



COMMUNAL LAND RESEARCH PROJECT

RFP/JHB/2015/003

ANNEXURE 8:

EASTERN CAPE PLANNING COMMISSION
DIAGNOSTIC STUDY ON LAND
ADMINISTRATION (EXTRACTS)



November 2015

Main Authors:

The full document was prepared by **Mike Coleman, Mike Kenyon**
and **Rosalie Kingwill** in 2013.

References to sections are to those in the Diagnostic Study itself.



www.afesis.org.za

CONTACT INFORMATION

9 Wynne Street, Southernwood,
East London, 5201
PO Box 11214, East London, 5213
Tel: +27 43 743 3830 Fax: +27 43 743 2200
Email: info@afesis.org.za

Website: <http://www.afesis.org.za>
Twitter: @Afesiscorplan
Facebook: [https://www.facebook.com/pages/
Afesis-corplan/373978865965289](https://www.facebook.com/pages/Afesis-corplan/373978865965289)
© 2015

Executive Summary

Land administration is a wide and essential aspect of public administration. It ranges from the determination and control of various land uses, to the establishment of settlements, the management and recording of rights to land across a spectrum of tenures, and the transfers of such rights.

At the most formalised level, land administration embraces the technical surveying of land, the approval of such surveys by the Surveyor-General (SG), together comprising the core of the cadastral system, and the registration of Deeds of Transfer involving such surveyed land with the Registrar of Deeds. This system functions effectively but does not include a range of land rights and tenure forms.

No less important, but less technically rigorous, is the demarcation of land parcels and recording of rights to land for a large proportion of the of citizens who reside in the rural areas of the bantustans and who make up the largest sector of the Eastern Cape population. This parallel system of land rights derives directly from the violent and catastrophic process of colonial conquest and administration from the nineteenth century. These rights include forms of tenure, especially the rights to the use of identified parcels of land for residential and arable purposes, known as quitrent and Permission to Occupy (PTO). These “rights” also include informal or unofficial rights such as customary or traditional tenure and outright illegal allocations of land by local headman, civic officials etc.

In the past the system of quitrent and PTOs captured most of the “other tenures” which were not recorded on the cadastral or Deeds Registry systems. This system at least provided some evidence of land rights and some security of tenure. Since 1994 these tenures have been discarded on political grounds but have not been substituted by replacement tenure and administration. In effect this aspect of land administration has been allowed to collapse by the commission and omission of the national state.

This neglect and the collapse of rural land administration in the bantustan areas impacts directly on the security of tenure and on the livelihoods of over **half a million rural households** in the Province.

Such neglect and collapse despite the Constitutional imperative of providing secure tenure would not be tolerated with regard to the cadastral system and Deeds Registries.

These records are the only official records of a large proportion of existing tenure rights. The state may be in dereliction of duty if it fails to take steps to preserve them. These records of existing rights must be the starting point of any land tenure reform legislation and programme as required by the Constitution.

The PTO system as inherited from the colonial and apartheid eras has a number of problems and defects that would need to be modified. Most particularly, attention would need to be paid to adjudication between family claimants, women’s access and the rights of heritability. This would involve stronger rights and modifications to succession and inheritance laws that were previously denied, discriminatory or left to administrative discretion. There is evidence that despite these past weaknesses, the system can be modified into a rights regime consistent with the Constitution.

The need for an integrated system

The critical challenge in land administration is to develop an integrated system that accommodates a variety of rights to land and fosters economic development for all citizens. The processes and systems administered by the SG and Registrars of Deeds could be modified to meet this challenge.

South Africa is fortunate to have escaped the pressure from international institutions such as the World Bank in the 1960s and 1970s which insisted on land titling programmes as a precondition for financial assistance. These programmes were expensive and involved the establishment of private property relations or ownership in land in areas where such concepts had previously been unknown under traditional forms of land use and land tenure.

On the basis of empirical evidence the World Bank has since revised its approach. Extensive research in Africa revealed that land titling programmes have not had the desired effect on land use and have failed to stimulate higher productivity, investment and economic development. There is evidence that titling programmes have worsened the position of the poorer strata of these societies, many of whom have lost what land rights they previously held to land speculators and powerful interests.

In the Eastern Cape a variety of types of land tenure sometimes exist side by side in the same village and range from full ownership to quitrent and PTOs. Yet there is very little by way of land use and productivity to distinguish them, and the distinctions are not visible. There is no apparent correlation between specific forms of tenure, including ownership, and increased productivity or exchange of this land.

Administrative breakdown

Most of the discussion in this report points to institutional disconnections and incompatibilities of land administration in the former bantustans at spatial, legal, jurisdictional and administrative levels. The examples and situations outlined in Sections 3.1 and 3.2 of this report indicate that the disjuncture has reached critical proportions across the Province and especially in the Administrative Areas, also widely referred to as communal areas, which make up the rural areas of the former bantustans.

The problem and the solutions lie squarely within the domain of the various spheres and structures that make up the three spheres of governance. Most of the difficulties appear to originate within the national sphere which does not function to support local development within the Province. The effect of these problems is to frustrate rural and economic development as well as to deny constitutional rights and entitlements.

The vacuum in a statutory framework for recognising land rights in the rural areas is made worse by the fact that different areas of governance are competing for authority over land – traditional councils versus municipalities, municipalities versus province, traditional councils versus the deeds registry system, province versus national, etc.

Opportunities

But an administrative and institutional void does not mean nothing is happening – in rural, peri-urban and urban areas people have some or other tenure, formal or informal, over their land, but increasingly without legal recognition. Looking carefully at these practices points the way to new designs – there are “emerging tenures” in the rural areas, containing aspects of indigenous law as well as of subsequent systems including PTOs.

There is a growing body of expertise in South Africa in land administration and land tenure, with connections to international networks such as UN-Habitat and international NGOs. A number of innovative approaches to the development of appropriate frameworks or reforms to land tenure and administration have resulted from trials in various post-colonial contexts and countries.

In the absence of land administration by the state some traditional leaders have assumed aspects of this function and claimed land administration and even ownership of rural land in the Administrative Areas and beyond. However this is an intervention that arises from the collapse and withdrawal of the state from rural land administration rather than a reflection of traditional leaders having performed these functions.

The argument in this study is that the public administration must return to provide effective land administration. There is no reason to create a fourth or fifth sphere of government under traditional leaders which has not existed before.

Recommendations

In the **short term** it is recommended that to halt the collapse of rural land administration in the Administrative Areas in all affected provinces:

1. PTO Proclamations to be administered until replaced. Either:
 - a) Existing Proclamations for the effective administration of the PTO system in the AAs in the must be properly delegated by the national Minister to a combination of officials located within the Provinces in national and provincial departments. However elements of these Proclamations may be contrary to provisions of the Constitution. However there are a range of difficulties, legal and practical, against this option, including the repeal of the enabling legislation for R188/1969
Or [preferred option]
 - b) The existing Proclamations that remain are annulled and the essential elements of these Proclamations are formulated as Regulations in terms of the *Interim Protection of Informal Land Rights Act (IPILRA) No.31 of 1996* and properly delegated by the national Minister to a combination of officials located within the Provinces in national and provincial departments. This will allow for the contents of the proclamations to be brought in line with the provisions of the Constitution, for example by eliminating gender and other discrimination in the original proclamations.
- 2 A Land Administration Unit must be established, preferably within the Provincial Department responsible for the sphere of Local Government, to administer the delegations to Province. This unit must seek to capture serving public servants from departments within the provinces who historically performed and are familiar with land administration function in the AAs, and locate them at magisterial district level (where some of them may still remain) with appropriate delegations and instructions. These officials at magisterial district level must work closely with traditional leaders, ward councillors and officials charged with various planning and land management functions including the PTO legislation until repealed and replaced.
- 3 Review and consolidate all existing assignments and delegations on land tenure, planning and land administration from DRDLR to provinces.
- 4 Pilot innovation with regard to the recording and documenting of existing land rights on the ground in selected districts. UN-Habitat and associated networks are engaged in ongoing and related work. Open-source software is available for this purpose.

In the **medium term**:

1. In the context of SPLUMA, formulate and/or align Provincial Land Administration Policies which integrate and supplement national policies.
2. As required to implement such policies, formulate, consolidate, enact, amend and align as required Provincial planning legislation which includes a rural land use planning framework that is compatible with and supplements SPLUMA, which repeals former provincial ordinances and other provincial legislation, and fills any rural planning void such as that which still exists in the Transkei despite the promulgation of SPLUMA.
3. Locate Land Administration functions at Local Municipality level (records, transfers, land-use), initially performed by the provincial department responsible for local government, increasingly transferred to Local Municipalities supported by provincial department responsible for local government, and within national framework legislation.
4. Ensure that local systems are not incompatible with the formal system (SG, Deeds, District and Local Municipality spatial and land use plans, etc) with local land records, including local public access. Note that this is very different from proposing that all systems must ultimately lead to full survey and registered title.
5. National rural land tenure reform act (Constitutional requirement) which provides incremental tenure security and a variety of tenure options in urban, peri-urban and informal settlements as well as on trust land and which protects the land rights of holders, especially of vulnerable land rights holders and communities, and of rights to high potential land in particular. Avoid blanket land titling programmes in favour of an incremental approach and a range of secure land tenure options.
6. Spatial planning and land use management at national level to be moved to the Department of Co-operative Governance and Traditional Affairs
7. Re-demarcation of local municipal boundaries and wards to align with AA boundaries to the maximum extent possible, and also to follow magisterial district boundaries to the extent practical, in order to give effect to various legislation including section 5(1) of the Traditional Leadership and Governance Framework Act (TLGFA) to encourage cooperation at local village and AA levels between municipal, traditional and civic structures.

All suggested reforms should follow an overall trajectory that leads towards the following **goals**, i.e. in the longer term:

1. Providing security of tenure for all citizens as per the imperative in the Constitution and to uphold the values of the Constitution.
2. Building an efficient and equitable local land administration system to record land rights, facilitate transfers and manage land-use, which builds on existing and recent practices or emerging tenures where these meet the requirements of the Constitution.
3. Building a unitary system of land tenure rights and land administration that provides a continuum of rights and practices.
4. Protecting the land rights of holders, especially of vulnerable land rights holders and communities, and of rights to high potential land in particular.
5. Establishing a system of secure tenure in AAs that facilitates the inflow of private capital investment with clear and demonstrable benefits to local land rights holders. This could include the long-existing form of registered leasehold.
6. Developing appropriate public institutions at local municipality level for land administration (or even at lower levels such as at town or magisterial district level where local municipalities include more than one town or the seats of more than one magistracy and where local citizens are accustomed to finding these services).
7. The establishment or harmonising of existing mechanisms for resolving land disputes locally (and therefore cheaply) in the first instance.

8. Avoiding the pitfalls of systematic and across-the-board titling programmes which have not produced increased productivity where they have been applied elsewhere in the developing world including in sub-Saharan Africa.
9. Incremental tenure security and a variety of tenure options in urban, peri-urban and informal settlements as well as on trust land.