



# THE SOUTH AFRICAN CADASTRE AND INDIGENOUS LAND TENURE

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## Abstract

A case study is presented describing how the South African national cadastral system was insufficient on its own to supply title security and land use control, with respect to newcomers to the city acquiring title in tribal areas. Land registration on its own, or even when accompanied with adjudication, does not necessarily deliver sustainable development. To ensure sustainable development, especially under conditions of rapid urbanisation within tribal areas, socio-political factors associated with land registration systems need to initially take centre stage. Adjudication needs to be accompanied by the transfer of resources to the tribe.

## Introduction

Fourie and van Gysen (6) argue that one must go beyond technical (administrative) and/or economic factors in order to describe and analyze a cadastral system. They argue that the socio-political behaviour associated with cadastral systems must also be included in the analysis, in order to undertake cadastral reforms that are practical.

In the case study presented below we will show that, because of the influence of socio-political behaviour, it cannot be taken for granted that there is an automatic link between the registration of previously unregistered land and sustainable development. The case study demonstrates that, if the socio-political factors are not taken into account, administrators cannot be sure that land registration will deliver land use control -for economic and environmental purposes, the ability to mortgage and security of tenure for the title holder. We are arguing that using land registration to deliver sustainable development requires that all three factors are taken into account, namely the socio/political, economic and technical (administrative).

This approach accords with other writings in this field in broad terms with respect to getting to grips with the human angle in cadastral matters. (15; 3; 10; 5:281; 13:300; 9) It also accords with other writing on how to adjudicate and register indigenous/informal tenures. (14:310; 15:32; 7; 11:123-5)

However, we are arguing that the incorporation of socio-political factors should take centre stage in the short to medium term if a land registration scheme undertaken in tribal (polity) land, for the purposes of urban development and the expansion of the city, is to deliver sustainable development. Also, adjudication needs to be augmented with additional approaches to ensure medium to long term sustainable development under these conditions.

## Case Study: Indigenous Land South of Durban

### Background

In the Province of KwaZulu-Natal, South Africa, south and west of Durban and Umlazi, in the Umbumbulu magisterial district, are two Zulu polities or tribes, the Cele and the Makhanya. Both these tribal areas have been affected by rapid urbanisation for decades. (5:159-170)

Tribal control over this land, both in terms of land allocation and administration, has severely limited formal housing development and land registration in this area since the 1960s. Instead, hundreds of thousands of people, who have migrated to Durban to find work, have acquired tribal land through indigenous and/or informal arrangements in the area. That is, the area is a densely settled rural area with numerous pockets of very high density informal settlements (8), also known by the more pejorative term of 'squatter settlements'.

The freehold title to this land was held at the national level by the South African Development Trust (S.A.D.T.), and then transferred to the KwaZulu government in 1986, which at that time was a 'homeland' regional-level government. That is, the Cele and Makhanya tribes and the individual tribespeople had no formal registered rights, only personal rights. (5:471-477) Aside from the cadastral interventions described below, this group of people still have no registered real rights to date.

As far as land administration is concerned, the 'homeland' of KwaZulu, now part of the province of KwaZulu-Natal, is composed of numerous polities or sub-tribes which make up the Zulu tribe. Each sub-tribe has its own land with boundaries set down by tradition, conquest and also often by proclamation. Each sub-tribal area is administered by an *inkhosi* (chief), his *induna's* (*izinduna*) and councillors (the latter only in some tribes, such as the Makhanya), together with the heads of kinship groups (descent groups or lineages). (5:101-103,324,346-352)

Their power has been historically shared with a magistrate, who represents the regional-level authority, as well as the central authority, based in Pretoria. The relationship between the indigenous structure of land administration and the magistrate, who represents the interests of the wider society, which often previously included apartheid policies, is a dialectical relationship. That is, it has often been characterised by structural tensions.

### ***Strangers in tribal land***

The reason why it has been almost impossible to extend formal urban development into these areas since the 1960s are too numerous and complex to be able to detail here. However, one important reason which needs mentioning, which occurs throughout sub-Saharan Africa, is the attitude of residents of tribal areas to newcomers or 'strangers', which is the term we use. This attitude must be taken into account when extending the city into tribal areas, as urbanisation always brings strangers into the neighbourhood.

P.C.Lloyd argues that in previous times, strangers never held that "quantum of rights in respect of land" which could be described as ownership in tribal land (12:66), only the extended family and those who married into the family obtained such ownership. Strangers who did not marry into the family eventually left the neighbourhood.

Nowadays tribal land can also be obtained within terms of the patron client relationship, although often the deciding factor as to whether the original patron has given up his claims to the land, depends on the extent to which the original client has become integrated into the local community (5:328-334), with marriage being a common index of integration.

Although the sale of land rights in tribal areas has become more frequent in Africa, (3:14), especially to strangers who over time have become friends (5:340-345), the group right of the tribe is often still very strong and prevents the outright sale of land to complete strangers.

In order to circumvent this, local level indigenous land tenure rules are often manipulated by families and individuals, to allow the informal allocation and/or sale of land rights to strangers. (4; 5:195-243; 2) Sometimes these strangers are friends, but in the later stages of urbanisation and the development of dense informal settlements these people can be outright strangers who never become friends or family of the original tribal land owner. (5:246-280)

As will be described below, urban development into the Umbumbulu magisterial district, and the type of approach that has been taken, has created a situation where complete strangers have been able to obtain title (deed of grant rights) giving them exclusive ownership of land within the boundaries of a tribe's area. (A deed of grant rights title effectively gave full ownership which was issued by a lesser registry held at the regional level). The national South African cadastral system, rather than the indigenous land tenure and administration system, has been used to create and award these titles.

Given the attitude of tribal people to their land and to its allocation to strangers, our case study will show that land registration, though probably necessary to protect the property rights of strangers in rapidly urbanising tribal areas, is not sufficient on its own to secure these property rights and sustainable land use control.

### ***Violence as an index***

The whole of Umbumbulu, including the three areas of the case study, has been characterised by violence for more than seven years. This violence is no different from that being experienced in the rest of KwaZulu-Natal. However, the case study demonstrates the effect that violent behaviour, and the fear of violent behaviour, has on a local indigenous tenure

and administration system, as well as any attempts at registering the land in the area. However, this paper is not about the affect of violence on a land registration system.

Rather, the violence and how it affects the registration of the land in this area should be seen as an exaggeration of the socio-political factors which would have affected land registration anyway. Therefore, the violence and its affect on the local cadastral system should not be seen as anomalous and allowing no comparative base. That is, we are arguing, based on the historical information from the area, that the socio-political factors would still exist even if there was no violence. The violence, because of its visibility, merely makes it easier to track the socio-political factors which influence land registration.

This case study covers three residential areas which have been created within these largely rural tribal areas over the last decade (see map). All three of these residential areas have been surveyed. The surveyed properties have been registered for Section CC, Umlazi and Folweni, but not for Section DD, Umlazi.

### **Section DD**

The area known by administrators as Section DD of Umlazi township, west of the present township (see map), was intended to be part of Umlazi by the central authorities. This proclamation was not readily accepted by some parts of the Cele tribe.

A layout or town plan of the area was created by a planner, taking into account the people settled on the land at the time. Their residences were taken into account in the layout but not the extent of their land holdings. In 1989 a land surveyor pegged the area according to the layout. That is, pegs were placed creating sites for the existing residences, as well as additional sites between such existing residences. Once this was done the land was registered and titles were created.

Subsequent to the survey, observed in a site inspection as recently as 1994, new settlement has taken place. However, the surveyed pegs of the new sites have been entirely ignored and people have not settled between them.

### **Section CC**

The area known by administrators as Section CC of Umlazi township (south, south-west of the present township) (see map) was divided into two sections for the purposes of development, Section 1 and 2. We are only examining section 1. Again, this time in 1986, some parts of the Cele tribe did not accept the setting aside of this area by the regional authorities for urban residential development.

A layout or town plan of the area was made by a planner, taking into account the people settled on the land at the time. However, the layout only took into account their residences, not the extent of their land holdings. The area was surveyed and pegs placed in 1992. Once this was done the land was registered and titles were created and the area was set aside for basic servicing.

That is, people could obtain a title to this land. Also, because of a subsidy scheme in operation in relation to this area, a developer could obtain a grant for the servicing of this area, which was used to provide basic services. Despite these incentives no new residents have taken occupation of these sites to date. This is probably because of the influence of the people already settled in the neighbourhood, whose customary rights have probably been infringed, or who were not involved in the initial negotiations about the area.

By comparison, in the same area, a soccer field which was negotiated between the developers, surveyors, and the residents of the area has remained as a soccer field. That is, it has not become a residential area as no one has moved onto this site.

From the description of events in these two areas it is possible to deduce that the very purpose behind the surveying of accurately beaconed boundaries and the registration of the land, which was to supply urban spatial management, title and introduce strangers into a tribal area, was thwarted by the local land tenure system and indigenous system of land administration. One can conclude that the official plans for these areas have not been put into effect as envisaged.

It also means that none of the intentions of government in relation to urban spatial management have come to fruition:

- People residing in these areas do not have addresses, thus undermining any chance of obtaining payment for general services;
- No land inventory exists of who holds what and where for future planning purposes, as what is on the ground is not mirrored in the public record of the registry office;
- Land use controls in relation to public sites identified in the layout, such as schools, have not been adhered to by the people on the ground;

- New people settled on the ground cannot have their land registered because it does not conform with the layout that was pegged;
- Any environmental planning included in the layout has been overridden by local approaches;
- New residents have no security of tenure and could be moved by the state (in the form of the local government) at any time to conform to the original plans for the areas; and they could lose their land to hostile neighbours as they have no recourse to state protection in the courts;
- Banks would not give mortgages to the residents of these areas.

That is, the registration of the land in these areas was a wasted exercise both as far as the individuals and the state are concerned.

### **Folweni**

The third area which forms part of the case study is Folweni, a densely settled formal residential area in the Makhanya tribal area (see map). It consists of three units each of about 1200 sites. The type of title issued in Folweni was known as a Permission to Occupy. This title was not registered but was administratively created with the approval of the tribe and the regional level authority.

Some parts of the tribe agreed in the early 1980s to set aside this area and allow strangers and people who were not members of the tribe to obtain residential sites. Initially the accurately beaconed boundaries and the titling exercise largely delivered security of tenure for title holders, land use control and the ability to raise a limited mortgage.

Part of the reason for this may be that accurately beaconed (pegged) boundaries, which were pointed out to people when they were settling in Folweni, supply boundary evidence which is held by the wider society and not at the local level. That is, a cadastral system such as the South African national cadastre can be used to facilitate the settlement of strangers into potentially hostile communities.

However, after a few years the residents of Folweni, who were located along the edge of the residential area adjacent to the rural tribal area, had their houses burnt and were driven off the land by some members of the Makhanya tribe. A narrow strip, two houses deep and approximately one kilometre in length, was burnt out and the residents re-located themselves elsewhere. About 300 plots were involved. This happened to every single residence without exception. The only building left untouched in the strip was a community centre. The management committee of this community centre consisted almost completely of tribespeople.

Based on Hillermann's observation of behaviour in this area over the last 10 years, he concludes that this happened because of the form which the resource allocation took. Resources were given to Folweni, during the course of the urban development in the area, which were not given to the adjacent tribal rural area. Effectively, the tribal area remained as poor as ever and without services.

This disparity in servicing, despite the fact that the tribe had made the land available for this urban development, finally led to some parts of the tribe taking action against the strangers who had moved into "their" area in Folweni. These tribespeople effectively, although informally, claimed back their land from these strangers. The state did not, and it could be argued, could not, police this situation and protect the property rights of the people who had obtained titles in Folweni.

That is, even if a form of adjudication is done, and some of the tribe involved in the allocation of tribal land for urban development, cadastral surveys are not sufficient under these conditions to ensure sustainable development. We are arguing that, in addition to iterative adjudication and community involvement, resources must be transferred to the surrounding tribal area. The resources transferred must be at least equivalent to that being allocated to the urban development project.

If major disparities in resource allocation are avoided in the short to medium term, then the socio-political conflict which can disrupt a land registration system can be minimised. In this way sustainable development can be better ensured in relation to titling schemes, with respect to city expansion into surrounding tribal areas.

### **Conclusions**

A number of conclusions can be drawn from these case studies. Firstly, "...security of tenure stem(s) more from the processes of adjudication than from the issuing of a title." (15:33) Section CC and DD show that if no, or insufficient, adjudication is done it is very difficult to supply security of tenure and land use control, when extending urban areas into existing tribal areas. The cadastral system and surveyed pegs on their own do not supply these things.

Secondly, the success of the soccer field implies that adjudication works in indigenous areas; and that it would have worked in Section CC and DD, Umlazi, providing resources were also transferred to the tribe.

Thirdly, adjudication and the fact that it offers an opportunity for community involvement, especially if it is done systematically and iteratively and uses a land tribunal, as a neutral third party to adjudicate (7:12; 15:33-4), is generally expected to deliver sustainable development with respect to land registration. We have shown that it can also work in the short term under these conditions. However, when urban areas are extended into tribal areas the transfer of resources to the tribe must approximate the transfer to the urban development, in the short to medium term, to ensure the sustainable development usually expected from land registration.

Fourthly, it is a waste of time and money making official plans and spending money on planning and survey under these conditions, unless and until systematic iterative adjudication and a transfer of resources is part of the exercise.

Fifthly, the cadastral evidence held by the wider society is of no use unless a court and the police can take action and protect the property rights affected. This aspect cannot be taken for granted in a land registration system and needs to be included in any analysis of a cadastral system.

Finally, we are arguing that there is no automatic link between land registration and sustainable development. Socio-political factors must be taken into account, iterative systematic adjudication undertaken, and innovative approaches to resource allocation adopted under these conditions.

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