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A Framework to Formalise Land Rights in Communal Land Areas of the Former Transkei, South Africa

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Abstract

The aim of this article is to design a framework for the formalisation of the land rights to ensure good governance in communal areas and to ensure that they are secure and equal to exclusive rights of ownership offered by the statutory land registration system in South Africa. South Africa is facing a problem of dual land tenure system inherited from colonial and apartheid land policies and practices. The colonial and apartheid policies and practices ensured that whites keep exclusive rights of ownership (i.e., freehold and leasehold) to the land, while Africans still have insecure permit-based land rights in the former homelands regulated by customary based land rights systems. The land tenure reform programme embarked upon as part of land reform since 1994 has not yet addressed this land tenure duality, despite the provisions of the Constitution to provide legally secure land tenure rights to those whose tenure of land is insecure and inferior because of past racially discriminatory laws and practices. Thus, the population residing in the communal areas of the former Transkei continues to occupy and use their land under the legally insecure land rights they were provided with under colonial and apartheid eras. The data used in this research were gathered through semi-structured interviews with residents, traditional leaders, and state officials, as well as through document analysis. This provided valuable data which assisted in establishing the key components that should form the framework to formalise the land rights in communal areas. A proposal for formalisation framework to solve the issues identified in the research is also provided. The article concludes with a few key recommendations that could be implemented to improve land governance in the communal land areas of the former Transkei.

Keywords: *Land reform; Land rights; Communal land; Traditional societies; Customary laws.*

1. Introduction

South Africans who reside in the rural areas of the former Transkei (these areas are commonly referred to as communal areas and will be referred to as such hereafter) do not have formal rights to the land they have occupied and used for generations. In these areas, land is accessed through customary or locally managed processes, and there is no legal framework to regulate these processes to secure land rights and ensure that land administration is improved. There is thus a legal and policy vacuum which results in the land rights of citizens who reside in communal areas not having statutory recognition. This has become a major problem given the increased competition for land in these areas, which is caused by population growth. In addition, contestations between traditional leaders, the communities, and the local government structures regarding their respective roles in land administration in communal areas have

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increased. The purpose of this article is to design a framework to formalise land administration in the communal areas to resolve the current land governance challenges and to establish a base on which the land tenure system can be upgraded incrementally to enjoy equal status as freehold land rights. The analysis in this article starts with the historical background and proceeds with the analysis of the historic background of land dispossession in South Africa and the land reform programme of the post-1994 government. The article proceeds with a brief overview of the land reform programme of the post-1994 government, the research methodology and the key lessons to consider in the process of land tenure formalisation and concludes with the findings from the respondents and well as the recommendations.

2. Historical Background

The land question in South Africa, and in particular the land rights challenges in communal areas, originates from the colonial and apartheid eras when European settlers used "a range of coercive measures" (Hall 2010:71) to dispossess Africans of their land. "Organised military campaigns were conducted from the middle of the 17th century to the end of the 19th century" to quell African resistance, to forcibly remove and confine Africans to the marginal portions of the land called the native reserves, as well as to appropriate fertile land for European settlers (Amanor 2012:17; Hall 2010:71). The former Transkei, which is the focus of this article, was annexed in the second half of the 19th century through protracted wars that erupted in 1865, 1872, 1878, and 1880 between the British armies and their mercenaries and the Africans who resided in the area to the east of the Kei River. From then on, the former Transkei was established as a reservoir of cheap labour for the mining houses (Crais 2011:41). By the late 19th century, the land dispossession of Africans through military conquests throughout South Africa was so well advanced that the colonial state had started to supplement it with legislation (Khan 2013:2-3). Several laws were promulgated, which sought to:

- formalise into the statutes the land dispossessions of the earlier period,
- provide legal justification for more land dispossessions,
- create separate living spaces along racial lines; and
- ensure that Africans occupied and used land under inferior and precarious land rights, which could be revoked by the colonial state whenever a rights holder broke any of the plethora of colonial regulations.

These laws included the Glen Grey Act, No. 25 of 1894, the Natives Land Act, No. 27 1913, the Natives Administration Act, No. 38 of 1927, the Natives Land and Trust Act, No. 18 of 1936, and the Bantu Authorities Act, No. 68 of 1951. These are briefly discussed here together with their impacts on the land rights of Africans in the former homelands. The Glen Grey Act, No. 25 of 1894, was passed by the Cape colonial parliament to regulate the land rights of Africans initially within the Glen Grey district. According to Braun (2014:150), upon its promulgation, "the Glen Grey Act was extended to the Transkei districts of Butterworth, Idutywa, Ngqamakwe, and Tsomo through Proclamation No. 352 of 1894". It was further extended to Pondoland along the east coast and later to the whole of the Transkei (Walker 1963:558).

The measures introduced by the Glen Grey Act of 1894 included requiring Africans to register their land holdings at the magistrate's office – a measure that subjected indigenous land tenure presided over by traditional leaders to the authority of colonial officials; empowering the state

to appoint headmen with duties that included the control of land, assistance in the collection of taxes, and general enforcement of the law; restricting the extent of land Africans could hold to no more than 3.5 hectares; introducing the 'one man one plot' principle; prohibiting the subletting or subdivision of land, thus prohibiting land accumulation by Africans; and introducing the male primogeniture system, which meant that only the eldest son in a family could inherit land (Hall 2010:73-74). Women were totally excluded from land ownership under the Glen Grey Act of 1894 and other laws that were instated by both the British colonial government and later the Apartheid government (Hall 2010:73-74). Through these provisions, the Glen Grey Act of 1894 effectively created a class of landless people (both male and female) who were deemed unqualified to own land and who had to leave their areas (especially males) to look for work in the mines and white commercial agriculture (Khan 2013:3; Hall 2010:75; Braun 2014:138).

The Natives Land Act, No. 27 of 1913, together with the Natives Land and Trust Act, No. 18 of 1936, were central in formalising the earlier land dispossessions of Africans and created the legal framework for further dispossessions. The Natives Land Act in particular "contained a schedule which set out areas in which Africans were allowed to purchase, lease, and occupy land". Africans were therefore legally precluded from purchasing land in most of South Africa, as the Natives Land Act "decreed that Africans could only own or rent land" in the areas reserved for them "which, at that stage, amounted to a mere 7.3% of South Africa's total land area" (Khan 2013:8). The Natives Administration Act, No. 38 of 1927, decreed that the Governor General of the Union Government, a representative of the British Queen was also the "Supreme Chief of all Natives" in South Africa, and provided him with all the powers and authority over natives. This provided the Governor General with vast powers to rule Africans; which included "the power to appoint and depose traditional leaders; issue proclamations; and issue regulations prescribing the duties, powers, privileges, and service conditions of chiefs and headmen" (Dyzenhaus 1991:37). These powers could also be devolved to any administrative official within the colonial state administration, which made colonial state officials such as magistrates more powerful than traditional leaders (Wicomb & Smith 2011:425).

The Natives Trust and Land Act, No. 18 of 1936, established the South African Development Trust (SADT), which owned and administered land in the native reserves on behalf of Africans and conferred "a right of usage for native communities with a restriction on their ability to alienate such land" (Home 2011:50). This act provided for two forms of tenure for Africans in the native reserves – "a quitrent title for surveyed land and Permission to Occupy (PTO) certificates for unsurveyed land" (Mukamuri, Manjengwa & Antey 2009:110). These rights did not confer full ownership onto the holder and prohibited alienation and transfer rights (Van Averbeke & Bennett 2007:153; Du Plessis 2011:56; Cousins 2010:56). Once again, the state could revoke these rights whenever the holder failed to meet several state regulations, for example if the holder was convicted of offences such as theft, stock theft, or possession of or dealing in drugs, or was sentenced on a second occasion to imprisonment for 12 months or more (Ngcobo 2010:13-14). Africans could therefore not legally have secure land rights even in the native reserves, because their land rights were insecure as described above and were subject to the administrative discretion of the European settler administration and its officials (Adams, Cousins & Manona 1999:15).

The quitrent title and PTO rights provided for Africans in terms of the Natives Trust and Land Act, No. 18 of 1936 vested all these rights in male household heads, thereby relegating

women's rights to occupy and use land to 'secondary' status as wives and daughters, which meant that women could not occupy and use land in their own right as women (Cousins 2010:56). The Bantu Authorities Act, No. 68 of 1951, established tribal authorities within the native reserves. In the process of demarcating areas for the various tribal authorities, the act entrenched "tribal boundaries and gave statutory powers to certain chiefs, incorporating these chiefs as the lowest rung of the administrative system" (Wicomb & Smith 2011:425). This act "reinforced the policy of indirect rule in the native reserves through a system of state-appointed chiefs and headmen who accounted to government officials". This has been also the case in terms of the Natives Administration Act of 1927 (Hall 2010:82). The purpose of the Bantu Authorities Act, No. 68 of 1951, together with other legislation such as the Promotion of Bantu Self-government Act, No. 46 of 1959, was to prepare the native areas established by the 1913 Land Act and the 1936 Natives Trust and Land Act for self-government as part of the overall policy of apartheid (Van Averbeke & Bennett 2007:141). The objective of this plan was to formally extinguish the citizenship of Africans within the so-called "white only" South Africa and ensured that Africans assume some form of citizenship "in one of the newly created homelands" (Ngcobo 2010:17-18). In converting the native reserves into 'independent states', "the basis for African claims to citizenship within the South African state was effectively stripped" (Hall et al. 2007:5).

By the beginning of the political transition to democracy in the 1990s, ten homelands had been created for each specific ethnic group: "Ciskei and Transkei (Xhosa people), Bophuthatswana (Tswana people), Venda (Venda people), KwaZulu (Zulu people), Lebowa (Pedi and Northern Ndebele people), Gazankulu (Shangaan and Tsonga people), KaNgwane (Swazi people), KwaNdebele (Ndebele people), and QwaQwa (Basothos)" (Butler, Rotberg & Adams 1978:3). The South African "homelands or Bantustans ceased to exist on 27 April 1994 and were reincorporated into the new nine provinces of a democratic South Africa" (Butler et al. 1978:3).

It is important to note that that some of these homelands, including former Transkei, took 'so-called independence'. However, the traditional authorities in these homelands did not have the power to pass their own land acts. Therefore, while it can be argued that a much more complex land legal situation entered the post-1994 democratic South Africa, the attainment of "independence" by the Transkei homeland in 1976 did nothing to alter the land rights situation prescribed by the apartheid government in the rural areas of the homeland. For example, although Transkei was one of the so-called independent homelands, Permission to Occupy (PTO) certificates were issued by the magistrate of a specific district under the auspices of the Natives Land and Trust Act of 1936. Traditional authorities and the Transkei Department of Agriculture allocated sites and records were kept in the offices of Agriculture. The fact that there is no known law which was passed by the former Transkei traditional authorities to regulate land rights in the communal areas, suggests that the new democratic government in 1994 inherited a dual and skewed land tenure system in South Africa's countryside. In communal areas, i.e., the rural areas of the former homelands, Africans accessed, occupied, and used land through customary or local practices, and the land rights acquired had no statutory standing; while on the other hand, and the parts of rural South Africa occupied by white commercial farmers had land rights secured through title deeds which guaranteed them individual ownership. This is the core of the land rights question in the former homelands, which is the focus of this article. Following is brief discussion of the land reforms attempted by the post-apartheid government after 1994.

2.1 Land Reform Programme of the Post-1994 Government

A review of literature shows clearly that the Land Reform Program of the Post 1994 government was much more extensive than it can be fully described in the limited space of this article. Following is a summary of the Land Reform Program of the Post 1994 government.

Interim Protection of Informal Land Rights Act, No. 31 of 1996

The Interim Protection of Informal Land Rights Act (IPILRA) was enacted as an interim measure to protect the land rights of people with untitled or informal land rights, pending a new long-term legislation that would provide for "far-reaching land tenure reform in the rural areas of the former homelands". Cousins and Hall (2013 cited in Weinberg 2015:12) described the IPILRA as "a holding mechanism" to secure the land rights of the residents of communal areas against powerful actors, including the state. Without the IPILRA, "the great majority of people residing in the rural areas of the former homelands (31.4% of the national population) would have no right, independent of the will of the state, to occupy or use their land" (Adams 2000:3).

Section 1 of the IPILRA defines an "informal right to land as the use and occupation of land in terms of any tribal, customary, or indigenous law or practice of a tribe" which is formally vested in the SADT established by section 4 of the Native Trust and Land Act (No. 18 of 1936), or in the governments of the former 'independent states' of Transkei, Bophuthatswana, Venda, and Ciskei. Section 2 of the IPILRA provides that no holder of an "informal right to land" defined in section 1 "may be deprived of any informal right to land without his or her consent". As stated above, the IPILRA was passed as an interim measure, but it has had to be renewed annually because work on a comprehensive legislation for communal areas has not produced results.

2.2 Draft Land Rights Bill (1998-1999)

The first attempt to design comprehensive legislation for communal areas occurred between 1998 and 1999 and resulted in a draft Land Rights Bill (LRB) (Cousins 2012:4). The LRB proposed the "creation of a category of protected land rights covering the majority of those occupying land in the former homelands" (Cousins 2012:12). The LRB aimed to provide for the reform of land tenure practised in communal areas by "repealing the many and complex apartheid laws relating to land administration, recognising customary tenure systems, and bringing tenure law in line with the Constitution" (Adams 1999 cited in Wily & Mbaya 2001:283).

The LRB "envisaged clear statutory limitations on the state's rights in respect of communal land and proposed the vesting of occupation, use, benefit, and decision-making rights in a class of 'protected' rights holders; these rights could be bequeathed and potentially transacted and mortgaged" (Wily & Mbaya 2001:283). These "protected rights would vest in the individuals who use, occupy, or have access to land, but would be relative to those shared with other members, as defined by agreed group rules" rather than by institutions such as traditional authorities or municipalities (Wily & Mbaya 2001:283). Protected rights would thus "secure occupation and use without having to first resolve disputes over the precise nature and extent of the rights" (ibid).

The LRB set out procedures for people to choose which "local institution would manage and administer land rights on their behalf". The envisaged law was "neutral on the issue of traditional authorities" (Wily & Mbaya 2001:283). "Where such systems had proved functional and enjoyed popular support, the law would have provided them with legitimacy. Where they were no longer viable or supported, the proposed law would have enabled people to appoint new structures" (Adams 1999 cited in Wily & Mbaya 2001:283). In cases where rights overlapped and were contested, the LRB proposed a Land Rights Officer in each district, backed by a Land Rights Board, who would be responsible for conducting a land rights enquiry.

The LRB was abandoned when a new Minister for Land Affairs was appointed in 1999 following the general elections of June 1999. The apparent reasons for the withdrawal of the LRB were that its content was too controversial and politically sensitive, and that it was too complex and too expensive to implement (Benjaminsen & Lund 2003:4).

2.3 Communal Land Rights Act, No. 11 of 2004

After withdrawing the draft Land Rights Bill in 1999, the then new Minister of Land Affairs, Ms Thoko Didiza, instructed that "legislation be prepared to transfer state land in the former homelands to the communities" (Adams 1999 cited in Wily & Mbaya 2001:283). This led to the introduction of the Communal Land Rights Bill in 2001, which was passed into law as the Communal Land Rights Act (CLaRA), No. 11 of 2004. CLaRA enjoined the Minister of Land Affairs (now the Minister of Rural Development and Land Reform), as the nominal owner of land in communal areas, to transfer title of such land to the communities. In terms of CLaRA, "the communities had to establish land administration committees, and these committees would allocate land rights, maintain registers and records of rights and transactions, assist in dispute resolution, and liaise with local government bodies in relation to planning and development and other land administration functions" (CLaRA 2004:2). It further stipulated that for traditional communities that have been declared as such in terms of section 2(1) of the Traditional Leadership and Governance Framework Act (TLGFA), No. 41 of 2003, the traditional council established in terms of section 3 of the same act would take over the powers and functions of land administration committees.

Several researchers saw the provisions of the CLaRA, read together with those of the TLGFA, as a significant departure from the tenure reform framework provided by the White Paper on Land Policy, as discussed in Section 3.3.2 of this study. These researchers criticised provisions such as providing traditional councils with land administration powers, as well as the absence of provisions for people residing in traditional communities to have a choice on whether their land rights should be administered by a democratically elected land administration committee or the traditional council (Claassens & Boyle 2015:2). According to Naute (2004:99), by conferring land administration functions to traditional councils in which traditional leaders have a major say, CLaRA effectively proposed the transfer of powers over communal land administration and ownership to traditional leaders. Had CLaRA been implemented, it would have consolidated "the unilateral authority of chiefs in relation to land ownership" provided to them under apartheid laws, such as the Bantu Authorities Act, No. 68 of 1951, which were based on colonial distortions of customary law (Claassens & Boyle 2015:1-2). Claassens (2014:2) argued that these provisions would have "serious consequences for many people and groups who were forcibly removed and subsumed within apartheid-era tribal boundaries against their will".

Claassens (2008:289-290 cited in Cousins 2012:12) further pointed out that by centralising power at the level of the traditional council, CLaRA and the TLGFA failed to "adequately capture the inherently participatory" and "democratic aspects of living customary law", which stress "multiple levels of authority and decision making extending upwards from the household, through the extended family, the clan, and the village to the wider polity".

Given this criticism and other questions of law, four rural communities in Kalkfontein, Makuleke, Makgobistad, and Dixie challenged the constitutionality of the CLaRA in 2008, arguing that its provisions would undermine the security of tenure they were enjoying in their land (Ngcobo 2010:22). The North Gauteng High Court in 2009 "declared certain key provisions of the CLaRA invalid and unconstitutional, in particular those providing for the transfer and registration of communal land, the determination of rights by the minister, and the establishment and composition of land administration committees" (Pepeteka 2010:2). According to Pepeteka (2010:2), the High Court Judge also noted that the CLaRA relied and built upon old apartheid laws such as the Bantu Authorities Act of 1951, which created tribal boundaries. The CLaRA in fact gave these authorities wide-ranging land administration powers which they did not have under state or customary law. The CLaRA was eventually struck down by the Constitutional Court in 2010 in its entirety, on the grounds that it did not follow the correct parliamentary process (Ngcobo 2010:73).

2.4 Communal Land Tenure Policy (2011)

Following the 2009 general elections, the fourth administration of the democratic dispensation released a Green Paper on Land Reform in 2011. This green paper (DRDLR 2011) envisaged a four-tier system of land tenure comprised of state and public land, which would be based on leasehold tenure, privately owned land based on freehold tenure "with limited extent", land owned by foreigners with "freehold but precarious tenure with obligations and conditions to comply with", and "communally owned land with institutionalised usage rights" (Centre for Law and Society 2015:5-6).

While the green paper expanded on three of the systems of tenure, it directed that the fourth tier – communally owned land – be treated in a separate policy articulation because of its complexity, as well as its requirement for extensive consultation and constitutional compliance given the nullification of the Communal Land Rights Act (No. 11 of 2004) by the Constitutional Court in 2010 (DRDLR 2011:6).

This separate policy articulation is provided in the form of the Communal Land Tenure Policy (CLTP) of the DRDLR, which was released during 2013 (DRDLR 2013). Its stated aims are to establish institutionalised use rights, particularly for households and other users, which shall be administered either by traditional councils in areas that observe customary law or communal property institutions outside these (DRDLR 2013:13). The CLTP aims to "strengthen the security of tenure of Communal Area households under traditional leaders, Communal Property Associations (CPAs) or trusts, secure the rights and interests of more vulnerable citizens, and enable household members to bequeath land to their children" (DRDLR 2013:13).

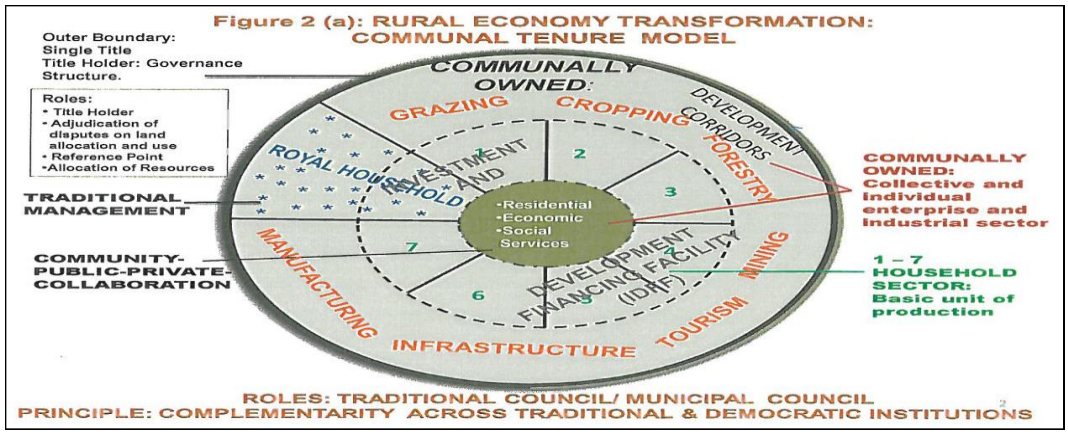

Figure 1: Wagon Wheel.
(Source: DRDLR 2013:18**).**

The CLTP proposes to secure land rights in communal areas; using what it calls the "wagon wheel" as depicted in Figure 2. The innermost circle of the wagon wheel "suggests a partnership between the municipality and the traditional authority". The traditional authority administers the land, while the municipality provides sector plans, integrated development, and spatial plans. The second circle represents the household level, which is the basic unit of production and implies clear allocation of land to each household. The outside circle indicates the commons, consisting of communally owned areas. The traditional authority (and CPA executives, where applicable) are vested with the responsibility of administering the land and related resources on behalf of households. The traditional authorities, CPAs, and trusts are tasked with the administrative responsibilities associated with communal area land (DRDLR 2013:19).

The provisions of the CLTP to transfer the outer boundaries of communal areas (or the commons) to traditional councils have been criticised by various authors. In his critique, Manona (2015:1) pointed out that the chiefs, not the people who live on and work the land, have a major say in traditional councils, and this provision gives them the ultimate right to decide what should be done with the land (Manona 2015:1). Van der Westhuizen (2013:1) argued that this provision has the effect of bringing back the provisions of CLaRA, which were declared unconstitutional by the courts. The Centre for Land and Society (2015:2) contended that the 'use rights' accorded to individual families in the CLTP "are restricted to small areas such as household plots while the traditional council owns and controls all development related to common property areas such as grazing land and forest". These provisions provide fertile ground for corruption and unaccountable versions of chiefly power. Examples in this regard include:

the sale of residential sites cut from grazing land by traditional leaders to outsiders, and massive community dissatisfaction with opaque mining and tourism deals that exclude and fail to benefit ordinary people in KwaZulu-Natal, North West, Limpopo, Mpumalanga, and Eastern Cape" (Centre for Land and Society 2015:2).

2.5 Spatial Planning and Land Use Management Act, No. 16 of 2013

This is a new piece of legislation that has been in the making for more than 13 years. It aims to provide a framework for spatial planning and land use management throughout the Republic of South Africa, including the rural areas. Spatial planning was described by Eglin (2015:1) as a process that involves government through public participation, which determines where new

schools and clinics should be built, which land needs to be conserved for agriculture and nature reserves, where the private sector should establish new business and industrial areas, etc.

The passing of the Spatial Planning and Land Use Management Act (SPLUMA) in 2013 and its regulations provides an opportunity to formalise land use and land administration in communal areas. SPLUMA introduces land use schemes which should be adopted and approved by a municipality for the area under its jurisdiction after public consultation. Key for communal areas and their lack of formal processes in terms of land governance is section 24(1)(c) of SPLUMA, which makes provision for "the incremental introduction of land use management and regulation in areas under traditional leadership, rural areas". The regulations of SPLUMA also make provision for a traditional council to conclude a service level agreement in terms of which the traditional council may perform certain functions, "provided that the traditional council may not make a land development or land use decision" (*ibid)*. Despite this, the traditional leaders are opposing SPLUMA because they see it as a further instrument to take away their roles and powers on land governance in rural areas.

As can be seen here, numerous attempts to legislate land rights in communal areas in South Africa have generally come to nought especially after the Communal Land Rights Bill being thrown out by the courts. Now the Interim Protection of Informal Land Rights Act (IPLIRA) is the only legislation that provides some form of protection. Therefore, the various legislations are not central to the discussion as they currently do not impact the land rights situation on the ground. The DRDLR is still in the process of developing a Communal Land Tenure Bill to give effect to the provisions of the CLTP. Based on the above discussion, the authors of this article argue that the post-1994 government in South Africa has a land reform policy, which seeks to address the colonial and apartheid legacies of land dispossession and land rights as described above. This land policy is implemented through three principal programmes:

- "Land Restitution, which seeks to return land or provide equitable redress to people who were dispossessed of their land after 19 June 1913,
- Land Redistribution, which aims to provide access to land to those who were previously denied access by past discriminatory laws and practices; and
- Land Tenure Reform, which seeks to provide secure tenure to those with legally insecure tenure because of past racially discriminatory laws or practices" (Department of Land Affairs (DLA) 1997:13-18).

The challenge of land rights in communal areas falls within the scope of the Land Tenure Reform Programme. This programme is described in the White Paper on Land Policy as "the most complex area of land reform". It is described as such because it aims to "bring all people occupying land under a unitary legally validated system of land holding" in order to address the current dual system of land holding inherited from the colonial and apartheid eras (DLA 1997:13 in Dekker 2005).

3. Research Methodology

The nature of this research requires the researcher to focus on the people who have an in-depth knowledge of the issues under study and the people who have the lived experience on communal land areas in Transkei. Thus, this study used a non-probability sampling technique known as purposive or judgemental sampling. According to Babbie (2007:184), "purposive sampling is a type of non-probability sampling in which the units to be observed are selected

on the basis of the researcher's judgement about which one will be most useful or representative". The sample for this research included the following 16 participants:

- Four local chiefs or headmen and the Secretary General of CONTRALESA, who is also a member of the Eastern Cape House of Traditional Leaders (ECHTL), who were selected based on purposive sampling because of their knowledge and direct involvement in the communal land tenure practised in their areas.
- Two state officials who are working in the Eastern Cape components of the Department of Rural Development and Land Reform (DRDLR), who were selected on the basis of their involvement in land tenure issues on behalf of the department as the nominal owner of communal land. One is a manager within the Land Tenure and Administration branch and the other a manager within the Spatial Planning Unit of the DRDLR.
- Ten local people residing in Upper Mtokwana village, falling within the Nqabara Administrative Areas Location No. 31 under the Mvilini Traditional Authority. In terms of the wall-to-wall municipality, the area is Ward 29 of the Mbashe Local Municipality. These participants were sampled to ensure fair representation of both young and old males and females.

The following section provides a synthesis of the findings and how they influence the formalisation framework models which is proposed in this research.

4. Findings and Analysis

One of the main elements in the formalisation process is to documents the existing customary and/or local norms and arrangements of land rights administration in communal areas. However, this can only be done within the context of the customs that govern traditional societies. Therefore, it is important to understand what the existing customary arrangements are in land administration in communal areas to design a formalisation framework that benefits the people. The discussion that is presented here comes from the respondents, and the researchers discuss these findings according to the following themes that have been gleaned from the literature above:

- State of land rights documentation,
- Accessing land for residential and arable purposes,
- Accessing land for development; and
- The state of women's land rights.

4.1 State of Land Rights Documentation in Communal Land Areas

The findings in this them confirm that the residents of communal areas do not have any form of documentation that proves their land rights. For example, four of the respondents said that they were allocated land to build their homesteads prior to 1994. These respondents confirmed that they had been issued with PTO certificates. However, because of the period between the issuance and the time they were interviewed they could not show copies of the PTOs or even remember where these documents were. The rest of the participants were allocated sites after 1994 and did not have any form of documentation, except for one of the older community members who had applied for a residential site for his son and was issued with a receipt by the Traditional Council (TC), which could be construed as a form of proof or documentation. However, even though there were no documents confirming their landholdings, all 10

participants expressed a sense of security in terms of their land rights. One lady argued that she had been living in her residence since 1972 and there had never been a threat to her security of tenure. This confirmed the lived reality of these communities as mentioned in the previous sections, which found that customary systems are secure within their local context and have a high level of social legitimacy (Wily 2000:2). This is because these communities have no lived experience of people losing their land rights within the communal areas because of a lack of documentation.

Despite the sense of tenue security, all the categories of respondents, (except the traditional leaders) expressed the need to have some form of documentation that reflects the land rights of community members. An analysis of the responses from the different categories of participants, however, showed that there were some differences in terms of the type of documentation and land rights accrued amongst and within the respondent categories. For example, within the resident category, the older generation had reservations about allocating individual ownership documentation like title deeds because they understand homesteads and arable land as belonging to a family, not an individual family member. The family homestead is seen by the older generation as a safety net for those members of the family who may not have anywhere else to go upon returning to the village from employment in the cities. For younger participants, the surveying of land and the registration of individual title were a necessity as they viewed land rights as a source of generating income through using it as collateral for loans or simply selling off the land. The traditional leaders, on the other hand, were totally opposed to the issuance of title deeds to individuals because in their view the title to the land should vest with the traditional council and individual families should obtain land use rights which should revert to the traditional council if the land is not utilised.

4.2 Accessing Land for Residential and Arable Purposes in Communal Land Areas

The existing local practices of land tenure should be included in the design of the framework for formalisation of land rights for the effort to stand a chance of success. The first step towards this is the documentation of current processes of accessing land so that this process can be captured and taken cognisance of when designing the formalisation framework. Figure 1 is a diagrammatic representation of the current process for land access as described by the traditional leaders and local people during the interviews for this research. The current process was described by the traditional leaders and local people who were interviewed as follows:

A community member (hereafter referred to as 'the applicant') who requires land for residential and/or arable purposes first identifies a piece of land and approaches the sub-headman (*ibhodi*) as a first point of call. The sub-headman is the head of the village. Any community member who is above the age of 21 years, irrespective of gender and marital status, is eligible to be allocated land. If the applicant is from another village, there must be a witness from within the village to testify on behalf of the applicant, as well as a testimonial from the head of the village of origin.

The sub-headman will then call a community meeting and if there is agreement to allocate the land to the applicant, the request is taken to the headman (*Komkhulu*). The headman is the head of the administrative area which covers several villages. If the headman is satisfied that the community has been consulted, he/she will take the matter to the TC (*eNqileni*). The TC has jurisdiction over several administrative areas.

The traditional leaders pointed out that before 1994, the TC would write a letter of recommendation to the provincial Department of Agriculture to request state officials to come and demarcate the piece of land. The applicant would then be issued with a PTO certificate,

with the applicant's details and a site number for the piece of land being allocated. Currently, the process of allocating land ends at the level of the TC, which provides written confirmation of the allocation and is marked with the TC's stamp to the applicant.

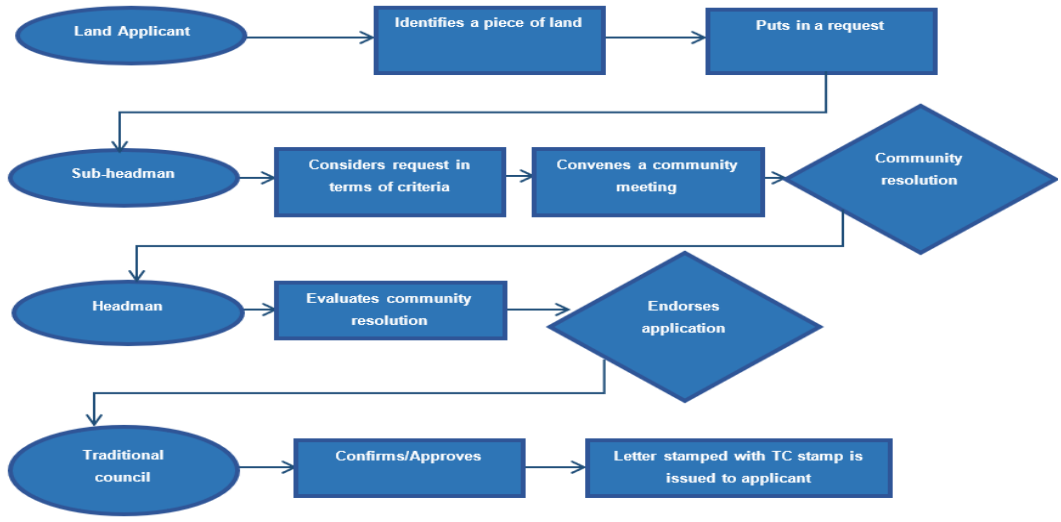

Figure 1: Process Flow of Land Allocation.
Source: Figure 1 Created by the Researcher.

As it can be observed here, this process flow is the process of accessing land in communal areas as articulated by the community members and traditional leaders during the interviews. As it can be seen, there are currently no state actors involved in the allocation of sites for residential and cropping purposes.

One of the DRDLR managers within the Land Tenure and Administration branch who participated in this research confirmed that the involvement of officials from the Department of Agriculture, as well the issuance of PTOs, was discontinued in 1994 as there was no legal framework to administer it. He emphasised that in the absence of legislation, the approach to communal land should be governed by the provisions of the Interim Protection of Informal Land Rights Act (IPILRA), which requires the community to come to a resolution facilitated by a government official before any decision can be made to allocate new sites. He further stated that the community must generate a list of those interested in acquiring land using its own criteria for site allocation. The community must then identify the land and approach the relevant government department to assist with the land demarcation, since such skills are located in government departments. However, the primary data from all the participants confirmed that this process is not followed. It was further found that role-players like traditional leaders and community members are not even aware that they are supposed to follow this process. The IPILRA process is only followed when there is a need to demarcate land for development purposes and this is generally when there is an external developer (or investors).

4.3 Process for Accessing Land for Development in Communal Land Areas of the Former Transkei

The focus on this theme is on the ease of access to land by investors and the official process they follow to access it in the former Transkei area in general and specifically in Nqabara Administrative Area of former Transkei.

4.3.1 Ease of Access

Investors and developers require easier and secured access to land before they can commit to productive investments in an area. Easier access to land rights thus depends on effective and accessible land administration systems. A key finding from the literature review was that accessing land in communal areas for investment and development is a long and cumbersome process. For example, it was estimated that projects involving agriculture, forestry, and eco-tourism can be delayed by up to two years due to a lack of clarity over land rights, which leads to time-consuming case-by-case investigation and negotiated agreements (Adams et al. 1999:7)

In the primary data, participants (i.e. traditional leaders and community members) also confirmed that the process of bringing investment into communal areas takes a long time due to unclear and confusing processes. The most common example cited by traditional leaders were engagements that communities have had with companies such as Ino Wind, which tried to obtain leases on communal land to install wind turbines to harvest wind energy. InnoWind Limited is said to be "a South African based integrated renewable energy company – with its French parent company, EDF Energies Nouvelles that develops, finances, builds, owns and operates commercial renewable energy generation facilities" (InnoWind 2018:1). This process, according to the most participants, took a very long time due to unclear processes from the DRDLR, which led to developers giving up, and this kind of situation is detrimental to the economic development of communal areas. Perhaps to clarify further the difficulties faced by people of the former Transkei area in accessing land for investment purpose one can look at the case of Nqabara Administrative Area.

4.3.2 The Case of Nqabara Administrative Area

The lack of formalised and communally established and accepted processes of availing communally owned land for development is clearly reflected within the Nqabara Administrative Area. In this community, a trust called the Nqabara Community Tourism Trust has been established, with its stated objectives being to "acquire, hold, and deal with the land for the economic and social benefit of the beneficiaries". The researcher interviewed one of the founding members of the trust to ascertain which processes they followed to access land in pursuit of the development objectives of the trust on behalf of the community. The Nqabara Community has at least three ventures which required them to access land, namely a medicinal plant garden, a community multi-purpose centre, and the Nqabara River Lodge. In all three ventures, according to the founding member of the Ngabara Community Tourism Trust who was interviewed, the trust had to follow different and complex processes to acquire the land, which are discussed below:

- Medicinal plant garden – The trust identified land that was allocated to a family within the community for arable purposes, but which was lying fallow. The trust consulted the 'owners', i.e., the people who were allocated the rights to use the land, to gain confirmation that they would no longer use the land. When they obtained this confirmation, the land was re-allocated to the trust and the garden was endorsed by the headman of the area.
- Multi-purpose centre – The centre includes conferencing facilities, a craft centre, and a few chalets. The trust secured external funding and approached the headman to request access to an identified piece of land. An agreement was reached to make the land available for the centre; however, it was felt that the centre covered a bigger piece of land and this request was referred to the Mvilini Traditional Council, under which the Nqabara Administrative Area falls, for approval. In addition, the trust applied to the Department of Agriculture to request that the land be rezoned from agricultural land so that the multi-purpose centre could be built.

- Nqabara River Lodge – Although the lodge is on communal land, the process to acquire this piece of land by the trust required them to approach the DRDLR as the nominal owner of communal land, which gave them a five-year renewable lease. According to the founding member interviewed, the duration of the lease impedes their ability to attract investors because the lease term is too short. In fact, the Mbashe Local Municipality has in turn cited this uncertainty as a reason for not providing bulk infrastructure such as water, sewage, and electricity. As a result, there is no water reticulation at the Nqabara River Lodge, and no electricity because the Mbashe Local Municipality cited costs in terms of rolling out infrastructure into areas with uncertain land rights. One of the founding members of the Nqabara Community Tourism Trust who was interviewed remarked that LED will remain a pipe dream for people who reside in communal areas due to this uncertainty of land rights. He expressed frustration that the lodge requires a private partner, but that the five-year lease period is an impediment to acquiring private sector partners.

The scenarios painted by the three ventures of the trust in Nqabara point to the difficulties that communities face in accessing land for development within the land they are supposed to own as a community.

4.3.3 The Process of Accessing Land for Development in Communal Land Areas of the Former Transkei According to the Department of Rural Development and Land Reform (DRDLR)

After listening to the local community and their traditional leaders, the researcher wanted to find out what was the official process of accessing land for development in communal land areas of the former Transkei according to the Department of Rural Development and Land Reform (DRDLR). The DRDLR is responsible for the implementation of the Interim Protection of Informal Land Rights Act (IPILRA). One of the DRDLR managers in the Land Tenure and Administration unit who participated in this research outlined the process that needs to be followed to access land in communal areas for development IPILRA. The IPILRA process is depicted in Figure 2. According to the DRDLR manager, where there is going to be development, land rights holders need to be identified and there must be a community or beneficiary meeting where a community resolution can be taken whether to accept or reject the idea by most of the community, which is facilitated by a DRDLR official. The community must, in addition, discuss and decide how the benefits that accrue from the investment on the communal land being requested are going to be shared by the community or beneficiaries. According to the DRDLR manager, delays attributed to this process are due to factors such as divisions within the community, as some may want the development, while others may oppose it. In addition, the DRDLR requires developers to submit the following documents to facilitate the leasing of communal land:

- Environmental Impact Assessments (EIA),
- Proof of funding for the proposed development,
- Clear business plans,
- Detailed breakdowns of how the people will benefit,
- A supporting letter from the local municipality (LM),
- A valuation report,
- A land survey; and
- A letter confirming that the land is not the subject of a land restitution claim.

Securing these documents from various state departments can take a long time, which is a source of delays in the leasing of communal land. These documents are required in order to prepare a lease proposal to the Minister or Director General (DG) of the DRDLR as the department responsible for communal land. When the developer has all the required documents, the proposal is sent to the District Screening Committee, which sits monthly, and then to the State Land Disposal Committee (SLDC) at a provincial level, which also sits monthly. If all is in order, the process of obtaining a lease by the developer can take anything between three and six months. Most of the delays are therefore in the preparatory phase, where the developer must interact with various state departments to obtain the necessary documents.

The researcher then reminded the DRDLR managers in the Land Tenure and Administration unit that the provisions of the Spatial Planning and Land Use Management Act (SPLUMA) provide a legal basis to formalise many of the land governance issues confronting communal areas and asked how this is being implemented to facilitate land access in traditional land area. However, despite the both the state officials and traditional leaders who were interviewed confirmed that the state currently has no role in or control over the process of land allocation, which is a huge anomaly for governance. As a result of this governance breakdown, communities have been allocating, and continue to allocate, sites for residential purposes in areas that were previously 'reserved' for grazing, and there is no process to formalise such land use changes. This practice continues even though SPLUMA provides municipalities with the necessary legal power to regulate land use in its areas of jurisdiction, including the rural areas.

The manager responsible for spatial planning in the DRDLR suggested that the process of allocating land in communal areas should be integrated into the municipal planning processes through the implementation of SPLUMA. He highlighted that involving municipalities in land allocation and land use through the provisions of SPLUMA would help traditional councils to obtain assistance from the municipalities in terms of zoning and managing their land uses, as they do not have the capacity for land use regulation. Land uses within communal areas should thus be based on plans approved by the municipality, including the identification of land parcels of various land uses, such as business areas, schools, graveyards, grazing lands, cultural ritual places, etc. The key point from the interviews with different managers responsible for spatial planning in the DRDLR is that the current processes of allocating land in communal areas need to be standardised and should go back and fit into the municipal planning system. While closer cooperation between the municipalities and the traditional councils is provided for in the Service Level Agreement (SLA) outlined in Regulation 19 of SPLUMA, the analysis of the literature and the responses of the traditional leaders and the manager responsible for spatial planning in the DRDLR showed that there remains a serious challenge in implementing SPLUMA in the communal land areas of the former Transkei.

During the process of collecting primary data, the researcher found two particular challenges that the implementation of SPLUMA in the communal areas of the former Transkei faces: a) from the interviews with the traditional leaders it was evident that there is strong opposition to the application of SPLUMA in the communal areas of the former Transkei because they see it as a further erosion of their powers and functions in rural land governance; and b) the non-application of IPILRA provisions in the allocation of land and the absence of state actors in the process speak to a lack of capacity for implementation, which will in all probability affect the implementation of SPLUMA. Thus, opposition from the local traditional leaders and a lack of capacity from the state institutions remain the two main challenges in the implementation of SPLUMA in the former Transkei.

Figure 2 depicts the process which is currently followed by developers and people who need land for development projects on the communal land areas in the former Transkei.

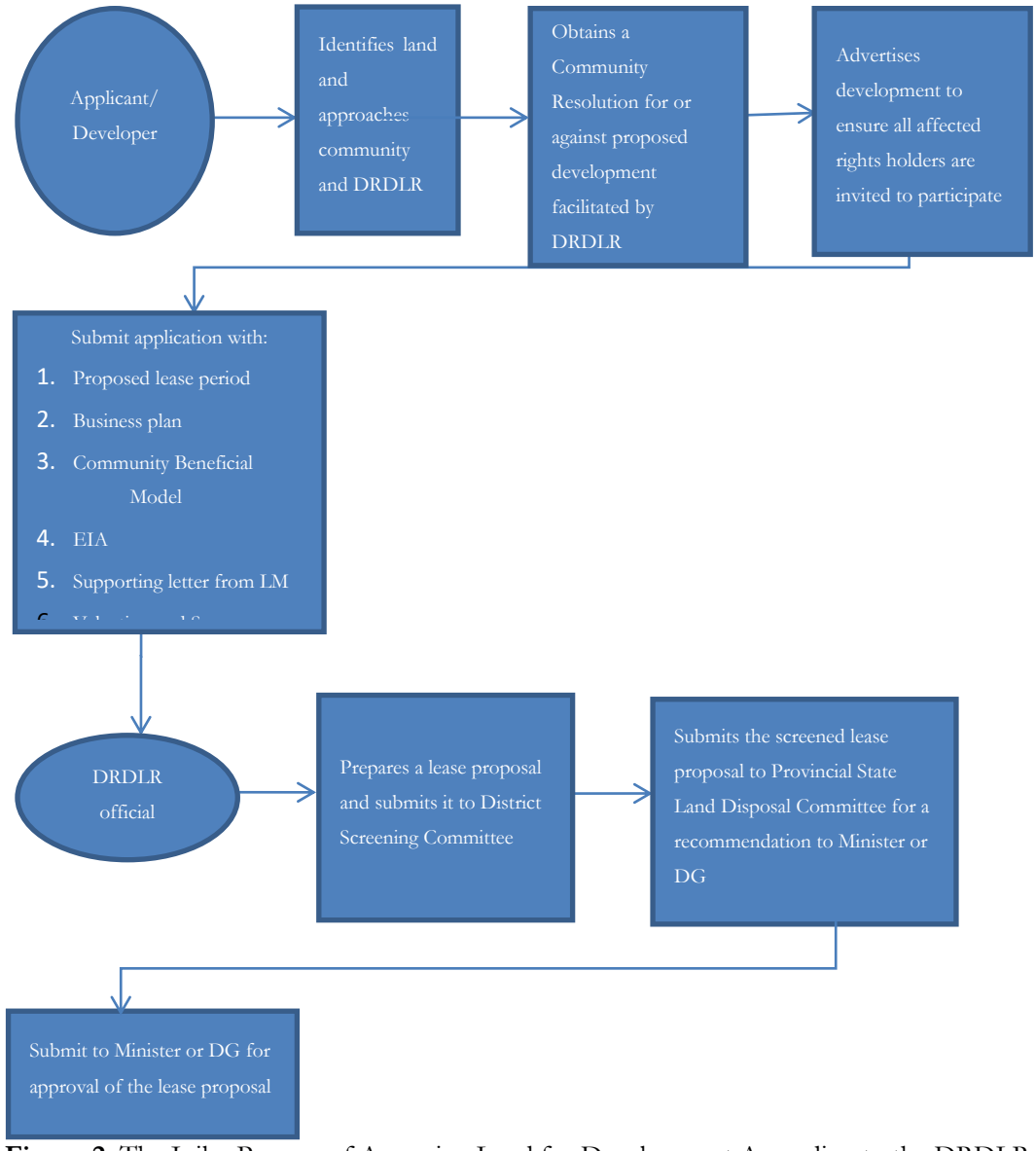

Figure 2: The Ipilra Process of Accessing Land for Development According to the DRDLR
Source: Figure 2 drawn by the researcher on the basis of the description provided by the state officials and community leaders who were interviewed.

5. Key Lessons to Consider in the Process of Developing a Framework to Formalise Land Rights Tenure in Communal Land Areas of the Former Transkei

The authors of this article envisages that the formalisation framework will lay a foundation to improve the governance of the land that is going to continue to be under the control of

traditional leaders on behalf of our people so that such land is held in custody for, and the interests and benefits of the communities (Ramaphosa cited in Mthathwa 2018:1). The term 'formalisation' is applied in this article to denote processes that aim to reform the land tenure situation in communal areas. The formalisation process involves transcribing oral processes and agreements, as well as establishing and recording facts about land rights as they exist to provide informal land rights an "identifiable legal form" (Durand-Lesserve 2013:2-3). This, according to Durand-Lesserve and Selod (2007:7) and Durand-Lesserve (2013:2-3), can be delivered via two channels, viz. administrative recognition of occupation rights and land titling which deliver real property rights. It is the former channel that is the subject of this article, i.e. the administrative recognition of land rights in communal areas. The formalisation framework must be able to "denote procedures and processes that give a legal, written form of rights, rules, customs, institutions, or land use management systems" (Durand-Lesserve 2013:5). The term 'formalisation of customary land tenure' in this article means the development of local administrative systems that document and keep records of all currently undocumented customary land rights, the procedures for the allocation of new customary land rights, the modalities for the management of common property resources, the procedures for the transfer of land rights, and the procedures for the maintenance of land rights records based on prevailing local or customary practices.

In the long term it is hoped that the framework that is going to be developed would help in the general administration of land by enabling the registration of the land rights practised in communal areas in the statutory land registration system of South Africa. As mentioned above, this article is necessitated by the fact that more than 20 years after the adoption of the Constitution, there is still no legislation to formalise the land rights of the population residing in communal areas whose land rights were systematically undermined by successive colonial and apartheid era laws. This legal and policy vacuum creates various challenges for the residents, the government, and the private sector in communal areas. Some of these challenges include:

- A lack of clarity as to which state institutions are responsible for validating and allocating sites for residential and cultivation purposes, as well as for keeping the relevant records, because state institutions such as the magistrate's office and the Department of Agriculture that used to perform these functions before 1994 no longer do so (Cousins 2008:8).
- Land rights records that have disintegrated to the extent that even apartheid land rights documentation like PTO certificates are of little or questionable value because such certificates have not been updated for at least one generation (Manona 2012:2-3). In addition, residents who have acquired land since 1994 in communal areas do not have any documented proof of their land rights.
- This "lack of clarity about the status of land rights and institutions" results in considerable delays to development projects (Adams et al. 1999:16). It is estimated that projects can be delayed by up to two years due to "time-consuming, case-by-case investigation and negotiated agreements" (Adams et al. 1999:16). Such delays are exacerbated by "tensions between local government bodies and traditional authorities over the allocation of land for projects" (Cousins 2010:57).
- The vacuum in land administration is being filled by "the emergence of unrepresentative local or traditional structures, the growth of systems of patronage and random land allocations", which have led to a total collapse of land administration in communal areas (Cousins 2008:8).

- Due to population growth and investment in rural areas, some of the communal areas are growing fast, which leads to land scarcity as demand for land outstrips supply. The resultant competition for this scarce resource ignites an informal and often illicit land market (Manona 2012:3). In addition, the absence of a legal framework often leaves the "'rules of the game' undefined and this weakens the land rights of the poorest and most vulnerable families and community members" (Knight 2010:5).

The literature and the findings in the above sections point to the following key factors that must be considered in the process of creating framework to formalise land rights in communal land areas of the former Transkei. These include that (1) formalisation should create an interface between communal or customary tenure and private individual tenures, (2) formalisation must be based on local practice, (3) accurate local level land registries must be created and kept up-to-date, (4) there should be unequivocal statutory recognition of customary land rights, (5) there is a need to develop capacity for land administration in rural areas, and finally (6) there is a need to utilise remote survey methods to delineate land rights. Each of these key success factors is further discussed below.

The Proposed Formalisation Framework as Discussed in this Section

Table 1: Formalisation Framework.

Components	Main Issues	Objectives	Measurable outputs
1. Leadership and governance	• Communal areas fall within the jurisdiction of local municipalities. • Traditional leadership is recognised by the Constitution and its authority is exercised in communal areas. • Communal areas are therefore governed in terms of two systems of governance; one based on hereditary rule and the other on democratic governance. • There is thus a contestation by traditional leaders on the role of local municipalities in communal areas.	To clarify the roles of traditional leadership structures and those of local government in the governance of communal areas.	• Stakeholder analysis report. • Memorandum of Understanding between local municipalities and traditional leaders.
2. Legal and institutional apparatus	• The de facto land rights of the residents of communal areas are legally insecure. • The formalisation framework should ensure that these land rights are protected and are enforceable. • Various Southern African countries have revised their land laws to provide legal recognition of customary land rights, providing lessons for South Africa. • Existing local practices of land tenure in each local setting must be considered when designing a legal framework. • There must be flexibility to accommodate different local concepts and practices. • State agencies must support the implementation of the IPILRA, which was enacted as an interim legislation.	To provide customary derived tenure rights the same statutory status as land held under freehold tenure.	Statutory recognition of land rights to support the formalisation process, e.g. amendments to make the IPILRA a permanent legislation to provide immediate statutory recognition of customary land rights.
3. Utilise remote survey methods to delineate the physical position of land rights	• A key aspect of formalising land rights is "the geographical identification of the land object in relation to the connected legal or social right". • As stated in Section 2.10.6 of Chapter 2, the delineation of land rights through accurate technical land surveying is neither feasible nor sustainable. • Aerial photographs, satellite images, and topographical models offer instrumental solutions to land identification and tenure recognition for many countries with poorly developed land administration capacity.	To utilise the 'fit for purpose' approach suggested by international organisations such the UN-HABITAT and FIG for cheaper, quicker, and more flexible methods to build a cadastral spatial layer for communal areas.	A spatial map showing the delineation of land parcels for each village in a ward. This map must show all land rights and land uses.

Components	Main Issues	Objectives	Measurable outputs
4. Local level registries	• Land administration in communal areas is happening without the documentation of the land rights. • Deeds registries are in the major centres of the country and require highly technical surveys and detailed descriptions of land rights. • The initial documentation of land rights would be assisted if it is done at the local level.	To begin the process of documenting land rights at the village level.	Decentralised land services.
5. Land use management	• Communities continue to allocate sites for residential purposes in areas that were previously 'reserved' for grazing, and there is no process to formalise such changes of land use. • SPLUMA provides municipalities with the necessary legal power to regulate land use in its areas of jurisdiction, including communal areas.	To utilise the land use planning capacities located at the municipal level to regulate land use within communal areas.	• Awareness on the provisions of SPLUMA. • Implementation of SPLUMA.
6. Provision for upgrade	• The initial documentation of land rights should be the first step in providing secure land rights. • An opportunity for ongoing upgrading of land governance in communal areas should be embedded in the framework.	To provide for the improvement of land governance over time.	Modalities for future upgrading of the framework.
7. Building capacity for land administration	• Improving land administration in communal areas requires capacity within the communities and the state. • The communities only know of the existing land administration that is documented in Section 5.5 of the findings. • Communities need to be aware of the challenges relating to the current land rights situation in communal areas. • There is no awareness of the sustainable use of land resources, nor the different processes of changing land use.	To create awareness of the land rights situation and what formalisation entails.	• Advocacy and awareness creation to ensure that communities are part of the development and implementation of the new formalisation framework. • Stakeholder forum / Council of stakeholders.

Source: Created by the Researcher.

The discussion of the seven components of the formalisation framework summarised in Table 1 has shown that each component will contribute to addressing the challenges outlined in this article.

6. Formalisation Must Create Interfaces Between Communal (I.e. Customary) Tenure and Individual Statutory Tenures

The literature above has shown that the initial attempts at formalising land tenure were based on the liberal economic paradigm, which, as discussed above sought to replace customary tenure with private individual tenure. However, based on the findings of the interviews from participants above, the formalisation of land tenure in communal land areas, is likely to succeed, only if it appreciates the existence of local and/or customary land tenure arrangements. Any effort to formalise customary land tenure should therefore seek to build an interface between the existing (customary) land tenure arrangements and the new formalised system. The dichotomy between the existing (customary) land tenure arrangements and the new formalised system presented the two tenure types as two ends of a spectrum; the one end of this spectrum emphasises the retention and enhancement of customary or social landholding of a local community, and the other extreme of this spectrum emphasises individual ownership, which is seen as offering secure land rights and being a basis for entrepreneurial success (Langton 2010:1). Langton's (2010:1) view is also supported by Sjaastada & Cousins (2009:1) who argue that "current universalist proposals which are based on the assumption that "the poor, do not lack assets, [but] lack only the formal, protected rights necessary to make these assets engines of entrepreneurship, thriving markets, and information networks contain numerous flaws" which can be corrected by establishing "a more context-specific and flexible land formalisation

approach". Such approach, as Sjaastada & Cousins (2009:1) explain, should pay "greater attention to local settings and specific objectives and tools" as well as "the local politics and culture" (Sjaastada & Cousins 2009:1). The combination of customary tenure, statutory and customary land rights, formal and informal systems, and traditional and modern systems of land holding could be the way forward in solving land tenure problems currently facing people in communal land societies (Cleaver 2002:13; Ensminger 1997:165). The dichotomous classification of institutions as being either "formal or informal, traditional or modern, is not in sync with local natural resource management practices and arrangements, which are likely to be a complex blend of formal and informal, traditional and modern" (Cleaver 2002:13-14). For example, customary systems "are in a constant state of evolution, adapting to the changing political, legislative, demographic, and ecological circumstances and choosing innovations that work best to accomplish the desired ends" (Knight 2010:3-4). As a result of these changes "there is currently very little pure 'tradition', and today's 'customary law' is a mixture of various practices that have been inherited, observed, transmuted, learned, and adopted" (Knight 2010:3-4). Cotula and Toulmin (2007 cited in Knight 2010:3-4) argued that "far from being clearly delimited and mutually exclusive, the customary and the statutory are usually intertwined in complex mosaics of resource tenure systems". Cotula (2006:7) noted that "the neat distinction between 'customary' and 'statutory' land tenure systems is considerably blurred, and easy dichotomies between the two must be avoided".

The building of interfaces between customary and statutory tenure has also emerged from literature sources such as Wallace (2010), Adams and Turner (2005), and Ensminger (1997) as being a key element in formalising customary land rights. Wallace (2010:40), for instance, proposed that modern approaches to formalising customary tenure must focus on stressing "the commonalities between these two tenures, rather than their differences". Adams and Turner (2005:6) proposed that tenure dualism resulting from the colonial past needs to be recognised as a "resource rather than an obstacle in changing the livelihoods of the poor". Adams and Turner (2005:6) further challenged societies undertaking tenure formalisation programmes to "bridge the divide between land tenure systems based on the imported concept of absolute private ownership and those based on more complex indigenous frameworks of nested individual and group rights". A formalisation framework must therefore seek to "merge modern statutory law with the traditional customary law that governs many people's day-to-day lives" (Blocher 2006:168).

The bridging of the divide is a significant factor because a fit between the new formal systems of land rights and the existing "informal institutions is key to the success of the new systems", i.e. "complementarity between informal and formal institutions" (Ensminger 1997:165). According to Ensminger (1997:165), formalisation approaches based on private property rights fail because they are often poorly matched with pre-existing property regimes generated by customary or local institutions, which may lead to the new rights regime becoming "un-implementable and unenforceable". Botswana provides a good example of an approach that builds an interface between customary and statutory tenure. The Land Law in that country allows customary land rights holders to apply through the Land Board for the conversion of their tenure right into a "common law lease", in order to acquire transfer and mortgage rights which are associated with private ownership. The common law leases range from a 99-year lease for residential purposes to 50-year renewable leases for industrial and commercial purposes (United States Agency for International Development (USAID) 2008:6). Another good example is Uganda. In the case of Uganda, customary land rights are established as being equal to all other forms of tenure, and may be leased, sold, and mortgaged (USAID 2008:6).

While Botswana's land laws allow for this interface, Enemark, Bell, Lemmen and McLaren (2014:23) noted that in other countries "the existing legal framework can be a barrier for implementing a flexible approach to building land administration systems". A typical example of this was found in a study in a location in Giyani in the Limpopo province of South Africa, where Nxumalo, Whittal and Xaba (2014) found that the use of ortho-rectified imagery would be enough to delineate land parcel boundaries for the purposes of registering land rights; however, their findings could not meet the technical standards of accuracy for cadastral surveys as determined by the Regulations of the Land Survey Act, No. 8 of 1996. It is in this regard that Enemark et al. (2014:23) proposed that land laws "should be flexible and be designed along administrative rather than judicial lines."

6.1 Formalisation must be based on Local Customary Practices

The second key argument for the formalisation of land rights in communal land areas is that existing local practices of land tenure in each local setting must be taken into consideration when designing a framework for the formalisation of land rights. The local practice would need to be drawn from "living customary law," which largely informs *de facto* communal tenure arrangements, rather than "official customary law". Official customary law was "produced out of colonial misunderstandings and politically expedient appropriations and allocations of land" (Peters 2007:85), whereas: "living customary law relates to the social practice of communities all over South Africa, and to essentially flexible and ever-changing arrangements concerning rights, duties, and sanctions between those people living under a traditional authority" (Oomen 2005:78).

The dominant formalisation approach based on Western private property regimes is usually driven from the central government level, and one of the weaknesses of centrally driven initiatives is that they do not take the local systems into consideration, which leads to a lack of local legitimacy. "Such top-down approaches to tenure reform tend to weaken the capacity of the poor and local administrative systems to protect local land rights or to resist neo-liberal policies which act against their interests" (Moyo 2008:56). For public policy initiatives to have the desired impact, it is important that the views and existing practices of local communities are taken into consideration, and their existing administration mechanisms need to be incorporated into the new approaches so that the community's support, which is crucial to the success of policy intervention, is included.

There are a variety of local land contexts and settings in rural Africa due to various colonial and post-independence government interventions and adaptations of customary land tenure (Cotula 2006:4). This variety of land contexts implies that a 'one-size-fits-all' approach to land tenure reform is inappropriate. There is thus a need to design land tenure policies and laws that provide for flexibility to accommodate different local concepts and practices (Cotula 2006:2) to develop formalisation approaches that are "appropriate for a particular local land administration system rather than a single standard blueprint solution" (Toulmin 2006:36). Thus, the argument for local and appropriate solutions to tenure formalisation is gaining ground, as individual titling is now being replaced with "a more resilient and nuanced assumption that the changing needs of a given population will drive tenure reform informed by the unique circumstances of that population" (Wallace (2010:38). The main purpose of this approach is to build a formalisation framework on local knowledge as a base, which should then be used to gradually improve the systems of land rights documentation in a specific locality over time (GLTN 2008:10).

6.2 Local Level Land Registries must be Established and Kept up to Date

The third principle on which for the formalisation of land rights in communal land areas must be based on is the establishment of land registries. One of the most important deficiencies of customary land tenure practices in communal areas is the lack of documented land rights. Basing a tenure formalisation framework on local practice, as argued in the previous section, requires that the documentation of land rights should be done at the local level. According to the GLTN (2008:10), placing land-related services at the local level would strengthen existing local institutions and improve access to land-related services for all land users, including the poor and the vulnerable. Bruce (2013:1) agreed with this view and stated that a failure to make and implement land governance policies through local institutions contributes to a frequent failure to realise objectives in the land sector, as well as in other development programmes and projects.

Within the context of communal areas, Fourie (2002:4) proposed the use of local level forms of land registration similar to Namibia where such local level registries exist. According to Fourie (2002:4), a great majority of people living in communal areas can benefit from local level registries through improved asset bases, good governance and service delivery. The local level registries in Namibia are institutionalised through the Communal Land Reform Act, No. 5 of 2002, which establishes Communal Land Boards (CLBs) that process land registration for Namibia's communal areas. The CLBs register customary land rights that are approved by traditional authorities, keep registers, and maintain the information in a computerised database known as the Namibian Communal Land Administration System (NCLAS) for future integration with the mainstream Deeds Registration system. The implementation of the local level registration process is not without challenges; however, thus it has not yet achieved its target of the registration of all communal land. Some of the challenges relate to the cost of the process of registration for the poor, and fears and misconceptions about the registration process given the high illiteracy rate in the communal areas of Namibia (Meijs, Kapitango & Witmer 2008).

Tanzania provides another good example of local level registry where the administration of customary land is highly decentralised, although "the Commissioner of Lands within the Ministry of Lands, Housing, and Urban Development" retains overriding powers. Tanzania's Village Lands Act of 1999 places the responsibility for the:

adjudication, survey, and registration of customary rights to village lands … to elected Village Councils and Village Adjudication Committees, which also maintain the village land registries. These registries take applications, process them, and submit to district councils, which issue the certificates" (USAID 2008:6).

Mindful of the capacity constraints at the local level, Fourie (2002:2) proposed that any formalisation programme should be investigated in terms of whether such land services can be decentralised to the local level and whether that level has the capacity to deliver, as well as the cost provision to the state and the citizen.

According to Migot-Adholla, Hazell, Blarel, & Place (1994 cited in Adams et al. 1999:11), population growth, commercialisation, and competition for scarce resources inevitably increase the likelihood of a property market in indigenous tenure areas, however informal. In such settings, some records of land ownership would be needed. According to Adams et al. (1999:11), the "recording of land rights need not require complex land survey, land transfers, and centralised registries as in modern economies". In addition, "the indigenous tenure systems

can evolve from communal rights systems to individual ownership rights when the right holders themselves decide that this is appropriate" (*ibid).* This is even recognised by institutions such as the World Bank, which admitted in its policy research report entitled "Land Policies for Growth and Poverty Reduction (2003) that "its previous promotion of individual titling as the only option for land tenure reform policies was a mistake and is now advocating for "decentralisation of land administration systems and a greater role for local ('customary') land tenure practices and laws" the local-level registration of rights in "low-cost and decentralised systems and a greater role for local ('customary') land tenure practices and laws" (Daley & Hobley 2005:4). In a decentralised system:

all land records are usually kept at the local land office level, including cadastral maps, land registration documentation, and land tax records". The local office usually works closely with the elected local authority, which is responsible for land use, development, and environmental management" (Williamson 2000:11).

Williamson (2000:11) further noted that a "key aspect of decentralisation" is that "there must be a central authority to establish policies, ensure quality of services, provide or coordinate training, limit corruption, and implement a personnel policy."

6.3 Statutory Recognition of Customary Land Rights

The fourth principle which must guide the formalisation of land rights in communal land areas is the unequivocal recognition of customary land rights. There is no doubt that there is a range of local variations, and thus a degree of heterogeneity in the content of communal land rights derived from customary norms and traditions in many African societies. It is important to understand that in many African indigenous people, "the sense of family and community is expressed in different ways by different tribes" (AIHEC 2009:32-39). Like any other indigenous societies, most, if not all, African indigenous tribal cultures and traditions are organised around various tribal kinship groups. Variations or land rights and ownership practices are therefore inevitable in the South African context, as is the case everywhere on the African continent. There is no doubt that these variations exist between and within the ten homelands that have been created by the Apartheid government to house the ten specific ethnic group, namely the Xhosa, Venda, Zulu, Pedi and Northern Ndebele people, Shangaan and Tsonga people, Swazi people, Ndebele people, Basothos which have been mentioned above in this article. In fact, the fact that there are about 3,000 tribes, speaking more than 2,000 different languages in Africa (Africa Safari 2018:1), also suggests that variations based on different trials' specific and unique customs are inevitable elsewhere in Africa. These variations have been used by authors such as Fay (2005), and Hornby et al (2017) to argue that land rights in African communal traditional areas such as the one discussed in this article should not be formalised because they are distinct from those of western style, which are based on formalised, exclusive and individualized land rights. The first difference between western style land ownership and land ownership in many African traditional societies is that land rights are held by families (not individuals) and that individuals' land rights are shared with other members of different social units at different levels of social organisation. Fay (2005), and Hornby et al (2017) further explain that the social organisation in communal land areas range from a person's nuclear family (father, mother children) to a complex web of extended families, neighbourhoods, one's village and neighbouring villages, and wider communities as far as possible. According to these authors, such complex web of shared ownership of land rights in communal areas is what mediates individual rights, renders them "relative" to the rights of others, and thus imposes duties on rights holders which are different to those in western

formalised and individualized systems of land rights where for example a neighbour could prosecute a neighbour for trespassing on private property. According to Fay (2005), and Hornby et al (2017), not only the systems of land ownership in communal areas is nested within the area's or village's customary traditions, customs, and cultural ways of land ownership, it is also situated within a vertically layered land rights because these rights are equally shared and co-owned land rights at different levels of social organisations such as traditional councils and political organization (such as the office of land affairs at the municipal, provincial and national) spheres of government which also makes it very difficult and almost impossible for determining and formalising individual land rights in communal land areas. Fay (2005), and Hornby et al (2017) also argue that it is almost impossible for individuals to own land independently from their family members, the village and the community at large because the most fundamental criterion for becoming a land rights holder is membership of a relevant social unit, rather than market transactions, and because where the latter occur, is subject to approval by neighbours and relevant political authority.

The above complex web of communal land ownership and the incapacity of the state to work around these complexities formalised land ownership rights on communal land has led to powerful arguments in the literature which suggest that "security of land tenure is obtained not trough law and administration but through open-ended, ongoing processes of negotiation, adjudication and political manoeuvres" (Berry 1994:35) and therefore that formalisation though land surveying, registering land units and land rights holders, and issuing documents attesting to such rights, may be neither feasible nor desirable is incorrect (Moore 1998:33). According to these authors an alternative approach to the formalisation of the land rights on communal land areas would be to strengthen the local institutional contexts in which claims to land are asserted, defended and negotiated (Berry 1994:35). In a situation where land rights cannot be formalised or individually apportioned, tenure reform policies in communal areas should thus give attention to institutionalised oversight of the robustness of these processes and outcomes, rather than attempting to define in law the precise content of rights (Moore 1998). The view that institutionalised oversight would be more amenable to the land ownership in communal areas such as the one discussed in this article is based on the variability of local contexts and situations discussed above, but also on the argument that land ownership in African indigenous communities cannot be formalised because of "changing and unstable economies, which continue to be ridden with conflicting interest" (Bruce & Migot-Adholla 1994:262). Berry's (1994:35) and Bruce & Migot-Adholla's (1994:262) argument is problematic because these authors acknowledge that the current land ownership methods on communal land is conflict ridden, but also suggesting that strengthening existing institutions would be the solution to the problem. This suggestion also implies that nothing which is based on African indigenous traditions, customs and practices can be formalised. More specifically in the South African context, similar arguments that individualised and formalised land ownership are impossible have been made by authors such as Cousins (2002) and Claassens and Cousins (2008). Cousins (2002) and Claassens and Cousins (2008) also argue that the land ownership in communal areas of South Africa should preferably be based on institutionalised oversight, rather than formalised individual ownership. However, while Cousins (2002) and Claassens and Cousins (2008) also strongly assert that an institutionalised oversight approach would solve problems of land ownership on communal land in South Africa, they also contend that institutionalised oversight should be preceded by a prior acknowledgment of the statutory recognition of existing communal land rights. The statutory recognition of existing communal land rights and the institutions responsible for overseeing the land ownership in communal land areas proposed by while Cousins (2002) and Claassens and Cousins (2008) is similar to the formalisation framework which is proposed by this article.

The authors of this article also agree with Cousins' (2002) and Claassens and Cousins' (2008) argument about prior acknowledgment of the statutory recognition of existing communal land rights. As this article will demonstrate in the following paragraphs, the problem in terms of land management in communal land areas in any rural communities in Sub-Saran Africa is not about indigenous customs and traditions and traditional leaders who are not respected or recognised by the indigenous people. The problem is that indigenous customs, traditions, traditional leadership authorities and traditional council institutions do not have an enforceable legal standing in courts of law and cannot be invoked to defend one's land ownership rights in a democratic South Africa. Formalisation will also improve relationship between the local traditional leadership structures, communities and the local government structures regarding their respective roles in land administration in communal areas. This article also agrees with Berry's (1994) and Moore's (1998) proposals for institutionalised oversight which are controlled by the existing tribal councils, but on condition that such tribal councils have the formalised legal status and powers. The authors' argument is that tribal councils can have the recognised legal status if their powers and practices are governed by a legally enforceable legal framework which is in line with the South African Constitution (1996). It is this constitutionally based legal framework, which can be invoked by the court of law which is missing at the moment. The other problem is that strengthening the existing traditional institutions without protecting individuals' land ownership rights is no longer in the best interests of the ordinary residents on the communal land area. The authors of this article strongly support the formalisation of the land rights on communal land areas in order to close the existing legal and policy vacuum, which results in the land rights of citizens who reside in communal areas not having statutory recognition. The authors of this article disagree with Berry's (1994) and Moore's (1998) argument that formalisation of land ownership though land surveying, registering land units and land rights holders, and issuing documents attesting to such rights, may be neither feasible nor desirable supposedly because of the complex web of communal land ownership in these areas, because these authors have not explained how foreign multinational companies, mining companies and Golf Course developers and private individuals who bribe traditional leaders and communal councils in order to buy from them tracks of communal land for commercial and private business activities can hold formalised land rights but individuals who are indigenous on that land cannot. Giving too much powers to the traditional council has led to large scale corruptions in in KwaZulu-Natal, North West, Limpopo, Mpumalanga, and Eastern Cape, where instead of using communal land for its purpose, traditional councils have often sold residential sites cut from communal grazing land mostly to business people from outside the traditional areas, and mining and tourism multinational companies that do not benefit ordinary people who live on the communal land (Centre for Land and Society 2015:2). If it is possible for people who are not indigenous on communal land areas to own title deeds for parts of the communal land areas, why would it be impossible or difficult for the rightful owners of the communal land to also have title deeds? Berry's (1994) and Moore's (1998) argument that land ownership rights on communal land areas in South Africa are difficult to formalize using conventional methods such as surveying and registration because of the complex nature of land ownership in these areas is also inconsistent with examples such as Namibia and Tanzania which have successfully established local level registries which have a legal status (Fourie 2002:4). If other countries with similar communal land problems can successfully formalise land ownership rights for their people, there is no reason such formalisation should be impossible in the South African context.

As stated in previous sections, the land rights of the residents of communal areas are very insecure, which indicates that the formalisation framework should ensure that these land rights are protected and are enforceable. This can be done by passing laws that seek to recognise, strengthen, and adapt customary land rights so that they are equal in weight and validity to statutory land rights (Williamson 2000:14; Cousins 2008:10; Knight 2010). Affording customary tenure, the same statutory status as land held under freehold tenure is an appropriate remedy, as "the greater source of the vulnerability of customary rights lies in the fact that the customary regimes themselves do not enjoy statutory recognition" (Lawry, Samii, Hall, Leopold, Hornby, and Mtero 2014:14). Statutory recognition of customary land rights would therefore be a far more effective policy intervention in the formalisation of customary land tenure than "premature attempts" at converting customary tenure to freehold tenure (Deininger 2003: xxvii).

In a review of various sub-Saharan African countries which "revised their land laws to grant legal recognition to customary forms of land tenure", USAID (2008:1-10) found that countries provided statutory recognition of their customary law through legislation (e.g., Botswana's Tribal Land Act of 1968, Namibia's Communal Land Reform Act of 2002, Uganda's Land Act of 1998, and Tanzania's Village Land Act of 1999). Most of these pieces of legislation sought to, in various ways, "vest all land occupied and used by native tribes according to customary law" in a decentralised system of land boards operating on behalf of the people. The Tribal Land Act of 1968 of Botswana, for example, was built on indigenous Setswana land tenure rules to validate customary tenure. It did this with one major shift:

"Whereas the power to allocate land under customary tenure rested with chiefs and headmen, the law shifted this authority to local land boards, semi-autonomous corporate bodies made up of a combination of locally elected and government appointed officials. Customary land rights (for residential/arable purposes) are secured by a 'customary land certificate' which grants exclusive, perpetual, and heritable use rights to individual applicants" (USAID 2008:1-10).

Wicomb and Smith (2011:427) held the view that where custom is recognised as a source of law, customary land rights should have equal weight and validity and "should be recognised in their own terms and measured according to standards set by their own systems". Joireman (2006:12-15) cautioned that due consideration should be taken of "the fundamental conflict between gender equality and the upholding of traditional customary law regimes". If this is not dealt with, one could have a situation where the formalised tenure simply replicates the patriarchal nature of many customary regimes. This could have "potentially disastrous consequences where customary law regulates access to land and where the co-ownership of women is not legally recognised or enforced" (Joireman 2006:12). "In many African contexts where customary law regulates access to land, formalising existing property rights will effectively alienate women from access to capital" (Joireman 2006:12-15). To mitigate this, Joireman (2006:15) proposed that a formalisation framework must provide for joint ownership between spouses in order to protect women's rights to property.

6.4 Develop Capacity for Land Administration

The fifth principle that must guide the formalisation of land rights in communal land areas is to develop capacity for land administration in rural communities. A formalisation framework must make provision for capacity development at various levels of society to ensure that land governance and administration are improved. Some researchers have written about the capacity to administer such a tenure formalisation framework in parts of Africa. For example, Adams

and Turner (2005:7) were of the view that "an adequately resourced and managed land administration system" is a long way down the road given "the administrative and technical capacity to unscramble the legal framework and 40 years of neglect of incremental reform" for many countries in Africa. Others have argued that formalising customary tenure in many parts of Africa is "dependent on government competencies that are not available" (Wallace, 2010:25-26), given the fact that many African countries "have inefficient and dysfunctional government land registration frameworks" (Nowlin 2012:2). Lawry et al. (2014:15) argued that because of this situation:

tenure insecurity may in fact increase for many customary rights holders after the conversion to systems based on securing rights through mandatory rights registration because of chronic weaknesses in the civil administrative capacity, while the customary land administrative systems delivered adequate levels of tenure security reliably and at low cost" (Lawry et al. 2014:15).

The foregoing discussion makes capacity development for land administration a critical part of any tenure formalisation framework. In this regard, Enemark et al. (2014:32) posited that capacity development should be seen in the wider context of "providing the ability of organisations and individuals to perform effectively, efficiently, and sustainably". Enemark et al. (2014:32-33) discussed capacity development for land administration from three different angles, viz. societal, organisational, and individual.

Most tenure reform or formalisation programmes are driven centrally on behalf of and without the participation of the affected communities. Capacity development at a societal level would, as Enemark et al. (2014:32) stated, ensures that there is "advocacy, awareness creation, and knowledge sharing and dissemination" to ensure that communities are part of the development and implementation of the new formalisation framework. This is critically important because "when formal systems are imposed upon a society with which they are out of accord, self-enforcement may erode, and externally engineered incentives may fail to yield the predicted results" (Ensminger 1997:165-167). In addition, an approach that views the populace as mere beneficiaries of "centrally driven, defined, and delivered processes" leads to problems of a lacking social legitimacy and deprives the programme of locally driven initiatives which would be simpler, more cost effective, and workable (Wily 2000:2). Experience has shown that when people are consulted and participate in a programme's design and implementation, it stands a better chance of achieving the desired outcomes as "the transitional processes are self-managed by the intended beneficiaries" (Wallace 2010:37).

At the organisational level, Enemark et al. (2014:32) positioned "institutional and organisational reforms, such as legal frameworks, processes and procedures" as being key to the development and sustainability of a formalisation framework. It is expected at this level that the government sets up "appropriate institutional innovations" to support the formalisation of customary land rights to provide "a reasonably cheap and accessible system of registration of rights in land" (Dekker 2005:168). Institutional innovation is required to ensure that the formalisation framework is "supported by a legal and institutional apparatus with appropriate forms of title and necessary support systems and procedures" (*ibid*). This requires capacity development at both the organisational and the individual level so that the state can facilitate and provide services such as agricultural credit possibilities, extension services, physical and agricultural market infrastructure, and the supply of agricultural machinery fitted for small-scale farming to stimulate investments, so that the formalisation of land rights can have the desired economic development results (Dekker 2005:147).

6.5 Utilise Remote Survey Methods to Delineate Land Rights

The sixth principle is proper surveying and recording of the land. One of the purposes of formalisation is to document customary tenure and make the land rights records readily available. An important aspect of this is "the geographical identification of the land object in relation to the connected legal or social right" (Williamson 2000:7). This requires the building of a Cadastral Land Information System (CLIS), which was defined by Barnes (1988 cited in Stanfield 1990:6) as "the means whereby a society officially delineates, records, and gives public notice of the nature and extent of rights to land". Formalisation of tenure through land titling contributes to the building of the CLIS through "the rigorous surveying, mapping, and registration of individual land parcels by advanced technical standards and highly qualified land professionals", which may "neither be feasible nor sustainable" for most countries in Africa (Hall & Paradza 2011:9). This is because such land registration systems "are usually expensive, complex, and slow to implement" and "if the costs have to be borne by the person or group seeking formal title, this tends to exclude poorer groups from getting title to the land they farm or the land on which their home is built" (Toulmin 2006:28). Enemark et al. (2014:19) argued, however, that formalisation "does not in itself require accurate surveys of the boundaries of land rights". Williamson (2000:7) stated that:

the fact that a fully surveyed cadastral layer is too expensive at a particular stage in a country's development or in the development of part of a country, should not mean that documentation or registration of a diversity of rights over land cannot go ahead".

Williamson (2000:7) called for the development of realistic and appropriate solutions that match the stage of development of a country and specific land rights requirement. "Such a flexible approach to building land administration systems also relates to the legal and institutional frameworks" (Williamson 2000:7).

Wallace (2010:29) pointed to growth in the use of spatial information, which has created flexible and innovative opportunities for formalising and reinforcing people-to-land relationships throughout the world, even in countries where computer use is not practical. Aerial photographs, satellite images, and topographical models offer instrumental solutions to land identification and tenure recognition for many countries with poorly developed land administration capacity. For example, the Land Tenure Regulation programme of Mozambique used Global Positioning Systems (GPS) to automate land parcel demarcation and Geographic Information Systems (GIS) to capture the land parcels into a comprehensive parcel map, which was then used for general spatial planning purposes. Mozambique is estimated to have three to four million land parcels, of which less than 5% are formalised. The Land Tenure Regulation programme in that country uses satellite imagery, together with Global Navigation Satellite System (GNSS) handheld data loggers, to map and draw in property boundaries (USAID 2008).

In the South African context, Nxumalo et al. (2014:8) investigated the use of "high-resolution, ortho-rectified aerial imagery with a resolution of 0.15 m to delineate parcel boundaries in Giyani in the Limpopo province of South Africa". They found that features such as "wire fences, hedges, low walls, and other boundary documentation could be identified, and their coordinates digitised" (Nxumalo et al. 2014:8). This would be sufficient to delineate land parcel boundaries for rural areas that are currently not covered by the formal land registration system. While it was, found that the ortho-rectified imagery (or Orthophotos) does not meet the technical standards of accuracy for cadastral surveys as determined by the Regulations of the Land Survey Act, No. 8 of 1996, but that this technique is cheap and would be sufficient, or at least the starting point, for

delineating land parcel boundaries for the purposes of registering land rights in rural areas (Nxumalo et al. 2014). Orthophotos, which are regularly updated by the Chief Directorate: National Geo-Spatial Information of the DRDLR, can be used to show how communal land is currently occupied and used. However, this ortho-rectified imagery approach should go hand in hand with a participatory approach, where community members participate in the verification and recording of land rights. The secondary data further showed that this approach has been applied with a measure of success in some African countries, for example Rwanda's Land Tenure Regularisation Programme used teams of "locally recruited and trained 'para-surveyors' to demarcate parcel boundaries and allocate land rights using these orthophoto maps" (Nxumalo et al. 2014:2). In addition, locally trained people can capture non-spatial data related to rights and (such as trees, rocks, termite mounds, etc.) for the purpose of delineating each individual land parcel. Through this programme, Rwanda was able to register 10.4 million land parcels between 2009 and 2013. There are other similar examples in the secondary data, such as Mozambique and Namibia, which implemented similar programmes. South Africa must implement a similar programme and amend its legislation and regulations to accommodate these flexible approaches. This component would ensure that the formalisation framework is able to build a spatial reference framework on a mass scale, which cannot be achieved utilising the conventional methods of technical field surveying and deed registration.

The finding in the South African context confirms Enemark et al.'s (2014:23) argument that "existing legal frameworks in a country are often a barrier for implementing a flexible approach to building land administration systems". Given the land information requirements of the rural and underdeveloped areas and adopting the 'fit for purpose' land formalisation approach proposed by Enemark et al. (2014), the technical land survey requirements of accuracy could be waived where there is a programme to build a spatial reference frame in an area not covered by the CLIS. This can be upgraded as and when the need arises, in line with the scale-up registration programme advocated by Byamugisha (2013:4-18).

The 'fit for purpose' approach proposes the use of other methods to delineate land parcels other than the ones used by the formal land registration system. These methods include using "general boundaries rather than fixed boundaries to delineate land parcels for rural areas", utilising high-resolution satellite or aerial imagery rather than field surveys for rural areas, relating accuracy standards to the purpose and use of the information, and building the spatial framework for ongoing updating, upgrading, and incremental improvements (Enemark et al. 2014:6-10). Although advanced GIS technology, funding, and institutional support could enable a substantial extension of national cadastres, Hall and Paradza (2011:9) argued that the challenge is not merely a technical one to be overcome through technical solutions. Rather, the challenge is to find systems for recording and registering rights, in a context where land rights are complex and overlapping, which are at odds with presumptions of exclusive individual rights. These systems can be in the form of sketches and geocodes that can be linked spatially. In this way, tenure rights can be gradually formalised over time, thereby increasing security of tenure in the short to medium term (Hall & Paradza 2011:9).

7. Conclusion and Recommendations

The purpose of this article was to design a framework for the formalisation of the land rights to ensure good governance in communal areas and to ensure that they are secure and equal to exclusive rights of ownership offered by the statutory land registration system in South Africa. The article has shown that one of the legacies of South Africa's colonial

and apartheid past is the dual land rights system in the rural landscape, where legally secure land rights are provided to the descendants of white settlers practising commercial farming while the Africans residing in the rural areas of the former homelands have inferior and precarious land rights. The process of designing an appropriate legislative instrument to address this dual land rights legacy has not come to fruition, despite the efforts of the post-1994 dispensation. At the centre of this failure by the democratic dispensation is the unresolved contestation around the roles and powers of traditional leaders in relation to land governance in communal areas. The analysis of available knowledge, views, and approaches to formalising customary or locally based land rights indicated a shift away from prior assumptions, which assumed that individual titling based on technical land surveys and land registration is an ineffective 'one-size-fits-all' solution for all formalisation efforts. The analysis in this article concludes that formalisation efforts should seek to gradually document the existing customary land management practices in a given community in order to incrementally improve land governance in communal areas over time. Based on the finding from literature review and the responses from the different participants who were interviewed during the process of this research, the researchers were able to propose a formalisation framework which is based on the following components: leadership and governance, legal and institutional apparatus, flexibility in the delineation of land rights, creating and updating local level registries, and land use management, provision for upgrading, and building capacity for land administration. It is however important to emphasise the fact that while the principles on which the framework to formalise land rights is based can be applied in other communal land areas only to a limited extent. Its application outside the former Transkei might be limited because of specific circumstances to those areas, which were not covered by this research. It is for this reason that further research on major issues such as the roles of traditional leaders in relation to the land administration of rural areas in the context of democratic local governance is recommended. This is a key important factor in resolving many of the policy challenges confronting communal areas post-1994.

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