



INNOVATIONS FOR SUCCESSFUL SOCIETIES

PUTTING JUSTICE INTO PRACTICE: COMMUNAL LAND TENURE IN EBENHAESER, SOUTH AFRICA, 2012–2017

SYNOPSIS

Following the 1994 transition from racial apartheid to democracy, South Africa's government aimed to provide tenure security for the estimated 16 million black South Africans living in communal areas. But the lack of a clear legal framework applicable to most communal areas meant that progress was slow. In contrast, a viable legal framework did exist to guide tenure reform in smaller communal areas formerly known as “coloured reserves,” where a series of apartheid laws had settled people of mixed race. In 2009, land reform Minister Gugile Nkwiti designated one such area—Ebenhaeser, on the country's west coast—as a rural “flagship” project. The aim was both to transfer land held in trust by the government to Ebenhaeser community members and to settle a restitution claim. Provincial officials from Nkwiti's ministry, working with private consultants, organized a communal association to serve as landowner. They helped negotiate an agreement with white farmers to return land that had originally belonged to coloured residents. The community also developed a land administration plan that would pave the way for Ebenhaeser's residents to become the legal owners of their communal territory.

Leon Schreiber drafted this case study with Professor Grenville Barnes of the University of Florida-Gainesville based on interviews they conducted in the Western Cape, Gauteng, and Eastern Cape provinces of South Africa, in March 2017. Case published May 2017.

INTRODUCTION

At a 2009 press conference, Gugile Nkwiti, South Africa's new land reform minister, acknowledged that the government had a long way to go to secure property rights for millions of black and mixed-race citizens previously dispossessed or blocked by law from owning land.¹ Earlier whites-only apartheid governments had sought to confine 70% to 80% of South Africans to 13% of the country's territory. Even after 15 years of democracy, much of that racial disparity persisted.

Jacob Zuma, who had won the presidency in the 2009 election, had pledged to put more land in the hands of the rural poor during the campaign.² On taking office, he set up a new Ministry of Rural Development and Land Reform and appointed Nkwiti, a former provincial traditional affairs and agriculture minister, to lead it.

Nkwiti had no time to lose. A 2008 report by the respected Institute for Poverty, Land and Agrarian Studies at the University of the Western Cape shone a harsh spotlight on the post-

apartheid government's failure to meet the targets of its own land reform program after the 1994 transition to democracy.³ The report highlighted the lack of progress toward strengthening the tenure rights of the estimated 16 million citizens who lived on communal land in the former blacks-only Bantustans (later known as homelands), as well as in former so-called coloured reserves (the term "coloured" referred to South Africans of mixed-race). It concluded that "little progress was made in the area of communal tenure reform."⁴

Determined to inject fresh momentum into the program, the land reform ministry asked

provincial officials to help identify rural "flagship" projects that could begin right away and produce meaningful results. Michael Worsnip, the chief director for restitution support in the Western Cape province, recalled: "The minister asked me which projects he should prioritize, and without hesitation I said, 'Ebenhaeser.'"

The Ebenhaeser community on South Africa's arid west coast was the Western Cape's biggest tenure reform and restitution project, covering a total of 23,755 hectares. The project had been stalled since the late 1990s. Nkwinti's new land reform ministry set out to turn Ebenhaeser into a success story.

Box 1. Tenure and traditional leadership in the former homelands of the Eastern Cape

It was easier to improve land tenure security in the former coloured reserves of the Western Cape than in homeland areas of the Eastern Cape partly because of the distinct histories of these regions. While most of the country's 23 former coloured-only reserves were located in the Western Cape, the province had none of the 10 communal blacks-only homelands that had existed under apartheid. And because coloured reserves were much smaller than homelands, communal land accounted for only 0.5% of the Western Cape's total land area.¹ In neighboring Eastern Cape, by contrast, communal land covered nearly a third (31%) of the province.²

The apartheid government created reserves like Ebenhaeser in the western half of the country to hold the local Afrikaans-speaking coloured people, who were descended from mixed-race parents as well as from the indigenous Khoisan and Malay slaves. The British colonial government originally created the Eastern Cape's communal homelands, the Ciskei and the Transkei, as reserves for the black isiXhosa speaking people whom the European settlers had encountered in the southeastern part of South Africa.

Owing to the arid natural conditions, the areas designated as coloured reserves were far less populated than the fertile Ciskei and Transkei homelands. Because coloured South Africans enjoyed relatively more freedom of movement than black people under apartheid, many flocked to the urban centers in search of work. The combination of more rapid urbanization and a drier climate drained the coloured reserves of people, while stricter controls on movement and better climatic conditions sustained much higher numbers of people in the homelands.

A further crucial difference was that the colonial and apartheid governments did not recognize traditional leaders in the coloured reserves. However, in homelands such as the Eastern Cape's Ciskei and Transkei, the government actively co-opted the traditional leaders, putting them on the government payroll, and granted them near-total control over land administration.

¹ Author's calculations based on Statistics South Africa, *Census 2011: Provincial Profile, Eastern Cape*, accessed March 13, 2017; <http://www.statssa.gov.za/publications/Report-03-01-71/Report-03-01-712011.pdf>; Department of Rural Development and Land Reform, *A to Z of the Transformation of Certain Rural Areas Act, 1998*, accessed March 13, 2017; <http://www.ruraldevelopment.gov.za/phocadownload/Land-Reform/Land-Reform-Administration/Trancraazrevisedjuly2010.pdf>.

² Author's calculations based on Sally Frankental and Owen B. Sichone, *South Africa's Diverse Peoples*, 2005, page 187; Statistics South Africa, *Census 2011: Provincial Profile, Eastern Cape*, accessed March 13, 2017; <http://www.statssa.gov.za/publications/Report-03-01-71/Report-03-01-712011.pdf>.

THE CHALLENGE

The difficulties confronting officials from the ministry reflected Ebenhaeser's complex history, which was not unlike that of many rural communal areas in South Africa. In the mid-1920s, the apartheid government had earmarked the fertile lands of the lower Olifants River Valley, four hours' drive north of Cape Town, for occupation by white South Africans and built a canal system to support the development of commercial farms. However, a community of mixed race, or coloured, people occupied some of the most fertile lands in the valley, which was surrounded by a semi-desert. (See Textbox 1)

In 1925, the government had evicted the community, resettled its members 30 kilometers down river at the mouth of an estuary, and designated the new settlement, Ebenhaeser, as a

coloured reserve. Sandy soil made the land poor for grazing and agriculture, and the salty water in the estuary was unsuitable for consumption and irrigation because of the Atlantic tide. Under apartheid-era laws, neither the community nor its residents could own any of the 18,288 hectares of the reserve. The national government held the territory in trust, through the Ministry for Coloured Affairs.

Following the country's transition to democracy, the government had enacted the 1998 Transformation of Certain Rural Areas Act, sometimes referred to by its acronym Trancraa, to serve as a guide for transferring land in former coloured reserves such as Ebenhaeser from the national government to the community. But the six-page law established only broad principles, and assigned significant discretionary powers to

Box 2. The history of the Ebenhaeser project

Ebenhaeser topped the list of doable projects for a reason. "The project's history went back to 1996, when the restitution claim was first lodged," said Johnny Slingers, who worked as the deputy director for land reform in the Western Cape for 19 years. In early 2004, it was part of the first attempt to implement tenure reform under Trancraa. A year later, the restitution commission also signed a framework settlement agreement acknowledging the validity of the claim and authorizing an investigation.

But the project ground to a halt by the end of 2005, said David Mayson, one of the land reform consultants who worked on the project. Under the law, the community had to decide who the new owners of the land would be within 18 months. In the end, they couldn't decide before the deadline," Mayson said. "Should it go to the local municipality? Should it go to a communal entity? Or should it be subdivided?"

While the community process deadlocked, the "town section" of Ebenhaeser was promptly transferred to the local Matzikama municipality, which became responsible for delivering basic services. The municipality also began registering and transferring title deeds for urban lots in the town to their occupants, who were members of the Ebenhaeser community.

Community leaders spoke with the local ANC to try to get the process moving again. Shortly after the 2009 general election, local leaders and land reform officials met with two powerful national figures who were from the Western Cape: Derek Hanekom, an ANC member of parliament and former land affairs minister, and Ebrahim Patel, minister of economic development. With the support of ANC heavyweights behind the Ebenhaeser project, the land reform ministry quickly released funding and the process got off the ground.

Minister Nkwinti and community leaders were on the same page. They both wanted an entity controlled by the community to own the land. The provincial restitution commission agreed to speed up work on the land claim while colleagues in the land reform branch drove the tenure reform aspect.

the land reform minister to prioritize projects.⁵ Before Nkwiti's new ministry came together in 2010, none of the 23 former coloured reserves identified in the act had received land. (See Textbox 2)

The legal intricacies did not end there, however. In 1996, two years earlier, a community member named Peter Love had secured help from the Legal Resources Centre, a land-rights NGO, to lodge a claim under the 1994 Restitution of Land Rights Act for the return of some of the farms from which Ebenhaeser's residents had been forcibly relocated in 1925.⁶ (The restitution law enabled any individual or community to submit a restitution claim for land lost between 1913 and 1994 as a result of racially discriminatory legislation.)

"The government initially offered us a cash settlement of 20 million rand (South Africa's currency) back in 1998" (equivalent to about US\$3.6 million at that time), Love said. "But the community rejected that, because they wanted the original land back."

Another complicating factor was that in the decades after the community's relocation the lower Olifants River Valley had become one of South Africa's major commercial wine-grape producing regions, with an annual harvest of 48,000 tons of fruit.⁷

Although South African law gave the government the authority to expropriate land for restitution subject to paying "just and equitable compensation," taking this step was politically sensitive and rarely pursued.⁸ Since 1994, the land reform ministry usually employed a "willing buyer, willing seller" policy. This meant that the restitution commission, which was part of the ministry, had to offer the existing owners fair market value for their properties and persuade them to accept the deal. But it also meant that those owners could potentially hold up the restitution process or demand exorbitant prices for their land.⁹

Worsnip and his team at the Western Cape's land claims commission thus had to negotiate a

deal with the commercial farmers, many of whose farms were worth hundreds of thousands of dollars on the open market, to sell their land to the restitution commission, which would then transfer that property back to the displaced community.

The difficulties were operational as well as legal. Finding a solution required collaboration among many people and several levels of government. Interested parties included Ebenhaeser residents, different parts of the land reform ministry at both national and provincial level, the land registry, the agriculture department, and commercial farmers, as well as the local Matzikama municipality, with a population of about 67,000, including Ebenhaeser's residents.

On top of these challenges, the new land reform ministry also lacked the capacity to lead all aspects of the project itself. Nkwinti recalled, the ministry had "insufficient capacity to administer functions mandated by the constitution, such as proper research and verification of land claims and deal making; information and records management; communication with claimants regarding their claims; and, constantly monitoring the state and functionality of the communal property institutions."¹⁰ The ministry had job vacancy rates of 18% and 23% in its land reform and restitution departments, respectively.¹¹ And both units had important roles to play in the Ebenhaeser project.

The administrative tasks were complex. Working with the community, officials had to survey the land and decide on the most appropriate ways to register the parcels in the deeds registry, and build a system for administering the communal land after Ebenhaeser became the owner. For the land that came to the community as part of the restitution claim, the community would need to draw up business plans for how the residents of Ebenhaeser—many of whom earned less than the poverty rate of 3,500 rand (US\$250) per month—would access capital to manage sophisticated farming operations.

FRAMING A RESPONSE

The first task was to create a forum for coordination and negotiation. Worsnip, the head of the provincial office of the restitution commission, and land reform officials worked together on this step, with the help of consultants they hired.

Henk Smith, an attorney from the Legal Resources Centre, South Africa's largest public interest and human rights law organization, explained that the law regarding coloured communal areas prescribed no clear procedures. "It was wide open, which was a strength, because it could adapt to realities on the ground," he said. (See Textbox 3)

The restitution law also allowed the provincial restitution commission to negotiate between the government and communities during any land reform project. Worsnip, who was appointed to lead the commission in early 2012, found that land reform ministry officials had already created an Ebenhaeser steering committee in 2005. But the committee had made slow progress in bringing Ebenhaeser residents together with other stakeholders.

Worsnip began to chair the steering committee meetings himself in order to improve coordination. A former priest who had founded a land rights NGO in KwaZulu-Natal and worked for the land claims commission as the director for research, he breathed new life into the body.

The project started to take off. Working together with David Mayson, whom the ministry re-appointed as the project's lead consultant in 2012, the committee managed to get key groups to commit to the goals. Meetings included not only Ebenhaeser community representatives but also officials from the restitution commission, the provincial land reform office, various divisions of the Western Cape agriculture department, the

provincial housing department, Cape Nature (the provincial environmental protection agency), the national department of water affairs, the local Matzikama municipality that included the Ebenhaeser community, as well as a number of white commercial farmers and representatives from the local Lutzville Vineyards. (Lutzville was the third largest wine producer by volume in South Africa and purchased almost all the wine grapes produced in the valley).

The steering committee "had all sorts of people who were part of it, and it was a really active committee where everyone could be kept up to speed on what was happening and take joint decisions where necessary," Worsnip said. The group met every six weeks, hosted by the Matzikama municipality at the nearby Vredendal hotel.

Importantly, the committee was able to align the two overarching challenges: restituting the commercial farms back to the community, on the one hand, and giving the community ownership over their existing communal lands through tenure reform, on the other. "Officials working on tenure reform sat together with [the restitution commission], discussing the settlement of the claim and all other aspects of land reform in Ebenhaeser. It was a very useful vehicle to keep it all together," said Ben Mars, a legal adviser for the Western Cape restitution commission. Mayson, the consultant from Phuhlisani Solutions, which focused on land reform and rural development, emphasized: "You couldn't separate the Trancraa land from the restitution land, because they were adjacent to each other. They had to be viewed as one entity."

With a joint forum for coordination and a project plan in place, the hard work of implementation began in mid-2012.

Box 3. The (incomplete) legal basis for communal tenure reform

In selecting Ebenhaeser for its rural flagship project in the Western Cape, land reform officials chose to focus their where the potential for progress was greatest. Despite the lack of precedent for tenure reform projects and the complications introduced by the restitution claim, there was a firm legal basis for transferring land in and around former coloured reserves to their residents.

It was nearly impossible to make meaningful progress on tenure reform in other types of communal areas, such as the former homelands, where there was no law in place, however. The legal void was the result of a ruling by the Constitutional Court on May 11, 2010—exactly one year after the creation of the land reform ministry—that confirmed a lower court decision to strike down the Communal Land Rights Act. Enacted in July 2004 to facilitate tenure reform in the communal areas of the former homelands, the act was never applied.¹

Controversy and legal challenges had dogged the Communal Land rights Act since its inception. Land rights NGOs such as the Legal Resources Centre, as well as representatives of four traditional communities who brought the original court challenge, argued that the act “undermined their security of land tenure because it undercut all the layers of decision-making around land, except that of chiefly power ... [It] gave traditional councils (‘tribal authorities’ under apartheid) wide-ranging powers, including control over the occupation, use and administration of communal land.”² Affected communities also complained that the act reinforced “apartheid-era tribal units” and “rendered the tenure of women more insecure in the same way that colonial and apartheid laws gave rights exclusively to men.”³ However, the courts ultimately ruled the act unconstitutional on the grounds that the process of creating the law had involved inadequate consultation.⁴

The new land ministry suddenly found it had no legal basis for undertaking communal tenure reform outside of the 23 former coloured reserves. Taken together, these 23 areas amounted to only 1% of the 17.2 million hectares of communal land in the country.⁵

The government’s failure to replace the communal land act with a new law that was consistent with the constitution was a painful blow to the country’s most vulnerable citizens. More than 90% of South Africa’s poorest municipal regions (known as wards) were located in former homelands, while more than 73% of former homeland residents earned less than 604 rand (\$47) per month, compared with 46% for the rest of South Africa.⁶

¹ Republic of South Africa, *Communal Land Rights Act, No. 11 of 2004*, July 20, 2004, accessed February 22, 2017;

<http://www.customcontested.co.za/wp-content/uploads/2013/03/CLaRA-2004.pdf>.

² “Communal Land Rights Act (CLaRA),” *Custom Contested*, accessed February 22, 2017; <http://www.customcontested.co.za/laws-and-policies/communal-land-rights-act-clara/>.

³ Yolandi Groenewald, “New land Act like apartheid,” *Mail & Guardian*, October 23, 2008, accessed February 22, 2017;

<http://mg.co.za/article/2008-10-23-new-land-act-like-apartheid>.

⁴ *Stephen Segopotso Tongoane and Others v Minister for Agriculture and Land Affairs*

and Others, *Constitutional Court of South Africa*, South African Legal Information Institute, May 11, 2010, accessed February 22, 2017;

<http://www.saflii.org/za/cases/ZACC/2010/10.html>.

⁵ *The Distribution of Land in South Africa: An Overview*, Institute for Poverty, Land and Agrarian Studies, University of the Western Cape, accessed February 23, 2017; <http://www.plaas.org.za/sites/default/files/publications-pdf/No1%20Fact%20check%20web.pdf>.

⁶ Michael Noble, Wanga Zemba and Gemma Wright, “Poverty may have declined, but deprivation and poverty are still worst in the former homelands,” *Econ3x3*, May 27, 2014, accessed February 23, 2017; <http://www.econ3x3.org/article/poverty-may-have-declined-deprivation-and-poverty-are-still-worst-former-homelands>.

GETTING DOWN TO WORK

Together, the committee had to create a democratic entity to define the legitimate participants of the project, represent the Ebenhaeser community during meetings with land reform officials, and become the legal landholding entity. It also had to determine the precise parameters of the restitution claim and communal land, and then work to settle the restitution claim, formalize ownership, and create a land use plan for how the Ebenhaeser community would manage its communal land going forward. Several of these steps proceeded simultaneously.

Empowering the community

The first step was to ensure that the Ebenhaeser community itself had a significant and legitimate role in negotiations and decision making. Although local leaders, including Peter Love, had represented Ebenhaeser informally during meetings, it was important to create an organization that could officially act on behalf of the community and elect its members democratically.

In addition to establishing an elected leadership structure, this new body—known as a communal property association, or CPA—also would serve as the legal owner of land acquired through restitution as well as tenure reform. The purpose of the Communal Property Associations Act, promulgated in 1996, was to “enable communities to form juristic persons...in order to acquire, hold and manage property on a basis agreed to by members of a community in terms of a written constitution.”¹² Although CPAs had been widely used for land restitution cases since the mid-1990s, land-reform officials like Mayson were aware that infighting often undermined the associations’ ability to use its land productively.¹³

The task of dealing with sensitive local political matters, including tensions between community leaders aligned with the ANC and those of the opposition Democratic Alliance party, fell to Mayson, the consultant. According to Worsnip, “Mayson was worth his weight in

gold. He personally had community connections that nobody else had [based on previous work in the community during the early 2000s], and because of his measured personality, he was able to pull things together like nobody else could.”

In contrast to communal areas in the former homelands, Ebenhaeser’s residents did not live under a system of traditional leadership. David Smit, a land restitution official, described it as a “cohesive” community with a group of dedicated informal local leaders who were determined to see the land reform project implemented. “Unlike in some other cases, it was luckily a community where there was a common understanding that this was one unified community,” he said. “That part made it a little easier.”

A key prerequisite for creating the CPA was to specify, in a written constitution, who the members of the Ebenhaeser community were, as this step ultimately determined who would benefit from the tenure reform and restitution processes.

“The fundamental issue was that no community is stagnant over time,” Smit said. “In some cases, people who weren’t currently staying there still regarded themselves as part of the community.” He added that Ebenhaeser learned from the experience of the Elandskloof community, about 250 kilometers distant, which was the first restitution claim in post-apartheid South Africa. “There, people who lived in Cape Town would show up to vote during meetings of the CPA. When they left, the people who actually lived there had to deal with the consequences,” he said.

After a series of negotiations with the steering committee and communitywide meetings facilitated by Mayson, residents decided through a vote that only people who were living in Ebenhaeser at the time would be included on the beneficiary list. Following the agreement, representatives of the ministry visited each of the community’s 800 households—2,100 people in late 2012. (Most of Ebenhaeser’s residents lived on the communal land in a cluster of houses that constituted a “town section”). “We were able to

verify each address, and it included both homeowners and people paying rent,” Smit said.

The final CPA constitution was written in Afrikaans, the primary language of 97% of Ebenhaeser’s inhabitants.¹⁴ It declared that anyone who was older than 18 qualified for membership in the CPA if “regularly resident in *and* committed to the community.” The document specified that regular residence involved “the place where a person physically settled her or himself, from where she or he is only temporarily absent for work, study, illness or holiday. If someone is absent for work for longer than a year, they are not regarded as ‘regularly resident.’”¹⁵

The final constitution also allowed the CPA management committee to grant membership to individuals from outside the community, on the condition that the individuals “had proven their willingness to make a valuable contribution to the business of the association and the welfare of its members.”¹⁶ Using the information from the earlier survey and based on the constitution’s definition, Smit compiled a list that contained the name and national identity number of every CPA member, each of whom received a membership certificate. The membership list was attached as an annex to the constitution.

Residents also decided to provide a once-off payment of 7,500 rand (about US\$570) to all residents older than 60 on the date of the restitution claim’s finalization. Smit explained the logic: “The idea was that older people wouldn’t benefit the same as other people, as the benefits of land reform would accrue over a period of time.” Since the lifetime stream of benefits would be lower for older people, residents decided that it would be fair to provide them with a portion of the settlement in cash. To finance the cash tradeoff, the community voted to remove a portion of commercial farmland from the restitution claim.

The constitution also set up a management committee to run the day-to-day affairs of the association. It provided for a minimum of nine and a maximum of 17 members, four of whom

had to be women and two of whom had to be younger than 30.¹⁷ The community would elect 15 members, while the Matzikama municipality and the national land reform ministry would each appoint one.

Through a community referendum, residents adopted the final constitution in late 2013.

For the association’s first election, conducted in early March 2014, the community was divided into seven wards, each of which would elect two committee members to four-year terms. On the day of the election, Mayson as well as Johnny Slingers, deputy director for land reform in the Western Cape, and his colleagues from the provincial land reform office distributed ballot papers to everyone on the membership list and oversaw the election process.

The initial committee members had the option to seek reelection once. The association’s constitution called for elections every two years, with half the seats up at any given time. On March 19, 2014, after the land reform ministry signed off on the fairness of the electoral process, Ebenhaeser’s communal property association registered with the ministry.

Investigating the restitution claim

The ministry’s newfound political commitment to resolving the restitution claim—first filed in 1996—spurred action. Worsnip’s commission first required Ebenhaeser to submit a Community Development and Land Acquisition Plan, in line with the commission’s mandate to empower claimants to make productive use of the restitution land.

“[With 800 total households in Ebenhaeser], we were talking about a substantial number of people and large tracts of commercial land that was going to be released,” Smit explained. “So we needed them to submit a business plan to ensure that we increase productivity. [A few years down the line,] nobody should be able to say, ‘You spent all this money, but there’s nothing going on and the claimants are worse off.’”

Mayson and EcoAfrica Environmental Consultants, a Cape Town-based firm, worked

with the community to develop the plan over an 18-month period. The first step was to prepare options and scenarios based on the views of community members and data about the location's physical and economic setting. Using the feedback from community forums, together with a survey that covered 80% of the households in Ebenhaeser, the consultants then prepared a draft plan, which community groups reviewed between May and September 2013. (Mayson explained that the survey missed 20% of households "because the occupants were not home at the time. There was no refusal to participate.")

In October 2013, Ebenhaeser residents adopted the final version of the plan during a community meeting. In the document, the community sought a total of 5,467 hectares of farmland—of which 1,606 hectares were on 53 privately-owned commercial farms. The national government held the remaining 3,861 hectares. (This land was in addition to the existing 18,288 hectares of communal land that the community would own.)

In addition to detailing the land claim, the plan also proposed to establish a development trust "to be the operational arm of the affairs of the community and to address the developmental aspects in the community."¹⁸ The trust, which was a limited liability corporation based on the U.S. model, would manage commercial farms obtained through the restitution process on behalf of the CPA. The trust would have five members that were elected by the community, two of whom were not allowed to be members of the CPA.

The plan called for trustees with "a variety of skills and experience... On the one hand, there must be trustees that have a good understanding of the issues in the community... On the other hand, there must be trustees who are technically capable and have an understanding of financial matters, of business, of commercial agriculture, of the wine market and the structure of the international wine industry. The trustees must all be persons of high integrity and an excellent sense of fairness."¹⁹ In order to register with the

government through a branch of the High Court, the trust also had to adhere to strict financial management requirements. In essence, the trust was a mechanism to inject skills into the project and to protect the financial interests of the community.

Importantly, the plan included a request for financial support from the ministry. The document noted that "the acquisition of these farms without the necessary additional capital for operational needs, for the acquisition of machinery, equipment and for additional infrastructure needed to run the farms acquired, is tantamount to setting the newly established businesses up for failure."²⁰ In response, the plan "provides that over and above the funds made available for the acquisition of the land, a support (or recapitalization) fund [should be] established which is used proportionately for these purposes."²¹

Based on data from Vinpro, South Africa's largest association of wine producers, the request called for the ministry to provide a total of 121 million rand (\$9.6 million) in upfront support funding over a period of three years.²²

While the community development plan was taking shape, the provincial restitution commission researched the validity and accuracy of the original 1996 claim Ebenhaeser residents had filed. Smit said that, compared to many other claims, "it actually wasn't such a difficult case to research." The existence of extensive historical land ownership records in South Africa's well-established system of surveying and deeds registration played a decisive role.

In the provincial deeds office, located in Cape Town, "we found the property description for who owned the land before 1925," Smit recalled. "We also tracked down the original legislation which declared that the Ebenhaeser community had to be relocated. So all the documentation was there."

The commission found that Ebenhaeser's forebears, mixed-race members of the Rhenish Missionary Society, had the right to reside on and graze the fertile land in the valley under a Crown

Land Deed issued by the government of the then British-ruled Cape Colony in 1837. The Van Rhynsdorp Exchange of Land Act 14 of 1925, passed by the parliament of what had become the Union of South Africa, ordered that 3,168 hectares of the land occupied by Ebenhaeser should become part of a farming plan designed to aid poor white people. That was when the government evicted the community's residents.

In 2014, Worsnip's commission ruled in favor of the claimants. Smit said that an important factor in the commission's decision was the racially discriminatory legal context. "They didn't have any choice but to accept their removal [from fertile land to inferior land]. It was 1925—it wasn't like they could say no. They just had to move." When the land exchange originally took place, the community received no financial compensation to make up for the difference in the quality of their lands.

Negotiating and settling the restitution claim

The commission's next move was to try to negotiate a settlement between the community and the 53 white commercial farmers whose lands were under claim. Importantly, the existence of the well-functioning steering committee meant that the farmers who regularly attended the meetings were continually kept abreast of the commission's findings. Smith, of the Legal Resources Centre, recalled that there initially was a cooperative atmosphere in the meetings and that many farmers accepted the concept of restitution.

But by late 2013, Worsnip said, the mood began to change as Ebenhaeser's representatives took a hard-line stance during negotiations. "You had the community that was so incredibly unbending in its view" that its members did not want a cash settlement in cases where white farmers refused to sell their land, he said. "It had to be all or nothing"—the community wanted all their land back. When some of the commercial farmers argued that the inferior land to which Ebenhaeser residents had been moved in 1925 should be taken into account when calculating the

extent of the restitution settlement, "the community representatives got upset and didn't want to hear anything about it," Worsnip recalled. On the other hand, "there were some [white] farmers who didn't really believe the claim could be in their interest at any level," he added.

The deteriorating relationship came to a head during a meeting between Worsnip and some commercial farmers on December 6, 2013. "[Former President Nelson] Mandela had just died, so we had two minutes of silence for him," Worsnip said. "Afterwards, I just let them have it. I asked, 'Tell me what Mandela stood for? Do you think it is really possible that things can just stay the same? That we can just carry on like normal?' There was this shocked silence." About half the farmers formed an opposition group and threatened to take the restitution commission to court.

The commission eventually persuaded 22 farmers to become "willing sellers." On June 13, 2015, almost two decades after the original claim was filed, Nkwinti, the minister, attended a ceremony in Ebenhaeser and signed a 350 million rand (\$26 million) settlement agreement with the CPA. In addition to promising to transfer 1,919 hectares of government-owned land (down from 3,861 hectares in the original claim), the agreement committed the ministry to use a portion of the \$26 million to buy and transfer 44 commercial farms covering 1,566 hectares to the community (down from the original claim's 53 farms covering 1,606 hectares).²³

While 22 farmers agreed to sell their land, the remaining 22 decided to challenge the validity of the claim in court. Under the willing buyer-willing seller model, the landowners had the right to refuse to sell their land.²⁴ And, while nothing in the country's constitution prevented the government from expropriating land with fair compensation when it was "in the public interest," this exercise of government power was a controversial option that was rarely used.²⁵

The group of farmers who opposed the claim argued that the commission should have

assigned greater significance to the fact that the Ebenhaeser community had received compensatory land as part of their move in 1925, even if the quality was inferior to their original land and the transaction took place without their consent. Worsnip said that, “[Although] I’m absolutely sure that it was a just claim and that it was quite right that the community should get recompense for what they lost ... I think the farmers actually have a point, legally speaking.” From Smit’s point of view, “the only thing that could happen as a result of the case is that the court says we must reduce the size of the restitution land somewhat, because the [initial] exchange of land itself was obviously not fair.”

In early 2017, the case remained in the hands of the land claims court.

Formalizing ownership via the land registry

Despite the pushback from half of the affected commercial farmers, the ministry moved to start purchasing farms from the 22 willing sellers. But in order to legally register the land in the name of the CPA, the ministry had to work closely with the Western Cape Surveyor-General and Registrar of Deeds, located in Cape Town.

The country had a well-developed land registration system with clear rules for how land should be transferred. The land reform ministry undertook to purchase nine out of the 22 available farms, and the transfer process started after a farmer formally accepted the ministry’s purchase offer.

John Obree, the former Surveyor-General for the Western Cape, explained, “The cadastral process is made up of four different elements, the first of which is for a private surveyor to ensure that the land has been correctly surveyed and to prepare a diagram for the registration of that parcel.” The survey process benefited from the existence of a national control framework developed in the 1800s, which meant that most property boundaries were referenced to a national coordinate system. By using the descriptions and coordinates on old survey diagrams, surveyors could easily locate and confirm the boundaries of

any land parcel in South Africa. In the case of Ebenhaeser, the nine farms earmarked for transfer already had official survey diagrams, held in the Surveyor-General’s Cape Town office.

After confirming the accuracy of the property boundaries, the Surveyor-General’s office sent the diagrams to the deeds office. Coordination between the two registration agencies functioned smoothly. “The Cape Town land registry is the oldest in the country—the Surveyor-General and the deeds office have been in the same building for over 100 years,” Obree said.

In the third step of the transfer and registration process, the land reform ministry hired a private conveyancing lawyer, who was legally responsible for ensuring that the new deeds contained all applicable conditions, that illegal conditions (such as those based on racial discrimination) were removed, and that all transfer duties and taxes were paid (See Textbox 4).

After confirming that the government had paid the first nine out of 22 farmers who had agreed to sell their land, the conveyancer submitted the deeds to the deeds office. The Registrar of Deeds then checked and registered the property in the name of the new Ebenhaeser CPA.

According to George Tsotetsi, the head of legal support in the office of the Chief Registrar, the cadastral system “is based on the principle that the state cannot be both player and referee.” Private surveyors and conveyancers were legally liable for any mistakes on the survey diagrams or deeds, with the government’s role limited to verifying compliance. Tsotetsi credited this separation for “South Africa having one of the world’s best land registries” when it came to registering freehold tenure. He said 994,566 deeds were registered in 2015-16²⁶, “and it was only once in a blue moon that they were challenged.” The Registrar of Deeds was also entirely self-funding, and used a sliding scale in determining the prices for its services to ensure that fees were not excessive.

At the end of the process, in December 2016, the Ebenhaeser CPA obtained the title deeds for

Box 4. South Africa's unique land registration system

South Africa's novel land registration system melded parts of the "registration of title" system (found Australia and parts of Europe) with the classic "registration of deeds" system found in the United States and many other countries around the world.

The key question in any registration system is how title is proved. A registration of deeds system achieves this goal by tracking back through previous deeds to establish what is known as a "chain of title." In some countries, the chain is traced back to the origin of the parcel (the grant of land from the government to the first owner), but some jurisdictions reduce the search requirement to a fixed timeframe. For example, in Florida and many other U.S. states, the requirement is 30 years.

By contrast, in a registration of title system, title holders' names are on a single register and are updated as new transactions occur. Retrospective searches are not necessary, except when land is brought onto the registration system for the first time. Title is simply established by identifying the most recent owner on the property register.

At the time of the Ebenhaeser project, the South African system used deeds, but instead of requiring a search to prove title the most recent "active" deed was regarded as sufficient proof. Private attorneys, with additional qualifications as conveyancers, were responsible for checking that the new deed was consistent with the terms of the previous deed.

South African deeds consisted of a legal and a spatial component. The legal part, drawn up by conveyancers, defined the parties to the transaction, the rights being transferred, and other contractual requirements such as terms of execution and delivery.

The spatial component, known as a diagram, was usually created by a private land surveyor and established the parcel boundaries (including coordinates, distances, and azimuths) as well as a description of the physical corner monuments, known as beacons. The diagram, once approved by the Surveyor-General's office, was collated with the legal component of the deed, and from that point onward became an integral part of the deed. The deeds office (usually at the provincial level) then examined and recorded the document, in effect providing public notice of the transaction.

George Tsotetsi, the head of legal support in the office of the Chief Registrar of Deeds in Pretoria, called South Africa's unique hybrid system "one of the world's best land registries."

However accurate and efficient it was, the system nonetheless focused almost entirely on individual freehold tenure, not on communal tenure. If South Africa successfully met the challenge of recording communal land, it would provide a model for other countries in Africa, where an estimated 70% of the land remained unregistered.

the first nine commercial wine farms. In accordance with the community development plan, the CPA began renting out the land to the Ebenhaeser Development Trust to manage the farms and turn the justice of restitution into an economic payoff for the community.

Creating a land use management system

Although the development plan served as a roadmap for how the property association and the trust would run the commercial farms, CPA leaders wanted to have a detailed land use

management plan to guide allocation of use rights in the communal areas. They also insisted on developing this second plan before they were willing to take ownership. Love explained that the CPA learned from the example of Mamre, a community about 300 kilometers south of Ebenhaeser, which had not decided how to allocate use rights before assuming ownership and had quickly collapsed.

Allocating use rights was a multi-stage process. Mayson explained that, in Ebenhaeser, "first of all, we had to do a land rights enquiry to

determine who currently had which rights to the communal land.” Although the community used most of the land for grazing, there were 153 parcels that individual farmers tended. Following the community’s resettlement in 1925, the local district council had allocated the two hectare sized, irrigated plots to 153 coloured men in

Ebenhaeser. Problems emerged after 1925 when the original beneficiaries began transferring their rights without officially registering those transactions with the local government.

“Ebenhaeser had every conceivable complication you could have,” said Roger Chennells, a lawyer and conflict resolution expert hired by the CPA to help establish who had legitimate rights to the 153 individual plots. “Over the years, for example, people had died, gotten married, had favorites who got the land, had mistresses, or someone had gone fishing and leased out the land. But then the lessee farmed so well that they started thinking the land was theirs, and they acted like they owned it.”

Chennells held a series of hearings at which he attempted to resolve disputes by melding statutory and customary law. “It was a bit like trying to be Solomon,” he said. “But that’s what you have to do if you’re a government: You have to make tough decisions which you can justify.” Although the majority of the complainants accepted Chennells’ decisions, “there were about 20 people who were probably still unhappy at the end. But the important thing is that the CPA was the one who asked me to make the rulings, so that gave the process a lot of authority,” he said.

Mayson next assembled the results of this process with details on use of communal grazing lands, experts’ assessments on archeological and botanical findings on the communal land, a report by CapeNature on a potential estuary conservancy area, and a proposal from the provincial agriculture department for a new irrigation system. This report provided the basis for developing the land administration plan.

Over a period of nine months, the CPA invited Ebenhaeser residents to a series of

meetings to discuss a draft. The final version had several key provisions.

The plan called for all CPA members who held a right to one of the 153 plots to receive freehold title deeds. (The holder of a freehold title became the outright owner of a piece of land in perpetuity, or until he or she decided to sell.)

This provision did not mean automatic ability to sell the land to any willing buyer, however. The plan also stipulated that during the initial ten years, the deeds would restrict transfer of the land, permitting only transfer to a member of the CPA, or to the CPA itself. Such a sale would not include the water usage rights, which the CPA would own. After the ten year moratorium, a resident could sell land on the open market (including to non-residents) if individual community members and the CPA both refused to buy the parcel. The open market sale would include both the land and the water use rights.

Further, the plan proposed to convert additional parcels of communal land into new two-hectare plots. CPA members who did not currently have access to the 153 individual plots could apply and obtain title once they had proven themselves to be capable farmers.²⁷

The idea was that the farmers could use this new freehold title to access financing. The aim was to persuade the banks that “this is a much stronger right than the old ‘permission to occupy,’” Mayson said. “Even though the land cannot be [transferred] on the open market, the bank could force a sale within the community. This means they can provide some small loans to the landowner.” The ability to secure loans from banks was, in theory, important for boosting investment and development.

In accordance with national Trancraa legislation, the Matzikama municipality, the relevant local government authority, transferred title deeds to the houses of the 60% of Ebenhaeser’s residents who lived in the formally-declared “town section” of Ebenhaeser. The land use plan resolved that other densely-populated sections of the communal land should be

declared part of the town, so that the owners in those areas also could obtain title deeds too.²⁸

The land use plan also called for resizing the areas used for grazing (known as “camps”) and limiting the number of small livestock to 13 per rights holder. (The community’s total grazing land encompassed 16,726 hectares that was divided into eight large camps that were in-turn subdivided into at least four camps each to allow for rotational grazing.) Because the soil and vegetation were in a poor condition from decades of overgrazing, the plan denied grazing rights to anyone who was not a member of the CPA.

Residents who had access to communal grazing land would be required to pay a monthly fee to the CPA to cover the cost of maintaining infrastructure (such as roads and fences) and providing medicine for the animals. (Because diseases could easily spread on communal land when one farmer failed to treat a sick animal, the CPA assumed responsibility for providing medicine). Going forward, the grazing lands would be administered by an elected land manager and camp coordinators.²⁹

Finally, the plan resolved that, as the entity responsible for administering land allocation, the CPA would set up a system for recording land use information. The registry would include detailed information about each land portion and allow the CPA executive committee and community members to access information on the location of the difference parcels, who currently has which rights, as well as information about any outstanding fees.³⁰

Although an initial community meeting during March 2017 failed to reach the attendance quorum necessary to formally adopt the plan, Mark Mannel from the development trust was hopeful that the plan would be approved during a subsequent meeting in mid 2017.

OVERCOMING POST-RESTITUTION OBSTACLES

By early 2017, the Ebenhaeser project had made significant progress since the 2012 project start date, breaking years of deadlock. With

established vineyards on the restitution farms, the Ebenhaeser trust planned to continue producing wine grapes. But soon after the first farms were transferred to the CPA, promised national financial support failed to materialize, casting doubt on the ability of the developmental trust to manage the nine commercial wine farms productively.

As part of the \$26 million settlement agreement, the land reform ministry had pledged in excess of \$7 million to enable the CPA to use the land productively by providing money for salaries and supplying tractors, pickup trucks, and other equipment. “We soon found that it was incredibly difficult to access those funds,” said Mark Mannel, the head of the Ebenhaeser Development Trust, which was responsible for operating the farms.³¹

Under the settlement agreement, the farms would receive some initial assistance to become profitable enterprises, drawing on help from the land reform ministry’s Recapitalization and Development Program, called Recap. The program began in November 2010, when Nkwinti, the minister, acknowledged that, of the 5.9 million hectares of commercial farmland the country had redistributed at that point, “90% of [the farm enterprises on that land] are not functional; they are not productive.”³² Recap responded to the collapse of redistributed farms by providing “black emerging farmers with the social and economic infrastructure and basic resources required to run successful agricultural business.”³³ Decisions about how to administer Recap funding were made at the highest level in the national land reform ministry.³⁴

But getting the timing and sequencing right proved difficult. According to Mayson, “our position during the negotiations around the settlement agreement was that the Recap money should be made available three months before any commercial land is transferred. When the ministry wouldn’t go for that, we tried to get the funds released concurrently.” However, the ministry rejected both proposals because the Recap policy determined that funds could be

made available only to beneficiaries who already owned land. In practice, this meant that the money allocated to post-settlement support in the settlement agreement was not guaranteed—the community would have to apply for Recap funding anew after the CPA became the landowner. The result, Mayson said, was that “the CPA got those [first nine] farms without having a single cent in their bank account.”

After the December 2016 transfer of the farms, the trust immediately presented their business plan and request for Recap funding. “But that was our only opportunity to personally present and defend our business plan,” Mannel said. As the plan made its way up the bureaucratic ladder, a succession of officials modified it. “The result was that they made decisions about what Ebenhaeser needed without getting direct input from us,” Mannel said.

Love said “it all slowed to a crawl due to bureaucratic red tape.” One example was a rule that Recap would not fund the purchase of tractors, ploughs and other tools older than five years. This meant that when some of the nine farmers who sold their farms to the CPA offered to include their implements in the sale—which were specifically customized to suit their farms—the ministry refused.

Mark Mannel added that applying for credit from a commercial bank was not yet an option. “At the moment, the Ebenhaeser Development Trust’s rules understandably prohibit the trustees from using the newly obtained land as collateral, because we cannot put the community’s property at risk. We did, however, try to get a small loan using the upcoming harvest as collateral, but the banks said no. They were only willing to accept the land as collateral.” By early 2017, with very little money flowing from Recap, the Ebenhaeser trust had to find a way to manage its first harvest.

Dirk Trotskie, an agricultural economist and director for business planning and strategy at the Western Cape’s agriculture department, pointed to the urgency of the situation: “A farm is a biological system. You can’t just switch it off and wait for the transfer [of Recap funding] to

happen.” In addition to a lack of capital, Trotskie said the CPA “is still in the process of developing the capacity to manage a business of this magnitude with reference to things like water usage and supplier contracts right away.”

In order to prevent disaster, the trust entered into a short-term agreement with other commercial farmers in the region to assist with the summer 2017 harvest in exchange for a share of the income generated by the sale of the produce. “The fact that they haven’t yet lost all the crops on those farms is entirely due to the resilience of the community,” Mayson said.

Mogale Sebopetsa, the Western Cape’s chief director for farmer support and development, explained that the provincial agriculture department attempted to fill some of the shortfall.

In response to the problems with the national government’s post-settlement support, the provincial department launched its own agriculture support program in 2009, which was based on a partnership with the private sector called the “commodity approach.” Sebopetsa explained that, through the program, Ebenhaeser’s farmers would be incorporated and assisted through a regional commodity committee. The committee “brings together the government, the new farmers, and existing private-sector farmers who farm with the same commodities. They then sit together and, with funding from the department and guided by the department’s terms of reference, decide on what projects are funded. The commercial farmers also provide mentoring and facilitate linkages to markets, which is crucial for success” Sebopetsa said.

Sarlon Mannel summarized the impact on the community of the failure to provide immediate post-settlement support: “When the government signed this agreement, they knew that we needed support. We had submitted comprehensive plans. And they told us that we were a flagship. But we don’t feel like a flagship now; we feel more like the Titanic. How are we supposed to keep this ship afloat when we can’t plug all the holes?”

The efforts to adapt at the local and provincial level might help, but the project's success continued to hinge partly on expediting the promised support from the ministry to help build skills and develop the capital and networks to run the farms profitably.

ASSESSING RESULTS

By March 2017, the Ebenhaeser project had made significant headway in restoring the community's ownership rights over both historical and communal lands. The development trust was busy harvesting wine grapes on its nine commercial farms. According to the settlement agreement, another 35 farms were scheduled to be transferred to the CPA. But the court case brought by 22 commercial farmers held up the process.

Defining and creating the CPA had also provided Ebenhaeser's 2,100 residents with a democratically constituted and legally registered entity to be the communal landowner. With strong management, the CPA was ideally positioned to serve as a vehicle for ensuring that every community member had a say over how their shared lands were managed—an ability that they did not enjoy for at least eight decades.

In its determination to avoid the mistakes made by other communities that obtained ownership over communal lands formerly designated as coloured reserves, the Ebenhaeser community also developed a detailed land use management plan to formalize the process of allocating land use rights on communal land before they assumed formal ownership. After decades of off-register transactions that generated significant conflict in the community, the land rights inquiry that Mayson and Chennells led identified who had access to which irrigated plots.

A further milestone of the process was the signing of the restitution settlement agreement. After years of slow progress, under Worsnip's leadership and with political support the restitution commission was able to get the

process moving by ruling on the legitimacy of the claim. The resulting \$26 million settlement agreement provided the community with a legally enforceable commitment from the government that they would restore the CPA's ownership over the 44 identified commercial farms in the lower Olifants River Valley.

But the decision by 22 affected farmers to challenge the decision in court introduced renewed uncertainty to the project, as did the lack of adequate start-up capital for the new landowners.

While the ministry's flagship Ebenhaeser project demonstrated its commitment to speeding up tenure reform, the disconnect between the process of securing land ownership and post-settlement support threatened overall success in boosting prosperity.

REFLECTIONS

Despite the threat posed by the lack of post-settlement support, by early 2017, Ebenhaeser held the most promise for success of any communal tenure reform project pursued by the South African government since the arrival of democracy in 1994. When viewed in a national context, however, the project highlighted a number of serious obstacles that stood in the way of expanding the Ebenhaeser approach into other communal areas, including the former homelands, which accounted for 99% of South Africa's 17.2 million hectares of communal lands.³⁵

Ebenhaeser highlighted the desperate need for further legal reform in other communal areas, however. The 1998 Transformation of Certain Rural Areas Act was a crucial pre-condition for the project. Similar progress in the former homelands depended on replacing the Communal Land Rights Act, which was struck down in 2010, with a new law that provided clear guidance for how rural communities in the former homelands could obtain greater tenure security.

The complexity created by the 153 individual plots that existed on communal land in Ebenhaeser further illustrated the need for the land reform ministry to consider creating a new

form of title specifically designed for communal areas. While the South African land registration system generally was held in high regard for its ability to register and protect individual freehold ownership rights, “the country didn’t have any tenure options other than freehold ownership and leases, which the [Ebenhaeser] CPA didn’t have the capacity to manage,” explained David Mayson, a consultant from Phuhlisani Solutions who worked closely with the CPA. In the absence of a communal tenure form that could be registered in

the deeds office, “we attached conditions to the [freehold] title deeds for the 153 plots as a way to work around that” void, Mayson said.

The lack of a legal framework for communal reform, as well as the need for the land reform ministry to introduce new forms of legally recognized communal tenure, highlighted the urgent need for lawmakers and policymakers to go back to the drawing board to design a land administration system capable of putting justice into practice.

EPILOGUE

ROADBLOCKS TO REFORM IN THE RURAL EASTERN CAPE

By 2017, only two of the 23 former coloured reserves (Ebenhaeser and Mamre, in the Western Cape) had benefited from meaningful tenure upgrading efforts. But the government’s track record was even more dismal in the former homelands, which accounted for 99% of the country’s communal land.³⁶ The question was whether the Ebenhaeser model held promise in these areas—and was politically feasible.

The former homelands of the Eastern Cape offered a microcosm of the land tenure challenges in other parts of the country. After apartheid was introduced in 1948, the government formally established homelands for the region’s Xhosa people: the Ciskei and Transkei (the names respectively referred to “this side of the Kei River” and “that side of the Kei River”). As part of a doctrine of separate development, the South African government declared the Transkei a quasi-independent territory in 1976. It did the same in the Ciskei five years later.³⁷ While the South African government held the land in trust, it incorporated local chiefs and headmen as salaried employees to make decisions over land allocation and exercise control over homeland populations.

According to Lungisile Ntsebeza from the University of Cape Town, the system “gave both chiefs and headmen enormous powers at the local

level, the main powers being land administrative and judicial powers ... [Traditional leaders] became extended arms of the apartheid state...”³⁸ In cases where traditional leaders refused to conform to the wishes of the apartheid government, it had the power to create and impose new “traditional leaders” on local communities.³⁹ No rural person living in a homeland could obtain a “permission to occupy” document without the approval of the tribal authority.⁴⁰

Given the ANC’s emphasis on bringing an end to this system of indirect rule and the fact that about a third of the country’s population resided in the former homelands, there was “an expectation that dismantling the [homelands] would be central to a post-apartheid South African project,” said Ntsebeza.⁴¹ At the height of the anti-apartheid struggle during the mid-1980s, the ANC-aligned United Democratic Movement had declared, “Chiefs must go, and the people must run the villages.”⁴²

After coming to power in 1994, the ANC government initially tackled the project of tenure reform on communal lands with zeal. It adopted an Interim Protection of Land Rights Act in 1996 to defend informal occupation rights, and two years later passed the Transformation of Certain Rural Areas Act to guide the process of

transferring land ownership to coloured communities. A legal framework that would guide tenure reform in the former homelands did not seem far off.

But by the early 2000s the government had shifted gears. Instead of expanding the legal framework to dismantle the artificial powers of traditional leaders over land administration and allocation, the land affairs ministry had taken systematic steps to reinforce the positions of traditional leaders—sometimes in direct contravention of the country’s newly adopted democratic constitution.

Mazibuko Jara, an activist and executive director of Ntinga Ntaba ka Ndoda, an NGO that worked on land rights in the Keiskammahoe region of the former Ciskei homeland in the Eastern Cape, ascribed the change of direction to the increased influence of traditional leaders over senior ANC officials. “After 1994, many of the chiefs got organized and formed the Congress of Traditional Leaders of South Africa” (CONTRALESA), he said. “They began to align with and lobby the ANC to protect their power.”

In a 2004 paper, Christina Murray, the director of the Bingham Centre for the Rule of Law, who had advised the writers of South Africa’s constitution, identified three reasons for traditional leaders’ success in consolidating their power after 1994. First, government leaders regarded powerful traditional leaders as important for maintaining peace and security in volatile areas like KwaZulu-Natal.⁴³ They also believed that traditional leaders had the power to shape voters’ choices at the ballot box, making it important for the ANC to accommodate them.⁴⁴ Finally, Murray pointed to the perception that “government by chiefs” could be more effective in delivering services than some rural local municipalities.⁴⁵

The result was the adoption, in 2003, of the Traditional Leadership and Governance Framework Act, which “reintroduced the tribal boundaries from apartheid almost exactly as they were,” said Jara, who was also a land rights researcher at the University of Cape Town. The

act changed the name of apartheid-era tribal authorities to “traditional councils” but left much of the institution’s structure and powers in place.

Jara added that subsequent provincial legislation passed by the Eastern Cape legislature also reestablished the headmanship. In fact, he said, “it went even further [than under apartheid], making headmanship a royal position that could only be inherited by birth. This while, traditionally, many communities had actually elected their leaders!” The government also continued the practice, established under apartheid, of having traditional leaders on the civil service payroll.

The process of reasserting the power of chiefs culminated in the 2004 adoption of the Communal Land Rights Act. Although the law provided the first legal blueprint for how to transfer communal land in the former homelands from the government to communities, it also gave wide-ranging powers to the traditional councils, including the ability to register the community’s land in the name of the council and impose decisions over land use and allocation on communities.⁴⁶ The legislation passed despite numerous objections during parliamentary hearings, including from women’s groups who feared that it would perpetuate a “profoundly unequal system that often excluded them from decision making.”⁴⁷ Paradoxically, some traditional leaders also rejected the legislation because they felt it did not give them enough power.⁴⁸

Following a series of legal challenges against the Communal Land Rights Act, the Constitutional Court in 2010 struck down the entire act, because the parliament had not adequately consulted affected groups when it wrote the law.⁴⁹ Although civil society groups welcomed the decision as a victory against creeping retribalization, it also meant that there was no legal instrument in place for improving tenure security for poor people in these communal areas.

In 2017, Siyabulela Manona, a land rights consultant from Phuhlisani Solutions who worked

extensively in the Eastern Cape, described the prevailing situation as an “absolute free-for-all.” He said, “The toughest person wins. As long as you have money or power, you can do whatever you want. If the chief is able to, he simply does as he pleases.”

Manona pointed to the example of a proposed titanium mining project on the land of the Xolobeni community on the Eastern Cape’s ecologically sensitive Wild Coast. Despite fierce resistance from residents, the local chief there had approved the mining application after receiving a luxury off-road vehicle from the prospecting company.⁵⁰ In the Eastern Cape, “there are all kinds of things going on, because there are no rules. Although there is a tapestry of incoherent laws, there is no one law that is enforced,” Manona said.

The legal void was the heart of the deadlock in the Eastern Cape’s communal areas. From the perspective of the deeds registry, most of the land in the former homelands simply continued to be classified as “unregistered state land, [although] some people had letters giving them permission to occupy” explained Waterson Mketshane, the deputy registrar of deeds in Mthatha, the former capital of the Transkei. The legislation that guided the work of the deeds registry dated from 1937, and was mainly geared to register land under freehold ownership. Since

the legislation did not cater for any form of customary or communal tenure, “different versions of freehold and some leaseholds are the only forms of tenure we are legally empowered to register,” Mketshane said.

Mketshane, who grew up on communal land in the former Transkei and worked his way from being a messenger in the Mthatha deeds office to becoming the deputy Registrar of Deeds, explained how the deadlock affected rural residents. Out of desperation “rural people often come [to the deeds office in Mthatha] to ask us to issue them a title deed,” he said. “Then we have to explain to them that we can’t help them. It has been happening since I joined this office in 1998, and it doesn’t stop.”

Ebenhaeser offered potential clues on how a legal framework for the homelands could work. One of the central constitutional objections to the Communal Lands Right Act was that it “would have enabled unelected traditional leaders to become the registered owners of communal land in the former homelands,” explained Jara. By contrast, Ebenhaeser showed that it was possible to create a democratically elected CPA to own communal land and make joint decisions over land use. The question facing lawmakers in the former homelands was how to combine the political and social significance of traditional leaders with the democratic legitimacy of elected CPAs.

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