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LAND AND THE CADASTRE IN SOUTH AFRICA: ITS HISTORY AND PRESENT GOVERNMENT POLICY

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Paper presented as a Guest Lecture at the International Institute of Aerospace Survey and Earth Sciences (ITC), Enschede, The Netherlands, 1st November, 2000.

Introduction

A majority government, led by the African National Congress under President Nelson Mandela, came to power in April, 1994 in South Africa, and one of its major policy and legislative focuses has been to address the injustices of the apartheid past in relation to land. It is only through understanding the history that it is possible to comprehend the challenges facing the new majority government, and the reasons behind its legislative programme. Also, it is only by grasping the enormity of the problems being faced, that it can be understood why the land and cadastral issue is not being solved in the short term in South Africa, but could well take generations. I will therefore briefly look at this history, before reviewing some of the new land legislation in the country, and assessing whether it is delivering the desired results. This will of necessity be a brief overview of a complex subject.

History of land tenure in South Africa

By the beginning of the twentieth century Black South Africans had been pushed into small areas of the country by the colonisers -both the Dutch and then the British. The pattern of racial discrimination in South Africa probably began as early as 1653 when colonisation started. I will focus on historical developments in the twentieth century, as this is the era when specific Acts were passed which formalised racial discrimination, or apartheid, with respect to the land.

There were two major Land Acts passed early in the twentieth century, which changed the face of South African society and whose effects will be felt for generations to come. These were the 1913 Land Act No.27 and the 1936 Trust and Land Act No. 18. These Acts effectively reserved 87 percent of the national surface of the country for Whites, Coloureds and Indians, but mostly for Whites. Black South Africans, probably about 75 percent of the population, were limited to 13 percent of the country's land. That is, Black South Africans could only occupy or own 13 percent of South Africa. I believe this is the largest ratio in the world of discriminatory land holding, either between races or 'haves and have-nots.' This has to be dealt with by the new South African government's land reform programme.

These two Land Acts also had other implications for Black South Africans. Most of the areas they could legally own or occupy were in rural South Africa. Blacks were only allowed as 'temporary residents' in the cities and towns, which were designated for White, Coloured and Indian ownership. From the 1950s Whites, Coloureds and Indians had to live in their own race group areas, with Whites having the largest amount and generally the best located land. Because Blacks could not legally reside in the cities and towns permanently, except under special conditions, they had to obtain land in the cities illegally.

This, together with the fact that so little land was available for Black occupation in general, meant that large informal settlements, sometimes known as squatter settlements, developed in and around most cities and towns. While the situation has improved dramatically in the last 5 years, this is still the picture today as we struggle to redistribute the land legally.

Let me give you an example. Johannesburg, the largest city in South Africa, has about 360 separate informal settlements located within its boundaries. The upgrading of these settlements, both in terms of services and titles, is a major cadastral challenge. It is an area where most of the jobs for land surveyors are focused.

In regard to the cities, the policy of apartheid also meant that the formal housing stock was not planned for the whole population at that time. This created enormous housing shortages in the cities and towns, especially for low income people. The new government came to power in 1994 intending to build a million houses over the next 5 years. Although the development of low income housing was slow to start, by early 1999 745,717 houses had been completed or were under construction, with 350,000 houses being completed alone in 1998. This compares very favourably with other large scale housing programmes in the world -Cuba built 500,000 over 25 years and 85,000 in the first 5 years; Sweden built a million houses in 10 years, 250,000 in the first 5 years.

The 1913 and 1936 Land Acts identified about 13 percent of the national land surface for Black South African occupation. After 1948, when apartheid was introduced and refined further, these same areas, became the Homelands or 'Bantustans.' The South African government's intention was that these areas would become 'independent states' separate from the South African state. This would effectively, in their eyes, remove the Black citizens of these states from South Africa.

This part of South Africa's history is probably not news to an audience such as this, but the land ownership and cadastral implications probably is news. Whereas previously the 13 percent was for Black occupation, from the 1950s a new filter was placed on the 13 percent. Only Xhosa speaking Blacks could live in the Transkei and own or occupy land there. Zulu speakers had to leave and live in KwaZulu. Tswana speakers could only acquire land in Bophutatswana. Of course a number of these areas took so-called 'independence' -Transkei, Bophutatswana, Venda and Ciskei. After their so-called 'independence' some of these 'Bantustans' or homelands started changing their cadastral systems. One even tried to introduce general boundaries, whereas South Africa has an accurately beacons boundary system. Consider the implications of this when these areas again became part of the jurisdiction of South Africa in April 1994.

The 1913 and 1936 Land Acts also introduced inferior forms of land titles for Blacks. In 1936 the South African Development Trust was formed, in which all land in the 13 percent, which was not already held by Blacks in freehold, became vested in the Trust. For the KwaZulu area only about 5 percent of KwaZulu was held by individual Black freehold owners and the rest was held by the South African Development Trust. This Trust made land available in this 13 percent to Blacks only, by allocating a range of highly restrictive titles. Permissions to occupy, 99 year leasehold which could be cancelled administratively, customary rights, house rentals and so on. A condition of title was always that it had to be occupied by a Black person and often the state could take the land back for unacceptable, read 'political' behaviour.

Some of these titles, for example the 99 year leasehold, included proper surveys, but the underlying title was not first extinguished. The new government is now trying to upgrade all these titles and give people freehold. So the Land Registration Offices and professions have been very involved in the upgrading of these titles, but it is a slow process.

The 1913 and 1936 Land Acts also had major implications for land delivery systems in South Africa. In the 13 percent part of South Africa, there were special land delivery procedures known as Proclamation R293 of 1962 for proclaimed urban areas and R188 of 1969 for rural areas. As each homeland or 'Bantustan' took so-called 'independence' they developed their own version of R293. So South Africa was a jigsaw puzzle of different pieces of legislation in relation to land delivery. This aspect had to be taken into account by professionals well after 1994, as different land delivery projects still had to be finalised, which had been started in different areas under different pieces of legislation. Even today we have what are still known as R293 townships that land professionals are attempting to convert to freehold areas, but are held back by the provincial planning ordinances which do not always accommodate more basic planning approaches.

As I have already indicated, the 1913 and 1936 Land Act areas became the homelands or 'Bantustans' of the apartheid government. Now, although a large number of Blacks had been pushed into these same areas by the turn of the century, there were many Blacks who lived outside of these designated areas. Some of these Blacks even owned freehold that they had acquired prior to 1913.

As the location of these people outside of the designated areas did not suit apartheid policies, the government removed millions of people, at least 3 million, to make the spatial units contiguous in racial terms. This historical removal of Black people from large tracks of land, that had been designated for Whites, to areas in the homelands or 'Bantustans' has resulted in specific policies by the new government, so I will deal with this aspect in some detail. However, before I do that, it must be noted that other race groups besides Blacks were also removed to bring about racial spatial distribution. For example, many so-called Coloureds lost land in Cape Town -and District 6 is a well known name. But in terms of scale the removal of Blacks far out-stripped the effects on other race groups.

Blacks who owned freehold land outside of the 13 percent had their land expropriated by the apartheid government. These areas were known as ÔBlack SpotsÕ as they were pieces of land settled and owned by Blacks in areas designated for Whites. In government circles they were known as 'badly situated' areas because they were not contiguous with the homeland boundaries. Once the areas were expropriated, the residents were then resettled into the closest homeland. The resettled people were often given land that already belonged to a tribe within that homeland, leading to ongoing conflict. They were given a weak form of title deed -a permission to occupy.

Also, in a number of areas of South Africa, namely KwaZulu, and Mpumalanga, there are a category of people called 'Labour Tenants' These are farm workers who have ancestral claims in the area. For example, in one area of what used to be the Transvaal, the Voortrekker farmers defeated a local tribe and took them as indentured labour around 1880. This tribe worked as indentured labour for 10 years and subsequently became farm workers in the area where they had ancestral rights. These farms over time became registered in the South African cadastral system under the name of the White owner. The indigenous rights of the tribespeople, who became farm

labourers, were not recorded on the title at all.

Even though the apartheid planners did not want Black South Africans to be part of the South African state, they did want Blacks to work in the cities. Consequently large urban areas called 'townships' were generally located within the closest homeland area to a city or town so that Blacks could commute to the so-called 'White' cities. A daily commuting distance of 180 kilometres was considered acceptable by the apartheid authorities. In some situations, such as in the case of Soweto, dormitory townships were also developed outside those cities that were too far from homelands. This approach meant that, unlike other cities in the world, the rich lived in the central city and the poor lived in the outside areas. This planning approach also pushed up the costs of servicing in general and transport costs for the poor in particular.

Finally, the 1913 and 1936 Land Acts were abolished only in 1991 by the Abolition of Racially Based Measurements Amendment Act No. 133. Eliminating racially discriminatory legislation on its own has been an uphill battle for the new government, as there are over 17,000 separate pieces of legislation involved.

This is a broad summary of the history of South Africa that serves as a backdrop to most of the legislation being passed by the new government. It is also the social context that is challenging our cadastral, land registration and planning systems, which were largely set up to serve the White minority settlers in the country.

The new government's land policy and legislative programme

The new government has developed a range of new land policies and legislation to redress the social injustices of the past and to turn the apartheid history of the country around. These policies include:-

1. Redistribution of land
2. Restitution of land to those who were removed
3. Large scale formal housing development for low income groups
4. Re-structuring the cities and towns
5. Giving land rights to labour tenants
6. Securing customary rights holders
7. Upgrading and giving title to informal settlements
8. Unifying the land delivery legislation and procedures
9. Rationalising administrative structures
10. Facilitating group registration approaches
11. Changing inferior titles to freehold
12. Gender equality
13. Providing a comprehensive, user friendly, affordable, accessible, transparent land information system, especially to the historically disadvantaged

Unification of the land administration system

Two of the most crucial Acts passed were the Land Administration Act No. 2 of 1995 and the Land Affairs General Amendment Act No. 11 of 1995. If we look at the map of the old pre-1994 South Africa, and compare it to the new South Africa, it is possible to see that there have been dramatic changes to our politico-administrative boundaries. Prior to majority rule as of April, 1994, South Africa consisted of four provinces and ten homelands or 'Bantustans.' On the day of the elections all the homelands with all their different legislation, became absorbed into the larger South Africa and simultaneously nine provinces were created. Act No. 2 dealt with the delegation of powers to the provinces and local authorities, in terms of the new constitution where land registration and cadastral policy is a central government function, but planning, land delivery and the operation of the cadastre and land registration system is a provincial function. Act No. 11 attempted to make land legislation uniform across the entire country to overcome the problems with differing legislation in the previous 'Bantustans.' Legislators, in drafting these Acts, had to take into account 54 separate pieces of legislation.

Each province and each homeland had different land delivery legislation. Can you imagine the complexity that the land professionals had to deal with in the first few years after majority rule, in undertaking land delivery, increasing the formal housing stock, upgrading titles and re-distributing the land. Just one small example is that all the titles in the country had to be re-numbered. Also, all the titles kept on record in the homelands had to be integrated into the main deeds registry system, a massive task that is still ongoing, as generally the underlying titles have to be cleaned up first.

Redistribution

In order to move away from the 13:87 percent ratio of racial land distribution, the government is relying on a range of measures.

Government does not intend to pass a redistribution act. Instead they are relying on the willing buyer-willing seller approach, and supplying a R16,000 (Fl. 5,300) grant to low income families to enable them to buy the land. It is commonplace for Black people now to pool their subsidies to buy up a commercial farm. Housing is also obtained by using this subsidy. Also, the Department of Land Affairs has set up pilot land reform programmes in most parts of the country to help people to obtain land for farming, using the Provision of Certain Land for Settlement Act 126 of 1993. By early 1999 1,034,161 subsidies had been approved.

With respect to the land registration and cadastral system, all land for redistribution has to pass through our very sophisticated and expensive Roman-Dutch system, which requires the extensive use of public and private sector land professionals. This has proved very problematic for poor individuals, and as many as one third of new owners might already have sold their recently acquired house informally.

Under the Interim Constitution property could only be expropriated for public purposes, such as hospitals and roads, and not for public interest, such as land redistribution. This policy was changed under the final constitution passed in 1996. Under the new constitution, section 25, land can be expropriated for redistribution purposes. This option has not been used in any significant way to date.

Finally, with respect to the redistribution of land, between 1994 and 1999, 465 projects were completed and 773,363 hectares has been redistributed. However, this figure added to the 173,805 hectares distributed through restitution, amounts to only 0.8 percent of the land, which is exceptionally low especially given the low starting base of 13 percent. Despite its massive resources relative to many other developing countries in terms of land professionals and finance for land acquisition, the process of redistribution is not working quickly enough.

Restitution

Whereas the redistribution policy concerns the general redistribution of land, the restitution policy concerns only specific parcels of land. 'Black spots' that were expropriated and the people re-settled into an adjacent homeland are an example. The Black owner of that freehold land who lost his/her title under apartheid may institute a claim against the state to get that specific parcel of land back. That is, it is a claims driven process.

The restitution policy, as laid down in the Restitution of Land Rights Act No. 22 of 1994, only allows claims dating back to the 19th June, 1913, when the first Land Act was passed. This means that all previous claims when most of the colonisation and settlement took place in the country will not be allowed, including that of the First Nations in the country such as the San, Strandlopers etc.

Claims for restitution are heard by a Land Claims court and the first hearings started in 1996. That is, it took about 2 years to set up the process administratively. There was a 3 year period for the lodgement of claims; 5 years to finalise them; and 10 years to implement the court orders.

The restitution of claims will be settled in a number of ways:-

1. By the restoration of the land lost under apartheid
2. By the provision of alternative land
3. By the payment of compensation

Some of the claims are on very high value land, such as central Pretoria. There is one claim that has been made which covers 129 citrus farms in the Mpumalanga Province. Many of the claims have been made by groups of people and especially tribes, rather than by individual freehold owners who were expropriated. This has complicated the process as evidence of these rights is not as easy to assess, as there are no title deeds to substantiate these claims.

Altogether 63,000 claims for restitution were lodged by the closing date in 1997. To date 6,560 have been settled at a cost to the state of R272,000,000 (Fl. 90,000,000) (Sunday Times: 20/8/2000). The Department of Land Affairs is taking a fresh look at the restitution approach as the costs to the state are considered to be unacceptably high, especially if one considers the number of claims still outstanding

Other new legislation

A number of new laws have been passed namely the Land Reform (Labour Tenants) Act No. 3 of 1996, the Interim Protection of Informal Rights Act No. 31 of 1996, the Communal Property Associations Act No. 28 of 1996, the Extension of Security of Tenure Act No. 62 of 1997 and the Prevention of Illegal Eviction from Unlawful Occupation of Land Act No. 19 of 1998. Many of these laws have introduced English common law approaches into what was a fairly rigid and absolute Roman-Dutch system. English common law approaches tend to be more progressive in terms of the protection of human rights, rather than property rights, which is critical in

a situation such as South Africa with its racially skewed land distribution. However, the implementation has not always been easy.

Officials working with this range of acts argue that where claims are made relative to other registered rights they are easier to solve. That is, if a claim is made and described in terms of a farm boundary and a farmers' rights, it is possible to obtain sufficient evidence of the vulnerable person's rights to reach a settlement. However, where the rights claimed are on unparcelled/unregistered state land and/or in a customary area, there is generally insufficient evidence/records to be able to easily reach a settlement. New and innovative cadastral/land registration approaches still have to be developed to underpin a number of these Acts.

With respect to the Land reform (Labour Tenants) Act, as already explained, in a number of areas in South Africa farm workers have ancestral rights in the area. These rights were not placed on the Land Register when the country was colonised. Only the rights of the White owner were registered. The intention of this Act is to secure the land rights of these labour tenants and make sure they acquire land. Also, the Act states that labour tenants cannot be given notice and evicted from the farm unless and until they have breached their contracts.

It has not always been possible to reach amicable agreements between farmers and the labour tenants on their farms. The Farmers Union for example, feel they own the freehold and the state cannot therefore give registered rights on their land. Therefore, usually the implementation of the act has led to the purchase of the land occupied by the labour tenant/s, either on an individual basis, or more often by a group of farm labourers, utilising the R16,000 (Fl. 5,300) subsidy already described.

The Communal Property Association Act is a legal mechanism that allows people to hold land collectively. Only an outside boundary is registered with the Deeds Registry, and no information is kept by the state on rights held on the inside. The Act also prescribes certain conditions and rules for the group holding the land and they must have a constitution that is approved by the Department of Land Affairs.

While there have been some limited successes, this approach has also encountered a range of problems, especially where the groups obtaining the land have not been cohesive with their own set of norms and acknowledged leadership structure. Another problem for the state has been that often these groups do not have sufficient leadership and/or the leadership does not have the land administration capacity to manage the area, and the state has had to intervene and supply this land administration. This has resulted in an increasing load being placed on the state, with no end in sight.

Facilitation of urban development

One of the key Acts passed as far as urban development and informal settlement is concerned is the Development Facilitation Act No. 67 of 1995. This Act was considered to be one of the major building blocks of the Reconstruction and Development Programme of the ANC, which was their platform for the 1994 elections. The main purpose of the Act was to facilitate the development of hundreds of thousands of houses for low income people and to upgrade the thousands of informal settlements in South Africa. This Act consists of a number of parts, and as I was on the Technical drafting committee both for the law and for the regulations, I am very familiar with the details.

The first chapter of the Act lays out the philosophical framework for development in the new South Africa. Here we see how the ANC is attempting to create new democratic guidelines and move away from apartheid approaches to planning and land delivery. For example, the densification of cities is enshrined and the movement of the rich to the outskirts is encouraged. This is especially important given the way apartheid structured the cities by creating dormitory suburbs for Blacks at a distance from the so-called White cities. Also, mixed land use is allowed in residential areas, providing use is not noxious or dangerous and so on.

Another innovation is the introduction of provincial tribunals. These are very powerful bodies which can overrule local authorities, utilities and property owners if necessary, to make it possible for developers to build low income housing. We have a phenomena in South Africa called NIMBY -not in my backyard. Every time someone wants to develop low income housing, the people in the local neighbourhood make it impossible. These tribunals will be able to override this. Some people consider this to be draconian, but the original 13:87 percent ratio of land distribution makes it the only way forward in many circumstances.

The tribunals are also a one stop shop for planning approvals for low income developments to speed up land delivery. To do this, and develop more appropriate standards, half the tribunal consists of the relevant land professionals. Adjusting standards, whether it be sewer sizes, road widths, land registration procedures or layout designs -for these areas, is one of the biggest challenges facing South Africa's professions. It is not just a matter of moving from middle-class standards to more cost effective approaches, but it is also about developing appropriate standards. For example, roads are generally developed for an automobile society, but we have a largely pedestrian society who use the roads differently.

The other chapters deal with land delivery and land registration procedures and again a number of innovative approaches have been

taken. An approach enshrined in the Act is that of an outside figure/boundary. When development applications for a property containing a number of land parcels is made, it is generally linked to some kind of outside figure. This figure should be registered as an accurately beacons boundary connected to our national geodetic network. This outside figure then serves a number of purposes. Firstly, it makes it possible to introduce a range of registration procedures and titles within the outside figure without affecting or degrading the outside system. For example, all parcels of land in South Africa are accurately beacons boundaries and the vast majority are linked to the national geodetic. This outside figure allows us to introduce general boundaries for the sites on the inside -either provisionally or permanently. Because there is an outside figure it will not degrade the cadastral system as a whole. But at the same time it makes it possible to extend the cadastral system to a wider range of people. This option has not been developed at all since the Act was passed, and even attempts by technicians to undertake the accurately beacons boundary surveys on the inside have been prevented by the land surveying profession.

Secondly, the outside figure becomes the point of reference for the negotiation of services with existing people on the ground in informal settlement upgrades. It is also the unit for planning purposes. Under the Act utilities and local governments are only responsible for taking bulk supplies up to the outside figure and a community on the inside is responsible for what happens on the inside. Also, when a DFA application is made to the tribunal, the developer in submitting a plan for the area, can suggest more appropriate conditions of title and can request that certain conditions of establishment, servitudes etc, can be set aside within such an outside figure. Again cost recovery is associated with the outside figure.

A community within an outside figure puts together the R16,000 (Fl. 5,300) per household subsidy, which then finances the entire development -professional costs, servicing and the house. The community becomes the direct client of a private sector developer and land professionals, who have to negotiate directly with the community in relation to layout, services, approaches etc. This approach has put pressure on all professionals -property lawyers, planners, civil engineers, land surveyors, geo-technical people, to learn to work with each other better as fellow professionals, as well as with communities and NGOs. The outcome of this approach has been very successful and there is much better integration of professional skills, leading to innovative cost effective approaches, and their relationship to low income groups and communities has vastly improved, building democracy and local land administration skills.

Situation today

As indicated, not all of the new legislation has produced the desired results. New approaches are under development to improve the results. Also, one of the critical areas which still remains to be addressed is that of the 13 percent customary tenure areas, which are still largely owned by the central state. Central government is very keen to divest itself of this ownership and give the land rights instead to those individuals/households/families in occupation and/or to tribes. Finally, as you can see, we live in intellectually challenging times in South Africa and I hope that I have managed to give you some idea of what is happening there.

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