in a court of law.⁶⁴³ In theory therefore, the registration of communal property associations should be able to provide the same protection to members of a communal property association.

For all of the different types of communities qualifying to use communal property associations⁶⁴⁴ as juristic persons, enforcement as a community against the public at large should provide adequate security. The community as owner of the property will have the same protection as land rights holders registered under the Deeds

⁶³⁶ Van der Merwe *Sectional Titles* 3-36.

⁶³⁷ Badenhorst et al *Law of Property* 620.

⁶³⁸ S 3 of the ST Act.

⁶³⁹ S 5(3) of the CPA Act.

⁶⁴⁰ Mostert "Diversification" in *Modern Studies in Property Law Vol II 4*; Pienaar 2007 *THRHR* 556-557.

⁶⁴¹ Pienaar 2007 *THRHR* 557.

⁶⁴² Van der Merwe *Sakereg* 13-14.

⁶⁴³ Mostert "Diversification" in *Modern Studies in Property Law Vol II 4*; Pienaar 2007 *THRHR* 556-557.

⁶⁴⁴ Ch 3 section 3 3 2 above.

Registries Act. Even if such a record is not available from the Department of Land Affairs's Registry Office, the transfer of communal property would be reflected in the South African Deeds Register. Since communal property associations can only be established on surveyed land, there will always be a record of the owner of the property, unless a new owner derived possession by means of original acquisition.⁶⁴⁵ Protection of title could however be different for individual members of a communal property association, as will be indicated below by the current state of affairs at the Department of Rural Development and Land Reform's Registry Office for communal property associations.

Part of the CSIR's review of communal property associations included an appraisal of the Department of Rural Development and Land Reform Registry Office where records are kept of all registered communal property associations.⁶⁴⁶ The files are intended to contain the motivation for registration of the communal property association by the project officer, the communal property association's constitution, an updated membership list, a business plan, and the association's registration certificate.

The Department of Rural Development and Land Reform employs a paper-based system because the national office of this department does not have access to the electronic databases of provincial and district offices.⁶⁴⁷ The findings of the research team indicate that some of the communal property associations forming part of their study were not registered at the head office of the Department of Rural Development and Land Reform.⁶⁴⁸ Several key documents prescribed by the CPA Act were not included in these files, such as the annual reports and business plans of the

⁶⁴⁵ See in general Prescription Act 68 of 1969; Badenhorst et al *Law of Property* 160ff.

⁶⁴⁶ CSIR *Diagnostic Study* 93.

⁶⁴⁷ CSIR *Diagnostic Study* 92. The Department of Rural Development and Land Reform did attempt to provide an online register of communal property associations, but the page have been "under construction" for years, and the tenure website of the Department of Rural Development and Land Reform have not been updated since April 2002, see <http://www.dla.gov.za/tenurereform/> (accessed 23-08-2010).

⁶⁴⁸ EG "Klein Tswanaing" CPA; CSIR *Diagnostic Study* 92

registered communal property associations. Despite the fact that the CPA Act prescribes that the relevant documents and the register of the communal property association should be available to the public, the researchers found that access to the documents is quite difficult.⁶⁴⁹

Although most files contain the constitutions of the communal property associations, the majority of the constitutions were not signed by community members to indicate the authenticity of the documents. In some instances, it was not easy to identify the final constitution in a file containing multiple versions without amended dates. Retrieval of the files is problematic because there is no standard index to indicate what documents each file should contain.⁶⁵⁰ Details of memoranda for approval by the Director General were inconsistent and ranged from comprehensive to the very cryptic.⁶⁵¹

In final analysis, the certainty of beneficiaries' rights is undermined by the lack of administrative support that the Department of Rural Development and Land Reform is supposed to provide.⁶⁵² It undermines the security of tenure of members of communal property associations should it be necessary to enforce their rights legally against other members of their own community.⁶⁵³ If property was transferred to a beneficiary community in terms of the CPA Act, and the records kept by the Department of Rural Development and Land Reform are insufficient, the legitimacy of the communal property association as an institution to properly exercise their rights as a juristic person might be undermined. This is especially the case with the memorandum expected from the official of the Department of Rural Development and Land Reform about the legitimacy of the constitution.⁶⁵⁴ Furthermore, the lack of

⁶⁴⁹ CSIR *Diagnostic Study* 92.

⁶⁵⁰ Above.

⁶⁵¹ Above.

⁶⁵² S 8(3)(a) to 8(3)(c) of the CPA Act.

⁶⁵³ CSIR *Diagnostic Study* 93.

⁶⁵⁴ S 7(2) read with ss 8(1), 8(2)(d), 8(2)(e) of the CPA Act. This includes the minutes and observations made by the Officer.

proper documentary coherence may play a role when the communal property association seeks funding from private financial institutions.⁶⁵⁵

The security of tenure and title of a community as a whole should however be adequately protected against third parties, as there is also a record of the property transaction at the Deeds Office. The existing lack of information on the role of conveyancers and the Registrar of Deeds' role in registering a communal property association is problematic.

Participating conveyancers and the Registrar of Deeds need to play a more active role in ensuring that communities fulfil all of their obligations regarding the necessary documentation when a property is transferred to a communal property association. This might be achieved by delaying registration of a communal property association, until both the Registrar of Deeds and the functionary of the Department of Rural Development and Land Reform have signed off that the necessary documents have been received.⁶⁵⁶ Although this might put an additional burden on such role players, it will contribute significantly to security of tenure of especially individual beneficiaries. It would also not necessarily be unfair to the possibly landless beneficiaries, since the CPA Act provides for the creation of a provisional communal property association allowing for occupation for a period of 12 months prior to registration of the communal property association.⁶⁵⁷ This will create a mechanism that allows community members to be protected by the publicity principle *inter partes*.

⁶⁵⁵ Nonyana June 2003 *PLD* para 6.

⁶⁵⁶ See for an analogous argument by Pienaar "Second Bite" in *At the Crossroads* at 330 regarding the fact that occupation of members should only occur after all rights have vested.

⁶⁵⁷ S 5 (4)(a) of the CPA Act.

4 5 CONCLUSION

The establishment procedure for communal property associations is important as it forms the basis for future living arrangements and management. If inadequate procedures are put in place security of tenure of the communal property association will be adversely affected. This chapter firstly investigated the requirements for individual membership of the communal property association.⁶⁵⁸ Status of members is important as it determines their participation in the management of the scheme and their specific substantive rights. The chapter demonstrated that membership of a communal property is too open-ended and that this can cause uncertainty about membership. In sectional title schemes, membership is directly linked to ownership of a unit. This provides for more certainty. The manner in which membership is determined in communal property associations may also be a cause for concern. Allocation of membership to households instead of individuals might lead to unequal benefits for the members of such households. It is recommended that membership is allocated to individuals.

Substantive rights should also be worked out as far as possible during the establishment phase.⁶⁵⁹ It is recommended that allocation of substantive rights be limited to prevent over-exploitation of the resources of the association. Substantive rights must be allocated fairly to prevent monopolisation by certain members to the detriment of others. In sectional title schemes, substantive rights are pre-determined by the developer and are linked to the individual units of a scheme, providing for more certainty. As substantive rights relate to the productive use of the available resources by the communal property association, every effort must be made to ensure fair and sustainable allocation. This applies both to the input of the community in the constitution-making process; as well as to the support provided by government in streamlining the legislative framework applicable to communal property association.

⁶⁵⁸ See ch 4 section 4 2 above.

⁶⁵⁹ See ch 4 section 4 3 above.

The registration procedure of communal property associations is unique as the necessary records are held by the Department of Rural Affairs and Land Reform.⁶⁶⁰ The ST Act provides that registration documents be held by the Deeds Office. The discussion above demonstrated that although the CPA Act provides for a more cost efficient mechanism of registration than the ST Act, implementation of the system is inadequate. Reasons for the inadequacy include lack of proper documentation and record-keeping. The security of tenure that a communal property association may derive from the publicity principle is consequently undermined.

The establishment procedure and especially the constitution-making process embodies the majority of substantive rights necessary for guaranteeing the security of tenure of holders of communal land. Establishment of an association, and the membership, rights and publicity issues accompanying it is, however, only a part of the problem relating to tenure security in respect of communal living. In the next chapter, I discuss issues that arise after the association has been established, once the need for management arises. The management organs of communal property associations are discussed with comparative reference to the ST Act.

⁶⁶⁰ See ch 4 section 4.4 above.

CHAPTER FIVE

MANAGEMENT OF COMMUNAL PROPERTY ASSOCIATIONS AND SECTIONAL TITLE SCHEMES

5.1 INTRODUCTION

The most important aspect to be considered regarding the management of a communal property association and a sectional title scheme is that the members forgo the powers of independence and individual decision-making to submit to the collective will.⁶⁶¹ Procedural rights are crucially important as they contribute to the proper management of the assets of communal property association. The preamble of the CPA Act states clearly that the communal property association should be managed on a basis agreed to by members. This agreement is reflected in the constitution of the community that is limited only by the constitutional principles promoting equality, transparency and accountability.⁶⁶²

To establish an efficient management system, the CPA Act provides for a three tier organisational structure. The organisational bodies include: the *association* (i.e. the entity with juristic personality), the *committee* (**i.e. the executive organ of the association**) and the *community* in its capacity as a general meeting (**i.e. the decision-making body of the association**).⁶⁶³ In this chapter, the terms

⁶⁶¹ Van der Merwe & Pope “Co-ownership, Sectional Ownership and other forms of Title” in Du Bois (ed) *Wille’s Principles* (2007) 557-583.

⁶⁶² S 9 of the CPA Act.

⁶⁶³ The distinction between community and association in this context is artificial; because the community is incorporated in the association (the members of the community form the members of the association). For purposes of this discussion the distinction is nevertheless maintained to indicate clearly the different community/ association in the different contexts.

association, *committee* and *community* are italicised when used in their technical sense in relation management issues, .

The *committee* is responsible for the daily running of the scheme, while the *community* in drafting its constitution, creates the rules which regulate the management of the scheme directing the *committee*. The communal property *association* can acquire rights and obligations in its own name as a juristic person.⁶⁶⁴ Management entails that the *community* makes decisions about the conduct of its members, transactions with third parties, maintenance of the property and all other decisions that affect communal living. Thus, persons representing the *community* namely the *committee* are necessary to execute such decisions.

A similar model is used in sectional title schemes. The owners of the units are part of the *body corporate*⁶⁶⁵ that forms the central management body of the scheme.⁶⁶⁶ The *body corporate* consists of the *general meeting* creating the rules and policies for management of the scheme executed by the *trustees*.⁶⁶⁷ The *body corporate* can also transact in its own name as a juristic person.⁶⁶⁸ Sectional title schemes are regulated by prescribed management and conduct rules that are submitted by the developer at registration of the scheme.⁶⁶⁹ The developer can alter certain of the rules but most of the rules are mandatory to ensure sound management and the protection of owners and outsiders that might have interests in the scheme.⁶⁷⁰

In this chapter, the roles of the various stakeholders and functionaries involved in the management process are investigated. Firstly, the internal mechanisms for the

⁶⁶⁴ S 8(6) of the CPA Act.

⁶⁶⁵ S 36–38 of the STA Act.

⁶⁶⁶ Van der Merwe *Sectional Titles* 14-5.

⁶⁶⁷ Van der Merwe *Sectional Titles* 14-6.

⁶⁶⁸ S 36(6) of the ST Act.

⁶⁶⁹ S 35 of the ST Act.

⁶⁷⁰ Reg 30(1) of the ST Act.

management of a communal property association will be evaluated to determine whether there are institutional weaknesses that might hamper the efficient functioning of the association. This involves appraising the functions of the management *committee* and the roles played by the *community* and the CPA as juristic person. The role the *community* play via the general meeting will also be examined. The ST Act provides for similar mechanisms for management of the sectional title scheme's property. These will be used as a comparative benchmark. Secondly, the assistance and monitoring role of the Department of Rural Development and Land Reform in the management of the communal property association, also known as *post settlement support* will be assessed. .

5 2 JURISTIC PERSON

The management of the affairs of communal property associations is entrusted to a *committee* elected by the community members.⁶⁷¹ The *committee* is responsible for the financial management⁶⁷² and day -to-day administration of the communal property association.⁶⁷³ Below, the nature, powers, and functions of the *association*, being the juristic person, are investigated. The *association* provides the management authority over substantive rights, contributing to security of tenure.⁶⁷⁴ This is compared to the mechanisms of the ST Act.

5 2 1 LEGAL PERSONALITY

Sectional title schemes and communal property associations enjoy the benefits of separate legal personality.⁶⁷⁵ Legal personality allows an *association* (in the context of communal property associations) or *body corporate* (in the context of sectional

⁶⁷¹ Def of "committee" in s 1 of the CPA Act.

⁶⁷² S 9(1)(e)(ii) of the CPA Act. This includes the recording of all financial transactions and keeping financial records relating to the CPA's property. This also includes the opening of a account held at a financial institution.

⁶⁷³ Ss 9(1)(c) & 9(1)(e) of the CPA Act. This includes the organizing of meetings and liaising with the Department of Rural Development and Land Reform.

⁶⁷⁴ Ch 2 section 2 4 4 2 above.

⁶⁷⁵ S 8(6) read with the preamble of the CPA Act; s 36(6) of the ST Act and *Ex parte Body Corporate of Caroline Court* 2001 (4) SA 1230 (SCA) par 8.

title) to act in its own name, participate in litigation, incur rights and obligations, and own assets apart from members.⁶⁷⁶

The CPA Act insulates its members from personal liability in the case of outstanding debts.⁶⁷⁷ The ST Act provides for the subsidiary liability of members when the body corporate is unable to satisfy the judgement debt of a creditor.⁶⁷⁸ Communal property associations usually draw on the land and movables owned by the *association* as security for debts in the name of the *association*, possibly affecting security of tenure.⁶⁷⁹ For this reason, some communal property *associations* create leasing agreements with commercial legal entities that then apply for finance in an effort to insulate the association from debt.⁶⁸⁰ These commercial legal entities are often created by enterprising members of a community, in joint-venture partnerships with outsiders. The lease agreement provides income to the community and contributes to development of the property.

The separate legal status in a communal property *association* is used in particular cases as a business vehicle to provide income for the community, in addition to administration of the land.⁶⁸¹ Business plans are often mandatory when land reform beneficiaries apply for funding from government, for example the LR AD programme.⁶⁸² The main reason for such requirements is to assess the commercial viability of land reform ventures. A further reason is the expectation that communities should pool their resources and equally share profits from the land. In practice, such

⁶⁷⁶ S 8(6) of the CPA Act; S 36(6) of the ST Act

⁶⁷⁷ S 8(6) of the CPA Act.

⁶⁷⁸ S47(1); Van der Merwe *Sectional Titles* 14-9 ff.

⁶⁷⁹ S 12(3) of the CPA Act; CSIR *Diagnostic Study* 69.

⁶⁸⁰ See for example *New Life Communal Property Association v Draigri Boerdery Bpk* (1616/2007) [2007] ZAECHC 101 (22 November 2007).

⁶⁸¹ S 8(6)(b) of the CPA Act. The CPA Act also specifically demand that the constitution of the communal property association should provide for the distribution and profits.

⁶⁸² The Land Redistribution for Agricultural Development Program; Hall, Jacobs & Lahiff "Evaluating Land and Agrarian Reform in South Africa 2003 *Occasional Paper Series* 5.

business plans and attempts to run communal property associations as businesses have failed dimly,⁶⁸³ mainly because the communal property *association* as a juristic person does not supply the adequate framework to distribute profits among members.⁶⁸⁴

A lack of adequate “training, infrastructure and capital” also hampers the potential success of the commercial venture.⁶⁸⁵ In practice, many commercial ventures take a long time to get off the ground with little initial return.⁶⁸⁶ This creates frustration among beneficiaries, possibly leading to deviation from envisaged and authorised usages of the land and unequal distribution of benefits.⁶⁸⁷ A key deficiency in the policy of commercial usage in the land reform sector is that the problem of subsistence household production is not addressed, which might cause unplanned usage of the land.⁶⁸⁸ In practical terms, communal property *associations* endeavouring to manage the productivity of and administer the property pay inadequate attention to either productivity or the administration of the land.⁶⁸⁹

The ST Act avoids such problems altogether by providing the developer with the freedom to choose the type of sectional title scheme to be created.⁶⁹⁰ During the planning phase, the developer can allocate units for specific usages and tailor the rules to accommodate it.⁶⁹¹ This, for example, can lead to mixed usage schemes offering both residential and commercial units, thereby making it more attractive to potential buyers or making the exploitation of densely populated areas more efficient.

⁶⁸³ James “The Tragedy of the Private” in *Changing Properties of Property* 261; CSIR *Diagnostic Study* 21; Hall “The impact of land restitution and land reform on livelihoods” 2007 *Research Report* 6.

⁶⁸⁴ CSIR *Diagnostic Study* 21.

⁶⁸⁵ Hall 2007 *Research Report* 6.

⁶⁸⁶ Hall & Cliffe “Introduction” in Hall *Another Countryside* 6.

⁶⁸⁷ Lahiff “With what Land Rights” in *Another Countryside* 32.

⁶⁸⁸ James “The Tragedy of the Private” in *Changing Properties of Property* 261.

⁶⁸⁹ CSIR *Diagnostic Study* 71.

⁶⁹⁰ Van der Merwe *Sectional Titles* 1-13.

⁶⁹¹ Reg 30(1) of the ST Act.

In commercial schemes the unit owners operate the business independently from the body corporate when exercising their rights, minimising risk to the body corporate. The *body corporate* might however be indirectly affected by the type of business the owner of a unit operates in terms of health and safety issues or the social acceptability of the venture.⁶⁹² Such concerns can be regulated by the management and conduct rules of the sectional title scheme, minimising negative influences.

The fact that communal property *associations* can be operated as a land administration mechanism and as a business entity is attractive on the one hand as it simplifies establishment procedures for the community. Transaction costs are minimised, as there is no need for the community to establish separate business entities to productively exploit the land. On the other hand, running the communal property *association* for land administration and business purposes demands more management resources. Lack of resources might affect security of tenure negatively as the core functions of land administration of communal property associations are neglected. For this reason, commentators in the land reform sector recommend that communal property *associations* should only operate as land administration entities.⁶⁹³ Any commercial ventures should be the concern of external commercial entities. However, it should be noted that communal property *associations* cannot acquire shares in other legal entities other than licensed shares listed on the Johannesburg Stock Exchange.⁶⁹⁴ While the community cannot own shares in a company, possible rental, profit sharing agreements and employment by the company could provide benefits for beneficiaries.⁶⁹⁵

⁶⁹² See for example *Body Corporate of the Shaftesbury Sectional Title Scheme v Estate of the late Wilhelm Rippert and others* [2003] 2 All SA 233 (C).

⁶⁹³ CSIR *Diagnostic Study 21*; Lahiff "With what Land Rights" in *Another Countryside* 35.

⁶⁹⁴ S 9(1)(e)(iv) of the CPA Act.

⁶⁹⁵ See for example the strategies used by Richtersveld Communal Property Association that uses various commercial vehicles in farming and mining to provide income and employment to beneficiaries. The community, however struggle to gain benefits from this arrangements. Pressly *Star* (10-08-2010) 21.

5 2 2 POWERS AND FUNCTIONS OF THE JURISTIC PERSON

The CPA Act mandates that the *association* should manage and control the property for the benefit of its members in a participatory and non-discriminatory manner.⁶⁹⁶ To achieve this goal, the *association's* powers and functions need to be defined.⁶⁹⁷ The *community* has wide discretion to formulate the powers of the *association* in the constitution and is only limited by the democratic principles in section 9 of the Act. The constitution for example can limit the power of the association to acquire and dispose of the immovable property or grant third parties limited real rights.⁶⁹⁸ More importantly, the constitution can limit the type of rights and obligations that the *association* may acquire in its own name.⁶⁹⁹ With adequate guidance, the *community* can tailor the powers of the *association* to suit their particular purposes during the establishment process. On the other hand, if the wide discretionary powers of the *association* are not adequately circumscribed, it can paralyse decision-making processes and create opportunities for abuse.⁷⁰⁰

The powers and functions of *bodies corporate* in sectional title schemes are specifically limited to the buildings and common properties of the specific scheme, while the powers of the *association* in the communal property association context are limited to the reasonable exploitation and administration of the common property.⁷⁰¹ For instance, the ST Act provides specifically for the maintenance of the common property⁷⁰² and enter into agreements with local authorities for the provision of basic

⁶⁹⁶ S 9(1)(d)(i) of the CPA Act.

⁶⁹⁷ Item 16 of Schedule of the Act.

⁶⁹⁸ S 8(5)(c)(i) of the CPA Act.

⁶⁹⁹ S 8(5)(b) of the CPA Act.

⁷⁰⁰ CSIR *Diagnostic Study* 20.

⁷⁰¹ S 38(j) read with s 37(1)(r) of the ST Act.

⁷⁰² Ss 37(j), s 37(o), 38(d) of the ST Act

services.⁷⁰³ By contrast, the CPA Act only provides a general provision on the powers of the association and its limitations without any further guidance.⁷⁰⁴

The sectional title scheme as a land holding entity provides more specific powers relating to the property to guide the *trustees* with decisions as regards the common property. Sections 36 and 37 of the ST Act explicitly spell out the mandatory powers and functions that the *body corporate* must exercise thus limiting the scope of their authority. The generality of the CPA Act's provisions holds the risk that some practical concerns, vital for security of tenure, are not addressed. It can also provide the *committee* that runs the *association* with too much discretionary power with little guidance to exercise such powers.⁷⁰⁵ This is a special concern where the *community* only received superficial guidance in the provisions of their constitutions defining their powers.⁷⁰⁶ What is important is that practical concerns of the communal property *association* are addressed such as administration of use rights and the maintenance of the property. In defining such powers, proper support by consultants, non-governmental organisations and the Department of Rural Development and Land Reform is vital to assist communities that often do not have experience in land administration.

The ST Act allows the *body corporate* to appoint agents and employees to manage the common property if necessary.⁷⁰⁷ Most communal property associations provide for the employment of managers, labourers and service providers to oversee the commercial operations on the land of the communal property association.⁷⁰⁸

⁷⁰³ S 38(h) of the ST Act.

⁷⁰⁴ Item 16 of the CPA Act.

⁷⁰⁵ CSIR *Diagnostic Study 20*.

⁷⁰⁶ Above.

⁷⁰⁷ S 38(a) of the ST Act

⁷⁰⁸ See for example the Elandskloof Communal Property Association that hired a farm manager/mentor to launch commercial farming operations: Barry 2010 *Land Use Policy* 144.

Furthermore, communal property *associations* have the power to buy or let property,⁷⁰⁹ purchase or hire movable property and borrow money⁷¹⁰ for the purposes of gaining benefit from the land.⁷¹¹ It is evident that communal property *associations'* constitutions provide for the power to maintain the property.⁷¹²

In rural areas, where most communities operate farms, maintenance of equipment and infrastructure is essential for success.⁷¹³ In practice, however, lack of maintenance and repairs often signal the beginning of the unravelling of the communal property association.⁷¹⁴ It might be argued that disrepair is mostly due to a lack of funds.⁷¹⁵ This emphasises the importance of explicitly indicating this power in the constitution to ensure that committees not acting in terms of their constitutions remain accountable. The community has the discretion to require owners to make contributions for land administration, but this is not explicitly mentioned in the Act.

The *association* must enter into an agreement with the local authority or other relevant bodies for the supply of basic services and amenities to the scheme.⁷¹⁶ Since the introduction of "wall-to-wall" municipalities in South Africa,⁷¹⁷ all communal property associations are under the jurisdiction of a municipality. Mechanisms should be implemented to enable a municipality to interact with a communal property *association* during the establishment process. The Department should provide support to associations to communicate with municipalities before a communal

⁷⁰⁹ S 38(b) of the ST Act.

⁷¹⁰ S 8(5)(c)(ii) of the CPA Act.

⁷¹¹ S 38(c) of the ST Act; s 38(c) of the ST Act.

⁷¹² S 38(d) read with s 37(1)(j) of the ST Act.

⁷¹³ See Ch 1 section 1.3 above.

⁷¹⁴ See for example the Mamerotse Communal Property Association that operated a game farm that fell into such disrepair that most of the game (resource) died or were extremely weak due to a lack of maintenance of water pumps. Janeke "Plaas betaling vir prokureur?" (15-12-2009) <http://www.landbou.com/nuus/nuus-artikel/plaas-betaling-vir-prokureur> (Accessed on 14-04-2010).

⁷¹⁵ Above.

⁷¹⁶ S 38(h) of the ST Act.

⁷¹⁷ S 151(1) of the Constitution of South Africa 108 of 1996.

property association is established in its jurisdiction by using the Provision of Land and Assistance Act.⁷¹⁸ In existing communal property associations that do not have support from their local authorities, it is advisable to amend the constitution to allow for the power to communicate with the local authority. This would require the *association* to be proactive in ensuring that the community receives basic services from the municipality,⁷¹⁹ and would compel the municipality to be responsive or face the consequence of not adhering to the obligations created by the just administrative action clause in the Constitution.⁷²⁰

Finally, the communal property association, through its *association*, must open a bank account to pay for expenses.⁷²¹ Lacking in the CPA Act, however, is an explicit provision that the account should provide specifically for future maintenance and management costs, thus encouraging sustainability of the *association*. The power to invest any money for future costs incurred by the *association* in the administration of the land might also be considered.⁷²² While most communal property *associations* will initially lack the means to provide for such a fund, planning for current and future expenses will contribute to the security of tenure of all the members of the *association*.

The ST Act explicitly provides for the contribution of levies as a major source of income for the management of the property.⁷²³ The *body corporate* could also claim additional funds to satisfy debts or additional costs incurred.⁷²⁴ The CPA Act does not clearly mention such a requirement, but the communal property association's juristic person (the *association*) should be able to provide in the constitution for the receipt of funds. This omission came about because the CPA Act often caters for

⁷¹⁸ 126 of 1993; CSIR *Diagnostic Study* 96.

⁷¹⁹ S 5(1)(g) of the Municipal Systems Act 32 of 2000.

⁷²⁰ S 33 of the Constitution of South Africa 108 of 1996.

⁷²¹ S 9(1)(e)(iii) of the CPA Act.

⁷²² S 38(g) read with s 37(1)(a) of the ST Act.

⁷²³ S 37(1)(b) of the ST Act.

⁷²⁴ Above.

poor communities that might not be able to afford contributions. Normally, the community derives income from government grants, commercial production from resources of the land and “non-farm activities”.⁷²⁵ It would be prudent, however, to include a clause in the constitution allocating a percentage of community income to address maintenance and future expenses specifically.

It should be noted that requiring individual contributions by households might be unrealistic, especially if allocated land rights only provides for subsistence level production. In diverse communities created by land restitution, not all members might be poor and some may be willing to contribute to the communal property association.⁷²⁶ To ensure equality among members of the community, the CPA Act provides for different classes of membership that might demand more investment in return for more benefits.⁷²⁷

Different class rights should be compatible with the overall principles of equality and should specify that settled communities' rights should remain consistent and be aligned with the CPA Act.⁷²⁸ Settled communities might experience problems if, under a new communal property association, class rights which differ from their previous form and status are allocated. Members' interests might include other income streams that could be utilised to improve the financial position of the communal property association. Different classes might lead to elitism and opportunistic abuse of community resources to the detriment of more vulnerable members.⁷²⁹ Such a problem would be challenging for communal property

⁷²⁵ Such as social security and land reform grants. See McCusker “Land Use and Cover Change as an Indicator of Transformation on Recently Redistributed Farms in Limpopo Province, South Africa” 2004 *Human Ecology* 49-55.

⁷²⁶ Lahiff “With what Land Rights” in *Another Countryside* 35.

⁷²⁷ S9(1)(b) read with item 6 of the CPA Act.

⁷²⁸ Above.

⁷²⁹ Lebert and Rohde “Land reform and the new elite” Exclusion of the poor from communal land in Namaqualand, South Africa” 2007 *Journal of Arid Environments* 818-830-832.

associations already struggling with enforcing rights and fighting against degradation of resources.

Lebert and Rhode argue that problems of elitism stem from the failure to understand cultural dynamics of communities in the land reform context.⁷³⁰ Elitism occurs when a small group appropriate resources and benefits for themselves to the detriment of other members in the community.⁷³¹ For example when elitism rears its head in the executive *committees* of communal property associations, it might provide opportunity for abuse of power.⁷³² Yet, if the mechanisms of enforcement⁷³³ provided by the CPA Act were effective, many such abuses could be limited or eliminated.

According to the ST Act, the *body corporate* is allowed to claim unpaid levies from members by action in any court.⁷³⁴ The communal property *association* may insert a similar clause in the constitution to enforce payments. Enforceability might be problematic for cash-strapped communal property *associations*, as the Act currently does not explicitly provide for such situations. A heavy-handed approach might be to determine that repeated non-payment of contributions might lead to termination of membership⁷³⁵ with subsequent eviction from the property if occupied. This will not infringe unreasonably on the tenure rights of a member, as it constitutes a substantive duty on the part of the member.

⁷³⁰ 832.

⁷³¹ Hall "Land reform for what? Land use, production and livelihoods" in Hall (ed) *Another Countryside* (2009) 23-48.

⁷³² See Ch 5 section 5.3.

⁷³³ S 14(1)(c) of the CPA Act.

⁷³⁴ S 37(2) of the ST Act.

⁷³⁵ Item 9 of the CPA Act.

5 3 TRUSTEES/COMMITTEE MEMBERS

The *committee* of the communal property association serves just like its counterpart, the *trustees* in sectional title schemes, as the executive organ of *community* (*body corporate* in the sectional title context). The powers and administrative functions of the *association* are exercised by the committee.⁷³⁶ The powers and functions of the *committee* are usually curtailed by the rules or the constitution and the directions of the *community* (in its capacity as the general meeting).⁷³⁷ The *committee* also serves as representative of the *community* when dealing with outsiders. Moreover, the communal property *association* must in some instances manage the production of the *association's* resources. In what follows, the qualification, election and status of the *committee* members will be considered. Thereafter the duties and powers of the *committee* will receive attention. Finally and most importantly, the accountability of the *committee* and committee members will be discussed.

5 3 1 ELECTIONS AND QUALIFICATION

The *committee* comes into existence during the provisional registration of a communal property association that is carried over when the *association* is established or converted.⁷³⁸ The CPA Act stipulates that members of the committee should be democratically elected⁷³⁹ and that the list of members should be updated annually when new elections are held.⁷⁴⁰ Ideally, all the different interest parties in a community should represent the *committee*, although this might be difficult to achieve in practice, depending on availability and qualification of committee members.⁷⁴¹ The CPA Act requires in general that all members must be afforded fair opportunity to participate in the decision-making processes of the *association*, but

⁷³⁶ S 39(1) of the ST Act; s 1 def of “committee” read with s 9(1)(e)(iv) of the CPA Act.

⁷³⁷ S 39(1) of the ST Act; s 9(1)(e)(iv) of the CPA Act.

⁷³⁸ S 5(2)(e) of the CPA Act.

⁷³⁹ S 5(2)(e) of the CPA Act.

⁷⁴⁰ Reg 8 of the CPA Act.

⁷⁴¹ Ss 9(1)(a); 9(1)(b) of the CPA Act.

does not expand on whether this extends to the *committee*; nor does it deal specifically with gender representation.⁷⁴²

At the establishment of a sectional title scheme, all the owners act as *trustees* of the body *corporate* until trustees are elected at the first *general meeting*.⁷⁴³ Within 60 days of establishment of the scheme, a general meeting must be held to determine the trustees of a scheme by election.⁷⁴⁴ There ought to be a minimum of two *trustees*, but the *general meeting* can appoint more.⁷⁴⁵ The constitution of the communal property *association* deals with the number of *committee* members in the constitution of the *association* and is thus discretionary.⁷⁴⁶ In both legal entities the executive functionaries need to resign after a year.⁷⁴⁷ The ST Act explicitly indicates that *trustees* who resigned are available for re-election. The fact that trustees resign, allows the *general meeting* to decide whether service by such a *trustee* was satisfactory or not. While this is not stipulated in the CPA Act, communities can specify such a provision in their constitutions.⁷⁴⁸ The advantage of re-election is the maintenance of continuity in the association.⁷⁴⁹

In the ST Act the majority of *trustees* must be owners of the scheme, leaving the possibility that outsiders with the necessary expertise can also become *trustees*.⁷⁵⁰ Although the CPA Act does not expressly stipulate whether outsiders may also serve on the *committee*, it is assumed that the *committee* will always consist only of community members. The preamble of the CPA Act clearly states that the

⁷⁴² In the now defunct Communal Land Rights Act 11 of 2004, s 22 stated that a third of the members of a land administration committee should be women.

⁷⁴³ Annexure 8 r 4(2) of the ST Act.

⁷⁴⁴ S 36(7)(a) and annexure 8 r 50(1).

⁷⁴⁵ Annexure 8 r 4(1).

⁷⁴⁶ Item 13 of the CPA Act.

⁷⁴⁷ Annexure 8 r 6.

⁷⁴⁸ Item 13 of the CPA Act.

⁷⁴⁹ Van der Merwe *Sectional Titles* 14-70(1).

⁷⁵⁰ Annexure 8 r 5(a) of the ST Act; Van der Merwe *Sectional Titles* 14-66.

community should be responsible for the general management of the property and, except for the support of the Department of Rural Development and Land Reform, should regulate themselves. The advantage of this lies in the fact that members have a personal interest in the successful management of the scheme, as well as the power to make independent decisions. On the other hand, researchers bemoan the lack of expertise of *committee* members in existing communal property schemes that is detrimental to the financial and administrative well-being of the communal property association.⁷⁵¹ *Committee* members are, therefore, dependent on training and advice from the Department of Rural Development and Land Reform and non-governmental organisations to build the necessary capacity and expertise.⁷⁵²

The ST Act provides in detail for the meeting of *trustees* including quorums, chairpersonship and voting procedures to guide trustees.⁷⁵³ Meetings can be convened at any time with at least seven days' notice.⁷⁵⁴ Owners can also attend such meetings although they would not be eligible to vote.⁷⁵⁵ In communal property associations it should be possible to shorten the notice period, especially if the *committee* members reside on the property or have reasonable access to offices of the communal property association to expedite decision-making procedures. The ST Act prescribes that a valid meeting can only be conducted if at least 50% of the *trustees* (a quorum) attend.⁷⁵⁶ The requirement for a 50% or higher percentage quorum should at least be stated in the constitution of a communal property association to ensure valid, inclusive and democratic decision-making processes.⁷⁵⁷ The communal property association should appoint a chairperson from amongst its members, holding the same term as *committee* members.⁷⁵⁸ In sectional title

⁷⁵¹ CSIR *Diagnostic Study* 91.

⁷⁵² Above.

⁷⁵³ Annexure 8 r 15 to Annexure 8 r 24 of the ST Act.

⁷⁵⁴ Annexure 8 r 15(2) of the ST Act.

⁷⁵⁵ Annexure 8 r 15(5) of the ST Act.

⁷⁵⁶ Annexure 8 r 16(1) of the ST Act.

⁷⁵⁷ Ss 9(1)(a); 9(1)(c) of the CPA Act.

⁷⁵⁸ Annexure 8 r 18 of the ST Act.

schemes, the chairperson has a casting vote as well as a deliberative vote for resolving dead-locks.⁷⁵⁹ The administrative functions and the accountability of the *committee* and *trustees* will be discussed below.

5 3 2 POWERS AND DUTIES

The powers of the *committee* in communal property associations are determined by the constitution of the community.⁷⁶⁰ The most important function of the *committee* is to exercise the powers conferred upon it by the constitution.⁷⁶¹ This can include, for example, entering into contracts for the provision of services by the local authority or acquiring land on behalf of the communal property association. Similar provisions exist in the ST Act to enable trustees to act on behalf of the *body corporate*.⁷⁶² Secondly, the regulations of the CPA Act provide for the option that *committee* members can hold specific positions and responsibilities.⁷⁶³ This is comparable to the *trustees'* authority of delegating specific powers and duties to one of the *committee* members.⁷⁶⁴ *Trustees* receive the authority to sign documents on behalf of the body corporate. This power is limited, however, by the so-called "four-eyes" rule that states that at least two of the *trustees*, or a *trustee* and the managing agent should sign any document.⁷⁶⁵ The rule ensures that a single *trustee* does not act contrary to the interests of the body corporate.⁷⁶⁶ The inclusion of such a section in the CPA Act, or at least in the constitution, would promote the Act's stated goal of promoting accountability.⁷⁶⁷ Another safeguarding measure in the ST Act that could be included in a community's constitution is the embargo on any loans a *trustee*

⁷⁵⁹ Above.

⁷⁶⁰ Item 13 of the CPA Act.

⁷⁶¹ Ch 5 section 5.1 above.

⁷⁶² Annexure 8 r 26(1)(a) of the ST Act.

⁷⁶³ Reg 8 of the CPA Act.

⁷⁶⁴ Annexure 8 r 26(1)(b) of the ST Act.

⁷⁶⁵ Van der Merwe 14-76; of the ST Act; annexure 8 r 27 of the ST Act.

⁷⁶⁶ Above.

⁷⁶⁷ S 9(1)(e)(i) of the CPA Act.

could make on behalf of the *body corporate* to other *committee* members or owners of the scheme.⁷⁶⁸

The functions to be exercised by *committee* members or *trustees*, relate mostly to administrative and practical duties.⁷⁶⁹ For example, the *committee* members must open a bank account to deposit all the funds received by the association and they have a duty to maintain the communal property.⁷⁷⁰ Closely related to this is the fact that control of payments to outsiders will also vest with the members of the *committee* according to the constitution.⁷⁷¹ Another important function is the provision of adequate information to the *community* about the activities of the association, for example, adequate notice of any meetings.⁷⁷² The *committee* should record and keep the minutes of the association's meetings⁷⁷³, keep financial statements and any other relevant documents and allow the community reasonable access to these documents.⁷⁷⁴ Similar provisions are found in the ST Act.⁷⁷⁵

In practice, it is difficult for *communities* to fulfil these functions as offices for administration purposes and adequate storage facilities are lacking.⁷⁷⁶ Some *committees* of communal property associations lack proper training in basic financial management and the general administration of the community.⁷⁷⁷ This often leads to leadership struggles and the subsequent disintegration of the communal property

⁷⁶⁸ Annexure 8 r 26(2) of the ST Act.

⁷⁶⁹ Ss 9(1)(a)(i); 9(1)(c) & 9(1)(e) of the CPA Act.

⁷⁷⁰ S 9(1)(e)(iii) of the CPA Act.

⁷⁷¹ Item 18 of the CPA Act.

⁷⁷² S 9(1)(c)(i) read with Item 14 of the CPA Act.

⁷⁷³ S 9(1)(c)(iii) read with Item 17 of the CPA Act.

⁷⁷⁴ S 9(1)(c)(iv) read with Item 18 of the CPA Act.

⁷⁷⁵ See in general Van der Merwe *Sectional Titles* 14-24(2).

⁷⁷⁶ CSIR *Diagnostic Study* 91.

⁷⁷⁷ Barry 2010 *Land Use Policy* 147; Wisborg & Rohde "Land Reform and Agrarian Changes in Southern Africa" 2004 (24) *PLAAS Occasional Paper Series* 18.

association.⁷⁷⁸ The failure to keep financial records is especially disconcerting, as this undermines accountability of *committee* members and creates opportunity for abuse. This indicates that the legal demands made by the CPA Act are not realised in the operations of most communal property associations. The powers and functions allocated to *committee* members are not unfettered and they should be held accountable for their actions. In the next section measures of accountability will be investigated.

5 3 3 ACCOUNTABILITY

Accountability in the management procedures of *communities* is important for security of tenure as it ensures that the authority vested in *committee* members is properly exercised.⁷⁷⁹ *Committee* members are held accountable for providing information of their dealings to the community. They are also held accountable for the level of care imposed in line with their fiduciary responsibilities. These will be discussed below with comparative reference to similar provisions in the ST Act.

5 3 3 1 ACCESS TO INFORMATION

Accountability is entrenched in the provisions in the CPA Act guaranteeing access to information concerning the management of the communal property association. This is indicated by requirements in the CPA Act that allow members access to the minutes of meetings, the right to inspect or make copies of financial statements,⁷⁸⁰ and access to the constitution of the communal property association.⁷⁸¹ The Act does not specifically regulate access to minutes and resolutions of committee meetings, leaving it up to the community to determine such access in the

⁷⁷⁸ Robins *From revolution to rights in South Africa : social movements, NGOs & popular politics after apartheid* (2008) 54.

⁷⁷⁹ See Ch 2 section 2 4 4 2 above.

⁷⁸⁰ S 9(1)(c)(iv) of the CPA Act.

⁷⁸¹ S 9(1)(c)(v) of the CPA Act.

constitution.⁷⁸² In the ST Act, it is mandatory for *trustees* to be present at meetings to sign a written copy of the resolution adopted by them.⁷⁸³

Access to information is important as it paints a picture of the state of the communal property association and actions taken by the *committee* members. While it creates additional obligations that could be time-consuming, it also provides protection for *committee* members against wrongful persecution by the community. Thus, access to information lays the foundation for orderly maintenance and ensures that *committee* members' actions are above board.

5 3 3 2 FIDUCIARY RESPONSIBILITIES

In various sections of the CPA Act the fiduciary responsibilities towards the CPA are mentioned.⁷⁸⁴ The *committee* members are accountable to the community and should always operate in the best interests of the CPA and not abuse their power to promote their own interests.⁷⁸⁵ Similarly, the trustees of a sectional title scheme stand in a fiduciary relationship to the *body corporate*.⁷⁸⁶ The CPA Act defines fiduciary duties as “exercising their powers in the best interests of all the members of the association, without any advantage to themselves in comparison to other members”.⁷⁸⁷

The ST Act determines that the *trustees* must exercise their powers in the interests and for the benefit of the *body corporate* and additionally, that they should not exceed their powers.⁷⁸⁸ There should be no material conflict between the interests of

⁷⁸² Item 17 of the CPA Act.

⁷⁸³ Annexure 8 r 24 of the ST Act.

⁷⁸⁴ S 9(1)(e)(vi) & s 8(7) of the CPA Act.

⁷⁸⁵ S 9(1)(e)(vi) of the CPA Act.

⁷⁸⁶ S 40(1) of the ST Act.

⁷⁸⁷ S 9(1)(e)(vi) of the CPA Act.

⁷⁸⁸ S 40(2)(a) of the ST Act.

trustees and the interests of the *body corporate*.⁷⁸⁹ A material conflict of interest in any contracts between the *body corporate* and outsiders, should be declared to all other *trustees*.⁷⁹⁰ The disclosure principle relates specifically to any economic benefit that a *trustee* can gain from the *body corporate*. The CPA Act, does not expressly require that a material interest should be disclosed and there is no reference to possible wider meanings of the term "fiduciary responsibility", other than is stated above. The ST Act provides clearer guidance by indicating that the general meaning of "fiduciary relationship" is affected or watered down by the provisions in the ST Act.⁷⁹¹ Van der Merwe indicates that the wider implications of this clause include common law principles of two specific duties: firstly, the duty of trust, and secondly, a duty of care and skill.⁷⁹² The duty of trust entails that all powers of the trustee must be exercised in a bona fide manner that is without self-interest.⁷⁹³ The duty of care and skill requires that reasonable care must be taken in the execution of a *trustee's* duties.⁷⁹⁴ While the duty of trust depends on the limits of the fiduciary powers, the duty of care and skill indicates the standard of such conduct.⁷⁹⁵

In case of the breach of such duties, the ST Act holds the *trustee* liable for mala fide acts or omissions and gross negligence.⁷⁹⁶ If the *trustee's* duty of care and skill is breached in a grossly negligent manner, the *trustee* will be personally liable for the loss suffered by the *body corporate*.⁷⁹⁷ If the *trustee* derived any economic benefit due to a conflict of interest, he or she will also be liable to account for such benefit.⁷⁹⁸ Furthermore, if the *trustee* did not disclose the benefit to the *committee*,

⁷⁸⁹ S 40(2)(b) of the ST Act.

⁷⁹⁰ S 40(2)(b)(ii) of the ST Act.

⁷⁹¹ S 40(2) of the ST Act.

⁷⁹² Van der Merwe *Sectional Titles* 14-63.

⁷⁹³ Above.

⁷⁹⁴ Above.

⁷⁹⁵ Van der Merwe *Sectional Titles* 14-64.

⁷⁹⁶ S 40(3) of the ST Act.

⁷⁹⁷ S 40(3)(c)(i) of the ST Act.

⁷⁹⁸ S 40(3)(c)(i) of the ST Act.

such contracts will be voidable by the *body corporate*. The ST Act also states that on application to a court of law, the body corporate can be held to the contract if it is just and equitable to do so.⁷⁹⁹

The CPA Act, on the other hand, stipulates that if a *committee* member acts in breach of the fiduciary relationship towards the communal property *association*, such a person will be guilty of a criminal offence.⁸⁰⁰ A *committee* member could be found guilty of a criminal offence if there is any abuse of a vested power or authority that might prejudice the rights and benefits of the community or individual members.⁸⁰¹ Conviction of the above-mentioned contraventions can result in a fine or imprisonment not exceeding ten years or both a prison term and a fine.⁸⁰² The constitution of a CPA can also provide for disciplinary proceedings that specifically deal with “corruption” and “nepotism”⁸⁰³ and makes provision for the termination of the membership of a member of the committee.⁸⁰⁴

It is submitted that the CPA Act should have clarified the position with regard to the personal liability of *committee* members receiving economic benefits. While *communities* have the freedom to regulate such matters in their constitution, the omission or lack of knowledge regarding the manner in which to hold a *committee* member liable can cause serious damage to the communal property association. The levels of accountability indicated in sectional title schemes, namely that *trustees* can only be held liable in case of *mala fides* or bad faith and gross negligence, are also instructive. This standard encourages owners of sectional title schemes to serve

⁷⁹⁹ Above.

⁷⁹⁹ S 40(3)(b) of the ST Act.

⁸⁰⁰ S 14(1)(b) of the CPA Act.

⁸⁰¹ S 14(1)(c) of the CPA Act.

⁸⁰² S 14(4) of the CPA Act.

⁸⁰³ Item 21 of the CPA Act.

⁸⁰⁴ Reg 11 of the CPA Act.

as *trustees*, as higher standards might deter participation.⁸⁰⁵ Such standards should also be added to the CPA Act as uncertain standards can cause confusion on both the part of committee members and the community.

The only other form of protection that the community has against *committee* members' breach of duties is the dispute resolution provision of the Act. This allows the Director-General to require members to call an election for a new *committee* if the integrity or impartiality of the *committee* or one of its members is in question.⁸⁰⁶ Unfortunately, this does not provide for a claim for the economic loss that the community might have suffered.

The CSIR report noted that some communal property associations can still function despite dysfunctionality of committees.⁸⁰⁷ This would be the case if members respect each other's substantive rights and the land is not linked to any immediate transactions.⁸⁰⁸ While this might indicate that the allocation of rights provides some protection, it will still expose communities to problems due to a lack of accountability on the committee's part.

5 4 GENERAL MEETING / COMMUNITY

The collective action by owners of a sectional title scheme and members of the *community* is exercised by a *general meeting*. The *general meeting* guides the actions of the juristic person and ensures that the functions and powers of the executive organ are adequately performed.⁸⁰⁹ The main aim of the *general meeting*

⁸⁰⁵ Van der Merwe *Sectional Titles* 14-65.

⁸⁰⁶ S 11(6)(d) of the CPA Act.

⁸⁰⁷ CSIR *Diagnostic Study* 18-19.

⁸⁰⁸ Above.

⁸⁰⁹ Van der Merwe *Sectional Titles* 14-35; Badenhorst et al. *Law. of Property* 468.

is to test and determine how the scheme should be managed.⁸¹⁰ In both legal entities the *general meeting* convenes at least once a year, while special meetings can also be called.⁸¹¹

Fair and inclusive decision-making processes, democratic processes and transparency must underpin *community* meetings in communal property associations.⁸¹² Members must be afforded a fair opportunity to participate in all meetings,⁸¹³ especially when the *association* deals with transactions involving the land and amendment of the constitution.⁸¹⁴ It is furthermore important that these members have the right to attend, speak and vote at any *community general meeting* to ensure democratic standards⁸¹⁵ and that access is possible to the minutes of and resolutions adopted at meetings.⁸¹⁶ The ST Act has similar procedures to meet these goals.⁸¹⁷ Below, the quorum for the general meeting, the protection of minority interests of members and dispute resolution measures are discussed.

5 4 1 QUORUM

To ensure fair and inclusive decision-making processes, a meeting must have a minimum number of attendees to constitute a quorum for valid decisions to be adopted. The CPA Act allows the community the freedom to determine the quorum among themselves in the constitution.⁸¹⁸ The number of attendees at a *general meeting* in sectional title schemes is, on the other hand, mandatory.⁸¹⁹ The quorum

⁸¹⁰ Badenhorst et al *Law. of Property* 470. See in general Van der Merwe “The General Meeting of the Sectional Titles Act compared to the Wohnungseigentümerversammlung of the German Wohnungseigentümengesetz” 1996 *Stell LR* 263–282.

⁸¹¹ Van der Merwe *Sectional Titles* 14-42.

⁸¹² S 9 of the CPA Act.

⁸¹³ S 9(1)(a)(i) of the CPA Act.

⁸¹⁴ S 9(1)(a)(i) of the CPA Act.

⁸¹⁵ S 9(1)(c)(ii) of the CPA Act.

⁸¹⁶ S 9(1)(c)(iv) of the CPA Act.

⁸¹⁷ Annexure 8 r 50-54 of the ST Act.

⁸¹⁸ Items 14; 15 of the CPA Act.

⁸¹⁹ Annexure 8 r 57(1) of the ST Act.

is calculated on the “aggregate share” of quotas held by owners in proportion to the number of units of the scheme. For example, in schemes with ten units a quorum is formed if entitled owners holding “at least 50 percent of the total value of votes” are present in person or represented by a legally valid proxy.⁸²⁰

The manner in which a quorum is determined in sectional title schemes, might be less effective in communal property associations. To ensure inclusivity in the decision-making process it is suggested that the quorum in communal property associations be determined by the number of members present. The quorum should also be set as high as practically possible to ensure that the whole *community* participates and is made aware of the affairs of the association. Researchers have criticised community constitutions for creating too high a quorum to manage communal property associations efficiently, because it creates deadlocks and ultimately paralyses the *committee’s* ability to administer the communal property associations properly.⁸²¹

A lack of a quorum at a meeting could indicate discontent in a community. For example, the 2700-strong Richtersveld community could only muster a vote of 102 people out of a minimum quorum of 200 when they initially voted for a settlement deal with the government to finalise their land claim.⁸²²

5 4 2 MINORITY PROTECTION

The communal management process is determined by majority rule. In some instances, this might have the effect of marginalising and disadvantaging certain groups of members. The ST Act does not provide for explicit measures of protecting

⁸²⁰ Van der Merwe *Sectional Titles* 14–48(1); annexure 8 r 57(2) of the ST Act.

⁸²¹ Festus & Joseph “Tracking the performance of livestock banks managed by land reform groups in the Northern Cape” 2007(5) *Farm Africa Working Paper Series* 7.

⁸²² SAPA “Dissidents derail land deal” *The Times* (26-09-2007) 4.

minority interests, such as minority representation in the executive or gan of the scheme.⁸²³

The constitution of a communal property association should contain explicit protection of minorities. For example, there could be a clause in the constitution that representation of minority interests in the committee is mandatory. Otherwise, institutional remedies seem to depend on ensuring that the correct procedures for decision-making were followed and that the constitutional democratic principles of section 9 were not breached. The CPA Act conversely allows for members to approach the Director-General to investigate irregularities in transactions concluded by the *association* in respect of any part of the immovable property.⁸²⁴

5 4 3 DISPUTE RESOLUTION

If a dispute arises within a community, the *association* must first attempt to resolve such issues on its own as determined by the constitution.⁸²⁵ If the issue cannot be resolved, a member must submit a request to the Director-General to undertake an enquiry to investigate such a complaint.⁸²⁶ The Director-General is obliged to inform the *association* and relevant parties of the investigation and its recommendations.⁸²⁷ The outcome of the investigation must be accompanied by guidance from the Director-General on the rights and obligations of the community.⁸²⁸ If the dispute can still not be resolved, the Director-General or functionary can appoint a conciliator to mediate the dispute.⁸²⁹ The conciliator should attempt to resolve the dispute by means of mediation that includes investigating the background to the dispute.⁸³⁰ The

⁸²³ Van der Merwe *Sectional Titles* 14–58.

⁸²⁴ S12(4) of the CPA Act.

⁸²⁵ Item 22 of the CPA Act.

⁸²⁶ S 11(6)(a) of the CPA Act.

⁸²⁷ Above.

⁸²⁸ S 11(6)(b) of the CPA Act.

⁸²⁹ S 11(6)(e) read with S 10(2) of the CPA Act.

⁸³⁰ S 10(3) of the CPA Act.

outcome of mediation should be reported to the parties to the dispute and the Director-General.

If the dispute is still not settled, the Director-General has various options available. Firstly, the recommendation that a new committee must be elected could be an effective solution to a dead lock, especially if the integrity, impartiality and effectiveness of the *committee* or a member of the *committee* are in question.⁸³¹ Secondly, the Director-General can take the drastic measure of applying to the courts for an order of either the administration or liquidation of the communal property *association*.⁸³² The Director-General must prove that the communal property *association* cannot manage its own affairs or that the dispute is of such a nature that it affects its existence.⁸³³

In the case of *Regional Land Claims Commissioner v RAMA Communal Property Association*,⁸³⁴ the regional land claims commissioner applied to the High Court to put the RAMA Communal Property Association under administration. Various allegations of impropriety, irregular transactions and mismanagement by the committee members were made.⁸³⁵ Despite a long list of complaints, the court dismissed the application on the ground that the Regional Land Claims Commissioner did not have *locus standi*.⁸³⁶ Despite the fact that the Director-General included documents to approve the administration, the court found that the Department of Land Affairs (as it then was) could not legitimately delegate such a function to the commissioner.⁸³⁷

⁸³¹ S 11(6)(d) of the CPA Act.

⁸³² S 11(6)(e) read with s 13 of the CPA Act.

⁸³³ S 13 of the CPA Act.

⁸³⁴ (48712/08) [2010] ZAGPPHC 139 (5 October 2010).

⁸³⁵ Para 26.

⁸³⁶ Paras 31-37.

⁸³⁷ Para 35.

The Director-General should have delegated the authority with the prior consent of the relevant provincial Premier to the commissioner in the service of the provincial government.⁸³⁸ Thus, it is important that the right procedures are followed, especially in the case of a distressed communal property *association* that needs intervention quickly.

In sectional title schemes, a more formal procedure of dispute resolution is followed by means of arbitration.⁸³⁹ All disputes, save for disputes regarding the destruction of buildings or the disposal on destruction of buildings, are to be resolved by means of arbitration.⁸⁴⁰ Arbitration is a statutory form of dispute resolution governed by the Arbitration Act.⁸⁴¹ This implies that the dispute resolution is not based on the agreement of the parties, but mandated by the ST Act.⁸⁴² Due to the mandatory nature of dispute resolution by statute, the courts do not have discretionary power to override the jurisdiction of a “arbitral tribunal”.⁸⁴³

The regulations of the ST Act provide for a specific procedure similar to that of the CPA Act.⁸⁴⁴ When a dispute arises, all parties need to be informed of the dispute, including the *trustees*.⁸⁴⁵ If the dispute is not settled between the parties within two weeks, the dispute is then referred to an independent arbitrator of their choice.⁸⁴⁶ The arbitration itself is held informally or as determined by the arbitrator and should

⁸³⁸ S 15(1)(a) of the CPA Act.

⁸³⁹ Reg 39 of the ST Act.

⁸⁴⁰ *Body Corporate of Greenacres v Greenacres Unit 17 CC 2008 (3) SA 167 (SCA)*; annexure 8 Rule 71(2) of the of the ST Act.

⁸⁴¹ 42 of 1965.

⁸⁴² Van der Merwe *Sectional Titles 9–36*(5).

⁸⁴³ Above.

⁸⁴⁴ For a full discussion on dispute resolution in Sectional Title Schemes, see Butler “The Arbitration of Disputes in Sectional Title Schemes under Management Rule 71” 1998 *Stell LR* 256-279 and Van der Merwe *Sectional Titles 9-36*(4) to 9-43.

⁸⁴⁵ Annexure 8 Rule 71(2) of the of the ST Act.

⁸⁴⁶ Annexure 8 Rule 71(3) of the of the ST Act.

be concluded within 21 days or less.⁸⁴⁷ The arbitrator should use the principles espoused in the ST Act to reach a decision. The decision of the arbitrator is final and can be confirmed by the High Court to ensure enforceability.⁸⁴⁸ Arbitration can be expensive and the award by the arbitrator includes the payment of costs by one or both of the parties.⁸⁴⁹ The Community Schemes Ombud Service Bill⁸⁵⁰ may provide an alternative. This bill proposes that a statutory dispute resolution service must be instituted to adjudicated disputes in all community schemes.⁸⁵¹

The CPA Act allows for a much cheaper and informal mechanism of dispute resolution than the ST Act. The Department of Rural Development and Land Reform carries all costs of resolving a dispute by employing conciliators and, if necessary, applying for the administration or liquidation of the communal property association. Such measures are to be welcomed, but the effectiveness of this system depends on responsiveness and intervention by the Department. The CSIR indicates that the Department of Rural Development and Land Reform rarely use these dispute resolution procedures of the Act, but when it was utilised, it provided long term solutions to disputes.⁸⁵² The specific time frames specified in the ST Act provide for quick and efficient resolution, but since this is absent in the legislation on communal property associations, it might mean that a dispute will take a long time to resolve, to the further detriment of the community or parties involved. Communal property associations also have the power to apply for an interdict that might temporarily solve the problem. An explicit clause expressing this power should be included in the Act by means of amendment.

⁸⁴⁷ Annexure 8 Rule 71(5) of the of the ST Act.

⁸⁴⁸ Annexure 8 Rule 71(7) of the of the ST Act.

⁸⁴⁹ Annexure 8 Rule 71(5) of the of the ST Act.

⁸⁵⁰ 21 of 2010.

⁸⁵¹ Preamble of the Community Schemes Ombud Service Bill.

⁸⁵² CSIR *Diagnostic Study* 53, 58.

5 5 MONITORING AND EVALUATION

The Department of Rural Development and Land Reform is mandated to monitor and evaluate the functions of the communal property association on a yearly basis.⁸⁵³ The communal property association must furnish the Department with prescribed documents within two months after the annual general meeting was conducted. These documents include the list of names of the newly elected committee members, new members of the community, independently verified financial statements, and any land transactions that the association was involved in.⁸⁵⁴ The land transactions documentation also requires specific details dealing with the parties to the transactions and the nature of affected rights.⁸⁵⁵ The communal property association should notify the Director-General if membership of an individual is terminated accompanied by reasons for such termination.⁸⁵⁶

The documents that the communal property *association* must furnish to the Department of Rural Development and Land Reform should present the Director-General with a clear picture of the health of the communal property association. It furthermore makes the association to be accountable to an outside institution, which ensures accountability and prevent unlawful activities.⁸⁵⁷

The Director-General is required to submit an annual report on the state of the communal property association stating whether the objects of the Act are accomplished.⁸⁵⁸ The Director-General may also inspect the affairs of the communal property association from time to time.⁸⁵⁹ The powers granted to the Director-

⁸⁵³ Reg 8 of the CPA Act.

⁸⁵⁴ Above.

⁸⁵⁵ Reg 9 of the CPA Act.

⁸⁵⁶ Reg 11 of the CPA Act.

⁸⁵⁷ CSIR *Diagnostic Study* 55.

⁸⁵⁸ S 17 of the CPA Act.

⁸⁵⁹ S 11 of the CPA Act.

General include the power to subpoena persons who may have relevant information or documentation dealing with the affairs of the communal property association.⁸⁶⁰ If such a person does not comply with such a request, he or she might be liable to prosecution under the Magistrates Courts Act.⁸⁶¹

The monitoring and evaluation procedures should play an important part in the management of communal property associations. Monitoring can function as an early warning detection system, detecting possible problems in communal property associations that could then be rectified. The land used by these institutions is in most instances bought by the state, giving the state a stake in ensuring security of tenure for communities as the Constitution of South Africa mandates.

In practice, however, the implementation of this monitoring system is almost non-existent on both national and on community level.⁸⁶² There are no reports by the Director-General to the minister, and communal property associations are in many instances not mentioned in the report of the Department of Rural Development and Land Reform to parliament.

5 6 CONCLUSION

The management of communal property associations consists of procedural rights to organise the community and manage their substantive rights.⁸⁶³ These procedural rights also create measures to ensure accountability of those responsible for managing the communal property association. Management is based on consensus between members that is embodied in the constitution of the communal property association. As has been indicated, the management of the communal property is

⁸⁶⁰ S 11(3)(b) of the CPA Act.

⁸⁶¹ 32 of 1944 read with s 11(5) of the CPA Act.

⁸⁶² CSIR *Diagnostic Study* 55.

⁸⁶³ Ch 5 section 5.1 above.

carried out by three management organs namely the *association*, the *committee* and the *community*.

The *association* of the CPA has separate legal personality that can incur rights and obligations in its own name. In some cases, the separate legal status of communal property associations is used as a business vehicle in addition to the duties of land administration. It was indicated that such ventures in most instances have a negative impact on communal property associations. Failure is attributed to the over extension of the already limited human and financial resources of communal property associations. It is therefore recommended that the CPA Act is used as a land administration entity only.⁸⁶⁴

It was also indicated that the *association* have wide discretion to determine its own powers, as long as it includes fair, inclusive and democratic processes that promote accountability and transparency. It was found, however that such a discretion is too wide, as communities lack experience in managing land.⁸⁶⁵

The democratically elected *committee* manages the day-to-day activities of the communal property association. It was indicated that committee members often fail in their duties, due to a lack of training in the administrative functions that they must exercise. In many instances, committees also lack the facilities to fulfil their duties. The breach by a committee member of his or her fiduciary duties can amount to a criminal offence. The CPA Act should include a clause that can hold a committee member personally liable for any benefits improperly received.⁸⁶⁶

⁸⁶⁴ Ch 5 section 5 2 1 above.

⁸⁶⁵ Ch 5 section 5 2 2 above.

⁸⁶⁶ Ch 5 section 3 3 2 above.

The *community*, sitting as the general meeting, directs the association and oversees the actions of the *committee*. While decisions are made by the majority of members, minority interests are protected by principles in the CPA Act that demands fair and inclusive decision-making processes.⁸⁶⁷ The CPA Act also provides for cheap dispute resolution procedures facilitated by the Department of Rural Development and Land Reform. It was indicated, these procedures are not often resorted to in practice, leaving communities to handle their own conflicts.

Finally, the CPA Act has put measures in place to monitor and evaluate communal property associations on a yearly basis. Unfortunately, many of these mechanisms still lack implementation. This is one of the issues discussed further in the next, concluding chapter.

⁸⁶⁷ S 9(1)(a) of the CPA Act

CHAPTER SIX

CONCLUSION

6 1 REASSESSING COMMUNAL PROPERTY ASSOCIATIONS

Fifteen years after the land reform programme had been started, restoration and redistribution are still ongoing processes and it might be argued that the constitutional mandate of section 25 has not (yet) been fulfilled. Security of tenure is still surrounded by uncertainty for many land reform beneficiaries who already received land. Much still needs to be accomplished to meet this mandate and to restore dignity to beneficiaries.

While South Africa's segregated past still casts a long shadow over the land reform programme,⁸⁶⁸ government has encountered its own problems with the implementation of its programme. Recently, the Minister of Rural Development and Land Reform (previously the Department of Rural Development and Land Reform) admitted that many farms occupied by beneficiaries have failed and have been abandoned.⁸⁶⁹ This state of affairs has forced Government to rethink their strategies surrounding land reform. One of the most important aims is to recapitalise and redevelop farms that have failed.⁸⁷⁰ Plans also focus on the provision of infrastructure for subsistence and economic farming.⁸⁷¹ It could be argued that such a rethinking is a modification of the policy envisaged in the White Paper on Land

⁸⁶⁸ Ch 1 section 1 2 above.

⁸⁶⁹ Xaba "Land Redress has failed" *Sowetan* (12-10-2010) 8.

⁸⁷⁰ Boyle *Herald* (13-09-2010) 4.

⁸⁷¹ Above.

Reform as emphasis is now placed on development of infrastructure and support for communities, rather than just providing land for agricultural and other purposes.⁸⁷²

Over the last nine years significant research reports were commissioned by the Department of Rural Development and Land Reform, and the recommendations of these reports are currently gaining significance. In the Strategic Plan for 2010 – 2013 of the Department of Rural Development and Land Reform, one of the key goals is to amend the CPA Act,⁸⁷³ while retaining communal property associations as central to the land reform programme. The continued relevance of communal property associations is also confirmed in the unofficial, hitherto unpublished Green Paper on Rural Development and Land Reform.⁸⁷⁴ Because of its prematurity, this document was not considered as part of the scope of this thesis. That this reform initiative is being undertaken, is a positive development for current communal property associations, who urgently need to unlock their own development potential. A significant number of communal property associations are in such a state of chaos that government intervention is inevitable.⁸⁷⁵ Communal property associations lose their land on a continual basis due to bad debts leading to sales in executions of communal land.⁸⁷⁶ Yet, as the past fifteen years have shown, ambitious plans need to be implemented efficiently.

⁸⁷² Ch 2 section 2.1 above.

⁸⁷³ Department of Rural Development & Land Reform Strategic Plan for 2010 – 2013 (2010) 30.

⁸⁷⁴ (6 September 2010) 128.

⁸⁷⁵ CSIR *Diagnostic Study 77*. See also Ch 1 section 1.3 above.

⁸⁷⁶ See for example the following magistrate cases that lead to sales in execution of the communal property association's land: *The Land And Agricultural Development Bank of S.A. v The Siphumelele Communal Property Association* 08/17242 (North Gauteng High Court); *C D De Jager v Thuthuka Ngokuzenzela Communal Property Association* 25/2008 (Magistrate's Court for the District Of Morgenzon Mpumalanga); *Pepworth Boerdery (PTY) LTD v Hlanganani Communal Property Association* 1630/07 (Magistrate's Court for the District of Klip River, KwaZulu-Natal); *Land And Agricultural Development Bank of South Africa v Isidingo Communal Property Association* 1465/2006 (ECD).

6 2 TENURE SECURITY: TYPES

The on going i mplementation o f co mmunal pr operty associations creates the opportunity to reconsider i nstitutional pr ocesses constituting t he building b locks of security of tenure. Communal tenure can be defined as land held by a community with shared usage rights to land used and held simultaneously by the members of the group and are regulated by agreed rules and norms.⁸⁷⁷ Communal land holding can take various forms, although the most popular model allows different levels of rights to vest in individuals within a social system of mutual support.

Property can ve st i n i ndividual hol ders through freehold or in the state as public property. Land rights should be secure enough not to cause abandonment due to the breakdown of ownership structures. In Chapter Two, it was shown that security of tenure dep ends on c ertainty of su bstantive and pr ocedural r ights.⁸⁷⁸ Substantive rights should be ce rtain and t ransferrable, w hile be ing adequ ately managed a nd enforced by means of procedural rights.⁸⁷⁹ Security of tenure is especially important as it lays down a foundation which enables land holders to exe rcise t heir r ights productively. A dded adva ntages include l ower t ransaction co sts, t he l esser occurrence of disputes and the promotion of productive use of the land.⁸⁸⁰

Tenure r ights i n l andholding are se cure i f t hey complies with t he f ollowing requirements.⁸⁸¹ Tenure r ights must clearly identify the i nterest hol ders and t he rights that emanate from membership to a community. Moreover, substantive rights need to be administered by an authoritative body within in the community to ensure proper usage of rights and to minimise disputes among members. Substantive rights should f urthermore be e xclusionary to provide va lue f or l andholders. Fi nally,

⁸⁷⁷ Ch 2 section 2 3 1 above.

⁸⁷⁸ Ch 2 section 2 4 2 above.

⁸⁷⁹ Above.

⁸⁸⁰ Ch 2 section 2 4.1 above.

⁸⁸¹ Ch 2 section 2 4 4 above.

mechanisms should be in place allowing the transfer of rights among members or to outsiders.

Attaining security of tenure in communities can, however, be hampered by perceptions and approaches to implementation of communal land holding mechanisms.⁸⁸² One such perception is that communal land holding only leads to over-use and degradation of land.⁸⁸³ The so-called “tragedy of the commons”-approach ignores wider value-driven approaches that communities use to regulate land usage,⁸⁸⁴ as well as external pressures on communities to survive. Such pressures are often the cause for dysfunctional land management.

The dominance of private ownership hampers the implementation of communal tenure systems in South Africa.⁸⁸⁵ While communal tenure has been acknowledged as a form of ownership in South Africa, important role players such as financial institutions still are hesitant to confer the advantages of ownership to such institutions.⁸⁸⁶ Unlike freehold tenure supported by the publicity principle,⁸⁸⁷ the unique personal nature of landholders’ rights in communal tenure is not acknowledged in the same way. Communal land holding is in desperate need of greater institutional support by government to ensure that communal rights are adequately protected as mandated by the Constitution.

⁸⁸² Ch 2 section 2 5 above.

⁸⁸³ Ch 2 section 2 5 1 above.

⁸⁸⁴ Above.

⁸⁸⁵ Ch 2 section 2 5 2 above.

⁸⁸⁶ Above.

⁸⁸⁷ Ch 2 section 2 5 2 above.

6 3 TENURE SECURITY AND EQUALITY

Communal land tenure's close relationship with customary tenure can create further difficulties.⁸⁸⁸ Many communities in South Africa still practice customary tenure under which tribal leaders wield significant political power.⁸⁸⁹ Incorporation of customary law principles into existing communal land tenure legislation has been problematic.⁸⁹⁰ The reason for this is that customary principles often clash with the underlying democratic principles that exist in such legislation.⁸⁹¹ Despite this, the institution of traditional leadership is still entrenched in the Constitution. The conflicting values reflected in the Constitution demand a balancing of interests that has not been achieved in current land tenure legislation.

One such obstacle is gender inequality in South Africa's land tenure system.⁸⁹² Women's subservient status in customary law has been perpetuated in new communal land holding systems.⁸⁹³ While legislation explicitly protects the position of women, institutionally this has had limited success. Compounding the problem is the lack of national representation of women in tenure issues. The status of women remains a problem in achieving security of tenure in communities.⁸⁹⁴

6 4 TENURE SECURITY AND COMMUNITY

The conception of a community can prove to be problematic⁸⁹⁵ as it is often viewed in a narrow legalistic sense that does not take its fluid nature into account. Different interests within a community lead to unanticipated conflicts only emerging once the

⁸⁸⁸ Ch 2 section 2 5 3 above.

⁸⁸⁹ Above.

⁸⁹⁰ See for example *Tongoane v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC).

⁸⁹¹ Ch 2 section 2 5 3 above.

⁸⁹² Ch 2 section 2 5 4 above.

⁸⁹³ Above.

⁸⁹⁴ Ch 2 section 2 5 4 above.

⁸⁹⁵ Ch 2 section 2 5 5 above.

community enters into possession of the property. The institutional design of communal land tenure mechanisms should provide for the shifting identities of communities to minimise future conflict.

Finally, the most important aspect of security of tenure is to ensure protection of individual members who form part of the community.⁸⁹⁶ Exclusive use of specific rights and efficient mechanisms of enforcement ensure that individuals can focus on securing livelihoods rather than dispute the underlying tenure mechanisms.⁸⁹⁷ Thus, it is crucial that principles of tenure security are incorporated during the establishment phase of communal landholding arrangements.⁸⁹⁸

Interests of multiple individuals in a single property are accommodated in South African law in various ways.⁸⁹⁹ The Interim Protection of Land Rights Act⁹⁰⁰ provides protection for traditional communities holding informal rights on unsurveyed land.⁹⁰¹ Land reform beneficiaries can use either trusts⁹⁰² or communal property associations to manage their communal living arrangements on surveyed property.⁹⁰³ Trusts provide a speedier establishment process, but property rights vest in a trust and not in the community. Trusts are also more costly to set up. Communal property associations on the other hand create a democratic entity for poor communities, allowing them to pool their resources for development of the property. Additionally, the CPA Act expressly provides for government support for communities. Communities are offered wide discretion on how to regulate their properties, provided that such regulation is in line with democratic principles. Similarly the ST

⁸⁹⁶ Ch 4 section 4.2 above.

⁸⁹⁷ Ch 2 section 2.4.4.3 above.

⁸⁹⁸ Ch 3 section 3.4 above.

⁸⁹⁹ Ch 3.

⁹⁰⁰ 31 of 1996.

⁹⁰¹ Ch 3 section 3.2.3.1.

⁹⁰² Ch 3 section 3.2.3.2.

⁹⁰³ Ch 3 section 3.2.3.1.

Act enables individuals to acquire ownership of a unit in a building and an undivided part in the common property.⁹⁰⁴ The Act initially focuses on the quality of buildings during the establishment phase, whereafter detailed provisions on management of a sectional title scheme are provided. The similarities between the ST Act and the CPA Act present a comparative approach to determine whether security of tenure is achieved in communal property associations.

6 5 TENURE SECURITY, RIGHTS AND MEMBERSHIP

The establishment of communal property associations grants substantive rights to members and creates procedures for governance of the property.⁹⁰⁵ The communal property association is set up with support from the Department of Rural Development and Land Reform, while in sectional title schemes the developer takes most of the responsibility and is mainly concerned with the construction of durable buildings. In communal property associations, establishment depends on negotiation between members to ensure that membership, rights allocation and management procedures are agreed upon and reflected in the community's constitution. The community has broad powers of discretion regarding the content of the constitution, provided that it adheres to democratic principles.⁹⁰⁶

As was demonstrated, the CPA Act does not provide for interaction with municipalities during the establishment phase.⁹⁰⁷ This affects the provision of basic services and development of the land. Membership is sometimes not finalised before the community takes occupation of the property, leading to conflict and unnecessary dilution of rights.⁹⁰⁸ This indicates a lack of proper implementation of the CPA Act.⁹⁰⁹ Institutional problems can be experienced if rights are allocated to households, one

⁹⁰⁴ Ch 3 section 3 3.

⁹⁰⁵ Ch 4 section 4 1 above.

⁹⁰⁶ Ch 5 section 5 2 2 above.

⁹⁰⁷ Ch 5 section 5 2 2 above.

⁹⁰⁸ Ch 4 section 4 2 above.

⁹⁰⁹ Above.

of which is that patriarchal family structures do not allow all members from benefiting from the communal property association. It was recommended that rights should be allocated to individuals, or if household representation is used, that rights within households should also be determined.

The community has wide discretion to allocate substantive rights that will vest in members. Communities use different models that may include the vesting of rights in members residing on the land or the leasing of such rights to outsiders, in which case community members share in the rental income.⁹¹⁰ Communities can allocate different levels of rights to different members of the community, as long as equality exists within such a class. Every user then has access to exclusive use areas designated for specific purposes, for instance, for residential purposes.

It was found that lack of proper allocation of substantive rights during the establishment phase often leads to some members appropriating other members' rights and using such rights for personal gain to the detriment of the community. It was recommended that more time should be spent on the appropriate allocation of rights in the communal property association.⁹¹¹ A diagrammatical representation of the physical boundaries of exclusive rights and the type of rights vesting in communal areas are recommended. Such a diagram should form part of the constitution of the community to inform community members adequately. While the CPA Act provides for such measures, it is not being implemented adequately in practice.

⁹¹⁰ Ch 4 section 4.3 above.

⁹¹¹ Above.

6 6 TENURE SECURITY AND PUBLICITY

The registration of communal property associations differs from sectional title schemes as the registration documents are held with the Department of Rural Development and Land Reform and not at the Deeds Registry.⁹¹² Such documents include the constitution and membership lists of the community. It was determined that the Department does not have an adequate and accessible system of keeping these documents, indicating improper implementation. This undermines the principle of publicity intended to allow members to enforce their rights adequately. It also contributes to a loss of funding from financial institutions, as third parties struggle to enforce any collateral rights that might be used as security for loans.⁹¹³ This thesis suggested that conveyancers and the Registrar of Deeds play a more active role in the establishment of the scheme to ensure that records are adequately submitted to ensure more effective registration procedures.⁹¹⁴ While this is not always possible as communities take occupation of already transferred property, it should be an added condition that documents are also attached to a title deed at the Deeds Registration Office before the juristic person is registered.⁹¹⁵

The main conclusion regarding establishment procedures is that many of the CPA Act's provisions are not being implemented adequately.⁹¹⁶ While some institutional problems exist, negotiation and guidance by the Department of Rural Development and Land Reform are necessary to overcome such problems. An inadequate establishment process will only lead to problems and conflict in the management phase.⁹¹⁷

⁹¹² Ch 4 section 4 4 above.

⁹¹³ Ch 2 section 2 5 2 above.

⁹¹⁴ Ch 4 section 4 4 above.

⁹¹⁵ Above.

⁹¹⁶ Ch 4 section 4 5 above.

⁹¹⁷ Above.

6 7 TENURE SECURITY THROUGH MANAGEMENT

Communal property associations are managed by an organisation structure comprising of a juristic person, a committee and the community.⁹¹⁸ These organs make decisions about the conduct of its members, transactions with third parties, maintenance of the property and all other aspects influencing communal living.⁹¹⁹

A central institutional problem in the CPA Act is that communal property associations can operate as business entities in addition to their land administration responsibilities.⁹²⁰ Communal property associations are not equipped to function as business entities and it is recommended that separate business entities be used to exploit the productivity of the land.

It was also found that the executive organ of the juristic person, the committee members, are inadequately trained for their duties of management.⁹²¹ Committee members frequently lack expertise and adequate training to exercise their duties.⁹²² The fiduciary responsibilities and personal liability of committee members are also not clearly defined in the CPA Act.⁹²³ While breach of fiduciary duties can lead to criminal charges,⁹²⁴ it might deter members from willingly participating as committee members. It is submitted that committee members should only be held liable in situations where they act with gross negligence or in bad faith. It is important to limit the powers and functions of committee members as much as possible, as wide discretionary powers can lead to paralysis in decision-making processes.⁹²⁵

⁹¹⁸ Ch 5 section 5 1 above.

⁹¹⁹ See Ch 5 in general.

⁹²⁰ Ch 5 section 5 2 1 above.

⁹²¹ Ch 5 section 5 3 above.

⁹²² Ch 5 section 5 3 2 above.

⁹²³ Ch 5 section 5 3 3 2 above.

⁹²⁴ Above.

⁹²⁵ Ch 5 section 5 3 2 above.

The community acts as legislative organ of the juristic person and guides the actions of committee members.⁹²⁶ Communities often set the quorum for voting on community issues too high, which might lead to deadlocks.⁹²⁷ The Act specifically provides for minority protection, but it seems that this does not translate into practice.⁹²⁸ One of the reasons for this is inadequate monitoring and evaluation by the Department of Rural Development and Land Reform.⁹²⁹

The Department of Rural Development and Land Reform should monitor and evaluate the functioning of the communal property association on an annual basis.⁹³⁰ This includes monitoring any legal transactions and business conducted by the communal property association. The Department has extensive powers to inspect and intervene in matters of the association and provide dispute resolution services.⁹³¹ In practice however, these mandates are not being implemented, leading to dysfunction in many communal property associations.⁹³²

6 9 CONCLUSION

This thesis investigated whether communal property associations provide security of tenure for land reform beneficiaries by using this juristic person, by comparison with a similar mechanism used in the ST Act. Many communal property associations seem to be dysfunctional because of implementation and institutional problems. The most significant obstacle is the lack of support from the Department of Rural Development and Land Reform in implementing the provisions of the CPA Act, leading to the inability of communal property associations to provide security of tenure to its members. A major cause for such failure of support is the lack of

⁹²⁶ Ch 5 section 5 4 above.

⁹²⁷ Ch 5 section 5 4 1 above.

⁹²⁸ Ch 5 section 5 4 2 above.

⁹²⁹ Ch 5 section 5 5 above.

⁹³⁰ Above.

⁹³¹ Ch 5 section 5 4 3 above.

⁹³² Above.

adequate funding and capacity problems that the Department have experienced over the last fifteen years. This indicates a lack of political will from the executive to fully implement the values of the constitutional property clause in South Africa.

Government has invested a large portion of tax-payers' money in the land reform programme and failure is not an option. More importantly, redress and social upliftment are owed to communities that have suffered in poverty under years of apartheid repression. Providing adequate tools for communities to ensure a sustainable livelihood is thus of the utmost importance. While the reconstitution of communal life is mostly the responsibility of community members, adequate opportunities should at least be afforded to them. An unsuccessful land reform programme betrays the ideals of South Africa's constitutional mandate to provide equal opportunities for all and security of tenure for land holders.

The institutional problems caused by the framework of the Act can be rectified by amending the Act and conceptualising communal tenure during the establishment of communal property associations. Despite all the problems experienced in communal property associations as a framework to provide communal tenure, success can be ensured by adequate support from government. The recent commitment by government to reassess the situation and identify and address many of the problems listed in this thesis is commendable.⁹³³

The highly politicised topic of land reform demonstrates that land indeed is a precious commodity in our context. It is perhaps as precious as water, and certainly even more emotional, as it represents deep-rooted cultural values about the way in which individuals and communities conduct their lives. In South Africa, land indeed does represent our freedom. It is understandable that in the communal living context, where land becomes a densely utilised resource, the emotive connotations are even stronger. If the government's new resolutions about revising the land reform

⁹³³ Department of Rural Development & Land Reform Strategic Plan for 2010 – 2013 (2010) 30.

programme are to bear fruit, a serious engagement with the problems currently experienced is indeed necessary.

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