

# **Statutory framework for land tenure reform in communal areas**

Mini-dissertation submitted in partial fulfilment of the requirements for the degree Magister Legum in Estate Law at the North-West University Potchefstroom Campus

**By**

**Pogiso Alfred Modise Lethobeng**

**18028632**

Promoter: Prof GJ Pienaar

November 2011

# **Statutory framework for land tenure reform in communal areas**

**POGISO ALFRED MODISE LETHOBENG**

## **ACKNOWLEDGEMENTS**

Dad, Mom, Nanaki, Pini, Thabo and Lydia thank you for your warmly support and encouragement.

To Ivan Rathebe, Itumeleng Motlhoiwa and Godfrey Moyawa: Your friendship and encouragement through my studies carried me through the difficult times, and made the good times last longer. Thank you for your understanding and the relentless laboring and neurotic fears of laptop break down and lost data. Oratile Komete: Thank you for your encouragement and care. Your interest in my life and the life I chose makes each and every sacrifice worthwhile. Anita Sapelberg: Thank you for the continued support, the sympathetic ear and the words of encouragement. You always reminded me about the due date.

Professor Gerrit J Pienaar: I find it difficult to express my gratitude... you have always been more than a supervisor, you are a teacher in the true sense of the word. Thank you for the continued support and guidance.

Lastly, allow me to extend fraternal salutations to my Lord and Saviour, Jesus Christ, who had given me the talent and the zeal to live to learn.

# TABLE OF CONTENTS

	PAGES
1 Chapter one.....	1
1.1 Introduction.....	1
1.2 Research objectives.....	5
1.3 Research question.....	5
1.4 Focus of study.....	5
1.5 Research methodology.....	6
2 Chapter two.....	7
2.1 Nature of customary tenure.....	7
2.2 Brief historical background.....	12
3 Chapter three.....	15
3.1 The influence of the <i>Constitution of the Republic of South Africa</i> .....	15
3.2 The influence of international instrument on the right to property.....	18
4 Chapter four.....	22
4.1 Legislative framework.....	22
4.1.1 An analysis of the <i>Interim Protection of Informal Land Rights Act</i> 31 of 1996.....	23
4.1.2 An analysis of the <i>Communal Land Rights Act</i> 11 of 2004.....	25
5 Chapter five.....	32
5.1 An analysis of the <i>Green Paper</i> (2010).....	32
5.1.1 A single land tenure system with four-tiers.....	33
5.1.2 Land Valuer-General.....	34
5.1.3 Land Management Commission.....	35
5.1.4 <i>Land Tenure Security Bill</i> (2010).....	36

6 Chapter six.....	44
6.1 Conclusion.....	44
6.2 Recommendations.....	46
Bibliography.....	48

## LIST OF ABBRIVIATIONS

A	Appellate Division
ANC	African National Congress
AU	African Union
BCLR	Butterworths Constitutional Law Reports
CRHRL	Columbia Review Human Rights Law
COSATU	Congress of South African Trade Union
CC	Constitutional Court of South Africa
CILSA	Comparative and International Law of South Africa
CLARA	Communal Land Rights Act 11 of 2004
DRDLR	Department of Rural Development and Land Reform
EJCL	Electronic Journal of Comparative Law
GG	Government Gazette
GN	Government Notice
IELRC	International Environmental Law Research Centre
IPILRA	Interim Protection of Informal Rights Act 31 of 1996
JLPUL	Journal for Legal Pluralism: Unofficial Law
JSAL	Journal of South African Law
LMC	Land Management Commission
LAWSA	The Law of South Africa
MKMVA	Umkhotosizwe Military Veterans Association
OAU	Organisation of African Unity
PER	Potchefstroom Electronic Law Journal Potchefstroomse Elektrniese Regsblad
PLAAS	Programme for Land and Agrarian Studies
PTO	Permission to Occupy
RLRA	Restitution of Land Rights Act
SA	South African Law Reports
SACP	South African Communist Party

SAJHR	South African Journal on Human Rights
SALJ	South Africa Law Journal
SAPL	South African Public Law
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review
WLR	Washington Law Review

## Summary

Tenure reform in South Africa is regarded as necessary to sustain social and economic growth and stability, particularly in rural areas where there are high levels of poverty and inequality. In fostering political agendas, black people were systematically distanced from the land under apartheid. Therefore the democratic government's efforts in redressing the imbalances and providing redress through the land restitution and redistribution programmes are very much dependent upon the success of the Land Tenure Reform Programme.<sup>1</sup> This study will mainly concentrate on land tenure reform in communal areas.

Customary land tenure has to be understood in the context of an extended family set-up, where it underpins the idea of social solidarity which gives rise to the "community land ethic".<sup>2</sup> Customary land tenure also reflects the subsistence economy, where land is either not exploited for commercial purposes at all or only to a limited extent.<sup>3</sup> Normally, this land cannot be sold but it devolves in the family. A family is normally allotted residential and arable land and once allotted; the person acquires access to natural resources on the commonage. Although the person allotted land occupies it exclusive of the rights of others, he or she cannot be described as an owner in the western sense of the word, as he or she does not have the power to sell it. He or she, however, has the most extensive right in the law and may be regarded as "communal owner".<sup>4</sup>

---

<sup>1</sup> Mahomed *Understanding Land Tenure Law* 1-2.

<sup>2</sup> Dlamini "Land ownership" 41.

<sup>3</sup> Dlamini "Land ownership" 41.

<sup>4</sup> *Ratsialingwa and Another v Sibasa* 1949 3 781 (A) 791-792.

The *Constitution* plays a pivotal role in ensuring that people's rights to access to land are protected. The *Bill of Rights* in the *Constitution* guarantees the right of everyone to have access to land and housing as well as security of tenure. Various laws were enacted to give effect to the guarantees of secure tenure in communal areas after 1991. As a person's right to land in customary law may be terminated by the traditional leader in consultation with his council, the *Interim Protection of Informal Land Rights Act*<sup>5</sup> (*IPILRA*) provides that people may not be deprived of an "informal right to land" without their consent except by expropriation. The *Communal Land Rights Act*<sup>6</sup> (*CLARA*) was intended to give effect to section 25(6) and (9) of the *Constitution*. The aim of *CLARA* was to provide for legal security of tenure through a process of transferring the communal land to communities or persons, usually on land held for communities by designated community leaders. Secondary aims were to award comparable redress where such transfer was not practicable; the conduct of land inquiries to determine the transition from old order rights to new order rights; the democratic administration of communal land; the establishment of land rights boards; and co-operation of municipalities in respect in respect of communal land.<sup>7</sup>

The *Green Paper*<sup>8</sup> proposes an improved trajectory for land reform which is supported by the following programmes and institutions: a recapitalisation and development programme; a single land tenure system with four tiers; a Land Management Commission; a Land Valuer-General and a Land Rights Management Board. The change agenda pursued in the *Green Paper* is that in order to create a new trajectory for land reform, a set of proposals are put forward which attempts to break from the past without significantly disrupting agricultural production and food security, and avoid redistributions that do not generate livelihoods, employment and incomes.

---

<sup>5</sup> *IPILRA* 31 OF 1996.

<sup>6</sup> *CLARA* 11 OF 2004.

<sup>7</sup> Preamble of *CLARA*.

<sup>8</sup> *Green Paper* on land reform.

## Chapter one

### 1.1 Introduction<sup>1</sup>

Land plays a pivotal role in South African society. It is a factor of production, a store of value and wealth, a status symbol and a source of political and social influence.<sup>2</sup> Land tenure reform is the most complex area of land reform in rural areas. It aims to bring all people occupying land in rural areas under a unitary, legally validated system of landholding. It is intended to devise secure forms of land tenure, help resolve tenure disputes and provide alternatives for people who are displaced in the process.<sup>3</sup> In the South African scheme of land reform, land tenure has a more specific remit; it remains in essence a process directed towards strengthening the legal right basis of various forms of landholding, as well as providing for the introduction of accessible new forms of tenure which reflect a major shift from “permit-based” to “right-based” tenure.<sup>4</sup>

Tenure reform in South Africa is regarded as necessary to sustain social and economic growth and stability, particularly in rural areas where there are high levels of poverty and inequality. In fostering political agendas, black people were systematically distanced from the land under apartheid. Therefore the democratic government’s efforts in redressing the imbalances and providing redress through the land restitution and redistribution programmes are very much dependent upon the success of the Land Tenure Reform Programme.<sup>5</sup>

The pattern of wealth and income distribution and social and political influence are partly determined by laws governing land tenure. These laws specify the acceptable forms of tenure and the privileges and responsibilities that go with them. They define land title, the extent to which the owner can freely dispose of it, and the income distribution deriving from the land. The forms of tenure range from temporary,

---

<sup>1</sup> It should be noted that this research is based on the position until December 2011.

<sup>2</sup> Skweyiya 1989 *CRHRL* 211-212.

<sup>3</sup> *White Paper on South African Land Policy* 1997 VI (hereunder referred to as *White Paper*).

<sup>4</sup> Carey Miller and Pope *Land Title in South Africa* 456-457.

<sup>5</sup> Mahomed *Understanding Land Tenure Law* 1-2.

conditional holding to ownership, which confers total unencumbered rights of control and disposal of land.<sup>6</sup>

Although land reform began under the apartheid government,<sup>7</sup> the major pillars of contemporary public policy are found in the *Constitution of the Republic of South Africa*<sup>8</sup> and several pieces of legislation enacted by the post-apartheid government.<sup>9</sup> These laws were passed to deal with historical land dispossessions. The strategic programmes of the new land policy encapsulated land restitution, land redistribution and land tenure reform.

Land restitution refers to the right to restoration or compensation for dispossessions as a result of past racially discriminatory laws. The *Restitution of Land Rights Act*<sup>10</sup> (*RLRA*) was enacted in terms of the *Interim Constitution of the Republic of South Africa*<sup>11</sup> to permit persons or communities who were dispossessed of their rights in land under past racially discriminatory laws to claim for the restitution of those rights from the state.<sup>12</sup> Eventhough the *RLRA* was enacted in terms of the *Interim Constitution*, it still has an indispensable role to play under the new *Constitution* as long as it remains consistent with the latter.<sup>13</sup> The *RLRA* is therefore subject to Item 2 of Schedule 6 to the *Constitution* and continues in force subject to (a) any amendment or repeal and (b) consistency with the *Constitution*.<sup>14</sup> The strategic objective of the Act is to discharge the jurisprudential mandate enumerated in the *Constitution*. The *Constitution* provides that:

a person or community dispossessed of property after June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of the property or to equitable redress.<sup>15</sup>

---

<sup>6</sup> Skweyiya 1989 *CHRLR* 213.

<sup>7</sup> Eg the *Abolition of Racially Based Land Measures Act* 108 of 1991.

<sup>8</sup> *Constitution of the Republic of South Africa*, 1996 (hereunder referred to as the *Constitution*).

<sup>9</sup> Gibson *Overcoming historical injustices* 12-16.

<sup>10</sup> *Restitution of Land Rights Act* 22 of 1994.

<sup>11</sup> *Constitution of the Republic of South Africa* 200 of 1993.

<sup>12</sup> See s 2 of the *RLRA* 22 of 1994.

<sup>13</sup> As it has been amended by *Restitution of Land Rights Amendment Act* 84 of 1995; *Land Restitution and Reform Laws Amendment Act* 78 of 1996; *Land Restitution and Reform Laws Amendment Act* 63 of 1997; *Land Affairs General Amendment Act* 61 of 1998; *Land Restitution and Reform Laws Amendment Act* 18 of 1999 and further amended by *Land Affairs General Amendment Act* 11 of 2000.

<sup>14</sup> Southwood *The Compulsory Acquisition of Rights* 229.

<sup>15</sup> S 25 (7).

no provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the result of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).<sup>16</sup>

Land redistribution refers to an assistance program through which the government aids individuals seeking to purchase land primarily for agricultural purposes.<sup>17</sup> The *White Paper* elucidated that:

The purpose of the Land Redistribution Programme is to provide the poor with land for residential and productive purposes in order to improve their livelihoods. The government provides a single, yet flexible, redistribution mechanism which can embrace the wide variety of land needs of eligible applicants. Land Redistribution is intended to assist the urban and rural poor, farm workers, labour tenants as well as emergent farmers.<sup>18</sup>

Redistribution does not involve or invoke directly new forms of rights in the land in the manner that restitution and tenure reform do; rather, it is essentially a means of promoting the acquisition of real rights in land by recourse to conventional mechanisms.<sup>19</sup> Since whites own such a vastly disproportionate share of land in South Africa, a program of land redistribution was inevitable. Through these efforts, land is purchased from current owners and redistributed through a variety of grants, loans, subsidies, and so on.<sup>20</sup> The *Constitution*<sup>21</sup> obliges the state to take all reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. The Government has attempted to discharge this obligation by purchasing land earmarked for redistribution from willing sellers at market related prices.

The Government's target is to redistribute 30 per cent of the country's commercial farms to the previously disadvantaged majority by the year 2014.<sup>22</sup> The historic Land Summit held in Johannesburg on July 2005 under the theme *A Partnership to Fast*

---

<sup>16</sup> S 25 (8).

<sup>17</sup> Redistribution relies on a system of grants allocated to individuals to allow them to purchase land on the market based on the principle of "willing buyer /willing seller." This policy has currently been undermined and blamed for the slow pace of land redistribution.

<sup>18</sup> *White Paper* at par IX.

<sup>19</sup> Carey Miller and Pope *Land Title in South Africa* 398.

<sup>20</sup> Gibson *Overcoming historical injustices* 17.

<sup>21</sup> S 25 (5).

<sup>22</sup> *White Paper* at par IX.

*Track Land Reform: A new Trajectory, forward to 2014* emerged with strategic resolutions. On strategic direction, it was resolved that:

- (a) the state should be proactive and be the driving force behind land redistribution;
- (b) the “willing seller, willing buyer” principle should be rejected;
- (c) the state should have the right of first refusal on all land sales;
- (d) land reform should benefit the people, particularly women, farm workers and youth; and
- (e) land should be expropriated for the purpose of land redistribution.<sup>23</sup>

On the other hand, land tenure reform refers to modifications in the statutory basis of land ownership to provide legal standing and security in land title.<sup>24</sup> Land is needed in rural areas for a variety of reasons, including for settlement, farming, security, harvesting natural resources, and this list is not exhaustive. While land may be needed for economic purposes, ownership or custodianship of land in South Africa also represents a source of identity and a symbol of ownership. Land reform is therefore also a political imperative and continuing inequality in land ownership is a highly emotive and controversial issue. On the one hand, commercial farmers fear a Zimbabwe-style land grab; on the other, landless people and their supporters are becoming increasingly frustrated with the slow pace of reform.<sup>25</sup> Insecurity of tenure is a significant problem for three groups in particular: farm workers and others living in privately owned land; the residents of coloured rural areas; and the people living in the former “native reserves,” now termed “communal areas”.<sup>26</sup> All South Africans, including those living in communal areas, should be able to obtain land with secure title and the rights to benefit from, exploit, lease, sell, hold and mortgage it. The government must fashion the legislation which will permit individuals to do so. In the main, amongst these three land reform programmes, this research will mainly concentrate on land tenure reform.

---

<sup>23</sup> Ntsebeza and Hall *Land Question in South Africa* 14-15.

<sup>24</sup> *Eg* the formalisation of informal land rights, especially in rural areas.

<sup>25</sup> Ntsebeza and Hall *Land Question in South Africa* 8.

<sup>26</sup> Cousins “Contextualising the Controversies” 3.

## 1.2 Research objectives

This study is aimed at exploring measures to improve the statutory basis of communal land tenure in the rural areas. Land management in communal areas is disorganised and open to misuse, and land is held under a wide variety of permits and other often informal arrangements.<sup>27</sup> Regulations differ between former homelands, and administrative systems are often dysfunctional in some areas. In addition, the conditions under which land is held are often inequitable.<sup>28</sup> Communal land happens to be under-developed, because persons who make the attempt and take the risk to toil on the land, or use it for grazing, do not have tradeable security of tenure.<sup>29</sup> This is a discouragement to individual households, to entrepreneurs and to government to invest in development. Therefore, it is inevitable to develop new legislation which must establish a system of land rights in these areas that is fair, just and equitable.

## 1.3 Research question

The fundamental question which this study seeks to answer is, how do land tenure measures protect the interest of people living in communal areas?

## 1.4 Focus of study

The principal laws<sup>30</sup> covered in this study are the *Interim Protection of Informal Land Rights Act*<sup>31</sup> and the *Communal Land Rights Act*,<sup>32</sup> the latter has been declared unconstitutional by the *Constitutional Court*. In the main, this study will focus on the *Green Paper on Land Reform*<sup>33</sup> released by the *Department of Rural Development and Land Affairs (DRDLR)* which is a new policy document aimed at addressing the challenges which are not addressed by the current land tenure measures.

---

<sup>27</sup> Dlamini “Land ownership and customary law reform” 40.

<sup>28</sup> Dlamini “Land ownership and customary law reform” 40.

<sup>29</sup> Dlamini “Land ownership and customary law reform” 40.

<sup>30</sup> These two laws are not the *locus classicus* on security of tenure in communal areas as there are other laws dealing with the same matter.

<sup>31</sup> *Interim Protection of Informal Land Rights Act* 31 of 1996.

<sup>32</sup> *Communal Land Rights Act* 11 of 2004.

<sup>33</sup> GN 686 in GG 34653 of 30 September 2011.

## 1.5 Research methodology

The research method employed in this study embraces a literature study of text books, case law, legislation, electronic sources and academic articles. The first chapter will present the research question while the second chapter will present a brief overview of the nature of customary tenure and a brief historical background to elucidate the types of communal tenure created by the Apartheid regime. Chapter three will reflect on the influence of the new *Constitution* on land tenure reforms. Chapter four will deal with legislative interventions embarked upon by the government starting from 1991 until today, and it will focus specifically on the *Interim Protection of Informal Land Rights Act*<sup>34</sup> and a brief analysis of the *Communal Land Rights Act*.<sup>35</sup>

Chapter five will present a comprehensive discussion on the *Green Paper*.<sup>36</sup> The last chapter will contain conclusion and recommendations.

---

<sup>34</sup> *Interim Protection of Informal Land Rights Act* 31 of 1996.

<sup>35</sup> *Communal Land Rights Act* 11 of 2004.

<sup>36</sup> *Green Paper on Land Reform*.

## 2 Chapter two

### 2.1 Nature of customary tenure

Generally, if the land is situated in a communal area, the legal system to be used to determine the rights and disputes relating to such land is customary land tenure law.<sup>37</sup> In the main, it must be pointed that customary tenure comprises a variety of land use rights which differ from common law (Roman-Dutch) land rights, primarily because the legal nature and content of customary land rights must be appreciated within the context of the traditional family relationship.<sup>38</sup>

In the case of *Alexkor (Pty) Ltd v Richtersveld Community*<sup>39</sup> the *Constitutional Court* cautioned that the nature and content of the right of the Richtersveld people concerning land must be determined by reference to indigenous law and not common (Roman-Dutch) law. The court stated that:

while in the past indigenous law was seen through the common-law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by s 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. ... It is clear, therefore, that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.<sup>40</sup>

It is safe to argue that customary land tenure consists of informal land use rights, since these rights are not registrable because of their nature. Tribal or customary land rights cannot be defined with reference to ownership, since that term has

---

<sup>37</sup> Bennet "‘Official’ vs ‘Living’ Customary Law" 149.

<sup>38</sup> Dlamini "Land ownership and customary law reform" 41.

<sup>39</sup> *Alexkor (Pty) Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC).

<sup>40</sup> At par 51.

acquired an element of individualism that is foreign to tribal property relations.<sup>41</sup> Ownership epitomised the most comprehensive real right in property and was regarded as the source of all limited real rights.<sup>42</sup> According to customary law land is not owned at all, or is owned by a tribe or small social unit as a whole, while individuals obtain protected rights of occupancy, use and exploration to certain parts of such land, within the social structure of the group in question.<sup>43</sup> In *Amodu Tijani v The Secretary, Southern Province Nigeria*<sup>44</sup> it was held that:

Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or Head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner.<sup>45</sup>

Bennet<sup>46</sup> noted that, neither “communal” nor “ownership” can capture the essence of customary land tenure. Although the individual’s interest in arable and residential land does not amount to ownership, it is not so precarious that it may be expropriated at whim. Nor does it permit the freedom to alienate at will or to use the land for whatever purpose the holder may choose. As for traditional rulers, they are clearly not owners although they do have powers of control, subject to broader responsibilities to care for their subjects. The term “trustee” probably comes closest to describing their position, but even this term cannot do full justice to the sense of responsibilities inherent in their office. In the case of *In Re Southern Rodesia*,<sup>47</sup> Lord Summer cited as authority the statement that:

when the African people of South Africa were governed by their own customs and laws the notion of separate ownership in land or of the alienation of land by a chief or any one else was foreign to their ideas.<sup>48</sup>

However, the fact that the incidence of customary law ‘ownership’ is not identical to those of common law ownership is not sufficient reason for asserting that it therefore

---

<sup>41</sup> Van der Walt 1990 *De Jure* 7.

<sup>42</sup> *Badenhorst v Minister van Landbou* 1974 1 PH K7.

<sup>43</sup> Van der Walt 1990 *De Jure* 7-8.

<sup>44</sup> *Amodu Tijani v The Secretary, Southern Province Nigeria* 1921 AC 399 PC 404.

<sup>45</sup> At par 404.

<sup>46</sup> Bennet “‘Official’ vs ‘Living’ Customary Law” 149.

<sup>47</sup> *In Re Southern Rodesia* 1919 AC 211.

<sup>48</sup> At par 215.

does not constitute a different form of ownership. Whatever the true nature of the individual's 'ownership' in customary law might be, there can be no doubt at all that the tribe could (and did) collectively own land, through the chief as trustee for the people. The tribe therefore had a legally enforceable right to the land, and members of the tribe could in turn enforce their individual rights, even though they did not hold registered title to them.<sup>49</sup> In *Sobuza II v Miller Others*, the *Privy Council*<sup>50</sup> declared that:

the true character of the native title to land throughout the empire, including South and West Africa... is uniform one ..(which) takes the form of a usufructuary right, a mere qualification of a burden on the radical or final title of whoever is sovereign.<sup>51</sup>

Customary land tenure has to be understood in the context of an extended family set-up, where it underpins the idea of social solidarity which gives rise to the "community land ethic".<sup>52</sup> The ethical element in customary land tenure reflects the status of the land holder within the group, and regulates the acquisition, content, exercise and protection of his land rights. This has the effect of limiting the sale or exploitation of land. Customary land tenure also reflects the subsistence economy, where land is either not exploited for commercial purposes at all or only to a limited extent.<sup>53</sup> Normally, this land cannot be sold but it devolves in the family. A family is normally allotted residential and arable land and once allotted; the person acquires access to natural resources on the commonage.<sup>54</sup> Although the person allotted land occupies it exclusive of the rights of others, he or she cannot be described as an owner in the western sense of the word, as he or she does not have the power to sell it. He or she, however, has the most extensive right in the law and may be regarded as "communal owner".<sup>55</sup>

Communal land rights have been and still are exercised by indigenous communities of rural South Africa. Communal land tenure is defined in terms of its inclusive nature and displays the following features:

---

<sup>49</sup> Budlender and Latsky 1990 *SAJHR* 170.

<sup>50</sup> *Mabuza II v Miller Others, the Privy Council* 1926 AC 518.

<sup>51</sup> At par 525.

<sup>52</sup> Dlamini "Land ownership" 41.

<sup>53</sup> Dlamini "Land ownership" 41.

<sup>54</sup> *Eg* grazing land, game animals, medicinal plants, wood and other natural resources.

<sup>55</sup> See *Ratsialingwa and Another v Sibasa* 1948 3 781 (A) especially 791-792.

- (a) land rights are embedded in a range of social relationships, including household and kingship networks, and various forms of community membership, often multiple and overlapping in character;
- (b) land rights are inclusive rather than exclusive in character, being shared and relative, but generally secure because the land upon which those rights are held cannot be sold. In a specific community rights may be individualised (dwelling); communal (grazing, hunting, fishing and trapping) or mixed (seasonal cropping combined with grazing and other activities);
- (c) access to land is guaranteed by norms and values embodied in the community's land ethic. This implies that access through defined social rights is distinct from control of landholding by systems of authority and administration;
- (d) the rights are derived from accepted membership of social units and can be acquired by birth, affiliation, allegiance or transactions;
- (e) social, political and resource use boundaries are usually clear but often flexible and negotiable, and sometimes the source of tension and conflict;
- (f) the balance of power between gender, competing communities, right holders, land administration authorities and traditional authorities is flexible; and
- (g) the inherent flexibility and negotiability of land tenure rights mean that they are adaptable to changing conditions, but susceptible to capture powerful external forces (like the state) or processes (like capital investments).<sup>56</sup>

If the family is not able to farm on a piece of their land, they can lend that land to another family for a reasonable period. This agreement will normally be made with the permission of the chief of such a tribe. This agreement is not tantamount to a lease, in the sense that no payment is required. Families normally agree that the lender is entitled to a specified sum of the produce from this land, for example, two bags of maize meal during harvest. The land is therefore held in perpetuity by the family, with all the implications and responsibilities that go with it, namely rootedness, the prevention of landlessness and of the prevention of the

---

<sup>56</sup> Pienaar 2008 *EJCL* 1-3.

concentration of wealth in the hands of few.<sup>57</sup> This practice tends to keep the family together and to limit divorce, because what is most imperative is the preservation of the family property, and not affection. The state did not play any role in the land coordination, and control was exercised by the local community and relatives.<sup>58</sup>

Regarding the nature of tenure which existed amongst the Richtersveld community of the Northern Cape before the imposition of western titling systems, the *Supreme Court of Appeal* in the matter between *Richtersveld Community and Others v Alexkor*<sup>59</sup> categorically stated:

One of the components of the culture of the Richtersveld people was the customary rules relating to their entitlement to and use and occupation of this land. The primary rule was that the land belonged to the Richtersveld community as a whole and that all its people were entitled to the reasonable occupation and use of all land held in common by them and its resources. All members of the community had a sense of legitimate access to the land to the exclusion of all other people. Non-members had no such rights and had to obtain permission to use the land for which they sometimes had to pay. There are a number of telling examples: A non-member using communal grazing without permission would be fined a couple of heads of cattle.<sup>60</sup>

The use of the right is controlled by the family head and is transferable in terms of customary law. The rule that such use and enjoyment cannot be alienated for consideration is not strictly adhered to as such alienation nowadays has to be approved by a traditional leader and his council and the buyer has to be acceptable to the community.<sup>61</sup> It is often a question under what circumstances a native chief, who is a trustee for his people can validly sell tribal land? The Chief Justice in the matter between *Hermansburg Mission Society v Commissioner of Native Affairs and Darius Mogale*<sup>62</sup> stated that:

since the chiefs are not acting for themselves ...(but as) trustees for their people, the consent of the people must in some way or another be given.<sup>63</sup>

---

<sup>57</sup> See Okoth-Ogendo "Nature of Land Rights" 101-102.

<sup>58</sup> Dlamini "Land ownership" 41.

<sup>59</sup> *Richtersveld Community v Alexkor Ltd and Another* 2003 6 BCLR 583 (SCA). This view was so confirmed by the *Constitutional Court* on appeal in the case of *Alexkor (Pty) Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC).

<sup>60</sup> At par 18.

<sup>61</sup> Okoth-Ogendo "Nature of Land Rights" 101-102.

<sup>62</sup> *Hermansburg Mission Society v Commissioner of Native Affairs and Darius Mogale* 1906 TS 135 quoted in Klug 1995 *JLPUL* 128.

<sup>63</sup> At par 141-143.

Tenure security must therefore be seen essentially as an assurance that:

- (a) access to land resources will always be available as long as membership in a community and equivalent use functions are maintained;
- (b) the land resources of the community will always be preserved for the sole enjoyment of its members;
- (c) the land resources remain also available to future generations; and
- (d) community land resources are generally not alienable outside the group unless this is in the interest of its members.<sup>64</sup>

## 2.2 Brief historical background

In South Africa the issue of land cannot be separated from the apartheid policies of homelands, group areas, housing and urbanisation. As a result land issues remain the core of South African race policies. Land is a resource around which racial competition, animosity and black anger have often crystallised.<sup>65</sup> As far as the rural areas are concerned, this policy was aimed primarily at the segregation of whites and blacks. This process was initiated by the *Black Land Act*,<sup>66</sup> in which the so-called “traditional” black land was identified and “reserved” for exclusive black use and occupation, while all other land was reserved for exclusive white use and occupation. The reserved land identified for black occupation was extended with the addition of released land in terms of the *Development Trust and Land Act*,<sup>67</sup> which introduced the concept of trust land to black land tenure.<sup>68</sup> The effect of these Acts is to force the legal aspect of land tenure in rural areas to proceed along “homeland” and “non-homeland” lines, in contemporary parlance.<sup>69</sup>

The legal structure of black land tenure in rural areas was dominated by the *Black Land Regulations*.<sup>70</sup> These regulations were promulgated under section 25 of the

---

<sup>64</sup> Okoth-Ogendo “Nature of Land Rights” 101-102.

<sup>65</sup> Skweyiya 1989 *CHRLR* 212.

<sup>66</sup> *Black Land Act* 27 of 1913.

<sup>67</sup> *Development Trust and Land Act* 18 of 1936.

<sup>68</sup> Van der Walt 1990 *De Jure* 4-5.

<sup>69</sup> Davis and Hugh 1990 *SAPL* 157.

<sup>70</sup> *Black Land Regulations* of 1940; See Du Plessis, Olivier and Pienaar 1990 *SAPL* 269-273.

*Black Administration Act*.<sup>71</sup> They were the embodiment of statutory communal land tenure. They regulated in minute detail the allocation, occupation and use of communal land. *Proclamation R188*<sup>72</sup> provides for the following forms of land control in the non-urban areas:

- (a) Quitrent tenure that was inheritable rights to surveyed land. It comprised the granting of registered title to occupiers of land against the payment of a small amount per year. It must be noted that quitrent tenure has since been abolished.
- (b) Permission to occupy (PTO), that was the statutory regulated communal tenure of unsurveyed land. Communal rights to land were acquired by allotment, inheritance or gift. The holder of allotted land did not become the owner in a western sense. He occupied the land exclusive to the rights of others but always in his capacity as a member of the tribe.<sup>73</sup>

PTO is defined as:

Permission in writing granted or deemed to be granted in the prescribed manner to any person to occupy a specified area or trust land for a specific purpose.<sup>74</sup>

PTO residential and arable land had to be authorised by the commissioner<sup>75</sup> after consultation with the community authority. The regulations also provided for the registration of a grant and transfer, and cancellation of the rights granted under quitrent tenure. Quitrent tenure conferred a better right than a permission to occupy as it was registered in the deeds office. The title could be terminated for a variety of reasons such as failure to occupy the land beneficially and conviction of a crime.

The demise of the system started virtually at its inception. Occupiers failed to register their titles, probably because their ideas of who should own the land differed from those of the commissioner. In many cases the *de facto* occupiers were women,

---

<sup>71</sup> *Black Administration Act* 38 of 1927.

<sup>72</sup> *Procl R188* in GG 2486 of 11 July 1969 and GR 1154 of 11 July 1969.

<sup>73</sup> Du Plessis, Olivier and Pienaar 1990 *SAPL* 273.

<sup>74</sup> See s 47(5) of *Procl R188* of 1969.

<sup>75</sup> Presently in practice an official of the *DRDLR*.

whereas, except in limited cases, they were not entitled to allotment. The *White Paper*<sup>76</sup> identified the partial breakdown of group system of land rights. A lack of legal recognition and administrative support for such systems has led to severe internal stresses and tension. One of the malaise is corruption and abuse of authority by chiefs and tribal authorities. Another finding by the *White Paper*<sup>77</sup> is that many black tenure systems are characterised by endemic violence. The *White Paper*<sup>78</sup> further identifies discrimination against woman as a fundamental feature of many land tenure systems in rural areas, including communal tenure. PTO's were generally issued to men to the exclusion of women. Inequalities in relation to land rights are exacerbated by the exclusion of women from most decision making structures. Another challenge identified is the high level of insecurity experienced by many rural women, particularly widows, divorcees and single women with children, and the impact of land tenure on declining rates of marriages.<sup>79</sup>

The abolition of the South Africa Development Trust and dissolution of the Department of Development Aid<sup>80</sup> threw the administration of the regulations into utter confusion and chaos.<sup>81</sup> In addition to PTO's not granting security of tenure, the whole system came to nothing. The disintegration of the system has been reported by different observers. There is widespread uncertainty about the validity of documents such as PTO certificates, the appropriate procedures for transferring land within households and the legality of leasing or selling ri<sup>82</sup>ghts to use or occupy land. In the meantime the application of the land regulations has fallen apart. They turned into administrative disaster. When commissioners and magistrate no longer administered the regulations the system came to a standstill. In addition, traditional leaders lost their foothold on the land. Numerous development initiatives are on hold awaiting clarity on ownership of land.

---

<sup>76</sup> *White Paper* 32-40; See paragraph 4 above.

<sup>77</sup> *White Paper* 32-40.

<sup>78</sup> *White Paper* 32-40.

<sup>79</sup> *White Paper* 32-40.

<sup>80</sup> The last apartheid department administering African land.

<sup>81</sup> Van der Walt 1990 De Jure 7-8.

<sup>82</sup> Van der Walt 1990 De Jure 7-8.

### 3 Chapter three

#### 3.1 The influence of the *Constitution of the Republic of South Africa, 1996*

The *Constitution* recognises the injustices of the past and aims to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental rights”.<sup>83</sup> The *Constitution* articulates the fundamental role of the *Bill of Rights* in that it is the cornerstone of democracy in South Africa which enshrines the rights of all people and affirms the democratic values of human dignity, equality and freedom.<sup>84</sup> Of the trio of democratic values the call for equality, without attempting to dilute the importance of the other two, has enjoyed a central focus in the South African constitutional history because it is the antithesis of the basic principles of apartheid.<sup>85</sup> It appeals for the improvement of the quality of life of all and equal protection under the law. The inclusion of numerous socio-economic rights in the *Bill of Rights* is central to the achievement of these fundamental constitutional purposes. These rights include, *inter alia*, the protection of housing and land rights, security of tenure and the protection of everyone from arbitrary evictions.<sup>86</sup>

In *Tongoane v The National Minister for Agriculture and Land Affairs*<sup>87</sup> a formal constitutional challenge was finally lodged in October 2008 which related to both procedural and substantive matters of the *Communal Land Rights Act* 11 of 2004.<sup>88</sup> Concerning procedural matters, it was argued that the Act was rushed through Parliament and that public hearings, as required by the *Constitution*, did not take place. The substantive matters broadly dealt with three main aspects: the role and function of traditional councils acting as land administration committees, discrimination between black and white owners of property, and tenure security of women. The *Constitutional Court* found that section 9 of the *Constitution*, dealing with equality, was infringed because some of the existing traditional councils have

---

<sup>83</sup> Preamble to the *Constitution*.

<sup>84</sup> Chapter 2, s 7.

<sup>85</sup> Jaichand *Restitution of Land Rights* 23-33.

<sup>86</sup> Chenwi *Eviction in South Africa* 14-15.

<sup>87</sup> *Tongoane v The National Minister for Agriculture and Land Affairs* (2010) ZACC 10.

<sup>88</sup> Which is discussed comprehensively at 4.1.2 below.

not been democratically elected and the interests of women, children, the elderly and the youth may not be represented on such councils.

The *Constitution* plays a pivotal role in ensuring that people's rights to access to land are protected. The *Bill of Rights* in the *Constitution* guarantees the right of everyone to have access to land and housing as well as security of tenure.<sup>89</sup> In terms of these sections, there is a positive obligation on the state to ensure progressively that everyone has access to land<sup>90</sup> and housing<sup>91</sup> as well as security of tenure,<sup>92</sup> and negative obligation to ensure that everyone is not deprived of opportunities to access these rights in their lifetime.

In terms of sections 25(5)-(7) of the *Constitution*-

(5) the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis, and

(6) a person or community whose tenure of land is illegally insecure as a result of past discriminatory laws or practices, is entitled to the extent provided by an Act of Parliament either to tenure which is legally secure or comparable redresses.

(7) a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

The *Constitutional Court* has elucidated that "the stronger the right to land, the greater the prospect of a secure home".<sup>93</sup> Sections 25(5)-(7) set out the three mechanisms which the state must utilise in order to address the legacy of landlessness and insecure tenure in South Africa, namely restitution, redistribution and security of tenure. Section 25(5) obliges the state to take reasonable legislative and other measures, within its available resources to foster conditions which enable citizens to gain access to land on equitable basis. Section 25(9) obliges the state to enact measures that provide legally secure tenure to persons whose tenure is insecure as a result of past discriminatory laws and mechanisms for land restitution.

---

<sup>89</sup> S 25 and 26.

<sup>90</sup> S 25 (5) and (6).

<sup>91</sup> S 26 (1).

<sup>92</sup> S 25 (6) and (7).

<sup>93</sup> *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC) at par 19.

Sax<sup>94</sup> promotes the view that “we are in the midst of a major transformation in which property rights are being fundamentally redefined to the disadvantage of property owners”. He attributes this transformation to the “perceived allocational failure of traditional property”.<sup>95</sup> Changing public values demands that ‘non-exclusive consumption benefits’<sup>96</sup> namely; land, water and mineral resources are extended and awarded protection.<sup>97</sup> Sometimes this can only be done by removing the particular asset, it would most often be a natural resource or heritage site, from the private property domain.<sup>98</sup> Apart from protecting these so-called non-exclusive consumption benefits, the demand on a natural resource can be so extensive that it is detrimental to the resource’s existence to leave it in private hands and in certain scenarios past injustices that occurred in the allocation of resource-use and the development that has since taken place, requires a reallocation of the rights relating to the resource.<sup>99</sup> The only way to allow justice to prevail is to remove the resource from the sphere of private property, as such private property can thus be converted into a public resource.<sup>100</sup> In this sense communal land can also be classified as a natural resource.

Section 25 of the *Constitution* exemplifies a negative protection of property and the right to acquire, hold and dispose of property is not guaranteed.<sup>101</sup> Through this a negatively framed property guarantee is not rendered inviolable, but limits and requirements are set for state intervention.<sup>102</sup> Linked to the fact that the preamble of the *Constitution* indicates that one of the aims of its adoption was the development and promotion of a society based not only on ‘democratic values and fundamental human rights’, but also on ‘social justice’ and the positive obligations with regard to various social and economic rights placed by the *Bill of Rights* on the state, the purpose of section 25 has to be seen as protecting property rights while serving the

---

<sup>94</sup> Sax 1983 *WLR* 481.

<sup>95</sup> Sax 1983 *WLR* 484.

<sup>96</sup> Sax 1983 *WLR* 484 explains the concept of nonexclusive benefits.

<sup>97</sup> Pienaar and Van der Schyff “The Reform of Water Rights in South Africa” 16.

<sup>98</sup> Pienaar and Van der Schyff “The Reform of Water Rights in South Africa” 16.

<sup>99</sup> Pienaar and Van der Schyff “The Reform of Water Rights in South Africa” 16.

<sup>100</sup> Pienaar and Van der Schyff “The Reform of Water Rights in South Africa” 16.

<sup>101</sup> *First National Bank of SA Limited t/a Wesbank v The Commissioner for the South African Revenue Services and the Minister of Finance* 2002 7 BCLR 702 (CC) at par 48, hereafter referred to as *FNB v SARS* or the *FNB* case.

<sup>102</sup> Van der Walt *Constitutional Property Law* 13.

public interest.<sup>103</sup> Judge O'Regan eloquently summarised this perspective when she stated in a minority judgment in *Mkontwana v Nelson Mandela Metropolitan Municipality*:<sup>104</sup>

A balance must be struck between the need to protect property, on the one hand, and the recognition that rights in property may be appropriately limited to facilitate the achievement of important social purposes, including social transformation, on the other.

It is inevitable that tension is created whenever a balance is to be struck between seemingly opposing interests to ensure equity. It must also be kept in mind that the right to property "is no stronger or no weaker than any other right; whether it is a real right, a personal right, contractual, delictual or a constitutional right".<sup>105</sup>

### 3.2 The influence of international instruments in relation to property

The right to acquire and hold property, including land in communal areas, is recognised in several democracies across the world. The following serve as examples of international instruments giving recognition to the right to property, which includes an interest in communal land.<sup>106</sup>

The *African Charter on Human and People's Rights*<sup>107</sup> provides that:

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in general interest of the community and in accordance with the provisions of appropriate laws.

The *American Charter on Human Rights*<sup>108</sup> provides that:

(1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

---

<sup>103</sup> *FNB v SARS* at par 52; Van der Walt *The Constitutional Property Clause* 1997 8; As per O'Regan J in *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) at par 565.

<sup>104</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) at par 566.

<sup>105</sup> Pienaar and Van der Schyff "The Reform of Water Rights in South Africa" 16.

<sup>106</sup> Bennet *Human Rights and African Customary Law* 144.

<sup>107</sup> Approved by the OAU (which is now called AU) in 1981 and came into force in 1986. See also Dugard *International Law* 224; Dlamini 1991 *CILSA* 189.

<sup>108</sup> *American Charter on Human Rights* of 1969.

- (2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.<sup>109</sup>

The *First Protocol of the European Convention on Human Rights*<sup>110</sup> states as follows:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of International Law.

The *Universal Declaration of Human Rights*<sup>111</sup> provides as follows:

Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.<sup>112</sup>

Sections 25(4) (a); 25 (5) and 25 (6) of the *Constitution* stipulates that:

(4) for the purpose of this section-

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources;

(5) the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis, and

(6) a person or community whose tenure of land is illegally insecure as a result of past discriminatory laws or practices, is entitled to the extent provided by an Act of Parliament either to tenure which is legally secure or comparable redresses.

Devenish<sup>113</sup> submitted that section 25(6) is intended to provide protection for customary interests in land. As Bennet<sup>114</sup> elucidated that:

Given the difficulty of expressing customary concepts in common law terms, such interests might have been regarded as too ephemeral or too precarious to warrant constitutional protection.

---

<sup>109</sup> See also s 25 (2) of the *Constitution*.

<sup>110</sup> Article 1 of the *First Protocol of the European Convention on Human Rights* of 1952 came into operation in 1954.

<sup>111</sup> Article 17 of the *Universal Declaration of Human Rights* 1948.

<sup>112</sup> See s 25 (1) of the *Constitution*; Devenish *Commentary on the South African Bill of Rights* 344.

<sup>113</sup> Devenish *Commentary on the South African Bill of Rights* 353.

<sup>114</sup> Bennet *Human Rights and African Customary Law* 144.

The South African courts can invoke the principles of international human rights law where legislation or the *Constitution* is silent.<sup>115</sup> The *Constitution* provides that:

- (1) When interpreting the *Bill of Rights*, a court, tribunal or forum
  - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law.<sup>116</sup>

In the landmark case of *S v Makwanyane*<sup>117</sup> Chaskalson P submitted as follows:

Public international law would include non binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which chapter 3 (the Bill of Rights) can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparative instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights and, in appropriate cases, reports of specialized agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of (the *Bill of Rights*).

As customary international law has always been part of our common law,<sup>118</sup> the courts can also apply these norms of human rights law that had acquired the status of custom, unless they are in conflict with legislation.<sup>119</sup> International human rights conventions and declarations not binding on South Africa, either as custom or treaty, might be invoked by the courts as a guide to judicial policy in the formulation of a rule of law.<sup>120</sup> South African courts could, even before our new constitutional dispensation, have regard to international law when interpreting legislation provisions.<sup>121</sup>

---

<sup>115</sup> Dugard 1994 *SAJHR* 208.

<sup>116</sup> S 39 (1) of the *Constitution*. See also Rautenbach and Malherbe *Constitutional Law* 45; O'Shea "International Law and the Bill of Rights" 7A.

<sup>117</sup> *S v Makwanyane* 1995 3 SA 391 (CC) at par 35.

<sup>118</sup> *South Atlantic Island Development Corporation v Buchan* 1971 1 SA 234 (C) 238C-D; Dugard *International Law: A South African Perspective* chapter 4.

<sup>119</sup> Dugard 1994 *SAJHR* 208-209.

<sup>120</sup> Dugard 1994 *SAJHR* 208 209; Mann *Studies in international law* 340; *Blathwayt v Cawley* 1976 AC 397 (HL) 426.

<sup>121</sup> However, in the past, courts showed no indication to invoke the principles of international law. See for example *S v Petane* 1988 3 SA 51 (C) 58G-J; *S v Rudman* 1989 3 SA 368 (E) 376A-B.

In the main, an interest in communal land is an interest in property<sup>122</sup>, therefore, it is a right which is guaranteed by the *Constitution* and the international instruments quoted above. In terms of the letter and spirit of the *Constitution*, the state must take reasonable legislative measures to ensure that people in communal areas also receive land on equitable basis. Recent literature, legislation and case law regarding the scope of section 25 of the *Constitution* have changed the notion that informal and fragmented use-rights, as well as communal land rights, are inferior to the individualised ownership orientation model for lack of registration.<sup>123</sup> A paradigm shift from the exclusive protection of ownership and limited real rights to tenure security for unregistered and informal land rights has been accepted by the *Constitutional Court*<sup>124</sup> as a solution to South Africa's land tenure challenges.

The above international instruments elucidated that for the realisation of this right to land in communal areas, land has to be expropriated from other owners of such land by means of payment of appropriate compensation in terms of the law. Arbitrary deprivation of property (in this case we refer to land) will be comprehensively discussed at 5.1.3 below.

---

<sup>122</sup> Bennet *Human Rights and African Customary Law* 144.

<sup>123</sup> Cousins 2005 *Stell LR* 488-513; Van der Walt 1992 *SAJHR* 440; Van der Walt 2001 *SALJ* 260.

<sup>124</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 SA 217 (CC) at par 16, 23 and 24.

## 4 Chapter four

### 4.1 Legislative framework

In 1991 parliament tabled the *White Paper on Land Reform*.<sup>125</sup> The points of departure contained in the *White Paper* were the following: “access to land is a basic need” and “free enterprise and private ownership is the appropriate system to fulfill this need”.<sup>126</sup> Its objectives were to broaden access to land rights to the whole population; upgrade the quality and security of title in land as well as utilise land as a national asset. The *White Paper*<sup>127</sup> outlined an approach that seeks to resolve the challenges inherited from the past and to give effect to the realisation of the constitutional right to security of tenure. It enumerated some underlying principles that should guide the drafting of legislation and the implementation of tenure reform programme:

- (a) tenure systems must rest on well-defined rights rather than conditional permits;
- (b) a unitary and non-discriminatory system of land rights for all must be constructed, supported by effective administrative mechanisms, including registration of rights where appropriate;
- (c) tenure systems must allow people to choose their preferred tenure system from a variety of options (including different combinations of group and individual rights);
- (d) tenure systems should be consistent with the constitutional principle of democracy, equality and due process;
- (e) rights-based approaches must assist in unpacking overcrowded situations of overlapping rights through the provision of more land or other resources; and
- (f) tenure policy should bring the law in line with realities on the ground (that is, recognise *de facto* rights in law).<sup>128</sup>

---

<sup>125</sup> *White Paper on Land Reform* WP B-91 of 1991.

<sup>126</sup> *White Paper on Land Reform* WP B-91 of 1991 2.

<sup>127</sup> *White Paper*.

<sup>128</sup> At par 16-17.

The *Abolition of Racially Based Land Measure Act*<sup>129</sup> repealed the majority of racially based laws, amongst others, the *Black Communities Development Act*<sup>130</sup> as well as the *Group Areas Act*.<sup>131</sup>

#### **4.1.1 Analysis of the Interim Protection of Informal Land Rights Act 31 of 1996**

Various laws were enacted to give effect to the guarantees of secure tenure in communal areas after 1991. As a person's right to land in customary law may be terminated by the traditional leader in consultation with his council, the *Interim Protection of Informal Land Rights Act*<sup>132</sup> (*IPILRA*) provides that people may not be deprived of an "informal right to land" without their consent except by expropriation. *IPILRA* further provides that where land is communally owned and the community decides to dispose of it, provision must be made for appropriate compensation to any person who is deprived of an informal right to land by such disposal.<sup>133</sup> It specifically deals with the insecure tenure of communities in the former homelands. The regulation and administration of land rights prevailing in the former national states and self-governing territories during the previous political dispensation had many shortcomings. Consequently, prescribed procedures were not always followed and records were not always kept or updated regularly and as a result, in many areas land was occupied and used without any legal basis. Despite the absence of a legal basis, individuals or communities had vested interests in their occupancy and had usually been on the land for many years. It was thus important to protect the existing *de facto* position for the duration of the upgrading or tenure reform programme.<sup>134</sup>

In terms of section 1(a)(iii) of the *IPILRA* an informal right include the use of, occupation of or access to land in terms of five categories of sources which includes the following: any tribal, customary or indigenous law or practice of a tribe; the

---

<sup>129</sup> *Abolition of Racially Based Measure Act* 108 of 1991.

<sup>130</sup> *Black Communities Development Act* 4 of 1984.

<sup>131</sup> *Group Areas Act* 36 of 1966.

<sup>132</sup> *IPILRA* 31 of 1996.

<sup>133</sup> See also s 25 (2) and (3) of the *Constitution* of 1996.

<sup>134</sup> Mostert, Pienaar and Van Wyk "Land" 123-124.

custom, usage or administrative practice in a particular area or community; beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997 and the use or occupation of any erf as if the person is the holder of Schedule 1 or 2 rights under the *Upgrading of Land Tenure Act*,<sup>135</sup> although the person is not formally recorded as such in a land rights register.

The protection against the deprivation of informal rights in land which is *raison d'être* behind *IPILRA* is entrenched to the extent that, subject to the provisions of section 2, any sale or other disposition shall be subject to any existing informal rights in that land, as defined, to the status of real right available against the whole world in the sense that it goes with the land binds a subsequent party who acquires an interest regardless of the state of knowledge of the party.<sup>136</sup> This means that a prospective purchaser or mortgagee of land potentially open to the acquiring of an informal right on the basis of occupation, use or access, needs to make a site inspection because an investigation of Deeds Office records would not disclose de facto circumstances which might be the basis of an informal right.<sup>137</sup>

As indicated in the Act, all of the above rights are protected. In terms of section 2(1) of the *IPILRA*, no person may be deprived of any informal right to land without his or her consent. This is subject to the relevant provisions of the *Expropriation Act*<sup>138</sup> and the situation is different where the land in question is held on communal basis. In the case where the land is held on a communal basis, a person may be deprived of such land in accordance with the customs and usages of that particular community only.<sup>139</sup> This is, however, subject to the following conditions:

- the decision to dispose of any such right may only be taken by a majority of the holders of such rights, who have to be present or represented at a meeting convened for the purpose of considering such disposal;

---

<sup>135</sup> *Upgrading of Land Tenure Act* 112 of 1991.

<sup>136</sup> Carey Miller and Pope *Land Title in South Africa* 466.

<sup>137</sup> Carey Miller and Pope *Land Title in South Africa* 466.

<sup>138</sup> *Expropriation Act* 63 of 1975.

<sup>139</sup> S 2(2) of *IPILRA*.

- sufficient notice must be given; and
- a reasonable opportunity to participate must be afforded.<sup>140</sup>

The holder of an informal right to land is deemed to be an owner of land for the purposes of section 42 of the *Mineral and Petroleum Resources Development Act* 68 of 2002.<sup>141</sup> The link between land, culture and custom has to be borne in mind when land reform is embarked on and issues linked with that are involved.<sup>142</sup> The case of *Alexkor (Pty) Ltd v Richtersveld Community*<sup>143</sup> is illustrative. In this case, the *Constitutional Court* emphasised the importance of approaching the nature of the land right in question from the perspective of customary law, as well as the community's history and usages. Customary land rights are thus as important and as recognised as "Western-style" individualised land and property rights. However, customary land rights also involve a further dimension as it is not only recognised as a source of law in itself, but is simultaneously also the focus or object of reform in particular.<sup>144</sup>

The *IPILRA* was originally intended to be an interim measure only,<sup>145</sup> but due to the complexity of this part of the land reform programme, the application of *IPILRA* is now extended on an annual basis.<sup>146</sup> One would expect *IPILRA* to be extended annually until the land tenure legislative reform programme is complete.<sup>147</sup>

#### **4.1.2 An overview of the Communal Land Rights Act 11 of 2004**

The *Communal Land Rights Act*<sup>148</sup> (*CLARA*) was intended to give effect to section 25(6) and (9) of the *Constitution*. The aim of *CLARA* was to provide for legal security of tenure through a process of transferring the communal land to communities or

<sup>140</sup> S 2(4) above.

<sup>141</sup> S 1(2) of the *IPILRA*. The *Mineral Act* 50 of 1991 was repealed by *Mineral and Petroleum Resources Development Act* 28 of 2002.

<sup>142</sup> Mostert, Pienaar and Van Wyk "Land" 108-109.

<sup>143</sup> *Alexkor (Pty) Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC). See also 2.1 above.

<sup>144</sup> Mostert, Pienaar and Van Wyk "Land" 109-110.

<sup>145</sup> It was supposed to have lapsed at the end of December 1997 but this is subject to the proviso that the Minister of Land Affairs may from time to time by notice in the Gazette extend the application for a period of not more than 12 months at a time.

<sup>146</sup> Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 619.

<sup>147</sup> Carey Miller and Pope *Land Title in South Africa* 466-467.

<sup>148</sup> *CLARA* 11 of 2004.

persons, usually on land held for communities by designated community leaders. Secondary aims were to award comparable redress where such transfer was not practicable; the conduct of land inquiries to determine the transition from old order rights to new order rights; the democratic administration of communal land; the establishment of land rights boards; and co-operation of municipalities in respect in respect of communal land.<sup>149</sup>

Before any rights could be upgraded, transformed or secured resulting in “new order rights”, it was essential that the existing legal framework, more particular, the kind of rights that actually existed and were exercised by individuals and communities, first had to be established. The Act provided that the Minister of Land Affairs could make a determination by exercising the discretion which was to result in any of the following options: transfer of communal land as a whole to the community in question; transfer of land in individual title to individual members of the community; and a combination of the above two options, thereby transferring some portions to the community and individualising other portions.<sup>150</sup> The end result of the determination of the Minister of Land Affairs was that “new order rights” were created, which included ownership.<sup>151</sup>

Individualised land tenure is not always a viable option for communities, especially those that rely on community structures for tenure security and group identity. In most instances, the conversion from communal land tenure to individualised land ownership by a land titling programme mainly benefits the wealthy and powerful leaving poor and vulnerable people in even worse conditions.<sup>152</sup> When disrupting the social structure of the community by individualising communal land tenure, one of the most important support mechanisms for the members of such a community is disrupted as well.<sup>153</sup>

---

<sup>149</sup> Preamble of *CLARA*.

<sup>150</sup> S 18 (3) (a)-(c).

<sup>151</sup> S 18(3) (d).

<sup>152</sup> Pienaar 2009 *PER* 32-34.

<sup>153</sup> Pienaar 2009 *PER* 32-34.

Various land-tenure rights were registrable in terms of the *CLARA*. After a determination had been made by the Minister of Land Affairs in terms of section 18, the specific communal land had to be registered in the name of a community as a juristic person, to hold such land on behalf of the community.<sup>154</sup> The Minister of Land Affairs could also determine that a part of the communal land had to be surveyed and subdivided and a communal general plan approved in terms of the *Land Survey Act*<sup>155</sup> and communal land register was then to be opened in terms of the *Deeds Registries Act* 47 of 1937.<sup>156</sup>

A holder of a registered new-order right in terms of a deed of communal land right could also apply to the land administration committee to convert such a right into freehold ownership.<sup>157</sup> The land administration committee could authorise such a conversion or disposal only after obtaining an informed and democratic decision of the community and on conditions imposed or rights reserved in favour of the community.<sup>158</sup>

It is clear that the Minister Land Affairs had a wide discretion to maintain communal land tenure or to individualise the land rights in the form of registered new-order rights or even freehold ownership according to the circumstances and needs of a specific community. The policy of the Department of Land Affairs on the issue of individualisation of communal land tenure was not clear at that stage, but it seemed to be biased towards individualisation.<sup>159</sup> There was some concern, however, that users within the customary tenure paradigm could be confined to engaging with customary law only, unless the law provides for the conversion of tenure arrangements within the communal, rural setting to individual title of the kind espoused by the prevalent deeds registration system.<sup>160</sup>

It was part of the fiduciary duty of the Minister of Land Affairs to exercise such discretion by taking into consideration existing community structures and the

---

<sup>154</sup> S 6 (a).  
<sup>155</sup> *Land Survey Act* 8 of 1997.  
<sup>156</sup> S 6 (b) (i) (ii).  
<sup>157</sup> S 9 (1).  
<sup>158</sup> S (3).  
<sup>159</sup> Pienaar 2009 *PER* 32-34.  
<sup>160</sup> Mostert 2011 *PER* 90-91.

customs and rules of the community. However, in terms of the wide discretion afforded by the *CLARA* and the regulations, it was possible for the Minister of Land Affairs to disregard a community's wishes to maintain communal land tenure according to accepted community rules and structures.<sup>161</sup>

The principles of democratic decision-making, transparency and accountability could be discarded in this procedure. Furthermore, old-order rights,<sup>162</sup> including communal land tenure, could be converted into individual ownership or comparable new-order rights, or cancelled and comparable redress be paid to affected persons or communities. The Department of Land Affairs seemed to be focusing on the privatisation and individualisation of communal land tenure to such an extent that the fiduciary duty towards communities was often neglected.

The *CLARA* as a whole superimposed the western construct of absolute and exclusive land rights on inclusive African systems of relative and 'nested' rights, thereby fundamentally changing them.<sup>163</sup> It provided for the transfer of title to 'communities' with the Minister determining the boundaries of the land to be transferred. Ownership at this level 'trumped' the rights that existed at lower levels, for example the right of a particular village within the 'community' to particular blocks of arable land. It also relegated family and individual rights to less than ownership. While the Act did provide for the registration of individual 'new order' rights, these ignored the family based nature of land rights and undermined the rights of family members other than the household head and spouse.<sup>164</sup>

*CLARA* had to be read together with the *Traditional Leadership and Governance Framework Act*<sup>165</sup> (*TLGFA*). The *TLGFA* includes a transitional provision, which deems existing tribal authorities to be traditional councils, provided they meet new composition requirements within a prescribed period. *CLARA* provided that where traditional councils exist, they had to be land administration committees. One of the powers and duties of the land administration committee was to represent a community owning communal land and to deal with land allocations.

---

<sup>161</sup> Pienaar 2009 *PER* 32-34.

<sup>162</sup> See s 1.

<sup>163</sup> Claassens *The Communal Land Rights Act and Women* 20.

<sup>164</sup> Claassens *The Communal Land Rights Act and Women* 20.

<sup>165</sup> *Traditional Leadership and Governance Framework Act* 41 of 2003.

A land administration committee could be elected by a local community according to the procedure prescribed by the community rules<sup>166</sup> or a traditional council recognised by the community could act as a land administration committee.<sup>167</sup> Land administration committees played a vital role in creating and maintaining the tenure security of communities. In this process the decision to individualise land tenure or maintain communal land tenure within existing community structures was extremely important. Community structures provide security to many rural communities.<sup>168</sup>

On the other hand, all new legislations on customary tenure reform need to conform to the dictates of the *Constitution*, particularly, they need to ensure that they strengthen democracy and ensure that they do not discriminate against women. It could be argued that a land titling scheme linked with registration, as set out in *CLARA*, was unsuitable in relation to traditional or communal lifestyle, and the term 'community' was vague. Furthermore, *CLARA* did not acknowledge and reflect the "nested" system of land rights inherent in traditional customary communities.<sup>169</sup> The employment of traditional councils to act as land administration committees has been criticised as being likely to entrench patriarchy and existing power relations.<sup>170</sup>

*The TLGFA* and *CLARA* made concessions to traditional authorities, effectively resuscitating the powers they enjoyed under the notorious *Bantu Authorities Act*<sup>171</sup> (*BAA*) which was introduced by the apartheid regime, and endorsed tribal authorities which were set up in terms of the *BAA* as a foundation for establishing what it referred to as traditional councils having authority to administer and allocate land in rural areas.<sup>172</sup> Furthermore, the post-1994 traditional councils were made up of majority of unelected and unaccountable members comprising traditional authorities and their appointees.<sup>173</sup> Furthermore, section 4(2) contradicted the implications of section 4(3) by vesting what could often be family property, within which women have 'secondary' use and occupation rights, exclusively in a male and

---

<sup>166</sup> S 21 (1).

<sup>167</sup> S 21 (2).

<sup>168</sup> Pienaar 2009 *PER* 32.

<sup>169</sup> Cousins "Characterising 'Communal' Tenure" 109-133.

<sup>170</sup> Mostert, Pienaar and Van Wyk "Land" 139-140.

<sup>171</sup> *Bantu Authorities Act* of 1951.

<sup>172</sup> Ntsebeza *Democracy Compromised* 14.

<sup>173</sup> Ntsebeza *Democracy Compromised* 14.

his spouse – to the exclusion of other female family members, in particular the man's mother and his sisters.<sup>174</sup>

However, the above criticism of the traditional councils has been contended. Khunou argued that, the post-1994 traditional councils are now judged in terms of the *Constitution*. Furthermore, traditional councils are transformed to be in harmony with the *Constitution* and the *Bill of Rights*.<sup>175</sup>

Finally, *CLARA* was declared unconstitutional in the case of *Tongoane and Others v The National Minister for Agriculture and Land Affairs*.<sup>176</sup> The court did not investigate the merits of the *CLARA*, but declared it invalid on account of the fact that Parliament failed to adopt it in accordance with the procedural requirements. The *DRDLR* moreover indicated that it is not interested in *CLARA* anymore because it was not implementable. The story of *CLARA*, hence, is one of a law - an important one - which was dead in the block. Therefore, it costed the South African tax-payer billions of Rands without changing the life of even a single rural, communal holder.<sup>177</sup>

The main criticism against *CLARA* was that *CLARA* mainly aimed at individualisation of communal land tenure. Individualised land tenure is not always a viable option for communities, especially those that rely on community structures for tenure security and group identity.<sup>178</sup> Most sociologists and anthropologists convincingly argue that individualised land tenure is not a prerequisite for tenure security, but that tenure security is often obtained by strong community structures as long as the community functions properly and sufficient land is available.<sup>179</sup> In most instances, the conversion from communal land tenure to individualised land ownership by a land titling programme mainly benefits the wealthy and powerful ("rich man's law"), leaving poor and vulnerable people in even worse conditions.<sup>180</sup> It can be argued that individualisation of communal land tenure may open up communal land for the

---

<sup>174</sup> Claassens *The Communal Land Rights Act and Women* (2005) 20 6-8.

<sup>175</sup> Khunou and Nthai 2011 *De Rebus* 34-35.

<sup>176</sup> *Tongoane and Others v The National Minister for Agriculture and Land Affairs* (2010) ZACC 10.

<sup>177</sup> Mostert 2011 *PER* 88.

<sup>178</sup> Pienaar 2009 *PER* 32.

<sup>179</sup> Pienaar 2009 *PER* 32.

<sup>180</sup> Pienaar 2009 *PER* 32.

markets, and in the process, the poorest of the poor will end up selling their only security (residential land) to the markets. On the other hand, individualisation of communal land tenure may not provide security as envisaged because the markets may not even be interested to invest on communal land. Therefore, individualised land tenure cannot be an option and it must be rejected outright.

## 5 Chapter five

### 5.1 Analysis of the *Green Paper* (2010)

The *DRDLR* have since released a *Green Paper*<sup>181</sup> which proposes, *inter alia*,

- one national policy and legislation governing land administration and to close the chapter on colonial and apartheid land administration;
- the new land administration law should provide for the establishment of a national body in the form of *Land Management Commission (LMC)*, to regulate the use, management and allocation of all state land in the country;
- all state land and public land must be surveyed as a matter of priority, within a period to be specified in the legislation, by all custodian departments, spheres of government and public entities;
- the *Minister of Rural Development and Land Reform* or any other relevant Minister shall have the authority to grant rights for use, allocation and development in consultation with the affected custodian user and or affected community;
- land previously acquired by communities but still held in trust by the state shall be subjected to compulsory adjudication prior to the surveying of outer boundaries and the allocation of use rights by qualifying members of that community;
- all land use rights will be allocated through lease hold rather than freehold;
- all state and public land should be subject to confirmation of ownership of that land by the envisaged *LMC*; and lastly,
- that the new land administration framework must attempt to address the policy conundrum the government faces with regard to the roles, responsibilities and relationship between various institutions currently having various roles in land administration.<sup>182</sup>

---

<sup>181</sup> *Green Paper on land reform.*

<sup>182</sup> *Green Paper on land reform* 5-6.

The *Green Paper*<sup>183</sup> further proposes a re-configured single, coherent four-tier system of land tenure, which ensures that all South Africans, particularly rural blacks, have a reasonable access to land with secure rights, in order to discharge their basic needs for housing and productive livelihoods; clearly defined property rights, sustained by a fair, equitable and accountable land administration system within an effective judicial and governance system; and effective land use planning and regulatory systems which promote optimal land utilisation in all areas and sectors and effectively administered rural and urban lands, and sustainable rural production systems. The four tiers are discussed at 5.1.1 below.

The following principles will strengthen the new approach towards sustainable land reform: deracialisation of the rural economy for shared and sustained growth; democratic and equitable land allocation and use across gender, race and class; and strict production discipline for guaranteed national food security.<sup>184</sup>

Accordingly, an improved trajectory for land reform is supported by the following programmes and institutions: a recapitalisation and development programme; a single land tenure system with four tiers; a Land Management Commission; a Land Valuer-General; a Land Rights Management Board, with local management committees; properly aligned common property institutions, and the *Land Tenure Security Bill* 2010, which is an integral part of the Land Reform Programme.

### **5.1.1 A single land tenure system with four tiers**

A single land tenure framework has been shaped, integrating the current multiple forms of land ownership<sup>185</sup> into a single four-tier tenure system:<sup>186</sup>

- (a) State and public land: leasehold;
- (b) Privately owned land: freehold, with limited extent;
- (c) Land owned by foreigners: freehold, but precarious tenure, with obligations and conditions to comply with; and,

---

<sup>183</sup> *Green Paper on land reform* 6.

<sup>184</sup> *Green Paper on land reform* 3.

<sup>185</sup> Which are communal, state, public and private.

<sup>186</sup> *Green Paper on land reform* 6.

(d) Communally owned land: communal tenure, with institutionalised use rights.

In the main, one should be greatly concerned with communal land tenure with “institutionalised” use rights. If the government does not encourage proper rural economic development in order to improve land reform rights, it would cost the country billions of rands to recapitalise the whole exercise. Land reform would fail unless there is a real commitment to develop the rural economy through schemes such as share ownership for beneficiaries or through the active participation of landowners who have parceled up their holdings for reform with appropriate compensation as dictated for by the *Constitution*.<sup>187</sup>

The extent of the limitations on privately owned land is not expressly defined in the *Green Paper* and therefore, it left us in the dark.

### **5.1.2 Land Valuer-General**

The proposed Valuer-General will be a statutory office responsible for:

- (a) the provision of fair and consistent land values for rating and taxing purposes;
- (b) determining financial compensation in cases of land expropriation, under the *Expropriation Act*<sup>188</sup> or any other policy and legislation, in compliance with the *Constitution*;
- (c) the provision of specialist valuation and property-related advice to the Government;
- (d) setting norms and standards, and monitoring service delivery;
- (e) undertaking market and sales analysis;
- (f) setting guidelines, norms and standards required to validate the integrity of the valuation data; and,
- (g) creating and maintaining a data-base of valuation information.<sup>189</sup>

The creation of the office of the Valuer-General with powers to determine the value of financial compensation in cases of land expropriation is worrying. The *Constitution*

---

<sup>187</sup> See s 25 (2)(b) and (3) of the *Constitution*.

<sup>188</sup> *Expropriation Act* 63 of 1975.

<sup>189</sup> *Green Paper on land reform* 7.

explicitly provided that this role was to be performed by the judiciary. For the Minister of Rural Development and Land Reform to appoint a non-independent body to determine compensation is open to misuse and is unlikely to surpass constitutional muster.

The Land Valuer-General is to determine financial compensation in compliance with the *Constitution* when land is expropriated.<sup>190</sup> If the aim is that this functionary would make final determinations of compensation payable, this would be unconstitutional. Perhaps the benefit of the doubt should be given to the Minister of Rural Development and Land Reform, in that the *Green Paper* determines that the Land Valuer-General would provide specialist valuation advice. The intention could be that this official is a mere resource to Government when offering compensation amounts; if parties cannot agree, then the amount would be decided by a court as the *Constitution* requires.<sup>191</sup>

### **5.1.3 Land Management Commission**

The Government is to establish a powerful statutory body that will regulate the ownership of land by both foreigners and locals. The proposed LMC is one of the measures aimed at expediting land reforms which are contained in Government's *Green Paper* on land reform. The LMC is set to operate separate from the Land Claims Commission and it would be an autonomous but not independent body within the Ministry of Rural Development and Land Reform.<sup>192</sup> Land specialists would be appointed to run the LMC together with stakeholders in the field of commercial agriculture and subsistence farming.<sup>193</sup> The envisaged LMC would, among others, have the powers to:

- (a) verify, validate or invalidate individual or corporate title deeds;

---

<sup>190</sup> See s 25(2) and (3) of the *Constitution*.

<sup>191</sup> Moore 2011 [http:// www.freemarketfoundation.com](http://www.freemarketfoundation.com).

<sup>192</sup> *Green Paper on land reform* 6.

<sup>193</sup> *Green Paper on land reform* 6.

- (b) subpoena anyone to appear before it to answer any questions on land holding;
- (c) demand a declaration of any land holding with all necessary documentation, and
- (d) seize or confiscate land acquired through fraudulent or corrupt means.<sup>194</sup>

The LMC would be a reference point for anyone intending to procure or sell land. The Government has been at pains to explain the slow pace of land reform and redistribution since coming into power in 1994. It is not likely to meet the target of transferring 30 percent of arable land to previously disadvantaged communities by 2014.

#### **5.1.4 Land Tenure Security Bill 2010**

The objectives of this Bill are;

- (a) to promote and protect the relative rights of persons working on farms, person residing on farms and farm owners;
- (b) to enhance the security of tenure of persons working on farms;
- (c) to create conditions conducive to peaceful and harmonious relationships on farms and in farming communities; and
- (d) to sustain production discipline on land in the interest of food security.

This Bill does not necessarily deal with land tenure reforms in communal areas, however, chapter six of the Bill provides for the establishment of agri-villages. It also provides the space for resettlement for human and agricultural purposes; authorises acquisition of land on temporary or permanent basis for the purpose of resettlement and makes provision for financial aid to vulnerable persons on farms whose rights are threatened. It is submitted that, this will result into the emergence of new forms of communal areas. These proposed agri-villages will assist to reduce the influx of farm workers to the existing communal areas which has contributed to the problem of overcrowding in these areas.

---

<sup>194</sup> *Green Paper on land reform 6.*

A number of proposals contained in the *Green Paper* are raising very serious concerns and need to be revisited. Included in these was the creation of a LMC reporting to the Minister of Rural Development and Land Reform with powers to subpoena, prosecute, and invalidate land ownership. It must be argued that it is indefensible that an extra-judicial body that is not independent from a political office is granted powers to terminate land ownership rights. This is a violation of the constitutional principle of property rights. The *Constitution* guarantees property rights as follows:

- 25(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application
  - (a) for a public purpose or in the public interest; and
  - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

It is difficult to see how the DRDLR's proposals can be implemented without altering section 25 of the *Constitution*. Moreover, it would require fair payment of compensation and the Government does not have the financial means to do so. Property rights being enshrined in the *Constitution*, there is no prospect of arbitrary changes to property ownership. The rule of law is robust and changes to the current property law regime, if any, must be effected in an orderly fashion and in line with the *Constitution*.

Section 25 of the *Constitution* states the requirements for which all infringements of property rights must comply with. In order to be a legitimate deprivation, the infringement must be authorised in terms of a law of general application and it may not be arbitrary. The phrase 'law of general application' has been held not only to include legislation that does not single out certain people or groups of people for discriminatory treatment but also the common law, equally applicable to all.<sup>195</sup> It is

---

<sup>195</sup> *Du Plessis v De Klerk* 1996 3 SA 850 (CC) at par 44 and 136; *Trustees, Brian Lackey Trust v Annandale* 2004 3 SA 281 (C) at par 18.

stated in *Minister of Transport v Du Toit*<sup>196</sup> that “the injunction in section 25 of the *Constitution* against any law permitting ‘arbitrary’<sup>197</sup> deprivation of property’ was designed not merely to protect private property but also to advance the public interest in relation to property.” The ordinary meaning of the word ‘arbitrary’ leads one to think that an arbitrary deprivation takes place mercurially and is neither based on reason nor principle.<sup>198</sup> In this context, ‘arbitrary’ is, however, ‘not limited to non-rational deprivations, in the sense of there being no rational connection between the means and the end’.<sup>199</sup> It was stated in *FNB v SARS*<sup>200</sup> that a deprivation will be arbitrary if:<sup>201</sup>

- it is procedurally unfair; or
- the provision under adjudication does not provide sufficient reason for the deprivation concerned. Whether there is *sufficient reason* for the deprivation, is to be decided on all the relevant facts of each particular case.

A ‘complexity of relations’ has to be considered when evaluating the relationship between the purpose of the law and the deprivation effected by that law. The process would *inter alia* entail:

- evaluating the relationship between the particular deprivation and the ends sought to be achieved;
- scrutinising the relationship between the purpose of the deprivation and the affected individual;
- assessing the purpose and extent of the deprivation in relation to the nature of the property affected;
- focusing on all the material facts of each individual case.

Interpreting these criteria, Judge Yacoob stated in *Mkontwana v Nelson Mandela Metropolitan Municipality*<sup>202</sup> that, “if the purpose of the law bears no relation to the property and its owner, the provision is arbitrary”. This approach was welcomed by Van der Walt,<sup>203</sup> because Judge Ackerman managed to introduce a more substantive element into the first-stage analysis of any infringement of property.

---

<sup>196</sup> *Minister of Transport v Du Toit* 2005 10 BCLR 964 (SCA) 968.

<sup>197</sup> See *FNB* case below dealing comprehensively with meaning of the word arbitrary.

<sup>198</sup> Badenhorst, Pienaar and Mostert *Silberberg and Schoeman’s The law of property* 99.

<sup>199</sup> *FNB v SARS* at par 65.

<sup>200</sup> *FNB v SARS* at par 100.

<sup>201</sup> For a thorough exposition of this aspect see Roux “Property” 46-1–46-25.

<sup>202</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 at par 547.

<sup>203</sup> Van der Walt 2004 *SALJ* 854-870.

According to the *ratio* of the *FNB*<sup>204</sup> case, the question whether a deprivation constitutes an expropriation will only come into consideration if all the above-mentioned requirements have been met.

The proposals contained in the *Green Paper* have wide-ranging consequences for the South African economy, and for prospects of uplifting and improving the destiny of those who were dispossessed of their land rights under apartheid. Any programme of redress must be based on the rule of law and the constitutional provisions that govern property ownership. Land reform must be a win-win scenario, in which the rights of present and future landowners are protected. Therefore, it is totally inappropriate that constitutional amendments should be contemplated to expedite land reform whilst delivery failures are at the heart of the problem. It should be argued that the current *impasse* and related consequences cannot be blamed on the failure of the “willing seller, willing buyer” approach alone, but is rather a consequence of corruption, tenderpreneurship, lack of capacity and poor implementation of programmes and legislation. The Government must be committed in rooting out corruption within all the departments and must appeal to all participants to act accordingly and co-operatively.

The main positive aspect of the *Green Paper* is that it is not aimed at individualisation, but protection of communal land tenure. It must be recognised that many urban dwellers, particularly the first generation, retain an expressive attachment to rural land, and also often regard it as a primary source of security against unemployment and poverty in old age.<sup>205</sup> Radical economic development and vibrant urban housing programmes will also reduce the rational aspiration for a piece of rural land as security against poverty. This will, in the long term, alleviate pressure and overcrowding in rural land.

The recent *Green Paper* on land reform does not provide comprehensive details on what is to happen in communal areas. It only make mention of institutionalised communal tenure without unpacking it. Furthermore, it is silent on the granting of

---

<sup>204</sup> *FNB v SARS* at par 59.

<sup>205</sup> They maintain a bond with the rural areas they were born.

freehold<sup>206</sup> tenure in these areas. The *Green Paper* provides no policy direction on how to solve the conflicts around the tenure rights of the two main rural constituencies: the 16 million people residing under communal tenure in the ex-Bantustans and the 3 million farm dwellers living on privately-owned commercial farms.<sup>207</sup> It should be revealed that any plan for granting freehold will face considerable opposition from traditional leaders and other interest groups because this can be viewed as opening communal land up to the markets. Some may argue that this will create capitalism<sup>208</sup> and communal land will be attached by the banks and put on sale resulting on communal people becoming landless. However, this assertion will not stand the test of time because South Africa is already a capitalist country.

According to Moore,<sup>209</sup> the best prospect for land redistribution is for the Government, which owns some five to fifteen million parcels of land in historically black areas, urban and rural, to immediately redistribute them all to existing occupiers at little cost, which would result in millions of new landowners. All land parcels lawfully or permanently held by black South Africans on government or municipal-owned land should be summarily converted to full, unambiguous, freely-tradable ownership at zero cost to beneficiaries.<sup>210</sup> Community, traditional and tribal land should be unambiguously and democratically owned and controlled by the people concerned, who should be allowed to give to each lawful occupant, if they wish, the plot they hold in full unambiguous freely-tradable ownership.<sup>211</sup>

The *Green Paper* attempts to generate ideas and responses to the policy questions facing land reform such as:

- why should the state continue to invest in transforming land relations;

---

<sup>206</sup> See Kilbourn *The ABC of conveyancing* 4 for a comprehensive definition of this term.

<sup>207</sup> Du Toit 2011 <http://tia-mysoa.blogspot.com>.

<sup>208</sup> Free market system where the state has less control of the economy.

<sup>209</sup> Moore 2011 <http://www.freemarketfoundation.com>.

<sup>210</sup> Moore 2011 <http://www.freemarketfoundation.com>.

<sup>211</sup> Moore 2011 <http://www.freemarketfoundation.com>.

- how important is land reform in South Africa today;
- is South Africa still primarily an agrarian society with the extent of the historic dispossession and transformation of the majority of the dispossessed into wage-workers;
- is there an agreement about the demand for land in South Africa and the purpose and prospective beneficiaries of land reform and
- can land reform represent a radical and rapid break from the past without significantly disrupting agricultural production and food security? <sup>212</sup>

The change agenda pursued in the *Green Paper* is that in order to create a new trajectory for land reform, a set of proposals are put forward which attempts to break from the past without significantly disrupting agricultural production and food security, and avoid redistributions that do not generate livelihoods, employment and incomes.<sup>213</sup>

Communal land tenure consists of informal land use rights, since these rights are not registrable because of their nature.<sup>214</sup> Only rights to demarcated, surveyed property can be registered, excluding a large part of the population from the protection offered by the registration system.<sup>215</sup> Therefore, the Government must investigate the possibility of registration of communal land rights in computerised form. The solution lies in the improved protection of statutorily recognised rights by an extended land registration system where informal, fragmented or communal land rights are recorded and protected in accordance with the application of the publicity principle.<sup>216</sup> Such a registration system should be underpinned by a suitable computerised land information system.<sup>217</sup> The new legislation must be enacted to make this possible. Prior to the introduction of the envisaged legislation, consultative workshops should be held to promote new systems of land tenure and address the

---

<sup>212</sup> Nkwinti 2011 <http://www.pmg.org.za>.

<sup>213</sup> Nkwinti 2011 <http://www.pmg.org.za>.

<sup>214</sup> See 2.1 above.

<sup>215</sup> Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The law of property* 193.

<sup>216</sup> Pienaar 2009 *PER* 38.

<sup>217</sup> Pienaar 2009 *PER* 38.

concerns of traditional leaders and their communities. Internal community dialogue and concessions should go before decisions concerning the manner in which tenure is facilitated within communal areas.

While individual landownership is based on an accurate land survey system of demarcated individual land parcels that indicate the exclusive area where rights are exercised,<sup>218</sup> communal land tenure is based on flexible use-rights by a range of members of a community within a specified area.<sup>219</sup> The borders of these areas are often vague or flexible, and may change from time to time due to specific uses or agreements.<sup>220</sup> Furthermore, the use-rights may differ due to seasonal, varied or changed needs, for instance a family may cultivate a designated portion of land during the summer, while the same portion of land may be available for grazing purposes to the whole community during the rest of the year.<sup>221</sup>

On the other hand, not all people living in rural areas are members of a functional community or recognise community structures and rules, and many people have a need for individualised land tenure rights within communal land in rural areas.<sup>222</sup> The Government must conduct a comprehensive land tenure audits (or investigations) as to what the nature and extent of land rights in rural areas are, and who exercises these rights. Furthermore, rights holders must be protected from abuse by giving them recourse to the law and access to information. The Government must provide support structures and mechanisms to allow them to do this. In this transition, the historic role of traditional authorities must also be adequately recognised, subject to the wishes of the people involved as well as the human rights requirements as enumerated in the *Constitution*.

Although we must wait for the implementation of the proposals contained in the *Green Paper* before the full implications of the proposed land policy can be assessed, it is intricate to see how it could be introduced without amending section

---

<sup>218</sup> See the provisions of the Land Survey 8 of 1997; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The law of property* 194-195.

<sup>219</sup> Pienaar 2009 *PER* 40-41; See also 2.1 above

<sup>220</sup> Pienaar 2009 *PER* 40-41.

<sup>221</sup> Cousins 2005 *Stell LR* 490-494; See 2.1 above.

<sup>222</sup> Pienaar 2009 *PER* 40-41.

25 of the *Constitution*, which protects people from arbitrary deprivation of their property, specifically land. Arbitrary deprivation would presumably include attachment of property rights without the compensation required by section 25 of the *Constitution*. Section 25 of the *Constitution* was one of the core compromises on which acceptance of the new *Constitution* depended. If it is diluted, the national consensus that made the *Constitution* and the new South Africa possibly will be seriously eroded.<sup>223</sup>

The ANC Youth League's debate on land reform has been so far centred on white fears of wholesale nationalisation and expropriation without compensation. This has been fuelled by the populist statements of ANC Youth League president Julius Malema, whose approval of Zimbabwe-style land invasions has fuelled white farmers' paranoia.<sup>224</sup> Malema's grave mistake is to attempt to use such a sensitive matter like land reform as a canvassing tool to serve his factional interest in preparation for the ANC's elective conference in Mangaung next year. However, notwithstanding the fact that the ANC has acknowledged that there is a need to hasten land and agrarian reform,<sup>225</sup> the balance of evidence reveals that Malema's call does not enjoy popular support within the ANC proper which include President Zuma, unlike the Polokwane campaign which was supported by all components of the Tripartite Alliance.<sup>226</sup> The SACP has since labelled Malema a tenderpreneur; a bad tendency within their movement and a right-wing populist demagogy. The MKMVA has called Malema an illdisciplined toddler who has never worked in a mine. It has been predicted that the ANC might throw Malema and his entourage into the political wilderness for their nationalisation call. Lastly, one concurs that there is a shortage of land in communal areas and land must be lawfully expropriated from other owners in order to respond to this shortage. Land expropriation without compensation is unjust and that will most probably disrupt agricultural production and food security, as a result, the objectives of the *Green Paper* will be derailed.

---

<sup>223</sup> Haviland 2010 <http://www.businessday.co.za/articles/Content.aspx?id=104957>.

<sup>224</sup> Terreblanche 2010 <http://www.capetimes.co.za/index.php>.

<sup>225</sup> ANC 2007 <http://www.anc.org> 24-28.

<sup>226</sup> Tripartite Alliance is a political relationship between ANC, SACP, and COSATU.

## 6 Chapter six

### 6.1 Conclusion

This study has indicated in the introductory chapter that, the current land reform policy has suffered from many weaknesses which have contributed to its failure. South Africa's history has created a pattern of land settlement based on racially determined access, which largely endures to this day. It is imperative, both to ensure that our society is a fair and just one, and to promote South Africa's growth and development, that priority must be given to changing these skewed patterns of ownership to create new opportunities for land rights particularly in communal areas. The most imperative governmental task is to create legislation which will protect the property rights of those who have land, and extend land rights to those who do not. In fact, it is only by resolving these apparent inconsistencies that we can achieve significant social and economic progress in South Africa.

Chapter two discussed the nature of customary land tenure together with a brief historical background. It has been argued that customary land tenure consists of informal land use rights, since these rights are not registrable because of their nature. Tribal or customary land rights cannot be defined with reference to ownership, since that term has acquired an element of individualism that is foreign to tribal property relations.<sup>227</sup> According to customary law land is not owned at all, or is owned by a tribe or small social unit as a whole, while individuals obtain protected rights of occupancy, use and exploration to certain parts of such land, within the social structure of the group in question.<sup>228</sup> The case of *Amodu Tijani v The Secretary, Southern Province Nigeria*<sup>229</sup> is authoritative in determining that land belongs to the community, the village or the family, never to the individual.<sup>230</sup>

---

<sup>227</sup> Van der Walt 1990 *De Jure* 7.

<sup>228</sup> Van der Walt 1990 *De Jure* 7-8.

<sup>229</sup> *Amodu Tijani v The Secretary, Southern Province Nigeria* 1921 AC 399 PC 404.

<sup>230</sup> See 2.1 above.

Chapter three revealed that our *Constitution* contains a carefully drafted *Bill of Rights* balancing the rights of property owners, the state and people entitled to redress as a result of past racially discriminatory laws and practices. The letter and spirit of the *Bill of Rights* must be respected at all times if land reform is to be successful and peaceful in South Africa. Both the return of land which has been taken from the original owners in the past, and the extension of land rights to those who have never before owned land, are important objectives for South Africa, and land reform must be carried out as hastily as possible.

Chapter four presented a comprehensive discussion of *IPILRA* and *CLARA*. The balance of evidence on land reform, and rural land reform in particular, is besieged with examples of land deals which have not delivered on expectations, leaving the dreams of people in communal areas in tatters. The *IPILRA* only protected the informal rights to land. It did not resolve the question of landlessness or bring about tenure reforms in communal areas. Basically, *IPILRA* only deferred evictions of informal rights holder upon land until proper land legislation has been enacted. On the other hand *CLARA* was not a very good piece of legislation and it contained many irreparable loopholes. It proposed the conversion of informal rights to land into formal rights to land. *CLARA* also proposed the individualisation of communal land tenure, which was rejected outright by rural communities. However, *CLARA* was never implemented and it was thrown into the dust bin.

Chapter five discussed the *Green Paper*.<sup>231</sup> The *Green Paper* proposed one system of land administration with four tiers, together with bureaucratic institutions.<sup>232</sup> Land reform must not be seen in terms of the land alone, but must be carried out with the very clear objectives of making life better for the beneficiaries and increasing the prosperity of South Africa as a whole. This will mean some fundamental training, and sufficient capital for land development. It is imperative that those who receive land as a result of the land reform process have access to these services. Some of these aspects will hopefully be addressed by some of the proposals contained in the *Green Paper*. The government must provide support; including funding for infrastructure

---

<sup>231</sup> *Green Paper on land reform.*

<sup>232</sup> See 5.1 above.

development and opportunities for training should be fully accessible to beneficiaries. The capacity of the DRDLR to monitor land reform, and intervene early to prevent projects from failing is also significant and it must be dramatically improved.

## **6.2 Recommendations**

The current land reform policy has suffered from many weaknesses which have resulted in many people in communal areas still lacking security of tenure over the land and many are still landless. It is therefore recommended that new legislation must be developed to deal comprehensively with the question of communal tenure, and provide for the formalisation of communal land tenure. The envisaged legislation must provide that the Government must:

- improve protection of statutorily recognised rights by an extended land registration system where communal land rights are recorded and protected in accordance with the application of the publicity principle;<sup>233</sup>
- develop a registration system that is underpinned by a suitable computerised land information system;<sup>234</sup>
- expropriate farms which are adjacent to communal areas and allocate them to communities in those areas so as to address landlessness and overcrowding;
- maintain the existence of communal land tenure so long as the members of the community are in favour of it;
- make tribal land rights freely transferable, confined to members of the community if that is the wish of the community;<sup>235</sup>
- increase budget allocated for land reform projects.

The Government must conduct a land rights enquiry as part of the process of a review of communal land ownership rights. This should be a comprehensive enquiry to undertake longstanding disputes and determine suitable solutions. Furthermore, rights holders must be protected from abuse by giving them recourse to the law and

---

<sup>233</sup> Pienaar 2009 *PER* 38.

<sup>234</sup> Pienaar 2009 *PER* 38.

<sup>235</sup> *Eg* buying from and selling back to members of the community.

access to information. The Government must provide support structures and mechanisms to allow them to do this. In this transition, the historic role of traditional authorities must also be adequately recognised, subject to the wishes of the people involved as well as the human rights requirements of the *Constitution*. Prior to the envisaged legislation being introduced, consultative workshops should be held to promote new systems of land tenure and address the concerns of traditional leaders and their communities. Internal community dialogue, battle of ideas and concessions should go before decisions concerning the manner in which tenure is facilitated within communal areas.

## Bibliography

### Literature

Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property*

Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's: The Law of Property* 5<sup>th</sup> ed (LexisNexis Butterworth Durban 2006)

Bennet "Official' vs 'Living' Customary Law"

Bennet T "Official' vs 'Living' Customary Law: Dilemmas of Description and Recognition" in Claassens A and Cousins B (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (UCT Press Cape Town 2008) 138-153

Bennet *Human Rights and African Customary Law*

Bennet TW *Human Rights and African Customary Law* (Juta Kenwyn 1995)

Budlender and Latsky 1990 *SAJHR*

Budlender G and Latsky J "Unraveling rights to land and to agricultural activity in rural race zones" 1990 *SAJHR* 155-177

Carey Miller and Pope *Land Title in South Africa*

Carey Miller DL and Pope A *Land Title in South Africa* (Juta Cape Town 2000)

Chenwi *Eviction in South Africa*

Chenwi L *Eviction in South Africa: Relevant international and national standards* (Mills Litho Cape Town 2008)

Claassens *The Communal Land Rights Act and Women*

Claassens A *The Communal Land Rights Act and Women: Does the Act Remedy or Entrench Discrimination and Distortion of the Customary?* (University of the Western Cape, Programme for Land and Agrarian Studies Cape Town 2005)

Cousins "Characterising 'Communal' Tenure"

Cousins B "Characterising 'Communal Tenure': Nested Systems and Flexible Boundaries" in Claassens A and Cousins B (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (UCT Press Cape Town 2008) 109-137

Cousins "Contextualising the Controversies"

Cousins B "Contextualising the Controversies: Dilemmas of Communal Tenure Reform in post-apartheid South Africa" in Claassens A and Cousins B (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (UCT Press Cape Town 2008) 3-31

Cousins 2005 *Stell LR*

Cousins B "'Embeddedness' versus titling: African land tenure systems and the potential impact of the Communal Land Rights Act 11 of 2004" 2005 *Stell LR* 488-513

Davis and Hugh 1990 *SAPL*

Davis D and Hugh C "Restructuring the rural economy: legal issue" 1990 *SAPL* 157-167

Devenish *Commentary on the South African Bill of Rights*

Devenish GE *A commentary on the South African Bill of Rights* (Butterworths Durban 1999)

Dlamini "Land ownership and customary law reform"

Dlamini CRM "Land ownership and customary law reform" in Van der Walt AJ (ed) *Land Reform and the Future of Landownership in South Africa* (Juta Cape Town 1991) 37-44

Dlamini 1991 *CILSA*

Dlamini CRM "Towards a regional protection of human rights in Africa: The African Charter on Human and Peoples' Rights" 1991 *CILSA* 189-205

Dugard *International Law: A South African Perspective*

Dugard J *International Law: A South African perspective* (Juta Kenwyn 1994)

Dugard 1994 *SAJHR*

Dugard J "The role of international law in interpreting the Bill of Rights" 1994 *SAJHR* 208-215

Du Plessis, Olivier and Pienaar 1990 *SAPL*

Du Plessis W, Olivier N and Pienaar J "Legislation affecting land: An overview" 1990 *SAPL* 266-276

Gibson *Overcoming historical injustices*

Gibson JL *Overcoming Historical Injustices: Land Reconciliation in South Africa* (Cambridge University Press New York 2009)

Jaichand *Restitution of Land Rights*

Jaichand V *Restitution of Land Rights: A Workbook* (Lex Patria Johannesburg 1997)

Khunou and Nthai 2011 *De Rebus*

Khunou F and Nthai S "Are traditional councils replicas of tribal authorities or new institutions altogether?" 2011 *De Rebus* 32-35

Kilbourn *The ABC of Conveyancing*

Kilbourn L *The ABC of Conveyancing* (Juta Cape Town 2008)

Klug 1995 *JLPUL*

Klug H "Defining the property rights of others: Political power, indigenous tenure and the construction of customary land law" 1995 *JLPUL* 119-148

Mahomed *Understanding Land Tenure Law*

Mahomed A *Understanding Land Tenure Law: Commentary and Legislation* (Juta Cape Town 2009)

Mann *Studies in international law*

Mann FA *Studies in International Law* (Oxford Clarendon 1973)

Mostert 2011 *PER*

Mostert H "Tenure Security Reform and Electronic Registration: Exploring Insights from English law" 2011 *PER* 85-114

Mostert, Pienaar and Van Wyk "Land"

Mostert H, Pienaar JM and Van Wyk AMA "Land" in Joubert *et al* (eds) "Land" *LAWSA* (Butterworths Durban 2010) 108-124

Ntsebeza *Democracy Compromised*

Ntsebeza L *Democracy Compromised: Chiefs and the Politics of Land in South Africa* (HSRC Press Cape Town 2006)

Ntsebeza and Hall *Land Question in South Africa*

Ntsebeza L and Hall R *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (HSRC Press Cape Town 2007)

Okoth-Ogendo "Nature of Land Rights"

Okoth-Ogendo HWO "The Nature of Land Rights Under Indigenous Law in Africa" in Claassens A and Cousins B (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (UCT Press Cape Town 2008) 95-108

O'Shea "International Law and the Bill of Rights"

O'Shea A "International Law and the Bill of Rights" in Barrie GN (ed) *Bill of Rights Compendium* (Butterworth Durban 2002) 7A-6

Pienaar 2009 *PER*

Pienaar G "Aspect of Land Administration in the Context of Good Governance" 2009 *Potchefstroom PER* 16-55

Pienaar 2008 *EJCL*

Pienaar G "The inclusivity of communal land tenure: A redefinition of ownership in Canada" 2008 *EJCL* 1-3

Pienaar 2006 *JSAL*

Pienaar GJ "The land titling debate in South Africa" 2006 *JSAL* 435-455

Pienaar and Van der Schyff "The Reform of Water Rights in South Africa"

Pienaar GJ and Van der Schyff E "The Reform of Water Rights in South Africa" (Paper prepared for the workshop entitled 'Legal Aspects of Water Sector Reforms' organised in Geneva from 20 to 21 April 2007 by the *IELRC*)

Rautenbach and Malherbe *Constitutional Law*

Rautenbach IM and Malherbe EFJ *Constitutional Law* 4<sup>th</sup> ed (Butterworths Durban 1999)

Roux "Property"

Roux T "Property" in Woolson S and Roux T (eds) *Constitutional Law of South Africa* 2<sup>nd</sup> ed (Juta Kenwyn 2003)

Sax 1983 *WLR*

Sax JL "Some Thoughts on the Decline of Private Property" 1983 *WLR* 481

Skweyiya 1989 *CRHRL*

Skweyiya Z "Towards a Solution to the Land Question in Post-Apartheid South Africa: Problems and models" 1989 *CRHRL* 211-234

Southwood *The Compulsory Acquisition of Rights*

Southwood MD *The Compulsory Acquisition of Rights: By Expropriation, Ways of Necessity, Prescription, Labour Tenancy and Restitution* (Juta Kenwyn 2000)

Van der Walt *Constitutional Property Law*

Van der Walt AJ *Constitutional Property Law* (Juta Cape Town 2005)

Van der Walt 2001 *SALJ*

Van der Walt AJ "Dancing with codes – protecting, developing and deconstructing property rights in a constitutional state" 2001 *SALJ* 258-311

Van der Walt 2004 *SALJ*

Van der Walt AJ "Striving for the better interpretation – A critical reflection on the Constitutional Court's *Harksen* and *FNB* Decisions on the Property Clause" 2004 *SALJ* 854-870

Van der Walt 1992 *SAJHR*

Van der Walt AJ "The fragmentation of land rights" 1992 *SAJHR* 431-450

Van der Walt 1990 *De Jure*

Van der Walt AJ "Towards the development of post apartheid land law: An exploratory survey" 1990 *De Jure* 1-44

## **Case Law**

*Alexkor (Pty) Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC)

*Badenhorst v Minister van Landbou* 1974 1 PH K7

*Blathwayt v Cawley* 1976 AC 397 (HL) 426

*Du Plessis v De Klerk* 1996 3 SA 850 (CC)

*First National Bank of SA Limited t/a Wesbank v The Commissioner for the South African Revenue Services and the Minister of Finance* 2002 7 BCLR 702 (CC)

*Hermansberg Mission Society v Commissioner of Native Affairs and Darius Mogale* 1906 TS 135

*In re Southern Rhodesia* 1919 AC 211

*Mabuza II v Miller Others, the Privy Council* 1926 AC 518

*Minister of Transport v Du Toit* 2005 10 BCLR 964 (SCA) 968

*Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC)

*Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC)

*Port Elizabeth Municipality v Various Occupiers* 2005 SA 217 (CC)

*Ratsialingwa and Another v Sibasa* 1948 3 781 (A)

*Richtersveld Community v Alexkor Ltd and Another* 2003 6 BCLR 583 (SCA)

*S v Makwanyane* 1995 3 SA 391 (CC)

*S v Petane* 1988 3 SA 51 (C) 58G-J

*S v Rudman* 1989 3 SA 368 (E) 376A-B

*South Atlantic Island Development Corporation v Buchan* 1971 1 SA 234 (C) 238C-D

*Trustees, Brian Lackey Trust v Annandale* 2004 3 SA 281 (C)

*Tongoane v The National Minister for Agriculture and Land Affairs* (2010) ZACC 10

## **Legislation**

*Abolition of Racially Based Land Measures Act* 108 of 1991

*Bantu Authorities Act* 68 of 1951

*Black Administration Act 38 of 1927*

*Black Communities Development Act 4 of 1984*

*Black Land Act 27 of 1913*

*Communal Land Rights Act 11 of 2004*

*Communal Property Association Act 28 of 1996*

*Constitution of the Republic of South Africa 1996*

*Constitution of the Republic of South Africa, Act 200 of 1993*

*Deeds Registries Act 47 of 1937*

*Development Trust and Land Act 18 of 1936*

*Expropriation Act 63 of 1975*

*Extension of Security of Tenure Act 62 of 1997*

*Group Areas Act 36 of 1936*

*Interim Protection of Informal Land Rights Act 31 of 1996*

*Land Affairs General Amendment Act 11 of 2000*

*Land Affairs General Amendment Act 61 of 1998*

*Land Reform (Labour Tenants) Act 3 of 1996*

*Land Restitution and Reform Laws Amendment Act 18 of 1999*

*Land Restitution and Reform Laws Amendment Act 63 of 1997*

*Land Restitution and Reform Laws Amendment Act 78 of 1996*

*Land Survey Act 8 of 1997*

*Mineral Act 50 of 1991*

*Mineral and Petroleum Resources Development Act 28 of 2002*

*Restitution of Land Rights Act 22 of 1994*

*Restitution of Land Rights Amendment Act 84 of 1995*

*Traditional Leadership and Governance Framework Act 41 of 2003*

*Upgrading of Land Tenure Act 112 of 1991*

*White Paper on Land Reform WP B-91 of 1991*

*White Paper on South African Land Policy 1997*

### **Government Publications**

*Procl R188 in GG 2486 of 11 July 1969 and GR 1154 of 11 July 1969*

*GN 686 in GG 34653 of 24 August 2011*

### **International instruments**

*African Charter on Human and People's Rights (1981)*

*American Convention on Human Rights (1969)*

*First Protocol of the European Convention on Human Rights (1952)*

*Universal Declaration of Human Rights (1948)*

### **Internet sources**

ANC 2007 <http://www.anc.org>

ANC 2007 52 National Conference Resolutions <http://www.anc.org> 2007 [date of use 17 Nov 2011]

De Havilland 2010 <http://www.businessday.co.za/Articles/Content.aspx?id=104957>

De Havilland, N 2010 *Proposed property reforms on shaky ground* <http://www.businessday.co.za/Articles/Content.aspx?id=104957> [date of use 30 Oct 2011]

Du Toit 2011 <http://tia-mysoa.blogspot.com>

Du Toit A 2011 Comment on the Newly Released Green Paper on Land Reform <http://tia-mysoa.blogspot.com> [date of use 25 Oct 2011]

Moore 2011 <http://www.freemarketfoundation.com>

Moore G 2011 Green Paper does not propose real land reform <http://www.freemarketfoundation.com> [date of use 19 Oct 2011]

Nkwinti 2011 <http://pmg.org.za>

Nkwinti G "Media statement on the Green Paper" <http://pmg.org.za> [date of use 30 September 2011]

Terreblanche 2010 <http://www.capetimes.co.za/index.php>

Terreblanche C 2010 Get Our Ground Working For All South Africans  
<http://www.capetimes.co.za/index.php?fArticleId=5482560> [date of use 10 Nov 2011]