COMMUNAL PROPERTY ASSOCIATIONS AND THE RURAL ECONOMY TRANSFORMATION MODEL

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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>TABLE OF CONTENTS</td>
<td>2</td>
</tr>
<tr>
<td>LIST OF ABBREVIATIONS</td>
<td>3</td>
</tr>
<tr>
<td>1. COMMUNAL PROPERTY ASSOCIATIONS AND THE RURAL ECONOMY TRANSFORMATION</td>
<td>4</td>
</tr>
<tr>
<td>1.1 Introduction</td>
<td>4</td>
</tr>
<tr>
<td>1.2 The Green Paper on Land Reform</td>
<td>6</td>
</tr>
<tr>
<td>2. COMMUNAL PROPERTY ASSOCIATIONS</td>
<td>7</td>
</tr>
<tr>
<td>2.1 Legislative framework: The Communal Property Associations Act,</td>
<td>7</td>
</tr>
<tr>
<td>number 28 of 1996</td>
<td></td>
</tr>
<tr>
<td>2.1.1 Recent creations, particularly in commercial lands acquired</td>
<td>8</td>
</tr>
<tr>
<td>for groups of individuals through various land reform programmes</td>
<td></td>
</tr>
<tr>
<td>2.1.2 Risks Identified in respect of Implementation of the Act</td>
<td>8</td>
</tr>
<tr>
<td>2.1.3 Proposed Risk Mitigation Strategies</td>
<td>8</td>
</tr>
<tr>
<td>2.2 The CPA Amendment Bill, 2014</td>
<td>9</td>
</tr>
<tr>
<td>2.2.1 Background</td>
<td>9</td>
</tr>
<tr>
<td>2.2.2 Objects of the Bill</td>
<td>10</td>
</tr>
<tr>
<td>2.2.3 Existing CPAs (already established)</td>
<td>10</td>
</tr>
<tr>
<td>2.2.4 New CPAs</td>
<td>10</td>
</tr>
<tr>
<td>3. THE RURAL ECONOMY TRANSFORMATION MODEL</td>
<td>11</td>
</tr>
<tr>
<td>3.1 The “Wagon Wheel”: Traditional Councils and Communal Property</td>
<td>11</td>
</tr>
<tr>
<td>Institutions (CPIs)</td>
<td></td>
</tr>
<tr>
<td>3.2 Institutional roles and role-relationships</td>
<td>15</td>
</tr>
<tr>
<td>3.3 The Share Equity “Joint Venture” Enterprise Model</td>
<td>16</td>
</tr>
<tr>
<td>4. SUMMARY AND CONCLUSION</td>
<td>17</td>
</tr>
</tbody>
</table>
LIST OF ABBREVIATIONS

CRDP  Comprehensive Rural Development Plan
DRDLR  Department of Rural Development and Land Reform
CPAs  Communal Property Associations
CLTP  Communal Land Tenure Policy
RADP  Recapitalisation and Development Programme
1. COMMUNAL PROPERTY ASSOCIATIONS AND THE RURAL ECONOMY TRANSFORMATION MODEL

1.1 Introduction

The Comprehensive Rural Development Plan (the CRDP), which was adopted by Cabinet in 2009, serves as the overarching policy trajectory and strategy for the Department of Rural Development and Land Reform (DRDLR). The strategy of the CRDP is 'agrarian transformation', which denotes 'rapid and fundamental change in the relations (meaning systems and patterns of ownership and control) of land, livestock, cropping and community'.

In practice, this strategy entails, amongst other things, integrated and strategically planned rural development programmes; and, an enhanced land reform perspective (in terms of conceptualisation, institutionalisation and implementation). The objective of the strategy is social cohesion and inclusive development of rural economies. Rural-urban linkages are critical to engendering this inclusivity.

The Agrarian Transformation System, as represented in Figure 1 below, serves, in the main, two purposes. Firstly, it summarises the mandate of the DRDLR; and, secondly, presents four Development Measurables, laid out in phases, which are meant to run sequentially (for effective planning) and simultaneously (guided by the plans). These are: a) meeting basic human needs; b) rural enterprise development; c) agro-village industries, sustained by credit facilities and value-chain markets; and, d) improved land tenure systems (embedded in meeting basic human needs).
Figure 1: RURAL ECONOMY TRANSFORMATION: AGRARIANTRANSFORMATION SYSTEM

LAND:
- Tenure system review
- Strategic land reform interventions
- Restitution
- Land based resources

COMMUNITY:
- Social infrastructure
- ICT infrastructure
- Amenities
- Facilities

CROPPING:
Economic infrastructure and inputs:
- Agri-parks, fencing, seeds, fertilizer, extension support, etc

LIVESTOCK:
Economic infrastructure:
- Processing plants
- Small industries
- Abattoirs, animal handling facilities, feedlots, mechanising stock water dams, dip tanks, silos, windmills, fencing, harvesters, etc

Tenure System Reform
1. State and Public Land
   - Lease hold
2. Private Land
   - Free hold with limited extent
3. Foreign land ownership
   - A combination of freehold and leasehold; and,
4. Communal land
   - Communal tenure: communal tenure with institutionalised use rights.
5. Institutions
   5.1 Land Commission
   5.2 Valuer General
   5.3 National Rural Youth Service Corps
   5.4 National Development Agency with rural cooperatives financing facility

Food Security: Strategic Partnerships:
- Mentoring
- Co-management
- Share equity
- Modalities being worked out between the Dept and farmers; big and small

Enterprise development
- Agro-village industries; credit facilities

Phase I
- Phase II
- Phase III
1.2 The Green Paper on Land Reform

The formulation of this policy on CPAs forms part of Government’s undertaking to review all land reform policies as enunciated in the 2011 Green Paper on Land Reform\(^1\) (hereinafter referred to as the Green Paper). The legacy of the 1913 Natives Land Act, which was the first of a number of discriminatory laws that reinforced the massive dispossession of land from black South Africans, is very much still apparent in today’s South Africa despite two decades of independence. As the constitutional pronouncements set out in sections 25, 26, 27 and 36 of the Constitution obligate Government to address challenges related to this legacy of dispossession, the Green Paper calls for an overhaul of the land reform programme to more effectively tackle issues related to social and economic exclusion, inequitable access to land, underdevelopment and food insecurity.

In enhancing the land reform perspective, the Green Paper presents five critical aspects: a clearly defined meaning of land reform; a set of principles underlying land reform; a strategic thrust for land reform; a four-tier land tenure model; and institutions to support and sustain land reform. The principles and the strategic thrust underlying land reform, as set out in the Green Paper, are as follows:

1) deracialising the rural economy;
2) democratizing the allocation and use of land across gender, race and class; and,
3) sustained production discipline for food security (and food sovereignty).

Furthermore, the strategic thrust, also set out in the Green Paper, is that land reform should be pursued with minimal or no disruption to food production and security. Given the aforementioned, the DRDLR defines land reform inclusively of the following four functions or pillars:

1) *restitution* of land rights;
2) *redistribution* of land;
3) *land tenure reform*; and,
4) *development* of the land.

It further defines the strategic objectives of land reform as two-fold:

1) *that all land reform farms are 100% productive* during the 2014-2019 Medium Term Strategic Framework (MTSF) period; and,
2) *that the class of black commercial farmers, which was deliberately and systematically destroyed* by the 1913 Natives Land Act and other subsequent pieces of legislation enacted by successive Colonial and Apartheid regimes, *be rekindled*.

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\(^1\) Published by the DRDLR in August 2011.
2. COMMUNAL PROPERTY ASSOCIATIONS

2.1 Legislative framework: The Communal Property Associations Act, number 28 of 1996

Communal Property Associations (CPAs) are established in terms of the Communal Property Associations Act, Act number 28 of 1996.

The objective of the Act is to create a new form of juristic person to allow disadvantaged communities to acquire, hold and manage property in common. A community that qualifies in terms of the Act can therefore, on the basis of agreement contained in a written constitution, form a legal entity (the CPA) and thereby become owners of property, including land, via the CPA.

Previously, it was possible for a community or group of persons to have access to a registered title to land only through common or joint ownership (with every name included in the Deed of Transfer) or through a trust (with title vesting in the trustees) or a juristic person (with title vesting in that legal entity). In principle, CPAs were designed to “serve the needs of disadvantaged groups generally, especially aimed … at those receiving land under redistribution programmes or under the Restitution of Land Rights Act. Under section 2(1)(d), however, the scheme was also available, on a voluntary basis, to other communities acquiring land”.2

The Property of the CPA must be dealt with in the constitution in considerable detail. Land or other property to be owned by the CPA must be identified. The purpose for which the property may be used and how it is to be divided physically, and then allocated, must be stated. Whether rights may be sold and, if so, to whom, must be explained. The constitution must also detail the devolution of property rights upon a member’s death.

Once registered, the CPA becomes a juristic person – that can sue and be sued. It may acquire rights and incur obligations in its own name, in accordance with its constitution. A registered CPA has perpetual succession, even though its membership may alter. The CPA has the power to acquire and dispose of immovable property and real rights therein as well as the competence to encumber by way of mortgage, servitude, lease, etc.

In respect of land registered in the name of a CPA, application may be made to the Minister to exempt such land from laws relating to the establishment of townships and/or the subdivision of agricultural land.

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2 For more details, see Claassens and Cousins (Land, Power and Custom (page 148), UCT Press 2008).
2.1.1 Recent creations, particularly in commercial lands acquired for groups of individuals through various land reform programmes

2.1.2 Risks Identified in respect of Implementation of the Act

Some of the risks associated with the implementation and management of CPAs that have been identified include:

- Adequate compliance with all provisions of the CPA Act and associated monitoring, specifically in relation to:
  - CPA Applications for registrations;
  - Registrations of CPAs and maintaining of records; and
  - Dispute resolution;
- Adequate and in compliant reporting by CPAs;
- Governance failures within CPAs;
- Financial management and accountability;
- Clear Roles and Responsibilities of governance structures vis a vis community members/representatives, impacting negatively of proposed development initiatives; and
- Alienation of immovable property in ownership of the CPA (39 instances identified during 2013).

2.1.3 Proposed Risk Mitigation Strategies

In addressing some of the risks identified (both internally and externally) the DRDLR has identified several proposed risk mitigation strategies. These aspects have informed and have been included in the proposed models included in this policy.

In the main, these relate to:

- Clarity on the roles and responsibilities of, and in support of, the CPAs (see Figures 2 (b) and (c));
- Improved governance through separation of land title holding- and development and investment structures;
- Improved governance through capacity building and training;
- Improved monitoring of compliance with the CPA Act, as well as departmental policies through:
  - The establishment of the Communal Property Associations Office and the appointment of a Registrar of CPAs (decentralised model is envisaged with provincial offices of the Registrar being established);
  - Strengthening of the advisory capacity of these offices to ensure capacity building and strengthen compliance;
o Pro-active and reactive intervention powers of the Registrar of CPAs with a view of dealing pro-actively with the potential of irregularities (and prevent these from occurring through adequate capacity building, training and rendering of assistance to CPAs), while dealing reactively with instances of irregularities or non-compliance, if and when these occur. The Registrar will have the necessary powers to investigate and report on irregularities, call on CPAs to account, ensure adequate document retention and access to required documentation (internally and externally); and

o Access to courts as a matter of last resort, if required, in the event of irregularities being detected and requiring intervention;

* Improved enterprise development and support (see section 3.3 of this document);
* Improved accountability and community participation in decision making processes with the introduction of a substantive quorum requirement of 60% of households participating within the CPA; and
* Future removal of the duality of structures in certain communal areas, where CPAs have been established in areas with traditional authorities, creating tensions and potential conflict – in the future this practice will be dissuaded.

### 2.2 The CPA Amendment Bill, 2014

#### 2.2.1 Background

The DRDLR has monitored the implementation of the Act since its enactment and has identified specific areas in respect of which the Act could be improved.

Challenges have been identified, including:

- Recipe for conflicts – creating communal areas within communal areas / creating CPAs in communal areas administered by Traditional Authorities;
- CPAs in areas administered by Traditional Authorities – expression of choice, through appropriate forms of popular participation, controlled by reputable institutions; and
- CPAs in areas acquired through farm-dwellership and tenancy. These are individual title-holders, who must voluntarily express choice to form a CPI, without undermining individual ownership.

The Communal Property Associations Amendment Bill, 2014 (hereinafter referred to as the Bill), proposes certain amendments to the Act, to address the shortcomings mentioned and therefore to improve the application and implementation of the Act.

Further amendments will be considered pending the outcome of this policy process.
2.2.2 Objects of the Bill

The objects of the Bill are to-

a) establish the Communal Property Associations Office;
b) empower the Minister to appoint the Registrar of the Communal Property Associations;
c) provide for the functions of the Registrar of the Communal Property Associations;
d) provide further on the protection of rights and interests in respect of movable and immovable property of the Communal Property Associations;
e) provide for the formation of Communal Property Associations in respect of land restituted to labour tenants; and
f) further regulate the management of the Communal Property Associations placed under administration.

2.2.3 Existing CPAs (already established)

In areas where CPAs have been established in communal areas with traditional authorities, the DRDLR will assist with the management and administration of these CPAs through, *inter alia*:

- Assisting with harmonising of relationships and providing clarity in respect of roles and responsibilities (as per figures 2(a) and 2(b)); and
- Traditional Authorities will be supported to function as Moral Authorities in these areas, in particular to deal with poverty, inequality and unemployment of the communities within these areas.

2.2.4 New CPAs

New CPAs will be established in areas where no Traditional Authorities exist – see figure 2(b) in this regard. The CPA Amendment Bill introduces a requirement of 60% of households as substantive quorum in respect of decision-making processes. The decision with respect to the legal entity and CPI to hold the land will be based on the choice expressed by the community through a properly constituted quorum of represented households who are direct beneficiaries to the intended CPI. This will also apply to land acquired through farm dwellership and tenancy. Similarly, the individual households that are title holders will through public participatory process be able to voluntarily express choice to form a CPA without undermining individual ownership.
The CPA Amendment Bill will therefore remove the potential of “duality” where Traditional Authorities and CPAs co-exist in the same space/area and will also promote clear roles and responsibilities that will ultimately enhance the impact of development initiatives in this area and ensure the attainment of the overall objective of Agrarian Transformation.

3. THE RURAL ECONOMY TRANSFORMATION MODEL

3.1 The “Wagon Wheel”: Traditional Councils and Communal Property Institutions (CPIs)

In terms of Section 3 of the CLTP, the “Wagon Wheel” Model for communal tenure has been developed. Figure 2(a) applies to conventional traditional communal areas that observe customary laws and Figure 2(b) relates to non-traditional communal areas.

In respect of traditional communal areas observing customary laws, land was usually under the rule of a chieftainship. The nature of the applicable tenure regimes in these areas was inclusive in character and therefore access to land (as opposed to control over land) was inclusive and based on accepted membership to a group. Both household level and communal decision making processes governed land rights allocation within these areas.

In this regard, the CLTP states that:

“In order to reconstitute the deteriorated accountability of traditional community structures to the communities and households they service as found in original forms of African tenure, the “Wagon Wheel model” for communal tenure reform, emphasizes that, these institutions are responsible for land administration as outer boundary title holders. The innermost circle located in the middle of the Wagon Wheel suggests a partnership between the municipality and the traditional authority. The traditional authority administers the land and has the responsibility to ensure compliance is met based on the household’s decisions, while the municipality provides for sector plans, integrated development and spatial plans. These are accompanied by by-laws that determine land use as well as norms and standards. Both support and co-govern public private partnerships in communal areas based upon decisions made through substantive quorums[^3] by the community. In the context of institutionalisation as determined by the Constitution and wall-to-wall municipalities, local municipalities (and by extension democratically elected governments) have executive authority over assigned responsibility areas. With respect to the 51 per cent share equity from corporate investment, the proceeds of this investment will be equitably shared in the interest of business growth and the

[^3]: “Substantive quorum” has been defined within the context of the CLTP as meaning 60% of households within the community.
development of the community and households. This will be incentivized and co-managed through an Investment Development Trust and/or Rural Investment and Development Finance Facility or another appropriate investment model or instrument, supporting such areas.

The second circle in the Wagon Wheel represents the household level, which is the basic unit of production and implies clear allocation of land to each household. Boundaries of household land rights shall be surveyed and registered through locally established, state supported facilities dedicated to these functions. However surveys and registration of such rights shall only be conducted where these are popularly required and must be based on equitably adjudicated land rights assignment. Within this context, the state shall prevent the imposition of any formal process of land surveying and registration in the Communal Areas.

In addition, the household as the basic unit of production holds specific roles and responsibilities and constitutes another focal point of targeted intervention in the CLTP. For their part, households are responsible for playing active roles in ensuring effective land governance as well as paying taxes and rates to local municipalities for service provision and complying with by-laws. This responsibility is further incentivized by recognition of its authority; the affirmed and formalized rights to the household lands and the commons as well as substantive decisions on the use of natural resources endowments to the benefit of all.

Finally, the outside circle indicates the commons, consisting of communally owned areas designated, well-planned and efficiently managed for economic development and infrastructure investment. The traditional authority (or CPA Executive, where applicable⁴) is vested, throughout this area, with the responsibility of administering the land and related resources on behalf of the households. Routine meetings to determine use, account for progress and substantively decide on the way forward will take place at least three times per year and annual reports to Parliament will be required on how governance is improving and equitable development being advanced.”

⁴ See figure 2(b).
Figure 2 (a) Traditional Communal Areas that observe Customary Laws

In respect of non-traditional Authority areas (Figure 2(b)), the roles of the CPA will be:

1) Title holder of the entire cadastral unit;
2) Reference point (governance structure);
3) Adjudication of disputes (solving of problems); and,
4) Allocation of resources (according to principles decided upon (not ad hoc) with a clear developmental perspective).

The separation of the governance structure and the Investment and Development entity will ultimately ensure adequate accountability, management and oversight in respect of integrated landholding and development within the respective areas.

It is furthermore envisaged that these structures will be resourced, during the first 5-year period of existence, through the allocation of departmental Recapitalisation and Development Programme (RADP) funds. The allocation of these funds will be based on adequate needs assessments undertaken within these areas and appropriate resource allocations linked thereto. This will ensure that adequate institutional support is provided during the period of government assistance, and that institutions are therefore strengthened and capacitated during this same period to undertake their respective mandates post termination of support by the DRDLR.
Figure 2 (b) Non-traditional Communal Areas

Figure 3 (b): RURAL ECONOMY TRANSFORMATION: COMMUNAL TENURE MODEL

Outer Boundary: Single Title
Title Holder: Governance Structure.

Roles:
- Title Holder
- Adjudication of disputes on land allocation and use
- Reference Point
- Land allocation

COMMUNALLY OWNED:
- Collective and individual enterprise and industrial sector

HOUSEHOLD SECTOR:
- Basic unit of production

COMMUNITY-PUBLIC-PRIVATE-COLLABORATION

roles: traditional council/municipal council/cpa/trust/cos
principle: complementarity across traditional & democratic institutions
3.2 Institutional roles and role-relationships

Figure 2 (c)

Figure 2(c) depicts the correlation between the authority of the state and the administrative responsibilities of the governance structures (Traditional Councils, CPAs and Trusts holding land in trust of the community). The model is premised on the “voters”/communities and households in respect of which investment and development is targeted. The households have rights and responsibilities and duties (enshrined in the Constitution) and require services and development opportunities. Through active and responsible citizenry the state becomes more informed about the needs of communities and made more capable in its communications planning, service delivery and its realisation of outcomes envisaged by the NDP. At the second level (see green box), traditional authorities, CPAs and other legal entities (see figures 2(a) and 2(b) above) are tasked with the administrative responsibilities associated with communal area land. Third, at the topmost level, the ultimate authority over land in communal areas rests with the state as mandated by the Constitution and relevant legislation.
3.3 The Share Equity “Joint Venture” Enterprise Model

The Share-Equity “Joint Venture” Enterprise model depicts the nature of new enterprises to be established (and in certain instances already established) in rural communal areas. In terms of this model, both landowners and business owners agree to the establishment of a new joint venture (holding company) on mutually acceptable terms and conditions. Through the implementation of the model, real rural economic transformation is achieved, ultimately ensuring the attainment of the overall goal of “A rapid and fundamental change in the relations (systems and patterns of ownership and control) of land, livestock, cropping and community”.
4. SUMMARY AND CONCLUSION

Communal properties, as created by the government in recent times, are not the same as traditional communal land. In the former case, people had neither right of use nor ownership. They lived on the farms at the mercy of the farm owner. There was no security of tenure at all. The first thing to do is not to create communal property ownership. It is to secure individual tenure to each household, be it a farm-dweller or tenant, where it would have accumulated rights, in terms of relevant law. The approach of starting with CPAs causes strife and potentially comprises production on the land. That is the essence of the policy and amendment to the CPA Act.