

Social Tenure Based on Intimacy – Avoiding Family Disasters: South African Marital Contracts as an Innovative Pro-Poor Land Tool

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SUMMARY

The Social Tenure Domain Model currently being developed by the Global Land Tool Network emphasizes the need to find innovative land tools that can function in a pro-poor way. One such tool that has not previously been explored is the use of marital and cohabitation agreements to secure tenure. Private agreements can go beyond a legal arrangement between spouses to record and entrench diversified forms of land rights that protect third parties. It is possible to use such agreements to secure housing rights for the entire household, to agree succession of land, and to agree to alternative conflict resolution procedures. Such agreements can take cognizance of both formal and informal strategies used by the poor to secure tenure, rather than being narrowly focussed on formal regularisation processes alone. It is possible to develop a model pro-poor prenuptial agreement under South African law that complies with constitutional principles, for use by couples in State subsidized housing. A similar construct could be replicated elsewhere in the region. Public trust in land administration systems is likely to be enhanced by the use of such privately determined records of rights, although legal aid remains a necessity for their implementation. Formal marital agreements are recorded in formal registries, meaning they are able to interface with land ownership records and are accessible to citizens as a public document. They can reduce fraud and eviction arising from dysfunctional family relationships and are fit for the purpose of recording family ties pre-conflict, in a manner that can assist with the management of family conflicts over land and housing after they arise.

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