



TITLE DEEDS WITHIN THE CONTEXT OF SUSTAINABLE HUMAN SETTLEMENTS

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1. LEGISLATIVE FRAMEWORK

The principal legislation that governs the issuing of title deeds in South Africa is the Deed Registries Act (No 47 of 1937). **The Act empowers only conveyancers to prepare deeds of transfer and in doing so, assumes responsibility for certain facts set out in the deed and documents.** Conveyancing fees are usually charged according to a recommended tariff as determined by the Law Society.

The Act has been amended several times post and before 1994, and the most recent amendment Bill [B10 – 2013] is currently before Parliament.

The function of the Registrar of Deeds is to keep a public register of land; preserve the records and provide information to the public. The Registrar of Deeds is an independent unit within the National Department of Rural Development and Land Reform and has a staff contingent of approximately 115. In addition to the Office of the Chief Registrar of Deeds, there are nine deeds registry offices located throughout the country.

2. OVERVIEW AND STATISTICS

In 1994, South Africa's housing policy was launched with a key feature being the housing subsidy scheme which was set to deliver one million houses over a five-year period. By the end of 2010/11, the Department of Human Settlements estimated that it has subsidised the development of approximately 3.25 million units of housing and serviced sites. These have been delivered through a variety of subsidy mechanisms, which included the understanding that beneficiaries who received a house on an ownership basis would receive the title deed to the property.

While the initial intention of the housing subsidy programme was to provide shelter for poor citizens, by early 2000 the concept that the house should be an asset was introduced. Accordingly, the title deed was seen as critical to ensuring not only security of tenure, but also that poor households could use their house as an asset to build wealth. In addition, such properties would contribute to the operation of the property market.

The *Comprehensive Plan for the Development of Sustainable Human Settlements*, commonly known as *Breaking New Ground* (2009) explicitly identifies the need to ensure residents of subsidised housing access to formal title, as a leading public policy priority. The Comprehensive Plan emphasises that duly conferred legal title, as registered in the deeds registry, is critical to

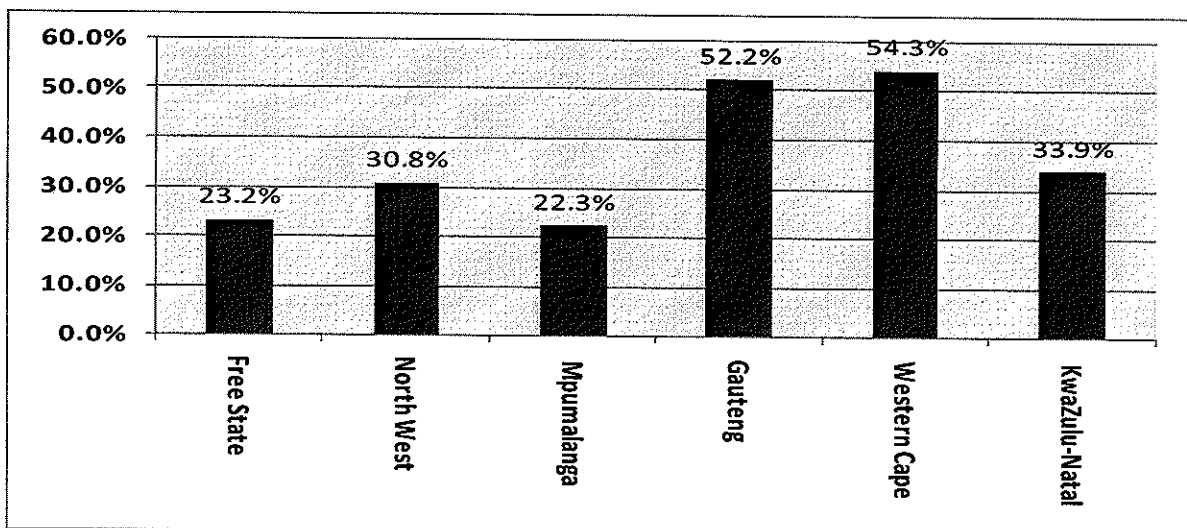


enable a functioning housing market, that it creates certainty in legal transactions and provides “a central, unchallengeable repository of ownership”.

Despite a number of recent media reports on the topic, the exact number of subsidy beneficiaries who do not have the title deeds to their properties is not known.¹ However, research commissioned by the Urban Landmark (2011) **estimates that between 1.1 and 1.4 million subsidy beneficiaries do not have the title deeds to their properties.** These statistics was also reported by the Financial and Fiscal Commission (2013) in a presentation to the Portfolio Committee on Human Settlements during May 2013.

Breaking New Ground estimates that that at **least 35% of subsidised houses had been delivered without the registration of formal title**, a estimate confirmed by the Department in June 2011 on a Beneficiary Occupancy Audit done in the 2009/10 financial year on 262 686 households in six provinces. This audit found that the extent to which title deeds have been provided varied across the provinces from 22 to 54% (see graph below). The average across the provinces is 36%.

Figure 1: Title deed registration 2009/10



Source: Department of Human Settlements (2011)

¹ FFC (2013)



4. CHALLENGES WITH TITLE DEED REGISTRATION

The key factors causing delays in the transfer of title to subsidy can be categorised as follows:

4.1 Delays in the township establishment process and proclamation

This factor is considered a major cause of delays in the registration of subsidy houses, and includes the following issues:

- Delays in proclamation: These occur where the various requirements to get an approval of a general plan, such as surveying, have not been met.
- Delays in opening a township register: The primary delay in this respect is the resolution of the underlying land rights. This requires not only proclamation (i.e. approval of the general plan) to be in place, but also the resolution of all restrictions and servitudes and consolidation of the affected title deeds (including in some instances the subdivisions of some of the underlying properties). The process can be hampered by missing information, deceased rights holders, and general inaccuracies in recorded data.

The following reasons for the delays in the township establishment process and proclamation was identified:

Implementation of the process within provinces and municipalities

- Lack of capacity within municipalities and provinces
- Undertaking the township registration and proclamation process requires access to technical specialists such as land surveyors, lawyers etc. Municipalities and provinces do not have sufficient access to these specialists.
- The process is complex and is often not understood by officials.
- Misalignment between municipal departments such as Planning and Housing/human settlements.
- Lack of clarity as to roles and responsibilities, particularly in respect of managing the process of opening the Township Register.
- Difficulties in rectifying mis-allocations of the subsidy to beneficiaries i.e. where the wrong house is allocated or where one house is allocated to more than one beneficiary.

In addition, was reported that there has been immense pressure on government officials in many areas to build subsidy houses at scale. To achieve this, officials would at times sometimes short-circuit the process of township proclamation to get houses on the ground, with the sense that they will revisit the paperwork afterwards. Officials respond to the political pressures by focusing on housing delivery, rather than being guided by policy prescripts. In this context, it is suggested that



deed registration can become “secondary in operational terms” by municipal managers and councillor.

Physical implementation of the process

A key challenge relates to where sites designated for subsidy housing development have been occupied informally. This makes the pegging of the site extremely difficult, if not impossible. The Surveyor-General will not accept the general plan unless the pegging has been undertaken. This problem is significant in that a key focus of the housing subsidy programme is the upgrading of informal settlements.

Legislation

The existence of three different legislative options namely, the **Provincial Ordinances, the Less Formal Township Establishment Act (LFTEA) and the Development Facilitation Act (DFA)** makes an already complex task even more so. Each of the different legislations is complex and requires different processes and systems – **could there be considerations to streamline and simply processes and enabling legislation?**

A further complicating factor is the June 2010 judgment by the Constitutional Court invalidating sections of the DFA. In the judgment the Court ruled that powers to establish townships and to re-zone land are classified as “municipal planning” and are, therefore, the exclusive function of the local sphere of government as assigned under 156(1) of the Constitution. Chapters V and VI of the DFA were seen to undermine this exclusive function, assigning as they did powers to the provincial sphere of government represented in the “person” of the various Development Tribunals. Outside of the cities of Johannesburg and eThekweni, the court suspended the invalidity of the said sections until 18 June, 2012.

There has been some concern that the same constitutional principle of the exclusive functions of municipal government on which the Court based its decision on invalidating key sections of the DFA, could logically also invalidate similar sections of LFTEA.

Deeds Registry offices

There is not consensus amongst stakeholders as to problems relating to the Deeds Registry offices. Views from the Deeds Registry offices suggests that municipal and provincial officials and their service providers do not prepare applications correctly, while municipalities and provinces on argue that title deeds can go “backwards and forwards” between the deeds office, the attorneys and the municipality.



Some views raised include the time it takes to register a deed, and while most deeds registry offices had reasonable numbers of staff, there are not enough employees with the necessary skills. Another view argues that rejections are at times made for editorial rather than substantive reasons. However, these opposing views have in common the **need to consider the quality of the paper work submitted and well-trained staff from both the deeds offices and government offices.** It was suggested that to address some of the challenges, conveyancers should always bring to the deeds office's attention that a particular batch of applications are for subsidy housing properties.

An issue to **consider is the value of the centralised nature of the deeds registration system in South Africa**, since it was argued by a stakeholder that 99% of transactions are simply "A to B" and that functions could be devolved to municipalities.²

Land held in trust by traditional leaders

It has reported that subsidy housing has been built on land held in trust by traditional leaders, and therefore, freehold title is not possible on this land. It is suggested that legal uncertainty is created when the land is state-owned land in trust to traditional leaders, since the position of individual traditional leaders on the matter varies – from support for individual title, communal title, etc.

4.2 Revisions to the project payment process in the development of subsidy houses

The project management and payment process of subsidy housing is also regarded as a key factor causing the low levels of registration of title. Some stakeholders argue that the low level of payment allocated in respect of the deed transfer of the developer's fee (R800 in 2010-2011) as a key contributory factor. In the Western Cape, the experience has been that developers would often relinquish the process than undertake the transfer and collect the minimal fee per property the programme makes available for this purpose. At the time of the interview the Western Cape Department of Human Settlements was **considering the possibility of motivating a change in structure to the final payment. In this scenario the final construction payment would be combined with the deed transfer component to make it a total of R2 000. It was anticipated that this would create a greater incentive for the developer to undertake the transfers.**

4.3 Failure to hand over title deeds

Problems with deed issuance reportedly also contribute to the low levels of title deed registration. The process of registration may have taken place, but this does not necessarily mean that the deeds have been distributed to the beneficiaries/owners. Noting that this is a particular problem in peri-rural areas, a stakeholder highlighted the need for community education around this issue.

² Urban Landmark 2011



This issue was confirmed by the Department in its presentation to the Parliamentary Portfolio Committee on Human Settlements in May 2010, noting that many beneficiaries had still not collected their title deeds after they had been processed (and after having resided in the premises for several years). Accordingly, it was speculated that this could be as a result of a lack of understanding of the importance of a title deed. **The Department, however, also noted that registered title deeds are sometimes held back by the conveyancer due to non-payment of fees by the project owner, which is usually the province or municipality (or a contractor appointed by such).**

Appropriateness of the deeds registration system

The suitability of the current Deeds Registration system has been questioned. One argument purports that while the residential property conveyancing system in South Africa is thorough and legally sound, it is far too complex for small transactions – evident by the logistics of arranging all the necessary stakeholders to be present at the State Attorney's office at the same time. Beneficiaries can be difficult to contact and sometimes have to take a day's leave, while the developer sometimes has to arrange to meet the beneficiaries on Saturdays or in some cases arrange for the State Attorney's representative to go the beneficiary's house.

Stakeholders also raised the fact that most municipal contact with the deeds office occurs via a conveyancing attorney. They, therefore, questioned the necessity to have an attorney undertake the conveyancing for subsidy properties, a process that while mandated in law, brings considerable costs and complexity. **Instead, it raises the need for possibly removing the need for an attorney to undertake the conveyancing (possible legislative changes to the Act required).** As such, South Africa could examine international models, and for on reducing complexity of the process, as well as reducing transaction cost.

5. THE IMPACT OF TITLE DEEDS NOT REGISTERED

The consequences of title deeds not registered have significant implications, as discussed below:

Informal sales and discrepancy between current occupants and owners

As a result of not having a title deed, many beneficiaries who want to sell their properties have done so informally, whereby the transaction is not recorded in the Registry of Deeds.

Difficulties in rectification

Given the high level of divergence between occupants and allocated beneficiaries or title deed owners, rectification of title deeds records is critical. Several stakeholders commented on the



considerable difficulty, time and expense of taking action to cancel an existing deed. It was reported that the action to cancel a title deed costs approximately R20 000, the bulk of which is used for attorney's fees (in addition to court costs). An order of the High Court is required for this action.

In addition, clearance certificates are also a challenge. Section 118 (1) of the Local Government: Municipal Systems Act (No. 32 of 2000) provides that a Registrar of Deeds may only register the transfer of a property upon submission of a certificate issued by the municipality. This document must certify that all monies owed in connection with such property for municipal service fees, surcharges on fees, property rates and other municipal charges for the period of two years before the date of application for the certificate, have been fully paid.

Difficulties in accessing title deeds

Reports indicate insurmountable challenges facing residents attempting to obtain valid title in their own name, particularly where there has been a change in de facto title as a result of informal sales or inheritance, but where the title deed was not formally transferred. It has been suggested that there are two possible remedies. One is a High Court action which can take at least two years and is extremely expensive, and the other is to use the Land Titles Adjustment Act (LTAA). In the case of the latter, however, it is reported that neither the Land Title Adjustment Commissioners nor the High Court could provide effective rectification of the problem (at least given the current legal framework).

Unresolved estates

In the event of the death of a beneficiary of an unregistered property, deed issuance is not possible until such time that the legal heirs have been identified and the estate concluded. Heirs may face a bill of R5,000 to R6,000 for this purpose and few can afford it. This issue is further complicated by the fact that, if the estate is worth more than R125,000, an executor must be appointed and the property valued.

6. CONSIDERING ALTERNATIVES AND THE WAY FORWARD³

6.1 Improving the extent to which registration occurs in respect of new subsidy housing projects

Financial and administrative disciplines should be re-introduced into the housing subsidy development process, even if it slows down development initially. In this regard the sequential phasing of development should be re-introduced so that it is not possible to commence the development of the housing until township proclamation and registration has occurred. In addition,

³ Urban Landmark (2011)



the final payment should not occur until title deeds have been provided to owners. Linked to this, the payments due for land servicing should not be payable unless the townships that have been serviced are also proclaimed. Further, the final payment should be substantial enough that developers will meet the milestone. It is estimated that these revisions will result in reduced delivery for one year.

Metropolitan and large municipalities should establish dedicated teams that focus on the township proclamation and establishment process. In the smaller municipalities this activity should be provided by province-wide dedicated teams. These teams should have sufficient budgets and adequate specialist input. This methodology has been applied very successfully by the City of Johannesburg and this case study should be written up and provided as an example.

Training on and promotion of the importance of title deeds should be undertaken for relevant officials in provinces, and officials and councillors in municipalities. This should include increasing understanding of the different forms of legislation that can be applied in undertaking township establishment and mechanisms for addressing the obstacles that can occur during the implementation process. In addition, councillors in municipalities should be briefed on the value of title deeds and the issues pertaining to them.

The capacity and levels of skills within the Deeds Registry Offices should be enhanced. Mechanisms to improve the time frame within which subsidy houses are reviewed and registered should be agreed between the Registrar of Deeds and the Minister of the Department of Human Settlements.

Consideration should be given to establishing a parallel less formal, more immediate and more affordable title or land-holding system. In considering this longer-term option, careful attention will need to be paid to the implications of such a system, both for the overall system of property rights registration as well as potential benefit for poor households.

The key features of this system should be as follows:⁴

1. It should retain administrative clarity on who owns a property.
2. Ownership should be registered on an alternative, more localised and accessible property register administered by municipalities or provinces.
3. The need for clearance letters and electricity compliance certificates should be streamlined or removed.

⁴ Ibid



4. The title provided should be able to be upgraded to normal, full-registered title at the cost of the individual property owner at any time, should they wish to do so.
5. Sellers and buyers should themselves be able to process transactions and submit them for recording in the parallel register without reliance on conveyancers

These recommendations recognise the low likelihood of eradicating the title registration backlog and registering all new subsidy houses delivered in the short to medium term, while also acknowledging that township proclamation and registration backlogs should be eradicated as an absolute priority.

6.2 Resolving the issue of properties where registration has not occurred

It is critical that the registration of subsidy housing that was provided without a title deed is resolved and that occupants of properties involving informal sales are able to access title deeds. To this end, the following recommendations are made:

A registration backlog eradication plan should be introduced. The focus of this plan should be to enable beneficiaries who occupy a property, but do not have the title deeds, to initiate a process to access such title. This will need to incorporate a dispute-resolution process to address contesting claims. The Urban Landmark recommends **that the model used in respect of the Discount Benefit Scheme (DBS) in Gauteng between 1993 and 2003 should be applied**

There needs to be further investigation into a series of options to make it more cost effective to transfer individual title for lower-value properties (say below R250 000). For example, options that need to be further investigated include:⁵

1. The need to use a conveyancer to register title should be removed for lower-value properties.
2. Transfer occurs through a commissioner of oaths. Municipalities would need to be accredited to do this. It is suggested that either Department of Human Settlements or the Department of Rural Development and Land Reform investigates due diligence and accredits the municipality to provide interim formalisation and to oversee the secondary transaction process.

⁵ Ibid.



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