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National Development Plan Chapter 8 – HUMAN SETTLEMENTS

Secure property rights represent one of the most important requirements for the protection of both economic freedom and civil liberties.

South Africa's "land acts" are often regarded as the cornerstone of apartheid, the aspect of South Africa's "crime against humanity" that made the biggest single contribution to psychological, political and material dispossession of black South Africans. The "land question" remains one of the most problematic and conflict-provoking aspects of post-apartheid South Africa. The "land debate" consists primarily of an acrimonious discourse about land redistribution from whites to blacks, which is so overpowering that scant attention is paid to other aspects that have greater potential for black economic empowerment.

Black South Africans constitute 80% of the population and live primarily on urban "plots" which they hold under a range of limited forms of tenure. The balance live on plots or farms in rural "tribal" areas (formerly "homelands"), also under a range of forms of tribal tenure. Around 3.4 million black families have been housed in RDP houses where pre-emptive clauses distinguish their ownership from that of whites. A small but growing number of blacks live in historically "white" areas.

Eighteen years after transition to predominantly black rule, most black South Africans still live under the legislative progeny of the Land Acts.

Additionally, the present regime inherited the massive loot of the apartheid government in the form of extensive government-owned land. This land is unutilised or underutilised, and, therefore, is readily available for redistribution to landless blacks.

The FMF proposes that:

1. All black occupied council-owned urban plots be converted to full ownership ("freehold").
2. Superfluous government land be redistributed to the victims of apartheid as a substantial once-off compensation for the crime of apartheid.
3. Pre-emptive clauses be removed from existing and future RDP titles.
4. In tribal areas, communities be allowed to grant private title over homesteads while maintaining communal rights over arable land.
5. The Subdivision of Agricultural Land Act, 70 of 1970 should be repealed because it would make it easier for poor individuals to finance smaller, more affordable plots of land. Furthermore, lowering

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the statutory costs of subdividing and transacting farmland would allow commercial banks to finance lower income individuals' applications.

Converting black occupied council-owned urban plots to full ownership: The "Perryville" example

"Perryville" is a municipal area covering various towns. It prides itself on the extent to which it has implemented land "transformation" for black South Africans. Virtually all black-occupied land has been properly surveyed, included in town planning schemes, proclaimed and registered in the deeds registry. "Perryville" municipality has resolved to become the first urban area in South Africa where all land is held under full freehold on the basis of complete equality between whites and blacks.

Because most formalities have already been complied with, conversion to ownership is relatively easy, at least conceptually. Even so, there are substantial obstacles of the kind that bedevil land ownership in the third world. Firstly, substantial sums in arrear rents, rates and taxes are owed to the municipality, sometimes far in excess of the value of the land. Although these sums are unlikely ever to be paid, they are reflected in the municipal accounts as assets. If they are written off to allow for tenure upgrade, the municipality will be technically insolvent and in breach of local government management legislation. Secondly, there are a host of professions wanting their slice of the cake: town planners, property lawyers, land surveyors, development consultants.

"Normalisation" in "Perryville" can be achieved only if the council breaks with convention in fundamental ways. To solve its accounting problem it was suggested that land-related debts be severed from the land and converted in the council's accounts to civil debts so that "clearance certificates" could be issued on all land regardless of debt to the council. It was also suggested that the council would have to be willing to grant full title without the prohibitively costly intervention of the professions.

FMF is working with "Perryville" to convert 33,000 council-owned urban plots to full freehold title thus granting black South Africans the same land rights as whites and releasing around R3bn into the local economy. We believe this project can be replicated countrywide, converting "dead capital" into "dynamic capital" and altering forever South Africa's landscape.

See Addendum 1: *Frequently asked questions*.

Redistributing superfluous government land

Government should transfer superfluous state land to the homeless free of charge. An allocation of five hectares per landless rural family and 200 square metres per unhoused urban family would absorb only a small part of government's land holdings.

This land should be defined and allocated under a simple, low-cost form of registration, defining the boundaries by description and sketch plans, and making existing land survey and deeds registration formalities inapplicable.

Titling should be accompanied by a removal of the red tape that prevents people from building their own homes.

There are virtually no budgetary implications to this land reform option.

Thereafter draw a line in the sand regarding government responsibility re providing free housing into perpetuity i.e. thereafter, newly formed households (children getting married and setting up their own homes) and foreigners needing homes will have to buy, build or rent in a normalised market.

Removing pre-emptive clauses from RDP titles

The allocation of RDP houses remains a source of frustration. Each house is handed over to a recipient with a pre-emptive clause that prohibits the sale of the house for 8 years. Studies indicate that it is largely unenforceable and has led to an 80% 'illegal' occupancy of RDP houses as a result of a 'grey' market in these properties.

The government's "use it or lose it" policy means that many RDP home "owners" are under a kind of house arrest. If they are unemployed, they often face a stark choice between losing their most valuable asset, their home, and getting a job elsewhere, or remaining unemployed where they are.

Note: There should be open, transparent, published waiting lists.

See Addendum 2: *Convert all RDP housing to full and unrestricted freehold title.*

Solutions for tribal areas

Traditional leaders have indicated that they would be very keen to explore with the FMF the issue of granting secure title to the members of their communities, especially if ways can be found of bringing this about with consensus agreement on the part of community members and in a manner that will not disturb the social cohesion of the communities.

Communities generally emphasise communal rights and family rights. Titled private ownership of property must take cognisance of the cultural sensitivities and other concerns prevailing in rural communities which differ from community to community.

Raising these concerns does not mean traditional leaders in these communities are averse to legal titling and therefore "against" the interests and overall socioeconomic progress of the people and development in these communities.

The FMF is exploring innovative property titling options that take into account the sentiments of the communities while at the same time ensuring the security of tenure that comes with conventional legal titling. The FMF emphasises to all parties that there does not have to be a uniform approach to the issue in every community; that every community should have the right to decide for itself what arrangements it wishes to make in respect of property titling. One option is to grant secure title over each homestead while maintaining communal land rights over arable land.

Attachments

See also LRP (jurisprudential) and FMF (economic) *submissions* on Green Paper on land reform (2).

See also *Current and apartheid land-tenure restrictions compared* (attached).

See also *Myths about land reform* (attached).

Addendum 1: Frequently asked questions

Before interrogating individual questions, the general point should be made that most concerns about and objections to blacks having indistinguishable property rights from whites, amounts to a perpetuation of the apartheid notion that blacks should be treated differently, specifically patronisingly and as if they are innately inferior. The assumption underlying most objections to conversion to full freehold is that black South Africans cannot be trusted with rights and powers taken for granted by white South Africans.

Is it right to give people free land? If they have to buy it, even at a nominal price, will they not value it more and be more likely to retain and improve it? Will free land on a vast scale not aggravate the “culture of entitlement”, and encourage black South Africans to expect the government to “deliver” all their needs?

These are good questions to which there is no simple answer. The case for conversion to full freehold at no cost to beneficiaries is that black South Africans were denied land rights under apartheid and that *one-household-one-plot* can be regarded as a form of compensation for the crime of apartheid utilising black-occupied land nationalised by the apartheid regime. In other words, it should not be seen as a matter of welfare or charity, but as just compensation for harm inflicted.

Secondly, most black households have paid “rent” and “rates” which can be regarded as instalments for the purchase of their land.

It is true that many have refrained from paying since the rent boycotts as part of the anti-apartheid struggle and that massive amounts of notional debt have accumulated in government books. The fact is that it is practically impossible to unravel the mess. There seems to be no practical solution to the problem, which is compounded by massive administrative problems in the books of government departments at all three levels. The extent to which such notional debts have in any event prescribed is unclear. In most cases the land concerned has acquired its present value by virtue of investment in improvements.

Finally, by virtue of the “land ethic” amongst most South African blacks, there is a singular relationship with and attachment to the land, which includes the belief that land permanently occupied rightfully belongs to the occupant. What full freehold will do is to modernise this relationship as beneficiaries become accustomed to the idea that land is tradable and residence does not have to be perpetually fixed regardless of economic realities such as whether people want to be peasant farmers or relocate to places with superior opportunities.

If blacks are free to sell, mortgage or let their land, will they not simply dispose of it – “cash in their chips” – and become landless, indigent dependents of the state?

The fact is that a vast proportion of South Africans are presently landless in that they live on land “informally” (i.e. unlawfully). They live in informal, semi-formal, and “squatter” settlements, and in shacks in the yards of people occupying land lawfully. They live in informal and unproclaimed settlements on farms and on allotments often made without regard to legal requirements in urban, rural and traditional areas.

If someone who is a newly empowered land owner, sells or lets their land, there is presently concern about whether they should be allowed to do so given that land was allocated to them by the state. There are an increasing number of instances of land being repossessed because it is not being used to the satisfaction of the state, being let to tenants or sold informally (i.e. unlawfully).

In the discourse on the matter, there is seldom if any mention of the person who has acquired the land. There are two parties to such transactions, those who attach higher value to the land and can make better use of it and are therefore willing and able to pay more than the value the land has for the preceding occupier. That means not only that the land has been transferred to someone who attaches more value to

it, but that the land value has been enhanced not only for the land concerned but of all land in the community, the majority of which has not been alienated. In other words, such transactions benefit the vast majority of land holders.

Furthermore, those who alienate land benefit in many ways. They now have resources with which to pursue objectives that are for them of higher value, such as relocating to another town where they might get a job or start a small business. They may need the money for health or educational purposes. It makes no sense to force people to stay on land which is not of adequate value to them and which is in a place where it is inappropriate for them to reside.

There is a related concern that people who alienate land would not do so to use the proceeds sensibly. Instead of using it to relocate to somewhere where they can get a job or start a business, or to educate their children, or acquire essential health care, or whatever, they may waste the money on reckless living.

This is an obviously patronising, insulting and demeaning conception of South African citizens. It is also manifestly in conflict with reality. There will always be a few people who do not conduct their lives responsibly and forcing them to remain on an unsatisfactory plot is no solution. Fortunately the reality is very different from the fear that vast numbers of beneficiaries will sell or let their properties recklessly and destructively. On the contrary, the black land ethic is such that black South Africans are extremely, perhaps excessively, reluctant to alienate land even when it is manifestly in their interests to do so. The experience in the few places where blacks hold land under freely tradable title is that there is a minimal land market. There are virtually no “for sale” or “to let” signs and very few if any estate agents.

Instead of discouraging blacks from alienating land, what is needed is a public education campaign accompanying conversion to full freehold to encourage blacks to regard land as tradable, lettable and mortgageable.

Regarding mortgages, the fear is that people will recklessly mortgage their lands to banks and others and then default on their payments and lose their land and the instalments they have paid. There are two reasons why this fear is unjustified. Firstly, mortgage grantors are reluctant to grant mortgages in low-income communities. The risks and administrative costs are far too high. This is why the government has gone to great lengths to encourage financial institutions through the financial sector charter and other means to grant mortgages in predominantly black areas. The greater interest of banks when low income communities have full freehold is that they are “bankable”. The mere fact that people have a substantial tradable asset means that, without a mortgage, they qualify for a rich range of financial products and services. Secondly, there is not much demand for mortgages, which is why banks promote and encourage awareness of the mortgage option.

If it is so simple, why has it not been done?

This is perhaps the best question of all. The answer seems to be a combination of attitudes mentioned in the introduction above to the effect that blacks cannot be trusted with as much freedom and emancipation as whites, on one hand, and complex technical challenges, and perverse vested interests on the other.

The technical challenges vary depending on the nature of existing land occupation. The proposal for conversion to full freehold is that all land permanently occupied by black households should be regarded, as it technically is, as land belonging to government in one of its forms. The underlying commonality between all contexts is disposal of state land. Increasingly “title deeds” have been given or sold to blacks in urban “townships”. The problem here is that in many or most there are restrictive conditions according to which land may not be freely sold, let, developed or mortgaged.

Another substantial technical problem is that for land to be owned, present law requires complex and costly preconditions and formalities including cadastral land survey, township proclamation, town planning schemes, deeds registration and conveyancing. There is no experience in South Africa of processing such substantial quantities of land. Serious consideration should be given to reforming the relevant laws so as to enable fast-tracking of at least initial titling.

Another significant technical challenge is that most local governments have as one of the biggest assets on their books outstanding rates and rents from the “townships”. This can be dealt with by a combination of writing off debt from indigent households (for the simple reason that, as everyone knows, it will never be paid), writing off debt that has prescribed by effluxion of time, and converting remaining debt to civil debt so that it is delinked from the land and local governments can issue rates clearance certificates.

The principle vested interest is that of low-level officials who administer land in predominantly black areas. These officials are one of the many problematic legacies of apartheid. They can be expected to resist or sabotage land reform for the very simple reason that if blacks own their land unambiguously there will be no need for such officials in black areas for the same reason that there are none in white areas. Needless to say, land management, control and allocation in predominantly black areas is accompanied by a significant degree of real or suspected abuse and corruption. This is of great value to the officials concerned and government will have to decide what to do with them: severance packages, redeployment, etc.

Won't blacks have to start paying rates, property taxes and municipal service charges?

Conversion to full freehold does not change the law in this regard at all. Residents in predominantly black areas are presently required by law to pay whatever charges are levied on such properties. The reality is that there is a random mixture of individuals and communities that do or do not pay according to law. Many do not start paying simply because arrears (rates plus compound interest) that have accumulated since the rent boycotts amount in some cases to over R100,000. They see no point in starting to pay now because it will make very little difference to the total debt they owe and therefore the risk of foreclosure. In particular, there is no point in them paying arrears which frequently amount to more than the value of the land, so even where they are entitled to take transfer into freehold title, they do not do so.

More fundamentally, what rates and charges government decides to impose are a matter of policy regardless of the nature of occupancy or title. The most obvious policy for government is to delink the two completely, that is to determine its rates and services policies independently of occupancy and title.

The point should be made, however, that if people have full freehold title, they will be more inclined to pay rates, etc for the simple reason that they will be wealthier. If they want to sell their land, they will then have to pay whatever is due in order to get a clearance certificate. When people have freehold title they have a valuable asset, which local governments can attach, although this is not recommended.

What this all amounts to is that freehold title does not in and of itself entail any negative implication for beneficiaries as far as government charges are concerned, on one hand, but does substantially enhance the likelihood of increased government revenue, settlement of outstanding debts, and people being inclined to make payments according to law in future.

Doesn't conversion to freehold discriminate unfairly against many people?

There are many senses in which conversion to freehold could be regarded as unfair discrimination.

Firstly, and most obviously, it is a discrimination in favour of people living in predominantly black areas who will be given a substantial asset by the state, in most cases the most valuable asset they will ever own. People of all races outside these areas will not get a comparable “donation”. In a perfect world with limitless resources it would be possible to investigate the circumstances of every individual and household with a view to making appropriate and just decisions. The best that can be achieved in the real world is to deal with 50 million South Africans in accordance with general rules that will have overwhelmingly appropriate consequences notwithstanding individual distortions. The legacy of apartheid is that people living in predominantly black areas are generally poorer and to a greater or lesser extent victims of apartheid, specifically land deprivation. They are therefore overwhelmingly the

appropriate beneficiaries of conversion to freehold. At a practical level, people in these areas do not have title like their counterparts in predominantly white areas, yet have invested in improving the land and thus its value although they cannot freely trade it.

A more complex ethical challenge is that people who already have permanent occupation of land (whether formal or informal) are privileged compared with people who are landless or live in shacks on other peoples land. Titling for black South Africans could therefore be seen as privileging the privileged. This is a truly serious consideration which has a particular gender dimension. Under the notorious Section 10 of the Group Areas Act, urban land was made available exclusively or predominantly to men. Land in traditional areas was and often still is allocated only to men. This means that most beneficiaries to freehold will be men and that it could be seen as unfair discrimination against women. Women were disproportionately discriminated against under apartheid as far as land is concerned. That this problem exists is no basis for denying the morality, justice, and socio-economic benefits of conversion to freehold. Whilst this is a massive part of the solution to the apartheid land legacy, it does not pretend to be an omnibus solution to all evil.

Mercifully there is a relatively simple and cost free solution to the problem of households that do not receive land on conversion to freehold. Namely to have a *one-household-one-plot* policy whereby superfluous state-owned land in urban areas is utilised for such people. The point is that the state already owns in virtually all urban areas substantial quantities of land, much of which it does not even know it owns. This is not the place to elaborate the point, but a substantial part of such land is called “reserved” land, which is land set aside in all proclaimed predominantly white townships for a full range of government purposes by property developers. Such land remains in perpetuity in the name of the developer in deeds registries and is only identifiable as state land if conditions of title are examined.

Much of this land is suitable for low-income housing. That which is not, can be used for BEE property development purposes or transferred to community owned trusts that will benefit from commercial development thereof.

The next form of apparently unfair discrimination is that all property holders will get full freehold title at no cost regardless of whether they have paid rates, rents, tax and service charges. People who have paid can be regarded as unfairly discriminated against when people who have not paid are treated equally. In a perfect world with limitless resources it would also be possible to address each case on its merits. The reality is that this is simply impossible. Even if it were possible it would delay normalisation of land ownership for decades as technocrats try to unravel the mess.

The time has come for South Africa to put an end to the apartheid land legacy by a practical and symbolic act that will probably be welcomed by all concerned even if they feel somewhat aggrieved that delinquent neighbours are enjoying the same generous treatment.

Addendum 2: Convert all RDP housing to full and unrestricted freehold title

Wouldn't it be wonderful if black South Africans had equal rights, if they enjoyed the same home ownership rights as whites, if they were emancipated, empowered and trusted, if they were presumed to be the equals of whites and no longer patronised? Wouldn't we rejoice if racism were ended, not just racism by whites against blacks, and blacks against whites, but racism by blacks against blacks? Imagine a world in which blacks stop treating blacks as if they are inferior and think they should no longer live under patronising laws which deny them the right to own and deal freely with their land.

Much fuss is made when blacks who get RDP houses that cost R50,000 or more sell them for R10,000. But, no spontaneous outrage erupts when politicians and officials announce with pride and glee the repossession of houses or farms from blacks who were not using them to their satisfaction, or who were not in personal occupation. It would make headline news if whites were treated like this.

This is not recycled news from the 1960's apartheid years; this is now, in the new 2011 aspirantly non-racial, post-apartheid South Africa.

Why is no outrage expressed? Because racism is so ubiquitous that one of its most extreme manifestations is going unobserved and unquestioned. Bureaucratic inertia may explain, but does not excuse why racially inferior land tenure inherited from apartheid is not being converted into full freehold title. Failure to do so is continuing and prolonging the Verwoerdian legacy of giving toxic RDP and redistribution title to blacks in the new South Africa and is perpetuating and exacerbating the problem.

Since 1994 about three million "RDP" houses have been allocated to black South Africans. Most or all are subject to racially discriminatory, restrictive and pre-emptive conditions. The two most common are (a) an eight-year prohibition on selling or letting, and (b) a condition that there may be only one dwelling per property. Both seem reasonable at first, but, as everyone who has anything to do with 'black townships', 'locations' and 'informal settlements' knows, the real world bears virtually no relationship to the fantasy world of planners and legislators. Experts and land audits suggest, but no one actually knows, that one half to three quarters of all RDP and other township houses are not occupied by official beneficiaries; most, in some areas virtually all, have illegal tenant shacks in the yard; and properties have been unlawfully sold, let or developed.

All major political parties have been reported as having taken back such housing. Not one major political party has been reported as calling for blacks in "black" areas to enjoy the same ownership rights as blacks who own property in "white" areas. This is especially curious since presumably no one wants the *status quo* in which most blacks live under virtual house arrest.

Most blacks are faced with the following intolerable choice: if they can get a job somewhere other than where they happen to live, which is the norm, they have to remain unemployed or abandon their most valuable asset, their house. If they choose to abandon an RDP house, it is reallocated to the next person on the waiting list (or, some believe, the next person to pay a suitable bribe), and they never get another, regardless of how compelling their reason might be for leaving. In short, they have to choose between being housed or employed. If they choose to remain unemployed, they will probably lose their house anyway because they won't be able to afford to maintain it or pay property taxes.

Most blacks ignore their lawful options and sell or let their RDP or other township house "informally". Since the law prevents them from having secure or tradable title, they are forced to sell or let at massively discounted "black market" prices. New occupiers live in a state of permanent fear that they might be caught and, with their belongings, summarily evicted onto the sidewalk.

Because of the discretionary and clandestine allocation of RDP houses, there is real or suspected corruption. In some areas people at the bottom of the list believe they will never rise to the top unless they bribe housing officials.

A common objection to black titling is that recipients of RDP housing will dispose of their houses, pocket the cash, and become homeless once more. The most conspicuous thing about this objection is that it is never raised against white rights. Why is it assumed that blacks are incapable of behaving responsibly? Why is it not assumed that people of all races who sell or let their most valuable asset do so after careful consideration? They might need the money more than the house for a host of legitimate reasons: relocating to somewhere with better employment prospects, starting a small business, educating children, or health care.

Perhaps the most bizarre aspect of this objection is the assumption that RDP houses disposed of by initial beneficiaries remain unoccupied. In truth, other blacks move in. For various reasons, the new occupants are likely to be more suitable: they have the resources to maintain or improve the house; they have upgraded from living in a slum; or they have moved to be near their place of employment.

The propensity for freely tradable assets to gravitate rapidly into optimal hands when markets are free is the 'Coase Theorem', according to which there is no need to anguish about the initial holder of assets. Provided there is no restriction on assets being exchanged, they will soon end up in optimal hands.

By far the most important first step that needs to be taken if the problem – or is it a national crisis? – is to be solved, is for the highest levels of government to decide to uproot apartheid tenure once and for all. The decision, fully backed and appreciated by the Cabinet, and purposefully championed by the President should be to immediately discontinue restrictive and pre-emptive RDP housing conditions. The effect would be that all new RDP beneficiaries would get full non-racial (white equivalent) title and property rights would no longer be racially denied.

AUTHOR Leon Louw, the Executive Director of the Free Market Foundation, has campaigned for more than three decades, starting in the depths of the apartheid era, for secure property rights for black South Africans. This article may be republished without prior consent but with acknowledgement to the author. The views expressed in the article are the author's and are not necessarily shared by the members of the Foundation.