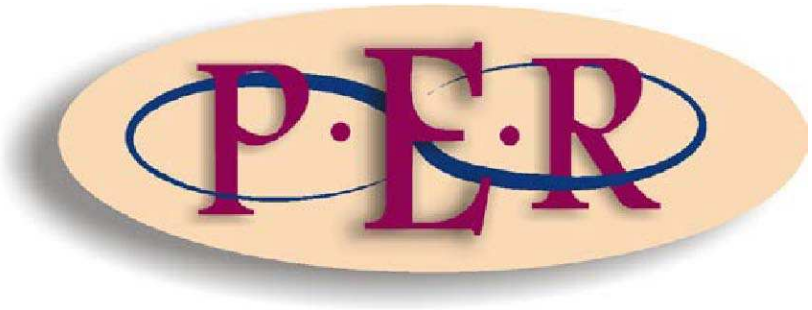
# ASPECTS OF LAND ADMINISTRATION IN THE CONTEXT OF GOOD GOVERNANCE

ISSN 1727-3781




2009 VOLUME 12 No 2

# ASPECTS OF LAND ADMINISTRATION IN THE CONTEXT OF GOOD GOVERNANCE

**G Pienaar***

## Abstract

Recent international developments have emphasised the importance of good governance in land administration. Good governance practices are *inter alia* predictable, open and enlightened policy-making; accountable and transparent processes; a professional ethos that combats corruption, bias, nepotism and personal gain; and strict financial control and management of funding.

This paper explores aspects of land administration where public funding and interests necessitate the application of good governance practices. The South African land reform programme is divided in three sub-programmes, namely land restitution, land redistribution and tenure reform. Land reform is a vast subject, based on policy, legislation and case law. Therefore it is impossible to deal with good governance principles over the wide spectrum of land reform. Special attention is however given to the land restitution programme in terms of the *Restitution of Land Rights Act* 22 of 1994 and tenure reform in the rural areas by means of the *Communal Land Rights Act* 11 of 2004. The purpose is not to formulate a blueprint for good governance or to indicate which good governance principles will solve all or most of the land tenure problems. It is rather an effort to indicate that policies and procedures to improve good governance in some aspects of land reform are urgently needed and should be explored further.

The three land tenure programmes have been introduced with some degree of success. Legislation promulgated in terms of these programmes, especially the

* Faculty of Law, North-West University.

*Restitution of Land Rights Act* and the *Communal Land Rights Act,* is extensive and far-reaching. However, many legislative measures are either impractical due to financial constraints and lack of capacity of the Department of Land Affairs, or are not based on sufficient participation by local communities. Land administration should furthermore be planned and executed in the context of global good governance practices. This includes equal protection; clear land policy principles; land tenure principles according to the needs of individuals and population groups; flexible land registration principles to accommodate both individual and communal land tenure; and appropriate institutional arrangements.

It is clear that established good governance principles may solve many of the problems encountered in land administration in South Africa. It is a topic that needs to be explored further.

**Keywords**: Good governance; Transparency; Accountability; Professional ethos; Financial control; Land administration; Land reform; Land restitution; Land redistribution; Tenure reform; Communal land rights; Land policy; Land registration; Equal protection; Cadastral information.

# ASPECTS OF LAND ADMINISTRATION IN THE CONTEXT OF GOOD GOVERNANCE

**G Pienaar***

## 1 Good governance in global perspective

Land administration, and especially land registration, is often associated with old, gray men shuffling around with maps and deeds. In South Africa pressing land tenure problems require more than the endeavours of old gray men. It is a process which has to be based on sound policy and manageable procedures. As proved in Zimbabwe, unsolved land tenure problems and ineffective land administration can result in economic and political disaster.[1]

Recent international developments have emphasised the importance of good governance in the private (corporate) and public (state) sectors, especially concerning policy, planning, decision-making, management and administration.[2] The transnational flow of information necessitates public and corporate institutions to adhere to good governance practices, which are defined as "predictable, open, and enlightened policy-making (that is, transparent processes); a bureaucracy imbued with a professional ethos; an executive arm of government accountable for actions; a strong civil society participating in public affairs, and all behaving under the rule of law".[3]

* Faculty of Law, North-West University.

1 Ocheje 2007 *Journal of African Law* 178.

2 Ferreira-Snyman and Ferreira 2006 *SAYIL* 57-58; World Bank *Indicators* 263; Botha 2008 *JCRDL* 490.

3 World Bank 1994 www.worldbank.org/ vii.

In the South African situation it was confirmed in *Tshishonga v Minister of Justice and Constitutional Development*[4] that good governance practices in the public sector include anti-corruption measures, open and democratic decision-making, unbiased allocation of funding, measures to combat nepotism, and strict financial control and management of funding. These are but a few aspects of good governance that should be developed and maintained. In this case it was confirmed that the movement towards "good, effective, accountable and transparent governance" should be the overreaching cornerstones of good governance. Furthermore, as emphasised by section 195(1)(f) and (g) of the *Constitution of the Republic of South Africa* 1996, public administration must be accountable and transparency must be fostered by providing the public with timely, accessible and accurate information.

In this paper the necessity of good governance in the implementation of aspects of the government's land tenure policy will be explored. Land tenure is a vast subject, based on policy, legislation and case law. It is impossible to deal with it comprehensively in this paper. A brief synopsis of aspects of land tenure in the context of good governance will be given, concentrating mainly on land restitution through the government's land restitution programme, and tenure reform introduced by the *Communal Land Rights Act* 11 of 2004. The purpose is not to elaborate on possible solutions for often insoluble and impractical policies and programmes, but to set the scene for a colloquium on "Good governance in land administration" during 2010. Therefore, a short exposition of challenges and shortcomings that need to be addressed in the context of public good governance will be given. These topics can be fully discussed during the planned colloquium.

4 *Tshishonga v Minister of Justice and Constitutional Development* 2007 4 BLLR 327 (LC) 352F.

## 2 Aspects of the South African land reform policy

Land tenure in South Africa has a long history of institutionalised racial and gender discrimination and the exclusion of persons, groups and communities from secure land tenure.[5] This culminated in the criminalisation of land tenure for certain racial groups, group areas and stringent anti-squatting measures that have often been described as draconian in nature.[6]

The first hesitant steps to rectify this situation were taken by the De Klerk government with the publication of the *White Paper on Land Reform* of 1991, which provided for the abolition of some of the racially based apartheid legislation and the idea of land restitution, but not the decriminalisation of illegal squatting.[7] This was followed by the *White Paper on South African Land Policy* of April 1997, published after the promulgation and in terms of the Constitution of 1996. The *White Paper* outlined three aspects of land reform, namely restitution of land rights, redistribution of land and tenure reform to secure land rights, and access to land.[8] The purposes of land reform were described in the *White Paper* as the redress of the injustices of apartheid, national reconciliation and stability' economic growth, and the alleviation of poverty. Some aspects of good governance were identified, namely market-driven reform, the statutory framework within which land reform has to occur, environmental issues, and budgetary constraints. Aspects of the three land tenure programmes will be examined briefly to determine to what extent good governance principles have been incorporated in the policies, execution and management of these programmes.

5 Van der Walt 1995 *SAPL* 2; Carey Miller and Pope *Land title* 241-245; Badenhorst, Pienaar and Mostert *Property* 586-587.
6 Van der Walt (n 5) 2.
7 Carey Miller and Pope (n 5) 245-246; Badenhorst, Pienaar and Mostert (n 5) 588-590; Van der Walt and Pienaar *Introduction* 320.
8 Carey Miller and Pope (n 5) 305-309; De Villiers *Land reform* 52.

## *2.1 Restitution of land rights*

### *2.1.1 Procedure*

The *Restitution of Land Rights Act* 22 of 1994, based on sections 121-123 of the 1993 interim Constitution[9] and section 25(7) of the 1996 Constitution, provides for an opportunity for specific persons or communities whose land was taken away after 19 June 1913 without adequate compensation by apartheid land measures, including racially discriminatory legislation or practices, to institute a land claim for the restitution of such property or for equitable redress.[10] Therefore, the process of restitution is aimed at claims against the state rather than between individuals and groups. It is a limited process aimed at rectifying a specific set of historic injustices, and not all land-related claims and problems in general.[11]

Restitution of land rights in South Africa is both market-driven and non-market-driven.[12] In the case of market-driven restoration, land is acquired on a "willing buyer willing seller" basis. Non-market-driven restoration is mainly executed through expropriation, which is not based on "willing buyer willing seller", although one of the factors to determine compensation is the market value of the land.[13] Both of these procedures have specific challenges to face. Market-driven acquisitions can be extremely costly and time-consuming, as it is dependant on available land on the open market. Non-market acquisition by expropriation, on the other hand, has the inherent possibility of abuse, undemocratic state action and economic instability.[14] Both of these processes have to be carefully managed and executed according to recognised good governance practises of transparency and unbiased financial control and management.

---

9 Constitution of the Republic of South Africa 103 of 1993.
10 S 2.
11 Carey Miller and Pope (n 5) 315-317; Van der Walt and Pienaar (n 7) 323.
12 De Villiers (n 8) 3; Draft policy on the Expropriation Bill: Expropriate for public purpose in the public interest 3 (GN 1654 in GG 30468 of 13 November 2007).
13 S 25(3)( c) Constitution 1996.
14 An expropriation policy, Draft policy on the Expropriation Bill (n 12), addresses some of these issues; see also Pienaar 2009 *JSAL* 344-352.

Land claims are lodged and adjudicated according to a set procedure provided for in chapter II of the *Restitution Act.* A land claims commission was established in 1995 to deal with the administration of land claims and the cut-off date for lodging land claims was 31 December 1998. It was planned that all of the land claims be finalised by the end of 2005, which date was extended to 2007, then 2008 and now to 2010.[15]

The following procedure to deal with land claims was prescribed by the *Restitution Act*:[16]

- A land claim lodged in accordance with prescribed requirements to establish a *prima facie* case has to be advertised in the *Government Gazette* and the landowner has to be notified of the land claim against his/her land.[17]
- The land claims commission, consisting of a chief commissioner and regional commissioners, screens all land claims, identifies those that qualify in terms of the Constitution and the *Restitution Act*, and attempts to solve these claims by administrative or mediation procedures.
- Claims not solved by the land claims commission are referred to the land claims court established in terms of the *Restitution Act.* The president of the land claims court must be a judge of the high court, and the judges must either be judges of the high court, legal practitioners or academics with experience in legal and land matters.

Approximately 70 000 land claims were submitted before the cut-off date of 31 December 1998, of which more than 65 000 have been settled by the land

15 Gwanya "Land and agrarian reform".
16 Carey Miller and Pope (n 5) 340-351; Van der Walt and Pienaar (n 7) 324; Badenhorst, Pienaar and Mostert (n 5) 639-642.
17 S 11(1); Carey Miller and Pope (n 5) 341-342; Badenhorst, Pienaar and Mostert (n 5) 639-640.

claims commission or adjudicated by the land claims court.[18] From a global perspective the success rate of settled land claims was hailed as a success story.[19] However, the sting is in the tail. The outstanding 4900 claims, mostly rural land claims, prove to be more complicated and expensive and the date for the finalisation of land claims has been continuously extended, recently to 2010.[20]

Problems encountered with the lodgement, screening, settling and adjudication of land claims are mostly related to a lack of good governance, especially a lack of transparency, communication, financial management, accountability and efficient administrative systems. These include the following:[21]

- Many land claims that were alleged to have been lodged before 31 December 1998, were advertised in the *Government Gazette* only years later, some as late as 2006 and 2007. Many landowners were not notified of the pending land claims against their property until the claims were referred by the land claims commissioners to the land claims court for adjudication, creating feelings of resentment and mistrust amongst most landowners.[22]
- Although many landowners resisted land claims, some landowners were prepared to settle the land claim if reasonable compensation had been

18 Gwanya (n 15).

19 Compared with land claims settled in other jurisdictions, land restitution in South Africa seems to be a success. In Australia 630 land claims have been lodged of which 45 have been settled, see De Villiers (n 8) 108-109; in Zimbabwe only 600 of 4500 white farmers are still on their land and 11 million hectares of land was reclaimed, at this stage without compensation, De Villiers (n 8) 21-22; in Namibia 34 000 out of 200 000 rural people were resettled on 7.5% of commercial farmland, De Villiers (n 8) 37.

20 Gwanya (n 15).

21 Many of the problems with land restitution were emphasised and discussed during the Land, Memory, Reconstruction and Justice Conference at Houwhoek on 13-15 September 2006, cf presentations by Bohlin "Choosing cash over land"; De Wet and Mgujulwa "Land restitution claim"; Liebenberg and Horn "Unfair criticism"; Tong "Judicial versus administrative settlement" and Walker "Defining restitution by default"; and at the Conference on Land Reform in South Africa in Pretoria on 26 August 2008, cf the presentations by Gwanya (n 15); De Jager "Organised agriculture"; Hall "Successes, challenges and concrete proposals".

22 De Jager (n 21).

offered, but the settlement was drawn out by the lack of attention by administrative employees of the different regional land claims commissioners. Some regional land claims offices are notorious for administrative blunders and delays.[23]

- Many land claims are rejected by the land claims court due to sloppy screening measures and lack of evidence, to the detriment of claimants.[24]
- Evidence upon which land claims are based is often a well-kept secret, only to be dramatically revealed during the court case.
- Most urban land claims, and a large part of the rural land claims, were settled by the payment of equitable redress. The princely sum of R40 000 was paid out in most instances of urban settlements. Many persons who had received such a settlement are still landless and poor, causing resentment.[25]
- The outstanding land claims, approximately 4900, are the more complicated claims to settle. These are mostly instances where communities or tribes are claiming large tracts of rural land, often situated in high potential agricultural areas where sugar cane, vegetables or export fruit is cultivated or other intensive farming like forestry is conducted. The land prices are high and vast areas are claimed.[26]
- Employees of regional land claims commissioners are often not trained and almost no agricultural economists are employed to assist in the determination of compensation. Hence many offers to landowners are too high, while in other instances offers which are too low result in lengthy and costly court battles to determine the extent of the compensation.[27]

23 De Bruin *Beeld* 2008 8; De Jager (n 21).
24 Walker (n 21).
25 Bohlin (n 21); De Villiers (n 8) 59.
26 Bottomley *Sake24* 2008 3; De Villiers (n 8) 65-66; Gwanya (n 15).
27 De Jager (n 21).

- The land restitution policy is directed at redress for apartheid victims, rather than beneficiaries of a new land policy system.[28] This hampers post-settlement support programmes.
- The state's long-term financial obligation to foot the bill for restitution seems to be unsustainable.[29]

These shortcomings in the procedure to adjudicate land claims and determine compensation are mostly due to unclear vision and policies, as well as management practices that do not comply with good governance principles. This lack of good governance practices is slowing the process down, causing resentment and anger in both claimants and landowners, and is costing South Africa billions of Rand in wasted resources that could have been used for other necessary land tenure developments.[30]

The following aspects of good governance to streamline the process of land restitution and rectify some of the problems encountered with the administration of land claims have been identified:[31]

- clarity of aims and objectives;
- downscaling of expectations;
- viability of monetary settlements;
- maintenance of the rule of law;
- clear policy;
- establishment of private sector partnerships;
- establishing cooperation rather than confrontation;
- monitoring; and
- efficient post-settlement support.

28 De Villiers (n 8) 67-69.
29 Anon *Legalbrief* 2008 (Oct) 2; Bottomley (n 26); De Villiers (n 8) 71; Gwanya (n 15).
30 Walker (n 21); Tong (n 21).
31 De Villiers (n 8) 81-87; Hall (n 21); Liebenberg and Horn (n 21); Gwanya (n 15).

### *2.1.2 Post-settlement support*

Two aspects of post-settlement support have to be addressed in the process of restoration of land, namely support with institutional arrangements and financial support. Land handed back to a community or tribe as a result of a successful land claim has to be registered in the name of such community or tribe as a juristic person or held in trust for the community. The *Communal Property Associations Act* 28 of 1996 provides for a procedure to establish communal property associations as juristic persons or trusts, which can acquire, hold and manage land on behalf of the community or group.[32] A communal property association has to be registered with the Department of Land Affairs by submitting a written constitution as prescribed by regulations in terms of the Act and the communal land may then be registered in the name of the association. The members of the group or community are all members of the communal property association and their use-rights to the communal land are allocated and protected by the association. In most instances where land is handed back to a group or a community as a result of a successful land claim in terms of the *Restitution Act,* the land claims court makes a specific order that a communal property association is to be registered to hold and manage the land on behalf of the group or community.[33]

The *CPA Act*[34] enjoyed a largely lukewarm reception, because it was in general perceived to be too sophisticated for most communities. Furthermore, lawyers drafting constitutions for these communities frequently did not take community customs and culture sufficiently into consideration.[35] Therefore, intensive training of the community or tribe would normally be required (it is envisaged that such training could take up to a year), but it has rarely been done.[36] Often these rules are ignored by the members, and the management of the

32 Carey Miller and Pope (n 5) 467-491; Badenhorst, Pienaar and Mostert (n 5) 620-622.
33 Nonyana 2000 *Butterworths Property Law Digest* 2-7; Carey Miller and Pope (n 5) 468.
34 *Communal Property Associations Act* 28 of 1996.
35 Pienaar "Communal property arrangements" 325; Pienaar 2000 *JSAL* 458-459; Nonyana (n 33); Terblanche *Grondbeheer* 81-83.
36 Nonyana (n 33) 2-7.

association or trustees of the trust do not always act to the benefit of the community. Because of these problems it is now widely accepted that communal property associations are in most instances not suitable to deal with communal property in rural areas. Many communal property associations are characterised by internal strife, dominance and power struggles. The lack of financial management often causes the management or trustees to misappropriate funds to the detriment of members or beneficiaries, who often struggle to exist or proceed with profitable farming activities.[37] Support to these struggling communities by the Department of Land Affairs is almost non-existent.

The financial side of post settlement support looks even bleaker. Although millions of Rand in terms of programmes like Settlement and Land Acquisition Grant (SLAG), Land Redistribution for Agricultural Development (LRAD) and the Land and Agrarian Reform Project (LARP) are available for economic support, the money is often mal-administered, corruption is rife, no proper agricultural advice is available to resettled farmers and communities, and the necessary money or expertise is available only at a stage when it cannot be utilised. For instance, seed and fertiliser are made available to farmers and communities only when the planting season has already passed.[38]

### *2.2 Tenure reform*

This programme is mainly focused on the improvement of the security offered by existing informal land tenure practices in rural areas. As a result of apartheid land measures many people in rural areas had only temporary permit-based permission to occupy land without secure land tenure rights.[39]

37 De Villiers (n 8) 70-71.
38 Terblanche (n 35) 59-60; De Jager (n 21); Geyer "Post-settlement support"; Anseeuw and Mathebula "Pre- and post-settlement implications"; Conway and Xipu "Securing post settlement support".
39 Pienaar 2000 *JSAL* 455-459.

The tenure security of labour tenants and farm labourers was improved by the *Land Reform (Labour Tenants) Act* 3 of 1996 and the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998. These Acts are not discussed in detail because the success rate of implementing the protective measures for labour tenants and unlawful occupiers against unjust evictions is fairly high.[40] Labour tenants can also claim registered rights to farmland they are occupying or the court may order a landowner to supply the labour tenants with alternative land.[41] The *Extension of Security of Tenure Act* 62 of 1997 provides for the protection of all lawful occupiers (including labour tenants)[42] outside urban areas. This Act is used mostly where persons occupy land in terms of an employment contract. It provides for protection after the contract has been terminated and includes protection for the relatives of the employee. This Act is also applied successfully in most instances where land tenure is insecure.[43]

The unravelling of communal land rights and interests in rural areas seems to be a daunting task. As more than sixteen million people in rural areas live in varying degrees of insecurity, tenure reform in rural areas needs the urgent attention of land authorities. The most ambitious legislative endeavour of the Department of Land Affairs is the *Communal Land Rights Act* 11 of 2004 (CLRA), which was promulgated on 14 July 2004, but has not yet been put into operation. This Act was received with a great deal of scepticism from various role-players. Sociologists were concerned about the lack of protection of existing communal structures by measures to individualise land rights,[44] while lawyers were concerned about the constitutionality of several provisions of the Act, as well as practical aspects like the functioning of institutions like land rights boards and land administration committees and the registration of new-

40 Van der Walt 2002 *SAJHR* 371-375; Van der Walt 2005 *Edinburgh LR* 33-35; Du Plessis, Olivier and Pienaar 2005 *SAPL* 186-207.
41 Badenhorst, Pienaar and Mostert (n 5) 601-604.
42 *Nhlabati v Fick* 2003 7 BCLR 806 (LCC).
43 Badenhorst, Pienaar and Mostert (n 5) 613-619; Pienaar and Mostert 2005 *SALJ* 633-634.
44 See for instance Claassens 2005 *Acta Juridica* 42-81; Cousins 2005 *Stell LR* 488-513.

order land tenure rights.[45] Economists indicated that individualised land rights do not necessarily improve agriculture, create land markets and alleviate poverty in sub-Saharan Africa.[46] They were further concerned about the cost of adjudication of land rights and the introduction of a surveyed land registration system.

In order to determine to what extent this Act complies with the principles of good governance, the following aspects are examined:

- The fiduciary duty of the state towards vulnerable rural people as embodied in the procedure of land rights enquiries and the functioning of land rights boards.
- The maintenance of communal structures through the administrative functions of land administration committees.
- The individualisation of land tenure by the registration of new-order rights.

### *2.2.1 The fiduciary duty of the state*

The fiduciary duty of the state towards rural people practising communal land tenure is embodied in the preamble to the CLRA, where it is stated that the Act must provide for legal security of tenure by transferring communal land to communities, the conduct of land rights enquiries to determine the transition to secure land tenure (new-order rights)[47] and the democratic administration of communal land by communities. This duty is also placed on the state by the

45 Mostert and Pienaar "Formalization" 317-340; Nonyana 2005 *Butterworths Property Law Digest* 1-5; Pienaar 2006 *JSAL* 435-455.

46 Kirk "Evolving role of the state" 33-35; World Bank *Sourcebook* 115; see also Deininger and Binswanger 1999 *World Bank Observer* 247-276; Sarfaty 2005 *Yale LJ* 1791-1818; Hunt 2005 *Development Policy Review* 199-218; Pienaar (n 45) 437-440.

47 S 1: "'new-order right' means a tenure or other right in communal or other land which has been confirmed, converted, conferred or validated by the Minister in terms of section 18."

Constitution of 1996,[48] as well as the International Covenant on Economic, Social and Cultural Rights of 1966[49] and the African Charter on Human and Peoples' Rights of 1981.[50]

#### 2.2.1.1 Land rights enquiries

The determination of communal land and the tenure security of communities is in terms of section 18 of the CLRA the responsibility of the Minister of Land Affairs. This is based on a land rights enquiry in terms of section 14,[51] where the participation of the community is prescribed, but not decisive.[52] The Minister is bound by his/her fiduciary duty towards the community to allocate the land tenure rights to the advantage of the community, which advantage does not necessarily entail the individualisation of communal land tenure.

However, it is clear that many administrative provisions of the CLRA are not based on the accepted community structures and community participation.[53] The Minister, without giving reasons, may determine that the whole of an area be surveyed and registered in the name of a community or subdivided and registered in the name of individuals.[54] The Minister is not bound by the democratic decision of the community, but has a wide discretion to recognise communal land rights or subdivide communal land and allocate individualised new-order rights.[55] The principles of democratic decision-making, transparency and accountability might be discarded in this procedure. Furthermore, old-order

---

48 S 25(5): "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."

49 Art 1.3 and 11.1. The South African Government is a signatory of the Covenant, but has not ratified it yet.

50 Art 20 and 21.

51 S 14(2) determines that the enquiry must enquire into the nature and extent of all rights, constitutional, human, old-order, competing or conflicting; the interests of the state; interests legally secure or not; access to land on an equitable basis; spatial planning and land management; gender equality; and the need for comparable redress.

52 S 17(3)(b) and (c).

53 Mostert and Pienaar (n 45) 327-332; Cousins (n 44) 505-512. On the need for community participation, see Dalrymple *Expanding land tenure* 37-39.

54 S 18(3).

55 S 18(2) and (3); reg 13(3).

rights,[56] including communal land tenure, may be converted into individual ownership or comparable new-order rights, or cancelled and comparable redress be paid to affected persons or communities. The Department of Land Affairs seems to be focusing on the privatisation and individualisation of communal land tenure to such an extent that the fiduciary duty towards communities is often neglected[57] (see also 2.2.3 below for the negative effects of individualisation). The focus should rather be on administrative measures to create tenure security for groups and communities in an accountable and transparent way.

The acceptability of the Minister's determination depends largely on the ability and integrity of the appointed land rights enquirer, the quality of the report by the enquirer and the integrity of the Minister. The land rights enquirer may consist of suitable officers of the Department of Land Affairs or unaffiliated persons or institutions or both, and must possess or have access to a long list of qualities, skills and knowledge.[58]

If a land rights enquiry is to be conducted according to the extremely high and multifaceted standards of the CLRA and the regulations thereto, it is going to be a very expensive and time-consuming exercise to deal with all of the communities, the different old- and new-order rights to the land, and all of the diverse areas where communal land tenure is presently practised.[59] Economists have warned that the unravelling of communal land rights to develop secure land tenure tends to be extremely expensive.[60] If the cost of adjudication of land rights and the demarcation and registration of new-order

56 S 1: "'old-order right' means a tenure or other right in or to communal land which – (a) is formal or informal; (b) is registered or unregistered; (c) derives from or is recognised by law, including customary law, practice or usage; and (d) exists immediately prior to the determination by the Minister in terms of section 18."

57 Cousins (n 44) 505-512; Pienaar "Communal property arrangements" 326-328; Claassens (n 44) 44-45.

58 Reg 14.

59 Cousins *et al* "Perspectives" 8-10.

60 Dale 1997 *Urban Studies* 1621-1633; Deininger and Binswanger (n 46) 247-276; Sarfaty (n 46) 1791-1818; Hunt (n 46) 199-218; Pienaar (n 45) 437-440.

rights is to be added, it is an open question whether this exercise will be affordable or not.

#### 2.2.1.2 Land rights boards

A land rights board must be established by the Minister of Land Affairs for a specific area.[61] The members of the board are appointed by the Minister in accordance with prescribed nomination and selection processes.[62] The appointment of board members is entirely at the discretion of the Minister and he or she is under no obligation to determine if board members will be acceptable to local communities or to get any input in this regard from communities. It is of the utmost importance for the credibility of the system of land administration by land rights boards that the appointment of members of these structures should be transparent and according to democratic principles.

Although acting in an advisory capacity, the land rights boards have far-reaching powers to influence the decision-making and planning of various agencies concerning the security and welfare of communities.[63] These powers may be exercised without proper input or advice by recognised community structures or other agencies. It is further unclear what the status of municipalities, organs of state, traditional leaders, civil society and the private sector will be in this process. Who will have the overriding power in decision-making regarding basic services, infrastructural development, agricultural and other sector employment and poverty alleviation opportunities? The land rights boards will also fulfil an extremely important function in land rights enquiries, the development of community rules, requests for the disposal of communal land, the possible individualisation of communal land and unresolved land disputes. These powers might be exercised in a diligent manner, but the risk of corruption, self-interest and the breaking down of functioning community structures cannot be excluded. The content and adoption of the rules should

61 S 25(a).
62 S 26(2).
63 Reg 10(2).

also be carefully monitored by the land rights enquirer[64] and the land rights board[65] to ensure that the rules are acceptable to and reflect the existing tenure arrangements of the community, to prevent the disregard of community rules by communities, as is often the case with communal property associations in terms of the *Communal Property Associations Act* 28 of 1996.

### *2.2.2 The functioning of land administration committees*

A land administration committee may be elected by a local community according to the procedure prescribed by the community rules (section 21(1)) or a traditional council recognised by the community may act as a land administration committee (section 21(2)). The composition of a land administration committee is prescribed by regulation.[66] In small communities it will be a daunting task to meet the requirements for the composition of the committee.

The main concern about the practical application of the Act is that land administration committees are structured in more or less the same way as communal property associations in terms of the *Communal Property Associations Act* 28 of 1996. This is widely accepted to be unsuitable for the purposes of communal land tenure. Another bone of contention is that the role of traditional leaders has to a great extent been continued in the land administration committees of many communities,[67] to the dismay of communities who fall under the jurisdiction of traditional councils that they do not recognise.[68] Traditional leaders, on the other hand, are concerned about the derogation of their power base by land administration committees of

64 Reg 17(1)(j).
65 Reg 10(2)(e)(ii).
66 S 22(2)–(5).
67 S 21(2)-(5).
68 Pienaar 2007 *JCRDL* 565-566. Cf the unreported case in the North Gauteng High Court *Tongoane v The National Minister of Agriculture and Land Affairs* (case number 11678/2006). Examples of communities who are opposing the CLRA are the Kalkfontein Trust, and the Katjebane Communal Property Association, which fall under the Ndzundza Tribal Authority; the Dixi Community, which falls under the Mnisi Tribal Authority; Makulele Communal Property Association and the Makgobistad community.

communities that do not recognise traditional councils.[69] These concerns have not yet been addressed by the Department of Land Affairs.

The powers of the land administration committees are far-reaching. Many of their powers are directed at the individualisation of communal land tenure (see also 2.2.3 below). This includes *inter alia* the allocation of new-order rights[70] to members of the community after determination of such rights by the Minister of Land Affairs, the registration of new-order rights, the establishment and maintenance of registers and records of new-order rights, the resolution of land disputes, liaison with municipalities and the land rights board to provide services and development, and the promotion of co-operation between members of the community regarding land matters.[71] According to regulation 33(1), the land administration committee must establish and maintain a community membership register and a land register. No further particulars regarding the nature of the land register are provided in either the CLRA or the regulations. The land administration committee may not, despite community rules or any customary law or practice, dispose of ownership of communal land, or encumber such land without an informed and democratic decision by the community.[72]

These sophisticated administrative functions must be exercised by a democratically elected committee of community members or a traditional council recognised by the community.[73] It is highly unlikely that most of the land administration committees will be able to function properly without extensive administrative assistance by the Department of Land Affairs. To date no structures to render such administrative assistance have been proposed or

69 S 21(4) and 22(2).

70 For a definition of new-order rights, see n 46 above. See also Mostert and Pienaar (n 45) 322-326, at 324 they indicate that the scope of the CLRA appears to be intentionally formulated vaguely, to leave room for the inclusion of the many diverse types of communal rights that might need protection.

71 S 24(3).

72 Reg 33(1)( c) and (d).

73 S 21(2). For the dissention regarding the exercise of these functions by traditional councils, see n 54 above.

established by the Department of Land Affairs. Given the lack of administrative or financial support to communities by the Department of Land Affairs after restoration of land following a successful land claim, the provision of such assistance by the Department seems doubtful.[74]

Land administration committees play a vital role in creating and maintaining the tenure security of communities. In this process the decision to individualise land tenure or maintain communal land tenure within existing community structures is extremely important. Community structures provide security to many rural communities. Before communal land can be transferred to a community, the community has to be incorporated as a juristic person with adopted rules regarding the composition and functioning of the community and tenure-related matters.[75] One problematic area is the determination of membership of a community in terms of the rules.[76] It is envisaged that the membership issue of many communities will be disputed and extremely difficult to solve. Such membership disputes will have to be adjudicated by a court, as neither the minister nor the land administration committee is expressly empowered to decide on this issue.

### *2.2.3 The individualisation of communal land tenure*

Many of the provisions of the CLRA are directed at the individualisation of communal land tenure (see 2.2.1 and 2.2.2). Individualised land tenure is not always a viable option for communities, especially those that rely on community structures for tenure security and group identity.[77] Most sociologists and anthropologists convincingly argue that individualised land tenure is not a prerequisite for tenure security, but that tenure security is often obtained by strong community structures as long as the community functions properly and

74 De Villiers (n 8) 69-70, 142-146; Cousins *et al* (n 59) 8-10; Pienaar "Communal property arrangements" 322-328.
75 S 3 and 19(1).
76 S 2.2.2 of Annexure E to the Regulations.
77 Pienaar (n 45) 441-446.

sufficient land is available.[78] In most instances, the conversion from communal land tenure to individualised land ownership by a land titling programme mainly benefits the wealthy and powerful ("rich man's law"), leaving poor and vulnerable people in even worse conditions.[79] When disrupting the social structure of the community by individualising communal land tenure, one of the most important support mechanisms for the members of such a community is disrupted as well. Cousins *et al*[80] indicate that titling can damage or destroy nested rights various members of the community have to resources on the land, because it compels exclusivity and individualises decision-making.

Various land-tenure rights are registrable in terms of the CLRA. It seems to be the policy of the Department of Land Affairs to follow a layered approach in recognising and registering land rights. After a determination has been made by the Minister in terms of section 18, the specific communal land must be registered in the name of a community as a juristic person, to hold such land on behalf of the community.[81] The land may then be used communally according to the community rules.[82] The Minister may also determine that a part of the communal land must be surveyed and subdivided and a communal general plan approved in terms of the *Land Survey Act* 8 of 1997. A communal land register must then be opened in terms of the *Deeds Registries Act* 47 of 1937.[83] A new-order right in communal land, other than freehold ownership, may then be transferred to a community member subject to an informed and democratic decision by the community and subject to conditions imposed in terms of the rules of the community.[84] Such a right must be recorded in the land register of the community and registered in a person's name in the deeds

78 Kirk (n 46) 33-35; World Bank (n 46) 115; see also Dale (n 60) 1624-1628; Deininger and Binswanger (n 46) 248-249; Ziqubu, Cousins and Hornby "Individual tenure rights" 1-3.
79 Cousins *et al* (n 59) 7.
80 *Supra* n 59 12.
81 S 6(a); s 18(3)(a).
82 S 3.2-3.7 of Annexure E to the Regulations.
83 S 6(b); s 18(3)(b).
84 Reg 33(1)( c) and (d).

registry by means of a deed of communal land right.[85] The nature of a use right in terms of such a deed can be only a limited real right, as a personal right is not registrable in a deeds registry. A holder of a registered new-order right may apply to the land administration committee to transfer such a registered right to a member or non-member of the community, or to encumber such a right. The transfer or encumbrance may be authorised only according to the community rules and only after obtaining an informed and democratic decision of the community, and may be subjected to any condition imposed by the rules.[86]

A holder of a registered new-order right in terms of a deed of communal land right may also apply to the land administration committee to convert such a right into freehold ownership[87] or the transfer any new-order rights to a member or non-member of the community.[88] The land administration committee may authorise such a conversion or disposal only after obtaining an informed and democratic decision of the community and on conditions imposed or rights reserved in favour of the community.[89]

It is clear that the Minister has a wide discretion to maintain communal land tenure or to individualise the land rights in the form of registered new-order rights or even freehold ownership according to the circumstances and needs of a specific community. The policy of the Department of Land Affairs on the issue of individualisation of communal land tenure is not clear at this stage, but it seems to be biased towards individualisation.[90] It is part of the fiduciary duty of the Minister to exercise such discretion by taking into consideration existing community structures and the customs and rules of the community. However, in terms of the wide discretion afforded by the CLRA and the regulations, it is

85 S 6(a)(iii).
86 Reg 33(1)(b).
87 S 9(1).
88 Reg 33(1)(b).
89 S 9(3); reg 33(1)(b).
90 Ziqubu, Cousins and Hornby (n 78) 1-3; Pienaar "Communal property arrangements" 326-328.

possible for the Minister to disregard a community's wishes to maintain communal land tenure according to accepted community rules and structures.

### *2.3 Redistribution*

This programme is aimed at making land available to people who have no land or insufficient land. Due to apartheid land policy 87% of the population had access to only 13% of the available land and the purpose is to establish a more equitable distribution of land.[91] Although legislation to improve the situation has been promulgated,[92] the process is slow and cumbersome due to the lack of sufficient funding, poor financial management, a lack of transparent vision and a lack of economic and agricultural advice after land has been made available.

A concept document has been formulated for the Land and Agrarian Reforms Programme (LARP) wherein principles, new approaches and targets are set; a project manager has been appointed to facilitate the implementation of LARP and the integration of provincial initiatives; proposals for the institutional arrangements have been completed; and business plans have been completed.[93] The aim of the Department of Land Affairs is to increase black agricultural landholding to 30% of the available agricultural land by 2014. Of the available 24.6 million hectares of agricultural land, 4.8 million hectares have already been transferred to black landowners, leaving a balance of 19.8 million hectares, or 3.3 million hectares per year, to be transferred to meet the 2014 deadline at an estimated cost of R74 billion. This aim seems to be more and more unattainable due to a lack of funding and capacity, and the more realistic

91 S 25(5) Constitution 1996; Carey Miller and Pope (n 5) 399-402; Terblanche (n 35) 58-59; Van der Walt and Pienaar (n 7) 326. This was the situation in 1960; it has improved considerably after 1994.

92 Eg *Provision of Land and Assistance Act* 126 of 1993; *Development Facilitation Act* 67 of 1995; *Land Reform (Labour Tenants) Act* 3 of 1996; *Housing Act* 107 of 1997; *Provision of Certain Land for Settlement Amendment Act* 26 of 1998; *Rental Housing Act* 50 of 1999; *Communal Land Rights Act* 11 of 2004.

93 Gwanya (n 15).

target of 2025 is under consideration.[94] The new policy includes increased financial support for the LRAD (Land Redistribution for Agricultural Development) and SLAG (Settlement and Land Acquisition Grant) programmes, strategic partnerships, increased capacity through the new managerial structures, improved performance management and continuous engagement with the National Treasury for more funding. Although aspects of good governance are included in the new policy (*eg* measures to improve financial control, management and accountability), it is not clear whether anti-corruption measures, open and democratic decision-making and measures to prevent nepotism are included in this policy.

One of the problems is that the extent of black landownership cannot be accurately established at this stage, as the race of landowners and members of landowning juristic persons is not recorded in deeds documents. As the principle of "willing buyer willing seller" is not successful in making sufficient land available for redistribution, the government is considering a new *Expropriation Act* to ensure that sufficient land is available for redistribution.[95] A draft policy[96] and bill were published during 2007 and 2008 respectively, but the bill was retracted because of a huge public outcry.[97] It is expected that a new revised bill will be published in the near future to streamline the expropriation procedure in the interest of land reform, especially restitution and redistribution.

## 3 Global good governance principles in land administration

Land reform is but one of many aspects of land administration. Good governance principles in land administration include policy issues (see 3.1 to 3.3 below) as well as procedural issues (see 3.4 to 3.6 below) to ensure that

94 Gwanya (n 15); Anon *Legalbrief* 2008 (Sep) 4; Du Plessis, Olivier and Pienaar 2005 *SAPL* 434-457.
95 Pienaar (n 14).
96 Draft policy on the Expropriation Bill (n 12).
97 Pienaar (n 95).

accountability, transparency, affordability, participation and easily accessible and accurate information are included in land management processes. To avoid a piecemeal approach to land administration, the following aspects are internationally recognised as requirements for a comprehensive land administration system for formal and informal, including communal, land tenure:

### *3.1 Equal protection*

Policymakers in South Africa have to deal with two diverse land tenure systems. The one is a well-developed deeds registration system for real and limited real rights to immovable property, which rights are individualised and registered according to the strict and formal procedure set by the *Deeds Registries Act* 47 of 1937.[98] These rights are often considered as absolute and superior to unregistered rights and offer strong protection to owners and holders of limited real rights. The registration of title by way of deeds is regarded as accurate and reliable, but it is characterised by exclusivity. Only rights to demarcated, surveyed property can be registered, excluding a large part of the population from the protection offered by the registration system.[99] Unregistered rights, and especially informal and communal land rights, are considered inferior and the protection of these rights is often fragmentary and insufficient.[100]

Recent literature, legislation and case law regarding the scope of section 25 of the Constitution have changed the notion that informal and fragmented use-rights, as well as communal land rights, are inferior to the individualised ownership orientation model for lack of registration.[101] Land tenure legislation[102]

98 Van der Merwe *Sakereg* 65-83; Badenhorst, Pienaar and Mostert (n 5) 193; Pienaar (n 45) 439-440.
99 Pienaar 1996 *JSAL* 205-226; Badenhorst, Pienaar and Mostert (n 5) 212-213.
100 Pienaar (n 45) 440.
101 Van der Walt 1992 *SAJHR* 431-450; Van der Walt 2001 *SALJ* 258-311; Cousins (n 44) 490-494.
102 See for instance the *Restitution of Land Rights Act* 22 of 1994; the *Land Reform (Labour Tenants) Act* 3 of 1996; the *Interim Protection of Land Rights Act* 31 of 1996; the

was promulgated to protect the informal land rights of labour tenants, squatters, lessees, destitute people, and rural individuals and communities practising communal land tenure, whose land tenure rights were insecure or who were dispossessed by apartheid land measures. A paradigm shift from the exclusive protection of ownership and limited real rights to tenure security for unregistered and informal land rights has been accepted by the constitutional court[103] as a solution to South Africa's pressing land tenure problems.

However, the formalisation of informal and communal land tenure seems to be inevitable in the present globalising world.[104] Therefore, the solution lies in the improved protection of statutorily recognised rights by an extended land registration system where informal, fragmented or communal land rights are recorded and protected in accordance with the application of the publicity principle.[105] Such a registration system should be underpinned by a suitable computerised land information system. The registration system and land information system should form part of a comprehensive land administration system for communal property to ensure that sufficient information is available to ensure the equal protection of all forms of land tenure.[106]

### *3.2 Land policy principles*

Modern land administration has to focus mainly on sustainable development of rural and communal areas, where there is often a tension between the environment and pressures of human activity.[107] Furthermore, it has to deal with recognising, controlling and mediating rights, restrictions and responsibilities over land and land related resources, such as minerals and

---

*Extension of Security of Tenure Act* 62 of 1997; the *Prevention of Illegal Eviction and Unlawful Occupation of Land Act* 19 of 1998 and the *Rental Housing Act* 50 of 1999.

103 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) par 16, 23 and 24.

104 Dalrymple (n 53) 3-4.

105 Pienaar (n 45) 448-450.

106 UNECE 1996 www.sigov.si/.

107 For the interaction between the social, environmental and economic dimensions of land administration, see Dale and McLaughlin *Land administration* 1-5; Williamson "Best practice" 8.

water.[108] The three key attributes to land policy are tenure, value and use.[109] To balance these competing tensions in land policy requires access to accurate and relevant information by way of spatial data, a multi-purpose cadastral system[110] and a comprehensive land information system.[111] Formalisation of tenure is required, but not necessarily in the form of a western-style individualised land policy.[112] In this regard it is important to establish and define roles and responsibilities of the various land related activities such as land management, land reform, land registration, cadastre and land administration infrastructure suitable for communal land tenure.[113]

### *3.3 Land tenure principles*

Before a final decision on a long-term land titling strategy is made, it is necessary to examine the needs of the different individuals and population groups across all tenure relationships.[114] In this regard the land titling debate in South Africa should receive proper attention.[115] To embark on a titling programme based on individualised land tenure, ignoring existing community structures and without community participation, would be catastrophic for rural societies and communities whose main protection lies in community structures. Furthermore, the concepts of property of traditional communities are completely different from the western concept of individualised land rights, due to their

108 Williamson "Land administration" 6; Dalrymple (n 53) 1-3.
109 Dale and McLaughlin (n 107) 8. This means not only economic value, but also social value – see Rakai *Customary land tenure* 152-154 and Dalrymple (n 53) 30.
110 A cadastral system is defined by Zevenbergen *Systems* 27-28 as "… (a) a technical record of the parcellation of land through any given territory, usually represented on plans of suitable scale, with (b) authoritative documentary record, whether of fiscal or proprietary nature or of the two combined, usually embodied in appropriate associated registers". See also 3.3 below and Rakai (n 109) 24-25; Harcombe *Cadastral model* 4-13.
111 A comprehensive land administration system is described by Dale and McLaughlin (n 107) 92-94 as a combination of geographic information and the institutional framework within which such technology is operated to produce information in support of land policy and management activities. See also Rakai (n 109) 19-23 and Harcombe (n 110) 13-18.
112 Dalrymple (n 53) 3-4.
113 Rakai (n 109) 27-29; Williamson (n 108) 12; Dalrymple (n 53) 29-30 and 38-39.
114 Rakai (n 109) 27-29; Williamson (n 108) 12; Dalrymple (n 53) 35-37.
115 Cousins (n 44) 488-513; Pienaar (n 45) 435-455.

possessing different social norms and values.[116] On the other hand, ignoring the fact that many communities in South Africa are dysfunctional would not help to solve the land tenure question. One should be careful not to idealise rural societies practising communal land tenure.[117] Many members of such communities are urbanised to such an extent that they oppose traditional customs and community structures, including the institution of traditional leadership.[118]

Developing countries such as South Africa should consider the range of alternative ways to confirm security of tenure and promote growth and development. It is also necessary to consider the possibility of different tenure arrangements within one cadastral and land information system to suit the diverse needs of individuals, communities, and land tenure in urban, agricultural and rural areas. The main purpose should be to foster sustainable development by security of land tenure for the diverse spectrum of tenure arrangements and needs.[119]

### *3.4 Land registration principles*

Land registration principles[120] applicable to communal land differ substantially from the western or privatised requirements in the case of individual land ownership. Communal land rights cannot be adjudicated and mapped with the same approach and techniques as can communal land, as people practising communal land tenure often have different spatial concepts from westernised individual ownership.[121] While individual landownership is based on an accurate land survey system of demarcated individual land parcels that indicate the

116 Rakai (n 109) 34-35; Dale and McLaughlin (n 107) 1; Dalrymple (n 53) 35-36 and 60. See also Godden and Tehan "Translating native title" 7-38.
117 Adams, Cousins and Manona "Land tenure" 111-112; Bosch and Hirschfield "Legal analysis" 19-35; Pienaar (n 45) 446.
118 Pienaar "Communal property arrangements" 325; Terblanche (n 35) 102-104; Claassens (n 44) 42-81.
119 Rakai (n 109) 61-64 and 143-149; Williamson (n 108) 14; Dalrymple (n 53) 35-37.
120 For a definition of cadastral systems, see n 92 above.
121 Rakai (n 109) 61-63 and 143-145; Williamson (n 108) 14.

exclusive area where rights are exercised,[122] communal land tenure is based on flexible use-rights by a range of members of a community within a specified area. The borders of these areas are often vague or flexible, and may change from time to time due to specific uses or agreements. Furthermore, the use-rights may differ due to seasonal, varied or changed needs, for instance a family may cultivate a designated portion of land during the summer, while the same portion of land may be available for grazing purposes to the whole community during the rest of the year.[123] On the other hand, not all people living in rural areas are members of a functional community or recognise community structures and rules, and many people have a need for individualised land tenure rights within communal land in rural areas. It is, therefore, necessary to develop a comprehensive registration system where both of these tenure forms can be accommodated without the one being superior to the other.[124]

Registration models have to be developed according to the specific social, legal, cultural, economic and institutional circumstances prevailing in a specific area, causing the need for different requirements in formal urban areas and communal rural areas.[125] In this regard the future vision of registration systems, as embodied in *Cadastre 2014*,[126] introduces a system where the focus is on land objects rather than land parcels. A land object is described as a piece of land in which homogenous rights, restrictions and responsibilities are exercised

122 See the provisions of the *Land Survey Act* 8 of 1997; Badenhorst, Pienaar and Mostert (n 5) 194-195.

123 Cousins (n 44) 500-501 indicates that the land rights are embedded in a range of social relationships, often of a multiple and overlapping character, which are inclusive rather than exclusive. The rights are derived from accepted membership of a social unit that determines access to land. Resource use boundaries are normally clear, but often flexible and negotiable and therefore difficult to demarcate formally by way of the present land survey techniques.

124 Rakai (n 109) 61 and 143-149; Williamson (n 108) 15; Dalrymple (n 53) 35-37.

125 Dale and McLaughlin (n 107) 9 indicate that a holistic approach is necessary, referring to UNECE 1996 www.sigov.si/ 1: "The modern cadastre is not primarily concerned with generalised data but rather with detailed information at the individual land parcel level. As such it should service the needs both of the individual and the community at large." See also Rakai (n 109) 163-165.

126 Harcombe (n 110) 96-99.

within its boundaries. This development is in accordance with the trend for registration systems to record more complex arrangements of rights, restrictions and responsibilities in order to accommodate environmental and social priorities in addition to the traditional economic function.[127] The success of a registration system is not dependent on its legal or technical sophistication, but on whether or not it protects land rights adequately and records such rights efficiently, simply, quickly, securely and at low cost.[128]

### *3.5 Spatial data and technical principles*

Spatial data infrastructure is a key component of land administration infrastructure.[129] Normally this is based on complicated and expensive land survey processes. In the case of South Africa the land survey system is directed at the demarcation of land parcels for the exercise of individual landownership and registered limited real rights.[130] It is, therefore, important to extend the spatial data infrastructure to include flexible and layered fragmented use-rights, especially in rural areas where communal land tenure is practised. In other developing countries it was established that a registration-based land information system for communal land tenure can largely function without a graphical database. The only prerequisite is a computerised land information system within a surveyed piece of land.[131]

The surveying and mapping component of land administration often needs vast amounts of money and resources. Such spending will be feasible only if it recognises the social needs of the users, and not only the economic advantages of surveying and titling. The technical solutions should be user driven, integrating formal and informal land tenure in one land administration and land information system. A computerised land information system is often

127 Rakai (n 109) 152-154; Williamson (n 108) 13.
128 See in general Nichols *Land registration*.
129 Groot and McLauglin *Geospatial data infrastructure* 5.
130 *Land Survey Act* 8 of 1997; see also Badenhorst, Pienaar and Mostert (n 5) 194-195; Van der Walt and Pienaar (n 7) 453-454.
131 Rakai (n 109) 143-150 and 163; Ventura and Mohamed "Information technologies" 4.

the best way to integrate the diverse needs of formal and informal land tenure, but it also has certain constraints. It is expensive to introduce and maintain, and often technically too sophisticated for informal land users, causing such a system to be ignored.

### *3.6 Institutional principles*

Although dependent on policy principles and legal developments, inappropriate institutional arrangements are often a severe limitation in any land administration system because of a lack of good governance principles.[132] It is important to combine all of the different land administration activities under the control of one specific state department, although the decentralisation of the activities and functions to regional level is likewise important. In particular it is important to synchronise the functions of land surveying, land information, and cadastral, valuation and land registration agencies within one central state department to ensure that key issues and strategies can be uniformly developed and applied.[133] At this stage the Department of Land Affairs plays a vital role in introducing the three land tenure programmes by way of legislation. However, the administration of many of these legislative measures, especially concerning post-settlement support and institutional and agricultural advice, are not sufficiently developed and are in some instances totally non-existent.

## 4 Conclusions

The aim of this paper was not to formulate a blueprint for good governance in land reform. That is far too wide a subject to discuss in one paper. Neither was it envisaged that the application of specific good governance principles will solve all or most of the land tenure problems. It is rather an effort to indicate

132 Nichols (n 128) 170-191; Williamson (n 108) 13; Harcombe (n 110) 139-141; Mulolwa *Integrated land delivery* 106-109.

133 Williamson (n 108) 18; Enemark 2003 www.fig.net/

that policies and procedures to improve good governance in some aspects of land reform are urgently needed and should be explored further.

The three land tenure programmes have been introduced with some degree of success. Legislation promulgated in terms of these programmes is extensive and far-reaching. However, many legislative measures are either impractical due to financial constraints and the lack of capacity of the Department of Land Affairs, or are not based on sufficient participation by local communities. This has the detrimental effect that such measures are either ignored by local communities, or impossible to implement due to lack of co-operation, funding or institutional capacity.

It is clear that established good governance practices may solve many of the problems encountered with land administration in South Africa. It is a topic that should be explored further, with a specific indication of what good governance principles should be applied to the different aspects of land administration in South Africa, and specifically to the land reform programmes.

**Bibliography**

Adams, Cousins and Manona "Land tenure"

Adams M, Cousins B and Manona S "Land tenure and economic development in rural South Africa" in Cousins B (ed) *At the crossroads: Land and agrarian reform into the 21st century* (Agrarian Studies School of Government University of the Western-Cape 2000) 110-114

Anon *Legalbrief* 2008 (Sep)

Anon "Cost escalates due to land Bill delays" *Legalbrief* 4 September 2008 4

Anon *Legalbrief* 2008 (Oct)

Anon "Land officials to explain discrepancies" *Legalbrief* 8 October 2008 2

Anseeuw and Mathebula "Pre- and post settlement implications"

Anseeuw W and Mathebula N "Linking restitution of land to development: pre- and post settlement implications" Paper presented at *Land, Memory, Reconstruction and Justice Conference* 13 September 2006 Houwhoek, South Africa (Proceedings on CD)

Badenhorst, Pienaar and Mostert *Law of Property*

Badenhorst P, Pienaar J and Mostert H *Silberberg-Schoeman's Law of Property* (LexisNexis Durban 2006)

Bohlin "Choosing cash over land"

Bohlin A "Choosing cash over land: Considering the time factor in urban land claims" Paper presented at *Land, Memory, Reconstruction and Justice Conference* 13 September 2006 Houwhoek, South Africa (Proceedings on CD)

Bosch and Hirschfield "Legal analysis"

Bosch D and Hirschfield E "Legal analysis of communal property institutions used in land reform" (Unpublished report for the CSIR Pretoria 2004)

Botha 2008 *JCRDL*

Botha MM "Can whistle-blowing be an effective good governance tool?" 2008 *Journal of Contemporary Roman-Dutch Law* 482-495

Bottomley *Sake24* 2008

Bottomley EJ "Kommissie kla eienaars druk grondpryse op" *Sake24* 16 October 2008 3

Carey Miller and Pope *Land title*

Carey Miller DL and Pope A *Land title in South Africa* (Juta Cape Town 2000)

Claassens 2005 *Acta Juridica*

Claassens A "The Communal Land Rights Act and women – does the Act remedy or entrench discrimination and the distortion of the customary?" 2005 *Acta Juridica* 42-81

Conway and Xipu "Securing post settlement support"

Conway A and Xipu T "Securing post settlement support towards sustainable restitution – lessons from Covie" Paper presented at *Land, Memory, Reconstruction and Justice Conference* 13 September 2006 Houwhoek, South Africa (Proceedings on CD)

Cousins 2005 *Stell LR*

Cousins B "'Embeddedness' versus titling: African land tenure systems and the potential impact of the Communal Land Rights Act 11 of 2004" 2005 *Stellenbosch Law Review* 488-513

Cousins *et al* "Perspectives"

Cousins T, Hornby D, Kingwell B, Royston D and Trench T "Perspectives on land tenure security in rural and urban South Africa" (Unpublished AFRA report Pietermaritzburg 2005)

Dale 1997 *Urban Studies*

Dale PF "Land tenure issues in economic development" 1997 (34) *Urban Studies* 1621-1633

Dale and McLaughlin *Land administration*

Dale PF and McLaughlin JD *Land administration* (Oxford University Press Oxford 1999)

Dalrymple *Expanding land tenure*

Dalrymple K *Expanding land tenure to alleviate poverty* (PhD thesis University of Melbourne2005)

De Bruin *Beeld* 2008

De Bruin P "Grootste grondeis sloer steeds" *Beeld* 21 October 2008 8

De Jager "Organised agriculture"

De Jager T "Organised agriculture's experiences on successes, challenges and concrete proposals" (Unpublished paper presented at the Conference on Land Reform in South Africa 26 August 2008 Pretoria)

De Villiers *Land reform*

De Villiers B *Land reform: Issues and challenges* (Konrad-Adenhauer-Stiftung Johannesburg 2003)

De Wet and Mgujulwa "When rights go wrong"

De Wet C and Mgujulwa E "When rights go wrong: The dynamics of as successful land restitution claim in the Eastern Cape" Paper presented at *Land, Memory, Reconstruction and Justice Conference* 13 September 2006 Houwhoek, South Africa (Proceedings on CD)

Deininger and Binswanger 1999 *World Bank Observer*

Deininger K and Binswanger H "The evolution of the World Bank's land policy: principles, experience, and future challenges" 1999 (14) *The World Bank Observer* 247-276

Du Plessis, Olivier and Pienaar 2005 *SAPL* 186-207

Du Plessis W, Olivier NJJ and Pienaar JM "Land matters: New developments" 2005 (1) *South African Public Law* 186-207

Du Plessis, Olivier and Pienaar 2005 *SAPL* 435-457

Du Plessis W, Olivier NJJ and Pienaar JM "Land matters: New developments" 2005 (2) *South African Public Law* 435-457

Ferreira-Snyman and Ferreira 2006 *SAYIL*

Ferreira-Snyman MP and Ferreira GM "Global good governance and good

global governance" 2006 *South African Yearbook of International Law* 55-94

Geyer "Post-settlement support"

Geyer C "SADC overview of post-settlement support in South Africa" (Unpublished paper presented at the Conference on Land Reform in South Africa 26 August 2008 Pretoria)

Godden and Tehan "Translating native title"

Godden L and Tehan E "Translating native title to individual title in Australia: Are real property forms and indigenous interests reconcilable?" Paper in the *Proceedings of the Reading Property Law Conference* April 2006 7-38

Groot and McLauglin *Geospatial data infrastructure*

Groot R and McLauglin J *Geospatial data infrastructure: Concepts, cases and good practice* (Oxford University Press Oxford 2000)

Gwanya "Land and agrarian reform"

Gwanya T "Land and agrarian reform in South Africa" (Unpublished paper presented at the Conference on Land Reform in South Africa 26 August 2008 Pretoria)

Hall "Successes, challenges and concrete proposals"

Hall R "Successes, challenges and concrete proposals on land reform" (Unpublished paper presented at the Conference on Land Reform in South Africa 26 August 2008 Pretoria)

Harcombe *Cadastral model*

Harcombe PR *A cadastral model for low value lands – the NSW western lands experience* (MGeo dissertation University of Melbourne 2002)

Hunt 2005 *Development Policy Review*

Hunt D "Some outstanding issues in the debate on external promotion of land privatization" 2005 *Development Policy Review* 199-218

Kirk "Evolving role of the state"

Kirk M "The context for livestock and crop-livestock development in Africa: The evolving role of the state in influencing property rights over grazing resources in sub-Saharan Africa" in McCarthy N *et al* (eds) *Property rights, risk, and livestock development* (International Food Policy Research Institute Washington 2000) 23-54

Liebenberg and Horn "Unfair criticism"

Liebenberg JL and Horn A "Unfair criticism: An alternative interpretation of the restitution deadlock" Paper presented at *Land, Memory, Reconstruction and Justice Conference* 13 September 2006 Houwhoek, South Africa (Proceedings on CD)

Mostert and Pienaar "Formalization"

Mostert H and Pienaar J "Formalization of South African communal land title and its impact on development" in Cook E (ed) *Modern studies in property law III* (Oxford University Press Oxford 2005) 317-340

Mulolwa *Integrated land delivery*

Mulolwa A *Integrated land delivery: Towards improving land administration in Zambia* (PhD thesis Technische Universiteit Delft 2002)

Nichols *Land registration*

Nichols SE *Land registration: Managing information for land administration* (PhD thesis University of New Brunswick 1992)

Nonyana 2000 *Butterworths Property Law Digest*

Nonyana MR "Communal property associations and their impact on the

formation of small business in the rural sector" 2000 *Butterworths Property Law Digest* 2-7

Nonyana 2005 *Butterworths Property Law Digest*

Nonyana MR "Some disturbing facts on implementing the Communal Land Rights Act" 2005 *Butterworths Property Law Digest* 1-5

Ocheje 2007 *Journal of African Law*

Ocheje PD "In the public interest: forced evictions, land rights and human development" 2007 (2) *Journal of African Law* 173-214

Pienaar 2009 *JSAL*

Pienaar GJ "Die grondwetlikheid van die voorgestelde onteieningsraamwerk vir Suid-Afrika" 2009 *Journal of South African Law* 344-352

Pienaar 2007 *JCRDL*

Pienaar GJ "The need for a comprehensive land administration system for communal property in South Africa" 2007 *Journal of Contemporary Roman-Dutch Law* 556-570

Pienaar 2006 *JSAL*

Pienaar GJ "The land titling debate in South Africa" 2006 *Journal of South African Law* 435-455

Pienaar 2000 *JSAL*

Pienaar GJ "Registration of informal land-use rights in South Africa" 2000 *Journal of South African Law* 442-468

Pienaar 1996 *JSAL*

Pienaar GJ "Die Suid-Afrikaanse registrasiestelsel – waarheen vorentoe?" 1996 *Journal of South African Law* 205-226

Pienaar "Communal property arrangements"

Pienaar K "Communal property arrangements: A second bite" in Cousins B (ed) *At the crossroads: land and agrarian reform into the 21st century* (Agrarian Studies School of Government University of the Western-Cape 2000) 322-328

Pienaar and Mostert 2005 *SALJ*

Pienaar JM and Mostert H "The balance between burial rights and land ownership in South Africa: Issues, content, nature and constitutionality" 2005 *South African Law Journal* 633-652

Rakai *Customary land tenure*

Rakai MET *Incorporating customary land tenure into a land administration system* (MSc dissertation University of Melbourne 1993)

Sarfaty 2005 *Yale LJ*

Sarfaty GA "The World Bank and the internationalization of indigenous rights norms" 2005 *Yale Law Journal* 1791-1818

Terblanche *Grondbeheer*

Terblanche A *Die landelike swart vrou se reg op grondbeheer* (LLM dissertation NWU2005)

Tong "Judicial versus administrative settlement"

Tong M "Judicial versus administrative settlement of claims" Paper presented at *Land, Memory, Reconstruction and Justice Conference* 13 September 2006 Houwhoek, South Africa (Proceedings on CD)

Van der Merwe *Sakereg*

Van der Merwe CG *Sakereg* (Butterworths Durban 1989)

Van der Walt 2005 *Edinburgh LR*

Van der Walt AJ "Ownership and eviction: constitutional rights in private law" 2005 *Edinburgh Law Review* 32-64

Van der Walt 2002 *SAJHR*

Van der Walt AJ "Exclusivity of ownership, security of tenure and eviction orders: a critical evaluation of recent case law" 2002 *South African Journal of Human Rights* 371-419

Van der Walt 2001 *SALJ*

Van der Walt AJ "Dancing with codes – protecting, developing and deconstructing property rights in a constitutional state" 2001 *Journal of South African Law* 258-311

Van der Walt 1995 *SAPL*

Van der Walt AJ "Land reform in South Africa since 1990 – an overview" 1995 *SA Public Law* 1-30

Van der Walt 1992 *SAJHR*

Van der Walt AJ "The fragmentation of land rights" 1992 *South African Journal of Human Rights* 431-450

Van der Walt and Pienaar *Introduction*

Van der Walt AJ and Pienaar GJ *Introduction to the law of property* (Juta Cape Town 2006)

Ventura and Mohamed "Information technologies"

Ventura SJ and Mohamed MA "Use of information technologies to model indigenous tenure concepts" (Unpublished research paper University of Wisconsin-Madison 1999)

Walker "Defining restitution by default"

Walker C "Defining restitution by default: the redevelopment of Cato Manor"

Paper presented at *Land, Memory, Reconstruction and Justice Conference* 13 September 2006 Houwhoek, South Africa (Proceedings on CD)

Williamson "Best practices"

Williamson IP "Best practices for land administration systems in developing countries" Paper delivered at the *Long Term Development of Land Management Policies Conference* 25-27 July 2000 Jakarta

Williamson "Land administration"

Williamson IP "Land administration 'best practice' – providing the infrastructure for land policy implementation (Unpublished report University of Melbourne 2001)

World Bank *Indicators*

World Bank *World development indicators 2006* (Development Data Center Washington 2006)

World Bank *Sourcebook*

World Bank *The Sustainable land management sourcebook* (The World Bank Washington 2008)

Zevenbergen *Systems*

Zevenbergen JA *Systems of land registration: aspects and effects* (PhD thesis Technische Universiteit Delft 2002)

Ziqubu, Cousins and Hornby "Individual tenure rights"

Ziqubu N, Cousins T and Hornby D "Using local practises and records to secure individual tenure rights in common property situations" (Paper presented at the National Land Tenure Conference July 2003 Durban)

***Register of legislation and policy documents***

*Communal Land Rights Act* 11 of 2004

*Communal Property Associations Act* 28 of 1996
*Constitution of the Republic of South Africa* 1996
*Constitution of the Republic of South Africa* 103 of 1993
*Deeds Registries Act* 47 of 1937
*Development Facilitation Act* 67 of 1995
*Extension of Security of Tenure Act* 62 of 1997
GN 1654 in GG 30468 of 13 November 2007
*Housing Act* 107 of 1997
*Interim Protection of Land Rights Act* 31 of 1996
*Land Reform (Labour Tenants) Act* 3 of 1996
*Land Survey Act* 8 of 1997
*Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998
*Provision of Certain Land for Settlement Amendment Act* 26 of 1998
*Provision of Land and Assistance Act* 126 of 1993
*Rental Housing Act* 50 of 1999
*Restitution of Land Rights Act* 22 of 1994
*White Paper on Land Reform* 1991
*White Paper on South African Land Policy* 1997

***Register of international agreements***

African Charter on Human and Peoples' Rights 1981
International Covenant on Economic, Social and Cultural Rights 1966

***Register of court cases***

*Nhlabati v Fick* 2003 7 BCLR 806 (LCC)
*Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC)
*Tongoane and Others v The National Minister of Agriculture and Land Affairs* Case number 11678/2006 Transvaal High Court (unreported)
*Tshishonga v Minister of Justice and Constitutional Development* 2007 4 BLLR 327 (LC) 352F

***Register of internet resources***

Enemark 2003 www.fig.net/

Enemark S 2003 *Capacity building for developing sustainable land administration infrastructures* www.fig.net/pub/monthly_articles/july_2003/Stig_Enemark_July2003.pdf [accessed on 8 November 2008]

UNECE 1996 www.sigov.si/

United Nations Economic Commission for Europe 1996 *Land administration guidelines: with special reference to countries in transition* www.sigov.si/mola/Preview/html/projects.html#nas1 [date of access 6 November 2008]

World Bank 1994 www.worldbank.org/

World Bank 1994 *Governance: the World Bank's experience* www.worldbank.org/wbi/governance/about.html [date of access 10 November 2008]

***List of abbreviations***

| | |
|---|---|
| art | article(s) |
| ch | chapter(s) |
| CLRA | Communal Land Rights Act |
| CPA | Communal Property Associations |
| LARP | Land and Agrarian Reform Project |
| LRAD | Land Redistribution for Agricultural Development |
| par | paragraph(s) |
| reg | regulation(s) |
| s | section(s) |
| SLAG | Settlement and Land Acquisition Grant |
| UNECE | United Nations Economic Commission for Europe |