

Why title deeds aren't the solution to South Africa's land tenure problem

By [Ben Cousins](#)

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The conventional view is that insecurity of land tenure results from the lack of a registered title deed which records the property rights of occupants of land or housing. Across Africa, many governments and international development agencies are [promoting large-scale land titling](#) as the solution.



Nearly 60% of all South Africans, live on land or in dwellings outside of the land titling system Flickr/lcrisat

In the South African context, some commentators [suggest](#) that a key legacy of the apartheid past is the continued tenure insecurity of the third of the population who live in “communal areas”, under unelected chiefs or of traditional councils. The remedy, they suggest, is simple: extend the system of title deeds to all South Africans.

We have just published a book which disputes this view. [Untitled. Securing land tenure in urban and rural South Africa](#) contains case studies of a wide range of land tenure systems found in different parts of the country. These include informal settlements, inner city buildings in Johannesburg, “deep rural” communal systems, land reform projects, and examples of systems of freehold rights held by black South Africans since the 19th century.

With the exception of systems of freehold rights, most people who occupy land or dwellings in these areas are “untitled”, and occupy land or dwellings under a very different kind of property regime. We term these social or off-register tenures.

But we argue that, fundamentally, South Africans need to question the assumption that the sole solution to the problem of tenure insecurity is a system of title deeds. Alternative approaches are needed, which we set out to explore.

Social tenures

The book offers an analysis of social tenures, which are regulated by a different logic and set of norms than those underpinning private property. Such tenures are diverse but share some key features. As is the case across the developing world, including Africa, land tenure is directly embedded in social identities and relations.

Rights are often shared and overlapping in character and generally derive from accepted membership of a community or kinship group. Processes of land allocation and dispute resolution are overseen by local institutional structures.

In these contexts, decisions are often informed by norms and values that stress the importance of reciprocal social relationships rather than buying power as the basis for land allocation. They involve flexible processes of asserting, negotiating and defending land rights, rather than the enforcement of legally defined rules.

It's estimated that in 2011 some 1.5 million people lived in low-cost dwellings provided to the poor by government's, so-called "[Reconstruction and Development Programme](#)" (RDP) houses, with inaccurate or outdated titles, in most cases due to transfers outside of the formal system.

Another 5 million lived in RDP houses where no titles had yet been issued due to systemic inefficiencies. Along with 1.9 million people in backyard shacks, 2 million on commercial farms, and 17 million in communal areas, this means that in that year around 30 million people, nearly 60% of all South Africans, lived on land or in dwellings held outside of the land titling system.



The edifice of title deeds

The book contrasts social tenures with the conventional system of title deeds, which constitutes a key element of an imposing "edifice". The current system of rates, services and processes of development assumes that land tenure equals a

surveyed plot with a singular registered owner, which may be persons or corporate bodies.

The system is serviced by a Deeds Registry, private sector surveyors and conveyancers, as well as municipal officials, all governed by a range of laws and regulations in a complex and interlocking manner.

One key problem facing those in social tenures is the discrimination they suffer at the hands of the state and the private sector. Despite some protection under laws such as the Interim Protection of Informal Land Rights [Act of 1996](#), people living in social tenures are severely disadvantaged. They may have to go to court to have their rights legally enforced, but most cannot afford to do so.

Development and land use planning, public investment and service delivery are constrained under these systems of tenure. Elite capture or abuse by unaccountable leaders can also take place, as in communal areas where minerals are found and chiefs and councils enter into business deals with mining companies that benefit only a few.

Titling enthusiasts argue that another problem with social tenures is the fact that banks do not accept untitled land or dwellings as security for bank loans. This constrains the poor from borrowing capital to invest in businesses of their own. But research indicates that few of the poor are willing to risk their homes in this way, since small enterprises often fail.

Tenure reform policy options

How then to proceed with pro-poor tenure reform? Our research indicates that it is not realistic to extend land titling to all; the system may be at breaking point, and is inadequate even for the emerging middle class.

Another option is to adapt elements of the edifice to provide a degree of official and legal recognition of rights within social tenures. Lawyers and planners working with communities and officials have developed a range of innovative practices, concepts and instruments aimed at securing such rights in an incremental manner. This includes special land use zones, recognising occupation rights in informal settlements, and recording rights using locally accepted forms of evidence.

A third option is a more radical overhaul of land tenure, leading to systematic recognition of and large scale support for social tenures. This would involve stronger laws protecting rights holders, an adjudication system that allows new forms of evidence to be considered in determining who holds rights, and new institutions for negotiating, recording and registering rights under social tenures. The system could include the office of a Land Rights Protector.

We believe that these alternatives all pose their own challenges. But we also believe that pursuing alternatives to a system of title deeds is not an impossible task.

The [book](#) was co-authored with Dona Hornby, a post-doctoral student at the Institute for Poverty, Land and Agrarian Studies ([PLAAS](#)) at the University of the Western Cape; Rosalie Kingwill, at the institute and Lauren Royston, a researcher at the [Socio-Economic Rights Institute](#).

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