

REPUBLIC OF SOUTH AFRICA

# COMMUNAL LAND RIGHTS BILL

*(As amended by the Portfolio Committee on Agriculture and Land Affairs (National Assembly)) (The English text is the official text of the Bill)*

(MINISTER FOR AGRICULTURE AND LAND AFFAIRS)

[B 67D-2003]

ISBN 0 621 34800 7

GENERAL EXPLANATORY NOTE:

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| [                           | ] | Words in bold type in square brackets indicate omissions from existing enactments. |
| <u>                    </u> |   | Words underlined with a solid line indicate insertions in existing enactments.     |

BILL

To provide for legal security of tenure by transferring communal land, including KwaZulu-Natal Ingonyama land, to communities, or by awarding comparable redress; to provide for the conduct of a land rights enquiry to determine the transition from old order rights to new order rights; to provide for the democratic administration of communal land by communities; to provide for Land Rights Boards; to provide for the co-operative performance of municipal functions on communal land; to amend or repeal certain laws; and to provide for matters incidental thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

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CHAPTER 1

DEFINITIONS AND APPLICATION OF ACT

Definitions

1. In this Act, unless the context indicates otherwise –
- "beneficial occupation"** means the occupation of land by a person for a continuous period of not less than five years prior to 31 December 1997 as if that person was the owner, without force, openly and without the permission of the owner, and "beneficially occupied" has a corresponding meaning;
- "Board"** except in Chapter 9, means a Land Rights Board established in terms of section 25;
- "communal land"** means land contemplated in section 2 which is, or is to be, occupied or used by members of a community subject to the rules or custom of that community;
- "community"** means a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group;
- "community rules"** means the rules registered in terms of section 19(1);
- "comparable redress"** means the redress contemplated in Chapter 4;
- "Constitution"** means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);
- "Deed of Communal Land Right"** means a deed in terms of which a new order right is registered in the name of a person as contemplated in section 6;
- "Deeds Registries Act"** means the Deeds Registries Act, 1937 (Act No. 47 of 1937);
- "Department"** means the Department of Land Affairs;
- "Director-General"** means the Director-General of Land Affairs;
- "land administration committee"** means a land administration committee established in terms of section 21;
- "land rights enquirer"** means a land rights enquirer designated or appointed in terms of section 15;
- "Minister"** means the Minister responsible for land Affairs;
- "new order right"** means a tenure or other right in communal or other land which has been confirmed, converted, conferred or validated by the Minister in terms of section 18;
- "old order right"** means a tenure or other right in or to communal land which –
- (a) is formal or informal;
  - (b) is registered or unregistered;
  - (c) derives from or is recognised by law, including customary law, practice or usage; and
  - (d) exists immediately prior to a determination by the Minister in terms of section 18, but does not include –
    - (i) any right or interest of a tenant, labour tenant, sharecropper or employee if such right or interest is purely of a contractual nature; and

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

**"prescribed"** means prescribed by regulation in terms of this Act;

**"this Act"** includes any regulations made under this Act; and

**"traditional council"** means a traditional council as defined in section 1 of the Traditional Leadership and Governance Framework Act, 2003.

#### **Application of Act**

##### **2. (1) This Act applies to-**

- (a) State land which is beneficially occupied and State land which –
  - (i) at any time vested in a government contemplated in the Self-governing Territories Constitution Act, 1971 (Act No. 21 of 1971), before its repeal or of the former Republics of Transkei, Bophuthatswana, Venda or Ciskei, or in the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936), but not land which vested in the former South African Development Trust and which has been disposed of in terms of the State Land Disposal Act, 1961 (Act No. 48 of 1961);
  - (ii) was listed in the schedules to the Black Land Act, 1913 (Act No. 27 of 1913), before its repeal or the schedule of released areas in terms of the Development Trust and Land Act, 1936 (Act No. 18 of 1936), before its repeal;
- (b) land to which the KwaZulu-Natal Ingonyama Trust Act, 1994 (Act No. 3 KZ of 1994) applies, to the extent provided for in Chapter 9 of this Act;
- (c) land acquired by or for a community whether registered in its name or not; and
- (d) any other land, including land which provides equitable access to land to a community as contemplated in section 25(5) of the Constitution.

(2) The Minister may, by notice in the *Gazette*, determine land contemplated in subsection (1)(d) and may in such notice specify which provisions of this Act apply to such land.

## **CHAPTER 2**

### **JURISTIC PERSONALITY AND LEGAL SECURITY OF TENURE**

#### **Juristic personality of community**

**3.** Upon the registration of its rules in terms of section 19(1), a community acquires juristic personality with perpetual succession regardless of changes in its membership and it may, subject to such rules, this Act and any other law, in its own name -

- (a) acquire and hold rights and incur obligations; and
- (b) own, encumber by mortgage, servitude or otherwise and dispose of movable and immovable property and otherwise deal with such property subject to any title or other conditions.

#### **Security of tenure**

**4. (1)** A community or person is entitled to the extent and in the manner provided for in this Act and within the available resources of the State, either to tenure which is legally secure or to comparable redress if the tenure of land of such community or person is legally insecure as a result of past racially discriminatory laws or practices.

(2) An old order right held by a married person is, despite any law, practice, usage or registration to the contrary, deemed to be held by all spouses in a marriage in which such person is a spouse, jointly in undivided shares irrespective of the matrimonial property regime applicable to such marriage and must, on confirmation or conversion in terms of section 18(3), be registered in the names of all such spouses.

(3) A woman is entitled to the same legally secure tenure, rights in or to land and benefits from land as is a man, and no law, community or other rule, practice or usage may discriminate against any person on the ground of the gender of such person.

## **CHAPTER 3**

### **TRANSFER AND REGISTRATION OF COMMUNAL LAND**

#### **Registration of communal land and new order rights**

5. (1) Communal land and new order rights are capable of being and must be registered in the name of the community or person, including a woman, entitled to such land or right in terms of this Act and the relevant community rules.

(2) Despite any other law –

- (a) on the making of a determination by the Minister in terms of section 18, the ownership of communal land which is not State land but which is registered in the name of –
  - (i) a person;
  - (ii) a traditional leader or traditional leadership whether recognised in terms of law or not;
  - (iii) a communal property association contemplated in the Communal Property Associations Act, 1996 (Act No. 28 of 1996); or
  - (iv) a trust or other legal entity, vests in the community on whose behalf such land is held or in whose interest such registration was effected, and such land remains subject to limitations and restrictions in relation to and rights or entitlements to such land;
- (b) the community referred to in paragraph (a) succeeds in all respects as the successor in title to such person, traditional leader or traditional leadership, communal property association, trust or other legal entity;
- (c) the title deed relating to land contemplated in paragraph (a) and any mortgage bond or other deed registered in respect of such land must, in the prescribed manner, be endorsed by the Registrar of Deeds to reflect the community as the registered owner of such land; and
- (d) the provisions of this Act must apply with the necessary changes to land contemplated in paragraph (a).

(3) (a) A document evidencing an old order right which is cancelled or replaced by a new order right in terms of this Act, must be lodged With the Registrar of Deeds, who must endorse such document as having been cancelled .

(b) If a document contemplated in paragraph (a) cannot be lodged, the Registrar must accept an appropriate affidavit to that effect by the holder of such right or the Minister.

#### **Transfer of communal land**

6. After making a determination in terms of section 18, the Minister must–

- (a) transfer the entire communal land determined by her or him to be the land to which a community is entitled, to such community subject to the conditions contemplated in section 18(4) which are applicable to such land;
- (b) despite any other law to the contrary, on behalf of such community and in respect of such land –
  - (i) have a communal general plan prepared and approved in terms of the Land Survey Act, 1997 (Act No. 8 of 1997);
  - (ii) have such plan registered and have a communal land register opened in terms of the Deeds Registries Act;
  - (iii) transfer, by means of a Deed of Communal Land Right or other appropriate deed, the new order rights to the person or persons entitled to such rights; and
- (c) do any other things necessary to give effect to that determination and this section.

#### **Functions of conveyancer**

7. A suitably qualified official of the Department may perform the functions of a conveyancer required in terms of the Deeds Registries Act.

### **Registration of subsequent transactions**

**8.** Registrable transactions in respect of communal land, including new allocations of rights in such land, arising after the opening of a communal land register, must be registered in terms of this Act and the Deeds Registries Act.

### **Conversion of registered new order right into freehold ownership**

**9.** (1) The holder of a registered new order right may apply to the community owning the land to which such right relates for the conversion of such right into freehold ownership.

(2) After considering an application referred to in subsection (1), such community must, subject to its community rules and any applicable title conditions, approve or reject such application.

(3) If a community approves an application in terms of subsection (2), it may impose any condition or reserve any right in favour of the community.

(4) On application by the holder referred to in subsection (1), the Registrar of Deeds must in the prescribed manner record the conversion contemplated in this section.

### **Transfer costs and stamp duties**

**10.** Transfer duty, value-added tax, stamp duty and deeds registration fees of office are not payable in respect of any registration required to give effect to sections 5 and 6.

### **Surveying and registration costs**

**11.** The Minister may, from money appropriated by Parliament for this purpose, pay the costs of surveying and registration required to give effect to sections 5 and 6.

## **CHAPTER 4**

### **PROVISION OF COMPARABLE REDRESS WHERE TENURE CANNOT BE LEGALLY SECURED**

#### **Award of comparable redress**

**12.** (1) The Minister may, on application by the holder of an old order right which is insecure as contemplated in section 25(6) of the Constitution and which cannot be made legally secure, determine an award of comparable redress to such holder.

(2) An award in terms of subsection (1) may comprise -

- (a) land other than the land to which the applicable old order right relates or a right in such other land;
- (b) compensation in money or in any other form; or
- (c) a combination of land or a right in land contemplated in paragraph (a) and compensation contemplated in paragraph (b).

(3) The provisions of section 18, read with the necessary changes, apply to a determination in terms of this section.

#### **Cancellation of old order right**

**13.** For the purposes of this Act the Minister may, with the written agreement of the holder of an old order right and on such conditions as may be agreed to, cancel such right.

## CHAPTER 5

### THE CONDUCT OF LAND RIGHTS ENQUIRY

#### Land rights enquiry

**14.** (1) Prior to securing an old order right in terms of section 4 or transferring communal land to a community or person in terms of section 6 or determining comparable redress in terms of section 12, the Minister must institute a land rights enquiry.

(2) A land rights enquiry must enquire into-

- (a) the nature and extent of all-
  - (i) constitutional and human;
  - (ii) old order and other land and tenure; and
  - (iii) competing or conflicting,

rights, interests and tenure of land, whether legally secure or not which are or may be affected by such enquiry;

- (b) the interests of the State;
- (c) the options available for legally securing any legally insecure rights;
- (d) the provision of access to land on an equitable basis;
- (e) spatial planning and land use management, land development, and the necessity for conducting a development or a de-densification or other land reform programme, and the nature of such programme;
- (f) the need for comparable redress and the nature and extent of such redress;
- (g) the measures required to ensure compliance with section 4 and to promote gender equality in the allocation, registration and exercise of new order rights;
- (h) any matter relevant to a determination to be made by the Minister in terms of section 18;
- (i) any other matter as prescribed or as instructed by the Minister,

and must endeavour to resolve any dispute relating to land and rights in, or to, land and a report on such matters must be submitted to the Minister.

#### Designation or appointment of land rights enquirer

**15.** (1) The Minister may in the prescribed manner designate an officer of the Department or appoint a suitable person who is not such an officer to conduct a land rights enquiry.

(2) The Minister may, with the concurrence of the Minister of Finance, remunerate and pay allowances to a land rights enquirer who is not a State official.

#### Notice of land rights enquiry

**16.** The Minister must, in the appropriate national, regional and local media and in the prescribed manner, publish-

- (a) a notice of an enquiry inviting interested parties to participate in such enquiry; and
- (b) a notice regarding the determinations made consequent upon a completed land rights enquiry.

#### Powers and duties of land rights enquirer

**17.** (1) A land rights enquirer must conduct a land rights enquiry in the prescribed manner, which must be open and transparent and must afford the communities and persons who may be affected by such enquiry an opportunity to participate in such enquiry.

(2) A land rights enquirer must adopt measures to ensure that decisions made by a community are in general the informed and democratic decisions of the majority of the members of such community who are 18 years of age or older and are present or represented by a proxy at a community meeting of which adequate notice of not less than 21 days was given.

(3) A land rights enquiry report contemplated in section 14(2) must-

- (a) include recommendations in respect of the matters which require determinations to be made by the Minister;



- (b) prior to being submitted to the Minister, be made available on adequate notice for inspection by any interested community or person who must be afforded an opportunity to make representations in relation to any matter relevant to such enquiry; and
- (c) be submitted to the Minister together with any such representations and supporting documents for his or her consideration.

(4) Whenever relevant to an enquiry, a land rights enquirer and any person assisting such enquirer, may in the prescribed manner and having regard to the constitutional rights of affected persons–

- (a) compel the provision of written and verbal evidence;
- (b) enter and search premises and take possession of documents and articles; and
- (c) convene and attend meetings of interested persons.

(5) A land rights enquirer has all other powers and duties which the Minister determines are necessary for the effective conduct of such enquiry.

#### **Determination by Minister**

**18.** (1) If the Minister, having received a report by a land rights enquirer, is satisfied that the requirements of this Act have been met, he or she must, subject to subsections (4) and (5) and having regard to–

- (a) such report;
- (b) all relevant law, including customary law and law governing spatial planning, local government and agriculture;
- (c) the old order rights of all affected right holders;
- (d) the need to provide access to land on an equitable basis; and
- (e) the need to promote gender equality in respect of land,

make a determination as contemplated in subsections (2) and (3).

(2) The Minister must, where applicable, determine the location and extent of the land to be transferred to a community or person.

(3) The Minister must, subject to subsections (4) and (5), determine that–

- (a) the whole of an area of communal land which is, or is to be, surveyed must be registered or remain registered in the name of a specified community;
- (b) the whole of an area contemplated in paragraph (a) is to be subdivided into portions of land, each of which must be registered in the name of a person and not a community;
- (c) a part of an area contemplated in paragraph (a)–
  - (i) must be registered or remain registered in the name of a specified community, and part of such land must be subdivided and registered as contemplated in paragraph (b); and
  - (ii) is reserved to the State; and
- (d) an old order right is to be–
  - (i) confirmed;
  - (ii) converted into ownership or into a comparable new order right, and the Minister must determine the nature and extent of such right; or
- (iii) cancelled in accordance with Chapter 4 and–
  - (aa) the land to which such right relates must be incorporated into land held or to be held by a community; and
  - (bb) the holder of such right must be awarded specified comparable redress as contemplated in Chapter 4.

(4) In making a determination in terms of this section, the Minister must take into account the Integrated Development Plan of each municipality having jurisdiction and, after consultation with the Minister responsible for local government, each municipality and other land-use regulator having jurisdiction may –

- (a) reserve a right to the State, including a municipality, and stipulate any land-use or other condition which in her or his opinion is necessary -
  - (i) for a public purpose or which is in the public interest;
  - (ii) to protect the affected land, rights in such land, an owner of such land and a holder of such rights; or
- (iii) to give effect to this Act;
- (b) confer a new order right on a woman–
  - (i) who is a spouse of a male holder of an old order right, to be held jointly with her spouse;

- (ii) who is the widow of a male holder of an old order right, or who otherwise succeeds to such right, to be held solely by such woman; or
  - (iii) in her own right; and
  - (c) validate a putative old order right which was acquired in good faith and declare invalid such a right which was not acquired in good faith, and must determine the holder or holders of a new order right.
- (5) The Minister may not make a determination in terms of this section which relates to land and a right in, or to, land which is directly affected by a dispute until such dispute is resolved by mediation, other alternative traditional or non-traditional dispute resolution mechanism or by a court, and must adopt measures to ensure that such dispute is resolved.

## **CHAPTER 6**

### **CONTENT, MAKING AND REGISTRATION OF COMMUNITY RULES**

#### **Content, making and registration of community rules**

- 19.** (1) A community whose communal land is, or is to be, registered in its name must in the prescribed manner, to which the provisions of section 17(1) and (2) read with the necessary changes apply, make and adopt its community rules and have them registered.
- (2) Community rules must, subject to any other applicable laws, regulate –
- (a) the administration and use of communal land by the community as landowner within the framework of law governing spatial planning and local government;
  - (b) such matters as may be prescribed; and
  - (c) any matter considered by the community to be necessary.
- (3) Community rules are binding on the community and its members and must be accessible to the public and are on registration deemed to be a matter of public knowledge.
- (4) (a) A community must apply to the Director-General for the registration of its adopted rules and he or she must refer such application to the Board having jurisdiction in the area for a report on the suitability of such rules.
- (b) The Director-General must consider the adopted community rules, any information submitted and the report of the Land Rights Board having jurisdiction in the area.
- (c) If the Director-General is satisfied that the adopted community rules comply with the requirements of the Constitution and this Act, a Registration Officer in the Department designated by her or him for that purpose must, in the prescribed manner, register such rules.
- (d) If the Director-General is not satisfied that community rules comply with the requirements and intention of the Constitution and this Act, she or he must notify the community of the steps to be taken to make such rules so comply.
- (5) Should a community fail to adopt and have community rules registered, the standard rules prescribed by regulation as adapted by the Minister to such community are deemed to be the rules of such community and must be registered as the rules of such community.

#### **Amendment of community rules**

- 20.** (1) A community may, in a general meeting and in the manner applicable to the adoption of community rules, amend or revoke any community rule.
- (2) An amendment or revocation contemplated in subsection (1) must be registered and only becomes effective on registration.

## **CHAPTER 7**

### **LAND ADMINISTRATION COMMITTEE**

#### **Establishment of land administration committee**

- 21.** (1) A community must establish a land administration committee which may only be disestablished if its existence is no longer required in terms of this Act.

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

(3) In the exercise of the powers and the performance of the duties of a land administration committee as contemplated in subsection (2), a traditional council must ensure that the composition of its membership satisfies the requirements of section 22(4) and (5).

(4) When a traditional council acts as a land administration committee as contemplated in this section, its functional area of competence is the administration of land affairs and not traditional leadership as contemplated in Schedule 4 to the Constitution.

(5) Any provision in this Act which refers, or is applicable, to a traditional council is intended to establish norms and standards and a national policy with regard to communal land rights, to effect uniformity across the nation.

### **Composition**

**22.** (1) A land administration committee must consist of a total number of members as determined by the applicable community rules and must comply with this section.

(2) Subject to section 21(2), the members of a land administration committee must be persons not holding any traditional leadership position and must be elected by the community in the prescribed manner.

(3) At least one third of the total membership of a land administration committee must be women.

(4) One member of a land administration committee must represent the interests of vulnerable community members, including women, children and the youth, the elderly and the disabled.

(5) Each of-

- (a) the Minister, in respect of the Department;
- (b) the chairperson of the relevant Land Rights Board;
- (c) the relevant provincial Member of the Executive Council responsible for agriculture;
- (d) the relevant provincial Member of the Executive Council responsible for local government matters; and
- (e) every municipality in whose area of jurisdiction a land administration committee functions,

may designate a person to be a non-voting member of a land administration committee.

### **Term of office**

**23.** The term of office of the members of a land administration committee is determined by community rules but may not exceed a period of five years.

### **Powers and duties**

**24.** (1) To the extent provided by this Act and subject to any other applicable law, a land administration committee represents a community owning communal land and has the powers and duties conferred on it by this Act and the rules of such community.

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

(3) In the exercise of its powers and the performance of its duties a land administration committee must –

- (a) take measures towards ensuring-
  - (i) the allocation by such committee, after a determination by the Minister in terms of section 18, of new order rights to persons, including women, the disabled and the youth, in accordance with the law; and
  - (ii) the registration of communal land and of new order rights;
- (b) establish and maintain registers and records of all new order rights and transactions affecting such rights as may be prescribed or as may be required by the rules;

- (c) promote and safeguard the interests of the community and its members in their land;
- (d) endeavour to promote co-operation among community members and with any other person in dealing with matters pertaining to land;
- (e) assist in the resolution of land disputes;
- (f) continuously liaise with the relevant municipality, Board and any other institution concerning the provision of services and the planning and development of the communal land of the community;
- (g) perform any other duty prescribed by or under this Act or any other law; and
- (h) generally deal with all matters necessary for or incidental to the exercise of its powers and the performance of its duties.

## **CHAPTER 8**

### **LAND RIGHTS BOARD**

#### **Establishment of Land Rights Board**

**25.** The Minister may, by notice in the *Gazette*-

- (a) establish one or more Land Rights Boards having jurisdiction in such areas as she or he may determine; and
- (b) disestablish a Board or amend its area of jurisdiction.

#### **Composition**

**26.** (1) Members of a Board must be appointed by the Minister in accordance with the prescribed nomination and selection processes.

(2) A Board consists of-

- (a) one representative from each of the organs of State determined by the Minister;
- (b) two members nominated by each Provincial House of Traditional Leaders contemplated in section 212(2)(a) of the Constitution having jurisdiction in the area of that Board;
- (c) one member nominated by institutions or persons in the commercial or industrial sector;
- (d) seven members from the affected communities, of whom at least-
  - (i) one must represent the interests of child-headed households;
  - (ii) one must represent the interests of persons with disabilities;
  - (iii) one must represent the interests of the youth as defined in section 1 of the National Youth Commission Act, 1996 (Act No. 19 of 1996); and
  - (iv) one must represent the interests of female-headed households.

(3) In appointing members of a Board, the Minister must -

- (a) have due regard to the required knowledge of land, land tenure, old and new order rights and the required capabilities, including relevant skills, expertise and experience; and
- (b) ensure that at least a third of the Board members are women.

(4) A member of a Board is appointed for a period of five years but the Minister may in her or his discretion extend such term of office by a further period not exceeding six months until a new Board member has been appointed.

(5) (a) The Minister must, after consultation with the appointed Board members, appoint a chairperson and a deputy chairperson from among such members.

(b) When a chairperson is unable to perform her or his duties, the deputy chairperson must perform such duties.

(6) The Minister must publish in the *Gazette* the names of, and position held by, each appointee to a Board, the date on which each appointment takes effect and such other information as may be prescribed.

(7) If a member of a Board dies or vacates her or his office before the expiry of her or his term of office, the Minister may appoint a person to fill the vacancy for the remaining portion of such term.

### **Disqualification as Board member**

- 27.** (1) The Minister must not appoint as a member of a Board a person who –
- (a) is not a South African citizen or a permanent resident and is not ordinarily resident in the Republic;
  - (b) is an unrehabilitated insolvent;
  - (c) is declared by a court of law to be mentally incompetent or is detained under the Mental Health Act, 1973 (Act No. 18 of 1973), or any other applicable law;
  - (d) has been removed from an office of trust on account of improper conduct;
  - (e) has had his or her name removed from any professional register on account of misconduct and who has not been reinstated;
  - (f) has been determined by a court, tribunal or forum as contemplated by the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000), to have contravened section 7 or any other provision of that Act; or
  - (g) is an elected political representative in the national, provincial or local sphere of government.
- (2) A member of a Board must vacate her or his office if she or he –
- (a) becomes disqualified in terms of subsection (1) from being appointed as a member of a Board;
  - (b) resigns by written notice addressed to the Minister;
  - (c) is removed from office by the Minister on reasonable grounds, after consultation with the Board; or
  - (d) has, without the leave of the Board, been absent from two or more meetings of the Board during a continuous twelve-month period.

### **Powers and duties of Board**

- 28.** (1) A Board must, in the prescribed manner and in respect of any matter contemplated by or incidental to this Act –
- (a) advise the Minister and advise and assist a community generally and in particular with regard to matters concerning sustainable land ownership and use, the development of land and the provision of access to land on an equitable basis;
  - (b) liaise with, all spheres of government, civil institutions and other institutions;
  - (c) monitor compliance with the Constitution and this Act; and
  - (d) exercise any other power and perform any other duty in terms of this Act or assigned to such Board by the Minister.
- (2) A Board and any Board member acting in her or his official capacity may, in the exercise of a power or in the performance of a duty of a Board –
- (a) at any time enter upon any communal land;
  - (b) enquire into any relevant matter;
  - (c) inspect any document in the possession of any land administration committee or any rights holder concerning old and new order rights and make copies of such document; and
  - (d) convene and attend meetings of a community or land administration committee.
- (3) A Board has all powers necessary, or incidental to the performance of its duties.

### **Resources of Board**

**29.** The Department must, from monies appropriated by Parliament for this purpose, provide a Board with the staff, accommodation and financial and other resources required by such Board.

### **Service conditions of Board members**

- 30.** The Minister must, in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999), determine —
- (a) the conditions of service of Board members; and

- (b) with the concurrence of the Minister of Finance, the remuneration and allowances payable to Board members who are not employed by the State from monies appropriated by Parliament for this purpose.

## **CHAPTER 9**

### **KWAZULU-NATAL INGONYAMA TRUST LAND**

#### **Laws governing KwaZulu-Natal Ingonyama Trust Land**

**31.** Communal land to which the KwaZulu-Natal Ingonyama Trust Act, 1994 (Act No. 3 KZ of 1994), applies is, from the date of commencement of this Act, governed by the provisions of that Act as amended by this Act and, to the extent provided for in this Chapter, by the provisions of this Act.

#### **Ingonyama Land Rights Board for KwaZulu-Natal**

**32.** From the date of commencement of this Act, the KwaZulu-Natal Ingonyama Trust Board established by section 2A of the KwaZulu-Natal Ingonyama Trust Act, 1994 (Act No. 3 KZ of 1994)-

- (a) is known as the Ingonyama Land Rights Board for KwaZulu-Natal;
- (b) constitutes both the Board so established by that Act and, despite the provisions of sections 25, 26 and 27 of this Act, the Land Rights Board for KwaZulu-Natal as contemplated in Chapter 8, with all the powers and duties provided for in both the KwaZulu-Natal Ingonyama Trust Act, 1994, and in this Act;
- (c) is headed in perpetuity by the Ingonyama referred to in section 13 of the KwaZulu Amakhosi and Iziphakanyiswa Act, 1990 (Act No. 9 KZ of 1990), or its successors in title or nominee as the chairperson and member of the Ingonyama Land Rights Board; and
- (d) continues to be constituted by the Ingonyama and the members appointed by the Minister in terms of section 2A of the KwaZulu-Natal Ingonyama Trust Act, 1994, until it is reconstituted in terms of section 33 of this Act.

#### **Reconstitution of KwaZulu-Natal Land Rights Board**

**33.** (1) Upon the termination of the term of office of the appointed members of the KwaZulu-Natal Ingonyama Land Rights Board immediately after the date of commencement of this Act, the Board must be reconstituted in terms of sections 26 and 27.

(2) From the date of such termination all the provisions of Chapter 8, with the exception of section 25(a), apply to such Board.

#### **Powers and duties in relation to Ingonyama land**

**34.** From the date of commencement of this Act, the powers and duties provided for in relation to land to which the KwaZulu-Natal Ingonyama Trust Act, 1994 (Act No. 3 KZ of 1994), applies, must be exercised or performed by –

- (a) such Board, when communal land is transferred to a community or person in terms of section 6;
- (b) the Minister, after consultation with such Board, when cancelling an old order right in terms of section 13;
- (c) the Minister or such Board, when a land rights enquiry is instituted in terms of section 14(1);
- (d) the Minister, in relation to the designation of an officer of the Department or such Board in relation to the appointment of a suitable person who is not such an officer, when a land rights enquirer is designated or appointed in terms of section 15; and
- (e) the Minister or such Board, when a notice of a land rights enquiry or a determination is published in terms of section 16.

## **Inconsistency in laws**

**35.** In the event of any inconsistency between this Act and the KwaZulu-Natal Ingonyama Trust Act, 1994 (Act No. 3 KZ of 1994), this Act prevails.

## **CHAPTER 10**

### **GENERAL PROVISIONS**

#### **Provision of assistance to community**

**36.** The Minister may designate an officer of the Department to assist a community or person to give effect to the implementation of this Act.

#### **Provision of municipal services and development infrastructure on communal land**

**37.** Despite the other provisions of this Act and the provisions of any other law, no law must prohibit a municipality from providing services and development infrastructure and from performing its constitutional functions on communal land however held or owned.

#### **Acquisition of land by Minister**

**38.** (1) The Minister may, for the purposes of this Act, purchase, acquire in any other manner or, consistent with section 3 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), expropriate land, a portion of land or a right in land.

(2) The Expropriation Act, 1975 (Act No. 63 of 1975), must, with the necessary changes, apply to an expropriation under this Act, and any reference to the Minister of Public Works in that Act must be construed as a reference to the Minister for the purpose of such expropriation.

(3) Where the Minister expropriates land, a portion of land or a right in land under this Act, the amount of compensation and the time and manner of payment must be determined either by agreement or by a court in accordance with section 25(3) of the Constitution.

#### **Application of Act to other land-reform beneficiaries**

**39.** This Act, read with the necessary changes, applies to beneficiaries of communal land or land tenure rights in terms of other land-reform laws.

#### **Extension of access to courts**

**40.** The Minister and a Board, in their capacities as such and on behalf of any community or person, each has the legal capacity to institute or intervene in any legal proceedings arising from, or related to, this Act.

#### **Offences**

**41.** (1) A person who –

- (a) hinders, obstructs or unduly influences any other person in the exercise of the powers or the performance of the duties conferred on or vested in such other person in terms of this Act;
- (b) unlawfully requires any other person to refrain from exercising a right in terms of this Act; or
- (c) in any manner prevents any other person from exercising such a right,

is guilty of an offence.

(2) Any person who grants or purports to grant to any other person, other than a member of a community, a new order right in communal land –

- (a) in contravention of, or without complying with, a community rule;
- (b) without the prior consent of the community or its land administration committee or, in the case of State land, the consent of the Minister,

is guilty of an offence.

(3) A person who, without good cause-

- (a) having been subpoenaed to appear before a land rights enquirer, does not attend at the time and place stated in the subpoena;
- (b) having appeared in response to a subpoena by a land rights enquirer, fails to remain in attendance until excused;
- (c) refuses to take an oath or affirmation as a witness when a land rights enquirer so requires;
- (d) refuses to answer any question fully and to the best of her or his knowledge and belief;
- (e) fails to produce any book, document or object when required to do so; or
- (f) does or says anything in relation to a land rights enquirer which if said or done in relation to a court of law, would be contempt of court,

is guilty of an offence.

#### **Penalties**

42. A person convicted of an offence in terms of this Act is liable on conviction-
- (a) in the case of an offence referred to in section 41(1) or (2), to a fine or imprisonment for a period not exceeding two years, or to both a fine and such imprisonment; and
  - (b) in the case of an offence referred to in section. 41(3), to the penalty applicable to a similar offence in a magistrate's court.

#### **Delegation of powers**

43. The Minister and the Director-General may delegate any power, except the power to expropriate land, a portion of land or a right in land, which has been conferred upon the Minister or the Director-General, respectively, in terms of this Act.

#### **Regulations**

44. (1) The Minister may make any regulation with regard to any matter which is governed by or incidental to the objects or implementation of this Act.
- (2) Any regulations made under this section must be tabled in Parliament.

#### **Act binds State**

45. This Act binds the State.

#### **Amendment and repeal of laws**

46. (1) The laws mentioned in the Schedule are amended or repealed to the extent set out in the third column of the Schedule.
- (2) Any law which regulates an old order right and which-
- (a) is not mentioned in the Schedule; and
  - (b) is not in conflict with this Act,
- remains in force until repealed by a competent authority.

#### **Short title and commencement**

47. This Act is called the Communal Land Rights Act, 2004, and comes into operation on a date to be determined by the President by proclamation in the *Gazette*.



Schedule

Amendment or repeal of laws

(Section 46)

Part 1: Laws enacted by Parliament

| No. and year of law | Short title                    | Extent of amendment or repeal  |
|---------------------|--------------------------------|--|
| Act No. 38 of 1927  | Black Administration Act, 1927 | Repeal of sections 6 and 7.  |
| Act No. 47 of 1937  | Deeds Registries Act, 1937     | <p>1. Amendment of section 3 by the insertion in subsection (1) after paragraph (d)bis of the following paragraphs:</p> <p><u>"(d)ter register deeds of communal land rights as contemplated in the Communal Land Rights Act, 2004;</u></p> <p><u>(d)ter(1A) register the conversion to full ownership of old and new order rights as contemplated in the Communal Land Rights Act, 2004;</u></p> <p><u>(d)ter(1B) register the cancellation of old order as contemplated in the Communal Land Rights Act, 2004;"</u>.</p> <p>2. Insertion after section 16B of the following section:</p> <p><b>"Registration of new order rights</b></p> <p><b>16C.</b> <u>New order rights shall be transferred by means of a Deed of Communal Land Right as contemplated in the Communal Land Rights Act, 2004."</u></p> <p>3. Amendment of section 102–</p> <p>(a) by the insertion after the definition of court" of the following definition:</p> <p><u>"Deed of Communal Land Right means a deed of communal land right as defined in section 1 of the Communal Land Rights Act, 2004;"</u></p> <p>(b) by the substitution for the definition of "general plan" of the following definition:</p> <p><u>"'general plan' means a plan which represents the relative positions and dimensions of two or more pieces of land and has been signed by a person recognized by law as a land surveyor, and which has been approved, provisionally approved or certified as a general plan by a surveyor-general or other officer empowered under any law so to approve, provisionally approve or certify a general plan, and includes a general plan or copy thereof prepared in a surveyor-general's office and approved, provisionally approved or certified as aforesaid, or a general plan which has at any time, prior to the commencement of this Act, been accepted for registration in a deeds registry or surveyor-general's office, and includes a communal general plan as contemplated in the Communal Land Rights Act 2004;"</u></p> <p>(c) by the addition to the definition of "immovable property" of the following paragraph:</p> <p><u>"(e) new order rights as contemplated in the Communal Land Rights Act, 2004;"</u>; and</p> <p>(d) by the substitution for the definition of "person" of the following definition:</p> <p><u>" 'person', for the purpose of [the registration of immovable trust property only] any registration in terms of this Act, includes a trust and for the purpose of the Communal Land Rights Act, 2004, includes a community;"</u>.</p> |

| No. and year of law | Short title  | Extent of amendment or repeal   |
|---------------------|--|---|
| Act No. 112 of 1991 | Upgrading of Land Tenure Rights Act, 1991            | 1. Repeal of section 20 .<br>2. Substitution for section 25A of the following section:<br><br>"25A. As from the coming into operation of the Communal Land Rights Act, 2004, this Act shall apply throughout the Republic."<br>3. Amendment of Schedule I by the insertion of the following items before item 1, items 1 to 6 becoming items 3 to 8:<br>"1. Any quitrent title referred to in Proclamation 196 of 1920.<br>2. Any quitrent title referred to in Proclamation 170 of 1922."  |
| Act No. 31 of 1996  | Interim Protection of Informal Land Rights Act, 1996 | Amendment of section 5 by the deletion of subsection (2).   |
| Act No. 8 of 1997   | Land Survey Act, 1997                                | Amendment of section 1 by the substitution for the definition of "general plan" of the following definition:<br><br>"'general plan' means a plan which, representing the relative positions and dimensions of two or more pieces of land, has been signed by a person recognised under any law then in force as a land surveyor, or which has been approved or certified as a general plan by a Surveyor-General and includes a general plan or a copy thereof prepared in a Surveyor-General's office and approved or certified as such or a general plan which has, prior to the commencement of this Act, been lodged for registration in a deeds registry or Surveyor-General's office in the Republic or any area which became part of the Republic at the commencement of the Constitution, 1993 and, for the purposes of the Communal Land Rights Act, 2004, includes a communal general plan contemplated in that Act;" |

Part 2: Laws of the former KwaZulu

| No. and year of law  | Short title                             | Extent of amendment or repeal  |
|----------------------|---|--|
| Act No. 3 KZ of 1994 | KwaZulu-Natal Ingonyama Trust Act. 1994 | 1. Amendment of section 2 –<br>(a) by the substitution for subsection (2) of the following subsection:<br><br>"(2) The Trust shall, in a manner not inconsistent with the provisions of this Act, be administered for the benefit, material welfare and social well-being of the members of the tribes and communities as contemplated in the KwaZulu. Amakhosi and Iziphakanyiswa Act. 1990 (Act No. 9 1(2 of 1990). referred to in the second column of the Schedule, established in a district referred to in the first column of the Schedule, and the residents of such a district to whom the land referred to in section 3 and the real rights and other rights in such land must, subject to this Act and any other law, be transferred."<br>(b) by the substitution for subsection (5) of the following subsection:<br><br>"(5) The Ingonyama shall not encumber, pledge, lease, alienate or otherwise dispose of any of the said land or any interest or real right in the land, unless he has obtained the prior written consent of the [traditional authority or community authority,] community concerned, and otherwise than in accordance with the provisions of any applicable law." |

| Part 3: Laws of the former Bophuthatswana |                                       |                               |
|---|---------------------------------------|-------------------------------|
| No. and year of law                       | Short title                           | Extent of amendment or repeal |
| Act No. 39 of 1979                        | Bophuthatswana Land Control Act, 1979 | Repeal of the whole.          |

| Part 4: Laws of the former Venda |                                       |  |
|----------------------------------|---------------------------------------|--|
| No. and year of law              | Short title                           | Extent of amendment or repeal  |
| Act No. 16 of 1986               | Venda Land Control Act, 1986          | Repeal of the whole.   |
| Proclamation 45 of 1990          | Venda Land Affairs Proclamation, 1990 | Repeal of sections I to 5, 8 to 13, 20 to 43 and so much of sections 6,7 and 14 to 19 as has not been assigned to the government of Limpopo province under section 235(8) of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993). |

| Part 5: Laws of the former Ciskei |                                  |   |
|-----------------------------------|----------------------------------|---|
| No. and year of law               | Short title                      | Extent of amendment or repeal   |
| Act No. 14 of 1982                | Ciskei Land Regulation Act, 1982 | Repeal of the whole with effect from the date of registration of a community's community rules under section 19(1) of "this Act", but only within the area comprised of that community's communal land and with effect from the date on which Proclamation No. R. 188 of 1969 is repealed in that area. |

| Part 6: Laws of the former Qwaqwa |                       |   |
|-----------------------------------|-----------------------|---|
| No. and year of law               | Short title           | Extent of amendment or repeal   |
| Act No. 15 of 1989                | Qwaqwa Land Act, 1989 | Repeal of the whole with effect from the date of registration of a community's community rules under section 19(1) of "this Act", but only within the area comprised of that community's communal land. |

| Part 7: Laws of the former KwaNdebele |                                  |                                   |
|---------------------------------------|----------------------------------|-----------------------------------|
| No. and year of law                   | Short title                      | Extent of amendment or repeal     |
| Act No. 11 of 1992                    | KwaNdebele Land Tenure Act, 1992 | So much as has not been repealed. |

| Part 8: Other laws      |  |   |
|-------------------------|--|---|
| No. and year of law     | Short title or description   | Extent of amendment or repeal   |
| Proclamation 26 of 1936 | Administrative Area Regulations — Unsurveyed Districts: Transkeian Territories | Repeal of the whole with effect from the dale of registration of a community's community rules under section 19(1) of "this Act", but only within the area comprised of that community's communal land. |

# **MEMORANDUM ON THE OBJECTS OF THE COMMUNAL LAND RIGHTS BILL, 2004**

## **1. BACKGROUND**

South Africa's inequitable and racially based system of land tenure causes an unsustainable imbalance in its citizens' access to land, legal recognition afforded to land rights and the consequent levels of security of tenure, and the registration of those rights.

On the one hand, much of the country's land is held by a minority of people under a system affording secure registrable (mainly individual) rights which are legally protected and enforceable. On the other hand, the greater majority of people have only insecure tenure rights (held communally or individually), in less advantaged areas and circumstances. The latter tenure rights (referred to in the Bill as 'old order rights') are often informal and unregistered and have a lower legal and social status, with title to the land vesting paternalistically in the State and the Ingonyama Trust.

The resultant overcrowding on communal land, lack of title to secure ('new order') rights, conflicting claims to land, gender inequities in the ownership and administration of communal land and the chaotic land administration systems occasioned by a plethora of disparate laws and administrative systems, perpetuate the imbalance in the enjoyment of the fundamental human and constitutional rights and prevent social and economic advancement of these areas.

## **2. OBJECTS OF BILL**

The objects of the Bill are mandated by section 25(5) and (6) of the Constitution.

The Bill seeks to—

- (a) legally recognise and formalise the African traditional system of communally held land within the framework provided by the Constitution;
- (b) legally secure land tenure rights of communities and people (including women, the disabled and the youth) within the tenure system of their choice;
- (c) provide for the transfer and registration of communal land and rights in and to that land;
- (d) create a uniform national registration system for all tenure rights whether held individually or communally;
- (e) provide comparable redress where rights cannot be legally secured *in situ*;
- (f) provide for community rules which are aligned to the Constitution and for their registration;
- (g) provide for a systematic and democratic administration of communal land in which traditional leaders and local and national government actively participate and support communities in the administration of their land and tenure rights;
- (h) extend the African peoples' access to land.

## **3. FINANCIAL IMPLICATIONS FOR STATE**

The implementation of the Bill will require an extensive communication strategy, the provision and training of departmental staff and the members of the Land Rights Boards, the conducting of land rights enquiries and the resolution of disputes around land and tenure rights, the training of and support to communities and their land administration committees and the provision of logistical requirements (accommodation, equipment, inventory and administration). The estimated annual total cost is R 68 318 299.00.

## **4. ORGANISATIONS CONSULTED**

### **4.1 National Departments**

The following National Departments were consulted:

- (a) Department of Agriculture;
- (b) Department of Environmental Affairs and Tourism;
- (c) Department of Housing;
- (d) Department of Justice and Constitutional Development;
- (e) Department of Minerals and Energy;
- (f) The National Treasury;

- (g) Department of Provincial and Local Government;
- (h) Department of Public Works;
- (i) Department of Trade and Industry;
- (j) Department of Transport; and
- (k) Department of Water Affairs and Forestry.

#### **4.2 Provincial Governments/Departments**

The following provincial Governments/Departments were consulted:

- (a) Eastern Cape Provincial Government (the office of the senior State Law Adviser in the Premier's office, Department of Local Government and Housing and Directorate: Traditional Affairs);
- (b) Free State Provincial Government (the office of the senior State Law Adviser in the Premier's office, Department of Local Government and Housing and Directorate: Traditional Affairs);
- (c) KwaZulu-Natal Provincial Government (the office of the senior State Law Adviser in the Premier's office, the Department of Traditional Affairs and the Department of Housing);
- (d) Limpopo Provincial Government (the office of the senior State Law Adviser in the Premier's office, Department of Local Government and Housing and Directorate: Traditional Affairs and Department of Agriculture);
- (e) Mpumalanga Provincial Government (the office of the senior State Law Adviser in the Premier's office, the Department of Traditional Leaders and the Department of Housing); and
- (f) North West Provincial Government (the office of the senior State Law Adviser in the Premier's office, Department of Local Government and Housing and Directorate: Traditional Affairs).

#### **4.3 Other organisations**

The following organisations were consulted:

- (a) Bafokeng Royal Council;
- (b) Banking Council of South Africa;
- (c) Church communities in various places in KwaZulu-Natal;
- (d) Church hierarchy in KwaZulu-Natal;
- (e) Coalition of Traditional Leaders;
- (f) CONTRALESA;
- (g) National House of Traditional Leaders, including the representation from the Provincial House of Traditional Leaders;
- (h) 68 local and district councilors from Polokwane and Capricorn district councils and officials from Polokwane municipality; and
- (i) 114 seminar participants in KwaZulu-Natal drawn from the legal fraternity, government departments, municipalities, the universities, Ingonyama Trust Board, financial institutions, farmers associations, community representatives, the press, representatives from organs of civil society, community-based organisations, His Majesty King G. Zwelithini, His Majesty King Zwelithini together with Inkosi Mangosuthu Buthelezi and Amakhosi in Ulundi.

#### **4.4 Reference Group**

The following organisations were represented in the Reference Group established by the Minister to participate in drafting the Bill:

- (a) Centre for Applied Legal Studies;
- (b) Coalition of Traditional Leaders;
- (c) Department of Agriculture;
- (d) Commission for Gender Equality;
- (e) Legal Resources Centre;
- (f) National African Farmers Union;
- (g) National House of Traditional Leaders;
- (h) National Land Committee;
- (g) PLAAS (University of Western Cape); and
- (j) South African Law Commission.

#### **4.5 Communities**

A total of 50 workshops were organised at the national, provincial and community levels. These workshops were conducted in consultation with organs of civil society. The workshops involved traditional leaders and their communities, the National House of Traditional Leaders with representation from the Provincial Houses of Traditional Leaders, the Coalition of Traditional Leaders, CONTRALESA and the Ingonyama Trust Board.

#### **5. CONSTITUTIONAL IMPLICATIONS**

None.

#### **6. COMMUNICATION IMPLICATIONS**

The Department will conduct an extensive communication campaign involving all categories of electronic and print media, and community-based communication methods. Workshops with the public and communities will also be held.

#### **7. PARLIAMENTARY PROCEDURE**

The State Law Advisers and the Department of Land Affairs are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.