Securing tenure at Ekuthuleni
Donna Hornby
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1. Introduction

AFRA's work at Ekuthuleni started in 1998. It's now 2004, six years later, and we
have to confess that we have failed. It is not possible to secure tenure at Ekuthuleni,
for the purposes for which people want that security, within the current legal,
technical and institutional frameworks.

A small window of opportunity still exists that might allow us to reverse this
judgement. That window is at the symbolic level contained in the provision for a
communal general plan in the Communal Land Rights Act (CLRA), but I'll come
back to this later because small windows are hard to squeeze through without
breaking walls.

2. Where it all started

In 1997 Tienie Swanepoel, the deputy director responsible for tenure reform in the
Provincial Land Reform Office (DLA) in KwaZulu-Natal, received a hand-written
application from Induna William Mnyandu, chairperson of the Ekuthuleni Land
Committee. Mnyandu was requesting Permissions To Occupy (PTOs).

Swanepoel found the 1 100-hectare farm in the Mthonjaneni Municipal District. DLA
itself owns Ekuthuleni following its transfer from the previous owner, the Lutheran
church to the South African Bantu Trust in 1971 and the failure of the province to
incorporate it into former KwaZulu. But DLA is a scarce visitor to the area so the
Ntembeni Tribal Authority carries out local land administration functions and has
done so since the community approached Inkosi Zulu after the church left.

Swanepoel was in a dilemma. DLA no longer issued PTOs because they were racially
based second-class property rights. Two other legal options were possible: transfer to
a group represented by a legal entity or establish a township, subdivide the farm and
issue individual titles to the current occupiers; a rigid choice between inappropriate
tools. Uncertain about which way to move, Swanepoel contracted AFRA to assess the
tenure needs of the Ekuthuleni community.

3. The world of Ekuthuleni

To get to Ekuthuleni, one climbs the hills north of Eshowe and towards Melmoth,
driving through rich valleys of commercial sugar, fruit and timber production. These
are interspersed with steep hills of communal lands that are dotted with thatched mud
and daub rondavels, fields of maize and livestock grazing commonage and roadsides.
One is struck by the lushness and diversity. It's a good place to survive.

The Ekuthuleni Land Committee is equally striking. William Mnyandu, a man in his 70s, induna of the area, chairperson of the committee and small-scale timber farmer, uses humour to wield his will. His brother, Walter, the former tribal secretary is more subdued and earnest. David Dlamini, tuck shop owner and elected IFP municipal councilor, is often called on to explain complex ideas in simple, clear Zulu. Charles Nxumalo, treasurer of the committee, primary school teacher, former Lutheran minister, has a master's degree certificate hanging on the wall of his library at home next to the picture of himself playing tennis in England – all these men read, write and speak English fluently. Mrs Dludla, the committee secretary and Mrs Ngema, both quiet and unassuming; the two people other than the chair who seldom miss a meeting, and whose talent at map reading we were later to uncover.

In the months to come, people at Ekuthuleni explained the practices underpinning their land system and the environment in which it has developed. They pointed out household boundaries that follow rivers, valleys, ridges and indigenous trees. There are few straight lines. The terrain is mountainous and many parts of it inaccessible, blocked by cliffs, brambles and forests. 'Road' access to plots is footpaths that follow contours or cattle-made paths. They criss-cross other peoples' land, including at times arable fields. Kids use them to get to school, women to fetch water from rivers and boreholes, adults to get to the road.

The land holdings are not individually owned. The family, past, present and future, have a stake and a say in the land. Roman-Dutch legal exclusiveness is foreign to how this land is held. That which seems exclusive diminishes further by the presence of 'ababhekiwe' – those who have been put, what most English speakers want to call 'non-rent paying tenants' except that the relationship is one of patronage and not an equality forged through contract and money. And they're usually very marginalised relatives, often single women with children who desperately needed land and whose brother or brother-in-law responded to that need.

Then there are the fields, exclusive at times, commonage at other, depending on the seasons. People borrow them from each other, sometimes for generations until it's no longer clear whose field it actually is. Daughters use their fathers' land even though they're married and the fathers are duty bound to allow someone's urgent need to prevail when deciding on field allocation. There are the commonages – idlelo – grazing lands, except that they are so much more than grazing lands. They provide poor households with firewood, mud, wild fruit, muthi (herbs for medical and ritual practices) and thatching, essential resources that these households could not survive without.

The community told AFRA they wanted "amatayitela" (title deeds). But they do not want a "lokhishi" (location or township), so access to the area must be controlled. They also want to continue to "hlonipha inkosi" (respect the chief). They want titles so that they can access credit to develop their timber farming and to access municipal and government services to improve roads (for timber extraction) and other services. A small, but very vocal minority wants title to secure land rights against neighbours (where there are boundary disputes) and others in the community (where there are disputes about who holds the rights to the land). And everybody wants to secure the tenure of his or her family against the state. ("The apartheid government took away

black people's land. We do not know that another government like that will not come in the future.")

4. Land reform begins

AFRA searched the land reform legislation at the time to find mechanisms to effect cheap subdivision and registration with community controls. Nothing quite addressed the needs. The choices were stark – destruction of the land system at Ekuthuleni through township establishment and individual titling; or a communal arrangement that allowed for current practices but left the rights hundreds of individual households a legal blur. Throughout the search, a determining factor for the community was affordability; understandable given that the average household income is slightly below the poverty line for the area, about R800 a month. With surveying estimates of about R2 000 to R6 000 a site (without regularizing boundaries), the community rejected individual titling as an unsustainable option.

After much agonizing, the Ekuthuleni community requested that DLA transfer the land to a communal property association, which the department agreed to. This met their minimal tenure needs, which is to secure the land against the state. It didn't meet their needs for local 'owners' to be recognized as legal owners of their own portions of land in ways that are affordable and sustainable.

The community still awaits transfer. Some doubt it will ever happen. The committee, which has no legal authority until transfer has taken place, is losing control over land allocation because its local legitimacy is bound up with the transfer.

5. The emergence of Pilar

While people at Ekuthuleni were asking for PTOs, DLA was developing legislation that would secure the tenure of black South Africans in the former homelands. This was precisely what people at Ekuthuleni needed. However, when four years of work crashed in 1999 with the shelving of the Land Rights Bill, it seemed that appropriate law would never be developed.

Disappointed, we reviewed what we had. Ekuthuleni has a system around land that works, most of the time, for most people. It's cheap (food and alcohol for the boundary witnesses and R40 a year to the inkosi), it's very local (walking distance at any time for a new allocation, access to dispute resolution) and it relies pragmatically on a mix of historical practice, environment and specific social need. AFRA thought that if the system - its mechanisms, rules, practices and institutions - could be described very clearly and a paper system created to reflect and support it, such records would begin to meet household needs.

And so began the work of Pilar (Piloting Land Administration Records), which took us into the heart of property rights and how they are constructed with values and a culture that is unsympathetic to the needs of the poor; and resourced with massive state investments and the private sector, which between them regulate policies, standards, practices and costs that result in the exclusion of the poor.

Our project path did not begin with a defined set of sequenced steps leading to products that conformed to the project goal. It couldn't start like that because no such path exists. Instead, we started with a goal, some principles and some observations. The goal was to provide legal, affordable and sustainable records to people holding land at Ekuthuleni that they could use to improve their access to credit and municipal services and which would provide evidence of their tenure rights.

The first principle was that the sustainability of any development intervention requires that one works with people to build on their existing systems, practices and knowledge, and not against them. This suggested that we needed to find technologies that would support and complement how people at Ekuthuleni administer their land.

The second principle was that adaptations of people's own systems must support the direction that people want to move in. Adaptations that don't do this are unlikely to 'stick' since they have no local rationale. At Ekuthuleni, this meant building links to public systems to give people greater tenure security and access to the mainstream economy.

The third principle, which came later, was the recognition that working with current institutions that underpin tenure also meant working with government and the private sector. Government is the public repository for information on property and therefore an important neutral place of recourse for dispute resolution and adjudication. The private sector professions fundamentally drive the property system in South Africa, particularly conveyancing and surveying. Any proposed system or reform of the current system must confront this fact.

We were looking, in other words, to:
- Adapt, not replace, community, public and private systems
- Build bridges that enable linkages and movement between the formal/legal and the informal/extra-legal
- Do this in ways that encourage technical, legal and institutional coherence

6. Using what exists

To record rights we needed to think about who has rights, what these rights are and where they are. Answers inevitably took us to the rules and practices of different existing property traditions in the country – a local and specific one at Ekuthuleni that could be broadly described as African in nature; the other legal and professional, which some describe as having Western roots.

Many along the way advised us to use existing law. We were skeptical because all around us is evidence of titling failure. Privately owned land in Edendale, Blaaubosch, Inchanga and many other places have been subdivided, sold and bequeathed over and over again without anyone going anywhere near a surveyor, conveyancer, Surveyor General's Office or the Deeds Registry. South Africa's property institutions may be among the most accurate and certain in the world but they do not work for most South Africans.

The causes of this failure are difficult to understand. Cost is an obvious explanation but it isn't the only one. Less easy to grasp are explanations related to familiarity or

cultural values, concepts of land and property and its role in social relations and issues of accessibility. Whatever the explanation, the idea of surveying or conveying land held under traditional type systems in KwaZulu-Natal seems extraordinarily difficult if one's intention is to work with what is there and not to destroy it.

Nevertheless, we did try to find solutions within the current formal system.

6.1. Rights

"Find us a law," we told a young law graduate, Thandeka Dube, "that will give legal recognition to the locally recognized ownership and that will enable people to use that recognition as mortgage for credit given that the community has decided to transfer land to a communal property association. And then tell us what it will cost."

Thandeka disappeared into the law library for weeks and returned with an arsenal of law. She began with laws that gave statutory content to the sort of rights of occupation and use that people exercised at Ekuthuleni, like IPILRA (the Interim Protection of Informal Land Rights Act). "No, people want evidence of rights that will be officially recognized, not a procedure to be followed that may deliver this evidence."

Thandeka pulled out the next array. We rejected the range of personal rights for the same reasons as the IPILRA rights. She shifted to the big guns, real rights. We went through individual ownership, leases, sectional title. But the required consents and planning control procedures combined with surveying and conveyancing were both prohibitive and nothing like the way people managed their land currently. Long-term sustainability seemed poor.

"There must be something in the middle, Thandeka," we told her. She came back with limited real rights. We could register habitation, usufruct and use servitudes. The Surveyor General said we could use aerial photography and mortgaging was possible under some conditions. But, the law says individuals hold these rights and they lapse on the death of the holder. Each new family decision-maker would have to re-register the servitudes. It seemed we were trying to squeeze the types of rights people at Ekuthuleni have into a mould designed for other purposes.

And so we concluded that we might have to work outside of the law, to create records that somehow by their very existence, by the power of their necessity, might accumulate legal force.

So we contracted Glen Tonkin, a former conveyancer who had some experience with land reform, to consider what a local registry might look like. A registry that the Deeds Office might be sympathetic to but that would be easier to administer and would enable adaptations for local conditions. He suggested a register much like the old paper registry that computers replaced, with some adaptations – the ibandla (neighbours who witness boundary demarcation and allocation) are included as is the induna or chairperson of the CPA. The land is registered in the name of the household, with certain elected decision-makers entitled to decide about alienation.

It was a good idea but we haven't tried it in practice. Ideas such as this would have to be institutionalized and accepted by government before they could accumulate legal force. Without institutionalization, the maintenance of such a registry is unlikely because it has no obvious rationale at community level.

We also knew that, if nothing else, we were creating evidence of personal rights. We thought that perhaps we were starting to find ways of bridging the legal split between real and personal rights. If the CPA owned the land, and the association agreed in its constitution that it required 100% agreement from members to alienate the whole property, and it agreed to allocate member households their portions of land in perpetual use, and it agreed that members could sell, mortgage or alienate those use rights through defined procedures …. then surely the bifurcation between real and personal rights would begin to erode? The real rights would be so constrained by the personal rights, and the personal rights given so much legal force that they would surely begin to squeeze into the more powerful rights of the owner?

So, last year we tried one more route. We contracted land-legal expert David Smyley and asked him to tell us "what is the legal nature of the property rights held by members of communal property associations?" There had to be a base in law for what we were doing if we were to meet the community's need for legal records.

Smyley struggled. He described the differences between real and personal rights, the array of real rights and some ideas of how they might be created. Members of CPAs have only personal rights, whose content is defined by the rights and duties outlined in the constitution. Ekuthuleni is no different, was his conclusion. Members have nothing more, nothing less, than personal rights. "Yes, but, how do we strengthen those? Could they ever be so strengthened that they meet the needs of secure tenure, improved credit access and service delivery?" In conversation, Smyley took us to township development and freehold title ("banks will not mortgage anything else"), back to evidence of personal rights ("yes, the more evidence the better if it ever goes to court"), a consideration of leases ("leases survive transfer of ownership so banks will mortgage them …. Yes, they have to be surveyed and registered"). But … but … the de facto tenure that Dlamini, Mnyandu, Nxumalo, Dludla and others have is not leasehold. It's ownership. "So perhaps a township should be established and individual title registered?" "No, that won't work. Won't these records improve people's access to credit because they tell finance institutions where people are and that they are indeed on a piece of land?" "Yes … maybe…probably not." "But there must be a way to do this!" In exasperation, Smyley told us: "I can only tell you what the law says, not what you think it should say!"

And so we concluded that there was nothing in the current legal framework that would enable people at Ekuthuleni to access affordable, legal records of their household property rights in a system that is sustainable.

6.2. The Communal Land Rights Act (CLRA)

And then came CLRA. CLRA provides for the transfer of a property to a juristic person representing a community as well as the registration of deeds of land tenure rights to members of the community. At first sight, this appeared to be exactly what

Ekuthuleni needed. It would provide legal records of household rights within a community context. But, on further consideration, problems emerged.

- What exactly is the distribution of rights and duties between the owner and land tenure rights holder, who decides this and how?
- What is the system that will issue the deeds of land tenure rights and will it be affordable and accessible to the poor?

CLRA calls for a rights enquiry, the basis on which the minister determines new order rights that can be registered as well as a layout plan that accommodates municipal planning for the area. After the rights enquiry, a communal general plan is lodged with the Surveyor General and, once approved, a township register is opened in the Deeds Office. Only after this can individual deeds of land tenure rights be issued. The state provides the resources for a first once-off transfer; thereafter, subdivisions, transfers or upgrades are at the rights holder's cost.

Many have criticized CLRA for its unaffordability. To implement the act will cost government more than all the current land reform programmes combined, a financial commitment that seems unlikely in the face of other political priorities. However, this paper is concerned with issues that relate to the sustainability of the land tenure model being proposed rather than just the costs of initial implementation. If the system is to be affordable and accessible after the initial costs, it cannot simply replicate the freehold model. It needs to "feel" familiar to people and savings must be made in the survey and registration processes and/or the institutional arrangements. These adaptations would have to include questioning the role of the private sector and the current centralization of property procedures and information. If adaptations to the current model of property rights are not made, we have done no more than replicate a model that fails.

6.3. Boundaries

Boundaries, in terms of the Land Survey Act, are established through pegs whose location is fixed through a survey undertaken by a qualified surveyor and lodged with the Surveyor General. The fewer pegs per site, the cheaper and easier the survey. At Ekuthuleni, boundaries are established through agreements between neighbours, the new occupier and the induna and are witnessed by affected neighbours. The more a boundary accommodates the specific needs of the affected parties, the less likely it is that disputes will emerge. It made sense then to us that we find a way of recording people's own processes around boundary creation and maintenance.

6.3.1. Pilar's approach

The answer to the question we asked, namely: "What demarcation technology can people at Ekuthuleni use that builds on their knowledge of the land?", seemed to be orthophotos. They're available. They show the land the way people who live on it know it. Technical professionals can also read them. They're a useful medium of communication, of bridging between local and technical knowledge.

Some months later, we took 1:10 000 colour orthophotos to the community, organized groups of neighbours to find their boundaries, agree on them and draw them on transparency overlaid on the photos. It took four days to "demarcate" over 200 sites,

including commonage and public use land, following locally accepted and familiar procedures of witnessing by neighbours. We also identified all boundary disputes, disputes about who the correct rightsholder is, and every property that has more than one household in occupation (ababhekiwe). Paths are visible, as are mountains, schools, soccer fields, forest plantations etc. We have digitised the data and created a numbering system linking every parcel to a grant holder on the DLA beneficiary list.

The maps and photos are not adequate as spatial evidence of rights in terms of the Land Survey Act and there was some concern about the accuracy of the data given that it depends on community people's map reading skills, amongst other things. So we asked academic Denis Rugege to test the accuracy of the boundaries with a GPS. We looked at three parcels that had what appeared to be inaccurate demarcations on the photos. In the field, Mr Mnyandu and each property owner accompanied us to point out the boundaries on the ground.

On the first expected error, Mr Mnyandu and the owner stopped on the side of the road. Five or so metres further there's a small road to the left, which is where I thought the boundary should have gone but the road isn't visible on the map because it's overshadowed by trees. There is a sharp bank downhill where we stopped. There's no evident marker except for grass, a couple of baby wattles, a small gum. "This is where we turn," says Mnyandu. "How do you know? What are you seeing?" I ask. "We just know because we were born here. This is the place." So, we all slid down the hill, tripping through the grass and trees. Then Denis shouted out: "Have a look!" The flashing cursor marking the GPS line was following the digitised line from the maps exactly. It was quite clear there is no error on this boundary. My error had been to assume the community members had misread the orthophoto. They hadn't.

On the second boundary where Mnyandu suspected an error, he explained that the boundary separates Hlabisa from Nsele. Nsele, the original owner of the whole plot, had wanted to keep a piece where his father was buried. The boundary goes around the grave in an arc and then follows the madumbi field down to the river. Mnyandu thought the people reading the map had made a mistake on the boundary going to the river. But there was no error here either. The GPS line followed the digitized line exactly except where it was not possible for Denis to walk the actual boundary.

Finally, we arrived at the third problematic boundary. It follows an old firebreak and then turns sharply to the right above Hlabisa's house. There's no geographical marker visible on the orthophoto at the turn. We walked up the hill until we reached a small cleared spot. There's a metal peg in the ground and next to it an indigenous tree planted recently. The community has started to use pegs since discussions began about surveying standards. But the digitized map on Denis's GPS showed the turning point to be some distance ahead. There was indeed an error here.

The conclusions we drew from this are that people can depict boundaries accurately on the orthophotos where they know the land well and there are visible geographical markers. Map reading is not a limitation in these situations. We also concluded that these depictions can be accurately digitized. However, where boundaries cross open fields without markers, these should be pegged, preferably with local, available materials.

Our view is that the orthophotos are accurate enough. They locate particular parcels within the cadastral boundary. The location is not millimeter precision but it is sufficient to identify that there is indeed such a parcel, that it stands in a particular relation to other parcels and that it has particular types of boundaries (river, ridge). The maps will not help to resolve with any precision a boundary dispute but, in the majority of cases, boundary data doesn't need to perform this function. Spatial data needs to place people on the map, to make them visible for public record and service delivery.

The question of how the function of resolving boundary and other rightsholder disputes should be performed is important. Local systems draw on boundary witnesses, social values (such as need) and negotiated agreement. This could be a base for developing a resourced adjudication process that, over time, develops a hierarchy of evidence derived from values that are broader than the market.

6.3.2. Alternatives

A technical task team set up to look at CLRA implementation is exploring other alternatives to the use of community-led demarcation processes based on orthophotos. The idea, which is the product primarily of discussions between DLA and the surveying profession, proposes the development of new professional categories, the land clerk and the land administrator. The clerk services a limited number of land administration committees and accounts to the administrator who reports to a land surveyor. The functions of collection/creation of data on boundaries and rightsholders for the communal general plan are spread between these professionals. Although this spread is not entirely clear yet, there is no statement of intent to amend the Land Survey Act, which suggests that current standards and procedures will be maintained.

There would appear to be at least two implicit views on the institutional arrangements that underpin this idea and that would give content to the various functions. The first is that the land clerk is a voluntary worker who assists the community's land administration committee in carrying out the various functions of allocation of new order rights, the registration of communal land and of new order rights and the establishment and maintenance of registers and records of all new order rights and transactions. The land administrator in this view seems to be a DLA official who effects the connection between the land clerk functions at community level and official functions located in the various DLA departments of Legal, Deeds and Survey as well as the Land Rights Board. Quite how surveying, the communal general plan, the registration processes and recording of any subsequent transactions are undertaken is unclear.

The second view as reflected in the surveying professions proposals is that the land clerks and administrators are new categories of private sector professionals who are paid for by the state and who take over some of the lower level functions of surveyors. The clerk accounts daily to the land administration committee and provides property information to the land administrator, who checks it and forwards it to the surveyor, who is contracted by the state on tender. The surveyor drafts and submits the communal general plan to the Surveyor General. The future role of surveyors in maintaining the records has not been discussed in any detail but may depend on

whether they are able to secure a role in supplying municipalities and other service providers with accurate property information.

There are major technical issues to be resolved in either proposal, including the technical rig the land clerk should use, the standards that will operate for demarcating boundaries, the training the clerk and the administrator should receive and the data storage and transmission between clerk, administrator, surveyor and the DLA. These technical issues are discussed alongside problems of no electricity and tele-communications in many areas, including Ekuthuleni.

Where does the communal general plan fit in this model? The general plan is a technical instrument for laying out property rights and services on vacant land in a township. That is the professional, legal and technical heritage of the communal general plan. At the moment, CLRA does not describe the communal general plan. It could simply be a general plan, the familiar territory of the professional and the official. But it could also become a technical instrument that bridges the general plan heritage with the local practices, procedures and priorities of communities. It could be the visible representation of how people use land and want to use land that enables effective communication between poor South Africans and a system that is currently alien.

To do this, the communal general plan must reflect the social values and aspirations of the clients it serves, it must build on systems that are familiar and at a pace that is comfortable and safe for poor people, it must link to a local registration process that ensures equity and expresses de facto rights. A communal general plan that does this will not look anything like a general plan, nor will it follow the same processes of a general plan. It will require amendments to the Land Survey and the Deeds Registry Acts. It will require the recognition of new professionals who understand indigenous or African systems of property. It will require a new focus on adjudication rather than demarcation and registration. The communal general plan symbolises the possibility of fundamentally altering how property rights are configured in South Africa, if it can escape its heritage and direct its attention to securing the rights of the poor.

The technical and institutional conundrums are fascinating but this fascination threatens the fabric of the social environment in which functional tenure security operates at Ekuthuleni. People are not asking for replacement. They're asking that what works for them be incorporated into official systems.

5. Conclusion

The formal system is monolithic. It has bases in the official, public system through the Deeds Registries and Surveyor Generals Offices. It also links to, and is used by, official planning processes in municipalities and provinces through land use controls and property tax. It stretches into the private sector in the form of three professions, surveyors, conveyancers and planners. The institutions that uphold registered property rights and the way they are arranged and link to one another are part of a structure that excludes the poor. The exclusion operates at the level of cost, complexity of procedure and inaccessibility of office and process.

The African tenure system as it operates at Ekuthuleni provides a functional tenure security for most people in the community. It adapts as needed and responds to the specific. There are no professionals, no officials. Its key limitation is it operates at a very local level without support from and recourse to an external public system. Should that public system be the one above?

Pilar has constantly slipped through the cracks of the divergence of the two tenure systems South Africa lives with. There are no bridges. There is the legal and then there is the system most people have, outside of the law. There are no stepping stones between them, no way for the poor to begin to enter the world of the economy and bureaucratic planning and service delivery without also entering a property system that doesn't work for them.

The one is no better than the other. The extra-legal property system meets the needs of the poor for cheap access to land, relatively functional tenure security, oral based evidence and adjudication practices. Its major problem is that it is invisible to those who determine and allocate government and private sector resources. It is a black box to the official systems. The legal system, which is better known to government and the professions, does what it needs to do for land markets, credit facilities, land use planning and urban zoning. The rich can afford it, and they are visible to the economy and the state.

As a South African, one is visible or invisible, legal or extra-legal – one cannot be in the middle, moving towards visibility. It is not yet legally possible. That possibility depends on how the implementation of CLRA is configured and how open DLA is to amending this law until it does work for the poor.