

FARM 39 TRANSFORMATION: THE LOST 18 YEARS

PART 7 : CHOICE OF ENTITY

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Ward 2 Forum
SERVING THE COMMUNITY TOGETHER

Ward 2 Forum Team
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PART 7: CHOICE OF ENTITY

The first option (reference1) is between individual ownership (ownership by a natural person) as against ownership by a legal person (a legal entity). An entity can be an owner whilst holding the land in trust on behalf of the community. When a natural person (an individual) becomes an owner, he can only be the owner until he dies. An entity lasts forever. Where the Minister keeps the land as owner he does not keep it as a person, it vests in his office for ever on behalf of, and in trust for, the community.

The first choice was made by the Consultants in favour of a legal person or entity, rather than individual ownership.

The second choice is more difficult – between the local municipality and a private entity, such as:

- Voluntary association (a club prohibited from trading if over 20 members);
- Trust (controlled by common law and the Trust Property Control Act) – trustees make the decisions and they are usually answerable to each other, not to the membership, often needing to employ legal experts to support them;
- Private Company (limited to 50 members) and Closed Corporation (limited to 10 members) – controlled by the Companies Act (both are very cumbersome organisations);
- Section 21 Company (cannot trade for gain of its members, has no share capital and cannot distribute shares or pay dividends to members);
- Communal Property Association (CPA) is not ideal for business and cannot easily obtain finance from a private banking institution. But, a CPA is more answerable to its members.

The more cumbersome process of establishing a CPA contains essential steps to ensure community participation and fair intra-community arrangements, such as the determination and allocation of rights to allotments, grazing and other commercial opportunities on land. There are no advantages that a trust as legal entity has that a CPA cannot match. A CPA at least has the benefit of state assistance. An ailing CPA can be placed under the administration of the Director General, with a budget to administer the CPA.

The Choice of CPA as the Entity

This choice was considered by the Consultants to represent the most suitable form of private entity. The Act does not include any specific provisions in relation to CPAs, although the CPA Act (28 of 1996) does include certain principles, similar to those applicable to municipalities. Since the CPA Act was passed (reference 2), 1483 CPAs have been registered, 48 in the last year, also 203 were assisted towards compliance with the Act. These cover a total area of 4540 ha. Problems faced by the over 1300 non-compliant ones include:

- Verification of members' eligibility for rights;
- Influence of external parties, especially where agricultural land value is high;
- Low literacy levels, hence records sometimes non-existent, and poor governance;
- Infighting, hence wasting people and financial resources;
- Lack of availability of, and interest in, training and learning - now improved;
- Use of funds for unnecessary interdicts, even against the DRDLR;
- Failure of committees to comply with their own constitution;
- Failure to exercise fiduciary responsibilities;

- Gross dysfunctionality – members and funds vanished, no meetings, no records;

Establishment of District forums with the DRDLR has assisted in improving communications between the CPAs, discussions on experience, problem solving etc. Undoubtedly, the future of CPAs will depend on the sustainability of high quality advice available from these Forums.

The constitution of a CPA must in terms of the law satisfy the following principles:

- Fair and inclusive decision-making processes;
- Fair and non-discriminatory treatment of all members;
- Transparency and accountability in conduct with all members;
- Fair and equal opportunity must be permitted to all members to apply for access to land;
- Property must be managed for the benefit of all members in a participatory and non-discriminatory manner;
- Accountability and transparency by the committee to members regarding finances and the allocation of rights.

Safeguards are built in to a CPA, such that a majority of members are not entitled to convene a meeting and change the provisions of the CPA constitution to undermine any of the provisions of the Act, because the Act, by force of law prohibits it. When a CPA does go wrong it has various supporting systems that may be accessed. If a member of an association or a group of members believes that things are going wrong in the association, or if there is a serious dispute in an association, then such a member can take steps to deal with the problem.

However, private ownership of land gives rise to Property Rates, and there may be only limited access to public funds.

Additional provisions and safeguards in the Municipal Systems Act and the Municipal Finances Act may be relevant, which are not necessarily available for a private entity such as a CPA or Trust.

The choice of Local Municipality as the Entity

If the land is transferred to the Municipality, there should be no rates and taxes payable by the residents for 10 years after a land tenure beneficiary's title is registered, nor by the occupiers and users of the land. Land ownership by the Municipality does not exclude control by the residents. On the contrary, the management of the land can be completely separated from its ownership. If the Municipality is the landowner, it has certain obligations regarding service delivery and a mandate to be responsible for the development of the land, as well as the extension of socio-economic rights in respect of the residents occupying the land.

If the land vests with the Municipality, then the residents may at any time resolve to transfer the land to another entity by means of a general meeting arranged for that purpose, where a majority vote is attained.

The choice of a municipality has been the recommendation of TWKM, supported by the Consultants, although there is absolutely no evidence that the community agrees, or indeed that the community has sufficient information to allow them to make a reasonable decision on the matter. There is a history of inexplicable hostile behaviour and actions taken by TWKM over the years that hardly encourage belief in their suitability to be the entity. Inevitably, this will influence the community's decision.

Mandatory Provisions

Section 4 of Act 94 prescribes that certain conditions must apply, for the choice of either municipal or private entity:

- Residents must be given reasonable preference to acquire Trust land outside the 'township';
- TWKM must not sell or encumber the land, or any substantial part of it, without the consent of a majority of residents at a public meeting called for that purpose;
- Residents must have a fair opportunity to participate in decision making related to administration of the land;
- Residents must not be discriminated against;
- Residents must have reasonable preference in decisions about access to the land;
- TWKM must be accountable to the residents and record effectively all financial transactions regarding the land;
- TWKM has fiduciary responsibilities in relation to the residents (as a Trustee).

Recommendations

Nevertheless, it is considered that the recommendation for choice of an entity, or a combination of entities, should be made dependent upon the following:

- Advice and assistance, on a sustainable, timely and trustworthy basis, on specific issues regarding Farm 39, from DRDLR;
- Development of general policies, Regulations and Guidelines from DRDLR;
- Accessible, sustainable funding for residential property owners in Farm 39, for major repairs and maintenance as well as for business ventures, against security of a property;
- Accessible, sustainable funding for community developmental ventures and investment;
- Satisfactory protection in the legal arrangements to comply with Act 94 to safeguard the reasonable interests and expectations of all the community.

Reference 1: Genadendal Legal Entity Options (1)

Reference 2: Communal Property Associations 2015-16 Annual Report.

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On behalf of Ward 2 Forum