UNIVERSITY OF KWAZULU-NATAL

COLLEGE OF LAW AND MANAGEMENT STUDIES

SCHOOL OF LAW

# Seeking Tenure Security: An Analysis of the Communal Land Tenure Bill and its Purported Promise to Give Effect to Section 25(6) of the Constitution

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This mini-dissertation is submitted in partial fulfilment of the requirements for the degree of Master of Laws in Constitutional Litigation

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2022

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I, Ektaa Deochand, declare that:

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## ACKNOWLEDGEMENTS

I am eternally grateful to my mother, who has made endless sacrifices to give me every opportunity. All my achievements are through you.

I am thankful to my colleagues at the Legal Resources Centre, who tirelessly breathe life into the constitutional promise every day.

My sincere gratitude is extended to the University of KwaZulu-Natal and particularly my supervisors, Professor Stephen Peté and Mr David Hulme. This would not have been possible without your ongoing guidance and encouragement.

And of course, this dissertation was inspired by and is dedicated to every woman, child and man I have met during my time working in rural KwaZulu-Natal.

# ABSTRACT

Since the demise of apartheid, land reform has been one of the greatest challenges facing the democratic dispensation. 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 is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress*." There is currently no comprehensive legislation which gives effect to this right, despite various laws providing for some level of protection for security of tenure to a certain extent, such as the Interim Protection of Informal Land Rights Act 62 of 1997.

One of the reasons for the delay in passing such legislation is the debate around the type of entity which should be selected to administer land which is communally held, and the role of traditional leaders. Traditional leaders were bolstered by the apartheid regime and have in some instances abused their powers relating to communities residing on communal land. The previous attempt to enact legislation to give effect to section 25(9) was challenged on the basis that it allowed traditional councils to assume the role of land administration committees, which could have resulted in the security of tenure of communities being diminished.

In 2017 the Department of Rural Development and Land Reform published the Communal Land Tenure Bill in order to give effect to section 25(6) of the Constitution. The intended purpose of the CLTB is to provide for the transfer of communal land to communities. This dissertation will analyse the communal landholding entities proposed in the CLTB to administer communal land, particularly communal property associations and traditional councils, in an attempt to assess whether these entities would constitute a viable legal vehicle to give effect to section 25(6) the Constitution and allow for democratic decision-making relating to land use and allocation.

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# CHAPTER ONE: INTRODUCTION TO COMMUNAL LAND TENURE IN SOUTH AFRICA AND PURPOSE OF RESEARCH

## 1.1 Introduction

Historically, African people were relentlessly dispossessed of their land and given legally insecure tenure over the land they occupied.[1] Since the demise of apartheid, land reform has been one of the greatest challenges facing the new dispensation. The South African land reform programme may be characterised as having three components: restitution of land to people who were dispossessed after 1913;[2] the redistribution of land to redress the skewed ownership of land along racial lines; and tenure reform to secure the land rights of people whose tenure is insecure as a result of discriminatory laws and practices. Insecurity of tenure is particularly problematic for those living in former 'native reserves', sometimes under traditional leadership, often known as communal areas.[3] Although all three components are strongly interlinked, the focus of this dissertation is tenure reform, specifically in terms of section 25(6) of the Constitution and landholding options for communities which hold land collectively.

Systems of communal land tenure and the role of chiefs in relation to these systems have been fundamentally transformed over the history of South Africa. Western legal constructs combined with racism led to a caricatured representation of African systems of land tenure which exaggerated the role of chiefs and diminished the rights of lower levels of political authority and households.[4] Therefore, any legislative attempts to regulate tenure in rural areas are particularly complex.

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 the extent provided by an Act of Parliament, either to tenure which is legally secure, or to comparable redress.*" Section 25(9) requires that Parliament enact the legislation referred to in subsection (6). [5]

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[1] *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC) at par 27 (hereafter "*Tongoane CC*").
[2] The Constitution of the Republic of South Africa 1996, Section 27(5).
[3] A Claasens and B Cousins *Land, Power & Custom, Controversies generated by South Africa's Communal Land Rights Act* (2008) 3.
[4] P Delius, 'Contested Terrain' in A Claasens & B Cousins (eds) *Land, Power & Custom, Controversies generated by South Africa's Communal Land Rights Act* (2008) 223.
[5] The Constitution, Section 25 and 26.

Parliament's prior attempt at enacting legislation in terms of section 25(9) was the Communal Land Rights Act[6] ("CLARA"). This Act was struck down in the Constitutional Court in the case *Tongoane v Minister of Land and Agriculture*[7] in 2010. Although the Constitutional Court did not deal with the substantive provisions of the Act, the High Court found that the Act would have undermined the security of tenure of various communities if traditional councils were given authority to administer their land. Seven years after the striking down of the CLARA, the Department of Rural Development and Land Reform made a fresh attempt to fill the lacuna in the law by publishing the Communal Land Tenure Bill in 2017 ("CLTB").[8] The Bill proposes three options for communities to choose land administration entities to administer their land. These are communal property associations; traditional councils; and any other entity approved by the Minister.

## 1.2 Aim and Purpose of this Research

This dissertation traces the evolution of legal provisions relating to communal land tenure, and assesses the entities proposed in the Communal Land Tenure Bill for communities to hold land collectively. Some of the proposed entities in the CLTB are traditional councils; communal property associations; and 'other entities approved by the Minister'. The institution of traditional leadership and custom is sometimes at odds with democratic decision-making. According to Roux, the core idea of democracy is that the decisions affecting the members of a political community should be taken by the members themselves, or at least by elected representatives whose power to make those decisions derive from the members.[9] The aim of this research is to determine whether the entities proposed in the Bill provide for democratic decision-making regarding the administration of land and whether they are viable legal solutions to advance security of tenure in communal areas.

## 1.3 Research Objectives

[6] Act 11 of 2004.
[7] *Tongoane* CC supra.
[8] Communal Land Tenure Bill 2017, Government Gazette No. 40965 7 July 2017.
[9] T Roux 'Democracy' in S Wilson & M Bishop (eds) *Constitutional Law of South Africa* (2018) 1.

The objectives of this research are to:

a) Provide a brief historical overview of communal land rights in South Africa and the expanded role of traditional leaders in administering land;

b) Provide a framework of the legal and political landscape regulating communal land tenure after the Constitution was enacted, particularly relating to communal property associations and traditional leadership;

c) To discuss the successful legal challenge to the Communal Land Rights Act instituted by rural communities; and

d) Assess whether the Communal Land Tenure Bill proposes communal landholding entities which will allow for democratic decision-making when it comes to decisions relating to land use and allocation on communal land.

## 1.4 Relevance of this Research

Despite political undertaking, there remains a lacuna in the legal framework relating to security of tenure for persons on communal land. The Communal Land Tenure Bill was introduced in 2017 and for several years thereafter, there was no legislative progress on the Bill. However, during March 2021 the Department of Agriculture, Land Reform and Rural Development publicly stated that the Bill is ready to be tabled in parliament.[10] In December 2021 the Department advised Parliament that they are currently working on the Bill, and it would be undergoing public consultations.[11] This research is relevant as there appears to be impetus to revive and pass the Communal Land Tenure Bill. It is critical to assess the viability and nature of landholding entities in order to ensure that land held collectively is administered effectively and in the best interests of both a community and community members. This research will add to the debate around proposed legal reform for communal landholding.

[10] 'Communal Land Tenure Bill ready to be tabled before parliament' SABC News (2021) available at https://www.sabcnews.com/communal-land-tenure-bill-ready-to-be-tabled-before-parliament/

[11] 'Update and report back by DALRRD on stakeholder matters reported to the Committee' *Parliamentary Monitoring Group* available at https://pmg.org.za/committee-meeting/34033/ accessed on 18 March 2022.

## 1.5 Methodology

Desktop research will be the form of research for this dissertation. Relevant land tenure legislation and proposed legislation will be analysed and discussed for purposes of highlighting the provisions dealing with communal landholding entities and the intersection with traditional leadership.

Literature in the form of textbooks, journal articles and online discussions will be used to offer more insight and expert opinion on the topic of communal land tenure and legal protection for informal land rights.

Case law will be referred to in order to demonstrate the way in which communal land tenure legislation has been interpreted by our courts and the impact this will have on proposed legislation.

This dissertation is structured as follows; chapter two discusses the historical overview of communal land tenure in South Africa; chapter three looks at constitutional reform regarding communal land and the persisting role of chiefs; chapter four discusses the constitutional challenge to the Communal Land Rights Act; chapter five discusses the proposed legislative reform for communal land; chapter six analyses the landholding options proposed in the Communal Land Tenure Bill; and chapter seven concludes the dissertation with a final summary and concluding remarks.

# CHAPTER TWO: HISTORICAL OVERVIEW OF COMMUNAL LAND TENURE IN SOUTH AFRICA

## 2.1 Introduction

In the case *Government of the Republic of South Africa v Grootboom*, it was stated that '*rights must be understood in their social and historical context.*'[12] To contextualise the trajectory of land tenure reform initiatives and proposed legislative reform in the form of the CLTB, it is necessary to reflect on the major historical events which have impacted upon land tenure, including political, social and economic factors. Whilst a complete history of land possession in South Africa cannot be covered in this mini-dissertation, this chapter seeks to traverse some of the key occurrences in South African history which have had an impact on the evolution of traditional land tenure systems and the role of traditional leadership in the administration of such systems.

## 2.2 European Arrival in Africa

In 1652, Jan van Riebeeck of the Dutch East India Company arrived at the Cape of Good Hope to establish a refreshment station that provided produce to ships sailing from the Netherlands to India.[13] Two groups of people already occupied much of Southern Africa, the first group being the Khoisan (consisting of San hunter-gatherers) and the KhoiKhoi nomadic herders; and the second group being African or black inhabitants, who were pastoralists that kept livestock.

The infrastructural and legal development of the Cape Peninsula was determined by directives of the Dutch East India Company.[14] At the time, Europe was moving from a feudalistic to a more individualistic society. In matters affecting land, individual ownership and control were generally in keeping with the values of the new Europe.[15]

Freehold permanent tenure was granted on the condition that produce was grown for the Dutch East India Company. However, the Company had no fixed policy toward the local people. In

[12] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) par 22.
[13] Report of the Presidential Advisory Panel on Land Reform and Agriculture (2019) 23.
[14] JM Pienaar *Land Reform* (2014) 54.
[15] D L Carey Miller and A Pope, *Land Title in South Africa* (2000) 3.

1657 Jan van Riebeeck entered into an agreement with the KhoiKhoi which delineated the Liesbeeck and Salt Rivers as the Cape Peninsula boundary as an island of Europe separated from Africa.[16]

From 1732 onwards, land was available on the basis of quitrent[17] or 'erfpacht' tenure.[18] It was ordered by the Governor and Council that additional land be made available on a renewable fifteen-year basis.[19] Under the new system of quitrent tenure, each farm was to be properly surveyed at the expense of the occupant and a diagram was to be registered in the deeds office.[20]

In 1778 an agreement was entered into between the Cape government and the Xhosa community stating that the Fish River was the eastern boundary of the Cape Colony. In Cape Town, a formal defined form of freehold existed, but in surrounding rural areas a less structured form of tenure existed in relation to loans of farming land or 'leeningsplaats'.[21] Formal freehold tenure included relatively large viable farming units with access to adjacent pasture land. The less structured 'leeningsplaats' was a loan of farming land. This entailed a bi-annual or annual payment of a nominal amount as token rent and later a tithe on agricultural production.[22]

## 2.3 The Cape Colony

In 1795 the British annexed the Dutch Cape Colony, strategically to command the route to India. It was retaken by the Dutch from 1803 to 1806 and then annexed by the British again in 1806.[23]

The British deemed the Roman-Dutch law to be native to the Cape, therefore only land titles granted by the Dutch authorities were recognised by the British. The Khoikhoi and San had no recognisable land titles. In 1813 standardised approaches for surveying land and individual tenure reforms were advanced.[24] Loan farm tenure was converted to perpetual quitrent tenure.

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[16] Pienaar *Land Reform* 55.
[17] An original form of leasehold on state land with certain restrictions. For example, land was inalienable and could not be mortgaged.
[18] Pienaar *Land Reform* 57.
[19] Carey Miller and Pope, *Land Title in South Africa* 5.
[20] Carey Miller and Pope, *Land Title in South Africa* 6.
[21] Ibid 56.
[22] Carey Miller and Pope, *Land Title in South Africa* 4.
[23] Ibid 58.
[24] Ibid 60.

In exchange for paying annual rent, a right-holder received 'irrevocable title' to a certain portion of land.[25]

From around 1833 the official policy would be that British officials would enter into discussions with local traditional leaders and conclude treaties relating to land. After numerous treaties were entered into, this policy was abandoned with the Seventh Boundary War.[26] The area between the Kei and Keiskama Rivers was declared British Crown land and allocated to the Xhosa community for their exclusive occupation. It was later annexed in 1865 and became part of the Cape Colony. Between 1875 and 1894 all the areas occupied by Xhosa tribes in the Eastern Cape gradually came under the Cape Town British administration. The area was then divided into magisterial districts, and each district was subdivided into 'locations' or regions. A headman was in charge of each region who had to report to a white magistrate.[27]

In 1883, the Natives Laws and Customs (Thembuland) Commission proposed that everyone (outside the communal areas) should receive individual titles to land in order to ensure loyalty towards the Crown. However, these recommendations were not followed and black people were not granted ownership in white areas. Many people had already left communal areas to settle in towns and urban areas.[28]

In an attempt to convince black people to return to their areas of origin, they were promised land with a secure form of tenure, being quitrent[29] and leasehold.[30] In 1894 the Glen Grey Act[31] was introduced to achieve this objective. It recognised individual tenure for black persons in the form of quitrent. Within the locations occupied by Xhosa communities mentioned above, further subdivision into allotments occurred. However, allotments were only alienable or executable with the governor's consent.[32]

Although the policy purpose was to establish a 'producing class' of black persons in the interests of reserves being self-supporting, at the same time the principle of 'one man one lot'

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[25] Ibid 59.
[26] Pienaar, *Land Reform* 59.
[27] Ibid 69.
[28] W du Plessis and J Pienaar, 'The more things change, the more they stay the same: the story of communal land tenure *in South Africa'* 2010 *Fundamina* 76.
[29] An original form of leasehold on state land with certain restrictions.
[30] W du Plessis and J Pienaar, 'The more things change, the more they stay the same: the story of communal land tenure *in South Africa'* 2010 *Fundamina* 77.
[31] Glen Grey Act 25 of 1894.
[32] TRH Davenport 'Some Reflections on the History of Land Tenure in South Africa, Seen in the Light of Attempts by the State to Impose Political and Economic Control' (1985) *Acta Juridica* 60.

was designed to prevent the emergence of black farmers so successful that they might compete with white farmers.[33]

Bundy suggests that earlier writers looked upon the Glen Grey Act favourably as they tended to only consider the successful peasants whose views were aired in the Transkeian Territories General Council which showed agricultural innovation and prosperity. But in Bundy's view, this was confined to only a small class of peasants.[34]

## 2.4 The Great Trek

A combination of the Great Trek and the Difaqane[35] changed the face of South Africa. When wandering traditional communities returned after the destruction of tribal structures and the disintegration of chiefdoms due to internal conflict, their land was already taken over by Boers moving inland.[36] Between 1834 and 1840 the Boers left the Cape colony in a series of trek parties inland. It has been contentiously argued that the inland trek effected dispossession of vast tracts of land that were occupied by indigenous people.[37]

Van Der Merwe writes:

> *"The important consequence of European settlement in the interior…was that Boers not only acquired dominium over the lands of the Africans, but used their control over the land to achieve sovereignty over them. In fact, evidence seems to indicate that the early settlers not only used their control over land to facilitate sovereignty over Africans, but actually saw their dominium over the land as justification for exercising imperium or, conversely, regarded their subjugation of an African tribe as justification enough to gain control over their land."*[38]

[33] *Land Title in South Africa* 17.
[34] RJ Thompson, 'Cecil Rhodes, The Glen Grey Act, and the Labour Question in the Politics of the Cape Colony' MA Thesis, Rhodes University (1991) 36.
[35] Period of forced migration of African tribes attributed to the rise of the Zulu King Shaka.
[36] Pienaar *Land Reform* 66.
[37] Ibid 63.
[38] D Van der Merwe 'Land tenure in South Africa: a brief history and some reform proposals' *TSAR* (1989) 673.

The movement inland resulted in the proclamation of various Boer Republics, namely, the Orange Free State, the Transvaal and the Natal Republics. The declaration of the Republics brought with it statutory measures that confirmed a policy of racial division.[39]

In the Transvaal, black land was taken by the Boers through invasion and treaties, which led to the establishment of the Zuid Afrikaanse Republiek (Transvaal Republic) in 1852. In that year, the British signed the Sand River Convention with the Boers which stated that all African land north of the Lekwa/Igwa (Vaal) River belonged to the Boers. All Africans were subjected to the supervision of the Native Sub-Commissioners.[40] The Convention had the effect of automatically turning Africans into tenants and labour tenants on land that they had lived on for many generations.[41] In 1854 the area between the Orange and Vaal Rivers was recognised under the Convention of Bloemfontein as the Republic of the Orange Free State.[42]

Although some movement toward individualised land holding occurred in the Cape Colony for black people, this did not occur in the independent Boer republics. No land rights could be acquired by blacks in the Orange Free State.[43] Although no legislative measure prohibited the acquisition of land by Africans in the Transvaal at this stage, ownership of land was rarely acquired. There were some exceptions, such as the Bafakeng tribe (located in what is today the North-West Province) acquiring tracts of land through a missionary, and the MotshaKgatlas acquiring land from white farmers in exchange for their services.[44]

In 1877 the Transvaal Republic was annexed by the British government, but again became a Boer republic under the Pretoria Convention of 1881.[45] In terms of the Pretoria Convention and the Volksraad Resolution of 14 August 1884, ownership of land could not be registered in the name of a native. The Pretoria Convention provided that *"Natives will be allowed to acquire land, but the grant or transfer of such land will in every case be made to and registered in the name of the Native Location Commission hereinafter mentioned, in trust for such natives"*[46]

This rule prevailed until challenged by Reverend E Tsewu in 1905, when the Transvaal Supreme Court handed down a judgment in the case *Tsewu v Registrar of Deeds*,[47] invalidating

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[39] Pienaar *Land Reform* 54.
[40] In terms of Law 4 of 1885.
[41] Report of the Presidential Advisory Panel on Land Reform and Agriculture supra 23.
[42] Pienaar *Land Reform* 72.
[43] Ibid.
[44] Ibid 73.
[45] Ibid.
[46] Pretoria Convention 1881, Article 13.
[47] 1905 TS 130 at 135.

the proclamation of 1881 on the grounds that the manner of the promulgation did not give it the force of law.[48] The result of this decision was that Africans were able to purchase land which could be registered in their own names for a short period of time.[49]

## 2.5 Natal

The Independent Republic of Natalia had a distinct racial land policy. This was later supported by the British when Theophilus Shepstone was appointed as diplomatic agent after the British annexation of Natal in 1844.[50] Shepstone was placed in charge of Native affairs in Natal from 1845 to 1875.[51]

Chiefs were recognised and incorporated as the lowest rung on the administrative system. Following the fragmentation of the Difaqane and Voortrekker dominance, many chiefdoms had disintegrated. Shepstone gathered these people into 'tribes' and appointed men as 'chiefs' to rule them. Some of these chiefs were leaders of communities, but often their appointment was due to Shepstone's preferences and not any traditional legitimacy.[52]

The Governor of Natal was regarded as the trustee of all land in Natal and also as the Supreme Chief of the AmaZulu. In 1864, Governor Pine thought it unrealistic to allow tribes to reorganise themselves in the tribal areas. His view was that white farmers could not keep up with African farmers who in his opinion, had 'slave women' to work in the fields. The resistance built up in the settler community was used as an excuse to divide land in a manner in which for every thirteen acres of land granted to a Zulu farmer, 6000 acres were granted to a settler farmer.[53]

## 2.6 Twentieth Century

In the twentieth century land use changed dramatically. This was a result of urban expansion linked to the discovery of minerals, economic factors, the effects of the Anglo-Boer war and

[48] TRH Davenport 'Some Reflections on the History of Land Tenure' supra 59.
[49] Ibid 61.
[50] Pienaar *Land Reform* 70.
[51] Ibid.
[52] P Delius, 'Contested Terrain' 223.
[53] 'The more things change, the more they stay the same' 77.

various agricultural disasters including cattle disease and drought. There was a concentration of poor whites and blacks in urban areas, general poverty and overcrowding in areas reserved for Africans.[54]

In 1903 the British government appointed the Zoutpansberg Land Tenure Commission which published the Lagden Report in 1905.[55] This report made several findings which for the first time recommended a structured racial approach to land.[56]

The South African Native Affairs Commission was subsequently established which approved of the practice of 'native reserves'. The Commission identified natives as having 'distinct rights' to the reserved lands as the '*ancestral lands held by their forefathers*.'[57] Their tenure rights were characterised as a form of group ownership under which the 'Tribal Chief' administered land in trust for the people. The chiefs were said to have 'transferred their sovereign rights' to the Crown through a process of 'peaceful annexation'. The Crown then had the duty to administer the affairs of the natives according to traditional forms of governance, being 'tribalism'.[58]

On 31 May 1910 the Union of South Africa came into being, with General Louis Botha as the Prime Minister.[59] The connection between the exercise of authority over blacks and the exercise of authority over land was made explicit in section 147 of the South Africa Act of 1909, which stated that the executive:

> *"shall exercise all special powers in regard to native administration hitherto vested in the Governors of the Colonies or exercised by them as Supreme chiefs, and any lands vested in the Governor . . . for the purposes of reserves, for native locations shall vest in the Governor-General in Council, who shall exercise all special powers in relation to such reserves as may hitherto have been exercisable by any such Governor."*[60]

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[54] Pienaar *Land Reform* 75.
[55] Report produced by the Native Commissioner, Sir Godfrey Lagden.
[56] Pienaar *Land Reform* 76.
[57] S Woolman & J Swanepoel 'Constitutional History' in S Wilson & M Bishop (eds) *Constitutional Law of South Africa* (2018) 14.
[58] Ibid 14.
[59] Pienaar *Land Reform* 79.
[60] S Woolman & J Swanepoel 'Constitutional History' supra 15.

By 1910 many Africans had lost their land or no longer lived within their traditional communities. Those who still lived in tribal areas either did so according to their own customs and practices or in terms of a land tenure system that was enforced officially.[61]

## 2.7 Black Land Act of 1913

The Black Land Act[62] established a nation-wide policy of spatial segregation based on race. The Act defined "native" as *"any person, male or female, who is a member of an aboriginal race or tribe of Africa; and shall further include any company or other body of persons, corporate or unincorporate, if the persons who have a controlling interest therein are natives*".[63] For consistency in terminology, persons classified as 'native' shall be referred to as 'black'.

Blacks were now prohibited from purchasing, leasing or otherwise acquiring any land outside 'scheduled areas'. These were parcels of land listed in the Schedule to the Act which comprised of various geographical areas across South Africa. Whites were also prohibited from purchasing land within the scheduled native areas.[64] The Act excluded the Cape, but applied to land in the Free State, Transvaal and Natal. The Land listed in the scheduled areas initially comprised 7.3% of South Africa, and increased to 8.3% later. This was intended to cater for about 67% of the population.[65]

The Black Land Act enforced segregation by stating that except with the approval of the Governor-General, *"a native shall not enter into any agreement or transaction for the purchase, hire or other acquisition* (of land outside the scheduled native areas) *from a person other than a native"*[66] and *"no person other than a native could acquire land within a scheduled native area, under penalty of a hundred pound fine or six months imprisonment."*[67]

Black people outside these scheduled areas had to return to 'their land of origin'. This was extremely difficult as the ancestors of some had left their communities decades ago with no

[61] Du Plessis & Pienaar 'The more things change, the more they stay the same' 78.
[62] Black Land Act No. 27 of 1913.
[63] Black Land Act No. 27 of 1913, Section 10.
[64] Pienaar *Land Reform* 82.
[65] Ibid 83.
[66] Black Land Act 27 of 1913, Section 1.
[67] TRH Davenport, "*Some Reflections on the History of Land Tenure"* 61.

subsequent contact. The result was that thousands of people were left homeless, which resulted in death of children and cattle, and eventual impoverishment. The scheduled areas consisted of stretches of communal land that were not large enough to ensure a sustainable livelihood for occupiers.[68]

Davenport identifies the ulterior motives behind the Act as follows:

> '*The Land Act imposed a policy of territorial segregation with a very heavy hand. It aimed specifically to get rid of those features of African land ownership and share-cropping which white farmers found undesirable, and enlarge reserves to ease congestion and facilitate the recruiting of labour for the mines.*'[69]

When the Natives (Urban Areas) Act[70] was passed, it provided for the establishment of black locations and single-sex hostels in predetermined urban areas. It also provided for local and general councils for black areas. This Act was succeeded by the Black Administration Act,[71] which regulated all aspects of administration of black persons, including family law and succession.

The Black Administration Act created a distinct and legal domain for blacks drawing on an authoritarian understanding of chiefly rule as a model. This was a significant step in the incorporation of chieftainship and its redefinition as an instrument of administration with power devolved from above.[72] Under this Act, the Governor General could recognise or appoint any person as a chief or headman and was authorised to define their powers, duties and privileges. Among other things, the Act allowed chiefs and headman to allot land in a just manner for arable and residential purposes.[73] This transformation was bolstered by an evolving system of customary law that entrenched the powers of the supreme chief and supported an authoritarian interpretation of chiefly powers.[74]

## 2.8 The Native Trust and Land Act of 1936

[68] Du Plessis & Pienaar 'The more things change, the more they stay the same' 79.
[69] *Land Title in South Africa* 19.
[70] Natives (Urban Areas) Act 23 of 1920.
[71] Native Administration Act 38 of 1927, later named the Black Administration Act.
[72] P Delius, 'Contested Terrain' 223.
[73] Contested Terrain 223.
[74] Ibid 224.

In 1936 the Native Trust and Land Act[75] was introduced which provided for the establishment of a Native Trust (later renamed the South African Development Trust) and provided for further acquisition of land for black occupation.[76] The Trust acquired 17.6 million morgen, which comprised about 13.4% of the country for native occupation.[77] All land reserved for occupation by blacks and land within the scheduled native areas vested in the Trust.[78] The affairs of the Trust were administered by the Governor-General in his capacity as Trustee, who could delegate his powers and functions to the Minister of Native Affairs.[79] The Governor-General had the power to make regulations, among other things, "prescribing the conditions upon which natives may purchase, hire or occupy land held by the Trust."[80]

The Act aimed to limit the number of black families residing on white farms and regulated conditions of service. Magistrates were required to keep registers of all labour tenants in their jurisdiction and occupiers on white land who were not registered were subject to eviction.[81] Section 13 of the Act empowered the trustees of the Trust to expropriate land owned by blacks outside a scheduled area for public health reasons or for any other reason which would promote public welfare or be in the public interest.[82] All communal land was endorsed in the Deeds Office as state land regardless of whether or not communities had proof that they were indeed owners of the land.[83]

The Native Trust Act went further than the 1913 Act by controlling the basis upon which land would be held in black areas by employing the trust concept.[84] Although not a new concept, trust ownership or another kind of paternalistic or indirect form of ownership was increasingly seen to be preferable, while individual tenure was reserved for whites. It also involved the utilisation of traditional tribal structures.[85] Chiefs became instruments of policies which were determined by priorities external to communities.[86]

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[75] Later renamed the Development Trust and Land Act 18 of 1936
[76] Pienaar *Land Reform* 88.
[77] Ibid 92.
[78] Native Trust and Land Act 18 of 1936, Section 6.
[79] *Tongoane* supra 14.
[80] Native Trust and Land Act 18 of 1936, Section 48(1)(g).
[81] Pienaar *Land Reform* 91.
[82] HJ Kloppers & GJ Pienaar 'The historical context of land reform in South Africa' 2014 *PER/PELJ* 683.
[83] The more things change, the more they stay the same 79.
[84] Pienaar *Land Reform* 93.
[85] Ibid.
[86] Contested Terrain, 228.

In communal areas white officials previously exercised a loose oversight over land tenure managed by chiefs and headman, but the trust system now gave them a central role. They were given wide powers to allot, determine the size of or cancel allotments of land for arable and residential purposes. Initially, there were attempts to win community support for the introduction of these measures, but the system became coercive over time.[87]

## 2.9 Apartheid Years

In 1934 the National Party and the beginning stages of apartheid ideologies were formed. Research and ideas by Professor Hendrik F Verwoerd and others would develop into the ideology of apartheid.[88] Separate development was supported and blacks were made permanent residents of defined areas known as reserves, which were well removed from their places of work in white urban areas.[89] Reserves were considered to be 'homes' of black South Africans and black people in urban areas were only tolerated on an interim basis as long as they were necessary for the provision of labour.[90]

In 1948 the National Party won the elections, and two broad phases of apartheid were entered into; the early years which formulated policy in negative terms (excluding certain populations from benefits and geographic areas); and 'grand apartheid' which commenced in the 1960s and which was more positively formulated, for example promotion of self-governance and self-determination.[91] The Nationalist government viewed reserves as a distinct domain for African society and asserted that chieftainship was the central and authentic institution within African society and could provide the foundations for the creation of a separate political system.[92]

Under the Population Registration Act[93], all persons were classified into different racial groups. This classification had implications for land rights, where one could reside and work, determined a marriage partner, access to healthcare and recreational amenities.[94]

[87] Contested Terrain, 228.
[88] Pienaar *Land Reform* 98.
[89] *Land Title in South Africa* 31.
[90] Ibid.
[91] *Land Reform* 99.
[92] Contested Terrain 229.
[93] Population Registration Act 30 of 1950.
[94] *Land Reform* 102.

The Natives (Urban Areas) Act[95] provided that black people could occupy urban areas on a temporary basis only. It also provided for 'locations' where blacks could remain as long as they were employed. A two-way migration paradigm was created, where blacks resided and worked in urban areas on a temporary basis and their families remained in rural areas.[96]

In 1951 the Bantu Authorities Act[97] was passed. The Act began a systemic process of incorporating chiefs into the administrative system. The system involved tribal authorities that were based on historical chiefdoms and regional territories. While during pre-colonial times councillors in many societies were partly selected on the basis of popular support and representing subgroups, the majority of persons in the tribal authorities were appointed by the chief and white officials. Stipends paid to chiefs significantly increased, which reduced the dependence of chiefs on their subjects and strengthened the hand of the state.[98] Individuals who were ready to co-operate with the new order replaced individual chiefs who proved reluctant to accept the new system.[99]

In 1952, the Prevention of Illegal Squatting Act[100] was amended to clarify and limit the right of blacks to be permanent residents in urban areas. The right was limited to the circumstances of birth, fifteen years continued residence or ten years continuous employment for the same employer. For the first time, all black persons were required to carry 'reference books' which recorded employment record, tax payment information and details of arrests.[101]

As part of the overall aim of spatial racial segregation, independent homelands were created for different tribal affiliations. Depending on the degree of development, homelands would become independent or self-governing territories.[102]

The Tomlinson Commission[103] was appointed to examine the economic development of the homelands within the apartheid paradigm. The Report was published in 1955 and supported 'betterment planning' to rehabilitate the reserves and address wide-spread soil erosion. It proposed effective economic farm units, which would be offered to a limited number of black farmers to whom ownership would be transferred. It proposed that large numbers of people

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[95] Natives (Urban Areas) Act 21 of 1923.
[96] *Land Reform* 104.
[97] Bantu Authorities Act 68 of 1951, subsequently renamed the Black Authorities Act.
[98] Contested Terrain 229.
[99] Ibid 230.
[100] Prevention of Illegal Squatting Act 52 of 1951.
[101] Land Title in South Africa 31.
[102] Ibid 113.
[103] Commission for the Socio-Economic Development of the Bantu Areas.

would have to be moved off the land and settled in urban areas or towns within the reserves. Hardly any of the recommendations of the Report were accepted on the basis that it was too radical and expensive.[104] The recommendation to establish small scale farmers was rejected and communal or traditional land ownership continued instead.[105]

In 1969 Proclamation R188 was issued in terms of section 25 of the Black Administration Act.[106] It provided for two types of tenure; quitrent on surveyed land, and a permission to occupy on unsurveyed communal land. The allocation of the permission to occupy was discredited in some areas as a reaction to the corruption of some government-appointed traditional leaders and officials.[107]

A large part of the 20th century focus was on turning all black people into de facto foreigners by de-nationalising them from South Africa and making them citizens of homelands. By the end of 1976, the following states were deemed to be self-governing territories: Ciskei, KwaZulu, Bophuthatswana, Lebowa, Venda, Gazankulu and QwaQwa. The Transkei (which had been a self-governing territory since 1963) was the first to become an independent national state. Followed by Bophuthatswana, Venda and Ciskei, known as the TBVC states.[108]

It is estimated that between 1960 and 1983 approximately 3.5 million people were forcibly removed as a result of racially discriminatory laws.[109] According to Sparks, the Bantustans existed more in the political imagination than on the ground. They were overcrowded and not economically viable. Land shortage was a huge problem as the population grew from 4.2 million blacks in 1960 to over 11 million in 1980.[110] Numerous problems remained in homeland areas, including high levels of poverty, undernourishment, malnutrition and high infant mortality rates.[111]

As each independent state could legislate over their own affairs, different land control and administrative systems developed gradually over time.[112] The role of chiefs in relation to land administration also transformed. Some authors are of the view that western legal constructs combined with racism led to a caricatured representation of African systems of land tenure,

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[104] Pienaar *Land Reform* 115.
[105] Ibid 116.
[106] Act 25 of 1938.
[107] The more things change, the more they stay the same 80.
[108] Pienaar *Land Reform* 119.
[109] The historical context of land reform in South Africa 686.
[110] Pienaar *Land Reform* 121.
[111] Ibid 122.
[112] Ibid 123.

which exaggerated the role of chiefs and diminished the rights of lower levels of political authority and households.[113]

## 2.10 Decline of Apartheid

During the 1970s, the National Party experienced opposition and several international resolutions against apartheid were taken, including embargoes, boycotts and sanctions.[114] By the late 1970s, the idea of economically viable homelands had faded. Even the Transkei could only meet 10% of its own food requirements and its own resources provided 20% of its expenses. The crisis during the 1980s stemmed from various causes, including agrarian, demographic, political and economic considerations.[115] In 1986, a State of Emergency was extended to the entire country, which galvanised the opposition further.[116]

Gradually, legislative activity aided the decline of apartheid, but on an ad hoc and uncoordinated basis. In 1984 the Group Areas Amendment Act[117] opened up central business areas for all race groups and allowed open access to certain sporting events. Government Notice Regulation 1036 of 1968 and the Black Communities Development Act[118] were amended to provide for acquisition of ownership by black persons in urban areas for the first time in history.[119]

In 1990 the ANC was unbanned, and an age of negotiation began from 1990 to 1996. The White Paper on Land Reform was published in 1991 which introduced a new non-racial approach to land and would form the basis of the direction which land reform would take South Africa going forward.[120]

The Abolition of Racially Based Land Measures Act[121] repealed the Land Acts of 1913 and 1936 and other race-based legislation. However, it did not repeal the regulations and

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[113] Contested terrain 233.
[114] The United Nations Partner in the Struggle Against Apartheid available at https://www.un.org/en/events/mandeladay/un_against_apartheid.shtml accessed on 20 May 2020.
[115] Pienaar *Land Reform* 128.
[116] S Woolman & J Swanepoel ‘Constitutional History’ supra 22.
[117] Group Areas Amendment Act 101 of 1984.
[118] Black Communities Development Act 4 of 1984.
[119] Pienaar *Land Reform* 131.
[120] Ibid 132.
[121] Abolition of Racially Based Land Measures Act 108 of 1991.

proclamations issued in terms of the Lands Acts. Section 25 of the Black Administration Act, Proclamation R188 and other subordinate legislation issued after 1913 remained intact.[122]

## 2.11 Conclusion

Historical events show that land dispossession and tenure systems were linked to political control. Individual private ownership was reserved for whites which guaranteed white political authority,[123] whilst communal or trust ownership was preferred for black landholding. The disregard for traditional indigenous governance, and the initial lack of a clear land policy all contributed to large scale disregard for traditional indigenous land rights. Millions of people lost their ancestral lands, communities were dispersed and indigenous structures linked to land were dismantled.[124] Large portions of land were either unsurveyed, or surveyed only informally. Record keeping was poor or non-existent, and some data was lost due to political uprisings.[125] The role of chiefs were bolstered to support the needs of the administration which diminished the rights of lower levels of political authority and households. Some authors argue that traditional authorities exploited the lack of checks and balances. There were allocations of land without going through formal procedures, and illegal taxation in the form of fees charged for land.[126]

It is clear that the Communal Land Tenure Bill and any other legal reforms relating to land will need to take into account this unique and complex history in order to achieve the aims of the constitutional land reform agenda.

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[122] The more things change, the more they stay the same 81.
[123] Pienaar *Land Reform* 134.
[124] Ibid 56.
[125] The more things change, the more they stay the same 81.
[126] L Ntsebeza, 'Chiefs and the ANC in South Africa: the reconstruction of tradition?' in A Claasens & B Cousins (eds) *Land, Power & Custom, Controversies generated by South Africa's Communal Land Rights Act* (2008) 251.

# CHAPTER THREE: CONSTITUTIONAL REFORM FOR COMMUNAL LAND AND THE PERSISTING ROLE OF CHIEFS

## 3.1 Introduction

An overall land reform program was embarked on under the Constitution which provided for redistribution, tenure reform and restitution programs. Tenure reform faced two major challenges: an immediate challenge to protect existing de facto land rights; and a long-term challenge to restructure land tenure in order to meet constitutional imperatives.[127] The long-term vision was included in the Constitution under Section 25(6), which stated that

> '*a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure, or to comparable redress.*'[128]

Section 25(9) requires that Parliament enact the legislation referred to in subsection (6) in order to provide tenure which is legally secure or comparable redress to affected persons or communities. [129]

While the constitution making process inspired democratic policies relating to governance, traditional leader constituencies exercised a strong influence over the political negotiations which culminated in them being given continued recognition into the democratic era.[130]

## 3.2 Legal Developments Relating to Tenure Reform

The Upgrading of Land Tenure Rights Act[131] was introduced during the dying days of the apartheid era to provide for the upgrading of rights to land, either automatically or only after a prescribed procedure had been followed. Initially the idea was to promote individual ownership, especially within the township context. However, there was a need to protect de

[127] The more things change, the more they stay the same 82.
[128] Constitution, Section 25(6).
[129] The Constitution of the Republic of South Africa, Section 25 and 26.
[130] Chiefs and the ANC in South Africa 246.
[131] Upgrading of Land Tenure Rights Act 112 of 1991.

facto rights in the former homelands.[132] To fulfil this objective, the Interim Protection of Informal Land Rights Act[133] ("IPILRA") was enacted. IPILRA was introduced as an interim measure, to ensure temporary legal protection for people living in communal areas whilst the state developed comprehensive legislation to give effect to section 25(6) and 25(9) of the Constitution.[134] In terms of IPILRA, no person may be deprived of any informal right to land without his or her consent.[135] However, where land is held on a communal basis, a person may "*be deprived of land or a right in land in accordance with the custom and usage of that community*."[136] An informal right to land includes "*the use of, occupation of, or access to land in terms of any tribal, customary or indigenous law or practice of a tribe*" and "*beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997"*.[137] IPILRA has been renewed annually in the absence of any other legislation being promulgated.[138]

Following the enactment of IPILRA in 1996, the Department of Land Affairs produced the White Paper on Land Policy in 1997 and began drafting a Land Rights Bill.[139] Both these documents asserted that those whose occupation of land was rendered legally insecure because of apartheid policies are de facto owners of the land. The proposed structure was that "ownership should vest in the people, rather than in leaders holding it in trust on their behalf."[140]

The White Paper drew a distinction between 'ownership' and 'governance'. In terms of paragraph 5.13.2 of the White Paper, '*the Tenure Reform programme will separate these functions so that ownership can be transferred from the state to the communities and individuals on the land'*.[141]

The principles emphasised that where land rights '*exist on a group basis, the rights-holders must have a choice about the system of land administration, which will manage their land rights on a day-to-day basis.*' It further stated that '*the basic human rights of all members must*

[132] The more things change, the more they stay the same 83.
[133] Interim Protection of Informal Land Rights Act 31 of 1996.
[134] Report of the High Level Panel on the Assessment of Key Legislation 258.
[135] Interim Protection of Informal Land Rights Act, Section 2.
[136] Interim Protection of Informal Land Rights Act, Section 2(2).
[137] Interim Protection of Informal Land Rights Act, Section 1 (a) and (c).
[138] Report of the High Level Panel on the Assessment of Key Legislation 258.
[139] Ibid 261.
[140] Ibid 261.
[141] Ntsebeza, Chiefs and the ANC 249.

*be protected, including the right to democratic decision-making processes and equality*'[142] and that systems of land administration which are popular and functional should continue.[143]

## 3.3 Communal Property Associations

In 1996 the Department of Land Affairs introduced the Communal Property Associations Act[144] to enable communities to form juristic persons known as communal property associations (CPAs) to acquire, hold and manage property on a basis agreed to by members of a community in terms of a written constitution.[145] It was largely used to enable groups of people who had applied for restitution to be able to take ownership of land restored through restitution.[146]

Policy makers recognised that communal systems fulfil social and economic functions and should be a choice for people as a tenure form. The assumption was that existing legal entities (such as voluntary associations, share-block schemes, sectional titles and trusts), were not appropriate due to the complex administrative requirements.[147]

In terms of the Act, some of the principles which ought to be accommodated in constitutions of CPAs are the following:[148]

1. Fair and inclusive decision-making processes, in that all members are afforded a fair opportunity to participate in the decision-making processes of the association.
2. Equality of membership, in that there is no discrimination against any member on the grounds of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
3. Democratic processes where all members have the right to receive adequate notice of all general meetings and to attend and participate in voting at the meetings.

[142] Ibid 250.
[143] The more things change, the more they stay the same 82.
[144] Communal Property Associations Act 28 of 1996.
[145] Communal Property Associations Act 28 of 1996, Introduction.
[146] Report of the High Level Panel on the Assessment of Key Legislation 262.
[147] T Cousins & D Hornby 'Leaping the fissures: bridging the gap between paper and real practice in setting up common property institutions in land reform in South Africa' in D Horby…et al *Untitled: Securing Land Tenure in Urban and Rural South Africa* (2017) 325.
[148] Communal Property Associations Act 28 of 1996, Section 9(1).

4. Fair access to the property of the association in that the association shall manage property owned, controlled or held by it for the benefit of the members in a participatory and non-discriminatory manner.
5. Accountability and transparency including accountability by the committee to the members of the association.

The Act requires that a CPA constitution must be adopted at a meeting convened in the presence of an authorised official from the Department of Land Affairs. The official must prepare a report which sets out observations relating to whether the notice of the meeting was effective to ensure the presence of community members; the number of members present; whether various interest groups were represented; the number of members who voted in favour of and against the constitution; and whether the interests of any person or group of persons are likely to be adversely affected as a result of the adoption of the constitution.[149]

The schedule to the Act specifies certain requirements which must be included in the constitution for it to be officially recognised. These include inter alia qualification criteria for membership; rights of members to use of property; rights of members to sell and if so to whom; procedures for resolving disputes on rights to membership; purposes for which the property may be used; procedures for governing annual general meetings; and the election, composition and powers of the committee.[150]

The Act was passed in a legal and political environment dominated by the successes of constitutionalism as a means of creating a new democratic South Africa. Klug argues that the CPA Act reflected a process of self-constitution for rural land holders that was modelled on the successful negotiation of the national Constitution. He states that this paradigm was proposed as a means to locally resolve a range of tensions unresolved in the national Constitution, including the question of how groups could hold land communally while solving the problem of discrimination against women and the role of chiefs.[151]

There was deliberately no mention of traditional authorities in the Act, as policy makers were concerned about tribal authorities that do not function democratically and operate in ways that undermine constitutionally entrenched human rights. The Act intended to provide a means for

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[149] Communal Property Associations Act 28 of 1996, Section 7.
[150] Communal Property Associations Act 28 of 1996, Schedule.
[151] Cousins & Hornby, Leaping the fissures 327.

groups to choose a structure to represent them in making decisions on land access and management issues.[152]

However, delivery was prioritised over the intricate and time-consuming job of identifying specific rights holders or where appropriate, awarding land to smaller units for separate families or groups. This resulted in people being locked into large sometimes dysfunctional groups.[153] There was an assumption that the new communal property institutions could exist in parallel with traditional systems without intrusion, confusion or conflict. In practice, the new social order that was to be realised through CPAs was at odds with the modes of governance derived from lineage and custom.[154]

The clash between CPAs and traditional leadership was evident in the case *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority.*[155] In this case, the Bakgatla-Ba-Kgafela community successfully lodged a land claim in terms of the Restitution of Land Rights Act. The community thereafter registered a communal property association to take possession of the restored land. The traditional council and the Kgosi objected to the land being held by the CPA. The Constitutional Court upheld the right of the community to elect an administration entity of its choice. Justice Jafta stated that '*where a traditional community or the majority of its members as was the position in this case, have chosen the democratic route contemplated in the Act, effect must be given to the wishes of the majority*.'[156] The judgment also praised the CPA Act for extending the fruits of democracy to traditional communities and for ensuring that amongst other things, unmarried women had equal rights on communal land.[157]

## 3.4 Recognition of Traditional Leadership

In 1992 the ANC formulated its policy on traditional leadership as follows:

[152] Ibid 329.
[153] Report of the High Level Panel on the Assessment of Key Legislation 261.
[154] Cousins & Hornby, Leaping the fissures 329.
[155] *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority* 2015 (6) SA 32 (CC).
[156] *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority* 55.
[157] 'Constitutional Court affirms value of CPAs in traditional communities' *Custom Contested* (2015) available at https://www.customcontested.co.za/constitutional-court-affirms-value-of-cpas-in-traditional-communities/.

*'The institution of chieftainship has played an important role in the history of our country and chiefs will continue to play an important role in unifying our people and performing ceremonial and other functions allocated to them by law. The power of chiefs shall always be exercised subject to the provisions of the constitution and other laws. Provision will be made for an appropriate structure consisting of traditional leaders to be created by law, in order to advise parliament – on matters relevant to customary law and other matters relating to the powers and functions of chiefs.'*[158]

The ANC guidelines suggested a ceremonial and advisory role for traditional authorities, however, the Congress of Traditional Leaders of South Africa (Contralesa) rejected this notion. During the reign of Chief Phathekile Holomisa as president of Contralesa, there was a push for the recognition of traditional authorities as the primary level of government in rural areas.[159]

In 1993 the Multi-Party Negotiating Forum admitted constituencies of traditional leaders as a result of efforts by Contralesa and bargains struck with the ANC. Traditional leaders won significant victories under the Interim Constitution. They were allowed to continue exercising all the powers and functions they held under customary law and applicable statutes, including the Black Authorities Act. They were also given new positions in the local, provincial and national spheres of government.[160]

Constitutional Principle XIII of the Interim Constitution stated that the institution of traditional leadership, as determined by indigenous law, was to be recognised and protected. Traditional leaders had no formal representatives at the Constitutional Assembly, which drafted the Final Constitution, and their powers were significantly reduced.[161] Section 211(1) of the Final Constitution inserted the caveat that the role of traditional leadership is recognised subject to the Constitution. It states that 'the institution, status and role of traditional leadership, according to customary law, are recognised*, subject to the Constitution.*'

Section 212(1) of the Final Constitution states that '*national legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local*

[158] Ntsebeza, Chiefs and the ANC, 242.
[159] Chiefs and the ANC, 243.
[160] T Bennett and C Murray 'Traditional Leaders' in S Wilson & M Bishop (eds) *Constitutional Law of South Africa* (2018) 16.
[161] Ibid 17.

*communities.'* Section 212(2) provides that national legislation must deal with matters relating to traditional leadership:

> '*To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law*
>
> > *(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and*
> >
> > *(b) national legislation may establish a council of traditional leaders*'.[162]

When it came to certifying the Final Constitution, the Inkatha Freedom Party argued that sections 211 and 212 failed to realise the Constitutional Principles as the powers of traditional leaders were subjected to national legislation and not customary law.[163] In the *First Certification Judgment*, the Constitutional Court stated:

> *'The CA [Constitutional Assembly] cannot be constitutionally faulted for leaving the complicated, varied and ever-developing specifics of how such leadership should function in the wider democratic society, and how customary law should develop and be interpreted, to future social evolution, legislative deliberation and judicial interpretation.'*[164]

The Court treated section 211 and 212 of the Constitution as entrenching the existence of traditional leadership but leaving the legislature to deal with the future role of traditional leaders.[165] In every sphere of government, the constitutional role of traditional leaders has been reduced from that granted under the Interim Constitution. The Final Constitution allows provincial constitutions to make provision for traditional monarchs and allows the establishment of houses of traditional leaders at both national and provincial level, although they may not delay the passing of legislation. At local level, traditional leaders are excluded from voting membership of local councils. Section 212(1) of the Constitution specifically refers to a role for traditional leaders at 'local level' and not 'local sphere of government'.[166]

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[162] The Constitution, Section 212(2).
[163] T Bennett and C Murray 'Traditional Leaders' 18.
[164] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of SA, 1996* 1996 (4) SA 744 (CC) 195.
[165] T Bennett and C Murray 'Traditional Leaders' 19.
[166] Ibid 20.

From the end of 1997 however, the pendulum seems to have swung in favour of traditional authorities. In 1999 a new Minister of Land Affairs was appointed, who stopped working on the Draft Land Rights Bill and took a new strategy which was to build on 'existing local institutions and structures, both to reduce costs to the government and to ensure local commitment and popular support'.[167]

Two significant pieces of legislation were enacted; the Traditional Leadership and Governance Framework Act[168] and the Communal Land Rights Act[169] which provided traditional leaders with far-reaching powers over rural land.[170]

Tribal authorities recognised under the Bantu Authorities Act[171] were reconstituted when the the Traditional Leadership and Governance Framework Act[172] ('TLGFA') was passed in 2003. The TLGFA enabled provincial legislation to give traditional leaders a role in land administration. The TLGFA recognised traditional communities; established and recognised traditional councils; and provided a statutory framework within which traditional leadership should operate.[173] In terms of section 28 of the Act, any traditional leader who was appointed as such in terms of applicable provincial legislation and was still recognised as a traditional leader immediately before the commencement of the Act is deemed to have been recognised as such in terms of the Act. Any 'tribe' previously established and recognised as such before the commencement of the Act was deemed to be a traditional council.[174]

Section 3(2) of the TLGFA stated that once recognised, a traditional community must establish a traditional council of at most thirty members of which at least one third must be women and a minimum of 40% of members must be elected for a term of five years, and a senior traditional leader selects the remaining 60% in terms of that community's customs. Transitional arrangements provided for in the Act meant that these requirements were to be met within one year.[175] This deadline was extended due to the very few number of traditional councils who were able to meet the requirements.[176]

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[167] Ntsebeza, Chiefs and the ANC 254.
[168] Traditional Leadership and Governance Framework Act 41 of 2003.
[169] Communal Land Rights Act 11 of 2004.
[170] Ntsebeza, Chiefs and the ANC 263.
[171] Bantu Authorities Act 68 of 1951.
[172] Traditional Leadership and Governance Framework Act 41 of 2003.
[173] Traditional Leadership and Governance Framework Act 41 of 2003, Objectives.
[174] Traditional Leadership and Governance Framework Act 41 of 2003, Section 28.
[175] Traditional Leadership and Governance Framework Act 41 of 2003, Section 28.
[176] D Hornby…et al *Untitled: Securing Land Tenure* supra 76.

The Traditional and Khoi-San Leadership Act[177] ('TKLA') was controversially promulgated in December 2020 and came into force on 1 April 2021.[178] This Act repealed the TLGFA and opened the system of traditional governance to Khoisan groupings. Section 24(2) of this Act provides traditional councils with the authority to enter into agreements with municipalities, government departments and private institutions. It states that:

> *'Kingship or queenship councils, principal traditional councils, traditional councils, Khoi-San councils and traditional sub-councils may enter into partnerships and agreements with each other, and with—*
>
> > *(a) municipalities;*
> >
> > *(b) government departments; and*
> >
> > *(c) any other person, body or institution.'*[179]

Section 24(3) of the TKLA allows for some level of community accountability and states the following:

> *'(3) Any partnership or agreement entered into by any of the councils contemplated in subsection (2) must be in writing and, notwithstanding the provisions of any other law,*
>
> > *(a) must be beneficial to the community represented by such council;*
> >
> > *(b) must, in addition to any other provisions, contain clear provisions on the responsibilities of each party and the termination of such partnership or agreement;*
> >
> > *(c) is subject to—*
> >
> > > *(i) a prior consultation with the relevant community represented by such council;*
> > >
> > > *(ii) a decision in support of the partnership or agreement taken by a majority of the community members present at the consultation contemplated in subparagraph (i); and*

[177] Act 3 of 2019.
[178] Z Pikoli 'Traditional and Khoi-San Leadership Act brings back Apartheid Bantustans say Activists available at https://www.dailymaverick.co.za/article/2019-12-08-traditional-and-khoi-san-leadership-act-brings-back-apartheid-bantustans-say-activists/
[179] Traditional and Khoi-San Leadership Act 3 of 2019, Section 24(2).

*(iii) a prior decision of such council indicating in writing the support of the council for the particular partnership or agreement;'*[180]

According to the Land and Accountability Research Centre, the use of the word 'notwithstanding' in section 24(3) of the Act as opposed to the words 'subject to' or 'in addition to' may result in the provisions of the Interim Protection of Land Rights Act being circumvented. Where IPILRA focuses on the rights of community members directly, the TKLA focuses on traditional leaders and the community is only presented with an agreement following a 'prior decision' made by the traditional council in terms of section 24(3)(c)(iii) of the Act.[181]

The case *Maledu and Others v Itereleng Bakgatla Mineral Resources*[182] dealt with a dispute relating to mining on communal land consented to by the traditional authority. This resulted in a community being evicted to make way for the mining. The Constitutional Court set aside the mining deal on the basis that there was no evidence of a deprivation of rights to land which occurred in terms of the community's customs and usages, and therefore no conformity with the provisions of IPILRA.[183] The judgment is a strong indication that individual community consultation and collective decision-making is required as opposed to decisions being made by traditional leaders on behalf of communities.[184]

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[180] Traditional and Khoi-San Leadership Act 3 of 2019, Section 24(3).
[181] 'Why the TKLA remains a fundamental threat to land rights' *Custom Contested* (2020) available at https://www.customcontested.co.za/why-the-tkla-remains-a-fundamental-threat-to-land-rights/
[182] *Maledu and Others v Itereleng Bakgatla Mineral Resources* 2019 (2) SA 1 (CC).
[183] *Maledu* 108.
[184] 'Why the TKLA remains a fundamental threat to land rights' *Custom Contested* (2020) available at https://www.customcontested.co.za/why-the-tkla-remains-a-fundamental-threat-to-land-rights/

# CHAPTER FOUR: CONSTITUTIONAL CHALLENGE TO THE COMMUNAL LAND RIGHTS ACT

## 4.1 Introduction to the Communal Land Rights Act 11 of 2004

In 2004 the Communal Land Rights Act was passed to give effect to section 25(9) of the Constitution. In terms of the Act, title would be transferred from the state to a community which should register its rules before it could be recognised as a juristic person. Such rules would be enforced by a land administration committee. The Act did not set out a choice for community members about which structure would act as a land administration committee.[185]

The Communal Land Rights Act was put forth as legislation that would offer redress to people whose tenure of land was legally insecure as a result of past racially discriminatory laws or practices. However, the Act was strongly opposed on the basis that it would have 'undermined security of land tenure because it undercut all the layers of decision-making around land, except that of chiefly power.'[186]

CLARA recognised a traditional council established under the Traditional Leadership and Governance Framework Act as a land administration committee.[187]

Section 21(1) and (2) of CLARA provided for the establishment of land administration committees and stated the following:[188]

> *(1) A community must establish a land administration committee which may only be disestablished if its existence is no longer required in terms of this Act.*
>
> *(2) If a community has a recognised traditional council, the powers and duties of the land administration committee of such community may be exercised and performed by such council."*

The land administration committee would have been responsible for allocating rights, maintaining registers and records of rights and transactions, assisting with dispute resolution

[185] Contextualising the controversies, Land Power Custom 13.
[186] 'Communal Land Rights Act (CLaRA)' in *Custom Contested*, available at https://www.customcontested.co.za/laws-and-policies/communal-land-rights-act-clara/ accessed on 20 June 2020.
[187] Communal Land Rights Act, Section 21.
[188] Communal Land Rights Act, Section 21.

and liaising with local government in relation to planning and development.[189] CLARA was challenged by various communities to which it would have been applicable in the case *Tongoane v Minister of Land and Agriculture*. The case dealt with firstly; the procedure which should have been followed in enacting the Act; secondly whether Parliament complied with its constitutional obligations to facilitate public involvement in the legislative process that culminated in the enactment of CLARA; and, thirdly, whether the provisions of CLARA, instead of providing legally secure tenure, undermine it.[190]

Details of the individual communities which challenged CLARA, and the judgments of the High Court and Constitutional Court are discussed below.

## 4.2 Applicant Communities

### 4.2.1 Kalkfontein Community

The Kalkfontein community consisted of heirs of a group of African people, who as co-owners, purchased two farms in Mpumalanga in the early part of the 20th century.[191] The ownership of the original co-purchasers had always been exercised through a trust arrangement, with the trustee being the Minister of Native Affairs.[192] The apartheid government subsequently placed the land within the area of jurisdiction of the Pungutsha Community Authority, which was established in terms of section 21(1)(a) of the Black Authorities Act.[193] In 1978 the land was placed within the area of jurisdiction of the newly created Ndzundza (Pungutsha) tribal authority.[194]

There were various disputes between the Kalkfontein community and the tribal authority, which resulted in a commission of inquiry recommending that the recognition of the chief be withdrawn and that the Ndzundza tribal authority be disestablished.[195] The Commission found various irregularities relating to community money. There was widespread unlawful collection of funds using the chief's position, and diverting them for his own use. This included funds for

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[189] D Hornby…et al *Untitled: Securing Land Tenure* supra 74.
[190] *Tongoane* supra par 3.
[191] *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 838 (GNP) par 2(1).
[192] *Tongoane* High Court par 2(2).
[193] Act 68 of 1951.
[194] *Tongoane* High Court par 2(5).
[195] Ibid par 2(7).

the chief's protection, his lobola, his residence and petrol and celebration fees. He also unlawfully collected money from pensioners.[196] Land was given away to outside families without consent of the co-purchasers of the land or their heirs, and the chief took several stands of land for himself.[197] Opposition to the traditional authority resulted in unlawful detention, a shooting of one of the members of the community and a public flogging.[198]

The heirs of the co-purchasers of the land successfully brought a court application to interdict the chief from permitting any person from occupying the land and declaring that the community was entitled to transfer or register the farms in their name, either individually or collectively.[199] The Kalkfontein B & C Community Trust was subsequently formed to take transfer of the property. Eventually, the land was transferred to the Community Trust in 2008.[200]

#### 4.2.2 Makuleke Community

The Makuleke community historically occupied about 26 500 hectares of land known as the Pafuri Triangle in Limpopo province.[201] In 1969 the Makuleke community was subject to a forced removal.[202] They were removed to Portion of the Farm Ntlhaveni 2 MU, which was later incorporated into the homeland of Gazankulu. When this happened, they were moved into the area of jurisdiction of the Mhinga tribal authority.[203]

The Mhinga tribal authority has abused its powers and undermined the security of tenure of the community.[204] The acting chief Cedric Shilungwa Mhinga had given people from outside of the community permission to graze their cattle on Makuleke lands without consulting the community.[205] The Makuleke community is still under the rule of the Mhinga tribal authority, which is recognised in terms of the TLGFA. By contrast, the Makuleke tribal council was never statutorily recognised as a traditional council despite representations made to authorities.[206]

[196] Ibid par 2(8.1).
[197] Ibid par 2(9.5).
[198] Ibid par 2(10).
[199] Ibid par 2(17).
[200] Ibid par 2(18).
[201] Ibid par 2(21).
[202] Ibid par 2(22).
[203] Ibid par 2(23).
[204] Ibid par 2(26).
[205] Ibid par 2(28.3).
[206] Ibid par 2(30).

The Makuleke community lodged a claim for restoration of their land in terms of the Restitution of Land Rights Act,[207] which resulted in the claimed land being transferred to the Maluleke Communal Property Association.[208]

4.2.3 Makgobistad Community at Maya Yane

The members of the Makgobistad community belong to the Barolong boo Ratlou ba ga Mariba of Makgobistad. They have land rights at Mayayane, which is a distance away from Makgobistad village. The Motsewakhumo tribal authority was established for the Barolong boo Ratlou ba ga Mariba tribe in terms of the Bantu Authorities Act.[209] The tribal authority is now recognised as a traditional council in terms of section 28(4) of the TLGFA.[210]

The uncle of the chief undermined the tenure security of members of the community at Mayayane. He allocated residential sites to people from outside the community without consulting the people who had established rights to agricultural land at Mayayane.[211] His unilateral actions were contrary to the custom and practice of the community, but were condoned by the chief.[212]

4.2.4 Dixie Community

The members of the Dixie community live at Dixie village on the Farm Dixie 240KU, in the Pilgrim's Rest district of the Limpopo Province. The Dixie community exercises their rights in relation to land in terms of customary law. The rights of each family to the residential sites and fields for cultivation are recognised as being exclusive to that family. They vest in the family in perpetuity and are capable of being inherited through successive generations.[213] The Mnisi Tribal authority is a traditional council which purports to exercise jurisdiction over the farm and the village of that tribal authority.[214] The chief of the Mnisi community claimed that the Dixie property falls within his area of jurisdiction. He also lodged a land claim with the

[207] Restitution of Land Rights Act 11 of 1994.
[208] *Tongoane* High Court par 2(31).
[209] Act 68 of 1951.
[210] *Tongoane* High Court par 2(38).
[211] Ibid par 2(40.1).
[212] Ibid par 2(39).
[213] Ibid par 2(44).
[214] *Tongoane* High Court par 2(45).

Restitution Commission to have the Dixie Farm included within the Mnisi land restitution claim.[215]

## 4.3 Legal Challenge in the High Court

The applicant communities sought to challenge CLARA and sections 5 and 20 of the TLGFA which related to the function of traditional leaders in the administration of land.

Section 20 of the TLGFA stated that national government or provincial government must provide a role for traditional councils in respect of land administration, and section 5 provided for a traditional council to enter into a service delivery agreement with a municipality in accordance with the Local Government Municipal Systems Act.[216]

The applicants submitted that CLARA would interfere with their right to ownership, control and management of the land which they presently own or occupy. They argued that CLARA and the TLGFA do not make exceptions in favour of people who have acquired full and secure ownership by their own effort and imposes new rules on them which will again strip them of determination of their destiny.[217]

According to section 21 of CLARA:

> *'(1) A community must establish a land administration committee which may only be disestablished if its existence is no longer required in terms of this Act.*
>
> *(2) If a community has a recognised traditional council, the powers and duties of the land administration committee of such community may be exercised and performed by such council.'*[218]

The applicants argued that in terms of CLARA, the body set up by the people for administration would now be controlled by the Minister and the community would have no choice when there is an existing traditional council.[219] It was also argued that the land administration committee was intended to exist for larger communities. The Makuleke community as a small community

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[215] Ibid par 2(49).
[216] Local Government Municipal Systems Act 32 of 2000.
[217] *Tongoane* High Court par 4.
[218] Communal Land Rights Act, Section 21.
[219] *Tongoane* High Court par 35.

falling within the jurisdiction of the Mhinga tribe, may find that they only have a minority voice and are subject to decisions of the larger group.[220]

### 4.3.1 CLARA Undermining Security of Tenure

Section 22(1) and (2) of CLARA dealt with the election of a land administration committee and states:

> *"(2) Subject to section 21(2), the members of a land administration committee must be persons not holding any traditional leadership position and must be elected by the community in the prescribed manner."*[221]

The High Court found that the words '*subject to section 21(2)*' may imply that section 21(2) is a dominant section, and that when there is a recognised traditional council, section 22(2) is not applicable.[222]

The court found that section 21(2) of CLARA conferred powers on a traditional council to carry out functions of the land administration committee which may undermine the tenure security of other communities, such as the Makuleke people. In the judge's view, some of the existing traditional councils have not been democratically elected and the interests of women, children, the elderly and youth may not be represented in such council. Therefore, section 9 of the Constitution is infringed.[223]

Although CLARA allowed for the adoption of community rules regarding the administration and use of communal land,[224] the court agreed with the applicants that the making and adoption of community rules would not solve or protect the communities from the powers of the traditional council.[225]

The Makuleka and Kalkfontein people bought or acquired land. The judge found that certain sections of CLARA had the effect or potential effect of destroying the secure tenure of the Makuleka and Kalkfontein communities, instead of protecting them as required by the

[220] Ibid par 37.
[221] Communal Land Rights Act, Section 22.
[222] *Tongoane* High Court par 41.
[223] Ibid par 42.
[224] Communal Land Rights Act, Section 19.
[225] *Tongoane* High Court par 43.

Constitution.[226] Therefore it declared various sections of CLARA[227] unconstitutional and invalid.[228]

With regard to the procedure followed, the High Court found that CLARA ought to have been classified as a section 76 Bill,[229] and that the procedure relating to section 76 Bills should have been followed. Despite this, it declined to declare the entire Act unconstitutional on that basis, as Parliament did not act in bad faith when adopting the procedure prescribed in section 75[230] of the Constitution.[231]

4.3.2 Does CLARA read with TLGFA create a fourth sphere of government?

The applicants submitted that the effect of CLARA read with sections 5 and 20 of TLGFA may give rise to a separate fourth sphere of government contrary to the three spheres of governance envisaged by the Constitution. Government is constituted as national, provincial and local spheres which are distinctive, interdependent and interrelated.[232]

The judge referred to section 211(1) of the Constitution which recognises the institution, status and role of traditional leadership, according to customary law and subject to the Constitution. Section 211(2) of the Constitution says that a traditional authority that observes a system of customary law 'may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.'[233] Section 18 of the Local Governance and Municipal Structures Act[234] further made provision for traditional leaders to participate in meetings of municipal councils.[235]

The court found that national legislation may provide a role for traditional leadership as an institution at local level.[236] However, the status of traditional leadership according to customary law is only recognised if it is not in conflict with the Constitution.[237]

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[226] Ibid High Court, par 65.
[227] Communal Land Rights Act, Section 2(1)(a), 2(1)(c), and (d), 2(2), 3, 4(2), 5, 6, 9, 18, 19(2), 20, 21, 22, 23, 24 and 39.
[228] *Tongoane* High Court, par 67.
[229] Ordinary bills affecting the provinces (section 76 of the Constitution).
[230] Ordinary bills not affecting the provinces (section 75 of the Constitution).
[231] *Tongoane* High Court, par 24.
[232] Ibid par 50.
[233] Ibid par 52.
[234] Local Governance and Municipal Structures Act 117 of 1998.
[235] *Tongoane* High Court par 53.
[236] Ibid par 54.
[237] Ibid par 55.

The court disagreed with the applicants and found that CLARA and TLGFA in giving certain powers to traditional leaders does not make it unconstitutional in that it creates a fourth sphere of government.[238]

## 4.4 Constitutional Court Judgment

The High Court order was referred to the Constitutional Court for confirmation of the declaration of invalidity of CLARA. The focus of this Court was more on the procedure relating to the enactment of CLARA and less on the substantive provisions of the Act.

Schedule 4 of the Constitution lists functional areas of concurrent national and provincial legislative competence and includes '*indigenous law and customary law, subject to Chapter 12 of the Constitution*'.[239] Section 76 of the Constitution sets out the procedure which ought to be followed when enacting an ordinary bill affecting provinces.[240]

The court held that CLARA replaces the living indigenous law regime which regulates the occupation, use and administration of communal land. It replaces the institutions that regulated these matters and their corresponding rules. CLARA also gives traditional councils new wide-ranging powers and functions. They include control over the occupation, use and administration of communal land.[241]

The Court concluded that:

> *'the provisions of CLARA in substantial measure affect "indigenous law and customary law" and "traditional leadership", functional areas listed in Schedule 4. It follows therefore that CLARA was incorrectly tagged as a section 75 Bill, that it should have been tagged as a section 76 Bill, and that the procedure set out in that section should have been followed.'*[242]

The Constitutional Court struck CLARA down in its entirety on the ground that Parliament failed to enact it in accordance with the procedures set out in section 76 of the Constitution.[243]

[238] Ibid par 56.
[239] The Constitution of the Republic of South Africa, Schedule 4.
[240] The Constitution, Section 76.
[241] *Tongoane* CC par 96.
[242] Ibid par 97.
[243] Ibid par 111.

However, it failed to deal with the substantive provisions of CLARA.[244]. One of the reasons for this was that before the Constitutional Court hearing, the Minister informed the Court that CLARA as it stood was not in line with government policy and would be repealed.[245] The Court did, however, draw Parliament's attention to the need for legislation dealing with security of tenure to be enacted urgently and with regard to the substantive objections raised by the applicants in the case.[246]

## 4.5 Commentary

The Constitutional Court judgment has been criticised by scholars. Mailula states that despite spending much time, energy and effort on identifying the substantive issues and providing a comprehensive historical background, the Constitutional Court failed to deal with the substantive issues, being that the provisions of CLARA actually undermined security of tenure on communal land instead of protecting it.[247] According to Mailula, there was no reason why the court avoided dealing with the issue. The court merely relied on a political statement by the Minister to the effect that CLARA would be repealed in toto.[248] The Minister is not a law-maker, and even if the statement was made by Parliament reliance could not have been placed on it as Parliament is a deliberative organ which may or may not have decided to repeal CLARA *in toto*.[249] The Court missed an opportunity to pronounce on key issues relating to access to land which is directly linked to the realisation of other socio-economic rights.[250]

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[244] Ibid par 122.
[245] Ibid par 117.
[246] Ibid par 127.
[247] D Mailula 'Customary (communal) land tenure in South Africa: Did *Tongoane* overlook or avoid the core issue?' (2011) *Constitutional Court Review* 92.
[248] Mailula, Customary (communal) land tenure 94.
[249] Ibid 95.
[250] Ibid 100.

# CHAPTER FIVE: PROPOSED LEGISLATIVE REFORM FOR COMMUNAL LAND

## 5.1 Introduction to the Communal Land Tenure Bill

Seven years after the striking down of CLARA, the Department of Rural Development and Land Reform published the Communal Land Tenure Bill.[251] The CLTB states that the purpose of the Bill is:

> *'to provide for the transfer of communal land to communities; to provide for conversion into ownership of land rights in communal land to communities that own or occupy such land; to provide for the transfer of ownership to communities and community members of land acquired by the State to enable access to land on an equitable basis; to provide for the right to use by community members of land owned by the State; to provide for registration of communal land...'*[252]

The CLTB notes the *'insecurity of land tenure that characterises the land rights of African people and the constitutional imperative…to provide land tenure that is legally secure, or comparable redress where such legally secure tenure cannot be provided.'*[253]

The objects of the Bill are to provide for legally secure tenure in relation to communal land by:

> *'(i) converting legally insecure land tenure rights held by a community member or a community that occupies communal land, into ownership;*
>
> *(ii) transferring ownership of land acquired by the State to communities to enable access to land, on an equitable basis;*
>
> *(iii) granting to community members the right to use, as individual members or as a community, land owned by the State;*

[251] Communal Land Tenure Bill, Notice 510 of 2017, Government Gazette No. 40965, 7 July 2017.
[252] Communal Land Tenure Bill, Introduction.
[253] Communal Land Tenure Bill, Preamble.

*(iv) regulating the administration of communal land; and*

*(v) promoting and fulfilling social, economic, environmental and sustainable development on communal land.'*[254]

In contrast with its predecessor CLARA, the CLTB outlines principles which should regulate the administration and management of communal land. These principles include:

- *'recognising and respecting all legitimate land rights and persons who hold such rights*;[255]
- *recognising the right of communities to choose institutions or entities that administer land on their behalf*;[256]
- *recognising the right of communities to democratically control their commonly owned land and the responsibility to account for such control;*[257]
- *balancing the interests of the state, communities and members of communities; and*[258]
- *promoting the rule of law, good governance, accountability and equality between men and women.'*[259]

Some features of the Bill are discussed in further detail below.

## 5.2 Communal Land

The CLTB defines 'communal land' as land "owned, occupied or used by members of a community subject to shared rules or norms and customs of that community." It includes land owned by the State but used by communities.[260] The Bill would also apply to communal land which is vested in the State, or which at any time vested in a government of the Self-Governing Territories or former Transkei, Bophuthatswana, Venda, Ciskei; or the South African Development Trust. It also applies to land which has been restored to a community in terms of

[254] Communal Land Tenure Bill, Clause 2.
[255] Communal Land Tenure Bill, Clause 3(a).
[256] Communal Land Tenure Bill, Clause 3(b).
[257] Communal Land Tenure Bill, Clause 3(c).
[258] Communal Land Tenure Bill, Clause 3(d).
[259] Communal Land Tenure Bill, Clause 3(f).
[260] Communal Land Tenure Bill, Clause 1.

Section 25(7) of the Constitution or land in respect of which equitable access to land is provided to a community in terms of section 25(5) of the Constitution.[261]

## 5.3 Determination on Communal Land

The Minister of Rural Development must institute a land rights enquiry which is to be undertaken by a land rights enquirer.[262] The enquiry should determine the nature and extent of competing and conflicting land rights and interests; options available for ensuring legally secure rights; spatial planning and land use management as well as other relevant matters.[263] Following the enquiry a report must be submitted to the Minister.[264] Upon receipt of the report, the Minister must consult with the community and thereafter determine the location and extent of land in respect of which legally insecure land tenure must be converted into ownership or the right to use land owned by the State is granted to a community member or community.[265]

If there is a dispute relating to the land, the Minister may not make a determination relating to the land or take any action relating to the transfer of land to a community until the dispute has been resolved.[266] There is little information in the Bill relating to how a dispute will be resolved, save to say that the Minister must publish a notice to that effect in the Gazette advising the public that the dispute has been referred to be dealt with by a land rights enquirer who must enquire into the dispute and report to the Minister within 24 months of the referral.[267]

## 5.4 Transfer and Registration of Communal Land

Chapter 3 of the Bill deals with conversion, transfer and registration of communal land. After making a determination on the extent and location of land which must be transferred, the Minister of Rural Development must have a General Plan which is supported by a resolution of the community and approved in terms of the Land Survey Act.[268] [269] The General Plan should outline parts of the communal land designated for:

[261] Communal Land Tenure Bill, Clause 4.
[262] Communal Land Tenure Bill, Clause 20(1).
[263] Communal Land Tenure Bill, Clause 20(2).
[264] Communal Land Tenure Bill, Clause 20(3).
[265] Communal Land Tenure Bill, Clause 5(1).
[266] Communal Land Tenure Bill, Clause 8(1).
[267] Communal Land Tenure Bill, Clause 9(3) read with Clause 8(3).
[268] Land Survey Act 9 of 1997.
[269] Communal Land Tenure Bill, Clause 9(1)(a)

a) *"economic, social, environmental and sustainable development and infrastructure investment for the community;*
b) *crop fields, grazing land, water ways, wood lands, conservation, recreational and other purposes for the entire community;*
c) *the provision of economic, social and other services for the benefit of the entire community; and*
d) *subdivided portions for residential, agricultural, industrial and commercial purposes*"[270]

The Minister must then "convert land rights into ownership and transfer communal land to a community or grant the community the right to use communal land."[271] However, communal land which at the commencement of the Act is occupied by a community must be transferred to that community, and a subdivided portion of communal land which is occupied by a community member at the commencement of the Act must be transferred to that community member.[272]

Section 11(1) of the Bill states that "a community whose land rights have been converted into ownership or to whom ownership of land has been transferred after the commencement of this Act in terms of section 9 must, by means of its community rules, determine the nature of rights to a subdivided portion of communal land designated for residential, industrial or commercial purposes."[273] The nature of rights include ownership in the case of land owned or occupied by a community; and the right to use, lease or any other right relating to property as may exist in law.[274]

## 5.5 Community Rules

The Bill provides for a certain level of participatory decision-making by allowing a community to whom land has been transferred to create community rules. The community rules must be adopted by 60% of households of the community. The community rules must regulate the

[270] Communal Land Tenure Bill, Clause 17.
[271] Communal Land Tenure Bill, Clause 9(1)(b)
[272] Communal Land Tenure Bill, Clause 9(2).
[273] Communal Land Tenure Bill, Clause 11(1).
[274] Communal Land Tenure Bill, Clause 11(2).

general management and administration of communal land, the nature of rights to subdivided portions of communal land; and the use of communal land by the entire community, households and persons.[275]

These rules would determine the nature of rights to a subdivided portion of communal land designated for residential, industrial or commercial purposes.[276] The nature of rights contemplated include ownership and the right to use, lease or any other right relating to property as may exist in law.[277]

The Bill states that the process of making and adopting community rules must be guided by the principles of fair and inclusive decision making, equality, accountability and democratic processes governing the conduct of community meetings.[278] Should a community fail to adopt rules, prescribed standard community rules will apply, although there is no detail as to what the content of such rules may entail nor whether any oversight mechanism will exist to enforce such rules.[279]

## 5.6 Land Administration Entities

One of the main differences between CLARA and the CLTB is that the CLTB provides communities with a choice with regard to its administration body.[280] In *Tongoane,* the High Court determined that the options in CLARA implied that traditional authorities would automatically become land administration committees, which was problematic as these councils were not democratically elected.[281] Where CLARA did not contain any quota required relating to the community support needed to approve of a land administration entity, the CLTB requires a resolution adopted by at least 60% of households in the community to choose the entity to manage and administer land on its behalf. The options provided in the CLTB are a

[275] Communal Land Tenure Bill, Clause 26(3).
[276] Communal Land Tenure Bill, Clause 11(1).
[277] Communal Land Tenure Bill, Clause 11(2).
[278] Communal Land Tenure Bill, Clause 26(4).
[279] Communal Land Tenure Bill, Clause 27(6).
[280] 'High Level Panel summary sheets: March 2018' in *Custom Contested*, available at https://www.customcontested.co.za/wp-content/uploads/2018/04/HLP-summary-Communal-tenure.pdf accessed on 20 June 2020.
[281] Tongoane High Court par 42.

traditional council; a communal property association; or 'other entity as may be approved by the Minister.'[282]

The procedure for adopting the contemplated community resolution will be prescribed (presumably by the Minister in regulations), and it must be facilitated by an independent person or organisation.[283] Where the community fails to exercise a choice as the land administration entity, the Minister must appoint an official of the Department or another qualified person to assist the community in making a choice. If the community still fails to make a choice, the Minister may make a determination as to what the entity will be.[284]

The land administration entity is given a wide range of responsibilities including; general management and administration of the land; allocation of subdivided portions of communal land to community members including women in accordance with the community rules; maintaining registers and records of land rights in communal land; resolving disputes among community members and promoting the rights and interests of the community.[285] However, the entity does not have the authority to sell, lease or encumber communal land.[286] This can only be done through a community resolution supported by 60% of households of the community.[287]

The Bill further attempts to include households in decision-making by providing for the establishment of Household Forums to oversee the administration of land by the chosen institution, by holding such institution accountable for their functions.[288] The Household Forum must comprise of 50% women[289] and must represent the interests of vulnerable community members.[290] The Household Forum must report to the community at least once a year, and may request the Minister to institute an investigation into the affairs of the institution responsible for the administration of the land.[291]

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[282] Communal Land Tenure Bill, Clause 28(1).
[283] Communal Land Tenure Bill, Clause 28(2).
[284] Communal Land Tenure Bill, Clause 28(5).
[285] Communal Land Tenure Bill, Clause 29(1).
[286] Communal Land Tenure Bill, Clause 29(2).
[287] Communal Land Tenure Bill, Clause 30.
[288] Communal Land Tenure Bill, Clause 35(1).
[289] Communal Land Tenure Bill, Clause 33(3).
[290] Communal Land Tenure Bill, Clause 33(4).
[291] Communal Land Tenure Bill, Clause 35(3).

## 5.7 Communal Land Boards and Funding

The Bill envisages the establishment of communal land boards which would advise the Minister on any matter relating to the administration of the Act, and provide support to communities and institutions created in terms of the Act.[292] The Department of Rural Development must, from monies appropriated by Parliament, provide any institution or person performing functions in terms of the Act with financial, administrative and any other support that may be required to perform such functions.[293] The Bill specifically requires the Minister to pay the costs of transfer, surveying and registration required to give effect to the Act.[294]

[292] Communal Land Tenure Bill, Clause 39(1).
[293] Communal Land Tenure Bill, Clause 42.
[294] Communal Land Tenure Bill, Clause 16.

# CHAPTER SIX: ANALYSIS OF LANDHOLDING OPTIONS IN THE CLTB

## 6.1 Introduction

In December 2015, the South African Legislative Sector co-ordinated under the Speakers' Forum, established an independent high-level panel of experts to assess the content and implementation of legislation passed since 1994. Over a process of 21 months, the panel conducted an investigation across the country hearing the experiences of ordinary South Africans, including relating to land reform.[295] The Report was released at a time during which there were proposals for the amendment of the Constitution to allow for expropriation without compensation to address the slow and ineffective pace of land reform.[296] According to the Report, experts advised the panel that the need to pay compensation has not been the most serious constraint on land reform in South Africa to date. They were advised that more serious stumbling blocks to land reform have been increasing evidence of corruption by officials; the diversion of the land reform budget; a lack of political will and a lack of training and capacity.[297] A clear issue which emerged during the High-Level Panel investigation was that individual and family rights within groups are often disregarded. The weaknesses of unrecorded or orally transmitted land rights facilitate land grabbing and enable the use of communal land for personal gain.[298]

During 2018 President Cyril Ramaphosa appointed the expert Presidential Advisory Panel on Land Reform to provide independent advice to the Inter-Ministerial Committee on Land Reform. In May 2019 the Panel published a Report which also made key findings relating to the state of land reform in the country and identified significant gaps in security of tenure over land.[299] According to the Presidential Panel Report, democratic processes are needed for the land tenure program.[300]

[295] Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 26.
[296] Ibid 50.
[297] Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 51.
[298] Ibid 480.
[299] Report of the Presidential Advisory Panel on Land Reform and Agriculture for his Excellency the President of South Africa (2019).
[300] Report of the Presidential Advisory Panel on Land Reform and Agriculture 37.

## 6.2 Issues relating to Communal Property Associations

According to the High-Level Panel, over eight million hectares of land has been transferred through land reform since 1994.[301] This includes through redistribution, restitution and tenure reform. The majority of this land is held by trusts or communal property associations. The CLTB proposes that CPAs continue to be a prominent entity for communal land administration.[302] However, evidence has shown that CPAs have faced a dire lack of support in carrying out their tasks of ensuring security of tenure and social development. If land holding entities are dysfunctional, land cannot be used productively and equitable access to land and secure tenure are not possible.[303]

An assessment conducted by the Legal Entity Assessment Project on a number of communal property institutions (both CPAs and trusts) identified the following problems:[304]

1. There were unrealistic expectations on associations: they were expected to perform many functions at an early stage;
2. There was no conceptual model for institution building in the project style, and officials or service providers demonstrated little understanding of tenure issues in common property systems;
3. There were no links to other institutions of land administration, such as local government or tribal authorities, unless the CPA did this linkage themselves;
4. In founding documents membership was defined in contradictory ways, which created a lack of clarity about the basis on which people could make claims to land use; and
5. There were numerous problems with founding documents, including that they were mostly written in English and were inaccessible to a largely unilingual membership.

A Diagnostic Report on Land Reform from 2017 found that CPAs often consist of large groups of people living in different places, with varied resources, skill sets and interests.[305] There is a lack of specification of rights in certain CPA founding documents; and substantive rights of

[301] Report of the High Level Panel on the Assessment of Key Legislation 253.
[302] Communal Land Tenure Bill, Clause 28(1).
[303] Report of the High Level Panel on the Assessment of Key Legislation 253.
[304] Cousins & Hornby, Leaping the fissures 330.
[305] Report of the High Level Panel on the Assessment of Key Legislation 252.

members are not clearly defined.[306] A meeting of the National Council of Provinces held on 10 September 2019 dealt with a report on Communal Property Associations compliance and intervention.[307] According to the meeting summary, at the time there were 1 599 registered CPAs in the country, but during the 2019/2020 financial year only 211 CPAs were compliant with the Act. Most CPAs failed to submit the required reporting documents, such as financial reports. The Acting Deputy Director of the Department of Rural Development conceded that there are numerous challenges with the establishment of CPAs. A substantial number of members are illiterate and CPA Constitutions are poorly drafted, often in a language which is not commonly used by CPA members.[308] According to the Deputy Director-General, the Department of Rural Development has created various interventions to support land reform beneficiaries, including an integrated financing model for agriculture support which is being finalised through the Inter-Ministerial Committee on Land Reform. It was conceded that the Department does not have the capacity to monitor CPAs.[309]

The CPA Amendment Bill introduced in 2017[310] suggests a move away from the CPA being the sole landowner to individual members becoming joint owners, with some areas of land designated as common and public property. However, the character of the juristic entity that will become the owner of the land remains unclear. It seems to be envisaged that CPAs will become management bodies (similar to body corporates) rather than the actual owner of the land.[311] In light of the poor functionality of CPAs in administering land, it is questionable whether this is a viable option for landholding in terms of the CLTB.

## 6.3 Issues relating to Traditional Leadership

During the public hearings held by the High-Level Panel, people residing on communal land gave testimony that they are "currently more vulnerable to dispossession than they were before 1994, especially in areas where mining takes place and in areas administered by the Ingonyama Trust in KwaZulu-Natal." It was reported to the Panel that some traditional leaders deny people

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[306] Report of the High Level Panel on the Assessment of Key Legislation 253.
[307] 'Communal Property Associations compliance and intervention report' Parliamentary Monitoring Group available at https://pmg.org.za/committee-meeting/28834/ accessed on  August 2020.
[308] Ibid.
[309] Ibid.
[310] Communal Property Associations Amendment Bill B12 2017.
[311] D Hornby…et al *Untitled: Securing Land Tenure* supra 82.

their land rights and claim that they have the sole authority to sign agreements with investors in respect of communal land.[312] A key issue raised was that for the few who do manage to get land through redistribution or restitution, they do not get secure rights to the land they acquire.[313] Cases such as *Tongoane* and *Maledu* have demonstrated the abuses which arise when the powers of traditional leaders are left unchecked, which reduces security of tenure for people residing on communal land.

The High-Level Panel noted that the Communal Land Tenure Bill, together with the TLGFA and Traditional Courts Bill defaults to the assumption that people living in the former homelands are primarily tribal subjects, as opposed to equal citizens. It stated that '*the underlying assumption appears to be that people in the former homelands are more appropriately governed by traditional leaders rather than elected local government. Recent laws and Bills propose prohibiting countervailing ownership rights held by individuals and families, and locking people under the sole jurisdiction of traditional courts by prohibiting them from using other courts instead*.'[314]

The new Traditional and Khoisan Leadership Act may undermine community members' rights to engage with issues which may result in deprivation of their rights. It may also cause conflict with the objectives of the Communal Land Tenure Bill in realising secure land tenure and undermine individual rights.[315]

In December 2020 the National Council of Provinces passed the Traditional Courts Bill.[316] The latest version of the Bill has been criticised by land activists for having removed the 'opt-out' clause which was in the previous version of the Bill. Previously, a community member could choose another forum over a traditional court to hear a dispute, but the latest version eradicates this option.[317] The new version of the Bill allocates an adjudicatory function to traditional courts in matters relating to disputes around land. This would likely arise in a conflict with section 8 of the CLTB which states that a dispute relating to land must be referred by the

[312] Report of the High Level Panel on the Assessment of Key Legislation 203.
[313] Ibid 203.
[314] Report of the High Level Panel on the Assessment of Key Legislation 54.
[315] D Hornby…et al *Untitled: Securing Land Tenure* supra 84.
[316] Traditional Courts Bill B1D-2017.
[317] 'Little comfort for rural communities as NCOP passes Traditional Courts Bill without opt-out clause' *Custom Contested* (2020) available at https://www.customcontested.co.za/little-comfort-for-rural-communities-as-ncop-passes-traditional-courts-bill-without-opt-out-clause/

Minister to a Land Rights Enquirer who must enquire into the dispute and report back to the Minister.[318]

If communities through a majority resolution choose a CPA or other entity to manage their communal land, it is unclear how this entity would interact with the provisions of the TKLA and Traditional Courts Bill which give traditional leaders greater decision-making over land use.

The Constitutional Court has interpreted customary law as 'living customary law'. In the case *Alexkor v Richtersveld Community*, it was noted that "unlike common law, indigenous law is not written…it is a system of law that was known to the community, practiced and passed on from generation to generation" and "evolved and developed to meet the changing needs of the community."[319] Legislation which favours traditional leaders and by-passes the actual lived practices by communities perpetuates the ossification of customary law particularly relating to rural land tenure. Cousins states that tenure reform laws need to acknowledge and take into account the nested and layered character of land administration in 'communal' systems. Focusing on one level such as chieftaincy, is likely to skew the relative balance of power between the different layers and undermine the flexibility and downward accountability of administrators to rights-holders.[320]

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[318] Communal Land Tenure Bill, Section 8.
[319] *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC) at par 53.
[320] Land Power Custom 126.

# CHAPTER SEVEN: CONCLUSION

Communal areas are home to approximately 16,5 million people yet many occupants continue to live under insecure circumstances.[321] Tenure reform is desperately needed in order to strengthen land rights in law and in practice. It is unacceptable yet unsurprising that the legislature has been unable to enact legislation to give effect to section 25(6) of the Constitution due to the complex history and nature of indigenous land rights. Historical events traversed in this dissertation have shown that land dispossession and the nature of land ownership in South Africa were complex and linked to political control. Traditional leaders were utilised by the apartheid regime to further political agendas. This resulted in an exaggeration of the role of traditional leaders and the diminishing of rights of lower levels of political authority and households. While the constitution-making period inspired democratic policies relating to governance, traditional leader constituencies exercised a strong influence over the political negotiations which culminated in them being given continued recognition into the democratic era.[322]

During the early 2000s, the Department of Rural Development shifted its focus away from its initial policies which preferred land being held by people themselves, and toward a model of land being held by 'leaders' on behalf of people. The CLTB appears to be an attempt by the Department to return to the concept of land being held by the people, and it has corrected some of the defects identified in CLARA in the *Tongoane* case. In *Tongoane,* the High Court declared CLARA unconstitutional on the basis that it conferred powers on a traditional council to carry out functions of land administration committees which may undermine the security of tenure of communities. A significant change in the CLTB is that it allows communities to choose an entity to administer land on their behalf and participate in decisions relating to the administration of their land. Where there are existing traditional councils, they will not be automatically imposed on communities unless there is a resolution supported by 60% of households to this effect.

There are certain provisions of the Bill such as the creation of community rules and household forums which have the potential to safeguard democratic processes and allow for inclusive decision-making relating to communal land usage. There is also a requisite resolution which

[321] B Cousins *Contextualising the Controversies* 3.
[322] Chiefs and the ANC in South Africa 246.

must be supported by 60% of households in the community for a decision to sell or encumber communal land.

However, there are practical challenges which may arise with the options for landholding entities proposed by the Bill. There is no clarity on how chosen entities and procedures enabling democratic decision-making will contend with other legislation governing traditional leadership such as the Traditional and Khoi-San Leadership Act. In *Tongoane*, the High Court indicated that there indeed is a place for traditional leaders in governance in traditional areas as their role is recognised by the Constitution. It is for legislation to define this role. However, in *Maledu*, the Constitutional Court has also clarified that traditional leaders do not necessarily determine the customs of communities nor make decisions on behalf of communities.

A further problem may arise in the case of communities electing communal property associations as their chosen landholding entity. The CLTB places extensive responsibilities and administrative burdens on landholding entities. Evidence has shown that CPAs are not provided with the requisite funding or support in order to effectively fulfil these responsibilities. If land holding entities are dysfunctional, land cannot be used productively and equitable access to land and secure tenure are not possible.[323]

This dissertation recommends that further extensive public consultations be undertaken with affected communities before the CLTB can be passed into a law which is capable of upholding the rights of persons on communal land. Although the Bill provides for democratic decision-making relating to the selection of an administration entity, it does not address how this will be reconciled with the role of traditional leaders in terms of practical application on the ground or in terms of other legislation. While communal property associations may theoretically be a viable solution as a landholding entity which seeks to ensure fairness and transparency for communities, practically this will not occur unless CPAs are provided with extensive administrative support from the government.

Despite weaknesses relating to the proposed landholding entities for administering land, the CLTB is a long overdue attempt to finally give effect to section 25(6) of the Constitution. In 2021 there appeared to be renewed impetus by the Department of Rural Development to introduce the Bill to Parliament. It remains to be seen whether the Bill will be published for public comment in its 2017 form, or whether substantive revisions will be made before it is

[323] Report of the High Level Panel on the Assessment of Key Legislation 253.

published. In either event, there is common agreement that the land reform process has been too slow, bureaucratic, and costly.[324] The CLTB is undoubtedly one of the key pieces of legislation to advance meaningful land reform in the country and will hopefully be given the requisite attention by the Department and the legislature.

[324] W Sihlobo & J Kirsten, 'The Secret of Land Reform Success is to Learn Lessons from Experience' in W Sihlobo *Finding Common Ground: Land, Equity and Agriculture* 20.

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20 December 2018

Ms Ektaa Deochand 211525146
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Dear Ms Deochand

**Protocol reference number:** HSS/2221/018M
**Project title:** The Communal Land Tenure Bill and the implications of Legal pluralism in realising security of tenure.

**Full Approval – No Risk / Exempt Application**

In response to your application received on 06 November 2018, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL.**

**Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number. PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.**

**The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.**

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

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**Dr Shamila Naidoo (Deputy Chair)**

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