“Informal” land rights under siege 18 years into democracy.

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Introduction

Section 25 (6) of the South African Constitution (RSA, 1996) states, "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.”. This article uses emerging evidence from the Eastern Cape (former Ciskei and Transkei) to argue that the government has failed to walk the talk, and also advocates for an amendment of the Interim Protection of Informal Land Rights Act 31 of 1996 as well as the drafting of regulations as a prelude to drafting a more comprehensive land tenure and land administration legislation. Problems and disputes associated with insecure tenure and broken down land administration system in the former Ciskei and Transkei are an egg in the face for South Africa’s land reform experiment. The need for legal and legislative clarity on the security of tenure of those holding informal land rights is not a nice to have but a constitutional imperative. These disputes have pitted individual rural dwellers against local traditional leaders who have also been at loggerheads with local municipalities. These disputes have significant implications for land rights of many rural dwellers, the overall rural land administration system and rural development planning. In fact, the former Ciskei and Transkei are littered with unrecorded cases of arbitrary deprivations of many rural dwellers of their land and property. This argument is informed by the contradiction that arises from the constitutionally entrenched protection of property rights and the lack of security of tenure inadequate legislation to secure the tenure of those with informal land rights.

Context and background

Since 1994, the South African government has embarked on a programme of land reform which is designed to redress the grave racial imbalances in land holding and secure the land rights of historically disadvantaged people (Lahiff, 2005). One of the three legs of South Africa’s land reform programme is “tenure reform”, which is intended to secure and extend the tenure rights of the victims of past discriminatory practices. This leg of land reform has been characterised by retrogression of at best, lack of progress in so far as it relates to communal tenure in the former homeland areas. This can largely be attributed to lack of policy direction from government, as well as to the ability of powerful interest groups, particularly traditional leaders and their supporters in government to manipulate the situation for their own gain. Land tenure reform in communal areas...
has been seen by many traditional leaders as an attack on their powers and privileges, and they have used their power to keep it off the political agenda. Lahiff (2005) argues that, despite the introduction of elected local government the post-apartheid state has shown itself to be sympathetic to the demands of traditional leaders, whether for patronage or pragmatic reasons. The Traditional Courts Bill, if passed in its current form, would just be one final nails in coffin in waiting, for rights or rural people.

It is common knowledge that over 16 million people live in the former homelands and that these areas are disproportionately poorer than the rest of South Africa. Many of these people live in various forms of tenure which can be characterised as “informal”. In these areas many people still hold onto Permission-to-occupy (PTO) certificates, which. PTOs often constitute the households’ only proof of land rights. Many of these PTOs have not been updated between one or more generations and are now of questionable value. In addition to the PTOs, many people who have acquired land in the past 20 years or so do not have any record of their land rights.

Despite stated government policy against land invasions, these have increasingly become a norm rather than an exception. Various National Government policy documents including the White Paper on South African Land Policy and the Development Facilitation Act 67 of 1995, section 3(1)(a) have made it clear that land invasions pose a great threat to stability and development and that the unlawful occupation of land must be discouraged at all costs. The Prevention of Illegal Eviction Act No. 19 was proclaimed to address this problem, but the Act is too cumbersome for implementation in rural areas.

The White Paper on South African land reform drew a crucial distinction between ‘ownership’ and ‘governance’ in land issues in rural areas (Ntsebeza, 1997). This distinction was blurred in the colonial and apartheid eras, as the state was both legal owner and administrator of land. Eighteen years into democracy, there is even greater uncertainty around the control and ownership of land, broken down record-keeping systems in the tribal authority offices as well as the offices of provincial Departments of Agriculture, have resulted in a legal and administrative vacuum that has allowed powerful individuals to extend their landholdings at the expense of others and has also allowed

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1 Features of a PTO system include the following; the land is not surveyed; it remains property of the state; it cannot be sold and the right is permission-based.
unscrupulous leaders to exploit communal land for personal gain (Lahiff, 2005). The chaos in land administration is particularly critical in the fast growing rural situations, where demand for land outstrips supply.

**Constitutional rights under siege: Experiences from the Eastern Cape**

Arbitrary deprivations of land rights are a common occurrence in the Eastern Cape and in the former homeland territories. These illegal deprivations are committed a range of actors including government officials of the provincial Department of Agriculture, by some traditional leaders and or by other community members. Lahiff (2005) alludes to the collapse of land administration systems in former Ciskei and Transkei, which is coupled with on-going uncertainty around the status of land rights in communal areas. According to Lahiff (2005) the then Department of Land Affairs (DLA) in the Eastern Cape had identified land administration in communal areas as one of the biggest challenges facing land reform in the province, and expressed frustration at the lack of clear national policy. Among the specific problems raised by DLA in the course of this study were unofficial ('illegal') land demarcations in communal areas by tribal authorities and other civic bodies, unresolved boundary disputes between chiefs, which sometimes lead to violent conflicts.

There is lack of policy directive with regard to how government should deal with PTOs, While many Districts of the Department of Agriculture in the Eastern Cape have over the years stopped issuing of PTOs, some districts such as the Joe Gqabi district office of the Department of Agriculture has up until recently continued to issue out PTOs for some of the allocations that they administer in the Herchel districts. Despite the legal questions pertaining to legality of PTOs, it is not uncommon to find these being allocated over pre-existing informal rights with no regard for pre-existing informal rights. It is only at the beginning of 2012 that the Department of Rural Development and Land Reform issued out an undated moratorium of allocation of land by traditional leaders and the the issuing of PTOs. It is also surprising to note that the moratorium on land allocations by traditional leaders is issued without time limits and not alternative measures to take care of current application, thereby opening a greater avenue for invasions. In many instances the invasions deprive rights holders of pre-existing rights, and he victims of arbitrary deprivations are in most instances not aware that their rights are protected in law.

Province wide, the land registers and records which are supposed to be stored in the local offices of the Department of Agriculture are, either non-existent, or outdated or in a state of total chaos. In the Herschel district the traditional leaders in collusion with some officials of the Department of
Agriculture are aware of this situation and have even put an embargo on access to land records, to the general public. This embargo is used to prevent any legal challenges to arbitrary deprivations, which happen on a daily basis. The chaotic land records seem to create conditions which are conducive to further maladministration and corruption in land allocations.

Experience from a number of cases in the Eastern Cape suggests that the would-be beneficiaries of IPIRLA, do not know this legal instrument, or and where they do, they do not have handles for making use of it. Some people who have managed to approach the District Land Reform offices with complaints of illegal deprivations complaints never go far in getting redress, because the Department of Rural Development and Land Reform lacks the administrative capacity and mechanisms for handling these issues. The primary reason for this is that the IPIRLA, as it stands, does not have regulations as envisaged in the Act, which creates a hurdle for how the protection will be effected. The Department of Rural Development and Land Reform also does not have administrative systems for managing these rights. This problem arises largely because IPIRLA was originally intended as a temporary statute which was later to be replaced by a more comprehensive tenure legislation. In the Herchel district many of the victims of the arbitrary deprivations do report to the local police station, where they find a hurdle, in that police simply do not know how to handle such complaints. Where police have managed to get some of the cases to the courts, the local magistrate’s court is also unable to handle these partly due to lack of understanding of legislation, and or largely because of the “ill defined” nature of informal rights.

The author of this paper has in his capacity as a land rights inquirer in Sterkspruit received many complaints of arbitrary deprivations of IPIRLA rights. The following are selected as typical complaints that are lodged.
Ms NIN is self employed as a hawker, and a female residing in New Rest Location in Sterkspruit. Ms NIN applied for a business site sometime in 2007 to the Basotho Tribal Authority. The site application was approved by the Basotho Tribal Authority in a letter dated 07 June 2007. The headman accompanied by the Department of Agriculture officials demarcated the site on 19 June 2007, and the size of the site demarcated was approximately 25m x 42m. Ms NIN was not issued with a PTO, as does normally happen.

On 5 June 2008 Ms NIN wrote a letter to the DLA complaining about Basotho Traditional Council and officials of the Department of Agriculture, complaining that Mr MS or his agent was digging a foundation and constructing on her site. DLA tried to mediate on the dispute without success. On 19 June 2008 the District office manager of DLA gave Ms NIN and Mr MS a letter instructing that construction should be terminated until an investigation is concluded. Mr MS ignored the letter and continued to build.

In August 2010 Ms NIN went to the Department of Agriculture to enquire about the PTO, and she was told that it had not been processed. Instead the officials gave Ms NIN a hand drawn sketch map. Based on the sketch map, Ms NIN noticed that the site originally allocated to her had been subdivided and a portion (22m x 16m) allocated to a Mr IPT, who happens to be the son of Mt JT who is the chairperson of Basotho Tribal authority.

Ms NIN wants her rights to her original site protected and restored to her in terms of IPILRA. Her right in land was eroded by Mr MS putting up a building on her land and secondly by the demarcation (subdivision) of a site for Mr IPT. (Symbolic names used to hide identity)
Where to now with informal rights?

The South African Constitution contains a provision – section 25 - which protect the right to property as a fundamental human right. Section 25(1) of the Constitution states, “No one may be deprived of property except in terms of law of general applicability, and no law may permit arbitrary deprivation of property. However as with other rights, this right is not absolute, but can be determined by law and limited to facilitate the achievement of important social purposes (Nkabinde, 2009).

Deprivation is recognised in South African statutes to enable able the state to regulate use of property for public good without the fear of incurring liability to owners of property affected in the course of such regulation.” Planning and zoning regulations are some of the instruments that the state may use to regulate use of private property (Van Wyk, 2009).

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Text Box 2: The Story of the African Ministries Association

In 1993 a group of priests from around Herschel formed an association named “Old Age Home African Ministries Association”, with a view to collaborate in developing a Old Age Home. In 1996 the association made an application to the AbeSotho Tribal Authority for land, with a view to develop the facility. The application was approved on the same year and a parcel of land demarcated by the Department of Agriculture, for which a Reservation Certificate was issued on 26 February 2002, for a parcel of land that measures 2 500 m$^2$ square metres.

According to Mr X who is a representative of the association mentioned above, on 18 June 2010, the local headman and his committee and three officials of the Department of Agriculture came and demarcated 15 sites, all within the fenced old age home site, thereby creating overlapping rights. The association members only got to know of the demarcation of the new sites on 23 June 2010. On 24 June 2010 five members of the association went to the local offices of the Department of Agriculture, with a view to enquire about the demarcation. It is alleged that, Mr N of the Department of Agriculture confirmed that sites were indeed demarcated. The explanation of the Department of Agriculture was that they were acting on instruction from the headman Mr Victor Slater.

On the very same day 24 June 2010, the association members went to the headmen Mr VS to further inquire Mr VS refused to give any answer, on the grounds that he is not alone on that matter. The association members left without getting a word.

On the very the members of the association communicated their findings to the Ward councilor for ward 10 Ms GP. The councilor suggested that the association lodges a charge with the SAPS, which they did. Detective Inspector N was the officer to whom the case was reported, but the detective did not give the association a case number. When the association made an inquiry, the Detective told the association that the docket was with the prosecutor, who will read it and write a report. By September 2011, the association did not have a case number.

In essence the association wanted to interdict the headman and Department of Agriculture to withdraw the allocations that infringe on the association’s land rights and to stop the beneficiaries from occupying the land, but they did not have the resources for hiring a lawyer to take the matter to the supreme court. (Symbolic names used to hide identity)
Taking the cue directly from the Constitution, IPILRA provides that the holders of informal rights may not be deprived of their right to land except with their consent or by expropriation. Section 4 of the Act explicitly provides that the Minister may make regulations in order to achieve the objects of the Act. The Act does not have regulations as envisaged in the Act, thereby raising issues about how the protection will be delivered. The Interim procedures only deal with a small element of protection, procedures to be followed in the event of deprivations that arise out of development decisions.

The Minister of Rural Development is directly affected as the nominal owner or trustee of the vast majority of the land where IPILRA rights exist and in that sense he has specific legal and fiduciary duties to the holders of IPILRA rights in all his dealings as trustee or nominal owner of state and trust land. This duty applies to all decisions by the landowner that impact on IPILRA rights, including for example, sales, sub-divisions, township development approvals, the granting of servitudes, leases, mortgages, and development or joint-venture agreements.

The state has effectively adopted what could be considered a “do nothing approach” in respect of informal rights, which is potentially equivalent to breeding the problem for the future. This policy vacuum creates an environment in which illegal deprivations continue unabated. Given that these rights are constitutionally entrenched, the first question that courts have to determine is whether these rights are can be protected post facto, meaning that someone who has been deprived of his/her rights without his/her consent can practically claim restoration if the right was taken away without due consideration for IPILRA. Should in future, a competent court make such a ruling, it could potentially open the Pandora’s box for government, because it would open up a new window for IPILRA land claims.

The declaration of Communal Land Rights Act to be unconstitutional has resulted in a policy impasse within the Department of Rural Development and Land Reform, with effect that the enactment of permanent replacement tenure legislation is not feasible in the short to medium term. While it is acknowledged that IPILRA will never sever the function of full tenure reform legislation, one feasible option of dealing with the current situation in the short to medium term is to amend IPILRA itself. The first thrust of amendment could focus on providing for clear mechanisms to effect protection, secondly do away with the requirement that it be renewed every year, and thirdly to draw up regulations which provide for mechanisms for enforcing the act. Such regulations would need to augment the minimalist approach originally adopted in what was an interim measure, providing concrete mechanisms for giving effect to section 25(6) of the Constitution, which provides
protection of rights and redress. Regulations have the added advantage that they can be developed and introduced more quickly than the process required for amending and introducing a new legislation. The advantage of this proposed route, that of developing regulations in the meantime, is that in addition to the immediate protection they would provide to rights holders, the experience emanating from the implementation of an elaborate IPILRA would form the basis and experience which would inform a future tenure legislation.
References:


