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# **Regularisation by Land Title Adjustment in South Africa: An Inadequate Remedy for Cloudy Titles**

**Michael Barry**  
University of Calgary

**Rosalie Kingwill**  
Independent Consultant

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- Problem, Objectives & Contribution
- Context and history of Land Title Adjustment
- Land Title Suitability Classification Theory
- Land Title Adjustment description
- Study Eastern Cape – rural and urban
- Study Edendale and KwaZulu-Natal – post conflict
- Analysis
- So what, and then what? How can we improve these situations?
- Conclusions

# Objectives & Contribution

- Problem: there's a long history of cloudy title in South Africa
  - A successful registration system or any other form of Land Tenure Information System is one that people use.
  - If they don't register secondary transactions, then what?
- There has been reliance (in theory if not in reality) on Land Title Adjustment (LTA) to clean up cloudy title but the outcomes we discuss here show it is an imperfect solution
- We present two studies on LTA
- We analyse what lies behind cloudy title and the limits of land title adjustment
- We address the question: "how can we improve the situation?"

# Historical Context

- Historic (19<sup>th</sup> early 20<sup>th</sup> C.) titles held by Africans and Khoisan people: quitrent and freehold
- Later apartheid period — township houses per various permits or leases
- All must be upgraded to freehold title
- Most are officially regarded as ‘cloudy titles’ and/or subject to family disputes, making upgrading contentious
- Why ? Dominion held by the (unquantified) family which is not a juristic entity or legal person, leading to clashes between law and practice

# Contemporary Context

- Land registration in state subsidised housing programme
  - 4.7 million housing opportunities since 1994
  - Ownership (freehold) had/has to be the tenure form for political reasons
  - 1.9 million registered in ownership
- Cloudy titles: Significant off-register transactions due to sales, house swops, gifts, off-register inheritance, grabs
- Consequences: freeze formal land market; freeze development plan approvals; cannot expropriate; impacts land taxation & service delivery; family disputes; heirs or sellers reclaim house; loan sharks, druglords
- Goal ranking in policy formulation and implementation—emphasis on delivery rather than quality
- Deliverology Driven? Indicators become the goal

# Classification Theory

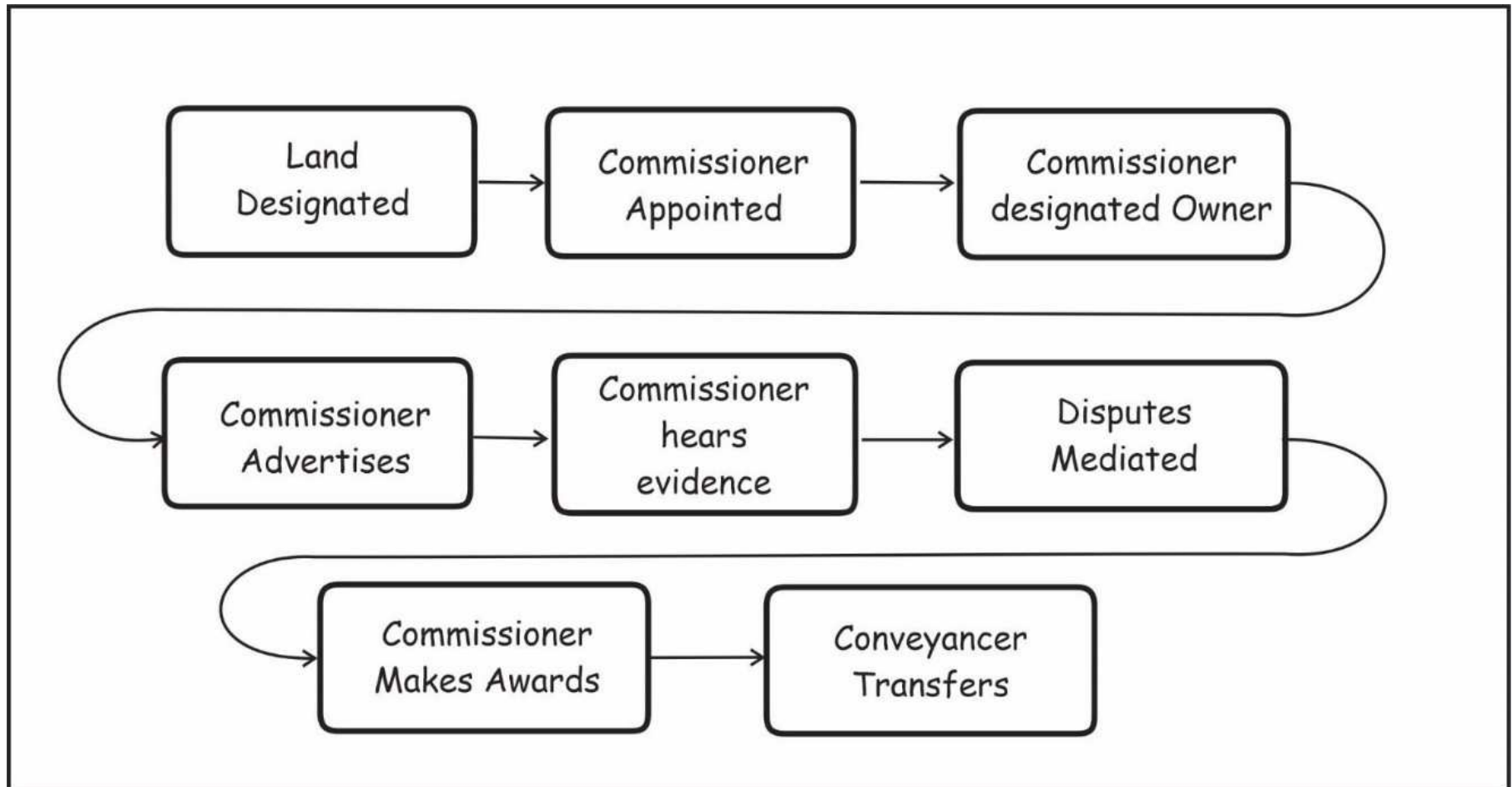
## We classify suitability of title into four categories

- Strong – All the Critical Success Factors (CSFs) present
  - Proceed with programme
- Semi-Strong – Some CSFs absent or weak, but possible to create or strengthen them
  - Proceed but with strategies to create or strengthen CSFs. Fix now, not after the fact
- Semi-Weak - Some CSFs present, but many absent – cannot be created
  - Land titles under ownership unsuitable
- Weak – programme ill-suited to circumstances
  - Documentation / recording of land interests nevertheless important to prevent land grabbing

# Land Titles Adjustment

- In terms of the law, cloudy titles must be cleaned by means of the Land Titles Adjustment Act, the only legal tool to regularise cloudy titles
- The sheer scale of cloudy titles makes it challenging
- Hundreds of TAs conducted throughout the 20<sup>th</sup> C, many reverted, and TAs repeated every generation
- TAs require a great deal of expertise as they take time and resources; all descendants must be traced
- Lawyers reluctant to conduct them at low fees and bureaucratic management
- The state itself has poor grasp of the problem and there is a gap in the law

# Land Titles Adjustment





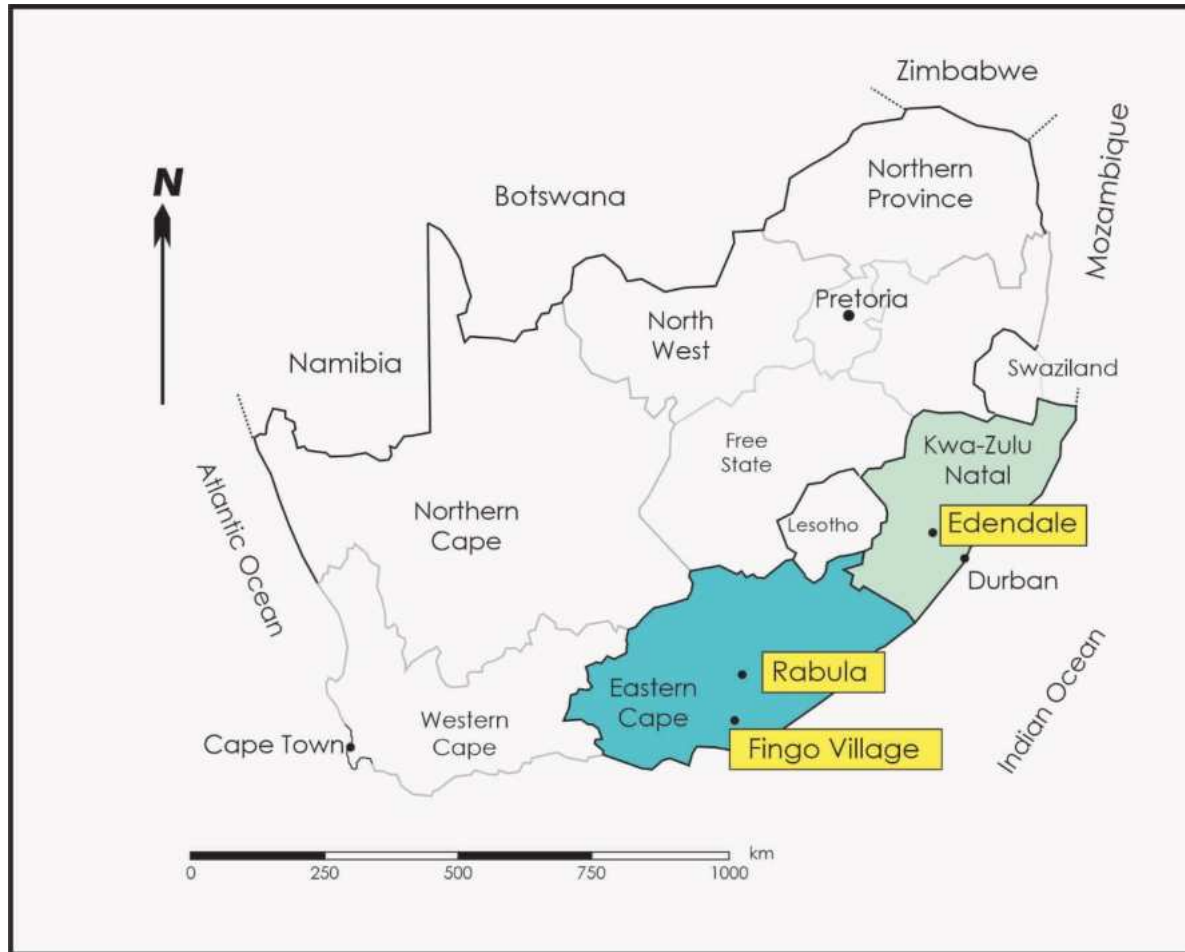
# Land Titles Adjustment

In view of the challenges, we question the wisdom of unquestioningly applying titling and upgrading of rights to title policies

There is a limit to successful regularisation via Title Adjustment

Go back to the basics and consider the range of tenure contexts as it is not one size fits all

# Eastern Cape Study

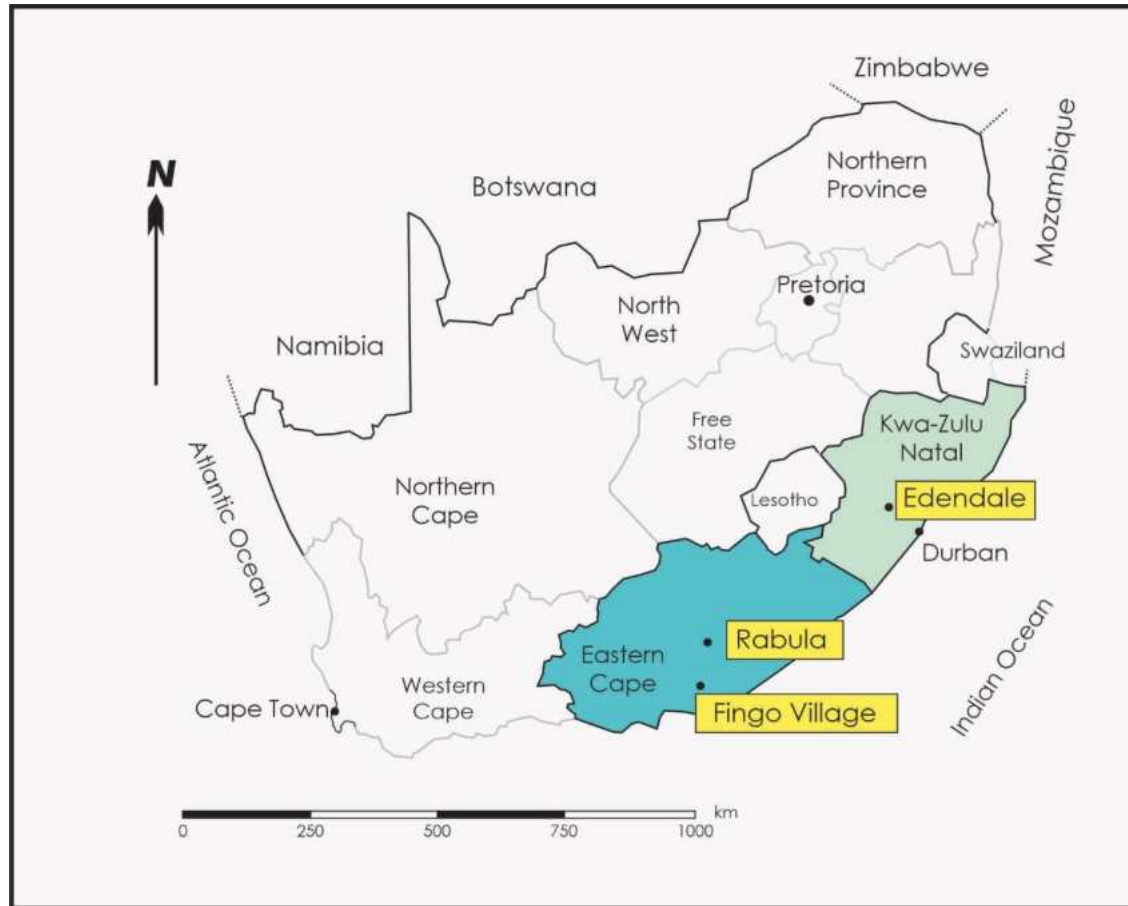


# Eastern Cape Study

In depth legal-ethnographic and diachronic study conducted in

- Fingo Village (Grahamstown/Makhanda – urban area); and
- Rabula (rural village, Keiskammahoek, former Ciskei rural reserve or homeland)
- Both acquired land in freehold title in 1850s – 1860s
- Similar patterns in both
- Dominion over the land is held by the perpetual family — the land is received from ancestral holders and held on behalf of the unborn (patrimonial property); succeeds automatically
- There is no such concept SA formal property law
- Registration in one or even two person's name is a threat
- Formal recording of transfers and writing of wills are consequently avoided
- Officially these titles are clouded and “need” TA
- Multiple TAs conducted but practice continues so TA is not permanent solution, it is a stopgap

# Edendale KwaZulu-Natal Study



Methods: LTA commissioners, land professionals and experts, politicians, officials, residents, historical documents, title deeds, survey plans, field workers who do door-to-door surveys, direct observation of regularization process. Other cases, other countries

# Edendale KwaZulu-Natal Study

- Zulu lands, Dutch settlers, English colonization
- Mission established in 1851 grazing commonage and individual plots registered.
- Old Edendale ownership / freehold
- Greater Edendale – apartheid tenure legacy Permission to Occupy
- Cloudy titles - A number of properties changed hands off-register – sales, intestate succession
- In 1986 not possible to do basic development
- Conflict started in 1970s between Inkatha and the African National Congress (UDF surrogate)
- 7-days war in 1991 major “battle”
- People displaced and killed, tenants stopped paying rent

# Edendale KwaZulu-Natal Study

- Land title adjustment since 1960s, perhaps before
- Development – clean titles invaded land and expropriate
- Three commissioners – few problems
- Most landowners too happy to get rid of problem
- Some resistance
- Corruption and incompetence – land gets invaded
- Officials – beware of innovating without documentation – the face of failure

# Analysis – Common Patterns

- People want a title, but it means different things.  
e.g. individual title vs family title?
- LTA commissioners in earlier times reported most LTA cases ran smoothly
- Expensive, time consuming and unsuited to large scale regularisation
- In significant no of these cases the title holders revert to old practices and do not transfer
- Avoid it or mitigate the problem, do not try to clean up after the fact

# Analysis – Case Specifics

## **Eastern Cape Findings**

- Title holders attempt to preserve the family property
- Not protected by law, thus, abused by some in the family e.g. someone claims to be 'heir' under common law but use 'male primogeniture logic; tries to sell and evict family members
- Family disputes but with no law to adjudicate,
- Ongoing unresolved issue, TA does not solve it (reversions)

## **KZN findings**

- Conflict in families e.g. when eldest son asserts primogeniture under Zulu custom
- Chancers!
- Tenure systems evolve in response to a range of forces

## **Common finding**

- Difficult to create a workable family title entity – trusts, recording all interested parties, names on title do not work well



# So What? What then? Strategy

- Classify as Strong or Semi-Strong to proceed or intervene
- Semi strong cases – people like titles.... But!
- Fix after the fact? Title Adjustment?
- Avoid or mitigate the off-register problem?
- Strategies include legal-institutional review and customised solutions
  - Title maintenance?
  - Fill legal gap re family holdings (arising in jurisprudence in SA)
  - Financial support / subsidies?
  - Street level bureaucrat activities?
  - Manage hybrid governance situations
  - NGOs. Education door-to-door, accessible advice / advice centres
  - Education programmes and estate management assistance– door-to-door?
  - Accessibility of official systems e.g. the right legal advice
  - School curriculum
  - Journalists, local politicians
  - Do not drive around with a loud hailer!

# Conclusions

- Who does these “things”? Stewardship?
- Unwise to register and then just leave things
- Monitor, evaluate, take action
- Review legal institutional framework to allow e.g. endorsements on title or other measures to acknowledge family property and commonly accepted practices of succession
- Meetings: classify as strong, semi-strong etc.
- If semi-strong?
- Why, how, what do we do, paths to “success” or not?
- Can we change behaviour re longstanding transaction strategies and social norms? If not .....
- Street level officials!
- Communication. Action!