Legal Analysis of Access to Land in Rural Areas of South Africa for Developmental Projects

By

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ABSTRACT

This study seeks to demonstrate the importance of accessibility of land in the rural areas for purposes of development projects. Land in rural areas is subjected to the authority of traditional leaders and local government and is regarded as a communal property. Many rural areas are not yet developed due to the strict restrictions regulating the acquisition of land for purposes of sustainable development projects. The study outlines the procedures that allow for land allocation and acquisition in the rural areas. It also highlights the challenges being encountered to acquire land and highlights the pitfalls in interventions that restrict access to land for development purposes.

Key words: Rural area, Land tenure, Traditional leaders, Local government, Land, Functions, Duties.

DECLARATION

I declare that the mini-dissertation hereby submitted to the University of Limpopo, for the degree of Masters of Law in Development and Management has not previously been submitted by me for a degree at this or any other University; that it is my own work in design and execution and all materials contained herein have been duly acknowledged.

22/02/17

Surname ,initials (title) **Date**

DEDICATION

I dedicate this dissertation to my mother, Ms Grace Hlamalani Ndlovu, through whose love and prayers that I stayed motivated. I appreciate all her sacrifices and the support she has given me. To my two sisters, Percely and Witness Sihlangu, your prayers gave me strength and hope. The same applies to my loving brothers, Israel Khoza, Pascal Sihlangu and Simeon Sihlangu for their support, encouragement and confidence in me. I thank my husband, Mr Kgaugelo Eddie Thulare for his love, patience, prayers and support that kept me focused and determined to work. To my precious daughter Kamogelo Thulare, your presence in my life gave me a reason to work hard on my study. Last but not least, my gratitude goes to my spiritual Father Apostle Justice Daniels, for his continuous prayers and being the pillar of my strength.

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LIST OF ACRONYMS

CLRB – Communal Land Rights Bill
CLARA -Communal Land Rights Act
CPA – Communal Property Association
CPA Act - Communal Property Associations Act 1996 (Act 28 of 1996)
CPI - Communal Property Institutions
DLA - Department of Land Affairs
ESTA-Extension of Tenure Act 82 of 1997
LUMS-Land Use Management System
LUMB-Land Use Management Bill
IDP – Integrated Development Plan
IPILRA - The Interim Protection of Informal Land Rights Act
PDA-Provincial Department of Agriculture
PLROs -Provincial Land Reform Office
PIE-Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
PGC -Provincial Grants Committee
ULTRA - Upgrading of Land Tenure Rights Act 1991 (Act 112 of 1991)
RDP-Reconstruction and Development Programme

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CHAPTER ONE: INTRODUCTION TO LEGAL ANALYSIS OF ACCESS TO LAND IN RURAL AREAS OF SOUTH AFRICA FOR DEVELOPMENT PROJECTS

1. INTRODUCTION

South African rural areas remain the most impoverished societies in the country with poor access to land, education, employment, housing, health services and other essential resources.[1] Most rural communities live in severe poverty and there are very few development activities taking place in these areas. Poor access to education, health and many other services is largely due to lack of developmental infrastructure such as libraries and health centres. This is often a result of challenges associated with accessing land for development projects.

Access to land for development projects in the rural areas of South Africa is becoming increasingly difficult to the general public, due to competing interests of competency to allocate land for development. It is pertinent to point out that land administration duties are vested in traditional authorities and the local government. These duties are not clearly distinguished, hence this creates an environment of uncertainty and confusion particularly with regard to the procedures that need to be followed in order to access land for purposes of development in the rural areas. The introduction of White Paper on South African Land Policy of 1997[2] was aimed at addressing the need for rapid release of land for development and the need to administer public land in an effective manner.

The main purpose of the introduction of the paper was to redress the injustices of apartheid and highlight key objectives which are based on finding new ways to accelerate and sustain the delivery of services particularly to the poor. It is for this reason, among others, that the White Paper on Local Government[3] defines and explicitly explains the role of the traditional leaders within the Constitutional dispensation of local government. Despite the legislation put in place to address land administration and clarify the role and functions of traditional leaders and local

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[1] Mohan Gopaul, the significance of rural areas in south Africa for tourism development through community participation 2004

[2] White paper on South African policy 1997

[3] White paper on local Government 1998

government, access to land in rural areas for developmental projects is still problematic as result of overlapping roles and functions of traditional leaders and local government.

2. RESEARCH PROBLEM

2.1. SOURCE OF THE RESEARCH PROBLEM

Land ownership in South Africa has long been a source of conflict. The South African history of conquest and dispossession, forced removals and a racially-skewed distribution of land resources, has left the country with a complex and difficult legacy. Current land ownership and land development patterns strongly reflect the political and economic conditions of the apartheid era.[4] Racially-based land policies were a cause of insecurity, landlessness and poverty amongst black people, and a cause of inefficient land administration and land use. The new post-apartheid land policies supposedly free of racism are however poorly understood and implemented due to overlapping roles and functions of local government and traditional leaders in land administration as a result the situation hinders developmental initiatives in the rural areas.[5]

2.2. BACKGROUND TO THE PROBLEM

For two-and-a-half centuries black South African's have been deprived of most of their land by the European colonists.[6] At the same time, Government made it difficult for Africans to use land outside their reserves. The Land Act 1913 "formalised the dispossession of Black South Africans, it was introduced to do away with communal land rights by introducing limited individual tenure".[7] Blacks had access to the most remote areas that had been set aside for them.[8]

African land ownership was limited to native reserves, with communal land tenure administered by traditional leaders. The 1913 and 1936 Land Acts also had "major

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[4] White paper (n1)
[5] Ibid note 1
[6] D Borsch ,land conflict management in South Africa; lessons learned from land rights 1999
[7] Bosch (n6)
[8] Ibid note 6

implications for land delivery systems in South Africa.[9] In the rural areas which form 13.9% of the South African land scape, there were special land delivery procedures known as Proclamation R293 of 1962 for proclaimed urban areas and R188 of 1969 for rural areas". [10]

The policy version of R293 was developed as a so-called independence of each homeland or Bantustan.[11] There were also other laws that prevented Africans from owning land in white farming areas and prevented white farmers from leasing land to black tenants and share croppers". [12]

The Abolition of Racially Based Measurements Amendment Act No. 133 of 1992 abolished the 1913 and 1936 Land Acts in 1991.[13] A visionary document called the Freedom Charter was adopted on the 26 June 1955 by the African National Congress (ANC). The ANC had also "put nationalisation forward as the mechanism necessary to redress decades of dispossession and destruction of black property and economic rights".[14] The main aim "in developing and implementing the Reconstruction and Development Programme, was to address the immense socio-economic problems brought about by the consequences of the struggle against its predecessors under the apartheid regime".[15]

The 1994 interim Constitution was a result of four years of constitutional negotiations that heralded the start of a democratic South Africa. Policies such as the Reconstruction and Development Programme (RDP) of 1994 provided a set of guidelines and principles that gave direction to the initiative process of formulating the land reform policy and programme. Despite this access to land in rural areas is still a complex matter. The current Constitution adopted in 1996 "retained the earlier negotiated "property clause". Section 25 provides that "no law may permit arbitrary deprivation of property". While expropriation is allowed "in the public interest" and this term is defined to include land reform policy, Constitution inevitably had the effect that the parameters of land reform were negotiated.

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[9] Dr clarissa Fourie, Land and cadastre in South Africa ,its historical and present government policy 2000
[10] Fourie (n9)
[11] Ibid note 9
[12] Fourie (n9)
[13] Ibid note 9
[14] Bosch (n6)
[15] Reconstruction and Development Programme 1994

Act No. 2 of 1995 dealt with the delegation of powers to the provinces and local authorities. This is also in line with the new constitution where land registration and cadastral policy is a central government function, but planning, land delivery and the operation of the cadastre and land registration system is a provincial function. The Communal Land Rights Act No. 11 of 2004 "attempted to make land legislation uniform across the entire country to overcome the problems of differing legislation in the previous 'Bantustans.' Legislators, in drafting these Acts, had to take into account 54 separate pieces of legislation".[16]

3. STATEMENT OF RESEARCH PROBLEM

Despite the legislative framework already in place such as the Communal Land Tenure[17], Development Facilitation Act[18] and the Constitution[19] (which makes provision that "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property)[20], accessibility to land in rural areas for purposes of development is slow and inadequate. The pace at which access to land in rural areas does not resonate with the current yearnings and aspirations of the rural people who are seeking radical transformation and delivery of dividends resulting from collapse of apartheid. Even though traditional rulers have been given the mandate to play a major role in allocation and distribution of land for development, their roles and functions are not clearly defined with regard to administration of land. This contributes to lack of access to land for development projects and further underdevelopment of the rural areas. The general public experiences difficulties in the procedure followed between the local government and traditional leaders due to their unclear respective functions and duties. The confusion arising from the duties of traditional authorities and local government in the administration of land results in most people deprived of access to land particularly in the rural areas.

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[16] Fourie (n9)
[17] Communal Land Tenure 2013
[18] Act 67 of 1995
[19] Constitution of the Republic of South Africa 1996
[20] Constitution(n19) Section 25(1)

4. DEFINITION OF CONCEPTS

Traditional leader - is any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position, and is recognised in terms of the Traditional Leadership and Governance Framework Bill[21]

Local government - is a unit of government below the central and state government set up by law to exercise political authority within a defined area. Local government is a creation of the state government as, a subordinate a local authority referred to in section 1 of the Local Government Transition Act[22].

Land tenure - is the right to hold property; it is part of an ancient hierarchical system of holding land.

Rural areas – in South Africa ,these are the most populated areas in which people farm or depend on natural resources, including the villages and small towns that are dispersed through these areas. In addition, they include the large settlements in the former homelands, created by the apartheid removals, which depend for their survival on migratory labour and remittances.

Developmental projects – these entail a 'process for improving human well-being through a reallocation of resources that involves some modification of the environment'[23]. They address basic needs, equity and the redistribution of wealth, and focus on the quality of life rather than the quantity of economic activity.

5. LITERATURE REVIEW

Extensive research has been carried out on the subject of access to land. However, most of it deals profoundly with the issue of land claims and not land for development in the rural areas or communities. There is a gap that exists which this research seeks to address. It is against this backdrop that the mini-dissertation seeks to fill this gap to demonstrate how the existing laws can be used to foster and provide land in rural areas for developmental projects.

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[21] Traditional Leadership And Governance Framework Bill 2003

[22] Local Government Transition Act 209 of 1993

[23] http://www.ruraldevelopment.gov.za/component/content/article/347-land-claim/re-opening/771-faq#.VaisNo6_TK8

In terms of Section 10(a) of the Provision of Land and Assistance Act 126 of 1993, land is accessed in three ways: redistribution, land claims and restitution. The current South African Constitution recognises the institution, role and status of traditional leadership according to customary law, but subjects it to the Constitution[24]. For example Chapter 12 of the Constitution specifically provides for the recognition of the institution of traditional leadership. However the Constitution falls short of providing for their specific role. It merely states that the status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution[25], and that national legislation may provide for the role of traditional leadership at the local government level[26].

In addition Section 155 of the Constitution provides for the establishment of municipalities in all areas of South Africa, including those occupied by traditional communities. It further provides that local government is to be democratic and accountable to local communities, to ensure the sustainable provision of services to communities, to promote social and economic development, and to encourage the involvement of communities and community organisations in matters of local government.

This gives rise to the current challenges in rural areas where traditional leaders and local government have been given responsibility by the Constitution over rural areas to perform certain duties. However, the extent to which each body should carry out is duties it is not clearly provided for.

The Constitution further makes provision that the national and the provincial government have the responsibility to develop rural areas. "National and provincial governments have concurrent responsibility in terms of Schedule 4 of the Constitution[27] which includes rural development. Local governments also have constitutional functions which affect land use and planning. Traditional authorities also carry out land-related functions in terms of customary law. All three spheres of

[24] Ibid note 19
[25] Constitution(n19)Section 211
[26] Ibid note 19 Section 212
[27] Constitution(n19)

government and traditional authorities have functions which require land administration".[28]

Taking into account that all the spheres of government have the responsibility towards development of rural areas, access to land to give effect to such development should have been well catered for by making proper distinction of each sphere's responsibility towards land administration.

Many of the land administrative functions are usually assigned to the provincial government. "It is eventually appropriate for most of these functions to be located at the local government level. This would make the situation in rural areas to be in line with those in urban areas where substantial land administration functions, particularly those relating to planning and development control, are already vested in local authorities".[29]Although the White Paper proposed that the elected local government in areas that fall under traditional leadership is constituted in such a manner that traditional leaders will be represented and have a role to play, the scope and functions of local government and those of traditional leaders overlap where land administration in rural areas is involved.

The national government has the responsibility to "ensure more equitable distribution of land in order to support the work of the Commission on Restitution of Land Rights and to implement the programme of land tenure and land administration. The provincial government has the responsibility to provide complementary development support such as infrastructure and agricultural support services to those who take part in the land reform programme. In this regard, a close co-operation between national and provincial government is required to ensure that beneficiaries of the land reform enjoy services provided by the provinces as stipulated in Schedules 4 and 5 of the Constitution".[30]

Despite the responsibility of the national government to ensure equitable distribution of land, the exercise has experienced some challenges. Land is still inaccessible for developmental projects as a result of the conflicting functions and duties between traditional authorities and the local government.

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[28] Ibid note 2
[29] Ibid note 6
[30] Fourie(n6)

In 2013 the Traditional Affairs Bill (TAB) was published for comment and it provides that traditional leaders and councils can be allocated roles by government departments through '**legislative or other measures**'[31]. A 2011 version of the Bill provides for these roles to be administratively delegated, by-passing the consultative processes required in parliament and making it difficult to know which powers have been delegated and to whom[32]. As a result, rural areas experience the complexity of overlapping roles and functions of both traditional leaders and local government with respect to access to land for development purposes. There are numerous reports of conflict and violent act between traditional authorities and the local government, particularly over unclear or overlapping responsibilities for land use.[33]

Land allocation functions of traditional leaders "**overlap with those of the elected local government**".[34] Chapter 12 of the Constitution recognises traditional leaders and makes provision for advisory role at provincial and national sphere but does not specify what role these leaders should play at the local sphere of government. Therefore giving traditional leaders a role with regard to the function already allocated to local elected government in terms of section 156 of the Constitution[35] would require amendment of the Constitution.[36]This creates ambiguity in differentiating the roles of the traditional leaders and the local government with regard to accessibility of land in rural areas.[37]It would appear that the problem of accessing land in rural areas, for development emanates from the unclearly distinguished functions **and duties of the local government and traditional leader's**.

In the past, the traditional leaders role included judicial functions, allocation of land held in trust (the ownership of the land is held by the traditional leader for the benefits of the people who live on it), the preservation of law and order, the provision of administrative services at local government, administration of social welfare such as the processing of applications for social security benefits and businesses,

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[31] Ibid note 21

[32] Thuto Thipe, The Boundaries of Tradition: An Examination of the Traditional Leadership and Governance Framework Act 2014

[33] Dr Paul Jackson, Dr Heather Marquette, The interaction between traditional systems and local government systems in Sub-Saharan Africa

[34] Sithole Pearl, Mbele Thamsanqa. Fifteen Year Review on Traditional Leadership A Research Paper. Cato Manor HSRC South Africa 2008

[35] Ibid note 19

[36] Rugege, Developmental local Government 2003

[37] Clement Timase Thloaele, interference in traditional leadership in shared rural local government, (2012),

premises, the promotion of education such as the erection and maintenance of schools and the administration of access to education and finance.[38] These roles were in terms of the Black Administration Act No 38 of 1927, which was passed to restrict the powers of the traditional authorities. The Black Administration Act No 68 of 1951 was aimed at controlling the traditional authority and traditional courts in the past.[39]

The present role of traditional leaders in land administration is contained in the Communal Land Rights Act 11 of 2004, which states that traditional councils established in terms of the Traditional Leadership and Governance Framework Act 41 of 2003 will have land allocation and administration power and functions in communal lands. [40]"This gives traditional leaders substantial and unprecedented powers. However the general public fears that the rulers may be open to abuse especially as the councils have a majority of the unelected and hence unaccountable members".[41]

It is clear on what basis the Constitution provides for two institutions at local and community level that operate within the same functional and jurisdictional areas. Laws derived from the past, assigned powers and functions to traditional leadership institutions that are similar to those exercised by municipalities in terms of the Constitution, the Local Government Transition Act 209 of 1993 and the Local Government Municipal Structures Act 117 of 1998.

The powers and duties given to both the local government and the traditional authorities are similar and yet their respective functions are not clearly distinguished in the manner which they carried out. The Freedom Charter provides that all shall have rights to occupy the land where ever they choose[42]. Section 25(1) of the Constitution[43] states that "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.[44] The

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[38] South African History ONLINE(SAHO)http://www.sahistory.org.za/article/role-traditional-leaders-during-apartheid,02-04-15
[39] Ibid note 37
[40]Talia Meer and Craig Campbell, Traditional leadership in democratic South Africa, 2007
[41] Meer (n40)
[42] African national congress ,freedom charter 1995
[43]Constitution(n19)
[44] Ibid note 19

Constitution further seeks to "achieve a balance between the protection of existing property rights on the one hand, and constitutional guarantees of land reform on the other hand. The property clause itself now provides clear constitutional authority for land reform. The equality clause also provides clear authority for a programme aimed at achieving substantive equality".[45]

The undistinguished functions and duties of traditional authorities and local government defeat the provisions of Section 25(1) of the constitution by depriving people access of land in rural areas.

6. AIM AND OBJECTIVES OF THE STUDY

The aim of the study is to:

- analyse the roles and functions of the local government and traditional leaders in ensuring that access to, land is granted for the purpose of implementing policy on provision of developmental projects in the rural areas including;
- highlighting of the right procedures and processes to follow in order to access land in rural areas for development projects.

6.2. Objectives of the study

The key objective of the study is to examine the laws promoting access to land for developmental projects in the rural areas in South Africa. They include:

- Defining the roles and functions of local government and traditional leaders;
- Ensuring that challenges emanating from overlapping functions and roles of these institutions are dealt away with.
- Establishing less bureaucracy for lengthy procedure of accessing land in rural areas, in order to give effect to speedy delivery of land for purposes of development within the rural areas.

7. RESEARCH METHODOLOGY

The research methodology used in this study will be non-empirical (qualitative) approach generally acceptable in legal research activities. Pursuant to this, existing literature will be used as sources to analyse and examine each legal issue raised in

[45] Constitution(n19)

order to come up with novel opinion on the issue. The study was library based and relied on numerous scholarly articles relevant to the issues surrounding the promotion of access to land in the rural areas for development projects.

8. SIGNIFICANCE OF PROPOSED STUDY

The study will enlighten the society of proper procedures to be followed in order to access land in rural areas for development purposes, by clarifying the role and functions of traditional leaders and the local government. It will also highlight the challenges that are still experienced, despite the legislations and policies which are put in place to regulate the functions and duties of both traditional authorities and local government. The study will further makes recommendations, suggestions and opinions towards resolving the challenges faced in accessing land for development projects in rural areas.

CHAPTER TWO: LEGAL ANALYSIS OF LAND POLICIES AND FRAMEWORK IN SOUTH AFRICA

2.1. LAND POLICIES AND LAND FRAMEWORK

Since 1994, the Department of Land Affairs has developed a complete and far reaching land reform policy and programme based on the contribution made to the national reconciliation, growth and development initiatives.[46] The final stage of the process of development, consultation and implementation which took about two and a half years resulted in the White Paper on Land Policy which aimed to redress the injustices of apartheid. The White Paper highlights key objectives which are based on finding new ways to accelerate and sustain the delivery of services, particularly to the poor [47]. The Reconstruction and Development Programme (RDP) provided a set of guidelines and principles that gave guidance to the initial process of formulating the land reform policy and programme. This took place a year after the Department of Land Affairs promulgated a Framework Document on Land Policy[48]. This was the beginning of the "process of public consultation regarding land policy issues". Organisations, such as farmers' associations, NGOs, government departments and concerned individuals, responded to the Framework Document".[49] At the same time, a "series of task teams of experts with knowledge in the different areas of land policy worked to refine and develop the different issues such as the inequitable distribution of land ownership.[50] Their work, together with the public comments, were incorporated into a Draft Statement of Land Policy and Principles that was the basic document discussed at the National Land Policy Conference held on 31 August and 1 September 1995".[51]

All participants[52] expressed their views as on the way forward for reform of the land policy. These views, together with feedback from the implementation process, were again taken into account in formulating the Green Paper on Land Policy.[53] In

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[46] White Paper on Land Policy 1995.
[47] White Paper(n46)
[48] Ibid note 46
[49] White Paper (n46)
[50] Ibid note 46
[51] White Paper(n46)
[52] Farmers, associations, NGO'S, government departments and concerned individuals
[53] Green Paper on South African Land Reform Policy 1996.

February 1996, the Green Paper which contained a number of valid suggestions on policy issues was distributed. About 50 written responses were received from the public which solicitation for submission was made. A number of workshops were held in all the nine provinces, where the Green Paper was brought before all stakeholders and communities. More than 30 of these workshops were conducted in rural areas. When reviewing policies and programmes, public concerns regarding land matters were taken into account. The Department of Land affairs in its endeavours has been significantly guided by the inputs of this process, which ensured that the land policy contained in the White Paper reflected the deepest concerns of the public.[54].

2.2. LAWS THAT ARE APPLICABLE TO THE LAND REFORM PROGRAMME

The government of South Africa has passed laws which are most applicable to land reform programme. The following are some of the laws which are relevant to the Land Reform programme.

2.2.1. Interim Protection of Informal Land Rights Act (No 31 of 1996) (IPILRA)

This Act aimed at protecting people with insecure tenure from losing their rights to land while land reform is being introduced. Section 2 of the Act provides that "Where land is held on a communal basis, a person may, subject to subsection (4), be deprived of such land or right in land in accordance with the custom and usage of that community". This implies that people could not easily get access of the land in communal areas, they had to first comply with the customs and usage of that community. People who are not well acquainted with the customs of the community were deprived access to land, merely because they did not comply with the customs or usage of that community. Although section 2 of the Act makes provision for deprivation of land rights, Section 3 provides if the deprivation is as a result of disposal of land by the community, the state shall pay compensation to any person deprived of such informal right to occupy land.

[54]White paper (n46)

The Communal Land Rights Act of 2004 elaborates more on provisions set out in the IPILRA. The main objectives of this Act[55] are to "provide for legal security of tenure by transferring communal land, to provide for the conduct of a land rights enquiry, to determine the transition from old order rights to new order rights and to provide for the democratic administration of communal land by communities".[56] It further makes provision for the co-operative performance of municipal functions on communal lands. Section 37 of the Act makes provision for municipal services and development infrastructure on communal land. It provides that "despite the other provisions of this Act and the provisions of any other law, no law shall prohibit a municipality from providing services and development infrastructure and from performing its constitutional functions on communal land. However held or owned". This clearly states that a municipality has undisturbed rights to develop communal land despite of the overlapping functions it has with other institutions with regards to land administration in rural areas.

2.2.2. Communal Property Associations Act (No 28 of 1996)

This Act makes provision for communities or groups of people to acquire and manage property under a written constitution. The Act established communal property associates which "are generally ineffective, and a number of theoretical problems support this opinion".[57] The reasons include "uncertainty about the status of members, improper allocation of substantive rights and mismanagement of the land. Communal property associations also do not adhere to democratic principles that the Communal Property Associations Act prescribes. The constitutional ideal of a more equitable dispensation of access to land, natural resources, and security of tenure is therefore jeopardised. Hence, the government is losing credibility with regard to its promises of delivery."[58]

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[55] Communal Land Rights Act of 2004

[56] Ibid note 55

[57] Petrus Jacobus Jacobs, Tenure security under the communal property association Act 28 of 1996:an analysis and establishment of management procedures with comparative reference to Sectional Tittles Act 95 of 1986, 2011

[58] Petrus(n56)

2.2.3. Land Reform (Labour Tenants) Act (No 3 of 1996)

This Act protects the rights of labour tenants and enables them to acquire permanent land to live and work on. Section 3 (1) of the Act provides that "a person who was a labour tenant on 2 June 1995 shall have the right with his or her family members to occupy and use that part of the farm in question, which he or she or his or her associate was using and occupying on that date; and the occupation and use of which is restored to him or her in terms of this Act or any other law."[59] This right can only be terminated in terms of this Act.

2.2.4. Extension of Security of Tenure Act (No 62 of 1997) (ESTA)

This Act makes provision for people who occupied someone else's land on or after 4 February 1997 with permission from the land owner, to secure legal right to continue living on and using that land in terms of section 6(1). Section 8(1) specifies clearly on which grounds the landlord may evict an occupier and section 10(1) provides grounds on which an order of eviction may be granted. The Act also specifies what the landlord needs to comply with before evicting the tenant.

The provisions of the Act have been flaunted by many land owners. They rather preferred to evict the tenants based on their terms, without fully complying with the procedures set out in the Act. The implementation of the Act was not quite successful which led to the enactment of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.[60]

2.2.5. Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (No 19 of 1998) (PIE)

This Act sets out clearly how land can be occupied in an orderly manner. It further explains when and how unlawful occupiers can be evicted and how to prohibit unlawful eviction. This Act repeals the Prevention of Illegal Squatting Act of 1951. Section 4 of the Act provides that "a notice must be given to unlawful occupiers, at least in 14 days before the hearing".[61] The Act requires that before evicting people a

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[59] Land Reform Act no 3 of 1996
[60] Land Act 19 of 1998
[61] Section 4 of the prevention of illegal eviction from unlawful occupation of land Act 19 of 1998

land owner must give them a notice which will give the people an opportunity to get a legal representative if needs be and defend them before the court. The time period given for the notice affords the people a reasonable time to vacate the land.

The Case Of Grootboom V Oesternberg Municipality 2000 ZACC 19,2001(1) SA 46 (CC),200(11) BCLR 1169(CC)

A group of people living in appalling conditions while awaiting their turn to be allocated low cost housing, decided to illegally occupy a land which belonged to someone else, and they were subsequently evicted. The cause of their problem was the intolerable situation which they were living under, since the environment was inhabitable. The court considered the legality of the conduct of the local authority which evicted the group of people. The magistrate court had ordered the people to vacate the land on a particular day failure of which they would face eviction .However the eviction under the control of the municipality took place a day earlier. The court held that the eviction was in violation of the negative obligation in Section 26(1) of the Constitution.[62] It was also in contravention of environmental justice as their houses were demolished and left homeless. The people were not only deprived of their right to adequate housing, but were also subjected to living under appalling conditions.

In this case the people were given notice in terms of Section 4(1) as it is required by the Act,[63] but they subsequently failed to vacate the land although the eviction took place a day earlier than it was stated in the notice. The people were not illegally evicted from the land but were given reasonable time to vacate the land, which they did not do. Section 4 (6) of the Act provides that "if an unlawful occupier has occupied the land for a period not exceeding 6 months when the proceedings were instituted, the court may grant an order of eviction if it is of the opinion that it is just and equitable to do so, after considering relevant circumstances including the rights and need of the elderly, children's, disabled persons and households headed by women".[64] It was held that a temporary place for the people to stay should have been provided for them. It appears that the municipality did not take proper

[62] Ibid note 19
[63] Prevention of illegal eviction from and unlawful occupation of the land Act 19 of 1998
[64] Ibid note 63 Section 4(6)

consideration of section 4(6) and (7) when effecting the eviction, as among the group of people, were children and elderly people including households which were headed by women.

2.2.6. The Transformation of Certain Rural Areas Act No 94 of 1998

This Act aims at "allowing the transfer of 1.7 million hectares of land to the communities consisting of 70 000 people in the former 'coloured reserves' in the Western Cape, Northern Cape, Eastern Cape and Free State".[65]

Land tenure is the conditions under which a land is held. In 1996 the Parliament passed or issued two most important pieces of legislation to the tenure. These legislations are; Interim Protection of Informal Land Rights Act, 31 of 1996, and the Communal Property Associations Act, 28 of 1996. The first is a "holding mechanism that prevents violation of existing interests in land until new long-term legislation is in place. The latter provides a means through which people wanting to hold land jointly and in groups can organise their tenure. In addition, the Upgrading of Land Tenure Rights Act, 112 of 1991, was amended to bring it in line with tenure policy".[66]

2.3. DEVELOPMENT FACILITATION ACT 67 OF 1995

The Development Facilitation Act[67] introduced "measures such as Section 67 to facilitate and expedite land for development projects. It aims to overcome bottlenecks in existing regulations to accelerate land development, especially the delivery of serviced land for low income housing".[68]

The Act makes provision for the "formulation of 'land development objectives', or development performance measures, at local government level, as a fast track alternative to current time consuming procedures".[69]This also implies that provincial

[65]White paper(n46)
[66] Ibid note 46
[67] Development Facilitation Act 67 of 1995
[68]White paper (n46)
[69] Ibid note 67 Section 27,28 and 29

government can assess the intention and performance of the local government. The importance of land development objectives is to "guide land development decisions with regard to goals and development in a particular area, taking into account the availability of resources in that area".[70]In order to avoid delays in decision making, support must be given to local authorities especially in rural institutions, in the formulation of these objectives. The process of setting land development objectives need to be harmonised with the Integrated Development Plans required in local government legislation.[71]

The Development Facilitation Act operates hand in hand with existing land development and planning legislation such as Spatial Planning and Land Use Management Act No 16 of 2013. The main objective of the Act is to "establish the provincial development tribunals which are responsible for government approvals of land development.[72] This will also quicken development decision-making, assist as a conflict resolution mechanism between stakeholders and foster greater community involvement in land development".[73]

The Development Facilitation Act has established the National Development and Planning Commission, which investigated a new legislative and policy framework for land development and planning in South Africa. Its purpose is to "advise national government and, if so requested, provincial government on future policies and laws dealing with land development procedures".[74]

The introduction of the White Paper on Local Government in March 1998 replaced the Green Paper on South African Land Reform Policy of 1996. There were issues in the Green Paper which were raised as critical issues that required further consideration, such as confusion and misunderstanding regarding the roles of elected councillors and traditional leaders with regard to the delivery of services; lack of infrastructure, funding and capacity in the case of both traditional authorities and municipalities. Which strains rural development initiatives as well the tension arising from land matters between municipal councils and traditional leaders are but a

[70] Ibid note 46
[71] White Paper(n46)
[72] Ibid note 46
[73] White Paper(n46)
[74] Ibid note 2

few.[75]The Green Paper requires that land tenure and land administration systems must meet development priorities and accommodate the interests of traditional leaders.

The Green Paper referred to a "proposal made by the Department of Land Affairs for joint representation by Traditional leaders and local councillors (and other role players) on statutory land boards on a primary and district level"[76]. Such land boards would among others consider applications for leases and the release of land for development. In the case of lack of effective day-to-day communication between municipal councils and traditional authorities,[77] the Green Paper suggested that a "mechanism must be created to enable the Traditional leadership and municipalities to act jointly on issues of common concern, and for communication between the two to be enhanced".[78]

The Green paper acknowledged that "traditional authorities and municipalities have similar statutory powers, functions, jurisdiction and constituency. The need was expressed that the relationship between these two institutions be organised in such a way that each can fulfil their constitutional mandate and contribute effectively to rural development".[79]Although the Green Paper did not spell out what the role of the Traditional leaders should be, it at least acknowledged that local government (municipalities) and traditional leaders (authorities) have similar statutory powers and functions as well as jurisdiction and constituencies. The White Paper only addresses the relationship between traditional leaders and municipalities (local government). Issues such as the courts and customary law, communal tenure and land trusteeship and other issues are left to the Department Justice, the Department of Land Affairs and the Department of Constitutional Development who initiated a White Paper drafting process on traditional affairs.[80]

According to the White Paper on Local Government the responsibilities and duties of a traditional leader are to act as head of a tribal authority subject to limited

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[75] White Paper(n2)
[76] B De Wet, C Rautenbach,W Duplessis,J Williams,TE Scheepers,constitutional provisions on the role of traditional leaders and elected local councillors at a rural level
[77]De Wet, Rautenbach, Duplessis, Williams, Scheepers,(n 76)
[78]Ibid note 76
[79] De Wet, Rautenbach, Duplessis, Williams, Scheepers,(n76) p 83
[80]De Wet, Rautenbach, Duplessis, Williams, Scheepers,(n76), p 84

legislative, executive and administrative powers; to preside over customary law courts and maintain law and order; to consult his or her communities through the tribal court regarding their needs and priorities and to provide them with information; to assist members of the community in their dealings with the state; to advise government through the National Council on Traditional Leaders and the various provincial Houses of Traditional Leaders; to protect cultural values and to provide a sense of community in their areas through a communal social frame of reference to be the spokesperson of the community; to serve as symbol of unity in the community and to be the custodian and protector of the community's customs and general welfare.[81]

Traditional leader's developmental role includes "the making of recommendations on land allocation and the settlement of land disputes, lobbying government and other agencies for the development of their areas. Ensuring that the traditional community participates in decisions on development and contribute to development costs, considering and making recommendations to authorities trading licences in their areas in accordance with the law[82]." Where there are rich mineral deposits, these resources are to be used to contribute to development of the community.

The 1997 White Paper stresses that where a function was allocated to a Municipality in terms of Chapter 7 of the 1996 Constitution, the municipality has sole jurisdiction over the matter. If this is the case, then Traditional Authorities will have no jurisdiction in their own affairs in any of the matters referred to in Chapter 7 of the 1996 Constitution and the functions listed in Schedules 4 and 5 of the 1996 Constitution. The only "influence that traditional authorities will have in their own areas will be in the case of development where a co-operative relationship that has been developed in terms of the White Paper".[83]

The White Paper states that where functions of local governments and traditional leaders overlap, the traditional authorities or institutions of their choice will be responsible for the general administration and the allocation of land. From what has been stated above it is clear that the Constitution and other laws provide for two

[81] Ibid note 76
[82] Constitution(n19)
[83] Ibid note 76, p 85

institutions Local and community level, that is, local authorities consisting of, *inter alia*, elected councillors and officials as well as traditional authorities consisting of ,*inter alia*, tribal councillors and traditional leaders. Communities need leaders and managers. In the development process of civil Society all communities have leaders. Rural communities have traditional leaders. Local government structures provides for the need of local leaders to act as managers of the development process. Both are needed by the people. Both types of councillors are, however, leaders who must participate in managing the process of change and improving the quality of life of the People they are responsible for".[84]

There are differences and similarities in the functions of the different leaders working at the community level. These differences must not be viewed subjectively as resulting in a conflict of interests and clash of responsibility. Conflict is created when a leader, or a leadership institution, lays a claim of being the only person or institution responsible for the well-being or aspects of development; it is because of this perception that other role players are excluded. Taking into account the development process at local or community level, it should be kept in mind that development is an inclusive process which requires the involvement of all role players which are not in competition. What is presently experienced in rural areas in South Africa is a result of conflict between local councillors and traditional leaders, which emanated from the perception that one group, has powers which supersede the other. Lack of understanding of how to democratically achieve sustainable development within the value framework and spirit of the Constitution has also contributed to this.[85]

The White Paper on Local Government made more emphasises on the relationship between traditional leadership and local government. The Constitution of the Republic of South Africa of 1996 [86] recognises that both institutions have their own functions that differ in some respects but overlap in others. It is stated in the White Paper on Local Government that "these have been a source of tension and had hampered development in certain rural areas."[87]

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[84] De Wet, Rautenbach, Duplessis, Williams, Scheepers,(n76), p 86
[85] Ibid note 76
[86] Ibid note 19
[87] De Wet, Rautenbach, Duplessis, Williams, Scheepers,(n76)

Section 211 of the 1996 Constitution[88] makes provision "for the recognition of the institution, role and status of traditional leadership according to customary law subject to the Constitution. Traditional leaders function subject to applicable legislation and customs which include amendments to and repeal of those legislations or customs".[89]

Land is an invaluable asset to people and for future generations. "Land is the most basic need for rural dwellers; Apartheid policies pushed millions of black South Africans into overcrowded and impoverished reserves, homelands and townships".[90]It is only the minority of black people that can afford land on a free market; this is so because even the abolition of the Land Acts also cannot redress inequities in land distribution.[91] A national land reform programme plays an important role as the central and driving force of the programme of rural development. Such a programme aims to "redress effectively the injustices of forced removals and the historical denial of access to land. It aims to ensure security of tenure for rural dwellers. And in implementing the national land reform programme, and through the provision of support services, the democratic government will build the economy by generating large-scale employment increasing rural incomes and eliminating overcrowding".[92]

The RDP provides for the implementation of a fundamental land reform programme which must be "demand-driven and aims to supply residential and productive land to the poorest section of the rural population and aspirant farmers. As part of a comprehensive rural development policy, it must also raise rural incomes and productivity, and encourage the use of land for agricultural, other productive or residential purposes. The land policy must ensure security of tenure for all South Africans, regardless of their system of land-holding. It must remove all forms of discrimination in women's access to land".[93]

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[88] Constitution (19)
[89] Willemien du Plessis and Theo Scheepers, House of Traditional Leaders: Role, problems and future,1999
[90] Ruth Hall and Lionel Cliffe, Another country side?,2009,p1
[91] Hall and Cliffe(n90)
[92] Ibid note 15 p19-20.
[93] Ibid note 89, p 19-20.

2.4. WILLING BUYER AND WILLING SELLER PRINCIPLE

The concept of a willing buyer and a willing seller is a completely voluntary transaction between a seller and a buyer, which in South Africa practically implies a process of redistribution where by Government officials rather than beneficiaries engage in negotiations with the owner.

The South African Constitution[94] places a positive obligation on the state to "take reasonable legislative and other measures, within its available resources" to effect land redistribution. The state is allowed to expropriate property forcibly if need be to achieve this purpose; this is in terms of Section 25 (3) of the Bill of Rights. This means that the state may validly expropriate property (even in cases where the owners of that property are not willing to cede their property or are not willing to cede their property at the price offered), when the expropriation is intended for redistribution of land to address the effects of widespread colonial and apartheid-era land dispossession.[95]

The state is not required by any provision in the constitution to comply with the "willing-buyer willing-seller" land redistribution policy. This policy has in some ways allowed property owners to hinder the redistribution efforts, as it allows "property owners to refuse to have their property expropriated and also allows them to hold the government to ransom by demanding that the state pay exorbitant prices for property intended for expropriation".[96]

Taking into account the snail pace which the land reform is moving and the exorbitant cost of the "willing-buyer willing-seller policy", it can be argued that the current land reform policy is unconstitutional because of its unreasonable measures, as they do not allow the state to move as quickly and efficiently as possible to address the effects of past unfair (race-based) land dispossession.[97] A new

[94] Ibid note 19 Section 25(5)
[95] Piere De Vos, Constitutionaly speaking , 2013
[96] De Vos(n 95)
[97] Ibid note 96

approach along the general lines of the proposed Property Valuations Bill and Expropriations Bill is therefore needed to deal with land redistribution.[98]

2.5 PROPOSED POLICY; THE LAND HOLDINGS BILL

The Land Holdings Bill is referred to as a practice that limits ownership of land by foreign nationals and the juristic persons by the President of the Republic of South Africa, as an established practice internationally.[99] The proposed policy states that "foreign nationals and juristic persons are understood to be non-citizens as well as juristic persons whose dominant share holder or controller is a foreign controlled enterprise, entity or interest, hence not all immigrants to South Africa will be excluded from land ownership."[100]This category of foreign nationals as they are regarded as non-citizens will only own land in freehold from the time the policy will be passed into law, they will also be allowed to lease long term leases of 30 to 50 years, as the policy states.

According to the policy, it was acknowledged that this will not apply retrospectively without having infringed some constitutional provisions. However those who have already acquired freehold would not have their tenure changed by the passing of the proposed law (the Regulation of Land Holdings Bill).However, the Presidency said "in such instances, the Right of First Refusal will apply in favour of another South African citizen in freehold or the state if the land is deemed strategic".[101]

The policy further states that the law will classify that ownership of land by foreign nationals (non-citizens) in areas which are environmentally and security sensitive lands as well as those that are of historic and cultural significance and strategic lands (for land reform and socio-economic development) will be discouraged[102]. It is a general view that a call for compulsory land holdings disclosures will affect the policy. These disclosures will be in terms of "race, nationality, gender, extent of land owned and its use".[103]

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[98]De vos(n95)
[99]Mac Maharaj,Limiting foreign ownership on land South Africa, 2015, issued by the presidency
[100] Maharaj(n99)
[101] Ibid note 99
[102] Maharaj(n99)
[103]State of the Nation Address 2015.

The process of implementation of the Bill will be managed through a "land commission established, amongst others, to call for these disclosures, collect and assess the information and maintain it in collaboration with the national deeds registry".[104]The policy seeks to address problems such as the need to secure the limited land for food security and address the land injustice of more than 300 years of colonialism and apartheid.

Access to a land allotment for households and rural entrepreneurs' and enterprises has shown to go a long way in addressing equity and poverty.[105] The policy states that "in many instances high value agricultural land has had its use changed to luxury and leisure uses and environmentally sensitive lands have also been inappropriately developed In some parts of the country, an escalation in prices has been experienced which has made land in these areas inaccessible to citizens.[106]The proposed policy makes provisions for exemptions to access land in classified areas based on certain conditions, primarily developmental".[107]

2.6. CONTRIBUTION OF LAWS IN THE REALISATION OF ACCESS TO LAND FOR DEVELOPMENTAL PROJECTS

South African laws have contributed to access to land for developmental projects in the rural areas in many different ways. Although some of the contributions did not have much impact due to poor implementation of laws. Section 25 of the Constitution provides that "no law may permit arbitrary deprivation of property"[108] and this includes land, hence the provision of this section entitles people to have a right to access land. However this is subject to law of general application. The Reconstruction and Development Programme (RDP) also provides a set of guidelines and principles that gives direction to the initial process of formulating the land reform policy and programme, with the main aim of addressing the immense socio-economic problems brought about by the consequences of the struggle under the apartheid regime.[109]

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[104] State of the Nation Address(n103)
[105] Ibid note 103
[106] State of the Nation Address(n103)
[107] Ibid note 103
[108] Constitution (19)
[109] Reconstruction and Development Programme(n15)

This led to the adoption of additional legislation such as the Restitution of Land Rights Act of 1994 which established the Commission on Restitution of Land Rights (CRLR) that "contributed to access of land in rural areas by providing equitable redress to victims of racially motivated land dispossession, in line with the provisions of the Act".[110] But this did not eliminate the reality of white people owning large portions of land belonging to the historically disadvantaged blacks in the rural areas. The White Paper on Land Policy also contributed to access of land by aiming at redressing the injustices of apartheid highlighting the key objectives which are based on finding new ways to accelerate and sustain the delivery of services particularly to the poor.[111] These aspirants could only be achieved with access to developmental infrastructures in rural areas, which then requires a uniform procedure to acquire land for developmental projects.

The above efforts were to be complimented by Rural Development and Land Reform (DRDLR) "to improve the economy of the country, by acquiring land in the rural areas and distributing it among the people for developmental projects, and also to ensure that sustained production on land is provided for by government".[112] The approach did not redress the entire challenges; hence access to land in rural areas is still hindered by other factors such as the overlapping scope and duties of the traditional rulers and local government with regard to allocation of land for development projects.

The Comprehensive Rural Development Programme (CRDP) was also adopted to redress the challenges of accessing land for developmental projects such as farming in rural areas. It mainly focuses on enabling rural people to take control of their lives, with support from government. The programme "aims to effectively deal with rural poverty through the optimal use and management of natural resources through an integrated broad-based agrarian transformation and the strategic investment in economic and social infrastructure that will benefit rural communities. However in order to achieve this legislations must provide a clear procedure to undertake for purposes of acquiring land in rural areas for development projects".[113]

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[110] Restitution of Land Rights Act 1994
[111] Ibid note 2
[112] Rural development land reform policy ,2009
[113] Comprehensive rural development programme,july ,2009

2.7. SUMMARY OF CHAPTER TWO

With all the legislation discussed above, access to land in rural areas for development purposes still remains a challenge which has not yet been properly addressed. Despite the fact that previous legislations have been enacted to address the problems of acquisition of land for development poor implementation has hindered the objectives set out in these multiple regulatory interventions.

CHAPTER THREE: FUNCTIONS AND DUTIES OF TRADITIONAL AUTHORITIES AND LOCAL GOVERNMENT IN RESPECT OF LAND ALLOCATION IN RURAL AREAS

3.1TRADITIONAL AUTHORITIES

Section 211 of the Constitution[114] makes provision for the "recognition of the traditional authority, role and status of traditional leadership according to customary law subject to the Constitution. Traditional leaders function subject to applicable legislation and customs which include amendments to and repeal of those legislation or customs".[115] Traditional leaders are responsible for changing the customs and tradition within their respective area of jurisdiction. The 1996 Constitution states that "national legislations must provide for the role of traditional leadership as an institution at the local level on matters affecting local communities."[116]

According to section 3(1) of the Traditional Leadership and Governance Framework Act, any area which is recognised by the premier as a traditional community must have a traditional council. These councils consist of mostly unelected members who amongst them are the traditional authorities and their appointees. The position of traditional leadership is not only recognised or acknowledged in the local government, but is also recognised at the provincial level by the Act.[117]

The communal Land Rights Bill which was amended on 8 October 2003 makes provision for the role of traditional authorities in land administration.[118]The amendment states that "the traditional councils established in terms of the

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[114] Ibid note 19
[115]De Wet, Rautenbach, Duplessis, Williams, Scheepers,(n76)
[116]Constitution (n19)
[117]Section 3 (1) of the Traditional Leadership and Governance Framework Act 41 of 2003.
[118] Ibid note 55

Framework Act, will have land allocation and administration powers and functions in communal areas."[119]

The traditional leadership councils of areas that observe customary law, or Communal Property Associations(CPA's) or Trusts outside these areas are vested with administrative responsibilities related to such communal area's land.[120] As outlined in the White Paper on Traditional Leadership and Governance, such responsibilities are set out as follows.[121]

3.1.1. Functions of Traditional Leaders

• Local land administration and governance.

The White Paper states that "traditional leaders must administer the affairs of the community in accordance with the customs and traditions".[122] According to Bantus Homelands Act[123], traditional councils' role as single title holders on communal land, would include land allocation and adjudication of disputes on land allocation and uses.

• Facilitate community involvement.

The traditional authorities must "facilitate the involvement of the traditional community in the development or amendment of the integrated development plan of a municipality in whose areas that community resides". [124]

• Communicate community needs.

Traditional leaders must 'work together with the municipalities in the identification of the community needs". [125] Community needs can only be identified through proper communication channels with the people, which can be achieved through public participation and meetings with the traditional authorities, who have the responsibility to communicate the needs of the community to the local authority.

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[119] Ibid note 17
[120] Communal Land Tenure (n17)
[121] Ibid note 17
[122] White paper local government 1998
[123] Black Authorities Act 68 of 1951
[124] Ibid note 123
[125] White paper (n122)

• Recommend appropriate interventions.

Traditional leaders must recommend, after consultation with the relevant Local House and the Provincial House of Traditional Leaders, appropriate interventions to government that will contribute to development and service delivery within the area of jurisdiction of the traditional council.

• Promote sustainable development.

Traditional leaders must "promote the ideals of co-operative governance, integrated development planning, sustainable development and service delivery and also promote indigenous knowledge systems for sustainable development and disaster management".[126]

• Participate in development programmes of government.

The traditional leaders must "participate in the development of policy and legislation at local level and also participate in the development programmes of municipalities and of the provincial and national spheres of government".[127]

• Manage community affairs according to custom and tradition.

The traditional leader must "promote peace and stability amongst members of traditional communities and promote social cohesion within the traditional community. And where he deems fit reject and proscribe such practices as the sowing of divisions based on tribalism".[128]

3.1.2. Authority

Traditional leaders have authority in the area that observes custom and tradition. This authority is derived from the constitution; they also have authority in the Participatory Land Administration of such land. Traditional authorities can also resolve community and household conflict which arises within their area of jurisdiction and they are also the custodian of indigenous knowledge of that particular tribe or community.

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[126] Ibid note 222
[127] White paper (n122)
[128] Ibid note 122

3.1.4. Responsibility

One of the major responsibilities of a traditional leader in a community is involving the community in decision-making. Before making decisions traditional leaders must hold meetings with the community, discuss the issues and the intended action to be taken and by agreement a decision can be taken. Although traditional leaders have advisors (headmen) they also need to consult the public before making decisions. The traditional leader also partakes in processes of the municipality and facilitation of access to services from government. Traditional leaders promote collaboration and mutual respect with local government and also promote good governance by ensuring participation in land administration. The legislation put into place to regulate such participation in land administration creates an overlap of responsibility between the local government and traditional leaders by not specifically drawing a clear separation the roles of each body.

3.1.3. Restrictions of roles and functions of Traditional Leaders and Local Government.

It is a historic norm that a traditional leader performs local service functions. One of the limitations which traditional leadership experiences, is that their leadership is inherited and is not elected.[129] Therefore, such leadership can only flow in a particular blood line and is not open to anyone. Only the oldest heir of that blood line can inherit the leadership.[130] Although some customs prohibited women from being traditional leaders, in the case of *Shilubana and Others v Nwamintwa*[131] the court ruled against the principle of male primogeniture. The decision validated women rights to become traditional rulers. Traditional leaders usually have subtle competition with the municipalities in that they have duties which overlap one another. As a result, the procedure to access land for purposes of developmental projects in rural areas becomes a complex matter. For instance, when one needs to apply for a business site, traditional leaders will require the applicant to obtain a resolution from the traditional court and on the other hand the local government will require the applicant to make an application to the municipality requesting for a

[129]De Villiers local provincial intergovernmental relations, a comparative analysis 1997
[130]De Villiers(n129)
[131](CCT03/07)[2008]ZACC9;2008

business site. Between the traditional leaders and the local government, it is not quite clear who has the authority to exercise which functions and to what extent.

3.2. MUNICIPALITY

Section 151 of the Constitution[132] states that the local sphere of government consists of municipalities that are established across the whole of South Africa.[133]Before the introduction of the 1993 Constitution[134], in general no municipalities existed in rural areas and the services in those areas were mainly provided by the regional services councils. Although some towns had local authorities, these were not extended to the non-urban areas.[135]

A municipality[136] "governs on its own initiative the local government affairs of its community subject to national and provincial legislation".[137] Section 153 of the Constitution makes provision for development functions of the municipalities.[138]A municipality must give "priority to the basic needs of the community and promote social and economic development and also participate in the national and provincial development programmes".[139] It must structure and manage the administration of its budget and planning process to achieve these goals.[140]

Matters listed in schedule 4 part B under Executive Authority of the Municipality,[141] and Schedule 5 part B of the Constitution outlines, amongst others, control of public nuisance, control of undertakings that sell liquor to the public, fencing and fences and local sports facilities,[142] as well as any other matter assigned or delegated to it in terms of the national or provincial legislation.[143] The national and provincial governments may assign or delegate part A functions (administration of indigenous forests, disaster management, housing and cultural matters) of schedule 4 and 5 to

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[132] Ibid note 129
[133] De Villiers(n129)
[134] Act 200 of 1993
[135]B De Wet, C Rautenbach,W Duplessis,J Williams,TE Scheepers,constitutional provisions on the role of traditional leaders and elected local councillors at a rural level
[136] Ibid note 19
[137] Constitution(n19) Section 153(1)
[138] Ibid note 19
[139]Constitution(n19)
[140] Ibid note 76
[141] Concurrent legislative powers of provinces with national government dealing with local government issues section 156(1),read with section 155(3), section 146 regulates the conflict that may occur
[142] Ibid note 19
[143] Section 156(1) read with section 155(3) executive legislative powers dealing with local government issues

local government if they are of the opinion that the municipality has the capacity to administer the matter and that such administration could be done most effectively locally. Municipalities are empowered to issue and administer by laws in this regard.

Schedule 4 part B functions include amongst **others "air pollution, building** regulations, municipal planning, trading regulations, municipal health services, Municipal public works and **tourism**".[144] Schedule 5 part B functions include among **others "billboards and display of** advertisement in public places, cemeteries, funeral parlours, undertaking to sell liquor to the public, facilities for accommodation, markets, municipal parks **and recreation, municipal roads and street trading**".[145] Other municipal responsibilities as set out in the Communal Land Tenure policy are as follows.[146]

Some of the functions of the municipality are spatial planning and land use management; these are according to section 156(1) read with part B of schedule 4 of the Constitution[147]. These functions were also confirmed in the case of, *the* ***City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & Others***[148]. A dispute arose in the case of the City of Johannesburg Metropolitan Municipality and the Gauteng Development Tribunal a provincial organ of the state which was created by the Development Facilitation Act[149] (DFA), the tribunal given the responsibility to approve applications for the rezoning of the land establishment of the townships. At the same time the Gauteng Town Planning and Township Ordinance [150] has the same powers to approve applications for the rezoning of the land establishment of the townships.

The constitutionality of the DFA was challenged. The matter went as far as the Constitutional Court which upheld the decision of the Supreme Court of Appeal by **stating that** "planning in the context of municipal affairs has assumed a particular,

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[144] Ibid note 19 Schedule 4
[145] Ibid note 19 Schedule 5
[146] Ibid note 17
[147] Constitution (n19)
[148](CCT 89/09 [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010(9) BCLR 859 (CC) (18 June 2010)
[149] Ibid note 67
[150] Gauteng Town planning and township Ordinance 15 of 1986

well-established meaning which includes the zoning of land and the establishment of townships".[151]

Section 156 (1) read together with part B of schedule 4 of the Constitution assigns an exclusive function to municipalities which in this particular case can be seen as the powers to consider and approve applications for the rezoning of land and the establishment of townships which forms part of the elements of municipal planning. It is also the duty of the local government to make provision of the basic service and important infrastructures.

3.2.1. Responsibility

The local government has the authority to establish service standards, by laws and also to enforce them. Local government has the responsibility to provide quality and reliable services to the community, conduct genuine participation rather than compliant consultations, deal with infrastructure development and also fight corruption in their governance of the particular area.[152]

3.2.2. Constrains

One of the greatest constrains experienced by the local government is the great reliance placed, which is solely based on equitable share and the lack of skills and human resource. This also adds to the already difficult position the local government is experiencing when performing its functions.

3.3. THE INTRODUCTION OF VILLAGE COUNCILLORS BY THE MUNICIPALITY

The White Paper on Local Government sets out the framework that guides the role of councillors in the South African system of local government.[153] A developmental model of local government is also proposed by this framework. The philosophy of sustainable ways to meet the socio-economic needs of residents and improve the quality of life of the people, targeting mostly the marginalised and poorest members

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[151] Municipality v Gauteng Development Tribunal & Others(CCT 89/09 [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010(9) BCLR 859 (CC) (18 June 2010)

[152] Organised local government Act 52 of 1997

[153] Ibid note 121

of society is espoused by the developmental local government.[154] These councillors differ in their categories and slightly in their functions.

The Councillors are categorised into two broad categories: there are ward Councillors and Proportional Representation (PR) Councillors. The elections of PR Councillors are conducted through a party list and they are primarily accountable to the party[155] . The PR Councillors at some point when the Ward Councillor is not present serve as a substitute chairperson and may at some point interact with local and provincial party structures. The PR Councillors are also allocated to wards mainly for the purpose of improving their accountability to communities. [156]

Ward Councillors[157] , on the other hand, are expected to ensure that the concerns related to the wards they serve in are presented before the council. The Ward Councillors are also the chairpersons of the council where they make representation of the articulated needs of the residents. Apart from responsibilities Ward Councillors are also responsible for:

• Providing residents with a progress report, explaining the decisions of the council in committing resources to development projects and programmes affecting them;

• Assessing the impact of municipalities' programmes and plans as to whether they are meeting their intended purpose

• Assessing the manner of service delivery on whether it is done fairly, effectively and in a sustainable way;

• Determining whether capital projects are being conducted in accordance with the Integrated Project Delivery Plan;

• Keep a close contact with their constituencies to ensure that council is well informed of all issues on the ground; and

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[154]Gaynor Paradza, Lebogang Mokwena and Robin Richards, Assessing the role of councillors in service delivery at local government level in South Africa,July 2010,

[155] Councillor Induction Programme: Handbook for Municipal Councillors, South African Local Government Association (Salga) and the German Technical Cooperation (GTZ), 2006. p 54

[156] Jossel, L. Local Government. Fiscal Management and Accountability Handbook. Open Society Foundation for South Africa, 2005

[157] Ward councillors are elected by a specific, geographically-defined ward

• Conveying important information from council to the residents. Councillors therefore serve as the interface between the citizens they represent and the municipal officials who design and implement development polices.

The Councillor's job is to ensure that the municipalities implements policies that addresses the needs of citizens and not only to serve as the voice of the people, for the expression of their community needs, but also to act as a watchdog and ensuring that the municipality performs its duties. A Ward Councillor has a duty as chairperson of his or her ward to raise concerns to council on behalf of ward members when residents experience problems relating to the financial management of a council.[158] Councillors are required to make recommendations to municipalities for the improvement of policies and programmes within the broad framework of developmental local government. [159]The introduction of the village counsellors by municipalities limits the powers of traditional leaders in decision making.

Although there are differences there are similarities in these roles, which results in the overlap of functions of the different leaders functioning at the community level. These differences must not be viewed subjectively leading to conflict of interests and clashes over responsibilities. It is only when a leader, or leadership institution, tries to lay claim to being the only person or institution responsible for the well-being or aspects of development, that conflict is created.[160] Such conflict is caused by the perception that a role player excludes other role players. When referring to the development process at local or community level, it should not be forgotten that development is an inclusive process which requires the involvement of all community leaders. Therefore traditional leaders and elected local councillors should not be viewed as leaders in a competition.[161]

And as such, that which is presently experienced in many areas in South Africa as a conflict between local councillors and traditional leaders is merely a result of a perception that the power of the one group excludes the power of the other In addition, this can be understood in terms of lack of understanding of how to

[158] Municipal Finance Management Act, Section 17 (f).
[159]Ibid note 134
[160]De Wet, Rautenbach, Duplessis, Williams, Scheepers,(n76)
[161]Ibid note 76

democratically achieve sustainable development within the value framework and spirit of the Constitution.[162]

3.4. WEAKNESSES IN LAND USE PLANNING, REGULATION AND RURAL DEVELOPMENT

The use of communal area land is mostly undermined by the number of land use regulatory weaknesses. These include among others : the "ineffective and often complete absence of spatial planning and land use zoning in the former homelands; undue bureaucratic red tape and delays for development of communal lands due to the requirement of prior ministerial approvals; the unregulated (uncontrolled) conversion of agricultural land towards non-agricultural land uses such as mining which arises due to absence of clear legal mandates and institutional capacity to enforce the existing land use conversion regulations; and overlapping and competing authorities responsible for land use planning and regulation which creates confusion regarding roles and responsibilities of each institution".[163]

The Municipality is required to prepare an Integrated Development Plan (IDP) in terms of the Municipal Systems Act, 2000[164]. The Act requires that the key concepts be the spatial development framework and land use management system[165] for the whole municipality. The Land Use Management Bill[166] "establishes the national enabling framework to guide spatial planning, land use management and land development throughout the Republic, in terms of which all municipalities are required to prepare a LUMS to regulate the use and development of land".[167]

The requirement for wall to wall zoning (trough land use schemes) was brought by the Land Use Management Bill. This implies bringing of all township establishments within town planning schemes. Currently the manner in which the surveyed land under freehold tenure is managed cannot be handled in the same way which the communal tenure system is zoned. In the freehold tenure, a person exercises exclusive control over the property as opposed to communal tenure as there is a

[162]Paradza, Mokoena and Richards (n134)
[163]Communal Land Tenure (n17)
[164] Municipal System Act no 32 of 2000
[165] Spatial Planning and Land U se Act 16 of 2013
[166] scoping of the important issues among, and affecting, people in the communal tenure, commercial farming, and urban/peri urban locations in South Africa, November 2003
[167]Ibid note 165

sharing of an oversight over the property.[168] Therefore a close alignment of the LUMB and the Communal Land Rights Bill[169] is needed to make provision for different tenure system. Simply naming the communal tenure areas as "mixed use areas" is not necessarily the same as zoning under a land use scheme. Some adjustments will need to be put in place to accommodate communal systems.[170]

3.5. INSECURITY OF TENURE

People residing in communal areas experience insecure land rights as a result of a number of issues. Firstly, the differences in the application of the land rights in communities across the Republic, the legal interpretations which are interchangeably used concerning land ownership and the conflicting conceptual understandings thereof, cause confusion around land rights.[171] Secondly, is the challenge of undemocratic land governance, lack of clarity and the disputes surrounding the land rights that causes weakness in the land rights which are held under the conflicting local land administration institutions such as Trusts, Communal Property Associations (CPAs) and traditional leadership structures.[172]The misconception the public has of responsibilities of the land administrator's results in the hindrance of development in rural areas. This result in people failing to acquire land because of the uncertainty of the information they have pertaining access to such land.

3.6. LACK OF CLARITY IN LAND ALLOCATION PROCEDURES AND IN LAND ADMINISTRATION MATTERS

Land allocation procedures in traditional communal tenure areas are not clearly articulated as reported, nor are they transparent to the public and those seeking land.[173] There is a great general absence of uniform requirements for qualification to apply for land and land allocation procedures. Aggravating to this is the overlapping and contradicting nature of a number of land administration institutions (traditional authorities, CPAs, Trusts, local government) that operate within the communal areas under weak institutional capacities and are often unaccountable to

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[168]Ibid note 57, 2011 ,p 22
[169] Communal Land Rights Bill October 2002
[170]Ibid note 169
[171] Ibid note 57
[172] Ibid note 17
[173]Communal Land Tenure(n17)

communities.[174] In addition, the formulation, implementation and communication of land reform policies are not presented or addressed to the community members. [175]

The initial allocation of land to families and the participation in the founding of communities by the traditional authorities established the role of traditional leaders.[176] The role of traditional leaders continues "through on-going oversight of use and distribution of communal land and serves a mediating function that underlies both the social and spatial distribution of land assets within the community".[177] Similarly, the social and economic protection including the safeguards for community resources are provided for by the assignment and resolution of overlapping and competing use claims.[178]

While authority over land allocation and administration formally transferred to the colonial state as owner of these lands, on the ground many traditional leaders continued to exercise a great deal of control in this respect through official and unofficial allocation of land. However substantial authority has since been returned by the Traditional Leadership and Governance Framework Act No. 41 of 2003 and Communal Land Rights Act No. 11 of 2004, which vest administrative powers over land in traditional councils on behalf of the communities that now own their land".[179] This role of traditional leaders is in all respects based in the authority they have historically exercised over land.[180]

However, customary chiefly ownership' interpretation vary. For instance, land in areas of the Limpopo Province is often referred to as "the chief's land" .In most cases community land would be named after the traditional leader.[181] Such as *Nwa Mintwa* village which is named after the late Chief Nwa Mintwa. However, in such areas as Moleletelo community, land redistribution was received independently by the groups through the use of communal property association and other land structures that permitted group tenure rights, relying on the grounds which are

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[174]Ibid note 17
[175]Communal Land Tenure(n17)
[176]Ibid note 17
[177] Communal Land Tenure
[178]Kristina Eberbach, Amber Kubera, Noëlle Lee Okoth and Aiko Watanabe, Annex 3: Contemporary traditional leaders a study on land and governance in South Africa.
[179] Eberbath,Kubera, Okoth and Watananabe (n178)
[180]Ibid note 178
[181] Eberbath,Kubera, Okoth and Watananabe (n178)

created by the constitution, and as such, the leadership of traditional authorities is not necessary required.[182]

3.7. CHALLENGES AND PITFALLS

The uncertainty of traditional leaders' authority over land and the process through which land is allocated leads to a lack of transparency in land administration.[183] Those who were denied access to land or who regard their share to be inappropriate often criticise the system of land allocation. Most community members are of the opinion that preferential land allocation is given to those with a higher social status, and that the allocation norms still exclude women and the youth. Some are of the opinion that "land allocation is not based on need or equality. And that people without land go to the chief for land and their access depends on the relation of your surname to the chief. If you are close, you have a chance."[184] While generally women do not receive equal access to land, progress has been reported in some communities: "five years ago, everything changed completely, and now women can go to the chief to get land, because of the so-called democracy."[185] Despite the progress made the absence of equality and transparency endured by many community members remain problematic.

The community members experience challenges of balancing local community development and guardianship of the communal land entrusted to traditional leaders due to lack of resources that are needed to develop businesses and to encourage economic growth.[186] There are many obstacles hindering attraction of outside investors to traditional authority areas, which can include their isolation, low profitability, and discrimination against outsiders.[187]

One of the obstacles to investment is the fact that "the acquisition of land for business purposes is more burdensome for those who are not considered members of the community".[188] At the same time, an application for land lease includes making a promise to traditional leader to employ a particular number of community members

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[182] Ibid note 178
[183] Eberbath,Kubera, Okoth and Watananabe (n178)
[184] Ibid note 178
[185] Eberbath,Kubera, Okoth and Watananabe (n178)
[186] Ibid note 178
[187] Eberbath,Kubera, Okoth and Watananabe (n178)
[188] Ibid note 178

and the commitment to the longevity of the business.[189] All rents are assessed at a higher rate for those not from the community and they are paid to the traditional leaders, who has the responsibility to redistribute them to the community.[190]

3.15. Inter-Communal Disputes

Inter-communal disputes are better resolved by traditional leaders, as the latter do play an integral part when it comes to resolving disputes involving communities or members of the community. For instance a dispute arose over a piece of land in the Limpopo Province which had many claimants. As a result, there were inter communal tensions, demonstrated in the vandalising of property and the burning of fields.[191] A meeting was held between the traditional leaders of both communities with an aim to resolve the dispute. They consulted with one another to ensure that members of each community did not continue to engage in the destructive activities.[192] While the Land Claims Court have ultimately determined the ownership dispute in contested cases, "such inter-communal communication can foster greater understanding and, arguably, prevent the escalation of conflict".[193]

Group Areas Act[194] has also contributed to the challenges being faced in land accessibility. According to this Act, "urban areas were to be divided into racially segregated zones where members of one specific race alone could live and work".[195] Group areas were created "for the exclusive ownership and occupation of a designated group".[196] This made it difficult for indigenous people to own land .It further became "a criminal offence for a member of one racial group to reside on or own land in an area set aside by proclamation for another race".[197]

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[189]Eberbath,Kubera, Okoth and Watananabe (n178)
[190] Ibid note 178
[191]Eberbath,Kubera, Okoth and Watananabe (n178)
[192] Ibid note 178
[193]Eberbath,Kubera, Okoth and Watananabe (n178)
[194] Groups Area Act 41 of 1950
[195]Thompson v. Lane, Ill. App. Ct. 1990, p194.
[195]Christopher Narimanya v Abdul Kasule & 2 others (Civil Suit No.159 of 1993) , p105
[195]O marlley , the heart of hope: online
https://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538.htm# accessed on the 12/10/2015 at 11:47

3.8. SUMMARY OF CHAPTER THREE

Both the local government and traditional leaders play an important role in administration of land on rural areas although some of their functions overlap. However, with proper application of the legislation guiding these institutions, clear demarcation of their functions can be outlined.

CHAPTER FOUR: THE PROCEDURE FOR LAND ACQUISITION

4. METHODS OF ACQUISITION

4.1. Land acquisition by the state

The state may acquire land through Section 10(a)[198] and such land will be registered in the name of the national government before the identification and the selection of beneficiaries. Land can be acquired in three ways through:

- Expropriation;
- Auctions ;
- Land market.

4.1.1. EXPROPRIATION

Expropriation means that "a department, agency or a municipality obliges the owner to cede his property or part of his property in exchange for a certain amount of money. Expropriation also occurs when a department, agency or Municipality requires him to grant them a right of way or any other type of servitude".[199] Section 3 of the Expropriation Act[200] provides that the Minister has authority to expropriate any property for the purposes of public interest subject to the compensation outlined in section 25 of the constitution.[201]

Section 4 further entails that if the juristic person satisfies the Minister that the property which is to be expropriated is for the benefit of the public, the Minister may expropriate property on behalf of the juristic person. Every regional office has an advisory board, which when requested "advises all organs of state on the fair price of immovable property and rights when organs of state acquire property, other than

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[198] Act 126 of 1993
[199] Expropriation Act 63 of 1975
[200] Ibid note199
[201] Expropriation Act (n199)

through expropriation or dispose of property".[202] The Advisory Board investigates and identifies suitable property for land.

4.1.1.1. Grounds for expropriation

- The construction of a water and sewer system
- The installation of a high-voltage line
- The development of a park or the extensions of a road are all examples of situations in which public interest requires a person to cede part or all of their property or to grant a right-of-way or other servitude.[203]

4.1.1.2 Procedure

An expropriation authority investigates the possible expropriation property required for the public purpose. In doing so, the expropriation authority must gather enough information with regard to existence of registered or unregistered rights to the property from the municipality in whose area the land is situated, any occupier of the land and the land-owner. The expropriation authority will before commencement of the expropriation in writing call upon, "the Regional Land Claims Commissioner in whose area the property is situated and the Director-General of the Department of Land Affairs to submit in writing within 30 days of delivery of the notice the names and addresses of all persons holding unregistered rights in respect of the property and particulars of the rights held by them in the property". [204]

The Advisory Board will in 60 days of the delivery of the notice investigate the said information given to them. The expropriating authority must publish a notice of intention to expropriate and serve a copy of that notice on all persons, including holders of unregistered rights, of whom it is aware and whose rights or interests may be materially and adversely affected by the intended expropriation and also deliver a copy of the notice to the Director - General. Objections with regard to expropriation

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[202] Ibid note 199
[203] Du Québec, Tribunal administratif, expropiation
[204] Expropriation Act 63 of 1975

must be lodged within 21 days of the receipt of the notice of intention to expropriate.[205]

If objection is made the expropriation authority must immediately after receiving an objection from any person, notify that person in writing that the objection has been received, and within 14 days of notifying that person that his or her objection has been received, invite that person in writing to enter into negotiations with it regarding the intended expropriation. If no agreement could be reached in the negotiation the expropriating authority must with 21 days make a decision whether to expropriate or not. In order to expropriate property, the expropriation authority must serve a notice of expropriation on the owner of the property in question and must publish it within seven days of such service.[206]

A copy of the notice of expropriation must be delivered to the Registrar of Deeds or the Registrar of Mining Titles or any government office in which rights in respect of the expropriated property are registered or recorded for public record and also tothe Director-General. The notice of expropriation must include an offer of compensation and must contain a clear and full description of the property. Section 25(2) of the Constitution also provides for the mechanisms of expropriation. It provides that "Property may be expropriated only in terms of law of general application. (a) for a public purpose or in a public interest and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court".[207]

Section 25(3) of the Constitution[208] further provides "that, the amount of compensation, the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including:

- The current use of the property;
- The history of the acquisition and use of the property;
- The market value of the property;

[205] Ibid note 204
[206] Ibid note 204
[207] Ibid note 19
[208] Constitution(n19)

- The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property ;
- The purpose of the expropriation"[209];
- The rationale of the targeted expropriation option would be that the land market is not providing adequate opportunities to acquire the land that is considered necessary for redistribution.[210] Expropriation or compulsory acquisition by the state has the advantage of enabling better planning;[211]
- If the entire land market is unable to supply enough land to meet all the targets set nationally ;
- If the land market is not supplying sufficient land in certain areas that the Government intends to develop as part of the land reform and rural development programs;
- Elevated potential of agricultural land;
- Contiguous blocks of agricultural land suitable for resettlement, with possible infrastructure cost-savings because of economies of scale; and
- Extension of farming by households resident in communal areas again cost-savings (due to economies of scale and possibly savings on residential infrastructure if households would not need to physically move) would be achieved if households can still use the existing social infrastructure in the communal area, but farm better land on neighbouring agricultural land. Comprehensive systems and procedures have been developed for expropriation of land for Redistribution, Extension of Security Tenure Act No 62 of 1997 and Restitution purposes".[212]

4.1.2. AUCTIONS

In terms of Section 10(1) (a) of Provision of Land Assistance Act 126 of 1993, the Minister may acquire land for the purposes of the Act. "Land auctions provide the

[209] Ibid note 19 Section 25(3)
[210] manual for the implementation of the proactive land acquisition strategy version 2 ,April 2007
[211] Ibid note 210
[212] manual (n210)

Department of Land Affairs (DLA) with an opportunity to proactively acquire land cheaply; given that the final bidding price for land at an auction is generally plus or minus 90% of the actual market value. The auction process is relatively straightforward. Prior to the commencement of the auction, all those intending to bid must make a 10-15% down-payment or provide a financial guarantee". [213]

This enables the auctioneer to properly identify who the serious bidders are. The sale "occurs as per rising bid, with the right to purchase reserved to the highest offer.[214] The agreed purchase price is paid as follows: a 10% deposit is payable or a financial guarantee is given to the auctioneer on the day of the auction with the balance paid to the liquidator/attorney by the date of transfer/upon registration of the property (approximately 30/60 days)"[215]

4.1.3. MARKET TRANSACTIONS/ NEGOTIATED TRANSFERS

Under market transactions or negotiated transfers land will be acquired through normal market transactions. The "Provincial Land Reform Office (PLROs) or prospective beneficiaries can approach owners to see if they would be interested in selling it through normal market transactions, depending on the negotiations. Occasionally land owners alert either provincial or national government officials that they would like to make their land available for sale for redistribution".[216] In this way access of land for redistribution will be solely based on consent of the land owners to sell.

4.2. STEPS OF LAND ACQUISITION

4.2.1. Land identification

The Provincial Land Reform Office is responsible for identifying land within the area-based approach, and also for checking land claims or land rights which may relate to the land in question. The Provincial Land Reform Office is assisted by the municipalities within the area which the land is situated and also by the Department of Agriculture which deals with agricultural projects and settlement projects.

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[213] Ibid note 210
[214] manual (n210)
[215] Ibid note 210
[216] manual (n210)

4.2.2. Planning costs approval related to land acquisition

The Provincial Land Reform Office is also responsible for the compiling of documents for release of funding for: feasibility studies, valuation and conveyancing. This responsibility of the provincial Land Reform Office is also shared with the Provincial Department of Agriculture (PDA) and the service provider. The Provincial Land Reform office is also responsible for the submission and presentation of the documentation to the district for screening committee and responsible for further submission to the provincial Chief Director for the release of the funding and planning, accompanied with the allocation of the provincial budget.

4.2.3. Valuation

Obtain valuation report to use in negotiations with the seller (not in auctions process. Valuations can be obtained prior to auctions to base maximum price state will be willing to bid at an auction).

4.2.4. Land feasibility

Provincial Land Reform Office (PLRO) is responsible for obtaining a feasibility report together with the Provincial Department of Agriculture (PDA).

4.2.5. Land acquisition

An approval must be obtained from the Provincial Grants Committee (PGC) for acquisition of Land. There must be an appointment of a conveyancer to register land in the name of the Republic of South Africa trough the National Government Financial officer who must then release funds for land acquisition to the seller and payment to the conveyancer. Transfer details will then be submitted to the provincial land reform office.

4.2.6. Register land on state the asset register

The PLRO project officer should fill in an asset inventory schedule and creates a manual file that must include:

- Copy of sale agreement
- Title deed

- Valuation report

The project officer will then update the Financial Lead Schedule. The total of inventory list should balance with the amount shown on the lead schedule. The national government has a responsibility to" ensure a more equitable distribution of land, to support the work of the Commission on Restitution of Land Rights and to implement a programme of land tenure and land administration reform".[217]

4.3. ACQUIRING LAND IN RURAL AREAS

- Redistribution of land aims to provide the disadvantaged and the poor with access to land for residential and productive purposes. Its scope includes the urban and rural very poor, labour tenants, farm workers as well as new entrants to agriculture.[218]

- Land restitution covers cases of forced removals which took place after 1913 are being dealt with by a Land Claims Court and Commission, established under the Restitution of Land Rights Act.[219]

- Land tenure reform is being addressed through a review of present land policy, administration and legislation to improve the tenure security of all South Africans and to accommodate diverse forms of land tenure, including types of communal tenure[220]

4.3.1. Land restitution

All land claims are lodged against the state. "A person or a community that was dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices, and who did not receive just and equitable compensation at the time of dispossession, can lodge a claim for the restoration of such a right, or equitable redress. Persons who have lodged a claim before, but have

[217] Ibid note 210
[218] Ibid note 2
[219] Act 22 of 1994
[220] Ibid note 220

not yet been compensated, must contact their respective provincial offices to verify whether the office has their original claim, before they can submit a new claim".[221] There are 14 lodgement offices situated across the nine provinces in the country. "Claims must be lodged at a designated lodgement office on a prescribed form, which is captured electronically during lodgement. A Commission on Restitution of Land Rights official will assist to complete the claim form. Claim forms are not distributed to the public. Prospective claimants must physically go into the lodgement office to lodge their claim. Once all required documents have been submitted. The Commission will investigate the merits of the claim. If there are disputes, the Commission will mediate and attempt to resolve disputes and inform the applicant about the progress on the claim at regular intervals or on request".[222]

4.3.2. Documents needed to lodge a land claim

- A certified copy of the South African green bar-coded Identity Document or Smart ID card.
- A signed letter authorising the applicant to act on behalf of the family or community, signed by two witnesses (power of attorney), if the applicant is acting on behalf of their family or community.
- A list of the people being represented
- A letter from the Master of the High Court by the executor of an estate
- A written decision from a community meeting, signed by the person who facilitated the meeting (community resolution), if lodging on behalf of a community.[223]

4.3.4. Other information which may be required

Information regarding the particulars of the applicant will be required and in an event where a person had lost a right, particulars of the person who lost the right will be required. The applicants are also required to state the capacity in which they are

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[221] http://www.ruraldevelopment.gov.za/component/content/article/347-land-claim/re-opening/771-faq#.VaisNo6_TK8

[222] Ibid note 210

[223] http://www.ruraldevelopment.gov.za/component/content/article/347-land-claim/re-opening/771-faq#.VaisNo6_TK8

acting. Proper description of the property in question must also be provided including, where the property is situated. Information about the government department which acquired the land must also be made available including the year of dispossession, but not which may have be received from the dispossession and history pertaining to such dispossession thereof.[224]

4.3.5. Categories of claimants include:

- Individual dispossessed of a land right;
- A direct descendant of a person with a land right (such as the wife or children);
- A juristic person, such as a company or a trust;
- An executor or an administrator of an estate of a deceased person;
- An executor of a community.

4.4. REDISTRIBUTION OF LAND

4.4.1. Land redistribution and land grants

Land redistribution aims to "give those most in need a chance to get land for housing and productive purposes. It caters for urban and rural areas and includes labour tenants, farm workers and people who want to start farming". [225]

A grant is a sum of money that the applicant does not have to pay it back. The government pays the money to help people pay for land or something else on the land such as a well or fencing. It is not money in the applicant's hand. The money goes directly to the person or agent that is selling the land or the service. The government gives no more than R16 000 in subsidy money to any one applicant/household. If an applicant applies for a grant from the Department of Land

[224] Ibid note 225
[225] http://www.paralegaladvice.org.za/docs/10_full.html

Affairs, such applicant cannot get a housing subsidy from the Department of Housing as well".[226]

4.4.2 Different grants from the Department of Land Affairs:[227]

- Land Acquisition Grant ;
- Settlement Grant ;
- Settlement Planning Grant;
- Land Acquisition Grant for local authorities;
- Land Redistribution for Agricultural Development Grant.

4.4.3. Land Acquisition or Settlement Grants

This grant can be used to buy land or secure tenure to land already occupied. The grant can also be used for improvements such as housing, water supply, sanitation, internal roads and fencing.[228]

To qualify for the grant, the "applicant must be a South African citizen living in a household where all combined income is less than R2 500 per month per applicant or household. A household means a single adult older than 18 years with dependants, or two adults with or without dependants. Households can apply individually or in a group. When households apply as a group, the average household income for the group must be less than R2 500 per month". [229]

4.4.4. People who qualify for the grant

People who qualify to apply for grants are the landless people, especially women who need to settle in rural or urban areas. This basically means that everyone who needs land can make use of this grant, provided that their need for land is solely for residential purposes. This also includes farmworkers and their families who want to improve their settlement and land tenure conditions. Even the labour tenants and

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[226] Ibid note 223
[227] Papralegaladvice(n223)
[228] Ibid note 223
[228] Paralegaladvice(n223)

their families who want to get secure title to land they are living on and to improve it, or to alternative land do qualify. Residents who want to secure titles to the land they are living on, business people who want rural land for production, such as farming or a shop, people who get land through the land restitution programme and those people who lost land but are not covered by the Restitution of Land Act qualify as applicants.

4.4.5. Settlement Planning Grant

The same people who qualify for the Settlement Grant also qualify for the Settlement Planning Grant. This grant is intended to assist poor communities to employ planners and other professionals to help them plan their settlement. It also covers services such as legal fees, land use planning, and infrastructure planning. The money gets paid in two instalments to the professional: once the project proposal is complete, and once the detailed settlement plan is completed. This grant is worked out as a portion of the R16 000 that each household in the settlement is entitled to. The amount that is paid to the professionals is deducted from each household's R16 000.[230]

To apply for a Land Acquisition, Settlement, or Settlement Planning Grant, but applicant must contact his or her nearest office of the Department of Rural Development and Land Reform and fill in a registration of need form. When applicants apply as a group, they must elect a representative to make the application on their behalf.

4.4.6. Land Acquisition Grant for local authorities

Many rural towns in South Africa have commonages. In the past this was used by people staying in town, who did not have land to graze their animals or grow crops. A fee was payable at the local authority for them to use commonages. As this practice fell way, the local authorities begun to lease out their commonages, to rich farmers who often paid very little for the land. The Land Acquisition Grant is aimed at assisting local authorities to buy land and create a commonage or to add to improve an existing commonage to help local authorities buy land to create a commonage, or to add to the existing commonage, so that even the poor residents can use the

[230] Ibid note 223

commonage.[231]The need in the community to use commonage is addressed by the local authority or the Provincial Department of Land Affairs.

4.4.7. In order to qualify for the grant, local authority must:

- Inform the Department of Rural Development and Land Reform how much they can contribute to buy the land ;
- Make available for the Department of Rural Development and Land Reform the communities financial records ;
- Give a commitment that the land will be for the poorest residents to lease ;
- Submit a list of all the people who will want to use the commonage ;
- Submit a plan from the residents explaining how the land will be used and for what purposes.

4.4.8. Access for those who do not have land

The purpose of the land redistribution programme is to "provide people with land for housing in urban and rural areas as well as land for farming purposes".[232] Government has realised that the normal prices for land are still not accommodating poor people. Hence the government decided to assist them to buy land using the land grants provided for by the government as a quicker way to facilitate land reform. The state had made its land available and people are able to acquire land as the government buys land from willing sellers on behalf of the applicants. This is not expropriation, where the state obliges the owner to sell or cede their property for the benefit of the public. Expropriation is applicable as the last option.[233] Where land is acquired for land reform through purchase or expropriation, the state is obliged by the Constitution to pay 'just and equitable' compensation.[234]As a result, those that have their land expropriated have the states guarantee for compensation.

Any person who wishes to acquire land under the Land Redistribution Programme must "make contact with the office of the Department of Land Affairs within the

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[231] Paralegaladvice(n223)
[232] Ibid note 223
[233]Papralegaladvice(n223)
[234] Ibid note 2

province concerned. They must provide information about the applicants, where they are looking for land and clarify what the land is to be used for. If the request for assistance is appropriate, they will complete a Registration-of-Interest Form. A request for a Settlement Planning Grant will then be prepared, on their behalf, by the official concerned and submitted to the relevant Provincial Director".[235]

The grant may be obtained by "under-resourced, poor or rural local authorities for use in preparing Land Development Objectives in terms of the Development Facilitation Act,[236]This required local authorities to set out a development vision for their area and to consult with local stakeholders and other relevant parties in the preparation of the application. Where the Department of Land Affairs funded the preparation of Land Development Objectives, a condition of the grant is that land reform planning was undertaken as part of the exercise. It was hoped that this will begin to ensure that land reform is harmonised with broader development plans".[237]

The sustainability of the land reform programme in both rural and urban areas requires support services and infrastructure that allow people to make productive use of the land. Land reform also exerts additional pressure for the "provision of water services, sanitation, infrastructure, housing, agricultural extension and so on".[238] The long-term success of land reform is closely bound up with the extent to which it is an integral part of local and provincial level planning.[239]

The land grant is to assist poor communities to plan for the acquisition, use and development of land and for the mobilisation of resources required to do this. It could also be used to support land reform initiatives undertaken by other institutions, for example, local authorities and NGOs (for example, churches) who wish to use their own land resources to implement land reform projects. The grant enables those engaged in land reform initiatives to select and appoint Department of Land Affairs-accredited planners and other professionals from private firms and NGOs, with whom they will collaborate on a strategy for land reform. The services which can be covered by the grant include legal and financial planning assistance, land use

[235] White Paper(n2)
[236] Ibid note 67
[237] Ibid note 2
[238] White Paper(n2)
[239] Ibid note 2

planning, infrastructure planning, land valuation, and assistance with land purchase negotiations, including the formation of a legal entity.[240]

4.5. LAND TENURE REFORM

The vision of a land policy and land reform programme "contributes to reconciliation, stability, growth and development in an equitable and sustainable way. It presumes an active land market supported by an effective and accessible institutional framework. In an urban context this will be applicable the poor would have secured access to well-located land for the provision of shelter. The land reform programme's poverty focus is aimed at achieving a better quality of life for the most disadvantaged. Land reform aims to contribute to economic development, both by giving households the opportunity to engage in productive land use and by increasing employment opportunities through encouraging greater investment. White Paper envisages a land reform which results in a rural landscape consisting of small, medium and large farms; one which promotes both equity and efficiency through a combined agrarian and industrial strategy in which land reform is a spark to the engine of growth".[241]

The productive and residential land usage in rural areas is included in the governmental vision.[242] This includes a well-balanced mix of farming systems and rural enterprises (livestock, annual and perennial crops as well as farm-forestry) with land held under a variety of forms of tenure by individuals, companies and communities.[243] The objectives are to establish "flourishing rural landscapes consisting of large, medium and small farms and enterprises developed by full-time and part-time farmers. A more balanced allocation of land and resources, partnerships between farm workers and farm owners leading to increased productivity, as well as the provision of secure tenure for all rural people are all part of governmental vision [244]

[240] Ibid note 235
[241] White Paper(n2)
[242] Ibid note 2
[243] White Paper(n2)
[244] Ibid note 2

4.6. COMMUNAL TENURE

It is not assumed without questioning that the tenure development in areas with customary landholdings will naturally be in the form of individual land titling. Hence, the Constitution refers to "tenure which is legally secure or to comparable redress as a solution without confinement to a particular form of tenure. A prime consideration is that sustainable development of the land in these areas must still recognise the communal character, as opposed to individual landholdings. Undoing the legacies of the past necessarily include the completion of the task to institute a predictable, certain and legally secure tenure form or forms for communal land".[245]

An attempt which was made previously to address this was through the Communal Land Rights Act[246], (CLARA). Section 151(1) of the 1996 Constitution[247] makes provision for local sphere of government which consists of "municipalities for the whole of the territory of the Republic with important land administration powers as part of the municipal planning powers, the institutional design of an appropriate land governance model in the communal/customary areas acquire critical importance".[248] Whatever is suggested must be able to address the issues of accountability and efficiency. The policy propositions were not sufficiently attended to by the underlying scheme of the Communal Land Rights Act. [249] It was suggested that land tenure reform policy should be flexible and gradualist with regard to the role of traditional authorities and role of local government in administration of land.[250]

4.7. SUMMARY OF CHAPTER FOUR

With all these processes of acquiring land having been outlined, it is important to know the most suitable one to apply under what circumstances. Expropriation of land in terms of the Expropriation Act procedure cannot be the same as the government buying land on behalf of the applicants on willing buyer and willing seller basis. This is similar with land acquisition in rural areas however it varies from an application of land for residential purposes than that of development.

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[245] White Paper(n2)
[246] Act 11 of 2004
[247] Ibid note 19
[248] Ibid note 2
[249] Ibid note 53
[250] Communal Land Right Act(n53)

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1. CONCLUSION

Local government is the elected government body that is responsible for making provision of Land Development Objectives under Section 27 of the Development Facilitation Act[251] which are binding to all land development decisions and policies in their area of jurisdiction, While an area that is recognised by the Premier as a traditional community must have a traditional council, this is provided for in accordance to section 3(1) Traditional Leadership And Governance Framework Act. These councils consist of mostly unelected members who amongst them are the traditional authorities and their appointees. The position of traditional leadership is not only recognised or acknowledged in the local government it is also important at provincial level.[252]

The communal Land Rights Bill[253] which was amended on 8 October 2003 makes provision for the role of traditional authorities in land administration. The amendment states that "the traditional councils established in terms of the Framework Act, will have land allocation and administration powers and functions in communal areas".[254] With all these powers given to both institutions there exists a dysfunctional procedure with regard to proper access to land in rural areas of South Africa. Hence, clear distinction and separation of these powers will enable society to have a proper route to follow in order to acquire land for development in the rural areas of South Africa.

5.2. RECOMMENDATIONS

- The drafting of a policy which will clearly demarcate the functions and duties of the traditional leaders and local government with regard to land administration in rural areas is required.

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[251] Ibid note 67
[252] Traditional Leadership and Governance Framework Act 2003
[253] Communal Land Rights Bill 2002
[254] Ibid note 17

- An awareness campaign programme may be conducted in rural areas to, educate the communities about matters of land administration and development.

- Public participation will enlighten the community on what development the state intends to do and also give the platform to discuss the community needs.

- Meetings with the traditional leaders will also shed knowledge to the community on the powers which the traditional authority has with regard to land administration.

- The change of land administration legislation should address the need for uniform legislation regulating township establishment and other development within each province. This means that there is a need for the replacement of former homelands and other apartheid laws with legislation that is applicable across the country.

Some of the recommendations which were made in the past included". The design of appropriate mechanisms to implement land use control measures at a local level and outside of urban areas which will be a priority focus of the development and Planning Commission provided for in the Development Facilitation Act. This will result in a rationalisation of legislation that will in all likelihood mean the repeal of these sections of the regulations. In the interim, the regulations will be amended to achieve greater uniformity in the application of the different versions of R188. The is need for provision to be made for greater community participation in land use planning and control. The location of personnel dealing with land issues at a district council level will facilitate the development of a land use planning capacity in these areas. Consideration will be given to the establishment of land use planning officers at provincial and possibly at lower levels of government".[255] These were some of the recommendations which were made in the past due to challenges experienced with the uncertainty of the responsibility of the land administrators at a local level, they were consequently not realised. Realisation of the above mentioned

[255]Policy issues 17, 18 and 25 were not expanded upon at the Technical Validation Workshop.

recommendations would assist in redressing the challenges currently experienced in land administration procedures.

The government should consider holding public participation and public awareness campaigns to address and clarify the public on issues relating to uniform procedures for access to land. Furthermore, it should gather public concerns which can be useful to the legislators when drafting a policy that will redress the challenges experienced in rural areas regarding the acquisition of land for development projects.

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