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The Shift from Freehold Titling to Using Permits in Regularising Tenure in Informal Settlements in South Africa, with Reference to City of Johannesburg

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A research report submitted to the Faculty of Engineering and the Built Environment, University of the Witwatersrand, Johannesburg, in partial fulfilment of the requirement for the degree of Master of Science in Housing

Johannesburg 2014

DECLARATION

I declare that this research report is my own unaided work. It is submitted for partial fulfilment of the degree of Master of Science in Housing in the Faculty of Engineering and the Built Environment at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university.

.....

H.P. Mbokazi

31 March 2014

ABSTRACT

This study explores how City of Johannesburg came to adopt its Regularization of Informal Settlements Programme with permission to occupy as a preferred tenure option. Firstly, the study examines tenure issues and debates around tenure including different forms of tenure. Secondly, it explores the policy shift in City of Johannesburg towards regularisation and what this entails. It further reviews international forms of tenure with reference to Brazil and Namibia. The study argues that there is a need for improved intervention strategies that allow informal settlements to be recognised as part of the city in a manner that would consider their livelihoods. It also argues that freehold titling is not necessarily the best form of tenure for informal settlement residents.

The study concludes that there is an acute need to recognise informal settlements as part of the City. Furthermore, City of Johannesburg had insufficient funding which limited them in their Regularization of Informal Settlements Programme. *The Development Facilitation Act 67 of 1995, The Less Formal Township Establishment Act 113 of 1991* and the amendment of City of Johannesburg Town Planning Scheme influenced the City in their approach to issuing permits. City of Johannesburg can draw lessons from City of Windhoek's approach to informal settlements.

DEDICATION

This study is dedicated to my parents, Enock and Betty (uMaKheswa) Khumalo.

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Foremost, I would like to thank God Almighty for the wonderful journey we have had. It is through His grace that I have completed this study. Indeed, I can do all things through Christ who strengthens me.

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CHAPTER 1: INTRODUCTION AND METHODOLOGY

1.1 Introduction

This study explores tenure options that are available in order to recognise informal settlements as part of the city. It then seeks to understand what led City of Johannesburg Municipality (referred to as City of Johannesburg throughout) to adopt its land regularisation programme with a permit to occupy as the preferred tenure option in a context of predominantly freehold tenure.

The urban land issue in South Africa dates back to the colonial era. Reinforced by the apartheid government, it precluded black people from ownership of freehold land. The apartheid regime's policy was based on the ideology of racial discrimination. Hence, land policies were deliberately enacted to exclude the black population from having access to cities as well as ownership. Instead, black people were expected to live in designated homelands, travel long distances to employment opportunities and rely on temporary accommodation in the white cities (Royston, 2002). Informal settlements increasingly provided such accommodation. Despite state-subsidised mass housing delivery by the post-apartheid government, the housing backlog has remained high, as has the need for urban informal settlements. In the last decade a number of municipalities have since introduced measures to eradicate or control informal settlements, while also gradually adopting ways of incorporating them into the formal city. City of Johannesburg, for instance, has devised a strategy to regularise informal settlements through, among others, the issuing of permits as a means to securing tenure. Historically, permits to occupy (PTOs) were issued to black communities denying them freehold titles that would have allowed them full ownership (Royston, 2002). To date, ownership is considered preferable to permits. It is in this regard that I decided to focus my research on the City of Johannesburg's regularisation programme, with a particular interest in tenure.

1.2 Background

Nationally, the growth of informal settlements and subsequent land invasions led the South African government to develop approaches to address these challenges. Government is under pressure to meet the United Nation's Millennium Development Goal 7 ensuring environmental sustainability, including Target 10 emphasising sustainable access to safe drinking water and Target 11 emphasising the improvement of the lives of at least 100 million slum dwellers by 2020 (UN-Habitat, 2004). In the period up to 2009, the South African Government believed that in order to meet these goals, there was a need to 'eradicate or eliminate' informal settlements (Huchzermeyer, 2009). This has led to numerous land conflicts that ended up in courts. In the same year that the UN adopted the MDG initiative in 2000, the Constitutional Court in South Africa ruled on the Grootboom case, requiring government to change its housing policy. Although the housing policy was amended in 2004 to embrace upgrading of informal settlements, simultaneously the eradication/elimination drive intensified (*ibid*.) This was despite the fact that Chapter 13, now Volume 4 Part 3, of the Housing Code recommends *in situ* upgrading of informal settlements (Department of Housing, 2004b, 2009). Taking a somewhat different approach, City of Johannesburg developed a regularisation of tenure programme for its informal settlements with an approach of incrementally formalising them to full township establishment (Urban LandMark, 2009). This programme, though not implemented in the way that was originally intended, set out to make use of permission or permits to occupy (PTO) as an interim tenure form (Abrahams, 2010).

The current practices towards existing informal settlements, subsequent land invasions and evictions in South Africa suggest that there is a need to recognise informal settlements as part of the city. Security of tenure as means of informal settlement recognition is therefore central to this research. The main purpose of this study is to explore how City of Johannesburg came to adopt its regularisation programme with a

PTO as a preferred tenure option in a context of predominant preference for freehold tenure. In addition, this study attempts to examine the policy shift in City of Johannesburg towards regularisation and what is entailed in the South African Government's definition of 'regularisation,' in terms of secure tenure. Accordingly, the report reviews international forms of tenure and debates around them, housing policy and its implementation. The rationale is to unpack policy implementation challenges. For example, Chapter 13 (now Part 3, Volume 4) of the Housing Code, though approved in 2004, has only very recently begun to be implemented. The discussion in this research report relates to *in situ* upgrading, shifts in housing and land policies, and land titling and security of tenure. The research draws on alternative forms of tenure that exist internationally.

It will be argued throughout that in the complex context of housing in South Africa, there is a need for improved intervention strategies that allow informal settlement residents to be recognised as part of the city. The study hopes to illustrate that there are various forms of tenure that could be considered for people living in informal settlements.

Since 1994, the South African Government has implemented a successful housing delivery programme which has incorporated individual ownership as an integral part of the package. The housing policy in 2004 introduced informal settlement upgrading as Chapter 13 of the Housing Code, recommending the use of permits to occupy (leaseholds or *commodatum*) (Department of Housing, 2004b). The challenge, though, is that the period between earmarking a settlement for upgrading and the actual implementing of projects takes between six months to 25 years (Urban LandMark, 2010a). The fear of such delays led City of Johannesburg to begin to explore alternative approaches (*ibid.*), though in the absence of actually considering Chapter 13 of the Housing Code in detail (Huchzermeyer, 2011).

1.3 Problem Statement

In addressing the needs of informal settlement residents, relocation has predominately featured in South African provincial and municipal interventions. This has posed a number of challenges to the residents. These include breakdown of their social networks and unfavourable location to economic centres, health centres, and educational facilities. Having to wait for a significant number of years before they receive their state-subsidised houses creates a challenge both to municipalities and the informal settlement residents. On the one hand, the municipalities are reluctant to provide services to people in informal settlements because they are illegally located on pieces of land which are privately or publicly owned. On the other hand, the residents do not have alternative places to stay because they cannot afford to buy land or rent houses in cities. They are then faced with living in severe conditions which are detrimental to their wellbeing, in addition to fear of eviction.

In addressing the above issues, City of Johannesburg (2009a), as already mentioned, came up with a programme for the 'regularisation' of tenure in informal settlements. This programme would give households proof of right to occupy in the form of a permit or some other form of documentation such as an Identity Document (ID) card. Roux (2004a) challenges stigma attached to this form of tenure. Permission to Occupy (PTO) was used by the South African apartheid Government as a form of tenure for black households. As a result, these households were denied freehold ownership. Compared to freehold ownership, PTOs are a temporary form of tenure. According to Roux (2004b), if supplied in the post-apartheid era, PTOs might give an impression that residents could still be relocated at any time in the future. Relocation would be easy to carry out because permits are temporary. This means that the households' stay is determined by the willingness of an authority (*ibid*.) Moreover, even if there is a future plan to formalise the settlement where it currently is, the current interpretation of 'formalisation', using the project-linked

capital subsidy for housing, would mean that people who do not qualify for a housing subsidy would have to be relocated, even if temporarily issued with a PTO. It should be noted that Chapter 13 of the Housing Code calls for an inclusive approach to permanent upgrading of informal settlements which also embraces the non-qualifiers (Department of Human Settlements, 2009).

Internationally, there is a wide range of secure tenure forms that exist in different countries. Some of these forms of tenure can be changed. In some cases they can be converted from one form to another (UN-Habitat, 2004). Before 1994, individual freehold tenure in South Africa was dominant, although largely restricted to white towns. Where 'black' people owned land, such as in Kliptown or Alexandra in Johannesburg, the apartheid Government deprived them of this ownership. Until 1986, 'black' households were given only Permission to Occupy (Ambert, 2002). This raises the following question: What are secure tenure options that might be used in City of Johannesburg's informal settlements?

1.4 Research Question

The objectives of this research include answering the following key questions:

Main question: What led City of Johannesburg to adopt its regularisation programme with a permit to occupy as the preferred tenure option in a context of predominantly freehold tenure?

In relation to the main question, the study identifies the following sub-questions**:**

- What are the options for securing tenure in informal settlements?

- What are the broad shifts that occurred in South African policy on informal settlements?

- What exactly does the new approach of City of Johannesburg entail in terms of security of tenure?

1.5 Central Argument and Guiding Assumption

The study expects to find that a range of different alternatives could potentially be adopted for informal settlement intervention in South Africa, and that the PTO was considered for its flexibility and ease of implementation, this overriding any concern with its racial connotations.

With regards to City of Johannesburg's regularisation programme, the study expected to find that the adoption of this programme occurred through discussions between political leaders, expert lobbyists and leading academics on a range of tenure options for informal settlements. It would be through these interactions that the policy agenda was shaped. The study also assumed that the shift happened because of identified gaps between policy and practice. City of Johannesburg, presumably, was responding to the Breaking New Ground policy of 2004 which emphasises the integration of peripheral housing developments into cities. This is supported by area-based subsidies rather than individual capital subsidies allocated per household.

1.6 Aims of the Study

The aim of this research project is to examine different tenure options that might be used in informal settlements. The study also explores the potential of PTOs in South Africa, through the original intentions of City of Johannesburg's regularisation programme. In so

doing, it documents the shift through analysing forms of tenure available in South Africa. It also draws on other countries that have long used permits rather than freehold titling. It sets out to understand the processes that were engaged in setting up the regularisation of informal settlements programme in the City of Johannesburg. Furthermore, the study seeks to explore what led City of Johannesburg to adopt the policy of regularising informal settlements and issuing of permits instead of freehold tenure which is widely used and sought after in South Africa. This might help promote a shift away from freehold titling towards more responsive approaches to informal settlements in other municipalities in South Africa.

1.7 Research Methodology

This research study is about City of Johannesburg's Informal Settlement Regularization Programme in the period from 2007 to 2010. The study focuses on the Programme's inception and does not cover more recent developments post-2010. It is qualitative in nature, relying both on secondary data and on in-depth interviews. Kumar (1996) refers to in-depth interviewing as an unstructured interview which allows flexibility. The interviewer develops a framework which serves as a guide (*ibid*.). This study is qualitative research because it describes the historical enumeration of events, an account of different opinions people have about tenure and a description of the living conditions of informal settlement dwellers (*ibid*.). In the first instance it involved data gathering from available literature. International literature was reviewed in order to draw conclusions based on alternative forms of tenure. Secondary data was sourced from books, newsletters, journal articles, electronic databases, grey literature and newspapers. Data was also collected in the form of primary research through qualitative interviews**.** The snowballing approach was used to identify respondents, with the regularisation programme Head, Dr Philip Harrison from City of Johannesburg, being the reference point. Snowballing is when the respondent recommends other participants that might be

interviewed who meet the criteria of the research and who might be willing to participate in the project (Sarantakos, 2013). Key informants included the informal settlement upgrading project manager in City of Johannesburg, City of Johannesburg's town planners, policy implementers, and Housing and Planning and Urban Management. I also had the opportunity to interview two relevant people in relation to the City of Windhoek's approach to informal settlements, which makes use of alternative tenure – City of Windhoek's town planner and an official dealing with informal settlement regularisation in Windhoek**.** For expert insight into land tenure and tenure alternatives, I interviewed two academic experts (one of them international). I interviewed researchers in relevant organisations such as Urban LandMark and Development Works, two organisations that had advised City of Johannesburg in its development of the regularisation programme and who had written reports on this programme.

The interviews were conducted from 2010 to 2011. During that period, City of Johannesburg had recently adopted its regularisation programme based in the Development Planning and Urban Management Division. The Chief Director, Professor Philip Harrison, under whom this programme had been developed and adopted, had recently left the municipality, and future support for the programme was not clear. During interviews it was not clear when City of Johannesburg was going to implement the programme as they were still grappling with how and when exactly to start the project.

In recording the interviews, I used a voice recorder because it accurately captures every word spoken by participants. The interviewees consented to this form of recording. The sets of data that I collected and investigated hinged on concepts of secure tenure; incremental tenure; policy; land titling; *in situ* upgrading; regularisation; recognition of informal settlements; livelihoods and vulnerability. After having collected data, the interviews were analysed in relation to findings from the literature review and conclusions were then drawn on tenure options and the potential of permits instead of

freehold title. Thematic data analysis was used by searching text for recurring words and themes. This was done to see which phrases or concepts predominate (Patton, 2002).

1.8 Limitations

This study was not without challenges. However, the acceptance of the limitations mentioned below should not compromise the results of this research report.

Data: Since the study deals with the issue of recognition of informal settlements against eradication, a limitation was that most of the respondents among municipal and provincial officials were unable to reveal their genuine views about the regularisation of informal settlements. One official from the provincial Department of Housing stated that her immediate superior advised her not to participate in the interview to share her views as they are not involved in City of Johannesburg's regularisation programme. The study, therefore, could not capture officials' actual perceptions and is limited to mere official viewpoints. Also, due to the fact that the regularisation programme had yet to be implemented at the time of the study, residents of the affected informal settlements could not be interviewed, but this study lays the foundation for further research once implementation has begun.

Unavailability of interviewees: There were quite a few referrals and non-responses of set appointments, questions and other excuses of tight schedules relating to respondents' programmes. Some officials could not participate in the interviews because they were newly appointed in their positions. Instead they delegated that their subordinates be interviewed. However, through the snowballing approach, sufficient officials were interviewed in line with the study's expectations.

Changes in City of Johannesburg's regularisation programme: Additionally, this study was started in 2010, when City of Johannesburg had recently adopted its regularisation programme with an alternative tenure form (completion of the study was delayed by my relocation to Namibia and back between 2010 and 2013). However, in the period since, the programme has undergone changes that this study did not anticipate. The study's empirical aspect is focused on the period of 2010/2011.

1.9 Outline of Remaining Chapters

Chapter 2 contains the literature review and covers theories, concepts and approaches in relation to secure tenure. At the end of this chapter, the study adapts an existing conceptual approach which is used in the study. This states that security of tenure is an important phenomenon in the recognition of informal settlements in cities. Different literature sources and reports are critically analysed in this chapter**.**

Chapter 3 discusses changes in policy with particular reference to South African policy on informal settlements. It further reviews literature on the challenges of policy change and shifts in South African policy on informal settlements. The study refers to the introduction of City of Johannesburg's regularisation approach as an example of attempted policy change.

Chapter 4 discusses, describes and presents City of Johannesburg's interpretation of tenure under the regularisation programme, as well as analysing Brazil's and City of Windhoek's strategy in dealing with informal settlements in order to create a comparative framework against which City of Johannesburg's policies could be measured.

Chapter 5 discusses the findings and analysis of the data derived from interviews collected during fieldwork. The conceptual framework was used to structure this chapter.

Chapter 6 is a concluding chapter where the study draws the main findings by providing a review of the whole research report and suggests recommendations. It provides a summary of important points with regard to the study.

CHAPTER 2: LITERATURE REVIEW AND CONCEPTUAL FRAMEWORK

2.1 Introduction

This chapter provides an assessment of existing literature on tenure in informal settlements. This will include both international and South African literature. The subsequent sections and sub-sections seek to present different definitions of tenure, its history, tenure options and land tenure debates. Lastly, it is to be noted that the study uses the terms 'security of tenure', and 'tenure security' interchangeably throughout the discussion.

The discussion of tenure approaches in this chapter reviews South African approaches with particular reference to City of Johannesburg. The discussion in this chapter suggests that informal settlements should be recognised as part of any city.

2.2 Understanding Land Tenure

2.2.1 Definition of tenure

A simplistic definition of tenure can be equated to permission to occupy which, according to the *Oxford Advanced Dictionary* (2005), means the legal right to live in a house or use of a piece of land. Ogolla and Mugabe (1996) point out that tenure is derived from the Latin word *tenere* which means to hold. Durand-Lasserve and Selod (2007: 4) state that land tenure implies

> 'The rights that individuals and communities have with respect to land, namely the right to occupy, to use, to develop, to inherit and to transfer land. It is a social relationship involving

> a complex set of rules that govern land use and land ownership'.

From this viewpoint, the land is not owned, but individuals are given actual rights on the land. In addition, UNCHS-Habitat (1999), cited in Durand-Lasserve and Royston (2002: 8), defines security of tenure as an 'agreement between individuals or groups to land and residential property which is governed and regulated by a legal and administrative framework'. Implicit in all these definitions, is that security of tenure has to do with a right to occupy or use a property regardless of the contents of those rights. In the next section the study discusses how the concept of tenure developed.

2.2.2 History of tenure

Ellsworth (2002: 5) points out that '[m]ost of the western concepts related to security of tenure originated in a historical discussion about how Britain, Europe and Russia were transformed away from feudalism'. Europe had a manorial system whereby land was not traded to outsiders to the Manor, but managed by the lord of the Manor who might be a king, a baron or a much lesser noble (*ibid*.). Land was divided and the peasants had a share. Peasants owned labour service, a share of the crop and military service to his lord. The lord owed the peasants military and legal protection. It is very important to note that the lord could not take away the land which was the principal means of livelihood for the peasant. Further, particular use rights allowed peasants to supplement their livelihoods in times of poor harvest. For example, they were allowed to collect timber and other resources from the lord's forests (*ibid*.).

In addition, in some places, villages were incorporated together and had by-laws in which the reciprocal rights and duties of lord and peasant were laid out

(Ellsworth, 2002). This arrangement between the lord and the peasant gave each person a geographic place in the world that could not easily be revoked and could be passed on to children, although the land itself was not tradable. This ideal defined security of tenure. For a feudal peasant it meant that a livelihood in a specific place in the world would be granted to him in exchange for predictable service to a person (*ibid*.).

Notably, the feudal system fell apart after the 12th Century. This means that 'tenure rights to land moved from being secure and uncontested to insecure and contested. Consequently, non-tradable resources like land, became tradable' (Ellsworth, 2002: 7). Proponents of property rights argue that a 'good property rights regime ought to grant people something called security of tenure' (Ellsworth, 2002: 9). The remaining argument is who should benefit from security of tenure, what role it plays in people's livelihoods and how to achieve it in the policy arena (*ibid*.).

In Africa, security of tenure existed as communal ownership. It is colonisation which introduced the concept of individual/freehold ownership and leasehold, as European settlers brought with them their own laws on land ownership (Economic Commission for Africa, 2004). This was used to merely benefit the settlers and not the original inhabitants. Original inhabitants in turn were pushed to the worst lands while colonists enjoyed freehold ownership with attractive bundles of rights (*ibid*.) This practice created the perception that freehold was a privileged form of tenure (Kiddle, 2011). Additionally, the perception that freehold is the best option is stated in Kiddle's (2011) analysis of housing policy. He states that there are two approaches which influence low income housing policy and intervention aimed at informal settlements. Those approaches are property rights and security of tenure (Kiddle, 2011; Urban LandMark, 2010b).

Property rights as an approach involve formalisation or titling (Kiddle, 2011), and is based on individual rights (Urban LandMark, 2010b). This is perceived as the 'best' intervention for informal settlements. Security of tenure as an approach does not perceive freehold titling as the only and best option and can be achieved through a number of ways (*ibid*.). The study unpacks the different tenure options in more detail in the following section.

2.2.3 Land tenure options

Freehold land, as illustrated in Economic Commission for Africa (2004: 27), is considered

> 'To provide absolute ownership rights, implying the right to own, control, manage, use and dispose of property. Such land rights, while being held in perpetuity, may however be sequestered through state intervention when land is targeted for expropriation for clearly public interest'.

This form of tenure is 'ownership in perpetuity', which means having no time limit on the ownership (UN-Habitat, 2008: 15). There is also a 'delayed freehold' which is 'conditional ownership', because title is granted on the completion of payments or when developments have been completed (*ibid*.: 15). Freehold is the most expensive tenure type and takes long to register and not all households can afford it (Bauman, Huchzermeyer, Bolnick, Roux and Wimpey, 2004). Freehold can be group ownership which is more affordable than individual tenure. It does not require specialised land administration approaches and diminishes the number of registration units. It requires partnership between the community, local authority, NGOs and landowners and housing associations to work (Bauman *et al*., 2004; UN-Habitat, 2004). Smit (2005) states that individual freehold is

expensive, complex and is not suited to the needs of the poor. While the option of group ownership remains under-explored, from the foregoing arguments, it can be deduced that freehold is not popular and not the best option for securing tenure to the urban poor.

Hence, the need to explore other land tenure options. One such option is 'leasehold'. In this option, land is rented out for specific periods (UN-Habitat, 2004: 10). Land belonging to one entity – either a state or an individual – is, by contractual agreement, leased to another entity. Such leases can be long or short. The 99-year lease is the most popular leasehold. In practice, the issuing of a 99-year lease is considered to be as secure as a freehold tenure system (UN-Habitat, 2008: 15). An example of 99-year lease is found in Mosha (1996) who uses a case study in Botswana's Fixed Period State Grant (FPSG) to demonstrate implementation of a 99-year lease. The lease agreement is then registered against the title of that land to create real land rights that are enforceable (*ibid*.). Rental is broadly split into two forms. Firstly, there is public rental which is rental occupation of publicly owned land or house. Secondly, private rental, which is rental of privately owned land or house (UN-Habitat, 2008). These rentals can be registered or unregistered. Documented, unregistered rights comprise unregistered lease or leasehold, rental, occupancy right and use rights. In these rights, ownership cannot be transferred, but other rights that are part of the leases can be transferred. Their advantage is that they can be transferred faster than freehold titles (Bauman *et al*, 2004).

A third land tenure option relates to the issuance of administrative permits, which are temporary, conditional and irrevocable. They are temporary because they are valid for a limited period of time. Their conversion into permanent permits may require construction of buildings within a certain period of time and in that case

the land can be repossessed by the government if the plot is developed (Durand-Lasserve, 2010). The Permission to Occupy (PTO), which is also an administrative permit, is recorded but not registered in the Land Book. Therefore, in principle, the temporary permit can be upgraded into a permanent permit, translating into full ownership (*ibid.*). PTOs are not transferable on urban land, especially if the land is not yet developed (*ibid*.) But, Durand-Lasserve (2010) further state that in reality, transfers are possible and take place through various informal procedures. In addition, formal security of tenure for PTO holders is relatively high, but as they rarely comply with required construction norms, their security depends heavily on government decisions (*ibid*.). As mentioned before, occupation rights under PTOs can be lifted once government has other plans for the land.

Lastly, there is a wide range of categories of non-formal tenure systems which:

> 'vary in degrees of legality and illegality. They include regularised and unregularised squatting, unauthorized subdivisions on legally owned land and various unofficial rental agreements. Equally important, several forms of tenure may co-exist on the same plot, with each party entitled to certain rights' (Swedish International Cooperation Agency, 2007: 36).

Before considering which form of tenure is more suitable for informal settlements, the next section explores the different opinions about tenure options and their benefits for poor people, particularly those living in informal settlements.

2.2.4 Land tenure debates

Land titling

In this discussion, 'titling' refers to full ownership of property. Bromley (2005: 7) views titling as a 'means of eradicating poverty'. He also argues that titles can decrease rather than increase security. His argument is based on the fact that if beneficiaries use their titles as collateral, they may lose them in cases where they can no longer afford repayment of their loan. The money lender has all rights to claim against the landed asset. Therefore, Bromley (2005: 7) points out that 'titles often weaken rather than strengthen security'. In support of Bromley (2005), Buckley and Kalarickal (2006) argue that formal titling programmes are not the only solution to solve the problems of the urban poor. They point out that it would be dangerous to promote land titling programmes as a sole solution necessary to solve the problems of the urban poor. Furthermore, they point out that titling will not necessarily increase assets for the poor as it raises a range of practical problems (*ibid.*). UN-Habitat (2004: 32) also holds a view that 'formal titling is not the only way of making people feel secure enough to invest in their homes and neighbourhoods'. It further states that, formal titling and individual freehold might attract investments causing high rents which urban poor could not afford, resulting in 'market eviction' (*ibid.*). Nevertheless, Turner (1968) gives credit to ownership as he argues that it contributes to consolidating informal settlements and integrating them into official systems, financing and regulation.

However, it can be argued that ownership is not the only tenure form which allows for these benefits, and as UN-Habitat (2004) implies, it can actually put the poor at risk. Contrary to this position, De Soto (2000) argues that titling promotes the poor in developing countries to own assets, but they hold them in deficient ways because they do not have formal, official registered rights of

ownership. Hence De Soto (2000: 10) refers to their investment as ‘dead capital’, as it cannot be recouped or leveraged against. His argument is that the poor lack property titles which they could use as collateral for loans to invest in business. De Soto advocates for property ownership because he holds a belief that if the urban poor could have these rights, it would unlock their capital (Kiddle, 2011).

De Soto’s idea is widely criticised, looking at the number of people who view formal titling as a threat to the urban poor living in informal settlements. Gilbert’s (2002) study of the poor settlements in Bogota, Colombia opposes De Soto’s position. The study shows how sales were actually more common when people lacked formal title; how informal credit was often available from the establishment of the settlement; and how little formal finance was available after formal titling. Therefore, Gilbert (2002: 7) claims that ‘land titling makes little difference to the lives of the poor and is widely recognized that security of tenure does not require the issue of full title’. In a similar way, De Soto is criticised in Home and Lim (2004) who carried out empirical research in peri-urban areas of Botswana, Trinidad, Tobago and Zambia. In these titled peri-urban plots, they found little evidence of market activity, with plot holders more likely to pass plots on to family than sell them on the free market (*ibid*.).

Ambert (2002) uses an example of her case study in Thekwane, which is situated between Nelspruit and KaNyamazane in Mpumalanga Province in South Africa, stating that there are a number of tenure forms including individual ownership, deed of grants, rental and permission to occupy. In her study, only two out of six areas had residents who perceived ownership as priority while residents in the other four did not value ownership. She argues that individual ownership is ‘costly and should be considered as the secure tenure route only when ownership

of property is needed to provide other benefits, in addition to providing security of tenure' (*ibid*.: 216).

Implicit in these debates is that formal titling as an approach to land management for the urban poor is widely criticised. As noted in the review above, formal titling is not the only solution for urban poor living in informal settlements, and, having formal title whilst poor may make a little difference. De Soto's (2000) assumption that with formal title the urban poor would use their properties as collateral, applies only in rare cases. Studies (Mashigo, undated) demonstrate that lenders are reluctant to lend money to poor households who do not meet the minimum requirements to access financial assistance.

Secure tenure

Payne (2002) states that, secure tenure is important to the urban poor in order to access livelihood opportunities which are normally in areas where land is in high demand and expensive. Examples of this include the recycling of paper, cardboards and steel; and street vending which they practise to make ends meet. The distance from their shelter to the recycling area should be within walking distance, but this is seldom the case. The home can also be a place for income generation (*ibid.*). Households can open businesses in their houses such as tuck shops, barber shops, hair salons, shoe repairs, to mention a few. In addition, home improvements may improve the health of household members and education of children, who benefit from a better learning environment at home. Light and fuel heating for cooking are important in this regard. Furthermore, tenure makes it easier for the local council to provide services and infrastructure more efficiently (*ibid*.). Therefore, tenure is the foundation which any effort to improve living conditions for the poor has to be built upon (*ibid.*).

Homing in on vulnerability and livelihoods, Bauman *et al.,* (2004: 24) explain that '[i]n terms of reducing vulnerability, secure tenure implies recognition of the right to the city' which is a certain degree of citizenship. They assert that for the very poor, 'tenure is primarily a matter of being able to access any space where they can obtain a basic livelihood without fear of eviction' (*ibid*.: 24). In securing the livelihoods of the urban poor and reducing vulnerability, there should be a consideration of the timeframe for which tenure security is granted, because this plays a role in stabilising their lives. While Payne (2002) posits long-term tenure security as a means of improving access to credit, services, and infrastructure, Bauman *et al*., (2004) emphasise the need for flexibility in tenure, arguing that long-term tenure (as usually granted through formal individual titling or ownership) is 'less important than the ability to move when livelihood opportunities change' (*ibid*.: 24). Payne (2002) points out that the degree of tenure security and the rights they provide may change over time. This means that tenure security may be achieved incrementally because it can be gradually improved. This is where Payne (2002) differs from Bauman *et al.* (2004) as he promotes systems that culminate in full titling, whereas Bauman e*t al.* (2004) argue that leasehold can be a long-term tenure form and that it need not be upgraded to freehold in the future. Bauman e*t al.* (2004) observe that what matters most for the poor is protection from eviction, and secure access to a location which is in favour of their survival strategies. In order to provide longer-term security of tenure, removal or relocation may be necessary in cases where physical safety of life and property is threatened or where the household to be evicted has occupied the property by force or intimidation (UNCHS-Habitat, 1999, 2004).

2. 3 Concepts Relevant to Tenure Security

2.3.1 Recognition of informal settlements

Recognition refers to 'an attempt to provide an intermediate tool for describing legitimacy of tenure arrangements that fall between legally acceptable, on the one hand and socially unacceptable, on the other' (Cousins, Hornby, Kingwell, Royston and Trench, 2005: 29). In the City of Johannesburg's approach recognition means 'acceptance of an informal settlement through a range of administrative and legal interventions' (Urban LandMark, 2010a: no page number). Recognition would begin to provide an incremental base outside the cadastral model for securing the tenure of the urban poor (*ibid*.). By 'cadastral', they mean data concerning properties based on a survey of their boundaries. It shows the property's nature, size, value and legal rights associated with the parcel (*ibid*.).

2.3.2 Livelihoods and vulnerability

The concepts of livelihood and vulnerability are often used in the discourse on land tenure (as already evident in the review above), as they are so pertinent to understanding how and where poor urban households are able to survive. Chambers (1995: 174) describes livelihood as the 'means of gaining a living, including livelihood capabilities, tangible and intangible assets'. Therefore, it means all activities that people undertake in order to make a living. These include 'gaining and retaining access to resources and opportunities, dealing with risk, negotiating social relationships and managing social networks and institutions within households, communities and the city' (Beall and Kanji, 1999: 2). A commonly adopted definition of a livelihood is that it 'comprises the capabilities,

assets (including both material and social resources) and activities required for a means of living' (Carney, 1998: 1).

According to Chambers (1995: 175), vulnerability means 'not lack or want but exposure to defencelessness'. He further states that when vulnerability increases, livelihoods become less sustainable. Similarly, Moser and Mcllwaine (1997: 2) state that vulnerability refers to 'insecurity of the well being of individuals, households and communities in the face of the changing environment'. They argue that the more assets people have, the less vulnerable they are. Assets include 'labour, human capital such as health, skills and education, productive assets such as land and housing and social capital such as supportive relations' (*ibid*.: 16). They further argue that vulnerability can be reduced when individuals are able to transform their assets into income, food or other basic necessities effectively. They view lack of tenure as increasing vulnerability of the poor.

2.3.3 *In situ* upgrading

This is a process whereby a settlement is in the process of being improved without relocating the residents, or with minimal relocation only. It is argued that *in situ* upgrading is preferable to relocation, in order to maintain social and economic links and networks (Department of Human Settlements, 2009). In the case of temporary structures, so-called 'roll over upgrading' has been considered appropriate in South Africa (this involves removal of households from occupied land, development of that land to conventional standards, and resettling of a portion of the original households on the developed land). But the negative impact of temporary relocation within the roll over upgrading structure should be minimised (Smit, 2005). It should be noted that roll over upgrading has been very prevalent in South Africa and is commonly referred to as '*in situ'*. This differs

from the international use of the term '*in situ* upgrading' (Huchzermeyer, 2011). In the international sense, infrastructure is constructed around houses without relocating households (*ibid.*). In South Africa, the Breaking New Ground policy (Department of Housing, 2004b) advocates for this approach as a shift away from relocation and roll over upgrading.

2.3.4 Regularisation

'Regularisation' means the activity of making a situation that already exists legal or official. It is defined as 'bringing the informal and unauthorised settlements within the official legal and administrative system of land management' (McAuslan, 1994: 47). Furthermore, it includes specific policy instruments of land tenure, land registration, land-use regulations and public intervention (Urban LandMark, 2008). Land regularisation is defined as 'processes and procedures involving land use planning, cadastral surveying and land registration i.e. upgrading and land legalization processes' (Magigi and Majani, 2006: 1067).

2.3.5 Incremental tenure

City of Johannesburg's intended approach to tenure in the Regularisation Programme is incremental because it allows for continuing improvement of tenure, services, structures and land use management during the period between settlement and township establishment (Urban LandMark, 2009b). The incremental approach 'begins by securing tenure through administrative mechanisms for the whole settlement and then in a stepwise way sets in place the requirements for ownership, including legal recognition' (Urban LandMark, 2010b: 3).

2.4 Conclusion

This chapter has presented a general review of different forms of tenure that might be considered in order to ensure that livelihood opportunities of the urban poor living in informal settlements are not interrupted. Various concepts such as livelihoods, vulnerability, *in situ* upgrading, tenure and recognition have been defined. These concepts are used in the report to explore the impact of tenure for people living in informal settlements. The chapter provided the meaning of tenure, drawing from a variety of perspectives. The chapter also dealt with different perceptions of tenure, which are mainly about alternatives to freehold. The argument made in favour of ownership can also be relevant in other forms of tenure as their ownership promotes the official inclusion of previously unrecognised informal settlements. Official inclusion is also promoted through rental and settlement recognition, permission to occupy and provision of services. Like ownership, other forms of tenure also trigger the provision of municipal services and provide substantial protection against eviction. This shows that other forms of tenure have similar benefits to ownership, in some cases even better than ownership. The discussion explains the importance of accepting other forms of tenure. There are various debates about full ownership. These debates show different approaches to tenure and their impact on the lives of the urban poor.

A better understanding of tenure forms can also significantly contribute to poverty alleviation in informal settlements. The provision of secure tenure can reduce vulnerability of the poor living in informal settlements, because it offers them the right to the city. Secure tenure among the poor is very critical because it allows them access to basic services, such as water, electricity and so forth, without any fear of eviction by authorities. In addition, a sense of tenure security can stimulate the residents of informal settlements to invest in their structures and environment. De Soto's (2000) argument of the poor not having officially registered rights of ownership can be advantageous to those

poor households as they are not at risk of losing their properties because of failing to pay for their loans.

CHAPTER 3: APPROACHES TO TENURE IN SOUTH AFRICA, BRAZIL AND NAMIBIA

3.1 Introduction

This chapter reviews tenure issues in South Africa, Brazil and Namibia. City of Johannesburg attempted to adopt lessons from the Brazilian regularisation of informal settlements approach. Therefore, the study briefly reviews the Brazilian approach. During the course of this research, I was able to meet City of Windhoek officials and as a result, the study also briefly reviews the very relevant approach this City has adopted for recognising its informal settlements as part of the city. This allows for a wider discussion of alternative approaches and therefore critical engagement with City of Johannesburg's approach.

Unlike in Brazil, the regularisation programme in City of Johannesburg was not a first step in an *in situ* upgrading approach. In Brazil, regularisation is part and parcel of *in situ* upgrading, and the zoning enables the upgrading as a land use. In City of Johannesburg, the zoning seems to be a temporary measure or at least not the key instrument to unlock *in situ* upgrading. The city is still, ultimately, visioning standardised housing development and not *in situ* upgrading as per the international definition.

3.2 Urban Land Tenure in South Africa

Different forms of tenure are available in South Africa. Previously, there were alternatives to ownership, namely deeds of grant, leasehold and permission to occupy (Royston and Ambert, 2002). However, these forms of tenure were politically driven as they were discriminatory (*ibid*.). They only applied to the previously disadvantaged groups, specifically 'black' people who did not have a right to own property. Royston and

Ambert (2002) point out that full ownership by 'black' people was re-introduced in 1986 after having being denied that right for many years. Currently, government issues different housing subsidies for different tenure types. The project-linked subsidy is made available for provincially approved housing projects and provides for individual ownership. Institutional subsidies are made available to housing institutions that develop affordable housing stock, under alternative forms of tenure including lease, instalment sale, rent to own, a form of condominium title and group ownership (*ibid*.). In 2004, an area-based or community-based subsidy was introduced under Chapter 13 of the Housing Code for informal settlement upgrading. This recommended alternatives to freehold titling.

Apart from full ownership, the democratic government introduced legal instruments for alternative tenure. These include *The Land Rights Bill*, now *Communal Land Rights Act 11 of 2004*, with the objective 'to provide blanket protection and non statutory, non registered secure tenure to people living on land in former homelands and trust land areas, which are mainly registered as state land' (Royston and Ambert, 2002: 266). It gave holders 'decision making power in respect of the land and the right to benefits accruing from the land' (*ibid*.: 266). The second legal instrument is *The Communal Property Associations Act (CPA) of 1996* (Royston and Ambert, 2002). It recognises communal ownership and was drafted with an intention of enabling groups benefiting from the land reform programme to hold, manage, and possess land rights communally (*ibid*.). The third instrument is the Family Title which allows all family members to register as rights' holders on a contractual basis in order to avoid conflict. Family title gives family members ownership rights in terms of the Discount Benefit Scheme (*ibid*.). This provision 'ensures continued family access to the tenure right' (*ibid*.: 267).

The fourth option, initial ownership, provided for in *The Development Facilitation Act of 1985*, was introduced to expedite the registration aspects of ownership and establishment,

and to speed up housing delivery (Republic of South Africa, 1995, cited in Royston and Ambert, 2002). Specifically, 'the Act introduced a process of phased access to ownership rights in the course of township establishment' (Royston and Ambert, 2002: 296). These rights 'comprise the right to occupy land and use land, acquire full ownership of the land, encumber the right by means of mortgage or personal servitude and sell the right' (*ibid.*: 267). However, Roux (2004a) points out that initial ownership in informal settlement upgrading has rarely been used in practice. Furthermore, he asserts that it requires a certain level of surveying and the placing of beacons which makes it more costly than other tenure forms such as communal tenure, permission to occupy and rental statutory tenancy. He explains that the rental option requires residents to pay for the use of land, which makes them develop a sense of urban citizenship. The advantage of these alternatives is that surveying of individual parcels would not be required (*ibid.*). However, this option requires 'considerable capacity for collective action and decision making, through complicated formal legal procedures which may hamper rather than enhance poor communities' capacity to participate in the upgrading process' (Roux, 2004b: 26). However, 'with limited surveying, initial ownership in terms of the Development Facilitation Act could be provided' (*ibid.*: 25).

Apart from the above-mentioned forms of tenure, informal tenure systems, which exist in informal settlements, also need to be recognised. In some informal settlements, newcomers pay for allocation of land but there is no receipt issued to them and that portion of land is not recorded (Cross, 2002). In informal tenure, tenants are responsible for putting up their own shelters and for dismantling them when they leave. In informal settlements it is mostly committees that are responsible for land allocation. However, informal rental does emerge in informal settlements, as a second layer of tenure. It involves residents renting out shacks in yards. Huchzermeyer (2002) points out that in the late 1980s and early 1990s, the civic movement tried to eradicate exploitative rental

which was common in informal settlements. As discussed in the preceding chapter, City of Johannesburg is looking for the best approach to suit its informal settlements' needs.

3.3 Urban Land Tenure Innovations in Brazil

In order to comprehend City of Johannesburg's regularisation of tenure approach, it is important to understand how Brazil deals with its informal settlements. As mentioned earlier, the regularisation approach that City of Johannesburg developed in 2007 was based on approaches developed in Brazil. South Africa and Brazil have similar characteristics in as far as inequality is concerned, and hence a similar approach to the consequences of inequality, namely informal settlements, has been taken by both. Brazil has two types of informal settlements: firstly, settlements in which residents have the collective right to regularisation, independently of the willingness of the public authorities; and, secondly, settlements in which the regularisation policies remain at the discretion of the public authorities (Fernandes, 2006). Therefore, 'not all informal settlements are to be regularised nor are all informal settlements upgradeable', due to environmental, health and safety considerations (*ibid.*: 67).

In 1983, pressure from civil society led to the passing of a municipal law in Belo Horizonte for the regularisation of *favelas* (Brazilian informal settlements), introducing a land use zoning category that recognised *favela* residents' rights to the land they occupied (Huchzermeyer, 2004). Special Zones of Social Interest (ZEIS) were created in the 1983 Land Use Plan, and their regulatory rules, 'Prezeis', were enacted as a law in 1987 under the administration of the first directly elected mayor in 24 years, who took power in 1986 (Maia, 1995). ZEIS is a zone which recognises *favelas* as part of the city. It applies to the already consolidated informal settlements which appeared spontaneously, and where special rules apply to promote their regularisation and their integration into the urban structure of the city (Maia, 1995). The implementation of ZEIS constitutes a considerable

step towards the recognition of social rights of *favela* dwellers to the city (Maia, 1995). This law is called PROFAVELA Law. Huchzermeyer (2004) further explains that

> 'The PROFAVELA Law when applied to *favelas* recognises permanent but officially substandard houses and layouts, exempting them from the general planning standards and norms that regulate urban development and replacing these with special norms issued by decree, together with approved spatial plan' (Huchzermeyer, 2004: 62).

Prezeis, under the PROFAVELA Law sets up rules to deal with peculiarities of each ZEIS area and deters land speculation within them. Plots in a ZEIS are designated for people recognised as poor, defined by reference to the average living standard of the city's population, which in turn is based on a survey carried out by the municipality together with the neighbourhood association of the area (Maia, 1995). According to Prezeis, each dweller may only have two plots of land legalised and even then only if they are used for different purposes, for example, housing and business (Maia, 1995). Furthermore, plots of more than 150 square metres are not permitted, except for public and community facilities such as schools and health centres. Plots which exceed 150 square metres are subdivided (*ibid*.). Possibly due to changes when ZEIS was adopted in other Brazilian cities, De Souza (2001) states that in the area declared ZEIS, the maximum plot size should not exceed 250 square metres, the land use should predominantly be for housing, and occupants are not allowed to accumulate properties or to combine two or more plots. As the average plot size in the city is 360 square metres, it is expected that ZEIS will deter speculation and market-related eviction (whether as a result of sale or renting out at higher rates than the original residents can afford) (*ibid*.). As Maia (1995) states, the municipality and communities of ZEIS areas should work together to ensure effectiveness of such measures.

Regarding the legalisation of land tenure in ZEIS areas, Prezeis does not specify a particular law. While it allows different tenure forms, which will be discussed below, Prezeis indicates a range of mechanisms to achieve secure tenure, which vary from property expropriation to concession of the right to real use CRRU/CDRU (Maia, 1995). The CRRU is the most common legal instrument which can be applied to both private and public land (De Souza, 2004). It does not transfer property from the owner to the possessor. Instead it grants individuals with real rights to use land for a certain period while keeping land in the ownership of the state (*ibid*.). However, there are instruments that do not transfer ownership of the land, for example, certificate of use (*autorizacao de uso*), permission of use (*permissao de uso*), and others, but these leave individuals in a precarious position since the state can withdraw permission at any time and individuals lack rights to compensation for their housing investments (i*bid*.). The CRRU and *usucapiao colectivo* are tools used to legalise property and they facilitate the upgrading process within ZEIS (Macedo, 2008). For instance, CRRU permits the application, when suitable, of urban *usucapiao* (adverse possession). Urban *usucapiao* is a legal instrument upheld by the 1988 Federal Constitution which is applied in cases where private land of less than 250 square metres is illegally occupied for five consecutive years with neither any form of payment to, nor claims from the owner (De Souza, 2001; 2004.). In such a case, an occupier can launch a *usucapiao* action to acquire the ownership of the property. *Usucapiao*, however, cannot be applied to public land. Where the state is the landowner, the occupier is granted a concession of the right to real use. Whatever the mechanisms applicable, the government bears the cost of changing the ownership of land rights in ZEIS areas which are then registered with a public notary's office (*ibid*.). However,

> 'Prezeis has not been an effective mechanism to transfer property rights from land owners to occupants of land, since the legalisation process has been time consuming and involves a lot of public resources, such as financial funds, human resources (expertise) and

> legal procedures that are complex and time consuming' (De Souza, 2001: 179).

It is difficult to draw clear conclusions regarding the effectiveness of CRRU in regularising land tenure situations on public land since 'there are many variables which determine performance' (De Souza, 2004: 10).

On the other hand, De Souza (2001) notes that one of the objectives of the Prezeis is to provide guidelines for the regularisation of land tenure in the interests of occupants. But occupants themselves need to show similar interest in regularising their tenure situation (*ibid*.). This could only be possible if there is community involvement in the planning process. Prezeis set up guidelines to determine land use mainly for housing and upgrading standards specific for each case, depending on topography, the elegibility of these areas to gain access to services, and legalisation of land, i.e. transfer of property rights from the landowner to the occupants (De Souza, 2001). In 2004, of the total of 35 ZEIS, CRRUs had been issued in only seven ZEIS areas. The remaining 28 ZEIS were somewhere in the process of regularisation (De Souza, 2004). The initial stage corresponds to the clarification of the physical boundaries of individual plots through the design of a local plan. Then contracts can be prepared, the beneficiaries can be requested to sign them, a municipal legal advisor endorses contracts, then the mayor has to sign them, and finally the contracts are sent to the registry office for registration. The initial stage alone can represent a delay of two to three years in the process (*ibid*.). In some cases, by the time the contracts are revised and returned for the beneficiaries to be signed, couples have divorced, individuals have died or have been forced to move out of their properties due to violence, or the mayor might have been succeeded by another candidate after elections and laws have been changed (*ibid*.). This illustrates the dynamics and complexity of the legalisation process (*ibid.*). Further, low income residents would not be

allowed to sell their property (CRRU) on the open market, as this would result in them making a windfall profit out of public investments on land (*ibid*.).

In 2003, a Working Group was created in Brazil to improve relations between federal government, states and municipalities so as to modernise and make more dynamic the complex and distorted federal system in Brazil (Fernandes, 2006). The challenge in Brazil was that the federal government had little recognition of the importance of land regularisation. There was a lack of political will, coupled with overly bureaucratic procedures (Huchzermeyer, 2004). As a result, land regularisation was allocated insufficient funds. The national regularisation is still an isolated policy which does not have support of the ministry (Fernandes, 2006). This delayed the implementation of the programme (Huchzermeyer, 2004). By not being equipped and resourced adequately, the 'regularisation programme has effectively been limited to the dimension of land regularisation in strictly legal terms, and has not been able to respond to the demands of upgrading informal settlements' (Fernandes, 2006: 72).

What is more, as stated in Fernandes (2006), the regularisation programme has specific objectives with one of them being:

> 'Creating the conditions for the municipalities to act, widening the access of the lowest income groups to serviced land, and, for this purpose – together with a broad concept of regularisation – that combines upgrading and legalisation. It is necessary to create social housing policies and inclusive urban planning directives' (*ibid*.: 73).

Another objective of the regularisation programme is to:

> 'Promote the full recognition, as new forms of real rights, of the institutes of special urban *usucapiao*, concession of the real right to

use and special concession of use for housing purposes, especially when used in a collective manner' (*ibid*.: 78).

In order to be effective, regularisation programmes need to be related to other programmes. This should be considered in order to avoid instances like that of the Federal legislation resulting in legal obstacles to municipalities that have already progressed in addressing the process of growing informal land development through the regularisation programmes (Fernandes, 2006). Additionally, De Souza (2001) states that there have been legal barriers to land legalisation which include the transfer of land from landowners to occupants; the reason being the complex and time-consuming legalisation process. Fernandes (2006) agrees that it is impossible for municipalities to register the newly regularised settlements at the local registration offices. The registration costs are high and the registration procedures bring obstacles to the development of municipal and state regularisation programmes. The Brazilian state has different guidelines concerning legal and administrative procedures adopted for registration of the areas and plots and the registration offices give different interpretations to such guidelines, often refusing to register the newly regularised areas and plots (*ibid*.).

The national entity representing the registrars proposed the creation of a national council to regulate all registration offices. This council would define uniform and simplified legal and administrative procedures to be followed for the registration of regularisation programmes (Fernandes, 2006). The use of Geographic Information Systems (GIS) reconciled the information from the anachronistic databases used by registration offices with the cadastral databases used by the municipalities (*ibid*.). Huchzermeyer (2004) points out that in the city of Belo Horizonte, it is in this regard that the municipal public body, URBEL, improved the upgrading approach, recognising major advancement in data capturing and management through the introduction of GIS. However, there are

registration offices that have refused to get involved in regularisation programmes, hence creating obstacles (*ibid*.).

In Belo Horizonte, the municipal public body also offered capacity building and legal assistance to communities. In support of capacity building, Fernandes (2006: 78) points out that '[p]romotion of socio-cultural and legal urbanistic inclusion was done by involving engineers, architects, social workers, psychologists, students, and professionals working with the cinema and with videos, music and drama'. It took place in 2003 for many actors who were involved in regularisation programmes throughout the country (*ibid*.). Capacity building should also include the residents of the informal settlements in question. Huchzermeyer (2004) points out that participation narrows the gap between those responsible for the planning decisions and those living in the settlement. Such involvement eases project implementation (*ibid*.).

3.4 Namibia's Approach to Informal Settlements

South Africa and Namibia share similar characteristics because of their history. They were both colonised and later Namibia was colonised by South Africa until March 1990 when she gained her independence. They share the same economic status, amongst other things. Literature states that the growth of informal settlements in Namibia started after 1990 when the apartheid laws were repealed in Namibia. This also happened in South Africa when the democratic government took over. In Namibia pre-1990, German and South African colonial administrations applied segregation between 'racial' groups. There were no building standards in marginal urban areas. 'Black' people were allowed to live in townships with less infrastructure and social services (UN-Habitat, 2005), which was also the case in South Africa. In Namibia, development of informal settlements was strictly regularised by the apartheid policies of the South African government. This continued even when the democratic government came into power and

apartheid strategies and policies were still in place in relation to informal settlements; therefore, Namibia, like the apartheid South African government had a policy of getting rid of informal settlements.

In Namibia, land belongs to 'the state if not otherwise lawfully owned' (UN-Habitat, 2005: 36). There are various types of land:

> 'The state land which includes land owned by local authorities in urban areas; private land which is privately owned; communal land which is all land used by indigenous communities. It is owned by the state but held in trust for them' (*ibid.*: 36).

Due to the increase of the housing demand in Namibia and the growth of informal settlements, the government has introduced the Flexible Land Tenure System approach. It recommends two forms of tenure: the Starter Title and the Land Hold Title. The Starter Title is a 'form of tenure registered in respect of a block of land. It gives the holder a right to occupy a site within a block' (UN-Habitat, 2005: 39). However, the rights cannot be held jointly except for people who are married in community of property (Republic of Namibia, 2012). The occupier can transfer their right to another person (Republic of Namibia, 2012). However, the right cannot be mortgaged (UN-Habitat, 2005). In Land Hold Title, the holder has all the rights that the owner has. It is ownership without full ownership rights (*ibid.*). Both Starter and Land Hold Title schemes can be upgraded into full/freehold ownership if situated within an approved township. Freehold ownership should be registered in a Deeds Office while starter and land hold titles are held at the land rights office (Republic of Namibia, 2012). In catering to the needs of the poor, Namibia created local level registries independent of but connected to the formal deeds registry. This allows for less costly forms of land administration (UN-Habitat, 2005).

3.5 City of Johannesburg's Attempt to Learn from Brazil

City of Johannesburg embarked on a study tour to Brazil in 2008. It is against this backdrop that the City's Department of Development Planning and Urban Management came up with a new approach to formalise the city's 182 informal settlements (City of Johannesburg, 2007). According to the report from the department, this new approach was premised on the recognition of the role played by informal settlements in providing fast and affordable accommodation. It was recognised at the time that residents of informal settlements live in a permanent state of legal insecurity and have little incentive to invest their own resources in their physical environments (City of Johannesburg, 2008a). The intention of this initiative was to bring a level of legal security to residents and include these areas within an appropriate regulatory framework and create an environment conducive to investment by the state and residents themselves (City of Johannesburg, 2007).

The City of Johannesburg report (2008a) states that because of the current growth rates in the city, there is a need to deliver some 90 000 units a year, of which 60 000 will be subsidised to meet the ever-increasing demand. The report identifies two key tools the City will use to give legal recognition to residents and the status of informal settlements. The first tool is through rezoning of informal settlements in terms of the City's Town Planning Scheme. This is based on the example of the ZEIS in Brazil, reviewed above. The second tool, in terms of *The Development Facilitation Act (DFA) of 1995*, provides process for the surveying, conveyancing and registration of land and assists in speeding up housing delivery to the poor (Berrisford, 1998). The main purpose of the *Act* is to facilitate development of low income housing and upgrading of informal settlements in South Africa.

The City has set up the Informal Settlement Formalization and Upgrade Steering Committee, comprised of the relevant Council Departments, Municipal Owned Entities, and representatives from the regional offices of the Council (City of Johannesburg, 2009b). These stakeholders were elected to manage the process of formalisation and regularisation of informal settlements. It should be noted that the programme is specifically aimed at informal settlements, and excludes backyard dwellers in and around formal townships, vagrants, the destitute as well as home seekers living in dilapidated buildings in and around the city (City of Johannesburg, 2010).

3.6 Conclusion

City of Johannesburg's visit to Brazil resulted in City of Johannesburg drawing some lessons out of it in dealing with informal settlements. It is in this regard that the study included Brazil's approach to recognition of their *favelas*. City of Windhoek's approach should also be considered in regularising informal settlements in South Africa.

As Brazil used CRRU and Prezeis as instruments of regularisation of *favelas*, City of Johannesburg also used Less Formal Township Establishment and *The Development Facilitation Act* with few adjustments as its tool in the Regularisation of Informal Settlement Programme. It also amended the Town Planning Scheme. The City's approach would have been flexible if it was similar to Namibia's Flexible Land Tenure System, because it allows for incremental tenure upgrading. The Starter Title gives informal settlement residents a right to occupy a site within a block whereas the Land Hold Title gives limited, not full, ownership rights. Its flexibility lies within its content which allows a person to upgrade into full ownership.

In conclusion, after reviewing the literature, the position statement is that there is a need for recognition of informal settlements as they play a major role in the city's economy.

Secondly, there are tenure options that can be considered besides ownership and City of Johannesburg had to be flexible in their regularisation of informal settlement programme. What is of value are the contents of the rights to occupy.

CHAPTER 4: CHANGES IN POLICY WITH PARTICULAR REFERENCE TO SOUTH AFRICAN POLICY ON INFORMAL SETTLEMENTS

4.1 Introduction

The chapter discusses changes in policy referring to City of Johannesburg's policy on informal settlements. It seeks to explore how policies change and what causes some to remain un-implemented. It then focuses on housing policy shifts as they have occurred in South Africa with particular reference to measures addressing housing and tenure issues, specifically with relation to the urban poor. Policy shifts in South Africa have happened because when it was time for implementation, there were gaps identified within the policies and municipalities have not implemented them, for various reasons.

Lastly, the chapter discusses City of Johannesburg's regularisation approach as an example of attempted policy changes, including *The Development Facilitation Act 67 of 1995* which was used as an instrument in the City's regularisation programme.

4.2 The Dynamics of Policy Change

In exploring how policies change, it is imperative to review local government's structure, policy-making processes and the actors involved. This review will take place in this section, after reviewing insights on policy change.

Generally, policies change due to social pressure. Bennet and Howlet (1992: 279) state that policy change is a 'natural by-product of economic development, the outcome of popular electoral control of leaders and party competition, the result of interest group pressures or the emergence and growth of administrative expertise'. This argument best describes housing policy shifts in South Africa. Municipalities have to address the

challenge of informal settlements within their jurisdiction. Powers vested in municipalities by the South African Constitution allow City of Johannesburg to change its policy on informal settlements (Republic of South Africa, 1996). The regularisation of informal settlements, for instance, was developed within this municipality.

Of note, however, is that this initiative was pioneered by the Development Planning and Urban Management Department, not the Housing Department within the municipality. As this chapter engages with policy change, it is imperative to note that policies change, but not without challenges. There have been various shifts in housing policy whereby some of these shifts have not been practical or implemented (Tissington, 2011; Maina, 2013). Policies are reviewed because by the time it comes to implement them, they do not conform to the ever-changing times. Minimal community participation and consultation during decision-making over policy change contributes to such failure (Huchzermeyer, 2004). Funding is another challenge. Some policies are not implemented because of the lack of provision in the relevant budget (Charlton and Kihato, 2006).

Since 1992, there have been a number of shifts in housing policy in South Africa. During this period there has been a shift in the country's political sphere. However, it is apparent that there seems to be challenges in implementing these policies (Charlton and Kihato, 2006). Firstly, freehold titling was perceived as the most suitable form of tenure because historically, 'black' people were denied freehold titling. Secondly, informal settlements were perceived as a phenomenon that needed to be eradicated. Despite the introduction of an *in situ* upgrading programme in 2004, there has been pressure to eradicate informal settlements by 2014 (Huchzermeyer 2006a). However, at the same time, there was a realisation within City of Johannesburg for the need to recognise informal settlements as part of the city and for them to be given legal status (Huchzermeyer, 2011). City of Johannesburg is driven by this realisation, hence its unique regularisation of informal

settlements programme. This programme and South Africa's housing policy shift are discussed in the ensuing sections.

4.3 A Brief Review of the Challenges of Policy Change

As reflected in Gumede (2008), in South Africa, legislative and executive powers of a municipality are vested in its municipal council. A municipality has a right to govern on its own initiative guided by the 1996 South African Constitution. Municipalities have the right to exercise their powers without the interference of either the national or provincial government (*ibid*.). Furthermore, 'municipalities may make and administer by-laws for the effective administration of the matters for which they are responsible' (*ibid*: 13). It is based on this clause that City of Johannesburg Municipality formulated its regularisation programme of informal settlements programme within its jurisdiction.

In light of the foregoing, it is therefore imperative to understand the City's legislation and policy-making processes. City of Johannesburg's political branch is the main sector responsible for policy formulation and legislation (Mohamed, 2009). It consists of the law-making body, City Council, executive body, the City's Executive Mayor, the Mayoral Committee, Section 79 and Section 80 committees, ward committees, and an administrative body led by the City Manager (City of Johannesburg, undated). The executive mayor is tasked with the responsibility of leading the City. S/He has to identify the priority needs of the City, recommends intervention strategies and approaches to address those needs, and reports back to the Council on the progress made in addressing those needs (City of Johannesburg, 2010). Section 80 committees 'consider and approve reports and policies and forward them to the mayoral committee for consideration, before referring to the council for approval' (Mahomed, 2009: 157). As a result, the regularisation programme was initiated following the then Mayor Masondo's concern about the poor conditions in informal settlements. He had pointed out that he could not

have people under his jurisdiction living under the poor conditions he saw when he visited some of the informal settlements (Abrahams, City of Johannesburg consultant, personal communication, 2010).

Although the political branch's responsibility includes legislation and formulation of policy, the management and implementation of by-laws and policies rest with the administrative body which is led by the City Manager. City of Johannesburg consists of various departments that deliver public services (*ibid*.). City of Johannesburg's regularisation of informal settlements programme was pioneered by the Department of Development Planning and Urban Management, which forms part of the administrative body. This marked a shift at local level from the eradication of informal settlements to recognising them as part of the city.

In exploring what might influence policy change, Hofferbert states that there are two principal factors: firstly, 'the changing role of social and economic conditions such as population migrations, emergence of social movements, and critical elections; secondly, macro-economic changes, inflation and unemployment' (Hofferbert, 1974 cited in Sabatier, 1988: 130). An analysis of South Africa's housing policy shows that it has been influenced by both factors identified by Hofferbert. The country went through a political transformation, shifting from apartheid's racial ideology to democracy. Consequently, there was migration of people from rural areas to cities and macro-economic change from apartheid's policies to neo liberalism (Bond, 2000). During the period of transition, social conditions and macro-economic conditions influenced policy change in City of Johannesburg.

Hays (1995) points out that in most countries political and decision-making power are not centrally controlled, although there is an element of democracy in such countries. However, there exists a strong top-down approach whereby 'policy change is made at the

highest levels and the formulation of initiatives is done by a small group of presidential advisers assisted by specialists in the area' *(ibid*.: 2). In avoiding the top-down approach, City of Johannesburg 'involved' communities in their decision making that led to the introduction of the regularisation of informal settlements programme (Maytham, personal communication, 2010).

A top-down approach to policy decisions is always a challenge relating to issues concerning the urban poor. In most instances, internationally poor households are not recognised when matters concerning their welfare are being discussed. Politicians decide on policies, while administrative agencies implement those policies (Nakamura and Smallwood, 1980; Verschuere, 2009). This approach may result in policies being unrealistic and therefore not being implemented. The gap is not only between communities and policy makers but also between administrative tasks and political tasks that affect the implementation (Nakamura and Smallwood, 1980). Policy implementers are primarily involved in decisions made during the implementation stages of policies, while policy makers make the most significant decisions during the preparation and decision-making stages of the policy. This means that the involvement of implementers in the policy-making process is limited in the preparation and determination stages of the policy cycle (Verschuere, 2009). From the above arguments, it is clear that a top-down approach in decision making hinders the effectiveness of a policy. Accordingly, the exclusion of the community and policy implementers in the preparation and decision-making stages of policy should be avoided. In so doing, policies would be effectively implemented and the intended recipients would buy into them.

For policy to be implementable, planning and budgeting are crucial to the implementation process (Nakamura and Smallwood, 1980). The process involves decisions on how policy should be implemented and who should be involved in physical implementation. Budgeting cannot be separated from the planning function (Department of Human

Settlements, 2010). In addition to financial and human resources, certain policies require other resources such as land. Therefore, policy implementers should make necessary efforts to secure such resources before implementing a policy.

4.4 Broad Shifts in South African Policy on Informal Settlements

Before the 1994 democratic dispensation in South Africa, housing policies were fragmented and influenced by apartheid ideology. They were designed to discriminate against 'non-white' 'racial' groups. Once the political ground for policy negotiation had been achieved in the early 1990s, policies were then reviewed. In that way, the National Housing Forum (NHF) was established in 1992 to develop housing strategy and policy in South Africa (Department of Human Settlements, undated). It was a

> 'multiparty non-governmental negotiating body comprising of 19 members from business, community, government, development organizations and political parties. It was on this forum where foundations of the housing policy were discussed and agreed upon' (*ibid.*).

Its key policy issues included developing a new planning framework, developing new mechanisms for land development and land use control, reforming land registration and tenure systems and the provision of bulk infrastructure and service standards and tariffs (Carey, Smit, Xaba, Royston & Ambert, 2003). The NHF task team proposed that inferior and parallel systems be unified, upgraded and tenure be upgraded through the concept of initial ownership which is fully upgradeable to ownership over time (*ibid.*). Since 1992, there have been drastic changes in the South African housing policy.

As Rust (2003) points out, South Africa's housing policy has undergone three shifts between 1994 and 2002, although there was no change in terms of the state using its

project-linked housing subsidy as the primary mechanism for delivering housing at a large scale. Rust (2003) explains that in 1999 there was a shift in emphasis from quantity to quality in which the state's capital subsidy had shifted from a starter house (25 square metres to a minimum of 30 square metres with defined specification). The second shift was the government's re-emphasis of the people's housing process. The third shift was the interpretation of tenure, which included the rental option (*ibid*.).

A further policy change was the creation of Breaking New Ground in 2004. The purpose of Breaking New Ground was to outline a comprehensive plan for the development of sustainable human settlements over the following five years, embracing them as part of the city (Department of Housing 2004a; Huchzermeyer, 2006b). The implementation of this plan was influenced by the then State President, Thabo Mbeki. In his State of the Nation Address in 2004, he promised that the Housing Department would present a policy document that addressed human settlements and social infrastructure, including rental housing stock for the poor within three months (Mbeki, 2004 cited in Charlton and Kihato, 2006; Huchzermeyer, 2006a). This new policy states that 'a phased *in situ* upgrading approach to informal settlements in line with international best practice is adopted' (Department of Housing 2004a: 2 cited in Huchzermeyer, 2006a: 46). One innovation is that the policy plan supports *in situ* upgrading.

Breaking New Ground (BNG) in 2004 was another shift, with Chapter 13 of the Housing Code, the Upgrading of Informal Settlements Programme (UISP) being part thereof (in 2009, this programme became Part 3 of the new Housing Code). Although the *1994 Housing White Paper* was implemented with provision of government subsidies, these were inadequate to solve the situation. This is aptly observed by Huchzermeyer (2006a: 43) as she points out that:

> 'The rapid continued growth of informal settlements results from failed policies, ineffective governance, corruption, inappropriate

> regulation, exclusionary urban development paths, poor urban management strategies, dysfunctional and inequitable land markets, discriminatory financial systems, and a profound democratic deficit'.

However, for the first four years after adoption of BNG, there was a concern that the UISP as per Chapter 13 of the Housing Code had still not been implemented. On the contrary, municipalities were looking for different approaches to dealing with informal settlements. Huchzermeyer (2006b) states that the BNG's target of full implementation of the UISP by 2007/08 was politically ignored. Municipalities on the whole were not made aware of the UISP's existence. Instead of enforcing indirect/positive measures of informal settlement eradication as per BNG's plan, such as upgrading and making alternatives accessible, the government contradicted the BNG by enforcing direct/negative approaches involving forceful removal and relocation (Huchzermeyer 2008).

It should be noted that to avoid enforcement of direct/negative approaches by means of eradication and relocation, Chapter 13 of the Housing Code (and Part 3 of the 2009 code) emphasises the minimisation of disruption and conservation of communities within informal settlements. It further discourages the eradication and relocation of informal settlements, unless the area is detrimental to people's lives and not habitable. Its emphasis is that relocation should be the last option. Chapter 13 of the Code also provides for funding in upgrading programmes so that there shall be fewer obstacles in upgrading the settlements. Upgrading is aimed at giving the residents security of tenure (Department of Housing, 2004b). Of central relevance therefore to Huchzermeyer (2006a) is that Chapter 13 of the Code recommends issuing of permission to occupy as a preferred option. This option 'does not impose costs on the resident household, but provides adequate tenure security for household investments to be made in the dwelling' (*ibid*.: 55). Evidently, as mentioned in Chapter 2, City of Johannesburg's intention is to bring a level of legal

security to residents and include informal settlements as part of the city (City of Johannesburg, 2007). However, it is noted that when the City initiated the programme it was not aware of the UISP because the 2004 additions to the Housing Code was not published in the Department of Human Settlement's website and was generally difficult to access.

City of Johannesburg's objective is to achieve recognition of informal settlements by regularising them and issuing their residents with a permission to occupy. City of Johannesburg adopted its regularisation of informal settlements programme with permission to occupy without knowing that this was being promoted in Chapter 13 of the Code. An official in City of Johannesburg's Planning Department, which developed the regularisation of informal settlement approach, also argued that they had no obligation to comply with the Housing Code because they were the Planning Department (Abrahams, personal communication, 2010). They were aware of the Upgrading of Informal Settlements Programme but did not feel obliged to use it as their guide, as it falls under 'housing'. Chapter 13 of the Housing Code prioritised permission to occupy, but the 2009 version dropped that reference to permission to occupy and has been interpreted to favour individual freehold title. Accordingly, it conforms to De Soto (2000) and Turner's (1968) arguments to the effect that freehold titling allows people to use their properties as collateral for loans.

Furthermore, there is another shift in policy which is still in the pipeline. This has resulted from the realisation that providing free housing units with full ownership is unsustainable. Consequently, the then Human Settlements Minister in 2012, Tokyo Sexwale, (cited in Zille, 2012) announced that there should be a shift from delivering a house towards delivery of land and services. He further stated that there was a need for 'increasing rental stock, upgrading of existing informal settlements and improving access to housing opportunities in the gap market' (*ibid.:* no page number).

4.5 The Introduction of City of Johannesburg's Regularisation Approach as an Example of Attempted Policy Change

City of Johannesburg's attempt to intervene in the growth of informal settlements led to a team visit to Brazil in 2008, as already mentioned. The aim was to learn about Brazil's strategy in dealing with informal settlements. Based on this visit, City of Johannesburg came up with a new strategy that was to improve the lives of informal settlements residents: the Regularisation of Informal Settlements Programme. As a result, an Informal Settlement and Upgrading Steering Committee was established to oversee the implementation of the programme and monitor participation by all role players such as City of Johannesburg's Housing Department, Gauteng Provincial Housing Department, City of Johannesburg Department of Development Planning and Urban Management, Infrastructure and Service Delivery Departments and Johannesburg Water (City of Johannesburg, 2007, 2009b).

However, it came to light that the provincial government did not endorse this programme. This was reflected by one of my intended interviewees, an official from the Provincial Government not agreeing to be interviewed, claiming she was instructed by her immediate superior not to get involved. The Steering Committee, in line with the resolution taken during the Growth and Development Summit, held on 12 May 2006, undertook to 'eradicate' informal settlements by 2014 through an incremental housing approach to create sustainable human settlements (City of Johannesburg, 2007). The term 'eradication' was intended to mean that the informal settlements would be legalised to enable the city to address the residents' needs for services. These settlements would also be able to obtain some form of individual tenure to protect the investments they had made in their structures and other improvements (*ibid*.).

The programme had two key elements: firstly, the legal recognition of informal settlements and residents' rights to the land, where formalisation is feasible; and secondly, the provision of basic services. The former would utilise tools that included an interim measure to recognise informal settlements, which was linked to full legal formalisation which was to follow. The interim measure of securing tenure was to be through the rezoning of informal settlements in terms of the City's Town Planning Scheme and basic services, in terms of *The Development Facilitation Act (DFA), 67 of 1995* (City of Johannesburg, 2008a). The town planning scheme rezoning approach allowed a layout to be prepared in consultation with the community. It linked sites to people and granted occupation certificates using a register. It further allowed flexible land use regulations, not entirely dissimilar to other parts of the city (Abrahams, 2008).

City of Johannesburg (2008a) outlined a number of normative principles on which the regularisation of informal settlements programme was premised. In its formalisation interventions, the municipality intended to be consistent with its spatial development policies and principles relating to strategic densification, mixed housing typologies, uses and income groups as well as location, especially long public transportation routes. In the formalisation process these settlements were to develop sustainable human settlements as per municipal standards for the provision of social infrastructure. Although City of Johannesburg considered public engagement as well as community education as an integral part of the programme in all its formalisation stages, to date this is yet to materialise.

Furthermore, City of Johannesburg's intention was to administer the programme in a transparent and efficient manner with sound records, information and management to ensure that the goals of recognition and regularisation would be effectively achieved. Though not referring to BNG or the Housing Code, City of Johannesburg intended to avoid relocation where avoidable (City of Johannesburg, 2008a). However, it was not

clear how City of Johannesburg was to avoid relocation and make it a last resort as it had categorised several informal settlements as needing to be relocated.

The regularisation approach aimed at 'bringing previously excluded informal settlements into the City's regulatory framework and allow residents certain rights to land and access to services' while the City would continue with township establishment processes (City of Johannesburg, undated: 4). The approach offered the opportunity for the City to run the rapid process of rezoning in parallel with *The Development Facilitation Act*'s incremental process to legalise informal settlements before full township establishment or to run them sequentially, depending on the roll out of the programme and individual circumstances of the settlements themselves. The rezoning would recognise residents through issuing occupation permits to residents that were linked to a detailed layout plan indicating land uses, whereas *The Development Facilitation Act* route would consolidate existing rights in land and allow for full ownership to property at a later stage, within the same process (City of Johannesburg, 2008a, 2009a).

It was proposed that a zone would apply and be called 'Special Zone for Transitional Residential Settlements'. The zoning would apply to 'land upon which informal settlements were established by the occupation of land and provision of residential accommodation in the form of self help structures and some ancillary non-residential uses' (City of Johannesburg, 2008a: no page number). Advocating for this approach, Abrahams (2008: 8) argues that

> 'The town Planning Scheme approach enables regularisation of land use, the determination and application of regulations. Tenure reform is limited to recognising rights in land through occupancy permits, and full title would be resolved as part of the formal process of formalisation'.

As the City used *The Development Facilitation Act (DFA)* to incrementally legalise informal settlements, it therefore had two options to recognise land rights in terms of this *Act*. This was through a land development application which would recognise the rights of occupants and ultimately allow them to be registered in full ownership, if desired by residents, or alternatively, through a similar application but then proceeding with a registration arrangement and providing initial ownership to residents prior to full ownership and final proclamation of the development application. For both, a land development application process is followed (Abrahams, 2008; City of Johannesburg, 2008a, 2009a).

In addition, City of Johannesburg (2008a; no page number) points out that there were a number of clauses in the DFA which were appropriate to the approach:

> 'Section 30 of the Act specifically allows for exemptions from Chapter 5 in instances where land has been settled informally or is to be settled on an urgent basis and where such areas are to be upgraded over a period of time. This provision is ideally tailored to progressive informal settlement regularisation and upgrading by municipalities. Chapter 5, section 31 of the Act makes provision for the establishment of land development areas. The approval of land development areas makes provision for the recognition of settlements as well as 'initial ownership' even before the conventional proclamations and opening of township registers have been complied with'.

A beneficial occupier therefore had certain limited rights on land such as occupation acquired in this prescriptive way. The City of Johannesburg's approach intended to recognise and formalise these rights (City of Johannesburg, 2008a).

Section 33(2) (d) and Section 34 of DFA allows for any restrictive conditions and servitudes to be suspended on a land development area (Republic of South Africa, 1995). It is endorsed on the township register and affected parties are given three years to claim for compensation. However, conditions relating to mineral rights are excluded (*ibid.*). Sections 33(2) (f) and (g) allow the tribunal to set aside the National Building Regulations or other building by-laws and apply another set of standards. Section 39 then 'allows buildings to be built at any stage without building plans' (City of Johannesburg, 2008a: no page number). Section 33(2) (h) 'allows for the inclusion of the area into town planning scheme or similar scheme to regulate land use management or allow specific special case provisions to apply' (Abrahams, 2008: 9; Republic of South Africa, 1995). As a result, through this legislation an area can be zoned as per any existing town planning scheme zoning (Abrahams, 2008). Furthermore, this will 'allow the Special Transitional Residential Settlement zoning of the rapid recognition option, to either be retained or amended' (Abrahams, 2008: 9). Section 33(2) (j) 'provides for extra-ordinary measures that allow laws to be suspended, especially any law in relation to land development and subdivision or law on physical planning (excluding land Restitution Act)' (City of Johannesburg, 2008a: no page number). City of Johannesburg saw the DFA as a powerful and suitable legal mechanism to formalise informal settlements and allows for incremental process, therefore 'areas can be recognised early in the legal process but still be on a trajectory towards full legal formalisation and settlement upgrading in line with City development strategies and objectives' (City of Johannesburg, 2008a: no page number).

City of Johannesburg acknowledges that while legal recognition of an informal settlement provided a level of security to occupants, 'it did not confer the full bundle of defensible rights to land' (City of Johannesburg, 2008a: no page number); mechanisms for legal recognition needed to be linked with a form of tenure. In terms of the Town Planning Scheme, occupants would receive an occupation permit which would be a certificate

issued by the City and managed through a local register. This process would allow occupants limited rights to occupy their site and to pass it onto their heirs and would allow for sale transactions. On Council or state-owned land, 'the land is *de jure* still owned by the government and the occupants would have rights in land rather than full rights to land' (City of Johannesburg, 2008a: no page number).

This means that occupants would not have full rights over land but have the right to occupy it. Section 38 (2) of the DFA allows for initial ownership to be registered. This is carried out in areas where the outside perimeter of the layout plan has been surveyed and approved by the Surveyor General, and pegs for the individual erven have been placed and certified by a professional land surveyor. A township register is opened and services are installed after the designated Officer receives a guarantee that the area is capable of having a general plan approved (City of Johannesburg, 2008a). The initial ownership provides the holder with 'the right to occupy and use erf as though it were theirs; the right to full ownership when a township register is opened; the right to encumber the property with a mortgage and the right to sell the initial ownership' (Royston and Ambert, 2002: 296). In consideration that some informal settlement residents might not need full ownership while they would want security of tenure, rental options would be available to such occupants (*ibid.*).

Informal occupation of privately owned land would lead to a need for partnerships between the Council and the private land owner. This would be considered in well-located parcels of land. In situations where the land is not suitable for public-private ownership, the City should acquire the land from the private owner through the willing buyer, willing seller principle, in the first instance and then expropriation if necessary (City of Johannesburg, 2008a). As part of the regularisation of informal settlements programme, the Infrastructure Services Department (ISD) would 'leverage resources from Municipal Owned Entities (MOEs) and other programmes of government such as

Municipal Infrastructure Grant (MIG) for the provision of infrastructure services to [...] informal settlements [...] being formalised' (*ibid*.: no page number). It was one of the key components of the programme to ensure that the occupants had access to various forms of affordable credit that would enable them to develop their top structures. Out of the 182 informal settlements on the City's confirmed list, 58 of the settlements were townships where township establishment has already begun but had not yet been completed. Some settlements were further subdivided into a number of extensions which increased the total number from 58 to 74. These settlements were classified into categories 1-5 (Ntsooa, Deputy Director – City of Johannesburg Housing, personal communication, 2010).

The Development Planning and Urban Management Department was charged with the implementation of category 3 and 5 settlements. Category 3, are the settlements which were earmarked for regularisation. Category 5, are the settlements in which feasibility studies had not yet been carried out. Depending on the outcome of feasibility studies, residents of Category 5 can be relocated, regularised or formalised. Initially, there were 23 settlements in Category 3. By 2010, three of these settlements had been transferred to other categories as resolved by the Steering Committee, leaving 20 settlements to be regularised as of 2009 (City of Johannesburg, 2009b). However, this figure went down to three in 2010 (Huchzermeyer, 2011).

The feasibility study reports of 2008 indicate that out of the 124 informal settlements that were targeted, 60 could be developed *in situ*. However, the challenge was that 18 of these were on land portions that were privately owned. In order to acquire ownership of such land, the City was to engage the Gauteng Housing Department for possible financing (City of Johannesburg, 2008b). Most land portions were not zoned for residential use; some were zoned as public spaces and others for community facilities. To change these land uses to residential, the City would have to apply for rezoning (*ibid*.). These land

ownership and land use issues were identified as major challenges in the implementation of the programme.

4.6 Conclusion

The discussion in this chapter points out that policies change due to political pressure, economic development, change in authority and power, and growth in administrative expertise. The housing policy shifts in South Africa came to the fore. It emerged that the review suggests that policy change may depend on the views of political leadership. In the South African context, for instance, racially discriminatory policies were significantly transformed. From that transformation, policies are changing owing to identified gaps and the power of social pressure. Although various shifts in the informal settlements policy aim at minimising eviction and relocation, it is noted that this has not reached the intended maximum level as some informal settlements are still not recognised.

Municipalities have by-laws which give them power to make decisions affecting their areas of jurisdiction. In its Regularisation Programme, City of Johannesburg used its Town Planning Scheme and *The Development Facilitation Act 67 of 1995* as instruments in implementing their programme. Policies are not implementable for various reasons. Lastly, it should be noted that this report was completed, after *The Development Facilitation Act 67 of 1995* and *The Less Formal Township Establishment Act (LFTEA), 113 of 1991* were repealed by the new Spatial Planning and Land Use Management Act 16 of 2013 (abbreviated SPLUMA). Furthermore, City of Johannesburg's Regularization of Informal Settlements Programme had been moved from Development Planning and Urban Management Department to its Housing Department.

CHAPTER 5: THE SHIFT IN APPROACH TO INFORMAL SETTLEMENTS TITLING FROM FREEHOLD TO ISSUING OF PERMITS IN THE CITY OF JOHANNESBURG

5.1 Introduction

This chapter presents data collected from the interviews from participants of this study. It aims to provide empirical evidence which serves as a basis for the conclusions and recommendations discussed in Chapter 6. The empirical evidence presented in this chapter is drawn from secondary data and primary data obtained during fieldwork. Key interviewees from different sectors provided insightful data on the issue of land tenure security in informal settlements. The data collection method helps in analysing data objectively and instead of focusing only on one side of a problem, the study captures information from professionals and land tenure experts. However, the study did not reach the intended recipients of the informal settlements regularisation programme, as at the time of the study the programme had not been implemented, and so informal settlement residents could not be interviewed.

As part of the empirical evidence gathering during the fieldwork for this study, the following participants were interviewed:

- Philip Harrison, Former Director of Urban Planning for City of Johannesburg.
- Gemey Abrahams, consultant to City of Johannesburg.
- Patrick Ntsoaa, Deputy Director of Housing for City of Johannesburg.
- Alain Durand-Lasserve, an international land tenure expert.
- Lauren Royston, a South African land tenure expert.
- John Maytham, City of Johannesburg Town Planner.

- Geraldine van Rooi, Head of the Sustainable Development Section, City of Windhoek.

The structure of the chapter follows themes of the interview schedule and research findings and is also aligned to the research objectives. The analysis provided in this chapter takes into cognisance the main objective of this research as outlined in Chapter 1, which is to examine what led City of Johannesburg to adopt its regularisation of informal settlement programme. The last section of this chapter discusses the City of Windhoek's approach to informal settlements in order to make recommendations that City of Johannesburg might draw from when implementing the programme.

5.2 The Need to Recognise Informal Settlements as Part of the City

The growth of informal settlements and the effect of these settlements on residents and on urban planning suggest that there is an acute need to recognise informal settlements as part of the city. Former Director of Urban Planning for City of Johannesburg, Harrison (Former Director of Urban Planning for City of Johannesburg, personal communication, 2010) opined that it is not possible to predict that by 2014 there will be no informal settlements in Johannesburg, as per the City's target. Instead, he speculated that by 2014 all informal settlements will have some form of legal status, even in the absence of formal recognition. As regularisation of informal settlements requires funding, Harrison further stated that it is difficult for the Councils to invest in infrastructure in the informal settlements because spending money in an illegal settlement would be a violation of urban legislation, such as the municipal systems financial management. According to *The Municipal Finance Management Act*, money cannot be spent in a settlement that does not have legal status. Consequently, 'it is important to give a settlement some formal legal recognition so that one can upgrade that settlement through capital spending' (*ibid.*).

Harrison went on to argue that with the 180 informal settlements City of Johannesburg had, it was very difficult to reach the point of township establishment in all the settlements. Consequently, the idea for the regularisation of informal settlement programme was to find a way to get some form of recognition to informal settlements quite quickly and incrementally upgrade the right to tenure and upgrade the physical infrastructure (*ibid*.).

According to Abrahams (personal communication, 2010), consultant to City of Johannesburg in the regularisation of informal settlements programme, City of Johannesburg amended Town Planning Scheme instruments in giving recognition to the settlements as Zones of Transitional Settlement. For this reason, the amendment of the Town Planning Scheme and the incorporation of informal settlement areas were intended to give recognition of informal settlements.

As discussed in Chapter 3, the regularisation of informal settlements programme was to be implemented incrementally. Durand-Lasserve (personal communication, 2010), an international land tenure expert, pointed out that incremental processes are the only solution for people to be integrated into the city because they give residents time to redefine a family survival strategy and to adapt. He stated that it does not break community cohesion, because people stay together. He pointed out that, local social networks are very important for survival, especially for poor people. Moreover, incremental processes 'give poor people time to accumulate and save money to be able to buy the right to have a land title, at a later stage' (*ibid*.). Therefore, the regularisation of informal settlements programme would prevent households from having their social networks being disrupted due to relocation. In Durand-Lasserve's opinion, the programme might give people time to improve their standard of living without being under pressure of relocation and fear of eviction.

Similarly, Royston (personal communication, 2010), a South African land tenure expert, supported City of Johannesburg's incremental approach, which starts with blanket recognition and does not move straight to individual demarcation. It recognises people already settled in the informal settlements, rather than threatening them with evictions. Intervention measures are introduced to improve their living conditions. However, Royston was of the view that the problem with this approach is that it is usually dependent on political will. For instance, when one politician assumes power and is not in favour of it, reasons can still be found to evict people (i*bid*.). The sentiment expressed in the above discussion embodies the view that the regularisation of informal settlements in City of Johannesburg might not be implemented or might not be continued, should new politicians decide against it.

However, apart from the question of political will, it is noted that City of Johannesburg has not been able to regularise all its informal settlements because of various challenges. Some of the settlements are situated in areas deemed un-habitable, for reasons such as: dolomitic land, wetlands, land with erosion caused by overgrazing, ESKOM servitudes, and land earmarked for designated uses other than housing, for example where there is a plan for a road. Some of the projects were not cost effective, even if City of Johannesburg tried to implement them (Abrahams; Maytham; Ntsooa, 2010). Ntsooa (personal communication, 2010), Deputy Director of Housing for City of Johannesburg, stated that reinforcing dolomitic land, for example, for habitation would be too costly. Secondly, City of Johannesburg would not be able to implement the programme in all informal settlements because it would not have sufficient funding as it relies heavily on limited provincial government for funding (*ibid.*).

5.3 Attaching Value to People's Lives

An approach that attaches value to the lives of people who live in informal settlements would help improve their living conditions, environment and tenure security. Most expert and professional informants interviewed believe that tenure plays an important role in people's lives. Royston pointed out that, in the context of informal settlements, attaching value to poor people's lives 'can be given meaning by securing tenure through legal declaration'. She further stated that

> 'the provision of services secures tenure in an incremental way because authorities would not relocate residents from the land on which they had invested. This means people can get street addresses which can enable them to open bank accounts, receive post, and get their cell phones rica'd [sic], all those things that conventional title is considered necessary for' (*ibid*.).

Therefore, in this regard Royston pointed out that 'tenure is performing some of the functions that we all think title does, so the City of Johannesburg is opening up ways of getting those benefits through other means, other than individual title' (*ibid*.). She further stated that informal settlement residents can also take out loans and it does not necessarily have to be a housing loan; it can be any loan that they can use for housing purposes. However, Abrahams argued that the residents of the regularised informal settlements would not be permitted to invest in buildings until full township establishment.

In adding value to people's lives, City of Johannesburg's objective was to achieve informal settlements where people can use their properties for investment purposes (Abrahams, 2010). City of Johannesburg Town Planner, Maytham (personal communication, 2012) pointed out that the residents would be able to generate income from rentals if they build outside rooms. It should be noted that this would take place

when there is full township establishment, according to the regularisation of informal settlements programme. Harrison pointed out that for those households who are waiting for a housing subsidy, or those not qualifying, City of Johannesburg could provide a form of legal recognition at their present location through provision of the requisite infrastructure to enable these residents to feel secure enough to make investments in their own houses. Furthermore, he asserted that the least the City could do would be to create conditions that allow public investment into the settlement, giving residents enough confidence to invest in their own properties. Ntsooa agreed and stated that by giving informal settlements some kind of tenure, City of Johannesburg would be encouraging them to invest in their properties.

However, the regularisation of informal settlements programme would only be a temporary intervention until there is full township establishment. Legally, this limits households' ability to consolidate or invest in formal structures. De Soto (2000) argues that owning assets without ownership rights does not benefit the poor. The core of De Soto's argument is that they cannot use their properties as collateral as long as these properties are temporary structures built on someone else's land.

5.4 Freehold Titling Ownership as a Preferred Form of Tenure

Most participants interviewed agree that freehold titling is the preferred form of tenure, but not the only solution, especially for the urban poor. Royston acknowledged that the period between waiting for the state's subsidised housing and full township establishment takes quite a number of years. Therefore, there was a need for intervention strategies, which the City of Johannesburg's regularisation of informal settlements programme was trying to address.

There is, however, a further point to be considered. The issue of permits was raised by Durand-Lasserve who indicated that Joe Slovo (democratic South Africa's first Minister of Housing) related permits to the apartheid system. Because of this relationship, Joe Slovo wanted to do away with permits. His first public statement as Minister put emphasis on removing permits, and as such, the permit to occupy system was rejected after the end of apartheid (*ibid*.). Nevertheless, Durand-Lasserve argued that the permission to occupy system had some advantages. He explained that it could serve as a temporary solution to poor urban households while a permanent solution is sought or proposed. He maintained, though, that temporary permits should be upgraded to permanent permits.

There appears to be uncertainty about the form of tenure security that would be issued by the Programme. Some interviewees agreed that City of Johannesburg would issue occupation permits whereas others are unsure about this. Abrahams confirmed that the City would issue 'occupant permits' (2010). However, Royston pointed out that the Amendment Scheme states that City of Johannesburg would issue a 'certificate that sounds like permits' (2010). Concerning the implementation, it is not clear if it would be possible because of the stigma attached to apartheid tenure forms. However, it is noted that the question of equity has to be considered. Royston questioned the use of permits if there is a consideration of equity. She asked: if a permit was a lesser form of tenure, similar to the one used to deprive black people during the apartheid system, would it be good for people in the informal settlements to be granted this form of tenure? Would it be acceptable to black South Africans when so many previously advantaged people had full ownership? Royston pointed out that middle class people consider ownership to be the best option. Seemingly, there is an acknowledgement that informal settlements should have legal recognition, but there is uncertainty as to which form of tenure best suits the needs of the informal settlement residents. Hence the lack of City of Johannesburg's clear-cut response on the form of tenure to be issued to the residents.

It should be noted that City of Johannesburg's approach is one of blanket recognition, which is not individualised. This means that legal recognition is given to a settlement, not to an individual household. Permits are issued individually and Abrahams referred specifically to occupation permits. Commenting on the issue of freehold title, Royston stated that freehold title, despite many advantages, is also a form of tenure that can be viewed as a hindrance to cohesion, compared to collective tenure. Organised groups with a shared interest unite because of their interest. The challenge is that after a period when security has been achieved, the interests fragment and then individual interest comes to the fore and these are not always shared.

Ntsooa pointed out that freehold title is difficult to implement because of the township establishment processes. He stated that there were many approvals that were needed; for example, environmental approval, mineral rights approval, and Water Affairs approval. He further argued that *The Environmental Management Act* puts constraints on planned projects, which in turn led to the introduction of regularisation as the intermediary process where the City could expedite some of the process and could then wait for 2-5 years before completion of township establishment. Abrahams added to the issue of difficulty of implementation, pointing out that it was not easy to issue title deeds as they had to be registered with the Deeds Office. Formalisation is quite an expensive and lengthy process. Poor people have to wait for this whole process before they get their RDP houses because they cannot afford to own title deeds without the government's assistance. Consequently, people are driven into informality to a larger extent.

It is in this regard that *The Less Formal Township Establishment Act (LFTEA), 113 of 1991* states that there should be well planned and developed land designated for less formal settlement. It advocates for different approaches towards rapid settlement of people (Republic of South Africa, 1991). Provided land is available, *LFTEA* states that people can be settled in a more organised way rather than spontaneous or informal ways,

but the *Act* can also apply to informal settlements that have emerged organically. Chapter 2 of *LFTEA* recognises and legalises occupation of people who live in informal settlements (*ibid*.). Chapter 1 of *LFTEA deals with* less formal settlements, where the whole process is administrative (Republic of South Africa, 1991; *Urban LandMark*, 2010b). Each province has to acquire the designated land, settle people on it and develop it at a later stage (*ibid*.).

Clearly, not all people can afford individual ownership. Durand-Lasserve argued that titles should only be acceptable provided they are incremental. His conclusion was that titling does not impact much on security of tenure and does not really permit the poor to have access to bank credit and loans.

5.5 City of Johannesburg's Approach or Legal Basis for Permits

During apartheid, permits to occupy were governed by Proclamations R293 and R188. How does this history relate to City of Johannesburg's wish to evoke permits to occupy under the Regularisation Programme? The City's consultant, Abrahams pointed out that City of Johannesburg never thought of permits in relation to Proclamation R293 or Proclamation R188. She said City of Johannesburg wanted to give permission to occupy to informal settlement residents. Abrahams stated that the constitutional responsibility of the municipality, based on Schedule 5 of the Constitution, was to regulate the municipal affairs through by-laws and certain of these by-laws give permission to occupy to people in the form of a permit. Municipal officials have to operate according to the by-laws. Abrahams was of the view that for this reason, the officials had to adhere to Proclamation R293 and Proclamation R188. The permit would be like a certificate with all the occupiers' details (*ibid*.). She perceived the bundle of occupation rights as the most important legal aspect, rather than this just being a right to occupy.

Pertaining to the stigma attached to permits, Royston stated that City of Johannesburg did not need to use an apartheid law to issue permits or certificates, whereas the City implemented the law as legislation separate to its apartheid past. Notably, the stigma is attached to the idea of a permit and a certificate. Contrary to that, Maytham argued that there was no need for a special document that serves as a permit because the City would not remove the informal settlement residents in the area as it was Council-owned land. He further pointed out that the City did not have enough resources to make township establishment, even though the land was suitable for residential development. He further stated that there was not enough money to implement proper services and build houses and that this was to be put on hold for a few years. Abrahams pointed out that the whole approach was not a rezoning approach, but a land use approach, which allows for the land to be used for informal settlements only and does not affect the underlying land rights or the underlying zoning. Rezoning can only take place in the process of township establishment. City of Johannesburg's approach is a temporary transitional arrangement.

5.6 Rental Tenure for Those Not Qualifying for Freehold Tenure

Outside of the regularisation programme, tenure options can be used for securing tenure in informal settlements. There was an assumption that people who did not qualify for freehold title would be provided with rental accommodation. When people who qualify for subsidies were moved to a formal township establishment, non qualifiers would be left behind (Maytham, 2010). However, at the time of the interviews in 2010, City of Johannesburg had not yet regulated the rental fees and services and it was not clear how much a tenant would be expected to pay per month in lieu of rent (*ibid.*).

Due to the fact that many people did not qualify for a housing subsidy, the regularisation of informal settlements approach was to serve as a mechanism to permit residents to remain settled on the land through the blanket recognition, this being a more communal

form of tenure recognition. It was to give people who did not qualify for a housing subsidy an opportunity to build their own houses incrementally as permitted by their affordability status (Abrahams, 2010).

The assessment of the regularisation of informal settlements programme was not easy to do as implementation was only just starting at the time of this study. The programme did not provide different tenure options as per choice or for different affordability levels and it remained unclear how tenure would be upgraded from leasehold to freehold. Furthermore, the communal tenure aspect, other than in the area-based zoning, was weakly developed, and also individual and collective self help was not directly promoted. Therefore, the City of Windhoek's approach to informal settlements was analysed as a comparable point of reference.

5.7 Recognition of Informal Settlements in the City of Windhoek, Namibia

The City of Windhoek's recognition of informal settlements is an interesting approach to incremental tenure security and a range of service levels based on affordability. The approach goes further than City of Johannesburg's regularisation programme in promoting communal solutions in the form of upgradeable shared ablutions and in group ownership of land. The City of Windhoek has a Development Strategy which governs its approach to informal settlements. The City provides informal settlement residents with a range of land development options (land tenure and basic services), in line with household affordability. The City has six development levels in the low income areas it deals with and development Levels 1-4 are determined by income per household (City of Windhoek, 2011; Van Rooi, Head of the Sustainable Development Section, City of Windhoek, personal communication, 2011).

In Level 1, the City provides lower levels of services, i.e. basic communal services with people having to walk a maximum of 200 metres to a water point and 100 metres to a toilet. The residents pay monthly bills for these services. In other settlements they have pre-paid water services (City of Windhoek, 2011) (See figure 1). People in this category are described as the 'poorest of the poor' by Van Rooi (2011). The informal settlement residents in this category or development level lease the land from the City of Windhoek. The City thereby encouraged them to come together and form savings groups as it was thought to be the only way they could acquire land ownership. This would be through forming a self help housing group and they could then upgrade from a leasehold tenure to group ownership (*ibid*.).



Figure 1: Water-borne communal toilet with pre-paid water tap adjacent thereto – Havana Informal Settlement. Source: City of Windhoek (2011).

The second Development Level is similar to Level 1, but with a higher level of convenience. As compared to Level 1, in Level 2 the toilet block is 30 metres away from the residential block and contains 30 households per block. In this level residents also lease land from the City of Windhoek, but can also purchase land as a group. The City of Windhoek created block erven to provide communal sanitation and water, but people

need to purchase these services in a particular block. In other words, they pay monthly bills for such services or use pre-paid water metres (City of Windhoek, 2011). It also allows them to upgrade their services as a group.

Level 3 is designed for households who are not able to purchase a single residential stand. They form a group and purchase a larger plot as a group (City of Windhoek, 2011). Implementation of Levels 1 and Level 2 was not without problems. Van Rooi (2011) indicated that this approach had 'not been implemented 100% as it should be' She said this was because when the residents moved to these areas, they wanted services that were not allocated to that level or category. For instance, residents in Level 1 would want an individual toilet which fell under Level 3. Therefore, people in Level 1 were demanding a hybrid of services that were not provided there. Level 3 was less contested because it had individual residential sites (*ibid*.).

City of Windhoek promoted group ownership because it accommodated people who could not afford to buy in a single residential area. However, group ownership was not without its challenges. Registration was a long process as it had to be registered at the Ministry of Social Services. And also, as groups had to elect a committee to run the group, there was at times mismanagement of funds which could lead to conflict (*ibid*.).

In Level 4, water, lights and toilets were not communal. Level 4 was for groups of residents who had improved from Levels 1, 2 and 3. People at this level had applied to the City for subdivision of their former communal erven to individual plots of 150 square metres. The City would subdivide the erven, rezone, and then residents would take individual ownership (*ibid*.). Figure 2 shows the subdivision of informal settlements in blocks in Windhoek, Namibia.

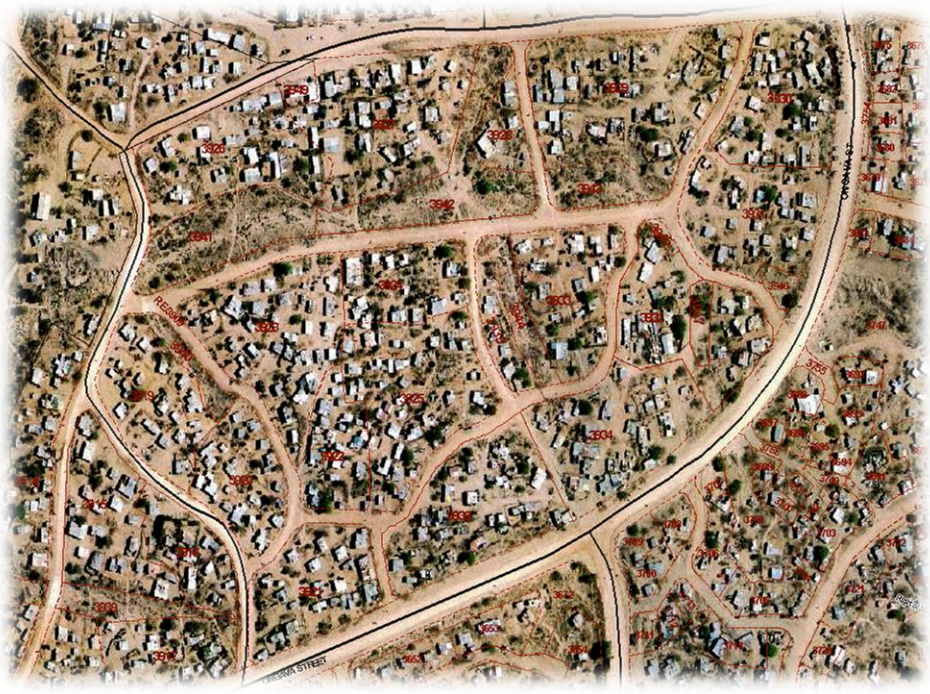


Figure 2: Subdivision of informal settlements in the City of Windhoek. Source: City of Windhoek (2011).

Beyond those assisted under Levels 1-4, there were people who could afford to purchase individual plots/erven who did not want to be in a group. Therefore, there was provision of single residential erven for those who did not want to purchase nor lease as a group. There was no limit to the leasehold period and they could lease indefinitely (Van Rooi, 2011). For single residential areas, the erf should not be more than 300 square metres (*ibid.*).

Upgrading of existing informal settlements by City of Windhoek follows Levels 1-3. The City avoided disruption of lives of those who had settled in informal settlements. As a result, the roads in the upgraded informal settlements did not follow the same pattern. Some roads were wide while others narrow. The City built streets without moving the residents' informal property. The City's intention was to assist people to proceed to upper levels so that they would benefit from individual servicing. However, the City did not

have sufficient resources to fully implement the programme (*ibid*.). Servicing an informal settlement with sewerage, water and electricity was beyond the City's financial means, due to the cost of laying service lines. Therefore, people had to rely on communal services which could be located quite far from their dwelling. While some residents in informal settlements with residential blocks (Level 1) had built toilets in their blocks, they could not utilise them because there were no water and sewer lines for them to connect to (*ibid*.).

The City of Windhoek issued lease agreements. However, Van Rooi stated that the City struggled to monitor these. It could not verify who held a lease agreement and who did not. As a result, more people illegally settled in these settlements and accessed services. While households were given individual lease agreements, they had to pay for the rates and taxes as a group, not as individuals. Van Rooi pointed out that in the past 10 years; only one group had paid for their services. For this reason, the City was considering billing residents as individuals so that it might be able to recover these costs (*ibid*.).

City of Windhoek has gone much further than City of Johannesburg in designing and implementing incrementalism, in not locking households into one development option and allowing a progression linked to affordability and to social capital, as households were able to pool resources for their tenure and service upgrading. However, the system needs to be flexible and responsive, providing as many options as possible, and needs to plan and budget for the incrementalism very carefully, so that upgrading runs smoothly once households can group together and afford this.

5.8 Conclusion

In summary, we can see that freehold titling is not a priority in City of Johannesburg's regularisation approach. In attaching value to poor people's lives, City of Johannesburg

considered providing them with permission to occupy as a form of tenure. It used the Town Planning Scheme as an instrument, an approach similar to the Zeis in Brazil embraced during the regularisation of the *favelas*. However, unlike in Brazil, the regularisation of informal settlements programme in City of Johannesburg is not a first step in an *in situ* upgrading approach. In Brazil, regularisation is part and parcel of *in situ* upgrading, whereas in City of Johannesburg the zoning seems to be a temporary measure, or at least not the key instrument to unlock *in situ* upgrading. The City still ultimately uses standardised housing development as its blueprint, rather than *in situ* upgrading as per international definition.

In Johannesburg, the intention was to have all the informal settlements recognised legally as part of the city by 2014. City of Johannesburg preferred blanket recognition through a zoning amendment, which meant recognising the settlement and not individual households. To sum it up, Johannesburg's regularisation approach aims at speeding up recognition of informal settlements so as to avoid evictions, which previously had huge legal cost implications as residents of informal settlements pursued the court route. Furthermore, the residents cannot wait for the township establishment as interviews reveal that this process takes a number of years, ranging from 6 months to 25 years before full township establishment, and not all people qualify for the state housing subsidy.

City of Windhoek's approach to informal settlements is very unique. It has had challenges, but it is well organised. Using this as a template, City of Johannesburg then has to implement different tenure options as stipulated in the Housing Code. This allows residents to live according to their means and to have a choice that would best suit them. There should be clarity in terms of how the City intends to upgrade leasehold to freehold in the future. While informal settlements are recognised, there should be self help initiatives that take place in order to develop the residents.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

This study has focused on the tenure options that might be used in City of Johannesburg's informal settlements in order to recognise them as part of the city. In an attempt to address this issue, the study engaged and analysed what might have led City of Johannesburg to adopt its regularisation of informal settlements programme with a permit to occupy as a preferred option. City of Johannesburg's approach, which is the first regularisation approach to informal settlements in South Africa, was difficult to assess, given that it was only recently adopted at the time of this empirical research. Therefore, the study explored literature on different forms of tenure and various debates around tenure issues, and analysed interviews from subject experts and other relevant participants collected during the fieldwork component of this study. It further explored Brazil and City of Windhoek's approaches to informal settlements. Brazil was chosen because City of Johannesburg visited Brazil and learnt how it dealt with their informal settlements. The City of Windhoek, with Namibia sharing its history and planning framework with South Africa, presents a very interesting design and implementation of incremental tenure and servicing for informal settlements, not without problems, but certainly providing a relevant lens for City of Johannesburg's approach.

The point of departure of the report was that despite the relevance of freehold titling in many urban land uses, there is a need for a more flexible form of recognition of informal settlements as they play a major role in the city's economy. Recognition of informal settlements includes careful consideration of the residents' livelihoods and vulnerability, right to the city, and security of tenure. Therefore, different tenure options should be used

for securing tenure in informal settlements, with the possibility of progressing to freehold ownership.

6.2 Summary and Discussion of the Research Findings

This study has examined different tenure options to be used in the informal settlements. The study found that there were numerous forms of tenure that could be used. The 2004 addition to the Housing Code (Chapter 13 – Upgrading of Informal Settlements) promotes the use of permits to occupy, leaseholds or *commodatum*. Leasehold can be provided in different approaches. The City of Windhoek leases the land to its informal settlement residents for an indefinite period. Similar to City of Johannesburg's approach, they provide services to informal settlements. However, it should be noted that the City of Windhoek subdivides informal settlements into different blocks. These blocks are given collective erf numbers and share communal water and toilets. In determining the installation of services, City of Windhoek categorises settlements or parts thereof into different levels according to the combined income of households. Only Level 4 residents have individual services. Progression is possible from one level to the next through the collective financial savings of groups of households in individual blocks.

Comparatively, City of Johannesburg has been attempting to use rental as an alternative to full ownership for those who do not qualify for a subsidy. The City, however, has no procedures in place to structure such rentals in full township establishment. The City also has insufficient evidence as to whether households would accept the rental option and assumed that people who would have ownership would build outside rooms for rental purposes to generate income. The City has never stated how it was going to deal with the non-qualifying residents. Under these circumstances, informal settlement residents who do not qualify might still face relocation, a challenge which the regularisation of informal settlements programme, attempts to avoid.

Under City of Johannesburg's regularisation programme, this study explored the potential of Permission to Occupy (PTO). In the interviews conducted, participants had different opinions about permits. Some acknowledge that there is a stigma attached to them, as they referenced an apartheid policy. Some maintain that there is no problem with permits if the contents of the rights issued bear no resemblance to an apartheid approach. City of Windhoek, though also not without problems, uses a communal lease agreement as a step to group ownership. It appears there is a need for innovative way of issuing permits. The Housing Code and City of Johannesburg's Town Planning Scheme do not specify the details and implementation logistics of permits. The Code and Scheme, therefore, leave these logistics to the discretion of people in authority.

There have been various housing policies in South Africa. A major shift happened from 1992 when there was a National Housing Forum which developed consensus on a single housing policy formulation leading to *The Housing White Paper in 1994*. This policy did not speak to informal settlement upgrading in a very direct way, this only being introduced into South African housing policy in 2004. The government appeared to misunderstand the Millennium Development Goals as requiring 'eradication' of informal settlements by 2014, which was never a requirement. Some drastic measures were implemented to deal with informal settlements in order to meet the 2014 target, these including evictions. City of Johannesburg, however, gradually realised that the vision of the Millenium Development Goals was that informal settlements should be recognised as part of the city.

Although an Upgrading of Informal Settlements Programme was introduced into the Housing Code in 2004, City of Johannesburg took a different approach in recognising its informal settlements. The City opted to design its own incremental approach, with the help of land tenure consultants to the City's regularisation of informal settlements programme. The Programme was initiated by the City's Department of Urban Planning

and Development Management, not its Department of Housing. The programme therefore relied primarily on the Town Planning Scheme as its land tenure instrument, rather than referring to the Housing Code.

While the City involved stakeholders in its planning and decision making, that led to the adoption of the regularisation of informal settlements programme, there appears to have been very little done to ensure capacity building and participation of informal settlement residents. Also, it should be noted that the number of informal settlements that were earmarked for regularisation was narrowed down, possibly due to lack of political will. This reduction in numbers of settlements to which the programme applied had not been communicated to informal settlement residents at the time of the study's interviews in 2010.

A delegation from City of Johannesburg had been to Brazil to study that country's approach to informal settlements. Brazil had developed Zeis (Special Zones of Social Interest) as an instrument in the regularisation of *favelas*. City of Johannesburg's Urban Planning and Management Department then decided to amend the Town Planning Scheme and used *LFTEA* as its regularisation of informal settlements instrument. City of Johannesburg's regularisation programme was also to issue permits as its tenure form. However, in interviews with City of Johannesburg participants it became clear that they were reluctant to clearly admit that they were actually going to use permits as a right to occupy and it appears that it was something they were still contemplating. Participants mentioned in interviews that the City would issue a certain document which would be 'like a certificate'; yet other interviewees mentioned the issuing of 'occupant permits'.

The literature review in Chapter 2 suggests that land access and tenure are critical to the urban poor. Use rights should be designed to supplement the livelihoods of the people in the informal settlements in times of hardship, by giving them access to areas where their

standard of living can be improved. Security of tenure would give the informal settlement residents access to livelihood opportunities.

In securing the livelihoods of the urban poor and reducing vulnerability, there should be a consideration of the timeframe for which tenure security is granted, because this plays a role in stabilising their lives. City of Johannesburg did not have a definite period for their permission to occupy approach and claims that it would last until there was full township establishment.

It is important to note the limitations of the regularisation of informal settlements programme. It had an element of inequity and exclusion, in that only a few settlements were selected for implementation. The residents of the regularised informal settlements would not be permitted to invest in buildings until full township establishment. It would just be a right to occupy, which would not include rights to the land, except for the top structure. However, in the Windhoek case, a leaseholds agreement does allow households to start building and improving. Therefore, in contrast, in City of Johannesburg it would be a right to occupy the land rather than right to property. A right to occupy can be managed in a way that does allow investment and the sale of investment to the next household that holds the lease. Informal settlements cannot use their properties as collateral because regularisation is a temporary intervention. Notably, a right to occupy can be managed in a way that does allow investment and the sale of investment to the next household that holds the lease.

The absence of beneficiaries' perceptions about the regularisation of informal settlements programme in this study is due to the fact that the programme had only been recently adopted at the time of the study's interviews, thus providing a basis for future research. Such future research might examine the impact that the programme has on the lives of the

residents. This could include the evaluation of the regularisation of informal settlements programme, once it has been implemented.

This study concludes that there are a number of tenure options which might be used in the informal settlements. City of Windhoek sets an example of how informal settlement residents could be accommodated with more response to diverse levels of affordability. The City of Windhoek's approach accommodates diversity of the informal settlement residents. It differentiates its settlements according to household's affordability. As a result, delivery of services varies according to different Development Levels, starting from communal services to individual services. It also allows residents time to gradually improve their buildings and tenure. It encourages group ownership and self help approach. However, like all projects, it was not without challenges. Consequently, the implementation had not reached the City of Windhoek's maximum target. Some informal settlement residents demanded a level of services which was not designated for their development level; registration to the Ministry of Social Services is a long process and there is mismanagement of funds among the residents, which ends up in conflict. This study therefore recommends further research into whether aspects of the City of Windhoek's approach can be incorporated into making the regularisation of informal settlements programme more effective and possibly also more amenable to politicians for their support.

6.3 Conclusion

There was to be a shift from freehold titling to issuing of permits in City of Johannesburg. This was a result of the realisation that informal settlements should be recognised as part of the city and that waiting for full township establishment takes a long time. The realisation was thus that informal settlement residents should be provided with necessary services in order to improve their living conditions and should be protected from fear of

relocation and eviction. . For the City to reach its goal, it had to come up with a strategy adopted (and adapted) from Brazil and also in consultation with land tenure experts. This strategy shaped the policy agenda. It led to an amendment of the Town Planning Scheme to enables regularization of the informal settlements. Residents were to be issued with permits or certificates as a proof of the right to occupy the land. Should City of Johannesburg adopt the tenure approach (of permits or certificates), this would be a shift away from freehold titling, which is still widely perceived as the best tenure option.

To date, the regularisation of informal settlements programme has limitations, because it does not consider various forms of tenure that might be suitable in the informal settlements. There is a stigma around permits and as a result the City did not want to issue a clear cut answer, in my interviews, on its plans for issuing of permits. City of Windhoek has a unique approach in recognising informal settlements, categorising them according to a household's affordability, which City of Johannesburg might learn from.

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