

LAND REFORM

National Land Reform Summit considers new modes of landholding tenure

1 June 2022 5 min read

Deputy President David Mabuza leading Inter-Ministerial Committee on land reform convened the Communal Land Administration and Tenure Summit on 27 – 28 May 2022, involving NGOs, academics, government officials, and traditional leaders to discuss reforming tenure systems and land administration of communal land. In June 2019, the Presidential Advisory Panel on Land Reform made 83 recommendations of which 61 were accepted on a unified, land reform programme.

National Land Reform

How did we get here?

The Presidential Panel embarked on extensive consultations with the National House of Traditional Leaders in January 2019, the Women's Land Rights Movement in February 2019 and hosted Land Administration, Rural Women and Grassroots Voices on Urban and Rural Reform engagements in February 2019. The Panel recommended the transfer of land acquired by the state directly to communities, elevating and protecting the rights of individual and women's rights on land.

Included in the recommendations was a proposal of a single, national data portal for all related information. The Panel recommended a move away from permissions to occupy to land rights that are legally recognised and enforceable. Central to the recommendations was also a system whereby persons living on communal land would be able to opt-in or out of land tenure systems which may or may not include indigenous law.

What does history teach us?

The Constitutional Court in 2010 (in *Tongoane and others v Minister of Agriculture and Land Affairs CCT 100/09 2010 ZACC 10*) handed down a judgment declaring as unconstitutional the then Communal Land Rights Act ("CLARA"), 2004. Although the court was mainly tasked with assessing the procedural matters that led the passing of CLARA, it also remarked on the substance of CLARA.

It observed that CLARA had unlawfully sought to give wide-ranging powers to traditional councils, and that in fact, had the effect of undermining the tenure of those communities and persons who were historically deprived of legally secure tenure due to a myriad of apartheid legislation. The Court held that any legislation that is to be enacted seeking to elevate and protect legally insecure tenure, must have the result of restoring land tenure to the communities themselves.

12 years after the *Tongoane* decision and 25 years since the promulgation of section 25(6) of the Constitution, the tenure of citizens of land living on the apartheid imposed former TBVC states remain vulnerable to unlawful land allocations, lack of consultation when land is developed on their land, and unlawful and patriarchal practices in the hands of some unscrupulous traditional leaders and members of Communal Property Associations and community Trusts.

Section 212(1) of the Constitution

What does the law say?

The institution of traditional leadership is recognised in chapter 12 of the Constitution. Section 212(1) of the Constitution envisages legislation that must be enacted in order to clarify and make provision for the role of traditional leaders at a local level on matters affecting traditional communities and in particular land administration. Section 20(1) of the Traditional Leadership Framework Act, 2003 contemplates the enactment of legislation to clarify the role of traditional leaders on land administration and culture.

On the other hand, section 9 of the Constitution guarantees the right to equality of everyone and to full and equal enjoyment of all rights and freedoms. In designing, reforming, and resolving the complexity of a dual tenure system, government must bear in mind the obligation it has on communal land right occupiers and owners to enjoy the full protection of the law in so far as land tenure is concerned.

Rights of communities

The courts have progressively elevated the significance of the rights of communities even in the context of mining and mining developments, where the consent of communities is required when mining companies develop mining operations on communal land. Jurisprudence is fast developing in such a way that it is unlikely that any tenure reform system that results in the oppression and/or undermining of communal land rights will pass constitutional muster.

It is critical that the legislative role of traditional leaders and/or traditional councils is clarified as being custodians of cultural practices that must be centred on the principles of equality, dignity, and freedom. More importantly, any form/s of landholding and tenure legal instruments must enable families and households to themselves enjoy the legal protection and autonomy on land that is occupied directly by them, moving away from custodianship which is a form of landholding that permeated past apartheid legislation.

Ahead of the Junior Mining Indaba, mining companies are often directly impacted by and often confronted by the incidence of intra-community disputes and a complexity that lies in not having clear guidelines and best practices in community engagements. Tenure reform is thus a critical component in mining activity and if resolved, will go a long way in elevating social and governance systems in mining areas.

In essence, land administration must be a function that lies at the heart of a unified nation that involves planning, monitoring, and evaluation capabilities beyond communal areas.

Ps. This is in my personal capacity as a member of the Presidential Advisory Panel on Land Reform and as Director and Head of Land Reform, Restitution and Tenure practice as Werksmans.



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