Implementing the Spatial Planning and Land Use Management Act of 2013: an examination of the intersection of the role of traditional leaders and municipalities in spatial planning and land use management.

by

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ABSTRACT

This study examines the intersection of the role of traditional leaders and municipalities in spatial planning and land use management. More specifically, the study interrogates the factors which led to tension and conflict between traditional leaders and municipalities in three provinces, namely, the Eastern Cape, Limpopo and KwaZulu-Natal, over the implementation of SPLUMA in areas governed by traditional leaders. These are the provinces where traditional leaders, through protest action, publicly expressed their grievances and disapproval of SPLUMA soon after it came into effect in 2015. They vowed to resist its implementation in the areas they governed even if it meant being imprisoned for doing so. The study analysed data from 32 key informants, personal observations, and the relevant constitutional provisions, statutes, case law, governmental reports and White papers, including the relevant literature on the history of both the institution of traditional leadership and local government in South Africa. The study identified the underlying reasons why in practice the implementation of the Spatial Planning and Land Use Management Act 16 of 2013 (came into force in 2015) in areas governed by traditional leaders is facing opposition. There are six main reasons which emanate from the interviews that were conducted with the abovementioned informants. These reasons are (1) the lack of meaningful engagement by traditional leadership when SPLUMA was introduced at national level; (2) outright rejection of SPLUMA; (3) misunderstanding of SPLUMA; (4) the lack of trust in municipalities; (5) the lack of trust in planning instruments and processes; and (6) the exclusion of traditional leaders from municipal planning tribunals. Nevertheless, given that the institution of traditional leadership is entrenched in South Africa's rural society, traditional leader's closeness and familiarity with rural people in their area, and importantly the role they play in land use management, the study concludes there is a need to find ways to diffuse or manage the contestation between traditional leaders. Options proposed include, national government meaningfully engaging the National House and Provincial houses of traditional leadership about SPLUMA, recognise traditional leaders as authorities of first instance in municipal planning by-laws, include traditional leaders as members/participants of the Municipal Planning Tribunals, as well as, capacitating traditional leaders to understand the meaning and benefts of land use schemes in municipal council meetings and formulating a developmental beneficiation model between traditional leaders and municipalities on land use management matters.

LIST OF ABBREVIATIONS

ANC	African National Congress (ANC)
CONTRALESA	Congress of Traditional Leaders of South Africa
DEIC	Dutch East India Company
IDP	Integrated Development Plan
IFP	Inkatha Freedom Party
ITB	Ingonyama Trust Board
JJCEN	Johannesburg Joint Council of Europeans and Natives
LGNF	Local Government Negotiating Forum
MDB	Municipal Demarcation Board
MSDF	Municipal Spatial Development Frameworks
MPT	Municipal Planning Tribunal
NNC	National Negotiating Council
NP	National Party
NSDF	National Spatial Development Framework
PTO	Permission to Occupy
PSDF	Provincial Spatial Development Frameworks
RDP	Reconstruction Development Programme
SANCO	South African National Civics Organisation
SPLUMA	Spatial Planning and Land Use Management Act
SANT	South African Native Trust
SLA	Service Level Agreement

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Chapter One: Introduction

1.2 Problem statement

The system of traditional leadership is firmly entrenched in South Africa.[1] Traditional leaders are found in the Eastern Cape, Free State, KwaZulu-Natal, Limpopo, Mpumalanga, and North West. The Western Cape also has its own house of traditional leadership, established in terms of the Traditional and Khoisan Leadership Act.[2] However, the Constitutional Court declared the Act unconstitutional in May 2023. At the time of writing, more than 400 communities across eight provinces in South Africa are governed by traditional leaders.[3]

Before the advent of colonial rule, traditional leadership was the backbone of local governance, with authority over all aspects of life, ranging from social welfare to judicial functions. More importantly, traditional leaders were the custodians of the land, with authority to allocate land under customary law, as explained in the next chapter.[4] Under customary law, land is held communally for the benefit of the clan and is normally not sold. In traditional rural areas of South Africa, traditional leaders allocate land to households through a 'permission to occupy' system that provides security of tenure but not ownership. This system provides access to land and livelihoods for rural communities. In rural areas, land is seldom viewed purely as a financial asset.[5]

The colonial and apartheid regimes discredited the institutions of traditional governance when they enlisted them to become the local arm of the central state which served their interests. These regimes, however, did not manage to completely destroy these institutions, as will be explained in the following chapter.[6]

Traditional leadership remains an important governance institution, not only in South Africa, but elsewhere on the African continent. Examples include Ghana, where the institution of

[1] Lutabingwa J, Sabela T & Mbatha J 'Traditional leadership and local governments in South Africa: Shared governance is possible' (2006) 25 *UP* 74.
[2] Traditional and Khoisan Leadership Act 3 of 2019.
[3] Bikam P & Chakwizira J 'Involvement of traditional leadership in land use planning and development projects in South Africa: Lessons for local government planners' (2014) 13 *IJHS* 143.
[4] Chapter Two, para 2.4.
[5] Dubazane M & Nel V 'The relationship of traditional leaders and the municipal council concerning land use management in Nkandla local municipality' (2016) *IAJIKS* 228.
[6] Ntsebeza L (1990) 85.

traditional leadership is recognised by its Constitution.[7] Debates around the role of chiefs in land control and land allocation continue to take place. Similar debates are taking place in other countries as well. In Botswana, land boards are responsible for the allocation of communal land, but district councils manage larger urban villages, leading to fragmented development functions caused by conflicting legislation.[8] In Zimbabwe, chiefs undertake important responsibilities in the rural areas which include land allocation and this is likely going to give rise to conflict between modern-day state institutions and chiefs.[9] In each case, the debate revolves around the control of the land, a critical resource for rural communities.

In South Africa, the role of traditional leaders in land use and land allocation continues to be a subject of debate and scrutiny. The background to the current debate is the promulgation of the Spatial Planning and Land Use Management Act No. 16 of 2013 (SPLUMA). SPLUMA gives expression to the 'municipal planning' function which the Constitution allocates to municipalities.[10] This Act gives expression and detail on the power to take decisions on land development and land use management by municipalities. The authority to manage land use in the rural areas, particularly traditional areas, is exercised by traditional leaders. While the Traditional and Khoisan Leadership Act recognised the institution of traditional leadership and provided for the functions of traditional leaders, notably the functions relating to land allocation and land use were not explicitly provided for in the Act.[11]

Although debates in academic literature regarding the institution of traditional leadership persist, the reality is that traditional leaders believe that the current legislative framework diminishes their authority over land and marginalises them.[12] Remarks to that effect have been made in the past by the Congress of Traditional Leaders of South Africa (CONTRALESA), which is a non-governmental body that represents the interests of traditional leaders throughout the country. Contralesa claims that the 1996 Constitution diluted their powers and functions when compared to the Interim Constitution of 1993 in that

[7] Constitution of the Republic of Ghana, 1992 (Chapter 22).
[8] Dubazane M & Nel V (2016) 226.
[9] Chigwata T 'The role of traditional leaders in Zimbabwe: are they still relevant' (2016) 20 *LDD* 71.
[10] This will be discussed further in Chapter Five.
[11] Traditional Leadership and Governance Framework Act No. 41 of 2003.
[12] Dubazane M & Nel V (2016) 230.

> all legislatures were obliged to refer relevant draft legislation to the appropriate House of Traditional Leaders before they could be passed into law. At the local level heads of traditional authorities were automatically members of municipal councils having jurisdiction over their areas of rule. [and] were allowed to continue to perform their tasks and exercise their powers as local government structures.[13]

None of these rules can be found in the 1996 Constitution.[14] The 1996 Constitution, under section 212, recognises the institution, status and role of traditional leadership.[15] However, it is vague when it comes to the powers and functions of traditional leadership. The provisions dealing with local government are explicit and clear in setting out the powers and functions of local government, as will be explained at length in Chapter Four.[16] Local government is another institution which is recognised and established by the Constitution. The 1996 Constitution ushered in a new era of local government. It introduced for the first time in South Africa's history a 'wall-to-wall' system of local government when it mandated that municipalities be established for the whole of the territory of the Republic.[17] At the same time, SPLUMA mandates municipalities to take decisions on matters concerning land use planning and land use management.[18]

Furthermore, the Act declares that it applies to the entire area of the Republic, including rural areas under the authority of traditional leaders. Thus, SPLUMA establishes a 'wall-to-wall' system of land use management.[19] Lastly, SPLUMA requires municipalities to adopt and approve a single land use scheme which must include provisions that permit the incremental introduction of land use management and regulation in areas under traditional leadership.[20] However, SPLUMA first instructs municipalities to allow for the participation of a traditional council when it is developing, preparing or amending its land use scheme.[21] This is to ensure

[13] Contralesa, quoted in 2011.
[14] Constitution of the Republic of South Africa, 1996.
[15] Section 212 of the Constitution.
[16] Section 156(1) of the Constitution.
[17] Section 155(6) of the Constitution.
[18] Section 23 and 33 of SPLUMA.
[19] Section 2 of SPLUMA.
[20] Section 24(2) (c) of SPLUMA.
[21] Section 23(1)(a) of SPLUMA read with Section 23(2).

that traditional leaders are aware of the abovementioned provisions that will guide the process of introducing land use management systems in the areas they govern.[22]

To ensure that the goal of implementing a uniform system of planning in South Africa is realised, SPLUMA directs that spatial development frameworks and land use management systems must be applicable in rural areas under traditional authority.[23] This means that SPLUMA is intended to operate as much in rural areas under traditional authority as it does in formally established urban areas to which spatial planning and land use legislation has traditionally applied (as will be discussed in detail in Chapter Five).[24] The reality is that, in rural areas, there is already a system of land allocation which encompasses land use management that is administered by traditional leaders in terms of customary law. This system has been in existence for many centuries. This has led therefore to the emergence of two systems of land use management co-existing parallel to one another and operating in the same rural areas that are under the authority of traditional leaders.[25]

In other words, in rural areas there exists what is referred to as legal pluralism, in which two different legal orders, namely customary law and common law, apply within the same social field, as will be discussed at length in Chapter Seven.[26] The power of traditional leaders to allocate land along with land use rights is derived from the ancient system of indigenous law which was adapted into customary law. On the other hand, the planning system which municipalities use to allocate land use originates from Western Europe. It is a system that was developed through common law and influenced by Roman Dutch and English law. Consequently, there exists a tension between municipalities and traditional leaders over the allocation of land use rights in rural areas. This tension flows directly from the two competing legal systems that apply with equal force (in theory) in rural areas.

Many traditional leaders and authors have argued that the Western model of land use management is not appropriate for rural areas under communal tenure. In such areas, a homestead is deemed to be more than a home, as it includes fields, kraals and communal

[22] This will be discussed at length in Chapter Five.
[23] Section 7(a)(ii) & (iv) SPLUMA.
[24] Berrisford S & Jaap de Visser 'Preparing for SPLUMA implementation: An introductory course for lawyers and planners'. Unpublished lecture notes. April 2015 (UCT).
[25] Dubazane M & Nel V (2016) 229.
[26] Niekerk G 'Legal pluralism' in Bekker, Labuschagne & Vorster (ed) *Introduction to Legal Pluralism in South Africa* (2002) 8-9.

grazing land.[27] They argue that conventional land use zoning as mandated by SPLUMA is not suited to accommodating these kinds of land uses that predominate in most of the rural landscape.[28]

It is generally accepted that the implementation of the Eurocentric model of planning was not done to benefit South Africans, particularly black South Africans. This view is supported by the fact that the use and application of planning law emanated from a need to do something about the horrendous living conditions of the then 'new' urban working class in Europe.[29] The transition to new manufacturing processes in Europe caused a large-scale migration to the towns, resulting in the extraordinarily rapid growth of urban areas and populations. This in turn put the cities under intense pressure. Since there was no attempt at zoning or the maintenance of proper standards for the construction of buildings, housing, health and living conditions began to deteriorate.[30] Confronted with this situation, the governments of the time used their powers to control and regulate the use of property, land and houses.

To property owners in urban areas in Europe, this was a new and unwelcome use of governmental power supported by the law. The reaction of the property owners was to seek the help of the courts to protect them against these intrusions. It was through this situation that planning law was conceived, and over time certain planning instruments, such as zoning, which are used to control and manage land use were introduced.[31] Essentially, the invention of planning law came as a response to resolving an urban crisis involving the deterioration of living conditions as a result of the unexpected population increase in cities that was caused by the development of trade and the rise of business in the 1700s. As alluded to earlier, it was in the urban areas of Europe, and not in the rural areas, that these developments occurred. Thus, it will be argued in detail in Chapter Four that the system of land use management as it is now, and as it was then, was never intended to apply in rural areas.

It was stated earlier that in South Africa and elsewhere in Africa traditional leaders as custodians of communal land are empowered by customary law to allocate land. Implicit in

[27] Barry J & Porter L 'Indigenous recognition in state-based planning systems: Understanding textual mediation in the contact zone' (2012) 11 *PELJ* 181.
[28] Dubazane M & Nel V (2016) 231.
[29] McAuslan P *The Ideologies of Planning Law* ed (1980) 3.
[30] Van Wyk J *Planning Law: Principles and Procedures of Land Use* Management (1999) 81-82.
[31] Van Wyk J (1999) 83.

the allocation of land are 'land use rights'. These rights include the erection of a homestead, land for the cultivation of crops, erection of a kraal for the safekeeping of livestock, as well as access to communal grazing land. As such, community members have access to multiple resources such as water, clay and thatching.[32] According to traditional leaders, the allocation of land for various purposes is informed by indigenous knowledge, as will be discussed in detail in the next chapter. While some modern traditional leaders who are moving with the times apply formal town planning principles when allocating land, the general requirement in this process is that land must only be allocated to the clan or a member of the community.[33] It is this function of allocating land along with the land use rights that appears to be in conflict with SPLUMA.

Therefore, the overall aim of the study is to examine, within the context of implementing SPLUMA by municipalities in areas under traditional leadership, the intersection of the role of traditional leaders in land allocation and the role of municipalities in spatial planning and land use management.

1.3 Significance of the problem

In this section, the study will outline the significance of the problem which it interrogates. Examining the intersection of the role of traditional leaders in land allocation and the role of municipalities in spatial planning and land use management is an important step towards finding solutions to the problem this study investigates. One of the objectives of SPLUMA is to establish a uniform, effective and comprehensive spatial planning and land use management system which is applicable throughout the entire country. Similarly, the Act seeks to ensure that land in the Republic is used in an efficient and sustainable manner.

During the apartheid era, formal planning systems never applied in rural areas; these planning systems applied only in the urban areas. This meant that there was no uniform system of planning that applied throughout the country, leading to fragmentation and underdevelopment in rural areas.[34] SPLUMA seeks to change this through the establishment of a single uniform system that will apply to the entire Republic. At the heart of this objective

[32] Dubazane M & Nel V (2016) 227.
[33] Dubazane M & Nel V (2016) 230.
[34] Berrisford S & Oranje M 'Planning law reform and change in post-Apartheid South Africa' in Hartmann (ed) *Planning by law and property rights reconsidered* (2012) 211-7.

is the transformation of communal spaces and the dismantling of the persisting legacy of apartheid. In order for this goal to be achieved, municipalities in the rural areas need to find ways to implement this new planning system and its principles. However, that is unlikely to occur if the municipalities and traditional leaders do not collaborate on this task.

Secondly, there are issues around the existing parallel processes administered by municipalities and traditional leaders, respectively, in rural areas. Parallel processes tend to create confusion and duplication of tasks. Also, they lead to unsustainable practices such as spatially fragmented development, settlements in disaster-prone areas, or villages that cannot be provided with basic services. Not only are there gaps between modern and community land administration practices, but little is known about traditional land administration processes. These traditional land administration processes are often plagued by a lack of transparency, which in turn opens doors to abuse of process or corruption by unscrupulous traditional authorities. Additionally, colonial planning models that form the current basis for land use management in South Africa are not suited to local rural areas, as explained earlier.

Thirdly, the issue of mining is increasingly becoming contentious in the former 'homeland' areas of South Africa, particularly in North West, Limpopo, KwaZulu-Natal and Eastern Cape. The rapid expansion of platinum, titanium and sand mining into rural communal land is creating tensions between community members and traditional leaders. Over the years, a new trend began to emerge. Local chiefs began to enter into deals with mining companies on behalf of the communities they governed. Chiefs, as assumed custodians of communal land and its associated resources, become mediators of mineral-led development and mining deals. Consequently, mining companies do not engage directly with thousands of rural residents before turning communal grazing land into massive pits and multiple shafts; they just obtain the approval of the chief and tribal council.[35]

In terms of SPLUMA, the conversion of communal grazing land and ploughing fields into mining land would have first required the mining companies to apply for a rezoning of the

[35] Dubazane M & Nel V (2016) 231.

grazing land into mining land, provided that the municipality had captured the purpose of that land in its municipal spatial development framework and land use scheme.[36]

The negative impact mining activities have on the environment, and by extension the lives of rural residents, is an issue which may be addressed, amongst other things, through SPLUMA. The rapid increase of unplanned informal settlements located near the mines is another concern which municipalities must deal with. This is because these unplanned informal settlements are often established without the knowledge of the municipality, thus making it difficult for the municipality to provide basic services such as water, sanitation and electricity. Therefore, the contestation between traditional leaders and municipalities in rural areas affects not only the implementation of SPLUMA, but also represents a barrier to the improvement of the living conditions and quality of life of rural residents. Most importantly, it hampers the provision of basic services. Therefore, the issues highlighted above emphasise why it is important to study this problem.

1.4 Research question

The study examines the intersection of the role of traditional leaders in land allocation and the role of municipalities in spatial planning and land use management within the context of implementing SPLUMA. In specific terms, the study interrogates the factors which underlie the contestation between traditional leaders and municipalities, and what strategies can be used to diffuse this contestation or to manage it.

1.5 Literature review

The role of traditional leaders in the new democratic South Africa was the subject of much debate during the negotiations in the early 1990s. Bikam and Chakwizira argue that during the negotiations in 1994, traditional leaders were initially ignored on matters related to land use planning and development projects. However, they were later brought into the process through their participation in the integrated development plan (IDP) and spatial development frameworks. Bikam and Chakwizira further argue that analyses of developments emphasise the importance of land use planning and land use management, but few have documented

[36] This will be discussed at length in Chapter Five.

the involvement of traditional leadership in land use planning and development projects and the role they should play.[37]

The authors also make mention of the Local Government: Municipal Structures Act[38] (Structures Act) and how it does not clearly define the role traditional leaders should play in land use planning and development projects. The Structures Act deals with, amongst other things, the establishment of municipalities in accordance with the requirements relating to the categories and types of municipality. It also provides for an appropriate division of functions and powers between categories of municipality. More importantly for this thesis, the Structures Act regulates the participation of traditional leaders in municipal councils.

Consequently, traditional leaders argue they are given a back-seat role of public participation only rather than of decision-making with regard to planning in their areas of jurisdiction.[39] This has given rise to conflict between traditional leaders and municipal officials in rural areas.[40] The researcher agrees with Bikam and Chakwizira that there is currently not much literature that addresses the involvement of traditional leaders in land use planning and development projects. The focus of this study is on the intersection of the role of traditional leaders in land allocation and the role of municipalities in land use planning and land use management. This is a question which is yet to be engaged in a dedicated study.

George and Binza examined the role of traditional leadership in promoting governance and development in rural South Africa. In this article, the authors sought to examine how well the Mgwalana Traditional Authority (MTA) is performing its role of governing and developing its area and the municipal area of Nkonkobe in the Eastern Cape.[41] As a guide to finding the answers they need, the authors pose two questions. First, what part does the Mgwalana Traditional Council play in governance and development? Secondly, has the South African government managed to add traditional leadership to the local government structures? In their findings, the authors argue that the MTA found it difficult to contribute to socio-economic development, as the Nkonkobe local municipality considered governance and

[37] Bikam P & Chakwizira J (2014) 144.
[38] Local Government: Municipal Structures Act 117 of 1998.
[39] Bikam P & Chakwizira J (2014) 148
[40] Bikam P & Chakwizira J (2014) 152.
[41] Binza M & George K 'The role of traditional leadership in promoting governance and development in rural South Africa: A case study of the Mgwalana traditional authority' (2011) 46 *CPTU* 948.

development as falling exclusively within the ambit of its powers and functions. According to the Nkonkobe municipality, traditional leadership is supposed to participate only in customary and cultural activities. To resolve this impasse, the authors suggest that the municipality work with local stakeholders, as envisaged by the Traditional Leader and Governance Framework Act of 2003, in order to achieve the developmental goals of local government as laid out in section 152 of the Constitution.[42]

While aspects of this article relate to the overall purpose of this study, it is important to point out that the current contestation between traditional leaders and municipalities, which this study seeks to examine, emanates from SPLUMA, an Act which came into force in 2015. Essentially, this study focuses on the role of traditional leadership and municipalities in spatial planning and land use management, and not on the role of traditional leadership in promoting governance. Furthermore, there is a reasonable amount of literature in which authors have emphasised the need for municipalities and traditional leaders to develop a cooperative relationship. However, the intersection of the role of traditional leaders in land allocation and the role of municipalities in spatial planning and land use management within the context of implementing SPLUMA is an issue which has not been examined extensively.

Additionally, Dubazane and Nel have analysed the relationship between traditional leaders and the municipal council concerning land use management in Nkandla municipality. This article was published in 2016, a year after SPLUMA came into effect. The central argument of the article is that a dual system of land use management exists in South Africa. In rural areas under traditional authority (former Bantustans), customary land management systems are exercised by traditional leadership. The other system is the Eurocentric form of development control, largely based on land use zoning.[43] The article shows that there are parallel land use management systems in Nkandla. The authors state that, although the land allocation system of the traditional leadership has servicing and financial implications for the municipality, there is little or no communication between the institutions. Municipal planning has no influence on traditional council decisions, and this leads to fragmented development.[44]

[42] Binza M & George K (2011) 947.
[43] Dubazane M & Nel V (2016) 236.
[44] Dubazane M & Nel V (2016) 240.

This study focuses on what Dubazane and Nel have examined in their article as far as discussing the existence of a dual system of land use management in the rural areas is concerned. However, the study takes it further. First, while Nel and Dubazane limited their research to only one municipality, the scope of this study is wider than that. This study will analyse whether in the other provinces the situation is the same or not. Furthermore, this study seeks to go beyond just examining the relationship between traditional leadership and municipal councils in matters related to land use management. It aims to assess the manifestation, in practice, of the intersection of the role of traditional leaders in land allocation and municipalities in spatial planning and land use management. Lastly, this study will also examine whether there are any mechanisms which the law offers to manage the conflict that exists between traditional leaders and municipalities in areas under traditional authority.

The existence of parallel systems in planning is not something that is unique to or new in South Africa. Van Wyk explores this issue in detail in her article.[45] In this work, Van Wyk offers a critical reflection on the landmark decision in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal.*[46]

Van Wyk argues that the existence of parallel authorities in the hands of two bodies which may speak with different voices on the same matter, serves only to cause disruption to orderly planning and development within a municipal area. These arguments were made in relation to the contestation between municipalities and the provincial planning tribunals that were taking decisions on the same subject matter, but in terms of different statutes. This had the effect of causing disruption and confusion in the municipal planning departments in whose area the developments were located. These are arguments which this study fully agrees with. But what this study seeks to interrogate differs in terms of context from what Van Wyk discusses. The issue of having two authorities taking decisions on the same subject matter forms a critical part of this study.

According to Lutabingwa, Sabela and Mbatha, shared governance is possible between local government and traditional leaders. In fact, the authors assert that, if local government is to

[45] J Van Wyk 'Parallel planning mechanisms as a recipe for disaster' (2010) 13 *PELJ* 1.
[46] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 9 BCLR859 (CC).

deliver on the spatial transformation agenda in areas under traditional authority, it needs to develop a cooperative relationship with the municipality.[47] This assertion builds on the argument made by Berrisford and Oranje, which is that commitment by all relevant stakeholders to the implementation of the Act is required before the fruits can be seen.[48] The study agrees with the views expressed above by Lutabingwa, Sabela and Mbatha. The issue of collaboration and cooperation between these two institutions in implementing SPLUMA is of critical significance to this study. However, this is an issue which the study will touch on in the overall examination of the problem of this study.[49]

1.6 Chapter outline

In Chapter One, the study outlines the problem statement and explains the significance of this problem. The study also conducts a literature review with a view to assessing whether other scholars have written about the particular problem that this study will interrogate, and to what extent. Lastly, the methodology of this study is set out at the end of this chapter.

Chapter two deals with the history and context of the role of traditional leadership in the land allocation process in South Africa. Chapter three analyses the road to democracy, with a focus on the debates regarding the role of traditional leadership in democratic South Africa. In Chapter Four, the study examines the history and development of the planning powers of local government in South Africa.

Chapter Five sets out the constitutional and legal framework for the role of municipalities in spatial planning and land use management while Chapter Six explains how in practice traditional leaders have reacted to the implementation of SPLUMA in their areas of jurisdiction. Specifically, in Chapter Six, the study documents its findings on the practice of the intersection of the roles of traditional leadership and municipalities in land use management. The findings will mainly be drawn from interviews that were conducted with purposively selected traditional leaders, municipal officials, provincial government officials, national government officials, academics and planners. In essence, Chapter Six highlights the experiences of the abovementioned stakeholders on the ground with regard to the

[47] Lutabingwa J, Sabela T & Mbatha J (2006) 79.
[48] Berrisford S & Oranje M (2012) 219.
[49] Chigwata T 'The role of traditional leaders in Zimbabwe: Are they still relevant?' (2016) 20 *LDD* 73.

implementation of SPLUMA. In Chapter Seven, the study addresses the existence of two legal orders operating in South Africa's rural areas. The operation of these two legal orders within the same social field indicates the existence of legal pluralism in rural areas. As such, this chapter will unpack what legal pluralism entail, and thereafter examine whether legal pluralism can offer any lessons or approaches that may be used to resolve or manage the contestation between traditional leaders and municipalities in rural areas over the implementation of SPLUMA in areas governed by traditional leaders.

Finally, Chapter Eight concludes the study by providing a set of recommendations aimed at providing practical, workable solutions that can assist in resolving or managing the tensions which have arisen between traditional leaders and municipalities in the course of implementing SPLUMA in rural areas.

1.7 Methodology

1.7.1 Introduction

The purpose of this section is to explain the research methodology that was selected to achieve the objective of this study. It presents the research method, design of the study, the target population and sampling method of the study, as well as the sources of data collection and the approach by which data were analysed, and includes the ethical requirements a researcher must comply with when conducting social sciences research. However, the entire study was not only about data collection, it also made use of the historical and legal methodology which included an analyses of the Constitution, statutes, case law, governmental reports and White papers etc. This methodolgy also included the extensive analyses of literature on the history of both the institution of traditional leadership and local government in South Africa.

According to Nkatini, research should be seen as a system through which a researcher is able to collect, analyse, and interpret data so that the research aims and objectives may be achieved.[50] Barley refers to research methodology as the philosophy of the research process.[51]

[50] Nkatini L 'Glimpses of research: Guidelines on the writing of research proposals, reports, essays, dissertations and theses' (2005) 10 *JP Publishers* 18.
[51] Barley K *Methods of Social Research* 2nd Edition (1982) 98.

This includes the assumptions and values that serve as a rationale for the research, and the standards and criteria the researcher uses for interpreting data and reaching conclusions.[52]

In this study, the researcher made use of the qualitative approach. A qualitative research method according to Masson, is a systematic, rigorous, strategic, flexible and contextually conducted research.[53] According to Dick, qualitative research refers to research that produces descriptive data, generally the participant's own written or spoken words pertaining to his or her experience or perception.[54] In other words, this research adopted a sociological approach to gain an understanding of why there is renewed contestation between traditional leaders and municipalities in rural areas and how it came about. The emphasis of the research was on social inquiry, to develop an understanding of the main and contributing factors which underlie the contestation between traditional leaders and municipalities, and what strategies can be used to diffuse this contestation or to manage it.

This study is what is otherwise described by Patton as 'real-world' research, namely research conducted in real life situations, where the researcher was fully involved throughout the entire research process.[55] The qualitative researcher collected, analysed and interpreted data. During the course of data interpretation, the researcher created new concepts and emphasised constructing theoretical and practical interpretations. The researcher drew on existing theory to build a new theory about the collaborative approach that traditional leaders and municipalities should follow in exercising their land use management authority in practice and within the framework of SPLUMA. In short, the qualitative research method required the researcher to consult various sources and collect information dealing with and relevant to the contestation between traditional leaders and municipalities brought about by the implementation of SPLUMA in areas governed by traditional leaders.

1.7.2 Study design

A case-study approach was the primary methodology adopted for this study, which focused on three provinces, namely KwaZulu-Natal, the Eastern Cape and Limpopo. According to Yin, in case studies the researcher explores a single entity or phenomenon, bounded by time and

[52] Barley K (1982) 99.
[53] Mason J 'Qualitative researching' (1996) 16 *SAGE Publications* 39.
[54] Dirk J, et al. *Introduction to Research* (2005) 38.
[55] Patton M *Qualitative Evaluation and Research Methods* 2nd Edition (1990) 47.

activity, and collects detailed information by using a variety of data collection procedures over a sustained period of time.[56] In this case, the research examined the intersection of the role of traditional leaders and municipalities in land use management in three provinces, namely KwaZulu-Natal, the Eastern Cape and Limpopo. The selection of these provinces was purposive. Yin explains that case studies are by nature flexible and allow for modification in the course of inquiry.[57] In designing the manner in which data would be collected, there was a need for flexibility to allow for exploration through semi-structured questionnaires, as well as allowing for new themes to emerge which had not been predetermined or contemplated. The study was designed to provide an in-depth analysis of what factors led to tension and conflict between traditional leaders and municipalities in these three provinces over the implementation of SPLUMA in areas governed by traditional leaders.

The three provinces made for appropriate case studies because they were, generally, the provinces where traditional leaders, through protest action, publicly expressed their grievances and disapproval of SPLUMA soon after it came into effect in 2015. They vowed to resist its implementation in the areas they governed even if it meant being imprisoned for doing so, as discussed in Chapter Six. Additionally, these provinces have a rich history of governance by traditional leadership during the pre-colonial era. During the colonial period, these societies were invaded and defeated by the colonial regime, as will be discussed in Chapter Two.[58] The imposition of the different strategies of control by the colonial and apartheid regime in these three provinces, and how those strategies came to shape the institutions of traditional leadership into what they are today, played a role in the selection of these case studies.

1.7.3 Research population

A population is that group (usually people) about whom the researcher wants to draw conclusions. According to Punch, a 'population' refers to a larger group the research focuses on, while a 'sample' refers to a smaller group selected from that population.[59] Punch refers to 'population' as the total target group, which would, in the ideal world, be the subject of the

[56] Yin R 'Case study research: Design and methods' (1997) 12 *Sage Publications* 54.
[57] Yin R (1997) 56.
[58] Chapter Two, para 2.1.
[59] Punch K 'Introduction to social research qualitative and quantitative approaches' (2005) 10 *SAGE Publications* 15.

research, and about whom one is trying to say something; 'sample' refers to the actual group which included in the study and from which data is collected.[60] The population that was sampled for this study consists of traditional leaders, municipal councillors, municipal officials, provincial official, national government officials and academics.

1.7.4 Sampling and sampling procedure

The sampling method this study used was the purposive sampling method. According to De Vos, purposive sampling method refers to a sample in which the researcher deliberately obtains units and analysis them. The sample obtained is regarded as being representative of the research population.[61] Purposive sampling procedure was used to select participants in this study, namely 17 traditional leaders, seven municipal officials, one provincial official, two national officials and one academic, across the three provinces. According to Nkatini, purposive sampling is a procedure that relies mainly on the researcher's judgment regarding which of the elements within the target population should form part of the study.[62] A purposive sampling procedure was chosen as the most suitable method of selecting research respondents which included national officials, provincial officials, municipal officials, traditional leaders, councillors and academics. This sampling procedure represented a cross-section of stakeholders, and was less complicated and more economical in terms of both time and budget.

1.7.5 Data collection methods

A researcher collects data using one or more techniques. In this study, the researcher used a variety of qualitative data collection methods, which included both primary and secondary data. Stake argues that in a research case study, several sources of data, such as documents, observation and interviews, are used to gain an understanding of the case.[63] For the purposes of this study, semi-structured interviews were conducted, and semi-structured questionnaires were prepared. The selection of these data collection methods was informed by the need to produce adequate and quality information for the research, cost-effectiveness in terms of

[60] Punch K (2005) 16.
[61] De Vos A & Strydom S & Fouche H 2005. *Research at Grass roots: For the Social Sciences and Human Service Profession* 3rd Edition (2005) 58.
[62] Nkatini L (2005) 24.
[63] Stake R 'Qualitative Case Studies: The Case of Qualitative Research' (2005) 5 *Sage Publications* 23.

travel, as well as getting the views of the respondents at the centre of the problem which this study investigated.

1.7.5.1 Interviews

Interviews were used in this study to collect data. The interviews conducted with the key informants was the primary tool used to collect data for this study. The respondents who were interviewed are people who were directly affected by the research topic in their various capacities. The interviews were conducted using semi-structured questionnaires that were prepared by the researcher. Semi-structured interviews, according to Nkatini, are interviews where the interviewer poses open-ended questions that allow both the interviewer and the interviewees (the respondents) to discuss the given topic in detail.[64] According to Patton, semi-structured interviews are based on a set of core questions, but allow for some variation from those questions in order to explore relevant topics that emerge in the interview process.[65] The main reason why the study made use of this method was because of the flexibility it provides both to the interviewer and the respondents. Semi-structured questions ensured flexibility in terms of adding new, impromptu follow-up questions for clarification purposes. They also enabled the respondents to express themselves clearly on the issues they were most comfortable with, and concerned and knowledgeable about. The researcher was actively involved in the interview process, and made sure that interviews were conducted in an open and frank manner by employing techniques that allowed the respondents to feel comfortable to engage with the topic.

1.7.5.2 Questionnaires

The other data collection method that was used in this study, as alluded to in the previous section, was semi-structured questionnaires. According to Nkatini, a questionnaire is the most commonly used method of gathering information.[66] The researcher chose the questionnaire method to collect data because questionnaires are easy to prepare and a less expensive way to collect information. The questionnaires were prepared and sent mainly to municipal officials located in deep-rural villages in KwaZulu-Natal. These are areas which the researcher would have found difficult to visit. However, the use of questionnaires ensured that responses

[64] Nkatini L (2005) 31.
[65] Patton L (1990) 23.
[66] Nkatini L (1990) 34.

were conveyed back to the researcher within a short period of time, enabling the researcher to process the information timeously. It is important to point out that these questionnaires were only sent to some respondents in KwaZulu-Natal due to challenges around travelling to these villages. Another reason why questionnaires were sent to some respondents in KwaZulu-Natal was due to a friendly warning the researcher received from a respondent who was physically interviewed in KwaZulu-Natal about how the issue of SPLUMA was highly politicised and dangerous to talk about in the province. To avoid these difficult obstacles, the researcher in consultation with his supervisor decided it would be prudent and safe to send out questionnaires to some of the respondents in KwaZulu-Natal.

1.7.5.3 Document analysis

According to Yin, document analysis is one of the three most commonly used data sources for case studies, along with interviews and questionnaires.[67] However, according to Merriam, it is important to reflect critically on data obtained from document analysis, particularly in relation to the authenticity and quality of the data.[68] Data sources such as primary (mainly from archives, minute books, and newspaper and record repositories) and secondary sources, including books, journals, newspapers, special reports, documents, published and unpublished theses and dissertations, were analysed in this study. In particular, data on the background and historical context of the role of traditional leadership in land allocation, the history and development of the planning powers of municipalities, and the way these roles have evolved over the years, were gathered largely using desktop document analysis.

1.7.6 Data analysis

According to White, the main objective of data analysis is to render data into a meaningful and organised form so that useful information can be extracted from it. The purpose of this exercise is to ensure that the study answers the original research's proposed question.[69] Data analysis is at the heart of any research, because it involves making sense of what the data collected says in relation to the problem statement of the research. The process of organising and thinking about data is key to understanding what the data does and does not contain. There are a variety of ways in which a researcher can approach data analysis, and it is easy to

[67] Yin R (1997) 59.
[68] Merrium S 'The case study research in education' (1994) 3 *SL* 12.
[69] White T 'Research writing' (2002) 6 *UC* 13.

manipulate data during the analysis phase to push certain conclusions. For this reason, it is important to pay attention when data analysis is presented and to think critically about the data and the conclusions to be drawn.[70] Thus, Taylor-Powell and Renner argue that good data analysis in a qualitative research depends on the researcher's understanding of the data collected.

Accordingly, the researcher read the full interview manuscript in order to obtain a thorough understanding of the responses from the participants.[71] The researcher analysed the data that was collected from the participants by means of finding common themes and trends. The researcher then analysed the responses from all 32 key informants to find patterns in respondents' reactions, dominant views, and justifications for their opinion. The researcher then used these narratives to establish a picture of the context for each theme; this is what the study presents in Chapter Six.

1.7.7 Ethical considerations

The ethics of science is concerned with what is wrong and what is right in the conduct of research, according to Mouton. Scientific research is human conduct, and it needs to conform to generally accepted norms and values.[72] In this study, the researcher was guided by the following ethics, namely informed consent and anonymity and confidentiality.

1.7.7.1 Informed consent

The interviews were conducted after the University of the Western Cape's Human Social Sciences Research Ethics Committee granted the researcher the required ethics clearance and letter of consent. Seale, Gobo, Gubrium and Silverman maintain that research participants have the right to know that they are being researched, the right to be informed about the nature of the research, and the right to withdraw their participation at any time they so wish.[73] It is against this background that the researcher first requested permission to conduct this study from all the respondents that were interviewed.

[70] White T (2002) 14.
[71] Taylor P & Renner M 'Analysing qualitative data' (2003) 4 *UWE* 9.
[72] Mouton J 1998. *The Practice of Social Research* (1998) 47.
[73] Seale, G & Gobo G, Gubrium J & Silverman D *Qualitative Research Practices* (2004) 96.

1.7.7.2 Anonymity and confidentiality

Anonymity means that, throughout the research process, the names of research participants will be kept strictly confidential so that they are not known to anyone, with the exception of the researcher. Confidentiality, according to Ritchie and Lewis, means avoiding the attribution of comments in a report or presentation which may identify participants. Both direct attribution (if specific comments are linked to a name or a specific role) and indirect attribution (by reference to a collection of characteristics that might identify an individual or a small group) must be avoided.[74] Seale points out that researchers are obliged to protect the participant's identity. This view is shared by McMillan and Schumacher, who reason that information on a research subject should be regarded as confidential unless otherwise agreed upon through informed consent.[75]

The researcher accordingly ensured that the information obtained was kept confidential. With the present chapter having explained the methodology of this study and how the social research requirements set by the Human Social Sciences Research Committee of the University of the Western Cape were met, the next chapter examines in detail the history of the role of traditional leaders in land allocation. It is this role of traditional leaders that intersects with the role of municipalities in spatial planning and land use management in democratic South Africa.

[74] Ritchie J & Lewis J *Quality in Qualitative Evaluation: A Framework for Civil Service* (2002) 47.
[75] McMillan J.& Schumacher S *Research in Education: A Conceptual Introduction* 4 Edition (2003) 101.

Chapter Two: History of the Role of Traditional Leadership in Land Allocation

2.1 Introduction

This chapter focuses on the history of the role of traditional leadership in land allocation in South Africa. The analysis of this history is important for understanding the evolution of the different roles of traditional leaders, particularly in land allocation at different episodes of South African history. This is done to provide background on these different roles and how they have come to affect local government. The aim is to assess how the roles of these two institutions have come to intersect in practice with regard to the management of land use in rural areas.

This analysis will be compartmentalised into four parts, with the first part tracing the roles and functions of traditional leaders which have continuously evolved from the pre-colonial period to the post-apartheid period. This part will also provide background on how tenure arrangements were structured in the pre-colonial period and thereafter, and explain the significance of this.

The second part of this chapter will scrutinise the arrival of colonial forces in southern Africa, particularly South Africa, and their impact on the institution of traditional leadership. This will be followed by an assessment of the impact this had on the role and functions of the institution of traditional leadership in regard to allocating land. This part will also assess whether the management and treatment of chiefs by the colonial regime was the same across all rural areas governed by chiefs.

In part three, the study will explain how land tenure in communal areas was modified and subsequently structured by the colonial regime. The implications of that modification will be scrutinised in part four. A number of key statutes that were enacted to give effect to these changes will be examined in order to assess the extent of the impact they had on the role of chiefs in land allocation. Lastly, the chapter will provide its concluding remarks.

2.2 The functions of traditional leaders in pre-colonial South Africa

Before Britain assumed control of African territories through conquest, traditional leadership in Africa was a prominent governance institution that enjoyed significant respect and

recognition in the communities in which it was present.[76] This institution administered control over vast areas of land in the rural areas of African societies.[77] Many of the territories that traditional leaders governed had groups that consisted mainly of kin who lived together in localised areas, often described as wards. The leaders of these wards wielded considerable authority over their own dependants and followers.[78] Apart from their role in land use allocation, chiefs were responsible for providing their subjects with defence from enemies. They were also expected to help them in times of economic need, assist with rain-making, maintain proper relations with the ancestors, punish witches, and resolve disputes in their courts.[79]

The literature on traditional leaders and the way they governed their subjects reflects two divergent views. One view is that traditional leaders were ruthless, unaccountable and feared, and that subjects simply followed the wishes of the king.[80] The other view asserts that chiefs paid attention to the wishes of their subjects, and would consult with the community before taking any decision that would affect its general welfare. This demonstrated that the exercise of traditional authority not only included some democratic elements such as community participation, consensus and consultation, but also that the authority of a traditional leader was not unfettered.[81] It is submitted that the first view is an extreme exaggeration of how chiefs conducted themselves or governed their communities. The second view is a better illustration of how chiefs governed in pre-colonial times.

Two factors affected the way in which traditional leaders exercised their authority, namely the availability of land and the absence of armies appointed by the king to enforce his authority. In South Africa, prior to colonial conquest and land dispossession, there was an abundance of unoccupied land and a shortage of people. The power and wealth of chiefs depended on their

[76] Rautenbach C 'Mapping traditional leadership and authority in post-apartheid South Africa' in Fombad M & Steytler N (eds) Decentralisation and Constitutionalism in Africa (2019) 487.
[77] Adams, Cousins & Manona 'Land tenure and economic development in rural South Africa: Constraints and opportunities' in Cousins (ed*) At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century* (2000) 111-124.
[78] Ross R A *Concise History of South Africa* (1999) 41-51.
[79] Mathenjwa M & Makama 'Revisiting the participation of traditional leaders in municipal councils in South Africa' (2016) 20 *LDD* 204.
[80] Delius P (1983) 8.
[81] Cook S 'Chiefs, Kings, corporatization, and democracy: A South African case study' (2005) 12 *The Brown Journal of World Affairs* 130.

being able to attract large numbers of followers or subjects.[82] Chiefs that were harsh and incompetent easily lost subjects, as groups could easily move to another chiefdom. In other words, easy access to land in other chiefdoms made it relatively easy for groups to move between chiefdoms. Therefore, losing followers or subjects to neighbouring chiefdoms could easily diminish the wealth and power of a chief. Aware of this possibility, many chiefs knew what was at stake if they exercised their authority in a manner that was inimical to the welfare and interests of their subjects.[83]

The absence of standing armies ready to enforce the king's instructions also restricted the manner in which traditional leaders governed their communities. A political leader who wished to use physical force against his critics or enemies could only do so if he managed to mobilise his subjects.[84] This means subjects of the king would carry out instructions only if they knew the basis for the instructions and agreed to carry them out. In many cases those who disagreed with the chief's actions could simply fail to arrive when called to the military or take their time to respond.[85]

While forms of chieftainship in pre-colonial South Africa varied from one chiefdom to the other, it is possible to identify a number of common characteristics. First, members of a particular chiefdom were bound together by the principle of recognising a particular chief, who in most instances was from a dominant or royal lineage.[86] Secondly, traditional leaders were distinguished from common people by, amongst other things, the fact that they occupied high political and social positions of leadership by virtue of a hereditary claim acknowledged by their communities.[87] Thirdly, in most cases, chiefs enjoyed tremendous prestige, power, rights, privileges and authority over their subjects. They also commanded the highest degree of respect and legitimacy in their respective communities and were seen as the embodiments of unity, peace and solidarity among their subjects.

Fourthly, they provided leadership during times of conflict, and were sometimes considered the direct link with the spirits of the African polities. Fifthly, chieftainship represented an early

[82] Ntsebeza L (2006) 4.
[83] Delius P (1983) 9.
[84] Jingoes J *A Chief is a Chief by the People: The Autobiography of Stimela Jason Jingoes* (1975) 10-13.
[85] Delius P (2008) 218.
[86] Fagan BM *Southern Africa during the Iron Age* (1988) 96.
[87] Rautenbach C (2019) 488.

form of societal organisation that embodied the preservation of culture, traditions, customs and values that oversaw the best interests of their communities.[88] Lastly, chiefs did not act alone; they had councillors who advised them. These councillors were highly respected by their peers and drawn from both the ruling lineage and subordinate groups in the chiefdom. Councillors kept chiefs informed about key issues of the day that were affecting the community, and chiefs rarely acted to address those issues without first consulting the councillors.[89]

The roles and functions of traditional leaders did not remain static but changed over time because of numerous issues and the occurrence of events within and outside their spheres of influence. Traditional leadership rule exhibited a solid system of governance. Under this governance system was a set of unwritten rules, laws and traditions that determined how the people would live together peacefully as part of a larger group.[90] While the roles and powers of functions were not explicitly categorised, it is possible to attempt to extract and classify their roles, responsibilities and powers in terms of the executive, legislative and judicial categories.

This study agrees with Koyana that traditional leaders used these powers to execute their political and socio-economic responsibilities.[91] Ndlela held the view that with such powers invested in them, traditional leaders had the mandate to ensure that their subjects enjoyed peace, prosperity and security at all times.[92] In addition, Ntsebeza wrote that with such enormous powers concentrated into the institution of traditional leadership, traditional leaders were in charge of almost all areas of their subjects' lives. Some of these areas included control over political functions, safety and security, and governance and development.[93]

However, some historians viewed African traditional leadership roles as being inferior. For instance, Landau opined that the historical literature generally depicted Africans as pre-political or politically naïve people who generally assumed submissive roles, which led them to being undermined by colonists. It is pointed out that there was a great deal of variability in

[88] Kompi B *The Evolution of Traditional Leadership in South Africa, 1996-2012: Traditionalism versus Modernism* (LLD Thesis, University of the Free State, 2018) 78.
[89] Delius P (1983) 8.
[90] Kompi B (2018) 79.
[91] Koyana D 'The indigenous constitutional system in a changing South Africa' (2013) 1 *Speculum Juris* 66.
[92] Ndlela N 'Traditional leadership and governance in Africa' (2010) 3 *Africa Insight* 2.
[93] Ntsebeza L (2006) 14.

the roles of traditional leaders, ranging from those who were highly hierarchical to those who were based on consensus decision-making. Furthermore, there were common threads that ran through all traditional leadership authorities, namely that they were custodians of ancestral and community land, custodians of culture, customary laws, traditions and history, and that they maintained law and order, including presiding over as well as settling all disputes. Below is a discussion of the different categories of the roles or functions of traditional leaders.[94]

2.2.1 The political duties of traditional leaders

In his unpublished dissertation, Mashele provided a brief overview of the political roles of traditional leaders. He asserted that traditional authorities derived their authority and legacy from a variety of sources, such as rights of conquests, control over land, direct descent from great ruling ancestors, or membership of a particular ruling family. Their political roles and functions were designed to ensure that the sovereignty of their kingdoms/chieftainships was protected and preserved for posterity.[95] Rugege observed that in most cases, traditional leaders responded in defence of the integrity of their territories and invasion against external aggression. By virtue of having powers to declare war and/or make peace, the king served as a commander-in-chief. Furthermore, traditional leaders played a role of inspiring unity and patriotism amongst their subjects. This was done through communal activities, such as cultural games, competitions, hunting and festivities.[96]

One important political duty of traditional leaders was to assist in maintaining a system of government based on accountability, consultation and, to a certain extent, decentralisation. In most cases, the system of governance connected heredity and legitimacy, through which the community was involved in the political process.[97] This process on its own embedded the principles of democracy. Thus, the researcher argues that the critique that traditional leadership compromises democracy cannot be entirely true. Traditional leaders commanded political power and served as political heads, but shared political decisions with chiefs and

[94] Kumpi B (2018) 79.
[95] Mashele P *Locating the Institution of Traditional Leadership within the Institutional Framework of South Africa's New Democracy* (Unpublished MA thesis, Rhodes University, 2003) 30.
[96] Rugege S, 'Traditional leadership and its future role in local governance' (2009) 15 *LDD* 172.
[97] Kompi B (2018) 81.

headmen. The next section explains the administrative roles of traditional leaders within a chiefdom during the pre-colonial period.

2.2.2 The administrative structure and the role of traditional leaders

The various aspects and duties of a traditional African organisation were determined by the fundamental African belief of communalism which, above all, recognised the individual within a communal or social context. As legislators and policy-makers of their communities, traditional leaders were responsible for the allocation of land, provision of defence, peace and order, coordination of agricultural activities, and the general progress of the group, including looking after the poor.[98]

The fact that traditional leaders exercised their authority in consultation with their councils is testimony to the fact that they were not absolute monarchs. George Whitfield, a magistrate and a Native Commissioner of Cala (Xalanga) in the Cape Province for over five decades, and on the Johannesburg Joint Council of Europeans and Natives (JJCEN) in 1931, refuted the assertion that traditional leaders were untouchable.[99] Whitfield and JJCEN held views that African chiefs were not absolute monarchs but were subjected to 'checks and balances' within the tribal organisation. They were also subject to censure from their councils and would not dare to exert arbitrary authority over their people. Whitfield made the following remark about checks and balances placed on a chief:

> [T]he power of making laws did not in reality vest absolutely in the Chief. The Chief himself is subject to the laws in force when he assumed his chieftainship, the Natives have not been subject to the capricious laws made by a Chief, but to laws emanating from the national will, which laws have been administered by the chief.[100]

This meant that the local political power was entirely in the hands of the traditional councils. Fundamentally, they were the eyes and ears of both the king/queen and the entire traditional community. They were the people that had proved their worth in community activities, and were selected because they were trusted to help run the affairs of the African polity. As Rugege puts it, a consensus-style of leadership formed part of the cornerstone of African

[98] Kompi B (2018) 80.
[99] Kompi B (2018) 82.
[100] Rugege S (2009) 175.

democratic rule that was not entirely different from the principles of Western democracy in that it curbed the abuse of power.[101] Ndlela supports the above view of African democracy and consensus leadership, arguing that kingdoms and chieftaincies operated on the principles of community participation, consultation and consensus, as stated earlier.[102]

However, not all traditional leaders followed the consultative process in promoting the principles of unity, patriotism and loyalty in attempts to promote internal relations. In some instances, community participation during gatherings was hampered by the fear of victimisation.[103] Rugege emphasised that those who exhibited signs of being autocratic were sometimes challenged.[104] The following section discusses the economic roles of traditional leaders.

2.2.3 The economic roles of traditional leaders

Traditional leaders also had the responsibility of ensuring the economic well-being of their communities. Berman recognised that trading networks and regional economies were present in Africa long before the arrival of European proconsuls on the continent.[105] Traditional leaders seem to have led the economic activities of their kingdoms. Wealthy kingdoms functioned properly and in an African context; the wealth of the royalty determined the wealth of the community under their jurisdiction. Africans traded amongst themselves and with other nations from other continents. Evidence of early gold smelting, and trade with ivory, pottery, Chinese porcelain, glass beads and cotton have been discovered, and this has proved that national and international trade took place. Traditional leaders also controlled the means of production, such as the allocation of land, and the provision of labour and cattle.[106]

For instance, Ndlela asserts that traditional leaders were great farmers, hunters and traders who also bartered with other groupings. The mining sector additionally played a vital role in their economic activities. In the context of SA, there is evidence of trade in a variety of metals, such as iron, tin, copper and gold during the pre-colonial era.[107] As explained earlier in this

[101] Rugege S (2009) 178.
[102] Ndlela N (2010) 7.
[103] Kompi B (2018) 82.
[104] Rugege S (2009) 177.
[105] Berman B, 'Ethnicity, patronage and the African state: the politics of uncivil nationalism' (1998) 97 *African Affairs* 311.
[106] Berman B (1998) 314.
[107] Ndlela N (2010) 9.

chapter, access to land was via traditional leaders, but tradition dictated that the land belonged to the community and not necessarily to a traditional leader.[108] Land was central to the traditional model of societal organisation and honed a healthy relationship between a traditional leader and his people, but the right to land was coupled with the right to use it. The king's control of the land was one of the strategic cornerstones of his legitimacy.[109] Chief Bonga Mdletshe, who is also a politician, represented the Inkatha Freedom Party in the KwaZulu-Natal Legislature from 1996 to 2014. He highlighted the importance of land in traditional societies. He stated that

> a community and its land were united by a mystical relationship which ties together past, present and future generations and that traditional leaders are the custodians of this relationship. Furthermore, the communal land and traditional leadership were two sides of the same coin that could not survive without the other and that communal land was the basis of traditional communities' social communalism, culture of Ubuntu (humaneness), and sense of social solidarity.[110]

The aforementioned roles and responsibilities of traditional leaders did not cease even with colonial encroachment. Traditional leaders continued to fulfil these responsibilities but with limited extent and influence. The colonial and apartheid governments' legislation, codes and proclamations limited and circumvented traditional leadership roles and responsibilities. Traditional leaders had to abide by these, and some of their pre-colonial responsibilities were exercised by colonial officials.

The same could be said of the institution of traditional leadership in the post-apartheid era. In the South African context, the 1996 Constitution also limited the scope and extent within which traditional leaders could operate, and this is what this thesis is about. It examines how the Constitution and the powers it allocates to municipalities have affected the powers of traditional leaders, particularly the power to allocate land.

[108] Chapter two, para 2.3.
[109] Erk J 'Constitutionalisation of traditional authorities and the decentralisation of governance: Anglophone and francophone compared' in in Fombad M & Steytler N (eds) Decentralisation and Constitutionalism in Africa (2019) 460.
[110] Mdletshe B 'What is the fate of "tribal" land?' (1998) 20 *NWJI* 7.

2.3 Land tenure in pre-colonial African societies

This section provides brief background on land tenure in pre-colonial times. It focuses on the nature of land tenure that existed at the time, including the requirements that one needed to meet in order to gain access to a piece of land in a traditional community. What will become clear in this section is that security of tenure was stronger in pre-colonial times due to certain safeguards that were put in place by members of these communities to protect their land rights. However, security of tenure weakened over time as the safeguards meant to protect the land rights of rural citizens were eroded by the colonial authorities. How exactly the land rights of rural residents were eroded will be discussed later in the chapter.[111]

As discussed earlier,[112] the relatively easy access to land in pre-colonial times constrained the power of chiefs. Nevertheless, land was a crucial resource for communities as their economies and livelihoods depended on mixed farming, crop production, stock-keeping and hunting.[113] The system of landholding in these societies was often referred to as a system of communal tenure. It is submitted that this is still the system of landholding that is dominant in many rural parts of South Africa.[114] Communal land tenure in this study is used in the broadest possible sense to refer to areas under customary law, permission to occupy (PTO), quitrent and other hybrid systems of community tenure, where land access and allocation is based on particular membership of a group or community. Communal land tenure is different from land use management. Communal land tenure is the system which determines access to land and within which land use rights reside. Land allocation or land use management is the mechanism through which land use rights are granted.

In African communities, rights to land were normally derived from membership of a localised kinship/residential group, which in turn was part of a political unit, usually a chiefdom. When a chief settled in a new area with no inhabitants, the chief, together with his councillors, would point out certain areas of land to subordinate leaders. These subordinate leaders would in turn delineate areas for ward heads, who would then establish processes for distributing areas

[111] Chapter Two, para 2.3.
[112] Chapter Two, para 2.1.
[113] Classens A & Hathorn M 'Stealing restitution and selling land allocations: Dixie, Mayayana and Makuleke' in Cousins B & Classens A (ed) *Land, Power & Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) 315-25.
[114] Cousins B 'Characterising "communal" tenure: Nested systems and flexible boundaries' in Cousins B & Classens (ed) *Land, Power & Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) 111-115.

of land to household heads on which to build and cultivate.[115] Normally only married men were eligible for residential land. In polygamous marriages, each wife would have her own field to work. Every married man was entitled to land, even though the size and quality of a piece of land varied from household to household.[116]

When households needed additional land, they would have to consult the local leaders or headman. In the event that there was no land available in the area, the local leader would approach the chief or royal council to identify suitable vacant land within the wider community.[117] In relation to new groups that wanted to settle in the area, they also had to approach the chief to request land. Once land had been granted, it would usually pass onto the next generation within the same household. Therefore, most individuals in these societies received land not directly from the chief but through inheritance. Even when new chieftainships were established, the existing rights of such groups would be protected, as oral tradition suggests.[118]

Grazing land, which covered vast areas of many chiefdoms, was not as strictly controlled or clearly allocated as farming and residential land.[119] Access to grazing land was open to all members of the community and there was no limit on the number of livestock each household could put out to pasture. However, chiefs and headmen played a role in ensuring that there were clear boundaries between grazing land and arable land. In most chiefdoms, it was generally accepted that once land had been allocated to households, it was highly unusual for it to be reclaimed by a chief or local leader. But there were certain instances in terms of which land could be taken away from households. Some of those instances was where an individual was found guilty of witchcraft or as punishment for revolt against the chief.[120]

A chief who denied his subjects additional land, or sought to reclaim land that was already allocated, could easily lose respect, support and followers. Although chiefs played a prominent role in administering land, there were real limits on their powers. This also indicates that chiefs

[115] Delius P 'Contested terrain: Land rights and chiefly power in historical perspective' in Cousins B & Classens A (ed) *Land, Power & Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) 218-19.
[116] Delius P (2008) 219-20
[117] Maylam P *A History of the African People of South Africa: From the Early Iron Age to the 1970s* (1986) 32.
[118] Cousins B (2008) 113-114.
[119] Du Plessis WJ 'African indigenous land rights in a private ownership paradigm' (2011) *PELJ* 14-19.
[120] Delius P (2008) 215-20.

were in fact not the owners of the land, but rather administered it on behalf of their subjects.[121] In support of this view, Chanock points out that the idea that chiefs owned land, 'owed more to the need to subvert African concepts and to render easier the seizing of African lands than to descriptions of actual use'.[122] Schapera also notes that chiefs could not be described as owning the land:

> [E]xcept for the portions reserved for him and his family, on more or less the same basis as everybody else, none of the land is his property, nor can he dispose of it except gratuitously and to members of his own tribe. All members of the tribe are entitled to the use of the land as much as they need, and the tribal authorities must see to it that their claims are gratuitously satisfied.[123]

Hunter makes specific reference to the Pondo clan in relation to what the status of the chief was in connection with the land of the chiefdom.[124] He states that 'a chief had jurisdiction over people, but he also had jurisdiction over land. All this implies political overlordship not ownership in the European sense'.[125] It is quite evident that assertions which suggest that chiefs were owners of land interpreted political authority as the right of ownership of communal land. In fact, Kerr, points out that 'the role played by chiefs in the process of allotting unoccupied land has often been mistaken for ownership'.[126] Delius argues that 'as in the case of the powers exercised by chiefs, it is plain that part of what bedevils this debate are the difficulties of cross-cultural translation'.[127] In Chapter Six, the study will highlight how some traditional leaders still refer to the land as land that 'they own' in democratic South Africa.[128]

It is nonetheless clear that household rights to arable and residential land were strong in pre-colonial systems of land tenure. This was largely due to the arrangements of how allocations of land were carried out and by whom. Also, once an allocation of land had been made, the power of the chiefs to reclaim that land could only be exercised in certain instances after due

[121] Du Plessis WJ (2011) 8-11.
[122] Chanock M 'Paradigms, policies and property: A review of the customary law of land tenure' in Mann & Roberts (ed) *Law in Colonial Africa* (1991) 61-70.
[123] Schapera I *Native Land Tenure in the Bechuanaland Protectorate* (1943) 56-69.
[124] The AmaMpondo, also spelled Pondo, are a group of Nguni-speaking peoples who have for several centuries occupied the area between the Mtata and Mtamvuna rivers in Eastern province of South Africa.
[125] Hunter M (1936) 36.
[126] Kerr J *The Customary Law of Immovable Property and of Succession* (1990) 26-9
[127] Delius P (2008) 219-21
[128] Chapter Six, para 6.3.

process had been followed. An important part of this process included the participation of the community on whether the allocated plot and the rights granted to the members of a household should be rescinded or not.[129] The consultation with and participation of the community in matters related to land is one of the customary safeguards that were eroded by the colonial regime, as mentioned earlier and further explained later in this chapter.

Put differently, the rights each household had in relation to land in the various chiefdoms were strong in pre-colonial times, in the sense that they could not be easily revoked or taken away by the chief without proper consultation with the community as a whole. These rights were, however, over time systematically weakened by the colonial regime, as the process noted above was substantially modified and key aspects of it, such as public participation, were largely ignored. The colonial regime did this to ensure that the rights to land of the residents living in these communities were weakened in order to further advance the dispossession of Africans of their land, as will be explained in the sections below.[130]

2.4 Status of chiefs under colonial rule

In this section, the study traces the arrival of the different colonial regimes in South Africa and assesses which colonial regime, through its conquest endeavours, had the most impact in shaping the development of government institutions that exist in democratic South Africa. This assessment will assist in understanding the genesis of the intersection between traditional institutions and colonial institutions.

In the course of the 19th century, colonial forces waged numerous wars against the African indigenous communities in southern Africa.[131] A total of three different colonial regimes, namely the Dutch, British and Batavian, descended on southern Africa and ruled for a particular period. While all three colonial regimes imported their systems, rules and institutions, it was the British Empire systems, rules and institutions that would later have a profound impact not only on the institution of traditional leadership, but also on its land allocation role.

[129] Maylam P (1986) 42.
[130] Chapter Two, para 2.7.4.
[131] Worden N *The Making of Modern South Africa: Conquest, Apartheid, Democracy* 5th ed (2012) 11.

The first colonial authority which arrived in southern Africa in 1652 was led by Jan Van Riebeek, who was a representative of a trading company called the Dutch East India Company (VOC). Shortly after his arrival, he settled in the Cape and established the Cape Colony. The Dutch regime ruled for nearly 150 years.[132] The reign of the Dutch came to an end when the British arrived in southern Africa and occupied the Cape in 1795. However, that occupation of the Cape by the British was short-lived. The representatives of the Batavian government (the Batavian government was a system of government where the Netherlands was under the French revolutionary tutelage) took over the Cape in 1803.[133] The rule of the Batavian government over the Cape lasted for only three years as the British regained control of the Cape in 1806, beginning the second British occupation of the Cape.

This time around, the British occupied the Cape for more than a century. It is important to note that during their rule the British gained control of other colonies, namely the Natal Colony, Transvaal Colony and the Orange River Colony in Southern Africa, through military conquest. The British regime continued with its rule, and eventually passed the Union of South Africa Act in 1909, which formally combined and converted the British colonies into four provinces, namely the Cape Province, Transvaal Province, Natal Province and the Orange Free State Province. By combining the four provinces, the British regime effectively constituted the Union of South Africa in 1910. The territorial reach of the British regime meant that it had the power to regulate the whole of South Africa, including the rural areas where indigenous forms of government existed.[134]

However, before the Union was constituted, several systems of rule or strategies of control, namely direct and indirect rule had been introduced in Transkei (which now forms part of the Eastern Cape) and Natal (which is now called KwaZulu-Natal). The aims and objectives of colonial governments were to control the economic, political and social systems of the African traditional communities in order to maintain white domination. Therefore, pre-democratic governments in South Africa, and elsewhere in Africa, viewed traditional leaders as vital entities that would ensure the successful implementation of their aims and objectives.[135]

[132] Binza SM 'The evolution of South African local government: The politics of memory' (2005) 30 *JCH* 71-73.
[133] Binza SM (2005) 73-74
[134] Delius P (2008) 219-29.
[135] Gerring T 'An institutional theory of direct and indirect rule' in *World Politics* 63 (2011) 380-385.

These systems of rule, which were used in conjunction with native policies that were aimed at controlling and limiting the freedom of rural residents at the time, shaped the manner in which the colonial authorities would later manage these areas. The management of these areas differed in practice, and different systems of governance or strategies of control were introduced in Transkei and Natal. In Transkei a system containing elements of both direct and indirect rule was implemented by the colonial regime, whereas in Natal a system of indirect rule was introduced.

The strategy of indirect rule was not only employed in South Africa, but also elsewhere on the continent by the British regime, proving how potent a weapon of control it was. For instance, one could describe the strategy of indirect rule as a colonial strategy that was employed especially by Britain's Lord Frederick John Dealtry Lugard in Northern Nigeria in the 1800s in order to sustain colonial hegemony over the colonised for an extended period. Lugard emphasised the three aspects of indirect rule in bringing about institutional reforms in a conquered country, namely the recognition of traditional leaders as administrators, the establishment of native courts, and the use of native treasuries to collect taxes from their subjects, mainly for the benefit of the colonial state.[136] The adoption of these strategies of control by the British regime had a profound impact on the institution of traditional leadership and its role in land allocation in the decades to come.

As explained earlier, the British regime gained control of the other colonies through violent means. It defeated many African communities that had existed in the other parts of southern Africa.[137] After these African communities had surrendered to the rule of the British regime in Natal and Transkei, the colonial regime had to immediately confront the question of what was to be done with the chiefs who had previously ruled these societies for many centuries. The Eastern Cape was the first area where these issues were confronted.[138] In the interest of clarity, the Eastern Cape in this section is broadly used to refer to the Eastern Cape Province that was established in 1994. It is an area that was formed out of the Xhosa homelands or Bantustans of Transkei and Ciskei, together with the Eastern portion of the Cape Province.

[136] Lugard F *The Dual Mandate in British Tropical Africa* (1929) 200-206.
[137] Delius P (1983) 26-32.
[138] Brookes H *A History of Native Policy in South Africa from 1830 to the Present Day* (1927) 214-236.

The following section discusses some of the governance models or strategies of control that were mentioned above and introduced in the different areas in the former homelands. What will be argued in this section is that the initial intention of the colonial regime was to gradually phase out of existence the institution of traditional leadership. However, when this plan was met with fierce resistance in some areas, the colonial regime opted to rather incentivise the institution of traditional leadership, and used it as an instrument to control rural residents on its behalf.

In other words, the British regime accepted the co-existence of the two legal orders (European and African) in rural areas, but ensured that its imported European legal regime reigned over African indigenous law which had governed rural residents for many centuries prior to its arrival in South Africa. Specifically, the legal orders concerned in this case are the Roman Dutch common law system, as influenced by English law, and the customary law system operating in rural areas.

2.5 British rule: System of control in Ciskei (Eastern Cape - direct rule)

The developments outlined in this section relate to the policy adopted by the British regime in dealing with chiefs in areas such as Ciskei, the Eastern Cape portion of the Cape Province and elsewhere, in what is now known as the Eastern Cape province. These developments are separate to the ones that occurred in Transkei.

As discussed earlier, the policy of the colonial regime was to destabilise and phase out of existence the institution of chieftainship and replace it with a form of direct rule, with white magistrates playing a central role, particularly when it came to land allocation.[139] The British regime viewed the institution of chieftainship as nothing more than an outdated system of governance that was represented by backward-thinking chiefs who promoted violence, were uncivilised, and stifled progress.[140] As a way forward, the British regime introduced a system of direct rule. In terms of this system, white magistrates replaced chiefs in the land allocation process. Since there was no formal recognition of customary law by the British government, this meant that rural residents were governed by the colonial legal system. However, in

[139] Brookes H (1927) 189.
[140] Mathenjwa M & Makama P (2016) 200.

practice communities continued to regulate their own internal affairs without much interference from the colonial regime.[141]

The developments outlined above are important, because it was during this period that the role of traditional leaders in land allocation in some areas began to be stripped away and allocated to other entities of the colonial regime, such as white magistrates and appointed headmen. It is often said that 'the past is the best Prophet of the future'.[142] This sentiment is true at least when one examines the basis of the current tension between traditional leaders and municipalities, namely traditional leaders arguing that their power to allocate land is being 'stripped' away by the government. The following sections examine the different systems of control, namely indirect and direct rule, that were imposed by the British regime in the different provinces, including the reasons underlying the imposition of these strategies of control.

2.6 British rule: System of control in Natal (KwaZulu-Natal – indirect rule)

While the official position of the British regime revolved around abolishing the institution of chieftainship, a different approach toward chiefs was undertaken in Natal. A system of indirect rule was introduced. In terms of this system, chiefs retained their positions including the power to allocate land. In addition, chiefs were recognised and incorporated as the local arm of the administrative system of the colonial regime. Lastly, customary law in Natal was recognised, provided that it was not 'repugnant to the general principles of humanity'.[143] The system of indirect rule resulted in traditional leaders continuing to exercise their land allocation powers subject to the repugnancy clause. Although Natal was under the control of the British regime, traditional leaders were nevertheless permitted to govern their areas with limited intervention from the colonial authorities. What was required from traditional leaders was ensuring compliance with the regulatory framework of the British regime, namely the Natal Code of Native Law 19 of 1891 applicable in Natal.[144]

[141] Delius P (1983) 33.
[142] Shongwe M 'The Thinkundla decentralisation system: Is this a blend of traditional and modern state governance that works?' (2019) 16 *NEJ* 522.
[143] Guy J 'An accommodation of patriarchs: Theophilus Shepstone and the foundations of the system of native administration in Natal' (2018) 32 *JNZH* 84.
[144] Myers JC *Indirect Rule in South Africa: Tradition, Modernity, and the Costuming of Political Power* (2008) 102.

The introduction of the system of indirect rule in Natal, coupled with the formal recognition and incorporation of chiefs into the administration of the colonial regime, was somewhat surprising given that the British regime detested the institution of traditional leaders in general. This approach differed completely to the one adopted in the Eastern Cape, Ciskei area where a system of direct rule was instituted.[145] The aftermath of the war between the Zulu kingdom and the Voortrekkers (who were Dutch-speaking farmers in the Eastern Cape), as well as insufficient resources for the enforcement of law, arguably provides the answer as to why a system of indirect rule was implemented in Natal.

The war between the Zulu kingdom and the Voortrekkers caused a great deal of destruction and damage which left many chiefdoms disintegrated. This led to Theophilus Shepstone, the head of the colonial administration in Natal, gathering the members of those disintegrated chiefdoms into 'tribes'. He then appointed men from those tribes to become 'chiefs' and rule in those chiefdoms.[146] These appointed chiefs had sometimes been serving as leaders of their communities, meaning they enjoyed some degree of recognition, but often their appointments were based primarily on Shepstone's preferences rather than any traditional legitimacy.[147]

The principle that 'a chief was a chief by the people' quickly became a thing of the past, since now the legitimacy of a chief was derived from the colonial authorities. Most importantly, the Lieutenant Governor (the highest state official in the Union of South Africa) was proclaimed as the 'supreme or paramount chief that enjoyed an array of powers to appoint all subordinate chiefs or other authorities among them'.[148] The appointment of chiefs based on preference meant that most chiefs would be more inclined to take decisions that favoured the nefarious aims and objectives of the British regime rather than their subjects. Among other things, this signalled the start of an era where the power to allocate land was exercised by traditional leaders under the direction and auspices of the British regime, leaving plenty of room for the British regime to introduce its imported laws, initiatives, programmes and plans in rural areas. Overall, what this illustrates is that the power to allocate land was a very important one in the

[145] Guy J (2018) 86.
[146] Guy J (2018) 88.
[147] Costa D (2000) 46.
[148] Mathenjwa M & Makama P (2016) 200.

eyes of the British regime, and that the incursions on the institution of traditional leadership were directed at acquiring the exercise of this power by any means necessary.

2.7 British rule: System of control in Transkei (Eastern Cape-mixed system)

A hybrid system containing elements of both direct and indirect rule was implemented in Transkei and became known as the Transkeian system.[149] The stance of the colonial regime on chieftainship and what it represented informed the implementation of this mixed system. The region was demarcated into districts with little regard to pre-existing chiefly boundaries.[150] In each district a white magistrate was appointed to preside over it. These districts were in turn subdivided into locations with approximately 30 in a district. Over each location a headman who served under the authority of the magistrate was appointed by the administration.[151]

Despite the recognition and incorporation of chiefs as the local arm of the colonial government, it is clear that the intent from the onset was to remove and replace chiefs from their governance roles. This was achieved in Ciskei, where chiefs were stripped of their functions, particularly the land allocation function. The authority to carry out this function was then vested in white magistrates. Similarly, in Transkei, chiefs were removed from the process of allocating land and their functions were performed by illegitimate headman that were appointed by the colonial regime. In Natal, the colonial administrator, Sir Theophilus Shepstone, rounded up men who would do as required by the colonial administration and appointed them as chiefs.[152]

These developments seem to suggest that the colonial government did in fact detest chiefs and, as such, the policy was for chiefs to be replaced by white magistrates. This aim was, however, not realised due to certain practical constraints in some rural areas which then necessitated that the institution of chieftainship be kept alive. The institution of traditional leadership was then used as a vehicle to serve the parochial interests of the colonial government through appointed chiefs, magistrates and headman, especially in matters involving land. After all, the control and ownership of land in South Africa is what caused the colonial government to embark on a mission of military conquest in the first place. All of this

[149] Mamdani (1996) 62.
[150] Mamdani (1996) 64.
[151] Myers CJ (2008) 118.
[152] Guy J (2018) 92.

indicates that the continued rule of the British regime had an impact on the role of traditional leaders in land allocation, particularly the manner in which the land allocation power was exercised to alter the land tenure arrangements which had existed prior to the arrival of the colonial forces. The following section assesses the impact of colonial rule on land tenure arrangements.

2.7.1 Land tenure arrangements under colonial rule

While the colonial regime permitted chiefs and headmen to still allocate land for specific purposes and subject to certain requirements, the key issue the colonial government had to deal with related to land tenure. Essentially, the colonial regime sought to modify or change the existing system of tenure that the African communities had been following for centuries. The tenure arrangements of these communities were based on well-defined rights to jointly own and manage community resources such as land, the forests and water. As pointed out earlier, a key aspect of this tenure arrangement was that access to these resources was based on membership of a particular group or community.[153] The colonial regime however, intended to change this and introduce a new system of land tenure. The colonial regime began the process of altering the existing systems of land tenure that the African communities had established and, by extension, weakened the role of traditional leaders in the process of allocating land.

2.7.2 Introduction of a new tenure system

This section focuses on the introduction of new tenure regimes by the colonial government with the aim of replacing communal tenure systems which had been applicable in these areas prior to the advent of colonialism. The aim of this section is to analyse the reasons of the colonial regime in seeking to replace communal land tenure systems with individual tenure systems, and thereafter to demonstrate the resilience of these communal land tenure systems despite colonial encroachment. In pursuing the objective of changing the indigenous land tenure arrangements, the colonial regime undertook to individualise tenure, resulting in each household in the community owning or managing their share of the available resources individually. For example, in the areas of Transkei that were annexed and put under the control

[153] KwaZulu-Natal Provincial Planning and Development Commission & Legal Entity Assessment Project Report- *Aligning Development Planning with Communal Tenure Arrangements in the Context of Changing Legislation in South Africa* (2004) 3.

of the Cape Colony, the colonial regime in the Cape Colony passed the Payment of Quitrent (Cape) Act 14 of 1927.[154] This Act introduced and regulated the payment of quitrent by part owners of land situated in the Cape. Quitrent means that part owners of land in the Cape were required to pay annual rent to the state.

Since land tenure was now individualised in those areas of Transkei that were under the control of the Cape Colony, and the annual rent was to be paid directly to the state by those land owners, the role of chiefs in the land allocation process became redundant. They were effectively stripped of their power to allocate land which was now vested in the magistrates. In practice, though, the power to allocate land was performed by headmen who were appointed by the colonial regime.

Outside the Cape Colony, not much attention was paid to tenure reform. In most parts of the rural areas, forms of land tenure which existed before the colonial period continued into the colonial era but subject to slight modifications. Chiefs who resided in Transkei also had their role in the land allocation process taken away and formally vested in magistrates. Again, appointed headmen that were placed in the various locations actually performed the function of allocating land in their respective areas subject to confirmation by the magistrate.[155] While officials claimed that they reproduced traditional practice, these changes had the effect of considerably reducing both the security and flexibility of the tenure systems.[156] Hunter describes the impact of these changes on the Pondo clan (a group of Nguni-speaking peoples who have for several centuries occupied the area between the Mtata and Mtamvuna rivers in Eastern province of South Africa) when he states that

> on annexation, land became the property of the Crown. The exclusive right to cultivate certain arable areas is now granted through the magistrates. Rights of cultivation are inalienable. On the removal or death of the grantee the area reverts to the Crown, but the widow retains the right to cultivate fields which she cultivated as a wife, and in re-allotting the fields the first claim is given to the eldest son of the deceased if he does not have the full quota of land. Land left

[154] Delius P (2008) 225.
[155] Hunter M (1936) 18.
[156] Hunter M (1936) 12-13

uncultivated may be forfeited. This law is enforced where there is a shortage of arable land.[157]

The new system not only had a negative impact on the tenure arrangements that were observed by rural citizens before colonial rule and on the role of traditional leaders in land allocation, but also had implications for the status of woman insofar as their rights to land were concerned. As explained earlier, woman in rural areas even before colonial rule did not enjoy equal rights to land as men. A woman could occupy land and enjoy rights to land only under limited circumstances, one of those being through marriage. Women were discriminated against even more under the new tenure arrangements that were introduced by the colonial regime. This was particularly the case when there was a shortage of land in the areas reserved for African occupation. For instance, single women did not qualify to apply for land unless they could demonstrate 'justifiable family obligations'.[158] They could only retain access to land through marriage, while men always received preferential access to land.

In summary, the introduction of the new tenure system by the colonial regime had the effect of shifting ownership of communal land from rural families and communities to the colonial regime. This resulted in the land rights of these families and communities being considerably weakened, particularly the rights of single women. More importantly, the role of traditional leaders in land allocation was usurped by white magistrates whose instructions was carried out by appointed headmen. The long term aim of the colonial regime was to replace the existing traditional systems of tenure and the traditional governing institutions with its own institutions.

2.7.3 Impact of the Native Administration Act on land allocation

It was explained earlier that the colonial regime's policy on the institution of chieftainship was uniform in theory but not in practice.[159] It was pointed out what the official position of the colonial government was towards the institution of chieftainship and its role on land allocation. It was also argued that the system of control that was applied in each territory depended on the prevailing circumstances of that territory at that particular time. Aware of its differentiated approach towards the different provinces, the colonial regime instituted a

[157] Evans I *Bureaucracy and Race: Native Administration in South Africa* (1997) 110-13.
[158] Evans I (1997) 115-16.
[159] para 2.4.

new policy for the creation of a single, rationalised and uniform administrative structure in African rural areas across the four provinces of the Union. The framework of this new policy was set out in the Native Administration Act of 1927 (subsequently renamed the Bantu Administration Act and later the Black Administration Act).[160]

This Act set up a separate legal system for the administration of law applicable to Africans. Essentially, the Act transferred the regulation of African life from Parliament to the Executive. This explains why the Act granted the Governor-General (President of the Union) the power to rule over Africans by simply issuing proclamations instead of having legislation passed by Parliament. Chapter One of the Act stunningly declares the Governor-General as the 'Supreme Chief' of all the natives in the provinces of Natal, Transvaal and the Orange Free State. According to this Act, the Supreme Chief's powers included the authority to recognise or appoint any person as a chief or headman in charge of a tribe or location. He could depose any chief or headman and was authorised to define their powers, duties and privileges.[161]

Furthermore, regulations in the Act defined the positions of chiefs, and prescribed a long list of duties designed to maintain control over the rural population.[162] In respect of the power to allocate land, chiefs and headmen were required to allocate land for arable and residential purposes in a just manner. In short, this not only meant that chiefs had been restored to their previously held positions, but also marked the start of a comprehensive process to recognise and incorporate chiefs into the administrative structure of the colonial government. The colonial regime would then use chiefs to implement among other things, a planning system designed to further exert colonial control over the lives of rural citizens.

In other words, this Act acknowledged the existence of legal pluralism, where traditional leaders were legally allowed to allocate land in terms of customary law but in a 'just manner'. However, the customary law system was secondary to the Eurocentric legal system of the British regime and could be abolished at any time, as will be discussed in detail in Chapter Five. This study examines the intersection of the role of traditional leaders and municipalities in land use management in areas governed by traditional leaders. The intersection of these

[160] Native Administration Act of 38 of 1927.
[161] Chapter 1, Native Administration Act 38 of 1927.
[162] Chapter 3, Native Administration Act 38 of 1927.

two roles manifests as a result of the existence of legal pluralism in rural areas which as evident from above, dates back to the colonial period.

The difference between then and now is that most traditional leaders accepted (whether by force or choice) the fact that the customary law system was subordinate to that of the colonial regime, and ensured its implementation in rural areas. Part of what fuels the contestation between traditional leaders and municipalities with respect to the implementation of SPLUMA in rural areas is that traditional leaders are not accepting that the imported system of planning, which SPLUMA is primarily based on, should be the sole and exclusive planning system that is used to plan their areas of jurisdiction. What this means is that traditional leaders reject, as will be shown in Chapter Six, the view that customary law is subordinate to the dominant Eurocentric legal system which is in force in South Africa. According to traditional leaders, although the two officially recognised legal systems co-exist and interact in rural areas, it should be customary law that should guide the management of land use in rural areas, as was the case before the arrival of the colonialists.

2.7.4 Impact of betterment planning on land allocation

While the legal system of customary law was officially recognised by the colonial government, the reality was that it was not fully autonomous, nor was it equal to the Roman Dutch common law legal system that was brought to South Africa by the colonial regime. The imposed Eurocentric legal system was perceived to be the superior, dominant system, while the customary law system was regarded as subordinate and inferior.[163] Thus, it can be argued that any proclamation, regulation or even legislation that was passed by the colonial government could very well abolish the indigenous law that governed the African communities at any given time. Furthermore, the colonial regime ensured that the Native Administration Act prevailed in circumstances where there was conflict of values between the two legal orders through the use of the 'repugnancy clause'. As was stated earlier, this then also created opportunities for the colonial government to introduce and implement its own initiatives, programmes and plans through traditional leaders. One of those programmes is what is known as 'betterment planning'.[164]

[163] This will be discussed later in Chapter Five.
[164] Chapter Two, para 2.5.

The next section scrutinises the roots, nature and purpose of betterment planning in rural areas. This section argues that some traditional leaders collaborated with the colonial government in implementing an imported, Eurocentric planning system in rural areas during the colonial era. That planning system forms the basis of the planning system that SPLUMA has established throughout the country. Traditional leaders now argue that this system gives exclusive authority to manage land use in rural areas to municipalities. This is one of reasons why tensions have flared up between the two institutions in rural areas over the implementation of SPLUMA, as will be discussed in Chapter Six.

2.7.5 The roots, nature and purpose of betterment planning

This section examines the roots, nature and purposes of betterment planning which was introduced in areas reserved for African occupation. It will be argued in this section that the purpose of betterment planning was to further increase the levels of landlessness among black Africans living in the reserves. Chiefs in rural areas implemented betterment planning which was nothing but a nefarious project to take away the remaining wealth Africans had, namely good, fertile and sufficient land for homestead subsistence and livestock. Livestock represented wealth in traditional communities and was of ritual and cultural significance, as stated earlier.[165]

The roots of betterment planning can be traced back to the 1930s. During this period the state decided to introduce measures to mitigate the declining agricultural conditions in the reserve areas. The aim of the colonial government was to rehabilitate the agricultural base of the reserves. This would also ensure that the government maintained its role of reproducing a migratory labour force.[166] Underlying the introduction of betterment planning was a belief that the agrarian crisis in the reserves reflected the 'bad farming' practices of Africans. The main causes of agricultural deterioration in these areas were seen as the 'innate laziness' of African men, their supposedly irrational desire to accumulate cattle, and unwillingness to accept crop rotation.[167]

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[165] Bizana T *Traditional Leaders in South Africa: Yesterday, Today and Tomorrow* (MPhil Mini-Thesis, University of the Western Cape, Cape Town 2008) 19-21.

[166] Letsoala E & Rogerson C 'Rural "development" planning under Apartheid: Betterment planning in Lebowa, South Africa' (1982) 13 *Geoforum* 303.

[167] T Quinlan, 'The perpetuation of myths: A case study of "tribe" and "chief" in South Africa' *in Journal of Legal Pluralism and Unofficial Law* (2012) 42.

The introduction and nature of betterment planning involved a major restructuring in the organisation of rural life. The programme necessitated a change to the pattern of scattered homesteads characteristic of traditional African farming practices. The scattered homelands were to be replaced by the establishment of a series of planned betterment villages into which the dispersed rural population would be concentrated. Livestock of African farmers would either be sold to white farmers at a below market value or be subjected to culling. In as far as loss of cattle is concerned, 7,000 head of cattle were sold in the reserves in 1939, 53,000 in 1952 and 51,700 in 1958. This was as a result of the so-called 'betterment' programme.[168]

A key aspect of betterment planning involved an attempt to impose a gridiron street pattern upon new village settlements, resulting in a considerable volume of forced population resettlement into the demarcated residential sites. A gridiron plan is a type of city plan in which streets run at right angles to one another forming a grid. The idea was to create residential areas whose design was informed by the European-derived system of planning that is based on zoning. As will be explained at length in the subsequent chapters, this is a system that was primarily brought to South Africa to design and develop areas in which people from Europe resided. At the heart of betterment schemes there is a re-arrangement of the existing patterns of land utilisation. Instead of traditional systems of land holdings and communal grazing, betterment planning involved the demarcation and fencing of arable lands and grazing camps.[169]

Essentially, betterment embraced a variety of forms of dispossession, namely, the demolition of homes, dispossession of community members of their right to use and enjoy the residential and communal commonages. It also included the dispossession of arable rights and the reduction of the size of arable land holdings. Also, the collective right as a community to manage its ancestral land through the application of rules of customary law and values was supressed.

The basis of agricultural production was to be the allocation of family 'economic units' of land as proposed by the Tomlinson Commission. The Tomlinson Commission was a government-appointed commission under the chairmanship of Professor F. R. Tomlinson. The Commission

[168] Semela M *The Namoha Battle, Qwaqwa* (*1950): A Case Study of the Significance of Oral History* (Unpublished PhD thesis, University of the Free State, Bloemfontein, 2005) 124.
[169] Delius P *The Lion amongst the Cattle: Reconstruction and Resistance in the Northern Transvaal* (1996) 139.

was charged with the task of devising a 'comprehensive scheme for the rehabilitation of the Native Areas with a view to developing within them a social structure in keeping with the culture of the Native and based upon effective socio-economic planning'.[170]

The family economic unit is an area of land viewed as sufficient to afford African farmers a subsistence livelihood. In other words, betterment planning resulted in the division and allocation of sub-economic unit parcels of land, therefore ensuring the easy maintenance of the role of the reserves in producing a cheap migratory labour force.[171] However, the progressive deterioration of the agricultural conditions of the reserves threatened the continuing role of these areas in maintaining and reproducing South Africa's cheap labour. This is the reason why the colonial government decided to initiate a series of legislative interventions throughout the homelands of South Africa.[172] The first of these legislative interventions is analysed in the section below.

2.8 Impact of the Native Trust and Land Act on chiefs

The first of these legislative measures, which in effect was a reinforcement of betterment planning, was the implementation of the Native Trust and Land Act of 1936. One of the main features of the Act was the establishment of the South African Native Trust (SANT).[173] SANT was a trust that absorbed previous trusts that managed all land that vested in the Crown and was set aside for the occupation of 'natives'. This Act facilitated the expansion of agricultural land in the reserves, as land that was vested in the SANT would now be released for the use and occupation by natives. The Act also provided that regulations could be passed to set out conditions on how to farm properly so as to avoid soil erosion.

Reinforcement of the betterment planning programme was provided by Proclamation 31 of 1939. The proclamation provided for the declaration of any area as a betterment area 'after the population had been consulted'.[174] It is not clear what was meant by the phrase

[170] Houghton D 'The significance of the Tomlinson Report' available at *http://www.sahistory.org.za* (accessed 19 June 2021) 2.
[171] Bank L 'The Janus-face of rural class formation: An economic and political history of traders in Qwaqwa 1960–1985', paper presented during the University of Witwatersrand History Workshop on Structure and Experience in the Making of Apartheid, 6–10 February (1990) 13.
[172] Semela M (2005) 127. Semela M (2005) 129.
[173] Chapter 1, Native Trust and Land Act of 1936.
[174] Proclamation 31 of 1939.

'consultation' as it was not defined, but, in practice 'consultation' tended to be limited to the chief rather than the wider communities of the homelands.[175]

The Betterment Areas Proclamation No. 116 of 1949 provided the Native Commissioner (latterly the Magistrate) with sweeping powers to plan land use in rural villages.[176] In many cases, the application of these powers led to the re-delimitation and re-registration of individual arable holdings, as well as the re-delimitation of grazing and residential areas. Chiefs and headmen who were against these measures were simply powerless to stop this process for two reasons.[177] First, the majority of chiefs in most areas had become agents of the state and thus assisted in the implementation of betterment planning. Secondly, chiefs who had resisted the implementation of betterment planning were viciously removed as leaders of their communities. Therefore, chiefs who had wanted to also support the resistance against the implementation of betterment feared suffering the same fate. What this study argues is that 'betterment planning' was not that different from the planning that is undertaken in terms of SPLUMA. It is the same method of planning traditional leaders are fiercely objecting to in democratic South Africa.

These proclamations provided for the re-demarcation of residential, arable, and grazing areas, including measures such as fencing, diversion banks, contour banks and stock limitation under the guise that it would 'improve' the quality of the land. However, there is compelling evidence, as alluded to earlier, which shows that the betterment planning programme was associated with the growth of landlessness, reductions in land available for ploughing, the forced resettlement of large groups of people, and major reductions in African livestock holdings.[178]

2.8.1 Resistance to betterment planning

It has been argued that traditional leaders exercised their land use management authority at the behest of the colonial government. This is supported by the fact that wide powers to plan land use in rural villages were allocated to magistrates who, in turn, instructed appointed chiefs and headmen to implement betterment planning. This means that the Eurocentric

[175] Letsoala E &Rogerson C (1982) 305.
[176] The Betterment Areas Proclamation No. 116 of 1949.
[177] De Wet, C.J 'Land tenure, local government and agricultural development in the Ciskei' available at http://www.sahistory.org.za (accessed April 4 2020).
[178] Semela M (2005) 130.

system of planning brought by the colonial government was being implemented by traditional leaders on the ground. However, the very same planning system that is based on zoning and disguised as 'betterment planning', which traditional leaders implemented then, is largely the same as the one that has been established in terms of SPLUMA.

For example, a key aspect of betterment planning involved an attempt to impose a gridiron street pattern upon new village settlements. This gridiron street pattern is still predominantly applied to establish many townships in post-apartheid South Africa. The reason for this is that South Africa's planning system continues to be predominantly Eurocentric in nature. It was Eurocentric during the colonial and apartheid era, and it remains Eurocentric even in democratic South Africa. This is another reason why traditional leaders are now resisting the implementation of this new planning system in their areas of jurisdiction.

The introduction and implementation of betterment planning policies attracted widespread resistance from the African population living in the homelands from as early as the 1930s. In examining this history of opposition to betterment, it is useful to distinguish two major phases of resistance according to their respective timelines.[179] The first phase of resistance was between the 1930s and the 1940s, and was directed mainly at the phasing in of betterment planning in the rural reserves. The second phase of resistance began in the 1950s, and at this time the resistance toward betterment was merged with a general resistance to the apartheid state's restructuring of the institution of chieftainship as a system of governance. More specifically, the enactment of the Bantu Authorities Act of 1951 gave rise to considerable resistance when it established tribal authorities, whose members (chiefs) had become officials of the state that were paid by the state.[180] Their function of being agents of social control, which was previously accommodated by Union governments, was now institutionalised in policy and legislation by the apartheid state.[181]

In summary, it is clear that during the colonial period some traditional leaders resisted the implementation of betterment planning, while most traditional leaders worked with the colonial regime to implement this programme. This programme was implemented for reasons

[179] Delius P (1996) 142.
[180] Bank L (1990) 26.
[181] Skweyiya Z 'Chieftaincy: The ethnic question and the democratisation process in South Africa' available at https://dullahomarinstitute.org.za/about-us/our-historical-publications/chieftaincy-the-ethnic-zola-skweyiya.pdf (accessed 15 April 2021) 4.

inimical to the welfare of rural residents and the spatial setting of their traditional communities. It was not intended to benefit them in any way but rather to support the role the reserves played as sources of cheap labour.

As such, the focus of this thesis is on understanding the reasons behind the resistance to implement SPLUMA in areas governed by traditional leaders. If a planning system brought by the British regime was implemented by most traditional leaders during the colonial era, what could be the reasons for not allowing a similar planning system whose purpose is not to support the production of cheap labour, cause landlessness or a reduction in livestock to be implemented in order to facilitate rural development? The next section scrutinises in detail the impact of the Bantu Authorities Act and its implications for the role of traditional leaders in land allocation.

2.8.2 The impact of the Bantu Authorities Act on the role of chiefs in land allocation

In 1948, the National Party came to power in South Africa on a segregationist political platform. This was the official start of apartheid in South Africa. The National Party effected major changes in South African cities and rural areas through a refinement of the segregationist legislation already put in place by the colonial regime and further implementation of the betterment planning programme.[182] Parliament passed the Bantu Authorities Act in 1951 (later renamed the Black Authorities Act).[183] The Bantu Authorities Act became the cornerstone of the apartheid system and many chiefs expressed their support for it.[184] It contained one of the most sophisticated divide-and-rule strategies ever devised in South Africa.[185] The Act signalled the intensification of the indirect rule strategy by the apartheid government and turned traditional leaders into government followers and proxies.[186]

After many years of uncertainty around the role of chiefs, as well as inconsistency in terms of recognition across the different provinces, the Act set in motion a systematic process of

[182] Christopher A J 'Apartheid planning in South Africa' (1987) 153 *Geographical Journal* 199.
[183] Bantu Authorities Act 68 of 1951 (Black Authorities Act).
[184] Delius P (2008) 228.
[185] Breytenbanch WJ 'Chieftainship and political development in the homelands' in *Bulletin of Africa Institute of South Africa*, No. 9 and 10 (1975) 330-342.
[186] Kompi B *The Evolution of Traditional Leadership in South Africa from 1996-2012: Traditionalism Versus Modernism* (Unpublished PhD Thesis, University of the Free State, Bloemfontein 2018) 104.

incorporating chiefs into the formal administrative system of the apartheid government.[187] The system provided for the establishment of tribal authorities that were led by chiefs who received a salary from the state. The aim was that in the long-run chiefs would be accountable to the National Party government rather than the people they led.[188]

The Act defined a tribal authority as a black tribal authority that has the power to appoint the majority of the councillors (councillors were men that advised the chief on governance issues) with the exception of a few that were appointed by white officials.[189] This was in stark contrast to the practice that was followed in the pre-colonial period when councillors were selected by elders of the royal family.[190] As discussed earlier,[191] in the pre-colonial period, councillors were selected based on popular support or because they represented significant subgroups. The role played by the Department of Bantu Affairs in controlling decisions about which individuals had to be recognised as chiefs also had serious implications for the legitimacy of a chief. This approach in fact resembles the one that was adopted by the colonial administrator of Natal in the 1800s, when he appointed men to become chiefs based on his preference.[192]

The Bantu Authorities Act provided for the establishment of tribal authorities. Section 2(2) and 2(3) of the Act provided that a tribal authority should be 'established in respect of the area assigned to a chief or headman of the tribe or community in question' and that these areas had to be made known in the government gazette.[193] In fact, during the 1950s and 1960s, an array of these notices were gazetted. Tribal authorities were then established throughout the rural areas, but there was an element of coercion at the centre of this process. Groups who accepted the establishment of tribal authorities without any reluctance were often allocated land claimed by groups who resisted the system. Questions as to whether the now-repealed Bantu Authorities Act granted rights of ownership to land as discussed earlier[194] to the tribal authorities during apartheid, or whether it explicitly provided that tribal

[187] Delius P (2008) 229.
[188] Mashele P *Locating the Institution of Traditional Leadership within the Institutional Framework of South Africa's New Democracy* (Unpublished MA dissertation, Rhodes University, Grahamstown, 2003) 45-62.
[189] Section 1 of the Bantu Authorities Act 68 of 1951 (Black Authorities Act).
[190] Chapter Two, para 2.4.
[191] Chapter Two, para 2.4.
[192] Chapter Two, para 2.5.
[193] Section 2(2) & (3) of Act 68 of 1951.
[194] Chapter Two, para 2.3.

authorities have land allocation powers or not, are an important aspect of the problem which this study seeks to address.

Some traditional leaders, as will be seen in subsequent chapters, still argue in post-apartheid South Africa that they own communal land under their authority by virtue of their power to allocate land. However, it is possible that some of that land may be owned by the municipality and the land in which the chief lives with his family is owned by the chief himself. But all of that land, irrespective of who owns it, falls under the planning jurisdiction of the municipality. Thus, before these questions which predate, and still find relevance in, democratic South Africa can be addressed, it is useful to set out the land allocation process under tribal authorities established under the Bantu Authorities Act.[195] Understanding this process is important because this is largely the same system which is still in place in post-apartheid South Africa.

2.9 The land allocation process under the tribal authorities Act

Access to land in all traditional communities during the pre-colonial period was through traditional leaders, but tradition dictated that the land belonged to the community and not necessarily to a traditional leader, as discussed earlier.[196] Under the new system, access to land was granted by magistrates and not the chiefs. Chiefs and headman played a procedural, complementary role which only sought to represent to the traditional communities that the land allocation process was still the one observed during the pre-colonial period, when in fact it was not. In terms of the new system established by the Tribal Authorities Act, the process of allocating land also began at the local, sub-headman level, but ended with the issuing of a PTO by the magistrate, which was a completely new feature. In theory, a person (usually a man) who wanted land would identify an area and approach the people in the neighbourhood to establish if there was another person who had submitted a claim for the land and to gather support. If the land were available, the applicant would approach the sub-headman of the ward in which the plot was situated. The sub-headman then called a ward general assembly (*imbizo*) to give an opportunity to the people to submit comments on the application. If there

[195] Ntsebeza L 'Chiefs and the ANC in South Africa: The reconstruction of tradition?' in Cousins B & Classens A (ed) *Land, Power & Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) 250.
[196] Mashele P (2003) 52.

were no objections, the sub-headman would submit the application to the headman of the administrative area.[197]

The headman would then verbally verify that the general assembly had been called and that no objections had been raised. The headman would also establish whether the applicant was married and a registered taxpayer. In this regard, the sub-headman had to produce a receipt issued by the magistrate as proof. If the applicant could not do so, the headman would have to accompany the applicant to the magistrate's office where he would be duly registered. The applicant could not go to the magistrate's office without a headman or the chief.[198] Upon production of the receipt, the headman would normally approve the application. This was seen as a formality. The headman would then submit the application to the tribal authority. This was also seen as a formality. The tribal authority completed the application form that was submitted to the district commissioner.[199]

The Bantu Authorities Act did not confer rights of ownership to land but only defined an area of political jurisdiction. In fact, tribal authorities were not explicitly granted land allocation powers under the Act, but were rather given 'the powers, functions, or duties conferred or imposed upon its chief or headman under any law including any applicable Black law and custom, or in terms of any regulations'.[200] In the light of this provision, chiefs tended to use their wide authority and reduced accountability to their subjects to assert greater control over allocation of land. They also benefited from increased payments from allocations of both arable and residential land. As a result, the increased power of traditional leaders, coupled with the arbitrary removal of families from their land if they did not support the new system, significantly weakened the security of tenure of rural residents.[201] Also, if you were opposed to the new system, a huge portion of your land could be taken away and re-allocated to a person who was in support of the new system. The next section examines the effect of the new system on the legitimacy and recognition of chiefs.

[197] Ntsebeza L (2008) 250.
[198] Ntsebeza L (2008) 251.
[199] A district commissioner was an administrative officer of the apartheid government.
[200] Section 4(1) of Act 68 of 1951.
[201] Ntsebeza L (2008) 251.

2.9.1 Implications of the system of land allocation for the legitimacy of chiefs

This section examines how the introduction of this system of land allocation affected both the manner in which chiefs derived their legitimacy and the manner in which they were recognised in the pre-colonial era. Under this system, the National Department of Bantu Affairs also had the authority to recognise individuals as chiefs at will. This resulted in a large number of 'new chiefs' entering the system and serving as the local government officials of the apartheid government.[202] For example, in Transkei, around the late 1960s, the number of recognised chiefs doubled from 32 to 64 and headmen were made subordinate to chiefs. Another example is in the Pedi Kingdom in Limpopo, where the number of recognised chiefdoms exponentially increased from three to 54.[203]

Not only did the number of recognised chiefs increase, but the stipends given to them also increased significantly. In practice, it was obvious that these developments were intended to make chiefs less dependent on their subjects and more dependent on the state. What is also apparent is that the apartheid government's policy was favourably disposed towards chiefs since they were used to implement its divide-and-rule strategy, and some chiefs unwittingly supported the apartheid's government's objective. The apartheid government's approach differed from the one adopted by the colonial government in which chiefs were removed from their positions and headmen were appointed to work with white magistrates. What apartheid did was to empower chiefs to become its administrative agents at the local level, so as to maintain effective control over every aspect of black Africans living under traditional rule.

Not all chiefs were supportive of the new system. Many of these chiefs argued that this system would have a negative impact on the legitimacy and support for the institution of chieftainship. Some people living in the rural areas believed that chiefs were being used as instruments of control by the state and that, since they were paid by the state, they were more inclined to serve the parochial interests of the state rather than the needs of their subjects[204] Others argued that the Bantu Authorities Act would be used to ensure that chiefs would drive the implementation of the much-maligned betterment schemes against the wishes of their subjects.

[202] Evans I (1997) 251-3.
[203] Section 1 of Act 68 of 1951.
[204] Delius P (2008) 215-20.

On the other hand, legitimate chiefs who governed in the best interests of their communities became instant targets after the system of the Bantu Authorities was imposed. Individuals who were ready to co-operate with the new system replaced chiefs who were hesitant to accept the new system, often for fear of isolating their subjects. In other cases, junior chiefs who showed support for the system were promoted to become chiefs over senior chiefs who were against the system. The extensive powers of the chiefs under the new system, combined with the support of a government concerned with racial separation, enabled chiefs to increasingly make demands on their subjects in the form of gratuitous gifts.[205]

These heavy demands gave rise to resentment among many rural residents. This resentment was directed at only a few chiefs who widely supported the new system, and not to the institution of chieftainship itself. Put differently, some chiefs continued to attempt to serve the interests of their subjects to the best of their ability under the new system, while others had become corrupt and only served the interests of the state. Despite most chiefs supporting and serving the new system, many people in the rural areas still viewed chieftainship as an institution of significant importance in their lives.

By the late 1960s, the system of the Bantu Authorities Act was firmly entrenched. Ownership of the land remained vested in the SANT and all of its land was placed under the control of the relevant Bantu Affairs Commissioners. These Commissioners were obliged by Proclamation R188 of 1969, issued under the 1927 Native Administration Act and the 1936 Native Trust and Land Act, to consult with chiefs and headmen before exercising their powers.[206] Furthermore, the powers granted to the Minister and his officials reflected the considerable powers the apartheid government enjoyed over land regulation and these included the

- authority to appropriate land;
- suspend;
- terminate; or
- cancel Permissions to Occupy (PTOs).[207]

[205] Chapter Six, para 6.3.
[206] Binza SM 'The evolution of South African local government: The politics of memory' (2005) 30 *JCH* 71-73.
[207] Lugard F *The Dual Mandate in British Tropical Africa* (1929) 200-206.

The impact of these regulations on administrative practice varied across the country. However, the issuing of PTOs for both arable and residential land became the order of the day during the apartheid era, and is still the order of the day in many traditional areas in democratic South Africa. The Bantu Affairs Commissioners during the apartheid era were responsible for this function, but in practice, chiefs and headmen, performed it which further increased their power.[208] In democratic South Africa, traditional leaders exclusively carry out this function. It is a function which buttresses the argument made by chiefs now that they are the sole, appropriate authority in rural areas to manage land use, and not municipalities, as envisaged by the Constitution and SPLUMA.

By the 1980s, the more educated, younger generation became discontent with the institution of chieftainship and began arguing for its abolition.[209] Around the same period, there were growing tensions in the rural areas between civic organisations, women's groups and the chiefs. These tensions brewed for a while during the course of the 1980s but eventually reached breaking point. In the midst of the nation-wide youth-led protest against the apartheid government, especially in the Northern Transvaal, the youth vehemently protested and demanded that chiefs atone for their actions or resign from homeland structures.[210] However, these calls fell on deaf ears as most traditional leaders continued to govern in rural areas under the auspices and direction of the apartheid regime until its imminent demise in the late 1980s.

2.10 Conclusion

The main purpose of this chapter was to provide a summarised historical background to the role of traditional leadership in land allocation in South Africa and to ascertain the evolution of this power from the colonial to the apartheid period and the role-players who have exercised it during various times. It was important to analyse this history because it showed the context within which chiefs and headmen in the traditional communities carried out land allocations, the conditions or rules under which they allocated land, and for what purpose. The characteristics and functions of traditional leaders in the process of allocating land in pre-

[208] Delius P (1983) 26-32.
[209] Delius P (1983) 33.
[210] Shongwe M 'The Thinkundla decentralisation system: Is this a blend of traditional and modern state governance that works? (2019) 16 *NEJ* 522.

colonial times were also presented, including tenure arrangements which had existed prior to the arrival of the colonial forces. The impact of the colonial and apartheid laws, programmes, and strategies of control was also examined.

It was revealed that these did not only severely compromise the legitimacy of the institution of traditional leadership, but also negatively affected the powers and functions of traditional leaders, and particularly the land allocation function. Consequently, in some areas traditional leaders were stripped of this function which affected their governance role in their respective communities, while in other areas traditional leaders retained their positions through the imposition of indirect rule. It was argued that, ultimately, some traditional leaders mainly implemented the aims and objectives of these regimes at the expense of the communities they governed through the land allocation power. This therefore proved how potent a weapon the power to allocate land could be if exercised for nefarious reasons. The focus of the following chapter will be on how the post-apartheid government sought to deal with concerns around the legitimacy and acceptance of traditional leadership as a governance institution at the local level in post-apartheid South Africa. More importantly, the chapter will assess how issues of recognition, status, role, powers and functions were addressed, particularly the power of traditional leaders to allocate land after the demise of apartheid in South Africa.

Chapter Three: The Road to Democracy

3.1 Introduction

The period and process that are covered in this chapter are similar to the period and political process that will be discussed in the next chapter.[1] The only difference is that the same period and process are dealt with from different angles, namely traditional leadership in this chapter, and local government in the next chapter. There is thus an overlap between the two chapters, as the discussions and debates around the reform of these institutions took place around the same time and broadly within the same political process.

The colonial and apartheid regimes succeeded in severely undermining and disintegrating the institution of traditional leadership. These regimes never accorded traditional leaders pride of place in South African governance, but mainly used them as agents or tools to further the aims and objectives of these regimes. This chapter scrutinises the debates that took place regarding the role and status of traditional leaders in the post-apartheid era. Specifically, the focus will be on how the power to allocate land, which was used as a tool to compromise the way and quality of life of rural people, was dealt with in post-apartheid South Africa.

The crucial questions to be considered are the following. Are traditional leaders the sole institution responsible for managing land use in rural areas in terms of customary law? What does the 1996 Constitution say about traditional leaders' powers and functions? And are traditional leaders legislatively empowered to allocate land? This chapter will attempt to answer these and other relevant questions in the course of mapping out the road to democracy.

3.2 Divergent views within the ANC about traditional leaders

In the early 1990s, it was becoming clear that a new political dispensation would soon become a reality. Political parties and various other stakeholders were busy negotiating a way forward that would bring about peace and put an end to racial segregation. The question of what role traditional leaders would play in democratic South Africa not only featured in the negotiations regarding the configuration of the state, but it also formed part of the discussions within

[1] Guy J 'An accommodation of patriarchs: Theophilus Shepstone and the foundations of the system of native administration in Natal' (2018) 32 *JNZH* 84.

parties, especially the African National Congress (ANC). The ANC was an organisation that led the fight against the apartheid regime in South Africa. After the demise of apartheid in South Africa, the ANC was one of the critical stakeholders in the CODESA negotiations that were held at the start of the early 1990s.

When the ANC was established in 1912, traditional leaders were among its founding members. However, when the ANC started becoming a radical organisation due to pressure from the Youth League and its communist allies around the 1940s, serious disagreements about the role of chiefs began to emerge.[2] While there were those in the ANC who supported traditional authorities that resisted the government policies at the time, others argued that the institution itself was antiquated and needed to be replaced by democratic structures. Thus, there was no single view within the ANC on the role of traditional leaders, and the debate gradually lost its momentum.[3]

After the liberation organisations were banned in the 1960s, the debate regarding the role of traditional leaders regained momentum within the ANC. The main issue was how the organisation would relate to people such as Chief Mangosuthu Buthelezi, who worked within the apartheid structures in Natal. As explained in the previous chapter, the imposition of indirect rule and the recognition of chiefs as state officials in Natal in the colonial period had strengthened the position of the institution of traditional leadership in that province.[4]

When the ANC was unbanned in 1990, its policy on traditional leaders had not articulated a clear and decisive position. In fact, Oomen shares a quote from a speech that was made by Nelson Mandela after his release from prison on 11 February 1990: 'I greet the traditional leaders of our country, many of you continue to walk in the footsteps of great heroes like Hintsa and Sekhukhune.'[5] Oomen argues that traditional leaders have never been officially criticised in a disparaging manner in ANC documents. In the early 1990s traditional leaders were often regarded by some ANC leaders as part of the coalition forces fighting for national liberation alongside other organisations.[6] Following this, in 1992 an attempt to clarify the role

[2] Costa D (2000) 46.
[3] Mathenjwa M & Makama P (2016) 200.
[4] Guy J (2018) 92.
[5] Hunter M (1936) 12-13
[6] Native Administration Act of 38 of 1927.

of traditional authorities was made when the ANC formulated its policy guidelines. The policy guidelines stated that

> the Institution of chieftainship has played an important role in the history of our country and chiefs will continue to play an important role in unifying our people and performing ceremonial functions allocated to them by law, the powers of the chiefs shall always be exercised subject to the provisions of the constitution and other laws, provision will be made for an appropriate structure consisting of traditional leaders to be created by law, in order to advise parliament on matters relevant to customary law and other matters relating to the powers and functions of chiefs. Changes in the existing powers and functions will only be made by parliament after such consultation has taken place.[7]

Skweyiya, who was the chair of the ANC's Constitutional Committee during the negotiations, also agreed that the institution of traditional leadership played an important role in the lives of rural people and therefore needed to be transformed and accommodated under the democratic dispensation. He argued that

> the institutions of chieftaincy forms part of the existing social institutions and impacts heavily on the lives and activities of the rural people at the local government level. There is no doubt that failure on the part of the government to devise a dispensation for the participation of chiefs at this level, will affect the acceptability of any administrative authority that can be installed in areas where traditional values and customs still rule supreme.[8]

These policy guidelines settled the position of the ANC with respect to the role of traditional authorities. However, some ANC members, including Albie Sachs (who later became a Justice of the Constitutional Court), never believed that chieftainship as a hereditary institution would play a primary role in local government.[9] Justice Sachs suggested that democratically elected councils would be established in the rural areas to work together with chiefs in local

[7] Chapter 1, Native Administration Act 38 of 1927.
[8] Bizana T *Traditional Leaders in South Africa: Yesterday, Today and Tomorrow* (MPhil Mini-Thesis, University of the Western Cape, Cape Town 2008) 19-21.
[9] Delius P *The Lion amongst the Cattle: Reconstruction and Resistance in the Northern Transvaal* (1996) 139.

administration.[10] But the manner in which this arrangement would take form in practice was never outlined by the ANC.

3.3 Concessions and compromise for traditional leadership support

It is important to point out that the ANC policy guidelines on traditional leaders were formulated during the political negotiations of the early 1990s which paved the way for the first democratic elections in 1994.[11] These negotiations will also be discussed at length in the next chapter as they are also relevant for local government. The negotiations involved several key players who were discussing among other things, the future of the country as well as the design of the state. Although numerous attempts to bring traditional authorities to the negotiation table were made, by March 1993 they did not feature in the negotiation process in any meaningful way. This was so mainly because of the stance that was adopted by Buthelezi in relation to the negotiation process. He demanded separate delegations in the form of powers for the Kwa-Zulu government and his king. When that demand was turned down, Buthelezi and the King withdrew from the negotiation process.[12]

The ANC (or rather some within the ANC) and the National Party (NP) supported the institution of traditional leadership for different reasons. On the one hand, the ANC viewed the institution of traditional leadership as still being widely supported, particularly in the rural areas where traditional leaders played (and continue to play) an important role as a local governance structure.[13] On the other hand, the NP viewed the institution of traditional leadership as an ideological base through which its goal of creating ethnically based provinces could be achieved during the negotiations. Skweyiya unhesitatingly states that

> traditional leaders were in fact used by the NP during the negotiations to entrench its post-apartheid policies which, among others, to create ethnic-based provinces.[14] While the ANC guidelines indicated a ceremonial and advisory role for traditional leaders which did not involve the administration of land in the rural areas, Contralesa, an organisation that represented traditional leaders rejected this idea and started to put pressure on the ANC to recognise traditional

[10] Houghton D 'The significance of the Tomlinson Report' available at http://www.sahistory.org.za (accessed 19 June 2021) 2.
[11] Proclamation 31 of 1939.
[12] Semela M (2005) 130.
[13] Delius P (1996) 142.
[14] Bantu Authorities Act 68 of 1951 (Black Authorities Act).

authorities as the local government in rural areas and not municipalities and elected councillors.[15]

In the end, traditional authorities gained recognition in the Interim Constitution mainly by way of political compromise. The ANC saw this as a way to secure the support of Contralesa. A similar approach was followed by the ANC when it came to the Inkatha Freedom Party (IFP). A compromise deal was struck between the NP, IFP and the ANC, resulting in millions of hectares of land which was administered by the KwaZulu Homeland ending up in the Ingonyama Trust Board with the Zulu King as its sole trustee. This was done apparently to ensure that the IFP did not boycott the 1994 elections.[16]

The creation of the Ingonyama Trust was central to the last-minute decision of the IFP to participate in the 1994 democratic elections. According to Lynd, Chief Mangosuthu Buthelezi, King Goodwill Zwelithini and the IFP threatened to boycott the 1994 elections and soon after proclaimed the 'sovereignty' of the Zulu Kingdom.[17] Fears grew that a secessionist war was looming, since the IFP had been advocating during constitutional negotiations for the establishment of a federal state in which provinces would have greater powers and autonomy. Lynd is of the view that a political compromise on this position was reached (that is, configuration of the state such that provinces would have limited autonomy) on the basis that Chief Mangosuthu Buthelezi and King Goodwill Zwelithini would be given the Ingonyama Trust land. Indeed, Chief Mangosuthu Buthelezi and King Goodwill Zwelithini secured the control of the Ingonyama Trust Land in 1994, a day before elections, when the Ingonyama Trust Act was passed by the Kwa-Zulu legislature, effectively handing over the Ingonyama Trust land to the King of Kwa-Zulu.[18]

This was a huge concession, which the ANC granted only to the King of Kwa-Zulu, supported by the IFP, with the aim of avoiding an explosion of violence in Kwa-Zulu, and excluding chiefs situated in the other provinces.[19] At the time of writing, this legislation (Ingonyama Trust Act) continues to present difficulties in KwaZulu-Natal in that, at the municipal level, a sizeable

[15] Delius P (2008) 228.
[16] Breytenbanch WJ 'Chieftainship and political development in the homelands' in *Bulletin of Africa Institute of South Africa*, No. 9 and 10 (1975) 330-342.
[17] Kompi B *The Evolution of Traditional Leadership in South Africa from 1996-2012: Traditionalism Versus Modernism* (Unpublished PhD Thesis, University of the Free State, Bloemfontein 2018) 104.
[18] Chapter Two, para 2.4.
[19] Chapter Two, para 2.3.

amount of land is controlled by the Ingonyama Trust Board (ITB) and not by municipalities. The ITB allocates land in areas under its authority through the local traditional councils and headmen.[20] These land allocations are almost always made without the involvement of the relevant municipality, which has a spatial development framework and a land use scheme that applies and governs the Ingonyama Trust land. Therefore, questions on whether the ITB enjoys exclusive land use management authority to decide what can or cannot be built on Ingonyama Trust land continue to be the subject of debate.

3.4 Municipalities and land use management

The 1996 Constitution explicitly recognises municipalities instead of traditional leaders as being the local government of both rural and urban areas. It allocates to municipalities the power to manage land use throughout the country, including areas where traditional leaders govern. Specifically, section 156(1)(a) of the Constitution states that a municipality has executive authority in respect of, and has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5.[21] Part B of Schedule 4 contains a list of local government matters and one of those matters is 'municipal planning'.[22]

In 2013, Parliament passed SPLUMA, which gave expression to 'municipal planning', and set out the framework under which this power must be exercised.[23] This Act empowers municipalities to regulate land use in their areas of jurisdiction. The Act also recognises the role of traditional leadership in managing land use in the rural areas, as will be explained further in subsequent chapters. With that said, the following section examines the powers and functions of traditional leaders under the Interim Constitution, and contrasts these in subsequent sections with the powers and functions of traditional leaders in the 1996 Constitution.

3.5 1993 Interim Constitution: Powers and functions of traditional leaders

This section scrutinises the way the post-apartheid democratic government dealt with the system of traditional leadership that was both politically and legislatively paralysed by the

[20] Ntsebeza L (2008) 251.
[21] A district commissioner was an administrative officer of the apartheid government.
[22] Section 1 of Act 68 of 1951.
[23] James A *Kinship and Land in an Inter-ethnic Community* (Master's Thesis, University of Witwatersrand 1987) 135.

colonial and apartheid governments. This will be done by analysing the provisions of the Interim Constitution of 1993 on the powers and functions of traditional leaders.

Before the powers and function of traditional leaders were set out in the 1993 Interim Constitution, various resolutions were adopted by the National Negotiating Council (NNC). The NNC, the highest decision-making body on what would be included in the Interim Constitution, was a 208-member, 26-party, parliamentary-style plenary. These Resolutions that were adopted by the NNC became the basis for the formulation of Constitutional Principles. A total of 34 Constitutional Principles were approved by the NNC. These formed part of the Interim Constitution that was adopted in 1993. The Constitutional Principles contained in the Interim Constitution later guided the process of drafting the 1996 Constitution. The adopted 1996 Constitution recognised and entrenched both the institution of local government and traditional leadership. As will be explained in detail later, the constitutional provisions in the 1996 Constitution needed first to be certified by the Constitutional Court in order for them to come into effect. The certification process ensured that the constitutional provisions in the adopted 1996 Constitution were consistent with the Constitutional Principles provided for in the Interim Constitution, including those provisions that recognised both these institutions.

According to Chief Patekile Holomisa, who was the President of Contralesa in the 1990s, the 1993 Interim Constitution was drafted and adopted with the full participation of traditional leader's representatives such as chiefs Mwelo Nonkonyana and Dumisani Gwadiso.[24] The pressure placed on the ANC by Contralesa resulted in Contralesa's becoming a party to the negotiations and thus securing representation in Resolution 34, which would facilitate its inclusion in the Interim Constitution. Resolution 34 was adopted by the NNC on 11 November 1993. The NNC, in terms of Resolution 34, agreed upon, inter alia, the following points:

- traditional authorities shall continue to exercise their functions in terms of indigenous law as prescribed and regulated by enabling legislation;
- there shall be an elected local government, which shall take political responsibility for the provision of services in its area of jurisdiction;

[24] Delius P (2008) 233.

- the hereditary traditional leaders within the area of jurisdiction of a local authority shall be *ex officio* members of the local government; and
- the chairperson of any local government shall be elected from amongst all the members of the local government.[25]

Although traditional leaders gained representation by way of resolution 34, the next step was not whether this resolution would find expression in the Constitutional Principles contained in the Interim Constitution but the manner in which it would do so. Given the political climate and the perceived importance of the role of traditional leaders in securing rural support by the different political parties, traditional leaders managed to secure certain guarantees in the Interim Constitution. These guarantees are quite elaborate, thus they will be grouped under a particular theme, followed by a discussion of what the Interim Constitution provides about that theme.

3.5.1 Guarantee: Recognition, powers and functions of traditional leaders

Some of the guarantees which dealt with the institution of traditional leadership included traditional leaders being entitled to *ex officio* membership to local government councils and being eligible to run local government office.[26] Furthermore, legislation which set out the powers and functions of traditional leaders would be drafted. However, before that legislation would be drafted, the Interim Constitution mandated for traditional leaders resident in a particular province to be consulted.

3.5.2 Guarantee: Duties of the Houses of traditional leadership

The other guarantees traditional leaders secured in the Interim Constitution pertained to the duties the Houses of traditional leaders would carry out. These duties ranged from these Houses being entitled to advise and make proposal to the provincial legislature or government in respect of matters relating to traditional authorities, indigenous law and customs of traditional communities.

[25] Chapter Two, para 2.5,
[26] Section 182 of the Constitution of the Republic of South Africa, Act 200 of 1993.

3.5.3 Guarantee: Council of traditional leadership

A further guarantee related to the establishment of the Council of traditional leaders constisting of a Chairperson and 19 representatives elected by traditional authorities. The Chairpeson and members of the council needed to be drawn from members of the Houses of traditional leaders. Draft legislation providing for the composition, election of representatives and the powers and functions of the Council shall be introduced in Parliament not later than six months as from the commencement of the Interim Constitution.

In particular, Constitutional Principle XIII of the Interim Constitution provided that

> [t]he institution and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied in courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.[27]

Although Resolution 34, as pointed out above, was an important guarantee for traditional leaders, their constitutional position was not of an equal status to that of elected structures. Some commentators saw the support for recognition of traditional leaders by the ANC in the Interim Constitution as a gain for both parties.[28] While traditional leaders managed to secure important guarantees in the Interim Constitution, it was not envisaged that these guarantees would pave the way for traditional authorities to play a prominent role in local governance in the rural areas.

It is argued that the recognition of existing traditional authorities and their practices depended on the exercise of authority by those structures being consistent with the provisions of the Constitution, especially the Bill of Rights and any other applicable law. For example, prior to South Africa's becoming a democracy, the institution of traditional leadership was accused of being an institution that was sexist, undemocratic, non-transparent, patriarchal and exclusionary, particularly when it came to the representation of women and other previously marginalised groups in society. Thus, the recognition of

[27] Oomen B (1996) 98.
[28] Skweyiya Z 'Chieftaincy: The ethnic question and the democratisation process in South Africa' available at https://dullahomarinstitute.org.za/about-us/our-historical-publications/chieftaincy-the-ethnic-zola-skweyiya.pdf (accessed 15 April 2021) 6.

traditional leadership in democratic South Africa depended on the institution subscribing to the universal values of democracy, non-sexism, equality, inclusivity and transparency, as enshrined in the Constitution.

Also, Resolution 34 is considered by some commentators to have been framed in a way which favours elected local government, with traditional leaders serving as *ex officio* members in local government (as explained further in the next chapter).[29] It is submitted that the *ex officio* status of traditional leaders in local government under the Interim Constitution was not as insignificant as some commentators made it out to be. The *ex officio* status automatically turned traditional leaders into councillors with voting powers, without needing to be elected. In addition to their powerful position in the areas they governed, traditional leaders would indeed become powerful role-players in the newly established municipal councils. Whether the views and assertions of the commentators and the author of this study would prove true depended on how the 1996 Constitution would recognise the role of traditional leadership, particularly their powers and functions, in democratic South Africa. Therefore, the following section analyses the role and status of traditional leadership under the 1996 Constitution.

3.6 Traditional leadership under the 1996 Constitution

The Interim Constitution of 1993 recognised the institution of traditional leadership, as part of which it allowed traditional leaders to continue exercising their functions in terms of indigenous law. The expectation was that those functions would also find expression in the 1996 Constitution. However, that turned out not to be the case. This section examines the relevant constitutional provisions and offers possible reasons as to why the functions provided under the Interim Constitution did not find expression in the 1996 Constitution.

Chapter 12 of the Constitution recognises traditional leadership and customary law, subject to the Constitution.[30] Essentially, any law or conduct that is inconsistent with the Constitution is unconstitutional. Chapter 12 of the Constitution provides the following:

[29] Sachs A 'The future constitutional position of traditional leaders' in Sachs (ed) *Advancing Human Rights in South Africa: Contemporary South African Debates* (1992) 77-82.
[30] Sachs A (1992) 81.

Recognition

211. (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

Role of traditional leaders

212. (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law—

(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and

(b) national legislation may establish a council of traditional leaders

An analysis of chapter 12 of the Constitution suggests that the recognition and entrenchment of the three levels of government, and particularly their democratic nature as in the 1996 Constitution, effectively closed the door for the institution of traditional leadership to be recognised as the sole governing structure at the local level in rural areas with its own powers and functions enshrined in the Constitution. What the Constitution protects and recognises rather, is the institution, status and role of traditional leadership in terms of customary law.[31] Furthermore, it can be argued that the status of traditional leaders was watered down

[31] Ntsebeza L (2008) 243.

significantly in comparison to local government, given that the majority of the powers they exercised before democratic South Africa were never constitutionally enshrined. This is a crucial challenge that faces traditional leadership in the modern democratic dispensation.

The Constitution further provides that any elements of traditional leadership or customary law inconsistent with the Constitution are invalid.[32] This means that traditional leaders may not exercise power or authority outside of the Constitution.[33] Section 212 of the 1996 Constitution concludes by setting out which sphere of government is responsible for regulating the institution of traditional leadership and the extent of its powers in democratic South Africa.[34] In effect, the Constitution mandates only the national government to perform this function.[35]

Chief Holomisa is critical of Chapter 12 of the 1996 Constitution because it describes the functions of traditional leaders in broad terms. It is not only Chief Holomisa who was aggrieved by the manner in which the 1996 Constitution recognised traditional leaders.[36] The IFP also claims that Chapter 12 of the Constitution failed to meet the aspirations of traditional leaders as had apparently been agreed upon during negotiations in March 1993.[37]

While the constitutional scheme provides recognition and protection for the institution of traditional leadership, it has removed quite a number of the powers and functions which traditional leaders had exercised previously under the apartheid regime. This is something which many traditional leaders noted and vigorously complained about in the late 1990s. To manage the growing frustrations of traditional leaders who still wielded considerable influence and power in rural areas, the national government initiated legislation that dealt with the institution of traditional leadership. This legislation was intended, amongst other things, to clarify the role of traditional leaders, particularly their role in land administration and land allocation. However, in reality this intention has not been realised, as explained in detail further below in this chapter.

[32] Ntsebeza L (2008) 243.
[33] Lynd H (2021) 7.
[34] Lynd H (2021) 9.
[35] Lynd H (2021)14.
[36] High Level Panel (2017) 274.
[37] *The Council for the Advancement of the South African Constitution v The Ingonyama Trust Board* (2021) 3 All SA 437 (KZP).

The general trend in the past 20 years has been that the national government promises some benefits to traditional leaders in exchange for rural support during elections.[38] These benefits have come mainly in the form of legislation that creates new roles for traditional leaders, increases their salaries, or reassures traditional leaders of their 'important' role in democratic rural South Africa.[39] In short, the relationship between the national government and the institution of traditional leadership has meandered from a turbulent and polarised stand-off in the 1990s to an arrangement that seeks to give more power to traditional leaders.

3.6 Legislative and policy developments on the role of traditional leaders

A common characteristic that has been ascribed to traditional leadership as a governance institution is that it was (and continues to be) undemocratic in nature. As stated in the previous chapter, this view was propagated by white missionaries, historians and scholars.[40] This occurred only during the colonial and apartheid periods, when the democratic nature of the institution of traditional leadership was eroded. This was because of numerous events that had occurred, and because many traditional leaders had chosen to serve the colonial and apartheid regimes to the detriment of the communities they governed. This section examines the efforts undertaken by the national government in the mid-1990s to democratise rural areas by establishing democratically elected structures within which democratically elected rural residents would serve. The democratisation project was initially aimed at removing traditional leaders from their governance roles in traditional areas, by introducing a system of elected local government. However, the aim of the project was not achieved because of the lobbying and resistance of traditional leaders.

In an effort to extend local democracy in rural areas, certain changes were introduced at the provincial level which affected both local government and traditional leaders. For instance, the promulgation in Eastern Cape of the Regulation of Development in the Rural Areas Act 8 (RDRA) of 1997 signalled a process of extending democracy in the countryside.[41] (This Act is still in operation.) The main objective of this process involved the removal of traditional

[38] Section 156(1)(a) of the Constitution.
[39] Part B of Schedule 4 of the Constitution.
[40] Spatial Planning and Land Use Management Act 16 of 2013.
[41] Holomisa P 'Ubukhosi the bedrock of African democracy' available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiqpY617PL1AhXloFwKHY1gDKEQFnoECAUQAQ&url=https%3A%2F%2Fmg.co.za%2Farticle%2F2000-02-11-ubukhosi-the-bedrock-of-african-democracy%2F&usg=AOvVaw1K_pE5Xis6TBnnEeLOAnTZ (accessed 9 February 2022).

leaders from playing a role in development, land administration and land allocation processes in the rural areas of the Eastern Cape. The process was to be carried out in terms of the RDRA. According to this Act, responsibility for rural development, land administration and land allocation would be undertaken by democratically elected structures. The inevitable effect of this resulted in traditional leaders arguing that their power to allocate land in particular had been taken away by the government. This is the same argument traditional leaders have raised with respect to the implementation of SPLUMA in their areas of jurisdiction.

By the end of 1997, things changed in favour of traditional leaders. First, the Ministry for Provincial Affairs and Constitutional Development published a White Paper on Local Government which made broad and generalising statements on the possible role traditional authorities could play.[42] (This is the same White Paper that will be discussed in detail in the next chapter when dealing with local government.) These statements included traditional leaders acting as the head of the traditional authority and, as such, exercising limited legislative powers and certain executive and administrative powers.[43] Also, traditional leaders would make recommendations on land allocations and settle land-related disputes.[44] The White Paper went as far as acknowledging that there are traditional authorities that have a stake in rich mineral deposits in some areas, and that through these resources they contribute to development.[45] On the issue of development, which is a task that the Constitution allocated to local government, the White Paper stated that 'traditional leaders have played an important role in the development of their communities and that they should continue to do so'.[46] This White Paper signalled a shift in government policy with respect to the role traditional leaders would play in local governance in rural areas.

In the run-up to the first democratic local government elections on 5 December 2000 (as explained further in the next chapter when dealing with local government), the role of traditional authorities was once again a focal point of discussion and negotiation. The negotiations ended in deadlock, resulting in the postponement of the elections as consensus

[42] Ntsebeza L (2008) 246.
[43] Section 182 of the Constitution of the Republic of South Africa, Act 200 of 1993.
[44] Section 183 of the Constitution of the Republic of South Africa, Act 200 of 1993.
[45] This was a set of negotiated principles listed in Schedule 4 of the Interim Constitution, which contained a number of principles that would guide and shape the drafting of the final Constitution.
[46] Henrard k (1999) 388.

was not reached.[47] Contributing to the truculent nature of the discussions was the fact that several pieces of legislation which gave effect to Chapter 7 of the Constitution, namely the Local Government: Municipal Demarcation Act 27 of 1998, Local Government: Municipal Structures Act 117 of 1998, the Local Government: Municipal Electoral Act 27 of 2000 and the Local Government: Municipal Systems Act 32 of 2000, had all been passed.[48]

The Municipal Structures Act provides, amongst other things, for the establishment of municipalities in accordance with the requirements relating to categories and types of municipality.[49] It also establishes the criteria for determining the category of a municipality to be established in an area, and defines the types of municipality that may be established within each category.[50] Furthermore, the Act provides for an appropriate division of functions and powers between categories of municipality and regulates the internal systems, structures and office-bearers of municipalities. Although the Municipal Structures Act dealt with the representation of traditional leaders on local government councils, which was capped at 10 per cent, the Act only gave voting rights in councils to elected councillors and not traditional leaders.[51] This move further angered traditional leaders, and threats of violence as well as boycotting the upcoming local government elections re-emerged. Seeking to ensure that the elections would go ahead as planned and peacefully, the national government and traditional authorities held a series of meetings where once again concessions were made.[52]

The first significant concession was an amendment to the Municipal Structures, which was quietly rushed to Parliament shortly before the elections. The amendment increased the representation of traditional leaders to up to 20 per cent of the total number of councillors in a municipal council. This increase in representation only secured the number of traditional

[47] Mamdani *M Citizenship and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996) 101-32.
[48] Section 211(1) of the 1996 Constitution.
[49] Chapter 12 of the 1996 Constitution.
[50] Section 212(2) of the 1996 Constitution.
[51] The weakness of the provisions relating to traditional leadership reflects the fact that the champion of chiefly power, the IFP, had boycotted most of the Constitutional Assembly proceedings because the government refused to enter into international mediation over the position of the Zulu monarch in accordance with a Memorandum of Agreement between the erstwhile South African government, the ANC and the IFP (signed on 19 April 1994). An additional factor explaining the absence of any solid entrenchment of chiefly powers in the final Constitution was the waning influence of Contralesa within the ANC, and the activities of the organisation's controversial president Phatekile Holomisa. Contralesa became estranged from the ANC after Holomisa called for a boycott of the local government elections in areas under traditional authority and began associating with senior officials of the IFP. Like the IFP, Contralesa opposed certification of the 1996 Constitution on the ground that it made inadequate provision for traditional leadership and customary law.
[52] Section 212(1) of the Constitution.

leaders that could participate in council activities, but traditional leaders would still not have the right to vote.[53] The government believed that this concession would appease traditional leaders and secure their participation in the upcoming local government elections. Ultimately, traditional leaders rejected the 20 per cent increase in respect of representation. What they wanted was for municipalities to be disestablished in the rural areas, and have the traditional authorities installed as the sole local governance structure in rural areas.[54]

The reaction from government was swift. It presented a Bill to Parliament to once again amend the Municipal Structures Act. The Bill was tabled in the Provincial and Local Government Portfolio Committee on 17 November 2000.[55] This Bill was dubbed as the 'rain-making' Bill since it clumsily included provisions that made reference to the mystical power to summon the rain by traditional leaders. The Bill, however, did not deal with the central demand of the traditional authorities, which related to the scrapping of municipalities in rural areas in favour of traditional authorities.[56] What the Bill sought to introduce was a procedure in terms of which local government was given the power to delegate certain functions and powers to traditional authorities.

Since this amendment did not address the main demand of the traditional authorities, they rejected the Bill and once again threatened to abstain from the 2000 local government elections. They also threatened that there would be chaos and violence in their areas if their demands were not met. Consequently, the Bill was withdrawn based on a technicality. Therefore, with the threats of violence and several rejections of bills that were presented in Parliament, traditional leaders ended up not participating in the 2000 elections as candidates, and did not mobilise their subjects to go out in their numbers and vote for the ANC. In summary, the policy and legislative uncertainty surrounding the precise functions and powers of traditional leaders, particularly around the administration of communal land, was becoming a serious bone of contention. On the one hand, traditional leaders wanted their powers of administering land in terms of customary law to be reflected in legislation; on the other, the ANC-led government was unwilling to do that.

[53] Section 212(2) of the Constitution.
[54] Kompi B (2018) 117.
[55] Kompi B (2018) 116.
[56] Redpath J (2020) 218.

3.7 Legislative and policy developments on the role traditional leaders in land administration

It was pointed out earlier that a policy shift in favour of traditional authorities was gaining momentum in the area of land administration. That momentum would be given concrete expression at the time by the Minister of Land Affairs, Thoko Didiza. In February 2000, the Minister announced her 'strategic objectives' regarding land tenure and administration in the rural areas. With respect to land administration, the Minister committed herself to building on 'the existing local institutions and structures', which in this case referred to traditional leaders, with the aim of both reducing costs to the government and ensuring local commitment and popular support.[57]

Two years after the Minister unveiled her 'strategic objectives', there was still no tangible plan as to how the issue of land administration in the rural areas would be addressed. Nor was it clear how the question of the role of traditional authorities in local government would be managed. Although traditional leaders were part of the municipal councils, they wanted nothing less than an amendment of the Constitution. The government opted for another amendment of the Municipal Structures Act.[58] Accordingly, a draft amendment was published for public comment. This draft amendment effectively gave traditional leaders authority over land allocation in rural areas.

The preamble provided for amendment to the Local Government: Municipal Structures Act, 1998, so as to provide for the retention of the powers, functions and role of the institution of traditional leadership, to provide for powers and functions of traditional authorities in local government matters, and to foster and harmonise partnerships between traditional authorities and municipal councils so as to enhance the culture of cooperative governance between traditional authorities and municipal councils and to provide for matters connected therewith. Most importantly, clause 1 of the Bill, which referred to section 81(1)(a) of the Municipal Structures Act, stated that

> [d]espite anything contained in any other law, a traditional authority observing a system of customary law continues to exist and to exercise powers and perform functions conferred upon it in terms of indigenous law, customs and statutory

[57] Redpath J (2020) 221.
[58] Chapter Two, para 2.1.

law, which powers and functions include the right to administer land and participate in development planning.[59]

Meanwhile, the first ever democratic local government elections took place in December 2000, ushering in a new system of local government in South Africa. With the new system of local government in place, the Provincial and Local Government Portfolio Committee in Parliament, which was debating the amendment Bill and analysing its compliance with the Constitution, was set to convene on 29 January 2001. However, it is not clear whether that meeting ever took place or what happened to this draft amendment bill, as it never saw the light of day.

The promulgation of the Traditional Leadership and Governance Framework Act 41 of 2003 and the Communal Land Rights Act 11 of 2004 seemed to have obviated the need for the draft amendment. Both these pieces of legislation are examined in detail in the subsequent sections of this chapter.[60]

It is submitted that the abovementioned provision in the Draft Municipal Structures Amendment Bill indicates the change in policy by the ANC government on the question of the role of traditional leaders in land administration in rural areas. The initial policy position that was adopted by the ANC-led national government focused on removing traditional leaders from processes related to land administration and land allocation. The Eastern Cape Regulation of Development in the Rural Area Act is a case in point because it explicitly articulated this initial policy position. However, as time went by, the policy changed to seemingly empowering traditional leaders, through legislation, to play a role in the administration of land in rural areas, albeit in an obscure manner. Whether the policy shifted in favour of traditional leaders as a way to secure their participation in the then upcoming local government elections and to persuade them to mobilise rural residents to support the ANC is unclear. However, what is evident is that if the amendment to the Municipal Structures Act had been passed, traditional authorities would have become the authority to administer communal land.[61] Since that did not happen, the uncertainty over traditional leadership's power over land has persisted.

[59] Regulation of Development in the Rural Areas Act 8 of 1997.
[60] *White Paper on Local Government* (1998) 63.
[61] Section 12 of the Structures Act.

The following section examines the White Paper on Traditional Leadership and Governance of 2003 dedicated specifically to traditional leadership.[62] The White Paper that was discussed earlier was dedicated to local government,[63] but it was only the section pertaining to traditional leadership that was discussed. As stated earlier, the contents of the White Paper on local government will be discussed at length in the next chapter. That chapter assesses the history and development of the planning powers of local government.

3.7.1 White Paper on Traditional Leadership

With uncertainty over the role of traditional leadership in the administration of communal land persisting, the national government instituted a process dedicated specifically to addressing this issue. The purpose was to clarify the role of traditional leadership with respect to land administration in rural areas through legislative means. However, the reality is that after several legislative enactments over 20 years, the uncertainty about traditional leadership's power to administer communal land remains unresolved. This legal uncertainty has also affected the relationship between traditional leaders and local government, as both institutions contest each other over the power to manage land use in rural areas under the authority of traditional leaders.

The power to manage land use forms part of the wider land administration regime applicable in rural areas. This section assesses a period that spans two decades, during which attempts to clarify the role of traditional leaders in rural land administration were made. It will do so by analysing the legislative developments that took place during this period.

The process to clarify the role of traditional leadership in administering communal land began in the early 2000s. A decision was made by the national government to formulate a comprehensive White Paper dedicated specifically to the institution of traditional leadership and governance. This White Paper was supposed to represent a milestone that would guide the transformation of the institution of traditional leadership and possibly solve the uncertainty about the roles of traditional leaders and municipalities with respect to land in rural areas governed by traditional leaders. This White Paper would also assist in addressing

[62] Local Government: Municipal Structures Amendment Act No. 33 of 2000.
[63] Ntsebeza L (2008) 253.

the need identified in the Constitution to have legislation for traditional leadership and bring about good governance and stability.[64]

Chapter Three of the White Paper attempted to define the roles of the institution of traditional leadership in democratic South Africa. It noted that traditional leadership can play a role in governance and development.[65] Also, it stated that there is a renewed effort by government to focus on improving living conditions in rural areas in an integrated manner, and to bring about sustainable development through the provision of water, electricity, clinics, roads, housing, telephones, and land restitution. It is submitted that, while the White Paper sets out the areas in which the institution of traditional leadership may be involved, it still fell short of defining the exact role traditional leaders would play, most notably in land use management and land administration.

The three spheres of government have arguably assumed authority and responsibility over the provision of infrastructure and basic services throughout the country, including rural areas.[66] Therefore, what governance role exactly can or will traditional leadership play in democratic South Africa, and does that role entail traditional leaders exercising any meaningful powers in terms of legislation? The answers to these questions can be gleaned from the White Paper itself. The White Paper carefully uses the word 'support' when it refers to the roles traditional leaders can play. For instance, the White Paper provided that the institution of traditional leadership can play a key role in 'supporting' government to improve the quality of life of the people.[67] The White Paper also stated that the institution of traditional leadership must complement and 'support' the work of government at all levels, and must form cooperative relations and partnerships with government in development and service delivery.[68]

It is therefore submitted that the role the White Paper envisages traditional leaders playing is limited to providing support to initiatives, programmes and plans of all three spheres of government. Given that traditional leaders had for a long time demanded that their powers and functions be recognised by way of legislation, Nthai (the head of the task team responsible

[64] Local Government: Municipal Structures Second Amendment Bill [B71-2000].
[65] Ntsebeza L (2008) 253.
[66] para 3.7.2.
[67] Local Government: Municipal Structures Second Amendment Bill (B71-2000).
[68] *White Paper on Traditional Leadership and Governance* (2003) 28.

for formulating the White Paper) emphasised that 'the White Paper enhances the role of traditional leaders and the forthcoming legislation on traditional leadership will provide more clarity on the role of traditional leaders'.[69]

The legislation Nthai was referring to became the Traditional Governance and Framework Act 41 of 2003. The next section scrutinises the content of the Traditional Governance and Framework Act 41 of 2003 (Framework Act), and analyses whether it does indeed provide more clarity on the role of traditional leaders, particularly with respect to land administration.

3.7.2 Traditional and Governance Framework Act

As explained earlier, the 1996 Constitution recognises traditional leaders and envisages a role for them in local government.[70] It provides that a role for traditional leadership as an institution at local level on matters affecting local communities should be provided through national legislation.[71] That legislation is the Framework Act 41 of 2003, which was replaced by the Traditional and Khoisan Leadership Act of 2019.

The Framework Act, amongst other things, provides for the recognition of traditional communities and for the establishment and recognition of traditional councils. It also provides a statutory framework for leadership positions within the institution of traditional leadership. Furthermore, the Act provides for the recognition of traditional leaders and their removal from office. Most importantly for this thesis, the Framework Act provides for the functions of traditional leaders. Section 19 of the Framework Act gives clarity on the functions of traditional leaders when it provides that 'a traditional leader performs the functions provided for in terms of customary law and customs of the traditional community concerned, and in applicable legislation'.[72] However, section 20 qualifies section 19 when it provides that 'only the national or provincial government may through legislative or other measures provide a role for traditional leaders in respect of the listed areas which include land administration'.[73] Section 20 of the Framework Act provides for the assignment of a role through legislation by

[69] George K (2010) 53.
[70] Chapter Three, para 3.4
[71] Section 212.
[72] Section 19, Traditional Leadership and Framework Act 41 of 2003.
[73] Section 20, Traditional Leadership and Framework Act 41 of 2003.

both national government and provincial government to traditional leadership on the following matters:

- arts and culture;
- land administration;
- agriculture;
- health;
- welfare;
- the administration of justice;
- safety and security;
- the registration of births, deaths and customary marriages;
- economic development;
- environment;
- tourism;
- disaster management;
- the management of natural resources; and
- the dissemination of information relating to governmental policies and programmes and education.[74]

It must be pointed out that some of these areas, namely land administration, the administration of justice, safety and security, the registration of births, deaths and customary marriages and the management of natural resources are exclusive national competencies.[75] This means that provinces have no authority over them. If an opportunity ever arose in which a province sought to assign roles to traditional leaders in terms of these areas, this, it is submitted, would be unconstitutional. While section 20 of the Framework purports to confer authority on provinces to assign roles to traditional leaders in the listed areas, they must refrain from assigning roles to traditional leaders in areas over which they themselves have no authority.

It was mentioned earlier that any law or conduct which is inconsistent with the Constitution is unconstitutional.[76] In this case, section 20 of the Framework Act purports to create a role

[74] Section 20, Traditional Leadership and Framework Act 41 of 2003.
[75] Section 44(1)(ii) of the 1996 Constitution of South Africa.
[76] Chapter Three, para 3.2.1.

for the provincial government to allocate a role to traditional leaders through legislation, while the Constitution mandates only the national government to perform this function, as was discussed earlier.[77]

It is argued that section 20 of the Framework Act is unconstitutional insofar as it empowers a provincial government to assign via legislation a role for traditional leaders in the matters listed above, while the Constitution itself in terms of Chapter 12 reserves this role solely for national government. Despite this, section 20 lists a range of functional areas in which provincial legislatures may legislate a role for traditional councils or traditional leaders. This has been done in several cases, particularly in areas such as 'safety and security' and 'the administration of justice'. For example, in the Eastern Cape in 2017, the provincial legislature imposed on traditional leaders the obligation 'to maintain law and order'. This is an obligation that is vested primarily in the South African Police Service.[78] It is not clear what specific role traditional leaders play in maintaining law and order in rural areas. It is also not immediately clear whether an organ of state has ever consulted the national or provincial government requesting that traditional leaders play a specific role in land administration in rural areas in terms of the Framework Act.

If a request that traditional leaders play a role in land administration should be made, and this should be granted by either the national or provincial government, then that role and function would be set out in legislation enacted by the relevant legislature. At the time of writing, there was no such legislation or measure. In practice, however, traditional leaders continue to play a prominent role in land administration, particularly in land use management in rural areas. Traditional leaders play this role and perform this function on the basis that customary law, as recognised by the Constitution and the Framework Act, empowers them to do so.

Whether the interpretation ascribed to section 19 by traditional leaders is correct is debatable, given that section 20 of the Act qualifies section 19 when it provides that 'only the national or provincial government may through legislative or other measures provide a role for traditional leaders in respect of areas which include land administration'. As explained earlier, at the time of writing no such legislation or measure exists. This means that until such

[77] Chapter Three, para 3.4.
[78] Redpath J (2020) 214.

roles are allocated to traditional leaders by means of legislation or other measures, there is no legislation that explicitly empowers them to play a role in land administration or to perform a function within the functional domain of land administration. Although the national government attempted to clarify the uncertainty surrounding the power of traditional leaders to administer rural land through the Framework Act, it failed because the uncertainty remained unresolved.

A legislative effort was made to clarify the uncertainty surrounding the power of traditional leaders to administer rural land. In 2004, the ANC government sought to mollify traditional leaders prior to the 2004 national elections by passing the Communal Land Rights Bill (CLRB), which became the Communal Land Rights Act 11 of 2004 (CLRA). The CLRA sought to give powers over communal land to traditional leaders. This Act was another legislative measure through which the role of traditional leaders pertaining to the administration of communal land in particular would be addressed. The next section scrutinises the content of the CLRA and analyses whether it addresses uncertainty about the role of traditional leaders in land use management in rural areas.

3.7.3 Communal Land Rights Act

As stated above, this Act gave traditional councils (tribal authorities under apartheid) wide-ranging powers, including control over the occupation, use and administration of communal land. For example, section 21(2) of the Act provides that 'if a community has a recognised traditional council, the powers and duties of the land administration committee may be exercised and performed by such council'.[79] As discussed in Chapter Two, under the colonial and apartheid regimes, chiefs and headmen allocated land to the residents subject to the approval of the white magistrates and, in other areas, the district commissioners.[80]

This also applied to the issuing of permits to occupy land in rural areas. However, under the new democratic dispensation, the ANC government decided that traditional leaders would no longer be the instruments of control who had previously exercised their land allocation powers to serve the interests of both the colonial and apartheid regimes. Traditional leaders

[79] Section 21(2) of Act 11 of 2004.
[80] Claassens A & Ngubani S 'Women, land and power: The impact of the Communal Land Rights Act' in Claassens A & Cousins B (ed) *Land, Power and Custom: Controversies generated by the Communal Land Rights Act* (2008) 172.

would now, in terms of the CLRA, become the sole and exclusive authority to exercise the power to allocate land, manage land use and administer rural land in terms of both customary law and legislation.[81] This was a clear and decisive statement, one which intended to put to bed any uncertainty about which institution was vested with the authority to allocate land, manage land use and administer land in the rural areas. Traditional leaders supported the CLRA when it was introduced in 2004.

The courts stepped in in 2006, when four rural communities challenged the constitutionality of the Act, arguing that it would undermine their right to tenure security as set out in the Constitution. The North Gauteng High Court declared that 15 key provisions of the Act, and in particular those providing for the transfer and registration of communal land, the determination of rights by the Minister, and the establishment and composition of land administration committees, were invalid and unconstitutional.[82] The Court also found that the procedure followed by Parliament in adopting this legislation was incorrect.[83] The matter was referred to the Constitutional Court for confirmation of whether indeed the legislation was unconstitutional.

In 2010 the fate of the Act was sealed by the Constitutional Court when it confirmed that the High Court was correct in its finding of unconstitutionality. The Constitutional Court limited its confirmation order of unconstitutionality to the procedural aspect of the case. It found the Act to be unconstitutional because it had not been correctly processed by Parliament.[84] This means that at the time of writing there still exists no legislation that explicitly grants traditional leaders the power to allocate land, manage land use, and administer rural land. But, while that may be the case, as explained earlier, traditional leaders in practice continue to play a significant role in land administration in rural areas. The next section scrutinises the content of the Traditional and Khoisan Leadership Act of 2019, and analyses whether it addresses the issue of the role of traditional leaders in land administration in areas under their authority.

[81] Claassens A & Ngubani S (2008) 174.
[82] *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* (2006) 4 BCLR 127 (ZAGPPHC).
[83] It held that CLRA should have been classified as a section 76 Bill instead of a 75 Bill as it had provisions that fell within functional area listed in Schedule 4 of the Constitution and the procedure set out under section 76 should have been followed in enacting CLRA.
[84] *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* (2010) 8 BCLR 741 (CC).

3.7.4 Traditional and Khoisan Leadership Act

The White Paper on Local Government promised to clarify the role of traditional leaders in land administration and land use management. It did so when it envisaged a supportive role for traditional leaders in municipalities. In addition, an attempt was made through the Traditional Leadership and Governance Framework Act 41 of 2003 to provide clarity on the issue of whether traditional leaders can administer rural land. However, that attempt fell short of achieving its intended result because the assignment of a land administration role by the correct sphere of government, namely national government, never materialised. Finally, another attempt to clarify the matter was made through the Communal Land Rights Act 11 of 2004. While the Act succeeded in clarifying the issue when it unequivocally allocated both the land administration and land use management functions to the institution of traditional leadership, it was challenged and eventually struck down by the Constitutional Court as being unconstitutional.

Fifteen years later, Parliament passed the Traditional and Khoisan Leadership Act 3 of 2019 (TKLA).[85] The TKLA was yet another attempt to clarify the issue of the land administration and land use management powers of traditional leaders in relation to areas under their authority. The TKLA replaced the Traditional Leadership and Governance Framework Act.[86] Importantly for this thesis, the Act recognised the functions that traditional and Khoi-San leaders performed in terms of customary law and custom.[87] Under the TKLA, various structures of the institution of traditional leadership were recognised and allocated various functions in a number of provisions. In particular, the TKLA recognised in Section 15(1) that traditional and Khoisan leaders may perform the functions provided for under customary law and custom, which is what the Framework Act also did.

The exception in this regard were the functions provided under section 24 of the TKLA relating to the entering into partnerships and agreements by traditional and Khoisan councils with a number of stakeholders. The main difference in this regard was that under the Framework Act, these partnerships could only be entered into by the various structures of the institution of traditional leadership and the different categories of municipalities, and the national and

[85] Traditional and Khoisan Leadership Act 3 of 2019.
[86] Schedule 4 of the Traditional and Khoisan Leadership Act 3 of 2019.
[87] Section 15(1)(a) of the Traditional and Khoisan Leadership Act 3 of 2019.

provincial governments had a duty to promote these partnerships. For example, a local municipality could enter into a partnership with a traditional council, and a district municipality could form a partnership with a kingship council. However, under the TKLA the different structures of the institution of traditional leadership could enter into partnerships and agreements with municipalities, government departments and the private sector.

Community activists took the streets to voice their concerns about the import of the section and the impact it would have on their land rights if it was implemented in practice. They argued that the Act sought to give power to traditional leaders to sign over land without consulting communities. In essence, they argued that the Act grants traditional leaders the power to take decisions on communal land by entering into agreements with private and public institutions without consent from those whose land rights are directly affected.

Unsurprisingly, on 21 December 2020, an alliance of land rights organisations, activists and rural communities filed an application in the Constitutional Court seeking to declare the Act unconstitutional. The applicants challenged the Act on procedural grounds, seeking Parliament's legislative public participation process. The alliance of land rights organisations argued that the TKLA is unconstitutional because the National Assembly, the National Council of Provinces and the provincial legislatures failed to reasonably facilitate public participation in the development of the legislation.[88] The Constitutional Court made this ruling on the basis that the public participation process adopted by Parliament in many instances did not correctly describe the Bill to the people who were going to be regulated by it, allow people to speak at hearings, advertise hearing dates timeously, accurately summarise submissions made at hearings and consider the completed public participation process when taking decisions.

3.8 Conclusion

This chapter scrutinised the road to democracy with a particular focus on the debates within the ANC on the role of traditional leaders in democratic South Africa. This debate was informed by events which had occurred during the colonial and apartheid period where many

[88] Businesslive 'Activists challenge the Traditional Leadership and Khoisan Act' available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiUst6L7_L1AhX68rsIHQVbBJ4QFnoECAUQAQ&url=https%3A%2F%2Fwww.businesslive.co.za%2Fbd%2Fnational%2F2021-12-21-activists-challenge-traditional-and-khoi-san-leadership-act%2F&usg=AOvVaw1_hKHkBl0ZF9k-_uqO5khr (accessed 9 February 2022).

traditional leaders collaborated with these vicious regimes in oppressing black Africans in the rural areas. The chapter analysed the ambivalence and the reasons for it within the ANC on the role of traditional leaders in democratic South Africa. At the end, political considerations necessasited the ANC to negotiate with traditional leaders and a compromise was reached. The chapter demonstrated that this compromise between traditional leaders and the ANC was aimed at avoiding the explosion of further violence and therefore jearpadise the first democratic national elections.

Amongst other things, the chapter analysed the concessions granted to traditional leadership which included recognition of the institution of traditional leadership, its powers and functions in the Interim Constitution. These powers and functions were quite elaborate and most importantly, the Interim Constitution explicitly recognised the power of traditional leadership to allocate land. However, since this was an Interim Constitution, a final Constitution still had to be drafted. This chapter showed how the drafters of Final Constitution Constitution decided to recognise the institution of traditional leadership and customary law. They did not however, set out the powers and functions of traditional leadership in the Final Constitution but rather placed this responsibility at the feet of Parliament to pass legislation regulating traditional leadership including its powers and functions. The chapter argued that this reflected a watering down of the recognition traditional leaders received from the Interim Constitution.

This chapter scrutinised the White Paper on local government which addressed although briefly the relationship between traditional leadership and local government and concluded that it did envisaged a role for traditional leadership. However, the said role according to this chapter was of a supportive role to the mandate, plans and programmes of municipalities. The chapter argued that what was paramount to traditional leadership was a policy or legsiative pronouncement that they were empowered to allocate land in communal areas under their jurisdictions. The chapter went on to analyse the White Paper on traditional leadership. The key thing for traditional leaders was for the White Paper to address the issue of the role of traditional leadership with respect to land administration in rural areas through legislative means. It was submitted in this chapter that, while the White Paper set out the areas in which the institution of traditional leadership may be involved in, it still fell short of defining the exact role traditional leaders would play, most notably, in land administration.

The chapter argued that traditional leaders were increasingly becoming frustrated that their role in land administration was still not resolved. Instead, the chapter noted that promises were made that this issue amaongst other would be clarified in the forthcoming legislation which will regulate the institution of traditional leadership. The chapter examined the Traditional Leadership and Governance framework which was based on the White Paper on traditional leaders. The chapter concluded that the Act provided for the recognition of traditional communities, establishment of traditional councils, the composition of these councils and the functions of traditional leaders. This legislation did not however, decisively deal with the central issue of clarifying the role of traditional leaders in land administration. It instead, created a procedure through which the provincial and national government would assign a role for traditional leaders in land administration. Therefore, according to this chapter, the government was still undecided on whether to legislatively empower traditional leaders to be at the helm of the administration of rural land. Nevertheless, traditional leaders were very unhappy with this outcome and the chapter alluded to the fact that strategic lobbying started taking place behind the scenes since the 2004 elections were looming.

This powerful strategic lobbying campaign by traditional leaders found expression in the Communal Land Rights Act of 2004 (CLRA). This Act was an effort that was made to clarify the uncertainty surrounding the power of traditional leaders to administer rural land. This chapter argued that in 2004, the ANC government sought to mollify traditional leaders prior to the 2004 national elections by passing the CLRA. The CLRA sought to give powers over communal land to traditional leaders. However, the Act faced a court challenge and eventually the Constitutional Court in 2010 set the Act aside on procedural grounds. The uncertainty surrounding the power of traditional leaders to administer rural land reigned again.

In yet another attempt to clarify the role of traditional leaders in the administration of rural land, in 2019, Parliament passed the Traditional and Khoisan Leadership Act. In terms of this Act, traditional and Khoisan leaders were empowered to enter into partnerships regarding land with government and the private sector. The chapter showed how rural communities took to the streets to voice their concerns about the Act and the powers it granted they argued that the Act grants traditional leaders the power to take decisions on communal land by entering into agreements with private and public institutions without consent from those whose land rights are directly affected. The chapter explained how the on 21 December 2020,

an alliance of land rights organisations, activists and rural communities filed an application in the Constitutional Court seeking to declare the Act unconstitutional. The applicants challenged the Act on procedural grounds. The alliance of land rights organisations argued that the TKLA is unconstitutional because the National Assembly, the National Council of Provinces and the provincial legislatures failed to reasonably facilitate public participation in the development of the legislation. In 2023, the Constitutional Court set aside the Act holding that Parliament had to reasonably facilitate public participation when the Act was developed. Therefore, the chapter argues that the uncertainty surrounding the power of traditional leaders to administer rural land persists in democratic South Africa.

The following chapter traces the history and development of the planning powers of local government in South Africa. It examines how the exercise of this power by municipalities in rural areas governed by traditional leaders has affected the role of traditional leaders in the land allocation process.

Chapter Four: History and Development of Local Government's Planning Powers in South Africa

4.1 Introduction

In Chapter Two, the study examined the history and development of the role of traditional leaders in the land allocation process. This chapter focuses on the history and development of local government's planning powers in South Africa, and assesses how these planning powers have developed under the colonial, apartheid and post-apartheid regimes. In particular, the chapter aims to ascertain the impact of the development of these planning powers on the role of traditional leaders in land allocation. This will contribute to understanding how the land allocation function performed by traditional leaders has come to intersect with local government's planning powers, and ultimately gave rise to the contestation between the two institutions at the time of writing.

In section one of this chapter, local government as an institution before 1994 is scrutinised, including the role played by the colonial regime in the emergence of the local government system in South Africa before 1994. The history of the role of local authorities in urban and town planning will also be explained. Section two will assess the enforcement of segregation in urban areas by the apartheid regime, and the role played by municipalities through their planning powers. Before concluding remarks are made in section five, sections three and four will examine some of the key developments on the road to democracy, starting from the 1990s, and look at how these developments laid the basis for the transformation of local government, particularly its planning powers.

4.2 Local government before 1994

The overseas empires of Western Europe shaped the history of all the continents and the people living in those continents. The colonial empires of the West, namely Portugal, Spain, France, Great Britain, the Netherlands, Belgium, Germany, Italy and the United States colonised many countries around the world. In so doing, they exported the languages, technology, values, laws, institutions and governance systems of the West to nearly all lands, peoples, and cultures worldwide.[89] South Africa is one of the many countries that were

[89] Benjamin T, *Encyclopaedia of Western Colonialism since 1450* (2007) 12.

colonised by the Western empires. As such, some of its institutions and laws including the local government system and planning law have their origins in Europe. It is therefore necessary to first explain which of the Western countries arrived in South Africa and claimed possession of it. The aim is to illustrate the role these countries played in developing South Africa's local governance system before 1994.

The scramble for the Cape was started in 1497 by a Portuguese explorer called Vasco da Gama, when he landed in Saint Helena Bay. Vasco da Gama discovered the sea route from Europe to India. Continuing the long-term 'Portuguese project' of exploring the African coastline, he rounded the Cape of Good Hope and continued to Calicut, India, during a voyage that lasted from 1497 to 1499.[90] The Portuguese did not establish any permanent settlement, but used the Cape as a stopping place on their way to India and East Africa. The arrival of the Dutch East India Company (Verenigde Oost-Indische Compagnie, or VOC) at the Cape of Good Hope in 1652 ushered in the first wave of colonial settlement for the region, as was explained earlier in Chapter Two.[91]

The Dutch East India Company was another colonial force in search of resources, but its military technology enabled them to dominate access to land and resources.[92] The first traces of local government establishment in South Africa are also found during the same period of the 1600s. The Dutch East India Company gradually developed the Cape as a company town, with a population of only 5,000 in the 1760s. It is the gradual development and expansion of the Cape which gave rise to the Colony of Cape Town, resulting in Cape Town being proclaimed a municipality in 1840. Through the late, seventeenth century, colonial settlement expanded into the interior – Stellenbosch was founded in 1679 followed by Swellendam in 1743 and Graaff Reinet in 1786.[93] By the early 1800s, most of the original inhabitants of the Cape who had relied primarily on pastoral activities had been subsumed into the economy of the Europeans.[94]

[90] Benjamin T (2007) 546.
[91] Paragraph 2.3.
[92] Financial & Fiscal Commission Research report on *Local Government Asymmetry and the Intergovernmental Fiscal System in South Africa* (2011) 3.
[93] Thompson *A History of South Africa* (2001) 164-185.
[94] Financial & Fiscal Commission (2011) 5.

The British first occupied Cape Town in 1795, effectively taking control of the Cape Colony from the Dutch and renaming it the Cape of Good Hope Colony, as discussed in Chapter Two. The British brought a different language and legal system to the Cape and abolished slavery, to the dissatisfaction of the original Dutch settlers. In 1820, the arrival of 4,000 British settlers in the Eastern Cape (which back then was divided between Transkei and Ciskei) led to the development of urban centres such as Port Elizabeth and Grahamstown.[95] In the 1830s, the Dutch settlers started their northwards trek to escape British rule. Soon after, a network of small towns developed in the Transvaal, Orange Free State, and in Natal before the Boers retreated back across the Drakensberg mountains, leaving the British to establish a new colony.[96]

It was during this period of the 1830s when an embryonic form of local government was introduced under Ordinance 9 of 1836 of the Cape Colony. This was followed by the establishment of a municipality in Cape Town as alluded to earlier.[97] Efforts to further build the local government system were stepped up when the Cape Parliament passed the Municipal Act in 1882. The Municipal Act remained in force until it was repealed by a provincial ordinance after South Africa had become a Union.[98]

The Union of South Africa Act 1909 established provincial councils in each of the four provinces. The Act then empowered these provincial councils to enact legislation regulating local government in their respective provinces. For example, section 85(vi) of the Union of South Africa Act empowered a provincial council to pass ordinances on matters dealing with 'municipal institutions, divisional councils and other local institutions of a similar nature', subject to the approval of the Governor-General who was also referred to in Chapter Two (this was the governor of a British Colony). Although the Governor-General wielded substantial decision-making authority on matters relating to municipal management, the Union Parliament still retained the power to legislate on any matter concerning municipalities.[99] Also, Parliamentary sovereignty ensured that a Union statute prevailed over a provincial ordinance that was repugnant to it. Ordinances governing local government were passed in

[95] Harrison P, Todes A & Watson V (2007) 23.
[96] Harrison P, Todes A & Watson V (2007) 24.
[97] Steytler N & De Visser J *Local Government Law of South Africa* (2018) 23.
[98] Steytler N & De Visser J (2018) 24.
[99] Steytler N & De Visser J (2018) 25.

all four provinces and largely influenced by the early Cape ordinances. Municipalities during this time were not self-governing entities, but rather creatures of statute that enjoyed only those powers that were either expressly or impliedly provided to them by the Ordinances.[100]

After 1910, South Africans increasingly moved to the cities, especially Johannesburg, Cape Town, Durban, Pretoria and Port Elizabeth.[101] These South Africans included whites who had lost their land in the South African (Anglo-Boer) War and uneducated Afrikaners who came into the cities in search of job opportunities. Many of these Afrikaners had abandoned their farming jobs due to the severe drought in the Free State. For Africans, the main reason they moved to the cities was that they were unable to survive in the reserves (as explained in Chapter Two). According to the official census of 1936, the urban population numbered more than 3 million and comprised 31 per cent of the total population. Of this, about 1,3 million were classified as white, 1,1 million as African, 400,000 as coloured, and 200,000 as Asian.[102] The forms of local government which existed at the time were established around the concern to protect European settlers that resided in the urban areas, as well as to organise racial segregation and manage the increasing number of Africans streaming into the urban areas. These forms of local government were not yet established in the rural areas, leaving appointed traditional leaders and headmen serving under the authority of white magistrates as the face of local government, as was discussed in Chapter Two.[103]

The government tried to control the flow of Africans into the cities with a complex system of pass laws. Certain pass laws were adopted to ensure that white farmers could not lose their African labourers. Other laws were designed to prevent Africans from living in towns, except as labourers for whites.[104] Furthermore, the government tried to segregate Africans within the urban areas. By 1910, there were laws in the Cape Colony, Natal, and the Transvaal authorising the colonial governments to create and control urban 'locations' for Africans.[105] However, many townships, particularly in the larger cities, had white and black areas that were

[100] Steytler N & De Visser J (2018) 23.
[101] Financial & Fiscal Commission (2011) 8.
[102] Parnell S 'Creating racial privilege: The origins of South African public health and town planning legislation' (1993) 4.
[103] para 2.3.
[104] Mabin A 'Origins of segregatory urban planning in South Africa, 1900-1940', *Planning History,* 13 (1991) 8-16.
[105] Parnell S (1993) 6.

separated by a few metres. In areas where black people lived, Black Advisory Boards were set up in terms of the Black (Urban Areas) Act of 1923. They comprised locally elected or appointed residents of these areas to advise the white municipal council on how to manage the black townships that fell within its municipal jurisdiction. In 1945, the Black (Urban Areas) Consolidation Act replaced the 1923 Act, but retained the Black Advisory Boards.[106]

As stated earlier, the government sought to organise racial segregation and control black urbanisation through the system of pass laws. The British regime also used municipalities as tools to control every aspect of the life of an African who had migrated to the urban areas, including deciding where Africans lived and worked and under which conditions. Similarly, in the rural areas, the British regime used traditional leaders as tools to control every aspect of African life, including deciding where Africans lived, worked and the extent of the land they would occupy.[107] As such, municipalities were the face of local government in urban areas, and traditional leaders were the face of local government in rural areas.

4.3 History of local authorities in urban and town planning

Various scholars explain the rise of urban segregation in South Africa by emphasising the creation of separate and unequal administrative structures that controlled where and how black South Africans lived.[108] These accounts seem to suggest that segregated, well-serviced 'white' areas developed without the involvement of the government. However, others disagree, arguing that the government manipulated planning regulations to protect working-class white residential conditions in the new industrial centres. This, so the argument goes, was an early strategy by which South African cities were racially segregated and the living standards of poor whites were protected.[109] The influx of unskilled, unemployed whites into the cities of Randburg during the 1900s and the 1910s produced a political crisis, the resolution of which would intensify the rise of racial segregation in South Africa.[110] The early planning instruments which were imported from Britain were used to organise racial segregation by empowering municipalities to decide what would be built where. This was a system of planning that was based on zoning certain areas for the use and occupation of

[106] Steytler N & De Visser J (2018) 26.
[107] Chapter three, para 2.5.
[108] Mabin A (1991) 26..
[109] Parnell S (1993) 475.
[110] Parnell S (1993) 473.

particular racial groups. This system of planning, as stated in the Chapter Two,[111] was imported from Europe essentially to protect the interests and needs of the Europeans, and it was only applied and implemented in urban areas where municipalities governed. Parnell argues that town planning was largely introduced within South Africa to improve the conditions of the white working class and affected the black population mainly by omission.[112]

Other measures, however, such as public health slum control and racial segregation tended to affect black Africans and, as a result, necessitated their inclusion in town planning. However, the extension of town planning instruments such as zoning schemes and spatial plans in the rural areas under the guise of betterment planning was not done to protect the interests and needs of rural citizens. The town planning instruments were introduced to strip away the wealth that rural citizens had and to ensure that they lived in an environment characterised by abject poverty.

4.4 Early emergence of town planning in South Africa

As explained before, the implementation of racial segregation by the colonial government was linked to the need of ensuring the safety and security of European settlers in South Africa. The Governor of the Cape Colony, who was referred to earlier in this chapter, recruited Johannesburg's first full-time Medical Officer of Health (MOH), Charles Porter, in 1901.[113]

With Porter's attitudes to town planning shaped by his English experience and training, and widely influenced by the new international trends in urban reform, he wasted no time in trying to implement some of his planning ideas. He immediately pushed for effective legislative authority for the Johannesburg municipality to plan and establish low density residential areas for the urban working white class. Within two years of his appointment in the rapidly growing and rather disorderly Johannesburg, Porter had drafted, and was effectively implementing a public health by-law that sought to restrict the establishment of slums by 1903.[114] However,

[111] Para 2.7.5.
[112] Parnell S (1993) 9.
[113] Porter's appointment triggered debate about town planning and public health. Porter went on to play a central role in extending municipal control of urban life, ensuring that the living conditions of the permanent European settlement in the mining town of Johannesburg were conducive to health. He also served on various Transvaal and Union commissions on issues pertaining to health and urban planning. As the MOH of the country's largest and fastest growing city, Porter became a powerful character with enormous influence, whose commitment to the British model of town planning and its application in South Africa was unquestioned.
[114] Parnell S (1993) 478.

the public health by-law was declared *ultra vires* by the Transvaal Provincial Council, and Porter went back to the drawing board to devise new measures of controlling overcrowding in Johannesburg. Undeterred, Porter worked hard to get public health and town-planning legislation passed in South Africa.

His first challenge of a unique South African urban issue was dealing with the significant increase in inadequate living quarters of the racially integrated working class in the industrial centres. After the four colonies, Transvaal, Orange Free State, Cape and Natal, were amalgamated to establish the Union of South Africa in 1910, as explained in Chapter Two,[115] Porter looked to use his influence outside of Johannesburg by advocating for the introduction of a provincial, and later a South African equivalent of the English Housing and Town Planning Act of 1909.[116] Of particular interest to Porter was for local authorities to be given powers which enabled them to close down uninhabitable buildings. In canvassing for local support, he also emphasised the importance of establishing separate locations for Africans, coloureds and Indians as an integral part of general town-planning provisions. This was segregation of the different races, each living in its separate location.[117]

With regard to Africans, Porter insisted that the best place for them to live was in the 'locations' set aside for Africans while they were working in white urban areas. To this end, he repeatedly called for the Johannesburg Council to provide more than 7,000 houses for Africans so that the black slum known as the 'Malay location' could be demolished.[118] The Malay location was an area that was identified as suitable for either establishing residential areas for poor whites, as it was close to the city centre, or for commercial expansion. The Africans from the Malay location were then moved away from the city centre and into 'locations' located at the periphery of the city.

[115] Para 2.4.
[116] Marks S & Trapido S 'Lord Milner and the South Africa state' (1981) 2 *Southern African Studies Journal* 25-48.
[117] Parnell S (1993) 479.
[118] Parnell S 'Sanitation, segregation and the Natives Urban Areas Act: African exclusion from Johannesburg's Malay location' (1991) 61.

This shows that municipalities played a crucial role in managing land use in the city in the early 1900s.[119] In democratic South Africa, this is a role which the 1996 Constitution has also allocated to municipalities.

As explained in the previous chapters, this role has, however, come to intersect with the role of traditional leaders in land allocation in the rural areas. As explained at length in Chapter Two, it is traditional leaders in rural areas who played an important role in the management of land use even before the advent of colonialism.[120] In short, the history of urban planning in this period has two main threads. The first is the story of the transfer of a mainly British system of town planning to the Union of South Africa. The second has to do with the rise of a nationwide system based on the imported system of planning to control and regulate the urbanisation of black South Africans.[121]

4.5 Tiers of government and contestation over planning powers

The question of which sphere of government should exercise which power has certainly attracted much debate in South Africa.[122] In this thesis, the question of who does what is relevant for traditional leaders and local government with respect to the management of land use in rural areas governed by traditional leaders. At the same time, the question of who does what is also relevant to the exercise of certain overlapping powers by local, provincial or national government. This section scrutinises the early emergence of the question of who does what between local, provincial and national government in so far as their planning powers were concerned during the colonial period.

As alluded to earlier, some of the ideas that were shared by Porter were given expression in legislation such as the Johannesburg Municipal Proclamation Act of 1901 (JMPA) and the Transvaal Proclamation of Township Ordinance of 1905 (TPTO) in the Transvaal.[123] The JMPA was used by the Johannesburg Municipality to facilitate the transfer of certain stands in the township of Vrededorp to the Council of the Municipality of Johannesburg, subject to certain conditions. This is yet another indication that municipalities were recognised as the tier of

[119] Parnell S 'Racial segregation in Johannesburg: The Slums Act, 1934-1939' (1988) 2 *South Africa Geographical Journal* 115.
[120] Para 2.2.
[121] Mark S & Trapido S (1981) 33.
[122] Parnell S (1993) 476.
[123] Parnell S (1993) 480.

government in charge of township establishment, subject to provincial control, from as early as the 1900s. However, the interest in having municipalities assume more and more aspects of the town planning function did not last long as the period between 1906 to the 1920s saw town planning attracting significant attention from both the provincial and national government.[124]

In Britain, town planning schemes had been introduced with the abovementioned English Housing and Town Planning Act of 1909. In South Africa, the process of introducing appropriate planning legislation took longer because of disagreement between national and provincial governments over which tier of government should be allocated the town planning function.[125] English-speaking Natal insisted that this function should be allocated to the provinces. After years of protracted negotiations and discussion over which tier of government should exercise control over this matter, it was agreed in 1925 that provinces should be allocated these powers.

Over a period of 10 years, having developed the capability to administer spatial planning and land management, the provinces began to pass Town Planning Ordinances which allowed for the establishment of township boards and town planning schemes.[126] These ordinances were not racially-based. The reason, as was stated earlier, is that town planning was simply never envisaged as an instrument to benefit the black population. Although the town planning function was allocated to provinces, certain aspects of it were exercised and conducted by municipalities. In other words, municipalities became the implementing agents of the town planning function at the local level, and thus began developing the capability to perform it. Reinforcement for implementing racial segregation came by way of legislation, and this affected the planning powers of municipalities. The section below assesses this legislation and its impact on the planning powers of municipalities.

4.6 Impact of the Native Act on the planning powers of municipalities

The primary objective of the Native (Urban Areas) Act of 1923 was the intensification of racial segregation. The Act segregated urban residential space and created 'influx controls' to reduce

[124] Harrison P, Todes A & Watson V (2007) 23.
[125] Harrison P, Todes A & Watson V (2007) 25.
[126] Harrison P, Todes A & Watson V (2007) 26.

access to cities by blacks.[127] The Act also laid a foundation for the development of another crucial piece of legislation in the subsequent years, namely the Group Areas Act of 1950. This Act compelled municipalities to enforce racial zoning.[128]

The Native Act empowered municipalities to proclaim whites-only areas and then move black residents to segregated 'locations' whose sites were located at the urban periphery away from the city centres. The significance of the Act lay in its long-term plan of starting a process through which the state had significant control over the urbanisation process.[129] This means that if the state sought to control urbanisation, the following logical step would be to also assume control of the reconfiguration and management of the reserves in rural areas, as was discussed in Chapter Two.[130] This assertion is supported by the efforts of the National Party to mitigate the influx of Africans into the cities. General Hertzog (the leader of the National Party and Prime Minister of the Union) proposed increasing the reserve areas and removing black voters in the Cape from the common roll in 1926.[131]

Urban planning and town planning instruments were generally applied in urban areas as a response to the influx of people, particularly Africans, which were pouring into the cities to find job opportunities. The planning system, as administered by municipalities, played an important role in the management of the influx of people into the cities. This Eurocentric system of planning, however, was never intended to benefit or accommodate black people. This system entrenched itself in the urban areas. In the rural areas, the colonial regime had sought to implement this imported planning system through traditional leaders under the guise of 'betterment planning'. As explained in Chapter Two, the main purpose of betterment planning was to take away the remaining wealth Africans had, namely good, fertile and sufficient land for homestead subsistence and livestock.[132] While the implementation of betterment planning was not entirely realised in many areas, it was however, implemented in some areas.

[127] Harrison P, Todes A & Watson V (2007) 26.
[128] Harrison P, Todes A & Watson V (2007) 26.
[129] Parnell S (1993) 482.
[130] Para 2.5.
[131] Correspondent A 'Native policy in South Africa' (1938) 25 *The Commonwealth Journal of International Affairs* 722.
[132] Para 2.7.5.

4.6.1 Legislation intensifies segregation in urban areas

As explained above, in 1948 the National Party came to power in South Africa on a segregationist political platform. It instituted a programme which was to effect major changes in South African cities through a refinement of the segregationist legislation already put in place by the colonial regime.[133] The two major pieces of legislation to enforce segregation were the Population Registration Act and the Group Areas Act, both passed by Parliament in 1950 and subsequently amended several times.[134] The first Act provided for the population of the country to be classified into distinct racial groups. The second Act provided that separate zones in urban areas should be set aside for the exclusive residential and commercial use of each group, and that no persons could live, own property or conduct business except in the area set aside for the group to which they were assigned.[135]

The creation of separate zones for each racial group emphasises how important it was for the apartheid regime to ensure that different racial groups lived in different areas and had different institutions to govern them. In the urban areas, municipalities governed the cities, while, in the rural areas, traditional leaders were the face of local government. This was an objective that was perpetuated for many years. It can be argued that it was an objective that made traditional leaders believe and accept that they were the exclusive local government of rural areas and that this would never change.

4.6.2 Implications of the 1961 Constitution for municipalities and chiefs

While the passage of the 1961 Constitution changed South Africa into a Republic, it made no changes to the status of local government, as discussed earlier in this chapter.[136] Provinces retained their power to manage 'municipal institutions, divisional councils and other local institutions of a similar nature'.[137] At the same time, the implementation of the ideology of apartheid was accelerated. The main goal of the apartheid government's segregationist ideology was twofold. First, the National Party sought to completely segregate the black population, and then set in motion a process of sending them back to the homelands.

[133] Christopher A J 'Apartheid planning in South Africa' (1987) 153 *Geographical Journal* 199.
[134] Population Registration Act 30 of 1950 & Group Areas Act of 1950.
[135] Christopher A J (1987) 200.
[136] Para 4.1.
[137] Steytler N & De Visser J *Local Government Law of South Africa* (2018) 6.

The effect of the return of these black people to the rural reserves was that they would be subjected to traditional leadership rule, which, at the time, had become a proxy for apartheid rule in rural areas, as discussed in Chapter Two.[138] With the system of traditional governance having been 'captured' by the apartheid government and reconfigured as a system to control the black population, the powers that this institution had enjoyed in the pre-colonial era were increased and reinforced by way of legislation, regulations and proclamations.

The objective was for traditional leaders, as tools of control, to hold a tighter grip on almost all areas of their subject's lives. Some of these powers included control over rural political life, land allocation, safety and security, and governance and 'betterment' development. In as far as the power to allocate land by traditional leaders and the power to manage land use by municipalities was concerned, this meant that a black person was regulated by two systems of land use management depending on whether he or she was in urban or rural areas at a particular time. The overall implementation and enforcement of these two systems were informed and guided by the segregationist interests of the apartheid regime.

On the one hand, in the urban areas, municipalities decided where black people lived through their land use management powers that were based on an imported, Eurocentric system of zoning. Essentially, zoning defines the rules governing what and where people and institutions can and cannot build and operate in our cities, suburbs, towns including in areas governed by traditional leaders.[139] On the other hand, upon the return of black people to the rural areas, most traditional leaders who worked with the apartheid regime decided where black people would live in terms of their customary law land allocation powers. As stated earlier, the land allocation power was exercised with a view to implementing racial objectives of the apartheid regime.

It is thus clear that black people have been subjected to two systems of land use management for generations, namely the land use allocation system based on customary law and the town planning system based on zoning and spatial plans. What should be noted, however, is that in democratic South Africa people from different races and ethnic backgrounds are affected by the operation of these two systems of land use management in areas governed by traditional

[138] Para 2.7.1.
[139] Nel V 'SPLUMA, zoning and effective land use management in South Africa' (2015) 22 *UF* 85.

leaders. First, the operation of the Eurocentric system of land use management was never designed to benefit black people nor to apply in the areas governed by traditional leaders. It began to affect traditional areas when the aim of taking away the huge tracts of fertile land of rural black people was set in motion. This was done through the introduction of the 'betterment' programme in the reserves, as discussed in Chapter Two.[140]

Secondly, the national government wanted to segregate the remaining population outside of the homelands into different groups living in separate areas. The main aim was to have no residential or business mixing and the establishment of separate towns for the various groups.[141] However, the ultimate objective of reversing the migration of black people into the towns did not succeed, as huge numbers of different race groups had established permanent residences within a single community, as explained earlier.[142] Therefore, the national government decided to create separate governance institutions for these groups.[143]

Christopher argues that a growing number of historical case studies have also shown how institutions and structures of government at the local level tended to deliberately exclude black Africans.[144] Black South Africans were denied the municipal franchise although the state was a Republic, the basic tenet of which is 'power to the people and their elected representative and not white people and their elected representatives'.[145] Africans were fobbed off with cooperative institutions. First the Advisory Boards from early in the century, then the Urban Bantu Councils (UBCs – also known as 'useless boys clubs') from the 1960s, followed by the Community Councils and, the final failure, the Black Local Authorities (established in terms of the Black Local Authorities Act of 1982) in the 1980s. Literature on the history of these local institutions tells the story of the functioning of the advisory boards. Advisory boards were officially set up under the 1923 Native (Urban Areas) Act (although they had already been created in Ndabeni and New Brighton before 1923).[146] All the case studies show that the advisory boards were powerless bodies. Even their advisory role was generally not taken seriously by municipal councils, and they lacked legitimacy in the eyes of black South

[140] Para 2.7.5.
[141] Christopher A J (1987) 201.
[142] Para 4.2.
[143] Steytler N & De Visser J *Local Government Law of South Africa* (2018) 7.
[144] Christopher A J (1987) 192.
[145] Maylam P 'Explaining the apartheid city: 20 years of South African urban historiography' (1995) *UP* 21.
[146] Maylam P (1995) 24.

Africans residing in the black areas. There was intense resistance towards these authorities throughout their years of existence.[147]

The apartheid government not only established these inferior structures in black areas, but also ensured that decision-making on how these communities would be developed and control over the pace of that development remained with the national government. The events that occurred through the 1950s and 1960s demonstrate how the national government began to centralise control over local planning processes that related to African urbanisation. The provinces were never given powers to undertake regional planning.

However, in 1964, a national Department of Planning was established. This Department replaced the Land Tenure and Advisory Board that was responsible for the implementation of the Group Areas Act, and centralised control over local planning processes that related to African urbanisation. Likewise, the introduction of the Physical Planning Act of 1967 also contributed significantly to the centralisation process, as it gave the national government new powers to make decisions on local planning through the preparation of Guide Plans for local areas. In 1972, the national government took complete control of the management of black townships. It did so when it shifted the management of black townships from municipalities to central government-controlled Administration Boards.[148]

During this time, local government had neither autonomy to manage its own affairs, nor did it enjoy powers except for those that were conferred by a competent legislative authority. Although local government had the power to enact by-laws, such by-laws were subordinate delegated legislation and subject to judicial review.[149] In other words, local government was an institution that was under the control of the provincial councils, and later under the control of the apartheid government which effectively dictated its local planning processes in areas where black Africans resided.

Furthermore, local government was used by the apartheid government as a vehicle to drive the implementation of racial segregation through the use of racially neutral planning laws and other legislation. For example, areas that were zoned for black Africans to reside in were far away from the city centres where job opportunities existed. Also, through zoning, the

[147] Maylam P (1995) 32.
[148] Maylam P (1995) 33.
[149] Steytler N & De Visser J (2018) 5.

establishment of shopping malls or centres in black areas was prohibited. Black Africans were allowed into the city centres to contribute labour and spend the little money they had. This meant that poor black South Africans contributed to the economy of a city that used those same resources to develop white urban areas.[150]

Although apartheid planning imposed strict controls on the black population, the trends in planning (and in spatial form) in increasingly 'white South Africa' were not much different from those of Europe or North America. It was an era that was characterised by low-density suburbanisation, aided by large-scale investment in freeways, the rise of multicentred metropolitan cities, the decentralisation of commercial and office activity, and the separation of land uses through the use of zoning schemes.[151] These developments were supported through the 1960s and early 1970s by rapid, sustained economic growth that benefitted mainly the white working and middle classes. The town planning schemes provided for in the provincial ordinances regulated planning and land-use control in 'white' areas, and provincial administrations administered the system.[152] After all, the planning system with its planning schemes that were imported from Britain was never intended to benefit, accommodate or apply in areas where black South Africans lived, including in rural areas where traditional leaders governed. The next section assesses how the 1983 Constitution further entrenched segregation and the consequences thereof.

4.6.3 Implications of the 1983 Constitution for local authorities in black urban areas

The 1983 Constitution further entrenched racial segregation in South Africa. Black people were not represented in the newly established tricameral Parliament of South Africa. The tricameral Parliament consisted of three houses, namely the House of Assembly for whites, the House of Representatives for coloureds, and the House of Delegates for Indians.[153] The three groups represented in Parliament could, for example, voice their concerns or make representations on all matters which affected their identity, culture, traditions and customs.

[150] Houghton D 'The significance of the Tomlinson Report' available at *http://www.sahistory.org.za (accessed 19 June 2021) 4.*
[151] Parnell S (1993) 481.
[152] Maylam P (1995) 27.
[153] Du Toit P & Heymans C 'The 1983 Constitution of South Africa: Towards Democracy or not?' (1985) 12 *SAJPS* 81.

Unsurprisingly, all matters which affected black people including the local authorities in the black areas fell under the control of the State President.[154] Following the urban uprising of 1976, there were various attempts to deal with black political aspirations in the urban areas. First, the Community Councils Act of 1977 introduced elected community councils which replaced the advisory councils, which took over some of the functions of the administration boards. In an effort to upgrade these community councils, the Black Local Authorities Act was passed in 1982, granting them powers similar to those of white municipal councils. These authorities lacked any semblance of legitimacy and were the focus of much resistance.[155] The continued exclusion of blacks from participating in the national and municipal elections attracted further opposition to the black local authorities, since they were seen as tools of control of the apartheid government. During this time, boycotts of rents and user charges became the chief weapons against what was considered an illegitimate regime. By the end of the 1980s, the system was brought to an end and the functions of the Black Authorities Act were passed on to the various provincial authorities black authorities.[156]

4.6.4 Road to democracy: Implications for local government

As explained in the previous chapter, it is important to note from the onset that there is overlap between the previous chapter and this chapter when it comes to discussing the road to democracy.[157] The negotiation process and time period which are covered in this section are broadly the same as the one those discussed in the previous chapter. The difference is that the focus of the previous chapter was on traditional leadership and the debates surrounding its role, particularly its land allocation role in democratic South Africa. These debates took place around the same time negotiations were held for a new, non-racial democratic South Africa. In this chapter, particularly the sections below, the focus will be on local government and the debates surrounding the transformation of local government as well as the development of its planning powers in democratic South Africa. Thus, references to the previous chapter will be made where necessary to highlight the overlap between the two chapters.

[154] Du Toit P & Heymans C (1985) 83.
[155] Steytler N & De Visser J (2021) 9.
[156] Steytler N & De Visser J (2021) 7.
[157] Chapter Three, para 3.2.

The unbanning of major political organisations, most notably the ANC, by the apartheid government in the 1990s effected major changes in the political landscape of South Africa. After a series of negotiations between various political groupings, as explained in the previous chapter, the ANC was clear that one of its key imperatives involved the transformation of local government to bring it in line with non-racial principles.[158] This was an important imperative given that the local government system under the apartheid government was structured strictly on racial lines. In addition, that local government system was tasked with a clear mandate of racially segregating South Africans.

The objective was to make local government a vehicle of social integration charged with providing services equitably to all South Africans irrespective of their race. The process of transforming local government occurred in three phases. The first phase, namely the pre-interim phase, started with the coming into force of the Local Government Transition Act 209 of 1993 (LGTA) and the establishment of the negotiating forums in local authorities pending the first local government election. The second phase began when the first local government elections were held in 1995-1996, establishing integrated municipalities comprising elected and appointed members of council. The final phase took effect after the local government election on 5 December 2000 was held, paving the way for the establishment of the current, fully democratic system of local government. The guiding framework for the transition process was provided by both the Interim Constitution of 1993 and the 1996 Constitution.[159]

4.7 Pre-interim period

The negotiations regarding local government transformation began early in 1993, and were separate from the widely publicised constitutional negotiations held in Kempton Park, Gauteng. The South African National Civics Organisation (SANCO), a body representing local alliances that were largely aligned with the ANC, entered into negotiations with two national bodies convened by the National Party Minister of Local Government to guide local

[158] Chapter Three, para 3.1.
[159] Constitution of the Republic of South Africa, Act 200 of 1993 & Constitution of the Republic of South Africa, 1996.

government transformation.[160] A product of these negotiations was the establishment of what came to be called the Local Government Negotiating Forum (LGNF).

Within a period of eight months, the LGNF produced three documents, namely an Agreement on Local Government Finances and Services, the Local Government Transition Act, as well as the Chapter 10 provisions dealing with local government in the Interim Constitution.[161] These documents were accepted by the Multi-Party Negotiating Forum with a few changes.[162] The objective was not only to dismantle a racially based system of local government, but was also to establish a legitimate and effective local government that would provide services to meet the basic needs of its residents.

Given that many traditional leaders during apartheid had been allocated a wide range of powers and functions which they exercised to serve the aims and objectives of the apartheid regime, as was explained in the previous chapter, it was unclear whether they would continue to do so in post-apartheid South Africa, and, which roles they would play in particular, given the role and nature of the new system of local government that was being designed. The principal legislative instrument that would drive the process of transformation and its fulfilment was the Local Government Transition Act.[163]

4.7.1 Local Government Transition Act

The Local Government Transition Act of 1993 (LGTA) was passed by the tricameral Parliament and came into effect on 2 February 1994. This move officially commenced the pre-interim phase, the goal of which was to facilitate the transition of a racially based system of local government to a non-racial one in terms of Part IV of the LGTA.[164] The first step towards achieving this was the creation of local government forums for each 'economically and historically bound' area. In other words, these would be transitional structures that were to cease to function after the first election was held. The forums also had to adhere to the 50:50

Bekker S, Buthelezi S & Manona C 'Local government transition in five eastern seaboard South African towns' (1997) 24 *SAJPS* 41.

[161] Bekker S, Buthelezi S & Manona C (1997) 41.

[162] Cameron R (2008) 23.

[163] Steytler N & De Visser J (2018) 11.

[164] Steytler N & De Visser J (2018) 12.

statutory and non-statutory composition of the LGNF by sending nominated members to the transitional structures negotiated by the forums.[165]

The supervision of the implementation of the new local government system remained in the hands of the provinces. Part III of the LGTA makes provision for the establishment of provincial committees for local government in each province. These committees were supposed to be broadly representative of the major stakeholders in each province. These committees were set up and required to work hand in hand with provincial administrators that were established by the National Party government to also supervise the implementation of this new system.[166] This was to ensure that the administrators did not restructure the local government system in a way which suited their narrow interests.

The LGTA was largely silent on the issue of rural local government. Most rural areas were governed by traditional leaders and therefore did not have the form of local government that was established in urban areas. The type of local governance that existed in many rural villages, as well as the resultant absence of negotiating forums, made central government decide that the pre-interim phase should not be applied strictly in rural areas.[167] The focus of the transition was on cities and towns, as these were places where the apartheid government predominantly implemented its policy of racial urban segregation, as was explained earlier in this chapter.[168]

This explains why an amendment to the LGTA made provision for the establishment of rural local government structures two years later, and traditional leaders were not part of these structures.[169] It can be argued that traditional leaders did not form part of these structures due to the uncertainty surrounding the role they would play in democratic South Africa, which was discussed in the previous chapter. The next section examines the town planning function of local government under the 1993 Interim Constitution, and explains why this function was important to the drafters of the 1993 Constitution.

[165] Bekker S, Buthelezi S & Manona C (1997) 42.
[166] Cameron R (2008) 27.
[167] Cameron R (2008) 32.
[168] Para 4.5.1.
[169] Cameron R (2008) 34.

4.7.2 Interim phase: Town planning under the 1993 Interim Constitution

During the apartheid era, municipalities took town planning decisions that were segregationist and inconsistent with democratic ideals. With South Africa's transition to a democratic state underpinned by non-racism, it was important for the drafters of the 1993 Constitution to revisit and restructure the manner in which town planning decisions were taken and the reasons for which these decisions were taken. An important aspect of the local government restructuring process related to decision-making within local government on specific matters. In this regard, section 176 (which deals with council resolutions) of the Interim Constitution set out how decisions could be taken in councils of the new local government system. Resolutions on other matters, except the ones listed below, could be passed by the council by a simple majority. According to section 176, matters before the council of a local government are that

- the budget of the local government, shall be decided by a resolution of the council adopted by a majority of at least two thirds of all its members; and
- town planning shall be decided by a resolution of the council adopted by at least a majority of all its members.[170]

The Interim Constitution thus contained a special rule for decision-making on budget and town planning matters.[171] It is submitted that the elevation of town planning to a special status that required a weighted or special majority indicates how town planning conducted by municipalities during the apartheid era had been disastrous, particularly for areas in which black people lived. This then meant that the importance of the municipal role in town planning in a soon-to-be democratic South Africa was on the minds of the drafters of the 1993 Constitution. To ensure that town-planning decisions would support spatial transformation, the drafters of the 1993 Constitution insisted on an inclusive, democratic decision-making process, perhaps for fear that the old guard would continue with segregationist decisions.

[170] Section 176 of the Constitution of the Republic of South Africa, Act 200 of 1993.

[171] Even if some members of the council that were present during a council meeting constituted a quorum, they could not adopt a valid or legally binding resolution on matters pertaining to the budget or town planning. A valid or legally binding resolution on these two matters could only be adopted by the council if a majority of all the members of council were present and voted on it.

In the midst of these developments around the restructuring of local government, traditional leaders in the rural areas continued to exercise their land allocation powers undisturbed, as explained in the previous chapter.[172]

4.7.3 The first local government elections in 1995-1996

In terms of the LGTA, before the first democratic local government elections could be held in 1995 and 1996, the process of demarcating municipalities had to be undertaken. Nine provincial boards were set up and required to demarcate the boundaries of three distinct types of municipalities, namely metropolitan, urban and rural.[173] In the metropolitan areas, metropolitan sub-structures had to be created as well. The process resulted in 842 municipalities being demarcated, including three metropolitan municipalities in Johannesburg, Durban and Cape Town.[174]

It is argued that the demarcation of these municipalities had implications for the institution of traditional leadership as a governance institution in rural areas, as will be explained later. This implication was perhaps never given any serious consideration by traditional leaders and the body that represented the institution of traditional leadership. The impact of this demarcation resulted in traditional areas falling under the jurisdiction of established municipalities. Eventually, most areas where democratic structures had been established would subsume areas governed by traditional leaders. But, given that traditional leaders were *ex officio* members of these democratic structures as stated in the previous chapter,[175] this might explain why these demarcations did not elicit much attention and anger from traditional leaders and its representative body.

The Act also provided for an interim phase, which began after the 1995-1996 local government elections. This election replaced the appointed members of the transitional authorities with elected members. As alluded to earlier, the LGTA's framework for rural local government required the division of the whole province into local areas of jurisdiction for the election of the following structures:

- transitional local councils for urban areas; and

[172] Chapter Three, para 3.4.
[173] Bekker S, Buthelezi S & Manona C (1997) 43.
[174] Steytler N & De Visser J (2018) 13.
[175] Chapter Three, para 3.3.

- district councils for rural areas, accompanied by a network of transitional representative councils and rural local councils.

Given that rural areas initially did not have local government structures, it was generally accepted during the transition that the entire country would be served by some form of local government, supported by district councils in all non-metropolitan areas. As explained in Chapter Two, during the colonial and apartheid era, traditional leaders conducted a number of functions such as dispute resolution, facilitation of public meetings, and issuing of permission to occupy certificates.[176] Traditional leaders were thus widely perceived as the reality of government in the rural areas. In the mid-1990s, it was still unclear how the two governing systems, namely local government and traditional leadership, would function in practice and whether traditional leaders would accept the areas they governed to be subjected to municipal rule. This is why the drafters of the 1993 Constitution formulated a number of constitutional principles that would give clarity, amongst other things, to the relationship between traditional leaders and municipalities in rural areas in democratic South Africa. The following section analyses these constitutional principles and explains the rationale for their formulation.

4.7.4 Constitutional Principles of the Interim Constitution

Since the Interim Constitution was a temporary measure, the 1996 Constitution had to be drafted by the newly elected Constitutional Assembly.[177] The Constitutional Assembly had to draft a new Constitution based on a set of negotiated principles that were enumerated under Schedule 4 of the Interim Constitution, as discussed in the previous chapter. Once that was done, the Constitutional Court would have to certify the text. As also stated in the previous chapter, this meant that the Constitutional Court needed to first examine the text and satisfy itself that it complied with the constitutional principles set out in Schedule 4 of the Interim Constitution.[178] These are the principles that would inform and shape the design of a new democratic local government system, including the post-apartheid system of traditional leadership that was discussed in Chapter Three.[179]

[176] Para 2.1.
[177] Chapter Three, para 3.4.
[178] Bekker S, Buthelezi S & Manona C (1997) 46.
[179] Para 3.3.

First, the status of local government as a level of government was recognised in Constitutional Principle XVI, which read: 'Government shall be structured at national, provincial and local levels.'[180] Secondly, Constitutional Principle XXIV provided that '[a] framework for local government powers, functions and structures shall be set out in the Constitution'.[181] The comprehensive powers, functions and other features of local government 'shall be set out in parliamentary statutes or in the provincial legislation or both'.[182] Lastly, the third Constitutional Principle dealt with the revenue sources for the different categories of municipalities including national transfers, while the fourth emphasised the importance of respecting and following legislative procedures by legislative organs at all levels of government.[183]

After many inputs by the Local Government Negotiating Forum calling for local government to have its own dedicated chapter in the 1993 Constitution, the members of the Constitutional Assembly responsible for drafting the 1996 Constitution heeded that request when a full chapter on local government was included in the 1996 Constitution. This meant that the content of the Interim Constitution guided the drafting of the 1996 Constitution. Local government, through its constitutional recognition, would now cease to be the creature of statute it was under apartheid. The following section scrutinises the constitutional provisions of the draft 1996 Constitution on local government with the aim of ascertaining its status, powers and functions, particularly as they relate to municipal planning.

4.7.5 Local government under the 1996 Constitution

Chapter 7 of the 1996 Constitution deals exclusively with local government. It represents the commitment to design a local government system that plays a transformative and service delivery role throughout South Africa.[184] That commitment finds expression in the provisions outlined below.

Section 151(1) of the Constitution, which deals with the status of municipalities, provides that the local sphere consists of municipalities which must be established throughout the Republic of South Africa. This includes areas that are governed by traditional leaders. In terms of section

[180] Schedule 4, CP XVI of the 1993 Interim Constitution.
[181] Schedule 4, CP XXIV of the 1993 Interim Constitution
[182] Section 175 of the 1993 Interim Constitution
[183] Section 178 of the 1993 Interim Constitution.
[184] Chapter 7 of the 1996 Constitution.

151(3), these municipalities have the right to govern on their own initiative the local affairs of their communities.[185] To ensure that these municipalities effectively govern the local affairs of the communities, the Constitution, under section 151(4), instructs the national and provincial governments to not impede the ability or right of a municipality to exercise its powers and perform its functions.[186]

The right of a municipality to govern on its own initiative is also guided by the objects of local government, which are set out in section 152(1) of the Constitution.[187] The objects of local government are to first, provide democratic and accountable government for local communities; secondly, to ensure the provision of services to communities in a sustainable manner; thirdly, to promote social and economic development to promote a safe and healthy environment, and fourth, to encourage the involvement of communities and community organisations in the matters of local government.[188]

The Constitution acknowledges that local government may not achieve its objects if it is not afforded the necessary support. Therefore, in terms of section 154(1), national and provincial governments are instructed through legislative and other measures to support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers, and to perform their functions.[189] The powers and functions of municipalities are provided for under section 156 of the Constitution.[190] In terms of section 156(1), it is provided that a municipality has the executive authority in respect of and has the right to administer

- the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 and;
- any other matter assigned to it by national or provincial government.[191]

Schedule 4 Part B contains a list of local government matters, which include 'municipal planning'. As will be discussed further in the sections below, although there is overlap between the planning powers allocated to the different spheres of government by the Constitution, the consideration and determination of land use and land development

[185] Section 151(3) of the 1996 Constitution.
[186] Section 151(4) of the 1996 Constitution
[187] Section 152(1) of the 1996 Constitution.
[188] Section 152(a)-(d) of the Constitution.
[189] Section 154(1) of the Constitution.
[190] Section 156(1) of the Constitution
[191] Section 156(1) of the 1996 Constitution.

applications falls within the ambit of municipal planning. This function is, therefore, an original power of local government, as it is derived directly from the Constitution.[192] For another sphere of government to exercise a power that is listed under Schedule 4 Part B, an amendment or a section 139 intervention of the Constitution would be required first. This is the extent to which the Constitution entrenches and protects the powers of local government.

4.7.6 The *First* and *Second* Certification judgment

As explained in the previous sections of this chapter, the Constitutional Principles that formed part of the Interim Constitution guided the process of drafting the 1996 Constitution. However, if the Constitutional Court was not satisfied that the 1996 Constitution adhered to the Constitutional Principles, it was empowered to send the draft Constitution back to the Constitutional Assembly for reconsideration of the areas the Constitutional Court took issue with. The *First Certification* judgment reflects circumstances in which the Constitutional Court was not satisfied with some aspects of the draft Constitution when it examined it in the first certification process.

It handed down the *First Certification* judgment, which resulted in sending back the adopted 1996 Constitution to the Constitutional Assembly to address the issues the Constitutional Court had raised. Once the Constitutional Assembly had resolved the issues identified by the Constitutional Court, it sent back the adopted 1996 Constitution to the Constitutional Court for a second round of certification. When the Constitutional Court was satisfied that the second draft Constitution complied with the Constitutional Principles, it handed down a *Second Certification* judgment. Interested parties could also apply to join the certification proceedings and make submissions on issues they had concerns with pertaining to the draft 1996 Constitution. Numerous interested parties petitioned the Constitutional Court, but the most important one in the context of this thesis was Contralesa. Contralesa is a group which brings together traditional leaders from all over the country, and advocates for greater rights for traditional leaders in the post-apartheid era.

Contralesa argued in the proceedings before the Constitutional Court that sections 211 and 212 of the draft Constitution of 1996 failed to protect the 'institution, status and role' of traditional leadership, as required by CP XIII. Contralesa argued that these words encompass

[192] Steytler N & De Visser J (2018) Chapter 5.

the powers and functions that traditional authorities have long exercised, and that such powers and functions must not only be acknowledged, but 'protected', and their substance had to be determined, not by national legislation, but 'according to indigenous law'. Contralesa further argued that the use of the word 'role' in addition to the words 'institution' and 'status' suggests that a constitutionally entrenched function is called for.

Contralesa sought support for its argument in the non-derogation provision in CP XVII, which essentially meant that if the drafters of the Interim Constitution agreed to confer certain guarantees in the 1996 Constitution for the institution of traditional leadership, then the Constitutional Assembly should not do anything that would substantially deprive the institution of traditional leadership from receiving those guarantees. The implication is that the provisions of CP XIII must contemplate a role for traditional leadership in government, otherwise the proviso would be no longer needed. Contralesa argued that the purpose underlying a guaranteed and active role for traditional leaders in government is to ensure an appropriate place in the constitutional structure for elements of traditional forms of government that have deep historical roots in the country. These deep historical roots, so the argument went, continue to have direct relevance for millions of people, particularly many living in rural areas, where the perceived reality of government is the traditional authority rather than the modern state.[193]

In response, the Constitutional Court was explicit about the position of traditional leadership in a constitutional democracy, and by extension local government. The Court held:

> CP [Constitutional Principle] XIII acknowledges the existence of three elements of traditional African society with noteworthy and continuing cultural relevance. These are institutions of traditional leadership, customary law and, at the provincial level, traditional monarchy. In a purely Republican democracy, in which no differentiation of status on grounds of birth is recognised, no constitutional space exists for the official recognition of any traditional leaders, let alone a monarch. Similarly absent, is an express authorisation for the recognition of indigenous law. The principle of equality before the law in CP VI could be read as presupposing a single and undifferentiated legal regime for all South Africans with no scope for the application of customary law – hence the need for expressly

[193] *Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) para 189.

> articulated CPs recognising a degree of cultural pluralism with legal and cultural, but not necessarily governmental, consequences.[194]

This judgment was used to reign in traditional leaders on any matter that might have been seen to promote inequality. It effectively extinguished any entitlement from traditional leaders in performing governmental functions without the express authorisation of either local, provincial and national government. [195] In other words, the recognition of the institution of traditional leadership had legal and cultural consequences. It was not, however, recognised as a sphere of government mandated with service delivery. The judgment also emphasised that all people of South Africa were equal before the Constitution, and that the Constitution was above customary law. This means that all powers and functions traditional leaders perform in terms of customary law are subject to the Constitution, and this includes the land allocation power. Despite the objections from various interested parties, the Constitutional Court certified the draft amended Constitution in the *Second Certification* judgment after being satisfied that it complied with all 34 Constitutional Principles of the Interim Constitution.

4.8. Impact of local government constitutional provisions on traditional leadership

As explained in the previous section, the Constitutional Court certified the Constitution of 1996, paving the way for the implementation of the constitutional provisions on local government. It is argued that the entrenchment and implementation of the local government provisions in the 1996 Constitution gave rise to three important consequences for traditional leaders. The combined impact of these three consequences is what ultimately gave rise to the first wave of serious tensions between local government and traditional leaders.

First, section 151(1) of the Constitution mandated the establishment of 'wall-to-wall' municipalities for the whole of the territory of the Republic. As stated earlier, this included areas under the authority of traditional leaders. The effect of the implementation of this provision meant that all rural areas would fall under the jurisdiction and authority of

[194] *Certification of the Amended Text of the Constitution of The Republic Of South Africa,* 1996 (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996).
[195] Kompi B (2018) 156.

municipalities.[196] Secondly, the implementation of section 157(1)(5) of the Constitution, which deals with the election of council members, also had an important consequence for traditional leaders. The application of that provision resulted in the termination of the *ex-officio* full-membership of traditional leaders in democratically elected municipal councils, as was discussed in Chapter Three.[197] Thirdly, the powers and functions of municipalities are provided for under section 156 of the Constitution.[198] In terms of section 156(1), it is provided that a municipality has the executive authority in respect of and has the right to administer

- the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
- any other matter assigned to it by national or provincial government.[199]

While the Constitution contained original local government powers that included 'municipal planning', this was not envisaged during the late 1990s and early 2000s, particularly by traditional leaders, as something that would affect their land allocation authority. This was because municipalities did not conduct land use management in rural areas pre-1994, as was explained in Chapter Two.[200] It did, however, have important consequences for traditional leaders in early 2010, when the Constitutional Court's interpretation of the meaning and content of the 'municipal planning' power confirmed the exact role municipalities should play in land use planning and land use management, as will be explained in detail later.

4.8.1 White Paper on Local Government

In the previous chapter, a discussion of the White Paper on Local Government insofar as it dealt with traditional leadership was undertaken.[201] This section examines the White Paper insofar as it deals with local government.

[196] X Poswa 'Role of traditional leaders in combating Covid-19 in rural areas' available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwit58CZ0pH5AhUq_rsIHYo6AJAQFnoECAYQAQ&url=https%3A%2F%2Fdullahomarinstitute.org.za%2Fmultilevel-govt%2Flocal-government-bulletin%2Farchives%2Fvol-15-issue-3-september-2020%2Fthe-role-of-traditional-leaders-in-combating-covid-19-in-rural-areas&usg=AOvVaw2969qwFt8EdHet9MK8NbOQ (accessed 14 September 2020).
[197] Para 3.4.
[198] Para 4.6.6,
[199] Section 156 of the 1996 Constitution.
[200] Chapter Two, para 2.6.
[201] Chapter Three, para 3.5.

After the Constitutional Court certified the amended text of the Constitution, the Ministry of Provincial Affairs and Constitutional Development started a consultative process of developing a comprehensive policy that would give effect to the new constitutional vision of local government. A precursor to the White Paper was a Green Paper on Local Government that was published for public comment in October 1997. This was followed by the White Paper on Local Government in 1998. The White Paper set out a policy framework to radically transform the existing local government system. According to the White Paper, this new system would be guided by the notion of 'developmental local government'. The characteristics of a developmental local government were laid out in the White Paper, including the outcomes of a developmental local government, as well as the approaches that municipalities should follow in order to achieve these outcomes.

To give effect to developmental local government, the White Paper proposed far-reaching changes to the institutions of local government. It proposed strong unified metropolitan government. Metropolitan government was necessary to promote strategic land-use planning and to co-ordinate public investment in physical and social infrastructure. To overcome the legacy of apartheid, spatial integration and socially inclusive forms of development were required. In addition, strong metropolitan government was necessary to develop a city-wide framework for economic and social development.[202]

The White Paper also proposed a system of district municipalities for all non-metropolitan areas to address regional challenges and to assist in the development of local municipalities. The introduction of a system of districts had important consequences for areas governed by traditional leaders. This was because non-metropolitan areas included traditional areas. It can be argued that traditional leaders were not aware of this, given their subsequent reaction to the establishment of municipalities in the areas they governed. Sharing jurisdiction with local municipalities, the functions of district municipalities were the following:

- to build local municipalities where there was no capacity;
- to initiate economic development of the district;
- to plan land-use in the district; and

[202] Ministry for Provincial Affairs and Constitutional Development *White Paper on Local Government* (1998) 52.

- to provide services directly to the community where local municipalities lacked capacity and to areas where, due to low population density, no local municipality can be established.[203]

It is suggested that the White Paper on Local Government reinforced what was in the Constitution, in terms of which spheres of government were conferred with the authority to plan land use. The White Paper envisaged a system of local government that would be established throughout the country and be responsible for the management of land use, including in rural areas where traditional leaders governed. At the same time, the White Paper addressed the relationship between municipalities and traditional leaders in rural areas. It set out the functions of traditional leaders at the local level to include

- making recommendations on land allocation and the settling of land disputes;
- lobbying government and other agencies for the development of their areas;
- ensuring that the traditional community participates in decisions on development; and
- considering and making recommendations to authorities on trading licences in their areas in accordance with law.[204]

It is clear that the White Paper envisaged that local government would form collaborative relations with traditional leaders in the interest of developing rural communities where traditional leaders governed. An indication of this collaboration is that local government would plan the land use of its area, and traditional leaders would make recommendations on land allocations. While that is the case, it is argued that the roles above that the White Paper allocated to traditional leaders were of a supportive nature, and did not include decision-making authority.

While the White Paper envisaged traditional leaders as having a role to play in land allocation in the areas they governed, it noted that other issues affecting traditional leadership would be addressed in the White Paper on Traditional Affairs to be drafted by the Department of Constitutional Development, the Department of Justice and the Department of Land Affairs.[205]

[203] *White Paper on Local Government* (1998) 57.
[204] *White Paper on Local Government* (1998) 62.
[205] *White Paper on Local Government* (1998) 59.

The other issues affecting traditional leaders were addressed in a White Paper on traditional leadership, which was published in 2003. This White Paper was discussed in detail in the previous chapter.[206] It was argued in that chapter that, although Chapter Three of the White Paper on Traditional leadership attempted to define the roles that the institution of traditional leadership could play in democratic South Africa, it still fell short of defining the exact role traditional leaders would play, most notably, in land administration and land use management.

4.8.2 Local government legislation

The 1996 Constitution recognised and entrenched local government under Chapter 7, while the White Paper which followed the adoption of the Constitution gave content to the constitutional provisions of local government. The next step was to give effect to Chapter 7 by way of legislation that was guided by the vision articulated in the White Paper on Local Government.

The first piece of legislation that Parliament passed in this regard was the Local Government: Municipal Demarcation Act 27 of 1998 (MDA).[207] This Act established the Municipal Planning Board (MDB), whose responsibility was to demarcate wards and the outer boundaries of municipalities in terms of a process that was set out in the Act. A list of objectives the Board must strive to achieve when it determines a municipal boundary is provided for in section 24 of the Act.[208] These objectives include enabling the municipality to fulfil its constitutional obligations by providing democratic and accountable government for local communities, as well as the provision of services to communities in an equitable and sustainable manner.[209]

To ensure that these objectives are achieved, the MDB must take into account several factors when determining a boundary. These factors include the interdependence of people, communities and economies, employment, commuting and dominant transport movements, as well as provincial and municipal boundaries and areas of traditional rural communities.[210] The inclusion of areas of traditional community as a factor by the MDA signals the intention of providing services by municipalities in an equitable manner in these areas. Most traditional

[206] Para 3.5.
[207] Local Government: Municipal Demarcation Board Act 27 of 1998.
[208] Section 24 of the Municipal Demarcation Board Act 27 of 1998.
[209] Section 24 (a)-(d) Municipal Demarcation Board Act 27 of 1998.
[210] Section 25 of the Municipal Demarcation Board Act 27 of 1998.

boundaries straddle municipal boundaries, while some traditional boundaries are coterminous. The Constitution and the MDA recognise the municipality as the institution which enjoys authority over its municipal area. As explained earlier, the impact of this demarcation resulted in traditional areas falling under the jurisdiction of established municipalities.

The MDA was followed by the Local Government: Municipal Structures Act 117 of 1998. This Act provided, amongst other things, the criteria for the determination of three categories of municipalities, namely metropolitan, district and local municipalities. According to the Act, in areas where a metropolitan municipality cannot be established, such an area must have municipalities of category B and C. This means a category B and C municipality is a district and a local municipality. These municipalities share jurisdiction and authority over powers and functions.

It can be argued that the division of powers and functions affected traditional leaders negatively, and the Act was silent about the role traditional leaders played in the land use allocation process in rural areas. A range of permissible types of municipal executives was also provided for, and the composition, membership and function of municipal councils and their executives were set out in detail, including the regulation of the representation of traditional leaders on councils, as discussed below.

4.8.3 Participation of traditional leaders in municipal councils

This section analyses section 81(1) of the Municipal Structures Act of 1998, which deals with the representation of traditional leaders in municipal councils. The next chapter will explain how SPLUMA outlines planning matters, in which traditional leaders may participate in the municipal council. According to section 81(1) of the Act, traditional authorities that observe a system of customary law in the area of a municipality may participate through their leaders, identified in terms of subsection (2), in the proceedings of the council of that municipality, and those traditional leaders must be allowed to attend and participate in any meeting of the municipal council. The number of traditional leaders that may participate in the proceedings of a municipal council may not exceed 20 per cent of the total number of councillors in that

council, but, if the council has fewer than 10 councillors, only one traditional leader may so participate.[211]

As discussed in the previous chapter, while the Act briefly catered for the representation of traditional leaders which was capped at 10 per cent of the total number of councillors in that council, it did not, however, grant traditional leaders voting rights.[212] This angered traditional leaders as they were included in participating in council activities but could not vote in the council. With the local government elections of 2000 imminent, traditional leaders threatened to boycott them. The government responded to these threats by amending the Municipal Structures Act. The amendment increased the representation of traditional leaders to up to 20 per cent of the total number of councillors in a municipal council. While the increase in representation could arguably be interpreted as a sign of good faith from the national government, it still lacked substance in the eyes of traditional leaders as this was not accompanied by voting rights.[213]

Furthermore, section 81(3) of the Act provides that, before a municipal council takes a decision on any matter directly affecting the area of a traditional authority, the council must give the leader of that authority the opportunity to express a view on that matter. Although there are a number of municipal organs that can take decisions which may affect the area of a traditional authority, it is important to note that section 81(3) limits the opportunity of a traditional leader to express a view on matters that are before the municipal council and require the decision of the municipal council. As will be explained in detail in the next chapter, the right to express a view by a traditional leader on any matter directly affecting the area of a traditional authority does not extend to other municipal organs charged with taking certain decisions, such as the Municipal Planning Tribunal or Designated Official, which are established under SPLUMA.

4.9 The local government elections of 5 December 2000

Preparations for the local government elections began in 1999. The MDB demarcated the entire land mass of the country into six metropolitan municipalities, 47 district municipalities and 231 local municipalities. Given that the 1996 Constitution introduced system of 'wall-to-

[211] See Chapter Three, para 3.4.
[212] See Chapter Three, para 3.4.
[213] See Chapter Three, para 3.4.

wall' local government, that system ensured that municipalities would all have elected councillors. Additionally, in line with the objects of local government, the system mandated municipalities to exercise their municipal planning power to develop their municipal areas. Local government now had, at the constitutional level, the authority to plan the land use of municipal areas under its jurisdiction, including areas where traditional leaders governed. But because the old order planning legislation remained in force, much of that planning authority was not exercised in traditional areas. That authority is, at the time of writing, being exercised at an increased level by municipalities in various traditional areas.

However, as explained in detail in the next chapter, there are still areas, particularly those that are under the control of the Ingonyama Trust Board, where the planning authority of municipalities is yet to be exercised.[214] This means that the demarcation process, as explained above and in previous sections, had an adverse impact on the role of traditional leaders in land use management in the sense that municipalities were empowered to plan the land use of their areas, including in areas where traditional leaders exercised land use management authority.

Nevertheless, on 5 December 2000, history was made when the first fully-democratic local government elections under the new democratic dispensation were held in the country. These elections marked the final phase of the local government transition process.

4.9.1 Uncertainty over who does what delays planning legislation

The Constitution distributes planning authority across national, provincial and local government. Should conflicts arise in the exercise of planning authority by a sphere of government, they are ultimately resolved by the courts. Given that these powers directly or indirectly affect land use, this gave rise to confusion about the scope and nature of each power between the three spheres of government. With discussion and debate not producing any solution, the uncertainty over which sphere of government should exercise planning powers prevailed and ultimately delayed the process of effecting legislative transformation in the area of planning law. These arguments and debates concerning 'who does what', as was alluded to

[214] Chapter Five, para 5.7.1.3.

earlier in this chapter, took place despite the 1996 Constitution's setting out the allocation of planning related competencies across the three spheres of government.[215]

With confusion, contestation and uncertainty prevailing over the exercise of planning powers between the spheres of government in democratic South Africa, the provincial ordinances which were passed under the apartheid regime, as discussed in the previous chapter, continued regulating sectoral matters such as land use planning, given that they were still in force until they were repealed or declared unconstitutional.[216] It was not only the provincial ordinances that continued to apply. There were also the Development Facilitation Act 67 of 1995 (DFA), and the various apartheid planning laws, regulations and proclamations.[217] While this thick web of planning legislation, regulations, betterment regulations and proclamations existed, it was most notably the DFA which facilitated the unconstitutional exercise of municipal planning powers by the provincial planning tribunals established under the DFA.

The following section briefly scrutinises the reasons behind the adoption of the DFA, and how it gave rise to a contestation between local government and provincial government. It will be argued that the resolution of the contestation between local and provincial government also had important consequences for the role of traditional leadership in land use management.

4.9.2 The DFA and contestation

The DFA (later repealed by the Spatial Planning and Land Use Management Act 16 of 2013) came into operation on 22 December 1995. It provided for the establishment of Development Tribunals in provinces to consider and determine land development applications.[218] The passing of the DFA was based on the concern that those who had benefited under the apartheid regime would try to block new transformative projects which the new democratic government intended to implement.

One of these projects was the Reconstruction Development Programme (RDP). The main feature of this programme was the introduction of low-income subsidy housing after 1994.[219] Therefore, to ensure that the government's RDP was not undermined by those who still clung

[215] Para 4.4.
[216] Provincial Ordinances are laws passed by a provincial legislature during the apartheid era. They regulate provincial matters.
[217] Development Facilitation Act 67 of 1995.
[218] Chapter 3 of the Development Facilitation Act 65 of 1995
[219] De Visser J & Poswa X (2019) 6.

to the vision of the apartheid government, which had for a long time deliberately neglected the development of areas in which black people lived, the government passed the DFA which provided for extraordinary measures to speed up and facilitate the implementation of RDP.[220] The intention behind the law was that the power to approve land development projects should be taken away from the hands of the local government councils that were not yet fully democratic and rather allocated to appointed tribunals. The DFA was among the first laws that were passed by the newly elected Parliament, and was described by many people as 'the most significant piece of land development legislation to have been enacted in recent times'.[221]

However, the DFA started to attract significant criticism from municipalities in the early 2000s. By that time many municipalities had realised their municipal planning powers in the Constitution, and therefore argued that the consideration and determination of land use and land development applications fell within the ambit of municipal planning.[222] Municipal planning, according to municipalities, encompassed both spatial planning and land use management. However, the question of which sphere of government had the power to pass legislation governing the use and development of land remained unresolved. National government argued that it should exercise this power on the basis that 'land' is not set out as a functional area of legislative competence in the schedules of the Constitution and therefore automatically becomes an area of legislative competence reserved for it.[223] The provinces countered this argument by contending that provinces should be allowed to exercise this power on the basis that the Constitution specifically allocated 'provincial planning' as the exclusive legislative competence for provinces.[224]

This debate was not new, as previous national and provincial governments as far back as the colonial era have had serious disagreements over which tier of government should exercise planning powers.[225] In the midst of this debate, the institution of traditional leadership was rather silent on this issue. It can be argued that one of the reasons traditional leaders were silent was because, at the time, discussions were taking place behind the scenes on how to address the question of the powers and functions of traditional leaders. Therefore, they did

[220] De Visser J & Poswa X (2019) 7.
[221] Van Wyk J 'Parallel planning mechanisms as a recipe for disaster' (2010) *PELJ* 214-234.
[222] Van Wyk J (2010) 235.
[223] Section 44(1)(ii) of the 1996 Constitution.
[224] Berrisford S (2011) 254.
[225] Chapter Four, para 4.4.

not pay attention to the nature of this dispute, or even consider that it would affect them negatively. Although the Constitution allocated planning powers to the three spheres of government, uncertainty over the content of these powers gave rise to conflict. Anticipating that disagreements would occur from time to time, the Constitution itself provides that, should conflicts arise, they will ultimately be resolved by the courts. This is what eventually happened. The following section highlights how the courts finally stepped in to resolve the impasse between these spheres of government.

4.9.3 The Constitutional Court interprets the meaning of municipal planning

In June 2010, the Constitutional Court not only resolved the long-standing impasse between municipalities and provincial government, but it also provided direction on how the process of reforming planning laws should proceed. As mentioned earlier, some municipalities took issue with the DFA's empowering provincial tribunals to take land use planning decisions, overriding city planning.[226] In *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*, the principal issue which the Court had to decide was whether the Gauteng Development Tribunal established in terms of the DFA was constitutionally empowered to take land use planning decisions.[227] The City of Johannesburg argued that the meaning and content of the municipal planning power allocated to local government by the Constitution under Schedule 4 Part B included decision-making authority on both spatial planning and land use management.[228] This meant that the Gauteng Tribunal exercised a power which the Constitution had reserved for local government.

The Gauteng Tribunal countered this argument by contending that the term 'municipal planning' only envisages the creation of spatial plans, and does not include the authority to take land use planning and land development decisions.[229] The Constitutional Court disagreed with the Tribunal's argument, and held that the Tribunal was not empowered to take land use planning and land development decisions.[230] The Court further held that only municipalities

[226] De Visser J & Poswa X (2019) 8.
[227] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 9 BCLR859 (CC) para 95.
[228] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 9 BCLR859 (CC) para 61.
[229] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 9 BCLR859 (CC) para 52.
[230] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 9 BCLR859 (CC) para 58.

have the authority to take planning decisions such as zoning, rezoning and subdivision of land, including township establishment. The Court ordered the national government to correct the defects or enact new legislation within 24 months. As stated earlier, the *Gauteng Development Tribunal* judgment not only clarified the meaning of 'municipal planning', but also provided direction on how the development of planning legislation should proceed. In the years to come, government eventually passed SPLUMA, which placed municipalities at the centre of the new planning framework.

4.9.4 Effect of municipal planning on traditional leaders and land allocation

The Constitutional Court did not consider the far-reaching implications its judgment would have on the power of traditional leaders to allocate land in rural areas, as these issues were not raised before it. As stated earlier, the resolution of the impasse between local and provincial government brought to the fore the contentious issue regarding which institution – traditional leaders or municipalities – is empowered to take land use management decisions in rural areas governed by traditional leaders.

In terms of this judgment, municipalities, as per the Constitution, are the appropriate sphere of government to exercise land use management powers throughout the Republic. As explained in earlier chapters and further in the next chapter, although traditional leaders exercise land allocation authority in terms of customary law, it must be noted that customary law is subject to the Constitution. This means that the exercise of land allocation powers by traditional leaders in terms of customary law is also subject to the framework governing the exercise of land use management authority in South Africa. This does not mean traditional leaders are precluded from exercising land allocation authority. What the above does mean is that traditional leaders may exercise their land allocation authority within the framework governing land use management in South Africa.

4.10 Conclusion

The main purpose of this chapter was to provide a summarised historical background to the development of the planning power of municipalities in South Africa. The nature and origins of this planning power, including the people who were intended to benefit from its exercise, were discussed. It can be seen in this chapter that this power is based on a system of zoning that was brought to South Africa to regulate and benefit areas of European settlers. It was a

power that was exercised by municipalities under the strict control of provinces as they were then. This system of planning was never intended to apply to, nor regulate, areas where black people resided. After the apartheid government assumed power, it used municipalities to implement its racial segregation objectives by deciding where black people lived and worked, and under what conditions. In the rural areas, the apartheid regime introduced betterment planning which was announced as a programme designed to improve the environmental conditions of the rural areas where rural citizens lived. However, the programme turned out to be a vehicle to strip the remaining wealth of rural citizens and gain control of their valuable natural resources, and by extension, gain control over the people that relied on these resources for their daily needs.

In this chapter, it was explained how it was only after the demise of apartheid that debates about the role of traditional leaders in the post-apartheid era began to re-emerge. These debates dealt with findings ways in which the significant role this planning function could play in reversing the legacy of apartheid. With the post-apartheid Constitution of 1996 having entrusted municipalities with town planning powers, the daunting task of redesigning the spatial make-up of South Africa was set to get under way. However, disagreement over the meaning and scope of municipal planning between the spheres of government only served to delay the process of effecting meaningful transformation in South Africa's urban and rural areas which had been designed along racial lines by the apartheid government.

The chapter went on to illustrate how the impasse over which sphere should exercise this power was finally resolved by the Constitutional Court in 2010. It was shown that not only did the Constitutional Court clarify the meaning of municipal planning, but it also provided guidance on the reform of planning laws in South Africa. The reform of planning in South Africa was eventually ushered in in 2013, when the Spatial Planning and Land Use Management Act (SPLUMA) was passed by Parliament.

Furthermore, the chapter explained how it was not anticipated that the meaning of municipal planning would affect the power of traditional leaders to manage land use in rural areas. The power to allocate land has been exercised by traditional leaders since time immemorial. Although this power was stripped from most traditional leaders in many rural areas during the colonial and apartheid period through the imposition of indirect rule, traditional leaders continued to exercise this power in one way or the other.

With SPLUMA placing municipalities at the forefront of land use management throughout the country, traditional leaders argue that they have been intentionally marginalised from their roles of managing land use. A central question in this regard is whether the municipality or traditional leadership enjoy an exclusive, sole right to manage land use in rural areas. In order to answer this question and others, it is imperative in the next chapter that the study conduct an overview of SPLUMA, unpack its objectives and specifically assess some of the relevant provisions in SPLUMA with a view to analysing whether it seeks to address the intersection of the role of municipalities and traditional leaders in land use management in rural areas and If so, in what way.

Chapter Five: Spatial Planning and Land Use Management in South Africa

5.1 Introduction

The study examines the intersection of the role of traditional leaders in land allocation, and the role of municipalities in spatial planning and land use management. This chapter analyses the spatial planning and land use management system in South Africa. It centres this analysis on the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA). SPLUMA is the first post-apartheid planning legislation that applies uniformly throughout the Republic, including areas governed by traditional leaders. This law places municipalities at the centre of land use management, therefore giving the impression that municipalities are the exclusive or primary institutions that exercise land use management authority throughout the Republic, including areas that are governed by traditional leaders. This has led traditional leaders to believe that their power to allocate land is being taken away.

In this chapter, the thesis will first set out the objective of SPLUMA, followed by a detailed overview of the legislation in parts two and three. In part four, an analyses of the SPLUMA regulations is undertaken. The SPLUMA regulations are important to the institution of traditional leadership as it suggests ways in which traditional leaders can exercise their land allocation power in the areas they govern. In part five, the study argues that land allocation by traditional leaders is a form of land use management. This is because SPLUMA, which is a state law, places municipalities at the forefront of managing land use, while customary law places traditional leaders at the forefront of managing land use in rural areas.

5.2 Objectives of the planning system

Under customary law, traditional leaders controlled the right to occupy and use land in many rural areas before and after the colonial-apartheid period.[1] Traditional leaders administered land use management systems based on customary law for areas under traditional leadership, while municipal authorities administered land use management systems based on land use zoning for previously white urban areas. In many parts of the country there was no land use

[1] Lutabingwa J, Sabela T & Mbatha J 'Traditional leadership and local governments in South Africa: Shared governance is possible' (2006) 25 *UP* 74.

management legislation applicable. This included commercial agricultural areas, and townships located at the outskirts of towns and cities, as discussed in Chapter Four.[2]

Parliament enacted SPLUMA in the wake of the *City of Johannesburg v Gauteng Development Tribunal* Constitutional Court judgment that was handed down in 2010 as was dicussed in Chapter Four.[3] SPLUMA was enacted to address the fragmented nature of land use management, and to ensure that everyone in South Africa has access to a system of spatial planning and land use management that promotes social and economic development. The Act came into operation in 2015, ensuring that, for the first time, South Africa has a single national piece of legislation for spatial planning and land use management. SPLUMA creates an overarching framework for spatial planning, policy and land use management for the entire country, including rural and informal settlements.[4]

SPLUMA is partly original, meaning it has introduced new planning concepts and institutions that did not exist before it was enacted. Some provisions can be applied directly by municipalities, planners, developers, land use rights holders, and land use rights applicants. The provisions do not require further legislation. SPLUMA is also partly a framework, a set of rules and standards that apply alongside or parallel to other legislation. The expectation is that the three spheres of government and the planning sector should use the SPLUMA framework to redress the imbalances of the past, and to ensure that there is equity in the application of spatial planning, development and land use management systems. The national government in consultation with provincial and municipal governments must also prescribe principles and criteria which will guide and inform planning activities.[5]

5.3 Overview of the Spatial Planning and Land Use Management Act

5.3.1 Introduction

The Act consists of six chapters which encapsulate the spatial planning and land use management system of South Africa, coupled with a set of regulations that was published in

[2] Kihato M & Berrisford S 'Regulatory systems and making urban land markets work for the poor in South Africa'. Paper prepared for the Urban Land Seminar, November 2006, Muldersdrift, South Africa. Available at: http://www.urbanlandmark.org.za (accessed 26 August 2021).
[3] Para 4.9.3.
[4] Nel V 'SPLUMA, Zoning and Effective Land Use Management in South Africa' (2016) 27 *UF* 79.
[5] Joscelyne M *Nature, Scope and Purpose of Spatial Planning in South Africa* (Unpublished LLM thesis: University of Cape Town 2015) 8.

terms of section 54 of SPLUMA (SPLUMA regulations) in 2015. The SPLUMA regulations were the last step in finalising the legislative framework for SPLUMA.

SPLUMA makes a distinction between spatial planning and land use management. According to SPLUMA, spatial planning is the articulation of the spatial vision of the area of jurisdiction of a municipality by way of spatial plans which do not confer rights to individuals or institutions.[6] Land use management refers to the system of regulating and managing the use of land within a municipal area by way of land use schemes which confer land use rights to individuals and institutions.[7]

Apart from providing key definitions of planning concepts in general, as well as defining new concepts introduced by SPLUMA, Chapter One spells out the objectives of the Act. It also sets out the components of the spatial planning system of South Africa, including the categories of planning, which are municipal planning, provincial planning and national planning. The sequence in which these categories of planning, municipal, provincial and national planning are set out signals a shift from the top-down approach to planning that was followed prior to the enactment of SPLUMA. Before the SPLUMA dispensation, planning decisions were taken by both national and provincial governments, and implemented by municipalities. Under SPLUMA, a bottom-up approach to spatial planning, land use management and land development with municipalities at the forefront of decision-making is envisaged. In other words, while SPLUMA provides for decision-making by a number of different decision-makers in different spheres of government, the majority of decisions made in terms of SPLUMA will take place at the municipal level.

5.3.2 Development principles

An important feature of SPLUMA is that it also contains development principles that must guide all decisions taken by organs of state. The development principles prescribed by SPLUMA are as follows:

- the principle of spatial justice;
- the principle of spatial sustainability;
- the principle of efficiency;

[6] Section 1 of SPLUMA.
[7] Section 1 of SPLUMA.

- the principle of spatial resiliency; and
- the principle of good administration.

SPLUMA spells out what each of these principles mean. First, the principle of spatial justice seeks to address the inclusion of persons and areas such as the former homelands and informal settlements through spatial development frameworks of the different spheres of government.[8] Secondly, the principle of spatial sustainability ensures that prime and unique agricultural land is protected and that urban and rural communities are viable.[9]

Thirdly, the efficiency principle is about ensuring that development applications and land allocation procedures are efficient and streamlined and that their timelines are adhered to by all parties.[10] Fourthly, the principle of spatial resiliency includes spatial plans and land use management systems that will accommodate greater flexibility in order to ensure the sustainability of livelihoods which are most vulnerable during economic and environmental crises.[11]

Lastly, the principle of good administration envisages an integrated approach to land development application processes that will be transparent and provide an opportunity to affected parties such as municipalities, traditional leaders and communities to make an input.[12]

Specifically, section 6(1) of SPLUMA provides that the development principles apply to all organs of state and other authorities responsible for the implementation of legislation regulating the use and development of land. It is argued that traditional leaders, councils are organs of state that are responsible for the implementation of SPLUMA through legislation which regulates land use and land development. Furthermore, these principles also address issues that affect rural areas which are governed by traditional leaders. Finally, according to section 7, these principles apply to spatial planning, land development and land use management.

[8] Section 7(a)(i) & (ii) of SPLUMA.
[9] Section 7(b)(ii) of SPLUMA.
[10] Section 7(c)(iii) of SPLUMA.
[11] Section 7(d) of SPLUMA.
[12] Section 7(iv) of SPLUMA.

As will be explained in detail in the subsequent sections of this chapter, traditional leaders exercise some form of land use management authority, and therefore fall within the ambit of section 7 of SPLUMA. This means therefore that traditional leaders are bound by the principles of SPLUMA and are obliged to take them into account when taking land use management decisions in their areas of jurisdiction.

SPUMA demands that municipalities must apply the principles contained in section 7 of SPLUMA when making a decision relating to the following:

- the preparation, adoption and implementation of any spatial development framework, policy or by-law concerning spatial planning and the development or use of land;
- the compilation, implementation and administration of any land use scheme or other regulatory mechanism for the management of the use of land;
- the consideration by a municipality of any application that impacts or may impact upon the use and development of land; and
- the performance of any function in terms of this Act or any other law regulating spatial planning and the land use management.

In addition, section 42 of SPLUMA deals specifically with decision-making on development applications, and requires municipal planning tribunals to be guided by the development principles set out in Chapter 2 of SPLUMA. These principles reflect an overarching set of concerns. These principles do not each have to be rigidly applied in every land use management and land development decision. What is required from a decision-maker such as a municipality or a traditional leader is to consider and weigh them up as and when they make decisions.

5.3.3 Integrated development plan and municipal spatial development framework

In Chapter Four of the Act, the mandate of each sphere of government to prepare, compile and adopt spatial development frameworks is set out in substantial detail.[13] Specifically, the Local Government: Municipal Systems Act (Systems Act) also regulates the development of municipal spatial development frameworks as part of the Integrated Development Plan of a

[13] Section 20(1) of SPLUMA.

municipality.[14] The term 'Integrated Development Planning' (IDP) first emerged in the White Paper for Local government which was discussed in the previous chapter.[15] This was presented as one of the most important tools for municipalities to fulfil their developmental mandate.[16] According to the Constitution, in order to achieve this developmental mandate, a municipality must structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote its social and economic development.[17] Chapter 5 of the Systems Act outlines the legal framework for IDP, which is essentially a participatory process of planning through which the municipality assesses needs, prioritises them, and then formulates objectives and strategies to address them.[18]

The basic tenet of IDP is that it is a strategic planning model for local government. Each municipal council must adopt and annually review an IDP. The Systems Act lists the features of the plan which ensure that the IDP-

- links, integrates and co-ordinates plans and takes into account proposals for the development of the municipality;
- aligns the municipality's resources and capacity with the implementation of the plan;
- forms the policy framework and general basis on which the budget must be based; and
- is compatible with national and provincial development plans and planning requirements that are binding on the municipality in terms of legislation.[19]

The development of the spatial development framework as part of the IDP must include basic guidelines for a land-use management system for the municipality. The IDP is the municipality's principal strategic planning instrument that guides and informs all planning, development and all decisions pertaining to planning, management, and development in the municipality.[20] As such, each municipality is expected to consolidate, through the IDP, all

[14] Local Government: Municipal Systems Act 32 of 2000, section 26(c).
[15] Chapter Four, para 4.8.1.
[16] *White Paper on Local Government* (1998) 19.
[17] Section 153(a) of the Constitution of the Republic of South Africa 1996.
[18] Chapter 5 of the Municipal Systems Act.
[19] Section 25 of the Municipal System Act.
[20] Section 35(1)(a) of the Municipal Systems Act.

municipal planning into a comprehensive strategy that is linked to the budget.[21] What must be emphasized is the fact that the SPLUMA MSDF is now part of the systems Act IDP.

5.3.4 Municipal, provincial and national spatial development frameworks

It is not only municipalities that are under an obligation to develop a spatial development framework. Provinces are also instructed by SPLUMA to adopt a provincial spatial development framework (PSDF).[22] Similarly, the national government must, after consultation with other organs of state and the public, compile and publish an NSDF. These provisions now entrench the PSDFs and NSDFs as statutory plans. Before SPLUMA, PSDFs and NSDFs were adopted without any specific basis in law. However, the SPLUMA planning dispensation changed this by creating a specific basis in law for the adoption of these plans. SPLUMA sets out (1) how they must be prepared and published, and (2) what they must contain as a minimum.[23] This new status does not drastically alter the legal status of the PSDF or NSDF. They remain policy documents that bind the institutions that adopted them but that do not bind others.[24]

Compared to the provisions on the NSDF and PSDFs, SPLUMA is more ambitious about the legal status of MSDFs.[25] It specifically prohibits municipalities from taking decisions that are inconsistent with the MSDF, unless "site-specific circumstances exist". Section 22(2) of SPLUMA deals with departures from an MSDF, and states that, subject to section 42, a municipal planning tribunal or authorised official may depart from the provisions of a municipal spatial development framework only if site-specific circumstances justify this.[26] SPLUMA does not define site-specific circumstances. For purposes of this thesis, it is suggested that 'site-specific circumstances' means any circumstance that is applicable to a specific land parcel and set out in the development application that has been submitted together with any other relevant considerations. The existence of this 'circumstance' does not change the

[21] Section 25 of the Municipal Systems Act.
[22] Section 12(1) of SPLUMA.
[23] Section 14(1) of SPLUMA.
[24] Section 17(3) of SPLUMA.
[25] The Act also regulates Municipal Spatial Development Frameworks (MSDFs). MSDFs already had a basis in law because section 26(e) of the Local Government: Municipal Systems Act 32 of 2000 instructs municipalities to adopt an MSDF as part of the integrated development plan. SPLUMA thus explicitly refers to and then elaborates on the provisions of the Municipal Systems Act (and its regulations).
[26] Section 22(1) of SPLUMA.

desired purpose and intent of an MSDF, and can therefore be seen as compliant with it.[27] The assessment of whether a proposed utilisation or development of land warrants a deviation from the MSDF may, amongst other things, come by way of a land use or land development application. This essentially involves the granting of land use and development rights in terms of a land use scheme which is unpacked in the next section. A relevant and important question in the context of this thesis is whether a decision to allocate land taken by a traditional leader that goes against the MSDF can qualify as "site specific circumstances"? Can it be reason for deviation from the MSDF as will be discussed further in the next section? It is argued that the answer is yes, it can be a reason for deviation provided the existence of this "circumstance" does not change the desired purpose and intent of an MSDF. This means, if an area is zoned by the municipality for business use and the traditional leader allocates land to a developer to build a block of flats within that area without the involvement of the municipality, it can be argued that the decision to allow a block of flats to be build in that area can qualify as a "site specific circumstance" because the "circumstance" does not change the desired purpose and intent of the MSDF which is to provide for housing in that area.

5.3.5 Land use scheme

Chapter Five of SPLUMA deals with land use management, which in SPLUMA is distinguished from land development management. Land use management refers primarily to the preparation and adoption by municipalities of a planning instrument that is called a *land use scheme.* A land use scheme or a zoning scheme is a planning instrument that regulates or governs the use and development of land within a municipal area. An adopted land use scheme must include appropriate categories of land use zoning and regulations for the entire municipal area, including areas not previously subject to a land use scheme.[28] The land use scheme must also include provisions that permit the incremental introduction of land use management and regulation in areas under traditional leadership, rural areas and informal settlements.[29] A land use scheme may include provisions relating to the use and development of land only with the written consent of the municipality.[30] An adopted and approved land use scheme carries the force of law, and all landowners, users of land, and organs of state within

[27] Section 19(1) of the Western Cape, Land Use Planning Act 3 of 2014.
[28] Section 24(2)(a) of SPLUMA.
[29] Section 24(2)(c) of SPLUMA.
[30] Section 24(3)(a) of SPLUMA.

the municipal area are bound by the provisions of such a land use scheme.[31] Lastly, land may only be used for the purposes permitted by the land use scheme.[32]

In terms of SPLUMA, a land use scheme is the main instrument that controls the use and development of land within a municipal area. It is an instrument used to (1) determine use rights, (2) confer use rights, and (3) to provide for control over use rights and over the utilisation of the land in the area of jurisdiction of a local authority. In what is perhaps one of its most crucial provisions for this thesis, SPLUMA, in section 24(1), introduces the concept of 'wall-to-wall' land use schemes that apply throughout the country including in areas governed by traditional leaders, as explained in Chapter One.[33]

The creation of these wall-to-wall land use schemes means that they also apply in rural areas governed by traditional leaders. In this regard, it is submitted that the drafters of SPLUMA were aware of the existence of an indigenous or customary law system of land use management when they mandated municipalities to include in their land use schemes provisions that permitted the "incremental" introduction of the system of land use management and regulation in areas under traditional leadership.[34] The intention was for the SPLUMA system of land use management not to be seen as being imposed therefore giving the impression that it seeks to replace the indigenous system of land use management. The idea rather was to gradually implement those areas of it that could be integrated into the existing land use management system.

Unlike spatial development frameworks, a land use scheme is the instrument through which land use rights are granted to existing property owners by mere application of the scheme in a municipal area. In other words, a zoning scheme is used to determine use rights and to provide for control over use rights and over the utilisation of the land in the area of jurisdiction of a municipality. However, in most rural areas, traditional leaders allocate land to residents in terms of customary law and custom, as explained in Chapter Two.[35] It is quite possible therefore that a land allocation made by a traditional leader could be inconsistent with the

[31] Section 26(1)(a) of SPLUMA.
[32] Section 26(2)(a) of SPLUMA.
[33] Chapter One, para 1.2.
[34] Section 24 (2) (C) of SPLUMA.
[35] Chapter Three, para 2.4.

municipality's land use scheme for which no deviation is permitted. However, with a MSDF, SPLUMA permits a deviation from the MSDF if there is a "site specific circumstance".

5.3.6 Land development management: Decision-making authority

Chapter Six of the Act governs land development management, which is essentially about the processing and deciding of land development applications. A developer must submit a land development application and for that application to be approved before land use rights can be granted in terms of a land use scheme. It is pointed out though that the development application is only necessary if the land use rights granted in the zoning scheme do not permit the envisaged land use. This means if the land use scheme allows for the development, no development application is necessary.

With respect to land development management, regardless of whether the municipal planning tribunal or a delegated official takes the final decision on a land development application (see below), the municipality has to 'receive' all land development applications. It is the 'authority of first instance' in terms of section 33(1) of SPLUMA, which means that it is the authority to which all land development applications must be submitted first. It will be argued later that traditional leaders are also 'the authority of first instance' in terms of customary law, which means they are the authority to which all formal requests for land allocations must be submitted first. If the request for a land allocation is granted by the traditional leader and a permission to occupy is issued, the municipality may thereafter receive the land development or land use application from the applicant.

5.3.6.1 Municipal planning tribunal

SPLUMA and its regulations regulate the establishment of municipal planning tribunals. SPLUMA instructs each municipality to establish a municipal planning tribunal. However, two or more municipalities may agree to jointly establish one municipal planning tribunal.[36] Where they choose to do this, the process is prescribed in the SPLUMA regulations.[37] Moreover, if all local municipalities and the district municipality agree, one municipal planning tribunal may be established for the entire district area.[38] Again, the SPLUMA regulations prescribe the

[36] Section 34(1) of SPLUMA.
[37] Spatial Planning and Land Use Management Regulations in GN 239 GG 38594 of 23 March 2015, Part C of SPLUMA regulations.
[38] Section 34(2) of SPLUMA.

process to be followed in this regard. The process to be followed is contained in Chapter Two of SPLUMA. Chapter Two of the Act provides that the establishment of a certain type of a municipal planning tribunal may be preceded by an assessment of the factors which includes, the impact of the Act on the municipality's financial, administrative and professional capacity. The ability of the municipality to effectively implement the provisions of Chapter Six of the Act is also considered, as well as the average number of applications dealt with by the municipality annually in terms of existing planning legislation, and the development pressures in the municipal area.

in terms of section 35(2) of the Act, a municipality 'may authorise that certain land use and land development applications may be considered and determined by an official in the employ of the municipality'.[39] Section 35 permits the municipality to authorise an official to consider certain land use and development applications. However, the municipality must first consider the following aspects in its categorisation of land development and land use applications:

- type of land development or land use application;
- scale and nature of the land development or land use application;
- the potential impact of the right granted if the land development or land use application is approved;
- the level of public participation required;
- and whether or not the land development or land use application is in line with the municipality's spatial development framework and other relevant policies.

The authorised official should not be the authorisation of a named official but rather the holder of a particular post in the municipality, that is, the head of the planning unit, or the municipal manager, depending on the structure of the municipality. The SPLUMA regulations differentiate between category 1 applications and category 2 applications. Category 1 applications includes those applications that must be referred to the municipal planning tribunal such as the establishment of a township or the extension of the boundaries of a township, the amendment of an existing scheme or land use scheme by the rezoning of land,

[39] Section 35(1) of SPLUMA.

as well as the removal, amendment or suspension of a restrictive or obsolete condition to name a few.

Category 2 applications includes those applications that must be considered and determined by the authorised official. These applications range from the subdivision of any land where such subdivision is expressly provided for in a land use scheme, the consolidation of any land, including the simultaneous subdivision, under circumstances contemplated in paragraph (a) and consolidation of land and the consent of the municipality for any land use purpose or departure or deviation in terms of a land use scheme or existing scheme which does not constitute a land development application to name a few.

More important for this thesis is the composition of the municipal planning tribunal. In terms of section 36 (1) (a) and (b) of SPLUMA, a municipal planning tribunal must consist of officials in the full-time service of the municipality and persons appointed by the municipal council who are not municipal officials. These people must have the knowledge and experience of spatial planning, land use management and land development management. Additionally, the SPLUMA regulations state that a member of the municipal planning tribunal appointed in terms of section 36(1)(b) of the Act may be an official or employee of any department of state or administration in the national or provincial sphere of government, a government business enterprise, a public entity, organised local government as envisaged in the Constitution, an organisation created by government to provide municipal support, a non-governmental organisation, and any other organ of state not provided for above, including an individual in his or her own capacity.

Municipal councillors are barred from being members of the municipal planning tribunals.[40] It is submitted that the prohibition of councillors from being members of the municipal planning tribunals is to avoid political interference in its decision-making process. While SPLUMA explicitly excludes councillors from becoming members of municipal planning tribunals, it is argued that it does not however explicitly excludes traditional leaders from participating or playing a role in the municipal planning tribunal.

[40] Section 35(1) of SPLUMA.

5.3.6.2 Appeals against land use management decisions

SPLUMA also anticipates that people whose land use or land development applications are considered and determined by the municipal planning tribunal may feel aggrieved with the decision taken by the tribunal. In this regard, SPLUMA provides for an appeal system in section 51. This appeal mechanism lies with the executive authority of the municipality which should ordinarily be the executive mayor, executive committee or municipal council, depending on the structure of the municipality. Appeals are further regulated in the SPLUMA regulations.[41] However, municipalities have the right to determine the detail of the appeal mechanism in their municipal planning by-law.

5.4 SPLUMA regulations: The role of traditional leadership in land use management

The SPLUMA regulations were published in 2015, two years after SPLUMA was passed, completing the legislative framework for SPLUMA. These regulations consist of seven chapters which deal with the detail of certain key matters pertaining to the functioning of the framework of SPLUMA. Chapter One of the regulations contains the definitions of certain words. Chapter Two of the regulations deals, amongst other things, with the factors that must considered prior to the establishment of a municipal planning tribunal, the institutional requirements for establishing a municipal planning tribunal in a municipal area, and the agreements to establish joint municipal planning tribunals, and the establishment of a district municipal planning tribunal. Chapter Three provides details on the procedure to be followed when submitting land development and land use applications to the municipality. Chapter Four deals with appeal procedures, while Chapter Five addresses the issue of intervener status. Lastly, chapters six and seven cover requests for exemptions from the provisions of the Act and general matters, respectively.

Most importantly for this thesis, regulation 19 which will be discussed at length in the context legal pluralism and legal integration in subsequent sections of this chapter, deals with areas under traditional leadership. Sub-regulation 19(1) provides that, a municipality and a traditional council may enter into a service level agreement in terms of which the traditional council may perform such functions as agreed to in the service level agreement. However, the

[41] Regulation 20 of the SPLUMA regulations.

traditional council may not make a land development or land use decision. Sub-regulation 19(2) provides an alternative to sub-regulation 19(1). It provides that, if a traditional council does not conclude a service level agreement with the municipality, that traditional council is responsible for providing proof of the allocation of land in terms of the customary law applicable in that traditional area to the applicant for a land development and land use application. This, according to sub-regulation 19(2), should be done in order for the applicant to submit that application in accordance with the provisions of the SPLUMA regulations. It is submitted that Regulation 19 recognises the authority of traditional leaders to allocate land in terms of customary law. This study argues that land allocation is a form of land use management. This argument is presented in full in the next section.

5.5 Land allocation as a form of land use management

In this section, the study puts forward the argument that the power to allocate land should be construed as a form of land use management. It is important to make this argument because it illustrates the premise on which the contestation between traditional leaders and municipalities is based. There are two institutions clashing over the exercise of the same authority within the same area. Can the allocation of land by traditional leaders in terms of customary law be regarded as a form of land use management? What do traditional leaders allocate land for, and what type of rights do these land allocations include?

The customary law system of land allocation involves rights of access and use on the basis of accepted group membership, and a degree of group control or supervision over how these rights are exercised. This means that the customary system of land allocation should be seen or described as a form of a land use management system that is observed and followed in rural areas of South Africa.

SPLUMA empowers municipalities to administer land use management throughout the Republic. The management of land use by municipalities is supported by the elaborate land use planning and land use management instruments such as zoning schemes and spatial development plans that municipalities may use to govern the use of land. These planning instruments are at the disposal of municipalities to plan their areas of jurisdiction.

As stated earlier, traditional leaders are responsible for land allocations in the rural areas. This power is referred to as the land allocation power. This is a literal description of what traditional

leaders actually do (allocate land) when someone has applied for a piece of land to reside on within a particular traditional community governed by a traditional leader.[42] Once an allocation of land has been made by the traditional leader, it is automatically accompanied by a set of land use rights. These include the right to build a homestead, the right to erect a kraal for the safe keeping of livestock, the right to access agricultural fields for growing of crops, the right to access grazing land for livestock, and the right to apportion a part of the land for the burial of family members, as explained in Chapter One.[43] These rights cannot be taken away arbitrarily.[44] They can only be revoked in carefully defined circumstances after due process has been undertaken.

It is therefore submitted that the process of allocating land by traditional leaders should for all intents and purposes be construed as a form of managing the use of the land of an area under the custodianship of a traditional leader. For example, a traditional leader, after consulting the community, would decide with his or her council which allocations of land use are permitted where. A crèche or child-care facilities will be close to a primary school. A tavern will be far away from schools. Allocations of land for a homestead will be far away from wetlands, rivers, or areas prone to floods or fires. These examples illustrate the importance of allocating land in a manner which protects the community's common property resources such as grazing and woodland, while managing the use of natural resources in a sustainable manner.

Put differently, the decisions taken under the two systems of land use management, the one set out in SPLUMA and based on Eurocentric concepts and principles, and the unwritten system of land use management based on customary law principles and values, broadly share similar objectives. These include avoiding risk to livestock, residents and property, and ensuring the sustainability of natural resources. While these objectives may be similar, the context, rural South Africa, in which they are pursued or realised gives them a level of distinctiveness in contrast to how they would be pursued and realised in another context, such as in European countries. In rural communities governed by traditional leaders some of these

[42] Para 2.6.
[43] Para 1.2.
[44] Para 2.2.

objectives are pursued because of their importance to culture and rural livelihoods.[45] This is where the overlapping systems of land use management become important tools, not only for those who take land use management decisions, but also for those who occupy rural spaces and rely on these natural resources to secure a livelihood and perform cultural ceremonies.

The main difference between the forms of land use management powers exercised by traditional leaders and municipalities is what guides the process of exercising this power. On the one hand, traditional leaders apply unwritten, customary norms, principles and values, which emanate from indigenous sources, in the process of allotting land. On the other hand, municipalities apply written, statutory based rules, principles and values which emanate from new statutes that codify a system of planning whose objective, amongst others, is the creation of a healthy environment.[46]

5.6 Conclusion

The overall aim of this chapter was to analyse and and unpack the different chapters of SPLUMA. The analyses covered the main objectives of the Act. It also explained the development principles of the Act, including scrutinising how SPLUMA regulated spatial development frameworks across the three spheres of government, as well as describing the meaning and objective of land use schemes and distinguishing it from land development management. The chapter concluded by arguing that land allocation must be construed or seen as a form of land use management. Crucially, in each of the abovementioned themes of SPLUMA, the chapter demonstrated the areas in which the institution of traditional leaders and customary law rules find relevance and applicability. In other words, linkages were made between the rules, principles and values of SPLUMA and customary law rules, principles and values.

[45] For example, certain wild plants play an important role in the creation of livelihoods for rural residents. One such plant is the wild olive tree (*Olea europaea Africana,* or *Umnquma* in Xhosa). This plant and many others are not only medicinal plant products used in rural areas for cultural functions, but are also exported to urban areas. This flow of materials for both medicinal and cultural rationalities has considerable potential for rural livelihoods. However, resources such as *Umnquma* are systematically being depleted, and it is therefore critical that appropriate sustainable management practices be introduced in communities order to conserve these natural resources.

[46] Chapter Four, para 4.8.4.

It is important to point out that up until now the study has analysed the history of traditional leaders in land allocation and the history of municipalities in planning. The study has also analysed theory and the law but the question is what happens in practice, on the ground? In the next chapter, the study will explain how the land use management roles of these two institutions in rural areas have intersected in practice, and then discuss how this intersection has affected the implementation of SPLUMA in areas governed by traditional leaders.

Chapter Six: The Intersection of the Role of Traditional Leaders and Municipalities in Land Use Management in Practice

6.1 Introduction

The implementation of SPLUMA is a process which local government is grappling with. At the time of writing, many municipalities across the country continue to develop their municipal planning by-laws, review their land use schemes, and to establish municipal planning tribunals of their own or in collaboration with other municipalities. However, the picture that has emerged in rural areas concerning the implementation of SPLUMA in areas under the authority of traditional leaders is one of simmering tensions. These tensions have propelled many traditional leaders to reject the implementation of SPLUMA in their areas of jurisdiction, even going so far as vowing to fight against the implementation of SPLUMA with their lives.[1]

This chapter contains an analysis of the intersection of the role of traditional leaders in land allocation, and the role of municipalities in spatial planning and land use management on the ground. This analysis was undertaken in order to better understand the reasons and causes behind the renewed tension between traditional leaders and municipalities in rural areas governed by traditional leaders.

The majority of the reasons behind the tensions were obtained, as explained in Chapter One, through information and experiences gathered during interviews with municipal officials, councillors, traditional leaders, provincial officials, national officials, academics, and consulting planners working with municipalities in implementing SPLUMA.[2] The chapter is based on a series of interviews that were conducted with stakeholders from three provinces, namely the Eastern Cape, Limpopo and KwaZulu-Natal.

There are six main observations which emanate from the interviews that were conducted with the abovementioned stakeholders. They encapsulate the obstacles facing the implementation of SPLUMA in areas governed by traditional leaders. These observations are (1) the lack of meaningful engagement by traditional leadership when SPLUMA was introduced at national level; (2) outright rejection of SPLUMA; (3) misunderstanding of SPLUMA; (4) the lack of trust

[1] Chapter One, para 1.7.2.
[2] Chapter One, 1.7.1.

in municipalities; (5) the lack of trust in planning instruments and processes; and (6) the exclusion of traditional leaders from municipal planning tribunals.

6.2 Methodology

The study has so far made use of the desktop study approach, in terms of which relevant legislation, literature and court cases were analysed and unpacked. In this chapter, a qualitative approach was used. In-depth interviews, guided by a prepared set of questions, were conducted. The interviews were flexible, and did not follow a question and answer approach rigidly. The questions served as a guide for the interviewer, allowing the interviewee ample flexibility to express themselves on the issues raised. During the interviews impromptu follow-up questions that did not form part of the pre-prepared questionnaires were posed to interviewees for clarification purposes, as explained in detail in Chapter One.[3] The answers, comments and explanations provided by the interviewees are presented within a structured narrative. During this narrative, the main observations that seem to have given rise to these tensions or significantly contributed to them are unpacked.

6.3 Analyses of the intersection in practice

This chapter now presents some of the main observations the study has identified as the underlying reasons why the implementation of SPLUMA in areas governed by traditional leaders is facing opposition.

6.3.1 Lack of meaningful engagement by traditional leadership when SPLUMA was introduced at national level

The first major observation which emerged from the interviews was the lack of meaningful engagement by traditional leaders when SPLUMA was introduced to them at national level. Although the development of a single, national planning law in post-apartheid South Africa had been in the works for more than 15 years, as explained in Chapter Four,[4] it was the Constitutional Court in 2010 which provided much needed clarity and impetus for the enactment of a new planning law.

The Constitutional Court in the *City of Johannesburg v Gauteng Development Tribunal* judgment described the fragmentation of planning legislation in South Africa as a situation

[3] Chapter One, para 1.7.
[4] Chapter Four, para 4.9.3.

that was crying out for legislative reform.[5] In this judgment, the Court confirmed the order of constitutional invalidity made by the Supreme Court of Appeal in respect of Chapters V and VI of the Development Facilitation Act 67 of 1995.[6] The declaration of invalidity was suspended by the Court for a period of 24 months from the date of the order to enable Parliament to correct the defects or enact new legislation. This meant that by 2012, Parliament needed to move with speed and enact a new planning law. By then, it was clear that more time would be needed to develop this new legislation. In 2013, a new planning law was finally enacted, namely SPLUMA.

It appears that during the stakeholder engagements when SPLUMA was being drafted or finalised, the manner in which it was introduced to traditional leaders by national government officials was done with insufficient care for the institution of traditional leadership. A municipal official from Limpopo, when asked for his opinion on why SPLUMA in particular is being rejected by many traditional leaders, had this to say:

> When SPLUMA was introduced to the traditional authority, a lot of misinformation went through. Nobody explained to them to say this is a kind of legislation that is going to bring improvement in as far as the development world is concerned. Someone construed it as someone in authority, not the municipality but the government itself wanting to take away the land from traditional leaders. There is some kind of misinformation.[7]

Another respondent, a provincial official from KwaZulu-Natal, corroborates what the respondent above said. When asked the same question, she said:

> It does appear that the build-up towards promulgation of SPLUMA, there are certain things that did not go so right in terms of how the law itself was introduced to them and what they understood the law to be about and it does seem like the damage started from there. What we are dealing with now are things that started from there which made it so complicated that you can't go back and correct those wrongs.[8]

[5] Chapter Four, para 4.9.3.
[6] Chapter Four, para 4.9.3.
[7] Interview with Councillor (29 July 2019), Limpopo, Tzaneen.
[8] Interview Provincial Official (21 November 2018) KwaZulu Natal, Mhlanga.

A traditional leader from the Eastern Cape explained the way that he and other traditional leaders felt because of the way SPLUMA was introduced at national level:

> Sometimes you can have a certain attitude about someone just by the way they greeted you and then afterwards you just don't want anything to do with them let alone talk to them. I think we need to resolve this issue of how they dealt with us when they started to talk to us about SPLUMA and thereafter talk about being capacitated to understand exactly what is it that they want to achieve with SPLUMA and whether it will benefit our communities and our institution.[9]

However, a national government official who was involved in the development and roll-out of SPLUMA refuted the allegations that the department responsible did not consult the relevant stakeholders, including traditional leaders. When asked for input on the matter, he said:

> I can assure you that we travelled extensively across the country to meet traditional leaders and other stakeholders. We even went to the Western Cape to meet the Khoisan leaders and more importantly the former King of KwaZulu-Natal. The assertions that we did not consult is not entirely true in my view.[10]

According to the information gathered from three different provinces, the lack of in-depth engagement when SPLUMA was introduced to traditional leaders or the institution of traditional leadership by national government officials was identified by the researcher as the main observation. However, a national government official refuted these statements by asserting that they went throughout the country and consulted traditional leaders. Perhaps traditional leaders were consulted, as the national official suggests, but that the manner in which these consultations took place were not sufficient and meaninigful. There are several points that traditional leaders and other stakeholders highlighted during the course of the interviews that arguably provide insight and context as to why traditional leaders were irked with the manner in which consultations over SPLUMA were conducted. It can be argued that these points, which will be explained below, created fertile ground for the seeds of the other major observations.

First, there was a sense from some of the respondents that the Department of Rural Development and Land Reform (DRD&LR) strongly believed in the rationality of modernist

[9] Interview Traditional Leader (29 April 2019) Eastern Cape, Bizana.
[10] Interview National Government Official (14 October 2022), Gauteng.

planning and felt that any challenges to this belief should not stand in the way of the formal activation and rolling out of SPLUMA. This, according to some of the respondents, was a point that the DRD&LR persistently informed all who attended SPLUMA engagements.[11] Secondly, the DRD&LR presented how planning in South Africa via the prescripts of SPLUMA would be standardised or homogenised to fit every geographic zone within the country. This planning system would then find expression through the typical rational planning approaches and tools of the current age, namely the spatial development plan and the zoning scheme. Thirdly, from the interviews conducted in the Eastern Cape in particular, a specific scenario which concerned the issue of meaningfully engaging traditional leaders about SPLUMA, and how the DRD&LR managed this, was explained.[12]

The respondents stated that during the course of May 2015, a joint programme between DRD&LR, the South African Local Government Association (SALGA) and the Eastern Cape Department of Cooperative Governance and Traditional Affairs (ECCOGTA) was designed to engage traditional leaders on this critical matter. However, this was amended by the first two organisations to deliberately omit an agenda item prepared by ECCOGTA. This item was to inform traditional leadership of the progress made in the preparation of a provincial green paper which pursued an inclusionary approach to the planning endeavour. The aim was then to demonstrate the formal recognition of the institution of traditional leadership, and from there to embrace this, in order to establish an inclusionary and complimentary effort going forward.[13]

The other critical aim was to create a platform for the development of trust, respect and dignity. Now any idea of pursuing a joint collaborative effort with traditional leaders has also been undermined. Finally, the other point highlighted by the respondents is about how the processes of formulating SPLUMA in the Eastern Cape was in effect captured by officials of DRD&LR. It is said the consultation processes were actually nothing more than information sessions. Any debate was quickly terminated, even more so on matters concerning traditional authorities, customs or culture. Not only was debate rapidly closed down, it also became very

[11] Williams AD *A Framework for a Sustainable Land Use Management System in Traditional Xhosa Cultural Geo Social Zone of the Rural Eastern Cape of South Africa* (Unpublished LLD thesis, University of the Free State 2015) 221.
[12] Williams AD (2015) 223.
[13] Williams AD (2015) 225.

obvious that the planners who attended these sessions were very averse to the latest developments concerning planning theory involving collaboration and multiculturalism.[14]

Given the similar reactions towards SPLUMA from traditional leaders in the other provinces where the researcher conducted interviews, it can be argued that the DRD&LR very likely adopted the same approach during its SPLUMA engagements, especially, on issues concerning the institution of traditional leadership. It is submitted that the way traditional leaders were consulted was not meaningful in the sense that they were not given adequate time, space and information to understand the aim and objective of SPLUMA. More importantly traditional leaders argue that they were not afforded a reasonable opportunity to make representations and put forward questions about a law that directly affected them as traditional leaders, the institution of traditional leadership, their role in land allocation and the communities they governed. In conclusion, it is therefore on this basis that this study adopts the word 'meaningful' to demonstrate the absence of cordiality, reasonable opportunity and time to be heard about the implications of a law that was going to regulate the authority of traditional leaders to allocate land in the areas they governed. These issues outlined above may explain why, after SPLUMA was introduced to traditional leaders by the DRD&LR, traditional leaders retaliated by resisting the implementation of SPLUMA in their areas of jurisdiction.

6.3.2 Outright rejection of SPLUMA by traditional leadership structures

It appears that the introduction of SPLUMA by national officials to traditional leaders was not sufficient, cordial or respectful to the institutions of traditional leadership. In response, many traditional leaders were mobilised through their formal structures to declare SPLUMA 'as enemy number one' to the institution of traditional leadership. This meant that the poor introduction of SPLUMA to traditional leaders led to it being rejected by many of them. To illustrate this, the mere mention of the word 'SPLUMA' in the presence of the traditional leaders that were interviewed for this study infuriated them. A traditional leader from the Eastern Cape, when asked why he did not want to hear the word SPLUMA, said: 'When we hear the word SPLUMA, it's a kill word.'[15]

[14] Willaims AD (2015) 223.
[15] Interview Traditional leader (29 April 2019), Eastern Cape, Bizana.

A municipal official from Limpopo, when asked why it was that traditional leaders would become infuriated when the word SPLUMA was mentioned in their presence, had this to say:

> We have had workshops but it was mainly with councillors and officials, we have not yet had a workshop with traditional leaders because when you start with this workshop you have to mention the word SPLUMA and then the tensions starts from there. So if we have anything like a training or some information sharing, we disguise it to just say it's a normal development, there is someone who wants to develop in your area and this is the new system. We don't normally even make mention of the word SPLUMA.[16]

An interview held in Limpopo with a group of traditional leaders nearly came to an abrupt end when the researcher of this study mentioned the word SPLUMA. The traditional leaders became immediately visibly upset. Unaware (at the time) of the effect the mere mention the word SPLUMA had on traditional leaders, the researcher innocuously used it. The tone of the respondents was immediately filled with anger followed by threatening promises which were directed at the researcher. This is the gist of what the respondents said:

> Who sent you to ask us about this thing (SPLUMA) you have just mentioned. Did you invite the provincial and district houses of traditional leaders to be part of this engagement because if not we will not talk to you.[17]

Others instructed the interviewer to do the following: 'Turn off this recording machine of yours because we do not want anything with this SPLUMA.'[18]

These responses illustrate how incensed traditional leaders are about SPLUMA. Aside from the anger, the similarity in the instant reaction of these respondents who are located in different places and in different provinces relayed to the interviewer more or less the same feeling traditional leaders felt when the word SPLUMA was mentioned in their presence. It can be argued that the reaction they displayed during the interviews also indicates just how united the institution of traditional leadership is in dealing with the issue of SPLUMA. These traditional leaders not only shared the same remarks about SPLUMA, but also reacted in a similar fashion when the word SPLUMA was brought up during the interviews.

[16] Interview Councillor (29 July 2019), Limpopo, Tzaneen.
[17] Interview Traditional leader 1 (28 October 2019), Limpopo, Phalaborwa.
[18] Interview Traditional leader 2 (28 October 2019), Limpopo, Phalaborwa.

The reason traditional leaders feel this way towards SPLUMA is probably because a person or a group of people somewhere spent a considerable amount of time discrediting SPLUMA as a piece of legislation that is inimical to the interests of the institution of traditional leadership.

This then arguably points to a coordinated and sustained mobilisation effort against SPLUMA, either in the National house of traditional leadership or the Provincial houses of traditional leadership, or both. Perhaps the campaign to reject SPLUMA was conducted without any appetite or desire to engage with its content. This might explain why the mere mention of the word SPLUMA instantaneously invokes anger and vitriol from some traditional leaders, because the message from those driving the campaign to denounce SPLUMA to other traditional leaders across the country was simply that SPLUMA is threatening the existence of the institution of traditional leadership. This is an observation which the researcher made, based on comments that traditional leaders were making during the course of this group interview. For the purposes of this chapter, the major observation that was made, however, is the outright rejection of SPLUMA.

6.3.3 Misunderstanding of SPLUMA

In many of the interviews that were conducted with different traditional leaders across the three provinces, it became apparent that they were not only angry about SPLUMA but also unaware about what the Act sought to achieve. For example, the preamble of the Act sets out the main purpose of the Act, namely to eradicate past spatial planning and land use laws and practices which were based on racial inequality, segregation and unsustainable settlement patterns. After realising what the purpose of SPLUMA was, then the next question should be, how would this affect traditional leaders or the areas traditional leaders govern? SPLUMA spells out its intention about traditional areas in the very same preamble, when it is stated that it seeks to introduce spatial planning and land use management legislation to parts of rural areas that do not have it and are therefore excluded from the benefits of development planning and land use management systems.[19]

[19] Preamble of SPLUMA.

It is against this background that a further major observation emerged, namely that there was misunderstanding of SPLUMA by traditional leaders. The misunderstanding is that some traditional leaders believe that SPLUMA intends to take away their power to allocate land.

Based on the responses from the majority of the interviewees, it appears that traditional leaders believe that SPLUMA seeks to take away their power to allocate land. It was argued in the previous chapter that land allocation is a form of land use management which is administered by traditional leaders.[20] In the same vein, municipalities also exercise land use management authority. What this means, according to traditional leaders, is that SPLUMA takes away their power to manage land use since it empowers another institution to manage land use in their areas of jurisdiction. This argument by traditional leaders is perhaps correct, but only to the extent that their land use management authority is not entirely taken away but is rather curtailed.

In other words, the exclusive authority to manage land use that traditional leaders have enjoyed since pre-colonial times has now come to an end. This argument is consistent with one of SPLUMA's aims, which is to introduce spatial planning and land use management legislation to rural areas so that these areas can also benefit from development planning and land use management systems. Be that as it may, some respondents from Limpopo seemed to think that SPLUMA seeks to strip them of their power to allocate land. When a traditional leader from Limpopo was asked for his input on the matter, he had this to say:

> On this issue of SPLUMA, in the house of traditional leaders in the district there is a very loud cry. Why? Because the municipality will have to allocate stands for those people [It is submitted that the municipality is unlikely to do that]. It goes hand in hand with the issuing of proof of residence. Immediately if the municipality takes over those things, it means there is no more power in those traditional leaders. Why they are there is only to manage the land, allocate people land and try to collect as little as they can. If you strip them of that function, it means you have just killed those traditional leaders.[21]

Another respondent, a national official responsible for the rolling out of SPLUMA, said:

[20] Chapter Five, para 5.4.
[21] Interview Traditional Leader (30 October 2018), Limpopo, Tzaneen.

> We are aware of this narrative about SPLUMA seeking to take away the powers of traditional leaders and it is unfortunate because it is not true. Traditional leaders have as a result taken a position not to support the implementation of SPLUMA in their areas of jurisdiction.[22]

A municipal official from KwaZulu-Natal said that the situation is the same in some areas in that province. When asked his opinion about the perception that SPLUMA is intending to take away the power of traditional leaders, he replied:

> It is a directive from Ingonyama Trust Board (ITB) not to accept SPLUMA, because it is perceived that it will take their powers in land management and allocate it to municipalities and government at large.[23]

A consulting planner from the Eastern Cape believed that part of what drives this narrative that SPLUMA seeks or intends to take away their power to allocate land is politics:

> I think there is a bit of a misconception of what it is that SPLUMA seeks to do and that is mainly because of politics. Currently SPLUMA is a swearword because it is viewed as taking away the powers of traditional leaders, but when you unpack it, it's not.[24]

This suggests two things. First, the misunderstanding that SPLUMA intends to take away the land allocation power of traditional leaders indicates the level of engagement traditional leaders had with the content of SPLUMA. If the traditional leaders that were respondents in this study had been made aware of the objective of SPLUMA and its regulations, they would have realised that SPLUMA does not seek to take away their power to allocate land. Instead, the SPLUMA regulations recognise the role of traditional leaders as custodians of communal land and their land use management authority as explained in the previous chapter.[25] It is submitted that the overarching aim is for municipalities to form collaborative partnerships with traditional leaders to give effect to the objective of SPLUMA, which is to improve the development of rural areas through the constitutional mandate of municipalities to provide services to rural communities in a sustainable manner.

[22] Interview National Official (28 January 2023), Gauteng, Pretoria.
[23] Interview Municipal Official (4 December 2019), KwaZulu-Natal, Umhlathuze.
[24] Interview Consultant Planner (6 March 2019) Eastern Cape, East London.
[25] Chapter Five, para 5.8.5.5.

Secondly, it may very well be that traditional leaders were persuaded or even instructed to refrain from engaging with anything that has to do with SPLUMA because of its perceived threat to the existence of the institution of traditional leadership in democratic South Africa. Whether these suggestions are justified or not is not for this study to decide. However, the misunderstanding of SPLUMA is yet another major observation this study has made.

6.3.4 Lack of trust in municipalities

Given the history between traditional leaders and municipalities in post-apartheid South Africa,[26] it is not surprising that the lack of trust between the two institutions emerged as another main observation. Also, history does indicate that traditional leaders never wanted the establishment of municipalities in the rural areas, arguing that they would take away the functions they were performing.

In fact, traditional leaders wanted the institution of traditional leadership to be the sole local governance structure in rural areas. This assertion was based on the deep roots the institution of traditional leadership had in rural areas and the direct relevance it had on the lives of rural residents.[27] According to the evidence gathered from the interviews, most traditional leaders are of the view that SPLUMA seeks to empower municipalities to take away their power to allocate land, a function they have performed since the pre-colonial period, as discussed previously.[28]

In this regard, the issue of the lack of trust should be separated into two. First, the issue of the lack of trust is based on the history of prolonged tension between these two institutions. Secondly, the issue is based on municipality's reported failure to deliver on its mandates.

On the first issue, a traditional leader from Limpopo explained the tension by saying:

> All we want is power to control. You see it happened a long time ago, the land was taken away from the Kgosis (chiefs) and they created CPAs (Community Property Associations) in an attempt to give the land back to his subjects directly. All they want to do is give the land back to communities, it can also be families.

[26] Chapter Three, para 3.2.
[27] Chapter Two, para 2.3.
[28] Chapter Six, para 6.3.3.1.

> We were staying here and this was land that belonged to Kgosi who in turn allocated it to individuals and families. The SPLUMA to me is perpetuating that.[29]

The respondent further explained:

> The issue is that they (municipalities) fail traditional leaders. From the 1936 Native Administration Act, the Kgosis (Chiefs) were given the right by government to cut the stands using the department of agriculture. But, when the evolution came, the power was removed from the department and also from the Kgosis in the sense that now those people are supposed to make those applications and do not consider now that is what is crippling the house of traditional leaders. Kgosis are afraid of a situation where they become nothing in the land that they are administering. Councillors or council together with the state took over so they become nothing.[30]

A national official told the researcher about a meeting they had with the late King of KwaZulu-Natal in which they were accused of trying to steal the land of the Zulu nation through SPLUMA. When asked to explain what transpired in that meeting, he said:

> We had a meeting with the King and his advisors including members of the Ingonyama Trust Board where through his interpreter, he said he did not trust that we had the best interest of the Zulu nation at heart because to him, SPLUMA is developed by colonisers in order to destroy the institution of traditional leadership in KwaZulu-Natal. He said he did not trust SPLUMA and those that wanted it implemented.[31]

The second aspect of the issue of trust relates to municipalities not being able to deliver on their mandates. This could either be linked to a lack of capacity or corruption in a municipality. In fact, reports from the Auditor-General paint a grim picture of the state of affairs of local government audit outcomes.[32] This issue arose in some of the interviews that were conducted in the Eastern Cape. A traditional leader stated that they could not trust the municipality when it came to the implementation of SPLUMA in their areas of jurisdiction. When asked for his opinion as to why, he had this to say:

[29] Interview Traditional leader (30 October 2018), Limpopo, Tzaneen.
[30] Interview Traditional leader (30 October 2018), Limpopo, Tzaneen.
[31] Interview National Official (14 October 2022), Gauteng.
[32] Auditor General of South Africa *Consolidated General Report on Local Government Audit Outcomes MFMA 2022-2023* (2023) 74.

> The (municipal) area is in ruins because the municipality cannot plan, they cannot even properly plan the town. What is it that they going to do in our rural areas when their own areas are broken and in ruins?[33]

What this comment suggests is that some traditional leaders are in fact saying that they do not trust that the municipality has the requisite capacity to effectively drive the process of implementing SPLUMA with the aim of 'developing' traditional areas. This is because the area of jurisdiction of the municipality which also covers rural areas governed by traditional leaders is in a bad state due to poor planning and perhaps lack of capacity. It is important to note how the respondent referred to that area as the municipality's 'own area'. This implies that some traditional leaders do not recognise or accept that municipalities have authority over their areas of jurisdiction, or that the municipality shares the same boundaries as the traditional authority. It therefore appears that the issue of the lack of trust between traditional leaders and municipalities has had a negative impact on the implementation of SPLUMA in areas under the authority of traditional leaders.

In another interview, also conducted in the Eastern Cape with a municipal official, the issue of lack of trust came up again. In this instance, the respondent viewed the issue of trust as a two-way street in which municipalities and traditional leaders should work hard to earn the trust of the other. During the interview, it became apparent that some traditional leaders do not trust the municipality and the municipality does not trust traditional leaders.

The respondent claimed that they had once held a series of meetings with a chief where they explained what SPLUMA sought to achieve, including how it would be implemented in areas governed by traditional leaders. At the end of those meetings, it was agreed that any new developments in the area would be guided by the Municipal Spatial Development Framework of the municipality as explained in the previous chapter.[34] When the respondent was asked what caused the lack of trust, he said:

> We drove the whole of an area we were planning to develop and we showed them that, over there we are going to build low density housing and that ridge over there will be resorts and hotels and here a business centre will be established etc. They were so happy and this guy who was the chief himself, we took him to lunch

[33] Interview Traditional leader (29 April 2019), Eastern Cape, Bizana.
[34] Chapter Five, para 5.3.

> afterwards and he was happy. But, subsequent to that meeting, he is still handing out land and it's a big issue in that area.[35]

It appears that in some cases it is traditional leaders who renege on proposed deals which mainly involve the development of traditional areas. As the quote illustrates, it was agreed that the area would be developed according to the municipality's spatial development framework and land use scheme. However, the traditional leader decided to allocate plots to residents or entities without the municipality's involvement and therefore went against what was agreed initially. The traditional leader did not go against the said agreement only, but also against the municipality's spatial development framework. As argued in the previous chapter, the municipality is entitled, on the basis of its constitutional authority, to block any development that goes against its municipal spatial development framework and land use scheme.[36] This is an important power which the Constitution grants to municipalities.

A consulting planner working closely with traditional leaders and municipalities in the Eastern Cape stated that the issue of trust was increasingly becoming an issue in the process of implementing SPLUMA, particularly in areas governed by traditional leaders. The respondent stated that traditional leaders are often invited to attend council meetings. However, sometimes they do not get invited, especially when the meeting is about SPLUMA. According to the respondent, the relationship between the councillors and some traditional leaders was damaged to a point where communication between the two parties was non-existent. When asked why this was the case, he had this to say:

> When we are dealing with traditional areas, we will approach the traditional leaders but you find that the councillor doesn't talk to the traditional leader because they do not trust each other. I have an example where a meeting about SPLUMA was arranged by council and they did not invite the traditional leader, but I still briefed him afterwards because it was his area. So questions like who governs here, is it the chief or the municipality always comes up.[37]

The relationship between the municipality and the traditional leaders appeared to be strained, conflictual and characterised by distrust. In fact, a clear flouting of both local

[35] Interview Municipal Official (30 April 2019), Eastern Cape, Mthatha.
[36] Chapter Five, para 5.7.
[37] Interview Consultant Planner 2 (6 March 2019), Eastern Cape, East London.

government law and SPLUMA is evident in this regard. As discussed at length in the previous chapter,[38] according to section 81 of the Municipal Structures Act, traditional leaders may participate in municipal councils. The section provides that before a municipal council takes a decision on any matter directly affecting the area of a traditional authority, the council must give the leader of that authority the opportunity to express a view on that matter.[39] Based on the quote above, the municipality failed to adhere to this provision, especially if it was a council meeting from which the traditional leader was excluded.

A municipal official from KwaZulu-Natal stated that the issue of a lack trust does emerge from time to time when the issue of SPLUMA is raised. When asked to describe the situation, he said:

> Previous legislation excluded traditional leaders and their areas, they had free reign over their land as no laws were imposed over them. SPLUMA seeks to include traditional areas in development and planning processes which has created tension between the two parties. A lot of that tension may be attributed to a lack of trust and education on what SPLUMA seeks to ultimately achieve.[40]

In summary, these comments illustrate that the lack of trust between these two institutions is informed by events which first occurred prior to democratic South Africa, and secondly, by events which have occurred in post-apartheid South Africa. During the colonial and apartheid era, wealth in the form of livestock and fertile land was taken away from black South Africans by way of racist laws and policies, coercion and deceit, as explained in detail in Chapter Two.[41] In democratic South Africa, the establishment of local government system in areas governed by traditional leaders, despite traditional leaders being against the system, sowed the seeds of distrust between the two institutions. Furthermore, poor service delivery to rural communities by some rural municipalities due to lack of capacity, or corruption or both, has served only to deepen the mistrust between traditional leaders and municipalities.

The combined impact of these events has left an indelible mark in the memory of many traditional leaders, to the extent that legislative enactments designed to address the legacy

[38] Chapter Five, para 5.9.2.
[39] Local Government: Municipal Structures Act 32 of 2000.
[40] Interview Municipal Official (12 March 2019), UMuziwabantu, KwaZulu-Natal.
[41] Chapter Two, para 2.4 & 2.7.4.

of apartheid are viewed with suspicion, especially if said enactment does not clearly set out their powers and functions in relation to land management.

6.3.5 Lack of trust in SPLUMA instruments and processes

The lack of trust in SPLUMA instruments and processes is another major finding of this study. This study has explained in detail in the previous chapters about how SPLUMA is an adapted version of planning law that originates from Europe.[42] The original planning statutes were brought to South Africa by the British for the benefit of white settlers and the areas they lived in and were administered by municipalities under the strict control of provincial governments. The British aggressively extended the use of these instruments in rural areas by way of proclamations and ordinances with the aim of stripping the remaining wealth of black rural residents.

As discussed in Chapter Two,[43] one of the insidious programmes through which planning instruments such as zoning and planning frameworks and processes were used in rural areas was the betterment programme. The programme was announced as a strategy to help prevent further soil erosion caused by the 'unscientific' use of farming methods and accumulation of livestock by black rural residents. However, the outcome of the programme was not the prevention of soil erosion, but a state of landlessness and the unjustified culling of livestock.

A municipal official from KwaZulu-Natal, when asked for his opinion on whether traditional leaders participate in spatial planning and land use management processes, said:

> Most of the traditional leaders in our municipal area have said they do not trust these planning processes we want to extend to their areas. They see these instruments as being foreign and not beneficial for rural areas.[44]

A councillor from Limpopo, when asked to comment on this issue, also stated that most traditional leaders do not see these planning instruments and the associated planning processes as being suited for the rural context. This is what he said:

> In our meetings, traditional leaders always say these instruments are designed for urban areas and not rural areas. They say it was through these instruments that

[42] Chapter Two, para 2.7.5.
[43] Para 2.7.5.
[44] Interview Municipal Official (12 March 2019) KwaZulu-Natal, uMhlathuze.

> their land was taken away from their forefathers during colonialism. They have also complained about red tape and long waiting periods which people who want to do development are subjected to.[45]

Another respondent who was asked for their opinion on the matter, stated:

> In the research I have conducted with my students, this is one of the issues that came up. We found that most traditional leaders are sceptical about the use of these instruments and following the planning processes for a number of reasons in their areas. They say they have lived on their land for many years and therefore know very well what should be built where. Traditional leaders think municipalities may use these planning instruments to take over development they have approved for the betterment of their communities.[46]

It appears from the comments above that distrust not only characterises the relationship between traditional leaders and municipalities, but also extends to legislation, instruments and processes administered by municipalities in areas governed by traditional leaders. What these quotes illustrate is the negative perception of SPLUMA. These sentiments could arguably be the reason why some traditional leaders were reluctant, or even refused, to participate in the spatial planning and land use management processes of the municipality.

6.3.6 Exclusion of traditional leaders from municipal planning tribunals

The final major observation is the exclusion of traditional leaders from participating or being members of the municipal planning tribunal (MPT). SPLUMA introduced the MPTs as the main organs that would consider and take decisions on land use and land development applications received by the municipality, as explained at length in the previous chapter.[47] The exception to this is when an official of the municipality is authorised to consider and make decisions on certain, specific land use applications.

Be that as it may, SPLUMA treats MPTs as the main municipal organ charged with considering and taking decisions on land use and land development applications. As the primary decision-makers on land allocations for proposed developments in their areas of jurisdiction, traditional leaders became upset and angry after being informed by someone or a group of people

[45] Interview Councillor (29 October 2019), Limpopo, Phalaborwa.
[46] Interview Academic Lecturer (14 October 2022), Free State.
[47] Chapter Five, para 5.3.6.1.

somewhere that SPLUMA had 'excluded' them from being members of the MPTs, or from even participating in them. It is submitted that SPLUMA does not explicitly state that traditional leaders are barred from being members of the MPTs or that they cannot participate in them.

A traditional leader from the Eastern Cape, when asked for his opinion on the exclusion of traditional leaders from MPTs, had this to say:

> We can read between the lines as traditional leaders, SPLUMA excludes us from the body that will take decisions about development that will occur on our land. Before SPLUMA we had a say on development, but now we will not form part of a structure that will be taking decisions about development that are planned for the area I am in charge of. What is the meaning of that?[48]

A provincial official shared her opinion on the exclusion of traditional leaders from MPTs:

> I don't think it was a wise decision to say that traditional leaders cannot form part of the MPT. It is their areas at the end of the day and they will want to have a say on any development that happens in their areas whether we like or not. The exclusion of traditional leaders from MPTs is one of the reasons they do not want anything to do with SPLUMA.[49]

A national official involved in the development and rolling out of SPLUMA explained the decision to exclude traditional leaders from the MPTs:

> We excluded traditional leaders from the MPTs because we wanted to insulate the MPTs from outside interference. But more importantly, we didn't want a situation where elected councillors who are also traditional leaders would also become members of the MPTs.[50]

It was argued in the previous chapter that the contestation between traditional leaders and municipalities in areas governed by traditional leaders is mainly fuelled by the exclusion of traditional leaders from the decision-making processes of the municipality or its organs. The exclusion, regardless of whether it can be justified or not in law, tends to be received by traditional leaders in practice as a way of excluding traditional leaders from the decision-making process that has a direct impact on their areas of jurisdiction.

[48] Interview Traditional leader (29 April 2019) Eastern Cape, Bizana.
[49] Interview Provincial Official (21 November 2018), KwaZulu-Natal, Mhlanga.
[50] Interview National Official (14 October 2022), Gauteng.

6.4 Conclusion

This chapter dealt with the analysis in practice of the intersection of the role of traditional leaders in land allocation and the role of municipalities in spatial planning and land use management. This was done to bring to the fore some of the reasons behind the tension between traditional leaders and municipalities over the implementation of SPLUMA. In this regard, the study identified six major findings that are the real reasons why SPLUMA is being vilified and assailed by traditional leaders. The first reason is that there was a lack of meaningful engagement by traditional leadership when SPLUMA was introduced at national level. The top-down approach adopted by the national department in its engagement with stakeholders about SPLUMA started the damage. The lack of appetite or reckless disregard for the meaningful engagement of traditional leaders about a law that regulates one of their most important functions paved the way for the vilification of SPLUMA.

The outcome of the consultation processes from the stand-point of traditional leaders led to the second finding, namely the outright rejection of SPLUMA. In response, traditional leaders concluded that the appropriate course of action was to declare that the institution of traditional leadership does not support SPLUMA and that they are therefore against its implementation in areas governed by traditional leaders. The study argued that the third finding, which is the misunderstanding of SPLUMA, flowed directly from events which had taken place when SPLUMA was introduced. Traditional leaders formed the opinion that SPLUMA sought to take away their powers to allocate land. The chapter showed how they could have formed this opinion. This was that they most likely never engaged with the content of SPLUMA.

If traditional leaders had engaged with the content of SPLUMA, they would have noticed that SPLUMA did not take away their powers to allocate land. Therefore, the evidence questioned whether a misinformation campaign about SPLUMA was possibly circulating within the circles of traditional leaders.

The fourth and fifth findings dealt with the issue of trust. The evidence confirms that traditional leaders reverted back to arguments they had made in the past, namely that they did not trust municipalities in general. Specifically in this case, they did not trust the instruments contained in SPLUMA, namely zoning schemes and MSDF's.

The last major finding which was discussed in this chapter concerns the exclusion of traditional leaders from municipal planning tribunals. While SPLUMA does not expressly exclude traditional leaders from being members of these tribunals, it appears that somehow traditional leaders were informed that they cannot be part of these structures. It can be argued that these statements are manifestations of the misinformation campaign surrounding SPLUMA. This is so especially when anecdotal evidence indicates that traditional leaders do participate in these tribunals.

In conclusion, it is submitted that there is a link or a connection between these findings. It is the manner in which SPLUMA was introduced to traditional leaders that led to a chain of grievances around SPLUMA emerging. The evidence shows that some of these grievances are valid while others are not. But what ultimately drove traditional leaders to oppose SPLUMA is a combination of factors which, in the view of the researcher, could have been properly addressed if only meaningful engagements characterised by cordiality, transparency, open and robust discussions of issues and collegiality had taken place when SPLUMA was introduced.

It must be pointed out that the contestation between traditional leaders and municipalities is playing itself out in rural areas governed by traditional leaders and not throughout the whole of South Africa. Essentially, the premise of this contestation is the exercise of land use management powers within the same social field or context that is defined by the operation of legal pluralism. Municipalities and traditional leaders are both defending their respective legal orders which empower them to exercise their authority to govern land use in rural areas.

This raises questions such as which institution is the appropriate authority to manage land use in areas governed by traditional leaders. Are both institutions empowered to take land use management decisions within the same jurisdiction, and if so, can each thus take its own decision? Is there any possibility that these independent decisions can be integrated? Does the law offer any mechanisms to resolve this issue? Does the law provide any solutions? These questions make it imperative that the study examines the emergence of legal pluralism in South Africa so as to better understand the impact of legal pluralism on how these powers are carried out in practice. The next chapter will thus explain the history of legal pluralism in South Africa, and examine whether legal pluralism can offer any approaches or solutions that could assist in the resolution or management of the contestation that was described in this chapter.

Chapter Seven: Legal Pluralism in South Africa

7.1 Introduction

The reasons for the contestation are laid bare in the previous chapter. It can be argued that the difference between SPLUMA receiving a warm or cold reception by traditional leaders boiled down to meaningful consultations. As the evidence shows, SPLUMA ended up receiving a cold reception from traditional leaders who vowed that its implementation would never see the light of day in their areas of jurisdiction because they were never meaningfully engaged by the national government. Traditional leaders and municipalities exercise land use management powers in rural areas. These two types of powers exist within a context that is defined by the operation of legal pluralism. This is why it is imperative to examine the emergence of legal pluralism in South Africa so as to better understand the impact of legal pluralism in how these powers are carried out in practice. The existence of the same power in the hands of two institutions which speak with different voices on the same matter and within the same area, serves only to cause disruption to orderly planning and development within a municipal and traditional area. This chapter examines legal pluralism in South Africa. It briefly traces the history of legal pluralism and explains the origins and forms of legal pluralism. This chapter puts forward several practical solutions targeted at resolving the contestation between traditional leaders and municipalities on the ground. It is argued in this chapter that perhaps the answer to resolving this contestation between traditional leaders and municipalities can be found in a particular approach in legal pluralism.

7.2 History, Origins and forms of legal pluralism

Legal pluralism is a key feature of African legal systems. Specifically, it is a feature of South Africa's democratic constitutional order. It became a part of South Africa's reality soon after the first Europeans arrived at the Cape. Legal pluralism derives from what is known as the principle of 'legal centrism', which holds that all law emanates from the state, and that rites developed and practiced by non-state actors, including religious and customary institutions, are law only to the extent they are recognised by the state.

Generally, legal pluralism refers to the co-existence of two or more normative orders in the same population. In the South African context, and as explained in Chapter Two, the first and dominant normative order is based on Roman-Dutch common law as influenced by English

law, adapted and developed through judicial decisions and legislation.[1] The other normative order that is recognised in South Africa to a limited degree is indigenous law that is incorporated into legislation, or pronounced in judicial decisions.

The origins of legal pluralism lie in the co-existence of different cultural or religious groups with their own legal systems. Legal pluralism also includes the law of a cultural or religious group which is practised by the group but not recognised by the state.[2] Legal pluralism is regarded as 'deep' or 'strong' when normative orders such as indigenous law exist without depending on the state for recognition of their validity.[3] According to Rautenbach, deep legal pluralism essentially means that the state does not have to incorporate cultural or religious forms of non-state law into state law.[4] Deep legal pluralism should therefore be distinguished from state-law pluralism where the legal norms of the various groups are recognised or adopted by the state.[5]

The period in which the Europeans 'scrambled for Africa' is considered in southern Africa to be the period in which state law pluralism originated. The Europeans briefly invaded the cultures of traditional indigenous people. This was long before the first British annexation of the Cape in 1795, and even before the Dutch East India Company (DEIC) set foot on South African shores. However, the influence of the Europeans was limited.[6] There is no evidence during this period pointing towards the recognition of indigenous laws or the imposition of European laws on the indigenous population. There is also no evidence of state-law pluralism during the brief Batavian control of the Cape or the first British occupation of the Cape from 1795 to 1803.[7]

The DEIC was interested in the Cape only for its strategic position in pursuing its imperialistic ventures. The brief occupation of the Cape by the British also had little impact on the administration of justice because of the policy that the laws of the conquered territory remained in force until altered by the conqueror.[8] In fact, legal pluralism emerged after the

[1] Para 2.3.
[2] Prinsloo M (1990) 326.
[3] Diala A (2019) 27.
[4] Rautenbach C 'Deep legal pluralism in South Africa: Judicial accommodation of non-state law' (2010) 12 *JLPUL* 146.
[5] Prinsloo (1990) 324.
[6] Nierkerk V G (2001) 353.
[7] Chapter Two, para 2.3
[8] Diala A (2019) 28.

British assumed control of the Cape in its second occupation in 1806. This resulted in the application of indigenous law being officially regulated, as discussed in Chapter Two.[9]

At first, the British government did not care about officially regulating the application of indigenous law governing indigenous people. However, that changed in 1833 when it attempted to control the indigenous tribes by entering into treaties with the chiefs. The application of the treaty system meant that the chiefs and their people became British subjects that fell under the control of the Cape government, but were allowed to continue to observe and follow their own indigenous laws and customs. While the treaty system was abolished in 1885, it is regarded as one of the earliest legal instruments that entrenched state-law legal pluralism.[10]

An important development occurred in British Kaffraria (a British colony/subordinate administrative entity consisting of the districts now known as King William's Town and East London), which was a reserve for the indigenous population. Legal pluralism was introduced in this colony when the inhabitants of this area were allowed to administer their own indigenous laws and practice their customs, subject to the discretion of the colonisers. The Cape Native Succession Act of 1864 and the Kaffraria Native Succession Ordinance of 1864 became the first official instruments to provide recognition for certain indigenous institutions. The introduction of legal pluralism was extended. After Kaffraria, this was extended to other colonies, namely Natal, Transvaal, and the Orange Free State.[11]

The various legal instruments recognising indigenous law in the different provinces were consolidated in the Black Administration Act of 1927.[12] This was the first legislative enactment to entrench state-law pluralism throughout the country.[13] Legal pluralism has thus been operating for a very long time. As explained earlier, in South Africa there are laws (Hindu and Islamic law) which are practised and observed by cultural and religious groups that are not dependent on state recognition for their continued existence and application. This is what was referred to earlier as deep legal pluralism.

[9] Chapter Two, para 2.7.
[10] Woodman J (1988) 36.
[11] Nierkerk V G (2001) 358.
[12] Chapter Two, para 2.7.2.
[13] Nierkerk V G (2001) 359.

The interpretation of the 1996 Constitution and various other pieces of legislation by the courts illustrates an appreciation of the operation of legal pluralism in South Africa. However, the question which this study will answer is whether a shift away from legal pluralism may be achieved through one of these approaches, namely unification, legal integration or harmonisation. The shift away from legal pluralism seeks to address the inequality imbedded in the relationship between adapted versions of Western law and traditional forms of African indigenous law.

Essentially, legal pluralism is occasioned by the colonial experience. In a simplistic sense, it may be described as the joining of European or Western and traditional forms of law. Within this paradigm, at least two officially recognised, autonomous and parallel legal systems co-exist and interact in limited, prescribed circumstances. Laws such as indigenous and customary law which are derived from sources other than state institutions only become law when they are authorised by the state. However, the recognition of traditional, unofficial forms of law inevitably goes hand-in-hand with the formulation of practical rules to determine when these laws may be applied, and when they should be regarded as acceptable (generally when they are not repugnant to Western perceptions of what is moral and in the public interest).

In the next section the study presents the alternatives to legal pluralism, and explains what each approach entails, with practical examples. The alternatives to legal pluralism are important mechanisms through which the tension that exists between traditional leaders and municipalities may be addressed.

7.3 Alternatives to legal pluralism

This section presents the three main blending approaches, namely unification, harmonisation and integration. The term 'blending' is used in this thesis to mean that the laws of the different legal orders existing within a shared normative space co-exist and interact without any conflict, discord or friction. It is submitted that the shift away from legal pluralism through one of these blending approaches can provide opportunities for the two systems of land use management existing in rural areas to co-exist and operate without discord or conflict.

The South African Law Reform Commission published a discussion paper in 2000 entitled 'Succession in Customary Law under the auspices of Project 90: The Harmonisation of the

Common Law and the Indigenous Law'. The objects and vision of the Law Reform Commission is to conduct research with reference to all branches of the law of the Republic in order to make recommendations for the development, reform and improvement of the legal system of South Africa. In this discussion paper, the Law Commission recognises the need to accommodate other unofficial laws into the state legal order while preserving legal pluralism.[14] The paper argued that South Africa currently recognises at least two different systems of succession: the common law (together with the statutes amending it) and various closely related customary laws. Many of the customary rules currently used by the courts are not only in conflict with the principle of equal treatment but are also out of step with social practice. Instead of attempting to reform customary law, the common law could be substituted. While this solution would have the advantage of providing a single law of succession for the whole country, it should not be adopted without careful consideration, for different cultural groups who may be unwilling to surrender their legal heritages. Therefore maintaining a policy of dualism accepts the fact of South Africa's legal and cultural diversity, a reality that the Constitution demands we respect.[15]

However, according to Van Nierkerk, an analysis of recent legal developments indicates a shift away from legal pluralism and a movement towards harmonisation or forced convergence of the law, where there is a blending of the various systems of laws into a new unified law within a framework of Western values.[16] Van Nierkerk's assertions are relevant for this thesis when one considers the new planning framework established by SPLUMA, and the way it deals with traditional leaders and their power to allocate land. The following section unpacks the three blending approaches. It is submitted that these approaches can be used to facilitate a shift away from legal pluralism, given its existence in the area of land use management in the rural areas governed by traditional leaders.

7.3.1 Unification

The insubordination of traditional forms of law to Western versions of law is maintained through legal pluralism. There are alternatives to legal pluralism that can be used to move away from legal pluralism to ensure that traditional forms of law are respected and viewed as

[14] South African Law Commission *Customary law*: *succession* Discussion Paper 93, Project 90 (August 2000).
[15] South African Law Commission *Customary law*: *succession* Discussion Paper 93, Project 90 (August 2000) 16.
[16] Nierkerk V G (2001) 356.

a body of law that enjoys the same legal status as Western forms. One of the approaches that can be used in this regard is unification. Unification involves a move away from legal pluralism to unity of law.[17] The process of unification works towards complete unity in substance and detail. This means that under unification, for example, a new law completely replaces the national laws that existed before. Complete unification results in the creation of a uniform system of law which substitutes the existing legal systems completely.[18]

In applying unification to the problem that is discussed in this thesis, it would mean that the planning system established by SPLUMA, which is based on Eurocentric concepts and principles, would be used to regulate the exercise of land use management authority by all persons, institutions and spheres of government. This would then result in the abolition of the other system, namely the customary system of land use management. Alternatively, the uniform system established by SPLUMA might include elements of the two legal systems, namely the Eurocentric system of land use management administered by municipalities, and the customary law system of land use management administered by traditional leaders.

7.3.2 Harmonisation

Harmonisation of laws involves the removal of explicit conflict between different legal systems of law, while retaining the key characteristics of the respective legal systems. The end product of the process of harmonisation is for the legal systems continue to operate separately without conflict. Harmonisation seeks to eliminate points of friction between the different legal systems but leaves the systems to continue to exist separately.[19] The unification and harmonisation of laws is similar in the sense that both involve approximating several legal systems, and both are oriented towards establishing some level of integration between different legal systems characterised by diversity. This does not take place spontaneously. It can only be attained through legislation or the intervention of the courts. Harmonisation is designed to incorporate different legal systems under a basic framework.

In applying harmonisation to the problem discussed in this thesis, points of friction, conflict or discord between the system of land use management established under SPLUMA and the

[17] Van Reenen P 'The relevance of the Roman (-Dutch) Law for legal integration in South Africa: With some lessons to be learnt from the African and European experiences' (1995) 112 *ALJ* 276.
[18] Rautenbach C (2010) 149.
[19] Rautenbach C (2010) 148.

customary system of land use management would be eliminated, while leaving the systems to operate independently. Practically, this would mean that traditional leaders would continue to allocate land in terms of customary law, while municipalities would also exercise their land use management powers in terms of their planning by-laws. The exercise of these powers might be done under a basic framework, namely SPLUMA.

Broadly construed, points of friction between these two institutions normally arise when traditional leaders allocate land for purposes of building a mall, filling station or any development of significance on land that is under the jurisdiction of the municipality, without consulting the relevant municipality. Such decisions may ultimately conflict with the municipality's land use scheme. In such a scenario, the allocation of that land to a private developer might cause conflict because the development could affect an adopted integrated development plan, land use scheme and the municipal spatial development framework of the municipality. In other words, even if the municipality is consulted, it could still end up having to deal with a development it did not plan for in terms of installing services such as roads, sewerage and storm-water infrastructure, electricity, and refuse removal, as mentioned in Chapter Three.[20]

On the other hand, points of friction or conflict can arise when the municipality, guided by its integrated development plan, municipal spatial development framework and bound by its land use scheme, authorises the construction of a mall or filling station or any other development on land that is under the control of a traditional authority without consulting the concerned traditional leadership. In such a scenario, the traditional leader, acting in terms of customary law, may block the development on the basis that the land is under its control as a traditional leader and thus must be consulted before any development may take place. Practically, the traditional leader may block the development for a number of reasons, namely because it could significantly change the rural character of the traditional area, significantly reduce grazing land for livestock, or bring new people into the area without the requisite permission of the traditional authority. Ultimately, this means a proposed development on land that is under the control of the traditional leader requires that such a traditional leader must be consulted.

[20] Chapter Three, para 3.8.

Given that harmonisation of laws entails the removal of explicit conflict between two legal systems, the two examples outlined above are representations of explicit sources of conflict that would need to be addressed and eliminated in order for both the Eurocentric system of land use management and the customary system of land use management to continue to exist, while retaining their individual characters. This would ensure that both systems maintain their continued application despite operating in separate legal systems. This may therefore have the effect of placing both systems on an equal basis.

Essentially, unification and harmonisation of laws are similar in the sense that both are oriented towards establishing some level of integration of the different legal systems or some elements of these different legal systems. But unification and harmonisation have different fundamental aims. The former works towards complete unity in substance and detail, whereas the latter avoids complete uniformity and is primarily concerned with the functionality or operation of different legal systems within the same social field without conflict.

7.3.3 Legal integration

The third approach is legal integration. This involves the bringing together, under a single piece of legislation, framework or system, the different laws affecting a particular area, in order for the different systems to continue to exist and operate without conflict.[21] Legal integration embodies a practical approach to the question of unification, namely that unification can be achieved gradually by unifying rules where this is possible, and leaving the matters which cannot be unified to continue being regulated by each legal system.[22] The main difference between legal integration and harmonisation is that harmonisation is aimed at changing or improving the conditions for the operation of legal principles emanating from different legal systems which exist in a particular society.

In applying legal integration to the problem which this thesis investigates, both the Eurocentric system of land use management and the customary system of land use management will be brought together under a single piece of legislation, for example SPLUMA, in order for the different systems to continue to exist and operate without conflict. The legislation under which the two systems of land use management are integrated could include elements of each

[21] Van Reenen (1995) 277.
[22] Prinsloo M (1990) 327.

legal system's process of managing land use. This could be achieved gradually by unifying rules where this is possible, and leaving the matters which cannot be unified to continue being formally or informally regulated by each legal system.

Practically, this would mean that before a traditional leader allocates land and authorises the construction of a mall, filling station or any development of significance on land which is under the jurisdiction of the municipality, that traditional leader would need to first meaningfully consult the municipality. The municipality, even though guided by its integrated development plan, municipal spatial development framework, and bound by its land use scheme, would also need to meaningfully consult the relevant traditional leader before authorising the construction of a mall or filling station or any other development on land that is under the control of a traditional authority. In this way, the two systems of land use management would continue to exist and operate without conflict.

Legal integration would therefore allow for elements of the customary system of land use management to be integrated with land use management regulated by SPLUMA. However, in areas of the customary system of land use management where it is not possible for rules to be unified, these would continue to be informally regulated by the traditional system of land use management. Harmonisation and legal integration have similarities as blending instruments. In practice, under certain circumstances they may reinforce one another. For example, to ensure that stakeholders actually consult one another on specific land use management matters of mutual interest, harmonisation dictates that consultation must not take place spontaneously. It must be made compulsory through legislation or the intervention of the courts.

Harmonisation is designed to incorporate different legal systems under a basic framework, while legal integration is designed to incorporate different laws with regard to a particular area, for example land use management. This is done to ensure that the different legal systems continue to co-exist and cooperate without conflict. These are some of the approaches that the state could adopt to ensure that the laws of the different legal orders, existing within a shared normative space, might co-exist without any conflict or friction.

The following section examines the constitutional framework on traditional leadership and customary law, seeking to understand how the Constitution treats customary law. It analyses

whether opportunities for customary law to be blended with modern adaptations of Eurocentric laws are supported by the Constitution and the jurisprudence of the Constitutional Court. This analysis is important because SPLUMA gives expression to municipal planning. Also, SPLUMA regulates the land allocation powers of traditional leaders. Although SPLUMA provides guidance on how these two institutions may exercise their respective land use management powers, it does not provide substantial detail about how these roles may be executed in practice and within the confines of the Constitution. This study seeks to close that gap by seeking guidance from the Constitution itself and the jurisprudence of the Constitutional Court on customary law matters.

7.4 Constitutional framework on traditional leadership and customary law

Traditional leaders are recognised and permitted in the SPLUMA regulations to exercise their customary land use management power within its Eurocentric framework as was explained in Chapter Five.[23] In essence, what SPLUMA attempts to do is to blend the two systems of land use management administered by traditional leaders and municipalities in rural areas. The manner in which these two systems could blend will depend on which of the above blending approaches SPLUMA promotes or adopts. In order to understand which blending approach SPLUMA actually promotes or adopts, further analysis of the relevant provisions of SPLUMA and its regulations will be undertaken.

The question that needs to be answered is whether SPLUMA envisages unification, integration or harmonisation with regard to planning law and the customary law system of land use management. Before this question can be answered, it is important to first assess, as explained in Chapter Three, how the Constitution treats customary law and traditional leadership with reference to the relevant constitutional provisions, as well as the Constitutional Court's jurisprudence.[24]

Under the Interim Constitution, traditional leaders were permitted to continue to exercise their powers and functions under customary law and 'applicable laws'.[25] As explained in

[23] Para 5.4.
[24] Para 3.3.1.
[25] Bennet T & Murray C 'Traditional leaders' in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2013) 17.

Chapter Three,[26] one of the guarantees traditional leaders secured under the Interim Constitution was that the status of traditional leaders would be protected in the 1996 Constitution.[27] This guarantee was secured by way of Constitutional Principle XIII.1 of the Interim Constitution. This Constitutional Principle provided that the institution of traditional leadership of traditional leadership as determined by indigenous law was to be recognised and protected as discussed in Chapter Three.[28]

Although traditional leaders were permitted to continue exercising their powers and functions in terms of customary law and applicable law under the Interim Constitution, these powers and functions did not find expression in the 1996 Constitution. This was mainly because traditional leaders were not formally represented in the Constitutional Assembly which adopted the 1996 Constitution.[29] Nevertheless, the institution of traditional leadership was recognised and protected under the 1996 Constitution.

The 1996 Constitution deals with customary law and traditional leadership in two short sections which are tucked away under a chapter entitled 'Traditional leadership'.[30] According to Bennet and Murray, the terseness of chapter 12 reflects the dominant view of the members of the Constitutional Assembly that democracy, not traditional leadership, was to take precedence in South Africa.[31] To understand how the Constitution treats customary law and traditional leadership, this section focuses on the importance of section 211(1) in particular. This is because the provisions of chapter 12 were explained in detail in Chapter Three.[32]

Section 211(1) provides for the recognition of the institution, status, and role of traditional leadership according to customary law subject to the Constitution. However, what does section 211(1) actually mean when customary law powers, functions and systems intersect with municipal powers, functions and systems? Put differently, should the argument, as postulated by Bennet and Murray about democracy and not traditional leadership taking precedence in South Africa, translate into democratically elected municipalities assuming the exclusive and dominant role in land use management over traditional leadership in rural

[26] Para 3.2.
[27] Bennet T & Murray C (2013) 3.
[28] Para 3.2.
[29] Bennet T & Murray C (2013) 18.
[30] Diala A (2019) 28.
[31] Bennet T & Murray C (2013) 2.
[32] Chapter Three, para 3.3.1.

areas? Or can these institutions exercise their land use management powers under the same framework? In answering this question, it is essential to first examine the jurisprudence of the Constitutional Court on how customary law must be interpreted and treated under South Africa's democratic order.

7.4.1 Court judgments on customary law

Although there are numerous judgments of the Constitutional Court dealing with customary law,[33] this section will examine three judgments. Two of these cases, namely *Alexkor* and *Bhe,* deal with an approach that must be applied to any process or enquiry that deals with customary law. The approach developed by the Constitutional Court in the third case, *Maccsands,* will be used specifically to illustrate the way in which these two systems of land use management could be integrated in practice. A recent High Court judgment concerning the Ingonyama Trust Board (ITB) will also be examined to further illustrate the progressive development of customary law jurisprudence by the courts.

Apart from the *Certification* judgment which was discussed at length in the previous chapters,[34] it took a long time for cases involving customary law to be heard by the Constitutional Court. The first two cases were the 2003 *Alexkor* case, which addressed customary land rights,[35] and the *Bhe* case, which addressed customary succession and the inheritance rights of women and children.[36] The study now turns to analyse the first of these two cases, namely the *Alexkor* case.

7.4.2 Alexkor approach in dealing with customary law

The *Alexkor* case concerned a claim for restitution of land by the Richtersveld Community under the provisions of the Restitution of Land Rights Act 22 of 1994. The Richtersveld is a large area of land situated in the north-western corner of the Northern Cape province.[37] For centuries it has been inhabited by what is now known as the Richtersveld Community. The application was launched by this community. The Richtersveld Community claimed that it was

[33] *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC), *Pilane and Another v Pilane and Another* 2013 (4) BCLR 431 (CC), *Sigcau v President of the Republic of South Africa and Others*, 2013 (9) BCLR 1091 (CC), *Mayelane v Ngwenyama and Another* 2013 (4) BCLR 415 (CC).
[34] Chapter Four, para 4.7.6.
[35] *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) BCLR 460 (CC) at para 51.
[36] *Bhe and others v Magistrate, Khayelitsha, and Others* 2005 (1) BCLR 580 (CC).
[37] *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) BCLR 460 (CC) at para 1.

dispossessed of ownership (under common law or indigenous law), or the right to exclusive beneficial occupation and use of its land. That dispossession included the right to exploitation of its natural resources after 19 June 1913, as a result of past racially discriminatory laws or practices.[38]

In its judgment, the Constitutional Court gave direction on how customary law must be interpreted and treated in our constitutional order. The Court held that while in the past indigenous law was viewed through the common law lens, it must now be viewed as an integral part of the law and an independent source of norms within the legal system. According to the Court, indigenous law, like all law, depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution.[39] This meant that, as the reasoning of the Court went, the courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights of our Constitution.[40]

According to the Court, the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. Additionally, the Court held that the Constitution, while giving force to indigenous law, makes it clear that such law has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation consistent with the Constitution and that specifically deals with indigenous law. As a result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.[41]

In explaining the nature of indigenous law, the Court stated that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life. The Court further held that in applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms.[42]

[38] *Alexkor* (2004) 4.
[39] *Alexkor* (2004) 51.
[40] *Alexkor* (2004) 52.
[41] *Alexkor* (2004) 53.
[42] *Alexkor* (2004) 53.

Throughout its history it has evolved and developed to meet the changing needs of the community, and it will continue to evolve within the context of its values and norms consistently with the Constitution.[43] In conclusion of its approach on how to deal with indigenous law, the Court cautioned against the dangers of looking at indigenous law through a Eurocentric common law prism. This is because the two systems of law developed in different situations, under different cultures and in response to different conditions.[44]

It is submitted that the main takeaway from this judgment is that indigenous/customary law and by extension the norms governing its processes, systems including the land use management system are not a fixed body of classified and easily ascertainable rules. This means municipalities have to collaborate with traditional leaders and learn these rules which govern their system of land use management in order to better accommodate and understand the customary system of land use management administered by traditional leaders.

The next section examines the second case dealing with how customary law must be viewed and interpreted in South Africa's democratic order, namely the *Bhe* case.

7.4.3 Bhe approach in dealing with customary law

The *Bhe case* concerned customary succession and the inheritance rights of women and children. This case builds on the approach laid down by the Constitutional Court in the *Alexkor* case in interpreting customary law. In its judgment, the Court explained the approach that must be followed when dealing with customary law. The Court stated that the Constitution itself envisages a place for customary law in our legal system. The Constitution puts it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution.[45]

The Court further held that section 39(3) of the Constitution states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by customary law as long, as they are consistent with the Bill of Rights. Finally, according to the Court, section 211 protects those institutions that are unique to customary law. It follows from

[43] *Alexkor* (2004) 54.
[44] *Alexkor* (2004) 56.
[45] *Bhe and others v Magistrate, Khayelitsha, and Others* 2005 (1) BCLR 580 (CC) at para 41.

this that customary law must be interpreted by the courts in a manner that is consistent with the contents of the Constitution. It is protected by and subject to the Constitution.[46]

Furthermore, the Court stated that it is for this reason that an approach that condemns rules or provisions of customary law merely on the basis that they are different to those of the common law or legislation would be incorrect. According to the Court, this approach avoids the mistakes which were committed in the past in which the Courts interpreted customary law through the prism of the common law rather in its own setting.[47] Importantly for this thesis, the Court explained the positive aspects of customary law which, in the words of the Court, 'have long been neglected'.[48] The Court held that the inherent flexibility of the system is one of its constructive facets.

Also, according to the Court, customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements. Nor are these aspects useful only in the area of disputes. They provide a setting which contributes to the unity of family structures and the fostering of co-operation. The Court concluded by asserting that these valuable aspects of customary law more than justify its protection by the Constitution.[49]

It is submitted that the key takeaway from this judgment should be how important a consensus-seeking, resolution orientated process is to those that observe and live by the rules of customary law. This implies that traditional leaders as the custodians of customary law must always find and follow ways which will achieve consensus rather than contestation. This is particularly applicable to the current tensions between traditional leaders and municipalities. If, suggestions, proposals and solutions which seeks to diffuse the tension are put forward, traditional leaders have the right to apply their minds to these suggestions, proposals and solutions in the interest of achieving consensus in the end.

The next section analyses the implications of the principles emanating from the *Ingonyama Trust Board* case on the roles of traditional leaders and municipalities in land use management.

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[46] *Bhe* (2005) 41.
[47] *Bhe* (2005) 43.
[48] *Bhe* (2005) 48.
[49] *Bhe* (2005) 45.

7.4.4 The approach in the Ingonyama Trust Board case

A recent judgment concerning the Ingonyama Trust Board (ITB) addresses, amongst other things, the control of land by traditional leaders in KwaZulu-Natal in terms of customary law under the policy direction of the ITB. While the judgment does not specifically deal with the exercise of land use management powers by traditional leaders and municipalities, it does, however, offer guidance about the parameters within which traditional leaders, including the ITB, must exercise their land allocation powers as derived from customary law in democratic South Africa. The approach adopted by the Court in this case is consistent with the approach that was formulated by the Constitutional Court, particularly in the two cases discussed above that dealt with customary law in the early 2000s. This approach first locates the proper place of customary law in our constitutional order, and thereafter sets the parameters within which all powers under customary law must be exercised in democratic South Africa. In the context of this thesis, one of those powers include the power to allocate land and manage land use in rural areas.

The applicants in this case launched an application to the Court seeking a declaratory order declaring that the Ingonyama Trust Board (Trust) acted unlawfully and unconstitutionally in cancelling the Permissions to Occupy (PTO) rights and concluding residential lease agreements with holders of PTOs.[50] The Board took this decision in April 2007, where it decided that PTOs should no longer be issued and that the then existing PTO rights in land should be converted to lease agreements for both business and residential purposes. Occupants would have to pay rent to remain entitled to live on the land. The Board designated this project 'the PTO Conversion Project'. The Trust and the Board communicated to the public, through its official website,[51] that PTOs would be granted until April 2007, and would only be issued in future in exceptional circumstances as they afford limited security for funding and registrable interests.

The Board provided further reasons in support of this decision in its Annual Report of 2011/2012. The Board stated that it was abolishing PTOs because PTOs were a 'racially based form of land tenure' that were 'weak in law'.[52] In order to curb the weakness in the system of

[50] *The Council for the Advancement of the South African Constitution v The Ingonyama Trust Board* (2021) 3 All SA 437 (KZP) at para 1.
[51] See www.ingonyamatrust.org.za (accessed 9 February 2021).
[52] *The Ingonyama Trust Board* (2021) 12.

indigenous tenure allocations, the Board concluded that the system had to be upgraded to a system which supported the issues underpinning traditional practice, and that 'the closest it could come to was the lease'. As from April 2007, the Trust insisted that 'all new tenure applications should be leases' and that the PTOs had to be upgraded to leases. The Board advanced three reasons for this decision. The first was that 'a PTO remains the aberration from the racially based land tenure'. The second was that the PTO was vulnerable. The third was that PTOs are uneconomic and unsustainable, in that a PTO holder is only liable to pay R48 per annum forever, irrespective of the size and the use of the land.

The applicants argued that the Trust had over a period of time been undermining the security of tenure of the residents and occupiers of Trust-held land in KwaZulu Natal. This was done by way of extracting money from the residents to pay rent so as to continue living on the land. Essentially, the applicants' contention was that the Trust and the Board's conclusion of leases with beneficiaries and residents of Trust-held land was unlawful and unconstitutional because these beneficiaries and residents were the true and ultimate owners of such land.[53]

According to the applicants, the conclusion of leases had the effect of depriving them of their customary law rights in the land in question. Therefore, the primary issue which the Court had to determine was whether the conduct of the Board and the Trust in concluding residential lease agreements with persons living on Trust-held land who were PTO rights holders was unlawful and unconstitutional or not.[54] After considering the arguments advanced by both parties, the Court ruled that the Trust and the Board had acted unlawfully and unconstitutionally by contravening the Trust Act, in terms of which they are required to administer the Trust for the benefit, material welfare and social well-being of the beneficiaries and residents of Trust-held land.

The Court held that the conduct of the Trust and the Board in inducing the residents to conclude lease agreements, without giving them proper notice of the nature of the agreements and their effect on their existing rights, also violated their right to procedural fairness.[55] Ultimately, the High Court found that the conduct of the Trust and Board was unlawful and unconstitutional. The Ingonyama Trust and the Ingonyama Trust Board were

[53] *The Ingonyama Trust Board* (2021) 15.
[54] *The Ingonyama Trust Board* (2021) 75.
[55] *The Ingonyama Trust Board* (2021) 105.

granted leave to appeal to the Supreme Court of Appeal against the judgment on 17 May 2022. The Supreme Court of Appeal has since dismissed with costs an application by the Ingonyama Trust Board for leave to appeal the Pietermaritzburg High Court ruling.

What is particularly relevant for this thesis is what the Court stated regarding customary law rights as they pertain to land that is under the control of the ITB. The Court asserted that the ITB does not have the exclusive right to own, control and regulate Trust-held land, nor does it have the unfettered right to deal with such land. A similar argument was made by the author of this study in Chapter Two.[56] The Court further stated that the Trust and the Board, in the execution of their functions and the exercise of their powers in terms of the Trust Act, must act within the parameters of such Act, indigenous law, any applicable law and the Constitution. The Trust and the Board may therefore, according to the Court, not exercise any power or perform any function beyond that which is conferred on them by the law.

While the judgment concerns the relationship between rural residents and the ITB regarding the control of customary law rights in Trust-held land, it is submitted that some of the findings of the Court are relevant in so far as understanding the proper role municipalities and traditional leaders could play in land use management in rural areas. For this topic, two important principles can be extracted from the judgment. First, the Court makes it clear that the flawed thinking that ITB has the exclusive right to own, control and regulate Trust-held must end as was argued in Chapter Two.[57] Secondly, the ITB should perform its functions and powers within the parameters of the applicable legislation, indigenous law and the Constitution.

In applying the two principles to the relationship between traditional leaders and municipalities regarding the management of land use in traditional areas, it would be important for both institutions to first accept and recognise that neither institution has the exclusive or sole authority over the management of land use in rural areas. Secondly, both institutions should accept and recognise that their land use management powers and functions must be exercised within the parameters of the applicable planning-by laws, indigenous law, SPLUMA and the Constitution. Broadly construed, these principles envisage

[56] Chapter Two, para 3.4.
[57] Chapter Two, Para 2.6.

the gradual integration of the land use management roles of these two institutions of government.

The following section examines the *Maccsands* case to determine whether the approach laid down by the Constitutional Court in this judgment can possibly be used to integrate the two systems of land use management.

7.4.5 The approach in the Maccsands case

It should be pointed out that this judgment has nothing to do with traditional leaders. However, it could be used to facilitate the process of legal integration within the area of land use management. In other words, it will be argued that the principles extracted from the judgment may be used to argue for legal integration of the customary system of land use management in rural areas administered by traditional leaders, and the Eurocentric system of land use management administered by municipalities.

In *Maccsands*, the dispute was between the City of Cape Town and Maccsands. Maccsands is a mining company that wanted to mine for sand in Mitchells Plain, Cape Town. In October 2007, the Minister for Mineral Resources, acting in terms of section 27 of the Mineral and Petroleum Resources Development Act of 2002 (MPRDA), granted a mining permit to Maccsand. This permit authorised Maccsands to conduct sand mining for a period of two years.[58] However, the land on which this mining activity would take place was zoned as public open space by the City of Cape Town. This meant that, unless the land was appropriately rezoned, it could not be used for mining. In February 2009, Maccsands commenced mining operations on the Rocklands dunes. The City, which was obliged to ensure compliance with the Land Use Planning Ordinance (LUPO), instituted proceedings in the High Court for an interdict restraining Maccsands from mining sand on the dunes until the dunes were rezoned to allow mining.[59]

Before the High Court, both the Minister for Mineral Resources and Maccsands contended that LUPO does not apply to land used for mining. The High Court rejected this argument and held that LUPO does apply to land used for mining. Unhappy with this decision, Maccsands

[58] *Maccsands* (2012) 20.
[59] *Maccsands* (2012) 20.

and the Minister for Mineral Resources appealed to the Supreme Court of Appeal.[60] They argued that a land use authorisation in terms of LUPO was unnecessary where a mining right or permit had been issued in terms of the MPRDA. Having considered the objects of LUPO and the MPRDA, the Supreme Court of Appeal held that these pieces of legislation operate alongside each other. The Court held further that a holder of a mining right or permit cannot proceed to mine unless LUPO permits mining on the land concerned.[61]

It is against these consecutive defeats by the City of Cape Town that Maccsand*s* decided to further appeal the matter to the Constitutional Court. In this Court, the principal issue which had to be determined was whether the fact that Maccsands had obtained a mining licence obviated the need for it to obtain municipal land use approvals. Maccsands, supported by the Minister for Mineral Resources, argued that the granting of a mining licence trumps municipal authority over 'municipal planning'. National government's exclusive authority over mining, so the argument went, would be usurped by the municipality, if it needed to first obtain municipal approval before mining operations could commence.[62] In response, the Court held that, because LUPO regulates the use of land and not mining, there is no merit in the assertion that it enables municipalities to usurp the functions of national government. All that LUPO requires is that land must be used for the purpose for which it has been zoned.[63]

The Court further held that the Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But, because these powers are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges these spheres of government to cooperate with one another in mutual trust and good faith and to co-ordinate actions with one another.[64]

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[60] *Maccsands* (2012) 24.
[61] LUPO, as provincial legislation, was originally applicable in the Eastern Cape, Northern Cape and Western Cape provinces. However, LUPO has been repealed in the Northern Cape and Western Cape by the following provincial legislation, namely the Northern Cape Planning and Development Act, 1998 and the Western Cape Land Use Planning Act, 2014. Recently, LUPO was officially repealed in the Eastern Cape by the Repeal of Local Government Laws (Eastern Cape) Act 1 of 2020, which commenced on 17 December 2020. LUPO existed pre-SPLUMA.
[62] *Maccsands* (2012) 47.
[63] *Maccsands* (2012) 46.
[64] *Maccsands* (2012) 47.

In addition, the Court reasoned that it is permissible in our constitutional order for mining in this case to not take place until the land in question is appropriately rezoned. It is proper for one sphere of government to take a decision whose implementation may not take place until consent is granted by another sphere, within whose area of jurisdiction the decision is to be executed. If consent is, however, refused it does not mean that the first decision is vetoed. The authority from whom consent was sought would have exercised its power, which does not extend to the power of the other functionary. This is so, in spite of the fact that the effect of the refusal in those circumstances would be that the first decision cannot be put into operation. This difficulty may be resolved through cooperation between the two organs of state, failing which, the refusal may be challenged on review. Accordingly, the appeal according to the Court had to fail for these reasons.[65]

7.4.6 Key principles of the approach of the Constitutional Court

Given that the ITB case follows the approach to customary law that was laid down in the *Alexcor* and *Bhe* cases, it is appropriate in the context of this thesis to consolidate the four judgments to extract some of the relevant principles. As stated earlier, the approaches laid down in the four cases taken together provide guidance in not only ascertaining the proper place that customary law, and by extension the customary system of land use management, occupies in South Africa's constitutional system, but also the way in which these two systems of land use management may be integrated in practice.

First, customary law is subject to the Constitution. It has to be interpreted in the light of the values and the Bill of Rights of the Constitution. Secondly, customary law must not be viewed through a common law lens; it must be seen as an integral part of the law and an independent source of norms within the legal system. Thirdly, customary law is not a fixed body of formally classified and easily ascertainable rules. It constantly evolves and develops to meet the changing needs of the community. Fourth, these two systems, namely common law and customary law, must be viewed and interpreted within their respective contexts. This is because the two systems developed in different situations, under different cultures, and in response to different conditions.

[65] *Maccsands* (2012) 51.

Next, the inherent flexibility of customary law is one of its constructive facets, one which provides excellent opportunities for the resolution of disputes and disagreements and for fostering cooperation. Sixth, traditional leaders do not have the exclusive right to own, control and regulate communal land, nor do they have the unfettered right to deal with such land. Lastly, traditional leaders should perform their functions and powers within the parameters of the applicable legislation, indigenous law and the Constitution.

It is submitted that the overall effect of these principles points towards the constitutional elevation of the institution, status and role of traditional leadership in democratic South Africa, particularly within the area of land use management. The acknowledgment of customary law as an integral part of the law and an independent source of norms means that these norms must be given effect to in any process or enquiry that deals with customary law, but subject to the Constitution. Although the Eurocentric system of land use management administered by municipalities is based on a fixed body of classified rules, the African customary law system of land use management is based on unwritten dynamic rules which change when the people who live according to this system change their patterns of life. Therefore, attempts to codify the entire set of rules governing the customary system of land use management, in order to ensure legal certainty and predictability, must be done in a manner which will not reduce this dynamic and evolving system of land use into a body of formally classified and static rules.

In this way, the customary system of land use management is still provided with an opportunity to develop continuously and to adapt itself to changing circumstances. The inherent flexibility of customary law in general may also find its way into the system of land use management administered by traditional authorities. This, therefore, presents both municipalities and traditional authorities with an opportunity to resolve disputes that have occurred, and also to prevent disagreements that may occur as a result of the operation of these two systems of land use management within the same jurisdiction.

However, the extent to which these principles may be realised in practice depends on the application of one of the three approaches that were outlined earlier, namely unification,

integration and harmonisation.[66] Each approach can be used to some extent to blend the rules of these two systems of land use management so that they co-exist and avoid conflict.

The main statute that seeks to blend the customary law system of land use management with the Eurocentric system of land use management within a framework of Western values is SPLUMA.[67] As will be explained in detail below, at first glance it appears as if SPLUMA follows the approach of legal pluralism. This is because it recognises the land use management authority of both municipalities and traditional leaders. Furthermore, it provides details, albeit insufficient, about how these two institutions may exercise their authority over land use management within the same jurisdiction. However, it is suggested that a closer reading of the Act in its entirety, including its regulations, reveals not the preservation of legal pluralism, but rather an intention to integrate the customary law system of land use management. In order for legal integration to be achieved, areas that might give rise to conflict or discord will have to be identified.

Although these areas could be identified, it is submitted that the starting-point in facilitating legal integration in the area of land use management is to first answer two important legal questions. First, does the power of municipalities to manage land use throughout the Republic trump or obviate the power of traditional leaders to manage land use in areas governed by traditional leaders, similar to the argument of national government in *Maccsands*? Secondly, can both these organs of state exercise their land use management authority within the same area? The following section addresses these questions and proposes an approach that is borrowed from the *Maccsands* judgment. This approach can be used in practice to resolve or manage the contestation between traditional leaders and municipalities over the control of land use management in areas governed by traditional leaders.

7.4.7 Legal integration approach in spatial planning and land use management

It is submitted that the principles formulated by the Constitutional Court in the *Maccsands* judgment can be relied upon for the legal integration approach to be used to practically blend the two systems of land use management administered by traditional leaders and municipalities respectively. First, it is clear from the judgment that the approach of the

[66] Chapter Five, para 5.5.
[67] SPLUMA regulations in GN 239 *GG* 38594 of 23 March 2015.

Constitutional Court is that, when two organs of state each have power over land use on the basis of their constitutional authority, they may both exercise that authority, and the one does not displace or trump the other. The developer 'simply' needs to obtain both approvals from the relevant authorities, as shown in earlier practical examples. In the context of this thesis, the relevant authorities should be taken to refer to municipalities and traditional leaders.

The first question was whether the power of municipalities to manage land use throughout the Republic trumps or obviates the power of traditional leaders to manage land use in the areas they govern. In answering this question, it is submitted that this may be interpreted to mean that the exercise of land use management powers by municipalities does not trump or displace the exercise of the same by traditional leaders. In applying this principle specifically to the context of this thesis, this means that sometimes the exercise of powers by two organs of state may result in an overlap, as is the case with traditional leaders and municipalities with respect to land use management in areas governed by traditional leaders. When this happens, neither organ of state is usurping the land use management power of the other. Each organ of state would therefore, be exercising power within its own competence. It is proper for one organ of state, namely a municipality, to take a decision whose implementation may not take place until consent is granted by another of organ of state, namely a traditional leader within whose area of jurisdiction the decision is to be implemented.

This then answers the second question in the affirmative, as to whether both organs of state may exercise their land use management powers within the same area. Additionally, this approach also lends credence to the submission that was made earlier regarding what must happen if a particular land use decision made by a traditional leader is not consistent with the municipality's land use scheme.[68] It was argued that, in such a scenario, it is open for the municipality to decide whether the land use scheme could be amended to accommodate the land use or not.

Two possibilities present themselves in this regard. Firstly, a land allocation decision taken by the traditional leader is permitted, irrespective of whether that decision goes against the land use scheme of a municipality. Secondly, a traditional leader could also block a proposed development if the municipality were to rezone land within the leader's area of jurisdiction

[68] Chapter Five, para 5.4.

without being issued with a proof of land allocation undertaken by the traditional leader in terms of customary law applicable in that community.

In summary, the principles outlined above can be used, amongst other things, to support the legal integration process of the two systems of land use management administered by municipalities and traditional leadership respectively in areas governed by traditional leadership. The next section analyses one of the main objectives of SPLUMA, namely to create a uniform system of land use management throughout the country as discussed in Chapter Five,[69] and argues that this objective actually aligns with the integration of these two systems of land use management.

7.5 Legal pluralism in SPLUMA: Approaches and instruments

This section will analyse some of the relevant, specific legal provisions of both SPLUMA and the Local Government: Municipal Structures Act. The analysis of the provisions of SPLUMA is undertaken for two reasons. First, it will assist in answering whether SPLUMA envisages unification, integration or harmonisation with regard to planning law and customary law. The answer to this question may have important consequences for how the courts interpret SPLUMA and its regulations, insofar as it relates to the nature and extent of the role traditional leaders can play in the management of land use in rural areas. Secondly, the assessment of the intersection of the roles of traditional leaders and municipalities in land use management cannot take place without first analysing some of the relevant provisions in SPLUMA and its regulations, which address the matter.

A good starting-point for this analysis is the preamble of SPLUMA, in which it is stated, among other things, that one of the purposes of the Act is to create a uniform system of spatial planning and land use management throughout the Republic.[70] The preamble also states that the Act seeks to address the issue of informal and traditional land use development processes being poorly integrated into formal systems of spatial planning and land use management.[71] This is an indication of the important role traditional authorities, as one of the organs of state, can play in driving the implementation of the Act in rural areas. It is therefore clear from the

[69] Para 5.2.
[70] Preamble (2013) of SPLUMA.
[71] Preamble (2013) of SPLUMA.

onset that the objective is to create a single, uniform system of planning that will integrate formal, informal and traditional land development processes.

7.5.1 Traditional leaders and municipal spatial development frameworks

SPLUMA elaborates on how this objective may be achieved in section 2 when it declares that the Act 'applies to the entire area of the Republic', including areas under the authority of traditional leadership.[72] In the development principles set out in section 7 of the Act, it is mandated that both spatial development frameworks and land use management systems must be applicable to former homeland areas, as explained earlier in this chapter.[73] It is submitted that these spatial development frameworks and land use management systems should not be rigid, but rather flexible and constantly reviewed to meet the changing needs of rural communities. In this regard, SPLUMA demands that the creation of a single uniform system of planning should include customary systems of land use management in the integration process. The Minister also has a role to play in this process as he or she is mandated by SPLUMA to consult organs of state at provincial and local level to prescribe norms and standards for land use management and land development. These norms and standards must, among other things, promote rural revitalisation.[74] Traditional leaders are among these stakeholders that can play a role in rural revitalisation in partnership with municipalities.

Section 12(1)(h) of SPLUMA spells this out in more detail, confirming that all spatial development frameworks must include areas under traditional leadership, and address their inclusion and integration as explained earlier in this chapter.[75] SPLUMA obliges municipalities to continuously engage traditional leaders to express their views when these spatial development frameworks are developed, especially when their areas will be earmarked for possible developments. Furthermore, section 24(2) requires that every municipality's land use scheme must include provisions that permit the incremental introduction of land use management and regulation in areas under traditional leadership.[76] What these provisions emphasise is not only the notion of integrating areas, but also the formal and informal land

[72] Section 2 of SPLUMA,
[73] Section 7(a)(iv) of SPLUMA.
[74] Section 8(1)(b) of SPLUMA.
[75] Chapter Five, para 5.3.2.
[76] Section 24(2) of SPLUMA.

use management systems applicable in these areas which are administered by traditional leaders. In sum, the inclusion of areas under traditional leadership should be guided by the involvement of traditional leaders in the preparation and development of municipal spatial development frameworks.

7.5.2 Municipal executive authority and land use schemes

SPLUMA provides for measures to address the co-existence between a municipality and a traditional authority. This is particularly important when it comes to taking decisions regarding land use management on land administered by traditional leaders in terms of customary law, but situated within the area of the municipality.[77] Section 23 of SPLUMA deals with the role of the executive authority of the municipality. Depending on what system the municipal council has put in place, SPLUMA defines the executive authority of a municipality as one of the following:

- the executive committee;
- the executive mayor or where, neither of these two has been appointed; or
- a committee of councillors.

SPLUMA allocates an overarching responsibility to the executive authority to:

- provide general policy and other guidance in the development, preparation and adoption of its land use scheme; and
- provide such guidance, and monitor and oversee the work of the officials in the land use scheme.[78]

The manner in which the executive authority of a municipality carries out the overarching responsibility that SPLUMA places on it may influence how traditional leaders perceive and understand land use schemes. Traditional leaders have the right to participate in the development and preparation of a land use scheme of a municipality. In addition, traditional leaders that observe a system of customary law in the area of a municipality, may participate in the proceedings of the council of that municipality, and those traditional leaders must be

[77] Laubscher N, Hoffman L & Drewes E *SPLUMA: A Practical Guide* (2017) 138.
[78] Section 23 of SPLUMA.

allowed to attend and participate in any meeting of the council in terms of the Local Government: Municipal Structures Act.

It would be beneficial for traditional leaders if the executive authority would, as part of its general policy, direct municipal officials to explain what the land use schemes entail to traditional leaders, in a language that they speak and fully understand. One of the ways to ensure that this is done would be for members of the executive authority to provide clear guidance on the formulation of information packs containing this information. Allow traditional leaders to speak and ask questions they may not be clear on at these meetings, communicate meeting dates timeously and accurately summarise submissions made by traditional leaders and consider the completed submissions of traditional leaders when developing and preparing land use schemes. The next step would be for the executive to monitor the work of the officials during these engagements and see to it that positive outcomes are achieved.

The next section delves deeper into the relationship between traditional leaders and land use schemes. As has been discussed before, this is because, under the customary system of land management, traditional leaders exercise a form of land use management powers in terms of which land use rights are determined, conferred and controlled in a similar way to that of the land use scheme.

7.5.3 Traditional leaders and land use schemes

As discussed earlier in this chapter,[79] the indigenous system of land use management, which forms part of the wider communal tenure regime governing access to and use of rights to land, shares some elements with the Eurocentric system of planning established by SPLUMA, which includes land use management. It is submitted that, whether a particular system of land use management consists of codified or unwritten rules, this does not mean that the systems are entirely different to one another in terms of their functional elements, or what they are designed to regulate or control. A case in point is the land use scheme. Some of the key instruments of these two systems of land use management are arguably similar. This may significantly boost the role and participation of traditional leaders in municipal councils and enrich their understanding of land use schemes and MSDF by relating the system of land use

[79] Para 5.3.5.

management administered by municipalities to their own system of land use management system.

The following section will analyse the participation of traditional leaders in the municipal council with regard to their roles in the decision-making processes of the different municipal organs by referring to some of the specific legal provisions.

7.5.4 Participation of traditional leaders in the municipal council

The participation of traditional leaders in municipal councils is governed by section 81(3) of the Local Government: Municipal Structures Act of 1998, as was discussed in Chapter Four.[80] Section 81(3) provides that a traditional leader must be given an opportunity to express a view before the municipal council takes a decision on any matter directly affecting the area of the traditional authority.[81] In the context of this thesis, traditional leaders, in terms of section 81(3), have the right to participate in the development, preparation and adoption of the land use scheme, MSDFs and other matters before the municipal council. However, there are municipal organs within the municipality apart from the municipal council that also have decision-making powers and some of these municipal organs have been introduced by SPLUMA while others have existed prior SPLUMA.

There are five different municipal organs that make decisions under SPLUMA, namely the municipal council, the municipality, the municipal planning tribunal, the executive authority of the municipality, and municipal officials. It is important to note that section 81(3) of the Structures Act applies only to decisions taken by the municipal council, or to matters that are before the council and which may directly affect the area of that traditional leader.

Before a decision is taken, traditional leaders must be afforded an opportunity to express their view on the development, preparation and adoption of the land use scheme, MSDFs and other council matters. Section 81(3) does not apply to decisions taken by the municipality, the municipal planning tribunal, the executive authority of the municipality and the municipal officials. This means that, in circumstances where a decision of these other municipal organs may directly affect the area of a traditional leader, the traditional leader concerned does not

[80] Chapter Four, para 4.8.3.
[81] Chapter Four, para 4.4.

on the basis of section 81(3) need to be provided an opportunity to express a view on the subject matter.

Does this then mean that, outside of section 81(3), there is no general need to consult traditional leaders before a decision which affects an area governed by a traditional leader is taken by one of these municipal organs? It is argued on the basis of the SPLUMA principles contained in section 7, particularly the principle of good administration, along with the objective of the Constitution that encourages participation of communities,[82] as well as the Local Government: Municipal Systems Act provisions on public participation that these municipal organs have a general duty to consult traditional leaders before a decision that affects the area of a traditional leader is taken.[83] This argument is based on the fact that the municipality, along with its municipal organs, is bound by the SPLUMA principle of good administration which supports an integrated approach to land development application processes that will be transparent and provide an opportunity to affected parties such as municipalities, traditional leaders and communities to make an input. Therefore, a municipal organ may not take a decision whose implementation may affect an area governed by a traditional leader without first consulting that traditional leader and the community he or she governs. It must be emphasised that these provisions support the legal integration of the systems of land use management administered by municipalities and traditional leaders respectively.

The following section will delve into the SPLUMA regulations. The SPLUMA regulations acknowledge the role traditional leaders play in land use management by proposing ways in which municipalities and traditional leaders may adopt an integrated approach when exercising their land use management authority in practice with the aim of developing rural communities.

[82] Section 152 (1)(e) of the 1996 Constitution of South Africa.
[83] Section 17 (1) (b) of the Systems Act of 2000.

7.5.5 Traditional leaders and land use management

7.5.5.1 Service level agreements and land use decision-making

In Chapter Five, sub-regulation 19(1) was introduced and briefly explained.[84] In this section, the intention and the resultant implications of sub-regulation 19 (1) are explained.[85] This sub-regulation provides that a traditional council may conclude a service level agreement (SLA) with the municipality in whose municipal area that traditional council is located. However, such an SLA is subject to the provisions of any relevant national or provincial legislation in terms of which the traditional council may perform such functions as agreed to in the service level agreement, provided that the traditional council may not make a land development or land use decision.[86]

It is submitted that sub-regulation 19(1) encourages traditional leaders to form working relationships with municipalities by entering into service level agreements. After entering into these service level agreements, the municipality may allocate certain functions to traditional leaders, provided those functions do not include making a land development or land use decision in terms of SPLUMA.[87] However, it is argued that this does not divest traditional leaders of their own authority to take land use or land development decisions in terms of customary law.

It can be argued that sub-regulation 19(1) worsens the problem by not setting out in a clearly defined manner the functions and powers of traditional leaders in SPLUMA or its regulations. SPLUMA and its regulations impact on the power of traditional leaders to allocate land. As explained earlier, this power is a form of land use management that is exercised by traditional leaders in rural areas, and is of deep and historical significance to the institution of traditional leadership.[88] It is therefore difficult to imagine which land use management functions traditional leaders would agree to carry out in terms of a service level agreement if those 'functions' do not involve some form of land development or land use decision-making in areas under their control.

[84] Para 5.4.
[85] Para 5.4.
[86] Sub-regulation 19(1) of the SPLUMA regulations.
[87] Sub regulation 19 (1) of the SPLUMA regulations.
[88] Chapter Five, para 5.5.

It is this exclusion from decision-making that fuels anger, confusion, distrust and conflict between traditional leaders and municipalities. Sub-regulation 19(1) is a form of legal pluralism that allows the customary law system of land use management to exist alongside the Eurocentric system of land use management based on zoning. However, as argued earlier in an earlier chapter,[89] the Eurocentric system of land use management appears to be the dominant one in that it defines the content of the customary system of land use management.[90] The dominance of the Eurocentric system of land use management over the tradtional causes tension between these systems in their application.

7.5.5.2 Customary law and decision-making

In this section, the study unpacks sub-regulation 19(2) of the SPLUMA regulations and its implications in the context of legal integration as was stated earlier in the chapter. It specifically examines what the sub-regulations entails and what it means for decisions taken by traditional leaders in terms of customary law. Sub-regulation 19(2) provides that, if a traditional council does not conclude a service level agreement with the municipality, as contemplated in sub-regulation 19(1), that traditional council is responsible for providing proof of the allocation of land in terms of customary law. This proof of land allocation is then provided to the applicant of a land development or land use application. The applicant will then submit it in accordance with the provisions of these regulations.[91]

In terms of sub-regulation 19(2), traditional leaders are given the option to not enter into service level agreements with municipalities. Therefore, traditional leaders may continue to allocate land use rights in terms of customary law. This is because sub-regulation 19(1) suggests at face value that, if traditional leaders enter into a service level agreement, whatever role they play will preclude them from taking land use or land development decisions. They are, however, required to provide proof of such land allocations to an applicant or developer, who must then submit that proof of a land allocation to the municipality in terms of the municipality's municipal planning by-law and SPLUMA regulations. In practical terms, this means that a person may not apply to the municipality without the proof of a land allocation from the relevant traditional leader. In other words, the municipal planning tribunal or the

[89] Chapter Five, para 5.5.
[90] Chapter Five, 5.5.2.
[91] Sub-regulation 19(2) of the SPLUMA regulations.

authorised official may not entertain an application if the traditional leader of the area where development is proposed has not provided its approval.

An argument can be made that the confirmation by SPLUMA, that traditional leaders retain their authority to manage land use and their role as custodians of communal land, suggests that traditional leaders should be viewed as the 'authorities of first instance' in terms of receiving a formal request for a land allocation from rural residents, developers or institutions. In the same vein, traditional leaders are obliged by the SPLUMA regulations to generate proof of a land allocation decision taken in terms of customary law, and to provide this to the applicant of a land development or land use application. The applicant will thereafter submit that proof of land allocation, in accordance with the provisions of the SPLUMA regulations and the relevant municipal planning by-law, to the municipality. Only then may the municipal planning tribunal or the authorised official decide on the land use or land development application. One of the criteria these municipal organs will apply in this regard is check whether the land allocation is consistent with the municipality's zoning scheme.[92] If that land allocation is consistent with the zoning scheme, then there would be no issue because the zoning scheme has the land use rights. However, if the land allocation is not in line with the zoning scheme, then a land development application must be submitted to the municipality. The municipality will thereafter check whether that development application is in line with the MSDF. The relevant municipal organ may determine whether 'site specific circumstances' exist in such a case and thus allow deviation from the MSDF, as was discussed earlier in this chapter.[93]

7.5.5.3 SPLUMA regulations and legal integration

While it was submitted earlier that sub-regulation 19(1) is a form of legal pluralism, it is argued here that sub-regulation 19(2) promotes legal integration. It does so by attempting to integrate the customary process of allocating land use rights by traditional leaders with the largely Eurocentric process of conferring land use rights in terms of SPLUMA. The effect of the legal integration of the two systems which SPLUMA envisages in terms of sub-regulation 19(2) is twofold. First, it confirms that traditional leaders retain their authority to manage land use in their areas of jurisdiction. It is this decision-making inclusion that should encourage

[92] Section 22(1) of SPLUMA.
[93] Chapter Five, para 5.3.

traditional leaders to work with municipalities and, vice versa, to realise the objectives of SPLUMA. Secondly, sub-regulation 19(2) preserves the role of traditional leaders as custodians of communal land. It is therefore incorrect to argue that SPLUMA seeks to destroy the institution of traditional leadership by attempting to usurp the role played by traditional leaders in land use management.

7.5.5.4 Conflicting land use management decisions

It is possible that land use decisions will be taken by municipalities and traditional leaders, which might conflict. This is primarily because these two organs of state exercise authority over the use and development of land within the same area in terms of two different land use management systems. This section analyses the inevitability of conflicting decisions and examines areas where this can potentially occur, as well as suggesting possible ways in which this conflict can be addressed.

SPLUMA makes it clear that no land may be used for purposes not permitted in the land use scheme.[94] What must happen if a land allocation made by a traditional leader is not consistent with the land use scheme of the municipality? It is proposed that the same process of determining whether the said land allocation by a traditional leader is consistent with the MSDF should also be applied with regard to land use schemes. Once proof of a land allocation made in terms of customary law has been provided to the municipality, the next step is for the municipality to ascertain whether that allocation is consistent with its land use scheme. If the allocation made by the traditional leader is not consistent with the municipality's land use scheme, an application must then be made to the municipality for a rezoning/amendment of the land use scheme.[95] If the municipality arrives at a decision that the land use scheme may not be amended to accommodate the land allocation, the development may not proceed.

On the other hand, what should happen in a case where the proposed development fits within the land use scheme of the municipality, but the traditional leader disagrees with the development? Is the traditional leader empowered to block the proposed development from going ahead? As the 'authority of first instance', a traditional leader can decide to oppose the proposed development by not issuing the developer or applicant with the required proof of

[94] Section 26 (2) (a) of SPLUMA.
[95] Section 28(1) of SPLUMA.

the land allocation. This means that the municipal organ charged with taking decisions on land use and land development applications, the municipal planning tribunal or the authorised official, may not entertain an application because one of the required approvals, traditional approval, is not obtained. This is an approach that is consistent with the objective of SPLUMA. This is to gradually integrate the rules of these two systems of land use management where possible, so that each institution is able to exercise its land use management authority in terms of its enabling rules.

7.5.5.5 Harmonisation of land use management decisions

It has been argued above that SPLUMA and its regulations pursue integration of these two systems of land use management by leaving the authority of both municipalities and traditional leaders intact. Additionally, the principle in the *Maccsands* judgment which states that, the exercise of authority by one sphere of government does not necessarily veto the exercise of authority by another sphere of government as sometimes the exercise of powers by two spheres of government may overlap. How can then integration be pursued practically? It is one thing to say that municipalities and traditional leaders may both take their own decisions but then how will things be streamlined in practice because that is a lot of hurdles for communities, residents and developers to go through. The key question is what can be done? This study submits that integration can be achieved in practice by way of harmonisation.

An important provision that can aid the process of integrating these two systems of land use management is section 30 of SPLUMA, which deals with the alignment of authorisations.[96] Section 30(1) provides that, where an activity requiring authorisation in term of this Act is also regulated in terms of another law, the relevant municipality and the organ of state empowered to authorise the activity in terms of the other law may exercise their respective powers jointly, by issuing separate authorisations or an integrated authorisation. In terms of this provision, both the municipality and traditional leaders may decide to either issue separate authorisations or an integrated authorisation.

Practically, this would mean that a developer or person approaches the traditional leader concerned to formally request to be allocated land. Once the traditional leader applies his or

[96] Section 30 of SPLUMA.

her mind to the request, follows the necessary customarly law norms and principles governing the land allocation process and therefore grants the applicant their request. The second leg of the process involves the applicant approaching the municipality, requesting the municipality to also grant its approval for the proposed development. It can be argued that this amounts to the issuing of separate authorisations as is envisaged by section 30 (1) of SPLUMA.

It is submitted that the issuing of separate authorisations fits into the legal integration approach. Under the legal integration approach, traditional leaders and municipalities may issue separate land use management authorisations in terms of customary law and a municipal planning by-law. The guiding framework for the issuing of these respective authorisations would be, for example, SPLUMA and its regulations. It cannot be doubted that both institutions can collaborate in the management of land use with a view to attract developments within their areas and provide job opportunities for rural residents.

7.6 Conclusion

The spatial planning and land use management framework established by SPLUMA contains a set of instruments that can be used by municipalities to discharge their planning duties. SPLUMA also provides development principles which must guide the decisions of all relevant organs of state that exercise land use management authority. In this chapter, it was argued that land allocation is a form of land use management, and that traditional leaders should exercise land use management authority when they make land allocation decisions. Therefore, as an organ of state that exercises land use management powers, traditional leaders are equally obligated by SPLUMA to consider these principles when making land use management decisions, in addition to the customary law principles, norms and values they would ordinarily follow. These principles do not each have to be applied rigidly in every land use case, but must sometimes be decided depending on the nature of each decision.

Since SPLUMA provides an overall planning framework, and does not deal with every aspect of planning, it can be expected that traditional leaders, through customary law, will add further land use management requirements to those that have been outlined by municipalities in municipal planning by-laws, or by provinces in provincial planning law. In areas that are not governed by traditional leaders, municipalities are the 'authorities of first

instance' in terms of receiving land use or land development applications. Thereafter the applicant or developer will forward the application to the municipality that will decide whether the municipal planning tribunal or a designated official should consider the land use or land development application and decide.

However, it was argued in the chapter that in areas that are governed by traditional leaders, traditional leaders should be the 'authorities of first instance' in terms of receiving formal requests for land allocations. It would be after the customary law process has been undertaken and concluded that the second process, the submission of the land use or land development application to the municipality would be activated. Including and complying with the additional requirements emanating from customary law will not only serve to elevate the status of the customary law system of land use management, but will also assist people to gain a better understanding of the orally-based system of land use management. In other words, the recognition of requirements which are derived from a traditional or indigenous source of law, and not only from adapted versions of Eurocentric sources of law highlights the existence of legal pluralism in rural areas.

This chapter has demonstrated how the SPLUMA planning framework contains several mechanisms through which traditional leaders and municipalities could perform their land use management duties in rural areas. It has been argued that these roles could be played effectively if both institutions perform their land use management mandates in an integrated system that provides clear directions and parameters concerning how each role should be performed. Through various practical examples, the chapter has illustrated how these roles could be played without clashes, by identifying the areas that could potentially give rise to conflict in the execution of these two overlapping roles.

The legal integration approach can be used to facilitate a shift away from legal pluralism towards the integration of these two systems of land use management. The chapter has outlined seven principles that were developed by the Constitutional Court. First, customary law is subject to the Constitution. It has to be interpreted in the light of the values and the Bill of Rights of the Constitution. Secondly, customary law must not be viewed through a common law lens; it must be seen as an integral part of the law and an independent source of norms within the legal system. Thirdly, customary law is not a fixed body of formally classified and easily ascertainable rules. It constantly evolves and develops to meet the changing needs of

the community. Fourth, these two systems, namely common law and customary law, must be viewed and interpreted within their respective contexts. This is because the two systems developed in different situations, under different cultures, and in response to different conditions.

Fifth, the inherent flexibility of customary law is one of its constructive facets, one which provides excellent opportunities for the resolution of disputes and disagreements and for fostering cooperation. Sixth, traditional leaders do not have the exclusive right to own, control and regulate communal land, nor do they have the unfettered right to deal with such land. Lastly, traditional leaders should perform their functions and powers within the parameters of the applicable legislation, indigenous law and the Constitution. Taken together, these principles first elevate the status of customary law. These principles can be used to support and guide the implementation of the legal integration approach in practice. The chapter has shown, through an analysis of the provisions of SPLUMA, that the legal integration approach is consistent with the objective and vision of SPLUMA to create a uniform system of planning.

This objective is further pursued by the SPLUMA regulations, particularly regulation 19. On the one hand, it was argued and concluded in this chapter that although sub-regulation 19(1) excludes traditional leaders from taking land use decisions in terms of SPLUMA, it does not, however, take away the power of traditional leaders to make land use management decisions in terms of customary law. On the other hand, it was found in this chapter that sub-regulation 19(2) promote legal integration when it permits traditional leaders to continue to exercise their land use management powers. The clarification of the role that traditional leaders can play under SPLUMA may also have a positive effect on their participation in municipal councils. The participation of traditional leaders in municipal councils in terms of the Municipal Structures Act will become even more significant and their voices will carry more weight, given the roles that they will play under the SPLUMA dispensation.

Lastly, the chapter has illustrated how the land use management decisions of traditional leaders and municipalities could be harmonised, as well as how conflicting land use management decisions should be approached and managed, both in terms of SPLUMA and customary law. In this regard, the chapter has suggested that both institutions must strive to adhere to implement the principles laid out in SPLUMA and those that are found in customary law in their quest to resolve and manage land use management disputes.

The next chapter draws the study to a close by setting out summaries of the previous chapters and the key research outcomes of each chapter. The chapter concludes with a set of recommendations targeted at resolving or managing the tension brought about by the implementation of SPLUMA in areas governed by traditional leaders.

Chapter Eight: Recommendations, and Conclusion

8.1 Introduction

The intersection of the role of traditional leaders in land allocation and the role of municipalities in spatial planning and land use management is an intriguing, fascinating and controversial topic. At the heart of this topic is a clash between the powerful forces of modernity and the resilience of the institution of traditional leadership. In other words, the topic deals with clashes between an imported, Eurocentric system of land use management based on zoning and administered by municipalities, and an indigenous Afrocentric system of land use management based on land allocation and administered by traditional leaders. It was shown in Chapter One how the exercise of these two powers under the SPLUMA dispensation in rural areas governed by traditional leaders gives rise to contestation between traditional leaders and municipalities. The aim of the study was to investigate the main reasons and causes of this contestation and examine the background to these reasons and causes.

The research has revealed a number of complex and deep-seated concerns and issues traditional leaders took an exception to during the development and roll-out of SPLUMA. Ultimately, the impact of these concerns and issues led traditional leaders to perceive SPLUMA as a piece of legislation that usurps the role of traditional leaders in land allocation and threatens the existence of the institution of traditional leadership. With that said, in the following section, the study outlines the recommendations of this study which should be seen as strategies that can be used to diffuse the contestation or atleast manage it. In conclusion, the study thereafter submits concluding remarks.

8.2 Recommendations

This study has brought to the fore some of the major underlying reasons for the contestation between traditional leaders and municipalities over the implementation of SPLUMA in areas governed by traditional leaders. This research must be understood as a contribution that aims to open doors for further research to be conducted, in order to investigate or advance the arguments and findings of this study. The issues identified in this study could be useful for the further investigation of other factors that contribute to the contestation but were not highlighted in this study.

The recommendations below should be seen as suggestions for creating a conducive environment for a meaningful, open and frank dialogue about what actually gave rise to this contestation. The recommendations below should also be seen as suggestions initiated in the spirit of creating a conducive environment for a negotiated, functional system of shared land use management authority between traditional leaders and municipalities in the countryside. Additionally, the study suggests that it is time that the difficult history of traditional leadership in seeking to understand the proper place of its power to allocate land in democratic South Africa be one which stimulates conversation and not contestation. This study contains some of the elaborate insights, proposal, solutions and recommendations in terms of how that difficult history can be overcome. The overall aim is to see SPLUMA being openly embraced and implemented by both traditional leaders and municipalities within an environment where both these institutions are able to co-exist harmoniously, with manageable differences.

It is also hoped that these recommendations will contribute towards the creation of a governance land use management framework that is underpinned by both customary law processes and municipal planning processes. This will assist in not only diffusing the contestation over SPLUMA, but also improving service delivery and development control in areas governed by traditional leaders. However, the first step in achieving this goal is by acknowledging and treating the two systems of land use management as equals in rural areas, otherwise the interests of the rural population are likely to remain forever unchanged.

Finally, it is envisioned that Parliament, the National, Provincial and Local Houses of traditional leadership, the Department of Agriculture, Land Reform and Rural Development, the Department of Cooperative Governance and Traditional Affairs, South African Local Government Association, rural municipalities and academics will find these recommendations useful in their quest to find ways for traditional leaders and municipalities to collaborate and implement SPLUMA as equal partners.

The following are recommendations that are based on the findings of this study:

i. *The national government must meaningfully engage the National House and Provincial houses of traditional leadership about SPLUMA.*

A key element in South Africa's tragic history is land dispossession. The spaces that both colonialism and apartheid created can only be regarded as spaces of injustice. There is also

the possibility that we can perpetuate the injustices of the past committed in the Bantustans/reserves. This context may arise in those instances where imposition continues to dominate the agenda. Spatial justice could be defined as the creation of space that is the outcome of human activity that is consistent with the prescripts of social justice. Land and its use are not separate or distinct from life or living. The management of these dynamics are controlled by the very people who subscribe to living customary law, for it is these very values, norms and worldviews that ultimately determine the shape of and form of the space that is occupied. Allocation and transmission of rights, including access rights, are the business of the resident community who are constitutionally free to pursue their custom or culture. Dialogue plays an essential role in all of these processes. Dialogue is essential as it is through this that people and their value are recognised. Failure to do so is a mark of disrespect.

What this study has noted as particularly concerning in this regard is the fact that the processes establishing SPLUMA at national level did not meaningfully engage the institution of traditional leadership. This fact has haunted the efforts to openly and officially secure the buy-in of traditional leaders at provincial and local levels. It is also important to note that orthodox spatial planning and land use management systems have not been applied historically in traditional areas for the benefit of rural residents. This means that there is considerable potential for persisting contestation, more especially if the national level continues to adopt a formalised top-down approach to the rural areas governed by traditional leaders.

Therefore, this thesis recommends that an attempt to diffuse the tension must first and foremost begin with meaningfully engaging the National House and Provincial houses of traditional leadership about SPLUMA and what it is that is sought to be achieved by the Act, and how it affects the institution of traditional leadership.

ii. Recognise traditional leaders as authorities of first instance in municipal planning by-laws.

SPLUMA recognises municipalities as the authorities of first instance in terms of receiving formal land use and land development applications. However, in traditional areas, the system of land allocation and land use management is administered by traditional leaders on behalf of the communities they govern. In this regard, the thesis recommends that traditional leaders

be recognised as the *authority of first instance* in the areas they govern, in terms of receiving formal land use and land development requests in the municipality's planning by-law. The word 'formal' in this context refers to the submission of a formal request for a land allocation by a person or a developer in accordance with customary norms and values. The said person or developer will first approach the headman or headwoman of the village and submit his or her formal land use or land development request for a land allocation. After a public participation process (*imbizo*) has been undertaken and other customary law requirements complied with, the traditional leader may then approve the formal request and allocate the person or developer the required land.

Once the land allocation request has been approved, the traditional leader is required by sub-regulation 19(2) of the SPLUMA regulations to generate proof of that land allocation made in terms of customary law. The traditional leader must thereafter give this proof of the land allocation to the person or developer who was allocated land. The said person or developer can then submit the application to the municipality in terms of the SPLUMA regulations.

It is submitted that the recognition of this position in law would aid the efforts of securing the buy-in of traditional leaders with regard to implementing SPLUMA and building a collaborative land use management relationship. This move would be in line with and give expression to sub-regulation 19(2) of the SPLUMA regulations, which recognise the role of traditional leaders in land use management and empower traditional leaders to take land use management decisions in terms of customary law. Importantly, this would give legislative recognition to the customary law practice of first approaching the traditional leader of a particular village when matters of land allocation and land management are concerned.

iii. Include traditional leaders as members/participants of the Municipal Planning Tribunals.

Many traditional leaders have argued that they are excluded from the Municipal Planning Tribunals (MPT). It is unclear where this claim originates from, because SPLUMA does not expressly exclude traditional leaders from being members of the MPT nor does it exclude them from participating in these decision-making structures. Therefore, this study recommends for municipalities that have not included traditional leaders as members/participants of the MPT in their by-laws to take a pro-active approach and dispel this notion of exclusion by inserting provisions in their municipal planning by-laws which

recognise the participation of a traditional leader in whose area the development will be undertaken in the MPT. In other words, within a particular area, it can happen that three or four traditional leaders govern certain villages falling within the municipal area. If that is the case, it is recommended that the municipality should include provisions in its planning by-law that will recognise the participation of those traditional leaders in whose area of jurisdiction the proposed development will take place.

Provincial governments can also contribute to this process by endorsing the participation of traditional leaders in the MPT in their provincial planning legislation. SPLUMA makes provision for an MPT to bring in advisors as and when it deems necessary. This is one possible channel through which traditional leaders could be invited into MPTs and participate in matters which concern their areas of jurisdiction.

iv. Traditional leaders and the SPLUMA principles

The five SPLUMA principles in section 7 of SPLUMA, namely those of spatial justice, spatial sustainability, efficiency, spatial resiliency, and good administration bind all spheres of government and state organs that exercise land use management authority. The institution of traditional leadership is an organ of state. Traditional leaders exercise some form of land use management authority, and therefore fall within the ambit of section 7. This study emphasises that traditional leaders must be made aware of and trained on the fact that they must adhere to the principles and that a system must be devised to enforce this. I.e. when traditional leaders take land use allocation decisions, they ought to be reviewable under the principles.

v. Capacitate traditional leaders to understand the meaning and benefits of land use schemes in municipal council meetings

Irrespective of whether a particular system of land use management consists of codified or unwritten rules, this does not mean that the systems are entirely different to one another in terms of their functional elements, or what they are designed to regulate or control. A case in point is the land use scheme. Some of the key instruments of these two systems of land use management, namely customary law system and the Eurocentric system of land use management are arguably similar. Capacitating traditional leaders to understand the meaning and objective of land use schemes may significantly boost the role and participation of

traditional leaders in municipal councils and enrich their understanding of land use schemes and MSDF by relating the system of land use management administered by municipalities to their own system of land use management system.

Furthermore, traditional leaders have the right to participate in the development and preparation of a land use scheme and the formulation of the MSDF of a municipality. It would be beneficial for traditional leaders if the executive authority would, as part of its general policy, direct municipal officials to explain what the land use schemes entail to traditional leaders in a language that they speak and fully understand. One of the ways to ensure that this is done would be for members of the executive authority to provide clear guidance on the formulation of information packs containing this information. Allow traditional leaders to speak and ask questions they may not be clear on at these meetings, communicate meeting dates timeously and accurately summarise submissions made by traditional leaders and consider the completed submissions of traditional leaders in developing and preparing land use schemes. The next step would be for the executive to monitor the work of the officials during these engagements and see to it that positive outcomes are achieved.

vi. Formulate a developmental beneficiation model between traditional leaders and municipalities.

At the heart of this contestation between municipalities and traditional leaders over the implementation of SPLUMA is the issue of resources. Traditional leaders argue that they will lose the livelihoods that they derive from land allocations if they support the implementation of SPLUMA, because SPLUMA empowers municipalities to deal with land management. This is a valid concern by traditional leaders given the confusion surrounding SPLUMA and the specific role it suggests traditional leaders may play.

To that end, this thesis recommends the formulation of a beneficiation model for traditional leaders and municipalities which will contribute to forging a land use management partnership between these two institutions. It is hoped that this beneficiation model, if agreed upon, may assist in mobilising traditional leaders to support the implementation of SPLUMA openly and officially. This beneficiation model could be in the form of a service level agreement or partnership agreement entered into by these two institutions in which developments could be undertaken on traditional land. The income on rent from a lease,

revenue generated from these developments such as rent, profit shares, fees etc could go to the community represented by the traditional leadership, and the municipality would receive its property rates and taxes.

This model would benefit the community, traditional leadership and the municipality. The specific statutes which would govern this agreement is SPLUMA and its regulations.

vii. Introduce shortened timelines for land use and land development applications in traditional areas.

Another valid concern which was conveyed by traditional leaders was that they did not trust SPLUMA and its associated processes. This in turn unduly delays the commencement of proposed developments and in some cases results in developers taking business opportunities elsewhere. In order to build trust in the processes of SPLUMA in managing land use and facilitating development, this thesis recommends that municipalities must introduce shortened procedures and timelines for development earmarked in areas that are governed by traditional leaders. This would assist to shift the perception that SPLUMA processes delay development instead of expediting it. Traditional leaders and rural communities are not so concerned about knowing in depth what spatial development frameworks and zoning schemes are, but rather focus on seeing the practical social benefits that these instruments can bring.

viii. Seven principles to guide and achieve legal integration in practice

The study recommends the use of seven principles to guide the achievement of legal integration as a way to deal with the contestation between traditional leaders and municipalities. These seven principles are distilled from four important judgments. Taken together, these principles provide guidance in not only ascertaining the proper place that customary law, and by extension the customary system of land use management occupies in South Africa's constitutional system, but also the way in which the land use management system administered by traditional leaders and municipalities respectively may be integrated in practice.

First, customary law is subject to the Constitution. It has to be interpreted in the light of the values and the Bill of Rights of the Constitution.

Second, customary law must not be viewed through a common law lens; it must be seen as an integral part of the law and an independent source of norms within the legal system.

Third, customary law is not a fixed body of formally classified and easily ascertainable rules. It constantly evolves and develops to meet the changing needs of the community.

Fourth, these two systems, namely common law and customary law, must be viewed and interpreted within their respective contexts. This is because the two systems developed in different situations, under different cultures, and in response to different conditions.

Fifthly, the inherent flexibility of customary law is one of its constructive facets, one which provides excellent opportunities for the resolution of disputes and disagreements and for fostering cooperation.

Sixth, traditional leaders do not have the exclusive right to own, control and regulate communal land, nor do they have the unfettered right to deal with such land.

Lastly, traditional leaders should perform their functions and powers within the parameters of the applicable legislation, indigenous law and the Constitution.

ix. Exercising land use management authority without conflict in practice

It is possible that land use decisions will be taken by municipalities and traditional leaders, which might conflict. This is primarily because these two organs of state exercise authority over the use and development of land within the same area in terms of two different land use management systems. It is recommended that the same process of determining whether the said land allocation by a traditional leader is consistent with the MSDF should also be applied with regard to land use schemes. Once proof of a land allocation made in terms of customary law has been provided to the municipality, the next step is for the municipality to ascertain whether that allocation is consistent with its land use scheme. If the said land allocation is consistent with the municipality's land use scheme, then there would be no issue. However, if the land allocation is inconsistent with the municipality's land use scheme, then a rezoning/amendment application would need to be submitted to the municipality.

Alternatively, if the municipality arrives at a decision that the land use scheme may not be amended to accommodate the land allocation, the development may not proceed.

On the other hand, what should happen in a case where the proposed development fits within the land use scheme of the municipality, but the traditional leader disagrees with the development? Is the traditional leader empowered to block the proposed development from going ahead? As the 'authority of first instance', a traditional leader can decide to oppose the proposed development by not issuing the developer or applicant with the required proof of the land allocation. This means that the municipal organ charged with taking decisions on land use and land development applications, the municipal planning tribunal or the authorised official, may not entertain an application because one of the required approvals, namely, a traditional approval, is not obtained. This is an approach that is consistent with the objective of SPLUMA. This is to gradually integrate the rules of these two systems of land use management where possible, so that each institution is able to exercise its land use management authority in terms of its enabling rules.

x. Aligning traditional and municipal land use decisions to achieve integration

Another issue which is prevalent in practice pertains to obtaining multiple approvals from organs of state located in different areas, including the amount of red tape a person has to overcome. SPLUMA seeks to address this issue through the integration of these approvals. An important provision that can aid the process of integrating these two systems of land use management is section 30 of SPLUMA, which deals with the alignment of authorisations. Section 30(1) provides that, where an activity requiring authorisation in term of this Act is also regulated in terms of another law, the relevant municipality and the organ of state empowered to authorise the activity in terms of the other law may exercise their respective powers jointly, by issuing separate authorisations or an integrated authorisation. In terms of this provision, both the municipality and traditional leaders may decide to either issue separate authorisations or an integrated authorisation.

8.3 Conclusion

The thesis in this chapter provided by a set of recommendations that are mainly practical in nature and designed to assist in diffusing the tension between traditional leaders and municipalities brought by the implementation of SPLUMA. It is without doubt that the

achievement of orderly planning and steady development in rural areas governed by traditional leaders must begin with traditional leaders and municipalities engaging in a meaningful dialogue. The provision of a meaningful opportunity to be heard is a sign of respect which municipalities and traditional leaders must strive to uphold and observe. If, that is achieved, whatever transpires at provincial or national level must not give rise to contestation at the local level where the implementation of service delivery takes place. In conclusion, meaningful engagements between traditional leaders and municipalities as equal partners can prevent the emergence of contestation. Municipalities and traditional leaders are allowed to agree to disagree, but in the interest of service delivery, such disagreements must be speedily resolved to ensure that the rural residents which they both have a duty to serve, are provided much needed services.

Bibliography

Case law

Alexkor Ltd and Another v The Richtersveld Community and Others 2004 (5) BCLR 460 (CC)

Bhe and others v Magistrate, Khayelitsha, and Others 2005 (1) BCLR 580 (CC)

Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996)

Certification of the Amended Text of the Constitution of the Republic Of South Africa, 1996 (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996)

City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal 2010 9 BCLR859 (CC)

Maccsand (Pty) Ltd v City of Cape Town and Others (CCT103/11) 2012 (7) BCLR 690 (CC)

Mayelane v Ngwenyama and Another 2013 (4) BCLR 415 (CC)

Pilane and Another v Pilane and Another 2013 (4) BCLR 431 (CC)

Shilubana and Others v Nwamitwa 2008 (9) BCLR 914 (CC)

Sigcau v President of the Republic of South Africa and Others, 2013 (9) BCLR 1091 (CC)

The Council for the Advancement of the South African Constitution v The Ingonyama Trust Board (2021) 3 All SA 437 (KZP)

Tongoane and Others v Minister of Agriculture and Land Affairs and Others (2010) 8 BCLR 741 (CC)

Books

Barley K *Methods of Social Research* 2 ed (1982) New York: The Free Press

Brookes H *A History of Native Policy in South Africa from 1830 to the Present Day* (1927) Cape Town: Nasionale Pers

Benjamin T *Encyclopaedia of Western Colonialism Since 1450* (2007) USA: Macmillan

Brynard Dirk J, Hanekom SX & Brynard P *Introduction to Research* (2005) India: Princeton Hall

Evans I *Bureaucracy and Race: Native Administration in South Africa* (1997) USA: University of California Press

Fagan BM *Southern Africa during the Iron Age* (1988) London: Thames and Hudson

Jingoes JA *Chief is a Chief by the People: The Autobiography of Stimela Jason Jingoes* (1975) Cape Town: Oxford University Press

Kerr J *The Customary Law of Immovable Property and of Succession* (1990) Grahamstown: Grocott and Sherry

Lodge T *Black Politics in South Africa Since 1945* (1983) Johannesburg: Ravan Press

Lugard F *The Dual Mandate in British Tropical Africa* (1929) Edinburgh: William Blackwood

Laubscher N, Hoffman L & Drewes E *SPLUMA: A Practical Guide* (2017) Cape Town: Juta

Mamdani *M Citizenship and Subject: Contemporary Africa and the Legacy of Late Colonialism* 2 ed (2018) New Jersey: Princeton University Press

Mason J *Qualitative Researching* (1996) Los Angeles: SAGE Publications

McAuslan P *The Ideologies of Planning Law* (1980) California: Pergamon Press

McMillan J & Schumacher S *Research in Education: A Conceptual Introduction* 4 ed (2003) Cape Town: Pearson

Maylam P *A History of the African People of South Africa: From the Early Iron Age to the 1970s* (1986) South Africa: St Martin's Press

Mouton J *The Practice of Social Research* (1998) Cape Town: Oxford University Press

Myers JC *Indirect Rule in South Africa: Tradition, Modernity, and the Costuming of Political Power* (2008) Cape Town: Boydell and Brewer

Patton M *Qualitative Evaluation and Research Methods* 2 ed (1990) USA: SAGE

Punch KF *Introduction to social research: Qualitative and quantitative approaches* (2005) London: SAGE Publications

Ritchie J & Lewis J *Quality in Qualitative Evaluation: A Framework for Civil Service* (2002) London: SAGE

Ross R A *Concise History of South Africa* (1999) Cape Town: Cambridge University Press

Schapera I *Native Land Tenure in the Bechuanaland Protectorate* (1943) Eastern Cape: Lovedale Press

Seale, G, Gobo G, Gubrium J & Silverman D *Qualitative Research Practices* (2004) London: SAGE

Steytler N & De Visser J *Local Government Law of South Africa* (2018) Cape Town: Juta

Thompson *A History of South Africa* (2001) New Haven, Connecticut: Yale University Press

Van Wyk J *Planning Law: Principles and Procedures of Land Use* Management, (1999) Cape Town: Juta

Worden N *The Making of Modern South Africa: Conquest, Apartheid, Democracy* 5 ed (2012) New Jersey: Willey Blackwell

Yin R *Case Study Research: Design and Methods* (1997) London: Sage Publications 54

Chapters in Books

Bennett T & Murray C 'Traditional leaders' in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2013) Cape Town: Juta

Berrisford S & Oranje M 'Planning law reform and change in post-apartheid South Africa' in Hartmann T & Needham B (eds) *Planning by Law and Property Rights Reconsidered* (2012) Netherlands: Urban Forum.

Chanock M 'Paradigms, policies and property: A review of the customary law of land tenure' in Mann K & Roberts R (eds) *Law in Colonial Africa* (1991) United Kingdom: Heinemann

Classens A & Hathorn M 'Stealing restitution and selling land allocations: Dixie, Mayayana and Makuleke' in Cousins B & Classens A (ed) *Land, Power & Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) Cape Town: UCT Press

Claassens A & Ngubani S 'Women, land and power: The impact of the Communal Land Rights Act' in Claassens A & Cousins B (ed) *Land, Power and Custom: Controversies generated by the Communal Land Rights Act* (2008) Cape Town: UCT Press

Delius P 'Contested terrain: Land rights and chiefly power in historical perspective' in Cousins B & Classens A (eds) *Land, Power & Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) Cape Town: UCT Press

Erk J 'Constitutionalisation of traditional authorities and the decentralisation of governance: Anglophone and francophone compared' in in Fombad M & Steytler N (eds) *Decentralisation and Constitutionalism in Africa* (2019) Cape Town: Oxford Univeristy Press

Ntsebeza L 'Chiefs and the ANC in South Africa: The reconstruction of tradition?' in Cousins B & Classens A (ed) *Land, Power & Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) Cape Town: UCT Press

Rautenbach C 'Mapping traditional leadership and authority in post-apartheid South Africa' in Fombad M & Steytler N (eds) *Decentralisation and Constitutionalism in Africa* (2019) Cape Town: Oxford Univeristy Press

Sachs A 'The future constitutional position of traditional leaders' in Sachs A (ed) *Advancing Human Rights in South Africa: Contemporary South African Debates* (1992) Cape Town: Oxford University Press

Stake R 'Qualitative case studies: The case of qualitative research' in Denzin NK & Lincoln YS (eds) *The Sage Handbook of Qualitative Research* (2005) London: *Sage Publications* 433–466

Van Niekerk GJ 'Legal pluralism' in Bekker JC, Labuschagne JMT, Vorster LP et al (eds) *Introduction to Legal Pluralism in South Africa* (2002) Cape Town: LexisNexis

Journal articles

Binza MS 'The evolution of South African local government: The politics of memory' (2005) 30(2) *Southern Journal for Contemporary History* 71–73

Binza MS & George K 'The role of traditional leadership in promoting governance and development in rural South Africa: A case study of the Mgwalana traditional authority' (2011) 46(2) *Journal of Public Administration* 947–962

Bekker S, Buthelezi S & Manona C 'Local government transition in five eastern seaboard South African towns' (1997) 24 *SAJPS* 38–56

Breytenbanch WJ 'Chieftainship and political development in the homelands' (1975) 13(9–10) *Africa Institute Bulletin* 328–323

Berman B 'Ethnicity, patronage and the African state: The politics of uncivil nationalism' (1998) 97(388) *African Affairs* 305–341

Bikam P & Chakwazira J 'Involvement of traditional leadership in land use planning and development projects in South Africa: Lessons for local government planners' (2014) 4(13) *IJHS* 142–452

Christopher A J 'Apartheid planning in South Africa' (1987) 153(2) *The Geographical Journal* 195–204

Chigwata T 'The role of traditional leaders in Zimbabwe: Are they still relevant?' (2016) 20(1) *LDD* 69–90

Cook S 'Chiefs, kings, corporatization, and democracy: A South African case study' (2005) 12(1) *The Brown Journal of World Affairs* 125–137

Correspondent A 'Native policy in South Africa' (1935) 25 *The Commonwealth Journal of International Affairs* 722–734

Diala A 'Our laws are better than yours: The future of legal pluralism in South Africa' (2019) 26 *Revista General de Derecho Público Comparado* 1–23

Dubazane M & Nel V 'The relationship of traditional leaders and the municipal council concerning land use management in Nkandla local municipality' (2016) 15(3) *Indilinga African Journal of Indigenous Knowledge Systems* 223–228

Du Plessis WJ 'African indigenous land rights in a private ownership paradigm' (2011) 14(7) *PELJ* 45–69.

Du Toit P & Heymans C 'The 1983 Constitution of South Africa: Towards democracy or not?' (1985) 12(2) *SAJPS* 79–85.

Gerring T 'An institutional theory of direct and indirect rule' (2011) 63(3) *World Politics* 377–433

Guy J 'An accommodation of patriarchs: Theophilus Shepstone and the foundations of the system of Native Administration in Natal' (2018) 32(1) *JNZH* 81–99

Koyana D 'The indigenous constitutional system in a changing South Africa' (2013) 1 *Speculum Juris* 66–101

Letsoala E & Rogerson C 'Rural "development" planning under Apartheid: Betterment planning in Lebowa, South Africa' (1982) 13(4) *Geoforum* 301–314

Lutabingwa J, Sabela T & Mbatha J 'Traditional leadership and local governments in South Africa: Shared governance is possible' (2006) 25(1) *Politeia: Journal for Political Science and Public Administration* 73–88

Lynd H 'The peace deal: The formation of the Ingonyama Trust and the IFP's decision to join South Africa's 1994 elections' (2021) 73(2) *SAHJ* 318–360

Mabin A 'Origins of segregatory urban planning in South Africa, 1900-1940' (1991) 13 *Planning History* 13(3) 8–16.

Maloka E '"Traditional" leaders and the current transition' (1995) 141 *The African Communist* 35–43.

Mdletshe B 'What is the fate of 'tribal' land?' (1998) 20 *NWJI* 7

Mathenjwa M & Makama 'Revisiting the participation of traditional leaders in municipal councils in South Africa' (2016) 20(1) *LDD* 200–214

Marks S & Trapido S 'Lord Milner and the South African State' (1979) 8(1) *History Workshop Journal* 50–81

Merrium SB 'The case study research in education: A qualitative approach' (1988) 3 *SL* 12.

Maylam P 'Explaining the apartheid city: 20 years of South African urban historiography' (1995) 21(1) *Journal of Southern African Studies* 19–38.

Ndlela RN, Green JM & Reddy PS 'Traditional leadership and governance in Africa' (2010) 40(3) *Africa Insight* 1–18

Nel V 'SPLUMA, zoning and effective land use management in South Africa' (2015) 27(1) *Urban Forum Journal* 79–92

Nkatini L 'Glimpses of research: Guidelines on the writing of research proposals, reports, essays, dissertations and theses' (2005) 10 *JP Publishers* 18

Ntebo M & Maimela C 'The indigenisation of customary law: Creating an indigenisation legal pluralism within the South African dispensation: Possible or not?' (2021) 21 *De Jure Law Journal* 54–69

Parnell S 'Sanitation, segregation and the Natives Urban Areas Act: African exclusion from Johannesburg's Malay location, 1897–1925' (1991) 17(3) *Journal of Historical Geography* 271–288.

Parnell S 'Racial segregation in Johannesburg: The Slums Act, 1934-1939 (1988) 70(2) *South Africa Geographical Journal* 112–126

Parnell S 'Creating racial privilege: The origins of South African public health and town planning legislation' (1993) 19(3) 471–488

Prinsloo M 'Pluralism or unification in family law in South Africa' (1990) 23(3) *TCILJ* 324–336

Quinlan T 'The perpetuation of myths: A case study of "tribe" and "chief" in South Africa' 1988 *Journal of Legal Pluralism and Unofficial Law* 79–115

Rautenbach C 'Deep legal pluralism in South Africa: Judicial accommodation of non-state law' (2010) 60 *JLPUL* 143–177

Rugege S 'Traditional leadership and its future role in local governance' (2003) 7(2) *LDD* 171–200

Shongwe M 'The Thinkundla decentralisation system: Is this a blend of traditional and modern state governance that works? (2019) 16 *NEJ* 522

Taylor-Powell E & Renner M 'Analysing qualitative data' (2003) 4 *University of Wisconsin-Extenesion* 9

Van Nierkerk G 'State initiatives to incorporate non-state laws into official legal order: A denial of legal pluralism' (2001) 34(3) *Comparative and International Law Journal of Southern Africa* 349–361

Van Wyk J 'Parallel planning mechanisms as a recipe for disaster' (2010) 13(1) *PELJ* 214–234

Van Reenen P 'The relevance of the Roman (-Dutch) law for legal integration in South Africa: With some lessons to be learnt from the African and European experiences (1995) 112 *ALJ* 276

Walker C 'Women, gender policy and land reform in South Africa' (2005) 32(2) *Politikon: South African Journal of Political Studies* 297–315

White T 'Research writing' (2002) 6 *UC* 13

Theses

Bizana T *Traditional Leaders in South Africa: Yesterday, Today and Tomorrow* (MPhil mini-thesis, University of the Western Cape, Cape Town, 2008) 19–21.

George K *The Role of Traditional Leadership in Governance and Rural Development: A Case Study of the Mgwalana Traditional Authority* (unpublished LLM thesis, Nelson Mandela University, 2010) 47

Henrard K *The interrelation between Human Rights, Minority Rights and the Right to Self-determination for an adequate minority protection* (unpublished LLD thesis, Leuven University, 1999) 397

James A *Kinship and Land in an Inter-ethnic Community* (master's thesis, University of Witwatersrand, 1987)

Joscelyne M *Nature, Scope and Purpose of Spatial Planning in South Africa* (unpublished LLM thesis, University of Cape Town, 2015) 8

Kompi B *The Evolution of Traditional Leadership in South Africa, 1996-2012: Traditionalism versus Modernism* (LLD thesis, University of the Free State, 2018) 78

Mashele P *Locating the Institution of Traditional Leadership within the Institutional Framework of South Africa's New Democracy* (unpublished MA thesis, Rhodes University, 2003) 30

Mulaudzi M *From Dispossession to Restoration: The History of the Dinkwanyane Community of* Lydenburg (unpublished Master's thesis, University of the Witwatersrand, 2002) 81

Oomen B *Talking Tradition: The Position and Portrayal of Traditional Leaders in Present-Day South Africa* (unpublished MA thesis, University of Leiden, 1996) 101

Semela M *The Namoha Battle, Qwaqwa (1950): A Case Study of the Significance of Oral History* (unpublished PhD thesis, University of the Free State, Bloemfontein, 2005) 124

Williams AD *A Framework for a Sustainable Land Use Management System in Traditional Xhosa Cultural Geo Social Zone of the Rural Eastern Cape of South Africa* (Unpublished LLD thesis, University of the Free State 2015) 221

Reports and policies of governmental bodies

Auditor General of South Africa *Consolidated General Report on Local Government Audit Outcomes MFMA 2022-2023* (2023) 74

Department of Provincial and Local Government *White Paper on Traditional Leadership and Governance* (2003) 24

Ministry for Provincial Affairs and Constitutional Development *White Paper on Local Government* (1998) 62

Speakers Forum *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 274

Law commission papers

South African Law Commission *Customary law*: *Succession* Discussion Paper 93, Project 90 (August 2000)

Constitutions

Constitution of the Republic of Ghana, 1992

Constitution of the Republic of South Africa, 1996

Legislation

Bantu Authorities Act 68 of 1951

Communal Land Rights Act 11 of 2004

Regulation of Development in the Rural Areas Act 8 of 1997

Local Government: Municipal Demarcation Act 27 of 1998.

Local Government: Municipal Electoral Act 27 of 2000

Local Government: Municipal Systems Act 32 of 2000

Local Government: Municipal Structures Act 117 of 1998

Native Trust and Land Act 18 of 1936

Spatial Planning and Land Use Management Act No 16 of 2013

Traditional and Khoisan Leadership Act 3 of 2019

Traditional Leadership and Governance Framework Act No 41 of 2003

Traditional and Khoisan Leadership Act 3 of 2019

Delegated legislation

Spatial Planning and Land Use Management Regulations in GN 239 GG 38594 of 23 March 2015

The Betterment Areas Proclamation No. 116 of 1949

Internet references

De Wet, CJ 'Land tenure, local government and agricultural development in the Ciskei' available at *http://www.sahistory.org.za* (accessed April 4 2020)

Houghton D 'The significance of the Tomlinson Report' available at *http://www.sahistory.org.za* (accessed 19 June 2021)

Skweyiya Z 'Chieftaincy: The ethnic question and the democratisation process in South Africa' available at *https://dullahomarinstitute.org.za/about-us/our-historical-publications/chieftaincy-the-ethnic-zola-skweyiya.pdf* (accessed 15 April 2021)

Holomisa P 'Ubukhosi the bedrock of African democracy' available at *https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiqpY617PL1AhXloFwKHY1gDKEQFnoECAUQAQ&url=https%3A%2F%2Fmg.co.za%2Farticle%2F2000-02-11-ubukhosi-the-bedrock-of-african-democracy%2F&usg=AOvVaw1K_pE5Xis6TBnnEeLOAnTZ* (accessed 9 February 2022)

Businesslive 'Activists challenge the Traditional Leadership and Khoisan Act' available at *https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiUst6L7_L1AhX68rsIHQVbBJ4QFnoECAUQAQ&url=https%3A%2F%2Fwww.businesslive.co.za%2Fbd%2Fnational%2F2021-12-21-activists-challenge-traditional-and-khoi-san-leadership-act%2F&usg=AOvVaw1_hKHkBl0ZF9k-_uqO5khr* (accessed 9 February 2022)

X Poswa 'Role of traditional leaders in combating Covid-19 in rural areas' available at *https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwit58CZ0pH5AhUq_rsIHYo6AJAQFnoECAYQAQ&url=https%3A%2F%2Fdullahomarinstitute.org.za%2Fmultilevel-govt%2Flocal-government-bulletin%2Farchives%2Fvol-15-issue-3-september-2020%2Fthe-role-of-traditional-leaders-in-combating-covid-19-in-rural-areas&usg=AOvVaw2969qwFt8EdHet9MK8NbOQ* (accessed 14 September 2020)

Kihato, M and Berrisford S (2006) 'Regulatory systems and making urban land markets work for the poor in South Africa' (Paper prepared for the Urban Land Seminar, November 2006, Muldersdrift, South Africa) available at: *http://www.urbanlandmark.org.za* (accessed 26 August 2021)