

**THE LAND SYSTEM IN 'BLACK' URBAN AND RURAL
AREAS OF THE PROVINCE OF KWAZULU-NATAL
AND THE EFFECT OF THE NEW LAND REFORMS
THEREON**

BY

N R ZUBANE



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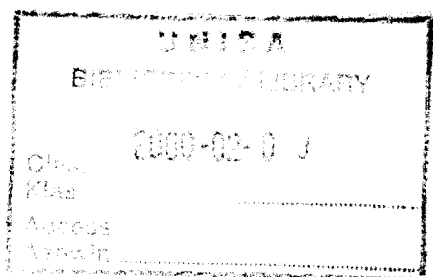
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N R ZUBANE

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BY

N R ZUBANE

DEGREE : LLM
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SUPERVISOR : PROF A M A VAN WYK

SUMMARY

The above topic deals with the land-use planning, the land-tenure and the deeds-registration systems, applicable in former black urban and rural areas of KwaZulu-Natal.

These areas are divided into three categories, namely:-

1. black townships on former black land (former KwaZulu townships);
2. rural or tribal land; and
3. black townships on former white land (Development Aid (DDA) townships).

The writer firstly explains how the above categories of land were created in terms of the 1913 and 1936 land laws and how the administration and control of the first two categories was taken over by the former KwaZulu Legislative Assembly in 1986 whilst administration and control of the last category remained with the South African Development Trust.

The writer critically analyses different pieces of legislation relating to the land system in the abovementioned categories of land. The writer further critically analyses the new land laws and their effect on the said land system.

KEY TERMS

Land-use planning; Land tenure; Deeds registration; KwaZulu-Natal; Former black townships; Former KwaZulu townships; Development Aid (DDA) townships; Customary-land rights; Tribal land; New land reforms



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NOZIPHO RONALDA ZUBANE

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2 BIBLIOGRAPHY

- 1 Budlender G and Latsky J "Unravelling rights, to land and to agricultural activity in rural race zones" 1990 *SAJHR* 155-177
- 2 Cross C "An alternate legality: the property rights question in relation to South African land reform" 1992 *SAJHR* 305-331
- 3 Dlamini C R M "Land ownership and customary reform" in Van der Walt A J (ed) *Land Reform and the Future of Land Ownership in South Africa* (1991) 37-44
- 4 Jenkin FJD "The Land laws of Kwazulu - Introduction and history" *KwaZulu Land Affairs Manual* (1994) (i)
- 5 Pienaar G J "The need for a uniform system of registration" in Van der Walt A J (ed) *Land Reform and the Future of Land Ownership in South Africa* (1991) 117 - 133
- 6 Robertson M "Dividing the land: an introduction to apartheid land law" in Murray C and O'Regan K (eds) *No Place to Rest - Forced Removals and the Law in South Africa* (1990) 127
- 7 Van der Post D J "Land law and registration in some of the black rural areas of Southern Africa" 1985 *Acta Juridica* 213

- 8 Van der Walt A J "Land reform in South Africa since 1990 - an overview"
1995 *SA Public Law* 1-30
- 9 Van der Walt A J "Towards the development of post apartheid land law:
an exploratory survey" 1990 *De Jure* 1-45
- 10 Van Wyk J "Land law update" 1991 *Codicillus* 43-48

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THE LAND SYSTEM IN "BLACK" URBAN AND RURAL AREAS OF THE PROVINCE OF KWAZULU-NATAL AND THE EFFECT OF THE NEW LAND REFORMS THEREON.

1. INTRODUCTION

The province of KwaZulu-Natal, which consists of the former KwaZulu territory and the former Natal provincial administration, has a very complicated and diversified land system due to the co-existence or parallel existence of different types of land-use planning, land-tenure and deeds-registration systems. These systems are the subject of different pieces of legislation.

Despite the introduction of a new democratic order in terms of the Constitution in 1994 this land system is still one of the remnants of South Africa's apartheid past.

The land system in the province can be divided into a so-called black and a so-called white land system. The white land system is not as complicated and confusing as the black land system, as the former is largely governed by legislation applicable throughout South Africa.

The black land system upon which I will concentrate, is however, very complicated and confusing as land occupied by blacks is divided into black land and white land as follows:

- a. Black land
 - (i) Black townships (former KwaZulu townships), e.g. Umlazi and KwaMashu townships which are governed by Proclamation R293 (GG 373) of 26 October 1962 as amended (promulgated in terms of the Black Administration Act 28 of 1927 read with the Development Trust and Land

Act 18 of 1936) read with the KwaZulu Land Affairs Act 11 of 1992.

- (ii) Black rural or tribal land which is governed by Proclamation R188 (GG 2486) of 18 June 1969 as amended (promulgated in terms of the Black Administration Act 28 of 1927 read with the Development Trust and Land Act 18 of 1936) read with the KwaZulu Land Affairs Act 11 of 1992.

b. White land

Black townships or so-called "Development Aid" (DDA) townships, e.g. Lamontville and KwaDabeka townships which are governed by the remnants of the Black Communities Development Act 4 of 1984 and Proclamation R29 of 1988 (GG 11166) dated 9 March 1988 as amended, (promulgated in terms of the Black Administration Act 28 of 1927 read with the Development Trust and Land Act 18 of 1936).

Although the Black Administration Act 28 of 1927 and the Development Trust and Land Act 18 of 1936 were repealed in terms of section 72(1) of the Abolition of Racially Based Land Measures Act 108 of 1991 the regulations remain in force. The Black Communities Development Act 4 of 1984 was also repealed by section 72(1) of the Abolition of Racially Based Land Measures Act 108 of 1991 with the exception of a few provisions. The regulations remain in force however.

I will endeavour to highlight the differences existing with respect to the land system in the above categories by critically analysing land-use planning, land-tenure and deeds-registration legislation applicable to the different categories prior to and after the new order governed by the Constitution of South Africa. Before analysing the current black land system one needs to look briefly at its history.

2 **HISTORY**

The concept of "self-governing territories" dates back from 1913 when the process of grand apartheid was initiated by the Black Land Act 27 of 1913 in which so-called traditionally black land was identified and reserved for exclusive use and occupation by black groups, while all other land in the country was reserved for exclusive white use and occupation. In 1936 the "reserved" land was extended with the addition of so called "released" land by the Development Trust and Land Act 18 of 1936 which also introduced the concept of trust land into black-land tenure. The said "scheduled" and "released" land constituted only 13% of the land in the country and accommodated more than 80% of the population in the country. Moreover, the black population was in most cases not given ownership of the land but only use and occupation rights whilst ownership thereof vested in the State. The whole process was aimed at creating political independence for different ethnic groups and in this way self-governing territories were created (Van der Walt "Land reform in South Africa since 1990 - an overview" - 1995 SA Public Law 2).

The former self-governing territory of KwaZulu, like other self-governing territories, was created essentially on land vested in the South African Development Trust. The former KwaZulu territory thus acquired control over the said land and inherited the regulations whereby these land areas (released and scheduled black areas) were administered e.g. Proclamation R293 of 1962 governing township areas and Proclamation R188 of 1969 governing rural areas (Jenkin "The Land laws of KwaZulu - Introduction and history" - *KwaZulu Land Affairs Manual* 1994 (i)).

In terms of GN R2751 of 31 December 1986, (GG 10559) the Minister of Education and Development Aid used his powers to transfer

administrative and other functions relating to R293 townships to the various self-governing territories. The townships of Umlazi, KwaMashu, Mpumalanga and Mpophomeni were in this way transferred to KwaZulu self-governing territory. From 1 January 1987 the legislative authority at Ulundi acquired sovereignty in land affairs in terms of section 3 read with section 5 of the Self-Governing Territories Constitution Act 21 of 1971 read with Proclamation R232 (GG 10560) of 24 December 1986 and was free to repeal, amend and replace all the existing land legislation it inherited. All South African legislation promulgated after the aforesaid date was of no effect in KwaZulu self-governing territory (Budlender "Unravelling rights to land and to agricultural activity in rural race zones" 1990 *SAJHR* 160).

However, not all areas occupied by the black population were released to the former KwaZulu territory. Others remained with the South African Development Trust and were called Development Aid (DDA) properties and were regulated by Proclamation R293 of 1962 which was later repealed by Proclamation R29 of 1988 in respect of Development Aid properties.

3 THE CURRENT BLACK LAND SYSTEM IN KWAZULU-NATAL

In this section, I will give a brief analysis of the current land-use planning, land-tenure and deeds-registration systems applicable in black townships and rural areas on black land on the one hand and in black townships on white land on the other hand.

3.1 BLACK TOWNSHIPS AND RURAL AREAS ON BLACK LAND (FORMER KWAZULU TOWNSHIPS AND TRIBAL LAND)

Prior to 31 March 1994 i.e. before the implementation of the KwaZulu

Land Affairs Act 11 of 1992, townships in former KwaZulu were administered and controlled in terms of Proclamation R293 of 26 October 1962 (as amended by Proclamations 221/69, 161/70, 264/70, 222/71, 150/76, 34/77, 178/78, Reg. no. 2624 of 29 December 1978, Proclamations 197/79, 153/83, 1561/85, 1936/83, 150/86 and R1538 of 1986 together with certain amendments made by the KwaZulu Legislative Assembly).

Similarly, rural or tribal land in former KwaZulu was administered and controlled in terms of Proclamation R188 of 18 June 1969 (as amended by Proclamations R84 of 1971, R95 of 1974, R16 of 1976, R97 of 1977, R101 of 1979 and R48 of 1979).

After 31 March 1994 Proclamation R293 of 1962 and Proclamation R188 of 1969 were substantially amended by the KwaZulu Land Affairs Act 11 of 1992 which provides for procedures to be followed with regard to the issue, transfer and registration of title deeds. Deeds of Grant, Certificates of Right of Leasehold and Permission to Occupy Certificates were consequently issued in terms of the KwaZulu Land Affairs Act 11 of 1992 (Jenkin " The Land laws of KwaZulu - Introduction and history" - *KwaZulu Land Affairs Manual: 1994 (i)*). The Act currently governs the land-use planning, land-tenure and deeds-registration systems in black townships and rural areas on black land.

By enacting the KwaZulu Land Affairs Act 11 of 1992 which became effective on 31 March 1994, the KwaZulu Legislative Assembly intended to shape the land affairs of the former KwaZulu before their powers were taken away by the interim Constitution of 1993 which became effective on 27 April 1994.

3.1.1 Land-use planning

In terms of the regulations of the KwaZulu Land Affairs Act 11 of 1992 (KwaZulu Land Affairs (Township Establishment) Regulations, GN 29 of 1994), the Minister of Traditional and Environmental Affairs is empowered to approve any development and any township establishment in both townships and rural areas.

Regulation 9 stipulates all the requirements with regard to the application for a development or township establishment.

Regulation 10 requires the Secretary for Traditional and Environmental Affairs to give notice of the application in the prescribed manner.

After consideration of the application the Secretary must make recommendations to the Minister as to whether the application should be granted or refused or granted subject to certain conditions (regulation 10).

3.1.2 Land tenure

Within the former KwaZulu area, i.e. land governed by Proclamations R293 of 1962 and R188 of 1969 as amended by the KwaZulu Land Affairs Act 11 of 1992 there are three most common forms of tenure, namely,

- i) Deed of Grant, in respect of a site situated in a township.
- ii) Certificate of Right of Leasehold, in respect of a site situated in a township.

- iii) Permission to Occupy (PTO) Certificate, in respect of rural land.

These forms of tenure confer on the holder rights which are lesser than ownership rights but it is possible to upgrade all three forms of tenure rights into full ownership in terms of the KwaZulu Land Affairs Act 11 of 1992 (section 9).

3.1.2.1 Townships

In terms of Proclamation R293 of 1962 and the KwaZulu Land Affairs Act 11 of 1992 which became effective on 31 March 1994, the Rights of Leasehold and Deed of Grant rights are granted in respect of the former KwaZulu townships. A Certificate of Right of Leasehold is not meant to be of a permanent nature. It is primarily issued to a developer by way of a land availability agreement, enabling a developer to register the land allocated to him. Once the developer sub-divides and disposes of the land to a purchaser, Deeds of Grant are issued to effect the transfer. In terms of section 7 (1) of the KwaZulu Land Affairs Act 11 of 1992, Deed of Grant rights may be granted by or on behalf of the owner of the land, in respect of an erf in an approved township or a piece of land for farming purposes.

The erf must be shown on a diagram or general plan but a township register need not be opened (section 7(1)(a)).

Deed of Grant rights are granted against payment of

prescribed amounts or amounts agreed upon (section 7(2)).

Transfer of Deed of Grant rights is effected by an endorsement on the Deed of Grant and no transfer duty is payable. Any encumbrance e.g. mortgage bond or a lease is registered against the Deed of Grant by means of an endorsement on the Deed of Grant (section 11).

3.1.2.2 **Rural land**

Before 25 April 1994 all the rural land set aside for blacks in KwaZulu territory was administered by the former KwaZulu Legislative Assembly which transferred it to Ingonyama Trust in terms of the Ingonyama Trust Act 3 of 1994 which became effective on 25 April 1994. This does not mean, however, that individuals have no rights in land. Quitrent tenure, which is not very common, applies to surveyed rural land. Permission to Occupy rights, which are the most common are granted in respect of unsurveyed rural land under the control of tribal authorities. In most respects the rights of a holder of land under a Permission to Occupy Certificate are very similar to those of quitrent title. The major differences relate to the functionary who is responsible for administration (Budlender "Unravelling rights to land and to agricultural activity in rural race zones" 1990 *SAJHR* 168).

In terms of regulation 5 of the KwaZulu Land Affairs (Permission to Occupy) Regulations, GN 32\94, which form part of the KwaZulu Land Affairs Act 11 of 1992, the Minister or Secretary for Traditional and Environmental

Affairs (formerly known as Secretary of Interior) issues a Permission to Occupy Certificate after completing a site inspection certificate and a sketch of the relevant allotment.

The Minister or Secretary, must obtain the recommendation of the tender board before issuing a Permission to Occupy Certificate to any person (regulation 5).

The Minister or Secretary must further ensure that the issue of a Permission to Occupy Certificate is not in conflict with the provisions of a town-planning scheme and any other provisions and rules applicable in the relevant area (regulation 5).

Regulation 5 prohibits the issue of a Permission to Occupy Certificate in respect of an allotment which is larger than 1 hectare in extent unless it is intended to be used for school or public purposes. The tender board is however, empowered to grant approval where the allotment is not intended to be used for school or public purposes.

3.1.3 Deeds registration

Records relating to former KwaZulu townships are registered in terms of Proclamation R293 of 1962 read with KwaZulu Land Affairs Act 11 of 1992. Until 31 January 1997 all records relating to townships falling under the former KwaZulu territory were registered in the now defunct Deeds Registry which was situated at Ulundi. Since 31 January 1997 all records are registered in the Deeds Office situated in Pietermaritzburg.

Records relating to former KwaZulu rural land are registered in terms of the regulations to the KwaZulu Land Affairs Act 11 of 1992 (KwaZulu Land Affairs (Permission to Occupy) Regulations GN 32\94). The said records are registered in the Department of Traditional and Environmental Affairs, formerly known as the Department of Interior.

3.2. **BLACK TOWNSHIPS ON WHITE LAND (DEVELOPMENT AID (DDA) TOWNSHIPS)**

The main statutory measure which was introduced to control the development of black communities outside the black areas was the Black Communities Development Act 4 of 1984. This Act, which mainly governed and controlled township establishment, complemented Proclamation R293 of 1962 which mainly governed land tenure. Proclamation R293 of 1962 was replaced by Proclamation R29 of 1988 on 9 March 1988.

The Abolition of Racially Based Land Measures Act 108 of 1991 which was, *inter alia*, intended to abolish certain restrictions based on race or membership of a specific population group on the acquisition and utilization of rights to land, repealed much of the Black Communities Development Act 4 of 1984 (see 1b above).

3.2.1 **Land-use planning**

In terms of the Black Communities Development Act 4 of 1984, areas were designated as development areas for township establishment under the Act. The Act read with the *Township Establishment and Land Use Regulations* (R1897 GG 10431 dated 12 September 1986) provided for a more speedy township-

establishment process and avoided the provisions of the Natal Town Planning Ordinance 27 of 1949 and other local Ordinances dealing with township establishment in white, coloured and Indian group areas.

Chapter III of the regulations provides for the submission of the application for township establishment to an officer authorised by the then Minister of Constitutional Development and Planning. Such application must be submitted together with draft conditions of establishment, proposed title conditions and a draft layout plan. After acknowledgement of receipt of the application by the authorised officer, the township applicant is required to give notice of the intended application to all interested parties in a prescribed manner. Any interested person may within 30 days of the notice object to the application and the township applicant may within 14 days of the objection give his or her reply to the objection. The authorised officer is thereafter required to submit the application together with his or her recommendations to the Minister for approval or disapproval.

The Black Communities Development Act 4 of 1984 also allowed, pending the opening of the township registers and with the approval of the authorised officer, registration of 99 year leasehold title once the general plan had been approved, which on opening of the township register could be converted to full ownership (section 52).

Although the Abolition of Racially Based Measures Act 108 of 1991 repealed much of the Black Communities Development Act 4 of 1984 it allowed the application of chapters VI and VIA to continue in areas already declared development areas under

section 33 of the Black Communities Development Act 4 of 1984. The *Township Establishment and Land Use Regulations R1897* of 1986 were also not repealed (section 72(2) of the Abolition of Racially Based Measures Act 108 of 1991).

The Less Formal Township Establishment Act 113 of 1991 was intended to facilitate the creation and establishment of new black townships and settlements with so-called less formal procedures. It has been correctly said that this was an acknowledgement of the permanence of blacks in what used to be white areas, and an attempt to regulate informal settlement or squatting to a certain degree and according to certain minimum standards as regards facilities and services.

In terms of Chapter I the Premier, if satisfied that in an area, persons have an urgent need to obtain land on which to settle in a less-formal manner, may designate the land for less-formal settlement.

On designation, he or she may suspend servitudes or other restrictive conditions, which conditions are cancelled on the opening of the township register. This avoids the need to apply to remove the conditions in terms of the Removal of Restrictions Act 84 of 1967 or by application to court. The provisions of various Acts relating to township establishment, subdivision of land, etc. also do not apply to designated land, unless they are, on request, made applicable.

Chapter II provides for a shortened township-establishment procedure. However, it is more formal than the procedure provided for in Chapter I and the regulations govern the form of

application. The Premier may also suspend servitudes and other restrictive conditions, which conditions are cancelled on the opening of the township register. On application, certain Acts can be declared not to apply.

The negative aspects of this Act are the following: (Van Wyk "Land Law Update" - 1991 *Codicillus* 47):

- a) the possibility exists of two or more township establishment procedures existing side by side. This refers first to the fact that provision has been made for both informal and formal township establishment, and secondly to the fact that much formal township establishment legislation still exists;
- b) the exclusion of the giving of notice to the public in respect of an application and the hearing of objections (section 29) is unacceptable, especially at a time when the general movement is in the direction of more public participation.

3.2.2 Land tenure

Within the Development Aid (DDA) townships the most common form of tenure is the Right of Leasehold which is essentially the same as the Deed of Grant rights applicable to the former KwaZulu townships in that both Deed of Grant rights and Rights of Leasehold are not ownership (freehold) but lesser rights than ownership.

In terms of the Black Communities Act 4 of 1984 land tenure in black urban townships can take the form of either leasehold or ownership. Moreover, the Act provides for the unilateral

conversion of leasehold into ownership (section 57A). The opportunity to acquire ownership was extended by the Conversion of Certain Rights to Leasehold Act 81 of 1988 which provides the holders of site permits, certificates of occupation and business-premises permits with the opportunity to convert their permits or certificates unilaterally and free of payment into leasehold (section 4). Although the Abolition of Racially Based Land Measures Act 108 of 1991 repealed much of the Act it left in place the leasehold provisions.

In 1991, the de Klerk government introduced the Upgrading of Land Tenure Rights Act 112 of 1991 which provides for a speedy process by which black tenure of land can be upgraded to full ownership free of charge. However, the said Act was not a success because of registration problems caused by the lack of facilities to provide quick and cheap land surveys in the black urban areas.

In terms of chapter 1 of Proclamation R29 of 1988 read with chapter 2, Rights of Leasehold may be granted by a township owner, including the South African Development Trust in respect of an erf in the township concerned. Furthermore, in terms of regulation 7 (2) of the Proclamation, Rights of Leasehold may be granted in respect of a piece of land other than an erf or a site if such land is situated within an informal area referred to in regulation 7 (1) of the Proclamation.

Before Rights of Leasehold can be granted, the owner of land must see to it that a certificate or annotated aerial photograph is prepared by a Land Surveyor appointed to carry out the survey of such piece of land. Such certificate or photograph must indicate

the boundaries of the piece of land, its dimensions and its approximate area in square metres. The certificate or photograph must further refer to a plan or diagram showing the situation of such piece of land relative to other pieces of land and the plan or diagram must have been submitted to the Surveyor General for approval (regulation 7(2)(a)).

Transfer of a Right of Leasehold is effected by an endorsement on the Certificate of Right of Leasehold and no transfer duty is payable. Encumbrances like mortgage bonds are registered against the Certificate by means of an endorsement. Regulation 10 (1) of Proclamation R29 of 1988 provides that where a Right of Leasehold has been granted, its currency must, subject to sub-regulation 2, be for a period of 99 years calculated as from the date of registration of such grant. Regulation 10 (2) provides that where a Right of Leasehold is transferred to another person, its currency must be for a like period of 99 years, calculated as from the date of registration of such transfer.

3.2.3 Deeds registration

Records relating to Development Aid (DDA) townships are registered in terms of Proclamations R29 and R30 and Government Notices R404 and R405 of 9 March 1988, (all in GG 11166) which replaced Proclamation R293 of 1962.

Until April 1992 all records relating to the Development Aid (DDA) properties were, registered in the now defunct Department of Development Aid which in Pietermaritzburg. Since May 1992 all records relating to Development Aid (DDA) properties are now registered in the Deeds Office situated in Pietermaritzburg.

4 **A CRITICAL ANALYSIS OF SIGNIFICANT PIECES OF LEGISLATION WHICH CURRENTLY GOVERN BLACK TOWNSHIPS AND RURAL AREAS ON BLACK LAND (FORMER KWAZULU TOWNSHIPS AND TRIBAL LAND)**

The KwaZulu Land Affairs Act 11 of 1992 which applied with effect from 31 March 1994, was promulgated after new land-reform legislation had been enacted in South Africa, namely,

- i) the Abolition of Racially Based Land Measures Act 108 of 1991;
- ii) the Upgrading of Land Tenure Rights Act 112 of 1991; and
- iii) the Less Formal Township Establishment Act 113 of 1991.

It is, however, interesting to note that except for the Abolition of Racially Based Land Measures Act 108 of 1991 the abovementioned Acts are not applicable in the former KwaZulu i.e townships and rural areas on black land , as the State President was required to consult with the Cabinet of former KwaZulu before the said Acts could be declared applicable to the former KwaZulu territory and that was not done. It therefore follows that all land affairs in the former KwaZulu are governed by KwaZulu Land Affairs Act 11 of 1992 including the upgrading of land-tenure rights and the establishment of less-formal townships.

Deed of Grant rights and Rights of Leasehold in former KwaZulu townships can be upgraded into full ownership in terms of the KwaZulu Land Affairs Act 11 of 1992 (section 9). Section 13 of the Act makes provision for the Minister of the Interior who is now substituted by the Minister for Local Government and Housing to apply for the opening of the township register which is opened in terms of section 46 of the Deeds Registries Act, 47 of 1937. Once the township register has been opened, section 9 of the Act provides that the holder of a Deed of Grant may make application to the Registration Officer (an appointed government official responsible for effecting such transfers) for the transfer of his

Deed of Grant rights to full ownership. It is worth noting that the holder of the Deed of Grant is not liable for any costs relating to the land when the transfer is registered.

In terms of section 26 of KwaZulu Land Affairs Act 11 of 1992, the holder of Permission to Occupy may upgrade his Permission to Occupy to a Deed of Grant and subsequently, through the process outlined above, upgrade the Deed of Grant to full ownership.

When one looks at the above-mentioned provisions of the Act, the upgrading process seems to be straightforward and easy but in practice that is not the case. What makes the upgrading process difficult is the fact that there are no regulations which clearly define the procedure to be followed. One has to constantly get guidance from the Department of Local Government and Housing. The only way to rectify this situation would be to promulgate the necessary regulations.

Another piece of legislation which brought about dramatic changes in the former KwaZulu, was the Ingonyama Trust Act 3 of 1994 which became effective on 25 April 1994. The purpose of this Act, though not stated, was to ensure that the ownership and control of much of the land under the control of the former KwaZulu Legislative Assembly did not pass to the National Government but remained with the remaining KwaZulu authorities after the dissolution of the KwaZulu Legislative Assembly in 1994.

Fundamentally, the Ingonyama Trust Act 3 of 1994 transferred all the land, together with all real rights therein which the KwaZulu Government held immediately prior to the date of commencement of the Act, in trust to the Ingonyama (King of the Zulus) as the sole trustee of the Ingonyama Trust, for and on behalf of the tribes and communities contained in the Schedule to the Act (the beneficiaries) (Jenkin "The Land laws of KwaZulu - Introduction and history"

- *KwaZulu Land Affairs Manual* : 1994 (iv)). However, in terms of section 2 (5) the Ingonyama is not entitled to encumber, pledge, lease, alienate or otherwise dispose of any of the said land or any real right in the land unless he obtained the prior written consent of the tribal authority of the tribe or community concerned.

The first version of the Ingonyama Trust Act 3 of 1994 was never implemented because of its lack of clarity and impracticability. Firstly, former KwaZulu townships were not excluded from the areas to be controlled by the Ingonyama which meant that the former KwaZulu townships also fell under Ingonyama Trust which could not have been the intention of KwaZulu Legislative Assembly. The intention of the KwaZulu Legislative Assembly was to make the said Act applicable to black-rural or tribal land which is governed by Proclamation R188 (GG 2486) of June 1969 as amended read with the KwaZulu Land Affairs Act 11 of 1992. Secondly, it was seen as an impediment to the National Government's land development programmes. Thus, amendments to the original Act have been made with effect from 2 October 1998. The said amendments have the effect of excluding townships and private land from the ambit of the Act. The amendments further make national land-reform programmes applicable to the Trust Land after consultation with the Ingonyama. In terms of the amendments the Ingonyama is made a titular leader as a board has been created to administer the Trust and its assets in conjunction with Ingonyama and the latter's power to delegate the administrative duties has been repealed.

5 LAND LAW REFORMS AFTER 27 APRIL 1994 AND THEIR EFFECT ON THE LAND SYSTEM IN BLACK TOWNSHIPS AND RURAL AREAS ON BLACK LAND (FORMER KWAZULU TOWNSHIPS AND TRIBAL LAND) AND BLACK TOWNSHIPS ON WHITE LAND (DEVELOPMENT AID (DDA) TOWNSHIPS)

5.1 Land-use planning

After the introduction of the Constitution further land-law reforms took place both nationally and in the province of KwaZulu-Natal. One important piece of legislation affecting the law of land-use planning and land tenure was the Development Facilitation Act 67 of 1995. It is generally said that this land-reform initiative is of a re-distributive nature as it involves making land which is both suitable and sufficient available for development purposes, and provides suitable mechanisms by which people can gain access to it quickly and cheaply. The Act is aimed at providing a single focus for standards and procedures in relation to land development, within which various land-development aims can be promoted in an integrated fashion. The Act further provides security of title and different tenure options for individuals and families and provides for a new form of title known as "initial ownership" which vests in the holder the right to occupy and use the land as if he or she were the owner, until the upgrading of initial to normal ownership is complete, as well as the right to acquire normal ownership by way of upgrading of ownership as contemplated in the Act, and the right to encumber the initial ownership by mortgage or servitude, but not to alienate or otherwise encumber the initial ownership. As soon as the land becomes registrable the initial ownership is transformed into full ownership, which then vests in the holder of the initial ownership. All these transfers, entries and endorsements are free from transfer and stamp duty and other fees (sections 61 and 62).

This Act has been commended for its aim to cut red tape, "fast track" the development of land not in isolation, but within the context of a national framework for physical planning, including procedures for the development of land in both the urban and the rural context (chapters V and VI).

The said Act was launched in the Province of KwaZulu-Natal on 8 July 1997 after it had been adopted by the KwaZulu-Natal Cabinet in November 1996. However, the Minister of Local Government and Housing in KwaZulu-Natal pointed out in his speech at the launch that the provisions of the Development Facilitation Act 67 of 1995 do not address all of the province's concerns. The Development Facilitation Act 67 of 1995 has to be complemented by provincial legislation designed specifically to provide for planning and to deal with the unique problems in KwaZulu-Natal.

The appropriate Act was promulgated on 29 July 1998 and is called the KwaZulu-Natal Planning and Development Act 5 of 1998. This Act embraces all the positive aspects of the Development Facilitation Act 67 of 1995 and also rationalises all provincial planning and development legislation within the provincial competence. The said Act will however, only become effective on 1 July 1999 as the local authorities still have to be trained in order to be able to implement the Act efficiently and regulations still have to be promulgated. The main difference between the Development Facilitation Act 67 of 1995 and the KwaZulu-Natal Planning and Development Act 5 of 1998 is that the Development Facilitation Act 67 of 1995 and not the KwaZulu-Natal Planning and Development Act 5 of 1998 provides for the appointment of a tribunal whose main function is to consider applications brought before it in terms of the Development Facilitation Act 67 of 1995 (section 15). In doing this the Development Facilitation Act 67 of 1995 confers upon the tribunal a range of extra-ordinary powers which are not available in the KwaZulu-Natal Planning and Development Act 5 of 1998. The two pieces of legislation complement each other, with the KwaZulu Natal Planning and Development Act 5 of 1998 accommodating the vast number of development applications received at a local level (chapters IV and V) and the Development Facilitation Act 67 of 1995 accommodating

development applications which require the tribunal to exercise its extraordinary powers provided for in terms of the Development Facilitation Act 67 of 1995 (chapters V and VI). The two pieces of legislation are otherwise based on the same development principles. The KwaZulu-Natal Planning and Development Act 5 of 1998 has adopted the Development Facilitation Act 67 of 1995 principles in chapter 1 and added to them (chapter 1). Furthermore, it is important to note that the Development Facilitation Act 67 of 1995 does not provide for a new procedure for all development applications but only an alternative procedure to the existing procedures. A developer will have a choice of either using the old procedures in terms of existing legislation or the new procedures in terms of the Development Facilitation Act 67 of 1995. On the other hand, the provisions of the KwaZulu-Natal Planning and Development Act 5 of 1998 are to prevail over any conflicting provisions of any planning and development law applicable in the former KwaZulu. In fact, some of the existing legislation (including legislation applicable in the former Natal provincial administration) has been repealed by this Act partially or in *toto* (section 55). The affected legislation which is applicable in black areas of KwaZulu-Natal is the *Township Establishment and Land Use Regulations* (R1897 of 1986), which are applicable in Development Aid (DDA) townships.

The above regulations have been repealed in *toto* except for regulations 18,32 and Annexure F. With regard to the Development Facilitation Act 67 of 1995, no conflict is anticipated as the two Acts complement one another.

5.2.1 Townships

Unfortunately, there have been no land-law reforms with regard to land tenure in townships. It is submitted that reforms are necessary to rationalize the land-tenure system so that the same form(s) of tenure exist in all townships.

5.2.2 Rural land

With regard to rural land two pieces of legislation were promulgated after the introduction of the Constitution, namely ,

- a) the Interim Protection of Informal Land Rights Act 31 of 1996; and
- b) the Communal Property Associations Act 28 of 1996.

The Interim Protection of Informal Land Rights Act 31 of 1996 was promulgated to protect informal and/or unrecorded rights pending long-term land-tenure reform. The Act does not establish any new form of tenure rights but provides legal recognition of certain informal rights including the customary rights.

This Act also provides that where land is held on a community basis, a person may be deprived of his land rights by the community majority of holders of such rights in accordance with the custom and usage of that community (section 2). Section 3 of the said Act further provides that any sale or disposition of any land must be subject to such rights.

The Communal Property Associations Act 28 of 1996 enables communities to form juristic persons, to be known as communal property associations in order to acquire, hold and manage property on a basis agreed to by members of a community, in terms of a written constitution and to provide for matters connected therewith (section 6).

5.3 Deeds registration

Another important piece of legislation promulgated after the introduction of the Constitution was the Proclamation dealing with the rationalisation of Deeds Registries, Proclamation R9 of 1997 (GG 5852). This Proclamation makes the Deeds Registries Act 47 of 1937 and the Sectional Titles Act 95 of 1986 applicable in the whole of South Africa including the former national states and self-governing territories like KwaZulu-Natal.

However, no transfer duty and no fee prescribed in the Deeds Registries Act 47 of 1937 is payable in respect of former KwaZulu townships until a date to be fixed by the Minister of Land Affairs by notice in the *Government Gazette*. Furthermore, records relating to Permission to Occupy Certificates in respect of rural land are still kept in the Department of Traditional and Environmental Affairs at Ulundi and not in the Deeds Office at Pietermaritzburg.

6. **CRITICISMS AND SUGGESTIONS WITH REGARD TO THE FUTURE OF THE LAND SYSTEM IN BLACK TOWNSHIPS AND RURAL AREAS ON BLACK LAND (FORMER KWAZULU TOWNSHIPS AND TRIBAL LAND) AND BLACK TOWNSHIPS ON WHITE LAND (DEVELOPMENT AID (DDA) TOWNSHIPS)**

6.1 Land-use planning

It is submitted that the Development Facilitation Act 67 of 1995 and the KwaZulu-Natal Planning and Development Act 5 of 1998 will go a long way towards addressing the land-use planning and development problems in that instead of submitting applications in terms of several different pieces of legislation, the Development Facilitation Act 67 of 1995 and the KwaZulu-Natal Planning and Development Act 5 of 1998 provide the mechanisms whereby a development application can be approved in totality by the Development Tribunal and local authorities respectively.

For instance, in terms of the Development Facilitation Act 67 of 1995, a large housing-development proposal will be able to obtain planning approval, approval for the registration arrangements and have restrictive conditions removed all through one application to the Development Tribunal.

The most important criticism about the old planning system was the delays and the distinction between white and black urban areas with regard to the different regulations applicable to the different areas. The abovementioned pieces of legislation apply to the whole province including rural areas.

The Development Facilitation Act 67 of 1995 and the KwaZulu-Natal Planning and Development Act 5 of 1998 have therefore rationalised the land-use planning system in the province of KwaZulu-Natal. These Acts are greatly commended for this significant reform.

6.2 Land tenure

The question I wish to address is, whether there is a need for rationalisation of the land tenure system in black townships (R293 and DDA townships) and whether full ownership should be the ultimate form

of tenure for everyone in black urban and rural areas.

6.2.1 Townships (R293 and DDA townships)

I am of the view that different pieces of legislation applicable to different townships namely, former KwaZulu townships and Development Aid (DDA) townships should be abolished and all black urban areas i.e townships on black land and on white land be governed by the same legislation. This will make the land tenure system in KwaZulu-Natal less complicated. It is absurd to find that two black townships approximately 10 kilometres apart are governed by different pieces of legislation, e.g. Umlazi and Lamontville townships.

Full ownership is the ultimate and most complete form of tenure available in South Africa. Legislation relating to former KwaZulu townships and DDA townships provides for the upgrading of Deeds of Grant and Certificates of Right of Leasehold to full ownership.

It is submitted that full ownership should or need not be the ultimate form of tenure for everyone. The legal requirements in terms of which Deeds of Grant and Certificates of Right of Leasehold are issued, are considerably less onerous and yet a Deed of Grant or a Certificate of Right of Leasehold confers virtually all the benefits of ownership that are found in full ownership. This is illustrated by the fact that the holder of a Deed of Grant or Certificate of Right of Leasehold can

- i) occupy the land allocated to him;
- ii) erect a building and carry out improvements;

- iii) mortgage the Deed of Grant or Leasehold Rights;
- iv) dispose of or bequeath the Deed of Grant or Leasehold Rights;
- v) let such land;
- vi) subdivide the land;
- vii) consolidate two adjacent portions of land;
- viii) register servitude rights;

(section 8 of KwaZulu Land Affairs Act 11 of 1992 and regulation 4 of Proclamation No. R29 of 1988.)

6.2.2 Rural land

The most important question with regard to the black rural land-tenure system is whether it has to be reformed and if so how? Black rural pieces of land do not belong to individuals but to the whole tribal community which occupies the land. The chief of the tribe acts as the trustee of the tribal land but has to act in consultation with other members of the tribe and for the benefit of the tribe in dealing with the tribal land. Individuals have occupation and use rights but not ownership. However, in reality some chiefs act in their own interest and disregard the interests of the members of the tribe or community.

Should the ownership of tribal land be taken away from chiefs who hold it in their capacity as representatives of tribal communities and be given to individual members of the community? It is submitted that individual ownership will destroy the social fabric that presently exists in rural communities and is therefore not desirable. Individual use and occupation rights should however be protected and secured through the registration of these rights.

Dlamini ("Landownership and customary reform" in Van der Walt (ed) *Land Reform and the Future of Landownership in South Africa* (1991) 37-44 and Cross ("An alternate legality: The property rights question in relation to South African land reform" 1992 *SAJHR* 307) are of the view that ownership of black rural land should remain with the tribal community as a whole and not be given to individuals. They maintain that if ownership were to be given to individuals who could easily exchange their ownership rights for short term monetary gains, poverty in black rural areas would be exacerbated. Cross correctly states that land-ethic values in rural communities will condition what rural communities will want from a new land dispensation (at 307). To the extent that private property systems cannot provide for these land-ethic values they tend to be rejected or modified in practice until they come closer to what the communities need from tenure.

Some politicians argue that members of rural communities should also be given a chance to get individual ownership of pieces of rural land as is the case in townships. They maintain that rural communities and their members need to be developed and this is not possible unless the rural land-tenure system is changed to conform with the urban land-tenure system. They argue that rural communities are not as unsophisticated as they were many years ago as many of their members now aspire to be like those living in urban areas.

Others (e.g. Van der Post in "Land law and registration in some of the black rural areas of Southern Africa" 1985 *Acta Juridica* 213) criticize the customary land tenure system for the arbitrary powers of dispossession which are vested in the tribal-authority structures

and also argue that the customary tenure does not seem to offer the appropriate kind of security required for mortgage financing.

Van der Walt ("Land reform in South Africa since 1990 - an overview" 1995 *SA Public Law* 5) states that tribal-land tenure is often seen as a backward and inefficient form of land holding, incapable of producing and sustaining a useful agricultural economy. It is often blamed for the poverty and backwardness of rural communities, for environmental damage resulting from poor agricultural techniques and for the upholding of an anachronistic social structure involving gender discrimination and other forms of chauvinism and inequality. He further states that on the other hand, research has indicated that the tribal structures have done much, even in extremely difficult situations which prevailed during the apartheid era, to hold groups and families together, and to see to it that individuals were cared for and kept alive. It is clear from the abovementioned statements that the abolition of customary-land tenure is a complex and difficult issue.

I am of the strong view that the communal land-tenure system is a better system than an individual-ownership land tenure system based on the traditional civil land-law system. This in my view is shown by the move of the countries practising the civil land law system from the notion that ownership is an "absolute" and "exclusive" right to the notion that ownership is limited and restricted by social considerations. It is therefore submitted that in this way the concept of individual ownership is moving closer to the concept of communal ownership. From the abovementioned arguments, it is clear that customary-land tenure has its weaknesses and strengths. It is suggested that the best solution would be to reform the customary-land tenure by addressing its

weaknesses rather than abolishing it altogether.

It is submitted that the Communal Property Associations Act 28 of 1996 which provides for the members of a community to form a communal-property association does in theory address the problem of mortgage finance. In terms of section 6 of this Act a communal-property association may acquire and dispose of immovable property and any real rights in the property. The association may also encumber such property and real rights in any manner e.g. by mortgaging the property. In this way ownership of rural or tribal land will always vest with the relevant rural or tribal community.

It is submitted that the Communal Property Associations Act 28 of 1996 and the Interim Protection of Informal Land Rights Act 31 of 1996 go a long way towards reforming the rural land-tenure system in KwaZulu-Natal and in the whole of South Africa.

However, the said measures are not enough as one is temporary until a long term land-tenure reform is introduced (Interim Protection of Informal Land Rights Act 31 of 1996) and the other optional (the Communal Property Associations Act 28 of 1996).

Furthermore, in terms of the Communal Property Associations Act 28 of 1996 a lot of formalities have to be complied with and yet the majority of rural people are illiterate and unsophisticated.

It is suggested that for the customary-land rights to get the respect and protection they deserve, they should all be recorded like other real rights. It might be argued that the aforesaid process will increase administrative problems which are already experienced in KwaZulu-Natal with regard to the existing deeds. My answer to that would be that the end result (security of tenure) justifies the

means and that a simple procedure of registration can be adopted which will not be cumbersome.

Furthermore, the individual holders of registered use and occupation rights should be entitled to:

- i) use and improve the allotment concerned,
- ii) encumber such rights by means of mortgage bond, cession etc.,
- iii) bequeath such rights to their heirs.

Furthermore, the criticism levelled at traditional leaders and the abuse of their powers can be addressed by the regulation of powers and duties of traditional leaders with regard to customary-land tenure.

With regard to the security of land tenure, Van der Walt ("Towards the development of post apartheid land law: - an exploratory survey" - 1990 *De Jure* 13) argues that it is possible to develop and implement a system of survey and registration which is simpler, cheaper and more suited to the needs of especially rural areas, while still retaining a sufficient measure of accuracy and dependability commensurate with the value and use of the land in question. He further argues that special registers such as the sectional title register could perhaps be used for the registration of customary rights. He further disputes the fact that customary land tenure is responsible for the poor state of agriculture in rural areas. He argues that agricultural underproduction and rural poverty are often the result of the limitations and restrictions of the rural household economy rather than examples of the failure of customary tenure.

6.3 Deeds registration

The rationalisation of the different registration systems brought about by Proclamation R9 of 1997 (see 5.3 above) has resulted in a uniform and reliable registration system.

This rationalisation has however, resulted in an increased amount of examination and registration activities conducted by the Deeds Office personnel. Pienaar ("The need for a uniform system of registration" in Van der Walt (ed) *Land Reform and the Future of Land Ownership in South Africa* (1991)128), correctly states that the appointment of more personnel does not offer the solution. "The solution is much rather situated in the simplification of the existing system with the retention of the accuracy provisions built in it." Pienaar suggests that consideration be given to the extension of certifying competence and the concomitant liability of conveyancers. This will have the effect that the full responsibility for the correctness of specific details as investigated by the conveyancer will be carried by him and such details need not be investigated again by the personnel of the Deeds Office. It is submitted that in this way time will be saved and registration costs reduced. Furthermore, Pienaar suggests that transfer duties should generally be reduced drastically and be made applicable to all registrations of real rights on immovable property above a certain stipulated value. It is submitted that Pienaar's view is correct in that the present system which requires payment of transfer duties in so called white areas but not in black areas is discriminatory and is therefore unconstitutional. However, a system based on affordability which will be measured by the value of the property transferred is more acceptable as it will apply equally to all different areas.

7 **GENERAL CONCLUSION**

A unified and integrated land system (land-use planning, land tenure and deeds-registration systems) is necessary as a developing country facing critical housing problems such as ours cannot afford the high costs of diversity and complexity existing in the present land system.

With regard to the land-use planning and deeds-registration systems, great progress has been made in KwaZulu-Natal to unify and rationalise different systems existing in different parts of the province, namely, former KwaZulu areas, Development Aid areas and former white, coloured and Indian areas.

However, no significant integration and rationalisation has been made with regard to the land-tenure system. It is however, submitted that the Development Facilitation Act 67 of 1995 will play a significant role in solving the problem of diversity and complexity of the land-tenure system in that a new form of title called "initial ownership" can be issued in respect of land which is subject to different forms of title. However, in practice there appears to be no overt sign of progress being made to bring this new form of title into existence.

Furthermore, the land-tenure system in rural areas still needs to be reformed to provide security of land tenure. I am of the strong view that private or individual ownership in rural areas should not be promoted or implemented as it is very expensive, slow and difficult to institute, as well as cumbersome to operate. Experience in other developing countries has shown that a private land-tenure system tends to be abandoned in practice, falls out of date and becomes useless, resulting in reversion to previous tenure practices. Legalising of prevailing-tenure institutions subject to a few reforms, is the most cost effective and accessible tenure option. Moreover, the prevailing-tenure institutions will help in retaining the social fabric which is the reason behind continued survival of rural communities.

In conclusion, land-use planning, land-tenure and deeds-registration systems must offer effective public participation in order to be seen as legitimate and sustainable procedures in a democratic South Africa.

N R ZUBANE

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