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Water-Energy-Food Communities in South Africa

Exploring Multi-Actor Governance Instruments Contributing to Social Justice

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Abstract

South Africa faces significant challenges concerning the scarcity and unequal distribution of water, energy and food resources. The Constitution of the Republic of South Africa, 1996 underscores the importance of social justice and mandates collaboration among all levels of government and state entities. To effectively address the interconnected nature of these resources, a collaborative governance approach is necessary. This article introduces the concept of 'Water-Energy-Food (WEF) communities', a concept not currently recognised in South African law, drawing inspiration from the European Union's *Renewable Energy Directive* (RES-Directive) of 2018 and the *Electricity Market Directive* (E-Directive) of 2019 that introduced the concept of 'energy communities'. WEF communities, operating at the local level, could integrate improved governance and decision-making in the water, energy, and food sectors, thereby advancing social justice in local communities. The article compares existing multi-actor governance instruments in South African law and uses the EU law as learning points for the establishment of WEF communities as opposed to energy communities that focus on one determinant only. Although the current South African multi-actor governance instruments do not explicitly address an integrated WEF governance approach, they may serve as a basis for proposing framework rules to establish WEF communities, highlighting their potential to achieve social justice goals in relation to their access to water, energy and food. The article proposes rules for the potential establishment of WEF communities, taking learning points from the EU directives as well as existing South African instruments.

Keywords

Water-Energy-Food (WEF) communities – multi-actor governance – social justice – South Africa – energy communities – collaborative decision-making – European Directive on Renewable Energy – European Union Electricity Market Directive

1 Introduction

Renowned for its geographical, environmental and cultural diversity, South Africa is confronting various challenges in water, energy and food security.¹ As

¹ We extend our gratitude to the anonymous reviewers for their valuable inputs and insightful feedback, which have enriched the manuscript. This work is based on research supported wholly by the National Research Foundation (NRF) of South Africa and the Dutch Research Council (de Nederlandse Organisatie voor Wetenschappelijk Onderzoek – NWO) Project

a result of the existence of historical and systemic socio-economic inequalities, the country is grappling with the scarcity and uneven distribution of water resources, an insufficient and increasingly strained energy infrastructure that leads to frequent load-shedding,² and limited access to affordable and nutritious food.³ These pressing issues are reverberating through South African society, with local, rural, and traditional communities finding themselves bearing a particularly acute burden.⁴ The Preamble to the *Constitution of the Republic of South Africa*, 1996 (the Constitution) expressly commits to establishing a society based on social justice,⁵ mandating all spheres of government (national, provincial, and local government) and organs of state to collaborate in eradicating extreme inequalities.⁶ It follows that these multiple actors and stakeholders at the national, provincial, municipal and traditional leadership levels should exert influence over the governance of water, energy and food

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- 2 The country's electricity supply constraints were declared a state of disaster in GN 3020 in GG 48009 of 9 February 2023. Load-shedding ensures that there is a reliable supply of electricity to customers rather than a total blackout. It entails that the energy provider rotates electricity provisioning to different municipalities according to a scheduled roster.
- 3 Sustainable Development Report. 2003. *South Africa*. Retrieved 27 June 2023 <https://dashboards.sdindex.org/profiles/south-africa>.
- 4 Extreme poverty is generally concentrated in rural areas, in which people depend on the available environmental resources for water, energy and food. See, e.g., T. Mabhaudhi and others, "The water–energy–food nexus as a tool to transform rural livelihoods and well-being in Southern Africa", *International Journal of Environmental Research and Public Health* 16(16) (2019), <https://doi.org/10.3390/ijerph16162970>.
- 5 'Social justice is primarily concerned with the eradication of poverty and extreme inequalities in access to material resources in order to ensure that all citizens command the resources needed to equally participate in socio-political life.' ON. Fuo, "A Critical Investigation of the Relevance and Potential of IDPs as a Local Government Instrument for Pursuing Social Justice in South Africa", *Potchefstroom Electronic Law Journal* 2013 (16) 5 222.
- 6 Chapter 3 of the *Constitution of the Republic of South Africa*, 1996; O.N. Fuo, "A critical investigation of the relevance and potential of IDPs as a local governance instrument for pursuing social justice in South Africa", *Potchefstroom Electronic Law Journal* 16(5) (2013) 221–286 at 222, <http://dx.doi.org/10.4314/pelj.v16i5.5>; P. Langa, "Transformative constitutionalism", *Stellenbosch Law Review* 17(3) (2006) 351–360 at 354. Also see M. Pieterse, *Rights-Based Litigation, Urban Governance and Social Justice in South Africa: The Right to Joburg* (Abingdon: Routledge, 2017); C. Martinex-Vargas, *Democratising Participatory Research: Pathways to Social Justice from the Global South* (Cambridge: Open Book, 2022); M.J. Murcott, *Towards a Social Justice-Oriented Environmental Law Jurisprudence in South Africa* (LLD thesis, North-West University, 2020).

resources.⁷ South Africa currently does not have a dedicated institution or instrument that provides for decision-making that considers water, energy and food. There are, however, collaborative or multi-actor instruments that involve communities in decision-making or that enable and allow communities or members of communities to establish their own institutions to make decisions that affect themselves. Yet, none of these instruments are geared towards integrated decision-making concerning water, energy and food.

Existing scholarship shows that, given the interconnected nature of water, energy and food, effective management and decision-making necessitate a collaborative or cooperative⁸ rather than a silo or sector-based governance approach.⁹

This article introduces a concept, namely that of Water-Energy-Food (WEF) communities, that does not exist in South African law, drawing inspiration from the European Union's (EU) *Renewable Energy Directive*¹⁰ (RES-Directive) of 2018 and the *Electricity Market Directive*¹¹ (E-Directive) of 2019 establishing energy communities. Energy communities are formed by groups of citizens taking energy-related actions, such as generating their own energy from

7 The precise role to be played by each sphere of government is determined by relevant legislation and policies. Also see chapter 6 of the Constitution read with Schedules 4 and 5 thereof.

8 Chapter 3 of the Constitution makes provision for cooperative governance, while the *National Environmental Management Act* 107 of 1998 provides for cooperative environmental governance by establishing principles for decision-making on matters affecting the environment and creating institutions that promote cooperative governance and procedures for coordinating environmental functions exercised by organs of state. Also see L. Nhamo and others, "An integrative analytical model for the water-energy-food nexus: South Africa case study", *Environmental Science & Policy* 109(1) (2020) 15–24.

9 South Africa's governance structure for water, energy and food resources remains primarily sector-based or siloed. See section 2 below. On the silo-based approach, see e.g., L. Kotze, "Improving unsustainable environmental governance in South Africa: the case for holistic governance", *Potchefstroom Electronic Law Journal* 9(1) (2017) 74–118, <https://doi.org/10.17159/1727-3781/2006/v9i1a2811>; R.K. Adom and M.D. Simatele, "Systemic and structural challenges to sustainable water management in South Africa", *Journal of Environmental Assessment Policy and Management* 22(1&2) (2020), <https://doi.org/10.1142/S1464333222500028>; B. Sivakumar, "Water-energy-food nexus: challenges and opportunities", *Stochastic Environmental Research and Risk Assessment* 35 (2021) 1–2, <https://doi.org/10.1007/s00477-020-01927-5>.

10 Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast) [2018] OJ L328/82.

11 Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast) [2019] OJ L158/125.

renewable sources.¹² By 2021, more than 8000 energy initiatives and 14,000 energy projects have been undertaken directly by citizens in 29 European countries (EU plus United Kingdom and Norway),¹³ with 4000 energy communities created, gathering 900,000 members.¹⁴ There are still challenges with the implementation of the concept, but the positive side is that it did contribute to the transition to use of renewable energy.¹⁵

The establishment of possible WEF communities in South Africa represents an opportunity to extend the concept of energy communities and its local, democratic management of resources to include decision-making on water and food ensuring improved water, energy and food governance, while advancing social fairness and participation in local rural communities.¹⁶

The existing South African multi-actor governance instruments such as public private partnerships, agreements between traditional councils and developers, communal property associations, or cooperatives, do not necessarily address an integrated WEF governance approach. Taking learning points from the EU Directives as well as the South African multi-actor instruments, the possible minimum rules for the establishment of a WEF

12 Collective energy initiatives by citizens have existed for a long time in and outside of Europe, where participants get together to undertake energy-related activities, such as producing electricity from renewable sources. This situation was legally formalised and encouraged by the integration of Renewable Energy Communities (REC) and Citizen Energy Communities (CEC) into EU law in 2018 and 2019 respectively. Also see section 3 below.

13 A. Wierling and others, "A Europe-wide inventory of citizen-led energy action with data from 29 countries and over 10000 initiatives", *Sci Data* 10(9) (2023), <https://doi.org/10.1038/s41597-022-01902-5>.

14 M. Koltunov and others, "Mapping of energy communities in Europe: status quo and review of existing classifications", *Sustainability* 15 (2023) 1–24 at 1 and 16, <https://doi.org/10.3390/su15108201>.

15 O. Gjergji, "Europe and Energy Communities", 2023, *Osservatorio balcony e caucaso transeuropa*. Retrieved 16 February 2024 <https://www.balcanicaucaso.org/eng/Areas/Balkans/Europe-and-energy-communities-223982> mentions as challenges the way the Directive was transposed in national legislation and financial barriers, for example. Also see L. Diestelmeier, "Citizen energy communities as a vehicle for a just energy transition in the EU challenges for the transposition", *Oil, Gas & Energy Law Intelligence* 19(1) (2021) 1–12 refers to possible discrimination against households that would not be able to participate in citizen energy communities. B. Hoops. 2023. "Embrace the diversity of the energy commons!" SSRN. 13 October 2023. Retrieved 14 February 2024 <https://ssrn.com/abstract=4679127> indicates that the rules for energy communities should not be so strictly applied that it excludes certain groups from their benefits, while D. Wuebben, J. Romero-Luis and M. Gertrudix, "Citizen science and citizen energy communities: a systematic review and potential alliances for SDGs", *Sustainability* 12(23) (2023), <https://doi.org/10.3390/su122310096> foresee that energy communities' positive role could be their contribution to further the aims of the SDGs.

16 The focus of the article is on rural communities, while the same may be true for urban communities, both in an affluent and indigent context.

community can be determined. The discussion further provides insights into possible challenges in establishing such communities in South Africa.

The research question that this article addresses is: which governance rules would need to be in place in order to establish WEF communities in South Africa, taking learning points from the European Directives? To answer this question, this article focuses on the legal technicalities and challenges that may exist for the creation of WEF communities and aims to formulate governance rules that should be in place to establish these communities.

The research is a legal doctrinal study, but informed by empirical research undertaken by the WEF-Nexus research group.¹⁷ The results of the empirical study indicate that rural communities in South Africa are water, energy and food insecure and that households and government institutions are making their own decisions in this regard, but not always in an integrated manner.¹⁸

The article follows an adapted functional comparative approach. Although a lot of criticism is lodged against the functional approach in comparative law,¹⁹ this approach serves a purpose here in that currently the concept of WEF communities does not exist in South Africa and the rules for the possible implementation of such a concept needs to be investigated. The functional comparative approach is useful, when a country's legislation does not include measures to deal with, for example, new challenges, such as those related to the environment or climate change. In these instances, legislators tend to borrow from other countries' legislation or international or regional legal instruments and adapt them to fit the unique circumstances of that specific country.²⁰

17 The empirical research was undertaken in the areas of the Matatiele Local Municipality (Eastern Cape), the Greater Taung Local Municipality and the Magareng Local Municipality, in the North West and Northern Cape Provinces respectively. The research was undertaken with ethical clearance from the North-West University Law Research Ethics Committee, approval NWU-01216-21-A3.

18 Also see H. Jaka, J.W.N. Tempelhoff and M.C.C. Musingafi, "The WEF nexus and rural household security in Zimbabwe and South Africa", *Rural Society* 32(2) (2023) 112–126, <https://doi.org/10.1080/10371656.2023.2235662>.

19 See, amongst others, R. Michaels, "The functional method of comparative law", in: M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: OUP, 2nd ed. 2019) pp. 345–389; M. Siems, "New directions in comparative law", in: M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: OUP, 2nd ed. 2019) pp. 852–874; C. Valcke and M. Grellette, "Three functions of function in comparative legal studies", in: M. Adams and D. Heirbaut (eds.), *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Oxford: Hart, 2014) pp. 99–112.

20 See in this regard J.B. Wiener, "Something borrowed for something blue: legal transplants and the evolution of global environmental law", *Ecology Law Quarterly* 27(4) (2001) 1295–1371; V. Perju, "Constitutional transplants, borrowing and migrations", in: M. Rosenfeld and A. Sajo (eds.), *Oxford Handbook of Comparative Constitutional Law* (Oxford: OUP, 2012) pp. 1304–1327; C.M. Fombad, "Comparative research in contemporary African legal studies", *Journal of Legal Education* 67(4) (2018) 984–1004.

This article also takes the historical, societal and governance context of South Africa into account.

The research follows a two-pronged approach, it first clarifies the meaning of multi-actor governance, the WEF nexus, and then it explains the concept of energy communities, including the rules for their establishment in the European context. European Directives serve as framework law which each member state has to individualise (transpose) within their own context.²¹ It is for this specific reason that we focus on the Directives as framework law and not their specific implementation within the European member states. We limit our focus on the rules for establishing energy communities and not the Directives as a whole.

The article then shifts focus to the South African context, highlighting the challenges associated with water, energy and food nexus challenges in South Africa, especially in rural areas. It then explores multi-actor governance instruments that specifically incorporate public or community participation within their frameworks. The article examines legislation that introduces multi-actor governance instruments for dealing with various aspects of water, energy and food as well as other instruments that individuals or communities establish themselves for a certain purpose. The article discusses the establishment, actors and governance of these instruments, and points out some of the challenges they face.²² The rules that exist for their establishment and governance are then juxtaposed to the framework rules for the establishment of energy communities in Europe; using those rules as point of departure. From this comparison, learning points are distilled for governing rules that can be used for the possible establishment of WEF communities.

The authors are cautious of the fact that not all EU-inspired measures will be applicable to South African circumstances. Nonetheless, by leveraging the EU directives as a starting point and using the comparison therewith with the South African legal instruments, we aim to conceptualise a viable model for the establishment of WEF communities as a multi-actor governance instrument to enhance livelihoods in relation to access to water, energy and food in the achievement of social justice in South Africa.

21 Article 288 Treaty on the Functioning of the European Union (TFEU) OJ C 326/47, 26.10.2012. Retrieved 16 February 2024 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>.

22 It is not possible in an article with limited scope to deal with all the challenges in detail. The article focuses on the most pertinent issues that may affect the establishment of potential WEF communities.

2 Defining Concepts and Background

The article focuses on three concepts, namely multi-actor governance, energy communities and the WEF nexus. Given the limited scope of an article, we cannot offer a comprehensive theoretical analysis of each concept, but for this reason, we provide a concise overview of each.

Multi-actor governance is built on the premise that more than one government institution is necessary to address complex governing issues. This is even more true once government institutions have to address water, energy and food issues. Multi-actor governance goes beyond the inclusion of government institutions only, but it also includes other stakeholders which could be communities and the private sector.

Moving on to energy communities; according to the EU's Joint Research Centre, "community energy" refers to a wide range of collective energy actions that involve citizens' participation in the energy system.²³ The two main elements of this idea are (i) that citizens are the ones collectively taking action, and (ii) that such actions are essentially limitless: they relate to all actions with a connection to energy, whether the actions are related to production, consumption, distribution, storage, energy efficiency, electric vehicles, etc.²⁴ In this sense, community energy groups predate by far the legal regime for energy communities as adopted by the previously mentioned European Directives.

In 2018, the RES-Directive introduced the notion of Renewable Energy Communities (RECs),²⁵ that is, energy communities focusing on the production and use of energy from renewable sources in any form (electricity, gas, liquids, heat or cold).²⁶ A few months later, the E-Directive introduced the concept of Citizen Energy Communities (CECs), that is, energy communities

23 A. Caramizaru and A. Uihlein, *Energy Communities: An Overview of Energy and Social Innovation* (Luxembourg: Publications Office of the European Union, 2020) p. 4.

24 S. Ahmed, A. Ali and A. D'Angola, 'A Review of Renewable Energy Communities: Concepts, Scope, Progress, Challenges, and Recommendations,' *Sustainability*, 16 (1749), (2024), pp. 1–34.

25 Bauwens T *et al.*, 'Conceptualizing community in energy systems: A systematic review of 183 definitions,' *Renewable and Sustainable Energy Reviews*, 156, (2022), 11999, pp. 1–16. Ahmed S *et al.* explain that EU energy communities were introduced for economic, environmental, social, political, and infrastructural reasons. Energy communities are collective, citizen-driven initiatives supporting renewable energy transition, contributing to public acceptance and local benefits like better energy efficiency, lower bills, reduced energy poverty, and green job opportunities.

26 Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast) [2018] OJ L328/82 (2018 RES-Directive).

not explicitly restricted to RES but focusing on electricity.²⁷ The directives provide very similar definitions and regimes for both entities. In essence, both a REC and a CEC are based on open and voluntary participation as well as non-discrimination (participation and consumers), are effectively controlled by their membership, which can encompass natural persons, local authorities or small enterprises, and their primary purpose is to provide environmental, economic or social community benefits to their members or to the local areas where they operate rather than to generate financial profits.²⁸ Vulnerable households may not be excluded, and the government must provide regulatory and capacity-building support.²⁹

In terms of the regime for RECs and CECs, they are explicitly authorised by the European Commission to get involved in a wide list of energy-related activities, encompassing production, supply and storage.³⁰ The only restricted activities include the transmission of electricity and its distribution, which depends on member states' own choices when they transpose the EU directives

27 Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast) [2019] OJ L158/125 (2019 E-Directive).

28 Article 2(16) 2018 RES-Directive; Art. 2(11) 2019 E-Directive. Art. 2(1) of the E-Directive states that a citizen energy community:

“(a) is based on voluntary and open participation and is effectively controlled by members or shareholders that are natural persons, local authorities, including municipalities, or small enterprises;

(b) has for its primary purpose to provide environmental, economic or social community benefits to its members or shareholders or to the local areas where it operates rather than to generate financial profits; and

(c) may engage in generation, including from renewable sources, distribution, supply, consumption, aggregation, energy storage, energy efficiency services or charging services for electric vehicles or provide other energy services to its members or shareholders.”

29 Article 22(4)(f) and (h) 2018 RES-Directive.

30 Article 22(2)(a) and (b) 2018 RES-Directive; Art. 2(11)(c) 2019 E-Directive, that reads:

“‘renewable energy community’ means a legal entity:

(a) which, in accordance with the applicable national law, is based on open and voluntary participation, is autonomous, and is effectively controlled by shareholders or members that are located in the proximity of the renewable energy projects that are owned and developed by that legal entity;

(b) the shareholders or members of which are natural persons, SMEs or local authorities, including municipalities;

(c) the primary purpose of which is to provide environmental, economic or social community benefits for its shareholders or members or for the local areas where it operates, rather than financial profits.” A few examples of community energy initiatives include putting solar photovoltaics on rooftops, distributing and selling surplus energy generated to your neighbours, or purchasing batteries to store extra energy from solar photovoltaics.

into their national law.³¹ REC s and CEC s are also thought of as energy markets actors like any others, entailing the right to access all suitable energy markets and to be treated in a non-discriminatory and proportionate manner, but are financially responsible for the imbalances they cause in the electricity system.³² The RES-Directive further stresses transparency in all processes. Finally, the REC's regime also specifies that participation "is accessible to all consumers, including those in low-income or vulnerable households",³³ stressing the importance of the justice component for energy communities.³⁴

In a nutshell, energy communities in EU law are characterised by the effective control of their members, gathering citizens, local authorities and small companies, to undertake pretty much any activity they want in the energy system, and for the provision of local environmental, economic or social community benefits.

In addition, EU Regulation 2018/1999³⁵ and the RES-Directive provide that member states should limit "administrative complexity and costs for all relevant stakeholders".³⁶ EU Regulation 2819/199 further places an obligation on member states to determine the number of "households in energy poverty" and also to indicate how energy poverty will be addressed and basic services delivered.³⁷ In South Africa, administrative complexity and costs still hinder the introduction of renewable energy, while many indigent households still

31 Articles 16(2)(b) and 16(4) 2019 E-Directive.

32 Articles 22(2)(c), 22(4)(e) and (d) 2018 RES-Directive; Arts. 16(3)(a), 16(1)(e) and 16(3)(c) 2019 E-Directive. Local communities can come together and make investments in renewable energy through energy communities. Energy communities can access all appropriate energy markets on an even playing field with other market participants when they operate as a single organisation.

33 Article 22(4)(f) 2018 RES-Directive.

34 Hanke F and Guyet R, 'The struggle of energy communities to enhance energy justice: insights from 113 German cases,' *Energy, Sustainability and Society*, 13 (16), (2023), pp. 1–16. Energy communities have access to affordable-priced energy, services, and energy-saving technologies. Vulnerable households that suffer from high energy costs and low incomes can benefit from these services. In this regard, the energy policy of the European Union emphasises the potential of energy communities to improve vulnerable populations' access to renewable energy sources, thereby reducing energy poverty. Energy communities can also combat energy poverty by lowering supply prices and promoting energy efficiency at the household level through decreased use. RED II emphasises even more that participation in energy communities should be open to all residents, especially the most disadvantaged and vulnerable households.

35 Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action [2018] OJ L328/1 (EU Regulation 2018/1999).

36 Article 3(3)(a) EU Regulation 2018/1999; Art. 22(4)(a) 2018 RES-Directive.

37 Preamble para. 26 read with Art. 3(3)(d) EU Regulation 2018/1999.

experience not only energy poverty but are water and food insecure.³⁸ Mroue and others³⁹ illustrate that energy cannot be considered in isolation but that other aspects such as water and food, for example, need to be considered.

The WEF nexus approach is based on the premise that water, energy and food security are interdependent.⁴⁰ This approach provides a well-informed and unambiguous framework for analysing and creating the optimal trade-offs and synergies that preserve and respect environmental sustainability and socioeconomic rights.⁴¹ The WEF nexus approach acknowledges that understanding the interconnections of water, energy, and food can be aided by reciprocal benefits. Additionally, the nexus approach offers a transparent and well-informed framework for figuring out the right trade-offs and synergies to preserve the sustainability and integrity of ecosystems.⁴² As a result, the nexus approach employs context-specific strategies based on varying degrees of involvement to accomplish long-term social, environmental, and economic objectives.⁴³ A study by Molefe and Inglesi-Lotz indicates that selected African countries, including South Africa, are working towards a WEF-nexus.⁴⁴ However, it is not denied that the introduction of the WEF-nexus is complex, needs interdisciplinary and transdisciplinary knowledge and that many challenges remain with its introduction.⁴⁵ Howlett warns against the implementation

38 See *supra* note 21 referring to the empirical research done.

39 A.M. Mroue and others, "Energy Portfolio Assessment Tool (EPAT): Sustainable energy planning using the WEF nexus approach – Texas case", *Science of The Total Environment* 648 (2019) 1649–1664, <https://doi.org/10.1016/j.scitotenv.2018.08.135>.

40 J.W. Lodge, A.P. Dansie and F. Johnson, "A review of globally available data sources for modelling the Water-Energy-Food nexus", *Earth Science Reviews* 243 (2023) 1–25 at 1, 5, 15, <https://doi.org/10.1016/j.earscirev.2023.104485>.

41 Also see G.B. Simpson and others, "An African perspective on the Water-Energy-Food nexus", *Scientific Reports* 13 (2023), <https://doi.org/10.1038/s41598-023-43606-9>; J.O. Botai and others, "A review of the water–energy–food nexus research in Africa", *Sustainability* 13(4) (2021) 1–26, <https://doi.org/10.3390/su13041762>.

42 Also see F. Brouwer (ed.), *Handbook on the Water-Energy-Food Nexus* (Cheltenham: Edward Elgar, 2022).

43 Botai and others *supra* at 2.

44 T. Molefe and Inglesi-Lotz, "Examining the water–energy–food (WEF) nexus through an SDG lens for the big 5 African countries", *Environment, Development and Sustainability* 25 (2023) 14083–14100, <https://doi.org/10.1007/s10668-022-02650-7>.

45 See in relation to governance issues e.g. H.A. Bulkeley, "Transgovernmental networks", in: J.-F. Morin and A. Orsini (eds.), *Essential Concepts of Global Environmental Governance* (London: Routledge, 2nd ed. 2020) pp. 270–271; J. van der Heijden, H. Bulkeley and C. Certomà, "Promises and concerns of the urban century: increasing agency and contested empowerment", in: J. van der Heijden, H. Bulkeley and C. Certomà (eds.), *Urban Climate Politics: Agency And Empowerment* (Cambridge: CUP, 2019) pp. 1–20; M. Howlett and M. Ramesh, "The two orders of governance failure: design mismatches and policy

of new policies and instruments without proper procedures to evaluate their future effectiveness.⁴⁶ Smith and others argue that “[s]trong governance and institutional innovations are critical for navigating trade-offs and identifying appropriate policy interventions that achieve equitable solutions”, while acknowledging that governance fragmentation remains a challenge.⁴⁷

Water is scarce in South Africa, and the bulk of available freshwater is consumed by agriculture for crop cultivation and livestock rearing.⁴⁸ Freshwater is also used for diverse purposes, including hydropower generation, industrial processes, and manufacturing. Compounding these challenges, South Africa is grappling with energy load shedding, resulting in blackouts that can last up to twelve hours per day. These issues collectively impede the country’s economic growth and adversely affect critical sectors such as transportation and healthcare. Moreover, climate change has led to water shortages for many communities, with their water supplies dwindling. When it does rain, the frequent flooding causes extensive damage to properties, crops, and sanitation infrastructure. This situation results in widespread food, energy, and water insecurity across many communities in South Africa.

Despite the constitutional imperative that all people should have access to sufficient water and food, these rights have not been realised yet.⁴⁹ The Constitution does not provide for a right to access to energy, although the Constitutional Court has constructed such a right.⁵⁰

capacity issues in modern governance”, *Policy and Society*, 33(4) (2014) 317–327, <https://doi.org/10.1016/j.polsoc.2014.10.002>; M. Howlett, “Governance modes, policy regimes and operational plans: a multi-level nested model of policy instrument choice and policy design”, *Policy Sciences* 42(1) (2009) 73–89; and on complexity: D.W. Smith and others, “Building a WEF nexus community of practice (NCoP)”, *Current Sustainable/Renewable Energy Reports* 4 (2017) 168–172 at 169; J.B.S.O. de Andrade Guerra and others, “A literature-based study on the water–energy–food nexus for sustainable development”, *Stochastic Environmental Research and Risk Assessment* 35 (2021) 95–116, <https://doi.org/10.1007/s00477-020-01772-6>.

46 M. Howlett, *Designing Public Policies: Principles and Instruments* (London: Routledge, 2nd ed. 2019).

47 Smith and others *supra* note at 170. This article does not address the WEF nexus and its challenges as such, but proposes a governance model where communities can make their own integrated decisions on water, energy and food.

48 C. Nhemachena and others, “Climate change impacts on water and agriculture sectors in Southern Africa: threats and opportunities for sustainable development”, *Water* 12(12) (2020) 1–17 at 2, <http://dx.doi.org/10.3390/w12102673>.

49 Section 27 of the Constitution.

50 *Joseph and Others v City of Johannesburg and Others* 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC). Also see F. Dube and C.G. Moyo, “The right to electricity in South Africa”, *Potchefstroom Electronic Law Journal* 25 (2022) 1–21, <https://doi.org/10.17159/1727-3781/2022/v25i0a1839>; G. Viljoen and F. Dube, “Realising the right to electricity through off-grid power solutions in South Africa”, *Potchefstroom Electronic Law Journal* 26 (2023) 1–25, <http://dx.doi.org/10.17159/1727-3781/2023/v26i0a15637>.

The dire state of people's access to water in South Africa is reflected in three reports published by the Department of Water and Sanitation in 2023.⁵¹ South African municipalities experience loss of water due to leaking pipes and failing infrastructure. The *No Drop Report* states as follows:⁵²

The preliminary 2021/22 national water balance indicates a SIV of 4 282.5 million m³/annum, NRW of 1 988.5 million m³/annum (46.4%), and water losses of 1 744.7 million m³/annum (40.7%). In the past year, NRW and water losses have increased by a notable 1.3% and 0.9%, respectively. The greatest increase was in the past three years and was attributed to the COVID-19 pandemic, and deteriorating and collapsing municipalities. The fluctuation between 2016 and 2019 was generally less than 1%.

This impacts on households' access to reliable water. The wastewater services are also in a dire state, with 334 municipal wastewater treatment works found to be in a critical state in 2022. The deterioration of sanitation works and pipes is a health risk, and they also pollute water resources both on the surface and underground.⁵³

According to the *Official Guide to South Africa 2021/2022*:⁵⁴

An estimated 45,2% of households had access to piped water in their dwellings in 2021. A further 29,4% accessed water on-site while 12,2% relied on communal taps and 1,9% relied on neighbours' taps. Although generally households' access to water improved, 2,7% of households still had to fetch water from rivers, streams, stagnant water pools, dams, wells and springs in 2021.

Regarding energy, South Africa still relies on coal-based electricity, but recent years have seen the collapse of Eskom in the provision of reliable energy. Indeed, South Africa is grappling with energy load shedding. Also, not all rural communities are connected to the grid, although great strides have been made

51 Department of Water and Sanitation. 2023. *Green Drop Watch Report 2023*. DWS. June 2023. Retrieved 11 June 2023 <https://ws.dws.gov.za/IRIS/releases/GDWR.pdf>; Department of Water and Sanitation. 2023. *Blue Drop Watch Report 2023*. DWS. June 2023. Retrieved 11 June 2023 <https://ws.dws.gov.za/IRIS/releases/BDWR.pdf>; Department of Water and Sanitation. 2012. *No Drop Watch Report 2023*. DWS. June 2023. Retrieved 11 June 2023 <https://ws.dws.gov.za/IRIS/releases/NDWR.pdf>.

52 DWS *No Drop Report supra* note at p. vii.

53 DWS *Green Drop Report supra* note at p. vii.

54 Government of South Africa. 2023. *Official Guide to South Africa 2021/2022 – Water and Sanitation*. GCIS. 2023, 4–6. Retrieved 6 July 2023 www.gcis.gov.za/sites/default/files/24%20Water%20and%20Sanitation%202021-22.pdf.

subsequent to 1994 (the year of the first democratic election). The Statistical Services of South Africa (StatsSA), conducted a census in 2021 and found that there was an increase “in the percentage of households that were connected to the electricity supply from the mains from 76,7% in 2002 to 89,3% in 2021”. This led to a “decrease in the use of wood (20,0% to 7,7%) and paraffin (16,1% to 3,5%) over the same period”.⁵⁵ The common use of wood and coal for cooking purposes in rural provinces such as Limpopo (32,9%) and Mpumalanga (21,0%) is, however, an indication that these resources are still very accessible and, most likely, less expensive than using electricity. Over one-fifth (22,3%) of households did not use electricity for cooking in 2021. In this context, the government has committed to a just transition to renewable energy.⁵⁶

In 2023, StatsSA reported that “In 2021, about 2,1 million (11,6%) of South African households reported experiencing hunger.”⁵⁷ This position was exacerbated as a result of Covid-19. During the Covid-19 epidemic, the South African government introduced a R350 income grant to jobless people and in June 2023 was continuing to do so.⁵⁸ The dependency on social grants is a huge concern for the South African government, and several job creation initiatives have been launched.⁵⁹ Furthermore, not all households improve their livelihoods by way of agriculture or small vegetable gardens. There are various reasons for this, such as lack of access to water, to seeds, or labour intensity depending on the age of the people living in the household.⁶⁰

55 StatsSA. 2022. “General household survey, 2021.” StatsSA. 23 June 2022. Retrieved 6 February 2024 www.statssa.gov.za/?p=15482. Also see A. Kumar and others, “Solar energy for all? Understanding the successes and shortfalls through a critical comparative assessment of Bangladesh, Brazil, India, Mozambique, Sri Lanka and South Africa”, *Energy Research and Social Science* 48 (2018) 166–176, <https://doi.org/10.1016/j.erss.2018.10.005>.

56 See in this regard StatsSA. 2022. “The state of the electricity, gas & water supply industry (2021).” StatsSA 2022. Retrieved 27 June 2023 www.statssa.gov.za/?p=15876; Presidential Climate Commission. 2022. *Just Transition Framework – Final Report and Recommendations*. The Presidency. June 2022. Retrieved 27 June 2023 www.climatecommission.org.za/publications/design-addition-and-amendment-to-just-transition-framework-with-dedication-to-pcc-secretary. Also see P. Späth and others, “The governance of energy transitions in Africa: a sketch of plural perspectives”, *Energy, Sustainability and Society* 12(51) (2022) 1–9, <https://doi.org/10.1186/s13705-022-00380-2>.

57 StatsSA. 2023. “Focus on food inadequacy and hunger in South Africa in 2021.” StatsSA. 11 April 2023. Retrieved 27 June 2023 www.statssa.gov.za/?p=16235.

58 See South African Government. 2023. “Social grants – Coronavirus COVID-19.” GCIS. 2023. Retrieved 27 June 2023 www.gov.za/covid-19/individuals-and-households/social-grants-coronavirus-covid-19.

59 T. Nexi ‘Massification of skills development and job creation programmes to combat unemployment’ South African Government News 11 April 2024.

60 This is based on the findings of empirical research done by the members of the NRF-NOW project mentioned above in areas in the Northern Cape, North West and Eastern Cape Provinces. Due to the limited scope of the article the findings cannot be discussed in detail here.

Placing the discussion within the context of multi-actor governance referred to above, the governance of water, energy and food fall under the auspices of various government departments as well as spheres of government in South Africa. The Department of Water and Sanitation is responsible for the allocation of water, and delivers water use authorisations, while municipalities are responsible for water and sanitation services in communities.⁶¹ Energy falls under the purview of two ministers, namely the Minister of Mineral Resources and Energy and the Minister of Electricity. The National Energy Regulator of South Africa (NERSA) is the authorisation authority.⁶² Since May 2023, the Minister of Electricity has the authority to determine the South African energy mix (previously the prerogative of the then Minister of Mineral Resources and Energy).⁶³ The energy mix (e.g. coal, renewable energy, nuclear) is determined in the Integrated Resource Plan (IRP), with the most recent one being the IRP2019 (with an updated draft IRP published for comment in January 2024).⁶⁴ Eskom (South Africa's electricity company) has a monopoly on the generation of electricity. In some instances private persons may generate their own energy. The *Electricity Regulation Act* 4 of 2006 was recently amended to allow smaller generators of energy to merely register their activity and not formally apply to NERSA for a licence.⁶⁵ This amendment will allow communities, private companies and even individuals to generate electricity using renewable sources without obtaining a licence. Food and food production are the responsibilities of the Departments of Agriculture Land Reform and Rural Development, as well as the provincial departments responsible for agriculture.⁶⁶

61 Schedules 4 and 5 of the Constitution; *National Water Act* 36 of 1998; *Water Services Act* 108 of 1997; *Local Government: Municipal Systems Act* 32 of 2000.

62 Instituted in terms of the *National Energy Regulator Act* 40 of 2004. The President assigns functions to the various ministers in terms of s 92 of the Constitution.

63 President Cyril Ramaphosa has in terms of s 97 of the Constitution signed a proclamation that transfers the powers and functions contained in s. 34(1) of the *Electricity Regulation Act* 4 of 2006 to the Minister of Electricity; Proclamation 121 in Government Gazette 48662 of 26 May 2023. Since July 2024, the Ministries have been split again into a Minister of Mineral Resources and a Minister of Energy. The Minister of Electricity is now the Minister of Energy.

64 Government Notice 1360 in Government Gazette 42784 of 19 October 2019. The IRP2019 envisages an increase in renewable energy until 2023. By 2023 renewables will make up 24.7% of the total energy mix. An updated draft Integrated Resource Plan 2023 was published for comment in Government Notice 4238 in Government Gazette 4997 of 4 January 2024.

65 Government Notice 2935 in Government Gazette 47877 of 19 January 2023 (Licensing Exemption and Registration Regulations).

66 Schedule 4 of the Constitution indicates agriculture as a functional area of both national and provincial government. Since, July 2024, the ministries split into a Minister of Agriculture and a Minister of Land Reform and Rural Development.

The governance of water, energy and food is complex due to the existence of this silo-based government system. South Africa has three types of municipalities (i.e., local government institutions), namely metropolitan, district and local municipalities, each with its own distinctive features and responsibilities.⁶⁷ A local municipality and a district municipality share responsibilities, but district municipalities specifically have a developmental mandate to respond to the needs of their constituencies.⁶⁸ Government has proposed the introduction of a District Development Model (DDM), that would in future pool resources to ensure better service delivery and development, including in the rural areas.⁶⁹ The DDM could be utilised to introduce the concept of WEF communities that will allow them to make their own decisions on water, energy and food, for example. At this stage the DDM focuses on integrated governance amongst the different spheres of government and still needs to be further developed. It may be opportune to not only focus on the public sector, but to find innovative solutions involving the public and private sector as well as communities. WEF communities could be such an instrument.

The spheres of government are not supposed to act in isolation. Section 40(1) of the Constitution specifically states that all spheres of government are interdependent and interrelated. They are, amongst other things, mandated to “secure the well-being of people in South Africa” as well as to assist and support one another.⁷⁰ However, although the Constitution and the legislation do not specifically refer to these actors by name or title, individuals and communities cannot be excluded from the actors that are involved in water, energy and food decisions. It is the individual, a household or the member of a community who bears the brunt of a lack of service delivery or who is water-energy-food insecure.

In addition to the formal government spheres and departments, the Constitution recognises Traditional and Khoisan leaders that govern their own communities.⁷¹ They do not have a developmental mandate in law, but

67 *Local Government: Municipal Structures Act* 117 of 1998.

68 See s 153 of the Constitution. On developmental local government, further see T-L. Field, “Local economic development and the pursuit of a green economy”, in: A.A. du Plessis (ed.), *Environmental Law and Local Governance in South Africa* (Cape Town: Juta, 2nd ed. 2021) ch. 4.

69 Department of Cooperative Governance Traditional Affairs. Date unknown. “District development model.” COGTA. Retrieved 6 June 2023 www.cogta.gov.za/ddm.

70 Section 41((b) and (h). The *Intergovernmental Relations Framework Act* 13 of 2005 establishes structures to promote cooperative governance.

71 Sections 211 and 212 of the Constitution, read with the *Traditional Leader and Khoisan Leadership Act* 3 of 2019. The Constitutional Court declared the 2019 Act unconstitutional due to a lack of public consultation during its draft phases: *Mogale and Others v Speaker of the National Assembly and Others* (CCT 73/22) [2023] ZACC 4 (30 May 2023). Parliament was granted 24 months to propose a new Bill, following the correct procedures.

in terms of their own customs that evolved over millennia, such leaders have a duty to look after their communities.⁷²

There are therefore numerous potential actors making decisions on water, energy and food or who could participate in WEF communities. It is uncertain which government department would have to take the responsibility should legislation be necessary to institute WEF communities as none of the above spheres of government and departments has an integrated mandate to do so. However, the Constitutional obligation to cooperate may force them to work towards a solution of integrated water, energy and food governance.

In order for WEF communities to receive official legal recognition in South Africa, several concerns related to justice, the concept, the definition thereof, their activities, and integration into the current system need to be resolved.

South Africa does not have all the answers as to what models could be used to empower communities to take action and make their own decisions on water, energy and food. However, as stated before, there are various instruments within South African legislation that provide for multi-actor governance, albeit sector specifically only. In the following section these instruments are explored.

3 Existing Legal Instruments in South Africa

There are various legal instruments in South Africa that create the possibility for the involvement of multi-party stakeholders such as local government (municipalities), the private sector, traditional councils, communities and the public. As stated above, the European legal framework on energy communities

⁷² Traditional Authority Research Group, "The role and future of traditional leaders in South Africa", *Koers* 64(2/3) (1999) 295–324, <https://doi.org/10.4102/koers.v64i2/3.505>. It is important that traditional and Khoisan leadership is regarded as contested; see in this regard J. Ubink and T. Duda, "Traditional authority in South Africa: reconstruction and resistance in the Eastern Cape", *Journal of Southern African Studies* 47(2) (2021) 191–208, <https://doi.org/10.1080/03057070.2021.1893573>; H.Y. Simelane and M.F. Sihlongonyane, "A comparative analysis of the influence of traditional authority in urban development in South Africa and Eswatini", *African Studies* 80(2) (2021) 153–171, <https://doi.org/10.1080/0020184.2021.1932417>; S.F. Khunou, "Traditional leadership and independent Bantustans of South Africa: some milestones of transformative constitutionalism beyond Apartheid", *Potchefstroom Electronic Law Journal* 12(4) (2009) 80–122, <https://doi.org/10.17159/1727-3781/2009/v12i4a2741>; S.F. Khunou, "The customary anatomy of the traditional governance of the Bafokeng traditional community: the implications of the constitutional recognition of hereditary headmanship", *Potchefstroom Electronic Law Journal* 20 (2017) 1–37, <https://doi.org/10.17159/1727-3781/2017/v20i0a3270>.

can provide some answers for the establishing of WEF-communities in South Africa. However, such a framework needs to be adapted to South African circumstances taking the societal and governance context into account. We choose those instruments geared towards community participation to determine how the EU legal framework might have to be adapted to provide a WEF community framework for South Africa. These instruments are compared in order to determine whether some of them may be feasible for or provide some guidance towards the establishing of WEF communities. For the purposes of this article, we focus on public private partnerships, agreements that traditional councils may conclude with other stakeholders, communal property associations, cooperatives, multi-actor governance instruments in terms of water legislation, environmental management cooperation agreements and community forestry agreements. We also discuss the concept of 'stokvels' that is a novel voluntary approach of South Africans to save and use money for a specific purpose. We deal firstly with public private partnerships in terms of local government legislation.

3.1 *Public Private Partnerships in Terms of Local Government Legislation*

The South African National Treasury acknowledged in its 2019 Budget Review that owing to the proliferating infrastructure demands which the government cannot meet, the concept of private public partnerships (PPPs) would be an effective way to deliver the much-needed infrastructure.⁷³ The PPP model is aimed at integrating the private sector into service delivery where both the public and the private sectors have a mutual interest in the success of the partnership.⁷⁴ The origins of South African PPPs can be traced to the 1990s.⁷⁵ PPPs were historically a model used to develop capital-intensive infrastructure such as provincial toll roads, hospitals and rapid rail transit systems.⁷⁶ According to Faber and Baillie,⁷⁷ the PPP model has been focussing

73 National Treasury, *Budget Review 2019* (Pretoria: Government Printer, 2019) p. 151.

74 T. Mandiriza and D.J. Fourie, "Comparative analysis of the public-private partnerships framework: case for South Africa and Brazil", *Journal of Local Government Research and Innovation* 3 (2022) 1-7 at 1, <https://doi.org/10.4102/jolgr.v3i0.93>. PPPs are defined in regulation 1 of the Local Government: Municipal Finance Management Act: Municipal Public-Private Partnership Regulations of 2005 published in Government Notice R309 in Government Gazette 27431 of 1 April 2005.

75 National Treasury *supra* note at p. 151.

76 B. Faber and B. Baillie. 2022. "A general introduction to public-private partnerships in South Africa." Herbert Smith Freehills LLP. Lexology. 25 March 2022. Retrieved 12 July 2023 www.lexology.com/library/detail.aspx?g=53749261-0103-47c2-b667-24704aaf37b9. For an example of PPP projects, see for instance Mandiriza and Fourie *supra* note; National Treasury *supra* note at p. 151.

77 Faber and Baillie *supra* note.

on independent power producers (IPPs); in other words, on the Renewable Energy Procurement Programme.

The characteristics of PPPs include but are not limited to long-term contracts between the public and private sectors for a clearly defined project wherein the private sector sources most of the finance required and the payment from the public sector to the private sector is based on the agreed outputs.⁷⁸

The framework legislation regulating PPPs at the local government level in South Africa includes the *Local Government: Municipal Finance Management Act* 56 of 2003, the *Local Government: Municipal Systems Act* 32 of 2000, the Municipal PPP Regulations of 2005⁷⁹ and the Municipal Supply Chain Management Regulations, 2005.⁸⁰ In addition, the Municipal Service Delivery and PPP Guidelines of 2007 aim at regulating the financial commitments of the municipalities concerning PPPs.⁸¹

Studies carried out by some scholars suggest that PPPs may be a solution to some of the water service provisioning challenges faced by municipalities in South Africa. Mandiriza and Fourie,⁸² for example, note the challenges faced by the water service authorities (in this instance municipalities) in South Africa concerning the delivery of their constitutional mandate of providing water services. They see PPPs as offering solutions in this regard.⁸³ The private sector should, according to them, bear the upfront project costs and ensure efficiency in the provisioning of services.

78 National Business Initiatives. 2019. *An Introduction to PPPs in South Africa*. NBI. 2019. Retrieved 12 July 2023 www.nbi.org.za/wp-content/uploads/2019/05/NBI_KYM-Report-3_Introduction-to-PPPs.pdf.

79 Government Notice 309 in Government Gazette 27431 of 1 April 2005.

80 Local Government: Municipal Finance Management Act: Municipal Supply Chain Management Regulations 2005 published in General Notice 868 in Government Gazette 27636 of 30 May 2005 as amended.

81 National Treasury PPP Unit. 2022. *Municipal Service Delivery and PPP Guidelines*. National Treasury. 2022. Retrieved 12 July 2023 www.gtac.gov.za/wp-content/uploads/2022/03/Municipal-Service-Delivery-and-PPP-Guidelines-new.pdf. Also see Mandiriza and Fourie *supra* note at 7.

82 Mandiriza and Fourie *supra* note. Some of these challenges include but are not limited to ageing infrastructure and constrained municipal finances.

83 However, some scholars argue that the PPPs can have adverse effects on impoverished communities. One major issue is the unaffordable tariffs imposed by private entities, which restrict access to essential services for the poor. This would result in communities facing exclusion from basic amenities such as water and electricity due to the high costs associated with privately managed services. For instance, see M.Sohail and S. Cavill, "Public-private partnership in the water and sanitation sector", *Proceedings of the Institution of Civil Engineers – Water Management* 162 (2009) 261–267, <https://doi.org/10.1680/wama.2009.163.4.261>.

There are no specific regulations governing the water, energy or food sectors in relation to PPPs.⁸⁴ However, the Municipal PPP Regulations of 2005 provide a feasibility study of toolkits for water and sanitation, amongst other services, which is designed to assist municipalities to carry out feasibility assessments for potential partnering with the private sector.

The proponents of PPPs argue that the success of the model depends on the availability of an enabling environment and a well-defined legal PPP framework.⁸⁵ However, the South African PPP legal framework is currently complex and may be difficult to implement, especially at the local government level. This may emanate from the lack of capacity and skills concerning the correct implementation of the legal framework.⁸⁶ The National Treasury noted in its Budget Review of 2022 that there is a need to review the current PPP legal framework with the intention of simplifying and rationalising the municipal PPP legal and regulatory framework.⁸⁷ Furthermore, the National Treasury proposed the establishment of a professional unit that would be mainly dedicated to the implementation of the municipal PPPs. This professional unit would focus on the following areas:⁸⁸

- a) Build-operate-transfer contracts for, amongst other things, reuse and wastewater treatment;
- b) Embedded energy generation from rooftop solar. It is anticipated that the private sector will play a critical role in producing rooftop solar; and
- c) Municipal power purchase agreements for renewable energy supply.

Seemingly, PPPs may be one of the legal instruments available to WEF communities. However, as alluded to above the current PPP legal framework is complex, subject to rigorous financial regulations, and requires amendment. Additionally, the other potential challenge raised in the literature concerning PPPs is the power imbalance between the public and private sectors which can ultimately affect the success of PPPs.⁸⁹

Municipalities may also conclude agreements with traditional councils which may contract with private parties or developers as set out in the following paragraph.

84 Mandiriza and Fourie *supra* note at 5.

85 Mandiriza and Fourie *supra* note at 7.

86 National Treasury. 2022. *Budget Review 2022*. National Treasury. 2022, p. 154. Retrieved 12 July 2023 www.treasury.gov.za/documents/national%20budget/2022/review/FullBR.pdf.

87 *Ibid* at p. 156. Also see Mandiriza and Fourie *supra* note at 6.

88 National Treasury *supra* note at p. 156.

89 Y. Dudink and others, "The dark side of public-private partnerships: Enforced hybridity and power dynamics in fighting financial crime" 2023 *Public Policy and Administration* 4; M.C. Fombad, "Enhancing accountability in public-private partnerships in South Africa" 2014 *Southern African Business Review* at p. 69.

3.2 *Agreements: Traditional Councils, Municipalities and Developers*

South Africa's indigenous communities recognise traditional leadership from time immemorial. In 2020 it was reported that approximately 17 million people live on traditional communal land.⁹⁰ The significance of traditional leadership and the role of traditional leaders in South Africa's constitutional democracy are recognised in section 211 of the Constitution. Section 211 of the Constitution empowers traditional authorities to play a role in matters affecting local communities at the local level, subject to relevant legislation. The legislation should provide for the establishment of the traditional councils, which may deal with matters concerning the traditional leadership. Be that as it may, the Constitution does not set clearly which role the traditional councils may play on matters concerning local communities.⁹¹ This has culminated in tensions between the traditional leadership and the local government concerning the roles that each of these entities plays.⁹²

The legislature enacted the *Traditional and Khoi-San Leadership Act 3* of 2019⁹³ to give effect to the above constitutional provisions. In 2023 the Constitutional Court declared the Act unconstitutional due to lack of public participation during the parliamentary process.⁹⁴ Although the Act has been declared unconstitutional, it will nonetheless remain valid for a period of two years.⁹⁵ The Act empowers the traditional and Khoi-San councils to enter into partnerships and agreements with municipalities, government departments, or any other persons, bodies or institutions.⁹⁶ The said partnerships or

90 O. Xolo, C. McConnachie and C. van Schalkwyk. 2020. "Communal land and the traditional elites." iAfrica. 14 April 2020. Retrieved 4 July 2023 <https://iafrica.com/communal-land-and-the-traditional-elites/>.

91 K.S. Ramolobe, "The dynamics of traditional leaders' relationship with municipal councillors and service delivery", *Journal of Local Government Research and Innovation* 4 (2023) 1–7 at 1, <http://dx.doi.org/10.4102/jolgr.v4i0.95>.

92 J. Mawere and others, "The role and significance of traditional leadership in South African local governance", in: R. Tshifhumulo and T. Makhanikhe (eds.), *Handbook of Research on Protecting and Managing Global Indigenous Knowledge Systems* (Hershey, PA: IGI Global, 2022) pp. 249–273. Also see T.S. Mashau, H.N. Mutshaeni and L.R. Kone, "The relationship between traditional leaders and rural local municipalities in South Africa: with special reference to legislations governing local government", *Studies of Tribes and Tribals* 12(2) (2014) 219–225, <https://doi.org/10.1080/0972639X.2014.11886702>.

93 Its predecessors were the *Traditional Leadership and Governance Framework Act 41* of 2003 and the *Black Authorities Act 68* of 1951. See e.g., Khunou, "Traditional Leadership" *supra* note at 80–122; Traditional Authority Research Group *supra* note; B. Oomen, *Chiefs in South Africa: Law, Culture, and Power in the Post-Apartheid Era* (Oxford: Palgrave MacMillan, 2005).

94 *Mogale and Others v Speaker of the National Assembly and Others* (CCT 73/22) [2023] ZACC 14 (30 May 2023).

95 Paragraph [87] of the case.

96 Section 24(2) of the *Traditional and Khoi-San Leadership Act 3* of 2019.

agreements must be beneficial to the communities represented. The Premier of the province in which the relevant council is situated has to ratify the agreement.⁹⁷ The agreement and partnership must be based on the principle of mutual respect and co-operative governance.⁹⁸ Unfortunately, there are various court cases indicating that the traditional leaders and councils do not always act in the interest of the community.⁹⁹ The hierarchical position of traditional leaders and their councils and the fact that they are now appointed by government instead of by the community, may impact on their accountability to their communities.¹⁰⁰

The Act further empowers the traditional councils to enter into service delivery agreements with municipalities.¹⁰¹ Arguably, the partnerships and agreements between the traditional councils and the municipalities may be among the possible legal vehicles for establishing WEF communities. However, the legislature may need to promulgate legislation or publish regulations which will detail how these partnerships and agreements may be established, who may be part of the said agreements, and the conditions for the termination thereof.

Some traditional communities are governed by communal property associations, as set out in the next section.

3.3 *Communal Property Associations (CPAs)*

Communal property associations (CPAs) serve as vehicles to enable the transfer of land, whether by way of restitution or by redistribution. The CPAs are established in terms of the *Communal Properties Associations Act* 28 of

97 Section 24(2)(d) of the *Traditional and Khoi-San Leadership Act* 3 of 2019. The Premier of the province is the head of the provincial executive in terms of s. 125 of the Constitution.

98 See Ramolobe *supra* note at 7.

99 See e.g. *Pilane and Others v Premier of the North West Province and Others* (UM127/2020) [2023] ZANWHC 103 (4 July 2023); *Glencore Operations South Africa (Pty) Ltd and Another v Master of The High Court, North West and Others* (M584/2020) [2022] ZANWHC 38 (30 September 2022); *Baleni and Others v Minister of Mineral Resources and Others* [2019] 1 All SA 358 (GP); 2019 (2) SA 453 (GP).

100 See e.g. A. Claassens and B. Cousins (eds.), *Land, Power and Custom* (Cape Town: UCT Press, 2008); W. Beinart, R. Kingwell and G. Capps (eds.), *Land, Law and Chiefs in Rural South Africa* (Johannesburg: Wits University Press, 2021).

101 Section 24 of the *Traditional and Khoi-San Leadership Act* 3 of 2019. Also see S. Maila and others, "Communal land tenure: past, present and future – accommodating division and allocation of land in the context of development with reference to the Limpopo Province in South Africa and other African jurisdictions", in: J.G. Horn, J.M. Pienaar and M. Wiese (eds.), *Protean Scholar: Essays in Honour of Professor Gerrit Pienaar* (Cape Town: Juta, 2023) pp. 25–59.

1996.¹⁰² Due to legal technicalities, traditional communities, for example, are not regarded as juristic persons for the purpose of land registration.¹⁰³ As a result, Parliament came up with the concept of CPAs to enable traditional communities to manage their property and affairs in terms of a written constitution.¹⁰⁴ The idea was that these institutions would be accountable to their communities, protect the communities against abuse, and that they would be run in a non-discriminatory, equitable and democratic manner.¹⁰⁵ Despite the laudable aim of the Act, not all CPAs manage the affairs of their communities to their benefit, and various issues arise.¹⁰⁶ One of these issues is the conflict between traditional leaders and CPAs as to how development should take place on communal land.¹⁰⁷ There is tension or power struggles

102 Sections 5–8 of the *Communal Properties Association Act* 28 of 1996. The *Restitution of Land Rights Act* 22 of 1994 enabled communities who had been removed from their land in terms of racially-based legislation after 19 June 1913 to institute land claims. Some land was restituted to individuals, communities, traditional communities or to communal property associations (CPAs).

103 G. Pienaar, “Land information as a tool for effective land administration and development”, *Acta Juridica* (2011) 238–271 at 238.

104 “Community” is defined in the 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.” S. 2 refers to communities that receive land in restitution, redistributed land, assistance from government-donated land or do so voluntarily.

105 Preamble to the Act.

106 See e.g., Select Committee on Land Reform, Environment, Mineral Resources and Energy. 2019. “Communal Property Associations compliance and intervention report.” Parliamentary Monitoring Group. 10 September 2019. Retrieved 4 June 2023 <https://pmg.org.za/committee-meeting/28834/>; *Leogale and Another v Diratsagae Communal Property Association and Another* (M520/2021) [2023] ZANWHC 6 (7 February 2023); Centre for Law and Society. 2015. *Communal Property Associations (CPAs)*. CLS. February 2015. Retrieved 4 June 2023 https://law.uct.ac.za/sites/default/files/content_migration/law_uct_ac_za/1149/files/Factsheet_CPAs_Final_Feb2015.pdf.

107 See, e.g., *Bakgatla-Ba-Kgafela Property Association v Pilane and Others* (M450/2021) [2023] ZANWHC 62 (25 May 2023). Also read S. Mnwana, “When custom divides ‘community’; legal battles over platinum in North West Province”, in: W. Beinart, R. Kingwell and G. Capps (eds.), *Land, Law and Chiefs in Rural South Africa: Contested Histories and Current Struggles* (Johannesburg: Wits University Press, 2021) pp. 60–80 at p. 60; G. Capps, “Chiefs, mines and the state in the Platinum Belt: the Bapo-ba-Mogale Traditional Community and Lonmin”, in: W. Beinart, R. Kingwell and G. Capps (eds.), *Land, Law and Chiefs in Rural South Africa: Contested Histories and Current Struggles* (Johannesburg: Wits University Press, 2021) pp. 81–103 at p. 81; T. Weinberg, “A history of communal property associations in South Africa”, in: W. Beinart, R. Kingwell and G. Capps (eds.), *Land, Law and Chiefs in Rural South Africa: Contested Histories and Current Struggles* (Johannesburg: Wits University Press, 2021) pp. 208–228 at p. 208; J.M. Pienaar, *Land Reform* (Cape Town: Juta, 2014) p. 650.

between the traditional leaders as the born leader of the community, and the imposed CPA s that threaten their authority.¹⁰⁸ Gerrit Pienaar¹⁰⁹ indicates that a CPA is a foreign, western concept unknown to traditional communities that have their own customs and rules as how to govern their communities,¹¹⁰ while Juanita Pienaar states that a CPA is “not only an ownership model, it is also a governance and managerial model” and that the Act does not consider the complexity of collective ownership models in traditional societies.¹¹¹

That said, the Act may provide some learning points for the establishment of WEF communities. Some of the measures correspond to those of the EU Directives discussed above. A community applies to the Director-General of the department responsible for land reform to register a CPA.¹¹² The registration is provisional at first, and if the community complies with the requirements in the Act, final registration follows.¹¹³ The application for a CPA must refer to the name of the intended CPA and indicate whether the community complies with section 2 of the Act. A list with the names of the community members must be provided, as well as what the principles are for the identification of such members as well as the procedure that will be used if people dispute the membership of a person in the community. An interim committee must be democratically elected and the community members must sign an undertaking that they comply with section 9 of the Act. Section 9 of the Act sets out the principles that should be reflected in the CPA’s final constitution, while the Schedule to the Act sets out the matters to be addressed in the constitution. The principles and Schedule refer, amongst other matters, to fair and inclusive decision-making processes in that all community members are afforded the opportunity to participate in the taking of decisions, including decisions on the constitution, the dissolving of the CPA, or the disposal of property. Membership is based on equality and non-discrimination, except that an age

108 Weinberg *supra* note at pp. 208–228; Pienaar *supra* note at pp. 356, 494–495, 649–650.

109 Pienaar *supra* note at 238.

110 Also see P.M. Sebola and M.A. Mamabolo, “The engagement of beneficiaries in farm governance of restituted land through the Communal Property Association Model: the ideal versus the reality of beneficiary farms in South Africa”, *Commonwealth Youth and Development* 16(2) 2018) 1–14, <https://doi.org/10.25159/2663-6549/5968>; J.M. Pienaar, “The battle of the Bakgatla-Ba-Kgafela community: access to and control of communal land”, *Potchefstroom Electronic Law Journal* 20 (2017) 1–31, <https://doi.org/10.17159/1727-3781/2017/v20i0a1444>; M. Barry, “Land restitution and communal property associations: the Elandskloof case”, *Land Use Policy* 28(1) (2011) 139–150, <https://doi.org/10.1016/j.landusepol.2010.05.007>; G.J. Pienaar, “The meaning of community in South African land tenure legislation”, *Stellenbosch Law Review* 16(1) (2005) 60–76.

111 Pienaar *supra* note at p. 495.

112 Section 8(1).

113 Section 8.

limit may be imposed for voting at and the attendance of meetings. Different classes of membership can be created if the principles of equality are adhered to, and such class differentiation does not lead to unequal access rights to land or resources. Membership may be terminated only if there are reasonable grounds for doing so, and a fair hearing was conducted. Furthermore, section 9(1)(c) describes the democratic processes that should be followed, for example, that ample notice should be provided before meetings, regulating attendance, voting, minuting, the inspection of financial records and the constitution.¹¹⁴ Specific rules may be devised for fair access to the property and natural resources and provision should be made for accountability and transparency.¹¹⁵ What is important is that the CPA must manage the property to the benefit of the community and this should be done “in a participatory and non-discriminatory manner”.¹¹⁶ If property is to be encumbered or sold, then the majority of the CPA members must consent thereto and this must be done at a general meeting of the CPA.¹¹⁷ Accountability is to be enforced by the CPA members,¹¹⁸ while financial records must be subjected to verification (auditing). The CPA executive must exercise its fiduciary responsibilities not only towards the finances but also in relation to the community.¹¹⁹ Provision should further be made for dispute resolution mechanisms and offences if any community member or council member breaches any of the constitutional duties.¹²⁰

In 2017 Clark and Luwaya¹²¹ indicated that some CPA s “have been crippled by financial and administrative mismanagement”. Sometimes annual meetings

¹¹⁴ Section 9(c).

¹¹⁵ Section 9(1)(d) and (e).

¹¹⁶ Section 9(1)(d)(i).

¹¹⁷ Section 9(1)(d)(iii). Also see *Khutso Naketsi Communal Property Association v Khutso Naketsi Agri (Pty) Ltd and Others* (61961/2022) [2023] ZAGPPHC 394 (25 May 2023), where the court declared the transfer of shares void as it had not been authorised at a general meeting with more than 50% of the households in the CPA represented.

¹¹⁸ Also see section 17 requesting annual reporting to the relevant director-general.

¹¹⁹ Section 9(1)(e), read with ss. 11–13. The Act also contains offences if the fiduciary responsibilities are breached – s. 14.

¹²⁰ Section 11(6)-(g) prescribes the dispute resolution mechanisms for CPAs, which may include an inquiry by the Director-General of the department responsible for land affairs, conciliation, or new elections taking into account the constitution of the CPA.

¹²¹ M. Clark and N. Luwaya. 2017. “Communal land tenure 1994–2017: Commissioned Report for High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa.” Land and Accountability Research Centre. June 2017. Retrieved 12 July 2023 www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commissioned_Report_on_Tenure_Reform_LARC.pdf.

or elections are not held, while powerful management members do not always act in the interests of the members or are absent in the sense that they do not live in the community.¹²² Women's and vulnerable persons' views are not always taken seriously. Disputes between community members confuse and hamper decision-making, as well as development on the land.¹²³ Issues of capacity building and a lack of support are also raised, which may be important for the consideration of WEF communities. Any legislation or policy that would establish WEF communities will have to take these concerns into account and ensure that there are mechanisms to address these failures.

The next section looks at whether cooperatives can be used as a starting point to conceptualise a viable model for the establishment of WEF communities in South Africa. Cooperatives have proven to be an effective model for creating socio-economic gains and ensuring environmental gains.¹²⁴

3.4 Cooperatives

The establishment of cooperatives is a common approach used to improve livelihoods and build stronger communities.¹²⁵ Cooperatives have assisted communities in obtaining goods and services they cannot afford on their own by enabling them to collectively pool their resources.¹²⁶ They are driven by a desire to bring fairness, equity and justice to communities.¹²⁷ They have open and voluntary membership, are controlled democratically by their members, offer socio-economic participation, independence, autonomy, training, education and cooperation to communities and other cooperatives, offer access to information, and are focused on the concerns of the community.¹²⁸

¹²² See e.g. *Leogale and Another v Diratsagae Communal Property Association and Another* (M520/2021) [2023] ZANWHC 6 (7 February 2023).

¹²³ Also see Sebola and Mamabolo *supra* note at 6–7; Barry *supra* note at 139–150.

¹²⁴ J. Theron, "Cooperatives in South Africa: a movement (re-emerging)", in: P. Develtere, I. Pollet and F. Wanyama (eds.), *Cooperating Out of Poverty: The Renaissance of the African Cooperative Movement* (Geneva: ILO, 2008) pp. 313–340.

¹²⁵ P. Khumalo, "Improving the contribution of cooperatives as vehicles for local economic development in South Africa", *African Studies Quarterly* 14(4) (2004) 61–79 at 61.

¹²⁶ M. Cossier and others, *Impact of Skills Development Support on Small, Medium and Large Enterprises, BEE Enterprises and BEE Co-operatives* (Pretoria: Human Sciences Research Council for Department of Labour, 2012).

¹²⁷ L.F. Von Der Osten *et al*, "What does the 7th cooperative principle (concern for community) really mean?", *Management Review Quarterly*, (2024), pp. 1–26.

¹²⁸ K. Philip. 2003. *Cooperatives in South Africa: Their Role in Job Creation and Poverty Reduction*. South African Foundation. October 2003, pp. 7–8. Retrieved 12 July 2023 www.waqfacademy.org/wp-content/uploads/2013/03/Kate-Philip-KP-10_2003-Co-operatives-in-South-Africa-Their-Role-in-Job-Creation-and-Poverty-Reduction.-South-Africa.-Kate-Philip.pdf.

The principles of cooperatives have to do with self-help, accountability and social responsibility, caring for others, solidarity and honesty.¹²⁹

The International Cooperative Alliance of 2013 states that cooperatives are important because they give communities participation through ownership; they put people at the heart of economic decision-making and bring a far greater sense of fair play to the global economy; and their model creates greater socio-economic and environmental sustainability. In the same vein, cooperatives have a long history in South Africa, with 43,062 registered cooperatives following the adoption of the *Cooperatives Act* 14 of 2005.¹³⁰ The Cooperative Development Policy of 2004 acknowledges that cooperatives can contribute to resource mobilisation, socio-economic empowerment, job creation and income generation, and can also promote sustainable human development.¹³¹ The government has kept up its efforts to close the gap between urban and rural development by trying to eliminate poverty and promote community cohesiveness.¹³² Cooperatives are seen as measures to develop rural areas where poverty persists.

The *Cooperatives Act* provides a definition of “cooperative” similar to that used by the International Co-operative Alliance.¹³³ Section 1(1) defines “cooperative” as “an autonomous association of persons united voluntarily to meet their common economic and social needs and aspirations through a jointly owned and democratically controlled enterprise organised and operated on cooperative principles”. According to section 2(b), cooperative principles include the promotion of social responsibility, independence, democracy and equality in South Africa. Cooperatives can be formed in any sector in South Africa, such as health, agriculture, energy, finance, labour, housing, social welfare, etc.¹³⁴ Cooperatives in South Africa are non-profit organisations.

¹²⁹ H.M. Kanyane and R. Ilorah, “The cooperative landscape in South Africa: analyzing critical issues”, *Africa Today* 61(3) (2015) 3–14. Also see P. Nganwa, M. Lyne and S. Ferrer, “What will South Africa’s new Cooperatives Act do for small producers? An analysis of three case studies in KwaZulu-Natal”, *Agrekon* 49(1) (2010) 39–55.

¹³⁰ *Cooperatives Act* 14 of 2005.

¹³¹ Kanyane and Ilorah *supra* note at 3. Also see Department of Trade and Industry. 2004. *A Cooperative Development Policy for South Africa*. DTI. 2004, p. 4. Retrieved 12 July 2023 www.ilembechamber.co.za/wp-content/uploads/2017/12/Co_operative-Development-Policy.pdf.

¹³² *Ibid.*

¹³³ International Co-operative Alliance. Date unknown. “What is a cooperative?” ICA. Retrieved 8 June 2023 www.ica.coop/en/cooperatives/what-is-a-cooperative.

¹³⁴ Section 4(2) of the Act. Also see T. Twalo. 2012. *The State of Co-operatives in South Africa: The Need for Further Research*. Labour Market Intelligence Partnership. 2012, p. 2. Retrieved 3 June 2023 <https://lmip.org.za/document/state-co-operatives-south-africa-need-further-research>.

The capital for a cooperative generally comes from members through shared capital, reserves, or retained earnings.¹³⁵ They are crucial for meeting the socioeconomic, environmental, and cultural needs of the members of the cooperative.¹³⁶

WEF communities would be aimed at decentralising the planning and decision-making processes for equitable access to resources. They should focus on local communities taking back control and running their activities democratically for themselves. This allows cooperation, enabling communities to gain income and ownership, share knowledge and improve awareness. Cooperatives are decentralised and focused on community needs, with members controlling the management and ownership, having an equal say in how the cooperative is run, and sharing profits equally.¹³⁷ Decision-making and planning in cooperatives are shared by all members, and members have the right to access information, subject to the *Promotion of Access to Information Act*.¹³⁸

Cooperatives in South Africa must be registered according to section 6 of the Act, which, as in the case of CPAs, requires a constitution signed by the founder members, a list of founders and directors, and the payment of a prescribed fee. Sections 2(c) and 8 of the Act recognise that cooperatives are legal entities able to carry out business as stipulated in their constitutions and in the Act. A cooperative has a director and a board of directors responsible for its economic viability and effective management.¹³⁹

Water, energy, and food insecurities are pervasive in South Africa, as referred to above,¹⁴⁰ and cooperatives could act when services are not available or when the needs of the community are not being met. One of the primary objectives is that they should serve the needs and improve the quality of life of communities. Consequently, as stated in the IRP 2019 and the National Water Security Framework for South Africa, securing and maintaining stable water, energy and food sources is essential to ensuring South Africa's economic prosperity.¹⁴¹

¹³⁵ *Cooperatives Act* 14 of 2005 section 40.

¹³⁶ Kanyane and Ilorah *supra* note at 3.

¹³⁷ *Cooperatives Act* 14 of 2005 section 3.

¹³⁸ *Promotion of Access to Information Act* 2 of 2000.

¹³⁹ *Cooperatives Act* 14 of 2005 section 32.

¹⁴⁰ Stats SA. 2023. *Assessing Food Inadequacy and Hunger in South Africa in 2021 Using the General Household Survey (GHS)*. Statistics South Africa. 2023, p. 7. Retrieved 12 July 2023 www.statssa.gov.za/publications/03-00-20/03-00-202021.pdf.

¹⁴¹ South Africa Water Task Team, *National Water Security Framework for South Africa* (Pretoria: National Planning Commission, 2020).

However, many cooperatives are going out of business even before they begin their operations.¹⁴² The Department of Trade and Industry's Integrated Strategy on the Development and Promotion of Co-operatives 2012–2022 states that the failure of cooperatives in South Africa is caused mainly by a lack of support from government departments, organs of state, and agencies. This, in essence, challenges the feasibility of the model in South Africa. Challenges include a lack of critical skills, funds for infrastructure projects, uncertainty about future investments, a lack of cooperation amongst members, failure to comply with the Act, and a lack of monitoring and evaluation of the cooperative's development.¹⁴³

In 2023, the Department of Small Business Development¹⁴⁴ indicated that solutions to these challenges might include increasing the supply of non-financial support services to cooperatives, such as a Cooperative Development Agency, bilateral agreements, an Enterprise Networks Programme, a Cooperative Promotion and Awareness Programme, the establishment of a Cooperative Academy, and curriculum development for training purposes. The Department intends to amend the *National Small Enterprise Act* 102 of 1996.¹⁴⁵ The Bill will introduce the Small Enterprise Development Finance Agency (SE DFA) to ensure that the cooperative ecosystem is able to offer efficient business advice, investment support, business development services, incubator support and business facilitation.

Furthermore, the establishment of the SEDFA will give effect to the government's powers, especially the cabinet powers, to integrate government support (financial or non-financial) into cooperatives. SEDFA will be established as a state-owned company under the *Companies Act* 71 of 2008, and its functions will be to design and implement support for cooperatives, such as promoting a service delivery network that aims to increase cooperatives' contributions to the South African economy. This will be an important addition since cooperatives have not had a leading business development entity to drive their economic transformation and inclusive growth in the South African economy through this non-financial or financial support and access to finances.

The Bill also introduces the Office of the Small Enterprise Ombud Service to solve disputes and complaints by cooperatives, making justice accessible

¹⁴² D. Fourie and C. Malan, "Co-operatives in South Africa: towards addressing the skills gap", *Academy of Entrepreneurship Journal* 27(5) (2021) 1–18 at 1.

¹⁴³ *Ibid.*

¹⁴⁴ Department of Small Business Development's Draft SMMEs and Cooperatives Funding Policy for South Africa, published in Government Notice 3353 in Government Gazette 48483 of 28 April 2023. The draft policy was published for comment. The final version of the policy had not yet been published when this article was being written.

¹⁴⁵ By introducing the National Small Enterprise Amendment Bill, 2023.

and affordable to cooperatives. The Office will recommend any effective responses to the Minister. These institutions may have financial implications for cooperatives, as they would most likely have to contribute to financing their existence. This will contrast with the initial aim of establishing cooperatives, which was to simplify processes. The EU Directives are moving in the opposite direction, namely to lessen the bureaucracy.¹⁴⁶ Nevertheless, despite their shortfalls, cooperatives may be the most adaptable legal vehicle to integrate these communities into the South African legal system. This is due to the fact that cooperatives can assist communities in producing goods and services themselves or obtaining them at a reduced cost, so avoiding expensive middlemen and meeting member requirements. However, a long-term approach to training and mentoring would be necessary, though, to ensure the success of the cooperative movement in South Africa.

Considering South Africa's water, energy and food context and challenges detailed above,¹⁴⁷ it is particularly important to examine the existing legal institutions, entities or instruments statutorily created by the country's legislature.

The delegation of water resource management functions to suitable institutions is not only a significant feature of South Africa's water regulatory framework but may be utilised or adapted to conceptualise a novel model for establishing WEF communities. These institutions are discussed in the next section.

3.5 *Multi-Actor Instruments in Water Legislation*

The Constitution forms the cornerstone of South Africa's legal framework for water governance because it enshrines the human right to access to sufficient water¹⁴⁸ and establishes a constitutional structure of co-operative governance. While national and provincial governments have an important monitoring role, it is the responsibility of local government to ensure that every person has access to water services.¹⁴⁹

Following the promulgation of the Constitution several legislative measures have been taken to progressively realise the constitutional right to access to

¹⁴⁶ Serban D I, 'The European Union: From a Complex Adaptive System to a Policy Interpreter', *Journal of Common Market Studies*, 59 (2), (2021), pp. 388–403. Also see Haag M, Hurka S, and Kaplaner C, 'Policy complexity and implementation performance in the European Union', *Regulation & Governance*, (2024), pp. 1–19.

¹⁴⁷ Section 2 above.

¹⁴⁸ Section 27(1)(b) of the Constitution.

¹⁴⁹ Section 156 of the Constitution provides for the municipal powers and functions of local government. Section 156(1) stipulates that a municipality has executive authority in respect of the matters listed in Part B of Schedule 4 and Part B of Schedule 5 and any other matter assigned to it by national or provincial legislation. Part B of Schedule 4 lists water and sanitation services, which are limited to potable water supply systems and domestic wastewater systems.

sufficient water. These include the *Water Services Act* 107 of 1998, the *National Water Act* 36 of 1998 (NWA), the *National Environmental Management Act* 107 of 1997 and the *Water Research Act* 34 of 1971, for example.

The *Water Services Act* deals mainly with water services and assists municipalities to undertake their role as water services authorities on a local level. It provides for the rights of access to a basic water supply; the setting of national standards and norms and standards for tariffs;¹⁵⁰ a regulatory framework for water services institutions and water services intermediaries;¹⁵¹ water boards; water services committees and their powers and duties;¹⁵² and the monitoring of water services and intervention by the Minister or by the relevant Province.¹⁵³ Notably “Water Services Institutions”, as defined by chapter 1 of the *Water Services Act*, encompass four distinct entities, namely Water Services Authorities, Water Services Providers, Water Boards, and Water Services Committees.¹⁵⁴

A Water Services Authority (WSA),¹⁵⁵ defined as any municipality,¹⁵⁶ is responsible for ensuring access to water supply and sanitation services in its area of jurisdiction.¹⁵⁷ It can either perform the functions of a Water Services Provider (WSP) itself or enter into contracts or joint ventures with other water service providers.¹⁵⁸ A WSP,¹⁵⁹ on the other hand, physically provides water supply and sanitation services¹⁶⁰ to consumers under contract with the WSA.¹⁶¹ This function to operate as a WSP can be fulfilled by various entities such as municipalities, water boards, community-based organisations, private sector companies, or any other public or private body.

Water boards as body corporates¹⁶² and organs of state established by the Minister primarily provide water services, including bulk potable water and wastewater services, to other water service institutions in their respective service areas.¹⁶³ A water board is subject to the *Public Finance Management*

150 Section 2(b) of the *Water Services Act* 108 of 1997.

151 Section 2(d) of the *Water Services Act* 108 of 1997.

152 Section 2(e) of the *Water Services Act* 108 of 1997.

153 Section 2(f) of the *Water Services Act* 108 of 1997.

154 Section 1(xxi) of the *Water Services Act* 108 of 1997.

155 See chapter 3 of the *Water Services Act* 108 of 1997.

156 Section 1(xx) of the *Water Services Act* 108 of 1997.

157 Section 11 of the *Water Services Act* 108 of 1997.

158 Section 19 of the *Water Services Act* 108 of 1997.

159 Chapter IV of the *Water Services Act* 108 of 1997.

160 Section 1(xiii) of the *Water Services Act* 108 of 1997.

161 Section 19(1) of the *Water Services Act* 108 of 1997.

162 Section 31(1) of the *Water Services Act* 108 of 1997.

163 Chapter VI of the *Water Services Act* 108 of 1997.

Act 1 of 1999 (PFMA) and is characterised as a schedule 3B entity: the National Government Business Enterprise. In the event of a failure by a WSA,¹⁶⁴ the Minister may establish a Water Services Committee, which is a statutory committee, to fulfil the duties that were not adequately addressed. Once constituted, the committee must develop a constitution that provides for its daily functioning.¹⁶⁵ It follows that municipalities, as the authorities responsible for access to and the delivery of water supply services, are authorised by the *Water Services Act* to choose the appropriate institutional arrangement for providing these services.¹⁶⁶

In turn the NWA establishes a comprehensive framework for the governance of water resources in South Africa. The NWA sets out various legal instruments or institutions to regulate and allocate water resources. The Act confirms the role of national government, as a public trustee, to govern water at the national level.¹⁶⁷ One of the key components of the NWA is the establishment of Catchment Management Agencies (CMAs).¹⁶⁸ CMAs are established as body corporates¹⁶⁹ to exercise water management at regional or catchment level while actively involving local communities in the decision-making processes.¹⁷⁰ The key responsibilities of CMAs involve managing water resources in collaboration with local stakeholders, with a specific focus on meeting basic human needs, promoting equitable access to water, and facilitating social and economic development. South Africa is divided into nineteen Water Management Areas (WMAs),¹⁷¹ each of which is expected to eventually have its own CMA.¹⁷² In addition, catchment management forums and partnerships inform and support CMAs. They have therefore been voluntarily established

164 Section 51(3) of the *Water Services Act* 108 of 1997.

165 Section 55(6) of the *Water Services Act* 108 of 1997.

166 M. Toxopeus. 2019. "The institutional structure for delivering water services." Helen Suzman Foundation. 2019. Retrieved 26 June 2023 https://hsf.org.za/publications/hsf-briefs/the-institutional-structure-for-delivering-water-services#_ftn22.

167 Section 3 of the *National Water Act* 36 of 1998.

168 See chapter 7 of the *National Water Act* 36 of 1998.

169 Section 79(1) of the *National Water Act* 36 of 1998.

170 See explanatory note to chapter 7 of the *National Water Act* 36 of 1998.

171 Chapter 1 of the *National Water Act* 36 of 1998.

172 The implementation of the *National Water Act* 36 of 1998 has encountered significant challenges, with some scholars even speculating a policy failure. The implementation challenge is particularly highlighted by the slow progress in establishing CMAs. Given the establishment of only two out of the initially proposed nineteen CMAs – namely the Breede-Gouritz and the Inkomati-Usustu CMAs – the Department of Water and Sanitation reduced the planned number of CMAs from nineteen to nine. Nevertheless, the Department of Water and Sanitation is in the process of finalising the establishment of the remaining CMAs. R. Meissner, R. Stuart-Hill, Z. Nakhouda. "The

to address water catchment issues. One notable example is the Umzimvubu Catchment Conservation Partnership.

The NWA also recognises the importance of public participation and consultation in water resource management. In fact, another relevant legal instrument is the establishment of a Water User Association (WUA).¹⁷³ WUAs are statutory bodies established by the Minister and comprise cooperative associations of individual water users who seek to engage in water-related activities at a local level for their mutual benefit.¹⁷⁴ These associations operate according to a formal constitution as outlined in Schedule 5 of the NWA. The primary function of WUAs is to ensure a fair and reliable water supply to their members, particularly irrigation or livestock farmers whose livelihoods depend directly on predictable and consistent access to water. WUAs play a crucial role in poverty eradication and in enhancing food security by enabling water users to cooperate and pool their resources, including their financial and human resources, and pooling their expertise to effectively carry out water-related activities.

The introduction of multi-actor governance instruments via the water legislation indicates that it is possible to involve both government and members of the community in decision-making. The WUAs could play a particular role in ensuring water and food security by pooling resources. Notably these institutions are subject to the PMFA and may have some bureaucratic stumbling blocks. Their role is also specifically mandated by legislation.

Legislation also creates other less formal opportunities to address water, energy and food issues, such as environmental cooperation management agreements, as discussed in the following section.

3.6 *Environmental Management Cooperation Agreements*

The *National Environmental Management Act* 107 of 1998 (NEMA) makes provision for environmental management cooperation agreements.¹⁷⁵ These agreements may be concluded by the Minister responsible for the environment,

Establishment of Catchment Management Agencies in South Africa with Reference to the Flussgebietsgemeinschaft Elbe: Some Practical Considerations", in: E. Karar (ed), *Freshwater Governance for the 21st Century* (Springer, 2017) pp 15–28; South African Government News Agency. 2023. "DWS works to finalise Catchment Management Agencies". Retrieved 20 January 2024 <https://www.sanews.gov.za/south-africa/dws-works-finalise-catchment-management-agencies>. G. Viljoen. 2017 "South Africa's Water Crisis: The Idea of Property as both cause and solution", *Law Democracy & Development* 21 (2017) 176–200 at 199.

¹⁷³ Chapter 8 of the *National Water Act* 36 of 1998.

¹⁷⁴ See the explanatory note to chapter 8 of the *National Water Act* 36 of 1998.

¹⁷⁵ Section 35 of NEMA.

a member of an executive council of a province (MEC) or a municipality with any person or a community to promote compliance with the principles of the Act.¹⁷⁶ An agreement may, amongst other things, include an undertaking “to improve on the standards laid down by law for the protection of the environment”.¹⁷⁷ The conclusion of such an agreement must be preceded by public participation.¹⁷⁸ The final agreement must provide for monitoring and reporting against set targets, the independent verification of reports, and verifiable indicators of compliance with targets, norms and standards in the agreement as well as in law.¹⁷⁹ The agreement should also describe what the penalties will be for non-compliance.¹⁸⁰ This opportunity is not much used in South Africa, and where such agreements have been concluded they have had mixed success.¹⁸¹ However, if the aim of the agreement would be to establish a WEF community with the aim of protecting the environment by providing access to renewable energy, ensuring access to reliable water and ensuring sustainable food production, this Act could apply in principle. Although water and food production fall under the auspices of other departments, it could be argued that NEMA provides for the spirit of cooperative governance in all matters related to the environment, and also provides the overarching sustainable development principles (in section 2) to ensure this.¹⁸² It further provides for monitoring and reporting. On that basis section 35 could perhaps in the absence of other measures, provide a mechanism to establish WEF communities.

Another multi-actor agreement, one that is less formal and that is specifically geared towards communities, is the community forestry agreement.

3.7 *Community Forestry Agreements*

The *National Forest Act* 84 of 1998 has as its purpose to promote sustainable forest management,¹⁸³ as well as to provide for the sustainable use of forests for environmental, cultural, social, economic and spiritual purposes. The Act

¹⁷⁶ Section 35(1) of NEMA.

¹⁷⁷ Section 35(3)(a) of NEMA.

¹⁷⁸ Section 35(2)(b) of NEMA.

¹⁷⁹ Section 24(c) of NEMA.

¹⁸⁰ Section 35(3)(d) of NEMA.

¹⁸¹ W. Scholtz, “Introduction of environmental management cooperation agreements in South Africa”, *South African Journal of Environmental Law and Policy* 11 (2004) 31–51; D. Fischer, *Environmental Management Co-operative Agreements: A Contribution to Pollution Prevention in South Africa* (MSc thesis, University of Johannesburg, 2009). Little information is available post 2009 on these agreements.

¹⁸² Including, but not limited to, for example, environmental justice, the polluter pays principle, the preventative principle, the precautionary principle.

¹⁸³ Section 2 of the *National Forest Act* 84 of 1998.

further promotes community forestry.¹⁸⁴ A unique feature of the *National Forest Act* is that the Minister of Forestry, Fisheries and the Environment¹⁸⁵ may conclude community forestry¹⁸⁶ agreements with relevant authorities responsible for State land, or traditional communal land, should a community endeavour to undertake any activity in a State forest or want to manage the forest on behalf of the State or on its own.¹⁸⁷ A community may approach the Minister, or the Minister may invite communities to make a proposal to enter into such agreements as the Act prescribes. One of the details is the consideration of the rights to land that the community has towards the forest and that are protected in terms of the *Interim Protection of Informal Land Rights Act* 31 of 1996. This will include all traditional community land. It is not clear how many such agreements have been concluded. During a parliamentary committee meeting in 2020 it was indicated that only 12% of such agreements had been successful. Most of the projects and infrastructure had been abandoned. It seems that no oversight or monitoring took place to determine whether the agreements were being successful. Members also raised concerns that such projects may be hijacked by people who did not have the community members' best interests at heart, as happened in some of the land restitution and land redistribution projects.¹⁸⁸ It was further indicated that communities involved in such agreements need capacity building and training

¹⁸⁴ Sections 29–32 of the *National Forest Act* 84 of 1998.

¹⁸⁵ Although the rights to use, manage, control and operate State forests vest in the Minister, she must exercise her discretion taking into account orders of the Land Claims Court (in terms of the *Restitution of Land Rights Act* 22 of 1994) and the *Interim Protection of Land Rights Act* 31 of 1996 s. 22. The requirements for licensing are set out in s. 24 of this Act.

¹⁸⁶ In terms of section 32 of the *National Forest Act* 94 of 1998, “community forestry” may also include small scale plantation forestry, the planting of trees for aesthetic reasons or to improve the quality of life or the sustainable use of a natural forest or woodland, as set out in the agreement.

¹⁸⁷ Sections 29(1)–(3) of the *National Forest Act* 84 of 1998. In 2024 the Department of Forestry, Fisheries and Environment transferred plantations to certain communities. See Department of Forestry, Fisheries and Environment. 2024. “Deputy Minister Soty to handover the Kei Mouth, Qolorha, Wilo and Ntlangaza Plantations in the Eastern Cape Province.” DFFE. 26 January 2024. Retrieved 6 February 2024 www.dffe.gov.za/mediareleases/soty_handovereasterncape_forestryplantations.

¹⁸⁸ Portfolio Committee on Forestry, Fisheries and the Environment. 2020. “Group transfer of state forests to communities: Department briefing; with Deputy Minister Forestry, Fisheries and the Environment.” Parliamentary Monitoring Group. 20 October 2020. Retrieved 21 May 2023 <https://pmg.org.za/committee-meeting/31235/>. Post 1994 people whose land had been taken by way of racially-based legislation after 13 June 1913 could have instituted land claims in terms of the *Restitution of Land Rights Act* 22 of 1994. In addition to land restitution, the government also introduced land redistribution programmes. See the discussion on CPA s above.

in order to successfully participate in community forestry. Despite these concerns, in June 2022 the Minister of Forestry, Fisheries and Environment concluded community forestry agreements with two traditional communities in the Mount Fletcher area situated in the Joe Gqabi District municipality in the Eastern Cape.¹⁸⁹

The literature refers to the successes and failures of similar community forestry agreements in Africa and elsewhere in the world. Successes include that some of these agreements addressed poverty reduction in the specific areas¹⁹⁰ by generating income for the areas and provide jobs and opportunities for community members.¹⁹¹ In addition to these, some of the reasons for the failure of community forestry projects include a lack of monitoring, a lack of benefit-sharing with the community members and a lack of the knowledge to deal with the product that is produced.¹⁹² Tenure security is important for such projects, as communities who are unsure who is going to benefit in the long-run may opt out. Community members will participate only if they could benefit from more secure land tenure.¹⁹³

Baynes and others¹⁹⁴ analyse several case studies in literature and accordingly identify five success factors for the successful application of community forestry agreements, namely (a) eradicating inequality in decision-making, (b) secure tenure rights, (c) shared governance (voting and benefit-sharing), (d) government support (in law or capacity building) as opposed to interference and corruption, and (e) some form of benefit for the members (in the general case raised in this article it might be access to energy, employment, or sharing in the profit of the selling of energy to non-members, for example).

189 A. Modise. 2022. "Deputy Minister Sotyú hands over forestry plantations to the Batlokoa and Makhoba Communities in the Eastern Cape." DFFE. 30 June 2022. Retrieved 3 July 2022 www.dffe.gov.za/mediarelease/sotyú_forestryplantationsbatlokoatraditionalcouncilEC.

190 P.A. Minang and others, "Evolution of community forestry in Cameroon: an innovation ecosystems perspective", *Ecology and Society* 24(1) (2019), <https://doi.org/10.5751/ES-10573-240101>.

191 J. Odera. 2004. *Lessons Learnt on Community Forest Management in Africa*. African Forest Forum. July 2004, p. 31. Retrieved 21 May 2023 https://afforum.org/oldaff/sites/default/files/English/English_118.pdf reported this benefit in some South African projects at the time.

192 L.A. Duguma and others, "Community forestry frameworks in sub-Saharan Africa and the impact on sustainable development", *Ecology and Society* 23(4) (2008), <https://doi.org/10.5751/ES-10514-230421>; J. Baynes and others, "Key factors which influence the success of community forestry in developing countries", *Global Environmental Change* 35 (2015) 226–238 at 226–227, <https://doi.org/10.1016/j.gloenvcha.2015.09.011>.

193 Odera *supra* note at p. 24.

194 Baynes and others *supra* note at 226–238.

Forestry agreements and their challenges may serve as examples of how to establish WEF communities in the South African legal framework and what to avoid. The Act prescribes the procedure and content of such agreements. The Minister will, for example, have to determine whether there are no other communities¹⁹⁵ with similar claims to the forest, invite the members of the community to make an offer, determine whether the forest is suitable for community forestry, and after consultation finally conclude the agreement with the community.¹⁹⁶

A community forest agreement must include non-discriminatory clauses (similar to the EU Directives) for example, must indicate which management powers are delegated to the community, must identify the relevant area and licensed activities that may be undertaken, must regulate the sustainable use of the forest, must identify each party's duties and responsibilities, must prohibit the transfer of rights to another person not included in the agreement, and must provide for alternative dispute resolution mechanisms such as informal mediation or arbitration.¹⁹⁷ The agreement may further stipulate the renaming of the forest and that the community should not pay rent if the community has a historical association with the forest or if it is not feasible in the light of the economic circumstances of the community. The community may also exchange its informal right to the forest for another right as mentioned in the agreement.¹⁹⁸ The land applicable is State land under the auspices of the minister responsible for land affairs or another national minister or provincial authority. Municipal land is excluded from the Act. WEF communities will include members with informal rights in land but may also include municipalities, individual members, private developers etc. That said, the prescribed requirements for forestry agreements could in principle serve as a basis for WEF community agreements, especially in that tenure security would play an important role and rent would not be charged.

195 The *Interim Protection of Informal Land Rights Act* 31 of 1996 section 1 defines a "community" as "a coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law."

196 Sections 29(4) and 30 of the *National Forest Act* 84 of 1998.

197 Section 31 read with section 45 of the *National Forest Act* 84 of 1998.

198 Section 31(2) of the *National Forest Act* 84 of 1998. Any information on indigenous plants that will be utilised or could be utilised in the commercial market is subject to bioprospecting, access and benefit sharing agreements: *National Environmental Management: Biodiversity Act* 10 of 2004 chapter 5.

However, over and above the instruments in law, the indigenous communities in South Africa developed their own voluntary agreement, namely *stokvels*. A *stokvel* is a self-help initiative designed to respond to the challenges of poverty and to overcome income insecurity in communities. This instrument is dealt with in the following paragraph.

3.8 *Stokvels*

A *stokvel* was initially not regulated by specific legislation or authorities.¹⁹⁹ In 2014 the *Banks Act* 94 of 1990 required *stokvels* to be registered and that a self-regulatory body must be established to do so.²⁰⁰ The Registrar of Banks approved the National Stokvel Association of South Africa as such a body.²⁰¹ From 1988 banks allowed *stokvels* to open their own accounts.²⁰²

Stokvels are widely practised and have been an integral part of South African communities for many years.²⁰³ Being deprived of the opportunity to participate in formal insurance and banking schemes in the past, impoverished South Africans developed and adapted certain informal financial structures to overcome the inaccessibility of formal structures.²⁰⁴ A *stokvel* is therefore a

199 Stokvels are not directly regulated by the State. S. Matuku and E. Kaseke, "The role of stokvels in improving people's lives: the case in Orange Farm, Johannesburg, South Africa", *Social Work/Maatskaplike Werk* 50(4) (2014) 504–515 at 505.

200 Government Notice 620 in Government Gazette 37903 of 15 August 2014.

201 In terms of regulation 3(b) of Government Notice 620 in Government Gazette 37903 of 15 August 2014. See National Stokvel Association of South Africa. Date unknown. "Home." Retrieved 6 July 2023 <https://nasasa.co.za/>. *Stokvels* that do not generate more than R100 000 per year at any time need not register. "NASASA is the sole association approved by the Registrar of Banks. It represents a constituency of over 800 000 Stokvel groups consisting of over 11 million individuals, collecting roughly R50 billion annually." NASASA. Date unknown. "About us." Retrieved 6 July 2023 <https://nasasa.co.za/about-us/>.

202 Seen NASASA. Date unknown. "The formation of NASASA." Retrieved 6 July 2023 <https://nasasa.co.za/about-us/history/>, as well as e.g., Nedbank. Date unknown. "Nedbank Stokvel account." Retrieved 6 July 2023 www.nedbank.co.za/content/nedbank/desktop/gt/en/personal/save-and-invest/savings-accounts/stokvel-account.html.

203 *Stokvels* are commonly known as "rotating savings and credit associations", but the term "*stokvel*" is unique to the South African context. A.T. Lukwa and others, "Can informal savings groups promote food security and social, economic and health transformations, especially among women in urban sub-Saharan Africa: a narrative systematic review", *Sustainability* 14(6) (2022) 1–26 at 2, <https://doi.org/10.3390/su14063153>; Matuku and Kaseke *supra* note at 504.

204 W.G. Schulze, "The origin and legal nature of the stokvel (part 1)", *South African Mercantile Law Journal* 9(1) (1997) 18–29 at 18–19.

self-help²⁰⁵ initiative designed to respond to the challenges of poverty and to overcome insecurity in communities.²⁰⁶

Regulation 1(c) of Government Notice 620 of 2014 refers to a *stokvel* as follows:

[a] 'stokvel' ... -

- (i) is a formal or informal rotating credit scheme with entertainment, social and economic functions;
 - (ii) fundamentally consists of members who have pledged mutual support to each other towards the attainment of specific objectives;
 - (iii) establishes a continuous pool of capital by raising funds by means of the subscriptions of members;
 - (iv) grants credit to and on behalf of members;
 - (v) provides for members to share in profits and to nominate management; and
 - (vi) relies on self-imposed regulation to protect the interest of its members;
- or
- (d) members of a specific group, governed in terms of rules agreed to and signed by the group's founders, exclusively established for the purpose of raising funds and applying or holding available such funds for housing advances to members, irrespective of whether or not such group is bound by its rules to terminate upon the expiration of a fixed period or upon the occurrence of an event specified in its rules.

Stokvels typically operate on fundamental principles which might include mutual assistance or trust,²⁰⁷ financial contributions by stokvel members,²⁰⁸ collective decision-making processes,²⁰⁹ and that they are informal instruments that are community-orientated, for example.²¹⁰ In fact, *stokvels* play a significant role in fostering socio-economic development.²¹¹

²⁰⁵ M.J.K. Bophela and N. Khumalo, "The role of *stokvels* in South Africa: a case of economic transformation of a municipality", *Problems and Perspectives in Management* 17(4) (2019) 26–37 at 27, [https://doi.org/10.21511/ppm.17\(4\).2019.03](https://doi.org/10.21511/ppm.17(4).2019.03).

²⁰⁶ Matuku and Kaseke *supra* note at 504.

²⁰⁷ Matuku and Kaseke *supra* note at 505, 508 and 512; G. Verhoef, "Stokvels and economic empowerment: the case of African women in South Africa, ca. 1930–1998", *New Contree* 46(Nov) (1999) 31–51 at 38.

²⁰⁸ Bophela and Khumalo *supra* note at 27.

²⁰⁹ J. Lappeman and others, "Exploring retail orientated rotating savings and credit associations: festive season 'stokvels' in South Africa", *The International Review of Retail, Distribution and Consumer Research* 30(3) (2020) 331–358 at 343, <https://doi.org/10.1080/09593969.2019.1667853>.

²¹⁰ Schulze *supra* note at 23–24.

²¹¹ *Ibid* at 25.

While stokvels have predominantly been associated with financial matters, their inherent principles can be extended to environmental conservation, sustainable practices and the governance of WEF resources.²¹² Communities may establish resource-based *stokvels* by adapting the *stokvel* concept. A water *stokvel*, for example, may be used to involve community members and pool their financial resources together towards the construction of communal water infrastructure, water tanks or boreholes to secure and improve access to water. Similarly, an energy *stokvel* could be formed to invest in renewable energy technology,²¹³ while a food or agricultural *stokvel* could be established to promote agricultural practices to enhance food security.²¹⁴ The nature and purpose of the *stokvel* depending on the wishes and rules of the members of the *stokvel*, are therefore open to various uses. It is also a useful instrument to explain the nature of WEF communities as the concept of *stokvels* may be better known to impoverished urban and rural communities than formal westernised concepts such as CPAs or cooperatives.

4 Comparison of the EU and South African Instruments

In order to determine the gaps in South African legislation and possible lessons to learn from the EU framework Directives, the different instruments are compared in Table 1 and explained thereafter.

EU energy communities rely on voluntary participation of community members. This is similar to the establishment of *stokvels*, CFA s and cooperatives in South African law. The EU energy communities are based on the principles of open participation and non-discrimination against vulnerable households. Only the cooperatives and *stokvels* are based on open participation, while all the other South African instruments prescribe specific actors. The CPAs, cooperatives and CFA s further specifically state that no discrimination should

212 MoneyMag. 2023. "Case study: Stokvel investments in environmental conservation projects in South Africa." Money Magazine. 11 June 2023. Retrieved 5 July 2023 <https://money-magazine.co.za/case-study-stokvel-investments-in-environmental-conservation-projects-in-south-africa/>.

213 *Ibid.*

214 See Lukwa and others *supra* note at 1–26.

TABLE 1 Comparison of EU and SA legal frameworks²¹⁵

	EU	PPP	TCA	CPA	WUA	CMA	EMCA	CFA	Coop	Stokvels
Voluntary participation	✓							✓	✓	✓
Open participation	✓								✓	✓
Non-discrimination / equality	✓			✓				✓	✓	
Creature of statute	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Definition of energy communities	✓									
Specific geared to include communities	✓		✓	✓	✓	✓		✓		
Inclusion of principles	✓			✓			✓			
Activities	✓								✓	✓
Any										
Specific purpose		✓	✓	✓	✓	✓	✓	✓		
Cultural benefits									✓	
Particip-ation in energy markets	✓									

²¹⁵ EU (EU Directives); PPP s (private and public partnerships); TCAs (traditional council agreements); CPAs (communal property associations); WUAs (water user associations); CMAs (catchment management agencies); EMCA s (environmental management cooperation agreements); CFA (Community Forestry Agreements) and Coop (cooperatives).

TABLE 1 Comparison of EU and SA legal frameworks²¹⁵ (cont.)

	EU	PPP	TCA	CPA	WUA	CMA	EMCA	CEA	Coop	Stokvels
Different classes of membership	✓			✓						
Controlled by members	✓			✓	✓			✓	✓	✓
Inclusion of local government	✓	✓	✓		✓		✓			
Transparency in decision-making	✓									
Strict financial regulation and auditing	✓	✓	✓	±	✓	✓				
Restrict administrative complexity and costs	✓									✓
Registration	✓									✓
Dispute resolution mechanisms				✓			✓	Literature	Proposed	
Meeting procedures to be described	✓			✓						
Access to land and natural resources				✓				✓	✓	Equal distribution of benefits
Tenure security / rental agreement								✓		
Disposal of property rules				✓						
Public participation				✓			✓			

TABLE 1 Comparison of EU and SA legal frameworks²¹⁵ (cont.)

	EU	PPP	TCA	CPA	WUA	CMA	EMCA	CFA	Coop	Stokvels
Monitoring				✓			✓			
Reporting				✓			✓			
Penalties for non-compliance				✓			✓			
Measures against corruption / capture			✓	✓				✓		
Integrated decision-making on water, energy and food	energy poverty									

take place and are based on the principles of equality.²¹⁶ All of the instruments are creatures of statute.

The EU Directives define energy communities, while the South African legislation does not contain similar definitions. Such a definition will be necessary as the term “community” has several definitions in South African legislation.²¹⁷ The legal frameworks of the EU, CPAs, WUAs, CMAs and CFAs all provide for the specific inclusion of communities as such, while the TCAs represent the community. The EU directives specifically include the introduction of principles to guide the establishment on energy communities, while the South African legislation pertaining to the other instruments is less clear in this regard. CPAs, however, have a constitution that sets out the principles underlying the CPA’s endeavours. In addition, all environmental related government activities must adhere to the section 2 sustainable development principles included in the NEMA, which implies that EMCAs will be bound thereto.

In terms of activities, the European Directives allow energy communities to undertake virtually any activity in relation to energy matters, as long as they have environmental, social and economic benefits. Stokvels’ and cooperatives’ activities broadly address social and economic needs or interests, while PPPs, TCAs, CPAs, WUAs, CMAs, EMCAs and CFAs have a specific purpose in terms of legislation but do not specifically mention social and economic benefits. These lastly listed instruments are directly connected to a specific purpose, either service delivery, poverty alleviation measures, water provisioning, environmental protection, or measures undertaken for the benefit of the communities. The South African cooperatives may include activities that address cultural needs, while in the case of CFAs cultural and spiritual needs may be addressed. The EU Directives and other South African instruments do not mention culture or the spiritual connection at all.

The citizen energy community may also participate in the energy markets, a concept that is not well developed in South Africa yet. However, it may become important once South Africa’s climate change legislation is finalised.²¹⁸

The EU Directives and CPAs provide for different membership classes, while the CPA may distinguish between different classes of membership, as long as they are not based on discrimination. The EU energy communities, the South

216 Also see section 9 of the Constitution that prohibits some forms of discrimination.

217 On the interpretation of communities, see W. du Plessis and J.M. Pienaar, “Illegal mining: the continued struggle for mineral resources, communities and the environment”, in: C. Rautenbach (ed.), *In the Shade of an African Baobab: Tom Bennett’s Legacy* (Cape Town: Juta, 2018) pp. 79–105.

218 Climate Change Bill, B9-2022.

African CPAs, WUAs, CFAs, cooperatives and *stokvels* are all controlled by their members. Members can include local governments in the case of EU energy communities, PPPs, TCAs, WUAs and EMCAs.

The EU Directives place great emphasis on transparency in decision-making as well as in relation to finances. In South Africa the financial regulations are very strict whether government entities are involved. These institutions are subject to public audits. In the case of CPAs, it is stated that there should be accountability and transparency but as stated above, this does not always happen.

An important aspect of the EU Directives is that they state specifically that the energy communities should not be subject to administrative complexity and excessive costs. This is not addressed in South African legislation, but much can be learnt from the *stokvels* that are created with minimum costs and bureaucracy. Like the energy communities they merely need registration.

With regard to dispute resolution, CPAs must provide for such mechanisms in general and particularly when there is a dispute about membership. The NEMA provides for conciliation, mediation and facilitation for environmental disputes, also therefore also in principle to disputes in relation to EMCAs. These dispute resolution measures could serve as an example for possible measures to include in WEF community rules.²¹⁹ Dispute resolution is further emphasised in the literature on CFAs, and dispute resolution in relation to cooperatives will be addressed once the Amendment Bill is passed.

The EU directives and CPAs specifically mention that meeting procedures need to be described.

In both the case of the CPA, CFA and cooperatives, access to land and natural resources must be described, while *stokvels* require that equal distribution of benefits must take place. From the literature on CFAs, the community should have secure tenure, or rental arrangements should be put in place before community forestry can take place. In a country such as South Africa, where people in the rural communities have insecure tenure of land, this is an important aspect.

The CPA requires that specific rules be included to regulate the selling and encumbering of the property and the majority of members must vote in favour of such actions. The other instruments do not refer to such measures. Both the CPA and EMCAs provide specifically for public participation, monitoring and reporting and penalties for non-compliance. The other measures do not specifically refer to public participation as such.

219 Sections 17–19 of NEMA.

The literature on CPAs, court decisions on traditional councils and municipalities as well as CFAs are clear that measures should be put in place to ensure that the projects or institutions are not hijacked or captured to the detriment of its members.

The EU Directives further place an obligation on member states to determine which households are energy poor and must in their policies and plans address how this would be addressed. The South African government has numerous policies and plans to address poverty, and even though they address energy-poor households, not all such households benefit from these plans and programmes. None of the South African instruments focuses specifically on energy poverty specifically nor do they address integrated decision-making on water, energy and food.²²⁰

5 Conclusion: Towards a Model for WEF Communities and Multi-Actor Governance in South Africa

Water, energy and food are critical resources essential for human survival. In South Africa the interdependence of these natural resources calls for the introduction of integrated WEF communities to ensure resource security and social justice. Although much can be learned from most of the existing multi-actor legal instruments in the country, they fall short to the extent that they cannot be regarded as ideal for the establishment of WEF communities. Reasons for the inadequacy include the reality that each predominantly focuses on silo-based or isolated sectors, or the fact that water, energy and food necessitate the participation and collaboration of diverse stakeholders, including government bodies, communities and private entities. The existing legal instruments in South Africa inadequately provide for effective participation and inclusive decision-making processes when it comes to integrated decision-making in relation to water, energy and food. Furthermore, service delivery is hampered by severe financial constraints, inadequate governance, unqualified staff and sometimes corruption. To overcome these shortcomings, it is imperative to adjust and enhance the legal framework to foster such integrated management, whereby communities can make their own decisions in relation to water, energy and food in a financially viable manner.

It follows that the introduction of WEF communities in South Africa will require a new and unique model that incorporates rules, obligations and accountability measures. It is crucial to address potential barriers and amend

²²⁰ See section 2 above.

existing legislation to facilitate the implementation of WEF communities and promote integrated decision-making processes. From the literature it is clear that when developing WEF communities certain caveats have to be taken into account, especially in the South African historical and social context.

Writing on the topic of community forestry agreements, Odera identified certain risks that should be avoided and that would also be true for the establishment of potential WEF communities.²²¹ He states the following:

Conflicts over rights of access, lack of a common vision over an activity, and ownership of resources are parts of human history, and may be triggered by one or a convergence of some of the elements.

Learning from the EU Directives, mechanisms for identifying community members, including women and vulnerable groups, should be established to ensure inclusivity and maximise benefits. The following framework rules are proposed for the establishing of WEF communities based on the discussion and comparative analysis above: They should (i) be voluntary, (ii) clearly defined and (iii) should allow for members to exit, should they wish to. (iv) The legislation should establish the principles governing the WEF community, and (v) should set procedures for establishing such communities based on non-discriminatory and democratic principles. (vi) The pursuance of social justice issues and equal access to energy, water and food production or special benefits for community members should be emphasised, while (vii) differentiation among participants should be carefully discussed to ensure fairness and non-discrimination. (viii) The WEF community should maintain a list of community members who choose to participate, and (ix) establish decision-making procedures that may involve all members or a majority on certain issues. These decision-making processes may include indigenous customs and values, as long as they do not discriminate against vulnerable groups. (x) Consideration should also be given to the creation of an independent board to oversee the community's activities. (xi) Clear guidelines should be developed to define the permissible activities and decision-making procedures in the WEF communities. Additionally, provisions for (xii) monitoring, (xiii) evaluation, (xiv) auditing, (xv) reporting and (xvi) dispute resolution mechanisms are essential to ensure transparency and accountability. (xvii) Adequate financial support and capacity building mechanisms must be put in place to sustain the WEF communities. In addition, (xviii) the WEF community should set rules for the disposal of assets during its activities and at the closure phase of the entity.

²²¹ Odera *supra* note at pp. 38–41.

By incorporating these elements into the legal framework, South Africa can establish robust and sustainable WEF communities that address the complex challenges of water, energy, and food security while promoting equitable and inclusive development, working towards social justice.

Establishing WEF communities has the potential to facilitate the formation of new, relatively modest, local collective bodies that are capable of carrying out operations in the food, energy, and water sectors. They may dismantle silos to enable the effective production and management of these three categories of goods, provide services to the local populace, bolster the resilience of the local economy, and strengthen it.

Before such communities can be introduced in South Africa, more research would be necessary. The urban and rural contexts differ as well as their access to resources and the knowledge base in relation what such communities would entail in terms of multi-actor governance.²²² Communities will have to be involved in the developing of the rules that will apply to them and where possible, cultural practices should be observed. What is clear though, is that communities will have to come up with their own new ideas to ensure that they do have access to water, energy and food, more so when the government fails them in this regard.

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²²² The feasibility of establishing WEF communities with equal success in both rural and urban settings requires careful consideration of the distinct characteristics and challenges inherent to each environment.