The role of documents in supporting land rights

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In the last twenty-five years millions of black urban residents in South Africa have been inducted into the land tenure system that earlier served whites only. This study follows this process as it has been experienced by administrators and residents in a township on the edge of the small Eastern Cape settler town of Bathurst. The aim was to identify vulnerabilities of the current system of formalisation as it works in practice.

The Black Urban Areas Consolidation Amendment Act of 1978 marked the first attempt by the apartheid government to allow property rights in black townships – somewhat grudgingly – in the form of 99-year leaseholds. In the 1980s many land surveyors supported this effort and in the democratic era cadastral surveys have supported freehold ownership in “RDP” townships. We can say that the greatest effort of cadastral surveying in the last thirty years has aimed at extending the cadastre beyond its heartland of the settler town and city, where mortgage finance has played a central role in constructing the built environment.

In 2004 the FinMark Trust publicised the results of a large study of the land market for townships. These were informed by the theories of the Peruvian developmental economist Hernando de Soto [1]. According to these theories the poor in third-world countries hold a huge stock of “dead capital” that they cannot leverage into wealth because of ineffective property markets. De Soto saw the professionals who maintain the cadastre – that is, lawyers and surveyors – as the culprits who keep property titling inaccessible and expensive, so that the capital in the properties of the poor remains locked up.

In a summary of the FinMark study, Rust [2] found that although the property market was indeed constrained by its legal, institutional and procedural framework, there were also social and economic factors that hindered the market. For example, between 60% and 90% of residents were unwilling to sell across the four sub-markets studied i.e. old townships; private sector housing; new townships and site-and-service schemes. Rust also reported a high level of perceived tenure security in sub-markets. After this research FinMark Trust seems to have moved to other ways of fulfilling its stated mission of “Making financial markets work for the poor”.

The purpose of this study has been to try to understand this apparent failure of residents, lawyers, surveyors and land administrators to work together towards our (hopefully) shared goals. We hoped to do this by considering the situation as presented by those involved. We assumed that the poor have expert knowledge of how to survive in their own context and we sought to extract clues on how to improve the relations between them and outsiders. A few possible ways of tweaking the current system without any radical redesign emerged.

The study area

The study was conducted in Nolukhanyo Township, located on the outskirts of the 1820 settler town of Bathurst in the Eastern Cape Province. Nolukhanyo lies 16 km inland from the resort town of Port Alfred which is also the seat of its municipality, named Ndlambe. Fig. 1 gives an idea of the extent of Nolukhanyo, typical of many
townships found near farming towns throughout South Africa.

The study area might be importantly different from towns with an ex-homeland hinterland like Mthatha and from the rapidly expanding settlements around conurbations such as eThekwini and Johannesburg. To put these differences in a nutshell, not a lot is happening in Nolukhanyo and its residents either grew up there or come from surrounding commercial farms where for the past century communal tenure has hardly existed. That was made clear to us by interviewee C.

The study methodology
In this study we used the semi-structured, random sampling survey technique for collecting information from local people. The sample was built up simply by following advice on who could give further information. Interviewee A was a municipal official with a long experience in township administration. B was a middle-aged woman from a prominent family in Nolukhanyo. C was the brother of B, an ANC committee member and ex-councillor. D was a prominent ANC member and associate of C. E was the nephew of B, a young labourer who also acted as interpreter and guide. F was a young woman occupying the house earlier lived in by E. G was a woman pointed out as possessing documents that turned out to relate to a land claim. H was her grandmother, also a land claimant. I was an Ethiopian refugee operating a spaza shop on the property of H. J is one of the authors also acted as interpreter and guide. K is a land claimant. L was an ex-councillor. D was a prominent ANC committee member and ex-councillor. E was the nephew of B, a young labourer who also acted as interpreter and guide.

National perceptions of the secondary property market
Factors inhibiting the market were summarised by Maseko [5] in an article “Soweto Property Market ‘crippled’”. These included failure to transfer ownership when the owner dies, unwillingness of renters to vacate a house that is sold under them, families wanting to keep a house as family asset, and “substantial arrears”. A house in Soweto could expect to be sold every hundred years, as against every 7 years for an average suburban home. In a detailed study by Shisaka Development Management Services for FinMark, Bertoldi [6] identified national rates arrears of R23,8-billion in 2002 as inhibiting formal sales. This is because a “rates clearance” from the municipality is needed before a sale can be registered with the Deeds Office. If we accept Rust’s [7] value 2,28-million households, that averages about R10 000 in arrears per household. Most of these points were strongly supported in this study area but whereas the FinMark researchers could move on to considering other ways to make financial markets work for the poor, cadastral surveyors have to face the issue of where a stagnant market leaves their product – which is also the justification for their profession. The opposite view of the problem is also of interest: if the cadastral product isn’t being used, does that degrade its reliability into the future? That issue is relevant to tenure security, quite apart from the market. As Williams-Wynn [8] put it: “The concept of ownership, land rights and title deeds goes much further than the ability to buy and sell property. Some of the answers given by people excited to receive title to the land they occupy are that it provides visible evidence, it gives security of title, and it brings permanence, protection and pride. Do people want land rights?”

In his study Williams-Wynn found that people did and that was also supported in our study.

Historical evolution of Nolukhanyo
Several interviewees indentified the origin of the settlement in the forced removal of a core group of nine families from another site, Erf 373, which lies on the opposite side of Bathurst and adjacent to an agricultural research farm. The date for this removal may have been shortly before 1930. According to H the community leader gave title to the government over the protests of the families and “the white men sent soldiers” to forcibly remove them. Some cattle were driven into the forest and thus were never removed; and community cattle still graze on the site today (J).

According to C the original families were resettled north of the settler town of Bathurst in what became known as Nolukhanyo, on low-lying ground shown as (I) on Fig. 1. Houses were not provided and interviewees described what they built as “mud huts”, “traditional dwellings” and “wattle and daub” houses. The scattered families cultivated lands between them where government efforts should be most efficiently targeted. It decried a so-called “watering can approach” whereby resources are spread indiscriminately over a large area. The coastline on which Ndlambe municipality lies is unremarkable in those spatial analyses. It lies half-way between the minor development centres of East London and Port Elizabeth and near the Karoo which as the study noted, is being “hollowed out” in terms of population.

Oranje et al [4] commented generally on the implications of the presidential study for small towns, pointing out that even though a town might not be specifically targeted, its managers still needed to target their own efforts within the smaller space of their administration. It is these relations within just such a small local space that we focus on here.

The study area in national perspective.
The presidential study named National Spatial Development Perspective [3] reported the results of national spatial analyses aimed at finding out

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**Fig. 2:** The continuum of land rights after Augustinus (2010).
and ran cattle (C). This life style was interrupted by the appearance of Bantu Administration Board (BAAB) officials, at first operating from a caravan. This was recalled with bitter associations of gross interference in the lives of residents. This interference might have begun earlier than their creation in 1971 according to the Race Relations report (p.153). According to C and others, residents over 21 years were required to keep "lodging cards" stamped monthly to record their payments. Visitors had to be brought to the offices, their length of stay recorded and issued with lodging cards. Permits to brew traditional beer had to be displayed on the wall and if police raids found that these were out of date the beer would be spilled on the ground. ID books had to be stamped with the right to live in the township. People living in a separate temporary settlement had to have their ID books signed by the same employer for 10 years before being allocated a site in the township. This was exploited by some employers as the 10-year limit approached. People needed permits to gather wood on the commonage. People found without permits would be taken into custody and fined. This period of intense interference might be dated between the Sharpeville massacre (1960) to the Soweto uprising of 1976 – that is, less than 20 years.

In 1970 there was a great flood and the families were moved from the low-lying land to their present sites in Area (II) of Fig. 1. The flood plain was condemned for habitation by the Bathurst authorities (C). However one family (Draai) refused to move. In the early 1980s people started flocking into Nolukhanyo, buying stands for R200 each, on 99-year leases. Bathurst could not supply employment so residents would move between farm employment and town living, partly for their children’s education in the Methodist school. The BAAB accommodated this influx by setting out stands in the flood-plain residents had been rescued from earlier. Thus the area around the Draai family came to be repopulated. In the late 1980s these sites were surveyed for 99-year leasehold (GPNo. L204/1990).

In the late 1980s the first government houses were set out above the older settlement in area (III) of Fig. 1, for R500 deposit and R200 per month. However, this was a time of growing rejection of apartheid administration by residents, including a rent boycott.

In the 1994 democratic local government elections four councillors from Nolukhanyo and two from Bathurst were elected and set about securing housing development. The first phase was a greenfields development in the North lettered as (IV) on Fig. 1. This was followed by in-situ upgrades (II) and then a succession of further greenfield developments mainly in the East.

In one of these a shack settlement on steep ground south of the settlement was abandoned due to dangerous sinkholes appearing. Remains of the old shack settlement named Endlovini can be seen at the bottom (South) of Fig. 1.

The early developments were managed through Bathurst municipality, which was later absorbed into Ndlambe whose municipal offices are located in Port Alfred 16 km away. Interviewees C and D recalled that they had used development organisations run by ex-BAAB staff members, who had set up their own businesses when they saw the way the wind was blowing. Developments were and are still funded via beneficiary lists which in turn are associated with the waiting list now prepared by Ndlambe. A provisional beneficiary list is sent to Province, that has access to databases of SARS, Home Affairs and SAPS and so can check for income status and whether an applicant or spouse has already received the once-off housing grant (A). On the face of it, access to this list could be a point of patronage but the ANC interviewees did not seem to regard it that way, merely directing interested people to apply to the municipality rather than do so through them.

According to the Ndlambe Integrated Development Plan 2010, Bathurst has a waiting list of 500. However there have been no land developments since 2005.

What messages can be taken from this history? Firstly, the phases experienced by residents were created by outside events rather than by purely internal growth. The core group of families is still prominent but also a large influx has been accommodated over the last 30 years. Secondly, some impact has come from nature: a flood, sinkholes and an emerging water shortage. This should give some pause to grand plans that assume a passive environment. Thirdly, residents have little grounds for accepting government interventions and promises with naive faith. At one time the government rescued them from a flood and condemned that area for occupation. A few years later it pegged out the same area and sold it to newcomers.

**Level of infrastructure**

Currently residents have pre-paid electricity connections and conservancy tank toilets (VIP) that are cleaned out as needed by tankers. A sewage reticulation and treatment works has been installed but this hasn’t been extended to house toilets and it’s difficult to see how it can be done in view of problems in the Ndlambe “water restricted” municipality. C cites a R1-billion cost for bringing water from the Great Fish River. A desalination plant at Port Alfred supplies 450 000 l per day (J). Water taps are installed on each plot, some in-house. However during the 2010 drought this water supply was cut off and residents had to rely on 5000 litre plastic tanks set up in the township, supplied by tanker. This happened at least 6 months before supply was cut off to the Bathurst CBD (J). There are complaints about water quality (B), some of which is drawn from a local farm dam (J). Several interviewees report damage to tanks by stabbing (A), stealing their...
SURVEYING  technical

Fig. 4: Showing the range in quality of improvements. The single-room shack on the left is in area (II) while that on the right is an ex-leasehold property in area (III) whose owner said he built it without bank assistance.

brass taps and throwing dead cats into them (E). The notorious “Number” gangs 26 and 28 are active in the township (E).

Messages from this section support those taken from the history given earlier. A new government put in a sewage system; but now it looks as if it might never be put to use. At one time officials used intrusive methods to enforce payments which were then successfully boycotted; but now it is possible to live without paying rates at all. In particular it is not clear why residents should work within the framework of the cadastre merely because that is presented to them as the right thing to do, or as a result of an education campaign as suggested by Maseko [5].

Ownership

All the erven on which interviews took place had owners in terms of Deeds of Transfer, according to the municipal GIS system. The municipal official A was under the impression that this was not freehold and that the municipality hadn’t issued freehold titles for a few years. Two erven used by elderly women G and H were registered in the names of their children. G emphasised that her son would understand that this was a family arrangement. This information built up a picture of the resident’s carelessness with documents was contradicted by the two instances where interviewees had documents. G and her grandmother H both had letters from the Commission on Restitution of Land Rights. These related to their claims to the original settlement from which they were evicted. Both interviewees still had the letters in their envelopes, together with pamphlets on land restitution. One also had a South African National Civic Organisation (SANCO) document that looked as if it had something to do with occupancy. When the grandmother asked for a snap of herself, she posed with a picture of her daughter in one hand and the document envelopes in the other – perhaps suggesting the importance she attached to the documents.

The spaza operator I was quick to produce his refugee certificate and the business card of his lawyer and to assure the interviewer that he did everything by the book. However he avoided further contact where possible. He evidently lived in a small enclosure at the end of the shop, with a security system close by. The shop had a lot of stock and substantial shop fittings. The operator’s uncle in Port Elizabeth was cited as having put up the capital, though he was not an owner. His brother ran in supplies to this and other spaza shops.

This information built up a picture of strong family arrangements determining occupancy while formal ownership was arranged to fit in with family needs. This puts some social flesh on the FinMark findings that residents are not anxious to sell their houses and believe they have good tenure security. On the other hand outsiders might experience the community as powerful and potentially dangerous.

Title documents

None of the interviewees produced title documents. D explained that it had been decided not to hand them to residents and A defended that decision warmly. She pointed out that a deed of transfer contained five pages and that the municipality had no money even to give its employees pens. People would just lose the deeds as they routinely lost other documents; they all knew they could get copies free from the municipality on request. Also, if deeds were in the township, the sharks living there amongst the people would find a way to exploit them against the poorest people.

This picture of the resident’s
described this arrangement with some pride as the Ubuntu principle.

Interviewee H lived in a mud shack on the erf of which her son was the registered owner, while the refugee I ran a spaza shop in her gutted RDP house, which he had extended to form his busy shop. She described their relationship as a good one: the spaza operator gave her R500 per month rent, paid the electricity and rates, gave her food when she asked, helped with clothes washing and saw off night intruders. The ANC committee member C maintained “we have no problem with the foreigners.” The view of others more distant from the scene were harsher; that foreigners traded drink and drugs under the counter, treated rightful owners cruelly, passed bad notes and married South African women who could then be seen walking around in religious costume. It seems these aliens – who were called the pejorative “makwerekwere” by E – live and work under quite tenuous conditions.

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The municipal official (A) gave an example of a preceding right in the form of a “Site Permit” issued by the Nolukhanyo Town Committee. This form certified the right to occupy a particular site, so its provenance was probably similar to the “Permission to Occupy” familiar in other areas. However it had space for 12 other members of the family apart from the grantee, including for each the name, sex, date of birth, relationship, identity number and signature of “superintendent” for each member. This might have echoed earlier apartheid-era forms.

Sietchiping [10] and Augustinus [11] depict a continuum of land rights as shown in Fig. 2.

The progression of documents identified at Nolukhanyo does not map accurately onto this schema. It progressed from Lodging Cards to receipt for a plot lease; then to Site Permits; then to Agreement of Sale in terms of the Alienation of Land Act 1981; and finally to Deed of Transfer in terms of the Deeds Registries Act 1937. These were all individual rights accorded to by the state. Their progression has been expressed in an increase in the detail of agreements the state has made with individuals and has been experienced as an external, state-driven progress rather than one of grassroots education in tenure concepts. At first the state was obsessed with crude control over residents. Then later, the 99-year leases were designed to woo residents into the ranks of the middle class. Finally, the new democratic government has taken the role of benefactor. Yet at any stage it would have been technically possible for the state to grant freehold and to have that understood – as of course it was, in most of South Africa, before the 1913 Land Act.

Housing stock

The rooftop colours in Fig. 1 clearly differentiate those stands occupied before 1994 from the later greenfields developments. Fig. 3 shows a zoomed image in the older area (II), that the FinMark study would have classed as “old township” – although many of the present houses were built post-1994 as infill development. Of the 12 erven shown in Fig. 3(a) only three contain the unimproved dwelling on its own, while five of the eight newer houses in Fig. 3(b) are unimproved. This may be partly because the older erven are larger, at least 28 being more than 700 m² while the ruling size in area IV is 300 m². Interviewee C complained specifically about the small erf size of later developments on grounds that cultural practices couldn’t be conducted on them. He pointed out that Bathurst has a large commonage for expansion, unlike many other towns. Of course the length of costly infrastructure routes increases with erf area.

The additions built on to RDP houses vary from one-room lean-to structures illustrated on the left in Fig. 4 to complete make-overs as shown on the right. Some parts of area (IV) have derelict houses and some streets seem to be occupied by people living from hand to mouth. But strikingly, even in those streets there are occasional houses on which money has been spent. Two overall impressions were formed from reviewing the housing stock: firstly of the slow accretion of improvements; and secondly, of a great range in the capacities of residents when building from their own disposable incomes. Over a period of 80 years, several efforts to make a built environment have been set back by natural causes or pushed forward by government action; but generally it has been a slow and erratic process of accretion.

Land transactions

Several sources agreed that informal sales take place in Nolukhanyo. C cited a case where the owner got into difficulties and sold his house informally to a family for R6000. He left the area, found work and recovered his finances. After a few years he came back to the family with R6000 and said he wanted the house back. He used his title documents – which were of course still in his name – to enforce his right, and the family had to move out. This case was presented as showing that the buyer is at risk in an informal land sale. When this was recounted to A she agreed that this sort of thing happens, but the seller does not always succeed in recovering the home. A case of a formal sale also recounted by C, was when a buyer came from Cape Town and wanted to buy formally. The house was sold for R16 000 but R4000 of that went for conveyancing fees that should actually have been paid by the buyer. The seller only made R6000. The discrepancy of R6000 in these amounts was later ascribed to outstanding rates. This high value is believable in view of the R23.8-billion in rates and services arrears nationally, cited by Betroldi [6].

In terms of the Agreements of Sale currently issued by the municipality, beneficiaries may not sell their properties for eight years, without first offering the house to the provincial department of housing. The Government Policy document “Breaking New Ground” [12] proposes reducing this provision against “down raiding” to five years on the grounds that it has created a significant barrier to formal secondary transactions. “Down raiding” is taken to mean exploitation of the vulnerable poor by people with more capital.

Adherence to cadastral boundaries

The leasehold survey of the original settlement seems to have been fenced before survey, since the street beacons are mostly described as “wooden fence post” The later greenfields developments were fenced by owners (C) after the beacons had been pointed out to them. This could be confirmed from the fences of non-standard construction. However the only unfenced houses noticed were abandoned ones. Especially in the oldest part of the settlement there have been substantial extensions but the cadastral boundaries appear to have been respected as shown in Fig. 3(a). The same respect was generally evident in the more recent greenfields developments as shown in Fig. 3(b).

If residents of Nolukhanyo had subdivided their properties, this would have given a stricter test of the adequacy of cadastral surveys to support the built environment. Probably we are saved from that test by the smallness of the erven and a tendency to regard back-yard shack arrangements as rental.

Discussion and conclusions

The decision not to put copies of title documents into the hands of owners is bound to strike cadastral practitioners as bad and some of the justifications for it seem specious. Even if a municipality is poor, the money spent duplicating title documents is miniscule compared with the costs of framing the GP and registering titles. If the government “gives ownership title to residents” surely something should be physically given to them, to make the act real and to educate all concerned. It might well be true that some people would lose title documents just as we lose ID documents and driving licences but as interviewee K put it, an administration cannot gear itself exclusively towards that. It might well be true that some people would lose title documents just as we lose ID documents and driving licences but as interviewee K put it, an administration cannot gear itself exclusively towards the 20% that will cause it 80% of the trouble, it must provide a service to the 80% that won’t.
Granted the above, it seems that the municipality does not have a simple way to distribute title documents, should it decide to do so. It would not matter much if a few people got the wrong documents and a few didn’t get their documents at all; all that is needed is that most people receive their title. That implies the services of a municipal messenger or community liaison worker. The Western Cape Provincial Government discussion document “Community development workers” [13] proposes just such a worker and envisages many tasks for him or her, but none relating to land tenure. In technical discussions for the Communal Land Rights Act a “land clerk” was envisaged, who would concern himself with nothing but land tenure. Probably there is a role for something in between these extremes. If the apartheid government could afford to assign BAAAB staff to Nolukhanyo when the township was much smaller, then perhaps today’s democratic government could pay for one liaison worker.

The case of the family that was dispossessed by the reappearance of the informal seller with his title deed might make one think that was a crooked use of title deeds. However it is no worse than the eventuality covered by an American Title Insurance company and the South African titling system protects the buyer better by ensuring that there is only one company and the South African title deeds. However probably there is a role for something in between these extremes. If the apartheid government could afford to assign BAAAB staff to Nolukhanyo when the township was much smaller, then perhaps today’s democratic government could pay for one liaison worker.

The arguments above might well be riding over problems that would reveal themselves in practice or would be obvious to the legal mind. What we feel more sure about is the underlying finding that there is a disjuncture between community and authority, around documents. The authority – both municipal and political – doesn’t think community members need documents, it doesn’t trouble itself to supply them and it doesn’t guide the community in how to communicate using documents. This fault could be remedied quite easily and inexpensively.

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