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Communal Land Rights: New Bill finally on the right track, if it can dodge the potholes in its way

Of all the programmes falling under the umbrella term 'land reform', communal land rights have arguably been the most complicated, and certainly the most neglected of them all. For communal occupiers in the former homeland areas, legally insecure tenure has simply been a way of life for the better part of a century despite the fact that section 25 (6) provides for legally secure tenure or comparable redress. After years of protracted consultations on a policy position, the Department of Rural Development and Land Reform has finally published the draft Communal Land Tenure Bill for public comment. The public has been given until the 6th of September to submit comments on the Bill.

Although it is hard to believe in this day and age, communal occupiers still use 'permission to occupy' certificates (or PTOs), that owe their origin to the 1936 Bantu Administration Act. These tenure rights are non-tradeable and ownership of the land is still vested in the state, which means that PTOs have little value as collateral and cannot be used as security to obtain a loan. Whilst certain communal areas have ample natural resources suitable for agricultural production, development has been hindered by a lack of access to finance due to the precarious nature of their tenure rights.

Consultations on the topic have been dominated by two schools of thought that advocate for ownerships rights and institutionalised use rights respectively. The first school of thought argues that ownership rights are the only way to mainstream the communal areas into the formal economy as it will empower occupiers with a right that has value, is tradable and can be used to obtain financing. The latter school of thought argues that ownership rights will allow occupiers to be exploited by unscrupulous lenders and developers, and that the state should retain ownership to prevent the land from falling into the hands of non-community members. They argue that occupiers should receive institutionalised use rights that provide certainty, prevent gender discrimination and allow for it to pass via succession but that it should not be freely tradable. Whilst the intention behind institutional use rights may be noble, it is patronising as it implies that occupiers are not responsible enough to make informed decisions about their own property. Be that as it may, this latter school of thought seemed to be gaining ground in the policy position adopted by the Department. It was therefore a welcome surprise to see that the Bill finally did opt for the transfer of ownership.

The draft Bill makes provision for the Minister to transfer ownership of the land a community resides on to the community. The community can in turn chose whether they want a Communal Property Institution (CPA), a Traditional Council or any other body approved by the Minister to administer the land. Whilst the land as a whole is transferred to the community, they can decide internally what legal form individual allocations to community members of households will take, namely leasehold, use rights or full ownership.

From an agribusiness point of view, this is a huge step towards creating an enabling environment in those areas to develop commercial agricultural and associated enterprises. If ownership is transferred, community members can decide to use their land as collateral to obtain the necessary financing required to build infrastructure, acquire machinery and buy inputs necessary to run a commercial farming operation. There are however still limitations, such as that a 60% community resolution is required to encumber the land, but at least the community itself is finally empowered to make that decision whereas the Minister's consent was previously required.

It is heartening to see that the Bill is finally on the right track, but with that said, there are still a number of potholes that needs to be addressed. The administration of communal land was a hotbed of contestation throughout the consultation process with traditional authorities and CPAs often clashing. Whilst it is good to see that the community is given the chance to choose for itself, the Bill is likely to receive a great deal of opposition from traditional authorities. Secondly, the definition of 'communal land' to which this Bill will apply seems to go further than the initial policy discussions. Provision is made for all land acquired under the redistribution process as well as restituted land to fall under the ambient of this Bill and provision is even made for the Minister to acquire more land so as to expand the communal areas. This can negatively affect the property rights of existing land reform beneficiaries.

Finally, the Minister is given full discretion to determine the existence of a right, the extent of that right, and whether or not to upgrade that right to full ownership or not. Although many communal occupiers' rights are not formally recorded, they are never the less recognised by law and protected by the Constitution. Only our courts have the power to definitively rule on the existence and extent of constitutional right, and as such the Bill opens itself up for constitutional scrutiny if the Minister's actions negatively affect an occupier's existing, albeit informal, right in land. When the state previously attempted to legislate on this topic, a similar mechanism in the 2004 Communal Land Rights Act (CLaRA) was challenged on the basis that a member of the executive cannot adjudicate on a person or community's land rights and they consequently alleged that the Minister's discretion was unconstitutional.

As it were the Constitutional Court never ruled on this matter as the Bill was struck down on the basis of a procedural flaw in the Parliamentary process, but the arguments remain compelling. So, whilst the Bill is certainly headed in right direction, it does contain some fatal flaws that will need to be addressed before it is enacted into law.

Theo Boshoff (theo@agbiz.co.za)