

# A legal framework for land reform and sustainable community conservation in South Africa

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## ABSTRACT

In the past, South Africa was fraught with racial injustices resulting in the creation of a void between the country's land reform and community conservation frameworks. The South African government has, over the past two decades promulgated a wide range of land laws to give effect to the property right contained in the *Constitution of the Republic of South Africa*, 1996 (the Constitution) in order to close this void. Similarly, the government has promulgated numerous national and provincial conservation laws to give effect to the environmental right contained in the Constitution, moving towards a more people-centred approach to nature conservation. Collectively, these set the foundation for land reform and sustainable development.

Despite this foundation, no single act comprehensively regulates community conservation in South Africa, resulting in a high level of fragmentation in both the legal and administrative sectors. This fragmentation, coupled with a division of responsibilities and a lack of coordination, has been a major factor hampering effective community conservation initiatives following the land reform process.

It is against this background that this study proposes to examine and evaluate the legal frameworks applicable to community conservation and land reform, with specific reference to the relationship between community conservation, land reform and sustainability, and to establish the extent to which South African law provides for sustainable community conservation following the land reform process.

Key words: land reform, community conservation and sustainability

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## LIST OF ABBREVIATIONS

ACCNNR	African Convention on the Conservation of Nature and Natural Resources 1968 (ACCNNR)
ARBLM	Abolition of Racially Based Land Measures Act 108 of 1991
BCLR	Butterworths Constitutional Law Reports
CBD	Convention on Biological Diversity 1992
CC	Constitutional Court
CLCC	Chief land claims commissioner
CMC	Co-management committee
CPA	Communal property association
CPI	Communal property institution
CRLR	Commission on Restitution of Land Rights
DEA	Department of Environmental Affairs
DEAT	Department of Environmental Affairs and Tourism
DLA	Department of Land Affairs
DRDLR	Department of Rural Development and Land Reform
DTLA	Development and Trust Land Act 18 of 1936
DWAF	Department of Water Affairs and Forestry
DWS	Department of Water and Sanitation
GAA	Group Areas Act 41 of 1950
IUCN	International Union for Conservation of Nature
LCC	Land Claims Court
MoA	Memorandum of Agreement
NCF	National Co-management Framework
NDA	National Department of Agriculture
NEMA	National Environmental Management Act 107 of 1998
NEMBA	National Environmental Management: Biodiversity Act 10 of 2004
NEMPAA	National Environmental Management: Protected Areas Act 57 of 2003
NLA	Natives Land Act 27 of 1913
PA's	Protected areas

PELJ	Potchefstroom Electronic Law Journal
PWC	Protocol on Wildlife Conservation and Law Enforcement 1999
RLCC	Regional Land Claims Commissioner
RLRA	Restitution of Land Rights Act 22 of 1994
RLRAA	Restitution of Land Rights Amendment Act 15 of 2014
SADC	South African Development Community
SAJS	South African Journal of Science
SALJ	South African Law Journal
SANBI	South African National Biological Institute
SDC	Sustainable Development Consortium
SISS	Settlement and Implement Support Strategy for Land and Agrarian Reform in South Africa
TLGFA	Traditional Leadership and Governance Framework Act 41 of 1993
WPLP	White Paper on South African Land Policy, 1997
WPLR	White Paper on Land Reform, 1991
WWF	World Wildlife Fund

## 1 Introduction and problem statement

In the past, South Africa was fraught with racial injustices resulting in the creation of a void between local communities and conservationists.<sup>1</sup> The South African government has, over the past two decades promulgated a wide range of land laws<sup>2</sup> to give effect to the property right contained in the *Constitution of the Republic of South Africa, 1996* (the Constitution) in order to close this void.<sup>3</sup> Similarly, the government has promulgated numerous national<sup>4</sup> and provincial conservation laws<sup>5</sup> to give effect to the environmental right contained in the Constitution,<sup>6</sup> moving towards a more people-centred approach to nature conservation. Collectively, these set the foundation for land reform and sustainable development. Yet what happens when these regimes overlap? Are they able to be reconciled? Could, or should, land reform occur within an environmental sustainability paradigm, and if so, how and to what extent? Based on these, the central question forming the basis of this study is to what extent does South African law provide for sustainable community conservation initiatives following the land reform process? A literature survey of South Africa's legislation, case law, textbooks and articles as well as electronic material pertaining to community conservation and land reform initiatives forms the basis of this study.

Land reform and community conservation initiatives frequently overlap, especially where communal land claims are lodged in terms of the *Restitution of Land Rights Act 22 of 1994* (RLRA). The restitution process is based on historical land claims and is aimed at restoring historic deprivations in terms of racially discriminatory land laws.<sup>7</sup> The

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<sup>1</sup> These racial injustices caused by discriminatory land legislation have led to fractured communities, increased poverty and the undermining of traditional land use patterns.

<sup>2</sup> These include the *Communal Land Rights Act 1 of 2004*, the *Land Reform Act 3 of 1996*, the *Restitution of Land Rights Act 22 of 1994*, the *Upgrading of Land Tenure Rights Act 112 of 1991*, and most recently the *Restitution of Land Rights Amendment Act 15 of 2014*.

<sup>3</sup> S25 of the Constitution.

<sup>4</sup> These include the *National Environmental Management Act 107 of 1998*, the *National Environmental Management: Protected Areas Act 57 of 2003*, the *National Environmental Management: Biodiversity Act 10 of 2004*, and the *National Heritage Resources Act 25 of 1999*.

<sup>5</sup> These include the *KwaZulu-Natal Nature Conservation Management Act 9 of 1997*, the *KwaZulu-Natal Nature Conservation Act 29 of 1992*, the *Limpopo Environmental Management Act 7 of 2003*, the *Eastern Cape Parks and Tourism Act 2 of 2010*, the *Mpumalanga Tourism and Parks and Parks Agency Act 5 of 2005*, and the *Northern Cape Nature Conservation Act 9 of 2009*.

<sup>6</sup> S24 of the Constitution. This section will be discussed in more detail in chapter 4 of this dissertation.

<sup>7</sup> *White Paper on South African Land Policy* (1997) 14.

restitution of land is provided for in the Constitution and the RLRA, which provide that a person or community dispossessed of property after 19 June 1913 due to past racially discriminatory laws is entitled to restitution of that property or equal redress.<sup>8</sup>

The Somkhanda Game Reserve, situated in northern KwaZulu Natal, is one example of the land restitution process. The land was taken from the Gumbi community in the late 1960's and restored to them under the land restitution process in 2005.<sup>9</sup> The Gumbi community, represented by the Emvokweni Community Trust, undertook to keep most of the restored land under conservation and created a game reserve which could be used to the benefit of the community.<sup>10</sup> This form of conservation is known as community conservation or community-based conservation. The objective of this form of conservation is to include communities in the project by involving them in the establishment of protected areas as well as their management and the socio-economic benefits arising from these areas.<sup>11</sup>

No single act comprehensively regulates community conservation in South Africa. This study will accordingly focus on the existing provisions of the South African environmental law regime, namely the *National Environmental Management Act 107 of 1998*, the *National Environmental Management: Protected Areas Act 57 of 2003* (NEMPAA) and the *National Environmental Management: Biodiversity Act 10 of 2004* (NEMBA). The NEMA provides the framework for the South African environmental law system,<sup>12</sup> and makes specific reference to the notion, concept and principles of sustainable development.<sup>13</sup> The NEMBA provides for community conservation as it aims at the management and conservation of South Africa's biodiversity,<sup>14</sup> the protection of species and ecosystems warranting protection,<sup>15</sup> the sustainable use of indigenous biological resources,<sup>16</sup> and the fair and equitable sharing of bio-prospecting benefits.<sup>17</sup>

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<sup>8</sup> S25(7) of the Constitution and S2 of the RLRA as amended by s2 of the *Land Restitution and Reform Laws Amendment Act 78 of 1996*, s3 of the *Land Restitution and Reform Laws Amendment Act 63 of 1997* and s2 of the *Land Restitution and Reform Laws Amendment Act 18 of 1999* .

<sup>9</sup> Anon <https://www.environment.gov.za>.

<sup>10</sup> Anon <https://www.environment.gov.za>.

<sup>11</sup> Glazewski *Environmental Law* 332.

<sup>12</sup> Glazewski *Environmental Law* 137.

<sup>13</sup> S2(4) of NEMA.

<sup>14</sup> S2(a)(i) of NEMBA.

<sup>15</sup> S2(a)(iA) of NEMBA.

<sup>16</sup> S2(a)(ii) of NEMBA.

In addition the NEMBA provides for cooperative governance in biodiversity management and conservation. The NEMBA aims at achieving these objectives by proposing a comprehensive planning framework including a national biodiversity framework,<sup>18</sup> bioregional plans,<sup>19</sup> and biodiversity management plans.<sup>20</sup> This framework provides opportunities for community involvement in biodiversity conservation<sup>21</sup> The NEMPAA makes specific reference to the need to progress towards community conservation in its objectives, which include the creation of a national system of protected areas in South Africa in order to manage and conserve its biodiversity,<sup>22</sup> the promotion of the sustainable utilisation of protected areas for the benefit of the people,<sup>23</sup> and the promotion of the participation of local communities in the management of protected areas.<sup>24</sup> In addition, the NEMPAA makes reference to the different kinds of protected areas in South Africa, which include special nature reserves, national parks, nature reserves and protected environments.<sup>25</sup> Somkhanda Game Reserve was proclaimed as a nature reserve and accordingly a protected area in terms of the NEMPAA in Proclamation Notice number 6 published in the *KwaZulu Natal Provincial Gazette* number 552 dated 17 February 2011.<sup>26</sup>

The NEMPAA also makes provision for the management of protected areas.<sup>27</sup> The criteria for the management of protected areas direct a management authority to manage the area exclusively for the purpose for which it was declared and in accordance with a management plan for the area, as well as with the NEMPAA, the NEMBA, the *National Environmental Management Act 107 of 1998* (NEMA) and any other applicable national and provincial legislation.<sup>28</sup> These acts are applicable to the management of game reserves. More directly, the Emvokweni Trust is responsible for

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<sup>17</sup> S2(a)(iii) of NEMBA. For a general discussion on bio-prospecting and benefit sharing of South Africa's biodiversity see Wynberg 2002 SAJS 239.

<sup>18</sup> S38 - s39 of NEMBA.

<sup>19</sup> S40(1)(b) of NEMBA.

<sup>20</sup> S43 of NEMBA.

<sup>21</sup> S2(c) of NEMBA.

<sup>22</sup> S2(c) of NEMPAA.

<sup>23</sup> S2(e) of NEMPAA.

<sup>24</sup> S2(f) of NEMPAA.

<sup>25</sup> S9 of NEMPAA.

<sup>26</sup> S23 of NEMPAA provides that the Minister or MEC may by notice in the Gazette declare an area as a nature reserve or part of a nature reserve. This declaration may be issued to protect the area only if the area has significant biodiversity or natural features, is of cultural or historical interest, or is in need of long-term protection for the maintenance of its biodiversity.

<sup>27</sup> Chapter 4 of NEMPAA.

<sup>28</sup> S40 of NEMPAA.

the management of the Somkhanda Game Reserve.<sup>29</sup> Over the past two years it has become apparent, however, that anomalies have begun to appear in the management of the reserve.<sup>30</sup> One of the main problems is that the traditional authority, as a trustee of the trust, appears hostile and unwilling to assist with issues regarding the management of the reserve. The traditional authority represents the link between the trust, and as such the reserve, and the community for which the reserve was created. This hostility is problematic since the community is effectively excluded from important decisions relating to the management of the reserve.<sup>31</sup>

The management issues experienced at Somkhanda Game Reserve have resulted in the community's not receiving sufficient benefit from the reserve, as a result of which there is little support for the community conservation model from the local people.<sup>32</sup> This lack of support coupled with the financial instability of the reserve has resulted in the plans to introduce additional wildlife into the reserve being put on hold for the foreseeable future. This has also caused the community to have a negative view of the community conservation model.<sup>33</sup> The management of these areas is dealt with in legislation. The NEMPAA addresses the situation of underperformance or non-performance by a management authority and provides that the Minister or MEC must notify the management authority in writing of its underperformance or failure to perform, directing the management authority to take corrective steps as set out in the notice.<sup>34</sup> Should the management authority fail to take these steps, the Minister or MEC may terminate the management authority's mandate and assign another management authority to the area.<sup>35</sup>

The NEMPAA, in the case of community owned nature reserves may, however, do more harm than good. Communities who are already distrustful of community conservation due to their wavering perceptions of the community conservation model might become completely hostile and might therefore reject the idea of community conservation in its entirety. It is thus evident that environmental legislation as well as

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<sup>29</sup> South African National Biodiversity Institute *Land Reform Stewardship Programme* 2009.

<sup>30</sup> Critical Ecosystem Partnership Fund *Final Project Completion Report* 1.

<sup>31</sup> Critical Ecosystem Partnership Fund *Final Project Completion Report* 1.

<sup>32</sup> Critical Ecosystem Partnership Fund *Final Project Completion Report* 1.

<sup>33</sup> Critical Ecosystem Partnership Fund *Wildlife Active Community Conservation Project* 1.

<sup>34</sup> S44(1) of NEMPAA.

<sup>35</sup> S44(2) of NEMPAA.

additional regulations and implementation policies should be developed to ensure the effective management of protected areas following land restitution in the case of community conservation with a view to promoting sustainability.

Sustainability has been defined as the use of natural resources for present needs without compromising the needs of future generations.<sup>36</sup> Sustainable development, according to the NEMA, means the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations.<sup>37</sup> Sustainability follows a three-pronged approach whereby the environment, social development and economic development must be taken into account. It follows then that to establish if the land reform process is sustainable, one must look at the relationship between the three factors, namely the environment, social development and economic development.

This study proposes to examine and evaluate the legal frameworks applicable to community conservation and land reform with specific reference to the relationship between community conservation, land reform and sustainability, and to establish the extent to which South African law provides for sustainable community conservation following the land reform process. The text in which it is intended to achieve this will be divided into eight parts. Part 2 will focus on a conceptual and theoretical analysis of land reform, community conservation and sustainability. Parts 3, 4 and 5 will examine South Africa's legal framework with specific reference to the constitutional law, land reform and environmental law frameworks. Part 6 will aim at reconciling South Africa's land reform and environmental frameworks. Part 7 will focus on a case study and recommendations, and the final part will conclude the study.

## **2. Conceptual and theoretical analysis**

### **2.1 Land reform**

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<sup>36</sup> Glazewski *Environmental Law* 504.

<sup>37</sup> S2(4) of NEMA.

This section focuses on South Africa's land reform regime, including the background resulting in this regime, and the different programmes available under the umbrella of the land reform regime with specific reference to land restitution.

### 2.1.1 Historical background

South Africa's pre-constitutional land rights regime resulted in racial segregation, racially based dispossession, and large-scale forced removals.<sup>38</sup> This system was based on a vast number of laws, the cornerstone of which was the *Natives Land Act 27* of 1913<sup>39</sup> (NLA). The NLA identified certain areas for exclusive occupation and use by black groups, which precluded black South Africans from acquiring land outside of these areas. Other statutes upon which the system was founded included the *Black Administration Act 38* of 1927,<sup>40</sup> the *Black Authorities Act 68* of 1951,<sup>41</sup> the *Blacks Resettlement Act 19* of 1954,<sup>42</sup> the *Development and Trust Land Act 18* of 1936<sup>43</sup> (DTLA), the *Group Areas Act 41* of 1950<sup>44</sup> (GAA) and the *Prevention of Illegal Squatting Act 52* of 1951.<sup>45</sup> The implementation of these laws restricted 80 per cent of the population to ownership of approximately 13 per cent of the land in South Africa.<sup>46</sup>

In 1991 the Government introduced a land reform programme by way of the *White Paper on Land Reform*<sup>47</sup> (WPLR), which proposed a number of bills to promote the broad policy objectives regarding land reform. The main purpose of the proposed bills and policy was the abrogation of all racially based legislation. In terms of the White Paper of 1991, a number of statutes were promulgated,<sup>48</sup> the most important of which was the *Abolition of Racially Based Land Measures Act 108* of 1991 (ARBLM).<sup>49</sup> This act repealed a string of apartheid statutes including the NLA, the DTLA and the GAA.

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<sup>38</sup> Paterson *Bridging the Gap* 162.

<sup>39</sup> *Natives Land Act 27* of 1913. The word "native" was used in early racially discriminative legislation when reference was made to black South Africans. It was later replaced with the term "black".

<sup>40</sup> *Black Administration Act 38* of 1927.

<sup>41</sup> *Black Authorities Act 68* of 1951.

<sup>42</sup> *Blacks Resettlement Act 19* of 1954.

<sup>43</sup> *Development and Trust Land Act 18* of 1936.

<sup>44</sup> *Group Areas Act 41* of 1950.

<sup>45</sup> *Prevention of Illegal Squatting Act 52* of 1951.

<sup>46</sup> Mostert 2002 *South African Law Journal* 401.

<sup>47</sup> *White Paper on Land Reform* (1991).

<sup>48</sup> These include the *Upgrading of Land Tenure Rights Act 112* of 1991 and the *Less Formal Township Establishment Act 113* of 1991.

<sup>49</sup> *Abolition of Racially Based Land Measures Act 108* of 1991.

South Africa then transitioned to a constitutional democracy following the elections in 1994 and the adoption of the *Constitution of South Africa* 200 of 1993. One of the aims of the new constitutional order was to facilitate economic, social and political transformation through a process of land reform.<sup>50</sup> This came to pass by way of a land reform programme which found its origins in the *African National Congress's Reconstruction and Development Programme: A Policy Framework* and is comprehensively encapsulated in the 1997 *White Paper on South African Land Policy*<sup>51</sup> (WPLP). The WPLP recognised that the land development and land ownership patterns at that time strongly reflected the political and economic conditions of the apartheid era.<sup>52</sup> It indicated that the land reform programme would redress apartheid injustices, improve household welfare, underpin economic growth and foster national stability and reconciliation.<sup>53</sup> This would be achieved by means of the three components of land reform: the restitution of land rights, the redistribution of land, and tenure reform.<sup>54</sup> These three components will be discussed in more detail below.

## 2.1.2 South Africa's Land reform programme

### 2.1.2.1 Restitution of land rights

Land restitution is based on specific historical land claims, and aims at restoring land and providing other restitutionary remedies to people who were dispossessed by racially discriminatory practice and legislation, which affected approximately 3,5 million South Africans.<sup>55</sup> The Government strives to rectify these injustices through the restoration of land rights by means of the RLRA as amended by the *Land Restitution and Reform Laws Amendment Act 78 of 1996*, the *Land Restitution and Reform Laws Amendment Act 63 of 1997*, the *Land Restitution and Reform Laws Amendment Act 18 of 1999* and most recently, the *Restitution of Land Rights Amendment Act 15 of 2014* (RLRAA). The RLRA aims at providing for the restitution of land rights to persons or communities

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<sup>50</sup> Paterson *Bridging the Gap* 163.

<sup>51</sup> *White Paper on South African Land Policy* (1997).

<sup>52</sup> *White Paper on South African Land Policy* (1997) 6.

<sup>53</sup> *White Paper on South African Land Policy* (1997) 7.

<sup>54</sup> *White Paper on South African Land Policy* (1997) 7.

<sup>55</sup> *White Paper on South African Land Policy* (1997) 14; Mostert 2002 *South African Law Journal* 405.

dispossessed after 19 June 1913<sup>56</sup> in terms of racially discriminatory laws<sup>57</sup> or practices,<sup>58</sup> the establishment of a Land Claims Court<sup>59</sup> (LCC) and a Commission on the Restitution of Land Rights (CRLR),<sup>60</sup> and providing for any matters connected thereto.<sup>61</sup> The CRLR is tasked with the administration of the restitution process.<sup>62</sup> The LCC, on the other hand, is tasked with the duty to decide on the validity of claims and to determine appropriate compensation.<sup>63</sup>

In terms of the Constitution, a person or community dispossessed of land in terms of past racially discriminatory laws is entitled to restitution of that land or equitable redress, to the extent provided for by an act of Parliament.<sup>64</sup> This provision should be read with section 2 of the RLRA, which provides that a person is entitled to land restitution if he or she is a person, community or deceased estate dispossessed of land in terms of racially discriminatory laws after 19 June 1913 and the claim is lodged no later than 31 December 1998.<sup>65</sup> Recently the date for the lodgement of claims was extended to 30 June 2019 in the RLRAA.<sup>66</sup> This extension was enacted as a means of improving the land reform process in accordance with President Jacob Zuma's State of the Nation Address of 26 February 2013.<sup>67</sup> The need for post settlement support for new land owners was also referred to in this State of the Nation Address, with the aim of ensuring continuous productivity.<sup>68</sup> Post-settlement support is relevant to the sustainability of community conservation initiatives, as these initiatives require continuous support from

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<sup>56</sup> S2(3) RLRA and s1 *Land Restitution and Reform Laws Amendment Act* 63 of 1997.

<sup>57</sup> In terms of s2(f) of the *Land Restitution and Reform Laws Amendment Act* 63 of 1997, "racially discriminatory laws" include laws made by any sphere of government and subordinate legislation.

<sup>58</sup> S2(f) of the *Land Restitution and Reform Laws Amendment Act* 63 of 1997 defines racially discriminatory practices as racially discriminatory practices, acts or omissions, direct or indirect, by:

- a) Any department of state or administration in the national, provincial or local sphere of government;
- b) Any other functionary or institution which exercised a public power or performed a public function in terms of any legislation.

<sup>59</sup> Chapter 3 of the RLRA makes provision for all aspects relating to the LCC.

<sup>60</sup> Chapter 2 of the RLRA makes provision for all aspects relating the CRLR.

<sup>61</sup> The Preamble of the RLRA as amended by s1 of the *Land Restitution and Reform Laws Amendment Act* 63 of 1997.

<sup>62</sup> S4 of the RLRA.

<sup>63</sup> S12 of the RLRA.

<sup>64</sup> S 25(7) of the Constitution.

<sup>65</sup> S2 of the RLRA as amended by s2 of the *Land Restitution and Reform Laws Amendment Act* 78 of 1996, s3 of the *Land Restitution and Reform Laws Amendment Act* 63 of 1997 and s2 of the *Land Restitution and Reform Laws Amendment Act* 18 of 1999.

<sup>66</sup> S1 of the RLRAA.

<sup>67</sup> Zuma 2013 <http://www.timeslive.co.za>. Little mention was made in President Zuma's State of the Nation Address of 2014 of the land reform programme.

<sup>68</sup> Zuma 2013 <http://www.timeslive.co.za>.

the local communities in order to be successful. One example of the need for post-settlement support can be found in the Somkhanda Game Reserve, which will be discussed in more detail in Part 7.

#### 2.1.2.2 Redistribution of land

Land redistribution is not based on specific apartheid land claims, but rather on the general need for land to be made available to the poor and disadvantaged.<sup>69</sup> The main purpose of land redistribution is to provide the landless poor with access to land for residential and productive purposes in order to improve their livelihoods.<sup>70</sup> This is attained mainly by means of the Settlement and Land Acquisition Grant in terms of which eligible individuals or groups may apply for small grants for the purchase of land from willing sellers.<sup>71</sup> This grant scheme has been supplemented by numerous additional grant schemes, namely the Settlement Planning Grant,<sup>72</sup> the Land Redistribution for Agricultural Development Grant,<sup>73</sup> the Settlement Production and Land Acquisition Grant,<sup>74</sup> and the Grant for the Acquisition and Development of Land for Municipal Commonage.<sup>75</sup>

#### 2.1.2.3 Tenure reform

Tenure reform is perhaps the most complex component of the land reform programme. It seeks to overcome numerous challenges, including: how to update the number of land tenure arrangements which currently restrict black South African investment and security of tenure;<sup>76</sup> how to reconcile the competing tenure rights of people forcibly removed and resettled on land with the rights of people who had prior rights to that

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<sup>69</sup> Van Der Walt and Pienaar *Law of Property* 359.

<sup>70</sup> *White Paper on South African Land Policy* (1997) 12.

<sup>71</sup> *White Paper on South African Land Policy* (1997) 12.

<sup>72</sup> A grant to enlist the services of planners and other professionals to assist applicants in preparing settlement plans and projects.

<sup>73</sup> A grant to assist the previously disadvantaged communities to access land specifically for agricultural purposes.

<sup>74</sup> A grant to provide for both the settlement and the agricultural production land needs of previously disadvantaged people.

<sup>75</sup> A grant for local authorities to acquire land for agricultural lease schemes and commonage for the residents of villages and towns.

<sup>76</sup> *White Paper on South African Land Policy* (1997) 11.

land;<sup>77</sup> how to bring about change to practices which resulted in the degradation of natural resources and at the same time strengthen the beneficial aspects of communal tenure arrangements;<sup>78</sup> and how to provide security of tenure to the millions of people currently residing on land belonging to other people.<sup>79</sup>

The *Labour Tenants Act* 3 of 1996, the *Interim Protection of Informal Land Rights Act* 31 of 1996, the *Extension of Security of Tenure Act* 62 of 1997 and the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 were all aimed at addressing these challenges and improving the security of existing land rights where security of tenure was prevented by racially based legislation.<sup>80</sup> Most recently a policy paper on land reform and restitution, titled *Strengthening the Relative Rights of People Working with Land*<sup>81</sup> (the SRRPWL policy), was released by the Department of Rural Development and Land Reform (DRDLR). In terms of this policy, farm dwellers and workers are provided opportunities to gain access to and/or purchase shares in the land which they have occupied over an extended period of time, based on their compliance with certain roles and responsibilities.<sup>82</sup> This policy is intended to be voluntary for farm owners and farm workers with the view of creating incentives to encourage widespread participation.<sup>83</sup>

This study now turns to community conservation and sustainability.

## **2.2 Community conservation and sustainability**

Conservation in general came under fire during the 1980's as the countries' conservation goals were not being achieved.<sup>84</sup> This led to the rise of the three schools of thought which make up the current conservation regime. The first is that conservation initiatives should involve communities.<sup>85</sup> Secondly, incentives for conservation initiatives

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<sup>77</sup> *White Paper on South African Land Policy* (1997) 11.

<sup>78</sup> *White Paper on South African Land Policy* (1997) 11.

<sup>79</sup> *White Paper on South African Land Policy* (1997) 11.

<sup>80</sup> Van Der Walt and Pienaar *Law of Property* 360.

<sup>81</sup> Policy proposal *Strengthening the Relative Rights of People* 30 July 2013

<sup>82</sup> Policy proposal *Strengthening the Relative Rights of People* 30 July 2013 30.

<sup>83</sup> Policy proposal *Strengthening the Relative Rights of People* 30 July 2013 36.

<sup>84</sup> Hulme and Murphee "Community Conservation" 1.

<sup>85</sup> Hulme and Murphee "Community Conservation" 1.

should be introduced and developed by authorities.<sup>86</sup> Thirdly, the concept of sustainable development led to the view that the exploitation of natural resources could be managed to achieve conservation goals.<sup>87</sup> This section focuses on two branches of the current conservation regime, namely community conservation and the sustainability thereof.

## 2.2.1 *Community conservation*

### 2.2.1.1 Terminological clarification

In order to adequately understand the notion of community conservation, one needs to understand the concepts of both “community” and “conservation”, as the areas conserved are in essence communally conserved areas. In the context of conservation, a community is defined as “any group of persons who share common interests and who regard themselves as a community”<sup>88</sup> and “any group of persons whose rights in land are based on shared rules determining access to communally held land.”<sup>89</sup> This would include indigenous communities previously disposed by racially based legislation, who have claimed land in terms of the land reform policies. A community is classified as an indigenous community, also known as a traditional community, if it is subject to a system of traditional leadership and observes a system of customary law.<sup>90</sup> “Conservation” on the other hand is defined as the protection, rehabilitation, maintenance, enhancement and restoration of natural resources,<sup>91</sup> including the sustainable use and management thereof.<sup>92</sup>

Community conservation has been defined as the management of natural resources by a community which has the right to manage the natural resources and derive benefits from this management.<sup>93</sup> The notion of community conservation accordingly encompasses the qualities of the terms “community” and “conservation” by including communities in the establishment and conservation of protected areas, as well as the

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<sup>86</sup> Hulme and Murphee “Community Conservation” 1.

<sup>87</sup> Hulme and Murphee “Community Conservation” 1.

<sup>88</sup> S1 of NEMA.

<sup>89</sup> S1 of RLRA.

<sup>90</sup> S2(1) of the *Traditional Leadership and Governance Framework Amendment Act* 41 of 2003 (TLGFA).

<sup>91</sup> “Natural resources” are defined in the *African Convention on the Conservation of Nature and Natural Resources* 1968 (ACCNNR) as renewable resources including soil, water, flora and fauna.

<sup>92</sup> Article 1 of the *Protocol on Wildlife Conservation and Law Enforcement* 1999 (PWC).

<sup>93</sup> Article 1 of the PWC.

management and benefits resulting therefrom.<sup>94</sup> Two distinct elements can thus be attributed to community conservation. The first is that communities are involved in the management of conservation resources and the second is the link between local development needs and conservation goals.<sup>95</sup> Community conservation is also referred to as people-based conservation, community-based conservation and co-management conservation.<sup>96</sup>

#### 2.2.1.2 Types of community conservation initiatives

In practice three main modalities of community conservation can be identified, namely protected area outreach, collaborative management, and community-based conservation.<sup>97</sup> Protected area outreach aims at protecting national parks and reserves by enhancing the role of protected areas in local plans to the benefit of local communities.<sup>98</sup> Collaborative management aims at creating agreements between local communities and conservation authorities for access to natural resources, which ordinarily fall under that authority.<sup>99</sup> This form of community conservation is also known as natural resource management and relies on management models that require: the management of natural resources; the cooperation of a community prepared to take over the responsibilities relating to the resources to be managed; and the existence of cooperative local and national government.<sup>100</sup> Community-based conservation is the predominant approach used in South Africa and aims at incorporating natural resource governance into the sustainable development and livelihood of communities.<sup>101</sup> This form of community conservation focuses on three components. The first component places an emphasis on economic incentives to ensure that the conservation yields better returns than other forms of land use, such as the rearing of livestock and crop growing. The second component focuses on the relinquishment of responsibility and authority to communities, thereby creating a framework for sustainable utilisation. The last component focuses on the development of community structures to control use and

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<sup>94</sup> Glazewski *Environmental Law* 332; Paterson *Bridging the Gap* 66.

<sup>95</sup> Adams and Hulme "Conservation and Community" 13.

<sup>96</sup> Pienaar *Land Reform* 631.

<sup>97</sup> Barrow and Murphee "Community Conservation" 31.

<sup>98</sup> Barrow and Murphee "Community Conservation" 32.

<sup>99</sup> Barrow and Murphee "Community Conservation" 33.

<sup>100</sup> Bocchino "Rural People" 291 - 319.

<sup>101</sup> Barrow and Murphee "Community Conservation" 34.

distribute benefits to community members, ensuring effective utilisation of natural resources.<sup>102</sup> Community conservation with reference to protected areas will now be discussed, as a large number of community conservation initiatives occur in protected areas.

## 2.2.2 *Community conservation and protected areas*

### 2.2.2.1 Definition of protected areas

Protected areas (PA's) have been widely used in South Africa to protect the nation's natural resources and are valuable conservation tools. The term "protected areas" is rather broad and both words need to be considered in order to gain a complete understanding of the term. The term "protected" is itself very broad. This dissertation focuses on the legal form of protection. In the legal sense "to protect" is defined as "to introduce laws that make it illegal to kill, harm or damage any natural resource, building or area of land."<sup>103</sup> This definition does not specify what types of land should be protected but we can assume that it applies to both state-owned land as well as privately owned land. The term "area" in the legal sense can be defined as "a particular place or region where the natural environment or buildings are protected by law from being damaged or changed."<sup>104</sup> We can deduce from this definition that "areas" include both the natural environment and areas which have been modified or built by people.

A "protected area" has been defined by the International Union for Conservation of Nature (IUCN) as an area of sea or land specifically dedicated to the protection and sustainability of biological diversity and of natural and cultural resources, managed through legal and other means.<sup>105</sup> This definition acknowledges that effective management regimes may include tradition or customary laws which are of relevance to community conservation initiatives, as communities are largely based on tradition and customary law.<sup>106</sup> Similarly "protected areas" have been defined in the *Convention on Biological Diversity* 1992 (CBD) as being geographically defined areas designed,

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<sup>102</sup> Barrow and Murphee "Community Conservation" 34.

<sup>103</sup> Wehmeier (ed) *Oxford Advanced Learner's Dictionary* (Oxford University Press Oxford 2000) 938.

<sup>104</sup> Wehmeier (ed) *Oxford Advanced Learner's Dictionary* (Oxford University Press Oxford 2000) 243.

<sup>105</sup> IUCN *Guidelines for Protected Areas* (2004).

<sup>106</sup> S2.2.3 of the *Guidelines for Protected Areas* (2004).

regulated or managed to achieve conservation objectives.<sup>107</sup> Protected areas come in many forms and are known by different names such as peace parks, conservation areas, protected natural environments, national parks, nature reserves and conservancies, to name a few.<sup>108</sup>

#### 2.2.2.2 Classification of protected areas

In the early 1970's the IUCN developed a system of classifying protected areas world-wide. This system was then revised and updated by the IUCN in 1994.<sup>109</sup> In terms of this system, six categories of protected areas exist, namely strict nature reserves,<sup>110</sup> national parks,<sup>111</sup> natural monuments,<sup>112</sup> habitat or species management areas,<sup>113</sup> protected landscapes or seascapes,<sup>114</sup> and managed resource protected areas.<sup>115</sup>

In South Africa these categories are largely reflected in the NEMPAA, which has contributed greatly to the establishment and protection of protected areas. In terms of the NEMPAA, the system of protected areas consists of nature reserves<sup>116</sup>, special nature reserves<sup>117</sup>, national parks<sup>118</sup>, protected areas, world heritage sites<sup>119</sup>, marine protected areas<sup>120</sup>, protected areas in terms of the *National Forests Act* 84 of 1998, and

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<sup>107</sup> Article 2 of the CBD.

<sup>108</sup> Glazewski *Environmental Law* 325.

<sup>109</sup> IUCN *Guidelines for Protected Areas* (2004).

<sup>110</sup> Strict nature reserves are defined as protected areas managed mainly for science or wilderness protection.

<sup>111</sup> National parks are defined as protected areas managed mainly for ecosystem protection and recreation.

<sup>112</sup> Natural monuments are defined as protected areas managed mainly for the conservation of specific natural features.

<sup>113</sup> Habitat or species management areas are defined as protected areas managed mainly for conservation through management intervention.

<sup>114</sup> Protected landscapes and seascapes are defined as protected areas managed mainly for landscape or seascape conservation and recreation.

<sup>115</sup> Managed resource protected areas are defined as protected areas managed mainly for the sustainable use of natural ecosystems.

<sup>116</sup> A nature reserve is defined in s1 of the NEMPAA as being an area which was declared or designated for the purposes of a nature reserve in terms of provincial legislation, and an area declared as a nature reserve in terms of s23 of NEMPAA.

<sup>117</sup> A special nature reserve is defined in s1 of NEMPAA as being an area which was a special nature reserve in terms of the *Environment Conservation Act* 73 of 1989, and an area declared as a special nature reserve in terms of s18 of NEMPAA.

<sup>118</sup> A national park is defined in s1 of NEMPAA as being an area which was a park in terms of the *National Park Act* 57 of 1976 and an area declared or regarded as having been declared as a national park in terms of s20 of NEMPAA.

<sup>119</sup> A world heritage site in terms of the *World Heritage Convention Act* 49 of 1999.

<sup>120</sup> An area protected in terms of the *Marine Living Resources Act* 18 of 1998.

mountain catchment areas declared in terms of the *Mountain Catchment Areas Act 63 of 1970*.<sup>121</sup> The National Register of Protected Areas of South Africa contains a list of all protected areas in South Africa and indicates the type of protected area in each case.<sup>122</sup>

### 2.2.2.3 Principles and guidelines for community conservation in protected areas

The IUCN definition of protected areas makes reference to “associated cultural resources”, which are therefore conserved, thus accommodating the interests of communities living in and around protected areas.<sup>123</sup> The IUCN expands on this idea by prescribing principles and guidelines which should be used as a framework to ensure the effective management of protected areas in partnership with local communities living in and around protected areas.<sup>124</sup> Protected areas should not be seen in isolation but should be seen in the broader context of conservation initiatives as a whole. It is for this reason that the IUCN guidelines will be the main focus of this section. The first principle prescribed by the IUCN is that there should be no conflict between the objectives of the protected areas and the local communities living in and around the protected areas.<sup>125</sup> In order to achieve this goal, it is necessary to see local communities as equal partners in the implementation, development, establishment and management of conservation initiatives and protected areas.<sup>126</sup> The second principle prescribed by the IUCN is that agreements drawn up between local communities and conservation institutions should give effect to the rights of the local communities to the sustainable use of their lands, territories, waters and other resources.<sup>127</sup> The third principle prescribed by the IUCN is that the management of the protected area must take into account the principles of participation, accountability, transparency and decentralisation in all matters pertaining to the interests of local communities.<sup>128</sup> The

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<sup>121</sup> S9 of NEMPAA.

<sup>122</sup> S 10(1) of the NEMPAA provides that the minister must maintain a register called the *Register of Protected Areas*. S10(2) of the NEMPAA provides that the register must:

- (a) contain a list of protected areas,
- (b) indicate the kind of protected area in each case, and
- (c) contain any other information determined by the Minister.

<sup>123</sup> IUCN *Guidelines for Protected Areas* (2004) 21. Cultural resources and values include those that do not interfere with the conservation outcome; more specifically those that contribute to conservation outcomes and those that are themselves under threat.

<sup>124</sup> IUCN *Indigenous and Traditional Peoples and Protected Areas* (2000).

<sup>125</sup> IUCN *Indigenous and Traditional Peoples and Protected Areas* (2000) 7.

<sup>126</sup> IUCN *Indigenous and Traditional Peoples and Protected Areas* (2000) 7.

<sup>127</sup> IUCN *Indigenous and Traditional Peoples and Protected Areas* (2000) 8.

<sup>128</sup> IUCN *Indigenous and Traditional Peoples and Protected Areas* (2000) 9.

fourth principle the IUCN prescribes is that the benefits associated with the protected areas should be shared equitably between the legitimate stakeholders and the local communities involved.<sup>129</sup> Finally, the IUCN prescribes that instruments should be adopted to ensure that protected area management supports the indigenous and local communities in cases where local communities' land, territory or waters are located in trans-frontier protected areas.<sup>130</sup> The IUCN and the World Wildlife Fund (WWF) have adopted these principles and suggest that this framework be used in conjunction with other complementary tools and approaches to ensure the effective management of protected areas in conjunction with local communities.

The IUCN also provides management guidelines which prescribe protected area governance<sup>131</sup> by indigenous people and communities as one of its suggested governance mechanisms.<sup>132</sup> This form of governance is defined as the governance of protected areas by a management authority consisting of indigenous people or local communities by means of customary or legal institutions and rules.<sup>133</sup> Three traits have been identified as forming the basis of this form of governance, namely that the relevant communities are concerned with the preservation of the area, whether for sustainable use or conservation; that the relevant communities are the main management authorities in respect of the area; and that the exercise of this authority results in the sustainability of the area.<sup>134</sup> Other forms of governance provided for in the IUCN guidelines include governance by the government, shared governance, and private governance.<sup>135</sup> Although these forms of governance are clearly defined, the IUCN is hopeful that they may overlap, resulting in protected areas which are more resilient,

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<sup>129</sup> IUCN *Indigenous and Traditional Peoples and Protected Areas* (2000) 11. The *Convention on Biological Diversity* 1992 also refers to this principle where it states as one of its objectives, the fair and equitable sharing of the benefits arising from the utilisation of biological resources, including by direct access to these resources. For a general discussion on access, use and benefit sharing see Paterson 2014 *SALJ* 398 – 405.

<sup>130</sup> IUCN *Indigenous and Traditional Peoples and Protected Areas* (2000) 25.

<sup>131</sup> Governance is defined in the IUCN *Management Guidelines* 2008 as the interaction between structures, traditions and processes that determine the exercise of powers and the taking of decisions of public concern.

<sup>132</sup> IUCN *Management Guidelines* (2008). The express purpose of these guidelines is to assist the international community and national policy makers to understand, accurately record, and plan for protected area governance.

<sup>133</sup> IUCN *Management Guidelines* (2008) 26.

<sup>134</sup> Paterson "Protected Areas Governance" 163 – 203.

<sup>135</sup> For a comprehensive discussion on these forms of governance see Paterson "Protected Areas Governance" 163 – 203.

adaptive and responsive, and accordingly more sustainable.<sup>136</sup> Caution must, however, be taken in strictly categorising protected areas into these governance forms, as specific protected areas may not completely fit into a specific form of governance, resulting in problems with enforcement, as no one governance model is applicable.<sup>137</sup>

As this study is focused on a South African context, it now turns to community conservation initiatives relating to protected areas in South Africa.

### *2.2.3 Community conservation and protected areas in South Africa*

There are many protected areas in South Africa, as their establishment is considered to be a valuable conservation tool. In the past, South Africa followed a racially exclusionary approach to conservation, which entailed the alienation of conservation initiatives from the people.<sup>138</sup> This refers to the prevention of ownership by the local community, resulting in insecurity and conflicts with conservation objectives, and the prevention of access to and the use of land for the pursuit of traditional livelihoods.<sup>139</sup> This approach resulted in local communities being displaced from protected areas in an effort to protect the resources situated within those areas.<sup>140</sup>

The previous legal framework providing for the declaration, management and identification of PAs was found to be flawed in many aspects, including its out-dated regulatory approach, insufficient resource allocation, lack of coordination and a failure to marry conservation initiatives with the needs of the people, resulting in the entrenchment of apartheid laws and racial segregation in the practices of conservation.<sup>141</sup> The current approach to conservation focuses on a people-centred management ideal, also known as an anthropocentric approach,<sup>142</sup> involving local communities in the conservation of protected areas and ensuring the protection of the environment for the sake of the people.<sup>143</sup>

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<sup>136</sup> Paterson "Protected Areas Governance" 163 – 203.

<sup>137</sup> Paterson "Protected Areas Governance" 163 – 203.

<sup>138</sup> This approach is referred to in more detail in Chapter 5.

<sup>139</sup> Bocchino "Rural People" 291 - 319.

<sup>140</sup> Paterson 2007 *SA Public Law* 5.

<sup>141</sup> Paterson 2007 *SA Public Law* 1.

<sup>142</sup> The anthropocentric approach is referred to in more detail in Chapter 5.

<sup>143</sup> Paterson 2007 *SA Public Law* 6. For a comprehensive discussion on this people-centred approach see Chapter 3.

The NEMPAA has gone a long way towards overcoming the challenges experienced in traditional conservation initiatives, and has given effect to the objectives under international instruments such as the CBD,<sup>144</sup> the *Durban Action Plan*<sup>145</sup> and the *Durban Accord*<sup>146</sup>. In this context the Somkhanda Game Reserve is an example of the new approach to conservation as it focuses on a more human approach by including the community in the conservation of the reserve.

#### 2.2.4 Sustainability of community conservation initiatives

Sustainability has been defined as the use of natural resources for current needs without compromising the ability of future generations to meet their needs.<sup>147</sup> Sustainability is referred to in the environmental clause of the *Constitution of the Republic of South Africa*, 1996 which states that everyone has the right to have their environment protected through measures that secure sustainable development and the use of natural resources whilst promoting social development.<sup>148</sup> The term “sustainability” has developed over time to be recognised as a legally entrenched principle and depends on the application of a multitude of different factors, measures and initiatives.<sup>149</sup>

Sustainable use has been defined in international law instruments such as the CBD as the use of the components of biological diversity at a rate and in a way that does not result in the long-term decline of biological diversity, thereby protecting its potential to meet the needs of present and future generations.<sup>150</sup> This definition is echoed in the

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<sup>144</sup> *Convention on Biological Diversity* 1992. The objectives of the CBD are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.

<sup>145</sup> *Durban Action Plan* (Fifth World Parks Congress) 2003. The *Durban Action Plan* sets out the targets and plan of action to be adopted by the participating states to ensure an effectively managed global network of protected areas.

<sup>146</sup> *Durban Accord* (Fifth World Parks Congress) 2003. The *Durban Accord* sets out policy statements agreed to by states attending the Congress, including a call for commitment and action in the sphere of protected areas.

<sup>147</sup> Glazewski *Environmental Law* 504.

<sup>148</sup> S24(b)(iii) of the Constitution.

<sup>149</sup> Du Plessis and Du Plessis “Southern African Perspectives” 252 – 290.

<sup>150</sup> Article 2 of the CBD.

*Protocol on Wildlife Conservation and Law Enforcement 1999 (PWC)*,<sup>151</sup> which was promulgated in 1999 by the Southern African Development Community (SADC), of which South Africa is a member.

In South African legislation sustainable development, according to the NEMA, means the integration of economic, social and environmental factors into planning and decision-making so as to ensure that development serves present and future generations.<sup>152</sup> Sustainable development requires that all relevant factors be considered, such as avoiding disturbance of ecosystems or loss of biological diversity;<sup>153</sup> avoiding the pollution and degradation of the environment;<sup>154</sup> avoiding the disturbance of the nation's cultural heritage;<sup>155</sup> avoiding waste, and reusing and recycling where possible;<sup>156</sup> ensuring that the exploitation and use of non-renewable natural resources are responsible and equitable, taking into account the depletion of the resource;<sup>157</sup> ensuring that the development, use and exploitation of renewable resources do not exceed the level beyond which their integrity is jeopardised;<sup>158</sup> applying a risk-averse and cautious approach to sustainable development;<sup>159</sup> and anticipating and preventing negative impacts on the environment and on people's environmental rights.<sup>160</sup> Sustainability thus follows a three-pronged approach whereby the environment, social development and economic development must be taken into account together.<sup>161</sup> There are views, however, that there should be a fourth prong in the form of cultural considerations, as these often influence environmental, social and

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<sup>151</sup> Article 4 of the PWC provides that the primary objective of this Protocol is to establish common approaches to the conservation and sustainable use of wildlife resources and to assist with the effective enforcement of laws governing these resources.

<sup>152</sup> S1(1) of NEMA. These factors are also referred to in Du Plessis and Du Plessis "Southern African Perspectives" 252 – 290.

<sup>153</sup> S2(4)(a)(i) of NEMA. Should these effects be unavoidable, the NEMA provides that they should be minimised and remedied.

<sup>154</sup> S2(4)(a)(ii) of NEMA. The NEMA provides that these effects should be minimised and remedied in the case that they are unavoidable.

<sup>155</sup> S2(4)(a)(iii) of NEMA. Should these effects be unavoidable, the NEMA provides that they should be minimised and remedied.

<sup>156</sup> S2(4)(a)(iv) of NEMA. Should waste be unavoidable or unable to be recycled or reused, the NEMA provides that such waste should be disposed of in a responsible manner.

<sup>157</sup> S2(4)(a)(v) of NEMA.

<sup>158</sup> S2(4)(a)(vi) of NEMA.

<sup>159</sup> S2(4)(a)(vii) of NEMA. The NEMA provides that this approach must take into account the limits of current knowledge about the consequences of decisions and actions.

<sup>160</sup> S2(4)(a)(viii) of NEMA.

<sup>161</sup> For a general discussion on the three-pronged approach see *Fuel Retailers Association of Southern Africa (Pty) Ltd v Director-General Environmental Management Mpumalanga and Others* 2007 BCLR 1059 CC.

economic behaviour.<sup>162</sup> The NEMPAA, in its objectives, makes reference to the sustainability of community conservation initiatives in protected areas.<sup>163</sup> These objectives include the promotion of the sustainable utilisation of protected areas to benefit the people,<sup>164</sup> and the promotion of local community participation in protected area management where appropriate, which matters can be broadly classified as socio-cultural.<sup>165</sup>

This next portion of this study investigates the legislative frameworks governing community conservation and land reform initiatives. Both community conservation and land reform initiatives have developed significantly over the last decade. South Africa's Constitution is the supreme law of the country and provides the framework for both land reform and community conservation. Part 3 will focus on South Africa's constitutional framework with reference to communally conserved areas. The subsequent parts will focus on the legal framework relating to both community conservation and land reform with part 4 considering the land reform framework with reference to communally conserved areas, part 5 focusing on South Africa's conservation framework with reference to communally conserved areas, and part 6 aiming at reconciling South Africa's land reform and community conservation frameworks.

### **3. South Africa's constitutional law framework**

The Constitution governs all law and conduct in South Africa to the extent that any law or conduct inconsistent therewith is deemed invalid.<sup>166</sup> A discussion on the Constitution in general is not necessary for this study, but the rights contained in the Bill of Rights<sup>167</sup> which have reference to community conservation and land reform will be examined and evaluated.

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<sup>162</sup> Du Plessis and Brits 2007 *SALJ* 263.

<sup>163</sup> S2 of NEMPAA.

<sup>164</sup> S2(e) of NEMPAA.

<sup>165</sup> S2(f) of NEMPAA.

<sup>166</sup> S2 of the Constitution. S1 declares the supremacy of the Constitution and identifies the rule of law as one of the values on which the South African democratic society is founded.

<sup>167</sup> The Bill of Rights is the cornerstone of democracy in South Africa and is encapsulated in chapter 2 of the Constitution. S7 of the Constitution states that the Bill of Rights enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

The first of these rights is the environmental right<sup>168</sup> contained in section 24 of the Constitution.<sup>169</sup> This section comprises of both socio-economic rights and traditional fundamental rights, and can be seen as being anthropocentric<sup>170</sup> in nature in as it focuses on people, their needs and their interests.<sup>171</sup> Section 24(a) provides that everyone has a right to an environment which is not harmful to their health or wellbeing, indicating that this right applies to both individuals and groups of people, including communities involved in community conservation initiatives. Section 24(b) is of relevance to community conservation in that it contains provisions which have an effect on communally conserved areas.<sup>172</sup> The first portion of section 24(b) reads: “Everyone has a right to have the environment protected, for the benefit of present and future generations.” This is of relevance to community conservation in that it brings about a notion of intergenerational equity whereby present community members as well as future generations of community members benefit from the right to environmental protection. This aspect was confirmed in *In re Kranspoort Community*,<sup>173</sup> where the court placed sustainability restrictions on the community to whom the land was restored, to allow future generations of the community to share in the benefits of the land. <sup>174</sup> The balance of section 24(b) provides that this right should be fulfilled through legislative and other measures which promote conservation<sup>175</sup> and secure ecologically sustainable development and the use of natural resources whilst promoting justifiable social and economic development.<sup>176</sup> From this section we can deduce that two key elements of South Africa’s environmental regime are conservation and sustainable development.

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<sup>168</sup> For a general discussion on the environmental right, see Glazewski *Environmental Law* 72 - 81 and Feris “Environmental Rights” 129 - 151.

<sup>169</sup> S24 of the Constitution provides that:

Everyone has the right –

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
  - (i) prevent pollution and ecological degradation;
  - (ii) promote conservation; and
  - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

<sup>170</sup> In “Southern African Perspectives” Du Plessis and Du Plessis state that the anthropocentric approach provides that a sustainable natural environment should be maintained and developed for the benefit of human well-being and not for the benefit of the environment itself.

<sup>171</sup> Du Plessis 2006 *PELJ* 9.

<sup>172</sup> S24(b) imposes a duty on the state to take positive steps to protect the environment.

<sup>173</sup> *Kranspoort Community* 2000 (2) SA 124 (LCC)

<sup>174</sup> 2000 (2) SA 124 (LCC) 127.

<sup>175</sup> S24(b)(ii) of the Constitution.

<sup>176</sup> S24(b)(iii) of the Constitution.

These elements should be the main focus when promoting social and economic development.

In order to conform to the environmental right, the South African Government has promulgated various statutes over the last decade, namely the NEMA, the NEMPAA and the NEMBA, which will be discussed in more detail later in this study. Various provincial statutes have also been promulgated to give effect to the environmental right contained in the Constitution, such as the *Kwazulu-Natal Nature Conservation Management Act 9 of 1997*, the *Mpumalanga Parks Board Act 6 of 1995* and the *Limpopo Environmental Management Act 7 of 2003*, to name a few. These national and provincial statutes provide the legal framework for the establishment and management of communally conserved areas.<sup>177</sup>

The second right contained in the Bill of Rights which has reference to this study is the right to property contained in section 25 of the Constitution.<sup>178</sup> With this provision the Government seeks to achieve a balance between existing property rights and the constitutional guarantees of land reform.<sup>179</sup> This section is of relevance to land reform and community conservation initiatives as it specifically refers to public interest, which includes the nation's commitment to land reform, and to reforms bringing about equitable access to natural resources in South Africa.<sup>180</sup> The meaning of "property" in this clause is of relevance to both initiatives, as it is not limited to land only, but includes other rights in property such as the right to access or use.<sup>181</sup> The latter portion of the property clause is, however, most relevant to community conservation and land reform as it contains the most recent changes in the communal land regime.<sup>182</sup> Section 25(5) of the Constitution places a general duty on the State to take reasonable legislative and other measures to foster conditions which enable citizens to gain equitable access to land. Section 25(6) entitles any community or person who has legally insecure land tenure as a result of past racially discriminatory laws or practices to legally secure the

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<sup>177</sup> For the purposes of this study only the national legislation will be discussed.

<sup>178</sup> For a general discussion on the property clause, see Glazewski *Environmental Law* 82 - 86 and Van Der Walt and Pienaar *Law of Property* 343 - 352

<sup>179</sup> Du Plessis 2006 *PELJ* 16.

<sup>180</sup> S25(4)(a) of the Constitution.

<sup>181</sup> S25(4)(b) of the Constitution.

<sup>182</sup> Van Der Walt *Constitutional Property Law* 21.

tenure of land or comparable redress.<sup>183</sup> Section 25(7) entitles a community or person dispossessed of property subsequent to 19 June 1913 as a result of past racially discriminatory laws to restitution of that property or equitable redress.<sup>184</sup> No provision is made in the Constitution for the State to enact section 25(7), but the RLRA provides for this enactment.<sup>185</sup> Finally, section 25(8) enables the State to take legislative and other reasonable measures to achieve land, water and related reform in order to redress the results of past racially discriminatory laws, provided that these measures are in accordance with the limitation requirements in section 36.<sup>186</sup> These provisions reflect the importance of land reform as an integral part of the property clause and provide the framework for the components of South Africa's land reform initiative, namely land redistribution, tenure reform and land restitution.

Customary law plays a vital role in both community conservation and land reform initiatives. The importance of customary law in South Africa is acknowledged in section 39(3), section 211 and section 212 of the Constitution. Section 39(3) provides for other rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are consistent with the Bill of Rights. Section 211 provides for the recognition of the institution, status and role of traditional leadership according to customary law<sup>187</sup> and the duty of the courts to apply customary law when applicable, subject to relevant legislation.<sup>188</sup> Section 212 affords national and in some cases provincial government the discretion to promulgate legislation providing for a role for traditional leadership as an institution at local level on matters affecting local communities,<sup>189</sup> the establishment of houses of traditional leaders<sup>190</sup> and the establishment of a council of traditional leaders.<sup>191</sup> This is important in the case of community conservation initiatives as these communities are in most cases governed by traditional authorities who preside over traditional communities and manage access

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<sup>183</sup> S25(6) provides that a community or person is entitled to this right only to the extent provided by an Act Parliament.

<sup>184</sup> S25(7) expresses the constitutional right to land restitution and provides that a community or person is entitled to this right only to the extent provided by an Act Parliament.

<sup>185</sup> Du Plessis 2006 *PELJ* 16.

<sup>186</sup> S25(8) provides that any departure from the provisions contained in s25 must be in accordance with the provisions contained in s36(1) of the Constitution.

<sup>187</sup> S211(1) of the Constitution.

<sup>188</sup> S211(3) of the Constitution.

<sup>189</sup> S212(1) of the Constitution.

<sup>190</sup> S212(2) of the Constitution.

<sup>191</sup> S212(3) of the Constitution.

to land as envisaged in these sections of the Constitution.<sup>192</sup> An alternative to management by a traditional authority is management in terms of a juristic person known as a Communal Property Association (CPA), which provides for group ownership by enabling members of a community to acquire, hold and manage the property in terms of a written constitution.<sup>193</sup> This form of management is not of relevance to this study and will therefore not be discussed in any detail.

The Constitution can be seen as the main framework within which the legal frameworks for community conservation and land reform initiatives exist. The legal frameworks relating to each of these initiatives will be examined in the chapters to follow.

#### **4. South Africa's land reform framework**

As discussed in chapter 2, South Africa's pre-constitutional land regime witnessed the spatial separation of people and communities on a racial basis.<sup>194</sup> Racially motivated land laws<sup>195</sup> formed the cornerstone of the apartheid era's policy of racial segregation. The new constitutional era recognises the need to free land and property from the shackles of the apartheid era, which is why the *White Paper on South African Land Policy* (WRLP)<sup>196</sup> was introduced. This policy was published in 1997 and recognised that the land policies existent at that time were a cause of insecurity, landlessness and poverty amongst black people, as well as a cause of inefficient land use in South Africa.<sup>197</sup> The WRLP indicated that the land reform programme should address these apartheid injustices by creating conditions of stability and certainty.<sup>198</sup> The three main components of the land reform programme are land restitution, land redistribution and land tenure reform.<sup>199</sup> For the purposes of this study, the legal framework relating to the first component, land restitution, will be examined.

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<sup>192</sup> For a practical discussion on these traditional authorities see chapter 7.

<sup>193</sup> Badenhorst, Pienaar and Mostert "Law of Property" 661.

<sup>194</sup> Mostert 2002 *South African Law Journal* 401.

<sup>195</sup> See chapter 2.

<sup>196</sup> *White Paper on South African Land Policy* (1997).

<sup>197</sup> *White Paper on South African Land Policy* (1997) 6.

<sup>198</sup> *White Paper on South African Land Policy* (1997) 7.

<sup>199</sup> *White Paper on South African Land Policy* (1997) 7.

## 4.1 Land restitution laws

The *Restitution of Land Rights Act* (RLRA), amended most recently by the *Restitution of Land Rights Amendment Act* 15 of 2014 (RLRAA), provides the framework for the implementation of the restitution process in South Africa. The provisions of the RLRA relating to who may be entitled to restitution and the procedure for the institution and settlement of claims will be examined with reference to community conservation.

The RLRA provides that a person, community or direct descendants<sup>200</sup> of a person who was dispossessed of a right in land<sup>201</sup> after 19 June 1913 as a result of the past racially discriminatory laws<sup>202</sup> is entitled to restoration of a right in land, provided that no just or equitable compensation<sup>203</sup> was received in respect of such dispossession and that a claim was submitted by not later than 31 December 1998, now extended to 30 June 2019<sup>204</sup>

The second important issue governed by the RLRA is the procedure for the lodgement and settlement of claims. This procedure involves six steps, namely lodgement and registration, screening and categorisation, gazetting, facilitation, settlement and implementation.<sup>205</sup> Claimants begin this process by submitting claims on the form prescribed by the Chief Land Claims Commissioner, to the Commission on the

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<sup>200</sup> For a discussion on who qualifies as a descendant, see *In re Kranspoort Community*.

<sup>201</sup> A “right in land” is defined in s1 of the RLRA as being any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.

<sup>202</sup> For the complete definition, please see part 2.1.2.1 of this study.

<sup>203</sup> Just and equitable compensation in this respect is determined by taking into account the factors listed in section 25(3) of the Constitution, which factors are:

- a) the current use of the property;
- b) the history of the acquisition and use of the property;
- c) the market value of the property;
- d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- e) the purpose of the expropriation.

<sup>204</sup> S2 of the RLRA. S1 of the RLRA provides the definitions for terms contained in the RLRA. Definitions of specific reference in S2 include: “person”, which is defined as including a community or part thereof; “community”, which is defined as being any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group; “direct descendants”, which are defined as including the spouse or partner in a customary union of such a person whether or not such a customary union has been registered; and “restoration of a right in land”, which is defined as the return of a right in land or a portion of land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices;

<sup>205</sup> De Koning 2009 *Africanus* 69.

Restitution of Land Rights (CRLR). The claim submitted must include a description of the land in question, the nature of the right in land of which the claimant was dispossessed, and the nature of the right or equitable redress claimed.<sup>206</sup> When a claim is lodged on behalf of a community, a resolution must be submitted authorising the representative to submit the claim on behalf of the community.<sup>207</sup> The Act prescribes a procedure to be followed should a dispute arise regarding who legitimately represents a community.<sup>208</sup>

Once the claim has been lodged, the screening and categorisation process begins. The regional land claims commissioner (RLCC) investigates whether the claim has been lodged in the prescribed manner,<sup>209</sup> whether the claim complies with the provisions of section 2 of the RLRA,<sup>210</sup> and whether the claim is frivolous or vexatious.<sup>211</sup> At this point an interim land claims committee is formed to represent the claimants in interactions between the management authority appointed to manage the relevant land and the claimants.<sup>212</sup> Should the RLCC deem the claim valid, he or she will publish a notice of the claim in the Government Gazette and make the claim known in the area in which the relevant land is situated.<sup>213</sup> Subsequent to the publication of the notice, the RLCC must in writing advise the owner of the land and any other interested party of the publication of the notice<sup>214</sup> and provide the owner and other interested parties with a full research report. These parties then have 30 days to question the report.<sup>215</sup> Once the notice has been published, the RLRA provides for a limitation of rights in respect of the land concerned. These limitations include prohibitions on the obstruction of the claim,<sup>216</sup> the

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<sup>206</sup> S10(1) of the RLRA.

<sup>207</sup> S10(3) of the RLRA.

<sup>208</sup> S10(4) of the RLRA prescribes that the relevant regional claims commissioner may, in order to have a person elected to represent the community:

- a) take steps for drawing up a list of names of the members of the community;
- b) direct that a meeting of such a community be convened and an election be held at that meeting; and
- c) take such other steps as may be reasonably necessary for the election.

In terms of s10(6) of the RLRA, due regard must be given to the cultural values of the community when following this dispute procedure.

<sup>209</sup> S11(1)(a) of the RLRA.

<sup>210</sup> S11(1)(b) of the RLRA.

<sup>211</sup> S11(1)(c) of the RLRA. S11(3) provides that a frivolous or vexatious claim may be dismissed by the regional land claims commissioner concerned.

<sup>212</sup> De Koning 2009 *Africanus* 70.

<sup>213</sup> S11(1) of the RLRA.

<sup>214</sup> S11(6)(a) of the RLRA.

<sup>215</sup> De Koning 2009 *Africanus* 70.

<sup>216</sup> S11(7)(a) of the RLRA.

sale, exchange, lease or subdivision of the land without notice to the chief land claims commissioner (CLCC),<sup>217</sup> the removal or destruction of any improvements to the land without prior consent by the CLCC,<sup>218</sup> and the eviction of claimants from the land concerned without the prior consent of the CLCC.<sup>219</sup>

The land claims process then moves to the facilitation phase, during which the options available for settling the claim are explored. If satisfied with the claim, the Minister of Land Affairs<sup>220</sup> may enter into an agreement with the interested parties for one or more of the following: an award to the claimant of a portion, an entire piece of land, or any other right in land; the payment of compensation to the claimant; both an award and payment of compensation to the claimant; the manner in which the rights awarded are to be held or the compensation to be paid or held; and such other terms and conditions as the Minister of Land Affairs deems appropriate.<sup>221</sup> Should the claimant be a community, the RLRA provides that the agreement must allow for all members of the community to have access to the land and compensation in question, on a fair and equitable basis.<sup>222</sup> This is important in the case of community conservation.

The land claims process then enters the settlement phase, where the RLRA provides three different options for finalising settlement agreements. If a settlement agreement has been entered into and the RLCC is satisfied with it, he or she will certify the agreement.<sup>223</sup> The agreement is then deemed to be effective from the date of the certification or a later date as provided in the agreement. If a settlement agreement has been entered into and the RLCC is not satisfied with it, he or she may refer the matter to the Land Claims Court (LCC) for determination.<sup>224</sup> If there was any dispute between the parties and a settlement agreement has not been entered into, the RLCC can refer the

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<sup>217</sup> S11(7)(Aa) of the RLRA.

<sup>218</sup> S11(7)(c) of the RLRA.

<sup>219</sup> S11(7)(b) of the RLRA.

<sup>220</sup> S42D(3) provides that the Minister of Land Affairs may delegate any power conferred on him/her by s42D(1) or s42C to the Director General of Land Affairs or any other officer of the State or to the RLCC.

<sup>221</sup> S42D(1)(a)-(f) of the RLRA.

<sup>222</sup> S42D(2) of the RLRA.

<sup>223</sup> S14(3) of the RLRA.

<sup>224</sup> S14(3A) of the RLRA. The RLCC may be dissatisfied with the agreement for any of the following reasons, to name a few: a question of law arising from the agreement which is unresolved; there is doubt as to the validity of the agreement; the agreement is not just and equitable in respect of any party; the authority of any signatory is in doubt; or the agreement is vague or contradictory.

matter to the LCC for determination.<sup>225</sup> A referral to the LCC must be accompanied by a copy of the deed of settlement if applicable and a report containing a thorough description of the background of the claim, the information necessary for the LCC to determine if it has jurisdiction, reasons for the referral to the LCC, and the RLCC's recommendations, if any.<sup>226</sup>

When considering a decision in a particular matter, the LCC shall have regard to the following factors, amongst others: the desirability of providing restitution of the rights in land to any community or person previously dispossessed as a result of racially discriminatory laws,<sup>227</sup> the requirements of equity and justice,<sup>228</sup> the desirability of avoiding major social disruption,<sup>229</sup> and the history of the dispossession.<sup>230</sup> This is a crucial part of the land claims process as it is at this point that the feasibility of the land restoration is examined. Once these factors have been taken into account, the LCC may order the restoration of land, a portion of land or any right in land in full or partial settlement of the claim, may order the State to grant the claimant appropriate rights in alternative state-owned land, may order the State to pay compensation to the claimant, may order the State to include the claimant as a beneficiary of a State housing programme, and may order the granting of alternative relief to the claimant.<sup>231</sup> In addition to these orders, the LCC may determine conditions for the restoration or granting of a right in land to the claimant; determine an amount to be paid by the claimant, if any; determine the manner in which rights are to be held if the claimant is a community; make an order in respect of compensatory land granted; and make such orders for costs as it deems just.<sup>232</sup> The LCC deems these later orders as necessary to ensure that all members of the dispossessed community have access to the land or compensation in question, in a fair and non-discriminatory manner.<sup>233</sup> The LCC's power to order the restitution of land is also inclusive of the power to adjust the nature of the

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<sup>225</sup> S14(1) of the RLRA.

<sup>226</sup> S14(4) of the RLRA.

<sup>227</sup> S33(a) of the RLRA.

<sup>228</sup> S33(c) of the RLRA.

<sup>229</sup> S33(d) of the RLRA.

<sup>230</sup> S33(eB) of the RLRA.

<sup>231</sup> S35(1) of the RLRA.

<sup>232</sup> S35(2) of the RLRA.

<sup>233</sup> S35(3) of the RLRA.

right held by the claimant and to determine the form and title under which the right may be held in future.<sup>234</sup>

The final phase of the land claims process is the implementation phase, which is also known as the post-settlement phase, and which relates to the implementation of the settlement agreements. The RLRA is silent on many issues relating to this phase, such as which authorities are responsible for the post-settlement process, the coordination of the post-settlement efforts, the process to be followed to facilitate the implementation of the settlement agreements, and who is responsible for funding the processes.<sup>235</sup> This paucity in the law leads to uncertainty regarding the settlement phase, as neither the Department of Land Affairs (DLA), nor the Commission on Restitution of Land Rights (CRLR) is certain of its role, and therefore neither takes responsibility for this phase.<sup>236</sup> The DLA acknowledged this problem and developed a *Settlement and Implement Support Strategy for Land and Agrarian Reform in South Africa (SISS)*.<sup>237</sup> This strategy and the *Comprehensive Rural Development Programme (CRDP)*<sup>238</sup> will be discussed in more detail later in this chapter.

The practical challenges facing the post-settlement phase can be seen in the Somkhanda Game Reserve where numerous issues arising subsequent to the settlement of the claim have been identified. The hostility of the traditional authority has led to problems surrounding the management of the reserve which, in turn has led to insufficient benefit accruing to the community. This has then led to the community affording very little support to the community conservation model, which is not conducive to the sustainability of this model following the application of the land reform process. The study will now turn to the strategies and programmes relating to land reform and community conservation initiatives.

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<sup>234</sup> S35(4) of the RLRA.

<sup>235</sup> Paterson *Bridging the Gap* 177.

<sup>236</sup> Du Plessis 2006 *PELJ* 22.

<sup>237</sup> Sustainable Development Consortium *SISS* 2007.

<sup>238</sup> Ministry of Rural Development and Land Reform *CRDP* 2009.

## 4.2 Programmes and Strategies

The South African land authorities have introduced several programmes and strategies to improve the implementation of the country's land reform regime. The content of the programmes and strategies of relevance to community conservation, namely the CRDP and the SISS, will be discussed in this part.<sup>239</sup>

The first programme of relevance is the CRDP, which was launched in 2009 and rolled out to 8 provinces in South Africa, with the aim of reaching 160 rural wards throughout the country by the end of 2014.<sup>240</sup> The CRDP was developed to address the problems of hunger, underdevelopment, poverty, lack of basic services and other social issues arising in rural areas.<sup>241</sup> A three-pronged approach was adopted by the CRDP in order to achieve these goals with a focus on coordinating and facilitating agrarian transformation, increasing rural development and improving the land reform regime in rural areas.<sup>242</sup> Agrarian transformation includes but is not limited to the increasing of production and the sustainable use of natural resources, the establishment and strengthening of rural livelihoods to ensure local economic development, and the goal of increased food security, dignity and an overall improvement in the quality of life for rural households. Rural development includes improved economic infrastructure, such as roads, sheering sheds, community gardens, water harvesting and electricity networks,<sup>243</sup> and improved social infrastructure, such as non-farming activities to strengthen rural livelihoods, social cohesion and access to human and social capital, and social mobilisation of rural communities to take initiatives.<sup>244</sup> Improving the land reform regime includes increasing the pace of land redistribution,<sup>245</sup> increasing the pace of land tenure reform,<sup>246</sup> speeding up the settlement of outstanding land restitution

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<sup>239</sup> Programmes and strategies not included in this study but of relevance to South Africa's land regime include the *Proactive Land Acquisition Strategy* and the *Land and Agrarian Reform Project*.

<sup>240</sup> Department of Rural Development and Land Reform *Strategic Plan 2010 – 2013* 12.

<sup>241</sup> Department of Rural Development and Land Reform *CRDP Fact Sheet* 2010 1.

<sup>242</sup> Ministry of Rural Development and Land Reform *CRDP* 2009 2.

<sup>243</sup> Ministry of Rural Development and Land Reform *CRDP* 2009 2.

<sup>244</sup> Ministry of Rural Development and Land Reform *CRDP* 2009 3.

<sup>245</sup> According to the CRDP, this is to be achieved by providing increased access to land for previously disadvantaged people, reviewing the land reform programmes for greater effectiveness, and reviewing land acquisition processes.

<sup>246</sup> According to the CRDP, this is to be done by fast-tracking the settlement of labour tenant claims, protecting the land rights of farm workers, establishing agri-villages for local economic development on farms, and providing basic needs for farm dwellers.

claims,<sup>247</sup> and providing effective support to all land reform programmes through information and land planning.<sup>248</sup> The CRDP is relevant to this study in that it provides a source for the promotion of rural development through community conservation initiatives.

The second programme is SISS, which was compiled by the Sustainable Development Consortium (SDC) in 2007 and launched in 2008. The SISS provides an analysis of the problems experienced with regard to post-settlement support following the land reform process, and a list of suggestions on how to overcome these problems. The aim of the SISS is to deliver effective settlement and implementation support resulting in successful land reform and sustainable land use.<sup>249</sup> SISS specifically states that the land reform programme is not meeting its objectives and lists the following challenges which are of relevance to community conservation initiatives: a fragmented approach to the development of policies and strategies, poor cooperative governance in the delivery of the land reform programme, the slow pace of the land reform programme, inadequate post-settlement support, the lack of sustainability following the land reform process, and the low level of impact on poverty reduction.<sup>250</sup> The SDC found the following additional problems with regard to the land restitution process: the absence of material benefits for claimant communities, the application of the “one-size-fits-all” approach to community claims resulting in a lack of commitment from the communities: the widespread failure to implement development plans; and a lack of post-settlement support resulting in a lack of marketing and production.<sup>251</sup> SISS acknowledges that the implementation of the land reform process cannot stop at land transfer; the CRLR and the DLA accordingly have a duty to ensure the sustainable settlement of land.<sup>252</sup>

A range of mechanisms is proposed to address these challenges, with the aim of achieving functional alignment and spatial integration, determining land rights,

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<sup>247</sup> According to the CRDP, this is to be achieved by providing an analysis of outstanding claims, indicating challenges and the manner in which to address them; adopting a developmental approach to the settlement of restitution claims; and ensuring stability, a contribution to poverty eradication, economic growth, and the vibrancy of land restitution matters, going forward.

<sup>248</sup> According to the CRDP, this is to be done by providing a reliable property registration system, providing mapping services to various clients, and the designing of a sustainable management system.

<sup>249</sup> Department of Land Affairs SISS 2007 33.

<sup>250</sup> Department of Land Affairs SISS 2007 4 - 5.

<sup>251</sup> Department of Land Affairs SISS 2007 18 – 19.

<sup>252</sup> Department of Land Affairs SISS 2007 17.

developing institutional capacity, ensuring sustainable human settlements and the integrated management of natural resources, and increasing livelihood security.<sup>253</sup> The proposed mechanisms of relevance to communally conserved areas include institutional arrangements ensuring cooperation between the DLA, the Department of Environmental Affairs (DEA),<sup>254</sup> the Department of Water and Sanitation (DWS),<sup>255</sup> the National Department of Agriculture (NDA) and the provincial departments of environmental affairs and nature conservation; the adoption of participatory land-use planning and management methods to determine individual rights to access and the use of land; the adaptation of existing land reform guidelines and policies to include environmental planning; the establishment of institutional arrangements to enable ecosystem approaches to integrated environmental management; the provision of adequate support for restitution claims resulting in co-management agreements for conservation; the development of a programme to inform claimants of their environmental rights and responsibilities; and the development of protocols for the mapping of environmental opportunities to ensure environmental sustainability.<sup>256</sup> SISS provides institutional options for the implementation of these proposals at national, provincial and local level.<sup>257</sup> In theory the post settlement proposals included in the SISS appear sound. In practice, however, it appears as if the Government is unable to put these proposals into action.

What is evident from the above evaluation is that the legal framework relating to South Africa's land reform regime is of great importance in the implementation of community conservation initiatives as many of these initiatives follow a process of land reform. This study now turns to South Africa's conservation framework with reference to these initiatives.

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<sup>253</sup> Department of Land Affairs SISS 2007 13.

<sup>254</sup> Previously known as the Department of Environmental Affairs and Tourism (DEAT).

<sup>255</sup> Previously known as the Department of Water Affairs and Forestry (DWAF).

<sup>256</sup> Department of Land Affairs SISS 2007 45 - 47.

<sup>257</sup> For a discussion on the institutional options for the implementation of the post-settlement proposals, see Department of Land Affairs SISS 2007 55 – 61.

## 5. South Africa's environmental law framework

Prior to 2004 South Africa's conservation framework made little provision for community conservation initiatives.<sup>258</sup> This changed in 2004 with the introduction of the NEMA, the NEMPAA and the NEMBA, which contain a number of provisions of relevance to community conservation. These statutes represent the transition from a racially exclusionary approach to conservation,<sup>259</sup> to an anthropocentric approach to conservation. The latter approach recognises the need to include people and communities in sustainable use and conservation and to protect the environment for the sake of the people.<sup>260</sup>

### 5.1 *National Environmental Management Act*

The first statute of relevance to this study is the NEMA, which came into force in January 1999 and is effectively a flagship statute providing the framework for the environmental law system in South Africa.<sup>261</sup> The NEMA embraces three fields of environmental concern, namely the conservation and exploitation of natural resources, pollution control and waste management, and land-use planning and management.<sup>262</sup> Of importance to this study is that the NEMA provides the notion, concept and principles of sustainable development.<sup>263</sup> Section 2(3) specifically provides that all development must be socially, economically and environmentally sustainable. The principles of sustainability referred to in the NEMA apply throughout the Republic, to all organs of state whose actions may significantly affect the environment.<sup>264</sup> Principles which evidence South Africa's transition to an anthropocentric approach to conservation, and accordingly apply to community conservation initiatives, include that environmental management must take into account all aspects of the environment and all people in the

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<sup>258</sup> The conservation framework prior to 2004 was largely based on the racially exclusionary approach to conservation.

<sup>259</sup> Critics have argued that this exclusionary approach is unsustainable in a developing country such as South Africa.

<sup>260</sup> Paterson *Bridging the Gap* 134.

<sup>261</sup> Glazewski *Environmental Law* 137.

<sup>262</sup> Chapter 1 of NEMA.

<sup>263</sup> S2(4) of NEMA.

<sup>264</sup> S2(1) of NEMA.

environment;<sup>265</sup> that equitable access to environmental services, benefits and resources must meet basic human needs and ensure the wellbeing of humans in general;<sup>266</sup> that all people must have the opportunity to develop the skills and capacity necessary to achieve equitable and effective participation in environmental governance;<sup>267</sup> that all forms of knowledge, including traditional knowledge, are to be taken into account when making decisions regarding environmental governance;<sup>268</sup> that community empowerment and wellbeing must be promoted through appropriate means;<sup>269</sup> and that the beneficial use of biological resources must serve the public interest.<sup>270</sup> In these principles the NEMA makes it clear that the environment is held in a public trust for the people, that the environment must be protected for the common heritage of the people, and that the beneficial use of biological resources must serve the public interest.<sup>271</sup>

In addition to sustainability, Chapter 3 of the NEMA is of relevance to this study in that it provides for co-operative governance in terms of which certain national governmental departments<sup>272</sup> are required to prepare environmental implementation plans<sup>273</sup> as well as environmental management plans.<sup>274</sup> The purpose of these plans is to co-ordinate national departments' plans, policies and programmes; to give effect to the principle of co-operative governance as provided for in the Constitution;<sup>275</sup> to secure the countywide protection of the environment; and to enable the Minister to monitor the promotion and protection of a sustainable environment.<sup>276</sup>

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<sup>265</sup> S2(4)(b) of NEMA. This section also provides that environmental management must be integrated and acknowledges that all elements of the environment are interrelated and linked.

<sup>266</sup> S2(4)(d) of NEMA.

<sup>267</sup> S2(4)(f) of NEMA.

<sup>268</sup> S2(4)(g) of NEMA.

<sup>269</sup> S2(4)(h) of NEMA.

<sup>270</sup> S2(4)(o) of NEMA.

<sup>271</sup> Noeth *Concept of public trusteeship* 18. Public trusteeship involves the State's or Government's managing the use and protection of the environment or specified natural resources to the benefit of the nation, in its capacity as trustee of the environment or specified natural resources.

<sup>272</sup> A list of these national governmental departments can be found in Schedule 1 and Schedule 2 of the NEMA.

<sup>273</sup> S13 of the NEMA provides for the contents of environmental implementation plans.

<sup>274</sup> S14 of the NEMA provides for the contents of environmental management plans.

<sup>275</sup> Chapter 3 of the Constitution.

<sup>276</sup> S12 of NEMA.

## 5.2 National Environmental Management: Biodiversity Act

The second statute of relevance to this study is the NEMBA, which came into force in September 2004 and represented a significant reformation of South Africa's biodiversity framework. In terms of the NEMBA the State is appointed as the trustee of biological diversity and has a duty to manage, conserve and sustain South Africa's biodiversity,<sup>277</sup> using the NEMBA to realise these duties.<sup>278</sup> The NEMBA aims at the management and conservation of South Africa's biodiversity, the protection of species and ecosystems warranting protection, the sustainable use of indigenous biological resources, the fair and equitable sharing of bio-prospecting benefits, the provision for cooperative governance in biodiversity management and conservation, and the establishment of a South African National Biodiversity Institute.<sup>279</sup> To achieve these objectives, the NEMBA provides for a comprehensive planning network, consisting of a national biodiversity framework,<sup>280</sup> bioregional plans,<sup>281</sup> and biodiversity management plans.<sup>282</sup> Using this planning network the NEMBA regulates a variety of issues relating to biodiversity conservation. Firstly, it provides for the establishment, function and powers of the South African National Biological Institute (SANBI) to attend to matters of biological conservation.<sup>283</sup> Secondly, it provides for the protection of threatened species and ecosystems and the restriction of activities which may threaten these species or ecosystems.<sup>284</sup> Thirdly, it regulates species and organisms which pose potential threats to biodiversity such as alien species,<sup>285</sup> invasive species<sup>286</sup> and genetically modified organisms.<sup>287</sup> The NEMBA provides a list of these species, as well as a list of restricted

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<sup>277</sup> Biodiversity is defined in s1 of the NEMBA as the variability among all sources of living organisms including terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part.

<sup>278</sup> S3 of NEMBA.

<sup>279</sup> Preamble and s2 of NEMBA.

<sup>280</sup> S38 and s39 of NEMBA.

<sup>281</sup> S40 - s42 of NEMBA.

<sup>282</sup> S43 - s46 of NEMBA.

<sup>283</sup> Chapter 2 of NEMBA.

<sup>284</sup> Chapter 4 of NEMBA.

<sup>285</sup> Alien species are defined in s1 of the NEMBA as being a species that is not an indigenous species; or an indigenous species translocated to a place outside its natural distribution range in nature, but not an indigenous species that has extended its natural distribution range without human intervention.

<sup>286</sup> Invasive species are defined in the NEMBA as being any species whose spread and establishment outside of its natural distribution range threatens ecosystems, habitats or other species, and may result in economic or environmental harm or harm to human health.

<sup>287</sup> Genetically modified organisms are defined in the *White Paper on the Conservation of South Africa's Biological Diversity* as being organisms whose genetic makeup has been altered by the insertion or

activities and a duty of care involving them.<sup>288</sup> This is relevant as these systems and species may be found in the environment subject to the community conservation initiatives. Finally, it seeks to regulate bio-prospecting,<sup>289</sup> access, and benefit-sharing involving indigenous biological resources.<sup>290</sup> Bio-prospecting involving any indigenous biological resources may not occur unless the relevant permit is obtained.<sup>291</sup> If a stakeholder<sup>292</sup> has an interest in the biological resources in question, the issuing authority may only grant a permit only if a material transfer agreement and a benefit-sharing agreement have been entered into between the applicant and the stakeholder.<sup>293</sup>

The NEMBA's comprehensive planning framework together with bio-prospecting provides opportunities for community involvement in biodiversity conservation. The first framework of reference to this study is the national biodiversity framework,<sup>294</sup> the purpose of which is to provide for an integrated, uniform and co-ordinated approach to biodiversity conservation by all spheres of government, non-governmental organisations, the private sector, local communities, the public and other stakeholders.<sup>295</sup> Secondly, the Minister<sup>296</sup> may determine a geographical region as a

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removal of fragments of genes or genetic material in order to create or enhance characteristics of a desirable nature.

<sup>288</sup> These activities include, hunting, capturing, gathering, collecting, cutting, uprooting or breeding any specimen of a protected or threatened species, by any means, method or device. Specific reference is made to the restricted activities and duty of care in s67 - s69 for alien species and s71 - s73 for invasive species.

<sup>289</sup> Bio-prospecting, in relation to indigenous biological resources, is defined in s1 of the NEMBA as being any research on, development or application of indigenous biological resources, for commercial or industrial exploitation, including the systematic search, collection or gathering of such resources; the utilisation of biological resources by indigenous communities, for purposes of research or development of any information regarding any traditional uses; and the research on, or the development, application or modification of any such traditional uses for commercial or industrial exploitation.

<sup>290</sup> Chapter 6 of NEMBA. In this chapter indigenous biological resources are defined in s80(2) and exclude genetic material of human origin, any exotic animals, plants or other organisms other than those mentioned in s80(a)(iii), and indigenous biological resources listed in terms of the International Treaty on Plant Genetic Resources for Food and Agriculture.

<sup>291</sup> S81 of NEMBA.

<sup>292</sup> In terms of s82(1) a stakeholder includes, a person, including any organ of state or community, providing or giving access to the relevant indigenous biological resources; and an indigenous community whose traditional uses of the resources have initiated or will contribute to the proposed bio-prospecting, or whose knowledge of the biological resources is to be used for the proposed bio-prospecting.

<sup>293</sup> S82(2) of NEMBA. Material transfer agreements regulate the provision of or access to the relevant biological resources and are provided for in s84 of the NEMBA. Benefit-sharing agreements provide for sharing by the stakeholders in any future benefits that may be derived from the bio-prospecting in question.

<sup>294</sup> S38 – s39 of NEMBA.

<sup>295</sup> S39(1)(a) of NEMBA.

bioregion, if it consists of a whole or several ecosystems and is characterised by its vegetation, land forms, history and human culture.<sup>297</sup> The Minister may in addition publish a bioregional plan providing for the management of biodiversity and its components in the said bioregion.<sup>298</sup> The third tool, namely biological management plans, is of the utmost importance to community conservation. Any person, organisation or organ of state wishing to contribute to biodiversity conservation may submit to the Minister for approval a draft management plan for an ecosystem,<sup>299</sup> an indigenous species,<sup>300</sup> or a migratory species.<sup>301</sup> Prior to the approval of the draft management plan, the Minister must identify a person, organ of state or organisation who is willing to take responsibility for the implementation of the plan.<sup>302</sup> The Minister may then enter into a bioregional agreement with this person, organ of state or organisation regarding the implementation of the biodiversity management plan.<sup>303</sup> The biodiversity management plan must be aimed at ensuring the long-term survival of the species or ecosystem to which the plan relates; provide for a responsible person to monitor the implementation of the plan; and be consistent with national management principles, the national biodiversity framework, any applicable bioregional plans, any municipal development plan, and any relevant binding international agreements.<sup>304</sup> The NEMBA does not provide for specifics regarding these biodiversity management plans,<sup>305</sup> thus enabling communities to enter into these agreements and tailor them to the specific needs of the community, conservation authorities and the biological resource in question.<sup>306</sup>

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<sup>296</sup> S1 of the NEMBA provides that “Minister” means the cabinet member responsible for national environmental management.

<sup>297</sup> S40(1)(a) of NEMBA.

<sup>298</sup> S40(1)(b) of NEMBA.

<sup>299</sup> These ecosystems include those listed in terms of s52 of the NEMBA and ecosystems not listed but warranting special conservation attention.

<sup>300</sup> These species include those listed in terms of s56 of the NEMBA and species not listed but warranting special conservation attention.

<sup>301</sup> S43(1)(c) of NEMBA.

<sup>302</sup> S43(2) of NEMBA.

<sup>303</sup> S44 of NEMBA.

<sup>304</sup> S45 of NEMBA.

<sup>305</sup> The NEMBA vaguely prescribes these biodiversity management agreements with regard to the nature of the contracting parties and their respective roles, their geographical scope, and the objectives sought to be achieved.

<sup>306</sup> Paterson *Bridging the Gap* 205.

### 5.3 *National Environmental Management: Protected Areas Act*

The third statute of relevance to this study is the NEMPAA, which came into force in 2003. The objectives of the NEMPAA include providing for cooperative governance in the declaration and management of protected areas; providing for a representative network of protected areas on private land, state land and communal land; promoting the sustainable utilisation of protected areas for the benefit of people; and promoting the participation of local communities in the management of protected areas.<sup>307</sup> As with the NEMBA, the State is appointed as the trustee of protected areas and has a duty to implement the NEMPAA in partnership with the people, to achieve its objectives.<sup>308</sup> The NEMPAA accordingly contains many provisions providing for the implementation of community conservation initiatives.<sup>309</sup> These provisions include the incorporation of communal land into protected areas, the management of protected areas by communities, communal access and the use of biodiversity within protected areas, and equitable benefit sharing in terms of this use. These provisions will be discussed in more detail, beginning with the incorporation of communal land into protected areas.

Protected areas now no longer predominantly consist of state-owned land, but also incorporate communal and private land within the four types of protected areas as prescribed by the NEMPAA. The NEMPAA provides that the South African protected areas system consists of special nature reserves,<sup>310</sup> nature reserves,<sup>311</sup> national parks<sup>312</sup> and protected environments;<sup>313</sup> world heritage sites; marine protected areas;

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<sup>307</sup> For a full list of the objectives see s2 of the NEMPAA.

<sup>308</sup> S3 of NEMPAA.

<sup>309</sup> S3(b) of NEMPAA.

<sup>310</sup> S18 of the NEMPAA provides that an area may be declared as a special nature reserve or part of a special nature reserve by the Minister in the Government Gazette. This declaration may be issued only to protect highly sensitive, outstanding ecosystems, physical, geological or species features in the area; and to make the area available for environmental monitoring or scientific research.

<sup>311</sup> S23 of the NEMPAA provides that the Minister, in the Government Gazette, may declare an area as a nature reserve or part of a nature reserve. This declaration may be issued only to provide for the sustainable flow of natural products and services to meet a community's needs, to enable the continuation of sustainable traditional consumptive uses, and to protect the area if the area has significant biodiversity.

<sup>312</sup> S20 of the NEMPAA provides that the Minister, in the Government Gazette, may declare an area as a national park or part of a national park. This declaration may be issued only to protect the area if the area is of national or international biodiversity importance, to protect the ecological integrity of one or more ecosystems in the area, to prevent exploitation or occupation inconsistent with the protection of ecological integrity, and to contribute to ecological development where possible.

<sup>313</sup> S28 of the NEMPAA provides that the Minister, in the Government Gazette, may declare an area as a protected environment or part of a protected environment. This declaration may be issued to protect the

specially protected forest areas; and mountain catchment areas.<sup>314</sup> The Minister<sup>315</sup> or the owners of land, whether individually or collectively, may initiate proceedings to have their private land declared as a special nature reserve, national park, nature reserve or protected environment.<sup>316</sup> The owners of the land must consent to the declaration by entering into a written agreement with the Minister,<sup>317</sup> which agreement is binding on the successors in title of such an owner.<sup>318</sup> The terms of the agreement must be recorded in a notarial deed and registered against the land's title deed.<sup>319</sup>

The second manner in which provision is made for community conservation initiatives is the management of protected areas. The management of any kind of protected area is assigned to a management authority, which may be a suitable person, organisation or organ of state appointed by the Minister or MEC.<sup>320</sup> The management authority must prepare and submit a management plan to the Minister or MEC, within 12 months of assignment, for approval.<sup>321</sup> When preparing these plans the management authority must consult municipalities, local communities and other parties who have an interest in the area, giving recognition to community conservation initiatives.<sup>322</sup> The management plan must contain the terms and conditions of any biodiversity management plan; a concise policy framework; any prescribed planning measures, controls and performance criteria; a programme for the costing and implementation of the plan; and the implementation of community-based natural resource management where applicable.<sup>323</sup> In addition, a management plan may include the development of local management capacity and knowledge exchange, the development of economic opportunities in terms of an integrated development plan framework, and financial support to ensure effective

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area if it is sensitive to development due to its biodiversity, natural characteristics, scenic, landscape or cultural value; to ensure the sustainable use of natural resources; and to enable the owners of the land to take collective action to conserve biodiversity on their land.

<sup>314</sup> S9 of NEMPAA.

<sup>315</sup> The Minister is defined in the NEMPAA as the cabinet member responsible for national environmental management.

<sup>316</sup> S35(1) of NEMPAA

<sup>317</sup> This agreement is referred to in s18(3) in respect of special nature reserves, s23(3) in respect of nature reserves, s20(3) in respect of national parks, and s28(3) in respect of protected environments.

<sup>318</sup> S35(3)(a) of NEMPAA.

<sup>319</sup> S35(3)(b) of NEMPAA

<sup>320</sup> S38(1) - s38(2) of NEMPAA. The MEC is referred to in s1 of the NEMPAA as being the member of the executive council of a province in whose portfolio provincial protected areas fall.

<sup>321</sup> S39(2) of NEMPAA.

<sup>322</sup> S39(3) of NEMPAA.

<sup>323</sup> S41(2) of NEMPAA.

implementation.<sup>324</sup> Provision is made for the monitoring and supervision of these plans to ensure compliance therewith.<sup>325</sup> The Minister may also enter into an agreement with another organ of state, local community or an individual, for the co-management of the area by the parties, or the regulation of human activities having a bearing on the environment in that area.<sup>326</sup> These co-management agreements may provide for the use of biological resources in the area, access to the area, and the appointment of any income generated from the management of the area, or for any other form of benefit sharing between the parties.<sup>327</sup> Whilst these mechanisms are provided for in the NEMPAA, their practical application in the case of community conservation initiatives following the land reform process appear to be lacking.

## **6. Reconciling South Africa's land reform and environmental law frameworks**

The need to link South Africa's land reform and community conservation frameworks has been highlighted as a major concern. Both of these frameworks have been plagued by a high level of fragmentation in both the legal and administrative sectors.<sup>328</sup> This fragmentation, coupled with a division of responsibilities and a lack of coordination, has been a major factor hampering effective community conservation initiatives following the land reform process.<sup>329</sup> The Government has taken steps in the quest to consolidate these two frameworks, firstly with the conclusion of a *Memorandum of Agreement* (MoA) between the conservation and land reform authorities,<sup>330</sup> and secondly with the conclusion of a *National Co-management Framework* (NCF).<sup>331</sup>

The MoA was entered into by the Minister of Agriculture and Land Affairs (now the DRDLR) and the Minister of Environmental Affairs and Tourism in 2007 (now the DEA), and recognises the need for state agencies to adopt a uniform approach to all stages of the restitution process.<sup>332</sup> Both parties agreed to a series of principles upon which land claims in protected areas will be based. These principles include the definition of the

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<sup>324</sup> S41(3) of NEMPAA.

<sup>325</sup> S43 of NEMPAA.

<sup>326</sup> S42(1) of NEMPA.

<sup>327</sup> S42(2)(b) - (d) of NEMPA.

<sup>328</sup> Du Plessis 2006 *PELJ* 25.

<sup>329</sup> *White Paper on the Conservation of South Africa's Biological Diversity* 2007 18.

<sup>330</sup> *Memorandum of Agreement* 2007

<sup>331</sup> *Co-management Framework* 2010.

<sup>332</sup> De Koning 2009 *Africanus* 68; Kepe 2008 *Environmental Management* 312.

roles and responsibilities of the respective parties, the fostering of cooperation between these parties, the perpetual conservation of protected areas which are assets of national and international importance, the implementation of co-management strategies which are sustainable and effective, the provision for restitution settlements which comply with the principles of economic viability and result in realistic benefits for land claimants, the clear definition of the award of the right to access, and the provision for the compatibility of biodiversity conservation and post-settlement land use.<sup>333</sup> In addition, the MoA provides that title in land shall be transferred to land claimants only where feasible and applicable, one association is to be formed by the land claimants to ensure representation in management structures, management is left to existing management authorities until reviewed, and benefit sharing is to be structured to ensure a tangible benefit to the communities without sacrificing the financial sustainability of the protected area.<sup>334</sup> Whilst the MoA appears to foster cooperation between the DRDLR and the DEA, it is silent on the role of traditional leadership institutions, which play an important role in community conservation initiatives.<sup>335</sup> This omission may undermine the use of the MoA as a means to consolidate land reform and community conservation initiatives. In addition, the MoA is not a legal document and is accordingly not legally binding but rather a means of addressing situations at national level.<sup>336</sup> As can be seen, the MoA is not a final solution in the quest to reconcile community conservation and land reform frameworks but is most certainly a step in the right direction.

The second step taken by the Government in the quest to consolidate these initiatives is the NCF, which was promulgated by the Department of Environmental Affairs (DEA) in 2010. The NCF was based on the principles contained in the MoA with the purpose of providing a uniform guideline for the management of land restitution claims in protected areas,<sup>337</sup> and to ensure a more effective redress of land rights for land claimants.<sup>338</sup> The problems the NCF aims to address include the lack of balance between the conservation of biodiversity and benefits accruing to land claimants, the inability of previous settlement models to provide the intended or desired results, the lack of post-

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<sup>333</sup> Paterson *Bridging the Gap* 214.

<sup>334</sup> De Koning 2009 *Africanus* 68.

<sup>335</sup> Paterson *Bridging the Gap* 215.

<sup>336</sup> De Koning 2009 *Africanus* 68.

<sup>337</sup> S3 of the NCF.

<sup>338</sup> Foreword by the Minister of Water and Environmental Affairs on the NCF.

settlement support, and the ineffective management of protected areas.<sup>339</sup> The NCF provides that these problems can be addressed by means of co-management.<sup>340</sup> The NCF further provides that co-management comprises of a number of benefits, as well as structures and procedures for co-management.<sup>341</sup> It furthermore identifies three models of co-management to address the problems identified, namely full co-management, lease, and part co-management or part lease.

Full co-management occurs where compensation for the lack of physical occupation takes the form of socio-economic beneficiation<sup>342</sup> and co-management participation.<sup>343</sup> In this model the management of the protected area remains vested in the existing management authority, but the new land owners<sup>344</sup> may actively participate in the management process, and are empowered to ensure effective partnership with the management authority.<sup>345</sup> Beneficiation under this model includes the allocation of a certain percentage of revenue to the new landowners, the involvement of the new land owners in employment opportunities involving tourism and conservation on the restored land, and the authorisation of communal access to protected areas for cultural reasons.<sup>346</sup> Notwithstanding these forms of beneficiation, the NCF provides that certain disadvantages are associated with this model, namely the lack of immediate benefits for landowners, the increase in management structures due to the added functions, the difficulties associated with including community members in the management process, and the length of the process of finalising agreements.<sup>347</sup> The full co-management model finds its applicability in the few protected areas which generate a profit.<sup>348</sup>

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<sup>339</sup> S4 of the NCF.

<sup>340</sup> Kepe 2008 *Environmental Management* 312. Co-management is also referred to as joint-management and claimant participation, and has been defined as a collaborative and participatory process of regulating decision making between representatives of user groups, research institutions, government agencies and other stakeholders.

<sup>341</sup> S7.1 of the NCF.

<sup>342</sup> Beneficiation is defined in s1 of the NCF as the acquisition of direct or indirect benefits derived by the claimants from the activities to be conducted and operated in the protected area.

<sup>343</sup> S7.2 of the NCF.

<sup>344</sup> New landowners are defined in s1 of the NCF as being the owners of land restored through the RLRA.

<sup>345</sup> S8.1 of the NCF.

<sup>346</sup> S8.1 of the NCF.

<sup>347</sup> S8.2 of the NCF.

<sup>348</sup> Paterson *Bridging the Gap* 218.

The second co-management model provided for in the NCF is the lease model, which entails the leasing of land by the state from the land claimants.<sup>349</sup> This model applies where few socio-economic opportunities exist, resulting in inadequate compensation for the loss of a beneficial occupation.<sup>350</sup> Various lease options exist to ensure the optimal accrual of benefits to the land claimants.<sup>351</sup> These include fixed cash leases, flexible cash leases,<sup>352</sup> percentage share leases,<sup>353</sup> and share of income leases.<sup>354</sup> These options are based on the economic potential of each individual protected area.<sup>355</sup> The advantages associated with this model include the existing management authority's continuing with the management of the protected area, the availability of immediate and guaranteed income for the land claimants, and a less lengthy agreement process.<sup>356</sup> As with the previous model, the NCF lists the possible disadvantages of this model, including the requirement of treasury approval due to the financial implications of this model; the lack of inherent commercialisation rights, community property institutions and guaranteed equity for the land owners; and the exclusion of any rights in respect of community use, access to and development of the protected area.<sup>357</sup> These disadvantages appear to render this model unsuitable for the management of protected areas in respect of community conservation initiatives.

In between these two models lies the third model provided for by the NCF, namely part co-management or part lease. This model is a combination of the co-management and lease models and is applied on the basis of socio-economic opportunities.<sup>358</sup> In terms of this model, new landowners will be empowered by the existing management authority and will have access to land, access to and the use of biological resources, and will participate in the management of the protected areas to an extent agreed upon by the management authority.<sup>359</sup> Beneficiation under this model includes the provision for

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<sup>349</sup> S7.2 of the NCF.

<sup>350</sup> S7.2.2 of the NCF.

<sup>351</sup> S9 of the NCF.

<sup>352</sup> Flexible cash leases are similar to fixed cash leases except that the final rent is based on the actual income and is accordingly adjusted.

<sup>353</sup> Percentage share leases occur where the claimant community receives a percentage of the income but does not contribute to the costs.

<sup>354</sup> Share of income leases occur where the total income is divided between the management authority and the community according to their contributions.

<sup>355</sup> S9.3 of the NCF.

<sup>356</sup> S8.3 of the NCF.

<sup>357</sup> S8.4 of the NCF.

<sup>358</sup> S7.2.3 of the NCF.

<sup>359</sup> S8.5 of the NCF.

developmental rights,<sup>360</sup> revenue sharing<sup>361</sup> and rental income<sup>362</sup> in agreement with the management authority.<sup>363</sup> As with the previous two models, the NCF indicates the possible disadvantages of this model. These disadvantages include the necessity for treasury approval, the lengthy process needed for the conclusion of agreements, the limitation in respect of guaranteed income and security, the increased cost of management, and the need for the development of a communal property institution (CPI) in order to ensure community participation.<sup>364</sup> Whilst the NCF provides for agreements between the land owners and the management authority, it is silent on the extent to which communities may be involved in this model. This model is accordingly not conducive to sustainable community conservation initiatives following the land reform process.

Finally, the NCP provides for the establishment of a co-management committee (CMC) to ensure the implementation of the terms of the settlement and co-management agreements for the restored land, and to provide for consultation between the management authority and the CPI on the preparation of the management plan for the protected area.<sup>365</sup> Each party will be responsible for the costs relating to its nominees to the CMC, and the management authority will provide secretarial support to the CMC.<sup>366</sup> The co-management committee members are appointed or removed by a party to the CMC by notice to the other party, and only decisions that are duly minuted by the parties will be binding.<sup>367</sup>

As can be seen, the NCF focuses on co-management as a means of effecting the governance of protected area. This is indicative of the fact that co-management has gone from being merely popular to being the only strategy used to marry conservation and land reform initiatives.<sup>368</sup> This can be seen in both the MoA and the NCF. Despite

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<sup>360</sup> In terms of s12.4 of the NCF, “development rights” refers to the identification of a development site on the restituted land in the protected areas.

<sup>361</sup> Revenue sharing is provided for in s12.1 of the NCF and entails the percentage of revenue to be paid by the management authority to land claimants.

<sup>362</sup> S12.2 of the NCF provides that rental income is income derived by land claimants from the state. This income can include a fixed rental or a fixed rental plus an amount based on income earned.

<sup>363</sup> S8.5 of the NCF.

<sup>364</sup> S8.6 of the NCF.

<sup>365</sup> S13 of the NCF.

<sup>366</sup> S13 of the NCF.

<sup>367</sup> S13 of the NCF.

<sup>368</sup> Kepe 2008 *Environmental Management* 312.

this and the existence of co-management strategies in protected areas, the co-management model may be too weak and inadequate a tool to address the problems hampering the land reform process in South Africa.<sup>369</sup>

## 7. Case Study and recommendations

This chapter focuses on an example of a community conservation initiative following the land reform process, namely the Somkhanda Game Reserve. The purpose of this part of this text is to briefly describe the history of this case and the type of governance employed therein, and to analyse the extent to which South African law provides for sustainable community conservation initiatives based on this case study. Recommendations in respect of this analysis will then follow.

The Somkhanda Game Reserve, situated in the Zululand District Municipality in northern KwaZulu Natal, was proclaimed as a nature reserve and accordingly a protected area in terms of section 23<sup>370</sup> of NEMPAA in Proclamation Notice number 6, published in the KwaZulu Natal Provincial Gazette number 552 dated 17 February 2011.<sup>371</sup> The Gumbi community, which now owns the Somkhanda Game Reserve, was forcibly removed from the land in the late 1960's<sup>372</sup> and lodged a land claim in 1998.<sup>373</sup> The Community was successful with their land claim and the land was returned to them under the land restitution process on 24 October 2005. A total of fourteen farms were allocated to the Community.<sup>374</sup> The Community, represented by the Emvokweni

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<sup>369</sup> Kepe 2008 *Environmental Management* 312.

<sup>370</sup> S23(1) of the NEMPAA provides that the Minister or the MEC may by notice in the Gazette declare an area specified in the notice as a nature reserve; or as part of an existing nature reserve; and assign a name to the nature reserve. S23(2) of the NEMPAA provides that a declaration under subsection (1)(a) may be issued only:

- (a) to supplement the system of national parks in South Africa;
- (b) to protect the area if the area-
  - (i) has significant natural features or biodiversity;
  - (ii) is of scientific, cultural, historical or archaeological interest; or
  - (iii) is in need of long-term protection for the maintenance of its biodiversity or for the provision of environmental goods and services;
- (c) to provide for a sustainable flow of natural products and services to meet the needs of a local community;
- (d) to enable the continuation of such traditional consumptive uses as are sustainable; or
- (e) to provide for nature-based recreation and tourism opportunities

<sup>371</sup> Proc R6 KZN PG 552 of 17 February 2011.

<sup>372</sup> Anon <https://www.environment.gov.za>.

<sup>373</sup> Gumbi "Presentation on Somkhanda" 3.

<sup>374</sup> Gumbi "Presentation on Somkhanda" 3.

Community Trust, undertook to keep the majority of the restored land under conservation.<sup>375</sup> A total of seven farms were consolidated into one property through the dropping of fences, forming the Somkhanda Game Reserve, with an approximate size of 16,400 hectares. The remainder of the farms totalling an area of approximately 4000 hectares were set aside for the 657 families making up the community.<sup>376</sup>

The Gumbi Community received support for their initiative from various governmental and external organisations such as the Regional Land Claims Commission, the Ezemvelo KwaZulu Natal Wildlife, the Department of Agriculture, the Wildlands Conservation Trust and the Black Rhino Range Expansion Project. During the restitution process numerous challenges were identified, namely the a lengthy and inefficient process pertaining to obtaining benefits from the Department of Land Affairs; an electricity debt left by the previous owners; two households refusing to move out of the game reserve; no water infrastructure; unsettled land claims; lack of marketing of the lodges and thus less income for the community; and a lack of funding for the eradication of alien plants, the erection of road signage and general maintenance.<sup>377</sup>

Whilst initial support was given to the community, post-settlement support has not been adequate and management problems have plagued the reserve. One of the main problems is that the tribal authority, as a trustee of the trust, appears hostile and unwilling to assist with issues regarding the management of the reserve. As the tribal authority represents the link between the trust (and as such the reserve) and the community for which the reserve was created, this poses a problem, as the community is effectively excluded from important decisions relating to the management of the reserve. One can see from this example that the involvement of traditional authorities<sup>378</sup> can hinder community conservation initiatives. The existence of this situation can be attributed to the lack of clarity afforded to tribal authorities, especially in the realm of conservation. Despite the promulgation of numerous provincial and national statutes

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<sup>375</sup> Anon <https://www.environment.gov.za>.

<sup>376</sup> Anon <http://www.wildlands.co.za>.

<sup>377</sup> Gumbi "Presentation on Somkhanda" 4.

<sup>378</sup> 'Traditional authorities' are known as 'traditional leaders' in the *Traditional Leadership and Governance Framework Act* 41 of 1993 (TLGFA) and are defined in s1 as: any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position, and is recognised in terms of the TLGFA.

prescribing the functions and powers of traditional institutions and authorities,<sup>379</sup> the South African Government has failed to clearly define the roles and powers of traditional authorities.<sup>380</sup> The management issues experienced in the Somkhanda Game Reserve have resulted in the community's not receiving sufficient benefit from the reserve and has therefore led to a negative perception of the community conservation model in the eyes of the local community and in the view of the general public.<sup>381</sup> This lack of support coupled with the financial instability of the reserve has resulted in the plans to introduce additional wildlife into the reserve being put on hold for the foreseeable future.

The Somkhanda Game Reserve is a prime example of continued fragmentation and co-management strategies failing to meet community conservation and land reform goals, indicating the lack of sustainability in respect of community conservation initiatives. Several recommendations relating to South Africa's legal regime will now be discussed with the aim of providing a more equitable and effective balance between community conservation and land reform initiatives. For the purposes of this dissertation, the discussion will provide a broad outline of the areas needing attention and will not provide an in-depth analysis of each aspect.

No single act comprehensively regulates community conservation in South Africa, but several options exist enabling community involvement in conservation initiatives and in particular in protected areas.<sup>382</sup> The South African Government appears to favour community-based conservation, but adopting a one-size-fits-all approach is not practical, as each land claim is unique, warranting a unique approach in each individual case. What is required is the development and implementation of a single, comprehensive programme highlighting the options available to the various parties involved in the community conservation and land reform initiatives. This would enable the parties to choose the most suitable option for the area and community involved. In order to ensure uniformity, the MoA and NCF,<sup>383</sup> which go a long way towards

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<sup>379</sup> These statutes include the *Traditional Leadership and Governance Framework Act* 41 of 1993 and the *Kwazulu Natal Traditional Leadership and Governance Act* 5 of 2005 which have reference in the case of the Somkhanda Game Reserve. For a general discussion on the lack of clarity afforded to traditional authorities in the Constitution see: Williams 2009 *Journal of Southern African Studies* 191 – 209.

<sup>380</sup> Kepe 2008 *Environmental Management* 316.

<sup>381</sup> Critical Ecosystem Partnership Fund *Final Project Completion Report* 1.

<sup>382</sup> See Chapter 2.2.1.2.

<sup>383</sup> See Chapter 6.

reconciling South Africa's land reform and conservation frameworks, would need to be supplemented to reflect all the options available to communities in these circumstances. In addition, these options, once chosen, should not be cast in stone, as the community's needs, resources and skills may change over time.

The second issue identified in this dissertation relates to the role of traditional authorities in community conservation and land reform initiatives.<sup>384</sup> Traditional authorities play an integral role in rural land ownership as they are the institutions which represent the communities. Despite their very large role in these initiatives, no domestic or national legislation has been promulgated providing for the role and functions of traditional authorities in the context of community conservation. This can lead to the abuse of power, as seen in this case study, where the traditional authorities are not acting in the best interest of the community. This has led to the community's negative perception of the community conservation model as a whole. The problem could be remedied by the clarification of the roles and functions of traditional authorities in a comprehensive programme relating to community conservation, taking into account the current problems undermining community conservation initiatives.

The third concern identified in this dissertation is one of management. As can be seen in the case study, management problems can lead to the downfall of community conservation initiatives. One of the problems relating to management is the adoption of the co-management approach, provided for in the NCF, as a preferred option for consolidating land reform and conservation initiatives.<sup>385</sup> The disadvantages associated with the exclusive use of this form of management have already been discussed in this dissertation.<sup>386</sup> These disadvantages could be lessened if we were to move away from the exclusive use of co-management towards the inclusion of other governance options, the choice depending on the requirements of each individual case.<sup>387</sup> In order to do this, new frameworks would need to be developed to clearly define the nature and scope of these governance options to ensure that they are offered the same recognition as co-management. Another problem associated with management in this context is linked to

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<sup>384</sup> See Chapter 3.

<sup>385</sup> See Chapter 6.

<sup>386</sup> See Chapter 6.

<sup>387</sup> For a discussion on the other governance options see Chapter 2.2.2.3.

the previous concern with the role of traditional authorities. As can be seen in the case study, traditional authorities do not always act in the best interests of the communities, and this leads to management problems which lead to larger problems affecting the reserve as a whole. Should the roles of these traditional authorities be clarified, the management problems associated therewith would in all likelihood be reduced.

The final issue identified in this dissertation involves the sustainability of community conservation initiatives. In order for these initiatives to be successful and gain popularity with communities, the sustainability of the livelihoods of the communities needs to be promoted. This can be done by ensuring increased and on-going financial support for the community conservation programmes, as these programmes are very rarely self-sufficient, as can be seen in the case study. Post-settlement support has also been identified in this dissertation as an area in need of reform in order to ensure the sustainability of community conservation and land reform initiatives.<sup>388</sup> The SISS and the CRDP were developed by the DLA and appear to go a long way towards the rectification of the issues arising in the post-settlement phase, but in practice the Government appears to have difficulty in putting these proposals into action. Skills development and transfer from Government to land claimants taking part in community conservation initiatives should be developed and encouraged in order to ensure the success of these initiatives, which often fall short due to the lack of post-settlement support. This post-settlement support should include the community in as many aspects as possible, including the employment of community members in the communally conserved areas where possible.

## **8. Conclusion**

The central issue in this study was whether South African law provides for sustainable community conservation initiatives following the land reform process and if so, the extent to which it provides for these initiatives. In order to answer this question a conceptual and theoretical analysis on land reform,<sup>389</sup> community conservation and sustainability was conducted.<sup>390</sup> The focus then moved to South Africa's legislative

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<sup>388</sup> See Chapter 4.2

<sup>389</sup> See Chapter 2.1.

<sup>390</sup> See Chapter 2.2.

framework, including the constitutional framework,<sup>391</sup> land reform framework,<sup>392</sup> environmental law framework,<sup>393</sup> and the reconciliation of these frameworks.<sup>394</sup> A brief outline of each of these topics will now be provided.

Part 2 of this study focused on a conceptual and theoretical analysis of South Africa's land reform and community conservation initiatives. Firstly South Africa's land reform regime was discussed. In this portion the historical background of the land reform regime<sup>395</sup> as well as South Africa's land reform programme including the restitution of land rights, the redistribution of land, and tenure reform were discussed.<sup>396</sup> The focus was on a specific arm of the land reform programme, namely the restitution of land rights.<sup>397</sup> It was established in this chapter that numerous challenges exist in both the implementation of land restitution initiatives and the stage after the conclusion of these initiatives, where post-settlement support is lacking.<sup>398</sup> Secondly, community conservation and sustainability were discussed, focusing on the types of community conservation initiatives available,<sup>399</sup> community conservation in protected areas,<sup>400</sup> community conservation in South African protected areas,<sup>401</sup> and the sustainability of community conservation initiatives in South Africa.<sup>402</sup> Through this analysis certain terms which are of relevance to this study were defined, such as the meaning of "community", "traditional community", "communal", and "community conservation", and the different forms of community conservation initiatives were defined, namely protected area outreach, collaborative management, and community-based conservation, which is the most common approach used in South Africa. In addition the definition of protected areas according to the IUCN was examined. The IUCN lists six categories of protected areas and provides principles and guidelines for community conservation in these protected areas. In a South African context it was identified that the NEMPAA provides for the establishment and protection of protected areas, which are thought to be

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<sup>391</sup> See Chapter 3.

<sup>392</sup> See Chapter 4.

<sup>393</sup> See Chapter 5.

<sup>394</sup> See Chapter 6.

<sup>395</sup> See Chapter 2.1.1.

<sup>396</sup> See Chapter 2.1.2.

<sup>397</sup> See Chapter 2.1.3.

<sup>398</sup> Zuma 2013 <http://www.timeslive.co.za>.

<sup>399</sup> See Chapter 2.2.1.

<sup>400</sup> See Chapter 2.2.2.

<sup>401</sup> See Chapter 2.2.3.

<sup>402</sup> See Chapter 2.2.4.

valuable conservation tools. The NEMPAA addresses the challenges experienced with the previous legal framework<sup>403</sup> by providing for a more people-centred or anthropocentric approach to conservation, thereby promoting community conservation.<sup>404</sup> In order to establish whether these community conservation initiatives are sustainable the focus turned to the meaning of sustainability in terms of the NEMA, where it was established that in order for an initiative to be sustainable, the environment, social development and economic development must be taken into account.<sup>405</sup>

Having focused on the concept, elements and theoretical background of community conservation and land reform, the study then moved to South Africa's legislative frameworks applicable to community conservation and land reform. This framework was examined and evaluated in chapters 3, 4, 5 and 6 with specific reference to the relationship between community conservation, land reform and sustainability. Both community conservation and land reform initiatives have transformed significantly following South Africa's transition to a constitutional democracy. It is for this reason that the focus of this study was on South Africa's constitutional framework as the base for these regimes.<sup>406</sup> The analysis began with a focus on the rights enshrined in the Constitution which are of relevance to this study, namely the environmental right<sup>407</sup> and the property right,<sup>408</sup> and how these rights form the framework upon which community conservation initiatives and land reform regimes are based. Whilst these rights do provide such a framework, it was established that the Constitution is fairly silent on how these rights may overlap, as in the case of community conservation following the land reform process. The vital role that customary law plays in the South African constitutional state was then examined. This role is acknowledged in numerous sections of the Constitution, where the institution, status and role of traditional leadership, amongst other things, is provided for.<sup>409</sup> The role of traditional leadership in the context

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<sup>403</sup> The previous legal framework followed an exclusionary approach to conservation whereby people were alienated from conservation initiatives.

<sup>404</sup> The people-centred approach to conservation involves local communities in the conservation of protected areas. For a general discussion on this approach see Paterson 2007 *SA Public Law*.

<sup>405</sup> Fuel Retailers of Association of Southern Africa (Pty) Ltd v Director-General Environmental Management Mpumalanga and Others 2007 BCLR 1059 CC and Du Plessis and Brits 2007 SALJ 263.

<sup>406</sup> See Chapter 3.

<sup>407</sup> S24 of the Constitution.

<sup>408</sup> S25 of the Constitution.

<sup>409</sup> S39(3), s211 and s212 of the Constitution.

of community conservation is not clearly defined, however, despite the promulgation of numerous national and provincial statutes prescribing the powers and functions of traditional authorities.

The study then moved to South Africa's land reform framework.<sup>410</sup> In this part of the text South Africa's land reform regime was examined and evaluated with specific reference to the land restitution component. The main focus in this respect was on the RLRA, which provides the framework for the implementation of the restitution process in South Africa. Practical problems which exist in the current land reform regime were identified, such as the implementation of a "one-size-fits-all" approach to community conservation and a widespread failure to implement development plans. In addition it was established that whilst provision is made for numerous stages of the restitution process, the RLRA is silent on many matters relating to the post-settlement phase, resulting in fragmentation of the roles and responsibilities of the CRLR and the DLA. In an attempt to address this problem the DLA developed the SISS and the CRDP, which were then discussed. It was noted that these programmes and strategies appear to go a long way towards addressing the problems that are inclined to arise in the post-settlement phase, but they do not address these issues in their entirety.

South Africa's environmental law framework was then discussed with specific reference to the NEMA, the NEMBA and the NEMPAA.<sup>411</sup> The first statute focussed on was the NEMA, which is a flagship statute providing the framework for South Africa's environmental law programme.<sup>412</sup> The NEMA is of relevance to this study as it makes reference to the general concept of sustainability and public trusteeship, the principles of which represent South Africa's shift to an anthropocentric approach to conservation. The NEMA also provides for cooperative governance in order to secure and promote the protection of a sustainable environment. The problems associated with this form of governance were discussed later on in this dissertation.<sup>413</sup> The study then moved to the NEMBA, which represents a significant revision of South Africa's biodiversity framework.<sup>414</sup> The NEMBA aims at the conservation of biodiversity, the protection of

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<sup>410</sup> See Chapter 4.

<sup>411</sup> See Chapter 5.

<sup>412</sup> See Chapter 5.1.

<sup>413</sup> See Chapter 6.

<sup>414</sup> See Chapter 5.2.

needy species and ecosystems, the sustainable use of biological resources, the equitable sharing of bio-prospecting benefits, and cooperative governance in biodiversity conservation. To achieve these goals the NEMBA provides for a comprehensive planning framework consisting of national biodiversity frameworks, bioregional plans, and biodiversity management plans. This framework provides opportunities for community involvement in biodiversity conservation. The final environmental statute discussed in this dissertation was the NEMPAA, which represents the introduction of an anthropocentric approach to the establishment and management of protected areas.<sup>415</sup> The NEMPAA contains many provisions providing for the implementation of community conservation initiatives, such as the incorporation of communal land into protected areas, the communal management of protected areas, communal access and use of biodiversity within protected areas, and equitable benefit sharing in terms of this use. Each of these provisions was then discussed in detail and it was established that whilst these mechanisms appear good on paper, their practical application in the case of community conservation initiatives following the land reform process seems to be lacking.

After discussing South Africa's constitutional, land reform and environmental law frameworks, it was established that there is a gap in these frameworks which needs to be addressed.<sup>416</sup> Both the land reform and environmental law frameworks have been plagued by fragmentation in the legal and administrative spheres. The Government has made two attempts to consolidate these two frameworks in drafting the MoA and the NCF. The MoA recognises the need for the adoption of a uniform approach to all stages of the restitution process by state agencies, whilst the NCF provides a uniform guideline for the management of land restitution claims in protected areas by means of co-management. This focus on co-management is indicative of the fact that this form of governance has become the only strategy used to consolidate land reform and conservation initiatives. Despite the extensive reliance on this form of governance, it was established that it may be too weak and inadequate a tool to address the problems experienced with the land reform and community conservation process.

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<sup>415</sup> See Chapter 5.3.

<sup>416</sup> See Chapter 6.

In the final part of this study the practical implication of these legal frameworks was discussed with reference to the Somkhanda Game Reserve, and recommendations for the identified shortfalls were provided. In the case study it was established that the continued fragmentation and failure of co-management strategies to meet community conservation and land reform goals indicated a lack of sustainability in respect of community conservation initiatives following the land reform process. It was suggested that in order to provide a more equitable balance between land reform and community conservation initiatives, legislation, strategies and policies need to be developed to incorporate the different types of community conservation available to land claimants in order to avoid a one-size-fits-all approach to community conservation initiatives; the roles and responsibilities of traditional authorities relating to community conservation need to be clarified to ensure that these authorities act in the best interests of the communities; the nature and scope of all of the governance options available need to be defined to ensure that the management problems identified are reduced; and increased financial and post-settlement support needs to be provided to land claimants participating in community conservation initiatives in order to ensure sustainability of these initiatives.

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