

The Battle of the Bakgatla-Ba-Kgafela Community: Access to and Control of Communal Land



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Abstract

Like numerous other traditional communities in South Africa, the Bakgatla-Ba-Kgafela community lost portions of their ancestral land in the pre-constitutional era. Under an all-encompassing land reform programme, which also provides for the restitution of land in particular circumstances, a land claim was lodged. Having been successful with the land claim as all of the requirements set out in the *Restitution of Land Rights Act 22 of 1994* were met, the first battle of the community in reclaiming their land had been won. The initial victory was short-lived as a second battle ensued, dealing with the governance of and form of control over the newly restored land. While the community wanted a communal property association, provided for in the *Communal Property Associations Act 28 of 1996*, the traditional leader preferred a trust. In this regard the various options of forms and constructs of collective ownership came into play. The second battle resulted in the Constitutional Court's deciding in favour of a communal property association in the light of the overall scheme of the *Communal Property Associations Act*, its objectives, the particular role of the Director-General of the Department of Rural Development and Land Reform, and all that had transpired in this particular case. This contribution deals with both of these battles, first setting out the struggle to reclaim the lost land, and then discussing the conflict over ownership and governance issues brought to finality in *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority 2015 6 SA 32 (CC)*. In this regard the judgment is analysed and thereafter reflected on with respect to recent developments linked specifically to communal property association legislation and then to other developments impacting on communal land and traditional communities in general. With regard to the former, recent draft amendments to the *Communal Property Associations Act* are highlighted, whereas policy developments and draft legislative measures are discussed with regard to the latter. While it is possible that some of the recent suggested amendments embodied in the *Amendment Bill* would have streamlined the process had these amendments been in operation when the Bakgatla-Ba-Kgafela community fought the second battle, various problems remain. In this context markedly different - conflicting - approaches emerged from the Constitutional Court judgment and official policy measures. Whereas the Court confirmed more democratic forms of ownership and governance in general, but specifically with respect to traditional communities, official policy documents coupled with draft legislative measures relating to traditional courts entrench traditional leadership constructs. In this regard more democratic forms of governance and ownership are seemingly reserved for areas outside traditional communal areas, most notably outside the former homelands. While the judgment handed down in the Constitutional Court may have brought closure to the Bakgatla-Ba-Kgafela community regarding the formation of a communal property association, the struggle of other traditional communities opting for communal property associations may just be beginning.

Keywords

Restitution of land; traditional communities; communal property association; communal land tenure; traditional leadership; Bakgatla-Ba-Kgafela community; homeland.

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1 Introduction

Such trials and tribulations as those of the Bakgatla-Ba-Kgafela community are often encountered in South Africa. A story of loss of land during the apartheid era is followed by a long battle to reclaim the ancestral land under the restitution programme.¹ While this dimension may be familiar, the story becomes more complex as in this case the successful lodging of the claim and award of the land did not result in a happy ending.² On the contrary, a further battle emerged as to the best form of ownership and governance in these particular circumstances. In this regard two battles were fought: dealing with the remnants of apartheid under the restitution programme on the one hand, and amongst community members and different factions in the community on the other.

The aim of this contribution is to relay the main elements in the two battles fought with a view to identifying critical issues concerning land, ownership and governance, subject to overarching land-related policies and legislation. While contextualisation is necessary regarding communal land and restitution generally, the second battle dealing with ownership and governance issues warrants more attention and analysis.³ This requirement is dealt with by way of a detailed discussion of *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority*,⁴ a Constitutional Court judgment handed down in August 2015. In order to be able to discuss the implications of the judgment at some length, generally but also specifically with regard to communal property associations and relevant forms of governance, the initial battle setting out the restitution dimension will be dealt with first, briefly. This discussion will be followed by

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¹ See generally Walker *Land Marked* 11-30; Cousins and Walker *Land Divided Land Restored* 232-249; Pienaar *Land Reform* ch 9; and in general; Thompson *History of South Africa* 154-220.

² In the course of 2013 in-fighting amongst the community members led to the Constitutional Court judgment of *Pilane v Pilane* 2013 4 BCLR 431 (CC) regarding the capacity to hold meetings so as to discuss concerns about the governance of the community. In March 2017 the Maluleke Commission commenced its investigation regarding the financial responsibilities and duties of Kgosi Pilane specifically (Mathibedi 2017 <http://www.sabc.co.za/news/a/863c1700404fd1c6b6dcff6b78d177f4/Maluleke-commission-to-investigate-Bakgatla-ba-Kgafela-chieftaincy-20170603>). While these developments illustrate the turmoil experienced in this particular community, these issues are not dealt with here in further detail in the light of the focus of this contribution on land.

³ While the concept of ownership, as well as its role and function are important, this contribution focuses on land in communal areas. In this regard the function and role of ownership, freehold and related property theories will not be explored further in this analysis.

⁴ *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority* 2015 6 SA 32 (CC).

a description of the various options and ownership constructs available where communal land is concerned, after which the *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority* judgment will be analysed in detail. The conclusion follows, after a reflection on the implications of the judgment for traditional communities in South Africa generally.

2 Contextualisation: Communal tenure and a need for restitution

2.1 A complex, diverse and multi-layered land control system

The history of dispossession in South Africa in support of a racially-based land control system embedded in apartheid is well known.⁵ Spatial racial segregation was endorsed by way of separate development initiatives⁶ linked to particular racial and cultural backgrounds.⁷ By following this process over a period of several decades, the implementation of the policy of separate development resulted finally in the establishment of four provinces,⁸ four national states⁹ and six self-governing territories,¹⁰ which is elaborated on in more detail below.¹¹

Apart from an overarching racial spatial framework, detailed provisions dealt with access to and control over land, influx control,¹² the rigid enforcement of unlawful occupation (squatting) measures,¹³ and group areas legislation.¹⁴ Departing from the point of the racial classification, all land-related matters, including surveys, deeds and registries, and land-use planning, were likewise racially-based. Ultimately a complex, diverse legal framework emerged, providing for different sets of measures for different

⁵ For more detail see the sources mentioned in fn 1 as well as Keegan *Colonial South Africa* 170-208; Dubow *Apartheid 1948-1994*; Van der Merwe 1989 *TSAR* 663-692; Bennett "African Land" 66.

⁶ Sparks *Mind of South Africa* 180; Evans 2012 *SAHJ* 117.

⁷ See specifically Pienaar *Land Reform* 113-121 with regard to the homeland policy.

⁸ The Transvaal, Orange Free State, Cape and Natal provinces.

⁹ The national states were located within the boundaries of South Africa but were wholly independent and had their own legal systems and national symbols. The national states were Transkei, Ciskei, Bophuthatswana and Venda. Also see Devenish "Development of Administrative and Political Control over Rural Blacks" 31-32; and Manson and Mbenga *Land, Chiefs, Mining* 124-141 with regard to Bophuthatswana specifically.

¹⁰ These territories were not yet independent but were in the process of becoming independent states. They were Lebowa, KwaNdebele, KaNgwane, Gazankulu, Qwaqwa and KwaZulu.

¹¹ See 2.2 below.

¹² McCarthy "African Land Tenure" 122-127.

¹³ Pienaar "'Unlawful Occupier' in Perspective" 309-330.

¹⁴ Robertson "Black Land Tenure" 125-126; Schoombee 1985 *Acta Juridica* 77.

areas of South Africa.¹⁵ Apart from the overarching racially-based grid of measures, the South African legal position was furthermore complicated in that a dual system prevailed, embodying Western-style national law co-existing alongside customary law, in an hierarchical fashion.¹⁶ With regard to customary law, formal (or official)¹⁷ customary law furthermore operated alongside unofficial (or living) customary law.¹⁸ Overall, a complex, multi-layered legal system prevailed, especially in relation to land.¹⁹

2.2 Traditional communal areas and tenure

The term "traditional communal areas" refers to areas in present-day South Africa where communal land tenure prevails. These areas were, in the apartheid era, the four national states and six self-governing territories alluded to above - land held by the former South Africa Development Trust²⁰ - as well as areas that were added post-1994, invariably resulting from the implementation of the land reform programme.²¹

The development of the homeland policy pre-1994 in apartheid South-Africa can broadly be divided into three stages: firstly, formalising the homeland policy (1948-1959); secondly, the expansion of self-governance from 1960-1976; and thirdly, the period of independence (until 1984). The word "homeland" was employed because it lent "legitimacy" to the government policy of separate development in that indigenous communities were linked to their "places of origin" or their "homelands".²² Opposition groups, however, preferred the word "reserves" or "Bantustans", thereby emphasising the "keeping separate" dimension of these areas so as *not* to lend any legitimacy to the policy development.²³ In this light the areas identified for Black occupation only were generally referred to as homelands, Bantustans or national states, and were the combined result of various legislative measures and reports, including the *Bantu Authorities Act*

¹⁵ See Pienaar *Land Reform* 142-151 for an exposition of the diverse grid of land control measures that prevailed in 1991 at the time when the White Paper on Land Reform was published by the De Klerk-government to initiate land reform.

¹⁶ This meant that Western law (or national law) took priority over customary law.

¹⁷ This entailed *inter alia* codified customary law in legislation, e.g. the (now repealed but 2 sections) *Black Administration Act* 38 of 1927, which contained succession and marriage provisions and judgments handed down by the (now abolished) Native Appeal Courts.

¹⁸ Claassens "Contested Power and Apartheid Tribal Boundaries" 174-209.

¹⁹ Pienaar *Land Reform* 142-153.

²⁰ In terms of the *South African Development Trust and Land Act* 18 of 1936. The Trust was dissolved in 1992 by way of Proc R28 in GG 13906 of 31 March 1992 as provided for in s 12 of the *Abolition of Racially Based Land Measures Act* 108 of 1991.

²¹ Also see the description of "communal land" in s 2 of the now repealed *Communal Land Rights Act* 11 of 2004.

²² Evans 2012 SAHJ 117.

²³ Beinart *Twentieth Century South Africa* 217. The word "Bantustan" means "Bantu state" and is linked to the "stans" created in the course of the partition of India in 1947.

68 of 1951, the Tomlinson Commission Report,²⁴ the *Promotion of Bantu Self-government Act* 46 of 1959 and the *Native Affairs Act* 55 of 1959. The period of self-governance was furthermore enabled by particular legislative measures pertaining to individual areas, such as the *Transkei Constitution Act* 48 of 1963 relating to Transkei. The promulgation of the *National States Constitution Act* 21 of 1971 provided that in future no special legislation dealing with the establishment of particular legislative assemblies for specific areas would be necessary. Instead, after 1971 relevant proclamations in the *Government Gazette* would suffice.²⁵

While communal land tenure, unpacked below, prevailed in all of these areas generally, various statutory forms also developed under the apartheid regime, such as permission to occupy, and quitrent.²⁶ In these areas where communal tenure was prevalent, vast tracts of land, varying in size depending on the particular community and location of the land, were occupied and still are occupied and utilised by communities as a whole, often subject to overarching traditional leadership constructs.²⁷ Underpinning the use of land are relational interests, including how individuals and communities relate to one another on the one hand, and to land and resources on the other. In this context the result does not resemble "ownership" or "freehold" as in Western-style constructs, as such.²⁸ Rather, it results in a set of reciprocal rights and obligations that bind parties and land together.²⁹ It is in this context that Cousins warns against the idea that the language of "ownership" is universal.³⁰ Instead, in the customary law context, different entitlements and interests are located in different persons, while various entitlements or interests may simultaneously be centred or grouped in a community.

Invariably, access is gained *via* membership of a particular community,³¹ which involves active participation and production, as reflected in a variety of rights and interests that may vest in and be exercised at various levels. Management and control are incidents of the community's power, usually embodied in traditional authority constructs. Accordingly,³²

- access to and control over land cannot be equated to common law ownership;

²⁴ Published in 1955 – see Beinart *Twentieth Century South Africa* 161.

²⁵ Changuion and Steenkamp *Omstrede Land* 224.

²⁶ Proc R188 in GG 2486 of 11 July 1969 – for more detail see Pienaar *Land Reform* 142-146.

²⁷ Claassens "Contested Power and Apartheid Tribal Boundaries" 174-209.

²⁸ Rautenbach and Bekker *Introduction to Legal Pluralism* 374.

²⁹ Okoth-Ogendo "Nature of Land Rights" 102.

³⁰ Cousins "Characterising 'Communal Tenure'" 109-110; Du Plessis 2011 *PELJ* 52.

³¹ Usually by way of birth, affiliation to specific social community, allegiance or transactions – see Pienaar 2008 *Stell LR* 260.

³² Okoth-Ogendo "Nature of Land Rights" 102.

- land rights embody a balance of access, use rights, control and management; and
- tenure security prevails as long as rights are asserted by individuals and managed and controlled in an accountable fashion.

In this context individual and communal dimensions emerge. An individual dimension is embodied in the sense that a particular person or family is allocated specific portions of land, usually comprising of two parcels: one for residential and another for agricultural purposes. The communal dimension means that all members of the relevant community also have access to communal resources, for example, water, mud, sand, clay and wild fruit, as well as access to the commonage.³³

While the control of land generally involved either communal land tenure, as explained above, or statutory diversions thereof, the picture at grass-roots level was much more complex. That was the case because different homelands gained independence at different stages³⁴ and because further distinctions were drawn between land within rural areas and urban areas, each having different forms of tenure.³⁵

A further complexity emerged in that the boundaries surrounding the above homelands were by no means clear-cut and finite.³⁶ On the contrary: as the ideology of separate development evolved, areas were constantly added to or taken away from existing territories, resulting in a rather fluid, ever-changing map. Fragmentation was addressed by way of consolidation, changing land patterns and the uprooting and transplanting of communities - all on the basis of race and cultural orientation.³⁷ Communities were also removed on other grounds, including for the formation of national parks and for the purposes of nature conservation.³⁸ And underlying all of these removals was clear racial bias with regard to the identification of land, the location of substitute land, and the amount of compensation to be paid, if any.³⁹

Consequently, before the new constitutional dispensation emerged, a complex, fragmented land control system prevailed, in terms of which different portions of the country were earmarked for occupation by persons

³³ Rautenbach and Bekker *Introduction to Legal Pluralism* ch 6.

³⁴ Haines and Cross "Historical Overview of Land Policy and Tenure" 73-92. See generally Pienaar *Land Reform* 142-153.

³⁵ Pienaar *Land Reform* 142-153.

³⁶ Evans 2012 *SAHJ* 117.

³⁷ Evans 2012 *SAHJ* 117.

³⁸ Pienaar *Land Reform* 628-635.

³⁹ Pienaar "As a Result of Racially Discriminatory Laws and Practices" 385-408; Pienaar *Land Reform* 629-630.

belonging to particular racial groups, comprising a variety of tenure forms, and with varied degrees of security.

2.3 A new constitutional dispensation and land reform

The new constitutional dispensation which came into being in April 1994 coincided with the commencement of an all-encompassing land reform programme, finally embedded in section 25 of the *Constitution*, the property clause. In this regard section 25 provides for the redistribution of land;⁴⁰ the tenure reform programme;⁴¹ and the restitution programme.⁴² Apart from these particular provisions setting out the broad parameters of the land reform programme, section 25(8) furthermore provides that no provision of section 25 may impede the state from taking the necessary steps to achieve land, water and related reforms in order to redress the results of past racial discrimination.

When the new political dispensation commenced the former homelands housed approximately 2.4 million households, involving roughly 12.7 million people.⁴³ About a third of the South African population was concentrated in these areas, which may essentially be characterised as rural.⁴⁴ Land rights were precarious in nature, were permit-based, and were subject to administrative discretion.⁴⁵ When apartheid was dismantled and a new constitutional dispensation commenced, resulting in the repeal of all racially-based land measures⁴⁶ and the physical unification of the country,⁴⁷ the dual legal system involving Western-style and customary law tenure continued. Following the re-unification of South Africa in 1994,⁴⁸ large tracts of communal land inevitably remained registered in the name of the state as the trustee and the overarching administrator of the land.⁴⁹

The legislative and regulatory frameworks that governed these areas initially remained intact.⁵⁰ Apart from insecure tenure, the communities that lived on the land had often been uprooted and relocated, usually in pursuit of

⁴⁰ Section 25(5) of the *Constitution of the Republic of South Africa*, 1996 provides that the state must take reasonable and other steps to broaden access to land.

⁴¹ Section 25(6) of the *Constitution* provides that a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to either secure tenure or comparable redress.

⁴² Section 25(7) of the *Constitution* provides that a person or community dispossessed of property after 19 June 1913 as a result of racially discriminatory laws or practices is entitled to either restitution or equitable redress.

⁴³ Adams, Cousins and Manana "Land Tenure and Economic Development" 7.

⁴⁴ Claassens "Contested Power and Apartheid Tribal Boundaries" 174-211.

⁴⁵ Pienaar *Land Reform* 151-153.

⁴⁶ Section 87 of the *Abolition of Racially Based Land Measures Act* 108 of 1991.

⁴⁷ See generally Van der Merwe and Pienaar "Land Reform in South Africa" 334-380.

⁴⁸ Resulting from, *inter alia*, the *Revocation and Assignment of Powers of Self-Governing Territories Act* 107 of 1993 and the *Regulation of Joint Executive Action Act* 109 of 1993.

⁴⁹ Boone 2007 *African Affairs* 561.

⁵⁰ Pienaar *Land Reform* 162-165.

effecting apartheid boundaries, as explained above. In this light two sub-programmes of the overarching land reform programme immediately become relevant with reference to the former homelands: the tenure reform programme,⁵¹ which provides for more secure tenure options, and the restitution programme, which provides for the reclaiming of lost land.

Given that the first battle fought by the community entailed reclaiming lost land under the restitution programme, thereby giving rise to the battle over the manner of land control and governance, a brief exposition of the restitution process is provided forthwith.

3 The initial battle: reclaiming lost land

3.1 Formal requirements

Section 25(7) of the *Constitution* provides for restitution in principle, but within a specific statutory framework; hence the *Restitution of Land Rights Act* 22 of 1994 (hereafter the *Restitution Act*). In order for a land claim to be successful, two sets of requirements have to be met, both found in section 2 of the *Restitution Act*. The first set consists of the formal or threshold requirements, which are linked to the date of submission and the issue of compensation. With regard to the timeline, recent developments resulted in the existence of two categories of claims, the first category comprising claims that were lodged during the period 1995-1998, and a new category comprising the second round of claims to be lodged from 1 July 2014 to 30 June 2019. The second round was made possible by way of an Amendment Act that commenced on 1 July 2014.⁵² As the two rounds of claims emerged, the idea was to compile two registers for them and prioritise claims that were lodged before 1998. However, in the course of 2016 the constitutionality of the Amendment Act was contested, on two grounds in particular. Firstly, it was averred that the provision to "ensure that priority is given" was incurably vague. Secondly, the legislative process was questioned on the basis that inadequate public participation had occurred, contrary to sections 72(1)(a) and 118(1)(a) of the *Constitution*. On 28 July 2016 the Constitutional Court confirmed the invalidity of the 2014-Amendment Act in *Land Access Movement of South Africa v Chairperson of the National Council of Provinces*⁵³ on the ground of insufficient public participation. To that end the

⁵¹ Within the context of communal land and traditional land ownership the *Communal Land Rights Act* 11 of 2004, drafted to transform old-order (apartheid-style) land rights to new-order rights, was declared unconstitutional in *Tongoane v Minister of Agriculture and Land Affairs* 2010 6 SA 214 (CC) on the basis that the incorrect tagging procedure had been followed in the legislative process.

⁵² Gen N R526 in GG 37791 of 1 July 2014 - *Restitution of Land Rights Amendment Act* 15 of 2014.

⁵³ *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* 2016 5 SA 635 (CC).

Chief Land Claims Commissioner was interdicted from processing in any manner whatsoever land claims lodged since 1 July 2014.⁵⁴

Also forming part of the formal requirements is that no just and equitable compensation must already have been received.⁵⁵ If persons and communities have already received just and equitable compensation, the claim will not be processed further. However, when both of these formal requirements have been met, the second set of requirements, constituting the legal requirements, enters into the picture.

3.2 Legal requirements

The legal requirements (constituting the second set of requirements) entail the following: the applicant must have been dispossessed of a right in land after 19 June 1913⁵⁶ as a result of racially discriminatory laws or practices.⁵⁷ Once both sets of requirements have been complied with, the land claims are validated and processed further. Applicants include private individuals, communities or parts of communities. Even though the *Restitution Act* sets out the definition of "community", it may still be difficult in practice to realise this particular requirement.⁵⁸ The definition is as follows:

[any] group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group.⁵⁹

⁵⁴ While the process of land claims has been halted, the interdict does not apply to the receipt and acknowledgement of receipt of land claims under the *Restitution Act*. Should the processing, including the referral of claims to the Land Claims Court, of all claims lodged by December 1998 be finalised before the re-enactment of the new Act, the Commission may process land claims lodged from 1 July 2014. If the Parliament does not re-enact a new Act re-opening the period for the lodgement of land claims within a 24 month period, the Chief Land Claims Commissioner must, and any party to the application or person with an interest in the order handed down, could apply to the Constitutional Court for a suitable order to process the claims lodged since 1 July 2014.

⁵⁵ For an analysis of this requirement see the discussion of *Florence v Government of the Republic of South Africa* 2014 6 SA 456 (CC) in Pienaar "Land Reform and Restitution in South Africa" 141-160.

⁵⁶ This is the commencement date of the notorious *Black Land Act* 27 of 1913, in terms of which, for the first time, the whole of the country's land matters would be approached on a racial basis. Essentially the Act provided for "black spots" where only black persons would be able to acquire rights in land, and the rest of the country. This Act was succeeded by the *South African Development Trust and Land Act* 18 of 1936, which added further land to the black spots, namely "released areas", so that the total area of land available for black occupation and for the vesting of land rights increased.

⁵⁷ Hall "Reconciling the Past, Present and the Future" 17-40.

⁵⁸ The difficulty relates to two issues in particular: communities are defined differently in different legislative measures (see e.g. the definition of community in s 2 of the *Traditional Leadership and Governance Framework Act* 41 of 2003); and communities are not static as membership fluctuates.

⁵⁹ Section 1 of the *Restitution of Land Rights Act* 22 of 1994.

To that end case law has provided some guidelines regarding "community" for the purposes of the restitution process. In *Department of Land Affairs, Popela Community v Goedgelegen Tropical Fruits (Pty) Ltd*⁶⁰ Judge Moseneke formulated a two-pronged test in order to determine whether the claim was indeed a community claim by (a) first establishing whether the community retained much of their identity and cohesion as part of the original clan, and then (b) establishing whether they derived their possession of the land in question from shared rules. When these requirements have been met, a claim is approached on a community claim basis. As no definition of "dispossession" is found in the Act, case law has indicated that the loss of a right in land may be gradual or may be abrupt, even overnight.⁶¹ What must be clear, however, is that a right in land existed at some point, which ceased to exist at another point.⁶² In this regard any right in land would suffice as it is not limited to ownership only.⁶³ The loss of the right in land must have occurred after 19 June 1913 and must be a result of racially discriminatory laws or practices. The last requirement was especially problematic, given that everything in South Africa - everyday life - was regulated on a racial basis. This raised the question whether or not all dispossessions, in principle, would qualify for the purposes of restitution. Interesting case law developments have occurred in this cadre in delineating both the "as a result of"⁶⁴ and the "racially discriminatory laws and practices"⁶⁵ elements contained in this requirement.⁶⁶ With regard to the Bakgatla-Ba-Kgafela community, which is dealt with in more detail below, the dispossession of land resulted from the need to expand a national park in the Pilanesberg area in the present-day North West province in South Africa.⁶⁷ However, on the basis that the identification of the land for this purpose as well as the resultant compensation evinced a clear racially-based approach, this particular requirement was also met, thereby enabling a section 42D-agreement with the Minister.⁶⁸

⁶⁰ *Department of Land Affairs, Popela Community v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC).

⁶¹ Pienaar *Land Reform* 548-550.

⁶² *Department of Land Affairs, Popela Community v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC).

⁶³ *Ndebele-Ndzundza Community v Farm Kafferskraal* 2003 5 SA 375 (SCA).

⁶⁴ In other words: the causation issue.

⁶⁵ In other words, whether only formal government conduct or agents resort under this or whether private individual conduct may also result in racially discriminatory practices.

⁶⁶ *Department of Land Affairs, Popela Community v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC). See further Pienaar *Land Reform* 553-563.

⁶⁷ Manson and Mbenga *Land, Chiefs, Mining* 142-169.

⁶⁸ Section 42D of the *Restitution of Land Rights Act* 22 of 1994 provides that if the Minister is satisfied that a claimant is entitled to the restitution of a right in land under s 2 of the Act, an agreement may be entered into with relevant parties who have an interest in the claim, providing that the award entails land, a portion of land or any right in land, the payment of compensation or both the award of land and the payment of compensation. The agreement may also relate to the manner in which

3.3 Resolution of claims

Once successfully lodged and validated, various options aimed at resolving the land claim are possible: specific restoration by restoring the actual parcel of land that was lost, restoring alternative State land, equitable monetary compensation,⁶⁹ or a combination of these options.⁷⁰ In the process of determining which of the options would suit the particular circumstances the best, a list of factors set out in section 33 of the *Restitution Act* has to be considered.⁷¹ These factors include *inter alia* the desirability of providing for the restitution of rights in land; the desirability of remedying past violations of human rights; the requirements of equity and justice; where the restoration of a right in land is claimed, the feasibility of such a restoration; and the desirability of avoiding major social disruption. While broad restorative options are provided for in the Act, guided by the list of factors, the actual result of each and every successful land claim depends on the particular circumstances of the claimants and the property involved. For example, where community claims are involved, as in the *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority* case, the Act is not prescriptive as to the final form of ownership construct or governance the successful land claim should take. It is at this point that the spectrum of ownership constructs, linked to governance within a communal set-up, becomes relevant. The various options in this context are explored in more detail below, after which the focus shifts to the Bakgatla-Ba-Kgafela community specifically.

4 Collective ownership options

As a community is involved, individual ownership comparable to freehold does not emerge here.⁷² Instead, a form of collective ownership becomes relevant which, in principle, can encompass either a customary law or a Western-style dimension. With regard to the latter, relevant options include accessing property through joint or common ownership or by way of a trust. Joint or common ownership is a common law (Roman-Dutch) construct in terms of which co-owners vest co-ownership in relation to a common object.⁷³ Generally, where free common ownership is involved, co-ownership is the only legal relationship that exists among the relevant parties.⁷⁴ Bound co-ownership, on the other hand, is a form of co-ownership where another legal relationship is also bound into the co-ownership

the rights so awarded are to be held and may also involve terms and conditions the Minister deems appropriate.

⁶⁹ *Florence v Government of the Republic of South Africa* 2014 6 SA 456 (CC).

⁷⁰ Section 35 of the *Restitution of Land Rights Act* 22 of 1994.

⁷¹ Pienaar "Land Reform and Restitution in South Africa" 141-160.

⁷² Mostert and Pope *Principles of Law of Property* 89-91.

⁷³ Mostert and Pope *Principles of Law of Property* 96-97.

⁷⁴ Eg, where parties enter into an agreement with the only objective being to become co-owners of a particular thing or asset.

construct, such as marriage in community of property.⁷⁵ For this reason the latter form of co-ownership is automatically excluded where communal land is at stake. All in all, in these instances common law rules regulate the acquisition, use and dissolution of these forms of co-ownership.⁷⁶

The trust option is another possibility in terms of which property can be held in common on behalf of the trust beneficiaries, by the trustee entrusted with the regulation of the property.⁷⁷ While some of these Western-style or common law options are theoretically also available in principle, they do not optimise or incorporate the concept of communally held property at its best, especially in the light of traditional customary law⁷⁸ or cultural considerations.⁷⁹

After the end of apartheid it became increasingly clear that what was required was a mechanism that promoted tenure security, but on a group or collective basis in terms of which particular customary law values and concepts could also be endorsed. Accordingly, a new juristic person was created under a new legislative measure, the *Communal Property Associations Act 28 of 1996* (hereafter the *CPA Act*) in the form of a communal property association (hereafter CPA). This kind of ownership is not common law co- or joint ownership as such,⁸⁰ but constitutes a new form of ownership that was specifically developed with the land reform programme in mind. While communal land tenure involves rights based on community or group membership, the actual day-to-day-management is invariably hierarchical and gender-biased.⁸¹ Accordingly, enhancing the community dimension of this kind of ownership also required some sense of bringing it in line with constitutional imperatives.⁸² Furthermore, in this context land tenure security is as much a concept of law as it is a concept of governance.⁸³ Although the *CPA Act* is tenure related in the sense that it was aimed at improving tenure matters specifically, the holding mechanism established under this Act, a CPA, is used regularly as the main vehicle to

⁷⁵ Two elements are thus involved: marriage partners and co-owners of property and assets.

⁷⁶ Mostert and Pope *Principles of Law of Property* 96-97; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 133-136.

⁷⁷ See in general Van der Merwe, Pienaar and De Waal *International Encyclopaedia of Laws*.

⁷⁸ Essentially involving "traditional communities", which, under s 2 of the *Traditional Leadership and Governance Framework Act 41 of 2003*, are communities which are subject to a system of traditional leadership and in which that particular community's customs and systems of customary law are adhered to.

⁷⁹ Also see Cousins "Characterising 'Communal Tenure'" 109-137.

⁸⁰ Mostert and Pope *Principles of Law of Property* 96-97.

⁸¹ Weeks "Securing Women's Property Inheritance" 140-173.

⁸² Including the right to equality (s 9) and the right to dignity (s 10) of the *Constitution of the Republic of South Africa*, 1996.

⁸³ Mostert and Jacobs "Mandate and Challenges of Achieving Communal Land Tenure Security" 19.

transfer ownership in both the redistribution and restitution programmes where groups or communities are involved.⁸⁴

The guiding principles of justice, fairness and equality underlie the *CPA Act* and have to be reflected in the particular constitution of each CPA. Essentially the *CPA Act* regulates tenure rights of members of the CPA and everything connected therewith. This is currently⁸⁵ done by way of a two-phased approach: first the provisional association is registered, followed by the registration of the CPA once all the requirements as set out in the *CPA Act* have been complied with.⁸⁶ Exactly how this process unfolds, as well as the legal implications of each phase, is set out below in more detail with reference to the Bakgatla-Ba-Kgafela community's experience.

5 The second battle: land, ownership and governance

5.1 Background

The Bakgatla-Ba-Kgafela community forms a sub-group of the Tswana, who reside in the North West of South Africa as well as in Botswana.⁸⁷ The area is rich in minerals, including massive deposits of chrome and platinum group metals. The area in the Pilanesberg region is also wealthy in natural beauty.⁸⁸ It was on this basis that the community lost land for the purposes of establishing a game reserve in and around Pilansberg during the apartheid era. Despite being dispossessed under a "racially neutral" measure, a clear racial bias emerged with regard to the identification of the land and the concomitant forced removal. To that end all requirements for lodging a land claim had been met, resulting in a successful claim.⁸⁹ Unfortunately their battle did not end there, as internal strife led to the formation of different factions in the community in relation to the best form of ownership and governance to control the property so reclaimed. In this

⁸⁴ Since the *Bakgatla*-judgment was handed down a draft Bill was published for comment on 29 April 2016 in GG 39960 and Bill B12-2017 was tabled on 28 April 2017, with the exploratory summary preceding it on 7 April 2017 in GG 40772. Also see 6.2 below for more detail. However, at the time of writing the Amendment Act had not yet been finalised.

⁸⁵ The Amendment Bills propose to abolish provisional associations and therefore to dismantle the two-phased approach.

⁸⁶ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 621; Carey-Miller and Pope *Land Title* 473-485.

⁸⁷ See generally Morton *When Rustling became an Art*; Magala *History of the Bakgatla бага Kgafela*; Breutz *History of the Batswana*; and Manson and Mbenga *Land, Chiefs, Mining*.

⁸⁸ Manson and Mbenga *Land, Chiefs, Mining* 142-169.

⁸⁹ See *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority* 2015 6 SA 32 (CC) (hereafter *Bakgatla-Ba-Kgafela* case) paras 2-13 for the relevant background.

regard the community wanted a CPA whereas the Tribal Authority and Kgosi Pilane (the traditional leader)⁹⁰ were in favour of a trust.

After various disputes and attempts to resolve matters, the Constitutional Court's judgment in *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority*,⁹¹ (hereafter *Bakgatla-Ba-Kgafela* case) handed down in August 2015 brought finality with regard to the issue of governance and the status of the CPA. While the matter had been dealt with at the highest level possible, closure for traditional communities opting for more democratic forms of governance and ownership has by no means been achieved, as will be explained in more detail below.

5.2 The Constitutional Court judgment

The case before the Constitutional Court dealt with an application for leave to appeal against an order handed down by the Supreme Court of Appeal (hereafter SCA) which overturned a judgment of the Land Claims Court (hereafter LCC). The matter concerned the interpretation and application of section 5(4) of the Act and was initially heard in the LCC. While the matter was very technical - hence the discussion that follows is likewise rather technical - the real issues transcend the technicalities. In reality the case deals with access to and control of land and the implications thereof. Herewith the background: The applicant was the relevant CPA that was established under the *CPA Act*. When the land claim was approved by the Minister under section 42D of the *Restitution Act*⁹² a process was set in motion of establishing an association with the intention of taking possession of the restored land. As required, the process of forming and registering an association involved numerous meetings and consultations, also under the supervision and guidance of relevant departmental officials.⁹³

Although an application for registration was submitted to the Department of Rural Development and Land Reform, the registration never took place due to a dispute between the community, the Tribal Authority and Kgosi Pilane, the second respondent in the proceedings. Due to the conflict and after an intervention by the Minister, the CPA was registered provisionally and the parties were afforded one year in which to resolve the issue. The provisional registration resulted in forming the applicant, the CPA, after which the land was transferred and registered in its name.

⁹⁰ Kgosi Pilane has been the traditional leader of the community since April 1996 and manages the community by way of the Bakgatla Ba-Kgafela Traditional Authority from the administrative buildings in Moruleng.

⁹¹ *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority* 2015 6 SA 32 (CC).

⁹² Pienaar *Land Reform* 619-624. S 42D enables the Minister to enter into a framework agreement with the relevant parties to speed up the final resolution of a claim.

⁹³ *Bakgatla-Ba-Kgafela* case para 6.

After one year the dispute had not been resolved and the CPA had not been registered as a permanent association. Because the terms of office of the provisional CPA members had lapsed, meetings had to be called in order to elect new members. The necessary notices were issued, the various meetings were convened⁹⁴ and the necessary reports were finalised.⁹⁵

Following the failure of the Department to register the CPA, the community instituted proceedings in the LCC directing the Department to release the CPA's certificate, to interdict Kgosi Pilane from intimidating officials and interfering with the process, and directing the relevant Director-General to effect the registration. When certain facts were disputed by the respondents, the LCC referred the matter for oral evidence. Upon the conclusion of the hearing the court dismissed the points raised *in limine* (that the application had no merits, that the court did not have jurisdiction to hear the matter and that the CPA did not have *locus standi*). Instead, the court handed down an order that confirmed the status of the CPA as an association established by a community as envisaged in the *Restitution Act*, and that the association could be registered permanently as a CPA, thereby directing the Director-General to effect such registration.⁹⁶

Questioning the status of the provisional CPA, an appeal was lodged to the SCA by the Tribal Authority and Kgosi Pilane, focussing on section 5(4) of the Act only, which states that a provisional association exists for a period of 12 months only. Since no extension had been granted, the LCC-judgment was overturned.⁹⁷

As explained, the proceedings before the Constitutional Court dealt with an application for leave to appeal against the SCA-judgment. In order to be successful, the applicant had to indicate that the Constitutional Court had jurisdiction, as well as that it was in the interests of justice to proceed. The Constitutional Court per Jafta J was satisfied that the interpretation of legislation linked to section 25 of the *Constitution*, the property clause, resulted in a constitutional issue:⁹⁸

The matter raises a constitutional issue relating to the restitution of land, dispossessed under apartheid, to communities in the realisation of the right guaranteed under section 25(7) of the Constitution.

The main issue was whether the CPA had legal standing to institute the proceedings. In order to establish that, section 5(4) of the Act would have to be scrutinised, and in order to do that, the scheme of the Act would have to

⁹⁴ *Bakgatla-Ba-Kgafela* case para 10.

⁹⁵ *Bakgatla-Ba-Kgafela* case para 11.

⁹⁶ *Bakgatla-Ba-Kgafela* case para 13.

⁹⁷ *Bakgatla-Ba-Kgafela* case para 14.

⁹⁸ *Bakgatla-Ba-Kgafela* case para 16.

be dealt with first. Having regard to section 25 of the Constitution, the court was satisfied that the main aim of the *CPA Act* was to:⁹⁹

enable communities to form communal property associations through which they may acquire and possess land that belongs indivisibly to the entire community.

Judge Jafta thereafter elaborated on the two kinds of associations, namely provisional and permanent associations. The former usually constituted a preliminary step in order to result in the latter. In order to be registered as a provisional association, various conditions had to be met, including that the applicant community had to constitute a community as set out in section 2 of the *Restitution Act*, and that the relevant land had to be identified clearly.¹⁰⁰

If everything went according to plan, the provisional association would usually be converted into a permanent association, which would be registered accordingly.¹⁰¹ The registration as a permanent association would be approved by the Director-General. The relevant application had to be accompanied by a report compiled by an authorised official. These matters were regulated under sections 7 and 8 of the *CPA Act*. Of importance was the special duty of the Director-General to assist the community in achieving a permanent registration.¹⁰² Also forming part of the final registration was the requirement that the particular constitution of the CPA had to comply with the principles contained in section 9 of the *CPA Act*. Numerous principles were embodied in section 9, including that the constitution had to embody fair and inclusive decision-making,¹⁰³ as well as the principle of equality,¹⁰⁴ that democratic processes had to be created that governed meetings,¹⁰⁵ fair access to the property of the association¹⁰⁶ and the principles of accountability and transparency.¹⁰⁷ Cumulatively, these principles¹⁰⁸

[s]afeguard the interests of members of traditional communities and empower them to participate in the management of a communal property [association]. The creation of an association introduces participatory democracy in the affairs of traditional communities. All members of the community are afforded an equal voice in matters of the association and the property it holds on behalf of the community.

⁹⁹ *Bakgatla-Ba-Kgafela* case para 18.

¹⁰⁰ *Bakgatla-Ba-Kgafela* case para 19.

¹⁰¹ *Bakgatla-Ba-Kgafela* case para 22.

¹⁰² *Bakgatla-Ba-Kgafela* case para 23.

¹⁰³ *Bakgatla-Ba-Kgafela* case para 25.

¹⁰⁴ *Bakgatla-Ba-Kgafela* case para 26.

¹⁰⁵ *Bakgatla-Ba-Kgafela* case para 27.

¹⁰⁶ *Bakgatla-Ba-Kgafela* case para 28.

¹⁰⁷ *Bakgatla-Ba-Kgafela* case para 29.

¹⁰⁸ *Bakgatla-Ba-Kgafela* case para 30.

With regard to the *CPA Act* itself, the court stated the following:¹⁰⁹

The Act is a visionary piece of legislation passed to restore the dignity of traditional communities. It also serves the purpose of transforming customary law practices. For example, in some traditional communities where communal land is held and controlled by a traditional leader, women are excluded from the allocation of land for individual occupation and use. This practice is inconsistent with the equality clause in the Bill of Rights which prohibits discrimination based on, among other grounds, gender and marital status. This inconsistency necessitates the development of customary law as mandated by section 39(2) of the Constitution. ... Customary law remains in force to the extent that it is in line with the Constitution and Acts of parliament dealing with matters to which customary law applies. Under the Act unmarried women who are members of traditional communities enjoy rights equal to those held by men when it comes to access to communal property, and management of the affairs of an association.

After commenting on the impact of democratic principles generally on the power of traditional authorities in relation to the removal and banishment of members,¹¹⁰ the court furthermore stressed that¹¹¹

The act seeks to transform customary law and bring it in line with the Constitution. At the same time, the Act extends the fruits of democracy to traditional communities that are still subject to customary law. This is the context in which these provisions must be read and understood.

In the light of the above, the court followed the point of departure that it was obliged not only to avoid an interpretation that clashed with the Bill of Rights, but also that it had to seek a meaning that promoted the rights of the relevant community. In this regard the particular meaning afforded would have to be consonant with the purpose of the Act.¹¹²

On provisional registration the community had been afforded a particular status in law which included certain rights to occupy and use the land in question. All of this had been tied to a period of 12 months, except if an extension was granted.¹¹³ However, in the context of section 5(4) of the *CPA Act*, the reference to the period of 12 months was made simply in relation to the *exercise* of the right to use and occupy land. It did not make any reference to the *lifespan* of the CPA as such. In this light the court concluded that the SCA therefore erred in assigning to this section the meaning that the provisional association ceased to exist upon expiry of the 12-month period, unless the extension was granted.¹¹⁴ Furthermore, at the time of the Minister's intervention the constitution of the CPA had already been adopted and other conditions had likewise been met. It was on that basis that the relevant official recommended final registration (although it never

¹⁰⁹ *Bakgatla-Ba-Kgafela* case para 31.

¹¹⁰ *Bakgatla-Ba-Kgafela* case para 32.

¹¹¹ *Bakgatla-Ba-Kgafela* case para 33.

¹¹² *Bakgatla-Ba-Kgafela* case para 36.

¹¹³ *Bakgatla-Ba-Kgafela* case paras 38-40.

¹¹⁴ *Bakgatla-Ba-Kgafela* case para 42.

happened). Accordingly, the association was established as soon as it had *qualified for registration*.¹¹⁵ This meant that at some point the provisional association co-existed with a permanent association. This would be the case where the requirements for a permanent registration were met, but before the application for registration was made. From that moment on it appeared that two associations would continue to exist side by side until the deregistration of the provisional association had occurred.¹¹⁶ Of importance was that a permanent association acquired rights only upon registration.¹¹⁷ Accordingly, the 12 month period was linked to exercising relevant rights and not to the lifespan of the provisional association as such.

In this whole endeavour the Director-General's role was crucial. Apart from the fact that the usual duties and responsibilities in implementing the Act and providing necessary support and information existed, the Director-General had specific duties with regard to drafting constitutions where the community failed to do so, and had the further duty to do inspection, where necessary. Overall, the actions of the Director-General were pivotal in achieving the objectives of the Act. Ultimately, whenever a community expressed a desire to form an association, the Director-General had to do everything possible to assist the community to accomplish that goal.¹¹⁸ On the facts before the court it was clear that the Director-General had not approached the process of registration in the spirit demanded by the Act.¹¹⁹ Opposition against registration was the fall-back position, instead of assisting and addressing the short-comings.

The Constitutional Court reached the conclusion that, in the light of the scheme of the Act, its objectives, the particular role of the Director-General and all that had transpired in that regard, the order of the SCA had to be set aside.¹²⁰ Once an association qualified for registration, the Director-General had no other option than to register the association. The fact that a traditional leader or some members of the traditional community preferred a different entity to an association was not a justification for withholding registration or referring it to mediation.¹²¹ Effect had to be given to the wishes of the majority.¹²² In conclusion, by effecting the registration the Department would be creating a platform for democracy to flourish among the Bakgatla-Ba-Kgafela Traditional Community.¹²³ The registration of a permanent CPA was thus endorsed.

¹¹⁵ *Bakgatla-Ba-Kgafela* case para 44.

¹¹⁶ *Bakgatla-Ba-Kgafela* case para 45.

¹¹⁷ *Bakgatla-Ba-Kgafela* case para 45.

¹¹⁸ *Bakgatla-Ba-Kgafela* case para 50.

¹¹⁹ *Bakgatla-Ba-Kgafela* case para 51.

¹²⁰ *Bakgatla-Ba-Kgafela* case para 52.

¹²¹ *Bakgatla-Ba-Kgafela* case para 54.

¹²² *Bakgatla-Ba-Kgafela* case para 55.

¹²³ *Bakgatla-Ba-Kgafela* case para 55.

6 Reflection

6.1 Background

The judgment is timely and important. For the Bakgatla-Ba-Kgafela community finalisation was reached concerning the form of ownership and governance, in line with the wishes of the majority of the community. Yet many issues remain. In this regard two particular matters are reflected upon: firstly, developments regarding the *CPA Act* specifically, and secondly, other policy and legislative developments impacting on communal land and communities in general.

6.2 CPA-legislation

While the Constitutional Court is correct in stating that the *CPA Act* is visionary, the reality is that the Act has not been very successful in practice.¹²⁴ Various reasons exist why this is the case, some of which emerge in the judgment. The Act is rather complex and requires technical expertise and know-how.¹²⁵ In this context the Department has a crucial role to play in disseminating information and assisting and advising where necessary. As illustrated in the judgment, problems exist in this regard, as the Department and the Director-General were not of great assistance in the case. It is therefore notable that since the *Bakgatla-Ba-Kgafela*-judgment was handed down in 2015 a *Communal Property Associations Amendment Bill* was published for comment on 29 April 2016¹²⁶ and resurfaced again a year later, in April 2017.¹²⁷ As the Amendment Act has not been finalised yet, it will not be analysed here in detail. Instead, only particular amendments linked to difficulties experienced by the Bakgatla Ba-Kgafela community will be focussed on.

A reading of the April 2017-Bill highlights three specific amendments that will be critical to improving oversight and management and to mediating and ameliorating future difficulties and clashes in a CPA-context. In this regard the Amendment Bill has (a) done away with provisional CPA's as separate entities; (b) provides for a new CPA Office at a national, overarching level, as well as the appointment of a Registrar; and (c) expands the principles to be contained in constitutions. Of critical importance, however, is the new thrust of the Bill, which makes it clear that the main purpose of a CPA is only to administer and manage communal land on behalf of the community. The communities therefore are the real owners of communal land and CPA's only transact on their behalf.¹²⁸ This is in direct contrast to the principal Act,

¹²⁴ DRDLR 2015 <http://pmg.org.za/committee-meeting/17873>.

¹²⁵ Carey-Miller and Pope *Land Title* 485-486.

¹²⁶ Gen N 464 in GG 39943 of 22 April 2016.

¹²⁷ B12-2017.

¹²⁸ Clauses 8 and 22 of the *Communal Property Associations Amendment Bill* 12 of 2017.

currently still operative, that provides for CPA's to acquire, hold and dispose of immovable property.

Section 5, which deals with the registration of provisional CPA's, stands to be deleted as a whole, although some transitional arrangements are contained in clause 18A of the Bill. Under clause 8 all applications for registration have to be lodged with the Registrar, who considers the application in the light of the relevant constitution and all prescribed information. As provisional associations will no longer exist (bar the transitional dimension thereof), the Registrar must now register the association if he or she is satisfied that the association qualifies for registration, and accordingly allocate a registration number and issue a certificate of registration.¹²⁹ This amendment is directly linked to the *Bakgatla-Ba-Kgafela* judgment in that the Constitutional Court found that a CPA effectively exists the moment when it *qualifies for registration*; in other words, when it meets the requirements. In this context there is no room for or no use for provisional associations. However, having no room for provisional associations does not necessarily mean that there is a smooth path to automatic registration. CPA's may be registered only when all requirements have been met. Clause 8(4) of the Bill therefore provides that, where the Registrar is not satisfied that the association qualifies for registration, the community will be notified accordingly. The steps that need to be taken in order to procure the necessary registration accompany that notification. The Registrar is therefore also involved in assisting and advising so as to ensure registration.¹³⁰ Upon registration the association acquires the authority to perform various acts as listed under clause 8(6). Abolishing provisional CPA's does away with the issue of when exactly a provisional CPA terminates and precisely when a (final) CPA begins. The overlapping of these two institutions is thus avoided.

Section 9 of the *CPA Act* (and clause 9 of the Bill) set out the principles to be dealt with in the constitutions of CPA's. These principles were relied on heavily by the Constitutional Court in reaching its decision in the *Bakgatla Ba-Kgafela* judgment.¹³¹ While the bulk of the principles have remained unchanged, references have been inserted in relation to communal property¹³² in particular: for example, fair access to communal property; the administration and management of communal property for the benefit of the members; and a prohibition on excluding a member from access to or the use of any part of communal land which has been allocated for such a member's exclusive or communal use except in accordance with the procedures set out in the constitution.

¹²⁹ Clause 8(3)(a) of the *Communal Property Associations Amendment Bill 12 of 2017*.

¹³⁰ Clause 8(5) of the *Communal Property Associations Amendment Bill 12 of 2017*.

¹³¹ *Bakgatla-Ba-Kgafela* case paras 25–26.

¹³² The concept "communal property" is not defined in the Amendment Bill.

Section 17, dealing with the annual report that has to be tabled in Parliament, was amended drastically under clause 17 of the Bill. The duty to table such a report is no longer with the Director-General, but with the Registrar. As the Registrar has extensive duties and responsibilities regarding oversight, advice, management and governance, he or she would have the full picture of how associations operate and function in practice and what the main concerns and problems are. In this respect the Registrar is the ideal person to draft the report. Unlike the former version of section 17, the amended version is all-encompassing and sets out ample guidelines as regards items and matters that have to be dealt with in the report. This may have a twofold effect: (a) it may highlight particular problem areas so as to ensure that they are dealt with expeditiously and effectively and that support is provided where it is needed most – a much-needed aspect that was also underlined in the *Bakgatla-Ba-Kgafela* judgment; and (b) it contributes to monitoring the Act at an overarching level and providing guidance as to its future adjustment or amendment.

While these developments are generally welcomed, especially the establishment of a new Office and the appointment of a new functionary, a Registrar, the Amendment Bill is not perfect: it provides insufficient guidance regarding concepts of "communal property" and "communal land". In this regard the vesting of the ownership of communal land in the community – and not in the CPA as such – needs the detailed clarification of concepts of communal land and property. This is currently lacking. The Bill is also lengthy and complex. It is also questionable whether the new Office and Registrar will have the necessary capacity and resources to fulfil their roles efficiently, given the massive pressure placed on the land reform budget generally. However, had the Amendment Bill been in operation at the time when the Bakgatla-Ba-Kgafela-community endeavoured to register their CPA, many of the complications and difficulties could arguably have been avoided, or at least dealt with more speed.

6.3 Communal land and traditional communities

While the *CPA Act* has inherent flaws, some of which are being attended to in the Amendment Bill alluded to above, possibly the greatest obstacle to the success of the *CPA Act* has been internal conflicts within communities, especially where traditional authorities and traditional leaders are also involved. This phenomenon was commented on in the judgment.¹³³ Favouring a more democratic form of governance has important implications for traditional authority constructs and roles. Moving away from traditional communal land tenure means moving away from traditional forms of regulation and management, which has crucial implications for traditional leaders. It is thus no surprise that the forming of CPA's in rural areas, while

¹³³ *Bakgatla-Ba-Kgafela* case para 54.

being supported by the majority of the inhabitants, is often actively resisted by traditional leaders.

A fact that has not resonated in the judgment is that the relevant area restored to the community is rich in minerals, especially platinum, and that the traditional leader, Kgosi Pilane, has already entered into various agreements with mining companies.¹³⁴ In this particular case the form of governance would therefore have impacted directly not only on access to and control over land, but also on the income derived therefrom. Endorsing personal and family interests above community and communal interests therefore also factored into the decision as to the final form of governance.

What is striking however, is the impact of the judgment against the background of recent governmental policy documents. The Constitutional Court unequivocally voiced its support for the formation of CPA's in traditional communal areas on the grounds that, cumulatively (a) redressing the remnants of apartheid necessitated more secure forms of tenure; (b) the fruits of democracy must be enjoyed equally; and (c) customary law had to be aligned with the *Constitution*. These considerations were outlined having regard to the scheme of the Act and because the interpretation of legislative measures not only required alignment with the *Constitution*, but also necessitated an interpretation that promoted the rights of the community in question. Interestingly, these considerations are not aligned with the most recent overarching governmental initiatives and developments in this domain. In fact, a clear disconnect emerges. Given that the former homelands generally comprise rural areas, the overarching document dealing with the development of rural areas - the Comprehensive Rural Development Plan of 2009¹³⁵ - is pivotal here. In this regard rural and agrarian transformation is highlighted in particular. Consequently a rapid and fundamental change in relations (meaning systems and patterns of ownership and control) of land, livestock, cropping and community is paramount. However, the most recent policy document, dealing with communal land in particular (constituting vast tracts of rural land), the September 2014 draft of the Communal Land Tenure Policy,¹³⁶ proposes that new CPA's be permitted only in areas where no traditional authorities exist.¹³⁷ In essence this means that CPA's would be limited to areas outside the former homeland areas.¹³⁸ If that is indeed the case, the transformation

¹³⁴ Mathibedi 2017 <http://www.sabc.co.za/news/a/863c1700404fd1c6b6dcff6b78d177f4/Maluleke-commission-to-investigate-Bakgatla-ba-Kgafela-chieftaincy-20170603>.

¹³⁵ Du Plessis, Pienaar and Olivier 2009 *SAPL* 608-610.

¹³⁶ Also see Loate date unknown <http://www.plaas.org.za/blog/communal-land-tenure-policy-state-land-grabbing-and-coercive-use-land-create-voting-blocks>.

¹³⁷ DRDLR 2014 <http://www.ruraldevelopment.gov.za/publications/land-tenure-summit-2014/file/2882-communal-land-tenure-policy-framework> 20. Also see Centre for Law and Society date unknown <http://www.customcontested.co.za/constitutorial-court-confirms-value-of-cpas-in-traitinal-communities>.

¹³⁸ In other words: in areas where land was allocated to communities by way of the redistribution or restitution programmes.

called for in the 2009-Rural Policy would not be realised in the areas where it is needed the most. Instead, traditional communal areas would still be bound to traditional communal forms of ownership and traditional leadership constructs. This result is exacerbated when the potential impact of the *Traditional Courts Bill* of 2011¹³⁹ is also taken into consideration. This Bill, read with the *Traditional Leadership and Governance Framework Act*, essentially places "law making" in the hands of traditional authorities, alongside traditional councils. In line with the Communal Land Tenure policy, where "conventional traditional communal areas observe customary law", traditional councils or traditional authorities are vested with the responsibility of administering land and all land-related resources on behalf of households.¹⁴⁰ Overall, it is thus striking that the judgment handed down in August 2015 is directly contrary to what government intends to do with CPA's generally and with communal land in particular.

As the judgment stands presently, its impact extends the boundaries of communal land and governance issues. While it endorses and promotes democratically-styled forms of ownership and governance, it specifically finds that customary law – while important and legitimate – has to be in line with the *Constitution* and relevant legislative measures. It confirms very clearly that people have the right to choose their form of land holding and that the State cannot enforce communal tenure as the only option. That would be the case generally in South Africa, but especially in the former homeland areas, where traditional leadership constructs remain prevalent. Ultimately the judgment forces the State to re-think its basic approach to communal land, ownership constructs and forms of governance. While an Amendment Bill has since been published, a revised version of the *CPA Act* will be of no use if the State has no intention of employing the Act in all areas where communal land is located. An urgent reconsideration and re-alignment of all relevant policy documents, legislation and case law is thus imperative.

7 Conclusion

While sound in theory, the particular approach to this kind of collective ownership where customary law and tradition are entwined with property constructs and forms of governance, as well as the mechanics thereof, has proved to be extremely problematic in practice.¹⁴¹ Forms of collective ownership in principle pose multi-dimensional difficulties to the legislature

¹³⁹ In 2008 the *Traditional Courts Bill* was first published for comment and was later revoked. However, in 2011 the Bill was re-introduced, essentially in the same format, as indicated in the explanatory summary published in Gen N 901 in GG 34850 of 13 December 2011, which also contained the invitation to submit comments. As it happened, the Bill lapsed in 2012.

¹⁴⁰ DRDLR 2014 <http://www.ruraldevelopment.gov.za/publications/land-tenure-summit-2014/file/2882-communal-land-tenure-policy-framework> 21.

¹⁴¹ Barten and Goldsmith "Community and Sharing" 6. Also see the memorandum to the *Communal Property Associations Amendment Bill* 12 of 2017 1.1-1.5.

(that has to reduce ideals and concepts to legal drafting and concepts), the implementers thereof as well as the communities affected thereby. It is extremely difficult to give effect to the constitutional imperatives of equality and dignity in practice. That remains the case even where CPA's are constructed with sound constitutions in place. What exacerbates the problem inherent in instances where a CPA is the preferred option is the fact that this legal construct is not only an ownership model but it is also a governance and managerial model. In practice the conflation of ownership and managerial elements remains a challenge.

However, experiencing difficulties in getting a CPA off the ground and making it work effectively should not deter communities from exploring the many benefits that accompany a more democratic form of ownership and governance. Apart from the fact that community members have a right to choose the form of ownership and/ or governance, communal ownership on a democratic platform remains valuable in other respects as well: it creates incentives for sustainable resource use and management;¹⁴² it enjoins customs and cultural rules to adapt and align with constitutional imperatives; and when operated successfully it results in more secure tenure and shared benefits – including mineral wealth and progress.¹⁴³

Clearly communal land, ownership and governance will remain key issues to be dealt with urgently by government. It is inconceivable that the present polarisation should continue in that the Constitutional Court endorses democratic forms of governance within traditional communities at one end of the spectrum and government promotes democratic forms of governance in all areas *except* in traditional communities on the other. Where communities choose democratic governance options that also impact on ownership, all available resources, including state and departmental assistance, guidance and support, should follow. As long as the polarisation continues, confusion will reign regarding the status of certain parcels of land and the relevant authority over these areas. This provides ample opportunity for corruption and exploitation.

For the Bakgatla-Ba-Kgafela community, legal certainty was achieved in that a CPA was confirmed. But there is not yet closure. Endorsing this form of ownership and governance is by no means a guarantee that everything will work out perfectly. As any form of communal or collective ownership naturally also involves human beings, the human element has to be accounted for as well. What is not negotiable, however, is the need to sculpt the best kind of ownership and governance construct for the particular community in the light of its particular circumstances and subject to constitutional norms and values.

¹⁴² Cousins *et al Land, Memory, Reconstruction and Justice* 13.

¹⁴³ Barten and Goldsmith "Community and Sharing" 25-27.

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List of Abbreviations

CPA

Communal property associations

CPA Act	Communal Property Associations Act 28 of 1996
DRDLR	Department of Rural Development and Land Reform
LCC	Land Claims Court
PELJ	Potchefstroom Electronic Law Journal
SAHJ	South African Historical Journal
SAPL	Southern African Public Law
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review