

Informal Settlement Upgrading: Incrementally upgrading tenure under customary administration



human settlements

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Socio-Economic Rights Institute and
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Table of contents

PART 1:	Introduction	3
1.1	The brief	3
1.2	Method	3
1.3	Report outline	3
PART 2:	Understanding tenure and tenure security	4
2.1	Defining tenure	4
2.1.1	Tenure form	4
2.1.2	Social relations	4
2.1.3	The bundle of rights	5
2.1.4	Norms, practice and authority	6
2.2	Defining tenure security	7
2.3	Tenure diversity and the freehold 'fixation'	8
PART 3:	Legal pluralism and tenure security	10
3.1	International debates about law and tenure security in customary contexts	10
3.2	The South African case	11
3.3	The different 'rules of the game'	11
PART 4:	Legal and policy framework	14
4.1	The Constitution	14
4.2	Tenure law	15
4.2.1	The Interim Protection of Land Rights Act (IPILRA) no. 31 of 1996	15
4.3	Planning law	17
4.4	Relevant policy	21
4.4.1	Communal Land Tenure Policy (2014)	21
PART 5:	Research findings	23
5.1	Context	23
5.2	Key issues	23
5.2.1	Under what circumstances can municipalities provide services on land under customary administration that they do not own?	24
5.2.2	Are there any pre-township establishment activities that can be undertaken and tenure security measures implemented?	25
5.2.3	What tenure rights do people living on land under customary administration currently possess?	27

	5.2.4 What is the role of traditional leadership in the upgrading process and beyond it, in land administration	27
5.3	Case study findings	28
	5.3.1 Background	28
	5.3.2 Methodology	29
	5.3.3 Access	30
	5.3.4 Documentation issued upon access to sites	31
	5.3.5 Land use and rights over property	32
	5.3.6 Supply of basic services and development projects	32
	5.3.7 Relationship between the municipalities and traditional authorities on issues of services	34
PART 6:	Proposed approach to upgrading informal settlements on land under customary administration	35
6.1	Conceptual framework	35
	6.1.1 Recognition	35
	6.1.2 The Upgrading Informal Settlements Programme (UISP)	37
6.2	Recommendations	37
	6.2.1 Local recognition: undertake a tenure investigation	37
	6.2.2 Legal recognition: identify rights holders	39
	6.2.3 Administrative recognition: develop municipal land records	39
	6.2.4 Administrative recognition: provision of basic services and basic layout planning in terms of the UISP	39
	6.2.5 Further legal recognition in terms of SPLUMA?	40
PART 7:	Conclusion	41
PART 8:	Acronyms	43

PART 1

Introduction

1.1 The brief

The Housing Development Agency (HDA) has embarked on a process to frame and package a document on incremental tenure options with an emphasis on informal settlements situated on communal land.

This process was carried out using four case studies – settlements situated on tribal land – in provinces that are largely rural in nature namely, the Northern Cape, Limpopo, KwaZulu-Natal and North West.

The assignment seeks to explore the specific challenges as well as possible recommendations for incrementally upgrading informal settlements situated on traditional authority land in communal areas, with a particular emphasis on securing tenure.

1.2 Method

Phase 1 comprised of a literature review to define tenure security, investigate the existing customary context and its implications for upgrading, explore the legal planning framework and review National Upgrade Support Programme (NUSP) assessment reports and upgrading plans. Also undertaken was case study research in four settlements, one in each province.

Phase 2 involved framing and packaging workshop presentations for land tenure workshops in four provinces and the production of this report.

A final third phase will entail producing a close-out report and meeting with NUSP to ensure alignment.

1.3 Report outline

In order to respond to the key question – how to secure tenure during informal settlement upgrading on land that is communally or traditionally administered – the report is structured in the following way:

- Section 1:** Defining tenure and tenure security
- Section 2:** Understanding the customary context and the implications for informal settlement upgrading
- Section 3:** Legal and policy framework for upgrading informal settlements on land under customary administration
- Section 4:** Research findings, including case studies
- Section 5:** Proposed approach to securing tenure
- Section 6:** Conclusion, including areas for further investigation

PART 2

Understanding tenure and tenure security

2.1 Defining tenure

The word tenure comes from the French verb *tenir*, which means to hold; tenure refers to the ways in which land and housing are held. The UN Special Rapporteur on Adequate Housing offered this definition in 2012:¹

The set of relationships with respect to housing and land, established through statutory law or customary, informal or hybrid arrangements

This definition emphasises relationships; tenure is not simply about the law, or about legal forms of holding land or housing. It is about the relationships to land that people have.

Her definition also shows that tenure is established in different ways and that statutory law is one of them. Others are customary and informal arrangements. She identifies a fourth way in which tenure relationships are established, and uses the term *hybrid arrangements*. This is important because it draws our attention to what happens frequently in practice; that tenure is often established through a combination of statutory law, custom or informal arrangements, rather than a single one.

2.1.1 Tenure form

When we talk about tenure people often think of **tenure form** such as individual ownership, group ownership, rental and variations and most often they think of individual ownership as the ideal form of tenure. People often use the terms *tenure* and *title* interchangeably. This is inaccurate because it contains an assumption that title and tenure are the same thing, when title is one example of a tenure form. This is problematic because it:

- Ignores a whole range of existing tenure arrangements
- Shuts down possibilities for improving tenure incrementally
- Focuses policy and practical attention on getting everyone into registered title which would take decades to achieve

Tenure form, whether registered, individual title or something else, does not bring tenure security in itself. The ability to enforce a socially legitimate tenure system is what makes tenure more secure, regardless of what type, form or option of tenure it is.

2.1.2 Social relations

A focus on form can cause confusion and it is preferable to start with the tenure arrangements that actually exist, rather than with form. This requires an investigation of **social relations**.

For example, in customary tenure systems, the question “who owns this land?” can have multiple answers depending on who is being asked. If the question is asked of a Deeds Registry official, then the answer may be “the South African Government” or “the Tsubatse Local Municipality”. If the person asked is part of the local community structures involved in land allocations or part of the traditional leadership, the answer may be “the chief”. If the person asked lives on the land and one is pointing in the direction of his or her house, the

¹ Rolnik, R 2012. Report of the United Nations Special Rapporteur on Adequate Housing to the Human Rights Council. New York: United Nations General Assembly.

answer may be “I am the owner”, or, “my brother, Dlamini, is the owner”. All of these are accurate answers to the question of ownership. The reason for the different answers is that in customary tenure settings, or where hybrid tenure systems exist, ‘ownership’ is nested in layers of social relations. The idea of rent tenancy, or leasehold, can also lead to confusion. In common law derived from English and Roman-Dutch legal systems, tenancy is an agreement between equal parties involving the right to occupy in return for the obligation to pay an agreed sum of money.

In many African customary systems, the right to occupy relates to a patron-client relationship; the obligation to assist poorer relatives, who in turn must support the patron in whatever way possible (sometimes money, sometimes politically). It is not a relationship between social equals. Furthermore, the obligation of the patron to support the person or family in need continues until the need no longer exists. This can, and sometimes does, take generations. For example, if Mr Manyathi's widowed sister asked for land to live on, Mr Manyathi and his heirs may not be allowed to retake occupation of that land even after the mother and her children have died, for as long as her descendants continue to need the land.

2.1.3 The bundle of rights

As well as exploring social relations, it is important to consider what functions tenure performs, and form follows from this. The notion of a **bundle of rights** helps us understand function better.

Going back a long way, some writers developed the idea of a ‘bundle of rights’ and of rights as ‘sticks’ in the bundle. There are many definitions about what the sticks are. The following example is taken from a research project² aiming to better understand how people's rights looked in practice – and at ‘local recognition’. The example shows the results in one of the case studies in order to give an idea of how the rights were experienced in practice. The left hand column shows the bundle of rights, with each right being a stick in that bundle. We would not expect that all these rights would be available in all cases. The list represents what we would commonly associate with registered, individual title rights. The right hand column shows how the stick or right was experienced in practice in the informal settlement.

Right in the bundle	Case study experience
Residential use Productive use	Yes, people in this case had occupation rights. No, people were not meant to use the land productively, or for economic or financial uses, but in practice, or unofficially, commercial activities did take place, such as spaza shops and hair salons.
Rent, sublet	No, according to the local rules people were not meant to rent out space.
Control access	Yes, access to the settlement was not ‘free for all’, there were local rules in place for how new people got permission to settle.
Sell/by or inherit	Yes, your children could inherit if you died and no, people were not meant to sell or transfer but unofficially some transactions did take place.
Develop or improve	Yes, households could make investments in their property to improve it, such as building a new room or incrementally building in brick (called consolidation).

² Rolnik, R 2012. Report of the United Nations Special Rapporteur on Adequate Housing to the Human Rights Council. New York: United Nations General Assembly.

Right in the bundle	Case study experience
Realise a benefit or return from selling	No, people were not meant to make a profit from the sale of their place as the local rules did not permit sale.
Access to services	Varied, because the settlement was not upgraded, people had made their own arrangements in some cases.
Access to formal credit	No, the research did not identify anyone with access to formal credit, although informal loans might have been taking place.
Claims to future development	Some rights holders, with evidence to prove their claims, were having their rights upgraded to title.

Another stick in the bundle of rights that is not explored in the example above is who has the right (normatively and in practice) to re-allocate a particular piece or portion of land. One is often told that the customary right to allocate belongs to the chief (for example, "who gave you this land?" "Kgoshi Mashifane gave it to me"). However, the Kgoshi cannot override the 'ownership' of the household that received the original allocation. Thus, for example, land that was allocated to the Sibisi family cannot be allocated to the Mbeki family without the Kgoshi (or his headman) getting the Sibisi household's agreement. This is important because it tells us where a core function of ownership (namely, the right to give away what is yours) resides. Customary or traditional land administration is not the same as ownership, and thus where land is identified for development, the first people who must be consulted, and expropriated (if that is planned), are the people who have the rights to transfer or reallocate the land.

2.1.4 Norms, practice and authority

As well as providing more insight into the idea of a bundle of rights, the example also shows how norms and practices can differ. For example, the local norm or rule was that people were not meant to use their land for non-residential purposes.

Practices refers to the established way of doing things or what actually happens on the ground concerning rights, duties or benefits, such as how adjudication of disputes is dealt with or how people access land and what happens if they leave, or how people use land. It is important to see practice as distinct from norms. **Norms** can be understood as the ideals of laws, whether these laws are legislated or locally developed rules. When it comes to tenure, some writers have developed the idea from observing practice that laws are not the only source of rule-making in society, and that we have to look locally to see what rules exist and what informs them.

A gap between a norm or local rule and practice might exist because the norm is not responsive or adequate or appropriate in some way. It is always a signal that something is not working as well as it could; the gap could be closed by reviewing the local rule or norm so that it matches practice more closely or the practice might not be considered socially legitimate and may need to be sanctioned. Sanction depends on authority and who wields it.

Authority is important in tenure because it refers to the power to enforce laws and rules concerning rights, responsibilities, and benefits. In practice much authority is socially derived, although conventional thinking about tenure tends to privilege the law as a source of authority in a way that does not help us to see what is going on locally, or in local practice. The concept of legitimacy is important in tenure because it refers to authority that is socially and locally acceptable and this is what really makes tenure secure for people. Another way of describing this is 'local recognition'. These are very helpful distinctions to keep in mind for

understanding how tenure is managed locally, before an upgrading project begins. It assists in obtaining clarity on what people can do with the land and with what their rights and obligations are.

2.2 Defining tenure security

The Global Land Tools Network differentiated passive and active tenure security and offered these definitions in 2012:³

- Passive tenure security means being free of the risk of being evicted from the land
- Active tenure security means being able to perform transactions on a parcel of land, for example to buy, sell or lease it

Regarding passive tenure security, since 1994 there have been many cases in court about eviction – more cases on this than on any other socio-economic right. This means that a body of case law has been developed around the right to housing which, in turn, has assisted in establishing the constitutional protections to which people are entitled.

Current residents in informal settlements, regardless of the lawfulness of their occupation and irrespective of how the settlements are assessed and categorised, possess a range of substantive and procedural protections that impose obligations on municipalities, private land owners and occupiers and rights holders⁴. The protections can be summarised as follows:

- Procedural requirements for an eviction
- Meaningful engagement
- Rights of private property owners
- Municipal provision of alternative accommodation
- Adequate alternative accommodation, or expropriation of the right of residence
- Accountability of municipal office bearers to enforce court orders

In its most basic definition tenure security means protection from eviction. Threats to tenure security do not only come from the state. They also can be seen within the community and the family.

For example, where community authority is not legitimate it can exploit the poor and vulnerable, and sometimes women and children are vulnerable to the actions of other family members. The literature on tenure refers to 'market evictions' which means that sometimes formalisation puts people into tenure arrangements that they cannot sustain due to poverty. One example is 'downward raiding' where people without adequate access to housing may displace poorer people who are recipients of public subsidies because they are poor, through buying their properties, often at less than the amount the state invested.

The definition of active tenure security raises the important issue of why tenure security is important. What is tenure security meant to achieve? Why does tenure security matter?

For this it is useful to draw a distinction between **wealth accumulation** and **livelihood security**.

Some schools of thought view property as a means for accumulating wealth. This is achieved when you sell your house for more than you bought it for and use the profit you made to buy another house that moves you up the property ladder – a bigger house in a better area. The profit you make could empower you to buy another house where you can open a

³ UN-Habitat, *Handling Land: Innovative tools for land governance and secure tenure*, Global Land Tool Network, United Nations Human Settlements Programme, International Institute of Rural Reconstruction, Nairobi. 2012.

⁴ SERI. 2013. 'Evictions and Alternative Accommodation in South Africa: An Analysis of Jurisprudence and Implications for Local Government'. SERI Research Report November 2013. Johannesburg: Socio-Economic Rights Institute. Written by Michael Clark.

business. In these ways, property can make you wealthier. In this school of thought individual title is held up as being essential for making your property work for you.

While this might be the scenario for some people, for many others it is a long way off from reality. For example, many people view a house as a family asset which they would never sell. In reality selling your property if you're poor in South Africa where the demand for housing far outstrips the supply, more often than not means moving down this ladder, back into informality, not up it. So we need to broaden our thinking about the benefits of property, and especially of tenure security, beyond the wealth accumulation mindset to accommodate how tenure security can improve people's livelihoods. A critical factor here is that households need security in order to make their own investments in housing, called consolidation. No one would be willing to invest in their property if they thought they might be arbitrarily evicted or if they were unsure about the future of their occupation.

However, there is some research and anecdotal evidence that some people invest in housing as a strategy to improve their tenure security. The relationship between housing and tenure security may therefore be reciprocal and iterative: build a house to secure tenure, secure tenure to increase investments in housing. Where relatively formal housing exists, one should therefore not automatically assume there is tenure security.

In many cases, formal credit requires not just secure tenure, but a form of tenure that is legally recognisable, such as a long-term lease, Permission to Occupy (PTO) or a title deed. There is a risk, however, that processes that aim to provide such tenure forms can undermine the actual tenure security in local or customary tenure systems. Thus, for instance, where title deeds are issued, market evictions can take place; or where leases are put in place, these can convert strong rights of customary ownership into legally weaker tenancy rights.

Without tenure security it is difficult, if not impossible, for people in informal settlements to get access to basic services, small scale finance and public investment in infrastructure like water services. One of our major challenges is to make sure that tenure security is sufficient to access these benefits, as in many places you will find reluctance to do so unless a township is established and title deeds are issued. This is one of the key areas where more innovation is needed and we address it further below.

2.3 Tenure diversity and the freehold 'fixation'

Many people have been waiting for twenty years or more for a subsidy without any improvements in their tenure security. This is where the Upgrading Informal Settlements Programme (UISP) comes in. It is possible to improve tenure security in informal settlements in an incremental way, with the foundation of the constitutional rights that protect people against arbitrary eviction. But it requires innovative thinking and a willingness to try to do things in different ways. Thinking differently about tenure is a critical part of this.

Freehold is a term that is used to apply to ownership. In the South African context, it refers to a registered title that is generally individual in nature (ownership tenure that is registered in the deeds registry which issues title deeds to owners). There is a debate about ownership with some people seeing freehold as the 'best' and most secure form of tenure, with others arguing for tenure diversity. Tenure diversity refers to a range of tenure options, rather than only ownership. Although the debate is important, one doesn't need to be all that familiar with it to know that ownership simply isn't happening for many poor South Africans. Many people either live in an informal settlement or an Reconstruction and Development Programme (RDP) house – there is no form of accommodation between the two.

Our housing subsidy programme has privileged ownership above other forms of tenure so far but the UISP is an opportunity to do things differently. From a tenure perspective the first

Due to the 'fixation' with freehold other well-established forms of tenure have been overshadowed and government support of other tenure arrangements tends to be reduced. The prevalence of individual freehold over any other tenure arrangements has increased the tenure insecurity of all other tenure arrangements. International institutions are increasingly aware of the limitations of strategies based predominantly on formalisation of urban land markets. Instead there is growing recognition of a variety of tenure instruments that can be employed.

PART 3

Legal pluralism and tenure security

3.1 International debates about law and tenure security in customary contexts

Land tenure reform in sub-Saharan African, aimed at reducing poverty and promoting economic growth, has over the past 40 years grappled with dual legal systems. The problem is that tenure reform that has centred on the conversion of customary tenure to individualised freehold rights has had high economic and social costs, and as a result, negative consequences for both governments and intended beneficiaries. It has frequently failed to deliver either tenure security or the benefits supposedly associated with titling and registration of land rights, such as credit access through mortgage value, or private and state investments in land. Upgrading customary rights of occupation and land use into registered rights in the form of titles has, in other words, often not achieved what was intended. Why is this?

The cause of the problem is often blamed on the imposition of colonial legal systems on top of pre-existing indigenous customary systems for managing people and land. By the time many countries in Africa achieved independence, their legal systems were made up of a proliferation of localised legal adaptations at the level of both national law and local adjustments in practice⁵. This proliferation has frequently given rise to a range of claims over land as a result of competing sources of legitimacy and authority, with the practical effect that community level questions of who has access to and control over land are mired in ambiguity and controversy. The solution, supported by the World Bank and other global financial institutions and donors from about the 1970s onwards, has increasingly been to find ways of 'harmonising' customary and western legal systems, while accepting that customary systems can and do provide tenure security albeit on the basis of a different logic or register. (See previous section on the different purposes of securing tenure: economic value realised through market transactions versus social value realised through livelihood provision for kin.) However, harmonization of legal pluralism is often harder to practice than it is to preach.

A more recent inclusion in the debate is the notion of 'living law'. This stands in contrast to both the fixed common law assumptions about property and rights to land that underpin colonial legal systems, and to the idea that customary law relating to land holdings is static and unchanging. *Living law* introduces the notion that all laws relating to property and land are dynamic and responsive to broader social changes, including new sources of legitimacy and contestation introduced by the interpenetration of the two systems and the development of hybrid land administration systems. Law understood in this way is not just the set of rules legislated by a parliament and implemented by state officials, but includes those norms and practices that feed into social regulation and are embedded in widely and deeply held social values and the relationships they give rise to. The totality of interactions between the various sources and practices of law and regulation, and the dynamic changes these give rise to constitute the 'living law'.

⁵ The term *legal pluralism* is used in different contexts to describe both these kinds of changes. It sometimes refers to changes in a country's law intended to give effect to the norms and practices that exist on the ground, but legal anthropologists may also use the term to include customary and/or living law, which may not be written down and whose origins are embedded in practice rather than government policy.

3.2 The South African case

This project, which raises the question of how to secure tenure during informal settlement upgrades on communally or traditionally administered land, is thus emblematic of the international debates. The excision of land from the jurisdiction of a traditional authority, the establishment of a formal township, and the survey and general plan underpinning this, along with the opening of a register and issuing of title deeds are not only costly and slow processes, they are likely to be subject to many hours of negotiation if not outright contestation. Furthermore, the outcome will certainly have a number of unintended consequences, amongst them the adaptation of the local existing land administration system in an unpredictable direction, the erosion of the social relations in which customary tenure is embedded and a tenure system that will immediately begin to draw in elements of customary law, thus moving away from the intended formalisation.

The South African case, however, with its particular Roman-Dutch and English colonial legal heritage, is distinctive. Customary law was both distorted through attempts to make it generally applicable and rendered static through codification. Furthermore, the codification was the base for a land tenure and administration framework that ultimately resulted in Africans being deprived of all forms of land ownership while being subjected to the authority of state-appointed and approved chiefs. Understandably, these systems have been the focus of highly contested legal reforms in the democratic period.

Nevertheless, the nature of local tenure arrangements that have emerged and the systems that have arisen to manage them cannot simply be extinguished through law or developmental intervention. Any intervention would take place in an environment already filled with rights, obligations, claims, and authorities; it may adapt these but it is not likely to eradicate them. This is important because an intervention might be contested, or it might lead to hybridisation. An implication of this is that it is necessary to be aware of this for better management of interventions.

3.3 The different 'rules of the game'

The essential logic of an idealised 'formal' system of title registration is that it underpins four elements of South Africa's land information system as reflected in the national cadastre⁶. This also applies to informal settlements that have been upgraded using laws like the Upgrading of Land Tenure Rights Act or the Less Formal Township Establishment Act. This 'logic' includes:

- The demarcation through survey of a parcel of land to levels of precision and accuracy that are statutorily defined
- The registration of rights over the parcel of land, in which the rights of ownership imply high degrees of autonomy and control in relation to other users of the land
- Property registers, which are linked to billing systems for services and income tax, creating fiscal obligations for the owner
- An ownership system tightly linked to rules of succession and inheritance

Each new transfer of land results in registration of a new title deed. The catalysts for transfer of land are mainly sales, deceased estates or upgrading of tenure – but can include expropriation by the state and property abandonment. The importance of wills in this system is that the will identifies the beneficiary to whom the property must be transferred. In the absence of a will, the law of succession applies and the rights of all legal descendants must be accounted for in the new registered title deed. The failure to register the land means that

⁶ Kingwill, R. (2014). Papering over the Cracks: an Ethnography of Land Title in the Eastern Cape. *Kronos* 40 (11) 241-268.

the title is in effect nullified, and the entire edifice that rests on this process as described above becomes unstable. Kingwill⁷, who describes the differences between registered and customary systems in South Africa, says land “transactions set off a domino effect. Like a train moving through stations, you cannot get to the destination of ownership until there has been an exchange of information at a number of stations along the way”.

By contrast, the logic of customary tenure, often under traditional authorities, is that the rights of land access and use are embedded in social relations and managed at different institutional levels of the social group. In a generic summary, these can be described as:

- a) Access to land hinges on membership of the group. As a member of the tribe, clan or community, one is entitled to land for residential purposes and to use any of the common areas for grazing, collection of natural resources and as access paths. Membership establishes a social compact of sorts: one receives land as an essential component of a livelihood and in return is obligated to support the interests of the group as expressed through its leadership, often the chieftaincy.
- b) The member of the group is the compound household, present, future and past, whose interests are articulated through the current head of house. In most indigenous groups in South Africa, the descent is patrilineal; the property of the house transfers into the care of either the youngest or oldest son as the newest representative of the interests of the compound household. This representative is not the owner. Unlike in the formal registration of title deeds system, which compels every right over the property to be separately demarcated, described and registered, customary tenure allows multiple rights in the 'property' to exist at the same time: all members of the compound household, past, present and future, are rights holders, and these rights descend down the generations according to rules embedded in accepted lineage structures. However, this norm must be exercised through active participation in order for these 'silent' rights to continue to be a basis for a claim to the property. The key issue, though, is that the rights of ownership belong to the members of the compound household in perpetuity, not to individuals to whom the property must be transferred and registered anew with each generation.
- c) Decisions about the property of the house, particularly its alienation, require that all actively participating members who hold rights in the property must be included. This may, for example, involve wives, brothers, sisters and paternal aunts and uncles of the household head. This implies two very important considerations: firstly, a tribal headman or chief is not entitled to make decisions about house property, particularly residential sites and fields; secondly, a decision about house property that did not involve the consultation of active lineage members could be challenged by them.
- d) In addition to the layer of authority that decides membership and its obligations and claims (the chieftaincy), and the household (or active lineage members) who decide issues relating to the use and alienation of house property, there is another layer of land administration in the middle. This is the localised institution at the level of the tribal ward (or *isigodi*), which is made up of representatives (heads) of the compound households in that ward and is headed by the headman of that ward. This group decides what happens to common land in the ward, and has, in some cases, the right to refuse a new member access to land in the ward. In particular, this group (in Zulu, the *ibandla*) would have to be consulted to approve decisions relating to changes in common land use, for example, any developments that affect access paths, the change of grazing lands into residential zones, or site allocations in the ward to new members. Outsiders and developers, who assume that consultation with the traditional council or chief only is adequate, frequently neglect this layer of authority. However, this is the

⁷ Kingwill, R. (2014). Papering over the Cracks: an Ethnography of Land Title in the Eastern Cape. *Kronos* 40 (11) 241-268.

layer that is called on as the first level of adjudication and dispute resolution when there are conflicts between land rights holders, including land claims, in the ward. Without their consultation, these two functions would not be undertaken.

Aspects of this land tenure and administration system were interrogated by the Constitutional Court in the *Bhe* judgment⁸. Of relevance to this discussion is the following quote from that judgment on the rules of customary law in relation to property:

“The heir did not merely succeed to the assets of the deceased; succession was not primarily concerned with the distribution of the estate of the deceased, but with the preservation and perpetuation of the family unit. Property was collectively owned and the family head, who was the nominal owner of the property, administered it for the benefit of the family unit as a whole.”

In conclusion, then, the first port of call to determine ownership would, in the formalised property system, be title deeds, survey diagrams and beacons, and the determination of land use would be the demarcated zones for specific uses through planning legislation. In an area under customary administration, the first port of call would be the chieftaincy (or traditional authority) to determine who the members of the group are, the ward-level group (*ibandla*) to determine the local land uses and who has residential sites and fields and where these are, and the compound household representatives to determine who must be consulted about possible changes to house property.

This describes the respective idealised 'rules of the game', the essential logic that underlies specific norms and practices in particular areas. However, these 'rules of the game' are not static and unchanging; and in particular, they have responded to legal, policy, social and political changes over time. In many existing communities under traditional authorities today, the actual practices are hybridised and variable. A planned intervention that intends to work with, rather than against, the existing dynamics of change in a settlement with hybridised tenure and land administration practices would need to determine:

- How the actual rules and norms vary from the essential logic that underlies both western-derived and customary notions of property
- What the primary drivers are of these variations

In summary then, a planned intervention aiming at changing tenure arrangements such that the changes 'stick', or are sustained, should:

- Identify the multiple layers of authority, the nature of the decisions they are entitled to take, and the specific spaces and groups they exercise that authority over
- Determine the layers of rights to live on and/or use land and who holds different rights at the level of the ward and the compound household
- Identify the 'rules of the game' in relation to different types of land and rights holders and the norms and practices governing how land is transferred. It is important not to assume all transfers are sales involving cash or that multiple rights-holding arrangements are necessarily tenancy contracts

We term this exploration a Tenure Investigation in the sections that follow. This is important because ways of managing land, including institutions, norms and practices, do not automatically disappear when new property forms are imposed through upgrading. The more likely outcome is new types of hybridisation of tenure and land administration that incorporate the existing and historical norms and practices in ways that may have consequences unintended by the development implementers. Being aware of the local institutions, norms and practices and involving the correct people and groups affected by the intervention will allow the process of implementation to be better managed.

⁸ *Bhe & others*, Case CCT 49/03. 15 October 2004.

PART 4

Legal and policy framework

This section addresses the laws and policies that have a bearing on upgrading informal settlements on land under customary administration. It starts with the Constitution, moves through applicable tenure and planning law and finally addresses policies.

4.1 The Constitution

Three clauses in the Constitution are relevant.

Firstly, the Bill of Rights (Section 25) dealing with property has a number of important statements, namely:

- No one may be deprived of property except under legally defined and generally applicable conditions
- Property that is expropriated for public purposes, of which land reform is an acceptable public purpose, is subject to compensation
- A person whose tenure is legally insecure as a result of racially discriminatory laws and practices is entitled either to legally secure tenure or to comparable redress

It is important to note that the Constitution does not refer to land owners; it refers to property holders. The property and who has rights to hold it must be defined through statutory laws. Furthermore, all property holders must be compensated if their property is expropriated, and it can only be expropriated for defined public purposes. And finally, it is not constitutionally permissible to erode existing tenure security of some in order to improve the tenure security of others.

Secondly, Chapter 12 of the Constitution provides for the recognition and role of traditional leaders and customary law. This is the third important provision, and it states that traditional leadership is recognised in the following respects:

- The institution, status and role of traditional leadership, according to customary law, are recognised subject to the Constitution
- Customary law may be applied subject to legal amendments of custom
- Courts must apply customary law when it is applicable, subject to the Constitution and any other limiting law

Parliament is allowed to define these clauses and provisions through legislation, but where no legislation exists, these constitutional provisions prevail.

Thirdly, the Bill of Rights (Section 9) deals with equality, and states:

- Everyone is equal before the law, which means everyone has the same enjoyment of rights and freedom
- No person, including the state, may discriminate against anyone on the grounds of (amongst other things) race, gender, ethnic or social origin, or marital status

Together, and in combination with other clauses that protect democracy, these latter clauses limit the authority that can be granted to chieftaincies. In customary tenure systems, where gender and marital status on the one hand can define who has access to what property at what points in their lives, these clauses limit the absolute application of customary law. The

Constitutional Court found in the *Bhe* judgement (in relation to succession of property) that customary law was subject to the provisions of the Constitution, and therefore male and female children, born in or out of civil and customary marriages, are all equal legal heirs in intestate properties.

Any developmental intervention is thus constrained by these provisions, or by acts of Parliament that define them. Given the tension between the equal rights of citizenship and the norms and practices that construct customary law and the institutions of traditional leadership, it is not surprising that there have been numerous legal and theoretical debates about how to reconcile these constitutional clauses. In practice, there are as many cases of traditional leadership that attempt to exceed the bounds of their customary given authority on the basis of the authority they have established under apartheid as compliant institutions, as there have been cases of traditional leadership co-operating with different spheres of government to further the interests of their communities or those who do not co-operate but neither do they openly contest the authority of democratically elected government structures. Furthermore, a complicating factor here is that traditional leaders do not all compel the same degree of authority and legitimacy on the ground; many continue to have the active support of their members, while others have effectively abandoned local land administration and are viewed as illegitimate in their communities.

A process of consultation is currently taking place around the Traditional Affairs Bill (2013), which will repeal the National House of Traditional Leaders Act, 2009, and the Traditional Leadership and Governance Framework Act, 2003. It provides for the recognition of different levels of traditional leadership, and the processes through which this recognition is granted or denied, as well as making provision for the recognition of Khoi-San communities and their traditional leadership.

4.2 Tenure law

4.2.1 The Interim Protection of Land Rights Act (IPLRA) no. 31 of 1996

IPLRA was passed in order to provide for the “temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law”. It was expected at the time of enactment that an overarching tenure policy framework and new tenure reform laws would replace IPLRA. An attempt to do this through the Communal Land Rights Act (CLRA), 2004, was unsuccessful when CLRA was found to be unconstitutional by the Constitutional Court in 2010 and never implemented. A new communal tenure policy framework is now in place, and will be discussed below. In the meanwhile, IPLRA remains the legal instrument that defines and protects land rights on land administered by traditional authorities.

IPLRA provides strong protection for the informal and customary land rights of rural people. Section 2(1) of IPLRA provides that people cannot be deprived of **'informal rights' to land** unless they **consent** to being deprived of the land (or the government expropriates the land and pays suitable compensation). This means that a person can only give up their informal or customary land right if they agree to give up their right⁹.

⁹ Centre for Law and Society, Communal Land Policy and IPLRA, Fact Sheet, February 2015.

IPILRA protects different types of informal and customary land rights, as follows:

- The right to use, live on or access land that falls in one of the former Bantustans or that was previously South African Development Trust land. This includes customary land rights. This means that people's rights to their household plots, fields, grazing land or other shared resources (like forests) are protected by IPILRA
- The land rights of people who are beneficiaries in terms of a trust that was created by a law passed by Parliament. This was included to protect the rights of people living on Ingonyama Trust land in KwaZulu-Natal, for example
- The rights of people who previously had Permission to Occupy certificates (PTOs). These certificates were issued by the apartheid government to show that people could use or live on specific pieces of land
- The rights of anyone who has continuously lived on the same piece of land since the beginning of 1993 as if they were the owner of the land. These people are called beneficial occupiers¹⁰

The owners of these rights can only be deprived of them with their consent, in terms of the custom and usage of the community, and subject to appropriate compensation. Where the rights are subject to a community or custom, decisions about disposing of land must be taken by a majority of rights holders at a meeting convened for the purposes of making such a decision. Sales and disposition of land is thus subject to the informal land rights in that land.

The Act binds all persons, including the State.

In a discussion of these types of customary or 'communal' land rights, law professor A.J. Kerr (1990)¹¹ makes two important observations. Firstly, residential and arable land is not communal land. It is individually held and owned. This counters the widespread assumption that on land described as communal (such as land under traditional authorities), all members of the community have the same rights to all parts of the land. Kerr's observation makes clear that only some land – mainly commonage – is land of this nature. On other portions of land within these areas, the rights are exclusive: that is, the owner of the right can exclude other people in the group from his or her land. This applies to land used for residential purposes and arable fields. Kerr says evidence of these exclusive land rights is found in the right of a household to return to its residential site and resume usage of arable fields after vacating an area (but having stated an intention to return to the headman); and that these lands could be bequeathed from generation to generation (although various laws and proclamations attempted to limit this custom). While customary law generally prohibits the sale of land, the household may alienate land to another person or relative without payment. Secondly, Kerr cites court cases where judges have referred to these land rights as "titles", in other words, they are recognised as legally equivalent to the registered rights of ownership, although they are different in nature.

In conclusion, Kerr's analysis suggests that IPILRA rights, particularly those to residential sites and arable fields, should be viewed as ownership rights, although they are not registered rights.

¹⁰CLS Fact sheet (Centre for Law And Society, 2015)

¹¹Kerr, A.J. (1990) *The Customary Law of Immovable Property and of Succession*. Grahamstown: Grocott and Sherry. Third Edition.

4.3 Planning law

The planning law histories of the provinces in South Africa differ, resulting in different planning laws having application in each province, leading in turn to further complexities in land development matters. This situation is one of the main reasons why The Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) was promulgated.

The intertwined nature of land development and land administration, land tenure and land use management instruments, especially in traditional areas, makes the legal context difficult to navigate. To simplify this, applicable law can be periodised as follows:

- Historical, pre-1994 land laws used in customary areas: such as the Black Land Act and Proclamations R293 and R188 and various Bantustan versions of these laws. Some are still applicable in parts of the country
- More recent land development, post-1994 laws: such as IPILRA, PIE, PPA, BCDA, LFTEA, ESTA, Labour Tenants, ULTRA, DFA
- New and future land development laws that will apply in customary areas: National SPLUMA and regulations, provincial SPLUMAs and regulations, and municipal planning, including by-laws

Tenure security in customary areas is provided by IPILRA. Where IPILRA rights do not apply, tenure rights are protected by the PIE Act.

Many people have Permission to Occupy (PTO) certificates in customary areas.

PTOs have a chequered history and their current validity is dependent on the legislation or regulations under which they were originally issued. For example, in the KwaZulu area of KZN they were issued in terms of Chapter XI of the KwaZulu Land Affairs Act No 11 of 1992. This act is still on the statute book but in practice it is not clear that PTOs are still being issued. Existing PTOs, however, retain their validity. In other provinces (including KZN other than the former KwaZulu) they would have been issued under the legislation applicable in the various homelands; mostly the version of the Black Land Regulations R188 of 1969 which applied in the homelands. Outside the homelands the South African version of the regulations would apply. By various laws, these regulations have been repealed but without tracing the repeals one cannot be certain. However, existing PTOs retain their validity¹².

The approach by municipalities and provincial departments that are responsible for development processes is to initiate upgrading through formal laws that apply in such areas. This enables services to be provided by the municipality. However, municipalities have concerns about securing their services over customary land.

Land development laws in informal settlements on land under customary administration are tied up with the laws that apply in traditional areas. The laws are complex and different laws apply in different areas.

The introduction of SPLUMA and its family of laws (provincial planning acts and municipal planning by-laws) raised hopes that unitary laws would apply and that historical laws could be removed from the statute books. However, SPLUMA has raised two different responses on the traditional leadership issue. The first is that traditional leaders have not welcomed SPLUMA because it introduces municipal roles in land development in customary areas. Secondly, there are concerns that SPLUMA gives traditional leaders too much authority in land development, making the chieftaincy like a fourth sphere of government when traditional leaders are not democratically elected.

¹² Personal communication with Peter Rutsch. 25 May 2015.

SPLUMA laws will provide some flexibility in the instruments they offer through SDFs. Land use schemes can have more flexible provisions and land development procedures can be bypassed (through exemptions) where they are inappropriate for traditional areas or informal settlement upgrading. However, the role of traditional leaders will remain complex terrain.

However, the SPLUMA family of laws are not yet in place. As a result, the diverse and complex deck of existing laws in play at the moment remain relevant.

Proclamation R293 of 1963: Proclamation R293 was issued in terms of the Black Administration Act 38 of 1927¹³. However, this Act was repealed by the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005 but it is unclear whether this applies to Proc R293. Different provinces have taken different approaches.

The significance of Proc R293 is that it is still on the statute books in many provinces because it was assigned to each of the provinces. It is still used in Limpopo but not in the North West or the Northern Cape. Limpopo uses it to affect upgrading of informal settlements and to do land development (housing projects) on former traditional areas, even to this day. It has provisions for land development and basic land use management and provides Deed of Grant forms of tenure that are considered as secure as freehold title in these areas. More information on this legislation and Deeds of Grant will be included in the report when discussing Limpopo.

Proclamation R188 of 1969: Proclamation R188 (Government Gazette No.2486 of 11 July 1969) issued in terms of section 25 of the Black Administration Act 25 of 1938, read with the South African Development Trust Act 18 of 1936, was assigned to the provinces of the Eastern Cape, Mpumalanga (Eastern Transvaal), KwaZulu-Natal, Limpopo, North West and Free State, making it provincial law¹⁴.

Proclamation R188 is a racially-based law that attempts to reflect the communal land tenure system. It also discriminates against women and other members of the community from obtaining land. The land rights are insecure. The rights are upgradable in terms of the Upgrading of Land Tenure Rights Act 112 of 1991, but being communal land, a traditional community resolution is required¹⁵.

The significance of Proc R188 is that it is still applicable in many traditional areas, often because it is flexible, simple and less bureaucratic to use. In Limpopo, the Department of Local Government, Housing and Traditional Affairs (LGHTA) issues Permission to Occupy certificates (PTOs) to persons who have permission from the traditional leader to develop residential or business sites on customary land.

Land allocation in traditional areas is undertaken by the traditional leaders and occupation of an identified portion of that traditional land is secured through a PTO. It is an occupancy right and is therefore a personal right. It belongs to the person and not the land, so it expires if the person dies or relinquishes the right by moving off the land. It therefore may not be inherited. Being a personal right it is therefore not registered in the deeds office and hence the land does not have to be formally surveyed. Proc R188 does not make provision for land survey and registration.

Provincial departments of Local Government and Traditional Affairs **use the Upgrading of Land Titles Rights Act 113 of 1991 (ULTRA)** to upgrade PTOs. ULTRA has provisions to

¹³ The South African Law Reform Commission Discussion Paper 118. August 2010. Page 111.

¹⁴ The South African Law Reform Commission Discussion Paper 118. August 2010. Page 114.

¹⁵ The South African Law Reform Commission Discussion Paper 118. August 2010. Page 115.

upgrade 'lesser' forms of title such as the Deed of Grant issued in terms of Proc R293 or PTOs in terms of Proc R188 to full freehold title. Schedule 1 of ULTRA allows for the conversion of leasehold, Deed of Grant and Quitrent as well as BDCA leaseholds. Schedule 2 deals with occupation rights including Proc R188 Permission to Occupy rights as well as a broad category called *"Any right to the occupation of tribal land granted under the indigenous law of customs or the tribe in question"*.

To convert land tenure rights in Schedule 2 areas requires that the area be formalised. For this reason the sites must be surveyed and a township register must be opened so that the upgraded rights can be registered. This is not an automatic process and the person upgrading their tenure must complete a Certificate of Ownership¹⁶ form (prescribed in the Deeds Act 47 of 1937) and submit this to the registrar of deeds to affect the registration of the upgraded right.

It is interesting that in Limpopo, ULTRA is used to upgrade PTOs on traditional land to Deed of Grant when doing informal settlement upgrading or housing developments¹⁷. To do this the land portion in question must be indicated on a survey diagram or general plan of the whole land area and then the deeds office can open a register to record the Deed of Grant titles.

The Spatial Planning and Land Use Management Act 16 of 2013 was signed into law by the president on 2 August 2013 and gazetted on 5 August 2013. A commencement date for it to be enacted is still to be finalised. This date is influenced by the completion of suitable regulations for the Act. Draft regulations were published for comment over an extended period until 10 November 2014¹⁸. The DRDLR has since prepared a new draft set of regulations, taking into account comments received, and is currently in the process of finalising the regulations for gazetting.

The Spatial Planning and Land Use Management Act heralds a new planning system for South Africa. It will introduce new reforms and move the planning system closer to the post-apartheid ideal outlined in the National Development Plan. It has clarified, to an improved extent, the roles and responsibilities for spatial planning of the three spheres of government which all have planning functions, where municipalities will have increased roles for municipal planning including:

- Preparation of a single SDF covering whole municipal areas
- Handling all planning applications in a municipality and deciding on them
- Decision-making through municipal planning tribunals
- Preparation and implementation of a single land use scheme for the entire area of the municipality

¹⁶ Information obtained from the Training Manual on ULTRA prepared by the KZN Chief Directorate of Development Planning in the Department of LGTA. 2005

¹⁷ Personal communication with Patricia Nake, Senior Manager in the Department of Local Government, Housing and Traditional Affairs in Limpopo on 20 November 2014.

¹⁸ See Circular No. 2 Spatial Planning and Land Use Management Act 16 of 2013 Draft Regulations. Department of Rural Development and Land Reform. 11 November 2014

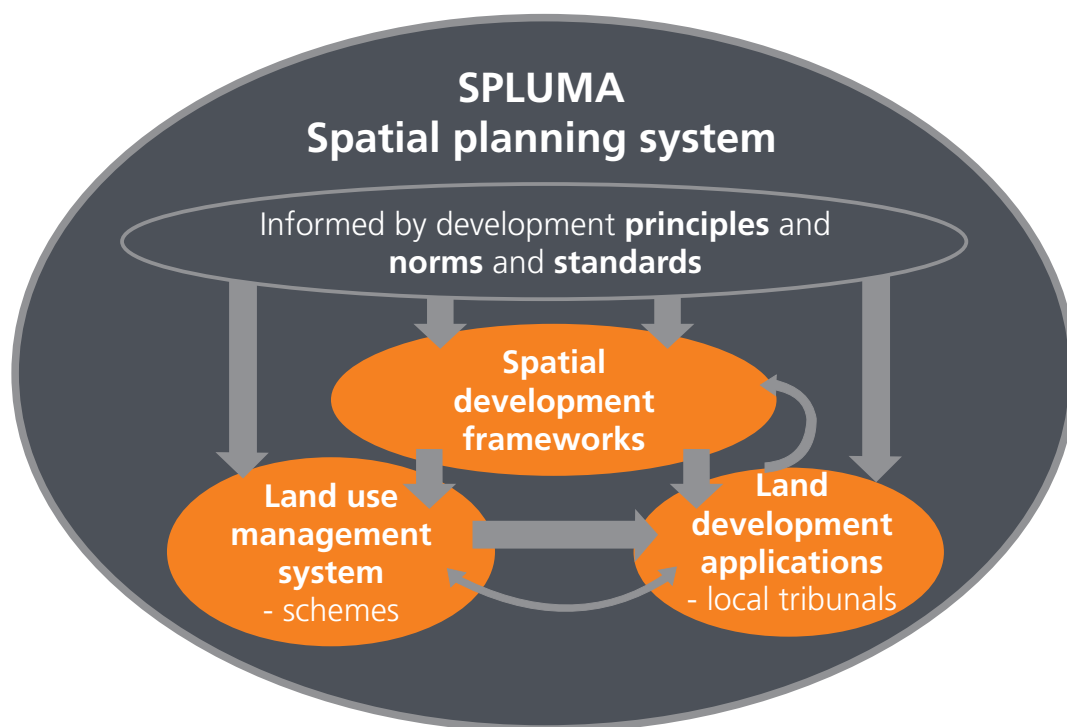


Figure 3: Concept of SPLUMA arrangement

Provinces will play a role in monitoring and support and will carry out identified provincial planning functions such as coordination of municipal SDFs when preparing its own provincial SDF.

The implications of all this is that SPLUMA will be framework legislation that must guide provinces and municipalities to carry out their respective planning functions. The SPLUMA regulations will therefore provide broad minimum standards. They will be accompanied by guideline documents providing standard guidance on several matters, including preparation of SDFs and LUSs. Most importantly SPLUMA will solidify a planning system that has:

- A national framework with minimum standards for planning
- Nine provincial planning Acts that will provide guidelines for municipalities to implement municipal planning
- Municipal planning by-laws to direct the implementation of municipal planning that will prescribe land use schemes and development procedures

SPLUMA has very positive and encouraging statements about addressing poverty and inequality and upgrading informal settlements. In the preamble, the definitions and the principles, informal settlements are highlighted and defined. SPLUMA compels municipal SDFs to identify areas where informal settlement upgrading will occur and municipal land use schemes must include them. This is very significant as it implies that informal settlements will become defined as a specific area (in the SDF) and they will have to have land use rules defined and formalised in the land use schemes.

INCREMENTALLY UPGRADING TENURE UNDER CUSTOMARY ADMINISTRATION

	SPLUMA requirements			
	Definitions	Principles	Spatial planning	Land use Management
Description	These provide legal definitions to terms used in the legislation and are found at the beginning of every law.	These are normative (says what is expected as the norm) prescriptions that must be applied to all development.	A Spatial Development Framework is a plan that indicates where and what kind of development will take place in the area.	Land Use Schemes are legal instruments that confer land use rights to land and set out development rules.
Section of Act	1 (1(1))	7(a)(v)	(12(1)(h))	(24(2)(c))
	<i>"Incremental upgrading of informal areas" means the progressive introduction of administration, management, engineering services and land tenure rights to an area that is established outside existing planning legislation and may include any settlement or area under traditional tenure.</i>	<i>Land development procedures must include provisions that accommodate access to secure tenure and the incremental upgrading of informal areas.</i>	<i>"Includes previously disadvantaged areas ... informal settlements, slums ... and address their inclusion and integration into the spatial, economic, social and environmental objectives of the relevant sphere".</i>	<i>"Includes provisions that permit the incremental introduction of land use management and regulation in areas under traditional leadership, rural areas, informal settlements, slums and areas not previously subject to a land use scheme".</i>
What does this mean?	There is a legal definition for incremental upgrading of informal areas.	The provincial laws must include provisions that will promote incremental upgrading and tenure.	Spatial plans of the municipality must show informal settlements on their plans as these areas can no longer be excluded. This would also be a form of recognition.	Land use schemes must include provisions to manage informal settlements so this will give legal recognition and secure tenure to informal settlements.

Table 1: Summary of SPLUMA provisions supporting informal settlement upgrading

SPLUMA is relatively silent on the specific role of traditional leaders in planning and specifically on municipal planning. The House of Traditional Leaders was opposed to SPLUMA when it underwent the process of consultation through the Council of Provinces. SPLUMA makes no specific provisions for the involvement of traditional leaders in the planning process nor does it define any specific procedures for planning in traditional areas. This is left to the provincial planning laws, and more specifically, the municipal planning by-laws. These are both still on the drawing board.

4.4 Relevant policy

4.4.1 Communal Land Tenure Policy (2014)

The Department of Rural Development and Land Reform is in the process of developing a Communal Land Tenure Policy (CLTP). By contrast with the locally defined but strong rights of 'ownership' in IPILRA, the CLTP provides for communal land ownership to vest in the traditional council and "establishes institutionalised use rights" for households, which are administered by traditional councils (or communal property institutions where land is outside of traditional authority jurisdiction). Traditional councils will thus be title-holders of land under their jurisdiction, with users of the land subject to their authority and control. In other

words, the current proposed communal land tenure policy appears to weaken IPILRA-type rights.

In what seems to be a contradictory statement, however, the CLTP also seems to give households rights that include important ownership rights of alienation. Thus, it states that: "Household members to have clear rights ... to bequeath land to their offspring and to use their land as collateral for commercial transactions." But, again contradictorily, and in contrast to the rights Kerr and IPILRA define, which give households significant say over how land is managed in the area in which they live, the CLTP states that people will have a minimal role in land management while their primary responsibilities are to "pay taxes, obey laws, consume goods and services and vote". It then counters this stating that "households [are] to play an active role on how land is distributed, used and allotted to investors". These contradictions make it extremely difficult to interpret the intention of the policy with respect to who the holders of land rights in communal areas are and thus who must be consulted in relation to any changes in these rights. Nevertheless, until these proposals are confirmed as policy, IPILRA remains the legislative framework for determining who the rights holders are.

Further ambivalences in the CLTP are apparent. It states that government – in practice, municipalities – will retain the "ultimate authority" to make decisions about "land rights and land use in communal areas". However, critics have pointed out that this proposal is hollow since land ownership and decision-making power over land go hand in hand, and once land is transferred to the traditional councils, it is out of the hands of government.

Finally, the CLTP seems to assume that all communal land is subject either to traditional leadership structures or CPLs established since 1994. However, there is research evidence that shows that there are communal lands under local democratically elected administration, and that in some areas where traditional leadership structures exist nominally, there are sub-wards under more direct local community management.

PART 5

Research findings

5.1 Context

Informal settlements on land under customary administration vary considerably along a series of different dimensions but we can identify the following general contextual considerations:

- **Urbanisation:** The growth of informal settlements is an expression of urbanisation pressures on land and the areas we researched are experiencing urbanisation to greater or lesser degrees. These pressures on land in North West, for example, are extremely high, while in the Northern Cape they are considerably lower. The implications are multiple but include the need for proactive land release strategies in order to programmatically accommodate growth, rather than being reactive through 'land invasion management' strategies
- **The emergence of land markets:** The settlements are undergoing change and while a land market is not conventionally considered to be a factor in customary areas it is clear that there are significant changes underway. The implications include uncertainty around who is selling land and on what basis, whether or not this conforms to custom, how legitimate land sales are considered to be and what the impacts on underlying rights and rights holders are
- **Living customary law:** *Living customary law* is a term that has been developed to describe the dynamic nature of custom. One of the key issues for this project was to understand who has access to, and control over, land in customary areas. The answer is both ambiguous and controversial as the context is characterised by dual legal systems and legal pluralism. On one hand, there are fixed common law assumptions about property and rights to land underpinning colonial legal systems. On the other, customary law relating to land holdings is generally understood as being static and unchanging. Living law is an alternative concept which sees land and property law as dynamic and responsive to social change. Sources of legitimacy in customary context compete. Living customary law considers the interactions between the different sources of authority
- **Highly contested legal reforms in the democratic period:** Section 25 of the Constitution requires that a law be enacted to secure tenure in customary areas. The Interim Protection of Land Rights Act was enacted as interim measure as the name suggests, pending the development of permanent legislation. The Communal Land Rights Act was that law, but it was declared unconstitutional. As a result, there is still no permanent law. The current draft land tenure policy for communal areas proposes that communal land be transferred in title to traditional authorities and that the existing residents hold institutional household rights. This proposal would undermine the existing informal land rights of residents

5.2 Key issues

The key research question posed by the brief is:

How could informal settlements be incrementally upgraded when land is under customary or traditional authority administration?

Our desktop research, key stakeholder interviews and workshops identified the following key issues that arise from the research question. These issues need to be resolved in order to

upgrade informal settlements on this land. Our proposals go some way toward resolving them. Our additional proposals in the conclusion address the remainder.

5.2.1 Under what circumstances can municipalities provide services on land under customary administration that they do not own?

This is a question that we posed after the first project workshop, as participants reported the perception that municipalities are unable to secure their investment on land which they do not own. In some of our case study sites we identified that services are being provided in practice, so it appears that there are circumstances under which municipalities can and do service this land, calling into question this perception. Another example of official practice came up in the workshops: municipalities can, and do, acquire a power of attorney over the land from the Department of Rural Development that enables them to proceed with upgrading. Both these workshop findings indicate that there is some uncertainty about how much of an obstacle RSA-ownership of the land actually is. This led us to further investigate the status of former Bantustans that is registered as RSA-land in the deeds registry. In addition to the municipal concern about the security of their investment in services, the workshops all revealed another reason for why municipalities are reluctant to service on 'traditional authority land' which is alluded to as the 'current political context'. It refers to the authority of traditional leaders on land under customary administration and the push towards increasing that authority that is currently observable in the media. One workshop participant said that we need to 'read between the lines' about the direction that is being taken politically to increase traditional leadership authority. Others simply indicated that the traditional authority interest is powerful and that municipalities are reluctant to enter the terrain as a result. It is important to note that these perceptions are exactly that – perceptions. Traditional leaders do not 'own' the land, although people sometimes used this language in our research. The 'fourth tier of government' argument is applicable here: rather than conferring a status on traditional leadership that does not currently exist in law, emphasis should be placed on the municipal sphere of government which is democratically elected and is legally and constitutionally required to perform roles ascribed to it, including municipal planning.

Our investigation of the status of land owned by the Government of the Republic of South Africa yielded the following results:¹⁹

Section 239 of the Interim Constitution provided that land which had vested in the RSA, a province, or a Bantustan government was allocated to the national or provincial government depending on which of them was responsible for the functional area in Schedule 6 for which the land was applied or intended to be applied. None of the land was allocated to municipalities, because Schedule 6 did not provide that municipalities were responsible for any of the functional areas. The 1996 Constitution did not address this, and the allocation remained unchanged. What the 1996 Constitution did was create a mechanism for the land in question to be registered in the national or appropriate government, according to the allocation which had been done by the Interim Constitution. This is in Schedule 6 of the 1996 Constitution, which deals with "Transitional Arrangements". Item 28 of Schedule 6 deals with "Registration of immovable property owned by the state". It provides:

On the production of a certificate by a competent authority that immovable property owned by the state is vested in a particular government in terms of Section 239 of the previous Constitution, a registrar of deeds must make such entries or endorsements in or on any relevant register, title deed or other document to register that immovable property in the name of that government.

¹⁹ Personal Communication with Geoff Budlender SC 14 August 2015

It is important to note that this is not a mechanism for the transfer (or, strictly speaking, allocation) of land. It is simply the means of registering the land in the name of the national or provincial government in which it has already vested as a result of the allocation which was done by Sec 239 of the Interim Constitution. The registration makes it possible for that government then to deal with the land, including by transferring it to another person or institution.

In 1996 government agreed that the “competent authority” in terms of Item 28 would be the Minister of Land Affairs. In the nineties the minister regularly issued these certificates and the assumption can be made that he still does so, although we did not verify this in our research. The test is which government (national or provincial) was responsible for the functional area for which the land was used or intended to be used in 1994.

Where land vests in the national or provincial government, the Government Immovable Assets Management Act of 2007 (GIAMA) determines the minister, premier or MEC who is the “custodian” of the land. Under GIAMA, the Minister of Land Affairs is in general the custodian of land in the Bantustans which vests in the national government. There may be some exceptions. The custodian of national land has the power, under the State Land Disposal Act, to dispose of the land. The custodian of provincial land also has the power under the relevant provincial land disposal Act to do so. The power of the provincial custodian to transfer land to a municipality is presumably regulated by the relevant provincial land disposal Act.

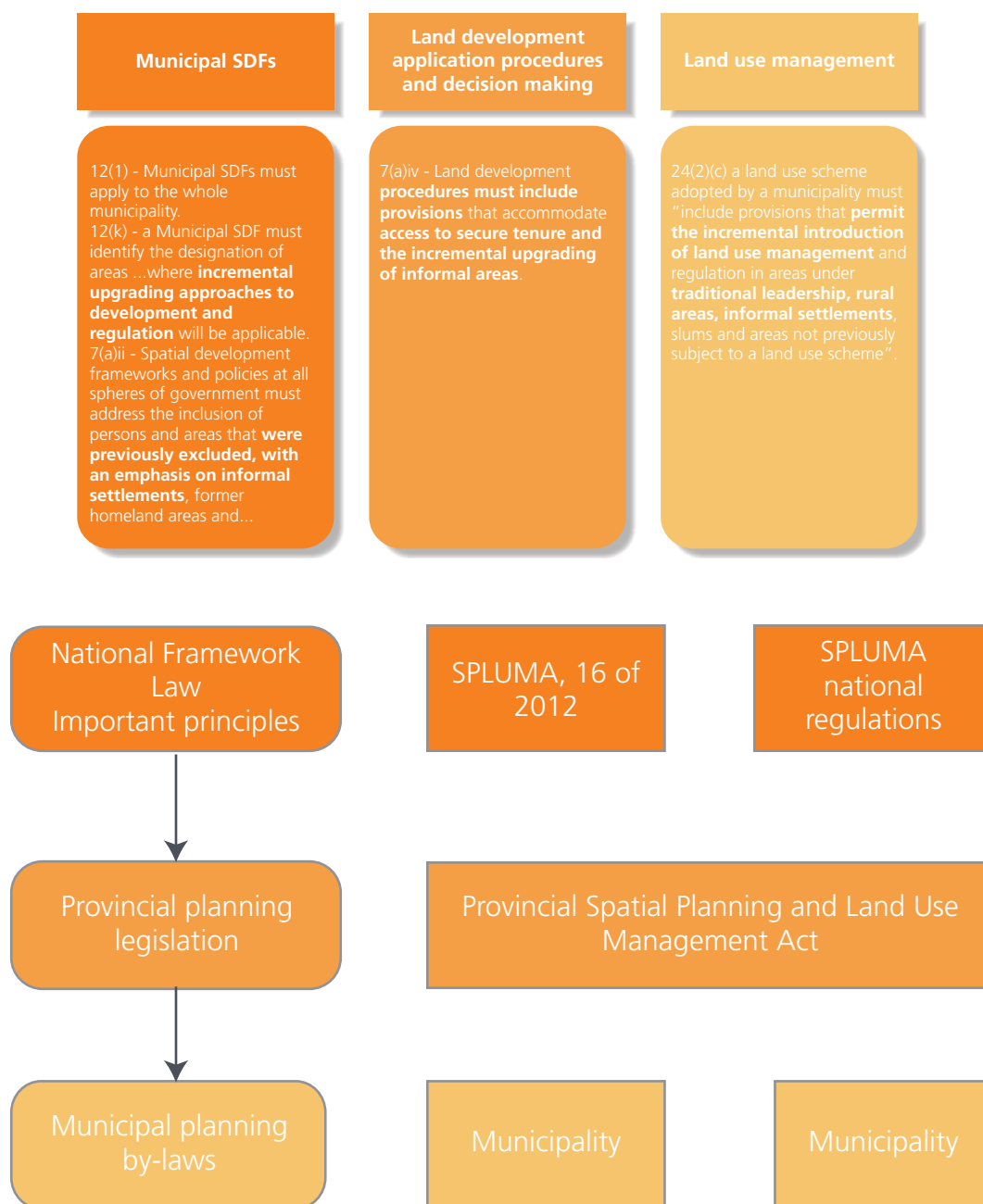
5.2.2 Are there any pre-township establishment activities that can be undertaken and tenure security measures implemented?

The origins of this question lie in the complexity of identifying an appropriate land development law to use due to both the historical planning law legacy, which has resulted in a 'patchwork' of laws in former Bantustan areas, and to the current transition to the new Spatial Planning Land Use Management Act (SPLUMA). Further, our brief required us to explore incremental tenure aligned to the incremental process of the Upgrading of Informal Settlement Programme (UISP). We were therefore concerned not only with the real world constraints experienced by municipalities with regard to planning law, but also with the requirement to practically apply the incremental principle.

Using the approach presented below (see conceptual framework section) we concluded that township establishment need not be the starting point of the upgrading process; land use planning mechanisms of the sort developed in the Cities of Johannesburg and Cape Town could in principle apply to these contexts, creating a legal status for the land through land use zoning, thus facilitating the provision of services.

In general, our conclusions are that there are some significant constraints to the identification and application of planning laws for both land development and land declaration through land use zoning due to the existing status of planning laws. In the course of our research SPLUMA was enacted and we turned to SPLUMA to identify both the incremental land use development and land use zoning opportunities.

INCREMENTALLY UPGRADING TENURE UNDER CUSTOMARY ADMINISTRATION



Our conclusion regarding SPLUMA is that it does indeed provide for incremental land development and special zoning that could be used to apply to informal settlements. The constraints, however, are that i) SPLUMA is new and provinces and municipalities must still develop and then apply provincial laws and municipal by-laws for it to be implementable and ii) there are currently no guidelines that detail how to incrementally develop land or develop special zones for informal settlements. As a result we see land development and special zones as opportunities for legal recognition in the medium, but not immediate, term.

5.2.3 What tenure rights do people living on land under customary administration currently possess?

IPILRA is widely applicable to informal settlements under customary administration. This means that people living on land under customary administration have informal rights to land in terms of the Act and tenure security that comes with **legal recognition**. Because IPILRA is not supported by evidence or registration procedures, one of our conclusions is that it needs to be strengthened administratively.

An informal right to land means:

- Use, occupation and access in terms of
 - Tribal, customary or indigenous law or practice of a tribe
 - Custom, usage or administrative practice in former Bantustans
- Beneficial occupation for a continuous period of not less than five years prior to December 1997.

No person may be deprived of any informal right to land without his or her consent. Our research identifies concerns that IPILRA rights holders might be giving consent without sufficient awareness about the nature of their rights or that, alternatively, consent might be being obtained by dubious means. It was beyond the scope of our work to investigate these concerns any further but our workshops did demonstrate low or no awareness of IPILRA. As a result we conclude that awareness needs to be raised about IPILRA amongst officials and the rights holders themselves.

We categorise IPILRA rights as 'protective tenure' because it exists in law but there are no regulations or administrative procedures that govern its application. We propose increasing administrative recognition for IPILRA rights and suggest that municipalities can improve these rights over time, especially with administrative procedures such as local land records. Whilst it might be possible for municipalities to do so in practice, we anticipate that guidelines are needed to assist them.

If residents of informal settlements do not possess IPILRA rights, they are legally protected by PIE. PIE requires that any eviction be just and equitable and that if people would be rendered homeless by an eviction, that alternative accommodation must be provided. Once again, we identify that awareness of PIE rights is also fairly limited and similarly we conclude that an awareness raising programme should be undertaken.

5.2.4 What is the role of traditional leadership in the upgrading process and beyond it, in land administration?

Our case study research and workshop findings indicate a perplexing confusion around the role and status of traditional authorities, especially in relation to land ownership. The legal situation is clear: the land is owned by the RSA and rights vest with the informal rights holders in terms of IPILRA. These are our two points of departure in the proposed approach. However, it is clear that the role of traditional leaders is the so-called elephant in the room.

Even with the legal position being clear, municipalities appear reluctant to proceed without agreements with traditional leadership institutions being in place. An example might be a services level agreement. However, without including the rights holders in such agreements, the risk is that their existing tenure security will be undermined and their legal rights ignored.

5.3 Case study findings

5.3.1 Background

This section of the report summarises the fieldwork research that was undertaken in four informal settlements in four South African provinces: KwaZulu-Natal, Northern Cape, Limpopo and North West.

It focuses on the existing tenure arrangements in all four settlements and explores the different authorities and their roles; the traditional authorities, the communities and the local municipalities. In exploring existing tenure arrangements, the section reports on the site allocation processes, the nature of tenure upon access to sites, available basic services and the processes used to provide these basic services. It will also look at the roles played by each of the relevant stakeholders in these communities and the relationships between them.

KwaZulu-Natal – Vulindlela

The Vulindlela settlement is about 30 kilometres from the town of Richards Bay. It is under the uMhlathuze Municipality. The local chief is Mkhwanazi. The induna of the area is also Mkhwanazi. The municipality says the Ingonyama Trust owns the land and that both Mkhwanazis are local custodians of the land.

The Vulindlela settlement is next to a township. The township is at the centre of the village and villagers use township amenities as they have easy access to them. These include a police station, clinic, schools, community hall, entertainment facilities and they do their shopping in the township. In all interviews people indicated that they chose Vulindlela because it is close to the township that has “everything”. The township seems to have been a pull factor.

The University of Zululand is based in Ward 30 of the township and most students rent in the township, while some rent from the village. The university is an influencing factor to the fast changing face of the community because of the rental property boom which has resulted in people building rental flats for the university students.

Most people do not want to be in a township because of the costs that will ensue. For example, one person indicated that, if the settlement became a township like their neighbouring township, they will lose benefits of free basic services and pay higher rates.

The allocation of sites, particularly in the new area of the settlement, started around 2003.

Northern Cape – Seoding

Seoding is a settlement about 7 kilometres from the town of Kuruman. It is under the Ga-Segonyana Municipality. The settlement also has 385 Reconstruction and Development Programme(RDP) houses that were constructed in 2006 and occupied from 2007. The RDP-houses were allocated mainly to people from Seoding village who met the criteria for allocation.

Everyone interviewed moved to the settlement with the permission of the chief and people still continue to be allocated stands by the chief. The chief does not know how old the village is. His grandfather lived in the settlement as well.

Limpopo – Mashifane

Mshifane is a settlement under the Greater Tubatse Local Municipality in the town of Burgersfort. It is located about 3 kilometres from Burgersfort. Most people obtained land in the settlement through buying stands from the chief. Sites began to be allocated in this settlement around 2003. They mostly heard through word of mouth that stands were for sale. Most respondents indicated that they were attracted to the settlement because it is closer to town. The chief also promised that the place would be developed and get full services, unlike most villages around the area.

The community has problems with insufficient water supply. The main challenges relate to access to, and provision of, services including electricity, water, roads and sanitation services. Another challenge relates to the quality of soil on which houses are constructed. Most people indicated that their houses have cracks because the land they have built on has clay soil. Some people stated that even when a deep foundation has been laid for the house, as advised by builders, cracks in the walls still appear. One household spent about R90 000 on building its house's foundation but the house still has cracks.

North West – Sefikile

Sefikile is a village about 30 kilometers from the town of Mogwase. It is under the traditional authority of Bakgatla Ba Kgafela. The name of the chief is Nyalala. The village has about 8000 households, as estimated by representatives from the traditional council, and is situated next to the Swartklip mine. The settlement pre-dates the mine and people cannot exactly say when the settlement came into being.

The mine has attracted people from different parts of the country and beyond the borders of South Africa, who are seeking employment opportunities. As a result of this, and lack of accommodation for mine workers, an informal settlement, known as Kwetsheza, has developed next to the Sefikile village. The settlement is located on land that was previously used by the Sefikile villagers for ploughing and cattle grazing. Kwetsheza is made up of 2625 informal settlements, as recorded by the residents' committee. The settlement was established as early as 1999 through self-allocation by people who were in desperate need of accommodation. The majority of people occupying Kwetsheza are people from the Eastern Cape with a few from KwaZulu-Natal, Mozambique and Lesotho.

Important leaders and structures in the Sefikile settlement are the political party ward councilor, political ward committee (it also includes three people from Kwetsheza) and the committee of the occupiers. The local induna does not recognise Kwetsheza because they have erected homes without his authority. There is a strained relationship between the induna, the Sefikile community and the Kwetsheza settlement. The office of the tribal authority has no role in the settlement. As a result of this, the residents are self-regulating through their committee.

5.3.2 Methodology

The research was conducted over a period of six months, from December 2014 to June 2015.

The research considered three parties in all four settlements: the community, the traditional authority and the municipal officials, mostly senior town planners.

The number of households which participated from the four settlements is 74. The interviews also included four focus groups, one from each settlement.

Interviews with traditional authorities considered varied members from the tribal council as well as a chief and an induna.

In Seoding settlement the mayor and councillor participated. This was unique to this settlement because the traditional authority and the mayor enjoy a good working relationship which may be influenced by the fact that they are blood relatives.

A set of open-ended questions were put to all participants.

The interview processes met with some challenges. A key challenge was that many households did not want to participate in the processes for various reasons. A common reason was that there have been similar studies done before and people were reluctant to participate in more research as they considered this to be of little benefit to them. They commented that though there has been much research in their informal settlement, it has not led to development of the area.

Existing tensions between the communities and their local government structures also played a role in the lack of resident participation. Many people believe that government has abandoned them and they therefore did not want anything to do with government processes.

As a result of these challenges, in some communities we had fewer household participants than was desired. This affected the structure and formatting of settlement reporting and as a result some reports were shorter than others and in a different format.

However, the challenges encountered did not compromise the purpose of the research and we are confident that the conclusions drawn from this research are valid.

5.3.3 Access

The process of site allocation can happen in three ways; allocation by an induna, self-allocation, which is usually deemed illegal by traditional authorities, or allocation by third parties.

The induna allocation process is popular and consistent in all settlements, with the exception of Kwetsheza in the North West province. The process begins with approaching the induna and the indunas remain at the forefront of the allocation process. There is little to no government involvement in the allocation process. The allocation process presents some tensions between the municipalities and traditional authorities because traditional authorities do not view government as having any role in this process and some municipalities believe they have an interest in playing a part. Their interest is not with who gets which site in the allocation process, rather in the layout process so that the sites do not later on present structural challenges when the municipality wants to service them. Traditional authorities generally view municipalities as wanting to 'take over' from them.

The process of getting a site also involves money. Once an agreement has been reached with the induna on the exact site, a person has to pay the induna the agreed amount. In some settlements, such as Seoding, the amount is standard. The money paid by the 'buyers' is not generally viewed as money within the context of buyer and seller. It is viewed as an administration fee as people do not own the land they have built on because "the land belongs to the chief". (The land does not, in fact, belong to the chief– it is RSA land.) The administration fees vary from between R300 to R65 000 for a site. There are, however, exceptional instances, such as Mashifane in Limpopo, where the traditional authority views people as owners of the land. In this case the traditional authority allocates stands for a higher price than other villages he presides over. He views this village as being a modern place for young people with money where they should own sites.

Moneys paid for the sites significantly vary within the same settlement. Respondents indicated in Mashifane that sometimes the amount you pay for the site depends on who you find at the tribal council. The money is paid in cash with no clear records of where it goes and for what use.

The administration fee is usually accompanied by the process of appeasing the induna. The process involves giving the induna a case of beer and a bottle of spirit alcohol. Without this appeasing, even if a person has paid the administration fee, he or she will not be formally recognised as a legal occupant until he or she has given this 'gift'.

The allocation process of sites by traditional authorities has many challenges for the traditional authorities. There is evidence that sometimes the process of allocating sites can take place without the knowledge or involvement of the traditional authorities. In such instances, where people allocate themselves sites, particularly Seoding in the Northern Cape and Kwetsheza (Sefikile) in the North West, the traditional authorities are frustrated as there is little they can do. In these communities political figures seem to play a major role in ensuring that the unauthorised occupiers remain settled and enjoy some form of legality. One councilor stated that these communities are an important "political constituency". For example, in the North West the local induna does not issue proof of residence papers when occupiers request them, but the local councilor issues them to the occupiers in defiance of the traditional authority.

The process of acquiring a site is one which is solely dependent on whether a person can afford to pay for the site. People in most of these communities can buy as many sites as they want as long as they have the required money. Money could also be a determining factor for the size of stand that one gets.

5.3.4 Documentation issued upon access to sites

In all settlements there is a record keeping process by the traditional authorities of each of the new occupiers and the sites allocated. The process is meant to guard against the allocation of the same sites to multiple people and for the traditional authority to know exactly who is under their authority. The land registration process of new occupiers is done by traditional authorities through the issuing of Permission to Occupy (PTO). There is, however, inconsistency in the issuing of these PTOs; in the same settlements some people would not be issued with PTOs even though they followed the same process as people who were issued with them. Occupiers are sometimes issued with receipts after payments. Occupiers seemed to be less concerned about the issuing of documentation as proof of ownership. They rely on other members of the community as proof that they are indeed legal occupiers. Consequently, when copies of their PTOs were requested, all the respondents replied that they had lost or misplaced them.

Permission to Occupy documentation normally reflects the occupier's name, the occupier's ID number, the allocated site number and dates. They also have stamps from the tribal council.

There were inconsistencies in relation to the costs for the issuing of PTOs. Some traditional authorities indicated that they do not charge any extra costs for the issuing of PTOs; however, information from participating households indicated otherwise.

Some participants, particularly in Mashifane in Limpopo, indicated that they needed something more than a PTO as proof that they are owners of their sites. The idea of requiring this in Mashifane may have been influenced by the fact that this settlement is occupied by young professionals who have been explicitly told by the chief that they are owners. This led to some people reporting that they could register their sites with the deeds office in Pretoria.

Neither the municipality, nor any government agency is involved in the issuing of PTOs. In KZN the municipality indicated that there is a process in place set by the Ingonyama Trust calling for occupiers to register their PTOs with them. Upon registration by the Ingonyama Trust, the PTOs would be converted into lease agreements between the trust and the occupiers. There was no evidence to suggest that any of the occupiers have followed this process. In fact people, including the induna, were unaware of this process; it was only the municipality which was aware of this.

In some settlements where there was no involvement of the local induna, people do not have PTOs or any form of registration with the chief but they continue to live undisturbed.

5.3.5 Land use and rights over property

There were some inconsistencies in terms of how people use their properties. In all settlements there was evidence of people renting out their properties or having tenants. There are processes in place for people to register their tenants with the local induna. However, in practice, in all the settlements people have tenants without registering them with their induna.

With regards to tenants, the Vulindlela settlement in KZN has introduced a special system for people who buy land for the purposes of running rental businesses. This is unique to this settlement because there is a high demand for accommodation for students as a result of the nearby University of Zululand. As a result of this demand, business people as well as some local people have taken the opportunity to buy sites and build flats. This has raised concerns with the local municipality as it is faced with the question of whether it should consider charging business rates for people who own and run these rental flats. The municipality also considers that the uncontrolled and improperly planned structures not only pose a health risk but present a nightmare for the future provision of services to the community. Because of existing tensions between the municipality and the traditional authorities, the municipality has little say on this problem. The building of flats continues to grow unchecked by local authorities because the municipality is not involved in the allocation process.

In terms of other forms of business the same approach has been taken by people, where they run businesses in their households without getting the required authority from the local induna. One settlement in Limpopo indicated that when a person wants to run a business on his premises, they need to get a business PTO issued by the induna. People, however, were not aware of this and business owners, as such, did not have such PTOs.

In almost all settlements the only business that one cannot run without the general approval of the community and the induna, is a liquor business. It seems this is common cause because of problems, such as crime, associated with spots selling alcohol.

The sites are also transferable to other owners. With regard to cases where the owner passes away and the spouse or children are left to inherit, it follows the customary route of inheritance. However, where the property is transferred to the next person within the context of sale of site, the new owner will need to register with the traditional authority and the old owner will be removed from the records of the traditional authority. In Kwetsheza, this role is played by the committee since the traditional authority is uninvolved in that community.

5.3.6 Supply of basic services and development projects

All four communities have access to some form of basic services. The provision of basic services, where municipalities provide them, are supplied at almost no cost to communities.

Communities indicated that water, electricity and sanitation are their priority needs. Development, and jobs to address socioeconomic issues, were also indicated by communities as high priority needs.

Basic services are so critical to people's livelihood that in Mashifane, where there is no public electricity, water and sanitation services, some people who cannot afford to privately build their own infrastructure, have abandoned their houses in preference of staying in places which have services.

The traditional authority has some role in the provision of such basic services. When there are plans to supply communities with basic services, the process requires some engagement with the traditional authorities for approval. Community meetings are also held to present proposals and local political principals are involved, such as councilors. However, it is not very clear at what stages communities are consulted, particularly when the process involves development projects such as the construction of new shopping centres.

The Mashifane community is the only informal settlement that does not have water supply from the local municipality. People have to buy water from private businesses or construct their own boreholes at a cost of about R25 000 (PIC). There was no indication by the local municipality of plans to supply water.

Other communities have water supplied by the municipality through shared stand water pipes. Out of the three communities, it was only the Vulindlela community which is billed for water consumption. People do not pay no more than R30 a month and some do not pay at all.

Some municipal officials indicated that the manner in which the sites are allocated will present future challenges for water supply. In Mashifane for example, where there is no water supply at all, the municipality said it would be impossible to provide any services without demolishing some structures and shifting people. This is due to the fact that the layout is unplanned.

Municipal officials, particularly in Vulindlela, indicated that illegal water connections as a result of the rental flats, posed a significant challenge. They are considering charging business rates for water consumption for people who have tenants to begin to address this issue.

With regards to electricity, ESKOM is the main supplier in all the communities. There is no clear role played by the municipality in the provision of electricity. The traditional authority, however, do play some role in some communities.

In some settlements the traditional authority has to issue an approval letter for individual households applying for installation of electricity. Where this practice is present, it is not consistent as there was evidence that some people had not received approval before being connected. This approval also came with a fee for some people, but was free for others.

Kwetsheza and Mashifane have no electricity. In Kwetsheza, the self-regulation of the settlement has presented major tensions in the areas between the occupants and the traditional authorities. ESKOM had plans to supply them with electricity but the surrounding community and traditional authorities of Sefikile blocked these plans.

In Mashifane there are households with electricity installed at their own cost. With regards to sanitation services, all settlements have pit hole toilets. The roll-out of these toilets was led by the councilors after approval from the traditional authority. In all communities some people still have their own pit hole toilets which they continue to simultaneously use with the municipal toilets. People have also built their own septic tanks

with flushing toilets. The system is expensive, so very few people have this kind of sanitation system.

5.3.7 Relationship between the municipalities and traditional authorities on issues of services

The relationship between the two bodies could be consistently described as acrimonious in all settlements. The tensions are as a direct result of the issue of ownership of land or sites which these settlements occupy. The approach by municipalities, particularly in bringing basic full scale services, is that they want the land to be transferred to individual site owners and title deeds to be issued to them. This would enable the municipalities to generate revenue from each individually owned site. The municipality does not want to provide services where ownership is seen as sitting with traditional authorities. Traditional authorities are not willing to entertain the issue of transferring land to the people because they consider themselves the owners of the land. They have also refused to have title deeds issued, even on RDP-houses that have been built on what they consider to be land they own.

As a result of these tensions, the municipalities in these settlements do not provide full-scale services; they only provide RDP standard services as they do not need land to be transferred first. Municipalities experience challenges even when trying to bring these RDP standard services because they are met with suspicion and scepticism by traditional authorities who consider municipalities as undermining their authority, or "taking over".

What seems to work for municipalities if they intend to provide services is to take practical approaches and meet with the traditional authorities without raising, or relying on, any legislative framework to provide services. When asked about the use of legislation they employ when they want to provide services, not one municipality representative could indicate which legislation they rely on.

It was also worrying that municipalities consistently did not seem to understand the rights of occupiers in terms of the Interim Protection of Land Rights Act.

PART 6

Proposed approach to upgrading informal settlements on land under customary administration

The proposed approach consists of a conceptual framework that informs the recommendations, and the recommendations themselves.

6.1 Conceptual framework

6.1.1 Recognition

The starting point of the proposed approach is that tenure security improves with increased recognition. Recognition can be either 'local' or 'official'.

Local recognition refers to the settlement level practices that have developed into norms over time. Norms are local rules or laws that have the force of social legitimacy. Examples of local norms include:

- The local land transfer being witnessed by a local leader in order for it to be valid
- Neighbours being called in to verify authenticity of land holding in the case of a dispute
- A receipt being a legitimate proof of a land sale and evidence of an occupation right
- An affidavit signed by a local police officer as proof of occupation
- Having your name on a locally maintained register of occupants is evidence of an occupation right

Official recognition can be either administrative or legal in nature. Administrative recognition refers to administrative action using policies or administrative practices to improve tenure security. Security derives from administrative authority and commitment in the form of council resolutions, occupation letters, registers of occupants, local records, shack enumerations with shack numbering and block layouts.

Legal recognition is when a legal process of development is initiated (for example township establishment) or a legal planning instrument is used (such as designating an area as an informal settlement through a town planning scheme amendment or zoning a settlement using the town planning scheme). Legal recognition grants legal status to an area. It usually results in declaring the area in terms of this law (a settlement area, an area zoned for informal housing, etc.). Examples of laws that can be used include existing Provincial Ordinances and their respective town planning schemes, the former

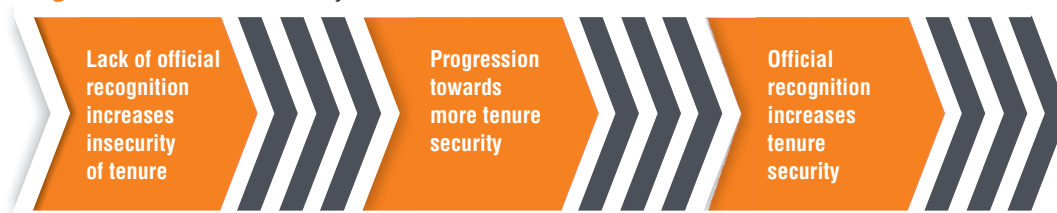
DFA and the new Spatial Planning and Land Use Management Act (SPLUMA).

Two examples of legal recognition via special zones are contained in the figure below.

<p>Zoning the informal settlement as a “single residential zone” - City of Cape Town</p> <p>1. Sr2 Zone</p> <p>Applies over whole settlement</p> <p>Can apply to individual plots after upgrading</p> <p>Sets out land use conditions - density, building lines, land uses</p> <p>May include certificates of occupation</p>	<p>Declaring the settlement area as a special area and attaching rules that will apply - City of Johannesburg</p> <p>1. TRSA designation</p> <p>Basic layout plan (aerial photo), roads, blocks</p> <p>Land use conditions - building lines, density, livelihood activities</p> <p>Building controls</p> <p>Record of occupants</p> <p>Certificate of occupation issues</p> <p>Can later be more formalised</p>
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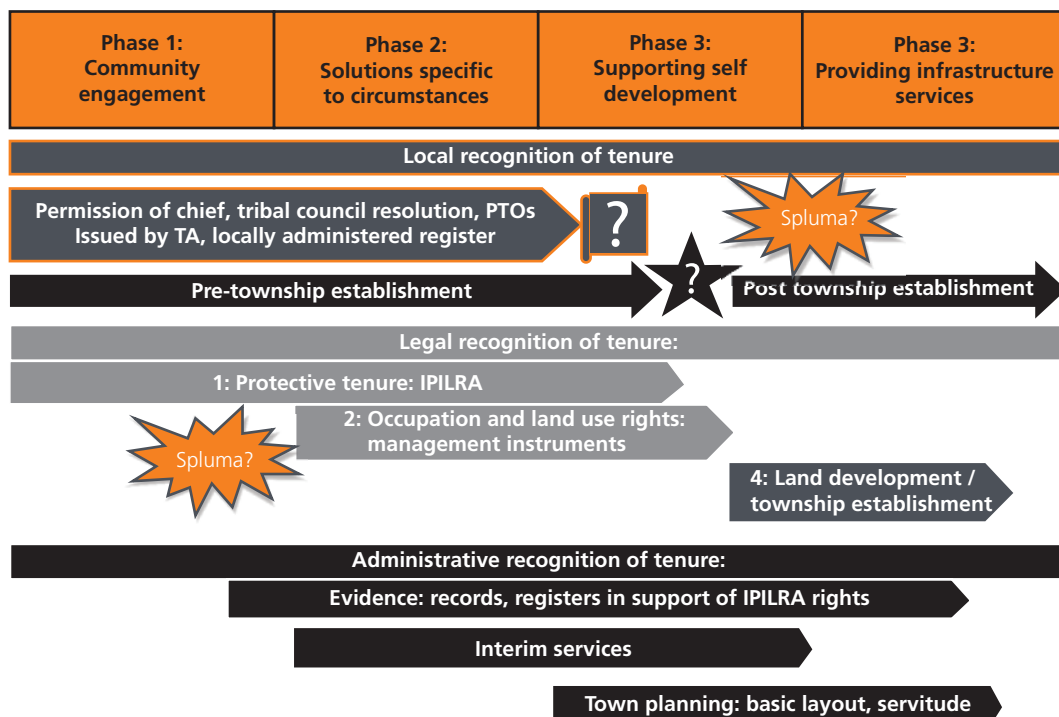
The following diagram depicts this approach graphically.

Diagram The tenure security continuum



6.1.2 The Upgrading Informal Settlements Programme (UISP)

The following diagram represents how we align the incremental tenure approach with the UISP. The UISP phases are represented on the top row. Local, legal and administrative recognition are located beneath the UISP phases, with a graphic indication of what might take place before and after townships establishment. The diagram is notional with the purpose of offering a guiding framework; care should be taken to avoid reading an exact identification of the different steps as these need to be applied in context for each upgrading strategy.



6.2 Recommendations

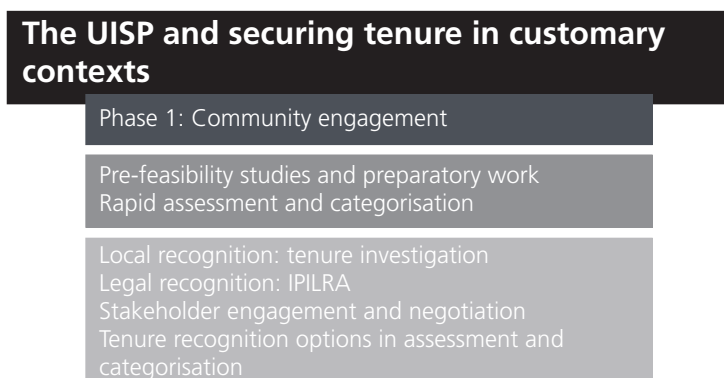
The following section contains the recommendations about how to incrementally secure tenure in informal settlements on land under customary administration, building on the conceptual framework.

6.2.1 Local Recognition: undertake a tenure investigation

The first objective of the tenure investigation is to understand the existing, local tenure arrangements and the local land management processes that have emerged to manage them. Rather than an intervention which 'writes over' what already exists, this approach begins with identifying and analysing existing local 'rules of the game'. Failure to do so is likely to result in investment that falls short of achieving the desired outcomes as people are likely to revert to some, or even most, of the pre-existing practices. Even worse, contestation may result unless local recognition is understood and managed. What are the existing rights, obligations, claims and authorities? Who has jurisdiction in terms of local norms and practice? The likely lines of contestation and hybridisation need to be understood in order to manage them effectively.

The tenure investigation should explore the following broad areas of enquiry: access and allocation, evidence or documentation, services (water, electricity, sanitation), land uses and permissions, and authorities.

The following figure aligns the tenure investigation with the UISP.



The next figure is a notional representation of the different forms of tenure recognition that might apply to the different categories in the assessment and categorisation of the HDA.

	Protective tenure (PIE IPI/LRA)	Customary law & local recognition	Administrative recognition	Legal recognition: IPI/LRA	Legal recognition: land use management	Legal recognition
Conventional formal full upgrading	Y	Y				Y
Incremental full upgrading	Y	Y	Y	Y	Y	Y
Interim arrangements	Y	Y	Y			
Deferred relocation with interim arrangements	Y	Y	Y			
Immediate relocation	Y	Y				

6.2.2 Legal recognition: identify rights holders

This step entails the identification of IPILRA rights holders. It is similar to the idea of a rights enquiry process.

6.2.3 Administrative recognition: develop municipal land records

This step entails recording the IPILRA rights holders in a municipal system of land recordation. Existing practices which utilise open source technology can be applied, such as the social tenure domain model.

The UISP and securing tenure in customary contexts

Phase 2: Solution specific to circumstances

Vital interim services
Negotiation of secure tenure
Detailed feasibility studies and pre-planning

Administrative recognition: interim services, records, evidence and land information

6.2.4 Administrative recognition: provision of basic services and basic layout planning in terms of the UISP

At this stage basic services can be provided with UISP funding and preliminary planning should occur.

The UISP and securing tenure in customary contexts

Phase 3: Supporting self development

Facilities
Savings and loans

Administrative recognition: Basic layouts, way leave?
Legal recognition: special zone - land use management instruments

6.2.5 Further legal recognition in terms of SPLUMA?

Here the incremental land development procedures and special zones in terms of SPLUMA could apply.

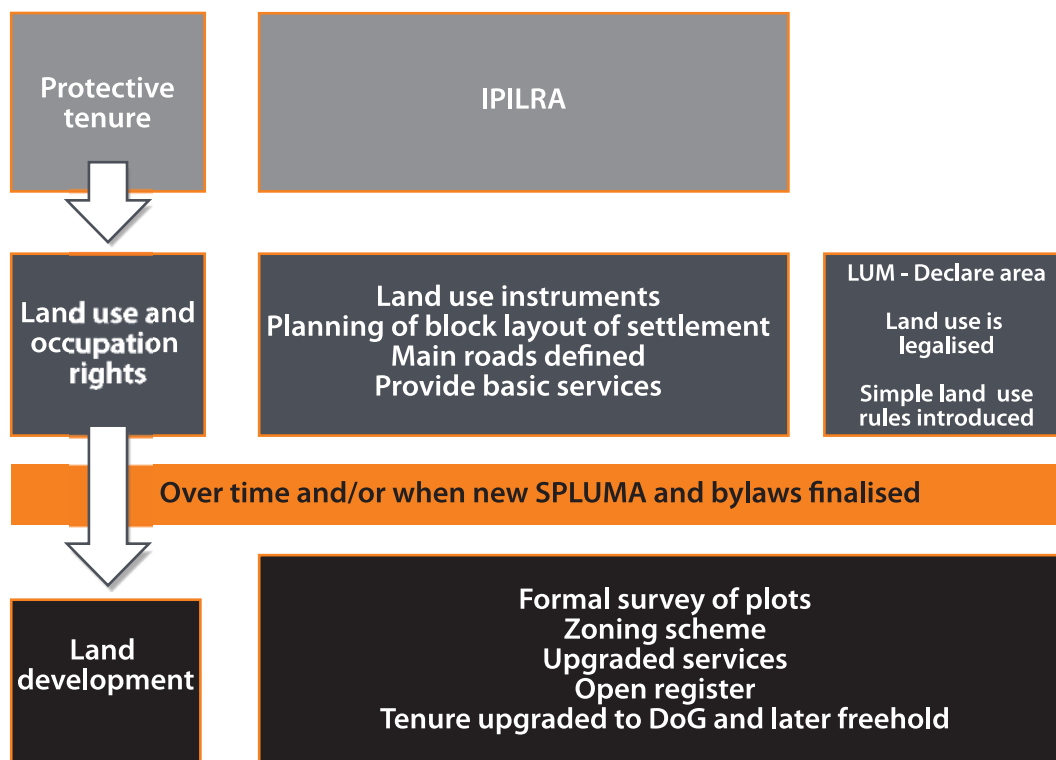
The UISP and securing tenure in customary contexts

Phase 4: Providing infrastructure services

Sewage, water, roads, electricity

Commence township establishment,
accommodate incremental approach - block or individual

The approach to legal recognition is summarised in the following diagram:



PART 7

Conclusion

In conclusion, the study raises a series of additional activities that were beyond its scope of work. Some of these activities are necessary to flesh out the proposals above in more detail and take the recommendations to the next level of detail, while others extend the scope of work into new, but related, areas that have been identified in the course of research. The proposals are for the HDA alone or in partnership with relevant stakeholders.

- Develop *guidelines for the tenure investigation*, based on the methodology used in the field work for this project. These guidelines could be included in the HDA's assessment procedures. They could also be for municipal use. This project could be undertaken with NUSP.
- Develop more detailed *guidelines for the administrative recognition of informal settlements on land under customary administration*. This should include an investigation of the use and applicability of the IPILRA operational procedures developed by the Department of Land Affairs in 1998. It should also include collaboration with other relevant initiatives, including a project on customary land administration in the Eastern Cape, the VPUU administrative recognition practice (local evidence and land office) in Cape Town, the open data source social tenure domain model of GLTN (UN-Habitat), and Talking Titler – also an open data source (University of Calgary). This should be undertaken by the HDA to further the recommendations contained in this report.
- Learn more from *existing official practices*, especially the approach developed in the North West district office of the Department of Rural Development. The purpose of this project is to gain more insight into approaches that have been developed in practice to upgrade informal settlements on customary land. This project could be undertaken by the HDA.
- Undertake an *IPILRA awareness raising programme* with municipalities in KwaZulu-Natal, the North West, Limpopo and the Northern Cape. Our workshops showed that awareness of IPILRA is low, or even absent, in some municipalities. This project could be undertaken by the HDA, SALGA, SERI and the Centre for Law and Society. The role of the Department of Rural Development would need to be worked out.
- Undertake a *PIE and evictions law awareness raising programme* in municipalities in the North West, Limpopo and the Northern Cape and the provincial and national departments of human settlements. If IPILRA-rights do not apply in an informal settlement, then occupants are protected by PIE. Both IPILRA and PIE develop constitutional obligations, relating respectively to tenure security (Section 25) and the right to housing (Section 26). The PIE awareness raising programme could be undertaken by the HDA, SALGA and SERI. It could build on an existing collaboration between SALGA and SERI in evictions law awareness raising.
- Develop *generic guidelines for 'special zones' in municipal SPLUMA by-laws* so that the opportunities for legal recognition through planning mechanisms contained in SPLUMA can be maximised by municipalities in informal settlement upgrading. This project could be undertaken by the HDA. Possible collaborators are NUSP, SALGA and the SACN.

- Develop *generic guidelines for incremental land development in terms of SPLUMA* so that the opportunities for legal recognition through incremental land development contained in SPLUMA can be maximised by municipalities in informal settlement upgrading. Alignment with the UISP should also be addressed. Possible collaborators are NUSP, SALGA and the SACN.
- Finally, a proactive land release programme is the flip side of incremental settlement upgrading. Especially in high urbanisation areas with growing land demands, a land release programme is a more sustainable approach than 'land invasions management'. In this regard, the proposal is to explore *the managed land settlement (MLS) model* developed by Afesis-Corplan. This should be a collaboration between the HDA, Afesis-Corplan and possibly NUSP.

Finally, the priority next step will be for the HDA to meet with the Department of Rural Development to take forward the proposed approach and additional recommendations.

PART 8

Acronyms

BCDA	Black Communities Development Act
CLRA	Communal Land Rights Act
CLTP	Communal Land Tenure Policy
CPI/CPA	Communal Property Institution (usually referred to as CPAs – Communal Property Association)
DFA	Development Facilitation Act
ESTA	Extension of Security of Tenure Act
GIAMA	Government Immovable Assets Management Act
GLTN	Global Land Tool Network
HDA	Housing Development Agency
IPILRA	Interim Protection of Land Rights Act
KZN	KwaZulu-Natal
LFTEA	Less Formal Township Establishment Act
LGHTA	Department of Local Government, Housing and Traditional Affairs
LUS	Land Use Schemes
MEC	Member of the Executive Committee
NUSP	National Upgrade Support Programme
PPA	Physical Planning Act
PTO	Permission to Occupy
RDP	Reconstruction and Development Programme
SACN	South African Cities Network
SALGA	South African Local Government Association
SDF	Spatial Development Framework
SERI	Socio-Economic Rights Institute of South Africa
SPLUMA	Spatial Planning and Land Use Management Act
TRSA	Transitional Residential Settlement Area
UISP	Upgrading Informal Settlements Programme
ULTRA	Upgrading of Land Titles Rights
UN	United Nations
VPUU	Violence Prevention Through Urban Upgrading

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