

**THE USE OF A PRIVATE COMPANY TO PROMOTE AND DEVELOP THE
PROPERTY INTERESTS OF RURAL COMMUNITIES**

by

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**submitted in fulfilment of the requirements for the degree of Master of Laws,
Full Research in Mercantile Law (MLL01)**

in the School of Law, Faculty of Management and Law

at the University of Limpopo.

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June 2018

DECLARATION

I declare that the '*THE USE OF A PRIVATE COMPANY TO PROMOTE AND DEVELOP THE PROPERTY INTERESTS OF RURAL COMMUNITIES*' (dissertation) hereby submitted to the University of Limpopo, for the degree of *Master of Laws in Mercantile Law (MLL01)*, has not previously been submitted by me for a degree at this or any other university; that it is my work in design and in execution, and that all material contained herein has been duly acknowledged.

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Date

ABBREVIATIONS AND ACRONYMS

CA	Companies Act
CC	Constitutional Court
CCDT	Corporate Communal Development Theory
CPA	Communal Property Association
DG	Director General
DRDLR	Department of Rural Development and Land Reform
MOI	Memorandum of Incorporation
NOI	Notice of Incorporation

ABSTRACT

The aim of this study is to posit the theory that it will be more beneficial to, rather use a private company instead of a Communal Property Association (CPA) to promote and develop the property interests of previous disadvantaged rural communities. Maladministration, poor governance, misappropriation of funds and property together with diverging interests give rise to disputes and internal conflict. The research will include a literature study of relevant textbooks, case law, law journals, legislation and discussion documents. Constitutional development in property law opened the door for a different approach in the application of property rights and rights relating to property, which in return precedes to a better understanding of communal rights and the enforcement of traditional values in a democratic society. Despite these constitutional developments, the maladministration, poor governance and misappropriation of funds and property by Communal Property Association executive committees caused discontent amongst community members, necessitating the examining of the use of a private company to promote and develop the property interests of rural communities, as an alternative institution to enhance democracy and the protection of human rights in communal context. The development of, either proper legislation to ensure compliance with the principles of good governance, accountability and transparency or the use of an alternative institution, which is already required by law to comply with the said principles, to manage the affairs of a Communal Property Association, should resolve these problems. The study is primarily a critical analysis and comparative study on the relevant provisions of the Companies Act 71 of 2008 in relation to the provisions of the Communal Property Associations Act 28 of 1996 to establish whether the use of a private company can resolve the problems currently experienced by Communal Property Associations.

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Chapter 1

1 General Introduction and Background

1.1 Introduction

The South African government has made several efforts to develop and strengthen the constitutional property rights of previously disadvantaged rural communities. The development of civil society institutions to manage and develop property rights are strategic to these efforts. Conversely, the success thereof is dubious since the development and operation of civil society institutions in these communities are constantly under threat and undermined by the tenacity of traditional leaders.¹

Constitutional development in property law opened the door for a different approach in the application of property rights and rights relating to property, which in return precedes to a better understanding of communal rights and the enforcement of traditional values in a democratic society.

In South African law the perception of ownership originates primarily from the Roman Dutch law. The Roman Dutch law constitutes ownership, as a real right in property, with acknowledgment of certain restrictive conditions that may be registered against the title of the property. These registered conditions will place a perimeter on the enforcement of real rights in the property by the owner.² Ownership in property has developed to be concomitant with real rights, which rights in broad, inaugurates an absolute and exclusive right in property.³ Such right in property is superior to any other rights.

More than a century ago, oppressive legislation was introduced by the government of the day with the aspiration of regulating the control over and the acquisition of immovable property. It was obligatory to repeal these acts in order to generate fair and equal opportunities for all citizens to acquire ownership in land, to accomplish more equality in the distribution of land ownership and to eradicate constraints based on race diversity for the acquisition and utilisation of various rights to land. Since 1996 communal property

¹ Bennett et al 2012 Elsevier Ltd 27.

² Van der Merwe Sakereg 9.

³ Pienaar 1986 TSAR 295; Pienaar 2008 EJCL 1.

could be managed democratically in terms of the Communal Property Associations Act 28 of 1996.⁴ Since its inception the concept of Communal Property Associations were criticised to be unsuitable to attend to communal land tenure.⁵

Prior to the promulgation of the *Companies Act* 71 of 2008⁶ it was not possible to register a private company for the purpose of promoting the property interests of a rural community for the mere fact that membership of private companies was limited to a maximum of fifty.⁷ Since 2011 the Companies Act does not impose any limitation on the number of members in a private company, which paved the way to test the theory whether a private company can be used to promote and develop the property interests of disadvantaged rural communities, rather than to use a Communal Property Association.

It is trite law that companies are juristic persons and in company law the relationships between members amongst themselves, members and the company, as well as the company and third parties, are regulated through well-established rules developed to advance the respective business relationships.⁸ Company law prescribes strict requirements to ensure transparency and one of the purposes of the *Companies Act*, as stipulated in section 7(a), is to “promote compliance with the Bill of Rights, as provided for in the Constitution, in the application of company law;” while section 7(b)(iii) describe another purpose of the Companies Act to encourage “transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;”

Despite all of the above mentioned constitutional, corporate and property developments many problems still prevail in the management of property of rural communities, necessitating the exploration of alternatives. One of the possibilities is the use of a private company to promote and develop the property interests of rural communities, as an alternative institution, to enhance transparency, higher standards, democracy and the protection of human rights in communal context.

⁴ Hereafter referred to as the Communal Property Associations Act.

⁵ Pienaar 2009 PELJ 23 – 24.

⁶ Hereafter referred to as the Companies Act.

⁷ Section 20(1)(b) of the Companies Act 61 of 1973.

⁸ Section 1 of the Companies Act 71 of 2008.

1.2 Problem statement

Disputes and internal conflict, as well as conflicting interest amongst Communal Property Association, Communal Property Association Committees and their members, Communal Property Associations and Traditional Authorities and Communal Property Associations and the rural communities seems to be the order of the day.⁹ This is the result of maladministration by Communal Property Association executive committees, poor governance, misappropriation of funds and property.¹⁰

1.3 Research aim and objectives

The proposed study falls within the broad focus of research on the development in the South African Constitutional State, and more specifically rethinking property and land reform in a Constitutional State, as it deals with the deficiencies of the *Communal Property Associations Act*. It will investigate whether private companies can be used to develop and improve the effective management of property of rural communities.

The aim of the study is to posit the idea that it will be more beneficial to, rather use a private company instead of a Communal Property Association to promote and develop the property interests of previous disadvantaged rural communities. This is tested by doing a comparative study of the elements found in both institutions, which may have an adverse effect on the property interests of communities.

The study relates to shareholders, as community members, and may accordingly contribute to development in the field of property law and protection of the constitutional rights of rural communities in South Africa. The study falls to some extent within the scope of new thinking in law, in as far as it deals with a novel doctrine suggesting new thinking in the application of company law to enhance the property interests of rural communities, specifically, as a result of constitutional development of property rights, and the development in company law.

⁹ Department of Rural Development and Land Reforms' 2011/2012 Annual Report.

¹⁰ Pienaar 2009 PELJ 23 – 24.

Among its central objectives, the following aspects pertaining to each of the above-mentioned sections and aspects must be established in order to determine the effectiveness of using a private company to promote community interests:

- (a) Development of constitutional property rights of members of a Communal Property Association.
- (b) Registration and documentation requirements.
- (c) The conduct and the common-law fiduciary duties of directors and executive committee members respectively to act in public interest.
- (d) Mandate of representation and other procedural requirements to ensure the development and protection of democratically elected institutions.
- (e) The relationship between shareholders amongst themselves and between shareholders and the company in relation to the relationship between members and the Communal Property Association.

1.4 Research questions

In order to achieve the research objectives, this dissertation addresses the following main research questions;

- a) Will it be more beneficial to make use of a private company instead of a Communal Property Association to promote and develop the property interests of previous disadvantaged rural communities?
- b) Whether private companies can be used to improve the effective management of property of rural communities.

To properly address the main questions the following questions need to be investigated.

- a) Which developmental theory, as argued in chapter 2, will augment a purposive approach to this study?
- b) The substantial difference in the application of the notion of ownership of members in the respective juristic entities, demands further consideration. Since a private company exists, as a separate entity, apart from its members, with its own legal

personality the principle of separateness is maintained throughout the existence of a company.¹¹ Only a measure of separateness is recognised in Communal Property Associations, raising the question whether the interest that members have in the communal property of the association can be justified in a private company? Chapter 3 will probe into the ownership concepts applicable to both institutions.

- c) Will the registration requirements of a private company be more beneficial to promote and develop the property interests of Communal Property Associations? This question is dealt with in chapter 4 by analysing the registration requirements of a private company with the registration requirements of a Communal Property Association.
- d) Since the essence of both juristic institutions is embedded in the founding documentation of each institution it necessitates an in depth scrutinising of the founding documentation to establish whether it will be more beneficial to use a private company to enhance the property interests of the relevant communities. Since all the rights and powers of a community is contained in the founding documents, a comparative analysis will indicate whether the founding documents of a private company would place a community in a better situation to promote and develop their property interests. This question is dealt with in Chapter 5.
- e) What are the differences relating to the management of each institution? Both institutions are juristic persons, managed in terms of their constitutions and relevant acts, which prescribes certain governance procedures. The effectiveness of each institution's governance will therefore have a direct effect on the property interests. Chapter 6 deals with the different governance procedures of each institution, while Chapter 7 will consider the accountability of the management of each institution.

1.5 Literature review

¹¹ Salomon v Salomon & Co Ltd 1897 AC 22.

Community interests of rural communities are normally promoted through community representatives who are the traditional leaders of the community and who are recognised in law in terms of the Traditional Leadership and Governance Framework Amendment Act.¹² These leaders are not only representatives of the community but are also members of the same community and share in the benefits obtained on behalf of the community.

Since 1994 efforts were made by the Government of the Republic of South Africa to draw statutes regulating communal land but this effort was abolished in 1999, as it was sternly criticised, and viewed as unacceptable by traditional leaders. The Communal Land Rights Bill, which was introduced in 2002 had to be redrafted, again owing to antagonism from traditional leaders. Eventually the Communal Land Rights Act 11 of 2004 was passed in 2004 stipulating in its preamble the fiduciary right of the state concerning rural people practicing communal land tenure.

Section 25(2) of the Constitution¹³ requires the state to “take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.” Ironically and despite the fact that the preamble refers to the constitutional and fiduciary rights the Communal Land Rights Act was affirmed to be unconstitutional by the Constitutional Court during 2010 mainly because of procedural irregularities.¹⁴

The *Communal Property Associations Act* endeavours to create “appropriate legal institutions” for disadvantaged communities to acquire and manage common property. To ensure the protection of members amongst themselves from abuse of power these institutions should be managed in a non-discriminatory, equitable and democratic way with accountability to their members, as stipulated in its preamble.

The purpose of the *Communal Property Associations Act* is further postulated in its preamble.

“To enable communities to form juristic persons, to be known as communal property associations in order to acquire, hold and manage property on a basis

¹² 23 of 2009.

¹³ Constitution of the Republic of South Africa, 1996.

¹⁴ *Tongoane v National Minister for Agriculture and Land Affairs* 2010 8 BCLR 741 (CC).

agreed to by members of a community in terms of a written constitution; and to provide for matters connected therewith.”

Despite a sluggish application process to get a Communal Property Association registered, a total of 1208 Communal Property Associations were registered since the inception of the *Communal Property Association Act* on 22 May 1996. It is clear from the Department of Rural Development and Land Reforms’ Annual Report on the performance of Communal Property Associations that most of the Communal Property Associations did not comply with the regulations of the *Communal Property Associations Act*.¹⁵ The following reasons were provided:

- Struggles for control and management of Communal Property Associations and their resources.
- Disputes amongst Communal Property Association members.
- Disputes between the Communal Property Association committees and their members.
- Disputes between Communal Property Associations and Traditional Authorities.
- Internal conflict within Communal Property Associations.
- Internal conflict between Communal Property Associations and the government regarding the provision of resources and services.
- Maladministration by Communal Property Association executive committees.
- Poor governance.
- Conflicting interests between Communal Property Association’s and the rural community.
- Conflicting interests between the Communal Property Association members and the executive committee.
- Communal Property Associations not serving the needs of all members of the community.
- Misappropriation of funds and property belonging to the Communal Property Association.
- Litigation in circumstances where the conflicts have been prolonged.

¹⁵ Department of Rural Development and Land Reforms’ 2011/2012 Annual Report.

Current legislation does not provide effective measures to counteract the problems experienced by rural communities. Pienaar¹⁶ states that the *Communal Property Association Act* “enjoyed a largely lukewarm reception, because it was in general perceived to be too sophisticated for most communities” and that the lawyers who drafted the constitutions “frequently did not take community customs and culture sufficiently into consideration”. Rigorous training of community members that could take up to a year would normally be required but was rarely done. According to Pienaar, the result of all the problems was that it is now commonly believed that Communal Property Associations are not the appropriate entity to manage communal property in furthermost of the rural communities.

Accordingly, the Department of Rural Development and Land Reform (DRDLR) acknowledged that all Communal Property Associations needed government assistance to effectively manage their affairs. Among others, financial assistance, capacity building, skills development, and mentorship were mostly needed.¹⁷

Pienaar and the report of the Department of Rural Development and Land Reform suggest certain probable solutions. Both concede that none of the suggested solutions was implemented, since it is absconded to the Government to intervene. This effectively nullifies their suggestions since they acknowledge the unlikelihood of the suggestions to be implemented for various reasons, including the high costs involved. Attempts by Government to introduce new legislation to combat criticism also proves to be catastrophic mainly due to constitutional issues.

The legislature did however anticipate the possibility that similar entities might be considered to operate as Communal Property Associations. A similar entity may therefore apply to the Minister of Rural Development and Land Reform to be considered, as a Communal Property Association. The Minister of Rural Development and Land Reform may, after considering the objects of the *Communal Property Association Act*, as well as the public interest, give notice in the *Government Gazette* to make the provisions of the *Communal Property Association Act* applicable to such entity. The Minister of Rural Development and Land Reform may further apply the provisions of sections 8 to 12, 14

¹⁶ Pienaar 2009 PELJ 23 – 24.

¹⁷ Department of Rural Development and Land Reforms’ 2011/2012 Annual Report 80.

or 16, or any subsection thereof, to such an entity subject to the conditions and qualifications, as he or she may deem fit.¹⁸

Up to date, no study has been done to examine the probability of using a private company as an alternative entity to combat the contemporary issues Communal Property Associations are faced with.

The *Companies Act* was put into operation during May 2011 to allow companies time to implement the Act and to give the Department of Trade and Industry sufficient time to publish the Amendment Bill and regulations. The main purpose of the *Companies Act* is to encourage the growth of the South African economy by encouraging private enterprise and business efficiency by generating suppleness and simplicity in the creation and preservation of companies.¹⁹

It is trite law that companies are juristic persons and in company law the relationships between members amongst themselves, members and the company, as well as the company and third parties, are regulated through well-established rules developed to advance the respective business relationships.²⁰

In order to establish the extent to which the stipulations of the *Companies Act* can be used to incorporate a private company for the purpose of promoting the property interests of previously disadvantaged rural communities, a parallel should be drawn between private companies and Communal Property Associations. An analysis and summary of the relevant and applicable corporate law principles will be done. Comparing these principles with the established principles of the *Communal Property Associations Act* should provide a basis for arguing whether an inference can be drawn between community members, as represented by community leaders, and members of a company, as represented by a private company, for the purpose of successfully developing and promoting community property interests.

¹⁸ Section 2(3) of the Communal Property Associations Act 28 of 1996.

¹⁹ Section 7 of the Companies Act 71 of 2008.

²⁰ Section 1 of the Companies Act 71 of 2008.

To establish whether the use of a private company could be beneficial to avoid the disadvantages of a Communal Property Association, careful consideration of the following company law principles, as embedded in the *Companies Act* will be done.

- (a) Section 1 – A company being a juristic person. The principle of companies being separate legal persons apart from its members imparts that the assets and profit of a company belongs to the company and not to its members. It must further be established whether the community members, as members of a company will directly benefit from the proceeds and assets gained by the company incorporated for the purposes of promoting the community interests, since this will disregard the fundamental nature of a company’s separate legal existence, as a company is defined, as a “juristic person incorporated in terms of the *Companies Act*.

- (b) Section 7 – The purposes of the *Companies Act* are amongst others to apply company law in accordance with the Bill of Rights, as provided for in the Constitution,²¹ and to encourage the growth of the South African economy by encouraging private enterprise and business efficiency by generating suppleness and simplicity in the creation and preservation of companies. The description of the purposes of the act now complies with modern developmental theories.²²

- (c) Section 76 and 77 - Standards of director’s conduct and their common-law fiduciary duties. The *Companies Act* is a product of developments in the corporate governance jurisprudence, which was inspired by the publication of various King Reports, being a result of long needed reform in company law. This follows the international governance trends that appeared in other countries, such as the United States of America, the United Kingdom and Australia.²³ Unfortunately none of the provisions of the King reports are binding or enforceable on companies, resulting in merely large public companies implementing effective corporate governance. The *Companies Act* does however provide for a shift from creditors relying on capital maintenance, to an emphasis on solvency and liquidity, as provided for, in the solvency and liquidity test.²⁴ Although the success of the

²¹ Constitution of the Republic of South Africa, 1996

²² See chapter 2 for a discussion on the theoretical framework.

²³ Botha 2014 PELJ 2042 – 2103.

²⁴ Section 4(1) of the Companies Act 71 of 2008.

implementation of such test still depends on the good corporate governance, as implemented by the directors of a company, there are personal consequences for directors' failure to implement the test and their common-law fiduciary duties.

- (d) The shareholders' agreement will play a decisive role in determining the relationship among shareholders in corroboration with the Memorandum of Incorporation, which serves as the constitution for a company and determines the boundaries of the company's mandate. These two documents will form the basis of the legality and powers of a company in representation of the community's interest.
- (e) Section 72(4) authorisation to the Minister of Trade and Industry to determine by way of regulation that certain companies have to appoint a social and ethics committee, should it be desired in the public's interest. This should be done after the social and economic importance of the company, as signposted by the yearly turnover, the dimensions of its workforce and the nature and scope of the company's undertakings have been considered. Section 30(2)(b)(i) contains similar considerations to be taken in account when the Minister of Trade and Industry may in terms of section 30(7)(a) prescribe by regulation that certain private companies should have their annual financial statements audited. Schedule one of non-profit companies provides for communal or group interests.

1.6 Delimitations

The proposed research will be limited with the following assumptions and hypotheses:

- (a) That both the *Communal Property Associations Act* and the *Companies Act* complies with the requirements of constitutionality.
- (b) The incorporation of a private company to promote the interests of a rural community does not have the purpose of replacing the role of community leaders.
- (c) Community interests will be limited to property interests and not community interests in general.

- (d) All members of the community will be shareholders in the theoretical private company, which is incorporated with the main purpose of developing and furthering communal property interests.
- (e) The hypothesis is thus that it should be possible to incorporate a private company to successfully promote community interests.

1.7 Research methodology

The research will include a literature study of relevant textbooks, case law, law journals, internet sources, legislation, draft legislation, media statements and discussion documents. The study is primarily a critical analysis and comparative study on the relevant provisions of the *Companies Act* in relation to the provisions of the *Communal Property Associations Act* to test the theory of using a private company to promote and develop the property interests of disadvantaged rural communities.

Chapter 2

2 *Theoretical Framework*

2.1 *Introduction*

To enable this discourse to test the theory on using a private company to promote and develop the property interests of disadvantaged rural communities, a specific developmental theory should first be defined. The developmental theory must facilitate the viewpoint that the conclusion and recommendations of the research are in line with the Bill of Rights, being provided for in the Constitution.²⁵ Reference will be made to the progress of developmental theories in general in order to identify a specific developmental theory, which will be used to facilitate the discourse in the critical analysis and comparative study on the relevant provisions of the *Companies Act* in relation to the provisions of the *Communal Property Associations Act*.

In accordance with the assumptions and hypothesis that community interests will be limited to property interests and not community interests in general, and that all members of the community will be shareholders in a theoretical private company, which is incorporated with the main purpose of developing and furthering communal property interests, the development of ownership in land will also be analysed.

To conclude, the diverging interests, which emanates from internal conflicts and struggles for control and management of Communal Property Associations, will be discussed in the light of current case law.

²⁵ Constitution of the Republic of South Africa, 1996.

2.2 Developmental theory in general

“Rates of economic growth in many countries were unimpressive despite foreign aid, and, even in rapidly industrializing states such as Brazil, South Africa, and Iran, long-term prospects for social equality and political democracy appeared poor. The experiences of Third World states forced an internal re-evaluation of the concepts and theories contained within the existing ‘modernization’ framework. By the late 1960s, the problem with Third World states was thought by scholars to be less their ‘traditional attitudes’ and more the injudicious mixing of political participation with institutional weakness, in addition to their profligate waste of resources. Political participation remained a laudatory objective, but the emphasis of the liberal ‘modernization’ scholars such as Almond, Lerner, Coleman, and Lipset on Western-style democracy as the end point of development gave way increasingly to an emphasis on the immediate need for order and efficiency.”²⁶

In the midst of renewed awareness in developmentalism, as an alternative to dependency, developmentalism were often distorted or misinterpreted by influential critics and its most important attainments are mainly unrecognised.²⁷ The assumption that Third World countries interest in obtaining Western qualities such as independence, progress, political involvement, judiciousness and modern presumptuousness, as well as the methods to achieve the way from tradition to modernism, was proposed as fact. The rethinking by leading practitioners of development projects, as well as by academics and social movements, towards the development in Third World countries is described as “countermodernist”.²⁸ A philosophy called the “Participatory Action Research” emerged from the diverse exertions to rethink development and was introduced during the 1970s in a number of countries in Latin America, Asia, and Africa. Central to the Participatory Action Research stands the problem of how to create widely held control instead of economic growth, to empower people to obtain control over the powers that determine their lives.

The Participatory Action Research philosophy merge techniques of political involvement, adult education and research in social science with a foundation of denunciation of the

²⁶ Manzo K 1991 Studies in Comparative International Development 4.

²⁷ Manzo K 1991 Studies in Comparative International Development 5.

²⁸ Manzo K 1991 Studies in Comparative International Development 13, 27.

Western abstract of "top down" development plans, which endeavour to universalise experience. It further inspires local grassroots ingenuities, emphasise on the necessity for economic processes that are both endowed in the needs of particular communities and fitting for the local ecologies. Prominence is placed on inquest into what development denotes to poor and marginalised people. Consequently, development should cease to be something that is done to people and should, rather be something that is done by the people, developing in to a participating process where people are empowered to determine the making of their own communities. Development theory should become more an exchange of ideas between researcher and subject, rather than a prologue from subject to object. As an alternative of telling people in the Third World what it is and how to get it, researchers should, rather listen to what the people say about development.²⁹

Consequently, the partitions between subject and object, research and practice, and the empiricist social science and Western philosophy dictating what is acceptable and what's not, will be rejected. Science will be considered the end result "of a process in which theory-building and popular organization for change are combined and become part of the same historical process". It will endeavour to exceed the parameters of present philosophy by acknowledging differences, lacking being internally obliged to define many of them as forms of dissimilarity to be conquered or assimilated.³⁰

Richard Peet and Michael Watts argue that the post-structural theory, which popularity lies in the deconstruction of the Western mythologies of "science, truth, and rationality", has also constructed a mythology about the contention and has taken the "dialectic of Stalin's iron laws of history" as its fundamental model. It is depicted as an "idealist device in which thesis incorporates anti-thesis during teleological passage to an already-given synthesis, allowing no room for contingency, difference, or, for that matter, the new". It is their opinion that "dialectical analysis", as an alternative, offers the opportunity of conjuring up a system of relations that does not devour the independence of the specific, and in which various vibrant trends, in moving ranked measures, are frequently upset by a new series of diverse actions. A dynamic with "pattern, order, and determination

²⁹ Manzo K 1991 Studies in Comparative International Development 28.

³⁰ Manzo K 1991 Studies in Comparative International Development 29.

without being teleological, a theory of totalities which, because it values their unique aspects, is not totalizing". This prolonged conception of discussions provides a way of comprehending the compound forms of environmental inconsistencies and social engagements.³¹

"What is needed now is for social theory to take seriously the ideas of those who argue for grounding knowledge in local histories and experiences, rather than building theory through the use of general conceptual categories and Western assumptions."³²

2.3 Corporate Communal Development Theory

In acknowledgment of the converted attentiveness in developmentalism and in recognition of the "Participatory Action Research" philosophy in applying a "countermodernist" approach, a new development theory, called the *Corporate Communal Development Theory* (CCDT) will be introduced in this discourse.

When South Africa became a democracy, a new dispensation was born in developmentalism coerced by the 1996 Constitution of the Republic of South Africa. Pre-1994 any development in law and society was driven by Western philosophies inherited with colonialism. Improvement and prosperity was measured by the success in achieving or not achieving Western objectives. The criticism of Western science, being wisdom in its pure and entire essence, opens the door for a better appreciation of the diverse methods to grasp the development-environment relationship. Exploration commences with concrete criticism on the destructive environmental corollaries of modernity and contend for context-reliant and considerably dissimilar indigenous discourses about development. The post-structural criticism of the cogent pinpoints the links between natural science and imperialism. It allows for a recovery of country-dweller and ethnic discourses on land use and management, which enhances the prospect for an exchange of information.³³

³¹ Peet and Watts 1993 Economic Geography 248-249.

³² Manzo K 1991 Studies in Comparative International Development 30.

³³ Peet and Watts 1993 Economic Geography 248.

The Corporate Communal Development Theory is a social development theory, which will candidly consider the acknowledged wisdom of those who reason for basic knowledge in local histories and practices without comparison to colonial hegemony. The *Communal Property Associations Act* is an example of a "countermodernist" approach that has acknowledged the resident antiquities of communities desiring to own and manage communal property without association to the Western concept of private property. The development of the *Companies Act* was a result of the requisite for legislation to comply with the country's Constitution.³⁴ The constitutionality of both the *Communal Property Associations Act* and the *Companies Act* is not questioned or doubted in this paper and both acts are considered to meet the requirements of constitutionality.

No community is immune to the effects of globalisation and technological progression. It is therefore obstinate that communities all over the world, irrespective of their traditions and values, will in one or another way be influenced to adopt new, or to amend their contemporary values and traditions with customs that are more advanced and in line with modern values. It also allows communities to become part of a globalised community, in a world that constantly becomes smaller day-by-day.

The Corporate Communal Development Theory will investigate whether a private company can be used to effectively develop and promote the property interests of rural communities, as an alternative institution, to enhance democracy and the protection of human rights in a communal context. Acknowledging the abrupt need for order and good organisation, this social theory will contend for basic knowledge in local histories and experiences, rather than building theory through the use of general abstract classifications and Western expectations, as argued by Manzo.³⁵

2.4 Ownership in Land

The *Communal Property Association Act* defines property as, " 'property' includes movable and immovable property and any right or interest in and to movable or immovable property or any part thereof;"³⁶ Judge Yacoob stated in *Government of the Republic of*

³⁴ Constitution of the Republic of South Africa, 1996

³⁵ Manzo K 1991 Studies in Comparative International Development 30.

³⁶ Section 1 of the Communal Property Associations Act 28 of 1996.

*South Africa v Grootboom*³⁷ that the comprehension of rights should be done within the sociological and historical perspective. It follows that in order to understand ownership in land or any other right or concern in and to either movable or immovable property in the correct context, reflection should first be given to the historical development of ownership in South Africa.

In the South African law, the perception of ownership originates primarily from the Roman Dutch law. The Roman Dutch law constitutes ownership as a real right in property with acknowledgment of certain restrictive conditions that may be registered against the title of the property. These registered conditions will place a perimeter on the enforcement of the real right in the property by the owner.³⁸ Ownership in property has developed in the South African law to be concomitant with real rights, which in broad inaugurates an absolute and exclusive right in property.³⁹ Such right in property is superior to any other rights.

Property legislation of the past was based on racial discrimination. The result was that majority of South African communities were excluded to own property rights in land. More than a century ago oppressive legislation embarked with the Natives Land Act 27 of 1913 shadowed by the Native Trust and Land Act 18 of 1936 and crowned with the Group Areas Act 41 of 1950. This was trailed by the Group Areas Act 36 of 1966, which completed the Group Areas Act 41 of 1950. The intention of the government of the day was to consolidate the law relating to the establishment of group areas with the aspiration of regulating the control over and the acquisition of immovable property. This also included the regulation of occupation of land.

It was obligatory to repeal these oppressive acts in order to generate fair and equal opportunities for all South African citizens to acquire ownership in land, and to accomplish more equality in the distribution of land ownership.⁴⁰ Eventually the Abolition of Racially Based Land Measures Act 108 of 1991 was promulgated to revoke or modify laws to eradicate constraints based on race diversity for the acquisition and utilisation of various

³⁷ 2001 1 SA 46 (CC) para 22.

³⁸ Van der Merwe Sakereg 9.

³⁹ Pienaar 1986 TSAR 295; Pienaar 2008 EJCL 1.

⁴⁰ Kloppers and Pienaar 2014 PELJ 686.

rights to land and to arrange for the phasing out of institutions founded on race. Section 12 of the Abolition of Racially Based Land Measures Act⁴¹ contained transitional measures to phase out the South African Development Trust. This Trust was the registered owner of the majority of communal land, that needed to be transferred back to the rural communities from whom this land was unjustly dispossessed off.

Consequently it was followed by the introduction of the Reconstruction and Development Programme with the aim of:

“... eradicating the legacies of the past through the redress of inequalities and building a vibrant and democratic South Africa...acknowledged that land represented the most basic need for the rural population, a need that resulted from the discriminatory practices of the past regime. In order to effectively address the issues of inequality, poverty and landlessness caused by the “injustices of forced removals and the historical denial of access to land” the programme identified the need for the establishment of a comprehensive national land reform programme.”⁴²

In 1997 the purpose of the White Paper on Land Policy was to create a land reform policy and addressing the historical injustices.⁴³ Its purpose is further described “...to provide an overall platform for land reform consisting of three principal components: restitution, redistribution and tenure reform,” which were the matching pillars, identified in the Reconstruction and Development Programme.⁴⁴

2.4.1 The Constitutional Property Clause

Although it is not the aim of this study to investigate the constitutionality of property rights, acknowledgment should be given to the current status of property. For the sake of completeness, it is necessary to consider the recent developments in constitutional property rights since it effects *all* property, which will of course also include any property or interest in property of rural communities.

Van der Walt⁴⁵ considers the question whether certain interests will qualify as property and then extensively compares the property clause, as contained in section 25 of the

⁴¹ 108 of 1991.

⁴² Kloppers and Pienaar 2014 PELJ 688-689.

⁴³ Department of Land Affairs White Paper on Land Policy 1997 para 2.1.

⁴⁴ Kloppers and Pienaar 2014 PELJ 692.

⁴⁵ Van der Walt The Constitutional Property Clause 30-71.

Constitution,⁴⁶ with the German private law. He examines property being the object of property rights, property as property rights and property as a restricted right and then summarises the German position regarding non-proprietary rights as follows:⁴⁷

“In accepting that non-proprietary rights can also qualify as property for purposes of the constitutional guarantee, the German courts rely on the fundamental guideline mentioned earlier: a right will be in- or excluded from the property concept according to the question whether the in- or exclusion will serve the creation of the sphere of personal freedom which will allow the individual person to take responsibility for the development and management of her own affairs within the social context. On the basis of this test, certain non-proprietary rights (and particularly the socially extremely important land-use rights of residential lessees and lessees of garden allotments, as well as the participatory rights of employees in a large firm, and the claim rights of beneficiaries of a socially important compensation fund for victims of a pregnancy drug) has been included in the property guarantee, while others (especially some social participatory rights and some claim rights) have been excluded.”

This functional and purposive approach requires that a court will have to apply a balancing of interests in each individual case. In analysing the *Port Elizabeth Municipality v Various Occupiers* case⁴⁸ Van der Walt⁴⁹ concludes that there is a shift in the thinking of property rights in general, as being abstract and rights-based to a contextual, non-ranked philosophy about property rights.

Pienaar⁵⁰ has as far back as 1986 already resolved that:

“Although the South African concept of ownership is basically derived from the Roman and Roman Dutch concepts, it is not in every way comparable to the latter because of changed social, political, economical, religious and philosophical factors. The said factors often make it necessary to introduce new developments, which influence the concept of ownership.”

In Van der Walt’s⁵¹ discussion of the FNB case,⁵² he confirms that the Constitutional Court has repeatedly indicated that a purposive approach is appropriate when the Bill of Rights

⁴⁶ Constitution of the Republic of South Africa, 1996.

⁴⁷ Van der Walt The Constitutional Property Clause 43.

⁴⁸ 2005 (1) SA 217 (CC) paragraphs 8-23.

⁴⁹ Van der Walt Constitutional Property Law 521.

⁵⁰ Pienaar 1986 TSAR 306, 308.

⁵¹ Van der Walt Constitutional Property Law 53.

⁵² First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC).

should be interpreted. Van der Walt observed that since his book was first published in 1997 the Constitutional Court has indicated that the property clause will definitely be approached from a purposive perspective and that the clause needs to be construed with due regard to its constitutional devotion and historical perspective. This approach has been confirmed in the recent *Bakgatla-Ba-Kgafela Communal Property Association* case.⁵³

Whether the trite law should be changed and non-proprietary rights treated equally, being absolute rights, together with vested real rights in property, or whether the court should apply a balancing act between property and non-proprietary rights, does not fall within the scope of this study, except to note that despite the Roman Dutch inheritance the courts⁵⁴ have recognised and applied the principle that there is no fixed number of real rights and have found that non-real rights, which burden real rights should be registered against the property because of its intimate connection with the property concerned.⁵⁵

It is further clear from section 25(4)(b) of the Constitution⁵⁶ that for purposes of section 25, property is not limited to land, as also unanimously confirmed by Jafta J in the *Bakgatla-Ba-Kgafela Communal Property Association* case,⁵⁷ where he states that: "In section 25(7), the Constitution recognises and protects rights in land which go beyond registered ownership."

Van der Walt⁵⁸ shares this opinion in his discussion of eviction from property, where he points out three matters to be considered when interpreting property legislation and the common law development of property. Firstly, an order should be justified in light of the circumstances. Secondly, a balancing exercise, between the rights of the landowner and interests of the occupiers should be done, despite the fact that the interests of the occupiers do not amount to property, as historically understood. Thirdly, a balancing

⁵³ *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* [2015] ZACC 25 para 35; *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 53.

⁵⁴ *Ex Parte Geldenhuys* 1926 OPD 155-165.

⁵⁵ *Carey Millar Land Title in South Africa* 102-103.

⁵⁶ *Constitution of the Republic of South Africa, 1996.*

⁵⁷ *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* [2015] ZACC 25 para 18.

⁵⁸ *Van der Walt Constitutional Property Law* 524.

exercise should be done between the permanent and continuing effects of the historical background and the current situation.

Van der Walt concludes that it could be argued that the “contextualised-balancing principle” could be expanded beyond the scope of eviction, resulting in punier rights not being hypothetically oppressed by stronger rights. The constitutional property concept has developed to include interests in property that would not have been recognised as property, prior to the Constitution and these interests may now compete on the same level with conflicting property rights.

It is thus evident that rights in land go further than real rights and will also include non-real rights or interests associated with land or the use of land. This opens the door for the long overdue recognition of traditional values in the interpretation, applying and enforcing of traditional rural communal rights.

Consideration should likewise be given to the exceptional limitation of rights, as contained in section 36(1) of the Constitution, which allow for rights in the Bill of rights to

“be limited only in terms of law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom, taking into account all relevant factors, including-

- a. the nature of the right;
- b. the importance of the purpose of the limitation;
- c. the nature and extent of the limitation;
- d. the relation between delimitation and each purpose; and
- e. less restrictive means to achieve the purpose.”

2.4.2 Traditional Ownership

Pienaar⁵⁹ compares the concept of ownership in a socialist community with those in a traditional primitive communal society and differentiate the two from each other, on the basis of control and ownership or absence of control and ownership by the state, as well as the existence or absence of the profit motive. The main distinction lies in the fact that

⁵⁹ Pienaar 1986 TSAR 303-305.

in a traditional community communal property ownership vests in a particular family while in a socialist's community, communal property belongs to the state.

The Rural Women's Action Research Programme at the Centre for Law & Society from the University of Cape Town refers to this concept of communal ownership as "African freehold" and states that "valuable lessons" need to be learned from the practice of African freehold ownership.⁶⁰ It is recommended by them that the customary values and understanding and practices of African freehold ownership should, rather be adhered to than following Western legislation, which is based on exclusive ownership. This will ensure that family interests of rural communities are protected. Ironically it is then suggested that: "Urgent additions are that protected rights must be recorded and registered, so that they cannot be sold from under people, and people have the security of written proof of their rights." Thus creating an anomaly, since the formal act of registration of ownership in land originates from Western tradition of registering rights in property.

A better understanding of rural communities' interpretation and enforcing of rights are well illustrated in the case study done by Michael Schnegg and Theresa Linke at the University of Hamburg in Germany.⁶¹

"In sum, the case studies indicate that social networks hinder formal sanctioning and at the same time adjust and substitute enforcement rules. Since they are substituted, institutions work and water is provided. It is difficult to say whether the causal relationships observed here will also hold true for the management of other common-pool resources, like pastures, forests or fisheries. From what we observe, we would assume that under similarly high levels of density, connectedness and multiplexity it will always be challenging to execute specific sanctions in small face-to-face communities."

A much more tolerant approach and gradual intensifying of social pressure to enforce the community's rights against an individual who does not comply with the rules and expectations of the community, exists in rural communities. This approach differs considerably from the less tolerant Western approach to the immediate enforcement of social or individual rights against offenders.

⁶⁰ Position Paper for National Land Tenure Summit, 2014 4.

⁶¹ Schnegg and Linke 2015 Elsevier Ltd 205-214.

2.4.3 Communal Ownership

The *Communal Property Association Act* defines the “holding of property in common” to mean “the acquisition, holding and management of property by an association on behalf of its members, in accordance with the terms of a constitution.”⁶² This definition implies a representative relationship and the relationship is confirmed to be a fiduciary relationship in terms of section 8(7), section 9(e)(vi) and section 14(1)(b) of the *Communal Property Association Act*.

One of the qualification requirements for the registration of a Communal Property Association, obliges the adopted constitution to dispense with the issues stated in the Schedule.⁶³ Item 4 of the Schedule refers to “land or property to be owned by the association” and item 7 only refers to members rights to use the association's property.

Although property is defined, as being movable and immovable property, specific reference to the acquiring of land is made on only three occasions in the act, of which one is by way of implication. The provisions of the *Communal Property Association Act* applies to communities who are eligible to restoration of land, legalised by the Restitution of Land Rights Act⁶⁴ where the Land Claims Court has made an order of restitution on condition that a Communal Property Association be established.⁶⁵ Secondly reference is made to disadvantaged communities approved by the Minister of Rural Development and Land Reform who acquired land or rights to land and who desires to form a Communal Property Association.⁶⁶ Thirdly reference is made to identified land or the right to land to be acquired by a provisional association, when it applies for registration.⁶⁷

The only reference made to the registration of land in the name of a Communal Property Association, is where the Minister of Rural Development and Land Reform is authorised to determine that the provisions of laws ruling the establishing of towns and the

⁶² Section 1 of the Communal Property Associations Act 28 of 1996.

⁶³ Section 8(2)(a) and 8(2)(d) of the Communal Property Associations Act 28 of 1996.

⁶⁴ 22 of 1994.

⁶⁵ Section 2(1)(a) of the Communal Property Associations Act 28 of 1996.

⁶⁶ Section 2(1)(b) and 2(2) of the Communal Property Associations Act 28 of 1996.

⁶⁷ Section 5(2)(c) of the Communal Property Associations Act 28 of 1996.

Subdivision of Agricultural Land Act⁶⁸ will not be applicable to land which is registered in the name of a Communal Property Association.⁶⁹

This is concurrent with the concept of a Communal Property Association being a juristic person, existing apart from its members.⁷⁰ Members of the association therefore do not become the registered owners of land, but are only entitled to the use of land owned by the Communal Property Association.

In slight contradiction to the above mentioned, item 9 of the Schedule allude to rights and property of a member on termination of membership and item 10 the purposes for which property may be used, the physical partition thereof, and apportionment of property to different members. This may create the impression that members individually become owners of parts of the communal property.

It is imperative that traditional and communal ownership should be defined properly without changing the original concept thereof. Without this comprehension all attempts to regulate traditional or communal ownership, in terms of Western legislation will dwindle, since current legislation do not provide for proper recognition and implementation of traditional ownership.

In contradiction to the findings of Van der Walt, Pienaar⁷¹ compares the South African Rickersveld Case with the Delgamuukw cases in Canada and focus on the elementary differences, being embedded in the range of inclusivity or the exclusivity of land tenure, also referred to as a "discourse of exclusion" and in the dissimilarity between the "idea of property" urged by individualism and the "institution of property" engrossed with concession, relationality and the strain between the individual and communal interests.

Pienaar chooses Canada to compare the inclusivity or exclusivity of property since both countries have fused communal land tenure in their property law. In South Africa the property law is primarily of civilian nature while Canada mainly follows a common law approach. Civil law and common law principles are recognised by both countries

⁶⁸ 70 of 1970.

⁶⁹ Section 8(8) of the Communal Property Associations Act 28 of 1996.

⁷⁰ Section 8(6)(a) of the Communal Property Associations Act 28 of 1996.

⁷¹ Pienaar 2008 EJCL 1.

respectively, which includes the Roman-Dutch concept of exclusivity of ownership, being a comprehensive real right a person can have, in relation to property within the limitations of the law in general.⁷² Although private ownership is constitutionally protected in our law, it is limited in the public interest.⁷³

According to Pienaar the common law principle on land tenure followed in Canada is considered to be less complete and is suppler than the strict Roman-Dutch concept. The Crown holds supreme ownership of all the immovable property in the country while the tenants only have land tenure rights in the form of interests, tenures and estates. Different land tenure rights can therefore be exercised by a number of people in respect of the same property. This modest form of ownership or freehold ownership found in Canada is often observed as “absolute ownership of the land, or at least, as close to being absolute owner as English common law permits”. To a large degree land tenure rights in Canada also appear to be exclusive in nature, excluding other persons from the rights of usage and possession of land.

Communal land rights are exercised by indigenous communities and presents qualities of social relationships (household and kinship networks with different forms of community membership); inclusive, rather than exclusive in character, are shared and relative but in general secured (in one particular community rights can be individualised, communal like grazing and fishing or mixed like seasonal cropping events); the community’s land ethos gives certain access to land (The norms and values of the communities determine social rights, rather than authoritative and administrative structures to control access to land); rights originates from putative membership (membership from of a particular social unit and is attained through birth, allegiance, relationship or dealings); Social and political boundaries (mark out the use of resources and are generally straight forward, frequently malleable and negotiable but also a cause for strain and skirmish); bendable balance of power (amongst gender role, contending communities, tenures, land administration authorities and traditional authorities); intrinsic negotiability and flexibility of land tenure rights (allows for rights to adapt to changing conditions but also make it vulnerable to

⁷² Gien v Gien 1979 2 SA 1113 (T).

⁷³ First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services 2002 4 SA 768 (CC) para 51. See also President of the RSA v Modderklip Boerdery (Pty) Ltd 2005 SA 3 (CC), Van der Walt 2004 SALJ 854 – 866.

acquisition by dominant external forces like the government or susceptible to capital investors).

The invariable goes for attempts to regulate rural communities with existing traditional authorities descending from the apartheid era. As long as there is resistance from communities against established authorities, none of the rules and regulations implemented by these authorities will be honoured by community members.

For any attainment, the land reform programme has to be elongate and feasible. The constant ignorance towards both economic and social sustainability in the redistribution and the restitution pillars of the land reform programmes contributed considerably to most of the envisioned agricultural land being unproductive.⁷⁴

2.5 Diverging interests

Internal conflicts and struggles for control and management of Communal Property Association's is a result of pre-existing tribal authorities to be deemed traditional councils in terms of the Traditional Leadership and Governance Framework Amendment Act.⁷⁵ The Act requires pre-existing tribal authorities to comply with two transformation measures. The first, is that forty percent of traditional council members have to be democratically elected and secondly, that one third of traditional council's members must be women.⁷⁶ The time frame for meeting these requirements, which was one year, had to be extended several times. It is now clear that pre-existing tribal authorities are not willing to share their power, especially not with woman. According to the Rural Women's Action Research Programme at the University of Cape Town, many councils still do not comply with the women's quota and where elections were held it was mostly flawed. Even 10 years later, there has not been traditional council elections in Limpopo.⁷⁷

⁷⁴ Kloppers and Pienaar 2014 PELJ 694.

⁷⁵ 23 of 2009.

⁷⁶ Section 3(2)(b) and (c) of the Traditional Leadership and Governance Framework Amendment Act 23 of 2009.

⁷⁷ Position Paper for National Land Tenure Summit, 2014 3.

The situation is so out of hand that the new Traditional Affairs Bill were supposed to come to the rescue with repealing the Traditional Leadership and Governance Framework Amendment Act,⁷⁸ and by introducing new provisions to contend with the consequences of non-compliance of traditional councils. It is however unlikely that the bill will ever be implemented due to constitutional issues.

Disputes and internal conflict, as well as conflicting interest amongst Communal Property Association members, Communal Property Association Committees and their members, Communal Property Associations and Traditional Authorities and Communal Property Associations and the rural communities seems to be the order of the day. Top this with maladministration by Communal Property Association executive committees, poor governance, misappropriation of funds and property and the parties will indefinitely end up with litigation where the conflicts have been protracted.⁷⁹

And indeed it ensued in a classic example, illustrated in the Bakgatla-case,⁸⁰ where the members of the community favoured a Communal Property Association, while the tribal authority and the traditional leader, Kgosi Pilane, preferred a trust to advance the community's property rights. Even after referral of their dispute to the Minister of Rural Development and Land Reform, who suggested the registration of a provisional Communal Property Association to enable the parties to decide the issue within the period of twelve months, being the time, as allowed by the *Communal Property Association Act*, the dispute could not be resolved. Neither was the Bakgatla-Ba-Kgafela Communal Property Association registered as a permanent Communal Property Association.⁸¹

The diversity of duties and responsibilities of the Director-General cannot be over emphasised. Save to say that the *Communal Property Association Act* not only empowers but requires the Director-General to play an active role in solving disputes between the leaders and the community. In the Bakgatla-case,⁸² the Director-General did not attend

⁷⁸ No. 23 of 2009.

⁷⁹ Department of Rural Development and Land Reforms' 2011/2012 Annual Report 80.

⁸⁰ Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others [2015] ZACC 25.

⁸¹ Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others [2015] ZACC 25 par 8 and 9.

⁸² Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others [2015] ZACC 25.

to the registration process in the spirit, as expected by the *Communal Property Association Act*. He resisted the Communal Property Association's registration without attempting to assist the community, and his conduct was capricious with the recommendation made by his own delegate. The Director-General showed an indecorous reaction to the community's lawful request for registration of a Communal Property Association. Not only did the Director-General obstruct the Bakgatla-Ba-Kgafela community's endeavours to register a Communal Property Association but also, collectively with the Minister of Rural Development and Land Reform, opposed the relief sought by the community.

The fact that the legislature gave recognition to traditional councils does not remove the communities' view and resistance towards traditional leaders, who are seen as an extension of the British colonialist's dictatorship. Customary systems of land rights do not comprise of property rights for their members, but allow for misuse by the autocratic power of traditional leaders. Evidently the non-compliance with the Traditional Leadership and Governance Framework Amendment Act⁸³ raises doubt over traditional leaders' legal capacity to own the land that belongs to the rural community. Consequently, most traditional councils are not legally constituted and therefore have not acquired the legal capacity to own or transfer land. For the same reason, traditional councils do not have the legal status to procure investment transactions.⁸⁴ Traditional leaders, on the other hand, are concerned about the wearing down of their seat of power by communities who refuse to further recognise their traditional councils.⁸⁵

In an application for leave to appeal and appeal against a decision of the Supreme Court of Appeal, the legality of a decision of the Department of Mineral Resources to award Genorah Resources (Pty) Ltd prospecting rights on the Bengwenyama community's land was decided.⁸⁶ The Bengwenyama community was dispossessed of their land during apartheid but successfully instituted a land claim and the land was subsequently returned to the Bengwenyama community. During the same time that the respondent, Genorah

⁸³ No. 23 of 2009.

⁸⁴ Position Paper for National Land Tenure Summit, 2014 2.

⁸⁵ Pienaar 2009 THRHR 2.

⁸⁶ *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) A par 3.

Resources (Pty) Ltd, applied for a prospecting right, the Bengwenyama community, making use of a company called Bengwenyama Minerals (Pty) Ltd also applied for a prospecting right. The company was specifically registered for the purpose of acquiring the prospecting rights on behalf of the Bengwenyama community. Despite the initial concern of the Department of Mineral Resources, and their advice to the community to procure better protection in the investment agreement, the community's application was simply ignored by the department. The court found that the Department of Mineral Resources forsake to comply with the requisites for consultation and with its duty to give Bengwenyama Minerals (Pty) Ltd an opportunity to apply for a preferent prospecting right.

The Mineral and Petroleum Resources Development Act⁸⁷ was proclaimed not only to give effect to the constitutional norms of equality, dignity and freedom, but also to substantially impact on individual and communal ownership of land and the empowerment of previously disadvantaged persons to gain access to mineral resources. Consequently, section 104 of the act allows previously disadvantaged communities to apply for and be granted a preferent prospecting right in relation to other applicants.

It is perplexing that the second respondent was the Minister for Mineral Resources, the third respondent the Director-General of Mineral Resources, the fourth respondent the regional manager of the department of Mineral Resources, Limpopo Region, and the fifth respondent was the deputy Director-General of the department of Mineral Resources. All are representatives of the government of South Africa opposing an application brought by a previous disadvantaged rural community seeking justice against an unlawful decision by the Department of Mineral Resources.

Mostert⁸⁸ resolved that:

“The problem is that no land reform venture of the scale embarked on in South Africa can even remotely hope to meet the targets set within one generation, let alone a few election cycles. Although land reform is highly politicised, it is, unfortunately, not an area in which real solutions fit political expediency.”

⁸⁷ 28 of 2002.

⁸⁸ Mostert 2014 PELJ 760 – 795.

Various reasons exist to justify the believe that Communal Property Associations are not suitable entities to manage communal property. The reality is that more than one thousand two hundred communities bought in to this concept of property management, which confirm their trust in the management style, as proposed by the *Communal Property Associations Act*. Much of the denunciation for the critics against Communal Property Associations can be laid at the door of the Department of Rural Development and Land Reform. Much of the frustration experienced by communities is directly linked to lack of knowledge and incompetence of government institutions including the legislature's incapability to draft proper legislation.

The emphasis should, rather be on the administrative measures to establish tenure security for communities and groups in a transparent and an accountable way.⁸⁹ Apposite legislation, which is akin to the codification of management regulations, as found in the *Companies Act* is essential to empower and assist communities to take command of the management of their property to the advantage of every member of the community.

2.6 Conclusion

In order to assess whether the Corporate Communal Development Theory can be applied to determine whether a private company can be used for the purpose of developing and promoting the interests of a rural community, the corporate law principles will be compared with the principles, being contained in the *Communal Property Associations Act*, which will test the possibility of a parallel, without deterring the concept of management already embraced by rural communities.

Emphasis will be placed on the concept of ownership, registration requirements, control and decision procedures, founding documents and management. These critical key theoretical elements will be comparatively analysed against the background of the principles of accountability, transparency, equality and democracy.

⁸⁹ Pienaar 2009 PELJ 28.

Chapter 3

3 Dissimilarities in the ownership of members in a Communal Property Association towards the ownership of members in a Private Company - An analysis

3.1 Introduction

Notwithstanding the fact that Communal Property Associations and private companies are recognised in law to be juristic entities, there is a considerable difference in the application of the concept of ownership of members in the respective juristic entities. A company exists as a separate entity apart from its members with its own legal personality from the moment of registration.⁹⁰ The principle of separateness is maintained throughout the existence of a company. Despite a measure of separateness recognised in Communal Property Associations, it varies as to the interest that members have in the communal property of the association. To enable a private company to be used, as a vehicle for the promotion, development and management of communities' interest in property, the interest that members have in the communal property of the association will have to be justified in a private company.

3.2 Ownership of members in a Private Company

Section 1 of the *Companies Act* defines a shareholder as:

“subject to section 57(1), means the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be.”

Section 57(1) refers to a shareholder, being a person who is entitled to exercise voting rights, which are attached to securities. Section 1 defines a share to be “one of the units into which the proprietary interest in a profit company is divided.”

⁹⁰ Salomon v Salomon & Co Ltd 1897 AC 22.

The nature of a share has been described, as an interest in a company, consisting of incorporeal movable property that gives rise to a bundle of personal rights.⁹¹ Section 35 of the *Companies Act* describes the legal nature of an issued share, being movable property, which is transferable by way of any means provided for in the *Companies Act* or any other law.

The holding of shares in a company does not entitle shareholders to any form of ownership in the assets of the company.⁹² Shares are divided in different classes to accommodate the different rights in dividends and distribution on liquidation. The rights attached to different shares are regulated in terms of the Memorandum of Incorporation and the rules of each company. Different main classes of shares exist namely: ordinary shares, preference shares, redeemable preference shares and deferred shares. The *Companies Act* requires that the different classes of shares have to specify a distinct description, attached rights, preferences, limitations and any other terms accompanying the respective classes.⁹³

The assets of the company are valued separate from the assets of its members and are owned by the company.⁹⁴ As a result assets of the company must be shown in the financial statements of the company.⁹⁵ Only on liquidation of the company and after all creditor's claims have been settled will the shareholders or specific class of shareholders be allowed to share in the residual assets of the liquidated company.⁹⁶

The same can be said about the opposite side of the coin. Davis differentiates between the concepts, incorporation and limited liability, but avers that in general incorporation also involves limited liability of shareholders.⁹⁷ Incorporation is an act by the incorporators of the company while registration is an act by the Companies and Intellectual Property Commission,⁹⁸ as soon as practical after incorporation.⁹⁹

⁹¹ Cooper v Boyes 1994 (4) SA 521 (C).

⁹² Hefer Notes on South African Companies Act 57.

⁹³ Section 36(1) of the Companies Act 71 of 2008.

⁹⁴ Davis Companies and other Business Structures 29.

⁹⁵ Section 29(1)(c) of the Companies Act 71 of 2008.

⁹⁶ Section 37(3)(b)(ii) and section 37(4)(b) of the Companies Act 71 of 2008.

⁹⁷ Davis Companies and other Business Structures 29 - 30.

⁹⁸ Hereafter referred to as the Commission.

⁹⁹ Sections 13(1) and 14(1)(b)(iii) of the Companies Act 71 of 2008.

Due to this separateness between members and a company members are also not liable for the company's debts. This separateness is well illustrated in the *Salomon* case where the court made it clear that a company, existing as a separate entity, is bestowed with legal personality from the moment of registration.¹⁰⁰ A company, being a separate entity, acquires the capacity to have its own rights and duties. It acquires legal personality and exists apart from its members. Salomon was the sole proprietor of a business. He later registered a company to extend the business and to provide for limited participation by family members. Salomon held by far the most shares and his wife and five of his children each held one share. Salomon and two of his sons were appointed as directors. Shortly after the company was registered a depression in the economy caused financial problems. Despite efforts by Salomon to save the company by lending additional amounts to it, the company failed and was liquidated. The assets were not even sufficient to discharge the secured debentures in full. It was submitted by the company's creditors that Salomon and his company were in essence the same person and that Salomon does not have a claim as a secured creditor to the assets of the company, but that he should actually be responsible for the debts of his company. The court found that there was no evidence of fraud or impropriety on the part of Salomon. Therefore, the extent of Salomon's shareholding in the company was irrelevant regarding the validity of the secured claim, as debenture holder against the company. It was further held that the facts provided no basis to hold Salomon personally liable for the debts of the company and the principle of the corporate veil between a company and its members was upheld.

In *Dadoo v Krugersdorp Municipal Council* it was held by Innes CJ that:¹⁰¹

"A registered company is a legal persona distinct from the members who compose it ... Nor is the position affected by the circumstance that a controlling interest in the concern may be held by a single member. This conception of the existence of the company as a separate entity distinct from its founders is no merely artificial technical thing. It is a matter of substance; property vested the company is not, and cannot be, regarded as vested in all or any of its members."

The *Companies Act* confirms that a shareholder of a company is not liable for any liabilities or obligations of the company except to the extent that the *Companies Act* or

¹⁰⁰ *Salomon v Salomon & Co Ltd* 1897 AC 22.

¹⁰¹ *Dadoo v Krugersdorp Municipal Council* 1920 AD 550 – 551.

Memorandum of Incorporation of the company provides otherwise.¹⁰² Piercing through the corporate veil entails the disregard of separateness between the company and its members. Only under certain circumstances will the law or the courts disregard the legal personality of a company and hold the members in person liable jointly with the company. Members of a private company will be held liable for the debts of the company in instances where the members treat the assets of the company as their own, fail to display the name of the company, as the law requires, do the business of the company recklessly to defraud creditors or in instances where there is evidence that the company is involved in criminal activities, the company is being used as a tool to cover the members' illegal activities or where the law deems it fit and necessary that the courts must disregard the separate legal personality of the company.¹⁰³

A private company has to maintain a securities register with the names and addresses of all shareholders who are incidentally also the members of such company.¹⁰⁴ There is a restriction on the transfer of securities in private companies, which prohibit the offering of securities to the public and also restricts the transfer of the company's securities.¹⁰⁵ The restriction on the free transferability of securities are usually accomplished by inserting a pre-emptive right in the memorandum of incorporation and the share certificate has to record the restrictions on transferability of the applicable shares.¹⁰⁶

3.3 Ownership of members in a Communal Property Association

The *Communal Property Association Act* defines members to be "members of an association or the members of a community" with the inclusion of "members who comply with the provisions of paragraph (i) of item 5 of the Schedule". For the purposes of sections 12, 13 and 14 members will be "those whose names appear on a list contemplated in item 5 of the Schedule". Item 5 of the Schedule deals with matters to be addressed in the constitution of a Communal Property Association and more specifically the credentials for membership of the Communal Property Association, with a list containing the names and, if freely available, each members' identity number. If it is

¹⁰² Section 19(2) of the Companies Act 71 of 2008.

¹⁰³ Sections 32(7) and 163(4) of the Companies Act 71 of 2008.

¹⁰⁴ Sections 50(2)(b)(i) of the Companies Act 71 of 2008.

¹⁰⁵ Sections 8(2)(b)(ii) and (ii) of the Companies Act 71 of 2008.

¹⁰⁶ Hefer Notes on South African Companies Act 19-20.

not reasonably probable to provide the names of all of the proposed members of the Communal Property Association, then the constitution has to include doctrines for the identification of additional persons eligible for membership of the association. The constitution will in the latter case also have to provide for a procedure to decide disagreements concerning other persons' rights to be members of the association.

Item 6 provides for different classes of membership, as well as different rights of members, relating to the different classes. Item 7 only refers to members rights to use the association's property and item 8 provides that membership may be based on individuals or families. In the event of membership based on families, provision must be made for representation of the family in the decision-making process of the association.

Item 9 deals with the grounds and procedures for terminating membership. Not only does it refer to the rights of a member, as previously in item 7, which only refers to the right to use the association's property, but it also mentions the property of the member concerned.

Item 10 refers to the purposes for which the property may be used, its allocation and physical division, while item eleven and twelve only refer to members' rights. Item 4 however, unconditionally stipulates that the Communal Property Association owns the property or the land. The *Communal Property Association Act* defines the "holding of property in common" to mean: "the acquisition, holding and management of property by an association on behalf of its members, in accordance with the terms of a constitution."¹⁰⁷

Unclear reference to the Communal Property Association's property and an individual member's property may create the impression that the Communal Property Association becomes owner of the individual member's property. In such case the executive committee of the Communal Property Association is empowered by its constitution, to determine what happens with a members' private property on termination of his or her membership, as item 9 suggests.

Section 9 of the *Communal Property Association Act* requires a Communal Property Association's constitution to contain certain principles. An "inclusive decision-making

¹⁰⁷ Section 1 of the Communal Property Associations Act 28 of 1996.

process” is mandatory in terms of section 9(1)(a)(ii) to transfer or to burden the property of the association. Section 9(1)(d) determines that members must have a fair right to use of the property of the Communal Property Association, in such manner that the “association shall manage property owned, controlled or held by it for the benefit of the members ...” Section 9(1)(d)(ii) refers to access or exclusive use of any portion of the Communal Property Association’s property by a member. Reference is also made to communal use of property.

Accordingly, a Communal Property Association may not sell or burden the Communal Property Association’s property, without a majority decision of the members of the Communal Property Association, taken at a general meeting.¹⁰⁸ From the wording it is distinct that a Communal Property Association is the owner of the property and merely user rights are apportioned to individual members or family groups, with a well-defined limitation on the associations’ powers to sell or encumber the communal property. This is further confirmed in section 13(1) of the *Communal Property Association Act*, which deals with the jurisdiction of the court in the administration, liquidation and deregistration of a Communal Property Association, where reference is made to the property of the Communal Property Association and the land, which a provisional association may acquire.

Where a provisional association and Communal Property Association existed together the provisional association may apply for it’s deregistration and the assets of the provisional association will then be transferred to the Communal Property Association.¹⁰⁹

3.4 Conclusion

Ownership of a company vests in the shareholders of a company, which is codified as shares in terms of the *Companies Act*. In terms of legislation and case law it is clear that a key element of a juristic person is found in the separateness between property interests of a member in relation to the property of the company.

A Communal Property Association is also recognised in law to be a juristic entity, and in accordance with the key element of a juristic entity, there is a separateness between

¹⁰⁸ Section 9(1)(d)(iii) of the Communal Property Associations Act 28 of 1996.

¹⁰⁹ Section 8(6)(f) of the Communal Property Associations Act 28 of 1996.

property of a member and property of a Communal Property Association. A Communal Property Association is the owner of the communal property and merely user rights are assigned to individual members or family groups, with a well codified limitation on the Associations' powers to sell or encumber the communal property. South African property law is underpinned by civil law.¹¹⁰ Communal land tenure, as acknowledged in the *Corporate Communal Development Theory*, and recognised as a counter modernist approach, in terms of the "Participatory Action Research" philosophy, particularly exists from communal land tenure and cultural discourses on land use and management. The prospect for an exchange of information is a direct result of this, which contributes and enhances constitutional property development. It is this purposive approach that gave birth to the *Communal Property Associations Act*.¹¹¹

A paradox exists to the principle of separateness amongst the two juristic entities in relation to the interests that members have in the property of the respective juristic entities. Members of a Communal Property Association have a direct interest in the communal property and are entitled to the communal and exclusive use of the property allocated to them.¹¹² Members of a private company will incur personal liability for the debts of the company in instances where the members treat the assets of the company as their own. This incongruity to the principle of separateness gives a distinctive character to a Communal Property Association, as a juristic entity.

¹¹⁰ See 2.4.3 on Communal ownership.

¹¹¹ See 2.3 on Corporate Communal Developing Theory.

¹¹² Items 7 to 10 and 13(1) of the schedule of the Communal Property Associations Act 28 of 1996.

Chapter 4

4 *Analysing the registration requirements of a private company with the registration requirements of a Communal Property Association*

4.1 *Introduction*

A further consequence relating to the fundamentals of a juristic entity is that it should be registered with the appropriate authorities. Both a Communal Property Association and a private company should foremost comply with the prescribed registration requirements to enable it to come into existence and to be recognised in law, as a juristic entity. For companies this is regulated by section 19(1) of the *Companies Act*. Section 4 of the *Communal Property Associations Act* regulates the registration of provisional associations while section 6 regulates the registration of Communal Property Associations. Both acts hence facilitate the formation of juristic persons through registration.

4.2 *Registration requirements of a Communal Property Association*

The registration of a Communal Property Association is far more complicated and entails a sluggish application process to be followed. The *Communal Property Association Act* provides for the initial registration of a provisional Communal Property Association to precede the registration of a communal property association.¹¹³

A community have to apply for the registration of a provisional Communal Property Association to the Director-General.¹¹⁴ A provisional association will be "A provisional Communal Property Association registered under section 5."¹¹⁵

The Director-General will give written consent if he or she is satisfied that the provisional association qualifies for registration by referring the application for registration together with his or her written consent to the Registration Officer. The Registration Officer must then register a provisional association by allocating a registration number and issuing a provisional Communal Property Association certificate to the community. The

¹¹³ Section 5 of the Communal Property Associations Act 28 of 1996.

¹¹⁴ Section 5(1) of the Communal Property Associations Act 28 of 1996.

¹¹⁵ Section 5(1) of the Communal Property Associations Act 28 of 1996.

Registration Officer is appointed by the Director-General and is an officer of the Department of Rural Development and Land Reform.¹¹⁶

The application for registration should contain the following information:¹¹⁷

- 1) The intended name of the provisional association.
- 2) Information indicative thereof that the community is indeed a community, as contemplated in section 2.
- 3) An unblemished identification of any land, or right to land, or other right which may be attained by the provisional association.
- 4) A list of the names and, if freely available, their identity numbers. If it is not reasonably possible to provide the names of all of the intended members of the association the constitution has to include doctrines for the identification of additional persons eligible for membership of the association, and a procedure to decide disagreements concerning other persons' rights to be members of the association.
- 5) A name lists of the interim committee who was democratically elected to act for the temporary association during the interim time before registration as an association.
- 6) An autographed undertaking to comply with the principles, as stated in section 9, by the members of the interim committee, awaiting the acceptance of the final constitution.
- 7) Any other information, being soundly demanded by the Director-General, concerning the right to occupation and use of land, and the community's settlement on such land.

¹¹⁶ Section 1 of the Communal Property Associations Act 28 of 1996.

¹¹⁷ Section 5(2) of the Communal Property Associations Act 28 of 1996.

The *Communal Property Association Act's* only reference to the necessity of a name for the Communal Property Association is the requirement that the application for registration must include the purported name of the provisional association.¹¹⁸

Upon registration, a provisional association presumes a certain standing in law. The rationale behind the registration of a provisional association is to assimilate communal rights in land. Subsequently registration of a provisional association constitutes a transitory measure and the limited rights in land may be exerted for a limited period of 12 months, imminent registration of a permanent Communal Property Association. The applicant community is given time to fulfil the requirements of section 8 of the *Communal Property Association Act*, which will allow it to attain a perpetual registration.

Should a provisional association forsake to adopt a constitution within the prescribed 12 months from the date of registration of a provisional association, then the Director-General can extend the period of 12 months with an additional period of 12 months, on condition that good cause be shown to him or her to do so. In such a case the Minister of Rural Development and Land Reform may approve a draft constitution prepared by the Director-General on behalf of such provisional association and initiate the registration of the provisional association, as an association.¹¹⁹

Clarity on the interpretation of section 5(4) of the *Communal Property Association Act* was given in the judgment of *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others*.¹²⁰ A provisional Communal Property Association was registered but due to a dispute between the community, the Tribal Authority and Kgosi Pilane, which could not be resolved within 12 months, the Bakgatla-Ba-Kgafela Communal Property Association was not registered as a permanent association.

¹¹⁸ Section 5(2)(a) of the Communal Property Associations Act 28 of 1996.

¹¹⁹ Section 5(5) of the Communal Property Associations Act 28 of 1996.

¹²⁰ *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* [2015] ZACC 25.

In this appeal from the Supreme Court of Appeal (SCA), hearing an appeal from the Land Claims Court (LCC), Jafta J brought a new perspective, in a unanimous judgment, on the trite beliefs regarding Communal Property Associations. Jafta J described the *Communal Property Association Act*, to be "A visionary piece of legislation passed to restore the dignity of traditional communities".

The Bakgatla-Ba-Kgafela community initiated the process of registering a Communal Property Association to enable them to take possession of their restored land. Several meetings were held in various villages, and a constitution for the proposed Communal Property Association was adopted on 3 December 2005. These meetings were observed by the officials of the Department of Rural Development and Land Reform, with the tenacity to give guidance to the community with regard to compliance on the requisites of the *Communal Property Association Act*.

Eventually an application for the registration of the Communal Property Association was presented to the Department of Rural Development and Land Reform. The official who was charged with the duty of satisfying himself that the association did indeed qualify for their registration under the *Communal Property Association Act*, all the more so recommended the registration, but due to a dispute between the community, on the one hand, and on the other, Kgosi Pilane and the Tribal Authority, the Communal Property Association could not be registered. Kgosi Pilane and the Tribal Authority preferred having a trust as a juristic entity in which the land should be registered, while the community favoured a Communal Property Association. On recommendation of the Minister of Rural Development and Land Reform, who intervened in the matter, a provisional association was registered. This was done to give the parties opportunity to resolve their disputes within a period of 12 months. The land was registered and eventually transferred in the name of the provisional association, but the continuing dispute between the Community, Kgosi Pilane and the Tribal Authority, could not be resolved within the 12-month period, nor was the Bakgatla-Ba-Kgafela Communal Property Association registered as a permanent association.

The Director-General informed the provisional association that the term of office of members of its executive committee had lapsed in January 2011 and that it was eminent that new members have to be elected. Consequently, meetings were held in numerous

villages, culminating to the annual general meeting on 30 July 2011, which was attended by 29 out of the 32 villages. The Association's constitution was re-adopted in this meeting which was held in the presence of a representative of the Department of Rural Development and Land Reform, as well as a private attorney. The private attorney's mandate from the community was to ensure that the requirements of the *Communal Property Association Act* were complied with.

The departmental representative acknowledged that the meeting did comply with the needed requirements of the *Communal Property Association Act*. He subsequently completed the applicable form that contained a report to the Department of Rural Development and Land Reform. This report indicated that the notice of the meeting was published far and wide and that eighty-six people did attend the annual general meeting, where all who were present did vote in favour of the adoption of the constitution. Remarkably, the report recorded the words "not applicable" against the column requiring an indication to be made whether the interests of other persons will be adversely affected by the adoption of the proposed constitution.¹²¹ Yet again the Department of Rural Development and Land Reform failed to either register the association, as a permanent association, or to issue a registration certificate.

Accordingly, the community instituted proceedings in the Land Claims Court. The original relief sought by the association was an order against the Department of Rural Development and Land Reform to issue the association with a certificate of registration and for an interdict, restraining Kgosi Pilane from interfering, intimidating and trying to sway officials of the Department in their business with the association. In an amended notice of motion, the association abandoned its initial claim and applied for a declaratory order to the effect that the association was created in acquiescence of section 8 of the *Communal Property Association Act*. It also pursued an order directing the Director-General to conclude the permanent registration of the association. Yet again, this application was opposed by Kgosi Pilane, the Tribal Authority and the Minister.¹²²

¹²¹ Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others [2015] ZACC 25 par 11.

¹²² Bakgatla-Ba-Kgafela Communal Property Association v Minister of Rural Development and Land Reform and Others [2013] ZALCC 16.

The respondents raised a factual dispute on some of the allegations made by the association in its motion and also raised points that the court did not have the jurisdiction to adjudicate the matter and that the association had no legal status to bring about the legal action. The Land Claims Court referred the matter for oral evidence and on conclusion of the hearing dismissed the points on the basis of lacking merit. The court granted an order that the applicant be declared an association, which was established by a community, being provided for by the definition of "Community" in *the Communal Property Association Act* and that the applicant was permitted to be registered as a permanent Communal Property Association by the Director-General. The court further ordered the Director-General to do the permanent registration of the Bakgatla-Ba-Kgafela Communal Property Association in the prescribed manner provided for in the *Communal Property Association Act* and upon registration to issue a certificate of registration in terms of section 8(3) of the Act.

The Tribal Authority and Kgosi Pilane appealed to the Supreme Court of Appeal. The Supreme Court of appeal dealt swiftly with the matter, finding that the Association's status was decisive to the appeal and curbed itself in deciding that issue alone. As a result, the court based its decision entirely on the interpretation of section 5(4) of the *Communal Property Association Act* and found that a provisional association can only be existent for a period of twelve months from the date of registration, unless the Director-General extends that period for a further twelve months. Since it was common cause between the parties that no extension was obtained, the Supreme Court of Appeal decided that the association ceased to exist on the expiration of twelve months and on that basis, the order of the Land Claims Court was set aside.¹²³

The association then applied for leave to appeal against the order of the Supreme Court of Appeal. In order for the association to be successful it had to proof that the court did have jurisdiction and that it is in the interests of justice that leave to appeal be granted. It is clear that this case concerns the interpretation and application of the provisions of the *Communal Property Association Act*, which was passed to give effect to the rights

¹²³ Bakgatla-Ba-Kgafela Tribal Authority v Bakgatla-Ba-Kgafela Tribal Communal Property Association [2014] ZASCA 203.

guaranteed under section 25(7) of the Constitution.¹²⁴ The interpretation of this legislation constitutes a constitutional issue concerning the restitution of dispossessed land to communities. On the basis that the court has never considered any case of this nature before and since it was likely that the court would interpret the relevant provisions differently, leave to appeal was granted.

Van der Walt states that the Constitutional Court has frequently indicated that a purposive approach needs to be followed in interpreting the Bill of Rights.¹²⁵ This approach was introduced by section 39(2) of the Constitution and was confirmed in the *Goedgelegen Tropical Fruits* case.¹²⁶ In applying this approach, the court found that the Supreme Court of Appeal blundered in its interpretation of section 5(4) of the *Communal Property Association Act*, to mean that a provisional association ceases to exist upon the expiry of 12 months, unless an extension is granted. In this context, the period of 12 months refers merely to the exercising of the right to occupy and use of the land. The section does not make any mention of the duration of a provisional association. The Supreme Court of Appeal therefore erred in finding that the present association did not have legal standing to institute the legal action.¹²⁷

Another reason for finding the Supreme Court of Appeal at error was the proven fact that, at the stage of the Minister's intervention, the association has already adopted the constitution and all other stipulations for registration, had been complied with. This was confirmed by the official enshrined with the authority to approve registration and who recommended registration, on being content that the association did comply with all the requirements. The Bakgatla-Ba-Kgafela Communal Property Association was therefore founded, as soon as it qualified for registration.

The judge further found that the respondents, being Kgosi Nyalala Molefe John Pilane, the Bakgatla-Ba-Kgafela tribal authority, the Minister of Rural Development and Land Reform and the Director-General of the Department of Rural Development and Land

¹²⁴ Constitution of the Republic of South Africa, 1996.

¹²⁵ Van der Walt Constitutional Property Law 53.

¹²⁶ Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 53.

¹²⁷ Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and others [2015] ZACC 18 par 42.

Reform should take the blame for wilfully obstructing the Bakgatla-Ba-Kgafela community's endeavours to register a Communal Property Association. More specifically did the Director-General not approach the registration process in the spirit, as contemplated by the *Communal Property Association Act*. His opposing of the registration on the basis of shortcomings, without assisting the community to remedy, reveals a conduct inconsistent with the recommendation made by his delegate. The court found the Director-General adopted an entirely improper reaction to the Community's legitimate request for registration. It is therefore not surprising that the court ordered the Minister of Rural Development and Land Reform and the Director-General of the Department of Rural Development and Land Reform to pay the legal fees, including the costs incurred in the Supreme Court of Appeal.

Since the definitions of the *Communal Property Association Act* states, that a permanent association "means a communal property association, which is registered or qualifies for registration in terms of section 8" it follows that a Communal Property Association can come into existence in two ways.¹²⁸ Either through registration in terms of section 8 or when it qualifies for registration, although registration is still pending.¹²⁹

The Minister of Rural Development and Land Reform may make the provisions of the *Communal Property Association Act* applicable to similar entities.¹³⁰ A similar entity is described as, "A trust, association of persons or company registered in terms of section 21 of the Companies Act, 1973 (Act 61 of 1973)".¹³¹ A section 21 company or association not for gain is a special kind of company not for profit and can only be incorporated as a company limited by guarantee. The main object of a section 21 company is the promoting of religion, arts, sciences, education, charity, recreation, or any other cultural or social activity or communal or group interests. In terms of the *Companies Act* this type of company is described as a non-profit company, which is incorporated for a public benefit or other object, as required by item one of Schedule one, and in general, the income and

¹²⁸ Section 1 of the Communal Property Associations Act 28 of 1996.

¹²⁹ *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* [2015] ZACC 25 para 44.

¹³⁰ Sections 2(3) and 8(3)(b) of the Communal Property Associations Act 28 of 1996.

¹³¹ Section 1 of the Communal Property Associations Act 28 of 1996.

property of the company may not be distributed to its founders, members, directors, officers or persons related to any of them.¹³²

The Registration Officer is obliged to furthermore keep a register of similar entities.¹³³ In instances where a community did, preceding the commencement of the *Communal Property Association Act* created a similar entity by ensuing a democratic process, the Director-General may discharge such community from the provisos of section 6, 7 or 8 to avoid stationing a superfluous burden on the community. Before discharging a community, the Director-General has to consider the procedure followed by the community to create such similar entity.¹³⁴

Only communities to whom the provisions of the *Communal Property Association Act* apply qualify for registration.¹³⁵ A community is a group of persons, who desires to have their rights relating to a specific property governed by shared rules in terms of a written constitution and who wishes to create a Communal Property Association or who is required to do so.¹³⁶

A Communal Property Association's main object must be the "holding of property in common".¹³⁷ The adopted constitution has to comply with the five principles stated in section 9, and dispenses with the twenty two matters to be addressed in the constitution of a Communal Property Association, as contained in the Schedule.¹³⁸

The provisions require the application for registration of a Communal Property Association, to make available the names of the members of the temporary committee who would be imparted with the duty of acting on behalf of the provisional association, pending its registration as a permanent association. The democratically elected members of the interim committee must furnish a signed undertaking that the provisional association will comply with the principles stated in section 9 of the *Communal Property Association Act*, awaiting the approval of the constitution, as proposed by members of

¹³² Section 1 of the Companies Act 71 of 2008.

¹³³ Sections 1 and 8(3)(b) of the Communal Property Associations Act 28 of 1996.

¹³⁴ Section 2(5) of the Communal Property Associations Act 28 of 1996.

¹³⁵ Section 2(1) of the Communal Property Associations Act 28 of 1996.

¹³⁶ Section 8(2)(a) of the Communal Property Associations Act 28 of 1996.

¹³⁷ Section 8(2)(a) of the Communal Property Associations Act 28 of 1996.

¹³⁸ Sections 8(2)(c) and 8(2)(d) of the Communal Property Associations Act 28 of 1996.

the provisional communal association and the registration of the Communal Property Association.¹³⁹

Before a community or a provisional association desires to adopt their constitution, the Director-General has to be notified henceforth. Meetings have to be convened in comportment with the *Communal Property Association Act* for the adoption of the constitutions.¹⁴⁰ The application for registration must be supplemented with a report composed by the authorised official. The contents of this report convey what transpired at the meeting at which the association's suggested constitution was adopted. It must include whether there was proper and effective notice of the meeting, the quantity of members of the community present, the number of those voting in favour of the constitution and the number of those who voted against it, the opinions of non-conforming persons, whether the interests of any person are expected to be undesirably affected by the adoption of the constitution and any other matter prescribed by the Minister of Rural Development and Land Reform or which may be relevant to the Director-General of Rural Development and Land Reform, in exercising his or her discretion.¹⁴¹ The community or provisional association must, as soon as attainable after the adoption of the constitution, present it at the same time with the prescribed information to the Director-General.¹⁴²

The Director-General may affect a Communal Property Association to be registered if he or she is placated that there was substantial conformity with the provisions of paragraphs (a) to (f) of section 8(2), that the constitution manifests the view of the main stream of the members of the Communal Property Association and that the constitution has been adopted through a significantly just and inclusive process.¹⁴³

If the Director-General or his delegate is not satisfied that the application complies with the *Communal Property Association Act*, then he or she is obliged to inform the applicant

¹³⁹ Sections 5(2)(e) and 5(2)(f) of the Communal Property Associations Act 28 of 1996.

¹⁴⁰ Section 7(1) of the Communal Property Associations Act 28 of 1996.

¹⁴¹ Section 7(2) of the Communal Property Associations Act 28 of 1996.

¹⁴² Section 7(3) of the Communal Property Associations Act 28 of 1996.

¹⁴³ Section 8(2)(f) of the Communal Property Associations Act 28 of 1996.

community about the shortcomings in their application, in order for them to rectify their application.¹⁴⁴ In addition, the *Communal Property Association Act* requires the Director-General to assist the community to achieve a permanent registration of a Communal Property Association.¹⁴⁵

In instances where a provisional association was registered, it is probable that for some period the permanent association and the provisional association will exist together with the permanent association. This would evolve once the necessities for permanent registration are met, and prior to the application for the registration being made. Until deregistration of the provisional association is made, the two associations would continue to prevail side by side.¹⁴⁶

The *Communal Property Association Act* provides a complaint process for any person appealing to have been left out from partaking in the process of tuition and approval of the constitution, or claiming that an unfair process was tailed.¹⁴⁷ A complaint may be lodged with the Director-General, who may, if he or she is content that on reasonable bases the complaint is substantial, decline to consent to the association being registered until the matter has been determined to the gratification of the Director-General.

Once registered, a Communal Property Association will be recognised as a juristic person with the aptitude to sue and be sued, assimilate rights and procure obligations in its own name, obtain and dispose of immovable property and any of the real rights in immovable property and burden such immovable property or such real rights by mortgage, servitude, lease or in any other way dependent to the stipulations of its constitution. A Communal Property Association shall have perpetual succession despite the consequences of changes in its membership and the constitution will be a legitimate agreement, coercing the Communal Property Association and its members. The constitution will be regarded to be a subject of public knowledge.¹⁴⁸ A register of registered provisional associations,

¹⁴⁴ Section 8(4) of the Communal Property Associations Act 28 of 1996.

¹⁴⁵ Section 8(5) of the Communal Property Associations Act 28 of 1996.

¹⁴⁶ *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* [2015] ZACC 25 para 45.

¹⁴⁷ Section 7(4) of the Communal Property Associations Act 28 of 1996.

¹⁴⁸ Section 8(6) of the Communal Property Associations Act 28 of 1996.

Communal Property Association's and akin bodies must be kept by the Registration Officer.¹⁴⁹

A provisional association is considered to be a juristic person with its own capability to be sued or to sue, and may obtain the right to occupy and utilise the land for a limited period of 12 months from the date of its registration. It has only limited rights and may not alienate the acquired rights in such land.¹⁵⁰ A Communal Property Association enjoys perpetual succession and auxiliary provisions is made to acquire rights and obligations in property, subject to the provisions of the constitution of the concerned Communal Property Association.¹⁵¹

4.3 Registration requirements of a Private Company

The *Companies Act* describes the powers and capacity of a company in considerable more detail. One of the purposes of the *Commission*, is described by the *Companies Act*, as the "efficient and effective" registration of companies including the registration of external companies.¹⁵² Different types of companies can be created and incorporated. Two main types exist namely non-profit companies and profit companies. A private company is a profit company with a Memorandum of Incorporation that proscribes the tendering of any of the company's securities to the public and also impedes transmitting of its securities.¹⁵³ Profit companies are defined to be companies assimilated for the purpose of monetary increase for its shareholders.¹⁵⁴

The powers and capacities of companies are equal to those of natural persons, subject to the limitations in the Memorandum of Incorporation and limited to the powers and capacity inherent to a juristic person. Companies are registered with the *Commission*.¹⁵⁵ The *Commission* is established in terms of section 185.¹⁵⁶ One or more persons may assimilate a profit company, by filing a Notice of Incorporation and a copy of the

¹⁴⁹ Section 8(3)(b) of the Communal Property Associations Act 28 of 1996.

¹⁵⁰ Section 5(4) of the Communal Property Associations Act 28 of 1996.

¹⁵¹ Section 8(6) of the Communal Property Associations Act 28 of 1996.

¹⁵² Section 186(1)(a) of the Companies Act 71 of 2008.

¹⁵³ Section 8 of the Companies Act 71 of 2008.

¹⁵⁴ Section 1 of the Companies Act 71 of 2008.

¹⁵⁵ Sections 14(1) and 187(4) of the Companies Act 71 of 2008.

¹⁵⁶ Companies Act 71 of 2008.

Memorandum of Incorporation, which is signed in person or by proxy by each incorporator.¹⁵⁷

The name of a company, as recorded on the Notice of Incorporation, should gratify the following criteria: The name may consist of commonly used words or words designed for naming purposes and may be words used in any language. These words may be used together with letters, numbers or punctuation marks, any of the symbols: +, &, #, %, =, round brackets, to either isolate any part of the name only or in any combination, or any other commonly recognised symbol, as prescribed by the Minister of Trade and Industry.¹⁵⁸

The names of a company may not be similar to the name of any other co-operative, close corporation or company unless the company is part of a group of companies, a registered trade mark not belonging to the company, any mark with regard to an application for registration as a trade mark, a registered business name, a mark, a well-known trade mark, word or expression restricted or protected in terms of the Merchandise Marks Act 17 of 1941.¹⁵⁹ Company names may further not be misleading by deceitfully suggest that: a company forms part of, or is associated with any other person or entity, is a state organ, court, or is sanctioned by the State or by any organ of State or a court, is managed or owned by people with an educational title, or related to any foreign or international organisation.¹⁶⁰

Should the *Commission* found that the applied company name for registration is inconsistent with the conditions of section 11(2)(a) or (b),¹⁶¹ then the applicant may be required, by written notice, to serve a copy of the application and name reservation on any specific person who may have a concern in the usage of the name.¹⁶² Any such person, whom is required to be given notice, may apply to the Companies Tribunal to make a determination if such name complies with the requisites and to make an administrative order, directing the *Commission* to either reserve or register the disputed

¹⁵⁷ Section 13(1) of the Companies Act 71 of 2008.

¹⁵⁸ Sections 11(1)(a) and 11(4) of the Companies Act 71 of 2008.

¹⁵⁹ Section 11(2)(a) of the Companies Act 71 of 2008.

¹⁶⁰ Section 11(2)(b) of the Companies Act 71 of 2008.

¹⁶¹ Companies Act 71 of 2008.

¹⁶² Section 12(3) of the Companies Act 71 of 2008.

name for the applicant, or to cancel the reservation if the reserved name has not been used by the person eligible to use it, or direct the applicant to select a new name and to file a notice of amendment to its Memorandum of Incorporation, within a specified period.¹⁶³

Any words, phrases or symbols that may reasonably be supposed to constitute war propaganda, incites violence, encourage hatred based on race, ethnicity, gender or religion may not be included in company names.¹⁶⁴ If the *Commission* found on reasonable grounds that the applied company name for registration is inconsistent with the musts of section 11(2)(c), then the *Commission* may refer the application and name reservation to the South African Human Rights Commission (SAHRC), who may also apply to the Companies Tribunal for a resolve and order in terms of section 160.¹⁶⁵

The name of a profit company can exist only of the registration number of the company ensued directly by the statement "(South Africa)".¹⁶⁶ If a company's Memorandum of Incorporation contain any special conditions pertinent to the company and any requisite for the amendment of any such condition in addition to the section 16 requirements, or prohibits the alteration of any specific provision of the Memorandum of Incorporation (MOI), then the name must immediately be tailed by the expression "(RF)," indicating a ring-fenced company.¹⁶⁷

Private companies' names must end with the expression "Proprietary Limited" or its abbreviation "(Pty) Ltd".¹⁶⁸ The *Commission* may modify the name of a company by inserting or replacing the proper expressions, as required.¹⁶⁹ If an applied private company name for registration matches the name of another close corporation, company, or co-operative, or is reserved in terms of section 12 on behalf of a person different than the name of one of the incorporators, then the *Commission* may still register the company and the registration number then becomes the name of the company, followed by the applicable expression "(Pty) Ltd" until such time as an appropriate name has been

¹⁶³ Section 160 of the Companies Act 71 of 2008.

¹⁶⁴ Section 11(2)(c) of the Companies Act 71 of 2008.

¹⁶⁵ Companies Act 71 of 2008.

¹⁶⁶ Sections 11(1)(b) and 11(3)(a) of the Companies Act 71 of 2008.

¹⁶⁷ Section 11(3)(b) of the Companies Act 71 of 2008.

¹⁶⁸ Section 11(3)(c)(ii) of the Companies Act 71 of 2008.

¹⁶⁹ Section 14(2)(a) of the Companies Act 71 of 2008.

reserved or approved. The company must then be invited to file an amended Notice of Incorporation with an adequate name.¹⁷⁰

A name reservation is done by completing Form CoR91 and endures for a period of six months from the date of such application. The period may be prolonged on application to the *Commission*, if good cause can be presented by the person for whom the name is reserved, together with payment of the prescribed fee. Extension will be granted for a further period of sixty business days at a time.¹⁷¹

For companies the Notice of Incorporation is defined as:

“... means the notice to be filed in terms of section 13(1), by which the incorporators of a company inform the Commission of the incorporation of that company, for the purpose of having it registered;”

The Notice of Incorporation of a company must be filed with payment of the prescribed fee, together with a copy of the Memorandum of Incorporation.¹⁷² The *Commission* may reject a Notice of Incorporation if the notice or Memorandum of Incorporation is incomplete or incorrectly completed in any respect.¹⁷³ The *Commission* have to reject a Notice of Incorporation of a private company if the notice does not contain any initial directors, or if the *Commission* with good reason believes that all of the primary directors of the company are disqualified in terms of the *Companies Act*.¹⁷⁴

The instant it is feasible after accepting a Notice of Incorporation filed by the incorporators, the *Commission* must ascribe an exclusive registration number to the company and record the stipulated information about that company in the companies register.¹⁷⁵ The *Commission* must then endorse the Notice of Incorporation and the copy of the Memorandum of Incorporation and issue and deliver a registration certificate to the company.¹⁷⁶ The later date of the date on which the *Commission* issued the registration certificate or the date as stated by the incorporators in the Notice of

¹⁷⁰ Section 14(2)(b) of the Companies Act 71 of 2008.

¹⁷¹ Section 12(4) of the Companies Act 71 of 2008.

¹⁷² Section 13(1)(b) and 13(2) of the Companies Act 71 of 2008.

¹⁷³ Section 13(4)(a) of the Companies Act 71 of 2008.

¹⁷⁴ Section 13(4)(b), 66(2) and 69(8) of the Companies Act 71 of 2008.

¹⁷⁵ Section 187(4) of the Companies Act 71 of 2008.

¹⁷⁶ Sections 1 and 14 of the Companies Act 71 of 2008.

Incorporation will serve as the date and time of incorporation of the company.¹⁷⁷ A registration certificate is conclusive proof that all the conditions for the incorporation of the company have been conformed with and that the company is incorporated.¹⁷⁸ As of the time and date that the incorporation of a company is registered, the company is established as a juristic person, which subsists continuously until its name is removed from the companies register.¹⁷⁹

4.4 Conclusion

Legislation underpin the registration of both a private company and a Communal Property Association. The registration requirements of A Communal Property Association exceed the requirements for the registration of a private company by far, and yet the powers and capacity of a company is dealt with in considerable more detail compared to those of a Communal Property Association. Detailed codification of the requirements relating to names and name reservation exists for companies, while none exists for Communal Property Associations.

Inception of a private company originates from the filing of a Notice of Incorporation, accompanied by a copy of the Memorandum of Incorporation and payment of the prescribed fee. Initiation of a Communal Property Association is first preceded with the registration of a provisional Communal Property Association, after obtaining on application, the written consent from the Director-General, sanctioning his or her satisfaction that the provisional association qualifies for registration.

In contradiction to the criticism on the slothful registration process of a Communal Property Association, the appeal court judges still consider the *Communal Property Association Act* to be legislation of a far-sighted nature, with the purpose to return the poise of traditional communities. Nevertheless, this long and expensive court case, which has gone from appeal to appeal, with contradictory judgements, was necessary to elucidate section 5(4) of the *Communal Property Association Act*. Evidently it was vibrant that neither the Minister of Rural Development and Land Reform, nor the Director-General

¹⁷⁷ Section 14(1)(b)(iii) of the Companies Act 71 of 2008.

¹⁷⁸ Section 14(4) of the Companies Act 71 of 2008.

¹⁷⁹ Section 19(1) of the Companies Act 71 of 2008.

of the Department of Rural Development and Land Reform, who are the actual people responsible for implementing the *Communal Property Association Act*, did not know how to correctly interpret the regulations of the act, and did not recognise what their prescribed responsibilities were.

Notwithstanding the consideration of the wisdom of the communities, who reason for basic knowledge in indigenous past and cultural practices, a vast difference exist between communities and the state, regarding interpretation of constitutional developed legislation, without connotation to Western concepts.¹⁸⁰

¹⁸⁰ See 2.3 Corporate Communal Development Theory.

Chapter 5

5 Founding legal instruments of a Communal Property Association and a Private Company

5.1 Introduction

Once an entity is registered, the founding documents become public knowledge, conforming to a democratic process of transparency regarding the contents thereof, and accountability of the entity, as provided for in the respective founding documents.

International developments put emphasis on the significance of good governance in both private and public sectors, specifically in relation to administration, management and decision-making. Good governance practices are demarcated as foreseeable, exposed, and progressive policy-making, which bring about a transparent process.¹⁸¹ The *Companies Act*, commits in its purpose provision, to encourage compliance with the Bill of Rights, and also the development of the South African economy, by "encouraging transparency and high standards of corporate governance".¹⁸²

High standards of corporate governance is further advanced through accountability of a company, which is attained and ensured by specific qualifications and codification of specificities, with emphasis on unalterable and minimum requirements, that has to be contained in the Memorandum of Incorporation.

The *Communal Property Associations Act* requires from a Communal Property Association's adopted constitution, to comply with the principle of accountability and transparency, identified as the fifth principle, stipulated by section 9.¹⁸³ Nonetheless, there are no specific minimum requirements to adhere to, that pronounces a transparent process.

¹⁸¹ Pienaar 2009 PELJ 15.

¹⁸² Section 7(a)-(b)(iii) of the Companies Act 71 of 2008.

¹⁸³ Section 9(1)(e) of the Communal Property Associations Act 28 of 1996.

5.2 Memorandum of a Private Company

A company's Memorandum of Incorporation is the written constitution of a company and may be altered from time to time. It stipulates the responsibilities, rights and duties of the company's shareholders, other officers and directors, towards each other and relative to the company, as well as other matters, as envisaged by section 15.¹⁸⁴

The legal status of a company is profoundly determined by the company's Memorandum of Incorporation, which determine the legal powers and capacity of the company. A company is constituted in accordance with the unalterable provisions of the *Companies Act*, as well as the alterable provisions of the *Companies Act*, in so far the alterable provisions are not contradictory, limited, qualified, prolonged or otherwise altered by the company's Memorandum of Incorporation. The Memorandum of Incorporation may even provide for any other provisions or distinctive conditions, not provided for in the *Companies Act*.¹⁸⁵

Together with the Notice of Incorporation, the Memorandum of Incorporation, in its prescribed form or in a form exclusive to the company, comprises the founding documents of a company. The Memorandum of Incorporation must be completed and autographed by the incorporators of the company.¹⁸⁶ A copy thereof must be filed with the *Commission* who will endorse it together with the Notice of Incorporation.¹⁸⁷ The Memorandum of Incorporation for a private company must be signed in person or by proxy, by one or more persons, in the prescribed default form, being provided for by Schedule 1, Part A of the *Companies Act*, or in a form distinctive to the company.¹⁸⁸ The *Companies Act* foists certain specific requirements on the contents of a company's Memorandum of Incorporation to protect the interests of shareholders, but also provides for alterable provisions to suit each individual company's needs.

None of the provision of a company's Memorandum of Incorporation may be inconsistent with the provisions of the *Companies Act*.¹⁸⁹ Should any provision be inconsistent with

¹⁸⁴ Section 88(2)(d) of the Companies Act 71 of 2008.

¹⁸⁵ Sections 15(2)(a)(i), 15(2)(b) and 19(1), of the Companies Act 71 of 2008.

¹⁸⁶ Section 13(1) of the Companies Act 71 of 2008.

¹⁸⁷ Section 14(1)(b)(ii) of the Companies Act 71 of 2008.

¹⁸⁸ Section 1 of the Companies Act 71 of 2008.

¹⁸⁹ Section 15(1)(a) of the Companies Act 71 of 2008.

any of the provisions of the *Companies Act*, such provision will be void to the degree that it infringes or is irreconcilable with the *Companies Act*.¹⁹⁰

An alterable provision, is a provision of the *Companies Act*, which expressly envisioned that its effect on a particular company may be “negated, restricted, limited, qualified, extended or otherwise altered in substance or effect” in terms of such company’s Memorandum of Incorporation.¹⁹¹ Accordingly, a company’s Memorandum of Incorporation may provide for any matter that is not provided for in the *Companies Act* or change the effect of any alterable provision of the *Companies Act*.

Alterable provisions of the *Companies Act*:

- i. A company possesses the same legal powers and capacity of an individual person, except to the scope that a juristic person is not capable of carrying out any such powers, or conceiving any such capacity.¹⁹² The Memorandum of Incorporation may provide otherwise.
- ii. Non-profit, private, and incorporated companies are allowed to choose whether or not to conform to the extended accountability requirements of Chapter 3 of the Act.¹⁹³
- iii. Shares in the same class partake in the same rights, limitations and terms, unless the Memorandum of Incorporation provides otherwise.¹⁹⁴
- iv. Memorandum of Incorporation may discount the right of first refusal of existing shareholders of a private company in respect of shares declared by the company.¹⁹⁵
- v. Memorandum of Incorporation may bar the board to give financial assistance to parties who would like to obtain shares in the company.¹⁹⁶

¹⁹⁰ Section 15(1)(b) of the Companies Act 71 of 2008.

¹⁹¹ Section 1 of the Companies Act 71 of 2008.

¹⁹² Section 19(1)(c) of the Companies Act 71 of 2008.

¹⁹³ Section 34(2) of the Companies Act 71 of 2008.

¹⁹⁴ Section 37(1) of the Companies Act 71 of 2008.

¹⁹⁵ Section 39(2) of the Companies Act 71 of 2008.

¹⁹⁶ Section 44(2) of the Companies Act 71 of 2008.

- vi. Memorandum of Incorporation may provide for elongated minimum notice periods applicable to meetings.¹⁹⁷
- vii. Electronic participation in and electronic notice for meetings are allowed unless prohibited by the Memorandum of Incorporation.¹⁹⁸
- viii. Companies may specify a higher quantity of minimum directors than the number requires by the *Companies Act*.¹⁹⁹

Unalterable provisions are provisions of the *Companies Act*, which the company are not allowed to change in terms of its Memorandum of Incorporation or rules, such as director's responsibilities and duties, as well as the greater accountability requirements for state owned and public companies.²⁰⁰

Where the Memorandum of Incorporation or rules is in conflict with the provisions of the *Companies Act*, then the provisions of the act will prevail.²⁰¹ In addition, the *Companies Act* allows for companies to supplement specifications to attend to issues applicable to that company, not addressed in the act itself, but all of the provisos have got to be consistent with the act.²⁰² The *Commission* or Takeover Regulation Panel may submit an application to court to declare any resolution, agreement, arrangement, transaction or provision of a company's Memorandum void to the degree that it overpowers or degrades the force of a prohibition or requirement founded by or in terms of an unalterable provision.²⁰³ The Companies Tribunal may on application by any person grant an administrative order releasing a transaction, agreement, resolution, arrangement, or provision of a company's Memorandum of Incorporation or rules from any prohibition or requirement founded by or in terms of an unalterable provision of the *Companies Act*.²⁰⁴

The Memorandum of Incorporation may further include any special conditions applicable to the company, with any requirement for amending any such condition, which will be

¹⁹⁷ Section 62(2) of the Companies Act 71 of 2008.

¹⁹⁸ Section 63(2) of the Companies Act 71 of 2008.

¹⁹⁹ Section 66(3) of the Companies Act 71 of 2008.

²⁰⁰ Section 1 of the Companies Act 71 of 2008.

²⁰¹ Section 15(1) of the Companies Act 71 of 2008.

²⁰² Section 15(2) of the Companies Act 71 of 2008.

²⁰³ Section 6(1) of the Companies Act 71 of 2008.

²⁰⁴ Section 6(2) of the Companies Act 71 of 2008.

supplementary to the requirements, as set out in section 16. Subsequently the Memorandum of Incorporation may contain special conditions to prohibit the alteration of any distinct provision of the Memorandum of Incorporation.²⁰⁵ The Notice of Incorporation have to contain a noticeable pronouncement captivating awareness to each one of such provisions, and their whereabouts in the Memorandum of Incorporation.²⁰⁶

The doctrine of constructive notice, as tempered by the Turquand rule, requires third parties to avail themselves of the contents of the constitutional documents of a company, to ensure their proposed transactions to be in compliance therewith. The *Companies Act* has done away with this doctrine and rule.²⁰⁷ The only resemblance remaining, is that a person will be deemed to have received notice and knowledge of the special conditions in the Memorandum of Incorporation, if the Notice of Incorporation contains a noticeable pronouncement conveying awareness to each one of such provisions, and their whereabouts in the Memorandum of Incorporation.²⁰⁸

The Memorandum of Incorporation may prohibit or allow the board of directors to compose, change or revoke any necessary or related rules, assisting in the governance of the company on issues not attended to in the *Companies Act* or in the Memorandum of Incorporation.²⁰⁹

A copy of the rules needs to be filed with the *Commission* and published in any manner, as obliged or sanctioned by the Memorandum of Incorporation or the rules of the company.²¹⁰ Rules may not be inconsistent with the *Companies Act* and the company's Memorandum of Incorporation. Any rule, which is not consistent will be void to the extent of the inconsistency. Rules become effective on the latter date of 20 business days after publication thereof, or if the date is definite in the rule, then on the indicated date. Rules will only be permanently binding once it is put to a vote and ratified by an ordinary decision at the next general shareholders meeting of the company.²¹¹

²⁰⁵ Sections 15(2)(b) and 15(2)(c) of the Companies Act 71 of 2008.

²⁰⁶ Section 13(3) of the Companies Act 71 of 2008.

²⁰⁷ Davis Companies and other Business Structures 56.

²⁰⁸ Section 19(5) of the Companies Act 71 of 2008.

²⁰⁹ Section 15(3) of the Companies Act 71 of 2008.

²¹⁰ Section 15(3) of the Companies Act 71 of 2008.

²¹¹ Section 15(4) of the Companies Act 71 of 2008.

SCHEDULE 1, Part A of the *Companies Act* contains a Default Form for the Memorandum of Incorporation for Profit Companies, which contain the following information:

Article 1 contains details about the incorporation and nature of a company. The name of the company and the name and identity number or registration number of the incorporator or incorporators, their signatures and the date of incorporation of the company. Signatures of shareholders or their proxies, attesting to the adoption of the Memorandum of Incorporation. The type of company, its purpose and powers, which are either subject or not subject to limitations, restrictions or qualifications, as provided for in the company's Memorandum of Incorporation. Any regulations that will limit or restrict changes to the Memorandum of Incorporation and Rules and whether a company elects to have the extended accountability requirements to be applicable to such a company.

Article 2 contains details about the securities of a company, such as issued and authorised shares, and the constraints on the registration of beneficial interests.

Article 3 comprises of the shareholder's right to information and their mandate to act. Constraints and adjustments to representation by simultaneous proxies. Limitations and restrictions on the mandate of a proxy to delegate, the obligation to deliver a proxy instrument to the company and premeditated authority of proxies. Provision is also made for a record date for the exercise of shareholders rights.

Article 4 contains requirements to hold shareholder's meetings, besides those explicitly required by the *Companies Act*. Shareholders' rights to request a meeting and the constrictions on the location of shareholders' meetings, as well as notice of shareholder's meetings and the limitations and restrictions on electronic participation. Quorum, adjournment and resolutions.

Article 5: Directors and Officers

1. Composition of the Board of Directors.
2. Authority of the Board of Directors - limitations and restrictions.
3. Director's Meetings and Committees - limitations and restrictions on authority.
4. Directors compensation and financial assistance.

5. Indemnification of Directors - limitations and restrictions.
6. Committees of the Board.

Article 6: General Provisions

The *ultra vires* doctrine applies to acts of a company, which fall beyond the legal capacity of the company. Such acts will be void and unenforceable. The reason for this doctrine is two-fold. Firstly, to assure the shareholders that their investment would be applied for the purpose intended for and secondly, to assure the creditors of the creditworthiness of the company. Creditworthiness, being a calculation of the risk profile of the company, could be done by way of resolve to its concern, as corroborated from the objectives as specified in the Memorandum of Incorporation.²¹²

All companies have to preserve a copy of its Memorandum of Incorporation, as amended or altered, and a copy of the rules made by the directors of the company.²¹³ Copies must either be in a written form or a form permitting the information to be converted to a written form within a reasonable time.²¹⁴

A company's Memorandum of Incorporation may be amended in terms of a court order and must be effected by a decision of the company's board of directors. It does not require a special shareholders resolution.²¹⁵

Unless a company's Memorandum of Incorporation provides otherwise, the company's board may decrease or increase the quantity of authorised shares of any specific class of shares, reclassify any unissued but authorised classified shares, classify any stated number of unclassified shares that have been authorised but are not issued or ascertain, set up the rights, preferences, limitations or new terms of shares under the board's control. The company has to file a Notice of Amendment of its Memorandum of Incorporation setting out the alterations effected by the board.²¹⁶

²¹² Davis Companies and other Business Structures 56.

²¹³ Section 24(3)(a) of the Companies Act 71 of 2008.

²¹⁴ Section 24(1)(a) of the Companies Act 71 of 2008.

²¹⁵ Sections 16(1)(a) and 16(4) of the Companies Act 71 of 2008.

²¹⁶ Sections 16(1)(b), 36(3) and (4) of the Companies Act 71 of 2008.

To amend the company's Memorandum of Incorporation at any other time, the board of the company or the shareholders who are capable of exercising at least ten percent of the voting rights that may be casted on such a resolution, adopted at a shareholders meeting, or in accordance with section 60 of the *Companies Act*, may suggest a special resolution to do so. The company's Memorandum of Incorporation may provide for alternative requirements.²¹⁷ An amendment may either be in the form of a new Memorandum of Incorporation replacing the existing one or mere adjustments to the existing Memorandum of Incorporation. Changing the company name, removing, changing or substituting any of the provisions, introduce any new provisions into the Memorandum of Incorporation, or any combination of the afore going changes can be made.²¹⁸

The company must include a copy of the amendment together with the Notice of Amendment and the *Commission* may call for the company to file a full copy of its altered Memorandum of Incorporation within a reasonable time.²¹⁹

A private company may not amend its Memorandum of Incorporation in such a manner that it does not continue to meet the criteria for its particular category of profit company, unless the company also amends its name accordingly at the same time, by changing the ending expression to reflect the category of profit company to which it has being changed to.²²⁰ If a company's amendment to its Memorandum of Incorporation includes a change of the company's name the provisions of sections 14(2) and (3), read with the changes required by the context will apply once again to the company.²²¹

A prescribed fee is payable and within the prescribed time after a company has amended its Memorandum of Incorporation, the company must file a Notice of Amendment with the *Commission*.²²²

²¹⁷ Sections 16(1)(c) and 16(2) of the Companies Act 71 of 2008.

²¹⁸ Sections 16(5) of the Companies Act 71 of 2008.

²¹⁹ Sections 16(7)(b)(ii) of the Companies Act 71 of 2008.

²²⁰ Sections 16(6) of the Companies Act 71 of 2008.

²²¹ Sections 16(8)(a) of the Companies Act 71 of 2008.

²²² Sections 16(7) of the Companies Act 71 of 2008.

An amendment to a company's Memorandum of Incorporation will be effective from the later of the date and time when the *Commission* accepts the filing of the Notice of Amendment or the date, as stipulated in the Notice of Amendment.²²³

Patent errors in spelling, punctuation, reference, grammar or similar defects on the face of the document may be corrected by the board of a company or by an individual authorised by the board. This is done by an amendment to the company's rules or its Memorandum of Incorporation and by the publication and filing of a notice of the alteration, in a manner, as called for or allowed by the Memorandum of Incorporation and the rules of the company.²²⁴

Should the published notice of alteration surpasses the authority to rectify a patent error or deficiency then the *Commission*, a shareholder, or a director of the company may apply to the Companies Ombud for an administrative order setting aside such notice.²²⁵

A company may, at any time after the filing of its Memorandum of Incorporation, files one or more translations of it in any one or more official languages of the Republic of South Africa. The translation must go together with a sworn statement by the person who prepared the translation, affirming that the translated document is a real, precise and a comprehensive translation of the Memorandum of Incorporation.²²⁶

The company could at any time after a company has filed its Memorandum of Incorporation, and successively filed one or more alterations or amendments to it, choose to file a combined revision of its Memorandum to reflect all the changes. A company may also be required to do so by the *Commission*.²²⁷

A consolidated revision of a company's Memorandum of Incorporation must be accompanied by an avowed statement of a director of the company or a statement made by an attorney or notary public, that the consolidated revision is indeed a real, precise

²²³ Sections 16(9) of the Companies Act 71 of 2008.

²²⁴ Sections 17(1) of the Companies Act 71 of 2008.

²²⁵ Sections 17(2) of the Companies Act 71 of 2008.

²²⁶ Sections 17(4) of the Companies Act 71 of 2008.

²²⁷ Sections 17(5) of the Companies Act 71 of 2008.

and a comprehensive version of the company's up to the date altered and amended Memorandum of Incorporation.²²⁸

The latest version of a company's Memorandum of Incorporation, as endorsed by the *Commission*, succeeds any other professed version of the company's Memorandum of Incorporation in the case of any conflict between it.²²⁹ Unless the consolidated version was ratified by a special resolution at a general shareholders meeting of the company, the Memorandum of Incorporation, as altered or amended, will succeed in any case of a contradiction between it and a translation filed in terms of section 17(3) or a consolidated revision filed in terms of section 17(5).²³⁰ When a company has amended its Memorandum of Incorporation, then the preceding Memorandum of Incorporation will have no force or effect with regard to any right, source of action, or matter occurring or arising after the effective date of the amendment.²³¹

5.3 Constitution of a Communal Property Association

The preamble of the *Communal Property Association Act* conveys it clear that everything established in terms of the *Communal Property Association Act* will occur on the grounds agreed to by members of a community in terms of their written constitution. The definition of community implies that the constitution be in writing and contain common rules. A constitution is defined to be a constitution, being adopted by an association, in terms of section 7. The definition of "holding of property in common" confirms again that the acquisition, keeping and supervision of property by an association occurs in accordance with the constitution. The definition refers to the terms of the constitution, implying that the constitution should contain terms relevant to at least the property rights.²³²

²²⁸ Sections 17(6) of the Companies Act 71 of 2008.

²²⁹ Sections 18(2) of the Companies Act 71 of 2008.

²³⁰ Sections 18(1) of the Companies Act 71 of 2008.

²³¹ Sections 19(6) of the Companies Act 71 of 2008.

²³² Section 1 of the Communal Property Associations Act 28 of 1996.

Section 5 refers to the adoption of a constitution by the members of the provisional association in terms of section 7.²³³ The reference to “final constitution” suggest that interim constitutions can exist pending adoption of the conclusive one but then section 7 refers to the adoption of a constitution (in the singular form) and then prescribes that it be done at a meeting or meetings convened in a manner prescribed for the adoption of constitutions (in the plural form).²³⁴

The adoption of a constitution is a pre-requisite for a community to be able to register a Communal Property Association and need to be filed together with the application for registration, to obtain the written consent of the Director-General for the registration of the Communal Property Association.²³⁵ A community may apply to the Director-General to assist in the ground work of a draft constitution and may present a draft constitution to be considerate for compliance by the Director-General. The Director-General may suggest modifications and shall notify the community of the reasons for such suggestions.²³⁶

A constitution has to conform to five general principles, each encompassing several matters to be addressed in the constitution of a Communal Property Association. The first principle a constitution should be coherent with is the “fair and inclusive decision-making processes” and the following matters need to be attended to.²³⁷

All the members of the Communal Property Association must be afforded an impartial opportunity to partake in the decision-making processes of the association. Members are defined as: “means the members of an association or the members of a community, as the case may be, including members who comply with the provisions of paragraph (i) of item 5 of the Schedule, and for the purposes of sections 12, 13 and 14, shall mean those members whose names appear on a list contemplated in the said item 5.”²³⁸

Decisions to alter the constitution, dissolve the Communal Property Association, or to either dispose of or burden the property of the Communal Property Association demands

²³³ Section 5(2)(f) and (5) of the Communal Property Associations Act 28 of 1996.

²³⁴ Sections 5(2)(f) and 7(1) of the Communal Property Associations Act 28 of 1996.

²³⁵ Section 8(3)(a) of the Communal Property Associations Act 28 of 1996.

²³⁶ Section 6 of the Communal Property Associations Act 28 of 1996.

²³⁷ Section 9(1)(a) of the Communal Property Associations Act 28 of 1996.

²³⁸ Section 1 of the Communal Property Associations Act 28 of 1996.

a comprehensive decision-making procedure. The Communal Property Association may only terminate a person's membership based on reasonable grounds after a fair hearing where the *audi altarem partem* rule was adhered to.²³⁹

The second principle a constitution should contain, is "equality of membership", which requires the following matters to be cogitated.²⁴⁰ There will not be any direct or indirect discrimination against any future or existing member of the community. Without limiting the general application of the foregoing race, sex, gender, ethnic or social origin, sexual orientation, colour, disability, age, religion, conscience, culture, belief and language are specifically cited. Two exceptions are made. In respect of age a constitution may contain rules specifying the age at which a member may attend and vote at meetings, and the age at which land rights may be allocated to a member.²⁴¹ Different classes of membership may be created on condition that the basis for diversity is harmonious with the superseding principle of equality. All members in a certain class of membership have equal rights and where members of the community already occupies land and no differentiation existed previously, the different classes will not lead to different rights to land or resources.²⁴²

The third principle a constitution should provide for is a "democratic processes", which requires the following five rights of members to be adhered to.²⁴³ All members have the right to receive proper notice of all the general meetings of the association. Attending, speaking and voting at any general meeting of the Communal Property Association and to receive copies of minutes or to have other reasonable access to the records of decisions taken at general meetings are two more rights specifically pointed out. The last two rights cited are the right to information about the financial statements and records of the Communal Property Association, and the right to have access to a copy of the constitution.²⁴⁴

²³⁹ Section 9(1)(a)(iii) of the Communal Property Associations Act 28 of 1996.

²⁴⁰ Section 9(1)(b) of the Communal Property Associations Act 28 of 1996.

²⁴¹ Section 9(1)(b)(i) of the Communal Property Associations Act 28 of 1996.

²⁴² Section 9(1)(b)(ii) of the Communal Property Associations Act 28 of 1996.

²⁴³ Section 9(1)(c) of the Communal Property Associations Act 28 of 1996.

²⁴⁴ Section 9(1)(c)(i) to (v) of the Communal Property Associations Act 28 of 1996.

All members should have “fair access to the property of the association”, is the fourth principle, which requires three matters a constitution should provide for.²⁴⁵ Firstly, the property of the Communal Property Association must be managed in a partaking and non-discriminatory manner on behalf of its members. Secondly, a member may not be barred from gaining access to or using of any part of the Communal Property Association's property, which was allocated for such member's exclusive or the communal usage, unless in accord with the procedures, being stipulated in the constitution of the Communal Property Association. Thirdly, the consent of a majority of the members present at a general meeting of the Communal Property Association is needed, before the Communal Property Association can sell or burden the property of the Communal Property Association or any substantial part thereof.²⁴⁶

The final principle a constitution should articulate is the principle of “accountability and transparency”. Six matters need to be addressed in the constitution.²⁴⁷ The fostering of accountability by the committees to the members of the Communal Property Association. Annual independent verification of the financial records of the Communal Property Association, as approved by the Director-General. All moneys of the Communal Property Association must be banked in an account opened in the name of the Communal Property Association, with either a bank registered in terms of the *Banks Act*,²⁴⁸ a mutual bank registered in terms of the *Mutual Banks Act*,²⁴⁹ the Post Office Savings Bank, as envisaged in section 52 of the *Post Office Act*,²⁵⁰ or another institution, as the Director-General may approve. The Communal Property Association may only purchase or acquire for consideration shares, which are listed on a licensed stock exchange, as defined in the *Stock Exchanges Control Act*.²⁵¹ The transactions of the Communal Property Association should be recorded and be managed in a financial effective way. Committee members are bestowed with fiduciary responsibilities in relation to the Communal Property

²⁴⁵ Section 9(1)(d) of the Communal Property Associations Act 28 of 1996.

²⁴⁶ Section 9(1)(d)(i) to (iii) of the Communal Property Associations Act 28 of 1996.

²⁴⁷ Section 9(1)(e) of the Communal Property Associations Act 28 of 1996.

²⁴⁸ 94 of 1990.

²⁴⁹ 124 of 1993.

²⁵⁰ 44 of 1958.

²⁵¹ 1 of 1985.

Association and its members and must exercise their powers in the best interests of all the members of the Communal Property Association without any disadvantage to other members who are similarly placed in contrast with them.²⁵²

A Communal Property Association's constitution will be interpreted in a manner, which will not be inconsistent with the essence and purposes of the five principles.²⁵³ A constitution should also deal with the matters referred to in the Schedule.²⁵⁴ A majority of a significant amount of the members of the community must adopt the draft constitution by way of a resolution.²⁵⁵

The Schedule prescribes the following matters that should be address in the constitution of a Communal Property Association.

1. The name of the Communal Property Association.²⁵⁶

The application for registration of a Communal Property Association must include the "intended" name of the provisional association.²⁵⁷ This suggest the possibility that the name might not be acceptable for registration, being a name for a particular Communal Property Association, but the *Communal Property Association Act* remains tacit on whatever possible reason there might be for the Director-General to deny registration, based on irregularities in the proposed name of a Communal Property Association. Neither does the *Communal Property Association Act* prescribes any procedure to be followed should any reason might exist for not allowing the registration of a certain proposed name.

2. Communal Property Association's address.²⁵⁸

The *Communal Property Association Act* does not specify whether the Communal Property Association's address should be the physical or postal address, but considering the areas inhabited by many of the rural communities, the physical address should suffice.

²⁵² Section 9(1)(e)(i) to (vi) of the Communal Property Associations Act 28 of 1996.

²⁵³ Section 9(2) of the Communal Property Associations Act 28 of 1996.

²⁵⁴ Section 8(2)(d) of the Communal Property Associations Act 28 of 1996.

²⁵⁵ Section 8(2)(e) and (f) of the Communal Property Associations Act 28 of 1996.

²⁵⁶ Item 1 of the schedule of the Communal Property Associations Act 28 of 1996.

²⁵⁷ Section 5(2)(a) of the Communal Property Associations Act 28 of 1996.

²⁵⁸ Item 2 of the schedule of the Communal Property Associations Act 28 of 1996.

3. Objectives of the Communal Property Association, as well as the identity of the community.²⁵⁹

The main object of a Communal Property Association has to be the holding of property in common, failing it will not qualify for registration as a Communal Property Association.²⁶⁰ It is necessary to identify the community, since the *Communal Property Association Act* only applies to certain communities. A community is defined to be a group of persons who desires to regulate their rights to and in specific property in terms of a written constitution. They should further either be required to form a Communal Property Association or they should prefer to register a Communal Property Association.²⁶¹

The provisions of the Communal Property Association *Act* applies to communities who are entitled to restitution of land under the *Restitution of Land Rights Act*.²⁶² It is required that the Land Claims Court has made an order of restitution on condition that a Communal Property Association be established.²⁶³

Communities who have received or who are designated to receive property or other assistance from the State whether in terms of an agreement or in terms of any law will qualify as a community for purposes of the *Communal Property Association Act*, on condition that a Communal Property Association needs to be formed.²⁶⁴

Disadvantaged communities approved by the Minister of Rural Development and Land Reform, who acquired property through donation, buying or otherwise obtained from any other person, on a condition that a Communal Property Association be formed.²⁶⁵

Finally, disadvantaged communities who are acquiring land or rights to land, and who desire to create a Communal Property Association, will qualify as a community to whom the *Communal Property Association Act* will be applicable to.²⁶⁶

²⁵⁹ Item 3 of the schedule of the Communal Property Associations Act 28 of 1996.

²⁶⁰ Section 8(2)(b) of the Communal Property Associations Act 28 of 1996.

²⁶¹ Section 1 of the Communal Property Associations Act 28 of 1996.

²⁶² 22 of 1994.

²⁶³ Section 2(1)(a) of the Communal Property Associations Act 28 of 1996.

²⁶⁴ Section 2(1)(b) of the Communal Property Associations Act 28 of 1996.

²⁶⁵ Sections 2(1)(c) and 2(2) of the Communal Property Associations Act 28 of 1996.

²⁶⁶ Sections 2(1)(d) and 2(2) of the Communal Property Associations Act 28 of 1996.

Disadvantaged communities' approval by the Minister of Rural Development and Land Reform, is done after appropriate consideration to the objects of the *Communal Property Association Act*, and if the Minister is satisfied that the community is a deprived community.²⁶⁷

In their application for registration of a provisional association, a community has to provide evidence, signifying that they do qualify as a community, as envisaged in section 2 of the *Communal Property Association Act*.²⁶⁸ A Communal Property Association may only be registered provided that the provisions of the *Communal Property Association Act* applies to the community concerned.²⁶⁹

4. Identified land or property of the association.²⁷⁰

"... to be owned by the association..." implies and confirm that property, including land, will have to be transferred to the Communal Property Association, once such property is obtained and on registration of the Communal Property Association. Land or property belongs to the Communal Property Association, as a juristic person, to be administered on behalf of the members. Property is widely defined to include, both movable and immovable property, as well as any right or interest in such property.²⁷¹ Land can be obtained either through an order of the Land Claims Court, from the State in terms of an agreement, or in terms of the law, donation or otherwise.²⁷²

In order for a community to register a provisional association, information regarding their occupation and usage rights on the land, as well as information relating to their settlement on such land, has to be provided in their application to be registered.²⁷³ Subsequently this right is limited for a period of twelve months, which is also the period granted to a community within which a Communal Property Association should be registered.²⁷⁴ This period may be extended for another period of twelve months by the Director-General. Consequently, a provisional association cannot become the owner of

²⁶⁷ Section 2(2) of the Communal Property Associations Act 28 of 1996.

²⁶⁸ Section 5(2)(b) of the Communal Property Associations Act 28 of 1996.

²⁶⁹ Section 8(2)(a) of the Communal Property Associations Act 28 of 1996.

²⁷⁰ Item 4 of the schedule of the Communal Property Associations Act 28 of 1996.

²⁷¹ Section 1 of the Communal Property Associations Act 28 of 1996.

²⁷² Section 2(1) of the Communal Property Associations Act 28 of 1996.

²⁷³ Section 5(2)(g) of the Communal Property Associations Act 28 of 1996.

²⁷⁴ Section 5(4)(a) of the Communal Property Associations Act 28 of 1996.

property, which is comprehensible in the light of its short-term lifespan. Accordingly, the rights obtained by a provisional association are protected and therefore the provisional association may not alienate any rights obtained in land.²⁷⁵

As indicated in the preamble of the *Communal Property Association Act*, it is desired that disadvantaged communities should be able to create juristic institutions to acquire, keep and manage property for common purpose. The holding of such property in common must be done on behalf of members in the terms of their constitution.²⁷⁶ A Communal Property Association will only be able to be registered if its key object is the "holding of property in common".²⁷⁷

Only after registration of a Communal Property Association it may obtain, alienate or burden immovable property, subject to the provisions of its constitution, and with the majority consent of the members who were present at a general meeting.²⁷⁸ The property of an association is further protected by proscribing a breach of the stipulations in the constitution regarding the allocation of rights in relation to property or access to such property.²⁷⁹ A convicted person may be fined or imprisoned for a period not exceeding ten years or sentenced to both such fine and imprisonment.²⁸⁰

It is further provided that a "disposal, mortgage, encumbrance or prescribed transaction" in violation of the provisions of the Communal Property Association's constitution and which is taken without the majority consent of the members shall be voidable.²⁸¹ The validity of such transaction may be challenged by a member, who may request the Director-General to assist him or her in doing so.²⁸² If the Director-General ruminates it necessary, a conciliator may be presented to assist the parties in resolving the dispute.²⁸³

²⁷⁵ Section 5(4)(b) of the Communal Property Associations Act 28 of 1996.

²⁷⁶ Section 1 of the Communal Property Associations Act 28 of 1996.

²⁷⁷ Section 8(2)(b) of the Communal Property Associations Act 28 of 1996.

²⁷⁸ Sections 8(6)(c) and 12 of the Communal Property Associations Act 28 of 1996.

²⁷⁹ Section 14(1) of the Communal Property Associations Act 28 of 1996.

²⁸⁰ Section 14(4) of the Communal Property Associations Act 28 of 1996.

²⁸¹ Section 12(3) of the Communal Property Associations Act 28 of 1996.

²⁸² Section 12(4) of the Communal Property Associations Act 28 of 1996.

²⁸³ Section 12(5) of the Communal Property Associations Act 28 of 1996.

- 5 Provisos for membership of the association, which should include a name list with available identity numbers.²⁸⁴

This item further stipulates that where it is not reasonably possible to make available the names of all the planned members apprehensive, the constitution have to include standards to identify other persons to be members of the Communal Property Association. The constitution also has to provide for a process to resolve quarrels concerning the right of other persons to be recognised as members of the Communal Property Association.

The *Communal Property Association Act* defines members to be “members of an association or the members of a community” with the inclusion of members who comply with the principles applicable for the identification of eligible members.²⁸⁵

6. Classifications of membership, if any, and their respective rights.²⁸⁶

Diverse classes of membership may be established provided that the foundation for diversity is congruent with the superseding principle of equality. All members with a particular class of membership should have equal rights and where members of the community already occupies land and no classification occurred previously, the different classes will not result in dissimilar rights to land or resources.²⁸⁷

7. The rights of members to using the association's property.²⁸⁸

The *Communal Property Association Act* is applicable to communities who owns land or property or who are entitled to rights in land or property.²⁸⁹ Accordingly the community's property will be registered in the name of this Communal Property Association.²⁹⁰ Members of the Association therefore do not become the owners of land or any of the property but are only entitled to the use of land or property owned by the Communal Property Association.

²⁸⁴ Item 5 of the schedule of the Communal Property Associations Act 28 of 1996.

²⁸⁵ Section 1 and item 5 of the Schedule of the Communal Property Associations Act 28 of 1996.

²⁸⁶ Item 6 of the schedule of the Communal Property Associations Act 28 of 1996.

²⁸⁷ Section 9(1)(b)(ii) of the Communal Property Associations Act 28 of 1996.

²⁸⁸ Item 7 of the schedule of the Communal Property Associations Act 28 of 1996.

²⁸⁹ Section 2(1) of the Communal Property Associations Act 28 of 1996.

²⁹⁰ Item 4 of the Schedule of the Communal Property Associations Act 28 of 1996.

8. Whether membership is founded on individuals or families.²⁹¹

From the wording it appears that a selection should be made between individual or family based membership. If based on families, the constitution should provide for rules of representation relating to the decision-making process of the association. It is ambiguous whether both forms of membership may exist and no provision is made for instances where there is a disagreement within a particular family. The *Communal Property Association Act* requires a majority decision for certain transactions. Therefore it is important to stipulate the voting power attached to a representative and whether a family may be presented by more than one representative. Each representative will then be able to carry a different mandate.

9. Reasons for ending membership and the process to be followed.²⁹²

This item further requires an elucidation on what become of the rights and property of the member concerned. Since all the property belongs to the Communal Property Association it is assumed that reference is made to the allocated property in terms of items 7 and 10. The Communal Property Association may only terminate a person's membership based on reasonable grounds after a fair hearing encompassing the *audi altarem partem* rule.²⁹³

Either the committee or the Communal Property Association may request a certificate from the Director-General to confirm his or her satisfaction that a person's membership was duly terminated in terms of the Communal Property Association's constitution. Such certificate will only be issued, once the Director-General has taken the necessary steps to determine whether the membership was correctly terminated.²⁹⁴

10. The purposes for which the property may be used and the physical distribution and allocation thereof.²⁹⁵

²⁹¹ Item 8 of the schedule of the Communal Property Associations Act 28 of 1996.

²⁹² Item 9 of the schedule of the Communal Property Associations Act 28 of 1996.

²⁹³ Section 9(1)(a)(iii) of the Communal Property Associations Act 28 of 1996.

²⁹⁴ Section 14(2) of the Communal Property Associations Act 28 of 1996.

²⁹⁵ Item 10 of the schedule of the Communal Property Associations Act 28 of 1996.

11. If members can trade their rights and if they may, to whom it may be sold.²⁹⁶
12. What transpires with a member's rights when he or she passes away.²⁹⁷
13. Election of the committee.²⁹⁸

A committee is elected by the members of a Communal Property Association, with the purpose of managing the affairs of such Communal Property Association.²⁹⁹ The item only requires that a procedure for election of committee members and the terms of office be provided for in the constitution.

The committee's powers and remuneration of committee members needs to be stipulated. The powers of members relating to decisions made by the committee and of removing the committee or members of the committee have to be formulated by the community in the constitution.

None of the powers of committees or committee members are stipulated except for bestowing the committee members with fiduciary responsibilities towards the Communal Property Association and its members. Committee members will further have to "...exercise their powers in the best interests of all the members of the association, without any advantage to themselves in comparison with other members who are similarly placed."³⁰⁰ Whether the requirement for a fiduciary relationship will underpin this, is doubtful in the light of the history of despotic management by traditional leaders.

14. Procedures applicable to calling of an Annual General Meeting and when it is to be called.³⁰¹

This item suggests that an annual general meeting has to be convened. Without postulating any procedure, the *Communal Property Association Act* only requires that the constitution of a Communal Property Association must provide for a procedure to be followed at an Annual General Meeting. Only items 14 and 15 refer to a quorum with the

²⁹⁶ Item 11 of the schedule of the Communal Property Associations Act 28 of 1996.

²⁹⁷ Item 12 of the schedule of the Communal Property Associations Act 28 of 1996.

²⁹⁸ Item 13 of the schedule of the Communal Property Associations Act 28 of 1996.

²⁹⁹ Section 1 of the Communal Property Associations Act 28 of 1996.

³⁰⁰ Section 9(1)(e)(vi) of the Communal Property Associations Act 28 of 1996.

³⁰¹ Item 14 of the schedule of the Communal Property Associations Act 28 of 1996.

only requirement that there should be a quorum at the annual general meeting. No prerequisites are stipulated for a quorum. Although provision is made for “other measure of representativity” it remains uncertain what other possible measures except those as provided for in item 8 may be referred to.

15. General Meetings.³⁰²

Similar provisions, as contained for annual general meetings, are likewise applicable to general meetings.

16. Powers of the Communal Property Association and any limitations thereon.³⁰³

The *Communal Property Association Act* is silent about the powers or limitations on powers of a Communal Property Association except for the requirement that powers and limitations relating thereto, should be addressed in the constitution.

17. Person who is responsible for keeping minutes of meetings and member’s access to the minutes.³⁰⁴

It is left up to the Communal Property Association to decide who will bear the responsibility of keeping minutes, suggesting that someone has to be responsible for taking minutes at a meeting. This item only specifies that members should have access to the minutes of a meeting and again the *Communal Property Association Act* remains tongue-tied about the procedure a member should follow to gain access, or the whereabouts of the minutes.

18. Financial affairs.³⁰⁵

Although this item elaborates on certain aspects of financial matters, the lack of precise prescriptions to safeguard conformity with principles of good governance, accountability and transparency, is unsettling. Save for the preamble of the *Communal Property Association Act*, accentuating the need for the management of institutions, which are

³⁰² Item 15 of the schedule of the Communal Property Associations Act 28 of 1996.

³⁰³ Item 16 of the schedule of the Communal Property Associations Act 28 of 1996.

³⁰⁴ Item 17 of the schedule of the Communal Property Associations Act 28 of 1996.

³⁰⁵ Item 18 of the schedule of the Communal Property Associations Act 28 of 1996.

accountable to their members, the principle of accountability and transparency³⁰⁶ and the requirement that financial records of a Communal Property Association has to be independently verified annually,³⁰⁷ no specific provisions exist to warrant conforming to the principle of good governance. The requirement in this item that the constitution should indicate a procedure on how money should be dealt with, and an indication as to which person will be authorised to make payments on behalf of the Communal Property Association, is supplemented by a further requirement that all moneys of the Communal Property Association must be banked.³⁰⁸ The only precise requirement is a limitation on the kind of shares that a Communal Property Association may own.³⁰⁹

Without specifying rules or standards, which will constitutes “effective financial management and recording”,³¹⁰ committee members are bestowed with fiduciary responsibilities in relation to the Communal Property Association and its members, and must exercise their powers in the best interests of all the members.³¹¹ The mere stipulation that the Communal Property Association’s constitution should provide for “how and by whom the financial records will be kept” is perplexing since no qualifications or requirements are prescribed for the person responsible for maintaining these records or for the safe keeping thereof. The constitution must also make provision for the independent verification of the financial records, which have to be approved by the Director-General.³¹²

The *Communal Property Association Act* refers to profits and expenditure on only one occasion by requiring the constitution to provide for the “...distribution and division of profits, responsibility and apportionment of working expenditure ...”

A mere stipulation that members should have access to the financial information deduces the contents that should be stipulated in the constitution regarding financial matters. Part

³⁰⁶ Section 9(1)(e) of the Communal Property Associations Act 28 of 1996.

³⁰⁷ Sections 9(1)(e)(i) and (ii) of the Communal Property Associations Act 28 of 1996.

³⁰⁸ Section 9(1)(e)(iii) of the Communal Property Associations Act 28 of 1996.

³⁰⁹ Section 9(1)(e)(iv) of the Communal Property Associations Act 28 of 1996.

³¹⁰ Section 9(1)(e)(v) of the Communal Property Associations Act 28 of 1996.

³¹¹ Section 9(1)(e)(i) to (vi) of the Communal Property Associations Act 28 of 1996.

³¹² Section 9(1)(e)(iii) of the Communal Property Associations Act 28 of 1996.

of the members' right to a democratic process is the right to examine and to duplicate the financial statements and records of the Communal Property Association.³¹³

19. Amending the constitution.³¹⁴

Any procedure may be followed for amending the constitution, as long as it is described in the constitution. An inclusive decision-making process is prescribed for a resolution to amend the constitution.³¹⁵

20. Dissolving a Communal Property Association.³¹⁶

The constitution needs to provide for a procedure for dissolving a Communal Property Association, with an explanation as to what will transpire with the assets of the Communal Property Association. The procedure will however have to be congruent with the just and inclusive decision-making process, incorporating the means to deal with the assets and liabilities of the Communal Property Association.³¹⁷

21. Disciplinary matters.³¹⁸

With specific reference to the procedure engaged to contend with corruption, nepotism and section 14 created offences.

22. Dispute resolution.³¹⁹

The *Communal Property Association Act* identifies the following possible disputes that may arise and also prescribes the procedures to be followed in solving some of these disputes.

³¹³ Section 9(1)(c)(iv) of the Communal Property Associations Act 28 of 1996.

³¹⁴ Item 19 of the schedule of the Communal Property Associations Act 28 of 1996.

³¹⁵ Section 9(1)(a)(ii) of the Communal Property Associations Act 28 of 1996.

³¹⁶ Item 20 of the schedule of the Communal Property Associations Act 28 of 1996.

³¹⁷ Sections 9(1)(a)(ii) and 13(3) of the Communal Property Associations Act 28 of 1996.

³¹⁸ Item 21 of the schedule of the Communal Property Associations Act 28 of 1996.

³¹⁹ Item 22 of the schedule of the Communal Property Associations Act 28 of 1996.

An application for registration of a provisional association must contain a procedure to resolve disputes relating to the right of other persons to become members of the provisional association.³²⁰

In disputes pertaining to the preparation or adoption of the constitution a conciliator may be appointed by the Director-General.³²¹ The conciliator must settle the dispute through mediation, exploring the truths, and by recommendations made to the disputing parties.³²² The same procedure is available to settle disputes between a provisional association or Communal Property Association and its members or between members or committee members. Should the disputing parties not reach agreement on the person to be appointed, then the Director-General may appoint an experienced person or a person who has knowledge in reconciling community disputes.³²³

The Director-General may, subject to the procedures prescribed in the constitution of a Communal Property Association or provisional association, enquire into the activities of the Communal Property Association or provisional association, provided that concerned parties are made aware of such enquiry, as well as its outcome.³²⁴ He or she may further give advice to the association and its members regarding their individual obligations and rights and appoints a conciliator.³²⁵

A dispute arising from an allegation by a member of the Communal Property Association that a decision was made without a majority accord of members attending a general meeting of members to dispose of or hinder 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, may also result in a conciliator being appointed by the Director-General.³²⁶

³²⁰ Section 5(2)(d)(ii) of the Communal Property Associations Act 28 of 1996.

³²¹ Section 10(2) of the Communal Property Associations Act 28 of 1996.

³²² Section 10(3) of the Communal Property Associations Act 28 of 1996.

³²³ Section 10(2) of the Communal Property Associations Act 28 of 1996.

³²⁴ Sections 11(6)(a) and 11(7) of the Communal Property Associations Act 28 of 1996.

³²⁵ Sections 11(6)(b) and 11(6)(c) of the Communal Property Associations Act 28 of 1996.

³²⁶ Sections 12(1) and 12(5) of the Communal Property Associations Act 28 of 1996.

Finally the *Communal Property Association Act* requires that the constitution of a Communal Property Association have to provide for a process to resolve disputes about the right of other persons to be recognised as members of the association.³²⁷

5.4 Conclusion

In essence it is the provisions of the *Companies Act*, which a company is not allowed to change in terms of its Memorandum of Incorporation or rules, hence warrants compliance with transparency and accountability of a private company. This is further underpinned by section 15 of the *Companies Act*, which stipulates that where the Memorandum of Incorporation or rules is in conflict with the provisions of the *Companies Act*, the provisions of the act will succeed.³²⁸ Furthermore the *Commission* or Takeover Regulation Panel may also submit an application to court to declare any part of a company's Memorandum void, to the degree that it overrides or diminishes the force of a prohibition or requirement in terms of an unalterable provision.³²⁹ The Companies Tribunal may also grant an administrative order releasing a transaction, agreement, resolution, arrangement, or provision of a company's Memorandum of Incorporation or rules from any prohibition or requirement founded by, or in terms of an unalterable provision of the *Companies Act*.³³⁰

The *Companies Act* contains a default Memorandum of Incorporation, which may be used by private companies, to ensure compliance with all the unalterable provisions of the *Companies Act*.

The constitution of a Communal Property Association has to conform to five general principles, each incorporating several matters to be dealt with. Except for reference to include the *audi altarem partem* rule at a hearing for the termination of a person's membership, no other specific provisions safeguard the principle of accountability when applying the principle of a "fair and inclusive decision-making processes". The principal will be complied with if all the members of the Communal Property Association be

³²⁷ Item 5 of the Schedule of the Communal Property Associations Act 28 of 1996.

³²⁸ Section 15(1) of the Companies Act 71 of 2008.

³²⁹ Section 6(1) of the Companies Act 71 of 2008.

³³⁰ Section 6(2) of the Companies Act 71 of 2008.

afforded an impartial opportunity to partake in the decision-making processes of the association. Measures to procure that the decision-making process is fair and inclusive are entirely legated to the community to postulate in their constitution.

The second principle of equal membership prohibits any form of discrimination against any member with distinct reference to, amongst others, age. Although different classes of membership may exist the basis for diversity may not contravene the principle of equality. A disturbing exception is made in respect of the age at which a member may attend and vote at meetings, and the age at which land rights may be allotted to a member. It is entirely up to the community to decide at which age a member of the community will become a member with full capacity. A person's age of majority is the age of eighteen years when minority is terminated, as determined by the Children's Act, which came into operation on 1 July 2007.³³¹ The mere fact that the *Communal Property Associations Act* does not provide for any limitations or minimum requirements regarding age to be complied with, negates all principles of legal status and contractual capacities of individuals, which in turn creates the possibility that certain individuals or groups may be excluded from the decision-making processes, which effectively violates their constitutional rights and human dignity, which in turn negates the principle of good governance.

The final principle a constitution should be coherent with, is the principle of accountability and transparency. Six specific requirements are stipulated to ensure compliance of which two only specify that committees should be accountable to the members of the Communal Property Association and that committee members are conferred with fiduciary responsibilities towards the Communal Property Association and its members. Only four specific requirements to ensure accountability and transparency are mentioned namely; an annual independent verification of the financial records, banking of all moneys with a registered bank, buying of listed shares, and effective financial management together with the recording of transactions.³³²

³³¹ Section 17 of the Children's Act 38 of 2005.

³³² Section 9(1)(e)(i) to (vi) of the Communal Property Associations Act 28 of 1996.

Despite attempts by the legislature to ensure that the constitutions of communal property associations will comply with the requirements of the Constitution of South Africa and principles of good governance, accountability and transparency, too much emphasis was placed on the autonomy of each community to develop their own rules in this regard. Considering rural communities' interpretation and enforcing of rights by gradually intensifying social pressure against individuals not complying with the rules and expectations of the community creates cause for concern.³³³ When it comes to protection of property rights certainty should exist towards procedures for the protection and enforcement of rights.

³³³ See 2.4.2 Traditional ownership.

Chapter 6

6 Governance procedures in a Communal Property Association and a Private Company

6.1 Introduction

At the end of the day it is the procedures in place, which determines how an entity is controlled and managed, that will determine whether the principles of “fair and inclusive decision-making processes, equality of membership, democratic processes, fair access to the property of the association” and “accountability and transparency” are complied with or not. The provision of exact procedures to be followed is important to enable the decision taking body of an entity to make fair and democratic decisions.

6.2 Control and Decision Procedures

Ultimate control of a company vests in the members and is regulated by the *Companies Act* and the Rules of the company. All major decisions require the knowledge of the members.³³⁴ In certain instances the shareholders of a particular class of shares need to have knowledge of a proposed change in their specific rights.³³⁵

A company controls another company or its business when a company is a subsidiary of that company. A person controls a company or its business when such person, together with any linked or inter-related person in a straight line or indirectly, exercise or determine the exercise of a majority of the voting rights attached to the securities of a company, whether pursuant to a shareholder agreement or otherwise, or has the right to assign or vote for or have power over the appointment or election of directors of the company, who controls a mainstream of the votes at a meeting of the board. In the case of a trust, the person who has the ability to control the majority of the votes of the trustees or to decide on the majority of the trustees or to appoint or transform the majority of the beneficiaries of the trust or the person has the capacity to substantially sway the dogma

³³⁴ Section 65(11) of the Companies Act 71 of 2008.

³³⁵ Section 164(2) of the Companies Act 71 of 2008.

of the juristic body in a way equivalent to a person who in regular commercial practice would be competent to exercise an component of control.³³⁶

Individuals are related to each other when they are married to each other, if they live together in a union comparable to that of a marriage relationship, or if they are parted by less than three degrees of natural or adopted affinity or consanguinity. There is a link between an individual and a juristic person when the individual directly or indirectly commands the juristic person. A juristic person is related to another juristic person, when one juristic persons directly or indirectly controls the other or the affairs of the other, each is a subsidiary of the other or a person directly or indirectly controls each of them or the business of each of them.³³⁷

If there is adequate evidence demonstrated to conclude that a person acts autonomously to any related or inter-related person in respect of a particular matter, then the court, Companies Tribunal or the Takeover Regulation Panel may discharge such person from the corollaries of the stipulation that would pertain to such person, for the reason of such relationship.³³⁸

In a private company the board of directors is involved in the day to day management of the company and receives their authority from the rules of the company and resolutions taken by the shareholders at the shareholders' meetings of the company. Rules are any related rules made, amended or repealed by the board of directors relating to the governance of the company in respect of matters that are not addressed in the *Companies Act* or the Memorandum of Incorporation. The board's authority to make, amend and repeal rules are governed in the Memorandum of Incorporation.³³⁹ A copy of the rules must be filed with the *Commission* and the rules need to be published in a manner obliged by the Memorandum of Incorporation. Rules have to be coherent with the *Companies Act* and the company's Memorandum of Incorporation. Any rule that is inconsistent therewith is void to the degree of the contradiction. Rules correlate exclusively to the governance of companies and in the light of section 15(3) of the

³³⁶ Section 2(2) of the Companies Act 71 of 2008.

³³⁷ Section 2(1) of the Companies Act 71 of 2008.

³³⁸ Section 2(3) of the Companies Act 71 of 2008.

³³⁹ Section 15(3) and 15(4) of the Companies Act 71 of 2008.

Companies Act, being an alterable provision, shareholders may forbid or restrict the powers of the board relating to rules.³⁴⁰

A company's Memorandum of Incorporation and any rules of the company are binding amid the company and every shareholder, the company's shareholders and each and every prescribed officer or director of the company or any other person attending the company, as a member of the audit committee, or as a member of a board committee in the carrying out of their respective purposes within the company.³⁴¹

The shareholders of a company may furthermore enter into any arrangement with one another in relation to any matter concerning the company. The shareholders' agreement must be in harmony with both the *Companies Act* and the company's Memorandum of Incorporation and the latter should also be consistent with the *Companies Act*. Any provision of such an agreement that is incoherent with the *Companies Act* or the company's Memorandum of Incorporation is void and unenforceable to the degree of its conflict.³⁴² If the shareholders desire to enter into an agreement with each other on a matter which conflicts with the Memorandum of Incorporation, then such matter must first be incorporated into the Memorandum of Incorporation, by way of an amendment to the Memorandum of Incorporation in order to be legally enforceable. A shareholders agreement is a private document while the Memorandum of Incorporation is filed with the *Commission* and therefore a public document.³⁴³

6.2.1 Notice of Meetings

The principle of adhering to a democratic process gives all members in a Communal Property Association the right to be given adequate notice of all general meetings of the Communal Property Association.³⁴⁴ More specifically it requires that notice of the meeting to adopt the constitution was effective to warrant the presence of the members of the community.³⁴⁵ The *Communal Property Association Act* taciturn boorishness, as to either

³⁴⁰ Hefer Notes on South African Companies Act 34.

³⁴¹ Section 15(6) of the Companies Act 71 of 2008.

³⁴² Section 15(7) of the Companies Act 71 of 2008.

³⁴³ Sections 13(2)(b) and 187(5) of the Companies Act 71 of 2008.

³⁴⁴ Section 9(1)(c)(i) of the Communal Property Associations Act 28 of 1996.

³⁴⁵ Section 7(2)(a) of the Communal Property Associations Act 28 of 1996.

the imputable person to be bestowed with giving notice, or the procedure to be followed, is perplexing.

To the contrary the *Companies Act* prescribes in detail the procedures to be followed relating to notice of company meetings. A company have to deliver a notice of each shareholder's meeting in the stipulated way and form to all the shareholders of the company, as determined by the record date, being set by the company's board of directors.³⁴⁶ Notice must be given at least 10 business days before the meeting is to commence, provided that the company's Memorandum of Incorporation may stipulate for longer minimum periods of notice to apply.³⁴⁷

Written notices should stipulate the date, time and place for each meeting, the general purpose of the meeting and any specific reason for the meeting in the event of a meeting demanded pronouncing a specific purpose for proposing such meeting, as well as the record date for the meeting.³⁴⁸ Notices should include copies of suggested resolutions that was received by the company, which should be considered at the meeting accompanied by an announcement of the percentage of voting rights necessary to adopt such proposed resolution.³⁴⁹ For the annual general meeting of a company a concise version of the financial statements with instruction on how to obtain a copy of the complete annual financial statements for the previous financial year must be furnished together with the notice of the meeting.³⁵⁰ The notice should further contain a protuberant statement informing a member of its right to appoint a representative to attend and cast a vote at the meeting. The notice should also contain a reminder that proper identification will be required at the meeting to allow for participation.³⁵¹

The *Companies Act* even goes further and prescribes in detail the procedures to be adhered to should a company forsakes to give the obligatory notice of a shareholders meeting or should the notice be substantially defective. In the latter instance a meeting may proceed, on condition that all the members who are eligible to exercise voting rights

³⁴⁶ Section 59(1) of the Companies Act 71 of 2008.

³⁴⁷ Sections 62(1) and (2) of the Companies Act 71 of 2008.

³⁴⁸ Section 62(3)(a) and (b) of the Companies Act 71 of 2008.

³⁴⁹ Section 62(3)(c) of the Companies Act 71 of 2008.

³⁵⁰ Section 62(3)(d) of the Companies Act 71 of 2008.

³⁵¹ Section 62(3)(e) of the Companies Act 71 of 2008.

in regard of each item on the agenda, do acknowledge actual receipt of the notice, are present at the meeting and waive notice of the meeting or ratify any material defect in the manner and form of giving notice.³⁵² Similar proceedings are prescribed if a material defect correlates only to one or more exact matters on the agenda.³⁵³

Members who do attend a meeting are deemed to have been given, or waived notice of the meeting, and each member has a right to assert a material deficiency in the form of the notice given for a specified item on the agenda. Such member may partake in the resolve whether to waive the prerequisites for such a notice or to ratify an imperfect notice, and will be considered to have waived any right founded on an actual or averred material defect in the notice of the meeting.³⁵⁴

6.2.2 At the meeting

A meeting is an assembly of two or more persons coming together for a common and lawful purpose. The purpose of a meeting is to discuss certain issues and to make certain decisions. The Common Law Rules will only be applicable to meetings and are followed where statutes or regulations does not provide the necessary rules governing the meeting.

There are two types of meetings namely public meetings and private meetings. A public meeting is a meeting, which is not a private meeting and therefore open to the public for example political meetings and evangelistic meetings. Private meetings is not open to the public but only to members who are entitled to attend, for example, companies, public and statutory bodies like parliament, school boards and town councils, close corporations and voluntary associations like churches and clubs. Admission to these meetings is limited to members or those who are invited to attend and only members are allowed to participate in the business of the meeting.

³⁵² Section 62(4) of the Companies Act 71 of 2008.

³⁵³ Section 62(5) of the Companies Act 71 of 2008.

³⁵⁴ Section 62(5) of the Companies Act 71 of 2008.

A Valid meeting must be properly convened and duly constituted. To be properly convened a meeting is called by the proper authority in terms of the governing rules of that body and that all persons entitled thereto have received proper notice. To be duly constituted means the appointed chairperson and required quorum must be present.³⁵⁵

A person is required to present reasonable satisfactory identification before he or she may attend and partake in a shareholders meeting. It is the responsibility of the presiding officer to reasonably verify the right of such person to partake and cast their vote either as a shareholder or as a proxy for a shareholder.³⁵⁶

A shareholder's meeting may be conducted entirely by electronic communication unless the Memorandum of Incorporation prohibits it. A company may allow shareholders or their proxies to partake by way of electronic communication, in part or in all of the shareholders meeting that is being held in person, on condition that the electronic communication employed, generally enables all persons participating in the meeting to communicate concomitantly with each other, without an intermediary and to participate reasonably for all practical purposes in the meeting.³⁵⁷ Shareholders has to be informed of the availability of electronic communication. The notice of the meeting must further provide any sufficient information to permit shareholders or their representatives to retrieve the accessible source or means of electronic communication and that it will be at the expense of the shareholder or proxy unless the company determines otherwise.³⁵⁸

In practice the chairperson of the board of directors will be the chairperson at the general meetings of the company. A meeting is not valid unless the chairperson was properly appointed. In most cases the chairperson is elected for a fixed period but may be elected at each meeting by the present members. The meeting is bound by the regulations, in so far the appointment of a chairperson is concerned. The deputy-or vice-chairperson will proceed in the absence of the chairperson but will normally vacate the chair once the chairperson arrives, although he is entitled to remain. If both the deputy-chairperson and

³⁵⁵ Davis Companies and other Business Structures 94.

³⁵⁶ Section 63(1) of the Companies Act 71 of 2008.

³⁵⁷ Section 63(2) of the Companies Act 71 of 2008.

³⁵⁸ Section 63(3) of the Companies Act 71 of 2008.

chairperson are absent, the secretary will take the chair and regulate the election of a member present to act as chairperson and to preside over the meeting.

As a general rule the chairperson should be appointed by an unopposed motion with a simple majority, or otherwise by way of secret ballot, to avoid preference of members be made known and to avoid any embarrassment. If there is any objection against the election of a chairperson the objection should be done immediately. The appointed chairperson will take the chair immediately. In the absence of rules and regulations the members may elect any one of them to be the chairperson.

Two kinds of meetings are recognised in the *Communal Property Association Act* being general meetings and annual general meetings.³⁵⁹ The principle of adhering to a democratic process gives all members in a Communal Property Association the right to attend, speak at and take part and cast a vote at any general meeting.³⁶⁰ The majority of the members present is required for a multiple number of transactions to be concluded at a general meeting of the Communal Property Association. In order for members to reach a majority decision or consent members need to attend, speak at and take part in the voting, thus implying and confirming that each member has a right to attend, speak at and take part in the voting at any general meeting.³⁶¹ The *Communal Property Association Act* is silent about the procedures at a meeting except for providing that the constitution of a Communal Property Association has to provide for any procedure to be followed at the Communal Property Association meetings.³⁶²

here are two kinds of company meetings, namely ordinary meetings for example the annual general meeting and extra-ordinary meetings, for example other general meetings or class meetings. All meetings of a company are private meetings and regulated by the common law rules subject to the regulations and rules of the *Companies Act*, the company's Memorandum of Incorporation and the rules of the company.

³⁵⁹ Item 14 and 15 of schedule of schedule of the Communal Property Associations Act 28 of 1996.

³⁶⁰ Section 9(1)(c)(ii) and (iii) of the Communal Property Associations Act 28 of 1996.

³⁶¹ Sections 9(1)(d)(iii), 12 and 13 of the Communal Property Associations Act 28 of 1996.

³⁶² Item 14 and 15 of schedule of schedule of the Communal Property Associations Act 28 of 1996.

Shareholders meetings are defined as:

“ ‘shareholders meeting’, with respect to any particular matter concerning a company, means a meeting of those holders of that company’s issued securities who are entitled to exercise voting rights in relation to that matter;”

A shareholders meeting can be called at any time by either the board of directors of the company or any other person postulated in the company’s Memorandum of Incorporation or rules. A company is however compelled to call a shareholders meeting, as and when it is required, by either its Memorandum of Incorporation or when a company is required in terms of the *Companies Act* that a particular matter must be referred to the shareholders for their decision. This is also the case when a company is required to fill a vacancy on the board for another reason than the outcome of an *ex officio* director ending to hold his or her office, or in terms of a written demand.

A written demand compels a company to call a shareholders meeting when a meeting is called by one or more written and signed demand, portraying the exact reason for which such a meeting is put forward, and collectively, demands for significantly the same reason are done and signed by the holders of at least ten present of the voting rights eligible to be carried out in relation to the proposed matter. A company must on receipt of the demand call for a shareholders meeting to be held. A company’s Memorandum of Incorporation may specify a lower percentage than the ten present of voting rights requirement, as suggest by the *Companies Act*.³⁶³

A company may alternatively submit the resolution for the election of a director, which would have been considered at a shareholders meeting, for consideration to the shareholders to vote in writing. Only shareholders, who at such meeting would have been entitled to exercise voting rights in relation to the resolution, will be entitled to exercise their voting rights in relation to the resolution. Eligible shareholders have to exercise their voting right within twenty business days after the decision was presented to them.³⁶⁴

³⁶³ Section 61 of the Companies Act 71 of 2008.

³⁶⁴ Section 60(1) of the Companies Act 71 of 2008.

Any of the company's shareholders or the company can obtain a court order setting aside a demand made in terms of section 61(3) on the basis that the demand was thoughtless, the call was made for a meeting with no other reason than to reconsider a matter already determined by the shareholders or that calling a meeting was in any other manner vexatious in nature.³⁶⁵

The shareholder or shareholders who have submitted a demand for a meeting may at any time before the start of such shareholder's meeting withdraw their demand. The company must then cancel the meeting if it appears that the voting rights of any remaining shareholders who still want to proceed with their demand for a meeting collectively has fallen lower than the least percentage of voting rights, as required by the *Companies Act* or Memorandum of Incorporation to call a meeting.³⁶⁶

If a company has no directors, or for the reason that all of the company's directors are incapacitated, then any other person, being sanctioned by the company's Memorandum of Incorporation may convene a meeting. Should the Memorandum of Incorporation not provide for such person, then any shareholder may request the Companies Tribunal to issue an administrative order for a shareholder's meeting to be convened, subject to any conditions that the Companies Tribunal deemed fit in the circumstances.³⁶⁷

If for any other reason a company fails to convene a meeting, as required by its Memorandum of Incorporation, or when required by shareholders, a shareholder may apply to a court for an order compelling the company to convene a meeting on a date and conditional to any terms considered appropriate to the situation by the court.³⁶⁸

In both instances where a shareholder either apply to court or to the Companies Tribunal, the company has to reimburse the shareholder for the costs of the proceedings.³⁶⁹ The

³⁶⁵ Section 61(5) of the Companies Act 71 of 2008.

³⁶⁶ Section 61(6) of the Companies Act 71 of 2008.

³⁶⁷ Section 61(11) of the Companies Act 71 of 2008.

³⁶⁸ Section 61(12) of the Companies Act 71 of 2008.

³⁶⁹ Section 61(13) of the Companies Act 71 of 2008.

company's failure to hold a meeting, as required, will not affect the company's existence or legitimacy of any action of the company.³⁷⁰

To enable the meeting to deal with matters in an orderly and effective manner an agenda is prepared to present to the members the business to be attended to. No common-law rule exists regarding agendas. The *Companies Act* does not contain any provisions relating to agendas in particular except to refer to the items and exclusion of items on the agenda in various provisions implying that agendas should exist for company meetings.

Normally copies of the agenda will be attached and sent with the notice of the meeting. Members are usually informed about the business of the meeting so that matters could be attended to more expeditiously and in a systematic and logical sequence without overlooking certain issues. A further advantage is that members do not anticipate matters which will come up for consideration in due course.

The company secretary draws up the agenda after consultation with the chairman. Previous minutes are perused to ensure matters not fully dealt with or postponed from the previous meetings are included. Normally a summarised agenda is posted with the notice of the Annual General Meeting.

Neither the procedure to be followed at a members meeting nor the agenda to be followed are mentioned in the *Communal Property Association Act*, except to oblige that the Communal Property Association's constitution should provide "how and when" the Annual General Meeting and General Meetings should be called and that a procedure should be described for each of the meetings.³⁷¹

6.2.2.1 Quorum and adjournment

A quorum is the minimum number of persons who are entitled to be present at a meeting to enable the meeting to make a valid decision. A quorum must be present for a meeting to be properly constituted.³⁷²

³⁷⁰ Section 61(14) of the Companies Act 71 of 2008.

³⁷¹ Items 14 and 15 of the schedule of the Communal Property Associations Act 28 of 1996.

³⁷² Davis Companies and other Business Structures 94.

In terms of the Common Law rules a simple majority will constitute a quorum and only persons entitled to vote are counted. Proxies are not counted as persons present at the meeting and is therefore excluded when a quorum needs to be established. A quorum must be maintained throughout the meeting. A meeting should be adjourned if a quorum is not present or cannot be maintained during the course of the meeting.

The *Companies Act* changed the common law rule by stipulating that a quorum will be members in person or represented retaining not less than twenty five percent of all the votes of all members entitled to be present and vote, but the Memorandum of Incorporation may specify a lower or higher percentage.³⁷³ If a company has more than two shareholders, at least three shareholders must be present at the meeting.³⁷⁴ If a quorum at the meeting is not reached within one hour of the scheduled time for the meeting, the meeting will be adjourned for a week, unless the Memorandum of Incorporation specify a different time and period.³⁷⁵ Other reasons for adjourning a meeting are that the quorum cannot be maintained or by action of the chairman with consent of the meeting, unless the Memorandum of Incorporation provides otherwise. The chairman may decide on an adjournment because the meeting is completely out of control, to take a poll, or to ensure that business is properly attended to.

For the protection of shareholders, a shareholder's meeting or the deliberation of any item being debated at the meeting, may be adjourned by a carried motion for an indefinite period, unspecified period limited to a given maximum period, specified date or fixed period, or to another place, specified time and place. No notice is given of an adjourned meeting, since it is only a continuation of the original meeting unless the Memorandum of Incorporation prescribes otherwise. When an adjournment was *sine die* or to attend to other business, then notice of the meeting needs to be given again.³⁷⁶ The Memorandum of Incorporation may also prohibit any adjournment.

To ensure that matters could be attended expeditiously and in a systematically and logical order without neglecting certain issues a meeting may not be adjourned longer than the

³⁷³ Section 64(1) and (2) of the Companies Act 71 of 2008.

³⁷⁴ Section 64(3) of the Companies Act 71 of 2008.

³⁷⁵ Section 64(4) and (6) of the Companies Act 71 of 2008.

³⁷⁶ Section 64(10) and (11) of the Companies Act 71 of 2008.

earlier of sixty business days from the date of the adjournment or hundred and twenty business days after the record date, unless the company's Memorandum of Incorporation provides for diverse maximum periods or for unlimited adjournment of meetings.³⁷⁷

Postponement of a meeting takes place before a meeting commences, is done by the convening authority and is not a decision taken by the meeting. A meeting, that has being convened can only move for a formal motion to adjourn. Notices of postponement must be sent to all members to whom the original notice was sent.

A motion is a proposal submitted to a meeting for consideration and may be submitted to the chairperson orally or in writing. Motions must be in accordance with and within the scope of the notice of meeting, duly proposed and seconded (if required by regulations), clear and unambiguous. The purpose is to conclude a decision confined to a single subject matter and therefore formulated in the affirmative. The chairperson must not allow motions that are vague and doubtful. In general control of a company is done through motions.

The *Communal Property Association Act* does not prescribe any procedures to be followed at meetings except to require that the constitution of the Communal Property Association should provide for procedures relating to the convening, constituting and procedure at the Annual General Meeting and at General Meetings.³⁷⁸

6.2.2.2 Decisions

Control of the company is done through motions, which become resolutions, if carried by a simple majority vote. Part F of the *Companies Act* regulates the governance of companies and describes a shareholder for the interpretation and constrained application of Part F, being a person who is authorised to execute any voting rights relating to a company regardless of the configuration, entitlement or characteristics of the securities to which such voting rights are conferred to.³⁷⁹

³⁷⁷ Section 64(12) and (13) of the Companies Act 71 of 2008.

³⁷⁸ Items 14 and 15 of the schedule of the Communal Property Associations Act 28 of 1996.

³⁷⁹ Section 57(1) of the Companies Act 71 of 2008.

The common law rule is that each person who is present at a meeting and who is entitled to vote has one vote. Although the chairperson in most private meetings will also be a member and therefore entitled to a vote, he or she will refrain from doing so, as a sign of impartiality.

If provided by the rules and regulations, a chairperson may have a second vote, referred to as a casting vote, in order to decide a matter in case of a deadlock in votes. If the chairperson is not a member, the rules and regulations may provide for a casting vote in the case of a deadlock between members. Bearing in mind his or her impartiality, the chairperson has a discretion whether or not to exercise his or her casting vote.

A company resolution is a formal decision of a company in a general meeting by a simple majority of members entitled to attend, vote, and who constitutes a quorum. All shareholder's resolution is either an ordinary resolution or a special resolution and the board of directors may suggest any resolution to be considered by shareholders and may decide whether such resolution will be deliberated at a meeting, by vote or in terms of a section 60 written consent.³⁸⁰

It was held in *Samuel v President Brand Gold Mining Co Ltd* that a shareholder in a company is bound by the decisions of the majority of shareholders despite an adverse effect on his own rights, as shareholder, provided such decisions are lawfully. In order for companies to function properly it is necessary to apply the principle of supremacy of the majority.³⁸¹

Any two of the shareholders of a company may recommend a resolution about any issue in respect of which they are each entitled to cast their respective voting rights. In putting forward a resolution shareholder may insist that the resolution be proposed to shareholders for deliberation at the shareholder's meeting. The meeting has to be called by one or more written and signed demands portraying the specific purpose for which the meeting is proposed, and cumulative, demands to a large extent for the similar purpose are made and signed by the holders of at least ten present of the voting rights authorised to be exercised in relation to the proposed issue. Such demand has to be

³⁸⁰ Section 65(1) of the Companies Act 71 of 2008.

³⁸¹ *Samuel v President Brand Gold Mining Co Ltd* 1969(3) SA 629 (A).

delivered to the company.³⁸² Shareholders may also choose to wait until the next shareholders meeting to propose a resolution or can propose a resolution in terms of a section 60 written consent.³⁸³

A proposed resolution is not imperiling to the strict requirements, as stipulated in section 6(4), but has to be clear, specific and be complemented by adequate information or expounding material to assist a shareholder who is eligible to vote on the resolution. A shareholder must be endowed to conclude whether to partake in the meeting and pursue to sway the result of the voting power on the resolution or not.³⁸⁴

Any shareholder or director who doubts that the form of the resolution satisfies these requirements may at any time before the meeting commences apply to court for a restraining order against the company from placing the suggested resolution to the casting of a vote, until the requirements are satiated. Further relieve may be sought against the company or the shareholders who proposed the resolution to take proper actions to amend the resolution so that it complies with the requirements. The applicant may also apply for an appropriate cost order.³⁸⁵ No person may contest or call into question the clarity, specificity and the accompanying information or explanatory material, as soon as the resolution is adopted.³⁸⁶

Two kinds of company resolutions can be distinguished. In terms of the common law ordinary resolutions are passed on a simple majority and constitutes any resolution taken at a general meeting, that is not a special resolution. Ordinary resolutions are defined by the *Companies Act*, as a resolution, passed at a shareholders meeting that carries the collaboration of more than fifty percent of the voting rights exerted on the decision, or a higher percentage, being obliged by the company's Memorandum of Incorporation, or by controllers of a company's securities acting otherwise than at a meeting.³⁸⁷ Apart from an ordinary resolution to remove a director a company's Memorandum of Incorporation could call for a higher percentage of voting rights to approve an ordinary resolution,

³⁸² Sections 65(3) and 61(3) of the Companies Act 71 of 2008.

³⁸³ Section 65(3) of the Companies Act 71 of 2008.

³⁸⁴ Section 65(4) of the Companies Act 71 of 2008.

³⁸⁵ Section 65(5) of the Companies Act 71 of 2008.

³⁸⁶ Section 65(6) of the Companies Act 71 of 2008.

³⁸⁷ Section 1 of the Companies Act 71 of 2008.

relating to one or more specific separate issues, on condition that there must at all relevant times be a margin of at least ten percentage points between the requisites for sanctioning of an ordinary decision and those of a special resolution.³⁸⁸

Ordinary resolutions that do not require a particular majority are normally used to decide normal business at an annual general meeting or any other business that does not require a special resolution, or a resolution requiring a special majority, as prescribed by the *Companies Act* or the rules. Although a quorum need to be present members may abstain from voting at a general meeting. Accordingly members holding at least twenty five percent of the votes of all members and who are authorised to cast their vote and who are personally present or represented by way of proxy is necessary.³⁸⁹ For an ordinary resolution to be approved, it must be supported by more than fifty percent of the shareholders voting rights applied to the resolution.³⁹⁰

A special resolution means a resolution that was adopted at a shareholders meeting or by holders of a company's securities conducting business other than at a meeting, as envisaged in section 60, which resolution was carried with at least seventy five percent of the voting rights.³⁹¹ A company's Memorandum of Incorporation may authorise a lower percentage of voting rights or different lower percentages of voting rights to carry any special resolution on any respective matter, provided that there must at all relevant times be a margin of at least ten percentage points between the requisites for approval of an ordinary resolution and that of a special resolution.³⁹²

In order to propose special resolutions, it has to be stated that the resolution will be proposed as a special resolution. The terms of the resolution, its effects and the reasons for the resolution need to be provided. Special resolutions are passed at a general meeting with members holding at least twenty five percent of the votes of all members entitled to vote and who are present in person or by proxy.³⁹³ On a show of hands each person in attendance and entitled to cast one vote regardless of the quantity of shares

³⁸⁸ Section 65(8) of the Companies Act 71 of 2008.

³⁸⁹ Sections 58 and 64(1) of the Companies Act 71 of 2008.

³⁹⁰ Section 65(7) of the Companies Act 71 of 2008.

³⁹¹ Sections 1 and 65(9) of the Companies Act 71 of 2008.

³⁹² Section 65(10) of the Companies Act 71 of 2008.

³⁹³ Section 64(1) of the Companies Act 71 of 2008.

he or she controls or represents. With a poll each member and their representatives are eligible to use all the voting rights attributed to the shares held or represented by such person.³⁹⁴ On a vote by show of hands a majority of at least seventy five percent in person and by poll a majority of at least seventy five percent in person and by proxy is needed to carry the resolution.³⁹⁵

Some major decisions to be taken by members of a company requires a special resolution:

- i. Alteration of Memorandum or Rules.³⁹⁶
- ii. Increase or reduction in share capital.³⁹⁷
- iii. Disposal of major assets.³⁹⁸
- iv. Take – over or amalgamation.³⁹⁹
- v. Scheme of arrangement.⁴⁰⁰

Other decisions commanding a special resolution from members, as required by the *Companies Act* are:

- i. Ratification of a merged alteration of a company's Memorandum of Incorporation.⁴⁰¹
- ii. When a company's Memorandum of Incorporation limits, restricts or qualifies the functions, authorities or actions of that company or bounds the authority of the directors to execute an action on behalf of the company the shareholders can ratify any action by the company or the directors that is paradoxical with any such restriction, limitation or qualification.⁴⁰²
- iii. When securities, shares, rights or options are allotted to a director, future director, prescribed officer or future prescribed officer of the company (or to a person linked

³⁹⁴ Section 63(4) and (5) of the Companies Act 71 of 2008.

³⁹⁵ Section 65(9) of the Companies Act 71 of 2008.

³⁹⁶ Sections 65(11)(a) and 16(1)(c) of the Companies Act 71 of 2008.

³⁹⁷ Section 36(2) of the Companies Act 71 of 2008.

³⁹⁸ Section 112(2)(a) of the Companies Act 71 of 2008.

³⁹⁹ Section 113 of the Companies Act 71 of 2008.

⁴⁰⁰ Section 114 of the Companies Act 71 of 2008.

⁴⁰¹ Sections 17(5) and 18(1)(b) of the Companies Act 71 of 2008.

⁴⁰² Section 20(2) of the Companies Act 71 of 2008.

or inter-related to the company or to a director or prescribed officer of the company or to any nominee of such person).⁴⁰³

- iv. When there is an issue of securities convertible into shares or rights, that may be used for shares in a transaction, or a series of cohesive transactions and the voting power of the class of shares that are issuable or issued as an outcome of such transaction or series of cohesive transactions will be equivalent to or surpass thirty percent of the voting rule of entirely the shares of that class held by shareholders just afore the transaction or series of transactions.⁴⁰⁴
- v. Financial assistance from a company in connection with the issuing of any of its securities the specific provision of financial assistance must be either pursuant to an employee share scheme that placates the requirements of section 97 or pursuant to a special shareholders' resolution that was adopted within the previous two years and, which resolution sanctions such assistance either for the particular recipient or in general for a class of probable recipients who falls within such category.
- vi. if a company approves loans or financial assistance to a director or to a connected company the specific proviso of financial assistance must be either pursuant to an employee share scheme that fulfils the requirement of section 97 or pursuant to a special shareholders resolution approved within the preceding two years, which resolution sanctioned such assistance either for the particular receiver or in general for a type of potential receivers and the particular receiver falls within that group.
- vii. Decisions by the board to buy back shares must be approved by a special resolution if any shares are to be procured by the company from a director or prescribed officer of the company or a person related to a director or prescribed officer of the company.⁴⁰⁵
- viii. Any share buyback, which either alone or together with other transactions in a cohesive series of transactions, comprises the procurement by the company of

⁴⁰³ Section 41(1) of the Companies Act 71 of 2008.

⁴⁰⁴ Section 41(3) of the Companies Act 71 of 2008.

⁴⁰⁵ Section 48(8) of the Companies Act 71 of 2008.

more than five percent of the issued shares of any specific class of the company's shares. Sections 114 and 115 will also apply to these transactions. These sections deal among others with schemes of arrangement and in general demand a special resolution of shareholders, as defined in those sections.⁴⁰⁶

- ix. Director's remuneration for services rendered may only be paid in accord with a special shareholders resolution approved within the previous two years.⁴⁰⁷
- x. Solvent companies can be wound up voluntarily when the company adopts a special resolution providing for winding up by either the company or by its creditors.⁴⁰⁸
- xi. A court may direct a solvent company to be wound up when the company has decided by special resolution that it should be wound up by the court or has made an application to the court to proceed with its voluntary winding up in court.⁴⁰⁹
- xii. A company may apply to be deregistered simultaneous to the transferral of its registration to an alien jurisdiction, as long as the shareholders have adopted a special resolution, approving such an application and transmission of registration.⁴¹⁰
- xiii. A special resolution is required to revoke the special resolution that was adopted to change a company's Memorandum of Incorporation, which gave rise to a dissenting minority shareholder's appraisal rights.⁴¹¹
- xiv. A company's Memorandum of Incorporation may oblige a special resolution to approve any other matter.⁴¹²

⁴⁰⁶ Section 48(8) of the Companies Act 71 of 2008.

⁴⁰⁷ Section 66(9) of the Companies Act 71 of 2008.

⁴⁰⁸ Section 80(1) of the Companies Act 71 of 2008.

⁴⁰⁹ Section 81(1) of the Companies Act 71 of 2008.

⁴¹⁰ Section 82(5) of the Companies Act 71 of 2008.

⁴¹¹ Section 164(9)(c) of the Companies Act 71 of 2008.

⁴¹² Section 65(12) of the Companies Act 71 of 2008.

Additional requirements are placed on fundamental transactions to dispose major of the assets or business, effect amalgamation or merger, or execute a scheme of arrangement. Notwithstanding the provisions regulating shareholders' resolutions and any other provision of a company's Memorandum of Incorporation, a resolution adopted by holders of securities or the board of directors, must also be approved by a special resolution adopted by persons eligible to cast voting rights on the precise matter. This resolution needs to be approved at a meeting called for such reason and where adequate persons are present to cast in favour and in total, at least twenty five percent of all of the voting rights that are eligible to be exerted on that motion.⁴¹³

In the event of the resolution be contested by at least fifteen percent of the voting rights that were cast on that resolution and any person who voted against the resolution, requires the company to seek a court to sanction same or on an application for review by such a person, the company must either apply for the court's approval and endure the costs of the application, or treat the decision as a nullity and may not proceed to implement the resolution. The court may set aside the resolution when the decision made is transparently prejudiced to any class of bearers of the company's securities or on the basis of any other noteworthy and substantial technical irregularity.⁴¹⁴

A special resolution is not required if the directors wish to adjust the authorised shares, as permitted by the companies Memorandum of Incorporation.⁴¹⁵

All shareholders resolutions that were adopted, as well as the notice and minutes of all shareholders' meetings, must be kept for a period of seven years from the date on which each such resolution was adopted.⁴¹⁶ There are various means in which the shareholders control or power may be limited. Powers of a simple majority may be limited by the *Companies Act* or the rules by requiring a special resolution and prescribed majority.

The majority cannot act illegally. This rule is tempered by the fact that any member or members can apply to court for an interdict preventing the company to do something

⁴¹³ Section 115(2)(a) of the Companies Act 71 of 2008.

⁴¹⁴ Sections 115(3) and 115(7) of the Companies Act 71 of 2008.

⁴¹⁵ Sections 36(3) and 36(4) of the Companies Act 71 of 2008.71 of 2008.

⁴¹⁶ Section 24(3)(d) of the Companies Act 71 of 2008.

illegal.⁴¹⁷ The *Companies Act* also provides that any member who is unfairly prejudiced by an act or omission of the company may apply to court for an interdict.⁴¹⁸ If for any reason the directors cannot act, then the members may act by way of a simple majority. The *Commission* or Takeover Regulation Panel may apply to court to declare any resolution void, to the degree that it overpowers or degrades the force of a proscription or requisite founded by or in terms of an unalterable provision of the *Companies Act*.⁴¹⁹

The Companies Tribunal may on application by any person grant an administrative order releasing a resolution from any proscription or requisite established by or in terms of an unalterable provision of the *Companies Act*.⁴²⁰ The word "vote" is used only three times in the *Communal Property Association Act*, of which two refers to the adoption of the constitution or any particular provisions thereof by members of the community. The Director-General needs to be informed by a community or a provisional association of their intentions to adopt a constitution at a convoked meeting or meetings.⁴²¹ An authorised officer must attend such meeting or meetings and has to take minutes of the proceedings, observe the adoption of the constitution and compile a report particularising his or her reflections of the meeting. Amongst others the number of votes in favour of and the number of votes against the adoption of the constitution or any particular stipulations therein needs to be recorded in the report.⁴²²

The only other reference to the word "vote" is found in the equality principle that has to be contained in the Communal Property Association's constitution relating the rules of a constitution with respect to the age at which a member may be present and vote at meetings of the Communal Property Association.⁴²³

Resolutions are neither defined nor is there any requirement of any percentage of voting rights to carry any resolution on any particular matter except that the resolution to adopt the draft constitution must be backed by the bulk of the members of the community

⁴¹⁷ Section 20(4) of the Companies Act 71 of 2008.

⁴¹⁸ Section 163(2) of the Companies Act 71 of 2008.

⁴¹⁹ Section 6(1) of the Companies Act 71 of 2008.

⁴²⁰ Section 6(2) of the Companies Act 71 of 2008.

⁴²¹ Section 7(1) of the Communal Property Associations Act 28 of 1996.

⁴²² Section 7(2)(c) of the Communal Property Associations Act 28 of 1996.

⁴²³ Section 9(2)(b)(i) of the Communal Property Associations Act 28 of 1996.

attending or being represented at the meeting.⁴²⁴ The only other reference to resolutions adopted at a members meeting is for a Communal Property Association or provisional association to be deregistered.⁴²⁵

The *Communal Property Association Act* does however refer to situations where either the consent or the support of the majority of the community members is required. The resolution for adopting the design constitution has to be favoured by the greater part of the members of the community attending or being represented at the various meetings held for this specific reason.⁴²⁶ A Communal Property Association may not trade or impede the assets of the association or any substantial part of it without the permission of a majority of the members attending a general meeting of the association called for and paying attention to this precise resolution.⁴²⁷ The majority consent of members present at a general meeting of members is reiterated in the provision on approval for certain transactions to dispose of or impede or complete any prescribed deal relating to any part of, or the whole of the immovable property of the Communal Property Association, or any real rights in regard thereof.⁴²⁸ Finally reference is made to necessary other steps to be taken by an authorised officer who attended a general meeting of a Communal Property Association to ensure and endorse that a certain transaction was “duly approved” at the general meeting and is in accordance with the constitution of the particular Communal Property Association.⁴²⁹

The *Communal Property Association Act* further compels the constitution of a Communal Property Association to devise impartial and comprehensive decision-making procedures.⁴³⁰ It goes further by dictating the following decision-taking procedures. All members should be granted a fair opportunity to partake in the decision-making processes of the Communal Property Association.⁴³¹ An inclusive decision-making process is required on any decision to amend the constitution or to dissolve the Communal Property Association or to dispose of or to impede the property of the Communal Property

⁴²⁴ Section 8(2)(f) of the Communal Property Associations Act 28 of 1996.

⁴²⁵ Section 13(3) of the Communal Property Associations Act 28 of 1996.

⁴²⁶ Section 8(2)(f) of the Communal Property Associations Act 28 of 1996.

⁴²⁷ Section 9(1)(d)(iii) of the Communal Property Associations Act 28 of 1996.

⁴²⁸ Section 12(1) of the Communal Property Associations Act 28 of 1996.

⁴²⁹ Section 12(6) of the Communal Property Associations Act 28 of 1996.

⁴³⁰ Section 9(1)(a) of the Communal Property Associations Act 28 of 1996.

⁴³¹ Section 9(1)(a)(i) of the Communal Property Associations Act 28 of 1996.

Association.⁴³² The Communal Property Association may terminate the membership of a person only on reasonable grounds and once the matter has been cogitated at a fair hearing where the member was given a chance to present his or her case.⁴³³

Any person claiming to have been excluded from partaking in the preparation process and adoption of the constitution or who claims that the process was unfair may file a complaint with the Director-General. If the Director-General found on reasonable grounds that the complaint is material he or she may negate to register the Communal Property Association pending determination of the issue to his or her satisfaction.⁴³⁴

6.2.2.3 Representation

The *Communal Property Association Act* does not explicitly refer to proxies, but specifies that the constitution must provide for how families should be represented in the decision-making process of the Communal Property Association.⁴³⁵ The resolution to adopt the draft constitution must be supported by the majority of the members of the community who were present or who are being represented at such meeting.⁴³⁶ The constitution must provide for "other measure of representativity" at the Annual General Meeting and at the General Meetings.⁴³⁷

Normally a proxy is a person (agent) appointed to act on behalf of another person (principal) or a document in terms of which a person is appointed to act and vote on behalf of another person. Proxies did not exist in the *common law* and therefore may only be applicable if provided for in the constitution of the Communal Property Association or in relation to companies if provided for in the *Companies Act*, the Memorandum of Incorporation and the rules. Limitations on proxies regarding the methods of voting may be specified and normally proxies will be restricted to also be members.

The procedure for lodging of proxies before the meeting must also be prescribed. A general proxy instructs the agent to vote on all matters while a special proxy instructs

⁴³² Section 9(1)(a)(ii) of the Communal Property Associations Act 28 of 1996.

⁴³³ Section 9(1)(3) of the Communal Property Associations Act 28 of 1996.

⁴³⁴ Section 7(4) of the Communal Property Associations Act 28 of 1996.

⁴³⁵ Item 8 of the schedule of the Communal Property Associations Act 28 of 1996.

⁴³⁶ Section 8(2)(f) of the Communal Property Associations Act 28 of 1996.

⁴³⁷ Items 14 and 15 of the schedule of the Communal Property Associations Act 28 of 1996.

the agent to vote on a specific matter only. Proxies may instruct agents to vote either only in support or only against the question, or allow the agent to use his or her own discretion. A proxy may be revoked at any time before the agent exercises the instruction. A Power of Attorney has the same effect as a proxy.

The *Companies Act* gives every member entitled to attend and vote a right to appoint a proxy.⁴³⁸ Companies are usually incorporated by the incorporators who have either signed the Memorandum of Incorporation in person or by proxy.⁴³⁹

A proxy appointment must be written, signed and dated by the principle shareholder. It will remain in force for one year after the date on which it was autographed or for any shorter or longer period, explicitly postulated in the nomination, except if it is revoked or expires earlier.⁴⁴⁰ The shareholder of a company may sign up two or more people concomitantly as representatives. A proxy may delegate the representative's authority to act on behalf of the shareholder to another person, dependent to any restriction, lest the Memorandum of Incorporation provides otherwise. A copy of the document appointing the proxy needs to be delivered to the company.⁴⁴¹

Regardless of the form of instrument used in appointing the representative, the appointment may be interrupted at any time and to the degree that the shareholder elects to act on his own authority and in person in the execution of any of his or her rights, being a shareholder. Proxies are revocable provided the proxy appointment does not explicitly states otherwise. The shareholder may revoke a proxy by the written cancelation thereof or by making a subsequent conflicting proxy nomination. A copy of the revocation document to the proxy must also be delivered to the company.⁴⁴²

6.2.2.4 Minutes of meetings

It is the duty of the company secretary to make sure that minutes of all shareholders meetings, company's audit committee meetings, board meetings and the meetings of any

⁴³⁸ Section 58(1) of the Companies Act 71 of 2008.

⁴³⁹ Section 13(1)(a) of the Companies Act 71 of 2008.

⁴⁴⁰ Section 58(2) of the Companies Act 71 of 2008.

⁴⁴¹ Section 58(3) of the Companies Act 71 of 2008.

⁴⁴² Section 58(4) of the Companies Act 71 of 2008.

committees of the board of directors are properly recorded.⁴⁴³ Copies of the minutes of all shareholders meetings and all the adopted resolutions must be preserved for seven years from the date each respective resolution was adopted.⁴⁴⁴ Unless minutes of meetings are properly kept it will be difficult to prove that the directors of the company has complied with certain of the provisions of the *Companies Act*, in making decisions, that may result in them being held personally liable, should they have not complied with such provisions.

Relating to a Communal Property Association, it is specified that an authorised officer shall take minutes of the proceedings at the members meeting to adopt the constitution of the Communal Property Association.⁴⁴⁵ The *Communal Property Association Act* determines that minutes should be kept of meetings and by stipulating that all members have a right to either receive copies of minutes or to have alternative and sound access to the records and decisions taken by members at general meetings.⁴⁴⁶ It does not however stipulates who are responsible for taking minutes, by whom and where, as well as the period that minutes should be kept, or the procedure to be followed by members to access the records.

The *Companies Act* specifically regulates access to company records by identifying the people who have access, in the form of a right to inspect and copy information and the manner in which such rights may be executed. In a private company persons who have a beneficial interest in the securities issued by the company has access to specified records of the company.⁴⁴⁷ The particular documents are also identified and a private company must keep and allow access to its Memorandum of Incorporation, and any changes to it, any rules made in terms of section 15(3) to 15(5), a record of its directors, reports presented at an annual general meeting, annual financial statements, notice and minutes of all shareholders meetings, all resolutions adopted by shareholders, any document that was made available by the company to the shareholders in connection with such resolution, and any written communications sent generally by the company to

⁴⁴³ Section 88(2)(d) of the Companies Act 71 of 2008.

⁴⁴⁴ Section 24(3)(d) of the Companies Act 71 of 2008.

⁴⁴⁵ Section 7(2) of the Communal Property Associations Act 28 of 1996.

⁴⁴⁶ Item 17 of the schedule and Section 9(1)(c)(iii) of the Communal Property Associations Act 28 of 1996.

⁴⁴⁷ Section 26(1) of the Companies Act 71 of 2008.

its holders of securities, for a period of seven years.⁴⁴⁸ A securities register of issued securities, whether certificated or uncertificated, and a record of its company secretaries and auditors.⁴⁴⁹ The Memorandum of Incorporation of a company may extend these rights by providing for additional information rights to any person relating to any information concerning the company.⁴⁵⁰

The *Companies Act* further provides the procedure and rights pertaining access and determines that the person may exercise these rights by making a direct personal request to the company in the prescribed form or by way of a representative or an attorney.⁴⁵¹ The request must be made in writing or coherent with the Promotion of Access to Information Act.⁴⁵² These rights are in addition to section 32 of the Constitution,⁴⁵³ the Promotion of Access to Information Act 2 of 2000 or any other public regulations and may not substitute any of these rights.⁴⁵⁴

It is further determined that the register of members and directors of a company must be available for inspection during normal business hours, free of charge by any member and upon payment for each inspection of an amount not exceeding one hundred rand by any other person.⁴⁵⁵

Consequently the failure to comply with a reasonable request or to refuse access by a person who has a right to inspect or copy information, as well as an attempt to obstruct or discourage or the actual obstruction or discouraging the reasonable exercise by a person of his or her rights to access, will be an offence committed by the company.⁴⁵⁶

⁴⁴⁸ Section 24(3)(a), (b), (c)(i) and (ii), (d) and (e) of the Companies Act 71 of 2008.

⁴⁴⁹ Sections 50 and 85(1)(a) of the Companies Act 71 of 2008.

⁴⁵⁰ Section 26(2) of the Companies Act 71 of 2008.

⁴⁵¹ Section 26(1)(c)(i) of the Companies Act 71 of 2008.

⁴⁵² 2 of 2000.

⁴⁵³ Constitution of the Republic of South Africa, 1996.

⁴⁵⁴ Section 26(4) of the Companies Act 71 of 2008.

⁴⁵⁵ Section 26(3) of the Companies Act 71 of 2008.

⁴⁵⁶ Section 26(6) of the Companies Act 71 of 2008.

All company records must be kept at the company's registered office within the Republic of South Africa or any other location, as notified by the company in terms of the filing of a notice indicating such location.⁴⁵⁷

6.3 Conclusion

The provision of meticulous procedures will safeguard a process which is fair and democratic, and which complies with principles of transparency and accountability, that in return, will protect and maintain the dignity and constitutional rights of the members of an entity who are influenced by its decisions.

Codification of the *Companies Act* and the Rules of a company safeguards that ultimate control of a company vests in the members of the company and that all major decisions come to the knowledge of the members. The *Companies Act* not only specifies control, but also define all possibilities of different control attained by subsidiaries and linked or inter-related persons. Control is exercised by way of a majority vote and the right to vote is in relation to the securities held by members individually or in terms of a shareholder agreement.

In a private company the day to day management of the company is the responsibility of the board of directors who obtains their authority from the rules of the company and resolutions taken by shareholders at the shareholders' meetings. Rules connect solely to the governance of companies and shareholders may forbid or restrict the powers of the board relating to rules and all rules are binding amongst the company, shareholders, prescribed officers or directors, members of the audit committee and members of a board committee. Shareholders may also enter into a shareholders' agreement, providing that it complies with the provisions of the *Companies Act* and the company's Memorandum of Incorporation.

Despite the principle of obeying to a democratic process and the right to be given adequate notice of all general meetings of the Communal Property Association, there are no prescriptions found in the *Communal Property Association Act*, as to either the person responsible for giving notice or the procedure to be followed to give notice. The

⁴⁵⁷ Section 25(2) of the Companies Act 71 of 2008.

Companies Act prescribes in detail the procedures to be followed relating to delivery and contents of notices. Detailed requirements for delivery to each shareholder in a specified way and form, as determined by the record date, minimum period of notice, purpose of the meeting, copies of suggested resolutions accompanied by an announcement of the percentage of voting rights necessary to adopt such proposed resolution also applies.

In the event of the annual general meeting of a company, the notice of the meeting should contain a summarised version of the financial statements, with instructions on how to attain a copy of the complete annual financial statements for the previous financial year, and a statement notifying members of their right to appoint representatives, as well as a reminder about proper identification for purposes of participation at the meeting. Detailed procedures are in place to be followed when a company forsakes to give the required notice of a shareholders meeting, should the notice be substantially defective or if a material defect exists in the agenda.

The *Communal Property Association Act* gives all members in a Communal Property Association the right to attend, speak at, take part and cast a vote at the general meeting of the Communal Property Association and requires the majority of the members to be present for several transactions to be concluded. It is however expected from the community to stipulate in the constitution of the Communal Property Association the procedure to be followed at the Communal Property Association meetings.

It is provided for when, and by whom a shareholder's meeting may be called, and that the meeting may be conducted by electronic communication. In certain instances, the *Companies Act* compels a company to call a shareholders meeting and no uncertainty exists as to the persons entitled or the procedures to be followed when calling such meetings. The *Companies Act* refers to the items and exclusion of items on the agenda in various provisions, implying that agendas should exist for company meetings that in return warrants that matters are dealt with in an orderly and effective manner.

A quorum must be present for a meeting to be properly constituted. The *Companies Act* changed the common law rule by specifying the minimum requirements for a quorum.

Shareholders meetings may be adjourned but the Memorandum of Incorporation may also prohibit any adjournment. For the protection of shareholders, the *Companies Act* specifies that a meeting may not be adjourned for certain maximum periods unless the company's Memorandum of Incorporation provides otherwise.

Formal decisions of a company are done by a resolution adopted at a general meeting by a simple majority vote of members entitled to attend, vote, and who constitutes a quorum or in terms of a section 60 written consent, and shareholders are bound by the decisions of the majority of shareholders according the principle of supremacy of the majority. A special resolution is necessary for major decisions to be taken by members of a company and added requirements exists for fundamental transactions. The authority of the simple majority may be limited by the *Companies Act* or the rules, by requiring a special resolution and prescribed majority. As long as the directors of the company act within their powers, they alone can exercise those powers without interference by the members.

The *Companies Act* further protects the rights of a member who is unfairly prejudiced by an act or omission of the company by providing that such member may apply to court for relief. Rights of members are protected by the *Commission* or Takeover Regulation Panel, who may apply to court to declare any provision in a company's Memorandum void, when not complying with an unalterable provision of the *Companies Act*. Administrative orders may be issued by the Companies Tribunal releasing an arrangement, transaction, agreement, resolution or provision of a company's Memorandum of Incorporation or rules from any prohibition or requirement in terms of an unalterable provision of the *Companies Act*.

There are no requirements of any percentage of voting rights specified, except that a majority of the members of the community attending or being represented at the meeting is necessary for a decision to adopt the draft constitution of a Communal Property Association, or to trade or impede in the assets of the association. The *Communal Property Association Act* expects that the constitution of a Communal Property Association must formulate impartial and complete decision-making procedures to give members a fair opportunity to partake in the decision-making process and specifies only a few instances where it is specifically required. The *Communal Property Association Act* only relief granted to persons excluded from partaking in the preparation process and adoption

of the constitution, or who claims that the process was unfair, is to file a complaint with the Director-General who may refuse to register the Communal Property Association pending determination of the issue.

Notwithstanding the fact that The *Communal Property Association Act* specifies that the constitution of the Communal Property Association have to provide for representation of families it does not refer to proxies all of the procedures relating to proxies.

The *Companies Act* entitles every member to attend and vote, a right to appoint a proxy and specifies the form, requirement and procedures to be followed in the appointment of a proxy. The *Companies Act* specifically regulates, in detail, the access to company records and the Memorandum of Incorporation may even extend these rights. It is the responsibility of the company secretary to make sure that minutes of all the company meetings, including shareholders' meetings are accurately recorded and kept for at least seven years.

Although the *Communal Property Association Act* provides that minutes should be kept of meetings and that all members have a right to either receive copies of minutes or to have access to the records and decisions taken by members at general meetings of a Communal Property Association, the act does not stipulate who are responsible for taking minutes, by whom and where, as well as the period that minutes should be kept, neither the procedure to be followed to gain access to the records.

Chapter 7

7 Accountability requirements for appointed representatives - and the management of a Communal Property Association in relation to the management of a Private Company

7.1 Introduction

To protect the rights and interests of members, it is essential that the governing body act in a transparent way, and is accountable to the members for their actions. It is therefore essential that there are proper regulations in place to make sure that governing bodies comply with their constitutional obligation towards their members. Of further importance is the provision of proper and effective regulations to curb any possible infringement by the governing body of their duties, as determined by the founding documents of the entity.

7.2 Accountability of the Board of Directors of a private company

The Board of Directors is immersed in the day to day managing of the company and receives their authority from the *Companies Act*, Memorandum of Incorporation, rules and resolutions taken by the members at shareholders' meetings of the company.⁴⁵⁸

One of the purposes of the *Companies Act* is to balance the rights and obligations of shareholders and directors within companies.⁴⁵⁹ The business and affairs of a company must be accomplished by or under the command of its board, who has the right to utilise all of the powers and execute any of the functions of the company except to the extent that the *Companies Act* or the company's Memorandum of Incorporation provides otherwise.⁴⁶⁰ Directors have a positive duty to manage the company in terms of a partial codified system. Partial codification allows for the adopting of general principles of law whilst expanding the common law.⁴⁶¹

⁴⁵⁸ Section 66(1) of the Companies Act 71 of 2008.

⁴⁵⁹ Section 7(i) of the Companies Act 71 of 2008.

⁴⁶⁰ Section 66(1) of the Companies Act 71 of 2008.

⁴⁶¹ Hefer Notes on South African Companies Act 177.

Directors act as an organ of the company relating to internal transactions, which refers to transactions or acts between functionaries within the company. Division of powers between the general shareholders meeting and the board of directors is established and controlled primarily by the rules. Acts of the board of directors are regarded as the acts of the company.⁴⁶²

The legal position of a director relating to external transactions are regulated by the law of agency and directors act as an agent of the company. External transactions refer to transactions or acts between third parties and the company. The only exception to the general rule of agency is in delictual matters, where directors may be held personally accountable.⁴⁶³

The rules regulating and the procedure to be followed in appointing directors are as follows. Private companies must appoint at least one director.⁴⁶⁴ A company's Memorandum of Incorporation may specify a greater number in replacement for the minimum quantity of directors necessary.⁴⁶⁵ Each incorporator of the company serves as a first director of the company pending the appointment of enough other directors to satisfy the minimum requirements of the *Companies Act* or the company's Memorandum of Incorporation.⁴⁶⁶ Should the number of incorporators of a company, together with any *ex officio* directors or directors to be appointed is less than the minimum number of directors required, then the board of directors must call a shareholders meeting within forty business days after incorporation of the company, with the tenacity of voting into office an adequate amount of directors to fill all vacancies on the board.⁴⁶⁷ Directors are thereafter appointed by the casting of a majority vote by shareholders eligible to vote on the election of directors. Directors are appointed for an indefinite period or for a term, as specified in the Memorandum of Incorporation.⁴⁶⁸

⁴⁶² Section 20(1) to 20(5) of the Companies Act 71 of 2008.

⁴⁶³ Section 77(2)(b) of the Companies Act 71 of 2008.

⁴⁶⁴ Section 66(2) of the Companies Act 71 of 2008.

⁴⁶⁵ Section 66(3) of the Companies Act 71 of 2008.

⁴⁶⁶ Section 67(1) of the Companies Act 71 of 2008.

⁴⁶⁷ Section 67(2) of the Companies Act 71 of 2008.

⁴⁶⁸ Section 68(1) of the Companies Act 71 of 2008.

A company's Memorandum of Incorporation may name and empower any person in the Memorandum of Incorporation to appoint or remove any directors. It may further provide for a person to be appointed as an *ex officio* director of the company, resulting from such person holding some other function, designation or analogous prominence. Provision is also made for the appointment or election of one or more alternate directors. In the case of a private company, shareholders have to elect no less than fifty percent of the directors and fifty percent of any alternate directors.⁴⁶⁹ Any vacancy may be filled by the board on a temporary basis with a person who placates the prerequisites for election as a director and such person obtains all the powers, functions, obligations and is imperil to all of the liabilities similar as to any other director of the company.⁴⁷⁰

A person who holds the office or acts in the capacity of an *ex officio* director of a company has all the functions and authorities of any other director of the company, apart from the scope that the company's Memorandum of Incorporation impedes the duties, powers and functions of an *ex officio* director and is subject to all of the responsibilities of any other director of the company.⁴⁷¹

The election or appointment of a person as a director, an alternate director, a prescribed officer, a committee board member or an audit committee member of a company will be null and void if, at the time of the election or appointment such a person is ineligible or disqualified in terms of section 69 of the *Companies Act*.⁴⁷² A person may not serve or continue to serve as an *ex officio* director of a company despite holding the relevant office, designation, title or similar status when such person becomes or is disqualified or ineligible in terms of section 69 of the *Companies Act*.⁴⁷³

A company may neither appoint or elect a director who is ineligible or disqualified,⁴⁷⁴ nor consciously allow a disqualified or an ineligible person to perform or act as a director.⁴⁷⁵ A person who becomes disqualified or ineligible while serving as a director of a company

⁴⁶⁹ Section 66(4) of the Companies Act 71 of 2008.

⁴⁷⁰ Section 68(3) of the Companies Act 71 of 2008.

⁴⁷¹ Section 66(5) of the Companies Act 71 of 2008.

⁴⁷² Section 66(6) of the Companies Act 71 of 2008.

⁴⁷³ Section 66(5)(a) of the Companies Act 71 of 2008.

⁴⁷⁴ Section 69(2) of the Companies Act 71 of 2008.

⁴⁷⁵ Section 69(3) of the Companies Act 71 of 2008.

stops to be a director immediately.⁴⁷⁶ The vacancy on the board does not occur until the later of the expiration of the time for filing the application for review or the obtaining of an order by the court.⁴⁷⁷

The Memorandum of Incorporation of a company may impose supplementary grounds of ineligibility or disqualification of directors than those provided for in the *Companies Act*, and may prescribe the minimum qualifications to be converged by the directors of such a company.⁴⁷⁸

A juristic person, an unemancipated minor, a person with similar legal disability or a person who does not meet any qualification, as stipulated in the company's Memorandum of Incorporation is ineligible to be a director of a company.⁴⁷⁹

A person will be disqualified to be a director of a company on any of the following grounds.⁴⁸⁰

- i. Such person is prohibited to be a director by order of the court.
- ii. A person declared to be delinquent in terms of section 162 of the Companies Act.
- iii. A person declared to be delinquent in terms of section 47 of the Close Corporations Act.⁴⁸¹
- iv. If a person is an unrehabilitated insolvent.
- v. A person prohibited in terms of any public regulation to be a director of a company.
- vi. Persons removed from an office of trust, on the basis of misconduct involving dishonesty.
- vii. A person who was found guilty and send to prison without the option of a fine or fined more than the prescribed amount for theft, fraud, forgery, perjury or an offence involving fraud, misrepresentation or dishonesty in connection with the

⁴⁷⁶ Section 69(4) of the Companies Act 71 of 2008.

⁴⁷⁷ Section 70(2) of the Companies Act 71 of 2008.

⁴⁷⁸ Section 69(6) of the Companies Act 71 of 2008.

⁴⁷⁹ Section 69(7) of the Companies Act 71 of 2008.

⁴⁸⁰ Section 69(8) of the Companies Act 71 of 2008.

⁴⁸¹ 69 of 1984.

staging, founding or managing of a company, the Close Corporations Act, the Financial Intelligence Centre Act,⁴⁸² the Securities Services Act,⁴⁸³ or Chapter 2 of the Prevention and Combating of Corruption Activities Act.⁴⁸⁴

A disqualification of a person who was removed from an office of trust or sentenced for an offence that involved dishonesty will end at the later of five years, after the date of removal from office or the serving of the sentence, imposed for the relevant offence, as the case may be, or after the expiration of any extensions to be determined by a court on application by the *Commission*.⁴⁸⁵ Disqualification of a person may be extended by the court for maximum periods of five years at a time, should the court find that an extension is required to protect the public. The court must consider the conduct of the disqualified person up to the time of such application.⁴⁸⁶

A public register of persons disqualified from being a director, or who are bound by an order of probation as a director, must be instituted and retained by the *Commission* and can be accessed on the Cipro website.⁴⁸⁷

A person becomes a director of a company when that person has been appointed or elected and has delivered to the company in writing his or her consent to serve as a director of the company.⁴⁸⁸

The businesses of a Communal Property Association is managed by a committee elected by the members of the Communal Property Association.⁴⁸⁹ An interim committee is elected to represent the provisional association during the period preceding registration as a Communal Property Association.⁴⁹⁰ When the integrity, independence or efficiency of the committee or any member of the committee is in question then the members are required to elect a new committee.⁴⁹¹

⁴⁸² 38 of 2001.

⁴⁸³ 36 of 2004.

⁴⁸⁴ 12 of 2004.

⁴⁸⁵ Section 69(9) of the Companies Act 71 of 2008.

⁴⁸⁶ Section 69(10) of the Companies Act 71 of 2008.

⁴⁸⁷ Section 69(13) of the Companies Act 71 of 2008.

⁴⁸⁸ Section 66(7) of the Companies Act 71 of 2008.

⁴⁸⁹ Section 1 of the Communal Property Associations Act 28 of 1996.

⁴⁹⁰ Section 5(2)(e) of the Communal Property Associations Act 28 of 1996.

⁴⁹¹ Section 11(6)(d) of the Communal Property Associations Act 28 of 1996.

The constitution must determine the procedure for electing the committee, its terms of office and its powers. The powers of members with regard to committee decisions and the power of members to remove the committee or members of the committee, as well as payment (if any) of committee members, must also be regulated in the constitution.⁴⁹²

A director, an alternate director, prescribed officer, a board committee member or an audit committee member of a company is obliged to not exploit their position or use any information obtained while acting in the capacity of a director to get an advantage for themselves or someone else, except the company. They may not, knowledgeably cause detriment to the company and have to inform the board, as soon as possible, of any information that came to their attention, unless there is reason to believe that the information is inconsequential to the company, generally available to the public, known to the other directors, or they are bound by a legal or ethical understanding of privacy not to disclose the information.⁴⁹³

Directors need to carry out their powers and operate their functions in good faith and with a purposive approach, in the company's best interests and with a degree of care, skill and diligence reasonably anticipated of a person conducting similar functions with the common knowledge, skillfulness and experience of such a director.⁴⁹⁴ When directors comprehend their duties and are cognizant of what is anticipated from them, their conduct will contribute positively to the attainment of a company.⁴⁹⁵

A director of a company will have acted in the best interests of the company and with a degree of care, skill and diligence, when such director has taken reasonably assiduous measures to become informed about any particular matter arising in the exercise of his or her powers or in the performance of his or her functions. The same applies when the director either had no substantial personal financial interest in the topic and had no reason to have known of any related person having a personal financial interest in the affair, or the director complied with the obligations of section 75, with respect to declaring any interest and refraining from making decisions effected by such information, unless

⁴⁹² Item 13 schedule of schedule of the Communal Property Associations Act 28 of 1996.

⁴⁹³ Section 76(2) of the Companies Act 71 of 2008.

⁴⁹⁴ Section 76(3) of the Companies Act 71 of 2008.

⁴⁹⁵ Hefer Notes on South African Companies Act 177.

specifically permitted to do so. If the director made a decision or backed the decision of a committee or the board involving an issue and the director had a reason to believe, and so believed that the decision was in the best interests of the company, the director will have acted in the best interests of the company and with a level of care, skill and diligence expected from him.⁴⁹⁶

Directors are entitled to rely on the performance of reliable and competent employees of the company, legal counsel, accountants, or other professional persons retained by the company, the board or a committee as to matters involving skills or expertise that the director reasonably believes are matters within the particular person's professional or expert competence, or a committee of the board of which the director is not a member, unless the director has reason to believe that the actions of the committee do not merit confidence and persons to whom the board may reasonably have delegated formally or informally by course of conduct the authority or duty to perform one or more of the board's functions that are delegable under applicable law.⁴⁹⁷ Directors may also rely on the information, opinions, recommendations, reports or statements, including financial statements and other financial data, as prepared or presented by any of these persons.⁴⁹⁸

A director of a company will further be held liable according to the doctrines of the common law in relation to a breach of his or her fiduciary duty and for claims arising from any loss, damages or other costs suffered by the company, as a result of any breach by a director of his or her duty relating to personal financial interests,⁴⁹⁹ position as director and information attained while acting in the capacity of a director,⁵⁰⁰ or in the exercise of the powers and in performing the functions of director in good faith and for a proper purpose, as well as in the best interests of the company.⁵⁰¹

A director of a company will also be held liable according to the doctrines of the common law relating to the principles of delict for any loss, damages or costs sustained by a company, as a result of the director's breach of a provision of the company's

⁴⁹⁶ Section 76(4)(a)(i) of the Companies Act 71 of 2008.

⁴⁹⁷ Sections 76(4)(b)(i) and 76(5) of the Companies Act 71 of 2008.

⁴⁹⁸ Section 76(4)(b) of the Companies Act 71 of 2008.

⁴⁹⁹ Sections 75 and 77(2)(a) of the Companies Act 71 of 2008.

⁵⁰⁰ Section 76(2) of the Companies Act 71 of 2008.

⁵⁰¹ Section 76(3)(a) and (b) of the Companies Act 71 of 2008.

Memorandum of Incorporation, any other provision of the *Companies Act* or a breach in his or her duty to exercise the powers and perform the functions of a director with a degree of care, skill and diligence that may reasonably be expected of persons carrying out the same functions relating to the company, as those carried out by that director and with the general knowledge, skill and experience of that director.⁵⁰² The Minister can issue regulations describing one or more peculiar function in a company to establish an office for the tenacity of the Companies Act.⁵⁰³

Hefer describes the common law fiduciary duty of directors as:⁵⁰⁴

“A fiduciary duty simply means that a director of a company must exercise the powers and perform the functions of director in good faith and in the best interest of the company. The director owes the duty to the company itself and not to shareholders or other stakeholders.

A director must not use the position of director, or any information obtained as a director, to gain personal advantage or for personal gain, nor advantage for any other person, other than the company itself. Nor must the director cause harm to the company.”

In harsh contradiction to the *Companies Act* the *Communal Property Association Act's* only requirement for members' committees is that they will stand in a fiduciary relationship to the members of the Communal Property Association and that they will have fiduciary responsibilities relative to the Communal Property Association and its members. The *Companies Act* escalates considerably by way of substantial codification on the duties and functions of directors.⁵⁰⁵

Consequently it is expected from them to exercise their powers in the best interests of all the members.⁵⁰⁶ Simultaneously the most important similarity between a company and a Communal Property Association lies within the requirement for complying with the common law fiduciary duty by both the committee members of a Communal Property Association and directors of a company.

⁵⁰² Sections 76(3)(c) and 77(2)(b) of the Companies Act 71 of 2008.

⁵⁰³ Section 66(10) of the Companies Act 71 of 2008.

⁵⁰⁴ Hefer Notes on South African Companies Act 177.

⁵⁰⁵ Sections 66, 75 and 76 of the Companies Act 71 of 2008.

⁵⁰⁶ Sections 8(7) and 9(1)(e)(vi) of the Communal Property Associations Act 28 of 1996.

Should a committee member's actions be in breach of a fiduciary relationship, then such committee member will be guilty of an offense.⁵⁰⁷ A fiduciary duty is likewise assigned upon the State by the Constitution,⁵⁰⁸ as well as the African Charter on Human and Peoples' Rights of 1981⁵⁰⁹ and the International Covenant on Economic, Social and Cultural Rights of 1966.⁵¹⁰ Although the South African Government is a signatory to this Covenant, it has not yet ratified it.

Any failure by a company at any time to have the minimum number of directors required by the *Companies Act* or the company's Memorandum of Incorporation will not limit or refute the power of the board of directors, or nullify whatever was done by the board or the company.⁵¹¹

Unless the company's Memorandum of Incorporation provides otherwise the election of directors is done as a sequence of votes, each of which is on the candidature of a solitary person, to fill one vacancy alone with an ongoing sequence of votes until all vacancies on the board is filled. Each voting right designated to be exerted may be used once and the vacancy is filled when carried by a majority vote casted in favour of a particular candidate.⁵¹²

Vacancies arises on the board of a company when a person ceases to be a director. A person ends to be a director when the fixed term of a director's office expires, either in terms of the provisions of the Memorandum of Incorporation, or in any other case, if the director resigns or dies. An *ex officio* directorship ends when he or she ceases to hold office, designation, title or similar status that sanctioned such a person to be an *ex officio* director. Directors who befalls to be incapacitated to such extent as being incapable to execute the functions of a director and it is dubious that the person will recover within a reasonable time, or is declared delinquent by a court, or is placed on probation under conditions that are inconsistent with pursuing to be a director of the company in terms of section 162, or becomes ineligible or disqualified in terms of section 69, ceases to be

⁵⁰⁷ Section 14(1)(b) of the Communal Property Associations Act 28 of 1996.

⁵⁰⁸ Section 25(5) of the Constitution of the Republic of South Africa, 1996.

⁵⁰⁹ Aa 20 and 21.

⁵¹⁰ Aa 1.3 and 11.1.

⁵¹¹ Section 66(11) of the Companies Act 71 of 2008.

⁵¹² Section 68(2) of the Companies Act 71 of 2008.

a director. A person will further ceases to be a director when such person is removed, either by an ordinary shareholders resolution, or a resolution of the board, or by order of the court.⁵¹³

Except for the vacancy of an *ex officio* director, vacancies must be filled by a direct appointment, by a person who is named in or established in terms of the Memorandum of Incorporation. If there are no remaining directors, a new election must be done at the next annual general meeting of the company, provided the company is required to hold such a meeting. In any other case, the vacancy should be filled within six months at either a shareholders meeting called for the specific purpose of electing a director or by a poll of the persons eligible to cast their voting rights in relating to the election of a director.⁵¹⁴

Where a company has more than two directors, and a shareholder or director avers that a director of the company has become ineligible or disqualified in terms of section 69, other than on the grounds anticipated in section 69(8)(a), became incapacitated to such degree that the director is incapable of accomplishing the functions of a director, without any prospects of recovery within a reasonable period, or has neglected or been dilapidated in the performance of his or her functions as director, then the board, excluding the director concerned, must resolve the matter by resolution and may remove a director whom it has determined to be ineligible, disqualified, incapacitated, negligent or derelict, as the case may be.⁵¹⁵ In such an event the vacancy on the board will not arise until the later of the running out of the time for filing a review application or the granting of a court order on such an application. The director will be suspended from office during that time.⁵¹⁶

If, as a result of a vacancy arising on the board of a company, there are no residual directors of a company, then any holder of voting rights, eligible to be casted in the election of a director, may convene a meeting for the reason of such an election.⁵¹⁷ Shareholder rights are protected by court, providing that such person may make an

⁵¹³ Section 70(1) of the Companies Act 71 of 2008.

⁵¹⁴ Section 70(3) of the Companies Act 71 of 2008.

⁵¹⁵ Section 71(3) of the Companies Act 71 of 2008.

⁵¹⁶ Section 70(2) of the Companies Act 71 of 2008.

⁵¹⁷ Section 70(4) of the Companies Act 71 of 2008.

application to the court for a supervisory order over a meeting convened and the court may grant relief, if convinced that such an order is necessary, to avert the coercion of or to sustain the shareholder's rights.⁵¹⁸

The *Commission* must be informed that a person has ceased to be a director of the company, by filing a notice within ten business days.⁵¹⁹ Any vacancies on the board may be filled, for the time being, by electing other board members or as the Memorandum of Incorporation provides, and for the duration of such period, any person so appointed has all of the duties, functions and powers and is subject to all of the liabilities of each of the other directors of the company.⁵²⁰

Notwithstanding anything to the contrary in a company's Memorandum of Incorporation or rules or between anyone of the shareholders and a director or in terms of any agreement between a company and a director, a director may be removed by an ordinary decision carried at a shareholders meeting, by the persons entitled to cast their voting rights in an election of that director.⁵²¹ In advance the shareholders of a company must cogitate such a decision and the concerned director must be notified of the meeting and the proposed decision. Notice of at least an equivalent period to that which a shareholder is entitled to receive, notwithstanding of whether or not the director is also a shareholder of the company. The director must be given a reasonable opportunity to present his or her case in person or by way of a representative to the shareholders at the meeting, before the resolution is put to the vote.⁵²²

Where a company has more than two directors and an allegation is made by a shareholder or director that a certain director of the company has either become ineligible or disqualified in terms of section 69, excluding the grounds, as set out in section 69(8)(a), or has become incapacitated and is unable to perform the functions of a director and will not likely regain such capacity within a reasonable time or has neglect or been dilapidated

⁵¹⁸ Section 70(5) of the Companies Act 71 of 2008.

⁵¹⁹ Section 70(6) of the Companies Act 71 of 2008.

⁵²⁰ Section 68(3) of the Companies Act 71 of 2008.

⁵²¹ Sections 66(4)(a)(i) and 71(1) of the Companies Act 71 of 2008.

⁵²² Section 71(2) of the Companies Act 71 of 2008.

in his or her performance as director, then the board of directors have to decide the matter by resolution at a boards meeting and may remove such director from office.⁵²³

The director against whom such allegation was made have to be given notice of the meeting, accompanied by a copy of the suggested resolution, as well as a declaration setting out the reasons for the resolution. Such director must be given sufficient information that will reasonably allow him or her to oppose the resolution in person or through a representative at the meeting.⁵²⁴ Should the board decide that a director is ineligible or disqualified, incapacitated or has been negligent or derelict, then the director or the person who appointed that director can apply to a court for a review of the board's decision within twenty business days.⁵²⁵ In the event of the director to be found not to be disqualified, ineligible, incapacitated or not to have neglected or been dilapidated in his or her performance then any director or any holder of voting rights entitled to be exercised in the election of such a director, who disagrees with the outcome of the vote, may apply to court for a review of the board's decision. The court may either sanction the resolve of the board of directors or may remove the director from office, should the court be contented that the director is disqualified or ineligible, incapacitated or has been neglect or deserted his or her duties.⁵²⁶

A company may compensate its directors for services rendered as directors but payment has to be authorised by the company's Memorandum of Incorporation and has to be carried by the adoption of a special resolution by the shareholders, contained by the preceding two years.

Each of the directors of a company, erstwhile than the first directors have to be elected by the persons enabled to exercise voting rights in such an election, to serve for an unlimited term, or for a pre-determined term, as set out in the Memorandum of Incorporation.

⁵²³ Section 71(3) of the Companies Act 71 of 2008.

⁵²⁴ Section 71(4) of the Companies Act 71 of 2008.

⁵²⁵ Section 71(5) of the Companies Act 71 of 2008.

⁵²⁶ Section 71(6) of the Companies Act 71 of 2008.

7.3 Accountability of the Committee of a Communal Property Association

The *Communal Property Associations Act* defines a committee to "means a committee elected by the members of an association to manage the affairs of that association" and an interim committee, as "an interim committee referred to in section 5(2)(e)". Section 5(2)(e) states the contents that needs to be contained in an application for registration of a provisional association and refers to the list of the names of democratically elected interim committee members, who will represent the provisional association during the period preceding the final registration, as a Communal Property Association.

Interim committee members have to sign "an undertaking" that the provisional association will comply with the five principles of section 9.⁵²⁷ It is specifically stated that members of the committee will service the members of the association in a fiduciary relationship.⁵²⁸ This is further iterated by the requirement that committee members must exercise their powers in the best interests of all the members of the association and shall not act to their own advantage in comparison to other members who are in the same position as themselves.⁵²⁹

Without stipulating specific requirements the *Communal Properties Association Act* just mention that the constitution of a Communal Property Association should promote accountability by committees towards members of the association.⁵³⁰

Election of, terms of office, and determination of the powers of committees are the responsibility of the community and the *Communal Properties Association Act* does not specify any disqualifications, conditions or minimum requirements to be met by members of committees. Similarly the powers of committee members regarding to decisions made by the committee and detailed requirements regarding payment of committee members are the responsibility of the community and needs to be stipulated in the constitution of the Communal Property Association.⁵³¹ It is even expected that the association's constitution describes the power of members to remove committee or members of the

⁵²⁷ Section 5(2)(e) of the Communal Property Associations Act 28 of 1996.

⁵²⁸ Section 8(7) of the Communal Property Associations Act 28 of 1996.

⁵²⁹ Section 9(1)(e)(vi) of the Communal Property Associations Act 28 of 1996.

⁵³⁰ Section 9(1)(e)(i) of the Communal Property Associations Act 28 of 1996.

⁵³¹ Item 13 of the schedule of the Communal Property Associations Act 28 of 1996.

committees without providing any guidance towards reasonable grounds for their removal, except that it is required from members to elect a new committee should the honesty, neutrality or efficiency of the committee or any of its members be doubted.⁵³²

7.4 Additional requirements

Should any disputes between an association or provisional association and its members or between members or committee members arise, then the Director-General may on own accord, or at the request of a community, association, a provisional association or any member of it, appoints a conciliator to mediate in resolving the dispute. In the event of the parties not being able to reach agreement on the person to be appointed, then the Director-General may appoint a person with adequate experience or knowledge in resolving disputes relating to communities.⁵³³

The *Communal Properties Association Act* creates certain offences, that all carries a sentence of a fine or imprisonment not exceeding ten years, or both such fine and imprisonment.⁵³⁴ Any person who awards or profess to award to any other person, rights relating to the property of an association or access to such property, in violation of the provisions of a constitution, will be guilty of an offence.⁵³⁵ Any person who acts in breach of his or her fiduciary relationship commits an offence.⁵³⁶

Any person who exploits the power or authority vested in him or her by members of the association or provisional association, or who refrains from doing anything or threatening to do or refrain from doing anything, in such a manner that the benefits or rights of a member will be prejudiced or threatened, or who attempts to incite any person to commit the aforementioned, commits an offence.⁵³⁷

⁵³² Section 11(6)(d) of the Communal Property Associations Act 28 of 1996.

⁵³³ Section 10(2) of the Communal Property Associations Act 28 of 1996.

⁵³⁴ Section 10(2) of the Communal Property Associations Act 28 of 1996.

⁵³⁵ Section 10(1)(a) of the Communal Property Associations Act 28 of 1996.

⁵³⁶ Section 10(1)(b) of the Communal Property Associations Act 28 of 1996.

⁵³⁷ Section 10(1)(c) and (d) of the Communal Property Associations Act 28 of 1996.

Finally, any person who awards or profess to award to any person, who is not a member of the provisional association, any right in relation to the rights of a provisional association, will be committing an offence.⁵³⁸

The *Communal Property Association Act* further provides that the Director-General will, on request by the committee or the association, do what is needed to establish to his or her satisfaction whether the membership of a person has been properly terminated in accordance with the constitution of an association and then to provide a certificate to that effect.⁵³⁹

A company is legally responsible for all of its actions, as portrayed by the company's directors, whether such actions is within or falls outside the scope of the stated objectives of the company. When the Memorandum of Incorporation limits, restricts or qualifies the purposes, powers or activities of a company, the actions of the company will not be void for the reason only that such action was forbidden by that restriction, limitation or qualification or as a result of that limitation, restriction or qualification, the directors had no power to mandate the action by the company. No one can rely on such limitation, restriction or qualification to challenge that such an action should be annulled.⁵⁴⁰ The provisions of the *Companies Act* must be interpreted concomitantly with, the *ultra vires* doctrine and must not substitute same.⁵⁴¹

When a company's Memorandum of Incorporation limits, qualifies or restricts the activities, powers or purposes of that company, or puts a constraint on the mandate of the directors to do an act on behalf of the company, then the shareholders may ratify any such action by directors or the company, except if such action contravenes the provisions of the *Companies Act*.⁵⁴²

A trade union representing employees of the company, prescribed officers, directors or shareholders of a company are allowed to take action to kurb the company from doing anything that is not consistent with the *Companies Act*.⁵⁴³ Prescribed officers, directors

⁵³⁸ Section 10(1)(e) of the Communal Property Associations Act 28 of 1996.

⁵³⁹ Section 10(2) of the Communal Property Associations Act 28 of 1996.

⁵⁴⁰ Section 20(1) of the Companies Act 71 of 2008.

⁵⁴¹ Section 20(8) of the Companies Act 71 of 2008.

⁵⁴² Section 20(2) and 20(3) of the Companies Act 71 of 2008.

⁵⁴³ Section 20(4) of the Companies Act 71 of 2008.

or shareholders of the company may apply to the High Court to restrain the directors or the company from doing anything inconsistent with the curbing, restraining or criterion of the objects, supremacies or actions of that company, or limitation on the mandate of the directors to do an act in representation of the company.⁵⁴⁴ Such proceedings will be without prejudice to any rights towards damages of third parties who have attained these rights in good faith and who did not have concrete knowledge of the curb, restraint or criterion.⁵⁴⁵

Shareholders of a company may institute a claim for damages against any person who by fraud or as a result of gross negligence affects the company to do anything that will be inconsistent with the *Companies Act* or any limitation, restriction or qualification in the Memorandum of Incorporation provided that the deed has not been ratified by the shareholders.⁵⁴⁶

The court will not likely interfere with the household affairs of a company, as exercised through the general meeting of members and the shareholders in a general meeting, may by way of a resolution, ratify the legal actions of directors who have acted beyond their powers. The court shall however come to the defense of an individual shareholder for assistance if the act was illegal, required a special resolution that was not obtained, a personal right of the shareholder was infringed or will be infringed or where a fraud was committed against the minority shareholders.⁵⁴⁷

Section 20(4) and 20(5) limit proceedings for a High Court application to restrain a company or its directors to act inconsistent to the *Companies Act* or the company's Memorandum of Incorporation. Section 20(6) of the *Companies Act* provides a different remedy although together with sections 20(4) and 20(5) it relates to a similar subject matter. A claim for damages can be instituted by only shareholders, as oppose to shareholders, directors, prescribed officers and trade unions, as described by sections 20(4) and 20(5).⁵⁴⁸

⁵⁴⁴ Hefer Notes on South African Companies Act 38.

⁵⁴⁵ Section 20(5) of the Companies Act 71 of 2008.

⁵⁴⁶ Section 20(6) of the Companies Act 71 of 2008.

⁵⁴⁷ *Foss v Harbottle* (1843) 2 Hare 461.

⁵⁴⁸ Hefer Notes on South African Companies Act 38.

Any person other than a director, prescribed officer or shareholder of the company who do business with a company in good faith, may assume that the company did comply with all the formal and procedural requirements of the *Companies Act*, when making any decision in the implementation of its powers, its Memorandum of Incorporation and the rules of the company, lest the person had knowledge or reasonably should have known that the company did not comply with any such requirement.⁵⁴⁹ The common law principle relating to the supposed validity of company actions is not replaced with this subsection. The subsection has to be interpreted in tandem with the common law principle.⁵⁵⁰

In contrast section 218(2) gives legal standing to any person to sue any other person, who has contravened any provision of the *Companies Act*, for any loss or damage suffered as a result of the contravention. A court may declare that an agreement or any part thereof, any resolution, Memorandum of Incorporation or rules of a company that is prohibited or that may be declared unlawful, is void.⁵⁵¹

The Minister of Trade and Industry may determine and issue a regulation to the company to appoint a social and ethics committee if it is in the public's interest.⁵⁵² This will be done depending on the social and economic importance of the company, as indicated by its annual turnover, size of workforce and the nature and scope of the company's undertakings. The Minister may, on similar considerations, prescribe by regulation that the annual financial statements of certain private companies be audited.⁵⁵³

Regulation twenty-six determines that each company must calculate its public interest score for each financial year. The public interest score of a private company is calculated as the sum of: number of points equal to the average number of employees, plus one point for every one million rand, or portion thereof, in third-party liability, plus one point for every person who has a beneficial interest in the securities of the company.⁵⁵⁴

⁵⁴⁹ Section 20(7) of the Companies Act 71 of 2008.

⁵⁵⁰ Section 20(8) of the Companies Act 71 of 2008.

⁵⁵¹ Section 218(1) of the Companies Act 71 of 2008.

⁵⁵² Section 72(4) of the Companies Act 71 of 2008.

⁵⁵³ Section 30(7)(a) and 30(2)(b)(i) of the Companies Act 71 of 2008.

⁵⁵⁴ Hefer Notes on South African Companies Act 273.

Regulation twenty seven stipulates that a private company with a public interest score of at least three hundred and fifty or with a public interest score of at least one hundred but less than three hundred and fifty and where financial statements are internally compiled, must be audited.⁵⁵⁵

7.3 Conclusion

The governing body of an entity is involved in the day-to-day management of such entity, which necessitates that the actions are transparent and that such body acts with accountability to its members. This can only be achieved when the actions of the management are certain and properly regulated. Directors are responsible for the management of a company and are regulated and receive their authority from the *Companies Act*, Memorandum of Incorporation, rules and resolutions of the shareholders meeting, all of which should comply with the provisions of the *Companies Act*, which will balance the rights and obligations of shareholders and directors.

There is a positive duty upon the directors of a company, which is regulated by a partial codified system, as provided for in the *Companies Act* and the company's Memorandum of Incorporation, describing their powers and functions in detail. The legal position of a director, relating to external transactions, are controlled by the law of agency, except in relation to delictual matters, where directors can be held personally accountable for their actions. From the appointment of directors, the filling of vacancies and removal of directors, as well as the grounds for ineligibility or disqualification, are provided for in the *Companies Act* and the Memorandum of Incorporation of a company.

A committee is responsible for the management of a Communal Property Association and is elected by the members of the Communal Property Association. A new committee needs to be elected if the integrity, independence or efficiency of the existing committee or any member of the committee is in doubt. No grounds are provided for reasons that will be regarded as acceptable sources of doubt. The constitution of a Communal Property Association has to provide for a procedure for electing the committee, its powers

⁵⁵⁵ Davis Companies and other Business Structures 276.

and terms of office. Detailed rules exist to prevent directors from misusing their position as directors and to ensure that they act in good faith, in the company's best interests and with a degree of care, skill and diligence, and with common knowledge, skillfulness and experience. This includes a fiduciary duty and directors will also be liable for loss or damages suffered by the company, as a result of breach of their fiduciary duty.

The only requirement for members of committees of the Communal Property Association, is that they need to stand in a fiduciary relationship to the association's members and the Communal Property Association. Although it is expected from them to exercise their powers in the best interests of all the members it does not nearly match the significant codification on the duties and functions of directors, as found in the *Companies Act*. The only similarity between a company and a Communal Property Association is the requirement for complying with the common law fiduciary duty by both the committee members of a Communal Property Association and the directors of a company, with the difference that when a committee member's actions be in breach of a fiduciary duty then such committee member will be guilty of an offense. Management of communal property was always subject to the common law fiduciary duty, which found its origin to be compliant with the corporate communal developmental theory.⁵⁵⁶ The same can be said for the application of the common law fiduciary duty in the application of Company law.

Without reference to any specific requirements the *Communal Properties Association Act* only states that the constitution should promote accountability by committees towards members of the association. The *Communal Properties Association Act* is silent on prescriptions regarding election of, terms of office, and determination of the powers of committees, that are entirely left to the wishes of the community, without any assistance regarding disqualifications, conditions or minimum requirements of members of the committees.

The only intervention provided for in the *Communal Properties Association Act* is the appointment of a conciliator by the Director-General, to resolve disputes and to issue a certificate confirming the accurate termination of membership of a member in harmony with the constitution of an association. A number of offences is introduced to protect the

⁵⁵⁶ See chapter 2 for a discussion on theoretical framework.

property interests of an association and to curtail the misuse of power by committee members. Detailed provisions exist specifying the rights and limitations on the rights of directors, prescribed officers, shareholders, unions and third parties involved in any actions with the company. Provision is also made for ratification of director's actions, that would originally have exceeded their powers, on condition that the actions will still comply with the provisions of the *Companies Act*. The Minister of Trade and Industry may intervene to protect the public's interest, by the issuing of regulations in terms of the *Companies Act*. Regulations twenty six and twenty seven specifies the calculation of the public interest score to determine whether a private company should appoint a social and ethics committee and illustrates the Minister's involvement in the accomplishment of the purposes of a company.

Chapter 8

8 Conclusion and Recommendations

8.1 Conclusion

Importantly, this dissertation reiterates the fact that rural communities still make out the biggest portion of South Africa. Despite the removal of racial discrimination, the concept and understanding of what proprietary rights to immovable property consists of and the recognition of individual and community rights in the registration of immovable property remains problematic. Notwithstanding the South African government's efforts to develop civil society institutions to develop and manage property rights, the implementation and success thereof is questionable mainly because of conflict between interested parties.

The development of property interests of rural communities are severely hampered by the drafting of poor legislation like the Communal Land Rights Bill and the Communal Land Rights Act,⁵⁵⁷ which acts were declared unconstitutional. On the other hand, the *Communal Property Associations Act*, which was criticised for being too complicated,⁵⁵⁸ and required government assistance in the form of skills development, mentorship, financial assistance and capacity building,⁵⁵⁹ was considered to be far-sighted by the country's highest court.⁵⁶⁰ Even with the court's view, it is unacceptable that matters of national interest, which should be regulated by proper legislation, should end up in court through a lengthy and expensive process primarily to the discomfort and expense of rural communities.

The recognition of the modern developmental theories facing Third World countries and the cognisance of developmentalism, as an substitute to dependency, led to the "Participatory Action Research" philosophy where researchers are urged to refrain from telling people in the Third World what development is and how to get it, but should, rather be development, that empowers people in a participating process. People are to

⁵⁵⁷ 11 of 2004.

⁵⁵⁸ Pienaar 2009 PELJ 23 – 24; Pienaar 2009 THRHR 2.

⁵⁵⁹ Department of Rural Development and Land Reforms' 2011/2012 Annual Report 80.

⁵⁶⁰ *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* [2015] ZACC 25.

determine the development of their own communities. Development theory implies that, as an alternative, researchers should, rather listen to what communities say about development.⁵⁶¹ Consequently the Corporate Communal Development Theory, discoursed in this research, is a social development theory that considers the basic knowledge in local histories and practices, without association to colonial hegemony and is a critically comparative analysis of the South African corporate law principles, being embedded in the *Companies Act* in relation to the *Communal Property Associations Act*, as product of the purpose of the land policy principal of tenure reform.⁵⁶²

The Corporate Communal Development Theory is further underpinned by the purposive approach, as determined by the Constitutional Court in the FNB case⁵⁶³ and followed in the *Bakgatla-Ba-Kgafela Communal Property Association* case.⁵⁶⁴ Section 25(4)(b) of the Constitution states that property is not limited to land and section 25(7) protects and acknowledges rights in land that goes further than registered ownership.⁵⁶⁵ The development of the constitutional property concept now comprises interests in property, which now can compete on the same level with differing property rights that would not have been recognised as property before. The inclusion of non-real rights creates an opportunity to develop traditional values into communal property rights. Naturally these rights will also be curbed by section 36(1) of the Constitution, as far as the limitation is reasonable and justifiable considering human dignity, equality and freedom, as already are provided for in the Constitution.⁵⁶⁶ Reflexion on the development of the Canadian common law approach regarding land tenure, that is less rigid than the South African civil law, as developed from the Roman-Dutch concept of exclusivity of ownership, leads to a better understanding of community norms and values, which norms and values determine social rights, rather than authoritative and administrative structures to control communal land tenure.

⁵⁶¹ Manzo K 1991 *Studies in Comparative International Development* 28.

⁵⁶² Kloppers and Pienaar 2014 PELJ 692.

⁵⁶³ *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

⁵⁶⁴ *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* [2015] ZACC 25 para 35; *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 53.

⁵⁶⁵ Constitution of the Republic of South Africa, 1996.

⁵⁶⁶ Constitution of the Republic of South Africa, 1996.

he development of traditional ownership into a unique concept of African freehold ownership, as regulated under the *Communal Property Associations Act*, did not properly consider the family interests,⁵⁶⁷ causal relationships,⁵⁶⁸ customs and culture⁵⁶⁹ of rural communities. The result of these oversights, accumulated in the current position of dissatisfaction by both traditional leaders and communities on opposing sides, as to the interpretation and application of the *Communal Property Associations Act*. The lack of codification of rules, prescribing how to deal with various matters in a communal property association's constitution, causes uncertainty and deprives it of accountability and transparency, which in return threatens the democracy and human dignity of rural communities.

Disputes and internal conflict, as well as conflicting interest amongst Communal Property Association members, Communal Property Association Committees and their members, Communal Property Associations and Traditional Authorities and Communal Property Associations and the rural communities are a direct result of a lack of transparency and accountability, due to the fact that communities are burdened with the responsibility of providing sufficient procedural processes to comply with and enforce the provisions of the *Communal Property Associations Act*. Accordingly, the *Communal Property Associations Act* complies with the counter modernist approach in giving communities say in the management of their own property but it unfortunately lacks to empower communities with a certain procedure on how to exercise and enforce their contributions.

Another perplexing matter, haunting Communal Property Associations, is the lack of knowledge demonstrated by government institutions responsible for the administration and protection of the rights of previously disadvantaged rural communities. Not do they only lack knowledge, but worse, they even went so far as to oppose court actions by rural communities who endeavour to exercise their constitutional rights to protect their property rights. This was well illustrated in the Genorah case,⁵⁷⁰ where the Department of Mineral Resources denied the Bengwenyama community their preferential prospecting

⁵⁶⁷ Position Paper for National Land Tenure Summit, 2014 4.

⁵⁶⁸ Schnegg and Linke 2015 Elsevier Ltd 205-214.

⁵⁶⁹ Pienaar 2009 PELJ 23 – 24; Pienaar 2009 THRHR 2.

⁵⁷⁰ *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC).

right, as regulated in the Mineral and Petroleum Resources Development Act.⁵⁷¹ Another example is found in the Bakgatla-case,⁵⁷² where yet again the state, through the actions of the Director-General, failed to attend to the registration process, in the spirit, as demanded by the *Communal Property Associations Act*.

Finally, Communal Property Associations are faced with the bureaucracy of traditional leaders refusing to comply with the stipulations of the Traditional Leadership and Governance Framework Amendment Act.⁵⁷³ The actions of traditional leaders do not only frustrate the working of the *Communal Property Associations Act*, but also impend the constitutional rights of equality, transparency and democracy of rural communities. This unfortunate situation negates the “Participatory Action Research philosophy”, which undermines the modern developmental theories. Due to development in the corporate law⁵⁷⁴ and the fact that it is possible for a similar entity to apply to the Minister of Rural Development and Land Reform, to be considered as a Communal Property Association,⁵⁷⁵ it became possible to use a private company to promote and develop the property interests of disadvantaged rural communities. The question whether this could be done effectively and efficiently is answered by using the Corporate Communal Development Theory to do a critical analysis of corporate law principles and to compare these principles with the principles, being contained in the *Communal Property Associations Act*. Such comparison also identifies the advantages and disadvantages in both acts, relating to the management of communal property.

The use of a private company to promote certain interests of communities is not a new phenomenon. The Bengwenyama community made use of a private company⁵⁷⁶ as a vehicle to procure prospecting rights on behalf of the community. The Corporate Communal Development Theory answers the question whether a private company can be used to promote and develop all the property interests of rural communities on a continuous basis. There are certain distinct similarities between a private company and a

⁵⁷¹ Section 104 of the Mineral and Petroleum Resources Development Act 28 of 2002.

⁵⁷² *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* [2015] ZACC 25.

⁵⁷³ No. 23 of 2009.

⁵⁷⁴ Companies Act 71 of 2008.

⁵⁷⁵ Section 2(3) of the Communal Property Associations Act 28 of 1996.

⁵⁷⁶ *Bengwenyama Minerals (Pty) Ltd*.

Communal Property Association. Both are juristic entities that needs to be registered with the relevant authorities. Both needs to comply with a prescribed registration process, although the registration process for the Communal Property Association follows a far more complicated process. Each entity receives a registration certificate, as proof of registration.⁵⁷⁷

A separateness exists in the ownership of property between members of a company and the company, as well as ownership of property between members of a community and a Communal Property Association. This distinctive separateness is the foundation to exist, as legal entity, apart from the founders and members.⁵⁷⁸ It therefore follows that shareholders of the company will not be liable for the liabilities or obligations of the company. A company's Memorandum of Incorporation may provide differently and to a certain extent, the *Companies Act* provides for the liability of members.⁵⁷⁹ Sections 32(7) and 163(4) of the *Companies Act* provides that members of a private company will be liable for the debts of the company, should members treat the assets of the company, as their own, attend to the business recklessly in order to defraud creditors, are involved in criminal activities, uses the company, being an instrument to conceal member's illegal activities or in any other instances where legislation prescribes that the court should disregard the separate legal personality.⁵⁸⁰ Although the *Communal Property Associations Act* does not specify anything about member's liability, it should follow that members will not be responsible for the debts of the Communal Property Association, in the light of a Communal Property Association being a juristic entity.

A clear identification of members exists. In a private company the securities register provides details of all members who are incidentally also the shareholders.⁵⁸¹ There is a restriction on the transfer of shares in a private company, which is usually obtained by a pre-emptive right in the Memorandum of Incorporation.⁵⁸² In a Communal Property Association, member's names should appear on a list, as contemplated in item 5 of the

⁵⁷⁷ Section 14(4) of the Companies Act 71 of 2008, section 8(3)(a) of the Communal Property Associations Act 28 of 1996.

⁵⁷⁸ *Dadoo v Krugersdorp Municipal Council* 1920 AD 550 – 551.

⁵⁷⁹ Section 19(2) of the Companies Act 71 of 2008.

⁵⁸⁰ 71 of 2008.

⁵⁸¹ Section 1 of the Companies Act 71 of 2008.

⁵⁸² Section 8(2)(b)(ii)(aa) and (bb) of the Companies Act 71 of 2008, Hefer Notes on South African Companies Act 19-20.

schedule.⁵⁸³ Both entities provide for different classes of membership or shares.⁵⁸⁴ Membership in a Communal Property Association may be based on individuals or families.⁵⁸⁵ The purpose of providing for different classes of membership is difficult to grasp, since differentiation in classes may not lead to different rights to land or resources.⁵⁸⁶

A major difference between the two juristic entities is found in the treatment of the respective entity's property by the members. Although members of a Communal Property Association are not the legal owners of the property registered in the name of the Communal Property Association, they certainly do have a direct interest in the property and are entitled to the communal and exclusive use of the property allocated to them.⁵⁸⁷ This is in total contradiction to the principle of separateness, which underpins a juristic person and contributes to the unique character in the establishment of a Communal Property Association, being a juristic entity. This right of use of property is mandatory and the executive committee of a Communal Property Association is obliged to hold and manage the property for the use and to the advantage of its members.⁵⁸⁸

Consequently, the members of a Communal Property Association has a direct say in how the property should be managed. This is done by way of a vote at meetings of the Communal Property Association, in order to comply with the equality principle.⁵⁸⁹ Hence a Communal Property Association may not sell or burden the Communal Property Association's property without a majority decision of the members taken at a general meeting.⁵⁹⁰ The only similarity with private companies is that major decisions of the company require the knowledge of the members that includes, amongst others, the disposal of major assets of the company.⁵⁹¹ Both the board of directors of a private company and the executive committee of the Communal Property Association have a

⁵⁸³ See also sections 12, 13 and 14 of the Communal Property Associations Act 28 of 1996.

⁵⁸⁴ Section 9(1)(b)(ii) and item 6 of the schedule of the Communal Property Associations Act 28 of 1996, Section 36(1) of the Companies Act 71 of 2008.

⁵⁸⁵ Item 8 of the schedule of the Communal Property Associations Act 28 of 1996.

⁵⁸⁶ Section 9(1)(b)(ii) of the Communal Property Associations Act 28 of 1996.

⁵⁸⁷ Items 7 to 10 and 13(1) of the schedule of the Communal Property Associations Act 28 of 1996.

⁵⁸⁸ Section 9(1)(d) of the Communal Property Associations Act 28 of 1996.

⁵⁸⁹ Section 9(2)(b)(i) of the Communal Property Associations Act 28 of 1996.

⁵⁹⁰ Section 9(1)(d)(iii) of the Communal Property Associations Act 28 of 1996.

⁵⁹¹ Section 112(2)(a) of the Companies Act 71 of 2008.

fiduciary duty, although in a Communal Property Association the duty is towards the members, while in a private company the duty is towards the company.⁵⁹²

A private company does not qualify, as a similar entity, and the community will therefore not be discharged from the provisos of sections 6, 7 or 8.⁵⁹³ To use a private company will therefore not do away with the complicated procedures, since a private company will have to comply with all the provisions of the Communal Property Associations Act, which includes that a private company will have to provide the Director-General with all the information, as required by Section 5(2) of the Communal Property Associations Act 28 of 1996, and will also have to comply with the complicated registration process.⁵⁹⁴ Private companies are profit companies established to upsurge monetary value for its shareholders,⁵⁹⁵ with the core purpose to inspire growth of the South African economy.⁵⁹⁶ Each Communal Property Association is established to serve the property interests of a particular community, without any profit motive and without considering the growth of the South African economy.

The mere fact that the constitution of a Communal Property Association must comply with the five principles of section 9 and deals with the twenty-two matters contained in the schedule, does not ensure that each Communal Property Association will comply with transparency and accountability. Neither does the undertaking of the interim committee that the provisional Association will comply with the section 9 principles, ensure that it actually does. The fact that the constitution of a Communal Property Association was adopted through a just and inclusive process and demonstrates the view of the majority of members, does not entail that either the process or the constitution complies with the standards of a democratic society. The complaint process only allows persons to complain about being excluded from partaking in the process or that an unfair process was followed.⁵⁹⁷ The ultimate control of both entities remains with the members by way of a

⁵⁹² Sections 1, 8(7), 9(e)(vi) and 14(1)(b) of the Communal Property Associations Act 28 of 1996, section 77(2)(a) of the Companies Act 71 of 2008, Hefer Notes on South African Companies Act 177.

⁵⁹³ Section 1 of the Communal Property Associations Act 28 of 1996.

⁵⁹⁴ Sections 5 and 8 of the Communal Property Associations Act 28 of 1996.

⁵⁹⁵ Section 1 of the Companies Act 71 of 2008.

⁵⁹⁶ Section 7 of the Companies Act 71 of 2008.

⁵⁹⁷ Section 7(4) of the Communal Property Associations Act 28 of 1996.

majority vote at a member's meeting.⁵⁹⁸ In a Communal Property Association, control is not dependent on inter-related persons. The five principles namely, "fair and inclusive decision-making processes,⁵⁹⁹ equality of membership,⁶⁰⁰ democratic processes,⁶⁰¹ fair access to the property of the association"⁶⁰² and "accountability and transparency"⁶⁰³ contained in section 9 of the Communal Property Associations Act must be adhered to in each constitution.

The principle of a "fair and inclusive decision-making processes" will be complied with if all the members of the Communal Property Association be afforded an impartial opportunity to partake in the decision-making processes of the association and decisions to alter the constitution, dissolve the Communal Property Association or to either dispose of or burden the property of the Communal Property Association. Termination of a person's membership must be done on reasonable grounds, after a fair hearing incorporating the *audi altarem partem* rule.⁶⁰⁴ Fairness is determined by the manner in which a person is allowed to partake in the decision-making process. Whether a member is afforded an impartial opportunity is mainly dependent on the impartiality of the chairperson who conducts the meeting and the application of the principle of supremacy of the majority, none of which is referred to in the *Communal Property Associations Act*.

The *Companies Act* provides for a remedy, when a motion was opposed by fifteen percent or more of the voting rights, to ensure that members are not prejudiced on the basis of transparency or material technical irregularity.⁶⁰⁵ Shareholders control may also be limited by a requisite for a special resolution, with a prescribed majority and only in so far the directors act within the scope of their powers. The rule that the majority cannot act illegally, is alleviated by Section 20(4) of the *Companies Act*, allowing any member to apply to court for an interdict, preventing the company to act illegal. The same remedy applies to a member who is unfairly prejudiced by an act or omission of the company.⁶⁰⁶

⁵⁹⁸ Section 65(11) of the Companies Act 71 of 2008, Sections 8(6)(c), 12(1), 9(1)(d)(i) and (iii) of the Communal Property Associations Act 28 of 1996.

⁵⁹⁹ Section 9(1)(a) of the Communal Property Associations Act 28 of 1996.

⁶⁰⁰ Section 9(1)(b) of the Communal Property Associations Act 28 of 1996.

⁶⁰¹ Section 9(1)(c) of the Communal Property Associations Act 28 of 1996.

⁶⁰² Section 9(1)(d) of the Communal Property Associations Act 28 of 1996.

⁶⁰³ Section 9(1)(e) of the Communal Property Associations Act 28 of 1996.

⁶⁰⁴ Section 9(1)(a)(iii) of the Communal Property Associations Act 28 of 1996.

⁶⁰⁵ Sections 115(3) and 115(7) of the Companies Act 71 of 2008.

⁶⁰⁶ Section 163(2) of the Companies Act 71 of 2008.

Two exceptions are allowed to the principle of “equality of membership”. The *Communal Property Associations Act* permits the respective communities to determine the age at which a member may attend and vote at meetings, as well as the age at which land rights may be allocated to a member.⁶⁰⁷ If a community decides to apply any or both of these exceptions it will seriously overstep the status of members effected by the exceptions.

Should it be provided for in the constitution of a Communal Property Association, that the age at which a member may attend and vote at meetings or that the age at which land rights may be allocated to a member, to be younger than the age of majority, then such members will have to be considered to be emancipated since their capacity as minors will effectively being changed to equal the legal status and capacity of a major. Should the age be determined to be older than the age of majority, then the rights of the persons who have already reached the age of majority, with the accompanying legal status and capacity, as embedded in their constitutional rights, be adversely restricted, which will in return, be an infringement on their human dignity, and therefore unconstitutional.

Most upsetting is the requirement, without specifications, conditions, limitations or minimum requirements, that a community must provide for democratic processes to ensure the protection of members rights to receive adequate notice of all general meetings; to attend, speak and vote at any general meeting; to receive copies of minutes or to have reasonable access to the records of decisions; to have a right to information about the financial statements and records; and access to a copy of the constitution of the Communal Property Association.⁶⁰⁸ Not only is there a requirement for proper notice of meetings but specific reference is made to require that *effective notice* is given to members of the community of the meeting to adopt the constitution to ensure their presence.⁶⁰⁹ When proper notice is not given it automatically infringes a person’s democratic right to attend and vote at a members meeting. It is not sufficient to require that “adequate” notice be given without specifying the minimum requirements that need to be complied with in order for a notice to be considered as “adequate”. The mere fact that the legislature expects from rural communities to identify and provide for a democratic process, is irresponsible and irrational. To require that proper notice should

⁶⁰⁷ Section 9(1)(b)(i) of the Communal Property Associations Act 28 of 1996.

⁶⁰⁸ Section 9(1)(c)(i) to (v) of the Communal Property Associations Act 28 of 1996.

⁶⁰⁹ Section 7(2)(a) of the Communal Property Associations Act 28 of 1996.

be given without providing a procedure is short sighted. The *Companies Act* not only provides adequate procedures but goes one step further and also provide for the possibility that members can waive the prerequisites for a notice of a meeting and declare a substantial shortcoming in the form of the notice given relating to specified items on the agenda.⁶¹⁰

Each member of a community should be able to attend, speak and vote at any general meeting.⁶¹¹ Again the *Communal Property Association Act* is quiet about the procedures to be followed at a meeting except for the requirement that the communal property association's constitution should provide for "how and when" the Annual General Meeting and General Meetings should be called and that a procedure should be described for each of the Communal Property Association's meetings.⁶¹² No uncertainty exists in the *Companies Act*, as to when and by whom a shareholders meeting can be called.⁶¹³ It also provides for a remedy to compel the convening of a meeting in the event of failure by the responsible persons to convene a meeting, as required.⁶¹⁴ For a meeting to be properly constituted, a quorum must be present.⁶¹⁵ In a company a decision is called a resolution of the company, which is a formal decision of a company in a general meeting by a simple majority of members entitled to attend, vote, and who constitutes a quorum. The *Communal Property Associations Act* has no requisites for a quorum, except to stipulate that the constitution should provide for a quorum in the general meeting and annual general meeting.⁶¹⁶

Decisions at a meeting is taken by way of a majority vote in favour of a motion. Voting is the most important way for a member to express his or her opinion. Two of the three times that the word vote is used in the *Communal Property Associations Act*, it refers to the adoption of the constitution confirming the importance of this decision. The only other reference is the age at which a member may vote. Absolutely nothing on the procedure to be followed or the manner in which voting should take place is mentioned.

⁶¹⁰ Section 62(4) and (5) of the Companies Act 71 of 2008.

⁶¹¹ Section 9(1)(c)(ii) and (iii) of the Communal Property Associations Act 28 of 1996.

⁶¹² Item 14 and 15 of schedule of the Communal Property Associations Act 28 of 1996.

⁶¹³ Section 61 of the Companies Act 71 of 2008.

⁶¹⁴ Section 61(12) of the Companies Act 71 of 2008.

⁶¹⁵ Davis Companies and other Business Structures 94.

⁶¹⁶ Item 14 and 15 of schedule of the Communal Property Associations Act 28 of 1996.

There is a substantial lack of codification, which is necessary to ensure that the principle of equality is complied with. Only three situations are described where the majority consent or support of the community is required. No regulations exist to regulate votes where a family is represented. This is not sufficient to procure an impartial and comprehensive decision-making process, as required by the *Communal Property Associations Act*.⁶¹⁷ The only remedy available to a person that was excluded from partaking in the adoption of the Constitution process is to file a complaint with the Director-General.⁶¹⁸

In terms of the *Companies Act* every member entitled to attend and vote has a right to appoint a proxy.⁶¹⁹ It is further specified that proxies must be in writing, signed and dated and will remain in force for one year except where specifically otherwise stipulated.⁶²⁰ A copy of the instrument appointing the proxy must also be delivered to the company.⁶²¹ A proxy may be revoked in writing or by appointing a conflicting proxy.⁶²² The word proxy is not even mentioned in the *Communal Property Associations Act*. The only reference to representation is that the constitution must provide for how families should be represented in the decision-making process of the Communal Property Association,⁶²³ that members may be represented at the meeting for the adoption of the constitution⁶²⁴ and that the constitution has to provide for "other measure of representativity" at the Annual General Meeting and at General Meetings.⁶²⁵

It is not sufficient to expect from communities to provide in their constitutions that members have the right to receive copies of minutes of a meeting, to have reasonable access to the records of decisions taken at the meeting, to have a right to information about the financial statements and records and to have access to a copy of the constitution without giving any guidance or information on how to comply with the prescribed principles.⁶²⁶ Both juristic entities origin is found in their constitutions, which

⁶¹⁷ Section 9(1)(a) of the Communal Property Associations Act 28 of 1996.

⁶¹⁸ Section 7(4) of the Communal Property Associations Act 28 of 1996.

⁶¹⁹ Section 58(1) of the Companies Act 71 of 2008.

⁶²⁰ Section 58(2) of the Companies Act 71 of 2008.

⁶²¹ Section 58(3) of the Companies Act 71 of 2008.

⁶²² Section 58(4) of the Companies Act 71 of 2008.

⁶²³ Item 8 of the schedule of the Communal Property Associations Act 28 of 1996.

⁶²⁴ Section 8(2)(f) of the Communal Property Associations Act 28 of 1996.

⁶²⁵ Items 14 and 15 of the schedule of the Communal Property Associations Act 28 of 1996.

⁶²⁶ Item 17 of the schedule and section 9(1)(c)(iii) of the Communal Property Associations Act 28 of 1996.

in the case of a private company, is the Memorandum of Incorporation and a copy thereof needs to be filed with registration of the entity.⁶²⁷ A company's Memorandum of Incorporation is a written constitution, that stipulates the responsibilities, rights and duties of the company's shareholders, other officers and directors towards each other and relative to the company, as well as other matters, as determined by section 15 and determines the legal powers and capacity of a company.⁶²⁸ A Communal Property Association's constitution is defined to be a constitution, as adopted by an association in terms of section 7 and the definition of "holding of property in common" confirms again that the acquisition, keeping and supervision of property by an association occurs in accordance with its constitution, implying that the constitution should contain terms pertinent to the property rights of an association.⁶²⁹ Both the constitution of a Communal Property Association and the Memorandum of Incorporation of a private company is subject to public knowledge.⁶³⁰

A reference to "constitution" and "final constitution" together with the inconsistent reference to the singular and plural form of constitution in the *Communal Property Associations Act* is confusing and may lead to uncertainties in the process to be followed for the adoption of the constitution by the community. Adoption of the constitution together with the obtaining of the written consent of the Director-General is a prerequisite for a community to be able to register a Communal Property Association.⁶³¹ One or more persons may register a profit company by filing a Notice of Incorporation and a copy of the Memorandum of Incorporation signed in person or by proxy by each incorporator.⁶³²

The Memorandum of Incorporation of a private company is regulated by the alterable and the unalterable provisions of the *Companies Act* and can provide for any other provisions or distinct conditions not provided for in the *Companies Act*, as long as the alterable provisions are not contradictory, limited, qualified, prolonged or otherwise

⁶²⁷ Section 8(3)(a) of the Communal Property Associations Act 28 of 1996 and section 14(1)(b)(ii) of the Companies Act 71 of 2008.

⁶²⁸ Section 88(2)(d) of the Companies Act 71 of 2008.

⁶²⁹ Section 1 of the Communal Property Associations Act 28 of 1996.

⁶³⁰ Section 8(6) of the Communal Property Associations Act 28 of 1996, Sections 13(2)(b) and 187(5) of the Companies Act 71 of 2008.

⁶³¹ Section 8(3)(a) of the Communal Property Associations Act 28 of 1996.

⁶³² Section 13(1) of the Companies Act 71 of 2008.

altered.⁶³³ A default Memorandum of Incorporation, as provided for by Schedule 1, Part A of the *Companies Act* may be used or a company can use a unique Memorandum of Incorporation to satisfy its individual needs.⁶³⁴ The interests of shareholders are protected by certain specific requirements in the form of unalterable provisions while the alterable provisions ensure that each individual company's needs are met. The Memorandum of Incorporation may contain special conditions to prohibit the alteration of any distinct provision of the Memorandum of Incorporation.⁶³⁵ Any provisions, that are inconsistent with any of the provisions of the *Companies Act*, will be void to the degree that it infringes or is irreconcilable with the *Companies Act*.⁶³⁶ Unalterable provisions are provisions of the *Companies Act*, which the company are not permitted to change in terms of its Memorandum of Incorporation, or rules such as director's responsibilities and duties and the greater accountability requirements for state owned and public companies.⁶³⁷ The constitution of a Communal Property Association must be consistent with the five general principles each incorporating several matters to be addressed in the constitution.⁶³⁸ The mere postulation of the principles "fair and inclusive decision-making processes", "equality of membership", "democratic processes", "fair access to the property of the association" and "accountability and transparency" without providing specific requisites and then expecting rural communities to improvise appropriately to comply with the matters that needs to be dealt with in the constitution, does not suffice. The reasons provided in the Department of Rural Development and Land Reforms' Annual Report on the performance of Communal Property Association's⁶³⁹ and litigation, as in the Bakgatla-case⁶⁴⁰ is evidence of the uncertainties that rural communities are faced with.

A Communal Property Association's constitution will be interpreted in a manner that will not be inconsistent with the essence and purposes of the five principles.⁶⁴¹ A constitution

⁶³³ Sections 15(2)(a)(i), 15(2)(b) and 19(1), of the Companies Act 71 of 2008.

⁶³⁴ Section 1 of the Companies Act 71 of 2008.

⁶³⁵ Sections 15(2)(b) and 15(2)(c) of the Companies Act 71 of 2008.

⁶³⁶ Section 15(1)(b) of the Companies Act 71 of 2008.

⁶³⁷ Section 1 of the Companies Act 71 of 2008.

⁶³⁸ Section 9 of the Communal Property Associations Act 28 of 1996.

⁶³⁹ Department of Rural Development and Land Reforms' 2011/2012 Annual Report.

⁶⁴⁰ Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others [2015] ZACC 25.

⁶⁴¹ Section 9(2) of the Communal Property Associations Act 28 of 1996.

should also deal with the matters referred to in the Schedule.⁶⁴² A majority of a significant amount of the members of the community must adopt the draft constitution by way of a resolution.⁶⁴³ The management of a company is exceedingly more regulated by the *Companies Act* than the management of a Communal Property Association is regulated by the *Communal Property Associations Act*. Directors who is ineligible or disqualified may not be appointed as directors of a company and should a director becomes disqualified or ineligible while serving as a director, he or she will immediately cease to be a director.⁶⁴⁴ The Memorandum of Incorporation may also impose additional grounds of ineligibility or disqualification of directors than those provided for in the *Companies Act* and may prescribe the minimum qualifications to be met by the directors of such a company.⁶⁴⁵ Directors have a positive duty to manage the company in terms of a partial but substantial codified system that allows for the adopting of general principles of law and at the same time allows for expanding the common law.⁶⁴⁶

A Communal Property Association is managed by a committee elected by the members of the Communal Property Association.⁶⁴⁷ The constitution must determine the procedure for electing the committee, its terms of office and its powers, as well as payment, if any, of committee members.⁶⁴⁸ It is expected from the committee to exercise their powers in the best interests of all the members.⁶⁴⁹ In total contradiction to the *Companies Act* the *Communal Property Association Act* only requires that members of committees stand in a fiduciary relationship to the members of the Communal Property Association and that they will have fiduciary responsibilities in relation to the Communal Property Association and its members.⁶⁵⁰

In accordance with the *Corporate Communal Developmental Theory* communities are allowed to develop their own procedures to protect and enforce their property rights. Unfortunately, the legislature failed to consider the importance of the immediate

⁶⁴² Section 8(2)(d) of the Communal Property Associations Act 28 of 1996.

⁶⁴³ Section 8(2)(e) and (f) of the Communal Property Associations Act 28 of 1996.

⁶⁴⁴ Sections 69(2) and 69(4) of the Companies Act 71 of 2008.

⁶⁴⁵ Section 69(6) of the Companies Act 71 of 2008.

⁶⁴⁶ Hefer Notes on South African Companies Act 177, sections 66, 75 and 76 of the Companies Act 71 of 2008.

⁶⁴⁷ Section 1 of the Communal Property Associations Act 28 of 1996.

⁶⁴⁸ Item 13 schedule of schedule of the Communal Property Associations Act 28 of 1996.

⁶⁴⁹ Section 9(1)(e)(vi) of the Communal Property Associations Act 28 of 1996.

⁶⁵⁰ Section 8(7) of the Communal Property Associations Act 28 of 1996.

protection of property rights. The legislature's lack of assistance two communities to effectively protect and enforce their property rights resembles in the many silent features of the *Communal Property Associations Act*. Concurrently the most important resemblance between a company and a Communal Property Association lies within the requirement for complying with the common law fiduciary duty by both the committee members of a Communal Property Association and directors of a company.⁶⁵¹ Compliant with the *Corporate Communal Development Theory*, the recognition of a fiduciary duty by representatives of the community is a positive attribute towards the act.

8.2 Recommendations

The creation of a unique juristic person⁶⁵² with an implied representative relationship,⁶⁵³ which in nature should be a fiduciary relationship⁶⁵⁴ calls for specific regulations on how such entity should operate and the requirements for such relationship. To leave these specifics to the discretion of illiterate rural communities is irrational, irresponsible and inconsiderate of the abilities of people who are generally illiterate and non-professionals insofar legal matters are considered. The drafting of depraved legislation in a fruitless effort to solve the problems created by existing poor legislation only created more uncertainty and dissatisfaction amongst already diverging parties. Just as the *Communal Property Associations Act* is a product of tradition to modernism, underpinned by the *Corporate Communal Development Theory*, so is the *Companies Act* also a product of a "countermodernist" approach embracing the principles of democracy and constitutionality.

Exceptions to the principle of "equality of membership" should not be allowed, since this may lead to the inclusion of minors or the exclusion of majors. In a democratic society it should be acceptable that any person who has reached majority should be able to partake in the business of the Communal Property Association. A detailed procedure similar to the procedures prescribed in the *Companies Act* relating to the delivery, way and form, as well as periods of notices of meetings would have ensured that a democratic

⁶⁵¹ Hefer Notes on South African Companies Act 177.

⁶⁵² Section 8(6)(a) of the Communal Property Associations Act 28 of 1996.

⁶⁵³ Section 1 of the Communal Property Associations Act 28 of 1996.

⁶⁵⁴ Section 8(7), 9(e)(vi) and 14(1)(b) of the Communal Property Associations Act 28 of 1996.

process would be followed. As in companies it should be provided that the constitution may stipulate for longer minimum periods of notice to apply.⁶⁵⁵ A clear instruction, as to the person responsible for giving notice, would simplify matters considerably, than leaving it up to each community to identify that a responsible person should be appointed to attend to this serious matter and to make provision for it in their constitution. The procedure should further specify the minimum requirements that need to be complied with in order for a notice to be considered as “adequate”.

The mere fact that the legislature expects the rural communities to identify and provide for a democratic process is irresponsible and irrational. To require that proper notice should be given without providing a procedure is short sighted. It should also provide for the possibility that members may waive the prerequisites for a notice of a meeting and declare a material shortcoming in the form of the notice given, as well as a remedy applicable in these circumstances. More clarity should exist, as to when and by whom a meeting can be called, and the remedy available to members in the event of failure by the responsible persons to convene a meeting, as required. Requisites for a quorum should be prescribed to safeguard a democratic process.

A more comprehensive codification on the procedure to be followed or the manner in which voting should take place, will safeguard the principle of equality. The form and procedure of representation in the form of proxies must also be prescribed. With reference to the minutes of the meeting, it should at least be specified as to who will be responsible for taking minutes, by whom and where the minutes will be kept. The procedure to be followed by members to gain access to the records should also be specified. Regulations similar to that found in the *Companies Act* should be followed. No uncertainty exists in the company’s law, since it is specified, that it is the duty of the company secretary to make sure that minutes are taken and to safely keep it for seven years.⁶⁵⁶

The importance of regulating access to records is illustrated in the specificity of regulations found in the *Companies Act* regarding rights of access.⁶⁵⁷ Similar regulations

⁶⁵⁵ Section 59(1), 62(1), 62(2) and (3)(a) and (b) of the Companies Act 71 of 2008.

⁶⁵⁶ Sections 88(2)(d) and 24(3)(d) of the Companies Act 71 of 2008.

⁶⁵⁷ Sections 24, 25 and 26 of the Companies Act 71 of 2008.

should be contained in the *Communal Property Associations Act*, that will maintain the transparency principle. The removal of inconsistencies relating to the use of the word “constitution” and “final constitution” in the *Communal Property Associations Act* should remove any possible uncertainties in the process to be followed for the adoption of a constitution by a community. Although the registration of a private company requires a much more simplified process, the process prescribed in the *Communal Property Associations Act* does ensure that illiterate members of a rural community can also partake in the adoption process and have knowledge of the contents of the constitution.

Valuable lessons can be learned from the use of alterable and unalterable provisions, as contained in the *Companies Act*.⁶⁵⁸ By providing a default constitution, similar like the use of a default Memorandum of Incorporation, as provided for by Schedule 1, Part A of the *Companies Act*,⁶⁵⁹ will empower and enable rural communities to comply with the requirements of the *Communal Property Associations Act*. The democratic rights and human dignity of the members will be protected by certain specific requirements in the form of unalterable provisions while the alterable provisions will ensure that each respective Communal Property Association’s needs are met. Conflict between members and management will be minimized if the rules relating to the qualifications and appointment of committee members are partial but substantially codified. Prescribing the actual procedure for electing the committee, its terms of office and its powers, rather than expecting from the community to provide same in the constitution, will assure that committee members exercise their powers in the best interests of all the members in a fiduciary relationship.

It is therefore recommended, that the *Communal Property Associations Act* be amended to accommodate all the above mentioned suggestions. Communities would still have the autonomy to provide for more lenient compliance with the prescribed procedures, but minimum procedures, similar like those found in the *Companies Act* will ensure compliance with the principles of accountability, transparency, equality and democracy.

⁶⁵⁸ 71 of 2008.

⁶⁵⁹ Section 1 of the Companies Act 71 of 2008.

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