

Post Conflict Land Regularisation in Edendale and Fit-for-Purpose Tenure Administration

Michael BARRY, Canada

Key Words: Regularisation; land title adjustment; fit-for-purpose; land tenure support, land grabbing.

Summary

The paper reports on land title adjustment (LTA), or land regularisation, in Edendale South Africa within the concept of fit-for-purpose strategy and policy. Edendale is a suburb in the Msunduzi Municipality, KwaZulu-Natal. Dating back to the mid-19th century, Edendale was one of the first places in southern Africa where indigenous Africans could hold land in registered ownership (freehold) under British colonial rule. As the urban footprint expanded, residents in the surrounding suburbs in the Greater Edendale Area could only hold land under Deeds of Grant and Permission to Occupy certificates in terms of racially based legislation that preceded the apartheid era from 1948 to 1994. Cloudy titles emerged in much of Edendale. Heirs did not register their parents' land and properties were sold off-register. In addition, violent conflict between supporters of Inkatha and the United Democratic Front during the last decade of the apartheid era compelled displaced people to settle on private land. Land grabbing by former tenants and through organised invasions has also been a major problem. The consequence is many properties were frozen for development. The municipality introduced a programme to clean up the titles and expropriate many of these properties to formalise development. The national government implemented land title adjustment programmes to facilitate this.

Fieldwork included 42 interviews involving a total of 51 people. Interviewees included land title adjustment commissioners, field workers, lawyers, land surveyors, officials, land professionals, politicians and homeowners.

The LTA process involves a commissioner calling for claims on specific properties, hearing evidence, making an award and dealing with objections. In general, the commissioners indicated that the process has worked well. However, poor governance and administrative inefficiencies hampered the programme. In addition, conflicts arose within families over whose names should appear on the new titles and how to deal with the rights of those whose names were excluded.

LTA programmes are a reaction to people not using the registration system. They may work well, but they are expensive and inefficient. Fit-for-purpose policy and strategy might include programmes that provide tenure maintenance strategies to reduce the incidence of cloudy titles rather than attempting to rectify situations after the fact.

1. INTRODUCTION

The paper examines land regularisation, locally known as land title adjustment (LTA) in terms of the Land Titles Adjustment Act 111 of 1993 (LTA Act 1993), in Edendale, Kwazulu-Natal, South Africa. Edendale was a local theatre for conflict between rival groups in the decade leading up to the end of the apartheid regime in 1994.

In a utopian world, a fit for purpose land administration system should suit local circumstances and address the needs of the majority and the interests of vulnerable sectors of society in each local community in a ways that best balance the tension between economic opportunities and the protection of human rights. As Walker observes, it is trite that land problems are complex problems (Walker 2008). The real problem from a tenure administration perspective is that state institutions are generally ill equipped to deal with these complexities. Overly simple solutions to tenure administration can lead to expensive remedial programmes down the line or outright intractable problems stemming from human rights abuses.

In simple terms, a fit-for-purpose land tenure information system (LTIS) is one that residents use if it is to be effective. When landholders transact in land through selling, gifts or inheritance, if they do not register titles or other keep other forms of tenure certificates up to date to reflect current tenure rights, the implications of that behaviour needs to be considered before a titling or certification programme is implemented. In the case of land titles, off-register transactions can freeze the formal land market, the authorities cannot tax land, provide services, expropriate land or approve building plans if affected titles are cloudy and the de facto owner is not the de jure owner (Barry and Roux 2016a). A risk of issuing either titles or certificates of tenure is that powerful individuals within a family or a community may grab land and sell it from underneath the legitimate owners (Barry and Danso 2014, Barry 2019, Muthama et al 2019). Mitigating these risks is possible. However, one case study of community based land records that the author has studied where certificates of occupation were used suggests that to be successful it requires a great deal of ongoing community organisation development and participatory development planning and administration to achieve this (Barry and Kingwill 2020).

Edendale is a qualitative case study (Barry and Roux 2013). The research method included historical method, 3 days of observing land regularisation process in a state-subsidised housing project, 32 key-informant interviews and group discussion sessions, 10 resident interviews, and an examination of published literature and documents provided by key-informants

2. EDENDALE HISTORY

2.1 Early History

Edendale has its origins in registered property as a mission station on the on the 6123 acre farm Welverdiendt. The first person of European descent to own the Welverdiendt farm was the Voortrekker leader, Andries Pretorius. The farm was registered as a land grant from Queen Victoria after the British annexed Natal in 1842 and started registering land grants in 1846 (Jones 1964, Bundy 1979, Meintjies 1988, ELRA 2012). The Voortrekkers were colonists, primarily of Dutch and French descent, who had moved into Natal, what is now the KwaZulu-

Natal province to get away from British rule in the Cape of Good Hope (Bundy 1979). Reverend James Allison led an ethnically diverse Christian community of 100 families (500 people) of Griqua, Rolong, Sotho, Tlokwa, Hlubi and Swazi origins who established a mission at Edendale in (Meintjies 1988). The mission group purchased the farm in instalments in undivided shares in the names of the community members on the understanding that the land would be transferred as individual parcels once the farm had been paid off (Msimang 1975). When the Christian community occupied the farm in 1851, the land was surveyed and divided into a central village, outlying arable fields of approximately 1 acre, and commonage for grazing (Meintjies 1988). In 1855, the farm was renamed Edendale after the Valley of Eden. In the same year, the mission itself was named Georgetown, after Sir George Grey, the Governor of the Cape of Good Hope, who visited Edendale, supported the initiative and personally provided loans to buy the farm (Msunduzi Municipality, 1992). A number of the current land owners can trace back their history to these first landholders (Meintjies 1988).

The first individual deeds were registered in 1861 (Cowie 2001). Unallocated land was placed in a Trust in 1861 by notarial deed, which was finally registered in 1891. The remainder of the original farm Edendale 775, as it is now known, is still registered in the name of James Allison, as per title deed T300/1855. It included the roads, cemeteries, commonage for grazing, and the old market square (Meintjies 1988, Cowie 2001). The Trustees were responsible for the management of unallocated portions of the farm, the preservation of the commonage, graveyard, market place, roads and paths. The Trustees could claim rates from landowners to administer these, and the Trust administered “old” Edendale or “Edendale proper” until 1941 when the Natal Local Health Commission took over from them (Meintjies 1988, ELRA 2012).

Edendale was one of the first places in southern Africa where black Africans could own registered land under as colonial regime (Meintjies 1988, Mkhize 2015). For a brief period, between 1856 and 1865 black landowners could vote for government representatives on an equal footing with whites in Natal (Ancestors South Africa ND).

2.2 Racially Based Land Tenure and Spatial Planning

After the Anglo-Boer war ended in 1902, the Union of South Africa amalgamated the two former Boer republics of the Transvaal and the Orange Free State with the existing British colonies of Natal and the Cape of Good Hope (also known as the Cape Colony) in 1910. After Union, racially based land tenure administration, law and spatial planning hastened the erosion of rights of South Africa’s indigenous populations. Relevant to Edendale, the 1913 and 1936 Black Land Acts restricted black Africans to Deeds of Grant and Permission to Occupy certificates (PTOs) owned by the state in the form of the South African Development Trust (SADT) in scheduled and released areas. Only black Africans could occupy land and transact in land in these areas (Black (Natives) Land Act 27 of 1913, Development Trust and Land Act of 1936, Feinberg 1993). These acts laid the foundations for the apartheid system when the National Party came to power in 1948 (Wickins 1981). The National party introduced the Group Areas Acts which had far reaching effects. The legislation introduced racial zoning, i.e. group areas for specific racial groups, and prevented interracial property transactions altogether.

Under the apartheid system people were forcibly removed into their group area classifications. In KZN alone, an estimated 105,000 black freeholders lost their land through forced removals (AFRA 1991).

Edendale expanded and the area that was on mission land became known as Edendale proper, and the areas that it expanded into became known as the Greater Edendale Area (GEA). Land in the GEA outside of Edendale proper was allocated under Deeds of Grant or PTOs by the SADT. Edendale proper survived the forced removals and land remained under ownership (Cowie 2001).

However, the GEA now had three different forms of tenure administered by different authorities. Land in Edendale proper was held under title deeds registered in the Deeds Registry. Land in the rest of the GEA was held under Deeds of Grant or PTOs administered by SADT organisations. In the 1980s, as the apartheid laws were relaxed, 99 year leaseholds were registered in the rest of the GEA in the Deeds Registry. When the apartheid system ended in 1994, the challenge was to bring these disparate tenure forms and record systems under one roof (Cowie 2001).

2.3 Conflict

The African National Congress (ANC) was at the forefront of the anti-apartheid movement and was voted into power in the first democratic elections in 1994. Edendale was a theatre for conflict between the United Democratic Front (UDF) and Inkatha, later to become the Inkatha Freedom Party (IFP) – a national political party after 1994, as part of the armed struggle against the apartheid system. At one stage Chief Mangosuthu Buthelezi, a Zulu traditional leader, had close ties to the ANC, and he was a member of the ANC youth league (Mkhise 2015). Buthelezi broke from the ANC and formed Inkatha in 1975, which advocated a Zulu ethnic identity. Hostilities between the ANC and Buthelezi ensued (Maré and Wright 1994, Mkhise 2015). In 1983 the United Democratic Front (UDF) formed as a front organisation for the (at the time) banned African National Congress (Jarstad & Höglund 2015). Armed conflict between the UDF and Inkatha followed (Mkhise 2015).

The most severe conflict was the Seven Days War which started on 25 March 1990. While tensions and violence had simmered for years, the immediate catalyst was UDF supporters provoked Inkatha supports at a rally in Durban, and three people were killed in the ensuing clashes. On Sunday 26 March 1990, 2500 armed IFP supporters advanced from Vulindlela into the lower Edendale Valley, where they fired on residents, and burned and looted houses. They attacked non-Inkatha areas in Greater Edendale, including Caluza, kwaNyandu, Imbali and Mpophomeni (TRC1998a, Manda 2013 citing Levine 1999).

According to the Truth and Reconciliation Commission many of those who were forced to flee were left with nothing from their time before the conflict as their houses and possessions were destroyed in the conflict. Seven days after the conflict started over 100 people had been killed, some 3000 houses had been destroyed by fire, and approximately 30,000 people fled their homes because of the violence. The vast majority of the people killed and injured were from

the non-Inkatha areas, and the major proportion of the property damaged burned and looted belonged to non-Inkatha supporters (TRC1998b, p475).

The Truth and Reconciliation Commission (TRC) found that members and supporters of the IFP aided and abetted by sections of the state's security forces were responsible for committing "gross violations of human rights" in the Seven Days war. The vast majority of those killed, injured, had their homes looted, and who were displaced were non-Inkatha supporters. Witnesses testified that "police provided buckets of ammunition to the armed attacking combatants", and uniformed and armed special constables assisted IFP vigilantes. Inkatha did not participate in the TRC hearings. However, policemen and other members of the security forces did testify, and their testimony supported the TRC findings (TRC 1998b, p 475-476, 625-627).

A number of planning and land administration challenges stem from the seven days war and the conflict in general. According to the Msunduzi Municipality, people were evicted from their homes for being affiliated with the "other" political party. In addition, as many as 10,000 squatters and internally displaced people (IDPs) had moved in to Edendale from outlying regions by 1992 in order to avoid conflict in those areas. Many of them were encouraged to squat on undeveloped former SADT land as they knew they would be accommodated (Msunduzi Municipality, 1992).

The actions of Harry Gwala, an ANC leader, have had a lasting impact on land tenure administration in Edendale. Gwala was at various stages a teacher, a union organiser, a member of the South African Communist Party, the Liberal Party and the ANC. He spent long periods in prison on Robben Island. Documents provided by participants in the field indicate that he was poisoned in prison, and consequently he was paralysed in both his arms and his legs (Int #127). People who had been involved as leaders in the ANC during the violence recalled how Harry Gwala asked landowners to accommodate people displaced by the Inkatha attacks, the internally displaced people (IDPs). The IDPs were given land to rent. Gwala, however, apparently told them they did not have to pay rent: "Don't pay rent. The land belongs to God"(Int #124). He also challenged land ownership. "If you find a space then build. If owners produce a title deed, then ask them for their title deed from God. Only God can have a title." (Int #127).

The conflict thus created a number of tenure challenges. Firstly, there were IDPs who refused to move. In addition, people invaded land on the pretext that they could claim title to it. Thirdly, people renting from landowners stopped paying rent and laid claim to title to the land.

In addition, as can be expected in a post-conflict situation, land governance was poor. Corruption in the province and the Msunduzi municipality was rife. In addition, managers were appointed to technical positions for which they were not qualified (IOL 2010, Peters S 2016, Int #116, 131). Political violence, including assassinations, occurred across the province. Politicians being involved in corruption, patron-client relationships and the access to government tenders that political office presented can explain much of this (Moerane Commission 2018, Int #131).

2.4 Tenure Challenges and Cloudy Titles

The conflict underlies a number of tenure challenges. However, cloudy titles preceded the conflict. Apart from problems they may create for landholders, cloudy titles pose problems for the provision of water, sewerage, roads and stormwater services. In summary, drawing on the literature and interviews (8 residents who had had their land grabbed and key informants), the following are some of the challenges that landowners and the municipality faced in relation to private property and state owned vacant land.

1. Dead man's titles, or cloudy titles, were identified as a problem in the 1980s when state institutions could not expropriate land to install roads and engineering services as the titles were cloudy. This was due to unregistered inheritances and off-register sales (Green 1994). These cloudy titles preceded the conflict-induced dead man's titles as some of them dated back to the early 20th century. The phenomenon may be caused by a combination of cost factors and socio-cultural factors; i.e. de facto, the titles are family titles.
2. Some IDPs did not move off private property after the 7 days war, and later laid claim to title to the land.
3. Existing tenants stopped paying rent and they also laid claim to the land; at times they quoted Harry Gwala. Consequently, landowners could not pay rates and other municipal fees.
4. There have been ongoing organised large-scale land invasions, often on land acquired for housing. Allegedly, often with the tacit support of elected municipal councillors.
5. Traditional leaders who had agreed to a caretaker role over land registered in the names of private individuals during the conflict sold off the land in spite of agreeing to a fiduciary role as a caretaker.
6. Municipal councillors sold or gifted privately owned undeveloped land to friends and acquaintances. Landowners lack the funds to take the matter to court and they also fear for their own safety if they pursue the matter.

Consequently, the Msunduzi municipality was acquiring these properties to formalise development. The first step was to clean up any cloudy titles using the Land Titles Adjustment Act 111 of 1993 (LTA Act 1993) and then expropriate the land.

3. LAND TITLES ADJUSTMENT

Aside from 19th century acts which addressed derelict land, the Black (Native) Administration Act 38 of 1927, s.8., was the first legislation to make provision for title adjustment – the re-adjudication of title in the case of “dead mans’ titles”, where the original registered owner had died or had sold the land off-register. Parallel legislation, the Land Titles Adjustment Act 38 of 1979 applied to white- and Asiatic-owned land. This had the same intention as the 1928 Act, but was more complicated in execution. The Land Titles Adjustment Act 111 of 1993 repealed both of these racially based laws as the apartheid system ended (Warner ND).

The LTA process in terms of the LTA Act of 1993 is as follows.

- The national government minister responsible for land tenure designates an area where there are a significant number cloudy titles for title adjustment and appoints a LTA commissioner(s). A commissioner may be a judge, magistrate, advocate or an attorney.
- The commissioner publishes notices in a local newspaper and/or the national Government Gazette. The notice calls on people to submit a claim as a putative owner of a piece of land within two months. The claim should include relevant documents where possible.
- The commissioner advertises the claim and notifies interested parties, and investigates additional written and oral evidence.
- He or she publishes another notice advising that the claims on file may be inspected. If there are objections, the Commissioner holds a hearing and then makes an award and notifies all interested parties (LTA Act 1993, Warner ND).
- The award is final. There is no quieting of title period. However, one commissioner noted that it could be possible for a Constitutional Court challenge; no such challenge has occurred to date (Int #123).

A criticism of LTA programmes is that they often do not solve the cloudy title problem. In two case studies, Kingwill observed that they occurred every generation. Landholders did not see the need to register inheritances or sales of land, and the authorities not landholders drove the process. She attributed the phenomenon to socio-cultural factors. De facto, the land is considered family property, in spite of what is reflected on the title. If the person whose name is on the title attempts to transfer the land this will likely cause problems within the extended family (Kingwill 2013). In one of these same case studies, Manona (1987) attributed the phenomenon primarily to the cost of registration. The author's work suggests that off-register transactions may be due to both cost and socio-cultural factors. Cost factors include the difficulties of putting together the documents for registration, accessing the registration system, the actual monetary costs and the availability of expedient alternative off-register transaction strategies. In addition, in state-subsidised housing projects, landholders have also pointed out how difficult it is to get a house and therefore it should remain in the family in perpetuity; i.e. it is a family house (Barry 1999, Barry and Roux 2016a, 2016b, 2019).

Thus, the piece of paper such as a title or tenure certificate is seen as valuable. However, there are a number of critical success factors in the way registration is set up in the legal sense that differ to how people on the ground view the system and how they rank the value afforded by a piece of paper relative to other social and economic factors. Consequently, they do not register transactions.

Crocombe (1964) advocated title maintenance as one response to this phenomenon in some Pacific Islands. The author has argued that tenure maintenance, where families are given ongoing support in administering tenure – e.g. where households have easy access to advice and legal services relating *inter alia* to wills and family trusts - should form part of a title maintenance regimen (Barry 2020).

LTA commissioners (one of whom had worked on LTA projects since the 1960s), lawyers and officials observed that in general the LTA process in Edendale and other designated areas in the KwaZulu-Natal province were working well. Families and other putative owners accepted the process. There were some major problem cases, however.

In Edendale, title adjustment preceded expropriation to resolve development, land use planning and land administration issues. The author interviewed residents who had had their land invaded or grabbed by traditional leaders who were too happy to have their land expropriated. There were, however, families that were hostile to the process. A social facilitator estimated this at 4% of households. Some of the door-to-door occupancy surveyors had been threatened, and attacked in isolated incidents. Reasons advanced for the hostility was they did not trust the state, they were on the land illegally, or the attacks on the occupancy surveyors were by common criminals (Greene 1994, Int # 108, 117, 121).

In LTA adjudications, problems do occur over the rights and powers of the family, especially the Zulu traditional custom of primogeniture where the eldest son inherits, and the complexity of de facto family titles. According to a LTA commissioner, in some families, major conflicts occur if the eldest son asserted a primogeniture right. Custom is evolving and women are aware of their constitutional rights and do not accept the primogeniture claim. However, it is impractical to record all the family members' interests on the title deed. Legal instruments such as family trusts are one solution. However, they are complex and not suited to low income families as they are difficult to manage and expensive for families who cannot afford a lawyer (Int #130).

There have also been problems with poor management. In Edendale, the authorities had mislaid a commissioner's award files (Int #122, 112 129). Consequently, development could not proceed and putative owners could not transact in their properties as the title was frozen. In another case, a commissioner had made awards some ten years earlier, but registration had not occurred (Int #130).

4. DISCUSSION

The LTA process is well-established and it works well in most cases. The hostile household problem will somehow have to be addressed if it is to be fully successful in a particular area, however. However, LTA does not stop off-register transactions and they may well occur once a generation. It is also expensive as the commissioners are legal professionals. Thus it is questionable if these programmes can be extended across the country where there are problems among the state-subsidised housing projects.

The Edendale case also demonstrates how difficult to maintain clean titles when there is poor land governance, post-conflict land grabbing, large scale and individual level land invasions and corruption which goes unpunished. Some form of land tenure administration support can mitigate the incidence of cloudy titles. It is unlikely to stop the phenomenon, however.

Land tenure programmes which assume a fit-for-purpose label have to be cognisant of which factors are critical to the success of a particular programme. I.e. what makes it effective, and what are the critical success factors that have to be present or created for it to be successful. Edendale adds to the body of evidence in the author's work that fit-for-purpose land administration implies ongoing support at the community and household level. One cannot issue titles or certificates and then leave and think that the intervention is going to be a success. In one case study which can be considered a success, an NGO has provided a range of different forms of support for close to 15 years.

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