The Abandonment of Landownership:

A Proposed Model for Regulated Exit

By
Richard Henry Cramer (CRMRIC002)

Thesis submitted to the Faculty of Law, University of Cape Town in fulfilment of the requirements for the degree of Doctor of Philosophy

Date of Submission: 16 September 2020

Supervisor: Professor Hanri Mostert, DST/NRF SARChI Research Chair: Mineral Law in Africa, Department of Private Law, Faculty of Law, University of Cape Town

MINERAL LAW
IN AFRICA

mlia@uct.ac.za www.mlia.uct.ac.za

In memory of Peter & Barbara Cramer, and Patrick Hayes.

Declaration

1. I know that plagiarism is wrong. Plagiarism is to use another's work and pretend that it is one's own.

2. I have used the footnoting convention for citation and referencing. Each contribution to, and quotation in, this thesis from the work(s) of other people has been attributed and has been cited and referenced.

3. This thesis is my own work.

4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

Signed by candidate

Richard Henry Cramer

Declaration on Inclusion of Publications in a PhD Thesis

I confirm that I have been granted permission by the University of Cape Town's Doctoral Degrees Board to include the following publication(s) in my PhD thesis, and where co-authorships are involved, my co-authors have agreed that I may include the publication(s):

a. R Cramer "The Abandonment of Landownership in South African and Swiss Law" (2017) 134 *SALJ* 870.

Signature: Signed by candidate Date: 16/09/2020

Student Name: Richard Cramer Student Number: CRMRIC002

Acknowledgements

The writing of this thesis has been a difficult journey in many respects. There are so many people to thank for making this thesis possible. If I forgot to mention anyone, I am incredibly sorry.

It is essential to acknowledge the financial support which made this research possible. In this respect, I must extend my thanks to the National Research Foundation; the Swiss National Science Foundation; and the Faculty of Law at the University of Cape Town. The opinions expressed in this thesis are my own, and should not be attributed to any of these institutions.

My deepest gratitude must be extended to Professor Ruth Arnet, my host for the Swiss-South African Joint Research Programme, and Katharina Tschopp, for facilitating my fruitful and rewarding research visit to Lehrstuhl Arnet at the University of Zurich. Further thanks must be extended to the members of Professor Arnet's team during my stay in Zurich – Anne Schnierer, Lena Manz, Christian Doster and Felix Tuchschmid – for making me feel welcome and supported for the duration of my visit.

I must also extend my deepest gratitude to Mr Malcolm Combe (now at the University of Strathclyde) for his invitation to conduct a research visit to the University of Aberdeen, as well as Professor Robin Evans-Jones for allowing me the use of his office for the duration of my stay in Aberdeen. Malcolm's engagement with me on the topic of the abandonment of landownership in Scots law was critical for the direction in which this thesis went.

I must also extend my thanks to the members of the Professor Hanri Mostert's postgraduate writing circle for their continued feedback over the years. Their dedicated reading of my work is greatly appreciated. Special thanks must be extended to Dr Louie van Schalkwyk and Dr Cheri-Leigh Young for their support and critical feedback during the process of writing this thesis.

Professor Hanri Mostert, my supervisor for my final-year LLB research paper, LLM, and finally this PhD, words cannot convey my gratitude for all the opportunities with which you have provided me over the years. Without your continued support, guidance, and supervision, none of this would have been possible.

Without the continued support of family and friends, I would never have had the strength to make it to the end of this journey. There are too many of you to name individually, but I trust you know who you are.

Finally, I must thank my late parents, Peter and Barbara Cramer. Your love and support will never be forgotten. I love you both and miss you every day.

Abstract

The question whether it is possible to abandon landownership is unresolved in South African law. The subject has only rarely been the subject of attention by scholars, with legislation and existing case law providing little in the way of clear guidance. This lack of clarity is obviously not ideal. In South Africa landowners may find themselves burdened with the ownership of land which has accrued a negative value.

This thesis seeks to engage with the question on a theoretical level, including to provide answers to practical problems in the South African landownership context. Ultimately two primary questions must be answered:

1. Is the abandonment of landownership possible in the South African legal framework?
2. Should the abandonment of landownership be permitted, and if so, under what circumstances?

The first question is evaluated in light of existing common-law principles, case law, as well as legislation such as the Deeds Registries Act 47 of 1937. However, the second question will be the primary focus of the thesis. Through the lens of the social-obligation norm of property as conceptualised by Gregory Alexander, as well as comparative studies of Swiss and Scots law, the thesis explores the viability of a right to abandon landownership in South African law.

The thesis argues that the abandonment of landownership in South Africa is not possible in the prevailing legal framework. Furthermore, an unrestricted right to abandon is not viable in the South African socio-economic context. However, landowners who find themselves burdened with land which has accrued a negative value for which they are not at fault may require some form of regulated exit from that ownership. The thesis makes suggestions for legislative law reform in this regard, to provide balance between the interests of landowners and the wider community.

Table of Contents

Table of Abbreviations

C	The Code of Justinian
C.Th	The Theodosian Code
D	The Digest of Justinian
Inst	The Institutes of Justinian
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
NHRA	National Heritage Resources Development Act 25 of 1999
PAJA	Promotion of Administrative Justice Act 3 of 2000
SPLUMA	Spatial Planning and Land Use Development Act 16 of 2013

For information on the translated editions of Roman and Roman-Dutch law sources used, please refer to the bibliography.

Chapter 1: Introduction

1. Introduction

One rarely acquires ownership inadvertently. Whether property is acquired with or without the assistance of a previous holder, it requires a conscious decision from the new holder to own.[1] In many ways, abandonment is the antithesis of ownership. Loss of control over property is not always deliberate, nor calculated. In particular, the circumstances giving rise to the (informal) abandonment of land are often beyond the control of the landowner.[2]

The subject of land has been an increasingly tense one in South Africa, pitting the demands for the protection of property rights by holders, against the legitimate

[1] Where property is acquired with the cooperation or assistance of the previous holder, a valid real agreement is required. A valid real agreement entails, among other things, an "intention of the transferor to transfer a particular real right to the transferee and the intention of the transferee to acquire that right". See G Muller, R Brits, JM Pienaar & Z Boggenpoel *Silberberg and Schoeman's The Law of Property* 6 ed (2019) 85-86; CG van der Merwe *Sakereg* (1989) 312-314; CG van der Merwe & A Pope "Part III – Property" in F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 405 521; CG van der Merwe "Things" in WA Joubert (founding ed) *LAWSA 27* 2 ed (2014) para 212. See *Legator McKenna Inc v Shea* 2010 (1) SA 35 (SCA) para 22; *Quartermark Investments (Pty) Ltd v Mkhwanazi* 2014 (3) SA 96 (SCA) para 24.
Similarly, in the context of original modes of acquisition, an intention on the part of the owner is required for the acquisition of ownership, in most cases. For example, one would not acquire ownership through *occupatio* by taking physical possession of an unowned thing alone. This assumption of physical possession must be accompanied by an intention to acquire ownership of the thing in question. Muller et al *Silberberg* 155; Van der Merwe *Sakereg* 217; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 489; Van der Merwe "Things" in *LAWSA* para 171; *Underwater Construction and Salvage Co (Pty) Ltd v Bell* 1968 (4) SA 190 (C) 192D-G. In the context of acquisitive prescription, an intention to be owner is clearly necessary through the requirement that the acquirer act openly *as if owner*. Section 1 of the Prescription Act 68 of 1969; Muller et al *Silberberg* 181-183; Van der Merwe *Sakereg* 278; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 513-514; Van der Merwe "Things" in *LAWSA* para 194; *Morgenster 1711 (Pty) Ltd v De Kock NO* 2012 (3) SA 59 (WCC) para 14. Accession may appear to be an outlier, since one may acquire ownership unintentionally of a new composite whole where another party is responsible for joining the property, although this is ultimately achieved through the intentional ownership of the principal thing. See Muller et al *Silberberg* 160; Van der Merwe *Sakereg* 229-232; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 493; Van der Merwe "Things" in *LAWSA* para 181. See for example the case of *Khan v Minister of Law & Order* 1991 (3) SA 439 (T), in which the applicant was responsible for the joining of different car parts, some of which were from his 1985 model wreck, and some of which were from a stolen 1988 model. The court ultimately found that the 1988 model was the principal thing, rendering the owner of the 1988 model the owner of the new composite whole (443E-G).

[2] See the discussion of the mining, heritage building, and problem building contexts in Chapter 6 Section 3.

grievances and aspirations of those who have been denied security of tenure.[3] Recent moves by the South African government towards realising the possibility of expropriation without compensation (if such is not already possible in terms of the property clause of the Constitution[4]) have raised passions in this regard.[5] Despite the heated debate about the direction of land reform in South Africa, circumstances may still arise where some landowners may wish to divest themselves of such ownership.

Given that land is a finite resource, and much sought after, why would any landowner wish to abandon her property?[6] This thesis explores this question, along with the question of how immovable property may be abandoned (if at all). Most importantly,

---

[3] AJ van der Walt *Property in the Margins* (2009) 1ff; H Mostert & A Pope *The Principles of the Law of Property in South Africa* (2010) 339; G Alexander "The Social-Obligation Norm in American Property Law" (2009) 94 *Cornell Law Review* 745 784-785; F Michelman "Liberal Constitutionalism, Property Rights, and the Assault on Poverty" (2011) 22 *Stell LR* 706 721-722. This tension has become pronounced over the past year, as evidenced by the debate in the media. See B Cousins "Land Debate in SA Clouded" *Citizen* (14-03-2018) 14; P Dlamini "'No Expropriation of Land From Blacks'" *The Herald* (20-06-2019) 2; S Mtshali "Overwhelming Support for Land Grab Amendment" *Sunday Tribune* (22-07-2018) 4; S Feketha "Grounds Move on Private Property Fears" *Cape Argus* (16-08-2018) 9; Author Unknown "Participants Advocate for Land Seizure Move" *Sowetan* (10-12-2018) 9; B Phakathi "Committee Recommends Amending Constitution for Land Expropriation" (15-11-2018) *Business Day* <https://www.businesslive.co.za/bd/national/2018-11-15-committee-recommends-amending-constitution-for-land-expropriation/> (accessed 23-11-2018); B Phakathi "Parliament 'Will Oppose AfriForum's Bid to Halt Property Clause Amendment'" (21-11-2018) *Business Day* <https://www.businesslive.co.za/bd/national/2018-11-21-parliament-will-oppose-afriforums-bid-to-halt-property-clause-amendment/> (accessed 23-11-2018); M Merten "ANC's Executive Proposal on Expropriation Without Compensation Obscures Already Vast Ministerial Powers" (28-01-2020) *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-01-28-ancs-executive-proposal-on-expropriation-without-compensation-obscures-already-vast-ministerial-powers/> (accessed 30-01-2020); S Grootes "Land Issue: Once More at Front and Centre of the ANC's Internal Politics" (27-01-2020) *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-01-27-land-issue-once-more-at-front-and-centre-of-the-ancs-internal-politics/> (accessed 30-01-2020). See also the Draft Constitution Eighteenth Amendment Bill, 2019 (in Government Gazette 42902 of 13-12-2019).

[4] Section 25 of the Constitution of the Republic of South Africa, 1996. See AJ van der Walt *Constitutional Property Law* 3 ed (2011) 506; R Hall *The Land Question: What is the Answer?* (2018) unpublished public lecture presented at the University of the Western Cape, 02-08-2019; T Ngcukaitobi & M Bishop *The Constitutionality of Expropriation Without Compensation* (2018) unpublished paper presented at the *Constitutional Court Review IX Conference* hosted by Wits School of Law at the Human Rights Room, Old Fort, Constitution Hill, Braamfontein, Johannesburg, 2 August 2018. See also the conclusions of the Constitutional Review Committee: Constitutional Review Committee *Report of the Joint Constitutional Review Committee on the Possible Review of Section 25 of the Constitution* 15-11-2018. Available at <https://pmg.org.za/files/181115FinalReport.docx>. For a detailed overview of compensation for expropriation under the Constitution, see WJ du Plessis *Compensation for Expropriation under the Constitution* LLD thesis Stellenbosch University (2009).

[5] See the media sources listed in note 3 above.

[6] See R Cramer "The Abandonment of Landownership in South African and Swiss Law" (2017) 134 *SALJ* 870. Note on the aforementioned publication by the author: My Memorandum of Understanding with my supervisor, as well as obligations attaching to funding I received through the Swiss-South African Joint Research Programme to facilitate my comparative study, required me to publish from my doctoral research. The article referenced here is the result of the obligation to publish from my doctoral research.

this thesis considers the question as to whether abandonment of ownership in immovable property should be permitted, and under what circumstances.

In considering whether abandonment of immovable property should be permitted, this thesis also engages with the possibility of a regulated exit from landownership. Should unilateral abandonment not be a viable option for the termination of a relationship between an owner and her land, it is necessary to investigate whether some form of right to exit from ownership, in limited circumstances, should be permitted. Such a regulated exit, requiring the cooperation of legal authorities, would not be abandonment as commonly understood.[7] However, regulated exit may provide the best balance between the competing rights and interests of community and landowner. The thesis proposes what such a model of regulated exit, given effect to by statute and regulated by legal process, would look like.

2. Context

Land ownership comes with liabilities, risks, and responsibilities. A landowner is responsible for municipal rates and taxes, among other things.[8] Moreover, circumstances beyond the landowner's control may effectively deprive her of beneficial use of her property, and may even see such property accrue a negative value.[9] For

[7] See Chapter 2 which engages with the legal definition of abandonment. See in particular, see L Strahilevitz "The Right to Abandon" (2010) 158 U. Pa. L. Rev. 355; E Peñalver "The Illusory Right to Abandon" (2010) 109 *Michigan Law Review* 191.

[8] Section 2(1) of the Local Government: Municipal Property Rates Act 6 of 2004, for example, explicitly empowers municipalities to levy rates on property within its area.
Furthermore, outstanding rates and taxes will result in a restraint on the transfer of the landowner's property, as he will be unable to obtain a clearance certificate from the municipality. Without such a clearance certificate, indicating property rates and municipal service fees have been paid, the registrar of deeds may not register the transfer of the property. See section 118(1) of the Local Government: Municipal Systems Act 32 of 2000. This restriction on transfer applies regardless of whether the landowner himself incurred the debt, or even if he was unaware of the debt. This debt enforcement mechanism was found to be constitutional in *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC).

[9] In his seminal article on abandonment, Strahilevitz distinguishes between market value and subjective value. Property may have a positive market value while simultaneously having a negative subjective value, such as jewelry gifted by a former lover. Property may also have a positive subjective value while holding a negative market value, such as a family heirloom. Property that holds both a negative subject value and a negative market value (refuse, for example) would be that property that is most subject to abandonment. Land may fall within this category, due to contamination, or burdensome property taxes. See Strahilevitz (2010) *U. Pa. L. Rev.* 355 362-372.
Concerning the possibility of land accruing a negative value to an owner, see N Shoked "The Duty to Maintain" (2014) 64 *Duke Law Journal* 437. Shoked explains that for property to have a negative value, it "must do worse than offer no conceivable economic benefit". The property must constitute a burden, as a result of the duties that attach to the ownership of the land. Such duties are not limited to taxes

example, due to urban decay and its consequences, an owner may find herself in circumstances where the property's liability attaches to her, along with the inability to make use of the property in a commercially viable or any other beneficial way.[10] A further example exists in the context of heritage buildings, where a landowner may lose beneficial use of her property due to restrictions on the use and alteration thereof, while potentially being saddled with high maintenance costs.[11]

Absent restrictions on owners' ability to abandon or dispose of property, and prescriptions about remedial costs, the consequences of abandoned property would be externalised and passed on to society at large.[12] For example, tax resources are often redirected to remedy the consequences of illegal dumping,[13] and municipalities have to enact by-laws on problem buildings to combat the consequences of unmaintained, (informally) abandoned immovable property.[14]

(which may be negligible or even be calculated at zero due to the value of the property). The negative value of property, and land in particular, can only stem from a positive duty to maintain (441). Such a duty to maintain is not an external imposition to the property right, but an integral part thereof (463ff). Shoked is concerned with the context in the United States, but as will become clear in the discussion in Chapter 6 Section 3, his observations apply in the South African context as well.

[10] JC Sonnekus "Abandonnering van Eiendomsreg op Grond end Aanspreeklikheid vir Grondbelasting" (2004) *TSAR* 747 748.

[11] The relevant legislation in this respect is the National Heritage Resources Act 25 of 1999 (NHRA). It requires the acquisition of a permit to demolish or alter structures over 60 years old (section 34(1). Furthermore, it empowers heritage authorities to impose compulsory repair orders on owners of certain classes of heritage buildings (section 45). See the detailed discussion in Chapter 6 Section 3.2.

[12] Strahilevitz (2009-2010) *University of Pennsylvania Law Review* 372, 388.

[13] City of Cape Town *The Cost of Illegal Dumping* <http://resource.capetown.gov.za/documentcentre/Documents/Graphics%20and%20educational%20material/The%20cost%20of%20illegal%20dumping%20(PDF).pdf> (accessed 20-05-2019); A Watson "Gauteng's Illegal Dumping Scourge" *Citizen* (06-07-2015) 8; M Ntseku "City of Cape Town Spends from R110m to R120m Cleaning Up Illegal Dumping" (13-10-2019) *IOL* <https://www.iol.co.za/capeargus/news/city-of-cape-town-spends-from-r110m-to-r120m-cleaning-up-illegal-dumping-34679517> (accessed 15-10-2019).

[14] To combat the abandonment of buildings and shift responsibility onto registered owners and those who appear to be in control of buildings, the City of Johannesburg has introduced the By-law on Problem Properties, 2014. The By-law makes provision for criminal prosecution and fines of up to R300 000 for failure to comply with its provisions as well as notices issued in terms thereof (section 11). In addition, the by-law makes the responsible person liable for the actual costs "the local authority incurs to repair, renovate, alter, close, demolish, remove, secure, maintain, or enforce compliance or payable in terms" of the relevant health, safety, town planning and fire by-laws (section 14).

The City of Cape Town also has a by-law dealing with problem buildings. Such problem buidings include those that appear "to have been abandoned by the owner with or without the consequence that rates or other service charges are not being paid" (section 1, definitions section). See Problem Building By-Law, 2010.

The consequences of abandonment of immovable property are indeed far-reaching in the urban context. In *City of Johannesburg v Rand Properties (Pty) Ltd*[15] the Supreme Court of Appeal notes the following consequences of an abandoned, unmaintained apartment block, as identified by an inspecting task team, thus:

> all the floors were flooded with sewer water and … water ran through the building and spilled out of the parking level onto the pavement … the building was a fire hazard because there were no fire extinguishers, the fire hydrants were unusable, there was no water supply, smoke and draught doors had been broken and unsafe electrical wiring abounded. In the event of a fire, the occupants would not be able to escape or be rescued … the building was a fire trap.[16]

Someone should take responsibility to remedy problem buildings such as the one described above. In cases such as this, the owner's name is still on the title deed. However, the building is not maintained adequately, which may be for reasons beyond the owner's control.[17] However, the reality is that where a building has become derelict and has fallen into a state of disrepair, the owner is often untraceable.[18]

An owner of unlawfully-occupied land is not able to renounce responsibility for rates and taxes, even if the land occupation is the result of lawlessness or uncontrolled informal settlement.[19] The owner will most likely not be able to use the property as

---

[15] 2007 (6) SA 417 (SCA).
[16] Para 8.
[17] A Cox "Losing the Battle Against Urban Decay" *Star* (04-05-2012) 8; TimesLive "Hijacked Buildings – What They Are, and What City of Johannesburg is Doing About Them" (05-07-2017) *TimesLive* <https://www.timeslive.co.za/news/south-africa/2017-07-05-hijacked-buildings-what-they-are-and-what-city-of-johannesburg-is-doing-about-them/> (accessed 16-01-2019); J Strydom & S Viljoen "Unlawful Occupation of Inner-City Buildings: A Constitutional Analysis of the Rights and Obligations Involved" (2014) 17 *PER* 1207 1222. See M Murray *Taming the Disorderly City: The Spatial Landscape of Johannesburg after Apartheid* (2008) 149-151.
[18] H Mphande "Guarding Derelict Eyesore Costs Ratepayers a Packet" *The Herald* (06-06-2008) 5; Author Unknown "Derelict Building Now a Dump" *The Herald* (31-08-2015) 11; C Mailovich "Pledge to Take Back Buildings" *Business Day* (01-06-2017) 1; A Lewis "Angry Residents to Take on 'Devil's Den'" *Cape Argus* (27-07-2015) 4; ENCA "Mashaba Wants Public Works to Intervene on Abandoned Buildings" (10-04-2018) *ENCA* <https://www.enca.com/south-africa/mshaba-wants-public-works-to-intervene-on-abandoned-buildings> (accessed 10-05-2019); B Athman "Abandoned Houses and Unkempt Land Help Crime" (14-03-2018) *News24* <https://www.news24.com/SouthAfrica/Local/Maritzburg-Fever/abandoned-houses-and-unkempt-land-help-crime-20180313> (accessed 14-03-2018).
[19] Sonnekus (2004) *TSAR* 747-748. Section 2(1) of the Local Government: Municipal Property Rates Act grants metropolitan and local municipalities the power to levy rates against property in their areas.

security to obtain a mortgage from a bank due to the decreased value of the property and would most likely face protracted and expensive eviction proceedings to regain control of the property.[20]

The issue of abandonment of land does not arise only in the urban and residential context. Abandoned mines and their accompanying dumps abound in the South African landscape.[21] Abandoned mines, which have not been adequately rehabilitated, are sources of both water and air pollution.[22] Under the current legal framework, the landowner has no agency regarding whether a third party is granted a right to prospect or mine on her land.[23] The landowner is not responsible for the rehabilitation of the mined-upon land.[24] However, South Africa has a poor record of effective and

---

Section 7(1) obliges the municipality, when deciding to levy rates, to "levy rates on all rateable property in its area". This is unless it is "impossible or unreasonably difficult to establish a market value because of legally insecure tenure resulting from past racially discriminatory laws or practices" (section 7(2)(a)(iv). Exceptions are made for owners whose property is below the market value determined by the municipality (section 2(e). For example, in the case of residential property, the City of Johannesburg does not charge rates for the first R350 000 of the market value of the property. See City of Johannesburg *Property Rates Policy 2018/19* 13. Available at <https://www.joburg.org.za/services_/Documents/Rebates%20documents/2018%20Rates%20Policy_Final.pdf> (accessed on 03-06-2019). See also City of Johannesburg *Draft Property Rates Policy 2019/2020* 20. Available at <https://www.joburg.org.za/services_/Documents/rates%20and%20taxes/Draft%20Rates%20Policy%202019-%2020.pdf> (accessed 18-02-2020).

[20] Sonnekus (2004) *TSAR* 748. Unlawful occupiers are protected by section 26(3) of the Constitution of the Republic of South Africa, 1996, which provides that nobody "may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances". This right is given effect to by the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998, which sets out the procedure for acquiring an eviction order. An eviction order, at the behest of a private landowner, cannot be granted unless it is just and equitable in light of the relevant sections. See section 4(6) and (7). The date on which an eviction may take place, when an order is granted, similarly must be just and equitable in the circumstances. See section 4(8) and (9). On evictions in general, see S Liebenberg *Socio-economic Rights: Adjudication Under a Transformative Constitution* (2010) Chapter 6; Van der Walt *Property in the Margins* 146ff.

[21] S Hartzer & W du Plessis "The Liability of Historical Mine Authorisation Holders for Rehabilitation of 'Old Order Mine Dumps'" (2013) 29 *SAPL* 469 469-470.

[22] Hartzer & Du Plessis (2013) *SAPL* 470; ES van Eeden, M Liefferink & JF Durand "Legal Issues Concerning Mine Closure and Social Responsibility on the West Rand" (2009) 5 *TD: The Journal for Transdisciplinary Research in Southern Africa* 51 51ff; D Limpitlaw, M Aken, H Lodewijks & J Viljoen *Post Mining Rehabilitation, Land Use and Pollution at Collieries in South Africa* (2005) unpublished paper presented at colloquium on *Sustainable Development in the Life of Coal Mining* hosted by South African Institute of Mining and Metallurgy at Boksburg, 13-07-2005 1ff; FG Bell, SET Bullock, TFJ Hälbich & P Lindsay "Environmental Impacts Associated with an Abandoned Mine in the Witbank Coalfield, South Africa" (2001) 45 *International Journal of Coal Geology* 195 195ff; A Akcil & S Koldas "Acid Mine Drainge (AMD): Causes, Treatment and Case Studies" (2006) 14 *Journal of Cleaner Production* 1139 1139ff.

[23] E van der Schyff *Property in Minerals an Petroleum* (2016) 581ff.

[24] These obligations rest with the right-holder. See Van der Schyff *Property* 560-574; MO Dale *South African Mineral and Petroleum Law* (SI 25 2018) 275-281C. See section 43 of the MPRDA and sections 24 to 24S of the National Environmental Management Act 107 of 1998.

responsible mine closure.[25] Landowners in such circumstances are thus never guaranteed to receive back their land in a rehabilitated condition.

In the mining context, the failure to plan properly for, and implement, mine closure has an impact beyond the environment. The closure of a mine affects the economy of nearby communities.[26] In the absence of adequate preparation for communities beyond the lifespan of the mine on which they rely for jobs and income, the failure to end the life cycle of a mine in a responsible manner can be devastating.[27] Furthermore, abandoned mines are often taken over by illegal artisanal miners,[28] referred to as *Zama Zamas*.[29] They mine these abandoned, unrehabilitated mines under the risk of death

[25] See Limpitlaw et al *Post-Mining Rehabilitation*; T McKay & M Milaras "Public Lies, Private Looking and the Forced Closure of Grootvlei Gold Mine, South Africa" (2017) 13 *The Journal for Transdisciplinary Research in Southern Africa* 1 4; RD Krause & LG Snyman *Rehabilitation and Mine Closure Liability: An Assessment of the Accountability of the System to Communities* (2014) unpublished paper presented at the *9th International Conference on Mine Closure* hosted by the University of Witwatersrand and Australian Centre for Geomechanics at the Sandton Convention Centre, 1-3 October 2014); C Digby *Mine Closure and Rehabilitation: From Dereliction to Accountability?* (2016) unpublished presentation presented at seminar titled *From Dereliction to Accountability?* hosted by Centre for Environmental Rights at the University of Witwatersrand, 05-05-2016; E van Druten & M Bekker "Towards an Inclusive Model to Address Unsuccessful Mine Closures in South Africa" (2017) 117 *Journal of the Southern African Institute of Mining and Metallurgy* 485; Centre for Environmental Rights "Mine Closure and Rehabilitation: The Hangover that Follows the Mining Party" (09-05-2016) *Centre for Environmental Rights* <https://cer.org.za/news/mine-closure-and-rehabilitation-the-hangover-that-follows-the-mining-party> (accessed 25-01-2019). See also T Field *State Governance of Mining, Development and Sustainability* (2019) 319-320 for general comment on the problem of enforcement of mine closure provisions in both developed and developing jurisdictions.

[26] J Howard *Corporate Social Responsibility in the Mining Industry* LLM dissertation UCT (2014) 41-42; JM Killian "Addressing the Social Impact of Mining Activities on Communities for Sustainability" (2008) 16 *Civil Engineering* 22 22-24.

[27] Howard *Corporate Social Responsibility* 41-42; Kilian (2008) *Civil Engineering* 22-24.

[28] Artisanal mining is "characterised by basic and manual mining techniques and it is largely unregulated. Artisanal miners are exposed to wide range of hazards and the industry is associated with number of social and economic ills, including diversion of people from more sustainable activities, squalid living and working conditions and widespread substance abuse and sexual promiscuity". See D Limpitlaw & C Digby *Planning for Mine Closure in Sub-Saharan Africa – Taking Urban Development and Artisanal Miners into Account* (2014) unpublished paper presented at *9th International Conference on Mine Closure* hosted by the University of the Witwatersrand at the Sandton Convention Centre, 1-3 October 2014 4. For an overview of artisanal mining in South Africa, see L Wilson *Unshackling South African Artisanal Miners: Considering Burkina Faso's Legislative Provisions as a Guideline for Legislation and Regulation* LLM thesis University of Cape Town (2018) 45-50.

[29] E Thelwell "Six Things to Know About the Illegal Mining Boom" (26-06-2014) *News24* <https://www.news24.com/SouthAfrica/News/Six-things-to-know-about-the-illegal-mining-boom-20140626> (accessed 11-10-2019); B Debut "Gang Wars Erupt over Abandoned Mines in SA" (02-11-2015) *Mail & Guardian* <https://mg.co.za/article/2015-11-02-gang-wars-erupt-over-abandoned-mines-in-south-africa> (accessed 11-10-2019); M Olaide "Driven Underground by Poverty" (09-10-2015) *IOL* <https://www.iol.co.za/news/opinion/driven-underground-by-poverty-1927803> (accessed 11-10-2019). See further Wilson *Unshackling* 45-50.

and in zones of lawlessness.[30] Gang wars are frequent, and forced labour in abandoned mines is not uncommon.[31]

There are thus two problems that one needs to engage with concerning the question of the abandonment of land. The first problem is the societal cost of abandoned land, and the second is the burden on owners of land that has accrued a negative value. Even if unrestricted abandonment is not feasible, some form of exit from landownership in certain circumstances is justified and necessary. Regulation is ultimately critical.

3. Legal framework

Owners of negative-value property may desire a way out of their ownership. That movable property may be abandoned - rendering it *res derelicta* (abandoned) and open to acquisition of ownership by another through *occupatio* - is considered uncontroversial.[32] Movable property is regarded as having been successfully abandoned where the physical loss of possession is coupled with the intention to divest oneself of ownership of the property.[33] Whether the intention requirement has been met will depend on the circumstances of the case.[34] South African courts will not readily find that valuable movable property has been abandoned without compelling evidence.[35]

Whether immovable property can be similarly abandoned is not settled in South African law. The standard view held by legal scholars is that if land is abandoned, it is rendered *bona vacantia*, meaning that it accrues to the State.[36] That abandoned land is rendered *bona vacantia* seemed to be taken for granted by the old Appellate Division in the case

---

[30] Debut "Gang wars erupt over abandoned mines in SA" *Mail & Guardian*.
[31] Debut "Gang wars erupt over abandoned mines in SA" *Mail & Guardian*.
[32] Van der Merwe *Sakereg* 224-225; Muller et al *Silberberg* 158; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 490-491.
[33] Van der Merwe *Sakereg* 224-225; Muller et al *Silberberg* 158; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 490-491.
[34] See discussion of the case law in Chapter 2 Section 4.1. In particular, see the cases of *S M Goldstein & Co (Pty) Ltd v Gerber* 1979 (4) SA 930 (A) and *Salvage Association of London v S.A. Salvage Syndicate, Ltd.* (1906) 23 SC 169.
[35] See Van der Merwe *Sakereg* 225; *S M Goldstein & Co (Pty) Ltd v Gerber* 1979 (4) SA 930 (A) 936F-G; *Salvage Association of London v S.A. Salvage Syndicate, Ltd.* (1906) 23 SC 169 171.
[36] Van der Merwe and Pope "Part III - Property" in *Wille's Principles* 490-491; Muller et al *Silberberg* 159; Van der Merwe *Sakereg* 227; CG van der Merwe "Minister van Landbou v Sonnendecker 1979 2 SA 944 (A)" (1980) *TSAR* 183 187-188; DL Carey Miller *The Acquisition and Protection of Ownership* (1986) 8-9.

of *Minister van Landbou v Sonnendecker*.[37] However, the court found that the requirements for abandonment had not been met.[38] In the absence of a finding of abandonment, it was not necessary for the court to interrogate the assumption that land is rendered *bona vacantia* more closely or whether abandonment is possible.

Although, most scholars agree that if the abandonment of immovable property is possible, it is rendered *bona vacantia* and accrues to the State, Sonnekus provides a strong dissenting view.[39] He argues that not only is the abandonment of immovable property possible,[40] but also that such property is rendered *res nullius* and thus open to appropriation by another.[41]

The abandonment of land in South African law appears impossible, due to the relevant legal rules.[42] In the context of movable property, the requirements for abandonment are the relinquishment of physical possession with the intention of no longer remaining owner.[43] As Mostert explains, it is uncertain how an intention to abandon immovable property can be evidenced in the absence of any actions in the deeds registry.[44] The relevant land registration legislation[45] is devoid of guidance in this regard, and registration actions are what provide for publicity "in respect of proprietary positions relating to land".[46]

It is also necessary to touch on the legal framework within which property may acquire a negative value. The mining context described above raises questions about the

---

[37] 1979 2 SA 944 (A).
[38] 946A-947B.
[39] See JC Sonnekus "Enkele Opmerkings na Aanleiding van die Aanspraak op Bona Vacantia as Sogenaamde Regale Reg" (1985) *TSAR* 121; JC Sonnekus "Grondeise en die Klassifikasie van Grond as Res Nullius of as Staatsgrond" (2001) *TSAR* 84; Sonnekus (2004) *TSAR* 747.
[40] Sonnekus (2004) *TSAR* 755-756.
[41] Sonnekus (2004) *TSAR* 752.
[42] H Mostert "No Right to Neglect? Exploratory Observations on How Policy Choices Challenge the Basic Principles of Property" in S Scott & J van Wyk (eds) *Property Law Under Scrutiny* (2015) 26.
[43] Muller et al *Silberberg* 158; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 490; Van der Merwe *Sakereg* 224; *Reck v Mills* 1990 (1) SA 751 (A) 757C; *S M Goldstein & Co (Pty) Ltd v Gerber* 1979 (4) SA 930 (A) 936F-G; *Salvage Association of London v S.A. Salvage Syndicate, Ltd.* (1906) 23 SC 169 171.
[44] Mostert "No Right" in *Property Law* 27. Registration is the form of delivery that prevails in respect of immovable property in South Africa. The transfer of immovable property is publicised through recording of said transfer at the deeds registry. It is unclear how the intention to abandon land could be manifest, with the possible exception of removing the title entry from the register. For more detail on the registration of land in South Africa, see Muller et al *Silberberg* 225ff.
[45] Deeds Registries Act 47of 1937.
[46] Mostert "No Right" in *Property Law* 27.

position of landowners on whose land such mines – both active and abandoned - are located. The Mineral and Petroleum Resources Development Act[47] (MPRDA) makes the State the custodian of the nation's mineral resources.[48] Rights to prospect and mine minerals on land are granted in terms of the MPRDA,[49] and thus exist apart from landownership. The landowner, who must be consulted during the mining right application process,[50] has little say as to whether or not prospecting and mining operations take place on her land.[51] The MPRDA provides some protection and provision for compensation for landowners,[52] although, as Badenhorst points out, it still favours the holder of the mining right as well as the State.[53] Furthermore, none of the grounds on which the State may expropriate mined-upon land is triggered in the event of the land being no longer viable for the landowner's purposes.[54]

---

[47] Act 28 of 2002.
[48] Section 3(1).
[49] Prospecting rights are applied for, granted, and renewed in terms of sections 16 to 18 of the MPRDA. Mining rights are applied for, granted and renewed in terms of sections 22 to 23.
[50] See sections 10, 16(4)(b), 22(4)(b), 27(5)(a) .
[51] As Badenhorst points out, an owner who has been notified and consulted in a proper manner may make reasonable demands of the right holder. However, such demands may be construed as unreasonable, given the right holder's statutory right of access. Should such demands on the right holder not be met, any refusal of access to the right holder may be deemed as being unlawful in the circumstances. See PJ Badenhorst "Conflict Resolution Between Owners of Land and Holders of Rights to Minerals: A *Lopsided* Triangle?" (2011) *TSAR* 326 338.
[52] See, for example, section 54.
[53] Badenhorst (2011) *TSAR* 340. If the owner (or lawful occupier) refuses to allow the holder of a right in terms of the MPRDA access to the land, or makes "unreasonable" demands for such access, the holder can notify the relevant Regional Manager (section 54(1)(a)-(b)). The Regional Manager must within 14 days then notify the owner to make representations concerning issues brought to the fore by the right holder (section 54(2)(a)). In the process, the owner is informed of the rights of the right holder, as well as the provisions of the Act being contravened by her actions and the steps that could be taken against her should she continue to contravene these relevant provisions (section 54(2)(b)-(d). If the Regional Manager is of the view that the owner has already suffered, of faces the prospect of suffering, loss or damage due to mining-related activities on her land, she must "request the parties concerned to endeavour to reach an agreement for the payment of compensation for such loss or damage" (section 54(3). Should the parties not come to an agreement, such compensation is to be determined by arbitration or by a competent court (section 54(4). If after having considered the issues brought forward by the holder, the representations by the landowner and any written recommendation of the Regional Mining Development and Environmental Committee, the Regional Manager concludes that any further negotiation may detrimentally affect certain objectives listed in section 2, she may put forward a recommendation to the Minister that the land be expropriated (section 54(5). Should, in the view of the Regional Manager, the fault for not reaching an agreement lie with the holder, he may "in writing prohibit such holder from commencing or continuing with prospecting or mining operations on the land in question until the dispute has been resolved by arbitration or by a competent court" (section 54(6). Section 54 applies, with necessary changes, if the landowner approaches the Regional Manager to notify him that loss or damage will likely result from prospecting or mining operations on the land in question (section 54(7).
[54] See Badenhorst (2011) *TSAR* 338-339. It is true that the tendering of sufficient financial provision for the environmental rehabilitation of land is a prerequisite for environmental authorisation to conduct

In the context of problem buildings and unlawful occupation of land, landowners may similarly find themselves in an undesirable situation.[55] While being unable to make use of the property in question, they may be held responsible for the state of such buildings in terms of problem-building by-laws.[56] Unlawful occupations, the size of which effectively render the loss of the owner's land a *fait accompli* due to the impossibility of carrying out an eviction order, also pose serious challenges for landowners.[57]

Finally, it is also possible that landowners may find all beneficial use of their property negated by laws and regulations concerning the protection of heritage buildings and sites.[58] Beyond being denied beneficial use of her property, the property could potentially accrue a negative value for the landowner, who can be held responsible for the maintenance thereof.[59]

4. Research question

Against this background, the research question, i.e. how the law can and should provide for abandonment of immovable property, may translate into the following subsidiary questions that are considered critically:

To what extent should people be free to abandon their immovable property in general, in light of the social obligations that come with ownership?

Is the abandonment of immovable property legally possible, and if so, is that property rendered *res nullius* or *bona vacantia*?

---

mining or prospecting operations on land (see section 24P of the National Environmental Management Act 107 of 1998). However, this is no guarantee that the land will ever be rendered viable for the owner's purposes in the future when mining operations have since ceased, or even that the necessary environmental rehabilitation will even take place. It also provides no remedy to an owner who wishes to divest herself of land that is no longer fit for her purposes. See Chapter 6 Section 3.1.2.

[55] See Chapter 6 Section 3.3.

[56] See, for example, the City of Johannesburg By-Law on Problem Properties, 2014; the City of Cape Town Problem Building By-Law, 2010; the eThekwini Problem Building By-Law, 2015. See also detailed discussion in Chapter 6 Section 3.3.

[57] See *Fischer v Unlawful Occupiers* 2018 (2) SA 228 (WCC) para 1; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) para 8. See detailed discussion in Chapter 6 Section 3.3.

[58] See J Strydom *A Hundred Years of Demolition Orders: A Constitutional Analysis* LLD thesis Stellenbosch University (2012) 180. See detailed discussion in Chapter 6 Section 3.2.

[59] See section 45 of the NHRA. See also J Strydom *A Hundred Years of Demolition Orders: A Constitutional Analysis* LLD thesis Stellenbosch University (2012) 180.

Should the abandonment of immovable property, particularly immovable property with little to no economic value (thus passing ownership thereof to the State), be made possible or easier?

What abandonment regime should be adopted in respect of immovable property, taking into account the interests of both the landowner and society at large?

5. Research method

This thesis relies primarily on scholarship and case law concerning the abandonment of ownership, as well as the social obligations that accompany ownership. It engages in comparative legal research. Comparative law involves collecting information regarding foreign law.[60] This information may encompass an entire legal system, a particular institution or a single rule.[61] The information is juxtaposed and contrasted to make comparisons, outlining the relevant similarities and differences between legal systems.[62] However, the function of comparative law goes beyond mere comparison, but also includes making available knowledge for law reform and research, as well as "furthering the universal knowledge and understanding of the phenomenon of law".[63]

The comparative jurisdictions chosen for this study are Switzerland and Scotland. The rationale for choosing these two jurisdictions are the different approaches to the abandonment of landownership that prevail therein.[64] In Switzerland, the abandonment (*Dereliktion*) of landownership is almost wholly unrestricted,[65] with the delivery of a

---

[60] E Örücü "Developing Comparative Law" in E Örücü & D Nelken (eds) *Comparative Law: A Handbook* (2007) 43 46; M Siems *Comparative Law* (2014) 2-3.
[61] Örücü "Developing Comparative Law" in *Comparative Law* 46; K Zweigert & H Kötz *An Introduction to Comparative Law* (1998) 4-5.
[62] Örücü "Developing Comparative Law" in *Comparative Law* 46.
[63] Örücü "Developing Comparative Law" in *Comparative Law* 46.
[64] See Chapter 5.
[65] Art. 666 Abs. 1 read with Art. 964. Abs. 1 of the *Schweizerisches Zivilgesetzbuch* (ZGB). See H Rey & L Strebel "Art. 666" in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 1134-1135; J Schmid & B Hürlimann-Kaup *Sachenrecht* 5 ed (2017) para 868; H Rey *Die Grundlagen des Sachenrechts und das Eigentum* 3 ed (2007) para 1673ff; P Tuor, B Schnyder, J Schmid & A Jungo *Das Schweizerische Zivilgesetzbuch* 14 ed (2015) § 100 para 33; F Hitz "Art. 666" in M Amstutz, P Breitschmid, A Furrer, D Girsberger, C Huguenin, A Jungo, M Müller-Chen, V Roberto, AK Schnyder & HR Trüeb (eds) *Handkommentar zum Schweizer Privatrecht* 3 ed (2006) 166-167; P Simonius & T Sutter *Schweizerisches Immobiliarsachenrecht* (1995) para 127. The only restriction which appears to exist is where the property is the family home (married couples) or the joint home (registered couples), in which case the spouse or partner's consent is required. See Art 169 lit 1 ZGB; Art 14 lit 1 *Partnerschaftsgesetz* (PartG); Art 10a *Bundesgesetz über das bäuerliche Bodenrecht* (BGBB); Rey &

waiver by the landowner to the land registry being all that is required to achieve abandonment.[66] In Scotland, by contrast, the abandonment of landownership is not possible due to the absence of a mechanism through which a landowner may unilaterally terminate her ownership.[67] The approaches of these two jurisdictions are compared with the prevailing position in South Africa, with the contrasting socio-economic situations in all three respectively kept in mind.

6. Course of Inquiry

The ideal solution to immovable properties which have accrued a negative value would be to provide effective remedies in terms of legislation. These remedies would provide owners of land that has ceased to be viable for reasons beyond their control to be properly compensated subject to expropriation by the State. In the absence of such measures, particularly in a country where the State is already subject to budgetary constraints,[68] it may be necessary to allow landowners to walk away from their

---

Strebel "Art. 666" in *Basler Kommenter* 1135; Schmid & Hürlimann-Kaup *Sachenrecht* para 526; Hitz "Art. 666" in *Handkommentar* 167.

[66] See Art. 964 Abs. 1 ZGB; Art. 46 and 48 GBV (*Grundbuchverordnung* of 23 September 2011). See also Schmid & Hürlimann-Kaup *Sachenrecht* para 868; Rey & Strebel "Art. 666" in *Basler Kommenter* 1134-1135; Rey *Sachenrechts* para 1676; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 100 para 33; Hitz "Art. 666" in *Handkommentar* 166-167; Simonius & Sutter *Schweizerisches Immobiliarsachenrecht* para 127.

[67] See *The Scottish Environment Protection Agency v The Joint Liquidators of the Scottish Coal Company Limited* [2013] CSIH 108 para 103; M Combe & M Rudd "Abandonment of Land and the *Scottish Coal* Case: Was it Unprecedented?" (2018) 22 *The Edinburgh Law Review* 301 303; Lord Eassie, HL MacQueen, A Anderson, D Bain, D Cabrelli, G Cameron, M Combe, C Ervine, N Grier, S Lamont-Black, D Nichols, R Paisley, A Simpson, M Sundara Rajan & Lady Wise *Gloag and Henderson The Law of Scotland* 14 ed (2017) para 34.03n30.

[68] The South African economic situation is perennially gloomy, characterised by low growth, a budget deficit and a poor credit rating. See S Muller "South Africa's Finance Minister Delivers a Budget Designated to Steady the Ship" (20-02-2019) *The Conversation* <https://theconversation.com/south-africas-finance-minister-delivers-a-budget-designed-to-steady-the-ship-112162> (accessed 15-10-2019); S Muller "Why Ramaphosa's 'New Dawn' Will Break Slowly for South Africa's Finances" (21-10-2018) *The Conversation* <https://theconversation.com/why-ramaphosas-new-dawn-will-break-slowly-for-south-africas-finances-105302> (accessed 15-10-2019); S Mapenzauswa "#Budget2019: SA Budget Deficit to Widen as it Borrows R1.2bn a Day" (20-02-2019) *IOL* <https://www.iol.co.za/business-report/budget/budget2019-sa-budget-deficit-to-widen-as-it-borrows-r12bn-a-day-full-speech-19404658> (accessed 15-10-2019); South African Institute of Professional Accountants "South Africa to Reach Fiscal Cliff by 2042" (23-02-2019) *IOL* <https://www.iol.co.za/business-report/budget/south-africa-to-reach-the-fiscal-cliff-by-2042-19443575> (accessed 15-10-2019); M Isa "Last Rating Standing" (28-02-2019) *Fin24* <https://www.fin24.com/Finweek/Business-and-economy/last-rating-standing-20190228> (accessed 28-02-2019); S Muller "Slow Growth and Shrinking Revenues Limit South Africa's Finance Minister" (27-10-2019) *The Conversation* <https://theconversation.com/slow-growth-and-shrinking-revenues-limit-south-africas-finance-minister-67745> (accessed 15-10-2019).

Budgetary constraints are demonstrated by the neglect of the land reform budget. See D February "Treasury Cuts Land Reform Budget" (20-02-2019) *Farmer's Weekly* <https://www.farmersweekly.co.za/agri-news/south-africa/treasury-cuts-land-reform-budget/>

ownership as a last resort. This will require balancing the interests of the landowner, in divesting herself of ownership, against the impact on society, of externalised costs related to such abandonment. As such, it may be better to refer rather to such a divestment of ownership as a "regulated exit", rather than abandonment, which by its nature is an inherently unilateral act.[69]

By "regulated exit", it is meant that a landowner is enabled to seek divestment of ownership of her property in the absence of another person that is willing to take transfer thereof. Such property would then fall into the ownership of the State, in line with the *bona vacantia* rule in respect of abandoned land.[70] The circumstances in which a landowner is enabled to divest herself of such ownership will be regulated, taking into account the competing interests of the relevant parties.[71] The term "abandonment" is used in this thesis for the sake of simplicity.

This thesis is divided into eight chapters. The aim and contents of each chapter is set out below.

Chapter 1 – Introduction

In the first chapter, the research question is introduced and its relevance in contemporary society discussed. This introduction sets out the relevant background, establishing why the abandonment of ownership – and in particular the abandonment of land in the urban and mining contexts - is a topic that warrants research.

(accessed 15-10-2019); Q Masuabi "Government Has Never Taken Land-Reform Budget Seriously" (16-05-2018) *Huffington Post* <https://www.huffingtonpost.co.uk/2018/05/16/government-has-never-taken-land-reform-budget-seriously_a_23435787> (accessed 15-10-2019); G Makou "Yes, South African Spends as much on VIP Protection & Security as on Land Reform" (09-05-2019) *Africa Check* <https://africacheck.org/reports/yes-south-africas-government-spends-as-much-on-vip-protection-security-as-on-land-reform/> (accessed 15-10-2019).
Evidently in this context, it is unlikely landowners can pin their hopes on government providing them with an effective remedy that entails expropriation at their request when land becomes unviable for their purposes, whether in the urban or mining context.

[69] See Peñalver (2010) *Michigan Law Review* 197-198.

[70] That, in the event of the abandonment of landownership being possible, such land falls into the ownership of the State, is the standard view held by South African property law scholars. See Van der Merwe and Pope "Part III – Property" in *Wille's Principles* 492; Van der Merwe *Sakereg* 227; Van der Merwe (1980) *TSAR* 187-188; Carey Miller *The Acquisition and Protection of Ownership* 8-9.

[71] Guidelines for drafting legislation enabling "regulated exit" are proposed in Chapter 4 Section 6 and discussed further in Chapters 6 and 7.

Chapter 2 – An Overview of Abandonment

This chapter seeks to establish what constitutes abandonment. It provides historical background to the basic requirements for abandonment as they exist in South African law. Abandonment as it existed in Roman law and Roman-Dutch law is thus explored, before discussing abandonment as it exists in South African law, including African customary law. An overview of the existing case law is provided to determine how South African courts approach cases in which abandonment of property is alleged.[72]

Chapter 3 – The Possibility of Abandoning Landownership

This chapter discusses the extent to which the abandonment of land is possible (or impossible) in the South African legal system. The only three cases in which the abandonment of land was raised were resolved on the grounds that there was an absence of intention to abandon.[73] The courts in these cases did not have to concern themselves with the publicity principle and how this may be satisfied in respect of the abandonment of land.[74] This chapter discusses the relevant sections of the Deeds Registry Act,[75] and the opposing views as to whether the provisions of the legislation allow for the abandonment of landownership.[76]

Chapter 4 – Locating Abandonment in a Social-Obligation Norm Framework

This chapter provides a theoretical background for the research undertaken in this thesis. The conception of the social-obligation norm as formulated by Alexander is adopted as the theoretical approach that informs this thesis.[77] The chapter then proceeds to evaluate whether the social-obligation norm of property finds expression in and is compatible with the constitutional framework, particularly the constitutional

---

[72] See *Salvage Association of London v S.A. Salvage Syndicate, Ltd.* (1906) 23 SC 169; *Underwater Construction and Salvage Co (Pty) Ltd v Bell* 1968 (4) SA 190 (C); *Minister van Landbou v Sonnendecker* 1979 2 SA 944 (A); *S M Goldstein & Co (Pty) Ltd v Gerber* 1979 (4) SA 930 (A); *Reck v Mills* 1990 (1) SA 751 (A).
[73] See *Minister van Landbou v Sonnendecker* 1979 (2) SA 944 (A) 946A-947B and *Meintjes NO v Coetzer* 2010 (5) SA 186 (SCA) paras 11-17; *Papas NO v Motsere Trading CC* [2014] ZAGPJHC 144.
[74] See Mostert "No Right" in *Property Law Under Scrutiny* 28.
[75] Act 47 of 1937.
[76] See Mostert "No Right" in *Property Law Under Scrutiny* 26-28; Sonnekus (2004) *TSAR* 755-757. See also Van der Merwe (1980) *TSAR* 185-188.
[77] Alexander (2009) *Cornell* 745; G Alexander *Property and Human Flourishing* (2018).

property clause.[78] Finally, in light of the social-obligation norm, the parameters for any potential law reform are proposed.

Chapter 5 – Comparative Study - The Abandonment of Land in South Africa, Switzerland and Scotland

This chapter engages in comparative study and highlights the imperatives of undertaking a legal comparison. The approach to the abandonment of land in South African, Swiss and Scots law are compared, with the contrasting socio-economic contexts of each jurisdiction kept in mind.[79]

Chapter 6 – Motivating for Reform

This chapter evaluates three different contexts to determine whether some form of abandonment of or regulated exit from, landownership should be permitted. The contexts in question are (1) mining, (2) heritage buildings, and (3) problem buildings and unlawful occupation of land. The parameters formulated in Chapter 4 are applied to determine whether in light of the burden to which landowners are subjected, as well as the adequacy of existing remedies, landowners should be permitted to divest themselves of landownership.

Chapter 7 – Reforming the Law of Abandonment

In light of the conclusions drawn in Chapter Six, this chapter considers the shape of law reform in respect of abandonment or regulated exit from land ownership. It suggests that an abandonment statute is necessary to facilitate the necessary reform. Suggestions are made as to how such a statute will operate, including the pre-conditions before the courts become involved in a dispute over abandonment. This Chapter also considers recent moves towards realising the possibility of expropriating land without compensation, as well as the implications of such a move for the relevance of an abandonment statute.

Chapter 8 - Conclusion

[78] See Chapter 4 Section 5.
[79] See Chapter 5 Sections 3 to 5.

This chapter provides the conclusion for the thesis. It summarises the conclusions reached in the preceding chapters while providing final thoughts and suggestions for future research.

Chapter 2: Defining Abandonment – History and Overview

1. Introduction

While this thesis is specifically concerned with the possibility of the abandonment of land, locating it within the wider area of abandonment more generally is necessary. Such context makes it possible to identify how the abandonment of movables and immovables differ. A more in-depth understanding of the nature of abandonment, and its history as a legal concept, is crucial. It is crucial not only for determining whether the abandonment of landownership is possible in the current legal framework, but for formulating necessary law reform.

The framework for this chapter is the following: First, a definition of abandonment is provided. This definition is not exclusive to the South African context and is informed

by the ideas of American academics who have addressed the complicated nature of abandonment in law.[1]

Second, an overview of abandonment as it existed in Roman and Roman-Dutch law is provided. Finally, the doctrine of abandonment as it exists in South African law is examined. The abandonment of other interests in land, such as servitudes and rights granted in terms of legislation, are also canvassed and compared to the abandonment of land by the owner. This is accompanied by an analysis of whether the law gives an owner an affirmative right to abandon in our law, or whether the doctrine merely serves as a means of resolving ownership disputes.[2]

2. Abandonment defined

In South African law, abandonment of property is simply understood as the relinquishment of possession with the intention to divest oneself of ownership of a thing.[3] Once this is done, property becomes *res derelictae* and open to appropriation by another.[4]

The essence of abandonment is its unilateral nature.[5] The owner, in effect, unilaterally divests himself of ownership of a thing he no longer wishes to own. If the cooperation of a third party is necessary to effect the disposal of the property in question, abandonment in its true sense has not occurred.[6] Cooperation of a third party negates the unilateral nature of the divestment of ownership, which is the distinguishing feature of divestment through abandonment.[7]

---

[1] E Peñalver "The Illusory Right to Abandon" (2010) 109 *Michigan Law Review* 191 192ff; L Strahilevitz "The Right to Abandon" (2010) 158 *U. Pa. L. Rev.* 355 355ff; L Fennell "Forcings" (2014) *114 Columbia Law Review* 1297 1310ff.

[2] Peñalver (2010) *Michigan Law Review* 208.

[3] G Muller, R Brits JM Pienaar & Z Boggenpoel *Silberberg and Schoeman's The Law of Property* 6 ed (2019) 39, 158; CG van der Merwe & A Pope "Part III – Property" in F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 490-491; CG van der Merwe *Sakereg* 2 ed (1989) 224-227.

[4] Muller et al *Silberberg* 39, 158; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 490-491; Van der Merwe *Sakereg* 224-227.
"*Res derelictae*" is the Latin term for an abandoned thing. Such things currently have no owner, having been disposed of by their previous owners with the intention of relinquishing ownership. "*Res derelictae*" is to be distinguished from "*res nullius*", which refers to things which have never been subject to private ownership. See JAC Thomas *Textbook of Roman Law* (1976) 166-168; Muller et al *Silberberg* 38-39.

[5] Peñalver (2010) *Michigan Law Review* 194.

[6] Peñalver (2010) *Michigan Law Review* 194-195.

[7] Peñalver (2010) *Michigan Law Review* 198.

"Unilateral" disposal means that the cooperation of a third party is not required and that the disposal is not directed to a particular person.[8] One can, but need not, have knowledge as to who may ultimately become the owner: it makes no difference to whether abandonment has occurred.[9] Depending on the location in which abandonment occurs, the unwanted thing will usually only be available to a "geographically confined pool and a weighted lottery within that pool".[10] Consequently there are persons who – due to locale – are more likely to find and appropriate the abandoned property before others. Knowing that the appropriator of the abandoned thing will more than likely be a resident of the locale in which it was abandoned does not negate the fact that abandonment has occurred.[11]

3. Abandonment in the Roman and Roman-Dutch law

The abandonment of ownership has ancient roots, with the concept stemming back to Roman law and ultimately being received into our law through the old authorities of Roman-Dutch law.[12] It is useful to trace the concept's development, which, on the face of it, shows little change from its original sources.

3.1 Roman law

The principles of the common law of abandonment find their earliest expression in the Roman-law sources. It thus forms the starting point of any historical overview of abandonment.

3.1.1 Movables

In Roman law, an abandoned thing ceased to belong to the abandoner, and would become the property of the first taker.[13] Acquisition by the first taker, however,

[8] Peñalver (2010) *Michigan Law Review* 197-198.
[9] Strahilevitz (2009-2010) *University of Pennsylvania Law Review* 378-380.
[10] Strahilevitz (2009-2010) *University of Pennsylvania Law Review* 379.
[11] Strahilevitz (2009-2010) *University of Pennsylvania Law Review* 379.
[12] For an overview of abandonment, with use of both Roman and Roman-Dutch sources, see Van der Merwe *Sakereg* 224-227.
[13] PJ du Plessis *Borkowski's Textbook on Roman Law* (2015) 197-198; Thomas *Roman Law* 166-168; AM Prichard *Leage's Roman Private Law* 3 ed (1967) 176-178; W Buckland & P Stein *A Text-Book of Roman Law from Augustus to Justinian* 3 ed (1963) 206-207; F Schulz *Classical Roman Law* (1951) 361-362; W Buckland *A Manual of Roman Private Law* 2 ed (1939) 138; D 41 7 1; Inst 2 1 47.

depended on whether there was an intention on the part of the owner to relinquish ownership of the thing in question.[14]

3.1.2 Immovables

Thomas points out that in the later Roman empire, with regard to *agri deserti* (deserted lands), the principles of *derelicto* were applied.[15] The abandonment (or desertion) of land did seem to be an occurrence where it accrued a negative value, such as due to high taxation.[16] A person could obtain ownership of abandoned land by occupying and cultivating it, if two years passed without the owner seeking to assert his title.[17] Thomas also notes the case of the landowner who abandoned land due to finding himself unable to meet the tax obligations that attached to it.[18] In these circumstances, should the owner fail to return to the land within six months, it would be open to anyone who took occupation of the land and undertook to meet the fiscal requirements that came with it, to acquire ownership of said land.[19]

3.1.3 Other rights in land

Other interests in land could also be abandoned. In respect of praedial servitudes, under Justinian, renunciation resulted in the termination of the servitude, whether such was done expressly or indicated by tolerance of conduct that was inconsistent with the servitude.[20]

---

[14] Du Plessis *Borkowski's Textbook* 197-198; Thomas *Roman Law* 167-168; Prichard *Leage's* 176-178; Buckland & Stein *Text-Book* 206; Schulz *Classical* 361-362; Buckland *A Manual* 138; Inst 2 1 48; D 41 7 7.

[15] Thomas *Roman Law* 168.

[16] R van den Bergh "Ownership of *Agri Deserti* During the Later Roman Empire" (2004) 67 *THRHR* 60 60-62.

[17] Thomas *Roman Law* 168 relying on C.Th 5 11 12 and C 11 58 8. See further Van den Bergh (2004) *THRHR* 64-65.

[18] Thomas *Roman Law* 168 relying on C 11 58 11.

[19] Thomas *Roman Law* 168 relying on C 11 58 11. See also C 11 59 on imperial legislation bringing *agri deserti* into agricultural economy.

[20] Thomas *Roman Law* 201; Du Plessis *Borkowski's Textbook* 174; Buckland & Stein *A Text-Book of Roman Law* 266; Buckland *Text-Book* 266; Buckland *A Manual* 160. See D 8.2.21 and 8.3.20.

3.2 Roman-Dutch law

The view of the Roman-Dutch authorities on the abandonment of ownership largely reflects the position as it existed in Roman law. It is ultimately these views that inform the law of abandonment in South Africa as it exists in the present.

3.2.1 Movable property

The abandonment of movables in Roman-Dutch law remained largely unchanged from the approach taken in Roman law. So long as a thing is disposed of with the intention of relinquishing ownership, abandonment occurs.[21]

3.2.2 Immovable property

The question as to whether in Roman-Dutch law, land could be abandoned and rendered *res nullius* is uncertain.[22] The possibility is mentioned by some Roman-Dutch authorities.[23]

Voet notes that in Roman law, it was open to the owner of land left vacant to take back his land within two years from the person who had seized it.[24] He goes on to discuss a possible distinction between land being left vacant and land that is abandoned, and that the recovery of land within two years should be reserved for the former situation.[25] In Voet's view, it seems the abandonment of land is possible, although not unrestricted.[26] For example, an owner cannot abandon barren land while retaining fertile land in the same area.[27] Rather, he must remain owner of all the land, or abandon it as a whole.[28]

Carey Miller points out that other Roman-Dutch writers, while raising the possibility of the abandonment of land, do not favour the unrestricted abandonment of land.[29] Liabilities associated with one's land ownership, for example, could not be escaped

---

[21] Grotius 2 1 52; Van der Linden *Manual* 1 7 2(d); Van Leeuwen *Censura Forensis* 1 2 3 14.
[22] Van der Merwe *Sakereg* 227.
[23] See DL Carey Miller *The Acquisition and Protection of Ownership* (1986) 8 relying on Grotius 2 32 3 and Van der Keessel *Praelectiones* 2 32 3. See also Voet 41 1 10 and Muller et al *Silberberg* 158n38.
[24] Voet 41 1 10.
[25] Voet 41 1 10.
[26] Voet 41 1 10.
[27] Voet 41 1 10.
[28] Voet 41 1 10.
[29] Carey Miller *The Acquisition and Protection of Ownership* 8.

through purporting to abandon the land in question.[30] For example, Grotius notes that land subject to dyke dues[31] could not be abandoned, unless the landowner abandoned all her property situated on the same *polder*.[32] This is supported by both Van Leeuwen and Van der Keessel.[33]

As noted, Grotius mentions the possibility of abandoning land. However, his view seems to favour such property as accruing to the state rather than being rendered *res nullius*. He lists abandoned land as one of the unappropriated things that the law deemed to be the property of the Commonwealth, and in the past was given to the Counts so they could be maintained.[34] This is supported by Van der Keessel.[35]

3.2.3 Other rights in land

The Roman-Dutch authorities discussed the abandonment of other rights in land in the context of the termination of servitudes. It was open to the owner of the dominant tenement to abandon a servitude in favour of his land.[36] The usufruct[37] – a personal servitude discussed by the Roman-Dutch authorities - was also open to abandonment by its holder.[38] As such, abandonment in these circumstances was a fairly simple matter.

3.3 Bridging the historical sources to the modern South African law

An overview of the doctrine of abandonment as it existed in Roman and Roman-Dutch law reveals that the basic principles regarding abandonment have remained static. As will be evident from the following overview of abandonment in South African law, the

---

[30] Carey Miller *The Acquisition and Protection of Ownership* 8 relying on Grotius 2.32.3, Van Leeuwen *Commentaries* 2 3 12 and Van der Keessel *Praelectiones* 2 32 3.
[31] A levy paid towards the administration of dykes. See C Dekker "The Representation of the Freeholders in Drainage Districts of Zeeland West of the Scheldt during the Middle Ages" in *Acta Historiae Neerlandicae/Studies on the History of the Netherlands VIII* (1975) 18.
[32] Grotius 2 32 3. A *polder* is defined by the Oxford English Dictionary as "a piece of low-lying land reclaimed from the sea, a river, etc., and protected by dykes". See "polder, *n.1*" in *Oxford English Dictionary* <www.oed.com> (accessed 14-02-2020).
[33] See Van Leeuwen *Commentaries* 2 3 12 and Van der Keessel *Praelectionesi* 2 32 3.
[34] Grotius 2 1 54.
[35] Van der Keessel *Praelectiones* 2 32 3.
[36] Van der Merwe *Sakereg* 537; Grotius 2 37 3; Van Leeuwen *Censura Forensis* 1 2 14 45; Van Leeuwen *Commentaries* 2 22 2.
[37] An usufruct can be defined as "a limited real right in terms of which the owner or grantor of a thing confers on the usufructuary the right to use and enjoy (*ius utendi*) the thing and to draw both the natural and civil fruits (*ius fruendi*) from the thing to which the usufruct relates". See Muller et al *Silberberg* 383.
[38] Voet 2 7 4 3.

basic two requirements remain largely unchanged. These are the relinquishment of possession coupled with the intention of no longer remaining owner of the thing.[39]

Further threads can be picked up in respect of the abandonment of land when moving from the historical sources to modern South African law. Much in line with modern law, land ownership in Roman-Dutch law came with obligations that could not be avoided through abandonment.[40]

4. South African law

In general, the Roman-Dutch law principles form the bedrock of the South African law of abandonment. The approach of our courts has been in line with these principles.

The law of abandonment has received little attention in major textbooks.[41] It often finds itself discussed under the heading of *occupatio*.[42] Where the area has found itself the subject of academic interest, the focus has generally been on the disputed issue of the status of abandoned land, i.e. whether abandoned land becomes *res nullius* or accrues to the state.[43] However, the abandonment of movables has received minimal academic attention.[44]

Given the focus of this dissertation on the abandonment of land, it may be questioned why the abandonment of movables is discussed at all. It is useful – and necessary - to examine both the abandonment of movables and immovables, as well as other rights

---

[39] Muller et al *Silberberg* 158; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 490; Van der Merwe *Sakereg* 224; *Reck v Mills* 1990 (1) SA 751 (A) 757C; *S M Goldstein & Co (Pty) Ltd v Gerber* 1979 (4) SA 930 (A) 936F-G; *Salvage Association of London v S.A. Salvage Syndicate, Ltd.* (1906) 23 SC 169 171.

[40] Carey Miller *The Acquisition and Protection of Ownership* 8 relying on Grotius 2.32.3, Van Leeuwen *Commentaries* 2 3 12 and Van der Keessel *Praelectiones* 2 32 3.

[41] Muller et al *Silberberg* 158-160, 305-306; Van der Merwe *Sakereg* 224-227; Van der Merwe and Pope "Part III – Property" in *Wille's Principles* 490-491.

[42] Muller et al *Silberberg* 158-160; Van der Merwe and Pope "Part III – Property" in *Wille's Principles* 490-491.

[43] CG van der Merwe "Minister van Landbou v Sonnendecker 1979 2 SA 944 (A)" (1980) *TSAR* 183; JC Sonnekus "Enkele Opmerkings na Aanleiding van die Aanspraak op Bona Vacantia as Sogenaamde Regale Reg" (1985) *TSAR* 121; JC Sonnekus "Grondeise en die Klassifikasie van Grond as Res Nullius of as Staatsgrond" (2001) *TSAR* 84; JC Sonnekus "Abandonnering van Eiendomsreg op Grond end Aanspreeklikheid vir Grondbelasting" (2004) *TSAR* 747.

[44] For the most part, academic attention with regard to movable property in the context of abandonment has been focused on shipwrecks and their acquisition. See JC Sonnekus "Besitsverkryging Oor 'n Skeepswrak as *Res Nullius*: *Mills v Reck and Others* 1988 3 SA 92 (K)" (1989) *TSAR* 720 720-730; J Bruk *An Analysis of the Law Governing the Acquisition of Shipwrecks* LLM mini-dissertation University of Cape Town (1996).

in land, for two main reasons. Firstly, the application of the basic principles regarding abandonment is much better developed in the context of movables. This development contrasts with the abandonment of corporeal immovables, subject to only three cases. Secondly, as will become clear in the subsequent comment and analysis section, the approach of the law to the abandonment of movables and immovables is not that different.[45] Similar to Peñalver's observations in the context of American law,[46] the South African law displays a general suspicion of abandonment.

4.1 Movable property

Abandonment of movable property occurs where an owner relinquishes possession of a thing with the intention of no longer retaining ownership of it.[47] Once these requirements have been met, a thing is rendered *res derelicta* and thus open to acquisition of ownership through *occupatio*.[48] As such, the conventional view of abandonment in the South African law is that it is a fairly simple matter.

The case law on abandonment of movables is sparse. However, *S M Goldstein & Co (Pty) Ltd v Gerber*,[49] perhaps best demonstrates how our courts will approach claims that movable property has been abandoned. It seems to indicate the courts will take into account the nature and circumstances in which allegedly abandoned property is found.

In *S M Goldstein*, the plaintiff sought damages against the defendant in respect of a road roller. After having completed the construction of certain roads using the roller, the plaintiff parked it on a construction site used by the defendant. This was done with the permission of a foreman who worked for the defendant. To make sure the roller could not be easily stolen, the battery was then removed. The roller was later sold by the defendant to a scrap metal dealer, and it was subsequently cut up for scrap. The plaintiff succeeded with a claim for damages in the court *a quo*. The defendant

---

[45] See Section 4.4 below.
[46] Peñalver (2010) *Michigan Law Review* 214.
[47] Muller et al *Silberberg* 158; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 490; Van der Merwe *Sakereg* 224; *Reck v Mills* 1990 (1) SA 751 (A) 757C; *S M Goldstein & Co (Pty) Ltd v Gerber* 1979 (4) SA 930 (A) 936F-G; *Salvage Association of London v S.A. Salvage Syndicate, Ltd.* (1906) 23 SC 169 171.
[48] *Reck v Mills* 1990 (1) SA 751 (A) 757D; *Underwater Construction and Salvage Co (Pty) Ltd v Bell* 1968 (4) SA 190 (C) 192C-D.
[49] 1979 (4) SA 930 (A).

appealed, arguing that the court *a quo* should have found that the roller had been abandoned, and thus open to appropriation by the defendant.[50]

The court found on the evidence that there was nothing indicating an intention to abandon the roller.[51] While the roller was left on the defendant's site for an extended period of time, it was, according to witnesses, a common practice for heavy industrial equipment that is not currently in use to be left in the open.[52] The defendant thus should have made proper enquiries regarding the status of the roller.[53] The appeal consequently failed.

The issue of the abandonment of movable property has also arisen in the context of shipwrecks and their cargo. The court in *Salvage Association of London v S.A. Salvage Syndicate Ltd*[54] set out a strict intention requirement for determining whether the cargo of a wreck can be regarded as abandoned. The case involved the underwriters of the owners of the shipwreck, on the one hand, and a syndicate that had begun salvaging operations in the belief the wreck and its cargo had been abandoned, on the other. The court stated that to lay claim to cargo against the original owners, one would be required to show that said owners had altogether abandoned the cargo.[55] With regards to cargo, it is insufficient to show that the owner has made no attempts to recover his property for a number of years.[56] There is the possibility that the owner may have been waiting for a new technological advancement that would facilitate the recovery of his property.[57] As such, it could not be said that the wreck and its cargo had been abandoned.

It is thus clear that our courts will be careful in finding that valuable property has been abandoned. The courts will not consider that sheer apathy on the part of the owner

[50] 935D.
[51] 936G.
[52] 936G.
[53] 937A.
[54] (1906) 23 SC 169.
[55] 171.
[56] 171.
[57] 171.

towards (or a prolonged absence from) the property automatically equates to the required intention for a finding of abandonment.[58]

Subsequent abandonment case law in the context of shipwrecks did not involve the owner, and there was no dispute as to whether the wreck and its cargo constituted *res derelictae*. Rather, the court was concerned with abandonment in the context of the competing ownership claims of two parties over salvaged parts of a wreck.

In *Underwater Construction and Salvage Co (Pty) Ltd v Bell*,[59] the plaintiff had separated four propeller blades from a wreck, which neither party disputed was *res nullius*.[60] Two were taken ashore while the other two were left on the seabed with a marker attached to them.[61] The defendant then later visited the site of the wreck and removed the two propeller blades.[62] The defendant had argued that the plaintiff had forfeited any rights in the two propeller blades by not remaining in possession of them.[63] This argument was rejected by the court. The propeller blades were *res derelictae*, and once seized with the intention of acquiring ownership, it did not matter that the plaintiff did not remain in possession.[64]

In *Reck v Mills*,[65] there was again no dispute that the wreck was abandoned by both its original owners as well as its insurers.[66] Salvage from the wreck, such as the condenser the respondent was seeking to salvage, was thus open to appropriation by the first taker.[67] The question was rather whether by tying a rope with a buoy on the other end established physical control of the condenser. Such was necessary to show that the respondent had been wrongfully deprived by the appellant. The court found that in the circumstances that sufficient physical control had not been established.[68]

---

[58] Sonnekus (1985) *TSAR* 140; *S M Goldstein & Co (Pty) Ltd v Gerber* 1979 (4) SA 930 (A) 936F-G; *Salvage Association of London v S.A. Salvage Syndicate, Ltd.* (1906) 23 SC 169 171. Although it dealt with the abandonment of land, see also *Minister van Landbou v Sonnendecker* 1979 2 SA 944 (A) 947A-D.
[59] 1968 (4) SA 190 (C).
[60] 192.
[61] 191.
[62] 191.
[63] 192.
[64] 192.
[65] 1990 (1) SA 751 (A).
[66] 754G-I.
[67] 757C-E.
[68] 759E-F.

4.2 Immovable property

Whether the abandonment of immovable property in the South African law is possible is a point of contention,[69] particularly in light of the publicity principle.[70] The principle is served in respect of movables through relinquishing possession.[71] Whether it may similarly be served in respect of land is open to question, given the failure of the legislation to provide a specific mechanism through which the owner's name can be struck from the title deed to the land.[72] This failure by legislation to provide a mechanism through which land can be abandoned is key, as registration in the deeds registry operates to give effect to the publicity principle concerning changes in ownership of land.[73]

This failure to provide a specific mechanism to strike the owner's name from the title deed will be explored in more detail in the subsequent chapter. However, the potential legal consequences of abandoning land are also important to consider, given that they are the primary motivation for the theoretical engagement this thesis seeks to provide. The consequences of abandonment are key to determining whether or not such abandonment should be permitted, and under what circumstances. The following section proceeds on the assumption that the abandonment of land is possible, to explore the question as to what becomes of abandoned land. The courts in the cases analysed below themselves appear to have proceeded on the assumption that the abandonment of landownership is possible,[74] but that it simply did not occur on the facts of those cases. It is thus crucial to review these cases before proceeding with the in-depth analysis of the subsequent chapter.

---

[69] See Sonnekus (2004) *TSAR* 747ff; H Mostert "No Right to Neglect? Exploratory Observations on How Policy Choices Challenge the Basic Principles of Property" in S Scott & J van Wyk (eds) *Property Law under Scrutiny* (2015) 27; Van der Merwe (1980) *SALJ* 186-188. See also Carey Miller *The Acquisition and Protection of Ownership* 9.
[70] Mostert "No Right" in *Property Law Under Scrutiny* 27.
[71] Mostert "No Right" in *Property Law Under Scrutiny* 26-27.
[72] Mostert "No Right" in *Property Law Under Scrutiny* 26-27; Van der Merwe (1980) *SALJ* 186-188; Carey Miller *The Acquisition and Protection of Ownership* 9.
[73] Muller et al *Silberberg* 93-94; Van der Merwe and Pope "Part III – Property" in *Wille's Principles* 410; Van der Merwe *Sakereg* 14.
[74] See Chapter 3 Section 2.4.1.

4.2.1 *Bona vacantia* or *res nullius*?

If one accepts that the abandonment of land is possible, this raises the further question as to what becomes of such abandoned land. The standard view holds that abandoned immovable property is rendered *bona vacantia*.[75] However, Sonnekus offers a dissenting view, arguing that abandoned immovable property is rendered *res nullius*, thus rendering it open to appropriation by the first taker.[76]

Sonnekus has expressed his displeasure with the suggestion that the rule of *bona vacantia* has been received into our law and has advised caution of unfounded state claims to private property.[77] According to the rule of *bona vacantia*, the state has a claim to, among other things, abandoned immovable property.[78] On his reading of the historical sources, the regal privilege to ownerless or abandoned property never formed part of the Roman-Dutch law.[79]

What about the aforementioned view put forward by Grotius that abandoned land becomes property of the Commonwealth (i.e. the state)?[80] Sonnekus attributes views such as this on the part of Roman-Dutch jurists to the influence of French jurists of the day.[81] In his view, they incorrectly believed that ownerless land became property of the state, when no such rule existed in the law of their own land.[82]

As such, he argues that the principle of *bona vacantia* was never received into our law when Roman-Dutch law was transplanted at the Cape.[83] He provides further support for his view by pointing out the manner in which land could be obtained through

---

[75] Van der Merwe and Pope "Part III – Property" in *Wille's Principles* 492; Van der Merwe *Sakereg* 227; Van der Merwe (1980) *SALJ* 187-188; Carey Miller *The Acquisition and Protection of Ownership* 8-9.
[76] See Sonnekus (1985) *TSAR* 121ff; Sonnekus (2001) *TSAR* 91ff.
[77] Sonnekus (1985) *TSAR* 121.
[78] Sonnekus (1985) *TSAR* 121. See also Van der Merwe and Pope "Part III – Property" in *Wille's Principles* 492; Muller et al *Silberberg* 159; Carey Miller *The Acquisition and Protection of Ownership* 8-9.
[79] Sonnekus (1985) *TSAR* 129-131; Sonnekus (2001) *TSAR* 95-102.
[80] Grotius 2 1 54.
[81] Sonnekus (1985) *TSAR* 130.
[82] Sonnekus (1985) *TSAR* 130.
[83] Sonnekus (1985) *TSAR* 128-135; Sonnekus (2001) *TSAR* 95-102. For general sources on the transplant of Roman-Dutch law at the Cape, see R Zimmermann & D Visser "Introduction" in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 1; E Fagan "Roman-Dutch Law in its South African Historical Context" in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 33.

occupatio in the early colonial Cape.[84] So long as one occupied such land with the necessary *animus domini*, one could obtain ownership through original acquisition.[85]

Furthermore, he argues that, despite the position in English law that all land is owned by the crown,[86] the British occupation never resulted in the alteration of the legal position at the Cape.[87] This failure to alter the legal position at the Cape is due to the British policy that the law of conquered and ceded territories remains in force until expressly changed through statute.[88] The royal prerogative of the crown to ownerless land was never recognised in South Africa.[89] As a consequence, Sonnekus argues that ownerless land in South Africa is thus *res nullius*.[90]

Sonnekus further points out that the early South African case law contains little mention of the concept of *bona vacantia*.[91] These cases do not deal with land, but rather with unclaimed inheritances. In *Ex parte Leeuw*,[92] the court stated that the crown was not entitled to exercise its right to a vacant inheritance until 40 years have passed.[93] Despite not concerning land, Sonnekus holds that this shows that the South African law never received the English rule concerning the claim of the crown to *bona vacantia*.[94]

There are later cases in which courts seemed to accept the rule of *bona vacantia* in our law. Again these cases were not concerned with land.[95] However, according to Sonnekus, these cases often seemed to be decided on the mistaken assumption that the rule of *bona vacantia* forms part of our law.[96] The judges in these cases did not

---

[84] Sonnekus (2001) *TSAR* 105.
[85] Sonnekus (2001) *TSAR* 105.
[86] Sonnekus (2001) *TSAR* 102ff.
[87] Sonnekus (2001) *TSAR* 108.
[88] Sonnekus (2001) *TSAR* 108.
[89] Sonnekus (2001) *TSAR* 108-109.
[90] Sonnekus (2001) *TSAR* 108-109.
[91] Sonnekus (1985) *TSAR* 138.
[92] (1905) 22 SC 340.
[93] 341-342.
[94] Sonnekus (1985) *TSAR* 138-139.
[95] In respect of property that belongs to a corporation to which nobody is able to establish title, see *Ex Parte Sprawson (In Re Hebron Diamond Mining Syndicate Limited)* 1914 TPD 458; *Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy v Rainbow Diamonds (Edms) Bpk* 1982 (4) SA 633 (A); *Government of the Republic of South Africa v Ocean Development Investment Trust plc* 1989 (1) SA 35 (T). In respect of mineral rights before the coming into force of the Mineral and Petroleum Resources Development Act 28 of 2004, see *Ex parte Marchini* 1964 (1) SA 147 (T); *Government of the Republic of South Africa v Ocean Development Investment Trust plc* 1989 (1) SA 35 (T).
[96] See Sonnekus (1985) *TSAR* 138ff.

interrogate the pedigree of the *bona vacantia* rule in our law in any detail.[97] However, despite Sonnekus' objections regarding its pedigree, the rule of *bona vacantia* has become accepted by the courts, academics, and those in practice with regard to assets belonging to a deregistered company to which nobody can establish title.[98] This position is unlikely to change, and the rule of *bona vacantia* in these circumstances has solidified in our law. The position regarding unclaimed inheritances is also that such property is rendered *bona vacantia*,[99] although this position is regulated by legislation now.[100]

Finally, to return to the issue of abandoned land, Sonnekus suggests that the legal position in South African law was never explicitly changed by statute.[101] Thus the common law position in respect of unowned land prevails.[102] In particular, no clear definition of state land exists in statute law, or at least brings unowned land within its scope.[103] For example, in the State Land Disposal Act,[104] "State land" is defined as land in which the right of disposal vests in the State President, as well as "right in respect of State land".[105] This definition evidently does not seem to bring unowned land within its scope.

Section 18 of the Deeds Registries Act[106] creates some uncertainty.[107] This section provides for the transfer of state land. The Act does not provide a definition of state land. Of particular interest, though, is section 18(1) which discusses the transfer of "unalienated state land". Such land can only be transferred by a duly authorised deed

---

[97] See Sonnekus (1985) *TSAR* 138ff.
[98] This approach was confirmed as recently as 2015 by the Supreme Court of Appeal. See *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 (SCA) para 15. See also *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)* 2011 (5) SA 14 (WCC) para 6; *Government of The Republic of South Africa v Oceana Development Inv Trust Plc* 1989 (1) SA 35 (T) 36C-E; *Ex Parte Jacobson: In re Alec Jacobson Holdings (Pty) Ltd* 1984 (2) SA 372 (W) 374D-375A; *Rainbow Diamonds (Edms) Bpk v SA Nasionale Lewensassuransiemaatskappy* 1984 (3) SA 1 (A) 10C-12E.
[99] M Paleker "Succession" in *Wille's Principles* 682. See *Estate Baker v Estate Baker* (1908) 25 SC 234; *Bielovich and Others v The Master and Another* 1992 (4) SA 736 (N).
[100] M Paleker "Succession" in F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 666 682n153. See sections 35(13), 43(6) and 92 of the Administration of Estates Act 66 of 1965.
[101] Sonnekus (2001) *TSAR* 109ff.
[102] Sonnekus (2001) *TSAR* 110.
[103] Sonnekus (2001) *TSAR* 109ff.
[104] Act 48 of 1961.
[105] Section 1.
[106] Act 47 of 1937.
[107] Sonnekus (2001) *TSAR* 110.

of grant. Nel notes that the term “unalienated state land” refers to land that has never been alienated (granted into private ownership).[108] Land which the state has alienated in the past, but has since reacquired, is referred to as “acquired state land”.[109] This categorisation is to reflect that the land in question previously formed the subject of private ownership.[110]

Does this refer to all unowned land, including that which has intentionally been abandoned by its owner, bringing such under the ownership of the state? A more express statement to this effect would be desirable if this was the intention. In the absence of a clearer definition, it would seem that Sonnekus is correct in his observation that no clear definition of “state land” exists in statute law.[111]

Does Sonnekus’ view that abandoned land is rendered *res nullius* hold up? Certainly, he is correct in his assertion that legislation does not provide us with a clear answer.[112] However, as has been stated, most academics support the view that abandoned land, (should such abandonment be possible) accrues to the state.[113] In this respect, they enjoy the support of old authorities such as Grotius and Van der Keessel.[114] Sonnekus’ dismisses such statements by Roman-Dutch authorities on the ground of possible influence by the French jurists of the day.[115]

However, if Sonnekus is correct in his evaluation of the Roman-Dutch sources and the influence of French jurists, the standard view remains preferable. This contention is made in light of the need for someone to take responsibility for the land, even if that is the State, so as to prevent immovable properties become hazards.[116] The proliferation of immovable properties which are *res derelictae* in law is undesirable. For this reason, the standard view, supported by the statements of Grotius and Van der Kessel,[117]

---

[108] HS Nel *Jones Conveyancing in South Africa* 4 ed (1991) 24.
[109] Nel *Conveyancing* 24.
[110] Nel *Conveyancing* 24.
[111] Sonnekus (2001) *TSAR* 109ff.
[112] Sonnekus (2001) *TSAR* 108ff.
[113] Van der Merwe & Pope “Part III – Property” in *Wille’s Principles* 492; Van der Merwe *Sakereg* 227; Van der Merwe (1980) *SALJ* 187-188; Carey Miller *The Acquisition and Protection of Ownership* 8-9.
[114] Grotius 2 1 54; Van der Keessel *Praelectiones* 2 32 3.
[115] Sonnekus (1985) *TSAR* 130.
[116] See the example of *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (6) SA 417 (SCA) para 8.
[117] Grotius 2 1 54; Van der Keessel *Praelectiones* 2 32 3.

should be accepted as the position in South African law. The uncertainty that prevails in this area of property law justifies the theoretical engagement provided by this thesis.

If Sonnekus' analysis of the historical and legal sources is correct, however, then the state is not the owner of all unowned and abandoned land in South Africa. It would thus be necessary for the position to be changed explicitly through statute law. In recent years, there appeared to be a shift in this direction with the Green Paper on Land Reform, 2011.[118] The Green Paper envisages land as a "national asset".[119] The implications of this still need to be clarified.[120] The possibility that this will entail the nationalisation of land has been raised.[121] Whether or not the legislation that stems from the policy direction of the Green Paper results in nationalisation of land, it is doubtful that abandoned or ownerless land would be rendered *res nullius* under such a regime. However, the nationalisation of land does not appear to be an objective of the current government. Rather, the goal of government at present appears to be a moderate form expropriation without compensation, targeting unused or underutilised land.[122]

4.2.2 The approach of the courts to the abandonment of land

Our courts have taken a strict approach in determining whether valuable property has been abandoned.[123] Apathy on the part of the owner of valuable property is thus insufficient to establish an intention to abandon.[124] Given the value attached to immovable property, a court will not find that abandonment has occurred absent an express intention to do so on the part of the owner. Such an approach was taken in *Sonnendecker*, *Meintjes NO v Coetzer*,[125] and *Papas NO v Motsere Trading CC*.[126]

---

[118] Department of Rural Development and Land Reform *Green Paper on Land Reform* (2011).
[119] Department of Rural Development and Land Reform *Green Paper* 1.
[120] H Mostert "Land as a 'National Asset' Under the Constitution: The System Change Envisaged by the 2011 Green Paper on Land Policy and What this Means for Property Law Under the Constitution" (2014) 17 *PER* 760 780.
[121] Mostert (2014) *PER* 766-767.
[122] See Chapter 7 Section 3 for a discussion of the implications of moves towards expropriation without compensation.
[123] See discussion in Section 4.1 above.
[124] See discussion in Section 4.1 above.
[125] 2010 (5) SA 186 (SCA).
[126] (46011/2012) [2014] ZAGPJHC 144 (6 June 2014).

These are currently the only cases in which the possibility of the abandonment of land has been considered by our courts.

In *Sonnendecker*, the respondent sought to obtain title to the land in question on the basis of acquisitive prescription while the appellant argued the land had been abandoned, thus rendering it *bona vacantia*. The land in question was registered in the name of Firmin. Firmin originated from the Baltic islands and had no family living in South Africa. Firmin could not be tracked down, with it appearing that he had returned to the Baltic Islands. The court *a quo* described the land as a wasteland at the time the respondent took possession of it. Furthermore, Firmin had not paid tax on the land from 1925 to 1934. It thus seems from the surrounding circumstances that the registered owner had a long-term disinterest in his land.

The respondent's claim based on acquisitive prescription failed in the court *a quo*, and he did not appeal the decision. The appellant's claim based on abandonment also failed in the court *a quo*, leading it to appeal to the Appellate Division (AD) as it was then known. The AD was thus concerned only with the appellant's claim based on abandonment of the land. The court took note of the true owner's apparent disinterest in the land. However, it was not willing to conclude that the land had been abandoned in the absence of an express indication on behalf of the owner.[127] Quoting the judgment of the court *a quo*, the possibility that the owner intended to retain the land as a long-term investment could not be discounted.[128] Nor could the possibility be ignored that he was unable to return to South Africa and his land for compelling reasons.[129] Thus the Appellate Division rejected the appellant's appeal, finding that it was not possible to establish an intention to abandon land on the evidence available.

In the absence of an express intention to abandon on the part of the owner, the court in *Sonnendecker* did not have an opportunity to engage with some of the more pertinent questions related to the abandonment of land. The court seemed to take it for granted that, should abandonment be established, the land would be rendered *bona vacantia*. It also did not provide clarity on how one may demonstrate an intention to abandon land in light of the publicity principle that must be given effect when ownership

[127] *Minister van Landbou v Sonnendecker* 1979 2 SA 944 (A) 946A-947B.
[128] 946F.
[129] 946F.

in land changes.[130] This case thus yields little as concerns the abandonment of land, other than the court's affirmation that more than sheer apathy on the part of a landowner is required to establish an intention to abandon.

Meintjes NO's circumstances were different to *Sonnendecker*. In *Meintjes NO*, the defendants had orchestrated the transfer of portions of a farm belonging to the deceased into their own names without her knowledge, prior to her death. The transfer was achieved through the falsification of documents. At no point did the deceased sign the relevant documents necessary to facilitate transfer. The plaintiff, in his capacity as executor of the deceased's estate, brought an action seeking rectification of the title deeds to reflect the deceased estate as owner of the portions of the farm.[131]

Prior to her death, the deceased had become aware of the fact that the two portions of her farm had been transferred into the names of the two defendants. The defendants argued that given the lack of action on the deceased's part to recover the two portions of the farm, the deceased had abandoned her rights to the two portions. The court rejected this argument. The defendants bore the onus to prove abandonment on the part of the deceased.[132] Registration of the property in the defendants' names was insufficient to indicate ownership.[133] Instead, there needs to be a clear intention to abandon on the part of the owner.[134]

The defendants were unable to prove an intention to abandon the property. Even though the deceased did not take steps to recover her property,[135] the court did not find this sufficient to establish that abandonment had occurred.[136] As in *Sonnendecker*, the court seemed unwilling to find that land had been abandoned in the absence of an express intention to do so by the landowner.

The question as to what would happen to land should it be found to be abandoned was not raised in *Meintjes NO*. The defendants seemed to assume that, should a finding of abandonment be made, their position as owners would be confirmed. Given the

---

[130] Mostert "No Right" in *Property Law Under Scrutiny* 27.
[131] *Meintjes NO v Coetzer* 2010 (5) SA 186 (SCA) para4-5.
[132] Para 16.
[133] Para 16.
[134] Para 16.
[135] Para 17.
[136] Para 17.

weakness of the defendants' argument, the court did not seem to give any thought as to what the consequences of a finding of abandonment would be. Furthermore, unlike in the case of *Sonnendecker*, it was in neither parties' interest that the land be declared *bona vacantia* on the ground that the owner had abandoned her ownership. This was likely the reason for the court's failure to consider the consequences of abandonment.

A further judgment in which the abandonment of land was raised is that of *Papas NO*.[137] Prior to his passing, the now deceased registered owner of the property in question had entered into what was termed an "abandonment agreement" with the City of Johannesburg.[138] The terms of the agreement stated that the deceased "abandoned" the property to the City of Johannesburg, which was set-off against what the deceased owed in taxes and municipal service fees.[139] Papas, the executor of the deceased estate, discovered in 2012 that the property had been fraudulently transferred to the first respondent (Motsere Trading CC), and then subsequently transferred to the second respondent (Temis Business Enterprises CC). The second respondent was innocent in respect of the fraud.

The second respondent, Temis, opposed the application by the executor seeking the setting aside of the fraudulent transfers. This opposition was founded on the claim that the executor lacked the necessary *locus standi*. While not claiming ownership of the property itself, Temis argued that the conclusion of the "abandonment agreement" by the deceased meant that the property was "unilaterally abandoned" to the City of Johannesburg.[140]

The court stated that, for abandonment to occur, there must be an intention to do so on the part of the owner.[141] The existence of such an intention must be established on the facts of the case.[142]

The court correctly found that no intention to abandon could be established on the facts of the case.[143] The agreement did not constitute an "abandonment" of the property by

[137] (46011/2012) [2014] ZAGPJHC 144 (6 June 2014).
[138] Para 2.
[139] Para 2.
[140] Para 3.
[141] Para 4.
[142] Para 4.
[143] Paras 5-8.

the deceased, but rather a transfer in return for a *quid pro quo*.[144] The deceased remained the registered owner of the property in question until registration of the property in the name of the City of Johannesburg.[145] The mere use of the words "abandon" or "abandonment" does not transform what is effectively a bilateral agreement to transfer property in return for a *quid pro quo* into abandonment.[146] As such, the court ordered the fraudulent transfers to be set aside.[147]

As in *Sonnendecker* and *Meintjes*, the question as to whether abandonment would be possible – should an intention to abandon be established on the facts – was not raised. However, remarks by the court seem to indicate it may have been of the view that abandonment is possible, and that the consequence would be that such property would be *res derelictae* and open to appropriation.[148] No mention was made of the view that abandoned immovable property is rendered *bona vacantia*.[149] However, given that the court did not engage with these questions more closely – seeing as there was no intention to abandon in the first place – any remarks made in this respect are of little consequence.

4.3 Other rights in land

Other rights in land are open to abandonment as well. Differences exist depending on whether these are rights that exist at common law, such as servitudes, or statutory rights, such as rights granted in terms of the Mineral and Petroleum Resources Development Act.[150]

4.3.1 Common law: servitudes

It is open to the holder of a servitude to abandon it. Clear proof that such an intention to abandon existed is required.[151] Such intention need not be express, as it is possible

[144] Para 7.
[145] Para 7.
[146] Para 7.
[147] Para 12.
[148] Para 4.
[149] See discussion in Section 4.2.1 above.
[150] Act 28 of 2002.
[151] AJ van der Walt *The Law of Servitudes* (2016) 572-578; PJ Badenhorst, JM Pienaar& H Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006) 336; Muller et al *Silberberg* 401; Van der Merwe *Sakereg* 537-539; CG Hall & EA Kellaway *Servitudes* 3 ed (1973) 141.

to infer the intention from the conduct of the servitude holder or owner of the dominant tenement.[152]

It has been said, however, that a servitude may not be abandoned if the servient tenement stood to be seriously harmed through such abandonment.[153] Authority for this view stems from *Du Plessis v Philipstown Municipality*.[154] In this case, the Philipstown Municipality had entered into an agreement with the plaintiff, allowing it to divert a river flowing over his land. To facilitate the diversion of the river, a weir and a wall were constructed, which resulted in water being dammed above the wall on the plaintiff's land. In this case, the municipality sought an order declaring it entitled to abandon its servitude and the wall. Ultimately, the river would be diverted back to its original course.

The nature of the land had been altered through the diversion of the river, and there was no guarantee that the municipality could restore the land to its natural state once the river was restored to its original course. The plaintiff was thus faced with the possibility of serious harm should the river be diverted back to its original course. Given this possibility, the court found that the municipality was not entitled to abandon its servitude and remove the wall.[155] The municipality requested that if the court was unwilling to allow it to remove the wall, it should still be entitled to abandon the servitude and the wall, thus leaving the river flowing along its current course. This request was

---

[152] Muller et al *Silberberg* 401; Van der Merwe *Sakereg* 537-539; Hall & Kellaway *Servitudes* 141-142; *Pickard v Stein* 2015 (1) SA 439 (GJ) para 47. Hall and Kellaway note cases which demonstrate the approach taken in our law to the abandonment of servitudes through conduct. See *Edmeades v Scheepers* (1880-1882) 1 SC 334 339-340, in which the court held a servitude was lost through allowing the holder of the servient tenement to act in a way contrary to the terms of the servitude for a period of eighteen years. See also *Head v Du Toit* 1932 CPD 287 295, where it was indicated that a reasonable amount of time should elapse before a finding of abandonment. See also the cases of *Vermeulen's Executrix v Moolman* 1911 AD 384 and *Margate Estates Ltd v Urtel (Pty) Ltd* 1965 (1) SA 279 (N).
The more recent case of *Pickard* confirms that servitudes may be be abandoned through conduct. In this case, a servitude of light was found to have been abandoned, as the respondent had given the applicant permission to build a way that obstructed "the servitude in all its components". See paras 47-72.

[153] Van der Walt *Servitudes* 572-573; Badenhorst et al *Silberberg* 336n133; Muller et al *Silberberg* 401; Van der Merwe *Sakereg* 538; Hall & Kellaway *Servitudes* 144.

[154] 1937 CPD 335.

[155] 339-343.

also rejected by the court.[156] The court stated that the municipality could not abandon its duties concerning the wall, and would have to continue maintaining the wall.[157]

The general interpretation of this decision is that servitudes cannot be abandoned where doing so would result in the servient tenement being seriously harmed.[158] The court did not indicate that its decision was limited to circumstances in which an organ of state sought to abandon a servitude, and academics have not interpreted the decision as implying such a limitation to the scope of the decision.[159]

Servitudes can thus be freely abandoned, except in the circumstances that such abandonment will have negative consequences for the servient tenement.[160] In these circumstances, an owner of a dominant tenement may be expected to retain his servitude, and maintain any works connected thereto.

4.3.2 Statutory rights in land

There are a number of statutory real rights one can hold in another's land.[161] The two that will be canvassed here are water servitudes in terms of the National Water Act[162] and rights in terms of the Mineral and Petroleum Resources Development Act.[163] The reason for choosing these two Acts is not only that they make provision for the granting of limited real rights. The rights granted in terms of these Acts also have in-built obligations, which as will become clear, cannot be avoided through abandonment.

4.3.2.1 Water servitudes

The National Water Act provides for servitudes in respect of water sources.[164] Where it is necessary to make effective use of water, a person authorised to use water in terms of the Act's provisions may claim a servitude over land belonging to another.

---

[156] 343.
[157] 343.
[158] Van der Walt *Servitudes* 572-573; Badenhorst et al *Silberberg* 336n133; Muller et al *Silberberg* 401; Hall & Kellaway *Servitudes* 144; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 614.
[159] Badenhorst et al *Silberberg* 336n133; Hall & Kellaway *Servitudes* 144; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 614.
[160] Van der Walt *Servitudes* 572-573; Badenhorst et al *Silberberg* 336n133; Muller et al *Silberberg* 401; Van der Merwe *Sakereg* 538; Hall & Kellaway *Servitudes* 144.
[161] See for examples sections 28-31 of the Sectional Titles Act 95 of 1986.
[162] Act 36 of 1998.
[163] Act 28 of 2002.
[164] Part 2 of Chapter 13.

Servitudes granted in terms of the Act may be either personal or praedial.[165] These servitudes can be cancelled for a number of reasons,[166] such as if the relevant authorisation to use water has been terminated,[167] or if the rights and obligations attaching to the servitude have not been exercised on the burdened land "for a continuous period of three years".[168] The Act further allows for a servitude granted in terms of its provisions to be cancelled for "any other lawful reason".[169] Such cancellation occurs at the behest of the landowner, rather than the servitude holder.

One can assume that where the Act has not expressly altered the common law, the common-law rules regarding servitudes will apply to these servitudes granted in terms of the legislation. It would thus be possible to abandon any servitude granted in terms of the Act, subject to the qualification that a servitude cannot be abandoned if it would result in significant harm to the servient tenement.[170] The Act, however, does not allow the servitude holder to walk away from the burdened land. On termination of the servitude it is required that "the holder of the servitude must rehabilitate the land subject to the servitude to the extent that this is reasonably possible".[171]

4.3.2.2 Rights in terms of the Mineral and Petroleum Resources Development Act (MPRDA)

It is warranted to mention the issue of abandonment of rights granted in terms of the MPRDA to provide a complete picture of abandonment under South African law.

---

[165] Section 127(2). Both personal and praedial servitudes amount to limited real rights that bind successors in title of the encumbered property. See Van der Walt *Servitudes* 57-58; Muller et al *Silberberg* 371; Van der Merwe *Sakereg* 458-459; Van der Merwe & Pope "Part III – Property in *Wille's Principles* 592.
Praedial servitudes, however, can only exist in respect of immovable property and require two tenements that exist in proximity of each other. This category of servitude benefits the owner of the dominant tenement in his capacity as landowner, and are attached to the land. Future owners of the dominant tenement will also enjoy the benefit of the servitude. See Van der Walt *Servitudes* 401-408; Muller et al *Silberberg* 373-377; Van der Merwe *Sakereg* 467-479; Van der Merwe & Pope "Part III – Property in *Wille's Principles* 593.
Personal servitudes, by contrast, only benefit the servitude holder in his personal capacity. They are said to be inextricably bound the servitude holder. See Van der Walt *Servitudes* 455-462; Muller et al *Silberberg* 382-383; Van der Merwe *Sakereg* 506-508; Van der Merwe & Pope "Part III – Property in *Wille's Principles* 604.
[166] Section 133.
[167] Section 133(1).
[168] Section 133(2).
[169] Section 133(3).
[170] Van der Walt *Servitudes* 572-573; Badenhorst et al *Silberberg* 336n133; Muller et al *Silberberg* 401; Hall & Kellaway *Servitudes* 144. See *Du Plessis v Philipstown Municipality* 1937 CPD 335.
[171] Section 128(5).

However, it is beyond the scope of this thesis to go into the depth the subject requires.[172]

The MPRDA does appear to envisage the possibility of abandoning rights accorded in terms of its provisions,[173] although little in the way of guidance has been provided as to how this may be achieved.[174] Section 107(1)(g) does empower the Minister to make regulations regarding the abandonment of any permit, licence, certificate and permission granted in terms of the Act. The regulations, however, are equally silent as to how one may abandon rights in terms of the MPRDA.[175]

The provision which appears to permit the abandonment of rights in terms of the MPRDA is section 11(1). A prospecting right or mining right may only be ceded, transferred, let, sublet, assigned, alienated or "otherwise disposed of" with the permission of the Minister.[176] It has been suggested, and it appears most likely, abandonment would fall within the ambit of this section.[177] Furthermore, section 56(f) provides that any right or permission granted in terms of the Act shall lapse when abandoned.[178]

---

[172] For a study on the subject, see D Hart *The Abandonment of Rights Under the Mineral and Petroleum Resources Development Act* LLB paper University of Cape Town (2013). See also Van der Schyff *Property* 508-510.

[173] See sections 30(1)(d), 30(5), 43(3)(a), 43(4), 44(1), 56(f).

[174] See Hart *The Abandonment* 7.

[175] Mineral and Petroleum Resources Development Regulations GN R527 of 2004.

[176] Section 11(1).

[177] Hart *Abandonment* 22.

[178] See further MO Dale *SA Mineral and Petroleum Law* (SI 27 2019) 350.10. Dale argues that the MPRDA does allow for abandonment through this section, and such support can be found in the regulations to the MPRDA. Regulation 76(4) of the regulations "contemplates relinquishment of areas already prospected or explored in respect of prospecting rights and exploration rights, and contemplates that written notification with details of the relinquishment be submitted by the holder to the Regional Manager or the designated agency". In addition, the standard forms provided by the Department in respect of mining and prospecting rights include terms and conditions that "entitling the holder to abandon the right wholly or as to part or parts of the relevant area". While the method through which such rights can be abandoned is not stated by section 56(f), Dale suggests written notice to the Minister must be provided.
Hart, however, in assessing Dale's argument, suggests this is incorrect, given the requirement for ministerial permission before any right may be disposed of, as per section 11(1) of the MPRDA. Section 12A of the Mining Titles Registration Act 16 of 1967 further provides that "[a]ny registration of a variation, amendment, modification, deduction, abandonment or cancellation shall be accompanied by a plan or a diagram depicting the area affected". Such suggests that abandonment of rights granted in terms of the MPRDA must be registered. See Hart *Abandonment* 22-23. See further Van der Schyff's discussion of the possibility of abandoning rights in terms of the provisions of the MPRDA: E van der Schyff *Property in Minerals and Petroleum* (2016) 508-510.

Abandonment of a right in terms of the MPRDA, however such may be achieved, does not mean that the holder is free of liabilities.[179] The holder of prospecting right, mining right, retention permit or mining permit that ceased to exist retains liability for the environmental damage caused through mining activities.[180] The liability for rehabilitation of the land continues until the holder is granted a closure certificate by the Minister.[181] On the abandonment of a right granted in terms of the MPRDA, the holder of such a right must apply for a closure certificate.[182] No closure certificate can be granted until the environmental obligations of the right holder have been addressed.[183]

4.3.3 Customary law rights in land

Land tenure rights granted in terms of customary law are open to abandonment.[184] Ultimately, though, such land does not become open to appropriation by others, but is subject to the reversionary interests of chiefs.[185]

Express, public disavowments of land rights in the customary law context would be unusual, according to Bennett.[186] Abandonment of customary law rights in land are usually inferred from extended periods of non-use which are deemed to be unreasonably long.[187] What is considered unreasonable will depend on community practice.[188] The traditional authorities in some areas have set prescribed periods for what constitutes a period of permissible absence from land before rights are lost.[189]

Abandonment of customary land rights differs from the common law of abandonment. At common law, abandonment has said to occur when possession of property is relinquished with the intention of no longer remaining owner.[190] In customary law, unless there is an express intention to abandon on the part of the right-holder, rights

[179] Van der Schyff *Property* 509-510.
[180] Section 43(1).
[181] Section 43(1).
[182] Section 43(3)(a).
[183] Section 43(5).
[184] T Bennett *Customary Law in South Africa* (2004) 399-400.
[185] Bennett *Customary Law* 399n215.
[186] Bennett *Customary Law* 399.
[187] Bennett *Cusomtary Law* 399-400.
[188] Bennett *Customary Law* 399-400.
[189] Bennett *Customary Law* 400.
[190] See Section 4.1 above.

seem to be lost on the basis of a period of non-use, deemed unreasonable by the community.[191] This loss can occur without a closer scrutiny of the facts to determine whether there was either an express or inferred intention to abandon on the part of the right holder.

Loss of rights in the manner outlined above seem to have more in common with prescription.[192] However, as Bennett points out, prescription itself, as far as the acquisition of rights is concerned, is at odds with customary law.[193] In customary law, rights in land by their nature depend on consent, while to acquire rights through prescription requires possession be non-precarious.[194]

4.4 Comment and analysis

Much in line with Peñalver's observation regarding the abandonment jurisprudence in the United States,[195] the South African case law on the abandonment of ownership has never been concerned with confirming an actual right to abandon ownership of property. Rather, the case law is predominantly concerned with settling ownership disputes. Such disputes can be between the original owner and the would-be appropriator, or between two parties competing to claim to property about which there was no dispute regarding its status as *res derelictae*. The South African courts have yet to consider a case in which an owner has raised abandonment of corporeal property as a defence, asserting her right to do so.

As Peñalver puts it:[196]

> [abandonment] provides a useful mechanism for resolving disputes over ownership after the fact, when there are multiple parties willing and able to assert responsibility for ownership of the item … it does nothing affirmatively to empower owners to unilaterally sever their ties to an item

[191] Bennett *Customary Law* 399-400.
[192] Bennett *Customary Law* 400.
[193] Bennett *Customary Law* 400.
[194] Bennett *Customary Law* 400.
[195] Peñalver (2010) *Michigan Law Review* 208.
[196] Peñalver (2010) *Michigan Law Review* 208.

> of property in the absence of another party who wishes to accept responsibility for it.

An example of the former is seen in cases such as *S M Goldstein* and *Salvage Association*. Circumstances may arise where a third party acts on the assumption that movable property has been abandoned. The court must then make a decision, based on the principles that govern the abandonment of ownership in the South African common law, as to whether to come to the aid of the original owner or protect the claim of the appropriator.[197] More often than not, however, given the strict requirements laid down with respect to the requisite intention required for valuable property to be regarded as abandoned, the court will support the claim of the original owner.

The next set of cases concern property whose status as *res derelictae* is not in dispute, at least prior to an attempted appropriation by the parties involved. In these cases, the court must decide as to whose attempt at appropriation complied with the requirements for *occupatio* of unowned property. Again, there is no mention of a right to abandon. The property is only classed as abandoned for the purpose of allowing another party to appropriate it, not for the purpose of protecting some right of the long-lost owner to dispose of her property as she sees fit.[198]

This approach can be seen in the context of land as well. At no point has a landowner approached a court to assert a right to abandon her land to avoid the liabilities that attach to her ownership of that land. Instead, as *Sonnendecker, Meintjes NO* and *Papas NO* make clear, abandonment only operates in the context of ownership disputes regarding land, where the abandonment of said land by the original owner would lead to the acquisition of ownership by one of the parties. Such an approach is not new. As noted above, even the Roman-Dutch authorities recognised that abandonment could not serve as an escape from one's obligations as landowner.[199]

---

[197] This approach is similar to the analysis of American abandonment case law by Peñalver. See Peñalver (2010) *Michigan Law Review* 208.
[198] See Peñalver (2010) *Michigan Law Review* 208.
[199] Grotius 2 32 3; Van Leeuwen *Commentaries* 2 3 12; Van der Keessel *Praelectiones* 2 32 3.

A defence of abandonment is unlikely to serve to allow one to escape liability stemming from one's property.[200] In respect of various statutory incorporeal property rights, such liability is directly built into the right itself.[201]

The only case in which a party has asserted their right to abandon, in the face of opposition from another party to a finding of abandonment, is in the context of servitudes. Servitudes can (usually) be freely abandoned, as the circumstances in which such abandonment can have an external impact are few and far between. However, where the possibility of a negative external impact from the abandonment of a servitude arises, it would seem that no right to abandon such a servitude exists.[202] As in *Du Plessis v Philipstown Municipality*, the servitude holder will likely find herself unable to free herself from the servitude, and obliged to maintain any related infrastructure.

Only where abandonment has no external impact, does it appear possible to abandon property freely. In all other circumstances, one will need to follow the (often strict) guidelines provided by law for disposal,[203] or even find themselves unable to relinquish ownership of the property in question.[204] This applies in respect of both corporeal and incorporeal property. The manner in which the doctrine of abandonment of corporeal movables has been negated, or at least highly streamlined, by legislation governing the disposal of unwanted property, is often overlooked.[205] It is, however, beyond the

---

[200] See Peñalver's observations regarding derelict boats in Florida, where it would be no defence for the owner to rely the doctrine of abandonment to avoid liability. Peñalver (2010) *Michigan Law Review* 208. Evidently, a similar position exists in South African law. It would be no defence to the obligations imposed on owners in terms of the National Environmental Management: Waste Act 59 of 2008. With regard to immovable property, the common law doctrine of abandonment will more than likely not serve as a defence to liabilities imposed in terms of rates or problem building by-laws. See the discussion of problem buildings in Chapter 6 Section 3.3.

[201] See section 128(5) of the National Water Act 36 of 1998 and section 43(1), (3)(a) and (5) of the Mineral and Petroleum Resources Development Act 28 of 2002. See also Section 4.3.2 above.

[202] Van der Walt *Servitudes* 572-573; Badenhorst et al *Silberberg* 336n133; Muller et al *Silberberg* 401; Van der Merwe *Sakereg* 538; Hall & Kellaway *Servitudes* 144.

[203] See the National Environmental Management: Waste Act 59 of 2008 regulating the abandonment of "waste", the definition of which in section 1 of the Act is wide enough to encompass abandoned property in general. See sections 26, 27 and 68(4) which regulate how one may dispose of waste materials and unwanted movables on public land, as well as on private land, while creating offences for littering and dumping. Municipalities will also usually have their own by-laws regulating the disposal of waste. See sections 15 and 23 of the City of Cape Town: Integrated Waste Management By-law, 2009.

[204] See Chapter 3 on the possibility of abandoning landownership in South African law.

[205] See in general Peñalver (2010) *Michigan Law Review* 191ff.

scope of this thesis to explore the abandonment of movables and the regulation of such in further detail.

What about land? Whether the abandonment of land is possible seems uncertain from the above overview. Sonnekus has put forward a compelling argument as to why abandoned land may be rendered *res nullius*.[206] However, for the aforementioned reasons, the standard view that abandoned land is to be rendered *bona vacantia* is to be preferred. Either way, whether the abandonment of land is possible in the absence of any mechanism to provide for the publicity principle is questionable.[207]

Publicity is a core principle of property law.[208] It requires "consonance between the legal and the factual situations".[209] As such, the existence of a real right and its acquisition (or loss) should be apparent to the world at large.[210] Regarding abandonment specifically, in the case of movables, the publicity principle can be served through the relinquishment of possession. In the case of land, in the absence of a mechanism through which a person's name can be struck from the title deed, it is difficult to see how the required publicity for abandonment can be achieved.[211] The cases in which the abandonment of land has been alleged were decided purely on the basis of intention. It was thus unnecessary for the courts to have grappled with the issue of how the publicity principle may be served in the abandonment context.

The uncertainty as to whether the abandonment of land is even possible, in line with our law's requirements for the abandonment of property, may reflect a general suspicion of abandonment by our law.[212] Our law regarding abandonment does not significantly differ from the American approach to abandonment set out by Peñalver.[213] Abandonment appears to be heavily regulated. The abandonment of land, while not being directly addressed by legislation, does not appear to be an exception. Possibly

---

[206] See Sonnekus (1985) *TSAR* 121ff; Sonnekus (2001) *TSAR* 91ff.
[207] Mostert "No Right" in *Property Law Under Scrutiny* 27. See Chapter 3 Section 2.4.3.
[208] Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 410; Muller et al *Silberberg* 93-95; Van der Merwe *Sakereg* 13-15.
[209] Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 410.
[210] Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 410; Muller et al *Silberberg* 93-94; Van der Merwe *Sakereg* 13-15.
[211] Mostert "No Right" in *Property Law Under Scrutiny* 27.
[212] See Peñalver's observations regarding the American context. Peñalver (2010) *Michigan Law Review* 214.
[213] Peñalver (2010) *Michigan Law Review* 191ff.

the failure to address the question in the relevant legislation, i.e. the Deeds Registries Act, could reflect an intention that the abandonment of land should not be possible. Such an intention would not be surprising, given the negative externalities that can arise from the (informal) abandonment of land, and the attempts by legislators to hold landowners accountable.[214]

5. Conclusion

This chapter has provided an overview of the concept of abandonment. The historical development of the requirements for abandonment, and the way it operated in respect of different types of property, has been outlined. This culminated in an overview of the doctrine of abandonment as it exists in South African law, and how the requirements for abandonment have been applied in case law. The abandonment of statutory rights has also been addressed.

Most important to take away from the above is that nothing in the case law appears to support a right to abandon on the part of the owner or right holder. In the one case in which such a right was asserted, where abandonment of a servitude would have negative external consequences for the servient owner, the court rejected the existence of any such right on the part of the holder.[215] Rather, as asserted by Peñalver, the doctrine of abandonment finds its greatest application in the context of ownership disputes.[216]

Regarding land specifically, there are compelling arguments on both sides as to whether abandoned land becomes *res nullius* or *bona vacantia*.[217] For reasons of policy as well as support from Grotius and Van der Keessel,[218] it is submitted that the latter approach is to be preferred. However, the possibility of the abandonment of land, considering the publicity principle, has not been adequately addressed, our courts

---

[214] See Chapter 6.
[215] *Du Plessis v Philipstown Municipality* 1937 CPD 335 339-343.
[216] Peñalver (2010) *Michigan Law Review* 208.
[217] For the standard view, i.e. that abandoned land is rendered *bona vacantia*, see Van der Merwe and Pope "Part III – Property" in *Wille's Principles* 492; Van der Merwe *Sakereg* 227; Van der Merwe (1980) *SALJ* 187-188; Carey Miller *The Acquisition and Protection of Ownership* 8-9. For the dissenting view of Sonnekus, i.e. that abandoned land is *res nullius*, see Sonnekus (1985) *TSAR* 121ff; Sonnekus (2001) *TSAR* 91ff.
[218] Grotius 2 1 54; Van der Keessel *Praelectiones* 2 32 3.

finding against abandonment purely on the basis of intention.[219] Such may reflect a general suspicion of abandonment in our law.[220]

Following the overview of the concept of abandonment, as well as the South Africa law of abandonment as it stands, it is necessary to engage with the question as to whether abandonment is possible in the prevailing legal framework. This is the subject to which this thesis now turns.

[219] *Minister van Landbou v Sonnendecker* 1979 (2) SA 944 (A) 946A-947B; *Meintjes NO v Coetzer* 2010 (5) SA 186 (SCA) para 16.
[220] Peñalver (2010) *Michigan Law Review* 214.

Chapter 3: The Possibility of Abandoning Landownership

1. Introduction

South African scholars have paid scant attention to the abandonment of land.[1] The primary debate has centred on the consequences of such abandonment, particularly, whether abandonment renders land *bona vacantia*,[2] or *res derelictae*.[3] The former approach is preferred for policy reasons.[4] However, it is premature to consider the consequences of abandonment before analysing whether the abandonment of land is possible in South African law. That is the focus of this chapter.

2. Legal possibility of abandoning land: differing views

Only Sonnekus and Mostert have engaged with the question of whether land can be abandoned under South African law in any detail and they have reached opposite conclusions. Sonnekus argues that the abandonment of land is possible in the absence of registration actions, which are only necessary to bring some formality to the abandonment in question.[5] To support this, he relies on the negative system of registration that prevails in South Africa.[6] In terms of the negative system of registration, the position in the Deeds Registry is not guaranteed to reflect the correct legal position regarding the existence of real rights in the land.[7]

---

[1] See the more detailed discussion in Chapter 2 Section 4.
[2] CG van der Merwe & A Pope "Part III – Property" in F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 405 492; CG van der Merwe *Sakereg* 2 ed (1989) 227; CG van der Merwe "Minister van Landbou v Sonnendecker 1979 2 SA 944 (A)" (1980) *TSAR* 183 187-188; DL Carey Miller *The Acquisition and Protection of Ownership* (1986) 8-9.
[3] JC Sonnekus "Enkele Opmerkings na Aanleiding van die Aanspraak op Bona Vacantia as Sogenaamde Regale Reg" (1985) *TSAR* 121 121ff; JC Sonnekus "Grondeise en die Klassifikasie van Grond as Res Nullius of as Staatsgrond" (2001) *TSAR* 84 91ff.
[4] See Chapter 2 Section 4.2.1.
[5] JC Sonnekus "Abandonnering van Eiendomsreg op Grond end Aanspreeklikheid vir Grondbelasting" (2004) *TSAR* 747 751ff.
[6] Sonnekus (2004) *TSAR* 756.
[7] Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 537; G Muller, R Brits, JM Pienaar & Z Boggenpoel *Silberberg and Schoeman's The Law of Property* 6 ed (2019) 260-261; Van der Merwe *Sakereg* 342ff; CG van der Merwe "Things" in WA Joubert (founding ed) *LAWSA 27* 2 ed (2014) para 231.

Mostert reaches the opposite conclusion, finding that in view of the prevailing law, it is not possible to abandon land in South Africa.[8] She primarily relies on the principle of publicity to support this assertion.[9] Registration actions give effect to the principle of publicity concerning changes of proprietary relations in the land.[10] According to Mostert, in the absence of a specific mechanism in the Deeds Registries Act,[11] abandonment of land is not possible.[12]

Before engaging with these arguments, it is beneficial to set the parameters of the argument found in this chapter. The parameters of the argument are followed by an introduction of the important concepts relevant to the arguments put forward by Sonnekus and Mostert. Finally, their respective arguments are analysed and critiqued.

2.1 Parameters of the Discourse

Loss and acquisition are often intertwined. In the case of derivative acquisition of ownership, loss and acquisition occur simultaneously. Once the parties reach the real agreement and delivery occurs (whether actual or constructive), one loses ownership and the other acquires ownership.[13] Similarly, in most forms of original acquisition of ownership (the exception being *occupatio,* where the acquired property for whatever reason is currently unowned[14]), loss and acquisition occur simultaneously. For example, in the context of prescription, the moment the requirement of an uninterrupted period of possession as-if-owner is met, the previous owner loses ownership while the acquirer acquires ownership.[15]

Abandonment is different. Abandonment is a form of loss of ownership, not a form of acquisition. As such, the rules regulating the acquisition of ownership cannot determine the rules regarding abandonment. Abandonment thus needs to be evaluated in its own

[8] H Mostert "No Right to Neglect? Exploratory Observations on How Policy Choices Challenge the Basic Principles of Property" in S Scott & J van Wyk (eds) *Property Law Under Scrutiny* (2015) 1126-28.
[9] Mostert "No Right" in *Property Law Under Scrutiny* 27.
[10] Mostert "No Right" in *Property Law Under Scrutiny* 27.
[11] Act 47 of 1937.
[12] Mostert "No Right" in *Property Law Under Scrutiny* 26-28.
[13] Muller et al *Silberberg* 195; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 520; Van der Merwe *Sakereg* 298-299; Van der Merwe "Things" in *LAWSA* para 208.
[14] Muller et al *Silberberg* 155; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 489-491; Van der Merwe *Sakereg* 217; Van der Merwe "Things" in *LAWSA* para 171.
[15] Muller et al *Silberberg* 192; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 516-517; Van der Merwe *Sakereg* 288-289; Van der Merwe "Things" in *LAWSA* para 199; E Marais *Acquisitive Prescription in View of the Property Clause* LLD thesis Stellenbosch University (2011) 38.

particular context. There is no automatic acquirer, at least not in the case of movables. The standard view regarding the consequences of abandonment of immovable property is that it accrues to the state.[16] It otherwise operates purely as a form of loss, in no way inherently connected to acquisition. The only similar action, which operates as a pure form of loss of property, is destruction.[17] Abandonment thus needs to be considered in the context of loss, separate from the context of acquisition.

Nevertheless, there are some common rules that apply to both loss and acquisition, given that they are both concerned with changes in proprietary relations. As explained by Carey Miller and Pope, "the rules governing acquisition of ownership serve to constrain unfettered intention and to ensure sufficient publicity".[18] Loss of ownership similarly requires effect be given to the principle of publicity, and cannot occur purely on the basis of "unfettered intention". In most contexts, loss of ownership depends on the acts that ensure publicity in the acquisition context, due to loss being often intertwined with acquisition.

However, where loss occurs on its own, independent of a form of acquisition that can be observed by third parties, it is necessary that acts are performed to give effect to the principle of publicity. In the context of movables, this is a simple matter, as the relinquishing of possession gives effect to the publicity principle.[19] However, whether this is possible in the context of immovables, without a specific mechanism in the Deeds Registries Act, has been subject to doubt.[20] Before proceeding to engage with the relevant arguments about the possibility of abandoning landownership in the South African law, it is necessary to introduce some important concepts.

---

[16] Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 492; Van der Merwe *Sakereg* 227; Van der Merwe (1980) *SALJ* 187-188; DL Carey Miller *The Acquisition and Protection of Ownership* (1986) 8-9.

[17] Muller et al *Silberberg* 307; Van der Merwe *Sakereg* 375-376; Van der Merwe "Things" in *LAWSA* para 262. For a theoretical discussion of the owner's right to destroy in the American context, see L Strahilevitz "The Right to Destroy" (2004-2005) 114 *Yale L. J.* 781.

[18] DL Carey Miller & A Pope "Acquisition of ownership" in R Zimmenmann, K Reid & D Visser (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 671 675.

[19] Mostert "No Right" in *Property Law Under Scrutiny* 26-27.

[20] Mostert "No Right" in *Property Law Under Scrutiny* 26-28.

2.2 Core concepts

There are several important concepts that need to be kept in mind, not only regarding the rules that regulate acquisition, but also concerning the rules about loss. These are the negative system of registration that prevails in South African law and the principle of publicity.

2.2.1 Negative system of registration

In a negative system of registration, there is no guarantee that the land register is correct.[21] The land register may, for various reasons, not reflect the true legal position of proprietary relations in respect of a parcel of land. The land register may be incomplete, or even incorrect.[22] For example, proprietary relations may have changed through an original mode of acquisition such as acquisitive prescription, or registration in another party's name may have been effected through fraud. In the former case, proprietary relations change despite the absence of registration actions.[23] In the latter, proprietary relations do not change, despite the occurrence of registration actions.[24]

A negative system of registration does not guarantee that the land register is correct,[25] and there are circumstances where registration actions are not required to change proprietary relations.[26] For example, original modes of acquisition such as acquisitive prescription do not require registration actions. Nevertheless, the transfer of rights (derivative acquisition) requires registration actions.[27] When real rights in land are transferred, registration fulfils the same function as delivery in case of movable things, giving effect to the principle of publicity.[28]

---

[21] Muller et al *Silberberg* 256ff; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 537; Van der Merwe *Sakereg* 342ff; Van der Merwe "Things" in *LAWSA* para 231.
[22] Muller et al *Silberberg* 256ff; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 537; Van der Merwe *Sakereg* 342ff; Van der Merwe "Things" in *LAWSA* para 231.
[23] Muller et al *Silberberg* 192, 256-257; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 516-517; Van der Merwe *Sakereg* 288-289; Van der Merwe "Things" in *LAWSA* para 199.
[24] Muller et al *Silberberg* 256-257. See *Meintjes NO v Coetzer* 2010 (5) SA 186 (SCA) para 21.
[25] Muller et al *Silberberg* 256ff; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 537; Van der Merwe *Sakereg* 342ff; Van der Merwe "Things" in *LAWSA* para 231.
[26] Muller et al *Silberberg* 256ff; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 537; Van der Merwe *Sakereg* 342ff; Van der Merwe "Things" in *LAWSA* para 231.
[27] Muller et al *Silberberg* 225; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 534; Van der Merwe *Sakereg* 333; Van der Merwe "Things" in *LAWSA* para 227.
[28] Muller et al *Silberberg* 225; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 520; Van der Merwe *Sakereg* 300ff.

Although the fact that South Africa has a negative registration system means that the absolute correctness of the records cannot be guaranteed, the deeds registration system observes a high degree of accuracy and is considered very reliable.[29] This high level of reliability has led to it being compared with a positive system of registration.[30]

2.2.2 Principle of publicity

The principle of publicity is a basic tenet of the law of property.[31] This is not only the case in South Africa but also other modern systems of property law. Switzerland and Scotland, for example, strictly adhere to the principle of publicity, in a manner that mirrors South African law.[32]

The principle is related to the absolute nature of real rights.[33] "Absolute" refers to the enforceability of real rights, that is, that they are "enforceable against all other legal subjects".[34] For example, an owner may vindicate his property from any person in control of it, even if they are holding it in good faith and have acquired it in return for consideration.[35] The term "absolute" does not refer to an unrestrained power for the owner to do with his property as she pleases. It is universally accepted that real rights, including ownership, can never and have never been "absolute" in this sense of the word.[36] The absolute nature of real rights contrasts with personal rights, which are

---

[29] Muller et al *Silberberg* 260-265. See G Pienaar "The Land Titling Debate in South Africa" (2006) *TSAR* 435 440; H Mostert "Tenure Security Reform and Electronic Registration: Exploring Insights from English Law" (2011) 14 *PER* 85 95*;* G Pienaar "Die Suid-Afrikaanse Aktesregistrasiestelsel-waarheen Vorentoe" (1996) *TSAR* 205 205; G Pienaar "Is 'n Eenvormige Registrasiestelsel Van Saaklike Regte Op Onroerende Goed Moontlik" (1990) *TSAR* 29 29 – 30; PJ Badenhorst "From Waurn Ponds: Registration of Title or Title by Registration?" (2009) *TSAR* 793 794; Van der Merwe *Sakereg* 344; Muller et al *Silberberg* 260-261.

[30] Muller et al *Silberberg* 260.

[31] Muller et al *Silberberg* 93-95; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 410-411; Van der Merwe *Sakereg* 13-15; Van der Merwe "Things" in *LAWSA* para 10; H Mostert & L Verstappen "Practical Approaches to the Numerus Clausus of Land Rights: How Legal Professionals in South Africa and the Netherlands Deal with Certainty and Flexibility in Property Law" in W Barr (ed) *Modern Studies in Property Law Volume 8* (2015) 351 365.

[32] P Tuor, B Schnyder, J Schmid & A Jungo *Das Schweizerische Zivilgesetzbuch* 14 ed (2015) § 88 para 9; GL Gretton & AJM Steven *Property, Trusts and Succession* 3 ed (2017) paras 4.19-4.21; 7.2.

[33] Muller et al *Silberberg* 93-95; Van der Merwe *Sakereg* 13-15.

[34] Muller et al *Silberberg* 60; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 410; Van der Merwe *Sakereg* 12-13; Van der Merwe "Things" in *LAWSA* para 9.

[35] Muller et al *Silberberg* 57-58, 198; Van der Merwe *Sakereg* 12-13.

[36] See in general C Lewis "The Modern Concept of Ownership of Land" (1985) *Acta Juridica* 241; P Birks "The Roman Law Concept of Dominium and the Idea of Absolute Ownership" (1985) *Acta Juridica* 1; Muller et al *Silberberg* 106; H Scott "Absolute Ownership and Legal Pluralism in Roman Law: Two Arguments" (2011) *Acta Juridica* 23.

regarded as relative in nature.[37] By relative, it is meant that personal rights are only enforceable against "a particular person or association of individuals on the basis of a special relationship".[38] For example, claims arising from a contract or a delict are only enforceable against the contracting parties or persons liable for the harm.[39]

The enforceability of real rights is why the principle of publicity is important. Due to the absolute nature of real rights, it is necessary that their existence, and their content, are discernible to third parties.[40] If real rights are enforceable against third parties, third parties should be able to determine the existence of such rights and conduct themselves accordingly. Through the publicising of real rights,[41] the interests of the owner or right holder and third parties are balanced.

The way the principle of publicity is given effect to differs in respect of different forms of property. For movable property, the principle of publicity is given effect to through possession.[42] There is a rebuttable presumption "that the possessor of a movable thing is also the owner thereof".[43] Further, in some instances, possession is an essential element of limited real rights in movable property. For example, a pledge (real security right) in movable property cannot come into existence nor continue to exist in the absence of possession, achieved through delivery.[44] The holding of real security rights in movable property in the absence of possession is only possible through statute,[45] where the principle of publicity is given effect to through other means. For example, possession is not required for a special notarial bond.[46] The clear description of the movable property in the registered notarial bond serves the principle of publicity.[47]

---

[37] Muller et al *Silberberg* 57-60; Van der Merwe *Sakereg* 60-61.
[38] Muller et al *Silberberg* 57-60; Van der Merwe *Sakereg* 60-61.
[39] Muller et al *Silberberg* 57-58.
[40] Muller et al *Silberberg* 93-95; Van der Merwe *Sakereg* 12-15; TW Merrill & HE Smith "Optimal Standardization in the Law of Property: The Numerus Clausus Principle" (2000) 110 *Yale Law Journal* 1 26.
[41] Muller et al *Silberberg* 93-95; Van der Merwe *Sakereg* 12-15; Merrill & Smith (2000) *Yale Law Journal* 26.
[42] Muller et al *Silberberg* 95; Van der Merwe *Sakereg* 14.
[43] Muller et al *Silberberg* 95; Van der Merwe *Sakereg* 14.
[44] Muller et al *Silberberg* 458-459; Van der Merwe *Sakereg* 655-658; R Brits *Real Security Law* (2016) 121.
[45] See the Security by Means of Movable Property Act 57 of 1993; Muller et al *Silberberg* 462-466; Brits *Real Security Law* 239-242.
[46] Muller et al *Silberberg* 462-466; Brits *Real Security Law* 240-241.
[47] Section 1(1) of the Security by Means of Movable Property Act; Muller et al *Silberberg* 462-466; Brits *Real Security Law* 242-243.

Regarding movables, the principle of publicity is not only served through possession to "advertise" the existence of real rights. In respect of changes in property relations through transfer, it is given effect to through a strict *numerus clausus* of constructive modes of delivery.[48] These modes of delivery, as with original modes of acquisition, require that changes in property relations be made evident to third parties,[49] or that the legal situation be aligned with the clear factual situation, as in the case of prescription.[50]

The handing over of physical possession of the land in question is irrelevant to the changing of proprietary relations in the land. While possession is important for serving the principle of publicity in respect of movable property, its relevance is greatly diminished concerning immovable property. Proprietary relations in land, with exceptions in the context of original acquisition of ownership, can only change through registration actions in the Deeds Registry.[51] An intention to transfer ownership in land or to create real rights in land is necessary but insufficient in the absence of registration, which fulfils the delivery requirement for rights in land.[52]

Original modes of acquisition give effect to the principle of publicity in their own way, through aligning the legal situation with the factual situation that is observable by third parties.[53] In the context of acquisitive prescription, for example, possession does ultimately serve the publicity principle. Proprietary relations are changed through possessing property openly "for an uninterrupted period of 30 year…as if he or she were the owner thereof".[54] Furthermore, other real rights in land such as servitudes can be acquired through openly exercising the content of such a right for an uninterrupted

---

[48] Van der Merwe *Sakereg* 11. It has been questioned whether such a *numerus clausus* exists, and whether it is possible to recognise new modes of constructive delivery such as "cession of the right of vindication". See Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 525; Muller et al *Silberberg* 201; Van der Merwe "Things" in *LAWSA* para 220.

[49] Muller et al *Silberberg* 201; Van der Merwe *Sakereg* 314-315.

[50] Muller et al *Silberberg* 179ff; Van der Merwe *Sakereg* 268ff.

[51] Muller et al *Silberberg* 261-262. See also JWS Heyl *Grondregistrasie in Suid-Afrika* (1977) 142, in which he states that according to "registrasiebeginsel" (registration principle), a registered owner remains such until the position is altered through formal registration actions, or otherwise by operation of law (e.g. prescription). See also Muller et al *Silberberg* 158-159.

[52] Muller et al *Silberberg* 245ff.

[53] H Mostert & A Pope *The Principles of the Law of Property in South Africa* (2010) 160. Regarding original modes of acquisition in general, see Van der Merwe *Sakereg* Chapter 6; Muller et al *Silberberg* Chapter 8; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 488ff; Van der Merwe "Things" in *LAWSA* paras 169-202.

[54] Muller et al *Silberberg* 179; Van der Merwe *Sakereg* 274; Marais *Acquisitive Prescription* 56. See section 1 of the Prescription Act 68 of 1969.

period of thirty years.[55] Outside original modes of acquisition of ownership, however, it appears that proprietary relations in land can only change through registration actions, due to the need to give effect to the principle of publicity.

How does this relate to abandonment? The abandonment of ownership in property – movable or immovable – is neither a derivative nor original mode of *acquisition* of ownership. It is a form of loss that operates on its own. While abandonment facilitates rendering movable property *res derelictae* – and thus susceptible to an original mode of acquisition (appropriation) – it does not involve the acquisition of ownership itself. For reasons that are established below, registration actions would appear necessary to facilitate abandonment of landownership, in light of the principle of publicity.

2.3 "Abandonment" in the context of immovable property

The term "abandonment" is often misused or used in a different sense in the context of land, than the term is otherwise understood in the law of property. In the law of property, abandonment entails the unilateral divestment of ownership in property.[56] It is not the surrender of the property to another party or the mere neglect of property. It is necessary to address the various uses of the term "abandonment" to clear up any possible misconceptions that may arise.

In the context of the inner city of Johannesburg, one finds the term abandonment misused, as well as used in a different sense. The first example is the so-called "abandonment agreements" between the City of Johannesburg and owners who are in arrears with rates.[57] The second example is the use of the term "abandoned" to refer

---

[55] Muller et al *Silberberg* 392-394; Van der Merwe *Sakereg* 530-533; AJ van der Walt *Servitudes* (2016) 279ff. See section 6 of the Prescription Act.

[56] E Peñalver "The Illusory Right to Abandon" (2010) 109 *Michigan Law Review* 191 194; L Strahilevitz "The Right to Abandon" (2010) 158 *U. Pa. L. Rev.* 355 360.

[57] *Papas NO v Motsere Trading CC* [2014] ZAGPJHC 144 para 2; City of Johannesburg "New Inner City Scheme" *Joburg* <https://www.joburg.org.za/media_/Newsroom/Pages/2013%20articles/2011%20&%202012%20%20Articles/New-inner-city-scheme.aspx> (accessed 27-03-2019); H Mashaba "City of Joburg to Expropriate Derelict Buildings" (27-02-2018) *The Johannesburg Inner City Partnership* <http://www.jicp.org.za/news/city-of-joburg-to-expropriate-derelict-buildings/> (accessed 20-02-2018); Sonnekus (2004) *TSAR* 748–749, 753–755.

to property neglected by its owner, both physically and in terms of her failure to meet her legal obligations.[58]

2.3.1 Abandonment agreements

In the context of urban renewal, the term "abandonment" has surfaced as a way to describe landowners' surrender of their property rights in exchange for a waiver of their property debts. The so-called "abandonment agreement" is one of the measures taken by the City of Johannesburg to promote the rejuvenation of its inner city.[59] In terms of abandonment agreements, owners of immovable property who are in arrears with municipal rates and taxes are offered the opportunity to surrender, or more precisely, transfer their property to the City.[60] In return for the transfer of the property to it, the City forgives the owner's municipal debts.[61] Owners in such circumstances often have little choice but to accept such an agreement to avoid incurring further debt. They are powerless as municipalities may withhold rates clearance certificates[62] if there are outstanding municipal taxes.[63] A rates clearance certificate is a prerequisite for the transfer of land. Hence, the landowner cannot alienate the property without clearing the arrear municipal rates.

Despite the use of the word "abandonment" in the name of these agreements, these agreements do not resemble abandonment in the legal sense. Rather, what is

---

[58] R Cramer "The Abandonment of Landownership in South African and Swiss Law" (2017) 134 *SALJ* 870 876-877 [Note on the aforementioned publication by the author: My Memorandum of Understanding with my supervisor, as well as obligations attaching to funding I received through the Swiss-South African Joint Research Programme to facilitate my comparative study, required me to publish from my doctoral research. The article referenced here is the result of the obligation to publish from my doctoral research.]; J Strydom & S Viljoen "Unlawful Occupation of Inner-City Buildings: A Constitutional Analysis of the Rights and Obligations Involved" (2014) *PER* 1207 1222ff. See also sections 2(8)(b)(i) and 7(1)(a) of the City of Johannesburg By-law on Problem Buildings, 2014; section 1 of the City of Cape Town Problem Building By-law, 2010; section 1 of the eThekwini Problem Building By-Law, 2015.

[59] City of Johannesburg "New Inner City Scheme" *Joburg*; Sonnekus (2004) *TSAR* 748-749, 753-755; *Papas NO v Motsere Trading CC* (46011/2012) [2014] ZAGPJHC 144 para 2.

[60] City of Johannesburg "New Inner City Scheme" *Joburg*; Sonnekus (2004) *TSAR* 748-749, 753-755; *Papas NO v Motsere Trading CC* (46011/2012) [2014] ZAGPJHC 144 para 2.

[61] City of Johannesburg "New Inner City Scheme" *Joburg*; Sonnekus (2004) *TSAR* 748-749, 753-755; *Papas NO v Motsere Trading CC* (46011/2012) [2014] ZAGPJHC 144 para 2.

[62] A rate clearance certificate is provided by a local authority to certify that "all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid" (section 118(1)(b) of the Local Government: Municipal Systems Act 32 of 2000). In the absence of a rates clearance certificate, the Registrar of Deeds will not effect transfer of the property.

[63] See section 118 of the Local Government: Municipal Systems Act. See also Muller et al *Silberberg* 252; Sonnekus (2004) *TSAR* 748-749, 753-755.

occurring here is a transfer of property in return for a *quid pro quo*.[64] The property is being transferred to a particular party, rather than being relinquished by the owner to nobody in particular. This is a bilateral transaction, regardless of how little choice the weaker party has to enter into the agreement.

This interpretation of abandonment agreements was confirmed in *Papas NO v Motsere Trading CC*.[65] In this case, it was argued that the conclusion of the abandonment agreement constituted the abandonment of the property, rendering the property *res nullius*. In rejecting this argument, the court found that the use of the term "abandon" in the wording of the agreement was of no significance.[66] What was envisioned by the parties was, in fact, a transfer in exchange for a *quid pro quo*.[67] As such, there was simply no intention on the part of the owner to abandon his property.[68] It is contended that, given the above, it is clear that the term "abandonment agreement" is misleading. It is submitted that "surrender agreement" or "release agreement" would be more appropriate.[69]

2.3.2 Abandoned buildings

Colloquially, one may refer to "abandoned" buildings where the owner of the land does not have any interest in the land and ceases to pay municipal rates and taxes.[70] Such conduct on the part of the owner, and the condition of the building in question, may fall within the dictionary definition of abandonment,[71] Nevertheless, such conduct does not qualify as abandonment in the legal sense. Such a building may be "abandoned" by its owner, in that she allows it to lie idle (or unlawfully occupied) and fails to comply with

---

[64] *Papas NO v Motsere Trading CC* (46011/2012) [2014] ZAGPJHC 144 para 7.
[65] (46011/2012) [2014] ZAGPJHC 144.
See also the case of *United Building Society and Another NO v Du Plessis* 1990 (3) SA 75 (W) in which the court used the term "abandoned" to refer to the transfer of property by the trustee of an insolvent estate to a mortgagee (88C-D).
[66] *Papas NO v Motsere Trading CC* (46011/2012) [2014] ZAGPJHC 144 para 6.
[67] Paras 6-7.
[68] Paras 6-7.
[69] Sonnekus (2004) *TSAR* 754-755.
[70] Strydom & Viljoen (2014) *PER* 1222ff. See also sections 2(8)(b)(i) and 7(1)(a) of the City of Johannesburg By-law on Problem Buildings, 2014. See Shoked's discussion of the difference between the understanding of the term "abandonment" as understood in the colloquial and legal senses. N Shoked "The Duty to Maintain" (2014) 64 *Duke Law Journal* 437 490-491.
[71] "Abandon" is defined by the Oxford English Dictionary to mean "[t]o let go, give up, renounce (a pursuit, practice, *possession*, etc.); to cease to *use*, *have*, or practise" (emphasis mine). See "abandon, *v.*" in *Oxford English Dictionary* <www.oed.com> (accessed 14-02-2020).

her obligations as owner. Nevertheless, she remains the owner of the property, despite such neglect.

2.4 The possibility of abandoning land: Arguments for and against

This section provides a detailed overview of Mostert and Sonnekus' respective arguments, while reaching its own conclusions as to the prevailing legal position. In doing so, it draws on the discussion of the relevant case law regarding the abandonment of landownership from Chapter 2.

2.4.1 Abandonment of immovables in case law

The abandonment of land is an issue our courts have only had to engage with on a few occasions. In all these cases, already canvassed in Chapter 2,[72] the courts seemed to proceed on the assumption that the abandonment of land is possible.[73] However, none of them found that the abandonment of land had occurred, primarily based on the intention requirement for abandonment.[74] Our courts are in general hesitant to infer an intention to abandon valuable property.[75]

In *Minister van Landbou v Sonnendecker*,[76] the court was unwilling to infer an intention on the part of the owner to abandon his land.[77] This was despite years of neglect of the land in question. The court did not engage with the question of the possibility of abandoning land, should the owner's intention to do so be established on the facts.

Similarly, in *Meintjes NO v Coetzer*,[78] a lack of intention was the reason for finding that abandonment had not occurred.[79] The question of the possibility of abandonment was not raised. Perhaps the court assumed that the abandonment of land was possible, or did not find it necessary to engage with the question in a case which involved clear fraud on the part of the defendants.

---

[72] See Chapter 2 Section 4.2.2.
[73] Muller et al *Silberberg* 159.
[74] Muller et al *Silberberg* 159.
[75] Mostert "No Right" in *Property Law under Scrutiny* 26-27. See *Salvage Association of London v S.A. Salvage Syndicate Ltd* (1906) 23 SC 169 171; *Minister van Landbou v Sonnendecker* 1979 (2) SA 944 (A) 946A-947B; *S M Goldstein & Co (Pty) Ltd v Gerber* 1979 (4) SA 930 (A) 936G.
[76] 1979 (2) SA 944 (A). See Chapter 2 Section 4.2.2.
[77] 946A-947B.
[78] 2010 (5) SA 186 (SCA).
[79] Paras 16-17.

Finally, in the unreported case of *Papas NO v Motsere Trading CC*,[80] the court found that abandonment of land had not occurred. The finding was based on a lack of clear intention.[81] As with the former Appellate Division and current Supreme Court of Appeal authority, no consideration was given to the possibility of such abandonment.

If the courts in the above cases did proceed on the assumption that abandonment of land is possible,[82] such assumption ultimately means very little. The principle of publicity, including how it is given effect to through registration actions in the deeds registries, was not addressed by the courts. Given the importance of publicity for changes in proprietary relations, including both derivative as well as original modes of acquisition, it would be necessary for a court to engage with whether the principle has found sufficient effect in the circumstances. The decisions do little but to indicate further the reluctance of our courts to infer an intention to abandon valuable property. It is thus necessary to take a closer look at how the relevant common law rules and statutory provisions interact.

2.4.2 The abandonment of land in the context of a negative registration system

Sonnekus grounds his abandonment argument in the negative registration system that prevails in South Africa.[83] It is his contention that formalities prescribed by the Deeds Registries Act are unnecessary to achieve the abandonment of land.[84] He adds that it is desirable to cancel formally the registration of ownership in land in the relevant Deeds Registry, thus observing the need for publicity.[85] However, cancellation is not a prerequisite for an owner to abandon land, as abandonment can precede any deletion of entries in the Deeds Registry.[86]

In Sonnekus' view, all that is required is for an owner of land to comply with the same common-law requirements applicable to the abandonment of movables.[87] That is, possession of the land must be relinquished with the intention of no longer remaining

[80] (46011/2012) [2014] ZAGPJHC 144 (6 June 2014).
[81] Paras 4-8.
[82] Muller et al *Silberberg* 159.
[83] Sonnekus (2004) *TSAR* 756. See also the views of Muller et al *Silberberg* 158-160 which appear to align with Sonnekus' argument.
[84] Sonnekus (2004) *TSAR* 751-752.
[85] Sonnekus (2004) *TSAR* 751-752.
[86] Sonnekus (2004) *TSAR* 751-752.
[87] Sonnekus (2004) *TSAR* 751ff.

owner.[88] Once the owner has fulfilled these requirements, the land is abandoned (which, in his view, renders it *res derelictae*, and consequently, open to appropriation by the first taker).[89] This is possible in the absence of registration actions because it is not necessary for the position on the register to reflect the correct legal position in a negative registration system.[90]

According to Sonnekus, requirements for abandonment beyond those that exist in common law are purely administrative.[91] These have no bearing on the changing of the ownership position in respect of land through abandonment.[92] Their only function is to formalise the change in proprietary relations through the amending of the records in the registry.[93]

While Sonnekus does not assert registration actions are necessary for the abandonment of land, he discusses how existing provisions of the Deeds Registries Act may provide formality to abandonment. As he correctly explains, the Registrar of Deeds may only exercise those powers granted to him in terms of the Act, and as such, the only permissible amendments to the registry are those authorised by law.[94]

The simplest example of when the Registrar may amend the registry would be to give effect to a transfer of property between two parties.[95] The Registrar may also be compelled to amend or cancel an existing registration, as provided for in section 6 of the Act. Finally, the Registrar is empowered to amend the register where an error exists.[96] Such an error may arise where the current owner has married in community of property,[97] or a third party has acquired ownership or a servitude through acquisitive prescription.[98]

---

[88] Sonnekus (2004) *TSAR* 751ff. See Chapter 2 Section 4.1.
[89] Sonnekus (2004) *TSAR* 751ff.
[90] Sonnekus (2004) *TSAR* 756.
[91] Sonnekus (2004) *TSAR* 755-756.
[92] Sonnekus (2004) *TSAR* 755-756.
[93] Sonnekus (2004) *TSAR* 755-756.
[94] Sonnekus (2004) *TSAR* 755.
[95] Section 3(d) of the Deeds Registries Act.
[96] See section 33 of the Deeds Registries Act.
[97] See section 17(4) of the Deeds Registries Act.
[98] See sections 32 and 33 of the Deeds Registries Act. See Muller et al *Silberberg* 192-193, 392-394; Van der Merwe *Sakereg* 288-289; Van der Walt *Servitudes* 279-281.

For the sake of bringing formality to the abandonment of ownership, Sonnekus places reliance on section 3(1)(r) of the Deeds Registries Act.[99] In terms of this section, the registrar is empowered to "register…any…extinction of any such registered right". It appears necessary from the wording of this provision that the right in question must have already been extinguished before it finds application. The provision does not itself operate to terminate rights, but rather to bring the register in line with the existing legal situation. As explained above, in Sonnekus' view, compliance with the common-law requirements for abandonment already extinguishes the right.[100] Effectively, cancelling the registration of land through this section would thus amount to little more than an administrative formality, beyond publicising the abandonment of the land.[101]

The next question is how the abandoning owner would utilise this section of the Deeds Registries Act to cancel registration of her land formally. Sonnekus contends all that is required is the submission of an affidavit by the registered owner stating that the land in question has been abandoned.[102] Most long-serving Registrars of Deeds, to the best of Sonnekus' knowledge, have never been confronted with such a scenario.[103] Nevertheless, the underutilisation of a legislative mechanism does not negate its existence.[104]

The interplay between common law and legislation, in Sonnekus' view, permits the abandonment of land, both legally and formally. Once the common-law requirements have been complied with, the land in question is abandoned.[105] The owner may then simply rely on the legislative mechanism provided for in section 3(1)(r) of the Deeds Registries Act to bring formality to the abandonment.[106]

On the face of it, the negative registration system that prevails in South Africa supports Sonnekus's argument. The question remains, however, how well Sonnekus' view holds up when considered in light of the principle of publicity.

---

[99] Sonnekus (2004) *TSAR* 755-757.
[100] Sonnekus (2004) *TSAR* 751ff.
[101] Sonnekus (2004) *TSAR* 755-756.
[102] Sonnekus (2004) *TSAR* 755-756.
[103] Sonnekus (2004) *TSAR* 755-756.
[104] Sonnekus (2004) *TSAR* 755-756.
[105] Sonnekus (2004) *TSAR* 751ff.
[106] Sonnekus (2004) *TSAR* 755-757.

2.4.3 The abandonment of land in light of the principle of publicity

Contrary to Sonnekus, Mostert argues that South African law does not allow, the abandonment of land: it is not possible, as "[i]t would seem that the constellation of applicable legal regulations renders it impossible to abandon land".[107] According to Mostert, the principle of publicity is not given proper effect to in the absence of a specific mechanism providing for abandonment in the Deeds Registries Act.[108] The Act specifically does not appear to expressly empower the Registrar to give effect to requests from registered landowners.[109]

It has been noted that the basic requirements for the abandonment of movable property are the giving up of possession coupled with the intention of relinquishing ownership of the property in question.[110] Such requirements operate logically in the context of movable property, adequately giving effect to the principle of publicity.[111] However, it is unclear how the requirements can be given effect to in respect of land.[112] Courts are reluctant to infer an intention to abandoned valuable property.[113] In the context of land, anything less than an express declaration by the owner of an intention to abandon seems insufficient for the courts. This approach is perhaps best illustrated by the case of *Sonnendecker*. The owner in this case had been absent for decades, seemingly no longer residing in the Republic, with the property being described as a wasteland. Despite this, the court was unwilling to infer an intention to abandon from the set of facts before it.[114]

---

[107] Mostert "No Right" in *Property Law Under Scrutiny* 26.
[108] Mostert "No Right" in *Property Law Under Scrutiny* 26-27. This position would also appear to be supported by Heyl, who as stated views formal registration actions as necessary to change the ownership position, unless otherwise provided by operation of law. In his view, the owner's ownership is unaffected by abandonment of the property (assumedly informal abandonment where the owner is no longer physically present nor complies with the obligations that attach to the ownership of her property). See Heyl *Grondregistrasie* 142.
[109] Mostert "No Right" in *Property Law Under Scrutiny* 26-27.
[110] Muller et al *Silberberg* 158; Van der Merwe & Pope "Part III - Property" in *Wille's Principles* 490; Van der Merwe *Sakereg* 224; *Reck v Mills* 1990 (1) SA 751 (A) 757C; *S M Goldstein & Co (Pty) Ltd v Gerber* 1979 (4) SA 930 (A) 936F-G; *Salvage Association of London v S.A. Salvage Syndicate, Ltd.* (1906) 23 SC 169 171.
[111] Mostert "No Right" in *Property Law Under Scrutiny* 26-27.
[112] Mostert "No Right" in *Property Law Under Scrutiny* 26-28.
[113] Mostert "No Right" in *Property Law Under Scrutiny* 26-27. See *Salvage Association of London v S.A. Salvage Syndicate Ltd* (1906) 23 SC 169 171; *Minister van Landbou v Sonnendecker* 1979 (2) SA 944 (A) 946A-947B; *S M Goldstein & Co (Pty) Ltd v Gerber* 1979 (4) SA 930 (A) 936G.
[114] *Minister van Landbou v Sonnendecker* 1979 (2) SA 944 (A) 946A-947B.

While possession operates to give effect to the principle of publicity in respect of movable property, registration serves this purpose for of rights in land.[115] Since registration is central to changes in proprietary relations in land, the Deeds Registries Act needs to provide expressly for the abandonment of land.[116] The problem is that the Deeds Registries Act is devoid of any guidance in what procedure to follow to abandon land.[117]

2.5 Analysis

The competing arguments provided by Sonnekus and Mostert are both compelling and warrant detailed consideration. Sonnekus has grappled with the sources in significant depth. However, Mostert's argument must be preferred. This contention is primarily for legal reasons, considering the principle of publicity. Policy reasons also favour her argument, which are covered in the remaining chapters of this thesis.

In the context of original acquisition of ownership, proprietary positions can change despite the absence of registration actions.[118] Original modes of acquisition give effect to the principle of publicity through aligning the legal situation with the factual situation that is clear to third parties.[119] Consequently, it is necessary to ask whether the abandonment of land (a form of loss as opposed to acquisition) may give effect to the principle of publicity in a manner similar to original modes of acquisition. In view of the negative system of registration, can the same common-law requirements applicable to the abandonment of ownership in movable property change the ownership position in respect of land without the necessity of registration actions? To answer this question, the way acquisitive prescription and marriage in community of property give effect to the principle of publicity is scrutinised. A subsequent inquiry focuses on whether the abandonment of land following the common-law requirements may similarly give effect to the publicity principle.

---

[115] Muller et al *Silberberg* 195; Van der Merwe *Sakereg* 305.
[116] Mostert "No Right" in *Property Law Under Scrutiny* 27.
[117] Mostert "No Right" in *Property Law Under Scrutiny* 27.
[118] The two mentioned above are acquisitive prescription and marriage in community of property. Muller et al *Silberberg* 261-262.
[119] Mostert & Pope *Principles* 160.

Acquisitive prescription is an example of an original mode of acquisition of ownership and real rights in land.[120] It facilitates not only the acquisition of ownership in movable and immovable property,[121] but also the acquisition and termination of servitudes.[122] In the former case, a person may acquire ownership in land through holding it openly as if owner, together with any periods the land was held by his predecessors, for an uninterrupted period of thirty years.[123] Acquisition of ownership occurs in the absence of registration actions.

The acquirer is entitled at the end of the prescriptive period, in terms of the procedure set out in section 33 of the Deeds Registries Act, to demand registration of the land in question in her name.[124] What is key is that, until the owner makes use of the procedure set out in section 33 to facilitate registration in her name, there is a discrepancy between the legal position and that reflected in the Deeds Registry.

The acquisition of a servitude through acquisitive prescription also requires a significant degree of openness. One may acquire a servitude through exercising the entitlements associated therewith for an uninterrupted period of thirty years.[125] As in the case of the acquisition of ownership, this must be done openly.[126] Similarly, a positive servitude may be terminated through an owner's failure to exercise the powers associated therewith for an uninterrupted period of thirty years.[127] Finally, a negative servitude may be terminated through the failure to object to the owner of the servient tenement acting contrary to the rights of the servitude holder for the same period of time.[128]

---

120 See Muller et al *Silberberg* 179ff; Van der Merwe *Sakereg* 268ff; Marais *Acquisitive Prescription* 1; Van der Walt *Servitudes* 1.
121 See section 1 of the Prescription Act. See also Muller et al *Silberberg* 179; Van der Merwe *Sakereg* 268.
122 See sections 6 and 7 of the Prescription Act; Muller et al *Silberberg* 392-394, 401-402; Van der Merwe *Sakereg* 530-533, 539-540; Van der Walt *Servitudes* 287ff, 548-550.
123 See section 1 of the Prescription Act. See also Muller et al *Silberberg* 179ff; Van der Merwe *Sakereg* 268ff.
124 See Muller et al *Silberberg* 192; Van der Merwe *Sakereg* 288-289.
125 See section 6 of the Prescription Act. See also Muller et al *Silberberg* 392-393; Van der Merwe *Sakereg* 530-533.
126 See section 6 of the Prescription Act. See also Muller et al *Silberberg* 392-393; Van der Merwe *Sakereg* 530-533; Van der Walt *Servitudes* 291ff.
127 See section 7(1) of the Prescription Act. See also Muller et al *Silberberg* 401-402; Van der Merwe *Sakereg* 539-540.
128 See section 7(2) of the Prescription Act. See also Muller et al *Silberberg* 401-402; Van der Merwe *Sakereg* 539-540.

It is thus clear that in respect of acquisitive prescription, the principle of publicity is adequately served. In effect, the legal position is brought into compliance with the clear factual situation that is publicised to third parties. This alignment of factual and legal situations has been acknowledged as the *raison d'être* for prescription.[129] For example, in respect of the acquisition of ownership of land through prescription, one is required to act *openly* as if owner. Acts that fall short of the openness condition, even if they would usually be performed by an owner, will not be sufficient for the physical control requirement of acquisitive prescription.

Hayes v Harding Town Board[130] provides a useful example of how courts will approach the openness requirement.[131] In this case, the court found that the payment of municipal rates by the party seeking to acquire ownership through prescription failed to establish the requisite physical control.[132] This finding was despite that fact that such payment evidenced an intention to be owner, being an act usually associated with the ownership of land.[133] While demonstrating an intention to be owner, it was evidently not sufficient to publicise such intention to the public at large. These acts by the would-be acquirer contrast with making physical use of the land itself openly as if owner of said land.

It does not seem that the abandonment of land serves the principle of publicity in a similar manner. The mere absence of the owner from his land for an extended period does not give rise to the presumption that the land itself is unowned. Even an empty piece of land, for example, may be held for investment purposes. This is made clear from the approach taken by the court in *Sonnendecker*. The fact that the court was unwilling to infer an intention to abandon in circumstances of extended absence and neglect indicates that the principle of publicity was not adequately served through even an extended period of absence. The court could not discount the possibility that the

---

[129] Carey Miller & Pope "Acquisition of Ownership" in *Mixed Legal Systems* 688; JC de Wet *Opuscula Miscellanea: Regsgeleerde Lesings en Ddviese* (1979) 78.
[130] 1958 (2) SA 297 (N).
[131] Mostert & Pope *Principles* 181-182.
[132] *Hayes v Harding Town Board* 1958 (2) SA 297 (N) 299A-H.
[133] 299A-H.

land was being held as a long-term investment, or that perhaps there were compelling reasons preventing the owner from returning to the Republic.[134]

It is thus evident that the abandonment of land is not possible by inferring an intention to abandon. The principle of publicity is inadequately served. The principle of publicity thus does not find the same expression that it does in the context of acquisitive prescription.

However, what about circumstances in which the owner expressly declares his intention to abandon his land? Could this not adequately give effect to the principle of publicity and thus facilitate the abandonment of the land in question, so long as such intention is coupled with the relinquishment of physical control?

It would seem that even an express declaration is insufficient to facilitate the abandonment of land. Express declarations are not enough to change the ownership position in land. Regardless of whether such a declaration is coupled with the physical relinquishment of the land in question, registration actions remain necessary to change the ownership position.[135] The principle of publicity in a modern system of land registration requires registration actions for changes in ownership positions in land outside original modes of acquisition, which give effect to publicity in their own way.[136] In the absence of such registration actions, there is insufficient publicity, and thus no change in ownership.

A possible objection to the above is that in some circumstances, proprietary relations in land can change through inferred intention or express declarations. Such a change is possible in the context of limited real rights, and in particular, servitudes. Servitudes, unlike ownership in land, may be abandoned.[137] Such abandonment does not require registration actions in the Deeds Registry.

Despite the absence of registration actions, the publicity principle is given effect to in the context of the abandonment of servitudes. In respect of limited real rights such as servitudes, as these are rights less than ownership, the threshold for the principle

---

[134] *Minister van Landbou v Sonnendecker* 1979 (2) SA 944 (A) 946F.
[135] Mostert “No Right” in *Property Law Under Scrutiny* 27.
[136] Mostert “No Right” in *Property Law Under Scrutiny* 27; Muller et al *Silberberg* 95.
[137] Muller et al *Silberberg* 95. See further discussion Chapter 2 Section 4.3.1.

would evidently be lower than what is required to give effect to the abandonment of ownership.

For example, abandonment of a servitude can be inferred from circumstances in which the servitude holder or the owner of the dominant tenement acquiesces in conduct that is in conflict with her rights.[138] This seems possible both in the context of positive servitudes and negative servitudes.[139] The servient tenement owner may prevent the servitude holder from exercising her rights in the former case.[140] In the latter case, the servient tenement owner may flout the restrictions placed on her ownership entitlements by the servitude in question, while the servitude holder fails to object for an extended period of time.[141] Clearly in both sets of circumstances, there is sufficient publicity from which an intention to abandon may be inferred.

Van der Walt disputes whether the abandonment of a servitude can indeed be classified as a unilateral act.[142] Rather, it appears to be bilateral in character.[143] Usually, the parties in the case of a praedial servitude – that being the owners of the dominant and servient tenements – will come to an agreement that the servitude in question will be "abandoned".[144] Even in the absence of an express agreement to abandon, where the owner of the dominant tenement acquiesces to conduct in conflict with her rights, this would be more bilateral than unilateral.[145] The parties are effectively cooperating, even if implicitly.[146]

---

[138] Muller et al *Silberberg* 401; Van der Walt *Servitudes* 577-578. See *Pickard v Stein* 2015 (1) SA 439 (GJ) paras 60-61; the judgments of Fannin and Burne JJ in *Margate Estates Ltd v Urtel* 1965 (1) SA 279 (N); the minority judgment of Innes J in *Vermeulen's Executrix v Moolman* 1911 AD 384 409; *Edmeades v Scheepers* (1880-1882) 1 SC 334 340.
[139] Muller et al *Silberberg* 401; Van der Walt *Servitudes* 577-578.
[140] See *Edmeades v Scheepers* (1880-1882) 1 SC 334 340.
[141] See *Pickard v Stein* 2015 (1) SA 439 (GJ) paras 34-72 in which the court came to the conclusion that a servitude of light had been abandoned. See also the concurring judgment of Burne J in *Margate Estates Ltd v Urtel* 1965 (1) SA 279 (N) 295G-297A.
[142] Van der Walt *Servitudes* 577-578. See *Pickard v Stein* 2015 (1) SA 439 (GJ) para 57 in which the court states that the "requirement that waiver operates bilaterally excludes the notion of a unilateral abandonment or waiver of a servitude, as contended for on behalf of Pickard. However, abandonment or waiver satisfying that requirement may still be inferred as having tacitly come about through the conduct of the parties."
[143] Van der Walt *Servitudes* 577-578.
[144] Van der Walt *Servitudes* 573.
[145] Van der Walt *Servitudes* 577-578.
[146] Van der Walt *Servitudes* 577-578.

In addition, Van der Walt explains that the loss of a servitude through abandonment will only be effective against third parties once the register has been amended to reflect the extinguishment of the right.[147] This emphasises the fact that actions in the deeds registry are essential for the changing of proprietary relations in land, even for real rights less than ownership such as servitudes.

This then leaves the final exception to the rule that registration actions are required to change ownership positions in land, namely, marriage in community of property. Community of property is the default matrimonial property regime, unless altered by an antenuptial contract between the parties to the marriage.[148] The consequences of a marriage concluded in community of property is that all assets of the parties – both acquired before and after the marriage – form part of the joint estate.[149]

The spouses are the co-owners of the estate.[150] This arrangement is considered a bound form of co-ownership.[151] As such, the spouses are not permitted to alienate their undivided share independently of the other so long as the underlying relationship persists.[152]

The ownership position in respect of the antenuptial assets changes despite an absence of registration actions in the Deeds Registry.[153] While the Deeds Registry may reflect one spouse as owner, this is in conflict with the correct legal position, namely, that the property in question is subject to bound co-ownership. This situation again

---

147 Van der Walt *Servitudes* 573-574. Van der Walt points out this is the view held by the majority of authors. See Van der Merwe *Sakereg* 538; Muller et al *Silberberg* 399. Sonnekus, on the other hand, holds a dissenting view, arguing that the servitude is immediately extinguished on abandonment, despite still being reflected in the registry. See JC Sonnekus "Oordraagbaarheid en Abandonnering van Persoonlike Diensbaarhede" (1987) *TSAR* 370 374.

148 C Himonga "Part II – Persons and Family" in F du Bois *Wille's Principles of South African Law* 9 ed (2007) 145 265-266.

149 Himonga "Part II – Persons and Family" in *Wille's Principles* 267ff.

150 Himonga "Part II – Persons and Family" in *Wille's Principles* 268-269.

151 Muller et al *Silberberg* 151; Van der Merwe *Sakreg* 378-379; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 557; Van der Merwe "Things" in *LAWSA* para 265. See *Ex Parte Menzies et Uxor* 1993 (3) SA 799 (C) 811B–E.

152 Muller et al *Silberberg* 151; Van der Merwe *Sakreg* 378-379; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 557; Van der Merwe "Things" in *LAWSA* para 265. See *Ex Parte Menzies et Uxor* 1993 (3) SA 799 (C) 811B–E.

153 Van der Merwe *Sakereg* 343; Muller et al *Silberberg* 261-262; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 537; Van der Merwe "Things" in *LAWSA* para 231.

demonstrates the operation of the negative system of registration that prevails in South Africa.

Despite the absence of any actions in the Deeds Registry, marriage in community of property is compatible with the principle of publicity. The Marriage Act[154] prescribes that marriages must be registered.[155] Such registration does not occur in the Deeds Registry, but nevertheless, it serves to publicise the occurrence of the marriage – and the change in proprietary relations - to the public in a similar fashion. The abandonment of ownership in land, following the common-law principle, gives no similar effect to the principle of the publicity.

In some circumstances, the marriage may not yet be registered. Despite this, the law governing marriage provides rules and presumptions to regulate these circumstances.[156] The presumptions in favour of the existence of a marriage depend on external evidence.[157] External evidence includes evidence of a marriage ceremony having taken place between the parties and that the parties have co-habited.[158]

In light of the above, it would seem difficult to justify the abandonment of land as similar to acquisition of co-ownership through marriage in community of property. The law of marriage has well-developed and clear rules that adequately give effect to the principle of publicity, despite the absence of any actions in the Deeds Registry.[159] In contrast, in the absence of a specific mechanism provided for in the Deeds Registries Act, abandonment of land falls short in serving the principle of publicity.[160]

Mostert is thus correct in her conclusion that the abandonment of land is not possible, given the absence of any mechanism to give effect to the publicity principle.[161] Original

---

[154] Act 25 of 1961,
[155] Section 29A(1). See J Heaton, J Church & J Church "Marriage" in WA Joubert (founding ed) *The Law of South Africa* vol 16 (2006) para 38; J Heaton & H Kruger *South African Family Law* 4 ed (2015) 32; Himonga "Part II — Persons and Family" in *Wille's Principles* 252.
[156] Heaton et al "Marriage" in *LAWSA* para 39; Himonga "Part II – Persons and Family" in *Wille's Principles* 252.
[157] Heaton et al "Marriage" in *LAWSA* para 39; Himonga "Part II – Persons and Family" in *Wille's Principles* 252.
[158] Heaton et al "Marriage" in *LAWSA* para 39; Himonga "Part II – Persons and Family" in *Wille's Principles* 252.
[159] See discussion in Cramer (2017) *SALJ* 884-885.
[160] Mostert "No Right" in *Property Law Under Scrutiny* 26-28. See Cramer (2017) *SALJ* 882-886.
[161] Mostert "No Right" in *Property Law Under Scrutiny* 27.

modes of acquisition do not require actions in the Deeds Registry for proprietary relations in land to change.[162] However, original modes of acquisition give effect to the publicity principle in a manner that the common-law requirements for abandonment – a form of loss - cannot in a modern system of land registration. Thus, even though South Africa observes a negative system of registration, the abandonment of land in the absence of registration actions does not appear possible. Such abandonment would require a specific mechanism in the Deeds Registries Act or other legislation.[163]

Sonnekus draws attention to section 3(1)(r) of the Deeds Registries Act that empowers the Registrar to register the extinction of a right (subject to the provisions of the Act).[164] In Sonnekus' view, this amounts to little more than an administrative formality, the abandonment already being achieved through compliance with the common-law rules.[165]

It appears necessary that before the Registrar may exercise his powers in terms of section 3(1)(r), the right in question should already be extinct, as a result of another law (e.g. extinctive prescription of a servitude[166]). As such, Sonnekus is correct that this section facilitates an administrative formality in removing registered rights from the Deeds Registry that have been rendered extinct for other reasons.[167] However, since it does not appear possible that abandonment may take place in the absence of express registration actions, this section does not facilitate the formal abandonment of land. Effectively, this section is irrelevant in considering whether the abandonment of land is possible or not.

3. Abandonment of Co-ownership shares in land: A brief note

The abandonment of land in South African law is not possible. However, what of co-ownership shares in land? Is it within the powers of a co-owner to renounce unilaterally or abandon her undivided share?[168]

---

[162] Muller et al *Silberberg* 261-262.
[163] Mostert "No Right" in *Property Law Under Scrutiny* 26-28.
[164] Sonnekus (2004) *TSAR* 755-757.
[165] Sonnekus (2004) *TSAR* 755-756.
[166] See Van der Walt *Servitudes* 548-550; Muller et al *Silberberg* 401-402; Van der Merwe *Sakereg* 539-540; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 614.
[167] Sonnekus (2004) *TSAR* 755-756.
[168] See Cramer (2017) *SALJ* 886-887.

The legal literature on co-ownership in South Africa is silent on this question. South African law distinguishes between two forms of co-ownership, these being free co-ownership and bound co-ownership.[169] Under the former, the co-ownership relationship is the only legally relevant relationship between the parties, who may alienate or encumber their undivided shares as they wish.[170] Under the latter, there is an underlying legal relationship – for example, marriage in community of property – that binds the co-owners.[171] Co-owners in such a relationship may not alienate or encumber their undivided shares unilaterally.[172]

It is trite that a free co-owner is free to alienate or encumber her undivided co-ownership share.[173] In the absence of a co-ownership agreement, a co-owner may encumber with a real security right or alienate to a third party her co-ownership share without the consent of her co-owners.[174] In respect of land, this entitlement is acknowledged by section 34(1) of the Deeds Registries Act.[175]

The question arises as to whether this entitlement includes a right to abandon an undivided share in land. It would appear not, based on a perusal of the relevant section of the Deeds Registries Act.

Section 34(1) of the Act is primarily concerned with the issuing of certificates of registered title of undivided co-ownership shares. It further outlines under what circumstances undivided co-ownership shares in land may be disposed of or encumbered with other rights. The first circumstance in which a certificate may be issued is upon application by one of the co-owners. Second, for a co-owner to transfer only a fraction of her undivided share, or to hypothecate or lease the whole or a fraction of her share, it is a prerequisite that a certificate be issued. The issuing of a certificate is not a prerequisite, however, for co-owners in unison to transfer an undivided or a fraction of a share. It is further not required for co-owners acting together to hypothecate or lease the whole of the share or land. Finally, the issuing of such a

---

169 Muller et al *Silberberg* 151; Van der Merwe *Sakereg* 378.
170 Muller et al *Silberberg* 151; Van der Merwe *Sakereg* 380ff.
171 Muller et al *Silberberg* 151; Van der Merwe *Sakereg* 378-379.
172 Van der Merwe *Sakereg* 378-379.
173 Muller et al *Silberberg* 153, 153n19; Van der Merwe *Sakereg* 384-386.
174 Muller et al *Silberberg* 153, 153n19; Van der Merwe *Sakereg* 384-386.
175 Van der Merwe “Things” in *LAWSA* para 269.

certificate is not necessary for a co-owner to dispose of the entirety of her share through “deeds of transfer registered simultaneously”.

The Deeds Registries Act does not envision, or enable, the imposition of one’s co-ownership share on the other co-owners against their will.[176] The Act is only concerned with transfers and encumbrances of undivided shares. Co-owners among themselves may agree that one co-owner will transfer her share to the other for no consideration. However, this is a donation, and thus a transfer. Abandonment does not appear possible.

It would be anomalous if an undivided co-ownership share in land could be abandoned, while the land itself could not. This anomaly may leave one unfortunate co-owner burdened with a valueless piece of land because the other co-owners were quicker on the draw to abandon their undivided shares.

Regardless, the Deeds Registries Act is silent on the matter. In line with Mostert’s argument,[177] and the conclusions drawn in this chapter, in the absence of registration actions, it would not seem possible to abandon undivided shares in land. The necessity of registration actions appears just as applicable to co-ownership shares as they do to the land itself.

4. Publicity and the impossibility of abandoning landownership

The question of whether it is possible to abandon ownership of land in South Africa appears to lack an explicit answer. However, in light of the principle of publicity, it would appear that it is impossible to abandon land.[178] This conclusion is reached despite the fact that South Africa observes a negative system of registration as well as the original modes of acquisition that do not require actions in the Deeds Registry to change proprietary relations.[179] When one examines original modes of acquisition more closely, they appear to serve the principle of publicity in the context of land in a manner that the doctrine of abandonment cannot. In the absence of express registration

[176] Cramer (2017) *SALJ* 886-887.
[177] Mostert “No Right” in *Property Law Under Scrutiny* 26-28.
[178] Mostert “No Right” in *Property Law Under Scrutiny* 26-28.
[179] Sonnekus (2004) *TSAR* 756; Muller et al *Silberberg* 261-262.

actions being available to facilitate the abandonment of land, it must be concluded that the abandonment of land is not possible.[180]

The conclusion reached above may be contentious, given the dearth of academic commentary on the possibility of abandonment of landownership beyond the debate between Mostert and Sonnekus. However, even if one agrees with the position of Sonnekus – that the abandonment of landownership is possible through the common-law requirements for abandonment[181] - this will not be the primary focus for the remainder of the thesis. Rather, it is necessary to engage with another question: should the abandonment of ownership in South African law be permitted, and if so, under what circumstances? These questions will be the focus of the following chapters. As a first step in answering this question, the next chapter will engage with the social-obligation norm of property as conceptualised by Alexander.[182]

[180] Mostert "No Right" in *Property Law Under Scrutiny* 27.
[181] See Section 2.4.2 above.
[182] See G Alexander "The Social-Obligation Norm in American Property Law" (2009) 94 *Cornell Law Review* 745; G Alexander *Property and Human Flourishing* (2018).

Chapter 4: Locating Abandonment in a Social-Obligation Norm Framework

1. Introduction

Scholars acknowledge that ownership entails obligations and not simply entitlements.[1] These scholars seek to challenge the conventional view that private property is solely concerned with individual rights, rather than obligations and responsibilities. The concept of abandonment in law has existed for millennia.[2] Nevertheless, the law does not appear to provide an unrestricted right to abandon, but rather, cases concerning abandonment involve parties contesting ownership of property.[3] Concerning immovable property, abandonment is simply not possible in South African law, as established in Chapter 3.[4] It is also not possible in Scots law,[5] while being almost unrestricted in Swiss law, as is canvassed in Chapter Five.[6] It is thus necessary to explain how a concept such as abandonment can exist in law, while a right to abandon does not, at least not in every jurisdiction. In this respect, it is beneficial to explore the school of thought that emphasises the responsibilities that accompany ownership. This

---

[1] See in general the works referred to in notes 7 and 15 below.
[2] See the historical overview of the law of abandonment in Chapter 2 Section 3.
[3] See E Peñalver "The Illusory Right to Abandon" (2010) 109 *Michigan Law Review* 191 207. See also Chapter 2 Section 4.4.
[4] See also R Cramer "The Abandonment of Landownership in South African and Swiss Law (2017) 134 *SALJ* 870. Note on the aforementioned publication by the author: My Memorandum of Understanding with my supervisor, as well as obligations attaching to funding I received through the Swiss-South African Joint Research Programme to facilitate my comparative study, required me to publish from my doctoral research. The article referenced here is the result of the obligation to publish from my doctoral research.
[5] See Chapter 5 Section 4. See also *The Scottish Environment Protection Agency v The Joint Liquidators of the Scottish Coal Company Limited* [2013] CSIH 108 paras 100-103; M Combe & M Rudd "Abandonment of Land and the *Scottish Coal* Case: Was it Unprecedented?" (2018) 22 *The Edinburgh Law Review* 301; Lord Eassie, HL MacQueen, A Anderson, D Bain, D Cabrelli, G Cameron, M Combe, C Ervine, N Grier, S Lamont-Black, D Nichols, R Paisley, A Simpson, M Sundara Rajan & Lady Wise *Gloag and Henderson The Law of Scotland* 14 ed (2017) para 34.03n30.
[6] See Chapter 5 Section 3. See also See Art 666 Abs 1 and Art 964 Abs 1 ZGB. See also H Rey and L Strebel "Art. 666" in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 1134 1134-1135; J Schmid & B Hürlimann-Kaup *Sachenrecht* (2017) para 868; H Rey *Die Grundlagen des Sachenrechts und das Eigentum* 3 ed (2007) para 1673ff; P Tuor, B Schnyder, J Schmid & A Jungo *Das Schweizerische Zivilgesetzbuch* 14 ed (2015) § 100 para 33; F Hitz "Art. 666" in M Amstutz, P Breitschmid, A Furrer, D Girsberger, C Huguenin, A Jungo, M Müller-Chen, V Roberto, AK Schnyder & HR Trüeb (eds) *Handkommentar zum Schweizer Privatrecht* 3 ed (2006) 166 166-167; P Simonius & T Sutter *Schweizerisches Immobiliarsachenrecht* (1995) para 127.

school of through provides justification for the legal framework which does not permit owners to relinquish their obligations to the detriment of society at large.

Despite perceptions to the contrary, property rights are not regarded in scholarship as absolute; not even when they amount to the so-called ultimate form of property, namely ownership.[7] Ownership is subject to a plethora of limitations, stemming from legislation, limited real rights held by third parties, as well as the interests of other owners and the general public.[8] Unrestricted ownership would, in the words of Singer, be a form of "dictatorship".[9] Evidently, unrestricted ownership is not viable, as ownership cannot entail a "right to rule" without consideration to the impact that the exercise of entitlements may have on others.[10] These observations clearly extend to the circumstances in which an owner can terminate her relationship with property – exercising the *ius disponendi*[11] - in the form of abandonment.[12] The liberal tradition of viewing property as a means of escape from community ignores that people are simultaneously individuals and social creatures.[13] Interpreting rights – including property rights - as being relational avoids the pitfalls of individualism.[14]

Ownership entails obligations that cannot be separated from the social context in which ownership exists.[15] These obligations may be seen as arising from a social contract between the owner as individual and the broader community on the one hand.[16] On

---

[7] See G Muller, R Brits, JM Pienaar & Z Boggenpoel *Silberberg and Schoeman's The Law of Property* (2019) 106; P Birks "The Roman Law Concept of Dominium and the Idea of Absolute Ownership" (1985) *Acta Juridica* 241; C Lewis "The Modern Concept of Ownership" (1985) *Acta Juridica* 241; H Scott "Absolute Ownership and Legal Pluralism in Roman Law: Two Arguments" (2011) *Acta Juridica* 23.
[8] Muller et al *Silberberg* 107ff; CG van der Merwe & A Pope "Part III – Property" in F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 405 473ff; CG van der Merwe "Things" in WA Joubert (founding ed) *LAWSA 27* 2 ed (2014) Paras 139ff.
[9] J Singer *Entitlement: The Paradoxes of Property* (2000) 209.
[10] Singer *Entitlement* 209.
[11] See CG van der Merwe *Sakereg* 2 ed (1989) 173; Muller et al *Silberberg* 105.
[12] See in general Peñalver (2010) *Michigan* 191.
[13] J Nedelsky "Reconceiving Rights as Relationship" (1993) 1 *Review of Constitutional Studies* 1 13.
[14] Nedelsky (1993) *Review* 15.
[15] G Alexander "The Social-Obligation Norm in American Property Law" (2009) 94 *Cornell Law Review* 745 747-748; G Alexander *Property and Human Flourishing* (2018) Chapter 2; G Alexander & E Peñalver *An Introduction to Property Theory* (2012) 94; Singer *Entitlement* 131ff; E Freyfogle *The Land We Share: Private Property and the Common Good* (2003) 27; J Singer "Democratic Estates: Property Law in a Free and Democratic Society" (2009) 94 *Cornell Law Review* 1009 1048-1049; H Dagan "Takings and Distributive Justice" (1999) 85 *Virginia Law Review* 741 771; H Dagan "The Social Responsibility of Ownership" (2007) 92 *Cornell Law Review* 1255; L Katz "It's Not Personal: Social Obligations in the Office of Ownership" (2020) *Cornell Journal of Law and Public Policy* (Forthcoming).
[16] See Alexander (2009) *Cornell* 759 relying on Dagan (1999) *Virginia* 771-774; Alexander *Property and Human Flourishing* 43-44.

the other, they may be seen as a price one pays for membership of the community in which the property rights in question exist, thus enabling people to flourish.[17] Regardless, obligation and responsibility remain crucial aspects of ownership, including the right to terminate ownership, whether through transfer or abandonment. The doctrine of abandonment reinforces obligation and responsibility through restrictions (and sometimes outright prohibition) on unilaterally divesting oneself of property.[18] The impossibility of abandoning landownership, for example, can serve as a vehicle for the enforcement of obligations in property law.[19]

This chapter seeks to provide an overview of the social-obligation norm, locating the norm in the South African legal framework, and ultimately linking the norm to the law's treatment of abandonment. It proceeds along the following lines. Firstly, the tenets of a social-norm based theory of property are introduced. Secondly, the concept of externalities in property law is briefly reviewed. Following this, an in-depth analysis of the social-obligation norm as set out by Alexander is provided, given that this conception of the norm will inform the suggestions made by this thesis. Finally, this chapter evaluates how the social-obligation norm is given expression to by the Constitution,[20] in particular the property clause therein.[21]

2. Tenets of a social-norm based property theory

Property rights are conceived of as "inherently relational",[22] with the consequence that owners – and landowners in particular - owe obligations to society at large.[23] It is necessary to acknowledge – even as property owners - that one is dependent upon others as well as the social framework that enables people to flourish, and that there

[17] Alexander (2009) *Cornell* 771-772; Alexander *Property and Human Flourishing* 73; G Alexander & E Peñalver "Properties of Community" (2009) 10 *Theoretical Inquiries in Law* 127 145.
[18] Peñalver (2010) *Michigan* 193-194.
[19] Peñalver (2010) *Michigan* 195-196.
[20] Constitution of the Republic of South Africa, 1996.
[21] Section 25.
[22] Alexander (2009) *Cornell* 747-748; Alexander & Peñalver *Property Theory* 94. As Underkuffler states, "property only has meaning when human relations…are at stake". See L Underkuffler *The Idea of Property: Its Meaning and Power* (2003) 12.
[23] Alexander (2009) *Cornell* 747-748; Alexander *Property and Human Flourishing* Chapter 2; Alexander & Peñalver *Property Theory* 94; Singer *Entitlement* 131ff; Freyfogle *The Land* 27; Singer (2009) *Cornell* 1048-1049; Dagan (1999) *Virginia* 771.

is thus a moral obligation to support such frameworks.[24] Consequently, ownership does not serve as an "exit" (ability to withdraw) from one's community,[25] but reinforces one's bonds with the community in which such property is located.[26]

Alexander highlights two particular conceptions of the social-obligation norm in the law of property that warrant consideration.[27] The distinction between the two approaches depends on how an individual's membership of her community is perceived.[28] The first approach, the so-called "contractarian" version,[29] views community membership in "purely instrumental terms".[30] Obligations stem "from our consent or from [these

[24] Alexander (2009) *Cornell* 760; Alexander *Property and Human Flourishing* xv; Alexander & Peñalver *Property* 95. See also Alexander & Peñalver (2009) *Theoretical* 134ff.

[25] It is beyond the scope of this thesis to engage in a detailed analysis of the concept of "community". It is a contested and elusive concept. See P Selznick *The Moral Commonwealth: Social Theory and the Promise of Community* (1992) 357ff. It is necessary, however, to define what exactly is meant by the use of the term in the context of this thesis. As Alexander's conception of the social-obligation norm is adopted, his conception of community will likewise be utilised. See in general Alexander *Property and Human Flourishing* Chapter 3.

When one defines community in the social sense of the word, one usually refers to groups held together by some commonality. These may be communities of identity (for example, residence or ethnicity) or communities of interest (for example, sports). Alexander notes the more complicated formulation of the concept put forward by Selznick: "A group is a community to the extent that it encompasses a broad range of activities and interests, and to the extent that participation implicates whole persons rather than segmental interests or activities" (Selznick *The Moral Commonwealth* 358). For Alexander, those groups that fall within the relevant definition of community, envisioned by his theory of ownership, are envisaged as facilitators of human flourishing. Such communities assist members in developing the capabilities critical to a flourishing life. Property owners, in their capacity as property owners, owe obligations to these enabling communities. See Alexander *Property and Human Flourishing* 81.

One can take a broad approach to community, into which groups larger than neighbourhoods may fall. Alexander notes that a definition of community which places emphasis on functions over relationships and feelings would bring cities within its scope. E.g. functions such as the provision of essential goods, services and the regulation of behaviour, and a shared sense of identity. Cities ultimately play a vital role in the nurturing of "their residents' capabilities and by doing so contribute in important ways to their opportunity to flourish". See Alexander *Property and Human Flourishing* 88-90. See also A Berger *The City: Urban Communities and Their Problems* (1978) 8, 29ff.

In discussing the concept of community, it is also important to note the work of Tönnies. Tönnies talks of *Gemeinschaft* (community) and *Gesellschaft* (society), which exist at opposite ends of the spectrum of community. *Gemeinschaft* "connotes moral unity, rootedness, intimacy, and kinship". It resembles what may be referred to as a traditional society, resembling an "idealised feudal order". Association, by contrast, is more artificial in the context of *Gesellschaft*, an exchange-based community, resembling a more modern, urban society. Individuals in *Gesellschaft* are more isolated and will act in their own self-interest. See Selznick *The Moral Commonwealth* 365-366; F Tönnies *Community and Association* (1955) translated by C Loomis 74.

Broader definitions of community which potentially encompass cities clearly fall within *Gesellschaft*. Nevertheless, the importance of these communities to enabling human flourishing cannot be gainsaid. While not being examples of the tightly-knit *Gemeinschaft*, property owners owe obligations to these communities, which have enabled them to flourish, to facilitate the flourishing of others. See Alexander *Property and Human Flourishing* 81.

[26] E Peñalver "Property as Entrance" (2005) 91 *Virginia Law Review* 1889 1894.

[27] Alexander (2009) *Cornell* 758-760.

[28] Alexander (2009) *Cornell* 758.

[29] See Alexander *Property and Human Flourishing* 42ff.

[30] Alexander (2009) *Cornell* 758; Alexander *Property and Human Flourishing* 42.

obligations] being to our advantage".[31] The second conception places greater emphasis on community membership.[32] While the individual is not disregarded, her membership of her community is taken more seriously than in the first conception.[33] A liberal, but a community-focused social-obligation norm is the result.[34]

It is important to establish on which of these conceptions reliance is placed when justifying the existing legal framework in which the abandonment of landownership is not possible.[35] Whether one views one's relationship with the community as stemming from reciprocal consent,[36] or rather as a deeper relationship with one's community,[37] there are important implications for the *ius disponendi*, and abandonment in particular.

The first conception has been developed in a number of articles by Dagan.[38] Alexander terms this the "contractarian version of the community-based conception of social obligation".[39] In this approach, Alexander explains, the individual is regarded as the "basic unit of social organization".[40] Communities are composed of individuals who consensually amalgamate to achieve certain goals for their shared benefit.[41] This approach views the relationship between the individual and community as contractual, as the two are bound by mutual agreement in pursuit of shared goals.[42] The main motivation to cooperate with the broader community is to maximise one's personal welfare, for example, the common interests of tenants in a building in promoting fire safety.[43] Cooperation with the community in these circumstances evidently has a reciprocal advantage for the owner, at least in the event of a fire, through increasing the likelihood that her possessions (and possibly even her life) may be saved. Key is

---

[31] Alexander (2009) *Cornell* 758 relying on Dagan (1999) *Virginia* 771-772; Alexander *Property and Human Flourishing* 42.
[32] Alexander (2009) *Cornell* 758; Alexander *Property and Human Flourishing* 45ff.
[33] Alexander (2009) *Cornell* 758; Alexander *Property and Human Flourishing* 45ff.
[34] Alexander (2009) *Cornell* 758.
[35] See discussion of the possibility of abandoning landownership in the South African legal framework in Chapter 3.
[36] Alexander (2009) *Cornell* 758; Alexander *Property and Human Flourishing* 42.
[37] Alexander (2009) *Cornell* 758; Alexander *Property and Human Flourishing* 45ff.
[38] Dagan (1999) 85 *Virginia Law Review* 741; H Dagan "Just Compensation, Incentives, and Social Meanings" (2000) 99 *Michigan Law Review* 134; Dagan (2007) *Cornell* 1255.
[39] Alexander (2009) *Cornell* 758; Alexander *Property and Human Flourishing* 42ff.
[40] Alexander (2009) *Cornell* 759 relying on Dagan (1999) *Virginia* 771-774; Alexander *Property and Human Flourishing* 43.
[41] Alexander (2009) *Cornell* 759 relying on Dagan (1999) *Virginia* 791-792; Alexander *Property and Human Flourishing* 43.
[42] Alexander (2009) *Cornell* 759; Alexander *Property and Human Flourishing* 43-44.
[43] Alexander (2009) *Cornell* 759; Alexander *Property and Human Flourishing* 43-44.

that cooperation with one's community (that being, fellow sectional title owners and tenants) is based on reciprocal advantage, whether such advantage is accrued in the present or some underdetermined future date.

Critically, the obligations placed on community members (such as to maintain their property and not abandon it) must provide them with benefits in return.[44] Cooperation with one's fellow tenants and sectional title owners in a building regarding fire safety is a clear example, as it improves one's personal welfare, through the extra security provided to oneself in the event of a fire. The returns to burdened members of the community may be accrued, if not in the short-term, at least in the long-term.[45] The concept of "reciprocity of advantage" is contested.[46] On the one hand, such reciprocity may be construed narrowly, requiring "distinct and tangible compensation-in-kind" to be provided to the burdened owner.[47] On the other, reciprocity may be construed broadly, requiring that the burdened owner benefit as a member of the community through the "general welfare-enhancement generated by the public action".[48] Even if the burden placed on the owner exceeds the benefit accorded to the community.[49] Again, returning to the example of cooperation with fellow tenants in respect of ensuring adequate fire-safety standards are met, which would benefit one as a member of that community by virtue of one's membership.

Similarly, a landowner benefits from her neighbours not neglecting and abandoning their properties, while they in turn benefit from her doing the same. This protects against urban decay and reduction in property values. There is thus a reciprocal benefit to a landowner in retaining and maintaining her property, thus providing justification for the absence of a mechanism in the law that permits her to abandon landownership.[50]

Dagan favours a long-term conception of reciprocity.[51] A landowner is a member of the community, from which she derives a number of social benefits at no financial cost.[52]

---

[44] Alexander (2009) *Cornell* 760; Alexander *Property and Human Flourishing* 44.
[45] Dagan (1999) *Virginia* 771ff; Alexander (2009) *Cornell* 760.
[46] Dagan (1999) *Virginia* 768-770.
[47] Dagan (1999) *Virginia* 769.
[48] Dagan (1999) *Virginia* 769.
[49] Dagan (1999) *Virginia* 769.
[50] See Chapter 3 for a discussion of the absence of such a mechanism in South African law.
[51] Dagan (1999) *Virginia* 771.
[52] Dagan (1999) *Virginia* 771.

Consequently, she also has obligations flowing from her community membership.[53] Dagan does not see any problem with one particular landowner carrying a disproportionate burden, as long as (1) there is no extreme disproportionality in the distribution of the burden in question and (2) the burdened party is not particularly politically or economically weak.[54] Ultimately, uncompensated burdens are unacceptable in the absence of any returns that will balance out the sacrifice made by individual community members.[55] In the context of restricting the abandonment of landownership, this view would require one to examine the proportionality of the burden on the landowner, taking into account her economic and political strength.

The second conception, favoured by Alexander and Peñalver, is referred to as the "ontological" conception of social obligation.[56] Here, the emphasis is on the importance of dependency and interdependency on other people as inescapable parts of our humanity, despite human beings yearning for autonomy.[57] Human flourishing is, consequently, of utmost importance.[58] This conception, as well as other theories of human flourishing, will be discussed in greater detail in section 4, given its central importance to this thesis.

Regardless of which conception is favoured, it is evident from property law scholarship that community membership entails obligations, and that property rights are not the

---

[53] Dagan (1999) *Virginia* 771.
[54] Dagan (1999) *Virginia* 771; Dagan (2000) *Michigan* 136-137.
[55] Dagan (2007) *Cornell* 1266-1267; Alexander (2009) *Cornell* 760.
[56] See Alexander (2009) *Cornell* 760ff; Alexander *Property and Human Flourishing* 45ff; Alexander & Peñalver (2009) *Theoretical* 127; Alexander & Peñalver *Property Theory* 80ff.
[57] Alexander (2009) *Cornell* 760; Alexander *Property and Human Flourishing* 45ff; Alexander & Peñalver (2009) *Theoretical* 134ff; Alexander & Peñalver *Property Theory* 87ff.
[58] Alexander (2009) *Cornell* 760; Alexander *Property and Human Flourishing* 45ff; Alexander & Peñalver (2009) *Theoretical* 134ff; Alexander & Peñalver *Property Theory* 87ff. Human flourishing, as used by Alexander, has its roots in Aristotelian ethics. Human flourishing, in Aristotle's theory, is associated with "living well" or "doing well", although there is a dispute as to what exactly constitutes a well-lived life (1095a15-25 relying on *Aristotle's Nicomachean Ethics* (2012) translated by R Bartlett & S Collins). Aristotle did not conceive of an individual's human flourishing as something which happens in insolation. Rather, in Aristotle's political theory, an individual's flourishing was inseparable from obligations owed to one's community. As Trott, relying on Kraut, explains, as "human beings flourish within the community, we as individuals are responsible to further contribute to the well-being of the community". Contributing to the well-being of the community, in turn, continues to promote human flourishing. Aristotle, for example, acknowledged the obligation on the part of the wealthy to support the community, as their wealth could not exist without said community. See A Trott *Aristotle on the Nature of Community* (2014) 74; R Kraut "Aristotelianism and Libertarianism" (1997) 11 *Critical Review* 359 365. For further reading on Aristotle's idea of human good, see G Lawrence "Human Good and Human Function" in R Kraut (ed) *The Blackwell Guide to Aristotle's Nicomachean Ethics* (2006) 37.

trumps they are automatically assumed to be.[59] One, for example, is not simply free to divest unilaterally oneself of ownership in property (and the obligations attached thereto) from which negative externalities can flow. Community membership does involve accepting burdens and responsibilities in respect of one's ownership of property.[60]

A social-obligation approach requires that one take account of the extent of the public burden imposed on the individual.[61] When deciding whether owners should be allowed to abandon land – and if so, under what circumstances – it must be decided whether they should carry the burden that comes with ownership of land. Alternatively, it should be decided whether they should be allowed to divest themselves of that ownership and pass the liabilities associated with it onto society at large. When such a burden is disproportionate, it needs to be analysed carefully, as disregarding a disproportionate distribution of public burden is offensive to both equality and community.[62] It must be asked whether the burden imposed on the individual is "a proper price of communal citizenship" or "an unfair sacrifice of the few to the many".[63] This observation is made in the context of expropriation law and distributive justice. However, it can similarly be applied in the context of the abandonment of land, and the denial of such an exit to a landowner, which will require such an owner to retain and maintain her property as a price of "communal citizenship".[64]

3. Ownership and externalities

An important concept to review prior to an in-depth discussion of the social-obligation norm is that of externalities. The issue of ownership and the externalities that flow from the exercise of its entitlements has been explored by Singer.[65] What is meant by the

---

[59] See in general the works referred to in notes 7 and 15.
[60] Dagan (1999) *Virginia* 771ff; Alexander (2009) *Cornell* 760ff; Alexander *Property and Human Flourishing* Chapter 2; Alexander & Peñalver *Property Theory* 94ff; Singer *Entitlement* 131ff; Freyfogle *The Land* 27; Singer (2009) *Cornell* 1048-1049.
[61] Dagan (1999) *Virginia* 761-762.
[62] Dagan (1999) *Virginia* 761-762.
[63] Dagan (1999) *Virginia* 762 relying on J Paul "The Hidden Structure of Takings Law" (1991) 64 *Southern California Law Review* 1393 1406.
[64] Dagan (1999) *Virginia* 762 relying Paul (1991) *Southern California Law Review* 1406.
[65] Singer *Entitlement* Chapter 1; Singer 'Property norms' in *Property and Community* 57; J Singer "The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations" (2006) 30 *Harvard Environmental Law Review* 309 309ff. For further reading on externalities in general, see R Patel *The Value of Nothing* (2009).

term externality?[66] An externality is an impact on third parties from an action or transaction in which they are not directly involved.[67] It is possible to define the term in a manner which brings any external effect, positive or negative, within its scope.[68] A preferable definition, however, according to Singer, is that an externality is any effect, positive or negative, "that has moral significance and to which the law should pay attention".[69]

The issue of externalities, and when they warrant the concern of the law, is critical to determining whether the abandonment of landownership should be permitted. Abandonment inevitably does not occur in a vacuum and has consequences for society at large. While one may normally associate externalities with positive acts, externalities can similarly flow from a negative act, from an owner dispensing with her obligations. There are numerous externalities that will flow from the abandonment of landownership should such be permitted, particularly in a context in which there is no willing party to take responsibility for such property. Unsafe buildings and fire hazards can result from the proliferation of neglected properties. This will further contribute to the growth of urban decay. As abandoned immovable property (if such abandonment is possible)

---

[66] Singer provides a brief history of externalities. See Singer "Property norms" in *Property and Community* 66ff. He notes Mill's theory of self-regarding acts, in terms of which one may act as they wish, so long as others are not affected by such actions. When one's actions do have an effect on third parties, the question arises as to whether the harmful activity should be regulated, either through limitation or outright prohibition. See J Singer "How Property Norms Construct the Externalities of Ownership" in G Alexander & E Peñalver (eds) *Property and Community* (2010) 68; J Mill *On Liberty and Other Essays* (1998) 85ff (Oxford World's Classics edition).
Singer notes, however, that Mill's model began to lose ground from the nineteenth century onwards. There was a legal and moral shift which began to view liberty as entailing a right to impose harms of third parties. Increasingly, there was a shift away from attempting to identify which actions may legitimately have a negative impact on others and towards interest balancing. Singer explains that this "skeptical approach to moral judgments makes it even harder to distinguish self-regarding acts from other regarding acts". From the perspective of Coase, for example, a claim to limit another's interest is itself an externality. As such, the claim by a local community that a factory owner is not entitled to inflict harm on their properties through pollution is itself an externality in that it potentially limits what the factory owner may do with her land. See Singer "Property norms" in *Property and Community* 68-69; R Coase "The problem of social cost" (1960) 3 *Journal of Law and Economics* 1 41-42.
Singer is critical of such an approach, likening the idea of homeowners' imposing an externality on the factory owner to complaining that your victim's chin got in the way of your fist. Property norms that are embedded in our culture, he explains, justify this view. Since one views homeownership as including an entitlement to safety in one's home, the homeowners in such circumstances should be regarded as "having a morally superior claim to that of the factory". On this view, the homeowners are committing a self-regarding act (i.e. not an externality), while the factory owner is committing an other-regarding act (i.e. an externality). To construe the matter differently is a moral distortion. See Singer "Property Norms" in *Property and Community* 69-70.
[67] Singer "Property Norms" in *Property and Community* 61.
[68] Singer "Property Norms" in *Property and Community* 58.
[69] Singer "Property Norms" in *Property and Community* 58.

accrues to the State,[70] so does the obligation to maintain it, which now falls squarely on the public purse.

The exercise of ownership entitlements inevitably entails externalities in some form or another.[71] Singer uses the example of refusing to allow a homeless person to use one's empty guestroom.[72] The law inevitably protects the owner, by empowering her to deny the homeless person (regardless of need) from using her empty guestroom.[73] This exercise of property rights subsequently results in harm to the homeless person, but most property-law regimes will not recognise it as a *legally relevant* harm.[74] As Singer explains, systems of private property simultaneously permit owners to impose harms on third parties, while also limiting the harms that may be imposed on third parties.[75] The question is, where is the line drawn in a particular system of private ownership between the owner's freedom and non-owner's security?[76]

One must determine when the exercise of an ownership entitlement does cause harm to legitimate interests, thus necessitating regulation of the entitlement in question.[77] Singer explains that "[p]roperty norms help answer this question by orientating us in a moral universe through background understandings that define legitimate interests that deserve legal protection".[78] Norms provide guidance by distinguishing between owners and non-owners of entitlements in certain resources, as well as by establishing when an owner is obliged to take into account the interests of others and when she may act entirely in her self-interest.[79] By doing so, norms identify those externalities that warrant concern and possibly prevention.[80]

The potential impacts of abandonment would appear to be externalities that warrant the law's concern, as well as regulation and prevention. The best way to regulate and

---

[70] See Chapter 2 Section 4.2.1.
[71] Singer "Property Norms" in *Property and Community* 57ff; Singer (2006) *Harvard Environmental Law Review* 319, 320.
[72] Singer "Property Norms" in *Property and Community* 61-62.
[73] Singer "Property Norms" in *Property and Community* 61-62.
[74] Singer "Property Norms" in *Property and Community* 62.
[75] Singer "Property Norms" in *Property and Community* 64.
[76] Singer "Property Norms" in *Property and Community* 64.
[77] Singer "Property Norms" in *Property and Community* 66; Singer (2006) *Harvard Environmental Law Review* 313, 320.
[78] Singer "Property Norms" in *Property and Community* 66.
[79] Singer "Property Norms" in *Property and Community* 66.
[80] Singer "Property Norms" in *Property and Community* 66.

manage these externalities will be a key consideration of this thesis. Regulation will need to take place in light of the social-obligation norm and the constitutional framework that gives effect to it. Suggestions for law reform in this context will be made in Chapter 7. The Chapter will now turn to an analysis of the social-obligation norm as well as its place in South Africa's legal framework.

4. The social-obligation norm and human flourishing

In his seminal article on the subject, Alexander explores the social-obligation norm in the context of human flourishing.[81] As it is his conception of the social-obligation norm that will inform the conclusions and suggestions of this thesis, it is necessary to set it out in more depth.

4.1 Human flourishing as the basis of social obligation

As noted, human flourishing is central to Alexander's conception of the social-obligation norm.[82] Human flourishing requires that the law of property – rather than emphasise individual rights over all other rights and interests – allow "individuals to live lives worthy of human dignity".[83] The justification for the existence of (and interference with) private property rights is to be found in human flourishing, to the extent that such rights provide holders with the ability to flourish.[84] Beyond justifying the continued existence of such rights as a social good, human flourishing also establishes the limitations law places on these rights.[85] These limitations necessarily extend to the *ius disponendi*, and the circumstances in which one may dispose of her property "in the absence of another party who wishes to accept responsibility for it".[86] The unrestricted disposal of immovable property would necessarily have consequences for the flourishing of others, through the proliferation of neglected properties, and the potential drain on the public purse.[87]

---

[81] Alexander (2009) *Cornell* 745; Alexander *Property and Human Flourishing*.
[82] Alexander (2009) *Cornell* 760ff; Alexander *Property and Human Flourishing*; Alexander & Peñalver *Property Theory* Chapter 5; Alexander & Peñalver (2009) *Theoretical* 134ff.
[83] Alexander (2009) *Cornell* 748. See also Alexander *Property and Human Flourishing* 5; Alexander & Peñalver *Property Theory* 89. See also Katz (2020) *Cornell Journal* (forthcoming).
[84] Alexander (2009) *Cornell* 749-750; Alexander *Property and Human Flourishing* 215.
[85] Alexander (2009) *Cornell* 749-750; Alexander *Property and Human Flourishing* 215.
[86] Peñalver (2010) *Michigan* 208.
[87] See Chapter 1 Section 2 and Chapter 6 Section 2.1.

Sen notes that wealth (which would include having property rights) is important due to what it enables people to do.[88] Wealth is not desirable merely for the sake of accruing wealth, but for the "substantive freedoms" made available through having such wealth.[89] Examples of such freedoms include being well-fed, not having to worry about avoidable mortality, as well as literacy.[90] In Sen's work, freedoms form the "basic building blocks" for individuals and their well-being.[91] Sen refers to these substantive freedoms as "capabilities".[92] These capabilities enable people to lead lives they value, as well as lives they have a reason to value.[93] In this respect, he introduces the concept of "functionings", which "reflects the various things a person may value doing or being".[94] Functionings may be either relatively simple – acquiring sufficient nourishment – or more complex – acceptance and participation in a particular community.[95]

When one talks of an individual's capability, what is being referred to are the various functionings and combinations available to her.[96] Capability refers to her ability to exercise choice regarding alternative combinations of functionings.[97] One may, for example, forego food and fast for religious reasons, despite one's wealth.[98] This choice may result in one's functioning being comparable to that of a destitute person who goes hungry due to want.[99] Key, however, is that in the first instance, one exercises choice, due to enjoying more developed capabilities.[100]

---

[88] A Sen *Development as Freedom* (2001) 14.
[89] Sen *Development* 14
[90] Sen *Development* 66.
[91] Sen *Development* 18
[92] Sen *Development* 74. See A Sen "Capability and Well-being" in M Nussbaum & A Sen (eds) *The Quality of Life* (1993) 30 33; M Nussbaum *Creating Capabilities: The Human Development Approach* (2011) 18.
[93] Sen *Development* 18, 74. See also M Nussbaum *Women and Human Development: The Capabilities Approach* (2001) 5.
[94] Sen *Development* 75. See also A Sen *Commodities and Capabilities* (1985) 10-11.
[95] Sen *Development* 75.
[96] Sen *Development* 75. See also Sen *Commodities* 13-14; Sen "Capability and Well-Being" in *Quality of Life* 30-31; Nussbaum *Creating Capabilities* 24-25.
[97] Sen *Development* 75. See also Sen "Capability and Well-Being" in *Quality of Life* 31; Nussbaum *Women* 5, 12.
[98] Sen *Development* 75.
[99] Sen *Development* 75.
[100] Sen *Development* 75. See also Nussbaum *Creating Capabilities* 25.

Alexander explains that these capabilities or the resources required to develop them cannot be acquired independently.[101] Rather, the cultivation of capabilities necessary for a well-lived life depends significantly on our dependence on other human beings.[102] Dependence on others remains a critical aspect of human existence, and one even remains partially dependent on others as otherwise independent adults.[103] Beyond mere physical dependence on others, capabilities essential to a well-lived life – such as freedom and social interaction – can "exist only within a vital matrix of social structures and practices".[104] Even a capability such as freedom depends on social and cultural context and the cooperation of others.[105] Our communities are thus essential for both our physical well-being as well as "our ability to function as free and rational agents".[106]

Alexander explains that capabilities are critical to the promotion of human flourishing, and as such, encouraging the development of people's capabilities is an "objective human good".[107] Human dignity demands an equal opportunity for each person to flourish.[108] Equal opportunity necessarily entails that everyone should have access both to the capabilities critical to their individual flourishing as well as the resources necessary for nurturing their capabilities.[109] The nurturing of vital capabilities depends heavily on social matrices.[110]

---

[101] Alexander (2009) *Cornell* 765; Alexander *Property and Human Flourishing* 6-9; Alexander & Peñalver *Property Theory* 90; Alexander & Peñalver (2009) *Theoretical* 134ff.
[102] Alexander (2009) *Cornell* 765; Alexander *Property and Human Flourishing* 6-9; Alexander & Peñalver *Property Theory* 90; Alexander & Peñalver (2009) *Theoretical* 138.
[103] Alexander (2009) *Cornell* 765; Alexander *Property and Human Flourishing* 6-9; Alexander & Peñalver *Property Theory* 90; Alexander & Peñalver (2009) *Theoretical* 138.
[104] Alexander (2009) *Cornell* 765; Alexander *Property and Human Flourishing* 6-9; Alexander & Peñalver *Property Theory* 90; Alexander & Peñalver (2009) *Theoretical* 138.
[105] Alexander (2009) *Cornell* 765; Alexander *Property and Human Flourishing* 6-9; Alexander & Peñalver *Property Theory* 90; Alexander & Peñalver (2009) *Theoretical* 138.
[106] Alexander (2009) *Cornell* 766; Alexander *Property and Human Flourishing* 6-9; Alexander & Peñalver (2009) *Theoretical* 138-139.
[107] Alexander (2009) *Cornell* 767; Alexander *Property and Human Flourishing* 6-9; Alexander & Peñalver (2009) *Theoretical* 140-141.
[108] Alexander (2009) *Cornell* 768; Alexander *Property and Human Flourishing* 6-9; Alexander & Peñalver (2009) *Theoretical* 140-141.
[109] Alexander (2009) *Cornell* 768; Alexander *Property and Human Flourishing* 6-9; Alexander & Peñalver (2009) *Theoretical* 140-141.
[110] Alexander (2009) *Cornell* 768; Alexander *Property and Human Flourishing* 6-9; Alexander & Peñalver (2009) *Theoretical* 140-141.

Alexander proceeds to engage with the question as to why one should be concerned with the flourishing of others.[111] He contends that it would be a self-contradiction, given our interdependence on others, to value one's own flourishing while disregarding the flourishing of others.[112] One should not only be concerned with one's own flourishing but should assist in enabling others to flourish as well.[113] This concern applies in respect of the exercise of our property rights, and when those rights may be limited or even taken away for the benefit of the community as a whole.

The limitation of property rights to ensure the ability of others to flourish also extends to the circumstances in which owners may dispose of their property, particularly through abandonment. The illegal dumping of movables,[114] as well as the proliferation of neglected buildings,[115] serve as drains on the public purse. When there are pressing socio-economic priorities, such as in South Africa,[116] abandonment has an inevitable impact on the ability of others to flourish.

The emphasis on human flourishing – both one's own and others – is why Alexander's conception of the role of community differs from that of Dagan's.[117] Dagan views

---

[111] Alexander (2009) *Cornell* 769; Alexander & Peñalver (2009) *Theoretical* 141-142.
[112] Alexander (2009) *Cornell* 769; Alexander & Peñalver (2009) *Theoretical* 141-142.
[113] Alexander (2009) *Cornell* 769; Alexander & Peñalver (2009) *Theoretical* 141-142.
[114] City of Cape Town *The Cost of Illegal Dumping* <http://resource.capetown.gov.za/documentcentre/Documents/Graphics%20and%20educational%20material/The%20cost%20of%20illegal%20dumping%20(PDF).pdf> (accessed 20-05-2019); A Watson "Gauteng's Illegal Dumping Scourge" *Citizen* (06-07-2015) 8; M Ntseku "City of Cape Town Spends from R110m to R120m Cleaning Up Illegal Dumping" (13-10-2019) *IOL* < https://www.iol.co.za/capeargus/news/city-of-cape-town-spends-from-r110m-to-r120m-cleaning-up-illegal-dumping-34679517> (accessed 15-10-2019).
[115] H Mphande "Guarding Derelict Eyesore Costs Ratepayers a Packet" *The Herald* (06-06-2008) 5; Author Unknown "Derelict Building Now a Dump" *The Herald* (31-08-2015) 11; C Mailovich "Pledge to Take Back Buildings" *Business Day* (01-06-2017) 1; ENCA "Mashaba Wants Public Works to Intervene on Abandoned Buildings" (10-04-2018) *ENCA* <https://www.enca.com/south-africa/mshaba-wants-public-works-to-intervene-on-abandoned-buildings> (accessed 10-05-2019); B Athman "Abandoned Houses and Unkempt Land Help Crime" (14-03-2018) *News24* <https://www.news24.com/SouthAfrica/Local/Maritzburg-Fever/abandoned-houses-and-unkempt-land-help-crime-20180313> (accessed 14-03-2018).
[116] The urgency of realising socio-economic rights in South Africa is evidenced by the huge wealth gap that prevails in South Africa. See A Orthofer *Wealth Inequality in South Africa: Insights from Survey and Tax Data* Working Paper for the Research Project on Employment, Income Distribution and Inclusive Growth, 2016, available at < http://www.redi3x3.org/sites/default/files/Orthofer%202016%20REDI3x3%20Working%20Paper%2015%20-%20Wealth%20inequality.pdf> (accessed 31-01-2019); A Orthofer "South Africa Needs to Fix its Dangerously Wide Wealth Gap" (06-10-2016) *The Conversation* <https://theconversation.com/south-africa-needs-to-fix-its-dangerously-wide-wealth-gap-66355> (accessed 31-01-2019). The State is obliged to realise socio-economic rights in a progressive manner, within its available resources. See sections 26(2), 27(2) and 29(1)(b) of the Constitution, 1996.
[117] See Section 2 above.

communities as composed of individuals who consensually amalgamate to achieve certain goals for their shared benefit.[118] Community participation in Alexander's conception cannot be seen as a mere volitional act in securing one's own interests.[119] Rather, community participation is a critical obligation based on the importance of capabilities for living a well-lived life.[120] One is morally obligated to support and maintain the social matrices that permit people to flourish, so that others may enjoy an equal opportunity to flourish.[121] This assertion is true even if those whose flourishing one is obliged to promote are not those from whom oneself has received any form of support.[122] Human interdependency means that the obligation to promote flourishing is not necessarily reciprocal.[123]

An approach which places greater emphasis on community membership and obligations to support and maintain social matrices that enable others to flourish better fits with the impossibility of abandoning landownership.[124] A landowner is not simply able to withdraw from ownership "in the absence of another party who wishes to take responsibility for it", [125] and pass on obligations to the community.

Alexander is careful not to take this emphasis on community participation in social obligation, in terms of individual sacrifices, too far.[126] While unreciprocated sacrifices may be the price of community membership, values such as individual respect and fairness must still be protected.[127] Nevertheless, contributory obligations cannot be restricted to circumstances where the value of the benefit matches that of the burden.[128] Human flourishing depends not only on social relations that are strategic to the individual, but also on those that are non-strategic.[129] For example, one may be

---

[118] Alexander (2009) *Cornell* 759 relying on Dagan (1999) *Virginia* 791-792; Alexander *Property and Human Flourishing* 43.
[119] Alexander (2009) *Cornell* 769-770.
[120] Alexander (2009) *Cornell* 770.
[121] Alexander (2009) *Cornell* 770; Alexander *Property and Human Flourishing* xv.
[122] Alexander (2009) *Cornell* 770-771; Alexander *Property and Human Flourishing* xv.
[123] Alexander (2009) *Cornell* 770-771; Alexander *Property and Human Flourishing* xv.
[124] See the conclusions reached on the possibility of abandoning landownership in South African law in Chapter 3 Section 4.
[125] Peñalver (2010) *Michigan* 208.
[126] Alexander (2009) *Cornell* 771-772.
[127] Alexander (2009) *Cornell* 771-772.
[128] Alexander (2009) *Cornell* 772.
[129] Alexander (2009) *Cornell* 772.

compelled to remain owner of a piece of land and to maintain it,[130] despite accruing no immediate benefit.[131] However, fairness must be taken into consideration as to whether or not one should carry such a burden, particularly in circumstances in which one is not responsible for the negative value the land has accrued.[132]

4.2 What does the social-obligation norm entail?

It is necessary to locate the law of abandonment, and the impossibility of abandoning landownership in particular, in the social-obligation norm and its impacts on ownership entitlements. This is not an issue with which Alexander explicitly engages. In terms of Alexander's conception of the social-obligation norm, there is a moral obligation on an owner to share with her community the benefits that are essential to promoting human flourishing.[133] Alexander defines these benefits as those essential to developing human qualities critical to people's ability to flourish as moral agents.[134] Further, these benefits must bear some reasonable connection to the land that is burdened.[135]

Restrictions on abandonment of property clearly find congruence with the examples Alexander provides of the practical effect of the social-obligation norm in property law.[136] Alexander notes two primary examples in the law of property that can be explained using the social-obligation norm. The first are instances where an owner must yield an entitlement – or ownership in its entirety – to the community in exchange for financial compensation.[137] An example of this would be the expropriation of property "for a public purpose or in the public interest".[138] The second are instances where the owner retains her property, but instead of yielding an interest, is prohibited from making use of her property in a manner deemed in conflict with the community's interests.[139] A clear example of this would be the law of nuisance, which limits the exercise of an

---

[130] L Fennell "Forcings" (2014) 114 *Columbia Law Review* 1297 1325-1327.
[131] See discussion of mining land, heritage buildings and problem buildings in Chapter 6.
[132] See in general Chapters 6 and 7.
[133] Alexander (2009) *Cornell* 774.
[134] Alexander (2009) *Cornell* 774.
[135] Alexander (2009) *Cornell* 774.
[136] The work of Peñalver in respect of abandonment best demonstrates the congruence between the social-obligation norm and restrictions on abandonment. See Peñalver (2010) *Michigan* 191. See also Cramer (2017) *SALJ* 901-904.
[137] Alexander (2009) *Cornell* 774-775.
[138] See section 25(2) of the Constitution, 1996.
[139] Alexander (2009) *Cornell* 775.

individual's ownership entitlements on the grounds that her neighbour's enjoy similar entitlements.[140]

A restriction (or prohibition) on the abandonment of landownership would fall into the second category, although not perfectly. While there is a negative obligation to refrain from using property in a manner that conflicts with community interests, it also entails positive obligations. That is, the owner retains her property (albeit unwillingly) while being obliged to maintain it.[141] She is not allowed to let the property to fall into neglect,[142] which would conflict with community interests. Regardless, such a restriction or prohibition appears to be best explained using the social-obligation norm: the owner retaining ownership, and thus the obligations to maintain such property, means that the costs of maintenance do not fall to the community, thus redirecting resources which may otherwise be used to facilitate the flourishing of others.

5. The social-obligation norm in South African property law

Restrictions on abandonment find a comfortable fit with the theory of the social-obligation norm in property law. However, it is most crucial to determine how restrictions on abandonment may be justified in South Africa's constitutional framework. This determination is necessary to justify the continued impossibility of abandoning landownership in South African law, as well as formulating necessary law reform.

A conception of the social-obligation norm that places significant emphasis on human flourishing finds easy concurrence with the values found in the South African Constitution.[143] These values include equality, human dignity, as well as the promotion of freedoms and human rights.[144] Alexander states that the property clause, section

---

[140] See in general AJ van der Walt *The Law of Neighbours* (2010); Muller et al *Silberberg* 125ff; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 476ff.
[141] See discussion of heritage buildings and problem buildings in Chapter 6 Sections 3.2 and 33.
[142] See discussion of heritage buildings and problem buildings in Chapter 6 Sections 3.2 and 33.
[143] Alexander (2009) *Cornell* 782ff. See further Cramer (2017) *SALJ* 899ff.
It is beyond the scope of this dissertation to discuss in detail how the constitutional property clause instils a social obligation norm in South African property law through permitting expropriation in the public interest or for a public purpose. The express approval for expropriation to achieve these aims by the South African Constitution makes it self-evident that the social obligation norm exists in South Africa's expropriation law (G Alexander *Global Debate Over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 149ff).
[144] See section 1.

25, gives expression to the social-obligation norm.[145] He explains that the clause "incorporates a thick social-obligation norm through its explicit commitment to land reform and racial justice".[146] The property clause expressly provides for the limitation of property rights, whether this be through deprivation in terms of a law of general application,[147] or an outright expropriation in the public interest or for a public purpose.[148] Section 25 also obliges the government to facilitate land reform and rectify past injustices in respect of property holdings.[149] Consequently, while landowners enjoy constitutionally-enshrined protection against the arbitrary deprivation of property, the sacrifice of entitlements is clearly envisioned in the new constitutional dispensation.[150] The entitlement referred to as the *ius disponendi*,[151] which would encompass abandonment, would be no exception.[152]

The following section will consider the system regulating private property created by the Constitution, a system which as has been noted embodies the social-obligation norm, with an aim to locating abandonment in this framework and context. It will also examine whether unreciprocated sacrifices can be expected of landowners in the constitutional framework and if so, under what circumstances. It will also take note of the landownership context that prevails in South Africa, which has important implications for whether an unrestricted right to abandon can exist in South African law.

5.1 Limitations inherent to the right or inherent to the system?

Arguably, there has always been a social-obligation norm in South African property law. This contention stands regardless of how such might have been eroded in the land law context through the overwhelming power of predominantly white landowners over poor black non-owners.[153] Even during the colonial and apartheid periods, one

[145] Alexander (2009) *Cornell* 782ff.
[146] Alexander (2009) *Cornell* 782.
[147] Section 25(1).
[148] Section 25(2)(a).
[149] Section 25(4)-(9). See Alexander (2009) *Cornell* 782ff.
[150] See Sachs J in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA217 (CC) paras 14–23.
[151] Van der Merwe *Sakereg* 173; Muller et al *Silberberg* 105.
[152] Peñalver (2010) *Michigan* 191; JE Penner *The Idea of Property in Law* (1997) 78-80.
[153] AJ van der Walt *Property in the Margins* (2009) 63-64. Van der Walt points to, for example, legislation such as the Prevention of Illegal Squatting Act 52 of 1951, which "obliged white landowners to evict 'unlawful occupiers' from their land and provided them with wide-ranging powers for that purpose" (63-64).

was not entitled to use property as one pleased.[154] As pointed out in Chapter 2, that landownership has always entailed obligations has roots in Roman-Dutch law.[155] Restrictions on the abandonment of landownership existed in Roman-Dutch law.[156] There has never been an unrestricted right to abandon landownership in Roman-Dutch law.

However, this thesis is not concerned with whether a restriction on the right to abandon is inherent to the right of ownership or an external imposition. In this respect, the work of Van der Sijde is illuminating.[157] She engages with the debate as to whether ownership is inherently limited, or whether ownership can be described as "absolute", with the consequence that any limitations would have to be viewed as external to the right.[158] She ultimately notes that this question is of little relevance under the current constitutional dispensation.[159] Rather, the question is whether the limitation is "inherent to the system in which the right functions".[160] Such an approach fits with the "single system of law" which has been endorsed by the Constitutional Court,[161] and expanded upon by Van der Walt in the context of the law of property.[162] According to this view, "all law, including the common law, derives its force from the Constitution".[163] Parallel systems of law should not be allowed to develop, and existing law should be reconciled with the new constitutional dispensation.[164]

Ultimately, when evaluating the existing impossibility of abandoning landownership in South African law, one does not need to consider whether this limitation is part of ownership in land. Instead, one must evaluate whether the limitation (impossibility of

---

[154] For example, the law of nuisance. See AJ van der Walt *The Law of Neighbours* (2010) Chapter 6; Muller et al *Silberberg* 125ff; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 476ff.
[155] See Chapter 2 Section 3.2.2.
[156] See Chapter 2 Section 3.2.2.
[157] See E van der Sijde *Reconsidering the Relationship Between Property and Regulation: A Systemic Constitutional Approach* LLD dissertation Stellenbosch (2015).
[158] Van der Sijde *Reconsidering* Chapters 3 and 4.
[159] Van der Sijde *Reconsidering* 150-151.
[160] Van der Sijde *Reconsidering* 150.
[161] *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) para 44.
[162] AJ van der Walt *Property and Constitution* (2012) 19ff; AJ van der Walt *Constitutional Property Law* 3 ed (2011) 69-70; AJ van der Walt "Normative Pluralism and Anarchy: Reflections on the 2007 Term" (2008) 1 *Constitutional Court Review* 77 90ff.
[163] *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) para 44.
[164] Van der Walt *Property and Constitution* 178.

abandonment) finds concurrence with the system in which the right and its limitation exist.[165] Even though this limitation pre-dates the constitutional dispensation, it is necessary that it be reconciled with the new constitutional provisions.[166] These are provisions which embody the social-obligation norm,[167] with the consequence that the limitation must give effect to the norm as a well. Such reconciliation is in fact compelled by the Constitution, which requires existing legislation be interpreted and the common law be developed in a manner which promotes the "spirit, purport and objects of the Bill of Rights".[168] How the social-obligation norm is given effect to, and the manner in which limitations on the right of ownership have developed in the new constitutional dispensation, are discussed in the next section.

5.2 Unreciprocated sacrifices and the objectives of the property clause

Restrictions on the unilateral disposal of property through abandonment – including that of landownership – have not been subject to evaluation in light of the property clause and its objectives as of writing.[169] It is thus necessary to look for parallels between the unreciprocated sacrifices entailed by the prohibition on abandoning landownership and other restrictions on ownership entitlements flowing from the Constitution.

In the new constitutional dispensation, the social-obligation norm is particularly evident in the context of unlawful occupation of land. In this context, landowners are often expected to sacrifice entitlements until an eviction order, made after considering all relevant circumstances, is granted.[170] This sacrifice is made without any reciprocal advantage, and lasts for an indeterminate period. In some extreme situations, such as

---

[165] Van der Sijde *Reconsidering* 150–1, 285–8.
[166] Van der Walt *Property and Constitution* 121–2.
[167] Alexander (2009) *Cornell* 782ff.
[168] See s 39(2) of the Constitution; Van der Walt *Property and Constitution* 120ff.
[169] The one exception to this is the author's own article. See Cramer (2017) *SALJ* 870.
[170] Section 26(3) of the Constitution, 1996; Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (particularly section 4(8) which requires a court to fix just and equitable dates for vacation and eviction from the unlawfully occupied land when the requirements to obtain an eviction order have been met). See Van der Walt *Property in the Margins* 133ff. See also *Occupiers, Berea v De Wet NO* 2017 (5) SA 346 (CC) para 80; *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) para 16; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) paras 30-41.
The Extension of Security of Tenure Act 62 of 1997 can also impose positive obligations on landowners to provide alternative accommodation in the event of eviction, in circumstances congruent with the Constitution. See *Baron v Claytile (Pty) Ltd* 2017 (5) SA 329 (CC) paras 35-37.

in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*,[171] the owner may be entitled to compensation when it is not feasible to implement an eviction order that has already been granted.[172] However, outside these exceptional circumstances, no reciprocity exists for the limitation on the owner's entitlements. This makes clear that the constitutional framework aligns with Alexander's conception of the social-obligation norm. That is, one may owe obligations to the community, to people unrelated to oneself, while reciprocity is not necessarily forthcoming.[173]

The constitutional property clause's objectives are primarily focused on redistribution of land and rectifying skewed property holdings.[174] However, section 25's objectives are more extensive than its explicitly redistributive clauses may initially indicate.[175] As Van der Walt explains, in the current constitutional framework, the "allocation, recognition and protection of individual property rights may not result in an environment that endangers the health or well-being of the citizenry".[176] The rights of landowners will inevitably come into conflict with the equally important constitutional rights of others. For example, the environmental rights encapsulated in section 24, which provides that "everyone has the right … to an environment that is not harmful to their health or well-being" and "to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures". As will become clear in the next paragraph, an owner neglecting (or outright abandoning) her land has potential ramifications for the right to a healthy environment, particularly in the form of a proliferation of neglected properties.

An unrestricted right to abandon landownership – proverbially washing one's hands of a piece of land the moment circumstances become unfavourable – threatens the right to a healthy environment.[177] A proliferation of neglected properties can result in unsafe buildings and fire hazards, posing a threat to those who live and work in the immediate

---

[171] 2005 (5) SA 3 (CC).
[172] Paras 52ff.
[173] Alexander (2009) *Cornell* 770.
[174] Van der Walt *Property and Constitution* 139-140.
[175] Van der Walt *Property and Constitution* 139-140.
[176] Van der Walt *Property and Constitution* 140.
[177] See section 24(1)(a) of the Constitution, 1996. See also the contextual overview in Chapter 1 Section 2, as well as Chapter 6 Section 2.1.

vicinity.[178] Neglected properties also have the potential to become dumping grounds, a concern highlighted by Peñalver in his defence of the prohibition on the abandonment of land in the United States.[179] Beyond the immediate externalities that can result from the abandonment of landownership, such abandonment can have implications for human flourishing in other ways. It would fall upon the state, particularly local authorities, to maintain neglected properties, at a cost to the public purse.[180] Government budgets are already constrained,[181] and this is coupled with pressing obligations to realise the social-economic rights enshrined in the Constitution.[182] As such, an unrestricted right to abandon may hamper the government in creating an environment that will enable the flourishing of the most vulnerable.

In these circumstances, owners may be expected to remain owners (and thus maintainers) of land, even where such land has a negative value. This would constitute an unreciprocated sacrifice, a price for their membership of the community.[183] Nevertheless, values such as fairness and respect for individual rights need to be taken into account,[184] particularly where the landowner bears no responsibility for the negative value the land has acquired. One will need to distinguish between those landowners who have caused their land to acquire a negative value, and those who have not.[185] Where burdens are found to be excessive (such as in the context of

---

[178] See the the contextual overview in Chapter 1 Section 2, as well as Chapter 6 Section 2.1. See also *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (6) SA 417 (SCA) para 8.
[179] Peñalver (2010) *Michigan Law Review* 209.
[180] See Chapter 6 Section 2.1.
[181] See X Potelwa "Budget squeeze pushing South African cities back to bond market" (18-02-2016) *Bloomberg* <https://www.bloomberg.com/news/articles/2016-02-18/budget-squeeze-pushing-south-african-cities-back-to-bond-market> (accessed 10-04-2018).
More recently municipalities have been subject to budget cuts following the beginning of the implementation of free higher education in South Africa. See Y Groenewald "Provincial, Municipal Budgets Cut to Fund Free Education" (21-02-2018) *Fin24* <https://www.fin24.com/Budget/provincial-municipal-budgets-cut-to-fund-free-education-20180221> (accessed 10-04-2018); K Magubane "Provincial and Local Government Allocations Fall in Gigaba's Budget" (22-02-2018) *Business Day* <https://www.businesslive.co.za/bd/economy/2018-02-22-provincial-and-local-government-allocations-fall-in--gigabas-budget/> (accessed 10-04-2018); C Mailovich "Struggling Metros Need a Bailout" *Business Day* (17-04-2019) 3; L Ensor "Local Government Underfunded, Says Advisory Body" *Business Day* (02-07-2019) 2; L Donnelly "Western Cape Fights 'Unrealistic' Budget Cuts" *Business Day* (01-11-2019) 3.
[182] See for example section 26(2), which obligates the state to realise, in a progressive manner, the right to access to adequate housing through "reasonable legislative and other measures, *within its available resources*" (emphasis mine). Similar provisions exist in other socio-economic rights clauses, i.e. health care, food, water and social security (section 27(2) and education (section 29(1)(b).
[183] Alexander (2009) *Cornell* 771-772.
[184] Alexander (2009) *Cornell* 771-772.
[185] See Chapter 6 Section 3.

unlawful occupation of land in *Modderklip*), some form of equalisation may be warranted, whether through compensation or equalisation[186] or a regulated exit from ownership.[187]

5.3 Sliding scale

When evaluating whether abandonment of landownership should be permitted, and under what circumstances, it is necessary to remember that not all cases are the same. Some landowners may bear responsibility for their position as owner of land that holds

[186] It is necessary to mention some examples of equalisation or compensation in circumstances where the burden itself is not found to amount to expropriation, and an expropriation is not ordered to alleviate the burden on the landowner. The most obvious example in South African law is the *Modderklip* case. Finding that the State had violated Modderklip's constitutional rights by failing to provide "appropriate mechanism to give effect to the eviction order", it ordered that Modderklip was entitled compensation, which was to be calculated in terms of section 12(1) of the existing Expropriation Act 63 of 1975. See *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) para 68. See also AJ van der Walt "The State's Duty to Protect Property Owners v the State's Duty to Provide Housing: Thoughts on the *Modderklip* Case" (2005) 21 *SAJHR* 144; Alexander *Global Debate* 192-196; A Liebenberg *Socio-economic Rights: Adjudiction Under a Transformative Constitution* (2010) 281ff; Van der Walt *Constitutional Property Law* 277-281.
Another example is the decision of the German Federal Constitutional Court in the *Denkmalschutz* case, discussed by Alexander (Alexander *Global Debate* 119-121). In this case, the owner of a building – a surviving piece of architecture from the late nineteenth century – unable to find a buyer for his property, wished to demolish it. The building, however, was subject to protection in terms of legislation that aimed to preserve historic buildings. The upkeep of the building had become prohibitively expensive, and the owner's use of the building was heavily restricted. His application for the demolition of the building was denied, as per the legislation only the public interest was considered in making the decision. The court found that the restriction on the owner's use of his property did not amount to an expropriation, but rather a regulation. However, the legislation was found to violate Article 14(1) (the guarantee of property) in the German Constitution (*Grundgesetz für die Bundesrepublik Deutschland*). The court reasoned in light of the restrictions existing on the owner, it was difficult to describe the legal relationship between owner and property as "ownership" (BVerfGE 100, 226 243). In the court's view the legislature should "anticipate and leave room in the regulatory measure for the possible need for equalisation" (Alexander *Global Debate* 120; BVerfGE 100, 226 245-246).

[187] See the example of the recent case of *Fischer vs Unlawful Occupiers* 2018 (2) SA 228 (WCC). This is the most recent case in a protracted legal saga around unlawful evictions (see *Fischer v Persons Unknown* 2014 (3) SA 291 (WCC); *Fischer v Ramahlele* 2014 (4) SA 614 (SCA); R Cramer & H Mostert "'Home' and unlawful occupation: the horns of local government's dilemma Fischer and Another v Persons Unknown 2014 3 SA 291 (WCC)" (2015) 26 *Stell LR* 583). This case will be discussed in greater detail in Chapter 6 Section 3.3 in respect of possible regulated exits from ownership in the absence of legislative law reform. On the facts, it did not appear that it would ever be possible to relocate such large numbers of unlawful occupiers currently occupied privately-owned land. Their section 26 rights would thus necessitate their remaining on the pieces of land in question (para 167). However, this needs to be achieved while also vindicating the section 25 rights of the landowners. The occupiers remaining on the land would effectively mean the landowners would be fulfilling the State's duties to the occupiers (para 192). The City of Cape Town was thus ordered to enter into good-faith negotiations with the landowners for the purchase of their properties, with obligations to report back to the court in the event of failing to reach an agreement with any of the landowners. Other State respondents – both national and provincial – were ordered to provide funds to the City to facilitate the purchases, where the City's budget falls short. The eviction applications were dismissed. See the order in paragraph 196.

a negative value,[188] while in other cases the burden on an innocent landowner may appear to be excessive and require that some form of remedy be provided.[189] It is necessary to ask how one may make such distinctions in respect of different properties and landowners.

How does one determine when a landowner may be required to make an unreciprocated sacrifice or should be provided with some form of equalisation? Constitutional jurisprudence reveals that the approach to the property clause follows the "sliding scale approach to evaluating the magnitude of social obligation" that Alexander has identified as existing in German jurisprudence.[190] Such an approach distinguishes between different forms of property in establishing the level of social obligation that should be placed upon the particular owner.[191] It is the very social function of property that determines this ordering of property according to category.[192] Thus greater legislative power may be exercised over more socially important assets than others.[193] For example, greater legislative power may be exercised over corporate stocks as opposed to small garden plots.[194]

The sliding-scale approach appears from the acknowledgment that a court may embark on a proportionality analysis in cases involving the deprivation of property.[195] The most relevant case in this regard is *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* (hereinafter the "*FNB*

---

[188] For example, a mining company which owned the land on which mining was conducted. See Chapter 6 Section 3.1. A further example would be a developer who purchased a property on which a building protected by the National Heritage Resources Act 25 of 1999 is situated, assuming the risk that permission to demolish or alter the building may not be granted. See Chapter 6 Section 3.2.

[189] For example, a landowner whose property has been subject to unlawful occupation the scale of which precludes the possibility of eviction. See Chapter 6 Section 3.3.

[190] Alexander *Global Debate* 138. The cases to which Alexander points are the *Codetermination/Mitbestimmung* (BVerfGE 50, 290) and *Small Garden Plot/Kleingartenentscheidung* (BVerfGE 52, 1) cases respectively, which appear to demonstrate a stronger social obligation attaching to shareholders' property rights, than the property rights of the owners of small garden plots (Alexander *Global Debate* 133-138).

[191] Alexander *Globel Debate* 138.

[192] Alexander *Global Debate* 138.

[193] Alexander *Global Debate* 138.

[194] Alexander *Global Debate* 138.

[195] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* 2002 (4) SA 768 (CC) para 100; *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) para 35; *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC) paras 48-49; *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) para 68. See also Van der Walt *Constitutional Property Law* 245ff.

case").[196] When interrogating the non-arbitrariness requirement to determine the validity of a deprivation, it is not necessarily sufficient to establish that there is a rational connection between means and ends.[197] Depending on the severity of the deprivation, proportionality of the means and ends may also need to be evaluated. That is, the impact of the deprivation on the owner in question will need to be considered.[198] Where a deprivation is found to be disproportionate to the infringement of a property right, it is likely that such deprivation will be found to be arbitrary.[199]

The factors considered in a proportionality enquiry are important to demonstrating how the sliding-scale approach manifests in the South African constitutional property law context. The *FNB* case set out the relevant factors.[200] Firstly, one must consider "the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question".[201] Secondly, "regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected".[202] Thirdly, "regard must be had to the relationship between the purpose of the deprivation and the nature of the property".[203] This requires a consideration of the "extent of the deprivation in respect of such property".[204]

---

[196] 2002 (4) SA 768 (CC).

[197] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* 2002 (4) SA 768 (CC) para 100; *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) para 35; *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC) paras 48-49; *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) para 68. See also Van der Walt *Constitutional Property Law* 245ff.

[198] Van der Walt *Constitutional Property Law* 237-238.

[199] See para 111 of the *FNB* case, in which the court stated that it was "grossly disproportionate" to allow the property of one party to be sold in execution to meet the customs debt of another party.

[200] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* 2002 (4) SA 768 (CC) para 100.

[201] Para 100.

[202] Para 100.

[203] Para 100.

[204] Para 100.

The nature of the property in question will be considered in a proportionality enquiry. A more compelling reason for the deprivation in question will be required where the property in question is a corporeal – such as land or a corporeal movable – than where the property is incorporeal. Related to this, a more compelling reason will be required in circumstances where a deprivation affects all the incident of ownership, as opposed to only some of the incidents of ownership. Para 100.

Often, when all the factors and relationships above are weighed up by a court, a mere rational connection between means and ends will be sufficient to establish non-arbitrariness. However, other cases may require an evaluation of the proportionality of the deprivation, which will more closely resemble a section 36 analysis (the limitations clause for constitutional rights in general). Any such analysis will require a consideration of all relevant facts. Para 100.

The social-obligation norm, therefore, finds effect to through the Constitution's provision for deprivation of property as well as the manner in which it is regulated. Not only is ownership not absolute, in that an owner may not do with his property as he wishes, but ownership entails obligations, particularly unreciprocated sacrifices when the rights of the vulnerable are at stake.[205] Obligations may be imposed on owners in the form of deprivations, following the sliding-scale approach, taking into account the relationships implicated by the deprivation in question.

This contention is even supported by the contractarian view of Dagan.[206] Dagan is concerned about politically and marginalised groups bearing the brunt of burdens on property.[207] The imposition of any such burden should be "a proper price of communal citizenship" rather than "an unfair sacrifice of the few to the many".[208] The contextual analysis of deprivation as developed in the *FNB* case should assuage such fears that some may bear an unfair burden.

Evidently, the sliding-scale approach to social obligation fits with the constitutional property clause and existing jurisprudence. This fit is clear from the proportionality analysis that is undertaken when evaluating whether a particular deprivation is arbitrary or not. This sliding-scale approach would appear equally applicable to considering whether the abandonment of landownership should be permitted, and if so, under what circumstances. While an unrestricted right to abandon is likely not feasible, the disproportionality of the burden in certain circumstances may warrant some form of exit of ownership.

5.4 The landownership context in South Africa

Some context needs to be provided for the particularly strong emphasis placed on the social-obligation norm in the new constitutional framework, particularly with respect to the unreciprocated burdens on landowners. During apartheid, the rights of (predominantly white) landowners trumped the interests of (predominantly black) non-

[205] Dagan (1999) *Virginia* 771; Dagan (2000) *Michigan* 136-137.
[206] See the discussion in Section 2 above.
[207] H Dagan "Re-imagining Takings Law" in G Alexander & E Peñalver (eds) *Property and Community* (2010) 39 45-46; Dagan (2007) *Cornell* 1262-1263; Dagan (2000) *Michigan* 135.
[208] Dagan (1999) *Virginia* 762 relying on Paul (1991) *Southern California Law Review* 1406.

landowners.[209] Despite inroads into the powers of landowners to do with their property as they please, landowners still remain in a (relatively) comfortable and privileged position.[210] Landowners have reaped the benefits of their ownership, largely thanks to past racially discriminatory laws.[211] Thus, it may be argued landowners should not be free simply unilaterally to divest themselves of ownership and concomitant liabilities during more difficult periods.

Nevertheless, it is true that not every landowner is politically or economically strong.[212] Rather, whether a particular landowner should be permitted to divest herself of ownership would have to depend on the context and the extent of the burden.[213] The possible regulation of abandonment of landownership in different contexts – mining, inner cities amidst urban decay, historic and protected buildings – will be explored in Chapter Six, which will provide suggestions for law reform. These suggestions will be made in light of the social-obligation norm and the constitutional framework which gives expression to the social-obligation norm.

6. Social obligation, abandonment of property and possible guidelines

Counterintuitively, the observations of scholars in respect of the operation of the social-obligation norm in the context of takings (expropriation) law and distributive justice can also be applied in the context of restrictions on the abandonment of property.[214] There are numerous externalities associated with the abandonment of land, even where such abandonment is informal due to the lack of mechanism through which an owner may

---

[209] Van der Walt *Property in the Margins* 63-64.

[210] While it is not denied that landownership encompasses numerous difficulties in contemporary South Africa, particularly in the context of unlawful occupation, landowners remain significantly better off and privileged than (particularly black) non-landowners. This situation is clear in the context of the problem of spatial injustice, which remains a vexing question in cities such as Cape Town. See M Hungwe "Factors Behind Urban Land Justice and Inequality in Cape Town" (2017) 18 *ESR Review* 5; J van Wyk "Can SPLUMA Play a Role in Transforming Spatial Injustice to Spatial Justice in Housing in South Africa?" (2015) 30 *SAPL* 26 29-30.

[211] Van der Walt *Property in the Margins* 1ff; AJ van der Walt "The Future of Common Law Landownership" in AJ van der Walt (ed) *Land Reform and the Future of Landownership in South Africa* (1991) 21 22-25.

[212] See the example of Mrs Fischer in the *Fischer* cases (note 187 above), who was a pensioner in her late 70s when the invasion of her property began (*Fischer v Persons Unknown* 2014 (3) SA 291 (WCC) para 4).

[213] See Chapters 6 and 7 for detailed discussion on the necessity of law reform and what shape such reform should take.

[214] For a discussion of "forcings" (compelled ownership) as opposed to "takings" (expropriation), see Fennell (2014) *Columbia Law Review* 1297.

divest herself of ownership. If unrestricted abandonment of landownership were permitted, it would fall to the state to maintain abandoned land, thus redirecting resources from elsewhere. Inevitably, this could potentially have a negative impact on the state meeting its socio-economic obligations, and thus could have a negative impact on the human flourishing of others.

Even an exclusion theorist[215] such as Penner, while advocating for a generally robust right to abandon one's property, is forced to concede such a right can never be unrestricted.[216] He notes that abandonment of property rights will usually entail social obligations, such as following the correction waste disposal procedures in respect of movables to avoid pollution.[217] As one is obliged not to harm others through the use of one's property in general, restrictions will be placed on the manner in which one may dispose of property.[218] In the case of land, responsibilities that accompany ownership cannot simply be avoided by the relinquishment of physical possession.[219]

The social-obligation norm finds expression in the current constitutional framework, in particular section 25 of the Constitution.[220] Despite the explicit emphasis on restitution and redistribution found in the provision, it is clear that the goals of constitutional property extended further.[221] There are competing constitutional rights against which the owners' rights must be weighed. Whether landowners should be permitted to abandon their land, and under what circumstances, needs to be evaluated in this

---

[215] For Penner, the right to exclude appears to be the best way to explain ownership, given that one is entitled to exclude others from things one not technically using at the moment (Penner *The Idea* 70). While property in terms of the exclusion thesis is characterised "primarily as a protected sphere of indefinite and undefined activity", it is not denied that the actions the owner may carry out can be circumscribed (Penner *The Idea* 134). On the exclusion theory further, see T Merrill & H Smith "What Happened to Property in Law and Economics?" (2001) 111 *Yale Law Journal* 357 360ff; H Smith "Property and Property Rules" (2004) 79 *New York University Law Review* 1719 1754ff.
For a critique of exclusion theories, see L Katz "Exclusion and Exclusivity in Property Law" (2008) 58 *University of Toronto Law Journal* 275. She finds an "emphasis on exclusion leaves us unable to describe important structural limits on the owner's authority" (287). Instead, the defining characteristic of ownership is the owner's entitlement to set the agenda of a particular resource. In Katz' view, "exclusivity of ownership is just one aspect of ownership's character as a position of agenda-setting authority" (290). See also Katz (2020) *Cornell Journal* (forthcoming).
[216] Penner *The Idea* 78-80.
[217] Penner *The Idea* 78.
[218] Penner *The Idea* 79-80.
[219] Penner *The Idea* 80.
[220] See Alexander (2009) *Cornell* 782ff. See Section 5 above.
[221] Van der Walt *Property and Constitution* 139-140.

constitutional context, despite the prevailing legal position pre-dating the constitutional dispensation.

In light of the above theoretical approach and the constitutional context, it is possible to set out a number of guidelines for formulating law reform in respect of the abandonment of land ownership.[222] The unrestricted abandonment of land in South Africa is not feasible, given the possible societal costs.[223] Nevertheless, there may be circumstances in which the abandonment of landownership should be permitted or some form of regulated exit from ownership provided.

The following guidelines are proposed in respect of formulating the circumstances under which abandonment should be permitted, if at all. These guidelines have been formulated with the social-obligation norm in mind, particularly the manner in which the norm is given effect to by the property clause of the Constitution. These factors will assist in formulating suggestions for law reform in Chapters 6 and 7.

The first consideration is the extent of the burden placed on the individual landowner. The second consideration is to what extent a third party (such as mining company) benefits from the burden to which the individual landowner is subjected. The third consideration is existing compensatory mechanisms, and to what extent these alleviate the burden on the landowner. The final (and possibly most important) consideration is the potential societal cost of abandonment in the relevant circumstances. What makes this factor particularly important in a framework informed by social obligation and human flourishing are the socio-economic obligations imposed on the state by the Constitution.[224] The proliferation of neglected properties has budgetary implications for government, particularly local government.[225] It is contended that the above factors would give effect to the sliding scale of obligation.[226]

The theoretical approach adopted in this thesis has been set out and considered in light of South Africa's constitutional framework. Further, guidelines for the abandonment of landownership have been considered in light of this approach. With

[222] See Cramer (2017) *SALJ* 904-905.
[223] See the contextual overview in Chapter 1 Section 2, as well as Chapter 6 Section 2.1.
[224] See note 116 above.
[225] See discussion in Chapter 6 Section 2.1.
[226] Cramer (2017) *SALJ* 905.

the social-obligation norm in mind, one can better explain the law's approach to the abandonment of landownership, and also, why approaches may differ in other jurisdictions. The following chapter seeks to compare the South African law of abandonment with the law that prevails in Switzerland and Scotland using the social-obligation norm as a tool.

Chapter 5: Comparative Study – The Abandonment of Land in South Africa, Switzerland and Scotland

1. Introduction: Rationale for choice of comparative jurisdictions

It is contended that the abandonment of land is impossible in the South African law.[1] This contention is based on an interpretation of existing law in light of the principle of publicity.[2] Ultimately there is no rule, either at common law or in legislation, which expressly permits or prohibits the abandonment of land. The lack of clarity in respect of such an important question is undesirable. The latter chapters of this dissertation will make suggestions for law reform on this issue.

Uncertainty about the possibility of abandoning land in the South African context, renders it useful to examine foreign jurisdictions with clearer answers to the same question. The differences between the approaches taken by these jurisdictions can then be analysed using the social-obligation norm (as detailed in the previous chapter) as a tool for explanation. For purposes of this thesis, Switzerland and Scotland are chosen as comparative examples. The primary reason for choosing these two jurisdictions is that they are opposites in respect of the abandonment of landownership. In Switzerland, a landowner is permitted to abandon her land by the Civil Code,[3] so long as the simple legal requirements are met.[4] By contrast, a decision by the Inner House of the Court of Session in Scotland found that as the law stands, it is not possible

[1] See the conclusions in Chapter 3 Section 4.
[2] See Chapter 3 Sections 2 to 4.
[3] *Schweizerisches Zivilgesetzbuch* (ZGB).
[4] See Art 666 Abs 1 and Art 964 Abs 1 ZGB. See also H Rey & L Strebel "Art. 666" in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 1134 1134-1135; J Schmid & B Hürlimann-Kaup *Sachenrecht* (2017) para 868; H Rey *Die Grundlagen des Sachenrechts und das Eigentum* 3 ed (2007) para 1673ff; P Tuor, B Schnyder, J Schmid & A Jungo *Das Schweizerische Zivilgesetzbuch* 14 ed (2015) § 100 para 33; F Hitz "Art. 666" in M Amstutz, P Breitschmid, A Furrer, D Girsberger, C Huguenin, A Jungo, M Müller-Chen, V Roberto, AK Schnyder & HR Trüeb (eds) *Handkommentar zum Schweizer Privatrecht* 3 ed (2006) 166 166-167; P Simonius & T Sutter *Schweizerisches Immobiliarsachenrecht* (1995) para 127.

to abandon landownership, in the absence of a mechanism in the legislation providing for such abandonment.[5]

In examining these jurisdictions, including their respective socio-economic contexts, it is not necessarily suggested South Africa adopt wholesale either of the approaches. It may be preferable for South Africa to adopt a middle path. However, to examine the approaches taken by other jurisdictions remains a useful tool in making suggestions for law reform.

2. Comparative law: A brief theoretical overview

Comparative law may be described as a discipline which explores "the similarities and dissimilarities of different cultural or social phenomena".[6] Through comparative law research, one can supply a variety of models on which to base law reform.[7] Legal systems will often have to tackle similar problems, and one can look to foreign jurisdictions as to how the same problem is dealt with differently.[8] A foreign jurisdiction may provide a more efficient model, from which law reformers can learn.[9]

This study will adopt the functionalist approach to comparative law. In terms of this approach, the law is viewed as providing solutions to society's problems.[10] The relevant jurisdictions are to be evaluated from the perspective of how they address the same questions: through not only the rules themselves - but also the possible consequences.[11] Thus, their responses to real-life situations where owners may feel burdened by their continued ownership, but cannot find a third party willing to take transfer of said land, will be assessed.

---

[5] *The Scottish Environment Protection Agency v The Joint Liquidators of the Scottish Coal Company Limited* [2013] CSIH 108 para 103.
[6] N Jansen "Comparative Law and Comparative Knowledge" in M Reimann & R Zimmermann (eds) *The Oxford Handbook of Comparative Law* (2006) 305 306.
[7] E Örücü "Developing Comparative Law" in E Örücü & D Nelken (eds) *Comparative Law: A Handbook* (2007) 43 55.
[8] Örücü "Developing Comparative Law" in *Comparative Law* 55; K Zweigert & H Kötz *An Introduction to Comparative Law* 3 ed (1998) 34.
[9] Örücü "Developing Comparative Law" in *Comparative Law* 55.
[10] Örücü "Developing Comparative Law" in *Comparative Law* 50-51; M Graziadei "The Functionalist Heritage" in P Legrand (ed) *Comparative Legal Studies: Traditions and Transitions* (2003) 100 100; M Siems *Comparative Law* (2014) 25; Zweigert & Kötz *An Introduction* 34..
[11] Örücü "Developing comparative law" in *Comparative Law* 50-51; Zweigert & Kötz *An Introduction* 34.

A functionalist approach is preferable to what is termed a "strong positivist approach" to comparative law,[12] which would be deficient for the purposes of research such as this. In terms of this approach, the two contrasting sets of legal rules would be juxtaposed, with the conclusion being that "these legal systems differ because they were enacted by different states".[13] Such an approach would do little more than set out the facts of each legal system and compare them.[14] This would ultimately provide a superficial account of the differences between jurisdictions.[15]

The functionalist approach cannot be described as uniform, but there are a number of important elements that functionalists accept in general.[16] First, the primary focus of the functional approach is not on the rules themselves, but their effects.[17] Legal systems are thus evaluated in the light of their responses to real-life situations.[18] Second, the functionalist approach to comparative law does not only take a functional approach.[19] It combines this approach with the understanding that objects must be evaluated "in light of their functional relation to society".[20] Despite being technically separate, both law and society are related to each other.[21] Third, function can be an example of *tertium comparationis* itself.[22] Institutions can be viewed as comparable so long as they "fulfil similar functions in different systems".[23] For example, one may compare systems of land registration in different jurisdictions, as they both perform essentially the same function, although in different legal settings.

---

[12] Siems *Comparative Law* 26.
[13] C Valcke "Comparative Law as Comparative Jurisprudence – The Compatibility of Legal Systems" (2004) 52 *American Journal of Comparative Law* 713 730-731; Siems *Comparative Law* 26.
[14] Valcke 2004 *American Journal of Comparative Law* 731.
[15] Valcke 2004 *American Journal of Comparative Law* 731.
[16] R Michaels "The Functional Method of Comparative Law" in M Reimann & R Zimmermann (eds) *The Oxford Handbook* (2006) 339 342.
[17] Michaels "The Functional Method" in *The Oxford Handbook* 342.
[18] Michaels "The Functional Method" in *The Oxford Handbook* 342. See also Örücü "Developing Comparative Law" in *Comparative Law* 51.
[19] Michaels "The Functional Method" in *The Oxford Handbook* 342.
[20] Michaels "The Functional Method" in *The Oxford Handbook* 342. See also Örücü "Developing Comparative Law" in *Comparative Law* 51.
[21] Michaels "The Functional Method" in *The Oxford Handbook* 342.
[22] Michaels "The Functional Method" in *The Oxford Handbook* 342.
[23] Michaels "The Functional Method" in *The Oxford Handbook* 342. See also Örücü "Developing Comparative Law" in *Comparative Law* 51.

3. Swiss law: A permissive regime

Switzerland serves as a useful comparative jurisdiction for land law, in general, and the abandonment of land. Its land registration system is efficient and well-developed in terms of its rules and operation.[24] The most important reason for the use of this jurisdiction, for the purposes of this thesis, is the direct manner in which the Swiss law addresses the abandonment of land (referred to as *Dereliktion*). The possibility of abandoning land in terms of Swiss law is acknowledged by both the courts and academics in that jurisdiction.[25] This position is in stark contrast to South Africa's Deeds Registries Act which does not contain any such provision.[26]

One of the unfortunate features of abandonment of land in South Africa is the absence of any clear answers. Despite debate between academics about whether the abandonment of land is possible,[27] and if so, what the consequences are,[28] there are few if any clear answers that major property law texts put forward.[29] By contrast, there appear to be almost no unanswered questions regarding the abandonment (*Dereliktion*) of land in Switzerland. Between the Civil Code and the *Grundbuchverordnung* (GBV),[30] as well as the writings of academic commentators, the finer details have been worked out and the consequences of abandoning certain rights determined.

---

[24] See Schmid & Hürlimann-Kaup *Sachenrecht* Chapter 2 for a general overview.
[25] For court decisions, see BGE 129 III 216; BGE 85 I 261; BGE 114 II 32. For the legal literature see Rey & Strebel "Art 666" in *Basler Kommentar* 1134-1135; Schmid & Hürlimann-Kaup *Sachenrecht* para 868; Rey *Sachenrechts* para 1673ff; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 100 para 33; Hitz "Art 666" in *Handkommentar* 166-167; Simonius & Sutter *Schweizerisches Immobiliarsachenrecht* para 127.
[26] Act 47 of 1937. See H Mostert "No Right to Neglect? Exploratory Observations on How Policy Choices Challenge the Basic Principles of Property" in S Scott & J van Wyk (eds) *Property Law Under Scrutiny* (2015) 11 26-28.
[27] See JC Sonnekus "Abandonnering van Eiendomsreg op Grond end Aanspreeklikheid vir Grondbelasting" (2004) *TSAR* 747 751-756; Mostert "No Right" in *Property Law Under Scrutiny* 26-28.
[28] CG van der Merwe & A Pope "Part III – Property" in F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 405 492; CG van der Merwe *Sakereg* 2 ed (1989) 227; CG van der Merwe "Minister van Landbou v Sonnendecker 1979 2 SA 944 (A)" (1980) *TSAR* 183 187-188; DL Carey Miller *The Acquisition and Protection of Ownership* (1986) 8-9; JC Sonnekus "Enkele Opmerkings na Aanleiding van die Aanspraak op Bona Vacantia as Sogenaamde Regale Reg" (1985) *TSAR* 121 121ff; JC Sonnekus "Grondeise en die Klassifikasie van Grond as Res Nullius of as Staatsgrond" (2001) *TSAR* 84 91ff.
[29] G Muller, R Brits, JM Pienaar & Z Boggenpoel *Silberberg and Schoeman's The Law of Property* 6 ed (2019) 158-160; Van der Merwe *Sakereg* 227; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 492.
[30] *Grundbuchverordnung* of 23 September 2011 (GBV).

3.1 Background: The Land Registration System in Switzerland

Both the Swiss and South African property law systems observe the principle of publicity.[31] The principle of publicity dictates that property rights must be evident to third parties to be enforceable against the world at large.[32] In respect of movables, the principle of publicity is served through possession of the thing in question.[33] By contrast, publicity in respect of land is served through registration in a land register (Deeds Registry or *Grundbuch* respectively).[34] Possession is thus insufficient in the context of land and rights therein to fulfil the function of publicity. In both jurisdictions, the rule that registration is required for the creation of rights in land is not without exceptions, for instance original modes of acquisition such as acquisitive prescription.[35] However, despite these limited number of exceptions, registration remains central in giving effect to the principle of publicity in respect of rights in land.[36]

The following discussion of the abandonment of land in Switzerland must be preceded by a brief overview of the land registration system in which it operates. The key feature of land registration in Switzerland is the *Grundbuch*. The *Grundbuch* functions as a public register in which information on real rights in land is compiled.[37] The law presumes that the person registered as owner in the *Grundbuch* is the owner of the land in question.[38] As such, it gives effect to the principle of publicity in respect of rights in land in Switzerland, in the way possession functions with respect to movables.[39] Any

---

[31] Muller et al *Silberberg* 93-95; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 88 para 9.
[32] Muller et al *Silberberg* 93-95; Schmid & Hürlimann-Kaup *Sachenrecht* para 63ff; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 88 para 9.
[33] Schmid & Hürlimann-Kaup *Sachenrecht* para 63ff.; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 88 para 9, § 93 para 1.
[34] Schmid & Hürlimann-Kaup *Sachenrecht* para 63ff.; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 88 para 9, § 93 para 1.
[35] On the doctrine of acquisitive prescription in Swiss law, see art 661 and art 662 ZGB. See also Schmid & Hürlimann-Kaup *Sachenrecht* para 858ff; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 100 para 21ff. The Swiss Civil Code expressly acknowledges other cases in which ownership can be acquired in the absence of registration. These include appropriation, inheritance, expropriation and debt enforcement or court judgments: see Art 656 Abs 2. See also Schmid & Hürlimann-Kaup *Sachenrecht* para 837; L Strebel & H Laim "Art. 656" in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 1054 1062ff; Rey *Sachenrechts* para 314.
[36] Schmid & Hürlimann-Kaup *Sachenrecht* para 66; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 88 para 9, § 93 para 1.
[37] Art. 2 lit b GBV; C Brückner & M Kuster *Die Grundstücksgeschäfte* (2016) 467.
[38] Art. 937 Abs 1 ZGB; Schmid & Hürlimann-Kaup *Sachenrecht* para 367.
[39] Schmid & Hürlimann-Kaup *Sachenrecht* para 63ff.; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 88 para 9, § 93 para 1.

transfer of ownership in land must occur in the *Grundbuch*.[40] Servitudes (*Dienstbarkeiten*), as well as other real rights in land, must also be recorded in the *Grundbuch* for such rights to have legal force.[41] It thus logically follows that any abandonment (*Dereliktion*) of land should also occur through registration actions in the *Grundbuch*.[42]

In simplified terms, the *Grundbuch* is little more than a book in which information regarding rights in land is compiled.[43] However, it is somewhat more complex than this. It is actually composed of different constituent components.[44] Brückner and Kuster identify the four most important components as being the *Hauptbuch*, *Vermessungspläne*, the *Belegsammlung* and the *Tagebuch*.[45] The *Vermessungspläne* are the survey plans. These document the topography of land, and the form and extent of all pieces of land in relation to their neighbours.[46] The *Belegsammlung* is a collection of supporting documents in relation to transactions in the *Hauptbuch,* such as powers of attorney, declarations of consent and authorisations relating to the transfer of land.[47] The *Tagebuch* serves as a chronological record of the transactions that occur in the *Grundbuch*.[48]

The *Hauptbuch* (main register) is undoubtedly the most important part of the *Grundbuch*.[49] It is central to the functioning of the *Grundbuch* as registration in the

---

[40] Art. 656 Abs. 1 and Art. 971 ZGB; Schmid & Hürlimann-Kaup *Sachenrecht* para 367.
[41] See Art. 731 Abs. 1, Art. 746, Art. 776 Abs. 3, Art. 783 Abs. 1 and Art. 799 Abs. 1 ZGB; Schmid & Hürlimann-Kaup *Sachenrecht* para 367.
[42] Art. 666 Abs. 1 and Art. 964 Abs. 1 of the ZGB. See Rey & Strebel "Art. 666" in *Basler Kommentar* 1134-1135; Schmid & Hürlimann-Kaup *Sachenrecht* para 868; Rey *Sachenrechts* para 1673ff; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 100 para 33; Hitz "Art. 666" in *Handkommentar* 166-167; Simonius & Sutter *Schweizerisches Immobiliarsachenrecht* para 127.
[43] Schmid & Hürlimann-Kaup *Sachenrecht* para 364.
[44] Art 942 Abs 2 ZGB. See Brückner & Kuster *Die Grundstücksgeschäfte* 480-494; Schmid & Hürlimann-Kaup *Sachenrecht* para 437ff. Art 942 Abs 2 ZGB.
[45] Brückner & Kuster *Die Grundstücksgeschäfte* 480-494. See Art. 942 Abs. 2 ZGB. See also J Schmid "Art. 942" in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 2435 2435.
[46] Brückner & Kuster *Die Grundstücksgeschäfte* 481-482; Schmid & Hürlimann-Kaup *Sachenrecht* para 443. See Art. 668 Abs. 1 and Art. 950 ZGB; Art. 2 lit. F and Art. 21 GBV.
[47] Brückner & Kuster *Die Grundstücksgeschäfte* 485-486; Schmid & Hürlimann-Kaup *Sachenrecht* para 445. See Art. 2 lit. g GBV. See also Schmid "Art. 942" in *Basler Kommentar* 2437-2438.
[48] Brückner & Kuster *Die Grundstücksgeschäfte* 487-503; Schmid & Hürlimann-Kaup *Sachenrecht* para 446. See Art. 948 Abs. 1; Art. 2 lit. e GBV. See also Schmid "Art. 942" in *Basler Kommentar* 2440.
[49] Brückner & Kuster *Die Grundstücksgeschäfte* 483-484; Schmid & Hürlimann-Kaup *Sachenrecht* para 439-441. See Art. 942 Abs. 2, Art. 945 Abs. 1, Art. 972 Abs. 1 ZGB; Art. 2 lit. d GBV. See also Schmid "Art. 942" in *Basler Kommentar* 2436-2437.

Hauptbuch is a prerequisite for the enforceability of real rights in land in Switzerland.[50] Art. 972 Abs. 1 provides that real rights are established, as well as assigned their rank and date, through their entry into the *Hauptbuch*.

Switzerland observes as a positive system of land registration.[51] As opposed to a negative system of registration, in which the contents of the land register are not guaranteed to be correct,[52] in the Swiss system, good faith acquirers of property or real rights are protected.[53] So long as one relies on the content of the land register in good faith, acquisition of property or real rights is guaranteed.[54] However, unlike the negative registration system in the South African context,[55] this is seen to have no bearing on the possibility of abandoning land in Swiss law. This is since abandonment occurs through actions in the land register.[56]

3.2 Dereliktion

In Swiss property law, the term *Dereliktion* is used in respect of both the abandonment of movable and immovable corporeal property.[57] However, despite this, the requirements for the *Dereliktion* for these two categories are entirely different.

The term "*Dereliktion*" will be preferred to the rough English translation "abandonment". This is because the use of the former term in Swiss law does not have the exact same

---

[50] Brückner & Kuster *Die Grundstücksgeschäfte* 483-484; Schmid & Hürlimann-Kaup *Sachenrecht* 438-441. See Art. 971 Abs 1 and Art. 972 Abs. 1 ZGB; Art. 2 lit. c GBV. See also Schmid "Art. 942" 2436-2437; Schmid "Art. 971" 2645-2648; J Schmid "Art. 972" in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 2649 2649.

[51] See Art 973 Abs 1. See also Rey *Sachenrechts* para 284; Schmid & Hürlimann-Kaup *Sachenrecht* paras 579ff; J Schmid "Art. 973" in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 2656 2658ff.

[52] See Chapter 3 Section 2.2.1 above. See Muller et al *Silberberg* 256ff; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 537; Van der Merwe *Sakereg* 342ff.

[53] Art 973 Abs 1.

[54] Art 973 Abs 1. This rule is subject to an exception found in Art 973 Abs 2 that the rule does not apply to land found in areas designated as permanently vulnerable to ground displacement.

[55] See Chapter 3 Section 2.2.1 above.

[56] See Art 964 Abs 1; Art. 46 and 48 GBV. See also Schmid & Hürlimann-Kaup *Sachenrecht* para 868; Rey & Strebel "Art. 666" in *Basler Kommentar* 1134-1135; Rey *Sachenrechts* para 1676; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 100 para 33; Hitz "Art. 666" in *Handkommentar* 166-167; Simonius & Sutter *Schweizerisches Immobiliarsachenrecht* para 127.

[57] Art 729 ZGB regulates the *Dereliktion* of movable property. See Schmid & Hürlimann-Kaup *Sachenrecht* para 1137; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 104 para 47; Hitz "Art. 729" in *Handkommentar* 412-414; Rey *Sachenrechts* para 2020ff. Art 666 Abs. 1 ZGB in conjunction with Art. 964 Abs. 1 ZGB regulates the *Dereliktion* of immovable property. See Schmid & Hürlimann-Kaup *Sachenrecht* para 868; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 100 paras 31-34; Hitz "Art. 666" in *Handkommentar* 166-168; Rey *Sachenrechts* para 1673ff; Simonius & Sutter *Schweizerisches Immobiliarsachenrecht* paras 127-129.

meaning as the latter term in South African law. "*Dereliktion*" would ideally be translated as the "abandonment of corporeal property",[58] the constant use of which would be clumsy.

Regarding movable corporeal property, the Swiss doctrine of *Dereliktion* does not differ significantly from abandonment in South African law. Ownership of a movable (*beweglichen Sache*) is not lost unless loss of possession is coupled with the intention to relinquish such ownership, making such a movable open to appropriation by another.[59] Deciding whether such requirements have been met requires scrutinising the factual context in which the alleged *Dereliktion* took place.[60] One should examine, for example, the relationship between a thing and the location in which it is found in determining whether the intention requirement for *Dereliktion* has been met.[61]

The requirements for the abandonment of movable property are, however, irrelevant in the context of immovable property in Swiss law.[62] This point is in line with the way the principle of publicity is served in that jurisdiction. Rather than *Dereliktion* taking place through relinquishing possession, coupled with an intention to forgo ownership of the land in question, it takes place through actions in the *Grundbuch*.[63] Verbal declarations or otherwise of an intention to abandon land, or prolonged absences which may indicate such an intention, are of no consequence.[64] In terms of the ZGB (*Schweizerisches Zivilgesetzbuch*, or Swiss Civil Code), the deletion of the entry in the *Grundbuch* is the only requirement for ownership in land to be terminated through

---

[58] The term *Dereliktion* only applies to corporeal property: Rey & Strebel "Art. 666" in Basler Kommentar 1135-1136; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 100 para 34; Rey *Sachenrechts* paras 1674a, 1680.

[59] Art. 729. See Schmid & Hürlimann-Kaup *Sachenrecht* para 1120, 1137; I Schwander "Art. 729" in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 1441 1441-1442; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 103 para 47; F Hitz "Art. 729" in M Amstutz, P Breitschmid, A Furrer, D Girsberger, C Huguenin, A Jungo, M Müller-Chen, V Roberto, AK Schnyder & HR Trüeb (eds) *Handkommentar zum Schweizer Privatrecht* 3 ed (2006) 412 412-414; Rey *Sachenrechts* paras 2020ff.

[60] See Art. 718 and Art. 729 ZGB. Schmid and Hürlimann-Kaup *Sachenrechts* para 1137; Schwander "Art. 729" in *Basler Kommentar* 1441-1442; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 103 para 47; Hitz "Art. 729" in *Handkommentar* 412-414; Rey *Sachenrechts* paras 2020ff. See in particular the case BGE 115 IV 104.

[61] BGE 115 IV 104 109.

[62] Rey & Strebel "Art. 666" in *Basler Kommentar* 1134; Hitz "Art. 729" in *Handkommentar* 166-167; Rey *Sachenrechts* paras 1675-1676.

[63] Rey & Strebel "Art. 666" in *Basler Kommentar* 1134; Schmid & Hürlimann-Kaup *Sachenrecht* para 868; Rey *Sachenrechts* paras 1675-1676; Art. 666 Abs. 1, Art. 964 Abs. 1 ZGB.

[64] Rey & Strebel "Art. 666" in *Basler Kommentar* 1134; Rey *Sachenrechts* paras 1675-1676.

Dereliktion.[65] This is achieved through the submission of a waiver by the registered owner of the land in question.[66]

3.2.1 The consequences of Dereliktion of immovable property

Each piece of land has a page in the *Grundbuch*, which includes an owner's column,[67] the name of the current registered owner of a piece of land.[68] The consequence of *Dereliktion*, and the subsequent deletion of the owner's name from the owner's column on the relevant page of the *Grundbuch*, is that the land in question is ownerless.[69] As such, it may be appropriated by another.[70] This is unless there is doubt as to who in fact the owner of the land is, in which case appropriation is precluded.[71]

The consequences of the abandonment of land in an individual canton[72] can be prescribed in its implementation law (*Einführungsgesetz*[73]).[74] As such, while the default position in terms of the Civil Code is that land subject to *Dereliktion* is ownerless and open to appropriation, this is not always the case. A few cantons have made the decision to direct ownership of abandoned land in their jurisdiction to another legal entity.[75] For example, Freiburg's implementation law makes provision for abandoned land to become the property of the state (assumedly the canton and not the Swiss

---

[65] Art. 666 Abs. 1 read with Art. 964. Abs. 1. See Rey & Strebel "Art. 666" in *Basler Kommentar* 1134-1135; Schmid and Hürlimann-Kaup *Sachenrecht* para 868; Rey *Sachenrechts* para 1673ff; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 100 para 33; Hitz "Art. 666" in *Handkommentar* 166-167; Simonius & Sutter *Schweizerisches Immobiliarsachenrecht* para 127.

[66] See Art. 964 Abs. 1; Art. 46 and 48 GBV. See also Schmid & Hürlimann-Kaup *Sachenrecht* para 868; Rey & Strebel "Art. 666" in *Handkommentar* 1134-1135; Rey *Sachenrecht* para 1676; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 100 para 33; Hitz "Art. 666" in *Handkommentar* 166-167; Simonius & Sutter *Schweizerisches Immobiliarsachenrecht* para 127.

[67] Schmid & Hürlimann-Kaup *Sachenrecht* para 367.

[68] Schmid & Hürlimann-Kaup *Sachenrecht* para 367.

[69] Rey & Strebel "Art. 666" in *Basler Kommentar* 1135; Hitz "Art. 666" in *Handkommentar* 167; Rey *Sachenrechts* para 1677.

[70] Art. 658 Abs. 1; Rey & Strebel "Art. 666" in *Basler Kommentar* 1134; Rey *Sachenrecht* para 1678; Simonius & Sutter *Schweizerisches Immobiliarsachenrecht* para 128.

[71] L Strebel & H Laim "Art. 658" in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 1086 1088.

[72] The member states of the Swiss Confederation are referred to as "cantons". E.g. the Canton of Zurich, the Canton of Bern and the Canton of Vaud.

[73] See Art. 49 of the ZGB on supplementary cantonal provisions.

[74] Rey & Strebel "Art. 666" in *Basler Kommentar* 1135; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 100 para 15; Rey *Sachenrechts* para 1554c; Simonius & Sutter *Schweizerisches Immobiliarsachenrecht* para 128.

[75] Rey & Strebel "Art. 666" in *Basler Kommentar* 1135; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 100 para 15; Rey *Sachenrechts* para 1678; Simonius & Sutter *Schweizerisches Immobiliarsachenrecht* para 128.

Confederation).[76] Similarly, Basel-Stadt's provides for previously registered land to accrue to the canton.[77] By and large, however, the default position set out in the civil code prevails.

When the registered owner takes the decision to relinquish ownership of her land through *Dereliktion*, her name is struck from the owner's column of the relevant page.[78] It is practice to leave a remark reflecting that the land in question is now ownerless.[79] Most often this remark will be "*durch Verzichserklärung gelöscht*" (lost through waiver) or "*Dereliktion*".[80]

3.2.2 A unilateral legal transaction

In Swiss law, *Dereliktion* is conceived of as a unilateral legal transaction.[81] As such, the decision and power to abandon land, for the most part, lies entirely with the registered owner.[82] The rights of third parties in the land in question have no bearing on the owner's right to elect to abandon her land,[83] and their consent is unnecessary to proceed.[84] The reason for this is that their rights in the land in question remain unaffected by the abandonment and continue to exist even if the land is acquired by another.[85] It is unnecessary to obtain the consent of third parties, and the owner will be successful in abandoning her land so long as the requirements set out in the Civil Code and GBV are met.[86] However, the landowner only frees herself from real burdens attaching to the land, such as servitudes.[87]

---

[76] See Art. 34 EG ZGB Freiburg.
[77] See § 155 EG ZGB Basel-Stadt.
[78] Rey & Strebel "Art. 666" in *Basler Kommentar* 1135; Hitz "Art. 666" *Handkommentar* 167; Rey *Sachenrecht* para 1677.
[79] Rey *Sachenrecht* para 1677; Hitz "Art. 666" in *Handkommentar* 167; U Fasel *Kommentar zur Grundbuchverordnung* (2013) Art 131 1-7.
[80] Rey *Sachenrechts* para 1677; Hitz "Art. 666" in *Handkommentar* 167; Fasel *Grundbuchverordnung* Art 131 1-7.
[81] Schmid & Hürlimann-Kaup *Sachenrecht* para 868; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 100 para 33; Rey *Sachenrecht* para 1676.
[82] BGE 85 I 261.
[83] Rey & Strebel "Art. 666" in *Basler Kommentar* 1135; Hitz "Art. 666" in *Handkommentar* 167; BGE 85 I 261 262-263.
[84] Rey & Strebel "Art. 666" in *Basler Kommentar* 1135; BGE 85 I 261 262-263.
[85] Rey & Strebel "Art. 666" in *Basler Kommentar* 1135; Hitz "Art. 666" in *Handkommentar* 167; Rey *Sachenrechts* paras 1676, 1679; Simonius & Sutter *Schweizerisches Immobiliarsachenrecht* para 129.
[86] BGE 85 I 261 262-263.
[87] Rey & Strebel "Art. 666" in *Basler Kommentar* 1135; Hitz "Art. 666" in *Handkommentar* 167; Simonius & Sutter *Schweizerisches Immobiliarsachenrecht* para 129.

The power to abandon one's ownership in land is not, however, unqualified. An important restriction exists where the property in question constitutes the family home (married couples) or the joint home (registered partnerships).[88] The owner in these circumstances must first obtain the consent of her spouse or partner in order to effect the *Dereliktion* of her property.[89] If unhappy with the withholding of consent by the spouse or partner, the owner may petition the court.[90]

3.2.3 Dereliktion, corporeality and renunciation of other rights in land

One of the major differences between the Swiss concept of *Dereliktion* and the way in which the term "abandonment" is used in South African law, is that the former only applies to corporeal property.[91] In South African law, one may talk of abandoning servitudes and other rights in land.[92] In Swiss law, similar rights may be renounced and ultimately extinguished, but this is not regarded as a *Dereliktion*.[93] Rather, the term *Verzicht*, or roughly translated, renouncement, is preferred.[94]

The reason for this distinction between corporeal and incorporeal rights in Swiss law is that only the former category may be rendered ownerless and open to appropriation.[95] Incorporeal rights, once renounced, are ultimately extinguished, or in some cases, accrue to third parties.[96]

Co-ownership serves as an example of a right which, while possible to renounce, may not be subject to *Dereliktion* as understood in Swiss law. The possibility of renouncing one's co-ownership share has been acknowledged by academics, courts and federal

---

[88] Art 169 lit 1 ZGB; Art 14 lit 1 PartG; Art 10a BGBB; Rey & Strebel "Art. 666" in *Basler Kommenter* 1135; Schmid & Hürlimann-Kaup *Sachenrecht* para 526; Hitz "Art. 666" in *Handkommentar* 167. This rule applies both to heterosexual spouses, as well as partners in a same-sex relationship.
[89] Art 169 lit 1 ZGB; Art 14 lit 1 PartG; Art 10a BGBB; Rey and Strebel "Art. 666" in *Basler Kommentar* 1135; Schmid and Hürlimann-Kaup *Sachenrecht* para 526; Hitz "Art. 666" *Handkommentar* 167.
[90] Art 169 lit 2 ZGB; Art 14 lit 2 PartG; Art 10a BGBB.
[91] Rey & Strebel "Art. 666" in *Basler Kommentar* 1135-1136; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 100 para 34; Rey *Sachenrechts* paras 1674a, 1680.
[92] Muller et al *Silberberg* 401; Van der Walt *Servitudes* 572-580. See Chapter 2 Section 4.3.
[93] Hitz "Art. 655" in *Handkommentar* 111; Hitz "Art. 666" in *Handkommentar* 167-168; Rey & Strebel "Art. 666" in *Basler Kommentar* 1135-1136; Rey *Sachenrecht* paras 1680, 1682.
[94] See Hitz "Art. 666" in *Handkommentar* 167-168; Rey & Strebel "Art. 666" in *Basler Kommentar* 1135-1136.
[95] Hitz "Art. 655" in *Handkommentar* 111; Hitz "Art. 666" in *Handkommentar* 167-168; Rey & Strebel "Art. 666" in *Basler Kommentar* 1135-1136; Rey *Sachenrecht* paras 1680, 1682.
[96] Rey & Strebel "Art. 666" in *Basler Kommentar* 1135-1136; Hitz "Art. 666" in *Basler Kommentar* 167-168; Rey *Sachenrecht* paras 1680, 1682; Schmid & Hürlimann-Kaup *Sachenrecht* para 869; BGE 129 III 216 220.

practice in Switzerland.[97] But it is not regarded as an example of *Dereliktion* as the co-ownership share is not corporeal, and thus not open to appropriation by a third party.[98] Instead, in proportion to their shares, the renounced co-ownership share accrues to the remaining co-owners.[99]

Accrual does not occur in every case that a co-ownership share is renounced, however. An example would be where a co-ownership share is subject to a burden in favour of a third party, such as a real security right (*Pfandrecht*[100]).[101] In such circumstances, the co-ownership share does not accrue automatically to the remaining co-owners. Rather, they are entitled to the share, in proportion with their own share.[102]

Other rights in land are also capable of renouncement by their respective holders.[103] Perhaps the most interesting category of limited real rights in land to consider in this context are what are referred to as *selbständigen und dauernden Rechten*,[104] or

---

[97] Rey & Strebel "Art. 666" 1135-1136; Schmid & Hürlimann-Kaup *Sachenrecht* para 869; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 100 para 34; Hitz "Art. 666" in *Basler Kommentar* 167-168; Rey *Sachenrecht* para 1680; BGE 129 III 216 220.

[98] Rey & Strebel "Art. 666" in *Basler Kommentar* 1135-1136; Schmid & Hürlimann-Kaup *Sachenrecht* para 869; Rey *Sachenrecht* para 1680; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 100 para 34.

[99] Rey and Strebel "Art. 666" in *Basler Kommentar* 1135-1136; Schmid and Hürlimann-Kaup *Sachenrecht* para 869; Hitz "Art. 666" in *Basler Kommentar* 167-168; Rey *Sachenrecht* para 1680; BGE 129 III 216 220.

[100] For a general overview, see Schmid and Hürlimann-Kaup *Sachenrecht* paras 1462ff.

[101] Rey and Strebel "Art. 666" in *Basler Kommentar* 1135-1136; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 100 para 34; Rey *Sachenrecht* para 1680; BGE 129 III 216 220.

[102] Rey and Strebel "Art. 666" in *Balser Kommentar* 1135-1136; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 100 para 34; Rey *Sachenrecht* para 1680; BGE 129 III 216 220.

[103] Praedial servitudes (*Grunddienstbarkeit*). See Art. 734; Schmid and Hürlimann-Kaup *Sachenrecht* para 1315; Petitpierre "Art. 734" in *Basler Kommentar* 1464; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 108 paras 12-13). Such renouncement can be determined implicitly, where the servitude is incompatible with further servitudes granted over the land in question. See Schmid and Hürlimann-Kaup *Sachenrecht* para 1315; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 108 para 13; E Petitpierre "Art. 734" in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 1463 1464; BGE 128 III 265 268-269; BGE 127 III 440 442-443.
Personal servitudes (*Personaldienstbarkeiten*) such as an usufruct (*Nutzniessung*). See Art. 748 ZGB; Schmid & Hürlimann-Kaup *Sachenrecht* para 1349; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 108 para 12-13. A habitatio (*Wohnrecht*) is subject to the same provisions as an usufruct. See Art. 776 Abs. 3 ZGB and Schmid & Hürlimann-Kaup *Sachenrecht* para 366.
Real burdens that require a landowner fulfil an obligation (*Grundlasten*). See Art. 786 ZGB; Schmid & Hürlimann-Kaup Sachenrecht para 1454; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 110 para 20; D Jenny "Art. 786" in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 1661 1662.
Reservations of ownership (*Eigentumsvvorbehalt*). See Schmid & Hürlimann-Kaup *Sachenrecht* para 1118.
Real rights of security over movable property (*Fahrnispfandrechte*). See Schmid & Hürlimann-Kaup *Sachenrecht* para 1901.

[104] See Schmid & Hürlimann-Kaup *Sachenrecht* para 1327ff; L Strebel & H Laim "Art. 655" in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 1043 1047-1050.

independent and permanent rights. An explanation of these rights follows below. What makes these rights special is that they are treated in a similar fashion to land ownership, as they are granted their own pages in the *Grundbuch*, and can be alienated or even burdened with further property rights.[105]

It is possible for particular kinds of personal servitudes (*Personaldiensbarkeiten*) to become independent and permanent rights on the meeting of certain requirements.[106] The first requirement is that the servitude is not created for the benefit of a specific person or to serve a dominant tenement.[107] The second requirement is that the servitude is created for a minimum duration of 30 years or an unlimited duration.[108] Examples of rights that may constitute independent and permanent rights include building rights (*Baurechten*) and planting rights (*Pflanzungsrechten*).[109]

While accorded a similar status to land in the *Grundbuch*, these rights remain incorporeal property by nature. As a consequence, they cannot be subject to *Dereliktion*, since they do not have a physical existence that renders them open to appropriation by a third party.[110] The holder of the right may elect to renounce it, but unlike in the case of land, the page assigned to the right is permanently closed, extinguishing the right.[111] One qualification is that renouncement requires the consent of any party with entitlements in the *selbständigen und dauernden Recht*.[112]

3.2.4 Apartment ownership

Much in the same way that the Sectional Titles Act does in South Africa,[113] the Swiss law makes special provision for apartment ownership. Apartment ownership is referred

---

[105] Schmid & Hürlimann-Kaup *Sachenrecht* para 1330, 1333; Art 22 Abs 1 GBV. See Art 216 Abs 1 OR concerning the formalities required for the sale of land.
[106] Strebel & Laim "Art. 655" in *Basler Kommentar* 1047-1050.
[107] Schmid & Hürlimann-Kaup *Sachenrecht* paras 1328-1329; Art 655 Abs 3 ZGB.
[108] Schmid & Hürlimann-Kaup *Sachenrecht* paras 1328-1329; Art 655 Abs 3 ZGB.
[109] See Schmid & Hürlimann-Kaup *Sachenrecht* para 1327.
[110] Rey & Strebel "Art. 666" *Basler Kommentar* 1135-1136; Hitz "Art. 666" in *Handkommentar* 168; Rey *Sachenrechts* paras 1680-1682.
[111] Rey & Strebel "Art. 666" in *Basler Kommentar* 1136; Hitz "Art. 666" in *Handkommentar* 168; Rey *Sachenrechts* para 1682.
[112] Art 964 Abs 1. See J Schmid "Art. 964" in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 2591 2594; Rey & Strebel "Art. 666" in *Basler Kommentar* 1136.
[113] See the Preamble of Act 95 of 1986. For a detailed overview, see GJ Pienaar *Sectional Titles and Other Fragmented Property Schemes* (2010).

to as *Stockwerkeigentum*, a unique form of co-ownership over immovable property.[114] This form of co-ownership grants co-owners exclusive rights to utilise different parts of a building.[115]

As with the rights covered in the previous section, apartment ownership is not subject to *Dereliktion*, but rather renouncement.[116] When the owner of an apartment elects to renounce his ownership, the apartment in question is not rendered ownerless, and thus open to appropriation by the first taker. Instead, in proportion to their floor share, the renounced apartment falls into the co-ownership of the remaining apartment owners.[117]

3.3 Contrast and analysis

This section compares the Swiss doctrine of *Dereliktion* and the apparent impossibility of abandoning land in South Africa from a legal and a policy standpoint.[118] The legal analysis focuses on the role of the principle of publicity and on whether registration actions are necessary for the abandonment of land.[119] The policy analysis focuses on whether the permissive approach to abandonment in the Swiss context may be appropriate in South Africa.

3.3.1 Legal analysis

There seems to be little difference in the way the abandonment of movable property in Swiss and South African law occurs. The basic requirements – physical loss of control, coupled with an intention to relinquish ownership - are the same.[120] Furthermore, in a dispute involving the allegation of abandonment of the property in question, the factual situation in which the alleged abandonment took place will be scrutinised by the court.[121]

---

[114] Art 712a Abs 1 ZGB. For a detailed overview of *Stockwerkeigentum*, see A Wermelinger *Das Stockwerkeigentum* (2014) 1ff. See also Rey & Strebel "Art. 666" in *Basler Kommentar* 1136; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 100 para 34; Rey *Sachenrechts* paras 1681.
[115] Art. 712a Abs. 1 ZGB.
[116] Rey & Strebel "Art. 666" in *Basler Kommentar* 1135-1136; Hitz "Art. 666" in *Handkommentar* 168; Rey *Sachenrechts* paras 1680-1682.
[117] Rey & Strebel "Art. 666" in *Basler Kommentar* 1136; Hitz "Art. 666" in *Handkommentar* 168; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 100 para 34; Rey *Sachenrechts* para 1681; BGE 129 III 216 221.
[118] See Chapter 3 for a discussion of the position in South African law.
[119] Mostert "No Right" in *Property Law Under Scrutiny* 26-28.
[120] See note 59 above and Chapter 2 Section 4.1.
[121] See note 60 above and Chapter 2 Section 4.1.

In respect of the abandonment of land, however, the differences could not be starker. While the Swiss approach to the *Dereliktion* of land is marked by its clarity, the same cannot be said for the South African approach. Where the abandonment of land has been alleged, the courts in South Africa have proceeded on the assumption that the same principles that apply to the abandonment of movables apply to the abandonment of immovables.[122] This has been done without regard to the absence of any express provision in the Deeds Registries Act that would permit and facilitate the abandonment of land. Usually, the courts are incapable of moving beyond the intention requirement for abandonment, which, given the reluctance of courts to find that valuable property has been abandoned,[123] cannot be met. However, even if there was an express declaration on the part of the owner to the effect that he is abandoning his land, it is uncertain how this could be given effect to in the absence of registration actions.[124]

By contrast, Swiss law, in line with the principle of publicity, has one simple requirement to give effect to the abandonment of land. This is the submission of a waiver to the land registrar, which results in the deletion of the owner's name from the relevant page of the *Grundbuch*.[125] Once this is achieved, the land is rendered ownerless and open to appropriation by a third party.[126] In the context of a modern system of land registration, and in line with the principle of publicity, it seems the Swiss approach provides the only satisfactory means to achieve the abandonment of land.

3.3.2 Policy analysis

As discussed in Chapter 4, the social-obligation approach to ownership provides the best explanation for the restrictions on abandoning land.[127] As explained by Peñalver, despite at first glance seeming to epitomise the powers of ownership, the doctrine of abandonment better reflects an "interplay between autonomy and obligation", rather

---

[122] See for example *Minister van Landbou v Sonnendecker* 1979 (2) SA 944 (A), *Meintjes NO v Coetzer* 2010 (5) SA 186 (SCA) and *Papas N.O. v Motsere Trading CC* (46011/2012) [2014] ZAGPJHC 144.
[123] See Chapter 2 Section 4.2.2 and Chapter 3 Section 2.4.1.
[124] See Chapter 3 Sections 2 to 4.
[125] Art. 666 Abs. 1 read with Art. 964. Abs. 1 ZGB. See Rey & Strebel "Art. 666" in *Basler Kommentar* 1134-1135; Schmid & Hürlimann-Kaup para 868; Rey *Sachenrechts* para 1673ff; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 100 para 33; Hitz "Art. 666" in *Handkommentar* 166-167; Simonius & Sutter *Schweizerisches Immobiliarsachenrecht* para 127.
[126] Art. 658 Abs. 1; Rey & Strebel "Art. 666" in *Basler Kommentar* 1134; Rey *Sachenrechts* para 1678; Simonius & Sutter *Schweizerisches Immobiliarsachenrecht* para 128.
[127] See Chapter 4 Sections 4 to 6.

than the autonomy of ownership.[128] Possibly the most useful aspect of the social-obligation approach is the sliding scale of obligation explained by Alexander.[129] It is through this sliding scale approach that the existence of a right to abandon land can be justified in the Swiss context, while the denial of such a right, or at least an unrestricted one, can be justified in the South African context.

The Swiss approach to the abandonment of land, through the doctrine of *Dereliktion*, clearly favours the right of the individual owner. The owner is free to unburden herself of ownership provided she complies with the simple requirement set out in the Civil Code and accompanying legislation, such as the GBV. The rights of third parties in the land in question ultimately have no bearing on the owner's decision to abandon her land. Furthermore, the interests of wider society do not seem to operate as a check on the owner's decision to abandon her land. The only point at which the interests of the wider community is taken into account is regarding the consequences of abandonment. Some cantons may opt to direct ownership in land subject to *Dereliktion* to another legal entity,[130] assumedly regarding it too valuable a resource to be left ownerless. This is of no concern to an owner, whose only interest is freeing herself of the obligations that attach to the land in question.

Dereliktion of land in Switzerland is an infrequent occurrence.[131] The primary motivation for Swiss landowners to opt for *Dereliktion* appears to be that continued ownership entails a negative value to them. A negative value would usually arise where property taxes and other costs associated with ownership become a burden which the owner decides no longer justifies continued ownership of her land.[132] An example would be agricultural land with a low market value that the owner no longer wishes to farm.[133] The motivation for the abandonment of ownership in land does not necessarily

---

[128] Peñalver (2010) *Michigan Law Review* 193.
[129] G Alexander *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 138.
[130] Rey & Strebel "Art. 666" 1135; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 100 para 15; Rey *Sachenrechts* para 1678; Simonius & Sutter *Schweizerisches Immobiliarsachenrecht* para 128.
[131] Simonius & Sutter *Schweizerisches Immobiliarsachenracht* 127n306. See also I Bayard "Wenn Eine Strasse Niemandem Gehört" (06-01-2014) *Tages Anzeiger* <http://www.tagesanzeiger.ch/panorama/vermischtes/Wenn-eine-Strasse-niemandem-gehoert/story/31312584> (accessed 16-03-2017).
[132] Bayard "Wenn eine Strasse niemandem gehört" *Tages Anzeiger*.
[133] Author Unknown "Wenn Grundeigentum zur Last Wird" (08-11-2004) *Neue Zürcher Zeitung* <https://www.nzz.ch/article9YV7W-1.331322> (accessed 16-03-2017).

differ from the reasons why landowners in South Africa may wish to abandon. However, the contexts in which property acquires a negative value to the existing owner differ significantly.

Overall, despite the permissive abandonment regime that exists in Switzerland, the societal impact of *Dereliktion* appears minimal. While concerns have been raised where a trend of abandoning worthless agricultural land arose,[134] at this time, there do not appear to be any suggestions that the law should be changed. The reasons for not permitting the abandonment of land in the South African context are completely alien to the Swiss context. No city in Switzerland is blighted by problem buildings in any manner resembling Johannesburg and other cities in South Africa.[135] The existence of a right to abandon ownership of land thus does not pose the same threat to public order in the Swiss context as it does in the South African context.[136] Furthermore, there is no significant mining industry in Switzerland of which to speak.[137] There is thus no concern regarding abandoned mines, which may be left to fester unchecked on abandoned land.[138]

Geography would also appear to be a determinative factor in limiting abandonment in the Swiss context. Settlement is limited by the mountainous areas of the Alps that characterise the south of the country.[139] Effectively, it is difficult to conceive of a situation in which land which has been subject to *Dereliktion* in Switzerland will remain unclaimed for long, or how a proliferation of abandoned, neglected properties may arise.

---

[134] Author unknown “Wenn Grundeigentum zur Last wird” *Neue Zürcher Zeitung*.
[135] See the sources in note 251 and 252 in Chapter 6 Section 3.3.
[136] See Mostert “No Right” in *Property Law Under Scrutiny* 26-28.
[137] S Hastorun “The Mineral Industry of Switzerland” in *2016 Minerals Yearbook* (2019) 45.1-45.3. A Google search of “mining waste in Switzerland” does not return any informative results.
[138] See Chapter 6 Section 3.1 for a discussion of the mining situation in South Africa.
[139] Central Intelligence Agency “Switzerland” (03-04-2019) *The World Factbook* < https://www.cia.gov/library/publications/the-world-factbook/geos/sz.html> (accessed 09-04-2019).

The Swiss law does not deny the social responsibility that attaches to ownership of property (*Sozialpflichtigkeit*).[140] The right to property is guaranteed,[141] but such does not mean it is unrestricted.[142] This is evident from, for example, the way society's interest in the protection of heritage buildings (*Denkmalschutz*) supersedes the owner's right to do as she pleases with her property.[143] *Denkmalschutz* includes bearing maintenance costs as well as restrictions, or outright prohibitions, on building,[144] should the owner decide to remain the owner of the building in question. The social-obligation theory seems consistent with Swiss property law, even though in respect of the abandonment of ownership in land, the sliding scale of obligation favours the owner. The Swiss socio-economic context and the interests of society do not demand that an owner retains ownership against her will in the absence of a third party willing to take transfer of her property.

Peñalver argues that restricting or prohibiting the abandonment of land underlines the law's general suspicion of abandonment of property, in particular the unrestrained disposal of that which is no longer wanted, e.g. waste.[145] Through such restricting or prohibition, the law prevents the creation of unowned spaces, thus effectively negating the right to abandon unwanted property in general.[146] This appears to be irrelevant in

---

[140] P Hänni *Planungs-, Bau und besonderes Umweltschutzrecht* 6 ed (2016) 16-17; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 102 para 15; § 97 para 4; Sprecher (2015) *SJZ* 257-258; P Tschannan "Bundesgericht, I. Öfeentlichrechtliche Abteilung, 30.8.1993, Nationale Genossenschaft für die Lagerung Radioaktiver Abfälle NAGRA c. Regierungsrat des Kantons Nidwalden und Obergericht des Kantons Nidwalden als Verfassungsgericht (1P.830/1992), Staatsrechtliche Beschwerde" (1994) *AJP* 627 627-629; BGE 119 Ia 390 399.

[141] Art. 26 BV; Hänni *Planungs-*, 18ff.

[142] Hänni *Planungs-* 18ff.

[143] Hänni *Planungs-* 40, 439ff; I Häner, A Lienhard, P Tschannen, F Uhlmann & S Vogel *Ausgewählte Gebiete des Bundesverwaltungsrechts* 8 ed (2014) 225. Art. 78 BV makes the protection of such heritage buildings the responsibility of the cantons. Individual cantons incorporate more specific rules related to such protection into their individual laws. See e.g. § 203-§ 217 PBG ZH.

[144] Hänni *Planungs-* 40. *Denkmalschutz* is ultimately a cantonal responsibility (see Art. 78 BV; Hänni *Planungs-* 439ff). The possibility of subsidies from the state for maintenance costs does exist, however. For example, the discretion to grant such subsidies is provided in the Canton of Zurich's own building legislation (§ 217 Abs. 2 lit. a PBG ZH).
In addition, Swiss law recognises the possibility of material (or constructive) expropriation (Art. 26 Abs. 2 BV; Hänni *Planungs-* 609ff), which an owner may rely on when the restrictions placed on his property through *Denkmalschutz*. Although *Denkmalschutz* restrictions are usually regarded as conventional property law restrictions (see BGE 91 I 340 341), there are circumstances in which a particular restriction may be seen as too great a sacrifice by an individual owner in the public interest (see BGE 112 Ib 263 269). See further Hänni *Planungs-* 622-624. See also, for example, the building legislation of the Canton of Zurich, which makes provision for compensation for material expropriation where *Denkmalschutz* measures amount to material expropriation (§ 214 Abs. 1 PGB ZH).

[145] Peñalver (2010) *Michigan Law Review* 214ff.

[146] Peñalver (2010) *Michigan Law Review* 203-207.

the Swiss context, however. The Swiss are renowned for being extremely recycling conscious.[147] Furthermore, Swiss authorities are harsh with those who fall foul of waste disposal laws, with effective means of locating and fining offenders they aim to deter repeat offences.[148] Restraining the abandonment of land is thus unnecessary to restrict the illegal disposal of waste.

One also needs to evaluate the different historical backgrounds of both countries. There are unique historical (and thus constitutional) reasons for controlling the abandonment of land in South Africa that do not exist in the Swiss context. Unlike Switzerland, South Africa's history is characterised by grave injustices.[149] As discussed in Chapter 4, the property clause in the South African Constitution embodies the social-obligation norm and mandates the remedying of historical injustices.[150] Some of the gravest injustices occurred in respect of land. During apartheid, the property rights of the white-landowning class were given primacy over the interests of black non-owners.[151] Although Swiss landowners may also be a privileged class, that society is

---

147 Author Unknown "Recycling" (13-05-2016) *Federal Department of Foreign Affairs* <https://www.eda.admin.ch/aboutswitzerland/en/home/umwelt/natur/recycling.html> (accessed 16-03-2017).

148 The New York Times told the experience of a woman who recently moved to the Swiss city of Bern. So-called "garbage detectives" go through trash that either looks suspicious or has been improperly placed in order to link the trash in question to the wrongdoer. For her first mistake, she received a fine of 1000 CHF "illegal and unorderly abandonment of personal waste", although she was able to reduce this to a warning. See L Bauerlein "Learning to Recycle in Switzerland, and Paying for It" (19-02-2016) *New York Times* <https://www.nytimes.com/2016/02/21/magazine/learning-to-recycle-in-switzerland-and-paying-for-it.html?_r=0> (16-03-2017). See also H Bachmann "Voices: For Swiss, Recycling is Very Serious Business" (07-03-2016) *USA Today* <http://www.usatoday.com/story/opinion/voices/2016/03/06/voices-swiss-recycling-very-serious-business/81333110/> (accessed 16-03-2017); M Curtis "I Faced Prison for Plastic in Wrong Recycling Bag" (03-12-2013) *The Local* <http://www.thelocal.ch/20131203/i-faced-prison-for-plastic-in-a-paper-recycling-bag> (accessed 16-03-2017).

149 See in general L Thompson *A History of South Africa* 4 ed (2014); C Feinstein *An Economic History of South Africa: Conquest, Domination and Development* (2005); S Terreblanche *A History of Inequality in South Africa* (2002); R Davenport & C Saunders *South Africa: A Modern History* 5 ed (2000); L Platzky & C Walker *The Surplus People: Forced Removals in South Africa* (1985).

150 G Alexander "The Social-Obligation Norm in American Property Law" (2009) 94 *Cornell Law Review* 745 782ff; Alexander *Global Debate* Chapter Four. See further R Cramer "The Abandonment of Landownership in South African and Swiss Law" (2017) 134 *SALJ* 870 899ff. Note on the aforementioned publication by the author: My Memorandum of Understanding with my supervisor, as well as obligations attaching to funding I received through the Swiss-South African Joint Research Programme to facilitate my comparative study, required me to publish from my doctoral research. The article referenced here is the result of the obligation to publish from my doctoral research.

151 AJ van der Walt *Property in the Margins* (2009) 63-64.

not plagued by the same levels of inequality that characterise post-apartheid South Africa.[152]

This does not mean that all landowners in South Africa can be classified as privileged. However, the historical injustices render justifiable the limitation of landowners to desert their obligations, the moment ownership is not beneficial to them anymore. Any exit from landownership should be more regulated if permitted at all. As Van der Walt points out, the objectives of the constitutional property clause do not end at restitution and redistribution.[153] Rather, the "allocation, recognition and protection of individual property rights may not result in an environment that endangers the health or well-being of the citizenry".[154]

Despite its favouring of the individual owner in general, *Dereliktion* in respect of land still reflects the social-obligation norm of ownership. The social-obligation norm is clear from the restriction on *Dereliktion* of a family home, in which case the consent of the spouse or partner is required.[155] The owner's interests weigh more heavily on the social-obligation scale than the interests of broader society, but her interests are ultimately subordinate to those of her immediate family. Even in the most permissive of jurisdictions in respect of the abandonment of land, obligation serves to restrict the owner's entitlement to abandon.

---

[152] See Author Unknown "Confronting Inequality" (2017) *New Agenda* 28; E Webster "South Africa Needs a Fresh Approach to its Stubbornly High Levels of Inequality" (11 December 2017) *The Conversation* <https://theconversation.com/south-africa-needs-a-fresh-approach-to-its-stubbornly-high-levels-of-inequality-87215> (accessed 31-01-2019); A Orthofer "South Africa Needs to Fix its Dangerously Wide Wealth Gap" (06-10-2016) *The Conversation* <https://theconversation.com/south-africa-needs-to-fix-its-dangerously-wide-wealth-gap-66355> (accessed 31-01-2019); A Orthofer *Wealth Inequality in South Africa: Insights from Survey and Tax Data* Working Paper for the Research Project on Employment, Income Distribution and Inclusive Growth, 2016, available at < http://www.redi3x3.org/sites/default/files/Orthofer%202016%20REDI3x3%20Working%20Paper%2015%20-%20Wealth%20inequality.pdf> (accessed 31-01-2019).

[153] AJ van der Walt *Property and Constitution* (2012) 139-140.

[154] Van der Walt *Property and Constitution* 140.

[155] Art 169 lit 1 ZGB; Art 14 lit 1 PartG; Art 10a BGBB; Rey and Strebel "Art. 666" in *Basler Kommentar* 1135; Schmid and Hürlimann-Kaup *Sachenrecht* para 526; Hitz "Art. 666" *Handkommentar* 167.

[155] Art 169 lit 2 ZGB; Art 14 lit 2 PartG; Art 10a BGBB.

3.4 In summary: Lessons from the Swiss approach

Switzerland serves as an example of a permissive jurisdiction in respect of the abandonment of land.[156] It is evident that the social-obligation norm of ownership is consistent with Swiss property law. The interests of broader society often limit ownership significantly.[157] Nevertheless, such interests do not appear to demand an owner remain such against her will. The only qualification to the otherwise unrestricted right to abandon land through *Dereliktion* is where a family home is implicated.[158]

The permissive Swiss approach to the abandonment of land operates in a different socio-economic context than South Africa. In this respect, it is difficult to suggest the Swiss approach as a model for law reform. Nevertheless, juxtaposing the permissive Swiss approach with the apparent impossibility of abandoning land in South Africa is useful. It can help explain why South African law does not provide a specific mechanism through which land is abandoned. The interests of the individual landowner cannot be given priority over those of broader society in the South African socio-economic context.

The Swiss model is not feasible in the South African context. But a valuable lesson can be drawn from Swiss law, which is to provide clear answers to questions concerning the unilateral termination of ownership in land. Regardless of the appropriate approach, it is critical that landowners and local authorities know their rights and duties. Even if the abandonment of landownership in South African should not be permitted, the prohibition should be stated expressly. This may discourage reckless behaviour by landowners who seek to abandon their land by neglecting their obligations attached to such ownership.[159]

---

[156] See L Strahilevitz "The Right to Abandon" (2010) 158 *U. Pa. L. Rev.* 355 390ff on the different types of regimes that exist concerning the abandonment of property.
[157] See the sources notes 140 to 144 and analysis in Section 3.3.2 above.
[158] Art 169 lit 1 ZGB; Art 14 lit 1 PartG; Art 10a BGBB; Rey and Strebel "Art. 666" in *Basler Kommentar* 1135; Schmid and Hürlimann-Kaup *Sachenrecht* para 526; Hitz "Art. 666" *Handkommentar* 167.
[159] See Strydom J & Viljoen S "Unlawful Occupation of Inner-City Buildings: A Constitutional Analysis of the Rights and Obligations Involved" (2014) 17 *PER* 1207 1222ff

4. Scotland: No mechanism, no abandonment

Scotland provides a useful comparative jurisdiction for South Africa in general, due to both jurisdictions serving as examples of mixed legal systems.[160] However, beyond their shared civilian and common law heritage, it is in the context of property law that the two jurisdictions perhaps have the most similarities.[161] Both jurisdictions draw heavily from the Roman law and the *ius commune* in property law.[162] This shared heritage is reflected through numerous shared concepts and principles.[163]

Nevertheless, there are a number of critical differences, particularly in the context of land law.[164] For example, South Africa observes a negative system of land registration[165] while Scotland has recently shifted to a positive system.[166] A further factor is that, until relatively recently, Scotland observed the feudal system of land tenure.[167] The abolition of the feudal system has, however, seen the law of immovable property in Scotland take on a more civilian character.[168]

---

[160] R Zimmermann "'Double Cross': Comparing Scots and South African Law" in R Zimmermann, K Reid & D Visser (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2005) 1 3; R Zimmermann & D Visser "Introduction" in R Zimmerman & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 1 2-3.

[161] K Reid & CG van der Merwe "Property Law: Some Themes and Some Variations" in R Zimmermann, K Reid & D Visser (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2005) 637 638.

[162] Reid & Van der Merwe "Property Law" in *Mixed Legal Systems* 641.

[163] Reid & Van der Merwe "Property Law" in *Mixed Legal Systems* 638-641.

[164] Reid & Van der Merwe "Property Law" in *Mixed Legal Systems* 642-644.

[165] See Chapter 3 Section 2.2.1.

[166] Reid & Van der Merwe "Property Law" in *Mixed Legal Systems* 642; G Gretton & A Steven *Property, Trusts and Succession* 3 ed (2017) 7.68-7.76.

[167] Reid & Van der Merwe "Property Law" in *Mixed Legal Systems* 643; Gretton & Steven *Property* A.19; Lord Eassie, HL MacQueen, A Anderson, D Bain, D Cabrelli, G Cameron, M Combe, C Ervine, N Grier, S Lamont-Black, D Nichols, R Paisley, A Simpson, M Sundara Rajan & Lady Wise *Gloag and Henderson The Law of Scotland* 14 ed (2017) 34.02. See section 1 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000. The appointed day was the 28th of November 2004. See Combe and Rudd's comments in this regard, that in the feudal system that if "the *dominium utile* was abandoned the titled would revert up the feudal chain". The concept of abandonment in a feudal system was conceptually difficult, and "could not have been conceived in the current sense". Combe M & Rudd M "Abandonment of Land and the *Scottish Coal* Case: Was it Unprecedented?" (2018) 22 *The Edinburgh Law Review* 301 304-305.
The feudal system is explained briefly in Eassie et al *Gloag and Henderson: The Law of Scotland*: "The historic system of land tenure in Scotland was until recently feudal: under which there was a hierarchy of interests in the same land, the greatest of which was that of the Crown. For a given piece of land, beneath the Crown there might be several persons, each holding the land under his feudal superior and obliged to observe the feuing conditions imposed on him by his superior." See Eassie et al *Gloag and Henderson* 34.02.

[168] Reid & Van der Merwe "Property Law" in *Mixed Legal Systems* 644.

Beyond the characteristics that make Scotland a useful comparative jurisdiction for property law in general, it is a particularly useful jurisdiction in the context of the abandonment of landownership. As discussed in Chapter 3, it does not appear possible to abandon land in South African law due to the absence of a specific mechanism in the relevant legislation.[169] A similar position exists in Scottish law, as established by a recent decision of the Inner House of the Court of Session.[170] In the case of *The Scottish Environment Protection Agency v The Joint Liquidators of the Scottish Coal Company Limited*,[171] it was found that there is no right to abandon landownership as the law in Scotland currently stands.[172] The reasoning for this, discussed in more detail below, is that the law does not provide a means through which landownership may be abandoned.[173]

4.1 Background: The Land Registration System in Scotland

As with South Africa and Switzerland, Scots law observes the principle of publicity.[174] The principle is given effect through the requirement of an external act, either delivery in respect of movables or registration in respect of land.[175] Possession is insufficient to give effect to the principle of publicity in the context of land.[176] Unlike the other two jurisdictions, however, acquisitive (positive) prescription does not operate as an exception to the registration requirement for land ownership.[177] For ownership of land to be acquired through prescription in Scotland, ten years of possession is required,[178]

[169] See Chapter 3 Sections 2-4.
[170] The Court of Session is effectively a combination of two courts. These are the Inner House and Outer House, the former primarily an appellate court while the latter serves as a court of first instance. Decisions can be appealed to the Supreme Court of the United Kingdom with the permission of either the Inner House of the Supreme Court of the United Kingdom. See Eassie et al *Gloag and Henderson* paras 2.01-2.05.
[171] [2013] CSIH 108 (CSIH).
[172] Eassie et al *Gloag and Henderson* para 33.03n30.
[173] Eassie et al *Gloag and Henderson* para 33.03n30.
[174] Gretton & Steven *Property* paras 4.19-4.21, 7.1.
[175] Gretton & Steven *Property* para 4.19.
[176] Gretton & Steven *Property* paras 4.19-4.21, 7.1.
[177] See the sources in note 35 above (Switzerland) and Chapter 3 Section 2 (South Africa).
[178] Gretton & Steven *Property* para 6.8; Eassie et al *Gloag and Henderson* paras 34.30ff.

as well as a registered disposition.[179] Servitudes, however, may still be acquired through peaceful possession without the requirement of registration.[180]

At present, two registers for land exist in Scotland. These are the Sasine Register and the Land Register.[181] The prevailing piece of legislation governing land registration is the Land Registration etc. (Scotland) Act 2012 (LRA 2012).

As with the Swiss *Grundbuch*,[182] the Scottish Land Register is divided into constituent parts.[183] The first of these parts is the cadastral map. The cadastral map uses the Ordinance Survey Map (a topographic map) over which title boundaries are superimposed.[184] As the Land Register is not yet complete, due to properties still being transferred to it from the Sasine Register, at present the cadastral map has been described as a "half-completed jigsaw".[185] The second part of the Scottish Land Register is the title sheet record. A title sheet[186] exists for each registered title unit.[187] The title sheet record can be defined as the entirety of all title sheets.[188] The archive record is a repository in which the Keeper places (1) copies of documents accompanying the submission of a registration application (or in respect of rectifications) and (2) data regarding previous positions reflected in the register.[189] The former is of critical importance, being the basis of what is reflected in the title sheets.[190]

---

[179] Gretton & Steven *Property* para 6.8; Eassie et al *Gloag and Henderson* para 34.30. See section 1 of the Prescription and Limitation (Scotland) Act 1973. It is particularly burdensome for a would-be acquirer to get the prescriptive clock to start running in the first place. Section 43 of the Land Registration etc. (Scotland) Act 2012 (LRA 2012) only permits the Keeper to register such a disposition when (1) the acquirer has possessed the land for one year and (2) attempts have been made to locate the owner of the land. On failing to locate the owner, the Crown should be notified.
[180] Gretton & Steven *Property* para 13.27; Eassie et al *Gloag and Henderson* para 34.48. See section 3 of the Prescription and Limitation (Scotland) Act 1973.
[181] Gretton & Steven *Property* para 7.3; Eassie et al *Gloag and Henderson* para 34.01.
[182] See Section 3.1 above.
[183] Gretton & Steven *Property* paras 7.26ff, 7.2;
[184] Gretton & Steven *Property* paras 7.27-7.29.
[185] Gretton & Steven *Property* para 7.28.
[186] Each title sheet has four sections, being (1) the property section, (2) the proprietorship section, (3) the securities section and (4) the burdens section. Section 5 of the LRA 2012. See Gretton & Steven *Property* paras 7.31ff for further detail.
[187] Gretton & Steven *Property* para 7.31.
[188] Section 3(3) of the LRA 2012. See Gretton & Steven *Property* para 7.31.
[189] Section 14 of the LRA 2012. See Gretton & Steven *Property* para 7.43.
[190] Gretton & Steven *Property* para 7.43.

The final part of the Land Register is the application record. This consists of (1) pending applications for registration and (2) extant advance notices.[191]

4.2 Abandonment of ownership

An overview of the abandonment of ownership in Scots law, in contrast to Swiss law, is relatively brief. The abandonment of ownership in property is touched on very briefly in major texts in Scots law. There are two primary reasons for this. First, movable property is rendered *bona vacantia* (i.e. accrues to the state) on abandonment, thus making unowned movables not possible.[192] Secondly, the possibility of abandoning landownership has only recently been subject to litigation, this being the *Scottish Environmental Protection Agency* case which found that such abandonment is not possible.[193]

4.2.1 Abandonment of movable property

In Scots law, movable property may be abandoned.[194] However, unlike in South African and Swiss law, the consequence is not that the property is rendered *res derelictae* and thus open to appropriation by the first taker.[195] Abandoned (or previously owned) property becomes *bona vacantia*, thus vesting in the Crown.[196] Unowned movable property is thus not possible.[197] As a result, the scope of *occupatio* is far more restricted in Scots law, only finding application in the context of unowned things which have never

---

[191] Section 14 of the LRA 2012. See Gretton & Steven *Property* para 7.45. Advance notices can be placed in the Land Register prior to settlement and create an interim period of protection upon registration of a disposition, trumping any adverse entries made in the Land Register. For example, it would protect a buyer in the event of the seller deciding to sell the property to two different parties, avoiding a situation in which the first buyer is "pipped at the post", i.e. the other buyer registers first. See Gretton & Steven *Property* paras 5.14, 7.55ff.

[192] Gretton & Steven *Property* para 3.7; K Reid *The Law of Property in Scotland* (1996) para 547.

[193] CSIH para 103.

[194] Gretton & Steven *Property* para 3.7; Reid *The Law of Property* para 547.

[195] See

[196] DL Carey Miller *Corporeal Movables in Scots Law* 2 ed (2005) 18-19; Eassie et al *Gloag and Henderson* para 31.04; Gretton & Steven *Property* para 3.7; Reid *The Law of Property* para 540.

[197] Carey Miller *Corporeal Movables* 18-19; Eassie et al *Gloag and Henderson* para 31.04; Gretton & Steven *Property* para 9.2.

previously been owned.[198] Wild animals are the exception to this rule, as they once again become unowned once they escape and regain their natural liberty.[199]

4.2.2 Abandonment of immovable property

The abandonment of landownership, and the possibility of such, have only recently attracted attention in Scots law. Until the recent *Scottish Environmental Protection Agency* decisions by the Outer and Inner Houses respectively,[200] there had been no case law engaging with the question. Furthermore, the major academic texts predating these decisions do not discuss the issue.[201] Given the absence of case law, as well as the dearth of academic commentary, the following discussion primarily focuses on the two *Scottish Environmental Protection Agency* judgments.

4.2.2.1 Scottish Environmental Protection Agency: Background

The facts of the case aptly demonstrate how land can acquire a significant negative value in the mining context. The Scottish Coal Company (SCC) conducted mining operations at open-cast mines in Scotland. At the time of litigation, the company was in the process of being wound up. Mining operations at the sites owned by the company had also since ceased. A problem facing the liquidators was the costs of meeting the environmental obligations attached to the land. Maintaining the sites in line with these obligations would cost an estimated £478 000 per month.[202] It was estimated that existing funds would provide for the sites to be maintained for between 20 and 22 months at most.[203] Inevitably, there would be nothing left for the SCC's unsecured creditors, as preference would be accorded to the costs of meeting its obligations to

---

[198] Carey Miller *Corporeal Movables* 18-19; Eassie et al *Gloag and Henderson* para 31.04; Gretton & Steven *Property* para 9.2; Reid *The Law of Property* para 540.
[199] Carey Miller *Corporeal Movables* 19; Eassie et al *Gloag and Henderson* para 31.04: Gretton & Steven *Property* para 9.3; Reid *The Law of Property* para 542.
[200] *Joint Liquidators of the Scottish Coal Company Limited* [2013] CSOH 124 (CSOH); *The Scottish Environment Protection Agency v The Joint Liquidators of the Scottish Coal Company Limited* [2013] CSIH 108.
[201] The first mention (found by the author) of the possibility of abandoning landownership can be found in the 2017 edition of *Gloag and Henderson The Law of Scotland*. Unsurprisingly, this was prompted by the *Scottish Environmental Protection Agency* case, which is the subject of discussion. See Eassie et al *Gloag and Henderson* para 34.03n30. See also Combe & Rudd (2018) *The Edinburgh Law Review* 301.
[202] Para 6. See also Author Unknown "Liquidators Escape £73m Clean-up Bill for Scottish Coal" (17-07-2013) *BBC News* <http://www.bbc.com/news/uk-scotland-23348222> (accessed 14-01-2020).
[203] CSOH para 6.

restore the land.[204] However, if the liquidators were simply allowed to relinquish ownership of the sites, the costs of restoring the land would fall to local authorities and relevant statutory bodies, and thus ultimately, the taxpayer.[205]

The liquidators also sought to abandon statutory licenses and thus the compliance with the conditions attached thereto.[206] While the Outer House found that it was possible to abandon such licenses,[207] the Inner House on appeal found that it was not.[208] Due to space constraints and relevance, this reasoning will be not discussed.

Much of the two judgments delve into questions around Scottish and English insolvency law and are thus not relevant for the purposes of this thesis. The two relevant questions that the liquidators put to the court were (1) whether it was possible to abandon the sites (with the consequence that they would become *bona vacantia*) and (2) what procedure was to be followed in effecting such an abandonment.[209] As the Inner House answered the first question in the negative, it is unnecessary to provide an answer to the second question.

4.2.2.2 The judgment of the Outer House of the Court of Session

The court acknowledged that there was no statutory provision which expressly empowered a liquidator of a company registered in Scotland to disclaim onerous property.[210] In the absence of case law or academic commentary, it was a case without precedent or authority in Scots law.[211]

The court noted that, in Roman-Dutch law, it was apparently possible to abandon land, except where the intention was to escape liabilities attaching to the property.[212] The court also pointed to the example of section 928 of the German BGB,[213] which provides

[204] CSOH paras 6-8.
[205] CSOH para 10.
[206] CSOH paras 5-9.
[207] CSOH para 26.
[208] CSIH paras 101-103.
[209] CSOH para 9.
[210] CSOH para 14. Whereas section 178 of the Insolvency Act 1986 empowers a liquidator to do so in respect of a company incorporated in England and Wales.
[211] CSOH para 14. See Combe & Rudd (2018) *Edinburgh Law Review* 301-302.
[212] CSOH para 22. See DL Carey Miller *The Acquisition and Protection of Ownership* (1986) 8 relying on Grotius 2.32.3, Van Leeuwen *Commentaries* 2 3 12 and Van der Keessel *Praelectiones Iuris Hodierni ad Hugonis Grotii* 2 32 2.
[213] *Bürgerliches Gesetzbuch*.

a procedure through which a landowner may abandon his property.[214] This, however, is a specific statutory mechanism. In the absence of any authority in Scots law, the court drew on the Roman-Dutch approach, which it saw as the closest analogy.[215] As this approach prohibits the abandonment of landownership for the purpose of avoiding obligations and liabilities, abandonment would have to be regulated by the courts, due to the absence of some other mechanism provided by law.[216]

The prevailing legislation at the time was the Land Registration (Scotland) Act 1979 (LRA 1979), as the LRA 2012 had yet to come into force.[217] Since section 3 of the LRA 1979, concerning the effect of registration, made no provision for the registration of abandonment, the respondents argued that it was not possible.[218] However, section 2(4) of that same Act states that any transaction capable under a rule of law which affects "the title to a registered interest in land" shall be registrable.[219]

Section 4(1) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (Abolition Act) states that ownership in land passes on registration in the land register. However, subsection 2 states that the "section is without prejudice to any…rule of law, by or under which ownership may pass". In the court's view, the effect of these legislative provisions was that the abandonment of landownership was possible, since other rules of law could still operate.[220]

The court also was of the view that ownerless land was a possibility. With the abolition of the feudal system, in which the Crown was the "ultimate superior", the Crown may waive its right to *bona vacantia*, thus creating ownerless land.[221] In the court's view, this is possible both in common law and according to statute.[222] The prerogative rights of the Crown were preserved by section 58 of the Abolition Act.[223] But the Crown is not

[214] CSOH para 22.
[215] CSOH para 22.
[216] CSOH para 22.
[217] The LRA 2012 only came into force on 8 December 2014. See Gretton & Steven *Property* para 7.14.
[218] CSOH para 22.
[219] That is, so long as it does not create or affect an "overriding interest". See the section 28 (interpretation section) of the LRA 1979 on "overriding interest".
[220] CSOH para 23.
[221] CSOH para 24. The court relies on ARG MacMillan *The Law of Bona Vacantia in Scotland* (1936) 10-12 in this regard.
[222] CSOH para 24. See for example section 1013(1) of the Companies Act 2006 which empowers the Crown to disclaim property in Scotland which it would acquire through the dissolution of a company.
[223] CSOH para 24.

compelled to retain ownership in land simply due to the prerogative through which it acquires it since it is able to waive such prerogative.[224] Thus ownerless land that is open to *occupatio* is a possibility in Scots law.[225]

To summarise the court's view, it is possible to abandon landownership, and if the Crown disclaims that land, it is rendered ownerless.[226] In the opinion of the court, the absence of a statutory mechanism for abandonment does not preclude it. It is possible to abandon corporeal movables, and as such, the abandonment of land should also be possible. However, the absence of a statutory mechanism does mean that such abandonments should be regulated by the courts.[227] The purpose of such regulation is to prevent would-be abandoners from avoiding liabilities attaching to land.[228]

Finally, the court had to consider the appropriate mechanism for the abandonment of landownership. The court's recommendations were qualified, as full argument had not been heard on the matter, with the suggested mechanism being based predominantly on the suggestions of the applicants.[229] The applicants suggested the completion of a notice by the liquidator, identifying the property in question, which would be sent to interested parties. These include various statutory bodies, the local authority and anyone benefitting from a servitude over the property.[230] The court endorsed these suggestions as reasonable while suggesting that there may be further interested parties who need to be informed.[231] It was also suggested that safety issues at the sites to be abandoned required advertisement in local newspapers.[232] Finally, notice should be sent to the Keeper, so that the title sheet in the land register can be amended to reflect the new factual situation.[233]

---

[224] CSOH para 24.
[225] CSOH para 25.
[226] CSOH para 26.
[227] CSOH para 26.
[228] CSOH para 26.
[229] CSOH para 70-73. The respondents had not provided argument on the question, as they had focused on whether abandonment was possible. The applicants formulated their suggestions using the analogous procedures for the abandonment of onerous property in England in terms of section 178 of the Insolvency Act 1986.
[230] CSOH para 71.
[231] CSOH paras 73-74.
[232] CSOH para 75.
[233] CSOH para 76.

4.2.2.3 The judgment of the Inner House of the Court of Session

The decision of the Outer House was subsequently appealed. The Inner House overturned the finding of the court *a quo*, ruling out the possibility of abandoning landownership.

The court noted that it is important to distinguish between abandoning property in the physical sense, i.e. to relinquish physical control, and abandoning ownership in the legal sense, i.e. divesting oneself of ownership.[234] Ownership, as a legal relationship between a person and a particular piece of property, must be regulated by law.[235] Consequently, the law must regulate the manner through which ownership may be terminated.[236]

Unlike the court *a quo*, which stated that since it is possible to abandon movables it should be possible to abandon land, the Inner House drew an important distinction between the two categories of property.[237] Ownership in movables may be abandoned through the relinquishment of physical control and the intention to divest oneself of ownership.[238] By contrast, landownership is manifested in the written record.[239] This "renders the fact of ownership public and, subject to the operation of law, permanent".[240]

Given that this permanency is subject to the operation of law, one must look to the law to establish the circumstances in which ownership may be terminated.[241] The law provides for a number of circumstances in which landownership may be brought to an end.[242] Examples include a forced sale in order to realise a real security right, expropriation or, the most common example, transfer to another person.[243] A bilateral transfer between parties is provided for by statute,[244] whereas the law simply does not

[234] CSIH para 98.
[235] CSIH para 98.
[236] CSIH para 98.
[237] CSIH para 100.
[238] CSIH para 100.
[239] CSIH para 100.
[240] CSIH para 100.
[241] CSIH paras 100-101.
[242] CSIH para 101.
[243] CSIH para 101.
[244] The legislation at the time was section 4(1) of the Abolition Act, prior to repeal by the Land Registration etc. (Scotland) Act 2012, which contains detailed provisions on registration of land and its effect in Parts 2 and 3.

provide a procedure for the "transfer of land into oblivion".[245] In the absence of such a mechanism, it is simply not possible to abandon a real right of ownership.[246]

On the point of whether ownerless land can exist, the Inner House agreed that it is possible. However, the Inner House took a different view of what constitutes ownerless land than the court *a quo*. It pointed out that land could be rendered ownerless where the previous owner of the land ceased to exist.[247] But it is through being rendered ownerless that land becomes *bona vacantia*.[248] In the court's view, it would be incorrect to describe the Crown's prerogative to property that has become *bona vacantia* as creating a "real right of ownership…in the private law sense".[249] Rather, the right has its origins in public law.[250] The Crown may take possession of ownerless property and administer it in line with the community's interests.[251] While a real right in ownerless movables may be acquired from the Crown taking possession,[252] the prerogative does not necessarily involve the Crown acquiring title to the ownerless land.[253] Instead, it is empowered to administer the land.[254] The Crown may exercise this entitlement, but is not obliged to do so, and can waive the right both in terms of common law and statute.[255] In the event of non-exercise or waiver of the right, it may be acquired by following the requirements for prescription in Scots law.[256] The latter point precludes the possibility of acquiring such land through *occupatio*, as the court *a quo* had suggested.

4.2.2.4 Co-ownership

It was established in Chapter 3 that, in South African law, undivided co-ownership shares in land cannot be abandoned, based on an interpretation of the relevant law.[257] In this chapter, it has been noted, however, that undivided co-ownership shares can

[245] CSIH para 103.
[246] CSIH para 103.
[247] CSIH para 104.
[248] CSIH para 108.
[249] CSIH para 108.
[250] CSIH para 108.
[251] CSIH para 108.
[252] CSIH para 108
[253] CSIH para 108.
[254] CSIH para 108.
[255] CSIH para 108. See section 1013 of the Companies Act 2006.
[256] CSIH para 109. See section 1 of Prescription and Limitation (Scotland) Act 1973.
[257] See Chapter 3 Section 3.

be renounced in Swiss law (effectively abandoned, though not regarded as *Dereliktion*).[258] It is thus necessary to touch on co-ownership shares in the context of Scots law.

As in South African law,[259] a distinction is drawn between the undivided shares of the co-owners and the co-owned property.[260] A co-owner is free to alienate or encumber her undivided share as she sees fit, without the consent of her fellow co-owners.[261] Nobody is bound to remain in a co-ownership relationship and a co-owner can demand an end to the co-ownership relationship.[262] Bar a few exceptions, a court is unable to refuse such a demand.[263]

Does this entail an entitlement to abandon that undivided share in respect of land? The academic texts appear silent on this point. Section 7(1)(b) of the LRA 2012 requires, in the case of co-ownership, that not only the names of the co-owners are reflected on the title sheet, but also their respective shares. Given that co-ownership in land is also manifested in the written record, it seems reasonable to deduce that the Inner House's remarks on ownership in land also apply to undivided co-ownership shares in land. That is, such rights are "public and, subject to the operation of law, permanent".[264] In the absence of a mechanism providing for the abandonment of such shares, it is not possible to do so.

4.3 Contrast and analysis

Analysis is warranted both from legal and policy-based standpoints. From a legal standpoint, analysis will focus on how the Inner House's judgment can provide support for the interpretation of the relevant South African law in Chapter 3. Policy analysis will

[258] Rey & Strebel "Art. 666" in *Basler Kommentar* 1135-1136; Schmid & Hürlimann-Kaup *Sachenrecht* para 869; Tuor et al *Das Schweizerische Zivilgesetzbuch* § 100 para 34; Hitz "Art. 666" in *Handkommentar* 167-168; Rey *Sachenrecht* para 1680; BGE 129 III 216 220.
[259] Van der Merwe *Sakereg* 384-386; Muller et al *Silberberg* 151; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 558; Van der Merwe "Things" in *LAWSA* para 269.
[260] Eassie et al *Gloag and Henderson* para 30.08; Gretton & Steven *Property* paras 10.01, 10.10; Reid *The Law of Property* para 28.
[261] Eassie et al *Gloag and Henderson* para 30.08; Gretton & Steven *Property* para 10.10; Reid *The Law of Property* para 28.
[262] Gretton & Steven *Property* paras 110.10-10.15; Reid *The Law of Property* paras 32-33.
[263] Gretton & Steven *Property* para 10.14; Reid *The Law of Property* para 32.
[264] CSIH para 100.

focus on the similar reasons that exist in South African and Scots law for not permitting the unrestricted abandonment of landownership.

4.3.1 Legal analysis

As established in the judgment of the Inner House, the prevailing legal rules in Scotland render the abandonment of landownership impossible. As ownership is a legal relationship, the circumstances in which it is terminated must be regulated by the law.[265] Land may be rendered ownerless, in the sense that it is *bona vacantia*, where, for example, the owner ceases to exist or dies without heirs.[266] However, in the absence of a specific mechanism through which landownership can be abandoned, it is not possible.[267]

The decision of the Inner House provides an important comparative source in answering the question as to whether the abandonment of land is possible in the South African context. As explained in Chapter 3, in line with Mostert's argument,[268] it is not possible to abandon landownership in the absence of a specific mechanism for such in the relevant legislation.[269] The views of the Inner House appear to support such a proposition in the context of a modern system of land registration. The same requirements for the abandonment of corporeal movables are simply not appropriate in the context of land.[270] In a property law system where registration is a central feature of landownership, ownership is manifested in the written record thus making "the fact of ownership public and, subject to the operation of law, permanent".[271]

While the court did not explicitly mention the principle of publicity, its reasoning for denying a right to abandon land in the absence of a specific mechanism is in line with the principle. The relinquishment of possession – applicable in the case of movable property – is simply not sufficient to terminate the ownership relationship in respect of land, regardless of intention. In the absence of such a mechanism, landownership –

---

[265] CSIH para 98.
[266] CSIH paras 104, 108.
[267] CSIH para 103. See also Eassie et al *Gloag and Henderson* para 33.03n30.
[268] Mostert "No Right" in *Property Law Under Scrutiny* 26-28.
[269] See the conclusions reached in Chapter 3 Section 4.
[270] CSIH para 100.
[271] CSIH para 100.

embodied as it is in the written record – is ultimately permanent, as there is no external act that gives proper effect to the principle of publicity.[272]

Despite South African law observing a negative system of land registration, in contrast to the positive system in Scots law,[273] these observations are equally relevant. Regardless, rights in land may be acquired (and thus lost) through original modes of acquisition in both positive and negative systems of registration, in the absence of actions in the land register.[274] It would seem, however, that ownership cannot be unilaterally terminated without some form of specific mechanism, regardless of whether one is concerned with a negative or positive system of registration.

4.3.2 Policy analysis

The impossibility of abandoning landownership in Scots law also warrants consideration in light of the social-obligation norm. As Alexander's sliding scale of obligation[275] could assist in explaining the differences between the Swiss and South African legal positions, it can also help explain the similarities between South African and Scots law. However, the social-obligation norm finds interesting expression in recent Scots legislation, particularly in the context of derelict and (informally) abandoned land.

The problems that plague landownership in South Africa do not exist on any comparable scale in the Scottish context. However, the mining context of the *Scottish Environmental Protection Agency* case provides strong policy reasons for not allowing a landowner simply to abandon ownership.[276] This contention is true even though the licenses (that the liquidators of the Scottish Coal Company also sought to abandon)

---

[272] CSIH para 100.
[273] Reid & Van der Merwe "Property Law" in *Mixed Legal Systems* 642; Gretton & Steven *Property* 7.68-7.76.
[274] The only reason that ownership in land cannot be acquired through acquisitive prescription in the absence of actions in the land register in Scotland is due to the peculiarities of that jurisdiction's law regard prescription. But other real rights in land such as servitudes can be acquired. See Section 4.1 above. However, Swiss law provides an example of a positive system of registration, and it permits ownership and other rights in land to be acquired and lost without actions in the land register in certain circumstances, including through original modes of acquisition such as prescription. See notes 35 (Switzerland), 177-180 (Scotland) above.
[275] Alexander *Global Debate* 138.
[276] Combe and Rudd note that plots of land with a negative value such as in the *Scottish Coal Company* case would have been largely "historically anomalous". Thus, positive prescription was far more likely to occur, precluding the possibility of engaging with the question of "outright abandonment". See Combe & Rudd (2018) *Edinburgh Law Review* 305.

were the primary source of the obligations that would incur the significant monthly expenditure in maintaining the land. These sites pose significant dangers to the environment and to the health and safety of surrounding communities.[277] In this context, owners cannot simply walk away from their obligations. The social-obligation norm requires them to retain ownership, with the consequence that they incur significant expense in maintaining the land.

Outside of the mining context, the impossibility of abandoning landownership in Scotland may appear less justifiable. However, it does not appear that there are any calls for a change in the law to permit the free abandonment of landownership. Rather, there have been recent legislative shifts towards empowering communities to acquire derelict or (informally) abandoned land in their area. To this end, the Community Empowerment (Scotland) Act 2015 (CEA) was enacted.[278] Before this Act, rural community bodies enjoyed a right of pre-emption stemming from the Land Reform (Scotland) Act 2003 (LRA 2003).[279] Such a right of pre-emption depended on whether the owner was willing to sell in the first place.[280] However, the CEA amended the LRA 2003 to extend the right to buy to the whole of Scotland.[281] As such, the right now applies to urban areas as well.[282] In addition to extending this right to urban areas, community bodies may now compel the purchase of certain categories of land and buildings which are abandoned, neglected or otherwise having a detrimental impact on "the environmental wellbeing of a relevant community".[283] The exercise of the right

---

[277] Author Unknown "Revealed: 'National Crisis' Opencast Mine Warning" (13-07-2014) *The Herald* <http://www.heraldscotland.com/news/13169742.Revealed___national_crisis__opencast_mine_warning/> (accessed 15-01-2020); A Leach "Ticking Time Bonds: Scottish Open Cast Coal Leaves Legacy of Dereliction" (25-02-2014) *Mining Technology* <http://www.mining-technology.com/features/featureticking-time-bonds-scottish-open-cast-coal-leaves-legacy-of-dereliction--4184435/> (accessed 15-01-2020).

[278] See Gretton & Steven *Property* para 15.21-15.23: D Adams "Tackling Hardcore Vacancy through Compulsory Sale Orders" in J Henneberry (ed) *Transience and Permanence in Urban Development* (2017) 215 226-227.

[279] Gretton & Steven *Property* para 15.20.

[280] Gretton & Steven *Property* para 15.20.

[281] Gretton & Steven *Property* para 15.22. See section 36 of the Community Empowerment (Scotland) Act 2015.

[282] M Combe "Digesting the Community Empowerment Act" (17-08-2015) *Law Society of Scotland* <https://www.lawscot.org.uk/members/journal/issues/vol-60-issue-08/digesting-the-community-empowerment-act/> (accessed 15-01-2020).

[283] Gretton & Steven *Property* para 15.22. See "Part 3A Community right to buy abandoned, neglected or detrimental land" of the Land Reform (Scotland) Act 2003 (LRA 2003), which was inserted by section 74 of the CEA.

depends on ministerial consent, however,[284] and the Ministers must be satisfied that such an acquisition is both in the public interest and "compatible with furthering the achievement of sustainable development".[285]

Effectively, the law in Scotland addresses the issue of the abandonment of landownership, in the mining context and outside it. Landownership may not be abandoned, forcing owners to comply with their obligations. However, where a local community wishes to acquire land, which is (informally) abandoned or derelict, they are empowered to do so, permitting them to put such land to more sustainable use.[286] The social-obligation norm is thus not only given effect through restraining owners from avoiding their obligations. It is also given effect to through allowing communities to acquire land, which is informally abandoned, even where the landowner may wish to retain such ownership.

4.4 In summary: Lessons from Scots law

In contrast to the permissive Swiss approach to the abandonment of landownership, Scotland provides an example of a jurisdiction in which landowners are not permitted to walk away from ownership as they please. The social-obligation norm operates not through an express prohibition, but through the withholding of an entitlement. This ultimately serves the interests of society at large, particularly in the mining context.

While the socio-economic contexts of Scotland and South Africa are significantly different, this does not necessarily mean that the law in the former grants landowners a right to divest themselves of ownership. In any event, there does not seem to be any particular demand for such an entitlement outside of the mining context. Instead, legislation has been enacted to permit community bodies to acquire ownership of land left (informally) abandoned or derelict by negligent owners, in the interests of sustainable development. Such acquisition can occur against the will of the owner.

---

[284] Gretton & Steven *Property* para 15.22. See sections 97G and 97H of the LRA 2003.
[285] Gretton & Steven *Property* para 15.22. See section 97H(1)(b) of the LRA 2003. The Ministers must also be convinced that the current owner would not further the goal of sustainable development. See section 97H(1)(c) of the LRA 2003.
[286] Gretton & Steven *Property* para 15.22.

Scots law provides important lessons about the nature of landownership, as well as the circumstances in which it may be terminated. As ownership is a legal relationship, the law must provide for its termination. In the absence of such provision it seems that it is not possible to do so. This again brings us back to the principle of publicity, a founding principle of all three jurisdictions surveyed in this thesis.

5. Abandonment of landownership: A contextual entitlement

Through comparative analysis, it becomes apparent that the entitlement to abandon land is not an inherent part of landownership. The entitlement only seems to be present where the societal cost of abandonment of landownership appears to be minimal and, even then, it is not completely unfettered. Neither South Africa nor Scotland, jurisdictions in which there is cause to restrain owners from walking away from their liabilities, permit the abandonment of landownership, even if no express prohibition exists. However, in Switzerland, there appears to be little reason to force landowners to retain title to land. Abandonment, or *Dereliktion*, ultimately does not appear to cause any societal harm. The above overview affirms Peñalver's assertion that the doctrine of abandonment reflects the "interplay between autonomy and obligation".[287]

The right to abandon is an entitlement that needs to be expressly bestowed on landowners through the provision of a mechanism that facilitates the striking of the owner's name from the entry in the land register. Even if abandonment is not explicitly prohibited, the publicity principle renders abandonment impossible in the absence of a mechanism provided by law.[288] This position is due to the permanent nature of landownership in a modern system of land registration, embodied as it is in the written record.[289] This is affirmed by the decision of the Inner House of the Court of Session in the *Scottish Environmental Protection Agency* case. As the court pointed out, ownership is a legal relationship, and thus the circumstances in which it is terminated need to be regulated by law.[290]

[287] Peñalver (2010) *Michigan Law Review* 193.
[288] Mostert "No Right" in *Property Law Under Scrutiny* 26-28; CSIH paras 100-103.
[289] Mostert "No Right" in *Property Law Under Scrutiny* 26-28; CSIH paras 100-103.
[290] CSIH paras 100-103.

At this point in the thesis, it has been established that (1) the abandonment of landownership is not possible in South African law and (2) the unrestricted abandonment of landownership should not be permitted. However, this does not mean that there should never be some form of exit for landowners in circumstances where their land carries a significant negative value. Often such landowners may not be responsible for the state of affairs. The circumstances and mechanisms for such an exit from landownership, in light of the social-obligation norm and the constitutional property clause, will be considered in the next two chapters.

Chapter 6: Motivating for Reform

1. Introduction

Abandonment of landownership is not possible in South African law in light of the principle of publicity.[1] The principle of publicity requires that the existence and content of real rights (as well as changes thereto) be determinable by third parties.[2] The importance of the principle of publicity in respect of achieving the abandonment of landownership is clearly recognised in foreign jurisdictions, as discussed in Chapter 5.

In Switzerland, the law permits one to abandon landownership (*Dereliktion*) through the submission of a waiver to the relevant land registry.[3] The owner's intention – when expressed through means other than a waiver or prolonged absences from the land in question – is simply not relevant.[4] The submission of the waiver by the registered owner is the only means through which land can be abandoned.[5]

Scots law, by contrast, has no equivalent mechanism to Swiss law, with the consequence that the Inner House of the Court of Session has found abandonment of landownership to be impossible.[6] As the Inner House stated, landownership is manifested in the written record.[7] This "renders the fact of ownership public and,

[1] See Chapter 3 Section 4.
[2] G Muller, R Brits, JM Pienaar & Z Boggenpoel *Silberberg and Schoeman's The Law of Property* 6 ed (2019) 93-95; CG van der Merwe *Sakereg* 2 ed (1989) 12-15.
[3] See Art. 964 Abs. 1; Art. 46 and 48 GBV. See also J Schmid & B Hürlimann-Kaup *Sachenrecht* 5 ed (2017) para 868; H Rey & L Strebel "Art. 666" in H Honsell, N Peter Vogt & T Geiser (eds) *Baslet Kommentar Zivilgesetzbuch II* 5 ed (2015) 1134 1134-1135; H Rey *Die Grundlagen des Sachenrechts und das Eigentum* 3 ed (2007) para 1676; P Tuor, B Schnyder, J Schmid & A Jungo *Das Schweizerische Zivilgesetzbuch* 14 ed (2015) § 100 para 33; F Hitz "Art. 666" in M Amstutz, P Breitschmind, A Furrer, D Girsberger, C Huguenin, A Jungo, M Müller-Chen, R Vito, A Schnyder & C H Trüeb (eds) *Handkommentar zum Schweizer Privatrecht* 3 ed (2016) 166 166-167; P Simonius & T Sutter *Schweizerisches Immobiliarsachenrecht* (1995) para 127.
[4] Rey & Strebel "Art. 666" in *Basler Kommentar* 1134; Rey *Sachenrechts* paras 1675-1676.
[5] See Art. 658 Abs. 1; Rey & Strebel "Art. 666" in *Basler Kommentar* 1134; Rey *Sachenrecht* para 1678; Simonius and Sutter *Schweizerisches Immobiliarsachenrecht* para 128.
[6] *The Scottish Environmental Protection Agency v In the Note for Directions by the Joint Liquidators of the Scottish Coal Company Limited in the Petition of the Directors of the Scottish Coal Company* [2013] CSIH 108 para 103.
[7] Para 100.

subject to the operation of law, permanent".[8] Being a legal relationship, the law must provide for the circumstances in which ownership is extinguished.[9]

With the above established, it is now necessary to evaluate whether the South African law should provide for abandonment of landownership, and if so, under what circumstances. Even if an unrestricted right to abandon is not feasible, there may be circumstances in which, due to the burden on an individual landowner, some form of regulated exit from ownership is justifiable. This Chapter evaluates three areas in which some reform is required in this respect. The first is the mining context, with a focus on owners on whose land mining operations are being conducted (Section 3.1 below). The second is the heritage-building context, in which a landowner finds a protected building prohibitively expensive to maintain as well as not being able to put it to any form of profitable use (Section 3.2 below). The final scenario is that of individual landowners being unable to make use of their properties due to conditions giving rise to either urban decay or unlawful occupation (Section 3.3 below).

This Chapter is structured along the following lines. First, this Chapter sets out the necessity for reform (section 2.1) as well as the parameters within which reform should take place (section 2.2). Secondly, the contexts in which abandonment or some form of regulated exit may be justified are explored, with attention being drawn to the shortfalls of existing remedies for landowners (section 3).

2. The case and parameters for reform

It is not possible to abandon landownership in South African law. The absence of a mechanism in the Deeds Registries Act or other legislation means there is no way one can strike one's name from the title deed of a piece of land.[10] Ownership, being a legal relationship, requires that the law provide a mechanism through which it can be

[8] Para 100.
[9] Para 98.
[10] H Mostert "No Right to Neglect? Exploratory Observations on How Policy Choices Challenges the Basic Principles of Property" in S Scott & J van Wyk (eds) *Property Law Under Scrutiny* (2015) 27. See also R Cramer "The Abandonment of Landownership in South African and Swiss Law" (2017) 4 *SALJ* 870 870-887. Note on the aforementioned publication by the author: My Memorandum of Understanding with my supervisor, as well as obligations attaching to funding I received through the Swiss-South African Joint Research Programme to facilitate my comparative study, required me to publish from my doctoral research. The article referenced here is the result of the obligation to publish from my doctoral research.

terminated.[11] In the absence of such a mechanism, no effect is given to the principle of publicity,[12] which is essential for advertising the existence of real rights to third parties.[13]

2.1 The necessity for reform

The law should provide a mechanism through which ownership in land can be abandoned (meaning it will be *bona vacantia*[14]), which would give effect to the principle of publicity,[15] provided that certain conditions prevail. However, such a mechanism cannot operate as an unrestricted right to abandon.

In the event of abandonment of landownership, the obligation to maintain the abandoned land would most likely fall on local government.[16] The Constitution states that the objects of local government include promoting a safe and healthy environment.[17] Local government already regulates buildings, including problem buildings through by-laws.[18] By-laws provide for the municipality[19] to pursue owners (or those in charge of a building) through civil litigation and criminal prosecution.[20] If landowners were able to wash their hands off problem properties, passing them onto

---

[11] See the comments of the court in the *The Scottish Environment Protection Agency v The Joint Liquidators of the Scottish Coal Company Limited* [2013] CSIH 108 paras 101-103. See also JWS Heyl *Grondregistrasie in Suid-Afrika* (1977) 142.
[12] Mostert "No Right" in *Property Law Under Scrutiny* 27. See also Cramer (2017) *SALJ* 870-887.
[13] Muller et al *Silberberg* 93-95; Van der Merwe *Sakereg* 12-15.
[14] See Chapter 2 Section 4.2.1. See also CG van der Merwe & A Pope "Part III – Property" in F du Bois (ed) *Wille's Principles of South African Law* (2007) 405 492; Van der Merwe *Sakereg* 227; CG van der Merwe "Minister van Landbou v Sonnendecker 1979 2 SA 944 (A)" (1980) *TSAR* 183 187-188; DL Carey Miller *The Acquisition and Protection of Ownership* (1986) 8-9.
[15] See Chapter 3 Section 2.2. See also Mostert "No Right" in *Property Law Under Scrutiny* 27. See also Muller et al *Silberberg* 93-95; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 410-411; Van der Merwe *Sakereg* 13-15; CG van der Merwe "Things" in WA Joubert (founding ed) *LAWSA 27* 2 ed (2014) para 10; H Mostert & L Verstappen "Practical Approaches to the Numerus Clausus of Land Rights: How Legal Professionals in South Africa and the Netherlands Deal with Certainty and Flexibility in Property Law" in W Barr (ed) *Modern Studies in Property Law Volume 8* (2015) 351 365.
[16] Part B of Schedule 4 of the Constitution of the Republic of South Africa, 1996, provides that building regulations are a local government matter subject to section 155(6) (a) and (7). See discussion of problem building by-laws in section 3.3 below.
[17] Section 152(1)(d).
[18] See City of Johannesburg By-Law on Problem Properties, 2014; City of Cape Town Problem Building By-Law, 2010; eThekwini Problem Building By-Law, 2015.
[19] A municipality is defined in section 2(a) of the Local Government: Municipal Systems Act 32 of 2000 as "an organ of state within the local sphere of government exercising legislative and executive authority within an area determined in terms of the Local Government: Municipal Demarcation Act [27 of 1998]".
[20] See, for example, section 10 of the City of Cape Town Problem Building By-Law, 2010; sections 11 and 12 City of Johannesburg By-Law of Problem Properties, 2014; sections 19, 20. 21 and 22 of the eThekwini Problem Building By-Law, 2015.

the State, municipalities would be obliged to maintain such properties. Municipalities would also not be able to recover expenses, assuming the resources even exist to fund such maintenance.

Maintaining buildings forsaken by their owners potentially conflicts with the socio-economic obligations placed by the Constitution on local government, by creating additional burdens on already constrained budgets. The Constitution requires that municipalities "structure and manage [their] administration and budgeting and planning processes to give priority to the basic needs of the community".[21] Additionally, municipalities must further socio-economic development of their communities.[22] These duties tie in with the various socio-economic rights in the Bill of Rights that the State is obliged to realise progressively, within available resources, through both legislation and other measures.[23] Evidently, private owners passing their obligations to local government may redirect resources from achieving important socio-economic goals.

In view of the severe budgetary constraints already existing at local-government level,[24] an unrestricted right to abandon land does not appear viable. These budgetary constraints at local government level were exacerbated in the 2018 Budget, in which the local government budget was cut by R3.2 billion.[25] Rather, attention must be paid

---

[21] Section 153(a).
[22] Section 153(a).
[23] See sections 26(2), 27(2) and 29(1)(b).
[24] X Potelwa "Budget Squeeze Pushing South African Cities Back to Bond Market" (18-02-2016) *Bloomberg* <https://www.bloomberg.com/news/articles/2016-02-18/budget-squeeze-pushing-south-african-cities-back-to-bond-market> (accessed 10-04-2018); K Magubane "Gauteng Metros Struggle to Deliver Services on Tight Budgets" (03-08-2017) *Business Day* <https://www.businesslive.co.za/bd/national/2017-08-03-gauteng-metros-struggle-to-deliver-services-on-tight-budgets/> (accessed 13/09/2018); C Mailovich "Struggling Metros Need a Bailout" *Business Day* (17-04-2019) 3; L Ensor "Local Government Underfunded, Says Advisory Body" *Business Day* (02-07-2019) 2; L Donnelly "Western Cape Fights 'Unrealistic' Budget Cuts" *Business Day* (01-11-2019) 3.
[25] National Treasury *Budget Review 2018* 70. Available at http://www.treasury.gov.za/documents/National%20Budget/2018/review/FullBR.pdf (accessed 13/09/2018). Local government is seen as one of the big losers in the financing of fee-free higher education and National Health Insurance. See K Magubane "Provincial and Local Government Allocations Fall in Gigaba's Budget" (22-02-2018) *Business Day* <https://www.businesslive.co.za/bd/economy/2018-02-22-provincial-and-local-government-allocations-fall-in--gigabas-budget/> (accessed 10-04-2018); K Heese & K Allan "Budget Adds to Problems in Delivery to the Poor" (01-03-2018) *Business Day* <https://www.businesslive.co.za/bd/opinion/2018-03-01-budget-adds-to-problems-in-delivery-to-the-poor/> (10-04-2018). See also the 2019 Budget in which only 9.1 per cent was allocated to local government. National Treasury *Budget Review 2019* 65. Available at <http://www.treasury.gov.za/documents/national%20budget/2019/review/FullBR.pdf> (accessed 19-02-2020). In the 2019 Budget, municipalities were urged to "ease their dependence on the national fiscus for infrastructure funding and instead attract private investment and take advantage

to the particular contexts in which abandonment or a form of regulated exit from ownership would be justified.

While the prevailing legal position is undesirable and often unfair to many owners, an unrestricted right to abandon is a poor remedy to the problems that plague landownership in South Africa.[26] If an unrestricted right to abandon were introduced in the current context, it would pose a threat to the already fragile public order.[27] As Mostert explains, unrestricted abandonment would "annihilate both municipalities' expectations of responsible behaviour by landowners, and landowners' expectations of sound processes and support from government".[28] Social chaos could result from the breakdown of the relationship between landowners and municipalities.[29] Urban decay would most likely accelerate, while greater strain is put on the State's resources to meet its social-economic obligations.[30]

Ideally, the law should make it clear that the unrestricted abandonment of landownership is not possible in South African law. It is important that such a legal position be precisely stated rather than inferred. Nevertheless, a form of abandonment of landownership should be provided to landowners in circumstances in which the burden stemming from the negative value of the land is deemed excessive. It is submitted that reform should take the shape of a piece of legislation with the express purpose of regulating abandonment, or perhaps more correctly, regulated exit from landownership. The manner in which this piece of legislation will operate is explored in

---

of incentives that reward good governance". See Author Unknown "Municipalities Must Diversity Funding Sources" *Witness* (21-02-2019) 6.

[26] See discussion of mining land, heritage-buildings, and problem-buildings/unlawful occupation in Section 3 below.

[27] Mostert "No Right" in *Property Law Under Scrutiny* 27.

[28] Mostert "No Right" in *Property Law Under Scrutiny* 27.

[29] Mostert "No Right" in *Property Law Under Scrutiny* 27.

[30] The mass departure of big business and capital from Johannesburg's inner city for locations such as Sandton from the 1987s onwards already accelerated urban decay in the area. See M Murray *Taming the Disorderly City: The Spatial Landscape of Johannesburg After Apartheid* (2008) 66ff. The existing strain on government's resources can be seen in the growth of service delivery protests which have become a common occurrence in South Africa. See R Davis "Why Counting Service Delivery Protests is More Complicated than it Seems" (13-07-2018) <https://www.dailymaverick.co.za/article/2018-07-13-why-counting-service-delivery-protests-is-more-complicated-than-it-seems/> (accessed 24-01-2019); S Reddy "The Politics of Service Delivery in South Africa: The Local Government Sphere in Context" (2016) 12 *The Journal for Transdisciplinary Research in Southern Africa* <https://td-sa.net/index.php/td/article/view/337/351#CIT0011_337> (accessed 24-01-2019); O Dassah "A Critical Analysis of Factors Underlying Service Delivery Protests in South Africa" (2012) 1 *Journal of African & Asian Local Government Studies* 1.

Chapter 7. The parameters for the proposed reform will be explored in the following section.

2.2 Parameters for reform

Chapter 4 sets out the social-obligation norm, conceptualised by Alexander.[31] The theory underlies the interpretation in this thesis of existing law, as well as forms the basis for suggestions for law reform. Alexander's formulation of the social-obligation norm places particular emphasis on human flourishing.[32] Human flourishing requires that the law allow "individuals to live lives worthy of human dignity".[33] One of the consequences of this theory is that the law of property entails obligations, which oblige owners to support those social matrices and institutions that have facilitated their own flourishing.[34] These obligations are necessary to provide others with the means to flourish as well.[35]

The social-obligation norm finds expression in the property clause of the Constitution.[36] As noted, the objectives of the property clause extend beyond simply restitution and redistribution.[37] Van der Walt explains that the "allocation, recognition and protection of individual property rights may not result in an environment that endangers the health or well-being of the citizenry".[38] One consequence of the social-obligation norm being embedded in the property clause is that unreciprocated sacrifices on the part of owners are anticipated.[39] However, it is still necessary to take account of the extent of the burden placed on an individual owner, and whether some form of compensation or equalisation should be available to alleviate the burden. In this respect, the sliding-

---

[31] G Alexander "The Social-Obligation Norm in American Property Law" (2009) 94 *Cornell Law Review* 745; G Alexander *Property and Human Flourishing* (2018); G Alexander & E Peñalver *An Introduction to Property Theory* (2012) Chapter 5; G Alexander & E Peñalver "Properties of Community" (2009) 10 *Theoretical Inquiries in Law* 127.
[32] Alexander (2009) *Cornell* 760ff; Alexander *Property and Human Flourishing*; Alexander & Peñalver *Property Theory* Chapter 5; Alexander & Peñalver (2009) *Theoretical* 134ff.
[33] Alexander (2009) *Cornell* 748. See also Alexander *Property and Human Flourishing* 5; Alexander & Peñalver *Property Theory* 89.
[34] Alexander (2009) *Cornell* 745; Alexander *Property and Human Flourishing* xv; Alexander & Peñalver *Property Theory* 95.
[35] Alexander (2009) *Cornell* 745; Alexander *Property and Human Flourishing* xv; Alexander & Peñalver *Property Theory* 95.
[36] Section 25 of the Constitution, 1996.
[37] AJ van der Walt *Property and Constitution* (2012) 139-140.
[38] Van der Walt *Property and Constitution* 140.
[39] Alexander (2009) *Cornell* 771-772.

scale approach to social obligation was identified,[40] which appears compatible with constitutional jurisprudence on deprivations.[41] This approach distinguishes between different forms of property[42] in establishing the level of social obligation that should be placed upon the particular owner.[43]

It is in view of the social-obligation norm and the sliding-scale approach to social obligation that a number of factors that constitute guidelines are suggested in Chapter 4. The law concerning the abandonment of landownership is to be evaluated in light of these factors. The guidelines are as follows. First, the extent of the burden placed on the individual landowner must be considered. Second, it must be asked whether a third party derives a benefit from the burden to which the landowner is subjected. Third, one must ask whether there are existing compensatory mechanisms on which the landowner may rely, and to what extent these mechanisms are adequate given the burden. Finally, and most critically, the potential societal cost of abandonment (or exit) in the relevant circumstances needs to be evaluated.[44] In this context, the burden refers to the ownership of land that has accrued a negative value to the owner[45] – such as in the scenarios explored below.

With the parameters for reform established through these guiding factors, it is necessary to identify contexts in which abandonment or regulated exit from landownership may be justified. Following the examination of these contexts and the relevant legal frameworks that accompany them, this chapter will proceed to suggest what legislation governing the law of abandonment should resemble.

3. The case for reform in three contexts

An unrestricted right to abandon is not feasible in the South African context. Nevertheless, abandonment or a regulated exit from ownership is justified in certain

---

[40] G Alexander *The Global Debate Over Constitutional Property* (2006) 138.
[41] Chapter 4 Section 5.3.
[42] Alexander points out that "[g]reater legislative power is recognised over socially important assets like corporate stock than over small garden plots used for leisure". Alexander *Global Debate* 138. Similarly, in the South African context, more significant obligations may attach to a property purchased for development purposes by a juristic person than a modest house owned and resided in by a private person. See discussion in Section 3.2 below.
[43] Alexander *Global Debate* 138.
[44] See Cramer (2017) *SALJ* 905.
[45] Regarding the nature of negative value property, see note 8 in Chapter 1 above. In particular, see N Shoked "The Duty to Maintain" (2014) 64 *Duke Law Journal* 437.

circumstances. The burden on a particular owner may be excessive and ultimately unfair considering the guidelines provided in section 2.2. Three contexts in which abandonment or regulated exit may be justifiable are (1) mining, (2) heritage buildings and (3) problem buildings marking urban decay. The motivation for the choice of these three contexts is that they provide examples of scenarios in which land can potentially accrue a negative value for the owner.

3.1 The mining context

The mining context may give rise to circumstances in which a landowner finds out that her land has accrued a negative value or is effectively sterilised for her intended purposes. The legal framework creates a situation in which a landowner not only exercises little to no agency in respect of whether mining or related activities occur on her land.[46] She is also not provided with any real guarantee of having the land restored to her in a rehabilitated state, or at least to the extent rehabilitation is possible.[47]

A key feature of contemporary South African mineral law, following the enactment of the Mineral and Petroleum Resources Development Act,[48] is that the State is the custodian of the nation's mineral and petroleum resources.[49] These resources must be

[46] E van der Schyff *Property in Minerals and Petroleum* (2016) 581ff.
[47] See Section 3.1.2 below.
[48] Act 28 of 2002.
[49] Section 3(1). A consequence of this legislative intervention is that rights in minerals exist apart from landownership, unlike in the previous dispensation in which severance of mineral rights from ownership of the land was necessary. Under the previous dispensation, minerals embedded in the land were the property of the landowner. The landowner could impart the entitlements to prospect and mine to third parties, where she lacked the inability or inclination to mine herself. The landowner's rights stemmed from the Roman-Dutch law maxim of *cuius est solum eius est usque ad coelum et ad inferos*, which meant that the owner was entitled to everything above and underneath her land. Mineral rights could be severed from the land under which minerals were found through various means. These include (1) the owner reserving mineral rights against the title deed, (2) the transferring of the land to a new owner, and (3) registering a notarial deed of cession, which would transfer the mineral rights to a third party while remaining owner of the land itself. The practice of severance was confirmed by case law in the late nineteenth century, as well as entrenched in legislation. See H Mostert *Mineral Law: Principles and Policies in Perspective* (2012) 7-8, 10-11; Van der Schyff *Property* 19-20, 46-48; H Mostert & M van den Berg "Roman-Dutch Law, Custodianship, and the African Subsurface: The South African and Namibian Experiences" in DN Zillman, A McHarg, A Bradbrook & L Barrera-Hernandez (eds) *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (2014) 75 79; Van der Merwe *Sakereg* 551; M van den Berg "Ownership of Minerals Under the New Legislative Framework for Mineral Resources" (2009) 20 *Stell LR* 139 141-143.
Despite the common-law position outlined above, the State has always exercised a great deal of control and intervened in respect of the rights of both landowner and mineral right holder (Mostert & Van der Berg "Roman-Dutch Law" in *The Law of Energy Underground* 76-80. For detailed overviews, see Mostert *Mineral Law* Chapters 3-5 and Van der Schyff *Property* 97ff. See also Van den Berg (2009) *Stell LR* 141-143). However, it is beyond the scope of this thesis to engage further with this subject.

utilised for the benefit of all South Africans.[50] In its role as custodian, the State is empowered to grant – through the Minister of Mineral Resources – rights in terms of the MPRDA's provisions.[51] Thus, in effect, third parties may be granted rights to mine and prospect over another's land, without the latter exercising any agency in this regard.

3.1.1 The shortfalls of existing protections for landowners under the MPRDA

While the landowner does not exercise any agency in respect of whether mining or prospecting takes place on her land, the MPRDA does require that she be notified and consulted, as well as providing for compensation (although such compensation is not automatic or compulsory[52]). In addition, the common law may provide some protection for the landowner, to the extent that it is not inconsistent with the MPRDA.[53] In deciding whether the mining context provides an example of a situation in which abandonment or regulated exit from landownership is permitted, it is necessary to evaluate these existing protections. This evaluation will determine the extent to which these existing protections are adequate in equalising the burden placed on the landowner through the conducting of mining operations on her land.

Before mining or prospecting may commence, the landowner must be notified and possibly compensated.[54] However, as noted, compensation under the MPRDA is not

---

[50] Section 3(1).
[51] Section 3(2)(a).
[52] *Meepo v Kotze* 2008 (1) SA 104 (NC) para 8; PJ Badenhorst "Conflict Resolution Between Owners of Land and Holders of Rights to Minerals: A *Lopsided* Triangle?" (2011) *TSAR* 326 334-335; Van der Schyff *Property* 589-592.
[53] Van der Schyff *Property* 594-597; Badenhorst (2011) *TSAR* 333-334.
[54] In terms of section 5A(c), a landowner must be given at least 21 days written notice before prospecting or mining may begin. Section 16(4)(b) states that once an application for a prospecting right has been accepted by the relevant regional manager, the applicant must consult with the landowner in the prescribed manner. The result of the consultation with the landowner must be included in the environmental reports (mandated by Chapter 5 of the National Environmental Management Act 107 of 1998 (NEMA). Sections 22(4)(b) and 27(5)(a) require the same consultation and reporting procedure in respect of applications for mining rights and mining permits respectively.
The court in *Meepo v Kotze* 2008 (1) SA 104 (NC) has stated that the consultation provisions in the MPRDA should be widely construed, being the only mechanism "whereby a land owner is to be appraised of the impact prospecting [or mining] activities may have on his land and, for instance, his farming activities" (para 13). See Badenhorst (2011) *TSAR* 328. Section 50 provides that the Minister may instigate an investigation into the presence of minerals on land, and the nature and extent of those minerals (subsection 1). The owner in such circumstances must be notified of the intention to enter her land and conduct the investigation (subsection 4), and must be entitled to compensation for loss or damage (subsection 2). See also *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) para 63-67 on the requirement of consultation. The Constitutional Court stated that while agreement between landowner and right holder is not imposed by the Act, good faith consultation

automatic nor compulsory.[55] A key aspect of the prevailing legal regime under the MPRDA is what Badenhorst has referred to as a "lopsided triangle".[56] The State grants rights to prospect and mine,[57] a process over which the landowner is unable to exercise any control.[58] As Van der Schyff points out, landowners only derive a benefit from mineral exploitation in their capacity as members of the public, despite bearing the burden of mining as landowners.[59] That is, unless the landowner is also the right holder. In addition to lacking agency in the granting of rights and not accruing any direct benefit, the landowner will also find that her rights and interests are trumped by the right holder's.[60] This is subject to the requirement that the right holder exercise her entitlements reasonably.[61]

With the landowner's rights being subordinate to that of the right holder, the landowner may not deny access to the right holder and her employees.[62] Access includes the right to bring any necessary machinery and equipment, as well as to construct any necessary infrastructure for conducting mining or prospecting operations.[63]

There are circumstances in which a landowner may be entitled to compensation; e.g. where conflict arises between the landowner and right holder regarding access to the land in question as well as the conditions attached thereto.[64] In such circumstances,

---

between the parties is required to see if accommodation is possible. A failure to reach an agreement with the landowner may result in the right holder being required to compensate the landowner at a future point (see section 54 of the MPRDA). The court also stressed the importance of notification for the landowner, so that the landowner is adequately informed to make representations and of the remedies available to her. See T Humby "The *Bengenyama* Trilogy: Constitutional Rights and the Fight for Prospecting on Community Land" (2012) 15 *PER* 166 177-178, 182-183. See further Van der Schyff *Property* 583ff; *Aquila Steel SA (Pty) Ltd v South African Steel Company (Pty) Ltd* 2014 JDR 0531 (GNP) paras 9-10, 36.

[55] *Meepo v Kotze* 2008 (1) SA 104 (NC) para 8.

[56] See Badenhorst (2011) *TSAR* 326. See also Van der Schyff *Property* 601ff.

[57] Section 3(2).

[58] Badenhorst (2011) *TSAR* 328; Van der Schyff *Property* 601. The only protection that would seem to exist, in light of the *Maccsand* case, is that a landowner could block mining where her land is not zoned for mining purposes. Olivier, Williams and Badenhorst suggest this would protect an owner against the Department of Minerals Resources from granting a prospecting or mining right in respect of land unsuitable for such purposes. See NJJ Olivier, C Williams & PJ Badenhorst "*Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC)" (2012) 15 *PER* 538 558. See also *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC) para 49.

[59] Van der Schyff *Property in Minerals* 601.

[60] Badenhorst (2011) *TSAR* 329ff; Van der Schyff *Property* 581ff.

[61] Badenhorst (2011) *TSAR* 332; Van der Schyff *Property* 596.

[62] Section 5(3)(a). See Van der Schyff *Property* 581ff. See further *Aquila Steel SA (Pty) Ltd v South African Steel Company (Pty) Ltd* 2014 JDR 0531 (GNP) paras 31ff.

[63] Section 5(3)(a). See Van der Schyff *Property* 581ff.

[64] See Van der Schyff *Property in Minerals* 589-592.

the relevant regional manager must request that the landowner make representations concerning the points of contention raised by the right holder.[65] Should the regional manager then conclude that the reconnaissance, prospecting or mining operations may cause loss or damage, she must ask the parties to attempt to reach an agreement concerning compensation.[66] The landowner may also initiate the process that may lead to compensation.[67] The protection provided by this section has been improved by recent confirmation by the Constitutional Court that a right holder may not bring an interdict against interference with the exercise of its rights until such time that the process envisaged by section 54 has been exhausted.[68] The process of section 54 may only be circumvented with an interdict if the landowner unreasonably refuses to cooperate and enter into negotiations with the right holder.[69]

The regional manager may decide, after considering the issues raised by the right holder and the representations put forward by the landowner, that continued negotiation may detrimentally affect certain objects of the MPRDA.[70] In these circumstances, the regional manager may recommend that the Minister take steps to expropriate the land in terms of section 55 of the MPRDA. Of central importance for this thesis is that none of the grounds on which the decision to recommend expropriation may be triggered relate to the continued economic viability of the land for

---

[65] Section 54(2)(a).

[66] Section 54(3). Where the "parties fail to reach an agreement, compensation must be determined by arbitration in accordance with the Arbitration Act" 42 of 1965. Compensation may also be determined by a competent court.

[67] Section 54(7).

[68] *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (2) SA 1 (CC) paras 85-97.

[69] Paras 87-88; *Joubert v Maranda Mining Co (Pty) Ltd* 2010 (1) SA 198 (SCA) para 16-17.

[70] Section 54(5). These objects include section 2(c) ("promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa"); section 2(d) ("substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources"); Section 2(f) ("promote employment and advance the social and economic welfare of all South Africans"); section 2(g) ("provide for security of tenure in respect of prospecting, exploration, mining and production operations"). Section 55 of the Act adds an additional ground on which the decision to expropriate may be triggered, that being conflict with the object of the Act found in section 2(h) ("give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development").
See the comments of the court in *Joubert v Maranda Mining Co (Pty) Ltd* 2010 (1) SA 198 (SCA), to the effect that an unreasonable denial of access on the part of the landowner does not trigger the discretion to expropriate the land in question (paras 16-17). See further *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) paras 62-68. See also Van der Schyff *Property* 591.

the landowner's purposes. In fact, not even the land accruing a negative value to the landowner will trigger the possibility of an expropriation.

The effect of the above provisions is that a landowner may be entitled to compensation for mining and related operations on her land. However, unless one of the grounds that triggers the discretion to expropriate her land is established, the landowner may remain saddled with a piece of land that is no longer economically viable for her intended purposes. Ultimately, there is no guaranteed exit for a landowner whose land is now subject to mining. The absence of such an option for the landowner is one of the reasons why Badenhorst refers to the relationship between State, mineral right holder and landowner as a "lopsided triangle".[71] Even a statutory mechanism that may result in the possible compensation of the landowner – that being section 54 of the MPRDA – still primarily protects the interests of the State and the mining right holder.[72]

This is not to say that the rights of the landowner are completely disregarded by the MPRDA. As Badenhorst has pointed out, there are a number of common law principles that protect the landowner and are consistent with the MPRDA.[73] The MPRDA only precludes reliance on common-law principles that are inconsistent with the Act,[74] while simultaneously not prescribing the principles that will regulate conflicts between landowners and right holders.[75] At common law, the general principle from case law was that the interests of mineral right holders prevailed over the interests of the landowner.[76] This principle was tempered, however, by the requirement that the mineral right holder must be acting *civiliter modo*, that is, reasonably and *bona fide*, in the exercise of her rights.[77]

---

[71] Badenhorst (2011) *TSAR* 340-341.
[72] Badenhorst (2011) *TSAR* 340-341.
[73] Badenhorst (2011) *TSAR* 333-334. Van der Schyff is a bit more hesitant to conclude that the common-law principles automatically apply in the legal framework established by the MPRDA. These principles developed when the owner was regarded as everything beneath the surface. Whether the application of these principles in the current legal framework would be just and equitable is open to question, as they may be applied in a manner detrimental to the landowner who no longer exercises control over the granting of mineral rights. See Van der Schyff *Property* 597, 601ff.
[74] Section 4(2).
[75] Van der Schyff *Property* 594-595.
[76] Van der Schyff *Property* 70.
[77] Van der Schyff *Property* 70; Badenhorst (2011) *TSAR* 332-333; Olivier, Williams & Badenhorst (2012) *PER* 557-558. What constitutes *civiliter modo* in the mining context was discussed in the case of *Trojan Exploration co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 (4) SA 499 (A). Factors to be considered include (1) the physical and geological conditions prevailing on the land in question, (2) the grade of the

The *civiliter modo* principle will restrict the decisions of right holders regarding the manner in which they conduct mining, taking into account the interests of the landowner.[78] For example, while open-cast mining would not have to be specifically authorised by an agreement with the landowner, it may only be conducted where it is reasonably necessary to facilitate the extraction of minerals.[79] It must, however, be conducted in a manner that is least injurious to the interests of the landowner.[80]

The common-law protections, however, do not seem to provide adequate protection in a context in which landowners exercise no agency in respect of mining on their land and only benefit in their capacity as members of the public.[81] These common-law protections do not address the possibility of land being effectively sterilised for the landowners purposes, or the land accruing a negative value to the landowner, so long as the right holder conducts mining operations in a reasonable manner. In this respect, Van der Schyff's concerns that reliance on common law principles that developed in a different legal framework to that which prevails under the MPRDA are valid.[82]

A further issue that is of serious concern for landowners is the possibility of being held responsible for land use violations by the holder of a right in terms of the MPRDA.[83] A number of municipal by-laws make it an offence for a landowner not to take "reasonable" steps to prevent the land from being used in a manner that contravenes the zoning scheme.[84] This could foreseeably result in landowners being held

---

ore concerned and the depth at which it is located, (3) the current state of the markets, (4) the extent to and manner in which minerals are mixed, (5) the available technology for extraction and refinement, and (6) whether new ore-bearing deposits have been discovered (Van der Schyff *Property* 70).
It was established in the case of *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) that the principle of lateral support, established in neighbour law, does not regulate the relationship between landowners and the holders of rights that mine on the very same land (para 14). A right to minerals is of the nature of a quasi-servitude, and as such, we are not concerned with the competing rights of owners (para 16).

[78] Van der Schyff *Property* 70; Badenhorst (2011) *TSAR* 332-333; Olivier, Williams & Badenhorst (2012) *PER* 557-558.

[79] *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) para 22. See also Van der Schyff *Property* 83-84; Badenhorst (2011) *TSAR* 332-333.

[80] *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) para 22. See also Van der Schyff *Property* 83-84; Badenhorst (2011) *TSAR* 332-333.

[81] Van der Schyff *Property* 601.

[82] Van der Schyff *Property* 596-597.

[83] Thanks must be extended to Louie van Schalkwyk for bringing this particular issue to my attention. See CL van Schalkwyk *A Legal Perspective on the Role of Municipalities in Navigating the Relationship between Land Use Planning and Mining* PhD thesis University of Cape Town (2019) 173n1167, 183.

[84] See for example section 86(2) of the Stellenbosch Land Use Planning By-Law, 2015 (Western Cape); section 60(2) of the Sol Plaatjie Local Municipality Municipal Land Use Management By-Laws, 2015 (Northern Cape); section 49(2) of the Rustenburg Local Municipality Spatial Planning and Land Use

responsible for zoning scheme violations by those who conduct prospecting and mining on the landowner's land. Since landowners have no agency in whether rights to prospect and mine on their land are granted, the imposition of such a responsibility would appear unjustified.

Nevertheless, as aforementioned, there is no guarantee of an exit from landownership, even where the land is no longer viable for the landowner's intended purposes, or for any purpose for that matter. Given that the landowner exercises no control over the granting of rights in terms of the MPRDA,[85] this may appear unjustifiable.

In theory, despite exercising little to no agency in the process that leads to the granting of the right to mine or prospect on her land, the landowner should at least receive a rehabilitated piece of land back at the conclusion of the operations. However, as will become clear from the following section, there is little to no guarantee of this occurring in practice, despite the existence of strong environmental protections on paper.

3.1.2 Unrehabilitated mining land

Holders of rights granted in terms of the MPRDA bear the obligation of having to rehabilitate the land and retain the environmental liabilities that stem from mining.[86] Such responsibilities do not rest with the landowner. The National Environmental Management Act[87] (NEMA) requires that right holders must rehabilitate the mined- or prospected-upon land "as far as is reasonably practicable" to (1) either the land's "natural or predetermined state" or (2) "to a land use which conforms to the generally accepted principle of sustainable development".[88] The right holder also remains liable for any environmental damage as well as pollution stemming from her operations.[89]

Management By-Law, 2015 (North-West Province); section 174(2) of the Thembisile Hani Local Municipality By-Law on Spatial Planning and Land Use Management, 2015 (Mpumalanga); section 91(2) of the Mafube Local Municipality By-Law on Land Use Planning, 2017 (Free State); section 86(2) of the Umlalazi Local Municipality Spatial Planning and Land Use Management By-Law, 2016 (KwaZulu-Natal); section 150(2) of the Buffalo City Metropolitan Municipality Spatial Planning and Land Use Management By-Law, 2016 (Eastern Cape); section 176(2) of the Polokwane Local Municipality Municipal Planning By-Law, 2018 (Limpopo).

[85] Van der Schyff *Property* 601.

[86] Van der Schyff *Property* 560-574; MO Dale *South African Mineral and Petroleum Law* (SI 25 2018) 275-281C. See section 43 of the MPRDA and sections 24 to 24S of the NEMA.

[87] Act 107 of 1998.

[88] Section 27N(7)(e).

[89] Section 27N(7)(f).

However, despite statutory requirements that, if given proper effect to, would see the eventual rehabilitation of the mined-upon land, South Africa has a poor record of mine closure.[90] As Milaras, Ahmed and McKay point out, historically mine closure in South Africa has been "environmentally inept".[91] Even following the enactment of strong environmental legislation,[92] mine rehabilitation and closure in South Africa is characterised by poor compliance and enforcement.[93]

There are a roughly between 5700-6000 derelict mines in South Africa, which will take 800 years in total to rehabilitate.[94] The cost of this rehabilitation is estimated to cost R100 billion.[95] While the inadequate environmental regulations which pre-date the MPRDA are to blame for a majority of derelict mines, the Act's otherwise well-meaning provisions have not had a great deal of success in practice.[96] Ultimately there is a clear "disconnect between policy and practice concerning mine closure".[97]

---

[90] D Limpitlaw, M Akens, H Lodewijks & J Viljoen *Post-Mining Rehabilitation, Land Use and Pollution at Collieries in South Africa* (2005) unpublished paper presented at conference on *Sustainable Development in the Life of Coal Mining* hosted by the South African Institute of Mining and Metallurgy at Boksburg, 13-07-2005; T McKay & M Milaras "Public Lies, Private Looking and the Forced Closure of Grootvlei Gold Mine, South Africa" (2017) 13 *The Journal for Transdisciplinary Research in Southern Africa* 1 4; RD Krause & LG Snyman *Rehabilitation and Mine Closure Liability: An Assessment of the Accountability of the System to Communities* (2014) unpublished paper presented at the *9th International Conference on Mine Closure* hosted by the University of Witwatersrand and Australian Centre for Geomechanics at the Sandton Convention Centre, 1-3 October 2014); C Digby *Mine Closure and Rehabilitation: From Dereliction to Accountability?* (2016) unpublished presentation presented at seminar titled *From Dereliction to Accountability?* hosted by Centre for Environmental Rights at the University of Witwatersrand, 05-05-2016; E van Druten & M Bekker "Towards an Inclusive Model to Address Unsuccessful Mine Closures in South Africa" (2017) 117 *Journal of the Southern African Institute of Mining and Metallurgy* 485; Centre for Environmental Rights "Mine Closure and Rehabilitation: The Hangover that Follows the Mining Party" (09-05-2016) *Centre for Environmental Rights* <https://cer.org.za/news/mine-closure-and-rehabilitation-the-hangover-that-follows-the-mining-party> (accessed 25-01-2019). See also T Field *State Governance of Mining, Development and Sustainability* (2019) 319-320 for general comment on the problem of enforcement of mine closure provisions in both developed and developing jurisdictions.

[91] M Milaras, F Ahmed & T McKay *Mine Closure in South Africa: A Survey of Current Professional Thinking and Practice* (2014) unpublished paper presented at the *9th International Conference on Mine Closure* hosted by the University of Witwatersrand and Australian Centre for Geomechanics at the Sandton Convention Centre, 1-3 October 2014) 2; M Milaras *The Judicious Use of Environmental Sustainability Indicators in Support of Mine Closure in South Africa* LLM thesis University of Johannesburg (2014) 1.

[92] Van der Schyff *Property* 560-574; Dale *Mineral and Petroleum Law* 275-281C. See section 43 of the MPRDA and sections 24 to 24S of the NEMA.

[93] McKay & Milaras (2017) *The Journal for Transdisciplinary Research in Southern Africa* 1 4.

[94] Van Druten & Bekker (2017) *Journal of the Southern African Institute of Mining and Metallurgy* 485; Field *State Governance* 351-352.

[95] Van Druten & Bekker (2017) *Journal of the Southern African Institute of Mining and Metallurgy* 485.

[96] Van Druten & Bekker (2017) *Journal of the Southern African Institute of Mining and Metallurgy* 485; Krause & Snyman *Rehabilitation and Mine Closure Liability* 1.

[97] Milaras et al *Mine Closure* 1.

The problem of South Africa's derelict mines and their rehabilitation is a pressing matter that warrants urgent attention. However, providing a solution to the rehabilitation of thousands of "orphaned" mines[98] is not the focus of this thesis. The focus is rather that the continued failure to achieve adequate mine closure provides further justification for providing landowners with some form of exit from that ownership.

Mining and prospecting right holders must provide financial provision for rehabilitation and closure of mines.[99] This financial provision may be increased on an annual basis to the satisfaction of the Minister.[100] Furthermore, the Minister responsible for mineral resources may opt to retain a portion of the financial provision to manage "latent, residual or any other environmental impacts".[101] Nevertheless, it remains difficult to estimate accurately the true cost of rehabilitation years down the line,[102] and the landowner is never guaranteed to receive the mined-upon land back in an economically-viable state. This contention is evidenced by the "practical impossibility" of being issued a closure certificate,[103] due to the residual environmental impacts for which the State is unwilling to take responsibility.[104]

Perhaps one of the most significant contributing factors in the failure to achieve sustainable closure of mines is the problem of larger mining companies on-selling mining operations, to smaller concerns.[105] These smaller concerns lack the resources

---

[98] Krause & Snyman *Rehabilitation and Mine Closure liability* 1; Field *State Governance* 298-299.
[99] Section 24P(1) of NEMA.
[100] Section 24P(3)(a).
[101] Section 24P(5).
[102] Field *State Governance* 328-335.
[103] Until the Minister issues this closure certificate, which must be applied for once the prescribed closing plan has been complied with (section 43(3)(d), the right holder remains "responsible for any environmental liability, pollution, ecological degradation, the pumping and treatment of extraneous water, compliance to the conditions of the environmental authorisation and the management and sustainable closure thereof" (section 43(1).
[104] Milaras et al *Mine Closure* 10.
[105] Field *State Governance* 335-336; T Humby "The Spectre of Perpetuity Liability for Treating Acid Water on South Africa's Goldfields: Decision in *Harmony II*" (2013) 31 *JERL* 453 459-460, 463; Krause & Snyman *Rehabilitation and Mine Closure Liability* 2; McKay & Milaras (2017) *The Journal for Transdisciplinary Research in Southern Africa* 11; T Humby *Facilitating Dereliction? How the South African Legal Regulatory Framework Enables Mining Companies to Circumvent Closure Duties* (2014) unpublished paper presented at the *9th International Conference on Mine Closure* hosted by the University of Witwatersrand and Australian Centre for Geomechanics at the Sandton Convention Centre, 1-3 October 2014) 7; M Olaide "Companies Skirt Law When They Shut Down Mines" *Cape Argus* (12-10-2015) 13; Centre for Environmental Rights "Newsflash: CER Calls for Transparency in Sale of Anglo's SA Coal and Iron Assets" (04-03-2016) *Centre for Environmental Rights* <https://cer.org.za/news/newsflash-cer-calls-for-transparency-in-sale-of-anglos-sa-coal-and-iron-assets> (accessed 29-01-2020); Centre for Environmental Rights "Warning Around Anglo-American's

for rehabilitation and closure and thus fail to meet their environmental obligations.[106] Humby points out that, in terms of sections 11 and 43 of the MPRDA, the obligations to meet closure obligations do not trigger when a larger company cedes or transfers a mining or prospecting operation to a smaller, and less-resourced, concern.[107] The Minister is required to give her consent to such a cession or transfer so long as the cessionary or transferee is deemed "capable of carrying out and complying with the obligations and the terms and conditions of the right in question".[108] The discretion of the Minister in this regard will likely be difficult to challenge on review.[109] With the transfer or cession of the relevant mining or prospecting right comes the environmental liabilities, which ultimately rest with the last right holder.[110] This right holder is likely the least well-resourced corporate entity, whose financial position is far more precarious than that of its predecessors.[111] The rule of law, through the thwarting of the purpose of the legislation, is effectively undermined by a situation in which the last company working a particular piece of land does not apply for a closure certificate as required.[112] This situation further exacerbates the problem of achieving effective mine closure and environmental rehabilitation in South Africa.

Critically, the landowner exercises no agency in respect of transfers or cessions of rights to smaller concerns, just as in the case of the granting of the right in the first place. A landowner, already unable to exercise any control of a mining company

---

Sale of Coal Mines: Transparency Essential to Avoid Downstream Disaster" (25-04-2020) *Centre for Environmental Rights* <https://cer.org.za/news/warning-around-anglo-americans-sale-of-coal-mines-transparency-essential-to-avoid-downstream-disaster> (accessed 29-01-2020); A Crotty "Trying to Keep Mine Deals Clean" (05-05-2017) *Business Day* <https://www.businesslive.co.za/fm/money-and-investing/2017-05-05-trying-to-keep-mining-deals-clean/> (accessed 29-01-2020).

[106] Field *State Governance* 335-336; Humby (2013) *JERL* 459-460, 463; Krause & Snyman *Rehabilitation and Mine Closure Liability* 2; McKay & Milaras (2017) *The Journal for Transdisciplinary Research in Southern Africa* 11; Humby *Facilitating Dereliction?* 7; Olaide *Cape Argus* (12-10-2015) 13; Centre for Environmental Rights "Newsflash: CER Calls for Transparency in Sale of Anglo's SA Coal and Iron Assets" *Centre for Environmental Rights*; Centre for Environmental Rights "Warning Around Anglo-American's Sale of Coal Mines: Transparency Essential to Avoid Downstream Disaster" *Centre for Environmental Rights*; Crotty "Trying to Keep Mines Deals Clean" *Business Day*.

[107] Humby *Facilitating Dereliction* 7.

[108] Section 11(2)(a). See Humby *Facilitating Dereliction* 7.

[109] Humby *Facilitating Dereliction* 7.

[110] Humby *Facilitating Dereliction* 7.

[111] Humby *Facilitating Dereliction* 7.

[112] Humby *Facilitating Dereliction* 7.

proceeding to conduct operations on her land, is also not able to prevent such a company playing "pass-the-parcel"[113] to avoid its liabilities.

Furthermore, even if statutory requirements for rehabilitation and mine closure are complied with, there is no denying that "it is a fundamental reality that many types of mining activity will effectively sterilize some of the land surface from virtually all other use".[114] Regardless of advancements in technology for the purposes of rehabilitating mined-upon land, land being permanently altered through mining is unavoidable.[115]

Beyond the slim hope of effective rehabilitation, a further problem plagues abandoned and closed mines in the South African context. These sites often attract illegal artisanal mining activities.[116] Even in circumstances in which there has been some degree of mine closure, illegal miners will take extreme measures to gain access, including using explosives to blast through sealed entrances to mine shafts.[117] As a result, even after large-scale mining has concluded, a landowner is not guaranteed to receive secure control of her land.

The above issues relating to the rehabilitation of land, and the failures in achieving such, ultimately stem from a use of the land permitted and facilitated by the State. The State accrues royalties therefrom, while the landowner exercises little agency beyond being consulted and possibly compensated for actual damage and loss suffered.[118] The landowner only stands to benefit from the mining operations in her capacity as a

---

[113] Humby *Facilitating Dereliction* 7; Field *State Governance* 335.

[114] R Worral, D Neil, D Brereton & D Mulligan "Towards a Sustainability Criteria and Indicators Framework for Legacy Mine Land" (2009) 17 *Journal of Cleaner Production* 1426 1427. See also Field *State Governance* 306-308, as well as Chapters 6 and 7 on environmental assessment and mine closure in general.

[115] Worral et al (2009) *Journal of Cleaner Production* 1427.

[116] Field *State Governance* 308-309; Krause & Snyman *Rehabilitation and Mine Closure liability* 2; D Limpilaw & C Digby *Planning for Mine Closure in Sub-Saharan Africa – Taking Urban Development and Artisanal Miners into Account* (2014) unpublished paper presented at the *9th International Conference on Mine Closure* hosted by the University of Witwatersrand and Australian Centre for Geomechanics at the Sandton Convention Centre, 1-3 October 2014) 4; L Wilson *Unshackling South African Artisanal Miners: Considering Burkina Faso's Legislative Provisions as a Guideline for Legislation and Regulation* LLM thesis University of Cape Town (2018) 45-50. See note 27 in Chapter 1 for a definition of artisanal mining.

[117] E Thelwell "Six Things to Know About the Illegal Mining Boom" (26-06-2014) *News24* <https://www.news24.com/SouthAfrica/News/Six-things-to-know-about-the-illegal-mining-boom-20140626> (accessed 11-10-2019); E Cropley "Desperation and Death Beneath South Africa's City of Gold" (13-11-2016) *Reuters* <https://www.reuters.com/article/us-safrica-mining/desperation-and-death-beneath-south-africas-city-of-gold-idUSKCN11J1M6> (accessed 29-01-2020).

[118] Van der Schyff *Property* 537-540, 601.

member of the public, while bearing the burden of the operation in her capacity as landowner.

It is beyond the scope of this thesis to make suggestions for how to enforce environmental compliance in mining better, particularly with concerning the rehabilitation of mining and achieving mine closure. What is key is that a landowner is never guaranteed to receive a rehabilitated and utilisable piece of land back, even if mine closure is achieved, particularly due to the nature of mining.[119] A landowner who no longer wishes to remain owner of such a piece of land should be entitled to a regulated form of exit from such ownership. It would not seem justifiable to force a person to remain owner of mining land against their will based on a vague (and unlikely) hope of return of rehabilitated land in the future.

3.1.3 Regulated exit under the Minerals Act

The above legal position is in contrast to the previous dispensation which prevailed in the old Minerals Act,[120] when rights to minerals (and consequently access to the land under which they are located) stemmed from landowners or existing holders of mineral rights.[121] In the previous dispensation, landowners exercised a great deal more control in acquiring compensation through granting mineral rights or cooperating in the severance of such rights from their landownership.[122] The limits of mining operations, as well as compensation for any damage caused to the land in the process of mining, would also be addressed when rights were granted or severed.[123] While, ultimately, mineral rights could only ever be exercised once the State had granted authorisation to proceed,[124] landowners nevertheless enjoyed far greater protection and agency in respect of third-party mining on their land than exists under the MPRDA.[125]

Perhaps the most interesting aspect of the previous regime, for this thesis, is that the Minerals Act offered the possibility of an exit from landownership for the burdened landowner. Section 42 of the Minerals Act made provision for the acquisition of land by

---

[119] Worral et al (2009) *Journal of Cleaner Production* 1427.
[120] Act 50 of 1991.
[121] Badenhorst (2011) *TSAR* 328.
[122] Badenhorst (2011) *TSAR* 328.
[123] Badenhorst (2011) *TSAR* 328.
[124] Section 5(2) of the Minerals Act.
[125] Badenhorst (2011) *TSAR* 328. See

the state where a mining operation "prevents or hinders or is likely to prevent or hinder the proper use of such land or such portion for farming purposes".[126] This provision could operate at either the request of the landowner or the person who held the entitlement to mine the land.[127] Kaplan and Dale point out that this section was only relevant to land on which farming was in fact hindered or prevented.[128] Where farming was not possible on the land to begin with, or the land was being used for a purpose other than agriculture, the section was not applicable.[129] In the event that the Minister of Agriculture reached the decision that the State should acquire the land, it would be regarded as necessary for a public purpose.[130] As a result, the Expropriation Act[131] would apply to the acquisition.[132]

Section 42 was not perfect, as it did not protect all landowners from the sterilising of their land for purposes other than agriculture (and only if it was their intention to use said land for agriculture).[133] Nevertheless, the section operated in a legal framework characterised by greater agency on the part of the landowner, even if it was open to the State to interfere with those rights.[134]

3.1.4 The need for exit under the MPRDA

Badenhorst is correct to argue for a review of section 54 of the MPRDA, given the prevailing lack of balance between the interests of State, right holder and landowner.[135] Section 42 under the old Minerals Act evidently provided some degree of protection for landowners in limited circumstances,[136] providing for the possibility of exit from said ownership when land was rendered uneconomic for agricultural purposes.[137] Badenhorst suggests that a way to stabilise the "lopsided triangle" (State, right holder, landowner), and balance the interests of all parties, is to recognise "an independent

[126] Section 42(1)(a); Badenhorst (2011) *TSAR* 330-331. See also M Kaplan & MO Dale *A Guide to the Minerals Act, 1991* (1992) 189-191.
[127] Section 42(1)(a); Kaplan & Dale *A Guide* 189.
[128] Kaplan & Dale *A Guide* 189.
[129] Kaplan & Dale *A Guide* 189.
[130] Section 42(2); Badenhorst (2011) *TSAR* 331.
[131] Act 63 of 1975.
[132] Section 42(2); Badenhorst (2011) *TSAR* 331.
[133] Kaplan & Dale *A Guide* 189.
[134] Van der Schyff *Property* 133.
[135] Badenhorst (2011) *TSAR* 340-341.
[136] Badenhorst (2011) *TSAR* 341.
[137] Badenhorst (2011) *TSAR* 330-331; Kaplan & Dale *A Guide* 189.

statutory claim for damage or loss caused by mining operations".[138] In addition, compensation should be agreed upon before mining or prospecting operations begin in the first place, not only when conflict between landowner and right holder arises.[139]

However, beyond a statutory claim for damage or loss, some form of exit from landownership should be provided for landowners who are no longer able to utilise their land for their intended purposes. This is particularly important in light of the poor record of mine closure that prevails in South Africa.[140] The adequate rehabilitation of mining land is unfortunately not a guarantee, despite statutory requirements regulating mine closure.

Ideally, landowners would be entitled to be expropriated in such circumstances, providing them with just and equitable compensation for their land.[141] Evidently, mining and prospecting operations can severely limit the landowners entitlements, and effectively sterilise the land for other purposes, which may on the face of it have the effect of an expropriation. However, such a remedy is unlikely to be forthcoming. The legislature is unlikely to provide such a remedy, and in addition, it remains unlikely that constructive expropriation will be expressly recognised by our courts,[142] particularly given the requirement for state acquisition to raise a deprivation to the level of expropriation.[143] Concerns also relate to the possibility of a doctrine such as constructive expropriation being used to hamper efforts at reform.[144] Mineral law, intertwined with a history of skewed landownership patterns stemming from colonial

---

[138] Badenhorst (2011) *TSAR* 341.
[139] Badenhorst (2011) *TSAR* 339.
[140] See the sources in note 90 above.
[141] See section 25(2) and (3) of the Constitution, 1996.
[142] See AJ van der Walt *Constitutional Property Law* 3 ed (2011) 376-384; K Bezuidenhout *Compensation for Excessive but Otherwise Lawful Regulatory State Action* LLD dissertation, Stellenbosch University (2014) Chapter 3. Slade has pointed out that suggestions that the Constitutional Court recognised constructive expropriation in the case of *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC) are incorrect. This is because the court "never regarded the vesting of the excess land in the local authority as a regulatory measure". See B Slade "Compensation for What? An Analysis of the Outcome in Arun Property Development (PTY) LTD v Cape Town City" (2016) 16 *PER* 1 20-21.
[143] *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC) para 64**;** *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 58.
[144] Van der Walt *Constitutional Property Law* 380-381; *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA) para 8.

conquest and discriminatory legislation,[145] is a context in which there is an urgent need for reform to redress historical injustices and persisting racial imbalances.[146]

However, simply because expropriation of such land, at the expense of the public purse, is not viable, does not mean that landowners should not be provided with an exit. Abandonment or regulated exit of some form in the mineral law context appears necessary. Whether some form of equalisation payment for the landowner should be coupled with this regulated exit is not considered, being beyond the scope of this chapter and thesis in general.[147]

In line with the guidelines set out in section 2.2, the balance of these factors would favour the landowner in the mining context. The extent of the burden is considerable. Landowners no longer exercise any control over the granting of rights to prospect and mine on their land.[148] While common-law principles may temper the impact of mining[149] – in that rights in terms of the MPRDA will need to be exercised *civiliter modo*[150] – this would appear insufficient, particularly in light of South Africa's poor record of mine closure and rehabilitation.[151] Furthermore, a third party[152] is evidently deriving a benefit from the burden to which the landowner is subjected. By and large, the legal framework favours the interests of the right holder over the landowner, however much the impact of mining may be tempered by common-law principles such as *civiliter modo*.

Existing compensatory mechanisms unfortunately do not appear adequate in the circumstances. While a landowner may be entitled to compensation in certain circumstances under section 54 of the MPRDA, this is not coupled with the option to

---

[145] *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 65.
[146] Section 25(8) of the Constitution, 1996, states that "[n]o provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1)".
[147] See Van der Walt's suggestion that a tool such as an equalisation payment to "save important and legitimate regulatory schemes that happen to have excessively harsh effects for some property owners". Van der Walt *Constitutional Property Law* 377ff. See also Bezuidenhout *Compensation* for an in-depth analysis of the possibility of non-expropriatory compensation for property owners subject to excessive regulatory burdens.
[148] Van der Schyff *Property* 601.
[149] Van der Schyff *Property* 594-597; Badenhorst (2011) *TSAR* 333-334.
[150] Van der Schyff *Property* 70; Badenhorst (2011) *TSAR* 332-333; Olivier, Williams & Badenhorst (2012) *PER* 557-558.
[151] See the sources in note 90 above, as well as the discussion in Section 3.1.2 above.
[152] I.e. the holder of a right in terms of the MPRDA.

have her land expropriated due to it no longer being economically viable for her purposes. This is particularly problematic where the rehabilitation of her land is not guaranteed, despite being provided for strongly by legislation.

There is the societal cost of abandonment that needs to be considered. If a landowner is permitted to divest herself of ownership, the State will most likely need to step in and assume responsibility for the land. However, it would appear the burden on the landowner in this case is excessive and must be given priority over the societal cost. Overall, the prevailing legal framework already benefits both the State and the mineral right holder.[153]

Evidently, the mining context provides an example of a situation which demands an exit for the landowner. However, it is not the only context in which it may appear justifiable to provide for abandonment of landownership. Attention is now turned to the heritage building context, another example in which property may accrue a negative value and be an excessive burden to the landowner.

3.2 The heritage-building context

The heritage-building context provides unique challenges to landowners, where the need to preserve buildings which are important to the community's heritage conflicts with the owner's entitlement to demolition.[154] The relevant legislation is the National Heritage Resources Act (NHRA).[155] Restrictions on demolition and alterations may effectively sterilise land for the landowner's purposes. Furthermore, an owner may be able to do very little with her property once formal protection is accorded thereto, without the permission of the relevant heritage authority.[156] In addition to having the property potentially sterilised, the owner may be compelled to maintain the building in question at her own expense,[157] through the issuing of compulsory repair orders.[158] Applications for permits to demolish – whether in whole or in part – are often

[153] See Badenhorst (2011) *TSAR* 326ff.
[154] J Strydom *A Hundred Years of Demolition Orders: A Constitutional Analysis* LLD thesis Stellenbosch University (2012) 180.
[155] Act 25 of 1999 (NHRA).
[156] Strydom *A Hundred Years* 180.
[157] Strydom *A Hundred Years* 180.
[158] See section 45 of the NHRA.

unsuccessful.[159] As Strydom points out, the legal framework established by the NHRA creates "another layer of limitations on ownership", adding to the limitations already imposed by legislation such as the Building Standards Act.[160]

The NHRA divides buildings that are to form part of the "national estate" into three groups.[161] The first relates to buildings of importance to a cultural group or community.[162] Secondly, there are buildings demonstrating "unique aesthetic, architectural, technical or other qualities".[163] Finally, there are buildings possessing historical relevance.[164] The categories created by the Act permit the preservation of buildings for reasons other than historic or aesthetic value.[165] In addition, the NHRA provides for the grading of buildings: (1) Grade I heritage resources which are of "special national significance";[166] (2) Grade II heritage resources which are "significant within the context of a province or a region";[167] and (3) Grade III which is a catch-all grade for "[o]ther heritage resources worthy of conservation".[168] The South African Heritage Resource Agency is responsible for Grade I heritage resources.[169] Provincial heritage authorities are responsible for Grade II heritage resources.[170] Local authorities are responsible for Grade III heritage resources.[171] A provincial heritage resources authority is also empowered to set out more detailed assessment criteria concerning Grade II and Grade III heritage resources.[172] For example, Heritage Western Cape

---

[159] Strydom *A Hundred Years* 180.
[160] National Building Regulations and Building Standards Act 103 of 1977; Strydom *A Hundred Years* 209. As Strydom explains, the Heritage Resources Act would qualify as "any other applicable law" in terms of section 7(1)(a) of the Building Standards Act.
The Building Standards Act restricts a landowner's entitlements by requiring municipal permission to erect new buildings (section 7). It also seeks to ensure uniformity in respect of the erection of buildings, such as by permitting the Minister of Economic Affairs and Technology to prohibit certain methods of erecting buildings as well as the use of certain building materials (section 19). See J van Wyk *Planning Law* 2 ed (2012) 385ff.
[161] See section 3. Also see J Strydom *A Hundred Years of Demolition Orders: A Constitutional Analysis* LLD thesis Stellenbosch University (2012) 185.
[162] Strydom *A Hundred Years* 185 relying on section 3(3)(a), (e) and (g) of the Act.
[163] Strydom *A Hundred Years* 185-186 relying on section 3(3)(b), (d) and (f) of the Act.
[164] Strydom *A Hundred Years* 185-186 relying on section 3(3)(c), (h) and (i) of the Act.
[165] Strydom *A Hundred Years* 185-186.
[166] Section 7(1)(a).
[167] Section 7(1)(b).
[168] Section 7(1)(c).
[169] Section 8(2).
[170] Section 8(3).
[171] Section 8(4).
[172] Section 7(2).

divides Grade III heritage resource authorities into three further subcategories, these being IIIA (high significance), IIIB (medium significance), and IIIC (low significance).[173]

Formal protection in terms of the NHRA, which restricts what the owner may do with her property without the permission of the relevant heritage resources authority,[174] can be accorded to buildings.[175] Section 27 of the NHRA empowers both national[176] and provincial[177] heritage bodies to identify those sites worthy of conservation and to accord protection thereto. Prior to the declaration of a site as protected, the owner and other interested parties must be notified.[178] The owner must be provided with a reasonable opportunity to make representations prior to notification.[179] Importantly, the moment notice is served on the owner, protection in terms of the NHRA is accorded to the site until six months from service of the notice elapses or the notice is withdrawn, whichever being shorter.[180] That is unless the site is then formally declared as protected, rendering such protection permanent.[181] A consequence of such protection is that significant inroads are made into the landowner's rights. The landowner may no longer "destroy, damage, deface, excavate, alter, remove from its original position, subdivide or change the planning status of any heritage site without a permit issued by the heritage resources authority responsible for the protection of such site".[182] Similar restrictions apply where a site is accorded provisional protection for the purpose of protecting a heritage resource that is considered threatened or to allow a heritage resource authority to investigate whether to accord formal to the resource in

[173] Heritage Western Cape *Grading: Purpose and Management Implications* (2016). Available at <https://www.hwc.org.za/sites/default/files/2_3_6%20Grading_Implications%20and%20Management_Approved.pdf> (accessed 29-01-2020).
[174] See section 27.
[175] Strydom *A Hundred Years* 186-187.
[176] Section 27(1) and (5).
[177] Section 27(2) and (6).
[178] Section 27(8)(a)-(c).
[179] Section 27(8)(d).
[180] Section 27(10).
[181] Section 27(10).
[182] Section 27(18).

question.[183] Violation of such restrictions by the owner may see her served with a compulsory restoration order.[184]

The NHRA, in section 34(1), further requires a permit to demolish or alter a structure that is more than 60 years old.[185] Such a permit is issued by the provincial heritage resources authority of the province in which the structure is located.[186] This is a "catch-all" provision, providing protection for buildings that have not been expressly identified as heritage resources for the purposes of the NHRA.[187] Should the relevant heritage resources authority refuse to issue a permit, it must then proceed to consider whether formal protection should be accorded to the site.[188] As Marques puts it, as a result of this section, "a man's house is no longer *his* castle. Where the 'castle' is of cultural importance, it becomes an asset to be preserved."[189]

The courts have confirmed that, in granting a demolition permit in terms of section 34(1), the relevant heritage authority may attach conditions, even if the property is not formally protected under the NHRA.[190] These conditions are imposed in terms of section 48(2). In *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape*,[191] the

---

[183] Provisional protection lasts for a maximum of two years where granted it is by the South African Heritage Resources Agency or a provincial authority (section 29(1) or three months where granted by a local authority (section 29(2). Section 29(10) provides that no person "may damage, deface, excavate, alter, remove from its original position, subdivide or change the planning status of a provisionally protected place or object without a permit issued by a heritage resources authority or local authority responsible for the provisional protection". See Strydom *A Hundred Years* 187.

[184] Strydom *A Hundred Years* 187.

[185] Section 34(1). See Strydom *A Hundred Years* 190-191. See also the case of *Provincial Heritage Resources Authority, Eastern Cape v Gordon* 2005 (2) SA 283 (E) in which the court stated that the protection of section 34(1) does not lapse in circumstances where a permit for demolition is refused but the relevant heritage resources authority does not proceed to accord formal protection to the site in question (292J-293I). See Styrdom's discussion of this case: Strydom *A Hundred Years* 201-205.

[186] Section 34(1).

[187] P Marques *The Right to Neglect Property: An Analysis of the Weaknesses of the National Heritage Resources* LLB research paper University of Cape Town (2012) 5.

[188] Section 34(2).

[189] Marques *The Right to Neglect Property* 5.

[190] Strydom *A Hundred Years* 196-201. Furthermore, as Strydom points out, courts are very reluctant to interfere with the discretion of the relevant heritage resource authority concerning the granting of permits and the conditions attached thereto. See Strydom *A Hundred Years* 205-210. See also the case of *Corrans v MEC for the Department of Sport, Recreation, Arts and Culture, Eastern Cape Government* 2009 (5) SA 512 (ECG) para 23.

[191] 2008 (3) SA 160 (SCA). This case concerned a review of a demolition order granted by Heritage Western Cape (the first respondent). On the site in question existed a villa and an annexe. The appellant wished to demolish both structures, but had ultimately only been granted permission to demolish the Annexe. In addition to only granting a permit for partial demolition, Heritage Western Cape attached a number of conditions to the development of the property following the demolition, including that the plans for development were to be submitted to it for approval. The appellant challenged this as being beyond the powers accorded to a provincial heritage body in terms of the Act. The Supreme Court of Appeal,

Supreme Court of Appeal (SCA) stated that conditions imposed by Heritage Western Cape, in terms of a partial demolition permit, were "in line with the principles of heritage resources management" found in the NHRA.[192] The court confirmed that the imposition of conditions in a permit is both within the parameters and the overall scheme of the NHRA, even though the site in question has not been accorded formal protection.[193] This approach was confirmed in *Gees v Provincial Minister of Cultural Affairs and Sport, Western Cape*.[194]

Beyond the potential sterilisation of the property for the owner's intended purposes, ownership of a heritage building comes with potentially steep costs. Maintenance of the site becomes a significant obligation. In particular, the relevant heritage resources authority is empowered to issue a compulsory repair order to the owner of a heritage site under certain circumstances.[195] Such an order can only be issued in respect of sites classified as Grade I or Grade II (national and provincial heritage sites respectively).[196] A compulsory repair order can be issued where the owner is permitting the site to fall into a state of disrepair for the purpose of achieving demolition or development of the site.[197] However, ulterior motives on the owner's part are not necessary for the issuing of a compulsory repair order. If the site is considered as being neglected "to such an extent that it will lose its potential for conservation", a compulsory repair order may be issued to the owner.[198] The repair order requires the owner to repair or maintain the site in question.[199] Repairs and maintenance must be done to the satisfaction of the relevant heritage resources authority and at the owner's expense.[200] Should the owner fail to comply with the order within the time specified,

confirming the decision of the court a quo, found that in fact the imposition of such conditions was envisaged by the Act (paras 19-20).

[192] *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape* 2008 (3) SA 160 (SCA) para 19.

[193] Para 19.

[194] 2017 (1) SA 1 (SCA) paras 27-29.

[195] See section 45.

[196] Marques *The Right to Neglect Property* 6; *Habitat Council v BPH Properties (Pty) Ltd* (A388/17) [2018] ZAWCHC 98 (17 August 2018) paras 9-10. See the definition of "heritage site" in section 1 of the Act.

[197] Section 45(1)(a).

[198] Section 45(1)(b).

[199] Section 45(1).

[200] Section 45(1).

the authority itself may take steps to ensure that the necessary repairs or maintenance take place.[201] The costs of such repairs are to be recovered from the owner.[202]

As Strydom points out, the NHRA does provide some (potential) alleviation of the burden placed on landowners.[203] The NHRA empowers the South African Heritage Resource Agency to provide loans or grants, which contribute to the purpose of the Act.[204] Such financial assistance can be bestowed on approved bodies or individuals. The NHRA also provides for the conclusion of heritage resource agreements between the SAHRA or provincial agencies and provincial or local authorities, conservation bodies, individuals or communities.[205] These agreements are intended to "provide for the conservation, improvement or presentation of a clearly defined heritage resource", but require the consent of the owner.[206] Such agreements may result in the relevant provincial authority or local authority being appointed guardian of the site.[207] Heritage agreements may provide for both the maintenance and management of the site in question, in addition to the payment of expenses incurred by the owner in the maintenance of the site.[208] Simultaneously, however, it may place further restrictions on the owner's use of the property.[209] Assumedly payment of expenses incurred by the owner may be balanced against the restrictions placed on the use of the property. However, it is not compulsory for a heritage resources authority to enter into such an agreement with a landowner.[210] As such, there is no automatic mechanism available to the landowner through which the burden may be alleviated.

Where buildings have not been granted the status of being either a national or provincial heritage site, but rather a grade III rating, making municipalities the authorities responsible thereof, an impasse may prevail.[211] The landowner may refuse to maintain the property, and the relevant authority may refuse to grant permission to

---

[201] Section 45(2).
[202] Section 45(2).
[203] Strydom *A Hundred Years* 188-189.
[204] Section 40(1).
[205] Section 42(1).
[206] Section 42(1)(a).
[207] Section 42(8).
[208] Section 42(9)(a) and (h).
[209] Section 42(9)(b), (c) and (d).
[210] Section 42(6).
[211] Marques *The Right to Neglect Property* 1ff.

demolish while being unable to compel the upkeep of the building.[212] As noted, compulsory repair orders may only be issued in respect of Grade I and Grade II heritage resources.[213] A local example that demonstrates this impasse is the Highclere saga.[214]

Highclere is a seaside cottage built in the late 19th century located in Bloubergstrand, Cape Town.[215] It was built out of crushed seashells.[216] Its current owner – BPH Properties – has permitted the property to fall into a dilapidated state – its roof having collapsed and its walls allowed to crumble – by refusing to spend any money on its maintenance or restoration.[217] However, due to the property not being a grade I or II heritage site, it is not possible to compel the owner to restore the property through a compulsory repair order.[218] Despite not being accorded the status of a provincial heritage site, BPH's repeated attempts to be granted a permit for demolition have proved fruitless.[219] The desire of the local community to see the seaside cottage preserved has proved to be a particularly difficult obstacle to BPH's attempts to demolish the site.[220] When BPH was initially granted a demolition permit by Heritage Western Cape, it was an appeal by interested neighbours that resulted in the reversal of the decision.[221] The situation thus appears to be at an impasse. As Marques puts it, the building is effectively being slowly demolished through neglect.[222]

The property was graded IIIA by the City of Cape Town, while Heritage Western Cape regarded the property as being worthy of the grade of IIIC.[223] Since the City is the competent authority to award such a grading, it must be taken that the grading is IIIA.[224]

---

[212] Marques *The Right to Neglect Property* 1ff.
[213] Marques *The Right to Neglect Property* 6; *Habitat Council v BPH Properties (Pty) Ltd* (A388/17) [2018] ZAWCHC 98 (17 August 2018) paras 9-10. See the definition of 'heritage site' in section 1 of the Act.
[214] See Marques *The Right to Neglect Property* 8-9; F Schroeder "Heritage Site Please Puts Development on Hold" *Sunday Argus* (16-10-2016) 4.
[215] Marques *The Right to Neglect Property* 1.
[216] Marques *The Right to Neglect Property* 1.
[217] Marques *The Right to Neglect Property* 8.
[218] Marques *The Right to Neglect Property* 8.
[219] Marques *The Right to Neglect Property* 8-9; *Habitat Council v BPH Properties (Pty) Ltd* (A388/17) [2018] ZAWCHC 98 (17 August 2018) para 2.
[220] *Habitat Council v BPH Properties (Pty) Ltd* (A388/17) [2018] ZAWCHC 98 (17 August 2018).
[221] Para 2.
[222] Marques *The Right to Neglect Property* 9.
[223] *Habitat Council v BPH Properties (Pty) Ltd* (A388/17) [2018] ZAWCHC 98 (17 August 2018) para 13.
[224] Para 13.

Since Heritage Western Cape has not declared the property a provincial heritage site, it appears evident that the body does not regard Highclere as being deserving of such a classification.[225]

The Highclere saga has been subject to recent litigation.[226] The facts directly relevant to the case are that in 2011, BPH Properties applied for a demolition permit, which was required to demolish a structure that is more than 60 years old.[227] The Built Environment and Landscapes Committee of Heritage Western Cape awarded BPH Properties with the requisite permit. However, this decision was challenged by interested neighbours of BPH Properties, who took the matter to the appeals committee of Heritage Western Cape. The appeals committee upheld the appeal, reversing the decision to award the demolition permit to BPH. On a subsequent appeal by BPH Properties, an independent appeals tribunal (IAT) confirmed the decision of the appeals committee, ultimately leaving BPH Properties without the desired demolition permit. The IAT had found that Highclere should be preserved as a heritage resource.[228] Furthermore, it recommended that Heritage Western Cape look into according formal protection of the property, as well as issue BPH Properties a compulsory repair order to restore the property.[229]

That the decision of the IAT constituted administrative action was not in dispute.[230] However, BPH Properties failed to initiate proceedings for judicial review within 180 days as required by the Promotion of Administrative Justice Act.[231] Nevertheless, the court *a quo* considered the explanation for the delay to be reasonable.[232] BPH Properties was ultimately successful in setting aside of a decision by the IAT.[233] This decision was subsequently appealed.

---

[225] Para 13.
[226] See *Habitat Council v BPH Properties (Pty) Ltd* (A388/17) [2018] ZAWCHC 98 (17 August 2018).
[227] See section 34.
[228] *Habitat Council v BPH Properties (Pty) Ltd* (A388/17) [2018] ZAWCHC 98 (17 August 2018) para 8.
[229] Para 8.
[230] Para 3. See the definition of “administrative action” in section 1 of the Promotion of Administrative Justice Act 3 of 2000.
[231] Section 7(1).
[232] *Habitat Council v BPH Properties (Pty) Ltd* (A388/17) [2018] ZAWCHC 98 (17 August 2018) para 4.
[233] Para 1. See section 49(2) of the NHRA.

The appellant was the Habitat Council, a voluntary association whose aim is to conserve the built environment.[234] The appeal was primarily concerned BPH Properties' failure to institute review proceedings within the prescribed timeframe.[235] On appeal, the court did not accept BPH Properties' reasons for failing to institute review proceedings in the prescribed timeframe, and in any case, its prospects of success in setting aside the decision were regarded as poor.[236] Since the property was not a national nor a provincial heritage site, effect could not be given to the IAT's advice that a compulsory repair order be issued to BPH Properties.[237] Nevertheless, this did not (in the court's view) provide BPH strong prospects of succeeding on the basis that such advice "tainted" the decision of the IAT in its entirety.[238]

BPH have made threats to abandon the property, although they did not indicate what they meant by abandonment.[239] Do they mean informally abandon (i.e. allow to fall into further neglect) or seek to divest unilaterally ownership of the property (which is not possible in South African law[240]). The possibility of donating the property to the City was also raised by BPH's attorney, but BPH did not revert to the City about this possibility.[241] The failure to proceed in making a formal offer for a donation of the property to the City would seem to indicate a reluctance to let go of the property by BPH Properties, or at least just while the possibility of succeeding with litigation existed.[242] However, the case does raise the question as to whether, in the event such an offer be made and the rejected by the City, should abandonment be an option for BPH Properties.

This appears an unhappy situation for all parties. On the one hand, the owner is saddled with a property with which it cannot do anything, and is content to permit to fall into a further state of disrepair.[243] On the other hand, those who would see the property maintained for its heritage value can do little to compel the owner to restore

---

[234] *Habitat Council v BPH Properties (Pty) Ltd* (A388/17) [2018] ZAWCHC 98 (17 August 2018) para 1.
[235] Para 3.
[236] Para 35.
[237] Para 9.
[238] Para 35.
[239] Para 28.
[240] See the conclusions reached in Chapter 3 Section 4.
[241] *Habitat Council v BPH Properties (Pty) Ltd* (A388/17) [2018] ZAWCHC 98 (17 August 2018) para 32.
[242] Para 32.
[243] Marques *The Right to Neglect Property* 7-12.

the property to an acceptable state, where the site is not considered important enough for a Grade I or II rating.[244]

The problem of developers allowing heritage buildings to fall into states of disrepair – with a view to being eventually granted a demolition order – is undoubtedly a serious one.[245] It is, however, beyond the scope of this thesis to suggest how such properties can be better protected from landowners who seek to demolish important heritage buildings by stealth. The focus is rather whether a landowner, finding herself unable to make use of a building accorded heritage protection, should be entitled to abandon, particularly in circumstances in which maintenance of such a property is an excessive burden.

It is necessary that developers who deliberately neglect property be held to account. As Strydom points out, the Constitutional Court has yet to decide a dispute concerning the constitutionality of the NHRA as far as its restrictions on demolition and alterations are concerned.[246] Inevitably, it is part and parcel of ownership of a historic building that an owner may not necessarily be entitled to the "most beneficial use of their property available for exploitation".[247] However, legislation does not provide sufficient safeguards for owners who may find themselves saddled with a property (1) they cannot use for any gainful economic purpose and (2) is expensive to maintain. Such property may ultimately hold a negative value for the landowner.

The heritage building context thus provides another example of a situation in which some form of regulated exit should exist for landowners, whether this be abandonment or otherwise. It gives rise to circumstances in which landowners may be subject to unjustifiable burdens, even in light of the social-obligation norm.

---

[244] Marques *The Right to Neglect Property* 5-7.
[245] See in general, Marques *The Right to Neglect Property*.
[246] Strydom *A Hundred Years* 181. The SCA, however, has rejected the argument that permitting the imposition of conditions controlling future building and development in the granting of a demolition permit for a building otherwise not protected in terms of the NHRA amounted to an arbitrary deprivation of property. In its view, "the imposition of the conditions, in my view, was reasonable and equitable, having regard to the inherent responsibility of the appellant towards the community in the exercise of his entitlements as the owner". See *Gees v Provincial Minister of Cultural affairs and Sport, Western Cape* 2017 (1) SA 1 (SCA) paras 30-34.
[247] Strydom *A Hundred Years* 258.

It is necessary to evaluate the heritage building context in light of the guidelines from section 2.2. In some contexts, it is conceivable that the burden could be excessive, particularly where the landowner is not a developer who purchased the property knowing the risks associated with acquiring ownership of a building that could qualify for protection. Where the property is a national or provincial heritage site, the burden is exacerbated by the possibility of being issued with a compulsory repair order to repair or maintain the property to the satisfaction of the relevant heritage resources authority.[248] The property in such circumstances could easily attain a negative value, with no third party willing to take transfer thereof.

A third party, in the form of a heritage resources authority or municipality, would appear to be deriving a benefit from the burden to which the landowner is subjected. As the landowner must bear the costs associated with maintenance, to preserve properties that fall into the national estate, heritage authorities are not required to do so. This links with the inadequacy of existing compensatory mechanisms in the heritage building context. Of particular concern is that it is not mandatory for a heritage resources authority to enter into a heritage agreement with a landowner to cover the costs associated with maintenance of the property.[249]

Finally, the societal cost of abandonment of heritage buildings needs to be considered. Inevitably, allowing a landowner to pass responsibility for her property onto the State will require that resources from elsewhere are directed towards its maintenance, since heritage authorities are predominantly funded from the public purse.[250] However, depending on the circumstances, the rights and interests of the landowner may prevail. One needs to take into consideration whether the landowner acquired the property aware of the risk that the building had heritage value and may be subject to protection

[248] See section 45 of the NHRA.
[249] See section 42(6) of the NHRA.
[250] Section 21(1)(a) of the NHRA states that among the sources of funding available to the South African National Heritage Resources Agency includes “moneys appropriated by Parliament to enable it to perform its functions and exercise its powers”.
Provincial heritage resource authorities are also funded from the public purse. For example, in the Provincial Gazette establishing Heritage Western Cape, it is stated that the “provincial department shall provide funds to Heritage Western Cape from moneys appropriated by the Western Cape Provincial Parliament for heritage resources management in the Western Cape to enable the Council of Heritage Western Cape to perform its functions and duties and exercise its powers prescribed in the Act”. See section 3(1) of PN 336 in PG 5937 of 25-10-2002.
Municipalities are the bodies responsible for Grade III heritage resources, and as such, any expense incurred in maintaining such a resource would come from the public purse.

in terms of the NHRA. The balance of the above factors would weigh against a developer who gambled on the possibility of eventually being able to demolish or substantially alter such a building. An individual landowner, however, who did not acquire the property cognisant of such a risk should probably be entitled to abandon.

3.3 The context of problem buildings and unlawful occupation

The context of problem buildings and unlawful occupation of land is an important one to consider in justifying a statute facilitating abandonment. The two issues often go hand in hand, as problem buildings are often unlawfully occupied.[251] Accordingly, these issues are discussed in the same section.

The issue of problem buildings is particularly prevalent in large cities such as Johannesburg,[252] while unlawful occupation is a problem throughout South Africa.[253]

---

[251] See S Strydom & S Viljoen "Unlawful Occupation of Inner-City Buildings: A Constitutional Analysis of the Rights and Obligations Involved"(2014) 17 *PER* 1206.

[252] Johannesburg: JC Sonnekus "Abandonering van Eiendomsreg op Grond en Aanspreeklikheid vir Grondbelasting: Aantekeninge" (2004) *TSAR* 747-757; M Murray *Taming the Disorderly City: The Spatial Landscape of Johannesburg after Apartheid* (2008); L Steyn "When Good Property Turns Bad" *Mail & Guardian* (2015-07-24) 2. Cape Town: L Dentlinger "Problem Buildings Investigated" *Cape Argus* (2016-3-15) 4; K Solomons "City Crackdown on Problem Buildings" *Saturday Argus* (2012-06-16) 4; J Etheridge "Cape Town Unit Steadily Dealing with City's 'Problem Buildings'" (13-07-2016) *News24* <https://www.news24.com/SouthAfrica/News/cape-town-unit-steadily-dealing-with-citys-problem-buildings-20160713> (accessed 12-11-2018). Durban: C Ndaliso "Derelict Building Hazard" *Daily News* (2017-06-28) 1; J Erasmus "Durban's Urban Decay Worsening" (07-04-2014) *News24* <https://www.news24.com/Archives/Witness/Durbans-urban-decay-worsening-20150430> (accessed 12-11-2018); S Naidoo "Vacant Building By-Law Loopholes Need to be Closed" *Saturday Argus* (2018-06-09) 5.

[253] Unlawful occupation of land is a perennial subject of litigation, demonstrating a clash between the rights of landowners (section 25) and those desperate for the shelter of a home (section 26(3). It is also a central concern for South African academics concerned with property and socio-economic rights. See for example *Fischer v Unlawful Occupiers* 2018 (2) SA 228 (WCC); *Occupiers, Berea v De Wet* 2017 (5) SA 346 (CC); *Fischer v Ramahlele* 2014 (4) SA 614 (SCA); *Fischer v Persons Unknown* 2014 (3) SA 291 (WCC); *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village* 2013(1) SA 583 (GSJ); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 (Pty) Ltd 2012 (2) SA 104 (CC); *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA); *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg* 2008 (3) SA 208 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC); AJ van der Walt *Property in the Margins* (2009) Chapter 5; S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) Chapter 6; G Muller & S Liebenberg "Developing the Law of Joinder in the Context of Evictions of People from their Homes" (2013) 29 *SAJHR* 554; Strydom & Viljoen (2014) *PER* 1206; R Cramer & H Mostert "'Home' and Unlawful Occupation: The Horns of Local Government's Dilemma" (2015) 26 *Stellenbosch Law Review* 583; C Cloete & Z Boggenpoel "Re-evaluating the Court System in PIE Eviction Cases" (2018) 135 *SALJ* 432.

Some properties may, due to their locale, acquire a negative value, which a landowner cannot hope to alleviate through her individual efforts.[254]

Likewise, outside the inner-city context, the extent of the unlawful occupation may render eviction no longer a viable option.[255] There have been cases in which the numbers of unlawful occupants have numbered in the tens of thousands, resulting in circumstances in which the cost of carrying out the eviction order exceeded the value of the land.[256] As such, circumstances may arise where a landowner may wish to divest herself of such ownership, and the liabilities attached thereto, even if she would not receive any form of compensation for her property.

This section does not engage with the debate as to whether landowners, particularly those in the inner-city, are being arbitrarily deprived of property when denied eviction orders (and the giving effect thereto) for an indefinite time.[257] Rather, the concern is to evaluate the existing law and factual situation and consider whether as a remedy of last resort, landowners should be entitled to abandon their property.

Problem buildings are regulated by municipal by-laws.[258] By-laws of various municipalities are consistent in their definitions of problem properties. These are properties that (among other things) appear to be (1) abandoned by the owner thereof, (2) fail to comply with legislation as well as health and safety by-laws, (3) are overcrowded, (4) appear to be a haven for criminal activities, (5) are illegally occupied,

---

[254] A Cox "Losing the Battle Against Urban Decay" *Star* (2012-05-04) 8; TimesLive "Hijacked Buildings – What They Are, and What City of Johannesburg is Doing About Them" (05-07-2017) *TimesLive* <https://www.timeslive.co.za/news/south-africa/2017-07-05-hijacked-buildings-what-they-are-and-what-city-of-johannesburg-is-doing-about-them/> (accessed 16-01-2019); Strydom & Viljoen (2014) *PER* 1222. See in general Murray *Taming the Disorderly City*.

[255] See discussion of *Fischer v Unlawful Occupiers* 2018 (2) SA 228 (WCC) below.

[256] See, for example, *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) para 9. Although the potential cost of eviction is not mentioned in *Fischer v Unlawful Occupiers* 2018 (2) SA 228 (WCC), it is safe to assume that the cost of eviction in those circumstances, given the extent of unlawful occupation, would be similarly astronomical.

[257] See for example Strydom & Viljoen (2014) *PER* 1207; M Kruger "Arbitrary Deprivation of Property: An Argument for the Payment of Compensation by the State in Certain Cases of Unlawful Occupation" (2014) 131 *SALJ* 328.

[258] Part B of Schedule 4 of the Constitution makes building regulations a local government matter, to the extent prescribed by section 155(6)(a) and (7).

(6) are sites of dumped or accumulated waste without valid approval, and (7) constitute a threat to both the safety of occupiers or the public in general.[259]

These municipal by-laws seek to hold owners of problem buildings responsible, or in the event that the owner cannot be found, anyone who appears to be responsible for such a building. The City of Johannesburg By-Law on Problem Properties defines "responsible person" to include both the registered owner of a building,[260] as well as the person or body "seemingly in charge of the property".[261] Such a person can include one who has taken over a building without the landowner's consent.[262] Any person falling within the definition of "responsible person" may be issued with a compliance notice.[263] Such a person may be subject to penalties or criminal prosecution for failure to comply with a compliance notice,[264] and may also be subject to civil action for failing to comply with the provisions of the by-law.[265] Critically, the wording of the by-law does not preclude the City from taking action against the registered owner, even where another party may fall within the definition of "responsible person".[266] This is not precluded even where the "responsible person" became such by taking over the property against the wishes of the owner.[267]

The City of Cape Town Problem Building By-Law similarly brings the person in charge of a problem building within the definition of owner.[268] Unlike the Johannesburg By-Law, it does not expressly note that such a person includes one who took over the building against the will of the owner. Nevertheless, the wording "person in charge of

---

[259] See section 7(1) of the City of Johannesburg By-Law on Problem Properties, 2014; section 1 of the City of Cape Town Problem Building By-Law, 2010; section 1 of the eThekwini Problem Building By-Law, 2015.
[260] Section 2(8)(a). This definition includes the directors of a company which is the registered owner of the problem property.
[261] Section 2(8)(b). Reasons for pursuing the person or body seemingly in charge of the property include that it is (a) abandoned by its registered owner, (b) the owner is either absent from the Republic of South Africa or her whereabouts are presently unknown, (c) the property in question has been taken over by the person seemingly in charge "with or without the consent of the registered owner", (d) the responsible person is receiving rent for the occupation of the building, and (e) the person has been appointed responsible for the property by the owner thereof.
[262] Section 2(8)(b).
[263] Section 8.
[264] Section 11.
[265] Section 12.
[266] See Cramer (2017) *SALJ* 871n5.
[267] See section 2(8)(b)(iii) of the City of Johannesburg By-Law on Problem Properties, 2014.
[268] See the definition of "owner" in section 1 of the City of Cape Town Problem Building By-Law, 2010.

such a building" is capable of including such a person.[269] Due to falling within the definition of owner in the by-law, the person in charge of the building may also be served with a compliance notice,[270] and face penalties and prosecution.[271] As in the case of the Johannesburg By-Law, the wording of Cape Town By-Law does not preclude the City opting to pursue the registered owner, even if there is another person in charge of the building. The definition is intended to expand the pool of potential parties who may be held responsible for a problem building.

The eThekwini Problem Buildings By-Law, by contrast, only holds those in control of the building responsible, in lieu of the owner, where the owner is either (1) not present in South Africa or (2) the municipality has been unable to locate the owner.[272] In all other circumstances, the landowner would be the person responsible for the maintenance of the building. As such, even when others are occupying the building (even against the owner's will), the owner will be the one required to act in terms of notices to rehabilitate the building.[273]

The obligations and penalties stemming from problem-building by-laws thus put registered owners in an unenvious position. These by-laws, on their wording, do not temper their provisions to provide for circumstances in which rehabilitation of a building is difficult (or even impossible) due to locale or unlawful occupation. Where other parties may be held liable, the intention does not absolve the registered owner of responsibility, but to expand the pool of parties who may be held responsible.[274] The burden of a problem building, which cannot be rehabilitated without great cost (including protracted legal proceedings to secure an eviction order), would be unjustified where the landowner bears no responsibility for the prevailing circumstances. This is especially applicable to circumstances in which the building is

[269] Section 1.
[270] Section 7.
[271] Section 10.
[272] See the definition of "owner" in section 1. The only other party which may be held liable is a "managing agent" who is either (1) appointed by the registered owner to manage the building or (2) is a tenant of the owner empowered to sub-let or manage the building.
[273] See section 9.
[274] Cramer (2017) *SALJ* 871n5.

located in a context characterised by widespread urban decay such as the Johannesburg inner city.[275]

Closely related to the problem-building issue is unlawful occupation of land in general.[276] The courts have made it clear that in some circumstances landowners must tolerate unlawful occupation for a limited time until it is just and equitable to evict.[277] However, it cannot be the obligation of private landowners to provide free housing to unlawful occupiers for an indefinite time.[278] Nevertheless, circumstances do arise in which eviction is simply not feasible, due to the extent of the unlawful occupation.[279] These circumstances mean that a landowner will in effect have to accept the loss of her land as a *fait accompli*, despite remaining the registered owner of such land.

The situation described above was what developed in the *Fischer* saga.[280] It culminated in the most recent judgment in the case of *Fischer v Unlawful Occupiers*[281] - in which three applications by different applicants were considered together.[282] The area occupied by the first respondents is known as Marikana in Phillipi East, Cape Town.[283] The applicant in the first application, the 86-year old Mrs Fischer, became aware of the occupation of her property in May 2013.[284] What followed involved the removal of structures by the City of Cape Town Anti-Land Invasion Unit, the erection of further structures by unlawful occupiers, as well as litigation related thereto.[285] The

---

[275] See Murray *Taming the Disorderly City* 149-151. See note 252 above.
[276] See note 253 above.
[277] Strydom & Viljoen (2014) *PER* 1211; AJ van der Walt & S Viljoen "The Constitutional Mandate for Social Welfare – Systemic Differences and Links between Property, Land Rights and Housing Rights" (2015) 18 *PER* 1034 1067-1068. See *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] 4 All SA 54 (SCA) para 16; *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) para 18; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) para 40; *Occupiers, Berea v De Wet NO* 2017 (5) SA 346 (CC) para 80.
[278] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) para 45; *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) para 18; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) para 18.
[279] See *Fischer v Unlawful Occupiers* 2018 (2) SA 228 (WCC) para 1; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) para 8.
[280] See *Fischer v Persons Unknown* 2014 (3) SA 291 (WCC); *Fischer Ramahlele* 2014 (4) SA 614 (SCA); *Fischer v Unlawful Occupiers* 2018 (2) SA 228 (WCC). See also Cramer & Mostert (2015) *Stell LR* 583.
[281] 2018 (2) SA 228 (WCC).
[282] *Fischer v Unlawful Occupiers* 2018 (2) SA 228 (WCC) para 6.
[283] Para 6.
[284] Para 78-80.
[285] *Fischer v Unlawful Occupiers* 2018 (2) SA 228 (WCC) para 80. See also Cramer & Mostert (2015) *Stell LR* 583.

other two applications – by landowners in the same area – have similar factual backgrounds, in which attempts to prevent and reverse the unlawful occupation of the properties in question failed.[286] Ultimately, the informal settlement in question burgeoned to 60 000 people, and the eviction of whom was simply not feasible.[287]

In the applications, eviction of the unlawful occupiers was only sought in the alternative.[288] The main relief sought in the three applications was a declaration that the City of Cape Town and other State respondents had violated the applicants' section 25 right by failing to protect their properties from unlawful occupation.[289] As a consequence of this finding, the court was asked to order that the City and other State respondents purchase the properties from the applicants.[290] The court ultimately awarded the applicants the relief they sought, with the City of Cape Town ordered to enter into good-faith negotiations with the applicants regarding the purchase of their properties.[291]

The City of Cape Town indicated its intention to appeal the matter to the Supreme Court of Appeal.[292] The question, which is briefly evaluated here, is whether courts may order organs of state to expropriate or purchase property in circumstances in which eviction is not feasible.[293] This question has come before the courts in the past, where due to the number of people to be evicted and the lack of suitable alternative accommodation, it was simply not just and equitable to order an eviction.[294] In the *Modderklip* case, an eviction order had been granted by the High Court, but the number of unlawful occupiers present made the eviction not feasible, due to the cost of carrying out the eviction order.[295]

---

[286] *Fischer v Unlawful Occupiers* 2018 (2) SA 228 (WCC) para 81-86.
[287] Para 1.
[288] Paras 80, 84, 86.
[289] Paras 80, 84, 86.
[290] Paras 80, 84, 86.
[291] Para 196.
[292] P Nombembe "'Largest Land Occupation' Unresolved" (2017-10-08) *Sunday Times* 10; F Villette "City Prepares to Fight Marikana Land Ruling" (2018-07-30) *Cape Times* 4.
[293] J Dugard "*Modderklip* Revisited: Can Courts Compel the State to Expropriate Property Where the Eviction of Unlawful Occupiers is not Just and Equitable?" (2018) 21 *PER* 1 2.
[294] Dugard (2018) *PER* 5.
[295] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA) paras 1-10.

The *Modderklip* case, on appeal to the Supreme Court of Appeal (SCA), was the first instance in which a court raised the possibility of ordering the State to expropriate property subject to massive unlawful occupation.[296] The SCA found that the violation by the State of the rights of the occupiers (section 26(1) resulted in the violation of the rights of the landowner (section 25(1).[297] The court noted that the best solution to the impasse would have been for the State to expropriate the property in question, and thus assume the burden of owning the property.[298] However, the court did not explore this possibility further, doubting the appropriateness of a court ordering an organ of State to expropriate land.[299] Instead of making such a far-reaching order, the SCA ordered the payment of damages[300] to Modderklip, compensating the landowner for what was lost, and for the advantage gained by the State in not having to accommodate the occupiers itself.[301] Damages were to be calculated in terms of section 12(1) of the Expropriation Act 63 of 1975.[302]

While the relief granted by the SCA was upheld on appeal by the Constitutional Court (CC), the CC opted to hinge its decision on section 34 of the Constitution.[303] Section 34 guarantees the right of access to the courts, stating that everyone "has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court". In line with this right, the State was under an obligation "to take reasonable steps to ensure that Modderklip was…provided with effective relief".[304] In

---

[296] Dugard (2018) *PER* 6.
[297] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA) paras 22-28, 52.
[298] Para 41.
[299] Para 41.
[300] The damages, in this case, were direct constitutional damages, these being damages which stem from the Constitution itself rather than an indirect source (e.g. the common law and legislation). K Bezuidenhout *Compensation for Excessive but Otherwise Lawful Regulatory State Action* LLD thesis Stellenbosch University (2015) 251; M Bishop "Remedies" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 5 2013) 9-156.
The possibility of awarding constitutional damages – as "appropriate relief" - was first recognized in the case of *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), where it is necessary to protect a right in the Bill of Rights (para 60). This case was decided in terms of section 7(4)(a) of the Interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993), the predecessor section 38 of the final Constitution. See K Bezuidenhout *Compensation for Excessive but Otherwise Lawful Regulatory State Action* LLD thesis Stellenbosch University (2015) 252-256; M Bishop "Remedies" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 5 2013) 9-156.
[301] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA) paras 44, 52.
[302] Para 52.
[303] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) para 39-51.
[304] Para 51.

the circumstances, the State could have taken steps to expropriate the land in question or have provided alternative land to the unlawful occupiers.[305] The State's failure to take any reasonable measures to provide Modderklip with effective relief amounted to a violation of Modderklip's right under section 34.[306] The court agreed with the SCA on the relief to be granted, that being damages calculated in terms of section 12(1) of the Expropriation Act.

The CC touched on the possibility of ordering the State to expropriate the property, although it found it unnecessary to decide the point. Attention was drawn to the argument that such an order may amount to a violation of the separation of powers.[307] However, on the current facts, it was unknown whether the State perhaps did have alternative land available – which would render the expropriation of Modderklip's land unnecessary.[308] In any case, the award of compensation formulated by the SCA was seen to be the most appropriate remedy on the facts.

The *Modderklip* remedy will not be satisfactory to every landowner, with expropriation subject to just and equitable compensation appearing the most ideal remedy.[309] This would see the State stepping into the landowner's shoes to fulfil directly its obligations to the occupiers.[310]

However, as Dugard[311] has pointed out, the SCA has aligned itself against court-ordered expropriation in *Ekurhuleni Metropolitan Municipality v Dada NO*.[312] This was an appeal against an order by the High Court in Johannesburg in which the municipality in question had been ordered to purchase land on which an informal settlement was located.[313] Besides the issue of the proprietary of a court making such an order, the court a quo was not in fact requested by the parties to make such an order.[314] Rather, it appeared the court a quo had made the order seemingly out of the belief it was

[305] Para 51.
[306] Para 51.
[307] Para 63.
[308] Para 64.
[309] Dugard (2018) *PER* 8.
[310] Dugard (2018) *PER* 8.
[311] Dugard (2018) *PER* 9.
[312] 2009 (4) SA 463 (SCA).
[313] *Ekurhuleni Metropolian Municipality v Dada NO* 2009 (4) SA 463 (SCA) para 1. See *Dada v Unlawful Occupiers of Portion 41 of the Farm Rooikop and Another* 2009 (2) SA 492 (W).
[314] *Ekurhuleni Metropolian Municipality v Dada NO* 2009 (4) SA 463 (SCA) para 13.

appropriate to hasten the realisation of the right of access to housing.[315] This order conflicts with the requirement of due judicial deference that the Supreme Court of Appeal and Constitutional Court have emphasised in previous decisions.[316] While the court a quo was empowered to grant "appropriate relief" in terms of section 38 of the Constitution, ordering the municipality to purchase the property clearly falls outside these bounds, and ultimately the courts' powers.[317] The appeal was, therefore, upheld and the relevant part of the order of the court a quo set aside.[318]

In *Dolpire v South African National Road Agency Ltd*,[319] the applicant (a private landowner) sought to compel the Minister of Transport to expropriate a portion of his land in terms of the provisions of the National Roads Act.[320] The portion of the land in question was subject to an encroachment resulting from the N2 national road.[321] Among the reasons for rejecting the relief sought by the applicant, the court argued that such an order would have the effect of usurping "the discretionary powers of the Minister and in the most intrusive manner encroach into the terrain of the executive sphere of government".[322] A court should leave decisions concerning expropriation to the executive, thus observing the doctrine of the separation of powers.[323]

In Van der Walt's view, the decisions reached in *Ekurhuleni* and *Dolpire* are correct.[324] He points out that the discretion to expropriate is granted to specific administrators in terms of legislation, and that it is not the courts' place to "direct the expropriator in its exercise of the discretion" to expropriate or not.[325] While the validity of an administrative decision to expropriate may be open to attack, it is not open to a landowner to compel an administrator to expropriate.[326]

---

[315] Para 13.
[316] Para 10.
[317] Para 14.
[318] Para 15.
[319] (19661/2009) [2010] ZAWCHC 130 (17 June 2010).
[320] Act 7 of 1998.
[321] *Dolpire v South African National Road Agency Ltd* (19661/2009) [2010] ZAWCHC 130 (17 June 2010) para 5.
[322] Para 43.
[323] Para 43.
[324] Van der Walt *Constitutional Property Law* 386-387. See also Van der Walt *Property in the Margins* 200-201.
[325] Van der Walt *Constitutional Property Law* 386.
[326] Van der Walt *Constitutional Property Law* 386-387.

The Court in *Fischer* was cognisant of the separation-of-powers issues.[327] However, it distinguished the *Fischer* case from that of *Ekurhuleni*, the latter being concerned with a small group of people whose relocation should pose no significant challenges.[328] In the former matter, alternative accommodation for such a large number of occupiers was clearly not possible.[329] As such, the occupiers had to remain where they were, but this had to be achieved in a manner that did not violate the right of the landowners under section 25(1).[330]

The Court in *Fischer* further distinguished the matter from that of *Modderklip*, in which the CC had decided it was not necessary to decide the question as to whether it was possible to order the State to expropriate.[331] In *Modderklip*, information concerning the availability of alternative land was not put before the court.[332] If such land were available, it would not be appropriate for the court to order the State to expropriate Modderklip's land.[333] In *Fischer*, the only land on which it was feasible to accommodate the occupiers was that of the applicants.[334] In line with existing emergency housing policy,[335] privately owned land may be acquired for emergency housing situations.[336] In a situation where the City is failing to uphold the constitutional rights of both occupiers and landowners, an order to purchase the land in question could fall within the scope of appropriate relief, in the court's view.[337]

While noting the drastic nature of such an order, Dugard argues that the prevailing circumstances in South Africa may require such an approach to address the "systemic failure of the state…to fulfil its section 26 housing rights-related obligations".[338] Careful

---

[327] *Fischer v Unlawful Occupiers* 2018 (2) SA 228 (WCC) para 167. See Dugard's discussion at Dugard (2018) *PER* 15-16.
[328] *Fischer v Unlawful Occupiers* 2018 (2) SA 228 (WCC) para 164.
[329] Para 165.
[330] Para 167.
[331] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) paras 62-65.
[332] Para 64.
[333] *Fischer v Unlawful Occupiers* 2018 (2) SA 228 (WCC) para 182
[334] Para 183.
[335] See for example Department of Human Settlements *The National Housing Code: Incremental Interventions* 44. Available at <http://www.dhs.gov.za/sites/default/files/documents/national_housing_2009/4_Incremental_Interventions/2%20Volume%204%20Emergency%20Housing%20Programme.pdf> (accessed 12-01-2019).
[336] *Fischer v Unlawful Occupiers* 2018 (2) SA 228 (WCC) para 187.
[337] Paras 191-192.
[338] Dugard (2018) *PER* 17. See also Strydom & Viljoen (2014) *PER* 1209, 1219-1220.

manoeuvring around the doctrine of the separation of powers may be necessary to ensure the rights of all parties are vindicated – including the right of the landowner to an effective remedy in terms of section 28 of the Constitution.[339] Expropriation of such property could provide all parties concerned with much needed legal certainty.[340]

Evidently, as Dugard argues, the remedy formulated by the court in *Fischer* is a transformative one, which addresses the prevailing housing crisis in South Africa.[341] Importantly for this thesis, it also vindicates the rights of the landowner, divesting her of land that has accrued a negative value or cannot be used by the landowner. However, it remains to be seen whether the relief granted in *Fischer* will be upheld on appeal. As noted, the SCA has set itself against court-ordered expropriation.[342] However, *Ekurhuleni* is distinguishable on its facts from *Fischer*.[343] Given the prevailing uncertainty, landowners in such circumstances are not guaranteed the granting of this remedy for the time being.

The problem-building context, as well as large-scale unlawful occupation of land in general, thus provide potential justification for permitting landowners to abandon where the land accrues a negative value. The burden is evidently excessive, with the landowner losing the use and enjoyment of her land, while effectively undertaking the State's duty to provide housing to the occupiers.[344] The burden in the problem-building context is augmented by the potential liability that may accrue in terms of municipal by-laws, even when a third party exercises control over the property. A third party, the State, is benefitting from the burden to which the landowner is subjected, as the private landowner is carrying the cost of the State's duty to realise the occupiers' housing rights.[345] Existing compensatory mechanisms are not adequate unless the remedy formulated in *Fischer* is upheld on appeal. Even so, this remedy only finds application in very particular factual circumstances.[346] Finally, the individual landowner's interests

---

[339] Dugard (2018) *PER* 17.
[340] Strydom & Viljoen (2014) *PER* 1209.
[341] Dugard (2018) *PER* 17-18.
[342] Dugard (2018) *PER* 9; *Ekurhuleni Metropolitan Municipality v Dada NO* 2009 (4) SA 463 (SCA).
[343] *Ekurhuleni Metropolian Municipality v Dada NO* 2009 (4) SA 463 (SCA) paras 164-165.
[344] Dugard (2018) *PER* 8. See discussion in *Fischer v Unlawful Occupiers* 2018 (2) SA 228 (WCC) paras 160-195.
[345] Dugard (2018) *PER* 8. See discussion in *Fischer v Unlawful Occupiers* 2018 (2) SA 228 (WCC) paras 160-195.
[346] See discussion in *Fischer v Unlawful Occupiers* 2018 (2) SA 228 (WCC) paras 160-195. See also Dugard (2018) *PER* 9ff.

in this case would appear to outweigh the societal cost of abandonment or a regulated exit from landownership. This would amount to a turning over of land to the State, which may be used for the purpose of fulfilling the State's obligation to realise the housing rights enshrined in the Constitution.[347]

3.4 Further contexts: The question of climate change

The issue of negative value property, and who is responsible for such negative value and the accompanying liabilities is an incredibly complex issue. The contexts analysed above, while themselves often complex as far as according responsibility to the appropriate party, may be relatively simple compared to other situations. It is beyond the limitations of scope of this thesis to engage with all the possibilities which may lead to land accruing a negative value. However, some general comment in this respect of one particularly complex issue is necessary.

With unabated climate change,[348] for example, properties may begin to accrue negative values for reasons far beyond the control of landowner, or even the individual State.[349] For instance, a combination of wildfires and droughts have made parts of southern California highly susceptible to mudslides in the event of heavy rains.[350] Following massive costs to insurers as a result of property damage,[351] it is not unlikely that it may be impossible to acquire or retain home insurance for high-risk properties in future.[352] It is foreseeable that particularly high-risk properties may accrue a negative

---

[347] See section 26(1)-(2).
[348] NASA "The Evidence for Rapid Climate Change is Compelling" (25-08-2020) *NASA* <https://climate.nasa.gov/evidence/> (accessed 30-08-2020); H Cloke "As Sea Levels Rise, Are We Ready to Live Behind Giant Walls?" (11-05-2020) *The Conversation* https://theconversation.com/as-sea-levels-rise-are-we-ready-to-live-behind-giant-walls-137976 (accessed 31-08-2020); T Matthews & C Raymond "Global Warming Now Pushing Heat into Territory Humans Cannot Tolerate" (20-05-2020) *The Conversation* <https://theconversation.com/global-warming-now-pushing-heat-into-territory-humans-cannot-tolerate-138343> (accessed 31-08-2020).
[349] This particular example was pointed out to me by one of my examiners. Further research is planned on the subject for the future, as it is not possible to give it the attention it deserves given the limited scope of this thesis.
[350] E Zachos "Mudslides, Wildfires and Drought – California's Deadly Weather Explained" (10-01-2018) *National Geographic* <https://www.nationalgeographic.com/news/2018/01/mudslides-california-wildfires-drought-extreme-weather-spd/> (accessed 31-08-2020).
[351] S Barlyn "California Mudslides Insurance Losses Exceed $421 million: Regulator" (2-04-2018) *Reuters* <https://www.reuters.com/article/us-california-mudslides-insurance/california-mudslide-insurance-losses-exceed-421-million-regulator-idUSKCN1H91PK> (accessed 31-08-2020).
[352] K Ronayne "California Insurers Drop Policies in High-fire Risk Areas" (21-08-2019) *Fox26 News* <https://kmph.com/news/local/california-insurers-drop-policies-in-high-fire-risk-areas> (accessed 31-08-2020).

value, as a result of being rendered uninsurable for an increasing risk of damage and destruction that is difficult (or impossible) to prevent.

South Africa faces similar challenges in respect of climate change,[353] particularly with respect of water.[354] The City of Cape Town already came close to reaching "day zero" in 2018, meaning that the critical shortage of water would have required the shutting off of the municipal water supply.[355] This would have necessitated residents of the City to queue for their water allocations.[356] Such a fate has already effectively befallen parts of the Eastern Cape province,[357] such as Grahamstown.[358]

The impact of climate change (such as more frequent, prolonged droughts) will inevitably have serious consequences for the value of immovable property in the hardest hit regions. Whether landowners should be permitted to abandon (or exit from) ownership in these circumstances will be a delicate balancing act of competing interests. Climate change is beyond the power of the South African State to remediate alone (although its contribution to combatting climate change is indeed lacking[359]).

---

[353] P Johnston "Farming in South Africa is Under Threat from Climate Change. Here's How" (12-11-2019) *The Conversation* <https://theconversation.com/farming-in-south-africa-is-under-threat-from-climate-change-heres-how-125984> (accessed 30-08-2020); N James "Climate Change is Hitting South Africa's Coastal Fish" (3-08-2015) *The Conversation* <https://theconversation.com/climate-change-is-hitting-south-africas-coastal-fish-44802> (accessed 30-08-2020); S Strydom & M Savage "The Influence of Climate Change on Fire Activity in South Africa" (7-08-2017) *The Conversation* <https://theconversation.com/the-influence-of-climate-change-on-fire-activity-in-south-africa-71349> (accessed 30-08-2020).

[354] M New, F Otto & P Wolski "Global Warming has Already Raised the Risk of More Severe Droughts in Cape Town" (19-12-2018) *The Conversation* <https://theconversation.com/global-warming-has-already-raised-the-risk-of-more-severe-droughts-in-cape-town-107625> (accessed 30-08-2020); M Galvin "Bold Steps are Needed Towards a 'New Normal' that Allocates Water Fairly in South Africa" (6-03-2018) *The Conversation* <https://theconversation.com/bold-steps-are-needed-toward-a-new-normal-that-allocates-water-fairly-in-south-africa-92191> (accessed 30-08-2020).

[355] L Taing, C Chang, S Pan & NP Armitage "Towards a Water Secure Future: Reflections on Cape Town's Day Zero Crisis" (2019) 16 *Urban Water Journal* 530 531.

[356] Taing et al (2020) *Urban Water Journal* 531.

[357] E Ellis "Emergency Water Restrictions as Eastern Cape's Water Woes Escalate" (4-02-2020) *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-02-04-emergency-restrictions-as-eastern-capes-water-woes-escalate/> (accessed 30-08-2020); M Muller "South Africa's Real Water Crisis: Not Understanding What's Needed" (6-11-2020) *The Conversation* https://theconversation.com/south-africas-real-water-crisis-not-understanding-whats-needed-126361 (accessed 30-08-2020).

[358] L Nowicki "Grahamstown Residents Queue for Hours for Water" (14-0-2019) *GroundUp* https://www.groundup.org.za/article/grahamstown-residents-queue-hours-water/ (accessed 30-08-2020).

[359] Climate Action Tracker grades South Africa as "highly insufficient" in terms of complying with its contribution to ensure global warming is held below 2°C, "let alone with the Paris Agreement's stronger 1.5°C limit". See Climate Action Tracker "South Africa" (2-12-2019) *Climate Action Tracker* <https://climateactiontracker.org/countries/south-africa/> (accessed 30-08-2020). See further the Paris Agreement, 2015. Available at

However, especially in the context of scarce water resources, mismanagement by the relevant authorities is a crucial factor in exacerbating climate disaster.[360] Further research in respect of such scenarios is essential.

4. Conclusion

An evaluation of the contexts above makes it clear that there are circumstances in which some form of abandonment or regulated exit would be justified in South African law. The burdens placed on owners in these circumstances may be excessive while existing compensatory mechanisms often fall short. In the mining context, the State grants rights to third parties over privately-owned land. However, it is also strong in the context of heritage buildings, as well as the context of problem buildings and unlawful occupation, where the landowner often is not responsible for the property accruing a negative value. Following these conclusions, it is necessary to consider the vehicle through which reform is to be achieved.

The best tool would be a piece of legislation, enacted to give effect to a right to abandon landownership in limited circumstances. This will provide a specific mechanism to give effect to the principle of publicity, while balancing the interests of the individual landowner with the broader community. Suggestions for what kind of provisions such a piece of legislation should contain is the focus of the following and penultimate chapter.

<https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf > (accessed 30-08-2020).

[360] Muller "South Africa's Real Water Crisis" *The Conversation*; M Feris "New Report Outlines the Dire Consequences of Corruption in Water Sector (12-03-2020) *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-03-12-new-report-outlines-the-dire-consequences-of-corruption-in-water-sector/> (accessed 30-08-2020).

Chapter 7: Reforming the Law of Abandonment

1. Towards a Statute on Abandonment

Following an evaluation of the above contexts, there are evidently circumstances in which the continued burden of landownership can be considered excessive. Landowners in such circumstances should be entitled to abandon ownership, or be provided with some form of regulated exit, regardless of how one interprets the mechanism through which ownership is divested.[1] However, in the absence of a legal mechanism that gives effect to the principle of publicity,[2] legislation will be required. The question that follows is what shape such legislative reform should take.

As an unrestricted right to abandon is not viable in the South African context,[3] the Swiss example would not be an option for reform. As discussed in Chapter Five, in Swiss law, all that is required for land to be abandoned (*Dereliktion*) is that the owner submits a waiver at the relevant land registry.[4] Upon submission of the waiver, the registrar removes the abandoning owner's name from the owner's column of the page of the *Grundbuch* assigned to the piece of land in question.[5] The land is then rendered ownerless and open to appropriation.[6]

---

[1] As explained in Chapter 2 Section 2, abandonment in the true sense of the word involves *unilateral* divestment of ownership, meaning the cooperation of third parties should not be required. See L Strahilevitz "The Right to Abandon" (2010) 158 *U. Pa. L. Rev.* 355 360; E Peñalver "The Illusory Right to Abandon" (2010) 109 *Michigan Law Review* 191 194-195.

[2] See Chapter 3 Sections 2 to 4.

[3] See the context provided in Chapter 1 Section 2, and Chapter 6 Section 2.1.

[4] See Art. 964 Abs. 1 ZGB; Art. 46 and 48 GBV. See also J Schmid & B Hürlimann-Kaup *Sachenrecht* 5 ed (2017) para 868; H Rey & L Strebel "Art. 666" in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 1134 1134-1135; H Rey *Die Grundlagen des Sachenrechts und das Eigentum* 3 ed (2007) para 1676; P Tuor, B Schnyder, J Schmid & A Jungo *Das Schweizerische Zivilgesetzbuch* 14 ed (2015) § 100 para 33; F Hitz "Art. 666" in M Amstutz, P Breitschmid, A Furrer, D Girsberger, C Huguenin, A Jungo, M Müller-Chen, V Roberto, AK Schnyder & HR Trüeb (eds) *Handkommentar zum Schweizer Privatrecht* 3 ed (2006) 166 166-167; P Simonius & T Sutter *Schweizerisches Immobiliarsachenrecht* (1995) para 127.

[5] Rey & Strebel "Art. 666" in *Basler Kommentar* 1135; Hitz "Art. 666" in *Handkommentar* 167; Rey *Sachenrechts* para 1677.

[6] Art. 658 Abs. 1 ZGB; Rey & Strebel "Art. 666" in *Basler Kommentar* 1134; Rey *Sachenrecht* para 1678; Simonius & Sutter *Schweizerisches Immobiliarsachenrecht* para 128.

The socio-economic context in South Africa, one in which Government is already subject to severe budgetary constraints in meeting its obligations to the populace,[7] renders a permissive approach unviable.[8] Any legislative reform should give effect to the guidelines identified in light of the social-obligation norm.[9] As previously noted, the social-obligation norm is given effect to by the property clause of the Constitution, that being section 25.[10] It is thus contended that these identified guidelines are compatible with the property clause and its objectives.[11] How these guidelines may be effected in legislation will now be considered.

Given the nature of the factors to be considered, the legislation should provide for a landowner to approach a court for relief in seeking to abandon her property. Unlike in the Swiss context, in which the owner's decision to abandon her property cannot be challenged,[12] abandonment in the South African context will be more complicated than a landowner merely deciding to abandon. However, as the following Chapter shows, a court will only become involved following a landowner's attempt to ameliorate her own circumstances and reach a satisfactory agreement regarding the property with the State. The courts thus, in the abandonment context, only operate as impartial adjudicators where the relevant parties have failed to reach an agreement.

This chapter explores what form an abandonment statute should take. While it makes a case for permitting an aggrieved landowner to make an abandonment application to a competent court, it also suggests prerequisites with which the landowner must first comply. Whether the statute should permit subdivision of the land in question, where the landowner wishes to retain part thereof, is also considered. This is followed by a consideration of the potential consequences of a successful abandonment application.

---

[7] See Chapter 4 Section 4.1 (particularly the sources in note 116) and Chapter 6 Section 2.1.
[8] For an example of a permissive approach, see the discussion of Switzerland in Chapter 5 Section 3.
[9] See Chapter 4 Section 6.
[10] G Alexander "The Social-Obligation Norm in American Property Law" (2009) 94 *Cornell Law Review* 745 782ff; G Alexander *The Global Debate Over Constitutional Property* (2006) 149ff. See further R Cramer "The Abandonment of Landownership in South African and Swiss Law (2017) 134 *SALJ* 870 899ff. Note on the aforementioned publication by the author: My Memorandum of Understanding with my supervisor, as well as obligations attaching to funding I received through the Swiss-South African Joint Research Programme to facilitate my comparative study, required me to publish from my doctoral research. The article referenced here is the result of the obligation to publish from my doctoral research.
[11] See Chapter 4 Sections 5 and 6.
[12] Rey and Strebel "Art. 666" in *Basler Kommentar* 1135; Hitz "Art. 666" in *Handkommentar* 167; BGE 85 I 261 262-263.

Two final issues are canvassed. Firstly, this chapter briefly outlines how – based on existing law – responsibilities will be passed on a successful abandonment application. Finally, given current events,[13] this chapter discusses whether an abandonment statute would still be relevant should a moderate form of expropriation without compensation become a reality.

1.1 Abandonment prerequisites

A statute empowering a landowner to divest herself of ownership unilaterally would likely only be used in circumstances where the affected property has accrued a negative value.[14] Because of such a negative value, the landowner may be unable to find another private party willing to take transfer of the land. The landowner may have limited options in the circumstances. Nevertheless, any abandonment statute should have prerequisites that must be met before the landowner approaches the court for relief.

Before the landowner may resort to abandonment, she should exhaust the options of either transferring the property to local government or another government department. She should also have exhausted all compensatory avenues available to her,[15] to try ameliorate the otherwise negative value of the property for herself. Effectively, before involving the court in the matter, a landowner should have attempted to ameliorate her situation through the avenues available to her.

The intervention of the courts in these circumstances is analogous to their role in the expropriation context. In the expropriation context, courts decide or approve the

---

[13] See discussion of recent moves towards expropriation without compensation below in section 3. See also T Mahlakoana "ANC Goes Radical on Land Question" *Business Day* (21-12-2017) 1; S Njobeni & K Koko "Heated Land Reform Debate Degenerates into Fist Fight" *Cape Argus* (22-12-2017) 4; B Phakathi "ANC, EFF Join Hands on Land Expropriation" *Business Day* (28-02-2018) 1; C Ramaphosa "This is No Land Grab" (24-08-2018) *Business Day* <https://www.businesslive.co.za/bd/opinion/2018-08-24-exclusive-this-is-no-land-grab-writes-cyril-ramaphosa/> (accessed on 19-10-2018); M Merten "ANC's Executive Proposal on Expropriation Without Compensation Obscures Already Vast Ministerial Powers" (28-01-2020) *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-01-28-ancs-executive-proposal-on-expropriation-without-compensation-obscures-already-vast-ministerial-powers/> (accessed 30-01-2020); S Grootes "Land Issue: Once More at Front and Centre of the ANC's Internal Politics" (27-01-2020) *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-01-27-land-issue-once-more-at-front-and-centre-of-the-ancs-internal-politics/> (accessed 30-01-2020). See the Draft Constitution Eighteenth Amendment Bill, 2019 (in Government Gazette 42902 of 13-12-2019).

[14] See the discussion of the mining, heritage building, and problem building contexts in Chapter 6 Section 3.

[15] The deficiency of existing compensatory mechanisms is discussed in Chapter 6 Section 3.

amount of compensation to the expropriated owner where the affected parties have failed to reach an agreement.[16] As in the proposed abandonment statute, there would be a number of important factors to be considered by the court in deciding on the amount of compensation payable.[17] Courts should not be burdened with unnecessary litigation, but given the importance of the factors to be considered in an abandonment statute, failure to arrive at an agreement would necessitate involving the courts, as in the expropriation context.

A landowner should be required by legislation to try to come to an agreement with the relevant municipality regarding the property she seeks to abandon. A good example of this is the "abandonment agreements" entered into by the City of Johannesburg with property owners.[18] As previously noted,[19] the use of the term "abandonment" to describe such an agreement is incorrect, given that these agreements are in fact bilateral acts, involving two cooperating parties, as well as a *quid pro quo*.[20]

In coming to an agreement concerning the transfer of the property to the municipality, the landowner and the municipality should attempt to reach an agreement on arrears of municipal rates, if applicable, and the costs of the transfer. Once such an agreement is concluded with the municipality, the landowner is divested of ownership, such ownership being transferred to the municipality.

Where the relevant municipality does not wish to enter into an agreement to acquire the property in question, the landowner should attempt to reach an agreement with the most appropriate government department. The relevant department is determined on the basis of which Minister would exercise the discretion to expropriate in a particular

---

[16] Section 25(2)(b) of the Constitution of the Republic of South Africa, 1996, and section 14 of the Expropriation Act 63 of 1975. See AJ van der Walt *Constitutional Property Law* 3 ed (2011) 509-510; G Muller, R Brits, JM Pienaar & Z Boggenpoel *Silberberg and Schoeman's The Law of Property* 6 ed (2019) 656ff.

[17] Section 25(3). See Van der Walt *Constitutional Property Law* 509ff.

[18] H Mashaba "City of Joburg to Expropriate Derelict Buildings" (27-02-2018) *The Johannesburg Inner City Partnership* <http://www.jicp.org.za/news/city-of-joburg-to-expropriate-derelict-buildings/> (accessed 20-02-2018); H Mashaba "City of Johannesburg to Expropriate Derelict Buildings" *Joburg* <https://www.joburg.org.za/media_/MediaStatements/Pages/2018%20Press%20Releases/City-of-Joburg-to-expropriate-derelict-buildings.aspx> (accessed 20-11-2018); JC Sonnekus "Abandonnering van Eiendomsreg op Grond end Aanspreeklikheid vir Grondbelasting" (2004) *TSAR* 747 748–749, 753–755. See Chapter 3 Section 2.3.1.

[19] See Chapter 3 Section 2.3.1.

[20] *Papas NO v Motsere Trading CC* (46011/2012) [2014] ZAGPJHC 144 (6 June 2014) para 7; Sonnekus (2004) *TSAR* 754–5.

context, should grounds that trigger such discretion arise. For example, the Department of Arts and Culture has authority in the heritage building context and the Department of Mineral Resources in the mining context.[21] Again, the agreement should cover issues such as the landowner's outstanding debts stemming from ownership of the land (such as municipal rates) as well as the costs of transfer. This transfer is not an expropriation, and hence compensation beyond transfer costs and outstanding debts will not be in question.

As previously stated, landowners should also make use of any existing compensatory mechanisms, to ameliorate the negative value of the property for themselves. For example, the landowner could reach a mutually satisfactory heritage agreement with a relevant heritage authority. Such an agreement has the potential to cover the costs of maintaining the property,[22] and pass guardianship of the property to the relevant heritage resources authority.[23] However, the negotiation of and assent to a heritage agreement by the relevant heritage resources authority is not compulsory.[24]

While compensatory mechanisms, such as those found in the National Heritage Resources Act[25] (NHRA) and the Mineral and Petroleum Resources Development Act[26] (MPRDA), already have their own procedures,[27] this is not the case for where a landowner wishes to transfer her property to the State. It is a daunting prospect for an individual landowner to attempt to approach the relevant public authorities with a view to negotiating such an agreement. It is necessary for an abandonment statute to provide for a streamlined process on which the landowner could rely. What such a process would resemble, and who would administer it, is difficult to determine, however. There are numerous public authorities with which it will be necessary for the owner to engage, depending on the context. Perhaps the ideal way to streamline the process is for an abandonment statute to prescribe that the relevant public authorities must provide procedures for the receipt of requests from landowners who wish to

[21] See the definitions of "Minister" in section 1 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and section 2 of the National Heritage Resources Act 25 of 1999 (NHRA).
[22] Section 42(9)(a), (h).
[23] Section 42(8).
[24] Section 42(6).
[25] Act 25 of 1999.
[26] Act 28 of 2002.
[27] See Chapter 6 Sections 3.1 and 3.2.

negotiate the transfer of their land to the State. The statute should provide that such requests should be evaluated considering the factors set out in Chapter 4[28] (and repeated below[29]), as well as provide timeframes within which a response is to be issued to the landowner. Such provisions will clearly situate the completion of the prerequisites within administrative law, and thus require that public authorities engage with landowners in a procedurally fair manner.[30]

A process such as that envisaged above will also formalise the otherwise ad hoc entering into of "abandonment" agreements, as practiced by City of Johannesburg.[31] The entering into of such agreements absent a formal process, in the context of administrative law, may raise the legitimate expectation doctrine.[32] This doctrine, with its origins in English law, can arise in two circumstances, these being (1) "an express promise on behalf of a public authority" or (2) "the existence of a regular practice which the claimant can reasonably expect to continue".[33] This doctrine applies even where the person seeking to attain a benefit has no legal right thereto, but despite this, she may have a legitimate expectation of being bestowed such a benefit by a public authority.[34] It was the decision in *Administrator, Transvaal v Traub*[35] which saw the complete recognition of the doctrine in South African law.[36] The doctrine, while not

[28] Chapter 4 Section 6.
[29] Section 1.3.
[30] The Promotion of Administrative Justice Act 3 of 2000 (PAJA) provides that "[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair" (section 3(1). As noted in *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC), "decision-makers who are entrusted with the authority to make administrative decisions by any statute are therefore required to do so in a manner that is consistent with PAJA" (para 101). See also C Hoexter *Administrative Law in South Africa* 2 ed (2012) 367-368; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) para 61.
It is beyond the scope of this thesis to discuss what constitutes procedural fairness in the administrative law context, however see Hoexter *Administrative Law* Chapter 7.
[31] City of Johannesburg "New Inner City Scheme" *Joburg* <https://www.joburg.org.za/media_/Newsroom/Pages/2013%20articles/2011%20&%202012%20%20Articles/New-inner-city-scheme.aspx> (accessed 27-03-2019); Sonnekus (2004) *TSAR* 748-749, 753-755; *Papas N.O. v Motsere Trading CC* (46011/2012) [2014] ZAGPJHC 144 [2].
[32] See Hoexter *Administrative Law* 39ff.
[33] See *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 943-944, referred to by Hoexter *Administrative Law* 394-395.
[34] *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935 943-944.
[35] 1989 (4) SA 731 (A).
[36] Hoexter *Administrative Law* 394-395.

expressly endorsed by the final Constitution in section 33, is now found in the Promotion of Administrative Justice Act.[37]

Conceivably, the City of Johannesburg entering into "abandonment" agreements with some landowners of properties with a negative value could give rise to a legitimate expectation on the part of other landowners in a similar situation that they will be entitled to the same benefit. At the very least, they should be entitled to make their case (i.e. be heard) as to why an offer to enter into an abandonment agreement should be extended to them.[38] Potentially, unnecessary litigation could result, as aggrieved landowners challenge the decision to not extend such an agreement to them. It is preferable that the process is formalised, with factors guiding the decision-maker regarding every request submitted by a landowner wishing to divest herself of land that has a negative value.

Failure to agree on the transfer of the land, when complying with the above prerequisites, coupled with the inadequacy or failure of any existing compensatory mechanisms, should entitle the landowner to approach a court for relief. This will effectively operate as an in-built review process where the landowner is unhappy with the relevant authority's decision to not take transfer of the property purely on the merits of the matter, absent other grounds for judicial review.[39] The manner in which this should be conducted is considered below.

1.2 Procedure

Motion proceedings[40] in which the relevant local authority and government department, as well as the Registrar of Deeds, are joined as respondents would appear to be most appropriate for a procedure in terms of an abandonment statute. However, any party with an interest in the matter should be entitled to be joined. In this respect, the would-

---

[37] See section 3(1).
[38] Hoexter *Administrative Law* 395.
[39] See section 6(2) of PAJA for grounds on which a decision make be taken on judicial review.
It is beyond the scope of this thesis to discuss judicial review in the administrative law context, however see Hoexter *Administrative Law* Chapter 3.
[40] Motion proceedings, or application proceedings, are one of the two most important means to approach a court of first instance in the South African legal system. The other is action proceedings, which involves to giving of oral evidence by witnesses. By contrast, motion proceedings are "decided on the papers placed before the court". The evidence on which a party to motion proceedings wishes to rely must be in these papers. See S Pete, D Hulme, M du Plessis, R Palmer, O Sibanda & T Palmer *Civil Procedure: A Practical Guide* 3 ed (2017) 153.

be abandoner should inform her immediate neighbours, as well as any holders of limited real rights in the land, of her intention to proceed with abandonment proceedings. The would-be abandoner should also publicise such intention with a notice in a community newspaper as well as a national newspaper.

1.3 Factors to be considered

An abandonment statute should provide guidelines for the court when considering whether to permit abandonment on the facts before it. The guidelines formulated in Chapter 4[41] and reiterated in Chapter 6[42] can be utilized for this purpose. Furthermore, the factors have been considered in detail in respect of the contexts explored above. As such, they will only be briefly repeated here.

The statute should provide that a court, in determining whether a landowner be permitted to abandon (and thus pass ownership of her property onto the State), consider (1) the extent of the burden to which the landowner is subjected, (2) whether a third party derives a benefit from the burden to which the landowner is subjected, (3) whether existing compensatory mechanisms are adequate in easing the burden on the landowner, and (4) the societal cost of abandonment. A court should also be empowered to consider any other relevant circumstances, even though any relevant circumstance should already have been considered in terms of the factors expressly listed.

1.4 Permitting subdivision

One issue to be considered in respect of abandonment of landownership are circumstances in which the landowner does not wish to abandon the land in its entirety, but only a portion thereof. Such circumstances may arise in the mining context – for example, where mining or prospecting operations are only being conducted on a portion of a farm. Similarly, in the heritage building context, the protected building may be located on part of the property in question, while the landowner wishes to develop the remainder. It is thus necessary to consider whether an abandonment statute should

[41] Chapter 4 Section 6.
[42] Chapter 6 Section 2.2.

make provision for subdivision and abandonment of a parcel of land, as opposed to an erf[43] in its entirety.

Subdivision refers to the practice of "cutting off a portion or portions of the parent property".[44] In principle, any landowner is entitled to subdivide her property, although in practice this entitlement is heavily restricted.[45] Subdivision of land is regulated by both national and provincial legislation.[46] The most important of these pieces of legislation is the Subdivision of Agricultural Land Act,[47] which prescribes the requirement of ministerial permission before agricultural land may be subdivided.[48] While the Act has been scheduled for repeal in terms of the Subdivision of Agricultural Land Act Repeal Act[49] twenty years ago, this has yet to occur.[50] Subdivision of land is also regulated by both old-order and new-order provincial legislation.[51]

An abandonment statute should permit subdivision and the abandonment of a parcel of land, in certain circumstances. The statute would need to provide for the decision-maker to weigh up the landowner's rights and interests against those of society at

---

[43] Section 102 of the Deeds Registries Act 47 of 1937 defines "erf" ("erven" for plural) as "means every piece of land registered as an erf, lot, plot or stand in a deeds registry, and includes every defined portion, not intended to be a public place, of a piece of land laid out as a township, whether or not it has been formally recognized, approved or proclaimed as such".

[44] J van Wyk *Planning Law* 2 ed (2012) 380; HS Nel *Jones Conveyancing in South Africa* 4 ed (1991) 165; Author Unknown "Chapter 6 Subdivision of Land" in *Conventional Deeds Manual/Deeds Practice Manuals* (RS, 2018) 1-275.

[45] H Mostert, JM Pienaar & J van Wyk "Land" in WA Joubert (founding ed) *LAWSA 14* 3 ed (2010) para 92; "Chapter 6" in *Conventional Deeds Manual/Deeds Practice Manuals* 1-275-1-293.

[46] Van Wyk *Planning* 380; Nel *Conveyancing* 165-175; "Chapter 6" in *Conventional Deeds Manual/Deeds Practice Manuals* 1-275-1-293.

[47] Act 70 of 1970.

[48] Section 3.

[49] Act 64 of 1998.

[50] Van Wyk *Planning* 380; Mostert et al "Land" in *LAWSA* para 93.

[51] Van Wyk *Planning* 383. Section 1 of Schedule 6 of the Constitution, 1996, defines "old order legislation" as "legislation enacted before the [interim] Constitution took effect". This definition would include old provincial ordinances which correspond to the boundaries of the four provinces that existed pre-1994. Section 2(1) states that such law continues in effect unless repealed or amended, so long as it is consistent with the Constitution. New order legislation refers to legislation enacted following the coming into force of the interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993). This would include provincial legislation passed by the provincial legislatures of the new provinces.

For an example of old-order legislation, see the Division of Land Ordinance 20 of 1986 (T), which remains in force in the provinces for Gauteng, Limpopo and Mpumalanga. Examples of new-order legislation includes the Western Cape Land Use Planning Act No. 3 of 2014 (see section 36) and the KwaZulu-Natal Planning and Development Act No. 6 of 2008 (see Chapter 3).

The subdivision of land is listed in Schedule 1 of the Spatial Planning and Land Use Development Act 16 of 2013 (SPLUMA) as a matter to be addressed in provincial legislation. This includes the repeal or amendment of provincial legislation concerning subdivision, as well as the formulating of procedures for an application for subdivision.

large. It should not allow the creation of new erven which, even when some form of rehabilitation has taken place, would remain economically unviable in perpetuity due to the size and location of the land in question. The creation of economically unviable erven would not only be a concern in the agricultural context, but also in the urban context, in which housing remains a problem.[52]

An abandonment statute should address how it would interact with legislation regulating the subdivision of land. Regarding subdivision in general, the input of the relevant municipality (already joined as a party to proceedings) is essential, since municipalities grant approval for subdivision in terms of planning by-laws.[53] The municipality would be best placed to inform the court of the potential impact of the subdivision in question, as well as whether such division is compatible with its spatial development framework.[54]

Land that falls within the ambit of the definition of agricultural land in the Subdivision of Agricultural Land Act presents a more challenging issue.[55] It would be necessary that the Minister of Agriculture be joined as a party to the proceedings. The question arises how an abandonment statute should address the possibility of the Minister refusing to grant consent for subdivision of the land in question. There is the possibility of the statute granting the court the power to override the Minister's decision on this matter. However, it would not seem appropriate, given the separation of powers,[56] as well as the national importance of preventing the fragmentation of agricultural holdings.[57] In the absence of grounds on which the Minister's decision to grant

---

[52] A Osman "South African Urgently Needs to Rethink its Approach to Housing" (04-06-2017) *The Conversation* <https://theconversation.com/south-africa-urgently-needs-to-rethink-its-approach-to-housing-78628> (accessed on 22-10-2018); K Wilkinson "The Housing Situation in South Africa" (09-05-2014) *AfricaCheck* <https://africacheck.org/factsheets/factsheet-the-housing-situation-in-south-africa/> (accessed 22-10-2018).

[53] See for example Part 4 of the City of Cape Town Municipal Planning By-Law, 2015 and Part 4 of the City of Johannesburg Municipal Planning By-Law, 2016.

[54] Concerning spatial development frameworks, see chapter four of the SPLUMA. Also see Van Wyk *Planning* 274-276.

[55] See section 1 of the Subdivision of Agricultural Land Act. As noted by Van Wyk, this definition is peculiar, as defines "agricultural land not in terms of what it is, but what it is not, according to exceptions". See Van Wyk *Planning* 380-382. See also Mostert, Pienaar & Van Wyk "Land" in *LAWSA* para 94.

[56] On the separation of powers in the South African context, see S Seedorf & S Sibanda "Separation of Powers" in S Woolman & M Bishop (eds) *The Constitutional Law of South Africa* 2 ed (RS 5 2013) 12-1-12-98.

[57] Van Wyk *Planning* 380.

subdivision may be set aside on review, it is submitted that the Minister's decision in respect of granting or refusing consent for subdivision should stand.

Which party should bear the costs associated with subdivision,[58] in the event the court finds subdivision justifiable in the circumstances? The answer depends on the relevant circumstances. Where the landowner wishes to abandon a portion of her land as a result of the State granting a third party a right over it (such as in the mining context), it is contended that the State should bear the costs associated with subdivision. Alternatively, where a third party (for example a mining company) is benefitting from the burden upon the landowner, such a third party should then bear the associated costs.

The imposition of costs on the State or a third-party would not always be a simple matter. For example, in the heritage context, one would need to account whether the landowner should reasonably have known that a building on the land would be subject to protection at the time of purchase. It would not seem appropriate for the State to bear the costs of subdivision. In fact, such knowledge on the part of the landowner at the time of purchase would probably weigh heavily against permitting any abandonment in the first place, given the factors outlined above. Abandonment should not serve as an exit from a gamble taken by a developer who had hoped to be granted permission to demolish a property.

Nevertheless, a court should be given a broad discretion to make a just and equitable decision concerning the associated costs of subdivision in abandonment proceedings. There are important factors that will need to be weighed up in making such a determination.

1.5 Consequences

The standard view among South African property law academics is that abandoned land is rendered *bona vacantia*, meaning it accrues to the State.[59] Sonnekus provides

[58] See Law Society of South Africa *Conveyancing Fees Guidelines* (in operation for instructions received from 01-06-2019). Available at <https://www.lssa.org.za/wp-content/uploads/2019/12/Conveyancing-Fees-Guidelines-November-2019-2.pdf> (accessed 06-02-2020).

[59] CG van der Merwe & A Pope "Part III – Property" in F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 405 492; CG van der Merwe *Sakereg* 2 ed (1989) 227; CG van der Merwe "Minister

a dissenting view, arguing that abandoned land is *res derelictae*, meaning it is open to appropriation by the first taker.[60] For the purposes of this thesis, it is assumed that the standard view is correct.[61] However, even if it is not correct, it can simply be confirmed through an abandonment statute, which directs abandoned property into the ownership of the State.

It should be open to the State to direct ownership of the property in question to a third party, such as the mining company conducting operations on the land in question, should the two come to an agreement to do so. Following registration of the property in favour of the State, it could then grant the land to the relevant third party.[62] But in the absence of such an agreement, the State would remain owner.

The way the operation of an abandonment statute will interact with the Deeds Registries Act upon a successful application to abandon must be considered. The relevant section of the Deeds Registries Act would appear to be section 31, which concerns land transferred to or vested in the State through expropriation or statute. Where ownership has vested in the State or a local authority, through statute, a deed of transfer must be executed in favour of the State (transferee).[63]

A final issue to consider with regard the consequences of a successful application in terms of an abandonment statute is the status of limited real rights in the land in question, real security rights in particular. Limited real rights, such as servitudes, should remain unaffected by the landowner's decision to abandon her landownership. In any case, section 31(4)(b) of the Deeds Registries Act, concerning land vesting in the State through statute, already provides that the deed of transfer "shall be registered subject to all existing conditions affecting the land in question which have not been

van Landbou v Sonnendecker 1979 2 SA 944 (A)" (1980) *TSAR* 183 187-188; DL Carey Miller *The Acquisition and Protection of Ownership* (1986) 8-9.

[60] JC Sonnekus "Enkele Opmerkings na Aanleiding van die Aanspraak op Bona Vacantia as Sogenaamde Regale Reg" (1985) *TSAR* 121 121ff; JC Sonnekus "Grondeise en die Klassifikasie van Grond as Res Nullius of as Staatsgrond" (2001) *TSAR* 84 91ff.

[61] See Chapter 2 Section 4.2.1.

[62] See section 18(2) of the Deeds Registries Act.

[63] Section 31(1).

expropriated or vested in the transferee".[64] Such a right is simply not extinguished upon abandonment by the landowner.

More attention will need to be paid to mortgage bonds, given the financial stake mortgagees have in the property in question. Section 56(1) of the Deeds Registries Act provides that land subject to a mortgage bond may not be transferred until such time as the bond is cancelled. [65] Cancellation is not necessary where transfer is provided for "in any other law specially provided or as ordered by the court".[66] As such, a court order, as provided for in an abandonment statute, could potentially permit the registration of the property in favour of the State despite the absence of cancellation of the bond in the deeds office, assuming the interpretation of the provision above is correct. It may also be argued that abandonment, which renders the property *bona vacantia*,[67] does not fall within the definition of "transfer",[68] thus rendering section 56(1) of the Deeds Registries Act irrelevant.

However, in the context of abandonment, the interests of the mortgagee should also be protected. The mortgagee, as with the landowner, would also be an innocent party affected by the unexpected accrual of a negative value by the land, for example by the State granting a third party a mining right therein. As such, an abandonment statute should require the consent of a mortgagee to any court order permitting abandonment. In any case, where (1) it is not possible to find a purchaser for the land in question and (2) the debtor is in fact losing money by virtue of her ownership of the land, it may be in the best interests of the mortgagee to provide its consent. The principal debt will remain unaffected.

Where the mortgagee consents to the abandonment, it is necessary to consider the fate of the mortgage bond. An abandonment statute would only operate in

---

[64] See Author Unknown "Chapter 17 Expropriation and Vesting Transfers" in *Conventional Deeds Manual/Deeds Practice Manuals* (RS, 2018) 1-191-1-192.
[65] See R Brits *Real Security Law* (2016) 57-58; Muller et al *Silberberg* 440; Nel *Conveyancing* 129.
[66] Section 56(1)(c).
[67] Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 492; Van der Merwe *Sakereg* 227; Van der Merwe (1980) *SALJ* 187-188; Carey Miller *The Acquisition and Protection of Ownership* 8-9.
[68] While the Deeds Registries Act does not include a definition of "transfer" in its definition section (section 102), the term "transfer" would seem to indicate that what is envisioned is a bilateral act, one with a transferor and a transferee. Effectively the term "transfer" is only relevant in the context of derivate acquisition, which abandonment is not. For more on derivative acquisition, see Muller et al *Silberberg* Chapters 9 and 10; Van der Merwe *Sakereg* Chapter 7; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 519ff.

circumstances in which the land has acquired a negative value, and no purchaser thereof can be secured. Leaving a mortgage bond registered against the abandoned land could lead to confusion down the line, as well as dissuade those who may otherwise be willing to take a grant of the land from the State with a view to rehabilitating it eventually. It would ultimately be simplest that abandonment – done with the consent of the mortgagee – resulted in the cancellation of the bond in the deeds office.

Costs orders will be awarded against the State on a successful abandonment application. Litigation could have been avoided since the State had the chance to take transfer of the property from the landowner, but elected not to cooperate in coming to an agreement.

2. Passing of responsibilities

Although not the concern of the landowner, and not the focus of an abandonment statute, it is necessary to discuss the passing of responsibilities following a successful abandonment application briefly. This will necessarily depend on the context in which the abandonment has occurred.

The mining context is a simple one as far as the passing of responsibilities is concerned. In this case, the responsibility to rehabilitate the land never rested with the landowner in the first place. Rather, it rested with the mining right holder,[69] and where the right holder no long exists, a rehabilitation fund should exist.[70] Other responsibilities unrelated to the mining operations would pass to the State as the new owner of the land, unless it had been agreed that the land would be granted to the right holder.

In the heritage building context, the State as owner will necessarily come to acquire the responsibilities imposed by the NHRA. However, it may be necessary for the NHRA to be amended to provide for the management of such buildings when ownership is passed to the State as a result of a successful abandonment application. Responsibility should depend on the grading of the building in question, seeing as the responsibility

[69] E van der Schyff *Property in Minerals and Petroleum* (2016) 560-574; MO Dale *South African Mineral and Petroleum Law* (SI 25 2018) 275-281C. See section 43 of the MPRDA and sections 24 to 24S of the National Environmental Management Act 107 of 1998 (NEMA).
[70] See section 24P of NEMA. See also Van der Schyff *Property* 570-574.

to protect and preserve such buildings is already assigned on such a basis in terms of the NHRA.[71] Realistically, only heritage sites that are graded II or III (provincial heritage sites and other heritage resources respectively[72]),[73] and predominantly the latter would be relevant in this case.[74] In any case, funds for the management of such sites will come from the public purse,[75] but it is desirable that the responsibilities for management of these sites are clearly defined. It would seem, in line with the assignment of responsibilities in the NHRA, provincial heritage resource authorities would take responsibility for abandoned properties rated Grade II.[76] Local authorities would bear responsibility for those properties rated Grade III.[77]

Concerning problem buildings and unlawfully occupied land, inevitably responsibility for such land should pass to the State, specifically local government.[78] Given that the obligation to realise the right to housing rests on the State,[79] it would seem appropriate that the State take responsibility for unlawfully-occupied land following a successful abandonment application by the landowner. It would then be open for the State to

---

[71] See section 8(2)-(4) of the NHRA.
[72] See section 7(1) of the NHRA. See Chapter 6 Section 3.2.
[73] Given that Grade I (national heritage sites) are those with "with qualities so exceptional that they are of special national significance" (section 1(a) of the NHRA), such sites are unlikely to be in private ownership in the first place. A list of declared national heritage sites is available on the website of the South African National Heritage Resources Agency. See South African Heritage Resources Agency "Declared National Heritage Sites" *South African Heritage Resources Agency* <https://www.sahra.org.za/national-heritage-sites/> (accessed on 25-10-2018).
[74] None of the cases canvassed in Chapter 6 Section 3.2 concerned heritage resources which had been awarded a Grade II rating.
[75] Section 21(1)(a) of the NHRA states that among the sources of funding available to the South African National Heritage Resources Agency includes "moneys appropriated by Parliament to enable it to perform its functions and exercise its powers".
Provincial heritage resource authorities are also funded from the public purse. For example, Provincial Gazette establishing Heritage Western Cape, it is stated that the "provincial department shall provide funds to Heritage Western Cape from moneys appropriated by the Western Cape Provincial Parliament for heritage resources management in the Western Cape to enable the Council of Heritage Western Cape to perform its functions and duties and exercise its powers prescribed in the Act". See section 3(1) of PN 336 in PG5937 of 25-10-2002.
Municipalities are the bodies responsible for Grade III heritage resources, and as such, any expense incurred in maintaining such a resource would come from the public purse. However, as established in Chapter 6, the municipalities are not currently empowered to issue compulsory repair notices for heritage resources, or take action to carry out repairs then later recover such costs from the landowner. See also P Marques *The Right to Neglect Property: An Analysis of the Weaknesses of the National Heritage Resources* LLB research paper University of Cape Town (2012) 5-7.
[76] Section 8(3) of the NHRA.
[77] Section 8(4) of the NHRA.
[78] Part B of Schedule 4 of the Constitution, 1996, provides that building regulations are a local government matter subject to section 155(6) (a) and (7). Furthermore, section 152(1)(d) states that one of the objects of local government is to promote a safe and healthy environment.
[79] See section 26(2) of the Constitution.

allocate ownership of the land to the unlawful occupiers, providing them with much-needed security of tenure.

Further research will be required into the passing of responsibilities on a successful abandonment application. The brief outline above may not be sufficient. However, it is beyond the scope of this thesis to explore the matter in further detail, since its focus is rather on whether abandonment is possible, whether it should be permitted, and under what circumstances.

3. Expropriation without compensation

It is necessary to touch on the potential consequences of expropriation without compensation for the abandonment context, given its central importance in the discourse about land in South Africa. There have been recent moves towards realising the possibility of expropriation without compensation. While talk of expropriation without compensation is not new,[80] moves towards the realisation of such a policy gained momentum following the African National Congress' (ANC) 54th national conference which took place from the 16 December to 20 December 2017.[81] The party endorsed a resolution to seek to amend the Constitution to permit the expropriation of land without compensation, although with the stipulation that such would have to be done in a sustainable manner.[82]

Following the resolution at the ANC's conference, a motion concerning expropriation without compensation was adopted by the National Assembly.[83] Although the motion was sponsored by the Economic Freedom Fighters (EFF), the smaller party ultimately had to make a number of concessions to the larger ANC to secure the passing of the motion.[84] Following a process of public participation, including written submissions and

---

[80] Expropriation without compensation has been a cornerstone of the Economic Freedom Fighters policy since its formation. See Economic Freedom Fighters *Economic Freedom Fighters Founding Manifesto: Radical Movement Towards Economic Freedom in Our Lifetime* (27-07-2013). Available at <https://effonline.org/wp-content/uploads/2019/07/Founding-Manifesto.pdf> (accessed 06-02-2020).
[81] Mahlakoana *Business Day* (21-12-2017) 1; Njobeni & Koko *Cape Argus* (22-12-2017) 4.
[82] Mahlakoana *Business Day* (21-12-2017) 1; Njobeni & Koko *Cape Argus* (22-12-2017) 4.
[83] Phakathi *Business Day* (28-02-2018) 1. See also A Gildenhuys "Full Compensation, Fair Compensation or No Compensation in Expropriations for Land Reform: A South African Perspective" in B Hoops, E Marais, L van Schalkwyk & N Tagliarino (eds) *Rethinking Expropriation Law III: Fair Compensation* (2018) 123 152-154.
[84] Phakathi *Business Day* (28-02-2018) 1.

oral hearings,[85] the final report of the Constitutional Review Committee was adopted on the 15th of November 2018.[86] The adopted report recommended the amendment of the property clause to make explicit that expropriation without compensation is an option for land reform.[87] In its view, this was already implicit in the property clause, but ultimately requires express approval.[88]

The road to the amendment of the property clause inevitably will not be a smooth one. Threats of legal challenges to the adoption of the report, to block an amendment, have been made.[89] As of writing, the Draft Constitution Eighteenth Amendment, 2019,[90] has been published, with written comments to have been submitted by 31 January 2020. The Bill provides for the amendment of section 25(2)(b) to allow for the amount of compensation awarded to be nil when land is expropriated for land reform purposes.[91] National legislation must provide the "circumstances where a court may determine that the amount of compensation is nil", subject to sections (2) and (3) of section 25.[92] The publication of the Bill has once again brought the issue of expropriation to the fore.[93]

---

[85] This process has been subject to criticism due to the manner in which the large volume of submissions was handled. See A October "Land Expropriation Shambles Highlights How Public Participation at Parliament is not Working" (29-11-2018) *Daily Maverick* < https://www.dailymaverick.co.za/article/2018-11-29-land-expropriation-shambles-highlights-how-public-participation-at-parliament-is-not-working/> (accessed 29-01-2019).

[86] See Parliamentary Communication Services "Joint Constitutional Review Committee Adopts Report on Expropriation of Land Without Compensation" (15-11-2018) *Parliament of South Africa* <https://www.parliament.gov.za/press-releases/joint-constitutional-review-committee-adopts-report-expropriation-land-without-compensation> (accessed 23-11-2018); Parliamentary Monitoring Group "Committee Report on Review of Section 25 of Constitution Adopted" *Parliamentary Monitoring Group* <https://pmg.org.za/committee-meeting/27548/> (accessed 23-11-2018); Constitutional Review Committee *Report of the Joint Constitutional Review Committee on the Possible Review of Section 25 of the Constitution* 15-11-2018. Available at <https://pmg.org.za/files/181115FinalReport.docx> (accessed 07-02-2020).

[87] Constitutional Review Committee *Report* 28.

[88] Constitutional Review Committee *Report* 28.

[89] B Phakathi "Committee Recommends Amending Constitution for Land Expropriation" (15-11-2018) *Business Day* <https://www.businesslive.co.za/bd/national/2018-11-15-committee-recommends-amending-constitution-for-land-expropriation/> (accessed 23-11-2018); B Phakathi "Parliament 'Will Oppose AfriForum's Bid to Halt Property Clause Amendment'" (21-11-2018) *Business Day* <https://www.businesslive.co.za/bd/national/2018-11-21-parliament-will-oppose-afriforums-bid-to-halt-property-clause-amendment/> (accessed 23-11-2018); J Gerber "Land Expropriation: Court Battle Looms as Parliament Opposes AfriForum Interdict Bid" (21-11-2018) *News24* <https://www.news24.com/SouthAfrica/News/land-expropriation-court-battle-looms-as-parliament-opposes-afriforum-interdict-bid-20181121> (accessed 21-11-2018).

[90] Draft Constitution Eighteenth Amendment Bill, 2019.

[91] Clause 1(a).

[92] Clause 1(c). See Draft Expropriation Bill B-2019.

[93] Merten "ANC's Executive Proposal on Expropriation Without Compensation Obscures Already Vast Ministerial Powers" *Daily Maverick*; Grootes "Land Issue: Once More at Front and Centre of the ANC's Internal Politics" *Daily Maverick*.

It is beyond the scope of this thesis to engage in detailed conjecture as to what the final amendment to the property clause will look like and how it will work in practice. However, it does not appear that the EFF's approach to nationalise all land will be adopted,[94] as the recommendation of the report seems to foresee private landownership continuing in the context of land reform. Rather a moderate approach with a focus on unused land appears to be the strong likelihood.[95] This conjecture is based on the statements of the President of both the ruling ANC and South Africa.[96] In any case, a radical programme of expropriation without compensation, as advocated by the EFF, would render this thesis moot. As such, the implications of such a radical approach for this thesis will not be explored.

What is key about such a moderate approach, as seems to be the strongest possibility, is that the State will be able to pick and choose which land it wishes to expropriate without compensation. As such, some land with a negative value – but holding a potential for land reform and human settlement – would be expropriated. Even in the absence of amendments to the Constitution, it has been suggested that such land may be expropriated without compensation.[97] For example, with a view to test the property clause as it currently exists, the City of Ekurhuleni has announced plans to expropriate four properties without paying compensation.[98] The stated purpose for expropriating the properties is human settlement.[99] The properties in question are unlawfully occupied, and the owners thereof had effectively "relinquished their property-

---

[94] P Hoffman "On the Nationalisation of Land" (05-03-2018) *PoliticsWeb* <http://www.politicsweb.co.za/opinion/on-the-nationalisation-of-land> (accessed on 19-10-2018).

[95] This conjecture is based on the statements of the South African and ANC President, Cyril Ramaphosa. See C Ramaphosa "This is No Land Grab" (24-08-2018) *Business Day* <https://www.businesslive.co.za/bd/opinion/2018-08-24-exclusive-this-is-no-land-grab-writes-cyril-ramaphosa/> (accessed on 19-10-2018).

[96] See Ramaphosa "This is No Land Grab" *Business Day*.

[97] This is the argument put forward by Ruth Hall of the Institute for Poverty, Land and Agrarian Studies (PLAAS) at the University of the Western Cape. See R Hall *The Land Question: What is the Answer?* (2018) unpublished public lecture presented at the University of the Western Cape, 02-08-2019; B Phakathi "Constitution Already Covers Land Reform, Says Expert" *Business Day* (11-04-2018) 2.

[98] N Gous "Ekurhuleni Plans to Expropriate Four Pieces of Land Without Compensation" (28-09-2018 *TimesLive* <https://www.timeslive.co.za/news/south-africa/2018-09-28-ekurhuleni-plans-to-expropriate-four-pieces-of-land-without-compensation> (accessed 07-02-2020); Author Unknown "Ekurhuleni Identifies Land to Expropriate Without Compensation" (29-09-2018) *Polity* <http://www.polity.org.za/article/ekurhuleni-identifies-land-to-expropriate-without-compensation-2018-09-28> (accessed 07-02-2020).

[99] Gous "Ekurhuleni Plans to Expropriate Four Pieces of Land Without Compensation" *TimesLive*; Author Unknown "Ekurhuleni Identifies Land to Expropriate Without Compensation" *Polity*.

ownership rights and responsibilities".[100] These seem to be owners, who if provided with the option of abandonment, would have pursued it. Whether these owners were offered the opportunity to enter into an "abandonment" agreement, or simply could not be found, is unknown. As of writing, there no further reported developments on this case are available.[101]

The current iteration of the Expropriation Bill[102] also makes reference to land that has been "abandoned".[103] The Bill states that may be just and equitable to pay zero compensation for land that has been abandoned.[104] However, the fact that the Bill acknowledges that such land still needs to be expropriated, even if zero compensation is paid, means it recognises that such land technically still has a registered owner. Thus, while the land may be informally abandoned, in that the landowner no longer maintains it and has stopped paying rates in respect thereof, abandonment in the sense as understood in terms of the law of property has not occurred.

However, expropriation without compensation – in line with the moderate approach above – would not provide relief to every owner of property that had a negative value. The government could opt, on deciding the liabilities that attach to the land in question are excessive and the possibility of rehabilitating the land for human settlement unlikely, not to expropriate otherwise unused property.

As such, even if a moderate form of expropriation without compensation become a reality, it would still be necessary for an abandonment statute to exist. It is unlikely the State would seek to expropriate every piece of unused land, particularly where the liabilities attached thereto are significant, and the land cannot be used for human settlement without cost-prohibitive rehabilitation. Both the mining and heritage contexts – where land will likely not be suitable for human settlement purposes – provide examples thereof.

---

[100] Gous "Ekurhuleni Plans to Expropriate Four Pieces of Land Without Compensation" *TimesLive*; Author Unknown "Ekurhuleni Identifies Land to Expropriate Without Compensation" *Polity*.
[101] The most recent reference to this case appears to be in an opinion piece by Black First Land First leader Andile Mngxitama, published in the Sunday Independent on 10 November 2019, which stated that it is unclear whether the properties in question had been seized by the municipality. See A Mngxitama "Ekurhuleni Doing Well on the Land Issue" *Sunday Independent* (10-11-2019) 8.
[102] Draft Expropriation Bill B-2019 (in Government Gazette 42127 of 21-12-2018).
[103] Clause 12(3)(d).
[104] Clause 12(3)(d).

4. Conclusion

It is ultimately necessary, in light of the principle of publicity,[105] that for abandonment of landownership to be possible in South African law, it will have to be given effect to by statute.[106] However, as has been established above, such a statute cannot operate to facilitate an unrestricted right to abandon, but rather should permit abandonment to be regulated by the courts. Even before a court is approached for relief, a landowner should attempt to ameliorate her own situation, through either reaching an agreement to transfer the land in question to the State or exhausting all compensatory mechanisms available to her.

It is correct to point out that the statute suggested above is not abandonment in the true sense of the word. As has been pointed out by scholars, and explored earlier in this thesis,[107] abandonment in its true sense operates as a *unilateral* divestment of ownership.[108] The suggestions above require to cooperation of third parties, whether it be the State, or the courts, or a mortgagee. It would be better to describe the procedure set out as a "regulated exit" from ownership, rather than abandonment. However, as the use of the term "abandonment" is easier to indicate the purpose of such a statute, that term is preferred.

Such a statute, as outlined above, is necessary to provide an appropriate balance between the rights of landowners and society as a whole. As established in Chapter Six, there are a number of circumstances in which the burden of landownership will be excessive, and requiring someone to remain owner may not be justified. Even if a moderate form of expropriation without compensation becomes a reality – with a focus on unused land[109] – this is no guarantee that every owner of land that has accrued a negative value can hope to be expropriated. An abandonment statute would still be necessary and relevant.

---

[105] See Chapter 3 Sections 2 to 4.
[106] H Mostert "No Right to Neglect? Exploratory Observations on How Policy Choices Challenge the Basic Principles of Property" in S Scott & J van Wyk (eds) *Property Law Under Scrutiny* (2015) 11 26-28.
[107] See Chapter 2 Section 2.
[108] Strahilevitz (2009-2010) *University of Pennsylvania Law Review* 360; Peñalver (2010) *Michigan Law Review* 194-195.
[109] See Section 3 above.

Chapter 8: Conclusion

1. Abandonment

The law of abandonment is more complicated than the limited attention accorded to the doctrine in major property law texts may suggest.[1] Abandonment is a unilateral act, through which an owner may simply dispose of her property at will,[2] but the cooperation of third parties is usually required to dispose of ownership of property.[3] The circumstances in which true abandonment may occur are extremely limited.[4] Restrictions on the abandonment of property serve as a means through which obligations on property owners may be enforced.[5] The limited case law on abandonment, rather than confirming a right on the part of owners to dispose of their property as they see fit, concerns ownership disputes between two parties who wish to have ownership in the property affirmed.[6] There is no case in which an owner has attempted to claim a right to abandon corporeal property, let alone succeed in such a claim to avoid the obligations that attach to the ownership of property.[7]

No express prohibition on the abandonment of landownership exists in South African law. Sonnekus argues, in light of South Africa's negative system of registration,[8] that

---

[1] See for example G Muller, R Brits, JM Pienaar & Z Boggenpoel *Silberberg and Schoeman's The Law of Property* 6 ed (2019) 158-160, 305-306; CG van der Merwe *Sakereg* 2 ed (1989) 224-227; Van der Merwe & Pope "Part III – Property" in F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 490-491.

[2] E Peñalver "The Illusory Right to Abandon" (2010) 109 *Michigan Law Review* 191 194.

[3] Peñalver (2010) *Michigan Law Review* 203ff.

[4] Peñalver (2010) *Michigan Law Review* 191. See the discussion of the law of abandonment in South Africa in Chapters 2 and 3.

[5] Peñalver (2010) *Michigan Law Review* 193-194.

[6] Peñalver (2010) *Michigan Law Review* 194. See discussion of the abandonment of movable property in South African law in Chapter 2 Section 4.1, and the analysis in Chapter 2 Section 4.4.

[7] The only case in which a party claimed a right to abandon involved a servitude, in which it was found that a servitude may not be abandoned in circumstances which would lead to significant harm to the servient tenement. See *Du Plessis v Philipstown Municipality* 1937 CPD 335; AJ van der Walt *The Law of Servitudes* (2016) 572-573; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006) 336n133; Muller et al *Silberberg* 401; Van der Merwe *Sakereg* 538; CG Hall & EA Kellaway *Servitudes* 3 ed (1973) 144.

[8] As explained in Chapter 3 Section 2.2.1, in a negative system of registration, there is no guarantee the land register is correct. The land register may, for various reasons, not reflect the true legal position of proprietary relations in respect of a parcel of land. The land register may be incomplete, or even incorrect. See Muller et al *Silberberg* 256ff; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 537; Van der Merwe *Sakereg* 342ff; CG van der Merwe "Things" in WA Joubert (founding ed) *LAWSA 27* 2 ed (2014) para 231.

the abandonment of landownership is possible.[9] In his view, it is not necessary for legislation to prescribe formalities to achieve the abandonment of landownership, but that such can be achieved through the same common law principles which apply to the abandonment of movables.[10] These principles are the relinquishment of physical possession coupled with an intention no longer to be owner.[11] However, the application of the common law principles does not appear sufficient in light of the principle of publicity,[12] which requires the existence of (and changes to) real rights to be observable to third parties.[13] A review of the relevant legal framework reveals the absence of any mechanism through which such abandonment may be achieved in a manner which would satisfy the principle of publicity.[14] Without a mechanism through which the principle of publicity may be given effect to, it is ultimately necessary to conclude that the abandonment of landownership in South African law is impossible.[15]

The conclusion that the abandonment of landownership is not possible in South African law by itself is not satisfactory. It is necessary to engage with the question as to whether landowners should be permitted to abandon landownership. This thesis contends that an unrestricted right to abandon is not feasible in the South African context. However, there may be circumstances in which land may accrue a negative value through no fault of the landowner herself.[16] In the absence of a third party willing to take transfer of such property,[17] such a landowner may require some form of exit from that ownership. It is thus necessary to ask in what circumstances such exit should be permitted.

---

[9] Sonnekus (2004) *TSAR* 751ff. See Chapter 3 Section 2.4.2.
[10] Sonnekus (2004) *TSAR* 751ff. See Chapter 3 Section 2.4.2.
[11] Muller et al *Silberberg* 158; Van der Merwe & Pope "Part III – Property" in *Wille's Principles* 490; Van der Merwe *Sakereg* 224; *Reck v Mills* 1990 (1) SA 751 (A) 757C; *S M Goldstein & Co (Pty) Ltd v Gerber* 1979 (4) SA 930 (A) 936F-G; *Salvage Association of London v S.A. Salvage Syndicate, Ltd.* (1906) 23 SC 169 171.
[12] H Mostert "No Right to Neglect? Exploratory Observations on How Policy Choices Challenge the Basic Principles of Property" in S Scott & J van Wyk (eds) *Property Law Under Scrutiny* (2015) 11 26-27.
[13] Muller et al *Silberberg* 93-95; Van der Merwe *Sakereg* 12-15; TW Merrill & HE Smith "Optimal Standardization in the Law of Property: The Numerus Clausus Principle" (2000) 110 *Yale Law Journal* 1 26.
[14] Mostert "No Right" in *Property Law Under Scrutiny* 26-27. See Chapter 3 Section 2.4.3.
[15] Mostert "No Right" in *Property Law Under Scrutiny* 26-27. See Chapter 3 Section 2.4.3.
[16] See Chapter 6 Section 3.
[17] Peñalver (2010) *Michigan Law Review* 208.

2. The Contrasting Approach of Switzerland and Scotland

The approaches towards the abandonment of land in both Switzerland and Scotland are informative for South African property law academics. These two jurisdictions take opposing approaches – Switzerland permits the abandonment of landownership,[18] while the abandonment of landownership is simply not possible in Scots law.[19] What both jurisdictions demonstrate, however, is that the law needs to provide a mechanism for the abandonment of landownership. Without such a mechanism, the publicity principle is not given effect to, and abandonment cannot be achieved.

In Swiss law, abandonment (*Dereliktion*) of immovable property is achieved through clear actions in the *Grundbuch*.[20] Scots law, by contrast, has no comparable mechanism.[21] In the absence of such a mechanism, the abandonment of landownership is simply not possible.[22] Ownership, being a legal relationship, can only be terminated in circumstances provided for by law.[23] As the Inner House of the Court of Session stated, landownership is manifested in the written record.[24] This makes "the fact of ownership public and, subject to operation of law, permanent".[25]

These two jurisdictions also demonstrate that abandonment does not occur in a vacuum. A permissive regime would appear to be feasible in the context of Switzerland. The societal cost of abandonment in that jurisdiction would appear to be negligible.[26] This is not necessarily the case in every jurisdiction, which would include South Africa and Scotland. While the socio-economic situations in South Africa and Scotland are

---

[18] Art. 666 Abs. 1 read with Art. 964. Abs. 1. See H Rey & L Strebel "Art. 666" in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 1134 1134-1135; J Schmid & B Hürlimann-Kaup *Sachenrecht* (2017) para 868; H Rey *Die Grundlagen des Sachenrechts und das Eigentum* 3 ed (2007) para 1673ff; P Tuor, B Schnyder, J Schmid & A Jungo *Das Schweizerische Zivilgesetzbuch* 14 ed (2015) § 100 para 33; F Hitz "Art. 666" in M Amstutz, P Breitschmid, A Furrer, D Girsberger, C Huguenin, A Jungo, M Müller-Chen, V Roberto, AK Schnyder & HR Trüeb (eds) *Handkommentar zum Schweizer Privatrecht* 3 ed (2006) 166 166-167; P Simonius & T Sutter *Schweizerisches Immobiliarsachenrecht* (1995) para 127.

[19] *The Scottish Environment Protection Agency v The Joint Liquidators of the Scottish Coal Company Limited* [2013] CSIH 108 para 103 (CSIH). See also M Combe & M Rudd "Abandonment of Land and the Scottish Coal Case: Was it Unprecedented?" (2018) 22 *The Edinburgh Law Review* 301.

[20] See Chapter 5 Section 3.2.

[21] See Chapter 5 Section 4.2.2.3.

[22] CSIH para 103.

[23] CSIH para 100.

[24] CSIH para 100.

[25] CSIH para 100.

[26] See legal and policy analysis in Chapter 5 Section 3.3.

not comparable, there may still be reasons which exist in Scotland not to permit unrestricted abandonment.[27] For example, land on which open-cast coal mining has been conducted, for which significant environmental rehabilitation is required, serves as an example of land for which the disposal of which should be regulated.[28] There is no universal approach to the abandonment of landownership, but that ultimately the manner in which a jurisdiction regulates or prohibits it reflects the obligations that attach to ownership. Even where the abandonment of landownership is not *expressly* prohibited, the decision not to provide a mechanism through which it can be achieved appears to indicate a policy choice in this respect, even if this appears to be more of a gap in the law. This is apparent from the South African context.

3. The Case for Reform in South Africa

In the prevailing legal framework, the abandonment of landownership is not possible in South African law.[29] As such, reform is necessary, to provide an exit for landowners whose land has accrued a negative value, in certain circumstances. In light of the social-obligation norm of the law of property as conceptualised by Alexander,[30] which finds expression in the South African constitutional property clause,[31] Chapter 4 proposes a set of factors to guide reform.[32] The first of these factors to be considered is the extent of the burden on the landowner. The second is to what extent a third-party benefits from the burden to which the landowner is subjected. The third factor evaluates the extent to which existing compensatory mechanisms alleviate the burden

---

[27] See legal and policy analysis in Chapter 5 Section 4.3.
[28] Author Unknown "Revealed: 'National Crisis' Opencast Mine Warning" (13-07-2014) *The Herald* <http://www.heraldscotland.com/news/13169742.Revealed___national_crisis__opencast_mine_warning/> (accessed 15-01-2020); A Leach "Ticking Time Bonds: Scottish Open Cast Coal Leaves Legacy of Dereliction" (25-02-2014) *Mining Technology* <http://www.mining-technology.com/features/featureticking-time-bonds-scottish-open-cast-coal-leaves-legacy-of-dereliction--4184435/> (accessed 15-01-2020).
[29] See the conclusions reached in Chapter 3 Section 4. Also see Mostert "No Right" in *Property Law Under Scrutiny* (2015) 26-28.
[30] G Alexander "The Social-Obligation Norm in American Property Law" (2009) 94 *Cornell Law Review* 745; G Alexander *Property and Human Flourishing* (2018). See also G Alexander & E Peñalver *An Introduction to Property Theory* (2012) Chapter 5; G Alexander & E Peñalver "Properties of Community" (2009) 10 *Theoretical Inquiries in Law* 127.
[31] Section 25. Alexander (2009) *Cornell Law Review* 782ff; G Alexander *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) Chapter Four. See Chapter 4 Section 5.
[32] See Chapter 4 Section 6.

on the landowner. The final factor considers the potential cost to society at large of permitting abandonment in the circumstances.

The factors above are considered in detail in Chapter 6. Three contexts in which land can accrue a negative value, for reasons beyond the control of the landowner, are evaluated in light thereof. These are (1) the mining context,[33] (2) the heritage building context,[34] and (3) the context of problem buildings and unlawful occupation of land.[35] In all three contexts, the prevailing legal framework is deficient in balancing the interests of the landowner, the State and third parties. Existing compensatory mechanisms in these contexts – such as those provided for in the Mineral and Petroleum Resources Development Act[36] - are not adequate in alleviating the burden to which landowners are subjected.[37] In some circumstances, a landowner may be responsible for her position. For example, a developer who purchases a heritage building, assuming the risk she may not be granted the permission required to alter or demolish it, may not necessarily be entitled to an exit from that ownership.[38] However, absent such culpability, it would seem unjust not to provide a landowner with some form of exit from that burden.

4. Reform Through Statute

It has been proposed in Chapter 7 that reform needs to come in the form of an abandonment statute, which provides for a balancing of the competing interests of the landowner and society at large.[39] Given the substantive factors to be considered in whether abandonment should be permitted, it is not sufficient – nor appropriate – that such reform take the shape of a provision inserted into pre-existing legislation. Rather, an individual abandonment statute is required.

An abandonment statute would require a landowner to attempt to exhaust her options in seeking the transfer of her property to the State, as well as any compensatory mechanisms which may otherwise ameliorate her position. It is suggested that such a

[33] See Chapter 6 Section 3.1.
[34] See Chapter 6 Section 3.2.
[35] See Chapter 6 Section 3.3.
[36] Act 28 of 2002.
[37] See Chapter 6 Section 3.
[38] See discussion in Chapter 6 Section 3.2.
[39] See Chapter 7 Section 1.

statute provide a streamlined process through which a landowner may exhaust her options. For example, relevant public authorities should be required to set out procedures for the receipt of requests from landowners who wish to negotiate the transfer of their land to the State. Such requests would be evaluated in line with the factors outlined above.[40] This will further situate the completion of the prerequisites in the realm of administrative law, with its requirement of procedural fairness.[41] Such provision would have the effect of formalising the practice of "abandonment" agreements between landowners and municipalities.[42] Absent a formalisation of the process, the ad-hoc conclusion of "abandonment" agreements may raise the legitimate expectations doctrine, appearing to be a practice that one can reasonably expect to continue.[43]

An abandonment statute should make provision for a landowner to approach a court. However, a landowner may only do so following compliance with the necessary prerequisites, coupled with a failure to reach an agreement with a public authority regarding transfer of the land or adequate compensation. Motion proceedings[44] in which relevant parties are joined, and interested parties are entitled to be joined would appear to be the most appropriate procedure. Again, the factors outlined above should guide any decision in this regard, as well as any other relevant circumstances not covered by these factors.

The possibility of a moderate form of expropriation without compensation becoming a reality does not negate the necessity for an abandonment statute. Unlike the complete nationalisation of land,[45] moderate expropriation without compensation permits the State to select the properties it wishes to acquire. Property that holds both a negative value and has no potential for land reform and human settlement is thus unlikely to be

[40] See Chapter 7 Section 1.3.
[41] See section 3(1) of the Promotion of Administrative Justice Act 3 of 2000. See also note 30 in Chapter 7.
[42] See Chapter 7 Section 1.1.
[43] See C Hoexter *Administrative Law in South Africa* 2 ed (2012) 39ff and discussion in Chapter 7 Section 1.1.
[44] Motion proceedings, or application proceedings, are one of the two most important means to approach a court of first instance in the South African legal system. The other is action proceedings, which involves the giving of oral evidence by witnesses. By contrast, motion proceedings are "decided on the papers placed before the court". The evidence on which a party to motion proceedings wishes to rely must be in these papers. See S Pete, D Hulme, M du Plessis, R Palmer, O Sibanda & T Palmer *Civil Procedure: A Practical Guide* 3 ed (2017) 153.
[45] See discussion in Chapter 7 Section 3.

chosen for such expropriation. Therefore, there remains scope for the operation of an abandonment statute.

5. Concluding Thoughts

The remarks of Peñalver on the doctrine of abandonment,[46] which have been reiterated throughout this thesis, have been made in respect of the United States of America (USA). In that jurisdiction, he states that the prohibition on the abandonment of landownership reflects the law's general suspicion of abandonment in general.[47] It creates a situation in which there are no spaces in which an owner may abandon her property without the cooperation of a third party.[48] It is clear that the law of abandonment in South Africa is similarly complicated, and in many ways mirrors the legal situation in the USA that Peñalver has outlined.[49] The abandonment of landownership provides the most evident example. While one cannot state that the abandonment of landownership is prohibited, an evaluation of South Africa's legal framework considering the principle of publicity makes it clear that it is simply not possible.[50] Such impossibility is effectively the same thing as an express prohibition from the standpoint of the landowner.

It is beyond the scope of this thesis to provide the exact details of how the abandonment of landownership, or a regulated exit from landownership, should be regulated in South African law. Such a task will rest with those who draft legislation, at all spheres of government. What this thesis seeks to do is to provide guidance, in light of the social-obligation norm that finds expression in South Africa's constitutional property clause.[51] An unrestricted right to abandon landownership is not feasible in the South African context, given the potential socio-economic impact of permitting

---

[46] Peñalver (2010) *Michigan Law Review* 191.
[47] Peñalver (2010) *Michigan Law Review* 212, 214-219.
[48] Peñalver (2010) *Michigan Law Review* 203-213.
[49] See in general Chapters 2 and 3. See also R Cramer "The Abandonment of Landownership in South African and Swiss Law" (2017) 134 *SALJ* 870. Note on the aforementioned publication by the author: My Memorandum of Understanding with my supervisor, as well as obligations attaching to funding I received through the Swiss-South African Joint Research Programme to facilitate my comparative study, required me to publish from my doctoral research. The article referenced here is the result of the obligation to publish from my doctoral research.
[50] Mostert "No Right" in *Property Law Under Scrutiny* 26-27.
[51] Alexander (2009) *Cornell Law Review* 782ff; Alexander *Global Debate* Chapter Four. See Chapter 4 Section 5.

landowners to pass their obligations on to the State.[52] However, there are many landowners who find themselves saddled with land which has acquired a negative value through no fault of their own. As such, law reform requires a delicate balancing of the competing interests.

It is hoped that this thesis will not only inspire law reform in respect of providing landowners some form of exit where their property has acquired a negative value, but also further research into the doctrine of abandonment in general. As Peñalver explains, if the creation of ownerless land is not possible, it is difficult to think of a situation in which true abandonment of movables may occur, without falling foul of legislation regulating the disposal of movable property.[53] This position is due to an absence of spaces in which such property may be deposited without an owner's permission.[54] This observation is as applicable to the USA as it is to South Africa. The manner in which abandonment operates – if it can operate at all – in respect of movables in contemporary South African law warrants research. Restrictions on the manner in which movable property may be disposed of can help incentivise a greater emphasis on recycling.[55] It is, however, beyond the scope of this thesis to expand on this further.

What is clear is that the prevailing status quo with respect to the possibility of abandoning landownership is unsatisfactory. The rights and obligations of landowners in circumstances where property accrues a negative value need to be made clear. While the abandonment of landownership, as an unrestricted entitlement, cannot exist, options for "regulated exit" must be made available.

[52] See Chapter 4 Section 4.1 (particularly the sources in note 116) and Chapter 6 Section 2.1.
[53] Peñalver (2010) *Michigan Law Review* 194.
[54] Peñalver (2010) *Michigan Law Review* 206.
[55] Peñalver (2010) *Michigan Law Review* 218-219.

Bibliography

Secondary Sources

Academic Texts*

Adams D "Tackling Hardcore Vacancy through Compulsory Sale Orders" in J Henneberry (ed) *Transience and Permanence in Urban Development* (2017) 215.

Akcil A & Koldas S "Acid Mine Drainge (AMD): Causes, Treatment and Case Studies" (2006) 14 *Journal of Cleaner Production* 1139.

Alexander G "The Social-Obligation Norm in American Property Law" (2009) 94 *Cornell Law Review* 745.

Alexander H *Property and Human Flourishing* (2018).

Alexander G *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006).

Alexander G & Peñalver E *An Introduction to Property Theory* (2012).

Alexander G & Peñalver E "Properties of Community" (2009) 10 *Theoretical Inquiries in Law* 127.

Aristotle's Nicomachean Ethics (2012) translated by R Bartlett & S Collins.

Author Unknown "Chapter 17 Expropriation and Vesting Transfers" in *Conventional Deeds Manual/Deeds Practice Manuals* (RS, 2018).

Author Unknown "Chapter 6 Subdivision of Land" in *Conventional Deeds Manual/Deeds Practice Manuals* (RS, 2018).

Author Unknown "Confronting Inequality" (2017) *New Agenda* 28.

Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* 5 ed (2006).

Badenhorst PJ "Conflict Resolution Between Owners of Land and Holders of Rights to Minerals: A *Lopsided* Triangle?" (2011) *TSAR* 326.

Badenhorst PJ "From Waurn Ponds: Registration of Title or Title by Registration?" (2009) *TSAR* 793.

* Note regarding sources in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015). There is now a 6th edition of this text, published in 2019. I used the 5th edition during my exchange at the University of Zurich, when I had access to both the physical book and that institution's online databases. Unfortunately, I was not able to access the 6th edition at the time of submission, as the cost of the book was prohibitive, particularly with the added risk of delivery through the South African Post Office.

Bell FG, Bullock SET, Hälbich TFJ & Lindsay P "Environmental Impacts Associated with an Abandoned Mine in the Witbank Coalfield, South Africa" (2001) 45 *International Journal of Coal Geology* 195.

Bennett T *Customary Law in South Africa* (2004).

Berger A *The City: Urban Communities and Their Problems* (1978).

Birks P "The Roman Law Concept of Dominium and the Idea of Absolute Ownership" (1985) *Acta Juridica* 1.

Bishop M "Remedies" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 5 2013).

Brits R *Real Security Law* (2016).

Brückner C & Kuster M *Die Grundstücksgeschäfte* (2016).

Bruk J *An Analysis of the Law Governing the Acquisition of Shipwrecks* LLM mini-dissertation University of Cape Town (1996).

Buckland W & Stein P *A Text-Book of Roman Law from Augustus to Justinian* 3 ed (1963).

Buckland W *A Manual of Roman Private Law* 2 ed (1939).

Carey Miller DL & Pope A "Acquisition of ownership" in R Zimmenmann, K Reid & D Visser (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 671.

Carey Miller DL *Corporeal Movables in Scots Law* 2 ed (2005).

Carey Miller DL *The Acquisition and Protection of Ownership* (1986) 8-9.

Cloete C & Boggenpoel Z "Re-evaluating the Court System in PIE Eviction Cases" (2018) 135 *SALJ* 432.

Coase R "The problem of social cost" (1960) 3 *Journal of Law and Economics* 1.

Combe M & Rudd M "Abandonment of Land and the *Scottish Coal* Case: Was it Unprecedented?" (2018) 22 *The Edinburgh Law Review* 301.

Cramer R "The Abandonment of Landownership in South African and Swiss Law (2017) 134 *SALJ* 870.*

Cramer R & Mostert H "'Home' and unlawful occupation: the horns of local government's dilemma Fischer and Another v Persons Unknown 2014 3 SA 291 (WCC)" (2015) 26 *Stell LR* 583.

* My Memorandum of Understanding with my supervisor, as well as obligations attaching to funding I received through the Swiss-South African Joint Research Programme to facilitate my comparative study with Switzerland, required me to publish from my doctoral research. The article mentioned here is the result of the obligation to publish from my doctoral research.

Dagan H “Just Compensation, Incentives, and Social Meanings” (2000) 99 *Michigan Law Review* 134.

Dagan H “Re-imagining Takings Law” in G Alexander & E Peñalver (eds) *Property and Community* (2010) 39.

Dagan H “Takings and Distributive Justice” (1999) 85 *Virginia Law Review* 741.

Dagan H “The Social Responsibility of Ownership” (2007) 92 *Cornell Law Review* 1255.

Dale MO *South African Mineral and Petroleum Law* (SI 25 2018).

Dassah O “A Critical Analysis of Factors Underlying Service Delivery Protests in South Africa” (2012) 1 *Journal of African & Asian Local Government Studies* 1.

Davenport R & Saunders C *South Africa: A Modern History* 5 ed (2000).

Dekker C “The Representation of the Freeholders in Drainage Districts of Zeeland West of the Scheldt during the Middle Ages” in *Acta Historiae Neerlandicae/Studies on the History of the Netherlands VIII* (1975) 1.

De Wet JC *Opuscula Miscellanea: Regsgeleerde Lesings en Ddviese* (1979).

Du Plessis PJ *Borkowski's Textbook on Roman Law* (2015).

Dugard J “*Modderklip* Revisited: Can Courts Compel the State to Expropriate Property Where the Eviction of Unlawful Occupiers is not Just and Equitable?” (2018) 21 *PER* 1.

Fagan E “Roman-Dutch Law in its South African Historical Context” in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 33.

Fasel U *Kommentar zur Grundbuchverordnung* (2013).

Freyfogle E *The Land We Share: Private Property and the Common Good* (2003).

Graziadei M “The Functionalist Heritage” in P Legrand (ed) *Comparative Legal Studies: Traditions and Transitions* (2003) 100.

Feinstein C *An Economic History of South Africa: Conquest, Domination and Development* (2005).

Fennell L “Forcings” (2014) 114 *Columbia Law Review* 1297.

Field T *State Governance of Mining, Development and Sustainability* (2019).

Gildenhuys A “Full Compensation, Fair Compensation or No Compensation in Expropriations for Land Reform: A South African Perspective” in B Hoops, E Marais, L van Schalkwyk & N Tagliarino (eds) *Rethinking Expropriation Law III: Fair Compensation* (2018) 123.

Gretton GL & Steven AJM *Property, Trusts and Succession* 3 ed (2017).

Hall CG & Kellaway EA *Servitudes* 3 ed (1973).

Hart D *The Abandonment of Rights Under the Mineral and Petroleum Resources Development Act* LLB paper University of Cape Town (2013).

Hartzer S & Du Plessis W "The Liability of Historical Mine Authorisation Holders for Rehabilitation of 'Old Order Mine Dumps'" (2013) 29 *SAPL* 469.

Hastorun S "The Mineral Industry of Switzerland" in *2016 Minerals Yearbook* (2019) 45.1.

Heaton J, Church J & Church J "Marriage" in WA Joubert (founding ed) *The Law of South Africa* vol 16 (2006).

Heaton J & Kruger H *South African Family Law* 4 ed (2015).

Heyl JWS *Grondregistrasie in Suid-Afrika* (1977).

Himonga C "Part II – Persons and Family" in F du Bois *Wille's Principles of South African Law* 9 ed (2007) 145.

Hitz F "Art. 666" in M Amstutz, P Breitschmid, A Furrer, D Girsberger, C Huguenin, A Jungo, M Müller-Chen, V Roberto, AK Schnyder & HR Trüeb (eds) *Handkommentar zum Schweizer Privatrecht* 3 ed (2006) 166.

Hitz F "Art. 729" in M Amstutz, P Breitschmid, A Furrer, D Girsberger, C Huguenin, A Jungo, M Müller-Chen, V Roberto, AK Schnyder & HR Trüeb (eds) *Handkommentar zum Schweizer Privatrecht* 3 ed (2006) 412.

Hoexter C *Administrative Law in South Africa* 2 ed (2012).

Humby T "The *Bengenyama* Trilogy: Constitutional Rights and the Fight for Prospecting on Community Land" (2012) 15 *PER* 166.

Humby T "The Spectre of Perpetuity Liability for Treating Acid Water on South Africa's Goldfields: Decision in *Harmony II*" (2013) 31 *JERL* 453.

Hungwe M "Factors Behind Urban Land Justice and Inequality in Cape Town" (2017) 18 *ESR Review* 5.

Jansen N "Comparative Law and Comparative Knowledge" in M Reimann & R Zimmermann (eds) *The Oxford Handbook of Comparative Law* (2006) 305.

Jenny D "Art. 786" in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 1661.

Kaplan M & Dale MO *A Guide to the Minerals Act, 1991* (1992).

Katz L "Exclusion and Exclusivity in Property Law" (2008) 58 *University of Toronto Law Journal* 275.

Katz "It's Not Personal: Social Obligations in the Office of Ownership" (2020) *Cornell Journal of Law and Public Policy* (Forthcoming).

Killian JM “Addressing the Social Impact of Mining Activities on Communities for Sustainability” (2008) 16 *Civil Engineering* 22.

Kraut R “Aristotelianism and Libertarianism” (1997) 11 *Critical Review* 359.

Kruger M “Arbitrary Deprivation of Property: An Argument for the Payment of Compensation by the State in Certain Cases of Unlawful Occupation” (2014) 131 *SALJ* 328.

Lawrence G “Human Good and Human Function” in R Kraut (ed) *The Blackwell Guide to Aristotle’s Nicomachean Ethics* (2006) 37.

Lewis C “The Modern Concept of Ownership of Land” (1985) *Acta Juridica* 241.

Liebenberg S *Socio-economic Rights: Adjudication Under a Transformative Constitution* (2010).

Häner I, Lienhard A, Tschannen P, Uhlmann F & Vogel S *Ausgewählte Gebiete des Bundesverwaltungsrechts* 8 ed (2014).

Lord Eassie, MacQueen HL, Anderson A, Bain D, Cabrelli D, Cameron G, Combe M, Ervine C, Grier N, Lamont-Black S, Nichols D, Paisley R, Simpson A, Sundara Rajan M & Lady Wise *Gloag and Henderson The Law of Scotland* 14 ed (2017).

McKay T & Milaras M “Public Lies, Private Looking and the Forced Closure of Grootvlei Gold Mine, South Africa” (2017) 13 *The Journal for Transdisciplinary Research in Southern Africa* 1.

MacMillan ARG *The Law of Bona Vacantia in Scotland* (1936).

Merrill TW & Smith HE “Optimal Standardization in the Law of Property: The Numerus Clausus Principle” (2000) 110 *Yale Law Journal* 1.

Merrill T & Smith H “What Happened to Property in Law and Economics?” (2001) 111 *Yale Law Journal* 357.

Michaels R “The Functional Method of Comparative Law” in M Reimann & R Zimmermann (eds) *The Oxford Handbook* (2006) 339.

Michelman F “Liberal Constitutionalism, Property Rights, and the Assault on Poverty” (2011) 22 *Stell LR* 706.

Mill J *On Liberty and Other Essays* (1998) 85ff (Oxford World’s Classics edition).

Mostert H “Land as a ‘National Asset’ Under the Constitution: The System Change Envisaged by the 2011 Green Paper on Land Policy and What this Means for Property Law Under the Constitution” (2014) 17 *PER* 760.

Mostert H *Mineral Law: Principles and Policies in Perspective* (2012).

Mostert H "No Right to Neglect? Exploratory Observations on How Policy Choices Challenge the Basic Principles of Property" in S Scott & J van Wyk (eds) *Property Law Under Scrutiny* (2015) 11.

Mostert H "Tenure Security Reform and Electronic Registration: Exploring Insights from English Law" (2011) 14 *PER* 85.

Mostert H, Pienaar JM & Van Wyk J "Land" in WA Joubert (founding ed) *LAWSA 14* 3 ed (2010).

Mostert H & Pope A *The Principles of the Law of Property in South Africa* (2010).

Mostert H & Van den Berg M "Roman-Dutch Law, Custodianship, and the African Subsurface: The South African and Namibian Experiences" in DN Zillman, A McHarg, A Bradbrook & L Barrera-Hernandez (eds) *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (2014) 75.

Mostert H & Verstappen L "Practical Approaches to the Numerus Clausus of Land Rights: How Legal Professionals in South Africa and the Netherlands Deal with Certainty and Flexibility in Property Law" in W Barr (ed) *Modern Studies in Property Law Volume 8* (2015) 351.

Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The Law of Property* 6 ed (2019).

Muller G & Liebenberg S "Developing the Law of Joinder in the Context of Evictions of People from their Homes" (2013) 29 *SAJHR* 554.

Murray M *Taming the Disorderly City: The Spatial Landscape of Johannesburg after Apartheid* (2008).

Nedelsky J "Reconceiving Rights as Relationship" (1993) 1 *Review of Constitutional Studies* 1.

Nel HS *Jones Conveyancing in South Africa* 4 ed (1991).

Nussbaum M *Creating Capabilities: The Human Development Approach* (2011).

Nussbaum M *Women and Human Development: The Capabilities Approach* (2001).

Olivier NJJ, Williams C & Badenhorst PJ "*Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC)" (2012) 15 *PER* 538.

Örücü E "Developing Comparative Law" in E Örücü & D Nelken (eds) *Comparative Law: A Handbook* (2007) 43.

Paleker M "Succession" in F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 666.

Patel R *The Value of Nothing* (2009).

Paul J “The Hidden Structure of Takings Law” (1991) 64 *Southern California Law Review* 1393.

Peñalver E “Property as Entrance” (2005) 91 *Virginia Law Review* 1889.

Peñalver E “The Illusory Right to Abandon” (2010) 109 *Michigan Law Review* 191.

Penner JE *The Idea of Property in Law* (1997).

Pete S, Hulme D, Du Plessis M, Palmer R, Sibanda O & Palmer T *Civil Procedure: A Practical Guide* 3 ed (2017).

Petitpierre E “Art. 734” in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 1463.

Pienaar GJ “Die Suid-Afrikaanse Aktesregistrasiestelsel-waarheen Vorentoe” (1996) *TSAR* 205.

Pienaar GJ “Is 'n Eenvormige Registrasiestelsel Van Saaklike Regte Op Onroerende Goed Moontlik” (1990) *TSAR* 29.

Pienaar GJ “The Land Titling Debate in South Africa” (2006) *TSAR* 435.

Pienaar GJ *Sectional Titles and Other Fragmented Property Schemes* (2010).

Platzky L & Walker C *The Surplus People: Forced Removals in South Africa* (1985).

Prichard *Leage’s Roman Private Law* 3 ed (1967).

Reddy S “The Politics of Service Delivery in South Africa: The Local Government Sphere in Context” (2016) 12 *The Journal for Transdisciplinary Research in Southern Africa* <https://td-sa.net/index.php/td/article/view/337/351#CIT0011_337> (accessed 24-01-2019).

Reid K & Van der Merwe CG “Property Law: Some Themes and Some Variations” in R Zimmermann, K Reid & D Visser (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2005) 637.

Reid K *The Law of Property in Scotland* (1996).

Rey H & Strebel L “Art. 666” in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 1134.

Rey H *Die Grundlagen des Sachenrechts und das Eigentum* 3 ed (2007).

Schmid J & Hürlimann-Kaup B *Sachenrecht* 5 ed (2017).

Schmid J “Art. 942” in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 2435.

Schmid J “Art. 964” in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 2591.

Schmid “Art. 973” in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 2656.

Schwander I “Art. 729” in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 1441.

Schulz F *Classical Roman Law* (1951).

Scott H “Absolute Ownership and Legal Pluralism in Roman Law: Two Arguments” (2011) *Acta Juridica* 23.

Seedorf S & Sibanda S “Separation of Powers” in S Woolman & M Bishop (eds) *The Constitutional Law of South Africa* 2 ed (RS 5 2013).

Selznick P *The Moral Commonwealth: Social Theory and the Promise of Community* (1992).

Sen A “Capability and Well-being” in M Nussbaum & A Sen (eds) *The Quality of Life* (1993) 30.

Sen A *Commodities and Capabilities* (1985).

Sen A *Development as Freedom* (2001).

Shoked N “The Duty to Maintain” (2014) 64 *Duke Law Journal* 437.

Siems M *Comparative Law* (2014).

Simonius P & Sutter T *Schweizerisches Immobiliarsachenrecht* (1995).

Singer J “Democratic Estates: Property Law in a Free and Democratic Society” (2009) 94 *Cornell Law Review* 1009.

Singer J *Entitlement: The Paradoxes of Property* (2000).

Singer J “How Property Norms Construct the Externalities of Ownership” in G Alexander & E Peñalver (eds) *Property and Community* (2010).

Singer J “The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations” (2006) 30 *Harvard Environmental Law Review* 309.

Slade B “Compensation for What? An Analysis of the Outcome in Arun Property Development (PTY) LTD v Cape Town City” (2016) 16 *PER* 1.

Smith H “Property and Property Rules” (2004) 79 *New York University Law Review* 1719.

Sonnekus JC “Abandonnering van Eiendomsreg op Grond end Aanspreeklikheid vir Grondbelasting” (2004) *TSAR* 747.

Sonnekus JC “Besitsverkryging Oor ‘n Skeepswrak as *Res Nullius*: *Mills v Reck and Others* 1988 3 SA 92 (K)” (1989) *TSAR* 720.

Sonnekus JC “Enkele Opmerkings na Aanleiding van die Aanspraak op Bona Vacantia as Sogenaamde Regale Reg” (1985) *TSAR* 121.

Sonnekus JC “Grondeise en die Klassifikasie van Grond as Res Nullius of as Staatsgrond” (2001) *TSAR* 84.

Sonnekus JC “Oordraagbaarheid en Abandonnering van Persoonlike Diensbaarhede” (1987) *TSAR* 370.

Strahilevitz L “The Right to Abandon” (2010) 158 *U. Pa. L. Rev.* 355.

Strahilevitz L “The Right to Destroy” (2004-2005) 114 *Yale L. J.* 781.

Strebel L & Laim H “Art. 655” in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 1043.

Strebel L & H Laim H “Art. 656” in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 1062.

Strebel L & Laim H “Art. 658” in H Honsell, NP Vogt & T Geiser (eds) *Basler Kommentar Zivilgesetzbuch II* 5 ed (2015) 1086.

Strydom J & Viljoen S “Unlawful Occupation of Inner-City Buildings: A Constitutional Analysis of the Rights and Obligations Involved” (2014) 17 *PER* 1207.

Taing L, Chang C, Pan S & Armitage NP “Towards a Water Secure Future: Reflections on Cape Town’s Day Zero Crisis” (2019) 16 *Urban Water Journal* 530.

Terreblanche S *A History of Inequality in South Africa* (2002).

Thomas JAC *Textbook of Roman Law* (1976).

Thompson L *A History of South Africa* 4 ed (2014).

Tönnies F *Community and Association* (1955) translated by C Loomis.

Trott A *Aristotle on the Nature of Community* (2014).

Tschannan “Bundesgericht, I. Öfeentlichrechtliche Abteilung, 30.8.1993, Nationale Genossenschaft für die Lagerung Radioaktiver Abfälle NAGRA c. Regierungsrat des Kantons Nidwalden und Obergericht des Kantons Nidwalden als Verfassungsgericht (1P.830/1992), Staatsrechtliche Beschwerde” (1994) *AJP* 627.

Tuor P, Schnyder B, Schmid J & Jungo A *Das Schweizerische Zivilgesetzbuch* 14 ed (2015).

Underkuffler L *The Idea of Property: Its Meaning and Power* (2003).

Valcke C “Comparative Law as Comparative Jurisprudence – The Compatibility of Legal Systems” (2004) 52 *American Journal of Comparative Law* 713.

Van den Berg M “Ownership of Minerals Under the New Legislative Framework for Mineral Resources” (2009) 20 *Stell LR* 139.

Van den Bergh R “Ownership of *Agri Deserti* During the Later Roman Empire” (2004) 67 *THRHR* 60

Van der Merwe CG “Minister van Landbou v Sonnendecker 1979 2 SA 944 (A)” (1980) *TSAR* 183.

Van der Merwe CG *Sakereg* 2 ed (1989).

Van der Merwe CG & Pope A “Part III – Property” in F du Bois (ed) *Wille’s Principles of South African Law* 9 ed (2007) 405.

Van der Merwe CG “Things” in WA Joubert (founding ed) *LAWSA 27* 2 ed (2014).

Van der Schyff E *Property in Minerals and Petroleum* (2016).

Van der Walt AJ *Constitutional Property Law* 3 ed (2011).

Van der Walt AJ “Normative Pluralism and Anarchy: Reflections on the 2007 Term” (2008) 1 *Constitutional Court Review* 77.

Van der Walt AJ *Property and Constitution* (2012).

Van der Walt AJ *Property in the Margins* (2009).

Van der Walt AJ “The Future of Common Law Landownership” in AJ van der Walt (ed) *Land Reform and the Future of Landownership in South Africa* (1991) 21.

Van der Walt AJ *The Law of Neighbours* (2010).

Van der Walt AJ *The Law of Servitudes* (2016).

Van der Walt AJ “The State's Duty to Protect Property Owners v the State's Duty to Provide Housing: Thoughts on the *Modderklip* Case” (2005) 21 *SAJHR* 144.

Van der Walt & Viljoen S “The Constitutional Mandate for Social Welfare – Systemic Differences and Links between Property, Land Rights and Housing Rights” (2015) 18 *PER* 1034.

Van Druten E & Bekker M “Towards an Inclusive Model to Address Unsuccessful Mine Closures in South Africa” (2017) 117 *Journal of the Southern African Institute of Mining and Metallurgy* 485.

Van Eeden ES, Liefferink M & Durand JF “Legal Issues Concerning Mine Closure and Social Responsibility on the West Rand” (2009) 5 *TD: The Journal for Transdisciplinary Research in Southern Africa* 51.

Van Wyk J “Can SPLUMA Play a Role in Transforming Spatial Injustice to Spatial Justice in Housing in South Africa?” (2015) 30 *SAPL* 26.

Van Wyk J *Planning Law* 2 ed (2012).

Wermelinger A *Das Stockwerkeigentum* (2014).

Worral R, Neil D, Brereton D & Mulligan D "Towards a Sustainability Criteria and Indicators Framework for Legacy Mine Land" (2009) 17 *Journal of Cleaner Production* 1426.

Zimmermann R & Visser D "Introduction" in R Zimmerman & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 1.

Zimmermann "'Double Cross': Comparing Scots and South African Law" in R Zimmermann, K Reid & D Visser (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2005) 1.

Zweigert K & Kötz H *An Introduction to Comparative Law* 3 ed (1998).

Translations of Roman and Roman-Dutch Law Texts

Gane P (translator) *The Selective Voet being the Commentary on the Pandects* vol 6 (1957) [referenced as "Voet" in the footnotes].

Gonin HL (translator) *D. G. van der Keessel Voorlesinge oor die Hedendaagse Reg na Aanleiding van De Groot se "Inleiding tot de Hollandse Rechtsgeleerdheyd"* vol 3 (1961) [referenced as "Van der Keessel *Praelectiones*" in the footnotes].

Kotzé JG (translator) *Simon van Leeuwen's Commentaries on Roman-Dutch Law* vol 1 (1881) [referenced as "Van Leeuwen *Commentaries*" in the footnotes].

Lee RW (translator) *The Jurisprudence of Holland by Hugo Grotius* (1926) [referenced as "Grotius" in the footnotes].

Moyle JB (translator) *The Institutes of Justinian* (1913) [referenced as "Inst" in the footnotes].

Pharr C (translator) *The Theodosian Code and Novels and the Sirmondian Constitutions* (1952) [referenced as "C.Th" in the footnotes].

Schreiner WP & Foord AJ (translators) *Simon van Leeuwen's Censura Forensis* (1883) [referenced as "Van Leeuwen *Censura Forensis*" in the footnotes].

Scott SP (translator) *The Civil Law* (1932) [used for the Code of Justinian, referenced as "C" in the footnotes].

Juta H (translator) *Institutes of Holland, Or Manual of Law, Practice, and Mercantile Law by Mr. Joannes van der Linden* 2 ed (1891) [referenced as "Van der Linden *Manual*" in the footnotes].

Watson A (translator) *The Digest of Justinian Volume 1* (1985) [referenced as "D" in the footnotes].

Watson A (translator) *The Digest of Justinian Volume 4* (1985) [referenced as "D" in the footnotes].

Theses

Bezuidenhout K *Compensation for Excessive but Otherwise Lawful Regulatory State Action* LLD dissertation, Stellenbosch University (2014).

Du Plessis WJ *Compensation for Expropriation under the Constitution* LLD thesis Stellenbosch University (2009).

Howard J *Corporate Social Responsibility in the Mining Industry* LLM dissertation UCT (2014).

Marais E *Acquisitive Prescription in View of the Property Clause* LLD thesis Stellenbosch University (2011).

Marques P *The Right to Neglect Property: An Analysis of the Weaknesses of the National Heritage Resources* LLB research paper University of Cape Town (2012).

Milaras M *The Judicious Use of Environmental Sustainability Indicators in Support of Mine Closure in South Africa* LLM thesis University of Johannesburg (2014).

Strydom J *A Hundred Years of Demolition Orders: A Constitutional Analysis* LLD thesis Stellenbosch University (2012).

Van der Sijde E *Reconsidering the Relationship Between Property and Regulation: A Systemic Constitutional Approach* LLD dissertation Stellenbosch (2015).

Van Schalkwyk CL *A Legal Perspective on the Role of Municipalities in Navigating the Relationship between Land Use Planning and Mining* PhD thesis University of Cape Town (2019).

Wilson L *Unshackling South African Artisanal Miners: Considering Burkina Faso's Legislative Provisions as a Guideline for Legislation and Regulation* LLM thesis University of Cape Town (2018).

Newspaper Articles

Author Unknown "Derelict Building Now a Dump" *The Herald* (31-08-2015) 11.

Author Unknown "Municipalities Must Diversity Funding Sources" *Witness* (21-02-2019) 6.

Author Unknown "Participants Advocate for Land Seizure Move" *Sowetan* (10-12-2018) 9.

Phakathi B "Constitution Already Covers Land Reform, Says Expert" *Business Day* (11-04-2018).

Cousins B "Land Debate in SA Clouded" *Citizen* (14-03-2018) 14.

Cox A "Losing the Battle Against Urban Decay" *Star* (04-05-2012) 8.

Dentlinger L "Problem Buildings Investigated" *Cape Argus* (2016-3-15) 4.

Dlamini P "'No Expropriation of Land From Blacks'" *The Herald* (20-06-2019) 2.

Donnelly L "Western Cape Fights 'Unrealistic' Budget Cuts" *Business Day* (01-11-2019) 3.

Ensor L "Local Government Underfunded, Says Advisory Body" *Business Day* (02-07-2019) 2

Feketha S "Grounds Move on Private Property Fears" *Cape Argus* (16-08-2018) 9.

Lewis A "Angry Residents to Take on 'Devil's Den'" *Cape Argus* (27-07-2015) 4.

Mahlakoana "ANC Goes Radical on Land Question" *Business Day* (21-12-2017) 1.

Mailovich C "Pledge to Take Back Buildings" *Business Day* (01-06-2017) 1.

Mailovich C "Struggling Metros Need a Bailout" *Business Day* (17-04-2019) 3.

Mngxitama A "Ekurhuleni Doing Well on the Land Issue" *Sunday Independent* (10-11-2019) 8.

Mphande H "Guarding Derelict Eyesore Costs Ratepayers a Packet" *The Herald* (06-06-2008) 5; Author Unknown "Derelict Building Now a Dump" *The Herald* (31-08-2015) 11.

Mtshali S "Overwhelming Support for Land Grab Amendment" *Sunday Tribune* (22-07-2018) 4.

Naidoo S "Vacant Building By-Law Loopholes Need to be Closed" *Saturday Argus* (2018-06-09) 5.

Ndaliso C "Derelict Building Hazard" *Daily News* (2017-06-28) 1.

Njobeni S & Koko K "Heated Land Reform Debate Degenerates into Fist Fight" *Cape Argus* (22-12-2017) 4.

Nombembe P "'Largest Land Occupation' Unresolved" (2017-10-08) *Sunday Times* 10.

Olaide M "Companies Skirt Law When They Shut Down Mines" *Cape Argus* (12-10-2015) 13.

Phakathi B "ANC, EFF Join Hands on Land Expropriation" *Business Day* (28-02-2018) 1.

Phakathi B "Constitution Already Covers Land Reform, Says Expert" *Business Day* (11-04-2018).

Schroeder F "Heritage Site Please Puts Development on Hold" *Sunday Argus* (16-10-2016) 4.

Solomons K "City Crackdown on Problem Buildings" *Saturday Argus* (2012-06-16) 4.

Steyn L "When Good Property Turns Bad" *Mail & Guardian* (2015-07-24) 2.

Villette F "City Prepares to Fight Marikana Land Ruling" (2018-07-30) *Cape Times* 4.

Watson A "Gauteng's Illegal Dumping Scourge" *Citizen* (06-07-2015) 8.

Lectures, Seminars and Unpublished Papers

Digby C *Mine Closure and Rehabilitation: From Dereliction to Accountability?* (2016) unpublished presentation presented at seminar titled *From Dereliction to Accountability?* hosted by Centre for Environmental Rights at the University of Witwatersrand, 05-05-2016.

Hall R *The Land Question: What is the Answer?* (2018) unpublished public lecture presented at the University of the Western Cape, 02-08-2019.

Humby T *Facilitating Dereliction? How the South African Legal Regulatory Framework Enables Mining Companies to Circumvent Closure Duties* (2014) unpublished paper presented at the *9th International Conference on Mine Closure* hosted by the University of Witwatersrand and Australian Centre for Geomechanics at the Sandton Convention Centre, 1-3 October 2014.

Krause RD & Snyman LG *Rehabilitation and Mine Closure Liability: An Assessment of the Accountability of the System to Communities* (2014) unpublished paper presented at the *9th International Conference on Mine Closure* hosted by the University of Witwatersrand and Australian Centre for Geomechanics at the Sandton Convention Centre, 1-3 October 2014.

Limpitlaw D, Aken M, Lodewijks H & Viljoen J *Post Mining Rehabilitation, Land Use and Pollution at Collieries in South Africa* (2005) unpublished paper presented at colloquium on *Sustainable Development in the Life of Coal Mining* hosted by South African Institute of Mining and Metallurgy at Boksburg, 13-07-2005.

Limpitlaw D & Digby C *Planning for Mine Closure in Sub-Saharan Africa – Taking Urban Development and Artisanal Miners into Account* (2014) unpublished paper presented at *9th International Conference on Mine Closure* hosted by the University of the Witwatersrand at the Sandton Convention Centre, 1-3 October 2014.

Milaras M, Ahmed F & McKay T *Mine Closure in South Africa: A Survey of Current Professional Thinking and Practice* (2014) unpublished paper presented at the *9th International Conference on Mine Closure* hosted by the University of Witwatersrand and Australian Centre for Geomechanics at the Sandton Convention Centre, 1-3 October 2014.

Ngcukaitobi T & Bishop M *The Constitutionality of Expropriation Without Compensation* (2018) unpublished paper presented at the *Constitutional Court Review IX Conference* hosted by Wits School of Law at the Human Rights Room, Old Fort, Constitution Hill, Braamfontein, Johannesburg, 2August 2018.

Orthofer A *Wealth Inequality in South Africa: Insights from Survey and Tax Data* Working Paper for the Research Project on Employment, Income Distribution and Inclusive Growth, 2016, available at < http://www.redi3x3.org/sites/default/files/Orthofer%202016%20REDI3x3%20Working%20Paper%2015%20-%20Wealth%20inequality.pdf> (accessed 31-01-2019).

Internet Sources

Athman B “Abandoned Houses and Unkempt Land Help Crime” (14-03-2018) *News24* <https://www.news24.com/SouthAfrica/Local/Maritzburg-Fever/abandoned-houses-and-unkempt-land-help-crime-20180313> (accessed 14-03-2018).

Author Unknown “Ekurhuleni Identifies Land to Expropriate Without Compensation” (29-09-2018) <http://www.polity.org.za/article/ekurhuleni-identifies-land-to-expropriate-without-compensation-2018-09-28> (accessed 07-02-2020).

Author Unknown “Recycling” (13-05-2016) *Federal Department of Foreign Affairs* <https://www.eda.admin.ch/aboutswitzerland/en/home/umwelt/natur/recycling.html> (accessed 16-03-2017).

Author Unknown “Revealed: ‘National Crisis’ Opencast Mine Warning” (13-07-2014) *The Herald* <http://www.heraldscotland.com/news/13169742.Revealed___national_crisis__opencast_mine_warning/> (accessed 15-01-2020).

Author Unknown “Wenn Grundeigentum zur Last Wird” (08-11-2004) *Neue Zürcher Zeitung* <https://www.nzz.ch/article9YV7W-1.331322> (accessed 16-03-2017).

Bachmann H “Voices: For Swiss, Recycling is Very Serious Business” (07-03-2016) *USA Today* <http://www.usatoday.com/story/opinion/voices/2016/03/06/voices-swiss-recycling-very-serious-business/81333110/> (accessed 16-03-2017).

Barlyn S “California Mudslides Insurance Losses Exceed $421 million: Regulator” (2-04-2018) *Reuters* <https://www.reuters.com/article/us-california-mudslides-insurance/california-mudslide-insurance-losses-exceed-421-million-regulator-idUSKCN1H91PK> (accessed 31-08-2020).

Bauerlein L “Learning to Recycle in Switzerland, and Paying for It” (19-02-2016) *New York Times* <https://www.nytimes.com/2016/02/21/magazine/learning-to-recycle-in-switzerland-and-paying-for-it.html?_r=0> (16-03-2017).

Bayard I “Wenn eine Strasse Niemandem Gehört” (06-01-2014) *Tages Anzeiger* <http://www.tagesanzeiger.ch/panorama/vermischtes/Wenn-eine-Strasse-niemandem-gehoert/story/31312584> (accessed 16-03-2017).

Central Intelligence Agency “Switzerland” (03-04-2019) *The World Factbook* < https://www.cia.gov/library/publications/the-world-factbook/geos/sz.html> (accessed 09-04-2019).

Centre for Environmental Rights “Mine Closure and Rehabilitation: The Hangover that Follows the Mining Party” (09-05-2016) *Centre for Environmental Rights* <https://cer.org.za/news/mine-closure-and-rehabilitation-the-hangover-that-follows-the-mining-party> (accessed 25-01-2019).

Centre for Environmental Rights “Newsflash: CER Calls for Transparency in Sale of Anglo’s SA Coal and Iron Assets” (04-03-2016) *Centre for Environmental Rights*

<https://cer.org.za/news/newsflash-cer-calls-for-transparency-in-sale-of-anglos-sa-coal-and-iron-assets> (accessed 29-01-2020).

Centre for Environmental Rights "Warning Around Anglo-American's Sale of Coal Mines: Transparency Essential to Avoid Downstream Disaster" (25-04-2020) *Centre for Environmental Rights* <https://cer.org.za/news/warning-around-anglo-americans-sale-of-coal-mines-transparency-essential-to-avoid-downstream-disaster> (accessed 29-01-2020).

City of Cape Town *The Cost of Illegal Dumping* <http://resource.capetown.gov.za/documentcentre/Documents/Graphics%20and%20educational%20material/The%20cost%20of%20illegal%20dumping%20(PDF).pdf> (accessed 20-05-2019).

City of Johannesburg "New Inner City Scheme" *Joburg* <https://www.joburg.org.za/media_/Newsroom/Pages/2013%20articles/2011%20&%202012%20%20Articles/New-inner-city-scheme.aspx> (accessed 27-03-2019).

Climate Action Tracker "South Africa" (2-12-2019) *Climate Action Tracker* <https://climateactiontracker.org/countries/south-africa/> (accessed 30-08-2020).

Cloke H "As Sea Levels Rise, Are We Ready to Live Behind Giant Walls?" (11-05-2020) *The Conversation* https://theconversation.com/as-sea-levels-rise-are-we-ready-to-live-behind-giant-walls-137976 (accessed 31-08-2020).

Combe "Digesting the Community Empowerment Act" (17-08-2015) *Law Society of Scotland* <https://www.lawscot.org.uk/members/journal/issues/vol-60-issue-08/digesting-the-community-empowerment-act/> (accessed 15-01-2020).

Cropley E "Desperation and Death Beneath South Africa's City of Gold" (13-11-2016) *Reuters* <https://www.reuters.com/article/us-safrica-mining/desperation-and-death-beneath-south-africas-city-of-gold-idUSKCN11J1M6> (accessed 29-01-2020).

Crotty A "Trying to Keep Mine Deals Clean" (05-05-2017) *Business Day* <https://www.businesslive.co.za/fm/money-and-investing/2017-05-05-trying-to-keep-mining-deals-clean/> (accessed 29-01-2020).

Curtis M "I Faced Prison for Plastic in Wrong Recycling Bag" (03-12-2013) *The Local* <http://www.thelocal.ch/20131203/i-faced-prison-for-plastic-in-a-paper-recycling-bag> (accessed 16-03-2017).

Davis R "Why Counting Service Delivery Protests is More Complicated than it Seems" (13-07-2018) <https://www.dailymaverick.co.za/article/2018-07-13-why-counting-service-delivery-protests-is-more-complicated-than-it-seems/> (accessed 24-01-2019).

Debut B "Gang Wars Erupt over Abandoned Mines in SA" (02-11-2015) *Mail & Guardian* <https://mg.co.za/article/2015-11-02-gang-wars-erupt-over-abandoned-mines-in-south-africa> (accessed 11-10-2019).

Ellis E "Emergency Water Restrictions as Eastern Cape's Water Woes Escalate" (4-02-2020) *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-02-04-emergency-restrictions-as-eastern-capes-water-woes-escalate/> (accessed 30-08-2020).

ENCA “Mashaba Wants Public Works to Intervene on Abandoned Buildings” (10-04-2018) *ENCA* <https://www.enca.com/south-africa/mshaba-wants-public-works-to-intervene-on-abandoned-buildings> (accessed 10-05-2019).

Erasmus J “Durban’s Urban Decay Worsening” (07-04-2014) *News24* <https://www.news24.com/Archives/Witness/Durbans-urban-decay-worsening-20150430> (accessed 12-11-2018).

Etheridge J “Cape Town Unit Steadily Dealing with City’s ‘Problem Buildings’” (13-07-2016) *News24* <https://www.news24.com/SouthAfrica/News/cape-town-unit-steadily-dealing-with-citys-problem-buildings-20160713> (accessed 12-11-2018).

February D “Treasury Cuts Land Reform Budget” (20-02-2019) *Farmer’s Weekly* <https://www.farmersweekly.co.za/agri-news/south-africa/treasury-cuts-land-reform-budget/> (accessed 15-10-2019).

Feris M “New Report Outlines the Dire Consequences of Corruption in Water Sector (12-03-2020) Daily Maverick <https://www.dailymaverick.co.za/article/2020-03-12-new-report-outlines-the-dire-consequences-of-corruption-in-water-sector/> (accessed 30-08-2020)

Galvin M “Bold Steps are Needed Towards a ‘New Normal’ that Allocates Water Fairly in South Africa” (6-03-2018) *The Conversation* <https://theconversation.com/bold-steps-are-needed-toward-a-new-normal-that-allocates-water-fairly-in-south-africa-92191> (accessed 30-08-2020).

Gerber J “Land Expropriation: Court Battle Looms as Parliament Opposes AfriForum Interdict Bid” (21-11-2018) *News24* <https://www.news24.com/SouthAfrica/News/land-expropriation-court-battle-looms-as-parliament-opposes-afriforum-interdict-bid-20181121> (accessed 21-11-2018).

Gous N “Ekurhuleni Plans to Expropriate Four Pieces of Land Without Compensation” (28-09-2018 *TimesLive* <https://www.timeslive.co.za/news/south-africa/2018-09-28-ekurhuleni-plans-to-expropriate-four-pieces-of-land-without-compensation> (accessed 07-02-2020).

Groenewald Y “Provincial, Municipal Budgets Cut to Fund Free Education” (21-02-2018) *Fin24* <https://www.fin24.com/Budget/provincial-municipal-budgets-cut-to-fund-free-education-20180221> (accessed 10-04-2018).

Grootes S “Land Issue: Once More at Front and Centre of the ANC’s Internal Politics” (27-01-2020) *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-01-27-land-issue-once-more-at-front-and-centre-of-the-ancs-internal-politics/> (accessed 30-01-2020).

Heese K & Allan K “Budget Adds to Problems in Delivery to the Poor” (01-03-2018) *Business Day* <https://www.businesslive.co.za/bd/opinion/2018-03-01-budget-adds-to-problems-in-delivery-to-the-poor/> (10-04-2018).

Hoffman P “On the Nationalisation of Land” (05-03-2018) *PoliticsWeb* <http://www.politicsweb.co.za/opinion/on-the-nationalisation-of-land> (accessed on 19-10-2018).

Isa M “Last Rating Standing” (28-02-2019) *Fin24* <https://www.fin24.com/Finweek/Business-and-economy/last-rating-standing-20190228> (accessed 28-02-2019).

James N “Climate Change is Hitting South Africa’s Coastal Fish” (3-08-2015) *The Conversation* <https://theconversation.com/climate-change-is-hitting-south-africas-coastal-fish-44802> (accessed 30-08-2020).

Johnston P “Farming in South Africa is Under Threat from Climate Change. Here’s How” (12-11-2019) *The Conversation* <https://theconversation.com/farming-in-south-africa-is-under-threat-from-climate-change-heres-how-125984> (accessed 30-08-2020).

Leach A “Ticking Time Bonds: Scottish Open Cast Coal Leaves Legacy of Dereliction” (25-02-2014) *Mining Technology* <http://www.mining-technology.com/features/featureticking-time-bonds-scottish-open-cast-coal-leaves-legacy-of-dereliction--4184435/> (accessed 15-01-2020).

Magubane K “Gauteng Metros Struggle to Deliver Services on Tight Budgets” (03-08-2017) *Business Day* <https://www.businesslive.co.za/bd/national/2017-08-03-gauteng-metros-struggle-to-deliver-services-on-tight-budgets/> (accessed 13/09/2018).

Magubane K “Provincial and Local Government Allocations Fall in Gigaba’s Budget” (22-02-2018) *Business Day* <https://www.businesslive.co.za/bd/economy/2018-02-22-provincial-and-local-government-allocations-fall-in--gigabas-budget/> (accessed 10-04-2018).

Makou G “Yes, South African Spends as much on VIP Protection & Security as on Land Reform” (09-05-2019) *Africa Check* <https://africacheck.org/reports/yes-south-africas-government-spends-as-much-on-vip-protection-security-as-on-land-reform/> (accessed 15-10-2019).

Mapenzauswa S “#Budget2019: SA Budget Deficit to Widen as it Borrows R1.2bn a Day” (20-02-2019) *IOL* <https://www.iol.co.za/business-report/budget/budget2019-sa-budget-deficit-to-widen-as-it-borrows-r12bn-a-day-full-speech-19404658> (accessed 15-10-2019).

Mashaba H “City of Joburg to Expropriate Derelict Buildings” (27-02-2018) *The Johannesburg Inner City Partnership* <http://www.jicp.org.za/news/city-of-joburg-to-expropriate-derelict-buildings/> (accessed 20-02-2018).

Mashaba H “City of Johannesburg to Expropriate Derelict Buildings” *Joburg* <https://www.joburg.org.za/media_/MediaStatements/Pages/2018%20Press%20Releases/City-of-Joburg-to-expropriate-derelict-buildings.aspx> (accessed 20-11-2018).

Masuabi Q “Government Has Never Taken Land-Reform Budget Seriously” (16-05-2018) *Huffington Post* <https://www.huffingtonpost.co.uk/2018/05/16/government-has-never-taken-land-reform-budget-seriously_a_23435787> (accessed 15-10-2019).

Masuabi “Government Has Never Taken Land-Reform Budget Seriously” (16-05-2018) *Huffington Post* <https://www.huffingtonpost.co.uk/2018/05/16/government-has-never-taken-land-reform-budget-seriously_a_23435787> (accessed 15-10-2019).

Matthews T & Raymond C “Global Warming Now Pushing Heat into Territory Humans Cannot Tolerate” (20-05-2020) *The Conversation* <https://theconversation.com/global-warming-now-pushing-heat-into-territory-humans-cannot-tolerate-138343> (accessed 31-08-2020).

Merten M “ANC’s Executive Proposal on Expropriation Without Compensation Obscures Already Vast Ministerial Powers” (28-01-2020) *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-01-28-ancs-executive-proposal-on-expropriation-without-compensation-obscures-already-vast-ministerial-powers/> (accessed 30-01-2020).

Muller M “South Africa’s Real Water Crisis: Not Understanding What’s Needed” (6-11-2020) *The Conversation* https://theconversation.com/south-africas-real-water-crisis-not-understanding-whats-needed-126361 (accessed 30-08-2020).

Muller S “Slow Growth and Shrinking Revenues Limit South Africa’s Finance Minister” (27-10-2019) *The Conversation* <https://theconversation.com/slow-growth-and-shrinking-revenues-limit-south-africas-finance-minister-67745> (accessed 15-10-2019).

Muller S “South Africa’s Finance Minister Delivers a Budget Designated to Steady the Ship” (20-02-2019) *The Conversation* <https://theconversation.com/south-africas-finance-minister-delivers-a-budget-designed-to-steady-the-ship-112162> (accessed 15-10-2019).

Muller S “Why Ramaphosa’s ‘New Dawn’ Will Break Slowly for South Africa’s Finances” (21-10-2018) *The Conversation* <https://theconversation.com/why-ramaphosas-new-dawn-will-break-slowly-for-south-africas-finances-105302> (accessed 15-10-2019).

NASA “The Evidence for Rapid Climate Change is Compelling” (25-08-2020) *NASA* <https://climate.nasa.gov/evidence/> (accessed 30-08-2020).

New M, Otto F & Wolski P “Global Warming has Already Raised the Risk of More Severe Droughts in Cape Town” (19-12-2018) *The Conversation* <https://theconversation.com/global-warming-has-already-raised-the-risk-of-more-severe-droughts-in-cape-town-107625> (accessed 30-08-2020).

Nowicki L “Grahamstown Residents Queue for Hours for Water” (14-0-2019) *GroundUp* https://www.groundup.org.za/article/grahamstown-residents-queue-hours-water/ (accessed 30-08-2020).

October A “Land Expropriation Shambles Highlights How Public Participation at Parliament is not Working” (29-11-2018) *Daily Maverick* < https://www.dailymaverick.co.za/article/2018-11-29-land-expropriation-shambles-highlights-how-public-participation-at-parliament-is-not-working/> (accessed 29-01-2019).

Olaide M “Driven Underground by Poverty” (09-10-2015) *IOL* <https://www.iol.co.za/news/opinion/driven-underground-by-poverty-1927803> (accessed 11-10-2019).

Orthofer A “South Africa Needs to Fix its Dangerously Wide Wealth Gap” (06-10-2016) *The Conversation* <https://theconversation.com/south-africa-needs-to-fix-its-dangerously-wide-wealth-gap-66355> (accessed 31-01-2019).

Osman A “South African Urgently Needs to Rethink its Approach to Housing” (04-06-2017) *The Conversation* <https://theconversation.com/south-africa-urgently-needs-to-rethink-its-approach-to-housing-78628> (accessed on 22-10-2018).

Parliamentary Communication Services “Joint Constitutional Review Committee Adopts Report on Expropriation of Land Without Compensation” (15-11-2018) *Parliament of South Africa* <https://www.parliament.gov.za/press-releases/joint-constitutional-review-committee-adopts-report-expropriation-land-without-compensation> (accessed 23-11-2018).

Parliamentary Monitoring Group “Committee Report on Review of Section 25 of Constitution Adopted” *Parliamentary Monitoring Group* <https://pmg.org.za/committee-meeting/27548/> (accessed 23-11-2018).

Phakathi B “Committee Recommends Amending Constitution for Land Expropriation” (15-11-2018) *Business Day* <https://www.businesslive.co.za/bd/national/2018-11-15-committee-recommends-amending-constitution-for-land-expropriation/> (accessed 23-11-2018).

Phakathi “Parliament ‘Will Oppose AfriForum’s Bid to Halt Property Clause Amendment’” (21-11-2018) *Business Day* <https://www.businesslive.co.za/bd/national/2018-11-21-parliament-will-oppose-afriforums-bid-to-halt-property-clause-amendment/> (accessed 23-11-2018).

Potelwa X “Budget Squeeze Pushing South African Cities Back to Bond Market” (18-02-2016) *Bloomberg* <https://www.bloomberg.com/news/articles/2016-02-18/budget-squeeze-pushing-south-african-cities-back-to-bond-market> (accessed 10-04-2018).

Ramaphosa C “This is No Land Grab” (24-08-2018) *Business Day* <https://www.businesslive.co.za/bd/opinion/2018-08-24-exclusive-this-is-no-land-grab-writes-cyril-ramaphosa/> (accessed on 19-10-2018).

Ronayne K “California Insurers Drop Policies in High-fire Risk Areas” (21-08-2019) *Fox26 News* <https://kmph.com/news/local/california-insurers-drop-policies-in-high-fire-risk-areas> (accessed 31-08-2020).

South African Heritage Resources Agency “Declared National Heritage Sites” *South African Heritage Resources Agency* <https://www.sahra.org.za/national-heritage-sites/> (accessed on 25-10-2018).

South African Institute of Professional Accountants “South Africa to Reach Fiscal Cliff by 2042” (23-02-2019) *IOL* <https://www.iol.co.za/business-report/budget/south-africa-to-reach-the-fiscal-cliff-by-2042-19443575> (accessed 15-10-2019).

Strydom S & Savage M “The Influence of Climate Change on Fire Activity in South Africa” (7-08-2017) *The Conversation* <https://theconversation.com/the-influence-of-climate-change-on-fire-activity-in-south-africa-71349> (accessed 30-08-2020).

Thelwell E “Six Things to Know About the Illegal Mining Boom” (26-06-2014) *News24* <https://www.news24.com/SouthAfrica/News/Six-things-to-know-about-the-illegal-mining-boom-20140626> (accessed 11-10-2019).

TimesLive "Hijacked Buildings – What They Are, and What City of Johannesburg is Doing About Them" (05-07-2017) *TimesLive* < https://www.timeslive.co.za/news/south-africa/2017-07-05-hijacked-buildings-what-they-are-and-what-city-of-johannesburg-is-doing-about-them/> (accessed 16-01-2019).

Webster E "South Africa Needs a Fresh Approach to its Stubbornly High Levels of Inequality" (11 December 2017) *The Conversation* <https://theconversation.com/south-africa-needs-a-fresh-approach-to-its-stubbornly-high-levels-of-inequality-87215> (accessed 31-01-2019).

Wilkinson K "The Housing Situation in South Africa" (09-05-2014) *AfricaCheck* <https://africacheck.org/factsheets/factsheet-the-housing-situation-in-south-africa/> (accessed 22-10-2018).

Zachos E "Mudslides, Wildfires and Drought – California's Deadly Weather Explained" (10-01-2018) *National Geographic* <https://www.nationalgeographic.com/news/2018/01/mudslides-california-wildfires-drought-extreme-weather-spd/> (accessed 31-08-2020).

Dictionaries

Oxford English Dictionary <www.oed.com> (accessed 14-02-2020).

Primary Sources

Cases

South Africa

Administrator, Transvaal v Traub 1989 (4) SA 731 (A).

Agri SA v Minister for Minerals and Energy 2013 (4) SA 1 (CC).

Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd 2007 (2) SA 363 (SCA).

Aquila Steel SA (Pty) Ltd v South African Steel Company (Pty) Ltd 2014 JDR 0531 (GNP).

Arun Property Development (Pty) Ltd v City of Cape Town 2015 (2) SA 584 (CC).

Baron v Claytile (Pty) Ltd 2017 (5) SA 329 (CC).

Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd 2011 (4) SA 113 (CC).

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd 2012 (2) SA 104 (CC).

City of Johannesburg v Changing Tides 74 (Pty) Ltd 2012 (6) SA 294 (SCA).

City of Johannesburg v Rand Properties (Pty) Ltd 2007 (6) SA 417 (SCA).

Corrans v MEC for the Department of Sport, Recreation, Arts and Culture, Eastern Cape Government 2009 (5) SA 512 (ECG).

Dada v Unlawful Occupiers of Portion 41 of the Farm Rooikop and Another 2009 (2) SA 492 (W).

Dolpire v South African National Road Agency Ltd (19661/2009) [2010] ZAWCHC 130 (17 June 2010).

Du Plessis v Philipstown Municipality 1937 CPD 335.

Edmeades v Scheepers (1880-1882) 1 SC 334.

Ekurhuleni Metropolitan Municipality v Dada NO 2009 (4) SA 463 (SCA).

Ex Parte Jacobson: In re Alec Jacobson Holdings (Pty) Ltd 1984 (2) SA 372 (W).

Ex Parte Marchini 1964 (1) SA 147 (T).

Ex Parte Menzies et Uxor 1993 (3) SA 799 (C).

Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa 2000 2 SA 674 (CC).

Ex Parte Sprawson (In Re Hebron Diamond Mining Syndicate Limited) 1914 TPD 458.

First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service 2002 (4) SA 768 (CC).

Fischer v Persons Unknown 2014 (3) SA 291 (WCC).

Fischer v Ramahlele 2014 (4) SA 614 (SCA).

Fischer v Unlawful Occupiers 2018 (2) SA 228 (WCC).

Fose v Minister of Safety and Security 1997 (3) SA 786 (CC).

Gees v Provincial Minister of Cultural affairs and Sport, Western Cape 2017 (1) SA 1 (SCA).

Government of the Republic of South Africa v Ocean Development Investment Trust plc 1989 (1) SA 35 (T).

Habitat Council v BPH Properties (Pty) Ltd (A388/17) [2018] ZAWCHC 98 (17 August 2018).

Hayes v Harding Town Board 1958 (2) SA 297 (N).

Head v Du Toit 1932 CPD 287.

Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village 2013(1) SA 583 (GSJ).

Joubert v Maranda Mining Co (Pty) Ltd 2010 (1) SA 198 (SCA).

Khan v Minister of Law & Order 1991 (3) SA 439 (T).

Legator McKenna Inc v Shea 2010 (1) SA 35 (SCA).

Maccsand (Pty) Ltd v City of Cape Town 2012 (4) SA 181 (CC).

Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another 2019 (2) SA 1 (CC).

Margate Estates Ltd v Urtel (Pty) Ltd 1965 (1) SA 279 (N).

Meepo v Kotze 2008 (1) SA 104 (NC).

Meintjes NO v Coetzer 2010 (5) SA 186 (SCA).

Minister van Landbou v Sonnendecker 1979 2 SA 944 (A).

Mkontwana v Nelson Mandela Metropolitan Municipality 2005 (1) SA 530 (CC).

Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd 2004 (6) SA 40 (SCA).

Morgenster 1711 (Pty) Ltd v De Kock NO 2012 (3) SA 59 (WCC).

National Credit Regulator v Opperman 2013 (2) SA 1 (CC).

Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd 2015 (4) SA 34 (SCA).

Occupiers, Berea v De Wet NO 2017 (5) SA 346 (CC).

Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg 2008 (3) SA 208 (CC).

Papas NO v Motsere Trading CC (46011/2012) [2014] ZAGPJHC 144 (6 June 2014).

Pickard v Stein 2015 (1) SA 439 (GJ).

Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele [2010] 4 All SA 54 (SCA).

Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC).

President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 (CC).

Provincial Heritage Resources Authority, Eastern Cape v Gordon 2005 (2) SA 283 (E).

Qualidental Laboratories (Pty) Ltd v Heritage Western Cape 2008 (3) SA 160 (SCA).

Quartermark Investments (Pty) Ltd v Mkhwanazi 2014 (3) SA 96 (SCA).

Rainbow Diamonds (Edms) Bpk v SA Nasionale Lewensassuransiemaatskappy 1984 (3) SA 1 (A).

Reck v Mills 1990 (1) SA 751 (A).

Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government 2009 (6) SA 391 (CC).

Salvage Association of London v S.A. Salvage Syndicate, Ltd. (1906) 23 SC 169.

S M Goldstein & Co (Pty) Ltd v Gerber 1979 (4) SA 930 (A).

Steinberg v South Peninsula Municipality 2001 (4) SA 1243 (SCA).

Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy v Rainbow Diamonds (Edms) Bpk 1982 (4) SA 633 (A).

Trojan Exploration co (Pty) Ltd v Rustenburg Platinum Mines Ltd 1996 (4) SA 499 (A).

Underwater Construction and Salvage Co (Pty) Ltd v Bell 1968 (4) SA 190 (C).

United Building Society and Another NO v Du Plessis 1990 (3) SA 75 (W).

Vermeulen's Executrix v Moolman 1911 AD 384.

Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape) 2011 (5) SA 14 (WCC).

Zondi v MEC for Traditional and Local Government Affairs 2005 (3) SA 589 (CC).

Germany

BVerfGE 100, 226.

BVerfGE 50, 290.

BVerfGE 52, 1.

Scotland

Joint Liquidators of the Scottish Coal Company Limited [2013] CSOH 124.

The Scottish Environment Protection Agency v The Joint Liquidators of the Scottish Coal Company Limited [2013] CSIH 108.

England

Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935.

Switzerland

BGE 85 I 261.

BGE 112 Ib 263.

BGE 114 II 32.

BGE 115 IV 104.

BGE 119 Ia 390.

BGE 127 III 440.

BGE 128 III 265.

BGE 129 III 216.

Legislation

South Africa

National

Administration of Estates Act 66 of 1965.

Constitution of the Republic of South Africa, 1996.

Constitution of the Republic of South Africa Act 200 of 1993.

Deeds Registries Act 47 of 1937.

Expropriation Act 63 of 1975.

Extension of Security of Tenure Act 62 of 1997.

Local Government: Municipal Demarcation Act 27 of 1998.

Local Government: Municipal Property Rates Act 6 of 2004.

Local Government: Municipal Systems Act 32 of 2000.

Marriage Act 25 of 1961.

Mineral and Petroleum Resources Development Act 28 of 2002.

Minerals Act 50 of 1991.

Mining Titles Registration Act 16 of 1967.

National Building Regulations and Building Standards Act 103 of 1977.

National Environmental Management Act 107 of 1998.

National Environmental Management: Waste Act 59 of 2008.

National Heritage Resources Act 25 of 1999.

National Water Act 36 of 1998.

Prescription Act 68 of 1969.

Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998.

Prevention of Illegal Squatting Act 52 of 1951.

Promotion of Administrative Justice Act 3 of 2000.

Sectional Titles Act 95 of 1986.

Security by Means of Movable Property Act 57 of 1993.

Spatial Planning and Land Use Development Act 16 of 2013.

State Land Disposal Act 48 of 1961.

Subdivision of Agricultural Land Act 70 of 1970.

Subdivision of Agricultural Land Act Repeal Act 64 of 1998.

New Order Provincial Legislation

Western Cape

Land Use Planning Act No. 3 of 2014.

KwaZulu-Natal

Planning and Development Act No. 6 of 2008.

Old Order Provincial Legislation (Pre-1994)

Transvaal

Division of Land Ordinance 20 of 1986.

Municipal By-Laws

Cape Town By-Laws (Western Cape)

Integrated Waste Management By-law, 2009.

Municipal Planning By-Law, 2015.

Problem Building By-Law, 2010.

Johannesburg By-Laws (Gauteng)

By-law on Problem Properties, 2014.

Municipal Planning By-Law, 2016.

eThekwini By-Laws (KwaZulu-Natal)

Problem Building By-Law, 2015.

Stellenbosch By-Laws (Western Cape)

Land Use Planning By-Law, 2015.

Sol Plaatjie Local Municipality By-Laws (Northern Cape)

Municipal Land Use Management By-Laws, 2015.

Rustenberg Local Municipality By-Laws (North-West Province)

Spatial Planning and Land Use Management By-Law, 2015.

Thembisile Hani Local Municipality (Mpumalanga)

By-Law on Spatial Planning and Land Use Management, 2015.

Mafube Local Municipality (Free State)

Mafube Local Municipality By-Law on Land Use Planning, 2017.

Umlalazi Local Municipality (KwaZula-Natal)

Spatial Planning and Land Use Management By-Law, 2016.

Buffalo City Metropolitan Municipality (Eastern Cape)

Spatial Planning and Land Use Management By-Law, 2016.

Polokwane Local Municipality (Limpopo)

Municipal Planning By-Law, 2018.

Regulations

Mineral and Petroleum Resources Development Regulations GN R527 of 2004.

Switzerland

Primary Legisation

Bundesgesetz über das bäuerliche Bodenrecht (BGBB).

Partnerschaftsgesetz (PartG).

Schweizerisches Zivilgesetzbuch (ZGB).

Regulations

Grundbuchverordnung of 23 September 2011.

Implementation Laws

Einführung des Schweizerischen Zivilgesetzbuches Basel-Stadt (EG ZGB Basel-Stadt).

Einführung des Schweizerischen Zivilgesetzbuches Freiburg (EG ZGB Freiburg).

Regional

Zurich

Planungs- und Baugesetz (PBG ZH).

United Kingdom

National

Companies Act 2006.

Insolvency Act 1986.

Scotland

Abolition of Feudal Tenure etc. (Scotland) Act 2000.

Community Empowerment (Scotland) Act 2015.

Land Registration etc. (Scotland) Act 2012.

Prescription and Limitation (Scotland) Act 1973.

Germany

Primary Legislation

Bürgerliches Gesetzbuch.

Grundgesetz für die Bundesrepublik Deutschland.

Reports, Government Documents and Bills

City of Johannesburg *Draft Property Rates Policy 2019/2020* 20. Available at <https://www.joburg.org.za/services_/Documents/rates%20and%20taxes/Draft%20Rates%20Policy%202019-%2020.pdf> (accessed 18-02-2020).

City of Johannesburg *Property Rates Policy 2018/19* 13. Available at <https://www.joburg.org.za/services_/Documents/Rebates%20documents/2018%20Rates%20Policy_Final.pdf> (accessed on 03-06-2019).

Constitutional Review Committee *Report of the Joint Constitutional Review Committee on the Possible Review of Section 25 of the Constitution* 15-11-2018. Available at <https://pmg.org.za/files/181115FinalReport.docx> (accessed 07-02-2020).

Department of Human Settlements *The National Housing Code: Incremental Interventions* 44. Available at <http://www.dhs.gov.za/sites/default/files/documents/national_housing_2009/4_Incremental_Interventions/2%20Volume%204%20Emergency%20Housing%20Programme.pdf> (accessed 12-01-2019).

Department of Rural Development and Land Reform *Green Paper on Land Reform* (2011). Available at <https://www.gov.za/sites/default/files/gcis_document/201409/landreformgreenpaper.pdf > (accessed 06-02-2020).

Draft Constitution Eighteenth Amendment Bill, 2019 (in Government Gazette 42902 of 13-12-2019).

Draft Expropriation Bill B-2019 (in Government Gazette 42127 of 21-12-2018).

Heritage Western Cape *Grading: Purpose and Management Implications* (2016). Available at <https://www.hwc.org.za/sites/default/files/2_3_6%20Grading_Implications%20and%20Management_Approved.pdf> (accessed 29-01-2020).

Law Society of South Africa *Conveyancing Fees Guidelines* (in operation for instructions received from 01-06-2019). Available at <https://www.lssa.org.za/wp-content/uploads/2019/12/Conveyancing-Fees-Guidelines-November-2019-2.pdf> (accessed 06-02-2020).

National Treasury *Budget Review 2018* 70. Available at http://www.treasury.gov.za/documents/National%20Budget/2018/review/FullBR.pdf (accessed 13/09/2018).

National Treasury *Budget Review 2019* 65. Available at <http://www.treasury.gov.za/documents/national%20budget/2019/review/FullBR.pdf> (accessed 19-02-2020).

Provincial Gazette 5937 of 25-10-2002.

Political Documents

Economic Freedom Fighters *Economic Freedom Fighters Founding Manifesto: Radical Movement Towards Economic Freedom in Our Lifetime* (27-07-2013). Available at < https://effonline.org/wp-content/uploads/2019/07/Founding-Manifesto.pdf> (accessed 06-02-2020).

International Agreements

Paris Agreement, 2015. Available at <https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf> (accessed 30-08-2020).