COMMUNAL LAND RESEARCH PROJECT

RFP/JHB/2015/003

ANNEXURE 2:

LEGACIES, CURRENT LEGISLATION AND POLICIES

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1 Current politics and historical background

1.1 Introduction

At the opening of the Eastern Cape House of Traditional Leaders in 2015, the chairperson, Ngangomhlaba Matanzima, issued a stark warning to the Premier of the Eastern Cape Province: provide political support for the institution and practices of traditional leaders as the traditional leaders have it in their power to determine if and for whom people residing in areas under traditional councils will vote in the municipal elections scheduled for 2016.

The national Minister of Rural Development and Land Reform, Gugile Nkwinti, who is the owner as trustee of almost all rural land in former Bantustan areas, recently but erroneously told traditional leaders that they are the *de facto* owners of this land. As the most senior trustee on behalf of the state, the Minister of Rural Development and Land Reform, in response to the objections of members of the National House of Traditional Leaders to SPLUMA stated:

> *"The law started on July 1 and the law is your law as well and not only the municipalities because you are the de facto owners of the land."* [1]

This appears to be electioneering in anticipation of the municipal elections due in 2016.

At a workshop in East London on 28 August 2015 and attended by Mr Nkwinti, the general secretary of Contralesa, Nkosi Xolile Ndevu, stated:

> *"Chiefs have always had the responsibility to manage and govern land we own for our communities ... and that is not going to change now."* [2]

In pre-colonial times the power of chiefs was held accountable by both councillors and the fluidity of societies in a time when abundance of land allowed homesteads and even clans to simply move away from authoritarian behaviour and in fact any decisions they disapproved of. These were generally patriarchal societies where women had little political influence.

In the colonial and apartheid periods, chiefs (*amankosi*) and headmen (*iinkosana, izinduna*) were increasingly subject to the executive authority of magistrates and the various incarnations of departments of Native Affairs. The draconian *Native Administration Act No.38 of 1927* made it clear that all executive authority vested in the state with the governor-general as the "Supreme chief of all Natives". The *Bantu Authorities Act No.68 of 1951* made it very clear that the functions of tribal authorities were to "generally administer", "render assistance and guidance to its chief or headman", and "advise and assist the Government".[3]

Chapter 5 of the *Traditional Leadership and Governance Framework Act No.41 of 2003* is headed "Roles and Functions of Traditional Leadership". Section 19 confines the functions of traditional leadership to those determined by applicable customary law. However section 20 provides that national and provincial legislation may provide a role for traditional leaders in a variety of fields including land administration and the management of natural resources. If such roles are legislated it will represent a major departure from previous practices.

New legislation departs from pre-1994 legislation in another key respect which is that headmen are now for the first time counted as traditional leaders. Act 41/2003 defines a

[1] *Daily Dispatch* 2015/07/03, *Sowetan* 2015/07/04
[2] Daily Dispatch 2015/08/31
[3] Section 4, Act 68 of 1951

headman of headwoman as a subordinate traditional leader. This definition is followed by EC Act 4/2005, KZN Act 5/2005 and Limpopo Act 6/2005.

The legal evolution of the powers and functions of chiefs and headmen is outlined in section 2.3 below headed "Traditional leaders in law".

The draft *Communal Land Bill* being prepared by the Department of Rural Development and Land Reform proposes to transfer ownership of settled land held in trust by the state to traditional councils. This is not just electioneering but would fundamentally alter power relations: *dominium* over land equates with *imperium* over people.

In other words, absolute ownership of land leads to political control over the people dependent on that land by those owners. This was the basis of feudalism in an earlier historical epoch and has no place in a democracy or in the 21st century.

An internal Department of Land Affairs draft discussion document headed "Profile on State Land" dated 6 November 1995 included the following passages (emphasis added):

> *State land held in trust for communities. This is land which has already been allocated to communities and individuals in towns, rural settlements and tribal areas in terms of various tailor made statutory provisions. This land is therefore only nominally owned by the state. Approximately 17 million hectares or 13% of the country is held in this manner and includes most of the former homelands and coloured rural areas.*
>
> *There are also two important challenges facing state land which is held on behalf of individuals and communities. These are:*
> - *The upgrading and securing of tenure rights of people who occupy the land.*
> - *The need for an effective and appropriate system of land administration, in particular where land is held in communal ownership.*
>
> *It would be appropriate to place this land under the administration of local government.*

While this passage could be re-written with a better choice of terminology, the general argument is as valid in 2015 as it was in 1995. So why has so little happened in twenty years?

In 1999 the then Minister of Land Affairs was about to present the *Land Rights Bill* to Cabinet and Parliament. A change in political leadership and new direction shelved that Bill but it would be another five years before the enactment of the *Communal Land Rights Act No.11 of 2004* (CLaRA). A challenge in the Constitutional Court to CLaRA resulted in the Act being declared *ultra vires* in May 2010 on procedural grounds.

Another six years were lost, additional to the delay of five years from the withdrawal of the *Land Rights Bill* to the enactment of CLaRA. Another five years has elapsed since the ruling of the Constitutional Court on CLaRA. In total land tenure reform has been deferred for one reason or another for twenty years.

If the Minister pushes ahead with the draft *Communal Land Bill* in its present form, it is likely to be challenged in the Constitutional Court. Any such challenge is likely to be based at least in part on the argument that the *Communal Land Bill* and other existing legislation including the *Spatial Planning and Land Use Management Act No.16 of 2013* (SPLUMA) elevate the institution and structures of traditional councils to a fourth sphere of government, contrary to

the Constitution which provides for only three spheres of government. This was one of the substantive arguments raised before the Constitutional Court in relation to CLaRA but not decided. However in the judgement of that court in that matter, Justice Ngcobo referred to this argument when he stated:

> *This judgment will, however, provide Parliament with the opportunity to take a second look at the substantive objections raised by the applicants in respect of CLARA when it considers the proper way to give effect to section 25(6) of the Constitution [which provides for secure tenure – see below].*[4]

Now twenty years after the Constitutional imperative at section 25(6) to provide secure tenure, do we need yet another lengthy delay while the new bill is challenged in court all the way up to the Constitutional Court once it is enacted? This could further delay or even prevent any progress for another five to ten years if the pattern over the past twenty years is indicative of the future.

A more cynical view is that should the ruling party lose political control of another metropolitan municipality in the forthcoming municipal elections, this may very well foretell the loss of a province in the next national and provincial elections. In that case there may well be pressures within the ruling party for an undemocratic approach and to increasingly rely on a rural electorate under the sway of traditional leadership.

1.2 Why the fuss?

Firstly there is the instruction contained at section 25(6) of the Constitution and referred to by the Constitutional Court above:

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

Where the occupation of land is by verbal agreement or tacit consent only, and not backed up by some form of public record or written contract, it is clear that such tenure is insecure.

According to the table below a total of almost 31 million South African in 2011 lived under conditions of insecure tenure. The largest proportion of this group, 17 million people across South Africa, are those who happen to regard home as a place in a rural part of a former Bantustan area where the public administration of land tenure rights has been allowed to collapse since 1994.

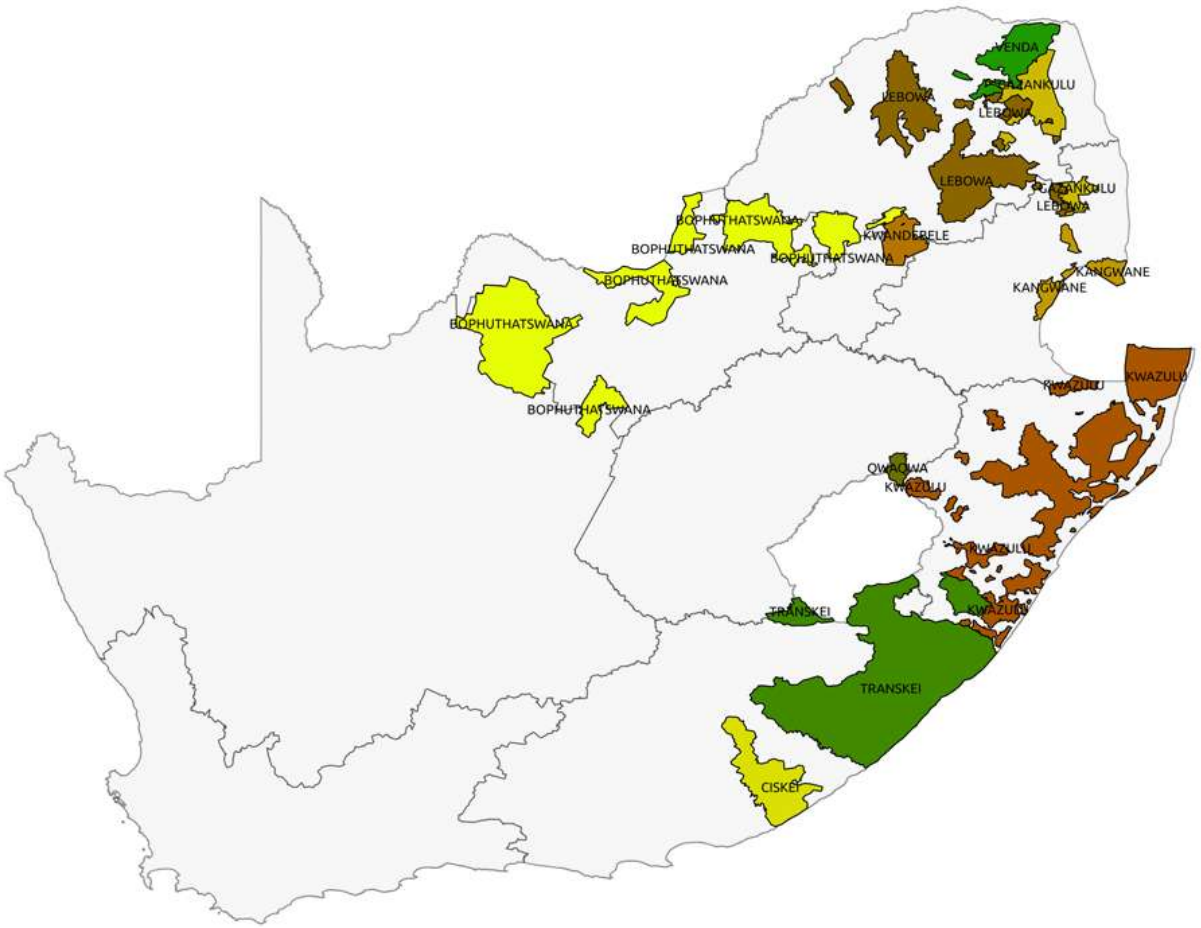
[4] Case CCT 100/09 [2010] ZACC 10

South Africans occupying land or dwellings outside formal property system in 2011

Location	Number of people	% of SA population
Communal areas	17 million	32.8%
Farm workers & dwellers	2 million	3.9%
Informal settlements	3.3 million	6.3%
Backyard shacks	1.9 million	3.8%
Inner city buildings	200, 000	0.38%
RDP houses – no titles	5 million	9.6%
RDP houses – titles inaccurate/outdated	1.5 million	3.0%
Total	30.72 million	59.7%

(Source: Prof. Ben Cousins, presentation to REDI workshop on spatial inequality, UCT, 2015/08/18)

These 17 million people reside in the rural parts of the areas described as Bantustans before 1994.



(Source: www.customcontested.co.za)

The second important reason for a need for a focus on these areas is that the former Bantustans remain the poorest areas of South Africa. In 2012 the poorest ten district municipalities or metropolitan municipalities were all district municipalities and all ten were situated in the Eastern Cape, KZN and Limpopo and mostly in former Bantustan areas:

Table 2: The 10 district municipalities/Metros with the highest lower bound poverty rates in 2011

Province	District Code	District Name	% of population below Lower Bound Poverty Line	Rank (Where 1=area with highest lower bound poverty rates and 52 = area with lowest lower bound poverty rates)
Eastern Cape	DC44	Alfred Nzo	81.6	1
Eastern Cape	DC15	O.R.Tambo	80.5	2
KwaZulu-Natal	DC27	Umkhanyakude	80.1	3
KwaZulu-Natal	DC24	Umzinyathi	78.7	4
KwaZulu-Natal	DC26	Zululand	77.6	5
KwaZulu-Natal	DC43	Sisonke	76.3	6
Eastern Cape	DC12	Amathole	75.6	7
Limpopo	DC47	Greater Sekhukhune	74.7	8
KwaZulu-Natal	DC23	Uthukela	74.0	9
Eastern Cape	DC14	Joe Gqabi	73.4	10

(Source: Noble, M., Zembe, W., Wright, G., Avenell, D. and Noble, S., 2014, *Income Poverty at Small Area Level in South Africa in 2011*, Table 2, SASPRI, Cape Town, www. saspri.org)

Furthermore the 10% of local municipalities with the highest levels of poverty were also all situated in these same three provinces and all in former Bantustans. In the Eastern Cape they were all situated in the former Transkei Bantustan:

Table 4: The 10 per cent of Local Municipalities in South Africa with the highest lower bound poverty rates

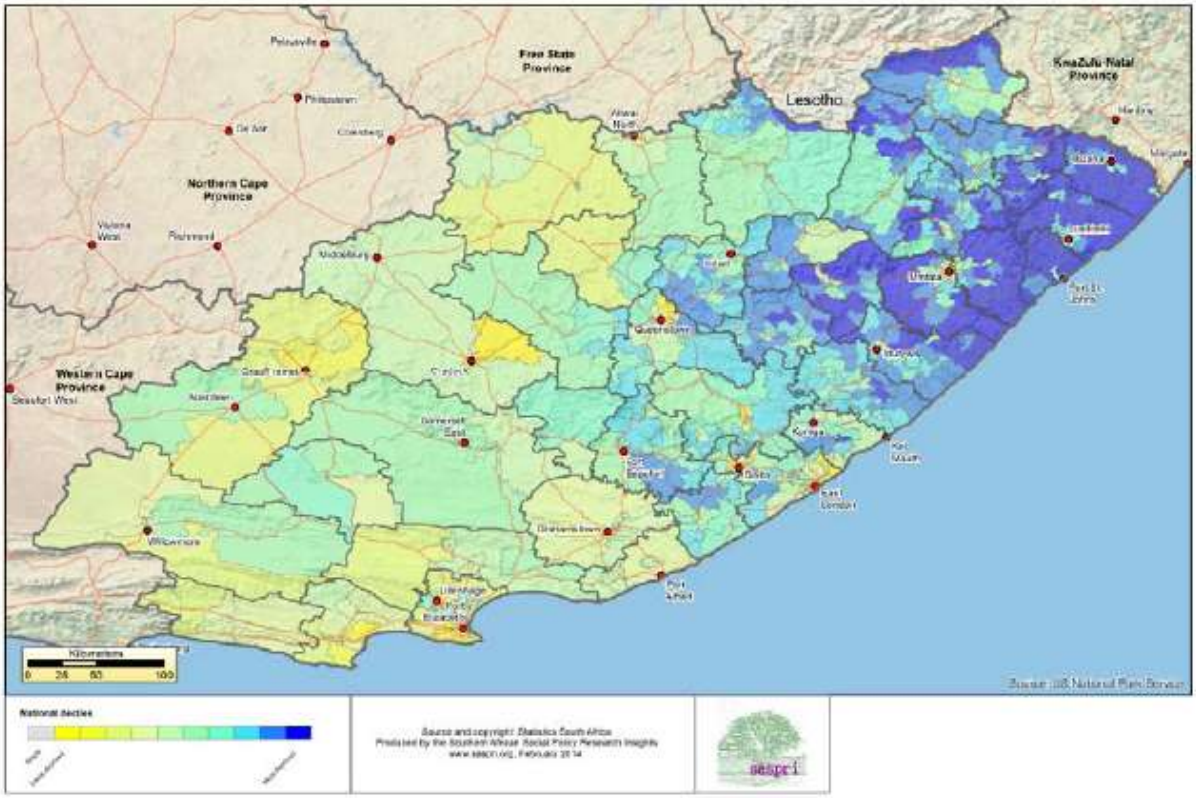
Province	Local Municipality Code	Local Municipality Name	% of population below Lower Bound Poverty Line	Rank (Where 1=area with highest lower bound poverty rates and 226 = area with lowest lower bound poverty rates)
Eastern Cape	291	Port St Johns	86.7	1
Eastern Cape	298	Ntabankulu	86.3	2
KwaZulu-Natal	569	Indaka	86.2	3
KwaZulu-Natal	576	Msinga	85.5	4
KwaZulu-Natal	575	Nqutu	84.7	5
Eastern Cape	290	Ngquza Hill	84.3	6
Eastern Cape	297	Mbizana	84.2	7
Eastern Cape	292	Nyandeni	84.2	8
KwaZulu-Natal	582	Umhlabuyalingana	82.9	9
North West	665	Ratlou	82.6	10
KwaZulu-Natal	580	Nongoma	82.4	11
KwaZulu-Natal	583	Jozini	82.3	12
Eastern Cape	284	Engcobo	82.3	13
KwaZulu-Natal	546	Maphumulo	82.1	14
KwaZulu-Natal	588	Ntambanana	81.9	15
KwaZulu-Natal	598	Umzimkhulu	81.7	16
Eastern Cape	293	Mhlontlo	81.7	17
Eastern Cape	270	Mbhashe	81.5	18
Limpopo	985	Makhuduthamaga	81.5	19
KwaZulu-Natal	542	Nkandla	81.4	20
Limpopo	969	Blouberg	81.4	21
KwaZulu-Natal	585	Hlabisa	81.1	22
KwaZulu-Natal	573	Imbabazane	81.0	23

(Source: Noble, M., Zembe, W., Wright, G., Avenell, D. and Noble, S., 2014, *Income Poverty at Small Area Level in South Africa in 2011*, Table 4, SASPRI, Cape Town, www. saspri.org)

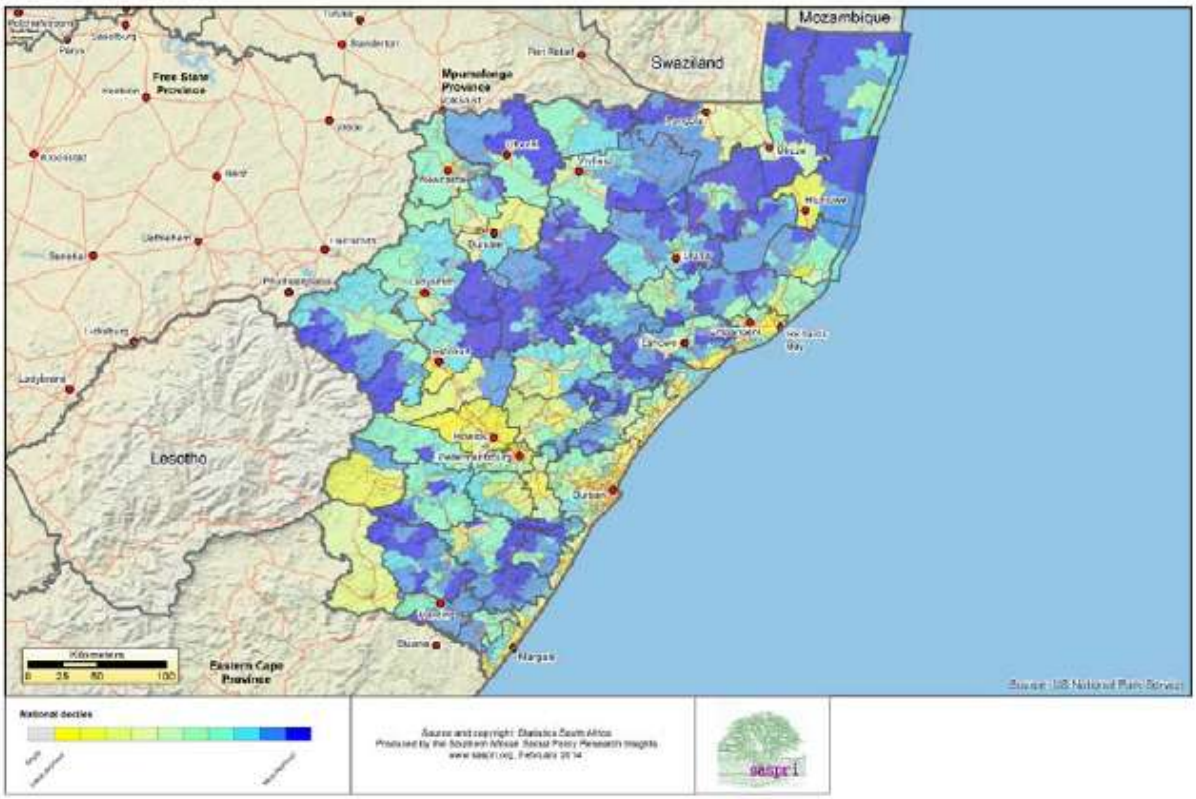
The greatest income inequality at ward level in these three provinces also maps the former Bantustan areas:

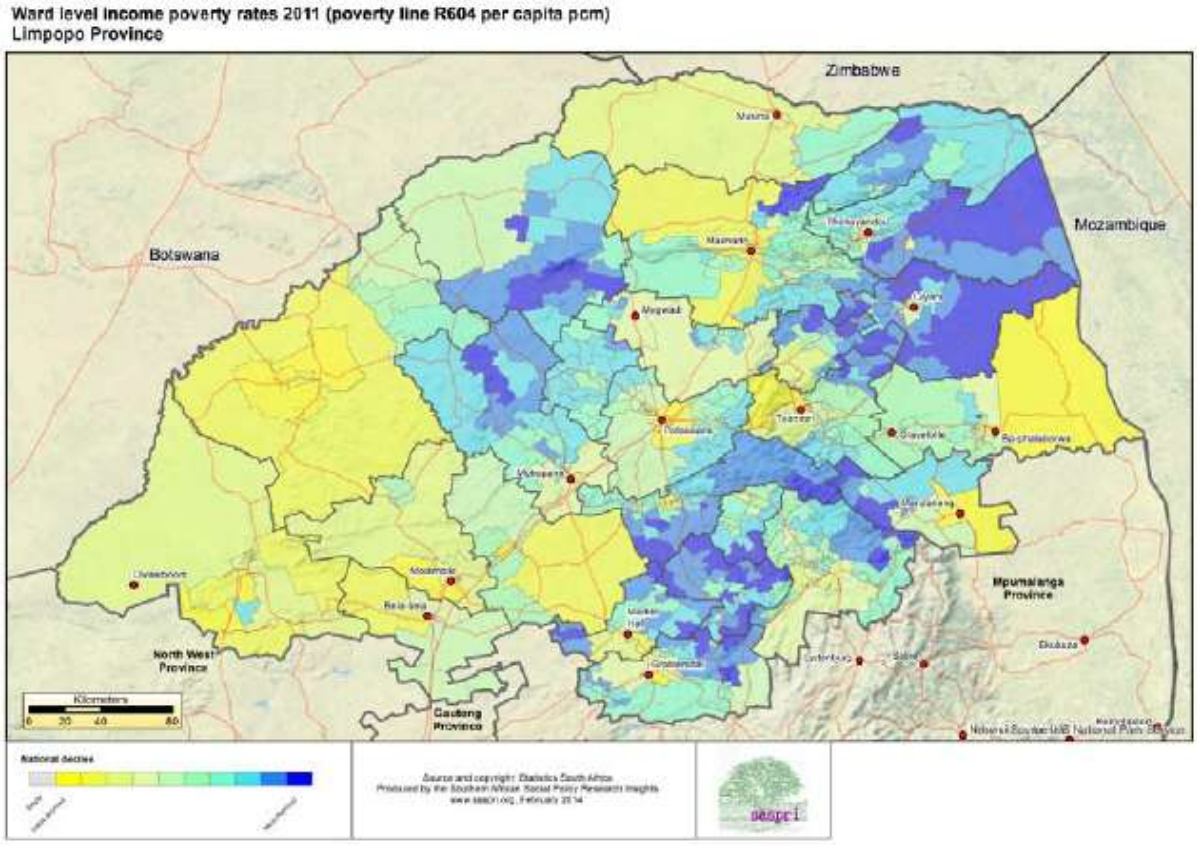
> *... the wards in the country are divided into 10 equal groups (deciles) and mapped. The wards in the decile with the highest poverty rates are shaded deep blue whilst the wards in the decile with the lowest poverty rates shaded bright yellow with a gradation in between ... (Noble et al 2014: 11)*

Ward level income poverty rates 2011 (poverty line R604 per capita pcm)
Eastern Cape Province



Ward level income poverty rates 2011 (poverty line R604 per capita pcm)
KwaZulu-Natal Province

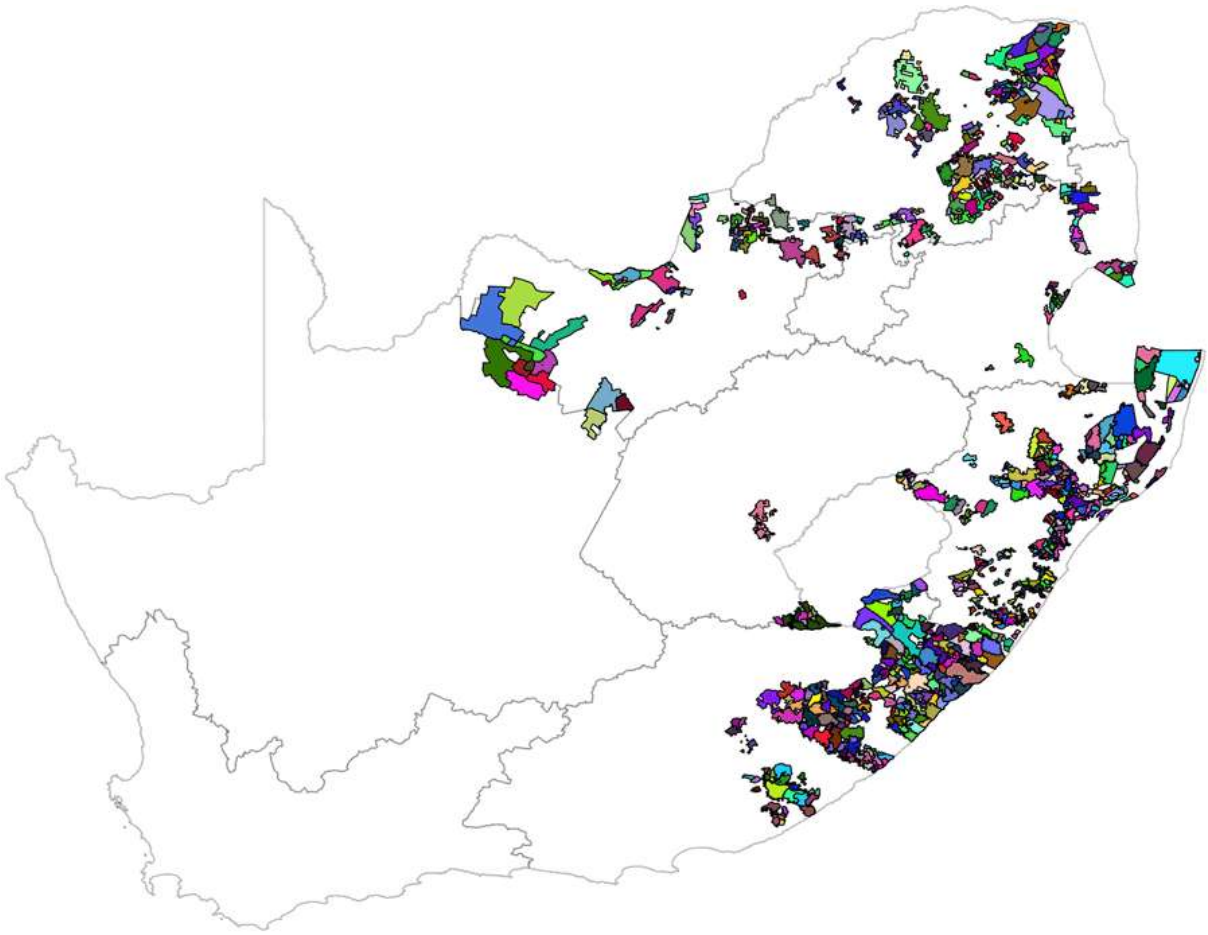




(Source: Noble et al 2014: 12-15)

Finally the ten poorest wards in the entire country are to be found in the Eastern Cape and KZN and all in former Bantustan areas. In the Eastern Cape they are all found in the former Transkei Bantustan.

The rural Bantustan areas were governed under apartheid by tribal authorities established from 1951. In terms of S28(4) of the *Traditional Leadership & Governance Framework Act No.41 of 2003* (*TLGFA*), these tribal authorities were deemed to be traditional councils. The following map shows the areas across the Republic of South Africa which fall under these councils.



(Source: www.customcontested.co.za)

Obviously these traditional council areas are located almost exclusively in former Bantustan areas. Ominously they also include the poorest local municipalities and wards in the country. Where district councils are not entirely comprised of former Bantustan areas, the presence of these impoverished areas in these district councils has dragged the district councils down into the poorest ten district councils nationally.

Thus arises the third major reason for the fuss. While it is not the state alone which can be expected or relied upon to raise these areas out of poverty, sound and effective governance and effective and efficient public interventions are critical to progress out of dire poverty. It is the absence of effective governance and the absence of effective land administration in particular, which frustrates a range of development initiatives, including state assistance in the development of sustainable human settlement in these areas.

As will be explained further in this document, this is not to suggest that addressing these issues will lead directly and inevitably to progress out of poverty. These are not sufficient conditions but rather necessary conditions for progress.

1.3 Political and Institutional challenges

The key question is whether there is political will to do the right thing, not just to do what is politically expedient in the short term. There is a broad international consensus on what approaches work and what do not work in the context of post colonial and developing

countries. Within the national DRDLR there would be support (although not necessarily overt) for the approach suggested in this report.

The political will has to be found at national level since land tenure and land tenure administration is a national competency. National legislation is required, either in the form of an Act of Parliament or at the very least in the form of Regulations to existing Acts. However the authority to implement this legislation has to be delegated in the first instance to competent authorities at first provincial level and in the medium to long term some functions will need to be further delegated to the municipal level.

While the Minister for Rural Development and Land Reform is currently the competent authority for land, at provincial level there may be more appropriate departments of state to exercise such delegated authority. Schedule 4 of the Constitution, headed "Functional areas of concurrent national and provincial competence", includes agriculture, indigenous forests, environment, nature conservation, regional planning and development, urban and rural development, soil conservation as well as housing and municipal planning. All of these relate closely to land. Land thus appears to be a transversal issue which affects a range of departments and all three spheres of government.

The close links between land rights and land use and the management and administration of these in the local sphere suggests that provincial departments responsible for municipal oversight may be best placed to exercise authority for land and land tenure administration.

This does not have personnel implications for DRDLR as it has never undertaken land administration functions at local level in the form these existed prior to 1994.

The draft *Communal Land Bill* prepared under the direction of Minister Nkwinti is at best over-ambitious and at worst entirely misdirected given the failure of titling programmes in South Africa going back to the nineteenth century.

A major failure of the Bill is that it makes no provision for the administration of the Bill. It seems to assume that traditional councils will be able to perform a range of administrative functions which they have never before performed, nor in their previous existence as tribal authorities. The proposed Land Board(s) appear to be a high level advisory structures rather than local administrative structures. A section of the Bill states that the DRDLR must provide financial, administrative and other support for the functions outlined in the Bill. However it is not known if any such costing has been prepared or any long term budgetary provision made.

It is thus likely that for the measures and functions outlined in the Bill to be implemented, some administrative capacity at sub-provincial and local municipal level will be required. This may open the door for delegations to provincial and municipal government and enable Provinces to influence both the legislation and the implementation thereof. But this will require personnel and budgetary commitment.

While all aspects of governance have their costs and fiscal implications, there is a strong argument that in the medium to long term, more effective and extensive land governance and administration may both stimulate economic activity and hence widen the revenue base, as well as creating a basis for local property taxes including municipal rates. Given the crisis of capacity at local municipal level and anticipated medium to long term fiscal constraints, the expansion of sources of local revenue is a critical argument for effective administration of land and land rights by public institutions.

The *Municipal Property rates Act No.6 of 2004* clearly anticipates such possibilities in that it provides for the phasing-in of rates in areas previously excluded from rates (sections 3 and 21) as well as for differential rates (section 8) and ongoing exemptions (section 16)

In the reserve areas of the Eastern Cape which later became Bantustans there is a particular history of local taxes in the first half of the 20th century which were used to fund local education, health, agriculture, as well as water and roads. Scaled up for inflation and population growth, in present value this would amount to over half of current provincial own revenue in the case of the Eastern Cape Province, or R600m per annum.

The 1951 *Bantu Authorities Act* terminated this system of local taxation and decision-making as to how this revenue would be spent and provided that tribal authorities would both raise local revenue and determine its use. While there always were and always will be honest chiefs who take the interests of their rural constituents seriously, there generally emerged systems of local extortion, patronage and aggrandisement of local elites associated with unaccountable tribal authorities.

1.4 History of Rural Land reserved under the 1913 & 1936 Land Acts for black occupation

The history of land tenure and land administration in South Africa includes the violent dispossession of the indigenous population of their land by settlers mainly of European origin. However there are a number of common misunderstanding and misrepresentations of aspects of this history. One crucial simplification which is relevant here is the notion that land rights in the trust areas are, firstly, of a lower order than the land rights recorded in the Deeds Registries, and, secondly, that these second or third class land rights are the inevitable outcome of colonial, segregationist and later apartheid policies and were inherently racist.

This view is entirely correct when viewed within the confines of the segregationist and apartheid eras from the 1920s to 1990. For example the denial of registered rights to land in urban areas in the economic heartland of South Arica went hand-in-hand with the severe limitation of the rights of black South Africans to reside permanently in these urban areas in terms of the *Native Urban Areas Act No.23 of 1923*, which became a cornerstone of apartheid influx control, the pass law system and migrant labour.[5]

A longer term view suggests that the rights usually referred to as weaker or lower order land rights in fact emerged out of a more complex and contested interplay during the nineteenth century in what is now the Eastern Cape Province. In the 1850s under Cape governor Sir George Grey, a serious attempt was made to assimilate at least a class of conquered people into the mainstream colonial society. This included the provision of both political rights in the form of a qualified franchise and title to surveyed parcels of land. As the conquest of still politically independent societies to the east and into the Transkei proceeded, so there was an increasingly ambiguous attempt to continue with aspects of the same policy, at least with respect to the survey and individualising of land title. However this was tempered by increasing white fears that the already significant black electorate in the eastern districts of the Cape Colony would grow to dominate electoral politics and so the qualifications for the

[5] This was one of a number of laws which followed the pass laws of the colonial period and later laws of the Union period. Influx control was considerably tightened after the end of the Second World War and the further *Native Urban Areas Consolidation Act No.25 of 1945* was substantially amended in 1952 shortly after the passage of the *Group Areas Act No.41 of 1950*.

franchise were simultaneously increased while new and weaker forms of title were introduced east of the Kei River which did not qualify for the franchise.[6]

However these weaker forms of title were at least in part a response of the colonial authorities to the failure of individually registered title to find widespread support and adoption combined with the significant costs to the colonial state of the survey of this land for such title. The practical solution which emerged was to lead directly to a locally administered system of recording occupational and use rights alongside customary rights. Thus of the 28 magisterial districts which comprised the "independent" Transkei Bantustan, only in 8 districts was land surveyed after annexation to the Cape Colony and the British Crown. For the rural areas in the other 20 districts and for subsequent land allocations in the 8 where surveys were initially undertaken, these new allocations were made under what became known as the Permission-to-Occupy or PTO system, described in the national Proclamation R.188 of 1969 which attempted to provide a unified system for the administration of such rights across South Africa.

The lack of general enthusiasm for titled land and also for meeting the formal requirements of the transfer of such land, whether by sale or by succession, relates at least as much to historical attitudes to land as a social rather than a legal and proprietary construct as it does to the costs of the formalities required for registration and transfer of land parcels.[7] Access to land and rights to the utilisation of land and its products is a result, firstly, of membership of a community, secondly, as a member of a family or extended family, and, thirdly, based on one's position within that family and contribution to the well-being of that family.

British colonial expansion eastwards in the nineteenth century from what is now the Western Cape Province was undertaken by a gradual process of conquest, with the greatest violence and dispossession of land, livestock and labour taking place up to and across the Kei River. Key figures in this process were the "diplomatic agents" placed by the colonial governor with "tribes beyond the colonial boundary". Once these tribes were brought under formal colonial rule, which in the case of the Transkei occurred from 1879 to 1894, these diplomatic agents became local magistrates of each new district. Critically these magistrates had very little coercive muscle. Each had only a handful of policemen and was obliged to rule more by co-operation and compromise with local elites than by coercion. What developed in the Transkei and in the Ciskei reserve areas (described as "locations" at the time) was a paternalistic form of local rule mediated by the local magistrates which included the provision that no laws of the Cape Colony would be applied to the Transkei unless this was expressly provided for and usually only after consultation with the magistrates who in turn sounded out the local elites through whom they effectively ruled.[8]

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[6] The granting in 1853 of limited representative government in terms of the constitution of the Cape Colony admitted to the franchise males of any race who earned £50 a year or occupied a site and structure together worth £25. In 1886 47% of the voters in five eastern Cape Constituencies were black men. The 1887 *Parliamentary Voter Registration Act* extended the franchise over the newly annexed Transkeian Territories but excluded tribal forms of tenure from the property qualification. It was referred to as *tung 'umolomo* or "the shutting or stitching up of the mouth". As a result 20 000 people were struck of the 1886 voter's role, the overwhelming majority of whom were black. The 1892 *Franchise and Ballot Act* raised the property qualification from £25 to £75 and introduced a literacy test. Women were only to get the franchise in the early twentieth century, and then only white women.

[7] There is a body of academic literature on this subject, including a very recent Ph.D. by a co-author of this report: Rosalie Anne Kingwill, 2014, *The Map is not the Territory: Law and Custom in 'African Freehold': A South African Case Study*, University of the Western Cape.

[8] "... only such laws of the old Cape Colony as were suited to the conditions under which the Natives were living were applied to the Territories after annexation, and the Governor-General-in-Council was empowered to draw up regulations which would have the force of law. ... No Acts of the Cape Parliament were enforced unless proclaimed so by the Governor or expressly extended to the annexed Territories in the Acts themselves. With Union this last provision was modified and now Union laws apply automatically unless the Territories are

While the history of the KwaZulu-Natal Province shares some similarities with the Eastern Cape in that both were once British colonies, the colonial history of political rights land tenure in KZN was different and never included any attempt at assimilation. Natal, the area south of the Thukela River, was annexed to the Cape Colony in 1844 and became a separate colony in 1856. Ordinance 3 of 1849 made the governor supreme chief, a practice which was later to be extended across the entire Union of South Africa. Seven reserves or locations were established in this area by 1848 for the occupation of the majority of the black population in Natal. In 1864 the Natal Native Trust was established to administer these reserves. The trustees were the members of the Executive Council of Natal. By 1884 there were 42 locations and 21 mission reserves, totalling some 2 300 000 acres. The mission reserves were outside of the locations and were granted in trust to missionary bodies. In 1903 the mission reserves were also placed under the control of the Natal Native Trust by the *Mission Reserves Act*.[9]

> *In 1897, when Zululand was annexed to the Colony of Natal, a Commission representing both the Imperial and Colonial Governments was set up to demarcate reserves in this area. 3 887 000 acres was set aside for Reserves and 2 615 000 acres, including much of the best land for both herding and sugar growing ..., was left for use and eventual sale to all races. The possibility of Africans acquiring some or all of this land was effectively blocked by the Native Land Act of 1913 ...*[10]

From the mid 19th century, the Zulu state based north of the Thukela and east of the Buffalo Rivers was encroached upon by the South African Republic, later the Transvaal province after 1910. During the Zulu civil war, boers took sides and in return claimed extensive land and proclaimed the New Republic. In 1887 this area of north-western KZN around Utrecht and Vryheid was incorporated into the Transvaal and returned to Natal after the South Africa War in 1903, but not returned to the amaZulu.

The Zulu people, whose land this once was, were not necessarily removed from these districts. Many continued to live on the white farms as labour tenants or rent-paying tenants, gradually brought under the increased control of both individual farmers and the state.[11]

This area and similarly tenanted areas in Limpopo Province (and others) were to be the focus of land claims in terms of the *Land Reform (Labour Tenants) Act No. 3 of 1996*.

The early colonial history of Limpopo Province as part of the Boer Transvaal Republic is divergent from both the Eastern Cape and KwaZulu-Natal.

In the far north of the Transvaal, boer domination was only finalised in 1898 when a boer force of about 4 000 plus African allies drove the Venda chief Mphephu and his followers across the Limpopo River. Thirty years earlier, in 1867, the boers, under the leadership of later president Kruger, were driven out of the Soutpansberg and their capital, Schoemansdal, was destroyed.[12]

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specifically exempted." (J.T. Kenyon, 1939, *An Address on the General Council Administrative System of the Transkeian Territories,* page 13)

[9] Eleanor Preston-Whyte, 1988, "Mission Land at Indaleni: What to do with a scarce resource", in Catherine Cross & Richard Haines (editors), *Towards Freehold*, pages 178-183

[10] *Ibid* 194

[11] The Surplus People Project, 1983, *Forced Removal in South Africa: Natal*, Vol.4, page 21

[12] For the early history of the far northern Transvaal, see Roger Wagner, 1980, "Zoutpansberg: the dynamics of a hunting frontier, 1848-67", in Shula Marks & Anthony Atmore (editors), *Economy and Society in Pre-Industrial South Africa*, Longman

There is also at least one important similarity between Limpopo and KZN:

> *In both Natal and the Transvaal, the authorities were reluctant to grant individual tenure, one reason being that in both territories the practice of placing African land in the hands of white trustees had been developed. Key architect of the Natal policy was Sir Theophilus Shepstone, Secretary of Native Affairs between 1848 and 1875.*[13]

A hallmark of "native administration" under Shepstone in Natal was that it was cheap. To achieve this he emphasised black chiefs, black taxes and black police. Following the annexation of the Transvaal by Britain on 12 April 1877, Shepstone was appointed as special commissioner to administrator of the Transvaal until 1879. He planned to introduce the same system as in Natal where each magistrate as administrator of native law communicated directly with the Secretary of Native Affairs. For about thirty years Shepstone functioned "as uncrowned king of Africans in Natal." However unlike in Natal, he was not to succeed in this in his brief tenure in the Transvaal and instead old systems of alliance and control were centralised.[14] The Transvaal reverted to independent status in 1881.

After the South Africa War, with the former boer republics under British control, the British High Commissioner, Lord Milner, in 1903 set up the South African Native Affairs Commission (SANAC) to develop a uniform "native policy". SANAC was generally in favour of the reserve policy of the Cape, which was then based on the ideas set out in the *Glen Grey Act No.25 of 1894*.[15] Upon the formation of the Union of South Africa in 1910, the Eastern Cape experience remained critical to the development of a national "native policy" including with regard to land issues.

This system of indirect rule had the twin advantages for the colonising power that it was both cheap and effective. As the system of government of the Cape developed and was elaborated towards the later part of the nineteenth century, it was logical that the officials administering the Transkei provided both the leadership and ideology for the new Native Affairs Department. In the absence of any coherent "native policy" or any effective administration in the northern provinces in 1910, the Cape Native Affairs section came to lead the new Union Department of Native Affairs.

One consequence of this was that the experiences in the Transkei around land tenure and land administration were reproduced across the entire Union, including the preference for locally recorded and administered land rights.

Proclamation R188/1969 was new legislation but it was based firmly on a series of proclamations and practices going back to the late nineteenth century. In particular it drew heavily on *Proclamation 117 of 1931, Regulations for certain surveyed districts of the Cape Province*. Annexure 1 of R188/1969 listed prior proclamations repealed by R188/1969. This list ran to over two pages and included legislation promulgated in the late nineteenth century, in particular the *Glen Grey Act No.25 of 1894*.

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[13] Richard Haines & Catherine Cross, 1988, "An historical overview of land policy and tenure in South Africa's Black areas", in Cross & Haines (editors), page 74

[14] Peter Delius, 1983, The Land Belongs to Us, Ravan Press, pages 220-3; Paul Maylam, 1986, A History of the African People of South Africa: from the Early Iron Age to the 1970s, David Philip, page 84

[15] *Op cit* 78. However it must be noted that the implementation and effects of the *Glen Grey Act* were much less significant than the intentions of the act: "At the conference, reference was made by a number of speakers to the Glen Grey Act of 1894 as shaping land holding in the Cape, but it was extended only to about half of the Ciskeian districts, and to seven out of 26 Transkeian districts. Even in those districts, enormous difficulties were experienced in administering the Act because it cut across rural practices and demand for access to land. See L. Wotshela, 'Quitrent Tenure and the Village System in the Former Ciskei Region of the Eastern Cape: Implications for Contemporary Land Reform (William Beinart and Peter Delius, 2014, "The Historical Context and Legacy of the Natives Land Act of 1913", *Journal of Southern African Studies 40:4*, page 686)

While the origins of the PTO system in the Transkei in the late nineteenth century may have been in practical measures and even the outcome of an effective compromise between colonial administrators and local custom, this practice was to be subsumed under wider national political priorities. The likes of mining magnate and Cape Prime Minister (until he attempted a *coup d'état* in the Transvaal, referred to as the Jameson Raid), Cecil Rhodes, and then the Union government, sought to establish a uniform approach to the "native question" which included ensuring a supply of cheap labour to the mines and securing political control by an overwhelmingly white electorate. This gained added impetus with the overt commitment to segregation as official government policy after 1924. There is a view that any vestiges of a benign paternalism in the Union Department of Native Affairs were eliminated by the late 1920s. Critical in this regard was the passage of the *Native Administration Act No.38 of 1927*:[16]

> *The Native Administration Act of 1927 was the first major step in the process of enforced retribalization, and facilitated further moves towards a uniform reserve policy. The Act extended considerably the executive powers of the Native Affairs Department (NAD) officials. As Lacey (1981: 99) stresses: "The NAD could do practically what they liked in the name of the Supreme Chief (the Governor-General) without being either answerable to Parliament or the law." [17]*

It was due to the overt racial discrimination of the official segregationist policy period from the 1920s through to the full-blown apartheid era from 1948 that black land rights came to be described as second class. The 1997 White Paper stated:

> *Until the 1990s, it was government policy that black people should not own land. In townships and ex-homeland areas, the form that land rights took was generally subservient, permit-based or 'held in trust'. The land was generally registered in the name of the South African Development Trust. In many areas, the administration of this land was inefficient and chaotic so that people who have lived on land for generations may find that they have no legal right to the land in question, even if nobody disputes that they are the rightful owners of the land. Some people have Permission to Occupy certificates (PTOs). Others do not.*[18]

VILLAGISATION OR BETTERMENT PLANNING

A critical determinant of the form and content of reserve land tenure and land administration into the 20th century is the policy of betterment. The reach and extent of the formal provisions of *Proclamation R188/1969* reflects the extent to which betterment planning including villagisation was implemented. Betterment planning was formally launched across SA by *Proclamation 31 of 1939*, and refined and made increasingly authoritarian by successive proclamations including those of 1944, 116/1949 and 196/1967, the later a consolidation of minor amendments since 1949.

[16] See Saul Dubow, 1986, "Holding 'a just balance between white and black': The Native Affairs Department in South Africa c. 1920-33", *Journal of Southern African Studies, Vol. 12, No. 2.* One of the provisions of the 1927 Act was for the appointment of "title adjustment commissioners" to investigate and update title where titles were registered in the names of long-deceased forebears. One of the land "reforms" of the De Klerk government was the *Land Titles Adjustment Act No. 111 of 1993*, which made these provisions of the 1927 Act into stand alone legislation!

[17] Richard Haines & Catherine Cross, 1988, "An historical overview of land policy and tenure in South Africa's Black areas", in Cross & Haines (editors), *Towards Freehold,* page 82

[18] Department of Land Affairs, 1997, *White Paper on South African Land Policy*, page 30

The purpose of betterment, initially and at least partially, derived from perceptions of the increasing degradation of the reserve areas and the perceived inefficiency of reserve agriculture. Betterment as with earlier attempts at "land rehabilitation" involved the reduction of "scrub" livestock, the introduction of "superior" genetic material through introducing and providing stud bulls and rams, the fencing of grazing camps and rotational grazing, the establishment of rural villages instead of displaced homesteads, and the separation of arable lands from homestead residential sites. It represented major changes to an old and well-established order. There is considerable evidence that the implementation of betterment is established areas had a disastrous impact on the established social organisation of production and arable production in particular.

Proclamation 31/1944 made compulsory planning along betterment lines on any land acquired in terms of the *Native Land and Trust Act No.18 of 1936* before any settlement was allowed or formalised. Thus the Ciskei which in the early 20th century was made up of some 19 unconnected reserved areas became a single land mass only after the acquisition of considerable private land (and also after the transfer of the Herschel and Glen Grey districts to the Transkei in 1976). Therefore it is not surprising that almost the entire Ciskei is "planned". Similarly the reserve areas in the Transvaal were minute in comparison to the reserved areas in Natal and the Eastern Cape. Therefore most land which was consolidated with the original reserved areas was "planned".

Elsewhere and especially in areas already settled, including those areas reserved in terms of the *Native Land Act No.17 of 1913*, the imposition of betterment was often fiercely resisted and often more so when combined with the imposition of tribal authorities after 1951 and where this imposition ran counter to local conventions of governance. Such resistance is at least part of the explanation for the slow implementation of betterment:

In 1967 a BAD [Department of Bantu Administration and Development] noted that in only 60% of the 1 199 413 morgen planning in Natal by 1965 had planning been physically carried out. ... Natal revealed the greatest disparity between planning and implementation – by contrast 77% of the plan for the Ciskei had been implemented, 76% for the Northern Territories and 80% for the Western Territories.

Part of the reason for this was the strenuous opposition to the implementation of betterment planning in parts of the Natal reserves. In the 1960s the district of Nongoma in Northern Natal witnessed extremely violent opposition to attempts to cull cattle and relocate houses into residential settlements.[19]

In the Eastern Cape resistance to betterment and tribal authorities were the reasons for the Mpondoland revolt. These coastal regions with high rainfall and higher agricultural potential are still the least affected by betterment and the issuing of PTOs as indicated by the map below.

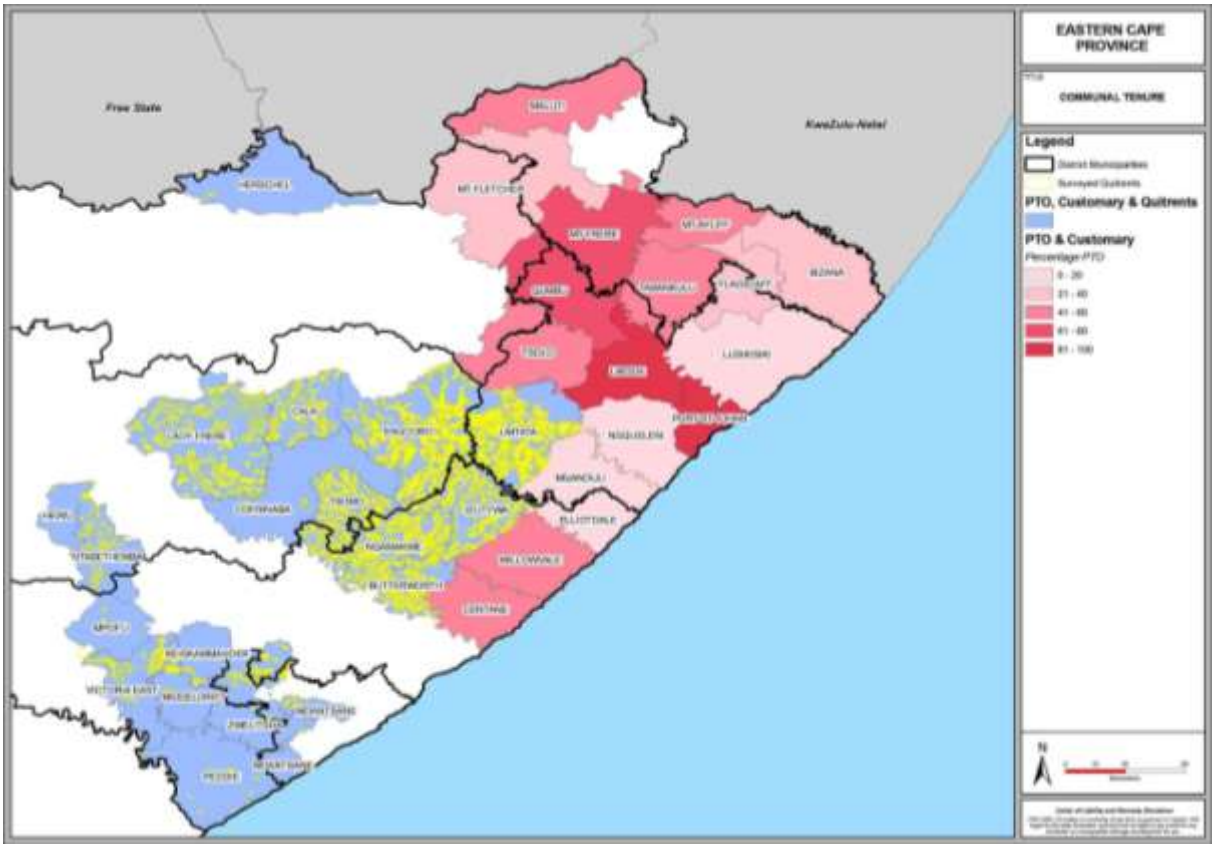
In Limpopo there was extreme resistance to the imposition of both tribal authorities and betterment in Sekhukhuneland, the core area of the Lebowa Bantustan, from 1957. By 1980 there were still areas of Sekhukhuneland which had not accepted betterment.[20]

There were continuities still 30 years later. The upsurge in opposition during the 1980s was both an urban and a rural phenomenon. In the rural areas of the Ciskei there was a revolt

[19] The Surplus People Project, 1983, *Forced Removal in South Africa: Natal*, Vol.4, page 271. See also Jill E. Kelly, 2015, "Bantu Authorities and Betterment in Natal: The Ambiguous Responses of Chiefs and Regents, 1955–1970", *Journal of Southern African Studies, 41:2*

[20] Joanne Yawitch, 1981, *Betterment: The myth of homeland* agriculture, South African Institute of Race Relations, page 55

against headmen as local agents of a repressive bantustan regime around 1990 and the positions of headmen were abolished and then later reinstated.



2 Land administration, traditional leadership and democracy

2.1 Local administrative levels and municipal structures

In most instances, for over a century, the first level of local administration in the trust areas which make up the rural Bantustan areas, began at village level, or a cluster of homesteads in areas which had not undergone betterment planning and forced removal into villages, under a sub-headman. This was the *ilali* (plural *iilali*) in isiXhosa or *igodi* (plural *isigodi*) in isiZulu.

In KZN there are approximately 3 000 *izigodi*, of which about 2 500 have been mapped using GPS.[21]

In the Eastern Cape, the next level was that of an Administrative Area, comprised of a number of villages under the jurisdiction of a headman, the *isibonda*. While these boundaries become generally known, they were not uncontested, and some remain contested to this day.[22]

[21] Interview with Rudi Hillerman, KZN CoGTA, 2015/10/08

[22] It is likely that the proclaimed boundaries never captured the elastic nature of historic boundaries where overlapping rights were not uncommon. However a century ago when population densities were comparatively low compared to the present, such issues may not have led to the intensity of boundary disputes which appear to be arsing at present. It is also not clear to what extent boundary disputes are pegs onto which to hang other issues.

There are at least 713 Administrative Areas in the Eastern Cape Province.[23] The boundaries of these Administrative Areas were first proclaimed in the late 19th and early 20th centuries. Half a century later in the mid 20th century these Administrative Areas were, in terms of the *Bantu Authorities Act No.68 of 1951*, combined to make up 241 Tribal Authority areas in the Eastern Cape.

In KZN there were and are no Administrative Areas. There are 286 Tribal Authority areas in KZN, falling under 282 amakhosi and 4 izihakanyiswa. In terms of Act 68/1951 the Tribal Authorities were combined under 23 Regional Authorities.[24] The boundaries of these Regional Authorities coincided with the boundaries of Magisterial Districts.[25] A process of surveying the boundaries of the tribal authority areas was commenced in the mid 1980s in KZN.[26]

In Natal and Zululand, the extension of colonial rule was effectively in two stages – firstly in Natal in 1842 and secondly of Zululand after the invasion of 1879 and subsequent Zulu civil war. The system of rule adopted by Shepstone first in the Natal reserves and then in Zululand was born out of financial necessity rather than any preconceived strategy. This resulted in rule at a higher scale and therefore by chiefs over larger units than the Administrative Areas to the south.

In Limpopo the same logic applied and led to spatial formalisation and rule at the level of what were called Territorial Councils.

In the Eastern Cape the system of administration was centred on the early British colonial model of magisterial rule of local districts. The creation of Administrative Areas in the Ciskei and Transkei reflected the process of creeping, piecemeal annexation, district by district and tribe by tribe, and the direct rule by magistrates through or with a headman in each Administrative Area, at least partly in an attempt to undermine and limit the rule of chiefs.

Aside from the outdated population figures, the passage below written in 1980 is valid:

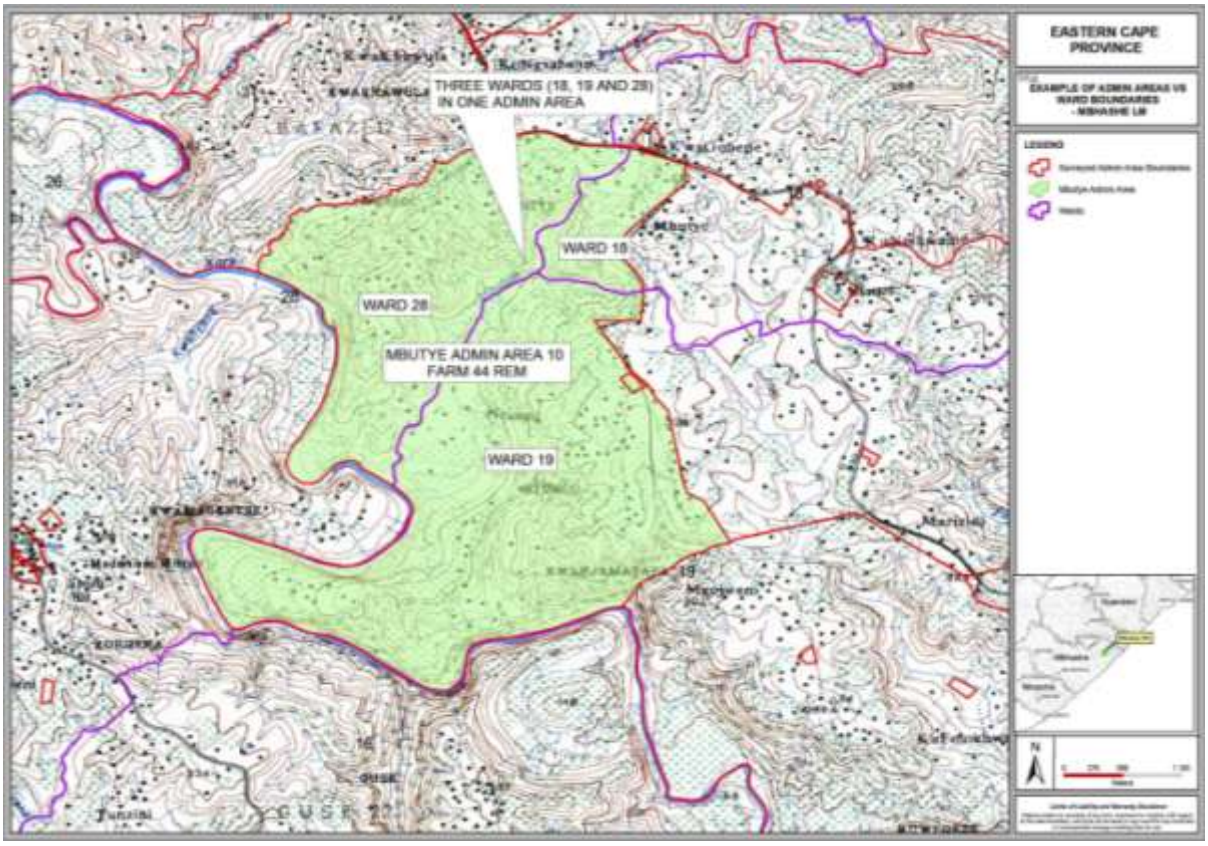
> The basic administrative unit in Transkei is the administrative area, formerly known as a "location", comprising 5 or 6 sections. It is under the control of a government appointed headman. On average, administrative areas are about 47 square kilometres in extent with an average population of about 3 000. Although the "location" was originally demarcated by the administration rather than the tribe, it has "... emerged over the years as the crucial administrative unit, capable of arousing a high degree of loyalty and solidarity on the part of its members."[10]

[23] 680 were in the Transkei and 33 in the Ciskei. There were 15 Administrative Areas in the Mzimkhulu magisterial district. In 2008 the magisterial district of Mzimkhulu was excised from the Eastern Cape and incorporated into KZN. There were 15 Administrative Areas in Mzimkhulu. These figures were provided by Mr Kyle van Niekerk, Surveyor-General Office, Eastern Cape, 043 783 1400, 2015/10/20.
[24] Nic Olivier, 2005, Community Empowerment & Social Inclusion: Case Study on Traditional Structures in Local Governance for Local Development, World Bank, page 29
[25] Rudi Hillerman
[26] Eastern Cape Surveyor-General, Chris Williams-Wynn, 2015/10/20

(Hawkins Associates, 1980, The Physical and Spatial Basis of Transkei's first Five Year Development Plan, page 69. The quotation is from D.W. Hammond-Tooke, 1975, Command or Consensus. The development of Transkeian local Government, David Philip)

This system of administration was centred on the British colonial model of magisterial rule of local districts.

Since 1994 and the restructuring of the municipal sphere of governance this system has been entirely replaced by wall-to-wall municipalities and a ward system of electoral divisions for local municipal councils. These ward boundaries do not correspond with the long-established boundaries of Administrative Areas and do not enhance local administration.



Mbutye Administrative Area Number 10 above is located in the Elliotdale or Xhora magisterial district and now falls under the Mbashe Local Municipality and Amathole District Municipality. The Administrative Area is now divided between three different municipal wards each with its own ward councillor. Each municipal ward shown includes parts of more than one Administrative Area.

This is an issue which is addressed in detail in Annexure 3 headed "Issues of jurisdiction on state trust land in the Eastern Cape Province" and in the main report under the heading "Recommendations".

In KZN the reorganisation of municipal government and municipal boundaries in particular was fortunate to simply combine previously existing magisterial districts rather than splitting them.[27] Accordingly it seems that the boundaries of regional authorities fall within or coincide with the new municipal boundaries.

[27] Rudi Hillerman

Another issue at this foundational level of administration is the grey area between the custom of *busa*, the giving of gifts, and corruption in the situation where the administrative decisions and acts of the local magistrate were often based on the advice of his underpaid employee, the headman. In 1966 the starting annual salary of a headman was R120, rising to R186 after 18 years service. The comparable salary for a black citizen in the manufacturing sector at the time was R524 per annum, more than four times the starting salary of a headman.[28]

2.2 Traditional systems and the Constitution

Integral to colonisation was an attempt to destroy traditional African political systems and the structures of chiefly rule in particular. The appointment of "headmen" as government employees answerable to local magistrates to oversee the rural locations was a deliberate attempt to sidestep traditional rule, although local compromises often put traditional leaders and chiefs or their close relations into these positions.

It was not until the rise of apartheid and in particular the notion of "separate development" with its corollary of the Bantustans systems of traditional leadership and the role of chiefs in particular were deliberately encouraged as mechanisms of rule and as a basis for the undemocratic regimes that rose to rule the Bantustans. However it is significant that aside from direct representation of chiefs in the Bantustan parliaments where chiefs always outnumbered elected representatives, the functions of traditional leadership were restricted to matters of culture and custom, including limited local civil judicial functions and were essentially non-executive. This pattern was continued in most Bantustan legislation which listed the functions and responsibilities of chiefs and headmen as communicators, facilitators and agents of magistrates and other public officials. This is discussed in some detail in the next section.

In 2000 the Department of Provincial and Local Government listed the numbers of tribal authorities across the country.[29] In the Provinces of Eastern Cape, KwaZulu-Natal and Limpopo these were as follows:

> *In the former Transkei there are 5 officially appointed paramount chiefs (iikumkani), 5 deputy paramount chiefs, 140 chiefs (iinkosi) and 863 headmen (izibonda). There are also 146 traditional authorities, 140 of which are headed by chiefs and 6 by headmen. There are 8 regional authorities, 5 of which are headed by paramount chiefs and 3 by elected chairpersons.*
>
> *In the former Ciskei there is 1 king (ikumkani),[30] 40 chiefs (iinkosi) and no officially appointed/recognised headmen.[31] There are also 40 traditional authorities, each of which is headed by a chief who is also its chairperson.*
>
> ...

[28] W.D. Hammond-Tooke, 1975, Command or Consensus: The Development of Transkeian Local Government, David Philip, page 137

[29] DPLG, 2000, *A Discussion Document towards a White Paper on traditional leadership and institutions*, pages 14-17

[30] The king of the amaRharhabe is longer recognised as such and now has the status of Principal Traditional Leader (Ministry for Cooperative Governance and Traditional Affairs, *Information Sheet: The President's Announcement of the Findings and Recommendations of the Commission on Traditional Leadership Disputes and Claims (Nhlapo Commission) 29 July 2010*, page 3)

[31] This is incorrect and probably arises from the brief abolition and then re-instatement of the headmen in the Ciskei in the early 1990's.

KwaZulu-Natal has one king (Ingonyama / Isilo samabandla), 277 chieftaincies, 195 officially appointed chiefs (amakhosi)), 44 officially appointed acting chiefs (amabamba bukhosi) and 38 vacancies. The 4 elected chiefs (iziphakanyiswa) who are heads of their community authorities have all been officially appointed. In addition to the 8 deputy chiefs (amasekela enkosi) who have been officially appointed by government, there are also other deputy chiefs who have been "unofficially" appointed by the traditional leader concerned. None of the about 10 000 headmen (izinduna) in KwaZulu-Natal have been officially appointed or recognised.

Each of the 277 traditional authorities in KwaZulu-Natal is made up of the chief (who is the chairman) and elected councillors. All the traditional authorities in a given magisterial district constitute a regional authority. However, the traditional authorities outside the former KwaZulu are not represented in these regional authorities. There are 23 regional authorities in the province. In addition, there are 4 community authorities, each of which is headed by an elected chief.

...

In the former Lebowa there are 128 officially appointed chiefs (magoshi) and over 900 headmen (mantona), but they are not officially appointed and do not receive remuneration. There are also clan headmen (borakgoro) who act under the authority of chiefs and headmen. They are responsible for the administration of their respective wards. The 128 traditional authorities, 12 community authorities and 12 regional authorities are headed by either chiefs or elected chairmen.

In the former Gazankulu, there are 33 officially appointed chiefs (tihosi). The headmen (tindhuna) are divided into three categories: (a) officially appointed independent headmen, (b) officially recognised headmen appointed by chiefs, and (c) non-officially recognised headmen appointed by chiefs and independent headmen. There are 47 independent headmen in the former Gazankulu. They are officially appointed (and remunerated) by the government and therefore not under the authority of chiefs, although their subjects ascribe to them the status of chief and use the title hosi to address them. There are 106 officially appointed (and remunerated) headmen in the former Gazankulu and all of these are appointed by chiefs. There are also about 385 headmen who are not officially appointed and not remunerated. Below headmen there are petty headmen (xamuganga) who are responsible for the administration of their respective villages.

The former Gazankulu has 33 traditional authorities, 6 community authorities and 6 regional authorities. The community authorities comprise two categories:

a) Independent headmen and their communities for which a Community Authority Council has been established, consisting of independent headmen and councillors elected by the communities. The Community Authority Council is chaired by an independent headman elected by the members of that council.
b) Communities without a headman and for whom a Community Authority Council has been established, consisting of councillors elected by the community. The chairperson is one of the elected councillors.

Chairpersonship of the Community Authority Council is supposed to rotate among the headmen after every 5 years. Some independent headmen who chaired community authority councils were eventually promoted to the position of chief. Other independent headmen who were not promoted to chief and thus remained

chairpersons of community authority councils refused to vacate their chairmanship after the expiry of their term of office.

In the former Venda there are 28 officially appointed chiefs (mahosi), 374 officially appointed headmen (vhamusanda), an estimated 248 officially unappointed headmen (vhamusanda) as well as petty headmen (vhakoma). There are also 28 territorial councils (equivalent to the Traditional Authority) and 5 regional councils (equivalent to the Regional Authority).

Key figures above are included in table form in the Annexure 1 headed "Terminology and Definitions".

In terms of section 28 of the *Traditional Leadership and Governance Framework Act No.41 of 2003*, all traditional authorities established in terms of the *Bantu Authorities Act No.68 of 1951* automatically became Traditional Councils provided they complied with new requirements.

At present and especially with local government elections due in 2016, it is not possible to discuss land administration in the state trust areas without reference to the issue of traditional leadership. It is not possible to determine whether some of the statements made by Members of Parliament and members of Cabinet are to be taken at face-value or are electioneering, in particular the statement by the Minister that traditional leaders are *de facto* owners of state trust land. Similarly the draft *Communal Land Bill* (which has not yet been released into the public domain) contains a provision for the transfer of title to the land described and recently surveyed as the Administrative Areas in the Eastern Cape or Traditional Council areas elsewhere to the relevant Traditional Council.

Does this indicate a serious intent or is this a provision which may be scrapped once municipal council elections have passed?

Section 20(1) of the *Traditional Leadership and Governance Framework Act No.41 of 2003*, under the heading "Guiding principles for allocation of roles and functions", provides that "National government or a provincial government, as the case may be, may, through legislative or other measures, provide a role for traditional councils or traditional leaders in respect of ... land administration ..." and a range of other public functions and services.[32]

This is one of a number of controversial pieces of legislation which reflects a resurgent traditionalist lobby since the 1990s and which is embedded both in the fabric of our society and in our Constitution.

While the Bill of Rights in the Constitution at sections 30 and 31 guarantees language, cultural and religious rights, these same sections require that the exercise of such rights must not be inconsistent with other provisions of the Bill of Rights. Perhaps most important in this regard is section 9 of the Bill of Rights, which deals with equality, and in particular sub-sections (2) and (3):

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

[32] The *Traditional Affairs Bill (TAB)* introduced in Parliament in 2013 (*Government Gazette 36856*, 20 September 2013) proposed to replace Act No.41 of 2003. Similar provisions to those at section 20 of the Act are contained at sections 24 and 25 of the Bill. The *TAB* has now been superseded by the *Traditional and Khoi-San Leadership Bill*.

> *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*

Section 211 of chapter 12 of the Constitution provides explicitly for the recognition of traditional leadership and also recognises that, as with all branches of the law, customary law must be subject to repeal and amendment. Section 212, the only other section in this, the shortest chapter in the Constitution, provides for the role of traditional leaders at local levels and the elaboration of customary law and institutions.

Thus there is enshrined within the Constitution a tension between tradition and equality, gender equality in particular. This tension is not an abstract tension that exists only in the Constitution. Rather it reflects tensions within society and was reflected in struggles over the wording of the Bill of Rights itself.

The Constitution was enacted in 1996 after an open and democratic process, which included contestation between lobbies representing traditional leaders and rural women respectively. The former wanted the right to equality to be subject to customary law. The later argued that customary law should be subject to the Bill of Rights. The latter position was confirmed.[33]

Legislation has also reflected this tension. For example section 6 of the *Recognition of Customary Marriages Act No.120 of 1998* provides:

> *A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.*

Such equality would have been contrary to much established custom but is consistent with section 9 of the Constitution. Section 6 of the 1998 *Recognition of Customary Marriages Act* is also a reverse of the situation enshrined by the 1927 *Native Administration Act* whereby all property vested in the husband and all marriages were deemed to be out of community of property unless another marital regime was specified. Married women were stripped of both legal standing and of any legal stake in the marital property.

The Constitutional Court in 2006 determined that male primogeniture in the customary law of succession, and in particular with references to the inheritance of property, discriminated unfairly against women and illegitimate children and accordingly was unconstitutional.[34] This case focussed on the provisions of section 23 of the 1927 *Native Administration Act* which entrenched male primogeniture. The court quoted approvingly an earlier judgement of the Constitutional Court that described this section as:

> *an egregious apartheid law which anachronistically has survived our transition to a non-racial democracy.*[35]

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[33] *Ex parte chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC), paragraphs 200-202. For discussion see: Aninka Claassens, 2013, "Recent Changes in Women's Land Rights and Contested Customary Law in South Africa", *Journal of Agrarian Change, Vol. 13 No.1*

[34] Bhe & others v Magistrate Khayelitsha & others 2005 (1) SA 580 (CC)

[35] Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC)

In 2006 the Court assessed the dangers inherent in codifying any common or customary law:

> *What needs to be emphasised is that, because of the dynamic nature of society, official customary law as it exists in the textbooks and in the Act is generally a poor reflection, if not a distortion of the true customary law. True customary law will be that which recognises and acknowledges the changes which continually take place … The official rules of customary law are sometimes contrasted with what is referred to as "living customary law," which is an acknowledgement of the rules that are adapted to fit in with changed circumstances.*[36]

The Constitutional Court thus clearly contrasted patriarchal and backward-looking concepts of customary law, which reflected pre-colonial, colonial and apartheid representations and manipulations of customary law, with living and therefore changing customary law.

This judgement is not the only judgement of the Constitutional Court to express such views. Earlier, in 2003, the Constitutional Court stated:

> *It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life.*[37]

In 2013 the Constitutional Court expressed these sentiments when it explicitly held that the ongoing evolution of customary law required a specific innovation:

Xitsonga customary law is developed to require the consent of the first wife to a customary marriage for the validity of a subsequent customary marriage entered into by her husband.[38]

The nature of customary law as flexible and changing has thus been emphasised, especially since 1994.[39]

In particular there have been important changes in customary practices with regard to land allocation and the holding of land rights in state trust areas. These are a result both of rural women demanding the equality enshrined in the Constitution and important changes in family structure and power relations, in particular declining rates of marriage and a shift in financial resources in favour of women, as migrant labour to the mines has declined and social grants to women have increased.

Between 2003 and 2010, the number of both civil and customary marriages registered annually with the Department of Home Affairs declined by 8%. More significantly and much more dramatically, the number of customary marriages declined from 17 283 to 9 996, a decline of 42%.[40]

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[36] *Bhe & others*, paragraphs 85, 86
[37] Alexkor Ltd & another v Richtersveld Community & others 2004 (5) SA 460 (CC), page 15 of 28
[38] *Mayelane v Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14, paragraph 89
[39] Prior to 1994 the late chief Burns-Ncamashe who was widely regarded as a living authority on customary law consistently refused requests to right down his knowledge of customary law on the grounds that this was contrary to customary law as living and ever changing. Over a century earlier when the area later known as the Transkei was annexed to the Cape Colony, the attorney-general of the Cape declined to codify African civil law for the same reason, unlike in what became the Colony of Natal (J.W. MacQuarrie 1958, *The Reminiscences of Sir Walter Stanford*, Vol.1, Van Riebeeck Society, pages 99-100).
[40] *Fast Facts,* September 2012, South African Institute of Race Relations

Prior to 1994 married men were the holders of land rights in trust areas, almost without exception.[41] The first acknowledgement in legislation that this was changing was the inclusion at various stages into the drafts of what became the *Communal Land Rights Act No.11 of 2004* (CLaRA) of sections 4(2), 4(3), 5(1) and 18(4)(b) to provide for the security of tenure for women and joint ownership of land rights.[42]

In 2011 the results of research conducted in three sets of rural villages in trust areas in the North West (Ramatlabana), KwaZulu-Natal (Msinga) and the Eastern Cape (Keiskammahoek) were published. The purpose of the research was:

> *to investigate the nature of women's land rights in three rural ex-homeland areas of South Africa and, to the extent possible from a cross-sectional survey conducted at one point in time, to explore how the nature of these rights might have changed over time. In particular, the survey aimed to explore how women access land (including different types of land such as residential and fields), their actual use of the different types of land, their decision making capacity in relation to the different categories of land, and the extent of their security or vulnerability to eviction. The survey also aimed to explore the impact of marital status on the nature and content of women's land rights.*[43]

In each site in each of the three provinces, 1 000 women in 1 000 homesteads were surveyed, giving a total sample of 3 000 households. The Eastern Cape surveys were conducted in the villages of Upper and Lower Rabula, Cata, and Upper and Lower Ngqumeya, all in the Keiskammahoek area. In KwaZulu-Natal the surveys were carried out in Msinga, previously part of the KwaZulu Bantustan. In North West Province the survey was undertaken in the two villages of Botshabelo and Ikopeleng in Ramatlabana. Both villages were established as resettlement camps in the late 1970s and were situated in what was the "independent" Bophuthatswana Bantustan.

In Keiskammahoek 62% of married women were married under civil law. Only 35% were married by customary law. These latter marriages were monogamous yet potentially polygamous. Only 1% of all marriages were polygamous. In 15% of the homesteads, women reported that ownerships of the residential site was theirs. 39% were jointly owned by women with their husband or partner and 29% were owned by their husband or partner.

In Msinga 28% of married women were married under civil law. 64% were married by customary law. These latter marriages were monogamous yet potentially polygamous. Only 7% of all marriages were polygamous. In 5% of the homesteads, women reported that ownerships of the residential site was theirs. 5% were jointly owned by women with their husband or partner and 62% were owned by their husband or partner.

Prior to 1994 only 8% of female respondents in Keiskammahoek compared to 3% in Msinga who had never married had been able to acquire residential land in their own name. This figure leapt to 44% after 1994 and 11% in Msinga. Similarly while only 9% of widowed women had been able to acquire residential land before 1994 and 9% in Msinga, this jumped to 48% after 1994 and 41% in Msinga. The change in the number of married women acquiring land before and after 1994 was negligible.

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[41] See for example sections 20(4)(c)(i), 37, 49(1)(b), 56(5)(b)(i), 53(2) etc of Proclamation No.R.188 of 1969, *Bantu Areas Land Regulations*.

[42] Compare for example the earlier version of the Bill published in *Government Gazette No.25562* of 17 October 2003.

[43] Debbie Budlender, Sibongile Mgweba, Ketleetso Motsepe, Leilanie Williams, February 2011, *Women, Land and Customary Law*, Community Agency for Social Enquiry, especially pages 9, 14-17, 59, 79, 91, 116-7.

While the increase in the number of unmarried or widowed women holding land in their own name is in line with democratisation, women remain vulnerable to losing rights to land. 115 women in the three surveyed areas in all three provinces reported losing their rights to residential land, of which 50 were in Keiskammahoek and 59 in Msinga. 10 of the losses of residential land in Keiskammahoek were voluntary and 21 in Msinga. 39 reported the loss of a garden lot of whom 34 were in Keiskammahoek. 10 of the 14 women who reported the loss of fields were also in Keiskammahoek.

The traditionalist lobby has advocated much contested legislation, mainly since 2003, including the *Traditional Courts Bill*. This Bill was introduced in Parliament in 2008 and withdrawn in 2014 after considerable opposition. The Memorandum to the Bill stated that it was prepared in consultation with the House of Traditional Leaders. In contrast the Bill disregarded most of the recommendations made by the South African Law Reform Commission after wide consultations, including with civil society and representatives of rural women in particular. In general, it was argued that the Bill did not represent a departure from the apartheid and highly centralised provisions of the 1927 *Native Administration Act* and 1951 *Bantu Authorities Act.* In particular, the Bill was criticised for undermining and in fact reversing progress on gender equality.[44] The Bill is to re-introduced in Parliament in 2015.

More generally, there is concern that a number of current legislative initiatives, including provisions of the *Spatial Planning and Land Use Management Act No.16 of 2013* (*SPLUMA*) and the 2013 *Traditional Affairs Bill* may contain provisions which may not stand up to scrutiny against the provisions of the Constitution. These are mainly provisions that could be interpreted to elevate Traditional Councils as a 4th tier of governance and which could lead to a lengthy process of litigation up to the Constitutional Court.

2.3 Traditional leaders in law

BEFORE 1994

Proclamation No.110 of 1957, Regulations prescribing the Duties, Powers Privileges and Conditions of Service of Chiefs and Headmen, laid the basis for the powers and functions of chiefs and headmen for over 50 years.

The following sections give a clear indication of the limited powers so proclaimed:

> *4. He shall maintain law and order in his tribe or community and bring to the notice of the Commissioner, immediately he becomes aware thereof, any condition of unrest or dissatisfaction or any other matter of serious import or concern to the Government.*
>
> *5. He shall enjoy the privileges and status conferred upon him by the recognised customs and usages of his tribe or community but shall not at any time extort, or by the use of compulsion or arbitrary means, obtain from any person any tribute, fee, reward or present.*
>
> *...*
>
> *8. He shall carry out all such lawful orders as may from time to time be given him by or through the Commissioner or any other officer of the Government duly authorised thereto in writing by the Secretary, the Chief Commissioner or the Commissioner.*

[44] See for example: Law, Race and Gender Research Unit, UCT, 12 February 2012, *Submission on the Traditional Courts Bill (B1-2012)*, to Parliament; Sindiso Mnisi Weeks, "Traditional Courts Bill contradicts Constitution", *Daily Dispatch*, 2015/06/09

9. He shall ensure the enforcement within his area of all laws and all orders, instructions or requirements of the Government relating to the administration and control of the Blacks in his area in general and to the following matters in particular:
(a) Public health;
(b) The registration of the persons in his area or of taxpayers and the collection of taxes, rates or levies;
(c) The registration of births and deaths;
(d) The taking of census and the collection of statistics;
(e) The prevention or eradication of animal diseases by dipping or other means;
(f) the occupation or cultivation of land and the use of commonages;
(g) the preservation, repair or restoration of beacons, fences and gates;
(h) the prevention, detection and punishment of crime;
(i) the efficient use of the labour resources of his area and the control of work seekers;
(j) the unauthorised influx of Blacks into urban areas;
(k) the eradication of weeds;
(l) the preservation of flora and fauna and of water supplies;
(m) the protection of public property and of monuments and other historical objects;
(n) the rehabilitation of land and the prevention of soil erosion, veld fires and overstocking.

10. He shall bring to the notice of his tribe or community all new laws, orders, instructions or requirements of the Government and shall ensure strict compliance therewith.

According to a secondary source:

> *Proclamation 110 of 1957 (Sections 7 and 30) and (Sections 12 and 20) of Act 38 of 1927 provided legislation regarding the exercise of functions in tribal authorities. The responsibility of carrying out state functions lay with the chief as he was the only legally accountable person at tribal level (Section 9, 10 and 11 of Proclamation 110 of 1957.)* [45]

Sections 12 and 20 of Act 38/1927 enabled the minister to authorise a duly appointed chief or headman to hear civil cases arising out of customary law as well as minor criminal cases.

Proclamation 110/1957 was assigned to the provinces after 1994 and repealed by the Eastern Cape *Traditional Leadership and Governance Act No.4 of 2005* and by the KZN *Traditional Leadership and Governance Act No.5 of 2005*, but not by the equivalent Limpopo *Traditional Leadership and Institutions Act No.5 of 2005*. It may still apply in Limpopo unless repealed by other as yet unidentified legislation.

Bantustan legislation made it even clearer that the functions of tribal authorities were very limited. For example the limited public functions of tribal authorities, largely facilitative rather than administrative or executive, were, prior to 1994, set out in the respective Ciskei and Transkei *Administrative Authorities Acts* (No.37 of 1984 and No.4 of 1965 respectively) and *Agricultural Development Acts* (No.14 of 1989 and No.10 of 1966 respectively).[46]

[45] Lulamile Ntonzima and Mohamed Sayeed Bayat, 2012, "The Role of Traditional Leaders in South Africa - a Relic of the Past, or a Contemporary Reality?", *Arabian Journal of Business and Management Review 1:6*
[46] The former two Acts were amended in 1997 by the Eastern Cape Regulation of Development in Rural Areas Act No.8 of 1997 and then repealed by the Eastern Cape Traditional Leadership and Governance Act No.4 of 2005. The latter two acts were repealed by the Eastern Cape Agricultural Development Act No.8 of 1999.

Act 4/1965 at section 4 headed "General Functions of Tribal Authority" made it clear that the functions were limited to advisory functions and the general administration of tribal affairs. In respect of the allocation of land rights sub-section (1)(d) provided that the tribal authority should:

> *Consider, and make recommendations to the competent authority in connection with application for –*
> *...*
> *(iii) arable and other allotments ...*

Section 4(1)(e) of Act 4/1965 did make provision for the assignment of functions by a minister to a tribal authority including for land administration, soil conservation, the improvement of livestock and animal husbandry and "other developments of a parochial nature". It is not known if such formal assignments were ever made in the Transkei.

The two Ciskei Acts, which were almost certainly modelled on the earlier Transkei Acts, made no direct provision for any land allocation function by such authorities, only to advise, assist, etc (S4 of Act 37/1984, S36 of Act 14/1989). The two Ciskei acts do not discuss the powers and functions of chiefs and headmen but only the powers, functions and duties (Act 37/1984) and duties and functions (Act 14/1989) of tribal authorities. Section 4 of Act 37/1984 did make provision for the assignment of functions by a minister to a tribal authority including for "land usage and settlement". However such formal assignments were never made.[47]

While authority over land allocation existed in customary law, such customary authority was superseded by statute across the RSA including the Bantustans.

In the Ciskei, Act 37/1984 permitted some limited flexibility in the type of local rural traditional structures, a provision taken from a 1964 amendment to the parent legislation, the *Bantu Authorities Act No.68 of 1951*. S3(1) of Act 37/1984 provided:

> *There shall for every tribe or community mentioned in Schedule 1 be a tribal authority or a community authority .*

Schedule 1 in 1984 listed only one community authority, at Healdtown.

Each authority consisted of a "chairman" and "councillors", comprised by chiefs and "the other persons, if any, who in accordance with any applicable custom are the councillors of the authority ..."

S26(1)(f) made it very clear that traditional leaders were subordinate members of the administration:

> *[A paramount chief or a chief or a headman shall] carry out all such lawful orders as may from time to time be given to him by or through the magistrate or any other duly authorised officer of the Government.*

The actual functions and roles in KwaZulu-Natal are a little different from what is provided in law in the Eastern Cape. This may suggest that while formal functions and roles are restricted, practice may stretch legal authority beyond its actual limitations.

[47] Discussion with Mike Coleman, one time Ciskei Director of Agriculture, East London, August 2015

The following description of the functions and categories of rural leaders under the Ingonyama Trust was provided in 2005 on the basis of interviews in the field:

Broadly speaking, the functions and roles of ordinary *Amakhosi* (hereditary traditional leaders) and *Iziphakanyiswa* (elected traditional leaders) can be summarised as follows:

· "Promotion of peace
· Dispute resolution
· Land administration responsibilities
· General development functions
· Customary functions
· Administrative functions."

Mention has been made of the existence of between 12 000 to 15 000 non-formally appointed (and non-remunerated) *Izinduna* who are responsible for the carrying out, on a delegated basis, of the following roles and functions:

"With respect to land administration, *Izinduna* are responsible for:

· Site allocation for residential purposes as well as for cultivation and grazing
· Land allocation
· Keeping of records
· Conflict resolution
· Marking of internal boundaries and *isigodi*"

As regards social, cultural and security matters, they are responsible for:

· "Dispute resolution within *isigodi*
· Maintenance of public order within *isigodi,* particularly during festivities
· Liaison between *inkosi* and the people of *isigodi*
· Officiating at customary marriages celebrations
· Counselling *inkosi* on matters of *isigodi"*

Izinduna perform the following administrative functions:

· "Keeping of the register of residents of *isigodi*
· Communication with key community based stakeholders."[48]

While this description was published 2005, it was based on legislation dating back to the early 1990s and local administrative practices going back much further.

These ongoing practices in KZN indicate a much smaller role of the state in functions such as land administration including the allocation of land rights to residential sites and arable land. To generalise the situation in what became the KZN Province in 1994, there was a much smaller reliance on the formal provisions of *Proclamation R188/1969* and in particular an absence of written official records such as reflected in the PTO registers in much if not most of the Eastern Cape.

In Limpopo there was some administrative uniformity across the three Bantustan areas and areas administered by the Transvaal Provincial Administration. Much of the land which formed the territorial basis of these Bantustans was land acquired and planned prior to

[48] Nic Olivier, 2005, *Community Empowerment & Social Inclusion: Case Study on Traditional Structures in Local Governance for Local Development*, World Bank, pages 38-9

settlement in terms of Proc. R188/1969 and various earlier betterment proclamations. Similarly it was easier for the state to impose the provisions of the *Bantu Authorities Act No.68 of 1951* in these areas.

POST 1994

While Chapter 2, the Bill of Rights in the Constitution, at Sections 30 and 31 guarantees language, cultural and religious rights, these same sections require that the exercise of such rights must not be inconsistent with other provisions of the Bill of Rights, including S9(3) which provides:

> *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*

Chapter 12 of the Constitution, on Traditional Leaders, is the shortest chapter in the entire Constitution, covering one page and two sections, S211 headed "Recognition" and S212 headed "Role of Traditional Leaders".

S211 reads:

> *(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.*
> *(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.*
> *(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.*

S212(1) reads:

> *National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.*

Sections 232, 233, 235 deal with international law, customary and otherwise, and the right to self-determination.

In terms of S28(4) of the *Traditional Leadership & Governance Framework Act No.41 of 2003* (*TLGFA*), Tribal Authorities established in terms of the *Bantu Authorities Act No.68 of 1951* were deemed to be Traditional Councils.

S5 of the *TLGFA* is headed "Partnerships between municipalities and traditional councils". SS5(3) provides:

> *A traditional council may enter into a service delivery agreement with a municipality in accordance with the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000), and any other applicable legislation.*

S20(1) of the *TLGFA* provides that national or provincial government, "through legislative or other measures" may provide a role for Traditional Councils and traditional leaders in respect of inter alia land administration.

Further sub-sections of S20 provide important qualifications to the exercise of SS25(1) and the conditions which must be met before allocating any such roles. This includes at SS20(2)(c) that the organ of state allocating such role(s) must:

> *ensure that the allocation of a role or function is consistent with the Constitution and applicable legislation*

If such roles are legislated it will represent a major departure from previous practices.

Prior to 1994 married men were the holders of land rights in state trust areas, almost without exception. See for example sections 20(4)(c)(i), 37, 49(1)(b), 56(5)(b)(i), 53(2) etc of Proc. R188/1969 The first acknowledgement in legislation that this was changing was the inclusion at various stages into the drafts of what became the *Communal Land Rights Act No.11 of 2004* (CLaRA) of sections 4(2), 4(3), 5(1) and 18(4)(b) to provide for the security of tenure for women and joint ownership of land rights. Earlier versions of the Bill did not contain such provisions, for example the version published in *Government Gazette No. 25562* of 17 October 2003.

New legislation departs from pre-1994 legislation in another key respect which is that headmen are now for the first time counted as traditional leaders. Act 41/2003 defines a headman of headwoman as a subordinate traditional leader. This definition is followed by EC Act 4/2005, KZN Act 5/2005 and Limpopo Act 6/2005.

S21 of the *Communal Land Rights Act No.11 of 2004* (*CLaRA*) set out requirements for the establishment of "land administration committees". This enabled some local choice, in theory at least, as to the form of local structure which would undertake defined land administration functions, in particular that such functions could be performed by a structure other than a Traditional Council.

CLaRA was declared unconstitutional and has yet to be replaced. With this declaration, the choice of structure to perform land administration functions has been removed, even if such choice was theoretical rather than practical. However while the provisions of S20 of the *TLGFA* are not peremptory, in the absence of an explicit legislative framework and authority, various local individuals, associations and institutions, but mainly traditional leaders and traditional councils have assumed rural administrative functions, especially in relation to land.

CLaRA was declared unconstitutional on procedural grounds relating to the enactment of the legislation. However substantive arguments were presented to court to the effect that *CLaRA* and other legislation was unconstitutional in that it created a 4th sphere of government.

The application was first made in the North Gauteng High Court in Pretoria.[49] According to *Business Day* on 2 November 2009:

> *The court challenge to the act was launched by public interest law firm the Legal Resources Centre (LRC) and Webber Wentzel on behalf of four communities: Kalkfontein, Makuleke, Makgobiestad and Dixie in Limpopo, Mpumalanga and North West province.*
>
> *The LRC's Henk Smith, who was involved in the case since 2003, said the ruling would finally force the government to rethink its approach to rural development.*

[49] Case No. 11678/2006. Judgement was handed down on 30 October 2009.

> *"Now the state can't just go ahead with the massive privatisation of communal land in the manner proposed in the act, involving extensive new powers for the minister and traditional councils unheard of anywhere in the area of land administration," he said.*
>
> *In his ruling, Judge Aubrey Ledwaba declared 14 sections of the act to be unconstitutional in that it gave unelected traditional leaders and the minister of land reform and rural development powers to impose decisions that undermined existing property and tenure rights "instead of protecting them, as required by the constitution.*

The application sought not only to strike down CLaRA but also S5 and S20 of the *TLGFA* on the grounds that these sections created a 4th tier of government. However the court did not find that S5 and S20 of the *TLGFA* were unconstitutional.

In accordance with the provisions of S167(5) of the Constitution, Judge Ledwaba referred his decision with regard to CLaRA to the Constitutional Court for confirmation. Unfortunately the Court declared CLaRA unconstitutional on procedural grounds and not the substantive grounds raised in the application. However the Court did make a few suggestive comments:

> *[96] To sum up, therefore, CLARA replaces the living indigenous law regime which regulates the occupation, use and administration of communal land. It replaces both the institutions that regulated these matters and their corresponding rules. CLARA also gives traditional councils new wide-ranging powers and functions. They include control over the occupation, use and administration of communal land.*
>
> *[127] ... This judgment will, however, provide Parliament with the opportunity to take a second look at the substantive objections raised by the applicants in respect of CLARA when it considers the proper way to give effect to section 25(6) of the Constitution. ...* [50]

The reasons for the substantive objections referred to in the judgement of the Constitutional Court, which according to Chief Justice Ngcobo clearly required reconsideration by Parliament, may be repeated in further legislation. *SPLUMA* and revised draft regulations for *SPLUMA* published for comment in the *Government Gazette* on 12 December 2014 may still be open to such challenge on specific provisions. S23(2) of SPLUMA provides:

> *... a municipality, in the performance of its duties in terms of this Chapter [headed "Land Use Management"] must allow the participation of a traditional council.*

This is poorly drafted as it can be interpreted to mean such participation not only in regard to areas where traditional councils exist but also in areas where they do not exist such as urban areas and commercial farmland.

S19 of the revised draft regulations provided for an elevated status for traditional councils but not for other structures of civil society:

> *(1) A traditional council may conclude a service level agreement with the municipality in whose municipal area that traditional council is located, subject to the provisions of any relevant national or provincial legislation in terms of which the traditional council*

[50] Case CCT 100/09 [2010] ZACC 10.
S25(6): "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress."

> *may perform land use management powers and duties on behalf of the municipality in the traditional area concerned.*
> *(2) If a traditional council concludes a service level agreement with the municipality as contemplated in subregulation (1), that traditional council must undertake land use management in its traditional area in accordance with provisions of that service level agreement.*
> *(3) If a traditional council does not conclude a service level agreement with the municipality as contemplated in subregulation (1), that traditional council is responsible for providing proof of the allocation of land rights in terms of the customary law applicable in that traditional area to the applicant of a land development and land use application in order for that applicant to submit it in accordance with the provisions of these Regulations.*

S19 of the final regulations was amended from what appears above to read:

> *(1) A traditional council may conclude a service level agreement with the municipality in whose municipal area that traditional council is located, subject to the provisions of any relevant national or provincial legislation, in terms of which the traditional council may perform such functions as agreed to in the service level agreement, provided that the traditional council may not make a land development or land use decision.*
> *(2) If a traditional council does not conclude a service level agreement with the municipality as contemplated in subregulation (1), that traditional council is responsible for providing proof of the allocation of land in terms of the customary law applicable in that traditional area to the applicant of a land development and land use application in order for that applicant to submit it in accordance with the provisions of these Regulations.*[51]

On the one hand S19(1) is now much wider in its scope that the draft version in that it permits the performance of unspecified functions as per a service level agreement. On the other hand it specifically excludes land development and land use some land functions but not necessarily other land administration functions.

S25 of the draft *Traditional Affairs Bill (TAB)*, published in 2013 and intending to repeal and replace the *TLGFA*, may be open to a similar questions and challenge. SS25 (1) provides:

> *A department within the national or provincial sphere of government, as the case may be, may, through legislative or other measures, provide a role for a kingship or queenship council, principal traditional council, traditional council, Khoi-San council, traditional sub-council and traditional and Khoi-San leaders in respect of any functional area of such department.*

Unlike the qualifying and hence restrictive conditions set out in the subsections of S20 of the *TLGFA*, SS 25(2) of the *TAB* only requires the department allocating roles to exercise its own discretion. As the *TAB* proposes to repeal the *TLGFA*, this is a regressive step.

SS25 (1) does not permit the equivalent provision of a role or roles by a municipality. Yet S23 (2) of SPLUMA requires a municipality to allow the participation of traditional councils in land use management. This could be construed to locate both municipalities and traditional councils as equivalents within the municipal sphere.

Lauren Kohn, attorney and lecturer in the Department of Public Law at the University of Cape Town, in an unpublished draft article on S25 of the *TAB* concludes:

[51] SPLUMA Regulations No. R. 239, Government Gazette 38 594, 2015/03/23

> *... clause 25 unconstitutionally seeks to confer governmental powers on traditional councils and leaders in such a way as to render them an impermissible fourth sphere of government. This is in direct breach of the delicate two-fold constitutional division of power to ensure limited government; namely the horizontal separation of powers (accompanied by checks and balances) – a fundamental, albeit implied, component of our constitutional architecture – and multi-sphere government (national, provincial and local). ... clause 25 is not compliant with section 212(1) of the Constitution insofar as the impugned provision contemplates the allocation of governmental roles to traditional councils and leaders at national and provincial (rather than local) government level and by measures other than via national legislation.*

Citing the certification judgement of the Constitutional Court, Kohn also argues that the powers and functions of traditional leadership are restricted to those necessary to maintain their status as guardians of traditional culture (page 10/23).[52]

S25 of the *Traditional and Khoi-San Leadership Bill (TKSLB)* which supersedes the *TAB* is identical to S25 of the *TAB* except for the addition of the phrase "Provided that such a role may not include any decision-making power." at the end of S25(1) as quoted above. This appears to be an attempt to undermine the argument put forward by Kohn above.

EMPLOYEES AND OFFICE BEARERS

Public Service Act No.103 of 1994:

S1 definitions:

> *'employee' means a person contemplated in section 8, but excludes a person appointed in terms of section 12A*
> *'functionary' means any person upon whom a power is conferred or a duty is imposed by this Act*
>
> *S8 Composition of public service (1) The public service shall consist of persons who are employed (a) in posts on the establishment of departments; and (b) additional to the establishment of departments.*

S12A deals with the appointment of ministerial policy advisors.

Remuneration of Public Office Bearers Act No.20 of 1998:

S1 definitions:

> *"office bearer" means a Deputy President, a Minister, a Deputy Minister, a member of the National Assembly, a permanent delegate, a Premier, a member of an Executive Council, a member of a provincial legislature, a traditional leader, a member of a provincial House of Traditional Leaders, a member of the Council of Traditional Leaders and a member of a Municipal Council;*
>
> *"traditional leader" means any person identified in terms of section 5(4).*

[52] Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996, 1996 (4) SA 744 (CC) paragraph 190.

> *S5(4) A traditional leader is a person identified by the Minister after consultation with the Premier concerned by notice in the Gazette for the purposes of this Act.*

So both municipal councillors and traditional leaders are office bearers. Insofar as municipal councillors and traditional leaders in general have limited administrative or executive powers (excluding executive committees and executive mayors), it is consistent that both municipal councillors and traditional leaders are public office bearers.

But in practice it would seem that there is little distinction to be made between employees and office bearers when it comes to the exercise of authority, powers, functions and discretion, as with executive mayors and municipal councillors who serve on executive committees.

Municipal employees are neither public servants nor office bearers. Municipal employees are another class of employee, determined by Chapter 7 and S66 of the *Local Government: Municipal Systems Act No.32 of 2000*.

2.4 Land tenure and land use planning

A 1998 report commissioned by DLA stated (emphasis added):

> *A defining characteristic of this tenure system [the PTO system] is its conflation of ownership and land administration issues. A situation was created where government (in its role as trustee for black persons) became the owner, developer and administrator of land. To provide the necessary empowering frameworks to exercise these competences, specific laws for specific tenure regimes were created which integrated the necessary empowering development and administrative provisions into encompassing laws. This contrasts with the situation outside the former homelands where a clear distinction can be drawn between the issue of ownership and governance and which clearly reflects in the administration and legal systems operative in these areas. If the issue of governance and ownership remains bundled in the rural areas of the former homelands under the new dispensation, little progress would be possible in extending democratic local government to these areas.*[53]

With respect to all the authors of that report, they got it wrong in this section of their report.

Firstly the "owner" of the land should be correctly identified as the holder of the recorded or informal rights to the land. The owner was mistakenly identified as the state as trustee.

Secondly the assumption of an unbreakable connection between "democratic local government" and the separation of governance and ownership has little if any theoretical or empirical basis.

Thirdly the PTO system combined the allocation of land rights with simplified land use planning undertaken by the local office of the Department of Agriculture which determined which area of land was suitable for human settlement and the demarcation of sites.

The point is that local municipalities are under-resourced but have local planning functions thrust upon them whether or not they can attract and keep the necessary competent staff. If a simple and cost effective local land administration system, such as what the best aspects

[53] A McIntosh, D Atkinson, R Kingwill of McIntosh Xaba & Associates and Jan Barnard, 1998, *Land Administration in the Ex-Homelands: Past, Recent and Current Situation*, DLA Project Reference: 98/RSA/TRCG/007, page 7/114.

of the PTO system presented, can be closely tied to land use management, this seems an optimal solution.

If one accepts that this was a functional and inexpensive administrative system and that "upgrading" is neither essential nor necessarily desirable, then the situation that is being described presents an opportunity!

If the roll-out of SPLUMA is to be effective in areas not previously subjected to zoning schemes, this will require some local level administration and recording of land rights and land rights allocation processes.

3 Land tenure and administration legislation

3.1 Introduction

A practice in land administration which emerged early in the 20th century is still very much what is widely understood by rural residents of the trust areas and former Bantustans.

Important decisions on land administration would usually be made annually or bi-annually when male migrant mineworkers were home from the mines. In the Eastern Cape, the number of newly married men who now needed their own land would be determined, the local officials of the Department of Agriculture would be asked to determine what land was suitable for the demarcation of new sites and to demarcate the required number of sites which would then be formally allocated and recorded in the name of the male head of household in registers of Permission to Occupy certificates issued and kept by clerks in the office of the local magistrate or commissioner for land.

In KZN a similar but less formalised procedure was followed:

> *In the rural, traditional areas, land was allocated by the izinduna with the sanction of the traditional leadership and the clan members and witnessed by the izinduna's izibandla. Proof of the right to the land allocated was stored in the collective mind of the clan and once allocated, the tenure rights held were held against all comers and protected by the collective interests of the clan. The rules governing the use of the land were similarly stored in the collective mind of the clan and, with local variations, generally were consistent throughout the various clans in the province.*[54]

Further local variations in land administration practices are emphasised in KZN:

> *They [the researchers] also describe significant variations from the normative ideal. Many of these reflect differences in interpretation and practice between densely settled tribal areas, on the one hand, and those located in areas that in the past were owned by white farmers as labour tenant farms (the ownership of which is now being transferred to local residents through processes of land reform), on the other. Contrasting local conditions and site-specific histories are key factors influencing interpretation and practice.*[55]

There are numerous variations across SA in the technical details of land tenure and land administration legislation applicable in the state trust land areas. This is due in the late

[54] Peter Rutsch et al, 2004, *Alternative Extra Land Markets*, Final Revised Report, KZN Provincial Planning and Development Commission, pages 12-13

[55] Ben Cousins et al, 2011, Imithetho yomhlaba yaseMsinga: The living law of land in Msinga, KwaZulu-Natal, PLAAS Research Report 43, page 31

nineteenth century to the piecemeal conquest and annexation of territory to the two British colonies and two Boer republics which formed the Union of SA in 1910. In the second half of the twentieth century, the variety of legislation was increased dramatically as the apartheid system drove ten trust territories towards Bantustan self-rule and independence after the enactment of the *Promotion of Bantu Self-Government Act No.46 of 1959*.

In 1963 the *Transkei Constitution Act No.48 of 1963* propelled the Transkei to partial self-government with its own legislative assembly while RSA retained control over defence, external affairs, internal security etc.

Side by side with the drive to self-rule went the deprivation of the SA birthright and citizenship of those people whom the apartheid state deemed citizens of these new creations – the *Bantu Homelands Citizenship Act No. 26 of 1970* made all black South Africans citizens of one of the self-governing territories or Bantustans.

On the basis of the Transkei experiment, the *Bantu Homelands Constitution Act No.21 of 1971* empowered the RSA to grant increasing powers of self-government to the Bantustans by proclamation. Act 21/1971 was firmly based on the *Bantu Authorities Act No.68 of 1951*. Firstly a legislative assembly could only be established in a "Black area" where a territorial authority had already been established in terms of Act 68/1951. Secondly a "Black area" was defined in Act 68/1951 and not in Act 21/1971 itself. Finally, Act 21/1971 refers to Act 68/1951 as the principal Act and section 38 of Act 21/1971 requires to the two Acts to be read together as if they were one Act.[56]

These ten new legislatures each acquired powers over land matters the moment they acquired self-governing status:

> *The various South African legislatures [Parliament] lose their jurisdiction inter alia when a matter referred to in Schedule 1 to the National States Constitution Act 1971 [previously the Bantu Homelands Constitution Act] first falls under the jurisdiction of a legislative assembly of a self-governing territory upon its establishment or is assigned to such legislative assembly ...*[57]

The first session of the new legislative assemblies occurred in May 1964 in the Transkei, in 1971 in Lebowa, in 1972 in KwaZulu and the Ciskei, in February 1973 in Venda, and also in 1973 in Gazankulu. As of those dates their respective land legislation was able to diverge from that elsewhere in SA.

All of these assemblies were dominated numerically by appointed chiefs as opposed to elected members.

RSA stamp commemorating the self-governing status of the Transkei.

[56] ...and in rural race zones" in Mike de Klerk (editor), ...SA, page 132, footnote 17
[57] *Ibid*, page 133, footnote 19

From the time that the (Transkei, Venda, Bophuthatswana, Ciskei) TVBC states attained "independence", no new RSA legislation applied, only legislation already applicable in the Bantustan and that enacted after "independence" by the particular Bantustan. These "independent" legislatures were also legally competent to amend and generally alter the legislation they inherited.

The key legislation and dates of "independence" were:

> *Transkei: Republic of Transkei Constitution Act No.15 of 1976 and Status of Transkei Act No.100 of 1976 (RSA), with effect from 1 October 1976;*
>
> *Venda: Republic of Venda Constitution Act No.9 of 1979 and Status of Venda Act No.107 of 1979 (RSA), with effect from 13 September 1979; and*
>
> *Ciskei: Republic of Ciskei Constitution Act No.20 of 1981 and Status of Ciskei Act No.110 of 1981 (RSA), with effect from 1 December 1981.*

The 1997 *White Paper on South African Land Policy* summed up the confused situation:

> *The many different pieces of land legislation and systems of land administration across the country are an apartheid legacy. In the former homeland areas, in particular, the situation is chaotic. Very often, day-to-day administration and record-keeping have broken down, leading to insecurity and uncertainty as to the lawful holders of land rights. Land records have been lost, permits and other documents have been issued without regard to legal requirements, very often because the laws are unclear. The laws are often unwieldy; even routine decisions have to be made at Ministerial, Parliamentary, or even Presidential level.*[58]

While this may suggest an impossibly complex set of legislation, fortunately this is not quite the case. The middle decades of the twentieth century saw attempts by the Department of Native Affairs and its many successors in name to attempt to carve out uniform legislation for the entire RSA. Furthermore, where legislation may have differed in detail, administrative practices tended to be uniform rather than disparate. This was also the case into the "independent" Bantustan period even though the names of departments of state and the titles of officials administering the legislation may have varied. The 1998 report commissioned by Department of Land Affairs (DLA) and quoted above expressed this situation as follows with regard to the Eastern Cape Province:

> *This seemingly perplexing array of legislative measures is mitigated only by the fact that in practise, administrative procedures are not dissimilar from one another, since the legislation had common roots in the old Transkeian administrative system. Seen in this light, the Transkei proclamations of 1921 and 1922 could be said to be early precursors to all subsequent legislation, such as R.188 of 1969 which still applies in former Ciskei and, in an amended form, in former RSA areas.*[59]

[58] Department of Land Affairs, page 21
[59] A McIntosh, D Atkinson, R Kingwill of McIntosh Xaba & Associates and Jan Barnard, page 28/114

> *They [the systems] generally operated on the basis of individuals obtaining permission to get a PTO from the tribal authority with comment on the PTO subsequently being obtained from various officials of government departments. Two characteristics of the system need to be noted. First, the approval of the traditional authority that the applicant was a fit and proper person to take occupation of a site, and second the technical approvals which provided a rudimentary form of development control. This system has continued throughout the apartheid period at varied levels of effectiveness. Although the magistrates' offices have generally played an important coordinating role in the issuing of PTOs at a local level, a variety of homeland departments have been involved in approving applications and homeland Departments of the Interior were often involved in the final approval of PTOs and the recording of PTOs.*
>
> *A common characteristic of previous systems of land administration within the former homelands has been the role of magistrates' offices in coordinating land administration at a local level and although magistrates have not undertaken the function since 1992 ...*[60]

Two core proclamations are discussed briefly below, and illustrate both the complexity and commonalities.

But first it is necessary to clarify some provisions of the *Constitution of South Africa Act No.200 of 1993*, (the interim Constitution) and the *Constitution Act No.108 of 1996* in respect of the assignment and delegation of powers.

3.2 Constitutional provisions

The Interim Constitution commenced on 27 April 1994. The Constitution commenced on 4 February 1997 unless another date was specified.

On assumption of office on 10 May 1994 by the President, all executive authority vested in the office of the President until assigned to a competent authority, either a Minister in the national sphere, or a Premier or MEC in the provincial sphere. Premiers also assumed executive authority on 10 May 1994 or if they had not yet assumed office, such authority remained with the President.

The complexity of assignments is outlined with regard to one fundamental piece of segregationist and apartheid legislation in the 2003 White Paper on Traditional Leadership:

> *This can best be illustrated by referring to the position pertaining to the Black Administration Act No. 38 of 1927. Some sections are the responsibility of the Department of Land Affairs (sections dealing with land), the Department of Justice (sections dealing with customary courts and inheritance), the Department of Home Affairs (the section dealing with marriages) and the Department of Provincial and Local Government (responsible for a number of other sections).*[61]

Schedule 6 of the Interim Constitution was headed "Legislative Competences of Provinces" and listed these areas of competence. Chapter 15 dealt with transitional arrangements. Section 235(6) provided that all legislation which did not deal with functional areas listed in Schedule 6 as well as legislation dealing with such functional areas but which were matters

[60] *Ibid* page 7
[61] Department of Provincial and Local Government, page 67.

referred to in section 126(3) “shall be administered by a competent authority within the jurisdiction of the national government ...”

Section 235(6) also provided for schedule 6 functions that laws administered prior to the commencement of 200/1993 by an office of national government or a provincial council were to be administered by national government until assigned to provinces. In regard to such laws previously administered by Bantustan governments, they were assigned to the province in which the law applied.

Section 235(8) also provided for the assignment of specified sections of laws to provinces – “either generally or to the extent specified”.

Within the national Department of Land Affairs, a Land Administration Reform Committee (LARC) was established to consider requests by provinces for assignments and delegations and to advise the Minister accordingly. A “Draft Discussion Document” dated 15 January 1996 and titled *Responsibilities of the different tiers of government in the delivery of land reform services* and made recommendations for the assignment and delegation involving 38 of 54 pieces of legislation identified to that date. Some of the 54 laws dealt with matters not administered by the Minister of Land Affairs and were to be referred to the relevant departments for consideration of assignments and delegations.

Some indication of the complexity of the situation is given by the following paragraph:

> *A large percentage of the laws considered by the LARC contain a mixture of schedule six and non-schedule six powers. The delegation of non-schedule six powers falls within the competence of the Minister of Land Affairs and can be delegated by him in terms of the Land Administration Act (Act No. 2 of 1995). Schedule six matters, which should be assigned, must be assigned by proclamation by the President in terms of section 235 (8) of the [Interim] Constitution. In many instances the schedule six functions contained in laws containing both schedule six and non-schedule six functions (for example GN R.404 of 9 March 1988) fall within the competence of the Minister of Provincial Affairs and Constitutional Development, and should be assigned by him. Also in certain instances, certain laws dealing with land matters have already been assigned by him, but only with regard to the schedule six matters contained therein.*

3.3 Bantu Areas Land Regulations, Proclamation No.R.188/1969

This was the central and critical piece of legislation, hereinafter referred to as R188/1969. It was issued in the name of the then Department of Bantu Administration and Development, successor in name to the Department of Native Affairs, and issued in terms of section 25(1) of the renamed Bantu Administration Act No.38 of 1927 and sections 21(1) and 48(1) of the Bantu Trust and Land Act No.18 of 1936.

The English version of the original proclamation ran to 70 pages including annexures. It covered procedures for dealing with all existing forms of land tenure. This includes a very brief chapter 2 on freehold tenure which remained where this was held by institutions for church, school or mission purposes but became subject to the conditions of grant stipulated in Act 18/1936. Chapter 3 deals briefly with rights to commonage. Chapters 4 and 5 deal with quitrent and Permissions to Occupy (PTOs).

There were a number of amendments of R188, including R84/1971, R95/1974, R16/1976, R97 of 1977, R48/1979, R101/1979 and R28 of 1992.[62] There may be others of which the present writer is unaware.

R188/1969 was substantially amended by Proclamation R23 of 1993 which ran to 12 pages. These amendments did not apply to the TVBC states as they were affected after "independence" and prior to 1994.

Proclamation 139 of 1994 assigned the Schedule 6 functions of R188/1969 to the Provinces.

An internal departmental document in May 1999 gave some idea of the uncertainty with regard to PTOs in general:

> *The delegations made so far by the Department of Land Affairs do not deal with the continued issue of PTOs except in former KwaZulu area of KwaZulu-Natal and certain categories of PTOs in the former Transkei part of the Eastern Cape. What is not exactly clear is whether this was a conscious policy decision or an oversight. However, discussions with legal service reveal that the aspects of these regulations which deal with the issuing of PTOs were not delegated because of lack of clarity with respect to who at the present moment would exercise the powers of the Bantu Affairs Commissioner [or Magistrate if not the same official]. In almost all these regulations issuing of new PTOs appears as the power of the Bantu Affairs Commissioner [or Magistrate]. ... A policy decision will need to be made in the light of the reluctance of the Department of Justice to allow the continued involvement of Magistrates on issues beyond the administration of justice.*[63]

3.4 Regulations for the Administration and Control of Townships in Bantu Areas, Proclamation No.R.293, 1962

As the title indicates applied to proclaimed townships. It was also issued in the name of the then Department of Bantu Administration and Development, successor in name to the Department of Native Affairs, and issued in terms of sections 6(1) and 25(1) of the *Native Administration Act No.38 of 1927* and section 21 of the *Native Trust and Land Act No.18 of 1936*.

It is important to contrast this legislation with R188/1969 because of the very different tenure regimes provided. While R188/1969 was used mainly for dealing with PTOs, and also quitrent where this occurred, R293/1962 provided for the issues of Deeds of Grant which were processed through applications to relevant homeland departmental officials. Although these Deeds of Grant fell short of freehold, they did involve the registration of deeds with the Deeds Office and, unlike with PTOs, the upgrading of Deeds of Grant to full ownership occurred by operation of law in terms of section 2 of the *Upgrading of Land Tenure Rights Act No.112 of 1991* (ULTRA), rather than by the various administrative measures set out at section 3 of the Act.

According to the national Department of Land Affairs in 1997:

> *The Schedule 6 and non-Schedule 6 functions of the said [R292] Proclamation were assigned and delegated respectively by the Department of Constitutional and Provincial Affairs and the Department of Land Affairs to the various provincial governments.*

[62] Tenure Directorate, May 1999, Draft status quo report on the administration of Permission to Occupy
[63] Ibid.

> *... the Deeds and Leasehold Title Registration functions contained in Proclamation R293 of 1962 is a non-Schedule 6 function, which was not delegated to the provincial governments.*[64]
>
> *The registration of Deed of Grants and leaseholds in terms of Proc R293 has now been taken over by the existing Deeds Offices in the RSA and all other Deeds Offices in the former Homelands have been closed, except for Umtata.*[65]

Proclamation 111 of 1994 assigned the Schedule 6 functions of R293 to the Eastern Cape Province.

Proclamation 164 of 1994 assigned the Schedule 6 functions of R293 to Mpumalanga, KZN and the Northern Cape Province.

In KZN sections of R293 were repealed by the *KwaZulu Land Affairs Act No.11 of 1992* and regulations issued under KZ Act 11/1992 to deal with town establishment and town planning.

However it seems that the assignments and delegations referred to above relate to the versions of R293 inherited and modified by the TVBC states and self-governing territories because on 9 March 1988 R293 was repealed in the areas where the SA Parliament still had jurisdiction and replaced by proclamations and regulations dealing with land tenure, registration of land rights and local government.[66]

As if this was not complicated enough,

> *... it seems to us that if land in respect of which Proclamation 293 of 1962 was repealed and substituted on 9 March 1988 was subsequently incorporated into any self-governing or TVBC territory, such a territory would together with the land also receive not only the proclamations and regulations which substituted Proclamation 293, but also legislative jurisdiction thereafter to substitute or repeal such proclamations and regulations.*[67]

Unfortunately this argument can be taken further. Any parcel of land transferred to a self-governing or TVBC territory would have taken with it all RSA legislation pertaining to it, which was possibly by then distinct from the inherited legislation if this inherited legislation had been amended by the self-governing or TVBC territory.

3.5 Legal status of R188 and R292

While it is clear that the TVBC states had the power to amend these regulations after their "independence", the "self-governing territories" also inherited such powers in terms of Schedule 1 of the *National States Constitution Act No.21 of 1971*.

Amendments by the TVBC states are generally known. But it is not clear to what extent use was made of this power and to what extent variations exist in the legislation still applicable in

[64] Directorate: State Land Management, 18 April 1997, Notes for Provincial governments on the vesting of state land by means of the issuing of Item 28(1) Certificates in terms of the New Constitution, 1996 (Act No 108 of 1996)
[65] DLA, Input for state land task team meeting on 27 May 1997
[66] Proclamation R29 of 1998, Government Notice R404 of 1988, Government Notice R405 of 1988, and Government Notice R1888 of 10 August 1988 which amended R404/1988
[67] Budlender and Latsky, 1991, page 118

the relevant geographical areas of SA which were previously under the administration of the "self-governing territories". This is a question of fact rather than a question of law.

Both R293/1962 and R188/1969 were issued under the authority of the renamed Bantu Administration Act No.38 of 1927 and the Bantu Trust and Land Act No.18 of 1936. Sections 5 and 11 of the Abolition of Racially Based Land Measures Act No.108 of 1991 repealed the enabling sections of Act 38/1927, section 25, and Act 18/1936, in its entirety, with certain provisos to enable the amendments such as those by R23/1993. Section 87 of 108/1991 also stated that these provisos and the power to amend lapsed on 31 December 1994:

> *In other words the President had the discretion, by Gazette proclamation, to repeal or amend Proclamations 293 and 188 before the end of 1994. A 'competent authority' in a self-governing territory could also repeal the Proclamations in that territory.*[68]

There is a further argument that after April 1994 the President inherited the power to amend legislation such as R188/1969 in terms of section 232(1)(c) of the 1993 Constitution as it applied to legislation within the competence of national government. However this power is now unconstitutional, i.e. under the present constitutional dispensation, and therefore, if it still exists, can no longer be exercised.[69]

These are questions of law rather than questions of fact. But there are more twists in the tale.

The *Repeal of the Black Administration Act and Amendment of Certain Laws Act No. 28 of 2005* at section 1(6) repeals any proclamation made in terms of section 25(1) of 38/1927 and which was not already repealed by 108/1991 with effect from "(i) 31 July 2006; or (ii) such date as it is repealed by a competent authority, whichever occurs first."

Sub-section (i) suggests that those sections of R188 and R293 not assigned or delegated to provinces have been repealed.

Sub-section (ii), on repeal by a competent authority, refers to assignments of sections of R188 and R293 to provinces. If assigned to provinces, then those provinces had the legislative competence to repeal those assigned sections. However the phrase "whichever occurs first" at the end of section 1(6) means that by 31 July 2006, any and all remaining sections of R188 and R293 and other regulations issued in terms of section 25(1) of 38/1927 were repealed. Parliament had the authority to enact such repeals in respect of both national competencies and concurrent competencies listed at Schedule 4 of the Constitution.

But the repeal of R188 and R293 and other regulations by Act 28/2005 does not have any effect on similar or even identical legislation which was enacted or amended by the TVBC states unless this legislation has been explicitly repealed.

3.6 Rights created by these regulations and similar legislation

[68] Centre for Law and Society, January 2015, Preliminary Investigation into the Repeal of R.293 of 1962 and R.188 of 1969.

[69] This is based on the fact that section 25 of the *Native Administration Act No.38 of 1927* created a "plenary legislative power" which gave the then Governor-General the power to amend acts of parliament (Geoff Budlender, 1999, *The Power to amend the PTO Regulations & to issue PTOs*). The Constitutional Court in *The Premier of the Province of the Western Cape versus the President of the Republic of South Africa* (Case CCT 26/98, paragraph 87 and footnote 96) implied that such powers were inconsistent with the doctrine of separation of powers enshrined in our Constitution.

While there may have been assignments and delegations of sections of R188 and R293 between 1994 and 2006, and land rights may have been determined in terms of these provisions, those sections no longer enabled any new rights to be created or determined from 31 July 2006 at the very latest.

However the repeal of the legislation has no effect on the determination and accrual of any rights under that legislation while it was in force and on the continued existence of those rights after the repeal.

Given the uncertainty about the administration of the various pieces of legislation, enabling the issuing of PTOs, many people still claim to have PTOs including PTOs issued since 1994 and even since 2006. Obviously the legal status of these PTOs is questionable. In some cases they have been issued with the best of intentions by public servants and even municipal officials who have simply resorted to familiar, old and established practices.

The perception of some holders of these "new" PTO is important. "Permission to occupy" is often taken in the literal sense of any permission, written or even verbal, granted by anyone purporting to have authority to grant such permission, including public servants, municipal officials, traditional and civic leaders, etc.

There are many examples of such practices and such PTOs, including in informal settlements in KZN.

There have also been innovative legal mechanisms employed to attempt to deal with such situations where PTOs have little if any legal standing. When land tenure rights were upgraded in Groutville in KZN, residents produced pink slips of paper with a name and number and a claimed link to a register in the office of the magistrate in Stanger. The attorney involved had reason to doubt the legality of these "PTOs". He was able to get the national Minister to sign Deeds of Donation to each holder to take the upgrading process forward.[70]

3.7 Upgrading of Land Tenure Rights Act No.112 of 1991 (ULTRA)

This was enacted as part of the package of land reform laws spearheaded by the *Abolition of Racially Based Land Measures Act No.108 of 1991*.[71]

Section 2(1) provides that the land rights listed in schedule 1 in respect of erven in a formalised township and surveyed land outside of a township "shall ... be converted into ownership."

Schedule 1 includes deeds of grant and rights of leasehold issued under R293 and quitrent as described in R188.

These conversions to "ownership" occurred by operation of law and the administrative actions of Registrars of Deeds.

The provisions of the Act, except for sections 3, 19 and 20, were extended to apply across the RSA in 1998 by the *Land Affairs General Amendment Act*.

[70] Personal communication under covering email dated 2015/07/29

[71] Some of the understanding in this section is based on personal involvement in the preparation of: Umhlaba Rural Services, 2009, *Situational analysis of the Upgrading of Land Tenure Rights Act (ULTRA)*, report commissioned by DLA. This report covered 8 provinces, excluding KZN, on the basis that such a study had already been completed for KZN.

Schedule 1 rights acquired prior to the "independence" of Venda in 1979 and the Ciskei in 1981 fall within the provisions of the amended Act and therefore are converted to "ownership" by operation of law.

What is not entirely clear is the status of rights acquired after "independence" and/or under amended versions of the legislation listed in Schedule 1. Technically, in other words on a narrow interpretation of the law, they may not qualify although in terms of the spirit and intention of the law it could be argued that they should apply.

Section 3 provides, subject to various conditions, for:

> *[The] Conversion of land tenure rights mentioned in Schedule 2 ... into ownership by the registrar of deeds by the registration of such erf or piece of land in the name of such person*

Schedule 2 includes:

> *2. Any permission to occupy any allotment within the meaning of the Black Areas Land Regulations, 1969 (Proclamation No. R.188 of 1969).*
> *...*
> *4. Any right to the occupation of tribal land granted under the indigenous law or customs of the tribe in question.*

ULTRA has been used extensively across SA, partly assisted by delegations of powers issued by the national Minister, including:

to the Eastern Cape MEC for Housing and Local Government, specified powers in relation to urban land;
to the Eastern Cape MEC for Agriculture and Land Affairs on 1996/05/07, specified powers in relation to rural land;
to the Premier of KZN in November 1995, specified powers; and
to the Premier of Northern Province in November 1995, specified powers.[72]

In the Eastern Cape R188 applied outside of the former Transkei reserve areas and to the magisterial districts of Herschel/Sterkspruit and Glen Grey/Lady Frere which were transferred to the Transkei in 1976. Therefore quitrent properties in other Transkei districts did not qualify for "ownership" in terms of section 2 and schedule 1. Section 3 and schedule 2 did not apply anywhere in the Transkei or in the Ciskei. However it did apply in the seven "Black Spot" state trust areas situated in the "white Border corridor" between the Transkei and Ciskei and which successfully resisted forced removal or forced incorporation into the Bantustans.

R293 did not apply in the Transkei with the exception of Ezibeleni and Ilinge near Queenstown, now under the Lukhanji Local Municipality, and Butterworth Extension 5.

In Limpopo there was no history of quitrent land tenure. However R188 and schedule 2 of ULTRA applied to Gazankulu and Lebowa, permitting the upgrading of PTOs and customary occupational rights. Section 3 and schedule 2 did not apply anywhere in Venda.

[72] Department of Rural Development and Land Reform, Implementation Manual on the Upgrading of Land Tenure Rights Act, 1991, Act 112 of 1991

R293 applied to a number of townships in Gazankulu, Lebowa and Venda. As of 2008 there had been very little progress in upgrading of any of these settlements.

In KZN the *Ingonyama Trust Act No.3 of 1994* was amended by Act 9 of 1997. The new Section 4A inserted into the Act provided that the Act would no longer apply to the 26 proclaimed townships within KwaZulu or to state domestic facilities previously under the Trust. Such land would henceforth vest in the appropriate local authority or national or provincial government.

It is quite likely that some of these 26 proclaimed townships were established by R293 and therefore may have been subject to the provisions of Section 2 and Schedule 1 of ULTRA. However sections of R293 were repealed by the *KwaZulu Land Affairs Act No.11 of 1992* and regulations were issued under this Act to deal with town establishment & planning. Any townships established under Act 11 of 1992 would not have fallen within the provisions of Section 2 of ULTRA.

It is also possible that the provisions of the *KwaZulu Amakhosi and Iziphakanyiswa Act No.9 of 1990* were used to establish less formal townships. However as of 1998 these provisions had not been used. This Act was amended by Act 5 of 1995 which extended the application of Act No.9 of 1990 across the entire KZN Province. Act No. 9 of 1990 was repealed in total by the *Kwazulu-Natal Traditional Leadership and Governance Act No.5 of 2005*. It is thus possible that townships were established using this legislation between 1998 and 2005. However any such townships would not have fallen within the provisions of Section 2 of ULTRA. [73]

4 Current legislation applicable to State Trust land

4.1 Eastern Cape Province

The Transkei legislature was established in 1964 and from that date was able to enact its own legislation including amending RSA legislation which applied in the territory under the jurisdiction of the legislature in functional areas in which it had been granted legislative authority. It acquired “Independence” in 1976.

The Ciskei legislature was established in 1972. It acquired “Independence” in 1981.

Area	Magisterial District(s)	Legislation and key provisions	Notes and post 1994
Trust areas in the former Cape Province: Mooiplaas, Kwelerha, Newlands, Mgwali, Wartburg, Goshen, Lesseyton	Komga, East London, Stutterheim, Cathcart, Queenstown	R188/ 1969 as amended by R23/1993. This was based on Proc. 117/1931, Regulations for certain surveyed districts of the Cape Province	“Black Spot” areas within Cape Province, administered by Ciskei 1981-1985 until court ruling. Schedule 6 functions assigned to provinces.[74] Partial delegations to all Premiers 1995/11/24[75] and to MEC for Agriculture and Land Affairs 1996/05/07

[73] A report was commissioned by DLA before 2009 on the implementation of ULTRA in KZN. However this report has not been located.
[74] Letter from Minister for Land Affairs to Premier of Eastern Cape Province, 1996/05/07
[75] Department of Rural Development and Land Reform, Implementation Manual on the Upgrading of Land Tenure Rights Act, 1991, Act 112 of 1991, pages 64-

Area	Magisterial District(s)	Legislation and key provisions	Notes and post 1994
Ciskei Bantustan	Mdantsane, Zwelitsha, Peddie, Keiskammahoek, Middledrift, Victoria East, Mpofu, Hewu	R188/1969 adopted as Ciskei Land Regulations Act No.14 of 1982	Partial delegations to Premier 1995/11/24 and to MEC for Agriculture and Land Affairs 1996/05/07
		Ciskei Townships Regulations: R293/1962	Schedule 6 functions assigned to provinces. Partial delegations to Premier 1995/11/24 and to MEC for Housing and Local Government 1996/04/29.
Transkei Bantustan	Herschel/ Sterkspruit	R188/1969	Administered as Ciskei reserve area to 1976. Schedule 6 functions assigned to provinces?
	Glen Grey/ Cacadu	R188/1969	Administered as Ciskei reserve area to 1976. Schedule 6 functions assigned to provinces?
	Butterworth, Dutywa, Mthatha, Ngcobo, Cofimvaba, Tsomo, Nqamakwe	Proc. 174/1921 as amended by Proc 39/1942, Act 4/1968. S2 authorises the issuing of PTOs and recording in a register but is not delegated	"Surveyed" districts under colonial and early Union rule. Partial delegations to Premier 1995/11/24 and to MEC for Agriculture and Land Affairs 1996/05/07. Delegations include S3 for the allocation of kraal sites. Wrong sub-section delegated?
	Cala/ Xalanga	Proc. 170/1922 as amended by Proc 39/1942, Transkei Land Amendment Act 4/1968	Almost identical to Proc. 174/1921 above. No delegations or assignment. Omitted from LARC lists
	Remaining 18 Transkei magisterial districts	Proc. 26/1936 as amended by Act 4/1968. S2 required each magistrate to keep a register of all permission granted under S4. S4 enabled the magistrate to grant permission to occupy homestead and arable allotments	"Unsurveyed" districts. Partial delegations to Premier 1995/11/24 and to MEC for Agriculture and Land Affairs 1996/05/07, mainly in regard to quitrent. No delegation for allocation of sites and issuing of PTOs

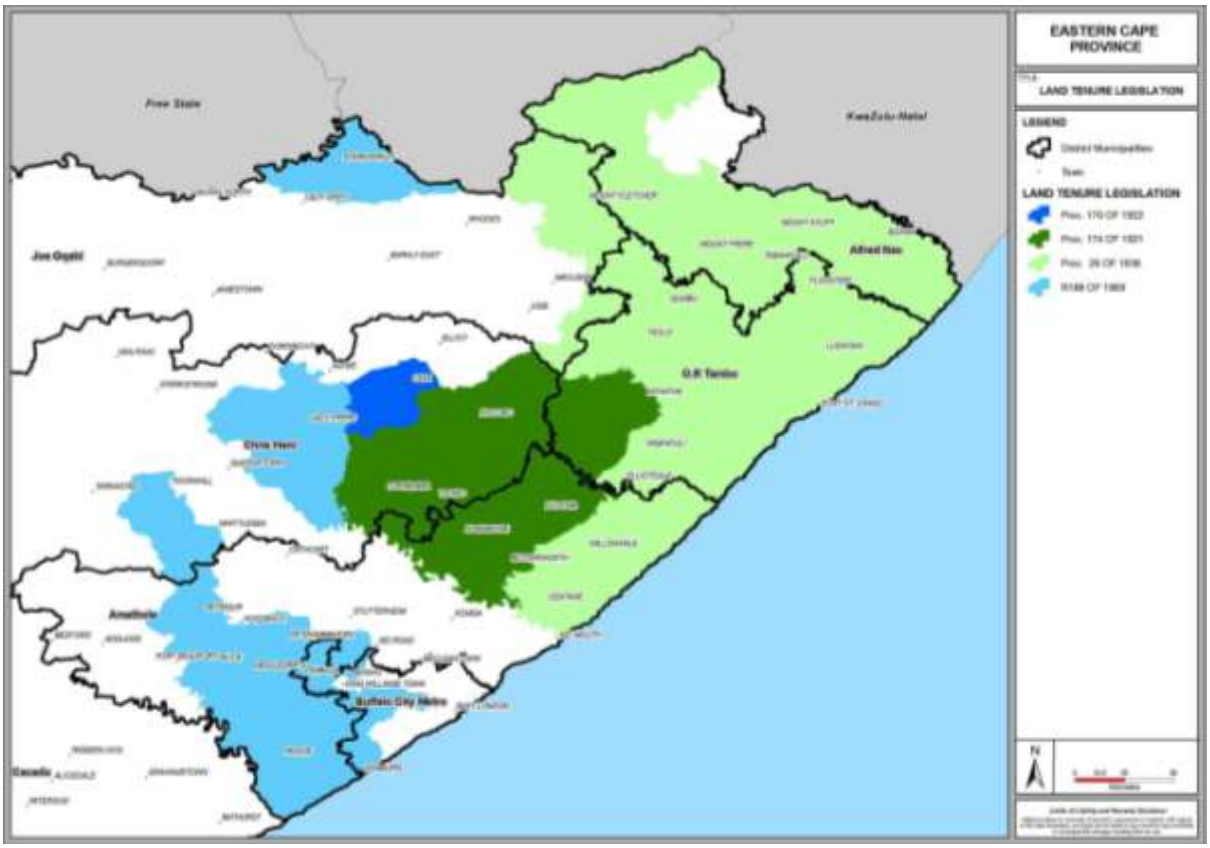


Diagram: Land tenure legislation Eastern Cape

The early Transkei proclamations of 1921, 1922 and 1936 were themselves attempts to rationalise previous proclamations dating back to the late nineteenth century and which were repealed by these proclamations.

Proclamation 170/1922 may also have been amended by the following proclamations: 217/1925, 28/1951 and 147/1956. Proclamation 174/1921 may also have been amended by these same 3 proclamations and Act 4/1986.[76]

Aside from the "unsurveyed" districts in the former Transkei where there is little if any quitrent tenure, most of the areas listed above include a mix of rural land tenure including quitrent, PTO and customary or common law. All rural quitrents in the former Ciskei districts, which include Herschel and Glen Grey, have since been converted to ownership and the quitrent conditions fallen away by the amendment and extension of some provisions of the *Upgrading of Land Tenure Rights Act No.112 of 1991* (ULTRA) to the TVBC states in 1998. However this did not apply to quitrent in the former core Transkei districts.

RELATED LEGISLATION

The following legislation is recorded not because it all has a direct bearing on land tenure, but because it may be relevant to any various attempts at human settlement development.

(Cape Province) Land Use Planning Ordinance No.33 of 1934

This still applies in the Transkei but to the urban areas only.

[76] Tenure Directorate, May 1999, Draft status quo report on the administration of Permission to Occupy

Natal Town Planning Ordinance No.27 of 1949.

> *The western portion of the Mount Currie magisterial district in Natal, including the towns of Matatiele and Cedarville with surrounding farmland, was incorporated into the Eastern Cape Province by the Municipal Demarcation Board in 2011 at the same time as the Mzimkhulu district of the Transkei was included into KwaZulu-Natal Province (MDB 2011, Alfred Nzo District Municipality DC 44, Map No.41). This area now forms part of the Matatiele Local Municipality together with Maluti magisterial district and part of Mount Fletcher magisterial district, the later both part of the Transkei. It does not appear from 1:250 000 mapping that there were any trust areas in this area incorporated into the Eastern Cape Province in 2011 (Chief Director: Surveys and Land Information, 3028 Kokstad, Fourth Edition, 1988). Ordinance 27/1949 does not apply to the rural/farm areas.*

(Cape Province) Land Use Planning Ordinance (LUPO) No.15 of 1985

> *This still applies across the urban and rural areas of the Eastern Cape Province which were previously part of the Cape Province. It may be amended or repealed as the current provincial process for a Green Paper on spatial planning and land use management unfolds.*

Ciskei Nature Conservation Act No.10 of 1986

(Ciskei) Land Use Regulation Act No.15 of 1987, urban and rural

Transkei Environmental Conservation Decree No.9 of 1992

Eastern Cape: House of Traditional Leaders Act No.1 of 1995

> *This provided for the establishment of the House of Traditional Leaders in the Eastern Cape. It was amended in 1997, 2001 and 2005.*

Regulation of Development in Rural Areas Act (Eastern Cape) No.8 of 1997

> *Section 2 divested traditional authorities of all powers newly vested in municipal structures in terms of the Local Government Transition Act No.209 of 1993 and amended the Transkei Authorities Act No.4 of 1965 and the Ciskei Administrative Authorities Act No.37 of 1984 accordingly.*

Eastern Cape: Agricultural Development Act No.8 of 1999

> *This repealed but did not replace all provisions of the Transkei Agricultural Development Act No.10 of 1966 and the Ciskei Agricultural Development Act No.14 of 1987.*

Eastern Cape: Land Disposal Act No.7 of 2000

Eastern Cape: Traditional Leadership and Governance Act No.4 of 2005

> *"To provide for the recognition of traditional communities; to provide for the establishment and recognition of traditional councils; to provide a statutory framework for leadership positions within the institution of traditional leadership, the recognition of traditional leaders and the removal from office of traditional leaders; to provide for*

the functions and roles of traditional leaders; to provide for code of conduct; and to provide for matters connected therewith."

This Act repealed the Transkei Authorities Act No.4 of 1965, the Ciskei Administrative Authorities Act No.37 of 1984 and Proclamation No.R110 of 1957.

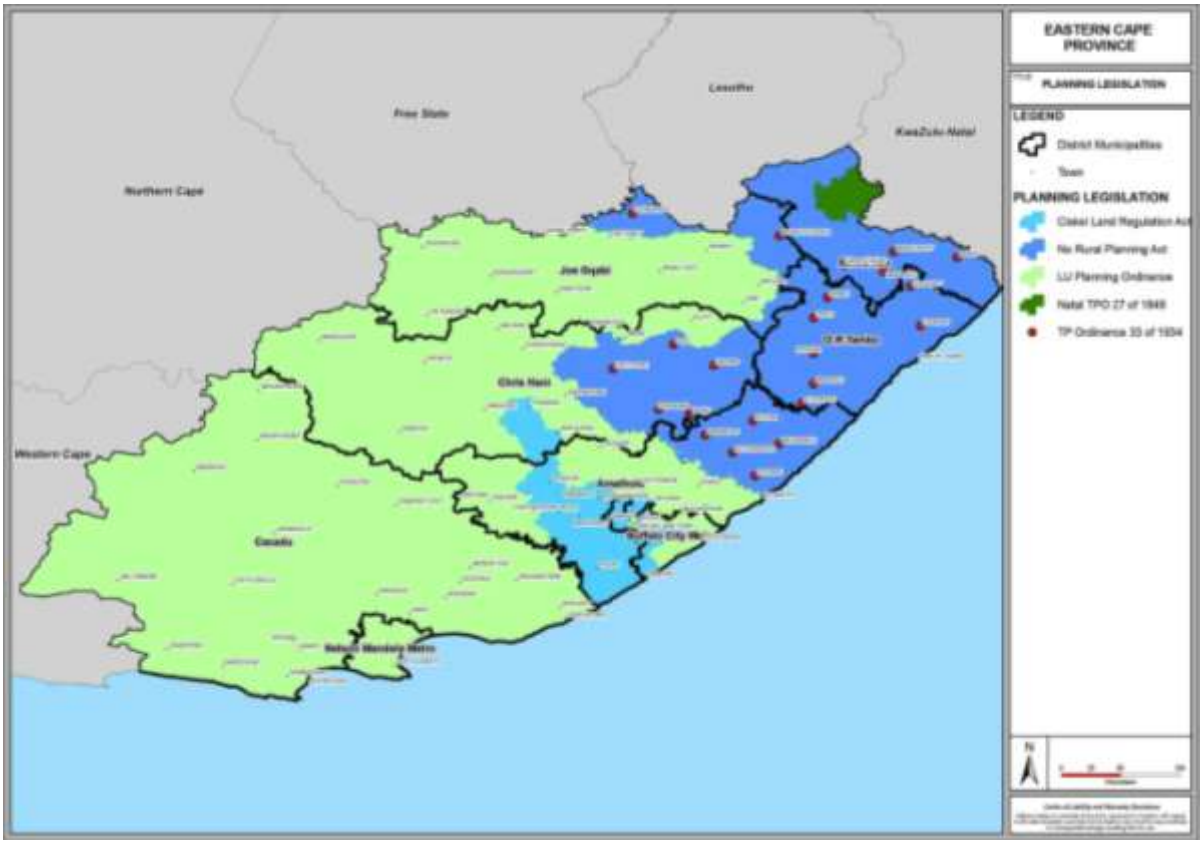


Diagram: Planning legislation in Eastern Cape

For a more detailed summary of planning legislation, see:

SA Cities Network, Provincial Land Use Legislative Reform Eastern Cape Province: Status Report September 2011, www.sacities.net

4.2 KwaZulu-Natal Province

The KwaZulu legislature was established in 1972 and from that date was able to enact its own legislation including amending RSA legislation which applied in the territory under the jurisdiction of the legislature in functional areas in which it had been granted legislative authority.

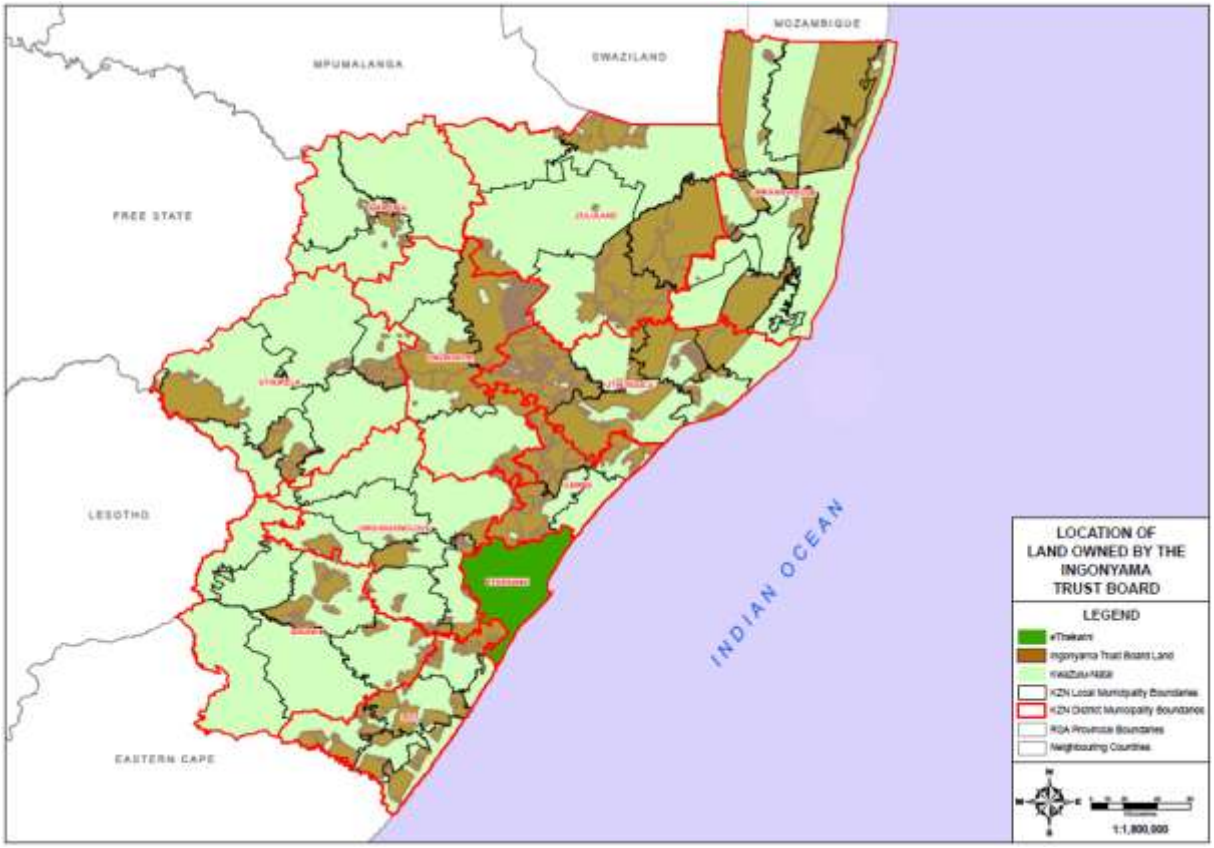
On the eve of the first democratic elections in 1994, the KwaZulu Legislative Assembly enacted the *Ingonyama Trust Act, No.3KZ of 1994*. It commenced on 24 April 1994, 3 days before elections.

The Ingonyama is the Zulu king.

An editorial note to the Act in about 2004 states that:

[The Act] has now been given the status of a National Act, due to the fact that it is now administered by the Minister for Agriculture and Land Affairs of the National Government, or any other Minister designated by the President.

It is estimated that some 2.8 million Ha of land falls under the jurisdiction of the Trust.



(Source: Centre for Law and Society, February 2015, *Land Rights under the Ingonyama Trust*)

The Ingonyama Trust is an entity which reports to and falls under the budget of the DRDLR. It is an organ of state as defined in section 239 of the Constitution and as such is subject to legislation such as the *Public Finance Management Act No.1 of 1999*, the *Promotion of Administrative Justice Act No.3 of 2000* and other statutory and common administrative law in general. In addition to Act 3/1994, the Trust is subject to regulations promulgated in terms of this Act: *KZN Ingonyama Trust Act, Financial Regulations*, GNR.1236, 1998/10/02, and *KZN Ingonyama Trust Act, Administrative Regulations*, GNR.1237, 1998/10/02.

The trust reports to Parliament on an annual and quarterly basis and such reports and presentation are public documents available on the internet. Some of the controversies surrounding mining and land rights, the use of lease income etc. are reflected in the discussions and records of the Parliamentary Portfolio Committee which received these reports as well as the following:

http://www.bdlive.co.za/opinion/columnists/2015/09/04/echoes-of-the-past-in-zumas-dangerous-tactics
http://www.news24.com/SouthAfrica/News/Amakhosi-must-drive-mining-initiatives-on-tribal-land-King-Zwelithini-20150826
http://www.customcontested.co.za/bayede-newspaper-traditional-leaders-and-mining-deals-in-kwazulu-natal/

Area	Legislation	Notes & post 1994 developments
Former SADT land in Natal	R188/1969 as amended by R23/1993	Schedule 6 functions assigned to provinces. Partial delegations to all Premiers 1995/11/24
Former KwaZulu	R293/1962	Sections were repealed by the KwaZulu Land Affairs Act 11/1992 & regulations issued under KZ Act 11/1992 to deal with town establishment & planning. Schedule 6 functions assigned by Proc R162/1994. 1997 amendment to Act 3/1994 excised 26 townships from provisions of Act and placed them under KZN Department of Local Government
	KwaZulu Amakhosi and Iziphakanyiswa Act No.9 of 1990 & amendments by Act 5/1995 [77]	Amendments by KZN Act 5/1995 included the extension of The Act across KZN. Repealed in total by KZN Traditional Leadership & Governance Act 5/2005. Provided for regulations proclamation & development of 'less formal townships'. As of 1998 these provisions had not been used. Provisions used concerned administration of traditional authorities
	KwaZulu Land Affairs Act No.11 of 1992	Proc 63/1998 in June assigned Act except S 11, 24, 25, 26, 29, 30 & 36 to Premier & also assigned 5 sets of regulations. S24-26 (for issuing PTOs) delegated to MEC for Traditional and Environmental Affairs 1998/09/10.[78]
	KwaZulu GN 32/1994, Land Affairs Regulations	PTO regulations. Delegated to MEC for Traditional and Environmental Affairs 1998/09/10.[79]
	Ingonyama Trust Act No.3 of 1994	Amended by Act 9/1997, including establishment of Trust Board to take over the administrative functions of the trustee, and excision of 26 proclaimed townships within KwaZulu together with state domestic facilities

LAND ADMINISTRATION UNDER THE INGONYAMA TRUST BOARD

Besides being protected by the *Interim Protection of Informal Land Rights Act*, rights to land owned by the Ingonyama Trust in KwaZulu-Natal, is also protected by the *KwaZulu-Natal Ingonyama Trust Act*. Most rights on that land are allocated by *amakhosi* and *iziduna* under the rules of indigenous law and practice, i.e. legitimised as described above. This system, whilst unrecorded, is sanctioned by the provisions of section 2(4) of the *KwaZulu-Natal Ingonyama Trust Act 3 of 1994*, which provides that the Ingonyama may deal with the land held by the Ingonyama Trust in accordance with Zulu indigenous law or any other applicable law. Thus land rights allocated under Zulu Indigenous law would be enforceable in a court of law.[80]

[77] AmaKhosi are hereditary traditional leaders and iziPhakanyiswa are elected traditional leaders.
[78] Chief: Legal Services, DLA, Memorandum to Director: Tenure Reform, 1999/03/05
[79] Ibid.
[80] Peter Rutsch et al, 2004, *Alternative Extra Land Markets*, Final Revised Report, KZN Provincial Planning and Development Commission, page 33

The assignments and delegations of KZ Act 11/1992 to the MEC created a potential tension between the MEC and the Trust:

> *The Trust claims that this created an unusual situation in terms of which someone other than the Trust (the provincial MEC) could issue tenure rights over Trust land, while the Trust had the power to provide all other forms of tenure (provided that the Trust could obtain the consent of the relevant traditional council). The Trust considered this problematic. In response, the Trust concluded an agreement (presumably with the MEC) that no new PTO certificates would be issued over Trust land after 1 April 2007. It thus seems that issuing leases over the Trust land was one of the ways in which the Trust sought to strengthen its own power in relation to holding and administering the Trust land. The Trust has also tried to convert existing PTOs (which remain legally valid) into leases.*[81]

The same document explains the attempt by the Trust to shift from PTOs to leasehold:

> *Another main reason the Trust is converting people's rights into leases is that rental income is the main income of the Trust. The Trust expects that in 2015, it will receive R15.3 million in rental income. The Trust has often stated that the rental it receives in terms of leases is significantly more than it would receive in terms of PTOs. For example, the Trust received R100 annually in terms of residential PTOs but receives, on average, R1000 annually in terms of lease agreements. The Trust argues that signing lease agreements has therefore increased the revenue of the Trust which is advantageous to the beneficiaries of the Trust, but this loses sight of the fact that it is the beneficiaries of the Trust who have to pay the rental in the first place.*

It seems that PTOs for new residential sites are a thing of the past. This is certainly an experience in the Josini area where applications for residential sites to the local induna are not accompanied by paperwork. However written confirmation for site allocation can be provided for instance where the holder intends to apply to Itala Bank, a regional KZN development bank, for a loan for home construction on the basis of a regular income as compared to land ownership. However documentation is issued in cases of all applications for sites for business purposes. This is presumed to be a step towards formalised lease arrangements and further rental income for the Trust.[82]

A consequence of the shift from PTOs and informal rights to land to leasehold is in fact to weaken land rights as leases can simply not be renewed whereas evicting holders of PTOs and even informal but protected rights is not supported by customary law.

CASE LAW

The case law indicates the complications arising from attempts by various municipalities to collect rates on land under the authority of the ITB and the law applicable to various different categories of land under the ITB.

Ingonyama Trust v Ethekwini Municipality (149/2011) [2012] ZASCA 104 (1 June 2012):

[81] Centre for Law and Society, 2015, *Land Rights under the Ingonyama Trust*. While KZ Act 11/1992 is still on the statute books, no new PTOs are issued and those already issued retain their validity (personal communication 2015/07/29)

[82] Discussion with Khulekani Mathe, National Planning Commissioner whose home is in Josini in northern KZN, Cape Town, 2015/08/17

The Supreme Court of Appeal found that the immovable property of the appellant, the Ingonyama Trust, within the area of the Municipality was exempt from rates pursuant to the provisions of s 3(3)(a) of the Rating of State Property Act No.79 of 1984.

Ingonyama Trust v Radebe and Others KZN HC 2012/01/25:

Here the ITB appeared to be trying to lease land for commercial agricultural purposes while the amakhosi were issuing occupational rights.

[40] In terms of section 2(4) the Trust must deal with the land referred to in section 3(1) in accordance with Zulu indigenous law or any applicable law. Under Traditional Law and Customs the land occupied by a particular tribe is administered and held in trust by the Inkosi and his or her izinduna for the benefit of the members of the tribe or community concerned. Each family head has the right to be allotted a family home site, arable land and the right to graze his livestock on the pasture-lands. The land is allotted to an individual without requiring any return in the nature of a purchase price. Individuals' holding of a portion of the land, is inviolable and inheritable

[49] Where the land is registered in the name of the Trust in the Deeds Office and not connected to any tribe or traditional authority the Trust is entitled to deal with it under the common law and it has the sole and exclusive right to deal with such land.

In a briefing to the Parliamentary Portfolio Committee on Rural Development and Land Reform in September 2015, the chairperson of the ITB reported that he anticipated litigation with the Mandeni municipality over payment of rates and taxes on ITB land.

RELATED LEGISLATION

The following legislation is recorded not because it all has a direct bearing on land tenure, but because it may be relevant to any various attempts at human settlement development.

Natal Town Planning Ordinance No.27 of 1949

KwaZulu-Natal Planning and Development Act No.5 of 1998.

This Act and 1999 Western Cape Planning and Development Act were overtaken by other events and were never brought into operation. KwaZulu-Natal also amended the 1949 Natal Planning Ordinance to extend its application.

KZN Rationalisation of Planning and Development Laws Act No.2 of 2008

KZN Town Planning Ordinance Amendment Act No.3 of 2008

KZN Planning and Development Act No.6 of 2008. This has already been used in the uMusiwabantu Local Municipality which includes former KwaZulu areas and the town of Harding to prepare a wall-to-wall land use scheme as required by SPLUMA.

For a more detailed summary, see:

Stephen Berrisford, 2005, Legislation dealing with planning and environmental management, www.sapi.org.za

SA Cities Network, Provincial Land Use Legislative Reform KwaZulu-Natal: Status Report September 2011, www.sacities.net

4.3 Limpopo Province

The Lebowa legislature was established in 1971 in terms of the *Bantu Homelands Constitution Act No.21 of 1971* and from that date was able to enact its own legislation including amending RSA legislation which applied in the territory under the jurisdiction of the legislature in functional areas in which it had been granted legislative authority.

Lebowa was declared a self-governing territory on 2 October 1972. It was the Bantustan designated for the people identified as Pedi or speakers of Northern Sotho despite the close association with many Ndebele and Swazi people.[83]

The Gazankulu legislature was established in 1971 and in 1973 was declared a self-governing territory. It was the Bantustan designated for the people identified as Shangaan or speakers of the Tsonga language.[84]

The Venda legislature was established in 1973

Venda acquired "Independence" on 13 September 1979.

Given the extensive acquisition of land by the South African Development Trust for the consolidation of the Transvaal Bantustans and the legal requirement and practice that this land be planned (i.e. betterment, villagisation etc.) prior to settlement, Proclamations R293/1962 and R188/1969 officially applied extensively in what became Limpopo Province. There were at least 80 townships established in terms of R293/1962 in Limpopo. However once again, the ongoing implementation of the legal requirements of R188/1969 especially was certainly uneven. After 1994 some tribal authorities and also some municipalities continued to issue PTOs. A report commissioned by DLA in 2007 on the implementation of ULTRA stated:

> *In the case of R188 denser settlements there are no township registers, and in most instances tribal authorities do not have an up–to-date register of the PTO rights holders. Due to a relatively high level of in and out migrancy there are often numerous informal transfers of PTOs. In addition there are often disputes (based on informal sales, inter family transfers and inheritance practices) between occupiers. This would render the process of conducting land rights enquiries more time consuming and costly in terms of tenure upgrading of R188 settlements. R188 settlements are further characterized as having relatively higher levels of subdivisions, consolidations and encroachments onto public open spaces, if compared to R293 townships.*[85]

Area	Legislation	Notes & post 1994 developments
Rural areas previously administered by	R188/1969 as amended by Proc.R23/1993	Schedule 6 functions assigned to provinces. Partial delegations to all Premiers 1995/11/24

[83] Surplus People Project, 1983, Forced removals in South Africa Vol.5 The Transvaal, page 38-9
[84] Ibid 27, 34
[85] Umhlaba Rural Services, 2009, *Situational analysis of the upgrading of land tenure rights act (ULTRA)*, section 4.1.5

Transvaal Provincial Administration		
Gazankulu	Proc.R188/1969	Not assigned or delegated to provinces as of 1998
Lebowa	Proc.R188/1969	Not assigned or delegated to provinces as of 1998
Venda	Venda Land Control Act No.16 of 1986	"The Act provides for control over the acquisition of land and the removal of restrictions on members of a particular race or class; for the reservation of land for particular purposes; and introduces measures to stop the misuse of land and for the better use thereof. Disposal and allocation of state land is also provided for. A Land Tenure Board is established under s9 and its functions set out in s10. This Act repeals the *Bantu Land Act 27 of 1913* and the *Bantu Trust and Land Act 18 of 1936.*"[86] Repealed by CLaRA but CLaRA declared unconstitutional.
	Venda Land Affairs Proc.45/1990 as amended by Proc. R.9/1997	Repealed R188/1969. Sections 26-28 provide for issuing of PTOs. Chapter 8 provides for conversion of tenure rights including customary & PTO rights. Chapter 11 deals with general PTO rights Not assigned or delegated to provinces as of 1998

The 1998 MXA report included the statements:

> *The above legislation all makes provision for the issuing of Permissions to Occupy and the process involved to apply for PTO's under these laws have been standardised across the board in the Northern Province. (72/113)*[87]

However as of 1998 the land to which Venda Proc. 45/1990 as amended applied was still vested nationally. Legislation assigned to a province only apples to land vesting in that province. Hence any actions in terms of that legislation on land not vested in province would be *ultra vires* and of no force and effect.

Proclamation No.110 of 1957, Regulations prescribing the Duties, Powers Privileges and Conditions of Service of Chiefs and Headmen, may still apply in Limpopo unless repealed by yet unidentified legislation, unlike in the Eastern Cape and KwaZulu-Natal where it was repealed by *Eastern Cape Traditional Leadership and Governance Act No.4 of 2005* and by the *KZN Traditional Leadership and Governance Act No.5 of 2005*.

Limpopo Act No.6 of 2005 authorises tribal levies, which are regarded by critics as a form of extortion. Lawyers advise that the Limpopo Act is not consistent with the constitutional dispensation governing taxation power and is unlikely to withstand legal attack.[88]

[86] R.Y. Phillips & G. Feltoe, 1987, "Current Legal Developments", *Comparative and International Law Journal of Southern Africa*, Vol.20, UNISA, page 144

[87] The same report also included the statement: "The Northern Province has recently appointed Stegmann Attorneys to conduct a complete audit of all national, provincial and former homeland laws applicable in the territory and to determine if these laws have been assigned to the province." (36-7) The provisional conclusions of that report were annexed to the 1998 MXA report but have not been located despite a request to Stegmann Attorneys and attempts to contact the responsible MXA author.

[88] www.customcontested.co.za 2015/08/06

An unattributed document states that the following legislation was assigned to the Northern Province:[89]

Black Administration Act, 1927 (Act no 38 of 1927, only sections 1 and 2(7)bis; (7)ter and (8)
Regulations prescribing the Duties, Powers, Privileges and Conditions of Service of Chiefs and Headmen, 1957 (Proclamation no 110 of 1957)
Land Regulations, 1969 (Proclamation No. R 188 of 1969)
District and Territorial Council's Act, 1986 (Act No 15 of 1986)
Venda Traditional Leaders Proclamation, 1991 (Proclamation 29 of 1991)
Gazankulu Pounds Act, 1976 (Act no 8 of 1976)
Lebowa Tribal Rates Act, 1975 (Act no. 2 of 1975)
Lebowa Royal Allowance Act, 1984 (Act no 3 of 1984)
Lebowa Pounds Act, 1990 (Act no 8 of 1990)
Black Authorities Act, 1954 (Act no 68 of 1951)
Regulations for the Control of Residents on and the Occupation of Privately Owned or Tribally Owned Land in Black Areas, 1967 (Proclamation number R129 of 1967)
Betterment areas proclamation, 1967 (Proclamation R196 of 1967)
Proclamation Concerning Payment by Blacks of Rentals for Arable and Residential Allotments and of Fees for Grazing on Certain Land Owned by the South African Development Trust, 1968 (Proclamation no. R.300 of 1968)
Gazankulu Nature Conservation Act, 1975 (Act No 5 of 1975)
Lebowa Nature Conservation Act, 1973 (Act No 10 of 1973)
Lebowa Dipping Tax Act, 1976 (Act No 9 of 1976)
Venda Pounds Act, 1976 (Act No 6 of 1976)
Venda Registration and Control of Dogs Act 1977 (Act No 9 of 1977)
Nature Conservation and National Parks Act, 1986 (Act No 20 of 1986)
Venda Land Affairs Proclamation, 1990 (Proclamation 45 of 1990) Section 6 and 7 and 14-1

RELATED LEGISLATION

For a detailed summary of planning legislation which may be relevant to any and various attempts at human settlement development, see:

SA Cities Network, Provincial Land Use Legislative Reform Limpopo Province: Status Report September 2011, www.sacities.net

5 Communal land tenure policy

5.1 Introduction

The post 1994 era is critical in giving new colour and content to land rights in communal areas in South Africa. Section 25 (6) of the Constitution states, “A person or community whose tenure and land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure that is legally secure or to comparable redress.

[89] http://www.polity.org.za/polity/govdocs/discuss/draft-traditional_ann.html 2015/09/11

The *Interim Protection of Informal Land Rights Act No. 31 of 1996* (IPILRA) was promulgated with a view to provide a holding mechanism for protecting informal land rights while government is developing a more elaborate tenure legislation. IPILRA provides protection to people who use, occupy or access land in terms of:

- Customary laws and practices
- Beneficial occupation, or
- Land vested in the South African Development Trust, or so called self-governing Bantustan government, or any other kind of trust established by statute.

IPILRA provides protection to people against deprivation of their informal rights to land, except under special circumstances. *The Land Rights Bill of 2000* could not see light of day because it was viewed to be costly to implement. *The Communal Land Rights Act No.11 of 2004* (CLaRA) was framed by the government as legislation that would offer redress to people "whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices", as proclaimed in Section 25 (6) of the Constitution . After concerted opposition from rural people, the Constitutional Court struck down the CLaRA in its entirety in 2010. A new tenure legislation to replace IPILRA has not been enacted yet. IPILRA is currently in force and is used in conjunction with the "Interim procedures governing land development decisions" which require the consent of the Minister of Rural Development and Land Reform as the nominal owner of the land, which was approved by Polcom on 20 November 1997 and amended on 14 January 1998 and also in terms of Section 3(1)(a)(ii) of Act 112 of 1991 as amended by Act 34 of 1996.

The *Promotion of Administrative Justice Act 3 of 2000* is one critical but least used protective legal instrument, with relevance to communal tenure rights. Part of the reason why this piece of legislation is least used is that it deals with rights broadly, and does not specifically mention land rights. Section 4 of the PAJA binds government decision makers to certain minimum levels of public participation in the process of making administrative decisions which materially and adversely affect the rights of the public (see van Wyk J. 2012)[90]. Whenever a person or a community's right or legitimate expectation is affected by or threatened by administrative action, the administrative action should pass the test of being just (lawful) reasonable and procedural fairness. PAJA sets out basic minimum procedures to give effect to the right to procedurally fair administrative action. A second key reason why this piece of legislation is little used is misunderstanding of its underlying content has been expanded upon by a range of court decisions, many of which are not generally known to administrators[91]. Many of these judgements clarify what constitutes an administrative decision, lawfulness, fairness etc. Third reason why this is little used is that the general public in communal areas have limited access to justice.

5.2 Tenures arising unintentionally

The land tenure picture in the rural South Africa is characterised by a range of tenures, which arise as an unintended consequence of various legal instruments. The quasi-tenures in themselves create various hurdles through which one has to manoeuvre their way to implement any development;

[90] Van Wyk Jeanine (2012) Planning Law 2nd Edition; Juta & Co; A.J. van der Walt (ed)

[91] Hayes and Other v Minister of Finance and Development Planning, Western Cape, and Others; Camps Bay Ratepayers and Residents Association and Other v Minister of Planning, Culture and Administration, Western Cape, and other; Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg and others; Van Huysteen and Others NNO v Minister of Environmental Affairs and tourism and Other,; etc.

5.2.1 Quasi-tenure arising from illegal occupation of land

Various National Government policy documents including the White Paper on South African Land Policy and the Development Facilitation Act 67 of 1995, section 3(1)(a) have made it clear that land invasions pose a great threat to stability and development and that the unlawful occupation of land must be discouraged at all costs (Manona, 2012). The *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (Act No. 19 of 1998, as amended)* (PIE) is the legal framework governing responses to illegal settlement formation and applies to all land in the Republic of South Africa. The PIE Act was proclaimed to address this problem, but the Act is too cumbersome for implementation in rural areas. Despite the policy, invasions have been a pervasive land distribution mechanism in both rural and urban contexts in the Eastern Cape and other parts of South Africa, underpinned by population growth trends, rural to urban migration and rural to rural migration. In all these instances legal land allocation mechanisms are not in place to respond to the growing land demand. Both unlawful occupation of and illegal eviction from land infringe upon basic human rights as entrenched in the Constitution. Government has the responsibility to manage the Constitutional rights of both occupiers and landowners in a careful and balanced manner. The PIE Act is difficult to interpret and costly and time consuming to implement. Management of urbanization and development requires Municipalities to adopt a wider approach than only the reactive management of unlawful occupation of and/squatting.

5.2.2 QUASI-TENURE ARISING FROM RESTITUTION PROCESS

Section 7 (a) of the *Restitution of Land Rights Act 22 of 1994*, states that, “Once a notice has been published in respect of any land - no person may sell, exchange, donate, lease, subdivide, rezone or develop the land in question without having given the regional land claims commissioner one month’s written notice of his or her intention to do so, and, where such notice was not given in respect of”. This section is subject to extreme forms of misinterpretations on the part of the Commission to the point of being a hindrance to development of land that is subject of land claim/s. The other side of the coin to this is the psychological side on the part of those who have lodged land claims, who often consider themselves as successful land claimants, before the actual settlement of the claim, often taking actions which enforce their rights on the land. To the extent that the interpretation of statute by the Commission on the one hand and the psyche of claimants on the other, impacts on the land, creates a quasi-tenure form where planning and development cannot happen.

The jury is still out on the impacts of the *Restitution of Land Rights Amendment Act of 2014*, as the lodgement process is still unfolding. The most significant amendment to the *Restitution of Land Rights Act of 1994* relates to the cut-off time for lodging land claims, with the initial cut-off time of December 31 1998 extended to June 30 2019. The amendment states that the Act will “ensure that priority is given to claims lodged not later than December 31 1998 and which were not finalised at the date of the commencement of the *Restitution of Land Rights Amendment Act, 2014*”.

5.2.3 Quasi-tenure forms arising from IPILRA

While laws to promote tenure security for farm dwellers and labour tenants have been enacted, there is no legislation beyond the *Interim Protection of Informal Land Rights Act 31*

of 1996 (IPILRA) to secure the land rights of the estimated 17 million people living in the former Bantustans. IPILRA was introduced in 1996 as a temporary solution that would protect people living in communal areas from being deprived of their land rights. To the extent that IPILRA protects informal land rights, it creates a quasi-tenure form that is tantamount ownership in situations which were previously considered extremely insecure forms of tenure. At the heart of IPILRA's criticism is the fact that it has no regulations and the fact that the Act has not been mainstreamed or aligned with other legislation that regulates land use.

5.2.4 Quasi-tenure arising from the CPA Act

The *Communal Property Association Act no. 28 of 1996* (CPA), was originally intended to establish what could be termed common hold tenure, intended to be an instrument for holding and managing group owned land rights, in the context of land reform beneficiaries. A recent development is that the Department of Rural Development and Land Reform has not been transferring land to CPAs, thus creating another quasi form of tenure, where, technically the land should have been restored as part of a settled claim, but the transfer had not taken place.

5.3 The draft Communal land tenure Policy

5.3.1 What CLTP proposes

The draft *Communal Land Tenure Policy (CLTP) of 2013* also popularly known as the "Wagon Wheel", like the *Communal Land Rights Act (CLRA) of 2003* proposes to transfer the 'outer boundaries' of 'tribal' land in the former Bantustans to 'traditional councils' (the new name for the tribal authorities created during the Bantustan era). In theory, the wagon wheel also provides for Communal Property Associations (CPAs) or trusts to own land titles, with input from members (as prescribed in the CPA act and in trust law). But the CLTP disallows the establishment of new CPAs in areas where Traditional Councils already exists, which ironically is the predominant case in most of the former Bantustans.

The CLTP further proposes that the units of land transferred to traditional councils will be defined according to the tribal boundaries created in terms of the controversial *Bantu Authorities Act of 1951*. The Department of Rural Development and Land Reform (DRDLR) proposes that 'traditional councils' will get title deeds (i.e. full ownership) of these blocks of land, while individuals and families will get 'institutional use rights' to parts of the land within them.

5.3.2 Critique of the Communal Land Tenure Policy

The proposed policy is criticised on a number of grounds some of which are briefly stated in this section. In summary, the CLTP is deemed unconstitutional in that it denies the rural people, most of whom live in the former Bantustans, their constitutional rights to choose the land tenure system that suits them. What follows below is a brief discussion of the criticisms.

INSTITUTIONAL USE RIGHTS AND TRIBAL OWNERSHIP

The institutional use rights that will be transferred to individuals, will be subject to, and therefore trumped by the outright ownership simultaneously vested in traditional councils. It is commonly known that title deeds trump 'use rights' in law.

So-called 'use rights' are restricted to small areas such as house-hold plots, while the traditional council owns and controls all development related to common property areas such as grazing land and forests. The CLTP specifically states that the traditional council will own, and be in charge of investment projects such as mining and tourism ventures. Although not every chief or traditional leader is corrupt and unaccountable, incidences of corrupt leadership in these structures have been recorded, and more worrying is that there seems to be no sufficient mechanisms for rural people to hold these leaders to account.

Also of concern is that the new policy promotes 'Investment and Development' structures alongside traditional councils. As has been demonstrated by incidences on the platinum belt in North West and Limpopo such arrangements may provide a vehicle for elite alliances between traditional councils and politically connected BEE investors that exclude and fail to benefit the ordinary people whose land and livelihoods are being destroyed by mining.

COUNTERVAILING LAND RIGHTS VESTING IN ORDINARY PEOPLE

The new CLTP proposals are also criticised for downplaying, excluding and undermining countervailing indigenous, statutory and common law rights vesting in ordinary people. The CLTP conceives of all the land in the former Bantustans as subject to chiefs and 'tribal tenure'. By so doing, the proposed policy fails to take stock of the significant historical reality that some black people managed to club together and buy land which they have since held under individual tenure system. Much of this purchased land was subsequently subsumed within the Bantustans and has been fiercely defended against counterclaims by superimposed traditional leaders in the intervening decades.

The customary land rights of people on state-owned "communal" land are also jeopardised by the new policy's attempt to centralise ownership and power in "traditional councils". This undermines decision-making authority at family, clan and village levels. Such decision-making authority is a key component of customary land rights and pivotal to indigenous accountability mechanisms. Land that is held and managed at different, coexisting levels of social organisation encourages accountability and mediates power. When unilateral authority is vested at the apex of superimposed "tribes", these internal balancing mechanisms are undercut.

PROPERTY RIGHTS AND THE BOUNDARIES OF 'COMMUNITY'

The crux of the problem is that the new policy imposes a tribal construct of 'community' on smaller pre-existing groups who often have strong countervailing identities and land rights, whether derived from common law, customary law or statute law. By transferring title at the level of the 'tribe' it seeks to trump these other smaller communities, who would then become structural minorities within larger super-imposed tribal boundaries. This is unconstitutional. Not only because such a plan would undermine tenure security for the most vulnerable South Africans, contrary to the promise in the Constitution. But also because such smaller pre-existing communities often have property rights derived from sources - including customary law, quitrent titles, PTO regulations, the Upgrading of Land Tenure Rights Act, IPILRA and title deeds – which are protected by s25 of the Constitution.

IS CUSTOMARY LAW RESTRICTED TO THE BANTUSTANS? ARE CHIEFS ITS SOLE CUSTODIANS?

The CLTP differentiates between 'conventional traditional communal areas that observe customary laws' and communal areas outside the former Bantustans. The policy, like the CLaRA, maps chiefs, customary law and the former Bantustans directly on to one another. It reinforces the traditional leadership lobby's claim that independent ownership rights undermines chiefly authority, and so will not be allowed within the boundaries of the former Bantustans. It also reinforces their reading of chiefs as the sole custodians of customary law.

The *Traditional Courts Bill (TCB)* took much the same approach – that customary law is restricted to the former Bantustans as a part of chiefly power, rather than a system of law that applies to all who use it in their daily lives in urban or rural areas. Yet the Constitution's recognition of customary law is not restricted to the former Bantustans. And its recognition of traditional leaders is subject to customary law. The Constitutional Court has rejected the official version of autocratic chiefly power inherited from apartheid, in favour a more democratic version of 'living customary law' that develops as society changes.

That interpretation of customary law as an opt-in system, which applies across South Africa, was re-iterated by the Provincial Legislatures during debates about the TCB in the National Council of Provinces. Province after province said the model of centralised top-down chiefly power contained in the TCB contradicted actual customary practice in their areas. In the end, the TCB failed politically because the required majority of provinces refused to support it. In that context it is very worrying that the new CLTP seeks to give traditional councils the role of dispute resolution by the back door, when a law designed to achieve the same outcome – the TCB – generated enormous rural dissent, and was rejected in parliament.

TRADITIONAL COUNCILS AND LEGAL CAPACITY TO OWN LAND

As discussed above, traditional councils are a product of the *Traditional Leadership and Governance Framework Act no. 41 of 2003* (the Framework Act). The Act deems pre-existing tribal authorities to be traditional councils provided that they comply with two transformation measures. The first is that 40% of traditional council members must be elected. The second is that one third of traditional councils members must be women. The time frame for meeting these requirements was initially one year, but this has been extended numerous times including retrospectively by a 2009 amendment to the Framework Act. Despite that, 10 years later there have still never been traditional council elections in Limpopo. And in many councils the women's quota has not been met. Those elections that have taken place have been mostly flawed. There have been numerous court judgments finding that the deeming provisions have not been complied with. This means that most traditional councils are not validly legally constituted, and so do not have the legal capacity to take transfer of, or own land. Nor do they have the legal status to enter into the kinds of investment deals envisaged by the Investment and Development structures proposed by the new policy.

5.4 Other related policy instruments

5.4.1 Draft Traditional Authorities Bill (TAB)[92]

The *Draft Traditional Affairs Bill (TAB)* was published in a Government Gazette notice by the Minister of Co-operative Governance and Traditional Affairs on 20 September 2013. TAB has not yet entered the parliamentary process and does not yet have a Bill number. The national Department of Co-operative Governance and Traditional Affairs (CoGTA) has made

[92] Centre for Legal Studies, Rural Women's Action Research Programme, Notes on the 2013 Draft Traditional Affairs Bill, Feb 2015.

changes to the 2013 version of TAB and it is anticipated that a new version will be tabled in Parliament towards the end of 2015.

Although there are already laws on traditional leadership in South Africa, the CoGTA Department has said that this new law is needed for two main reasons:

- to put the various traditional leadership laws that currently exist into a single law, while at the same time solving problems that exist in the current laws, and
- to provide recognition to Khoi-San communities, leaders and councils – since this recognition has been absent until now.

5.4.2 Draft Traditional Courts Bill[93]

The stated aim of the TCB's was to advance South Africans' access to justice by recognising the traditional justice system in a way that upholds the values in customary law and the Constitution. It was developed to replace Sections 12 and 20 of the *Black Administration Act of 1927*, colonial-era provisions that still empower chiefs and headmen to determine civil disputes and try certain offences in traditional courts. When the TCB was first introduced in Parliament in 2008, it met with much opposition, which has continued after its reintroduction in late 2011. The legislation has been criticised for giving traditional leaders too much power, as it allows a chief to punish someone with forced labour[94]. There was also no accountability or oversight body to review court decisions and community members could not opt out of a traditional court case. There are talks of reintroducing the Bill.

5.5 State Land Lease and Disposal Policy v Bifurcated ownership regime

Given the nominal ownership of the land by the state, there are a number of administrative decisions which are in the domain of the state (the Department of Rural Development and Land Reform), thus creating a potential for the state to take decisions which may impact on the informal land rights. The DRDLR is central in the decision making in so far as it is the nominal owner of communal land. This is understandable, in that the state, in its trusteeship role, has fiduciary responsibilities in respect of the communal land.

This confusion of powers becomes glaring in relation to decisions pertaining to leasing and disposal of communal land. The national policy document entitled "State Land Lease and Disposal Policy[95]" is applicable to all immovable assets for which the Department has legal title. Due to absence of any other more directed policy, officials tend to erroneously include communal land in this broad category of land which is owned by the state. However the policy is clearly not designed to be applied in the context of communal areas. Of particular importance is that communal land is a particular form of state land, in that it is nominally held by the state in a custodianship role. Firstly, among others, the policy seeks to reverse the legacy of the *1913 Natives Land Act*, by addressing issues relating to "historical exclusion, equitable access to land, and participation in the optimal utilization of land; as well as to address challenges relating to access to food at both household and national level to bring about household food security and national food self-sufficiency."

Notwithstanding that 'communal land' is also a special category of state land, the problem statement of this policy is not congruent with the communal land context. Among others, the policy puts a 30 year lease cap, which may be renewed for another 20 years. The cap

[93] http://www.customcontested.co.za/laws-and-policies/traditional-courts-bill-tcb/
[94] https://www.enca.com/south-africa/traditional-courts-bill-kicked-out-parliament
[95] Approved on 25 July 2013

seems not to be relevant in relation to communal land, because the state is a nominal owner, which would make this policy inconsistent with IPILRA.

The *State Land Lease and Disposal Policy* makes reference to the *State Land Disposal Act No 48 of 1961* which empowers the State President, to amongst other things, lease State land, which powers have been assigned to the Minister of Rural Development and Land Reform in succession. In this case the leasing entity that gets the benefits would be the Trust (to be formed).

The policy make further reference to the *Government Immovable Asset Management Act No. 19 of 2007* which mainly provides a uniform framework for the management of immovable assets that are held or used by national or provincial departments – the Act provides asset management principles. Among the key principles that the policy highlights are the following:

> *Rental determination: In the context of the current project, the state is the nominal owner or custodian (keeper/ caretaker) of the land in question, and the decision of how to determine rental will be an outcome of negotiation between the investor/ developer and the land Trust. This assumes that the Trust is empowered to make those decisions by the land rights holders, in a community resolution process.*
> *Water use authorization shall be applied for separately from the relevant water authority.*
> *The lessee shall get permission for any improvements on the land – the approval should be granted in writing by the Chief Director: Provincial Shared Service Centre.*

For all the reason outlined above, this policy is neither designed for the purposes of regulating leases and disposal of communal land. It important to clarify this because very often the officials of the DRDLR inappropriately make reference to it.

6 Policy relevant for communal land administration

The following sections are extracts from various policy documents that are of relevance to communal land administration.

6.1 Constitution

EQUALITY
Everyone is equal before the law and has the right to equal protection and benefit of the law.(9.1)
Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (9.2)
The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (9.3)

PROPERTY
s25(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
s25(2) Property may be expropriated only in terms of law of general application
- *for a public purpose or in the public interest; and*
- *subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.*

s 25(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
s25(9) Parliament must enact the legislation referred to in subsection (6).

HOUSING
Everyone has the right to have access to adequate housing. (26.1)
The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (26.2)
No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions. (26.3)

THE ENVIRONMENT
Everyone has the right
to an environment that is not harmful to their health or well-being (24.1); and
to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
a. prevent pollution and ecological degradation;
b. promote conservation; and
c. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. (24.2)

INTERPRETING THE BILL OF RIGHTS
When interpreting the Bill of Rights, a court, tribunal or forum

a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (39.1)

TRADITIONAL LEADERSHIP
Recognition
The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution. (211.1)
A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs. (211.2)
The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. (211.3)
Role of traditional leaders
National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities. 212.1)
To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law
a. national or provincial legislation may provide for the establishment of houses of traditional leaders; and
b. national legislation may establish a council of traditional leaders. (212.2)

LAND COMPETENCY
According to schedule 4A land is a concurrent national and provincial function

LOCAL GOVERNMENT
According to schedule 4B municipal planning (which has been determined by the constitutional court to include spatial (forward) planning and land use management)

JUST ADMINISTRATIVE ACTION
Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (s33)

6.2 National development plan

Rural areas present particular challenges. Over one-third of South Africa's population live in the former "homelands", and a large proportion of this group is economically marginalised. Policies are
required to bring households in these areas into the mainstream economy. There are rural areas, however, where transport links are good and where densification is taking place in the absence of effective land-use management and urban governance. (p 47)

Under development in the former homelands must be confronted through agricultural development, improved land management, infrastructure and targeted support to rural women. (p218)

Land access in communal areas is treated as though land rights and the right to use land for different purposes are the same thing. In practice, land rights differ depending on how people use the land. Securing tenure is important when land is used to grow crops. The focus should be on cooperating with traditional leaders to secure tenured irrigable land supported by fully defined property rights. This will allow for development and give prospective financiers and investors the security they require. (p222)

Create tenure security for communal farmers. Tenure security is vital to secure an income for existing farmers and new entrants. The possibility of flexible systems of land use for different kinds of farming on communal land needs to be investigated. (p226)

A layer of complexity comes from the role assigned to traditional leadership. Traditional leadership plays an important role in facilitating communication with South Africa's citizens to improve the effectiveness of developmental local government. However, confusion emerges when traditional forms of authority are legislated, as traditional leadership structures may then displace or duplicate the role of the state. This has potential to create disjuncture between the traditional authorities' land-usage rights and the responsibilities of municipalities to deliver services to that land. (p233)

The current framework governing land use in traditional areas is not working. In particular, it discriminates against women. (p265)

Some rural areas have large populations that are experiencing change, for example, new settlement formation. Such areas need management, institutional development, land and tenure reform, infrastructure provision and economic stimulus. They include the more densely populated parts of the previous homelands, where there is population dynamism and sufficient numbers to provide the basis for viable markets. There may also be areas with agricultural, tourism or mining potential. Almost all provinces have areas that fall within this category, but the [Rural Restructuring] zones should only be designated after careful consideration against a set of criteria. (p280)

6.3 Medium Term Strategic Framework: 2014-2019

OUTCOME 7: COMPREHENSIVE RURAL DEVELOPMENT AND LAND REFORM

Sub outcome 1: improved land administration and spatial planning: action 1
develop and implement spatial development [framework] plans as the basis to guide land use planning and development and to address spatial inequities, prioritising the 27 resource poor district municipalities.

sub outcome 2: sustainable land reform contributing to agrarian transformation: action 3
Fast track the development of tenure security policies and legislation in communal areas to address tenure insecurity [Target: Communal land tenure policy and legislation in place and implemented by march 2019]

OUTCOME 8: SUSTAINABLE HUMAN SETTLEMENTS AND IMPROVED QUALITY OF HOUSEHOLD LIFE

sub outcome 1: adequate housing and improved quality living environments
Develop a coherent and inclusive approach to land for human settlements [target: by march 2015]

6.4 Breaking New Ground

Developing a rural housing programme which is to deal with a comprehensive range of rural housing related issues, such as tenure, livelihood strategies and broader socio-cultural issues. The programme will also respond to the needs of farm workers and farm dwellers and will consider:

- *The economic, social, and institutional sustainability of farm worker settlements;*

- *The required institutional framework, the roles and responsibilities of implementing agencies, technical norms and standards, tenure security, suitable subsidy mechanisms, and legislative amendments*

Enhancing traditional technologies and indigenous knowledge which are being used to construct housing in rural areas and to improve shelter, services and tenure where these are priorities for the people living there.

Developing appropriate funding mechanisms to support the rural housing programme. (p21)

6.5 Integrated Urban Development Framework

Developing solutions to benefit the whole country is difficult if rural and urban areas are seen as opposites, especially as these areas are becoming increasingly integrated because of better transport and communications, and migration. Therefore, focusing on linkages (not separateness) between rural and urban areas can help reframe how development occurs in these areas.

POLICY LEVER 5: EFFICIENT LAND GOVERNANCE AND MANAGEMENT

2 . Tenure uncertainty and insecurity
Urban and rural areas are inextricably linked, with informal settlements in urban areas often serving as reception areas for new migrants from rural areas. Rural areas include communal (or traditional authority) areas where people's tenure is less secure, they do not have registered land rights and are therefore unable to use their land in the same way as their urban counterparts can, selling it, or using it for collateral. This, arguably, places a severe constraint on the economic and social mobility prospects of such households. Government's efforts at reforms to address inequalities in access to land have been slow and difficult to implement. Overall, the country's racially discriminatory and fragmented land tenure system is proving difficult to dismantle.

4 . Slow land-use planning and management processes
Land-use planning and management processes are often slow, despite legislated timeframes. Many municipalities contain large and well-developed urban areas, but also traditional authority areas (often located some distance from urban opportunities), which make developing coherent spatial plans difficult. The inclusion of traditional authority areas within the city-regions is a unique feature of the South African urban landscape, and the planning, management and the taxation of such areas need to be urgently examined.

Policy priority
Address impact of Traditional Authority areas within predominately urban municipalities There is growing evidence that households are opting to locate to traditional authority areas, which are located in close proximity to urban centres and infrastructure, not only to access land cheaply, but also as a means of circumventing the payment of rates and service charges. A policy and strategy needs to be developed, which addresses aspects such as planning, enhanced integration, management and taxation for traditional areas

POLICY LEVER 6: INCLUSIVE ECONOMIC DEVELOPMENT

Municipalities with large rural populations can experience tensions between elected local councils and traditional leaders, which can dilute focus on essential economic development tasks that should be carried out.

Improve relations between municipal councils and traditional authorities. Most municipalities have both elected politicians and traditional leaders, and tensions often arise between the two institutions, particularly between the statutory rights system of land tenure and the customary system. This tension is often the result of conflict between the traditional land administration system and municipal spatial plans, as elected governments need access to land to fulfil their responsibilities of providing infrastructure, such as roads and sanitation. The tensions and uncoordinated land management systems compromise the linkages between rural and urban areas. A framework to guide relations between elected local government and traditional authorities on matters of land governance and the overall development of municipal space is essential.

6.6 Spatial Planning and Land Use Management Act (SPLUMA) 2013

Relevant extracts from this act include:

- *"incremental upgrading of informal areas" means the progressive introduction of administration, management, engineering services and land tenure rights to an area that is established outside existing planning legislation, and may include any settlement or area under traditional tenure; (definition)*
- *Land development procedures must include provisions that accommodate access to secure tenure and the incremental upgrading of informal areas. (s7v)*
- *Identify the designation of areas in the municipality where incremental upgrading approaches to development and regulation will be applicable. (s21k)*
- *Include provisions that permit the incremental introduction of land use management and regulation in areas under traditional leadership, rural areas, informal settlements, slums and areas not previously subject to a land use scheme (s24.2c)*
- *Subject to section 81 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998), and the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), a municipality, in the performance of its duties in terms of this Chapter must allow the participation of a traditional council. (s23(2))*

Relevant regulations (approved in March 2015) associated with this act include:

- *A traditional council may conclude a service level agreement with the municipality in whose municipal area that traditional council is located, subject to the provisions of any relevant national or provincial legislation, in terms of which the traditional council may perform such functions as agreed to in the service level agreement, provided that the traditional council may not make a land development or land use decision. (19.1)*
- *If a traditional council does not conclude a service level agreement with the municipality as contemplated in sub regulation (1), that traditional council is responsible for providing proof of the allocation of land in terms of the customary law applicable in that traditional area to the applicant of a land development and land use application in order for that applicant to submit it in accordance with the provisions of these Regulations. (19.2)*

6.7 Eastern Cape Provincial Development Plan

Goal1: a growing, inclusive and equitable economy
An accelerated and completed land-reform process. This will be achieved by designing, implementing and completing a new land redistribution plan; conducting communal land tenure reform; fast-tracking the land restitution process; and supporting the productive use of resettled land. (p17)

Strategic objective 1.4: Accelerate and complete the land-reform process
Strategic action 1.4.2: Address communal land tenure reform On 18 November 2013, Business Day reported on a presentation by the former MEC for Economic Development, Environmental Affairs and Tourism, Mcebisi Jonas, at the Wild Coast Development Summit: "Leadership is needed to make deals with communities where land-tenure issues are a serious obstacle to development. We need leaders who can go in and make deals with rural communities and then legalise those deals … Then they can continue to have their debates about land tenure if they want to."
The problem with this statement is that it is not straightforward for communities to legalise land agreements. For example, villages around the Tyefu irrigation scheme (in Peddie) have tried for some time to formalise long-term leases for the commercial production of pomegranates and tomatoes. The provincial Department of Rural Development and Agrarian Reform and the national Department of Rural Development and Land Reform have been unable to formalise these leases, and so the communities have been deprived of income and employment.

The PDP suggests the following interventions:

- *Address communal land tenure reform and the collapse of land administration. This could be achieved through the Interim Protection of Informal Land Rights Act (1996) and appropriate delegations in the short term.*
- *Pilot alternative land tenure arrangements, learning from similar projects in Mpumalanga. (p75)*

Strategic action 1.4.3: Finalise restitution process Land restitution claims (for example, in Mthatha and Mbizana) inevitably reduce the appetite of property developers to invest. The land restitution process should be concluded as soon as possible to resolve the uncertainties surrounding land ownership. Targets for this strategic objective include:

- *New land redistribution programme to be designed and resourced by 2016*
- *Land redistribution programme to be completed by 2030*
- *Quantified targets for areas to be redistributed*
- *New tenure pilots to be launched by 2016*
- *New land tenure and administrative arrangements to be fully functional by 2025*
- *A target date for completing the land restitution process. (p76)*

Spatial equity is predicated on the equitable redistribution of land. However, the pace of land reform has been slow due to a collapse of land administration, and tenure insecurity in communal areas hampers development. Urban areas face issues relating to availability of suitable land for public housing, economic and industrial development, and land-use practices that enable urban spatial restructuring. Because the province has not conducted a comprehensive review of old-order legislation governing planning and land administration in communal areas, multiple forms of rural land tenure exist across the former Transkei and Ciskei. The neglect and collapse of rural land administration directly affects the security of tenure and livelihoods of over half a million rural households in the province. (p113)

Engage with traditional leaders to ensure they are an integral part of the development effort and to facilitate access to land for development.(p132)

6.8 Kwa-Zulu Natal Provincial Growth and Development Strategy - August 2011

A KwaZulu-Natal House of Traditional Leaders and eleven local houses of traditional leaders (at District level) and 265 traditional councils at local level. The Ingonyama Trust Board, appointed custodian of traditional land, holding about 40% of the land of the Province

Strengthening the relations between local municipalities and traditional councils in their respective areas is critical. Given that such a large proportion of the land under rural municipalities is also under the custodianship of the Ingonyama Trust and traditional leadership, it is imperative that more effective systems and processes for integrating municipal planning and service delivery in Ingonyama Trust areas be developed. In turn there is a need for enhancement of the participation of members of traditional councils in the processes of municipalities. (p43)

An important area of challenge and of opportunity, which relates in particular to governance and development of the more rural parts of the Province, is that of the Ingonyama Trust and the land under the custodianship of the Trust. Whilst the Trust has played and continues to play a very important role in overseeing the development of land in KZN, there is a need to greatly improve the alignment in planning and in development facilitation between the Trust, Provincial Government and local municipalities.
The economic development strategy of this Province depends to quite a large extent on better utilisation of land as a resource to unlock value in the economy, but this will require all stakeholders tackling the difficulties related to Ingonyama Trust land in an honest and balanced manner. The on-going challenge around unresolved land claims, as well as unsuccessful land reform programmes, is also an area that the PGDS must address, to ensure that land becomes a much stronger tool for empowerment of communities and for equitable economic development.
A further issue regarding rural housing is the contradictory practices / policies in relation to densification and the current provision of rural housing which follows existing scattered rural patterns. (p66)

Land use management is difficult in areas where no cadastral boundaries exist especially in the traditional council areas of KwaZulu-Natal.
There is thus a resulting need for land use management schemes to ensure that land use activities do not negatively impact on the natural environment, on existing developments by negating the economic potential and value of adjacent land portions/properties and the general amenity of an area. (p132)

6.9 Limpopo Provincial Development Plan (LDP)

From summary:

In 2011, 74.4% of local dwellings were located in a traditional area, compared to a national average of 27.1%. This makes communal land an important aspect of development in Limpopo. (p11)

There are 184 traditional leaders in Limpopo with a mandate to participate in matters of development affecting their communities. (p16)

The LDP Stakeholder Engagement Sessions on issues of Governance, highlighted the need to strengthen the relationship between traditional leadership and local government, which is a critical aspect of social cohesion, important for the implementation of the Spatial Planning and Land Use Management Act (SPLUMA) and essential for good governance. (p36)

Limpopo Department of Agriculture will co-ordinate the promotion of employment in this sector in conjunction with the structures of organised agriculture. ... Departmental projects, as well as communal land should be included in the strategy, with creative and innovative options such as renting of land for communal farming. (p19-20)

Achieving this vision [for the province] will require leadership on land reform, communal tenure security, financial and technical support to farmers, and the provision of social and physical infrastructure for successful implementation. (p22)

The following policy imperatives will be the focus of the coming MTSF [Medium Term Strategic Framework] period:
1. Improved land administration and spatial planning for integrated development with a bias towards rural areas;
2. Up-scaled rural development as a result of coordinated and integrated planning, re 2015-2020 source allocation and implementation by all stakeholders;
3. Sustainable land reform (agrarian transformation); 9p22-23)

Achieving this vision and these targets [for development in the province] will require more coordination between land reform and land-use, provision of communal tenure security, increased financial and technical support to farmers, and the provision of improved social and physical infrastructure. It will also require capacity building to enable state institutions and private industries to implement these interventions. Improved coordination and integration in the planning and implementation of area-based and rural development plans will be needed to achieve the vision of an inclusive rural economy. (p37)

6.10 Interim Protection of Informal Land Rights Act (IPILRA) 31 of 1996

Section 1: definitions:

"beneficial occupation" means the occupation of land by a person, as if he or she is the owner, without force, openly and without the permission of the registered owner;

"informal right to land" means -

(a) the use of, occupation of, or access to land in terms of -
(i) any tribal, customary or indigenous law or practice of a tribe;
(ii) the custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in -
(aa) the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936);
(bb) the government of any area for which a legislative assembly was established in terms of the Self-Governing Territories Constitution Act, 1971 (Act No. 21 of 1971); or
(cc) the governments of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei;

(b) the right or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established or appointed by or under an Act of Parliament or the holder of a public office;

(c) beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997; or

(d) the use or occupation by any person of an erf as if he or she is, in respect of that erf, the holder of a right mentioned in Schedule 1 or 2 of the Upgrading of Land Tenure Rights Act, 1991 (Act No. 112 of 1991), although he or she is not formally recorded in a register of land rights as the holder of the right in question, but does not include -

(e) any right or interest of a tenant, labour tenant, sharecropper or employee if such right or interest is purely of a contractual nature; and

(f) any right or interest based purely on temporary permission granted by the owner or lawful occupier of the land in question, on the basis that such permission may at any time be withdrawn by such owner or lawful occupier;

"Tribe" means -
(a) any community living and existing like a tribe; and
(b) any part of a tribe living and existing as a separate entity.

Section 2: deprivation of informal rights to land

(1) ... no person may be deprived of any informal right to land without his or her consent.
(2) Where land is held on a communal basis, a person may, subject to subsection (4), be deprived of such land or right in land in accordance with the custom and usage of that community.
(3) Where the deprivation of a right in land in terms of subsection (2) is caused by a disposal of the land or a right in land by the community, the community shall pay appropriate compensation to any person who is deprived of an informal right to land as a result of such disposal.
(4) For the purposes of this section the custom and usage of a community shall be deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate.

6.11 Prevention of Illegal Eviction from Unlawful Occupation of Land act (PIE) 19 of 1998

s1. Definitions
(xi) ''unlawful occupier'' means a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996). (vii)

s2. This Act applies in respect of all land throughout the Republic.

s4(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.

s4(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

s6(3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—
(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;
(b) the period the unlawful occupier and his or her family have resided on the land in question; and
(c) the availability to the unlawful occupier of suitable alternative accommodation or land.

7. (1) If the municipality in whose area of jurisdiction the land in question is situated is not the owner of the land the municipality may, on the conditions that it may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the municipality may determine.

6.12 Comprehensive Rural Development Programme Framework 2009

Implementation of the Communal Land Rights Act, 2004 (CLaRA) [that has been repealed] in order to stimulate economic growth in traditional communities, especially those in the former homeland areas, and promoting efficient and sustainable use of land and natural resources. The majority of the Communal areas are characterised by intense poverty. The Department therefore has an obligation to ensure that its measures ultimately result in the broader socio-economic development of the communal areas. The higher order objective of the programme is the social and economic development of the affected persons and communities. The provision of legally secure rights in land will contribute towards the socio-economic growth of the communal areas. Directly, this means that people will be able to use the newly acquired title to land as surety in order to participate effectively in the markets for the factors of production, distribution of the products and the consumption of the goods and services. (page 9)