

Land Transactions in Social Housing in the Western Cape of South Africa: A Narrative of Kransdorp

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This paper was first presented at AfricaGeo conference “Developing Geomatics for Africa” in Cape Town, South Africa, 30 May - 2 June 2011

Reference for this paper: Roux, L. & Barry, M., 2011. Land Transactions in Social Housing in the Western Cape of South Africa: A Narrative of Kransdorp. AfricaGeo 2011, Developing Geomatics for Africa, Cape Town, South Africa, 30 May - 2 June 2011

ABSTRACT

Kransdorp is one of three case studies in a larger research project investigating registration system usage in low-cost housing settlements in the Western Cape of South Africa. This qualitative inquiry studies how and why buyers and sellers of registered land decide to transact within or outside the official land registration system. This decision has a significant impact on the tenure security of the buyers and if a transaction is conducted off-register the buyer will remain vulnerable to eviction, be it from the previous owner or the state.

There is a gap in knowledge regarding why off-register transactions occur. The prevailing discourse amongst municipal officials, land professionals and politicians is that the non-usage of the land registration system is due to the lack of financial resources and education. The main objective of the research is thus to develop an in-depth understanding of land transactions from the perspective of land registration system users, in particular users who transact in land.

This case study narrative describes the history of the town Kransdorp and the development of the town's 1997 Project low-cost housing settlement. The institutional environment as well as the loci of power within a settlement is examined. A description of transactions within the 1997 Project is used to identify factors that influence the decision to register sales transactions. The preliminary findings in the study illustrate that decisions are a function of time, cost, finance, information, legal restriction, legal invisibility, security, trust, fear of deceit, deceitful intent, and the influence of an external agent.

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1. Introduction

This is a narrative of a 1997 Reconstruction and Development Programme (RDP) housing project in Kransdorp in the Western Cape, South Africa. (Please note that all place and people names are replaced by pseudonyms to protect privacy.) This case study forms part of research into the use of land registration in transactions subsequent to initial allocation of RDP properties. The research also investigated alternative mechanisms that property buyers, sellers and heirs to deceased estates use to transact in land. The focus is on identifying and explaining patterns of behaviour concerning property transactions.

The South African government's Reconstruction and Development Programme (RDP) facilitated the construction of 2.3 million houses since 1994 (Sexwale 2007). Largely due to the subsidy programmes associated with these social housing programmes, more than 90% of RDP beneficiaries were granted ownership rather than weaker tenure forms such as leasehold (Royston and Ambert 2002).

Registered ownership should provide tenure security for RDP landholders. In South Africa changes in ownership are only recognised in law if they are registered. However, a number of researchers have reported off-register or informal transactions in RDP properties (e.g. Gordon 2008; Smit 2008; Payne *et al.* 2008; Marx 2007b; Payne 2002; Barry 1999) as have many newspaper articles (Gophe 2005; Ngalwa 2008; Hweshe 2008; Mabandla 2009; Luhanga 2010; Phaliso 2010, Boyi 2010). Off-register transactions have serious implications for the parties to the transactions, for the integrity of the registration system, and for government housing programmes. These implications are described below.

For the case study, the data comprised documentary evidence and interviews with municipal officials, residents, community leaders, lawyers and estate agents. Residents were interviewed, using a door-to-door survey in 2010. Fourteen municipal officials, two community leaders, three lawyers or estate agents and 37 residents were interviewed. Supplementing the interviews were municipal documents, newspaper articles and land registry information.

The paper proceeds as follows. Previous work in the area, the RDP programme and pertinent aspects of land registration in South Africa are first discussed, followed by the case study narrative. The narrative starts by describing the municipal institutional environment, followed by the 1997 RDP Project's history and the loci of power in the settlement. This is followed by a description of the sales that occurred in the area, and analysis of the transaction methods.

2. Previous work

Various land market studies report off-register sales. None of these had as their primary focus the interaction between users and the land registration system, but they do advance hypotheses, speculative in many instances, pertaining to registration usage, most of them based on anecdotal or

limited evidence. These hypotheses have been tested in the 1997 Project case study and further hypotheses were developed.

In Westlake Village, Cape Town, very few properties were found to have been sold off-register. Lemanski identifies three causal factors: (1) a reduction in the costs and complexities of registered transactions because a local councillor provided free or cheap professional conveyancing services and legal advice; (2) many of the properties were bought for employees by employers “who are themselves integrated into formal property markets”; and (3) there is no clause restricting sales within the first five or eight years (as has been the case elsewhere) in the title deeds and therefore residents did not feel that they needed to hide sales from the government (Lemanski 2010, p.11).

Three large scale South African studies were conducted in recent years; by FinMark Trust, Urban LandMark, and a study managed by Geoffrey Payne and Associates. The Township Residential Property Market (TRPM) study by FinMark Trust (TRPM 2003a, 2003b) included research sites in four metropolitan areas. The six sub-markets identified were private sectors (middle and upper income), old township stock, informal settlements, site and service schemes, and RDP housing. Secondary transfers were identified in these studies, but perhaps not fully investigated. However the TRPM report recommended the repeal of the restrictive clause, reducing the costs of transfers, increasing the availability of information and providing education to home owners.

The question explored by Urban LandMark was how the poor access, hold and trade land (Marx 2007a, Marx 2007b, Smit 2008). The land market research project included three informal settlements, a township area, a peri-urban customary communal tenure area, a public rental housing area and three RDP housing projects in three metropolitan areas in South Africa. The authors ventured that off-register transactions occur because a registered transfer is expensive and the registration process is complex. The widespread use of affidavits, which are written statements testifying to an affirmation or oath countersigned by a police officer, in off-register transfers was identified in a DAG study (2006 cited in ULM 2008) and confirmed in the Urban Landmark study. In a visioning workshop by Urban LandMark with NGOs, Civil Society Organisations and other key thinkers, the lack of legal title, delays in transferring the first generation title and obtaining municipal clearance certificates, the restrictive clause, the lack of service providers and the affordability of transaction costs were identified as significant constraints in transferring properties (ULM 2007).

The third study was confined to Ekurhuleni metropolitan area and included an informal settlement, an in-situ upgrade project (partly RDP) and an RDP project (Marx and Rubin 2008). It focussed on the impact of titling in low income communities. In the study the use of affidavits in transactions were again pointed out by conveyancers, but also cases in which the name on the title

deed is crossed out and replaced with the name of the buyer. It was concluded that the data suggested off-register sales are due to the restrictive clause, and “cumbersome, expensive, and time-consuming nature of the housing transfer process” (Marx and Rubin 2008, p.134). In a paper flowing from this research, Payne *et al* (2009) states that the legal system favours affluent households and poor households are excluded because of a lack of access to the tools, instruments and systems necessary to use the land registration system effectively.

In summary, previous research indicates that the decision to register or not register a sale is a function of:

- affordability (conveyancing costs and transfer costs)
- access to legal services
- access to information
- education
- the legal restriction on sales (implemented according to clause 10A and 10B of the Housing Act 107 of 1997)
- the complexity of the registration system
- the lack of legal title
- time to complete transfer process
- time to obtain rates clearance certificates
- assistance of an external agent (e.g. an employer)

These hypotheses require further validation (or falsification), which we address in part in the discussion section below.

3. The South African Land Registration System

The South African land registration system is widely recognised as very sophisticated (Radloff 1996, p.816). Simpson (1976) described it as the type of system Torrens would have liked to have introduced in South Australia in the mid nineteenth century.

In terms of the Deeds Registry Act 47 of 1937, “the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar” (RSA 1937, s.16). In addition, a deed of transfer may only be prepared by a conveyancer, and a conveyancer must be an attorney who has passed the conveyancing exam (RSA 1937, s.15).

The process for buying and registering property consists of the following steps. Contact is made between the buyer and seller. Then a contract (Deed of Sale or Offer to Purchase) is drawn up between the seller and the buyer, usually in the presence of the conveyancer or estate agent. There are certain legal requirements stipulated in the Alienation of Land Act 68 of 1981 regarding the drafting of the Deed of Sale: the contract must include the names of the parties involved in the sale

and their addresses, the address and description of the property (including erf number and extent), the purchase price, and the date (RSA 1981 s.6). These are the basic requirements and there are others, for example, the date of expiry of offer. Once the Deed of Sale is signed, the seller appoints a conveyancer to transfer the property. The conveyancer investigates the title and obtains other documentation for example a rates clearance certificate. To obtain the rates clearance the seller usually pays the municipality the outstanding rates or provides for its payment. The seller signs for registration and a power of attorney (the conveyancer acts for the seller when the deed is transferred at the Deeds Registry). The buyer pays the conveyancing costs and the purchase price is paid into the conveyancer's trust account. Finally the purchase price is paid to the seller once registration has occurred.

Presently the basic fees in terms of the recommended guidelines for the conveyance of immovable property ranges from R3 200 (for property valued at R80 000 or less) to R3 900 (value between R125 000 to R150 000) and so forth (Law Society of South Africa, 2009).

All the steps in the process are designed to minimise the risks involved when dealing in property as well as ensuring the currency and correctness of the land registration system.

4. Kransdorp

Kransdorp is a large town in the Western Cape province. In the mid twentieth century the population of the town increased significantly due to the labour needs of the industrial and agricultural sectors (Interview 743). People migrated from a variety of towns in the now Western Cape, Northern Cape and Eastern Cape provinces (Interview 711). Most of these migrants, as well as the existing population of coloured and black people rented municipal flats and houses (Interviews 706, 736). In the 1960s long-term residents were forcibly moved from the town to outlying areas in terms of Group Areas legislation (Interviews 704, 706, 721, 724, 736, 738). Then in the 1980s, the national government took the position that the building of housing was not part of its mandate, and so the supply of housing stock to black and coloured people decreased (Parnell 1992; Interview 743), which increased pressure on existing housing and resulted in longer and longer housing waiting lists. At the same time the local economy suffered a major blow when many factories in the area closed in the 1980s, causing high unemployment among municipal rental housing residents (Interviews 706, 743).

The relationship between the municipality or the state and the town's coloured and black residents was partly defined by the landlord-tenant relationship. This relationship was marked by friction, but it did expose tenants to the use of official systems of land management. Although there were later waves of migration, the majority of 1997 Project beneficiaries were born in Kransdorp or migrated there before 1982. Interviews indicate that most of the beneficiaries lived in municipal rental housing, although some moved to informal settlements in later years, with the exception of a small number of beneficiaries who lived on farms.

In the early 1990s the lack of housing and the relaxation of laws controlling informal structures led to an increase in informal settlements, backyard shacks, and informal structures attached to formal housing (Interviews 59, 704, 706, 758). In 1997 the first government subsidised housing project was started, followed by a number of other projects. Parallel to the RDP housing projects, rental units and state financed properties, which had been occupied before July 1993, were transferred through the discount benefit scheme to tenants and owners repaying state loans (according to the guidelines of the National Housing Code from 2000, but the discount benefit scheme was used by the municipality throughout the 1990s) (Kransdorp Council Minutes 29 September 1998).

One of the problems the municipality faces is recovering outstanding debt. Kransdorp municipality adopted a policy specifically for indigents in 1999 (Kransdorp Executive committee minutes 11 February 1999, Council minutes 23 February 1999; Kransdorp Newspaper 3 September 1998). The policy provided a limited amount of free electricity and water as well as a subsidy towards the municipal account for residents who earn less than R800 a month (this amount is now R2600 - it is continually adjusted according to changes in the government pension grant). Despite these measures, residents may find themselves unable to pay their municipal accounts. The municipal debtors' policy includes the possibility of sale in execution to recover debt and there was a period in the early 2000s when the municipality did threaten to sell houses to recover debt (Interviews 724, 727). However, this is not currently happening because the debtors are given the opportunity to arrange payments and the municipality actively encourages this (Interview 706, 736; Indigent Policy: Kransdorp 2010)

A related municipal practice is an adaptation to the process of obtaining a rates clearance certificate prior to selling and transferring a property. Traditionally municipalities only provide a rates clearance certificate if the municipal account is up to date. In many sales involving RDP houses, the responsibility for paying the outstanding municipal account is accepted by the buyer. This leads to a delay in transfer as the buyer seldom budgets for this expense, which may be significant. Kransdorp municipality changed this policy by permitting the transfer to occur once the buyer has made a payment agreement with the municipality (Interviews 706, 715, 740, 743). This adaptation in policy lowers the risk of the seller disappearing or contesting the sale and thus impeding the transfer, because the period between the signing of the sales contract and the transfer remains approximately three months (Interview 707).

5. The 1997 Project

The 1997 project started with the provision of serviced erven in an area previously designated as a coloured area under Group Areas legislation (Kransdorp Newspaper 5 September 1996; Interview 752). As more funding became available, top-structures were included (Kransdorp Newspaper 3 April 1997). A development company managed the project, including the application for subsidies

(Interview 700). 80% of the beneficiaries were from the waiting list (occupying informal structures, living in municipal rental property with family, evicted farm workers etc.) and 20% were people who had been tenants in municipal housing for 15 years or longer (Kransdorp Newspaper 19 September 1996; Interview 700). At a later stage approximately 100 houses were set aside for residents in the nearby informal settlement (Kransdorp Newspaper 19 March 1998). It was also an integrated project, i.e. the beneficiaries included coloured and black people although the majority of beneficiaries were coloured people (Interview 58). The bottom rung subsidy at that stage was R17 500 if the beneficiary earned less than R800 per month (Kransdorp Newspaper 26 September 1996). A social compact was formed two years before the project started that included local organisations and the municipality (Kransdorp Newspaper 6 April 1995) and later the developers (Kransdorp Newspaper 19 September 1996). This social compact was different to the current form of social compact required by the Department of Human Settlement since it was not specific to the project and did not include beneficiaries (Interview 700).

The project was advertised in the local newspaper and people were invited to apply (Interviews 734, 752). During the development of the project, beneficiaries attended many meetings and information sessions. The erven were allocated by an official lottery (Interviews 718, 752).

The houses were handed over as they were completed and the final beneficiaries moved in at the end of 1999 (Kransdorp Newspaper 25 November 1999; Interview 700). Approximately 800 houses were built. The transfer of ownership was the responsibility of lawyers who each took responsibility for a group of new owners (Interview 743). The lawyers made an effort to educate new owners and information sessions were held where beneficiaries completed their sales contracts (Interview 743). The impact of the educational process is reflected in the awareness of title deeds by the majority of original beneficiaries interviewed in 2010; 20 of the 28 original beneficiaries interviewed directly named the title deed or "*kaart en transport*". The other eight participants used the terminology "documents" or "papers". It has to be noted though, that in addition to the title deed or document, 50% of the participants included the municipal account as proof of their ownership. This belief is reasonable, because from the perspective of the residents, the municipal account affirms ownership every month, and they invest in their ownership by paying the account.

Due to the high outstanding debt owed to the municipality (1998 the debt was R18 million – Kransdorp Newspaper 26 February 1998), one of the major messages with the handover of the houses was that the owner is responsible for the payment of the municipal account (Kransdorp Newspaper 30 May 1999, 25 December 1999).

5.1 Initial State of the Land Records

The transfer of the title deeds was started in 1998 and the majority completed by 1999 (Transfer records 1997 - 2010; Interviews 701, 702). The sales price stated in the title deeds was R14 600.

The title deeds in this project do not contain the eight year restrictive clause or any other sales restriction (Interviews 58, 700, 706, 707, 743; Deed A/1998).

In the first year of the project there were cases where the original beneficiary was disqualified and the property re-allocated. The municipality offered people on the waiting list the option to buy houses for the value of the subsidy (R15 000); in these cases the properties were transferred to the buyer (Transfer records 1997 - 2010, Friedman 2002).

In the 1997 Project the titles deeds were processed in a relatively short time. There were no mistakes in the initial allocation, such as the wrong owner registered against the wrong property which we have observed elsewhere. Allocation mistakes related to the qualification criteria of the subsidy scheme were corrected and ownership registered. Thus, in general, the initial state of the land records indicates a successful titling process, with no legal barriers to sales.

5.2 Loci of Power

Reviewing the literature and experience in the other case study areas included in the larger research project indicated that identifying the loci of power in the project area is critical in understanding land tenure practices. The official structures are also included in this description.

The dominant land administration organisation in the area is the local authority, i.e. the municipality. Residents have an ambiguous relationship with the municipality. Residents hold a suspicious or mistrusting attitude towards the municipality, which has its roots in minor issues such as rudeness or disrespect shown by municipal officials when making inquiries and difficulty in solving municipal account issues, and more serious accusations (unsubstantiated in this study) that municipal officials target residents with high outstanding municipal accounts and intimidate them so that they will sell their properties (Interviews 706, 714, 715, 727, 730, 734, 738, 745). However at the same time, residents expect and trust the municipality to assist them with ownership problems. In interviews residents were asked who they would approach for assistance if their ownership was threatened and 15 of 28 original beneficiaries replied that the municipality is the first organisation they will go to.

Although the residents view the municipality as an important organisation in protecting and securing their ownership, the municipality does not accept any responsibility for land tenure matters after a subsidised house is handed over (excluding service provision, building plans, valuation etc.) (Interviews 700, 702, 705, 707). This is according to law. Theoretically the five or eight year sales restriction clause in the title deeds means that the state retains control over ownership during that period, and the national and provincial Department of Human Settlements have used this power, but the Kransdorp municipality has not. The municipality is prepared to give residents information and advice about ownership, but does not involve itself in private law matters.

The ward councillors are known by residents, but again there is an ambiguous relationship. The councillors are held in high regard or residents feel the councillors are only available when they need the votes of residents (Interview 727). Residents do ask councillors for advice and assistance, and councillors may become involved as mediators or advise residents to go to the police or courts (Interviews 700, 706, 730, 736). This involvement may have mixed results and councillors have been accused of exploitation or blamed if the conflict is not resolved in favour of the complaining party.

Other organisations were active in Kransdorp and the 1997 Project. The Civics disbanded and street committees did exist in other areas in Kransdorp but not the 1997 Project. There were two residential organisations during the development of the 1997 Project, but these were short-lived (Interview 736; Kransdorp Newspaper 25 February 1999, 15 December 1999).

Finally, there are powerful criminal or financially well-off individuals active in the area. As far as could be ascertained, these individuals are only involved in securing their own holdings.

None of the powerful groups or individuals appears to be involved in land administration subsequent to the completion of the 1997 Project development. The residents either use the registration system of the national government or conduct transactions privately without outside intervention.

5.3 External Agents

Other than officials, two types of external land administration agents were identified in the area, estate agents and lawyers. Both estate agents and lawyers facilitate registered sales as well as fulfilling an educational role. Yet their influence, especially estate agents, is not entirely beneficial and accusations were made that estate agents and lawyers are involved in fraudulent activities. However, these claims too could not be substantiated.

In the 1997 Project the houses were originally transferred at a price of R14 600. The municipality valued a house in the original condition at R68 000 – R70 000 with R140 000 as the highest valuation for an extended house (Kransdorp Valuation Roll 2008). The 1997 Project housing stock is attractive to agents and potential buyers because although the original houses are small (30m²), the erven are relatively large (approximately 250 m²) for a government subsidized residential area (Interview 748). Cases were identified of other estate agents assisting in sales in 2004 and 2007 (Transfer records 1997 - 2010; Interview 729).

Two estate agents aggressively market their services in the 1997 Project. They have advertisements in the Kransdorp newspaper and the local 1997 Project supermarket, but also actively search for sellers by going door-to-door and marketing directly to owners. Both agents

have long lists of interested buyers; the one agent claimed to have at least 50 interested buyers (Interviews 747, 748).

The primary educational impact the estate agents have is in teaching residents about the valuation of houses. Residents explained in interviews that the value of their house is determined by its condition, extent of additions to the house and the character of the surrounding area (proximity to shebeens (establishments where alcohol is sold without a license), informal structures etc.) (Interviews 724, 726, 730, 731). In addition, the estate agents educate residents in relation to the requirements for a sale, e.g. that a title deed is necessary (Interviews 747, 748; Advertisement 1).

Residents have mixed opinions of the estate agents. Some residents view them as predatory because of their marketing and others as providing an important service to sellers and buyers (Interviews 706, 724, 726, 729, 730, 731). The suspicion towards estate agents may be compounded by a perception among the residents that the agents are not acting fairly. Three different cases were identified where an estate agent was accused or perceived to be acting unfairly (Transfer records 1997 - 2010; Interviews 700, 706; Kransdorp Newspaper 27 May 2010).

Lawyers are another group with whom residents have a contradictory relationship. One resident (Interview 740) stated that “lawyers *is mos so skelm*” (“lawyers are indeed crooks”) reflecting a widely held opinion among participants in the study. Lawyers are aware of this attitude and one lawyer, as standard practice, starts his consultations with showing clients the Law Society of South Africa Fee Guidelines (Interview 743). Despite this attitude residents recognise that they need to consult lawyers about the transfer of property. In addition, a great deal of residents have used lawyers in the past for other matters not related to property and some referred to their “personal lawyer” (Interviews 715, 718, 726, 731, 732).

In the transaction process lawyers educate residents about ownership (Interview 743). They also advise clients applying for home loans to ensure that legal and transfer costs are added to the loan amount (Interviews 715, 743, 754).

6. Sales

The previous sections described the environment in which residents conduct sales. This section describes the strategies used to secure transactions and elaborates on the factors that influence the decisions of buyers and sellers to register a transaction or not.

6.1 Sales: Strategies

Both registered and off-register sales occur. Off-register sales may be effected in a number of forms such as a verbal agreement between parties, a verbal agreement with the addition of a witness, a written private contract between parties, transferring the municipal account to the name of the buyer, and delivering the title deed as a form of private conveyance and perhaps changing the

name on the deed to that of the seller as mentioned above (Interviews 706, 707, 714, 715, 716, 717, 721, 722, 727, 730, 731, 734, 735, 743, 753). The phrase “*uit die hand uit*” is often used and describes a verbal agreement or a private contract. The use of affidavits to transfer property rights, prevalent in other areas within Kransdorp and other towns in the Western Cape, is not common in the 1997 project (Interviews 706, 707).

None of the above transaction forms are recognised in law. A transfer is only legal, and therefore enforceable, if it is registered. As described earlier, the Alienation of Land Act (68 of 1981) stipulates that a sale of land must be based on a written contract which has to meet the requirements set out in the Act. The private contracts mentioned above seldom fulfil these requirements. If off-register owners later attempt to formalise and register, lawyers often find these contracts of little use (Interview 743). The purchase price has usually been paid when the private contract is concluded. It is difficult and sometimes impossible to find the seller and convince them to participate in the registration process.

The strong relationship between municipal accounts and ownership was discussed above, so the *de facto* transfer of ownership by changing the name of the account holder is not surprising. The registered owner retains the right to change the municipal account back to his or her name, since this change may only be initiated by the title holder (Interviews 59, 707). Because of this residual right, it is possible for the owner to reclaim the house. Normally, in a rental contract the municipal account is changed to the tenant name who then assumes responsibility for the service charges. Thus the seller can argue that he or she only let the property and it was not a sale. Therefore the strategy does not provide security of tenure, even though it uses official documentation. However, in the case study we found that there is a perception that it does provide security of tenure.

6.2 Sales: Off-register and Registered Transactions

The circumstance of the seller may determine the type of transaction. A seller who sells because of financial distress may insist on an off-register transaction, because the seller needs the money within a short period of time (Interviews 715, 743). A seller with a high outstanding municipal account may also decide to transact off-register to prevent the discovery of the debt until it is too late for the buyer to reclaim the purchase price (Interview 744). A buyer may also decide to register because they want to secure their ownership to ensure that they and their children have a home without relying on the charity of others, including family members (Interview 740).

The use of a “living will” also results in sales. This is where an aged parent decides to transfer a house to a child before he or she dies (Interviews 701, 702, 707, 734, 743, 744). This may be a sale or a donation. In some cases transfer occurs in others not. The sale is more likely to be registered if the parent is concerned that the “inheritance” might be challenged by other potential heirs.

Owners also sell due to the breakup of relationships. This may be a divorce or the breakup of a co-habiting couple (Interviews 721, 722, 724, 743, 748, 753). In all the interviews where a sale due to a divorce was discussed, the sales transaction was registered (Interviews 715, 720). Since the couple was already involved in a legal proceeding, the sale became part of the process. In the case of a divorce, the divorce decree assists in deciding the fate of the house. There is no such ruling in the breakup of a co-habiting couple. The one partner may try to sell the house without the knowledge of the ex-partner (Interviews 747, 748). This is legally impossible unless fraud is committed and thus results in an off-register sale.

The sale of houses because of debt other than municipal debt also occurs and often this is linked to substance abuse, such as alcohol or drug addiction (Interviews 706, 707, 709, 714, 727). In this case it is not a state organisation such as the municipality, but crime lords and loan sharks who take possession of houses to cancel a debt. These sales are done in a variety of ways. The powerful individual or group may pressure the owner into selling their property after they reach a point where they cannot pay their debt, or they may insist on holding the title deed as surety (Interview 706). The owner is also likely to owe the municipality a significant amount and this places him or her in an even more uncertain position. Two participants did state that the lender would force the indebted owner to go to a lawyer (Interviews 706, 709). Nevertheless, it is often in the lenders' interests, especially if they are involved in criminal activities, to keep their ownership invisible. They also have little incentive to register since the protection of their ownership is achieved by the high level of fear they instil among residents (Interviews 706, 707). A case was identified where a man sold his informal structure in the informal settlement to a powerful individual, included in the sale was his right to a subsidy and thus a house (Interviews 706, 707). When the man received his house, it was claimed by the powerful individual. Officials and political structures are aware of the case. However the beneficiary is afraid of the powerful individual and unwilling to challenge him. The informal nature of the transaction also means there is no evidence. For these two reasons the municipality and political structures are not prepared to remedy the situation.

Registered sales are conducted because the parties to the sales have previous experience of land transactions; they are aware that a lawyer must conduct the transaction and acts upon this knowledge; or they follow the advice obtained from respected individuals, the municipality or political parties. Participants involved in registered sales without the involvement of outside agents also stated that they decided to register because of all the stories about sales involving fraud (Interviews 715, 731, 753).

The seller and buyer may decide to transact off-register or register the sale, but intervening conditions may change or reinforce their decision. There are a number of intervening conditions related to external agents, finance, legality, deceit and affordability.

The influence of estate agents and lawyer were discussed above. Other external agents that influence registration are employers and banks. Three participants who were party to registered transactions obtained loans to pay for the houses; one loaned money from his employer and the other two qualified for a bank housing loan. An additional participant received the finance for the house from his employer as a donation in exchange for years of service. In all these cases the bank or employer facilitated the registered sale.

Buyers and sellers may also decide to transact off-register because they perceive they are in a legally uncertain position. This occurs when the sellers themselves bought the house off-register and sells or the buyer cannot fulfil the payment schedule and decides to sell. Buyers and sellers may also assume that the house cannot be sold because of the restrictive sales period (Interview 718).

Although there is no restrictive sales clause in the 1997 Project title deeds, there is a deal of confusion about this (Interviews 728, 731). Even some of the municipal officials, an important source of information for residents, are under the impression that the eight year clause was included in the title deeds. Interviews with residents indicated a mixture of beliefs. An indication of the perception that there is an eight year clause in the title deeds is that in 2007, eight years after the completion of the project in 1999, 22% of the registered sales from 1999 to 2009 occurred. This is more than double the number of sales that occurred in any other year during the period. One reason for this perception is that the restriction of sales has been highly publicised by government and local authorities since it was passed as law. It is also a leading topic in the Housing Consumer Education workshops (in operation since 2007) conducted for new owners (Interviews 702, 705, 707). Also, since the completion of the 1997 Project various other projects have been developed in the area and all of these have either a five year or eight year clause inserted in the title deeds. The belief that there is a restrictive sales clause leads to off-register sales since buyers and sellers believe the sale is illegal and want to remain 'legally invisible' (Interviews 704, 708).

The decision to transact off-register can be motivated by deceit. Participants mentioned that it is general knowledge that owners are selling houses off-register and then reclaiming the sold houses by using the title deed (Interviews 721, 727, 731, 735, 755). Two court cases were identified where the buyer contested this claim, but the buyer could only recoup the money paid for the house (Interviews 743, 753). These claims are sometimes due to deliberate racketeering or the result of a serendipitous discovery by the seller. A variation on the behaviour is the owner selling the house multiple times and the buyers only discovering this once they try and move into a house already occupied by another buyer (Interviews 715, 716, 734). Houses may also be reclaimed by family after the seller dies (Interview 731). In all these variations the transaction was off-register. To speculate why buyers are prepared to transact off-register if they are aware of the potential risk; it may be because they may be motivated by a much more affordable purchase price. Participants resident in the 1997 Project did report off-register sales of R7000 – R20 000 (Interviews 709, 727, 753).

6.3 Consequences of Off-register Transactions

The consequences of off-register transactions in the 1997 Project can be categorised as the consequences for residents, the land registration system and the government.

Residents who were party to off-register transactions are in a precarious position. The houses they bought may be claimed by the seller or they may be unable to defend their ownership against threats by the state or powerful individuals. At present the municipal policies regarding service debt and sales in execution do not pose a threat, but these policies can change in future. Off-register buyers will not be able to access bank loans linked to their ownership. They will not be able to sell the house using a registered transaction and their heirs will not be able to legally inherit the house. Also, the buyer cannot access social subsidies, for example the application to access the indigent subsidy has to be made by the owner (Indigent Policy: Kransdorp 2010).

It is possible to change an off-register sale to a registered sale, but to do this the presence and cooperation of the buyer and seller is required. There are other legal mechanisms that can be used, for example the Land Titles Adjustment Act 111 of 1993, but these are expensive and complicated. Attempting this change will always contain the risk that the buyer would lose the house.

An important consequence of off-register sales combined with fraudulent or deceitful actions is providing an incentive for buyers to register sales transactions (Interviews 708, 713, 731, 753).

The consequences for the land registration system are significant. At present the land records do not reflect the situation on the ground. Unless there is a dramatic legal intervention or change, this is not likely to improve, since it is legally expensive and difficult to correct for individuals. Home owners, the government as well as financial institutions and other organisations trust that the information in the land registration system is correct, but if the information becomes uncertain, trust in the system will decline and may result in the introduction of more expensive, long term security measures such as title insurance.

The government uses information from the land registration system extensively. In the context of housing provision, the registration system is used to confirm that applicants for government housing subsidies have never owned property (one of the criteria to qualify for a housing subsidy). Thus buyers of off-register property are not identified as owners and remain potential beneficiaries of housing subsidies. More generally, this incorrect information makes planning and management difficult.

7. Discussion

The review of previous work highlighted reasons for the decision by buyers and seller to use or not use the registration system. In short, reasons why the registration system is used were

affordability, access to legal services and information, education and the assistance of an outside agent. Barriers were the restriction on sales, complexity of the registration system, the lack of legal title, time delay to affect transfer and delays in obtaining rates clearance. These reasons are considered in the case study.

Affordability of the registration system does play a role in the 1997 Project, but it does not affect all buyers. Access to legal services, excluding the cost constraint, does not have a significant impact in the 1997 Project. Most of the residents specifically named lawyers and have previously used lawyers in other legal matters. But when accessing the legal system the home owner needs to feel that they have acted in a legal manner. To clarify, if the transaction involves a house that is sold within the period of the eight year restrictive clause, the buyer may recognise (warranted or not) that he or she is acting outside of the law, and by approaching a lawyer they may expose themselves as acting illegally, and thus decide to keep the sale invisible. Linked to this, in the same situation, if the house is reclaimed by the seller, the buyer may feel as if he or she has no recourse since they acted illegally by buying a property within the eight year moratorium period. Thus their “legal invisibility” prevents them from defending their ownership.

Access to information is a problem if the seller or buyer feels that they are acting illegally and thus they are reluctant to expose themselves to official structures. Despite this the seller or buyer may still approach sources of information. The sources of information are the municipality, councillors, lawyers, political structures and respected individuals within the area. The advice is usually to go to a lawyer. The primary source is the municipality, but the information provided may be limited by the strictures under which the municipality operates. In addition, when considering that some of the Kransdorp municipal officials believe the title deeds of the 1997 Project contains a restrictive sales clause, a source of information may be a source of inexact information.

As mentioned above the lawyers who did the original transfer in the project did attempt to educate the beneficiaries regarding ownership. The impact of this education is noticeable in the wide-spread knowledge about the meaning of title deeds. However, buyers and sellers, in spite of knowledge of the legal transaction process may still decide to transact off-register if they are swayed by one of the other factors discussed in this paper. There remain misconceptions about ownership, for example, the belief that the municipal account proves ownership when in fact it only identifies the person responsible for the debt. As part of education, experience has an influence on the decisions of the buyers and sellers. This includes their past experiences as well as that of others, such as family members or friends.

The assistance of an outside agent, estate agents, lawyers, banks or employers, does encourage the registration of sales. In the case of a bank it is impossible to obtain a mortgage without registration. Employers would advise registration or insist upon it to protect the financial

contribution or loan. To obtain access to finance is thus an additional reason to register a transaction.

Although the title deeds in the 1997 Project do not contain the restrictive sales clause, many people, residents, municipal officials and estate agents are under the impression that the sales restriction applies to the area. The perception of the existence of the restriction result in residents believing that sales are illegal for eight years and thus that they can only conduct an off-register transaction. This misconception causes sellers and buyers to transact off-register so that the transaction remains legally invisible. Another motivation for remain legally invisible is if the seller bought the house using an off-register transaction and decides to sell off-register because of the lack of legal title.

Legal invisibility is also to the benefit of criminals and others of similar ilk that might find that it is to their personal or business benefit not to register their ownership. Their holdings are secured by reputation and ownership can link them to their illegal activities.

For the participants in the case study, the complexity of the registration system does not impact on the decision to register a transaction or not. Residents tend to only acknowledge the interface - the lawyer or the municipality - between them and the registration system. It is likely that the complexity of the registration system only becomes apparent once the buyer and seller are in the midst of registering a transaction.

The lack of first generation titles is not applicable in this case study since the majority of title deeds were transferred within approximately two to four months of signing the deeds of sale. As discussed previously, changes in the municipal policies mitigate the delay in obtaining rates clearance certificates. The policy to allow the buyer to assume responsibility for the municipal debt is sensible in the case of RDP houses. Residents do sell because of financial distress, and the buyers are more likely to be in a position to pay the debt. It is also in the interest of the municipality to facilitate registration of sales.

Previous experience, access to finance and legal invisibility are thus additional reasons to those hypothesised in the literature. Access to information is refined to incorporate the idea that information may be accessible, but it may be inexact. Other reasons for conducting a registered or off-registered transaction identified in the study include the circumstance of the seller; to secure a succession; to secure ownership; the transaction is linked to another legal process; trust; deceit; fear of deceit and affordable purchase price.

The seller's circumstances may dictate a speedy transfer and obtaining the maximum possible amount of money from the buyer, and this usually results in an off-register sale. This confirms a finding in the literature that the cost and time it takes to register a transaction may persuade sellers

and buyers to avoid registration. A sales transaction linked to another legal process, for example a divorce, tends to produce a registered transaction. A registered transaction also occurs when the buyer wants to secure their ownership of the house and prevent any future problems or registers to secure a succession and prevent any disputes amongst potential heirs.

Registration also occurs if the amount of trust between a buyer and a seller is low and both the buyer and the seller may only feel secure if they conduct a registered transaction. The mistrust of buyers is related to the number of sales involving fraud or deceit, which provides a motivation to register. Deceit not only provides an incentive to register, but is also a motivation to transact off-register. Sellers use deceit to gain personal and financial benefit through transactions. They use off-register transactions so that they can potentially reclaim the sold house or conduct multiple transactions. Buyers on the other hand might agree to an off-register sale and accept the risk it involves in return for a cheaper purchase price.

The decision to register a transaction or not, is likely a combination of the reasons listed above. A simple illustration, a seller knows that to conduct a transaction he or she has to go to a lawyer, because that is the advice he or she received from a source of information, however decides to sell off-register because of a time restriction related to his or her circumstances.

8. Conclusions

Our preliminary results support and extend the findings in literature, albeit some variables that may be present elsewhere were not present or their effects were mitigated in the 1997 Project case. The literature indicates that landholders' choice of using (or not using) registration to effect transactions is a function, *inter alia*, of affordability, access to legal services, access to information, education and the assistance of external agents (Lemanski 2010; Marx and Rubin 2008; Smit 2008; Marx 2007b; ULM 2007; FinMark Trust 2003a, 2003b). We did not find the complexity of the registration system, cited by some researchers as a disincentive to use land registration (Lemanski 2010; Smit 2008), to have a noticeable impact in this case study. In a ULM visioning workshop (ULM 2007) participants noted that long periods between the occupation of the house and registration to be a significant variable. This was not a factor in Kransdorp as the majority of beneficiaries reportedly received their title deeds within two to four months of occupying their houses. The lack of title did have an impact if the property was previously sold off-register. Another impediment in the transaction process which we have observed elsewhere, the requirement to obtain a municipal rates (land tax) clearance certificate which forms part of the bundle of documents required for registration, was also not present in Kransdorp. There are often significant backlogs of rates and service fees in RDP estates. Sellers cannot dispose of their properties until they have paid these off. The Kransdorp municipality adapted their rates clearance policy to allow the buyer to assume the outstanding municipal debt and committing to a payment plan commencing after registration, thus not impeding the transaction process. In many RDP projects, a restrictive clause in the title prevents the beneficiary from selling to anyone but the state for the first eight years after

registration. Although the eight year restriction clause was not inserted in the 1997 Project beneficiaries' title deeds, we discovered commonly held belief among landholders that it does apply. This *de facto*, rather than *de jure*, title restriction in turn influences parties to transact off-register.

In the Kransdorp case we found additional variables that influence landholders' decisions to use or not use land registration. These are:

- previous experience of land registration (related to education)
- to obtain access to finance
- the trust between the parties to the transaction
- fear of deceit
- deceitful intent
- legal invisibility (i.e. a desire to hide transactions)
- the seller's circumstances (financial and time constraints)
- to secure a succession of ownership (the owner insists on a registered transaction to ensure his or her preferred heir becomes the owner)
- to secure ownership (the buyer wants to ensure legal recognition of his or her ownership)
- the transaction is linked to another legal process
- an affordable purchase price in exchange for the risk of transacting off-register

These are the preliminary findings in the 1997 Project case study. Future work will include further case analysis, with the addition of another housing project in Kransdorp. The data collection in three other RPD housing developments in different local authorities is complete. The analysis from these studies will elaborate the 1997 Project findings to develop a rich, in-depth understanding of the use of the land registration systems in RDP estates.

Acknowledgments

This study has been conducted with the support of the John Holmlund Chair in Land Tenure and Cadastral Systems.

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