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MEMORANDUM

[Confidential]

TO: Ms Ngwenya-Mabila, MP
Chairperson of the PC on Rural Development and Land Reform

COPY: Mr G Mgidlana
Secretary to Parliament

FROM: Constitutional and Legal Services Office
[Dr BE Loots – Parliamentary Legal Adviser]

DATE: 10 March 2015

REF: 20/2015

SUBJECT: Oversight powers of the PC on Rural Development and Land Reform in the context of the administration of communal property



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INTRODUCTION

1. Our Office was requested to provide legal advice on how the Portfolio Committee on Rural Development and Land Reform ('the Committee') can exercise its oversight mandate in the context of communal property, whether controlled as a trust or a communal property association.

LEGAL QUESTION

2. As per the instruction received, the specific legal questions to be answered are the following:

How can the Committee exercise its oversight mandate –

- (a) *Where an administrator has been appointed by the Department of Rural Development and Land Reform?*
- (b) *Where land reform beneficiaries have opted to register as a trust rather than a communal property association?*

BACKGROUND

3. The Committee during a recent oversight visit to the Northern Cape and Gauteng learnt that there are communal property associations (CPAs) that are currently under administration because they were found to be dysfunctional. Furthermore, the Committee was made aware of the fact that, in the context where communal property is managed by means of trusts, trustees are not properly held accountable for such management.

4. During these visits the communities reported to the Committee that the administrators refuse to account to the beneficiaries and the Department on Rural Development and Land Reform ('the Department').

LEGAL ANALYSES

5. In the South African context, tenure reform generally refers to "policies that seek to strengthen the property rights of those who already occupy the land ... notably in the communal areas and on commercial farms, it also has relevance for those who obtain land under the redistribution and restitution programmes".¹ In trying to provide structure to this policy position "all land allocated under these programmes, whether state-owned or private to begin with, is transferred in freehold title to individuals or, more commonly corporate structures representing groups of beneficiaries – either trusts or communal property associations (CPAs)."²

Communal Property Associations Context

6. The registration of communal property is regulated by the Communal Property Association Act 28 of 1996 ('the CPAA').
7. The objective of the CPAA is to –
 - a. allow disadvantaged communities to established appropriate legal institutions through which they may acquire, hold and manage property in common;
 - b. ensure that such institutions are established and managed in a manner which is non-discriminatory, equitable and democratic and that such institutions be accountable to their members; and
 - c. ensure that members of such institutions are protected against abuse of power by other members.
8. Section 2 provides that where a CPA has been formed, whether as a result of –
 - a. a ruling of the Land Claims Court in terms of the Restitution of the Land Rights Act 22 of 1994;
 - b. an entitlement to property or property/assistance received from the State;
 - c. property donated, sold or otherwise disposed of; or
 - d. a property acquisition by a group who wishes to form an association,that association will be established in terms of and subject to the provisions of the CPAA.
9. Under options (a) and (b), the condition of registration as a CPA in terms of the CPAA can be ordered by the Land Claims Court (a), or required in terms of an agreement with the State or in terms of any law (b).
10. Under options (c) and (d), a discretion is activated, as "[t]he Minister may ... approve a community ... for the purposes of this Act if he or she is satisfied that the community is disadvantaged and that it is in the public interest that such approval be given, having regard to the nature and current use of the land".³
11. In an attempt to put in place an efficient management system, the CPAA takes a three tiered approach to the organisational structure of CPAs:
 - a. the association (the juristic personality)⁴

¹ E Lahiff "With What Land Rights? Tenure Arrangements and Support" 92 at 93.

² E Lahiff "With What Land Rights? Tenure Arrangements and Support" 92 at 93.

³ See section 2(2) of the CPAA.

⁴ In terms of section 8(6) of the CPAA, the association can sue and be sued.

- b. the committee (the executive organ)⁵
 - c. the community (the decision making body).⁶
12. The CPAA makes provision for the Director-General (DG) of the Department to monitor and inspect compliance of a CPA with the provisions of the CPAA.⁷
 13. In the event that a CPA becomes dysfunctional, section 13(1) of the CPAA allows for the DG, the CPA, a member of the CPA or any other interested person to apply to a division of the Supreme Court or a Magistrates Court with jurisdiction to place the CPA under administration of the DG. In such an instance the court, subject to the provisions of the CPAA, will determine the powers to manage assigned to the DG.⁸
 14. The DG (regardless of whether he or she is acting as administrator), is obligated by section 17 of the CPAA to "in every calendar year submit to the Minister a report concerning associations and provisional associations and the extent to which the objects of this Act are being achieved, and the Minister shall table the report in Parliament".

Trust Context

15. Trusts are governed by the Trust Property Control Act 54 of 1988. The term "trust" implies a fiduciary relationship, with the term "trustee" in turn being described as "anyone who is entrusted with the affairs of another".⁹ The establishment of a trust takes place "when the founder ... binds him- or herself to transfer certain assets to an office-holder called a trustee, who is bound to administer them as a concern *publici iuris*¹⁰ otherwise than for his or her own benefit".¹¹
16. In taking over the administration of property in this nature, the trustee therefore owes the fiduciary duty to the trust beneficiaries.¹² The terms of the trust instrument, a written agreement creating the trust, will inform the responsibilities to be met by the trustee in administering the trust.
17. Although trusts "have been set up for many resettlement project ... often they are considered unsuitable for land reform projects because they vest ownership in non-beneficiaries (the trustees) who are not democratically accountable to the beneficiaries". As such, [t]rusts can be regulated only by the Master of the High Court and, therefore, are not open to interventions by agencies as the Department".¹³
18. The fact that trusts do not fit the model of management required for communal property was the reason for the development of communal property associations as "a new model of collective land ownership" as regulated by the CPAA, as a system that is "specifically aimed at communities obtaining land under the land reform

⁵ Any person appointed to a CPA's committee stands in a fiduciary relationship to the members of the CPA. See Section 8(7) of the CPAA. Section 14(1)(b) makes it an offence to act "in breach of the fiduciary relationship".

⁶ PJ Jacobs *Tenure Security under the Communal Property Association Act 28 of 1996: An Analysis of Establishment and Management Procedures with Comparative Reference to the Sectional Titles Act 95 of 1986* (LLM: University of Stellenbosch) explains that "[t]he distinction between community and association in this context is artificial; because the community is incorporated in the association (the members of the community form the members of the association)."

⁷ See section 11 of the CPAA.

⁸ See section 13(2). Section 13(5) also states that "[t]he Minister may prescribe the procedure to be followed in an application contemplated in subsection (1) and set out the powers and duties of the Director-General, the Registration Officer, the association, members and interested parties in those situations".

⁹ "Trust" LAWSA 31 par 529. Section 9 of the Trust Property Control Act provides for the level of care, diligence and skill required of a trustee and sets it at the level "which can reasonably be expected of a person who manages the affairs of another".

¹⁰ The phrase is loosely translated as "belonging to the public".

¹¹ "Trust" LAWSA 31 par 529.

¹² "Trust" LAWSA 31 par 529.

¹³ E Lahiff "With What Land Rights? Tenure Arrangements and Support" 92 at 97.

programme".¹⁴ Some communities have nevertheless opted to established trusts instead of CPAs to manage their communal property.

19. Even though such trusts are not obligated to report to the Department, the Trust Property Control Act has put in place certain checks and balances to guard the interest of the beneficiaries.
20. Section 13 of the Trust Property Control Act grants the court the power to amend the trust instrument, if for example it prejudices the interests of the beneficiaries.
21. Section 15 also makes provision for the person who audits the accounts of the trust to report in writing any irregularities in connection with the administration of a trust to the Master. The person must however, before taking such a step, first in writing report any material irregularities to the trustee, and allow him or her one month to rectify the situation to the satisfaction of the person so reporting.
22. It is furthermore in the Master's power to call upon a trustee to account on his or her administration of a trust. In terms of section 16(2) of the Trust Property Control Act the Master may, if he or she deems it necessary, call for an investigation in a trustee's administration of trust property.
23. If at any time a trustee fails to comply with a request by the Master to account for the administration of a trust or to perform a duty imposed on him or her either by the trust instrument or by law, section 19 allows for "any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with such request or to perform such a duty". The Trust Property Control Act similarly in section 20 makes provision for the removal of a trustee "on the application of the Master or any person having an interest in the trust property... if the court is satisfied that such removal will be in the interest of the trust and its beneficiaries". Section 20(2)(e) also specifically states that "[a] trustee may at any time be removed from his [or her] office by the Master ...if he [or she] fails to perform satisfactorily a duty imposed upon him [or her] by or under his Act or to comply with any lawful request of the Master".
24. In *Gross and Others v Pentz*,¹⁵ the Appellate Division confirmed the general rule that although a trustee is usually the appropriate person to sue on behalf of a trust, in this case where maladministration was at issue the beneficiary was nevertheless entitled to sue the trustee for breach of trust.

CONCLUSION

25. Although it is true that parliamentary committees have, in terms of the Constitution (section 56) and the Rules of the National Assembly (Rule 138), the power to "summon any person to appear before it to give evidence on oath or affirmation, or to produce documents, this power must be read within the context of –
 - a. the fact that "[c]ommittees are one of the mechanisms required by the Constitution to ensure accountability by and oversight of the Executive";¹⁶ and
 - b. the specific mandate of the relevant committee, i.e. in this instance oversight over the functioning of the Department of Rural Development and Land Reform and its related entities.
26. When a community therefore exercised their discretion to move their property into a trust, they moved it out of the public oversight scenario and into a private management scenario. Within the context of the latter scenario it is the judiciary that is legislatively tasked with safeguarding the interest of beneficiaries through the obligations assigned to the Master.

¹⁴ E Lahiff "With What Land Rights? Tenure Arrangements and Support" 92 at 97.

¹⁵ [1996] 4 All SA 63 (A).

¹⁶ *National Assembly: Guide to Procedure* 2004 242. Emphasis added.

27. Given the specific context of the Committee's oversight mandate and the fact that some communities opted for private management of their communal property, the following oversight approaches are recommended:

- a. As far as CPAs are concerned, the Committee can in the exercise of its constitutional oversight obligation, call upon the Minister to report as to any action (or non-action) in terms of the administration of any CPA, which the Committee does not regard as satisfactory based on the information provided the communities.
- b. In the context of trusts (where communities who outside the CPAA options (a) and (b) as noted in paragraph 8 above opted not to apply for registration as a CPA), the affected community can be advised of their rights in terms of the Trust Property Control Act to bring any form of maladministration under the attention of the Master to take the appropriate steps.

28. Furthermore, if the Committee is of the opinion that the current legislative structure does not provide sufficient protection for the regulation of communal property whether administered via trust or CPA, it is within the Committee's legislative powers as constitutionally provided to –

- a. request the Department to introduce legislative amendments that addresses these issues; or
- b. in the event that the Department does not adhere to such a request, apply to the National Assembly to introduce a committee bill aimed at bringing about the required amendments.



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