

# Land Tenure Security: the Need for Reliable Land Information



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## Registration as a Source of Land Information

*Presently, the only official and reliable source of land information in South Africa is the land registration system, which is based on the land survey system. The history of land registration indicates that it is part of the process of giving publicity to the acquisition of ownership and limited real rights in respect of immovable property.*

In the South African context, two diverse property regimes exist alongside one another; namely the system of individualised common law (Roman-Dutch) land ownership, which is predominantly based on civil law principles, and the system of communal land tenure, which is predominantly based on the shared use of land by communities in terms of indigenous law principles. The present registration system does not provide for the registration of communal land rights and, as a result, official information in respect of communal land tenure is currently insufficient and unreliable.

Land information by registration forms part of the general land administration system of South Africa. 'Land administration' can be described as the integrated processes of determining, recording and disseminating information on the tenure, value and usage of land in the context of developing suitable land management and development policies. A well-developed land administration system for formal and surveyed urban property and agricultural land already exists in South Africa, but the same cannot be said about informal land rights and communal land tenure in rural areas. Therefore a comprehensive and effective land administration system for all land tenure rights, based on reliable land information, should be developed to avoid a piecemeal approach to land administration and sustainable development. In this process, the development and application of good governance principles regarding land administration is necessary.

## Registration of Individualised Land Rights

For registration purposes, rights in immovable property are separated into ownership as well as registered limited real rights that are registrable in a deeds registry in accordance with section 63(1) of the Deeds Registries Act 47 of 1937, and other forms of land tenure that are normally not registrable in a deeds registry. The former individualised rights are strictly enforced and protected by means of court actions, can only be transferred through registration in a deeds registry and are considered absolute in nature. The latter, on the other hand, are often considered 'weak' rights, or in most instances subservient, permit-based entitlements to occupy or use land,

and are not registrable. The reason for this is that the land in question has either not been surveyed properly, or that the individualisation of land-use rights in communal property, which is a requirement for the registration of rights in a deeds registry, is not possible.

Two recent developments of the registration system illustrate the acceptance of a more flexible attitude towards the registration of communal and fragmented use rights. Firstly, in the case of sectional titles, a registration procedure different to that of individualised and surveyed land is followed. A sectional title unit, as part of a building, is registered in the sectional title register of a specific sectional title scheme held at a deeds registry rather than in the conventional land register. What differs is that the management structure of a sectional title scheme, according to the registered management and conduct rules as applied and enforced by the body corporate of the scheme, also forms part of the sectional title register.

Secondly, the Chief Registrar of Deeds has been examining the introduction of a fully computerised land registration system (e-DRS) since 1998. It is envisaged that this development will enable conveyancers, who are linked to the central registration system by computer, to make use of paperless lodging and electronic verification of information for the transfer of real rights together with simultaneous electronic transactions, such as the cancellation of existing bonds and the registration of new bonds. A fully computerised registration system offers the possibility to incorporate different land tenure models, such as individual landownership, fragmented land tenure (e.g. sectional titles and time-sharing) and communal land tenure in different registers in the same registration system.

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## Communal Property Structures in Rural Areas

Communal land rights have been exercised for centuries by traditional communities in the rural areas of the former homelands. These rights are not individualised, and may not be registered at present. It is estimated that approximately 16.5 million people, or more than 3 million households (more than a third of the total population), still live in these areas. Official land information regarding communal land tenure is almost non-existent. 'Communal land tenure' is described in terms of its inclusive nature, and ideally exhibits the following features:

- Land rights are embedded in a range of social relationships, including household and kinship networks, and various forms of community membership, often multiple and over-lapping in character;
- Land rights are inclusive rather than exclusive in character, being shared and relative, but generally secure. In a specific community, rights may be individualised (dwelling), communal (grazing, hunting and fishing) or mixed (seasonal cropping combined with grazing and other activities);
- Access to land is guaranteed by norms and values embodied in the community's land ethic. This implies that access through defined social rights is distinct from control of land by systems of authority and administration; and
- Social, political and resource-use boundaries are usually clear, but often flexible and negotiable, and sometimes the source of tension and conflict.

It has been demonstrated in several legal systems in Africa that the abolition of indigenous systems disrupts traditional rules, values and customs that have historically governed the use of land, including well-developed conflict resolution mechanisms. Replacement strategies often introduce new institutions of land administration that may not be readily accepted, causing disputes and conflict over access to land.

## Legislation and Case Law

The social cohesion within communities and the attachment of communities to land have been afforded little recognition by recent legislation. One example is the Restitution of Land Rights Act 22 of 1994, which was promulgated to provide for the restitution of rights to persons or communities dispossessed of land rights as a result of the racially discriminatory laws or practices of the past. ‘Community’ is defined in section 1 as ‘any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group’. The rights or interests in land are not limited

to surveyed land, but to land in general, and are widely described as access (and not only use and occupation) to land held in common by such group. The definition of ‘community’ in the Restitution Act, without any reference to the status or legal personality of the community, resulted in uncertainty as to whom the land should be restored in the case of a successful land claim instituted by a group of persons. Consequently, the Communal Property Associations Act 28 of 1996 (CPA Act) was promulgated to enable communities to form juristic persons in order to acquire, hold and manage immovable property in terms of a written constitution. In the context of the Act being promulgated to facilitate the registration of communal property in the name of the group as a juristic person, it can only refer to surveyed property registrable in a deeds registry. The CPA Act

most enjoyed a lukewarm reception because it was generally perceived to be too sophisticated for most communities. Furthermore, lawyers drafting constitutions for these communities frequently did not take community custom sufficiently into consideration. The main problem with this Act from the perspective of indigenous people was that it was based on the individualisation of land tenure for registration purposes by using Westernised corporate models. Consequently the distinctive communal spirit and responsibilities, whereby tenure security are normally ensured, were completely ignored.

In order to provide for the specific needs of rural communities practising communal land tenure, the Communal Land Rights Act 11 of 2004 (hereafter CLRA) was promulgated. This Act was recently found to be unconstitutional and scrapped in its entirety by the Constitutional Court. The stated objective of the CLRA was to provide for legal security of tenure by transferring communal land to communities and to provide for the democratic administration of communal land. The administration and management of communal land were to be exercised by land rights boards and land administration committees appointed by the communities for

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the benefit of the community members (sections 22(2) and 22(4)). For this purpose, the community was required to apply to the Department of Land Affairs to be incorporated as a juristic person by registering community rules as contemplated by section 20. The juristic person could, subject to the provisions of the Act and its community rules, acquire rights and incur obligations in its own name and could, in particular, acquire and dispose of immovable property and real rights therein and encumber such property by mortgage, servitude or lease.

The following objections were raised against the implementation of this Act:

- Although the Act provided for the registration of land in the name of a community, more or less the same Westernised corporate model as in the case of the CPA Act was prescribed, losing sight of the communal spirit and responsibilities of traditional communities that are essential for access to communal land and security of land tenure.
- Although security of tenure is often obtained by membership of a functional community, many communities in rural areas in South Africa are dysfunctional. Reasons for this include apartheid land measures, the dumping of thousands of unrelated people on communal land, severe overpopulation and unproductive farming practices, compelling a substantial part of the community to migrate from the communal land, or necessitating other ways of earning a livelihood.
- It was clear that the intention of the Department of Land Affairs was to use established traditional councils as land administration committees for all communities, depriving communities of their democratic right to form their own land administration committees in terms of section 22(1) of the Act. Presently, many communities fall under traditional leaders that they do not recognise, due to historical allocations in terms of the Black Authorities Act 68 of 1951.
- The Act was furthermore based on the upgrading of land tenure rights by individualising such rights for registration purposes and to use such individualised property as collateral for financial assistance. The Minister of Land Affairs had the final say in deciding to individualise land rights on a recommendation based on a land rights enquiry.

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Although these legislative measures were an effort by the Department of Land Affairs to acknowledge communal land tenure and the registration of land to improve the security of tenure of communities, much of the flexibility and negotiability of communal land tenure was ignored. The legislation did not fully recognise the true spirit of inclusivity based on acknowledged social relationships. There is at this stage no clear policy by the Department of Land Affairs and Rural Development to fill the vacuum that has existed since the scrapping of the CLRA. The Draft Security of Tenure Bill of 2010 indicates briefly that security of rural land tenure will be dealt with in separate legislation, which has not been published yet.

Recent case law is much more explicit in recognising the historically based social cohesion of communities and the attributes of communities in securing land tenure.

The three *Richtersveld* cases are significant in determining what constitutes a community for the purposes of a land claim. In *Richtersveld Community v Alexkor*

*Ltd*<sup>1</sup> the Land Claims Court confirmed that there must be a group of persons who have rights to land. These rights are derived from shared rules determining access to land that the group holds in common. In analysing the evidence adduced by the Richtersveld people and corroborated by the expert evidence of an archaeologist and several anthropologists, the Land Claims Court held that the Richtersveld community fulfilled these requirements. The evidence indicated that the Richtersveld people shared the same culture, including the same language, religion, social and

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political structures, customs and lifestyle. One of the components of their culture was the customary rules relating to their use and occupation of land. The Constitutional Court held that the customary law interest in land is something distinct from common law ownership, and must be understood in terms of its own values and norms in terms of the customary law.<sup>2</sup> Although the indigenous nature of communities and communal property is not always acknowledged and fully understood by land tenure legislation, the Constitutional Court firmly established the principle that these institutions are rooted in indigenous law and should be acknowledged as such, but always subject to the spirit, purport and objects of the Bill of Rights in

the Constitution. Therefore the Constitutional Court concluded that the nature of the customary law interest in land (also referred to as 'indigenous title to land')<sup>3</sup> is 'a right of communal ownership under indigenous law', including communal ownership of minerals and precious stones.<sup>4</sup> Therefore, it is a true property right with economic implications.

## Security by a Comprehensive Land Administration System

The failure to provide tenure security for indigenous communities can be attributed to the following factors:

- Community structures in modern-day South Africa do not provide sufficient security of tenure due to a large incidence of dysfunctional communities and a defective, and often entirely absent, administrative system to support communities.
- Legislation introduced the wrong kind of formalisation, namely Westernised corporate models too far removed from accepted customs and therefore not suitable for indigenous communities. Much of the flexibility and negotiability of communal land tenure was ignored and the legislation did not fully recognise the true spirit of inclusivity based on acknowledged social relationships.
- An additional cause of this insecurity is that land tenure rights conferred in general by legislation do not comply with the requirements of the publicity principle and are therefore uncertain until, in individual cases, such rights are confirmed by a court order, arbitration, mediation or agreement. The Richtersveld cases are examples of litigation that lasted almost a decade before the Constitutional Court decision brought finality. Legislation alone is not sufficient to obtain security of tenure, but it has to be formalised by an additional and suitable information and recording system.
- The main aim of a formalised structure should not be the individualisation of communal land tenure in the form of freehold title to be used by communities as collateral for financial support, but the security offered by information (recording and publication) of communal land rights exercised within accepted community

structures. The information system should be upgradeable in order to provide for the registration of communal title and eventually individual title if required by a community.

In the process of developing a comprehensive land administration system for both individualised and communal land rights, internationally accepted principles of good governance or best practice should be adhered to. These include predictable, open and enlightened policy-making; transparent processes; a bureaucracy imbued with a professional ethos, an executive arm of government accountable for actions; a strong civil society participating in public affairs, and all behaving under the rule of law'.<sup>5</sup> The following aspects are internationally recognised as requirements for a comprehensive land administration system for formal and informal, including communal, land tenure:

#### **Equal protection**

Policymakers in South Africa have to deal with two diverse land tenure systems. Only rights to demarcated, surveyed property can be registered, excluding a large part of the population from the protection offered by the registration system. Recent literature, legislation and case law regarding the scope of section 25 of the Constitution have changed the notion that informal and fragmented use rights, as well as communal land rights, are inferior to the individualised ownership orientation model for lack of registration. A paradigm shift from the exclusive protection of ownership and limited real rights to tenure security for unregistered and informal land rights has been accepted by the Constitutional Court<sup>6</sup> as a solution to South Africa's pressing land tenure problems. The solution lies in the improved protection of statutory recognised rights by an extended land information and administration system in which informal, fragmented or communal land rights are recorded and protected in accordance with the application of the publicity principle.

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#### **Land policy principles**

Modern land administration has to focus mainly on recognising, controlling and mediating rights, restrictions and responsibilities over land and land-related resources, such as minerals and water. Balancing these competing tensions in land policy requires access to accurate and relevant information by way of spatial data, normally in the form of a multi-purpose cadastral system, as part of a comprehensive land information system. In this regard it is important to establish and define the roles and responsibilities of the various land-related activities such as land management, land reform, land registration, cadastre and land administration infrastructure suitable for communal land tenure.

#### **Land tenure principles**

Before a final decision on a long-term land development strategy can be made, it is necessary to examine the needs of the different individuals and population groups across all tenure relationships. Developing countries such as South Africa should consider the possibility of different tenure arrangements within one cadastral or land information system to suit the diverse needs of individuals, communities and land tenure practices in urban, agricultural and rural areas. The existing deeds registration system already provides for different forms of registration, namely individualised land rights in the case of surveyed land and urban fragmented

property holding in the case of sectional titles and time-sharing (see II above). It is possible to develop a third form to record communal land rights in the name of communities in accordance with the distinct nature of community structures and communal land tenure (see III above). The aim of such register should be to record use rights associated with communal land tenure, which will provide the necessary information (publication) for the development of a comprehensive land administration system that is lacking at this stage.

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#### **Spatial data and technical principles**

Spatial data infrastructure is a key component of land administration infrastructure. Normally this is based on complicated and expensive land survey processes. It is important to extend the spatial data infrastructure, which is aimed at individualised ownership and real rights, to include flexible and layered fragmented use rights, especially in rural areas in which communal land tenure is practised. The only prerequisite is a computerised land information system within a demarcated (and not necessarily surveyed) piece of land. Communal land tenure is based on flexible use

rights exercised by a range of members of a community within a specified area. The borders of these areas are often vague or flexible, and may change from time to time due to specific uses or agreements. This can only be recorded by a computerised land information system specifically developed to record communal land rights.

#### **A combined land information and registration system?**

Often, too much emphasis is placed on the formal registration of rights to improve tenure security, while a reliable land information system as the basis of an efficient and comprehensive land administration system is more important in this respect. It is more cost-effective and practical to implement a computerised land information system for the purpose of land administration initially, and at a later stage for the purpose of formal registration of rights when required. In developing an affordable as well as accessible register of communal land rights in rural areas for the purpose of a comprehensive land information system, the following principles should be followed:

- It should be a computerised register of persons, households and families, and rights exercised by them within a cadastrally defined or surveyed piece of land.
- The system must provide for complex, overlapping, fragmented use rights associated with communal land tenure by recognising secondary and more distant right-holders.
- The communal rights, even when registered, must be exercised in group context according to generally accepted rules, e.g. inheritance rules, alienation only with consent of the group and limitations imposed by the group, or the administrative system in which the rights are being exercised.
- The land information system should form a separate part of the central land registration system so that information of these rights will be accessible whenever a search is conducted in the land register.
- Information on the limitation of the rights by group members or the administrative system in which the rights are exercised must be recorded.
- There are several models of combined land information and registration systems,

mainly in operation in developing countries. A land information template is normally used to develop a conceptual model for documenting and recording communal land tenure where multi-dimensional rights exist. This is done by identifying the recordable components of communal property and providing a corresponding database template for documenting and recording all aspects of tenure associated with a given person, family or household with reference to a specific unit of land.

## Conclusion

The scrapping of the CLRA will be regretted by few people, but it has left a policy vacuum in the Department of Rural Development and Land Affairs regarding rural land administration. This necessitates the development of a new rural land policy by the Department. At this stage, the lack of a suitable land policy has extremely negative consequences for people living in the previous homelands, which are still characterised by tenure insecurity and a lack of administrative support for agricultural activities. Efficient planning for housing, roads, health services, educational services and electricity and sewerage services is almost non-existent and needs to be addressed urgently.

The envisaged electronic deeds registration system offers the possibility of registering three completely different forms of land tenure, namely individual ownership, urban fragmented property schemes (sectional titles and time-sharing) and communal land rights in one registration system. This also offers the possibility of different aims for the different forms of registration. A computerised land information system linked to the present registration system will be relatively inexpensive and easy to operate. It will offer security of land tenure by the publication of the nature and extent of the use rights exercised by the members of the community on a specific piece of land. In the process of developing a land policy, implementing a comprehensive land administration system and securing the land tenure rights of all South Africans, it may be profitable to accord attention to research, literature and legal precedents in other legal systems that are considerably further down the rocky road than South Africa.

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### NOTES

- 1 2001 (3) SA 1293 (LCC) par 66–75. This aspect of the decision of the Land Claims Court was confirmed in Richtersveld Community v Alexkor Ltd 2003 (6) SA 104 (SCA) par 5 and Alexkor Ltd v The Richtersveld Community 2004 (5) SA 460 (CC) par 8.
- 2 Par 50.
- 3 CC par 57 and 62.
- 4 CC par 64.
- 5 Anon Governance: the World Bank's experience (2008) vii.
- 6 Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) par 16, 23 and 24.