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1 Introduction

Multiple legal frameworks are normally referred to as legal pluralism, which can be defined, with respect to land law, as the simultaneous existence of multiple normative constructions of property rights in a social organisation.¹ Hoekema distinguishes between legal (*de jure*) and actual (*de facto*) pluralism.² Pluralism exists *de jure* when the national law explicitly recognises customary law. The national law may be the constitution or national sector laws, like land law. Recognition of customary law in the constitution will cover all aspects of law, where recognition through sector law is specific. Pluralism exists *de facto*, when state and customary law co-exist without formal linkages.

As Africa urbanises rapidly, rural areas transform to urban through a peri-urban phase. Changes in land use and population density are obvious characteristics of peri-urban areas, but a less visible, but important, characteristic is the dynamic of land tenure. Multiple tenure systems co-exist and interfere with each other, customary inherited from the rural past, and statutory gradually expanding from the town centre, while informal tenure emerges as people cannot access land through formal ways.

The existence of multiple tenure systems contribute to lower levels of tenure security.³ Tenure security is defined as the degree of confidence held by people that they will not be arbitrarily deprived of the land rights enjoyed, and/or of the economic benefits deriving from them. Tenure security cannot be determined easily, as it contains both objective and

* I want to express gratitude to Professor Doctor Jitske de Jong (Delft University of Technology) for providing critical comments on the draft version of this chapter.

¹ H Dekker *In pursuit of land tenure security* (2005) 240.

² AJ Hoekema *Rechtspluralisme en interlegaliteit* (2004) 7.

³ D Fitzpatrick "'Best practice' options for the legal recognition of customary tenure' (2005) 36 *Development and Change* 453.

subjective elements, or legal and factual dimensions.⁴ This chapter distinguishes between legal and perceived (*de facto*) tenure security. For instance, people might perceive a high level of security concerning their tenure situation, even while their legal title to the land might be weak. The existence of multiple tenure systems can result in multiple land claims, with varying levels of legal validity. A continuum of land rights can be used to relate the existing land rights to tenure security.⁵ Land registration is a possible tool to upgrade areas with multiple tenure regimes and formalise property rights, and justifies itself by the claim that tenure security of the beneficiaries will increase, leading to more investment and improvement of livelihoods.

This chapter focuses on poor people, who resort to informal tenure when access to formal land is limited for various reasons. This results in squatting and the emergence of informal settlements with tenure insecurity, so that the occupiers get evicted or do not reap the benefits from their investments. Wealthy people, often better informed, may have easier access to land and more opportunities to bring land under formal tenure.⁶ Large-scale land registration projects have not had the intended results, with the poor often not benefiting at all.⁷ Pro-poor land registration has been suggested, specifically aimed at improving tenure security for the poor, and this chapter assesses the impact of these tools. The conceptual model of relations between urbanisation, land tenure, land registration and tenure security is given in figure 1.

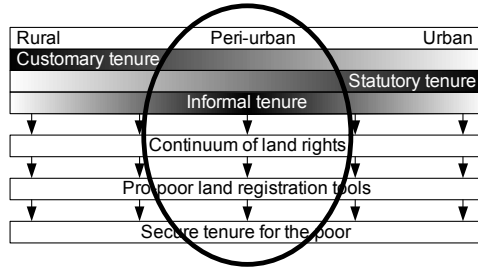


Figure 1: Conceptual model (the author)

⁴ N Kanji *et al* *Can land registration serve poor and marginalised groups* (2005) 3; K Deininger *Land policies for growth and poverty reduction* (2003) 36.
⁵ G Payne 'Urban land tenure policy options: titles or rights?' (2001) 25 *Habitat International* 418.
⁶ C Fourie 'Reviewing conventional land administration approaches and proposing new alternatives: peri-urban customary tenure and land readjustment' (2002) 4. Presented at the symposium on land redistribution in Southern Africa, Cape Town South Africa available at http://www.fig.net/commission7/pretoria_2002/papers/SYM_LR_PRETORIA_PAPER_FOURIE.pdf (accessed 28 August 2011).
⁷ G Payne *et al* 'Social and economic impacts of land titling programmes in urban and peri-urban areas: A review of the literature' (2007) 12. Research proposal available at www.gpa.org.uk/News/proposal.doc (accessed 28 August 2011).

Namibia was chosen as a case study because its Flexible Land Tenure System (FLTS) is a promising pro-poor land registration tool. The research investigates land registration, how central and local government deal with land registration in areas with multiple tenure systems, and how local inhabitants perceive developments concerning land registration and tenure. Oshakati was chosen as a local pilot study for various reasons: it is a rapid growing town, it is expanding into former customary land, it contains informal settlements, and pro-poor land registration pilots have been carried out.

To capture local perceptions on tenure security from local residents, semi-structured interviews were undertaken with 26 local residents in the peri-urban and informal settlements, using an interpreter with a background in land administration, and interviews conducted in the local language (Ovambo). In addition, local stakeholders were interviewed and available reports and documents studied. The interviews focused on how people perceived their property rights, land registration activities and titles.

This chapter describes the existing legal framework within Namibia for peri-urban and urban land, including the FLTS. The reality on the ground is described through the multiple tenure regimes in Oshakati and the land tenure related activities of its Town Council (OTC). Tenure security is assessed through the continuum of land rights and conclusions drawn, ending with a view of the future.

2 Legal framework

The Constitution of Namibia offers rights to acquire and own land, and free settlement for all its citizens.⁸ The legal framework consequently provides for the delivery of freehold plots through systematic planning and land registration. In urban areas the following Acts are important:⁹

- The Land Survey Act of 1993 (specifying the terms for cadastral surveying in Namibia),¹⁰
- The Deeds Registries Act of 1937 (stipulating that all land in Namibia must be surveyed before it can be registered). All transactions resulting in change of land ownership require a survey by a professional land surveyor, approved by the Surveyor General (SG), and registration in the Deeds Office;

⁸ Constitution of the Republic of Namibia of 1990 art 16.

⁹ W de Vries & J Lewis 'Are urban land tenure regulations in Namibia the solution or the problem?' (2009) 26 *Land Use Policy* 1116. For other land, the registration of communal lands is covered under the Communal Land Reform Act 5 of 2002 and Agricultural (Commercial) Land Reform Act 6 of 1995. See M Lankhorst 'Land tenure reform and tenure security in Namibia' in JM Ubink *et al* (eds) *Legalising land rights: local practices, state responses and tenure security in Africa, Asia and Latin America* (2009) 193.

¹⁰ The Land Survey Act is almost identical to the Land Survey Act of 1927 of South Africa; see W de Vries & J Lewis (n 9 above) 1116.

- The Townships and Division of Land Ordinance no 11 of 1963 (providing for the township establishment, subdivision and consolidation);
- The Town Planning Ordinance 60 of 1954 (providing for township development and town planning guidelines);
- The Squatters Proclamation (AG 21 of 1985), providing for the removal of buildings and people who have settled unlawfully. Although this proclamation is still in force, it has never been applied after Independence.

These acts (the Land Survey Act excepted) have not been reformed since the new Constitution was promulgated.

There have been attempts at independent assessments of titling programmes around the world,¹¹ and research has assessed land access and land tenure in urban areas in Namibia. A report on the City of Windhoek concludes that it is applying the principles of FLTS, developing settlements with varying levels for people with corresponding income categories.¹² Mooya and Cloete, investigating the relationships between property rights, real estate markets and poverty alleviation in informal settlements in Windhoek, compared freehold, group rights (savings schemes) and informal rights.¹³

For peri-urban and urban land tenure, the Flexible Land Tenure Bill (with several revisions since it was introduced in 1996) aims to overcome problems related to land delivery for people with low income, mainly attributed to lack of affordable freehold land. A second property registration system is proposed, parallel to and interchangeable with the existing system. Such a system should provide an affordable, more secure, and simple right which can be upgraded according to what the government can afford at any given time.¹⁴ The proposed FLTS can only be applied within proclaimed villages, settlements and towns (not on communal lands), to upgrade existing settlements and develop new ones (see figure 2). It introduces two new sub-tenures:

- Starter title: a statutory form of tenure registered in respect of a block of land (*blockerf*);
- Landhold title: a statutory form of tenure with all of the most important aspects of freehold ownership but without the complications of full ownership.

¹¹ G Payne *et al* (n 7 above) 7.

¹² Legal Assistance Centre 'A place we want to call our own – a study on land tenure policy and securing housing rights in Namibia' (2005) 21. Available at <http://www.lac.org.na/projects/lead/Pdf/aplaceweanttocallourown.pdf> (accessed 28 August 2011).

¹³ MM Mooya & CE Cloete 'Property rights, real estate markets and poverty alleviation in Namibia's urban low income settlements' (2010) 34 *Habitat International* 436.

¹⁴ SF Christensen & PD Hojgaard 'Report on a flexible land tenure system in Namibia' (1997) 18.

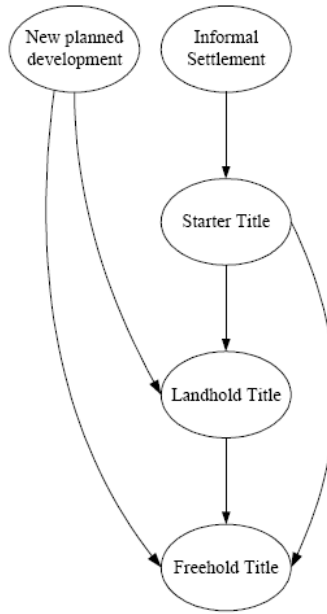


Figure 2: Principles of FLTS¹⁵

The starter title is given within a block, without delimiting the extent of each individual plot. The *blockerf* may be held in ownership with a government body, community organisation (group, association) or even private developer. The whole block is registered as a single entity in freehold ownership, both at the Registration of Deeds in Windhoek and the Land Right Office (LRO).¹⁶ All (potential) inhabitants of the block have to form an association with a Constitution. The maximum size of a group is set at 100 members (or households). Within the block, the starter titleholder must abide by the rules set up by the association. The starter title is transferable; it cannot be used as collateral for credit. The *blockerf* is surveyed according to the Land Survey regulations. The landhold title relates to defined plots for individuals. A starter title can be given to a new settlement, but, to prevent random settling, a layout plan has to be prepared as the basis of the landhold titles.

The Land Rights Office, located at the local authority, registers the landhold titles, and the cadastral layout is done by a land measurer (with

¹⁵ Christensen & Hojgaard (n 14 above) 74.

¹⁶ Early drafts of the Flexible Land Tenure Bill referred to Local Property Offices, which deal with freehold tenure, but the latest draft refers to Land Rights Offices.

at this stage no intervention from the Ministry of Lands). The landhold title can be used as collateral for credit and is, with respect to credit facilities, comparable to freehold. In order to upgrade to freehold, the individual plots have to be resurveyed according to the applicable laws relating to surveying and subdivision of land.¹⁷ It is assumed that the conversion from landhold to freehold would be less costly than registering freehold directly. In order to upgrade, at least 75% of the members have to agree, and the local authority may compensate those who refuse to upgrade and sell the *erven* to interested outsiders.¹⁸

The FLTS was piloted in Windhoek, Rundu and Oshakati, and gained international attention because of its innovative character. Hackenborch and Kozonguizi assessed the pilots and concluded (from expert interviews without a field survey) that land survey was being done without registration, and was raising expectations on tenure security, leading to improvements to homes.¹⁹ The improvement of buildings can also be attributed to the fact that OTC may grant development permission when a plot is surveyed.

Lankhorst and Veldman assessed the potential of FLTS in Otjiwarongo (where FLTS was not piloted), and argued that conditions were not favorable there or nation-wide, because of the difficulty of establishing decentralised offices and services. Instead, they proposed to bolster extra-legal practices, like exempting the 300 m² rule (the stipulated minimum plot size), and managing layout problems at micro level.²⁰ Such measures would facilitate upgrading (like building permission, services construction), and improve perceived tenure security, but the *de jure* tenure security will not change. They underscore the advantages of extra-legality, an aspect often ignored in current literature. Results on the pilot projects in Oshakati, however, are not in the public domain, hence the present study.²¹

3 Land tenure in Oshakati

Oshakati, founded as recently as 1966, is the regional capital of Oshana region, within the jurisdiction of Owambo Traditional Authority.²² Its

¹⁷ Flexible Land Tenure Bill 4th draft 2004 sec 15 (2).

¹⁸ Flexible Land Tenure Bill (n 17 above) secs 14(2), 15(4) & (5).

¹⁹ K Hackenborch & GK Kozonguizi *Security of tenure for urban areas in Namibia* (2005) 24.

²⁰ M Lankhorst & M Veldman 'Regulating or deregulating informal land tenure? A Namibian case study on the prospects of improving tenure security under the Flexible Land Tenure Bill' in JM Ubink *et al* (n 9 above).

²¹ MM Mooya & CE Cloete 'Property rights, land markets and poverty in Namibia's "extralegal" settlements: an institutional approach' (2007) 3(1) *Global Urban Development* 14.

²² Oshakati means center in the local Owambo language, as the town is regarded as the center of all Owamboland; L Hangula 'The Oshakati Human Settlement Improvement Project: The Town of Oshakati: A Historical Background' (1993) 8. Project report.

population grew from 2950 in 1970²³ to an estimated 42,000 in 2005.²⁴ An important physical characteristic of Oshakati is the existence of *oshanas* (low-lying areas prone to flooding), which cover an estimated 50% of the total area and limit the available land for urban expansion, but are already partly built-up by informal settlers.²⁵ Annually since 2008 Oshakati has been flooded severely, with many houses flooded and casualties reported.²⁶ The OTC responded by announcing that people in informal settlements might be relocated to higher areas, and those in informal settlements were no longer allowed to develop, or even rebuild damaged buildings. Official plot allocation and development of services in informal settlements was stopped.

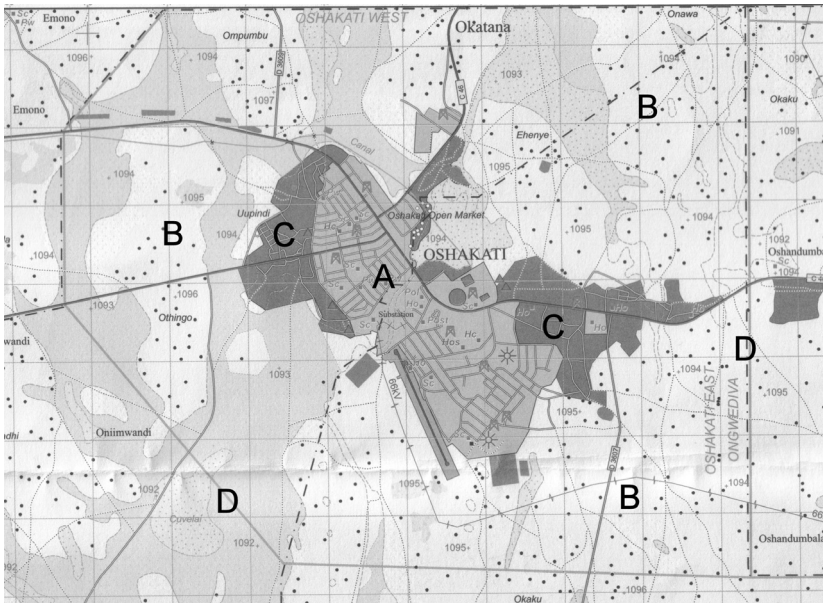


Figure 3: Topographic map Oshakati (1996)²⁷ ©Ministry of Lands and Resettlement, Namibia

²³ L Hangula (n 22 above) 25.
²⁴ Legal Assistance Centre (n 12 above) 10.
²⁵ Urban Dynamics 'Oshakati Structure Plan' (2001) 30. See The First Namibian National Development Plan published in 1995.
²⁶ See The Namibian 'North under water' 13 February 2009 <http://allafrica.com/stories/200902130439.html> (accessed 1 September 2010); The Namibian 'Oshakati floodwater recedes' 13 April 2010 <http://allafrica.com/stories/201004130730.html> (accessed 1 September 2010).
²⁷ Original in full color, original scale 1:50:000 (figure not to scale).

In Oshakati, one can distinguish three main land tenure systems (as for all Namibia), which are discussed below.

3.1 Statutory tenure

Statutory tenure in Oshakati deals with urban land where standard concepts of state, municipal and private ownership apply within proclaimed boundaries under statutory law.²⁸ The most significant appearance of statutory tenure is the area where private ownership applies, displayed on the topographic map as Built-up area (area A in figure 3). Most plots are held under freehold registered at the Registry of Deeds of the Ministry of Lands and Resettlement (MLR) in Windhoek. The conditions of the Lands and Deeds Registry Act and the Land Survey Act apply. Vacant plots can be sold to the public under freehold, with transactions handled by the Local Property Office of OTC. Around 1140 freehold plots (also called *erven* [plural] or *erf* [singular]) were registered in Oshakati in 2001.²⁹ Besides the freehold areas, areas with traditional huts (also called homesteads, see areas B in figure 3) and informal settlements (see areas C in figure 3) are subject to statutory tenure, although other tenure systems play a significant role.

3.2 Customary tenure

Around 40% of the territory of Namibia, the so-called communal areas, is governed by traditional authorities, where customary tenure applies. Mostly use rights are given for residential and agricultural uses, and the national government holds the land in trust for the indigenous communities.³⁰ People live in homesteads; a group of which are represented by a traditional headman.

Before Independence, the freehold areas of Oshakati were surrounded by the communal areas. Over time, settlements have developed on these communal areas near the town, and settlers normally asked permission from the traditional headman to settle and built a residential house. The informal settlements were thus legally developed under control of the traditional authority, and can be regarded as customary settlements, although in literature are referred to as informal. The former colonial administration discouraged black urbanisation, and land ownership by blacks was not permitted.³¹

Oshakati, like other towns in northern Namibia, grew rapidly in the post-Independence period, especially in the communal areas, and in 1993,

²⁸ Legal Assistance Centre (n 12 above) 18.

²⁹ Urban Dynamics (n 25 above) 25.

³⁰ Legal Assistance Centre (n 12 above) 18.

³¹ Legal Assistance Centre (n 12 above) 2.

through the Local Authorities Act of 1992, Oshakati was proclaimed townland.³² In figure 3, the communal areas which were proclaimed townland are denoted as B, and the townland boundary as D. From the moment of proclamation, the area fell under the jurisdiction of OTC, and so the official land tenure regime suddenly changed from customary into statutory tenure.³³ Thus the OTC got control over rural or unused land and existing informal settlements, and the traditional people and informal settlers were suddenly subject to statutory tenure, liable to register with the local authority and to pay a monthly plot rent.³⁴

The conversion of customary into statutory tenure did not end customary and informal practices. The traditional authority continued to exist for communal areas outside the townland boundary, and the traditional institutions within the townland boundary mostly remained intact. Examples were found during fieldwork:

- Cattle owned by the homesteads walking freely through informal settlements, sometimes destroying gardens and other property. Cattle walking freely are a customary right, but not recognised under statutory tenure.
- Informal headmen exist within some informal settlements, are still recognised by the community, and have a role in resolving land disputes. Asked who has the final authority over land, one traditional headman replied: 'I am the one with the final authority, but the municipality is the one that has the most.' He was keeping a land register, for both the homesteads and the informal settlers within his area.

3.3 Informal tenure

Informal tenure is the result of informal land acquisition, and the Namibia Housing Action Group (NHAG) estimates that currently 130,000 people live in informal settlements in Namibia. There are about ten informal

³² S Hamata *et al* *A socio-economic assessment of the enclosure of communal land within the townland boundaries of Oshakati and Ongwediva, and the relocation of Ndama settlement in Rundu* (1996) 3. The Local Authority Act defines 'townlands' as the land within a local authority area situated outside the boundaries of any approved township which has been set aside for the mutual benefit of the residents in its area, and for purposes of pasturage, water supply, aerodromes, explosive magazines, sanitary and refuse deposits or other public purposes or the extension of such township or the establishment of other approved townships.

³³ Article 3(a) of the Local Authority Act reads: If the area of any township or village management area established or purporting to have been established by or under any law on the establishment of townships or village management boards on communal land is, in terms of subsection (1), declared to be, or, in terms of subsection (5), deemed to have been declared to be, a municipality, town or village, the assets used in relation to such township or village management area and all rights, liabilities and obligations connected with such assets shall vest in the municipal council, town council or village council of such municipality, town or village, as the case may be, to such extent and as from such date as may be determined by the Minister.

³⁴ OH Fjeldstad *et al* 'Local governance, urban poverty and service delivery in Namibia' (2005) 16. Report prepared under the auspices of the Chair Michelsen Institute.

settlements in Oshakati (denoted as C in figure 3), most dating from the 1960's and 1970's, first when land was under control of the traditional authority and since 1993 under control of the OTC. The characteristics of these informal settlements are discussed in section 4(3). OTC faces challenges both to manage and control urban development, with measures like eviction or relocation of illegal settlers, managing urban expansion and formalising the existing informal settlements.

4 Tenure-related urban processes

4.1 Eviction/relocation

Eviction and relocation are possible measures for a local authority council to deal with informal settlements, but have a large impact on the livelihoods of those affected, and contribute to higher levels of perceived tenure insecurity.

Informal settlement dwellers are reported to be 'accepted' by Namibian authorities, although the ones living in so-called impermanent houses (usually iron shacks) are particularly vulnerable to eviction.³⁵ COHRE reported on one eviction in an urban area within the period 2003-2006.³⁶ LAC, however, found that:

Eviction is uncommon in Windhoek, it is usually due to water and electricity payment arrears continuing for long periods.³⁷

In one news article, homes were reported to be bulldozed,³⁸ and eviction of tenants by landlords seems to be frequent.

The field interviews found that some respondents knew about evictions, which turned out to be relocations of illegal settlers by OTC to more suitable areas, either because they have settled illegally, because the settlement is re-zoned for other purposes (like a business area), or because the land is prone to flooding. In such relocations, no cash compensation was offered, but those relocated were offered a new place with transport assistance to move (often the shacks are taken and rebuilt). Only people with permanent buildings approved by OTC or the traditional homesteads are entitled to cash compensation when relocated. One relocation area was visited during the fieldwork, and was found to have been surveyed and plots demarcated, but people were not allowed to build permanent structures, so continued to stay in shacks.

³⁵ Fjeldstad *et al* (n 34 above) 16.

³⁶ Centre on Housing Rights & Eviction (COHRE) 'Global survey on forced evictions, violations of human rights' (2006) 26.

³⁷ Legal Assistance Centre (n 12 above) 40.

³⁸ 'Opuwo Homes bulldozed: Otuzemba residents homeless after council action' *The Namibian Sun* 31 July 2008.

Illegal settlers interviewed were confident that they could stay at their place, but some said that they felt threatened by the OTC. They were aware of the possibilities of relocation as they knew of such council actions. One relocated resident felt more secure, having been relocated once.

4.2 Urban expansion

For formal urban development, OTC has to follow the statutory acts, which lead to the sale of freehold plots. It includes the Town Planning Ordinance and Township and Division of Land Ordinance requiring approval from the Namibian Planning Board and the Surveyor-General.

When the local authority needs land for development, it first has to relocate and compensate the homesteads. In the early years of Independence, such practices were viewed by the local community as continuing colonialism and exploitation of the peasants by the development planners.³⁹

Although many people hold the view that the state owns such land and should be able to deal with it as it sees fit, the Constitution nevertheless requires that it is necessary to formally acquire the land rights that certain citizens hold in relation to it.⁴⁰

Where homesteads are relocated, compensation (set by MLR) is considered to be low. Land made available in this way can be subdivided according to the rules and made available as freehold plots, but poor people, the majority in Oshakati, cannot afford to buy them and plots are made available by the OTC, surveyed and registered at the Planning Department, but not subject to statutory planning procedures.

The field research sought to interview people in the peri-urban areas over their access to land and awareness of tenure status, but access was not allowed because the OTC was in the process of negotiating their relocation. Only one headman was interviewed, who was still influential on land issues to both OTC and inhabitants of his former area of jurisdiction (both the traditional farmers and informal settlers).

4.3 Formalisation

The majority of Oshakati's people live in informal settlements, which OTC aims to formalise. A standard procedure does not exist, but the most basic approach is to apply house numbering, and register inhabitants for election

³⁹ For more historical information and socio-economic effects of the proclamation on Oshakati, see Hamata *et al* (n 36 above).

⁴⁰ UN Habitat *Land Tenure, Housing Rights and Gender in Namibia* (2005) 39.

and census purposes, although without affecting legal tenure status. The first significant steps towards formalisation were carried out within the Oshakati Human Settlement Improvement Project (OHSIP) between 1993 and 1996.

That project aimed at improving livelihoods in the informal settlements, especially through the construction of services and development of small businesses. A key role was given to Community Development Committees of settlement representatives, who were given a role in land allocation. Traditional leaders joined the committees later to reduce ambiguities and confusion on land allocation, and the headman became the chairman of the land allocation sub-committee.⁴¹ Some such committees still exist, helping the needs of the people and cooperating with OTC. Some members indicated that they have no more powers to allocate land, others claimed that they still have the power, but there is no more land available.

Over time, not all households have been formalised and the influx of illegal settlers continues, so a new tenure category was suggested by Urban Dynamics, subdividing the informal component into a legal and illegal component. People in legal informal settlements have permission from OTC to reside, and are registered at OTC Planning Department by name and plot or house number, the plot being part of an *erf* (the legal entity under statutory tenure). Plot numbers are issued when the area is planned and surveyed by order of the Council, and plot-holders should pay land rent to OTC. I refer to these arrangements as council leases, although there are no formal lease agreements. Those in informal settlements without a council lease are considered illegal. Urban Dynamics estimated the number of households in legal informal settlements as 4120, in illegal informal settlements as 875.⁴²

People may apply for development permission to erect permanent structures. An example of development permission given by OTC reads as follows:

According to our records Mr ... has right on this plot no ... at Oneshila, but the plot in question is not yet proclaimed. The plot is still a part of Portion of Erf 1373, Extension2-Oshakati. He has the right to develop the above erf.⁴³

⁴¹ B Frayne *et al* 'Urban development and community participation in Oshakati, Northern Namibia' in A Tostensen *et al* (eds) *Associational life in African cities: popular responses to the urban crisis* (2001) 284.

⁴² Urban Dynamics (n 25 above) 26.

⁴³ Letter from Planning Department, Oshakati Town Council on 13 September 2006.

Only such plots are eligible for the construction of services (individual water, sewerage and electricity connections). The distribution within each land category is given in table 1.⁴⁴

Tenure category	Estimated population	% of population
Formal residential: freehold	7918	22,1
Informal residential: legal	21425	59,9
Informal residential: illegal	4551	12,7
Homesteads	1875	5,2
Total	35769	100

Table 1: Population and tenure in Oshakati (derived from Urban Dynamics (n 28 above))

5 Tenure-related projects

5.1 Flexible Land Tenure System (FLTS)

The FLTS concept resulted from the formalisation exercise within OHSIP, and was piloted from 2000, in existing settlements and on vacant urban land. Two pilots were carried out in Oshakati, aimed to test the technicalities of the surveying exercise.⁴⁵ The settlements were surveyed and plots demarcated, although it is unclear whether any documentary evidence was given to the households (experts and inhabitants contradict on this matter). Two respondents mentioned that they paid land rent, but, surprisingly, some community members did not know about the existence of the FLTS.

Four FLTS pilots were carried out by a land surveyor (seconded from MLR to OTC) after 2000 in Oshakati, and an estimated 2000 individual 'landhold' plots were surveyed (out of 3600-5400 households eligible), but no association was set up nor starter titles issued. As FLTS has not been enacted yet, no formal arrangements could be made after the pilots, no title certificates issued, and cadastral maps not been maintained.⁴⁶ So the pilots were more or less surveying exercises, in anticipation of an enactment of FLTS. Although the pilots did not cover all aspects of FLTS, the people involved appreciated the exercise, and some got permission to build permanent structures after the land was surveyed. People paid charges to

⁴⁴ Urban Dynamics (n 25 above) 12.

⁴⁵ J Gold 'The flexible land tenure system in Namibia: enabling sustainable options to urban poor' (2006) 29-30. Paper presented at the Africa Region CASLE Conference, 1417 March 2006, Bagamoyo, Tanzania.

⁴⁶ Hackenborch & Kozonguizi (n 19 above) 39.

OTC, although not all of them paid land rent (those who have are effectively entering into a council lease).

5.2 Saving schemes

Saving schemes allow community-based organisations to improve the livelihoods of its members, with members paying fixed contributions on a regular basis. A saving scheme can support small businesses or provide access to land and housing, and operate both in urban and rural areas. They may be linked to umbrella organisations, of which the Namibia Housing Action Group (NHAG) and Shack Dweller Federation of Namibia (SDFN) are the largest. The NHAG was established in 1992 as an umbrella organisation for low-income housing groups, while SDFN started in 1998 with 30 saving schemes from NHAG.⁴⁷ It was decided to separate support (technical, legal and financial) through NHAG from community organisation and empowerment through SDFN. The latest available annual report discloses that:⁴⁸

- In 2008, there were 587 SDFN saving schemes (138 in Windhoek), representing around 18 000 members. (SDFN saving groups may have other objectives than providing access to land, and are located in both rural and urban areas.)
- In some regions, the number of members was falling, attributed to slow land delivery processes causing impatience and withdrawals.
- The total value of savings in 2008 was reported to be N\$ 4.8 million (US 375 000), of which 44% were land savings.
- SDFN also manages a Loan Fund (Twahangana Fund). In 2008, 317 beneficiaries received a total of housing loans of about N\$ 5.6 million (US 440 000).
- In 2008 3,530 members secured tenure in Namibia, mostly as community-managed land tenure.

The general procedure for a SDFN saving scheme dealing with land and housing development is as follows: A saving group starts when a community is formed after one or more meetings. All members sign a constitution, which regulate the group's affairs and describe each member's rights and duties. The scheme will apply for a group *erf* from the council, delivered either as freehold plot (comparable to a *blockerf* within FLTS) or as council land. Members will sign an agreement for property rights with the association. A layout plan is prepared, plots surveyed, and the Land Committee of the association allocates plots to members, who can then apply for a loan (either through Twahangana Fund or other funds). When the loans are issued, every member can build their own

⁴⁷ UN Habitat (n 40 above) 35.

⁴⁸ Namibia Housing Action Group 'Annual report Shack Dweller Federation of Namibia (SDFN) & Namibia Housing Action Group 1 July 2007 to 30 June 2008' (2009).

house. At the last stage, services should be provided, either by the council or by the members themselves.⁴⁹

In Oshakati, there are 18 SDFN saving schemes, with 13 to 79 members per scheme. Some members are trained in FLTS-principles, and try to use it in their projects, but, according to the SDFN-coordinator, knowledge on land issues by the people is limited. There is one saving scheme in Oshakati dealing with access to land. The members of this saving scheme originated from other groups, formed a new one to develop their own area, and got a block of land from OTC. With help from NHAG and the MLR land surveyor at OTC, a plan with individual plots was made, and the intention was to register the block as freehold. The savings scheme holds weekly meetings, so that members are well informed (and gave similar answers to most questions). They did not pay land rent, only water bills and sometimes charges for waste collection. The members of the saving scheme got building permission from OTC, a document seen as an important proof of ownership of the building and tenure security on the land. Once again, the land is assumed to be delivered under a council lease.

Fear of relocation was especially strongly articulated within the saving scheme. Building permission was given before the severe flooding in 2008. When media announced the council's decision that people living in flood-prone areas would be relocated to higher grounds, members of the saving scheme consulted SDFN, which established from the Council that relocation was possible, but members of the saving scheme continued to build and moved in to their new homes in the period August-November 2008.

6 Analysis

The tenure systems in the peri-urban areas have been influenced by the following developments:

- Conversion of customary tenure;
- Relocation of illegal settlers (FLTS);
- Formalisation in existing settlements (both OHSIP and FLTS);
- Urban development (saving scheme, FLTS).

Four tenure regimes in Oshakati can be distinguished: formal, informal, illegal and urban saving regimes.

⁴⁹ Mooya & Cloete (n 21 above) 438 refer to group rights, although within the group the rights are individualised through these agreements.

6.1 Formal

This comprises land formerly already under Oshakati Town or formally planned urban expansions after Independence. Plots are sold to the public under freehold title, in conformity with the laws and policies concerning land survey and registration and urban planning, and people build permanent homes, subject to development permission by the council.

6.2 Informal

This is held by the council and given out to people under tenancy agreements. People pay land rent and/or other charges to OTC. The land may be surveyed, and may be located in existing settlements or in urban extensions (some of them temporary relocation areas after the flooding in 2008). Most people build permanent buildings, subject to development approval from OTC. In the one relocation area visited during fieldwork, people were not allowed to erect permanent structures.

A special case within informal tenure is the saving scheme. The council has delivered land under a council lease to the saving scheme, although freehold title is envisaged. The saving scheme made individual land right agreements with all its members. At the time of fieldwork, people did not pay land rent, only for water at OTC. All members erected permanent buildings for which development permits were issued.

6.3 Informal with customary influences

The people in traditional homesteads live on council land and pay land rent to OTC, under a council lease with OTC. When the land is needed for urban expansion, the people are relocated and compensated. If they wish, and fits the layout, they can be given a residential plot at the location of their homestead.

6.4 Illegal

People without land who do not want to rent, erect shacks at the fringe of informal settlements or at empty spaces within. They do not pay charges to OTC, which does not recognise them as inhabitants (although the shacks may have been numbered for census or election purposes). In case of urban expansion, they will be evicted or relocated, without any compensation.

Table 2 summarises the relation between land tenure and tenure security through the continuum of land rights. As people from homesteads were not interviewed and formal areas were outside the scope of the

research, they are not included in the table. Existing informal settlements were also excluded, and only the FLTS-pilots were investigated.

Concerning informal tenure, there was a wide range in recognition by OTC, through administering house numbers, surveying plots, allowing permanent buildings, and raising land rent and other charges. These variations might result in variations in perceptions of tenure security as well. The legal tenure security for the council leases is considered low, and not defined in national laws and regulations.

	Illegal	FLTS-pilots (council lease)	Saving scheme (council lease)
Perceived tenure security	Little: people feel not recognised, fear of being relocated	Sufficient; although fear of being relocated due to flooding risk	High because of development approval and land right agreement; although fear of being relocated due to flooding risk
Legal tenure security	None	Low	Low

Table 2: Continuum of land rights in peri-urban Oshakati (the author)

FLTS and saving schemes are both community-based systems. Potential land holders have to join the community, which forms the base for success, as is proved with the savings scheme. Because savings are collected almost daily, and there are weekly meetings, people are informed and help each other. People are also stimulated to share experiences with other saving schemes, at regional, national and international level. Those who want to settle individually, can either do so illegally or approach OTC for the (unlikely) provision of plots (either freehold or council lease).

7 Conclusions

The key problem is that poor people, who are the majority in Oshakati, cannot afford to buy formal freehold plots, but must resort to informal or illegal settlement. Although the whole of Oshakati is under statutory tenure, customary and informal structures are also in place, a clear example of legal pluralism which allow people to access land informally.

7.1 Tenure security in Oshakati

Statutory tenure is the official tenure regime within the jurisdiction of Oshakati, but underneath are significant influences from customary tenure

and informal tenure. All tenure regimes co-exist, especially in the peri-urban areas, and OTC tries, within its limited resources, to provide tenure security and development opportunities to its inhabitants. Due to the fact that the formal procedures are expensive and lengthy, OTC has resorted to some kind of informal planning system, with simple layouts and surveying to create plots against which permission for permanent buildings can be given, and council charges for land and services collected. However, OTC cannot fully cope with the continuing influx of illegal settlers and the already existing non-formalised settlers. Within the peri-urban areas in Oshakati, implementation of the land registration system is incomplete. Nevertheless, layouts and land surveying in some areas have increased perceived tenure security among the beneficiaries, but the announcement by OTC that all flooding-prone areas could be relocated had the opposite effect.

The saving scheme has succeeded in providing land and housing to the poor. Through the provision of land to the scheme, the land rights agreement between the association and each individual, the provision of loans and the development permission issued, people managed to develop their own house in a secure way. Even here, however, the danger of relocation had negative effects on perceived tenure security. Since no freehold title had been issued, the legal security is regarded as low. With freehold, the group would have a stronger position against relocation. Saving schemes cannot be seen as an overall solution, as their numbers are too small and depend on individual willingness to join, while slow land delivery to the groups is also a problem.

7.2 The Flexible Land Tenure System

The FLTS pilots have contributed to peri-urban development, but so far only the surveying stage has been successfully applied. Although the Flexible Land Tenure Bill has not been enacted for over a decade, the delay did not significantly affect perceived tenure security (most respondents were unaware of the Bill). The FLTS can, when enacted, fill the legal gap between the informal land tenure and freehold tenure, and increase legal tenure security. The saving schemes operate on FLTS-principles, without the enactment of the Bill. When the saving scheme has acquired a freehold title to the *blockerf*, there are no barriers for the members to subdivide and get individual freehold titles. In other words, what the Bill envisages, is already being achieved in reality. The main difference seems to be in perception: the saving schemes try to provide for security and improvement of livelihoods for its members, whereas the FLTS forms an intermediate step towards freehold title, encouraged by the Namibian government. Additionally, saving schemes fully depend on private initiatives, in most cases backup by CBOs and NGOs, whereas local authorities may establish as many starter and/or land hold schemes as they find necessary. The crux of FLTS seems to be reduced costs of surveying

and registration, and by-passing costly and lengthy planning procedures. An alternative way might be to subsidise costs of land acquisition for those on lower incomes, but it is not known if such alternatives have been attempted.

The current Bill provides for upgrading schemes to individual titles. In both cases, more than 75% of the right holders have to agree to upgrade. The ones who don't agree will be granted a starter title in a similar scheme, or paid fair compensation (in case of a land-hold scheme). This puts unfair pressure to people to agree, otherwise they have to leave their house, almost comparable to expropriation and against the aims of FLTS.

FLTS creates local land registers at local authorities. In general, local registries are preferred, as local staff knows the local situation and beneficiaries do not have to travel far. A problem might be the requirement that a person granted a starter title may not have any immovable property or landhold title in Namibia, which requires a search through all local land rights offices and the Deeds Registry in Windhoek for all starter title applications.

If there is eventual enactment and implementation, challenges lie ahead:

- It is questionable if all existing settlements can or should be formalised through FLTS. Many *blockerven* have to be registered as freehold, all settlers within a *blockerf* should join the starter or land hold association to participate. This also holds for the FLTS-pilots which have been carried out, no associations have been formed. There are no rules should the layout of *erven* need adjusting.
- Land Right Offices would need funding, personnel, and equipment.
- Other than those in saving schemes, people are not yet familiar with FLTS. Amoo and Skeffers have assessed that the rule of law exists in Namibia, but is hampered by lack of education and information amongst much of the population.⁵⁰ Raising awareness on land rights and FLTS will therefore contribute to improved rule of law as well.

7.3 Conversion of customary tenure into statutory tenure

In peri-urban Oshakati customary tenure was abolished and replaced with statutory tenure at a stroke of the pen. OTC, however, was incapable of monitoring and controlling the land in their jurisdiction, and customary structures remained intact, with traditional leaders still executing powers in land issues.

⁵⁰ SK Amoo & I Skeffers 'The rule of law in Namibia' in N Horn & A Bösl (eds) *Human rights and the rule of law in Namibia* (2006) 37-38.

Mapaure has examined the legal aspects of proclaiming towns, focusing upon the Communal Land Reform Act of 2003, with a case study of the Helao Nafidi town, where the traditional authority and local authority clashed over land allocation powers.⁵¹ Legally the traditional authority loses power when communal land is proclaimed townland, but in reality local people still regard headmen as representatives of the area, and the town council feels the need to cooperate with them.

8 The way forward

Both saving schemes and the principles of FLTS (simple procedures, upgradable titles) have potential application in other countries, and saving schemes are already internationally promoted through Shack Dwellers International. When implementing a pro-poor land registration system, the main option is to choose between incremental upgrading and full titling within the existing statutory framework. Namibia has chosen incremental upgrading, while the government continues to implement land registration for specific tenure regimes: the statutory freehold systems in rural and urban areas for the well-to-do; communal land registration for the poorer rural communities; and FLTS for the poorer urban communities. It is hoped that these measures will alleviate poverty and give the poor more secure land rights. An alternative would be to design and implement a unified land registration system, as advocated for Zambia by Mulolwa.⁵²

The Namibia case has shown that, due to the existence of legal pluralism, the realities of land ownership and control are complex and need to be understood before a land registration system can be designed. Awareness and knowledge by the targeted people about land registration and its effects are indispensable, so that they can make proper decisions concerning acquisition of land rights and benefit from land registration.

⁵¹ C Mapaure 'Jurisprudential aspects of proclaiming towns in communal areas in Namibia' (2009) 1 (2) *Namibia Law Journal* 23.

⁵² A Mulolwa 'Integrated land delivery: towards improving land administration in Zambia' unpublished PhD thesis, Delft University of Technology, 2002 3