NAMAQUALAND AND CHALLENGES TO THE LAW: COMMUNITY RESOURCE MANAGEMENT AND LEGAL FRAMEWORKS

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Land reform in the arid Namaqualand region of South Africa offers unique challenges. Most of the land is owned by large mining companies and white commercial farmers. The government's restitution programme which addresses dispossession under post 1913 Apartheid land laws, will not be the major instrument for land reform in Namaqualand. Most dispossession of indigenous Nama people occurred during the previous century or the State was not directly involved. Redistribution and land acquisition for those in need of land based income opportunities and qualifying for State assistance will to some extent deal with unequal land distribution pattern. Surface use of mining land, and small mining compatible with large-scale mining may provide new opportunities for redistribution purposes. The most dramatic land reform measures in Namaqualand will be in the field of tenure reform, and specifically of communal tenure systems.

Namaqualand features eight large reserves (1 200 000ha covering 25% of the area) set aside for the local communities. These reserves have a history which is unique in South Africa. During the 1800's as the interior of South Africa was being colonised, the rights of Nama descendant communities were recognised through State issued "tickets of occupation". Subsequent legislation designed to administer these exclusively Coloured areas, confirmed that the communities' interests in land predating the legislation. A statutory trust of this sort creates obligations for the State in public law. Furthermore, the new constitution insists on appropriate respect for the fundamental principles of non-discrimination and freedom of movement.

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1 Unfinished notes 5/6/96 for panel discuusion: Reforming communal land tenure arrangements in post-Apartheid South Africa: Strengthening tenure security under a diversity of systems. " Voices from the Commons" conference, International Association for the Study of Common Property, 5-8 June 1996, Clark Kerr Campus, University of California, Berkeley.

At the heart of the debate is the future of tenure systems for the Namaqualand reserves. The oppressive legal regime of the past, embodied in the Coloured Rural Areas Act, allowed for the systematic undermining of common property management systems. The challenge to the Namaqualand reserve communities is to use the new space created under the new constitution and a flexible new tenure policy, and to design tenure systems appropriate to their circumstances, history and expectations. The question is whether the legal framework will allow them to do so. Their trust title requires their participation in the review of the Coloured Rural Areas Act, and new legislation such as the Communal Property Associations Act of 1996 allows communities to shape their own landholding constitutions. All bodes well for the Namaqualand reserve communities to decide for themselves how they wish to hold their land.

A COLONIAL HISTORY OF CONQUEST AND ENCROACHMENT

Prior to occupation by the Dutch settlers, Namaqualand was inhabited by a section of the Khoi Khoi, known as the Nama. They were pastoralists, some of whom had come into the area a number of centuries before as part of a large southward trek from the area now known as northern Botswana. Others had moved into the district more recently after the Dutch began to occupy their land to the south in the 17th century.

In pre-colonial times the Nama speaking Khoi pastoralists moved over the whole area of Namaqualand and adjacent areas and, depending on the availability of pasture and water, visited various eco-zones during different seasons. The unpredictable resources of water and pasture caused a flexible nomadic system which facilitated frequent movements and necessitated a system of reciprocity between pastoralists.

From the eighteenth century onwards White and Baster trekboere and hunters started populating this marginal area. The colonists, the first illegal occupiers or "squatters" of Namaqualand, consolidated their hold over land and water resources not only through superior technology in the form of guns and ammunition, but also because the newcomers were accommodated in the traditional system of reciprocity. The colonial authorities soon legalised the occupation of White settlers by developing "loan farm" quitrent and perpetual quitrent tenure systems and by extending, in 1847, the boundary of the Cape Colony to the Orange River. This encouraged the rapid dispersal of free burgers and trekboere into the interior.

The Dutch occupation of land was driven by the free burgers whom the Dutch East India company encouraged in order to reduce dependence on imports, and more particularly by the trekboers, who were unable to compete with the wealthier free burghers nearer the Cape, and became pastoralists seeking grazing areas further afield.

The Dutch would grant the trekboers land rights known as "ordonnantien" and loan farms. By 1750 the northern boundary of the Dutch colony in the Cape was the Olifants River, but by 1753 24 farms had been registered north of the Olifants. In 1776 a farmer was granted land on the Orange river, and by the end of the 18th century the area of land occupied by the Khoi, even in Namaqualand was already substantially restricted.

Dutch farmers would obtain grants for land beyond the colonial boundaries and pay taxes so as to claim colonial protection. They would also graze their livestock in Namaqualand without colonial authority. Indigenous inhabitants, on the other hand, could not generally register land claims and were pushed north. On the other hand, where it helped stabilise the situation the colonial authorities did recognise the rights of certain indigenous groups to areas of land.

Displaced Namaqua sought refuge with the Christian missionaries who in turn appealed to the British colonial authorities to protect their congregations from further encroachment. The British Crown issued "tickets of occupation" in respect of partially surveyed land surrounding such mission stations (Steinkopf and Concordia 1874 and 1905; Leliefontein 1854; Kommagas 1843; Pella, Rietpoort, Richtersveld 1927). These Certificates of Occupation typically provided that the land shall be held in trust for and on behalf of the local Nama inhabitants, "aboriginees" or "bastards of aboriginal descent". Thus an association was establihed between the particular form of access to land (ie communal) and a racial category.

Besides the Dutch farmers, the missionaries thus also played an important, if contradictory role in the process of colonisation. While attempting to limit the Khoi's nomadic lifestyle in order to further their spiritual and secular work, they also helped limit boer encroachment. For example, the "tickets of occupation" for a number of areas prevented further boer encroachment. These "tickets of occupation" guaranteed communal ownership of areas of land by the local communities, and these areas form the basis of the areas currently referred to as the coloured reserves.

The granting of these occupation rights took place in the context of increasing activity by the third group of people driving the colonisation of Namaqualand, the mining companies, who were mining mainly copper. The Komaggas ticket was granted prior to the extension of the colony to the Orange River, and allowed non-occupiers to be prosecuted, preventing encroachment by mining, but the rights granted in the later tickets of occupation were more limited. These allowed expropriation of communal land by the mining companies, although required compensation to be paid for the use of land and water.

The general approach of the authorities during this period of land alienation could best be understood as an attempt to contain conflict while satisfying the various different and sometimes competing colonial interests represented by the missionaries, farmers and mining companies. The creation of the mission linked

reserves can be understood in this way.

In 1896 a Select Committee on Namaqualand Mission Land and Reserves was set up. It recognised the role played by these areas in maintaining stability while providing a source of labour for mining and agricultural activities, which, because of fluctuations, could not employ a permanent labour force.

Flowing from the work of this committee a system of administration was set up which took the responsibility of civil administration away from the missionaries. In terms of Act 29 of 1909 Management Boards (Rade) were established, chaired by the magistrate of the district, with some board members appointed by the authorities, while others were nominated by the inhabitants. These boards had the same responsibilities as the boards headed by the missionaries, and these included land allocation and distribution. They also acted as courts of law. There was some conflict surrounding the appointment of these boards, and in a number of areas they were unable to establish their legitimacy. In Steinkopf military force was used to overcome resistance to the new dispensation.

The Mission Stations and Communal Reserves Act 29 of 1909 brought mission trust land under secular control, but communal holding of grazing land remained the prevalent form of tenure. The semi-nomadic pastoralists continued to move beyond reserve boundaries on a seasonal basis during drought years in search of better pastures on unallocated Crown land and as temporary bywoners on White farms where grazing was not fully utilised.

It could be argued that this administrative regime has continued largely unchanged since then. Various legislative changes have established somewhat different structures for the management of the reserve areas, but the communal farming system has remained, and while the boards have been able to exercise authority, their legitimacy has often been in doubt.

An extensive system of trek paths criss-crossing Namaqualand and Bushmanland[2] shows that both White and Coloured farmers relied on their mobility and access to non privatised land[3]. But such access soon disappeared when the State, through a remarkable programme of affirmative action, provided graslisensie (grazing licences), leases on easy terms and eventually full ownership exclusively to White farmers on remaining Crown land. Confinement to the reserves severely constrained the ability to move with herds[4].

Inside the Reserves pressure on the land led to overgrazing and the introduction of stock limitation measures in 1948 and 1959 in the form of grazing regulations

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2 recorded by the Interdepartmental Committee on Missions and Coloured Reserves of 1947, UG33/1947

3 Van der Merwe; the Land Settlement Act 12 of 1912 as amended in 1917, 1925, 1928, 1934, 1935,1937, 1944, (in particular the amendments of the 1930 depression years) and the Land Settlement Act 21 of 1956)

4 Khrone and Steyn 1991: Land Use in Namaqualand . Surplus People Project, Cape Town.

issued under the 1909 Act. Informal arrangements of grazing management and conservation were practised by inhabitants, and a system of reciprocal "good manners" rights amongst farmers prevented "free riding" and serious grazing degradation associated with the "tragedy of the commons" phenomenon, whilst under this informal institutional arrangement it was still attempted to provide a living through independent farming to the greatest number of people[5].

By the early 1960s the reserves largely lost their economic base and function as areas for viable self-sufficient agricultural production and regressed into surplus labour reservoirs as remittances from migrant workers on the diamond and copper mines, state pensions and local employment accounted for the largest percentage of household and community income. Farming was no longer sufficient to support reserve families in the long term, and most households were forced to supplement their income from other sources[6]. For many residents local agricultural production gradually assumed the character of a supplement to wages and remittances[7].

B LAWS UNDERMINING COMMUNITY RESOURCE MANAGEMENT: RESISTANCE AGAINST PRIVATISATION

It has become gainsay that the South African government has often intervened in the name of conservation, but almost always with disastrous consequences to the environment and huge social disruption.

Typically rehabilitation or "betterment" programmes in South Africa's rural "homelands" provided for enforced stock reduction to curtail overgrazing, separation of agricultural and residential land, drawing scattered populations into closer settlements, consolidation of arable land, and allocation of "economic units" to viable farmers selected as such[8].

The imposition of a system of economic units and the "privatisation" and sub-division of communal grazing land in the Namaqualand reserves bore the same characteristics, with possibly one difference. The introduction of "betterment" programmes also smacked of political opportunism in that it was a transparent attempt by the Labour Party of the tricameral own affairs dispensation to favour its supporters and potential supporters and members of the largely discredited

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5 See Khrone and Steyn

6 Sharp 1984: Rural Development Schemes and the Struggle against Impoverishment in the Namaqualand Reserves: Second Carnegie Inquiry into Poverty and Development in Southern Africa, Conference Paper No. 69

7 A survey which Carstens conducted in 1957 (1966, The Social structure of a Cape Coloured Reserve. Cape Town: Oxford University Press) shaowed that nearly 80% of a sample were involved in some form of farming, and 22% relied exclusively on agriculture. By 1985 30% participated in farming and the majority were "peripheral" stockowners both in terms of nubers of stock owned and income generated (Emmett: Agriculture, Land Tenure and Development in a Namaqualand reserve 198?)

8 Cooper 1991: From soil erosion to sustainability: Land use in South Africa, in Cock and Koch, "Going Green", Oxford.

local management boards. Some maintain more cynically that the privatisation policy was aimed at creating a brown middle class as part of an overall strategy of control by co-option.

Legal sanction for the subdivision and privatisation of grazing land in the reserves is to be found in the divisions of the Coloured Rural Areas Act 24 of 1963 which replaced the 1909 Act, and which was in turn replaced by the Rural Areas Law (Coloured Representatives Council) 1 of 1979 and the Rural Area (House of Representatives) 9 of 1987[9]. In the late 1970s and early 1980s the four largest reserves, Leliefontein, Steinkopf and Richtersveld in Namaqualand and Mier in the Kalahari were "replanned" and the outer commonages sub-divided into fenced-off economic units, amounting to 134 in the three Namaqualand reserves.

The majority of these "eenheidsplase" were offered on lease, with an option to purchase, by the Department of Local Government, Housing and Agriculture and the Management Boards to individuals who qualified as so-called bona fide farmers. A bona fide farmer was loosely interpreted as an owner of at least 200 stock or assets to a value of R3 000.00 and capable of paying rent in the amount of R300.00 per annum.

As there were about 1 250 stock farmers in the three reserves, the clear implication was that only a privileged few of the middle class of the coloured "volk-in-wording" could potentially benefit from the new system.

The majority of farmers rejected the proposals and made no effort to apply for units as they viewed the system as inherently inequitable and an act of expropriation of community owned land. Those who did apply and were awarded farms generally tended to be those who had managed to accumulate sufficient wealth (as traders, teachers or government employees), often "inkommers" (outsiders who became settlers) as opposed to "boorlinge" (natives), and carried favour with the management board and departmental officials.

Social consequences

The deprived majority was forced off the outer commonage and either had to sell their stock or attempt to survive on overstocked village commonages and "vennootskapsplase" (partnership farms). They did not get compensation for the loss of grazing rights and their improvements on the land.

Those who refused to vacate the outer commonage became the victims of harsh

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[9] Act 24 of 1963 also confirmed the restriction of access to the rights in the reserves to persons classified as Coloureds. This restriction was lifted in 1991 with the enactment of the Abolition of Racially Based Land Measures Act.

new grazing and pound regulations and were even criminally prosecuted.[10]

How did the victims perceive their forced removal? Oom Paul Cloete of Steinkopf described it as follows: "Hulle het my eers soos 'n plakker behandel op my eie grond en nou wil hulle van my 'n dorpsplakker maak" (they first treated me like a squatter on my own land, and now they want to make me a town squatter).

The privatisation drive had a profound impact on the practice of informal relations of reciprocity and the social networks which underpinned them. The fencing erected to demarcate the economic units undermined the the stockpost system in which grazing territory available to all the stockfarmers is informally divided into loosely defined grazing areas around the stockposts. The struggle against privatisation was for the retention of the ability to negotiate and coordinate use rights with neighbouring stockfarmers, and to follow informal rules of preferential access for families and groups and succesional rights.[11]

Part of the privatisation policy was to draw farmers from the outlying settlements (buitewyke and buiteposte) where they lived permanently or seasonally on the outer commonage, into closer settlements. The towns were replanned and streets and other services laid on. But even in the towns the new arrivals from the outer commonage were not accommodated and afforded full rights. Reserve residents are classified into three categories: registered occupiers, non-registered occupiers and those with residential rights only, locally called "bywoners". The status of "registered occupiers" is most sought after as it recognises full burgerskap-rights such as access to grazing, a sowing plot, a garden plot and a resident erf, while registered occupiers at the same time pay the lowest taxes. Bywoners pay the highest taxes and are treated as probationary tenants whose citizenship applications are (permanently) pending decision by the Management Board and the Minister, despite the fact that many bywoners were born on the reserves and lived in reserves for many years.

This explains Oom Paul's charge that the government was making urban squatters out of boorlinge. The problem was that the registers for registered occupiers, have in certain instances effectively been frozen since the date of the last relevant general registration proclamation in 1966. Many residents failed to register in time or have since come of age and qualified for application.

In Mier the Management Board sued Jakob "Skapie" Bok, a boorling of Mier, in the Supreme Court in Kimberley seeking his banishment from the area because he allegedly built his house in the middle of a planned street and was not a registered occupier.[12]

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10 S v Gert Beukes Garies Magistrate's Court and, in the case of Mier, civil proceedings Steenkamp v Mienies 1987 4 SA 186 (NC).

11 Marinus 1996, Local level politics and agrarian reform in the Leliefontein reserve. University of Western Cape.

12 Mier Management Board v Bok case no. 813\89 (NC)

Oom Paul Cloete may have been treated like a rural squatter when he was denied access to the commonage, but he was never to become a bywoner or town squatter. He refused to move to the Steinkopf settlement and still lives and farms at his stockpost or "veepos" at Skuitberg.

Environmental effects

Resource conservation was forwarded as the scientific rationale for the State imposed development-via-privatisation strategy of the 1970's and 80's. It was for example argued that because of the combination of of private stock ownership and communal land tenure, there was a built-in mechanism for for overstocking and over exploitation of communal land resources. In relation to the responsiblity for the conservation of agricultural resources, it was maintained that "precisely because it is everyone's responsibility, it is no one's responsibility"[13].

The farmers who were forced into the villages and small surrounding commonages, could no longer move their stock seasonally and practice rotational grazing. The village commonages became seriously overgrazed. The privileged few who were awarded, "economic units" quickly found that the units were too small, and they too suffered from not being able to move between eco-zones within the reserves boundaries and many fell in arrears with their annual rent.

Archer[14] related potential income from livestock farming in the region to costs of production, and found that the 47 units of the Leliefontein reserve were, in fact, not viable economic farming units; and the imposed system provided no guarantee against further land degradation. She found further that there was little evidence to indicate that the communal system per se has been responsible for land degradation.

Resistance through the courts

Despite the overwhelming evidence of the social, economic and environmental costs of privatisation, the government pushed ahead with the policy. Residents organised themselves in civic associations and petitioned government, to no avail. They finally approached the courts. In April 1988 the Cape Supreme Court ruled in favour of four Leliefontein communal farmers and set aside the subdivision of the outer commonage and economic unit leases, thus reinstating

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13 Redlinghuis, 1981: Die Ontwikkelingspotensiaal van vyf landelike gebied in Namakwaland, D-Pil tesis. Universiteit van Weskaapland, op p 210.

14 Archer, Hoffman and Danckwertz: How economic are the farming units of Leliefontein, Namaqualand?, Journal of the Grasslands Society of Southern Africa (1989), 6(4).

the communal land tenure system.[15]

The judgment was based on the fact that planning for the system of economic units had ignored certain statutory planning procedures requiring that residential erven, agricultural lot (akkerbou-persele) and grazing rights shall be allotted to every person whose rights have been cancelled in the replanning of the area. It was ruled that as the intention of the subdivision was ultimately to allocate all the units for private farming, no agricultural lots or grazing rights had been allotted to the displaced persons as required, the subdivision exercise was therefore ultra vires.

Similar results were obtained in respect of Steinkopf and Richtersveld.[16]

The threat of privatisation was not over. When farmers of Mier challenged the leases and sale of weidingstroke in their reserve, the House of Representatives hurriedly passed the Mier Rural Areas Act of 1990 to validate past (procedurally unlawful) subdivisions, leases and sales.[17]

C LEGAL FRAMEWORK TO ENABLE COMMON PROPERTY MANAGEMENT

Review of the Rural Areas Act 9 of 1987

The Minister of Land Affairs gave notice[18] in January 1996 that the Rural Areas (House of Representatives) Act 9 of 1987, the Act which governs the administration of the 24 coloured rural areas including the so-called reserves in Namaqualand, is to be reviewed with a view either to repealing or amending the act. He instructed a committee to prepare a discussion document which will form the basis of a thorough consultation process with the affected communities. A revised legal framework for the reserves is to conform with the new constitution and the government's land reform policy.[19]

In terms of the current legislation these areas are held in trust by the State... the Minister holds the land on behalf of and for the benefit of the inhabitants. The community as a whole has certain rights, such as the right that land be administered for the benefit of the respective communities, and members of the community have land rights which usually include a right to a residential plot, to land for cultivation, and to land for grazing.

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15 Gert Bekeur v Minister of Local Government, Housing and Agriculture (House of Representatives) 1990 1 SA 335 (C)

16 Paul Cloete v Minister of Local Government, Housing and Agriculture case no. 1106/88 CPD; J Cloete v Minister of Local Government and the Budget case no. 9072/89 CPD

17 See also Vilander and Smith v Minister of Local Government, Housing and Agriculture case no. 713/90 (NC). The Mier tenure dispute is now the subject of local negotiations facilitated by the Department of Land Affairs

18 Letter from the Minister of Land Affairs to affected communities and other interest groups dated 10 January 1996.d

19 A third draft report and discussion document by the committee was presented to the Minsiter of Land Affairs at the end of May 1996.

But the State's obligations follows both from the nature of the title and from the statutory framework governing such title. The interests of the inhabitants in their land is a pre-existing legal right not created by legislation. The "trust" created by the Rural Areas Act confirms the rights to the land predate the legislation. In other jurisdiction, including North America, the courts have accepted that a statutory trust of this sort is not a purely private law trust, but in fact creates a "fiduciary duty" in public law. The obligations of the trustee therefore assume a public law character: including the obligation to provide a hearing to interested parties and to act in their best interest.

It is thus argued that changes to the legislation must be consistent with the community and individual rights already enjoyed by the current inhabitants.

The requirements of the Interim Constitution include freedom of movement, freedom of association, the right to own property, the prohibition of discrimination. Perhaps more challenging the new final constitution contains new social and economic rights (or development rights) such as equitable access to housing, security of tenure, land and water reform measures and social security. The prohibition on restrictions of movement and notorious "pass laws" means access to public resources cannot be restricted to members of a certain community or race group.[20]

The key challenge in altering the legislation is to make security of tenure possible under a variety of tenure systems which are consistent with the new constitution and the common law, general legislation as well as new land reform policy.

Proposed approach to land tenure reform

While it is government policy to strengthen tenure security within a framework of diverse tenure options, tenure reform will not be driven by ideological preferences for one form of tenure over others.[21] The Green Paper states that it is of fundamental importance that the right of communities to express their own preferences for the type of tenure arrangements by which they wish to live, is respected. To succeed, tenure reforms must be developed in a manner which solicits the participation of all affected parties and communities.

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20 Clause 25(5) and (6) of the final constitution (presently being considered for certification by the Constitutional Court) reads as follows:

> The state must take reasonable legislative and other measures, within its avalble resources, to foster conditions which will enable citizens to gain access to land on an equitable basis.
>
> A person or a community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property, or to equitable redress.

21 Green Paper on South African Land Policy, Department of Land Affairs, February 1996

"Government is committed to the right of people to make decisions about their own tenure systems.

Where communal tenure systems no longer meet the requirements of landholders, the government should assist communities to make informed decisions about the adoption of alternative tenure systems, including freehold tenure. For many communities, communal tenure is likely to have continued relevance because it provides access for the poor to land for residential and agricultural purposes, at little or no cost, and as a social right. The introduction of unfettered land markets into many rural communities, and particularly where large numbers of poor people could not afford to purchase land or to repay mortgage bonds thereon, would lead to increased landlessness and poverty.

The land reform programme is targeted in the first instance at meeting the land needs of the poorest South Africans. Systems of communal land tenure, by providing low-cost and secure access to land, can make an important contribution to land reform and poverty alleviation in many parts of the country. Government has a role to play in assisting communities to reconstruct old or develop new forms of communal or group holding in ways that reflect local preferences.

Communities currently holding land under some form of communal tenure should be able to choose whether they wish to continue to use and administer land as a communal resource. Where communities exercise the option to retain communal or group tenure, they should be able to decide at the local level how the system will be administered, choosing from a range of options, including traditional authorities, local government, trusts, communal property associations and other models.

Communities should be empowered to convert all or part of their communal systems to other forms of tenure, and should have the power to enable individual community members to convert their holdings to other forms of tenure, depending upon land use or other criteria established by communities. For instance, communities should be able to allow commercial sites, residential holdings and arable plots to be converted to ownership, at the discretion of landholders, while retaining grazing land as a communal resources.

Rights under communal tenure, and the administration of communal tenure systems, must be subject to Constitutional human rights provisions, particularly those pertaining to equality, due process and participation. No system of communal tenure should use gender as a basis for assignment or denial of rights to any kind.

All tenure systems must be consistent with constitutionally guaranteed human rights. Thus, tenure systems must provide access to land rights on a non-discriminatory basis.

The Communal Property Associations Act will enable members of disadvantaged and poor communities to collectively acquire, hold and manage property in terms of a written constitution. The Act proposes a relatively simple and accessible mechanism through which group ownership schemes may be recognised. In order to qualify for the benefits of this mechanism, communal property associations will be required to conform to basic public standards of fair process, democratic accountability and equality. The Act proposes a substantive framework to facilitate the formation and registration of communal property associations. It also proposes a review by government officials of the constituting documents of any community wishing to register an association in terms of the Act in order to ensure consistency with the principles laid down in the Act.[22]

The approach should be for the state to provide an enabling framework that results in local communities negotiating amongst themselves rights of access to

22 Green Paper para 3.13

the land as well as agreements on the management of resources. In this way existing informal practices could be formalised, and formal rights legitimised where appropriate. This should go hand in hand with the development of institutions to uphold such rights.

The value of legal security is that it makes it possible for individuals, groups and communities to plan their future. Such tenure can be provided through new and existing legislation, the scrapping or amendment of certain parts of Act 9 of 1987, and the introduction of transitional measures to facilitate of an appropriate legal framework for the coloured rural reserves, which will accord with national policy.

In the context of Namaqualand the new policy framework requires community participation in decisions about approriate tenure systems. The Rural Areas Act 9 of 1987 has a strongly centralised approach which is clearly inappropriate in the new policy environment. This implies profound changes for the reserves in respect of tenure arrangements in the town areas and the commonages, development planning and implementation, and local government.

OPTIONS FOR LAND TENURE REFORM

Land tenure reform must build on the existing local formal and informal institutions, and a first step should be to encourage those to be affected to recognise and appreciate where they are now. Presently the institutional status quo is a blend or mixture of formal and informal institutions in an uncomfortable relationship. One way to approach this uneasy relationship is through the establishment of co-management arrangements which recognise that both the state and local communities and their institutions have legitimate interests in resource management.[23] Rather than the state attempting to provide legal frameworks down to the lowest level, the state would offer an enabling framework and require ocal groups to negotiate accessrights, inheritance rights and resource management agreements among themselves. The ste should retain a mere minimum of responsibility for default dispute resolution and procedural guidelines for rule enforcement. Part of this approach would involve the formalisation of existing informal rights and giving legitimacy to "illegitimate" formal rights.

Town areas

The existing ordinances governing local authority functions, land use ordinances, and the Less Formal Township Establishment Act of 1991 are appropriate instruments for governing the town areas. Ownership should be available without discrimination on the basis of race, sex, age or status. Existing rights must be respected and for those who do not wish to own properties, provision must be made for protected and affordable rental. As is the case

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23 Cousins 1992, Institutional dynamics in communal grazing regimes in Southern Africa: Proceedings of a workshop held in Harare, Zimbabwe, December 1990. Centre for Applied Social Sciences.

elsewhere in the country, this will affect the identity of the community over time.

Agricultural land

In respect of agricultural land there are good arguments for restricting rights to agricultural land to members of the current community.[24] The question is how this could be done. The Interim Protection of Informal Tenure Rights Act of 1996 will offer protection till the end of 1997, giving the current residants and users an opportunity to introduce new systems.

The Communal Property Associations Act of 1996 will provide a new instrument for making rules which recognise both individual and community rights in respect of formal and informal systems. The general aim of this Act is to register land in the name of an association with the authorities able to intervene only when there are problems. The association draws up its own constitution adhering to prescribed principles on democratic decision making, election of representatives and accountability. A variety of different systems of tenure are then possible within this.

Presumably, this kind of association will be comfortable with a restricted number of members, preferably farmers with an economic interest in the land and who want to participate actively in decisions over shared interests. In line with the current situation in the reserves areas, members of the reserves not farming at present could also be accommodated.

While new local authorities may be uneasy about managing natural resources, but given that it was a role played by the Management Board, ex officio representation can be given to relevant local authorities in these associations. If communities choose, they could continue to run the agricultural lands under the jurisdiction of the local authority, but with the understanding that the authority and its interests can change with the changing character of the community.

The necessarily opportunistic (but efficient) strategies of using environmental variability were limited by the encroachment to herders into the reserves. The limited sizes of the reserves are a fundamental constraint on giving more livelihoods. More land is needed for the reserve farmers as good management of the existing resource through tenure reform will not meet the land hunger. At least one community' Komaggas has purchased more land from the DeBeers Diamond Mining Company through state assistance under the land acquisition programme and the Certain Land for Settlement Act 126 of 1993. Access to

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24 The number of members of a community may be larger thatn the number of present users. Lane and Moorehead (New directions in rangeland resource tenure and policy, in Scoones ed 1995 Living with Uncertainty) assert that many pastoral tenure systems were appropriate with the management system practised by herders in that herders "vested ownership of the resources in larger social groupings, which could provide the policing necessary to retain ownership of the range, while at the same time providing a quick and and simple decisionmaking process through kinship links legitimised by widely held beliefs and providing a set of clear rules, understood and accepted by everyone".

more land is to create opportunities for new entrants and especially poorer members of the community.

Development Planning

The Development Facilitation Act of 1995 offers new possibilities for the integration of district level development objectives or performance criteria, local needs, local involvement in decision making and financial support from central level. An early start was made in Namaqualand in formulating land development ojectives when the Department of Land Affairs allocated a district planning grant to non-governmental organisations. This project involves the identification of land based economic opportunities, land claims, needs and demands, and gearing institutions to implement jointly formulated development projects. The output will assist the district authority in preparing development goals as envisaged by the Development Facilitation Act to establish a matrix for land use and zoning decisions.[25]

Transitional measures

Before drastic changes can be made to current land rights in the rural areas, the existing law as well as good policy considerations demand that an inclusive consultation process must be conducted with those currently formal and informal holding rights.

Some questions

The initial policy document of the Reconstruction and Development Programme in 1994 identified identified a "national land reform programme (as) the central and driving force of a programme of rural development". It continous: "Such a programme aims to redress effectively the injustices of forced removals and the historidal denial of access to land. It aims to ensure security of tenure for rural dwellers." [26] Two years later we are recognising
the fiscal, constitutional, organisational, capacity and governance constraints. More importantly the absence of a comprehensive strategy for the economy as a whole threatens the land reform programme; by not relieving the pressure on the land because people have a more viable alternative, or by enabling people the land in a more effective way because they have access to resources external to the land reform programme and the agrarian sector generally. This brings the issue back to the role of the state and its role in land reform. Policy formulation, law reform and implementation go hand in hand. Law reform and intervention/implementation must be defined for what it is, a tension and struggle between classes, groups and individuals.

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25 Van Ryneveld and Surplus People's Project, 23 May 1996: Namaqualand District Planning and Management Project, final report on phase one(pre-planning phase) submitted to the Northern Cape Land Reform Steering Committee.

26 RDP, a policy framework, ANC, 1994 pages 19-20.

This puts the state in a pro-active role. It cannot merely be a facilitator.

LEGAL RESOURCES CENTRE
LAND, HOUSING AND DEVELOPMENT UNIT

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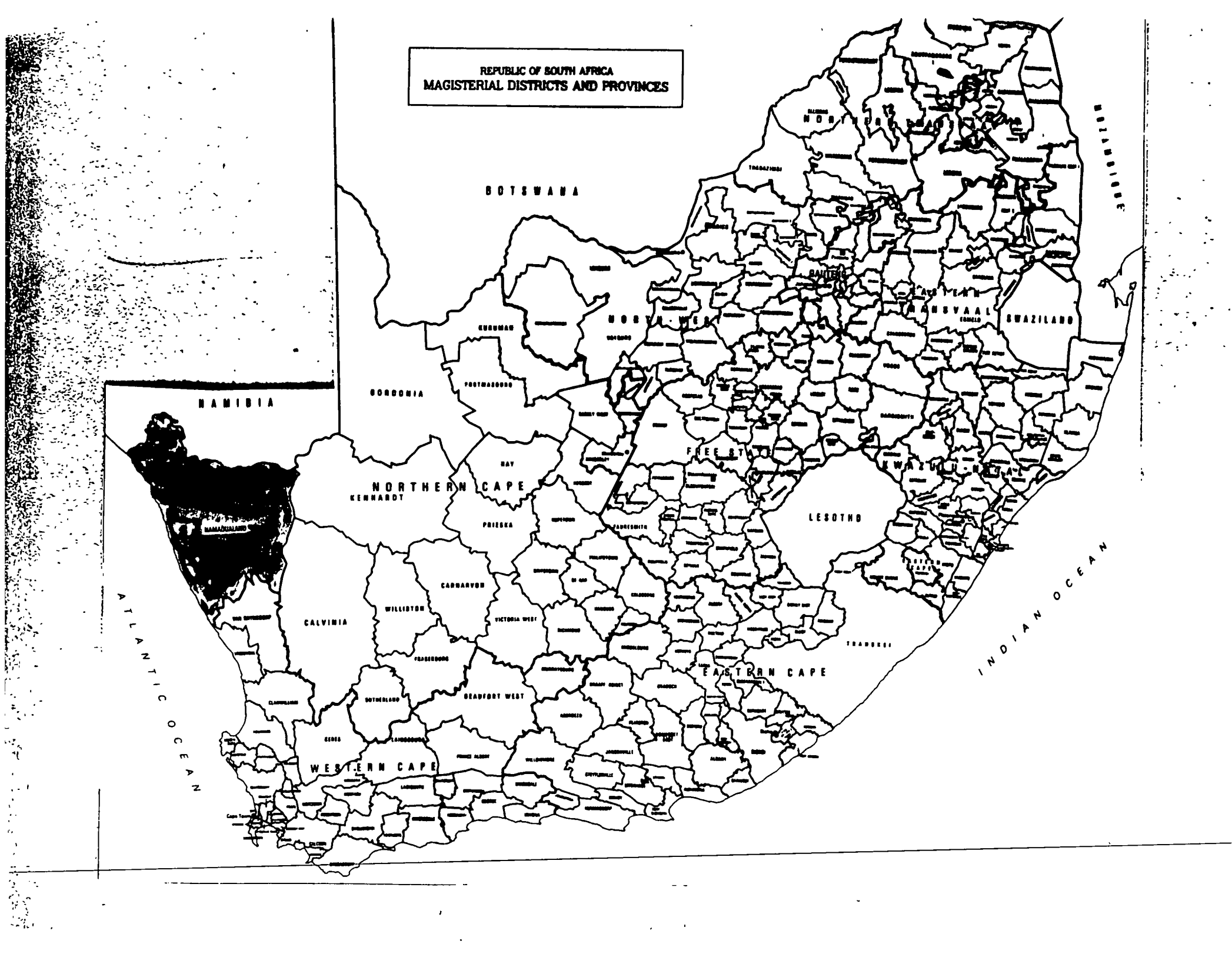
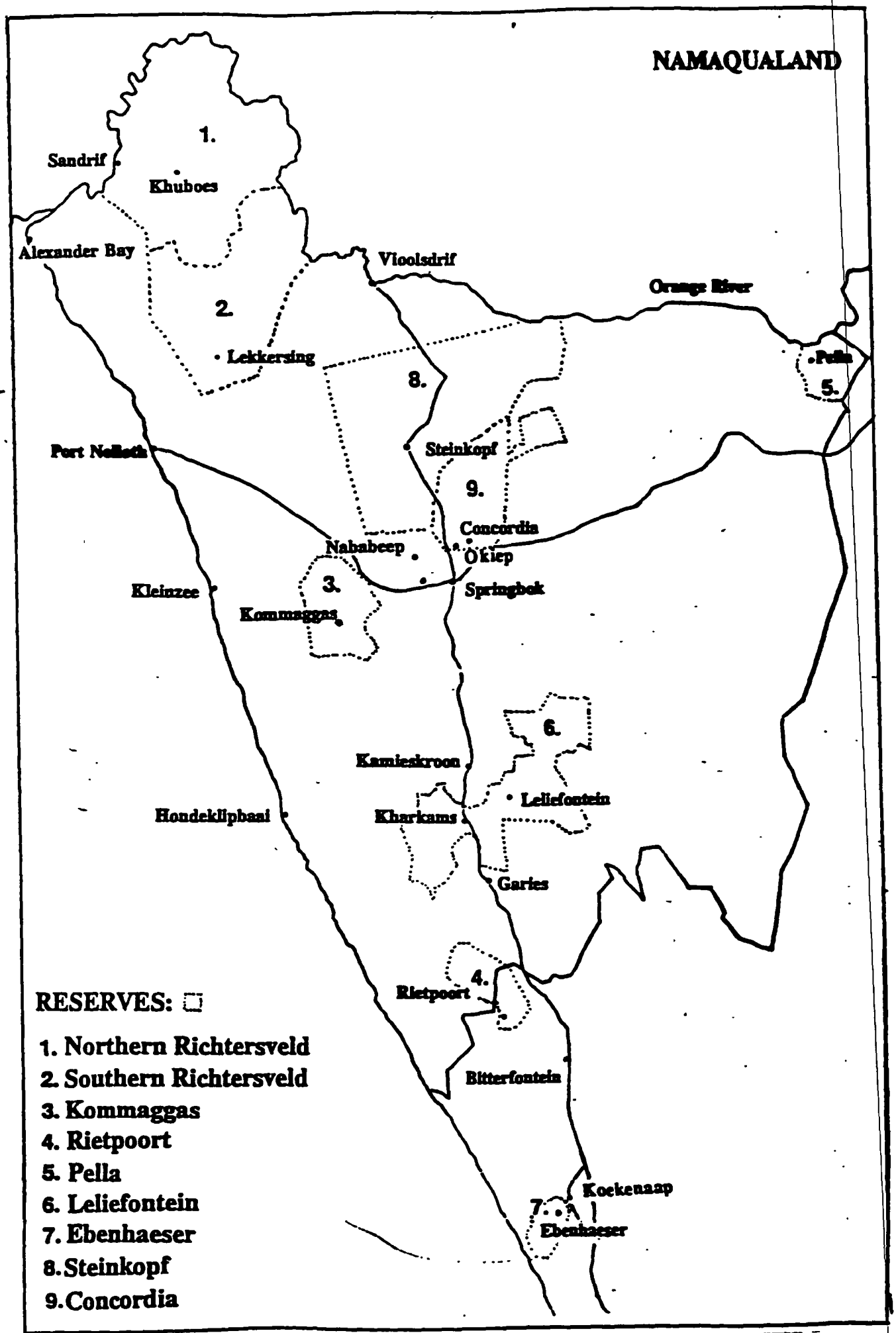

REPUBLIC OF SOUTH AFRICA
MAGISTERIAL DISTRICTS AND PROVINCES
BOTSWANA
NAMIBIA
BOPHUTHATSWANA
TRANSVAAL
SWAZILAND
LESOTHO
NORTHERN CAPE
KENHARDT
CALVINIA
CARNARVON
WILLISTON
VICTORIA WEST
BEAUFORT WEST
WESTERN CAPE
EASTERN CAPE
TRANSKEI
ATLANTIC OCEAN
INDIAN OCEAN


NAMAQUALAND
1.
Sandrif
Khuboes
Alexander Bay
Vioolsdrif
Orange River
2.
Lekkersing
8.
Pella
5.
Port Nolloth
Steinkopf
9.
Concordia
Nababeep
Okiep
Springbok
Kleinzee
3.
Kommaggas
6.
Kamieskroon
Leliefontein
Hondeklipbaai
Kharkams
Garies
4.
Rietpoort
Bitterfontein
Koekenaap
7.
Ebenhaeser
RESERVES:
1. Northern Richtersveld
2. Southern Richtersveld
3. Kommaggas
4. Rietpoort
5. Pella
6. Leliefontein
7. Ebenhaeser
8. Steinkopf
9. Concordia

STATISTICS IN RESPECT OF COLOURED RURAL AREAS

AREA	EXTENT - HECTARES	RESIDENTS	VOTERS	ERVEN	O\SHIP S20A
Concordia NC	63 383	3300/1200			
Ebenezer WC	18 271	1 200	980	166	
Eksteenskuil NC	2 012	1 060	636	none	
Enon EC	10 261	1 855	649	586	
Friemersheim WC	190	1 200	411	524	
Genadendal WC	4 821	5 800	2 105	+-1600	
Haarlem WC	1 415	3 500	850	269	*
Komaggas NC	62 603	3 300			
Kranshoek WC	244	2 100	887	419	
Leliefontein NC	192 719	8 000	355+		
Mamre WC	7 951	5 000	2 300	1651	
Mier NC	398 789	4 487	2 167	1 637	
Oppermansgrond e FS	34 185	945	542	198\63	*
Pella NC	48 276	4 500	1 380		
Pniel WC	54	2 600	1 070	51	*½
Richtersveld NC	513 919	3 643	1 628		
Rietpoort NC/WC	15 092	2 200	943	261	
Saron WC	3 478	4 000	1 400	1 200	*
Slangrivier WC	1 123	3 000	973	600	*
Steinkopf NC	329 301	8 000			
Suurbraak WC	4 789	+-3 000	+-863		*
Thaba Patchoa FS	3 624	742	415	134	
Zoar WC	5 902	3 200	1 283	1 374	*
TOTAL	1 722 402	73 482	21 837	10 670	

ANNEXURE "3"

AREA

For the purposes of this study Namaqualand is defined as the area of the magisterial district of Namaqualand. This also represents the area of the current District Council of Namaqualand, which is based in turn on the old Namaqualand Regional Services Council, and its forerunner the old Divisional Council of Namaqualand. It is an area of nearly 48 000 square kilometres. Namaqualand has a total population of just over 70 000 people at a density of 1.35 persons per square kilometre.

Traditionally Namaqualand is often thought of as bounded in the south by the Olifants River, which is a little to the south of the current administrative boundary. The Olifants River now falls within the Western Cape province, while Namaqualand District Council is part of the Northern Cape province.

There are roughly fourteen towns in Namaqualand, most of which are small, as well as six former coloured rural reserves, which also have settlements within their boundaries. Springbok, is the uncontested major centre of the area. The remaining thirteen towns are the diamond mining settlement of Alexander Bay, Kleinzee, Koingnaas, the copper mining towns of Carolusberg, Nababeep, O'okiep and Spektakel, the mining town of Aggeneys, the fishing settlements of Hondeklip Bay and Port Nolloth, and the farming centres of Garies, Kamieskroon, and Vioolsdrif. The six coloured rural areas are Richtersveld, Steinkopf, Leliefontein, Concordia, Komaggas and Pella. They comprise 1 210 000 hectares (about 25% of Namaqualand).

ANNEXURE "4"

GEOGRAPHY

Namaqualand has some remarkable geophysical features. Most significant are its variety of mineral deposits and its rich concentration of succulent plant species. The latter is more varied than anywhere else in the world.

The escarpment runs approximately down the middle of Namaqualand, with the Koperberg lying to the north west of Springbok, and the Kamiesberg to the south east. To the east of the escarpment is a plateau with an average altitude of over 900 meters. The part of this plateau which falls within Namaqualand is called the Cape Middleveld. The plateau area in the north eastern section of Namaqualand is a rocky region known as the little Namaqua-Bushmanland Plain. In the south east of Namaqualand this plateau area is known as the South Cape Middleveld. Here the soil is somewhat clayey and brackish. Running along the northern border of Namaqualand is the Orange River gorge, which is a rugged area with small patches of irrigable land.

To the west of the escarpment are the plateau slopes. There is a sandy strip of between 35 to 50 kilometres wide along the Namaqualand coast, which is called the Sandveld. Further inland is the Hardeveld, which is much rockier. In both areas the vegetation is sparse, increasingly so towards the north. The bush and shrub vegetation of the Hardeveld is good for stock farming.

All of Namaqualand is dry. In most of the district the water must be drawn from boreholes and is often brackish. To the west of the Kamiesberg there is between 50 and 70mm of rain per year, which falls in the winter months. East of the Kamiesberg is a summer rainfall area. In the Southern Cape Middleveld there is between 150mm and 300mm of rain per year, while in the Namaqua-Bushland plain and the Orange River gorge rainfall is approximately 50mm per annum. Apart from the Orange River, the only other river of note in Namaqualand is the Buffelsrivier.

The most valuable minerals have been diamonds - mostly along the coast. These diamonds were washed down the huge rivers that used to exist in the area millions of years ago, and deposited along certain sections of the coast. Other important minerals which are include copper, zinc, lead, silver, bauxite, pegmatite, limestone, and kaolin, amongst others.