

2 June 2016

Director-General
c/o Adv Sello Ramasala
Department of Rural Development and Land Reform
E-mail: CPABill@drdlr.gov.za and sello.ramasala@drdlr.gov.za

Dear Sir/Madam,

Submission on the Communal Property Associations Amendment Bill, 2016

About LARC

The Land and Accountability Research Centre (LARC) – formerly the Rural Women’s Action Research Programme at the Centre for Law and Society (CLS) – is based in the University of Cape Town’s Faculty of Law. LARC forms part of a collaborative network, constituted as the Alliance for Rural Democracy, which provides strategic support to struggles for the recognition and protection of the rights of people living in the former homeland areas of South Africa. An explicit concern of LARC is power relations, and the impact of national laws and policy in framing the balance of power within which rural women and men struggle for change at the local level.

We have worked extensively with groups of land restitution beneficiaries and Communal Property Associations (CPAs) in the North West, KwaZulu-Natal, Eastern Cape, Limpopo and Mpumalanga. We have considerable experiences in providing research assistance to such groups, including the provision of expert evidence in litigation. In 2015 we applied to, and submitted an affidavit in support of, a direct intervention as a friend of the court in the Constitutional Court case of *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority*. This case dealt extensively with the legal interpretation of the Communal Property Association Act 28 of 1996 and the systemic challenges facing CPAs. Over the years, we have become established as a critical and influential voice in debates about land reform, tenure security, customary law and ‘traditional’ governance, as well as how existing and proposed laws and policies impact rural people living in communal areas.

Summary of Submission

LARC acknowledges that there is a need for the CPA Act to be amended to provide for stronger, more easily enforceable land rights for individuals and families who are members of CPAs. This would mitigate instances of abuse of power by committees and powerful individuals within CPAs. We support the view that amendments to enable members of CPAs to effectively enforce their rights and hold leaders accountable are desirable. In our view vesting exclusive ownership in CPAs – without

an additional process of recording internal rights – does not adequately reflect the strength of the layered and nested land rights that characterise customary systems, including in particular, strong family-held rights. We believe that for these family-held rights to be secured against potential abuse they need to be better recorded and referenced in law. In this context, we welcome the Department’s gesture to address the challenges in CPAs and reaffirm the crucial role that these institutions play in South Africa’s land reform programme and land tenure system.

In this submission, we draw attention to several problems with the Bill and suggest where it could be improved. The key issues that we address are:

1. The problem with limiting CPAs’ roles to administration and management of land
2. The flaws and expense of the General Plan model
3. The problem with requiring Ministerial consent for CPAs’ decisions about land
4. Restrictions on people’s right to choose the entity to hold, manage, control and administer land
5. The lack of meaningful institutional support for CPAs provided in the Bill

We had hoped that the CPA Amendment Bill would rectify the current challenges with CPAs by clarifying the content and providing for the proper recording of internal rights within CPAs. Perhaps it intends to do so by the introduction of General Plans that would allow for subdivision and registration of different parcels of land within CPAs. However, the problem with the General Plans is that the costs of surveying, conveyancing and registering subdivisions at scale would be prohibitive. Innovative models of geo-referencing and registering internal rights that would be more affordable and far less exclusive have been developed and debated in the international community over decades. A key feature of these models is that they are based on inclusive consultative community processes of reaching agreement on the definition and extent of existing rights in land. It is well known that previous attempts to create individual ownership rights within the context of communal ownership have had serious unintended consequences throughout the world. Women invariably lose out to household heads, as do others with co-existing and overlapping rights in the land. Moreover registers are seldom updated because of the expense entailed, and because the model of individual ownership is not in sync with the practice of family-based rights. We will not repeat Phuhlisani’s excellent summary of current international protocols and models for securing and recording tenure rights in customary contexts, which is set out in their submission under the heading of General Plans. We endorse their submission in its entirety.

It is striking that this Bill ignores those more affordable and participatory options in favour of defaulting to the expensive and rigid General Plan model. We have recently witnessed the coming into force of the Restitution of Land Rights Amendment Act 15 of 2014 without sufficient resources to implement it, and must take very seriously whether the Department has the capacity and financial resources to implement proposed legislation at scale and on an equal basis throughout the country. Where it patently does not, the purpose of the legislation must be closely interrogated.



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All Africa House, University of Cape Town,
Private Bag X3, Rondebosch 7701, South Africa
Tel: +27 21 650 3288 | Email: pbl-larc@uct.ac.za

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In that context we are concerned that the CPA Amendment Bill undermines the ownership status of CPAs without explaining this as a specific objective of the Bill. This is a very material change to the current Act, yet the policy objective for doing so is not spelled out. The Bill redefines CPAs as organisations that ‘manage and administer’ land, rather than own land. It provides for the Minister to exercise extraordinary discretion in respect of decisions that have far-reaching implications for CPAs. This is of utmost concern in light of the Minister’s repeated statements that the Department discourages CPAs from forming and operating in communal areas, as well as the Constitutional Court’s recent unanimous judgment in *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority*. In this judgment the Court expressly affirmed and protected the right of land claimant groups to choose which legal entity they want to hold and manage land held on a communal basis. In fact, the Court recognised the importance of CPAs – in particular, their features as democratic land-holding institutions – as a critical option that should remain available to land restitution and redistribution beneficiaries throughout South Africa.

The CPA Amendment Bill as it stands would make it more difficult for future CPAs to protect their rights in the face of the Minister’s stated policy preference for traditional councils owning communal land. The option that was open to the Bakgatla ba Kgafela CPA in challenging the Minister’s intervention in their choice of land holding options would be curtailed. In that sense the Bill would make the property rights of CPAs less, rather than more secure. The Bill transfers power to the Minister, and leaves the content of rights vesting in members vague and ambiguous. For the reasons listed above the Bill cannot pass constitutional muster as currently worded. Were the Bill to curtail the ownership powers of CPAs by vesting and registering strong and clear procedural and substantive rights in members it could well be justifiable in terms of section 25 of the Constitution. But insofar as it undermines existing property rights in favour of enhanced powers for the state and ambiguous benefits for members it is unlikely to do so.

We call on the Department to explain the motivation for the shift from ownership to administration and to conduct more extensive consultations with the over 1 200 CPAs that currently exist and can speak most substantially about the challenges CPAs face and where improvements should be targeted.

Issues

1. The problem with limiting CPAs’ roles to “administration and management”

The CPA Amendment Bill envisages the creation of a wholly different system of rights and interests for CPA members. The Bill restricts CPAs’ roles to administration and management, as opposed to ownership.¹ This constitutes a major shift away from the original intention of the CPA Act, which was to acquire, hold and manage land held in common.

¹ This is in line with previous statements made by the Department which indicate that it intends on giving CPA members “institutionalised use rights” over communal land, rather than ownership. See Department of Rural Development and Land Reform *CPA Annual Report 2014-2015* (2015), p. 24.



This shift is clear throughout the Bill, where references to ownership rights such as “property of the association” or “holding of property in common” are replaced with wording indicating that the CPA will only be in charge of the “administration and management” of communal land.² This contradicts the stated intention of the CPA Act, which is to establish democratic legal entities to hold land communally. The impact of the Bill on existing CPA’s who already own land is unclear. Insofar as the Bill would apply to them and negate their ownership of land, it would constitute an arbitrary deprivation of property in contravention of section 25 of the Constitution.

Although clause 2A and clause 18A(7) of the Bill provide that the communal land be registered in the “name of the community”, this ownership is essentially nominal as the community or CPA members would have much diminished power over the communal land registered in their name.

The shift away from ownership rights towards weaker administrative and management powers is further evident in a range of provisions that limit the role and decision-making powers of the CPA committee. The definition of a CPA committee, for example, has been amended to provide that a committee means “committee elected by members of an association to *assist the association* to manage the affairs of the association” rather than to manage the affairs of the association as mandated by the CPA’s members.

Moreover, the CPA Amendment Bill does not define the term “communal land”. The Bill also fails to clarify the nature of the rights or interests that will replace the current ownership model. This is deeply problematic as the Bill undermines existing rights without clarifying what they will be replaced with. This Bill’s vagueness in these two arenas paves the way for the Department’s ‘Wagon Wheel’ model. The Wagon Wheel infringes on the rights of CPA members and the strong customary land rights held by families throughout communal areas.

We suggest that the Bill retain the CPA’s core function of “holding property in common.” If “administration and management” are added to the Bill, this should not be to the exclusion of holding property in common.

2. General Plan

Clause 2B of the Bill provides for the Department of Rural Development and Land Reform (the Department) to develop a comprehensive spatial and land use management plan, including the possibility of sub-dividing the land into portions for residential, industrial or commercial purposes. The provision states that “before” land is registered in the name of the community the “Department shall have a general plan for such property ... prepared and approved”.

² See clauses 7(1), 8(2)(b), 8(2)(d), 8(6)(c), 9(1)(a(ii)), 9(1)(d), 14(3), as well as the long title of the Bill and the amended preamble of the Bill. This is also evident from the deletion of the definition “holding of property in common” which was defined as the “acquisition, holding and management of property by an association on behalf of its members in terms of the constitution of the association” in the CPA Act.



Our major concern with this provision is its ambiguity. It fails to specify what the processes involved in drawing up the general plan will entail. This includes a failure to specify the range of rights or interests that CPA members may be provided in terms of the general plan, how these rights and interests will relate, the processes through which these rights or interests will be granted, and who will be empowered to make decisions about the rights and interests that will be granted to CPA members. Of most concern, is that this provision potentially undermines important consultative processes that are determinative of land relations at local level by its failure to provide for the involvement of CPA members in the decision-making processes associated with the general plan. This model undercuts the Constitutional right to restitution by potentially curtailing the property rights of those who qualify.

Moreover, we submit that there are serious questions about whether this model can be implemented at scale given the substantial injection of financial resources that would be required to enable the Department to conduct land surveys and register the land that may be subject to the Bill. As much of this land falls in deeply rural areas in the former homelands, the costs of surveying and registering land is likely to outweigh the value of the land in some instances. Without a firm commitment from the National Treasury to make more funding available for the purposes of land surveying and deeds registration, the Department will not be able execute the process of subdividing and allocating land to CPA members.

3. Written consent from state authorities for certain transactions

Clauses 12(1)(a), (b) and (c) of the Bill significantly limit the powers of CPA members to individually or collectively sell, donate or encumber their immovable property (and in some instances movable property) or buy new immovable property by providing that this may be done only after the CPA obtains written consent of the Minister or Registrar authorising such encumbrance. If the consent referred to in these clauses is not obtained, clause 12(3) of the Bill provides that “[a]ny disposal, mortgage, encumbrance, purchase or prescribed transaction ... shall be voidable”. The provision also requires a resolution should be passed to encumber CPA land or buy new land by “at least 60% of the total number of households with ownership or leasehold rights present at a meeting where such a resolution was adopted”. However, the manner in which the requirement to obtain the “written consent” of the Minister or Registrar is phrased, means that these public officials have the ultimate decision-making authority in relation to such encumbrance or purchase. These provisions will significantly delay the process by which CPAs can make decisions. Crucially, they diminish the centrality of collective decision-making within a CPA by expanding the authority of public officials over these transactions.

This problem is compounded by the fact that clause 12(1)(a) grants the Minister unfettered discretion when making the determination about whether or not to grant his or her consent. Unfettered discretions have consistently been held to be contrary to the principle of public law legality, as such discretions enable authorities to exceed the constraints of the powers granted to them (Cora Hoexter *Administrative Law in South Africa* 2 ed (2010), pp. 258-259). Without any objective criteria against which the decisions of public officials can be reviewed, unfettered discretions are unlikely to pass legal scrutiny.



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All Africa House, University of Cape Town,
Private Bag X3, Rondebosch 7701, South Africa
Tel: +27 21 650 3288 | Email: pbl-larc@uct.ac.za

www.larc.uct.ac.za
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Moreover, clause 12(1)(a) grants the Department the “first option to purchase such immovable property” and allows the DRDLR a grace period of three months in which to determine whether or not it intends to purchase the land (after which it has a further nine months within which to purchase the land). The result is that the same public official has the power to simultaneously authorise the sale of CPA property, on the one hand, and retain the first option to purchase such property, on the other. This constitutes a clear conflict of interest.

While we laud the Department’s wish to enhance and strengthen the protective machinery available to CPA members faced with abuse of power by CPA committees, the effect of the new consent provisions is to undermine the rights and consultative processes which the Department seeks to protect. Instead of strengthening the substantive rights of CPA members in relation to each other, the Bill constructs a paternalistic framework that curtails the decision-making powers of CPA members by subjecting such decisions to official authorisation.

As they stand clauses 12(1)(a), (b) and (c) undermine the property rights of restitution and redistribution beneficiaries and CPA members, and as such, are inconsistent with section 25 of the Constitution.

We submit that the powers granted to the Minister and the Registrar in terms of clause 12(1) should be limited and these clauses reformulated in order for the Bill to pass constitutional muster. We are of the view that the desired result of protecting the rights and interest of CPA members is important and that the Bill should focus on this.

4. Subverting the right of land restitution or redistribution beneficiaries to choose the legal entity to hold, manage, control and administer land held on a common basis

LARC notes with concern the Department’s statements, in the Draft Policy Paper on CPAs, that the establishment of new CPAs should be “principally discouraged” in areas where traditional councils exist. LARC submits that land restitution and redistribution beneficiaries should not be prevented from forming CPAs in communal areas, particularly areas where traditional councils exist, as this would deny people’s ability to choose the landholding entity that best fits their needs and their land tenure practices (including customary land practices).

We remain concerned that the ambiguous wording of the CPA Bill would diminish the ability of people in areas where traditional councils exist to freely choose CPAs as the legal entity to acquire, hold and manage the land held on a communal basis. Any restriction to such freedom would be contrary to the Constitutional Court’s unanimous judgment in *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority*, where the court expressly affirmed and protected the right of land claimant groups to choose which legal entity they want to hold and manage land held on a communal basis. In fact, the court recognised the importance of the particular features of CPAs as democratic land-holding institutions, as a critical option that should remain available to land restitution and redistribution beneficiaries. As the



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court stated:

“There can be no doubt that [the democratic principles that CPAs must adhere to in terms of section 9 of the CPA Act] safeguard the interests of members of traditional communities and empower them to participate in the management of a communal property. The creation of an association introduces participatory democracy in the affairs of traditional communities. All members of the community are afforded an equal voice in matters of the association and the property it holds on behalf of the community.”

The CPA Amendment Bill should affirm the ability of people living in areas where traditional councils exist, to choose the legal entity to hold, manage, control and administer land held on a common basis.

5. Failure to provide for effective institutional support to CPAs

In its Draft Policy Paper on CPAs, the Department acknowledges that the state has failed to provide CPAs with much needed institutional support and emphasises the importance of directing more resources, capacity and training towards CPAs by establishing an institutional home for CPAs in the form of the CPA Office. Clause 2C of the Bill seeks to establish the CPA Office. This is a welcome and important move.

The Constitutional Court, in the *Bakgatla ba Kgafela CPA* case, also emphasised that the Director General (and the Department) are under a legal duty to provide assistance and institutional support to CPAs when claimant communities have chosen CPAs as the entity they want to manage their land. The Court listed the duties of the Department as set out in the CPA Act in great detail, many of which have been retained in the current Bill. According to the Constitutional Court:

“All these obligations illustrate the deep involvement of the Director-General in ensuring that the objects of the Act are achieved. It is clear from the scheme of the Act that once a traditional community express a desire to form [a CPA], the Director-General *must do everything permissible to assist the community to accomplish its goal. She is required to make certain that every obstacle in the way of registration of [a CPA] is removed.*”

However, the CPA Amendment Bill, like the Draft Policy Paper, lacks the specificity to indicate how the state will ensure greater support be provided to CPAs. The functions of CPA Office are omitted from the Bill. The Bill thereby misses a critical opportunity to clarify, in more substantial terms, the nature and content of the support that the Department intends to provide to CPAs.

The failure to clarify the functions of the CPA Office causes us to be concerned that the Department has not fundamentally altered its current approach to CPAs. The Department’s annual reports on CPAs seem to suggest that the DRDLR’s only concern is whether CPAs comply with the legal framework as this is the sole measure it uses to monitor the progress or performance of CPAs. Although compliance monitoring is clearly important, substantive compliance with the spirit of the CPA Act should be prioritised. According to the current Bill and the Draft Policy Paper, the Department equates compliance with meeting the formal requirements of the CPA



Act. But limited assistance and institutional support is provided to CPAs in relation to other issues. Moreover, it does not seem as if the Department has any alternative way of measuring the effectiveness or efficiency of CPAs. The Bill is likely to perpetuate this trend. In fact, clause 11 of the Bill that provides for the monitoring and compliance powers of the Registrar remains largely unchanged.

We submit that the Bill should elaborate on the functions of the CPA Office by specifically focusing on the needs of CPAs and CPA committees. This should include the provision of capacity building, training and assistance to CPAs and CPA members. The CPA Office should make provision for drawing on specialists to train officials, improving communications between government officials and CPA members, and deepening the expertise of officials to provide strong oversight and support to existing and new CPAs. In particular, the Office should provide support to new CPAs during the foundational processes of establishing a new CPA, adopting a constitution, and holding meetings by helping CPA members to come to grips with the different types of rights CPA members may have over land and how CPAs can tailor their constitutions to fit their specific needs. Moreover, the CPA Office should also be made accountable to Parliament by tabling annual reports on its activities, and open communication channels through which CPAs can reach out for report backs.

Conclusion

LARC thanks the Department for its willingness to improve and support the crucial role that CPAs play in South Africa's land reform process, and in broader moves to realise security of land tenure for the majority of South Africa's citizens. However, LARC is concerned that in its current form the Communal Property Association Amendment Bill will undermine the land rights, security of tenure and autonomy of land reform, restitution and redistribution beneficiaries to hold, control and manage land on a common basis throughout South Africa, particularly in the former homeland areas. The Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA) deems the tribes and tribal authorities created in terms of the Bantu Authorities Act of 1951 to be the 'traditional communities' and 'traditional councils' of the future despite over 1 400 disputes about the legitimacy of past tribal boundaries having been lodged with the Commission on Traditional Leadership Disputes and Claims. The Communal Land Rights Act of 2004 (struck down by the Constitutional Court in 2010) would have empowered the Minister of Land Affairs to endorse the title deeds of Trusts and CPAs over to 'traditional communities'. The current Minister of Rural Development and Land Affairs, as already stated, is on record as saying that CPAs should not exist within the boundaries of traditional communities. Yet the TLGFA superimposes the tribes of old as traditional communities virtually wall-to-wall within the former Bantustans. It is against that background that we ask the Department to explain the shift from ownership to administration in the objectives of the Amendment Bill, so that the policy objectives of the Bill are explicit for the legislators to engage with.

We submit that as it stands the Bill constitutes a significant shift in the legal framework governing communal land holding which is likely to have detrimental consequences for land restitution and redistribution beneficiaries and existing CPAs in



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communal areas. We call for the Department to take into account the wealth of knowledge that CPA members themselves hold with regard to improving the running of these institutions. So far, CPAs have had little opportunity to comment on this Bill. More consultation with them is required to produce a set of amendments that meet their needs. We hope that you will take account of our recommendations to improve the Bill and seize the opportunity to address key weaknesses and strengthen land rights in the functioning of CPAs.

We thank the Department for this opportunity to present our views on the Bill.

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