

**Poverty Alleviation, Economic Advancement
and the need for Tenure Reform in Rural Areas**

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INTRODUCTION

South Africa has diverse property systems, a formal system based on common law ownership and a system resembling customary law adapted to suit the political needs of colonial and later apartheid governments. The latter system, on which the majority of South Africans place their reliance for access to land, was never accepted into formal law. Yet that same majority was in the past on the basis of race systematically excluded from accessing the formal property system. As a result they have remained excluded from a valuable economic asset in rural areas, land.

The paper aims to set out the need for tenure reform to ensure secure access to land as the basis for development and economic advancement. It will look at present legislative framework for tenure reform in South Africa and at possible future policy and legal developments.

CONCEPTUAL AND HISTORICAL BACKGROUND

The arrival of European settlers in South Africa brought with it a concept of property based on common law ownership. At common law ownership is defined as a real right that entitles the holder to deal with her property as she pleases to the exclusion of outsiders. The rights in ownership can be subject to private and public law restrictions, but these are seen as an exception and not inherent to the content of ownership.¹ Any other rights in property are both defined and limited by content of the rights of ownership.²

The common law concept of ownership is hierarchical in nature. Ownership itself is the strongest and most complete right any person can have over property, followed by limited real rights that restrict the rights of owners over property. Personal rights in property are regarded as the weakest in content. It gives the holder no direct control over the property and do not constitute a restriction on the rights of ownership.³

Customary property rights imply that persons may hold different, but concurrent right in the same parcel of land. Entitlement to the land held communally depends on individual needs and personal status within the land-holding group.⁴ It is based on universal right of access by members of the group in exchange for allegiance to the political community and commitment to its social and moral standards. The rights to the property are concretized through use and occupation, conferring strong heritable rights, granted in perpetuity.⁵

¹ *Gien v Gien* 1979 2 SA 1113 (T); C Lewis 'The Modern Concept of Ownership of Land' in TW Bennet *et al* (eds) *Land Ownership: Changing Concepts* at 241 *et seq*; DG Kleyn & A Boraine *Silberberg and Schoeman's The Law of Property* at 161; HJ Delpont *South African Property Practice and the Law* at 7.

² HJ Delpont *op cit* note 1 at 7.

³ For a discussion on real and personal rights see DG Kleyn & A Boraine *op cit* note 1 at 43 *et seq*.

⁴ E Letsoalo *Land Reform in South Africa* at 20 *et seq*; M Gluckman *The Ideas in Barotse Jurisprudence* at 77.

⁵ CR Cross 'Freehold in the Homelands: What are the real Constraints?' in CR Cross & RJ Haines (eds) *Towards Freehold? Options for Land and Development in South Africa's Black Rural Areas* at 278 *et seq*; U Mattei 'Socialist and Non-Socialist Approaches to Land Law: Continuity and Change in Somalia and Other African States' (1990) 16 *Review of Socialist Law* 17 at 22; E Letsoalo *op cit* note 4 at 21 *et seq*;

Historically colonial and apartheid governments saw customary tenure as precarious, not worthy of protection at formal property law. Common law ownership became the only form of property rights protected at formal law supported by an efficient land registration system. Customary tenure was at best relegated to the status of personal rights, weakened further by racial discrimination, which moreover excluded people from common law ownership on the basis of race.

What is today perceived as and in many ways has become customary tenure is a colonial and apartheid construct of customary law, based on the need of indirect political control by successive colonial and apartheid governments. In order to achieve political control over indigenous institutions, chiefs were endowed with administrative powers as officials of government. Indigenous people were denied any form of control over formal government and democratic processes at community level were undermined in the interest of administrative control.

Customary tenure relationships were cast into the model of trusteeship with the chief seen as the trustee holding the land on behalf of those he governed. In terms of this changed relationship property rights came to be seen as flowing from the chief downwards. As a result political sovereignty, administrative jurisdiction and land ownership have become inextricably intertwined. The customary property rights of members of the community were downgraded to that of beneficiaries of a trust relationship⁶. The rights to land held at individual level in communal land-holding structures are protected only by unwritten agreements have become severally compromised.⁷

Racial discrimination restricted the extent of land Blacks were allowed to own. In order to overcome these restrictions land-holding syndicates were formed to enable the purchase of land large enough to make land-holding economically viable to provide for the economic advancement of the members of these groups. These land-holding syndicates operated independently of tribal institutions. This negated the political control governments had over the people through traditional authorities. In order to retain this control the policy that land purchased by six or more “natives” had to be registered in tribal context was enforced. As a result chiefs and traditional authorities gained title in land to which they had no legitimate claim, neither at common law nor at customary law.⁸

⁶ H Klug ‘Defining the Property Rights of Others: Political power indigenous tenure and the construction of customary land law’ *Working Paper 23, Centre for Applied Legal Studies, Wits University* 1995; M Chanock ‘Paradigms, Policies and Property: A Review of Customary Law of Land Tenure’ in K Mann and R Roberts (eds) *Law in Colonial Africa* (1991) at 76; AJ Kerr *The Native Law of Immovable Property in South African Law*; This concept is clearly reflected in the Native Land Act of 1913 and the Development Trust and Land Act of 1936 when read together with the Black Administration Act of 1927.

⁷ The Interim Protection of Informal Land Rights Act of 1996 goes some way towards protecting property rights at individual level in that in terms of section 2 of the Act no person holding rights in communal land may be deprived of her right without her consent.

⁸ HM Feinberg, Southern Connecticut State University, New Haven, Connecticut: ‘Challenging the Natives Land Act: African Land Acquisition between 1913 and 1936.’ Unpublished conference paper, dated 28 September 1997.; Letter by H Rodgers Native Commissioner dated 21 December 1934, NAD files, National Archives. Many instances of where this policy was enforced can be found

LAND AS A RESOURCE FOR DEVELOPMENT: CONSTRAINTS

Land is an important economic resource for the development of rural livelihoods.⁹ Lack of clarity over who controls the land and the non-recognition at formal law of rights held in land by farm dwellers and the occupiers of communal land puts constraints on the extent to which land can be used as an economic resource for development.

The ability to access financial assistance is crucial to development. Accessing financial assistance for development carries with it risk that is managed through obtaining certainty as to who holds the land and who must take responsibility for the risk attendant upon the granting of credit for development. Non-recognition at formal law of certain land rights creates not only conflicts around control over land, but also restricts the ability to raise the capital needed to make economic advancement in rural areas a reality.¹⁰

Case Studies

Tladi and Maseema families

The Tladi and Maseema families occupy and use the farms Boschoek and Ongezien in the Groblersdal district. They are descendants of a community who occupied that land in nineteenth century. The farms are situated on the banks of the Olifants River, making it a prime resource for developing an irrigation scheme. Uncertainty and dispute over who controls the land has prevented the development of such a scheme.

The farms in question were given in private ownership by deed of grant to white owners, dispossessing the community who occupied the land of their customary land rights. The rights of the community were downgraded to that of labour tenants whose right to remain on their ancestral land was made contingent upon providing labour free of charge to successive white land owners. The rights in land held as labour tenants was extremely precarious with evictions an ever present reality. During 1976 the farms were bought by the South African Development Trust to be later incorporated into the erstwhile homeland of Lebowa. These developments provided only temporary relief to the Tladi and Maseema families who had managed to remain on the land. Until 1995 they used the farms for their own benefit, grazing their cattle and planting crops until they decided to lodge a claim in restitution to the farms.¹¹ It was then that the conflict on tenure to the land became apparent.

In 1993 the Matlala Tribal Authority under Khoši Matlala was given jurisdiction over the two farms. The jurisdiction was conferred in terms of the Black Administration Act of 1927. In April 1994 the Matlala Tribe was granted ownership over the land in terms

in title deeds to land in the districts of Moutse and Sekhukhuneland and in land comprising the erstwhile independent homeland of Bophutatswana now part of the North West Province.

⁹ SE & CC Shackleton & B Cousins 'The Economic Value of Land and Natural Resources to Rural Livelihoods: Case Studies from South Africa' in B Cousins (ed) *At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century*.

¹⁰ H de Soto *The Mystery of Capital*.

¹¹ The dispossession was prior to 1913 with the result that the families are excluded from claiming restitution in terms of the Restitution of Land Rights Act of 1994. Their only remedy to gain security to the land is tenure reform.

of the Upgrading of Land Tenure Act of 1991.¹² This despite the fact that the Matlala never had any rights in the land and has no historical connections to the land. Frank Maseremula predecessor of the present Khoši moved into the district of Groblersdal from Jane Furse with a number of his followers in early 1950's to escape political conflict.

The then Nationalist Government considered itself obliged to transfer a number of farms to chiefs in the erstwhile Lebowa amongst others Matlala on the basis of "promise" made in the past. The Maseema and Tladi families were never consulted with regard to the transfer of the land their rights in the land based on strong historical and economic ties were ignored.

The Tladi and Maseema are still using the farms, but have lost the control they previously over had their ancestral lands. They are unable to access any development assistance on the basis that they cannot use their only asset the land as a basis for securing credit. The Matlala Tribal Authority with who they are in potential conflict holds title to the farms. The community at large aware of the history of the two farms has seemingly not accepted that Matlala has control over the land and have ignored his calls to settle on the farms.

The Matlala Tribe has title to the land. The members of the tribe are not defined. It is not known who can be held accountable should the tribe as owners of the land wish to obtain credit to develop the land. The Khoši is perceived as a trustee but without the backing of the formal legal structure of a land holding trust as a legal entity holding the land. The Tladi and Maseema families whose rights of occupation are protected by the Interim Protection of Informal Land Rights Act of 1996 can interdict any development on the land by the Matlala Tribe that does not have their approval.¹³

Until this legal logjam is unraveled the idea of developing a profitable irrigation scheme on the land remains just that an idea.

The Dixie Community

The Dixie Community who occupies the farm Dixie in the Northern Province falls under the jurisdiction of the Mnisi Traditional Authority. The jurisdictional authority over the farms was conferred on the Mnisi even though the Dixie Community has no traditional relationship with the Mnisi.

The farm Dixie is situated on the borders of the Kruger National Park, wedged between the private nature reserve of Sabie Sands and the provincial game reserve of Manayaleti. It is recognised that the farm holds great potential for tourist development. The Mnisi Traditional Authority has entered into a lease over the farm for the development of a luxury lodge. The members of the Dixie Community were never consulted and should the development of the lodge go ahead they stand to loose the use

¹² These transfers formed part of a number of very controversial land transfers effected by the then government shortly before the April 1994 elections. In the case of the Matlala Tribe the Nationalist government of the day apparently felt itself bound by promises made to a number of chiefs in Lebowa. Seemingly the transfers of land were made for political reasons.

¹³ Section 2 of Act 31 of 1996

of a large part of their land including access to the river and the resources it has to offer. This in return for ten percent of the profits the lodge may make.

Should the community's rights in the farm be recognised at formal law, they could become joint owners of the tourism venture. The development of complimentary land uses optimizing the resources the land has to offer could be explored. The colonial concept of tribal land holding giving the Mnisi the authority as "trustees" to deal with the land poses the threat of closing off these development possibilities, perpetuating the well-known phenomena in South Africa, tourist opulence amidst rural poverty.

At present the farm vests in the state. The Department of Land Affairs acting on behalf of the State as the nominal owner of the land has not approved any developments on the land. It will not do so until a resolution by the Dixie Community has been taken approving the development of a luxury lodge on the basis of the lease signed by the developer and the Mnisi Tribal Authority. The Dixie Community although not opposed to tourism development does not support the process followed by the Mnisi Tribal Authority. The lease signed between the developer and the Mnisi Tribal Authority has so far proved an empty shell unable to deliver on its promise of lucrative tourism development.¹⁴

The evictions from the Sheepmore Farms in Ermelo in 1996

A community of labour tenants was evicted from the farms in the Ermelo district in 1996 just prior to the enactment of the Land Reform (Labour Tenants Act) granting statutory rights in land to labour tenants residing on farms. They lost everything, livestock, homes, furniture and crops. The labour tenant families had occupied the farms for successive generations and managed to provide for themselves and sell surplus produce, by all accounts able farmers.

They were resettled on a different farm where they had to start from scratch after a long and protracted legal process lasting some three to four years;¹⁵ a situation all too familiar to many farm occupiers.

THE CONSTITUTIONAL AND LEGAL FRAMEWORK FOR TENURE REFORM

The entitlement to land reform is constitutionally guaranteed.¹⁶ The property rights clause is part of the socio-economic rights contained in the Bill of Rights. The Constitutional Court has ruled that these rights are justiciable and that government can be held accountable in terms of those rights.¹⁷

In more particular the entitlement to tenure reform is guaranteed in section 25(8) of the Constitution:

¹⁴ As with the Tladi and Maseema families the Dixie Community can also interdict development on the basis of lack of consent in terms of section 2 of the Interim Protection of Informal Land Rights Act 31 of 1996.

¹⁵ The community fell under the Land Reform (Labour Tenant's Act) in that they were labour tenants entitled to use and occupy the farms on 2 June 1995 – section 3 of the Act and could rely on the Act for relief.

¹⁶ Section 25 of the Constitution.

¹⁷ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

“A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to the extent provided by an Act of Parliament either to tenure which is legally secure or to comparable redress.”

The constitutional right to tenure reform is made contingent upon legislation passed by parliament aimed at defining and concretizing tenure rights held as personal rights made insecure by racial discrimination. A number of Land Reform laws aimed at providing statutory protection to holders of informal rights in land have been enacted since 1994, but comprehensive tenure reform legislation is still outstanding.¹⁸

Land Reform (Labour Tenants Act) 3 of 1996

The Act re-creates labour tenancy a system abolished as a limited “land rights system” in 1986. In the past it afforded very limited protection to farm dwellers who, were allowed to graze their cattle, plant crops and the right to reside on white owned farms in return for providing free labour.

Although formally abolished the system continued to be used. In order to protect farm dwellers on land where the system is still operational, statutory protection was provided through the Labour Tenants Act The Act also provides for labour tenants to formalise their rights through a claims process.¹⁹

The Communal Property Association Act 28 of 1996

The Act provides a framework for communal land holding. It provides for the creation of a legal entity defined as a Communal Property Association to hold land on behalf of a community. The land is formally registered in the name of the Communal Property Association. It does directly not confer rights in land to individual members of the association, but provides for the adoption of a constitution through a democratic process. The rights of use, occupation and access to the land by individual members are circumscribed in the constitution of the association. The constitution must meet the criteria laid down in section 9 of the Act which criteria are aimed at protecting the interests of individual members.

The Interim Protection of Informal Land Rights Act 31 of 1996

This Interim Protection of Informal Land Rights Act is an interim mechanism aimed at providing protection of rights of use, occupation and use to land in circumstances set out in section 1 of the Act. It is applicable to rural land not held in formal private ownership. The Act affords a measure of protection to individual members of communities to the land they occupy against land uses by others without their consent. It does not confer any real rights in land on occupiers even though they depend on the land for their livelihoods and have invested in the land. The Act is an interim protection

¹⁸ For a discussion on this legislation see G Budlender, J Latsky & T Roux *Juta's New Land Law*.

¹⁹ Chapter III of Act 3 of 1996.

measure and will lapse unless renewed by proclamation in the Government Gazette for a period of twelve months at a time.²⁰

The Extension of Security of Tenure Act 62 of 1997

The stated aim of the Act is the provision of long-term security of tenure for persons whose rights in land have been made insecure by previous racial discrimination. In reality however the legislation has provided for little else but a statutory framework for “fair eviction procedures”.²¹ The relationship between farm dweller and landowner is defined in the Act in terms of that of landlord and tenant. It confers no formalised rights in land to farm dwellers even though many have strong historical ties and economic commitments to the land they occupy.

The legislation enacted so far provides no coherent structure for an integrated formalised property system aimed at extending rights in land to those previously excluded. A system, which will provide the necessary legal framework to enable previously, disadvantaged communities and persons to have the full benefits of land as an economic resource. At best land reform legislation provides limited protection in defined circumstances.

Unless the rights of long-term farm dwellers are recognised as rights held concurrent with the rights of landowners their potential to use the land they occupy, as an economic resource will remain restricted by the ever-present threat of eviction. As the law stands at present it is the labour tenant who must prove her rights in the land. Once proven this proof does not automatically guarantee that the labour tenant remains on what is often her ancestral land, this has to be negotiated with the landowner. The needs of the landowner more often than not are the determinative factor in the outcome of these negotiations.

The rights traditionally held in land by labour tenants are not defined in terms of a geographically surveyed parcel of land, as is the case with formal ownership. Formalizing these rights in terms of concepts as presently recognized in formal law carries with it the real possibility of restricting the rights of labour tenants in the interest of gaining legal certainty.

Similar problems are experienced in negotiations for rights in land in terms of the Extension of Security of Tenure Act, which moreover unlike the Labour Tenants Act does not provide for the right to claim land.²²

The Communal Property Association Act is still the only legal mechanism for communal property holding. It is however modelled on the common law model of individual ownership in that it provides for the creation of a single juristic person in whose name the land will be registered. The members of the association do not hold any real rights in the communally owned land, casting them as beneficiaries of the Communal Property Association. This restricts the ability of individual members to

²⁰ The duration this Act was extended to the end of 2001 in October 2000.

²¹ Sections 8 to 23 of the Extension of Security of Tenure Act 62 of 1997.

²² For a full commentary on the Act see Budlender *et al* note 17 at 7A-3 *et seq.*

develop their landholding to its full potential. Any financial assistance for development needs to be channelled through the association as the legal land holding entity.

Whether or not a Communal Property Association will be able to meet its financial commitments in terms of credit is difficult to assess at this stage. In many cases membership of the Communal Property Association is large and elected committees tasked with the administration of the land would find it difficult if not impossible to ensure that members meet their credit obligations made by the association on their behalf. Unlike Sectional Title developments²³ a Communal Property Association does not provide for individualised landholding capable of individual registration. If this were the case it would make it easier for grantors of credit to identify those responsible.

The Interim Protection of Informal Land Rights Act provides for a negative protection of use rights in land by persons and communities. It can prevent developments in land not approved of by affected communities, but fails to provide security of tenure and legal certainty as to who controls the land. It cannot serve as the basis for providing a measure of security for credit needed to develop the land as an economic resource nor as the basis for long-term investment occupiers are able and willing to make in the interest of development.²⁴

CONCLUSION

Legislation aimed at tenure reform needs to give effect to the strong economic and historical ties people have to the land they occupy recognizing that these ties were never accepted as forming the basis for rights in land as a result of past racial discrimination.

Property law needs to move away from the hierarchical system of land rights presently accepted in our law. The rights in land held at individual level by occupiers of communal land, labour tenants and farm occupiers need to be formulated as rights concurrent with and not subservient to ownership. These rights held should be formalised and accepted as part of system of property law integrating previously unrecognised rights into formal law. This will open up access to the economic resources enabling rural communities and farm dwellers to capitalize on their most important asset, land.

Tenure reform legislation needs to provide a legal framework that will create certainty as to who holds the land and who is accountable for developments on the land. This will facilitate access to financial resources needed for development.

Tenure reform should not be based on uncritically extending rights of the exclusive ownership to a greater number of people. Although it may increase the number or people having access to ownership over land, it will not in any way address the inequities existing in the distribution of land in South Africa. It will continue to marginalize the majority of rural people who are dependant on the land for their livelihoods.

²³ See HJ Delpont *op cit* note 1 at 95 *et seq* for a discussion on the Sectional titles Act 95 of 1986.

²⁴ See the case discussions *supra*.

The strong individualized rights in land held in communal land-holding, recognised and accepted as such by community members need to be reflected in formal property law. Registration of tribal land to tribal landholding entities without critically examining the historical underlying political and power relationships that gave rise to the present tenure relationships in rural areas will perpetuate conflict over land in rural areas. If the legislation provides for occupiers to challenge the rights and jurisdiction of tribal authorities over land, this will only serve to increase the conflict.

The uncertainty over who controls the land will persist with neither the tribal authority nor the occupiers who see themselves as the real owners, able to make the long-term investment in the land necessary to support development. In many cases the injustice is made all the more apparent by the fact that in the purchasers of land have been prevented from obtaining title as a result of past racially discriminatory practices.

Section 25(6) of the Constitution provides the basis for equitable tenure reform in South Africa. Tenure reform should reflect the underlying principles of our Constitution to build a society based on equality and justice.