

### WHERE DO CPAs COME FROM?

Under colonialism and apartheid, millions of black people had been dispossessed of their land and their land rights. It was an urgent priority of the new democratic government to restore land to black South Africans and to secure their land rights against powerful actors, including the state (who had been a dispossessor under apartheid)

Since the land reform programme would involve the transfer of land from the state and private landowners to black South Africans, a legal entity needed to be created through which land reform beneficiaries could acquire, hold and manage property.

The new legal entities needed to accommodate and be able to adapt to a range of de facto land-holding practices, many of which were group-based. Unfortunately they have often failed to mirror or adapt to realities on the ground; focus has been too much on compliance with Act, not enough on how they work smoothly for groups.

Communal Property Associations (CPAs) were established to meet these challenges.

### RECENT LAW AND POLICY ON CPAs

CPAs are landholding institutions established under the Communal Property Associations Act No. 28 of 1996 (the CPA Act). Beneficiaries of the land reform, restitution and redistribution programmes who want to acquire, hold and manage land as a group can establish legal entities to do so. The CPA Act provides for government registration of CPAs and also government oversight to enforce the rights of ordinary members. At its Land Summit in September 2014, the Department of Rural Development and Land Reform (DRDLR) released a new policy on CPAs. This document engages with that policy.

### EVOLUTION OF CPA PROGRAMME

The **CPA Act (1996)** provides for the registration of CPAs; guidelines for CPA constitutions; outlines minimum oversight procedures required of the government in respect of CPAs

The **CPA Registration Officer** within DRDLR, is responsible for keeping a register of all CPAs and their relevant documents;

**DRDLR's Duties** (outlined in Act) towards CPAs:

- Monitor CPAs, communicate with them and intervene where necessary
- Assist CPAs in drafting constitutions
- Submit an annual report to the Minister on the extent to which CPAs are complying with the CPA Act. The Minister is to table this report annually in parliament.

Since 2000 there have been a few **substantial reviews of CPAs**, which DRDLR commissioned to trouble-shoot CPAs' problems and suggest improvements (example: CSIR review of 2005). Many constructive proposals were put forward, some of which appear in DRDLR's most recent policy on CPAs **but most have not been taken up**.

The most recent development is the **regularisation process**, in which DRDLR has employed consultants to fix problems in existing CPAs. There is not enough data yet on whether this has been effective

## CHALLENGES WITH CPAs

- CPAs can and do work, especially for poorer members, but socio-economic pressures on them are huge. While the CPA Act has been poorly implemented, it remains an important option.
- CPAs are extremely under-resourced legal entities compared to sectional title estates and companies; and they operate in a wide variety of social contexts.
- There has been very limited support and oversight of CPAs from the government, and a lack of communication between officials and CPAs.
- In some areas where traditional authorities are present, traditional leaders have tried to undermine the functioning of CPAs as they see them as challenging their authority.

### HAVE CPAs FAILED?

You often hear people saying 'CPAs have failed'. But we need to question this assumption. Take a look at the challenges to the left.

*"CPAs have not failed agrarian reform. Agrarian reform has failed CPAs."*

- delegate at Commission on CPAs, Land Tenure Summit (2014)

### TRADITIONAL COUNCILS & CPAs

Evidence from officials in DRDLR in the Eastern Cape suggests that the government at certain times put a stop to land transfers to CPAs because of traditional leaders' complaints:

*"In various discussions with traditional leaders they are resolute in objecting to the transfer of land falling under their authority to CPA. The land in question falls under Chief Ulana and in order to get a long lasting solution it is imperative that Chiefs should accept the process."*

- Ntombizodwa Mashologu, Chief Director of DRDLR in Affidavit for *Cata CPA vs. Minister of DRDLR* (June, 2012)

land tenure realities and dynamics on the ground. Many CPAs have constitutions that have been 'cut-and-pasted' from other CPAs, and are therefore out of sync with local land tenure practices. They establish rules that are impossible for people to comply with.

- Long delays in transfer of title to a CPA undermine the authority of a CPA committee, and the uncertainty that ensues allows opportunists to challenge or take control of the CPA.
- In some CPAs there is abuse of power by the committee and powerful CPA members and neglect or abuse of ordinary members. Committees are sometimes unaccountable. But it is not clear who CPA members can appeal to when conflict or abuse occurs.
- Substantive rights of CPA members are often not clearly specified. Women's land rights are often particularly vulnerable and insecure.
- The processes by which CPAs are set up and offered assistance pay little attention to

## GOVERNMENT POLICY ON CPAs: STRENGTHS AND WEAKNESSES

- *Choice and equality*

**Strength:** The Draft Policy Paper acknowledges that people should be able to choose between CPA, Trust and traditional councils as their land holding – but this choice is narrowed for people living in former homelands. In these areas only traditional leaders can own land.

**Weakness:** Counter to the DRDLR's Draft Policy Paper on CPAs, people should not be prevented from forming CPAs in communal areas or where traditional authorities (TAs) exist,

as this would deny people's ability to choose the landholding entity that best fits their needs and their land tenure practices (including customary practices).

- No ability to opt-out of traditional councils owning land
- Failure to mirror customary law practices on ground
- Potential to undermine land rights

- *Government and institutional capacity to support CPAs*

**Strength:** The Draft Policy Paper recognises that the state has not provided enough support for CPAs to succeed. It therefore emphasises the importance of directing more resources, capacity and training towards an institutional home for CPAs – the CPA office.

**Weakness:** DRDLR needs to be more specific about how it will solve the lack of capacity to monitor and support CPAs. DRDLR's emphasis should be on ensuring that skilled facilitation is available for setting up and assisting CPAs - not just on CPAs' legal compliance with the CPA Act. This includes drawing in specialists to train officials, improving communication between officials and CPA members, and deepening the expertise of officials so that they can provide strong oversight and support to existing and new CPAs.

- *Rights and accountability*

**Strength:** The Draft Policy Paper acknowledges that many CPAs have struggled because members come together to form a new association and that to do so effectively requires very skilled facilitation. It also emphasises the need for capacity building and training for CPA members.

**Weakness:** DRDLR's proposals also need to engage with the matter of how to secure individual CPA members' rights against other members and against the group as a whole. DRDLR needs to offer more substantive solutions for resolving problems of abuse of power by CPA committees and unaccountable members. This will require putting resources and capacity into processes for establishing and running CPAs, and identifying recourse mechanisms for when internal negotiations fail.

- *Absence of a plan to address the delay in transfer of title deeds to CPAs – especially where there is no apparent conflict within the CPA*

**Weakness:** The Draft Policy Paper fails to acknowledge the delays in transferring title deeds to CPAs and the vulnerability this cause. Many CPAs are made up of land restitution and land reform claimant groups who, although their claims were settled over 10 years ago, have still not received their title deeds. These long delays undermine the authority of a CPA committee, and the uncertainty that ensues allows opportunists to challenge or take control of the CPA. One of the reasons for the delay is that in certain areas, traditional leaders have objected to the transfer, saying it undermines their authority (see Affidavit in the *Cata* matter of 2011). Another is that DRDLR has lacked the capacity to rapidly process the transfer of title deeds.

## UNANSWERED QUESTIONS

These are important questions which must be asked of the DRDLR, especially as it plans to table the CPA Amendment Bill in June 2015:

- On what basis has DRDLR decided that CPAs will no longer be established in areas where traditional councils exist? Why are CPAs being side-lined in terms land transfers?
- How do we tackle the issue of elites capturing resources (whether CPA members or alongside CPAs or instead of them, in case of traditional leaders)?

- Why won't the Department invest more in training and skills development for CPA members?
- What is the best scenario for CPAs in investment situation/resource rich environment? How can we support healthy dynamics within CPAs so that they can make most of opportunities?
- What's the best way to secure the rights of individual CPA members and families, so that they are not infringed upon by other CPA members or by the CPA committee?
- How do we focus on substantive issues in CPAs (such as whether people's rights are being undermined) rather than legal compliance?

## RECOMMENDATIONS ON CPAs

1. *Land reform beneficiaries should be able to choose the kind of landholding entity they want to form.* Counter to the DRDLR's Draft Policy Paper on CPAs, people should not be prevented from forming CPAs in communal areas or where traditional authorities (TAs) exist, as this would deny people's ability to choose the landholding entity that best fits their needs and their land tenure practices (including customary practices).
2. *DRDLR's emphasis should be on ensuring that skilled facilitation is available for setting up and assisting CPAs - not just on CPAs' legal compliance with the CPA Act.*
3. *Establish institutions with capacity to support CPAs within the DRDLR.*
4. *Put resources and capacity into processes for establishing and running CPAs.*
5. *Implement mechanisms to allocate and secure individuals' and groups' substantive rights to land and accompanying benefits, in relation to other members of the group and the CPA.* During the LAP process, and ideally before the land is transferred to the CPA, define the nature and content of different parties' substantive rights (ownership rights, use rights, occupation rights, access rights, grazing rights etc) in relation to others, which will be informed by local land tenure practices and systems.
6. *The CPA Office and CPA Registrar should be accountable to CPAs themselves and not just to parliament.* This means the DRDLR must produce annual reports to be tabled in parliament, but must also open communication channels through which CPA members can reach them for report-backs.
7. *As the DRDLR's Policy Paper on CPAs suggests (at 2.1.3.), businesses and economic entities can be separate from CPA committees.*
8. *Subdivide or split CPAs into smaller groups and smaller CPAs where appropriate, and in line with local land tenure arrangements and land use patterns of individuals within the larger group.*
9. *Provide for sub-division of farms if that is what CPA members choose to do.*
10. *Devise detailed regulations to accompany amendments to the CPA Act.* Regulations will flesh out what is meant by each part of the Act and guide implementation of the Act.
11. *Establish an additional independent external recourse institution in the form of a land ombudsman.* The role of this institution can be to trouble-shoot intractable land tenure issues (not just in CPAs) and can step in to negotiate protracted disputes in CPAs when other processes have failed.