



Do Informal Land Markets Work for Poor People?

An assessment of three
metropolitan cities
in South Africa

Analysis of legislation

Isandla Institute and
Stephen Berrisford Consulting
with Progressus Research and Development



Urban LandMark

MAKING URBAN LAND MARKETS WORK FOR THE POOR

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1. Introduction

This component of the research project seeks to determine what the effects of the regulatory system are on the ability of the urban poor to access, trade and hold land. Only the most significant laws have been examined because of the expansive nature of laws inherent to such a study. The analysis has been supplemented by key interviews of people who interact with the regulatory system both as consumers and regulators in order to determine how the laws function in practice.

Six regulatory thematic areas have been created, grouping diverse laws and regulations together for ease of scrutiny. These areas are:

- Legislation relating to township establishment and management;
- Deeds registry laws;
- Legislation relating to resource conservation;
- Legislation related to property taxes;
- Legislation relating to township establishment and management; and
- Legislation related tenure security.

Each of these categories has laws and regulations scrutinised under the following headings¹:

- **Relevance of the law**, which answers the question how, when, and where the legislation applies;
- **Security of tenure** determines the effects of the law on the tenure security of the urban poor;
- **Access to disadvantaged groups** determines whether the law enables disadvantaged groups obtain urban land;
- **Delivery of infrastructure**, queries whether the law enables access to urban infrastructure for the poor;
- **Dispute resolution examines** the dispute resolution mechanisms the law provides and their accessibility to the urban poor;
- **Effects on cost** determine how costly compliance with the law or regulation is.
- **Effects on acquisition and trading** which answers two questions; firstly, does the law ease the acquisition of urban land by the poor and secondly, does the law facilitate the ability of land owners to trade and use the land for profit or gain;
- **Facilitating access to government subsidies**. This queries whether the law eases the ability of the urban poor to access government subsidies;
- **Effects on transacting the land**, determines if the law or regulation imposes any restriction on the sale, pledging or inheritance of the land;
- **Participation** scrutinises the participatory structures that accompany implementation of the law and their overall effectiveness.

These categories are representative of instances where the laws and regulations have some impact on the ability of the urban poor to access, trade and hold land.

¹ These headings are adapted from Rakodi and Leduka (2004).

2. Some key findings

This analysis is a study of the land use management systems and regulations, as well as related laws that formally govern urban land in South Africa. Broad but in-exhaustive coverage of these laws is made, examining provisions that deal with security of tenure, access of the land to disadvantaged groups, delivery of infrastructure and dispute resolution. Current evidence a quantitative study of informal settlements in three metropolitans and a number of high level interviews has informed the study on the effects of the regulations and laws on costs, land acquisition, trading and ability to transact in land, and finally participation. From this study a number of recurring themes have emerged with regard to the systems.

Firstly, a strong sense of out-datedness emerges. Due to the fact that many of the regulations are carry-overs from the apartheid era, with very little change, they have increasingly become inappropriate for use in the new dispensation. This becomes especially relevant when, because of their history, they create different classes of regulatory management, with some 'lesser' or 'inferior' to others. This often causes red lined and stigmatised areas.² It also raises questions on their ability to meet the demands of the current democracy, that requires delivery of infrastructure and tenure security for the poor at scale. Participatory mechanisms also fall short of the new spirit of greater community involvement in development.

A sense of disjointedness and lack of coherence in reform initiatives also emerges. While there have been limited advances in reforming these laws, this has been sporadic and has not been singular, concerted and comprehensive reform. This has created considerable confusion in their use, with the creation of parallel consent mechanisms, multiple authorisations and consents as well as duplication. This presents a formidable challenge to land development projects, and considerably makes it that much more difficult to cater for the poor.

The regulations have not adequately understood and began to deal with informality and the challenges it presents. New developments, for instance the DFA began to engage with informal processes through their more flexible, quicker and less exacting requirements for development aimed at the poor. This has not been sufficient; the regulatory responses have largely been embedded in the formal and have failed to provide adequate innovation that will better deal with the informal.

Regulatory mechanisms are often not pro-poor, and indeed, they often work against the urban poor. The legacy they represent and their design as foremost protectors of private property rights has often meant that they are detrimental to the urban poor finding a place in the city.³ The often repeated complaints of delays caused by long and tedious technical studies, protracted court processes as a result of resistance by neighbours, and insensitivity of processes to speedy socially driven development are symptomatic of this fact.

² See for instance section 2.1.6 on the effects on acquisition and trading of the regulations in terms of the Black Administration Act and Black Communities Development Act.

³ See for instance section 2.7.1.6 on the abuse of the participatory processes of NEMA.

Provision of land and housing to the poor is a challenge to intergovernmental coordination. Regulatory mechanisms have proved to be an impediment to working cooperation among governmental institutions, because they are administered by disparate governmental authorities, which do not have well established mechanisms for intergovernmental dialogue. The recent enactment of the Local Government Intergovernmental Relations Framework Act No. 13 of 2005 targets this issue, and it remains to be seen how effective this Act will be.

Regulatory mechanisms revolve around centralised authorities initiating and leading land development projects, with local communities being participants rather than drivers. This problem may occur during planning, for instance in processes that create Integrated Development Plans at municipal level. However, a greater problem occurs at the project implementation phase. While there have been recent moves away from this, for instance through the people housing process, regulatory mechanisms still focus on various state organs as providers of land and housing, with communities participating to various degrees. This often means that well organised and capacitated local communities have to depend on bureaucratic processes to enable things to happen, which renders them vulnerable to the inevitable delays arising out of lack of coordination and capacity. Provision for more localised control of certain processes such as allocation, dispute resolution and certain 'softer' aspects of the development can be assigned to capacitated local communities, with governmental support for more technical issues.

It is apparent that because circumstances often create variations in the cost and time needed to fulfil regulatory requirements, more nuance and discretion is needed for the allocation of resources in order to fulfil them. This is especially true in allocation of resources in subsidy driven development. Further, while the Development Facilitation Act (DFA) established some mechanisms for the use of discretion to waive certain regulatory requirements, the principles behind such waivers are not clear and they are often resisted by regulatory bodies. There is a need for clearer thinking on what are the priorities of all the regulatory requirements, and how these can be traded off with other more pressing concerns.

Regulatory reform has greatly improved the security of tenure for the urban poor. The next logical step is to ensure that this defensive mechanism against evictions becomes a more powerful tool in land redistribution in the city, guaranteeing the urban poor a place in the city. This is because while guaranteed tenure security forestalls unlawful evictions, it falls short of creating a positive right to the city for the urban poor.

There is a need for innovation and simplification of regulatory systems in order to accommodate the urban poor. There are moves towards better accommodating traditional forms of tenure through laws such as the Communal Land Rights Act, 11 of 2004. This law has made some progress in laying out a framework for the governance of communal land in terms of broader issues such as creation and transfer of communal land to communities, security of tenure and registration of the underlying rights. However, it is noteworthy that the rules of engagement for traditional and 'less than formal' methods with day-to-day land use management have yet to be detailed by law. There is a need to scrutinise what positive elements the urban poor use to access hold and trade in land and where possible, provide these as alternatives to the more formalised systems. Dispute resolution for instance can be

simplified and made more accessible. Similarly, there have been calls for less restrictive modes of urban land use governance that targets greater flexibility and accommodation.

Capacitating many of the institutions that administer these regulations has to be tackled if they are to meaningfully facilitate urban change. Any regulatory reform initiatives need to go hand in hand with enabling state institutions to properly administer the new and changed ways of doing things. This problem cuts across all state initiatives geared at development rather than urban land reform alone, and is especially acute at local government level.

Finally, regulatory mechanisms need more built in provisions that explicitly cater for the urban poor. Critical decision making moments such as planning and environmental consents need to consider the plight of the urban poor. Through provisions that require decision makers to apply their minds, following laid down principles, greater sensitivity towards the poor's access to urban land can be enabled through the regulatory system.

3. Legislation relating to township establishment and management

Laws regarding township establishment and management are important regulators of how the urban poor access, trade and hold land because:

- Township establishment is the principal way in which formal land title is provided for the urban poor;
- Township establishment procedures have an influence on the ultimate cost of the land (house);
- The underlying regulations for township establishment control the manner in which land is used; and
- The underlying regulations that manage the land influence value and desirability of the land to the market;

The laws regarding township establishment and management are largely old laws inherited before the democratic dispensation. One law however, the Development Facilitation Act was enacted after 1994 and represents a considerable paradigm shift in the manner in which townships are developed and managed. This is through provisions that make it easier for the urban poor to access land, as well as provisions that provide for upgrading of informal areas and granting of secure tenure.

The laws under scrutiny include:

- Regulations in terms of the Black Administration Act, 38 of 1927⁴
- Regulations in terms of the Black Communities Development Act, 4 of 1984⁵

⁴ These are the Land use and planning regulations, R. 1888 of 1990 (applicable in the Western Cape, Gauteng and KwaZulu-Natal), Township development regulations for towns R. 1886 of 1990 and Black areas Land regulations R. 188 of 1969 (applicable in Kwazulu-Natal).

⁵ These are regulations relating to township establishment and land use, Proclamation R. 1897 of 1986 (applicable in the Western Cape, Gauteng and KwaZulu-Natal), and regulations for the Establishment

- Development Facilitation Act, 67 of 1995 and regulations and rules in terms of the Development Facilitation Act, GNR.1 of 7 January 2000
- Less Formal Townships Establishment Act, 113 of 1991
- Land Use Planning Ordinance, 15 of 1985 and regulations under the Land Use Planning Ordinance (applicable in the Western Cape)
- Town-Planning and Townships Ordinance, 15 of 1985 and town-planning and townships regulations No. 858 of 1987 (applicable in Gauteng)
- Natal Town-planning Ordinance, 27 of 1949 and the Regulations for the purposes of the town-planning ordinance, R. 408 of 1953 and the applications for Change of Usage Regulations, R. 672 of 195
- Gauteng Division of Land Ordinance, 20 of 1986 and regulations in terms of the division of land regulations, R. 859 of 1997
- Provision regulating the division of land in the various town-planning ordinances
- Removal of Restrictions Act, 84 of 1967
- Gauteng Removal of Restrictions Act, 3 of 1996 and regulations relating to the removal of restrictions, R. 9 of 1997

3.1. The Regulations in terms of the Black Administration Act, 38 of 1927⁶ and the Regulations in terms of the Black Communities Development Act, 4 of 1984⁷

3.1.1. Relevance of the law

These laws were applicable in the former black areas of South Africa. The substantive laws have largely been repealed but the regulations persist, and while not often used for township establishment, they still underlie the management of townships initially established using them.

3.1.2. Security of tenure

The regulations under the Black Communities Development Act and the Black Administration Act relating to township establishment provided for various forms of tenure⁸. These tenure systems provided lesser rights to urban black residents than full registered ownership did, and are considered inferior. However, the regulations also

and Amendment of Town-planning Schemes for the Province of the Cape of Good Hope R. 733 of 1989 (applicable in the Western Cape).

⁶ These are the Land use and planning regulations, R. 1888 of 1990 (applicable in the Western Cape, Gauteng and KwaZulu-Natal), Township development regulations for towns R. 1886 of 1990 and Black areas Land regulations R. 188 of 1969 (applicable in Kwazulu-Natal).

⁷ These are regulations relating to township establishment and land use, Proclamation R. 1897 of 1986 (applicable in the Western Cape, Gauteng and KwaZulu-Natal), and regulations for the Establishment and Amendment of Town-planning Schemes for the Province of the Cape of Good Hope R. 733 of 1989 (applicable in the Western Cape).

⁸ This included quitrent tenure and the permissions to occupy and leases.

deliberately allowed for a simpler, less restrictive method of doing this⁹. To remedy this, the regulations in conjunction with the Upgrading of Land Rights Act 112 of 1991, have been used to convert these insecure tenure forms into formal ownership rights in terms of Act 112 of 1991. As such, the said regulations have had limited use in granting of ownership rights.

3.1.3. Access to disadvantaged groups

The legacy of these laws was restricting access of people classified as ‘black’ to designated townships in urban peripheries and on undesirable land. Because of this, they are inappropriate as a means of allowing quick and easy access to land by previously disadvantaged groups, with more recent legislation fulfilling this role.

3.1.4. Delivery of infrastructure

The rationale that underlay the enactment of these laws was separate development in townships, and this went hand in hand with infrastructure neglect. These townships markedly displayed infrastructural backlogs that have been the focus of recent upgrading efforts. These laws are thus not useful in this regard, and instead, more recent legislation such as the DFA has been used to facilitate this process.

3.1.5. Dispute resolution

In all these laws, decision-making lies with the local authority. Disputes with regard to planning matters are thus resolved at this level. Appeals from these decisions lie at provincial level (appeal boards or to the MEC).

As a rule, dispute resolution, especially when development application are considered, requires the parties to make coherent representations in prescribed formats lodged within certain periods. Certain other disputes, for instance infringements on the underlying use rights, require the opposing party to bring the issue to the attention of the local authority. Such procedures, even for relatively simple laws such as this may be out of reach for the urban poor.

3.1.6. Effects on acquisition and trading

Regulations in townships that have these underlying laws are often considered ‘rudimentary’, and ‘second class’. Thus while they do not create any substantive barriers to the acquisition and trading of land, there is a general perception that they

⁹ For instance reg. 20 of R. 1897 of 1986 provides that this may be done notwithstanding that the fact that ‘certain requirements must be met before the land in a proposed township becomes registrable’. It is noteworthy that this greater flexibility was motivated by a desire by the authorities to shirk their responsibilities towards administering these areas, and is an indicator of neglect rather than an altruistic recognition of the need to accommodate the poor. Perversely however it has to a limited extent presented some advantages to these residents (see also fn 29 below).

may not adequately preserve the amenity of the townships they are in, and thus in effect, do not fully protect property rights of individuals. This arguably means they are barriers to the full participation of landowners in the formal market because of the associated stigma and red lining that characterises the outside world's perception of them. However, paradoxically, the greater flexibility of these regulations often serves as a plus for the ability of owners to more effectively use the land for income generating purposes¹⁰. The future for reform is thus coherent and organised incorporation of this flexibility to deal with the concerns of financiers and other players of the formal market.

3.1.7. Facilitating access to government subsidies

The regulations are not directly linked to subsidy provision. Many of these areas have been subject to extensive subsidised housing upgrade programs, often with different regulations such as the DFA being used for granting tenure to the inhabitants.

3.1.8. Effects on transacting the land

The full rights with regard to transacting, that are access to credit, inheritance and sale are available in areas with these underlying regulations. The procedure necessary however needs to comply with the formal and often arcane processes of deeds registration.

3.1.9. Participation

Planning instruments created by these regulations for instance town-planning schemes provide for participation of residents. Importantly however, these measures are short of the very deliberate, proactive and broad based requirements in current legislation that has its origins in the current Constitutional dispensation¹¹.

3.2. Development Facilitation Act, 67 of 1995

The DFA is a national law applicable across the country, enacted by the Department of Land Affairs. It was operationalised after the creation of a democratic dispensation in South Africa. It is characteristic of the priorities of the times, which were largely geared towards rapid delivery and integration. This was achieved by among others, the removal of strict rules and regulations for land development, and instead a move towards more flexible decision-making determined by substantive principles and norms.

¹⁰ See fn 28

¹¹ For instance prior consultation for scheme preparation under the land use and planning regulations r. 1888 of 1990 is optional. Further this is limited to the local authority, any neighbourhood body and representatives of commerce (reg. 16).

3.2.1. Relevance of the law

Used for land development in a 'land development area' rather than townships as is the common terminology. It is applicable across the country. It is also an important law in terms of dispute resolution, creation of security of tenure, and facilitating the upgrading of informal areas.

3.2.2. Security of tenure

The implementation of the DFA has been key to providing security of tenure to previous holders of tenuous rights to land in urban and rural areas. Initial ownership, a unique creation of the DFA, vests title to a person upon the meeting of certain conditions, while the land development has yet to be completed. Essentially, it commences into operation when fewer and less exacting requirements for land development have been met. Thus for instance, time saving concessions with regard to layout plans can be used, dispensing with detailed plans, before granting initial ownership. The Act further gives the Development Tribunal wide ranging discretion in approving land development applications, which in effect is the precursor to the registration of initial ownership of the land. The tribunal may thus for instance suspend restrictive conditions or servitudes attaching to the land; determine whether general requirements of physical planning, building standards, zoning schemes, land subdivision, roads and ribbon development, bye laws and other provisions relating to land use planning apply to the area; determine whether building plans will be submitted for approval; suspend the requirement for financial receipts and certificates, and many more¹².

3.2.3. Access to disadvantaged groups

The DFA established the now common trend of in built principles for the interpretation and application of legislation. The DFA specifically provides for the correction of the historically distorted spatial patterns of settlement and requires skilling and capacitating disadvantaged persons.

3.2.4. Delivery of infrastructure

The DFA was optimised to enable rapid delivery of housing and infrastructure to the poor. The establishment of development tribunals with wide ranging discretion allows this, together with its provisions for easy identification and registration of land ownership. In addition, it specifically requires that every land development area be provided with the engineering services specified in a services agreement between the land development applicant and the local government body, complying with the prescribed guidelines approved by the tribunal¹³. This provision allows for the necessary discretion, which is often important in developments for the poor where

¹² S 33(2)

¹³ s 40

flexibility and delivery according to priority are often as important as delivery of the infrastructure itself.

3.2.5. Effects on cost

The DFA establishment procedure is generally deemed less costly than other processes, such as those using town-planning ordinances, because of its potentially fewer and less stringent requirements. As a rule costs associated with meeting administrative requirements for land development are low. The government subsidy guidelines for instance pegs total administration costs at 8% of the total housing subsidy per unit¹⁴. However township establishment is an inherently costly procedure. Apart from fees, considerable resources are expended in hiring specialists such as town planners and engineers. Further, the allocated amount is often insufficient and costs do escalate when meeting the requirements of the DFA and other related statutes. A good example is when public participation causes substantial public resistance, or when more in depth technical studies are prescribed¹⁵. These may require additional hiring of professionals, such as lawyers in the former case where the matter becomes contested before the tribunal and even in court. This often stalls projects and imposes an insurmountable financial burden on poor communities.

3.2.6. Effects on acquisition and use of the land

A special deed of transfer is created for registration of ownership in land development areas¹⁶. It does not preclude the registration of transfer under any other law, but its inclusion is clearly intended to provide a simplified and potentially expedited form of conveyance for rapid delivery of ownership in land development projects. Despite this, the method is largely formal, and formal registration needs to go through the rigours of a conveyance and ultimately be registered at the office of the surveyor general. The rapid delivery of housing through laws such as the DFA within the new democratic dispensation has exposed the flaws of the formal system of land registration, by creating a substantial backlog in delivery of titles to individuals, and its failure to adequately capture less formal forms of ownership.

The DFAs formula for rapid acquisition and ownership of land through initial ownership does not compromise the ability to use the land for income generating purposes for instance. Initial ownership vests in the holder the right to do a number of things including occupy and use the erf as owner¹⁷; the right to obtain a mortgage or impose a personal servitude, subject to some conditions¹⁸ and the right to sell¹⁹.

¹⁴ See Department of Housing (2007) Subsidy Quantum Schedule INTERNET.

<http://www.housing.gov.za/Content/Subsidy%20Information/Subsidies%20Home.htm>

¹⁵ There is provision for escalation of the subsidy amount in cases of abnormal development costs such as excessive slopes, sandy soil and medium dolomite

¹⁶ s 64

¹⁷ s 62(4)(a)

¹⁸ s 62(4)(c)

¹⁹ s 62(4)(d)

3.2.7. Facilitating access to government subsidies

The DFA was deliberately structured to mesh in with a comprehensive system of subsidies introduced or scaled up with the new democratic dispensation. The preamble of the Act provides that the Act is intended to *'promote security of tenure while ensuring that end-user finance in the form of subsidies and loans becomes available.'* Many state driven urban housing projects using the DFA are driven by subsidies, primarily those for housing and basic service provision.

3.2.8. Effects on transacting the land

DFA regulations do not hinder transactions of land. Further, initial ownership as created by the Act allows for inheritance and mortgaging.

3.2.9. Participation

As with principles targeting disadvantaged persons, the DFA specifically provides that *'members of communities affected by land development should actively participate in the process of land development'*²⁰. Specific provisions provide for this are, for instance, land development applicants must give notice of the application to prescribed persons and bodies²¹.

The DFA participatory process for land development while in principle sound and in line with the new Constitutional dispensation has often been used by hostile and NIMBY²² neighbours to stall low cost housing development in urban and peri-urban areas. This is especially so when used in conjunction with other participatory processes for the same development, for instance environmental impact assessments. This abuse has often considerably slowed down and even stalled development projects.

3.3. Less Formal Townships Establishment Act, 113 of 1991

3.3.1. Relevance of the law

The Less Formal Townships Establishment Act (LEFTEA) was part of package of reform proposals that were initiated in the final years of the minority government. The law was initiated seeking to among others, accelerate the provision of sufficient land for urbanisation to keep up with the inevitable influx into urban areas with the elimination of influx control. LEFTEA was intended to ensure that the influx and the ensuing demand for housing is accompanied by some modicum of order when the settlers become established within the urban areas.

²⁰ s 3(d)

²¹ s 31(3)

²² Not In My Back Yard

LEFTEA is used for township establishment across the country. Its principal target is the establishment of low cost housing in urban areas, with a section also dedicated to the regulation of the use of land by tribal communities to provide communal forms of residential settlement.

3.3.2. Security of tenure

Part of the rationale behind LEFTEA is providing for formal housing and registered titles to potential and existing informal urban settlers. The Act usefully provides for the exclusion of laws and suspension of servitudes and restrictive conditions for the purpose of shortening procedures. Thus various laws and regulations on physical planning and building standards, establishment of townships and town-planning and laws requiring authority for subdivision of land may be designated inapplicable if their effect is seen to be dilatory to the designation and development of land²³.

LEFTEA since then has often been used to grant formal registered title of land to the urban poor.

3.3.3. Access to disadvantaged groups

The language of the Act clearly displays its intent as a law that targets the development of land for urban dwellers with an urgent need. Thus the Act provides for powers of the Premier to make land available and to establish a township if satisfied that persons in an area have an urgent need to obtain land on which to settle in a less formal manner, or the demand for housing in an area justifies township establishment. These powers include the powers to avail state held land or to purchase or expropriate land for that purpose²⁴.

While LEFTEA has been a useful tool for availing security of tenure to poor urban dwellers, it was a creation of its time, and was never intended to be a comprehensive measure for urban tenure reform. LEFTEA retains overall control for the initiation of township establishment with the provincial authorities, which has enormous discretionary powers to determine the need for land and housing. Again, the thinking behind it was more to control the impending disorder that was going to be created by the mass of rural inhabitants flocking to the urban areas, rather than a genuine concern for insecure tenure, and a need to grant widespread tenure security. LEFTEA is also a formal township establishment mechanism, and while simplifying the procedures to some extent, still requires considerable knowledge of town-planning procedures and processes, and invariably requires the use of costly professional services of town planners and surveyors.

²³ s 3 and 12

²⁴ s 2 and 19.

3.3.4. Delivery of infrastructure

Tied to the township establishment procedures is a memorandum of motivation which includes details on the method of provision of engineering services, existing and proposed transportation routes and systems, proposed sewerage disposal works and so on²⁵.

3.3.5. Dispute resolution

LEFTEA is administered at provincial level and does not provide for delegation. Applications are directed to provincial authorities in charge of planning and development. However, underlying land use control mechanisms are often regulations passed in terms of other laws, such as the township planning ordinances or the Black Communities Development Act. Local government authorities in charge of development planning will thus deal with disputes in such instances. The use of these laws is sometimes seen as contrary to the purposes of the Act, which intends to simplify and hasten processes. As with all other formally produced procedures for township establishment, dispute resolution will necessarily require formal procedures of lodgement and hearing.

3.3.6. Effects on cost

Like similar regulations, LEFTEA formal processes require costly professional input from town planners, surveyors and other related experts.

3.3.7. Effects on acquisition and trading

Land established through the use of LEFTEA is registered and has no restrictions to acquisition and trading. Invariably however, the use of LEFTEA which is associated with lower standards for establishment, creates the danger of stigmatisation and red lining which can be a problem for integration of this land within the broader formal market.

Despite the shortened procedures and less exacting standards, LEFTEA like all formal establishment procedures requires considerable expertise and know how to use. The substantive application for township establishment needs to be accompanied by a host of documents, plans, technical studies and reports from specialists such as lawyers, land surveyors, town planners and engineers. Invariably therefore, development under it can only be driven by well resourced developers or the government, on behalf of the poor.

²⁵ Regulations on the requirements for an application for the establishment of a township: Gn 2132 of 1991, reg. 5 (b)(ii), (c)(v) and (d)(ii), and reg. 7.

3.3.8. Facilitating access to government subsidies

In recent times, LEFTEA has been used to establish subsidised housing for the urban poor.

3.3.9. Effects on transacting the land

The full rights with regard to transacting, that is sale, inheritance and access to credit are available in areas with these underlying regulations. The method taken however needs to comply with formal and arcane conveyance processes established by the Deeds Registration Act.

3.3.10. Participation

As is characteristic of laws passed before the new democratic dispensation, participation was limited and confined to a narrow constituency. LEFTEA vests considerable powers with provincial government, unsurprisingly since it inherited its implementation from the pre-1994 state. Consequently, the decision to develop as well the process itself is highly centralised. Comments must only be obtained from local authorities and apart from the gazetting of the application for establishment, little else required by way of participation or appeals²⁶. The processes of establishment of townships within the Act have thus been characterised as closed, undermining the participation of local communities and entirely dependent on the initiative of the government (Miller and Pope, 2000).

3.4. The town-planning ordinances

- Cape Land Use Planning Ordinance, 15 of 1985 and Regulations under the Land Use Planning Ordinance (applicable in the Western Cape)
- Transvaal Town-Planning and Townships Ordinance, 15 of 1985 and Town-planning and townships regulations No. 858 of 1987 (applicable in Gauteng)
- Natal Town-planning Ordinance, 27 of 1949 and the Regulations for the purposes of the town-planning ordinance, R. 408 of 1953 and the applications for Change of Usage Regulations, R. 672 of 195

3.4.1. Relevance of the law

These three town-planning Ordinances are used for the preparation, approval and amendment of town-planning schemes, the subdivision of land in approved townships and township establishment. Previously they were only applicable to 'white coloured and Indian areas'. They are now by virtue of the Local Government Transition Act, 209 of 1993, also applicable in former 'black areas' The ordinances have a raft of town-planning schemes which manage the land that falls within their jurisdiction. To

²⁶ Gn 2132 of 1991 reg. 8 and s 11(2) of the Act

apply these schemes in areas formerly not under the ordinances, application has to be made to give effect to the ordinance in these areas.

Provisions in the ordinances with regard to rezoning and amendment of town-planning schemes are necessary in so far as the land falls under a specific town-planning scheme, and the desired or proposed use of the land does not comply with the use rights allowed by the scheme. Applications for rezoning and amendments to town-planning schemes are a common feature of the urban landscape because the prescriptive and static nature of town-planning schemes, coupled with the ever-changing land use environment, which in practice often means that they quickly become overtaken by events.

3.4.2. Security of tenure

The town-planning ordinances in all three provinces were traditionally used for township establishment in limited ‘white’ areas, and were not intended as instruments for the provision of tenure security for the urban poor. Consequently, the ordinances are deliberately lengthy, exacting and complex to use, and are complex instruments for large-scale delivery of tenure security to urban inhabitants. All the ordinances have to go through formal registration of title procedures.

3.4.3. Access to disadvantaged groups

The ordinances are complex pieces of legislation, and consequently their procedures and processes are difficult to access for the urban poor. They are thus more appropriate for private sector township development. This is one of the reasons that laws such as the DFA were formulated, the thinking being that they will enable processes that more appropriately target the urban poor, through simpler and faster procedures and processes.

3.4.4. Delivery of infrastructure

Ordinance requirements for infrastructure delivery are elaborate and comprehensive.

3.4.5. Dispute resolution

The ordinances have well-structured institutions and mechanisms for dispute resolution. Applications for township establishments for instance are directed to the local authority through the relevant department concerned with development planning, from where specialised structures such as committees may then consider the applications. Appeals then lie to the various provincial townships boards²⁷.

²⁷ Gauteng, the townships board; KwaZulu-Natal, depending on the type of appeal either the Private Townships Board or the Town-planning Appeals Board; in the Western Cape depending on the type of appeal either the Premier (delegated to the MEC for Environment, Planning And Economic Development) or a provincial Appeal Committee.

As a rule, getting audience from these bodies requires comprehensive applications that have complied with numerous substantive and procedural requirements. In the Western Cape for instance, appeals to the provincial department of for Environment, Planning And Economic Development are required to be in writing and directed to the Chief Director; accompanied by all ‘relevant documents’; and submitted together with a confirmation that a copy of the appeal has been served on the Council. Further a motivated appeal needs to be served on the Chief Director within 21 days of the date of registration of the letter informing him/her by post of the council’s decision; and within the mentioned period, a copy of the appeal is to be served on the council²⁸. These formidable requirements do not easily lend themselves accessible to the urban poor given the need for hiring the services of professionals such as planners or lawyers because of their complexity.

3.4.6. Effects on cost

Like similar regulations, the ordinances formal processes require costly professional input from town planners, surveyors and other related experts.

3.4.7. Effects on acquisition and trading

The provisions of the ordinances do not restrict the acquisition of land managed by their provisions. However, they are complex and very technocratic pieces of legislation to implement, ill suited for speedy development. Further, they are very fragmented, and apply many different town-planning schemes across their areas of their jurisdiction. Like all township laws, they work with formally registered title, which has to go through the rigours of formal legal conveyances. They require hiring seasoned professionals familiar with them to both drive as well as handle the development processes at local government level. This complexity worsens the considerable capacity problems in many municipalities within the provinces, further hampering the expeditious handling of applications. As such, the ordinances are unfriendly means for the acquisition of urban land by the poor, even in large government driven developments.

These ordinances under the various town-planning schemes provide an underlying management framework that is restrictive and controlling in orientation. Increasingly there is recognition that the laws have a different underlying rationale behind them that fails to capture the current drive towards developmental guidance and enablement. The rigidity of these systems has been captured in many studies and sometimes plays itself out in court challenges of municipal decisions²⁹. These problems are often encountered by more resourced and enabled landowners given the history of the ordinances, which necessarily means a bigger problem for urban poor.

²⁸ Regulations under the Land Use Planning Ordinance, reg. 22 and 23

²⁹ The inappropriateness of LUPO for instance has been challenged, somewhat ironically arguing that the greater flexibility afforded by the Black Communities Development Act amounts to discrimination. In the case, LUPO was described by the challenger as are ‘rigid and ill adapted to modern economic development compared with the flexible and less restrictive approach to town-planning in the other areas’ (see *The Municipality of Port Elizabeth v Rudman* (1) SA 665 (SE)).

3.4.8. Facilitating access to government subsidies

Not commonly used for subsidy driven housing.

3.4.9. Effects on transacting the land

The full rights with regard to transacting, that is sale, inheritance and access to credit are available in areas with these underlying regulations.

3.4.10. Participation

The ordinances allow for participation of land owners in the management of their areas through comment procedures for changes to, adopted plans, zoning schemes and during subdivisions for instance.

3.5. Gauteng Division of Land Ordinance, 20 of 1986 and regulations in terms of the division of land regulations, R. 859 of 1997

3.5.1. Provisions regulating the division of land in the various town-planning ordinances

3.5.1.1. Relevance of the law

These laws are concerned with ensuring the orderly sub division of formally registered land in townships. Such rules ensure that infrastructure and services are sufficiently and effectively provided for the newly created areas. The Gauteng Division of Land Ordinance is applicable solely to the province of Gauteng. Applications for subdivisions are either directed at an authorised local authority, or in the case of local authorities that are not authorised, to the provincial department which is the decision making body. Additionally, all the various town-planning ordinances have provisions that regulate the process of land sub-division in townships³⁰. Applications are directed to the respective local authorities.

³⁰ s 92 Transvaal Town-Planning and Townships Ordinance; s 24-28 Cape Land Use Planning Ordinance; and KwaZulu-Natal, generally incorporated in sections on township establishment.

3.5.1.2. Effects on cost

The sub-division process is costly in that it requires the payment of fees as well as the submission of plans and diagrams by a town planner. The process also requires the lodgement of the finally approved sub-division to the surveyor general for registration.

3.5.1.3. Effects on acquisition and trading

The formal sale of a portion of land will require going through the rigours of sub-division of land. This entails lodging a formal application together with professionally prepared plans and diagrams to the local authority, a significant time lapse as opportunity is presented for comment and as the local authority considers the application, and finally lodge the approved sub-division documents with the surveyor general for registration. In terms of the urban poor, this is a process that will likely be out of their reach, one factor that has been attributed to the proliferation of informal and un-registered subdivisions and sales.

3.5.2. Laws enabling the removal of restrictions

- Removal of Restrictions Act, 84 of 1967
- Gauteng Removal of Restrictions Act, 3 of 1996 and regulations relating to the removal of restrictions, R. 9 of 1997

Land restrictions comprise obligations that are imposed on title to land. They may be contracted, for instance conditions of title, which emerge out of the conditions of establishment for townships when they are proclaimed or attached to the title deed of the land, for instance restrictive covenants, which are burdens that attach to land for the benefit of someone or some other piece of land. Restrictions prohibit the owner of the land from doing something which is contrary to that condition, for instance, the use of land for other than a residential use.

3.5.2.1. Relevance of the law

The Removal of Restrictions Act 84 of 1967 is applicable in Cape Town and Ethekwini. The Act requires that restrictions related and registered against the title deed of the land, those relating to the establishment of townships or to town-planning and any provisions of a by-law or of a regulation or of a town-planning scheme may be removed can be removed using the Act³¹. The Gauteng Removal of Restrictions Act, 3 of 1996 is used to remove, among others, conditions registered against a title deed or leasehold title, conditions imposed under any town-planning scheme, as well as conditions imposed under a land use control mechanism having the effect of a town-planning scheme³².

³¹ S2

³² S 2(a-d)

These laws are important because restrictions over land prevent the development of land, including housing projects, and a process of removing the restrictions often needs to precede the development of the land.

3.5.2.2. Dispute resolution

Contentious issues with regard to the laws are dealt with at the local government level through the respective Townships Boards. The decisions are transmitted to the MEC's who have the power to dismiss or uphold the decisions or appeals.

3.5.2.3. Effects on cost

These laws have considerable cost implications. In KwaZulu Natal, a substantive application has to be made to the Township Board which then considers the application, and subsequently makes recommendations to the MEC. The procedures that precede applications for removal of restrictions are fairly onerous. The Gauteng Act for instance requires that³³:

- The application is submitted in a form and accompanied by the documents as required by the local authority³⁴;
- bond holders consent if the land is encumbered by a bond;
- payment of a fee;
- publishing of a notice in the provincial gazette in two languages including English;
- publish a notice in English and one other official language in two newspapers circulating in the area. This notice has specific requirements with regard to content;
- Posting copies by registered post of the notice to owners of the land abutting upon or sharing a common boundary with that land and other persons specifically required by the local authority;
- placing a conspicuous notice on the land itself.

In addition to the above, if interested parties make objections to the removal, a hearing is often necessary. The need for a specialist professionals to deal with these considerable requirements is therefore necessary.

3.5.2.4. Effects on acquisition and trading

Formal applications for removal of restrictions commonly have to precede the development of land for housing. This regulatory requirement necessarily has an

³³ S5

³⁴ In terms of the regulations, there is a prescribed form as well as various other requirements such as those for copies of deeds and maps, written motivations, list of names and full postal addresses of owners of the registered abutting properties, sketch plans, zoning certificates, powers of attorney, company resolutions and so on (see Annexure 2 of the regulations).

impact on the eventual acquisition of the project beneficiaries to the land. It is also important that uses contemplated after acquisition of the land comply with the restrictions that have been imposed on the land. This may affect how the owner of the land trades on it as typically, restrictions will confine the type of activities that can be carried out on the land.

3.5.2.5. Effects on transacting the land

Apart from the fact that land restrictions and the need to remove them will affect the desirability of the land to the buyer (or mortgagor), the laws have little impediment to the transacting of land.

4. Deeds registry laws

Deeds registry laws in South Africa are concerned with the formal registration of ownership and other rights to land through a systematic system of public records. South Africa's modern practice of registration is based on the Deeds Registries Act, 47 of 1937. The importance attached to formal registration in the property law regime is, and has remained significant. It still represents the most secure and most distinguishable form of ownership (Miller and Pope, 2000). It is thus highly desirable, and even in the era of legal reform in the realm of property rights that accompanied the democratic dispensation, the trend still is to move from 'lesser' forms of rights to registration of full title. Further, the large-scale land and housing programmes initiated over the last ten years and more have had the ultimate goal of providing fully registered titles. Similarly, the far reaching legal reforms in land have, at their very heart, the historically established system of national deeds registration and its linked cadastral. Accordingly, the 1997 White Paper provided that one of the key issues of ownership during tenure reform was that '*land which is redistributed, restored or awarded to beneficiaries must be registered in one or other form of ownership*'.

4.1. Deeds Registry Act, 47 of 1937

4.1.1. Relevance of the law

The Deeds Registry Act is the primary vehicle through which ownership of land rights are acquired and transferred. The Act provides that '*ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar*'³⁵. The various forms of derived rights that the land reform process has created, for instance the DFA's formula for rapid acquisition and ownership of land through initial ownership and specialised deeds of transfer, all ultimately rely on formal registration through the Act. Un-alienated land, that is land that is unregistered and owned by the state also needs to go through the deeds registry system in order to be transferred to another person. The significance of the Act is apparent: all land ownership in South Africa is based on registration through the procedures and processes established by the Act.

³⁵ s 16

4.1.2. Security of tenure

Registration through the Act provides the most secure form of tenure to land. This recognition has driven the historically massive housing programmes in South Africa that have the ultimate aim of granting registered title.

4.1.3. Access to disadvantaged groups

The deeds registry system relies on specially trained individuals, mainly lawyers who specialise in conveyancing, to operate³⁶. These are expensive and not always easily accessible to the poor. It creates a substantial hurdle to acquisition of urban land, and more so for the urban poor. Indeed, most descriptions of conveyancing and other registration procedures point to their complexity, and call for a simpler systems when dealing with access to urban land for the poor (see for instance Royston, 2002). Further, as a reaction to this complexity, formal tenure procedures are often bypassed, and instead a mixture of traditional or customary, informal and illegal systems of land acquisition proliferate among traditionally disadvantaged groups. The positive side of the system is that successful navigation through the system promises a high degree of certainty as to ownership or other rights in urban land in the formal sector.

4.1.4. Dispute resolution

Disputes with regard to formally registered land are referred to the court system. There are no informal or localised procedures. Indeed it is through the judgements of this formal court system that the practices and procedures of deeds registration have evolved and found approval.

4.1.5. Effects on cost

Costs for registering ownership are substantial. These costs are traceable firstly, to the expenses incurred from the professional fees of mainly, lawyers. Secondly is the cost of the process itself. This includes fees to be paid at the registry, as well as costs incurred in order to meet the requirements of form³⁷. Thirdly, costs to be met in order to obtain fiscal documents. These are documents that prove that a person has paid all the necessary taxes, duties and fees payable to government agencies. They are typically receipts and certificates, and they have to accompany any transfer for it to be registered successfully³⁸.

³⁶ s 15 of the Act for instance requires that a deed of transfer be prepared by a conveyancer and that it shall not be registered by the registrar unless it has been prepared by a conveyancer

³⁷ This include costs of obtaining copies, granting powers of attorney, disbursements such as travelling costs to lodge the documents at the registry, etc.

³⁸ s 92(1). They include receipts proving payment of transfer duties and rates clearance certificates from local authorities.

4.1.6. Effects on acquisition and trading

Currently, the main way of acquiring land ownership in South Africa is through deeds registration. It thus represents the principal route through which the urban poor can acquire ownership to urban land. Registered ownership is not necessary for one to trade on land. This is because trading needs only a derived right not necessarily incidental to full ownership.

4.1.7. Facilitating access to government subsidies

The land and housing subsidy system revolves around the registered ownership of land. Housing subsidies are geared towards the eventual acquisition of formal registered title to land. Land reform grants, apart from a few exceptions, also target either the acquisition of registered title to agricultural land, or alternatively target registered owners of agricultural land³⁹. The proof of indigence to qualify for municipal subsidies is often based on the value of the property registered and owned. The formal registration system is thus a key ingredient to the qualification under the subsidy system.

4.1.8. Effects on transacting the land

Registering ownership to land facilitates subsequent transactions over the land through sales and mortgages for instance. Indeed, registered property is the sole constituent of the formal urban land market.

Since low cost housing programs that target the urban poor grant registered title, the fact of registration has been the principal method used to exert some form of control over subsequent transactions. The Housing Act prohibits the sale of a subsidised housing unit by the beneficiary or his/her successors within eight years after acquisition⁴⁰.

5. Housing Legislation

5.1. The Housing Act 107 of 1997

5.1.1. Relevance of the law

This Act represents the principle law through which the South African government's housing policy is implemented. It contains a set of principles that all spheres of

³⁹ The exceptions include for instance the Land Redistribution for Agricultural Development Grant which can also be used for obtaining equity in an existing agricultural enterprise as long as security of tenure is ensured.

⁴⁰ S 10A and 10B of the Housing Act.

government are obliged to adhere to. The principles are wide ranging, and cover many important aspects of housing development including the principle of participation; sustainable housing development; transparency and good governance; empowering communities; racial and social integration through housing; high density development; meeting of special housing needs, and so on.

Additionally, the Act endorses the need for a properly functioning housing market to enable creation of viable communities as well as broaden accessibility to housing. It states that the state must promote ‘the effective functioning of the housing market while levelling the playing fields and taking steps to achieve equitable access for all to that market.’⁴¹

5.1.2. Security of tenure

The Act elevates to principle level the need to provide as wide a choice of housing and tenure options as is reasonably possible. However, the implementation of housing programmes has been distinctly lacking in this ideal of variety and creating tenure options. Instead the roll out over the years has been biased towards formal titling.

5.1.3. Access to disadvantaged groups

The Act explicitly provides for housing for disadvantaged groups and has been implemented over the years with this particular goal in mind.

5.1.4. Effects on acquisition and trading

Apart from recognizing housing as a basic human need, the law does not directly provide for criteria to be used in determining who qualifies for access to state subsidised housing. The Act provides under section 4 that the state must create a national housing code that sets out housing policy. This in turn is where issues such as these are addressed. Over time, questions on access have centred around a number of matters including the long waiting periods qualified people are exposed to; the appropriateness of the qualification criteria and the exclusion of many deserving persons (for instance unmarried but deserving persons or those with higher income levels); and the failure to adequately provide for people in desperate and dire need.

There are no legal restrictions on using state provided housing for gain apart from restrictions on outright sale.

5.1.5. Facilitating access to government subsidies

The National Housing Subsidy program is implemented through the provisions of this Act.

⁴¹ Section 2(e)(v)

5.1.6. Effects on transacting land

The Housing Act is faced with the difficult task of striking a delicate balance between protecting the state's investment in housing and ensuring the beneficiaries of subsidies are protected on the one hand, and reaping the benefits of a land markets such as broader access to housing and appreciating asset values on the other. This is because often, taking advantage of these aspects of the market also exposes the poor to exploitation and high risks. The national Housing Minister when supporting changes to the Housing Act explained the problem:⁴²

“Government has invested billions of Rands in subsidised low-cost housing for the poor, mainly through the Government's Housing Subsidy Scheme. Yet some beneficiaries are selling or disposing of their houses at prices far below cost. Municipalities have also been selling these houses in execution where the beneficiaries have defaulted on payment for municipal services. The houses are generally sold in execution at a fraction of their building cost.

We have received numerous reports to the effect that the majority of the buyers of these houses are not poor people for whom the houses were built in the first place. We are also aware of houses purchased for cash or bought at sales in execution by gangsters and drug lords who either use the houses for their unscrupulous deeds or on-sell them at great profit.”

As a response to this, the state implemented restrictions to the sale of state subsidised housing. Through these, no beneficiary can, within a period of eight years, sell their house unless it has first been offered to the relevant provincial housing department.⁴³ There is no compensation provided by the province although the vacating person can qualify for a further subsidy. Involuntary sales, by creditors for instance, are also controlled, principally through the same requirement of a pre-emptive offer to the state.⁴⁴

Debate on this issue has persisted even after these amendments. Many have questioned the appropriateness of this response noting that by imposing these restrictions, the benefits of home ownership such as realisation of asset value and leveraging of finance in the market are either lost or difficult to enjoy. The practice of pre-emptive acquisition by the provincial authorities has further eroded the ability of homeowners to fairly obtain a fair monetary value on their homes as currently no compensation is provided, a fact that overlooks home improvements and appreciation of value. These criticisms resulted in further revisions to the Act being proposed, through the Housing Amendment Bill 2006. This Bill proposes to among others reduce the period of restriction from eight to five years. Further, a fairer process of acquisition of houses by the provincial authorities is proposed. This includes that the person vacating is entitled to a response from the provincial authorities within 60 days of presenting the offer in writing; that the person is entitled to a fair purchase price;

⁴² Speech by the national Minister of Housing Sankie Mthembu-Mahanyele on the Housing Amendment Bill, 2001, the National Council of Provinces (NCOP), 27 March 2001

⁴³ Requirement inserted through section 10A

⁴⁴ Section 10B

and that the provincial authorities may grant exemption from the requirements of presenting a pre-emptive offer to them when deemed necessary.⁴⁵

These series of amendments represents the legislative and policy process trying to resolve a dilemma. Because housing is often unaffordable, the state is forced to subsidise it for the poor. Subsidies are however invariably accompanied by restrictions which often eliminate much of the meaning of homeownership.

6. Legislation relating to resource conservation

This section examines laws with the underlying rationale of conservation and management of natural resources. These laws work mainly by requiring that evaluations and consents are obtained from the relevant authorities, before certain proposed developments which have an impact on natural resources such as agricultural land, ecosystems, protected species of flora and fauna, natural features, and so on are allowed. Consents can be denied if it is determined that the development can have a detrimental effect on the environmental resource concerned. However often, the development is allowed with attached conditions that require certain actions to be done to mitigate the effect of the development on the resource. These laws have considerable impact on the dynamics of the relationship of the urban poor with land because they are powerful determinants on the suitability and hence availability of land for development, the mode and type of use of land, and the cost of acquisition and development. They are also at the interface of the inevitable tension that arises between established often-affluent neighbouring communities, and the new, poor beneficiaries of land and housing projects.

- National Environmental Management Act, 107 of 1998
 - Regulations in terms of Chapter 5 of the National Environmental Management Act, R. 385 of 2006
 - Listing notices of activities and competent authorities identified in terms of sections 24 and 24d of the National Environmental Management Act, R. 386 and 387 of 2006
- Conservation of Agricultural Resources Act, 43 of 1983
- Subdivision of Agricultural Land, Act 70 of 1970
- National Heritage Resources Act, 25 of 1999
- KwaZulu-Natal Heritage Act, 10 of 1997

6.1. National Environmental Management Act, 107 of 1998

Also regulations in terms of Chapter 5 of the National Environmental Management Act, No. 385 of 2006; Listing notices of activities and competent authorities identified in terms of sections 24 and 24d of the National Environmental Management Act, No. 386 and 387 of 2006

⁴⁵ Proposed amendments to section 10A

6.1.1. Relevance of the law

The National Environmental Management Act (NEMA) is the principal legislative framework that ensures the protection, promotion and fulfilment of the rights entrenched in the environmental clause under section 24 of the Bill of Rights. It is a national law applicable through out the Republic. It contains a set of principles which serve as guidelines that should inform any organ of state's exercise of a function when taking any decision that concerns the protection of the environment. More importantly, NEMA provides for environmental related approvals for development. Activities that have a potential to impact on the environment, socio-economic conditions, and cultural heritage require authorisation, which is granted only upon evaluation of the said impact (commonly referred to as an Environmental Impact Assessment (EIA)). The procedures and processes for EIA evaluations are provided by regulations R. 385 of 2006, and the activities requiring evaluation are listed by two sets of regulations; R. 386 and 387 of 2006 (listing notices). Provincial authorities are in the process of supplementing the listing notices by mapping geographical areas based on environmental attributes in which specified activities may not commence without environmental evaluation.

NEMA evaluations are required for a number of activities that are commonly associated with the urban poor acquiring land. A number of examples include⁴⁶:

- Development and infrastructure provision larger than a certain area;
- Transformation or removal of indigenous vegetation, especially so if the ecosystem is endangered;
- Abstraction of groundwater;
- Construction of certain types of roads;
- Transformation of undeveloped and vacant land to establish infill development or to create residential uses;
- Subdivision of portions of land into portions;
- Transformation of areas zoned for use as public open spaces or conservation to another use.

From the above activities, it is clear that it is highly likely that formal acquisition and development of land for the urban poor will have to undergo an evaluation.

6.1.2. Security of tenure

While NEMA provides for the protection of the environment, it does not create threats to the urban poor through evictions for instance, as was common prior to the democratic dispensation.

⁴⁶ The scale and area affected in these activities is often a factor.

6.1.3. Dispute resolution

NEMA has elaborate dispute resolution mechanisms, including conciliation and arbitration. Additionally, EIAs are appealable to the Minister or MEC in charge of the environment in the province. The appeal process is fairly intricate and will necessarily entail the use of an EAP⁴⁷ or other professional. It is strictly time bound, and requires timely lodgement of various documents. It is very procedural with specific requirements for various notices to be lodged such as notices of intention to appeal, mandatory service to all interested and affected parties, use of prescribed forms, and prescribes detailed content requirements such as grounds of appeal and statements of compliance. It is also highly structured, with sequential submissions and counter submissions. Finally there are fee requirements in addition to the costs of the above processes⁴⁸.

6.1.4. Effects on cost

The NEMA process is a contributing factor to the cost of the land acquisition and development, and is lumped up as part of the 8% total administrative cost, to be allocated from housing subsidies in government low-income housing projects. An EIA process must be carried out by an EAP, who is required to be a professional capable of planning, management and coordination of EIAs. Depending on the location and the type of development, EAPs will often manage a large team of specialists typically, geologists, social scientists, heritage conservationists, zoologists and botanists, who will carry out various specialist studies.

EIA's are thus inherently complex processes and both resource and skill intensive. They are also often contentious because of the limits of knowledge on environmental issues, typified by NEMAs call for 'risk averse' approaches. This is often a useful entry point for resistance by well-resourced communities hostile, to low income development within their areas. One consequence of this is that costs often escalate and can have a crippling effect on projects, especially if they are within strict budgets such as those driven by government subsidies. This has created a lot of frustration within government quarters and has driven recent reform initiatives, such as the new regulations, whose success will be clearer with time⁴⁹.

6.1.5. Effects on acquisition and use of the land

The effect of NEMA on acquisition of land is mainly through need for an EIA for certain activities often associated with land acquisition and development. As noted, EIAs can present a formidable hurdle, through their technical, cost and time requirements, which often makes land acquisition a difficult process.

⁴⁷ Environmental Assessment Practitioner

⁴⁸ For detailed requirements see chapter 7 of Regulations in terms of Chapter 5 of the National Environmental Management R. 385 of 2006.

⁴⁹ EIA's have repeatedly come under criticism from some quarters of national government for failing to be sensitive to developmental needs, and elevating environmental issues above development concerns such as the need for housing.

The use of land for income generating purposes will fall within the ambit of the requirements for EIA if the activity is a listed one. Activities such as land sub-division, groundwater abstraction, removal of indigenous vegetation may require an EIA and possibly have an effect on the ability of the urban poor to successfully use and generate an income from urban land. However, more likely than not, the listed activities are large-scale industrial type of activities, not associated with survivalist income generating activities commonly associated with the urban poor⁵⁰. Instead, municipal by laws and health regulations are more important.

6.1.6. Participation

Being fairly recent legislating, NEMA emphasises the importance of participatory processes. The EIA process for instance has extensive requirements for participation, including: requirements that prescribe the opening and maintenance of a register of all interested and affected parties whose objections and representations must be considered; sufficient time should be provided for comment; and details of the public participation processes carried out at various stages of the EIA process such as what steps were taken for notification, proof of notice board announcements, lists of all persons, organisations and organs of state consulted etc, must be provided whenever various applications are submitted. Further, all decisions have to explicitly consider representations made by the public. The regulations also prescribe the methodology for public participation to great detail, including on-site requirements such as notice boards, advertising requirements, and the parties to be consulted⁵¹. While the consultation process is appropriately comprehensive, affluent communities intent on stalling low cost housing projects often abuse it.

6.2. Conservation of Agricultural Resources Act, 43 of 1983

6.2.1. Relevance

CARA regulates the control and use of land for agriculture. The long title of the Act provides for the ‘... control over the utilisation of the natural agricultural resources in order to promote the conservation of the soil the water sources and the vegetation’. While as implied by the name of the Act, it is applicable to agricultural land, often, peri-urban developments such as low cost housing developments encroach on agricultural land and therefore fall under the ambit of the Act. The Act is applicable across the country, although the Draft Sustainable Utilisation of Agricultural Resources Bill, 2003 compiled by the Department of Agriculture, has slated it for repeal.

⁵⁰ For instance, EIAs would be required for large scale fuel trading such as filling stations industrial scale, husbandry and slaughter of domestic animals, aquaculture, storage and recycling of waste etc.

⁵¹ For the detailed public participation process see chapter 6 of Regulations in terms of Chapter 5 of the National Environmental Management R. 385 of 2006.

In terms of CARA a number of land use and agricultural production practices are prohibited or controlled in order to prevent soil erosion and other harmful effects of some agricultural practices. For example, it is forbidden to plough 'virgin', i.e. previously unploughed, land without the written permission of the Minister of Agriculture. This law is of relatively marginal importance because in practice, few of these controls are currently enforced.

6.2.2. Effects on cost

The main effect that CARA has on the cost of land development is in the rare instances where the Minister prescribes 'control measures' in order to mitigate the effects of the development on agricultural land. These measures will target issues that touch on the cultivation and development of virgin soil, the utilization and protection of land which is cultivated, and the utilization and protection of the vegetation. The extent of these measures is determined by the kind of development and the resources targeted by the development.

6.2.3. Effects on acquisition and use of the land

Depending on the kind of 'control measures' prescribed, there may be some restrictions on the use of the acquired land.

6.2.4. Facilitating access to government subsidies

CARA provides for subsidies to owners of land for conservation activities. These are however associated with agricultural activity and rarely applicable to urban land dwellers⁵².

6.3. Subdivision of Agricultural Land, Act 70 of 1970

6.3.1. Relevance of the law

The underling rationale behind the Subdivision of Agricultural Land Act is the need to conserve the economic viability of individual units of land for agriculture. It was assigned to all the provinces, Gauteng, KwaZulu-Natal and Western Cape included, although it is rarely used in KwaZulu-Natal and the Western Cape. Originally, agricultural land referred to land outside, the jurisdiction of local authorities, proclaimed townships or development trust land. The introduction of wall-to-wall municipalities has meant that today, it imprecisely applies to 'new land' for development in 'peri-urban' areas.

⁵² For instance the construction of soil conservation works, the reparation of damage to the natural agricultural resources, the restoration of damaged land, the planting and cultivation of particular crops, the combating of weeds or invader plants etc (s 8(1)(a)).

Among the relevant provisions of the Act are among others, that agricultural land shall not be subdivided nor development area or peri-urban area or other such area established on, or enlarged so as to include, any land which is agricultural land⁵³, without the consent of the national Minister of Lands.

6.3.2. Effects on cost

The consent process, which often accompanies the entire township establishment process, requires the appointment of professionals such as town planners. They are the main contributors to the process being expensive and out of the reach of the urban poor.

6.3.3. Effects on acquisition and use of the land

Applications are submitted to the provincial government which investigates the applications, thereon making recommendations to the National Department of Agriculture In Pretoria. At provincial government level, the application is referred to local government for conditions to be placed on approval. Further, the Act provides that the Minister may require that application be accompanied by any necessary plans, documents and information. The effects on acquisition are therefore significantly adding to length of time associated with land acquisition and development.

7. Legislation related to property taxes

Formal ownership of land creates financial liabilities in the form of taxes. Land taxation is done through the old rating ordinances. These are:

- In the Western Cape and Cape Town the Property Valuation Ordinance, 148 of 1993 regulations relating to the valuation of properties in local authority areas and matters pertaining thereto, R. 619 of 1993;
- In Gauteng and KwaZulu-Natal the Local Authorities Rating Ordinance, 11 of 1977 and Local Authorities Rating Regulations, R. 1446 of 1977.

Another form of tax incidental to land ownership is triggered upon transfer of ownership. This is through the transfer duties imposed by the Transfer Duty Act, 40 of 1949.

There are proposed changes to the local government rating system through the Local Government: Municipal Property Rates Act, 6 of 2004 which has repealed the above ordinances, but whose implementation is pending the creation of new valuation rolls. This Act, among others, creates one uniform system for rating land in South Africa, creates a much more extensive list of person exempted from rate payments, and provides for a municipality to determine its own rating policy in consultation with the public. This policy determines how rates are levied in the municipality, and from whom, in order to address developmental concerns.

⁵³ S 3

Property taxation systems are important in the examination of the urban land market principally because they influence the affordability of owning and transacting in land.

7.1. The property rating ordinances

These are the Property Valuation Ordinance, Proc. 148 of 1993 Regulations relating to the valuation of properties in local authority areas and matters pertaining thereto, R. 619 of 1993 (applicable in Cape Town) the Local Authorities Rating Ordinance, 11 of 1977 and Local Authorities Rating Regulations, R. 1446 of 1977 (applicable in Gauteng and KwaZulu Natal).

7.1.1. Relevance of the law

The rating ordinances determine the method through which property taxes are imposed by local authorities in the respective provinces.

7.1.2. Security of tenure

With the comprehensive laws that guarantee tenure security especially to the poor such as PIE, there is minimal threat of rates arrears being used as a basis for eviction.

7.1.3. Access to disadvantaged groups

The rating ordinances generally provide for exemptions to certain classes of land users. In practice, these include religious and education institutions, welfare organisations and social type service organisations such as privately owned sporting clubs. This is achieved through full exemption, rebates or grants-in-aid. These exemptions are a product of the era in which the ordinances were enacted and reflect the priorities of the then ruling elite. Their failure to expressly provide for the most needy, that is the urban poor, has prompted the current reform initiative. The Local Government: Municipal Property Rates Act thus expressly provides for exemptions for these kind of property owners from paying municipal rates, including:

- indigent owners;
- owners dependent on pensions or social grants for their livelihood;
- owners temporarily without income;
- owners of property situated within an area affected by a disaster or any other serious adverse social or economic conditions;
- owners of residential properties with a market value lower than an amount determined by the municipality;
- owners of agricultural properties who are bona fide farmers.

The Act, while in force, will only be fully implemented with the creation of new valuation rolls.

7.1.4. Effects on cost

Rating creates a cost incidental to ownership of land. There are provisions for exempting the indigent from the payment of rates. This has been implemented in the past in the absence of comprehensive policies, a situation the new rating act intends to remedy.

7.1.5. Facilitating access to government subsidies

Often, property owned by the urban poor entitles them to tax relief under a package of municipal services subsidies, which additionally encompass a fixed amount of free water and electricity, refuse removal and sanitation and as well as accumulated debt write offs. These have been recently introduced and increasingly implemented in many municipalities.

7.1.6. Effects on transacting the land

Transfer of registered ownership is only possible once the owner proves that the rates have been paid to the local authority, or that arrangements have been made to the satisfaction of the local authority or exemption has been granted for the outstanding sums⁵⁴. Further in practice, local authorities require that rates are paid sometimes six months in advance before land can be sold. This can have detrimental effect on the poor by preventing transfers of land, especially if they are in arrears of payments to local authorities.

7.2. The Transfer Duty Act, 40 of 1949

The main impact of this law is that it imposes costs on transacting in land. The tax is payable upon the transfer of ownership. The Act does provide for some exemptions for instance exemptions to ecclesiastical, charitable and educational institutions, land acquired by state or state bodies and land acquired by heirs. However, it is important to understand these exemptions in the political context of which they were provided, which effectively meant that they invariably benefited an elite few. Progressive legislative developments through the DFA have partly addressed this legacy by specifically targeting land development for the poor, exempting it from transfer duties⁵⁵.

8. Legislation related to tenure security

One of three pillars of South African land reform was tenure reform⁵⁶. Tenure reform targets the way in which land is held and acquired, specifically strengthening the legal rights of various landholders and easing the process of acquiring land rights. It especially targeted the tenuous rights to land and weak legal basis available to certain

⁵⁴ s 63(2) of the Deeds Registry Act

⁵⁵ s 64(8)

⁵⁶ The other two were redistribution and restitution.

communities, which were the basis for the discriminatory land laws of the apartheid regime. The following laws are relevant for our purposes:

- Prevention of Illegal Eviction from Unlawful Occupation of Land Act, 19 of 1998
- Interim Protection of Informal Land Rights Act, 31 of 1996

8.1. Prevention of Illegal Eviction from Unlawful Occupation of Land Act, 19 of 1998

The Prevention of Illegal Eviction from Unlawful Occupation of Land Act (PIE) can be seen as a substantiation of the Constitutional right against arbitrary evictions. It is intended to reverse the Apartheid legacy of forced removals and evictions, which left its victims impoverished and insecure. By introducing rigorous controls and benchmarks for evictions, the Act aims at promoting greater security of tenure to occupiers of urban and rural land, irrespective of their legal right to occupy the land.

8.1.1.Relevance of the law

PIE applies in respect of all land throughout the Republic⁵⁷. It is used to regulate evictions by affording protection to unlawful occupiers or squatters in the context of the exercise of property owners of their proprietary rights. By introducing rigorous controls and benchmarks for evictions, the Act aims at promoting greater security of tenure to occupiers of urban and rural land.

8.1.2.Security of tenure

The Act has promoted greater security of tenure to occupiers of urban and rural land, irrespective of their legal right to occupy the said land through its procedural and substantive rigors for evictions. PIE requires that the unlawful occupiers are served with a notice by the court, upon which they may attend a hearing. Should the court be satisfied no valid defence has been raised by the unlawful occupier, it will grant an eviction considering that it is ‘just and equitable’ and ‘all relevant circumstances’ have been taken into account⁵⁸. PIE has also had the effect of decriminalising illegal occupation of land, in direct contrast to the previous legal regime with laws like the Prevention of Illegal Squatting Act. It also ensures that informal and illegal occupiers of land are provided suitable alternative accommodation before eviction

⁵⁷ S 2

⁵⁸ s 4(8)

8.1.3. Access to disadvantaged groups

The Act especially focuses on the plight of the rights of the elderly, children, disabled persons and households headed by women⁵⁹. The rights of these vulnerable groups especially circumscribe court action when coming to a decision to evict or not to evict. For instance courts have been prepared to assume the existence of these persons amongst families slated for evictions despite the lack of information on this fact⁶⁰.

8.1.4. Delivery of infrastructure

The tenure security provided is not extended to service delivery to the informal occupiers because they are outside the formal housing delivery system. Increasingly however, PIE has forced housing authorities to re-examine their housing delivery program and integrate the informal occupiers into it.

8.1.5. Dispute resolution

The formal court system is used for dispute resolution.

8.1.6. Effects on cost

The fairly hefty costs of eviction and relocation and resettlement have often discouraged both the landowners and the authorities from effecting the relocation. This in effect leaves the plight of the poor in limbo, and while allowing some form of tenure security, the Act does not provide concrete access to proper housing. Recent court judgements have provided that the costs of relocations imposed on private landowners are in fact to be borne by government⁶¹. However this has not automatically happened because according to many authorities such costs (which will necessarily entail things other than simple relocation such as land acquisition and basic service provision) are not within their housing budgets.

8.1.7. Effects on acquisition and trading

PIE may provides tenure security to occupiers of land not ownership rights. Any trade activities on the land will have to be informal and may be outside the law. PIE may however hasten the process of acquiring land if the illegal occupiers are recognised and incorporated within the state housing programs.

⁵⁹ Preamble to the Act.

⁶⁰ Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Another [2001] 1 All SA 381 at 391

⁶¹ Modder East Squatters and Another v Modderklip Boerdety (Pty) Ltd (unreported) Supreme Court of Appeal Cases 187/03 and 213/03, at 43, judgement delivered on the 27th of May 2004.

8.1.8. Facilitating access to government subsidies

The Act has created an important nexus between the illegality of the actions of unlawful occupiers of land and the larger state responsibility towards providing for the housing right of the citizenry. It has often forced housing authorities to re-examine their housing programs in the light of court judgements under the Act. It may thus hasten the process of the poor obtaining housing and other subsidies, especially if the landowner challenges the government to deal with the illegal occupation, although this has been disparaged as ‘queue jumping’.

8.1.9. Effects on transacting the land

Land occupied by the informal settlers cannot be formally transacted (sold, inherited or mortgaged) as they are not the registered owners. PIE does not provide *de jure* ownership to land for the poor until they are relocated or the land is expropriated and they are then included in a formal housing program

8.2. Interim Protection of Informal Land Rights Act, 31 of 1996

This Act was enacted to provide for the temporary protection of people holding ‘informal’ land rights, broadly being those created by customary or indigenous law. This was aimed at ensuring that, while the policies and processes of land reform were being finalised, the ensuing atmosphere in anticipation of this reform did not threaten the rights of vulnerable land occupiers. These rights are available in an urban setting, where the land falls under the jurisdiction of customary law. In order for the protection of the Act to apply, the occupation has to have gone on for a period of not less than five years prior to 31 December 1997. The Act was intended to be an interim one, subject to extension annually, which was last done for the period ending 31 December 2006.

9. Personal law

These deal with among, others matrimonial property rights as well as rights of inheritance. Their main influences on the land market are their regulation of how children and surviving spouses inherit land.

A number of laws regulate matrimonial rights in South Africa. The Matrimonial Property Act of 1984 and the recognition of Customary Marriages Act 120 of 1998 are some key ones.

Previously, prior to the Matrimonial Property Act, failure to enter into a valid antenuptial contract deemed the marriage to be in community of property, and the wife was subject to her husband’s marital power. The estate in effect was under the control of the husband despite relative contributions made during the marriage. They shared equally in the profits, and the joint estate was liable for all the debts of the parties. In short, each of the parties was entitled to an undivided half share in the joint estate. To this extent, the wife was assured of a share in the estate, though it was the

husband alone who exercised full control over the joint estate that is to contract on the estates behalf. The Matrimonial Property Act created a new type of community of property by allowing both husband and wife to have equal rights of administration over their joint estate, and by introducing the accrual system as part of the new standard form of *ante nuptial* contract⁶².

The Recognition of Customary Marriages Act requires that all customary marriages occurring after the law comes into force⁶³ will be in community of property. This allows rules of equitable marriage relationships between men and women to apply, and creates equal capacity and full status to acquire assets and dispose of them, and enter into contracts and litigate. Further, all future customary marriages are similarly automatically in community of property. However, the devolution of estates of customary marriages in existence *before* the commencement date of the Act still fall under customary law.

It has been argued that the legislative provisions do not reflect the *de facto* positions of women, especially under customary law. Further, when and where customary law legally applies, for instance in devolution of estates of marriages before the Recognition of Customary Marriages Act, it is generally biased against women (Liebenberg and O'Sullivan, 2001; Mbatha 2002). Customary laws of succession for instance are often based on the rule of male primogeniture, which requires that the male heir of a deceased benefit. The courts have additionally often found in favour of rules of African customary intestate succession, despite the fact that male primogeniture discriminates between men and women. Additionally, the formal or recognized systems above, which while flawed have assisted in protecting women's rights, may not be reflective of the situation of women in informal or quasi legal situations, typical of the urban poor.

In terms of succession, all children of dead persons including legitimate or illegitimate can inherit a deceased property.

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⁶² In the accrual system, both spouses are in principle during the subsistence of the marriage independent, but it is only at the dissolution of the marriage that they share in the accrual accumulated by each other during the marriage. This sharing is based on the principle that in most marriages, both spouses make a contribution in various forms to the accumulation of assets during the subsistence of the marriage.

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