

**SUBMISSION TO THE PORT FOLIO COMMITTEE FOR LAND AND AGRICULTURE
by**

**LEGAL RESOURCES CENTRE
on**

THE COMMUNAL LAND RIGHTS BILL [B 67 – 2003] (CLRB)

10 November 2003 – second version, including submission on Mineral Rights

INTRODUCTION:

The Legal Resources Centre is a non-profit public interest law firm. Much of our work is devoted to representing poor rural communities, and our comments on the Communal Land Rights Bill are made in the light of such experience.

On 25 October 2002 the LRC submitted comments to the Director General, department of land affairs on the 14 August 2002 draft CLRB published in the GG for comment. At the time we informed the DLA that we were concerned that the Bill, if enacted would adversely affect communities and their members with insecure tenure in the former homelands and other communal land.

We noted that our submissions were also directed at highlighting constitutional aspects that have been neglected in the Bill. We noted that unless the constitutional aspects were addressed, the Bill may upon enactment face challenges on the grounds that it violates the equality rights entrenched in the Constitution. We note that it may also be open to challenge because it does not give effect to the section 7(2) requirements in respect of section 25(6).

At the time we noted that we believed that certain matters of principle or points of departure and their logical implications should also be addressed.

We are still concerned about the implementation implications of the CLRB. These include the budgetary implications of law reform, the administrative and other support required for a very large number of community administrative structures envisaged to put communal land on a sound management footing, the role of local and provincial authorities and NGOs.

The CLRB is clearly open to Constitutional challenge.

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A – C: POINTS OF DEPARTURE ON WHICH THERE ARE BROAD AGREEMENT.

A. The establishment of a unitary non-racial system of land rights where all rights holders are afforded equality under the law.

1. Our Constitution causes a break with the past dual system where "white" property rights were afforded protection through state administrative support and apartheid created or modified rights or permits which were less important, insecure and economically invisible.
2. The property clause of the Constitution protects ownership and other property rights, and mandates the transformation of insecure tenure to legally protected and non-discriminatory tenure. The White Paper is unapologetically committed to the eradication of the distinction between black and white land rights.
3. The distinction between black and white rights is the result of colonial and apartheid law, policy and practice that denied the rights of black people and affirmed the interests of whites.
4. The import of the Constitution and new administrative justice law is that authorisations and permits issued by the state and for that matter community land holding structures must comply with new procedural and substantive requirements to ensure equitable and non discriminatory outcomes.

5. The obligations of the state go further where it assumed the power to administer land belonging to the people who originally occupied it. The state as trustee of land must act to protect the asset, it must act in the interests of and to benefit trust beneficiaries and it has legal duties towards the trust beneficiaries. Current jurisprudence not only questions the notion of unqualified state trusteeship of communal land, but asserts that breaches of the fiduciary duty that ordinarily arises from trusteeship may confer benefits on land occupants in the form of either secure tenure of the land itself or damages.
6. The point is that new communal rights must fulfill certain constitutional, policy and legal criteria. The CLRB is similar to the Upgrading of Land Tenure Rights Act of 1991¹ in a different guise.

Like ULTRA, the CLRB read in conjunction with the Traditional Leadership and Governance Framework Bill now provides us with chiefly governance instead of democratic governance. Similarly, the Communal Property Associations Act of 1996 provides for community and membership (private) ownership of communal land, but it makes wholly inadequate provision for security and promotion of tenure for members. The CPA Act was designed for greenfield occupation and rights allocation and is largely inappropriate for occupied situations.

B. The rights in land that require security and legal protection go beyond traditional private law definitions of land rights.

1. "Real rights" (ownership and rights derived from it), embryonic rights susceptible of registration and statutory permits (issued by "homeland administration" systems), do not encompass the full category of rights that deserve attention.
2. Beneficial occupation indicates the intention to acknowledge even forms of possession not otherwise protected. The Land Claims Court has interpreted rights in land to include the right to inherit (Dulabh) and rights derived from actual occupation coupled with a traditional governance system of allocation (Nchableleng). The Land Claims Court has also adjusted the nature of the right previously held by claimants from being beneficial occupiers and trust beneficiaries under a Church, to the transfer of ownership to a Communal Property Association (Elandskloof and Kranspoort).
3. Consistent with the restitution approach, the tenure reform list of rights should at least include the basic possessory rights, customary law interests, and trust beneficiary arrangements.
4. The point is that the communal rights and interests that require protection must be identified and defined and they must then be treated in an even-handed manner. If not, the existing discriminatory hierarchical model is perpetuated.
5. If rights overlap, the overlap must be resolved by further definition and restriction and if practicable or necessary, redress. But it serves no purpose to create a new hierarchy, and treating some rights as better than others.

¹ ULTRA 1991 provides that, once majority consent is given, communal land can be transferred to a tribe. Individual old order permit holders could have their rights upgraded. The Constitution of 1996 and the trusteeship responsibilities of the state now require progressive state action and the full recognition of both formal and informal rights of individuals.

6. It serves no purpose to leave the definition of rights to unstructured enquiries or investigations or consensus rule making exercises. The generic definitions of all rights that are covered by the Bill must be stated upfront, recognised and protected by the legislature.
7. The processes and administrative steps in the CLRB cause some rights to be worse off than others unless the scheme of the Bill is changed to ensure the protection of rights at a minimum, so that the inquiry process, the community rule making process and the deeds allocation process may not cause arbitrary internal dispossession, or cause certain rights to be afforded less protection, affirmation and promotion than others.
8. The reliance on a discretionary and purely administrative process to identify and give content to the rights and interests that fall under the scope of the Bill requires that the Bill must adequately define the relevant rights and interests to guide administrators in their decisions.

C. Rights must be given equal protection and ‘real right’ content:

1. The basic content of all new rights of a holder must go beyond protection against vindication by the owner and interference by others (such as the “protective shield approach adopted in the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA)).
2. IPILRA protects insecure de facto rights against otherwise dominant rights... but it does nothing more. Right holders must, as of right, be able to have their rights declared and confirmed (by a court of law or by way of an administrative procedure). This should be the core object and function of new unitary communal tenure law. Non-discriminatory content of rights should address transferability, benefit and enforceability. Otherwise we perpetuate lesser rights.
3. It is not good enough to defer transferability, benefit and enforceability of the new communal rights to a vague consensus rule making process. That may make for more insecurity rather than security.²
4. All rights in communal land do not have the same content. Certain rights are more exclusive than others, such as the household’s right to a homestead or agricultural allotment for planting. Some rights relating to less exclusive and more shared usage are by their nature interdependent on the reciprocal rights of others. This is particularly relevant where rights are exercised to a shared and limited resource such a grazing or where different use rights to a portion of land overlap, for instance sowing allotments which revert back to becoming a portion of the grazing commonage during the dry season. The right to an exclusive homestead plot may afford the holder a claim to a less exclusive grazing right on the communal grazing commonage. The grazing right however cannot be extricated from either the homestead right in the village or the grazing rights of other holders on the commonage. The grazing right is thus derived from both (a) a primary homestead and garden or farming plot, and (b) the grazing rights of other members. In this sense the grazing right is derivative or secondary.
5. Different land uses give rise to different types of rights and different types of rights require different systems of rights administration. All rights are not susceptible to “easy”

² The practice on the ground is that internal transactions happen. Transactions with limited long-term effect on rights such as seasonal sharecropping arrangements must be accommodated and not outlawed or delayed until final formal rulemaking and registration processes are complete. On the other hand external transactions require procedural oversight.

registration in the deeds office. This does not mean that such rights should not or cannot be recognised and protected within a unitary system.

6. The thrust of the Bill is to afford certain rights a higher status than others. Old order rights of exclusive use may be defined by statute such as the R188 regulations³ providing for PTOs. These will be afforded a fast track validation procedure in the CLRB⁴ and defined in deeds of communal land rights and are registered in the deeds office. They are enforceable against “the world at large”.
7. Informal rights which by their nature and content are non-exclusive, shared and dependent on and limited by the reciprocal rights of others, cannot necessarily be registered in the deeds office. They are afforded second-rate status mediated through community rules and the discretionary powers of land administration committees and traditional councils.⁵

D. The failure of the CLRB to give effect to 25(6) of the Constitution:⁶

The CLRB is constitutionally flawed because it fails to:

- give effect to the underlying constitutional right created in section 25(6);
- determine the extent of the right;
- give constitutionally consistent guidance to decision-makers.

D.I Failure to give effect to the underlying constitutional right and, D.II Failure to determine the extent of the right

- 1.1 Section 25(6) and 9 of the Constitution obliges Parliament to adopt legislation that will determine the extent to which a person or community will be entitled to legally secure tenure or to comparable redress because their rights are legally insecure as a result of racially discriminatory laws or practices.
- 1.2 On the face of it, clause 4 of the Bill appears to be the pivotal clause:

“An old order right which is legally insecure as a result of past racially discriminatory laws or practices as contemplated in section 25(6) of the Constitution must be legally secured in terms of this Act.”
- 1.3 Clause 4 does however not create a right that may be enforced to secure tenure and in so doing, give effect to section 25(6). Clause 4 also makes no reference to comparable redress. Clause 4 merely provides for a discretionary system for the conversion of certain old order rights to other forms of tenure. The rest of the Bill similarly does not contemplate any right held by the people who qualify.

³ Black Areas Land Regulations R188 of 1969 made under the Black Administration Act of 1927 and the Land Act of 1936.

⁴ Clause 18(4)(c)

⁵ clause 24

⁶ The points made here is a summary of the opinion provided by Adv Gilbert Marcus SC as instructed by the Legal Resources Centre for the Human Rights Commission.

- 1.4 Clause 18 gives the Minister extensive discretionary powers to determine whether the rights of the holders of old order rights are to be converted into new order rights, and if so, what the content and extent of those new order rights will be.
- 1.5 Clause 12 empowers the Minister to determine an award of comparable redress to be given to a holder of an old order right whose right, in the discretion of the Minister, cannot be legally secured.
- 1.6 Clause 13 merely permits the Minister to enter into an agreement with the holder of an old order right to determine the terms subject to which such a right may be cancelled.
- 1.7 The Bill does therefore not give effect to the basic requirement of sec 25(6) of the Constitution.
- 1.8 The Bill does therefore not confer any right or entitlement to secure tenure or comparable redress neither does the Bill determine the extent of to which the tenure is to be made legally secure or the extent to which comparable redress should be awarded. Whether a person is entitled, and the extent to which a person is entitled remains entirely within the Minister's discretion.
- 1.9 The mechanism created by the Bill is inherently problematic.
- 1.10 Section 25(6) of the Constitution confers a right. The Bill, however, provides that the effect that may be given to the right is entirely within the Minister's (or his or her delegate's) discretion.
- 1.11 The Constitutional Court, albeit in a different context, has indicated that rights cannot be dependent upon the exercise of a discretion. See: **S v Mbatha; S v Prinsloo 1996 (2) SA 464 (CC)**, the Court was concerned with a reverse onus in the Arms and Ammunition Act 75 of 1969. Langa J observed at para 23:

"... Thirdly, and in itself conclusively, it is clear that the presumption could lead to the conviction of innocent persons. Their rights are enshrined in the Constitution and do not depend on the discretion of the police or the Attorney-General to prosecute only in cases where the accused are in fact guilty."

See also: S v Zuma and Others 1995 (2) SA 642 (CC) at para 28; and Attorney-General v British Broadcasting Corporation [1980] 3 All ER 161 (HL) at 171 j - 172 a

- 1.12 It follows that the Bill is in the first instance inconsistent with the Constitution because it seeks to transform a constitutionally guaranteed right into a discretionary benefit, the granting of which is entirely subject to Ministerial discretion.
- 2.1 Whereas the Constitution states that the extent of the right to legally secure tenure or comparable redress is to be determined by an *Act of Parliament*, the Bill states that the extent of the right is to be determined by the *Minister*.
- 2.2 The Constitution does not require that the Act should describe precisely what tenure or comparable redress each community or individual affected is to receive. What it requires is that the Act should describe the content of the right to secure tenure or comparable redress, who holds that right, what the criteria are for determining the extent of secure tenure or comparable redress, and how the right is to be claimed and enforced.

- 2.3 The Act does not set out any method by which it may be objectively determined whether a particular individual falls within the class of those who are to receive secure tenure or comparable redress, or the extent of that tenure or redress. These matters are left entirely in the discretion of the Minister.
- 2.4 An example of how objective criteria are set in law to determine whether a claimant may qualify for redress is to be found in the **Restitution of Land Rights Act** 22 of 1994. The Act for instance sets criteria for who qualifies for the right, the nature of the right, how the right is to be exercised, and how any disputes over these matters are to be determined. Similar detailed provisions are also to be found in the tenure legislation concerned with the **Transformation of Certain Rural Areas Act**, 1998. The criteria that the minister has to take into account to satisfy her are set out in Section 3(2) of Act 94 of 1998 and are recorded below.
- 2.5 The Bill, if enacted, will therefore not be an Act of Parliament which determines the extent of the right to legally secure tenure or comparable redress. It therefore does not meet the requirements of section 25(6) of the Constitution.

D.III Failure to give constitutionally consistent guidance to decision-makers

- 3.1 The third difficulty with the Bill is that it makes the realisation of constitutional rights subject to the exercise of official discretion in a manner which does not give constitutionally adequate guidance to those officials as to how they are to exercise that discretion.
- 3.2 Clause 14(2) sets out various matters which are to be enquired into by the rights enquirer. These are presumably matters which must be considered by the Minister or her or his delegate when making a determination in terms of clause 19.
- 3.3 Clause 19(1) and (4) set out certain matters which must be considered by the Minister or her or his delegate when making a determination.
- 3.4 What is striking in this list of matters to be considered, is a critical omission: the need to give effect to the constitutional right to legally secure tenure or comparable redress.
- 3.5 The Bill applies to a large part of the land mass of South Africa (clause 2). The land tenure rights and comparable redress of literally millions of South Africans will have to be determined. It is therefore inevitable that the Minister will have to make extensive use of this power of delegation.
- 3.6 In **Dawood and another v Minister of Home Affairs and another; Shalabi and another v Minister of Home Affairs and another** 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) the Constitutional Court held that where a law gives an official an administrative discretion which may affect the constitutional rights of a person who is affected, the law must instruct the official to exercise the discretion in a manner which achieves the realisation of the right concerned.
- 3.7 There can be no doubt that, in the words of the Constitutional Court, the Bill does not give guidance to decision-makers to exercise their powers in a manner that would protect the constitutional rights of the people affected. While the Bill identifies a range of relevant factors which the Minister or his or her delegate must take into account (with certain notable omissions), it is the very open-ended nature of these factors which will inevitably lead to inconsistencies in decision-making.

3.8 For the above reasons, the Bill is clearly inconsistent with the Constitution.

E. The CLRB and the rights of women:

Main Points:⁷

1. The Communal Land Rights Bill does not give effect to the constitutional obligation on the state to respect, protect, promote and fulfil the right to gender equality. On the contrary, it is likely to have the effect of entrenching and aggravating the existing inequality of women with regard to land rights.
2. Our focus is on whether the Bill addresses the issue of gender equality in the manner required by the Constitution. For the reasons given, it does not do so.
3. It needs to be added that the Bill has a further and related fundamental flaw, which arises from the double discrimination which African women suffer.
4. The insecure tenure held by African women is not only because they are women - it is also because they are African. Other women are not subjected to insecure tenure by the Black Administration Act, the Development Trust and Land Act, and the Black Areas Land Regulations.
5. It follows that African women are, in the words of section 25(6) of the Constitution, people 'whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices'. They therefore have a constitutional right to tenure which is legally secure or to comparable redress.
6. The Bill does not provide African women with legally secure tenure or comparable redress. The Bill is therefore inconsistent with the constitutional requirement that Parliament 'must enact the legislation referred to in subsection (6)', to provide them with legally secure tenure or comparable redress.

How can the rights of women be recognized and affirmed? Procedural rights and substantive rights that require mediation through institutional arrangements will not satisfy the expectations and the constitutional requirements of non-discrimination and promotion of equality.

The only way in which the rights of women (and by the same token, informal rights) can get a running start is to insist that the law formally recognises and affords protection to the de facto occupation and use of land by women. Women were generally excluded from the apartheid and post apartheid permit system. Women's land use rights and practice must be recognised up front, and be accommodated in the ensuing inquiry and registration processes.

⁷ These points are in summary from an opinion prepared by Geoff Budlender (LRC) for the Commission of Gender Equality.

F. THE CLRB, TLGFB AND LOCAL GOVERNMENT:⁸

F.1 Summary of fundamental flaws:

- (a) The setting up of duplicate and overlapping decision making structures in the CLRB masks the fact that the practical effect of the Bill will be that new order right holders will not exercise ownership powers in terms of the determinations made by the Minister but that they will in fact be governed by LACs in terms of community rules. This conceptual confusion will give rise to host of problems.
- (b) Read together, the CLRB and the TLGFB establishes a fourth sphere of government which is not recognised by the Constitution, particularly because it will be an undemocratic and unaccountable fourth sphere of government.
- (c) The CLRB entrusts the Minister, in response to the report by the inquirer, or on her own volition, to involve him- or her in planning decisions when an application is made for the transfer of land. Local government is responsible for such planning and development decisions and not the Minister. The consultation requirements with local government in respect of planning and development are too weak to give effect to local government executive powers in respect of these functional areas. The CLRB permits the Minister to usurp municipal powers and functions without allowing municipalities to perform their functions in terms of existing planning and development legislation on communal land.
- (d) The same applies in respect of land use determination. The Minister's power to make land use determinations has in fact been extended in the new version of the CLRB at the expense of local government's powers.
- (e) The effect of the CLRB may further be to '*compromise or impede the ability of municipalities*' to comply with their constitutional and statutory duties to provide municipal services.

F.2: CONCEPTUAL CONFUSION BETWEEN THE MINISTER'S POWERS AND THE POWERS OF THE LACS:

1. The CLRB vests key powers respectively in the Minister and in Land Administration Committees (LACs). The two sets of powers are interwoven, duplicated and in certain respects they overlap.
2. In terms of clause 18(3)(d), the Minister has the power to determine whether old order rights will be confirmed, converted into full ownership or new order rights, or cancelled. The Minister must determine the:

'the location and extent of the land to be transferred',⁹

'nature and extent of the new order right'¹⁰

'holder or holders of a new order right'.¹¹

⁸ This part of the submission is based on an opinion prepared for the LRC by Adv. Johan De Waal.

⁹ Clause 18(2).

¹⁰ A new order right means a tenure right in communal land or other land '*which has been confirmed, converted, conferred or validated by the Minister in term of section 18*'. See clause 1.

3. The Minister also has the power to 'reserve rights to the State'¹² and stipulate '*land-use conditions*'.¹³
4. After making a determination, the Minister must:
 - transfer the entire communal land to the community¹⁴ in terms of clause 6 '*subject to the conditions determined by her*';
 - on behalf of such community, have a communal general plan prepared, registered and a communal land register opened in terms of the Deeds Registries Act;¹⁵ and
 - transfer new order rights in terms of a Deed of Communal Land Right to the person or persons entitled to such rights.¹⁶
5. By focusing on the Minister's powers to determine rights, to determine holders and to 'transfer' new order rights, the CLRB seems to leave very little for the LACs to do.
6. But this reading of the Bill makes little sense if one takes the powers given to LACs seriously. In terms of clause 21(1) a community is obliged establish a LAC – it has no choice. In terms of clause 24(1), '*the LAC represents a community owning communal land and has the ownership and administrative powers conferred by its rules*'.
7. The rules must first be approved by Director-General and then registered. Similar to the Minister's determinations under clauses 18 and 6, the community rules deal with land administration and land use.¹⁷

¹¹ Proviso to clause 18(4).

¹² Clause 18(3)(c)(ii) and (4)(a).

¹³ CLRB makes no provision for compensation or for obtaining community or affected rights holder consent. Such a 'with holding' or reservation will amount to an unlawful dispossession of communal land unless the permission is obtained. A 'reservation' by the state may be permitted without community consent, but then the land or rights to be obtained will have to be formally expropriated subject to meeting the section 25(2) and (3) Constitutional requirements, i.e. for a public purpose or in the public interest and upon payment of just and equitable compensation. The same applies to the cancellation of old order rights. In cases where the where the history and customary law tenure amounts to indigenous title which may well be in the region of 50% of the ex-homeland territories, such reservations will have to be effected by expropriation if permission is not granted.

Section 2(1) of the Interim Protection of Informal Land Rights Act 31 of 1996, provides that: Subject to the provisions of subsection (4), and the provisions of the Expropriation Act, 1975 (Act 63 of 1975), or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent.

¹⁴ The community acquires juristic personality upon the registration of its rules (Clause 3).

¹⁵ Clause 6(b)(ii) and (ii).

¹⁶ Clause 6(b)(iii) of the CLRB.

¹⁷ Clause 19 of the CLRB. In terms of the definition of a 'community' rights to land are derived from the shared rules, which determines 'access to land held in common by such group'.

8. Similar to the Minister, the LAC must '*take measures towards ensuring*' the allocation of new order rights¹⁸ and the registration of communal land and of new order rights.¹⁹
9. In the exercise of its powers and the performance of its duties, the LAC must (similar to the Deeds Registry Office) establish and maintain registers and records of all new order rights and transactions affecting such rights as may be prescribed or as may be required by the rules.²⁰
10. The community is therefore also obliged to exercise its ownership and land administrative powers through the LAC. Right holders would not, as one would have thought, exercise their rights in accordance with the terms registered by the Minister.
11. Since the LAC represents the community in terms of clause 24(1) it is the structure that either approves or rejects the application by a new order right holder for the conversion of a his / her right to ownership in terms of clause 9(2). As representative of the community, and, again, similar to the Minister, the LAC is empowered to impose any condition or reserve any right in favour of the community.
12. A tension is therefore created in the CLRB between the powers of the Minister and those of the LACs. The tension in the CLRB is the result of conceptual confusion.
13. On the one hand the CLRB purports to give effect to section 25(6) of the Constitution to ensure that a person's or a community's tenure of land is made legally secure or to provide comparable redress. For this purpose, the drafters chose to confer wide discretionary powers on the Minister with hardly any role to be played by the 'community'.²¹
14. On the other hand, as the CLRB does not envisage continued involvement of the Minister, but creates the LAC as a powerful body with interwoven, duplicate and overlapping powers to those of the Minister.
15. The tension in the CLRB does not bode well for the new order right holders who wish to exercise their ownership powers as determined by the Minister or otherwise. Rather than to allow them to do so, the CLRB allows the LACs exercise ownership powers and public administrative powers in terms of community rules which may well be different from the determinations made by the Minister. By providing parallel powers to the LACs, the CLRB provides for the determinations made by the Minister to be side-stepped. If the LAC can

¹⁸ Clause 24(3)(a).

¹⁹ Clause 24(3)(a)(ii). Note that the allocation of new order rights by the LAC may also take place before transfer. In that sense the Minister and the LAC will share responsibility for the initial executive action and decision in the statutory scheme of conferring tenure security. The LACs is then given powers to allocate rights and register rights and transactions (in terms of) community rules without the support of the Minister. These powers are conferred by statute. Conventionally these powers are public functions. Here they are now conferred on the representative committee of a private legal entity, which holds land in private ownership for the benefit of its members, and, because the Minister is no longer in the picture, has as its main function the obligations to provide legally secure tenure. The LAC and not the state is therefore placed under the obligation to respect, protect, promote and fulfil section 25(6) and other rights within the Bill of rights as envisaged in section 7(2) of the Constitution.

²⁰ Clause 24(3)(b).

²¹ As defined in clause 1.

govern in terms of its own, parallel set of rules, the community may never pluck the fruits of the Minister's efforts to secure their rights.

16. In this manner, the CLRB interposes the LACs between the new order right holders and their ownership rights. Viewed from this angle, the communal general plan determined by the Minister will have little significance for new order right holders. It is unlikely to say much and even less likely to have any practical effect.²²

F.3 THE CREATION OF AN UNDEMOCRATIC AND UNACCOUNTABLE FOURTH SPHERE OF GOVERNMENT:

17. Given the fact that the tracts of land to be transferred under the CLRB are so 'extensive' (at least 13% of the total surface of the Republic), the 'club' of communal owners so large (more than 13 million people will be affected) and the 'house-rules' so important and pervasive, the likely effect of the CLRB will be to create LACs as a fourth sphere of government. This was clearly a concern with the August 2002 draft CLRB.
18. The issue becomes more serious under the CLRB as introduced. The CLRB now introduces traditional councils as default LACs.²³ The Traditional Leadership and Governance Framework Bill [B 58 -2003] ('the TLGFB') however adds additional public powers and functions to the traditional councils.
19. The question whether a fourth sphere of government is established is dealt with first, whereafter it is explained why such a new sphere does not fit in with the basic features of the 1996 Constitution, such as democracy and accountability.

(i) Is a fourth sphere created by the CLRB and the TLGFB?

20. As stated above, the ownership and administrative powers and functions of the LAC under the CLRB are set out in clause 24, read with clause 19, of the Bill. The powers and functions of the traditional councils under the TLGFB are set out in clause 4, read with clauses 17 and 18.
21. Broadly speaking, the CLRB provides for the conferral of all the powers traditionally associated with private ownership of land onto LACs. These include an owner's ordinary land management and resource maintenance functions, land allocation functions, such as the conclusion of leases or other land availability agreements. In addition, the CLRB also vests LACs with public land administrative powers and functions as noted.²⁴

²² A range of important land use rights are in any event not capable of registration in the deeds office such as rights to shared use for grazing purposes, wood lots, forests, medicinal plant harvesting such as boegoe, hoodia, indigenous wild growing tea species, seasonal specific sowing rights on communal areas which revert back to communal grazing lands, etc.

²³ Clause 21(2) of the CLRB provides:

'If a community has a recognised traditional council, the powers and duties of the land administration committee of such community may be performed and exercised by such traditional council.'

²⁴ Regulating the administration and use of communal land (19(2)(a)); the allocation of new order rights (24(3)(a)(i), the registration of new order rights (24(3)(a)(ii)); and the establishment and maintenance of registers and records and recordal of transactions (24(3)(b).

22. The (public) administrative powers conferred by the clauses 9 and 24 of CLRB are the core powers of the fourth sphere. Even if the Minister fulfils all the functions envisaged by clause 18 and 6, the LAC still retains these powers under the CLRB. The foundation for the fourth sphere of government is therefore laid in the provisions of the CLRB.
23. The building blocks for the fourth sphere are put in place when a LAC is established as a traditional council. The TLGFB boosts the public powers of the LACs by providing for them to be established as traditional councils, and by conferring status and a further set of public functions on traditional councils.
24. The most important of the powers are contained in clause 4(1)(a) of the TLGFB, in terms of which a traditional council is empowered *inter alia* to administer '*the affairs of the traditional community in accordance with custom and tradition*'.²⁵ The council is also to assist, support and guide traditional leaders in the performance of their functions,²⁶ which include the functions conferred by customary law, customs and statutory law.²⁷
25. In addition, the national government or a provincial government may through legislative and other measures provide a role for traditional councils or traditional leaders in a number of other respects, including land administration, agriculture, the management of natural resources, etc.²⁸
26. Whenever organs of state within the national or a provincial government considers allocating a role for traditional councils in one of these respects, it must *inter alia* "*strive to ensure that the allocation of a role or function is accompanied by resources and that appropriate measures for accounting for such resources are put in place*".²⁹ The organ of state must monitor the implementation of the function in order to ensure that it is consistent with the Constitution and that the function is being performed. If this does not happen, any resource given to a traditional council to perform that function may be withdrawn.³⁰ While not insignificant, it should be noted that none of these supervisory powers exist over the exercise of administrative powers by traditional leaders in terms of custom and tradition. The state has divested itself almost completely of the responsibility to ensure that ownership of the land serves the public good.
27. As far as the status of the fourth sphere is concerned, in clause 5 of the TLGFB, under the heading, '*Partnerships between municipalities and traditional councils*' it is provided that national government and provincial government must promote partnerships between municipalities and traditional councils through legislative and other measures.
28. The elevated status of the traditional councils and traditional leaders is further recognised by clause 6 of the TLGFB which provides that '*A provincial government may adopt such legislative or other measures as may be necessary to support and strengthen the capacity of*

²⁵ See, also, s 17(1) of the TLGFB, in terms of which 'A traditional leader performs the functions provided for in terms of customary law and practices of the traditional community concerned, and in applicable legislation.'

²⁶ Clause 4(1)(b) of the TLGFB.

²⁷ Clauses 4(1)(l) and 17(1) of the TLGFB.

²⁸ Clauses 18(1) of the TLGFB.

²⁹ Clauses 18(1) of the TLGFB.

³⁰ Clause 18(3) and (4).

traditional councils within the province to fulfil their duties’. This provision reminds of section 154(1) of the Constitution, where a similar duty is imposed on national government in respect of municipalities. In fact, it is difficult not to conclude that the TLGFB as a whole is geared towards substituting local government, functioning under the laws of the land, by traditional councils and traditional leaders, functioning in terms of customs and tradition, in respect of communal land.

29. Read together, the CLRB and the TLGFB provide for the exercise of public administrative powers and ownership powers by traditional leaders in terms of custom and tradition. In this form the Bills create a fourth sphere of government.

(ii) Does the Constitution recognise a fourth sphere of government?

30. The only recognition of a role for traditional leadership is to be found in Chapter 12 of the Constitution, most pertinently in section 212(1) which provides that ‘*National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities*. This provision must be read with s 211(1) where it is provided that ‘*The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution*.’
31. Chapter 3 of the Constitution, which sets out the spheres of government in the Republic, makes no mention of a fourth sphere of government in the form of traditional councils. On the contrary, it provides for only three spheres.
32. The structure of the Constitution therefore does not envisage a fourth sphere of government in the form of traditional leaders. It recognises three spheres of government and all organs of states must fall within these spheres. Legislative and executive authority is divided amongst three spheres,³¹ and revenue is raised and divided amongst three spheres, and not four.³²
33. Municipalities established throughout the territory of the Republic constitute the (third) local sphere of government.³³ As stated above, section 212(1) envisages a role for traditional leadership as an institution at local level on matters affecting local communities. In short, section 212 envisages traditional leadership to be an organ of state within the local sphere of government. As described above, the CLRB and the TLGFB creates an autonomous fourth sphere of government, in some respects subject to national and provincial control. This was not the intention of the drafters of the 1996 Constitution.³⁴
34. In any event, the fourth sphere in the form provided for in the CLRB and the drafters of the Constitution did not envisage the TLGFB.

³¹ See, in respect of the legislative authority of the Republic, s 43; in respect of executive authority, s 85(1) (national), s 125 (provincial) and s 156 (local).

³² Section 214.

³³ Section 151(1).

³⁴ See *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (First Certification judgment)* 1996 (4) SA 744 (CC) para 195, where the Court stated the purpose of the Constitutional Principles, in respect of traditional leadership were to recognise “a degree of cultural pluralism with legal and cultural, but not necessarily governmental, consequences.”

(iii) Democracy and accountability and the CLRB and the TLGFB

35. The principle of democracy is referred to at several places in the Constitution.³⁵ Indeed the very first section of the Constitution, section 1, provides that the Republic of South Africa is one, sovereign, *democratic* state founded on, amongst others, the value of 'universal adult suffrage, a national common voters role, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness'.
36. References to the principle of democracy in the Constitution are often followed by references to the ideas of openness, responsiveness and accountability.³⁶ The principles of democracy and accountability are therefore regarded to be amongst the 'basic features', which form the blue print of the new constitutional order. Is the fourth sphere compatible with the principles of democracy and accountability? Even a cursory overview of the Bills reveals that this is not the case.
37. Where the community has no recognised traditional council, clause 23(2) of the CLRB provides that the members of the land administration committee '*must be persons not holding any traditional leadership position and must be elected by the community*'. Provision is then made in terms of clauses 23(3) and (4) that one third of the membership of the LAC must be women, that the interests of vulnerable community members including women, children, the youth, the elderly and the disabled must be indirectly represented, and that certain organs of state, including municipalities may designate non-voting members to serve on the land administration committee.
38. Where a community has a recognised traditional council, the picture looks quite different. The recognition of communities as a traditional communities and the establishment and recognition of traditional councils are then governed by clauses 2 and 3 of the TLGFB read with clauses 23(4) and (5) of the CLRB. In terms of these provisions, 60% of the traditional council / LAC will not be elected and a sunset period of one year is provided to the councils to incorporate the elected component (40%) and women to join the council.³⁷
39. A bright line distinction is therefore drawn between communities with a recognised traditional council and those without such council. In the case of the former, the traditional council will become the LAC. In the case of the latter, traditional leaders are precluded from participating in land administration and the LAC will be elected. The point is that in a situation where a community has a recognised traditional council, the traditional council members will insist that a traditional council and not an ordinary LAC be established, because they will not be afforded any representation. The change in the 8 October draft CLRB in clause 21(2) from "the duties of the LAC *must* be exercised" to "*may*" is of little if any consequence.

³⁵ See the preamble, and ss 1, 7, 36, 39, 57, 59, 61, 70, 72, 116, 118, 152, 160, 195, 234, 236 and the whole of Chapter 9.

³⁶ See eg s 1(d) where 'a multi-party system of democratic government, to ensure accountability, responsiveness and openness' is entrenched as one of the founding values. See also the preamble ('a democratic and open society'); s 195(1) ('**Public administration** must be governed by the democratic values and principles enshrined in the Constitution, including ...people's needs must be responded to, and the public must be encouraged to participate in policy-making. Public administration must be accountable. Transparency must be fostered by providing the public with timely, accessible and accurate information.')

³⁷ Clause 25 of the TLGFB.

40. Given the importance of the principle of democracy in the Constitution, it is not surprising that the preamble to the CLRB provides that the purpose of the CLRB is to provide for the '*democratic administration of communal land*'.³⁸ Similarly, the preamble to the TLGFB provides that the '*institution of traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights so that democratic governance and the values of an open democratic society may be promoted*'. However, by entrenching a default position in terms of which the 60% of the LAC will not be democratically elected, the CLRB and the TLGFB can hardly be said to give effect to these stated objectives. On the contrary, the late replacement of elected LACs with unelected traditional councils violates the Constitution in that it entrenches the position of an undemocratic fourth sphere of government.
41. If not elected, the next question is whether traditional leaders and traditional councils are made accountable to the community in any other sense. The most important role foreseen for the community itself is to be found in the adoption, revocation or amendment of community rules, in terms of clauses 19 and 20 of the CLRB. This is to take place in terms of a process yet to be prescribed. While the rules are binding,³⁹ the question is whether the community will be able to enforce these rules against the traditional leaders.
42. The CLRB sets up a weak supervisory mechanism over LACs (including LACs established as traditional councils), in the form of Land Rights Boards.⁴⁰ Except for the provision of clause 24(2)⁴¹, no other provision is made that compels the LRB to supervise LACs. The invitation to liaise at clause 24(3)(f) '*liaise with the relevant Board*' and for the LRB to (28(1)(b)) '*liaise with all spheres of government, civil institutions and other institutions;*' does not constitute supervisory powers.
43. The TLGFB provides equally little opportunities for communities to hold traditional councils and traditional leaders accountable. One drastic option for the community would be to motivate for the withdrawal of the recognition as a traditional community as envisaged in clause 7 of the Bill. This would obviously be an option of last resort, which will lead to great instability. In any event it is not clear on what basis a dissatisfied community will be able to make use of this option.
44. The community itself plays no role in the removal of the traditional leaders. In terms of clause 14 it is the Premier, acting on the advice of the royal family, which is made responsible for the removal of traditional leaders. The Commission on Traditional Leadership Disputes and Claims are also of little assistance for the community, as it is only deals with the types of disputes listed in clause 23(2)(a) of the TLGFB such as contests over the title or right to a traditional leadership position. Disputes concerning customary law or customs must be resolved internally, failing which the dispute may be referred to the relevant provincial house

³⁸ This sits uncomfortable within the rest of the structure of the CLRB. For example, it is difficult to reconcile clause 24, which provides that the 'term of office of the members of a land administration committee is determined by community rules but may not exceed a period of five (5) years' with entrenching the position of unelected traditional leaders.

³⁹ Clause 19(2) of the CLRB.

⁴⁰ Chapter 8 of the CLRB.

⁴¹ 24(2) A decision by a land administration committee which has the effect of disposing of communal land or a right in communal land to any person including a community member does not have force and effect until ratified in writing by the Board having jurisdiction.

of traditional leaders.⁴² It is only if the dispute remains unresolved, that an outsider in the form of the Premier may be called upon to resolve the dispute.

45. The system of financial accountability is also weak. Clause 4(2) of the latest version of the TLGFB leaves the issue to the provinces. The traditional council itself must, in terms of clause 4(3)(b) '*meet at least once a year with its traditional community to give account of the activities and finances of the traditional council and levies received by the traditional council.*' It is not clear what the members of community are supposed to do when dissatisfied with the manner in which their financial affairs are conducted.
46. This weak system of financial accountability stands in sharp contrast with the framework provided for the other three spheres of government in Chapter 8 of the Constitution and the applicable laws, including the Public Finance Management Act, 1999 and the Municipal Finance Management Act, 2003.

F.4 LOCAL GOVERNMENT EXECUTIVE POWERS: PLANNING AND DEVELOPMENT:

47. The exclusion of local government from decision making in the areas of planning and development, violated local government's executive powers, conferred by s 156 of the Constitution of the Republic of South Africa Act 108 of 1996 ('the Constitution').
 - 47.1 The consultation requirements with local government in respect of planning and development⁴³ are an improvement on the predecessors but remain too weak to give effect to local government executive powers in respect of these functional areas.
 - 47.2 In terms of s 156, a municipality has the *right* to administer any local government matter listed in Part B of Schedule 4 and Part B of Schedule 5. 'Municipal planning' is area listed in Schedule 4 B of the Constitution.
 - 47.3 In addition, a municipality has the right to administer any other matter assigned to it by national or provincial law. The latter provision is qualified in that a municipality *is entitled to the assignment* of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government if the matter would most effectively be administered locally and the municipality has the capacity to administer it. 'Regional planning and development' and 'Urban and Rural Development' is listed in Schedule 4 A and 'Provincial planning' is listed in Schedule 5 A.
 - 47.4 Section 155(7) permits national and provincial government to pass laws to ensure the 'effective performance' by municipalities of their functions by 'regulating' the exercise of their executive authority. It does not sanction the deprivation of a municipality's right to administer a matter and the vesting of that right in another organ of state.
 - 47.5 The CLRB entrusts the Minister, in response to the report by the inquirer, or on her own volition, to involve him- or her in planning decisions when an application is made for the transfer of land. Local government is responsible for such planning and development decisions and not the Minister.

⁴² Clause 19(1)(a).

⁴³ Clause 18(4) of the CLRB.

Although clause 18(4) is triggered whether the discretionary power in terms of s 18(3) is used or not, the clause merely requires the Minister to consider the IDP of each municipality. The Minister only needs to consult, in the weak sense of the word (i.e. considering their views) with municipalities themselves when he or she decides to reserve a right to the State or stipulate any land use or other condition.

- 47.6 It is not clear why room is not made for local government, even if only upon assignment, as envisaged by section 156(4), to take responsibility for planning decisions.

F.5 LOCAL GOVERNMENT POWERS: LAND USE DETERMINATION:

48. The CLRB allows the Minister of Land Affairs to take decisions in respect of land use determination, and thereby to usurp local government's right to perform this function.
- 48.1 A weak consultation requirement with local government has been introduced when the Minister wishes to impose land use conditions when considering the transfer of land. This is an improvement.
- 48.2 In other ways, however, the Minister's powers in respect of land use determinations have been extended. In the 2002 version, the Minister's determinations on land use had to be in the '*public interest*'. In the new version of the CLRB, the Minister, in addition to imposing a condition for a public purpose or in the public interest, may impose a land use condition in order to "*protect the affected land, rights in such land and an owner of such land and a holder of such rights*" or to '*give effect to [the CLRB]*'.⁴⁴
- 48.3 The new version therefore leaves no doubt that the Ministry of land affairs is to become the primary institution responsible for land use determination (before transfer takes place) on communal land. For the same reasons pointed out above in respect of planning and development, local government is not permitted to perform this function as envisaged by sections 156(1) and (4).

F.6 IMPEDING THE ABILITY OF LOCAL GOVERNMENT TO DELIVER SERVICES:

49. The CLRB '*compromises or impedes the ability of municipalities*' to comply with their constitutional and statutory duties to provide municipal services.
50. Local government is under a constitutional and statutory duty to provide a minimum level of municipal services to members of the local community. This is clear from the following provisions:
- 50.1 Section 152 (1)(b) of the Constitution provides that one of the objects of local government is to 'ensure the provision of services to communities in a sustainable manner'.
- 50.2 The preamble to the Structures Act provides that there is 'fundamental agreement in our country on a vision of democratic and developmental local government, in which municipalities fulfill their *constitutional obligations to ensure sustainable, effective and efficient municipal services, promote social and*

⁴⁴ Clause 18(4)(a).

economic development, encourage a safe and healthy environment by working with communities in creating environments and human settlements in which all our people can lead uplifted and dignified lives (our emphasis).

50.3 Section 73(1)(c) of the Systems Act provides, under the heading 'General Duty' that:

'A municipality must give effect to the provisions of the Constitution and- ...

(c) ensure that all members of the local community have access to at least the minimum level of basic municipal services'

51. The question is whether the transfer of land into private ownership, on which large numbers of people reside, as envisaged in the CLRB, will prevent a local authority from providing municipal services to the communities living on communal land. More particularly, the question is whether the implementation and effect of the CLRB will be to 'compromise or impede the ability of municipalities'⁴⁵ to comply with their duty to provide municipal services.
52. In practice, municipal services are usually delivered up to the boundary of a private land holding. Internal reticulation is the responsibility of owner of the land. It is often stated that the fact that the land vests in private ownership poses a problem for the provision of services. The local authority that effects improvements to land for the purposes of services (dams, sewerage works, etc) would want to own the land on which the improvements are made. Township establishment procedures are therefore designed to ensure that upon the opening of a township register, ownership to streets and public places vest in the local authority. If this did not happen, the erection of infrastructure and maintenance would amount to the enrichment of the private landowner. The second and bigger problem is that tenure arrangements in residential areas should be such that a local authority can collect payment for services and rates and taxes. For this to happen, town-planning procedures are devised to ensure that occupants of residences own the land on which their homes are built. Comparable procedures will be necessary in order to make it feasible to collect services fees, rates and taxes in respect of communal land.
53. The question of whether the CLRB will 'compromise or impede the ability of municipalities' to provide services can therefore not be answered in the abstract. It will turn *inter alia* on the size of the communal land in question and more importantly, on whether the Minister, in exercising her powers under clause 18 reserves the 'sufficient passages of land for public purposes' in order to allow a municipality to reach the members of the community in order to provide them services and also on land tenure and other arrangements relevant to the recovery of service fees and outstanding amounts in respect of rates and taxed. If sufficient land is not reserved and workable systems for the collection of service fees and rates and taxes are not put in place, the effect of the CLRB may well be to compromise or impede the ability of municipalities to fulfill their constitutional duty to provide services.
54. The issue is simply one of lack of alignment between systems and mechanisms for service delivery and collection of rates and charges. The CLRB permits the Minister to usurp municipal powers and functions without allowing municipalities to perform their functions in terms of existing planning and development legislation on communal land.

⁴⁵ Within the meaning of section 151(4) of the Constitution

55. This last concern has been partially addressed. A strange new provision has been added which provides that, notwithstanding, the CLRB and the provisions of any other law, no law must prohibit a municipality from providing services and development infrastructure and from performing its constitutional functions on communal land.⁴⁶ In this regard, the following is submitted:

55.1 While it addresses the concern, to the extent that there may be *laws* which prevent local government from installing infrastructure on private land, it does not remove the real deterrent, which lies in the effect of the common law. The real concern was that local government will be deterred from delivering service across large tracts of private land as the developmental infrastructure will then, in terms of common law, become the property of the communal land owner. The provision does not address this concern.

55.2 The second problem is that tenure arrangements in residential areas should be such that a local authority can collect payment for services and rates and taxes. For this to happen, town-planning procedures are devised to ensure that occupants of residences own the land on which their homes are built. Comparable procedures will be necessary in order to make it feasible to collect services fees, rates and taxes in respect of communal land.

⁴⁶ Clause 37 of the CLRB.

G. THE CONSEQUENCES OF THE IMPLEMENTATION OF THE CLRB with regard to Communal Property Institutions (CPIs), Church land and Coloured Rural Areas Act land:

In terms of clause 18(3):

"The Minister may, subject to [taking into account the IDP, after consultation with the Minister of PLG and the municipality] subsection (4), determine that— (c) a part of an area contemplated in paragraph (a) is – (ii) reserved to the State; and

(4) In making a determination . . . the Minister . . . may— (a) reserve a right to the State including a municipality and stipulate any land use or other condition which in her or his opinion is necessary—

- (i) for a public purpose or which is in the public interest;
- (ii) to protect the affected land, rights in such land and an owner of such land and a holder of such rights; or
- (iii) to give effect to this Act;"

The need for obtaining consent or pursuing expropriation steps and payment of compensation is dealt with above. It is a case of old habits concerned with a persistent refusal to respect, protect, promote and fulfill community title.⁴⁷

Clause 2(1)(c) provides that the CLRB applies to "*land acquired by, or for, a community whether registered in its name or not.*" This means that the CLRB will apply to: Legal entities established to acquire land for a community, communities in occupation of Church Land, other trust held land such as land held in terms of the Coloured Rural Areas Act (currently subject to tenure transformation in terms of the Transformation of Certain Rural Areas Act 94 of 1998) and cases where the tenure history and usages of the community amounts to [informal] indigenous title.

In all these cases the CLRB is applicable. The Minister may as a result be entitled to 'reserve,' without compensation, part of the communal land area without consent and without the payment of compensation.

The fact that the CLRB will be made applicable to such areas of 'communal land' will bring uncertainty in law with regard to the consequences that will follow if the current owner is divested and the community vested to "*succeed in all respects as the successor in title of such person,*

⁴⁷ Since 1837 the government started 'Granting' land in trust to communities to be held by a missionary official or government officials. The standard clause that was contained in the pro forma deeds of grant contained the following clause:

" . . and with full power and authority henceforth to possess the same in Perpetuity, ~~with permission to dispose of or alienate the same, with the approbation of Government, in such manner as he may think proper~~ subject, however, to all such Duties and Regulations, as are either already, or shall in future be established with regard to such Lands. Also that all roads and thoroughfares shall remain free."

These so-called 'Tickets of Occupation' and 'Certificates of Reservation' issued during since the 1837 and later, simply included a clause to the effect that: "nothing herein contained shall be construed or as to prevent the Colonial Government, for the time being, from cancelling and revoking this instrument at pleasure, and making such other disposition of the lands therein mentioned as the said Government shall think fit."

traditional leader or traditional leadership, communal property association, trust or other legal entity a LAC or a traditional council."⁴⁸

It is not at all clear what the legal consequences of the *cul de sac* provision of 'confirmation of an old order right' (without converting it into a new order right) will be, or whether and to what extent the Minister will convert old order rights. If such rights are converted to new order rights or ownership and if 'title' is transferred to a 'holder' or owner, it is not clear to what extent the community as entity and other affected rights holders will be compensated for the dispossession or diminution of its *dominium*. Such a 'transfer' clearly amounts to a disposal of a right in communal land.

Churches as owners of land have in most instances established a web of rights to the land they acquired for a community and it is unclear how a church will, if at all, relate to a LAC established to 'represent a community'.

The Minister may, in terms of the CLRБ, cause a CPA committee to be replaced by a LAC. In terms section 12(1) of the CPA Act 28 of 1996, unlike any provision in the CLRБ:

"An association may not dispose of or encumber or conclude any prescribed transaction in respect of the whole or any part of the immovable property of the association, or any real rights in respect thereof, without the consent of the majority of members present at a general meeting of members."

In terms of section 4 of the Transformation of Certain Rural Areas Act 94 of 1998, unlike the CLRБ, the following principles apply to a Municipality if it is to become the owner of Coloured Rural Areas Act 9 of 1987 trust land:⁴⁹

"Principles to be adhered to by a municipality

(1) When dealing with the land transferred to a municipality in terms of sections 3 (6) and 12 (a) or (b), such municipality-

- (a) must afford residents a fair opportunity to participate in the decision making processes regarding the administration of the land;
- (b) must not discriminate against any resident;
- (c) must give residents reasonable preference in decisions about access to the land;
- (d) must not sell or encumber the land, or any substantial part of it, without the consent of a majority of residents at a public meeting called for that purpose;
- (e) is accountable to the residents;
- (f) must manage and record effectively all financial transactions regarding the land; and
- (g) has fiduciary responsibilities in relation to the residents. "

⁴⁸ Clause 5(2)(b).

⁴⁹ Act 94 of 1998 provides the implementation of 18 month community consultation process in terms of which 23 communities, 70 000 people, who live on almost 2 million hectares of state land held by the Minister in Trust in terms of the Rural Areas (House of Representatives) Act 9 of 1987, have to prepare a report to the Minister of Land Affairs on how their land will be held and managed in future. Six of the Communities have completed the process and have submitted reports for onward transmission to the Minister in the Namaqualand District of the Northern Cape Province.

Furthermore, the Minister may in terms of section 3(2) of Act 98 of 1994 (unlike the provisions of the CLRB) transfer land to a CPA or a Municipality subsequent to the completion of the 'transformation process' if the following criteria are met:

"3(2) No transfer of land referred to in subsection (1) must take place unless the Minister is satisfied that, in the event of a transfer to-

- (a) a municipality, the legislation applicable to such a municipality; or
- (b) a communal property association or other body approved by the Minister, the rules of such association or body,

make suitable provision for a balance of security of tenure rights and protection of rights of use of-

- (i) the residents mutually;
- (ii) individual members of such a communal property association or other body;
- (iii) present and future users or occupiers of land, and the public interest of access to land on the remainder and the continued existence or termination of any existing right or interest of a person in such land.

(3) If in the opinion of the Minister the legislation or rules referred to in subsection (2) do not fully achieve the objects of subsection (2), he or she may determine terms and conditions for the transfer of such land, in order to achieve such objects."

H. LRC participation in the CLRB process:

The last meeting of the Ministerial reference group referred to in the memorandum to the CLRB was held on 1 July 2003. The draft Bill at the time contained a provision permitting 25% elected traditional leadership members as members of the Land Administration Committee. A further version, of 18 September 2003 was thereafter circulated, without referral to the reference group meeting. However, shortly after 8 October a "cabinet approved" version of the Bill was circulated which made provision for traditional councils to be deemed land administration committees. This posed a major departure from the June version of the Bill. The final version of the Bill was only circulated after 23 October 2003. The Bill was published during November 2001.

H: Memorandum on mineral rights under the Communal Land Rights Bill with reference to the new Mineral and Petroleum Development Resources Act 28 of 2002.

With regard to mining and mineral rights communities will be worse off as a result of the operation of the Communal Land Rights Bill and the Mineral and Petroleum Resources Development Act 28 of 2002.

1. Current legal position
2. Past discrimination against communities
3. Minerals under the CLRB
4. Communities under the Mineral and Petroleum Resources Development Act of 2002
5. The claims and interests of communities
6. Case studies

1. Current legal position

"If land is involved which was previously owned by the disbanded South African Development Trust (SADT) or land held in trust for a tribe or community, the Department of Land Affairs is approached by DME. DME and Land Affairs also agreed that the latter will consult with the Provinces and the occupiers of such land or the tribe or community when they are approached to comment on applications for prospecting or mining rights. The wishes of the Provinces and the occupiers are taken into consideration before any decision concerning such land is taken by the Minister of Minerals and Energy or his delegate. (When the SADT was disbanded in 1992 most of the land owned by the SADT was transferred to the then Minister of Regional and Land Affairs with effect from 1 April 1992). Only after a final decision has been taken and conditions have been embodied in a contract the required permit will be issued by the Director: Mineral Development concerned."⁵⁰

In terms of policy directives of the Department of Land Affairs⁵¹, communities with insecure tenure in the former homelands should, for the purpose of mineral rights, be treated as the putative owners of the land that they occupy. When land occupied by such a community is to be mined, the Department of Land Affairs should enter into a tripartite agreement with the relevant mining company and the community, in terms of which the community should obtain negotiated benefits.

2. Past discrimination against communities

- a) black people were not allowed to participate in the industry in that they were prohibited from applying for prospecting and mining permits;⁵²
- b) white land owners and tenants were given legislative backing to participate in mining and shares in the proceeds of mines⁵³, whilst black people could not become owners

⁵⁰ Website of the Department of Minerals and Energy, 10 October 2002

⁵¹ Payment of benefits to the occupants and users of land, where the power of formal disposal of rights in that land vests in the Minister of Land Affairs, dated 18 May 2000; read with the opinion of the Chief State Law Advisor, dated 6th October 1999; Interim Procedures Governing Land Development Decisions Which Require The Consent Of The Minister Of Land Affairs As Nominal Owner Of The Land, website of the Department of Land Affairs, 2002.

⁵³ Sections 7(3) and 61 of the repealed Mining Rights Act of 1967 prohibited and limited prospecting permits and subsequent mining leases to any "Bantu" or coloured person.

of the land they occupy and did not get benefits from mineral exploitation on their land;

- c) the Development Trust and Land Act of 1936 contained a blanket provision reserving all mineral rights on trust land and black owned land for the Trust and all proceeds went to the trust fund as if it was the private holder of mineral rights⁵⁴.

It would be ironic if disadvantaged communities on state owned land were to forfeit (in terms of the operation of the Bill if it were to be enacted in its current form) even the minimal benefits obtainable under the now repealed Development Trust and Land Act of 1936 and the land control laws of former homelands.⁵⁵

Old order land owners and surface owners received mining benefits by virtue of their land ownership and by operation of law. As a matter of principle and consistency, black people who could not get ownership of their land should now be afforded similar treatment.

3. Minerals under the CLRB

The starting-point in the Bill is clause 4, which provides as follows:

‘An old order right which is legally insecure as a result of past racially discriminatory laws or practices as contemplated in section 25(6) of the Constitution must be legally secured in terms of this Act.’

The bill raises the expectation that all rights associated with land will be transferred to communities. Clause 3 reads: “upon registration of its rules ..., a community ... may ... in its own name ... own... movable and immovable property and ... deal with such property...”.

The bill does not explain how mineral rights associated with land ownership will be dealt with.

4. Communities under the Mineral and Petroleum Resources Development Act of 2002

The Act does not address past racial discrimination in respect of land ownership.

Unused old order rights⁵⁶ including ownership of minerals where surface and mineral rights were not separated, can be converted into mining rights within 1 year of the coming into operation of

4 By operation of law, owners, surface owners or tenants were advantaged in two ways: firstly (in terms of section 12 of the Mining Rights Act of 1967 and section 5 of the Precious Stones Act of 1964) they had the exclusive right to prospect on their land and a first option to take out a prospecting permit and subsequent mining lease or transact such right to a nominee, and secondly (in terms of the operation of section 31 of the Mining Rights Act) the owner received a 25% share of profits or royalty payable to the state.

In terms of section 17(1)(b) of the Precious Stones Act a surface owner or lessee of state land was entitled to at least a 32% share in a mine on his or her land.

⁵ section 23 of Act 18 of 1936 quoted below

⁵⁵ Section 16(1) of the Bophuthatswana Land Control Act and section 16(1) of the Venda Land Control Act provide that the Minister of Economic Affairs must authorise mining on land held in trust for a tribe or community, and by operation of law conditions can be attached to benefit the communities concerned.

⁵⁶ Including “a mineral right under the common law for which no prospecting right or mining authorization was issued in terms of the Minerals Act” see category 1, table 3 of schedule 2 of the MPRDA 28 of 2002.

the act⁵⁷. Other old order mining rights or statutory authorisations can be converted into new mining rights within 5 years or prospecting rights within 2 years.

Otherwise these old order rights are permanently extinguished by the operation of the MPRDA.

Section 104⁵⁸ provides that a community can apply for preferent rights to mine in respect of land to be transferred to the community. But a preferent right cannot be given on land where a new or converted mining or prospecting right is granted.

If the Minister of Land Affairs as current owner of communal land and owner of any unused old order mining right does not apply for a new order mining right within one year, any potential or current mineral ownership right of the community will be extinguished. The nominal mineral ownership of the Minister will be extinguished before the communal land is transferred to by the Minister. Arguably a community could claim damages from the Minister for failure to fulfil fiduciary obligations.

Applicants for prospecting and mining rights, including conversions, will be given rights on communal land on a first come first serve principle before such land and the associated mineral ownership rights are transferred.

⁵⁷ Item 8 of schedule 2 to the MPRDA

⁵⁸ "community' means a coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law;"

"Preferent prospecting or mining right in respect of communities

104. (1) Any community who wishes to obtain the preferent right to prospect or mine in respect of any mineral and land which is registered or to be registered in the name of the community concerned, must lodge such application to the Minister.

(2) The Minister must grant such preferent right if the community can prove that -

- (a) the right shall be used to contribute towards the development and the social upliftment of the community concerned;
- (b) the community submits a development plan, indicating the manner in which such right is going to be exercised;
- (c) the envisaged benefits of the prospecting or mining project will accrue to the community in question; and
- (d) the community has access to technical and financial resources to exercise such right.

(3) The preferent right, granted in terms of this section is -

- (a) valid for a period not exceeding five years and can be renewed for further periods not exceeding five years; and
- (b) subject to prescribed terms and conditions.

(4) The preferent right referred to in subsection (1), shall not be granted in respect of areas, where a prospecting right, mining right, mining permit, retention permit, production right, exploration right, technical operation permit or reconnaissance permit has already been granted."

5. The claims and interests of communities

White land owners and surface owners received mining benefits by virtue of their land ownership and by operation of law. White landowners were the owners of their land and the minerals unless the mineral rights were separately sold or registered. As a matter of principle and consistency, black people who were could not get ownership of their land should now be afforded similar treatment.

In the case of communal land ownership of the surface and the minerals vested in the nominal owner of the land, often the SADT trust.

The SADT was replaced by the Minister as nominal owner, and the Minister is the current owner of mineral rights. Now that the Minister can transfer land to communities under the communal land rights bill, the mineral rights should also be transferred.

But in terms of the Mineral and Petroleum Development Resources Act 28 of 2002 such mineral ownership will be extinguished within one year, before communities could become the owners of such mineral rights.

In order to avoid a situation where mineral ownership rights to be formally acquired when land is transferred are extinguished before such transfer, it is proposed that the relevant time periods applicable for the extinguishment of unused old order rights under the MPRDA do not begin running for a period of one year from the date on which the relevant land is transferred to a community.

At the same time communities should be given assistance to apply for preferent rights under section 104 of Act 28 of 2002 in order to avoid that new prospecting or mining rights are granted on their land without them being given the opportunity to negotiate the terms for benefits and participation.

6. Case studies

The **Bakgaga Ba-Mphahlele** tribe or community still lives on land occupied since before colonization. In 1889 some of the land was set aside by the ZAR government as a “native location”. Other land was granted in title to settlers. In 1891 the community bought 9 farms from the local fieldcornet for 2130 pounds. Transfer to the community never happened and in 1898 the Supreme Court ordered the transfer of the land to the “Superintendent of Natives” to hold it on behalf of the community. In terms of the 1913 Land Act some of the land was set aside for occupation by the tribe, and the land subsequently vested in the former SADT and the Minister of Land Affairs. The land is mineralised and the mineral rights were not separated from the surface rights. The community claims that it is not receiving benefits from mineral exploitation. A land claim was lodged but may not be satisfied as aspects of the process of dispossession may have occurred prior to the 1913 cut-off date. The community lives on state land which the community paid for. The community demands recognition of its right to negotiate with mining companies regarding the terms of exploitation. As rightful owners the community should be entitled to the relevant old order mineral rights, or at the very least be entitled to participate in or receive part of the proceeds of exploitation.

The land and minerals claim of the **Masha** community to the Steelpoortdrift farm: The claim is based on their customary law interest or indigenous title in the land and their beneficial occupation thereof. They were removed from the land in terms of Chapter IV of the Native Trust and Land Act, 1936. The Lebowa Minerals Trust entered into an arrangement with a foreign owned mining company, and the company compelled registration of the mining lease by way of a court order. The community land claim for restitution/compensation or restoration of the land and/or minerals is pending. The matter could be resolved and settled in the interest of all the parties at an early stage if the Minister had statutory authority to determine negotiated conditions for community participation in mineral exploitation or compensation.

The **Kadichuene** community has historical rights in terms of customary rights to the land they occupy. As a result of past racial practices and laws, the land is vested in the state. The previous government granted the rights to mine the granite found on and under the surface of the land occupied by our clients to African Red Granite (Pty) Ltd and Bestaf (Pty) Ltd. No recognition or consideration was given to the rights in land held by members of the Kadichuene Community. An Environmental Impact Assessment undertaken by African Red Granite at the insistence of the Department of Minerals and Energy and the Kadichuene community clearly indicated the urgent need for the community to move to alternative land. The community’s land can no longer be used for its original purpose. Negotiations over the past years to resolve the issue, have come to nothing. Appropriate recognition of their rights should include alternative land and participation in benefits.

There are many examples of community claims for participation in mineral exploitation on their own land which have political, legal and economic merit. New order land and mining law should recognise this need and create enabling mechanisms to achieve outcomes that satisfy the obligation to redress the results of past racial discrimination.

Development Trust and Land Act 18 of 1936

23. Prospecting or mining on land held by the Trust or by Blacks. –

- (1) Notwithstanding anything in any other law the following provisions shall apply to land in respect of which the mineral rights are held by the Trust or a Black or in trust for a Black tribe or community:
 - (a) No person shall prospect for minerals on such land without the written permission of the Minister: Provided that this provision shall not apply in respect of land situate in the Province of the Transvaal which at the commencement of this Act is a proclaimed public digging for precious or base metals or is land declared open to public prospecting for precious and base metals for so long as it remains so proclaimed or open. For such permission such minimum fee as may be prescribed by regulation shall be paid to the Trust; and the Trust shall, in the case of land of which the Trust is the owner, pay the fee to the fund, and in the case of land of which any other person is the registered owner, pay the fee to that person.
[Para. (a) amended by s.3 (b) of the Act No. 18 of 1954]
 - (b) If such land is proclaimed as a public digging or as a mine, or if any right to mine on such land is granted, such conditions shall be imposed as the Trustee may deem necessary or desirable for preserving the continued or future use by Blacks of the surface of such land.
 - (c) For the purposes of this section minerals shall be deemed to include all metals and ores of metals, precious or base, precious stones, and all clays, stones, earths, coals, oils or other mineral substances of whatever nature which may be dug or extracted or separated from the ground.
[Sub-s. (1) amended by s. 3(a) of Act No. 18 of 1954.]
- (2) So much of the moneys received by the State in respect of licences to prospect or mine on any land situate in a scheduled Black area or in a released area or on any land wherever situate held by the Trust or a Black or in trust for a Black tribe or community as would be retained by the State if this Act had not been passed shall be paid by the State to the fund.
[Sub-s. (2) amended by s. 3(c) of Act No. 18 of 1954.]
- (3) Save as is otherwise provided in this section, the Trust shall in respect of mineral rights held by it be in the same position as any private holder of mineral rights.

I: Case studies on how the implementation of the CLRB will impact on communities represented by the LRC:

1. Makuleke Community – Limpopo Province

- *Owners of the farm Makuleke 6MU through a Communal Property Association in extent 22438ha*
- *Holders of Nthlaveni 1MU in terms of an Agreement with the State in extent some 20000ha*
- *The community comprises some 2 000 families*

The Makuleke Community was restored to their land in 1998 in terms of the Restitution of Land Rights Act 22 of 1994. The land comprises the Pafuri Area of the Kruger National Park, a portion of the Makuya Park, a portion of the Mashakatini Nature Reserve and a portion of the land held by the Mutele Tribal Authority now known as the Makuleke 6MU and registered in the name of the Makuleke Communal Property Association. Part of the agreement resolving the claim was that the State recognised the rights the Makuleke Community has in Nthlaveni the area to which they were removed during the 1960's. Finalising the tenure rights in Nthlaveni would in terms of this agreement be done in accordance with the yet to be promulgated tenure legislation in terms of section 25(6) of the Constitution of the Republic of South Africa.

The Pafuri area 19477 ha, now part of Makuleke 6MU, a highly complex ecosystem and a sensitive nature conservation area, has in terms of the terms of the restoration agreement to remained an integral part of the Kruger National Park. The importance of this settlement was that it made the development and advancement of the international Transfrontier Peace Park a reality. It resolved the conflict around the tenure rights to the land, a prerequisite for the development of the Transfronteir Park.

The Makuleke Community presently resorts under the jurisdiction of the Minga Tribal Authority. The Makuleke were placed under the jurisdiction of that tribal authority after their removal to Nthaveni. In fact it is documented that the tribal Minga Tribal Authority at the time were actively involved in the removal of the Makuleke to Nthlaveni in that Chief Adolf Minga actively lobbied the Minister of Native Affairs to place the Makulele under their jurisdiction and ordered his tribal police to enforce the dispossession of the Makuleke from their land.

The Minga Tribal Authority, now under Chief Cedric Minga, contested the claim by the Makuleke Community over what is now known as Makuleke 6MU. The claim by the Minga Tribal Authority was dismissed, a decision never taken on review by the Minga Tribal Authority.

The agreement to restore the land to the Makuleke Community was confirmed by a court order in the Land Claims Court on 14 December 1998, which court order also confirmed the tenure rights of the Makuleke Community over the area of Nthaveni to be finalised in terms of still to be formulated tenure legislation.

In terms of the Communal Land Rights Bill, the Bill now before Parliament the restoration of Makuleke 6MU and the rights of the Makuleke will once again be thrown into doubt and conflict. The Bill is applicable to Makuleke 6MU as being communal land acquired by a community. Chief Cedric Minga's traditional council will be deemed to be the land administration committee in terms of the CLRB which will have jurisdiction over Makuleke 6MU, a situation that will negate the restoration of the land to the Makuleke and once again the development of the Transfronteir Park will be threatened by dispute and conflict.

The rights in Nthlaveni held by the Makuleke Community, recognised and admitted by the State as part of the agreement resolving their restitution claim will be negated firstly as these will now

be dealt with by the Minister and will be administered by Chief Minga's traditional council with jurisdiction.

The Makuleke Community has for many years attempted to register their own traditional authority, but to no avail. Any application by the Makuleke Community for registration of a Makuleke Traditional (Tribal) Authority always has been and will in the future be strongly contested by Minga given the fact that both Minga and Makuleke are clans of the larger Maluleke tribe.

The Bill will effectively negate the restoration of Makuleke 6MU to the Makuleke Community and will in no way provide for the security of tenure to Nthlaveni as agreed between the State and the Makuleke Community.

2. KALKFONTEIN COMMUNITY– MPUMALANGA PROVINCE

- *Two groups of co-buyers some 150 to 200 families who each purchased a portion of the farm Kalkfontein*
- *Registered in the name of the Minister of Native Affairs now the Minister of Land Affairs to hold in trust for the co-buyers*
- *Presently occupiers hold de facto ownership rights over Kalkfontein*

Two separate groups of co-buyers, the Buyers each bought a portion of the farm Kalkfontein, the Farm near the town of Settlers in the erstwhile Kwa-Ndebele now falling in the Mpumalanga Province. The Farm was registered in trust for the co-buyers in the name of the then Minister of Native Affairs now the Minister Land Affairs. This was a racially discriminatory policy, which denied the right of common law freehold title to Black persons on the basis of race in a manner inconsistent with the right to equality now entrenched in the Bill of Rights of the Constitution of the Republic of South Africa.

When Kwa-Ndebele was to be declared a self-governing homeland during 1986, the area comprising the homeland had an insufficient number of tribal authorities. A fourth tribal authority was needed. Kalkfontein with its owners were promulgated against their will to be that fourth tribal Authority the Pungutsha – Ndzunza Tribal Authority with an unelected chief who used the Farm for his own gain, negating the rights of the Buyers.

In 1994 the Buyers approached the Transvaal High Court for an order that the Farm be transferred into a Community Trust for each of the groups of co-buyers. The application was granted on the grounds that the defective title, i.e. the Minister of Land Affairs as it was then holding the Farm in trust, was based on racial discrimination and therefore unconstitutional and further that the Pungutsha – Ndzunza Tribal Authority has no rights in the land.

The court order will effectively be negated as a result of the Communal Land Rights Bill. The Farm is communal land, must fall under a traditional council with the unelected Chief as member effectively once again denying the rights of the co-purchasers to acquire full title and independent secure rights to the Farm, entrenching the discriminatory practices of the past in law.

3. THE MOHUMUTSI FAMILY AND THE DESCENDANTS OF 14 CO-PURCHASERS

- *Elandsfontein 440JQ in the district of Brits, North West Province*
- *Clients are the descendants of 15 families who have lodged a claim in restitution in terms of the Restitution of Land Rights Act 22 of 1994 based on the rights of*

freehold title on the purchased portion and on the interests they held in neighbouring portions of the Elandsfontein as Labour Tenants

- *Presently the land is registered in private ownership*

15 Co-buyers with the Mohumutsi family as the senior family, the Buyers, purchased a portion of the farm Elandsfontein 440JQ the Farm in the late 1940's. In terms of stated government policy at the time "where six or more "Natives" wished to hold land in co-ownership they had do so in tribal context". As a result of the implementation of this policy the Buyers could not register the Farm in their own names as co-owners, but had to have it registered in the name of Chief Motsepe to hold for them in trust. Chief Motsepe never contributed to the purchase of the land, but the Buyers fell under his tribal jurisdiction. Chief Motsepe also held no rights as labour tenant for the remainder of the Farm the Buyers claim in terms of their rights and interest as labour tenants. In fact Chief Motsepe always has and still does reside in the area of Garankuwa land vested in the erstwhile South African Development Trust and later part of Boputhatswana before 1994.

Once resolved the Buyers will no doubt hold the land as a community as this under the circumstances will be the most suitable form of tenure given the fact that they now comprise of more than 200 members. The Buyers will then resort under the Communal Land Rights Bill. This will result in the Buyers, who were denied full title in terms of racial measures and were forced to register Chief Motsepe as trustee owner, having to abide by appointing a traditional council not only with Chief Motsepe as member, but with members who never had nay rights over the Farm. In effect the "6 Native Rule" will still hold albeit in a changed form.

The "6 Native rule" was part of apartheid policy, which denied the right of common law freehold title to Black persons on the basis of race in a manner inconsistent with the right to equality now entrenched in the Bill of Rights of the Constitution of the Republic of South Africa.

The "6 Native Rule" was widely applied in the Moutse are, the North West Province and in the district of Sekhukhune; many Communities who originally purchased land as co-owners find themselves under the tutelage of Tribal Authorities. Tribal Authorities, amongst others the Bantoana and Sekhukhune Tribal Authorities, hold land in trust for groups of co-buyers who as a result of racist policy were not allowed to hold land in co-ownership under common law freehold. Effectively that infamous rule will now be entrenched in law should the Communal Land Rights Bill become law. The co-buyers will be denied their rights to own the land they bought in freehold. In many cases the co-owners do not even form part of the tribal grouping under whose jurisdiction and tutelage they were placed by local Native Commissioners often against their will.

4. DIXIE COMMUNITY – LIMPOPO PROVINCE

- *Dixie 240KU in the district of Bushbuckridge, Limpopo Province*
- *The Dixie Community consists of some 200 families*
- *The members of the Dixie Community have residential, cropping and grazing rights in the farm Dixie 240KU which rights are protected in terms of the Interim Protection of Informal Land Rights Act 31 of 1996*
- *Dixie 240 KU is some 1000ha in extent*

The Dixie Community resides on the farm Dixie 240KU, The Farm in the Limpopo Province. The Farm borders on the Kruger National Park, Manyaleti Game Reserve and Sabie Sands Reserve. Traditionally the Dixie Community has and still do resort under the jurisdiction of the Mnisi Tribal Authority.

The Mnisi Tribal Authority under whose jurisdiction the Dixie Community resorted in terms of the Black Authorities Act of 1958, attempted to develop part of the Farm for a luxury lodge, depriving the Dixie Community of a substantial part of their land without consultation or affording the community an opportunity to make an informed decision on the issue. The Mnisi Tribal Authority

had signed an agreement with Curato Developments for the building of the lodge. Any attempts to determine how the Dixie Community who was directly affected would benefit from this development proved fruitless. None of the procedures in terms of the Interim Protection of Land Rights Act 31 of 1996, designed to protect the rights held in the Farm by the Dixie Community, were followed.

In order to protect their rights the Dixie Community instituted summons in terms of section 2 of the Interim Protection of Informal Land Rights Act to interdict Curato Investments and the Mnisi Tribal Authority from developing the lodge on their land. When faced with court action all the parties withdrew.

The Communal Land Rights Bill will effectively negate the rights the Dixie Community has in terms of the Informal Land Rights Act. The Farm, communal land to which the Communal Land rights Bill will apply will place the administration of the Farm under a traditional council of which the Chief of the Mnisi Tribal Authority will be a member.

5. MBAULA AND PHALaubeni COMMUNITIES

- *Several farms in the north of the Limpopo Province*
- *Clients are two communities who have rights of residence, cropping and grazing over the land they occupy*
- *Part of the land 14000ha is a proclaimed game reserve the Mthimkulu Game Reserve*

The Mbaula and Phalaubeni are two communities who reside on farms bordering on the Kruger National Park. 14000Ha of the land was proclaimed a game reserve the Mthimkulu Game Reserve, the Reserve by the erstwhile Gazankulu Government. The Reserve borders directly on the Kruger National Park. The Interim Protection of the Informal Land Rights Act 31 of 1996 protects the Communities' rights to the Reserve.

The local Headman PG Mabunda proceeded to sign a lease in 1996 over part of the Reserve without consulting with the Communities. In October Mr. Mabunda proceeded to extend the lease once again without consultation. Furthermore Mr Mabunda has so far failed to account for moneys he received in terms of the rent owing under the contract of lease.

The Communities wish to approach the South African National Parks Board for a joint venture agreement whereby the Reserve will become an integral part of the Kruger Park with traversing rights into the Kruger Park and commercial ventures in favour of the Communities. This is however made very difficult as a result of the lease signed by Mr. Mabunda which agreement allows for hunting rights in the Reserve.

The Communal Land Rights Bill will not assist the Communities as the land is communal land, falls under a traditional council with the Headman PG Mabunda as member in his position as headman.

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