

THE EFFECT OF LAND RESTITUTION ON PROTECTED AREAS – AN
ANALYSIS OF THE CO-MANAGEMENT MODEL IN OPERATION AT THE
MKAMBATI NATURE RESERVE

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ABSTRACT

With the advent of the Constitution of the Republic of South Africa, and having been faced with a huge number of land claims on protected areas, the South African Government adopted a co-management system as a way of informing the settlement of land claims lodged within protected areas. Through a case study of the Mkambati Nature Reserve (MNR) in the Eastern Cape, this dissertation seeks to critically analyse the co-management conservation model that is in operation in the MNR, in order to provide a proper perspective on whether it provides a satisfactory model for reconciling both the country's protected area regime and its land reform regime. The dissertation commences with a brief analysis of South Africa's socioeconomic and environmental realities, in order to contextualise the analysis. It then turns to consider South Africa's constitutional framework, and, particularly, the environmental right and the property clause, which have largely been responsible for shaping and informing South Africa's contemporary conservation and land reform regime. Thereafter, it seeks to briefly outline these two relevant regimes, with a view to critically analysing the manner in which they complement, or do not complement, one another. It then critically reviews recent initiatives taken by the country's conservation and land reform authorities to bridge the apparent divide between South Africa's protected areas and land reform regimes. These initiatives include both a Memorandum of Understanding, signed by the erstwhile Minister of Land Affairs and the Minister of Environmental Affairs and Tourism, and the recent National Co-Management Framework adopted by these authorities. Thereafter, the dissertation turns to critically reflect on the effectiveness and equitability of the co-management model advocated by these initiatives, through the lens of a case study – namely, the MNR in the Eastern Cape. This section of the dissertation starts by providing a background to the reserve, and the history form and nature of the settlement agreement implemented to resolve the land restitution claim within it. It then turns to the evaluation of the governance regime that is in operation in the MNR (specifically in respect of its land tenure, management, access/use and benefit-sharing arrangement), with a view to drawing lessons which could possibly inform the resolution of the many outstanding land restitution claims in protected areas.

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LIST OF ABBREVIATIONS

ASGISA	Accelerated and Shared Growth Initiative – South Africa
CBD	Convention on Biological Diversity
CMC	Co- Management Committee
CPA	Communal Property Association
CPAA	Communal Property Associations Act
CPPP	Community Public Private Partnership
CRLR Rights	Commission on the Restitution of Land
DAFF	Department of Forestry and Fisheries
DEA	Department of Environmental Affairs
DEAET	Department of Environmental Affairs Economic Development and Tourism (Eastern Cape)
DEAT	Department of Environmental Affairs and Tourism
DLA	Department of Land Affairs
DPW	Department of Public Works
DRD&LR	Department of Rural Development and Land Reform
DWAFF	Department of Water Affairs and Forestry
ECA	Environment Conservation Act
ECPB	Eastern Cape Parks Board
ECRFC	Eastern Cape Rural Finance Corporation
ECPTA	Eastern Cape Parks and Tourism Agency
EIA	Environmental Impact Assessment

GEAR	Growth Employment and Redistribution
HSRC	Human Sciences Research Council
IUCN Nature	International Union for the Conservation of Nature
MEC	Member of the Executive Council
MLT	Mkambati Land Trust
MNR	Mkambati Nature Reserve
MOA	Memorandum of Agreement
NEMA	National Environmental Management Act
NGO	Non-Governmental Organisation
NPAES Strategy	National Protected Areas Expansion Strategy
PA	Protected Areas
PFMA	Public Finance Management Act
PPP	Public Private Partnership
RDP Programme	Reconstruction and Development Programme
RLCC	Regional Land Claims Commission
RLRA	Restitution of Land Rights Act
SANParks	South African National Parks
SDI	Spatial Development Initiatives
SMP	Strategic Management Plan
WCPA	World Congress on Protected Areas
WPC	World Parks Congress

1. CHAPTER 1 – INTRODUCTION

1.1 The Research Context

The South African Government has for the past 20 years sought to redress the injustices of the past and to reverse land inequalities, through the introduction of a comprehensive land reform programme which consists of three components namely; land restitution; land redistribution and land tenure.¹

The South African Government further introduced a statutory framework to guide the implementation of the three components of the land reform programme. It did so primarily through the introduction of the Restitution of Land Rights Act (RLRA), which seeks to give effect to the right to restitution as a constitutional right, as provided for in the Constitution.² The RLRA provides for the restitution of land rights to persons or communities dispossessed after 19 June 1913, as a result of the past discriminatory laws or practices, and without equitable compensation. The RLRA further facilitates the establishment of the Regional Land Claims Commissions in all nine provinces in order to expedite the submission, processing and resolution of land claims.³

The South African Government has, in the last twenty years of the new democracy, further introduced policies⁴ and an array of laws that govern land reform.⁵

¹ For an overview on this see: Kepe T, Wynberg R & Ellis W “ Land Reform and Biodiversity Conservation in South Africa: Complimentary or in conflict” 2005 (1) *International Journal of Biodiversity Science and Management* 4; De Koning M “ Returning Manyeleti Game Reserve to its Rightful Owners: Land Restitution in Protected Areas in Mpumalanga in South Africa” (2010) 236 (61) *Unasylva* 41; Hall R “ Reconciling the Past, Present and Future: The Parameters and Practices of Land Restitution in South Africa” Unpublished paper presented at the Seminar on Land Restitution and Transitional Justice at the Norwegian Centre for Human Rights, University of Oslo, 10 September 2009.

² Restitution of Land Rights Act 22 of 1994.

³ See the preamble of the Act; see further R Hall “Land Restitution in South Africa: Rights, Development and the Restrained State” (2004)38(3) *Canadian Law Journal* 657.

⁴ These policies include: Department of Rural Development and Land Reform *Green Paper on Land Reform 2011*; Ministry of Rural Development and Land Reform *The Comprehensive Rural Development Programme Framework* (2009); Sustainable Development Consortium *Settlement and Implementation Support Strategy for Land and*

The South African Government has tried to conserve its rich biological wealth by promulgating a number of laws⁶ and policies⁷ that seek to regulate, administer and manage biodiversity conservation.⁸

Some forced removals were carried out to create protected areas – which included national parks, provincial game and nature reserves that were to be preserved for the protection of the environment.⁹ This has resulted in land restitution claims on land that is inside the protected areas.

Agrarian Reform in South Africa: A Synthetic Report (2007) Commission on Restitution of Land Rights in Pretoria; Government of the Republic of South Africa *The Land and Agrarian Reform Project: The Concept Document (2008) Version 5(2)* dated February 2008; and Department of Land Affairs *White Paper on South Africa's Land Policy* 1997.

⁵ These laws include: Restitution of Land Rights Act 22 of 1994; Communal Property Associations Act 26 of 1998; Extension of Security of Tenure Act 62 of 1997; Communal Land Rights Act 11 of 2004; Development of Facilitation Act 67 of 1997; Upgrading of Land Tenure Rights Act 112 of 1993; Land Titles Adjustment Act 111 of 1993; Transformation of Certain Rural Areas Act 94 of 1998; Provision of Land and Assistance Act 126 of 1993; Land Administration Act 2 of 1995; Interim Protection of Informal Land Rights Act 31 of 1996; and Restitution of Land Rights Amendment Bill, 2013.

⁶ These laws include : National Environmental Management: Protected Areas Act 57 of 2003; National Environmental Management Act: Biodiversity Act 10 of 2004 ;Marine Living Resources Act 18 of 1998;National Heritage Resources Act 25 of 1995; World Heritage Convention Act 49 of 1999; and National Forest Act 30 of 1998.

⁷ These policies include : National Biodiversity Assessment 2011: An Assessment of South Africa's Biodiversity and Ecosystems Synthesis Report 2012; National Protected Areas Expansion Strategy for South Africa (2008) 2009; National Biodiversity Framework 2009;South Africa's National Biodiversity Strategy and Action Plan; Guidelines for the Implementation of Community Based Natural Resource Management (CBNRM) in South Africa; and White Paper on the Conservation and use of South Africa's Biodiversity 1997.

⁸ For an overview of this see: Department of Environmental Affairs and Tourism *10 Year Review (1994-2004)* 2005 43-45.

⁹ Carruthers J "South Africa: A World in One Country: Land Restitution in National Parks and Protected Areas" 2007 *Conservation and Society* 295; Kepe et al 2005 (1) *IJBSM* 3; Kepe T "Land Restitution and Biodiversity Conservation in South Africa: The Case of Mkambati Eastern Cape Province" 2004 *Canadian Journal of African Studies* 691; Department of Environmental Affairs and Tourism *The Cape Vidal Memorandum Statement to the 5th World Parks Congress* 5-7 September 2003; the term also includes marine protected areas; mountain catchment areas; special nature reserves; protected natural environment; conservation areas; conservancies, national heritage sites; provincial heritage sites; forest wilderness areas; lake area development; natural forests; local authority nature reserves; defence areas; certain islands and rocks; maritime cultural zones; biosphere reserves; lake area development area; forest nature reserves; and marine reserves; provincial nature reserve ; conservation areas; private nature reserve; national botanic gardens; conservancies; local authority nature reserve; and protected natural environment; protected areas have been defined as 'a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives' (Convention on Biological Diversity (1992) 31 ILM 88); and as 'an area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means' (IUCN Guidelines for Protected Areas Management Categories (1994) 7 and 'a clearly defined geographical space, recognised, dedicated and managed through legal or other effective means, to achieve the long term conservation of nature with associated ecosystem services

Upon the successful land restitution process the communities become land owners of the restored land. They accordingly play a role in the management of the protected areas by becoming land owners, managers, developers; beneficiaries; or owner/manager; owner/co-manager; owner/beneficiary; non-owner/ manager; non-owner/ co-manager; non-owner / non manager /beneficiary.¹⁰ Therefore there are legal tools that facilitate their role.¹¹

It can be argued that, the land restitution claims in protected areas have created problems for the Government as it struggled to reconcile the conservation and the land reform regime.¹² Similarly, until recently, the Government did not have any policy framework that sought to regulate the overlap between the protected areas regime and the land reform regime.¹³

Due to the apparent divide between the two regimes, the South African Government has attempted to traverse this divide through the conclusion of a *Memorandum of Agreement* (MOA) between the Minister of the former Department of Agriculture and Land Affairs (DLA) and the Minister of the former Department of Environmental Affairs and Tourism (DEDEAT).¹⁴ Both Ministers agreed on the approach to be followed in the resolution of land claims in protected areas. They further outlined their respective roles and responsibilities in the settlement of land claims in protected areas. DLA further agreed to take a lead in the implementation of the MOA. The MOA further promotes co-management as a preferred option of managing restored protected areas.

The second initiative that was taken by Government to bridge this divide was the adoption of the *National Co- Management Framework* that seeks to collaborate with the MOA in promoting co- management as a preferred

and cultural values' (IUCN Guidelines for Applying Protected Areas Management Categories (2008) 8.

¹⁰ For a detailed discussion on these options see: Paterson A "Co- Managing South Africa's Conservation and Land Reform Agendas: Evaluating Recent Initiatives to Resolve the Unruly Interface Thrust Upon South Africa's Protected Areas" 2010 *South African Journal of Environmental Law and Policy* 110-123.

¹¹ These legal tools include: Communal Property Associations Act 28 of 1996; Trust Property Control Act 57 of 1998; Companies Act 71 of 2008; and the Protected Areas Act 57 of 2003.

¹² Kepe et al 2005 (1) *IJBMSM* 4.

¹³ Kepe T "Land Claims and Co- Management of Protected Areas in South Africa: Exploring the Challenges" 2008 (41) *Environmental Management* 311- 312; De Koning (2010) 236 (61) *Unasylva* 41.

¹⁴ Minister of Agriculture and Land Affairs & Minister of Environmental Affairs and Tourism *Memorandum of Agreement* (2007) dated 2 May 2007.

governance system in restored protected areas.¹⁵ The framework further seeks to expedite the conclusion of co- management agreements in restored protected areas.

There are about 150 land claims that had been lodged in protected areas and only 46 of these had been settled.¹⁶ In the Eastern Cape only seven of the eighteen claims that were lodged in protected areas had been settled. This number includes the protected areas that are managed by the Eastern Cape Parks and Tourism Agency (ECPTA).¹⁷ The introduction of the Restitution of Land Rights Amendment Bill is likely to increase the number of land restitution claims in protected areas as it extends the closing date for the submission of land claims to 31 December 2018.¹⁸

This extension of the deadline will increase the number of land claims in protected areas and could also create more capacity problems for the Department of Rural Development and Land Reform (DRD&LR) officials and Management Authorities.

In the Eastern Cape, the population has grown by 4.5% from 6 278 651 to 6 562 053 since 2008.¹⁹ People living in rural areas are estimated to be in the region of 4,100,000.²⁰ These rural areas are the most poverty stricken parts of the Eastern Cape as people living in these areas still lack access to basic water services, infrastructure development and are still experiencing low levels of education.

The Government has over the last twenty years attempted to redress the injustices of the past through the introduction of new policies, programmes

¹⁵ Minister of Environmental Affairs *National Co- Management Framework* 2010.

¹⁶ Commission on Restitution of Land Rights *Presentation of Progress on Land Claims in Protected Areas* by Acting Chief Land Claims Commissioner (' T Mdintswa) to the Portfolio Committee on Rural Development and Land Reform on 20 August 2013; regarding the number of land claims that had been finalised where payment and transfer of land was made to the beneficiaries and those that had been settled through the approvals by the Minister in 2012/13 financial year refer to :Department of Rural Development and Land Reform *2012/13 Annual Report* 19.

¹⁷ These relate to the Dwesa- Cwebbe Nature Reserve; Mkambati Nature Reserve; Silaka Nature Reserve, and Double Drift Nature Reserve.

¹⁸ Restitution of Land Rights Amendment Bill, 2013.

¹⁹ Statistics South Africa *Census Report 2011*.

²⁰ Fobosi S "Rural Areas in the Eastern Cape Province South Africa: The Right to Access Safe Drinking Water and Sanitation Denied?" Discussion paper Consultancy Africa Intelligence.

and strategies with a view of promoting its economic growth.²¹ However the inequalities and poverty are still dominant in the Eastern Cape which is still regarded as one of the provinces that has the highest levels of unemployment and poverty.²² Between the fourth quarter of 2011 and the last quarter of 2012, the unemployment rate in the Eastern Cape increased by 2.7% from 27.1% to 29.8%.²³ This rate increased further by 0.4% from 29.8% to 30.2%.²⁴ The continued increase of job losses is constantly increasing the rate of poverty in the Eastern Cape as according to the Eastern Cape

Development Report, the Eastern Cape still ranks as one of the Provinces that has the highest rate of poverty.²⁵

The Eastern Cape is also experiencing an imbalance between the economically active population (skilled people between the ages of 15 and 64) and the economically inactive population (people below 18, 65 and above). This situation is normally present in rural areas where the communities lack job opportunities and they therefore resort to natural resources for their livelihoods as they harvest the natural resources.²⁶

Over a number of years there has been a global shift from a classic or exclusionary, state-centred model of protected areas, to the model that

²¹ These policies, programmes and strategies include: the Reconstruction and Development Programme (RDP); the Growth, Employment and Redistribution Strategy (GEAR); the establishment of the Accelerated and Shared Growth Initiative – South Africa (ASGISA) in 2006 to assist Government in achieving its goal of halving poverty and unemployment by 2014; ASGISA Eastern Cape was established in 2007 with a view of halving poverty and unemployment in the Eastern Cape; ASGISA Eastern Cape has now been merged with the Eastern Cape Rural Finance Corporation ECRFC t/a Uvimba Finance into the Eastern Cape Rural Development Agency (ECRDA); the establishment of the National Planning Commission in 2010 to develop a vision for the country and how it should be achieved; the Eastern Cape Planning Commission was proclaimed in March 2012 with a view to aligning its strategies with the National Planning Commission; the establishment of the Eastern Cape Development Corporation, two Industrial Development Zones and the Eastern Cape Socio-Economic Consultative Council.

²² Eastern Cape Socio- Economic Consultative Council *Eastern Cape Development Indicators- 2012*.

²³ Statistics South Africa, *Quarterly Labour Force Survey*, Quarter 4, 2012.

²⁴ Statistics South Africa, *Quarterly Labour Force Survey*, Quarter 1, 2013.

²⁵ Eastern Cape Socio-Economic Consultative Council *Eastern Cape Development Report 18*; Statistics South Africa *Census Report 2011*; Human Sciences Research Council Report (HSRC) 2011.

²⁶ Naughton- Treves L, Holland M & Brandon K “The Role of Protected Areas in Conserving Biodiversity and Sustaining Local Livelihoods” 2005 *Annual Review Environmental Resources* 241.

includes the communities in the management of protected areas and allows them to be part of the decision making processes.²⁷ As a result, from the Third to the Fifth World Parks Congress, the new protected area partnership paradigm topic has been a constant feature on the agenda of conservation management. Protected areas are now seen as a means of enhancing sustainable development, through which the livelihoods of local people can be improved.²⁸ These areas are now managed through partnerships, which include government, local communities, indigenous groups, the private sector and Non-Governmental Organisations (NGOs).²⁹ Local people are now actively involved as partners, instead of playing a passive role at the receiving end.³⁰ Protected areas are now considered as community assets, as they are managed to cater for the needs of local people from which economic benefits can be derived.³¹ This approach resulted in the involvement of local communities in the management of protected areas.³²

The Eastern Cape is home to seven biomes which include Forest, Fynbos, Grassland, Nama Karoo, Succulent Karoo and Thicket.³³ The Albany, Drakensberg and Pondoland centres of endemism cut across the province and as a result, the Eastern Cape has been recognised as one of the richest provinces in terms of biological wealth.³⁴

The Eastern Cape further contributes seventy four formal terrestrial protected areas and seven marine protected areas to South Africa's protected area

²⁷ For a comprehensive discussion on the shift in protected areas management see: Hulme D & Murphree M "Communities, Wildlife and the New Conservation in Africa" 1999 *Journal of International Development* 11 278; Paterson A "Wondering about South Africa's New Protected Areas Regime 2007 *SA Public Law* 1-33; Paterson A "Protected Areas" in Glazewski J *Environmental Law in South Africa* (2008) LexisNexis Durban 7-8.

²⁸ National Protected Area Expansion Strategy for South Africa (NPAES) (2008) 12.

²⁹ Hulme & Murphree 1999 *J.Int,Dev* 280-284.

³⁰ Department of Environmental Affairs Conservation for the People with the *People: A Review of the People and Parks Programme* 2010 DEA; World Commission on Protected Areas Durban Action Plan 2003 IUCN Gland 229.

³¹ National Protected Area Expansion Strategy for South Africa (2008) 13.

³² The role of communities in protected areas is discussed in detail in chapter 2.

³³ For a comprehensive description of the biodiversity value of the Eastern Cape see: Conservation International Southern African Hotspots Programme & South African National Biodiversity Institute *Ecosystem Profile Maputaland –Pondoland-Albany Biodiversity Hotspot* (2010) 36-37; Department of Water Affairs and Forestry *Eastern Cape Biodiversity Conservation Plan Handbook* (2007) 3;

³⁴ For a comprehensive discussion on this issue see: Department of Water Affairs and Forestry *Eastern Cape Biodiversity Conservation Plan Technical Report* (2007)3; Eastern Cape Biodiversity Conservation Plan Handbook (2007) 3; South Africa's National Biodiversity Strategy and Action Plan (2005) 12.

estate that is estimated to be about 433.³⁵ There has been a steady increase in the number of both marine and terrestrial protected areas that have been gazetted since 2003.³⁶ The management of these protected areas in the Eastern Cape is shared between various agencies which include the Eastern Cape Parks and Tourism Agency (ECPTA), municipalities and the South African National Parks (SANParks).³⁷

Currently, protected areas play a significant role in supporting local, national and international biodiversity policies.³⁸ Protected areas also play a major role in maintaining ecological and evolutionary processes that create and sustain biodiversity, and maintain a viable population of species.³⁹ They also assist with the recognition of cultural heritage, preservation of natural and biological resources, biodiversity conservation, tourism, watershed protection, storm protection and research.⁴⁰

They also serve as places for scientific research, wilderness protection, maintenance of environmental services, education, tourism and recreation, protection of specific natural and cultural features, and sustainable use of biological resources.⁴¹ In the context of land restitution, the importance of protected areas was highlighted at the 5th World Parks Congress (WPC) in 2003 in Durban.⁴² The main objective of the WPC was to address matters between conservation and the communities that were removed to create

³⁵ Eastern Cape Parks and Tourism Agency *Eastern Cape Protected Area Expansion Strategy* (2012) 2.

³⁶ For the steady increase in the number of protected areas see: Department of Environmental Affairs, *Review of Institutional Arrangements for Management of Protected Areas* (2010) 24.

³⁷ Eastern Cape Parks and Tourism Agency *Eastern Cape Protected Area Expansion Strategy* (2012) 2.

³⁸ Phillip A *Economic Values of Protected Areas: Guidelines for Protected Area Managers* 1998 Best Practice Protected Area Guidelines, Series No.2, IUCN Gland Switzerland and Cambridge 3

³⁹ Kepe et al 2005 *International Journal of Biodiversity Science and Management* 9; Phillips A (ed) *Financing Protected Areas – Guidelines for Protected Area Managers* (2000) Best Practice Protected Area Guidelines Series No. 5, IUCN Gland 3; Thomas L & Middleton J *Guidelines for Management Planning of Protected Areas* (2003) Best Practice Protected Area Guidelines Series No.10, IUCN Gland 3.

⁴⁰ Secretariat of the Convention on Biological Diversity (2008) *Protected Areas in Today's World: Their Value and Benefits for the Welfare of the Planet*, Montreal, Technical Series No. 36; see also Department of Environmental Affairs & Resource Africa *People and Parks Toolkit* 2011 10 – 16.

⁴¹ See: IUCN Guidelines for Protected Area Management (1998); Phillips A *Management Guidelines for IUCN Category V Protected Areas, Protected Landscapes/ Seascapes* (2002) Best Practice Protected Area Guidelines Series No.9, IUCN Gland

⁴² World Commission on Protected Areas Durban Action Plan (2003) IUCN Gland at 257.

protected areas, and to encourage the involvement of the dispossessed, and the communities surrounding protected areas, in decision making processes.⁴³ At this congress, protected areas were also recognised for their role in poverty reduction and their contribution to sustainable development, among other roles.⁴⁴

As has been discussed above, the Eastern Cape is also affected by the land restitution claims on land that is inside protected areas. There are about eighteen land restitution claims that have been lodged in protected areas in the Eastern Cape and only seven have been settled thus far.⁴⁵ The author assumes that this number also includes claims lodged on privately owned protected areas or protected areas that are managed by the municipalities because only four claims of the seven that had been lodged on State owned protected areas have been settled thus far.⁴⁶

This number is likely to increase due to the introduction of the Restitution of Land Rights Amendment Bill which seeks to extend the deadline for submitting land claims to 31 December 2018.⁴⁷ The enactment of this Bill into law could create problems for the Eastern Cape Province, in particular for the ECPTA, because about 99% of the protected areas it manages are under land restitution claims.⁴⁸ The implications of this extension for the ECPTA are that firstly; there is a high possibility of having all the Nature Reserves under the land restitution process, secondly, there is also a high possibility of contesting claims on the already registered claims- this could cause further delays on their settlement, thirdly the possibility of traditional

⁴³ On the eve of this congress, The Department of Environmental Affairs (DEA) [the then Department of Environmental Affairs and Tourism (DEAT)], organised for communities from the Richtersveld, Khomani San, Riemvasmaak, Makuleke areas and communities from iSimangaliso (then known as St Lucia), to meet at Cape Vidal. They represented the people who had been removed or directly threatened with removals from Protected Areas (PAs) to make way for wildlife and conservation; DEAT 2012.

⁴⁴ World Commission on Protected Areas Durban Action Plan Revised Version 2004 at 226.

⁴⁵ Commission on Restitution of Land Rights *Presentation of Progress on Land Claims in Protected Areas* by Deputy Land Claims Commissioner (Mr Mdintswa) to the Portfolio Committee on Rural Development and Land Reform on 20 August 2013; further see: Department of Environmental Affairs Conservation For the People with the People: *A Review of the People and Parks Programme* 2010 37.

⁴⁶ These include: Dwesa-Cwebe Nature Reserve; Mkambati Nature Reserve; Silaka Nature Reserve and Double Drift Nature Reserve.

⁴⁷ Restitution of Land Rights Amendment Bill, 2013.

⁴⁸ The former provincial Department of Environmental Affairs assigned the management of all the State protected areas to the erstwhile Eastern Cape Parks Board (ECPB) now the Eastern Cape Parks and Tourism Agency.

authorities that are currently managing the communal land, using this window to register a counter claim against the existing Trusts and communal property associations (CPA).⁴⁹

It thus becomes important for a proper co-management model to be operational in the Eastern Cape for purposes of encouraging new land owners to co- manage their land with the Management Authorities.

However, in areas where there has been a successful land restitution process, there are often conflicts between the conservation agencies and the local communities which emanate from the expectations of the communities to benefit from their restored land. Unfortunately these conflicts emerge after the land had already been restored to them or during the post settlement process.⁵⁰ These conflicts are discussed in chapter four below.

1.2 THE AIM AND SCOPE OF THE RESEARCH

The aim of this dissertation is to share the lessons that can be drawn from the implementation of the co-management model currently in operation in the Mkambati Nature Reserve (MNR), and, particularly, to use the recent experience of the MNR to reflect on, and draw lessons from, the utility of the co-management model.

The primary research question is therefore what lessons does the co-management model in operation in Mkambati Nature Reserve hold for

⁴⁹ For detailed comments on the Restitution of Land Rights Amendment Bill see: Submissions prepared by Cousins B, Hall R, Moenieba I & Paradza PLAAS dated 1 November 2013.

⁵⁰ For a comprehensive discussion on this issue see : Ntshona Z, Kraai M; Kepe T & Saliwa P “ From Land Rights to Environmental Entitlements: Community Discontent in the Successful Dwesa- Cwebe Land Claim in South Africa” 2010 *Development South Africa* 357; Leach M. Mearns R & Scoones I “Environmental Entitlements: Dynamics and Institutions in Community- Based Natural Resource Management *World Development* 227; Kepe 2004 *CJAS* 691; Cousins & Kepe 2004 *EJDR* 9-11; Kepe T, Cousins B & Turner S “ Resource Tenure and Power Relations in Community Wildlife Contexts: The case of the Mkambati Area on the Wild Coast of South Africa” Evaluating Eden Series Discussion Paper No.16 12-16.

creating effective and equitable governance regimes for settling and regulating the remaining land restitution claims in South Africa's protected areas?

This dissertation seeks to address eleven subsidiary research questions. First, what is the socio-economic and environmental context in South Africa? Secondly, what are protected areas and why are they so important to South Africa? Thirdly, what important international developments in the protected areas paradigm should inform the nature and implementation of South Africa's protected areas regime? Fourthly, what is the legal regime governing protected areas in South Africa? Fifthly what is Land Reform and why is it of relevance to South Africa's protected areas? Sixthly, what is the legal regime governing those aspects of South Africa's Land Reform Programme (most notably the RLRA, CLRA, CPAA) of relevance to Protected Areas? Seventhly, what steps have been taken by the SA Government to traverse the apparent divide between South Africa's Land Reform and Protected Areas Regimes? Eighthly how have these steps been implemented in the context of the Mkambati Nature Reserve.? Ninthly, what is the resultant Governance Arrangement (Tenure, Management, Access/Use and Benefit Sharing) in operation in the Mkambati Nature Reserve? Tenthly, is this Governance Scheme working? Finally, if so – what lessons does it hold for fellow protected areas subject to land restitution claims?

This dissertation limits itself to the analysis of the co- management model that is in operation at the MNR. It further critiques the relevant components of the governance arrangement that is at play at the MNR.

It then focuses on the MNR because it was the second communal land restitution claim to be settled in a protected area in the Eastern Cape. It is one of the largest protected areas in Eastern Cape and it is situated on the Wild Coast approximately 25km South of Umtavuna River Mouth.

The governance scheme that is in operation at the MNR consists of communal land tenure schemes and co- management arrangements. The governance scheme is also unique because of its benefit sharing model that seeks to extend community beneficiation through the introduction of the Community Public Private Partnership and a transparent benefit sharing

system. There is also a secure land tenure system in the Mkambati Nature Reserve which was established after the land was transferred in title to the Mkambati Land Trust.

1.3 THE STRUCTURE OF THE DISSERTATION

Flowing from the key research questions identified above, this dissertation is divided into five key parts. This dissertation proceeds in Chapter 2 with a brief analysis of South Africa's overarching legal regime governing protected areas and the land reform regime. This analysis includes a consideration of South Africa's Constitutional framework, specifically: its relevant rights; the allocation of legislative and executive competence to the different spheres of Government; and the entrenchment of cooperative governance as a constitutional dictate. It then moves to unpack how the Constitutional dispensation has translated into an array of contemporary laws governing protected area and land reform, with a view to critically analysing the manner in which they complement, or do not complement, one another. Thereafter, it critically reviews recent initiatives taken by the country's conservation and land reform authorities to bridge the apparent divide between South Africa's protected areas and land reform regimes.

Chapter 3 introduces the Mkambati Nature Reserve which is used as a case study to critically reflect on the implementation of the above relevant regime. It provides a historical overview of the establishment of the Reserve and the resolution of the land claim settlement reached in respect of it.

Against this context Chapter 4 critically evaluates the governance regime that is currently in operation at the Mkambati Nature Reserve. This analysis is divided into three key themes which appear to impact on governance arrangements in the Reserve namely, land tenure, management, access or use and benefit sharing management.

Chapter 5 highlights the key lessons that can be drawn from the governance system that is currently in operation at the MNR, and how it could possibly inform the resolution of the many outstanding land restitution claims in other protected areas.

The sixth chapter concludes by drawing together all the elements of the dissertation and lessons that can be learned from the co- management model that is in operation in the MNR.

2. CHAPTER 2 – SOUTH AFRICA’S OVERARCHING RELEVANT LEGAL FRAMEWORK

After having provided the research context and reflected briefly on the socio-economic conditions of the people that live in the rural areas of the Eastern Cape, this paper now turns to consider the legislative framework that governs the protected area regime and the land reform regime in South Africa.

It starts by analysing the Constitutional framework which has largely been responsible for shaping and informing South Africa’s contemporary conservation and land reform regime. It further analysis the analysis the protected areas regime as well as the land reform regime. Lastly it provides an analysis on the measures that were initiated to bridge the gap between the protected areas regime and the land reform regime.

2.1 CONSTITUTIONAL FRAMEWORK

The Constitution of the Republic of South Africa (Constitution) is the supreme law of the country which was enacted primarily to redress the injustices of the past.⁵¹

The Constitution has a Bill of Rights that contains a number of rights which also include: the environmental right and the property right. The environmental right is contained in section 24 and its inclusion in the Constitution prompted the South African Government to comply with its statutory obligations and enacted a number of laws that regulate protected areas and biodiversity in South Africa.⁵²The provincial authorities also promulgated several conservation laws to regulate the establishment and management of protected areas and biodiversity.⁵³

⁵¹ Constitution of the Republic of South Africa, 1996.

⁵² These laws include: National Environmental Management: Protected Areas Act 57 of 2003; National Environmental Management Act: Biodiversity Act 10 of 2004 ;Marine Living Resources Act 18 of 1998;National Heritage Resources Act 25 of 1995; World Heritage Convention Act 49 of 1999; and National Forest Act 30 of 1998; Section 24 (b) imposes a duty on the State to take steps to protect the environment by preventing pollution and other damage to the environment and to promote conservation and sustainable development

⁵³ These laws include: Provincial Parks Board Act (Eastern Cape) 12 of 2003 now repealed by Eastern Cape Parks and Tourism Agency Act 2 of 2010; KwaZulu- Natal Nature Conservation Management Act 9 of 1997; Mpumalanga Parks Board Act 6 of 1995 now repealed by Mpumalanga Tourism and Parks Agency Act of 2005;Mpumalanga Nature Conservation Act 10 of 1998; North West Parks and Tourism Board Act 3 of 1997; Limpopo Environmental Management Act 7 of 2003 ; Limpopo Tourism and Parks Board Act 8 of 2001; and the Western Cape Biosphere Reserves Act 16 of 2011.

Similarly, the property clause which is contained in section 25 of the Constitution was entrenched in the Constitution for the purpose of protecting existing property interests and providing opportunities for the restoration of land to the previously dispossessed communities. Section 25 (7) is the most relevant section in the context of protected areas because it enables a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices, to lodge a claim for the restitution of that property or for equitable redress. Consequently there are land restitution claims that have been lodged in protected areas.⁵⁴ The inclusion of section 25 in the Constitution has also shaped South Africa's contemporary land reform regime.⁵⁵ In an attempt to give effect to section 25, the South African Government promulgated a number of policies⁵⁶ and laws.⁵⁷ There were no provincial laws that were promulgated to govern the land reform regime because the land reform competency lies with the National Department of Rural Development and Land Reform (DRD&LR).

In the context of protected areas, the Restitution of Land Rights Act (RLRA) becomes the most relevant as it creates a platform for the lodgement of land restitution claims in protected areas and this was done through the Regional Land Claims Commissioner's offices (RLCC) which were established in all nine provinces.⁵⁸ Consequently there is a relationship between section 24 and section 25 of the Constitution, because even though section 25 does not deal with environmental rights issues, some of the property rights that relate to the

⁵⁴ See Van Der Walt *A Constitutional Property Law* 2005 Juta & Co Cape Town 17.

⁵⁵ For a comprehensive discussion on this see: Van Der Walt *Property and Constitution* 2012 Pretoria University Law Press 132- 139.

⁵⁶ These include the *White Paper on South Africa's Land Policy* of 1997.

⁵⁷ The laws include: Restitution of Land Rights Act 22 of 1994; Communal Property Association Act 26 of 1998; Extension of Security of Tenure Act 62 of 1997; Communal Land Rights Act 11 of 2004; Development of Facilitation Act 67 of 1997; Upgrading of Land Tenure Rights Act 112 of 1993; Land Titles Adjustment Act 111 of 1993; Transformation of Certain Rural Areas Act 94 of 1998; Provision of Land and Assistance Act 126 of 1993; Land Administration Act 2 of 1995; Interim Protection of Informal Land Rights Act 31 of 1996; and Restitution of Land Rights Amendment Bill, 2013; Section 25 further requires the State to take reasonable legislative and other measures, within its available resources, to foster conditions that enable citizens to gain access to land on an equitable basis

⁵⁸ On the role of the of the Land Claims Commissioners see: De Villiers B " Land Reform: Issues and Challenges: A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia" 2003 Occasional Paper Series , KAS Johannesburg 55.

restoration of land rights relate to the claims that are lodged in protected areas.⁵⁹

The Minister of Water Affairs and Environmental Affairs is responsible for the administration of the national laws that govern the protected area regime in South Africa. The Minister gets the administrative support from the Department of Environmental Affairs (DEA)⁶⁰ and the Department of Water Affairs (DWA).⁶¹

There are also Directorates within the Department of Water Affairs that assist the Minister in the management of protected areas.⁶² In the context of national parks and biodiversity conservation, the South African National Parks (SANParks) and the South African National Biodiversity Institute (SANBI) manage the national parks and biodiversity conservation respectively. The Minister of Agriculture, Forestry and Fisheries is responsible for the implementation of the National Forest Act.⁶³ The Department Agriculture, Forestry and Fisheries (DAFF) renders the administrative support to the Minister.

The provincial Members of the Executive Council (MEC's) with the support of their Departments for Environmental Affairs are also responsible for the establishment, administration and regulation, of the protected areas.

⁵⁹ See Du Plessis A "Land Restitution Through the Lens of Environmental Law: Some Comments on the South African Vista" 2006 (1) *Potchefstroom Electronic Law Journal* 4; Feris L "The Role of Good Environmental Governance in the Sustainable Development of South Africa" 2010 (1) *Potchefstroom Electronic Law Journal* 38; Crane W "Biodiversity Conservation and Land Rights in South Africa: Whither the Farm Dwellers?" 2006 (37) *Geoforum* 1038; see also Ntshona "Analysis of Lessons on Conservation and Land Reform" Power Point Presentation at the Eastern Cape People and Parks Provincial Workshop 16 August 2010.

⁶⁰ The laws that fall under DEA include: National Environmental Management Act 107 of 1998; National Environmental Management: Protected Areas Act 57 of 2003; National Environmental Management Act: Biodiversity Act 10 of 2004; Marine Living Resources Act 18 of 1998; National Heritage Resources Act 25 of 1995; World Heritage Convention Act 49 of 1999; National Forest Act 30 of 1998; National Environmental Management: Integrated Coastal Management Act 24 of 2008; Sea- Shore Act 31 of 1935; and Environment Conservation Act 73 of 1989; National Environmental Management Amendment Laws Act No 14 of 2013; National Environmental Management: Protected Areas Amendment Bill , 2013.

⁶¹ DWA is responsible for the Mountain Catchment Areas Act 63 of 1970.

⁶² These Directorates include: Protected Areas and Development; Protected Areas; Protected Areas, Legislation and Compliance; and Trans- frontier and Conservation Areas.

⁶³ National Forest Act 84 of 1998.

However some of these provincial MEC's have assigned the management of protected areas to provincial conservation agencies.⁶⁴

Following the South African general election in 2009, the mandate for the implementation of the land reform programme in South Africa has been allocated to the Minister of Rural Development and Land Reform (DRD&LR).⁶⁵ The Minister was further tasked with the responsibility of the administration of all land reform legislation.⁶⁶ The DRD&LR is divided into various branches that administer several components of South Africa's land reform programme.⁶⁷ There are no provincial and local authorities that preside over land reform issues due to the Minister of DRD& LR's sole competency on land reform issues. However, in an attempt to expedite the land reform process, DRD& LR has opened Provincial and District Land Reform Offices in each of the nine provinces to facilitate the submission, processing and resolution of land claims. They are also responsible for the facilitation of the land tenure reform and redistribution process at the

⁶⁴ These include : The Eastern Cape Parks and Tourism Agency for the management of provincial nature reserves in terms of the Eastern Cape Parks and Tourism Agency Act 2 of 2010 ; the Cape Nature for the management of the provincial nature reserves, special nature reserves; world heritage sites; protected environments; and mountain catchment areas in terms of the Western Cape Nature Conservation Board Act 15 of 1998; the Mpumalanga Parks and Tourism Agency manages the provincial nature reserves in terms of the Mpumalanga Tourism and Parks Agency Act 2005; the North West Parks and Tourism Board manages the provincial nature reserves and the world heritage sites in terms of the North West Parks and Tourism Board Act 3 of 1997; the Ezemvelo KZN Wildlife manages provincial nature reserves; marine nature reserves and world heritage sites in terms of Kwa-Zulu Natal Nature Conservation Management Act 9 of 1997. The Northern Cape and Free State provincial departments have not assigned this responsibility.

⁶⁵ There was a name change from DLA to DRD&LR.

⁶⁶ These laws include: Deeds Registries Act 47 of 1937; Black Authorities Act 68 of 1951; Abolition of Racially Based Land Measures Act 108 of 1991; Upgrading of Land Tenure Rights Act 112 of 1991; Land Title adjustment Act 111 of 1993; Provisions of Land and Assistance Act 126 of 1993; Kwa Zulu- Natal Ingonyama Trust Act 3 of 1994; Restitution of Land Rights Act 22 of 1994; Land Administration Act 2 of 1995; Land Reform (Labour Tenants) Act 3 of 1996; Communal Property Associations Act 28 of 1996; Interim Protection of Informal Land Rights Act 31 of 1996; Extension of Security of Tenure Act 62 of 1997; Transformation of Certain Rural Areas Act 94 of 1998; and the Communal Land Rights Act 11 of 2004. There are also emerging laws that are under the competency of the DRD&LR and these laws include: Land Tenure Security Bill, 2011; Communal Property Associations Amendment Bill; the Extension of Security Tenure Amendment Bill, 2013; and Property Valuation Bill.

⁶⁷ For an overview of the structure of the DRD&LR, see: <http://www.ruraldevelopment.gov.za/>; see further: Department of Environmental Affairs & Resource Africa *People and Parks Toolkit* 2011 41.

provincial and local levels. In areas where land reform and conservation issues overlap, other national, local and provincial authorities also become relevant in the implementation of the land reform programme. These relate to the Department of Environmental Affairs, SANParks, provincial environmental departments and conservation agencies, municipal authorities and protected areas management authorities; the National Treasury; the Department of Agriculture, Fisheries and Forestry, and Department of Mineral Resources and Department of Water Affairs; Department of Public Works and the Department of Cooperative Governance and Traditional Affairs.⁶⁸

There is often an overlap between the protected areas regime and the land reform regime, particularly in areas where there are land restitution claims that had been lodged on land inside protected areas. As a result as at 20 August 2013, there were about 150 land claims that had been lodged in protected areas and out of this only 46 had been settled.⁶⁹ In the Eastern Cape, there were eighteen claims that were lodged on land inside protected areas and only four had been settled in protected areas that are managed by the Eastern Cape Parks and Tourism Agency (ECPTA).⁷⁰ The slow progress in the settlement of land claims in protected areas has been attributed to overlapping and competing claims; community disputes; disputes between the communities and traditional leadership over the registration of the CPA's;⁷¹ and the tardiness of the DRD&LR in engaging the existing management

⁶⁸ For a clear description of the roles these institutions play in the protected areas regime and conservation regimes see: Paterson A "Bridging the Gap between Conservation and Land Reform Communally- Conserved Areas as a Tool for Managing South Africa's Natural Commons" DPhil Thesis University of Cape Town (2011) 154 – 161.

⁶⁹ Commission on Restitution of Land Rights *Presentation of Progress of Land Claims in Protected Areas by Deputy Land Claims Commissioner (Mr Mdintswa)* Presentation to the Portfolio Committee on Rural Development and Land Reform on 20 August 2013.

⁷⁰ The number of land claims in protected areas could increase due to the introduction of the Restitution of Land Rights Amendment Bill, 2013 that extends the period of lodging land claims to 31 December 2018.

⁷¹ Some traditional leaders believe that they are competent enough to manage the restored land on their own without the CPAs and have rejected the registration of the CPA. This has

authorities in the settlement of the land claims. The non-availability of funds has also been identified as one of the contributing factors that slow the progress in the settlement of land claims in protected areas.⁷²

In an attempt to collaborate and expedite the resolution of land claims in protected areas, the erstwhile Minister of Agriculture and Land Affairs and the erstwhile Minister of Environmental Affairs and Tourism identified the need to collaborate in the settlement of land claims in protected areas and entered into a *Memorandum of Agreement (MOA)*.⁷³ The MOA outlines the roles and responsibilities of the two Ministers in the settlement of land claims in protected areas. The MOA is discussed in detail in the section that analyses it.

2.2 PROTECTED AREA REGIME

Subsequent to the enactment of the Constitution, the South African Government changed its protected areas and biodiversity conservation regimes by enacting an array of laws that establish, regulate and manage the protected areas.⁷⁴ The protected areas network is made up of different types that include: national parks, provincial protected areas, local protected areas, marine protected areas, mountain catchment protected areas, state forests, world heritage sites and special nature reserves.

consequently delayed the settlement of the land claim in Hluleka Nature Reserve which is one of the Nature Reserves that is managed by the ECPTA.

⁷² See: T Mdintswa note 69 above.

⁷³ Minister of Agriculture and Land Affairs & Minister of Environmental Affairs and Tourism *Memorandum of Agreement* 2007 dated 2 May 2007.

⁷⁴ These laws include: National Environmental Management Act 107 of 1998; National Environmental Management: Protected Areas Act 57 of 2003; National Environmental Management Act: Biodiversity Act 10 of 2004; Sea Birds and Seals Protection Act 46 of 1973; Marine Living Resources Act 18 of 1998; National Heritage Resources Act 25 of 1995; the National Forest Act 84 of 1998; Mountain Catchment Areas Act 63 of 1970; World Heritage Convention Act 49 of 1999; National Forest Act 30 of 1998; and Environment Conservation Act 73 of 1989.

The National Environmental Management: Protected Areas Act (Protected Areas Act) ⁷⁵ was promulgated with the aim of; declaring and managing protected areas, to provide for cooperative governance in the declaration and management of protected areas, to effect a national system of protected areas in South Africa as part of a strategy to manage and conserve its biodiversity, to provide for a representative network of protected areas on State land, private land and communal land, to promote sustainable utilisation of protected areas, for the benefit of people in a manner that would preserve the ecological character of that area and to promote participation of local people in the management of protected areas where appropriate.⁷⁶ In a nutshell, the main object of the Protected Areas Act is to rectify the errors of the past as prior to the enactment of the Protected Areas Act, the protected area system in South Africa was riddled with problems and challenges.⁷⁷

The Protected Areas Act also assists the South African Government in achieving the international mandate of shifting the protected area regime from the exclusionary to the participatory regime as it encourages the involvement of local communities in the management of protected areas through co - management agreements.⁷⁸

It further encourages the apportionment of income generated from the management of the protected area or any other form of benefit sharing between the parties. The Protected Areas further promotes the development of local management capacity and knowledge exchange.⁷⁹ The provincial authorities also enacted the provincial laws that serve as a statutory framework for the declaration, management and regulation of protected areas.⁸⁰

⁷⁵ National Environmental Management: Protected Areas Act 57 of 2003.

⁷⁶ See Section 2 of the Act; for a comprehensive discussion of the Protected Areas Act see: Paterson A "Legal Framework for Protected Areas: South Africa" IUCN –EPLP No.81 1-43.

⁷⁷ For a comprehensive discussion on these challenges see: Paterson 2007 1 SAPL 1-33; and the *White Paper on Conservation and Sustainable use of Biological Resources in South Africa* 30.

⁷⁸ This is in line with the *Convention on Biological Diversity (CBD)*.

⁷⁹ See Section 2.

⁸⁰ The provincial laws include: Provincial Parks Board Act (Eastern Cape) 12 of 2003 now repealed by the Eastern Cape Parks and Tourism Agency Act 2 of 2010; KwaZulu - Natal Nature Conservation Management Act 9 of 1997; Mpumalanga Parks Board Act 6 of 1995 now repealed by Mpumalanga Tourism and Parks Agency Act of 2005; Mpumalanga Nature Conservation Act 10 of 1998; North West Parks and Tourism Board Act 3 of 1997;

The conservation authorities further introduced a number of policies,⁸¹ plans and programmes that relate to the management and expansion of protected areas. These programmes are briefly highlighted in this section to demonstrate their relevance in the context of land reform and conservation. These include the *National People and Parks Programme* that facilitates the active participation of rural communities that reside within or adjacent to protected areas in the management of protected areas. This facilitation is achieved through strengthening park management and creating buffer zones around the Protected Areas (PAs); providing compensation or substitution for loss of access to resources and, further encouraging socio – economic development among communities living next to protected areas.⁸²

The *Stewardship Programme* is a component of the National Protected Area Expansion Strategy (NPAES) that encourages private and communal land owners to enter into agreements with an Organ of State for the joint management of their land for conservation purposes.⁸³ The *National Biodiversity Strategy and Action Plan* grants local communities access and use of protected areas.⁸⁴ The *National Protected Areas Expansion Strategy* promotes the inclusion of communal land in a protected area.⁸⁵

In 2007, the former Department of Water Affairs and Forestry (DWAFF) developed the Eastern Cape Biodiversity Conservation Plan Technical

Limpopo Environmental Management Act 7 of 2003; Limpopo Tourism and Parks Board Act 8 of 2001; and the Western Cape Biosphere Reserves Act 16 of 2011.

⁸¹ These policies include: Department of Environmental Affairs and Tourism *Guidelines for the Implementation of Community Based Natural Resource Management* (CBNRM) in South Africa (2003); White Paper on the Conservation and Use of South Africa's Biodiversity (1997); A Driver, K Sink, J Nel, S Holness, L Van Niekerk, F Daniels, Z Jonas, P Majiedt, L Harris & K Maze *National Biodiversity Assessment 2011: An Assessment of South Africa's Biodiversity and Ecosystems. Synthesis Report* (2012) South African National Biodiversity Institute & Department of Environmental Affairs, Pretoria; Government of South Africa *National Protected Areas Expansion Strategy for South Africa 2008* (2009); *National Biodiversity Framework* (GN 813 GG 32474 of 3 August 2009); Department of Environmental Affairs and Tourism *South Africa's National Biodiversity Strategy and Action Plan* (2005)

⁸² For the history of the People and Parks Programme refer to: Department of Environmental Affairs Conservation for the People with the People: *A Review of the People and Parks Programme* (2010) 15.

⁸³ For the background on the Stewardship Programme refer to <http://www.sanbi.org/sites/default/files/documents/documents/microsoft-word-background-land-reform-and-stewardship.pdf>

⁸⁴ Department of Environmental Affairs and Tourism South Africa's National Biodiversity Strategy and Action Plan (2005). 62-63.

⁸⁵ Government of South Africa *National Protected Areas Expansion Strategy 2008*(2009) 32-34.

Report⁸⁶ with a view to regulate land and resource use in the Eastern Cape Province. DWAFF also developed the Eastern Cape Biodiversity Conservation Plan Report to regulate the preservation of biodiversity hotspots in the province. The ECPTA further adopted the People and Parks Strategy which is aligned to the National People and Parks Strategy. Recently, the Eastern Cape Province has adopted the Eastern Cape Protected Area Strategy that seeks to increase the protected areas network in the Eastern Cape.⁸⁷

2.3 LAND REFORM REGIME

During the apartheid regime, the South African land regime was governed by an array of racially motivated laws that included: the Native Land Act,⁸⁸ Group Areas Act,⁸⁹ Prevention of Illegal Squatting Act,⁹⁰ Black Administration Act,⁹¹ Black Authorities Act,⁹² and the Black Communities Development Act.⁹³

Following the entrenchment of section 25 in the Constitution, the South African Government published the White Paper on South African Land Policy to facilitate the land reform programme.⁹⁴ The White Paper on South African Land Policy outlines three components of land reform, namely, land redistribution, land restitution and land tenure reform.

In order to give effect to section 25 of the Constitution, the South African Government promulgated a number of laws that regulate the land reform regime.⁹⁵ The Restitution of Land Rights Act (RLRA) was the first law to be passed by the new democratic Government to provide for the restitution of

⁸⁶ Department of Water Affairs and Forestry *Eastern Cape Biodiversity Conservation Plan Technical Report*

⁸⁷ *Eastern Cape Protected Areas Strategy* 2011.

⁸⁸ Native Land Act 27 of 1913.

⁸⁹ Group Areas Act 36 of 1966.

⁹⁰ Prevention of Illegal Squatting Act 52 of 1951.

⁹¹ Black Administration Act 38 of 1927.

⁹² Black Authorities Act 68 of 1951.

⁹³ Black Communities Development Act 4 of 1984.

⁹⁴ Department of Land Affairs *White Paper on South African Land Policy* 1997; see also: Kepe et al 2005 IJBSM 6.

⁹⁵ These laws include: Restitution of Land Rights Act 22 of 1994; Communal Property Associations Act 28 of 1996; Extension of Security of Tenure Act 62 of 1997; Communal Land Rights Act 11 of 2004; Development of Facilitation Act 67 of 1997; Upgrading of Land Tenure Rights Act 112 of 1993; and the Interim Protection of Informal Land Rights Act 31 of 1996; and Restitution of Land Rights Amendment Bill, 2013.

rights to land in respect of persons or communities dispossessed of such rights after 1913 in terms of past racially discriminatory laws or practices.⁹⁶ The Act contains three components of land reform namely, land restitution, land distribution and land tenure. The RLRA facilitates the lodgement of claims by the dispossessed persons or communities and for the registration of the land in the names of the claimants whose claims have been approved in terms of the RLRA.⁹⁷ It further refers to the establishment of the Commission on the Restitution of Land Rights (CRLR) which facilitates the submission, processing and resolution of land claims. Land tenure reform is the third element of the land reform programme which is also relevant in the context of this paper because it seeks to promote the security of tenure in rural areas.⁹⁸ It becomes more relevant in the context of the MNR, which is the case study in this paper because it is located in rural areas.

Similarly, there are a number of laws that have been enacted to facilitate the land tenure reform programme.⁹⁹ The Communal Property Associations Act facilitates the registration of communal property associations to acquire, hold and manage the land on behalf of the new owners and in terms of a written constitution. The Communal Property Associations Act was followed by the Communal Land Rights Act which was to provide for the recognition and regulation of communal land rights regime in South Africa.¹⁰⁰ The Communal Land Rights Act was declared unconstitutional by the Constitutional Court in 2010.¹⁰¹

Similarly, as in the context of the conservation regime, there were programmes, projects, plans and strategies that were introduced by the South African Government to facilitate the implementation of the land reform

⁹⁶ See the preamble of the Act.

⁹⁷ See Du Plessis 2006 *Potchefstroom Electronic Journal* 20.

⁹⁸ For a comprehensive discussion on the security of tenure see: Kepe T, Cousins B & Turner S "Resource Tenure and Power Relations in Community wildlife Contexts: The Case of the Mkambati Area on the Wild Coast of South Africa" *Evaluating Eden Series Discussion Paper No.16* at 6 ; Rugege S "Legal Reform in South Africa: An Overview" 2004 (283) *International Law Journal* 13.

⁹⁹ For purposes of this paper these laws include: the Communal Property Associations Act 28 of 1996; and the Communal Land Rights Act 11 of 2004.

¹⁰⁰ Communal Land Rights Act 11 of 2004.

¹⁰¹ *Tongoane v Minister of Agriculture and Land affairs* 2010 (6) SA 214 CC.

regime.¹⁰² The relevant aspects of these programmes are briefly discussed in this section. The Comprehensive Rural Development Programme (CRDP)¹⁰³ is one of the programmes whose vision was to create vibrant, equitable and sustainable rural communities.¹⁰⁴ The Settlement and Implementation Support Strategy for Land and Agrarian Reform in South Africa (SIS Strategy)¹⁰⁵ was developed with a view of assisting people in regaining land rights through the Restitution programme and to provide post settlement support to Land Redistribution for Agricultural Development and Commonage projects under the auspices of the Redistribution Programme.¹⁰⁶ This document is not relevant in the context of this paper as it deals mainly with the redistribution programme.

The Land and Agrarian Reform Project (LARP)¹⁰⁷ was developed with the objective of distributing white owned agricultural land to new agricultural producers and promoting Black people in agricultural business.¹⁰⁸ This document is not relevant in the context of this paper because its focus is on the agricultural sector. The Proactive Land Acquisition Strategy (PLAS)¹⁰⁹ was developed to expedite the land redistribution process.¹¹⁰ This strategy will not be discussed in detail, in this paper because it also deals with agricultural issues.¹¹¹

¹⁰² These include: The Comprehensive Rural Development programme; Settlement and Implementation Support Strategy for Land and Agrarian Reform in South Africa; Land and Agrarian Reform Project and Proactive Land Acquisition Strategy.

¹⁰³ Ministry of Rural Development and Land Reform The Comprehensive Rural Development Programme Framework 2009.

¹⁰⁴ Ministry of Rural Development and Land Reform The Comprehensive Rural Development Programme Framework 2009 3-4.

¹⁰⁵ Sustainable Development Consortium Settlement and Implementation Support Strategy for Land Agrarian Reform in South Africa: A Synthesis Report (2007) Commission on Restitution of Land Rights Pretoria.

¹⁰⁶ Sustainable Development Consortium Settlement and Implementation Support Strategy for Land Agrarian Reform in South Africa: A Synthesis Report (2007) Commission on Restitution of Land Rights Pretoria xii.

¹⁰⁷ Government of the Republic of South Africa The Land and Agrarian Reform Project: The Concept Document (2008) (Version 5(2)).

¹⁰⁸ This is the abridged version of the objectives of the document.

¹⁰⁹ Department of Land Affairs Implementation Plan for the Proactive Land Acquisition Strategy (2006) version 1 dated May 2006.

¹¹⁰ For the objectives of the Strategy see: Department of Land Affairs Implementation Plan for the Proactive Land Acquisition Strategy (2006) version 1 dated May 2006 4.

¹¹¹ For a comprehensive discussion of all these programmes, projects and strategies see: Paterson at note 68 above 198-202.

2.4 MEASURES TO BRIDGE THE DIVIDE BETWEEN THE PROTECTED AREA REGIME AND LAND REFORM REGIME

In an attempt to bridge the divide between the protected area regime and the land reform regime, the South African Government initiated two processes in 2007, namely the *Memorandum of Agreement* (MOA) concluded between the erstwhile Minister of Agriculture and Land Affairs (DLA) and the former Minister of Environmental Affairs and Tourism.¹¹²

The second initiative that was taken by the Minister of Environmental Affairs was the adoption of the *National Co-Management Framework* in 2010 to provide clarity when resolving land claims in protected areas.¹¹³

2.4.1 THE MEMORANDUM OF AGREEMENT (MOA)

The first initiative to bridge the apparent divide between the conservation and land reform regimes, was the conclusion of the MOA between the erstwhile Minister of Agriculture and Land Affairs (DLA) and the erstwhile Minister of Environmental Affairs and Tourism in 2007.¹¹⁴

The preamble of the MOA outlines the objectives of the MOA which covers the cooperative national approach in the resolution of land claims in protected areas, and also defines the roles and responsibilities of DLA and DEAT with regard to the restitution of rights to land within protected areas. It further acknowledges the optimum participation of communities and beneficiaries in protected areas without compromising the protection of the environment in the protected areas where the claimed land is situated.¹¹⁵ In summary, the purpose of the MOA is to encourage a collaborative approach between the DLA (now the DRD&LR) and DEAT (now the DEA) in the resolution of land claims in protected areas.

The MOA further outlines the fundamental principles that serve as a basis for the settlement of land claims in protected areas and these principles include :

¹¹² Minister of Agriculture and Land Affairs & Minister of Environmental Affairs and Tourism *Memorandum of Agreement* (2007) dated 2 May 2007.

¹¹³ Department of Environmental Affairs *National Co-Management Framework* 2010.

¹¹⁴ For a comprehensive discussion on this see: De Koning M "Co- Management and Its Options in Protected Areas of South Africa"(2009) 39 (2) *Africanus* 6; Kepe 2008 (41) *Environmental Management* 311- 312; De Koning M & Marais M "Land Restitution and Settlement Options in Protected Areas in South Africa"(2009) 39 (1)*Africanus* 68.

¹¹⁵ *Memorandum of Agreement* (2007) 4-5.

the parties are committed to working within the framework of the Cabinet Memorandum in respect of the settlement of restitution claims in protected areas; it is imperative that the various state agencies cooperate closely and adopt a consistent approach during all phases of the restitution process (including preparation, planning, implementation and post settlement support); existing protected areas are assets of national and international significance whose continued conservation is non-negotiable and must be managed in perpetuity as protected conservation area; the ownership of land by claimants without physical occupation and other restrictions in title does not necessarily compromise the continued conservation and management of protected areas; carefully defined co - management of protected areas involving claimants must take place in a manner that is sustainable, effective and compatible with the conservation and development mandates governing protected areas; restitution settlement should result in tangible and realistic beneficiation for claimants and restitution packages should be aligned to such beneficiation; restitution settlements should uphold the principles of economic viability, financial sustainability and holistic management of protected areas; restoration should be equitable and should not disadvantage claimants by placing them in a position where they are worse off than before; post- settlement land use (including eco – tourism) must be compatible with biodiversity conservation and protected area legislation; the integrated management of protected areas based on a conservation- led approach is crucial; restitution settlement should be compatible with applicable legislation and policy applicable to protected areas; access rights awarded as part of restitution settlement must be clearly defined and land in protected areas, if restituted shall not be alienated other than to an organ of State. The Settlement Agreement relating to the transfer in protected areas to claimants must therefore include such a prohibition, as well as that any proposed activity, of whatever nature, by the claimant will be subject to the provisions of the Protected Areas Act specifically and generally to any other legislation.

¹¹⁶ The MOA still gives the existing Management Authorities management powers over the restored protected areas.¹¹⁷ It further outlines the roles and

¹¹⁶ *Memorandum of Agreement* (2007) 8-10.

¹¹⁷ *Memorandum of Agreement* (2007) 4.8.

responsibilities of DEA and DRD&LR.¹¹⁸ It further encourages co-management as the only viable option in areas where land has been restored to the communities.¹¹⁹ The rest of the clauses are a duplication of its principles.

However, the MOA has omitted other role players that are either involved in the management of protected areas or are affected by the land restitution claims in protected areas and these include: the provincial departments and conservation authorities; the new land owners; the traditional authorities who are responsible for rural land administration; district and local municipalities. This exclusion raises a question of whether this MOA has any binding effect on these excluded entities and can consequently not be implemented effectively. Similarly, there is no indication in the MOA that the new land owners whose claims were approved but not settled prior to its finalisation were consulted to get their consent on some of its conditions.¹²⁰

2.4.2 THE NATIONAL CO- MANAGEMENT FRAMEWORK

In 2010, DEA developed the *National Co-Management Framework* as a second initiative to bridge the divide between the protected area regime and the land reform regime. The primary objective of the *National Co - Management Framework* is to address the delays that were experienced in the development of co-management agreements between the State and the local communities due to lack of unity within local communities and their poor understanding of the Protected Areas.¹²¹

The *National Co- Management Framework* presented three models of co-management, namely full co- management; full lease; and part co-

¹¹⁸ *Memorandum of Agreement* (2007) 12-14.

¹¹⁹ *Memorandum of Agreement* (2007) 4.3; for further discussion on this issue see: De Koning (2010) 236 (61) *Unasylva* 41-42; Kepe 2008 (41) *Environmental Management* 311-312.

¹²⁰ Some of these conditions include: clause 4.10 that compels the new land owners to sell the land to the State only; clause 4.1 that deals with the registration of conditions against the title deed. For further discussion on the MOA see: De Koning note 114 above; on the issue of the consultation process see: Berkes F “ The Problematique of Community- Based Conservation in a Multi – Level World” 2006 Unpublished paper presented at 11th Conference of the International Association for the Study of Common Property , Bali, June 2006 6 – 7; Berkes F & Henley T “ Co- Management and Traditional Knowledge: Threat or Opportunity” 1997 *Policy Options* 30; Beltran J *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies* 2000 Best Practice Protected Area Guidelines Series No4, IUCN Gland 9-10.

¹²¹ Department of Environmental Affairs *Conservation for the People with the People: A Review of People and Parks Programme* (2010).

management and part lease.¹²² It further packaged different types of benefits that can be derived from each of the three co – management models. These include: revenue sharing; rental income; capacity building; development rights; mandatory partner status in management and development opportunities; equity partnership in private sector tourism concession enterprises, access rights; natural resource use; participation in management through representation on the management authority; and employment and contractual delegation of certain management functions to community enterprises.¹²³

The full co- management model entails participation of communities in the management of the protected area. The framework encourages the consideration of this model in areas where socio- economic beneficiation is viable and possible. The benefits that are associated with this model include: developmental rights; revenue sharing; economic opportunities and mandatory partner in development.

The full lease co- management entails the lease agreement between the new land owners and the State where the State leases the area from the new land owners. This model is encouraged in protected areas where socio- economic benefits to the new land owners are not viable. This model requires approval by the department of National Treasury due to its financial implications for the State. The benefits that are associated with this model include: freedom to manage by the management authority; immediate income to landowners; guaranteed stable income for the period of lease and the process is shorter.¹²⁴

The part co- management and part lease model is the combination of the two models that is applied on the basis of socio economic opportunities. The benefits associated with this model include: access to land; consultation; empowerment; revenue sharing; rental income; access to and use of natural resources; participation in management; developmental rights; mandatory

¹²² *National Co- Management Framework (2010) 3.*

¹²³ *National Co- Management Framework (2010) 3 10-13.*

¹²⁴ *National Co- Management Framework (2010) 5.3.*

partner in development and consultation on all aspects and broader representation.¹²⁵

However the *National Co- Management Framework* acknowledges that, there is no blanket approach in the application of these models because their viability is determined by various factors that include: the allocation of the protected area; biodiversity value inside the protected area; the size of the protected area and the viability of eco- tourism initiatives inside the protected area.¹²⁶ The South African Government has chosen the co- management model as a preferred option for protected area governance.¹²⁷ However it has not provided any detailed explanation for choosing co- management in the management of protected areas.¹²⁸

¹²⁵ *National Co- Management Framework (2010) 5.5.*

¹²⁶ *National Co- Management Framework (2010) 4.*

¹²⁷ For other protected area governance models see: Paterson A “ Clearing or Clouding the Discourse- A South African Perspective on the Utility of the IUCN Protected Areas Governance Typology ” 2010 *South African Law Journal* 496 - 503; Borrini- Feyerabend G, Dudley N, Jaeger T, Lassen B, Pathak Broome N, Phillips A, and Sandwith T 2013 *Governance of Protected Areas from Understanding to Action. Best Practice Protected Area Guidelines Series No. 20*, GLAND, Switzerland IUCN 12; Dudley N (ed) 2008 *Guidelines for Applying Protected Area Management Categories* IUCN Gland 25-32.

¹²⁸ Kepe 2008 (41) *Environmental Management* 311-312. For a comprehensive analysis of the *National Co- Management Framework* see: Paterson 2010 *South African Journal of Environmental Law and Policy* 105-110; De Koning 2009 (39) 2 *Africanus* 12-15.

CHAPTER 3 – AN INTRODUCTION TO THE MKAMBATI NATURE RESERVE AND THE SETTLEMENT REGIME

The Mkambati Nature Reserve is one of the largest protected areas in the Eastern Cape. It is managed by the Eastern Cape Parks and Tourism Agency (ECPTA) as one of its provincial protected areas.¹²⁹ It is 7720 hectares in extent and is located on the Wild Coast approximately 25km South of Umtavuna River Mouth. It is home to numerous endemic plants that include the Pondo Coconut Palm or Mkambati Palm from which it inherited its name.¹³⁰

The Mkambati Nature Reserve is one of the richest Nature Reserves in biodiversity as it offers floral endowments, over 2,000 wild herbivores, the marine reserve that includes a breeding sanctuary for marine species and the wild species that include eland, red hartebeest, impala, blue wildebeest, plain zebra and mountain zebra, kudu, springbuck and blesbok.¹³¹ The MNR has been a popular tourist destination due to its pristine environment and high biodiversity value.

The Mkambati Nature Reserve is also made up of 80% grasslands and is the only conservation area in the Eastern Cape that incorporates a portion of the Pondoland- Natal Sandstone Coastal Sourveld veld type.¹³² These grasslands contain a variety of the endemic or near endemic species which are considered to be the most threatened vegetation type in the Maputoland- Pondoland region.¹³³ Historically these grasslands have played a major role in the improvement of the rural economy and livelihoods because the

¹²⁹ The ECPTA manages the Nature Reserve through its delegated authority assigned to it by the Provincial Department of Economic Development, Environmental Affairs and Tourism

¹³⁰ For a comprehensive description of the location, geology, climate, vegetation and wildlife found in the Nature Reserve please refer to: Eastern Cape Parks Board Integrated Reserve Management Plan - Strategic Management Plan: Mkambati Nature Reserve (dated 23 November 2009) 6-7; Kepe 2004 *CJAS* 693; Kepe et al 2005 (1) *IJBSM* 9 ; Kepe 2008 (41) *Environmental Management* 313; and *Mkambati Settlement Agreement*, Land Claims Commission, 17 October 2004.

¹³¹ *Eastern Cape Parks Board Integrated Reserve Management Plan- Strategic Management Plan: Mkambati Nature Reserve* dated 23 November 2009.

¹³² Mkhulisi M "Aligning Ecological and Social Objectives for Community- Based Natural Resource Management (CBNRM): A Case Study of Post Settlement Cases on Eastern Cape Province Protected Areas: Dwesa – Cwebe and Mkhambati" 2010 Unpublished paper 2.

¹³³ See Mkhulisi note 132 above.

Mkambati communities rely on them for grazing livestock, thatch grass for building and for collection of medicinal plants.¹³⁴

3.1 THE HISTORY OF THE MKAMBATI NATURE RESERVE

The Mkambati Nature Reserve was initially used as a leper colony in 1920, after the people of Khanyayo were forcefully removed from the area.¹³⁵ After their forced removal the people of Khanyayo settled in an area that fell under the Thaweni Tribal Authority. As a consequence of their forced removal, the local people were denied access to the area and to natural resources situated there. However the Khanyayo people continued to fight for the return of their land but their demand to get their land back was ignored by the Mkambati Leper reserve officials.

In 1966, the Mkambati area was transferred to the Transkei Government in terms of the Transkei Constitution Act.¹³⁶ Following the closure of the leper colony in 1976, the land was transferred to the Department of Agriculture and Forestry of the then Transkei Government. A portion of the area was later converted into the Mkambati Nature Reserve in 1977 and was subsequently proclaimed as a Nature Reserve initially in terms of the Transkei Nature Conservation Act 6 of 1971,¹³⁷ and thereafter under the Transkei Environmental Decree Act 9 of 1992.¹³⁸ The remainder of the area was made a state farm under the management of the then Transkei Agricultural Corporation (TRACOR).

The Transkei Government transferred the management of the Mkambati Nature Reserve to the Mkambati Game Reserve (Pty) Ltd, a company formed by the then Transkei Department of Agriculture and Forestry in 1978. When the company was subsequently dissolved, the management of the

¹³⁴ Kepe T and Scoones I "Creating Grasslands: Social Institutions and Environmental Change in Mkambati Area, South Africa" 1999 *Human Ecology* 30.

¹³⁵ For a detailed history of Mkambati Nature Reserve see: Mkambati *Settlement Agreement* : Land Claims Commission, 17 October 2004; Kobokana: Reconciling Poverty Reduction and Biodiversity Conservation: The case of Expanded Public Works Programme (EPWP) in Hluleka and Mkambati Nature Reserves, South Africa MPhil University of the Western Cape (2007) 63-65 ; Cousins & Kepe 2004 *EJDR* 40; Kepe 2004 *CJAS* 693; Kepe et al Evaluating Eden Series Discussion Paper No.16; Kepe et al 2005(1) *IJBSM* 9; the Mkambati Nature Reserve Strategic Management Plan; Section 42D Memorandum to the Minister of DLA dated 26 June 2004.

¹³⁶ Transkei Constitution Act 58 of 1963, (section 59).

¹³⁷ Transkei Nature Conservation Act.

¹³⁸ Transkei Environmental Decree Act.

Nature Reserve was returned to the Department of Agriculture and Forestry in terms of the Transkei Nature Reserve Act.¹³⁹ However, the communities that were removed from the area on which the leper colony was established started to demand their rights to land from the Transkei Authorities. They continued to use the land and its resources as they used to before the forced removals, in defiance of the Transkei authorities.¹⁴⁰ The Khanyayo people continued with the demand over their grazing rights and in 1990, TRACOR returned 3500 hectares for grazing land. However the defiance continued and later manifested itself as conflicts between the State and the Khanyayo people, who in 1992 marched to the Mkambati Nature Reserve to demand the unconditional return of their land and resources.¹⁴¹ They staged a sit-in for a period of nine days and during this period the Government authorities opened a small clinic in the area that used to be a leper hospital. Through the intervention of the then Transkei Government, the communities were allowed access to sea and forest resources. They were further allowed to participate in the management of the Nature Reserve.¹⁴²

After several disputes between the communities and the State, over access to the land and natural resources, the Khanyayo people decided to lodge their claim to have their rights to land restored to them, with the Regional Land Claims Commission (RLCC) under the RLRA in July 1997. The other villages that were under the Thaweni Tribal Authority also lodged their counterclaim in 1998, also claiming to have lost their grazing rights and that the Khanyayo people were also part of the Thaweni Tribal Authority. After lengthy negotiations the Khanyayo people claim was extended to include other villages that were under the Thaweni Tribal Authority.¹⁴³

3.2 THE SETTLEMENT AGREEMENT

After lengthy negotiations between the claimants and the State authorities, the land claim was approved in 2004. Thereafter the parties entered into a *Settlement Agreement* on 17 October 2004, which effectively restored the

¹³⁹ Transkei Nature Reserve Act.

¹⁴⁰ Mkambati *Settlement Agreement* 3.6.

¹⁴¹ These villages include: Khanyayo, Mtshayelo, Rhamzi, Kwa Cele, Ngquza, Thahle and Vlei.

¹⁴² This was to be in line with the principle of sustainable utilisation and as permitted by law.

¹⁴³ These villages include: Khanyayo, Mtshayelo, Rhamzi, Kwa Cele, Ngquza, Thahle and Vlei.

claimed land to the Mkambati Land Trust (MLT).¹⁴⁴ The claimed land comprised the TRACOR land, the land proclaimed as a provincial protected area and the land on which the clinic was situated. This was the second land claim to be settled in a protected area in the Eastern Cape, following the settlement of the Dwesa- Cwebbe Nature Reserve land claim in 2001.

The *Settlement Agreement* was effectively restoring the claimed land which comprised the TRACOR land, the land proclaimed as a provincial protected area and the land on which the clinic was situated, to the Mkambati communities as represented by the Mkambati Land Trust (MLT).¹⁴⁵ The *Settlement Agreement* requires the restored land be kept in Trust for the benefit of the claimant communities.¹⁴⁶ In an attempt to give effect to this condition, the DLA facilitated the establishment of the Mkambati Land Trust in terms of the Trust Property Control Act.¹⁴⁷ The *Settlement Agreement* gives full ownership rights of the restored land to the MLT.¹⁴⁸ However, the transfer of the land was subject to the conditions that include: the land must be retained as a provincial protected area in perpetuity; the land must be utilised as a provincial protected area, and must not be used for residential purposes.¹⁴⁹ The *Settlement Agreement* further prevents the MLT from disposing the land to any person or institution other than to the State or to a Competent Authority authorised by the State.

The *Settlement Agreement* recognizes the Provincial Department of Economic Affairs, Environment and Tourism (DEAET) or its delegated

¹⁴⁴ The signatories to the agreement include: the Minister of Agriculture and Land Affairs; the Eastern Cape Province MEC for Agriculture and Land Affairs; the Eastern Cape Province MEC for Economic Affairs, Environment and Tourism; the Executive Mayor of the O.R. Tambo District Municipality; and the Mkambati Land Trust.

¹⁴⁵ *Settlement Agreement* clause 2.3; For the purpose of the settlement, the 326 claimant households were structured into seven Communal Property Associations (CPAs) representing the interests of the seven major villages in the area (Khanyayo, Mtshayelo, Rhamzi, Kwa Cele, Ngquza, Thahle and Vlei); These CPAs are established in terms of the Communal Property Association Act 28 of 1998. The MLT was also established to represent the CPA's and its membership is comprised of sixteen members representing the seven CPAs. The MLT was established with a view to represent the communities in the Co-Management Committee and in tourism concession initiatives; the MLT also ensures the utilisation of the restitution grants through various engagements with the DRD&LR and the OR Tambo District Municipality; the establishment of the MLT is regulated under the Trust Property Control Act 57 of 1988.

¹⁴⁶ *Settlement Agreement* clause 4.2.

¹⁴⁷ Trust Property Control Act 57 of 1988.

¹⁴⁸ *Settlement Agreement* clause 5.1.

¹⁴⁹ *Settlement Agreement* clause 7.

Management Authority as the management authority of the Nature Reserve.¹⁵⁰

The *Settlement Agreement* has to be read together with other additional documents namely: the *Community Agreement*¹⁵¹ and the *Management Planning Framework* for the Mkambati Nature Reserve.¹⁵² The *Community Agreement* seeks to give effect to the co-management of the Mkambati Nature Reserve by the DLA, the erstwhile ECPB and the MLT for a period of 35 years. It further forms the basis for the establishment of the Co-Management Committee (CMC) between the MLT and the DLA or its Delegated Management Authority DEAET.¹⁵³ The *Community Agreement* further outlines the composition of the CMC and the roles and responsibilities of its parties relating to the management of the Nature Reserve.¹⁵⁴

The *Settlement Agreement* also provides for the co- management of the Nature Reserve for a period of 35 years even though it contains a different a different terminology regarding the composition of the *Community Agreement*. It states that the land shall be co- managed by the MLT, DLA and/ or its delegated management authority whereas the Community Agreement confirms the status of the DEAET in the *Community Agreement*. The *Settlement Agreement* and the Community Agreement require the parties to renew the *Community Agreement* after the expiry of the initial period.¹⁵⁵ The negotiations towards the conclusion of a new community agreement should commence a year before the lapse of the existing *Community Agreement*. In the event of the parties failing to conclude another community agreement, the State shall take over the management of the claimed land including the Nature Reserve.¹⁵⁶ The *Settlement Agreement* further gives the State full management powers in the event of a material

¹⁵⁰ *Settlement Agreement* clause 3.13; DEDEAT further delegated the management of the Mkambati Nature Reserve to the erstwhile Eastern Cape Parks Board (ECPB) now the Eastern Cape Parks and Tourism Agency.

¹⁵¹ The Minister of Agriculture and Land Affairs , the Member of the Executive Council for Economic Affairs , Environment and Tourism (Eastern Cape Province) & the Mkambati Land Trust *Community Agreement*.

¹⁵² *Management Planning Framework* for Mkambati Nature Reserve, undated.

¹⁵³ DEDEAT later delegated the management of the MNR to the erstwhile ECPB.

¹⁵⁴ *Management Planning Framework* clause 3.

¹⁵⁵ *Settlement Agreement* clause 8.2; *Community Agreement* clause 5.2.

¹⁵⁶ *Settlement Agreement* clause 8.4

breach of the *Community Agreement* by the MLT.¹⁵⁷ The *Settlement Agreement* and the *Community Agreement* require the MLT to provide a financial contribution for the management and maintenance of the Nature Reserve.¹⁵⁸

The *Settlement Agreement* further requires the land including the Nature Reserve to be managed through the *Community Agreement* and the *Management Framework*.¹⁵⁹ Thus MNR is managed in terms of the *Mkambati Nature Reserve Strategic Management Plan* and the *Subsidiary Management Plan for Natural Resource Use at Mkambati Nature Reserve*.

The *Management Planning Framework* and the *Community Agreement* require DEAET to provide an annual budget for the management of the Nature Reserve and give effect to the principles of co-management.¹⁶⁰

The *Management Planning Framework* seeks to prescribe the legislative framework that should regulate the Nature Reserve. It contains the vision and mission of the MNR, guiding principles and the administrative principles.¹⁶¹ It further supports the concept of eco –tourism opportunities inside the Nature Reserve for the benefit of local communities but it unfortunately does not articulate how this has to be achieved.

It further outlines the roles and responsibilities of the parties to the *Settlement Agreement* and the establishment and the composition of the CMC as stated in the *Community Agreement*.¹⁶² It further promotes the community's access to natural resources in a sustainable manner.¹⁶³

The claimed land including the protected area was valued at R11 967 186, being its market value at the time.¹⁶⁴ For grazing, arable land, residential land and the residential buildings - the communities were each given R55 500

¹⁵⁷ Settlement Agreement clause 8.6.

¹⁵⁸ Settlement Agreement clause 10.2.4 and Community Agreement clause 14.6

¹⁵⁹ Settlement Agreement clause 10.2; in order to comply with this the erstwhile ECPB adopted the *Mkambati Nature Reserve Strategic Management Plan*.

¹⁶⁰ *Management Planning Framework* clause 4 ; and *Community Agreement* clauses 13.2 & 13.3

¹⁶¹ *Management Planning Framework* clauses 2, 3&4.

¹⁶² *Management Planning Framework* clause 4.

¹⁶³ Clause 4; the ECPTA manages this in terms of the *Mkambati Nature Reserve Strategic Management Plan* and *Subsidiary Management Plan for Natural Resource Use at Mkambati Nature Reserve* prepared by the ECPTA.

¹⁶⁴ *Settlement Agreement* clause 11.1.

which was also the market value at that time.¹⁶⁵ Furthermore, the 326 dispossessed households were each given R38 850 as compensation for their lost homesteads.¹⁶⁶ An amount of R5 427 900 was set aside for the development of the community and the area.¹⁶⁷

In addition to the amounts paid to the communities as compensation for the land and residential buildings, the communities were further paid R26 463 400 in restitution discretionary grants and settlement planning grants for settlement planning, agricultural, educational and development projects.¹⁶⁸

¹⁶⁵ *Settlement Agreement clause 11.2.*

¹⁶⁶ *Settlement Agreement clause 11.3.*

¹⁶⁷ *Settlement Agreement clause 11.4.*

¹⁶⁸ *Settlement Agreement clause 11.5.*

4. CHAPTER 4 – CRITIQUE OF THE RESULTANT GOVERNANCE ARRANGEMENT IN THE MNR.

Having provided the history of the MNR and the process that led to the land claim and its settlement, this chapter now discusses the governance regime that is at play in the MNR. It is doing so, firstly, through the analysis of the establishment of the governance structure and secondly, through a number of themes that are relevant in the governance arrangement in the MNR.

4.1 LAND TENURE

The *Settlement Agreement* recognises the communities' full title to the land. Thereafter the land was transferred to the MLT to secure land tenure to their restored land. The communities have been able to adopt a long term approach to natural resource management as a result of the transfer of the land to the MLT. This was made possible through the adoption of the Subsidiary Management Plans for Natural Resource Use at Mkambati Nature Reserve.¹⁶⁹ The process that leads to the development of tenure is summarised under the following themes;

4.1.1 FORM OF LAND TENURE

The *Settlement Agreement* affords the communities' full rights to the land.¹⁷⁰ As a result, the land was restored to the MLT which comprises of representatives from the seven communal property associations.¹⁷¹ The transfer of the land to the MLT effectively changed the land tenure system in the MNR from the State to the communal land tenure system, accordingly affording the communities access to their natural resources.¹⁷²

However, even though the tenure system has changed, the communities' rights to their land, has been constrained by the number of conditions that have been registered against the title deed. These conditions prevent the community from disposing the land to any legal entity other than the State or to a competent authority authorised by the State. The community is further

¹⁶⁹ Shackleton J, Gambiza J & Venter J *Subsidiary Management Plan for Natural Resource Use at Mkambati Nature Reserve* 2011.

¹⁷⁰ *Settlement Agreement* clause 4.

¹⁷¹ The seven communities had in turn established the CPA's.

¹⁷² On the detailed features of the communal land tenure see: Pienaar G "The Inclusivity of Communal Land Tenure: A Redefinition of Ownership in Canada and South Africa" 2008 (12) *Electronic Journal of Comparative Law* 1.

required to ensure that the Nature Reserve remains a provincial protected area in perpetuity and shall not be used for residential purposes.¹⁷³ It is not clear whether these conditions were discussed with the communities prior to the settlement of their claim because the Mkambati communities have on a number of occasions expressed their unhappiness about the lack of proper consultation during the settlement process.¹⁷⁴ It can be argued however that, registering conditions against the title deed, restricts the MLT from exercising full ownership land rights over their property. This could be viewed as one of Government's efforts to retain control over the restored land so as not to lose its biodiversity conservation mandate inside the Protected Areas. These restrictions can further be viewed as trumping the communities' property rights.¹⁷⁵

The land tenure process in the MNR is further complicated by the prohibition on the MLT and DLA from engaging in any private partnerships or commercial ventures with any third party regarding the development and exploitation of the restored land including the Nature Reserve, without prior written approval from each other.¹⁷⁶ This effectively means that the MLT cannot enter into commercial ventures without the consent of the DLA (now DRD&LR).¹⁷⁷ Again it can be argued that, the above clause did not give recognition to the MLT's rights to the full enjoyment and use of their property rights as it excluded them from participating in the proposed eco-tourism venture in their own land.¹⁷⁸

¹⁷³ *Settlement Agreement clause 7.*

¹⁷⁴ Some of these concerns were expressed during the CMC meetings and they also requested workshops to be held on the *Settlement Agreement* to enhance their understanding; see further Walker C "Land Claims, Land Conservation and the Public Interest in Protected Areas" 2008 (39) 2 *South African Review of Sociology* 239; Kepe 2008 *Environmental Management* 318.

¹⁷⁵ For a comprehensive discussion on how these restrictions impact on the claimants' property rights see: Naguran R " *Property Rights and Protected Areas: The Case of Ndumo Game Reserve*" 2002 Unpublished Paper Presented at the Research Seminar on Property Rights and Environmental Degradation Organized by the Beijer International Institute of Ecological Economics 27-30 May 2002, Durban, South Africa 9.

¹⁷⁶ *Settlement Agreement clause 10.2.5.*

¹⁷⁷ *Settlement Agreement clause 10.2.1.*

¹⁷⁸ This gap in the Settlement Agreement was identified by the MLT and as a result it proposed the amendment of clause 9.1 of the *Settlement Agreement* to remove DEAET and replace it by MLT as land-owners; the proposal was made in the workshop that was held in Port St John's on the 18 and 19 April 2006 that was arranged by the then ECPB to explain the contents of the *Settlement Agreement* to the MLT. A copy of the minutes of the workshop is in the file with the writer.

The *Community Agreement* further prevents the MLT from assigning or delegating their rights or obligations in terms of the agreement without the consent of the Minister.¹⁷⁹

This restriction indicates that, even though the land was transferred in title to the MLT, the MLT is still restricted from exercising its full authority as a new owner of the restored area and that this right still vests with the Minister even though the land is no longer State land. It can further be argued that the State wants to have a final say on the management of the restored Nature Reserve.¹⁸⁰

The *Settlement Agreement* alone does not provide clarity on the communities' tenure rights. These have to be extracted from the *Settlement Agreement*, the *Community Agreement* as well as the *Management Planning Framework*. The consultation of three documents that contain different terminology makes it difficult to understand their actual intention of dealing with clarity on land tenure rights.

In summary, even though the community has been given title to the land, the *Settlement Agreement* is in effect granting them only operational level rights, namely access and withdrawal and restricts their collective – choice rights of management, exclusion and alienation.¹⁸¹

It has also been argued that the South African Government has not performed well in securing a better land tenure for the people residing in rural areas.¹⁸² This challenge was further exacerbated by the declaration of the Communal Land Rights Act as unconstitutional in 2010.¹⁸³ The primary objective of CLARA was to secure a better land tenure system for people residing in rural areas. The South African Government has not been in a

¹⁷⁹ Clause 11; the Minister is defined as the Minister of Agriculture and Land Affairs.

¹⁸⁰ This is against the spirit of equal partnership as required in co-management arrangements.

¹⁸¹ For a comprehensive discussion on the impact of land restitution on land rights see: Naguran note 175 above.

¹⁸² For a comprehensive overview of this see Kepe T & Cousins B “ *Radical Land Reform is Key to Sustainable Rural Development in South Africa*” 2002 Policy Brief No. 3 PLAAS Bellville 3 -4.

¹⁸³ *Tongoane v Minister of Agriculture and Land Affairs 2010 (6) SA 214 CC*

position to implement an effective land tenure reform without a communal land tenure regime that governs communal land rights. In the absence of the communal land tenure regime, the South African Government has transferred the communal land rights to CPA and Trusts.¹⁸⁴ In the context of the MNR, the land tenure rights are held by the MLT. However some authors have raised their concerns about the legitimacy of this arrangement.¹⁸⁵

4.1.2 INSTITUTIONS

The *Settlement Agreement* gives full tenure rights to the MLT with the provision that the land including the Nature Reserve shall be held in Trust for the benefit of the communities.¹⁸⁶ Therefore the MLT and the ECPTA as a management authority co- manage the Nature Reserve. The ECPTA provides the necessary capacity in the management of the Nature Reserve.

The DRD&LR manages the land restitution process and the post settlement support in ensuring that the settlement and discretionary grants are paid.

They also facilitate the appointment of new trustees.

The OR Tambo District Municipality was appointed as the implementing agent for the *Settlement Agreement* to assist in the administration of the restitution funds and in the implementation of the projects.¹⁸⁷ The OR Tambo District Municipality was further appointed to provide financial, institutional and technical support required for the sustainable use of the restored land.¹⁸⁸

The Settlement Agreement does not provide any rationale for entrusting the municipal authorities with the financial support. There are problems that are associated with this arrangement because the municipalities do not have the necessary capacity to deal with these responsibilities and they will consequently not prioritise the spending of the required funds.¹⁸⁹

¹⁸⁴ For a proper analysis of the implications of this regime see: Paterson and Mkhulisi "Traversing South Africa's Conservation and Land Reform Objectives- Lessons from the Dwesa- Cwebe Nature Reserves" 2013, Unpublished Paper 21-23.

¹⁸⁵ For a comprehensive discussion on this see: Pienaar G " Aspects of Land Administration in the Context of Good Governance " 2009 (12) 2 *Potchefstroom Electronic Law Journal* 23-23;

¹⁸⁶ *Settlement Agreement* clauses 4 and 5.

¹⁸⁷ *Settlement Agreement* clause 13.1.

¹⁸⁸ *Settlement Agreement* clause 13.2.

¹⁸⁹ On the ineffectiveness of local government authorities see: Fay A "Land Tenure, Land Use and Land Reform at Dwesa- Cwebe, South Africa: Local Transformation and the

The involvement of municipal authorities should be avoided in the settlement of future land claims in protected areas because their delay in spending the communities' funds creates tensions between the land owners and the management authorities. Alternatively municipal authorities have to be involved during the negotiation and settlement stages to enable them to get an appreciation of the importance of spending the funds.

4.2 MANAGEMENT

The shift from the state- centred protected area management approach to the shared authority management has influenced Government's approach in the management of protected areas in South Africa. This approach affords local communities the opportunity to enter into collaborative management of the protected area they reside within or adjacent to, with the management authorities.

4.2.1 FORM OF MANAGEMENT

The form of management that is in operation in the MNR is that of co – management between the MLT and the ECPTA whereby the authority to manage the protected area is shared between the ECPTA and the MLT.¹⁹⁰

The term co – management can be defined in various ways but basically it can be defined as ‘ a situation in which two or more social actors negotiate, define and guarantee amongst themselves a fair sharing of the management functions, entitlements and responsibilities for a given territory, area or set of natural resources’.¹⁹¹ It can also be simplified to mean a partnership between

Limits of the State” 2009 (37) 8 *World Development* 1408; also bearing in mind that the municipal authorities do not become part of the pre- settlement process.

¹⁹⁰ This is in line with the *Settlement Agreement* and the *Community Agreement*.

¹⁹¹ For a various definitions and comprehensive discussion of the co- management system see : Carlson L & Berkes F “ Co- Management: Concepts and Methodological Implications” 2005 (75) *Journal of Environmental Management* 66; see further Borrini- Feyerabend G, Favar MT, Nguingiri JC & Ndangang VA “ *Co- Management of Natural Resources Organising, Negotiating and Learning –by Doing 2007* ” *Towards Equity and Enhanced Conservation*, IUCN Gland 13; for a comprehensive discussion on the collaborative management of protected areas see: Borrini – Feyerabend G, Kothari A & Oviedo G “ *Indigenous and Local Communities and Protected Areas : Towards Equity and Enhanced Conservation- Guidance on Policy and Practice for Co- Managed Protected Areas and Community Conserved Areas* 2004 Best Practice Protected Area Guidelines Series No. 11, IUCN Gland/ Cardiff University Gland 23 and 32; see also Berkes F “ Evolution of Co- Management : Role of Knowledge Generation, Bridging Organisations and Social Learning” 2009 *Journal of Environmental Management* 1695.

the State and local resource users and in cases of the restored land; the partnership is between the State and the local communities.¹⁹² Co – management promotes the involvement of local communities in power sharing and the decision-making processes regarding the use of natural resources, in most cases the agreement is between the State and the local communities as is the case in the MNR.¹⁹³ The co –management model that is in operation in the MNR is informed by the *Community Agreement between the MLT, DLA and the Provincial Department of Economic Affairs, Environment and Tourism (DEAET)* to co- manage the land and the Nature Reserve for a period of 35 years.

The *Management Planning Framework* also acknowledges that the Nature Reserve will be community- owned but will be co-managed on an equal partnership basis with a competent authority. The use of the term ‘equal partnership’ seems to be more acceptable in the co-management system as all the parties in the co-management agreement will have an equal say in the decision making process.¹⁹⁴

The basis of limiting the initial period of co- management to 35 years or even attaching a time framework to the co-management has not been specified in both the *Settlement Agreement* and the *Community Agreement*. Therefore it is not clear whether the State plans to allow the communities to manage the protected areas on their own. However the *Community Agreement* and the *Settlement Agreement* provide for the renegotiation of another community agreement between the MLT and the relevant competent authority after the expiry of the initial one, both documents do not specify the duration of the second community agreement and what will happen after its expiry.

The model of management that is in operation in the MNR appears to be in support of the principles of the *National Co- Management Framework* that has been adopted by the State in 2010. However it is not clear why the South

¹⁹² Carlson & Berkes 2005 *Journal of Environmental Management* 70; Berkes F, George P & Preston R “Co- Management: The Evolution of the Theory and Practice of Joint Administration of Living Resources” TASO Research Report, Second Series No.1 Unpublished Paper 4-6.

¹⁹³ On the analysis of the *National Co- Management Framework*, see the references on note 128 above.

¹⁹⁴ For a detailed discussion on the co-management concept see Kepe 2008 *Environmental Management* 70; Carl & Berkes 2005 *Journal of Environmental Management* 66.

African Government is promoting co-management as the preferred option of settling land claims in protected areas.¹⁹⁵

In the context of the MNR, it can be argued that, the choice of the co-management model was further influenced by the inability of new land owners (because of their lack of management skills and resources), to manage their restored land, hence the *Community Agreement* extended the initial period of co- management to 35 years. The parties can further conclude another co- management agreement at the expiry of the initial period of 35 years. It can be argued that by allowing the parties to enter into a new agreement after the initial period, the South African Government did not foresee the communities' ability to manage the protected area on their own.

However it has been argued that, the success of the co- management system is dependent upon the fulfilment of four conditions namely, the existence of appropriate institutions; the prevalence of trust between the respective parties; the recognition and protection of community rights of access and use; and the provision of economic incentives to those communal institutions partner to the co- management arrangement.¹⁹⁶ The co-management model that is in operation in MNR is a success because it conforms to all four conditions. As a result the communities have embraced it.¹⁹⁷ However the choice of the co- management model to align the land restitution process in protected areas, has not be left without any criticism. It has been argued that this type of co- management model is used in areas that require the protection of natural resource and not to deal with land rights

¹⁹⁵ For a comprehensive discussion on this see: Kepe 2008 *Environmental Management* 312; Reid H, Fig D, Magome H & Leader – Williams N “Co-Management of Contractual Parks in South Africa : Lessons from Australia” 2004 *Conservation & Society* 377- 409; Isaacs M & Mohamed N Co-Managing the Common in the “New” South Africa: Room for Manoeuvre? Paper presented at the 8th Biennial Conference of the International Association for the Study of Common Property entitled, *Constituting the Commons*, May 31- June , 2000; Kepe et al 2005 *IJBMSM* 13; Songorwa AN, Buhrs T& Hughey KFD “Community Based Wildlife Management in Africa” 2000 *Natural Resources Journal* 603- 643.

¹⁹⁶ De Koning (2010) 236 (61) *Unasylva* 41-42.

¹⁹⁷ Cundill G, Thondhlana G, Sisitka L, Shackleton S & Blore M “ *Land Claims and the Unquestionable Pursuit of Co-Management on Four Protected Areas in South Africa*” 2013 Unpublished paper 7- 8.

issues.¹⁹⁸ Thus other settlements options and other governance system were overlooked in the settlement of the land claim.

The MNR *Settlement Agreement* contains similar clauses to the MOA which could indicate that the MOA was based on the land claims that were settled prior to its adoption. Consequently the MNR *Settlement Agreement* was benchmarked against other *Settlement agreements*.

The ambiguity and vagueness of the *Settlement Agreement* has also been noted when it requires the MLT to contribute to the costs of managing the nature reserve but it does not specify when the contribution is expected from the MLT, taking into consideration their financial status at the settlement stage. These areas require clarity during the pre- settlement stage in order to avoid ambiguities.

4.2.2 FORM, NATURE AND COMPOSITION OF THE MANAGEMENT INSTITUTIONS

Following the settlement of the land claim, the erstwhile ECPB and the MLT entered into a co- management arrangement with a view to agree on the day to day management of the MNR.¹⁹⁹ The MLT and the ECPB further established a Co-Management Committee (CMC) which is made up of twenty members, sixteen of which are all the Trustees of the MLT and the remaining four members were appointed by the ECPTA.²⁰⁰

The composition of the CMC is contained in the *Community Agreement*, which has omitted other stakeholders that may play a role in the management of the protected area.²⁰¹ Fortunately the *Community Agreement* provides for the co-option of ad-hoc additional members. Consequently the ECPTA and the MLT co- opted a representative from the investment company in the CMC to expedite eco- tourism development

¹⁹⁸ Kepe 2008 *Environmental Management* 314.

¹⁹⁹ In the absence of a signed Co-Management Agreement.

²⁰⁰ This is in line with clause 6 of the *Community Agreement*.

²⁰¹ These stakeholders include: traditional leaders; local government authorities, conservation authorities and land reform authorities.

inside the Nature Reserve. The skewed composition of the CMC creates an imbalance in terms of the decision – making process as the MLT is overly represented in the CMC. The *Community Agreement* further outlines the principles of the co- management model that is in operation in the MNR.

The *Community Agreement* and the *Settlement Agreement* do not provide guidance on the functioning of the CMC, its legal status in terms of decision-making powers, the rights, duties and authority assigned to its members.

Therefore in the absence of guidance relating to the above issues, decisions that are taken at a CMC meeting have to be ratified by the Chief Executive Officer of ECPTA or the ECPTA Board of Directors depending on the delegated authority. The same applies to the MLT who are supposed to report back to the CPA to ratify the decision. This lack of guidance on the roles and responsibilities of the parties has also delayed the finalization of the signed co- management agreement between the MLT and the ECPTA.²⁰²

Thus the management of the Nature Reserve is centralised between the MLT and the ECPTA.

4.2.3 MANAGEMENT PLANNING

The MNR is managed through the *Eastern Cape Parks Board Integrated Reserve Management Plan - Strategic Management Plan: Mkambati Nature Reserve* as dictated by the *Community Agreement*.²⁰³ The *Eastern Cape Parks Board Integrated Reserve Management Plan - Strategic Management Plan: Mkambati Nature Reserve* provides guidance on the management issues of the Nature Reserve and determines access and use of natural resources within it.²⁰⁴ The MLT and ECPTA further adopted a *Subsidiary Management Plan for Natural Resources use for the Mkambati Nature Reserve*.²⁰⁵ The *Subsidiary Management Plan* provides guidance and

²⁰² The parties are struggling to identify their roles and responsibilities in the CMC and agree on the actual terms of the co- management agreement.; on the conflicts between the Eastern Cape Parks Board which was the management authority at the time of the settlement see: Kepe 2008 *Environmental Management* 314; the ECPTA took over the management of the protected area after the ECPB and the ECTB merged to form the ECPTA. The merger effectively repealed the Eastern Cape Parks Board Act 12 of 2003.

²⁰³ *Eastern Cape Parks Board Integrated Reserve Management Plan - Strategic Management Plan: Mkambati Nature Reserve*.

²⁰⁴ This plan was approved by the MEC of Economic Development Environmental Affairs and Tourism in 2009.

²⁰⁵ *Subsidiary Management Plan for Natural Resource Use for the Mkambati Nature Reserve*.

permits access to and use of species required by local communities. These species need to be in sufficient abundance within the Nature Reserve. The plan is also meant to ensure that the species that can be accessed inside the Nature Reserve are unavailable in surrounding areas and are harvested in a sustainable manner.

4.2.4 DECISION- MAKING PROCESS

The management regime in operation in the MNR is a shared authority between the MLT and the ECPTA. This was achieved through the establishment of the CMC where decisions are taken by consent subject to ratification by the ECPTA Board of Directors or its Chief Executive Officer and the CPA's.²⁰⁶ The MLT, DLA and the ECPTA further established an Investment Task Team that look into issues of eco- tourism opportunities inside the Nature Reserve.²⁰⁷

The shared management of the MNR is not without its own challenges that arise due to a number of factors that include firstly, the inability of the MLT to clearly understand the terms of the *Settlement Agreement* particularly their role as new land owners,²⁰⁸ secondly, the failure by the authorities to articulate the concept of co- management in the *Settlement Agreement*, and thirdly the failure by the MLT to report progress on the management of the Nature Reserve to their CPA's and traditional leadership.²⁰⁹ The fourth challenge is the failure of the DRD&LR to provide a post settlement support for the utilization of the restitution grants and implementation of projects. The fifth challenge is the failure of the DRD&LR to hold the elections of new Trustees immediately after the term of the old ones has expired. The sixth challenges relates to the failure of the DRD& LR to monitor the performance of the Trustees. In the context of the MNR the inability of the MLT to report back to the constituencies and the lack of post settlement support by the

²⁰⁶ Due to the skewed composition of the CMC, the MLT and the ECPTA agreed to take decisions by consent.

²⁰⁷ In this Task Team the ECPTA is represented by the Legal Advisor and the Manager of People and Parks and one representative from the DLA and the MLT is represented by two members.

²⁰⁸ This can be attributed to the failure by the land reform authorities to provide post settlement support to the communities.

²⁰⁹ This has resulted in the aggrieved community members staging protests inside the Nature Reserve to demand the appointment of new Trustees.

DRD&LR present a threat on the management and functioning of the Nature Reserve.

4.3 ACCESS, USE AND BENEFIT SHARING

The *Management Planning Framework* provides guiding principles for the management of the Nature Reserve. It also promotes a management system that will balance eco-tourism opportunities and biodiversity conservation for the benefit of the local communities.²¹⁰

It has been argued that the success of benefit sharing is dependent on good governance structures at community level.²¹¹ This has been the case in the MNR because the success of the benefit sharing is attributed to the good working relationship between the ECPTA and the MLT which has allowed the communities within and adjacent the MNR regulated access to the protected area for the past nine years. This regulated access has also been extended for recreational, traditional and spiritual purposes.²¹²

The communities also benefit through the minimal employment opportunities they get from the ECPTA whose employment policy gives them preferential employment opportunities within the Nature Reserve. The ECPTA is also an Implementing Agent for the Wild Coast Project whose main objective is to develop the skills of the communities on the Wild Coast.²¹³ The Mkambati communities also benefit through the Expanded Public Works Programme projects that create temporary jobs. The

Mkambati communities also benefit from the skills development project that is led by the Wild Coast Project.

Some new relationships do experience teething problems. The relationship between the former ECPB and the MLT during the introduction of the co-management arrangement in the MNR was no exception to this rule.²¹⁴

However, the relationship between the MLT and the ECPTA has since

²¹⁰ *Management Planning Framework* clause 3.

²¹¹ Collins: Optimising Community benefits from tourism GTZ Transform South Africa 5

²¹² Every now and again the traditional healers request access to the beach through the Nature Reserve to perform their traditional rituals; the faith healers also access the beach through the Nature Reserve to perform their spiritual rituals.

²¹³ This is a GEF funded project that is implemented by the ECPTA on behalf of DEDEAT.

²¹⁴ Kepe 2008 (41) *Environmental Management* 316.

stabilised and as a result the MLT has agreed to incorporate more land into the Nature Reserve to form part of the existing protected area estate of the MNR. The *Settlement Agreement* and the *Community Agreement* provide for eco-tourism initiatives to be undertaken inside the Nature Reserve. This has to be undertaken with Private Sector Companies with a strong hospitality industry background for a period of 30 years.²¹⁵ While the CPPP process is still underway and as part of beneficiation, the ECPTA has been paying 15% of its gross revenue to the MLT on a quarterly basis. The Mkambati communities have access to certain natural resources that are found inside the nature reserve.

Some writers have also commended the good working relationship between the MLT and the ECPTA that actually resulted in the successful co-management arrangement that is in operation at the MNR.²¹⁶ However, there were issues that were highlighted that could threaten this relationship and these include: lack of benefits, including financial benefits, as a long term threat to the relationship as financial benefits accrue to MLT members for their sitting fee and travelling expenses, otherwise other than that there are no tangible benefits.²¹⁷ The overall success of the management system that is in operation at MNR is attributed to the good working relationship between the MLT and the ECPTA and the ability to attract potential investors to carry out eco-tourism activities inside the Nature Reserve.

However, the delay in the issuing of the title deed in the MLT has thwarted previous attempts to attract potential investors to conduct eco-tourism development inside the protected area.²¹⁸ This delay also strained the relationship between the communities and the MLT and also between the MLT and the Management Authority. Fortunately the ECPTA and the MLT have recently managed to secure a Community –Public Private Partnership (CPPP) Investment deal with a private investor. The details of the concession

²¹⁵ *Settlement Agreement* clause 9.1.

²¹⁶ Cundill et al note 197 above 11.

²¹⁷ Cundil et al note 216 above 12.

²¹⁸ See <http://www.info.gov.za/speeches/2003/03091115461002.htm> speech by the former MEC of Economic Affairs, Environment and Tourism in the Eastern Cape; Cousins & Kepe 2004 *EJDR* 45.

agreement are discussed under the distribution of land rights and benefits below.

However, in an attempt to close the vacuum and to come up with a viable benefit sharing options for the benefit of the Mkambati local communities, the ECPTA solicited the services of Grahamstown Land Claims Model Consortium to process and do a methodology desktop comparative analysis on land claims implications for State protected areas. The Consortium was further required to consolidate the ECPTA's position and strategy on land claims in Nature Reserves. It was also required to do a ranking of ECPTA Nature Reserves along clearly defined parameters. It was also required to consider sustainable economic benefits (current and future) that can be derived from the Nature Reserves to empower land-owner communities in the context of applicable planning and management frameworks.

The Consortium was also briefed to advise on the anticipated financial and non-financial implications for ECPTA operations and recommend a model and guidelines with human resource, legal and risk and mitigation implications, and develop an implementation plan for all the recommendations.²¹⁹

The Consortium came up with an array of recommendations and findings.²²⁰ The most important finding was that, co- management can increase management costs by up to 50%. Therefore in the context of MNR, the communities can only benefit through tourism developments in terms of acquiring equities from the investment companies and through the concession fees.²²¹

²¹⁹ The terms of reference for the appointment of the Consortium are in the file with the writer.

²²⁰ These recommendations include: the composition of the CMC, the functions of the CMC, the duration and revision period of the CMC, clear definition of the roles and responsibilities of the parties to the agreement, specific functions of the CMC, the financial management, employment opportunities and skills transfer, Mediation and arbitration and residual powers of all the parties, and not just those of the Management Authority as stated in the *Settlement Agreement* .

²²¹ Grahamstown Land Claims Model Consortium " *From Land Claim to Co- Management : A Process Model for Protected Areas*" A report prepared for the Eastern Cape Parks and Tourism Agency18.

4.3.1 NATURE AND FORM OF RIGHTS AND BENEFITS

The MNR was identified in the Spatial Development Initiatives (SDIs) as one of the five development nodes in the Wild Coast because of its high eco-tourism potential and beautiful surroundings and offerings.²²² Accordingly the *Settlement Agreement* and *Community Agreement* enable eco-tourism development inside the Nature Reserve. Both documents require the potential private sector investor to pay DEAET or its delegated Management Authority an annual levy of not less than 9% of the companies' annual gross turn over for the use of the Nature Reserve. A minimum of 6% of the 9% would be paid directly to the Community Trust (MLT) as a consideration for its commitment of keeping the Nature Reserve as a provincial protected area in perpetuity.²²³

The ECPTA and the MLT have consequently entered into the concession agreement with the private investor and the details are discussed under the implementation of the rights and benefits.

It has been argued that the success of benefit sharing is dependent on good governance structures at community level.²²⁴ The success of the benefit sharing in MNR is attributed to the good working relationship between the ECPTA and the MLT

as the communities surrounding MNR have for the past nine years enjoyed regulated access to the Nature Reserve. This regulated access has also been extended for recreational, traditional and spiritual purposes.²²⁵

²²² For a comprehensive discussion on the SDIs in the Wild Coast see: Cousins B & Kepe T 2004 *European Journal of Development* 38-40; Kepe et al 2000 Evaluating Eden Series Discussion Paper No.16 ; Kepe T 2001 (a) *Waking up from the Dream: The Pitfalls of Fast Track Development on the Wild Coast of South Africa*, Research Report No.8 PLAAS Bellville 1-4.

²²³ *Settlement Agreement* clause 9.2.

²²⁴ Collins: Optimising Community Benefits from Tourism GTZ Transform South Africa 5

²²⁵ Every now and again the traditional healers request access to the beach through the Nature Reserve to perform their traditional rituals; the faith healers also access the beach through the Nature Reserve to perform their spiritual rituals.

The communities also benefit through the minimal employment opportunities they get from the ECPTA which adopted a recruitment policy that gives preferential employment opportunities within the Nature Reserve to local communities. As a way of acknowledging the Mkambati communities' commitment to biodiversity conservation by opting to have their land restored to them without taking any

physical occupation,²²⁶ the ECPTA and the MLT agreed that whilst they are in the process of attracting interested investors the ECPTA would pay 15% of the gross revenue to the MLT. The ECPTA is also an Implementing Agent for the Wild Coast Project whose objective is to develop the skills of the communities in the Wild Coast.²²⁷ The Mkambati communities also benefit from the skills development project that is managed by the Wild Coast Project. The communities are further given access to four of the eighteen species that have been identified for use within the Nature Reserve.

The *Settlement Agreement* promotes biodiversity conservation in perpetuity, co-management of the restored land, and optimisation of benefits to claimants but it fails to outline the forms of benefits that should accrue to the communities or at least quantify the benefits. Instead the communities are expected to contribute towards the management costs.²²⁸ This expectation, together with the omission, creates a vacuum in the implementation of the *Settlement Agreement*, more especially in the finalisation of the Co-Management Agreement between the ECPTA and the MLT.²²⁹

However in the context of MNR, there are minimal challenges that specifically relate to the MLT's inability to report back to the constituencies. This requires the intervention of all the relevant stakeholders because if it is not addressed as a matter of urgency its implications could create instability and undermine the progress that has been achieved thus far. The implications of this will be dealt with below.

²²⁶ *Settlement Agreement* clause 6.1.

²²⁷ This is a GEF funded project that is implemented by the ECPTA on behalf of DEDEAT.

²²⁸ *Settlement Agreement* clause 10.2.4.

²²⁹ Community members expect economic benefits and more employment opportunities.

4.3.2 IMPLEMENTATION OF THE RIGHTS AND BENEFITS

The *Settlement Agreement* refers to the access, use and benefit sharing schemes but it does not articulate the manner in which they are distributed and implemented. In terms of access to natural resources, the MLT is allowed to harvest four of the eighteen species that have been identified for use - inside the Nature Reserve.²³⁰ The communities are also allowed to cut the thatch grass inside the Nature Reserve. The MLT also receives 15% of the annual gross profit generated by the MNR through game sales, gate takings and eco- tourism initiatives as an acknowledgement of their contribution to biodiversity conservation. The ECPTA, and the MLT, have entered into a Community Private Public Partnership (CPPP) with a private investor, for an initial period of 49 years subject to further renewal. In terms of the concession agreement, the private investor agreed to develop areas designated for eco- tourism inside the Nature Reserve. The private investor further agreed to pay 66.666% and 33.333% of their annual gross profit as lease fees to the MLT and the ECPTA respectively. The ECPTA has undertaken to utilise the lease fee towards fulfilling its biodiversity mandate inside the Nature Reserve.²³¹

The community and members of the public will still enjoy the regulated access to the Nature Reserve.²³² After the second anniversary of the effective date, the MLT will also be allowed to acquire up to 25% of the issued ordinary shares from the investor.²³³ At the end of the lease period, the improvements done on the land will be transferred over to the MLT free of any liabilities, charges, claims and encumbrances.²³⁴ The ECPTA and the MLT will still remain the owners of the wild life and its progeny through - out the lease period.²³⁵

²³⁰ This access is informed by the *Subsidiary Management Plan for Natural Resource Use at Mkambati Nature Reserve*; on the participation of communities in natural resource management see also Holmes- Watts T & Watts S “ Legal Frameworks for and the Practice of Participatory Natural Resource Management in South Africa” 2008 *Forest Policy and Economics* 437.

²³¹ Concession Agreement clause 15.

²³² Concession Agreement clause 10.

²³³ Concession Agreement clause 16.

²³⁴ Concession Agreement clause 34.

²³⁵ Concession Agreement Clause 32.

4.3.3 DISTRIBUTION OF RIGHTS AND BENEFITS

The MLT receives 15% of the annual gross profit generated by the MNR through game sales, gate takings and eco- tourism. However there are allegations by other community members that the MLT is not open and transparent in the distribution of the benefits to community members. This has resulted in conflicts between the MLT and the community members who have accused the MLT of lack of accountability.²³⁶

In order to ensure fairness and transparency in the equitable distribution of rights and minimal benefits that are due to the communities, the MLT needs to be assisted to account properly to the rest of the community members and traditional leaders. The 15% that is paid over to the MLT is only enough for the administrative and operational requirements of the Trustees but the communal property associations and traditional authorities may not be aware of this challenge.²³⁷ Thus there is no real benefit that goes to the rest of the members of the communities but in the absence of transparency by the MLT, conflicts will often arise between the members of the communities and the Trustees as they accused the Trustees of enriching themselves at the expense of their constituencies.²³⁸

The above challenges could be resolved through the involvement of the management authorities, traditional leadership, the MLT, municipal authorities and the communal property associations. During these engagements, the concerned communal property associations need to be addressed on the realities on the ground regarding access, use and benefit sharing and that after ten years post settlement there have not been any tangible benefits that have accrued to the communities. The communities also need to be addressed on the alternative dispute mechanisms other than staging a sit- in inside the Nature Reserve. The communities are yet to benefit in the eco- tourism development that is currently underway in the MNR.

²³⁶ As a way of expressing their dissatisfaction with the MLT and DRD&LR, a concerned group of community members staged a sit in inside the MNR from 8 January 2014 to 10 January 2014. Their demand was to meet the DRD&LR officials to discuss issues that require a change in the representation in the MLT.

²³⁷ These include transport; accomodation and catering costs.

²³⁸ These conflicts resulted to the delay of appointing new Trustees when the term of the current Trustees expired. They even led to the rotation of chairmanship.

5. CHAPTER 5 – LESSONS FOR THE FUTURE RESOLUTIONS OF LAND CLAIMS IN PROTECTED AREAS

The previous chapter analysed the relevant components of the governance arrangement that is in operation at the MNR. It also distilled its successes, challenges and lessons that can be drawn in the resolution of land claims in protected areas. This chapter now gives an overview of the lessons that can be drawn in the resolution of future land claims in protected areas based on the analysis of the regime.

5.1 PROCEDURAL ISSUES

The attempts by the South African Government to overhaul the protected areas and land reform regimes are applauded. However this overhaul does not seem to be sufficient enough because of the gaps that have been identified in the laws that have been promulgated. The subsequent promulgation of the RLRA was one of the first attempts to settle land claims in protected areas because it facilitates the submission, processing and resolution of land claims. The RLRA further provides three settlement options that require consideration during the negotiation phase.²³⁹ Initially the implementation of the RLRA seemed to be problematic in the context of MNR because the communities claimed that they were not made aware of the other settlement options hence there was conflict between the State and the communities. It is recommended that, a proper presentation of all the settlement options during the negotiation phase be done. This presentation should also take place in the presence of the Management Authorities and other relevant stakeholders in the management of protected areas.

The RLRA was followed by the promulgation of the Protected Areas Act which does not deal with land claims in protected areas, but makes provision for the co- management of protected areas.²⁴⁰ However the Protected Areas Act does not indicate the type of co- management that should be in operation in the protected areas and reasons for preferring co- management governance. This failure to state the type of co- management that should be in operation in a restored protected area created conflicts between the MLT

²³⁹ These options include: The restoration of the land rights, provision of an alternative land, payment of financial compensation and some combination of the two.

²⁴⁰ Section 42 of the Protected Areas Act 57 of 2003.

and the State in the MNR. The lesson that can be drawn from this is that, the type of co- management and its advantages and disadvantages must be stated clearly during the pre- settlement stages. The State must further explain in clear terms the rationale for choosing the co- management model in a restored protected area over other governance options.

Regarding clarity on land tenure rights, the South African Government is still faced with the challenge of regulating its land tenure regime, following the declaration of CLARA as unconstitutional.²⁴¹ Thus in the absence of the land tenure regime, the communities cannot be afforded proper communal land tenure rights. Fortunately in the context of MNR, the land was transferred to the MLT after six years following the settlement of the land claim.

The negotiation process for the settlement of the MNR land claim was protracted due to community conflicts over the legitimacy of the Khanyayo people to lodge the land restitution claim.²⁴² It took the State over seven years to settle the land claim, following an intervention by the then DLA. A proper identification of legitimate claimants during the negotiation phase should serve as a key lesson that can be learned in the context of the MNR.

The settlement was further delayed due to the exclusion of the key stakeholders that are relevant in the management of the MNR.²⁴³ The delay that is caused by the exclusion of key stakeholders in the negotiation phase could cause a delay in the post settlement implementation. For instance in the context of the MNR, the Department of Public Works (DPW) was excluded during the negotiation phase and as a result the transfer of the land to the MLT was delayed for about six years. The delayed transfer of the title deed also impacted negatively in the context of the MNR as the first attempt to conclude a concession agreement was delayed until the investor lost the interest.

²⁴¹ *Tongoane v Minister for Agriculture and Land Affairs* 2010 (6) SA 214 CC.

²⁴² For a comprehensive discussion on this see: Kepe et al 2005 *International Journal of Biodiversity Science and Management* 9-10; see also Kepe T "The Problem of Defining 'Community': Challenges for the Land Reform Programme in Rural South Africa" 1999 *Development Southern Africa* 415-424

²⁴³ These key stakeholders include: The Management Authority which was the erstwhile ECPB, the OR Tambo District Municipality, the communities, traditional authorities, and the Department of Public Works.

Accordingly the exclusion of the DPW as the custodian of the State's immovable assets should serve as a lesson in the resolution of future land claims in protected areas as it creates some delays.

The early involvement of the Management Authorities and other stakeholders during the pre-settlement negotiation process is very crucial in terms of influencing the settlement options and governance options²⁴⁴ that can be viable for both the new land owners and the Management Authority, especially on the issues that relate to access, use and benefit sharing.²⁴⁵ This approach will also assist in minimising the expectations of the new land owners in getting benefits, during the post settlement phase which sometimes results in conflict if their expectations are not realised. The involvement of the traditional leaders and traditional authorities during the pre- settlement stage is also encouraged due to the role the traditional leaders play in the administration of land and land tenure issues in the rural areas. This approach will also avoid post settlement conflict between the traditional authorities and the Trustees.

As a result and in the context of MNR, the first concession agreement was installed because the Kingdom was not properly briefed about the eco-tourism development within the Nature Reserve. The involvement of traditional leadership should serve as a lesson in the resolution of claims in protected areas. Also the State needs to ensure that the communities are capacitated to be on the same level as the Government officials during the negotiation phase so as to eliminate mistrust between the two parties during the implementation phase.²⁴⁶

The negotiations should be open, fair and transparent and the draft terms of settlement have to be presented to the communities prior to the development of the final document. In the context of the MNR, it can be argued that, the State failed to explain the terms of the settlement prior to the final

²⁴⁴ These include: private governance, shared governance and governance by indigenous peoples and local communities.

²⁴⁵ For a discussion on the governance options in protected areas see the references on note 123 above

²⁴⁶ Hall R " Reconciling the Past, Present and Future: The Parameters and Practices of Land Restitution in South Africa Paper presented at the Seminar on Land Restitution and Transitional Justice at the Norwegian Centre for Human Rights, University of Oslo 10 September 2009.

settlement.²⁴⁷ The lack of proper consultation during the negotiation process usually presents a challenge during the implementation phase as conflicts often arise between the Management Authority, Municipalities, Government Departments and the new land owners on the interpretation of the *Settlement Agreement*. It is accordingly recommended that the conflict of interest between the communities and the stakeholders are dealt with appropriately and in a transparent manner during the negotiation phase.²⁴⁸ Also there is no indication that other governance options were presented to the communities during the negotiation phase.²⁴⁹

The *Settlement Agreement*, which informs the resolution of the land claim in MNR was issued with two additional documents namely; the *Management Framework* and the *Community Agreement*. The three documents have to be read concurrently in order to get an indication of the governance model that is in operation in the MNR even though they contain conflicting and different terminology.²⁵⁰ The cluttering of the *Settlement Agreement* with other documents creates confusion because these documents do not complement each other. As a lesson in the resolution of other land claims, the *Settlement Agreement* must be drafted comprehensively in order to avoid cross referencing to its annexures.

Another lesson that can be drawn in the settlement of land claims in protected areas, is that, it is advisable that DRDL&R must avoid the application of a blanket approach in settling the land claim in a protected area and instead settle the claim according to the needs of the communities, the terrain of the Nature Reserve, the value of biodiversity inside the Nature Reserve and the eco – tourism value of that particular Nature Reserve. The settlement of a marine protected area should differ from the terrestrial protected area.

²⁴⁷ This assertion is based on the request by the MLT during the CMC meetings to be assisted with the explanation of certain terms of the *Settlement Agreement* and as a result of these requests the erstwhile ECPB held workshop with a view to explain the clauses of the *Settlement Agreement*.

²⁴⁸ Steenkamp C & Uhr J: *The Makuleke Land Claim: Power Relations and Community-Based Natural Resource Management* 2000 Evaluating Eden Series Discussion Paper No. 18, IIED London 3- 4.

²⁴⁹ For a comprehensive discussion on these governance options see the references on note 127 above.

²⁵⁰ Kepe 2008 *Environmental Management* at 318

5.2 LAND TENURE ISSUES

In terms of the *Settlement Agreement*, the land including the Nature Reserve shall be restored to the claimant communities as represented by the MLT and shall be co-managed with the Management authority for an initial period of 35 years. The land was restored to the MLT due to the absence of the communal land rights regime. This effectively gives the MLT full title to the land and effectively changes the land tenure system to the communal land tenure.

By giving back the land in title to the communities, it has been argued that it has been Government's way of creating an opportunity for the communities to gain full control of their natural resources that are situated inside the restored protected areas.

This approach seems to be in line with the Government's approach of settling land claims in protected areas. However as has been discussed above, the land was given back with an array of conditions that are registered against the title deed. These conditions present a challenge to the land tenure rights and their implications are discussed in detail in chapter four above.²⁵¹ These conditions cast a doubt on the Government's intention of giving the land back to its rightful owners. It is therefore recommended that clear land tenure rights with no conditions should be well articulated in the *Settlement Agreement* in order to avoid uncertainties.²⁵²

The uncertainties on the land tenure issues are further caused by the delay in the handing over of the title deed to the new land owners because potential investors become reluctant to invest under uncertain conditions.

In the context of the MNR this delay has had a negative impact on the initial attempt of entering into Public Private Partnerships (PPP). At a later stage the MLT had to get an exemption from National Treasury to enter into Community Public Private Partnership (CPPP) with a private investor. The

²⁵¹ The communities could not enter into CPPPs because the land was registered in the name of the State.

²⁵² Cousins B & Kepe T "Decentralisation when Land and Resource Rights are Deeply Contested: A case study of the Mkambati Eco-tourism Project on the Wild Coast of South Africa" (2002) unpublished paper presented at a conference on Decentralisation and the Environment, Bellagio, Italy 18-22 February, 2002.

land tenure issues should be dealt with prior to the finalisation of the Settlement Agreement. Also the DRDL&R need to commence the process of transferring the land into the new owners soon after the settlement. In the context of MNR, the DRD&LR only initiated the process on the insistence of the investor.

5.3 MANAGEMENT ISSUES

As has been discussed earlier, the nature and type of co-management is not adequately described in the *Settlement Agreement* and *Community Agreement* except for saying that the Nature Reserve shall be co-managed for a period of 35 years.

In an ideal situation, the *Settlement Agreement* has to be drafted by the DRD&LR in consultation with the Management Authorities, other relevant stakeholders and the claimant communities in order to eliminate any potential ambiguities which could result in long term conflict around the management of the Nature Reserve. The DRDL&R should design a system of introducing the Management Authority to the new land owners and also clarify their role in relation to the management of the Nature Reserve instead of the current system of introducing it abruptly. A lesson that can be learned is that the abrupt introduction of the Management Authority to the new land owners creates some problems around issues of game and land ownership.

The community expectations should also be clarified before the actual settlement. For instance, in the MNR the new land owners were expecting the Management Authority to pay for using their facilities.²⁵³ This was an indication that there was no process in place to attend to the issues of expectations by the communities. However the ability to drive eco – tourism inside the Nature Reserve and the shared responsibility to attract investors has stabilized the relationship between the ECPTA and the MLT. This has also made the co-management arrangement that is at play in Mkambati Nature Reserve successful. This success is contrasting the views that have been expressed by other writers on balancing tourism and biodiversity in

²⁵³ The *Settlement Agreement* refers to the restoration of land and becomes silent about other assets that are inside the restored land.

protected areas in South Africa.²⁵⁴ The management plans that provide guidance on the management of the Nature Reserve should be adopted soon after the settlement of the land claim.

The composition of the CMC should not be specified in the *Community Agreement* as this creates an imbalance in terms of the representation in the CMC. Similarly, the co- management agreements should be finalised immediately after the *Settlement Agreement*. This will assist in clarifying the roles and responsibilities of the new land owners and the Management Authority. The costs of managing the Nature Reserve need to be clarified in advance prior to the *Settlement Agreement*.

5.4 ACCESS, USE AND BENEFIT SHARING ISSUES

The issue of access to natural resources and what benefits should go to the communities need to be explained prior to the finalisation of the *Settlement Agreement*. This approach will avoid the post- settlement impasse that often arise between the concerned community members and the Trust members as well as between the Trust members and the Management Authority over access to natural resources and sharing of benefits. This should serve as a lesson in the resolution of other land claims in protected areas.

The lack of administrative capacity of the Trustees compromises their ability to account to their communities, therefore their standing remains questionable. They require more capacitation in administrative issues to enable them to account properly to their communities. The lack of proper reporting has led to conflicts between the Trustees and community members.²⁵⁵ These conflicts also impact negatively on the ability of the Management Authority to operate inside the Nature Reserve. There is also another challenge in terms of expediting eco- tourism development inside the

²⁵⁴ See De Villiers B Land claims and National Parks: *The Makuleke Experience* (1998) HSRC Press Pretoria 77-78; Kepe et al 2005 (1) *International Journal of Biodiversity Science and Management* 4.

²⁵⁵ For instance in the context of MNR the concerned group of community members staged a sit in inside the Nature Reserve on 8 January 2014, demanding to see the DRDL&R officials and requesting that they replace to change the Trustees as they do not report to them on the issue of development inside the Nature Reserve.

Nature Reserve, and this challenge is associated with the delay in the transfer of the land to the new owners. This then slows the pace of eco-tourism development inside the Nature Reserve and as a result the MLT had to apply for exemption from the Department of National Treasury to enter into CPPPs whilst the registration process was still underway.

A proper definition of land rights and the benefits to the communities needs to be incorporated into the *Settlement Agreements*. Thus the *Settlement Agreements* need to be drafted in a clear and precise manner that would form a good basis for a good co-management agreement. A lack of a clearly defined and precise *Settlement Agreement* has thwarted the efforts of the ECPTA to enter into a formal co-management agreement with the MLT as both parties do not seem to be on the same level of understanding regarding the terms of the *Settlement Agreement*.

It accordingly becomes crucial to maintain good working relations between the Management Authorities and the new land owners so as to build a trustworthy relationship. It also becomes important for co-management agreements to be finalised immediately after the *Settlement Agreement* as the delay in its finalisation lead to conflict between the communities and the Management Authorities, more especially about the exact terms of the Settlement Agreement.

The *Settlement Agreements* need to define the property rights in a manner that will be understood by both the Management Authority and the new land owners.

The exceptional feature of the co-management model that is in operation at the MNR is the shared responsibility between the Management Authority and the MLT of attracting interested investors to carry out eco-tourism development inside the Nature Reserve. That is why currently the parties are expecting the appointed investor to start the development as soon as the Environmental Impact Assessment (EIA) report is released. The details of this development are discussed in detail in chapter four above. This is the key lesson that can be drawn even though the *Settlement Agreement* does

not provide clear terms of benefit sharing initiatives, there are other initiatives that can be undertaken to ensure beneficiation.

The adoption of the *Subsidiary Management Plan for Natural Resource Use at Mkambati Nature Reserve* is another initiative of ensuring access to natural resources. This could be drawn as a lesson in the resolution of the outstanding land claims in protected areas.

Key to the success of the co-management model that is in operation at the MNR is the strong relationship that currently exists between the MLT and the ECPTA. The relationship is based on transparency as the MLT understands the operational budget of the Nature Reserve and the need to attract investors for its economic development.

In the absence of clear guidance from the *Settlement Agreement*, the ECPTA and the MLT rely on the *Strategic Management Plans*, *Game Management Plans* and the *Subsidiary Plans for Natural Resources* for guidance on the management of the Nature Reserve, access, use and benefit issues.

6. CHAPTER 6 – CONCLUSION

This dissertation has sought to share the lessons that can be drawn from the co- management model that is in operation in the MNR for creating an effective and equitable governance regime for settling and operating the remaining land restitution claims in South Africa's protected areas.

It commenced with a brief analysis of the socio economic and environmental realities in order to contextualise the analysis. It then considered the South Africa's Constitutional framework namely the environmental right and the property clause which have largely been responsible for shaping and informing South Africa's conservation and land reform regime. It has briefly outlined the two relevant regimes and has criticised the manner in which they complement or do not complement one another.

It has critically reviewed the *Memorandum of Agreement* and the *National Co- Management Framework* being the recent initiatives that have been taken by the country's conservation and land authorities to bridge the apparent divide between South Africa's protected areas and land reform regimes and has concluded that both documents have overlooked other governance options that maybe of relevance in the management of protected areas other than the preferred co- management model. It has also critically reflected on the effectiveness and equitability of co- management model advocated by these initiatives through the lens of a case – namely MNR in the Eastern Cape and has concluded that this model seems to be working in the MNR due to the efforts the ECPTA has made in terms of assisting the MLT to benefit through sharing the gross revenue and through the community public private partnerships inside the Nature Reserve. It has provided a background to the Nature Reserve and the history, form and nature of the *Settlement Agreement* implemented to resolve the land restitution claim within it.

It has evaluated the governance regime that is in operation in the MNR and has divided them into different themes. These themes relate to the land tenure, management, access, use and benefit- sharing arrangement with a view to drawing lessons which could possibly inform the resolution of the many outstanding land restitution claims in protected areas.

It has concluded that, even though the governance model that is in operation in the MNR has been steady, there are lessons that can be drawn from it to be used in the settlement of the outstanding land claims in protected areas.

Regarding the pre settlement phase that also includes the negotiation process, the involvement of all relevant stakeholders should not be overlooked. This will assist to expedite the settlement of the land claim in a fair and transparent manner with clear terms of settlement.

Regarding the settlement of community claims in protected areas, it is recommended that in the future settlement of land claims, these should be settled according to the terrain of the Nature Reserve, the biodiversity and tourism value of the Nature Reserve, the needs of the communities. The capability of the community members to enter into equal partnership agreements with the State should also be considered. This will also assist the communities to negotiate access to natural resources and benefit through eco –tourism development inside the Nature Reserve.²⁵⁶ Accordingly each claim has to be settled according to its own merits. A proper consideration of all of the above, will assist in the consideration of the most preferred settlement option. Also, the *Settlement Agreement* does not have to be cluttered with additional documents that also require a similar consideration. This cluttering of the documents has created some confusion about their implementation as they contain different terminologies.

On the issue of land tenure, this is complicated, firstly, by the failure of the *Settlement Agreement* to specify the land tenure rights and secondly by the absence of a communal land tenure regime in South Africa. This creates uncertainties on the communities' legal rights over their land.

Regarding management, it is highly recommended that all other governance options should be presented to the communities before the settlement of their land claims. This will facilitate the communities' participation in the management of the Nature Reserve. However, in the context of the MNR I, the ECPTA and the MLT established a CMC where decisions regarding the management of the Nature Reserve are taken. It is during the CMC meetings

²⁵⁶ See Walker 2008: *South African Review of Sociology* 239.

where the ECPTA provides a full report on the financial status of the Nature Reserve and the employment opportunities that are available.

The dictated composition of the CMC still remains a challenge because of the imbalance in the representation. Furthermore the MNR is managed through *Mkambati Nature Reserve Strategic Management Plan* which provides clear guidelines for the management principles of the MNR. This should also serve as a lesson in the resolution of future land claims in protected areas.

Regarding the access, use and benefit sharing scheme and in the absence of clearly defined communities' benefits in the *Settlement Agreement*, the ECPTA and MLT have entered into a full co-management arrangement. The outstanding feature of this full co-management model is the shared responsibility between the management authority and the MLT. This has resulted in the conclusion of a concession agreement also referred to as a Community Public Private Partnership between the private investor, the MLT and the ECPTA to carry out eco- tourism development inside the Nature Reserve.

The open, transparent and strong relationship that currently exists between the MLT and the ECPTA has created stability in the governance scheme because the MLT is having an understanding of the operational budget of the Nature Reserve, its operational costs as well as the income generated by the Nature Reserve generates. These all are discussed during the CMC meetings. This is an indication of the intention of the ECPTA to create more benefits for the communities. However the MLT needs to be taught and encouraged to report back to their constituencies.

However there are also challenges that are sometimes encountered by the MLT and the ECPTA in the management of the Nature Reserve and these include: the delay by the DRDL&R in implementing the post settlement support due. They often complain of capacity constraints; and the inability of MLT to provide constant reports in the developments inside the protected areas to its traditional leadership and other community members (CPAs).²⁵⁷

²⁵⁷ There is only one official from DRD&LR that is responsible for post settlement support in the Eastern Cape.

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