

Land information as a tool for effective land administration and development

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In South Africa two diverse property regimes exist alongside one another, namely the system of individualised, common-law landownership, predominantly based on civil-law principles, and the system of communal land tenure, predominantly based on the shared use of land by communities in terms of indigenous-law principles. Added to this is a registration system originally based on the Dutch land registration procedures, but modified in the nineteenth century through the introduction of English cadastral survey procedures linked to the registration system. Only individualised common-law landownership, co-ownership and limited real rights are registrable. The registration system does not provide for the registration of communal land rights, which has the effect that official information in respect of communal land tenure is currently unreliable.

The failure to provide tenure security for indigenous communities can be attributed to several factors, including a large incidence of dysfunctional communities; a defective, and often entirely absent, administrative system to support communities; the wrong kind of formalisation introduced by legislation, namely Westernised corporate models too far removed from accepted customs; the absence of the publicity principle; and the lack of a suitable information and recording system. The main aim of a formalised structure should not be the individualisation of communal land tenure in the form of freehold title, but the security offered by information (recording and publication) of communal land rights exercised within accepted community structures.

The existing deeds registration already provides for different forms of registration, namely individualised land rights in the case of surveyed land and urban fragmented property holding in the case of sectional titles and time-sharing. This article explores the possibility of the development of a third form to record communal land rights in the name of communities, in accordance with the distinctive nature of community structures and communal land tenure. The aim of such a register should be the recording of use rights associated with communal land tenure, which will provide the necessary information (publication) for the development of a comprehensive land administration system that is lacking at this stage.

I INTRODUCTION

Presently, the only official and reliable source of land information in South Africa is the land registration system, which is based on the land

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survey system. Land registration is often perceived as a subject or an aim in itself.¹ In modern South African law, it is often applied as a separate science with intricate and ‘mysterious’ procedures best understood by conveyancers, land surveyors and property specialists.² However, the history of land registration indicates that it is part of the process of giving publicity to the derivative acquisition of ownership and limited real rights in respect of immovable property.³ The publicity given to the transfer of real rights is an essential means of ensuring security of tenure in civil- and common-law systems.⁴ As a specialised field of property law, it is intrinsically tied to the general principles of property law, which forms the basis of the land registration system.

The property dispensation upon which land registration is based is therefore a decisive factor in the registration procedure that is followed. In the South African context, two diverse property regimes exist alongside one another, namely the system of individualised common-law landownership and co-ownership, predominantly based on civil-law principles,⁵ and the system of communal land tenure, predominantly based on the shared use of land by communities in terms of indigenous-law principles.⁶ Added to this is a registration system originally based on the Dutch land registration procedures, but modified in the nineteenth century through the introduction of English cadastral survey procedures linked to the registration system. This system does not provide for the registration of communal land rights, having the effect that official information in respect of communal land tenure is currently unreliable and insufficient.⁷ It was only after the demise of apartheid land law and the development of an inclusive property regime in terms of the constitutional property

¹ J W S Heyl *Grondregistrasie in Suid-Afrika* (1977) v and 18–19; R J M Jones & H S Nel *The Law and Practice of Conveyancing in South Africa* (1991) 1; J M Knoll *Conveyancing Forms and Precedents* (1994) 23–24; contra P J Badenhorst, J M Pienaar & H Mostert *Silberberg and Schoeman’s The Law of Property* (2006) 201–202, who correctly describe it as the publicity that is given in the case of a transfer of rights based on the derivative acquisition of immovable property.

² *Chief Registrar of Deeds v Hamilton-Brown* 1969 (2) SA 543 (A) 554A–B.

³ D L Carey Miller & A Pope *Land Title in South Africa* (2000) 47–48; Badenhorst et al (n 1) 201–202.

⁴ J C Sonnekus ‘Property law in South Africa: Some aspects compared with the position in some European civil law systems – the importance of publicity’ in G E van Maanen & A J van der Walt (eds) *Property Law on the Threshold of the Twenty-first Century* (1996) 285 at 287–297.

⁵ The civilian nature of landownership is one of the best examples of the reception of the Roman-Dutch principles into South African law without influence by many English common-law concepts; for an exposition of English principles received into the South African property law, see J R L Milton ‘Ownership’ in R Zimmermann & D P Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 664; K Reid & C G van der Merwe ‘Property law: Some themes and some variations’ in R Zimmermann, D P Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective* (2004) 637 at 646–647; D L Carey Miller & A Pope ‘Acquisition of ownership’ in R Zimmermann, D P Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective* (2004) 672.

⁶ Jones & Nel (n 1) 3.

⁷ Heyl (n 1) 13; Jones & Nel (n 1) 3; Badenhorst et al (n 1) 203–204.

clause⁸ that serious efforts were made to formalise communal land tenure in order to offer better security to indigenous people and improve the information system in respect of communal land rights.⁹ However, the mistake has persistently been made to develop and register principles and procedures that fit in with the individualised civilian nature of common-law landownership only, and attempt to force communal land rights into this registration mould or adapt communal land tenure principles to the existing land registration system.

Land information by registration forms part of the general land administration system of South Africa. 'Land administration' is defined as the integrated processes of determining, recording and disseminating information on the tenure, value and use of land in the context of developing suitable land management and development policies.¹⁰ A well-developed land administration system for formal and surveyed urban property and agricultural land already exists in South Africa, but the same cannot be said about informal land rights and communal land tenure in rural areas. Therefore, a comprehensive and effective land administration system for all land tenure rights should be developed to avoid a piecemeal approach to land administration and sustainable development (see section V below). In this process, the development and application of good governance principles regarding land administration will be necessary.¹¹

The purpose of this contribution is to examine the manner in which land information and land registration can be used as tools within a specific land tenure regime and as part of a comprehensive land administration system in order to afford security of tenure to people who exercise their property rights in terms of such regime, whether through individualised landownership, fragmented property schemes or communal land tenure. The emphasis will be on tenure security based on information of the property dispensation concerned.

II REGISTRATION OF INDIVIDUALISED LAND RIGHTS

(1) *Registration as a source of land information*

For registration purposes, rights in immovable property are separated into ownership and registered limited real rights that are registrable in a deeds registry in accordance with s 63(1) of the Deeds Registries Act 47 of 1937

⁸ Section 25 of the Constitution of the Republic of South Africa, 1996.

⁹ Restitution of Land Rights Act 22 of 1994, Communal Property Associations Act 28 of 1996 and Communal Land Rights Act 11 of 2004; see also section III below.

¹⁰ UN Economic Commission for Europe *Land Administration Guidelines* (1996) 1; G J Pienaar 'The need for a comprehensive land administration system for communal property in South Africa' (2007) 70 *THRHR* 556 at 558.

¹¹ In this regard, see G J Pienaar 'Aspects of land administration in the context of good governance' (2010) 12 *PER* para 3.

and other forms of land tenure that are normally not registrable in a deeds registry.¹² The former individualised rights are strictly enforced and protected by means of real actions, can only be transferred through registration in a deeds registry according to the principles of the derivative acquisition of real rights¹³ and are considered absolute in nature.¹⁴ The latter, on the other hand, are often considered ‘weak’ rights, or in most instances subservient, permit-based entitlements to occupy or use land.

The South African deeds registration system is regarded by South African and foreign jurists as an accurate and reliable system of information of land title.¹⁵ However, it is characterised by its exclusivity. In the case of the transfer of real and limited real rights, it is easy to maintain an accurate and reliable information system. But a large part of the population, notably those living in informal urban settlements and in rural areas where a system of communal property still prevails, is excluded from the deeds registration system. The reason for this is that either the land in question has not been surveyed properly or the individualisation of land-use rights in communal property, which is a requirement for the registration of rights in a deeds registry, is not possible.

A negative deeds registration system has been in use in South Africa since the reception of the registration principles from Dutch law in the seventeenth century.¹⁶ Deeds (documents), whereby title is transferred, are registered in the deeds registries without the correctness of the registers, the registered data or the content of such deeds being guaranteed by the state or the personnel of the deeds registry. The reason for the lack of a guarantee lies mainly in the fact that it is an established principle of the material property law to distinguish between the original and derivative acquisition of ownership and limited real rights to immovable property. Original acquisition occurs without the cooperation of the previous

¹² C G van der Merwe *Sakereg* (1989) 65–83; Badenhorst et al (n 1) 65.

¹³ In South African law, certain means of original acquisition of real rights in immovables are recognised, eg by prescription in terms of the Prescription Act 68 of 1969, expropriation in terms of s 25(2) of the Constitution and the Expropriation Act 63 of 1975, accession and marriage in community of property. In such cases, ownership is acquired without the cooperation of the previous owner and such acquisitions are often not registered in the deeds registry, resulting in the South African deeds registration system being classified as a negative registration system of deeds (and not a positive registration system of title according to which the deeds registry guarantees the correctness of the registered data). In this regard, see G J Pienaar ‘Die Suid-Afrikaanse aktesregistrasieselsel – waarheen vorentoe?’ 1996 *JSAL* 205.

¹⁴ Milton (n 5) 692–699; Reid & Van der Merwe (n 5) 659–660; *contra* D P Visser ‘The “absoluteness” of ownership: The South African common law in perspective’ (1985) *Acta Juridica* 39.

¹⁵ Badenhorst et al (n 1) 235–238; Pienaar (n 13) 219–220.

¹⁶ Sections 16 and 16A of the Deeds Registries Act. See also Heyl (n 1) 20–21; R J M Jones ‘Conveyancing and deeds registration’ (December 1977) 120 *De Rebus* 759; J C Sonnekus & J L Neels *Sakereg Vonnisbundel* (1994) 402–403; Pienaar (n 13) 219; *Knysna Hotel CC v Coetzee NO* 1998 (2) SA 743 (SCA); *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA (SCA) para 16.

owner or entitled person, eg in the case of prescription, expropriation, accession or marriage in community of property. In these instances, no compulsory registration takes place and the information in the deeds registry is not always rectified immediately to reflect the factual position.¹⁷ In the case of derivative acquisition, the transfer of the right takes place only after a written deed of alienation has been signed by both parties to the transaction and a deed of transfer (title deed) has been registered.¹⁸ Furthermore, the abstract theory of transfer of real rights is followed in the case of the derivative acquisition of rights in immovable property. This means that the subjective intention of the owner or entitled person to transfer ownership or real rights, as embodied in the real agreement, is a requirement for the actual transfer of such rights.¹⁹ Therefore, as the consent to the transfer of such right²⁰ is a requirement, any incorrect or mistaken registration in the deeds registry without the owner's or entitled person's consent does not result in the transfer of ownership or a limited real right.²¹

Normally a negative deeds registration system is not very accurate. The South African system differs in this respect in that several requirements that are normally regarded as part of the title registration procedure²² are incorporated in order to maintain the accuracy and reliability of the registered information.²³ Registration only takes place when the documents and the transactions have complied with all the legal and statutory provisions for the transfer of real rights;²⁴ the property description in any deed is linked to the cadastral map kept by the surveyor-general;²⁵ the registration of transactions has to follow the sequence of preceding legal acts;²⁶ and all simultaneous transactions are linked and are therefore registered simultaneously.²⁷ The registers kept in the various deeds registries are largely computerised.²⁸ The investigative duties of the deeds registries, aimed at ensuring the registration system is accurate and

¹⁷ Pienaar (n 13) 219–220; Badenhorst et al (n 1) 236.

¹⁸ Van der Merwe (n 12) 333–345; Badenhorst et al (n 1) 235–237.

¹⁹ Sonnekus & Neels (n 16) 391–394; Badenhorst et al (n 1) 74.

²⁰ Naturally, this is only the position in the case of the derivative acquisition of ownership and not in the case of the original acquisition of ownership, for which the owner's consent is not required.

²¹ *Klerck NO v Van Zyl and Maritz NNO* 1989 (4) SA 263 (SEC) 273D–273H; *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 (3) SA 517 (Bop) 545B–545D; D L Carey Miller *The Acquisition and Protection of Ownership* (1986) 164.

²² As to the requirements of a positive title registration system, see G J Pienaar 'Is 'n eenvormige registrasiesistelsel van saaklike regte op onroerende goed moontlik' 1990 *JSAL* 29 at 31–32; Badenhorst et al (n 1) 232–234.

²³ Section 3(1)(b) of the Deeds Registries Act.

²⁴ Section 4; see also Knoll (n 1) 23–27 for other applicable legislation.

²⁵ Eg s 18(1) and see Knoll (n 1) 40–41.

²⁶ Section 14, Deeds Registries Act.

²⁷ Section 13(1), Deeds Registries Act.

²⁸ Sections 99 and 100, Deeds Registries Act.

reliable, is the main reason that the South African procedure is relatively slow, cumbersome and expensive.²⁹ Furthermore, many duties are duplicated because the sellers' conveyancers have the duty to investigate and certify the correctness of the names and identities of the parties, their capacities to transfer or accept property rights, the capacities of the representatives of incapable or legal persons, and the validity of the transfer documents and concomitant acts by the parties.³⁰

(2) *Historical development of individualised title*

The registration system provides information only in respect of individualised title. The requirement that only individualised real and limited real rights are protected by registration in a deeds registry originates from the notion that the civil-law property concept in South Africa is absolute, exclusive and individualistic in nature due to its historical reception from Roman-Dutch law.³¹ However, the contention that Roman, Roman-Dutch and South African property law are identical is based upon an erroneous interpretation of Roman and Roman-Dutch property law.³²

Ownership in Roman law was never absolute and individualistic, and the similarity between the modern concept of 'ownership' and the Roman concept of 'ownership' has been exaggerated.³³ Initially only one real right,³⁴ ownership (*dominium*), was recognised in pre-classical Roman law. However, what were later known as *iura in re aliena* were also classified as *dominium* through the recognition of functionally divided ownership (*duplex dominium*). These rights, like servitudes, were distinguished from ownership and conceived as fragmented ownership.³⁵ Besides the concept of '*duplex dominium*' (or divided ownership) in classical and Justinian law, kinds of ownership other than *dominium ex jure Quiritium* or *proprietas* were identified by modern authors.³⁶ *Duplex dominium* (different types of ownership), in the form of full ownership and what is today termed *iura in re aliena*, was accepted by the Glossators in the

²⁹ In this regard, see Pienaar (n 13) 221 for a schematic exposition of the deeds registration procedure.

³⁰ Section 15A and reg 44A Deeds Registries Act; see also Knoll (n 1) 45–47.

³¹ Milton (n 5) 692–699; Reid & Van der Merwe (n 5) 659–660; Carey Miller & Pope (n 5) 674.

³² Visser (n 14) 39.

³³ A J van der Walt & D G Kleyn 'Duplex dominium: The history and significance of the concept of divided ownership' in D P Visser (ed) *Essays on the History of Law* (1989) 213 at 216; see also *Body Corporate of Albany Court v Nedbank* [2008] JOL 21739 (W) para 20: 'The powerful right of ownership of an immovable property is not absolute.'

³⁴ Although the Romans did not initially identify ownership as a right, the relationship between a *dominus* and a *res* was protected by actions in more or less the same way as the right of ownership, which evolved later.

³⁵ M Kaser *Eigentum und Besitz im Älteren Römischen Recht* (1956) 18 and 303.

³⁶ M Kaser 'The concept of Roman ownership' (1964) 27 *THRHR* 8–9; see also Van der Walt & Kleyn (n 33) 217 and 223.

Middle Ages and by Roman-Dutch lawyers such as Van der Keessel, Van Leeuwen and Voet.³⁷ The feudal division of *dominium plenum* of the landlord and *dominium minus plenum* (including rights later known as *iura in re aliena*) of the vassal as different forms of *dominium* was accepted in some form by most Roman-Dutch writers.³⁸

Grotius, on the other hand, distinguished between complete ownership (*volle eigendom*) and incomplete ownership (*gebrekelicke eigendom*).³⁹ In order to distinguish the right of an owner to a thing burdened with a servitude from the right of the servitude holder, he referred to the first as *opper-eigendom* or the right of the owner who holds the greater part of ownership ('ownership' or *dominium directum*), and the second as *gerechtigheid* ('right' or *dominium utile*). This led to the distinction between *dominium* and *iura in re aliena*. He still distinguished between *dominium directum* and *dominium utile* as different types of ownership.⁴⁰ Grotius did not describe ownership in absolute terms either, as he provided for *ius eminens*, or the overriding ownership of the state over the property of its citizens on behalf of the community.⁴¹ The state, on behalf of the community, had this superior interest for two reasons: first, to ensure that everything belonging to the community was preserved in the interests of the members of the community; and second, for the purpose of maintaining peace and undisturbed possession of the property. The practical and social reasons for the restrictions on ownership are a clear indication that Roman-Dutch ownership was not in principle an unrestricted and individualised concept.⁴²

The French revolution in the eighteenth century and the farmers' revolution in Germany in the nineteenth century were mainly aimed at the abolition of the feudal land system based on *dominium directum* and *dominium utile*.⁴³ This was the catalyst that changed the fundamentally restricted character of ownership and led to a formal, uniform, individualistic and absolute (unrestricted) concept of ownership.⁴⁴ The Pandectists justified this conceptual change by supporting and expanding the distinc-

³⁷ Visser (n 14) 41–42.

³⁸ Van Leeuwen *RHR* 2.2.1; Voet *Commentarius* 6.1.1.

³⁹ Grotius *Inleidinge* 2.33.1; A J van der Walt 'Tradition on trial: A critical analysis of the civil-law tradition in South African property law' (1995) 11 *SAJHR* 169 at 175–179.

⁴⁰ Visser (n 14) 41.

⁴¹ Grotius *Inleidinge* 2.3.2; see also R. Feenstra 'Historische aspecten van de private eigendom als rechtsinstituut' (1976) 1 *RM Themis* 248 at 271. Grotius used the term '*ius eminens*', but it developed into *dominium eminens*, or the overriding ownership of the state over the property of its citizens on behalf of the citizens.

⁴² See Visser (n 14) 44–45 for examples of these restrictions in the interests of the community, eg *naastingsrecht*, *recht van spastekinghe*, neighbour law and the prohibition on the alienation of certain family property or property held on behalf of persons with limited capacity.

⁴³ G C J J van den Bergh *Eigendom. Grepen uit de Geschiedenis van een Omstreden Begrip* (1979) 5; Van der Walt & Kleyn (n 33) 245–248.

⁴⁴ Van den Bergh (n 43) 5.

tion between *dominium* and *iura in re aliena* by Grotius.⁴⁵ However, this was based on a distortion of Grotius's theory, as they eliminated his notion of social and economic restrictions on ownership through the application of the *ius eminens*. Von Savigny referred to 'ownership' as the unrestricted and exclusive domain over an object,⁴⁶ while Windscheid indicated that ownership is basically unrestricted, although it tolerates temporary restrictions.⁴⁷

The Pandectist view of ownership as an absolute, individualistic and basically unrestricted right was accepted in South African case law erroneously as the legacy of Roman and Roman-Dutch property law, but this view is contrary to the acceptance of divided, and inherently restricted, ownership by Roman and Roman-Dutch lawyers.⁴⁸ The prominence that Grotius gave to the limitation of ownership in the interests of the community (*ius eminens*) is of particular importance in refuting the notion that Roman and Roman-Dutch ownership was absolute and individualistic in nature. The interests of the community were therefore always balanced against an owner's right of ownership.

Today, this principle is again strongly applied to the functioning of urban fragmented property communities, with management structures such as bodies corporate of sectional title schemes or general meetings of share-block schemes.⁴⁹ For many reasons, urban communities increasingly rely on community structures associated with urban living. Gated communities are established for safety,⁵⁰ retirement schemes fulfil an essential role with regard to the housing needs of the elderly,⁵¹ and urban sectional title and share-block communities designed for high-density living and commercial activities are the rule rather than the exception.⁵²

⁴⁵ Van der Walt & Kleyn (n 33) 247; A J van der Walt 'Ownership and personal freedom: Subjectivism in Bernard Windscheid's theory of ownership' (1993) 56 *THRHR* 573.

⁴⁶ F C von Savigny *System des Heutigen Römischen Rechts* Bd 1 (1840) 367: 'ausschliessliche oder der Idee nach unbeschränkte Herrschaft'; see also Visser (n 14) 47.

⁴⁷ B Windscheid *Lehrbuch des Pandektenrechts* 7 ed (1891) 492: 'seinem Wesen nach unbeschränkt'; also C G van der Merwe 'Die wet op deeltitels in die lig van ons gemeenregtelike saak- en eiendomsbegrip' (1974) 37 *THRHR* 113 at 122–124; Van der Walt (n 45) 575.

⁴⁸ *Lucas' Trustee v Ismail and Amod* 1905 TS 239 at 247; *Johannesburg Municipal Council v Rand Townships Registrar* 1910 TPD 1314 at 1319; *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 537; *Gien v Gien* 1979 (2) SA 1113 (T) at 1120; see also D H van Zyl *Die Geskiedenis van die Romeins-Hollandse Reg* (1979) 478–482; Van der Merwe (n 12) 172–173.

⁴⁹ G J Pienaar *Sectional Titles and Other Urban Fragmented Property Schemes* (2010) para 1.1.

⁵⁰ C G van der Merwe *Sectional Titles, Share Blocks and Time-sharing* vol 1 (2010 Service 12) para 1.7.3; T Maree 'Home owner's associations. How do they differ from bodies corporate?' (2007) 12/3 *Buttenworths Property Law Digest* 1–4. See also T Heuer 'Living history: How homeowners in a new local historic district negotiate their legal obligations' (2007) 116 *Yale LJ* 676, regarding the duty of homeowners to preserve the historic buildings in their community.

⁵¹ T Maree 'Administrative structures for complex owners' associations' (September 2005) 446 *De Rebus* 47 and (October 2005) 447 *De Rebus* 44.

⁵² D V Cowen *New Patterns of Landownership* (1984) 21–24; R Green & P Feuillherade 'Lost property' (June 2001) 401 *De Rebus* 18–21; Van der Merwe (n 50) para 1.5.

The excessive need for privacy and individualised property rights of the twentieth century has largely been substituted by a need to exercise property rights within suitable community structures.⁵³ This principle is also evident in the case of communal property in the rural areas (see section III below).

(3) *Recent developments*

Two recent developments of the registration system illustrate the acceptance of a more flexible attitude towards the registration of fragmented use rights, and consequently information about such rights. First, in the case of sectional titles a registration procedure different to that of individualised and surveyed land is followed. A sectional title unit consists of a part of a building and an undivided share in the common property comprising the scheme.⁵⁴ It is registered in the sectional title register of a specific sectional title scheme held at a deeds registry, and not in the conventional land register.⁵⁵ This procedure resembles the German *Grundbuch* and the New South Wales register.⁵⁶ The certificate of registered sectional title and the subsequent deeds of transfer of a unit⁵⁷ differ from a conventional deed of transfer in that no conditions of title are recorded or carried forward in the certificate or deed of transfer, because all servitudes and conditions of title are recorded in the sectional title register for the specific scheme.⁵⁸ No diagram is attached to the certificate of registered title or reference to a plan in subsequent deeds of transfer of a sectional title unit. Although the recording of transactions in respect of the sectional title unit resembles the system of title registration, rather than a system of registration of deeds, it is part of the prevailing negative deeds registration system of South Africa. However, what differs is the management structure of a sectional title scheme according to the management and conduct rules⁵⁹ as applied and enforced by the body corporate.⁶⁰ The

⁵³ Heuer (n 50) 676–823; see also the Sectional Titles Schemes Management Act 8 of 2011.

⁵⁴ Pienaar (n 49) para 2.2.

⁵⁵ Sectional Titles Act 95 of 1986 s 12(1)(c) and reg 13.

⁵⁶ Regulation 11; Annexure 1 form C.

⁵⁷ Before 1991, no subsequent deeds of transfer were registered when transferring a sectional title unit, rather the transactions were endorsed on the original certificate of registered sectional title of the unit. This resembled the transfer by endorsement in the case of title registration systems. This procedure was abolished by the Sectional Titles Amendment Act 63 of 1991, which established a registration procedure similar to the prevailing deeds registration practice in South Africa. See also G J Pienaar 'A comparison between some aspects of South African deeds registration and the German registration system' (1986) 19 *CILSA* 236 at 247–249.

⁵⁸ The conditions are set out in a schedule certified by a conveyancer and forming part of the sectional title register for the particular scheme. Therefore, no conditions form part of the certificate of registered sectional title or subsequent deeds of transfer of a unit, or have to be carried forward in the certificate or deed; see also Pienaar (n 49) para 3.5 and 3.7(b).

⁵⁹ Pienaar (n 49) para 4.2.

⁶⁰ Pienaar (n 49) para 4.1.

rules restrict the use rights of sectional owners to a far greater extent than in the case of individual landownership.⁶¹

Second, the Chief Registrar of Deeds has been examining the introduction of a fully computerised land registration system (e-DRS) since 1998.⁶² It is envisaged that this development will enable conveyancers, who are linked to the central registration system by computer, to make use of paperless lodging and electronic verification of information for the transfer of real rights together with simultaneous electronic transactions, such as the cancellation of existing bonds and the registration of new bonds. The purpose of e-DRS is to manage the dramatic increase in the volume of registrations, especially since the incorporation of sectional title registrations in the system, to shorten the process and to improve the accuracy and quality of registered data.⁶³ The current process will still be followed and systemic changes are not envisaged, but all paper-based documents and registers will be replaced by electronic documents and registers.⁶⁴ A fully computerised registration system offers the possibility to adapt, in several ways, to allow for the registration of statutory use rights and communal land tenure, which are presently not recordable. A registration system that incorporates different land tenure models, such as individual landownership, fragmented land tenure (eg sectional titles and time-sharing) and communal land tenure, is a distinct possibility in a fully computerised environment.

III COMMUNAL PROPERTY STRUCTURES IN RURAL AREAS

For centuries, communal land rights have been exercised by traditional communities in the rural areas of the former homelands. These rights are not individualised and may not be registered at present. Consequently, no official information in respect of these rights exists. Use rights are allocated to families, communities and tribes on communal land belonging to the state and various trusts. These rights are administered by traditional leaders in co-operation with various state departments. It is estimated that approximately 16.5 million people, or more than three million households (more than a third of the total population), still live in these areas.⁶⁵ With the exception of the traditional leaders, these people

⁶¹ Pienaar (n 49) para 4.6; *Albany Court* case (n 33) para 20.

⁶² G Radloff 'Electronic land registration progress report' (February 1999) 373 *De Rebus* 34; Chief Registrar of Deeds *Policy Document on the Electronic Deeds Registration System (e-DRS)* (2009) 1–2; H Mostert 'Tenure security reform and electronic registration: Exploring insights from English law' (2011) 14(3) *PER* 85–117.

⁶³ Chief Registrar of Deeds (n 62) 9.

⁶⁴ Chief Registrar of Deeds (n 62) 14.

⁶⁵ S Gutto *Property and Land Reform: Constitutional and Jurisprudential Perspectives* (1995) 4–9; G J Pienaar 'The inclusivity of communal land tenure: A redefinition of ownership in Canada

are generally very poor. They mainly practise subsistence farming on the communal land allocated to them. Official land information regarding communal land tenure is almost non-existent.

‘Communal land tenure’ is defined in terms of its inclusive nature and ideally exhibits the following features:⁶⁶

- (i) Land rights are embedded in a range of social relationships, including household and kinship networks, and various forms of community membership, often multiple and overlapping in character.
- (ii) Land rights are inclusive rather than exclusive in character, being shared and relative, but generally secure.⁶⁷ 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).
- (iii) 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 land by systems of authority and administration.
- (iv) The rights are derived from accepted membership of a social unit and can be acquired by birth, affiliation, allegiance or transactions.
- (v) Social, political and resource-use boundaries are usually clear, but often flexible and negotiable, and sometimes a source of tension and conflict.
- (vi) The balance of power between gender, competing communities, right-holders, land administration authorities and traditional authorities is flexible.
- (vii) The inherent flexibility and negotiability of land tenure rights mean that they are adaptable to changing conditions, but susceptible to capture by powerful external forces (such as the state) or processes (like capital investments).

It has been demonstrated in several legal systems in Africa that the abolishment of indigenous systems disrupts traditional rules, values and customs that have historically governed the use of land, including well-developed conflict resolution mechanisms. Replacement strategies often introduce new institutions of land administration that may not be readily

and South Africa’ (2008) 19 *Stell LR* 259 at 260–261; J Love ‘Foreword’ in A Claassens & B Cousins (eds) *Land, Power and Custom* (2008) xii.

⁶⁶ Gutto (n 65) 13–17; B Cousins ‘“Embeddedness” versus titling: African land tenure systems and the potential impacts of the Communal Land Rights Act 11 of 2004’ (2005) 16 *Stell LR* 488 at 500–501; H W O Okoth-Ogendo ‘The nature of land rights under indigenous law in Africa’ in A Claassens & B Cousins (eds) *Land, Power and Custom* (2008) 95 at 100–102; B Cousins ‘Characterising “communal” tenure: Nested systems and flexible boundaries’ in A Claassens & B Cousins (eds) *Land, Power and Custom* (2008) 109 at 111–118.

⁶⁷ Cousins ‘Embeddedness’ (n 66) 498–500.

accepted, causing disputes and conflict over access to land.⁶⁸ Sociologists and anthropologists agree that the idealistic view of communal land tenure was distorted by colonial and apartheid policies in South Africa.⁶⁹ Traditional leaders were drawn into the power web of apartheid land policy and often acted as mere agents of the apartheid state. There are also well-known incidents of traditional leaders who abused their powers over a long period of time and, without popular consent, either used the land under their control largely to their own benefit or alienated communal property.⁷⁰ For more than a century, the legal precedent in South Africa has been that communal property belongs to the chief as trustee for his people. Contrary to this principle, it has been decided in several cases that, when alienating communal property, the chief only needs the consent of his councillors and not the consent of the people living on the communal property.⁷¹ Klug convincingly indicates that the true meaning of the chief acting as trustee for his people has been distorted by several court cases to fit in with the general political idea of the lack of rights of indigenous people. The power of the chiefs was therefore abused by land administrators to develop a system in which the rights vested exclusively in the chiefs, while the chiefs formed part of the administrative authority of the state power.⁷² This concept of the lack of land rights of individual people,

⁶⁸ G Barnes *Comparative Evaluation Framework for Cadastre-based Land Information Systems (CLIS) in Developing Countries* (1990) 33–34; J Bruce & M S Freudenberg *Institutional Opportunities and Constraints in African Land Tenure: Shifting from a 'Replacement' to an 'Adaptation' Paradigm* (1992) 1–6; S Ventura & M A Mohamed *Use of Information Technologies to Model Indigenous Tenure Concepts* (1999) 4; B Cousins 'Contextualising the controversies: Dilemma of communal land tenure reform in post-apartheid South Africa' in A Claassens & B Cousins (eds) *Land, Power and Custom* (2008) 3 at 10–11.

⁶⁹ Cousins 'Embeddedness' (n 66) 505; Cousins (n 68) 16–18; P Delius 'Contested terrain: Land rights and chiefly power in historical perspective' in A Claassens & B Cousins (eds) *Land, Power and Custom* (2008) 211.

⁷⁰ H Klug 'Defining the property rights of others: Political power, indigenous tenure and the construction of customary land law' (1995) 35 *J of Legal Pluralism and Unofficial Law* 110 at 119–127; C Cross 'Reforming land in South Africa: Who owns the land' in M Barry (ed) *Proceedings of the International Conference on Land Tenure in the Developing World* (1998) 106.

⁷¹ See the discussion of *Tsewu v Registrar of Deeds* 1905 TS 130, *Hermansberg Mission Society v Commissioner of Native Affairs and Darius Mogale* 1906 TS 135 and *R v Ndobe* 1930 AD 484 in Klug (n 70) 119–147; see also M Letsoalo *Land Reform in South Africa – a Black Perspective* (1987) 18–19 and *Bafokeng Tribe case* (n 21) 545–551.

⁷² Klug (n 70) 141: 'Having constructed a vision of African land tenure under "customary law" in which the most important rights – allocation, alienation, and reversion – were vested exclusively in the political authority embodied by the chief, it was a short step to the assertion that the loss of sovereign powers to the colonial authority made African land rights subject to administrative authority. This collapse of property rights into the realm of chiefly authority had equally debilitating consequences for the political rights of Africans. Founded in the practices of "indirect rule", first advocated by Theophilus Shepstone and modified by Lord Lugard, the "preservation" of "native lands and traditional authorities" became the justification for the exclusion of Africans from broader political participation.' See also A McIntosh, S Sibanda, A Vaughan & T Xaba *Traditional Authorities and Land: The Position in KwaZulu-Natal* (1995) 4–6.

based on the distortion of the true meaning of communal property rights, was then used to deny political rights to indigenous people.

It is clear that the security of land tenure by means of communal structures has been eroded over centuries, first by colonial and thereafter by apartheid land policies. This has had an adverse effect on reliable land information in respect of communal land tenure. The demographic reality of a significant population movement to the urban areas due to better career, health-care and education prospects has furthermore disrupted traditional communities. Sociologists report that there is a significant migration of young people and children to urban areas as a result of better opportunities in the urban areas.⁷³ There is also a lack of cohesion in many communities, resulting in border and other disputes within and among communities. It appears impossible to undo the damage caused. The answer to the protection and adjudication of land rights does not lie in disintegrating community structures or the failing memories of community members. Some kind of formal security linked to the key principles of information and publicity of land-use rights in the context and within the framework of communal land tenure has to be developed.

IV LEGISLATION AND CASE LAW

The social cohesion within communities and the attachment of communities to land have been recognised to a limited extent by recent legislation. One example is the Restitution of Land Rights Act 22 of 1994, which was promulgated to provide for the restitution of rights to persons or communities dispossessed of land rights as a result of the racially discriminatory laws or practices of the past. 'Community' is defined in s 1 of the Act as 'any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group'. The rights or interests in land are not limited to surveyed land, but to land in general and are widely described as access (and not only use and occupation) to land held in common by such group. This definition of 'community' is in accordance with its general definition as 'a group of people living together in one place, especially one practising common ownership'⁷⁴ and the definition of 'communal tenure' as 'that form of title by which immovable or real property is held on behalf of a community, such community being formed and organised so as

⁷³ D Bosch & E Hirschfield *Legal Analysis of Communal Property Institutions Used in Land Reform* (2004) 10–14.

⁷⁴ J Pearsall (ed) *The Concise Oxford English Dictionary* (2002) 289. The concept 'community' also features in s 235 of the Constitution dealing with self-determination: 'The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.'

to protect and promote its general interests'.⁷⁵ The concept of communal structures securing communal land rights was confirmed by the Restitution Act, although the administrative blunders by the Land Claims Commission and the lack of post-settlement support have jeopardised the restitution process.⁷⁶ The definition of 'community' in the Restitution Act without any reference to the status or legal personality of the community resulted in uncertainty as to whom land should be restored in the case of a successful land claim instituted by a group of persons. Consequently, the Communal Property Associations Act 28 of 1996 (hereafter the CPA Act) was promulgated to enable communities to form juristic persons in order to acquire, hold and manage immovable property in terms of a written constitution.⁷⁷ 'Community' was defined in this Act as 'a group of persons, which wishes to have its rights to or in particular property determined by shared rules under a written constitution and which wishes or is required to form an association as contemplated in section 2'.⁷⁸ Although this definition of 'community' is wider in scope and includes any group of persons and not only family or tribal members, it is also restricted to particular property (meaning surveyed and registrable property) and not any property they occupy or to which they have access. There is no definition of 'particular property' in the Act. However, in the context of the Act being promulgated to facilitate the registration of communal property in the name of the group as a juristic person, it can only refer to surveyed property registrable in a deeds registry. A list of names of the members of the community forms part of the application for the registration of the association to enable the Director-General of the (then) Department of Land Affairs to determine whether the community is one contemplated by s 2(1) of the Act.⁷⁹

In cases in which it is not possible to provide all the names of the intended members, principles for the identification of persons entitled to be members and a procedure for resolving disputes regarding the right of persons to be members have to be included.⁸⁰ The CPA Act mostly enjoyed a lukewarm reception because in general it was perceived to be too sophisticated for most communities. Furthermore, lawyers drafting constitutions for these communities frequently did not take community

⁷⁵ A Milne, C Cooper & B Burne *Bell's South African Legal Dictionary* (1951) 150.

⁷⁶ See the references cited by Pienaar (n 11) para 2.1.1.

⁷⁷ K Pienaar 'Communal property arrangements: A second bite' in B Cousins (ed) *At the Crossroads: Land and Agrarian Reform into the Twenty-first Century* (2000) 322; A Terblanche *Die Landelike Swart Vriou se Reg op Grondbeheer* (2005) 74–99.

⁷⁸ Section 1.

⁷⁹ Section 5(d); sch cl 5.

⁸⁰ Section 5(d)(i) and (ii); sch cl 5.

custom sufficiently into consideration.⁸¹ The main problem with this Act from the perspective of indigenous people was that it was based on the individualisation of land tenure for registration purposes by using westernised corporate models, and consequently the distinctive communal spirit and responsibilities whereby tenure security is normally ensured were completely ignored. In this process the aim of obtaining official land information regarding communities practising communal land tenure was completely lost.

In order to provide for the specific needs of rural communities practising communal land tenure, the Communal Land Rights Act 11 of 2004 (hereafter CLRA) was promulgated, but the date of its commencement was extended. In May 2010 the Act was found to be unconstitutional and scrapped in its entirety by the Constitutional Court. The stated objective of the CLRA was to provide for legal security of tenure by transferring communal land to communities and to provide for the democratic administration of communal land. For the purposes of this Act, 'community' was defined as 'a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group'.⁸² The administration and management of communal land were to be exercised by land rights boards and land administration committees appointed by the communities for the benefit of the community members.⁸³ In the case of a community that had a recognised traditional council, the powers and the performance of the duties of the land administration committee of such community could be exercised and performed by the traditional council.⁸⁴ In the case of a community exercising communal land rights on specified state land⁸⁵ or land registered in the name of a traditional leader, a communal property association, a trust or other legal entity, such rights could be registered in the name of the community.⁸⁶ For this purpose, the community was required to apply to the Department of Land Affairs to be incorporated as a juristic person⁸⁷

⁸¹ P Rutsch *South African Experiences in Communal Property Associations, Communal Land Trusts and Other Forms of Group Ownership* (1997) 13–14; Pienaar (n 77) 322–323 and 325–330; M R Nonyana 'Communal property associations and their impact on the formation of small businesses in the rural sector' (2000) 9 *Buttenworths Property Law Digest* 1 at 2–7; G J Pienaar 'Security of communal land tenure by registration of individualised title – is the Communal Land Rights Bill of 2003 the final solution?' (2004) 67 *THRHR* 244 at 249; Terblanche (n 77) 81–83.

⁸² Section 1.

⁸³ Sections 22(2) and 22(4)(a); Nonyana (n 81) 8; G J Pienaar 'Regulating communal land rights: The story continues' (2009) 72 *THRHR* 1 at 6–9.

⁸⁴ Section 21(2); see, however, the requirements regarding the composition of such land administration committee prescribed by s 21(3). A 'traditional council' is defined in s 1 of the Traditional Leadership and Governance Framework Act 41 of 2003.

⁸⁵ Section 2(2).

⁸⁶ Section 5(2)(a).

⁸⁷ Sections 3 and 19(1).

by registering community rules as contemplated by s 20.⁸⁸ The juristic person could, subject to the provisions of the Act and its community rules, acquire rights and incur obligations in its own name and could, in particular, acquire and dispose of immovable property and real rights therein and encumber such property by mortgage, servitude or lease.⁸⁹

This Act was received with a great deal of scepticism by various role players. Sociologists were concerned about the lack of protection of existing communal structures by measures to individualise land rights,⁹⁰ while lawyers were concerned about the constitutional validity of several provisions of the Act, as well as practical aspects, such as the functioning of institutions like land rights boards and land administration committees and the registration of new order land tenure rights.⁹¹ Economists indicated that individualised land rights do not necessarily improve agriculture, create land markets or alleviate poverty in sub-Saharan Africa.⁹² They were furthermore concerned about the cost of adjudication of land rights and the introduction of a surveyed land registration system. The following objections were raised against the implementation of this Act:

- (i) Although the Act provided for the registration of land in the name of a community, more or less the same westernised corporate model as in the case of the CPA Act was prescribed, losing sight of the communal spirit and responsibilities of traditional communities that are essential for access to communal land and security of land tenure. Many communal property associations instituted in terms of the

⁸⁸ The matters that have to be regulated by the rules are stated in s 19(2).

⁸⁹ Section 3. Communal property would be encumbered with a mortgage mainly in the case of business property or for intensive farming activities such as irrigation schemes.

⁹⁰ See for instance A Claassens 'The Communal Land Rights Act and women – does the Act remedy or entrench discrimination and the distortion of the customary?' 2005 *Acta Juridica* 42; Cousins '“Embeddedness”' (n 66) 488–513; A Claassens 'Women, land and power: The impact of the Communal Land Rights Act' in A Claassens & B Cousins (eds) *Land, Power and Custom* (2008) 154 at 163–169.

⁹¹ H Mostert & J Pienaar 'Formalization of South African communal land title and its impact on development' in E Cooke (ed) *Modern Studies in Property Law III* (2005) 317; M R Nonyana 'Some disturbing facts on implementing the Communal Land Rights Act' (2005) 14/2 *Butterworths Property Law Digest* 1; G J Pienaar 'The land titling debate in South Africa' 2006 *JSAL* 435; Pienaar (n 83) 2–3; H Smith 'An overview of the Communal Land Rights Act 11 of 2004' in A Claassens & B Cousins (eds) *Land, Power and Custom* (2008) 35 at 39–40.

⁹² M Kirk 'The context for livestock and crop-livestock development in Africa: The evolving role of the state in influencing property rights over grazing resources in sub-Saharan Africa' in N McCarthy, B Swallow, M Kirk & P Hazell (eds) *Property Rights, Risk and Livestock Development* (2000) 23 at 33–35; World Bank *Sustainable Land Management Sourcebook* (2008) 115; see also K Deininger & H Binswanger 'The evolution of the World Bank's land policy: Principles, experience, and future challenges' 1999 *World Bank Observer* 247; G A Sarfaty 'The World Bank and the internalization of indigenous rights norms' (2005) 114 *Yale LJ* 1791; D Hunt 'Some outstanding issues in the debate on external promotion of land privatization' (2005) 23 *Development Policy Review* 199; Pienaar 'Land titling' (n 91) 437–440.

CPA Act are presently unsuccessful or dysfunctional.⁹³ It was envisaged that juristic persons incorporated in terms of the CLRA would experience constraints similar to those experienced by communal property associations.⁹⁴

- (ii) Although security of tenure is often obtained by membership of a functional community, many communities in rural areas in South Africa are dysfunctional.⁹⁵ Reasons for this include apartheid land measures, the dumping of thousands of unrelated people on communal land, severe overpopulation and unproductive farming practices, compelling a substantial part of the community to migrate from the communal land, or necessitating other ways of earning a livelihood.⁹⁶ Improved health care, and educational and career opportunities have the effect of a significant migration of young people and children to urban areas. Many members of communities are urbanised to the extent that they oppose traditional customs and community structures, including the institution of traditional leadership.
- (iii) In November 2003, the Director of Tenure Reform of the (then) Department of Land Affairs indicated to the Land Affairs Portfolio Committee that the envisaged number of land administration committees was 892.⁹⁷ This number tallied with the number of recognised traditional councils countrywide. It was therefore clear that the intention of the Department of Land Affairs was to use established traditional councils as land administration committees for all communities, thus depriving communities of their democratic right to form their own land administration committees in terms of s 22(1) of the Act. Presently, many communities have traditional leaders that they do not recognise due to historical allocations in terms of the Black Authorities Act 68 of 1951, which established tribal structures for the administration of black people in the rural areas. These facts formed part of the constitutional attack on the Act in *Tongoane v Minister for Agriculture and Land Affairs*.⁹⁸
- (iv) The Act was furthermore based on the upgrading of land tenure rights by individualising such rights for registration purposes and to use such individualised property as collateral for financial assistance,

⁹³ Pienaar (n 77) 325–326; Terblanche (n 77) 77–100.

⁹⁴ Nonyana (n 91) 5.

⁹⁵ Bosch & Hirschfeld (n 73) 10–14.

⁹⁶ M Adams, B Cousins & S Manona 'Land tenure and economic development in rural South Africa' in B Cousins (ed) *At the Crossroads: Land and Agrarian Reform into the Twenty-first Century* (2000) 110 at 111–112.

⁹⁷ Claassens 'Discrimination' (n 90) 69; Pienaar (n 83) 10.

⁹⁸ 2010 (8) BCLR 741 (CC); see also Mostert (n 62); Love (n 65) xii–xiii; Smith (n 91) 47–56.

resembling the De Soto model.⁹⁹ The Minister of Land Affairs had the final say in deciding to individualise land rights on a recommendation based on a land rights enquiry.¹⁰⁰

The Act was scrapped in its entirety by the decision of the Constitutional Court in the *Tongoane* case because of procedural defects. It was also found unconstitutional in several respects, inter alia, by placing communities under the jurisdiction of traditional councils (exercising the functions of land administration committees) along the divisions of and according to apartheid powers bestowed upon such traditional councils in terms of the Black Authorities Act.¹⁰¹ The nature of the powers and duties of a traditional council exercised in terms of s 24 of the CLRA surpassed the functions allocated to traditional councils by chapter 12 of the Constitution,¹⁰² in that it included the individualisation and administration of communal land in terms of the provisions of the CLRA, and not functions restricted to the application of customary or indigenous laws and practices. The provision of s 21(5) that any condition in the CLRA that referred to a traditional council was intended to establish norms and standards and a uniform national policy regarding communal land rights was a further indication of the extended competencies of traditional councils. These aspects raised questions on the constitutionality of the CLRA regarding the functions of traditional councils and the procedure followed to adopt the CLRA.¹⁰³ Other constitutional matters raised by the applicants were race and gender discrimination and the deprivation of security of tenure. The Constitutional Court confirmed that the CLRA undermined security of tenure in several respects. An appeal against the South Gauteng High Court's¹⁰⁴ ruling against the procedural objections was upheld and it was ordered that the Act should be scrapped in its entirety.¹⁰⁵

Although these legislative measures were an effort by the Department of Land Affairs to acknowledge communal land tenure and the registration of land to improve the security of tenure of communities, much of the flexibility and negotiability of communal land tenure was ignored. The legislation did not fully recognise the true spirit of inclusivity based on acknowledged social relationships. A further constraint on the social

⁹⁹ See H de Soto *The Other Path – the Invisible Revolution in the Third World* (1989) and *The Mystery of Capital* (2000); for criticism of this theory, see Hunt (n 92) 200; Pienaar 'Land titling' (n 91) 436–439; Cousins (n 68) 15.

¹⁰⁰ Section 18 read with s 14; see also Pienaar (n 83) 3–6.

¹⁰¹ Paras 24 and 25.

¹⁰² See also s 21(4) of CLRA and sch 4 to the Constitution.

¹⁰³ *Tongoane v Minister for Agriculture and Land Affairs* 2010 (8) BCLR 838 (GNP) and *Tongoane* CC case (n 98).

¹⁰⁴ *Tongoane* (GNP) case (n 103).

¹⁰⁵ *Tongoane* case (CC) (n 98) paras 6, 36–37, 72–97 and 111.

structure of communities was the prescribed democratic principles to which the rules must comply, but which in most instances contradict the customary rules of the community and often led to the community ignoring the registered rules.¹⁰⁶ Furthermore, the CLRA explicitly provided for the individualisation of communal land tenure for land registration purposes, clearly to enable individual members of communities to obtain freehold title and use the individualised land rights as collateral for financial assistance and loans.

Recent case law is much more explicit in recognising the historically based social cohesion of communities and the attributes of communities in securing land tenure. In *In re Kranspoort Community*,¹⁰⁷ it was held that, for the purposes of a land claim in terms of the Restitution of Land Rights Act, a community should have exercised land tenure rights at the time of dispossession and not at the time at which a land claim is lodged. At the time of lodging the claim, there must be:

- (i) a sufficiently cohesive group of persons to demonstrate that there is still a community or a part of a community, taking into account the impact that the original removal of the community would have had
- (ii) some element of commonality with the community as it was at the time of the dispossession to demonstrate that it is the same community or a part of the same community that is claiming.¹⁰⁸

The three *Richtersveld* cases are significant in determining what constitutes a community for the purposes of a land claim. In *Richtersveld Community v Alexkor Ltd*,¹⁰⁹ it was confirmed that there must be a group of persons who have rights to land, which rights are derived from shared rules determining access to land that the group holds in common.¹¹⁰ In analysing the evidence adduced by the Richtersveld people, and corroborated by the expert evidence of an archaeologist and several anthropologists, the Land Claims Court held that the Richtersveld community fulfilled these requirements.¹¹¹ The evidence indicated that the Richtersveld people shared the same culture, including the same language,

¹⁰⁶ Pienaar (n 77) 325; Bosch & Hirschfield (n 73) 19–35; Pienaar (n 65) 259.

¹⁰⁷ 2000 (2) SA 124 (LCC) para 46; also *Ndebele-Ndzundza Community v Farm Kafferskraal no 181 JS 2003* (3) SA 375 (LCC) para 18. In *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd 2007* (6) SA 199 CC para 39 it was held that there is no justification to infer a requirement that the group concerned must show an accepted tribal identity and hierarchy. Where it is appropriate, the bonds of custom, culture and hierarchical loyalty may be helpful to establish that the group's shared rules related to access and use of the land; see also H Mostert, J M Pienaar & J van Wyk 'Land' in (2010) 14 (1) *LAWSA* para 143.

¹⁰⁸ Para 34; also *Richtersveld Community v Alexkor Ltd 2001* (3) SA 1293 (LCC) para 67.

¹⁰⁹ *Richtersveld LCC case* (n 108) paras 66–75. This aspect of the decision of the Land Claims Court was confirmed in *Richtersveld Community v Alexkor Ltd 2003* (6) SA 104 (SCA) para 5 and *Alexkor Ltd v The Richtersveld Community 2004* (5) SA 460 (CC) para 8.

¹¹⁰ *Richtersveld LCC case* (n 108) para 66.

¹¹¹ *Richtersveld LCC case* (n 108) para 72.

religion, social and political structures, customs and lifestyle. One of the components of their culture was the customary rules relating to their use and occupation of land. All the members of the community had a sense of legitimate access to the land to the exclusion of all other persons. The customary rules of the Richtersveld community also included rules related to civil and criminal matters. From this evidence, it was clear that a community that fulfilled the requirements of the Restitution Act existed.¹¹² The Supreme Court of Appeal attempted to equate the customary-law interest ('a right in land') of the Richtersveld people to something akin to common-law (Roman-Dutch) landownership,¹¹³ but the Constitutional Court overruled this description and held that the customary-law interest in land is something distinct from common-law ownership, and must be understood in terms of its own values and norms in terms of the customary law.¹¹⁴ Although the indigenous nature of communities and communal property is not always acknowledged and fully understood by land tenure legislation, the Constitutional Court firmly established the principle that these institutions are rooted in indigenous law and should be acknowledged as such, but always subject to the spirit, purport and objects of the Bill of Rights in the Constitution.¹¹⁵ Therefore, the Constitutional Court concluded that the nature of the customary-law interest in land (also referred to as 'indigenous title to land')¹¹⁶ is 'a right of communal ownership under indigenous law', including communal ownership of the minerals and precious stones.¹¹⁷ The inclusiveness of indigenous title is indicated by the following characteristics:

- (i) communality
- (ii) inalienability
- (iii) exclusive use and occupation by the community
- (iv) the right to exploit natural sources above and below the surface, including minerals.¹¹⁸ Therefore, it is a true property right with economic implications.

In stark contrast to these clear guidelines regarding the nature and characteristics of communal land tenure, the legislative measures were in general aimed at the individualisation of communal land tenure for the purposes of registration in the existing deeds registration system and the

¹¹² *Richtersveld* SCA case (n 109) paras 18–20.

¹¹³ *Richtersveld* SCA case (n 109) paras 8, 26, 29 and 111(a).

¹¹⁴ *Richtersveld* SCA case (n 109) paras 50; also *Nchabeleng v Phasha* 1998 (3) SA 578 (LCC) para 27; H Mostert & P Fitzpatrick "Living in the margins of history on the edge of the country" – legal foundation and the Richtersveld community's title to land' 2004 *JSAL* 309 at 317–318.

¹¹⁵ Section 39(2).

¹¹⁶ *Richtersveld* (CC) case (n 109) paras 57 and 62.

¹¹⁷ *Richtersveld* (CC) case (n 109) para 64.

¹¹⁸ *Richtersveld* (CC) case (n 109) paras 62–64.

use of the individualised rights as collateral security.¹¹⁹ The nature of the juristic persons incorporated in terms of the legislation did not concur with the distinct characteristics and true nature of indigenous communities. The intention to improve security of tenure by individualising communal land tenure had the adverse effect of stripping functional communities of the security offered by established community structures. It also had an adverse effect on reliable information in respect of the exercise of communal land rights.

V SECURITY BY A COMPREHENSIVE LAND ADMINISTRATION SYSTEM

The failure to provide tenure security for indigenous communities can be attributed to the following factors:

- (i) Community structures in modern-day South Africa do not provide sufficient security of tenure due to a large incidence of dysfunctional communities¹²⁰ and a defective, and often entirely absent, administrative system to support communities.¹²¹ Some kind of formalisation of community structures and administrative support is required in order to provide security of tenure in accordance with the distinct characteristics of indigenous customs.
- (ii) Legislation introduced the wrong kind of formalisation, namely westernised corporate models too far removed from accepted customs and therefore not suitable for indigenous communities. Much of the flexibility and negotiability of communal land tenure was ignored and the legislation did not fully recognise the true spirit of inclusivity based on acknowledged social relationships. The policy of the CLRA was furthermore based on traditional councils acting as land administration committees, while the administrative power of many traditional councils are not acknowledged by communities for historical reasons.
- (iii) An additional cause of this insecurity is that rights conferred in general by legislation do not comply with the requirements of the publicity principle¹²² and are therefore uncertain until, in individual cases, such rights are confirmed by a court order, arbitration, mediation or agreement. The *Richtersveld* and *Tongoane* cases are examples of litigation that lasted almost a decade before Constitutional Court decisions brought finality. Legislation alone is not

¹¹⁹ CLRA ss 6(a)(iii) and 9(1).

¹²⁰ See section IV above regarding dysfunctional communities.

¹²¹ Pienaar (n 11) paras 2.1.1 and 2.2.1.

¹²² Sonnekus (n 4) 285–326; Pienaar (n 22) 29–30; B de Villiers ‘Native title from down under: From hot tub to preservation of evidence – mediation in complex land claims’ (2004) 19 *SAPL* 440.

sufficient to obtain security of tenure, but it has to be formalised by an additional and suitable information and recording system. In such a system, there may be an initial dispute, but the problem will not perpetuate itself in the way it might if security depended on legislation only. The importance of the rights-based strategy of the government is not in the promulgation of the legislation, but in making the rights a reality for people, especially in rural areas.¹²³ In order to do that, the rights must become concretised by an applicable system of governance.

- (iv) The main aim of a formalised structure should not be the individualisation of communal land tenure in the form of freehold title to be used by communities as collateral for financial support, but the security offered by information (recording and publication) of communal land rights exercised within accepted community structures. The existing deeds registration system already provides for different forms of registration, namely individualised land rights in the case of surveyed land and urban fragmented property holding in the case of sectional titles and time-sharing (see section II above). It is possible to develop a third form to record communal land rights in the name of communities, in accordance with the distinct nature of community structures and communal land tenure (see section III above). The aim of such a register should be the recording of use rights associated with communal land tenure, which will provide the necessary information (publication) for the development of a comprehensive land administration system that is lacking at this stage. The information system should be upgradeable to provide for the registration of communal title and eventually individual title if required by a community.

In the process of developing a comprehensive land administration system for both individualised and communal land rights, internationally accepted principles of good governance or best practice should be adhered to. Recent developments in South Africa have emphasised the importance of good governance,¹²⁴ which is described as ‘predictable, open and enlightened policy-making; transparent processes; a bureaucracy imbued with a professional ethos; an executive arm of government

¹²³ B Cousins ‘How do rights become real? Formal and informal institutions in South Africa’s land reform program’ in M Barry (ed) *Proceedings of the International Conference on Land Tenure in the Developing World* (1998) 88 at 92–94; see also G Ferder & A Nishio ‘The benefits of land registration and titling – economic and social aspects’ in *International Conference on Land Tenure and Administration Florida* (1996) 19–25.

¹²⁴ M P Ferreira-Snyman & G M Ferreira ‘Global good governance and good global governance’ (2006) *South African Yearbook of International Law* 55 at 57–58; World Bank *World Development Indicators 2006* (2006) 263; M M Botha ‘Can whistle-blowing be an effective good governance tool?’ (2008) 71 *THRHR* 482 at 490.

accountable for actions; a strong civil society participating in public affairs; and all behaving under the rule of law'.¹²⁵ In the South African context, it was confirmed in *Tshishonga v Minister of Justice and Constitutional Development*¹²⁶ that the movement towards 'good, effective, accountable and transparent governance' should be the cornerstone of good governance. Furthermore, as emphasised by s 195(1)(f) and (g) of the Constitution, public administration must be accountable and transparency must be fostered by providing the public with timely, accessible and accurate information.

Good governance principles in land administration include policy issues (see V.1 to V.3 below) and procedural issues (see V.4 to V.7 below) to ensure that accountability, transparency, affordability, participation and easily accessible and accurate information are included in land management processes. In order to avoid a piecemeal approach to land administration, the following aspects are internationally recognised as requirements for a comprehensive land administration system for formal and informal – including communal – land tenure.

(1) *Equal protection*

Policymakers in South Africa have to deal with two diverse land tenure systems. The one is a well-developed deeds registration system for real and limited real rights to immovable property, which rights are individualised and registered according to the strict and formal procedure set by the Deeds Registries Act.¹²⁷ These rights are often considered as absolute and superior to unregistered rights and offer strong protection to owners and holders of limited real rights. Only rights to demarcated, surveyed property can be registered, excluding a large part of the population from the protection offered by the registration system.¹²⁸ Unregistered rights, and especially informal and communal land rights, are considered inferior and the protection of these rights is often fragmentary and insufficient.¹²⁹

Recent literature, legislation and case law regarding the scope of s 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.¹³⁰ Land tenure

¹²⁵ Anon *Governance: The World Bank's Experience* (2008) vii.

¹²⁶ 2007 (4) BLLR 327 (LCC) 352F.

¹²⁷ Van der Merwe (n 12) 65–83; Badenhorst et al (n 1) 193; Pienaar 'Land titling' (n 91) 439–440.

¹²⁸ Pienaar (n 13) 205–226; Badenhorst et al (n 1) 212–213.

¹²⁹ Pienaar 'Land titling' (n 91) 440.

¹³⁰ AJ van der Walt 'The fragmentation of land rights' (1992) 8 *S.AJHR* 431; AJ van der Walt 'Dancing with codes: Protecting, developing and deconstructing property rights in a constitutional state' (2001) 17 *SALJ* 258; Cousins "Embeddedness" (n 66) 490–494.

legislation¹³¹ was promulgated to protect the informal land rights of labour tenants, squatters, lessees, destitute people, and rural individuals and communities practising communal land tenure, whose land tenure rights were insecure or who were dispossessed by apartheid land measures. 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 Court¹³² as a solution to South Africa's pressing land tenure problems. However, the formalisation of informal and communal land tenure appears inevitable in the present globalising world.¹³³ Therefore, the solution lies in the improved protection of statutory recognised rights by an extended land information and administration system in which informal, fragmented or communal land rights are recorded and protected in accordance with the publicity principle.¹³⁴ The recording of rights should be based on a suitable computerised land information system as part of a comprehensive land administration system for communal property in order to ensure that sufficient information is available for the equal protection of all forms of land tenure.¹³⁵

(2) *Land policy principles*

Modern land administration has to focus mainly on sustainable development of rural and communal areas, where there is often conflict between the environment and pressures of human activity.¹³⁶ Furthermore, it has to deal with recognising, controlling and mediating rights, restrictions and responsibilities over land and land-related resources, such as minerals and water.¹³⁷ The three key attributes to land policy are information regarding tenure, value and use.¹³⁸ Balancing these competing tensions in land policy requires access to accurate and relevant information by way of

¹³¹ See inter alia the Restitution of Land Rights Act 22 of 1994; Land Reform (Labour Tenants) Act 3 of 1996; Interim Protection of Informal Land Rights Act 31 of 1996; Extension of Security of Tenure Act 62 of 1997; Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 and Rental Housing Act 50 of 1999.

¹³² *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 16, 23 and 24.

¹³³ K Dalrymple *Expanding Land Tenure to Alleviate Poverty* (2005) 3–4.

¹³⁴ Pienaar 'Land titling' (n 91) 448–450.

¹³⁵ UN Economic Commission for Europe *Land Administration Guidelines: With Special Reference to Countries in Transition* (1996).

¹³⁶ For the interaction between the social, environmental and economic dimensions of land administration, see P F Dale & J D McLaughlin *Land Administration* (1999) 1–5; I P Williamson 'Best practices for land administration systems in developing countries' (2000) *Long Term Development of Land Management Policies Conference, Jakarta* 1 at 8.

¹³⁷ I P Williamson *Land Administration 'Best Practice' – Providing the Infrastructure for Land Policy Implementation* (2001) 6; Dalrymple (n 133) 1–3.

¹³⁸ Dale & McLaughlin (n 136) 8. This does not only mean economic value, but also social value – see M E T Rakai *Customary Land Tenure into a Land Administration System* (1993) 152–154 and Dalrymple (n 133) 30.

spatial data, normally in the form of a multi-purpose cadastral system,¹³⁹ as part of a comprehensive land information system.¹⁴⁰ Formalisation of tenure is required, but not necessarily in the form of a Western-style individualised land policy.¹⁴¹ In this regard, it is important to establish and define the roles and responsibilities of the various land-related activities such as land management, land reform, land registration, cadastre and land administration infrastructure suitable for communal land tenure.¹⁴²

(3) *Land tenure principles*

Before a final decision on a long-term land development strategy can be made, it is necessary to examine the needs of the different individuals and population groups across all tenure relationships.¹⁴³ In this regard, the land titling debate in South Africa should be given proper attention.¹⁴⁴ To embark on a De Soto-style titling programme based on individualised freehold title, ignoring existing community structures and community participation, may be catastrophic for rural societies and communities, whose main protection lies in community structures. Property concepts of traditional communities are completely different to the Western concept of individualised land rights because of different social norms and values.¹⁴⁵ On the other hand, ignoring the fact that many communities in South Africa are dysfunctional and land administration in these areas is almost non-existent will not solve the land tenure question. Often rural societies practising communal land tenure are idealised (see section IV above).

Developing countries such as South Africa should consider a range of alternatives in order to confirm security of tenure and promote growth and development. It is also necessary to consider the possibility of different tenure arrangements within one cadastral or land information

¹³⁹ A cadastral system is defined by J A Zevenbergen *Systems of Land Registration: Aspects and Effects* (2002) 27–28 as ‘(a) a technical record of the parcellation of land through any given territory, usually represented on plans of suitable scale, with (b) authoritative documentary record, whether of fiscal or proprietary nature or of the two combined, usually embodied in appropriate associated registers’. See also Rakai (n 138) 24–25; P R Harcombe *A Cadastral Model for Low Value Lands – the NSW Western Lands Experience* (2002) 4–13.

¹⁴⁰ A comprehensive land administration system is described by Dale & McLaughlin (n 136) 92–94 as a combination of geographic information and the institutional framework within which such technology is operated to produce information in support of land policy and management activities. See also Rakai (n 138) 19–23 and Harcombe (n 139) 13–18.

¹⁴¹ Dalrymple (n 133) 3–4.

¹⁴² Rakai (n 138) 27–29; Williamson (n 137) 12; Dalrymple (n 133) 29–30 and 38–39.

¹⁴³ Rakai (n 138) 27–29; Williamson (n 137) 12; Dalrymple (n 133) 35–37.

¹⁴⁴ Cousins ‘Embeddedness’ (n 66) 488–513; Pienaar ‘Land titling’ (n 91) 435–455.

¹⁴⁵ Rakai (n 138) 34–35; Dale & McLaughlin (n 136) 1; Dalrymple (n 133) 35–36 and 60. See also L Godden & M Tehan ‘Translating native title to individual “title” in Australia: Are real property forms and indigenous interests reconcilable?’ in E Cooke (ed) *Modern Studies in Property Law IV* (2007) 263–294.

system to suit the diverse needs of individuals, communities and land tenure practices in urban, agricultural and rural areas. The main purpose should be to foster sustainable development by security of land tenure for the diverse spectrum of tenure arrangements and needs.¹⁴⁶

(4) *Land registration principles*

The registration of different kinds of land-use rights for different purposes in one registration system should be considered.¹⁴⁷ Land registration principles applicable to communal land differ substantially from the westernised requirements in the case of individual landownership. However, not all people living in rural areas are members of a functional community or recognise community structures and rules, and some people may have a need for individualised land tenure rights in rural areas. It is therefore necessary to develop a comprehensive registration system in which both of these tenure forms can be accommodated without the one being superior to the other.¹⁴⁸ Registration models have to be developed according to the specific social, legal, cultural, economic and institutional circumstances prevailing in a specific area, as formal urban areas and communal rural areas have different requirements.¹⁴⁹ In this regard, the future vision of registration systems, as embodied in Cadastre 2014,¹⁵⁰ introduces a system in which the focus is on land objects rather than land parcels. A 'land object' is described as a piece of land in which homogeneous rights, restrictions and responsibilities are exercised within its boundaries. This development is in accordance with the trend for registration systems to record arrangements of rights, restrictions and responsibilities that are more complex in order to accommodate environmental and social priorities in addition to the traditional economic function.¹⁵¹ The success of a registration system is not dependent upon its legal or technical sophistication, but whether it protects land rights adequately and records such rights efficiently, simply, quickly, securely and at low cost.¹⁵²

In this context, 'title' does not necessarily mean 'ownership'¹⁵³ and different people can have different forms of title in respect of the same

¹⁴⁶ Rakai (n 138) 61–64 and 143–149; Williamson (n 137) 14; Dalrymple (n 137) 35–37.

¹⁴⁷ For a definition of cadastral systems, see note 139.

¹⁴⁸ Rakai (n 138) 61 and 143–149; Williamson (n 137) 15; Dalrymple (n 133) 35–37.

¹⁴⁹ Dale & McLaughlin (n 136) 9 indicate that a holistic approach is necessary, referring to the UN Economic Commission for Europe (n 135) 1: 'The modern cadastre is not primarily concerned with generalised data but rather with detailed information at the individual land parcel level. As such it should service the needs both of the individual and the community at large.' See also Rakai (n 138) 163–165.

¹⁵⁰ Harcombe (n 139) 96–99.

¹⁵¹ Rakai (n 138) 152–154; Williamson (n 137) 13.

¹⁵² See S E Nichols *Land Registration: Managing Information for Land Administration* (1992).

¹⁵³ Regarding 'title' in the case of long-term leases and mineral rights, see Knoll (n 1) 204 and 356, respectively. For different forms of title over the same property in English law, see

piece of land simultaneously.¹⁵⁴ This is illustrated by the fact that an usufructuary can obtain title simultaneously with the owner regarding the same property. Other examples are the titles of registered long-term lessees and the holders of mineral rights. Use rights can thus be fragmented to the extent that different people exercise different use rights in terms of different titles over the same property. This principle is not prohibited by the Deeds Registries Act. Furthermore, it has always been recognised that in the case of more than one title existing simultaneously over the same property, ownership does not necessarily confer a preferential title to an owner.¹⁵⁵ This has been confirmed by recent legislation and case law.¹⁵⁶ In this vein, the Constitutional Court referred to the community's interest in land in the *Richtersveld* case paras 57 and 62 as 'indigenous title to land' (my emphasis).

In the White Paper on South African Land Policy,¹⁵⁷ a part of the envisaged land policy emphasised the development of the registration system to make the registration of informal land rights in urban and rural areas possible. Several needs were identified:

- (i) a speedy, reliable, and cost-effective system of demarcating land and recording the identity of those who are entitled to occupy it, followed by rapid release of such land to meet the pressing land tenure needs (demarcation does not necessarily mean the formal survey of land);
- (ii) a reliable and cost-effective system of recording rights to land that are established in the process of tenure reform; and

D M Walker (ed) *The Oxford Companion to the Law* (1980) 1221: 'The word is most commonly used in connection with land. Various kinds of title to land may be recognized. The highest is the title of the absolute owner, in English law the owner of the fee simple absolute in possession. Lesser rights are conferred by the interest for life, the term of years, the mortgage, down to the title of occupancy or bare possession. The squatter has no title and may be evicted at any time.' See also J S Riddall *Introduction to Land Law* (1993) 479–481; K Gray *Elements of Land Law* (1993) 176–178. For the Dutch law, see W H M Reehuis et al *Goederenrecht* (1994) 70: 'Onder "titel" is in het eerste lid van art. 3:84 te verstaan: de rechtsverhouding die aan de overdracht ten grondslag ligt en deze rechtvaardigt'; and for the meaning of 'title' in the case of limited real rights, see 84 (usufruct); see also H J Snijders & E B Rank-Berenschot *Goederenrecht* (1996) 248.

¹⁵⁴ Regarding the fragmentation of title, see Van der Walt 'Fragmentation' (n 130) 431–450; A J van der Walt 'Unity and pluralism in property theory – a review of property theories and debates in recent literature' 1995 *JSAL* 15–42.

¹⁵⁵ Van der Walt 'Unity' (n 154) 25–28.

¹⁵⁶ See eg the Restitution of Land Rights Act 22 of 1994; the Land Reform (Labour Tenants) Act 3 of 1996; the Interim Protection of Informal Land Rights Act 31 of 1996; the Extension of Security of Tenure Act 62 of 1997; the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; and the Rental Housing Act 50 of 1999; also *Port Elizabeth Municipality CC* case (n 132) paras 16, 23 and 24; *Richtersveld CC* case (n 109) paras 57 and 62.

¹⁵⁷ Department of Land Affairs (1997) 106–107; see also Cousins 'Contextualising' (n 68) 9–12.

- (iii) a reliable and cost-effective system of recording the rights of those who are entitled to use and occupy land that is held on a communal basis.

The following strategies were recommended in the *White Paper*:

- (i) the establishment and maintenance of a comprehensive land information system, which would include alphanumeric and spatial data on land-related matters;
- (ii) collection and maintenance of cadastral and topographic information;
- (iii) maintenance and extension of the deeds registration system to provide for the registration of different land tenure systems;
- (iv) the establishment of norms and standards to structure and manage the land information process and
- (v) the compilation of a comprehensive state land register to improve the management of state land.

Only a few of these needs and strategies have been realised since 1997. However, it has become clear that rights in terms of the two diverse tenure systems (individualised and communal land tenure) can be recorded only if a fully computerised land recording system is developed that provides land information in respect of the two completely different systems of land tenure.¹⁵⁸

(5) *Spatial data and technical principles*

Spatial data infrastructure is a key component of land administration infrastructure.¹⁵⁹ Normally this is based on complicated and expensive land survey processes. In the case of South Africa, the land survey system is directed at the demarcation of land parcels for the exercise of individual landownership and registered limited real rights.¹⁶⁰ Therefore, it is important to extend the spatial data infrastructure to include flexible and layered fragmented use rights, especially in rural areas in which communal land tenure is practised. In other developing countries, it has been established that a registration-based land information system for communal land tenure can largely function with a limited graphical database.¹⁶¹ The only prerequisite is a computerised land information system within a demarcated (and not necessarily surveyed) piece of land. Communal land rights cannot be adjudicated and mapped with the same approach and techniques as in the case of individual landownership, as people practising communal land tenure often have spatial concepts different from those of

¹⁵⁸ See Mostert (n 62) paras 2.3 and 3.

¹⁵⁹ R Groot & J McLaughlin *Geospatial Data Infrastructure: Concepts, Cases and Good Practice* (2000) 5.

¹⁶⁰ Land Survey Act 8 of 1997; see also Badenhorst et al (n 1) 194–195.

¹⁶¹ Rakai (n 138) 143–150 and 163; Ventura & Mohamed (n 68) 4.

westernised individual ownership.¹⁶² While individual landownership is based on an accurate land survey system of individualised land parcels that indicate the exclusive area in which rights are exercised,¹⁶³ communal land tenure is based on flexible use rights exercised by a range of members of a community within a specified area. The borders of these areas are often vague or flexible, and may change from time to time due to specific uses or agreements. 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 of the whole community during the rest of the year.¹⁶⁴

The surveying and mapping component of land administration often requires vast amounts of money and resources. Such spending will only be feasible if it recognises the social needs of the users, and not only the economic advantages of surveying and titling. The technical solutions should be user driven and the demarcation aimed at the minimum graphical database required for recording the use rights associated with communal land tenure.

(6) *Institutional principles*

Although dependent on policy principles and legal developments, inappropriate institutional arrangements often severely restrict any land administration process.¹⁶⁵ At this stage, the Department of Rural Development and Land Reform plays a vital role in managing the three land tenure programmes by way of legislation. However, the administration of many of these legislative measures, particularly concerning post-settlement support and institutional and agricultural advice, is not sufficiently developed and is in some instances non-existent. The lack of administrative support is evident in the case of most communal property associations. Furthermore, one of the main objections against the CLRA was the policy decision by the former Department of Land Affairs to use traditional councils that were not acknowledged by communities as suitable community structures to act as land administration committees (see section IV) above). These mistakes should not be repeated. It will also be expedient to consider examples of administrative bodies used by other

¹⁶² Rakai (n 138) 61–63 and 143–145; Williamson (n 137) 14.

¹⁶³ See the provisions of the Land Survey Act 8 of 1997; Badenhorst et al (n 1) 194–195.

¹⁶⁴ Cousins 'Embeddedness' (n 66) 500–501 indicates that resource-use boundaries are normally clear, but often flexible and negotiable and therefore difficult to demarcate formally by way of the present land survey techniques.

¹⁶⁵ Nichols (n 152) 170–191; Williamson (n 137) 13 and 18; Harcombe (n 139) 139–141; A Mulolwa *Integrated Land Delivery: Towards Improving Land Administration in Zambia* (2002) 106–109; S Enemark *Capacity Building for Developing Sustainable Land Administration Infrastructures* (2003).

jurisdictions in the region, eg land boards in Botswana and village councils in Tanzania.¹⁶⁶ In principle, there is nothing wrong with the idea of land administration committees democratically elected by communities and representative land boards appointed by the Minister, as long as these structures are acceptable to the communities and administer land rights within accepted community structures. Although these administrative bodies must adhere to the accepted governance principles of indigenous communities, the democratic principles of the Constitution must be incorporated in the governance of such structures, as indigenous law is also subject to the spirit, purport and objects of the Bill of Rights.¹⁶⁷

(7) *A combined land information and registration system?*

The main obstacles to the incorporation of use rights associated with communal land tenure into a formal registration system are the following:

- (i) The land is normally not properly surveyed.
- (ii) The rights are not exercised within a specific or defined part or parcel of the land, for instance overlapping grazing rights or cultivating of an unspecified part of the land.
- (iii) The cost of surveying and registering of formalised land parcels is too high.
- (iv) The rights are based on group membership of a rural community.

Often, too much emphasis is placed on the formal registration of rights to improve tenure security, while a reliable land information system as the basis of an efficient and comprehensive land administration system is more important in this respect. It is more cost-effective and practical to implement a computerised land information system for the purpose of land administration initially, and at a later stage for the purpose of formal registration of rights when required.

In developing an affordable, accessible register of communal land rights in rural areas for the purpose of a comprehensive land information system, the following principles should be adopted:

- (i) It should be a computerised register of persons, households and families, and rights exercised by them within a cadastrally defined or surveyed piece of land.
- (ii) The system must provide for complex, overlapping, fragmented use rights associated with communal land tenure by recognising secondary and more distant right-holders.

¹⁶⁶ A Mazondo 'Land issues in Botswana – limits of communal land tenure' 1998 *Review of South African Studies* 40 at 42–44; LA Wily *Community-based Land Tenure Management – Questions and Answers about Tanzania's new Village Land Act, 1999* (2003) 4–6.

¹⁶⁷ *Richtersveld CC case* (n 109) para 51; *Pienaar* (n 65) 259; see also section IV above.

- (iii) The communal rights, even when registered, must be exercised in group context according to generally accepted rules, eg inheritance rules, alienation only with consent of the group and limitations imposed by the group, or the administrative system in which the rights are being exercised.
- (iv) The register must be aimed at land information primarily, and the registration of individualised or communal title should take place upon demand of the community only.
- (v) The comprehensive and computerised land information system should contain as much information as possible regarding the right-holders, duration and transferability of the rights, consent by the community or group to alienate, and the extent of the use rights.¹⁶⁸
- (vi) The land information system should form a separate part of the central land registration system so that information about these rights will be accessible whenever a search is conducted in the land register,¹⁶⁹ although it does not necessarily have to be maintained by deeds registry personnel.
- (vii) If the right is exercised on a part of the property, a description of the specific part of the property demarcated with reference to natural beacons or features of the land will suffice and a surveyed map is not required.¹⁷⁰
- (viii) Information on the limitation of the rights by group members or the administrative system in which the rights are exercised must be recorded.
- (ix) Information of encumbrances by real security rights should be available.
- (x) In instances in which the rights are completely individualised to the extent that the land in question has been surveyed and the rights are exercised outside a group or community structure, the rights should be registered upon demand in the ordinary land register according to existing deeds registration procedure.

There are several models of combined land information and registration systems, mainly in operation in developing countries.¹⁷¹ The most suitable model to adapt for South African conditions is the one proposed by Ventura and Mohamed.¹⁷² This land information template is based on the

¹⁶⁸ C Fourie 'The role of local land administrators and land managers in decentralisation, land delivery and information management in developing countries' *International Conference on Land Tenure and Administration* Florida (1996) 1–28.

¹⁶⁹ See 2 above.

¹⁷⁰ The existing procedure for the description of servitudes that are not surveyed, can be followed – see Heyl (n 1) 170.

¹⁷¹ Barnes (n 68).

¹⁷² Ventura & Mohamed (n 68).

development of a conceptual model for documenting and recording communal land tenure where multi-dimensional rights exist.¹⁷³ This is done by identifying the recordable components of communal property and providing a corresponding database template for documenting and recording all aspects of tenure associated with a given person, family or household with reference to a specific unit of land.¹⁷⁴ Land units or the boundaries of the communal property can be identified with reference to existing deeds,¹⁷⁵ existing land surveys, data such as aerial photography,¹⁷⁶ or other forms of demarcation. For the further recording of land-use rights within the communal property, there may be existing data, but these will mainly be obtained from demarcation based on a description of the spatial element of the use of the property by the group, tribe or administrative system in which these rights are exercised.

It is important to note the following:

- (i) The above-mentioned model is an example of an information sheet for a computerised land information system that can be kept by either the deeds registry or an administrative body.
- (ii) The information regarding right-holders and the spokesperson or head of the family may change from time to time and must be updated in the event of change.
- (iii) In the case in which communal or group rights are exercised, any transaction or variation in rights can take place only with the consent of the tribe, group or administrative system in which these rights are exercised.
- (iv) It will not be possible to record all transactions in respect of communal property and other statutory use rights in this way because of the sheer magnitude of these rights. In many cases, people do not want these rights recorded because the rights are properly protected by statutory measures and/or the administrative process involved. Therefore, rights should be recorded upon demand initially, for instance in cases in which conflict necessitates it.

VI CONCLUSION

The scrapping of the CLRA will be regretted by few people, but it has left a policy vacuum in the Department of Rural Development and Land

¹⁷³ Ventura & Mohamed (n 68) 4. For a graphical exposition of the land information model proposed by Ventura & Mohamed, see G Pienaar 'Registration of informal land-use rights in South Africa: Giving teeth to (toothless?) paper tigers?' 2000 *JSAL* 442 at 461-462.

¹⁷⁴ This refers to the unit in which the rights are exercised, and not a cadastrally defined parcel of land.

¹⁷⁵ Deeds of grant or transfer to the South African Development Trust and other state agencies in cases in which the land was not held by the state.

¹⁷⁶ Registers kept at the different offices of the Department of Land Affairs and/or deeds registries.

Affairs regarding rural land administration. This necessitates the development of a new rural land policy by the department and it will be useful for the department to reconsider the 1997 White Paper on South African Land Policy. At this stage, the lack of a suitable land policy has extremely negative consequences for people living in the previous homelands, which are still characterised by tenure insecurity and a lack of administrative support for agricultural activities. Efficient planning for housing, roads, health services, educational services, and electricity and sewerage services is almost non-existent and needs to be addressed urgently. Developing a comprehensive land administration system for communal land tenure in South Africa requires time, managerial skills and political stability. A prerequisite for successful land administration is the cooperation with and input of communities in the formulation and execution of a suitable rural land policy. The process of involving communities in policy matters still has to be improved. In this respect, the department has proved itself to be deficient. Significantly more consultation and planning are required to ensure that a beneficial land policy and administrative system is developed.

The envisaged electronic deeds registration system offers the possibility of registering three completely different forms of land tenure, namely individual ownership, urban fragmented property schemes (sectional titles and time-sharing) and communal land rights in one registration system. This also offers the possibility of different aims for the different forms of registration. In the case of individual ownership and fragmented property holding in urban areas, the main aim is the registration of individualised rights in accordance with the current deeds registration system. In the case of communal land tenure, the main need currently is the recording of communal land-use rights in a land information system that provides for the particular requirements in respect of communal land tenure. A computerised land information system will be relatively inexpensive and easy to operate. It will offer security of land tenure by the publication of the nature and extent of the use rights exercised by the members of the community on a specific piece of land. The system must also provide that such rights could be upgraded and registered upon demand in the conventional land register.

In this process, it is not necessary to rediscover the wheel. Many other legal systems in developing countries in sub-Saharan Africa and elsewhere have to grapple with the same pressing land tenure problems. There is a host of literature available that can be used and adapted to suit South African requirements and conditions. In the process of developing a land policy, implementing a comprehensive land administration system and securing the land tenure rights of all South Africans, it may be profitable to

accord attention to research, literature and legal precedents in other legal systems that are considerably further along the rocky road than South Africa.