

DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM
NOTICE 510 OF 2017

The Minister for Rural Development and Land Reform hereby publishes the Communal Land Tenure Bill, 2017 and the Explanatory Memorandum for public comment.

Members of the public are invited to submit written comments within 60 calendar days of the publication of this notice to the following address:

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Hand delivery: 184 Jeff Masemola Street, Pretoria, (Old Building reception).

Comments received after the closing date will not be considered.

REPUBLIC OF SOUTH AFRICA

COMMUNAL LAND TENURE BILL, 2017

*(As introduced in the National Assembly as a section 76 Bill;
Bill published in Government Gazette No. of 2017)
(The English text is the official text of the Bill)*

(MINISTER OF RURAL DEVELOPMENT AND LAND REFORM)

[B 2017]

BILL

To provide for the transfer of communal land to communities; to provide for conversion into ownership of land rights in communal land to communities that own or occupy such land; to provide for the transfer of ownership to communities and community members of land acquired by the State to enable access to land on an equitable basis; to provide for the right to use by community members of land owned by the State; to provide for registration of communal land; to provide for conditions of registration of communal land; to provide for general plans for communal land; to provide for the award of comparable redress; to provide for land rights enquiries; to provide for acquisition of more land for use as communal land; to provide for the choice on the administration of communal land; to provide for the establishment of households forums by communities; to provide for community rules; to provide for the establishment of communal land boards; to provide for dispute resolution mechanisms; to provide for the provision of municipal services on communal land, to amend and repeal certain laws; and to provide for matters incidental thereto.

PREAMBLE

NOTING the injustices of the past, particularly the systematic dispossession of land belonging to African people by the apartheid government and the continued state of landlessness on the part of the majority of the people;

FURTHER NOTING the insecurity of land tenure that characterises land rights of African people and the constitutional imperative to the democratic government to provide land tenure that is legally secure or comparable redress where such legally secure tenure cannot be provided;

RECOGNISING the need for the State to transfer ownership of land it holds in trust to its rightful owners and to acquire more land as communal land;

DETERMINED to provide land tenure that is legally secure, especially in respect of land owned or occupied by communities and community members; and

FURTHER DETERMINED to ensure investment in and sustainable development of land in communal areas,

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

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SCHEDULE

CHAPTER 1

DEFINITIONS, OBJECT, PRINCIPLES AND APPLICATION OF ACT

Definitions

1. In this Act, unless the context indicates otherwise—

"board" means a communal land board established in terms of section 36;

"communal land" means land contemplated in section 4, owned, occupied or used by members of a community subject to shared rules or norms and customs of that community and includes land owned by the State but used by communities as communal land;

"communal property association" means a communal property association as defined in section 1 of the Communal Property Associations Act, 1996 (Act No. 28 of 1996);

"Communal Property Association Act" means the Communal Property Associations Act, 1996 (Act No. 28 of 1996);

"community" means a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group regardless of its ethnic, tribal, religious or racial identity and includes a traditional community;

"community member" means a person who is born into a community or assumes membership of a community and who lives permanently in that community regardless of that person's gender, ethnic, tribal, religious, or racial identity;

"community rules" means community rules made in terms of section 26;

"comparable redress" means redress contemplated in section 19;

"Constitution" means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);

"Deeds Registries Act" means the Deeds Registries Act, 1937 (Act No. 47 of 1937);

"Department" means the Department of Rural Development and Land Reform;

"Director-General" means the Director General of the Department of Rural Development and Land Reform;

"general plan" means a general plan as defined in section 102 of the Deeds Registries Act;

"household" means a person, or a group of persons who live together ordinarily as a family unit by occupying a common dwelling or part of it and provide themselves jointly with food and other essentials for living;

"households forum" means a households forum established in terms of section 32;

"land right" means any right, registered or unregistered, to the occupation of communal land created by or under any law, including the right to use land contemplated in section 10, but does not include a right that is purely of a contractual nature or based purely on temporary permission granted by the lawful occupier of the land in question;

"Minister" means the Minister responsible for Rural Development and Land Reform;

"occupy" means to lawfully occupy communal land in accordance with applicable laws, usage or practice;

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

"this Act" includes any regulations made in terms of this Act;

"traditional community" means a traditional community as defined in section 1 of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003); and

"traditional council" means a traditional council as defined in section 1 of Act No. 41 of 2003

Objects of Act

2. The objects of this Act are to provide for—
- (a) legally secure tenure in relation to communal land by:
 - (i) converting legally insecure land tenure rights held by a community member or a community that occupies communal land, into ownership;
 - (ii) transferring ownership of land acquired by the State to communities to enable access to land, on an equitable basis;
 - (iii) granting to community members the right to use, as individual members or as a community, land owned by the State;
 - (iv) regulating the administration of communal land; and
 - (v) promoting and fulfilling social, economic, environmental and sustainable development on communal land;
 - (b) awarding of comparable redress in instances where legally secure land tenure cannot be provided;
 - (c) acquisition of more land to be used as communal land;

- (d) choice on the administration of communal land by communities;
- (e) protection of communal land against unfair acts of disposal;
- (f) performance of municipal functions on communal land; and
- (g) mechanisms for resolving disputes emanating from the administration of this Act.

Principles of communal land regulation

3. The following principles apply to the regulation, management and administration of communal land:

- (a) recognising and respecting all legitimate land rights and persons who hold such rights, as contemplated in section 25(6) of the Constitution;
- (b) recognising the right of communities to choose institutions or entities that administer land on their behalf;
- (c) recognising the right of communities to democratically control their commonly owned land and the responsibility to account for such control;
- (d) balancing the interests of the state, communities and members of communities;
- (e) providing access to justice and redress where land rights are in dispute;
- (f) promoting the rule of law, good governance, accountability and equality between men and women; and
- (g) promoting economic growth, poverty eradication, investment and development in communal land areas.

Application of Act

4. (1) This Act applies to—
- (a) communal land which is vested in the State, or which at any time vested in—

- (i) a government contemplated in the Self-Governing Territories Constitution Act, 1971 (Act No. 21 of 1971);
- (ii) the governments of the former Transkei, Bophuthatswana, Venda or Ciskei; and
- (iii) the South African Development Trust; (b) land restituted to a community in terms of section 26(7) of the Constitution;
- (c) land in respect of which equitable access to land is provided to a community as contemplated in section 25 (5) of the Constitution; and
- (d) land in respect of which the Minister has, by notice in the *Gazette*, determined that this Act applies.

(2) This Act applies to the exclusion of any provision of any legislation that regulates communal land and that is materially inconsistent with an object or specific provision of this Act.

CHAPTER 2

DETERMINATION BY MINISTER

Determination on communal land

5. (1) The Minister must, upon receipt of a report by a land rights enquirer and if satisfied that the requirements of this Act have been met, determine, after consultation with the community concerned, the location and extent of land in respect of which—

- (a) legally insecure land tenure must be converted into ownership in instances where a community occupies communal land or has a claim to communal land held in trust or administered on its behalf;

- (b) ownership is to be transferred to a community in instances where the State has acquired land to enable access to land on an equitable basis; or
- (c) the right to use land owned by the State is granted to a community member or community.

(2) The Minister must, upon receipt of a report by a land rights enquirer relating to a dispute, and if satisfied that the requirements of this Act have been met, determine the location and extent of land to be transferred in terms of section 9.

Reserving rights to state

6. (1) In making a determination in terms of section 5, the Minister may reserve part of communal land for the State for public use or public benefit.

(2) In reserving part of communal land for the State as contemplated in subsection (1), the Minister must consult with the community concerned, the Minister responsible for local government and the relevant municipality.

Considerations before determination

7. In making a determination in terms of section 5 or transferring communal land in terms of section 9, the Minister must have regard to the following:

- (a) all relevant law, including law governing land surveys, deeds registries as well as spatial planning and land use management;
- (b) all affected land right holders;
- (c) the need to provide access to land on an equitable basis;

- (d) the need to regulate and support the administration of land in an effective, efficient and sustainable manner;
- (e) the need to protect, promote and fulfill the social, economic, environmental and sustainable development rights of communities and community members;
- (f) the spatial development framework of each municipality having jurisdiction.
- (g) any report of a land rights enquirer or that the Minister may have commissioned to enquire into any matter relating to the provisions of this Act;
- (h) any competing or conflicting rights;
- (i) any matter the Minister may deem necessary including the interests of the State;
- (j) land value, land development, and the necessity for conducting land rehabilitation, sub-division, consolidation, readjustment, de-congestion and any other land reform programme;
- (k) the need for comparable redress and the nature and extent of such redress; or
- (l) any measures required to promote gender equality in providing access to land.

Land or rights affected by dispute

8. (1) The Minister may not—

- (a) make a determination as contemplated in sections 5; or
- (b) conclude any action taken in the implementation of section 9(2),

which relates to land or right to land which is directly affected by a dispute until such dispute is resolved.

(2) A dispute contemplated in subsection (1) includes a dispute arising from an encumbrance or debt relating to such land.

(3) The Minister must refer a dispute contemplated in subsection (1) to a land rights enquirer who must enquire into the dispute and report, in respect of the matters specified in the referral, to the Minister within 24 months of the referral.

CHAPTER 3

CONVERSION, TRANSFER AND REGISTRATION

Conversion into and transfer of ownership of communal land

9. (1) After making a determination in terms of section 5, the Minister must—

(a) have a general plan contemplated in section 17—

- (i) prepared on behalf of a community;,
 - (ii) supported by a resolution of the community; and
 - (iii) approved in terms of the Land Survey Act, 1997 (Act No. 8 of 1997);
- and

(b) convert land rights into ownership and transfer communal land to a community or grant to a community the right to use communal land as contemplated in section 5.

(2) Notwithstanding subsection (1) and section 5, the Minister must transfer ownership—

(a) of communal land which at the commencement of this Act is occupied by a community to that community;

(b) a subdivided portion of communal land which at the commencement of this Act is occupied by a community member to that community member.

(3) Whenever communal land contemplated in subsection (2)(a) is affected by a dispute referred to in section 8(1)(b), the Minister must publish a notice to that effect in the *Gazette* and advising that the dispute has been referred to be dealt with in accordance with section 8(3).

Granting of right to use

10. (1) The Minister may, in respect of land owned by the State, grant the right to use such land to a community member or a community.

(2) The manner of granting the right to use land owned by the State and the use of such land by the community must be as prescribed.

Determination by community

11. (1) A community whose land rights have been converted into ownership or to whom ownership of land has been transferred after the commencement of this Act in terms of section 9 must, by means of its community rules, determine the nature of rights to a subdivided portion of communal land designated for residential, industrial or commercial purposes.

(2) The nature of rights contemplated in subsection (1) include—

(a) ownership in the case of land owned or occupied by or transferred to a community; and

(b) right to use, lease or any other right relating to property as may exist in law.

(3) In making a determination as contemplated in subsection (2), the community must take into account whether—

- (a) the land is owned by the community or the State; and
- (b) the holder of rights to a subdivided portion is a community member.

Registration of communal land

12. (1) Communal land must be registered in the name of a community or a name preferred by the community.

(2) In the case of ownership as contemplated in section 11(2)(a), a subdivided portion of communal land must be registered in the name of a community member already occupying such subdivided portion at the commencement of this Act or to whom it is allocated.

(3) In the case of rights contemplated in section 11(2)(b), the subdivided portion of communal land must be registered in the name of the community and the community member.

Conditions of registration

13. It must be registered as a condition of registration in terms of section 63 of the Deeds Registries Act, that—

- (a) communal land contemplated in *section 17(1)(a), (b) and (c)* cannot be sold, donated, leased, encumbered or in any manner disposed of without a written resolution to that effect supported by 60% of households of the relevant community; and
- (b) a subdivided portion of communal land contemplated in section 17(1)(d) cannot be sold, donated or in any other manner alienated to a person who is not a member of that community without offering—
 - (i) members of the owner's family;

- (ii) members of the relevant community; or
 - (iii) the State,
- the first option to acquire such subdivided portion.

Registrable transactions

14. Registrable transactions in respect of communal land must be registered in terms of this Act, the Deeds Registries Act and any other applicable laws.

Conveyancer

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

Transfer, surveying and registration costs

16. The Minister must, from monies appropriated by Parliament for this purpose, pay the costs of transfer, surveying and registration required to give effect to this Act.

CHAPTER 4

GENERAL PLAN AND TITLE TO COMMUNAL LAND

General plan

- 17.** (1) A general plan for communal land must outline parts of communal land designated for—
- (a) economic, social, environmental and sustainable development and infrastructure investment for the entire community;

- (b) crop fields, grazing land, water ways, wood lands, conservation, recreational and any other purpose for the entire community;
- (c) the provision of economic, social and other services for the benefit of the entire community; and
- (d) subdivided portions for residential, agricultural, industrial and commercial purposes.

(2) The Minister may prescribe the format for the general plan for communal land.

Title to communal land

18. (1) A community in whose name communal land is registered is the owner of such communal land.

(2) A person in whose name a subdivided portion of communal land contemplated in section 17(1)(d) is registered, is the owner of that subdivided portion of communal land: Provided that a community may, in its community rules, impose conditions on such ownership or reserve any right in its favour.

(3) A community or the State, where it has granted a right contemplated in section 11(2)(b) on a subdivided portion of communal land, remains the owner of that subdivided portion of communal land: Provided that the community or the State may convert such right into ownership after an uninterrupted occupation by the same person for a period as may be determined by a community in its community rules or prescribed by the Minister.

(4) The Minister may prescribe general conditions for the registration of communal land.

CHAPTER 5

AWARD OF COMPARABLE REDRESS

Award of comparable redress

19. (1) The Minister must, after determining that a right that is legally insecure as contemplated in section 25(6) of the Constitution held by a person or community cannot, for any reason, be made legally secure, award that person or community comparable redress.

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

- (a) land or a right in land other than the land to which the insecure land right relates;
- (b) compensation in money or in any other form; or
- (c) both forms of redress contemplated in paragraphs (a) and (b).

CHAPTER 6

LAND RIGHTS ENQUIRY

Land rights enquiry

20. (1) The Minister must institute a land rights enquiry before making—

- (a) a determination on communal land in terms of section 5; or
- (b) an award of comparable redress in terms of section 19.

(2) Matters to be enquired into in terms of subsection (1) include the following:

- (a) the nature and extent of competing or conflicting land rights and interests, and whether such rights are legally secure or not;

- (b) the interests of the State;
- (c) the options available for ensuring legally secure rights;
- (d) the provision of access to land on an equitable basis;
- (e) land value, spatial planning and land use management, land development, and the necessity for conducting a development or a decongestion, subdivision, readjustment or consolidation or other land reform programme, and the nature of such programme;
- (f) the need for comparable redress and the nature and extent of such redress;
- (g) the measures required to promote gender equality in the allocation, registration and exercise of land rights;
- (h) any matter relevant to any determination to be made by the Minister in terms of this Act; and
- (i) any other matter as may be determined by the Minister.

(3) The land rights enquirer must, after completion of a land rights enquiry, submit a report on the enquiry to the Minister.

Designation or appointment of land rights enquirer

21. (1) The Minister may designate an officer of the Department or appoint a suitable person who is not such an officer as a land rights enquirer to conduct an enquiry in terms of this Act.

(2) The Minister may designate officials or appoint persons to assist the land rights enquirer contemplated in subsection (1).

(3) The Minister may, with the concurrence of the Minister of Finance, determine such remuneration and allowances payable to a land rights enquirer and his or her assistants who are not State officials.

Functions of a land rights enquirer

22. A land rights enquirer may enquire into—

- (a) the nature and extent of land rights;
- (b) interests of the State;
- (c) options available to ensure legally secure tenure;
- (d) provision of land on an equitable basis also taking into account gender equality;
- (e) any other matter relevant to a determination to be made by the Minister in terms of this Act; or
- (f) any other matter as directed or as instructed by the Minister to achieve the objects of this Act.

Notice of land rights enquiry

23. (1) The Minister must, in the national, regional and local media and in the prescribed manner, publish a notice relating to the enquiry—

- (a) inviting interested parties to participate in such enquiry; and
- (b) indicating the period within which the enquiry must be completed.

(2) After the completion of the enquiry, the Minister must in the same manner that the notice was published, publish the findings and recommendations made by the land rights enquiry.

Powers and duties of land rights enquirer

24. (1) A land rights enquirer—

- (a) may do all that is necessary to perform his or her functions in order to give effect to the objects of this Act; and

(b) report on the enquiry in the *prescribed* manner.

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

(a) by notice request the provision of written or verbal evidence; or

(b) convene and attend meetings of interested persons.

(3) A land rights enquirer may, where permission to enter premises is refused, apply to a magistrate for a warrant to enter any premises, including a private dwelling or an office, where documents relating to the administration of this Act may be kept, and search such premises and take possession of documents and articles.

CHAPTER 7

JURISTIC PERSONALITY AND COMMUNITY RULES

Juristic personality

25. A community to whom communal land is transferred in terms of section 9 becomes a juristic person upon receipt of a Deed of Communal Land.

Community rules

26. (1) A community contemplated in section 25 must, in the prescribed manner, make and adopt its community rules.

(2) Community rules must be adopted by 60% of households of such community.

(3) Community rules must regulate—

- (a) the general management and administration of communal land;
- (b) the nature of rights to subdivided portions of communal land;
- (c) the alienation or termination of rights other than ownership rights;
- (d) the allocation of subdivided portions of communal land;
- (e) the keeping of communal land register;
- (f) the use of communal land by the entire community, households and persons in general;
- (g) the sale, donation, lease, encumbrance or any alienation of rights to communal land;
- (h) the use of communal land by persons or legal entities other than those from the relevant community;
- (i) administration fees;
- (j) such matters as may be *prescribed*; and
- (k) any other matter the community deem necessary to regulate.

(4) The process of making and adopting community rules must be guided by the following principles:

- (a) fair and inclusive decision making;
- (b) equality;
- (c) access to communal property;
- (d) accountability and transparency; and
- (e) democratic processes governing the conduct of community meetings.

(5) Any act or conduct relating to matters contemplated in subsection (3) which is inconsistent with community rules is invalid.

Registration of community rules

27. (1) A community must, in the prescribed manner, apply to the Director-General for the registration of community rules.

(2) The Director-General must consider the adopted community rules and if satisfied that they comply with the rules of natural justice, the Constitution and this Act, register such rules.

(3) If the Director-General is not satisfied as contemplated in subsection (2), he or she must notify the community of the steps to be taken to ensure compliance.

(4) Community rules are binding on the entire community.

(5) Community rules are on their registration deemed to be a matter of public knowledge and must be accessible to the public.

(6) The prescribed standard community rules apply to a community that fails to adopt and have community rules registered.

(7) The Minister may adapt the prescribed standard community rules for a community contemplated in subsection (6) upon request by the community in the prescribed manner.

CHAPTER 8

LAND ADMINISTRATION

Choice on land administration

28. (1) A community issued with Deed of Communal Land must, within a period of 24 months from the date of such issue, by a resolution supported and adopted by not less than 60% of households of that community, choose either—

(a) a traditional council;

- (b) a communal property association; or
 - (c) any other entity as may be approved by the Minister,
- to manage and administer communal land on its behalf.

(2) The procedure for arriving at and adopting a resolution contemplated in subsection (1) must be—

- (a) as prescribed; and
- (b) facilitated by an independent person or organisation as determined by the Minister.

(3) A communal property association administers communal land in accordance with the Communal Property Associations Act: Provided that in the event of any inconsistency between this Act and the Communal Property Associations Act relating to the administration of communal land, this Act supersedes the Communal Property Associations Act.

(4) A community may not choose a—

- (a) traditional council not duly constituted in terms of section 3 of the Traditional Leadership and Governance Framework Act (Act No. 41 of 2003), notwithstanding section 28(4) of that Act; or
 - (b) a communal property association not registered in terms of the Communal Property Associations Act,
- to perform functions in terms of this Act

(5) (a) The Minister must, in respect of a community that fails to exercise a choice as contemplated in subsection (1), appoint an official of the Department or any other suitably qualified person to assist such a community in making a choice; and

(b) Where a community fails to make a choice even after being assisted in terms of paragraph (a), the Minister must determine the choice in accordance with the recommendations of the official or person contemplated in that paragraph.

Functions of institutions

29. (1) An institution responsible for the management and administration of communal land must perform the following functions in relation to communal land:

- (a) General management and administration of communal land in accordance with community rules and this Act;
- (b) allocation of subdivided portions of communal land to community members, including women for residential and commercial purposes, in accordance with community rules and this Act;
- (c) establishing and maintaining registers and records of land rights in communal land and transactions affecting such rights as may be prescribed or as may be required by community rules;
- (d) promoting development rights and interests of the community and its members;
- (e) resolution of disputes among community members;
- (f) promoting co-operation among community members and with any other person in dealing with matters relating to communal land;
- (g) any other function as may be delegated to it by the community; and
- (h) any other function as may be prescribed.

(2) An institution contemplated in subsection (1) has no inherent authority to sell, donate, lease, encumber or in any manner alienate communal land except in accordance with this Act.

Community resolutions

30. Any community resolution having the effect of selling, donating, leasing, encumbering or in any manner alienating or disposing of communal land, must be supported by 60% of households of that community.

Meetings and reports

31. (1) An institution responsible for the management and administration of communal land must meet at least four times a year—

- (a) for purposes of its role and performance of functions in terms of this Act; and
- (b) to report on its activities to a household forum.

(2) An institution contemplated in subsection (1) must submit an annual report in the prescribed manner on its activities to the community, the Premier of the relevant province and the Minister.

CHAPTER 9

HOUSEHOLDS FORUM

Establishment and meetings of households forum

32. (1) A community contemplated in section 25 must establish a households forum.

(2) A households forum must meet at least four times a year.

Composition

33. (1) A Households Forum must consist of—

- (a) not less than 20 but not more than 30 members elected by the relevant community subject to subsections (3) and (4);
- (b) two persons designated by the relevant traditional council or communal property association; and
- (c) one person designated by a municipality in whose area of jurisdiction a Households Forum is established to be a non-voting member of that Forum.

(2) A community must elect the Households Forum's chairperson, deputy chairperson and other three office bearers.

(3) At least 50% of the total membership of a Households Forum must be women.

(4) Three members of a Household Forum must represent the interests of vulnerable community members, including child headed households and the youth, the elderly and the disabled.

Term of office

34. The term of office of a member of a Households Forum contemplated in section 33(1)(a) is 5 years which may be renewed.

Functions

35. (1) A Households Forum represents a community and is responsible for—

- (a) generally overseeing the management and administration of communal land by an institution or entity contemplated in section 28(1);

- (b) receiving quarterly reports from an institution or entity contemplated in paragraph (a);
- (c) providing an institution or entity contemplated in paragraph (a) with the necessary support to enable such institution or entity to perform functions in terms of this Act;
- (d) generally holding an institution or entity contemplated in paragraph (a) accountable in their performance of functions in terms of this Act;
- (e) performance of any functions as may be provided for in community rules; and
- (f) the performance of any functions as may be prescribed.

(2) A Households Forum—

- (a) must report to the community at least once annually; and
- (b) may request the Minister to institute an investigation into the affairs of an institution responsible for the management and administration of communal land relating to such institution's role in terms of this Act.

(3) For purposes of performing its functions, a households forum may liaise with the relevant municipality, Board or any other institution concerning the provision of services and the planning and development of communal land.

CHAPTER 10

COMMUNAL LAND BOARDS

Establishment of communal land boards

36. The Minister may, by notice in the *Gazette*—

- (a) establish one or more communal land boards having jurisdiction in such areas as the Minister may determine; and

- (b) disestablish a board or recognize an already existing board subject to conditions as the Minister may determine or amend a board's area of jurisdiction.

Composition

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

(2) A board consists of no fewer than 9 but not more than fifteen members.

(3) The board must at least have-

- (a) one person nominated by and representing a provincial house of traditional leaders contemplated in section 212 (2) (a) of the Constitution having jurisdiction in the area of that board;
- (b) an official of the Department;
- (c) one person representing municipalities in the province;
- (d) not more than five members representing all communities in the board's area of jurisdiction; and
- (e) not more than seven other persons appointed by the Minister.

(4) Members of the board must-

- (a) be suitable to serve on the board by virtue of suitable qualifications, expertise or experience; and
- (b) be committed to the objectives of this Act.

(5) A member of a board is appointed for a period of five years but the Minister may in her or his discretion appoint a member for another term which shall not be further extended.

(6) At least 50 percent of members of the board must be women.

(7) (a) The Minister must, after consultation with the appointed board members, appoint a chairperson and a deputy chairperson from among members of the board; and

(b) other office bearers of the Board shall be appointed by the board.

Disqualification

38. (1) The Minister may not appoint as a member of a board a person who—

- (a) is not a citizen or a permanent resident of, and is not ordinarily resident in, the Republic;
- (b) is an unrehabilitated insolvent;
- (c) has been removed from an office of trust on account of improper conduct;
- (d) is an elected political representative in the national, provincial or local sphere of government.

(2) A member of a board must vacate her or his office if she or he:

- (a) is removed from office by the Minister on reasonable grounds, after consultation with the board; or
- (b) has, without the leave of the board, been absent from two consecutive meetings of the board.

Powers and functions

39. (1) A board must,

- (a) advise the Minister with regard to any matter relating to the administration of this Act;
- (b) advise and support communities and an institution or entity contemplated in section 28(1) in respect of any matter contemplated in this Act;
- (c) monitor the implementation of this Act and report thereon to the Minister at least once annually;
- (d) appoint committees to assist it in the performance of its functions;
- (e) assist with the resolution of disputes; and
- (f) perform any function in terms of this Act or as assigned by the Minister.

(2) A board member acting in her or his official capacity and duly authorised by the relevant board may—

- (a) at any time enter upon any communal land, except a private dwelling;
- (b) enquire into any relevant matter;
- (c) inspect any document relating to communal land management and administration and make copies of such document; and
- (d) convene and attend a meeting of a community, households forum or an institution responsible for the management and administration of communal land.

(3) The board must annually report to the Minister on its activities.

Service conditions of board members

40. (1) The Minister must determine—

- (a) the conditions of service of board members; and

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

CHAPTER 11

GENERAL PROVISIONS

Failure or maladministration by institution or entity

41. (1) The Minister may determine that an institution or entity contemplated in section 28(1) is not suitable to continue performing its functions in terms of this Act as a result of—

- (a) failure to perform its functions; or
(b) any act of maladministration or corruption.

(2) The Minister may only make a determination contemplated in subsection (1) after instituting a land rights enquiry or an investigation into the role of such institution or entity in terms of this Act.

(3) The Minister may appoint an administrator to perform the functions of an institution or entity which has been determined to be unsuitable to perform its functions under subsection (1).

Support to perform functions

42. (1) The Department must, from monies appropriated by Parliament for this purpose, provide a board, traditional council, communal property association, community, households forum, institution or person performing functions in terms of

this Act with financial, administrative and any other support that may be required to perform such functions.

(2) The support contemplated in subsection (1) includes support for communities to—

- (a) adopt community resolutions;
- (b) adopt community rules;
- (c) make a choice in terms of section 28;
- (d) establish dispute resolution mechanisms as contemplated in section 45; or
- (e) perform any other function in terms of this Act.

Provision of assistance to communities

43. The Minister may designate an officer of the Department to assist a traditional council, communal property association, any other institution or person to give effect to the provisions of this Act.

Provision of municipal services on communal land

44. Nothing in this Act or any other law prevents a municipality from—

- (a) providing services and development infrastructure; and
- (b) performing its constitutional functions,

on communal land including subdivided portions of communal land.

Dispute resolution

45. (1) Parties to a dispute arising from the application of this Act must first attempt to resolve the dispute between them.

(2) If the parties are unable to resolve the dispute between them, either party may refer the dispute to a traditional council, communal property association or a household forum for the resolution of such dispute.

(3) Where a traditional council, communal property association, or a household forum is a party to a dispute and the dispute could not be resolved by the parties, either party may refer such a dispute for mediation by an independent mediator appointed by the Director-General.

(4) If the dispute is not resolved by mediation, either party may refer such dispute to the Minister and the Minister must—

- (a) designate an official of the Department who has skills in the adjudication of disputes to hear both parties and make a finding; or
- (b) appoint an adjudication committee comprising three persons one of whom shall be the chairperson of the adjudication committee, appointed on account of his or her knowledge of the law, which shall hear the parties and make a finding.

(5) A person who is not satisfied with a finding of the adjudication committee may approach the courts for relief.

(6) A dispute which is not resolved as contemplated in subsections (2) or (3) within three months may be referred for adjudication in terms of subsection (4).

Acquisition of land by minister

46. The Minister may, for the purposes of this Act, acquire more land or a right in land for use as communal land to ensure access to land on an equitable basis.

Offences

47. (1) A person who—

- (a) hinders, obstructs or unduly influences any other person in the exercise of powers or the performance of duties in terms of this Act;
- (b) unlawfully or in any manner prevents any other person from exercising a right in terms of this Act; or
- (c) manages or administers or purports to manage or administer communal land in contravention of this Act,

is guilty of an offence.

(2) Any person who grants or purports to grant to any other person a right in communal land in contravention of a community rule, regulation or this Act is guilty of an offence.

Penalties

48. A person convicted of an offence in terms of this Act is liable on conviction in the case of an offence referred to in section 47(1) or (2), to a fine determined in terms of the Adjustment of Fines Act, 1991 (Act No. 101 of 1991), or imprisonment for a period not exceeding ten years, or to both a fine and such imprisonment.

Delegation of powers

49. The Minister or the Director-General may delegate any power conferred to the Minister or the Director-General, as the case may be, in terms of this Act, except the power to make regulations in the case of the Minister, to any official of the Department.

Regulations

50. The Minister may make regulations relating to—

- (a) registration of land rights, including use rights;
- (b) the manner in which meetings and business of institutions responsible for the management and administration of communal land and households forums are conducted;
- (c) the election of members of households forums and their office bearers;
- (d) the manner in which meetings and business of a board are conducted;
- (e) the facilitation of dispute resolution mechanisms in terms of this Act;
- (f) the making and adoption of community rules;
- (g) allocation of rights in communal land;
- (h) factors to be taken into account in determining comparable redress; and
- (i) any other matter which it is necessary or expedient to achieve the objects or the implementation of this Act.

Amendment and repeal of laws

51. The laws mentioned in the Schedule are amended or repealed to the extent set out in the third column of the Schedule.

Short title and commencement

52. This Act is called the Communal Land Tenure Act, 2017, and comes into operation on a date to be determined by the President by proclamation in the *Gazette*.

SCHEDULE

AMENDMENT OR REPEAL OF LAWS (Section 51)

<i>Number and Year of Law</i>	<i>Short Title</i>	<i>Extent of Amendment or Repeal</i>
Act No. 11 of 2004	Communal Land Rights Act	Repeal of the whole.
Act No. 47 of 1937	Deeds Registries Act, 1937	<p>Amendment of section 102—</p> <p>(a) by the insertion after the definition of "court" of the following definition:</p> <p><u>"'Deed of Communal Land' means a deed of communal land as defined in section 1 of the Communal Land Act, 2015;"</u></p> <p>(b) by the substitution for the definition of "person" of the following definition:</p> <p><u>"'person', for the purpose of [the registration of immovable trust property only] any registration in terms of this Act, includes a trust and, for the purpose of the Communal Land Act, 2015, includes a community;"</u>.</p>
Act No. 112 of 1991	Upgrading of Land Tenure Rights Act, 1991	<ol style="list-style-type: none"> 1. Repeal of sections 19 and 20. 2. Substitution for section 25A of the following section: <p><u>"25A. As from the coming into operation of the Communal Land Act, 2015, this Act shall apply throughout the Republic."</u></p>
Act No. 31 of 1996	Interim Protection of Informal Land Rights Act, 1996	Amendment of section 5 by the deletion of subsection (2).
Act No. 38 of 1927	Black Administration Act, 1927.	Sections 6, 7 and 8.

<i>Number and Year of Law</i>	<i>Short Title</i>	<i>Extent of Amendment or Repeal</i>
Act No. 39 of 1979	Bophuthatswana Land Control Act, 1979	Repeal of the whole.
Act No. 16 of 1986	Venda Land Control Act, 1986	Repeal of the whole
Proclamation No. 45 of 1990	Venda Land Affairs Proclamation, 1990	Repeal of whole.
Act No. 14 of 1982	Ciskei Land Regulation Act, 1982	Repeal of the whole.
Act No. 15 of 1989	Qwaqwa Land Act, 1989	Repeal of the whole
Act No. 11 of 1992	KwaNdebele Land Tenure Act, 1992	Repeal of the whole.
Proclamation No. 26 of 1936	Administrative Area Regulations – Unsurveyed Districts: Transkeian Territories	Repeal of the whole

MEMORANDUM ON THE OBJECTS OF THE COMMUNAL LAND TENURE BILL, 2017**1. BACKGROUND**

1.1 The Communal Land Tenure Bill ("the Bill") seeks to regulate communal land. Communal land encompasses land occupied mostly by African communities in the former *homelands*. As the racist policies and laws of the apartheid government would provide, ownership of such land could not be registered in the name of a *native*. Land occupied by *natives* was registered in the name of the South African Native Trust which was governed by the Governor-General, who, according to the Black Administration Act, 1927 (Act No. 38 of 1927), had the title of the *Supreme Chief of all Natives*.

1.2 Communal land continues to be held by the State *in trust* for communities and thereby perpetuating legally insecure land tenure for those communities.

1.3 The Constitution, section 25(6) in particular, seeks to reverse the above remnants of the past by placing an obligation on the State by providing that a *person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress*. Section 25(9) provides that Parliament must enact legislation referred to in section 25(6). The Bill represents such legislation in the making.

1.4 As required by the Constitution, the Bill seeks to ensure that land tenure envisaged in section 25(6) is made legally secure by converting precarious tenure into ownership and other forms that guarantee persons' or communities' rights in land.

2. OBJECTS OF BILL

The main objects of the Bill are the following:

- (a) to convert legally insecure tenure into ownership where persons and communities already hold some form of rights to land;
- (b) to enable the State to grant persons and communities the right to use land that is acquired and owned by the State; and
- (c) to provide for the administration of communal land in general.

3. CLAUSE BY CLAUSE ANALYSIS

A clause by clause analysis of the Bill follows hereunder.

Clause 1 provides for the definitions of words or expressions used in the Bill.

Clause 2 provides for the objects of the Bill which are listed in item 2 above.

Clause 3 provides for the principles applicable to the regulation, management and administration of communal land. The principles also assist in the interpretation of the Bill once enacted.

Clause 4 provides for communal land to which the Bill applies. The Bill applies to communal land currently vesting in the State and held in trust for communities; land acquired by or for a community; and land which the Minister has determined as land to which it shall apply. The Bill further provides that it applies to the exclusion of any other legislation relating to communal land that is inconsistent with it.

Clause 5 provides for a determination by the Minister on communal land in respect of which ownership must be transferred to a community which owns, occupies or has a claim in respect such communal land. It further provides for the granting of use rights by the State to a community where the State owns the land and wishes to continue owning such land. The determination process will follow a consultation process between a community and the Minister wherein the location and extent of land to be transferred is determined.

Clauses 6 provides for the reservation of part of communal land for use by the State. Such use is for public use or public benefit mostly by community members.

Clause 7 provides for matters to be taken into account by the Minister before transferring communal land or before converting into ownership rights in respect of communal land. The matters are listed in the Bill to ensure that the determinations by the Minister are not made arbitrarily. This is in line with constitutional requirements that a functionary exercising power in terms of legislation must be guided by Parliament in the exercise of such functions.

Clause 8 provides that no determination shall be made in respect of land that is the subject of a dispute. This allows disputes to be resolved before determinations are made. A time frame of 24 months is provided for in terms of which disputes must be resolved to ensure that the Minister's determinations are not held up by disputes.

Clause 9 provides for the conversion into ownership and the actual transfer of communal land already occupied by communities and community members. It provides that before communal land is transferred, a general plan in respect of that land must be prepared and approved. This means that the land must first be surveyed before it can be transferred.

Clause 10 provides for the State to continue to own land it has acquired but grants a community the right to use such land without transferring ownership of such land to a community.

Clause 11 seeks to enable the community to which land has been transferred after the commencement of the Act to decide on the nature of rights to be conferred to community members in respect of subdivided portions of communal land. Subdivided portions are for use by individual members for residential, business or any other purposes. The community has a choice, it may confer ownership, lease, right of use or any other rights recognised in law.

Clause 12 seeks to enable a community to register its communal land in its own name or a name preferred by the community. A subdivided portion of communal land is to be registered in the name of a community member to whom it is allocated in ownership. Where a subdivided portion is leased or allocated only for use and not in ownership, such subdivided portion is registered in both the name of the community and the community member.

Clause 13 provides for conditions of registration. These conditions seek to protect communal land against disposal. Before such land can be disposed of, e.g. leased or sold for mining ventures, more than the majority of community members, in this instance 60%, must agree to such act of disposal.

In cases where residential portion is alienated to a person who is not a member of the community, the owner must first offer other family members, community members or the State an option to acquire such property.

Clauses 14, 15 & 16 provide for registrable transactions, that these must be registered in terms of the Deeds Registries Act. Transfer and deeds registration fees as well as VAT are not payable in recognition of the economic status of many communities affected by the Act. The Minister bears some costs.

Clause 17 provides for a general plan for communal land. This serves to ensure some form of land use planning. The plan shall outline parts of communal land designated for different purposes. The clause allows the Minister to prescribe the format for the general plan as circumstances may differ from community to community.

Clause 18 provides for title to communal land to ensure legally secure tenure. The community is the owner of communal land. A person granted ownership rights in respect of subdivided portions is the owner of such subdivided portion subject to conditions as may be determined by the community. The State or community remains the owner where no ownership is transferred.

Clause 19 seeks to enable the Minister to award some form of redress in instances where already existing rights cannot, for any reason, be confirmed. The award can be in the form of another right or land, compensation in money or any other form or both right in land and compensation.

Clause 20 provides for land rights enquiries to ensure that determinations made by the Minister in terms of the Act are sound, rational and based on substance.

Clauses 21, 22, 23 & 24, provide for matters incidental to land rights enquiries including the appointment and powers of the enquirer as well as the notice of the enquiry.

Clauses 25, 26 & 27 seek to enable a community to receive property in its own name, to sue and be sued in its name by making it a juristic person. Because a community is required to act in its name, it will require rules that govern its activities and how it arrives at decisions. A community is therefore required to develop community rules that will govern its activities. The rules must be registered with the Department to ensure that the rules are clear, certain and understood by the community.

Clause 28 requires a community to choose an entity that will assist the community in administering its communal land. This is an entity that will run the affairs of the community in relation to land administration on a day to day basis. Communities can choose a traditional council, a communal property association or any other entity approved by the Minister.

There have been conflicts in the past and some are current wherein some entities are fighting with communities for the control of communal land and its natural resources. The purpose of these provisions is to ensure that whatever entity is chosen, it is an entity that is governed by law so that the Department can have recourse in instances where challenges arise relating to land administration.

Land administration is a contentious issue in that in the past the apartheid government used it as a control mechanism wherein entities were given land administration powers as a means to control communities. This the apartheid government did as it also arrogated to itself the power to appoint and dismiss traditional leaders contrary to customary laws and practices. The provision seeks to allow communities to decide how they want their land administered.

Where a community fails to exercise a choice as contemplated above, the Minister shall attempt to assist the community to make a choice by appointing a suitably qualified person to assist the community. However, should this attempt fail, the Minister shall make a choice for the community.

Clause 29 provides for the functions of an entity chosen by the community to administer its communal land on its behalf. It is important to define the functions as the entity must only act in accordance with the law by exercising only the powers it has and perform the functions as determined by law to avoid conflicts. The functions are listed.

Clause 30 provides for requisite majority for arriving at decisions. This is important to ensure that decisions are arrived at openly and by more than a mere majority of community members. In this instance, decisions must be supported by at least 60% of households.

Clause 31 provides for meetings and reports of land administration entities to ensure accountability to the community.

Clauses 32, 33, 34 & 35 provide for a households forum, its composition, term of office and functions. It is a community structure that will act as middle person between the community and an entity chosen to administer communal land. This is required to ensure that there is immediate accountability on a regular basis especially during the times when the entire community is not able to meet.

Clauses 36, 37, 38, 39 & 40 empower the Minister to appoint a board or boards to advise the Minister on the administration and implementation of the Act in general. This is important as it ensures that the Minister will have at his or her disposal expertise that is necessary to make rational decisions and determinations. The composition of the board is provided for as well as its powers and functions.

Clause 41 seeks to empower the Minister to intervene in instances of maladministration or corruption on the part of an entity that administers communal land. The Minister may institute an investigation and appoint an administrator where an entity is found to have been involved in acts of maladministration or corruption.

Clauses 42 and 43 enable the Department to provide support to communities as well as structures involved in the administration of the Act. The support includes administrative and financial support.

Clause 44 reaffirms the right or obligation of municipalities to provide services on communal land. Some traditional leaders have been reported as indicating that municipalities can get involved in the provision of services and development programmes on communal land only with their consent. The Act seeks to reaffirm municipalities' constitutional obligation to provide services on communal land.

Clause 45 seeks to provide dispute resolution mechanisms to deal with the highly contentious issues provided for in the Act including land administration and other decisions made in the general administration of the Act.

Clause 46 enables the Minister to acquire more land to be used as communal land as communities outgrow their boundaries. This will assist in dealing with congestion in communities that are growing.

Clauses 47 & 48 provide for offences and penalties which are necessary in legislation dealing with land rights and contentious issues of land administration.

Clause 49 provides for delegation of powers by the Minister and the Director-General.

Clause 50 provides for the making of regulations.

Clause 51 provides for repeal and amendments of related legislation. Old *homeland* laws are repealed whereas laws strengthening informal rights are accordingly amended.

Clause 52 provides for the Short Title and the commencement of the Act.

4. FINANCIAL IMPLICATIONS FOR THE STATE

There will definitely be financial implications for the State. The SEIAS conducted in respect of the Bill contemplates that it will require about R20m per annum to implement the Act at all levels. These include transfer costs, survey costs and other related costs. Acquisition of more land for use as communal land will also require more financial resources. The administration of the Act will require financial resources. The Department will budget appropriately for the implementation of the Act.

5. DEPARTMENTS / PERSONS / BODIES CONSULTED

The Department has consulted widely on the policy document and there is general consensus on the policy that gave rise to this Bill. There is however, some resistance in some quarters by persons who would like to see the status quo maintained. The main objective of the Bill is to ensure a legally secure land tenure as required by the Constitution.

The Department has particularly consulted with the National House of Traditional Leaders on the policy document.

6. CONSTITUTIONAL IMPLICATIONS

The Department is of the considered opinion that the provisions of the Bill are not unconstitutional.

7. COMMUNICATION IMPLICATIONS

The Department is committed to communicating with rural communities including traditional communities on the objectives of the Bill as well as other stakeholders affected by the Bill.

8. PARLIAMENTARY PROCEDURE

The Department is of the view that the Bill must be introduced as a section 76 Bill as it affects provinces. It must also be referred to the National House of Traditional Leaders as it impacts on traditional leaders. The Bill also provides a role for traditional councils in the administration of the Act where communities choose traditional councils to assist in communal land administration.