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## **CRL RIGHTS COMMISSION'S PROTOCOL ON GRAVES**

### **1. Purpose**

This Protocol serves to promote unity and smooth cooperation between the property owners whose land/property has graves, and cultural and religious communities whose family members are buried in such graves. It also serves to set terms and procedures of access to graves on the property of someone else, for purposes of visiting & maintaining the graves, erecting tombstones, and performing cultural and religious rituals at the graves as per section 6(4) of the Extension of Security of Tenure Act No 62 of 1997 (ESTA) as amended. The identification, discovery, and relocation of graves as per section 38 and 36 of the National Heritage Resources Act No 25 of 1999 (NHRA), as well as sections 39 and 46 of the Kwa-Zulu Natal Amafa Research Institute Act No 05 of 2018.

### **2. Definitions**

“Affected party” means a person with an interest to access a grave or graves located on a property of another person.

“Amafa KZN Act” means the Kwa-Zulu Natal Amafa Research Institute Act, Act 05 of 2018.

“Amafa Institute” shall mean the Kwa-Zulu Natal Amafa Research Institute.

“ECPHRA” shall mean the Eastern Cape Provincial Heritage Resources Authority.

“ESTA” means the Extension of Security of Tenure Act, Act No 62 of 1997, as amended.

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“CRL Rights Commission” means the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

“HWC” shall mean the Heritage Western Cape.

“NHRA” means the National Heritage Resources Act, Act No 25 of 1999.

“Owner” for the purposes of this protocol shall mean the person that owns the title deed to a property, property developers, municipalities, mining companies, lessees of the properties or other persons in charge of the properties and all other sectors on whose property the graves are located.

“Person” shall mean a natural or juristic person.

“Property” shall mean fixed property both private or public on which graves are located.

“SAHRA” shall mean the South African Heritage Resources Agency.

“SAPS” shall mean the South African Police Services.

“Visiting arrangement” shall mean the Memorandum of Understanding/Agreement or any tacit agreement between the person who wants to visit the graves and the owner regarding access to graves on the property of the owner.

### **3. Protocol terms and conditions**

**3.1 Existing grave(s), known by both the family and the owner of the property, family members known to the owner and visiting arrangements between the family and the owner established.**

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3.1.1 A person(s) wishing to visit a grave that is known by both the family and the owner of the property who has established a visiting arrangement with the owner may visit the family graves located on the property in terms of section 6(4) of ESTA subject to the following:

- (i) Prior permission must be obtained from the owner of the property or his/her designated representative(s) for each visit; conditions of access imposed by the landowner are adhered to.
- (ii) Section 27 of ESTA which provides that nothing in the Act shall affect the rights of an owner or person in charge in terms of the Trespass Act 6 of 1959.

**3.2 Existing graves, known by either the family or the owner of the property, family members known or unknown by the owner and no visiting arrangements between the family and the owner is established.**

3.2.1 A family member wishing to visit a known family grave(s) on a person's property with whom visiting arrangements have not been established whether written or verbal shall obtain access to the property subject to the following conditions:

- 3.2.1.1 The owner of the property shall be notified prior to any intended visit to the grave in order to obtain permission from the owner.
- 3.2.1.2 The owner, upon such request, shall be informed of the number of family member(s) or other persons accompanying them intending to visit the grave, along with the identity of all the persons who shall be visiting the grave(s) as well as their relationship to the deceased.
- 3.2.1.3 The owner shall not deny access but is entitled to impose any reasonable conditions to safeguard life or property and to prevent any undue disruption of work on the property. This may include but is not limited to:

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- (i) Agreeing on a date and time for the intended visit so that it does not interfere with any working activities or endanger any person(s), moveable assets, crops, fauna and flora, any wild or domestic livestock on the property. (*minimum of (7) seven days before the date of the visit*);
  - (ii) Agreeing that any person(s) who visit the grave should report to the owner or their appointed representative at a specified place for the visitor(s) to identify themselves and be recorded.
  - (iii) That the owner be informed in advance of any intended activities, whether the intended visit is to merely visit the grave(s), erecting of tombstones, performing of rituals, clearing of the gravesite area, etc so that an agreement can be reached prior to the visit to ensure that any safety or health regulations or restrictions imposed on the property because of the activity taking place on the property, are adhered to;
  - (iv) Agreeing that all objects brought onto the property by the family members are removed by the family members upon departure. This does not include any objects left on the grave for religious purposes and which are deemed non-hazardous. (*Any object(s) left behind shall be subject to agreement with the owner*);
  - (v) Agreeing that family members shall be held responsible for any damage to the property caused as a result of any of their actions;
  - (vi) Agreeing on the route to be followed to the graves and on access points to the property or portion of the property where the graves are situated;
  - (vii) That no littering or making of fires are allowed and that all litter be removed by the family members upon departure;
  - (viii) Agreeing that visitors may not enter upon or access any other portion of the property, except with the permission of the owner;

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- (ix) That either the owner or an authorised representative of the owner may accompany the family members to the grave(s) if required by the owner but should wait at a respectful distance of at least 500m from the grave site and not interfere with the family members proceedings.
  - (x) The owner or authorised representative must provide any Safety Gear/Personal Protective Equipment (PPE) required for any Health and Safety procedures on the property.

3.2.1.4 Further conditions that may be imposed by the owner on the family members wishing to visit the graves:

- (i) That all gates must be left the way that they were found i.e. open gates must be left open, and closed gates must be left closed;
- (ii) That family members use existing roads to the property as designated by the owner;
- (iii) That family members must stay within the vicinity of the graves, not wander off into other parts of the property and may not climb through any fences;
- (iv) That no family members shall be allowed to bring any animal(s) on to the property unless for the purpose of performing rituals in terms of the family culture and religion and with prior consent of the owner; The family must provide veterinarian certificates certifying the animal to be free of diseases that might be contagious.
- (v) That any livestock on the property belonging to the owner shall not be disturbed in any way whatsoever.
- (vi) That the owner may set a reasonable maximum number of family members that may visit the grave/s at any one time in terms of safety and security but shall agree to grant access to the graves to multiple smaller groups, on any

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given day, should the number of family members exceed such maximum number.

- (vii) The owner and the family members may agree on the time and duration of the visit and stay at the graves. That might include night visits to perform rituals at the graves.
- (vii) The owner must take reasonable measure to ensure safety of the visitors, while on the property, from attack by dogs and wild animals on the property.
- (ix) Pictures of the family proceedings should not be taken without their consent, as that will contravene the provisions of the Protection of Personal Information Act, No 4 of 2013;
- (x) All Health and Safety Protocols in place on the properties must be adhered to by the visiting family members

### **3.3 Tampering with and exhumation of graves without the consent/knowledge of the family**

3.3.1 In the event that the owner of the property is alleged to have tampered with the graves and/or removed/exhumed the bodies from the graves which were located on his/her/its property without permission of the family; that is regarded as contravention in terms of section 36 of the NHRA and punishable in terms of section 51 of the same statute. NHRA, as well as a contravention of section 39 of the KZN Amafa Research Institute Act. The contravention must be reported to SAHRA and/or SAPS.

### **3.4 Erection of tombstones**

3.4.1 Where the family members wish to erect a tombstone, such tombstone may only be erected on the designated grave/s as identified by the family members as the

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grave/s of their deceased family member. Proof of relations to the deceased family must be provided i.e commissioned affidavits, in the absence of death certificates.

3.4.2 Any changes to the graves or any existing structures by family members shall be done with prior notice to the owner of the property, and to any relevant authority.

3.4.3. A SAHRA permit must be obtained for erection of tombstone on grave(s) protected in terms of section 36 of the NHRA.

**3.5 Visits for purpose of searching for unknown graves on the property (when the family or the owner does not know the exact location of the graves on the property), which are alleged to be of family members buried on the property.**

3.5.1 In the event of a person who has no knowledge of the exact location of the graves on a property and who wishes to search for graves on a property, the following protocol should be followed:

- (i) The owner or manager should be contacted at least a month in advance with such request;
- (ii) The owner or manager shall be entitled to, prior to granting access to such person, insist on the following being provided to him/her in writing:
  - (iii) That the identity of the person allegedly buried be provided, including the date of birth and identity number, date of death, and copy of the death certificate where available;
  - (iv) That the identity of each person who wishes to visit the farm be provided, including the full names, identity numbers and addresses of such persons and the relationship between such persons and the deceased alleged to be buried on the property;
  - (v) If the owner is satisfied that it is a *bona fide* request by *bona fide* family members, the process set out above in paragraphs 1 to 3 shall be followed.

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- (vi) If the owner is not satisfied with the answers given, or suspects that the request is not *bona fide*, he/she should advise the requester/s to notify and involve the Department of Agriculture Land Reform and Rural Development.

3.5.2. If a grave's location is known but no surface evidence of such a grave exists, SAHRA must be contacted to advice on suitable mitigation measure to assist the landowner/ family. Where a GRP survey or Test excavation may be required, an Archaeologist must be appointed at the cost of the person wishing to identify/ confirm the existence of such a grave.

### **3.6 Disputes regarding the existence of graves**

3.6.1 In the event of a dispute as to the existence of the graves in the property, the matter shall be referred to the SAHRA for guidance in terms of the NHRA and the Department of Agriculture Land Reform and Rural Development to be dealt with in terms of their dispute resolution mechanism, and for the department to check within their system, records of aerial view in respect of the property to establish if graves existed.

### **3.7 Discovery, Exhumation, and Reinternment of the contents (relocation) of graves**

3.7.1 In the event that the owner of a property/developer discovers a grave on his/her/its property, including a residential property, during the development of the property, the owner must report the discovery thereof to SAPS and the relevant Heritage Resources Authorities in each province (SAHRA for NC, FS, MP, LP, NW and GP).

3.7.2 In the event that the landowner/developer has identified the family of the graves on his/her/its property i.e farm, and the owner **with the consent of the family**, wishes to exhume and relocate the graves out of his/her/its property to the

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cemetery of the family's choice, bearing all the costs of the relocation, the owner/developer through the relevant specialists shall report the matter to SAHRA or the Provincial Heritage Resources Authority assessed to be competent to deal with section 36 of the NHRA, the Department of Health, and the local municipality for assistance therewith.

3.7.3 In the event that the family wishes to relocate the grave of their family member from one place to another, i.e out of the property of another person to the formal cemetery, the family should report the matter to SAHRA, Department of Health, and the local municipality for assistance therewith. The family shall bear the costs of such relocation.

### **3.8. Interface between the CRL Rights Commission, the landowners, developers, and cultural and religious communities**

3.8.1 The CRL Rights Commission is an institution established to strengthen constitutional democracy with specific reference to the rights of communities to enjoy their culture, practise their religion and use their language.

3.8.2 In the event that the landowner/developer intends to relocate (exhumation and re-interment) the graves and consensus is not reached or a conflict arises during the consultation process, between the family and the landowner/developer regarding the cultural and religious rituals to be performed by the family during grave relocation, , the matter must be reported to the CRL Rights Commission by any party or institution, for the CRL Rights Commission to facilitate resolution of such conflict.

3.8.3 The CRL Rights Commission facilitates conflict resolution regarding cultural and religious rituals to be performed i.e slaughtering of cows, goats, sheep and the costs thereof, i.e the costs of the traditional beers, incenses, cleansing, etc. The Commission, however, does not deal with or facilitate resolution of conflict

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regarding compensation by the owner to the family for any reason whatsoever, which is not related to the observance and performance of cultural and religious rituals.

3.8.4 The CRL Rights Commission further facilitates resolution of conflict between the owner and the cultural and religious communities, in respect of access to existing (known) graves to perform cultural and religious rituals and erection of tombstones in terms of section 6(4) of ESTA.

3.8.5 The CRL Rights Commission's objective is to promote respect for and protect the rights of cultural and religious communities, to ensure that communities are able to enjoy their culture and religion: by visiting the grave/s of their deceased family members to erect tombstones and perform cultural and religious rituals at the graves; and by observing and performing their cultural and religious rituals during relocation (exhumation and re-interment) of graves.

3.8.5 Any affected party may address their concern, regarding 3.8.2, 3.8.3 and 3.8.4 above with the CRL Rights Commission to investigate, facilitate conflict resolution and make recommendations.

3.8.6 The Protocol shall apply to all affected parties.

**Signed by:**



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Professor Luka David Mosoma  
Chairperson  
CRL Rights Commission  
Date: 05/12/2023