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- AN EVALUATION OF ASPECTS OF
GROUP AREAS LEGISLATION IN
SOUTH AFRICA -

by

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Being a Thesis submitted for the degree of Doctor of Laws in
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ABSTRACT

In this study an evaluation of the Group Areas Act as a major piece of 'governmental law' is undertaken. The Act (originally introduced in 1950) is a prime example of what may be termed governmental law because it constitutes the centre-piece of a comprehensive legislative and administrative regime aimed at implementing political objectives of a far-reaching and long-term nature. The system of group areas is widely recognised as a cornerstone of the policy of apartheid (racial segregation) pursued by the South African government. The main purpose of group areas legislation, which explains its complexity and essential characteristics, is to bring about the territorial segregation of the racial groups defined in the Act.

Existing legal publications which deal with group areas in a comprehensive way generally cover only the 'black letter' aspects of the law involved, and are presently outdated in certain important respects. In the present study (which covers the period up to the end of 1986) the 'black letter' legal aspects are also analysed in fair detail, but the system of group areas is further evaluated thematically and critically from the perspective of constitutional and administrative law, and also with reference to issues in the fields of jurisprudence, the interpretation of statutes and the interaction between public and private law. Thus the cardinal role played by the wide discretionary powers and specific policies (such as selective non-enforcement) of the executive branch of government is discussed and evaluated with reference to doctrines such as the Rule of Law, and the concern in administrative law relating to the confining, structuring and checking of discretionary administrative powers.

An extensive analysis of judicial attitudes and approaches in group areas cases is undertaken and these are related to the aspects of the doctrine of legal positivism. In respect of judicial attitudes, the conclusion is reached that the Supreme Court, and in particular the Appellate Division, failed in its duty to serve as buttress between the citizen and draconian government powers, and in certain key decisions actually indulged in what may be termed 'apartheid thinking'.

Group areas form part of the web of apartheid laws and a specific feature of this study is the exploration of the complementary interrelation between group areas and laws such as the Community Development Act, laws governing urban Blacks and apartheid measures in respect of educational institutions and public amenities.

The significant societal impact of the implementation of group areas is examined and the gross discrimination perpetrated against the 'target groups' (Coloureds and Indians) in favour of Whites pointed out. The resentment generated in respect of group

areas amongst these target groups rules out the retention of group areas in any constitutional dispensation based on a genuine consensus of all the major groupings in the South African society.

Emphasis is placed upon an important yet relatively unexplored facet of the system of group areas, namely its present significance in constitutional law. Ethnic (racial) local authorities coupled to group areas are to constitute the main participants in the new system of Regional Services Councils, and group areas are also used to territorialize the administration of 'own affairs' ethnic matters under the 1983 Constitution.

Finally, the prospects and implications of group areas and of their eventual abolition, are discussed. Here comparative reference is made to developments in Windhoek, Namibia where segregation in residential and business areas, and in certain public amenities, has been abolished by legislation dating from the period 1979-1981. In respect of South Africa, the general conclusion is reached that while the introduction of reforms such as 'grey' residential areas would be a step in the right direction, ultimately no workable and defensible constitutional dispensation can tolerate the retention of group areas. Ethnicity cannot be successfully territorialized in South Africa, and any constitutional representation of groups, or the administration of group affairs, will have to be premised upon acceptance of this reality. It is pointed out that the abolition of group areas legislation will have limited effects unless positive steps are taken, for instance in a town planning context to counter the pervading influence and enduring legacy of the system of group areas.

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PREFACE

Period covered

Developments are covered up to the end of 1986, unless otherwise stated.

Note on terminology

For the sake of clarity, the nomenclature of the legislation to be discussed will generally be followed in respect of 'racial' groups. Thus the Group Areas Act distinguishes between the 'White', 'Coloured', and 'Black' (originally 'Native') groups - the latter referring to Africans. The 'Coloured' group (hereinafter the general Coloured group) has been subdivided by means of delegated legislation and the most important result has been the creation of separate 'Indian', 'Chinese' and ('residual') 'Coloured' groups. The latter is herein referred to as the 'Coloured group'. Following the scheme and practical application of the Group Areas Acts, the term 'non-White' is used to distinguish the 'White' group from all the other groups.

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AN EVALUATION OF ASPECTS OF GROUP AREAS LEGISLATION IN SOUTH AFRICA

CHAPTER ONE - INTRODUCTION

1.1 *Current importance of Group Areas*

Group areas have often been described as one of the cornerstones of the policy of apartheid, or 'separate development' as it is presently styled. This assertion appears to be justified even though the abolition of measures such as job reservation and influx control, which have also been described as 'cornerstones of apartheid', does raise the question as to what the 'true' cornerstones of the policy of the National Party government are.

Speaking on the first Group Areas Bill in 1950, the then Prime Minister, Dr D F Malan, asserted:

'It is the essence of the apartheid policy which is embodied in this Bill.'¹

Through the years the importance of group areas legislation has been emphasized by all elements involved in the political process. The government and other groupings to the 'right' have argued strongly for its retention; on the other side of the political spectrum opposition groups of different persuasion, such as the PFP and the UDF, have increasingly demanded its abolition.

Strong calls for the abolition of group areas have also been going out during 1985-6 from the South African business community,² foreign governments and special interest groups such

as the Commonwealth Eminent Persons Group.³ Even the Afrikaner Broederbond has recently called for drastic (liberalising) changes to the legislation, including the immediate creation of 'grey' residential areas and the promotion by radio and television of the concept of 'mixed' residential areas.⁴

So where does this leave us? Are group areas about to be abolished? This is obviously a difficult question to answer as at the end of 1986, because the President's Council's long awaited comprehensive review of group areas legislation has yet to be published.

It can be asserted with some confidence, however, that several factors indicate that the *abolition* of group areas does not appear to be on the National Party's political agenda for the near future.⁵ As a matter of political assessment it can be added that political pressure from the 'right' (in the form of the HNP, CP and AWB) will in all probability see to it that this situation is maintained for some time to come.

In recent times the South African government has repeatedly affirmed that 'White group rights, separate White schools and exclusive White residential areas' are at the top of the list of political 'non-negotiables'.⁶ Separate living areas for the various population groups were also affirmed in the government's 1986 *White Paper on Urbanisation*.⁷ The present State President has even gone so far as to prejudice the findings of the pending President's Council's review of group areas, by saying that as long as he remained leader of the country, the principle of group areas would be retained.⁸ At most the government has expressed a

willingness to apply the Group Areas Act 'flexibly' and to this end to create 'grey' localities (ie 'mixed' blocks of flats or street blocks), but not entire 'grey' residential areas, so as to legalise the position of numerous disqualified persons (primarily Coloureds and Indians) living illegally in White areas.⁹

It should also be borne in mind that group areas constitute the basic building blocks of the present government's 'quasi-consociational' or 'pluralist' constitutional model. The new Regional Service Councils, for instance, are premised upon the existence of racially segregated residential areas, while on a more general plane the radical transformation of local government in South Africa, discussed in Chapters 2.6 and 7, seeks to entrench both the letter and spirit of group areas. There is certainly no sign that the government is about to abandon its elaborate plans in this sphere.

Politically then, the indications are that group areas in some or other form will remain with us for the foreseeable future. The pressure for their abolition will no doubt some day become irresistible - whether political developments in South Africa take an evolutionary or revolutionary path. But even this would not mean that group areas could then simply be forgotten. Their legacy will still be with us and the patterns of ownership, occupation and social interaction established by them, will exert a gravitational influence for many years to come - as indicated in Chapters 6 and 8.

1.2 *Treatment of Subject-matter*

The aim of this study is to provide a thematic analysis of group areas legislation in South Africa, rather than a comprehensive survey. The advantages of focussing on particular themes are perceived to lie roughly in four directions:

- (i) By focussing on particular (important) themes and topics, a comprehensible account of this extremely complicated and technical field may be given. As indicated herebelow, there are already in existence at least two comprehensive works dealing with the 'black letter' law of group areas. These are, however, essentially blow-by-blow accounts of detailed legislative provisions. They tend to leave the reader (even the legally qualified one) baffled and without a grasp of the legislation or its societal impact and significance.
- (ii) A thematic approach allows emphasis on those aspects of group areas legislation and practice which are of current, or probable future, importance. The first Group Areas Act was enacted in 1950. The thirty six intervening years have seen not only several legislative changes, but also numerous shifts in emphasis and policy. For instance, in the early years legal issues relating to the administrative machinery involved in proclaiming group areas, and the relocation of disqualified persons, were of great importance and gave rise to leading cases such as *Cassem*¹⁰ and *Lockhat*¹¹. Now that the 'grand scheme' of group areas is all but complete, these issues have been overtaken in importance by others. Here the growing importance of the local government facet of group areas and the permit system may

be mentioned. The former is a vital component of the controversial Regional Services Councils, which in turn constitute an important element in the government's current constitutional plans. The permit system whereby a disqualified person (eg a Coloured) may be granted permission to stay in a group area (eg a White one), has increased in importance by reason of the fact that 'mixed' marriages have been recently legalised, and also by reason of the population pressure exerted by disqualified persons (Coloureds, Indians and Africans) vis-à-vis White residential areas. Amongst these 'non-Whites' there exists a severe housing shortage, while White areas are experiencing a housing surplus. A total of 37 000 houses and flats in White areas are unoccupied, while outside the TBVC states, there is a shortage of 538 000 houses for Africans, 52 000 for Coloureds and 40 000 for Indians, according to figures released by the Housing Research Information Centre during August 1986.¹² The government's recent policy of allowing 'non-White' scholars and students freer access to traditionally predominantly White private schools and universities, has also increased the importance of the permit system and the statutory exemptions relating to the attendance of educational institutions.

(iii) The identification of particular themes facilitates the discussion of the interconnection between group areas and other legislation. It would appear, for instance, that the recent abolition of influx control measures in respect of large numbers of Blacks in urban areas has increased the importance of group areas legislation for this population group.

(iv) The themes to be explored include political, social and economic effects of group areas. Why these are regarded as of particular importance for the present study, will be discussed in the next section.

1.3 Group areas legislation and practice as 'governmental law'

Group areas legislation and practice appear to be regarded, amongst laymen and lawyers, as something of a closed book. Even some public lawyers and those actively engaged in 'public interest law' tend to confess that 'they do not really understand group areas'. Several explanations may be suggested for this state of affairs. As explained more fully herebelow, these appear to be: the complexity of group areas legislation; the predominance of other political issues in the past; present uncertainties relating to the future of group areas; a history of unsuccessful judicial challenges, and the state of the literature on group areas.

The first explanation which may be offered for the opacity of group areas is the complexity of the legislation involved. Moreover, some of its most important provisions are contained (or rather tucked away) in delegated legislation which is hard to find and which may be changed with practically no notice to the public.¹³ But the same could be said of, for instance, the provisions which have governed the movement and residence rights of Blacks in urban areas. Yet this field appears to have been mastered by a significant number of lawyers, and this is borne out by successful challenges to governmental action in cases such as *Komani*,¹⁴ *Rikhoto*,¹⁵ and *Mthiya*¹⁶. Why have there not been

similar developments with regard to group areas? There appear to be three reasons for this.

First, issues such as the legal position of Blacks (particularly in an urban context) and the New Constitution, rather than group areas, have tended to head the legal and political agenda in the late seventies, early eighties.

Secondly, for a considerable period of time there has been a feeling, expressed even in certain government circles, that 'group areas are on their way out'. At the 1985 Cape National Party conference a discussion point on the scrapping of group areas was actually debated, but elicited a firm 'no' from the State President and leader of the National Party, Mr P W Botha.¹⁷ (To date the government has repeatedly confirmed that group areas, particularly in a residential context, are here to stay - as outlined in 1.1 above.) Moreover, a spate of commissions investigating group areas has created further uncertainty and a 'wait and see' attitude. This has directed attention away from the specificities of group areas legislation and practice.

Thirdly, the history of unsuccessful legal challenges to governmental action in a group areas context has served to dampen the enthusiasm of lawyers for this area of law. Particularly the Appellate Division decisions in *Cassem*¹⁸, *Lockhat*¹⁹ and *Adams & Werner*²⁰ have cast long shadows over group areas litigation. In chapter five this aspect will be discussed in depth.

It can finally be argued that the treatment of group areas in the two main current works on the topic, namely D'Oliveira's 'Group Areas and Community Development' in the *Law of South*

Africa series,²¹ and Van Reenen's *Land Its ownership and Occupation in South Africa*,²² have left many of the difficulties relating to group areas legislation and practice unexplored or unresolved.

The aim of the *Law of South Africa series* is to provide a relatively uncritical, 'black letter' account of various areas of the law. This aim (which has its merits and justification) has had a restrictive influence on the treatment of a topic such as group areas. It has, for instance, precluded discussion of government policy with regard to group areas, and of the interrelationship between group areas and other apartheid legislation.²³ It will be argued in the present study that the examination of this interrelationship is vital to an understanding of group areas legislation. The Appellate Division has observed that the phenomenon of group areas 'represents a colossal social experiment'.²⁴ There is certainly truth in this assessment (even if one disagrees with the consequences the Court attached to this characterisation), and group areas should further be seen as an important part of an even wider 'social experiment', namely the policy of apartheid. As such it can only be properly understood in relation to the other main elements of apartheid legislation. Moreover, the political, social and economic implications and effects of legislation which embodies a 'social experiment' appear obviously relevant and important.

While the discussion in LAWSA is restricted by reason of the general aim of the series, Van Reenen has deliberately chosen to limit the scope of his work in terms evidencing a very narrow or

'positivistic'²⁵ view of law. The author who, apart from his legal qualifications, holds an engineering degree and is presently Chief Justice of the Transkei Supreme Court, states in his Introduction:

"The lawyer has no business with the merits of the policy underlying an Act nor with the ultimate social and other consequences of the Law:

'With the policy of this Act we have nothing to do: our duty is to give effect to its provisions.' (Innes CJ in *De Vos v Rex* 1909 TS 214, referring to sec 131 of the Gold Law.)

The lawyer takes the law as he finds it, and applies it as he understands it, no matter what the consequences. If these consequences turn out to be harmful or inequitable or discretionary, it is for the Legislature, forced thereto if needs be by pressure of public opinion, to remedy matters.

When treating, therefore, with (sic) a piece of legislation which cannot but have far-reaching social, economic and other sociological effects, it behoves me, as a lawyer, to confine myself purely to the legal aspects of the subject and to leave it to politicians, humanitarians and sociologists to deal with the other aspects thereof. But I am entitled, and have freely availed myself of that right, to criticize the legal construction and application of the Act!"²⁶

This unduly narrow 'definition' of law and legal scholarship stands to be rejected. A court called upon to apply group areas legislation may in a given context have no choice but to give effect to provisions evidencing what it conceives to be a pernicious policy, but this is hardly an argument for the view that the author of what purports to be a comprehensive legal textbook should ignore the policy and effects of group areas legislation when discussing such legislation. A better view is put forward by Mathews and Albino in their discussion of South Africa's detention laws:

'Of course, there are some who would deny lawyers and legal writers the right to approach these measures at all except for the limited purpose of statutory interpretation. This narrow

view of the function of the lawyer, practising or academic, may have been tenable in Austin's time but hardly in the twentieth century. It is today well understood that law is not a phenomenon which can be studied in isolation; that it is both necessary and desirable to study a law with reference to its purpose, its effect and its moral, social and political implications. A study of this kind is the special, but not exclusive, function of the academic lawyer, who, not being involved in the heat of the conflict, is more likely to see the problem in terms of its essentials and to seek ultimate rather than expedient solutions.'²⁷

Van Reenen's views are attacked herein not simply to justify the 'legal' credentials of the present study. His approach is a prime example of the attitude which has bedevilled the study of what may be termed broadly South African public law or, following Baxter, 'governmental law'.²⁸ Baxter draws a distinction between governmental law and what he terms 'lawyer's law' - the latter typically is comprised of such areas as the core elements of private law, the general principles of constitutional law and the rules relating to the interpretation of statutes. The existence and influence of 'public policy' may be recognized in these spheres, but lawyer's law nearly always confines public policy 'to certain well-established considerations of community morality or international comity'.²⁹ By way of contrast governmental law:

'consists almost exclusively of legislation made, not by professional lawyers, but by legislatures and administrative officials. It is the product of conscious attempts to implement public programmes, which are designed to regulate some form of human activity, provide some service or execute some plan of public action. Ideally, it is designed to advance the collective welfare and is the kind of law that tends to reflect considerations of public policy most clearly. It is also the kind of law that is subject to frequent amendment, even reversal, as the policies towards which it is directed are themselves revised or abandoned.'³⁰

Group areas constitute one of the most important, controversial and topical areas of governmental law in South Africa, and in this study it will be treated as such. This entails that attention will be paid specifically to the (often changing) policy considerations underlying the legislation, as well as its societal effects.

The study, teaching and practice of governmental law bring to light that the legislation constituting the core of a particular area of governmental law usually has some pattern and structure to it, which is directly related to the policy considerations underlying the law - in a group areas context, for instance, the pattern and structure turn essentially upon the control of ownership and occupation of land. Such pattern and structure are, however, often not obvious; the various sections of the legislation in question are usually strung together in a seemingly haphazard fashion. They are drafted to be applied by government officials with close ties to the draftsmen, not to be understood by 'outsiders' such as affected citizens and their legal advisers. Yet careful analysis usually brings to light some inner logic, some 'method in the madness'. Such analysis also tends to reveal, concomitantly and conversely, 'madness in the method' - contradictions and systematic deficiencies in the structure or application of the law. Van Reenen is probably referring to the latter when he reserves to himself the right, in the passage cited above,³¹ 'to criticize the legal construction and application of the Act.'

In a group areas context, an illustration of such systematic contradiction would be the confusing overlap between the control of the 'occupation' and 'use' of land and premises.

A further characteristic of governmental law which is well-illustrated by group areas legislation and practice, is the interaction between governmental law and traditional areas of 'lawyer's law', such as the law of property and contract. This interaction is often of a varied nature. Governmental law usually has to utilize concepts taken from these traditional areas (eg 'occupation', 'ownership', 'immovable property'.) But often it 'adapts' (or even distorts) them to suit its own policy needs - compare, for instance, the extended meaning given to 'occupation' and 'immovable property' in a group areas context, discussed in Chapter 4. Governmental law also often goes even further, and 'invents' its own concepts and terminology. In a group areas context examples would be the attributing of racial characteristics to companies, and the significance attached to the 'use' of premises, while our law of property does not know 'use' as a defined concept.

The aforementioned characteristics of group areas as a species of governmental law serve to complicate its study and analysis. There are also further complications which face the researcher in this area. Governmental law in general, and group areas in particular, are subject to frequent changes. In a group areas context these appear to be occurring with ever increasing speed. Because delegated legislation (which is relatively inaccessible) plays such an important role, it is difficult to

keep track of the actual state of law. It is even more difficult to keep track of vital changes in policy which, if announced at all, are contained in speeches and press releases by politicians. (In the result a system of newspaper cuttings is an important aid to research in this field.) Important documents evidencing policy, such as departmental memoranda setting out the criteria for the granting of permits, are also not available to anyone except the officials concerned.

Despite these complications, the present study aims at presenting a critical evaluation of key areas of group areas and at coming to grips with group areas as a species of governmental law. The analysis will be undertaken primarily from the perspective of constitutional and administrative law, but will also involve areas of the law such as the interpretation of statutes, jurisprudence and the interaction between public and private law. Like few other areas of governmental law, group areas vitally affect the lives of virtually all South Africans. And as Dison & Mohamed observed in the preface to their work on group areas:

'(I)t is certain that the less ignorance there is about these laws the better because the devil one does not know is always a very frightening and menacing creature.'³²

1.4 *Breakdown of Chapters*

In chapter two an overview of the Group Areas Act and the practice relating to group areas, is provided. An attempt will be made to steer a middle course between generality and specificity, so as to give an understandable but informative account of the key elements of current group areas legislation.

Specific attention will also be paid to the cardinal role played by executive discretion in the application of the legislation. The granting of wide discretionary powers to the executive branch of government (such as occurs in the sphere of group areas) has serious implications in constitutional and administrative law, *inter alia* for the reviewability of discretion, the Rule of Law and the separation of powers doctrine.

In chapter three brief reference will be made to historical antecedents to present group areas legislation, as well as to the relationship between group areas and the laws governing Blacks. The interrelationship between group areas and the most important other legislation which complements it, will also be discussed. This complementary legislation also controls, in specific respects, the ownership, occupation or use of land on the basis of race.

In chapter four the central notions of the Group Areas Act, notably the 'holding' and 'acquisition' of 'immovable property' and the 'occupation' and 'use' of land and premises will be examined, to illustrate how these essentially private law concepts have been used (and adapted) to serve the policies underlying group areas. This will highlight the 'governmental law' features of group areas legislation, and illustrate the impact public law can have on private law concepts and institutions, such as the law of property and contract.

In recent years there has been considerable controversy surrounding the role and function of the judiciary in South Africa. Chapter five deals with 'Group areas and the judiciary'.

Here the record of the South African judiciary in the context of group areas will be examined, and related to the jurisprudential debate on 'positivism', and the element of choice involved in judicial decision-making.

Chapter six deals with the impact of group areas legislation and its implementation. The statistics relating to relocations will be discussed, as well as the costs of group areas on material and other levels. The creation of what may be the 'apartheid city' will also be discussed.

Chapter seven examines recent developments in respect of group areas, and the prospects for reform. Two significant recent developments, namely free trade areas and Regional Services Councils, are examined in detail. The findings of the most important recent investigations and commissions of enquiry concerning group areas are analysed. Against this background the significance of group areas for the present constitution is discussed, as well as possible reforms in terms of related constitutional models.

Chapter eight is entitled 'A future without group areas legislation'. Pressure for the total abolition of group areas legislation is constantly mounting. In this chapter the probable effects of the abolition of legally sanctioned group areas will be discussed. In an Excursus entitled 'The abolition of group areas type restrictions - the case of Windhoek, Namibia', the position in this city will be examined. Racially segregated residential areas were abolished there during 1979-1981, and it will be argued that some valuable insights into the probable

effects of the abolition of group areas in South Africa may be gained by examining the experience of Windhoek over the past seven years.

In the concluding chapter (nine), the main findings of the study will be summarized.

CHAPTER ONE

ENDNOTES

- 1 HAD col 7726 31 May 1950.
- 2 Eg ASSOCOM (see *Cape Times* 29 May 1986, p 13), Project Free Enterprise (see *Cape Times* 9 June 1986, p 1) and the Cape Town Chamber of Commerce (see *Cape Times* 7 July 1986, p8).
- 3 The Commonwealth Group of Eminent Persons: *Mission to South Africa* (1986). And see the letter by a member of this group, Mr Malcolm Fraser (a former Australian Prime Minister) in the *Guardian Weekly* 27 July 1986, p6.
- 4 See *Sunday Times* 14 September 1986, p1 and *Argus* 19 September 1986, p9.
- 5 See eg report 'Group Areas Act will not be scrapped' *Cape Times* 5 August 1986, p2.
- 6 See statements by State President and National Party leader, Mr P W Botha, at 1985 Transvaal Congress of National Party (as reported in *Cape Times* 21 September 1984, p8), at 1985 Cape Congress (as reported in *Die Burger* 30 October 1985, p1) and at Federal Congress held in Durban during August 1986 (as reported in *Die Burger* 14 August 1986, p1) and in respect of 1987 election (*Rapport* 4 January 1987, p1); cf also statement by Minister of National Education at same Federal Congress, reported on p9. See also statements by Deputy Minister of Constitutional Development and Planning, reported in *Cape Times* 29 May 1985.
- 7 Par 4.3.5.-4.3.6.

- 8 At the 1986 Federal Congress of the National Party (n6
above) - see *Die Burger* 14 August 1986, p1.
- 9 For statement by Deputy Minister of Constitutional
Development and Planning, see *Die Burger* 16 August 1986, p1.
- 10 *Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad* 1959 3
SA 651 (A).
- 11 *Minister of the Interior v Lockhat* 1961 2 SA 587 (A).
- 12 See *Weekly Mail* 22-28 August 1986, p1.
- 13 See for instance Barry Streek 'Group Areas Act reformed'
Cape Times 16 July 1986, p1.
- 14 *Komani v Bantu Affairs Administration Board* 1980 4 SA 448
(A).
- 15 *Oos-Randse Administrasieraad v Rikhoto* 1983 3 SA 594 (A).
- 16 *BAAB Western Cape v Mthiya* 1985 4 SA 754 (A).
- 17 See *Die Burger* 30 October 1985, p1.
- 18 See n10 above.
- 19 See n11 above.
- 20 *S v Adams, S v Werner* 1981 1 SA 187 (A).
- 21 d'Oliveira JA van S 'Group Areas and Community Development'
10 *LAWSA* para 478-600 (1980 - with annual cumulative
supplement).
- 22 Van Reenen TH *Land Its ownership and occupation in South
Africa* (1962 - most recent update 1981).
- 23 With the exception of the 'sister act' of the Group Areas
Act 1966, namely the Community Development Act 1966.
- 24 *Minister of the Interior v Lockhat* 1961 2 SA 587 (A) 602D,
per Holmes JA.

- 25 On the uses and abuses of the terms 'positivism' and
'positivistic' in this context, see chapter 5 below.
- 26 Van Reenen A5-6 (n10 in quoted extract omitted).
- 27 Mathews AS and Albino RC 'The permanence of the temporary -
an examination of 90 - and 180-day detention laws' (1966) 83
SALJ 16, at 16.
- 28 Baxter LG 'Legal Education and Public Policy' (1985) 1 Natal
University Law and Society Review 15.
- 29 Op cit 19.
- 30 Ibid.
- 31 At n26.
- 32 Group Areas and their development (1960).

CHAPTER TWO

OVERVIEW OF GROUP AREAS LEGISLATION AND PRACTICE

2.1. *Purpose and Objects*

The current Group Areas Act 36 of 1966 (referred to herein as 'the Act' or 'the current Act') follows the scheme and pattern of the first Group areas Act 41 of 1950 (referred to herein as 'the original Act'). The original Act first sought to introduce group areas on an all-embracing, country-wide scale.¹ As pointed out in the previous chapter, this Act was described by the then Prime Minister as embodying 'the essence of the apartheid policy'.²

Some idea of the more specific purposes or objects of the legislation can be gleaned from the long title of the original Act, which stated that the statute had been enacted:

"To provide for the establishment of group areas, for the control of the acquisition of immovable property and the occupation of land and premises, and matters incidental thereto".

(The long title of the current Act is essentially the same).

The long title highlights the process by which group areas are to be established, as well as the two main areas of control: the acquisition of immovable property, and the occupation of land and premises.

Separate sets of controls have been enacted in respect of the control of, respectively, ownership and occupation, although there is an obvious link between the ownership and occupation of property. The ability of an owner to enjoy or dispose of

occupation of his property (eg by means of a lease) is a normal and important incidence of *dominium* at common law.³ Limitations upon the common law rights and freedoms in respect of the occupation of property therefore necessarily affect the substance of ownership. Moreover, in the group areas legislation the two sets of controls are in certain respects interlinked. For instance in the so-called controlled areas, immovable property takes on the racial character of the owner, and anyone belonging to a different racial group is not only prohibited from acquiring it in ownership but also from occupying it.

Commentators such as Rousseau⁴ and D'Oliveira⁵ have made the point that of the two sets of controls, the control of occupation has been the more immediate and, from a social and political point of view, more important. Rousseau (one time law adviser to the Group Areas Board) stated in this context:

'The clashes and difficulties between persons of different races which other countries have experienced have had their origins almost entirely in undesired occupation. If your neighbour by reason of his race has a way of living different from yours, so that his proximity offends you, you are not likely to worry about the racial group of his landlord. Restrictions on ownership are largely the aftermath of the legislation referred to in chapter 1, and sprout from the efforts to stop Indians from acquiring land in which their ownership of land was forbidden...'⁶

In similar vein, the director of physical planning of the Department of Constitutional Development and Planning (which is presently responsible for group areas) observed during 1986 that the control of occupation was more important than the control of the acquisition or holding of immovable property. This was so, he stated, because such a high premium was placed on the racial

character of occupation which was necessary for orderly community development and separate communities.⁷

Analysis of group areas legislation and practice bears out the general assertion that the control of occupation has been of primary importance compared with the control of ownership.

We shall first deal with factors substantiating this assertion, and then seek to identify the main reasons for the prime importance attached to the control of occupation.

As first indication of the importance of occupation, the considerable number of provisions in the Act and delegated legislation dealing with occupation (and the related concept of 'use') may be mentioned. It should be recognized, of course, that in this context numerical weight can also be attributed to factors other than social and political importance. Occupation is for instance more complex to control than ownership. The occupation of land and premises can take very many forms. In the nature of things it would require more detailed and a greater number of provisions than the control of ownership. Moreover, even the planners of the apartheid society recognised 'that there would be widespread disruption if the general restrictions on occupation in the various types of areas were not subject to a large number of exceptions and exemptions'.⁸

Here recourse was made not only to the permit system, but also to numerous exceptions and exemptions contained in the Act and delegated legislation made thereunder.

An argument can, however, be made out that the plethora of provisions dealing with occupation is not explicable solely on

the basis of the 'inherent' complexity of occupation control, but also on the basis of the perceived need to have elaborate and variable controls over something regarded as especially important to group areas. As an example the controls in so-called 'specified areas' under the Act may be cited. These include elaborate controls as to who may occupy new or altered buildings, in order to control any increase in the number of persons occupying any premises even where the racial character of the land and premises has been fixed.⁹

That greater stress has been laid on the control of occupation than ownership is further borne out by the different rules relating to on the one hand continued ownership and on the other hand continued occupation by disqualified persons in respect of a group area newly proclaimed for ownership and occupation. Such an area constitutes the last state, the pinnacle of racial segregation envisaged by the legislation. In such an area a disqualified (natural) person may retain ownership of property for life, while a disqualified company or administrator of an estate in which any disqualified person has a testamentary interest, may do so for a period of ten years.¹⁰ Yet as far as *occupation* is concerned, any disqualified person can be barred from the area a year after the proclamation of the area.¹¹

The actual implementation of group areas since 1950 has also focussed on the control of occupation. In 1956 Horrell recorded that by that time few full group areas had been proclaimed, and that while all of these had been proclaimed for occupation, not

all had been proclaimed for ownership.¹² Already in 1951 the controls over occupation provided for in specified areas were invoked by means of proclamations which declared the whole of the provinces of Transvaal, Cape and Natal specified areas.¹³

A socio-economic factor which increased the importance of the control of occupation, was the circumstance that very often a 'target group' (potential disqualified persons vis-à-vis a group area), such as the Coloureds who lived in District Six before its becoming a White group area, did not own the premises in which they were living. It is estimated for instance that District Six had a 94-per-cent Coloured population of over 30 000 when it was declared 'White' in 1966. Yet Whites owned 56 per cent of the properties there.¹⁴ This appears to have been a familiar pattern in respect of the Coloured and Indian groups which contributed the overwhelming majority¹⁵ of disqualified persons occupying land or premises in group areas. They have tended to be lessees rather than owners of residential or business premises. This has made them particularly vulnerable to controls over occupation, and the White controlled group areas apparatus, with its emphasis on the control of occupation, could thus be used effectively against them.

In dealing with the objects of group areas legislation and the importance of the control of occupation, a further aspect of this control deserves attention. When the background¹⁶ to and provisions of the original Act, and specifically those relating to occupation, are analysed, it appears that the Act was intended to control occupation in the sense of the relatively permanent or

stable control over land and premises. The term 'occupation' was not defined in the Act. Writing in 1960, Dison & Mohamed stressed that occupation in a group areas context must mean habitual physical presence or physical presence for a substantial period of time.¹⁷ According to the authors 'occupation' would thus, for instance, not apply to patrons of a cinema, customers of a bank or other business, or customers of a Turkish bath establishment.¹⁸

In the fifties and sixties the rise of rigid Verwoerdian apartheid led to efforts on the part of the government to entrench social apartheid - that is segregation in respect of sport, sport clubs, theatres, cinemas, restaurants and similar places of social intercourse. To achieve this end, use was made of the Group Areas Act. The meaning of 'occupation' in the legislation was greatly extended to include *inter alia* mere physical presence for a substantial period of time. This was done by enacting section 1(4) of the Group Areas Act 1957, which allowed the then Governor-General to extend the meaning of 'occupation' by means of proclamation, and a series of successive proclamations has been issued. So through section 1(4) (which still forms part of the current Act) and proclamations thereunder, an entirely new purpose or object was added to group areas legislation - the imposition of social apartheid. Thereby the importance of the control of occupation (in its extended sense) was also increased. With regard to this development the following remarks of the HSRC's working committee on legislation affecting sport, are apposite:

'Daarmee is die aanwendingsterrein van die Groepsgebiedewet - in wese die afbakening van groepsgebiede vir die doeleindes van eienaarskap en (betreklik permanente) okkupasie - byna oewerloos uitgebrei na situasies waarvoor dit nooit verorden is nie.' ²⁰

This brings us to the question: Why was the control of occupation regarded as more important than that of ownership? First, the strict segregation envisaged by the apartheid planners could only be achieved through stringent controls over the occupation of land and premises. Control of ownership would be both less necessary and less effective to achieve this predominant goal of group areas legislation. Occupation has an immediacy to it, connotes actual physical presence of human beings. By way of contrast, ownership (denuded of the concomitant right of occupation) presents itself as an abstract legal relationship.

The second reason flows from the first. The ownership per se of land and premises does not shape the life of an individual or a group to the same extent that occupation does. Patterns of occupation determine where a person has his home, where he spends his life. The location of his home in turn largely determines which community facilities he would use, where he would receive hospital treatment and where his children would go to school. We shall see that in the current debate on the possible abolition of residential group areas, the retention of the racial exclusivity of health and community facilities and schooling by means of group areas features very strongly in the arguments of those wishing to retain residential group areas. ²¹

* * *

Finally, a further object of the legislation not mentioned in the long title of the Act, is the local government component of group areas. The original Act contained only rather vague provisions for the institution of 'governing bodies' in ('non-White') group areas,²² but since the early sixties this facet of group areas has grown considerably in importance. It has now assumed major constitutional significance with the proposed introduction of the controversial Regional Services Councils. This issue is further discussed in 2.1.6 herebelow, and in Chapter 7.3.

2.2 *Racial groups and criteria for classification*

2.2.1 *Introduction*

Where legislation seeks to control the ownership, occupation and use of land comprehensively on the basis of 'racial' group identity, the groups to be used and the criteria for differentiating between them, are obviously of prime importance.

Delimiting 'racial' groups by means of legislation is certainly not limited to the Group Areas Act. Race classification, in some form or another, has been part and parcel of the long history of segregation in South Africa.²³ This process of race classification has invariably involved the discipline and practice of law in an exercise which is unscientific,²⁴ arbitrary and artificial. In his recent account of life in South Africa, Joseph Lelyveld reports on a criminal prosecution under the Group Areas Act where the defence led expert evidence to attack the notion that a facial feature such as high cheekbones could be used as a 'diagnostic criterion' for

excluding someone from the White group. The magistrate, however, convicted the accused for unlawfully occupying premises in a White area and in finding against her relied *inter alia* on her having a flat nose and and high cheekbones.²⁵ In several reported group areas prosecutions the defence led expert scientific (anthropological) evidence to the effect that the sub-groups established in a group areas context by means of delegated legislation (like the Indian group), were without scientific foundation.²⁶ On the basis of such evidence it was then argued that the proclamations in issue were void for vagueness. In *S v Bhoolia*²⁷ the Appellate Division accepted that the definitions in question could not be justified anthropologically²⁸ or on general scientific grounds,²⁹ but nevertheless held that they were not void for vagueness because their meaning was reasonably clear according to colloquial language ('omgangstaal') and would be understood by the ordinary citizen.³⁰

To compartmentalise human beings on the basis of race in South Africa is an artificial and arbitrary exercise. As it was put by Fagan J (a later Chief Justice), this amounts to an 'attempt to draw a dividing line when the Creator himself has blurred it'.³¹ The unscientific and impressionistic nature of race classification legislation is also borne out by the use made of supposed racial archetypes. The Group Areas Act is a case in point. Section 12 of the Act provides that the White group shall include any person who is in appearance 'obviously White'. This really begs the question and is premised upon a racist 'we all really know what a White person looks like' approach.

A further general complication of race classification in South African law is the 'chameleon-like quality',³² which race exhibits in our law. There exists no single set of criteria for race classification, be it in a statutory or non-statutory context.³³ It is quite possible that in different contexts an individual may be classified as belonging to different racial groups. And it is even possible that in a given context an individual's classification may change from time to time.

In the present discussion we shall, for the moment, focus on classification in a statutory context, which is the more important.

At the time of the enactment of the Population Registration Act 30 of 1950, it was the declared intention of the National Party government that the system of race classification envisaged by this Act should become the basis for all subsequent statutory references to race or ethnic groups.³⁴ This has, however, not been done, despite the many important³⁵ consequences flowing from classifying someone as a member of a specific racial class or group in South African law - a classification may turn the individual's life upside down or split his family into different racial groups. The Population Registration Act is, however, the most important race classification measure, certainly on the basis of the number of references to its classification system contained in other legislation.

In recent years the 'chameleon-like quality' of racial classification in a statutory context has been reduced in one respect by the repeal, during 1985, of the Prohibition of Mixed

Marriages Act 1949 and section 16 of the Immorality Act 1957 (which prohibited *inter alia* illicit sexual intercourse between 'White' and 'Coloured' persons). The repealed measures had contained their own classification provisions, which were not the same as those of the Population Registration Act.³⁶ But the repeal of these measures has, in a different respect, increased the chameleon-like quality of race classification through its lifting of legal restrictions upon 'mixed' marriages or cohabitation. As explained herebelow, such (mixed) marriages or cohabitation trigger the 'rule of attraction' in a group areas context - the woman inevitably 'attracts' the race classification of her male partner for the duration of the marriage or cohabitation, except if he happens to be White; then he attracts her 'non-White' classification.

As far as race classification in general is concerned, the present position is that there are three major legislative measures, namely the Population Registration Act, the Group Areas Act and the legislation which subdivides the Black group into distinct 'tribal' groups or 'national units'.³⁷ The main purpose of the latter, which will not be further considered herein, has been to 'territorialise' all Blacks in some or other homeland (ie now 'independent state' or 'national state').

The various groups under the Group Areas Act, and the criteria for classification in terms of this Act will now be discussed, followed by a brief comparison of race classification under the Group Areas and Population Registration Acts.

2.2.2 The Groups

The Act distinguishes between three groups, namely:

- (i) White,
- (ii) Black (formerly native) and
- (iii) Coloured.³⁸

Provision was further made for subdividing the latter two groups by proclamation, either generally or in respect of certain areas only.³⁹ Such subdivision of the Coloured group was effected by means of Proclamation 28 of 1961.⁴⁰ The most important effect of this Proclamation was to define (create) the Indian and Chinese groups in respect of the Cape Province, Natal and Transvaal, thereby bringing about a division of the general Coloured group into an Indian, Chinese and 'residual' Coloured group. (The latter is referred to herein as 'the Coloured group'.) A special subgroup of the Indian group, the so-called Zanzibari Arabs, has been defined for the districts of Durban and Pinetown. Likewise the Malays are presently declared to be a separate group only for the purposes of the Malay Quarter or Schotsche Kloof (Malay) group area, which lies against the lower slopes of Signal Hill in Cape Town.⁴¹

The position of the Chinese

This group has been granted what may be termed 'honorary White' status for group areas purposes and it appears convenient to consider their position at this stage. Since 1984 Section 49D of the Act provides that Chinese are not prohibited from the 'holding, acquisition or occupation' of any 'land or premises' which may only be 'held or occupied' by a member of the White

group in terms of the Act. (As pointed out below, the specific terminology used to effect this 'honorary White' status gives rise to a number of problems.) In keeping with the allocation of 'honorary White' status, Chinese men are now subject to the same rule as White men: in terms of section 49D they lose their White classification for group areas purposes if they marry or cohabit with any woman who is not White or Chinese. Chinese women are, of course, also subject to the rule of attraction - for group areas purposes they follow the classification of their 'non-White' spouses or cohabitants.

Closer consideration of section 49D does not inspire confidence in the abilities of its draftsman. First, it is not clear why the section has departed from the scheme of the Act which refers on the one hand to the *holding and acquisition of immovable property*, and on the other hand to the *occupation of land and premises*. In the last part of section 49D it is stated that Chinese shall not be prohibited from the holding or acquisition of *land and premises*. One would have expected *holding and acquisition* to be coupled to immovable property which is the combination used throughout the Act. The latter concept of *immovable property* is defined in such a way in section 1 of the Act that it bears a very specific (group areas) meaning,⁴² and can certainly not in any way be equated with 'land' (which is not defined in the Act, except that it is provided that it 'includes any portion of land'). The picture is further complicated by the omission of 'acquired' in the reference to the actions to be performed by Whites which Chinese may now also do -

ie section 49D now allows them to hold, acquire or occupy any land or premises which may only be 'held or occupied' by Whites - surely elementary symmetry requires that the last clause should have read: which may be 'held, acquired or occupied' by Whites. It is submitted that a court interpreting the section would be justified in reading in 'acquired' in the present context. There is ample authority to the effect that 'terms can be introduced into a statute to give effect to its clear intention by remedying mere defects of language'.⁴³

The more serious problem of the coupling of 'acquiring' and 'holding' to 'land and premises', rather than to 'immovable property', remains, however. If the section is interpreted according to its literal meaning, strange results would follow. It would mean, for instance, that a Chinese could still not hold a real right in respect of land in a White area: such right would fall under the definition of 'immovable property', but can hardly be said to be included in the term 'land'. And in terms of section 49D a Chinese may only hold 'land', not 'immovable property'. Yet the Chinese would be able to hold the land itself in ownership, and may also occupy it (!). It is suggested that this situation calls for what Steyn has termed 'woordwysigende uitleg'.⁴⁴ The overriding intention behind section 49D appears to be clear, namely to equate the position of Chinese with that of Whites as far as the ownership and occupation are concerned. On this basis the section should be read as placing the acquisition or holding of *immovable property* by Chinese on the same footing as Whites. A reference to 'immovable property' should thus be

read into the section. The root of the problem again appears to be incorrect terminology, rather than a genuine *casus omissus*, which the court cannot 'fill in',⁴⁵

A further and seemingly more difficult problem exists with regard to section 49D. It contains no exemption relating (or, for that matter, reference) to the use of land or premises. Yet section 35 of the Act contains a general prohibition against 'use' of land and premises by disqualified persons 'for any purpose other than the letting thereof'. The exact ambit and scope of this prohibition is unclear as pointed out in the discussion herebelow in Chapter 3. As mentioned therein, the court in *Southern Durban Civic Federation v Durban Corporation*⁴⁶ rejected the argument that 'use' should be equated to occupation. It was accordingly held that a three hour conference to be held in the Durban Town Hall would have constituted 'use' of the property, even though it might not have constituted 'occupation'.⁴⁷ It is respectfully submitted that it is doubtful whether this decision is correct, but it can be argued that it, in any event, does not preclude holding that, for the purposes of section 49D, 'occupation' should be interpreted as including 'use', and that Chinese are consequently also exempted vis-à-vis White areas from the 'use' prohibition contained in section 35. The argument may be put as follows: 'Occupation' is a 'stronger' concept than use, implying habitual presence or presence for a substantial period of time, coupled to an element of control over the property concerned.⁴⁸ If occupation is exempted, then it should follow that the 'weaker' form of physical presence, namely

use should also be exempted. It hardly makes sense to say that a Chinese may occupy a flat in a White area above a shop (in terms of section 49D) but that he, or a Chinese company, may not trade in the shop because such activity would amount to 'use' of the shop premises in terms of section 35. To put the argument another way: where there are separate prohibitions against 'occupation' and 'use', 'use' may cover a situation not covered by 'occupation' eg a meeting of short duration. In this context it serves to extend the scope of the Act. But when a general exemption is now granted with respect to 'occupation', it hardly makes sense to suggest that casual presence upon land or premises is still prohibited, because 'use' has not been exempted *eo nomine*.

Japanese

South Africa has a very small Japanese population - during September 1965 there were only 60 to 100 Japanese in South Africa. Most of them stay here temporarily for purposes of trade.^{48a} Since 1961 they have been treated as 'honorary Whites' for group areas purposes in terms of a government decision to this effect,^{48b} although they would probably be legally classifiable as Coloured for group areas purposes, and are classified as 'other Asiatics' for population registration purposes.

Black Group

Finally, a word about the Black group. This group has not been subdivided for group areas purposes. The main reason for this appears to be that the ownership, occupation and use of

immovable property by Blacks have been largely controlled under a different statutory regime, that is the plethora of laws and regulations governing Blacks. There are, for instance, no Black group areas. The general position of Blacks is discussed under 2.2 herebelow. Here it should only be mentioned that in the context of the laws governing Blacks, subdivision of the Black group has taken place, for the purpose of 'territorialising' all South African Blacks in some or other homeland.^{48c} Where residential areas have been set aside for Blacks under the Blacks (Urban Areas) Consolidation Act 25 of 1945 or the Black Communities Development Act 4 of 1984, this has been done in respect of Blacks in general, rather than on an ethnic 'tribal' or subgroup basis. There appear to be cases, however, where the vast administrative powers which the legislation governing Blacks has granted officials in respect of the residential position of urban Blacks,⁴⁹ have been used to subdivide Black residential areas and to allocate specific areas to specific 'tribes' or ethnic units - eg on mine compounds. (It is of interest to note that in Namibia, Windhoek's Black residential area, Katutura, had been divided into ethnic sections (Herero, Ovambo etc) in terms of the Natives (Urban Areas) Proclamation of 1951, which was the equivalent of the South African Blacks (Urban Areas) Consolidation Act 25 of 1945.)⁵⁰ The predominant function of the Group Areas Act vis-à-vis Blacks has been to keep them out of the group areas of all other groups - and particularly out of the White group areas. The fulfilling of this purpose has not required the subdivision of the Black group into further 'tribal'

or ethnic units. It appears highly unlikely that any subdivision of the Black group will in the future be effected under the Group Areas Act.

2.2.3 *Criteria for race classification under Group Areas Act*

An overview of the numerous provisions in South African law which have, through the years, dealt with race classification, shows that four sets of criteria have come into play in this field, viz

- (i) appearance;
- (ii) habits and mode of life;
- (iii) general acceptance within a group;
- (iv) descent - either in terms of the test of 'full blood', or of 'preponderance of blood'.⁵¹

Depending on the legislation in issue, one or more of these sets of criteria have been utilised to effect race classification. If we now turn to classification under the Group Areas Act, we find the following general position:

'From a conspectus of the definitions of the three main groups it appears that membership of a group does not - except in the case of aboriginal Blacks - depend on blood or descent, but rather on habits and mode of life, or acceptance.'⁵²

A further feature of group areas classification which should be mentioned at the outset, is the fact that the general Coloured group has been negatively defined: it includes any person who is not a member of the White or Black groups.⁵³ This directs our enquiries firstly in the direction of the White and Black groups. Thereafter the Coloured group will be discussed, followed by a brief exposition of the classification criteria of 'appearance'

and 'general acceptance'. Thereupon the so-called 'rule of attraction' will be discussed.

(i) *White group*

In terms of section 12(1)(a) this group includes any person who is in appearance obviously a White person or who is generally accepted as such - but specifically excluded is anyone who, 'although in appearance obviously a White person', is generally accepted as a Coloured person. Likewise excluded from the White group, is a White person who is hit by the so-called 'rule of attraction' by reason of his or her marriage to or cohabitation with a 'non-White'.

So, basically, entry into the White group can be gained along two avenues - appearance or general acceptance. In practice the issue of membership of the White group most commonly arises in criminal prosecutions. Hence the process of establishing membership of the White group can be fruitfully discussed in the context of such a criminal case where the State alleges the accused to be Coloured,⁵⁴ and the latter claims to be White. The process of classification is complicated by the existence of at least three provisions which, if not conflicting, are at least disharmonious. These are:

- (a) the provision in section 12(1) that a person accepted as a member of the Coloured group cannot be a member of the White group even if 'in appearance obviously a White person';
- (b) the presumption in section 45(1) that a person in appearance obviously a White person is presumed to be a member of the White group;

(c) the presumption in section 45(4)(c) that an allegation in any indictment or charge that a person belongs to a certain group (eg Coloured) is presumed to be correct.

It is suggested these provisions may be reconciled in the following way. The first question to be answered is: is the accused 'obviously White'? There is much to be said for the view of Hiemstra J expressed in *R v Nicholas*⁵⁵ that it is for the presiding judicial officer to decide this issue on the basis of his own observations. However, in the *Vilbro*⁵⁶ case the Appellate Division ruled that the testimony of witnesses (including non-expert witnesses) could be adduced on this issue. The position is thus now that evidence may be led on 'obviousness' and this often occurs in practice. In such a case the presiding officer should consider and weigh up the evidence and should also make (and record) his own observations. Where conflicting evidence has been led, a finding one way or the other is called for on such evidence, and this raises the issue of *onus*. It would appear that in such a case the onus is upon the accused to prove 'obviousness' on a balance of probabilities. As pointed out in the *Wynngaard* case, this is so by reason of the presumption aiding the prosecution referred to in (c) above.⁵⁷ It is true that in the *Vilbro* case the Appellate Division had held

'that the onus lay in the first instance upon the Crown to establish that the appellants are not obviously White persons in appearance, and that if the Crown succeeded on this point, the appellants had to prove that they are nevertheless members of the White group.'⁵⁸

But this case had been decided under the original Act, which contained provisions similar to those referred to in (a) and (b)

above, but not the presumption aiding the prosecution referred to in (c) above. The latter was placed in the statute book by the 1957 Group Areas Act. It was thus in issue in the *Wyngaard* case but not in *Vilbro* or the earlier cases⁵⁹ upon which reliance was placed in *Vilbro*.

Once 'obvious Whiteness' has been established, the accused can rely on the presumption in (b) above, which then defeats the presumption in (c). This is, however, not the end of the matter. The prosecution can still defeat the presumption in (b) (ie 'obviously White' equals member of the White group) by proving, beyond reasonable doubt, that the accused was not a member of the White group. As pointed out in *S v Wyngaard*, this can be done by proving that the accused was generally accepted as a Coloured person.⁶⁰ Should the accused have failed to establish that he or she was 'obviously White', then membership of the White group can still be established by proving, upon a balance of probabilities, general acceptance as a member of the White group. There are conflicting decisions as to whether such acceptance should be established with reference to the date specified in the charge,⁶¹ or to the (later) date when the summons was served.⁶² Often the position will be the same, no matter what date is taken, but in terms of general principles the former would appear to be correct.⁶³ However, it could be argued, favouring the liberty of the accused, that the latter date should be taken if it operates in favour of the accused.⁶⁴

(ii) *Black group*

This group includes, in the first place, any person who is 'in fact' a member of an 'aboriginal race or tribe of Africa'. In *R v Radebe* the Appellate Division was willing to countenance the possibility that a person could be a 'native' in terms of a similarly worded statutory definition on a 'preponderance of blood' test.⁶⁵ Later cases decided in a population registration context have, however, decided that because of the possibility of being classified Black by reason of 'general acceptance', membership 'in fact' should be taken to refer to 'full-blooded' descent from parents who are themselves members of the race or tribe in question.^{65a} The same reasoning would apply in a group areas context where general acceptance is also in issue.

In the context of the Blacks (Urban Areas) Consolidation Act 25 of 1945 it has been held that a Griqua was not a Black (or 'Native', as the legislation read at the time).⁶⁶ Presumably only the African 'tribes'⁶⁷ and Bushmen thus fall under the Black group for group areas purposes by reason of descent.

In the second place, membership of the Black group can be based on general acceptance as a member of an aboriginal race or tribe of Africa. This could, for instance, apply to persons who are regarded as Blacks, but do not satisfy the 'full blood' test.

Van Reenen suggests⁶⁸ that once it is established that a person is 'in fact' (ie by 'full-blooded' descent) a member of the Black group, it precludes that person from being classified as anything else on the basis of general acceptance as a member of a different group. There is clear authority, including two

Appellate Division cases, to this effect in the context of the Population Registration Act 1950,⁶⁹ and the same reasoning would probably apply in the present context.

The 'rule of attraction' can, of course, also bestow membership of the Black group upon an individual - see below under (iv).

(iii) *The Coloured group*

Reference has been made to the fact that the general Coloured group is defined negatively, as including any person not a member of the White or Black group. Section 45(3) of the Act creates a presumption in respect of membership of the Coloured group, but this is of little or no practical consequence, because it only arises once it is proved that the person in question is not in appearance obviously a White person, and is not in fact or by general acceptance a member of an aboriginal race or tribe of Africa.⁷⁰ Of course, in criminal prosecutions and certain other contexts an allegation that a person is a member of the Coloured group saddles him or her with an onus to disprove this, as explained under (i) above.

It will be recalled that a division of the general Coloured group into Indian, Chinese and Malay and a 'residual' Coloured group has been effected by proclamation.⁷¹ In determining membership of these groups, the current Proclamation 28 of 1961 is similar to the provisions determining membership of the Black group, discussed under (ii) immediately above. In both instances membership is based on 'fact' (descent) or general acceptance. Indians and Chinese are said to belong to 'a race or tribe' whose

national home is respectively in India or Pakistan, or China, while in the case of the Malays, the reference is to the 'race or class' known as Cape Malays. In the context of the legislation relating to population registration, which contains similar provisions, it has been held, with reference to the 'race or class' label, that the Malay group is not an 'ethnic' group.⁷² This entails, so it was held, that membership 'in fact' of this group need not be based on full-blooded descent; it can also be based on mixed descent coupled to other factors - eg association, cultural affiliations, and religion.⁷³ And, of course, it can also alternatively be based on 'general acceptance'. This would appear to apply also to classification in terms of the group areas classification proclamation.

Conversely, it has been held in a population registration context that the Indian and Chinese groups are 'ethnic' groups. In their case, as in the case of Blacks,⁷⁴ membership 'in fact' requires full-blooded descent. Furthermore, once such membership 'in fact' has been established, it precludes the possibility that the person in question could be a member of another group by general acceptance.⁷⁵ This may conceivably be applicable in the group areas context, but the Cape Provincial Division decision in *S v Ahmed*⁷⁶ is to the contrary. There it was held that the groups created by proclamation⁷⁷ for group areas purposes were not defined in a mutually exclusive manner. (This contrasts with the position in a population registration context where the courts have held that the groups are meant to be mutually

exclusive.) It was specifically said that an Indian 'by descent' could also be classified as a Malay by general acceptance:

"(T)he Proclamation defined the membership of the Indian and Malay groups in such a manner as to give a person, for example, the choice of living (i) with the people of his own race - ie in an Indian group area, or (ii) with people who have accepted him as belonging to their group (linguistic or cultural), eg in a Malay group area where he had been accepted as a Malay; or (iii) with the people of his own race and with the people who have accepted him as belonging to their group, eg both in an Indian and a Malay group area."⁷⁸

It was consequently held in the *Ahmed* case that the overlapping of the definitions in the proclamation did not render it void for vagueness.⁷⁹ This is to be contrasted with the finding in the *Arnold*⁸⁰ case, where it was held that such overlapping rendered the similar proclamation *dividing the coloured group for population registration purposes*, void for vagueness. In the *Ahmed* case the court reasoned that whereas overlapping created intractable uncertainty in the sphere of population registration, the same was not the case in a group areas context.

(iv) Appearance

As explained under (i) above, appearance plays an important role vis-à-vis membership of the White group.

There is little actual discussion in the reported decisions of what the 'archetypal' White, Coloured or Indian person is supposed to look like. The reason may be that the judges of the Supreme Court have been somewhat wary to engage in the pseudo-science of racial phrenology. On the other hand, the judges have generally not expressed any particular discomfort in having to decide issues such as whether a person was 'obviously White'. In

matters on appeal the judges have been willing to add their own general observations on appearance to that of the court *a quo*,⁸¹ where the person whose race was in issue, was present in court. In the *Vilbro* case the Appellate Division even asked counsel for the appellants 'whether his clients wished to present themselves for observation to this Court'.⁸² The lack of judicial explication on the issue of appearance can probably be best attributed to a desire to keep the issue vague, to leave it at the level of what may be termed the 'racial common sense of the average South African'. This is borne out by the ruling of the Appellate Division in the *Vilbro* case that evidence of members of the public on the issue of (racial) appearance was admissible. The argument that it amounted to inadmissible (non-expert) opinion evidence, was rejected. The court said that while nothing could be gained by calling witnesses at random to express an opinion on the matter, 'there may be people who have had a reason to apply their minds specially to the question of distinguishing the races'.⁸³ As an example of such a quasi-expert on racial appearance a Chief Inspector of Indian and Coloured Education who had vetted the admission of pupils on racial grounds, was mentioned.⁸⁴

As to the actual basis for determining racial appearance for group areas purposes, the *Vilbro* case refers to 'distinctive racial features' and skin colour. The latter is stressed: 'colour is, after all, the main criterion for distinction between the White and Coloured Group'.⁸⁵ The issue of race classification for group areas purposes arises most frequently in

criminal prosecutions in the Magistrates' Court. Here judgments are often handed down explicating the racial features which have excluded the accused from the White group: dark or sallow skin colour, flat nose, high cheekbones and crinkly hair.⁸⁶

(v) *General acceptance*

Here the factors to be taken into consideration have been explicated in fair detail in reported cases. Some of the factors mentioned in the cases dating from the fifties would carry little weight today - particularly when the position in racially more 'relaxed' parts of South Africa such as Cape Town is considered. For instance, if membership of the White group is in issue, 'being served in White hairdressing salons' or 'working with (and even over) Whites' in Cape Town would not carry much weight today. The main factors of current relevance may be summarised as follows:

- (a) Freely using public facilities which are actually restricted to a particular group (eg Whites);
- (b) Acceptance in a particular neighbourhood as being of a particular group;
- (c) School attendance of the person in question and his or her children;
- (d) Description in official documentation such as birth and marriage certificates. It would appear that race classification for population registration purposes could be relevant for group areas purposes where such registration is not simply (as is now usually the case) based on the classification of the person's parents.⁸⁸ Where such an independent assessment is made, membership of the White group is, for instance, for population registration purposes dependent on *inter alia* general acceptance as a White person and the absence of general acceptance as a Coloured person.⁸⁹

(vi) *Mixed couples and the 'rule of attraction'*

The so-called 'rule of attraction'⁹⁰ may be fairly concisely stated in the following terms: where a man and woman belonging to different racial groups marry or cohabit, the one inevitably attracts the (group areas) classification of the other. The woman attracts the classification of the man, except in the case of

- (a) a White man, who attracts the classification of his 'non-White' spouse or cohabitant;
- (b) a Chinese man, who attracts the classification of his 'non-White' spouse or cohabitant (unless, of course, if she also happens to be Chinese).

The rule has two purposes. First, to ensure that a single classification applies to mixed couples. Second, to preserve the white group as a 'protected' or 'pure' group - this is also the case in other race classification legislation.⁹¹

The implications of the rule of attraction are, of course, far-reaching. The example of a White man who lives in his own house in a White suburb and who then marries a Coloured woman, may be taken. He immediately becomes a 'disqualified person' vis-à-vis all White group areas. Unless a permit is obtained, the following restrictions apply. He (and, of course, his wife) cannot live in his house. He can retain ownership of the dwelling but cannot effectively bequeath it to anyone who is also classified 'non-White'. He cannot buy property in any White area and strictly speaking, cannot use facilities which are classified 'White' in terms of group areas legislation - eg restaurants in

White areas outside 'free trade areas'. Any company in which he holds a controlling interest likewise becomes a disqualified person vis-à-vis White areas.

Some of the restrictions will, of course, be difficult to enforce, because the man's change of group is not self-evident. In the case of mere cohabitation, the change of group of the spouse affected by the rule of attraction is likely to remain largely theoretical - unless, of course, neighbours or residents in the area lodge a complaint with the Police against the 'mixed' couple's presence.⁹²

It should be pointed out that the rule of attraction tends to assist the prosecution when a married person-cohabitant or a couple is charged for (say) unlawful occupation. If one of the spouses/cohabitants turns out to be a disqualified person, this would secure the conviction of both.⁹³ It was pointed out in *R v Nicholas* (with respect, rightly) that the prosecution cannot simply at the end of the case seek to rely on the alleged classification of the spouse of the accused where the former had not herself been charged: 'The Crown did not base its case on the group of the accused's wife, and it cannot be said to have been brought properly in issue.'⁹⁴

While on the topic of 'mixed' couples, something should be said about the position of children born of such a union. Unlike the Population Registration Act 1950, the Group Areas Act and delegated legislation made thereunder, do not provide for the transmissability of parents' classification to their children. Of course, membership 'in fact' (descent) plays an important role

vis-à-vis the membership of certain groups, and here the classification of the parents is highly relevant for the group areas classification. But essentially the tests provided in the group areas legislation must be applied in respect of each child - there is no *ipso facto* transmission of the parents' classification to their children. It is suggested that in the context of children's classification the rule of attraction should be ignored. Thus a White man marrying an Indian woman becomes Indian for group areas purposes. But their children would not be 'full-blooded' Indians by descent, and acceptance in society would thus determine the racial group of the children. In the nature of things the children would share the same 'general acceptance' as their parents - but not inevitably. They may, for instance, be reared by one side of the 'mixed' couple's family, and be accepted into that group.

Finally, the position upon termination of the marriage or cohabitation should be considered. Such termination causes the applicability of the rule of attraction to fall away and classification of the surviving spouse or former partners to the relationship has to be determined in accordance with the general classification rules as at date of termination. So if the Coloured husband of a White woman were to predecease her, she would in all probability revert to a White classification - unless she is then generally accepted as a Coloured person. This would entail her becoming a 'disqualified person' vis-à-vis Coloured group areas and prior to 1984, she could not, for instance, continue to occupy the former common home in such area,

unless she obtained a permit. In 1984 section 49B was inserted into the Act.⁹⁵ It reads as follows:

49B. Retention of certain rights by women. - The death or divorce of, or the termination of cohabitation with, a man between whom and a woman contemplated in section 12(1)(b)(ii) or (c)(ii) of this Act, or in paragraph (b) of Schedule 1, of Schedule 2 and of Schedule 3 to Proclamation 28 of 1961 there existed a marriage at a time of the death or divorce or termination of cohabitation or who at that stage cohabited with such a woman, shall not prejudice any right to the holding, acquisition and occupation of immovable property which the woman or the man held or occupied at the time of such death or divorce or termination of cohabitation.

This section is again⁹⁶ not an example of lucid legislative drafting, but the following interpretation is suggested. The focus of the section is squarely on the position of the woman⁹⁷ - it refers to the husband/cohabitant, and her divorce etc of him. (The Afrikaans text speaks, for instance, of 'die afsterwe van 'n man'.) It thus sees termination of the relationship only from her perspective. Should termination of the relationship occur, it is her⁹⁸ rights to 'the holding, acquisition or occupation of immovable property' which are not prejudiced - on condition that she or her former husband/cohabitant held the immovable property in question in ownership or occupied it at the time of the termination of the relationship. The ambit of the section will now be illustrated by means of examples and by references to the several contexts in which its application may be in issue.

The woman in our above example (the White widow of a Coloured man) could clearly continue to occupy the former common home of the couple if she was the registered owner thereof or if the lease was in her name. Section 49B overrides the fact that she is now a 'disqualified person' vis-à-vis the Coloured group

area in which it is situated. The position is essentially the same in the case of a marriage in community of property. In law the woman is co-owner of the immovable property falling in the communal estate. Her right to a half share is definitely preserved by section 49B. As to her inheriting her husband's half share, the position is the same as with inheritance between spouses married out of community of property. This position will now be discussed.

The situation is more problematic where the husband was the registered owner of the property or the lessor, and bequeathed the property or the lease to her in his will, as would occur in a marriage out of community of property, or in respect of his half share in a marriage in community of property. Prior to the death of her husband, the woman had, strictly speaking, *no right* to acquire the property which could possibly be 'prejudiced' by the death of her husband - prior to his death she had only a *spes successionis*, an expectation to inherit. Only upon the death of her husband did she acquire a definite right, namely a *ius in personam ad rem acquirendam* - a personal right (against the executor) for delivery of the subject matter of the bequest.⁹⁹ It is submitted, however, that it would be overly technical to limit the protection offered by the section to rights fully in existence prior to the termination of the relationship. The section itself contains no such express limitations although it does say that the rights in issue should not be prejudiced by death - which implies that the rights must exist at the time of death. This can, however, be sensibly interpreted to include

rights which arise simultaneously with the termination of the relationship. Such an interpretation would not do violence to the wording of the section and would advance the manifest purpose of the section, namely to aid the woman by preserving the status quo vis-à-vis the holding and occupation of immovable property of the couple. In the ordinary course of events this status quo can only be preserved where a husband predeceases his wife if she is allowed to inherit and occupy property formerly held by her husband - whether he held the whole of the property (as is usually the case in a marriage out of community of property) or a half share (in the case of a marriage in community of property). As section 49B is undoubtedly a remedial provision, it should be construed in the widest and fullest manner in favour of the class of persons which it seeks to benefit.¹⁰⁰ In our example the White woman should thus be allowed to inherit and take transfer of the property (either the whole or her deceased husband's half share) situated in a Coloured area.

This line of reasoning should apply a *fortiori* where the woman has a claim against her husband's estate in terms of the new accrual system.¹⁰¹ Although the Matrimonial Property Act 1984 provides that generally a claim in terms of the accrual system 'arises at the dissolution of the marriage',¹⁰² this right could certainly for the purpose of s 49B be regarded as a right which is in existence at the time of the termination of the marriage. Alternatively, it would arise immediately upon termination of the marriage and should be protected by section 49B, on the basis of the argument advanced hereabove. A more

difficult question is whether the wife's claim under the accrual system is a right to (specific) immovable property held by her husband, so as to fall within the ambit of s 49B. In terms of the system, adjustments take place with reference to monetary values of the respective estates. But this does not seem to necessitate, in all circumstances, liquidation of the assets before adjustment takes place. Say R150 000 has to be transferred from the husband's estate to the wife's, and the former common home, valued at R120 000, belongs to the husband. If transfer of this property is now effected to the wife as part of the process of settling the husband's debt, section 49B would apply. It is doubtful, however, whether the husband's executor can be forced to transfer a specific asset to the wife as part of the adjustment under the accrual system. The latter appears to create only debts payable in monetary terms (*ad pecuniam solvendam*) but the wife should be able to persuade a court to come to her assistance with an appropriate order relating to the transfer of the specific immovable property to her, so as to enable her to gain the benefit of the protection afforded by section 49B.

The foregoing reasoning would also apply to the situation where the transfer of immovable property is to be effected upon termination of the relationship by divorce. Normally the division of the property held by the couple will be effected in a consent paper which takes effect as part of the decree of divorce. If such consent paper were to provide that the (White) wife is to obtain a house registered in the name of the

(Coloured) husband, she should be able to take transfer of it in terms of section 49B. Here it can even be argued that as a consent paper is signed prior to the actual granting of the decree of divorce, the agreement embodied in the consent paper creates conditional rights, that is rights subject to the (suspensive) condition that the court grants a decree of divorce incorporating the consent paper. In terms of section 49B her conditional right to acquire the immovable property embodied in the consent paper should then not be prejudiced by the divorce which causes the rule of attraction to fall away and her to become, in all probability, a disqualified person vis-à-vis the group areas where she could live prior to the divorce.

Finally, the position with respect to a claim under s 7 of the Divorce Act 1979 may be examined. Where a partner to a 'mixed' marriage out of community of property (concluded prior to 1 November 1984)¹⁰³ advances a claim to a part of the other partner's estate in terms of section 7(3) to (5) of the Divorce Act 1979,¹⁰⁴ s 49B is clearly applicable because the right to claim part of the other's estate arises during the course of the marriage, although it is only concretised by virtue of a court order granted upon divorce in terms of section 7(3) of the Divorce Act. Where such an order involves the transfer of immovable property to a former wife who would, upon divorce, become a disqualified person vis-à-vis the area in which the house is situated, section 49B would sanction the transfer. It is, of course, quite unfair that the husband cannot rely on

section 49B - he may be the one claiming against his wife's (larger) estate, as occurred in *Macgregor v Macgregor*.¹⁰⁵

It should be observed, generally, that it is most unfortunate that the legislation has not extended the protection of section 49B to men. There appears to be no sound reason for the current differentiation.

2.2.4 Classification under Group Areas and Population

Registration Act - a brief comparison

A discussion of race classification under the Population Registration Act 1950¹⁰⁶ falls beyond the scope of this study, but a brief comparison between classification under this Act and the Group Areas Act 1966 is apposite. The Population Registration Act is the single most important race classification measure in South Africa, and the comparison will serve to contextualize classification under the Group Areas Act in the broader rubric of race classification in South Africa. Classification under the Population Registration Act also has a decided influence, particularly on a practical, everyday level, upon classification for group areas purposes. This is so, firstly, because classification under the Population Registration Act results in a definite, administrative certification of race.

In the case of persons other than Blacks, the position was, until recently,¹⁰⁷ that the identity document issued to an individual reflected his or her race classification through the identity number appearing therein. Race classification was reflected in the penultimate and ante-penultimate of the thirteen digits comprising the identity number - '00' designated, for

instance, a White male.¹⁰⁸ (In the case of Blacks, classification was, until recently,¹⁰⁹ effected not under the Population Registration Act, but under a different statutory regime, but this also resulted in a racially distinct reference book ('pass') or similar document.)¹¹⁰ The classifications reflected in these official documents are, of course, not meant to apply in a group areas context, but recourse is widely made to them for group areas purposes - eg by conveyancers when they certify that the transferee of immovable property situated in a group area belongs to a particular group.¹¹¹ (The new, uniform, 'raceless' identification documents available to all population groups will gradually replace the older 'racial' ones, and this will, of course, tend to lessen the wider effects of classification under the Population Registration Act.) There is further some evidence that in practice (eg in criminal trials in the Magistrates' Court), race classification under the Population Registration Act is taken into consideration when the accused relying upon 'general acceptance' as a White could be expected to have previously objected to a 'non-White' classification for population registration purposes. Absence of any such objection is taken to be evidence pointing away from 'general acceptance' as a White.¹¹² This approach is, however, highly questionable, particularly when the trouble involved in securing re-classification is considered. It can further be argued that in not coupling classification for group areas purposes to the Population Registration Act, the legislature envisaged that

completely 'informal' general acceptance as a member of a group would suffice.

We now turn to deal in broad terms with the similarities and thereupon with the differences between classification in terms of the two Acts.

I *Similarities*

- 1) The same three general groups, namely White, Black and Coloureds, are utilized for classification purposes.
- 2) Classification is based on the interplay of the same three factors: 'obvious appearance', descent and general acceptance.
- 3) In both instances White and Black are defined in specific terms, and the general Coloured group then has a 'residual' character, including all persons not classified as White or Black.
- 4) The White group is accorded the highest status and its supposed 'purity' protected. In a group areas context this is manifested *inter alia* by the operation of the 'rule of attraction' vis-à-vis White (and Chinese) men. In a population registration context reference may be made to the rule that 'a person shall not be classified as a White person if one of his natural parents has been classified as a Coloured person or a Black',¹¹³ and the numerous presumptions and onera working against anyone claiming to be White.¹¹⁴
- 5) Both statutes provide for the possible subdivision of the Black and general Coloured group by means of delegated legislation. In both instances the latter but not the former has been so subdivided.

6) Although the subdivisions of the general Coloured group are not the same, both resulted in the defining of an Indian, Chinese, Malay and a 'residual' Coloured group.

7) An individual's classification under either statute can change - in the case of group areas the classification of a natural person is in any event always dependent on the applicability of the criteria on an *ad hoc* basis at a particular point in time. In case of population registration, re-classification can be secured - in 1980 for instance, some 558 Coloureds were reclassified White .¹¹⁵

II *Differences*

1) The Group Areas Act and the delegated legislation made thereunder, constitute a relatively self-contained legislative regime aimed at securing the control of the ownership and occupation of land on a racial basis. The purpose of racial classification under this Act is therefore to establish racial groups which are subject to rights, duties, disqualifications and penalties relating to the control purpose of the Act. In the case of the Population Registration Act, the purpose is different. Racial categories are created by the Act, but the consequences of classification are supplied by other statutory measures - eg the Republic of South Africa Constitution Act 1983 which determines the groups that may vote for the respective Houses of Parliament.¹¹⁶ The Population Registration Act thus provides a classification framework to be utilized by other apartheid legislation.

2) Generally¹¹⁷ classification for the purposes of the Group Areas Act occurs on an *ad hoc*, *pro tempore* basis. Someone's classification may be in issue in a criminal prosecution for unlawful occupation, or the question may arise whether an intended transferee of immovable property is a 'disqualified person'. In these varying contexts different persons are called upon to decide the question of classification - for instance, a landlord wanting to let a flat in a group area, a court trying a criminal prosecution, or a conveyancer wishing to certify that the transferee is not a 'disqualified person'. There exists no single body or person which can authoritatively classify a person for group areas purposes. Ultimately the Supreme Court may become seized of the matter on appeal or review under the ordinary law of the land, but the Act itself makes no provision for a general supervisory jurisdiction to be vested in the Supreme Court. By way of contrast, the Population Registration Act contains a fairly elaborate administrative machinery to effect the process of classification. This includes a statutory right of appeal to the Supreme Court in terms of section 11. The end result is an authoritative classification which has, within the ambit of the Act, general and lasting effect - until changed in terms of the same administrative process.

3) The Group Areas Act applies to all persons who happen to be in South Africa or have interests (such as immovable property) here; the Population Registration Act is applicable only to certain categories of persons with definite ties (such as permanent residence or citizenship) with the Republic.¹¹⁸

4) In the case of the Group Areas Act, certain groups (Indians, Zanzibari Arabs, Chinese and Cape Malays) have only been declared for certain areas of the country; the population registration group categories apply throughout the country.

5) In a group areas context *general acceptance* appears to be the strongest classification criteria; for population registration purposes, *descent*. Thus a person who has freely and voluntarily admitted that he is by descent a Black or Coloured, cannot be classified White under the Population Registration Act.¹¹⁹ The Group Areas Act contains no equivalent provision. Further, as far as the subgroups of the general Coloured group are concerned, in a population registration context membership 'in fact' of any of the six defined groups, which is based upon descent, excludes membership of any other group on the basis of general acceptance.¹²⁰ In a group areas context, an individual can be a member of one group by descent, and of another on the basis of general acceptance.

6) The predominance of *descent* in the population registration context also manifests itself in the *transmissibility* of classification. Where both parents have the same classification, a child follows the classification of his parents. In the case of the Coloured subgroups, the child follows the classification of his father if the latter has been classified. For group areas purposes, there is no such automatic transmission of parental classification.

7) A 'mixed' marriage or cohabitational union affects classification of the partners involved for group areas purposes only.

8) In the case of Blacks 'obvious appearance' plays a role in classification only for population registration purposes.

9) The subdivision of the general Coloured group differs under the two Acts. The position under the Group Areas Act has already been discussed;¹²¹ for population registration purposes the following groups have been defined: Cape Coloured, Malay, Griqua, Chinese, Indian, other Asiatic and other ('residual') Coloured.¹²²

10) Chinese and Japanese are 'honorary Whites' only for group areas purposes.

2.3 Companies

The effect of group areas legislation can obviously be circumvented to a considerable degree if the normal rule that a company constitutes a legal ('raceless') person distinct from its members, were allowed to apply. Thus in the celebrated case of *Dadoo Ltd v Krugersdorp Municipal Council*¹²³ the Appellate Division was called upon to decide whether a company the shareholders of which were all Asiatics, could not own immovable property by reason of old Transvaal legislation dating from the 1880's, which prohibited Asiatics from owning fixed property. The majority of the court held that the company was not 'an Asiatic' and thus not hit by the prohibition.¹²⁴ *Dadoo Ltd's* case represents but one episode in the long battle between South African legislatures bent upon enforcing restrictions upon the

occupation and ownership of land against companies on the basis of the race of those controlling the company, and entrepreneurs equally determined to use the 'corporate veil' and flexible commercial potential of the modern company to try and get around racial restrictions applying to them as individuals. An extreme example of the steps taken by a South African legislature, is provided by Act 35 of 1932, which provided, in respect of the Transvaal, that henceforth: 'No Asiatic company shall hold any fixed property'. Property so held was forfeited to the State!¹²⁵

The Group Areas Act has drawn considerably upon the earlier legislation which sought to curb 'Asiatic' companies in the Transvaal, but it has not followed the extreme example, of Act 35 of 1932. It has rather attributed to all companies a racial group character by utilising the concept of 'controlling interest'. Where a controlling interest in a company is held or deemed to be held by or on behalf or in the interest of any racial group, the company is deemed to be a member of that group.¹²⁶ Before taking a closer look at the concept of 'controlling interest', it should be pointed out that in the context of the group areas act 'company' bears an extended meaning, as including *inter alia*:

'any corporate or unincorporated association of persons, and any registered or unregistered corporate body other than a statutory body.'¹²⁷

So a voluntary association having only a minority of 'disqualified persons' as members¹²⁸ (eg Coloureds), could lease immovable property in a White area, even though the members would not be able to conclude the same lease jointly in their personal

capacities.¹²⁹ (What use Coloured members could make of the premises, would, of course, depend on the interpretation of the difficult concepts of 'occupation' and 'use', discussed in Chapter 4.)

In defining 'controlling interest', the legislature has sought to cast its net so wide that the use of the term 'controlling interest' is really an abuse of language. In terms of section one, unless the context otherwise indicates:

'controlling interest, in relation to any company, means -

- (a) a majority of its shares; or
- (b) shares representing more than half its share capital; or
- (c) shares of a value in excess of half the aggregate value of all its shares; or
- (d) shares entitling the holders thereof to more than half its profits or assets; or
- (e) shares entitling the holders thereof to a majority or preponderance of votes; or
- (f) any interest¹³⁰ acquired by virtue of the grant of loans for an amount exceeding in the aggregate half its share capital, or debentures for such an amount; or
- (g) the power to exercise, directly or indirectly, by holding any interest, whether or not of the nature referred to in paragraphs (a) to and including (f), in any other company, or otherwise, any control whatsoever over the activities or assets of the company:

Provided that in the case of an association of persons controlling interest therein shall be deemed to be held by a person of the same group as the majority of the members thereof;

It should be noted that the racial group character of companies stands to be determined on the basis of 'a controlling interest' - not 'the controlling interest' - in the company. 'Controlling interest' is thus so defined that a company may

belong to more than one group at the same time - eg White on the basis of the majority shareholding, and Indian on the basis of the Indian shareholders' entitlement to more than half of the profits.¹³¹ Such a situation would entail not only that the company may find itself disqualified in relation to more than one area,¹³² but in effect that it would be disqualified vis-à-vis all areas. (This situation may be contrasted with the position of an individual who is (say) Indian by descent and Malay by 'general acceptance'. According to the *Ahmed*¹³³ case, he or she has a choice whether to reside etc in an Indian or the Malay area.) It is often a difficult and complicated task to establish who exactly holds a controlling interest in a company at a given point in time. In order to prop up the 'racial' character of companies and to seal off possible loopholes, the legislature has accordingly enacted elaborate controls which fall, broadly, speaking, into four categories:

- (i) a deeming provision relating to controlling interest;
 - (ii) the restriction of shareholding in and the operation of certain companies holding or acquiring immovable property;
 - (iii) the granting to the Minister of the power to determine the controlling interest in a company; and
 - (iv) creating a presumption of controlling interest if this is alleged by certain designated officials in court proceedings.
- These measures will now briefly be considered.

(i) *Deeming provision*

Section 1(2) provides:

'A controlling interest in a company wherein a controlling interest is not held or deemed under any other provision of

this Act to be held by or on behalf or in the interest of any person, shall for the purposes of this Act be deemed to be held by any person who holds any shares in that company or who has any interest in that company arising out of the grant by him of a loan or debentures issued by that company.'

It is difficult to make sense of this deeming provision.¹³⁴

It would appear to arise only if all other provisions of the Act relating to the determination of controlling interest have been exhausted without reaching a result. The opening words and the 'deeming' nature¹³⁵ also suggest that actual proof of a (any) controlling interest defeats its operation. Van Reenen argues that the legislative history of the sub-section points to the conclusion that the final part should be interpreted (or re-drafted) to mean that a controlling interest is deemed to be held by:

- (i) any shareholder in the company;
- (ii) any person who has any interest in that company, either
 - (a) because he has granted a loan to the company; or
 - (b) because he holds debentures issued by that company.¹³⁶

It can, however, be argued, drawing on the restricted interpretation given to the phrase 'interest in' by the courts in the sphere of restraint of trade clauses,¹³⁷ that as the section now stands it is *only if* the grantor of the loan or debenture holder acquires a *proprietary interest* in the company, in the sense of, for instance, a share in the profits, that he or she is deemed to hold a controlling interest.

(ii) Restrictions in respect of companies holding or acquiring immovable property

The main restrictions¹³⁸ are contained in sections 36 and 37.

Under section 36 the Minister may, upon notice to the person concerned, declare any share or debenture held by a disqualified person or company in a private company holding immovable property in a group area for ownership, to be forfeited to the State.

Under section 37 companies with bearer shares, share warrants or debentures may only hold or acquire immovable property in the controlled or a group area under the authority of a permit or if the company has been granted exemption by means of delegated legislation. It is practically impossible to check on the shareholding of companies with bearer shares, and they have thus been singled out for particularly strict control. In terms of the section, a number of large public companies, almost all of which are large gold mining companies,¹³⁹ have been granted an exemption in respect of the acquisition and holding of immovable property in the controlled area and in any White area.

(iii) Power of Minister to determine controlling interest

In the discussion of race classification for the purposes of the Group Areas Act, the point was made that, in contrast with the Population Registration Act, the former Act does not provide for an authoritative, administrative determination of the race of a natural person. In the case of companies, however, such a power has been granted to the Minister by sections 37(2) and 38. In terms of these provisions, the Minister can determine and fix

the controlling interest of a company, and this excludes the possibility of a controlling interest in such companies vesting in 'any other group'. In both instances the power is to be exercised only upon notice to the company. In the case of section 37(2), the determination serves to fix the racial identity of the company with bearer shares, share warrants or debentures. Under section 38 the Minister is granted the general power to determine the controlling interest of any type of company.

(iv) Presumptions arising from allegations in litigation

Where in any court proceedings the Minister, or any officer in charge of a deeds registry, or the prosecution alleges that a controlling interest in a company is or was held by or on behalf or in the interests of a member of any group, this allegation is presumed to be correct unless the contrary is proved upon a balance of probabilities.¹⁴⁰

2.4 Types of Areas

2.4.1 Introduction

The ultimate aim of the Group Areas Act is the establishment of 'group areas' for the various racial groups, but the legislation has been drafted to provide for several different types of areas, differing in the nature or measure of the control exercised over ownership, occupation and 'use'. If the various types of areas were to be seen as forming part of a spectrum, then at the one end would be placed so-called 'controlled areas' and at the other end fully-fledged 'group areas'. The spectrum may then be taken to represent, generally speaking, a progression

in the nature and measure of control - the controls vis-à-vis group areas being the most complete and far-reaching. The spectrum would also represent the general time-frame envisaged by the originators of the legislation - a start was made with controlled areas, and in the course of time more and more group areas were proclaimed.

The original Act provided that it would come into operation in respect of the various provinces upon a date fixed by proclamation. In the case of the Transvaal, Natal and Cape this was 30 March 1951; in the case of the Orange Free State 31 October 1952.¹⁴¹ The coming into force of the Act meant that the province in question was constituted a controlled area - as explained below, this preserved the racial *status quo* as far as the ownership and occupation of immovable property and land were concerned. In terms of the Act specific, geographically definite group areas could thereupon be carved out of the controlled area. During 1957 Schreiner J A observed:

'There is nothing to prevent the (Group Areas) Board, or the (local) Committee, and nothing should prevent it, from advising the Minister, if that be its view, that the district does not require or is not suitable, for the proclamation of group areas.'¹⁴²

Pending the declaration of group areas, varied forms of control could be introduced through the declaration of other types of areas - specified areas, defined areas, border strips, future border strips, and future group areas.

Although the declaration of group areas represents the ultimate aim and final stage of group areas legislation, the apartheid planners have perceived, at least since the early

sixties, that in particular instances, adaptations in control and even selective deproclamation of declared group areas may be necessary. This gave rise to what may be termed a reverse trend. This trend caused the introduction in 1961 of the legislation providing for the (old) section 19 'use' areas which have been the forerunners of the recently introduced free trade areas. Another manifestation of this reverse trend has been the deproclamation of certain industrial areas.

All in all, the picture is thus a complicated one. In fact, Van Reenen's 'Diagrammatic scheme of areas'¹⁴³ which seeks to explain the intricate interconnection between the various types of areas looks somewhat like a space navigational chart for the Milky Way.

The purposes of the present analysis and the current state of group areas legislation and practice calls for more detailed examination of the following: controlled areas, specified areas, group areas, (old) section 19 'use' areas, industrial areas and free trade areas. (The last will be discussed in Chapter Seven.)

In discussing the nature of the controls in the various areas, it should be borne in mind that practically all restrictions can be relaxed by means of a permit. The permit system will be discussed separately under 2.8.4 herebelow.

2.4.2. Controlled areas

In the controlled area the racial status quo is preserved by attributing to immovable property, land and premises the race classification of the owner thereof. This means that a disqualified person or company (that is, belonging to a different

racial group as the owner) cannot acquire such immovable property,¹⁴⁴ or occupy such land or premises.¹⁴⁵

In the case of the occupation of land and premises, the Act contains a number of exemptions some of which have, from time to time, been qualified or extended by delegated legislation. Apart from the preservation of existing rights of occupation as at 24 April 1950 in terms of a written agreement,¹⁴⁶ the most important general exemptions¹⁴⁷ relate to occupation by disqualified persons:

(1) as a *bona fide* servant or employee of the State or a member or employee of a statutory body or as a domestic servant of any person lawfully occupying the land or premises;¹⁴⁸

(2) as the *bona fide* visitor for a total of not more than ninety days in any calendar year of any person lawfully residing on the land or premises or as a *bona fide* guest in an hotel;¹⁴⁹

(3) as a *bona fide* patient in a hospital, asylum or similar institution controlled by the State or statutory body or in any such institution which was in existence at the commencement of the Group Areas Act, 1950, and is aided by the State, or as an inmate of a prison, work colony, inebriate home or similar institution so controlled;¹⁵⁰

(4) as a *bona fide* scholar attending a school controlled or aided by the State.¹⁵¹

A further important exemption in the Act, which, however, has to be brought into effect by proclamation and is subject to all the conditions imposed by the relevant proclamation, relates to occupation as the *bona fide* employee (other than a domestic servant) of any person, or as the husband, wife, minor child or dependant of any person (including a domestic servant or employee) who is lawfully occupying the land or premises in the controlled area.¹⁵² The relevant proclamation rendering this

exemption applicable contained for many years very restrictive conditions, for instance excluding all White employees (who could thus not work on 'non-White' premises without a permit) and excluding further 'non-White' managerial employees.¹⁵³ The current proclamation (R111 of 1985)¹⁵⁴ does not contain these restrictions, but in the case of a *bona fide* employee other than a domestic servant working in any urban area or rural township, the exempted occupation is 'for the purpose of performing work he is engaged to perform but only for the duration of the intended performance'.¹⁵⁵ And in such urban areas and rural townships the spouses and dependants of domestic servants (and other employees) are not allowed to occupy the land or premises in question.¹⁵⁶

2.4.3. Specified areas

Specified areas were envisaged as the first major further step from the basic form of control, namely controlled areas. The purpose was to exercise greater control over the occupation of land and premises; occupation is specially controlled in specified areas in terms of sections 17 and 18 of the Act, whereas the position relating to the control of ownership in specified areas is the same as in the controlled areas. In a specified area the group character of land and premises for the purposes of occupation is determined by the group of the lawful occupant of the property at a certain date - the so-called specified date; in a controlled area by the group character of the owner. So through the introduction of specified areas, a 'pegging effect' similar to that of the earlier legislation directed against Asiatics, was achieved in a group areas

context.¹⁵⁷ The aim is the preservation of the racial status quo as to occupation.

Originally the entire locality of the Transvaal, Natal and Cape Province was declared a specified area, but already in 1952 this was altered so as to leave essentially all urban areas (eg all areas under the jurisdiction of any municipal or town council)¹⁵⁸ in these three provinces specified areas. So the politically and economically sensitive localities were brought within the ambit of specified areas.

Analysis of the (quite complex) provisions governing specified areas, reveals that in at least four ways occupation control in such areas is stricter than in controlled areas.

(1) By focussing on lawful occupation at the specified date, specified areas in effect prolong the 'pegging' restrictions of earlier legislation such as the Asiatic Land Tenure Act 28 of 1946.¹⁵⁹

(2) Only certain stable forms of occupation are recognized by the Act as impressing the land and premises with the racial character of the occupant - ie occupation as owner, by virtue of a lease, usufruct or right of *habitatio* or by virtue of prescriptive title.¹⁶⁰

(3) In the case of buildings erected or completed after the specified date, and of buildings or land unoccupied at that date, section 18 contains complicated deeming provisions, providing *inter alia* for deemed occupation on the basis of the racial group of the owner. In two important instances, the Minister is given the power to determine the deemed occupation. First, where a

company or statutory body owned the building or land of the aforementioned kind. Second, and probably more importantly, the Minister is given this power in relation to all such buildings and land falling within areas defined under section 18(3). In such 'defined areas' (which may be seen as specific sub-species of specified areas) the Minister can thus exert control over expanded occupation by a particular group. If, for instance, a building belonging to a White and occupied by Indians is extended after the date defining the area, more Indians could not live there lawfully without an appropriate determination by the Minister. And the Minister is given the power to postpone the determination for as long as 'he may deem fit'.¹⁶¹ In our present example the land will have a White group character in the meantime, because it is deemed to be unoccupied¹⁶² and then the owner's group determines the occupation character.¹⁶³

(4) The exemptions from the general prohibition against occupation by disqualified persons are narrower than those applicable to controlled areas. The exemptions in section 17 of the Act relating to *bona fide* visitors, patients and scholars are the same as those referred to under 2.4.2, but there are fewer exempted categories *in toto* and no general exemption for domestic servants. The exemptions have been extended by means of proclamation.¹⁶⁴ In the case of *bona fide* employees (other than domestic servants), occupation is allowed for the purpose of performing the employee's work but 'only for the duration of such performance'.¹⁶⁵

Since 1 July 1986 a domestic servant is also exempted on condition that he or she does not allow a disqualified person to be upon the land or premises between 22h00 and 08h00.¹⁶⁶

In the delegated legislation there is also an exemption for:

'any bona fide student or scholar attending an educational institution controlled or aided by the State, for the purpose of such attendance only.'¹⁶⁷

This is a curious exemption, because section 2(f) already contains an exemption for any 'bona fide scholar attending a school controlled or aided by the state'. In respect of scholars (as opposed to students) the purported exemption contained in the delegated legislation may be narrower than that contained in section 17(2)(f), in which case the former would be *ultra vires*, because the State President can hardly use his delegated power to grant exemptions and impose conditions to derogate from exemptions granted in the Act itself. What is meant by 'for the purpose of such attendance' in the context of the attendance of educational institutions, will be taken up in the discussion of a similar exemption in relation to occupation in group areas, herebelow under 2.4.4.1.

Finally, by recent proclamation the following noteworthy further exemption was enacted, namely in favour of:

'any person occupying or using any building, land or premises for professional purposes in terms of a town planning scheme which is in operation or binding under any law in the specified area concerned.'¹⁶⁸

The meaning and ambit of this exemption is discussed under 2.4.4.1(5) herebelow.

2.4.2 Group areas

It is possible for a group area to be proclaimed for occupation or ownership, or both. The general pattern¹⁶⁹ has been the proclamation of group areas both for occupation and ownership, and the controls in respect of occupation and ownership will now be considered in turn.

2.4.4.1 Occupation in group areas

Whereas in controlled and specified areas the control of occupation is intended to preserve the racial *status quo*, the aim behind group areas is a more radical one: the achievement of 'racially pure' occupation, as far as this is practically possible. To this end provision is made for the termination of existing rights of occupation held by disqualified persons in the group area.

Where a group area for occupation is established, the relevant proclamation specifies a date at which the controls of the Act relating to occupation become applicable in such area.¹⁷⁰

Disqualified persons already in lawful occupation at the specified date can stay on for at least a further year; at the end of this year their lawful occupation may be terminated by the Minister, provided that he had given the person concerned three months prior notice, or in the case of business premises, months prior notice.¹⁷¹

In respect of disqualified persons not already in lawful occupation in the area in question at the specified date, section 26 imposes a general ban with regard to occupation by

them. Following the general pattern of the Act, the section further contains certain general exemptions from the basic ban. In the case of a group area for occupation, these exemptions embodied in the Act are similar to those applicable in respect of specified areas - discussed above at 2.4.3(4). As in the case of specified areas, occupation by disqualified domestic servants is exempt only to the extent that the State President allows this by proclamation. Unlike in the case of specified areas, the Act itself contains no exemption for *bona fide* scholars attending a school controlled or aided by the State.

Again following the general pattern of the Act, the State President has been empowered to create additional categories of exempted occupation by means of the proclamation.¹⁷² The last two years have seen several changes in the categories exempted by proclamation - this has been a major area where shifts in government policy have been reflected and concretized. The control of occupation in group areas is of particular significance, because proclaimed group areas presently encompass the geographical areas of the Republic which are most important from a social, political or economic perspective. For this reason the current exemptions by means of proclamation merit closer discussion.

In terms of Proclamation R112 of 1986¹⁷³ the State President has exempted from the operation of Section 26(1) of the Act:

1.

'(1) the husband, wife, minor child or dependant of any person (other than a domestic servant or an employee) lawfully occupying land or premises;

(2) any person occupying premises on 30 June 1986 in pursuance of a licence issued to the owner, lessee or occupier thereof under section 9(4) of the Blacks (Urban Areas) Consolidation Act, 1945 (Act 25 of 1945): Provided that this exemption shall expire on the date on which the licence concerned would have expired if the said Act had not been repealed;

(3) any *bona fide* student or scholar only for the purpose of daily attending academic lectures at an educational institution controlled or aided by the State;¹⁷⁴

(4) a *bona fide* employee (other than a domestic servant) of a person lawfully occupying land or premises while such employee is on duty; and

(5) any person occupying or using any building, land or premises for professional purposes in terms of a townplanning scheme which is in operation or binding under any law in the group area concerned:

Provided that any person referred to in paragraph

1(1),(2),(3),(4) or (5) who lawfully occupies land or premises may not permit a disqualified person to be on the land or premises occupied by such person between the hours of 22h00 and

08h00 and that during non-compliance with this proviso this exemption shall not apply to him;

2. ...the provisions of section 26(2)(c) of the said Act shall apply in respect of all group areas on condition that a domestic servant of a person lawfully occupying land or premises may not permit a disqualified person to be upon the land or premises occupied by such domestic servant between the hours of 22h00 and 08h00 and that during non-compliance with this condition by such domestic servant he shall not be exempt from the provisions of the said section 26(2)(c).'

The six exemptions will now be discussed in turn.

(1) Exemption relating to close family of lawful occupant

At first blush this exemption may be thought to have been introduced to afford some relief to 'mixed' married couples after the repeal, during 1985, of the Prohibition of Mixed Marriages Act 1949. The following situation may be envisaged. A White man occupies his own house in a White area. He is obviously in lawful occupation thereof. He now marries a Coloured woman. Can it not be said that she falls under the exemption? This would entail reading 'lawful occupation' as being subject to the qualification: 'but for the operation of the rule of attraction', because if the 'rule of attraction' were to apply in determining lawful occupation, both partners to the marriage would be Coloured from the moment of the marriage - and this would render unlawful the occupation by the husband in a White area (unless he, of course, obtains a permit). If 'lawful' is not to be determined with reference to the rule of attraction, it would

refer to other legal requirements, such as the private law right of occupation and compliance with zoning restrictions. In pressing the argument that the 'rule of attraction' should be ignored in assessing the requirement of lawful occupation in terms of the exemption, the point can be made that a contrary reading would render the exemption practically meaningless as far as the position between the spouses is concerned. If the husband in our example has to apply for a permit for himself, he may as well apply for a permit for his wife as well. The permit application forms currently in use in any event require an applicant to give particulars of his or her spouse.¹⁷⁵

Upon reflection the conclusion must, however, be that the exemption affords no general relief to the spouses in a 'mixed' marriage. Although the starting point in interpreting legislation is usually the 'ordinary meaning' of the words employed¹⁷⁶ the present problem justifies reference to the context¹⁷⁷ of the (delegated) legislation, and in particular to the history thereof.¹⁷⁸ Here it should be pointed out, firstly, that earlier proclamations (dating from at least 1957)¹⁷⁹ have consistently contained the exact same exemption. This is also the case in respect of similar proclamations relating to controlled and specified areas.¹⁸⁰ It has thus been carried over from earlier times when 'mixed' marriages were still prohibited. So the purpose was not to afford 'mixed' couples general relief in the post-1985 period.

Second, the ordinary meaning of 'lawful occupation' entails lawful in all respects.¹⁸¹ If 'lawful' were to be read as

excluding the impact of the 'rule of attraction', then it would not be possible to draw the line at say the person already in lawful occupation who thereupon concludes a 'mixed' marriage which causes him or her to become a disqualified person. 'Lawful occupation' in this qualified sense would necessarily extend to all forms of occupation. It would then also cover occupation of new premises after the marriage, the one spouse relying on his or her pre-rule of attraction classification.

Third, the exemption has a field of application (albeit a limited one) even if it is accepted that the lawfulness of occupation has to be tested also against the 'rule of attraction'. In referring to 'husband and wife', the oft re-enacted exemption must be taken to have intended to refer to lawfully married couples - on the basis of the presumption that a reference in a legislative instrument to a specific situation or act, is presumed to be a reference to a lawful situation or act.¹⁸² Since the inception of the original Group Areas Act (and up to 1985) 'mixed' marriages have been prohibited in South Africa. So up to 19 June 1985, when this prohibition was repealed,¹⁸³ the married persons referred to in the exemption must either have contracted their marriage prior to the coming into operation of the Proclamation of Mixed Marriages Act 1949 or must have contracted a valid marriage outside South Africa after the coming into operation of this Act.¹⁸⁴ In either case the exemption could apply in the following instances. A White man and a Coloured woman married during 1948, and went to live in the husband's house. Subsequently the area in which the house is

situated is declared a White group area for occupation. In terms of s 23(2) of the present Act the husband (as lawful occupier at the date specified in the proclamation) has further protection for at least one year - but it is not clear that his wife and children would also be 'lawful occupiers' within the meaning of section 26,¹⁸⁵ and thus entitled to the period of grace. Section 23(2) appears to protect only the primary occupant, and not those who derive their right of occupation solely through him. In the case of *specified areas*, to which an identical exemption applies, this is spelt out - only occupation flowing from ownership, a lease, usufruct, *habitat*io or presumptive title is entitled to protection by virtue of the preservation of existing rights.¹⁸⁶ So in the example under discussion the wife and children would in any event be able to rely on the exemption in issue for their occupation in the group area. In principle the same reasoning would appear to apply where a disqualified person (say a Coloured male) gets a permit to live in a (White) group area. If he now marries, his wife would invariably be classified Coloured for group areas purposes. It would appear that he can rely on the exemption in question as obviating the need for a permit for her and later born children. In practice his permit would, however, be issued on the condition that he does not allow occupation of the premises in question by a disqualified person. If he then allows occupation by his (disqualified) wife, he would forfeit the protection of the permit and the touchstone of the exemption, namely his lawful occupation by virtue of the permit, would fall away.

It is possible to envisage further limited instances where the exemption could apply. Say in the last example the couple had children, and the wife then dies. The husband would then probably 'regain' his White classification. He can obviously stay on in the White group area without a permit - and so can his children, *even if they were to be classified Coloured*, in terms of the exemption. He would not need a permit for them.

The present discussion can thus be summarized by saying that the exemption in question will only afford limited relief to 'mixed' couples, because of the requirement that at least one spouse must have 'lawful occupation' - and the 'rule of attraction' operates so as to impart to both spouses the same group areas classification. This entails that they are either both disqualified (in which case neither would be in lawful occupation) or both qualified persons in respect of a group area (in which case the exemption would be superfluous). The exemption would thus only appear to be applicable in basically two sets of circumstances:

(i) where a disqualified person has lawful occupation in a group area, as is the case when his existing rights of occupation are preserved by the Act upon proclamation of the group area. The individualised and conditional nature of the permission embodied in a permit to occupy probably precludes an argument that once 'lawful occupation' has been obtained in terms of such a permit, the exemption is inevitably activated by this lawful occupation, and no further permit is required by a spouse, minor child or dependent.

(ii) Where a *qualified* person wishes to allow his or her disqualified minor child or dependent to live with him or her. The termination of a 'mixed' marriage may bring about such a situation, but it is also possible that the classification of the parents and minor child may differ, or that of the occupier and dependent - for instance, because they are 'generally accepted' as members of different groups.

(2) *Licences under section 9(4) of repealed Blacks (Urban Areas) Consolidation Act*

The repeal of section 9 of the Blacks (Urban Areas) Consolidation Act 1945 with effect from 1 July 1986¹⁸⁷ has meant that since this date no further licences will be issued under section 9(4) of this Act. (The licences in question were usually issued for a period of a year.)¹⁸⁸ In respect of the exemption under discussion the following may be noted. It illustrates the fact that whereas Blacks were traditionally subjected in urban areas to dual sets of controls, ie under the specific statutory regime governing Blacks and under group areas, the former was predominant, certainly in practical terms. Section 9(5) of the Blacks (Urban Areas) Consolidation Act contained a general ban, subject to very limited restrictions,¹⁸⁹ on Blacks being accommodated on any premises outside a location or a Black village. To do this, a licence under section 9(4) was required. The Group Areas Act¹⁹⁰ and the various proclamations¹⁹¹ made thereunder then provided that occupation in terms of such a licence would constitute lawful occupation for group areas purposes.

Because the Blacks (Urban Areas) Act has been repealed, the position is that Blacks wishing to reside in, say, a Coloured group area now require a permit under the Group Areas Act. The actual field of application of the Act has therefore been significantly extended. It should be noted that Blacks may now in given circumstances be better off in relation to occupation in group areas of other groups - they can, for instance, rely on the statutory exemption allowing occupation for 90 days per calendar year for *bona fide* visitors. The prohibition in s 9(5) of the now repealed Urban Areas Act contained no such exemption. This explains why, during the first half of 1986 when Parliament had already repealed this section but the State President had not yet assented to the Bill effecting the repeal, government officials in Cape Town still sought to rely on s 9(5) to evict refugees who had fled from the fighting at Crossroads and who had taken shelter in church premises in White areas!

(3) *Bona fide students and scholars*

The recent history of this exemption is somewhat bizarre. When Proclamation R112 was published on 27 June 1986, exemption was granted to:

'a *bona fide* student and scholar attending an educational institution controlled or aided by the State.'

This constituted a significant break with the more conservative exemptions in the previous proclamations¹⁹² - in the latter the exemption applied only 'for the purpose of daily attending academic lectures'.

Universities such as Cape Town interpreted the new exemption as allowing at least the occupation of university residences by disqualified students. This was borne out by the proviso to all the exemptions, including the one under discussion, which prohibited the exempted person from allowing occupation of the premises by (other) disqualified persons *between 22h00 and 08h00*. Overnight occupation by the exempted person was clearly envisaged. It could be argued that the exemption had gone even further. Once a student fell within the exemption, it would appear that he escaped *all* group areas occupation restrictions. Unlike in the case of a *bona fide* employee (see (4) below), the exemption contained no further restriction, eg 'for the purposes of his studies'. This would entail that he could, for instance, take up private accommodation in an area where he was otherwise a 'disqualified person'.

To this situation the government reacted on 22 July 1986 by re-introducing the 'old' exemption. Thus students and scholars are now (again) exempted 'only for the purpose of daily attending academic lectures'.

The exact scope of this exemption is by no means clear. As students and scholars are not only exempted 'during academic lectures', but 'for the purpose of attending lectures', the exemption would appear to cover activities reasonably incidental to the attending of lectures - eg using library and cafeteria facilities during the periods associated with normal lecture times. More problematic is the use of these and other university facilities over weekends and during vacations. Would these be

covered by the exemption? It should be observed, of course, that these activities may well in the first place not amount to 'occupation' of land and premises - even within the extended meaning 'occupation' bears in a group areas context, ie 'presence for a substantial period of time'.¹⁹³ In that case there would be no need for the exemption. But if it were to be accepted that (say) spending a day in a library amounts to 'occupation', then it is submitted that this activity, *and all other activities normally incidental to being a bona fide student or scholar should be exempted* - at least when performed on land and premises belonging to the institution, or generally utilized by the institution for its activities. And it should not matter whether the activities take place during term or vacation. For the present purposes, it should be accepted that a student/scholar remains a *bona fide* student/scholar from one registration date to another. The relationship between a student and the university is a contractual one. As pointed out in *Fourie v Schoeman*¹⁹⁴ it arises when the student is admitted. It should endure until it comes up for renewal, ie at the next registration date.^{194a}

It is thus submitted that the dividing line drawn by the exemption is between daily educational activities (in the wide sense of the word) on the one hand and domestic activities on the other hand. The latter would include the question of residence. The wording of the section and particularly the words 'only' and 'daily' appear to exclude residence rights although residing in a university or school residence does, of course, enable a student or scholar to attend daily lectures. It is also strange that the

present exemption is still subject to the proviso that the exempted person should not allow another disqualified person to occupy the land or premises between 22h00 and 08h00 - this implies that an overnight stay by the exempted person is contemplated. The probable explanation is, however, bad and overhasty draftsmanship. In the haste to undo the more 'liberal' exemption originally contained in Proc R122 of 1986, the proviso was not adjusted to exclude a reference to the present exemption.

In support of the distinction suggested hereabove, reference may be made to the practice relating to the exemption, as constituting *subsecuta observatio*, and thus an aid to interpretation.¹⁹⁵ While the government has insisted on permits for 'non-White' students living in university residences in a white area,¹⁹⁶ it has been generally accepted by all concerned that permits will not be required for the normal educational activities pursued through schools or universities.

(4) *Bona fide employees*

The present exemption is relatively straight forward, particularly compared with previous exemptions which excluded White employees working on 'non-White' premises and 'non-White' managerial employees on White premises, and also required the provision of 'adequate separate ablution and toilet facilities' for the exclusive use of the employee falling under the exemption.¹⁹⁷

The present exemption only applies 'while such employee is on duty'. It is arguable that a person in the position of a

'live-in' caretaker is for practicable purposes on duty all the time, and such a person would accordingly not require a permit.

(5) *Occupation or use for professional purposes*

(i) *Can prohibited 'use' be authorised?*

Before dealing with the meaning of 'professional purposes' in the present context, it should be pointed out that the exemption purports to extend to both occupation and use of buildings, land and premises by disqualified persons. This raises the very difficult issue of the interrelationship between the control of occupation and the control of 'use' (of land and premises) in the Group Areas Act. As explained in chapter 3 below, and in the discussion of the position of Chinese under 2.2.2 above, s 35 of the Act contains a prohibition against the 'use' of land and premises by disqualified companies or persons which does not really tie in with the rest of the Act, and in certain respects appears to contradict the provisions relating to occupation. Thus the blanket prohibition against the 'use' of land and premises by disqualified companies or persons appears to nullify the exemptions granted in the Act and delegated legislation to disqualified persons in respect of certain categories of occupation. The exemption presently under discussion purports to extend also to the use of buildings, land and premises. But this exemption has been enacted under section 26(3)(a) of the Act which empowers the State President to grant exemptions only in respect of occupation. Section 35, the 'use' section, in fact contains no provision which empowers the State President to exempt certain categories of use. As pointed out in

2.2.2 and chapter 3 below, it can, however, be argued that given the general structure and purpose of the Act, and the interrelationship between the control of 'occupation' and 'use', any exemption with regard to 'occupation' must by necessary implication carry with it an exemption in respect of those forms of use which would occur if the exempted form of occupation were to be exercised. Otherwise the exemptions with regard to occupation would be rendered nugatory. The latter consideration probably prompted the State President-in-Cabinet to purport to exempt occupation and use for professional purposes at one and the same time.

(ii) '*Professional purposes*'

Although the exemption is set in a townplanning or zoning context by reason of the explicit reference to occupation for professional purposes 'in terms of' an applicable townplanning scheme, 'professional purposes' is not a usual or standard zoning category. The Cape Town City Council's Townplanning Scheme, for instance, contains no such zoning category. In practice, occupation of offices etc by professionals such as medical doctors and lawyers is covered by a 'general business use' zoning.¹⁹⁸ The Cape Town Townplanning Scheme does, however, make provision¹⁹⁹ that premises in a general residential zone may, with the Council's permission, be used, subject to certain conditions, 'for the conduct of a profession'. 'Profession' is, however, not defined, and we now turn to deal with the probable meaning of 'professional purposes'.

What is meant by 'a profession', has cropped up in various contexts - often in the interpretation of legislation dealing with taxation or licensing. A conspectus of the case law on the matter suggests the following guidelines in determining the meaning of 'profession': which occupations or vocations (Afrikaans: 'beroepe') can properly be described as 'professions' (Afrikaans: 'professies',²⁰⁰), is 'a question of degree and always of fact'.²⁰¹ As du Parc LJ puts it:

'Ultimately one has to answer this question: Would the ordinary man, the (ordinary intelligent subject) ... say now, in the time in which we live, of any particular occupation, that it is properly described as a profession?'²⁰²

Originally the word 'profession' was first applied to the three learned professions of divinity, law and medicine, and subsequently to the military profession - but the number of professions is now greatly extended and it is recognized that over a period of time other occupations may yet achieve the status of 'professions'.²⁰³

In trying to provide an answer to the question what the ordinary man would understand by 'profession', the courts have utilised certain broad definitions, such as the possession of 'some special skill or ability, or some special qualifications derived from training or experience';²⁰⁴ or, drawing on the *Shorter Oxford Dictionary*, 'a vocation in which a professed knowledge of some department of learning is used in its application to the affairs of others, or in the practice of an art founded upon it'.²⁰⁵ Thus legal and medical practitioners, architects, accountants, engineers, editors,²⁰⁶ journalists, bankers,²⁰⁷ artists, and (chartered) accountants have been

held²⁰⁸ to be professionals. Dentists, physiotherapists, clinical psychologists, teachers, and townplanners would also qualify. The person in question need not be self-employed to qualify as a professional in the present context.²⁰⁹

In excluding certain occupations from the professions, the courts have drawn a distinction between professions on the one hand and trades and businesses on the other. Here reference is made to the 'intellectual' or 'artistic' content of the skill involved in the job. Thus it has been held that a carpenter pursues a trade, not a profession;²¹⁰ a sculptor a profession, not a trade. In Australia it has been held that training horses is not a profession.²¹¹ Moreover, any 'operation which is substantially the production or sale or arrangements for the production or sale of commodities' cannot qualify as a profession.²¹² Estate agents would probably therefore not qualify as professionals;^{212a} nor seemingly, in the present context, the ordinary chemist running a pharmacy - he primarily conducts a business on the premises rather than a profession. The same reasoning would probably not apply to a stockbroker, however.^{212b}

When the professional status of a particular occupation is in issue, reference may be made further to the presence of trappings commonly associated with the established professions, such as the existence of a 'professional' governing body and a code of conduct and ethics in respect of the occupation. Such trappings should, however, be seen as pointers rather than definite criteria in answering the question, in the present context, whether an occupation qualifies as a 'profession'.^{212c}

The group areas exemption under discussion relates to occupation 'for professional purposes'. It is submitted that this should be taken to refer to the *dominant* purpose of the occupation;²¹³ once this is for professional ends, the occupation is not rendered unlawful by the pursuit of other incidental purposes - eg a practising attorney may as part of his professional practice (in the widest sense) also manage a building society agency. The latter activity would, strictly speaking, fall outside the scope of his professional activities in the more limited sense discussed hereabove.²¹⁴ But he would not need a group areas permit for this side of his practice.

It should be noted, finally, that the exemption only requires that the use for professional purposes must be 'in terms of' an applicable townplanning scheme. Applying the reasoning of *Kathwaroo v Mootala*,²¹⁵ the exemption would thus be applicable as long as the zoning of the land allows occupation for professional purposes and it is so occupied. The land need not be zoned specifically or exclusively for professional purposes; a 'general business use' zoning would, for instance, suffice, and so would occupation for professional purposes with special permission in terms of the townplanning scheme.²¹⁶

(6) Domestic servants

By reason of the introduction of a more generous exemption relating to *bona fide* employees (discussed under (4) above), it is presently of less importance to establish exactly what is meant by a 'domestic servant'. In *R v Bushveld Agencies Ltd* it was held:

'Domestic servants are servants whose main or general function it is to be about their employers' persons or establishment, residential or quasi-residential, for the purposes of administering to their employers' needs or wants or to the needs or wants of those who are members of such establishments, or of those resorting to such establishments, including guests. What is said of a club applies, I think, to an hotel or boarding house, and if an incorporated company carries on the business of conducting an hotel, those of its employees who are engaged in the menial household duties incidental to the business would properly be described as domestic servants.'²¹⁷

The distinction between domestic servants and other employees is, however, still relevant in the following circumstances. In the case of a 'live-in' domestic servant the exemption obviously caters for the servant sleeping on the premises; in the case of other employees, they can only do so without a permit if it can be said that they are 'on duty' during their overnight stay.

The exemption in question implies no limitation as to the number of domestic servants that may be employed.

2.4.3.2 *The holding and acquisition of immovable property*

Where a group area has been proclaimed for ownership, the Group Areas Act contains no provisions which interfere with the right of a 'disqualified (natural) person' to hold immovable property situated in the area for the duration of his life. Upon his death he, however, may only bequeath it to a qualified person.²¹⁸ But the 'sister' Act of the Group Areas Act, namely the Community Development Act does, however, contain elaborate provisions for the termination of such person's rights (eg by expropriation), as part of the process of 'clearing' a group area of disqualified persons.²¹⁹ The position would be the same with regard to a natural person who becomes a disqualified person

after the date of the proclamation - for instance, by marrying a disqualified person.

By way of contrast, the Act allows a disqualified company or the administrator of a deceased estate 'in which any disqualified person has a testamentary interest', only a period of ten years after the date of the proclamation for the continued holding of the immovable property situate in the area. The reference to 'the administrator of a deceased estate in which any disqualified person has a testamentary interest', is somewhat obscure. In our law 'administrator' means 'trustee',²²⁰ and the reference is thus to a trustee holding immovable property by virtue of a testamentary trust having a disqualified person as (trust) beneficiary. The disqualification apparently applies no matter how small the interest of the disqualified person.

The strictest rule applies with regard to any company which acquires immovable property in a proclaimed group area. It if subsequently becomes a disqualified company (eg through a disqualified person obtaining a controlling interest therein), it must immediately dispose of the property, unless a permit can be obtained.²²¹

* * * * *

The position with regard to occupation and ownership in group areas, which constitutes the final stage of segregation envisaged by the original Act, has now been examined. In the following two sections attention will be paid to two types of areas which form part of the more recent modification of the

'pure' group areas model, namely old section 19 'use' areas and industrial land.

2.4.4 Old Section 19 'use' areas

So-called use areas²²² were constituted under s 19 prior to its recent substitution. Since 1961 the section provided that the State President may by proclamation declare that a defined area or group area or any portion thereof may from a specified date only be used or occupied for a particular purpose. In practice this power was exercised to introduce a limited measure of 'mixed' trading in certain business areas. Certain parts or specific premises within White business areas were declared open for trading and commercial use but subject to the requirement that 'non-Whites' still had to obtain a permit and subject to the limitation that any concomitant residential occupation was invariably prohibited.

The question may well be asked: What was the good of this? A disqualified trader could in any event have obtained the necessary permit to trade in a White controlled or group area under the general provisions of section 21. The point is, however, that under section 21(2) the Minister may only grant such a permit in respect of a group area if he is of the opinion that the refusal of the permit would cause undue hardship to the applicant or that the issue of the permit would be in the interests of the group for which the group areas has been established. In practice this meant that disqualified 'non-White' traders were not granted permits in respect of White areas, unless some element of vested interest on their part was present

(for example, that they had traded there at an earlier stage). The establishment of a 'use' area for commercial purposes signalled a willingness on the part of the Executive to relax the exclusive trading rule, and to regard the requirements of s 21(2) as having been fulfilled in principle. In practical terms there was thus a greater chance to obtain a permit. Controversy has surrounded the question whether permits have in actual fact been granted freely in respect of these areas. During 1983 the Strydom Committee noted dissatisfaction amongst 'non-White' traders with the 'rigorous permit control' exercised in 'use' areas,²²³ but in 1979 the government declared, in response to the recommendation of the Riekert Commission²²⁴ that central business districts should be opened, that permits were already 'granted relatively freely under section 19'.²²⁵

As at February 1985, 44 'use' areas in 32 centres had been proclaimed under s 19.²²⁶ The 'use' areas were to serve as a springboard for the introduction of proper free trade areas (discussed in 7.2. below), and Section 49C of the Act, which came into operation on 30 May 1985, has in a limited way sought to convert 'use' areas into free trade areas. It provides that certain restrictions²²⁷ in the Act relating to ownership, occupation and use shall not apply to buildings, land or premises in established 'use' areas, so long as the buildings etc are not used for purposes other than trading, commercial, professional or religious and educational purposes in terms of any town planning scheme. Importantly, the restrictions lifted do not include those relating to occupation and ownership in group areas. So in

the most important business districts, which fall in White group areas, Section 49C will have no effect.

Moreover, the Executive has sought to nullify even the limited effect of Section 49C - by deproclaiming all old section 19 'use' areas the day before Section 49C came into operation!²²⁸ It is submitted that these deproclamations are invalid. The State President's delegated power (be it administrative or legislative) to deproclaim 'use' areas was in the circumstances apparently used for an ulterior purposes, namely to defeat the accrual of rights which Parliament intended to bestow. As such the exercise of the power was *ultra vires*.^{228a}

2.4.5 Industrial land

In relation to industrial land, the government accepted the recommendation of the Theron Commission that such land should not have a group character.²²⁹ This led to the enactment of Section 49A of the Act during 1977. The section was tightened, following the decision in *Kathwaroo v Mootala*,²³⁰ so that it now only applies in respect of land or premises which are 'zoned specifically, and may be used without any approval, for industrial purposes in terms of any townplanning scheme' and which 'are not used for any purposes other than industrial purposes'. In respect of such land the restrictions relating to ownership, occupation and use of the Act, *except those relating to group areas*, do not apply. This has meant that the exemption cannot operate in respect of industrial areas situate in group areas (which would constitute the more important ones). For the exemption to apply, that part of the group area would have to be

deproclaimed. According to the department of Constitutional Development and Planning, extensive deproclamations are being undertaken for this purpose, but no statistics are presently available.²³¹

2.5 Machinery for proclaiming group areas

The proclamation of a group area often has far reaching effects. As explained under 2.4.3 above, 'disqualified persons' are effectively barred from the area and the rights of those living there or owning property in the area, are subject to termination. This immediately raises the question: What safeguards, procedural or otherwise, have been provided in the Act to protect the people who may be prejudicially affected by the proclamation of a group area? The answer is unfortunately that the Act contains very few, if any, significant safeguards. As explained more fully under 2.8 herebelow, the entire Act, both in its design and practical operation, hinges upon executive or administrative discretion. And, in terms of Prof Kenneth Culp Davis' terminology, this discretion is both unconfined and unstructured.²³² It is *unconfined* in the sense that a very wide discretion is granted by the Act to the Executive branch of government in respect of the proclamation of group areas. For instance, the State President may, 'whenever it is deemed expedient', by proclamation in the Gazette establish a group area.²³³ The process by which this wide discretion is to be exercised, is also largely *unstructured*. It is true that, as explained below, certain procedures have to be followed, but these lack the requirement of 'openness' which is a requirement

for the proper 'structuring' of an administrative discretion.²³⁴ Vital steps in the process leading to the proclamation of a group area are taken without any public participation at all and where limited public participation is allowed, the resultant findings by the administrative body involved (that is the Group Areas Board), is of a recommendatory nature only. Small wonder then that the implementation of the Act has acquired such a reputation for the infliction of injustice and suffering.²³⁵

In discussing the steps leading to the proclamation of a group area, it appears more sensible to focus on the actual practice rather than simply to discuss the steps set out in the Act itself.²³⁶ Because of the cloak of secrecy or semi-secrecy which surrounds so much of governmental activities in South Africa, it is usually very difficult to obtain reliable first hand information on the practice of a government department in a politically sensitive area. In the present context we are fortunate, however, in that valuable information was supplied in a recent seminar paper by Mr A Nell, Director of Physical Planning in the Department of Constitutional Development and Planning. In referring to the preparatory steps before a group area can be proclaimed, Nell commented: 'Some of these steps are prescribed by the Act whilst others have become part of the procedure over the years'.²³⁸

The various steps mentioned by Nell will now be set out, with comment where necessary. Thereafter this section will be concluded with reference to a related development of relatively

recent origin, namely guide plans under the Physical Planning Act 88 of 1967.

2.5.1 Steps leading to proclamation of group area

(1) 'The submission of proposals by interested individuals or bodies, such as local authorities or members of Parliament, to the regional office concerned of the Department of Constitutional Development and Planning, with a view to the identification of suitable land for a particular group. Although it is not obligatory, it is departmental policy, even at this early stage, to consult with interested local leaders as well as with Government Departments.' Nell then goes on to explain:

'(O)ther government departments such as Agricultural Economics and Marketing, Transport and Mineral Energy Affairs are consulted. The reasons for such consultation are obvious, namely to determine the suitability of the land with reference to the need for agricultural land, the impact of future road and railways and the effect on possible mineral resources which could influence the use and development of the land.'

Comment

Until November 1984 the Minister responsible for group areas was the Minister of Community Development.²³⁹ In November 1984 the State President transferred responsibility for the Act to the Minister of Constitutional Development and Planning.²⁴⁰

In the early 1950's the Land Tenure Advisory Board, predecessor of the present Group Areas Board, invited proposals for group areas from local authorities. In the case of Cape Town, the City Council refused to co-operate and the Western Province Land Tenure Advisory Board consequently drew up its own proposals for Cape Town and advertised them at the beginning of 1953.²⁴¹

(2) 'The Regional Director then submits a report on his findings to the Head Office of the Department, where it is studied and evaluated by the various branches concerned with local authority affairs and physical planning.'

Comment

A considerable degree of centralisation of functions has taken place in Minister Chris Heunis' 'empire', the Department of Constitutional Development and Planning. As explained below this presently means considerable influence for guide plans under the Physical Planning Act 1967.

(3) 'The Group Areas Board is then drawn into the picture, by carrying out an investigation in order to furnish the Minister with a report and a recommendation. According to the provisions of the Act, no proclamation may be issued, withdrawn or amended without the Minister having considered a report by the Group Areas Board. To make this possible, the Head of the Department must give notice of the intended investigation in a newspaper circulating in the district in which the proposed group area is situated. The notice must contain sufficient particulars for the area to be identified and must call for interested parties to submit written representations which they may wish to make. Such parties must be afforded at least 10 days to make representations, calculated from the date of the last notice, if more than one notice is given.'

(4) 'The Chairman of the Group Areas Board then appoints an investigating committee from members of the Board to carry out the necessary investigations and draw up a report, taking into consideration the written representations received from interested parties. Taking into consideration such representations which are at its disposal, the investigating committee may decide to hold a public hearing in order to afford the parties an opportunity to state their cases verbally or to clarify any uncertainties.'

Comment

The Act requires the Board to hold an enquiry, but there is no *duty* from the Board to hold a *public* enquiry. The investigating committees referred to above, are appointed under s 9 of the Act which grants the Minister wide powers to appoint standing and ad hoc committees of the Board.

In *Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad* ²⁴⁴ the Appellate Division held that the Board does not perform a

quasi-judicial function when conducting a pre-proclamation enquiry - even though a specific proposal and objections thereto are being investigated. As a result it was held that the *audi alteram partem* principle does not apply, and that an objector has consequently neither a *right* to a hearing, nor any *right* to be informed of evidence (for example, a report) in possession of the Board which may be prejudicial to the case he is seeking to make out. This means that interested parties wishing to object to group areas proposals can only rely on the limited procedural rights explicitly granted to them by the Act, which really means that they can only submit the written representations referred to above. By way of contrast, *proposers* of a group area are in a much better position. Where a proposal for a group area has been submitted to the Board, the Board cannot reject it unless it has afforded the proposer 'an opportunity of being heard or of submitting written representation to it'.²⁴⁶ It is also now (that is subsequent to *Cassem's* case) specifically provided that if the Board conducts an enquiry, representatives of the State and of any local authority concerned, and any proposer of a group area are entitled to be heard before the Board, but no other person (which would include an objector) shall be so entitled, 'unless specially allowed by the Board to do so'.²⁴⁷

Originally the public enquiries held by the Board entailed that the persons and bodies who had lodged representations would appear, lead evidence, and question witnesses. Since the late 1950's hearings have been generally scaled down - representatives

of the parties concerned make submissions to the Board and hand in supporting documentation.²⁴⁸

(5) 'The report by the investigating committee is then considered at a meeting of the Group Areas Board. In addition to the members of the Board, representatives of the State Departments involved, such as the Administrations of the Houses of Assemblies, Delegates and Representatives are also present at these meetings, where all aspects are finally clarified with a view to submitting a report and recommendation to the Minister.'

Comment

The fact that the functions of the Board have been held not to be quasi-judicial, allows the Board to undertake wide ranging enquiries without would-be objectors having the opportunity to comment on the information obtained by the Board. In the planning process relating to group areas, the input of individuals and non-governmental bodies representing them, is obviously completely overshadowed by the input and influence of the various government bodies involved.

(6) 'The Act specifically prescribes that the Administrator of the Province in which the proposed area is situated as well as the Minister of Mineral Energy Affairs must be consulted before a proclamation is issued.'

(7) 'The final report and recommendations are then submitted to the Minister for a decision. Depending on his decision, a draft proclamation is either submitted to the State President for his approval, or the matter is referred back for further consideration. If the proposal is accepted, the area is then proclaimed as a group area for a particular group.'

Comment

In the case of the Board, the exercise of its discretion in making a recommendation is circumscribed or structured to the extent that, before advising the Minister, it has to take into consideration whether or not suitable accommodation would be

available outside the affected area to persons whose occupation of land or premises in that area would be rendered unlawful by the proclamation of a group area.²⁴⁹ This requirement has, however, been interpreted by the Appellate Division as only requiring the Board to consider the availability of suitable alternative accommodation. It need not satisfy itself that such accommodation is actually available.²⁵⁰

For certain (eg Black) group areas, a resolution of all three houses of Parliament is required prior to proclamation.²⁵¹

It is of interest to note that according to Nell's version, the final decision lies with the Minister. This appears to conflict with the present constitutional position in terms whereof such a proclamation, as a general affairs matter, stands to be issued by the State President acting in consultation with the Cabinet.²⁵² Although it can be argued that the actual decision is now that of the State President, and that he should only consult²⁵³ with his Cabinet and not act on their advice or the advice of a particular Minister, the actual practice under the new constitution appears to be that the responsible Minister still takes the decision which is usually implemented by the State President as a matter of course.²⁵⁴ In as much as the State President can be said to be 'consulting' with anybody, it appears that outside the context of actual Cabinet meetings where he presides, he consults only with the relevant Minister or Ministers.

2.5.2 Role of guide plans under Physical Planning Act 1967

In his paper Nell specifically drew attention to the possible role of guide plans vis-à-vis group areas. The general purpose of guide plans under the Physical Planning Act 1967 is to provide a long term strategy for the use of land in urban areas.²⁵⁵ These guide plans are drawn up by Guide Plan Committees consisting of the representatives of central and local government. Guide plans for several of the larger urban areas in the country have already been compiled or are in process of being finalised, as is the case in the Cape Metropolitan area, Bloemfontein and the various sub-regions within the PWV complex, such as the Greater Pretoria area, the East Rand/Far East Rand and the Central Witwatersrand area.²⁵⁶ Once the approval of a guide plan by the Minister has been gazetted, the plan in effect acquires the force of law. New town planning schemes must conform with the guide lines laid down in the guide plan and existing town planning schemes may not be amended unless in accordance with the guide plan.²⁵⁷ Where there is no such townplanning scheme, use of the land in the guide plan area is limited to the purpose for which it was being used immediately prior to the introduction of the guide plan.²⁵⁸

An important element of guide plan drafting is the projection of the future use of land for residential purposes. It would be possible, at least theoretically, to plan future residential areas on a non-racial or non-ethnic basis, or even to plan for an integrated society. This is, however, not what is happening in the sphere of guide plans. The planning has a

distinct racial character. New residential areas are planned specifically to link up with existing group areas. The existing pattern of group areas thus has a 'natural' influence upon the guide plan. The converse is also true in the sense that the broad structure determined by a guide plan constitutes a very important input into the planning and actual demarcation of group areas. This interconnection has, for instance, been recognized by the Guide Plan Committee for the Cape Metropolitan area:

'Since the demarcation of group areas has a determining influence on metropolitan structure, the Committee feels it is necessary to give a general indication in its discussions of the possible group structure of the areas being considered for future township development. It must be stressed, however, that the planning of the group character of such areas can only be completed after an in-depth study by the Group Areas Board in terms of the provisions of the Group Areas Act.'²⁵⁹

When the actual proposals of this Committee are examined it turns out that they give far more than 'a general indication' of the projected group character of land set aside for residential use. The projected needs of the various population groups (Whites, Coloureds, Indians and Blacks) are considered separately and the report even contains a map indicating the main future urban areas on a racial basis.²⁶⁰ The guide plan is also drawn up in the context of and with deference to existing government policies. Specific reference is made in the Cape Metropolitan Guide Plan to 'government decisions with formative spacial implications in the metropolitan context',²⁶¹ and then the following example of a government decision with formative implications is given:

'The restriction of further large Coloured Development, which means that only existing proclaimed Coloured group

areas will be developed to their full capacity, provided, however, that additions to existing Coloured group areas may be made to consolidate them.'²⁶²

In the case of Blacks the planning for residential expansion in the area of Khayelitsha provide for 'the plus/minus 400 hectares of unoccupied buffer strip required by the Department of Co-operation and Development.'²⁶³

The influence of group areas planning on guide plans is also felt on a more practical level. Both fall within Minister Chris Heunis' Department of Constitutional Development and Planning, and it transpired during an interview with a senior official in this Department that immediate control of both group areas and guide plans resort under a single official, namely the Deputy Director of Physical Planning.²⁶⁵

In the light of the foregoing it is clear that guide plans are to have a decisive influence on the future planning of group areas. Here it should be pointed out that the planning process involved in arriving at guide plans is a specific manifestation of a general trend within South African 'governmental law'. This is the 'tendency ... to remove particular functions from the political arena of decision-making on the grounds that they demand a more technical approach'.²⁶⁶ The Group Areas Act still envisages some - albeit very limited - public participation in the process leading to the proclamation of group areas and many individuals and non-governmental bodies (such as the Transvaal Indian Congress²⁶⁷) have fought hard and long to try and infuse some justice into this process. By way of contrast, the guide plan process is a highly technocratic one. It would appear, for instance, that of the 51 members of the Guide Plan Committee for the Cape Metropolitan area only 2 were not connected with central

or local government bodies.²⁶⁸ And the influence of central government structures, moreover, appears to be predominant.

Our present discussion on guide plans can thus be summarised by saying that these plans are having a decisive influence upon the demarcation of future group areas. Only when the role of guide plans is borne in mind can the present machinery for the proclamation of group areas be seen in a proper perspective.

2.6 *Local Government Provisions*

2.6.1 *Introduction*

The constitutional crisis of the 1950's saw the removal of Coloured and Indian voters from the Parliamentary roll but their removal from the Municipal rolls was only finally effected in 1971.²⁷⁰ Whilst the participation of Coloureds and Indians in municipal government had not been significant, it had not been trivial either in areas such as Cape Town. During 1949 there were, for instance, 5 coloured councillors out of a total of 45 on the Cape Town City Council.²⁷¹ Some of these Coloured councillors actively pleaded the lot of the poorer areas where the Coloureds tended to live.²⁷²

The position of Coloureds and Indians with regard to local authorities has in a sense mirrored the development with regard to the higher levels of government: a removal from involvement with 'White' institutions and a progressive development of 'own' institutions for these groups. At the local government level the Group Areas Act has been of central importance to this process. Key provisions relating to Coloured and Indian local government have been contained in the Act and the territorial jurisdiction

of the relevant Coloured and Indian bodies has been tied to group areas. Through the years the 'own' local government institutions for Coloureds and Indians have been strengthened and this has led to a concomitant increase in the importance of group areas. The more established these bodies became and the more powers they were granted, the more group areas became entrenched. By tying group areas to government institutions in this direct way, the constitutional significance of group areas has been increased. The latest development, namely the creation of Regional Services Councils, is a prime example of this.

We propose now to deal firstly with the legal position relating to local government institutions under the Act and then to look at the problems besetting these authorities. The position of Regional Services Councils will be analysed in chapter 7.3.

2.6.2 *The legal position*

Analysis of the legislation from the first Group Areas Act onwards reveals two broad trends: first, the progressive strengthening of the position of Coloured and Indian local government bodies, also vis-à-vis their White counterparts; secondly, and more recently, the incorporation of the administration of Coloured and Indian group areas within the differentiated structure of the government's present quasi-consociational or pluralistic constitutional model.

The 1950 and 1957 Group Areas Acts contained rather vague provisions providing for the institution of 'governing bodies' in ('non-White') group areas.²⁷³ These provisions were described as 'measures of positive apartheid' by the Minister of the Interior,

during the second reading debate on the original Bill.²⁷⁴ The early legislation provided that these 'governing bodies' would have such powers and functions as may be prescribed by regulation, and it was envisaged that they would exercise such powers and functions under the supervision of the (White) local authority in whose area the group area in question was situated. The situation remained dormant, however, until 1962, when the Group Areas Amendment Act 49 of 1962 'established the trajectory of development of local government for Coloured and Indian people'.²⁷⁵ The Act presently provides²⁷⁶ for successive stages of development in the form of consultative committees, management committees and eventually fully fledged 'non-White' local authorities for Coloured and Indian group areas. These local government provisions have been supplemented by provincial ordinances²⁷⁷ authorising the Administrator of the province in question to establish consultative committees, management committees or 'ethnic' local authorities. After 1973 no more new consultative committees were created²⁷⁸ and in the Cape Province all such committees were converted to management committees during 1978.²⁷⁹

As at 1982, the overall position was as follows:²⁸⁰

1 *Local authorities*

	<i>Coloured</i>	<i>Indian</i>	<i>Total</i>
Cape	1	0	1
Natal	$\frac{0}{1}$	$\frac{4}{4}$	$\frac{4}{5}$

2 *Management committees (in Natal known as Local Affairs Committees)*

	<i>Coloured</i>	<i>Indian</i>	<i>Total</i>
Cape	158	7	165
Natal	7	15	22
OFS	6	0	6
Tvl	$\frac{18}{189}$	$\frac{3}{25}$	$\frac{21}{214}$

3 *Consultative committees*

Only in respect of Indians in the Transvaal: 33.

* * * * *

Although the Act and the provincial legislation dealing with management committees envisage that these bodies may be vested with certain functions and duties, the pattern up to now has been to confine them to a consultative role. To strengthen their position in this regard the Promotion of Local Government Affairs Act 91 of 1983 provides in s 17 that the Minister may in consultation with the relevant Administrator make regulations aimed at the improvement of communication between White local authorities and the Coloured and Indian local government bodies. The position of the latter is the strongest in Transvaal and the Cape Province.²⁸¹ In these provinces budget propohch have

a direct bearing on the area for which a management committee has been established have to be jointly considered by a committee of the local authority and members of the management committee before the local authority takes a final decision on the budget. Furthermore, local authorities in these provinces are required to take at least one of certain specified measures (such as the attendance by members of the management committee of meetings of committees of the local authority) 'in order to improve the communication' between the bodies.²⁸² As pointed out in 2.6.3 below, the consultative role played by management committees has not been a success upon any analysis.

Since the mid-60's various government committees have investigated and reported on local government in South Africa and in particular on the management committee system. The reports in question all concluded that it was not possible to establish viable autonomous local authorities for Coloureds and Indians on any significant scale. This was particularly borne out by the findings of the Yeld and Slatter committees in the late 70's.²⁸³ This perceived limitation has been an important stimulus to the creation of a system of Regional Services Councils. It also prompted the government to consider measures by which *relative autonomy* could be conferred upon management committees. This led to the enactment, during 1985, of section 17B of the promotion of Local Government Affairs Act 1983. In terms of this section the Administrator may transfer to a management committee the rights, powers and duties of the local authority for the area concerned. During September 1986 such a transfer was contemplated in respect

of the Athlone and District Management Committee in Cape Town.²⁸⁴ The Provincial Administration suggested that functions such as the construction of sport and other public amenities, property leasing, new housing projects and self-help schemes be transferred from the Cape Town City Council to this management committee, and it is envisaged that the management committee would have its own budget, which would be jointly approved by itself and the City Council. Section 17B of the Promotion of Local Government Affairs Act 1983 thus represents something of a halfway house in the process of creating autonomous ethnic local authorities for Coloureds and Indians. Through the use of this section funds can be channelled from White local authorities to management committees on a selective basis. It is of interest to note that the functions which stand to be transferred to the Athlone and District Management Committee closely mirror the so-called 'soft services' which first-tier local authorities are to provide under the the system of Regional Services Councils.

Finally, the relationship between the local government facet of group areas and central government structures should be sketched. As is now well known, the Republic of South Africa Constitution Act 1110 of 1983 draws a distinction between 'own' and 'general' affairs. Ultimately the decision as to what constitutes own affairs and what general affairs lies with the State President in terms of section 16 of the Constitution Act. Schedule 1 of this Act does, however, provide a basic scheme of division, and item 6 thereof lists as an own affairs matter:

'Local government within any area declared by or under any general law as a local government area for the population

group in question, but subject to any general law in relation to matters to be administered on local government level on a joint basis, and excluding -

(a) any matter assigned to local authorities by or under any general law; and

(b) exercised by any local authority, otherwise in accordance with general policy determined by the State President acting as provided in section 1(1)(b) of any power to raise loans.'

Item 6 is thus to be activated through the declaration of local government areas. In the case of the Cape Province this was, for instance, recently done by means of the Declaration of Local Government Areas Ordinance 18 of 1986.²⁸⁵ In terms of this Ordinance every group area for the Coloured and Indian groups situated within the area of jurisdiction of a local authority shall be deemed to have been declared a local government area. The area of jurisdiction of a local authority, other than any portion thereof which is comprised of a Coloured or Indian group area or an area set aside for Blacks, shall be deemed to be a local government area for the White population group. The effect of this Ordinance is to tie White, Coloured and Indian group areas to respectively the own affairs administrations of the House of Assembly, House of Representatives and House of Delegates. The relevant Ministers in the own affairs administrations will now represent 'their' group areas on, for instance, the Council for the Co-ordination of Local Government Affairs²⁸⁶ and Appeal Boards set up under the Regional Service Councils Act 109 of 1985.²⁸⁷ Group areas thus constitute vital building blocks in the government's constitutional program - a

point to which we shall return in our discussion of Regional Services Councils.

EVALUATION

2.6.3 Management Committees: a brief evaluation

The system of management committees is simply not working. In evaluating the reasons for this situation it is important to try and establish whether the problems are inherent or systematic or whether they can be overcome by the present government's reform package. The problems besetting the management committee system manifest themselves generally in three areas. These will now be discussed in turn.

2.6.3.1 Limited Powers and Lack of Fiscal Base

Management committees lack both executive powers and an independent fiscal base. The two are, of course, interrelated. At present management committees are limited to a consultative role but without an independent fiscal base they would in any event not be able to provide services, the provision of which lies at the heart of local government. The management committees thus find themselves powerless junior partners in a government structure which is largely rejected by their own communities. Thus the attitude of the coloured inhabitants of Atlantis, a new outlying development in the vicinity of Cape Town suffering a severe economic recession, has been described as follows during the course of 1985:

'They blame their situation on the apartheid system - the central government (which put them where they are), the Divisional Council (which is threatening to throw them out of their homes) and the management committee (which has done nothing to stop the rot).'

2.6.3.2 Legitimacy crisis

Management committees have been facing a severe legitimacy crisis. First, they are seen by the largest part of their

communities as part of the apartheid structure and as such rejected. Various sources have documented the very low polls recorded at the election of the management committees²⁹⁰. At a by-election of the Atlantis management committee during 1984 a poll of only 1,05% of registered voters was recorded.²⁹¹

Second, as creatures of apartheid, management committees often come into conflict with community organizations which reject apartheid. Particularly in areas such as the Cape, these community organizations (civics and residents' associations) have been in existence for many years - the Gleemore and Cape Flats Civic Association has, for instance, been in existence since 1926. These community organizations have consistently and over a very long period of time rejected imposed and racially-defined representative structures, and have taken a strong 'non-collaboration stance'.²⁹² In certain areas in the Cape, such as Atlantis, there has been a long battle over the question whether the White local authority should deal with the management committee or the popularly supported Residents' Association, or possibly with both.²⁹³

Third, the management committees themselves have displayed considerable uncertainty, ambivalence and even contradiction with regard to their own political role. This ties in with the unease with which the parties in the House of Representatives and House of Delegates operate within the apartheid structures. The Coloured Labour party has, for instance, repeatedly called for the immediate repeal of the Group Areas Act²⁹⁴ - yet this party voted for the Local Government Affairs Amendment Act 1985, which

provided for the granting of wider executive powers to Coloured and Indian local authorities. The Indian House of Delegates rejected this measure unanimously, but it was thereupon effectively passed by the President's Council in terms of the 'deadlock' provisions of the Constitutional Act.²⁹⁵ The Coloured Labour party has also resolved to 'keep a tight grip on management committees to derive maximum political benefit from the system for the party'.²⁹⁶ The majority parties operating within the context of the House of Representatives and House of Delegates have, of course, provided the major inputs into the management committee system.²⁹⁷ The umbrella bodies representing management committees have also manifested considerable ambivalence with regard to the system. Various government committees have noted the objections by such bodies against the apartheid nature of the system²⁹⁸ and bodies such as the Transvaal Association of Management Committees and the National Association of Management Committees have repeatedly called for direct representation on hitherto White City and Town Councils.²⁹⁹ At the twelfth Annual Conference of the Association of Management Committees in September 1985 it was even resolved that all members serving on management committees would resign if they were not given direct representation on local authorities within a year's time. However, at the recent conference of this organization, held during September 1986, this decision to disband was rescinded with an overwhelming majority.³⁰⁰

3.6.3.3 *Disharmonious relationship with White authorities*

Management committees have been saddled with a consultative role only and they thus stand or fall by the effectiveness of their representations. During 1982 the President's Council recorded, however, 'that very often their representations do not receive sympathetic attention'.³⁰¹ Such complaints appear to be widespread and Municipal Councils such as the Cape Town City Council have been strongly attacked by Coloured members of Parliament. The City Council's Executive Committee even thought it necessary to issue a detailed statement to dispel any impression 'that the Cape Town City Council's treatment of its management committees has been unsatisfactory'.³⁰³ In this statement it was pointed out that the Council actually did more than was required of it in terms of the relevant regulations.

In their relationship with White local authorities management committees appear to be caught in an ideological cross-fire. Both conservative and 'liberal' authorities are unwilling to co-operate with them. The conservative ones dismiss them as politically immature; the more 'liberal' authorities (like the Cape Town City Council) argue for direct representation by all Municipal voters and reject ethnicity as a key to local government.³⁰⁴

3.6.4 *Conclusions*

The local government facet of group areas illustrate both the controversiality and importance of this phenomenon in a constitutional context. Although the government appears to be aware of the severe problems besetting management committees and

ethnic local authorities in general, it seems determined to press ahead with reform plans built upon the existing system. Here the new system of Regional Services Councils is of central importance. This system will be evaluated in chapter 7. It suffices to say here that although the system may be able to resolve or alleviate some of the more technical problems besetting management committees such as limited powers and a lack of a proper fiscal base, it will not remove the more serious problems affecting and undermining the political credibility and legitimacy of these bodies.

2.7 Mechanisms for enforcement of Group Areas Act

Here two broad categories of enforcement mechanisms should be distinguished. The first category consists of those measures enacted to secure that the general goals of the Act are achieved, which apply irrespective of whether any contravention of the Act is in issue. A prime example would be the provisions enabling the government departments concerned to clear group areas of disqualified persons. It is a feature of group areas legislation that these measures are mostly contained in the 'sister' act of the Group Areas Act, namely the Community Development Act 3 of 1966, which is to be discussed under 3 herebelow.

Our present concern is with the second category of enforcement mechanisms, namely those aimed at *preventing, nullifying or punishing contraventions* of the Act. These will now be considered.

7.2.1 Criminal Prosecutions

This constitutes the most general enforcement mechanism in the Act. Section 46 creates a host of offences, covering not only all forms of unlawful occupation and the unlawful holding, acquisition or disposal of immovable property, but also failure to co-operate with enquiries by the Group Areas Board or South African Police.

Where prosecutions are brought under the Act, the racial group of the accused is often in issue. As explained in 2.2.3 above, there exist a number of prescriptions and presumptions with regard to group membership, and the interrelationship between those provisions is a matter of some complexity. This may be illustrated by taking as an example the prosecution of someone alleged to be Coloured for living unlawfully in a White area where the accused claims to be a member of the White group. In terms of s 45(4) the State would be aided by the presumption that any such allegation in an indictment or charge is presumed to be correct unless the contrary is proved. Yet in terms of s 45(1) anyone 'in appearance obviously ... a white person' is presumed to be White, unless the contrary is proved. As suggested in 2.2.3(i) above, the provisions can probably be reconciled by starting the inquiry with the issue of 'obvious whiteness'. If this is in dispute, the accused will have to prove it upon a balance of probabilities - by reason of the presumption in s 45(4) aiding the State. If such 'whiteness' were to be established, the State could only succeed by proving (beyond reasonable doubt) general acceptance as a member of the

Coloured group. If such 'whiteness' is not established, then the accused would have to prove (upon a balance of probabilities)³⁰⁵ general acceptance as a White.

In terms of a general deterrence theory of criminal punishment, prosecutions under the Act should tend to enforce the Act by deterring would-be offenders through the threat of fines and imprisonment. It is important to note, however, that the Act does not merely rely on fines and imprisonment as the (probable) outcome of a successful prosecution. It is specifically provided that a court convicting a person for illegal occupation may, in addition to any penalty imposed:

'(i) make an order for the ejectment, at State expense, from such land or premises, of such person and any other person of the same group proved to be living with him whether permanently or otherwise;

(ii) make such orders, give such instructions and confer such authority as it may deem necessary to give effect to the said order of ejectment and for the removal from such land and premises of the possessions of any person to be ejected.³⁰⁶

It is further provided that such an order may be made against any person living with the convicted person 'without prior notice having been given to such first-mentioned person'.³⁰⁷ Originally the earlier legislation only provided that the accused, once convicted,³⁰⁸ had to be ordered to vacate the property and would commit a further offence if he stayed on. By Act 56 of 1965 provisions substantially similar to the present ones were placed in the Statute book.³⁰⁹

This led to the sentencing practice whereby persons convicted under the Act for illegal occupation would be fined and would then also have an additional sentence imposed upon them,

suspended on condition that they vacate the premises by a certain date or obtain the necessary permit. It was then further, as a matter of course, ordered that upon failure to vacate by the stated date, the accused could be ejected, at State expense, and the messenger of the court or officials of the department concerned were authorised to effect the ejection.³¹⁰

In 1982 in *S v Govender*³¹¹ the Transvaal Supreme Court held, however, in a decision which went unreported in the Law Reports for nearly four years, that such an ejection order should not be an automatic consequence of conviction. It was held that the court had a discretion in this regard; it 'may' (not shall)³¹² issue such order, but only after a proper enquiry:

'The prosecutor, if requested by an interested party to seek such an order, would be obliged to place material before the court to justify the exercise of the court's discretion to grant the ejection order. I cannot imagine any circumstances which would justify a court making such an order *mero motu*. Many considerations may be relevant to the exercise of the court's discretion, for example the nature of the area concerned; the attitude of the neighbours; the policy and views of the Department of Community Development or any other interested Department of State; the attitude of the landlord; the prospects of a permit being issued for continued lawful occupation of the premises; the personal hardship which such an order may cause and the availability of alternative accommodation. I cite these merely as examples of the type of circumstance which could be relevant to the exercise of the magistrate's discretion.'³¹³

In September 1986 the Deputy Minister of Constitutional Development and Planning was reported as saying that the *Govender* decision (of which the department has been aware since 1982) had caused prosecutions under the Act 'to stop', as the difficulty to prove the availability of alternative accommodation for the accused rendered prosecutions futile in the view of the Attorneys-General.³¹⁴ He added that he would act

'administratively' against offenders, and would have their property sold.³¹⁵

It is certainly not true that all prosecutions for unlawful occupation have been stopped by the *Govender* decision, and the recent prosecutions in the *Coates*,³¹⁶ *Smit*³¹⁷ and *Meintjies*³¹⁸ cases were reported in the newspapers. The office of the Attorney-General of the Cape confirmed that prosecutions were still taking place, but that the matter was one of those regarded as 'sensitive', by reason of the far-reaching consequences which may follow upon conviction. Prosecutions had to be cleared by the Attorney General's office, but would in all probability be brought where the complainant insisted upon it.^{318a} There appears to have been some amelioration in respect of the sentencing of group areas offenders which seems to reflect an appreciation of the hardships caused by the Act. In two recent cases in Cape Town, *S v Smit*^{318b} and *S v Meintjies*^{318c}, the accused were only cautioned to obtain a permit and in the *Meintjies* case the magistrate (who tried both matters) observed that he could not change the laws, he only applied them - indicating sympathy for the accused.

Finally, criminal prosecutions under the Act and the concomitant evictions should be seen in the broader context of the vast array of criminal measures which exists in South Africa to control the occupation of land. The government's present strategy of 'orderly urbanisation' relies strongly upon those penal provisions which are contained in *inter alia* the Prevention

of Illegal Squatting Act 1951, the Group Areas Act, the Slums Act 1979 and the Trespass Act 1959.³¹⁹

2.7.2 Measures against nominees

The Group Areas Act and its predecessors, which curtailed particularly the commercial activities of Asiatics, have given rise to a wide-spread, elaborate system of nominee holdings³²⁰ - described by the Strydom Committee as 'ingenious and cunning co-operation over group boundaries'.³²¹ When the matter was debated in Parliament during 1984 NP members alleged that the professed political conservatism of CP members 'did not prevent some of them from acting as nominees for Indian businesses in the Transvaal'.³²² A common form of nominee holding is the '51/49%' business: a disqualified person holds ostensibly only a 49 per cent share, but really runs the business using an 'in-group' member as a front. Various techniques have been developed to protect the real owner - eg the trading account of the business, in the name of the nominee, is kept in the red.

In the Act a strenuous effort has been made to stamp out the nominee system. Section 40 in terms prohibits the acquisition or holding of immovable property on behalf of a disqualified person, and it was recently affirmed in *Essop v Abdullah* that any agreement which contravenes the section is void.³²³ Section 39 strikes down any 'condition or provision' which seeks to empower any disqualified person to exercise 'any influence upon the transfer of immovable property'. In terms of s 35 no-one (not even a qualified person) may occupy land or premises for any purpose connected with the *unauthorised* use of such property. So

White employees of an Indian company may not run its premises in a White area.

Where property acquired or held in contravention of s 40 is sold up by ministerial direction (as discussed under 2.7.4 herebelow), the disqualified person on whose behalf it was unlawfully acquired or held is not entitled to the proceeds thereof.³²⁴

2.7.3 *Restricting transfer of immovable property in contravention of the Act*

Transfer in the Deeds Office of immovable property situated in a controlled area or group area may only be registered upon proof by the transferee that he is not a disqualified person and that the transferor may lawfully dispose of the property to him;³²⁵ the first limb of this dual test is obviously the important one. Section 47(1)(c) of the Act envisages that more detailed controls may be laid down in regulations, and the regulations in question³²⁶ require that in the case of the transferor or transferee being natural persons, group identity should be proved on affidavit by the person concerned or certain named officials and office-bearers, or by a certificate of a magistrate, attorney or conveyancer stating that from his personal knowledge or from enquiries made by him, he is satisfied of the person's group identity.³²⁷ In the case of a company, the group of every person holding a controlling interest has to be proved by an affidavit made by an officer³²⁸ of the company concerned. In terms of s 42 the registrar of deeds may call for 'further proof', but this is not done in practice.

Section 42(2) spells out that registration in contravention of these requirements is not invalid, but remains subject to any penalty incurred under the Act and, of course, forced disposal under s 41 (discussed herebelow).

Section 41 of the Act contains further provisions restricting transfer of immovable property in the deeds office once the property is subject to notice enforcing the sale thereof in terms of the section.

2.7.4 *Disposal of property illegally held*

The Minister is provided with a potent enforcement weapon by s 41, which empowers him to cause immovable property acquired or held in contravention of any provision of the Act or any condition in a permit, to be sold - either out of hand or by public tender. The section draws a threefold distinction as to what happens to the proceeds of such an enforced sale.

The most benevolent treatment is reserved for those cases³²⁹ where the contravention can generally³³⁰ be said to have occurred not by reason of a deliberate act of the holder or acquirer of the property, but by reason of changed circumstances (eg the individual or company concerned changes his or its group)³³¹ or by reason of the application of the Act (eg the 10 years grace granted to disqualified companies holding property in a group area has run out).³²² Once the costs of the sale, bond debts and similar charges have been paid, the person or company concerned is entitled to the balance.

The harshest treatment is reserved for cases involving nominees - here the section prohibits any payment to the person on whose behalf the property was acquired or held.³³³

All other instances constitute the third or middle category - the nett proceeds are paid into the Community Development Fund, unless the Minister directs otherwise.³³⁴ (On the basis of the argument advanced herebelow in relation to the *Mariam* case, *audi alteram partem* should apply in this context, and the Minister should give the parties involved a hearing before directing the proceeds to be paid into the Fund.)

Section 41(1) provides that the Minister must give the person concerned and any bondholder three months written notice of the intended sale. The question whether the Minister's decision to issue such a notice attracts the *audi alteram partem* principle, came before the Appellate Division in the well-known and much criticized decision of *Minister of the Interior v Mariam*.³³⁵ It was held that the principle did not apply. First, because the real cause of the prejudice suffered by Mariam was said not to be the Minister's decision, but 'the operation of the provisions of the section upon the facts of the case' - by which is presumably meant the mere fact that her property fell within the ambit of the section.³³⁶ Secondly, it was said that the Minister's decision involved 'an absolute and purely administrative discretion' because it did not involve an inquiry into and consideration of facts in regard to which there may be a conflict.³³⁷

This decision is, with respect, wholly unconvincing and represents a low-water mark in the Appellate Division's treatment of the *audi alteram partem* principle.³³⁸ The first ground of the decision does not make sense. The court itself recognised that the question whether the property fell within the ambit of the section depended upon (objective) jurisdictional facts. Once this had been determined, an entirely distinct, further question as to the *discretion to act*, vested in the Minister, arose. There is certainly no indication in the legislation that the Minister was under a *duty* to resort to an enforced sale; s 41(8) even empowers him to withdraw the notice of the intended sale.³³⁹ All in all his decision to enforce a sale poses a paradigm case for the application of the rules of natural justice: he exercises a discretion which prejudicially affects the (property) rights of another.

The second ground of the decision applies an overly strict *lis inter partes* test, and in a sense begs the question. Mariam may well have been able to put (potentially controversial) facts before the Minister which may have persuaded him not to enforce a sale - *eg to postpone it*.

A further point which was not argued in *Mariam* also merits attention. It can certainly be argued, on the basis of the recent *Momoniat* decision,³⁴⁰ that even if the Minister has no duty to hear the person affected before sending out the notice, he has a duty to do so when the person makes representations in response to the notice. The Minister would be obliged 'to give his bona fide attention and consideration to any representations

made to him'.³⁴¹ This may be seen as one of the purposes of the notice. And, as pointed out above, the Minister is explicitly given the power to withdraw any notice. The argument is however somewhat of a double-edged sword, because on the basis of *Momoniat* the later duty to consider representations would exclude *audi alteram partem* prior to the issue of the notice.

2.7.5 Forfeiture of shares and debentures

Section 36 gives the Minister, in respect of shares and debentures in private companies which hold immovable property in group areas, a similar power to s 41, discussed in 2.7.4 immediately above. He may declare such shares and debentures held by or pledged to a disqualified person to be forfeited to the State upon 3 months written notice to the disqualified person concerned. *Audi alteram partem* should apply to any such decision, but here again the decision in *Mariam* points the other way.

2.7.6 Control of licences required for the purposes of trade, business or occupation

Both the original and the 1957 Acts contained elaborate provisions aimed at preventing the issue of licences to carry on any business, trade or occupation to disqualified persons. The original Act *inter alia* provided that the applicant for the licence should submit a full statement relating to the application, and that the licensing authority should report 'suspicious' cases to the chief inspector of the Board. The latter could then apply to a magistrate to have the licence set aside.³⁴² The 1957 Act required a clearance certificate by an

officer of the Board before the licence could be issued.³⁴³ The position is presently regulated by s 43A of the Community Development Act 3 of 1966. Subsection (1) prohibits licensing authorities issuing licences required in terms 'of any ordinance of a province',³⁴⁴ to issue any licence required for the carrying on of any trade or occupation 'for the first time' to any disqualified person after a group area has been proclaimed under the Group Areas Act 1966. Subsection (2) thereupon grants the Minister the power to prohibit the licensing authority from renewing to 'any person' any licence 'referred to in subsection (1)'. In the *Suliman* case³⁴⁵ the latter phrase was widely construed, as referring to all licences for trade and occupation, and not only to those that had been issued for the first time after an area has been proclaimed a group area.

The power to prohibit the renewal of licences contained in s 43A(2) applies in respect of 'any person', not 'any *disqualified* person'. The context would, however, suggest that this draconian power must at least be limited by requiring the Minister to have reasonable grounds to believe that the person in question was a disqualified person.

There is authority for the proposition that a licensing authority should not embark upon an investigation of, and decision upon, an involved question of law and fact in order to decide whether an applicant for a licence has a right to occupy the premises in question; it must act upon the applicant's *prima facie* right of occupation in deciding the application. In the context of s 43A it would thus only be entitled to refuse a

licence on the basis that the applicant was 'clearly' a disqualified person. If the applicant who has been refused a licence were to seek a *mandamus* against the licensing authority, he would, however, seem to bear the onus of proving (upon a balance of probabilities) that he was not a disqualified person, by reason of the general principle that the applicant bears the overall onus in review proceedings,³⁴⁷ although strictly speaking he should only have to prove that the local authority had not been entitled to reject his application.³⁴⁸

2.7.7 *Prohibition of certain agreements*

In several instances³⁴⁹ the Group Areas Act expressly prohibits certain agreements, such as the selling of land in a border strip,³⁵⁰ and in one instance, relating to any written 'condition or provision' empowering any disqualified person to exercise influence upon the transfer of immovable property, the agreement embodying such condition or provision is declared to be null and void.³⁵¹

In the cases of such express prohibition, the agreement would be unenforceable;³⁵² some of the consequences which flow from this situation will be discussed in 2.7.8 immediately below.

In practically all instances of prohibitions contained in the Group Areas Act, the prohibition may be suspended by virtue of a permit issued, until recently by the Department of Constitutional Development and Planning, and presently by the provincial administrations. The Act does not specify exactly when the permit should be obtained, that is in the case of a

prohibited agreement, whether it should be obtained prior to the actual conclusion of the agreement.

The general practice is, however, to conclude the prohibited agreement, subject to the suspensive condition that a suitable permit be obtained. This practice has been sanctioned by the courts³⁵³ and has also been accepted by the authorities concerned.³⁵⁴ Unless the contract determines otherwise, either party can apply for the permit.³⁵⁵ If it is refused, or not granted within a reasonable period of time, the agreement would become unenforceable through impossibility of performance.³⁵⁶

2.7.8 *Implied nullification of transactions contravening the Act*

The Act contains multiple prohibitions. An important and difficult issue is whether any agreement or transaction which brings about or furthers one of the prohibited acts or situations, is itself illegal and thus unenforceable. In the previous paragraph we discussed instances where the legislature has actually specified that certain agreements are themselves prohibited and in one instance, that it is null and void; presently we are concerned with the question whether, in the absence of such explicit ban on agreements, the prohibition of a certain act (such as the acquisition of immovable property by a disqualified person) carries with it an implied prohibition against an agreement aimed at achieving or furthering the prohibited act (such as a contract of sale with a disqualified person as purchaser).

From a social control perspective it may have suited the group areas legislators to have ordained that all such agreements

are illegal and unenforceable. But in the absence of a definite direction by the legislators on the issue, the question is in effect left to the courts to determine in specific instances. The principles evolved by the courts³⁵⁷ present a complex picture - no doubt because the context in which the question arises highlights other factors besides the social control function of the legislation. In the present context the illegality of an agreement would most commonly be raised by a party resisting enforcement of the agreement, usually a party who all along knew of the prohibition. In deciding whether to uphold such a defence, the court cannot but consider issues such as the interference with freedom of contract it would entail, fairness between the parties, the inconvenience of setting aside a commercial bargain and how important striking down the agreement really is for the upholding of the Act.

Although these and other general considerations enter into the enquiry undertaken by the court, the enquiry is shaped by the statutory prohibition, in the sense that this forms the starting point. Thus the courts say that the 'real question' is whether the 'intention of the legislature' is to render the agreement furthering the prohibited act illegal and thus unenforceable³⁵⁸ this does not really take the matter much further because in the present context this intention is, *a priori*, unclear. At a more concrete level, though, the point of departure is that an agreement or transaction in conflict with a statutory provision, is presumed to be illegal and unenforceable. (This causes social control legislation such as the Group Areas Act which contains

multiple prohibitions to cast an ill-defined but menacing shadow over the enforceability of contracts.)³⁵⁹ This presumption of illegality is then further tested against more specific considerations, which are of a linguistic nature (how strongly the prohibition has been worded) and of a policy nature: would recognition of the agreement by the court bring about, or give legal sanction to, the very situation which the legislature wished to prevent; does the existence of penalties vis-à-vis the prohibited act suffice, with the result that invalidity of the agreement is not additionally required; would invalidity not result in greater inconvenience and impropriety than upholding the agreement.³⁶⁰ The recent suggestion in *Essop v Abdullah*^{360a} that the court actually has a *discretion* in deciding whether or not a contract is against public policy and thus unenforceable, puts the matter too high. The question obviously involves a value judgment, but as the Appellate Division pointed out in the *Setsokeane* case, this should not be equated with 'discretion'.^{360b} Applying these principles in the sphere of group areas legislation and its antecedents, it has been held in earlier cases that agreements to acquire immovable property (such as agreements of sale) involving disqualified persons were illegal and unenforceable.³⁶¹ But the earlier legislation specifically prohibited agreements whereby a disqualified person acquired or purported to acquire or would acquire immovable property.³⁶² Presently the Act only prohibits the acquisition of immovable property³⁶³ and neither the definition of 'acquire' nor (the very wide definition) of 'immovable property',³⁶⁴ refers in

terms to *agreements to acquire* concluded by a disqualified person. It was thus held in *Karjieker v Karjieker*³⁶⁵ that such agreements are not illegal; the party seeking to enforce the agreement would only have to obtain a permit *prior to transfer* (ie prior to actual acquisition upon registration of transfer.) Similar reasoning was applied in the *Ornelas*³⁶⁶ case, in upholding the sale of a business where disqualified persons (Blacks) would use the 'eating house' facilities of the business; this side of the business infringed the prohibition against occupation by disqualified persons contained in s 20 of the Act. In reaching its decision, the court referred to several factors, *inter alia* that in other instances the legislature had chosen to expressly prohibit agreements; that criminal sanctions already existed which would penalise illegal occupants and those allowing them to occupy; and that enforcement of the agreement would not frustrate the objects of the Act.³⁶⁷

In respect of leases, the position is, however, different. The wide definition of 'immovable property' in s 1 of the Act includes 'any lease or sublease'. So the conclusion of an agreement of lease amounts to the 'acquisition of immovable property' (!) and the involvement of a disqualified lessee would render the lease illegal and unenforceable.³⁶⁸ The lessor or lessee would as a result not be able to enforce any of the terms of the lease (*ex turpi causa non oritur actio*), but the lessor would probably be able to secure ejectment of the lessee by giving him notice in terms of the lease, or upon effluxion of the lease period. In *Jaybhay v Cassim*³⁶⁹ the Appellate Division held

that the maxim '*in pari delicto potior est conditio possidentis/defendentis*' ('where parties partake in an illegal enterprise the position of the possessor/defendant is the stronger') was not of unyielding application. It may be relaxed to prevent injustice and promote public policy, by for instance allowing the lessor to an illegal lease to recover possession of the premises from the lessee. This he would be able to do if the lease had expired or if he had given the lessee notice in terms of the (illegal) lease,³⁷⁰ because the equities would then lie with the lessor.

In this situation a disqualified person leasing property contrary to the Group Areas Act is thus not really prejudiced by the illegality of the lease, but his position is nevertheless precarious. In his case, '*huur gaat voor koop*' does not apply and the purchaser of the premises could summarily eject him.³⁷¹ It would also appear that if he lives in rent controlled premises, the illegality of the lease would prevent him from relying on the protection of the Rent Control Act 80 of 1976.³⁷²

2.8 The Act and executive discretion

2.8.1 Introduction

Analysis of the law and practice in respect of group areas reveals the cardinal role played by executive discretion. It would not be an exaggeration to say that the implementation and application of the entire Act hinges upon executive discretion. This proposition will be substantiated by the examination of four facets of group areas legislation and practice, namely Discretion vis-à-vis the creation of group areas; Delegation of powers;

The permit system, and Discretionary enforcement of group areas legislation.

Before examining these four facets, a brief theoretical perspective will be given of the issue of executive discretion in the context of constitutional and administrative law. This touches upon one of the most important and complex problems in these fields of law,³⁷³ and the discussion that follows is obviously not meant to be exhaustive. Group areas do, however, provide a valuable testing ground for the general concerns which have been expressed in relation to executive discretion. Reference will be made to these concerns after a brief elucidation of the concept of 'discretion'.

'Discretion' in the present context may be defined as existing where there is

'the power to make choices between causes of action of where, even though the end is specified, a choice exists as to how that end should be reached.'³⁷⁴

At a fairly uncomplicated level it may be seen as involving the mental process of establishing certain facts and circumstances, and the exercise, in the light thereof, of a choice or choices resulting in a decision.³⁷⁵ The elements of evaluation and choice are thus crucial to discretion. The subjectivity of the evaluation and the degree of choice involved in the exercise of various discretionary powers differ considerably. Although these differences are of degree rather than kind, and should properly be seen as forming part of a continuum or spectrum, there is a tendency in a legal context to draw distinctions of kind between

types of discretionary powers, and to attach important consequences to the resultant classification.³⁷⁶

This is particularly so in administrative law. As a general proposition it may be stated that the greater the element of subjectivity and choice involved in a discretionary power, the less protection the citizen is afforded against abuse of this power.

Thus a dichotomous distinction is drawn by the courts between objective and subjective jurisdictional facts (that is the facts upon which the exercise of discretion is premised); in the latter case, the subjective judgment of the repository of the power is final and not justiciable in a court of law.³⁷⁷ In the case of subjective jurisdictional facts the courts have often asserted that judicial review on any substantive ground other than *mala fides* and a failure to take into account relevant considerations is precluded.³⁷⁸ Moreover, wide discretionary powers are often said to involve so-called 'unbounded and purely administrative discretions',³⁷⁹ which leads to the negation of common law procedural safeguards, because the courts tend to distinguish between 'administrative' and 'quasi-judicial' discretions and then deny the applicability of the principles of natural justice such as the right to a hearing in the case of 'administrative discretions'. (Certainly in a South African context, the 'conservative' attitude of the courts in administrative law matters has contributed to the unease felt by public lawyers about wide discretionary powers.)³⁸⁰

Wide discretionary powers thus raise serious concern as to the protection of the citizen against arbitrary and oppressive administrative action. This ties in with broader constitutional considerations, namely the implications of wide discretionary powers for the applicability of the Rule of Law, principle of legality and/or *Rechtsstaat* concept. The exact interrelationship between these doctrines will not be presently explored.³⁸¹ For our purpose it suffices to say that they share a concern, stated as part of the minimum requirements of an acceptable legal order, for relatively clear, pre-announced rules or standards as a guide to conduct, particularly when basic liberties are at stake, and a testing right vested in independent courts vis-à-vis governmental action. Wide discretionary powers unchecked by procedural safeguards, such as are constantly encountered in a group areas context, conflict fundamentally with the precepts of these doctrines.

In the present context two further (interrelated) constitutional doctrines should be mentioned which stand opposed to wide discretionary powers vested in the executive. The granting of undetermined administrative powers can be said to amount to a delegation or abdication of power by a (supposedly) democratic institution (Parliament) to unelected and relatively less accountable administrators. The width of the discretion causes them in effect to make and not only apply the law.³⁸² Related to this, is the infringement of the separation of powers doctrine: one branch of government ends up exercising legislative, administrative and adjudicative functions.³⁸³

At this point two arguments may be raised against the line of reasoning adopted herein. The first argument would relate to the interrelationship between substantive and formal or procedural justice and may be put as follows: the criticisms set out above are essentially of a formal or systemical nature. But group areas legislation is *substantially* so unfair, so far removed from the material *Rechtsstaat* concept,³⁸⁴ the Rule of Law conceived as embodying substantive justice³⁸⁵ or internationally accepted notions of human rights,³⁸⁶ that the concomitant formal injustice is relatively unimportant. In terms of this argument it could be pointed out that substantive injustice in the context of group areas would lie firstly in the racial foundation of the legislation. It would thus be unacceptable even if it espoused a 'separate but equal' principle.³⁸⁷ Moreover, despite some 'separate but equal' protestations by its promoters,³⁸⁸ the legislation was destined to operate unequally, because it was bound to consolidate and strengthen the already existing privileged position of Whites. Thus Rousseau wrote in 1960 that the Act was 'completely nondiscriminatory' but that Whites were favoured as 'the result of circumstances', because they already occupied the better areas which 'must inevitably become White group areas'.³⁸⁹ In pressing the point of substantial injustice, it could then be added that an all White Group Areas Board, appointed by and responsible to the National Party government, could hardly be expected to have acted out a 'separate but equal' approach and most certainly did not do so.³⁹⁰

The cogency of this argument based on the overriding importance of the absence or presence of substantial justice in society, must be conceded, at least in part. The point should be made, however, that the grant of wide discretionary powers *facilitated the implementation of the unjust legislation*. It enabled the Act to be implemented without proper public scrutiny or enquiry. It engendered in those vested with the wide powers the attitude that members of the disadvantaged groups were objects for relocation, not fellow citizens. Officialdom could operate without the need to furnish reasons; the reports and other material on which its decisions were based could remain undisclosed. (Even in 1986 the Department concerned refused to disclose a *specimen* permit when requested by the present writer to do so for research purposes.)

The second argument that may be raised against the criticism of wide discretionary powers presented herein, would be on a different level. The charge may be made that doctrines such as the Rule of Law are premised upon a yearning for purely rule-based government from which discretion was expunged. Such a view of governmental functions, particularly in the context of the modern interventionist State, would be totally unrealistic. Thus Davis' in his seminal work *Discretionary Justice*. A preliminary enquiry,³⁹¹ criticized what he termed 'the extravagant version of the rule of law',³⁹² and there is certainly merit in this criticism. Davis also pointed out that discussion of doctrines such as the Rule of Law and principle of legality has tended to ignore any detailed examination of discretionary power; it has

totally underestimated both the extent to which discretionary power has always existed (even in Dicey's time), and its continued necessity.³⁹³ He thereupon suggested that the *optimum* level of discretionary power in the administrative process should be sought. This is important for our enquiry, because it avoids the simplistic approach of the 'extravagant version of the rule of law'. Davis suggested three broad controlling techniques:

1. *Confining discretion*, that is fixing the boundaries of the power, eliminating certain choices. Here his main (and controversial) suggestion is to allow administrative rule-making at the earliest feasible time;³⁹⁴
2. *Structuring discretion*, that is regulating the manner by which discretionary decisions are reached. Davis sees 'openness' in administration as being central to this process. The specific methods suggested to achieve this are: open plans (allowing long term planning), open policy statements, open rules, open findings, open reasons, open precedents and fair informal procedure (that is informal 'hearings along the lines required by the *audi alteram partem* principle);³⁹⁵
3. *Checking discretion* through supervision by superiors, administrative appeals and judicial review.³⁹⁶

Davis' work has provided valuable insights in the area of discretionary powers, even though its limitations should be recognized. He wrote very much within the context of American law where independent regulatory agencies (like the Federal Trade Commission) play an important role; he dealt with discretionary decisions and justice in individual cases, and not with broad

policy-making or decisions affecting segments of the population; and he probably overestimated the benevolent influence of administrative rule-making.

Many of Davis' arguments and ideas can, however, be applied in a critical appraisal of executive discretion in group areas legislation and practice. Group areas represent 'a colossal social experiment'³⁹⁷ and the combined task undertaken by the Group Areas Board and the government departments concerned approximate that of a US regulatory agency.

Executive discretion in the sphere of group areas will now be examined under the four headings indicated earlier; and thereafter Davis' suggestions on the confining, structuring and checking of discretion will be briefly related to particular facets of discretionary powers in a group areas context.

2.8.2 Discretion vis-à-vis the creation of group areas

The Act only sets up the machinery for the creation of group areas. The vital questions as to when and where group areas are to be introduced, are left to the discretion of the executive. Section 23 simply provides that the State President may 'whenever it is deemed expedient' proclaim a group area. The Act does not explicate upon what grounds this discretion should be exercised or what would, in administrative-law terms, constitute 'relevant considerations' for the exercise of this discretion. And neither the administration nor the courts in the exercise of their review powers, have 'confined' or 'structured' this discretion in the sense indicated by Davis.

As far as the administration is concerned, it has not confined its discretion, but has kept the exact policies behind group areas proclamations to itself; we have only seen the discriminatory results and have been left to guess at the precise motivations.³⁹⁸ It is true that the departments concerned have 'structured' the pre-proclamation process, as indicated in 2.5 above. But this structuring has been the very opposite to that suggested by Davis - it has resulted not in openness but in a technocratic process in which affected individuals and communities have no effective say.

As for the courts, the Appellate Division has held, in cases which could have gone the other way, that the *audi alteram partem* principle does not apply to pre-proclamation enquiries undertaken by the Group Areas Board;³⁹⁹ that the common law presumption against the use of delegated powers in a discriminatory fashion is inapplicable to the proclaiming of group areas;⁴⁰⁰ that group areas proclamations are not invalidated by the unreasonable effects they may have;⁴⁰¹ and that the Minister need not consider the question of the availability of suitable alternative accommodation when terminating lawful occupation of disqualified persons in a group area under s 23(2)(b).⁴⁰²

2.8.3 Delegation of powers

The Act provides that the executive may, through delegated legislation, expand or contract the application of the Act in material respects. The best illustration of this is the concept of 'occupation'. Section 1(4) leaves it to the State President to expand the meaning of 'occupation' and such expansion has been

effected through a series of successive proclamations.⁴⁰³ This has caused the Act to be applied in a sphere not originally envisaged, namely to bring about social apartheid.⁴⁰⁴ Furthermore, the Act lists certain exemptions from the prohibitions against occupation in controlled, specified and group areas, which apply only to the extent that the State President declares them to apply.⁴⁰⁵ Even more important is the power given to the State President to create entirely new categories of exempted occupation.⁴⁰⁶ As indicated in 2.4 above, these exempted categories created by delegated legislation are amongst the most important provisions to be found in group areas legislation.

As far as administrative powers are concerned, the Minister is granted a wide discretion to delegate his functions to officials in his department, subject to a right of appeal to him by a person aggrieved by virtue of a decision taken under such delegated powers.⁴⁰⁷ Extensive delegations exist, but they are not disclosed to the public.⁴⁰⁸ The functions of the Group Areas Board may be performed by standing or *ad hoc* committees if the Minister so directs.⁴⁰⁹ These extensive delegations tend to leave the seat of administrative power and any conditions relating to its exercise undisclosed to anyone outside the bureaucratic hierarchy.

2.8.4 *The permit system*

A conspicuous feature of practically every⁴¹⁰ restriction or prohibition imposed by the Act is that it is accompanied by the phrase 'except under the authority of a permit'.

The main provisions in the Act relating to the issue and revocation of permits may be summarised as follows:⁴¹¹

1. Permits are issued by the Minister or his delegatee,^{411a} (hereinafter referred to as 'the grantor') upon written application;
2. Permits may be granted subject to such conditions as the grantor may determine;
3. In granting a permit or imposing conditions, the following may be taken into consideration by the grantor

'the relative needs of any group concerned in regard to housing; the amenities of life and educational facilities, trading and industrial undertaking, the situation of immovable property, land or premises in relation to other property, land or premises owned or occupied by members of any group, and any other matters which in his opinion are relevant to the question ...'⁴¹²

4. In the case of the most important category of permits, namely those relating to occupation and ownership in group areas, it is further provided that the permit shall not be granted unless the grantor:

'is of the opinion that the refusal of the permit would cause undue hardship or that the issue of the permit would be in the interests of the group for which the group area has been established.'⁴¹³

5. Once a permit has been issued, the grantor may amend the conditions or direct that it shall be available for a portion only of the land and premises in respect of which it had originally been issued.

6. A permit can only be revoked where:

(i) it was issued under the condition that it would endure 'until withdrawn at the discretion of the Minister';⁴¹⁴ or where

(ii) it relates to occupation and is used contrary to its conditions.⁴¹⁵ In the latter case the Act specifies that the holder should be given one month's notice - this appears to be a statutory injunction to honour the *audi alteram partem* principle implicit in the provision.⁴¹⁶ This would entail that the notice must disclose the grounds for alleging the breach of a condition with sufficient precision to enable the permit holder to deal with it, and any representations of his in this regard should be considered before the revocation is implemented.

* * * * *

An important question is whether the issue and revocation of a permit (apart from the case of 6(ii) above) entail a so-called quasi-judicial function, giving rise to the applicability of the principles of natural justice. Before attempting to answer this, reference should be made to the practice which the Department of Constitutional Development and Planning has followed in respect of permits.⁴¹⁷ As explained herebelow, permits are, since the second half of 1986, issued by the provincial administrations, but as the practice established by the Department is still followed, this practice will now first be sketched.

A composite application form, set out in Appendix V, has been in use for the various types of permits. The annexure to this form requires the applicant to furnish a locality plan (indicating *inter alia* the race groups of adjacent owners and occupiers) and also to indicate 'whether they support or object to the application'. As mentioned above, there has existed a series of delegations dealing *inter alia* with the issue and

revocation of permits. There is also in existence a substantial departmental memorandum or guide on this topic - this is again not available to the public. From an interview with a senior official⁴¹⁹ it would appear that this guide contains directions relating to such matters as the relatively unstringent requirements for a 'mixed' showground permit and the stipulation that any revocation of a permit requires top level clearance.

In dealing with applications, the department has never seen itself as performing a quasi-judicial function. Comments were invited in respect of applications from the local authority concerned, the member of Parliament for the area, the 'own affairs' ministers in the case of a Coloured or Indian group area and certain interest groups - eg in a rural context, farmers' associations. These comments were, however, never put to the applicant for a reply.

In the twelve months up to 31 August 1986, 113 applications from members of other groups to live in White areas were approved, and 119 refused. Reasons are not given for refusals. Enquiries of the department established that such permissions were regarded as 'exceptional cases'. Most members of other groups wishing to live in White areas obviously do not even try to get a permit.

Recently⁴²⁰ a transfer of powers in respect of permit applications has been effected by the State President. As from 1 July 1986, permit applications for Blacks are screened by officials of the now abolished Development Board - in their present capacity as provincial employees in the (provincial)

departments of community services. The permits are then issued by the Administrator of the province concerned.⁴²⁰ As from 1 October 1986, the Administrator also handles all other permit applications under the Group Areas Act.^{420a} Some of the personnel of the Department of Constitutional Development and Planning went over to the provincial administrations at the same time, and it would appear that the practice outlined above is essentially being continued.^{420b} The application form set out in Appendix V has, for instance, remained the same.

Against this background, the nature of the administrative functions involved in permit applications can now be discussed, and more particularly the question whether the *audi alteram partem* principle applies.

Van Reenen asserts that the principle is not applicable but he relies on *Bhyat v Dönges NO*,⁴²¹ which did not decide this issue.⁴²² The HSRC Sport Report⁴²³ contains an illuminating discussion of the issue and reaches the tentative conclusion, on the basis of the judgment of Marais J in *Sundarjee Investments v De Vos Hugo NO*,⁴²⁴ that *audi alteram partem* is applicable.

In the *Sundarjee* case, the company had applied for a permit to allow the occupation by Indians of renovated rooms situate in a specified area. The permit was needed because it was uncertain which group had occupied the rooms at the specified date (when the occupational character was fixed) - Marais J described the then occupants as 'n heterogene versameling trekvoëls'.⁴²⁵ The area in question was, however, predominantly Indian.

The permit was refused by an official. Thereafter a committee of the Board afforded the applicant an opportunity to state his case, but this only resulted in a further refusal by the official concerned. An appeal to the Minister also failed. All the decision-makers concerned refused to furnish reasons for the refusals.

Marais J held the refusal(s) reviewable on two grounds. Firstly, it was held that *audi alteram partem* applied, and had been breached because the grounds for refusing the permit should have been disclosed to the applicant (i) at the hearing before the committee and (ii) in any event, when the appeal was lodged to the Minister. The learned judge interpreted 'appeal' to refer to a more or less formalised procedure, with the official who refused the permit as 'respondent'.

In holding *audi alteram partem* applicable, he applied two tests: whether the Act envisaged it and, secondarily, whether the decision affected the rights of the person concerned. In his view both tests pointed to the applicability of the maxim. He held that the Act envisaged the permit system as a method to achieve gradualism in the implementation of the Act and to protect individuals from its harsh consequences. A permit application would also not raise broad issues of governmental policy but rather the narrower question whether in the specific circumstances an exception should be allowed. As to the secondary test, it was held that the applicant's existing right of occupation vis-à-vis the rooms was affected by the refusal to lift restrictions in respect of this right, and the case of

Laubscher v Native Commissioner, Piet Retief ⁴²⁶ was distinguished: there an attorney had been refused permission to enter property of the SA Native Trust in order to render legal services to Africans living in the area. The Appellate Division held that the statute in question did not oblige the native commissioner to hold an enquiry before refusing permission, and further that the refusal did not affect any right, liberty or property of Laubscher - at most it prevented him from acquiring a right of entry.

Marais J further held that even if the consideration of a group areas permit were to be characterised as a 'purely administrative' function, then there appeared to be no cogent reasons for the refusal, which should be set aside on this ground as well.

On appeal to the Transvaal Full Bench, his decision was reversed.⁴²⁷ The court analysed the papers in the case, and came to the conclusion that the applicant had not really relied on a breach of natural justice, but on the fact that no factors adverse to his cause could 'in the circumstances have existed and that therefore the matter could never have been properly considered'.⁴²⁸ It was held that the court a quo had in fact decided the matter on this ground.⁴²⁹ On this point, the Full Bench held, however, that the Minister (or his delegate) had such a wide discretion, including in relation to broad policy matters such as whether more Indians should be allowed in the area, that it could not be inferred that no proper consideration had been given to the matter.⁴³⁰

The court further held that even if it were assumed ⁴³¹ that *audi alteram partem* applied, it had not been established that it had been breached: there was no evidence that any adverse facts (in contrast with adverse policies, or reasons) had not been disclosed to applicant.⁴³²

The court also rejected Marais J's version of a semi-formalised appeal to the Minister - all he had to do was to reconsider all the facts of the application.

The *Sundarjee* litigation thus leaves the question whether a permit application under the Group Areas Act attracts the *audi alteram partem* principle essentially unresolved, and no other case directly in point could be found. Resort to the general principles governing the applicability of the principle does not provide a conclusive answer either. Our courts have often stated that the maxim applies to (discretionary) decisions which result from an inquiry into matters of fact, or fact and law, and which affect or may affect the property, liberty or rights of, or involve legal (or civil) consequences for, another.⁴³⁴ But in this context 'legal consequences' and, for that matter 'rights', are really question-begging formulations, calling for 'creative interpretation' on the part of anyone deciding whether the principle should apply in a given context.⁴³⁵

Moreover, a conspectus of the decisions dealing with the applicability of *audi alteram partem* brings to light that a complex interplay of various factors determine the end result. Some of these factors which the courts take into consideration, explicitly or implicitly, do not appear pertinent to our present

enquiry. These would include: whether the decision is preliminary or final; whether it is advisory or executive; and whether a snap or emergency decision is required.

Factors which do, however, appear relevant and are regularly considered by the courts, include the following:

- (i) reference to some enquiry or hearing, or to the giving of notice to the affected person, in the legislation - this obviously points to the applicability of *audi alteram partem*;
 - (ii) whether the decision-making process has trappings commonly associated with the judicial process - such as the creation and/or determination of a *lis inter partes*, or a legally qualified decision-maker. This is an important factor because the absence of such trappings often leads the court to say that the process is not 'quasi-judicial' and that *audi alteram partem* thus has no applicability;
 - (iii) the more concrete and vested the character of the interests which may be affected by the decision, the more likely that the maxim would apply;
 - (iv) where the decision affects or is aimed at a group, rather than specific individuals, the courts incline towards non-applicability.
 - (v) whether the decision involves the formulation or application of what may be termed 'high level policies' or involves sensitive information which cannot be disclosed to the affected person.
- Thus there is a general disinclination to apply *audi alteram partem* in spheres such as prison discipline, aliens, foreign policy and state security. High level policy considerations may

even be thought to extend to the (procedural) decision whether to give a hearing to the affected person or not.⁴³⁶ By way of contrast, the maxim is often applied to decisions involving limited policy decisions taken on the basis of facts which are not sensitive or confidential - such as the issue of a licence to regulate a sphere of commercial activity;

(vi) the availability of a right of appeal, or right to make representations after a decision is taken, is often taken as impliedly excluding the common law right to a hearing prior to the decision.

Upon reflection it will be realized that the application of these factors vis-à-vis group areas permits is problematic. There is, for instance, no formal enquiry with legal trappings, postulated by the Act ((i) and (ii) above), but on the other hand the Act requires a written application and (by clear implication) due consideration of the particular facts of the case (usually with reference to the question of undue hardship to the applicant or the advantage of the group for which the area has been proclaimed) - and it may be argued that there is 'geen beter metode van uitpluising as dat albei kante van die saak openlik gestel en openlik bespreek moet word nie'.⁴³⁷

The interest affected by the decision to issue or refuse the permit would ordinarily not be a vested one (see (iii) above) - unless its vested character is related to a common law right (liberty) to live where one pleases. (In particular circumstances, such as staying on in certain premises after becoming a disqualified person by reason of the 'rule of

attraction', elements of a vested right would be present.) On the other hand, a decision upon where a person may live or trade certainly touches an interest which is both definite, concrete and very important.

In a sense the decision on the permit affects the individual concerned most directly, and in terms of (iv) above this points to *audi alteram partem*. On the other hand, it also affects the group in whose area the exception is made, and s 21(2)(a) actually specifies as one of the only two grounds upon which a permit in respect of a group area can be granted, 'the interests of the group for which the group areas has been established'.

A similar problem exists with regard to the factors referred to in (v) above. In the *Sundarjee* case Marais J specifically stated that a permit application raises 'geen groot landsbeleidskwessies'.⁴³⁸ But the Transvaal Full Bench emphasized that the Minister had an 'extensive discretion' and that in respect thereof 'all sorts of legitimate considerations (could) be imagined', including a general 'no more Indians' policy.⁴³⁹

In the present context a right of appeal to the Minister in the case where the permit has been refused by his delegate, would not point away from *audi alteram partem* ((vi) above) - as pointed out by the Full Bench in *Sundarjee*, this 'appeal' is essentially a continuation of the original decision-making process.⁴⁴⁰ It is submitted that, if anything, it points to *audi alteram partem* - on the basis of (i) and (ii) above.

The evaluation of the general factors determining the applicability of *audi alteram partem* does not appear to provide a certain answer in respect of group areas permits when the case law on *audi alteram partem* is examined at a more specific level, there appears to be two conflicting lines of cases which seem relevant to the present enquiry. The first line, which could be used to argue for the applicability of natural justice in permit applications under the Group Areas Act, is constituted by the series of decisions holding *trade licencing* to be a quasi-judicial function. Here two related arguments feature, which may be termed the 'conditional entitlement' and 'antecedent right' arguments. They are admirably summarised by Rose Innes:⁴⁴¹ the rights of the citizen which attract *audi alteram partem*

'include, for example, a general 'right to trade' which every man has at common law and which may be affected by the refusal of a licence. As was pointed out in *Tayob v Ermelo Local Road Transportation Board*,⁴⁴² every citizen is entitled as of right to obtain permission to carry on a trade, unless there are sound reasons to the contrary, and the granting of a licence is as of right, subject to the same proviso, and is not a privilege in the gift of a licensing authority. '(This is the 'conditional entitlement' argument.)' There is a right to trade at common law which applies to the whole of South Africa, and any applicant for a trading licence has an antecedent right to trade which may be prejudicially affected by the decision of a licensing authority which must therefore arrive at its decision in a quasi-judicial manner.'⁴⁴³

The opposing line of cases is constituted by the Appellate Division decisions in *Laubscher*⁴⁴⁴ and *Pieters*.⁴⁴⁵ Reference has been made to the former;⁴⁴⁶ *Pieters* applied the reasoning of *Laubscher* to the refusal of the Administrator of SWA to grant *Pieters*, a qualified Coloured attorney, a permanent residence permit. The reasoning in both cases turned upon the lack of any

antecedent (existing) right on the part of the applicant. The applicant was held to be seeking a privilege, which could be refused by the exercise of an unfettered, administrative discretion.

These decisions, and in particular *Pieters*, have been severely criticized.⁴⁴⁷ Both cases appear to have overlooked (or ignored) the common law rights (liberties) to freedom of movement and and to pursue one's occupation - particularly *Laubscher*, where the applicant had been used to visit the trust land to see his clients.

These two decisions also appear distinguishable with respect to group areas permits, even though there exists a certain superficial similarity: in each instance the applicant claims an entitlement to enter or sojourn in an area in respect of which he has no vested right or special qualification (that is, if 'undue hardship' is in this context discounted as a special qualification). But there are important distinctions. *Laubscher* contained a refusal by the owner of the land concerned. It is true that the ratio of the decision was not that any owner may refuse entry to whom he wants to,⁴⁴⁸ but the fact that it concerned property vested in the SA Native Trust, which was represented by the local Native Commissioner, featured in the characterisation of function.⁴⁴⁹ *Pieters*, on the other hand, concerned entry into what was not at the time and has never been legally part of the Republic - even though SWA was for a long time treated as a 'fifth province'. The case thus concerned, in a sense, an 'immigration' matter, where our courts (and the English

courts for that matter) have always been reluctant to impose *audi alteram partem*.

It is submitted therefore that the 'gravitational pull' of the licensing cases should result in the applicability of *audi alteram partem* to group areas permits, particularly in view of the general considerations raised by Marais J at first instance in the *Sundarjee* case. In a modern context such a permit should also be seen both as a species of property - part of 'the 'new property' created through the extensive allocations by modern governments, and as an adjunct of personal liberty (freedom) of movement, or in a commercial setting, freedom to trade.⁴⁵⁰ It is true, however, that the 'conditional entitlement' argument of the licensing cases is not so readily transposable to the sphere of group areas: one cannot be 'duly qualified' to obtain a group areas permit in the same way as one could be to get a trading licence, except in cases of some vested interest (as in the *Sundarjee* case). Examples of such vested interest would be someone wishing to stay on in a newly declared group area or in particular premises upon becoming a disqualified person (for instance through the rule of attraction).

As to the *withdrawal* of group areas permits once issued, *audi alteram partem* should clearly apply.⁴⁵¹ The fact that in one instance (withdrawal for breach of conditions under s 21(16)) notice (and thus *audi alteram partem*) is required, does not justify an 'expressio unius est exclusio alterius' argument vis-à-vis withdrawal in terms of a power reserved to the Minister (or Administrator) in the permit itself under s 21(4).⁴⁵² Nor

should the reference in the latter subsection to withdrawal 'at the discretion' of the Minister exclude *audi alteram partem* - it merely confirms his power to do so, (probably) without the giving of reasons; it does not govern the procedure to be followed and the disclosure of the grounds for the decision.⁴⁵³

2.8.5 Discretionary enforcement

It should be clear from the discussion of the mechanisms for enforcement of the Act in 2.7 that enforcement of the Act hinges upon executive discretion. In practice constant use has been made of this discretion, even in the sphere of criminal prosecutions.

There have been examples of selective or total non-enforcement - in short, turning a 'blind eye' to contraventions in certain localities. It is, of course, generally the duty of the police to detect offences and of the Attorney-General to prosecute the offenders but the 'technical' and 'victimless' nature of most group areas offences means that the attitude of the Minister and department administering the Act will usually be decisive vis-à-vis large scale prosecutions.⁴⁵⁴ In certain instances a 'blind eye' has been turned to unlawful occupation of premises in White business districts by 'non-White' professionals such as lawyers.⁴⁵⁵ This also appears to be the case in respect of many restaurants (at least in Cape Town) which openly serve 'disqualified persons' in contravention of the prohibition against occupation by such persons. 'Mixed sport', however, provides the most pointed example of a 'blind eye' practice. During 1980 the Minister heading the then Department of Sport and

Recreation (which department, it should be mentioned, has never been charged with the administration of any part of the Group Areas Act) purported to 'exempt' all sports activities from the application of the Act by means of a departmental circular!⁴⁵⁶ A law committee of the Human Sciences Research Council thereupon pointed out that the first principles of our constitutional law, traceable to the English 'glorious revolution' and Bill of Rights of 1689, did not allow for such 'executive suspension' of laws enacted by Parliament.⁴⁵⁷ The 'Sports' exemption was thereupon embodied in legislation.⁴⁵⁸

2.8.6 The Act and executive discretion - a brief retrospect

The large measure of executive discretion underpinning group areas legislation can hardly be seen as something beneficial. It may have provided flexibility in the administration of the Act and some relief from its oppressive provisions but overwhelmingly it has resulted in uncertainty, official capriciousness and a lamentable undermining of basic rights and freedoms which any civilized legal system should seek to uphold.

As argued more fully in chapter five, the judiciary has by and large failed to confine, structure or check this wide discretion along the lines suggested by Davis when exercising its common law powers of review. Much damage has already been done. One remaining area where enlightened judicial supervision could still bring about significant structuring, concerns permit applications. Here the Administrator or his delegate deciding such an application should be required to apply the principles of natural justice. The applicant for the permit should at least be

given the opportunity to deal with adverse facts or policy directions (that is any specific policy adopted by the Administration which would disqualify him, such as a total ban on members of his group in the area concerned).

CHAPTER TWO

ENDNOTES

- 1 The original Act was repealed and replaced by the Group Areas Act 77 of 1957 (a consolidating Act) which in turn was repealed and replaced by the current Act, also essentially a consolidating measure.
- 2 See Ch 1 n1.
- 3 Cf Van der Merwe C G Sakereg (1979) 112-3.
- 4 Rousseau, F P *Handbook on the Group Areas Act* (1960) 8-9.
- 5 Par 492.
- 6
- 7 Nell, A 'Residential Group Areas: the present position' Seminar paper published in School of Business Leadership (UNISA): *The Future of Residential Group Areas* (1986) 15 at 18.
- 8 Rousseau 31.
- 9 Sections 17 and 18; see Van Reenen Ch E8, D'Oliveira par 525-9.
- 10 Section 27(1)(b).
- 11 Section 26(1) read with s 23(2).
- 12 Horrell, M *The Group Areas Act - Its Effect on Human Beings* (1956) 27.
- 13 Van Reenen E8.7 - certain changes were later effected, eg in 1952 (*ibid*).
- 14 Centre for Intergroup Studies *District Six* (Occasional Paper No 2 1980) 2.
- 15 See below Ch 6.1.
- 16 Including the parliamentary debates on the first Bill. See especially *House of Assembly Debates* col 7439 29 May 1950, col 7724 and 7815 31 May 1950.
- 17 *Group Areas and their Development* 22; on the meaning of 'occupation', see further below Ch 4.
- 18 *Ibid*.

- 19 See Van Reenen E6.5A, E6.12 and p 481.
- 20 Human Sciences Research Council *Sportondersoek : statutêre bepalings wat sport beïnvloed. Verslag van die Werkkomitee Sportwetgewing* (deel 1) (1982) (cited as HSRC Sport report) par 6.3.
- 21 See above Ch 1 n6.
- 22 Section 6.
- 23 See Van Reenen Ch D, Suzman, A 'Race classification and definition in the legislation of the Union of South Africa. 1910-1960'. 1960 *Acta Juridica* 339.
- 24 See Suzman op cit (n23) 267, Dison & Mohamed 3.
- 25 *Move your shadow* (1986) 93.
- 26 See *S v Naicker* 1966 1 SA 594 (N) 597 B-G; *S v Bhoolia* 1969 3 SA 600 (T) 620A-611F; 1970 4 SA 692 (A) 694H-695E.
- 27 1970 4 SA 692 (A).
- 28 At 695G and 696E-F.
- 29 At 696H.
- 30 At 699.
- 31 *R v Gill* 1950 4 SA 199 (C) 204B-C.
- 32 See Boberg, P Q R *The Law of Persons and the Family* (1977) 126-129.
- 33 The issue of race classification can crop up in various non-statutory contexts, eg in a racial restriction contained in a title deed, or a clause in a will making a bequest conditional upon marrying (or not marrying) someone of a particular racial group.
- 34 See Van Wyk D H 'Race' *LAWSA* vol 21 (1984) par 445 n6.
- 35 See eg *Secretary for the Interior v Moosa* 1970 4 SA 445 (A) 460E, per Trollip JA.
- 36 See Boberg 126-8.
- 37 See the Promotion of Black Self-Government Act 46 of 1959, National States Citizenship Act 26 of 1970 and the four Status Acts which granted independence to the TBVC states.
- 38 Section 12.

- 39 Section 12(1)(d) and (2).
- 40 See Van Reenen p 471-2 and n77 below.
- 41 On the position of this area, see Weston J *Outcast Cape Town* (1981) 115.
- 42 See ch 4 below.
- 43 *Santy's Wine and Brandy Co v District Commandant, SA Police* 1945 NPD 115 at 118; *Ngwenya v Hindly* 1950 1 SA 839 (C); Steyn LC *Uitleg van Wette* (5th ed 1981) 60-1.
- 44 At 55.
- 45 See Steyn 16 for the rule that our courts cannot 'fill the gap' in the case of a genuine *casus omissus* in legislation.
- 46 1972 2 SA 133 (D & CLD).
- 47 On the meaning of occupation, see herebelow ch 4.3.
- 48 Ibid.
- 48a Horrell I 169.
- 48b Ibid, and see statement by Minister of the Interior HAD col 4769-71 1 May 1962. This is another remarkable instance of the purported 'suspension' of the Act by the Executive - cf below at n456.
- 48c See above at n37.
- 49 See eg Dean W H B 'The legal regime governing urban Africans in SA - An administrative-law perspective' 1984 *Acta Juridica* 105.
- 50 See Simon D and Davies R J *Aspects of urban change in Windhoek, Namibia during the transition to independence* (1986) 280-281.
- 51 See Van Reenen D35: Suzman op cit (n23) passim.
- 52 D'Oliveira par 498; see also Van Reenen E2.30.
- 53 Section 12(1)(c).
- 54 It is practice for the prosecution to allege not simply that the accused is a 'disqualified person' vis-à-vis the White group area, but actually to specify in the indictment or charge his or her alleged group. See for instance *S v Naicker* 1966 1 SA 594 (N) 595 A-C; *S v Bhoolia* 1969 3 SA 606 (T) 607F-G.

- 55 1958 3 SA 761 (T) 762H-763A.
- 56 *S v Vilbro* 1957 3 SA 223 (A) 228.
- 57 *S v Wyngaard* 1966 2 SA 372 (C) 376G.
- 58 1957 3 SA 223 (A) 227H.
- 59 See *R v L'Etang* 1954 4 SA 430 (N).
- 60 1966 2 SA 372 (C) 373C-D; cf Van Reenen E2.6. The suggestion in *R v Nicholas* 1958 3 SA 761 (T) 762H to the effect: 'If he is obviously white, then *cadit quaestio*', does not appear to be correct.
- 61 *R v Lucas* 1959 2 SA 257 (N) 258C-E.
- 62 *R v Nicholas* 1958 3 SA 761 (N) 765.
- 63 See s 92 of the Criminal Procedure Act 1977, and the comments thereon (and particularly on 92(21)) in Hiemstra V G *Strafproses* (3rd ed 1981) 217-8.
- 64 See Van Reenen E2.7; D'Oliveira par 496 n17.
- 65 1945 AD 590 at 610.
- 65a See cases cited by Boberg 99 n77, 107n 99 and 112-3.
- 66 *R v Vinger* 1951 1 SA 389 (GWLD); cf *R v Le Fleur* 1927 EDL 340.
- 67 This would include members of 'tribes' outside Southern Africa, eg Hausas from the Sudan: *Wangra v Geffen and Rand Townships Registrar* 1947 2 SA 288 (T).
- 68 E2.20-1.
- 69 See *Hoosain v Sekretaris van Binnelandse Sake* 1970 1 SA 259 (A) 263H, and Boberg 111 and 114.
- 70 Compare the (apparently nonsensical) presumption relating to membership of the Black group contained in s 45(2).
- 71 See text above after n41.
- 72 *Sekretaris van Binnelandse Sake v Jawoodien* 1969 3 SA 413 (A) 420-1; *Moosa v Race Classification Board* 1971 1 SA 201 (E) 204A.
- 73 Boberg 113.
- 74 See above at n68-9.

- 75 See above at n69.
- 76 *S v Ahmed* 1969 2 SA 276 (C).
- 77 The *Ahmed* case dealt with Proclamation 28 of 1961; the latter has been republished by Proclamation 516 of 1964 in GG 761 of 3 April 1964 (Reg Gaz 321).
- 78 At 280H-281A.
- 79 At 281.
- 80 *Arnold v Race Classification Appeal Board* 1967 2 SA 267 (C). The proclamation in issue was, however, resurrected in a slightly altered form and clothed with immunity from judicial review by an Act of Parliament. See Van der Vyver J D *Die Beskerming van Menseregte in Suid Afrika* (1975) 93-4; Boberg (n32) 99 n76. It was held that the proclamation intended to exclude the possibility of a person falling into more than one group - see eg *Hoosain v Sekretaris van Binnelandse Sake* 1970 1 SA 259 (A) 264D.
- 81 See *S v Wyngaard* 1966 2 SA 372 (C) 376B, E-F.
- 82 *R v Vilbro* 1957 3 SA 223 (A) 229F-G. The invitation was declined.
- 83 At 228H.
- 84 Ibid.
- 85 At 229B-C.
- 86 Cf the magistrate's decision discussed in Lelyveld op cit (n25)93.
- 87 See *R v George* 1954 2 SA 243 (N); *R v L'Etang* 1954 4 SA 430 (N); *R v Nicholas* 1958 3 SA 761 (T); *R v Lucas* 1959 2 SA 257 (N); *S v Wyngaard* 1966 2 SA 372 (C), and the summaries in Van Reenen E2.10 and D'Oliveira par 496.
- 88 See Boberg 101.
- 89 Section 1(1) of Population Registration Act 1950; and see the presumption in s 1(2)(b) of this Act that a person (not being a Black) is generally accepted as a Coloured person. In the group areas criminal prosecution cited by Lelyveld op cit (n25) 93, the magistrate held it against the accused that she, while alleging that she was generally accepted as a White, had not applied for reclassification under the Population Registration Act 1950.
- 90 See D'Oliveira par 498. The rule is drawn from the combined effect of s 12(1)(a), (b)(ii) and (iii), (c)(ii) and (iii)

49D (proviso), and the schedules I-III of Proclamation 28 of 1961.

- 91 See s 1 and 5(5) (and particularly paragraph (e)) of the Population Registration Act 1950; Boberg 101-2; Van Wyk D H 'Race' 21 *LAWSA* par 450.
- 92 For a recent case in Cape Town where a White man and his Coloured 'common law wife' were convicted for living illegally in a White group area after 'spying' and the lodging of complaints by the chairman of the (White) Koeberg Residents Association, see *Cape Times* 2 July 1986, p 3; 26 July 1986, p 7; *Die Burger* 25 July 1986, p1.
- 93 See *R v George* 1954 2 SA 243 (N) 244F; *R v Lucas* 1959 2 SA 257 (N) 258F.
- 94 1958 3 SA 761 (T) 766G.
- 95 By Act 101 of 1984, which came into force on 30 May 1984.
- 96 Compare s 49D (dealing with Chinese) also enacted by Act 101 of 1984, discussed in text after n41 above.
- 97 The marginal note reads : 'Retention of certain rights by women', but marginal notes appear not be a legitimate aid to statutory construction. See Steyn 148-9, and cases there cited.
- 98 It is thus suggested that the phrase 'by such women' should be inserted immediately after 'shall not prejudice any right ...', in order to make the meaning of the section clearer.
- 99 See eg *Estate Smith v Estate Follett* 1942 AD 364 at 367; *SIR v Estate Roadknight* 1974 1 SA 253 (A) 259.
- 100 See *S v Galgut's Garage* 1969 2 SA 459 (A) 463; Steyn 116, and cases cited therein n193.
- 101 Introduced by the Matrimonial Property Act 88 of 1984, which came into effect on 1 November 1984. See Sinclair J An *Introduction to the Matrimonial Property Act* (1984).
- 102 Section 3(2). Section 8(1) does provide for division of the accrual prior to termination of the marriage in the case of seriously prejudicial conduct by one spouse.
- 103 See next note.
- 104 Inserted by s 36 of the Matrimonial Property Act 1984 which came into effect on 1 November 1984. In terms of s 7(3) of the Divorce Act, the new provisions apply only to marriages out of community of property entered into before the commencement of the first-mentioned Act.

- 105 1986 3 SA 644 (C).
- 106 See Boberg Ch 7; Van Wyk D H 'Race' 21 LAWSA (1984). (Van Wyk II).
- 107 The Identification Act 72 of 1986 provides in s 5(2) that new identity documents issued under the Act shall no longer reflect a person's race; but his or her race classification is still reflected in the birth entry number contained in the population register, because it is provided that this number is to perpetuate the coding system of the 'old' identity numbers - s 5(3), and n108 below.
- 108 See Van Wyk II par 437.
- 109 The Identification Act 72 of 1986 abolished the Blacks Abolition of Passes and Co-ordination of Documents Act 67 of 1952.
- 110 See Van Wyk II par 435, 445 and 446.
- 111 See regulation 3(a) of GN 819 of 1963, n326 below.
- 112 See s 5 of Identification Act 72 of 1986.
- 113 Section 5(5)(e).
- 114 See Boberg 107-8.
- 115 See statistics cited by Lelyveld op cit (n25) 85.
- 116 See sections 52 and 100(1)(ii), (vii), (ix), (xii) and (xiii).
- 117 Section 38 empowers the responsible Minister to declare by notice in the Government Gazette that the controlling interest in a company is held by a specific group, but this is subject to appeal to the Supreme Court (s 38(3)).
- 118 See s 4 of Identification Act 72 of 1986.
- 119 Section 1(1), exclusionary provision.
- 120 See Boberg 111-3.
- 121 See above 2.2.3(iii).
- 122 Proclamation R 123 of 1967 GG 1753 of 26 May 1967 (Reg Gaz 797); and see s 21A(4) of the Act.
- 123 1920 AD 554.
- 124 See on this case *inter alia* Steyn 23 and 46, Corder H Judges at Work (1984) 194-8.

- 125 See Van Reenen B1.205-6.
- 126 Section 1, s v 'disqualified company'.
- 127 Section 1.
- 128 In the case of an association of persons the controlling interest is determined by the majority of members - see definition of 'controlling interest' cited in text below.
- 129 See *Shillings v Cronje* 1986 3 SA 423 (T).
- 130 On the possible restricted meaning of 'interest', see below at n137.
- 131 Cf *Adbro Investment Co Ltd v Minister of the Interior* 1956 3 SA 345 (A).
- 132 D'Oliveira par 502.
- 133 *S v Ahmed* 1969 2 SA 276 (C) 280H-281A, cited above.
- 134 See Van Reenen E3.22-4.
- 135 See *R v Haffeejee* 1945 AD 345 at 352-3 on the interpretation of deeming provisions. It would appear that in the present context the deeming of a controlling interest on the part of a person (eg shareholder) can be displaced by proof by him that this, in fact, is not the case - see *Haffeejee* case 353, end of first paragraph.
- 136 E3.23.
- 137 See eg *Pito v Deeb* 1967 1 SA 166 (O) 170E-F; *Raimonde Steel Construction v Manique* 1970 2 SA 422 (T) 426A-427A.
- 138 See also s 14 - restrictions on holding of immovable property in controlled area by companies upon change of group identity.
- 139 See Van Reenen E4.13.
- 140 Section 45(4)(d); see also s 45(4)(b) and (c).
- 141 See Van Reenen E1.5.
- 142 *Sader v Natal Committee, Group Areas Board* 1957 4 SA 444 (A) 450. These remarks reflect an overly benevolent view of the attitudes of those implementing the Act - cf ch 5.5.1(8) below.
- 143 E1.8.

- 144 Section 13, read with definition of 'disqualified person' in s 1.
- 145 Section 20, read with definition of 'disqualified person' in s 1.
- 146 Section 20(2)(b).
- 147 See s 20(2).
- 148 Section 20(2)(e).
- 149 Section 20(2)(f).
- 150 Section 20(2)(g).
- 151 Section 20(2)(m).
- 152 Section 20(2)(h).
- 153 See Proclamation R 4 of 1968, as amended by Proc R 311 of 1969, set out in Van Reenen p 475-8.
- 154 GG 9831 of 5 July 1985 (Reg Gaz 3842), set out in Appendix III hereto.
- 155 Section A(1)(b) of R 111 of 1985.
- 156 See s A(1)(a) of R 111 of 1985.
- 157 See Dison & Mohamed 31, and for the earlier legislation, Ch 3.2 below.
- 158 On the (wide) meaning of 'urban areas' see Van Reenen E7.93. The OFS has been characterised by a high degree of pre-group areas segregation, and the Act has had limited application there.
- 159 See below at 3.2. Section 18(7)(a) of the Act specifically incorporates determinations made under the Asiatic Land Tenure Act, 1946.
- 160 Section 17(3).
- 161 Section 18(6).
- 162 Section 18(3)(c).
- 163 Section 18(1)(a).
- 164 Currently Proclamation R 110 of 1985, GG 9831 of 5 July 1985 (Reg Gaz 3842) set out in Appendix IIA, amended by Proc R 111 of 1986, (Appendix IIB) and Proc 113 of 1986 (Appendix IIC).

- 165 Proc R 110 of 1985, s B(2).
- 166 Proc R 113 of 1986.
- 167 Proc R 110 of 1985, s A(4).
- 168 Proc R 111 of 1986 (GG 10296 of 27 June 1986), inserting s A(5) into Proc R 110 of 1985. See Appendix IIB.
- 169 See, for instance, Horrell M Group Areas - *The Emerging Pattern, with illustrative examples from the Transvaal* (1966).
- 170 Section 23(1)(a).
- 171 Section 23(2).
- 172 Section 26(3).
- 173 GG 10296 of 27 June 1986, as amended by Proc R 133 of 1986, GG 10368 of 22 July 1986. See Appendix I.
- 174 Subsection (3) was substituted by Proc R 133 of 1986 (n173 above). See text below at 2.4.4.1(5).
- 175 See Appendix V. Contrast the form reproduced in Van Reenen p 515-8, which apparently dates from the late fifties.
- 176 See Steyn 4 et seq.
- 177 On the relevance of context in the wide sense of the word, as an aid to interpretation ie 'the matter of the statute, its apparent scope and purpose, and, within limits, its background', see the well-known judgment of Schreiner JA in *Jaga v Dönges* NO 1950 4 SA 653 (A) 662.
- 178 See Steyn 153, and cases there cited in n100-1.
- 179 See Proc R 329 of 1 November 1957 set out in *Dison & Mohamed* 267; Proc R 80 of 1964 GGE 762 of 3 April 1964; Proc R 5 of 1968, set out in *Van Reenen* p 469-70A; and Proc R 109 of 1985 GG 9831 of 5 July 1985 (Reg Gaz 3842).
- 180 See *Dison & Mohamed* p 272-78; *Van Reenen* p 473-8.
- 181 Cf *Van Reenen* E7.65 and E8.22.
- 182 See *S v Mapheele* 1963 2 SA 651 (A) 655; Steyn 127.
- 183 By Act 72 of 1985.
- 184 Such marriages were, of course, subject to the so-called 'lex Breytenbachi', in terms of which a male person who was a citizen or domiciled in the Republic could not validly

contract a 'mixed' marriage anywhere in the world: s 1(2) of the Prohibition of Mixed Marriages Act 1949, (now repealed.)

- 185 Dison & Mohamed (44) state: 'The immediate family of such persons living together with them are probably also protected', but cite no authority for this proposition.
- 186 Section 17(1) and (3).
- 187 By the Abolition of Influx Control Act 1986. This Act repealed the remaining 20 sections of the Blacks (Urban Areas) Consolidation Act 1945.
- 188 Personal communication Mr Van Dyk of Cape Provincial Administration, Community Services (formerly Development Board, Western Cape) 17 September 1986.
- 189 Section 9(2) of this Act.
- 190 Section 20(2)(k) (in respect of controlled areas).
- 191 In respect of specified and group areas - see respectively n180 and n179 above.
- 192 See n179 above.
- 193 See below Ch 4 for discussion of the meaning of 'occupation' and the question whether the extended meaning cited in the text is binding.
- 194 1941 AD 125 at 133. It could be argued that the relationship between a student/scholar and his academic institution should be characterized as an 'administrative law relationship' (administratiefregtelike verhouding) rather than an ordinary contract. Such characterization would, however, only strengthen the argument in the text. On a possible administrative law relationship in this context, see Kuschke L 'Die regsverhouding tussen Student en Universiteitsowerheid mbt Tugmaatrëels' 1974 *Responsa Meridiana* 12, and in general Wiechers M *Administrative Law* (2nd ed 1985) and Venter F *Die Publiekregtelike Verhouding* (1985).
- 194a See *Mkhize v University of Zululand* 1986 1 SA 901 (D) (quare whether the actual decision is correct.)
- 195 Steyn 159.
- 196 See report in *Cape Times* 8 May 1985 on University of Cape Town's application for open residences and responsible Minister's statement in Parliament that restrictions 'governing residential occupation by 'disqualified person'

(sic) were applicable to university residences' (emphasis supplied).

- 197 See Schoombee J T 'Group Areas Legislation - The Political Control of Ownership and Occupation of Land' 1985 *Acta Juridica* 77 at 80 n22.
- 198 This is standard practice. This was also confirmed by enquiries made of the Town Planning Section of the Cape Town City Council, September 1986.
- 199 Section 22 (1) of City of Cape Town Revised Final Statement of the proposed Townplanning Scheme (amended to 1981-06-26) 1982.
- 200 Note that the exemption under discussion in the Afrikaans text actually refers to 'professionele doeleindes' rather than 'beroepsdoeleindes' - the former appears to have a more limited meaning, being the equivalent of the English 'professional purposes'. See Bobbert M C J (1976) 1 *Tydskrif vir Regswetenskap* 134 at 135; *Die Prokureursorde van die OVS v Schoeman* 1977 4 SA 588 (O) 591.
- 201 *Robbins Herbal Institute v Federal Taxation Comr* (1923) 32 CLR 457 at 461.
- 202 *Carr v IRC* [1944] 2 All ER 163 (CA) 166.
- 203 See the Canadian case of *R v Chemical Institute of Canada* [1974] FC 247 at 251, cited in *Words and Phrases Legally Defined* (2nd ed 1985 Supplement) 241; and further on occupations attaining in the course of time the status of a 'profession', *Carr v IRC* (n202 above) 167, and *Bradfield v Federal Taxation Comr* (1924) 34 CLR 1 at 7.
- 204 *Carr v IRC* (n202 above) 166, cited with approval by Centlivres C J (dissenting) in *Ellert v CIR* 1957 1 SA 483 (A) 488D-E.
- 205 *R v Chemical Institute of Canada* (n203 above) *ibid*.
- 206 *Kadalie v Hemsworth NO* 1927 TPD 862 at 866.
- 207 See the *Robbins Herbal Institute* case (n201 above) *ibid*; this would, however, not include a mere bank clerk.
- 208 See n200-205 above, and generally further *Words and Phrases Legally Defined* (2nd ed 1969) Vol 4 sv 'Profession'; *Stroud's Judicial Dictionary* (4th ed 1972) Vol 4 sv 'Profession'.
- 209 *Kadalie v Hemsworth NO* (n206 above) *ibid*.
- 210 *Carr v IRC* (n202 above) 166.

- 211 *Bradfield* case (n203 above).
- 212 *IRC v Maxse* [1919] 1 KB 647 at 657.
- 212a But cf *Escritt & Barrell v IRC* 177 LT 6, where it was held, in a tax context, that a partnership engaged in making tenant-right valuations and estates management is engaged in a profession. It may be argued that a chemist conducts a profession (dispensing medicine) and that the other sales activities are only incidental.
- 212b But see *Barber & Sons v IRC* [1919] 2 KB 222.
- 212c It would certainly be overrigid, in the context of a group areas exemption, to accept as test the six prerequisites for a profession laid down by Bobbert (op cit) (n200 above) and cited, apparently with approval, in the *Schoeman* case (n200 above) 591D-E.
- 213 Cf *CIR v King* 1947 2 SA 196 (A) 215; *R v Kadalie* 1926 NPD 437 at 444.
- 214 *Ellert v CIR* 1957 1 SA 483 (A) 491-2.
- 215 1979 1 SA 374 (W); contrast the position with regard to industrial land under s 49A, which must be zoned 'specifically for industrial purposes' - below at 2.4.5.
- 216 See above at n198-9, and contrast again the position with regard to industrial land under s 49A, where it is spelt out that the land must be so zoned that it 'may be used without any approval'.
- 217 1954 2 SA 457 (T) 462B; see also *Stuttaford v Batty's Estate* 1917 CPD 639; *Norwood Land & Investment Co Ltd v North Eastern District Association* 1929 AD 32; *Johannesburg Consolidated Investment Co v Butler* 1936 WLD 107.
- 218 Section 27.
- 219 See below 3.4.
- 220 Corbett et al *The Law of Succession in SA* (1980) 408-9.
- 221 Section 27(1)(c).
- 222 A term coined by Van Reenen Ch E10, which gained general acceptance. It should not be confused with prohibited 'use' under s 35 - below Ch 4.
- 223 Par 27.
- 224 See below 7.4.2.

- 225 *White Paper WPT* - 1979, 14; see further Schoombee I 81 n26.
- 226 Press statement by the Minister of Constitutional Development and Planning, 18 February 1985.
- 227 Those of s 13,14,15,17,18,20 35 37 and 40.
- 228 See Proc R 53 to R 88 of 1985, GG 9758 of 29 May 1985.
- 228a See *Rikhoto v East Rand Administration Bd* 1983 4 SA 278 (W).
- 229 *White Paper WPD* - 1977, 7.
- 230 1979 1 SA 374 (W).
- 231 Interview 9 September 1986 at Cape Town with Mr J W Fourie of the department.
- 232 See *Discretionary Justice. A preliminary inquiry* (1969-reference herein to Illini Books edition 1971).
- 233 Sec 23. The same applies to specified areas, border strips, future group areas, old section 19 'use' areas and free trade areas.
- 234 Davis op cit (n232 above) Ch iv.
- 235 See Ch 6 below.
- 236 As to these see Van Reenen Ch E15; D'Oliveira par 537-45; Schoombee I par 2.1.6.
- 237 'Residential group areas : the present position' in School of Business Leadership (UNISA) *The future of residential group areas* 15.
- 238 Op cit (n237) 16.
- 239 See s 1 of Act, sv 'Minister', under (b).
- 240 In terms of s 26(a) of the Republic of South Africa Constitution Act 110 of 1983; see GN 2526 of 16 November 1984, GG 9498 of 16 November 1984.
- 241 See *Western J Outcast Cape Town* (1981) 121 ff.
- 243 Section 5(4).
- 244 1959 3 SA 651 (A). Although the case was decided under the original Act, its reasoning would still apply to the current Act. See further Ch 5 below.
- 245 Cassem's case 660F-G; see Ch 5 below.

- 246 Section 5(4).
- 247 Section 7(4).
- 248 Van Reenen p 294, 300; LR Dison SC, personal communication, June 1985.
- 249 Section 5(6).
- 250 *Lockhat v Minister of the Interior* 1960 3 SA 765 (A) 779F-G; *Harnaker v Minister of the Interior* 1966 4 SA 303 (A) 311. See Ch 5.
- 251 Section 23(6).
- 252 Section 23 of the Act, read with s 19(1)(b), 15 and 98(1) of the Republic of South Africa Constitution Act 1983.
- 253 On the meaning of 'in consultation with', see *R v Mbete* 1954 4 SA 491 (E).
- 254 See, for instance, the practice relating to the issue and withdrawal of passports as revealed in the papers in the case of *Boesak v Minister of Home Affairs*. (n 453 below)
- 255 Nell op cit (n237) 25-6.
- 256 Nell op cit (n237) 26; see eg Guide Plan Committee for Cape Metropolitan Area Cape Metropolitan Area - *Draft Guide Plan*, Vol 1 : Peninsula (1984).
- 257 Sections 6A(11) and (12) of Physical Planning Act.
- 258 Section 6A(12)(b).
- 259 Op cit (n256) par 3.6.
- 260 See map 3.2.
- 261 Par 8.2.
- 262 Loc cit (a); see also (j) (on p 116) on the position of Blacks.
- 263 Par 3.2.3.
- 264 See above n242.
- 265 Interview Mr J W Fourie, Cape Town, 5 September 1986.
- 266 Todes A and Watson V *Local Government Reorganization : Government proposals and alternatives in Cape Town* (1986) 96.

- 267 See eg *Transvaal Indian Congress v Land Tenure Advisory Board* 1955 1 SA 85 (T).
- 268 See Draft Guide Plan (n256 above), schedule E.
- 269 See Todes and Watson 78,96; *Cape Town City Council Regional Services Councils* (1986) 23-5.
- 270 For the position with regard to municipal voting rolls, see Horrell M *Laws affecting race relations in SA 1948-1976* (1978) 57-9. Coloureds lost their municipal vote in Natal in 1956, and the municipal vote and right to be elected in the Cape by virtue of the Local Authorities Voters' Amendment Ordinance of 1971.
- 271 Todes & Watson 28.
- 272 Ibid.
- 273 Section 6 of 1950 Act, s 25 of 1957 Act.
- 274 *House of Assembly Debates* col 7441 29 May 1950; see also cols 7440 and 7452.
- 275 Todes & Watson 31.
- 276 Sections 28 and 29.
- 277 See, for instance, the Cape Local Authorities (Development according to community) Ordinance 6 of 1963.
- 278 Hughes H and Grest J 'The Local State' in *SA Research Service South African Review* I 122 at 132.
- 279 See section 2(2) or Ordinance 20 of 1978 (Cape).
- 280 See the *Joint Report on Local and Regional Management Systems in the Republic of SA* (PC 1/1982) by the Committee for Economic Affairs and the Constitutional Committee of the President's council (hereinafter cited as *PC Report on Local and Regional Management Systems*) par 3.46 and Schedules E and F.
- 281 See GN 2451 of 9 November 1984 GG 9490 9 November 1984 (*Reg Gaz* 3767).
- 282 See regulation 3. See also the Statement by Chairman of Cape Town City Council's Executive Committee, MR J A K Muir on 'Powers for Management Committees' (1986).
- 283 See *PC Report on Local and Regional Management Systems* (n280 above) Ch 4; Hughes & Grest op cit (n278).

- 284 See *Cape Times* 26 May 1986, p 11; interview with Mr E J Woodbridge of Cape Provincial Administration 24 September 1986, Cape Town.
- 285 *Official Gazette* (Cape) 4446 of 26 September 1986.
- 286 Promotion of Local Government Affairs Act 1983, s 3(aB).
- 287 Section 11, especially (3)(a)(iii).
- 288 See PC Report on Local and Regional Management Systems (n280) par 4.12-16; Hughes & Grest op cit (n278) 135.
- 289 Venables H 'Civic Diary' *Cape Times* 25 November 1985, p 9.
- 290 Todes & Watson Table 6, p 34; Hughes & Grest op cit (n278) 133; Venables H 'Civic Diary' *Cape Times* 24 June 1985, p 11 and *Cape Times* 5 December 1985, p 15.
- 291 Venables op cit (n289). Todes & Watson loc cit point to estimates which put registered voters in Coloured areas in the Cape at only 52% of the eligible voters.
- 292 See Todes & Watson 29.
- 293 See reports in *Cape Times* of 13 November 1985, p 11; 15 November 1985, p 13; 18 November 1985, p 2 and 11; 21 November 1985, p 3; 12 December 1985, p 15; 25 November 1985, p 9. And see on Belhar, *Cape Times* 20 March 1986, p 13.
- 294 See eg *Cape Times* 8 September 1986, p 2; *Die Burger* 1 September 1986, p 9.
- 295 See *Cape Times* 19 June 1985, p 4 and section 32 of the Constitution Act.
- 296 See Venables H 'Civic Diary' *Cape Times* 24 June 1985, p 11.
- 297 See n296 above.
- 298 See PC Report on local and regional management systems (n280) par 4.5 and 5.5.
- 299 See *Die Burger* 11 October 1985, p2 and *Cape Times* 19 September 1986, p 7; and Hughes & Grest op cit (n278) 134 on the position in Natal.
- 300 See *Cape Times* 26 September 1986, p 3.
- 301 Report (n280) par 5.8(a).
- 302 See *Cape Times* 22 March 1984, p 4.

- 303 *Powers for Management Committees* (1986).
- 304 See n303 above; *Argus* 26 June 1985, p5; Hughes & Grest op cit (n278) 134.
- 305 Cf *R v Vilbro* 1957 3 SA 233 (A) 227H.
- 306 Section 46(2)(a).
- 307 Section 46(2)(b).
- 308 Section 34(2) of the original Act, s 42(2) of 1957 Act. Both provisions stated that the court shall grant such order.
- 309 Section 17 of the Group Areas Amendment act 56 of 1965, which substituted S 42 of the 1957 Act.
- 310 See *S v Naicker* 1966 1 SA 394 (N) 604; *S v Govender* 1986 3 SA 696 (T) 970-1, especially 971B-C.
- 311 1986 3 SA 969 (T).
- 312 Contrast the earlier legislation - n308 above.
- 313 1986 3 SA 969 (T) 971H-J; the relevant department would presently be Constitutional Development and Planning.
- 314 See reports of Deputy Minister's speech at Free State NP Congress in *Die Burger* 4 September 1986, p 11, and *Cape Times* 4 September 1986, p 4. The Govender case had been noted in *Survey* 1982 344.
- 315 Ibid.
- 316 *Cape Times* 21 November 1985, p 4 (trial of 'mixed' couple in Uitenhage).
- 317 *Cape Times* 9 July 1986, p 7 and 26 July 1986, p 7 (conviction of White man living with Coloured woman in Maitland, Cape Town).
- 318 *Cape Times* 2 July 1986, p 3, 24 July 1986, p3 and 26 July 1986, p 7; *Die Burger* 25 July 1986, p 1 (conviction of White man living with Coloured woman in Brooklyn, Cape Town).
- 318a Personal communication Adv F Kahn SC, Deputy Attorney-General, 3 October 1986.
- 318b See *Cape Times* 26 July 1986, p 7.
- 318c See *Cape Times* 24 July 1986, p 3.

- 319 See Schoombee H and Davis D 'Abolishing Influx Control - Fundamental or Cosmetic Change? (1986)2 SAJHR 208 at 216-7.
- 320 See generally Van Reenen Ch B1.
- 321 Par 61 and 193.
- 322 *House of Assembly Debates* col 1737 24 February 1984.
- 323 1986 4 SA 11 (C). See also in this context definition of 'disqualified company' in s 1 of the Act.
- 324 Section 41(5) - proviso.
- 325 Section 42. Section 41(2) further provides, in effect, that once immovable property has been held in contravention of the Act or earlier legislation, it can only further be transferred under a permit or in terms of s 41.
- 326 See GN R 819 of 1963 GG 519 of 7 June 1963, republished by GN R 517 of 1964 GG 3 April 1964 (Reg Gaz 322); the former is set out in Van Reenen p 482-3.
- 327 Cf also s15A of Deeds Act 1965.
- 328 Here the definition of 'officer' contained in s 1 of the Companies Act 1973 is applied in practice; 'officer' means a managing director, manager or company secretary (excluding a legal person acting as secretary).
- 329 Section 41(5)(a).
- 330 But compare the case of s 21(6).
- 331 Sections 14 and 15.
- 332 Section 27(1)(b).
- 333 Proviso to s 41(5).
- 334 Section 41(5)(b).
- 335 1961 4 SA 740 (A), decided upon the similarly worded provision of the 1957 Act.
- 336 At 751D-F.
- 337 At 751H.
- 338 See *inter alia* Baxter *Administrative Law* (1984) 576.
- 339 The apparent defence of the decision in *Wiechers Administrative Law* (2nd ed 1985) 130 n134 and 135 n155 does not therefore appear to be tenable.

- 340 *Momoniati & Naidoo v Minister of Law and Order* 1986 2 SA 264 (T).
- 341 At 276G.
- 342 Section 23.
- 343 Section 31.
- 344 This would include local authorities to which the power to issue licences has been delegated in provincial ordinances.
- 345 *Suliman v Minister of Community Development* 1981 1 SA 1108 (A).
- 346 *Wing Lee Ltd v Johannesburg City Council* 1931 AD 45 at 54; *Vandayer v Port Elizabeth Municipality* 1957 2 SA 67 (E) 70.
- 347 *Stanton v Minister of Justice* 1960 3 SA 353 (T) 354G-355H; *Dempsey v Minister of Law and Order* unreported case no 6787/86 9 July 1986 CPD, p 8-9 of typed judgment; *Salter v Municipality of Kirkwood* 1986 3 SA 810 (E) (successful challenge to refusal of renewal of trading licence where local authority had contended that 'rule of attraction' had rendered licence-holder a disqualified person).
- 348 *Salter v Municipality of Kirkwood* 1986 3 SA 808 (E) 813G-H and 814F appears to support this view.
- 349 Section 24(4)(a)(iii), 25(3)(a) and (4)(c), and 39; and see definition of 'immovable property' in section 1.
- 350 Section 25(3)(a).
- 351 Section 39.
- 352 *Dorklerk Investments v Bhyat's Department Store* 1974 1 SA 483 (W) 488H; *Karjiek v Karjiek* 1978 2 SA 499 (C) 504E-G; *Ornelas v Andrew's Café* 1980 1 SA 378 (W) 392B-F.
- 353 *Corondimas v Badat* 1946 AD 548; *Cross v Wiehahn* 1954 1 SA 216 (N); *Ornelas v Andrew's Café* 1980 1 SA 378 (W) 390F-G. Contrast, in a different context, *Ewels v Leach* 1954 4 SA 62 (E); *Du Plessis v Joubert* 1968 1 SA 585 (A) 594-7 which held that a failure to obtain a permit before conclusion of the relevant agreement, was fatal.
- 354 The application form for a permit under the 1957 Act specifically referred to agreements already concluded - see items 3 and 4, Van Reenen 516. This is not the case in the present application form (Appendix V), but permits are still granted in respect of agreements already concluded.
- 355 *Naidoo v Ramnarain* 1962 4 SA 637 (D).

- 356 *Ornelas v Andrew's Café* 1980 1 SA 378 (W) 394D-393A.
- 357 See Steyn Ch 6.
- 358 See the leading case of *Swart v Smuts* 1971 1 SA 819 (A) 829E-F.
- 359 This is particularly so because once it is established that a particular contract is invalidated by statute, the awareness of the parties involved as to the invalidity, is irrelevant. See *Reynolds v Kinsey* 1959 4 SA 50 (FC).
- 360 *Swart & Smuts* (n358) *ibid*.
- 360a 1986 4 SA 11 (C) 16-17.
- 360b *Setsoikosane Busdiens v Voorsitter, Nasionale Vervoerkommissie* 1986 2 SA 57 (A) 86F.
- 361 See eg *Corondimas v Badat* 1946 AD 548; *Cross v Wiehahn* 1954 1 SA 216 (N).
- 362 Section 5 of Act 35 of 1943 (first two categories; s 5(2) expressly nullified such agreements); s 8(1) of the original Group Areas Act and s 11(1) of the 1957 Act (all three categories; no express nullification).
- 363 Section 27(1).
- 364 Section 1.
- 365 1978 2 SA 499 (C). See Van Reenan E7.9. My earlier criticism of this case (*Schoombee I* 92 n143) appears to be wrong in as much as 'any right which would upon registration be such a real right' in the definition of 'immovable property' (s 1) does not refer to a right to obtain transfer of property, but only a limited real right (*beperkte saaklike reg*). The learned judge did, however, overlook the penal provision relating to section 27. The issue is however not free of doubt - see under 4.2.1 (iii) below.
- 366 *Ornelas v Andrew's Café* 1980 1 SA 378 (W).
- 367 At 392.
- 368 *Dorklerk Investments v Bhyat's Department Store* 1974 1 SA 483 (W).
- 369 1939 Ad 537.
- 370 *Jaybhay* case 545 and 557; *Kelly v Kok* 1948 3 SA 522 (A) 527-8.
- 371 *Dorklerk* case (n368) 489.

- 372 This is stated by Tindall ACJ in *Kelly v Kok* (n370) 527-8.
- 373 See *inter alia* Henning R J van R Oor die begrip diskresie in die administratiefreg (1967); Davis K C *Discretionary Justice. A preliminary inquiry* (1969 - reference herein to Illini Books edition 1971); Baldwin R and Hawkins K 'Discretionary Justice: Davis reconsidered' 1984 *Public Law* 570; Craig PP *Administrative Law* (1983) 371-383; Baxter L *Administrative Law* (1984) 80-93.
- 374 Craig op cit (n373) 351.
- 375 Cf Baxter op cit (n373) 80.
- 376 For instance, the distinction between 'weak' and 'strong discretion' drawn by Ronald Dworkin in his *Taking Rights Seriously* (1979); cf *Setsokeane Busdiens v Voorsitter, Nasionale Vervoerkommissie* 1986 2 SA 57 (A) 86.
- 377 See leading case of *SA Defence and Aid Fund v Minister of Justice* 1967 1 SA 31 (C) 34-5.
- 378 Compare the 'conservative' approach of cases such as *CIR v City Deep Ltd* 1924 AD 298 at 306-7, *Sachs v Minister of Justice* 1934 AD 11 at 39 and *Harper v Steyn* 1974 1 SA 54 (O), with the more 'liberal' (and preferable) approach to the review of (non-quasi judicial) administrative powers in *North-west Townships v Administrator of the Transvaal* 1975 4 SA 1 (T) 8, endorsed in *Suliman v Minister of Community Development* 1981 SA 1108 (A) 1123B-C.
- 379 *Minister of the Interior v Mariam* 1961 4 SA 740 (A) 751H; *Administrateur SWA v Pieters* 1973 1 SA 850 (A) 857G.
- 380 See Wiechers M *Administrative Law* (1985) 304.
- 381 On the Rule of Law see *inter alia* Beinart B 'The Rule of Law' 1962 *Acta Juridica* 99; Verloren van Themaat *Staatsreg* (3 ed 1981 by Wiechers M) 135-42; Davis D 'The Rule of Law and the Radical Debate' 1981 *Acta Juridica* 65, Mathews A S *Law, order and liberty in SA* (1971) and 'The Rule of Law - A reassessment' in Kahn E (ed) *Fiat Justitia* (1983) 294. On the principle of legality, Wiechers M 'Die Legaliteitsbeginsel in die Administratiefreg' 1967 *THRHR* 309. On the *Rechtstaat* concept, *inter alia* Henning op cit (n373) 35-52; Van Wyk D H 'SA en die regstaatsidee' 1980 *TSAR* 152.
- 382 Cf US cases such as *Panama Refinery Co v Ryan* 293 US 388 (1935), and Baxter op cit (n373) 82; but cf Davis op cit (n373) 44-5.
- 383 Baxter op cit (n373) 82.

- 384 See Van Wyk op cit (n381) 164-5.
- 385 Mathews works cited (n381) at respectively 31 and 303.
- 386 Dugard J *Human Rights and the South African Legal Order* (1978) passim.
- 387 On the basis of the inherent inequality of separate facilities - cf *Brown v Board of Education Topeka* 347 US 483 (1954).
- 388 See statements by Minister of the Interior during second reading debate on first Bill, *House of Assembly Debates* col 7452 29 May 1950, col 7810 and 7827 31 May 1950.
- 389 *Handbook on the Group Areas Act* (1960) 8.
- 390 See below Ch 6.
- 391 See n373 above.
- 392 At 28 et seq.
- 393 Ch II.
- 394 Ch III.
- 395 Ch IV.
- 396 Ch V.
- 397 *Minister of the Interior v Lockhat* 1961 2 SA 587 (A) 602D-E.
- 398 Such as security considerations in the case of District Six.
- 399 *Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad* 1959 3 SA 651 (A).
- 400 *Minister of the Interior v Lockhat* 1961 2 SA 587 (A).
- 401 *S v Adams, S v Werner* 1981 1 SA 187 (A).
- 402 *Suliman v Minister of Community Development* 1981 1 SA 1108 (A).
- 403 See below ch 4.
- 404 See above under 2.1.
- 405 See ss 17(2)(c); 20(2)(h), (i) and (o); and above at
- 406 See ss 17(4) and (5); 26(3).
- 407 Section 22.

- 408 Interview Mr J W Fourie, Department of Constitutional Development and Planning, Cape Town, 5 September 1986.
- 409 Section 9.
- 410 Sections 35 ('use') and 40 (nominees) are exceptions.
- 411 See s 21; Van Reenen E14.
- 411a On transfer of powers to provincial administrators, see text at n417 et seq.
- 412 Section 21(3). It has been held that there is no duty upon the grantor to consider these factors: *Bhyat v Dönges* NO 1951 3 SA 115 (T) 121-2; *Minister of Interior v Sundarjee Investments* 1960 3 SA 348 (T) 352B-G.
- 413 Section 21(2)(a).
- 414 Section 21(4).
- 415 Section 21(16).
- 416 *Sorrell v Milnerton Municipality* 1980 4 SA 660 (C) 664A.
- 417 Information is largely drawn from interview referred to in n408 above.
- 418 Personal communication department concerned, September 1986.
- 419 See reply to Parliamentary question by Minister of Constitutional Development and Planning on 10 September 1986: *Weekly Mail* 19-25 September 1986, p4; *Cape Times* 11 September 1986, p 3.
- 420 This has been done in terms of s15 of the Provincial Government Act 1986 - see GN 524 of 1986 GG 19359 of 25 July 1986.
- 420a In terms of the State President Minute 0962 of 25 September 1986 - no notice in the Government Gazette could be found.
- 420b Personal communication Mr D Barker Cape Provincial Administration 12 December 1986.
- 421 1951 3 SA 15 (T).
- 422 E14.9. He is also wrong in suggesting that the judgment of Marais J in *Sunderjee's* case (n424 below) was, on this point, overruled on appeal - see text at n425.
- 423 (n20 above) par 5.3
- 424 1959 2 SA 367 (T).

- 425 At 369F.
- 426 1958 1 SA 546 (A).
- 427 Sub nom *Minister of the Interior v Sundarjee Investments* 1960 3 SA 348 (T).
- 428 At 351H.
- 429 At 352A.
- 430 At 352F-G; and see n412 above.
- 431 At 352G-H; cf 352A-B.
- 432 At 353.
- 433 At 351A-F.
- 434 See *inter alia Hack v Venterspost Municipality* 1950 1 SA 172 (W) 190; *Administrateur van SWA v Pieters* 1973 1 SA 850 (A) 860F-G.
- 435 See further Schoombee J T 'The sources and nature of the rules and principles of administrative law' in *Liber Amicorum in honour of W H B Dean* (1986) 162 at 170.
- 436 Whether to afford an affected person a hearing (eg before his passport is withdrawn) in itself involves a policy decision; whether to withdraw the passport (eg because he advocated economic sanctions against SA) another.
- 437 Per Marais J in *Sundarjee* case a quo 372C.
- 438 At 372B.
- 439 1960 3 SA 348 (T) 352E-G.
- 440 At 351C-D.
- 441 *Judicial Review of Administrative Tribunals in SA* (1963) 53.
- 442 1951 4 SA 440 (A) 449.
- 443 See also Wiechers op cit (n380) 132-3; *De Vries v Du Plessis NO* 1967 4 SA 469 (SWA) 477C-478E; *Lek v Estate Agents Board* 1978 3 SA 160 (C) 170-1.
- 444 1958 1 SA 546 (A).
- 445 *Administrateur van SWA v Pieters* 1973 1 SA 850 (A).
- 446 Above at n426.

- 447 See Wiechers op cit (n380) 133-4; Baxter op cit (n373) 577-80.
- 448 HSRC Sport Report par 5.3.1, p 55 n57.
- 449 See majority judgment of Schreiner J A at 549G-H.
- 450 See Reich C A 'The New Property' (1964) 73 *Yale Law Journal* 733 especially at 741-2; Baxter op cit (n373) 578; cf *Msomi v Abrahams NO* 1981 2 SA 256 (N).
- 451 See Wiechers op cit (n380) 134-5.
- 452 *R v Ngwevela* 1954 1 SA 123 (A).
- 453 Cf *Boesak v Minister of Home Affairs* CPD Case no 11868/1985 19 December 1985 (yet unreported) p38-9 of typed judgment - the case dealt, however, with the withdrawal of a passport, in terms of the prerogative, 'at the pleasure' of the Minister.
- 454 Cf HSRC Sport Report par 5.3.5. 2-3.
- 455 This is before occupation for professional purposes became exempted. See Van Wyk D H 'The Rights of Africans to Participate in Business, Professional, Recreational and other Activities in Urban Areas in SA' 1984 *Acta Juridica* 65 at 83; but see Horrell op cit (n270) 148-9 for the draconian policy followed in respect of Black professionals up to 1975.
- 456 See HSRC Sport Report par 5.3.3. and 'Aanhangsel B' (145-7) thereto. Cf also position in respect of Japanese, discussed under 2.2 above.
- 457 HSRC Sport Report par 5.3.4.
- 458 Section 1(6) of the Act. See also s 72(1) of the Liquor Act 1977 and *infra* at 3.5. The blanket ban on persons other than Blacks entering Black residential areas without a permit, was lifted through the amendment of s 9(9) of the Blacks (Urban Areas) Consolidation Act 25 of 1945 by s 3 of Act 91 of 1985, which came into force on 3 July 1985. Act 25 of 1945 has now been repealed in its entirety.

CHAPTER THREE

THE GROUP AREAS ACT - HISTORICAL ANTECEDENTS AND INTERRELATIONSHIP WITH CERTAIN OTHER LAWS.

3.1 *Introduction*

A general outline of group areas legislation and its operation has now been given. We turn to consider, very briefly, the historical antecedents of this legislation and also its most immediate interconnection with other current legislation. It has often been pointed out¹ that South Africa's elaborate group areas system is not all the making of the National Party government which came to power in 1948. It has even been suggested that group areas measures can be traced back to Jan van Riebeeck's direction in 1660 that a bitter almond hedge be planted to mark the dividing line between the 'Hottentots' (Khoi) and the Free Burghers.² When one seeks for more substantial historical precedents than Van Riebeeck's tree-planting directive, the spate of legislation which has sought to confine Africans ('Blacks') to particular areas, immediately presents itself as a candidate. Historical analysis proves, however, that the actual legislative model taken for group areas has been the string of legislative measures starting in the 1880's directed against 'Asiatics' (particularly Indians) in the Transvaal and later, Natal.

3.2 *Asiatic legislation*³

During 1860 Indians came to South Africa as indentured labourers to work on the sugar cane plantations of Natal, and also as traders - so-called 'passenger Indians'. Soon they started acquiring land and competing with the White colonists in commerce and agriculture. The discovery of gold drew them to the Transvaal and after the first Anglo-Boer war, the London

Convention of 1884 guaranteed them entry into the then South African Republic. Substantial numbers moved there. These developments triggered off a complex series of legislative and administrative measures designed to curb what was termed Indian 'penetration' - both in the residential and commercial areas. The legislation was frequently changed and tightened in order to stultify the continuing efforts of Indians to circumvent the discriminatory restrictions placed upon their activities. Van Reenen points out that although initially the focus was on the control of *ownership*, the latter 'was relevant only in so far as it gave them (ie Indians) rights of occupation'⁴. Enforced segregation was ostensibly justified in the SAR on the ground of 'sanitary considerations', but in the *Dadoo* case Wessels J observed in the decision at first instance that the 'true reason' for segregation as applied to Indians was 'the fear that they might get control over the land in a country (with) no equality between white and black.'⁵

The anti-Asiatic legislation under consideration displayed certain broad characteristics many of which found their way into the Group Areas Act. The legislation generally followed a pattern of 'pegging' the ownership and occupation of land by Asiatics as at a certain date; the racial character of the land was fixed at this date with reference to the race group of the owner or occupier. Asiatics could then not acquire or occupy 'new' land, unless it fell in areas set aside for them. This 'pegging' notion was, of course, the point of departure of the Group Areas Act - compare the position in respect of controlled and specified areas, discussed in 2.4.2 - 3 above.

Much effort was spent in the earlier legislation to curb nominees and the activities of 'Asiatic' companies and to control the issue of trading licences to Asiatics. It will be recalled that in 1932 Asiatic companies were for instance banned from holding any immovable property in the Transvaal.⁶ These three concerns again feature prominently in our present group areas legislation, although the blanket ban against Asiatic companies was not carried over into the Group Areas Act.

Indians in the Transvaal bore the brunt of the early measures and although those in Natal did not escape restrictions,⁷ the Trading and Occupation of Land (Transvaal and Natal) Restriction Act 35 of 1943 was the first post-Union Act to impose restrictions on Indians in Natal. Like Indians in Transvaal, they now became subject to a general 'pegging' measure.

The pre-group areas legislation culminated in the Asiatic Land Tenure and Indian Representation Act 28 of 1946 - the so-called Ghetto Act. This further implemented the 'pegging' principle and introduced rudimentary 'group areas' for Indians. The occupational character of land was determined by the race of the lawful occupant at the fixed date.⁸ Only in specially defined exempted areas, could Indians henceforth purchase land, or commence with occupation after the fixed date. In respect of other areas, it was specifically provided with regard to Natal that agreements between Asiatics and non-Asiatics to acquire fixed property, were null and void.⁹ This brought the position in Natal in line with that already prevailing in the Transvaal.

Three features of the 1946 Act which were carried over to the Group Areas Act also deserve mention: the introduction of an extensive permit system; the creation of the Land Tenure Advisory Board; and the granting of a discretionary power to the responsible Minister to determine, in certain circumstances, the racial character of fixed property.

The first Group areas Act drew considerably upon the earlier Asiatic legislation. The point should be made, however, that it also displayed several novel features. It was generally a far more comprehensive, complex, stringent and 'ideological' measure - it sought to redraw the population map of the entire South Africa according to the apartheid formula. It only used racial 'pegging' as a starting point; the Act provided the machinery for the proclamation of group areas and (together with its sister act) for the concomitant relocation of disqualified persons in a manner which paid scant regard to vested rights.

When the Group Areas Act and its antecedents are considered the high degree of White support, for these measures should also be borne in mind. The long line of preceding segregationist legislation had been consistently sponsored by various White governments who otherwise differed in their political views. These measures had also apparently been supported by a substantial majority of Whites, who clamoured for wider restrictions. The joint committee appointed in 1948 to consider amendments to the 1946 Act, reported in the following terms on the consensus that existed between the English and Afrikaans sections of the White population:

'It would indeed be difficult to point to any other vital problem in the history of South Africa in regard to which the two sections of the White population held such identical views and co-operated so well as on the Asiatic question.'¹⁰

Even in the 'more liberal' Cape Province complaints had been voiced against Coloured 'penetration', and in 1939 the Cape Municipal Congress had voted, by 127 to 33, in favour of segregated residential areas.¹¹ A large measure of consensus amongst the major White parties was also evident with regard to the first Group Areas Bill - on behalf of the opposition United Party it was affirmed that it stood 'four-square for the principle of social and residential segretion',¹² although the UP called for a judicial commission of inquiry before the enactment of group areas legislation.¹³

3.3 *Laws governing Blacks*

The position of Blacks vis-à-vis the Group Areas Act has differed markedly from the general position of the other racial groups. The applicability and practical application of the Act with regard to Blacks will now be briefly considered.

At the most general level, the distinct position of Blacks is attributable to the fact that control over the ownership and occupation of land by Blacks has historically been effected in terms of a separate set of legislative measures which created its own species of Black 'group areas'. The Black laws (to coin a generic term) allocated (very limited) land to Blacks, and *prohibited* (or restricted) ownership and occupation by them

outside the allocated areas. This explains why there has been no allocation of Black land under the Group Areas Act, and no proclamation of Black group areas in terms of the Act, even though the Act makes provision for such a possibility. While Blacks have not been affected by (or 'benefited from') the *allocatory* aspect of the Group areas act, they have on the other hand been subject to its *prohibitory* aspects; they are, most importantly, disqualified persons vis-à-vis the group areas of all other groups. This has meant that Blacks have been subject to dual controls - under Blacks laws and the Group Areas Act. Thus in an urban context the former restricted them to Black areas and the latter moreover banned them from the group areas of other groups. We shall return to this dual control aspect.

When we turn to deal with the Black laws, the Black Land Act 27 of 1913 and the Black Land and Trust Act 18 of 1936 firstly deserve consideration. These Acts have respectively sought to confine Blacks to 'scheduled' and 'released areas', which provided the territorial base for the 'independent' (TBVC) states and 'national states'. In conjunction with these measures entry by Blacks into and residence in prescribed areas (roughly all urban and town areas outside scheduled and released areas) have been strictly controlled, primarily through the Natives (Urban Areas) Act of 1923 and its successor, the Blacks (Urban Areas) Consolidation Act 25 of 1945, which until its recent repeal constituted the main element of the elaborate influx control system, and also provided for the strict residential segregation of Blacks in prescribed areas.¹⁴ The implementation of these measures has involved a massive relocation of Africans. Platsky and Walker calculated the total number of forced removals in South Africa during 1960-1983 at 3 548 900; of these, group areas removals contributed 800 400; the rest were effected under the laws governing Blacks.¹⁵

The plethora of Black laws and the policies pursued thereunder have resulted in what approximates the 'ultimate group areas solution' - 'independent states' and 'national states' politically and territorially divorced or semi-divorced from the

rest of South Africa on an ethnic or tribal basis. For a considerable period of time apartheid dogma sought to incorporate even urban Blacks into this scheme. Their stay in urban areas was deemed to be 'temporary' and they had to exercise all their political rights in their respective 'homelands'. Recently there has been some shift of thinking in this area - an aspect to which we shall return at the end of this section.

When the interrelationship between the Black Laws and Group Areas Act is examined on a more specific level, it can broadly speaking be stated that where their spheres of application could overlap and conflict, the former take preference. Thus the restrictions on the acquisition of immovable property in controlled areas do not extend to Black 'released areas' (which are subject to strict control under the Development Trust and Land Act 1936), or to any acquisition of immovable property governed by the recently repealed Blacks (Urban Areas) Consolidation Act 1945.¹⁶ As to occupation in controlled areas, the exemptions contained in s 20(2) of the Group Areas Act preserve the exemptions of the 1936 Act relating to Blacks living outside scheduled and released areas.¹⁷ The Group Areas Act provides that a proclaimed group area may not include scheduled areas, black residential areas established under the Blacks (Urban Areas) Consolidation Act 1945¹⁸ or any land in a released area vested in the SA Development Trust.¹⁹

Comparison of the policies which have underlain the two sets of measures reveals important differences. In the case of group areas legislation applicable to Whites, Indians and Coloureds, there was some argument, in theory at least, that the aim was to provide separate areas where each of these racial groups could

pursue basic economic and social freedoms. By way of contrast, the overt aim of the Black legislation, and the delegated legislation made thereunder, in relation to urban areas, has been the severe curtailment of these activities by Blacks even in *their own (urban) areas*.²⁰ Residential segregation of Blacks in urban areas has also been closely linked to other policies such as influx control, and the so-called Stallard doctrine that Blacks should only be allowed in urban areas to minister to the needs of the Whites. Influx control has not really²¹ operated in respect of disadvantaged groups under group areas legislation, namely Coloureds and Indians, although it can certainly be argued that the severe housing shortage experienced by these groups (which has either been created or aggravated by the discriminatory application of the group areas legislation) acts as a *de facto* influx control measure.²²

Recently there has been a shift in the government's thinking on the political position of Blacks that has implications for the application of the Group Areas Act. The shift manifested itself *inter alia* in the recognition of the permanence of a substantial proportion of urban Blacks. Consequently we have seen the introduction of 99 year leasehold rights for Blacks in urban areas and, recently, the opportunity for full rights of ownership in Black residential areas.²³ The traditional system of influx control in respect of Blacks has recently been abolished and there has also been a selective 're-nationalisation' of TBVC citizens who lost their SA nationality upon independence but who have some permanent connection with the

Republic.²⁴ Further, concerted efforts have been made to establish and promote Black local authorities.²⁵ These are meant to link up with White authorities and the Coloured and Indian local authority institutions created by the Group Areas Act on a regional basis through the Regional Services Councils (to be discussed under 7.3 below). Black local authorities, however, appear resently to be beset with even greater problems than their Coloured and Indian counterparts - they seem to be teetering on the brink of collapse by reason of *inter alia* a severe legitimacy crisis in their communities, sustained physical attacks on members, competition from 'alternative' organisations and a rent boycott in their areas causing arrears in rentals to run, as at August 1986, into R200 million.²⁶

Some of these recent legislative changes increased the importance of the Group Areas Act vis-à-vis Blacks. Thus the repeal of the Blacks (Urban Areas) Consolidation Act has meant that the notorious curbs of section 9 of this Act (restricting *inter alia* the accommodation of Blacks outside Black residential areas²⁷ and the conduct of schools, churches, other institutions and places of entertainment for the benefit of Blacks outside such areas) have fallen away. The entitlement of Blacks to live outside Black residential areas, and to attend the above-mentioned establishments, henceforth stands to be determined with reference only to the Group Areas Act - and, of course, depending on the circumstances, in terms of other legislative measures such as the Prevention of Illegal Squatting Act 1951 and the Trespass

Act 1959 which continue to operate as covert influx control measures by reason of socio-economic circumstances.²⁸

3.4 The Community Development Act²⁹

The Group Areas Act is complemented by several legislative measures which share its segregationist philosophy and either facilitate its implementation or carry group areas thinking (including the social apartheid dimension thereof) into spheres where the Act does not apply or does not lay down detailed rules. The most important of these complementary measures is the Community Development Act 3 of 1966.

This Act started out life as the Group Areas Development Act 69 of 1955 and has been termed the 'sister act' of the Group Areas Act.³⁰ The Group Areas Act envisages the relocation of 'disqualified persons' on a grand scale, and the Community Development Act contains the necessary administrative machinery for this purpose.

The Act vests extensive functions and powers in a statutory body, the Community Development Board. With the advent of the new Constitution, these functions and powers were transferred to 'own affairs' ministries of the three houses of Parliament during 1984.³¹ In the case of the white House of Assembly, an 'own affairs Community Development Act' has now been enacted, namely the Development and Housing Act 103 of 1985.³² It must thus be borne in mind, with regard to the summary which follows, that the functions of the Community Development Board (hereinafter referred to as 'the Board') vis-à-vis particular group areas are

now carried out by the 'own affairs' ministry of the group in question.

Immovable property in a group area³³ which is occupied or owned by a disqualified person at the date of proclamation³⁴ constitutes 'affected property' in terms of the Community Development Act. The Board must compile a list of such 'affected properties'.³⁵ The Community Development Act then grants the Board a pre-emptive right in respect of such properties,³⁶ which is one of the powers that can be used to 'clear' a group area of disqualified persons. Other powers to this end include expropriation³⁷ and, in a controlled area, the termination of leases of disqualified persons.³⁸ The same Act furthermore contains 'positive' provisions catering for the relocation of and provision of housing for persons displaced by group areas legislation.³⁹ The development of housing estates or townships for this purpose is usually undertaken in conjunction with local authorities. In this sphere of 'community development' there is an overlap between the provisions of the Community Development Act, the Housing Act 4 of 1966, and to some extent, the Slums Act 76 of 1979.

In the discussion of the impact and legacy of group areas in chapter six, further reference will be made (under 6.7) to the losses and unfair financial burdens imposed upon disqualified persons by the exercise of the aforementioned powers.

3.5 Reservation of Separate Amenities Act

In 2.1 above the point was made that the scope of the Group Areas Act was considerably extended in 1957 when the meaning of

'occupation' was expanded to include *inter alia* physical presence for a substantial period of time. This made the Group Areas Act into a measure for what may be termed 'social apartheid'. In this sphere it linked up with an important earlier social apartheid law, the Reservation of Separate Amenities Act 49 of 1953.

Section 2 of this Act empowers any person who is in charge of any public premises or public vehicle to set apart or reserve such premises or vehicle 'or any counter, bench, seat or other amenity or contrivance' therein for the exclusive use of persons belonging to a particular race or class. Section 3 then enacts a 'separate but unequal' principle. It provides that any such setting apart or reservation shall not be invalid on the ground merely that no such premises or vehicle has similarly been set apart for the exclusive use of any other race or class or that any premises or vehicle reserved for the other race or class 'is not substantially similar' to that set apart for the first group.

Within its field of application this Act nullified the common law presumption that public officials or bodies without original legislative power may not, in the absence of authorisation to this effect, discriminate in the use of their powers either if the result is substantial inequality of treatment or if no reason can be advanced for such discrimination. In cases such as *Abdurahman*⁴¹ and *Lusu*⁴² decided before this Act, segregationist practices by the Railways were successfully attacked on the basis of the presumption against discrimination. The Act has enabled governmental and quasi-

governmental bodies (such as the Railways) to apply apartheid measures with regard to the facilities under their control - without fear that they might be held to a 'separate but equal' test in terms of the common law presumption governing the exercise of statutory powers. It would appear that segregation in state and provincial hospitals is, for instance, presently maintained on the basis of the Separate Amenities Act. *Bona fide* patients in such hospitals are exempted from the occupation restrictions of the Group Areas Act relating to controlled⁴³ and group areas,⁴⁴ while the restrictions contained in s 9(7)(d) of the Blacks (Urban Areas) Consolidation Act 1945 relating to the attendance by Blacks of hospitals outside Black residential areas, have fallen away with the repeal of this Act.

The Separate Amenities Act can be used to impose stricter constraints than the Group Areas Act, because under the former any group or class can be prohibited from entering land or premises or being there even for an insignificant period of time. Thus a Black walking through a park in a White group area is not 'occupying' land in terms of the Group Areas Act; the local authority in charge of the park can, however, in terms of the Separate Amenities Act prohibit Blacks from entering the park - as the Pretoria City Council did in respect of 17 parks during April 1983.⁴⁵

The Separate Amenities Act contains no definition of the different races or classes to which the Act can be applied. Presumably the meaning of a particular reservation (eg 'Whites Only') is to be determined by asking how it would reasonably be

understood in our society and here the intention of the person or body who imposed the reservation would probably be relevant. The parameters of a reservation in terms of this Act (such as 'Whites only') cannot be determined by simply referring to race classification under the Population Registration Act, or, for that matter under the Group Areas Act. In the nature of things race classification for the purposes of a reservation under the Separate Amenities Act must be determined on the basis of appearance. In *Ex parte X* the court was faced with a race classification problem in a situation where no statutory test was applicable. Van den Heever J propounded the following test, which appears to be relevant in the present context:

'The physical appearance of the person concerned, his origin and his mode of life, and association, appearance being the predominant factor.'⁴⁶

The Separate Amenities Act itself contains no criminal provisions. Anyone who enters land or a building contrary to a reservation under the Act would, however, be trespassing under the Trespass Act 1959, and may be prosecuted under that Act. Reservations under the Separate Amenities Act are also frequently backed by criminal sanctions contained in the bye-laws or regulations of the public body effecting the reservation. In the case of local authorities provincial ordinances such as the Reservation of Separate Amenities by Local Authorities 20 of 1955 (Cape) supply criminal sanctions.

3.6 Educational institutions

3.6.1 Introduction

Apartheid in educational institutions, particularly schools, and group areas complement each other in an important way. Most schools have a strong 'neighbourhood' basis. Segregated residential areas and segregated schools go hand in hand - on an ideological and practical basis. In the light of the US experience in seeking racial integration, Glazer and Moyhihan suggest that integrated housing would appear to be more difficult to achieve than integrated schools or places of employment.⁴⁷ But recent experience in Namibia suggests otherwise: legal segregation in state schools has there persisted long after the abolition of legally segregated residential areas.⁴⁸ The present SA government has certainly made no secret of its firm commitment to segregated (state) schools. These have been listed (with residential group areas) as a political 'non-negotiable'.⁴⁹ Recent moves by certain government schools (such as SACS and Rondebosch Boys High in Cape Town) to go 'mixed' have been rejected - the Minister of National Education said that the alternative for people who wanted integrated education lay with private schools.⁵⁰ And the plight of the Roux children which was raised in Parliament recently, suggests that the government is less willing to make exceptions with regard to segregated schools than segregated neighbourhoods. The children's (originally) White father and Coloured mother live in the (White) suburb of Belgravia, Transvaal by virtue of a group areas permit. But the children have to go to a Coloured school 20 kilometres away,

because White neighbourhood schools are not allowed to take them.⁵¹

Segregation in education exists, of course, not only to complement group areas by upholding physical segregation. It lies at the heart of the aim of the apartheid ideology to create separate societies, each with its own 'culture'. The most notorious off-shoot in this context has been the purposefully inferior education which resulted from Verwoerd's 'Bantu education' philosophy.⁵²

3.6.2 *Interrelationship with Group Areas Act*

The attendance of educational institutions situate in group areas by disqualified persons is governed by the Group Areas Act, because such attendance would in all probability constitute 'presence for a substantial period of time'. This is assumed by the government; hence the important exemption introduced by delegated legislation in respect of any:

'bona fide student or scholar only for the purpose of daily attending academic lectures at an educational institution controlled or aided by the state.'

This exemption, discussed under 2.4.4.1(3) above, would also apply to virtually all private educational institutions by reason of the fact that they receive state aid in some form or other. While the Group Areas Act does not, by virtue of the aforementioned exemption, control ordinary attendance (physical presence) at educational institutions, it does control related issues such as boarding in a school or university residence - as explained in 2.4.4.1(3) above. Actual attendance of classes is

regulated by the legislative measures which control enrolment; these will now briefly be discussed.

3.6.3 *Admission to Universities*

Through the Extension of University Education Act 45 of 1959 apartheid was imposed upon the 'White' universities (which were more or less open till then) and this Act also set in motion the creation of separate Black, Coloured and Indian institutions of higher education. 'Non-White' students were until 1983 admitted to 'White' universities on a permit system.⁵³ During 1983, a racial quota system replaced the permit system. The payment of State subsidies to a university was made conditional upon compliance with the racial quotas determined by the Minister of National Education in respect of the particular university.⁵⁴ Following strong protests by certain 'White' universities against the quota system, the Minister announced during August 1983 that quotas would not actually be enforced, but that the number of 'non-White' students at these universities would be closely watched. Permits would still, however, be required where 'non-White' students wished to study medicine, dentistry and certain other courses at 'White' universities.⁵⁵

The government has displayed a relatively more lenient attitude towards limited 'mixing' in universities than in schools. This appears to be explicable on the basis of the following factors:

- (i) some respect for university autonomy and the 'open' tradition of certain universities;

- (ii) consistent protest especially by the English-speaking universities against apartheid in education;
- (iii) universities do not have a 'neighbourhood connection' like (state) schools;
- (iv) an acute shortage of skilled manpower which the new 'ethnic' universities have been unable to overcome.

3.6.4 State Schools

These are run by various departments. Black school education at all levels is controlled by the ('general affairs') Department of Education and Training; in the case of Coloureds and Indians, presently by 'own affairs' departments of respectively the House of Representatives and House of Delegates which took over from the central government departments. The three Acts governing these spheres of education, clearly envisage that only Blacks are to be admitted to Black schools, etc, and this has been the practice. The specific provisions in the Acts dealing with the admission of pupils, however, only state that they are to be admitted 'in prescribed circumstances and subject to prescribed conditions'.⁵⁶ The Coloured Labour Party which controls the administration of the House of Representatives has on occasion stated that it intends 'opening up' Coloured schools. The government has made it clear, however, that such a move would resort under 'general affairs' and could not be implemented by an 'own affairs' ministry.⁵⁷ Any steps in this direction by an 'own affairs' ministry could probably be blocked by a ruling of the State present under s 16 of the 1983 Constitution (stating that the issue was a 'general affairs' one) and further through the

budgetary control exerted by the 'general affairs' administration over 'own affairs'.⁵⁸

White schools have traditionally resorted with the Provinces. Again the respective Education Ordinances envisage a policy of White pupils only in White schools, and this is the practice. Control of White school education now vests with the 'own affairs' Department of Education and Culture of the House of Assembly, and the position is presently governed by the recent National Education Policy Amendment Act (House of Assembly) 103 of 1986. In terms of this Act provincial education departments continue essentially to function as before, but they now fall under the auspices of the own affairs Department and each is controlled by an education council.

3.6.5 *Private Schools*

As indicated in 3.6.1 above,⁵⁹ the government is prepared to allow (some) 'mixing' in private schools. The reasons are probably that private schools

- (i) do not have the 'neighbourhood connection' of state schools;
- (ii) are relatively few and far between;
- (iii) in any event practice 'economic apartheid' by reason of their fees structure;
- (iv) run by churches have since the mid-seventies taken a strong stand against apartheid foisted upon them.⁶⁰

In 1981 the Financial Relations Amendment Act 102 of 1981 granted Provincial Councils the power to authorise and regulate the admission of children, other than White children, to private schools and to subsidise the children who were so admitted.⁶¹

All the provinces have made use of this power and the Education Ordinances presently empower the Administrator to allow the admission of 'non-White' children to private schools at all levels, on the conditions and in accordance with the procedure prescribed by him.⁶² This has been an important development, because most private schools are traditionally White. The actual admission of 'non-White' pupils to White private schools was, until recently, implemented through a quota system,⁶³ and at the beginning of 1986 there were reports that state subsidies to private schools would be reduced in proportion to the growth of their 'non-White' component.⁶⁴ On 23 May 1986 the responsible Minister announced in Parliament that the quota system in respect of private schools had been dropped. State subsidies (of 15%) were henceforth to be dependent on a particular private school's showing that it met the 'educational and cultural needs of a cultural or religious group', its providing satisfactory accommodation and its complying with the medium-of-instruction provisions applicable to private schools. Private schools that achieved 'higher scholastic standards' would qualify for a 45% subsidy.⁶⁵

Recently the House of Assembly adopted new ('own affairs') legislation on private schools, viz the Private Schools Act 104 of 1986. It was promulgated on 24 September 1986, but is deemed to have come into operation on 1 April 1986. In terms of this Act all (White) private schools must register with the Department of Education and Culture of the House of Assembly. Registration shall be subject to such conditions as may be prescribed.

Section 6 provides that the granting of state financial aid to private schools is to be conditional upon compliance with the prescribed conditions. The Department's powers under the act may be delegated to the provincial education authorities. It would appear that the conditions set out immediately above relating to the admission of 'non-White' pupils will simply continue to apply under the new Act - it was stated in May 1986 that they would apply as from 1 April 1986, which is the date upon which the new Act is deemed to have come into operation.^{62a}

3.7 *Beach apartheid*

Beach apartheid is not effected through group areas legislation; all group areas proclamations in coastal areas (ie Cape Province and Natal) only run up to the high-water mark. So the laws governing beach apartheid literally take over where the application of group areas legislation ends. These laws are exceedingly complicated and obscure, and what follows is only a sketch of the legal position.⁶⁶ This area of the law may be characterised by obscurity and frequent changes, but segregated beaches remain a politically sensitive and emotive issue. In the Port Elizabeth area the police⁶⁷ and the defence force⁶⁸ have in recent times been used to clear beaches reserved for Whites of 'non-Whites', while General Motors has offered legal and financial assistance to any of its employees prosecuted for swimming on PE's 'Whites only' beaches.⁶⁹ At the beginning of 1987 the leader of the Coloured Labour party undertook a protest swim on a White beach in the city, while racial violence erupted on beaches in Durban and Amanzimtoti during the same time.^{69a}

The legal position with respect to beach apartheid may be summarised by saying that beaches are subject to 'racial' control through the combined effect of the Sea-shore Act 1935 and the Reservation of Separate Amenities Act 1953. It should also be mentioned at the outset that specific stretches of the beaches are set aside for certain racial groups in terms of *ad hoc* rulings, mostly by the local authority concerned. It is thus very difficult to get an overall picture of the extent of beach apartheid in South Africa. But there can be little doubt that the best and most popular beaches have traditionally been reserved for Whites. In February 1983 the PFP MPC, Mrs Molly Blackburn, made the point that in the Cape Province 150 000 Whites had exclusive use of 28,4 kilometers of coastline while other groups were restricted to 8,5 kilometers.^{69b} The last number of years have, however, seen a progressive desegregation of beaches.

As far as the applicable legal provisions are concerned, it should firstly be noted that in terms of s 6 of the Sea-shore Act 21 of 1935 the State President owns the land and sea between the high-water mark and the edge of the territorial waters. In the discussion that follows, the term 'beach' will be used to refer specifically to this land below the high-water. The high-water mark is defined as 'the highest line reached by the water of the sea during ordinary storms occurring during the most stormy period of the year, excluding exceptional or abnormal floods'.⁷⁰ This mark is obviously not something that can be observed on the ground, and it may authoritatively be determined on charts in

terms of s 9 of the Sea-shore Act 21 of 1935 or s 16 of the Land Survey Act 9 of 1927.

The line so determined is reflected on the maps in the Surveyor-general's office depicting group areas, but only rarely (for instance, in the case of Fish Hoek, Cape Town) is there any indication on the beach itself where the high-water mark runs.

The Reservation of Separate Amenities Act 1953 links up with the Sea-shore Act in the following way. Section 2A of the former Act provides that the provincial executive committee is deemed to be in charge of the beaches vesting in the State President in terms of the latter Act. The committee can thus segregate beaches in terms of the Separate Amenities Act, discussed under 3.5 above. The executive committee can also delegate control of specific beaches to the local authorities.⁷¹ The actions of local authorities can be kept in check by virtue of the fact that the Administrator is empowered by provincial legislation in the Cape and Natal to direct local authorities to implement beach apartheid.⁷²

The control so vested in the executive committees (or local authorities) and the Administrator is, however, not exclusive. The Sea-shore Act empowers the relevant Minister (presently the Minister of Environmental and Water Affairs) to make regulations relating to beaches,⁷³ and specifically provides for the implementation of beach apartheid through such regulations.⁷⁴ These powers can also be delegated to the provincial executive committee, and the Minister may authorise a local authority to make such regulations.⁷⁵

In practice these powers have been differently applied in the Cape Province and Natal.

3.7.1 Cape Province

The executive committee has in terms of s 2A(2) of the Seashore Act delegated to local authorities the control of beaches within their respective areas of jurisdiction.⁷⁶ They are supposed to implement a 'master plan' for beach apartheid drawn by the executive committee and revised from time to time. In the past there has been some reluctance on the part of local authorities such as the Cape Town City Council to implement beach apartheid.⁷⁷ During 1985-6 various local authorities in the Cape have made moves to desegregate beaches, and there appears to be a reluctance on the part of the provincial authorities to force local authorities to apply beach apartheid. In December 1986 the Cape Divisional Council ('DIVCO') desegregated virtually all the beaches under its control, although the prior permission of the provincial authorities could not be obtained for this step. The Administrator reacted by saying that he could not take a definite stand on the matter, because his hands were tied - by the 'existing law', and by virtue of the pending investigation by the President's Council into group areas and beach apartheid. He did also state that the DIVCO 'had taken the law into its own hands'.^{77a} If the latter remark implies that DIVCO acted unlawfully, it stands to be rejected. The delegation to the DIVCO by the provincial executive committee^{77b} effected a decentralization of administrative functions^{77c} and the DIVCO could act on its own initiative. The Administrator could, of

course, still order it to implement beach apartheid in terms of his specific enforcement powers under the 1955 Ordinance.^{77d}

Prosecutions of persons venturing onto prohibited beaches also face complications. The Strydom Committee doubted whether a successful prosecution could be brought where merely the traditional 'Whites Only' notice-boards have been erected at intervals along an otherwise undemarcated beach.⁷⁸ It would be unclear where the stretch of the beach set aside for a specific racial group begins and ends. The position with regard to demarcation is further complicated by the fact that the beach in the popular sense of the word (ie the sandy or rocky part of the coastline) often extends above the high-water mark, which is the limit of the 'beach' in the technical sense referred to in the Sea-shore Act. Above the high-water mark the Group Areas Act would apply, and the better-known beaches would fall in a proclaimed group area - usually a White one. But control of physical presence in a group area is less strict than under the Separate Amenities Act - under the former an infringement only occurs in the case of '*presence for a substantial period of time*'; under the latter mere entry or presence suffices. Where a person is charged for infringing beach apartheid, it could thus be all important to establish whether he was above or below the high-water mark. And in general the clarity of the demarcation of a segregated beach would be relevant to the issue of *mens rea*.

Where the beach (up to the high-water mark) does not abut a group area, but a *controlled area*, the picture is further complicated in respect of the part of the beach (in the wide

sense) above the high-water mark. The occupational character of land in the controlled area is determined by the racial group of the owner. The land immediately above the high-water mark would, in the case of the better known beaches, often be owned by the local authority or the State. In the Cape Province local authorities attract, in the controlled area, the race classification of the majority of their councillors - they would thus invariably be 'White' and all other groups would be disqualified persons vis-à-vis the land.^{78a} The state, on the other hand, is racially neutral.⁷⁹

There is a very real possibility that the land immediately above the high-water mark would belong to the state. Along various parts of the Cape and Natal coast there is namely in existence a strip of state-owned land known (*inter alia*) as 'Admiralty Reserve'. This runs from the high-water mark landwards for varying distances - up to 200 feet, depending on the original reservation in favour of the Crown.⁸⁰ So racial restrictions would not apply in Admiralty Reserve areas situated in a controlled area, unless they have been imposed by the State - local authorities do not exercise control over the Admiralty Reserve.

It remains to mention the position in the Cape with regard to the Minister's powers to make regulations under the Sea-shore Act. The Minister has delegated his powers to the executive committee,⁸¹ but the legislative process is a cumbersome one (involving consultation with various government departments) and has in any event not been used to implement beach apartheid.

3.7.2 Natal

Here the provincial administration has not implemented beach apartheid and in a press release of 17 February 1983 stated that it did not believe 'in enforcing either integration or segregation.'⁸² Except in the case of Richard's Bay, control of beaches has also not been delegated to local authorities.⁸³ The City of Durban occupies a peculiar position, because the land between high and lower water mark between the Umgeni River and the Point is part of the town lands.⁸⁴ This strip forms part of the 'foreshore' as defined in the Durban (Extended Powers) Consolidation Ordinance⁸⁵ and in terms of this Ordinance⁸⁶ beach apartheid has in the past been implemented along this stretch of the coastline.⁸⁷

While the Natal provincial administration has not implemented beach apartheid, the central government has in certain instances. In terms of the Sea-shore Act the Minister has published general regulations regarding beaches along the Natal coast (excluding Durban)⁸⁸ and these provide that he may upon notice set aside beaches for racial groups - as has for instance been done in the case of the Newsel-Umhloti beach.⁸⁹

3.8 Liquor Act

For a considerable period of time racially 'mixed' drinking in public had been subjected to strict statutory control.⁹⁰ This served to bolster not only the 'racial purity' of group areas, but aimed at enforcing social apartheid beyond the scope of group areas legislation. It would appear, however, that the Liquor

Amendment Act 12 of 1986 has now taken the overtly racial elements out of this area of the law.

CHAPTER THREE

ENDNOTES

- 1 Van Reenen A1; D'Oliveira para 478; *Strydom Committee* par 13-15.
- 2 *Strydom Committee* par 13.5.
- 3 See Van Reenen Ch A-D (pl-112); D'Oliveira par 478-491; Maasdorp, G & Pillay, *N Urban Relocation and Racial Segregation. The case of the Indian South Africans* (1977) 79-91 (focussing on Natal); Forsyth, C F *The Appellate Division of the Supreme Court of S A from 1950 - an historical study of judicial choice* (1984) 312-321.
- 4 B.1.35; cf B.1.8.
- 5 See *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 535.
- 6 See 2.3 above, at n125.
- 7 Maasdorp & Pillay 80-88.
- 8 In Transvaal 15 March 1946, in Natal 21 January 1946.
- 9 See ch 2.7.8, at n362, above.
- 10 As cited in *House of Assembly Debates* col 7445 29 May 1950; an extract of the report was published as UG 49-50.
- 11 Ibid col 7450-1. As to the general position outside the Transvaal prior to the Group Areas Act, see Van Reenen ch B.3, and on the ban against Indians in the OFS, also Schoombee I 85 n 81 - the latter legislation has now been repealed.
- 12 *House of Assembly Debates* col 7457 29 May 1950.
- 13 Ibid col 7454-5.

14 See generally contributions in *Urban Black Law* (1984)/ 1984 *Acta Juridica*, and Schoombee, H & Davis, D 'Abolishing influx control - fundamental or cosmetic change? (1986) 2 *SAJHR* 208. And see ch 6 n64.

15 *The Surplus People - Forced Removals in SA* (1985) 10; see further Surplus People Project Report *Forced Removals in S A* (1983; 5 vols); Haysom, N & Armstrong, A 'Population relocation and the law: Social engineering on a vast scale' *Second Carnegie Inquiry into Poverty and Development in Southern Africa*. Carnegie Conference Paper No 86 (13-19 April 1984). A recent report by Stellenbosch academics estimated that at least 4 million Blacks have been moved into the homelands between 1950 and 1980 - *Cape Times* 19 August 1986, p 8.

16 Section 13(2) of the act. *Semble*: the Group areas Act does extend to scheduled areas under Act 27 of 1913 - see s 38(6) of original Act.

17 Section 20(2)(i)(j)(k) and (p); cf s 26(2) of Act 18 of 1936 (repealed by Act 68 of 1986).

18 This Act has now been repealed. The provision should probably now read as referring to the Black Communities Development Act 4 of 1984 in terms of which Black residential areas are now to be set aside - see s 12(1) of Interpretation Act, 33 of 1957.

19 Section 23(6)(c) of the Act.

20 See Horrell, M *Race Relations as Regulated by Law in S A* 1948 - 1979 (1982) 90-3, 96-8, 100-1.

21 On the now repealed s 3C of the Prevention of Illegal Squatting Act 52 of 1951, see Schoombee I 85 n 78.

22 This appears *inter alia* from the facts in *S v Adams*, *S v Werner* 1981 1 SA 187 (A); see also Schoombee I 85 n 79 and ch 6.5 below.

23 See on 99 year leasehold s 6A of the Blacks (Urban Areas) Consolidation Act 1945 (enacted during 1978), and ch 6 of the Black Communities Development Act 4 of 1984, and on ownership the Black Communities Development Amendment Act 74 of 1986.

24 See Schoombee & Davis *op cit* (n 14).

25 Through the Community Councils Act 125 of 1977 and the Black Local Authorities Act 102 of 1982.

26 See *inter alia* *Weekly Mail* 17-23 January 1986, p 4 ('Street committees aim to replace State bodies'); *Cape Times* 10 April 1986 ('Black community councils 'collapse'); *Die Burger* 22 June 1986 p 15 ('40% van swart besture in duie'); *Cape Times* 23 August 1986, p 4 ('R200 m arrears in rentals'); *Weekly Mail* 5-11 September 1986, p 5, and generally Hughes, H & Grest, J 'The local state' in *SARS: SA Review One* (1983) 122 at 123-131, and 'State Strategy and Popular Response at the Local Level' in *SARS: SA Review Two* (1984) 45.

27 See above 2.4.4.1 (2).

28 See Schoombee & Davis n 24 above.

29 For extensive treatment, see Van Reenen ch F and D'Oliveira par 561-600.

30 *S v Samy - Padiachy* 1972 3 SA 895 (NC) 901 H.

31 On 17 September 1984 - see s 63 of Development and Housing
Act 103 of 1985. It would appear that certain decisions of the
'own affairs' ministries are still implemented by the Community
Development Board on an agency basis, because executive power is
still vested in the Board.

32 In force, except for s 12-18, on 1 January 1986.

33 The provisions of the Act are quite complex, and actually
relate to group areas and future group areas, as well as other
types of areas - see D'Oliveira par 586.

34 Section 1(1).

35 Section 29.

36 Sections 30 and 34.

37 Section 38.

38 Section 21.

39 Sections 15(2)(d),(f); 23; 28.

40 See *Strydom Committee* par 82-9.

41 1950 3 SA 136 (A).

42 1953 2 SA 484 (A).

43 Section 29(2)(g).

44 Section 26(2)(d).

45 See *SAIRR Survey of Race Relations in SA 1983* (1984) 224
(hereinafter *Survey 1983*).

46 1940 OPD 156 at 159-60; cf, however, *Ex parte Kinnear* 1921
CPD 737.

47 *Beyond the Melting Pot* (2 ed 1970) 54.

48 See below ch 8.

49 See ch 1 n 6.

- 50 See *Cape Times* 17 September 1986, p 7; 18 September 1986,
p 2.
- 51 See *Cape Times* 6 February 1986, p4; 25 February 1986, p9.
- 52 See Horrell, M *Laws affecting race relations in SA 1948-1976*
(1978) 298 for formulation of this policy.
- 53 Survey 1983 462. The exact statutory basis for this permit
system is difficult to establish; see ss13(5) and 36(1)(i) of
Extension of University Education Act 45 of 1959.
- 54 Survey 1983 462. On the subsidy issue, see s 25 of
Universities Act 61 of 1955.
- 55 Survey 1983 463.
- 56 Education and Training Act 90 of 1979 (s 34); Coloured
Persons Education Act 47 of 1963(57); Indians Education Act 61 of
1965(57).
- 57 Survey 1983 462.
- 58 See Dean, WHB 'A new constitution for SA?' (1984) 33
Jahrbuch des öffentlichen Rechts der Gegenwart 459 at 503-4.
- 59 At n50.
- 60 See Horrell op cit (n20) 116-7.
- 61 By inserting s 15A in the Financial Relations Act 1976.
- 62 See Education Ordinances: Transvaal (29 of 1953) s 112 G;
Cape (20 of 1956) s 240(9); Natal (46 of 1959) s 35(10); OFS (12
of 1980) s 34; cf the 3 Acts cited in n56 - respectively s 8, 6
and 6 which fit in with the provincial ordinances.
- 63 Survey 1984 654.
- 64 *Cape Times* 26 March 1986, p 6.
- 65 *Cape Times* 24 May 1986, p 5.

- 65a Ibid.
- 66 See the exposition of the *Strydom Committee* par 102-145, which is, however, difficult to follow.
- 67 *Survey* 1983 223 n 39.
- 68 *Cape Times* 24 February 1986, p2; 25 February 1986, p 5 and 9; 26 March 1986, p 7 ('PE vote to open beaches'); *Weekly Mail* 28 February - 6 March 1986, p 5.
- 69 Ibid.
- 69a See *Cape Times* 29 December 1986 p 2, 3 January 1987 p 11.
- 69b *Survey* 1983 223; cf *Survey* 1984 366.
- 70 Section 1 of the Sea-shore Act.
- 71 Section 2A(2) of Act 49 of 1953.
- 72 Ordinance on the Reservation of Separate Amenities by Local Authorities 20 of 1955 (Cape); Ordinance on the Reservation of Separate Amenities 37 of 1967 (Natal).
- 73 Section 10.
- 74 Section 10(8).
- 75 Section 11(2).
- 76 See PN 693 of 1977, *Official Gazette* of 10 June 1977; *Strydom Committee* par 130.
- h⁷⁷ Horrell op cit (n20) 65.
- 77a See *Cape Times* 10 December 1986 p 3, 11 December 1986 p 6 & 7, 16 December 1986 p 3.
- 77b See above at n76.
- 77c See Wiechers 544.
- 77d See above at n72.
- 78 Par 128.

- 78a Section 1 of Group Areas Act, s v 'disqualified person'.
- 79 See *Gamiet v Heckroodt* NO 1960 1 SA 614(A); Van Reenen E3.4, and n78a above.
- 80 See Schoombee I 88n 115; Glazewski, J 'The Admiralty Reserve - an historical anachronism or a bonus for conservation in the coastal zone' in *Liber Amicorum in honour of WHB Dean* (1986) 93.
- 81 *Strydom Committee* par 131. This delegation (of 10 February 1977) has not been gazetted but a copy thereof was inspected at the Cape Provincial Administration during October 1986.
- 82 *Development of Natal Beaches for all population Groups.*
- 83 *Strydom Committee* par 136.
- 84 *Strydom Committee* par 135; Natal Provincial Secretary, personal written communication to present writer: 'Segregated Beaches along Natal Coast' 23 September 1986, p 2.
- 85 18 of 1976, s 197.
- 86 Read with s 268 of the Local Authorities Ordinance 25 of 1974.
- 87 Letter Natal Provincial Secretary (n84). Relying on Ordinance 18 of 1976, certain beaches on the Bluff (which fall outside the Umgeni River - Point stretch) have also been segregated (*ibid*).
- 88 In terms of his powers referred to above at n73-5. For regulations see GN R168 of 2 February 1962 (GG 169 of 2 February 1962; *Reg Gaz* 62) read with GN 2235 of 28 October 1977 (GG 5790 of 28 October 1977, *Reg Gaz* 2554), in terms of which all local authorities (except Durban) were authorized to apply the regulations.

89 *Strydom Committee* par 140; see *S v Naicker* 1963 4 SA 610
(N). Even the Natal Provincial Administration is presently
unclear exactly which beaches have been so segregated - letter
(n84) p2.

90 See Schoombee I 2.3.3.

CHAPTER FOUR

CONTROL UNDER THE GROUP AREAS ACT - KEY CONCEPTS

4.1 *Introduction*

The long title of the Group Areas Act, which sets out its purpose, stresses the control function of the legislation: 'to consolidate the law relating to the establishment of group areas, the control of acquisition of immovable property and the occupation of land and premises, and matters incidental thereto.'

Certain concepts are of cardinal importance to the controls imposed by the Act, notably:

- (i) the *acquisition (and holding) of immovable property*;
- (ii) the *occupation of land and premises*;
- (iii) the *use of land and premises*.

In this chapter these concepts will be examined in the context of the Group Areas Act to illustrate how they have been used to further the aims and policies of the Act. This should not only provide important perspectives on group areas legislation and practice as a species of 'governmental law', but also illustrate the impact of governmental law upon areas of private law. Finally, in 4.5 below, it will be examined why group areas legislation has focussed on the control of land and rights in land, at a time when it is generally asserted that other, more abstract, property rights (such as shares and patents) have gained greater economic importance than rights in land.

Before dealing with specific concepts, it is important to draw attention to the general characteristics of the Act's

treatment of the key concepts referred to herein. Group areas legislation did not go about creating a set of neologistic apartheid concepts to control human relationships to land. The starting point has been common-law concepts drawn from the sphere of private law, and specifically the law of property. Control was super-imposed upon the best-known property relationships in private law. But to achieve this, the legislation extended, contracted and in certain instances, distorted these common-law concepts to serve the aims and policies of the Act. Indeed, some of the key concepts, notably 'immovable property' and (to a lesser extent) 'occupation' end up approximating apartheid neologisms.

4.2 *The acquisition (and holding) of immovable property*

Here the definition of 'immovable property' is of prime importance; the meaning of 'acquire' and 'hold' largely flows from the meaning attributed to 'immovable property'. Thus 'acquire' is defined as meaning, in relation to immovable property, to 'become the owner of such property in any manner whatsoever',¹ and 'hold' is left undefined.

Section 1 of the Act provides that unless the context otherwise indicates,² immovable property

'includes any real right in immovable property and any right which would upon registration be such a real right and any immovable property referred to in paragraph (b) of the definition of "owner" and any lease or sublease of immovable property (other than a lease or sublease of immovable property in an area which is a specified area in terms of section 16, not being a lease or licence referred to in the said paragraph), but does not include any right to any mineral (including any right to prospect for or to dig or mine any mineral) or a lease or sublease of any such right or a mortgage bond over immovable property, or any other

real right in immovable property excluded by the State President from time to time by proclamation in the Gazette.'

This definition should be read with that of 'owner' which in relation to immovable property includes:

(a) in the case of immovable property registered in the name of a trustee or trustees for a company, such company; and

(b) in the case of immovable property forming part of the farm Alexanderfontein or the farm Bultfontein in the district of Kimberley and held under a lease or licence which entitles the lessee or licensee and his successors in title to occupy such property, the person registered in the deeds registry as the lessee or licensee of that property';

and also with that of 'mortgage' which in relation to immovable property

'includes a cession in securitatem debiti of any lease or licence₃ referred to in paragraph (b) of the definition of owner.'³

This presents a rather complex picture of the meaning of 'immovable property' which may be clarified by drawing a threefold distinction in respect of those aspects which (1) confirm (2) extend or (3) curtail the common-law meaning of the concept.

4.2.1 Confirmation of common-law meaning

(i) The starting point is the common law meaning of 'immovable property'. This is signified by the use of the word 'includes' at the beginning of the definition.⁴ In fact, the paradigm case of immovable property, namely land, is not explicitly mentioned.

(ii) Confirmation of the common-law is further the reference to any real right in immovable property. This follows the common-law rule which Van der Merwe puts as follows

'Die algemene reël is dat 'n reg wat op 'n onroerende saak betrekking het, onroerend is.'⁵

Included would obviously be ownership, and further such personal servitudes such as usufruct, usus and *habitatio* - either registered or acquired by prescription, as they would (only) then constitute real rights. (The main characteristic of real rights is their enforceability vis-à-vis third parties or the world at large, as it is sometimes put.)⁶

(iii) A problematic category of rights which is declared to be 'immovable' by the Act relates to:

'any right which would upon registration be such a right (ie a real right in immovable property)'.

This would appear to refer to unregistered servitudes, usufructs etc. Such unregistered rights would normally exist by virtue of an agreement between the owner of the land and the acquirer of the right. Registration of this agreement (in the form of a notarial deed) in the Deeds Office converts the personal right in question into a real right. Whether such unregistered rights would be classified as *immovable* at common-law is a matter of some difficulty, but the answer appears to be 'yes'. This would be so in terms of the rule stated by Van der Merwe, cited above under (ii).⁷

Whatever the common-law position, the result of the present definition in the Act is that a disqualified person who acquires (say) a usufruct over land by means of an ordinary contract with the landowner, acquires 'immovable property' in terms of the Act.

In relation to the category under discussion, viz rights which would upon registration be a real right, the question arises whether it applies to the situation where a disqualified person concludes a contract of purchase or exchange in respect of

land in a group area. In terms of such a contract he acquires a personal right against the seller to obtain ownership of the land by means of registration of transfer in the Deeds Office.

It can be argued that this right to obtain ownership should not fall within the category under discussion, and that the conclusion of (say) a contract of sale in respect of land in a group area does not amount to the acquiring of immovable property within the meaning of the Act. The first argument in support of such a conclusion would rely on the fact that at common-law the right to obtain transfer of an immovable is apparently classified as a movable,⁸ (unlike an unregistered personal servitude, which would be classified immovable, as indicated above). Such rights to obtain transfer are certainly ceded in practice without registration in the Deeds Office. Any such right should therefore not be regarded as included in the part of the definition of 'immovable property' presently in issue because this part deals with rights which would in any event at common-law be immovable. A further related argument for excluding the acquiring of a right to obtain ownership from the ambit of the definition, would be that such a right is simply not something that can be registered. The content of the contractual right to acquire ownership, and ownership itself, differs markedly. This line of reasoning was accepted by Selke J in *Starr v Ramnath* when he pointed out that it is not 'the contractual right acquired by the purchaser under a contract for the purchase of land which is, in truth, registerable in the Deeds Office'.⁹ The right to require transfer carries with it none of the incidents of

ownership such as enjoyment of the property concerned. By way of contrast an unregistered usufruct has the same content as a registered one. The difference is only that the former is not protected against interference by third parties, because it is not a real right.

In the *Karjleker*¹⁰ case, discussed under 2.7.8 above, Friedman J held that an agreement to acquire immovable property did not amount to an acquisition of immovable property under the Group Areas Act, but the fact that the learned judge had concentrated on the meaning of 'acquire' and had not referred to the wide definition of 'immovable property' and its limb: 'any right which would upon registration be a real right in immovable property', detracts from the weight of the decision.

The position is nevertheless that the weight of authority favours the above view that the conclusion of a contract of sale does not amount to the acquisition of immovable property in terms of the Group Areas Act.¹¹ The matter is, however, not cut and dried. A counter-argument would be the following: to emphasize that the right to obtain transfer is not registerable, and therefore not a right which would become a real right upon registration, is 'somewhat technical', as Selke J conceded in the *Starr*¹² case. Broom JP in his minority judgment on this point in the *Starr* case, referred to the Appellate Division decision in *Corondimas v Badat*¹³ where the (undefined) term 'acquire' in Act 35 of 1943 was given a wide meaning, as extending to the acquisition of a right to obtain ownership, and stated:

'There was no definition of "acquire" in the 1943 Act, and the Court found it necessary to give the word an extended

interpretation so as to include an agreement to acquire a legal right to claim transfer. That extended interpretation is now incorporated in the two definitions, for "acquire" in relation to immovable property is to mean "to become the owner of such property", and "immovable property" is to include any right which would upon registration be a real right. It would thus appear that a person who has a contractual right to obtain transfer has already acquired immovable property as defined, so that the present Act arrives at the same result as the Appellate Division reached by means of an extended interpretation.¹⁴

An argument in favour of the view expressed by Broom JP would be that 'the intention of the Legislature' was, broadly speaking, to prohibit not only the acquiring of immovable property (as ordinarily understood) but also any agreement which would or could lead to such acquiring.¹⁵ But it can also be argued that this states the presumed intention too broadly, and that the intention was only to prohibit agreements which grant the disqualified person a right to beneficial enjoyment of some of the incidents of ownership - particularly occupation¹⁶ of the property. For this reason, leases are included in the definition of immovable property, while mortgages are excluded.

4.2.2 Extension of common-law meaning

4.2.2.1 Leases and licences on diamond-mining land in Kimberley area

The intention appears to declare such leases and licences immovable property; disposal of such a lease or licence is deemed to be a disposal of the immovable property (land) to which it relates.¹⁷ Van Reenen explains this esoteric category of 'immovable property' on the basis that the licences and leases in question were originally granted by De Beers in respect of building plots on the two farms in the Kimberley area on a large

scale, and have come to be regarded as being tantamount to ownership by all concerned. Moreover, since 1952 Kimberley has been a specified area. In terms of the definition of 'immovable property' leases in a specified area are not regarded as immovable property - see 4.2.2.3 below. So unless an exception was created, this special form of 'Kimberley property' would have escaped the net of the Group Areas Act.

4.2.2.2 *Leases and subleases*

At common law only long term leases of land are regarded as immovable property, even though short term leases also constitute real rights in immovable property.¹⁹ (The Deeds Registries Act 47 of 1937 draws the line between short and long term leases basically at ten years.²⁰) Because the Group Areas Act includes all leases under the term 'immovable property', someone who concludes a monthly lease of a flat within a group area or controlled area 'acquires immovable property' within the meaning of the Act,²¹ and the same occurs if the tenant thereupon subleases the flat. Leases and subleases of property in a *specified area* are excluded from the definition of immovable property. This is necessitated by the fact that, as indicated in 2.4.3 above, the occupational character of land in this area is determined by the group of the lawful occupant at the specified date. So if a flat belonging to a White was occupied by a Coloured at the specified date, another Coloured could not acquire ownership of the flat, but in terms of section 17 he could occupy it in terms of a lease. But the signing of a lease would have amounted to the acquisition of immovable property by a

disqualified person if the very wide definition of immovable property applied to specified areas. Thus leases and subleases in a specified area were excepted from the definition of 'immovable property'.²²

4.2.3 *Curtailment of common law meaning*

4.2.3.1 *Exclusion of mineral rights*

These are excluded because all mining activities are closely controlled by the State and the relevant legislation in several instances imposes its own racial restrictions.²³ Any detailed examination of this aspect falls outside the scope of the present work, but it may be pointed out that the well-known Gold Law²⁴ of 1908 which applies in the Transvaal and, since 1936, in the OFS, prohibits the acquisition of mining rights under this Act by any 'Coloured' person - defined as 'any African or Asiatic native or any other person who is manifestly a Coloured person'. The Mining Rights Act 20 of 1967 which presently regulates the prospecting for and mining of precious metals, base minerals and natural oil, provides that prospecting permits shall not be issued to any Coloured person (which in this context includes Indians), except in respect of state land in the Cape Province or private land owned by a Coloured;²⁵ nor to any Black, except in respect of land held by the S A Development Trust or another Black.²⁶ The same restrictions apply to the issue²⁷ and transfer²⁸ of claim licences under the Act.

4.2.4.2 *Exclusion of Mortgages*

In *Lief NO v Dettman*²⁹ the Appellate Division pointed out that registered mortgage bonds over immovable property had a dual

character. They were instruments of debt and also instruments for the hypothecation of immovable property - and as far as the latter aspect was concerned, they were immovable property within the meaning of the Deeds Registries Act 1937. The present exception reverses this position as far as the Group Areas Act is concerned. This entails that any disqualified person or company can become a mortgagee vis-à-vis land in a group area - by so doing he does not 'acquire immovable property'. The terms of the bond would, of course, still be governed by *inter alia* s 39 of the Act which prohibits any clause empowering a disqualified person from exercising influence upon the transfer of the immovable property - such as a stipulation that the mortgagee can cause the property to be sold at will.

4.2.3.3 *Exclusion by proclamation in the Gazette*

The power here granted, of course, affords another example of the role played by executive discretion vis-à-vis the application of the Act. Two exceptions have been created under this heading, namely in respect of the following real rights in immovable property:

(1) 'Any right of way over immovable property in favour of the public';

(2) 'Any right to construct, erect, lay or maintain any railway line, power line or water pipe-line over immovable property'.³⁰

In (1) the well-known 'public servitude' of right of way is envisaged.³¹ The 'public' can obviously not belong to a specific racial group. In terms of the definition of 'disqualified person' in s 1 of the Act, the 'public' is thus doomed to remain

a 'disqualified person' in all circumstances - in any group area it would not belong to the group for which the area was proclaimed, in the controlled area it would not belong to the same group as the owner - unless, of course, the owner happens also to be groupless, which would be the case with State land.³² The present exception allows owners of land such as private developers to create rights of way in favour of the public without fear of contravention of the Act.³³ Van Reenen's suggestion³⁴ that the purpose of this exception is to allow disqualified persons to occupy land forming part of public streets in group areas (eg when parking their cars), is spurious for two reasons. Firstly, a public street cannot rightly be described as a right of way over immovable property in favour of the public; secondly, the Act controls the occupation of *land and premises*, not of immovable property. 'Land' as defined in the Act³⁵ would still include a public street.

The explanation for the second exception lies in the same direction as the first - the necessity of allowing disqualified persons (eg certain public bodies) to acquire and hold what may be termed public utility rights over land, without intervention by the Act.

4.2.4 'Acquire' and 'hold'

Section 1 defines 'acquire', in relation to immovable property, as meaning to become the owner thereof in any manner whatsoever; 'hold' is left undefined.

In taking a closer look at the meaning of acquire, the first point to be made is that its content is largely determined by its

coupling to immovable property; the definition of acquire naturally raises the question: how does one become the owner of a particular species of immovable property? Take the example of leases, which constitute immovable property in terms of the Act. A lease (and more specifically the right of occupation under the lease³⁶) can only be acquired by the usual methods for acquiring contractual rights, that is the conclusion or cession/delegation of a lease agreement. In the result the conclusion of a lease amounts, with 'a certain awkwardness',³⁷ to the acquisition of immovable property in terms of the Act.

The Act thus envisages not only the ownership of corporeal property, but also the ownership of rights, including mere contractual rights. This use of the concept of ownership in relation to rights is open to criticism on analytical grounds,³⁸ but also occurs in other legislative contexts, for instance in the case of copyright.³⁹

The second issue with regard to the meaning of 'acquire', concerns the question whether it not only refers to the actual acquisition of ownership of property (the narrow meaning) but also to the acquisition of a right to obtain ownership at a later stage, eg under a contract of sale (the extended meaning). In the *Corondimas* case⁴⁰ the Appellate Division accepted the latter, extended meaning, in the context of the predecessor of the Group Areas Act, namely Act 28 of 1946, where 'acquire' had been left undefined. In the context of the Group Areas Act the courts have, however, held⁴¹ that the Act embodies the narrower meaning, and this appears, with respect, to be correct (when the

narrow definition of 'acquire' in the Act is considered). Van Reenen's argument⁴² that this would make it impossible to 'acquire' a lease in terms of the Act, stands to be rejected - as indicated above, the Act envisages that leases or in any event the rights under leases can be acquired in ownership.

In the result 'acquire' must be given a narrow meaning. With regard to land it means to become owner thereof; in respect of rights classified as immovable property under the Act, it would mean to become holder in the fullest possible sense of the right in question. Whether a contract to purchase land amounts to an acquisition of immovable property thus depends not really on the meaning of 'acquire' but on the interpretation given to 'rights which would upon registration be real rights', which forms the definition of immovable property - a question discussed under 4.2.1 (iii) above.

It is asserted in the present discussion that to acquire rights in terms of the Act they must be obtained 'in the fullest possible sense' because ownership connotes, in Van der Merwe's words, 'die mees omvattende reg oor 'n saak'⁴³; 'ownership' of a right falling within the definition of immovable property must thus by parity of reasoning connote optimum juridical control over the right. On this basis 'acquire' would not include an acquisition *in securitatem debiti*⁴⁴, obtaining an option to acquire, or a *pactum de contrahendo* (an agreement to reach an agreement); nor an agreement to acquire subject to a suspensive condition (whether relating to the obtaining of a permit or not),⁴⁵ but it would extend to acquisition as a trustee - in our

law a trustee is owner of the trust property,⁴⁶ and s 27(1)(2) of the Act confirms this.

This brings us, finally, to the meaning of 'holding immovable property'. Several sections of the Act⁴⁷ refer to 'acquire' and 'hold' in a way which links them conceptually: 'acquisition' results in 'holding'. Or to put it another way: once X has been acquired in terms of the Act, it would be held in terms of the Act. 'Hold' thus takes its meaning from 'acquire' and in the Group Areas Act would not include occupation or possession without legal ownership. In the *Mariam* case *a quo*⁴⁸ the latter, wider meaning was attributed to 'hold' in Act 28 of 1946 which referred to 'own, hold or occupy'; but this interpretation cannot be transposed to the Group Areas Act.⁴⁹

4.2.5 Summary

The foregoing analysis of the Group Areas Act's control of the acquisition and holding of immovable property indicates the following:

- (1) The legislation has set up wide and elaborate controls in respect of ownership and other rights in land;
- (2) The controls relating to the acquisition and holding of immovable property appear to serve two broad purposes:
 - (i) Firstly, to control ownership of land and rights in land from an economic perspective. In practice this has operated to maintain the dominant position of the White group, and here group areas legislation ties in with the historical control over economically 'sensitive' land such as mining land.

(ii) Secondly, and probably more importantly or immediate, occupation of land is controlled through the control of the acquisition of immovable property. Normally the acquisition of land would, for instance, carry with it the right of occupation. The ways in which the common law concept of immovable property has been adapted in the legislation, are explicable in terms of this purpose. Thus leases (no matter how short their duration) are classified as immovable property. They, of course, carry with them the right of occupation. By way of contrast, a typical real right in immovable property such as a mortgage bond is excluded. This is explicable on the basis that the control of occupation is not undermined by disqualified financial institutions aiding the acquisition of immovable property by 'qualified' persons in their own areas. Moreover, a mortgagee has no rights of occupation vis-à-vis the property. Institutions like building societies which specialize in bonds have also traditionally been controlled by whites, so this exception has worked in the favour of Whites, the privileged group in a group areas context.⁵⁰ Even the categories of real rights exempted from the definition of immovable property by proclamation fit the purpose of the control of occupation. Disqualified persons are allowed to walk through group areas, along public servitudes, and public utility servitudes, which do not involve human occupation, may be freely acquired without any threat to enforced segregation.

(3) Given the aforementioned two purposes, the legislature has imposed the related controls in a convoluted and awkward way by

trying to pack so much group areas thinking into the definition of 'immovable property'. It was pointed out in the *Debele*⁵¹ case that when the legislature tries to use a single term in such a way as a catch all, the end result is often artificiality and confusion.

4.3 *Occupation of land and premises*

4.3.1. *Introduction*

The original Act left 'occupation' undefined, but there can be little doubt that it sought to control 'betreklik permanente okkupasie'.⁵² As pointed out in the discussion under 2.1 above, the Act was not originally drafted as an instrument of social apartheid, that is to achieve segregation in clubs, restaurants, places of entertainment or on the sports field. Group areas legislation continued the pattern of the earlier Asiatic legislation⁵³ and aimed essentially to control occupation of the kind which would normally be an incident of ownership, or would be associated with settled patterns of human interaction with land and premises. Thus in cases under the earlier legislation occupation was generally equated to *habitual physical presence*.⁵⁴ When the courts came to interpret 'occupation' under the Group Areas Act, it was given a somewhat wider meaning but the definition given was still substantially influenced by the earlier case law. In *R v Ghoor* the Cape Supreme Court held that

'the prohibited occupation of land and premises envisaged by the Group Areas Act is habitual physical presence, or physical presence for substantial periods⁵⁵ of time, flowing from some form of control, whether subordinate or overriding, over the land or premises in question'.⁵⁶

This interpretation, which is supported by the overwhelming weight of authority,⁵⁷ thus emphasizes the dual nature of occupation: what is required is i) an element of control, plus ii) habitual physical presence/physical presence for (a) substantial period(s) of time. Proof of mere control over land or premises (such as a right of access) is in itself not enough, nor proof of use in the sense of drawing benefit from land or premises.⁵⁸ The emphasis on physical presence also meant that a company, in contrast with a natural person, could not occupy land or premises.⁵⁹

Van Reenen⁶⁰ has strongly criticized the above approach. His inarticulate major premise is that the Act must be given a wide application, to cater for social apartheid. He has thus sought to define 'occupation' solely by reference to a control test - the power to exclude others from utilizing space in or on land or premises. In terms of Van Reenen's proposed test the following persons would 'occupy' land or premises in terms of the Act: a patron in a cinema, a diner in a restaurant, a shopper in a fitting cubicle, and a motorist parking his car in a public street. Occupation would also in terms thereof extend to companies, because a company can control space. He concedes that '(t)his test leads to some startling results, but that does not detract from its correctness'.⁶¹

Van Reenen's criticisms are unfounded in the light of the careful analysis of the term 'occupation' undertaken in cases such as *Ghoor*. In criticizing the reasoning in *Ghoor*, Van Reenen relies strongly on one of the exceptions created by proclamation

in respect of 'immovable property', namely in respect of any right of way over immovable property in favour of the public - discussed under 4.2.3.3. This, he argues, indicates that 'the legislature itself considered that using the street amounts to occupation and (this) lends force to the above analysis'. His reliance on this exception in the present context is entirely misplaced. As indicated above,⁶² the exception in question relates to 'immovable property' and does not concern 'land or premises' - occupation is only controlled vis-à-vis the latter. Moreover the exception does not even refer to a public street. It should be added that the meaning attributed to provisions in an Act by a subordinate legislative body (at the time the Governor-General-in-Council who made the proclamation) can hardly be equated with what 'the legislature itself (ie Parliament) considered'.⁶³

The interpretation given to 'occupation' in cases such as *Ghoor* led *inter alia* to judgements that attending a cinema performance did not constitute occupation⁶⁴ and caused a prosecution flowing from the playing of a 'mixed' soccer match in a group area to fail.⁶⁵

4.3.2 Extention of meaning of 'occupation'

The interpretation given to the concept of 'occupation' by the courts conflicted with the National Party's determination, which manifested itself particularly from the mid-fifties onwards, to use the Act as an instrument of social apartheid. It is generally accepted⁶⁶ that the *Fen Sam Jackson* case⁶⁷, which held that attendance of a cinema performance did not amount to

occupation, led to the enactment of s 1(4) of the Group Areas Act 1957, which authorised the then Governor-general to extend the meaning of 'occupation' by proclamation. In its present form s 1(4) provides:

'The State President may by proclamation in the Gazette declare that, subject to such exceptions as may be specified in the proclamation, any provision of this Act relating to the occupation of land or premises shall apply also with reference to any person who is at any time present in or upon any land or premises... for a substantial period of time or for the purpose of attending any place of public entertainment or partaking of any refreshments at a place where refreshments are served or as a member or guest in any club, as if his presence constituted occupation of such land or premises.'

In terms of this subsection, a number of successive proclamations⁶⁸ have been issued - the current one being R17 of 1986,⁶⁹ set out in Appendix IV. In general each successive proclamation constituted a tightening up of the control of 'social' occupation - often as a result of court decisions which did not suit the government's purposes. The current proclamation is to a certain extent an exception with regard to the tightening of control, because it is stated not to apply to free trade areas. This is the first time control in this area has been 'de-escalated'. It is ironic that this long process of tightening control was strongly influenced by a desire to control 'mixed' sport, and specifically the activities of groups of sportsmen such as the Aurora Cricket Club in Pietermaritzburg.⁷⁰ Sports activities were effectively exempted from the Group Areas Act in 1982,⁷¹ yet extended control over 'social' occupation has lived on! The current proclamation is, however, presently being investigated by the Group Areas Board⁷², and one may expect that

changes may be effected in this area as part of the reforms expected in the wake of the awaited President's Council report.

Proclamation R17 of 1986 is set out in Appendix IV, and at this point the reader is referred to the contents thereof. This proclamation raises a number of difficult issues, most of which were subjected to searching analysis in the HSRC *Sport Report*. It will be seen that the proclamation, closely following its empowering provision (s 1(4) of the Act), creates four categories of deemed occupation. These will now be discussed in turn.

4.3.2.1 *Presence at any time for a substantial period of time*

This appears to echo the second limb of the test for 'ordinary' occupation enunciated in cases such as *Ghoor*, cited above, but there are important differences. Firstly, the statutory formulation omits any reference to the element of *control*. It can thus conceivably apply to a person who walks around in a group area (or sits around on the beach above the high-water mark) for a day. Secondly, in the courts' formulation 'physical presence for substantial periods' (*Ghoor* case) or 'for a substantial period' (*Fen Sam Jackson* case) was coupled to *habitual physical presence* and suggested something akin to the latter. The statutory formulation carries the opposite suggestion through the use of the words 'at any time' - it appears to be aimed at what may be termed *mere physical presence*.

The present (drastic) extension of the concept of 'occupation' has been achieved through the use of very vague terminology, and this raises the question whether it is not void for vagueness. Multiple examples may be cited to illustrate the

uncertainty inherent in physical presence for a *substantial* period of time. 'Substantial' must refer to something more than 'not trivial'. But does it cover a day's shopping excursion in a group area or sleeping a night in a caravan parked in a street? After a thorough investigation of the legal position in respect of proclamation R17's identically worded predecessor, the HSRC *Sport Report* concluded that the extension under discussion was indeed void for vagueness,⁷³ and this was apparently accepted as correct by the Strydom Committee.⁷⁴ Subsequently Prof David van Wyk has, however, argued that as the proclamation follows the actual wording of the Act, it is 'immune to any attack on its validity on the grounds of vagueness, ambiguity, unreasonableness or whatever'.⁷⁵ Here reliance was placed on *S v Mosoeu*,⁷⁶ which confirmed the principle that

'if the enabling statute actually prescribed the terms of a by-law, it would not be open to attack even if it was in the form held to be bad on the grounds of vagueness in the cases quoted....It is always a question of the intention of the enabling statute'.

It is, however, submitted that in the present context this line of reasoning cannot cure the intractable vagueness of 'a substantial period'; there is ample authority to the effect that this line of reasoning would only be applicable if the enabling legislation is such

'as to confer a specific power in terms which define the limits of it, so that if the subordinate legislature does precisely what it is authorised to do, there can be no question of its legislation being unreasonable in relation to the powers conferred'.⁷⁸

The reference to 'a substantial period' in the enabling legislation really invites further specification; the intention

of the legislature was in all probability that 'substantial' had to be 'concretised'⁷⁹ in the delegated legislation implementing s 1(4). In the result the direction in the proclamation that presence 'at any time ... for a substantial period of time' equals occupation, is void for vagueness. It is certainly wider and vaguer than the 'second limb' of the test for 'ordinary' occupation developed by the courts.

Before dealing with the further three categories of extended occupation, the point should be made that the principle set out in the *Mosoeu* case would probably protect these three categories from a successful challenge on the ground of vagueness. The HSRC *Sport Report* reached a contrary conclusion (referring specifically to the vagueness inherent in terms such as 'place of public entertainment', 'refreshments' and 'club'),⁸⁰ but in these instances the fact that the of the terminology of the empowering section has been exactly followed, is probably conclusive. Moreover, the terminology used, though vague, is less open-ended than 'presence for a substantial period of time'.

4.3.2.2 *Presence for the purpose of attending any place of public entertainment*⁸¹

Here again the terminology used is quite vague, but, as mentioned above, it is doubtful whether a challenge to this part of the proclamation on the basis of vagueness would succeed. 'Place of public entertainment', which is rendered 'openbare vermaaklikheidsplek' in the (signed) Afrikaans test, is the key concept. Entertainment ('vermaaklikheid') here appears to refer to exhibitions, performances, public dances,⁸² amusements, games,

or sports,⁸³ even though admission may be without payment, but would not include, for instance, the mere consumption of food.⁸⁴ 'Place of public entertainment' should be interpreted to refer to a place assessable to the public as of right⁸⁵ where entertainment is actually taking place for the benefit of the public, rather than a place where entertainment could or otherwise habitually does take place.⁸⁶ Thus attending a political meeting in a cinema would not amount to attending a place of public entertainment in the present context. The terminology 'for the purpose of attending' stresses the direct link between physical presence and the entertainment. It also appears that 'attend' here refers to presence as a spectator or one of the audience, and not presence as someone putting on the performance.⁸⁷

4.3.2.3 Presence for the purpose of partaking of any refreshments as a customer at a place where refreshments are served in a licensed restaurant, refreshment room, tea-room or eating house where the partaking ordinarily involves the use of seating accommodation.

The general aim of this extension appears to be to control 'sit down' eating facilities, in contrast with 'take away' or 'casual' eating facilities. 'Licensed restaurant' must be taken to refer to a restaurant having some type of liquor licence,⁸⁸ but it would appear that the somewhat archaic term 'refreshment room', drawn from licensing laws, would cover other restaurants, ie premises where a wide range of food is prepared for consumption on site, involving the use of seating facilities.⁸⁹

'Tea room' is really a genus of the species 'refreshment room',⁹⁰ involving specifically the serving of beverages and incidental refreshments. 'Eating house' has in South Africa acquired the meaning of a so-called 'native (Black) eating house', ie a restaurant serving Africans;⁹¹ rarely, it has also been held to refer to 'non-European' eating houses.⁹²

In *S v Mosoeu*⁹³ this part of the proclamation was unsuccessfully attacked on the basis of unreasonableness (undue restriction and discrimination vis-à-vis Blacks) and, apparently, vagueness⁹⁴ -it is, however, not clear that the latter was really argued as a substantive, separate point - the very wide terms of the proclamation, it was argued,⁹⁵ caused it to be unreasonable. The Court held, however, that the Act authorised both the terms of the proclamation in issue and, following *Lockhat*⁹⁶ any discrimination brought about by the proclamation, in causing Blacks to struggle to find places to eat, especially in smaller towns and villages.

4.3.2.4 *Presence as a member of or guest in any club.*⁹⁷

It would appear that the present proclamation, differing in this respect from prior proclamations,⁹⁸ does not couple such presence to the taking of refreshments.⁹⁹

What would be meant by 'club' in this context? It may be defined as an association or society of persons (not for gain) of like sympathies, of a common vocation, or otherwise mutually acceptable, meeting periodically (under certain regulations) at some house of entertainment, resort or 'club-house', for social intercourse, co-operation or to pursue common activities.¹⁰⁰ It

should be added that in the present context 'club' really refers to 'club premises'.¹⁰¹

4.3.3 'Land' and 'premises'

In terms of the Act, occupation is controlled vis-à-vis land and premises. Section 1 provides that the former 'includes any portion of land' and the latter 'includes any room or apartment in any building'.¹⁰² In the present context these terms, which have a physical quality about them, do not appear to be problematic.

4.4 The use of land and premises (s 35)

This constitutes the third sphere of control in terms of the Act. Like the extended meaning of occupation discussed in 4.3.2. above, it was not contained in the original Act. The extensive legislative control of the 'use' of land and premises appears to have come about as a reaction to court decisions limiting the meaning and scope of 'occupation'. It will be recalled that the courts held that a company could not 'occupy' land or premises within the meaning of the Act,¹⁰³ and in the *Lenz Township*¹⁰⁴ case the Appellate Division moreover observed that where the Act prohibited occupation by 'disqualified persons', 'persons' did not include 'disqualified' companies. This meant *inter alia* that a disqualified company could, subject to the provisions dealing with nominees, run a business in a group area through employees belonging to the 'right' group: the company would not be 'in occupation' and the occupation by its employees qua individuals would not be illegal.

This created opportunities for (economic) 'penetration' by disqualified companies and, moreover, encouraged 'non-White' companies to employ Whites so as to be able to trade in White areas - practices strongly opposed by the National Party government. (The fear of economic 'penetration' was one of the motives for the original Act¹⁰⁵ and the point relating to Whites working under 'non-Whites' is illustrated by the fact that up to 1985 the exemption relating to occupation by *bona fide* (disqualified) employees of a (qualified) lawful occupier did not extend to White employees of a 'non-White'. 'Non-Whites' were clearly discouraged from employing a White person.¹⁰⁶) To try and 'remedy' this situation, a new section was inserted into the 1957 Act during 1961.¹⁰⁷ This new section prohibited disqualified companies from *using* land or premises if a disqualified natural person could not occupy the land or premises. 'Use' was not defined, but the section further provided that it did not preclude any company from *letting* such land or premises. The clear implication was that letting would otherwise have constituted 'use'. In 1965 the section was amended¹⁰⁸ and cast in the form of the present s 35. In terms thereof, the prohibition relating to use now extends to both disqualified companies and disqualified (natural) persons. It is also provided that any person (even a 'qualified' one) who occupies land 'for any purpose connected with such (prohibited) use' shall be deemed to be disqualified vis-à-vis the land and premises. Thus if A, a White, runs a business for B, an Indian, in a White group area, A is deemed to be a disqualified person.

A could be convicted of unlawful occupation; B of unlawful use of the premises. (To achieve this result may have been the reason for extending the use prohibition to natural persons.)¹⁰⁹

What is covered (or rather not covered) by 'use', and how does it fit in with the general scheme of the Act? 'Use' can obviously bear a very wide meaning.¹¹⁰ Take the case when it is said that ownership in Roman law included the right to use the property.¹¹¹ In *Southern Durban Civic Federation v Durban Corporation*¹¹² it was held that even if an Indian ratepayers' association could not be said to 'occupy' the Durban City Hall when holding a three-hour conference therein, the conference nevertheless constituted 'use' of the premises by a disqualified company or person (the federation), within the meaning of s 35. The court rejected the argument that 'use' in effect meant 'occupation, and no limits were placed on the extremely wide lexicographical meaning of 'use' except to suggest that drawing benefit from land or premises would amount to use.¹¹³

Some limitation must, however, be placed on the extremely wide potential meaning of 'use'. It can hardly apply to say a mere visit to premises (eg to see a professional person). If the scope of use is not sensibly restricted, absurd consequences and an inconsistency within the scheme of the Act would follow. The blanket prohibition of s 35 relating to use would undermine all the statutory exemptions with regard to otherwise prohibited occupation - 'occupation' would necessarily also involve the 'use' of land or premises,¹¹⁴ and the exempted forms of occupation would fall foul of the unqualified prohibition against

use.¹¹⁶ (In the case of 'use' there is only one exempted category - letting. And exemption can be granted by means of a permit.)

There thus appears to be merit in the suggestion of the HSRC Sport Report that in the context of s 35, and against the legislative history of its prohibition relating to 'use', the term should be restricted to the use of land or premises for *business or trade purposes or for the exploration/exploitation of minerals*.¹¹⁶ The committee of lawyers who drafted the report here placed reliance upon the fact that the 'mischief' which the prohibition against use sought to address, had been trading by disqualified companies through the use of 'qualified' employees. In support of this line of reasoning it may be added that the one exemption in s 35, relating to the *letting* of land or premises, (which must amount to a category of use) fits in with the meaning suggested above.

The suggested interpretation does, however, pose some problems. It may be objected that the above reasoning attributes an over specific meaning to 'use'. Would it, for instance, extend to the storage of goods, which should arguably¹¹⁷ be included under 'use'? Moreover, the term 'use' is found in other sections of the Act where it appears to have a wider meaning - compare 'use' in s 19 (before its amendment in 1984),¹¹⁸ s 24 (future group areas) and s 25 (border strips) - in the last instance 'use' appears to include use for residential purposes. To uphold the specific meaning suggested above one is driven to argue that 'use' in s 35 means something different (and more

specific) than in those other sections - contrary to the presumption that a term carries the same meaning throughout a statute.¹¹⁹

Even if the narrower interpretation suggested above were not to be acceptable, it is, however, in any event submitted that use cannot in s 35 refer to casual use or use for an insubstantial period of time. For this reason the *Durban Civic Federation* case was wrongly decided. Moreover, use must involve an element of control. It is thus suggested that it differs from 'occupation' in the sense that for 'use' the physical presence of the controller is not required. Support for this argument is again to be found in the exempted use category of *letting*, which suggests both the substantial time¹²⁰ and control elements. In *Govender v Chief Constable, Pietermaritzburg*¹²¹ the court had to interpret a provision that no person shall permit certain premises 'to be let or used ...' by others. It was held that the prohibited Act must relate to more or less permanent use, and at least relate to use on more than one occasion. Here the meaning of 'use' was also influenced by the fact that it was mentioned in conjunction with letting.

The present line of reasoning is further supported by the fact that s 35 envisages that there may be occupation 'for a purpose connected with such use'. And it would appear that the meaning of occupation in s 35 has not been extended by proclamation,¹²² with the result that it carries the meaning suggested in the *Ghoor* case. This implies both that use must carry with it an element of control and that it must endure for a

substantial period of time. The present interpretation also does not conflict with the apparent meaning of 'use' in other sections of the Act, referred to above.

It must be observed, finally, that the blanket prohibition against use represents an ill-considered and loosely drafted legislative 'overkill' which fits in badly with the scheme of the Act. 'Use' should at least have been properly defined, and its interrelation with the control of occupation sorted out.

4.5 *Focus on the control of land*

The key concepts of control under the Act relate to land and human relationships with land. This holds true even when the extended meanings of 'immovable property' and 'occupation' and the wide meaning of 'use' are considered.

Why this focus on land and rights to land? How does this tie in with modern developments in the field of property? Commentators on the law of property in the twentieth century have tended to stress the rise of 'new property', supplanting land as the traditional source of wealth. This 'new property' may consist of so-called intellectual property rights (copyright, patents) or forms of property associated with the modern company, notably shares.¹²³ A further important source of new property consists of the 'benefits, services, contracts, franchises and licenses'¹²⁴ dispensed by modern governments, no longer confined to the role of mere 'umpires' or 'watchmen', as in the classic *laissez-faire* model of the state and the economy. In general there has been a shift of emphasis within the law of property:

'een verschuiving van het onroerende goed naar het roerende.'¹²⁵

These developments have been brought about by an interplay of social, economic, political and legal factors. Compared to land, movable and intangible assets can be accumulated more easily and in vast dimensions, and are more easily transferable. Their ownership is less onerous than the ownership of land in respect of which governmental controls and restrictions abound and where possessors such as tenants claiming security for their tenancy, are making increasing demands against owners. The subject-matter of the new forms of property (shares, patents) can be 'created' and multiplied, while the stock of usable land which is available for development is ever dwindling.

The rise of new property has had important consequences. Arguably the most important has been the split in ownership and control: the shareholders of a large company hold the assets of the company in (collective) ownership; but the control is vested in the managers. The managers in modern industrial society have emerged as an all important 'commercial bureaucracy' which appears to continue to operate even under socialist systems.¹²⁷ The 'new property' which has emanated from government in the form of licences, subsidies and similar allocations, has given the government of the day considerable scope to pursue specific policies (such as decentralization or encouragement of specific industries) by means of selective allocation.

In the present context it is also often observed that rights in land, and particularly ownership, have become less important to society than the new forms of property.¹²⁸ General acceptance

of this proposition would tend to play down the importance of group areas legislation. It is, however, suggested that rights in land remain of predominant importance when it comes to the control and structuring of society.

In an *economic* sphere,¹²⁹ the point should be made that even in a developed capitalist society ownership and occupation of land underlie, in some way at least, the profitable utilization of more abstract species of property. Several illustrations of this point spring to mind. Land represents a stable investment and the optimum form of security for obtaining credit. The actual location of factories and shops (near to markets) is vital, while location constitutes a major component of business goodwill. (This is why group areas relocations have had such an adverse impact on a group such as the Indian traders.¹³⁰) On a *social level*, control of the ownership, occupation and use of land obviously determines the patterns of human interaction in society. Segregated residential areas to which have been linked segregated schools, constitute the best illustration of this.

When one looks at the *political* sphere, the foregoing economic and social factors, of course, all constitute inputs into the political process. Thus the control function of group areas in these spheres ??????C?K

It may be added that the political demands of those owning the best or most strategic land carry considerable weight. The distinctive and preferential patterns of allocations such as occurred under group areas legislation, have entrenched and strengthened the position of the White group and weakened that of

the others. In a political context it should also be mentioned that group areas have had a specific, unique and at times openly acknowledged *security function* for the planners of apartheid.

'Non-white' group areas are generally removed from urban nerve centres, strategic points, major business districts and White residential areas. They can be sealed off in times of crisis; their physical layout features 'patrollable streets'.¹³¹ The following remarks of Verwoerd made during 1952 in respect of 'native locations' reflect to a large extent thinking towards group areas in general: 'non-White' townships, he stated, should be

'an adequate distance from the white township ... preferably separated by an area of industrial sites ... (with) suitable open buffer spaces around and a considerable distance from the main, and more particularly national roads'.¹³²

So the conclusion must be that from the perspective of societal control (whether seen from a 'race' or 'class' perspective),¹³³ the control of land and rights in land offer unique possibilities. Group areas legislation and the laws which complement it have sought to seize upon these possibilities. In this sphere rights of ownership and occupation of land are not of secondary importance:

'Land is the basis of material and psychological security and the way in which the law determines a system of tenure is a matter of immediate consequence to all people. Land rights are frequently organized so as to achieve social, political and economic aims; and the group that is in a position to manipulate land rights is able to entrench its political hegemony.'¹³⁴

CHAPTER FOUR

ENDNOTES

- 1 Section 1; and cf 1(3).
- 2 This is the customary reservation contained in definition sections - see Steyn 162. A definition of a term will, however, only be disregarded if it is clear that it cannot be applied in a given context. Then its ordinary (common law) meaning revives.
- 3 Section 1. Compare the definitions of 'immovable property' in s 102 of the Deeds Registries Act 1937 and in s 1 of the Administration of Estates Act 66 of 1965.
- 4 See *R v Debele* 1956 4 SA 570 (A) 575 H.
- 5 31 n107.
- 6 See Van der Merwe 43-4.
- 7 See Van der Merwe 31 and cases cited there, especially in n107 and n109.
- 8 See *Perumal v Messenger of the Court* 1953 2 SA 734 (N); but cf Van der Merwe 31 n112 and cases there cited.
- 9 1954 2 SA 249 (N) 257 D-E; see also at 262 C (per Shaw J) and *Cross v Wiehahn* 1954 1 SA 216 (N) (per Shaw & Holmes JJ).
- 10 1978 2 SA 499 (C), especially 503 E-H, 504 E-G.
- 11 See n9-10.
- 12 See n9, and also *Registrar of Deeds (Tvl) v The Ferreira Deep Ltd* 1930 AD 168 at 180 where it was stated that the right to obtain transfer 'is converted into a real right by ... registration.'
- 13 1946 AD 548. See further below at n40.
- 14 At 255 E-G; see also *Mariam v Minister of the Interior* 1959 1 SA 213 (T) 217 A.
- 15 See remarks of Selke J in *Starr* case (n9) 261 D-E, but note present definition of 'acquire' in s 1 of Act, as contrasted with earlier definitions.
- 16 Cf the remarks in *R v Bagas* 1957 4 SA 311 (A) 316-7 and *Diner v Ensor NO* 1967 1 SA 547 (D) 550.
- 17 Section 1(3).

- 18 E5.24-30.
- 19 *Green v Griffiths* (1886) 4 SC 346 at 350.
- 20 See S 102, s v 'immovable property'.
- 21 *Dorklerk Investments v Bhyat's Departmental Store* 1974 1 SA 483 (W) 485G - 486C.
- 22 See D'Oliveira par 526 n12-13.
- 23 See in general on the topic of mining rights Franklin B L S & Kaplan M *The mining and mineral laws of SA* (1982).
- 24 Act 35 of 1908 (Transvaal). See Van Reenen ch C1 and 2, and E19.
- 25 Section 7(3)(b).
- 26 Section 7(3)(c) & (d).
- 27 Section 48 (2)(b)(i) - (ii).
- 28 Section 61(4).
- 29 1964 2 SA 252 (A).
- 30 Proc 274 of 1952; it is still applicable in terms of s 49(2) of the present Act.
- 31 See Van der Merwe 389n 593.
- 32 See above ch 3 n 79.
- 33 Rights of way in favour of the public have in the past frequently been created as part of township development - Van der Merwe 390.
- 34 E6.11.
- 35 Section 1.
- 36 *R v Bagas* 1957 4 SA 311 (A) 316 H.
- 37 Ibid.
- 38 Van der Merwe 109: 'Aangesien sodanige losse gebruik van die woord eiendom die grense tussen saaklike en persoonlike regte uitwis, is dit verwerplik'.
- 39 See Copyright Act 98 of 1978, s 21.
- 40 1946 AD 548 at 558.

- 41 *Cross v Wiehahn* 1954 1 SA 216 (N) 218E; *Starr v Ramnath* 1954 2 SA 257 (N) 257H-258A, 262C; *Karjieker v Karjieker* 1978 2 SA 499 (C) 503D-504A.
- 42 E5.15.
- 43 111.
- 44 Cf 1(3).
- 45 *Corondimas v Badat* 1946 AD 548 at 551 in fine, 560.
- 46 On the position of the trustee, see *Braun v Blann and Botha* NNO 1984 2 SA 850 (A) especially 859E - 86AA. Other sections of the Act (eg relating to nominees) may of course also be applicable.
- 47 See s 13(3), 14, 15 and 27.
- 48 1959 1 SA 213 (T) 217-8.
- 49 See *Minister of the Interior v Toubkin* 1952 4 SA 223 (T) 232 G, 233 G; cf *Minister of the Interior v Mariam* 1961 4 SA 740 (A) 750 D-F.
- 50 In the Parliamentary debate on the first Group Areas Bill the acting leader of the (UP) opposition raised the objection that in a group areas context (White) bond holders would not be able to 'buy in' to preserve their security: *House of Assembly Debates* col 7463 29 May 1950.
- 51 Above n 4 at 576 B; see also Schoombee I 92.
- 52 HSRC Sport Report par 6.3, p 73; cf p 71.
- 53 See 3.2 above.
- 54 *Madrassa AI v Johannesburg Municipal Council* 1922 1 AC 500; *Dison & Mohamed* 22-3.
- 55 The plural 'periods' is somewhat problematic. In *Fen Sam Jackson v Conradie* 1955 4 SA 266(E) 269 G-H, 270F reference was made to 'substantial period of time', but this was apparently given an interpretation akin to that of 'habitual physical presence' (270 F). See under 4.3.2 below.
- 56 1960 3 SA 42 (C) 50 B-C.
- 57 See cases cited in *Ghoor* and *Dison & Mohamed* 22-3; *S v Mamajee & Co* 1965 1 SA 485 (T) & 487-8; contrast *R v Asmal* 1958 3 SA 664 (N).
- 58 *Ghoor* 50 C-D.

- 59 *Ghoor* (n56); *S v Mamajee & Co* (n57) 487 H; cf *Lenz Township Co v Lorentz NO* 1961 2 SA 450 (A) 460 F; contrast *R v Bushveld Agencies* 1954 2 SA 457 (T).
- 60 E 6.1 - 6.18.
- 61 E 6.11.
- 62 4.2.3.3, at n 34-5.
- 63 Cf. remarks in *R v Mamajee & Co* (n57) 488 H - 489 A.
- 64 *Fen Sam Jackson v Conradie NO* (n 55).
- 65 *S v Brandsma* 1963 1 SA 261 (N).
- 66 *R v Conradie* 1959 1 SA 781 (C); 782 G - 783 A; Van Reenen E6.12; HSRC Sport Report par 6.3.
- 67 1955 4 SA 266 (E).
- 68 See Van Reenen E6.12 n22.
- 69 GG 10101 of 21 February 1986 (Reg Gaz 3925).
- 70 See Anderson P C *An investigation into the effect of race and politics on the development of S A sport* (1979) 221.
- 71 See s 1(6) of Act, inserted by Act 62 of 1982.
- 72 Personal communication officials department of Constitutional Development and Planning October 1986.
- 73 Par 6.7 - 6.11.
- 74 Par 44 and 176.
- 75 Van Wyk I 69 n38. Prof van Wyk was apparently also one of the compilers of the HSRC Sport Report.
- 76 1961 4 SA 518 (T).
- 77 At 523 B.
- 78 *R v Seedat* 1957 1 SA 27 (N) 34 E-F; see also *Natal Organic Industries v Union Government* 1935 NPD 701 at 710. See, on the issue of 'general' or 'specific' powers, and the consequences of this distinction for the validity of delegated legislation, Steyn 244-7; and, with regard to the issue of unreasonableness, *Sinovich v Hercules Municipal Council* 1946 AD 783 at 791, 803 and 817.

- 79 HSRC Sport Report par 6.11 p 97; and see remarks of Steyn CJ in *Prokureur-Generaal (Kaap) v Barenblatt* NO 1969 2 SA 534 (A) 542.
- 80 Par 6.11, p 97-8.
- 81 See HSRC Sport Report par 6.9.
- 82 *Swart v Van den Bergh* 1954 3 SA 755 (T), overruled on a different point sub nom *Divisional CID Officer, Pretoria v Swart* 1955 3 SA 374 (A).
- 83 See generally *R v Hathorn* 1948 4 SA 162 (N).
- 84 *Hathorn* case 167.
- 85 *S v Rosenberg* 1972 3 SA 91 (T) 98 F; *R v Dorey* 1953 2 SA 281 (E).
- 86 Cf *Southern Durban Civic Federation v Durban Corporation* 1972 2 SA 281 (E).
- 87 *Hathorn* case (n83) 167; *Allen v Emerson* [1944] KB 362 at 368.
- 88 See eg *R v Weinberg* 1939 AD 81; *Critten v Cadell* 1956 2 SA 487 (FC).
- 89 See *Saheebolay v Wolfson* 1924 NPD 225 at 231 (upheld on appeal: 1925 AD 38). Cf *R v Ah Tong* 1918 AD 186.
- 90 *Ibid.*
- 91 See eg *R v Ah Tong* 1918 AD 186 at 190; *R v Susich* 1929 TPD 193 at 198; *S v Mosoeu* 1961 4 SA 518 (T) 524 H; *Ornelas v Andrew's Cafe* 1980 1 SA 378 (W) 382 A-B.
- 92 *Padayachee v Licensing Officer, PMB* 1926 NPD 473.
- 93 1961 4 SA 518 (T).
- 94 See at 522 D-E.
- 95 524A et seq.
- 96 1961 2 SA 587 (A) 602.
- 97 HSRC Sport Report par 6.10.
- 98 Eg the proclamation in issue in *S v Brandsma* 1963 1 SA 261 (N) 263.
- 99 See HSRC Sport Report par 6.10 p 96.

- 100 See in general definitions given in *Von Wielligh v Mimosa Inn* 1982 1 SA 717 (A) 728-9; *Bruyns v Rand Sporting Club* 1919 WLD 55.
- 101 Cf *Von Wielligh* case 729 B-C.
- 102 On 'premises', see Van Reenen E6.27-9.
- 103 See above at n 59.
- 104 1961 2 SA 450 (A) 460 f.
- 105 See above 2.1.
- 106 See proclamations R3 of 1968 (specified areas), R4 of 1968 (controlled areas) and R5 of 1968 (group areas), replaced by respectively R110 of 1985, R111 of 1985 and R109 of 1985 - above at ch 2 n164 et seq.
- 107 Section 31, by Act 23 of 1961.
- 108 By Act 56 of 1965; this appears to have confirmed the result of the decision in *S v Mamajee & Co* 1965 1 SA 485 (T).
- 109 But see discussion at end of this present section.
- 110 See *R v Tru Products* 1954 4 SA 356(C) 365.
- 111 Van der Merwe 112.
- 112 1972 2 SA 133 (D&C).
- 113 At 139 H.
- 114 See above 2.2.2. n 45 et seq.
- 115 It can possibly be argued that the potential conflict should be resolved by applying the maxim *generalalia specialibus non derogant* - but see Schoombie I 94 n 169.
- 116 Par 6.12, especially p 104.
- 117 See *Dison L R Group areas and their development - 1961 Supplement* (1961) 2.
- 118 See above 2.4.4.
- 119 Steyn 126.
- 120 Of course premises (eg a hall) can be let for a few hours, but this is an atypical case.

- 121 1926 NPD 498 at 500. See also *R v Appel* 1959 3 SA 944 (C) 947-8; contrast *R v Breedts* 1932 NPD 196.
- 122 The proclamation in issue (R17 of 1986 - above 4.3.2, and Appendix IV) does not refer to s 35. Section 35 does contain a reference to s 17(1), 20(1) and 26(1), which are referred to in the proclamation, but this is insufficient to cause the proclamation to apply to section 35 re occupation.
- 123 See *inter alia* Valkhoff J 'Nieuwe beschouwingen over eigendom en eigendomsrecht' (1957) 21 *R M Themes* 21 at 30-2; Pinckaers, BJ *Eigendom in een nieuwe tijd* (1960) 243, 266.
- 124 Reich C A 'The New Property' (1964) 73 *Yale LJ* 733.
- 125 Valkhoff op cit (n123) 30; and see observations of Friedmann, cited at 31.
- 126 See Valkhof op cit (n123) 34-5; Pinckaers op cit (n123) 242-3; 262; Ryan A *Property and Political Theory* (1984) 189-190.
- 127 Ryan *ibid*.
- 128 See n 125 above.
- 129 On the role of economic factors in a group areas context, see in general Schoombee I par 3.
- 130 See 6.2 and 6.7 below.
- 131 See Schoombee I 90 n 137.
- 132 See 'Policy of the Minister of Native Affairs, May 30, 1952' in Pelzer AN (ed) *Verwoerd Speaks* (1966) 31 at 42 as cited in Lipton M *Capitalism and Apartheid 1910-1984* (1985) 27
- 133 See Schoombee I par 3.
- 134 Editorial Preface to 1985 *Acta Juridica* and *Land Ownership - Changing Concepts*.

CHAPTER FIVE

GROUP AREAS AND THE JUDICIARY

5.1 *Introduction - Scope of chapter*

The first and main aim of this chapter is to trace the approach and attitudes of the judiciary vis-à-vis group areas legislation by analysing the most important cases on certain key aspects of group areas law and practice. The South African judiciary is traditionally known for its 'independence'. The present analysis will seek *inter alia* to answer the important question as to how the judiciary reacted when confronted with such a far-reaching piece of governmental law embodying the essence of apartheid? Did the courts assert their independence and seek to uphold basic rights and liberties in the face of the legislation?

The examination of judicial approach and attitudes will be undertaken specifically with regard to (i) discrimination and unreasonableness in the implementation of group areas; (ii) procedural safeguards; (iii) the judicial control of executive discretion and (iv) race classification under the Act. These four areas are of pivotal significance in a group areas context. They have also been selected because the case law in these areas contains a definite reflection of the approach and attitudes of the South African judiciary to group areas, and of the policy arguments¹ employed by the judiciary to justify their conclusions in controversial and politically sensitive cases.

The second aim of the analysis is to assess the influence that key court decisions have had in the implementation of group areas. We have for instance² seen that the Deputy Minister of

Constitutional Law and Development has recently ascribed the general drop in group areas prosecutions to the 1982 Transvaal decision of *S v Govender*³ which restricted the ease with which persons convicted of unlawful occupation could be ejected as part of the criminal process. Here a single judicial decision favouring individual rights appears to have had a significant impact on the implementation of the Act. Yet chapter six will reveal the gross discrimination which has generally been part and parcel of the implementation of group areas. Have the attitudes and decisions of our courts contributed in any way to this state of affairs?

An assessment of the attitudes and assumptions of the judiciary with regard to group areas legislation, and the impact of judicial decisions in this sphere, should tell us something about the general position and role of the judiciary in our⁴ society. Although no thorough investigation of the general position and role of the judiciary will be undertaken in this study, it is intended that the present analysis should nevertheless make a contribution of value to the current debate on the position and role of the South African judiciary.

5.2 *Relevance of current debate on SA judiciary*

The analysis undertaken in this chapter should be seen against the background of the current debate on the South African judiciary. The main (interwoven) strands of this debate will now briefly be identified, followed by an indication of the strands to be picked up in the further discussion.

(1) At the centre of the debate has been the meaning and permissible use of the term 'positivism', and the role of positivist theories of law. This has been specifically related to the position and performance of judges, and the influence (or blame) that may legitimately be attributed to positivism or positivist theories of law with regard to the performance of judges. Thus Dugard criticised 'positivism' as either preventing judges from perceiving that controversial decisions which have had the effect of curtailing human rights have often involved a choice between alternative solutions, or, worse even, as being used by judges to cloak unenlightened inarticulate major premises in their reasoning.⁵ This criticism has been countered *inter alia* by Forsyth & Schiller,⁶ who argue that Dugard's attack is misdirected, because 'positivism' is an epistemology, not a theory of law. As such it is an inappropriate scapegoat for the sins of a conservative judiciary. They also point out that most developed positivist theories of law not only concede but emphasize that judges are faced with real choices in what may be termed 'hard cases', that is cases not clearly covered by the relevant statutes or precedent.⁷

(2) A second area of concern has been the reality and range of choice open to judges, once it is accepted that they have a significant choice to make in hard cases. The scope of this choice is limited in our system not only by doctrines such as parliamentary sovereignty but, so it is argued, also by inherently undemocratic and repressive values (such as racial discrimination) which have assumed a dominant role in our legal

system. Here Wacks has argued that the legal system, taking its cue from society, is so unfair, so premised upon inequality, that a judge minded to promote equality and individual liberty has no choice but to resign, because in a hard case he will be driven, if intellectually honest, to apply these pernicious values.⁸

(3) Thirdly, the track record of particular courts and judges has been critically examined, to determine what choices were made and attitudes displayed. In assessing the social role of the Appellate Division during the period 1910-1950, Corder⁹ came to the conclusion that far from being upholders of civil liberties and equality during this period (as has often been asserted), the judges of appeal essentially saw their dominant role as protectors of stability in the social formation of which they formed an integral part. Forsyth¹⁰ picked up where Corder had left off, and analysed the Appellate Division decisions 1950-1980. His analysis stresses the choices open to the Appellate Division in leading cases and the generally pro-executive character and questionable legal basis of the decisions handed down by the court from the late 1950s.

Of interest for the analysis to be undertaken in this chapter, is Forsyth's conclusion that *inter alia* through group areas decisions such as *Lockhat* and *Adams & Werner*, the Appellate Division

'emasculated - and effectively destroyed - the doctrine of "separate but not substantially unequal" established in *Abdurahman*, *Lusu* and *Tayob*. In a racially polarised country where the unequal treatment of race is a fact of everyday life, the Appellate Division bears a heavy moral responsibility for the destruction of this small step towards equality.'¹¹

As far as specific judges are concerned, the most significant recent analyses have focussed on the careers and impact of respectively OD Schreiner JA and LC Steyn CJ; the former is generally portrayed as the paradigm of a 'liberal' judge,¹² the latter (in Cameron's characterisation)¹³ as tending to be an executive-minded legal chauvinist.¹⁴

(4) Finally, the longest standing issue in the debate, which has been the object of fresh attention recently, concerns the status of rival schools of thought on the proper sources of the South African legal system, and the methodology to be employed in respect of the sources. Thus the battle lines have been drawn between the 'Purists' and the 'Pragmatists',¹⁵ amongst judges and academics, on the basis of their views on the 'true' sources of our common law, and specifically the role and status of English law.

* * *

It will be appreciated that the first aspect of the analysis undertaken in this chapter, namely to establish the approach of the judiciary to group areas legislation, ties in with the strand of the general debate summarised in (3). So does the second aspect, namely the impact of judicial decisions on the implementation of the Act. In as much as conclusions are to be drawn with regard to the general role and position of our judiciary in 5.5.3 below, these tie in with aspects of the strands summarised under (1) and (2). The conclusions in this regard will relate to two jurisprudential issues, namely the element of choice in judicial decision-making in a sphere such as

group areas, and the extent to which, what may loosely be termed 'positivist legal thinking', can be blamed for the line of remarkably 'executive-minded' decisions handed down by the Appellate Division.

5.3 Sources and methodology

The aims of this chapter will be pursued through analysis and evaluation of the key reported¹⁶ decisions on group areas - a number of these cases have already been discussed in greater or lesser detail in earlier parts of the study.

Selecting the 'key decisions' in an area of law obviously involves an element of subjective evaluation. Here the selection was carried out with the aims of the chapter in mind, and of course, specifically with reference to the four areas to be discussed below under 5.4.1-4. It may be added that the pattern of the case law in these areas aided the selection process: the respective areas have for instance been dominated by a relatively limited number of well-known, even notorious, Appellate Division cases.

Before turning to deal with the analysis of the court decisions in the specific areas, something should be said about 'hard cases' and the relevance of the broad distinction between what may be termed 'hard' and 'unproblematic' cases for the purposes of this analysis.¹⁷ At the simplest level, all lawyers would agree that some cases are easier to solve than others. This is not to say that any particular case necessarily proclaims itself as being 'hard' or 'unproblematic'. It is sometimes only after a (preliminary) exploration of the facts and applicable

sources of law (in our system legislation, precedent, the common law and custom) that the lawyer would realise whether he is faced with a hard or unproblematic case. It should also be realised that legal problems present themselves at varying levels of complexity and difficulty. It is thus submitted that there is no rigid dividing line between hard and unproblematic cases; it is a matter of degree. But the distinction is nevertheless important for our present purposes. It is only when the problem falls in the 'hard case' side of what may be seen as a hard-unproblematic spectrum, that judicial attitudes are likely to emerge in the course of its solution, and that policy arguments play a decisive role. This is particularly so when the case involves a controversial application of fundamental common law norms, rather than, for instance, difficult factual issues or problems in establishing what legislation is applicable. To further explain this point, a brief look will be taken at the various types of hard cases. Broadly speaking, cases may be 'hard' by reason of the facts or the law involved, or both.¹⁸ Thus a lawyer dealing with a specific case may find a large number of facts that appear relevant - when the availability of suitable alternative accommodation for disqualified traders in a specific city is in issue in a challenge to a group areas proclamation, or if the discriminatory effect of a group areas proclamation were to be tested in litigation. Apart from being numerous, the facts may also be difficult to establish for a variety of reasons. It may for instance be difficult to establish exactly how many potentially disqualified persons are living in a certain region

because no reliable census figures are available.¹⁹ The facts may also be heavily disputed - in a group areas context the exact effects of relocation upon disqualified traders may be subject to conflicting views, even of experts.

Legal issues may also be controversial for a variety of reasons thereby creating a hard case. It may simply be very difficult to establish which enactments (statutes or regulations) are relevant to the case. This is often the case in say tax law, and there are many group areas cases dealing with the complex interplay between successive legislative measures, particularly with respect to Asiatics in the Transvaal.²⁰ Even if this problem were to be overcome and all the possibly applicable legal norms (including non-statutory ones) were to have been marshalled in a given context, the 'open-textured' nature of the norms involved may create doubt as to which one should apply, or there may be a conflict between norms. An interesting and important species of conflict between legal standards or norms concerns what may be termed the 'tension' or potential conflict between rules (taken as standards of more or less definite content, with a circumscribed sphere of applicability) and principles, that is broader standards of less definite content which may be said to 'argue' for a particular conclusion, rather than to dictate such result once a certain set of circumstances exist.²¹

This 'tension' is of particular importance for our present enquiry because the key group area decisions analysed herebelow can be seen to involve exactly such 'tension'.

Thus in the first sphere to be discussed, namely discrimination and unreasonableness, the courts were called upon to interface the definite, apparently untrammelled exactments granting wide powers to the executive to implement group areas, with the common law principles (or presumptions)²² that executive powers should not be exercised in a grossly unreasonable manner or so as to result in substantially unequal treatment.

A similar 'tension' arose with regard to procedural safeguards. The Act itself granted limited procedural rights to those to be affected by group areas proclamations. The crucial issue was whether the administrative structures and functions created by the legislation did, upon proper characterisation by the courts, bring into play the common law *audi alteram partem* principle.

Similarly, with regard to the judicial control of executive discretion, the question arose to what extent the courts were willing to structure and confine the largely unqualified discretion granted in the legislation to the executive to proclaim group areas and thereupon 'clear' them of disqualified persons. It is the inescapable task of the courts to characterise the discretion involved and to stipulate the considerations, if any, such as the availability of suitable alternative accommodation for disqualified persons which have to be taken into account in the exercise of the discretion to implement group areas.

Finally, in the sphere of classification under the Act, the courts were called upon to test the racial categories created by

the apartheid planners in delegated legislation against the common law principle that such legislation must be reasonably certain.

Hard cases involving the interface of statutory rules and common law principles is a prime area where the approach and attitudes of the judiciary are decisive to the outcome. Much is left to the judgment of the court. Plausible arguments can usually be adduced either way. With respect to such a situation Stone has perceptively remarked:

'In a case where there is any real problem about the applicable rule ... the crucial decision is made before the reasoning can be cast into syllogistic form and it is trivial to describe the reasoning as a whole as deductive. The crucial decision is then as to relevant similarities and differences, and this necessarily involves advertance to factors of justice and social policy, transcending any mere syllogistic relation to or among rules of law formally enthroned in the available cases.'²³

The category of hard cases under discussion is particularly revealing because the approach and attitudes of the judiciary tend to translate themselves into the *policy arguments* put forward in the judgments to justify the outcome of the cases.

'Policy arguments' are here used in the sense set out by Bell:

'Policy arguments may be defined as substantive justifications to which judges appeal when the standards and rules of the legal system do not provide a clear resolution of a dispute. Unlike authority reasons, where reliance is placed simply on the clear rules and principles established by statute or precedent, the appeal is to the values which could justify a rule, or an interpretation of it, and the argument centres on the balancing of conflicting values. Such substantive reasons can be both ethical and non-ethical. Non-ethical or goal-based reasons justify a decision by showing that it advances some accepted goal, such as greater wealth for the community or a better environment. They seek to show ways in which the decision will be good for individuals in society, whereas ethical arguments do not turn so much on the benefits accruing from the decision, as on its moral desirability. Though each may

be consequentialist in its approach, they may produce different solutions to a particular case, and should thus be distinguished as separate kinds of argument.'²⁴

The endeavour to establish the approach and attitudes of the judiciary to group areas legislation, and the policy arguments employed in the key cases, is bound to be a controversial one. For one thing, the judges themselves tend to deny or minimise the role played by their societal attitudes in judicial decision-making. On the relatively rare occasions when South African judges have addressed this topic outside the court room, the views expressed have generally amounted to a rather simplistic and question-begging protestation:

'We only apply the law.'

Specifically in the sphere of the interpretation of statutes, the search for the intention of the legislature is put forward as the be all and end all of the interpretation process.²⁵ By the same token, policy arguments are often not explicated in their judgments, even though these appear to have played a crucial role.

The argument may be raised that it is purely speculative to try and trace judicial attitudes, approaches and (at times, unexplicated) policy arguments by analysis of the case law. In countering this argument, it should be pointed out that group areas cases in any event, do reveal definite patterns which, it is submitted, can only be ascribed to distinct judicial attitudes, approaches and the policy arguments. Thus it is of interest to note that group areas cases have been marked by a recurring vertical split in judicial opinion: in nearly all key

decisions the Appellate Division overruled decisions of the lower courts, and in the process ruled in favour of the government. It can hardly be argued that the lower courts (often consisting of two or three judges) simply happened to have been 'clearly wrong' every time. Moreover, the role played by attitudes and policy arguments is also shown up by the fact that the Appellate Division decisions on group areas such as Cassem, Mariam and Lockhat have not only been criticized on the basis of the attitudes towards justice and social realities displayed therein, but also because of the doctrinal weakness of the administrative law arguments advanced by the Appellate Division. The most feasible explanation for this deficiency is that the influence of what may be described, at best, as a 'hands off' attitude, and at worst, a pro-executive attitude, led the court to distort the accepted principles of administrative law in order to find for the government. The level of distortion is such that these decisions have achieved notoriety within the broader field of administrative law.

5.4 Analysis of case law

5.4.1 On discrimination and unreasonableness

The implementation of the Group Areas Act has resulted in substantial discrimination against the 'non-White' groups and much human misery. This is borne out by the analysis undertaken in the next chapter.

At a crucial stage in the implementation of group areas the issue came before the courts whether group areas proclamations had to comply with the common law²⁶ prohibition against the

discriminatory use of administrative powers. The Act has never contained any express sanction of discrimination.

In the *Lockhat*²⁷ case the 1958 proclamation which introduced group areas in Durban was challenged. A number of Durban Indians instituted an action for an order setting aside the proclamation and declaring it to be null and void. They owned or occupied land in parts of the city that had been declared White group areas. In Plaintiffs' pleadings several grounds were advanced in support of this claim. Of importance in the present context is the allegation that the proclamation resulted

'in partial and unequal treatment to a substantial degree as between members of the White group and members of the non-White group.'

In amplification of this allegation, it was averred that whereas there was sufficient accommodation for Whites in the proclaimed White group areas, this was not the case in respect of Indians vis-à-vis the declared Indian group areas. These areas did not afford Indians suitable accommodation - reasonably adequate accommodation and land were not available, and infrastructural services and amenities were lacking. It was further averred that there was

'no reasonable prospect in the foreseeable future of suitable accommodation being made available to plaintiffs or to any members of the Indian Group ... in the ... areas or of any of the amenities ... being made available.'

The government challenged the ground of attack based upon discrimination by means of an exception - Plaintiffs' pleadings were said to be bad in law and not to disclose a cause of action. This meant, of course, that for the purposes of deciding the exception, all facts alleged by Plaintiffs had to be accepted as

true and correct. The gist of the government argument in support of the exception was that discrimination alone could not render the proclamation invalid - only *mala fides* could. Moreover, it was argued that in the absence of an allegation that permits under the Act would not be issued to alleviate hardship caused through the proclamation of group areas, partial and unequal treatment could not generally render the proclamation invalid.

In a well-reasoned judgment Henochsberg J dismissed the exception - this meant that Plaintiffs would succeed in setting aside the proclamation if at the subsequent trial they could prove the facts averred by them. On the legal issue of discrimination the learned judge held:

'Authority to do unreasonable things can be specifically given either in express terms or by necessary implication. I can find no such express terms in the Group Areas Act nor can I find anything which by necessary implication authorises discrimination coupled with partiality and inequality in treatment to a substantive degree It seems to me that the exercise of a power to proclaim group areas for the different race groups can and should (in the absence of specific authority in the statute to the contrary) be exercised without the inevitable result that members of different races are treated on a footing of partiality and inequality to a substantial degree.'²⁸

And such discrimination could not be cured by the possibility of permits, *inter alia* because permits related only to the future and could be granted to persons in the position of the Plaintiffs' only in exceptional cases, ie where 'undue hardship' existed.²⁹

On appeal this ruling was overturned by the Appellate Division in an unanimous decision handed down in March 1961.³⁰ In a passage which has justifiably achieved notoriety, Holmes JA declared:

'The important question raised is whether the Act empowers the Governor-General-in-Council to discriminate to the extent of partial and unequal treatment to a substantial degree between members of the different groups as defined in or under the Act. According to the decision of this Court in *Rex v Abdurahman*, 1950 (3) SA 136, such a power will not be attributed by the Court unless it is given expressly or by necessary implication in the statute concerned. No such power is expressly given in the Group Areas Act; but it seems to me clearly implied. The Group Areas Act represents a colossal social experiment and a long term policy. It necessarily involves the movement out of Group Areas of numbers of people throughout the country. Parliament must have envisaged that compulsory population shifts of persons occupying certain areas would inevitably cause disruption and, within the foreseeable future, substantial inequalities. Whether all this will ultimately prove to be for the common weal of all the inhabitants is not for the Court to decide. But in that connection reference might perhaps be made to the Group Areas Development Act, 69 of 1955, sec 12 of which empowers the Board to develop group areas and to assist persons to acquire or hire immovable property in such areas. The question before this Court is the purely legal one whether this piece of legislation impliedly authorises, towards the attainment of its goal, the more immediate and foreseeable discriminatory results complained of in this case. In my view,³¹ for the reason which I have given, it manifestly does'.

This finding is open to criticism on several counts. It chose to ignore the 'wholesome rule of our law which requires a strict construction to be placed upon statutory provisions which interfere with rights'.³² Moreover, the court clearly relied on the presumed *political* intention of the (National Party dominated) legislature - again contrary to strong authority.³³ There was simply nothing in the Act to justify such a conclusion or to oust the presumption against discrimination. Furthermore, even if the Appellate Division could not³⁴ refer to the assurances given by the government in Parliament when the Group Areas Act was debated that it 'does not discriminate against one section or another, against one race or another in our country'³⁵ and that as 'regards the carrying out of this Bill ... it will be

based on justice No policy, which is not based on justice, has any prospect of success',³⁶ then it could at least have considered the views of a commentator like Rousseau who declared: 'In theory, at least, the Group Areas Act was, and is completely undiscriminatory.'³⁷

Where the South African Parliament had wanted to authorise discrimination, it has not hesitated to do so - for instance in the Reservation of Separate Amenities Act.³⁸

The court's emphasis on 'the more immediate and foreseeable discriminatory results' which were said to be authorised, is also puzzling. It is true that the Plaintiffs, for obvious reasons, focussed on these *in attacking* the proclamation. But in rejecting the attack the Appellate Division seems to suggest that short-term discrimination was specially authorised. This would involve drawing a highly questionable and unsubstantiated distinction between 'more immediate' discrimination (which was authorised) and longer term discrimination which (apparently) may not have been authorised.³⁹ In short, there was no sound basis for the court's suggestion that it could confine the enquiry to the short-term discriminatory effects of the proclamation *in upholding it*. The reasoning smacks of classic apartheid thinking: *in the end* the policy may lead to the disappearance of discrimination.

The approach of the Appellate Division was clearly a 'hands off' one. The justification offered was essentially that the Act constituted a 'colossal social experiment'. The court was unwilling to interfere with the grand design of apartheid - even

if this meant ignoring well-established common law principles embodying respect for individual rights and democratic principles. It is further not overly speculative to suggest that the strong support amongst Whites for group areas and the philosophy underlying it must have weighed with the court.⁴⁰ (In theory at least, the National Party could have lost the next election and the Group Areas Act could have been repealed - then it would not have constituted a 'long term policy') A factor which may also have weighed with the court, was the political strength and proven determination of the National Party government to implement its key policies despite opposition by the courts - the outcome of the constitutional crisis of the fifties established this point beyond doubt.⁴¹ Of course, a court *should* not shrink from a particular decision because the legislature *may* annul it.

The 'colossal social experiment' argument also appears to bring into play the issue of *justiciability*. In this connection Baxter has observed:

'The power to review is, in a sense, a power of government and it does not merely involve a mechanical "application of the law to the facts". The outer boundary of review is a matter of political significance; and it ebbs and flows in sympathy with the continuously fluctuating interrelationship of the three organs of government. Meta-legal constraints also shape the perception, formulation and application of the law and the prescriptions of legality. Much will depend upon whether an issue, or even a whole dispute, is considered to be justiciable (that is, amenable to and suitable for judicial resolution).'

⁴²

If in *Lockhat* the Plaintiffs had not failed at the exception stage, a massive trial would in all probability have resulted. Evidence and counter-evidence would have been led and issues such

as existing housing and amenities, as well as plans for future development of group areas canvassed - in short, a re-run, with differences, of the investigation undertaken by the Group Areas Board. The trial judge, operating within the constraints of the accusatorial system, would in the end have been faced with a difficult and complex decision on the facts. Similar legal battles could be fought in respect of virtually every city and town in South Africa. The Appellate Division seems to have suggested that a court of law is not really equipped to decide on the *legality* of 'colossal social experiments' by using non-discrimination as a yardstick.

The justiciability of societal issues certainly raises real problems for judicial review in constitutional and administrative law. But in a group areas context they were not insurmountable and could not justify the 'hands off' attitude of the highest court. Moreover, it is not idle to suggest that the *prospect* of judicial review on the issue of discrimination would have infused some justice into the process of proclaiming group areas.

The impact of the *Lockhat* decision has been very considerable. It gave the executive immunity against judicial review upon the most obvious and strongest substantive ground, namely discrimination in the implementation of the Act. Those suffering the consequences were driven to try and argue review points practically impossible to prove, eg that in proclaiming group areas a fixed policy of making life intolerable for Indians to compel them to emigrate, was being followed.⁴³ In *S v Mosoeu*

⁴⁴ *Lockhat* was invoked to defeat an argument that restaurant

segregation imposed by proclamation was invalid on the grounds of being grossly unreasonable and discriminatory vis-à-vis Blacks; and in *S v King*⁴⁵ to defeat a similar argument based on the fact that no group area for Chinese had been set aside in Johannesburg.

In 1980 a full-scale and well-argued attack was launched on Lockhat in the Appellate Division in the cases of *S v Adams*, *S v Werner*.⁴⁶ Both cases had originated in Johannesburg as a result of a 'cleaning-up operation' by the government department concerned.⁴⁷ Adams (an Indian) and Werner (a Coloured) were charged with living illegally in White areas. The evidence in both cases established that the accused (who were both married with a child each) were faced with appalling, dehumanizing living conditions in their 'own' areas, and had in practical terms been forced to live in White areas with their families. In the court's *a quo* in *S v Adams*⁴⁸ the defence of necessity was raised; this was also done in *S v Werner*,⁴⁹ but it was further argued in the latter case that the relevant group areas proclamation (dating from 1962) was invalid on the grounds of the discriminatory way in which it was applied at the time of the Werner case.⁵⁰ All the defences failed, however.

In *Adams*, King J expressed considerable sympathy for the accused, even saying that if he had been sitting as a court of equity, he would have come to the assistance of the accused.⁵¹ He also observed that 'it is now well known that the provisions of the Act have caused and are still causing hardships'⁵² and strongly hinted that the Minister should grant the accused a

permit until suitable accommodation in an Indian area became available.⁵³ Le Roux J in *Werner* was less sympathetic. At the outset of his judgment he intimated that he would address 'a few less exalted remarks to the accused',⁵⁴ and he ended up lecturing him on getting his life sorted out - addressing him in 'jy' and 'jou' terminology.⁵⁵

The appeals in *Adams* and *Werner* were heard simultaneously in the Appellate Division. Counsel for the Appellants (and the State) presented very full heads of arguments. These ran to 28 pages in the law reports - the judgment refusing the appeals which was delivered by Rumpff CJ, ran to 7 pages! In the judgment the learned Chief Justice showed himself to be wholly unsympathetic to the (undeniable) housing plight of the accused.

Curt and unconvincing reasoning led to the rejection of the defence of necessity in respect of both Appellants - in the case of *Werner*, without even canvassing the (distinct)⁵⁶ facts of his case. In rejecting the pleas of necessity, the court placed reliance firstly on a curious and question-begging analogy: someone without a proper home in a residential area would not be justified in squatting in a business area.⁵⁷ By the same token, so it was argued, the accused could not claim that their living in White areas was justified. It was further held that even if an absolute housing shortage in Indian or Coloured areas had been established, this was only to be equated with economic necessity, which affords no defence in our criminal law.⁵⁸ And the accused had in any event only established 'hoogs ongerieflike en

onhigiëniese huisvesting',⁵⁹ in their areas, not an absolute housing shortage.

In attacking the validity of the group areas proclamation, Prof John Dugard, who argued this aspect of the case, submitted that *Lockhat* was either (i) distinguishable or (ii) had been wrongly decided. The main arguments in support of (i) were firstly that *Lockhat* had dealt only with one aspect of reviewable unreasonableness in terms of the *Kruse v Johnson*⁶⁰ test, namely partial and unequal treatment. It could thus still be argued that the proclamation was invalid because its application resulted in manifest injustice and gratuitous and oppressive interference with the rights of the citizen. Secondly, it was argued that the *Lockhat* case only gave approval to temporary substantial unequal treatment - not inequality existing some 18 years after the proclaiming of the group areas.⁶¹ As to (ii), it was argued that *Lockhat* had been wrongly decided because the court had too readily inferred an intention on the part of the Legislature to discriminate, and had in interpreting the Act ignored South Africa's obligations under the UN Charter to promote and observe human rights and fundamental freedoms.

These arguments received short shrift at the hands of Rumpff CJ. *Lockhat*, it was held, had actually gone further than the present cases⁶² - the prejudice alleged in *Adams* and *Werner* was less than the 'substantial inequality' sanctioned in *Lockhat*.⁶³ Any unreasonableness flowing from gratuitous interference with the rights of the citizen was by implication sanctioned by the Act - because the legislature must have envisaged that at any

point of time there may be a temporary housing shortage in any group area - including White areas.⁶⁴ Since World War II a shortage of housing had been a common phenomenon, the court observed. It followed that *Lockhat* had not been wrongly decided.⁶⁵

In precluding an attack on group areas proclamations on the basis of any form of unreasonableness, *Adams* and *Werner* thus went further than *Lockhat*. The tone of the later judgment was also far more strident. Rumpff CJ emphasized that both the accused had moved to Johannesburg from respectively Durban and Cape Town, and clearly hinted that they and their families had no right to demand decent homes in the 'new' city.⁶⁶ Of interest is also the emphasis on housing shortage as a *social phenomenon* 'sowel in Westerse lande as in ontwikkelende lande', and the reference to the *possibility* of housing shortages in White group areas. This ties in with a familiar process of reasoning employed by the National Party government - problems created or exacerbated by apartheid policies are 'sanitised' by dressing them up as *common social problems, calling for technocratic answers*.⁶⁷ To refer to possible housing shortages in White areas is to introduce a speculative makeweight into the argument. As the analysis in chapter six will show, the discriminatory implementation of group areas and the *relocations effected in terms thereof*, have created a pattern of *chronic* housing shortage in *Indian and Coloured* areas. In *Lockhat* and *Adam & Werner* the Appellate Division kept on referring to short term problems, and particularly housing shortages, created by the Act, thus implying that things may well

sort themselves out in the end.⁶⁸ But this is really only an exercise in wishful apartheid thinking. Thirty six years of group areas legislation have not seen an improvement in the dire social and economic circumstances which led to the *Lockhat* and *Adams & Werner* cases.

Finally, it should be observed that by emphasising the *inevitability* of housing shortages the court in *Adams* and *Werner* actually legitimised the implementation of group areas by exculpating the government from the negative results of this process.

5.4.2 Procedural Safeguards

5.4.2.1 Introduction

The proclamation and implementation of group areas obviously affect the rights and liberties of disqualified persons owning or occupying property in the proclaimed group areas. At various stages in the process which begins with the pre-proclamation investigations and ends with the final clearance of a group area of disqualified persons, the question arises whether the *audi alteram partem* principle is applicable, that is whether persons should be given a hearing before decisions affecting them are taken.

Decisions on *audi alteram partem* leave considerable scope for judicial attitudes and approach to make themselves felt. It was pointed out in the discussion of permit applications (under 2.8.4 above) that judicial pronouncements as to when the right to a hearing arises, tend to be couched in open-ended and even question-begging terms. Much is left to the judgment of the

court that has to characterise the function involved in order to decide whether it is quasi-judicial or not - does it, for instance, involve 'civil consequences' for the affected person? And even when it is characterised as quasi-judicial, so that *audi alteram partem* would in principle apply, the further question still has to be answered whether the right to a hearing has been excluded by the legislation in issue - such exclusion can *inter alia* 'be by necessary implication. In the result the attitude and approach of the court to a basic question such as whether the administrative body should operate within procedural controls and limitations or, on the other hand, be given freedom of action, are often decisive.

5.4.2.2 Pre-proclamation hearings

In the key decision of *Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad*⁶⁹ the Appellate Division held that the Group Areas Board did not perform a quasi-judicial function when conducting a pre-proclamation enquiry - even though a specific proposal for the proclamation of group areas and objections thereto were being investigated. As a result it was held that *audi alteram partem* did not apply, and that an objector had neither a *right* to a hearing, nor any *right* to be afforded access to evidence (for example, a report) in possession of the Board which may be prejudicial to his case.

The facts of *Cassem's* case were somewhat unusual. In the late fifties the Eastern Cape Committee of the Group Areas Board held a public enquiry into the proposals of one of its sub-committees for group areas in Port Elizabeth. These proposals

were strongly opposed. In *Ramjee v Eastern Cape Committee, Group Areas Board* ⁷⁰ the full bench of the Eastern Cape Provincial Division held, in a 2:1 judgment, that the objections which had been lodged against the proposals had created a *quasi-lis inter partes* and that the Committee of the Board was as a result performing a quasi-judicial function when conducting a hearing concerning the proposal and objections thereto, before reporting to the Minister.⁷¹ It was consequently obliged to disclose to the objectors a report which had been filed by the sub-committee in support of its proposals. As a result of the decision in *Ramjee*, the committee disclosed the report to the successful applicant. A further unsuccessful application was thereupon brought by the same *Ramjee* to compel the committee to disclose the report to other interested parties.⁷² Nevertheless, the Committee made the report available to such parties for a period of ten days and gave them fifteen days to make representations thereanent. Cassem applied to court for an extension of the latter period. (He had originally withdrawn from the hearing before the committee when it had first refused to disclose the report.) When the Eastern Cape Provincial Division refused to order an extension of the period within which to make representations, Cassem appealed to the Appellate Division.

There can be no doubt that, on the facts, the merits of the appeal were dubious. Advocate Lewis Dison, who had successfully argued *Ramjee*, at the time advised against pursuing the appeal in *Cassem*.⁷³ It should be noted that Cassem had withdrawn from the hearing and had only pursued his rights to obtain the report at a

later stage. It is at least doubtful whether the *audi alteram partem* principle embraces such a delayed demand. The Appellate Division was certainly aware of the possibility that the appeal could be dismissed on the facts of the case,^{73a} but did not opt for this narrow ground. It chose instead to overrule *Ramjee* and to deny objectors any right to a hearing before the Group Areas Board. It was held, per Steyn CJ, that the findings and recommendations of the Board did not affect the *rights* of interested parties. It was pointed out that the relevant Minister or the cabinet, which advised the (then) Governor-General to proclaim the group area, could ignore the report of the Board. The decision to issue the proclamation would be based primarily on policy considerations ('beleidsoorwegings') which would tend to go beyond the factual issues canvassed in the Board's report.

This decision has been convincingly criticized⁷⁴ on the basis that it espoused a fragmented view of the administrative process and chose to ignore or minimise the significant practical impact of the Board's investigations and findings. More realistic is, for instance, the approach of Conradie AJ in the recent case of *Grundling v Van Rensburg NO*⁷⁵ where he observed that the test for the applicability of the rules of natural justice in relation to an investigatory body should not turn upon the question whether the decision of the body in question would be final or preliminary, but upon the potential for prejudice ('benadelingspotensiaal') emanating from the decision. On this

approach, audi alteram partem would be applicable to the Board's investigations.

What was the underlying motivation of the decision in *Cassem* and what policy arguments were advanced in support of it? In a telling passage⁷⁶ towards the end of the judgment, Steyn CJ made the point that if the Board were to conduct hearings along quasi-judicial lines, its investigations could readily assume dimensions which would be barely manageable and which would impede the implementation of the Act in such a way that it can hardly be supposed that the legislator impliedly wished to impose such quasi-procedural limitations upon the Board's freedom of action ('vryheid van optrede'). The implication is clear. As Cameron has pointed out, in the court's judgment the interests of the executive's freedom of action outweighed considerations of individual justice and fairness.⁷⁷

5.4.2.3 *Determination of basic value of affected property*

Once a group area has been proclaimed, disqualified persons and property held by them become subject to elaborate and stringent administrative measures designed to ultimately clear the area of such persons.

As explained in 3.4 above, the Community Development Act 1966 provides that the Community Development Board must list all the 'affected properties' (that is property owned or occupied by disqualified persons in a group area). It is further provided that the 'basic value' of affected properties should be determined by valuers (presently) appointed by the Minister.⁷⁸ The 'basic value' is essentially⁷⁹ the market value of the land

plus the erection cost of buildings at time of valuation less actual depreciation. The 'basic value' serves as a datum valuation - if the owner for instance disposes of the property for a consideration less than the basic value, he can claim a depreciation contribution from the Board equal to eighty per cent of the difference between the basic value and such consideration.⁸⁰

In *Down v Malan NO*⁸¹ the Appellate Division had to decide whether the valuers had given Down, the owner of affected property, a proper hearing in determining the basic value of his (affected) property. At the time⁸² the Act provided that owners had to be granted a 'reasonable opportunity' to submit information and make representations to the valuers before they determined the basic value. Down had requested details concerning the facts and circumstances upon which the valuers were basing their valuation, but had not been furnished with all the detail requested. It was argued that this amounted to a breach of the *audi alteram partem* principle.

The Appellate Division, per Steyn C J, affirmed that a valuator performed in essence a quasi-judicial function and that the *audi alteram partem* principle applied. It was held, however, that Down had not been entitled to the information requested - it related essentially to factors which would 'obviously' affect the valuation and of which he could readily have informed himself. Quite a strict⁸³ limitation was placed upon the requirement of the *audi alteram partem* principle that an affected person is entitled to be informed of the facts or information which may be

considered in reaching a decision adverse to him. The court held that if the affected person can reasonably expect that the administrative decision-maker will have knowledge of facts or information which can be taken into account against him from a source other than submitted evidence and submissions, and nevertheless neglects to deal with these facts or information, he does so at his peril. The ratio of *audi alteram partem*, so it was held, is to protect the interested party against unfair prejudice and not against his own carelessness or casualness.

Of importance is the emphasis placed, once again, on administrative expediency and the freedom of action of those implementing group areas.

The legislation was interpreted to imply that valuers need not follow what was viewed as unnecessary, time consuming procedures and that the finalisation of property transactions in the areas should not be 'unnecessarily' delayed.⁸⁴

5.4.2.4 *Administrative powers in relation to property illegally held*

In 2.7.4 we discussed the wide powers of the Minister to have immovable property acquired or held in contravention of the Act, sold. It will be recalled that in *Mariam's*⁸⁵ case the Appellate Division held, on the basis of wholly unconvincing reasoning, that *audi alteram partem* does not apply to the exercise of this power.

The court *a quo* had suggested that the functions of the Minister appear to be quasi-judicial rather than administrative.⁸⁶ By way of contrast, Botha JA chose to describe

the discretion of the Minister in terminology which not only excluded the applicability of *audi alteram partem*, but suggested a (practically speaking) 'unreviewable' discretion: in respect of property illegally held the Minister had 'an absolute and purely administrative discretion which may be exercised at will'.⁸⁷ As pointed out in 2.7.4 above, this characterisation of the Minister's function is, when judged according to the general principles of administrative law, clearly wrong. In this context Baxter has remarked: 'Botha JA's dicta appear little short of bizarre'.⁸⁸ The approach and tone of the Appellate Division's judgement in *Mariam* evidence (once again) a determination not to have the executive's 'freedom of action' in the implementation of the Act hampered by 'procedural fetters'.

In relation to administrative powers to deal with property unlawfully held, the Appellate Division decision in *Cassem* has had an important influence. In *SA Defence and Aid Fund v Minister of Justice*⁸⁹ the decision in *Cassem* was interpreted by Botha JA in his majority judgement as laying down a general (restrictive) test that *audi alteram partem* would only be applicable if 'the rights of persons are affected by the exercise',⁹⁰ of the power in issue. In *Surtee's Silk Store v Community Development Board*⁹¹ Margo J had to decide whether *audi alteram partem* applied to the decision by the Community Development Board to exercise its statutory powers to eject, without a court order, occupiers who had previously been lawfully required to vacate the premises. The learned judge was clearly sympathetic to the plight of the Indian traders who wished to

resist ejectment and accepted that hardship was inflicted upon them by virtue of the far-reaching powers granted to the Board. On the basis of this hardship to them he held:

I accordingly adopt the initial approach that citizens are being deprived of what is *prima facie* one of their ordinary rights as citizens. They are being denied the right to trade in a particular area and they are being required to vacate premises of which, but for the Act, their occupation was lawful. However, I am bound by my oath of office to administer the law as Parliament has enacted it, and hardship or deprivation can only influence the interpretation of the Act if the language thereof is ambiguous or uncertain, so as to be capable⁹³ of a meaning which avoids such hardship or deprivation.

But he concluded: 'I am powerless to assist them'.⁹⁴ On the narrow 'rights' test defined by the Appellate Division in *Cassem* (and *SA Defence and Aid Fund*), he was unable to find any implied incorporation of the maxim *audi alteram partem* in respect of the exercise by the Board of its power to pass a resolution to enter upon and possess property without a court order, because the traders' rights of occupation had been previously terminated.⁹⁵

5.4.3 *Review of administrative discretion - the availability of alternative accommodation as mandatory decisional referent.*

5.4.3.1 *Introduction*

The exercise of discretionary powers is obviously conditioned by a multitude of decisional referents - that is factors which influence the decision-maker in the exercise of his discretion.⁹⁶ One of the principles of administrative law which applies generally⁹⁷ to the exercise of discretionary administrative or executive powers, is that the decision-maker must have recourse to proper decision referents in reaching his decision. In terms of this principle it has repeatedly been

affirmed that a decision-maker exercising statutory discretionary powers must apply his mind to the considerations relevant to the exercise of the power in question, and should, conversely, not rely on irrelevant considerations.⁹⁸ Often the enabling legislation is silent on what should count as relevant (or irrelevant) considerations. It simply states that a certain decision 'may' be taken, or contains a very vague and open-ended decisional referent: group areas may, for instance, be declared by the State President 'whenever it is deemed expedient'.⁹⁹ These situations leave considerable scope for judicial choice in determining what counts as relevant or irrelevant considerations. As De Smith has put it:

'In determining what factors may or must be taken into account by the competent authority, the courts are faced with problems of statutory interpretation in the solution of which they themselves in practice exercise a wide discretion.'¹⁰⁰

Specifying what considerations are 'relevant' or 'proper', is an important judicial task and depends, essentially, upon the court's view of what is reasonable in the circumstances. This view will of course in turn be influenced by factors such as the nature of the power involved (eg does it have a high 'policy' content?); the position held by the decision-maker (eg does he hold high political office, or is he an expert?); the objects of the power (eg does it affect specific individuals or a diffuse group?) and the general statutory setting of the power (eg is it contained in 'sensitive' legislation such as security laws?) By specifying the relevant considerations for the exercise of a power, the courts are, in Prof Kenneth Culp Davis'

terminology¹⁰¹, *confining* and *structuring* the administrative discretion involved. The discretion is *confining* or limited because certain factors are excluded while others have to be considered. By the same token, the discretion is *structured* - the decision-maker is forced to ask the right questions, to apply his mind in a certain way. The merits of the decision eventually reached is thus only controlled indirectly - the result as such is not subject to judicial control or 'second guessing', only the decisional process by which it is reached.

De Smith has pointed out that the English courts show special restraint in applying tests of legality (such as the one relating to relevant/irrelevant considerations) where 'the *'policy'* content of the power is large and its exercise affects large numbers of people.'¹⁰² The same can generally be said of the South African courts, and the point is well illustrated by the approach of particularly the Appellate Division to important decisions under the Group Areas Act that have a large policy content.

In the following analysis we shall see that the Appellate Division has persistently refused to give recognition to what is surely an obvious 'relevant consideration' in the declaration and implementation of group areas, namely the availability of suitable alternative accommodation for disqualified persons who face displacement and relocation as a result. It will be argued that in so doing the Appellate Division failed in its duty to uphold civil rights and liberties and adopted an indefensibly

narrow view of the administrative process in issue and its role in adjudicating upon this process.

5.4.3.2 Pre-proclamation investigations by the Board and the availability of suitable alternative accommodation for disqualified persons.

In 2.5.(4) above it has been pointed out that the proclamation of a group area must be preceded by an enquiry of the Group Areas Board, which advises the responsible Minister by means of a report. The Act specifies that the Board shall not advise the Minister in the present context

'without taking into consideration whether or not suitable accommodation will be available outside the area affected for persons whose occupation of land or premises in that area would be rendered unlawful by such proclamation'.¹⁰³

So here the Act stipulates suitable alternative accommodation as a 'relevant consideration.' It should be noted, however, that there is no requirement that the Board should actually be satisfied of the existence of such suitable alternative accommodation.¹⁰⁴ As long as it has considered this aspect, it is free to recommend proclamation of a group area in circumstances where no suitable alternative accommodation is available - a situation which has occurred regularly over the years.

In the *Harnaker*¹⁰⁵ litigation of the early sixties the legality of the report by the Board which had led to the proclamation of group areas in Cape Town in 1957, was challenged by an Indian trader who as a result of the proclamation faced relocation to the bleak, outlying and undeveloped Indian group area of Rylands Estate. Harnaker's case was essentially that the

Board could not properly have considered the availability of suitable alternative accommodation for himself (as tradesman) and other affected Indians, because the Board had not established the number of Indians (either in total or by number of households) who would become disqualified persons and had directed its mind neither to the type of accommodation (ie residential or business) occupied by them prior to the proclamation, nor to the actual suitability of the accommodation (residential or business) available in the proposed Indian group area.

After a lengthy trial Corbett J dismissed the Plaintiff's case and found that it could not be said that the Board had not investigated the aforementioned aspects. His judgment was upheld by the Appellate Division.¹⁰⁶ Corbett J did remark that the Board's approach to the relocation of traders appeared 'to have been somewhat perfunctory'.¹⁰⁹ When the facts of the case are considered, this is revealed to be a considerable understatement. Thus the Board calculated that the area of Rylands (which was largely undeveloped) had some 49 vacant erven which were zoned for business purposes. Each erf had the capacity to accommodate 3-5 traders. In the Board's view this (potential) trading accommodation took care of the approximate 192 Indian traders from all over Cape Town who faced relocation to Rylands(!).

Corbett J further held that 'suitable alternative accommodation' in a trading context did not include the trading potential of the new site.¹⁰⁸ This unduly narrow and unrealistic view was upheld by the Appellate Division: the Afrikaans 'geskikte huisvesting' was said to be narrower than 'suitable

accommodation'.¹⁰⁹ The court, per Steyn CJ, simply refused to read the wording of the statute *in context* and against the background of social realities.

Forsyth has rightly remarked that 'an air of complete lack of reality pervades the entire judgment' of the Appellate Division.¹¹⁰ While trading potential was denied any direct relevance in testing whether a particular trading site provided 'suitable' alternative accommodation, it was held, by a tortuous process of reasoning, to be relevant in some vague, general sense: trading potential would, through market forces, help to determine the construction rate of business premises in Rylands, and *this* rate had to be considered by the Board. Moreover the lack of trading potential in Rylands would influence the issue of permits to Indian traders to enable them to temporarily remain in their established premises.¹¹¹ Here again the arguments of the *Lockhat* decision that group areas should be seen as a 'social experiment' and 'long term policy' surface.

In *Harnaker* the Appellate Division also displayed a very benevolent and 'trusting' view of the attitudes and activities of the Board, and more generally of those charged with the implementation of the Act. It was for instance said that 'it may reasonably be assumed' that the Board was 'not altogether unacquainted with at least the more general nature of the accommodation which would be required by these families and traders.' While the result of the court's ruling was that the traders had no *legal* right to insist that the availability of *genuine* alternative accommodation be investigated, they were in

fact told: 'Trust the government'. The court stated that 'declared (administrative) policies',¹¹² would see to it that the traders were not prejudiced. Steyn C J remarked: 'I would be surprised to find that the obvious hardship Indian traders would experience if deprived of their livelihood was regarded as a matter of indifference'.¹¹⁸ This statement, made in 1966, is remarkable. That year saw the controversial proclamation of District Six in Cape Town as a White area, and by that time the discriminatory implementation of the Act was surely a well-established fact.

5.4.3.3 *The proclamation of group areas and the availability of suitable alternative accommodation.*

The Act simply provides that group areas may be proclaimed 'whenever it is deemed expedient',¹¹⁵ and does not specify 'relevant considerations' (such as the availability of suitable alternative accommodation) which have to be taken into account in the exercise of this power.

In the *Lockhat*¹¹⁶ case, one of the issues Henochsberg J had to decide was whether the responsible Minister, and ultimately the (then) Governor-General-in-Council, were obliged to consider the availability of suitable alternative accommodation for disqualified persons before a proclamation was issued.

It will be recalled that the Group Areas Board is obliged by the Act to consider the aspect of suitable alternative accommodation. It is further obliged by the Act to provide the Minister with a report on its general investigations. Using these duties of the Board as point of departure, the learned

judge put forward a realistic construction of what the administrative (or quasi-legislative) process of issuing a group areas proclamation would involve:

'There is an implied duty upon the Governor-General-in-Council to exercise the discretion given to it by sec 20 of the Act on the advice and information furnished by the Minister. The Minister cannot simply ignore the report made to him by the Board. The Minister's consideration of that report and the Governor-General-in-Council's consideration of the advice and information given to it by the Minister, are all part of the question as to whether it is expedient to issue a Proclamation. Can it be said that the Governor-General-in-Council acting on the Minister's advice, exercises its discretion in good faith when it issues a Proclamation without giving due and honest consideration to the effect of any such Proclamation upon the persons whose occupation of land or premises in the areas is affected by such Proclamation and in particular without giving due and honest consideration to the availability of suitable alternative accommodation outside such areas for such persons? The knowledge of the Minister in this regard, particularly as the Act obliges him to consider the Board's report as to whether or not suitable accommodation will be available, must be imputed to the Governor-General-in-Council'.¹¹⁷

This line of reasoning did not, however, find favour with the Appellate Division.¹¹⁸ It adopted an exceedingly narrow *expressio unius est exclusio alterius* approach to the issue: because the Act only dealt with the position and duties of the Board, and did not structure the functions to be exercised by the Minister or the Governor-General-in-Council in any way, no such structuring could take place.

The court accepted that in practice the relevant Minister had to consider the Board's report and that the procedure thereafter would be 'for the Minister to acquaint the Executive (ie the cabinet) with the salient facts within his knowledge, and for that body to consider them'. But these incontestable facts relating to constitutional practice could not be used to justify

the argument that the suitable alternative accommodation as a relevant consideration was carried over from the Board's investigation to the ultimate decision:

'[T]he Act...imperatively requires the Minister to consider the Board's report before any Proclamation...is issued.

There the express provisions end, and the procedure between that point and the stage when the Governor-General-in-Council deems it expedient to issue the Proclamation, seems to me to be pointedly left by this Act to the good sense and faith of that body, including the Minister. Whether that is satisfactory or not, does not arise: one has to construe the Act and give effect to it. It may well be that Parliament contemplated that the procedure which I have mentioned would be followed, namely that the Minister would acquaint the Governor-General-in-Council with the salient facts within his knowledge, and that that body would consider them. But if such a procedure can be implied it is, for the reasons I have given, directory and not imperative'.¹¹⁹

Here the Appellate Division in fact simply abandoned judicial control over executive action. As Henochsberg J pointed out, the availability of suitable alternative accommodation was obviously a factor the executive had to consider in issuing a group areas proclamation. This requirement could be easily fulfilled - nobody has argued in this context that the decision-making body had to be satisfied that such accommodation was actually available. But if the Appellate Division had at least held it to be something which had to be considered, some rationality would have been injected into the process of proclaiming group areas.

5.4.3.4 *Termination of the rights of occupation by disqualified persons in group areas and the availability of suitable alternative accommodation.*

Where a group area has been proclaimed the rights of occupation of disqualified persons in the area are not immediately terminated. As explained in 2.4.4.1 above,¹²⁰ the

Minister has the power to terminate these rights. In terms of s 23(2) this can be done generally, by notice in the Gazette, or by individual notice in respect of particular disqualified persons - in both cases certain time limits are stated in the Act.

It will be appreciated that any such termination raises the issue of the availability of suitable alternative accommodation in a most immediate sense.

In *S v Variawa*¹²¹ the accused, an Indian, was convicted of staying on in a White group area (Pageview) after having received a notice under the Act to vacate the premises. On appeal the Transvaal Supreme Court¹²² referred to the fact that the Group Areas Act had been amended in 1961 to allow for notices in individual cases, and held:

'The clear intention of the Legislature therefore was that, in order to make a determination to apply the provisions of sec 23 to the occupation, by any disqualified individual, of premises within a Group area, the authority making such a determination is to apply his mind duly and properly to the individual case and also to the question of availability to the individual of suitable alternative accommodation, upon the date of such consideration or upon the date fixed from which the provisions of sec 23 of the Act are to apply.'¹²³

In *casu* the notice issued by a departmental Under Secretary contained an endorsement, namely 'alternative accommodation is available in Lenasia' (an Indian group area). The accused established in evidence that *prima facie* no such alternative accommodation was available, and this evidence was not controverted by the State. On the basis thereof, the court concluded:

'It is as much as saying that, when the determination was made and the notice issued, the Under Secretary knew that

there was no alternative accommodation available to the appellant in Lenasia, this notwithstanding that he made the determination and issued the notice informing appellant that his determination was made upon consideration of the availability of accommodation in Lenasia. That in our view would clearly be such an improper and most unreasonable exercise of a discretion as to make his determination and notice invalid.¹²⁴

Commentators¹²⁵ welcomed the result of this decision, but pointed out that the decision broke new ground in appearing to hold that a mistake of fact could render an administrative decision unreasonable and thus invalid. The result can, however, be defended on the basis that the facts justified the inference that the official in question could not properly have applied his mind to a relevant consideration (alternative accommodation) - this would constitute a recognised ground for review.

Some four years later similar issues came before the Northern Cape Division in *S v Samy-Padiachy*.¹²⁶ The accused, an Indian doctor practising in a White area in Kimberley, was served with a notice similar to the one in the *Variawa* case - he was offered alternative consulting rooms in a border strip. The court¹²⁷ dissented from the *Variawa* case on two bases.

The court (rightly) questioned whether the Transvaal court's approach to errors of fact and review on the basis of unreasonableness could be supported in the light of the case law.¹²⁸ But, as pointed out above, the earlier decision can be supported on the basis that the official had not applied his mind properly.

Of more importance for our purposes was the other ground upon which the court differed from *Variawa*. It was held that in issuing the notice the Department need not consider the

availability of suitable alternative accommodation for the individual concerned. The court's reasoning in this regard¹²⁹ was unconvincing. Reliance was placed *inter alia* on the wording of section 5(6) in terms of which the Group Areas Board has to consider the availability of alternative accommodation before advising the Minister on the proclaiming of a group area. The court held that this duty of the Board took care of the issue of alternative accommodation in individual cases, but it is submitted that the court failed to appreciate that section 5(6) has no application in respect of notices issued after proclamation of a group area. The court further assumed that all notices of termination under s 23(2) had to be treated the same in respect of the question of alternative accommodation. But surely different considerations apply when a general notice is issued in respect of (say) all Indians in an area, and when the notice terminating occupation relates to a specific Indian doctor. Although the court rejected consideration of alternative accommodation in individual cases as mandatory decisional referent, the court did, however, hold that before any notice under s 23(2) could be issued terminating the occupation of any disqualified person, regard must be had to the stage which had been reached in the process of generally providing suitable alternative accommodation for disqualified persons affected by the determination. This, it was held, followed as a matter of necessary implication from the provisions of the Act.¹³⁰ On the facts of the case it was held that the issue of alternative accommodation had been duly considered on this general level.

In *Suliman v Minister of Community Development*¹³¹ the issue whether alternative accommodation had to be considered in issuing notices of termination under s 23(2), came before the Appellate Division. The decision in *Variawa* was brushed aside, and the court failed to deal with the positive finding in *Samy-Padiachy* in respect of a duty to generally consider the availability of alternative accommodation. Galgut AJA (as he then was) found that the Minister (or any official acting on his behalf) had no duty to consider the availability of alternative accommodation in issuing notices under s 23(2).

The reasoning of the Appellate Division¹³² closely mirrored that of the *Lockhat* decision, discussed in 5.4.3.3. According to the decision in *Suliman*, no provision of the Act suggests any duty to consider alternative accommodation at this (final) stage. Further, the fact that the Act only requires the Board to consider it at the pre-proclamation stage, supports the inference that there is no need to consider it at any later stage.

Again the reasoning of the court is literalist in the extreme. The court failed to deal with the obvious argument that the enactment of a period of delay (of minimum but no maximum duration) between proclamation of the group area and termination of occupation in the area by means of a notice, surely envisaged that the deciding factor in the actual implementation of group areas segregation through the termination of the occupation of disqualified persons, would be the availability of suitable alternative accommodation elsewhere. And on what basis can this

then not be a (mandatory) relevant consideration vis-à-vis the exercise of the power of termination under s 23(2)?

5.4.4 Race classification under the Act

Here a number of points made above in 2.2 (*Racial groups and criteria for classification*) should be recalled. The Act distinguishes three main groups, namely White, Black and Coloured. The Coloured group has been subdivided by means of delegated legislation into *inter alia* the Chinese, Indian and 'residual' Coloured groups. Because this sub-division is contained in delegated legislation (a proclamation by the State President-in-Council), it is in principle open to attack on several grounds - *inter alia* on the basis of unreasonableness in terms of the *Kruse v Johnson*¹³³ test, and on the basis of being overly vague or uncertain.

In several reported group areas prosecutions the defence led expert scientific (anthropological) evidence to the effect that the sub-groups established by proclamation (such as the Indian group) were without scientific foundation.¹³⁴ The evidence showed that the definition of the Indian group as including a member of a 'race or tribe' whose national home is India or Pakistan, does not accord with scientific concepts. There is for instance no such thing as an 'Indian race'. It was thus argued that the proclamation was void for vagueness.

This scientific evidence was not controverted by the State, but this did not avail the accused in their attack on the proclamation. The Natal and Transvaal provincial divisions of the Supreme Court pointed out that 'race' must be given a popular (South African) meaning.¹³⁵

It was pointed out that for at least a hundred years it had been accepted that the group known as Indians belonged to a race which had its national home in India or Pakistan - and 'it was too late in the day to allow any inroad to be made by evidence on (this) generally accepted fact.'¹³⁶

The same approach was followed by the Appellate Division when the issue came before it in *S v Bhoolia*.¹³⁷ It was accepted that the definition of the Indian group could not be justified anthropologically¹³⁸ or on general scientific grounds,¹³⁹ but it was nevertheless held that this did not render the proclamation void for vagueness, because the meaning was reasonably clear according to colloquial language ('omgangstaal') and would be understood by the ordinary citizen.¹⁴⁰

It may be argued that the courts had no real choice in the present context and that in accordance with generally accepted principles of statutory interpretation words such as 'race' should be interpreted with reference to their popular rather than scientific meaning.

This may be accepted, but it does not conclude the issue. The real question was: Did 'race' according to its popular meaning connote something definite enough to pass the test relating to vagueness? The answer the courts gave was really a question-begging : 'we all know what we're talking about.' Yet the application of 'popular racial characteristics' necessarily involves a demeaning and often ridiculous investigation into matters such as shape of cheekbones and the profile of noses.¹⁴¹ That the judges were willing to sanction such a process in a

sphere where it vitally affected the lives of persons, is significant. The judges shouldered (or assumed they had to shoulder) the mental baggage of a hundred years' of race and racist legislation emanating from White legislatures. It was certainly possible for the judges in cases such as *Bhoolia* to have struck down the racist and unscientific classification scheme of the proclamation in issue without stepping outside the generally accepted parameters of the judicial function. That the judges showed such a strong disinclination to do so, appears explicable on one basis only: the judges themselves were drawn from the White class or group in society and were imbued with the racial thinking of this group. It was also in their interest to support the (broad) status quo on issues such as race classification, and they were not going to rock the boat.

5.5 Conclusions

5.5.1 *Judicial approach, attitudes and policy arguments*

We are now in a position to draw conclusions in the light of the foregoing discussion.

It seems apposite to start the discussion by referring to the conclusions reached by Forsyth in his analysis of the Appellate Division's attitudes to occupation and ownership by different racial groups, and specifically to group areas legislation. Chapter IV of his thesis,^{141a} which deals with this topic, has not been published with the rest of the thesis in his book *In danger for their talents*.¹⁴² As the thesis is not generally available in South Africa, his conclusions in respect of Group Areas cases will briefly be summarised, followed by

comment. Thereafter further conclusions of my own will be set out.

(1) Forsyth's first conclusion may be summarised as follows:

There is no sign in the Appellate Division cases of preference for any race of litigant, but individuals who were not white did not win their cases against the state. Cases dealing with Asiatic legislation indicate some racial prejudice, but there is no basis for a general charge of racial prejudice against the Appellate Division.

This conclusion appears to be broadly correct, but does not take matters very far. Overt or consistent racial prejudice on the part of the Appellate Division would constitute an extreme and unlikely scenario. The point should rather be made the other way round. The Appellate Division showed no real sympathy for the undeniable victims of group areas, the 'non-Whites'. By way of contrast, such sympathy (and acknowledgement of the hardships caused by group areas) are to be found in judgments at provincial level - compare the judgements of Margo J in *Surtee's Silk Stove* and King J in *Adams*, as well as the more recent judgment in *S v Govender*. In *Govender* the court structured the discretion to be exercised by magistrates when deciding whether to order ejectment of a person convicted of unlawful occupation in definite and realistic terms, with specific reference to the hardship ejectment may cause to the persons concerned.

It should also be observed that the judgement of Rumpff CJ in *Adams & Werner* can hardly be said not to exhibit racial prejudice. The learned Chief Justice's message was clear - these

Coloureds and Indians who dare to move from one city to another should not trouble the Appellate Division with their housing problems.

(2) In most cases decided by the Appellate Division there was a large measure of judicial choice involved.

This is certainly true, and is borne out particularly by the fact that the Appellate Division frequently overruled well-reasoned judgments of the lower courts. We shall return to this aspect of choice in 5.5.3 below.

(3) When exercising the choices open to it, the Appellate Division generally chose simply to announce the result - either without giving any legal justification for it, or by advancing unpersuasive reasons.

The brevity and skeletal nature of much of the reasoning in the leading cases is indeed remarkable - *Suliman* is a case in point. Often the judgments of the lower courts, reversed on appeal, contain fuller and more rounded reasoning. Here *Lockhat* is an outstanding example. In *Adams & Werner* no justice was done to the elaborate arguments of counsel on appeal.

The explanation for this phenomenon appears to be that the real grounds for the Appellate Division decisions were policy considerations which the court was unwilling to elaborate, and which were moreover relatively incapable of elaboration or justification in terms of traditional legal grounds - for example that the executive should be given a 'free hand' in implementing group areas (*Cassem*), or that the Act, somehow, implicitly authorised discrimination (*Lockhat*).

(4) Close examination of the exercise of judicial choice by the Appellate Division, reveals considerable reluctance to obstruct the implementation of any executive policy or plan.

This appears to be a general thread running through important decisions such as *Lockhat*, *Cassem*, *Adams & Werner*, *Mariam*, *Harnaker* and *Suliman*. Indeed, the point may be made in stronger terms: the Appellate Division certainly showed a *determination* that the administrative process by which the Act was to be implemented, *should not* be obstructed or hindered by the courts - be it by judicialising the administrative process, structuring the discretion involved or subjecting the results to a test of reasonableness or non-discrimination.

(5) The reluctance on the part of judges of appeal to frustrate executive plans lead, in certain instances, to interpretations which were contrary to the legislature's intent.

Here Forsyth refers to *Lockhat* and *Harnaker*. With regard to *Lockhat*, he makes the point that the finding by the Appellate Division that the Act impliedly sanctioned discrimination, flatly contradicted the assurances given by National Party Parliamentarians. In the debate on the original Bill they stated that the Act did not envisage discrimination against 'non-Whites'. A note of caution should, however, be sounded in respect of these assurances given in Parliament. As pointed out in the discussion of *Lockhat* (5.4.1 above), these protestations of 'justice' and 'non-discrimination' should be seen in proper (political) perspective. In political terms, the aim to secure White paramountcy by means of the Group Areas Act (which was also

explicated by the Minister of Interior during the second reading debate¹⁴³) outweighed any considerations of justice. Moreover, what the White politicians in question regarded as 'just' or 'non-discriminatory' *via-à-vis* 'non-Whites' did not entail equal treatment with Whites.^{143a} So in finding implicit authorisation of discrimination in the Act, the Appellate Division in fact implemented the *political intentions* of the majority in Parliament. These intentions behind the legislation were however not translated into the actual terms of the Act, and the decision in *Lockhat* can thus be said not to accord with the 'intention of the legislature' as expressed in the Act. There is ample authority^{143b} to the effect that a court interpreting legislation should *only* concern itself with the intention of the legislature thus expressed, and should not seek to implement unexplicated political intentions which appear to have motivated the legislation.

In respect of *Harnaker*, the point can be made that the court gave a narrow and unrealistic interpretation to 'suitable alternative accommodation' in a trading context which again cannot be justified with reference to the Act itself. The court's interpretation did however accord with the views and policies of those implementing the Act.

Reference should also be made to *Suliman*, where the Appellate Division simply refused to require the executive to consider suitable alternative accommodation when terminating the occupation of disqualified persons, while the history and scheme

of the legislation pointed to it as the prime decisional referent.

At first blush it appears curious that the Appellate Division should favour the views of the executive as against those of the legislature expressed in the Act. After all, the decisions in question all involved statutory interpretation, and here it is customary to assert (as Steyn CJ, who played an important part in the group areas decisions, does in his book on interpretation) that the main task of the interpreter of legislation is to establish the intention of the legislature.

This issue will be discussed in 5.5.3 herebelow. At this stage the following points can briefly be made. In the decisions in issue the Appellate Division was pre-occupied with the actual political intention of the legislature. The court read this political intention as entailing support for the results of the executive decisions which came before the court - even when these involved discrimination. This reading of the political intention of the majority of legislators was in all probability factually correct. (Whether this intention should override the intention manifested in the Act, is of course, a different question. We shall return to this important constitutional and jurisprudential issue in 5.5.3.) The court followed a general 'hands off' attitude - the judiciary should simply not interfere with the implementation of the Act as undertaken by the government - which after all controlled both Parliament and the executive.

(6) The reluctance of the Appellate Division to interfere with the executive's plans has had a baleful effect on the development of administrative law.

This point is well taken. As pointed out in 5.3 above, decisions such as *Cassem*, *Lockhat* and *Mariam* achieved notoriety in the general field of administrative law. *Cassem* for instance not only broke with the earlier case law,¹⁴⁴ but subsequently there has been a reluctance (at least in the lower courts) to follow its overrigid insistence that rights must actually be infringed before *audi alteram partem* applies.¹⁴⁵

(7) The Appellate Division did show some solicitude for the rights of individuals where issues of compensation arose which could not prejudice executive plans or policy.

This appears to be generally correct when the cases relied upon by Forsyth, namely *Down*, *Roos*,¹⁴⁶ *Lenz Township*¹⁴⁶ and *M&K Trust*¹⁴⁶ are considered. It is certainly true to say that on this micro level of the implementation of group areas, the Appellate Division was more willing to apply 'normal' principles. *Lenz Township* and *M&K Trust* are also somewhat special because they dealt with what may be termed technical matters. *M&K Trust* was really decided in accordance with the general principles of the law of expropriation and the distinctive features of Group Areas legislation were not in issue.

It should be noted that while the Appellate Division did in *Down* recognise the applicability of *audi alteram partem* in a compensation sphere, which tends to support the point made by

Forsyth, it interpreted the principle so as to ensure that implementaiton of group areas would not be hampered or delayed.

(8) The Appellate Division judgements frequently exhibited a considerable lack of contact with the views and opinions of those affected.

Forsyth points out that the traders in *Harnaker* would have greeted the court's view that the Board and Minister would see to it that they did not suffer hardship with disbelief. It is submitted that in the present context three related aspects should really be distinguished and borne in mind. The Appellate Division did firstly fail to appreciate the views of the victims of group areas (as pointed out by Forsyth), but it also secondly showed no sympathy for them - as pointed out under (1) above. Thirdly, the court displayed amazing naivety in professing to assume or trust that the Act would be implemented benevolently - for instance by judicious use of the permit system. It is probably more accurate to say the court shut its eyes to well-known realities relating to the hardship caused by the Act - such as were recognized by King J in *Adams*. The reliance placed on the permit system by the Appellate Division in cases such as *Harnaker* and *Suliman*¹⁴⁷ also meant that those affected could not rely on *rights*; they had to hope for an administrative *fiat* in their favour.

* * *

To the conclusions and discussion hereabove, the following should be added:

(a) At the beginning of this chapter the question was posed: How did the South African judiciary, traditionally known for its 'independence', react when confronted with a far-reaching piece of governmental law such as group areas legislation which embodies the essence of apartheid?

In answering this, a distinction should be drawn between the approach of the Appellate Division on the one hand, and that of the provincial courts on the other. While the approach of the latter has certainly not been uniform, a significant number of decisions have evidenced a willingness to uphold individual rights in the face of the impact of group areas legislation and to apply the general principles of administrative law in this sphere. The decisions of the provincial divisions in *Ramjee*, *Lockhat*, *Mariam*, *Samy-Padiachy* and *Govender* bear this out. In *Variawa* a special effort was even made to curtail unreasonable administrative action in a group areas context, and the judgment of Marais J in *Sunderjee* (dealing with permits and *audi alteram partem*) tends in the same direction.

In general it would appear that the provincial courts did not see group areas as involving issues of such 'high policy' that it should be a 'no go' or non-justiciable area for judicial review.

By way of contrast, the Appellate Division consistently emphasized the 'high policy' content of group areas decision-making and refused to give the principles of administrative law 'normal' application in this sphere.

As has been mentioned, the approach was a 'hands off' one. No effort was made to protect citizens against the drastic effects of this piece of governmental law. On the contrary, the Appellate Division recurrently relied on the policy argument that the government's 'freedom of action' to implement the Act efficiently (that is, efficiently in the bureaucratic sense) should not be hampered by judicial interference or supervision. Since the late fifties, when the important group areas cases started coming before the Appellate Division, the judges of appeal have shown a remarkable uniformity of approach. Not a single leading case in this highly controversial area produced a dissenting judgment.

(b) The cases on race classification illustrate that not only the Appellate Division, but the superior courts in general, thought themselves unable to turn their backs on a hundred years' tradition of 'racial legislation' embodying the values of the dominant White group or class. Here factors such as the broad consensus amongst Whites in respect of residential segregation which existed at the time of the passing of the first Group Areas Act (and for a considerable period thereafter) should be borne in mind.¹⁴⁸ That judicial attitudes reflected the *status quo* is probably unsurprising. Judges can be expected to be imbued with the values of the segment of society from which they come.

(c) A point of greater significance and specificity than the one in (b) can, however, be made in respect of the approach and attitude of the Appellate Division in group areas cases. This is something which Forsyth appears to have missed. A close reading

of Appellate Division judgments such as *Lockhat*, *Harnaker* and *Adams & Werner* reveals a subtle but distinct indulgence in what may be termed 'apartheid thinking'. It will be recalled that the decision in *Lockhat* hinged upon the assertion that group areas constituted a 'colossal social experiment' and 'a long term policy' which would necessarily involve discrimination. The court said that whether group areas would 'ultimately prove to be for the common weal of all inhabitants is not for the Court to decide', but then immediately referred to the forerunner of the Community Development Act in terms of which group areas for disadvantaged groups could be developed.¹⁴⁹ In effect the court said: 'In the short term we have discrimination. But all may (and could well) turn out well in the end.' But this is really to echo a well-known apartheid refrain which has been proved false time and again - for instance in the sphere of 'homeland' development, influx control and, of course, group areas. From the outset group areas have been implemented on a discriminatory basis and, moreover, have been part and parcel of the grand apartheid strategy which, particularly when *Lockhat* was decided in the early sixties, hardly held out any real hope of eventual equality. The Appellate Division's contemplation of and reliance upon the contrary was premised upon apartheid thinking.

The reliance placed in Appellate Division decisions on the supposed ameliorative effect of the permit system also fits in with apartheid thinking. The government has frequently asserted that permits would be issued to relieve hardship. This has not happened in practice. Moreover, in *Lockhat* a quo Henochsberg J

pointed out at length that the limited scope of the system in any event prevented it from having a general curative effect. Yet in *Harnaker* the Appellate Division placed reliance upon the fact that 'the permit system would, in accordance with declared policies, be used to accommodate the surplus of traders.'¹⁵⁰

It should also be recalled in the present context that in *Adams & Werner* the severe housing shortage affecting Coloureds and Indians was seen as part of a 'universal' social problem. Reference was made to the 'temporary' nature of housing shortages. It was suggested that the problems called for technocratic solutions - more houses would be built in group areas. All this ties in with, and echoes, government thinking (or propaganda) in relation to group areas and more generally on issues such as 'orderly urbanisation'.¹⁵¹ As pointed out in chapter six, group areas have created chronic and severe housing shortages for Coloureds and Indians - so much so that by 1986 forced 'penetration' of White areas has significantly undermined enforcement of the Act. Yet as late as 1980 when *Adams & Werner* was decided, the Appellate Division appeared to believe that the apartheid master plan was still capable of fulfilment.

(d) Although the performance of the judiciary in areas other than group areas has not been investigated in this study, it can generally be asserted, drawing on general studies such as Forsyth's and my own wide reading of the case law, that the attitudes and policy arguments to be found in the Appellate Division judgements on group areas tend to fit in with those discernible in other 'sensitive' areas such as state security.

The position with regard to group areas was certainly not exceptional.

It is for instance interesting to note how in a state security context the majority in *S A Defence & Aid Fund* could draw on the approach in *Cassem*¹⁵² when it came to the applicability of *audi alteram partem* to investigatory administrative functions.

5.5.2 Impact of key judgments

5.5.2.1 In a group areas context

The most important and general impact of the key decisions has been to give the executive practically a *carte blanche* in the implementation of the Act. As a result the National Party government found itself in a particularly fortunate position. It could, for instance, point to an Act which nowhere sanctioned discrimination or unreasonableness. Yet its actions in implementing group areas could not be attacked on the basis of discrimination or unreasonableness because the Appellate Division had held that all of that was impliedly sanctioned by the Act. And because such attacks were doomed to fail, affected persons did not resort to litigation to expose discrimination.

As will be clear from the analysis in 5.4 above, *Lockhat* has had a particularly marked influence. The sweeping judgment in *Lockhat* provided the government with answers to what would otherwise have been strong grounds to attack the harsh, unfair and discriminatory implementation of the Act. *Lockhat* in effect drew a judicial veil over the implementation of the Act.

At this point it may be objected that the impact of key judicial decisions is being overestimated. It could be argued that if decisions such as *Cassem* and *Lockhat* had gone the other way, the National Party dominated legislature would have changed the Act in no time. This has certainly occurred in many other sensitive areas where the courts have handed down judgments not to the government's liking, for instance with regard to race classification under the Population Registration Act¹⁵³.

While it is certainly true that the Act may have been changed if the government had lost the cases, this possibility does not in any way diminish the actual impact of the key decisions and can hardly provide an excuse for the decisions handed down. Moreover, by reason of these decisions, the government was spared controversial amendments - yet it could implement its policies as if such amendments had taken place.

In *Lockhat* the Appellate Division in effect supplied the Act with what amounted to a clause sanctioning discrimination and (as interpreted in *Adams & Werner*) unreasonableness in general. An attempt to distil the ratio of *Lockhat* into a legislative provision would result in something along the following lines:

'No action taken under this Act shall be reviewable on the ground of discrimination or on the ground of unreasonableness in any shape or form'.

To pilot such a provision through Parliament would, to say the least, have caused the National Party a considerable political headache.

Finally, in *Lockhat* and *Suliman* the Appellate Division assured the executive that it need not be concerned that a

failure even to think about the issue of the availability of alternative accommodation at various vital stages in the implementation of group areas, would affect the validity of its actions.

5.5.2.1 General impact

Here two points may be made.

Firstly, key decisions in a group areas context have had a wide and persistently adverse effect on the development of areas of the law such as administrative law. This has already been explained - take the restrictive influence of *Cassem* on the applicability of *audi alteram partem*. Two further areas of the law which have been so affected are constitutional law and interpretation of statutes (both of which of course tend to overlap with administrative law).

In *Ramjee* and *Lockhat a quo* the lower courts were willing to take cognisance of the constitutional practices with regard to the issuing of proclamations by the head of state and to tie important legal consequences to the decision-making process brought about by these practices - these included the enduring influence of the Board's report and the carry over of the availability of alternative accommodation as decisional referent from the Board, through the Minister, to the cabinet and thus to the head of state. The approach of the Appellate division in *Cassem* and *Lockhat* was very different. While the existence of constitutional practices was acknowledged, the court specifically refused to tie legal consequences to the decision-making process which resulted from these practices. Decision-making at the

highest constitutional level was seen as an almost mystical process which operated in a rarefied 'high policy' atmosphere where judicial scrutiny was completely out of place. This marked an unrealistic and unhealthy development¹⁵⁴ in our constitutional law, and may be contrasted with for instance the approach of the House of Lords in the recent *CCSU*¹⁵⁵ case where even prerogative powers were held to be reviewable.

In the sphere of the interpretation of statutes a case like *Harnaker* stands out as an example of an over-literalist, anti-contextual approach in interpreting a phrase such as 'suitable accommodation', and the same can be said of the reasoning in *Suliman*. A decision such as *Cassem* is also a prime example of a case where statutory provisions were overemphasized in the interpretative process at the expense of background material - common law principles or presumptions.

Secondly, decisions such as *Adams & Werner* cannot but have undermined faith in the judiciary on the part of those on the receiving end of group areas. Whether this is viewed as good or bad, depends upon one's own perspective. For instance, from a 'radical' perspective it may be argued that this only revealed an inevitable but often veiled reality: the courts are part of the repressive state machinery and can hold out no salvation to the oppressed. From a 'liberal' perspective it may, however, be argued that the courts must and can act as guardians of civil liberties and that a decision such as *Adams & Werner* manifested a gross dereliction of this duty.

5.5.3 *Some implications for the role of the judiciary*

As indicated in 5.2 above, the intention is to draw certain conclusions on the basis of the foregoing analysis in respect of (i) the element of choice in judicial decision-making, and (ii) the role of what may be termed 'positivist legal thinking'.

Choice

On the issue of choice, it can be asserted, at the outset, that the key decisions in a group areas context were hard cases where the judiciary was faced with choices which could only be resolved by recourse to 'policy arguments', in the sense indicated above, namely 'substantive justifications to which judges appeal when the standards and rules of the legal system do not provide a clear resolution of a dispute.'¹⁵⁶

Does this mean that these choices were left to the 'discretion' of the judges involved and that, on the basis of the foregoing analysis of the case law, one can only say that the judges of appeal just exercised their discretion differently to that of the judges of first instance? 'Discretion' would here imply a very wide choice of a meta-legal nature. Following Dworkin,¹⁵⁷ it is suggested that a sounder explanation for the judicial function is to say that the judges were called upon to exercise *judgment*,¹⁵⁸ rather than discretion in the sense indicated.

In the present context 'judgment' has to be exercised in the light of the norms and standards recognised in our legal system. The key group areas cases brought into play principles¹⁵⁹ such as *audi alteram partem*, non-discrimination and the prohibition against unreasonableness. In respect of these principles, and particularly in the case of the last two,¹⁶⁰ the Appellate Division was faced with the situation where the principles had presumptive application to the matters to be decided. It is trite law that these principles governed the administrative

action in in issue unless their application had been excluded explicitly or by necessary implication in the enabling legislation. Explicit exclusion was not in issue. It was the Appellate Division's weak arguments on exclusion by necessary implication that have earned it so much criticism - criticism that its *legal* reasoning was wholly unconvincing. What policy arguments did the courts adduce to counterweigh the applicability of these recognised common law principles with their strong moral undertones?

Three interconnected arguments appear to have been of decisive importance - relating to judicial restraint, administrative efficiency and the incompatibility of group areas legislation with common law values.

The first argument relates to judicial restraint: it is not the function of the court to interfere with the specific effects (such as discrimination) of 'colossal social experiments', the *general import* of which is backed by the legislature. Secondly, administrative efficiency in the implementation of the Act should not be hampered through the judicial imposition of procedural or quasi-substantive restraints. And finally: a major piece of governmental law such as group areas reflects an (authoritarian) approach and its implementation necessitates, on a practical level, administrative freedom of action. These characteristics are incompatible with the common law principles referred to above.

When the policy arguments invoked by the court are explicated in this way their weakness becomes apparent. It is

submitted that these arguments did not reflect accepted norms and standards of our legal system - certainly not at the time they were invoked or with regard to the decisive weight attached to them. After all, earlier Appellate Division cases emphasized that a strict construction should be placed upon statutory provisions which interfere with rights.¹⁶¹ Steyn CJ (who played such a prominent part in the group areas decisions) in his work on the interpretation of statutes cited with approval in the following dictum of Van den Heever JA:

'Where Parliament has conferred vast powers of legislation upon the Executive, the courts should not in my opinion be astute to divest themselves of their judicial powers and duties, namely to serve as buttresses between the Executive and the subjects.'¹⁶²

The approach reflected in this dictum would certainly dispose of any notion that the courts should adopt a 'hands off' attitude towards legislation embodying a 'colossal social experiment', and it is submitted, of any argument that common law principles are ousted by the authoritarian or 'social experiment' flavour of legislation.

It may be conceded that administrative efficiency is a factor which may legitimately be considered in deciding a hard case - it may be accepted that in an administrative law context judicial decisions should strive not to render the administrative process inefficient or nugatory. But this factor cannot outweigh the common law principles or presumptions referred to above. They are grounded in fundamental principles of justice, recognised in our and other legal systems and associated with liberal democracy. Administrative efficiency *per se* has no such

pedigree. It may conceivably achieve a special status when coupled to some alternative theory of justice, such as that our society requires a radical redistribution of wealth, and so help to outweigh the traditional common law principles and the values effected in them. But no such coherent alternative theory was proposed by the Appellate Division.

At this point reference may again be made to the third policy argument used by the court in a group areas context, and the question posed: What about the saying that the 'colossal social experiment' launched by the legislature simply pushed all the common law principles out of the way? It may thus be argued that as these principles were fundamentally incompatible with the experiment, the (sovereign) legislature had by implication ousted them. In pressing this argument, it may be argued that the Appellate Division qualified or even changed existing legal principles of interpretation by lowering the threshold at which the presumptive application of common law principles yield to contrary *indiciae* of legislative intention. It may then further be argued that the adoption of such a (new) theory of interpretation did fall within the legitimate ambit of judicial choice.

This line of reasoning and approach to interpretation has been well summarised by Dyzenhaus in his recent review of Forsyth's book:

'(Legislation) should be interpreted according to how the majority of legislators wanted it interpreted, or according to how they would have wanted it interpreted, had the problem before the judge occurred to them.'¹⁶³

This is indeed the approach followed by the Appellate Division in key group areas cases. It explains the lack of substantial justification for ousting the common law principles, because as Dyzenhaus explains,¹⁶⁴ this approach looks to mental states, while on the other hand reasoning seeking to uphold common law principles tries to find its justification in values expressed in the relevant legal materials.

Two further questions now arise: (i) Why did the Appellate Division adopt this approach? (ii) Can its exercise of choice in this regard be criticized on legal grounds?

As to (i), it would appear that a combination of factors was responsible. After the constitutional crisis of the fifties the court was composed mostly of judges in broad sympathy with the National Party government or in any event with group areas thinking. Support for the latter, as has been pointed out, extended beyond the National Party and embraced a substantial majority of Whites. The court also adopted a general non-interventionist approach vis-à-vis the executive. It is of interest to note that two key judges, Steyn CJ and Botha JA, were ex-civil servants. It would also appear that the court, influenced by Steyn CJ, who so stressed 'the intention of the legislature' in the process of interpreting statutes, tacitly adopted what may be termed a 'qualified democratic theory' - democracy is best served if the courts interpreting legislation defer to the actual or counterfactual intentions of duly elected legislators.¹⁶⁵ In an extra-curial address Steyn CJ spelt this out: judges should avoid controversy 'in a strongly contested

matter in which Parliament has, by way of firm deliberate policy, knowing what it is about and in the valid exercise of its legislative powers, laid down what is to be done'.^{165a} Of course the objection may be raised that any reference to democracy, or to the 'valid exercise' of Parliament's powers, should be discounted by reason of the fact that one group (the Whites) has monopolised legislative power. The point is, however that the Appellate Division, along with the vast majority of Whites, has at all material times regarded Parliament as 'duly and democratically elected.'

Can this approach be criticized on legal grounds? The question has been deliberately posed in this awkward way because defenders of the Appellate Division's record are quick to dismiss criticism as being 'politically inspired' and not based upon 'legal grounds'. The answer to this is twofold: choices made upon political and moral grounds (such as the one in issue) stand to be criticized upon political and moral grounds. Moreover, at this fundamental level no rigid distinction can be drawn between political and moral issues on the one hand, and legal issues on the other. Thus in arguing for the legal pedigree of the Rule of Law, Beinnart asserted that the Rule of Law 'may be described as a truly juridical principle in the sense that it postulates a technique of legal and judicial organisation'.¹⁶⁶

Any theory dealing with the fundamentals of adjudication necessarily involves, at least partially, an exercise in political theory.

Having said that, it appears that the deference shown by the Appellate Division to the 'democratically elected' legislature is open to criticism on at least two grounds. The first one is obvious. Any 'democratic theory' of legislative supremacy cannot sensibly be applied to the Group Areas Act - the target groups of the Act had no say in its passing.

The second objection or series of objections are of a more general nature, in the sense that the focus is not on the peculiarities of franchise in South Africa; the criticism offered here would apply even if we were dealing with a truly democratically elected legislature.

The approach to statutory interpretation in issue turns upon the political intentions of the majority of the legislature. But unless these views have been concretized in legislation, the process remains speculative to a large extent. What exactly were the political intentions at the material time? Even if this can be answered, the further question arises: Exactly how would the political intentions have translated themselves into law - for example how would the legislature have drafted the clause authorising discrimination which the Appellate Division 'supplied' in *Lockhat*?

The approach in issue also takes *majoritarianism* too far. The infringement of common law principles embodying fundamental (democratic) values is too readily inferred on the basis of the political intentions of the majority of the legislature. Doctrines such as the Rule of Law and the principle of legality

require at the very least duly enacted legislation before these common law principles can be infringed.

A further criticism of the approach in issue turns upon the fact that the political intentions of the most prominent branch of government, the executive (whose members issue statements, take important decisions) tend to be transposed to the (majority of the) legislature. This is in a sense 'natural', because under the modern Westminster system or its clones, the executive branch dominates the legislature through the cabinet system and the role of political parties. The 'government' spans both the executive and legislature. Such transposition is nevertheless open to criticism because it infringes the remaining healthy vestiges of the separation of powers doctrine. At least the executive should see to it that its political intentions are *duly enacted*. Again, unless the intentions and views of the government have been concretized in the legislation, the process of interpretation contains a large degree of speculation. This is illustrated by *Lockhat*. The Act did not authorize discrimination. In Parliament the supporters of the legislation said that discrimination was not intended. When the executive came to implement the Act, they obviously wished to push ahead - either on the basis of discrimination or, on a somewhat more charitable view, whether discrimination occurred or not. And in *Lockhat* the views of the executive prevailed. This makes a mockery of the legislative process and the interpretation of its end-results.

Positivist theories of law

This brings us to the final issue. To what extent can the approach of the Appellate Division be attributed to any positivist theory of law?

This obviously raises a very complex further question: What is meant by a positivist theory or theories of law? This cannot be explored within the confines of the present discussion. It is intended instead to relate two issues concerning legal positivism to the approach of the Appellate Division to group areas, namely the influence of the Austinian 'command theory' and the question whether legal positivism 'either leads or tends to lead to judges somehow not facing up to the moral issues involved in cases where judges are concerned with interpreting morally abhorrent legislation'.¹⁶⁷

Dugard has argued that one particular positivist theory of law, namely Austin's command theory¹⁶⁸ has been moulded or transformed in a South African context, resulting in a 'popular positivist message':

'The notion of law as the command to a political inferior coupled with a sanction, the view that 'the existence of law is one thing, its merit or demerit is another', Austin's harsh strictures directed at civil libertarians, and the declaratory nature of the judicial function are components of the legal philosophy of the average South African lawyer'.¹⁶⁹

Forsyth and Schiller¹⁷⁰ termed this approach 'vulgar Austinianism' and pointed out that although judges tend to profess that they are simply declaring the law, they are indeed influenced by values they hold. This would make them 'pseudo-vulgar Austinians'. With this qualification, Forsyth and

Schiller seem to accept that Dugard painted a realistic picture of the judiciary, but argue that this does not mean that legal positivism as such should be rejected. In his book Forsyth also suggests that what ails the South African judiciary is not adherence to a questionable theory of law, but rather societal factors such as their conservative background, political tensions in the country, and similar matters.¹⁷¹

Analysis of the key decisions in group areas certainly confirms the influence of a 'command' approach to legislation - whether this is derived from Austin or not, is a more difficult question. It is submitted that this ties in directly with the approach discussed above, whereby the intention of Parliament is worked out by looking to the actual or counterfactual mental states of legislators. The latter approach leads naturally to the question: what is the specific (political) intention behind the command issued by the legislature? It is of interest to note that Steyn who in his work on interpretation, stresses the 'intention of the legislature', relies on old authorities who refer to the intention of the legislature in very personalised, *subjective* terms such as 'mens', 'voluntas' and 'der Wille'. Steyn himself refers to 'die eintlike wil van die wetgewer'.¹⁷² This stress upon subjective intention ties in with a command theory, rather than with an alternative (positivist) theory of interpretation which seeks to establish the meaning of legislative rules.^{172a}

It is further submitted that Forsyth underplays the role of 'questionable theories of law' in relation to the decisions

handed down by judges. Judges have to live with themselves and their role in society. The theory of law adopted by a judge plays an important legitimizing function in this regard. If a particular theory of adjudication held by a judge is shown up to be false, or inferior, it may not change his political views (such as whether group areas are a good thing), but in a hard case it may influence his decision because without recourse to the discarded theory he may not be able to justify a particular pro-group areas decision to his 'legal audience'.¹⁷³ Ailments of the South African judiciary are thus, at least partly, attributable to questionable theories of law such as a command theory of legislation.

We now turn to deal briefly with the question whether positivism encourages or discourages sound judgments in hard cases dealing with legislation such as group areas. A developed and well-known positivist theory such as that of Hart¹⁷⁴ proposes that in such cases the judges have to reach a decision much as a legislator, although in reaching and justifying their decisions, they would operate under additional constraints such as coherency and consistency. The judge thus has a 'discretion' in these hard cases which especially on matters of high constitutional import, often involve a choice between moral values. The resulting decision cannot be said to be *legally* correct or wrong. Legal positivists in this tradition stress that at a meta-juridical level, morality plays an important part in adjudication in hard cases, and that legal positivism emphasizes, not diminishes, the moral responsibility of the judge in hard cases.

The analysis of the group areas cases suggests otherwise. Legal positivism in its traditional guise stresses the importance of legal rules, that is legal standards of more or less definite content and predictable application, and the separation between law and morality. Rules are held out as the prime tools of judges. Legal positivism in effect, if not by design, discourages thinking about principles such as the common law principles in issue in group areas cases, because they are relegated to secondary status. It may also be said to encourage legalism, in the sense of a focus on rules which tends to narrow the range of legally relevant facts, thereby detaching legal thought from social reality.¹⁷⁵ It further discourages the evolvment of a coherent theory with regard to common law principles and the values underlying them because their 'political' or 'moral' content is too high - and lawyers should really be concerned with legal rules. It may, of course, be possible that legal positivism could be restated to 'capture' these common law principles, and to emphasize their role in adjudication, but during the period under review in relation to group areas, no such theory appears to have exercised any significant influence upon the decisions handed down by the Appellate Division.

It may, of course, be objected that the Appellate Division never even got to Hart's theory and the issue of judicial discretion in hard cases - it espoused a simplistic and wholly untenable declaratory theory of adjudication, in terms whereof judges simply 'apply the law'. The latter theory has certainly

had a considerable influence,¹⁷⁶ but even one of its main exponents, Steyn CJ, pointed out that in hard cases, the judge often seeks an *ad hoc* solution to suit his sense of equity. This may lead to 'n afwyking van beginsel en logika' and to 'irrasionele bestanddele' exercising a decisive influence.¹⁷⁷

So here the role of judicial discretion is recognised - albeit a fairly crude version thereof. But there is no acknowledgment that the judge should in this situation, also when a statute is in issue, decide in the light of common law principles.

CHAPTER FIVE

ENDNOTES

- 1 On the meaning of 'policy arguments', see below at n 24.
- 2 See above 7.2.1 at n 314.
- 3 Reported in 1986 3 SA 969 (T).
- 4 It is not assumed or suggested that the S A judiciary is necessarily in any way unique, nor is the contrary assumed or suggested. It is simply not the aim of this chapter to draw conclusions on an even higher level abstraction, namely with regard to the general position and role of a judiciary. The analysis is also confined to the judges of the South African Supreme Court. Only their judgments are reported and these have a far greater influence than decisions of magistrates.
- 5 See especially *Human Rights and the S A Legal Order* (1978) (cited as Dugard).
- 6 'The judicial process, positivism and civil liberty II' (1981) 98 SALJ 218.
- 7 Ibid 226. See further *inter alia* Davis, D M 'Positivism and the Judicial Function' (1985) 102 SALJ 103; Hoexter, C 'Judicial policy in SA' (1986) 103 SALJ 436.
- 8 'Judges and Injustice (1984) 101 SALJ 266. This sparked off a debate whether SA judges should resign. See *inter alia* Dugard J 'Should judges resign - a reply to Professor Wacks' (1984) 101 SALJ; Wacks, R 'Judging judges: a brief rejoinder to Professor Dugard' (1984) 101 SALJ 295, and further Dyzenhaus, D 'Judging the judges and ourselves (1983) 100 SALJ 496, 'Judges, equity and

truth' (1985) 102 *SALJ* 295; and Forsyth, CF *In danger for their talents* (1985) 230-236.

⁹ Judges at work (1984), especially at 237.

¹⁰ Op cit (n8) For his thesis, see n 141a below.

¹¹ 126.

¹² See *inter alia* Kahn, E 'Oliver Deneys Schreiner: A South African' in Kahn, E (ed) *Fiat Justitia. Essays in Memory of Oliver Deneys Schreiner* (1983); Forsyth *passim*.

¹³ 'Legal chauvinism, executive-mindedness and justice - LC Steyn's impact on the SA Law (1982) 99 *SALJ* 38.

¹⁴ For a reply to Cameron see, Dyzenhaus, D 'LC Steyn in perspective' (1982) 99 *SALJ* 380.

¹⁵ See *inter alia* Van Blerk, A 'The irony of labels' (1982) 99 *SALJ* 365; 'The Genesis of the 'modernist' - 'purist' Debate: a historical bird's-eye view' (1984) 47 *THRHR* 255; Visser, DP 'Daedalus in the Supreme Court - the common law today' (1986) 49 *THRHR* 127; Zimmerman, R 'Synthesis in SA private law: Civil law common law and *usus hodiernus pandectarum*' (1986) 103 *SALJ* 259.

¹⁶ In the South African and Prentice Hall Law Reports. The latter did not produce any decision of importance to the analysis not reported in the former.

¹⁷ The distinction is not necessarily conterminous with that drawn by Prof Ronald Dworkin in his *Taking Rights Seriously* (1978).

¹⁸ See Hutchinson, AC & Wakefield, JN 'A Hard look at 'Hard cases': the nightmare of a noble dreamer' (1982) 2 *Oxford Journal of Legal Studies* 86 at 91 et seq.

19 Cf *Harnaker v Minister of the Interior* 1966 4 SA 303 (A) 315
G et seq.

20 The first point decided in *Minister of the Interior v Mariam*
1961 4 SA 740 (A) would be an example.

21 See Schoombee, JT 'The sources and nature of the rules and
principles of administrative law' in *Liber Amicorum in honour of*
WHB Dean (1986) 162 at 170-176 (cited as Schoombee II). Again
the distinction drawn is not conterminous with the
rules/principles of distinction made by Dworkin (nl7).

22 See Schoombee II 164-170 for a full discussion of this
distinction between common law principles and presumptions and
the implications thereof.

23 *Legal System and Lawyer's Reasoning* (1964) 315-6.

24 *Policy arguments in judicial decisions* (1983) 22-3.

25 See eg Ogilvie Thompson 'Address at Centenary celebrations
of Northern Cape Division' (1972) 89 *SALJ* 30 at 33; Steyn, LC
'Regsbank en Regsfakulteit' (1967) 30 *THRHR* 101 at 106-7; Dugard
366 et seq. This was also the tenure of an address given by the
Judge president of the Cape Provincial Division to attorneys in
Cape Town during 1986. For a different perspective, see Mr
Justice Diemont, MA 'Law Teachers and the Law' 1968 *Acta Juridica*
1 at 3-4. For a discussion of the obfuscating effects of an
overemphasis of the 'intention of the legislative' in the
interpretation process, see Du Plessis LM *The Interpretation of*
Statutes (1986) 35-39, 49-50.

26 This can be seen either as a common law principle governing
the exercise of administrative powers or as a presumption of

statutory interpretation - that Parliament is presumed not to have authorised discrimination in the exercise of delegated powers. See above at n22.

27 *Lockhat v Minister of the Interior* 1960 3 SA 765 (D&C).

28 At 786 D-E, H.

29 At 788 H- 790D.

30 Sub nom *Minister of the Interior v Lockhat* 1961 2 SA 587 (A).

31 At 602C-E.

32 *Dadoo v Krugersdorp Municipal Council* 1920 Ad 530 at 552 (per Innes CJ). See also *R v Pretoria Timber Co* 1950 3 SA 163(A) 181; *R v Abdurahman* 1950 3 SA 136 (A) 145.

33 See Steyn 23, 32-3, 57. The author, Steyn CJ, concurred in the decision of Holmes JA in *Lockhat*.

34 *Travaux préparatoires* such as parliamentary debates cannot be invoked to interpret statutes - Steyn 134-6.

35 Minister of the Interior, *House of Assembly Debates* col 7810, 31 May 1950. Statements such as these referred to in n35-6 should not be taken at face value though. They contained a good deal of propaganda, and on a proper assessment took second place to the government's assertion that the Act would assure 'he paramountcy' of the White man - see further ch 6 n68, and at n143 below.

36 Minister of the Interior, *House of Assembly Debates* col 7827 1 June 1950.

37 At 8.

38 See above 3.5.

39 In the later Werner case (1980 2 SA 314 (W) 327H-328A, and on appeal: 1981 1 SA 187 (A) 201 E-H), Prof John Durgard sought to argue that *Lockhat* covered only substantial inequalities within the foreseeable future from the date of proclamation of a group area. This argument was however rejected by the court *quo* (at 328A) and the Appellate Division (at 223H, 224H).

40 See above 3.2 at n10-13.

41 See generally Forsyth Ch 1.

42 At 320.

43 *Minister of Community Development v Saloojee* 1963 4 SA 65(T); *S v Naicker* 1965 2 SA 919 (N).

44 1961 4 SA 518 (T) 525 D-H; see 4.3.2 at n93 above.

45 1966 1 SA 500(A) 506 F-G.

46 1981 1 SA 187 (A).

47 See Van der Vyver J D 'Qu'ils Mangent de la Brioche' (1981)

98 SALJ 135 at 136-7, for the background to the cases.

48 1979 4 SA 793 (T).

49 1980 2 SA 313 (W).

50 See at 316C.

51 801A.

52 801C.

53 801C, G.

54 315D-E.

55 329F-330B.

56 See Van der Vyver op cit (n47) 142-3.

57 At 221F-G. Why not? Surely it would be excusable if such conduct constituted a reasonable alternative - see Van der Vyver op cit (n47) 140.

58 At 221H. Cf *R v Canestra* 1951 2 SA 317 (A) 324.

59 At 222A. In fact the accused Werner could not find any place to stay in 'his' group areas - see n56 above.

60 [1898] 2 QB 91 at 99.

61 See n39 above.

62 At 223H.

63 At 224H.

64 At 224E-225A, 225C-D.

65 At 225.

66 Werner's wife was actually a Johannesburger.

67 See Schoombee H and Davis D 'Abolishing Influx Control - Fundamental or Cosmetic Change?' (1986) 2 *SAJHR* 208 at 218.

68 Lockhat 602E-F; *Adams & Werner* 224 A-D, 224G.

69 1959 3 SA 6451(A). See above under 2.5(4).

70 1958 2 SA 67(E).

71 See also *Transvaal Indian Congress v Land Tenure Advisory Board* 1955 1 SA 85 (T), but contrast *Transvaal Indian Congress v Land Tenure Advisory Board* 1954 2 SA 506 (T).

72 For this aspect of the litigation, see *Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad* 1959 3 SA 651 (A) 658.

73 Personal communication June 1985.

73a At 664.

74 Baxter 585-7; Rose Innes 155; Cameron op cit (n13) 54-6; Forsyth Thesis (n141a) 345-7; cf Wiechers 223-5.

- 75 1984 4 SA 680 (W) 689 B-C.
- 76 At 663 D-E; see Cameron op cit (n13) 55-6.
- 77 Ibid.
- 78 Section 33.
- 79 See S 1, sv 'basic value' for the full definition.
- 80 Section 34(4). Up to 1978 an appreciation contribution was payable to the Board where the consideration exceeded the basic value.
- 81 1960 2 SA 734 (A).
- 82 Section 19(2) of the Group Areas Development Act, 1955. Act 81 of 1959 amended this section and introduced the procedure which still prevails - a preliminary valuation is made, and owners and other affected parties may then object to it. See s 33 of Community Development Act, 1966.
- 83 The limitation certainly appears to go further than earlier Appellate Division cases, which stressed actual knowledge on the part of the affected party - see judgement 742 and Cameron op cit (n13) 56.
- 84 At 743 A-F. For this interpretation the court relied on the fact that the Act and regulations stated that administrative steps relating to affected properties and their valuation had to be taken 'as soon as possible'.
- 85 1961 4 SA 740 (A).
- 86 *Mariam v Minister of the Interior* 1959 1 SA 213 (T), per Roper AJ.
- 87 At 751H.
- 88 At 576 n256.

- 89 1967 1 SA 263 (A).
90 At 270. Emphasis supplied.
91 1977 4 SA 269 (W).
92 Section 18 of the Community Development Act 1966.
93 At 273 G-H.
94 At 275F.
95 At 275 E-F.
96 See Baxter 89.
97 Suggestions in two recent Natal decisions that in the case
of 'purely administrative' acts failure to take into account a
relevant consideration can never constitute a ground for review,
stand to be rejected - Baxter 503 n126, 317 n203. The position
with regard to prerogative powers is somewhat more complex, and
will not be considered in the discussion in the text.
98 See *North-West Townships Ltd v The Administrator of the*
Transvaal 1975 4 SA 1 (T) 8F-G; the principles there formulated
were accepted as a correct statement of our law by the Appellate
Division in *Suliman v Minister of Community Development* 1981 1 SA
1108 (A) 1123 B-C.
99 Section 23(1) of the Act.
100 *Judicial Review of Administrative Action* (1980 4 ed by J M
Evans) 340-1; see also Baxter 507.
101 See above 2.8.1 n 391 et seq.
102 Op cit 297.
103 Section 5(6) of the Act. See s 27(5) of original Act and s
5(7) of 1957 Act.

104 See *Lockhat v Minister of the Interior* 1960 3 SA 765 (A) 779
F-G; *Harnaker v Minister of the Interior* 1966 2 SA 162 (C) 164 F-
G; 1966 4 SA 303 (A) 311.

105 It resulted in three reported judgements in the Cape
Provincial Division and one in the Appellate Division, sub nom
Harnaker v Minister of the Interior 1963 4 SA 559 (C) (on
absolution of the instance); 1965 1 SA 372 (C) (on an amendment)
and 1966 2 SA 162 (C) (the eventual judgement a quo) and 1966 4
SA 303 (A).

106 See n105 above.

107 At 169 D-E.

108 At 170 G-H.

109 At 312H - 313D.

110 Thesis (n141a) 364.

111 At 313 A-D and 318 A-C.

112 At 316 G-H.

113 At 317H.

114 At 317H-318A.

115 See n99 above.

116 1960 3 SA 765 (D&C).

117 At 791H-792B.

118 *Minister of the Interior v Lockhat* 1961 2 SA 587 (A).

119 At 599G-600H.

120 See s 23 of Act.

121 1968 1 SA 711 (T).

122 Theron J, with whom Myburgh AJ concurred.

123 At 713 H.

- 124 At 716 G-H
- 125 Henning, P 'S v Variawa...' (1968) 31 *THRHR* 192; Kahn, E in
1968 *Annual Survey of SA Law* 22-3.
- 126 1972 3 SA 895 (NC).
- 127 De Vos Hugo JP, with whom Van den Heever J concurred.
- 128 At 904 G - 905 C.
- 129 At 904 D-G.
- 130 At 903 B-C, 905 D-E.
- 131 1981 1 SA 1108. The judgment of the court a quo (Transvaal
full bench), which had dissented from the Variawa case, is
reported *sub nom Suliman v Rustenburg Town Council* 1979 2 SA 435
(T).
- 132 At 1123C-1124E.
- 133 [1898] 2 QB 91 at 99.
- 134 See eg *S v Naicker* 1966 1 SA 594 (N) 597 B-G; *S v Bhoolia*
1969 3 SA 606 (T) 610 A-611 F.
- 135 See cases in previous note.
- 136 *S v Bhoolia* 1969 3 SA 606 (T) 615 H.
- 137 1970 4 SA 692 (A).
- 138 At 695 G and 696 E-F.
- 139 At 696 H.
- 140 At 699.
- 141 See 2.1.2.1 above, especially at n25.
- 141a *The Appellate Division of the Supreme Court of South Africa
from 1950 - an historical study of judicial choice* 1984 PhD
(Cantab) (hereinafter cited as *Forsyth Thesis*). In the thesis
Forsyth examined only Appellate Division cases. He discussed the

Appellate Division's attitudes to 'Asiatic encroachment' legislation (329-340), (an area not examined in the present study), and in respect of group areas legislation, the areas covered in 5.4.1, 5.4.2.2-4 and 5.4.3.2 above, and also 'Compensation decisions' (*Thesis* 366 et seq), with reference to *Lentz Township Co v Lorentz* NO 1961 2 SA 450 (A), *Bestuursraad van Sebokeng v M&K Trust en Finansiële Maatskappy* 1973 3 SA 376 (A) and *Down v Malan* NO (above n81). Brief reference is also made to 'Penal decisions' (*Thesis* 370-1) and the decision of *Minister of the Interior v Roos* 1956 2 266 (A).

142 (1986).

143 HAD col 7453 29 May 1950. See above at n34, and ch 6 n68.

143a See Ch 6 n68, and Raath AWG 'Die instelling van groepsgebiede - 'n geoorloofde rassedifferensiasie?' (1983) 16 *De Jure* 110 at par 3.1.

144 See Rose Innes 52.

144b See above n33.

145 See n75 above.

146 See n141a above.

147 See 1981 1 SA 1108 (A) 1125.

148 See above 3.2 n10 et seq.

149 See generally the passage cited in 5.4.1. at n31.

150 1966 4 SA 303 (A) 317H (emphasis supplied).

151 See at n67 above.

152 See above 5.4.2.4 n89 et seq.

153 See Van Wyk, DH 'Race' 21 LAWSA par 445 n14, and generally Baxter 329-330.

154 Also when compared to earlier cases such as *R v Hodos & Jaghbay* 1927 TPD 101.

155 *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374.

156 See above at n24.

157 See *Taking Rights Seriously* (1978), especially ch 4.

158 On aspects of the distinction between judgment and discretion, see above 2.8.1 n376. The correctness of Dworkin's 'right answer' thesis is not defended as part of the present analysis.

159 'Principles' are here used not in the specific sense employed by Dworkin, but rather to denote general standards, as indicated in Schoombee II.

160 It may be argued that the presumptive application of *audi alteram partem* only arises once the function has been classified as quasi-judicial. In *Cassem* it was held not to have arisen because on a doctrinal level, *rights* were held not to have been infringed and, on a policy level, it was held that the Board's freedom of action would be overly hampered.

161 See above n32.

162 At 205 n2 - see *R v Pretoria Timber Co* 1950 3 SA 163 (A)

181.

163 Review of *In Danger for their talents* (1986) 2 SAJHR 351 at 358-9. Emphasis supplied - the aspect italicised is particularly important, because it goes much further than the traditional interpretative theory which defers to the 'intention of the

legislature' in a depersonalised, fictional way. For discussion of objections to this approach see following text.

164 Dyzenhaus op cit (n163) 360.

165 Dyzenhaus op cit (n163) 354.

165a Op cit (n107) 107.

166 'The Rule of Law' 1962 *Acta Juridica* 99 at 131.

167 Dyzenhaus op cit (n163) 353.

168 For a summary, see Hart, HLA *The concept of law* (1961) ch

II-IV.

169 396; footnotes omitted.

170 Op cit (n6) 226-7).

171 230.

172 2-3.

172a Cf Du Plessis op cit (n25) 49-50.

173 On the issue of judges' audience, see Bell op cit (n24) 23-4.

174 Op cit (n165) 125-132, 200 See generally Bell op cit (n24) on the 'interstitial legislator model' - (ch IX), which is meant to reflect Hart's theory.

- 175 See Matthews AS 'The Rule of Law - A reassessment' in Kahn E (ed) *Fiat Justitia* (1983) 294 at 310-1.
- 176 See above at n25 above.
- 177 'Regsbank and Regsfakulteit' (1967) 30 *THRHR* 101 at 104.

CHAPTER SIX

THE IMPACT OF GROUP AREAS

6.1 *Introduction*

An accurate assessment of the impact of the Act is a difficult task. This is so for a number of reasons.

What may be termed the issue of 'causation', is the first complicating factor. Certain negative social phenomena (such as a high crime rate in new housing estates) have tended to coincide with the implementation of group areas. The question is, however, whether these phenomena have been brought about (either exclusively or partially) by group areas legislation, or rather by other causes, such as urbanization, urban change and the problems associated with public housing projects. It should, for instance, be remembered that when the original Act was introduced, South African cities and towns already displayed a marked degree of residential segregation traceable to their colonial origins.¹ This causation problem also features in any assessment of the permanency of the impact of the Act and any prediction as to what would happen if it were abolished - issues to be taken up in chapter eight.

Secondly, the Act and its implementation have had a major impact on a psychological level. This is difficult to measure or quantify, but it is nevertheless important. An evaluation of group areas as a major piece of governmental law implementing apartheid would be incomplete without reference to the strong and sustained negative reaction it has evoked amongst those groups who have suffered by reason of it. This reaction effectively

rules out the retention of group areas in any constitutional dispensation based on the consensus of all the major groupings in society.

Thirdly, there has been, particularly until recently, a relative lack of theoretical and practical studies on the impact of group areas in germane disciplines such as urban economics,² urban geography and town planning. This contrasts, for instance, with the position in the USA with regard to segregated housing, schooling and related matters.³

A concise assessment will now be attempted, starting with the basic statistics and then moving on to the main areas of impact.

6.2 Statistics

The Coloured and Indian groups have borne the brunt of the implementation of group areas - in terms of forced relocations under the Act and in terms of the limited land allocated to them. Whites have been the favoured group. (It should, of course, be remembered that the segregation and massive relocation of Blacks have taken place under different laws.⁴) The statistics⁵ reflect the following position:

(i) *Families moved up to 31 December 1983*⁶

	White	Coloured	Indian
Cape	826	65 169	3 004
Transvaal	688	11 647	11 728
OFS	0	2 300	0
Natal	<u>817</u>	<u>3 743</u>	<u>25 160</u>
Total	<u>2 331</u>	<u>82 859</u>	<u>39 892</u>

(ii) *Families under threat of removal*

	White	Coloured	Indian
(a) March 1984 ⁷			
	345	4 587	2 541

Total: 7 128

(b) *Revised figures May 1984*⁸

-	1 372	684

Total: 2 056

(iii) *Traders moved from business premises up to 31 December 1983*⁹

	Whites	Coloured	Indian
Cape	3	95	403
Transvaal	32	81	1 545
OFS	0	0	0
Natal	<u>19</u>	<u>11</u>	<u>576</u>
Total	<u>54</u>	<u>187</u>	<u>2 524</u>

(iv) *Proclaimed Group Areas 31 December 1983*¹⁰

	No of Group Areas	Area in Hectares	Average Size in Hectares	Percentage of Total Area Proclaimed
White	448	749 866	1 674	83,7
Coloured	313	95 128	304	10,6
Indian	<u>116</u>	<u>50 535</u>	<u>436</u>	<u>5.7</u>
Total	<u>877</u>	<u>895 529</u>	<u>—</u>	<u>100</u>

In reflecting upon these statistics, and particularly those in Table (iv), it should be borne in mind that, as pointed out by the Strydom Committee during 1983,¹¹ the task of proclaiming group areas has practically been completed and future

demarcations will be concerned mainly with extensions of or adjustments to existing group areas. (The Orange Free State which has very few¹² group areas is a peculiar case. The lack of group areas is explicable on the basis of rigid segregationist patterns which have come about without the Act. Until recently, Indians could, for instance, not settle in the OFS.) Anybody wishing to live in a South African city or town will thus have to conform with the residential patterns established by group areas. And Coloureds and Indians here face severe discriminatory limitations. The inequality revealed in Table (iv) emerges all the more clearly when the the 1985 census figures¹³ of the three relevant racial groups are compared:

Whites	Coloureds	Indians ^{13a}	Total
4 947 100	2 862 200	861 300	8 670 600
57,1%	33%	9,9%	100%

In the result, the White 57,1% has 83,7% of the land proclaimed as group areas; the 'other' 42,9% only 16,1%.

6.3 Psychological impact

Numerous studies and reports have confirmed what is really common knowledge: the Group Areas Act is probably the most hated piece of legislation amongst the Coloured and Indian communities.¹⁴ Its sponsors argued in the 1950s that it would lessen 'racial friction'; in fact it has given rise to racial distrust and increasing violence in a compartmentalized and distrustful society. The recent HSRC Report even ascribed 'the

radicalization of the theological standpoints in the NG Sendingkerk' mainly to group areas.¹⁵

Group areas segregation has also reinforced other forms of discrimination by preventing normal contacts through which prejudice may gradually be overcome.

Amongst the disadvantaged groups, group areas have given rise to what may be termed a modern 'folklore of repression'. Herein the fate of District Six near the centre of Cape Town, which was declared 'White' in 1966 when it had a 94-per-cent Coloured population of over 30 000, played a prominent role.¹⁶ The Coloureds living there were relocated and virtually all their former dwellings razed to the ground. Since then District Six has, for the most part, remained an open, desolate piece of land.¹⁷ District Six has featured in the poetry of Adam Small,¹⁸ the photographs of E Jansje Wissema¹⁹ and Chris Jansen,²⁰ Richard Rive's recent novel '*Buckingham Palace, District Six*,²¹ at least one play²² and two recent films.²³

In assessing the fate of District Six one should guard against romanticising. At its height it was certainly overcrowded, housing conditions tended to be poor and organised crime strong.²⁴ A proper, non-segregationist urban renewal scheme would have entailed that at least some of its Coloured residents would have had to be relocated. But such a scheme could have preserved the 'spirit of the place' of District Six and its special meaning for those classified Coloured.²⁵ Here it is of interest to note that the (White) Afrikaans poet D J Opperman, in his poem *Kersliedjie* published in 1956,^{25a} chose

'die sink en sak van Distrik Ses' as the birthplace of the Coloured 'saviour'.

If we turn from the specific case of District Six to group areas in general, we find that large-scale relocations have been part and parcel of the implementation of group areas. Even where relocations are carried out elsewhere in the world as part of normal (ie non-segregationist) town planning the effect has been traumatic for the humans involved - Maasdorp and Pillay point out that in cases of benevolent relocations 'the losses are to a great extent psychological rather than economic.'²⁶ In the case of group areas, the frustrations and bitterness generated by the discriminatory nature of the relocations and by the fact that the relocatees had no say over their lot, have been super-added to the 'normal' burdens.

6.4 Social costs

The threat of the imposition of group areas and of relocation have undermined the morale of the disadvantaged 'target' communities, have given them 'a sense of rooflessness'.²⁷ In evidence before the Theron Commission Coloureds testified that when the White houses started to creep over the hill towards their traditional residential area, they knew that their time for relocation was near.²⁸ This sense of rooflessness has *inter alia* led to a failure to improve homes and businesses.

Actual relocations have had a severe disruptive effect on the communities involved. It often, for instance, involves a breakup of the extended family.²⁹ Probably the most publicized

effect is the soaring crime rate in the new areas.³⁰ Again this may be partially attributed to urbanization and general socio-economic tendencies. Also, public housing estates the world over do not appear to have a good record in this regard.³¹ But the group areas context of the relocations has undoubtedly been a significant aggravating factor, in forcing people into soulless, isolated housing estates with little or no infrastructure.

6.5 *Housing shortage*

South Africa is experiencing an acute and growing housing shortage,³² yet whole neighbourhoods have often been flattened in the course of the implementation of group areas. In 1977 it was stated by the government that during the previous eight years 12 104 dwelling units had been demolished in South African cities, as part of this process.³³ The units so destroyed included a considerable proportion of good³⁴ or renovatable dwellings.

The implementation of group areas has been a drain on already inadequate public funds. Between 1960-1975, R261 million was spent by the state on Coloured and Indian housing; over R200 million of this was spent on rehousing families disqualified under the Group Areas Act.³⁴

As the relocation figures cited in 6.2 (Table (i)) above show, group areas have meant that Whites have gained former Coloured and Indian residential areas. This has greatly exacerbated the housing shortage amongst the last two groups, and in particular the shortage of housing near the centre of town. It was pointed out in chapter one that whereas an estimated 37

000 houses and flats in White areas were unoccupied during August 1986, there was a shortage of 538 000 housing units for Africans, 52 000 for Coloureds and 40 000 for Indians.³⁵

This situation means that Coloured and Indians have to pay more than Whites for comparable housing, and that desirable housing is often simply not available for them. The property values in Walmer Estate, a Coloured area near the centre of Cape Town, are generally 30% higher than in the adjacent White University Estate.³⁶ During 1986 the Real Estate Research Project of the University of Cape Town found that the prices of some homes in Coloured areas had doubled during the preceding two years - at the time of a deep slump in house prices in White areas.³⁷

6.6 *Unfair financial burdens*

As set out in 3.4 above,³⁸ various statutory powers exist to clear group areas of disqualified persons. The resultant relocation can obviously and usually does bring about serious financial losses. Although the applicable legislation contains provisions relating to compensation for such losses, the general point should be made that relocatees have in practice been inadequately compensated for their losses. Experience in other countries has taught that even in the case of 'benevolent' relocations (for instance, as part of a popularly supported slum clearance scheme), it is difficult to establish what would constitute adequate compensation to those affected.³⁹ Again the situation is aggravated by the trappings of group areas relocations.

The relevant statutory provisions⁴⁰ do not provide for full or adequate compensation, and the socio-economic position of most of the relocatees makes it difficult for them to pursue fully the limited available remedies. Lessees of residential properties (who would constitute the major part of relocatees) are particularly vulnerable. Where their leases are terminated by the Community Development Board, it may compensate them for resulting inconvenience.⁴¹ Where the property is expropriated by this Board, such lessee loses his right of occupation, and has no right of recourse against the Board.⁴² Even where a group areas proclamation forces the closure of a business, compensation for loss of goodwill is limited and moreover payable in the discretion of the Board.⁴³ In general, relocatees also suffer because they are not compensated on a replacement basis, and their new accommodation is usually more expensive.

Disproportionately high property values in crammed 'non-White' residential areas, and in well-located business areas, also result in unfair financial burdens. On the basis of the facts set out at the end of the previous section (6.5), it can be asserted that 'non-White' house buyers often have to pay more for housing than their White counterparts. Businessmen such as the Indian traders in Durban's Grey Street area rightly complain that they are paying unfair rates.⁴⁴

Finally, the common group areas pattern of settling target groups, especially Coloureds, in outlying townships and housing estates has caused the poorest people to end up living the

furthest from their work with resultant increases in their transport costs.

6.7 *Wasted public resources*

Under 6.5 the point was made that group areas caused valuable public resources to be spent on relocation and the replacement of housing demolished to implement group areas. The cost of relocating 1 277 Indian traders up to the end of 1975 alone amounted to R24,4 million.⁴⁵ Prior to relocation, their businesses were thriving; many now struggle in the 'Oriental Plazas' where they have been relocated - at subsidized rentals.

Valuable land acquired by the Community Development Board to implement group areas often lies dormant and unused for many years. Again District Six is a case in point. Moreover, rates are not payable on such land to local authorities, which means a serious loss of revenue.⁴⁶ In 1986

Dr J McCarthy, an urban geographer of the University of Natal, estimated that Durban's controversial Block AK, which has been lying useless for two decades after a group areas 'clear out' implemented by the Community Development Board in the 1960's, has cost the city R300-million in lost rates.⁴⁷

6.8 *The transformation from Segregation City to Apartheid City*

To what extent has the implementation of group areas over a period of some three and a half decades transformed the spatial ordering of South Africa's cities?⁴⁸

In the first section of the present chapter the point was made that when the original Act was introduced, South African cities already displayed a marked degree of segregation,

particularly in respect of residential areas.⁴⁹ Kuper et al calculated the 1951 White:Indian segregation index in Durban at a high 0,91.⁵⁰ W J Davies' findings in respect of racial segregation in Port Elizabeth are similar.⁵¹ Cape Town was also characterised by residential segregation, but was the most 'mixed' city prior to group areas.⁵² There is also evidence to suggest that in the forties and early fifties there was a trend of increased segregation in South African cities.⁵³

The aforementioned phenomena were brought about by a complex interplay of various factors. Firstly South African cities were founded as colonial cities - 'a distinctive, albeit heterogeneous, category not accounted for in conventional and simplistic dichotomies between pre-industrial and industrial cities.'⁵⁴ Such colonial cities were non-indigenous establishments characterized by domination of the colonized people by the colonizers - this domination manifested itself *inter alia* in persistent social and residential segregation.⁵⁵

At a more specific level, economic factors evidently played a major role in bringing about segregationist patterns prior to group areas. In South Africa race and economic class have tended to coincide, and the poorer 'non-Whites' have been compelled by economic forces to settle in less desirable areas, and economic factors caused the areas to become densely populated.⁵⁶ As the land near the centre gradually became occupied, they were forced to 'congregate' in outlying areas - this is an important factor in explaining increasing segregation prior to the Group Areas Act.⁵⁷

A factor which also contributed to segregation is what may be termed 'natural' ethno-centricity - affinity of language, culture and 'race' is a major factor in causing the 'natural' segregation of groups.⁵⁸ The actual contribution made by this factor to segregation is difficult to assess because in practice segregation does not take place in a sphere free of coercive forces. In ideological terms, this factor has played a major role. It forms the basis of a more elaborate 'community-instinct' theory often espoused by apartheid apologists. It seeks at the same time to explain 'natural' segregation and to justify enforced segregation. Thus W J Davies has asserted:

'Since residential segregation is clearly a developmental trend in South African cities, its progress should be aided and ordered'.⁵⁹

Such arguments however over-emphasize the importance of 'natural' 'racial' affinity by 'excluding the highly significant role of the political and economic structure of the society'.⁶⁰

Considerable hostility⁶¹ on the part of Whites to 'non-Whites' further led through the years not only to informal measures to promote segregation prior to the Group Areas Act (such as the decision by building societies in Durban during 1942 not to advance loans to Indians for the purchase of property in predominantly White areas),⁶² but also to a series of formal and legislative measures. For instance, since 1922 it was (legally sanctioned) practice for the Durban City Council to sell erven in 'White' areas with racially restrictive title conditions.⁶³ And

in Cape Town the City Council at the same time started to set up municipal housing estates exclusively for Coloureds.^{63a}

In Chapter 3 reference was made to some of the pre-Group Areas Act legislative measures aimed at ensuring racial segregation. These were particularly directed against Blacks and Asiatics. In an urban context,⁶⁴ an important measure aimed at confining Blacks to locations was the 1923 Native (Urban Areas) Act, which was amended and eventually replaced by the Black (Urban Areas) Consolidation Act.⁶⁵

Until its recent repeal, the latter constituted the main element of both influx control and segregation of urban Blacks.

As far as Indians are concerned, the pre-group areas position has been sketched in 3.2 above. It will be recalled that the 'pegging' and 'ghetto' effects of the 1943 and 1946 legislation applied generally to Indians in the Transvaal and Natal, while they were by law prohibited from settling in the Free State.

We are now able to provide an overall picture of segregation in South African cities prior to group areas. In this context urban geographers such as Prof Ron Davies have drawn a distinction between the *segregation city* which existed prior to group areas, and the *apartheid city* into which the former was transformed as a result of group areas:

'The two cities differ in the degree to which formal control was exercised through the political economy not only over the social formation of society but also over its spatial organization in the city, especially the residential space. In the Segregation City the response to conflicting spatial demands that arose from expanding urbanization and an increasingly complex set of social relations between class groups was one of pragmatism and compromise. Segregation in

the city evolved as a natural outcome of high levels of social distance generated by dominance-dependency relationships that arose from class forming processes in the political economy, on the one hand, and from cultural and ethnic pluralism on the other. Imposed and voluntary residential segregation were both present in the spatial formation.

The city, however, was not consciously built to a comprehensive social design and it permitted a degree of flexibility in the spatial accommodation of its social groups. Thus, though political intervention and legal controls over the space relations of race-class groups were strongly in evidence, they were incomplete, differentially applied and permissive in practice. Spatial flexibility that tended to blur the bounds of the social formation in the city, however, was to become a source of social and economic tension under conditions of rapid industrialization and urbanization from the mid 1930s onward. These tensions significantly influenced the transformation of the city into an Apartheid form.⁶⁶

This brings us to the *apartheid city*. The question arises as to what the main changes i) envisaged and ii) actually brought about by the Act were, and also why it was thought necessary to bring about these changes given the relatively high degree of segregation which already existed in South Africa prior to the introduction of group areas.

The Act itself provides some important clues as to the kind of spatial ordering envisaged under the group areas regime, but the picture it presents is incomplete and fragmented. The most immediate explanation for this takes us back to a topic explored in 2.8: the implementation of the Act hinges upon executive discretion. The apartheid planners purposely left the substance of spatial ordering to the practically unfettered discretion of the executive branch of government; the Act merely contains the machinery for bringing about spatial ordering. This does not mean, however, that we cannot answer the question as to what the intentions behind the Act were, or the related but distinct

question, namely which goals were actually pursued in the implementation of the Act.

When the political and legislative history and background of the Act are analysed, it emerges that two interrelated political motivations were of predominant importance. The first was the friction theory of racial interaction: inter-racial contact breeds friction, and harmonious relations can thus only be secured by reducing points of contact to the minimum.⁶⁶ This theory was stressed by government spokesmen in promoting the first Group Areas Bill.⁶⁷ The second major political motivation was the aim that the 'paramountcy of the white man ... must be ensured'.⁶⁸ (It is true that the assertion of White paramountcy conflicted with the repeated assurances given by the government in Parliament that the Act was non-discriminatory and would be applied fairly.⁶⁹ It is clear however that paramountcy rather than equality reflected the political reality and true motivation for the Act. At the time of the first Act, and certainly up to 1966, when the present Act was passed, the 'baasskap' philosophy dominated apartheid thinking.⁷⁰ Moreover, the results of the implementation of the Act, detailed in this chapter, bear out the paramountcy argument.)

A number of provisions in the legislation can be traced to the friction theory and we shall see herebelow that it also had a determining influence upon the administrative planning policies which were adopted in the proclamation of group areas. Minimum inter-racial contact calls for physical barriers between groups - thus section 25 of the Act provides for the proclamation of

border strips to separate the group areas of different groups. In a border strip all forms of occupation are *inter alia* prohibited. The Act also envisages, ultimately, consolidated group areas which could carry ethnic local authorities - provision was made for the latter in the original Act and these bodies are now subject to detailed statutory regulation - as set out in 2.6.2 above. In terms of the friction theory, scattered 'out-group' members or enclaves of such persons cannot be tolerated in group areas. This was precisely the situation which characterized the segregation city.⁷¹ In speaking on the first Bill, Dr Dönges, the Minister of the Interior, made it clear that 'the liquidation of isolated pockets' could be effected 'within a very short period.'⁷² The liquidation of racial pockets has subsequently become a feature of the implementation of group areas and the resultant *apartheid city*.

As to the preservation (or achievement) of 'White paramountcy', the Act itself contains no real clues in this regard. It was secured by the policies followed in the implementation of the Act. Group areas legislation has of course always contained restrictions on the issue of trading licences to disqualified persons, and in Parliament the government made it quite clear that the Act would be used to stop economic 'penetration' by Indians.⁷³

This brings us to the question: how was the Act implemented in practice in pursuing the friction theory and the goal of White paramountcy?

It is of interest to note that the Durban City Council co-operated with enthusiasm in drawing up group areas planning principles in the early fifties and 'indeed contributed to the planning of Group Areas legislation for the country as a whole'⁷⁴. Drawing *inter alia* on the 'Durban principles', which turn on the friction theory, Prof Ron Davies has put forward the following picture of the prototype apartheid city:

Design criteria developed for the Apartheid City provided for a minimum number of consolidated race areas for each group. Such areas were to be large enough or to have growth hinterlands adequate to accommodate future population growth and to provide possible future devolution of local government. Race islands enclosed by areas allocated to other groups were to be avoided where possible. In cities bordering onto African homelands, African Group Areas could be designed with hinterlands projecting towards such homelands to facilitate their ultimate incorporation. Group Areas were to be separated by strong physical or man-made barriers or, in their absence, by buffer zones of sterile land. These were to serve not only as boundaries but to inhibit contact and interaction between groups. Major lines of movement, where possible, were to be controlled and mass public transport was to form part of the planning for low income black areas. Where possible each group was to be given direct access to work places to avoid filtering through areas set aside for other groups, and African (group areas) were, where possible, to be accessible to major industrial work centres that could also serve as boundary zones. Work zones, for employment, were to be regarded as common areas but property acquisition and the establishment of business and industries within such zones was to be subject to race zoning and control.

In theory the spatial structure of an Apartheid City incorporating these criteria, (which) is at the same time at least spatially equitable, takes the form of a proportionally divided sectoral design. The model provides for equitable access to the city centre and to industrial zones and for shares of urban residential space proportionally related to the size of individual population groups.⁷⁵

Davies then makes an important further point:

'The application of Group Areas criteria to existing cities, however, required recognition of existing spatial patterns and of the balance⁷⁶ of forces in the social formations of existing society'.

In practice the sectoral or radial model which would be based on the friction principle and *spatial equality between races*, was completely 'distorted' by the striving to ensure White paramountcy and generally by deference to White political opinion.

The actual *apartheid city* accordingly departs in important respects from the sectoral model. It is essentially⁷⁷ focussed around a White central business district (which advances White economic interests) and further structured about an extensive, consolidated White residential core.⁷⁸ The latter has been perceived as having an important security function for Whites and this consideration probably explains the fate of District Six which lies near the centre of Cape Town.⁷⁹ Security also played an important role in the location and design of 'non-White' areas: they are generally removed from urban nerve centres, major business districts and White residential areas. They can be sealed off in times of crisis; their physical layout features 'patrollable' streets.⁸⁰ Furthermore, the actual drawing of the group areas map has been influenced by the striving to consolidate existing White areas, to provide for White access to desirable land and minimise the relocation of Whites. The result has been gross inequality revealed in the Tables reproduced in 6.2 above.

The *apartheid city* probably reached the height of its development in the seventies. Its structuring then achieved near absolute residential segregation and a general compartmentalisation of society - also through the imposition of

social apartheid on beaches, in cinemas and other facilities. In comparison with the *segregation city*, it manifested a substantially higher degree of segregation which was moreover ideologically motivated. Whites secured for themselves a position of spatial and social dominance in the *apartheid city*, thereby consolidating their dominance which existed in the *segregation city*. Inter-racial contact in the *apartheid city* most frequently occurred in the economic sphere. Even at its height the *apartheid city* never achieved the 'ideal' of independent 'racial' communities, although ethnic local authorities constitute a marked segregationist progression.

Since the late seventies some cracks have been appearing in the edifice of the *apartheid city* - notably in the form of open central business districts and the growth of significant *de facto* 'grey' residential areas. There appears to be growing pressure, also in White society, for further changes. It may be that we are at the beginning of a reverse process - a movement from *apartheid city* to *segregation city*. This theme will be taken up in the next chapter.

6.9 Positive effects?

In terms of the analysis undertaken in this chapter group areas end up with a heavy debit balance. But are there any real positive effects? Here a supporter of group areas would probably point to the creation of a segregated society, and may further point to slum clearance, the provision of housing and the stimulation of 'own communities' with 'own' businesses, schools and similar institutions. A National Party Minister of Community

Development in fact once described the Act as 'one of the greatest spiritually emancipating measures in South Africa'.⁸¹

The general ideological claim that a segregated society is a blessing will not be canvassed herein. In answer to this claim, one could point to the extreme negative reactions to group areas discussed in 6.3 above and the undeniable state of tension in our segregated society. At a more specific level, and in relation to alleged positive features such as slum clearance and the construction of housing, it is of course true that the implementation of group areas entailed some of these. But the same (and far better) results could have been achieved in these areas through enlightened, non-segregationist planning and urban renewal.⁸²

CHAPTER SIX

ENDNOTES

- 1 See inter alia Maasdorp G & Pillay N *Urban Relocation and Racial Segregation. The case of Indian South Africans.* (1977) (hereinafter Maasdorp & Pillay) 93; Davies R J 'The spatial formation of the South African City' (1981) 2 *Geo-Journal* (Supplementary Issue) 59 at 69; Western ch 2; Davenport T R H *The beginnings of urban segregation in SA* (1971); Kuper L et al *Durban. A study in racial ecology* (1958) 152-9. (hereinafter Kuper et al.)
- 2 See Maasdorp & Pillay 193-5.
- 3 See for instance the literature cited by Maasdorp & Pillay ch 1-4 and Davies op cit (n1).
- 4 See ch 3 n15.
- 5 See SAIRR *Race Relations Survey 1984* (1985) (Survey 84) 468-470; the figures are based on information supplied by the then responsible Minister of Community Development in response to Parliamentary questions, as indicated below.
- 6 Survey 84 468; HAD q column 546-7 8 March 1984. The figures in tables (i) and (ii) assume even greater significance when, for each race group, the number of disqualified families is taken as a percentage of total families. As at December 1976, 'almost one-third of all Asian and almost one-fifth of all coloured families have been disqualified, compared with less than one percent of all white families'. Maasdorp & Pillay 165; and see their table 10.3 (166).
- 7 Survey 84 469; HAD q col 545-546 8 March 1984.
- 8 Survey 84 469; HAD col 5961-2 7 May 1986. In an assembly debate the Minister indicated that the figures given in March of that year (table (ii)(a)) had been revised, because they were based on old statistics and the occupation of a number of disqualified persons had been 'condoned'.
- 9 Survey 84 470; HAD q col 547-8 8 March 1984. For very many years numerous Indian traders lived under the threat of removal. For instance, of the 5 078 Indian traders who were disqualified at the end of 1976, only 1 678 (33 per cent) had by then been relocated: Maasdorp & Pillay 181.
- 10 Survey 84 469; HAD q col 661 16 March 1984. There is also one Chinese group area of 239 hectares. Calculations in third and fourth vertical columns are my own.

- 11 *Report of the technical committee of enquiry into the Group Areas Act 1966, the Reservation of Separate Amenities Act 1953 and related legislation (Strydom Committee) par 29.*
- 12 The Strydom Committee par 29 listed one White and 10 Coloured group areas.
- 13 RSA 1985 Population Census (Report No 02-85-01) Table 3. The Census refers to 'Asiatics' - the overwhelming majority of this group consists of Indians, but it does also include groups such as the Chinese and Japanese.
- 14 See, for instance, *Report of the Commission of Inquiry into Matters Relating to the Coloured Population group* (RP 38/1976 - the Theron Commission) par 9.35 and Professor Erica Theron in Western ix-xi; Maasdorp & Pillay 169; Joint Committee consisting of the Planning Committee and the Committee for Community Relations of the President's Council *Report on Principles and Implementation of the Group Areas Act* (PC 2/1982) par 6.6.4-6.6.10; Main Committee: HSRC *Investigation into Intergroup Relations The SA Society: Realities and Future Prospects* (1985) 126 (hereinafter HSRC Report).
- 15 Ibid.
- 16 On District Six (renamed Zonnebloem) see *Report of the President's Council on the Group Areas Act ... with Special Reference to Zonnebloem (District Six) and Pageview* (PC 1/1981); Western 142-59; Centre for Intergroup Studies UCT *District Six* (Occasional Paper No 2 1980) and *Group Areas* (Occasional Paper No 7 1983) 15-16.
- 17 There has been considerable hesitation to go ahead with 'White' projects - the recently constructed Cape Technikon met with strong opposition. For BP's recent R100-million proposal to redevelop District Six as an open residential area, and the government's negative reactions, see *Cape Times* 17 November 1986 p 3 and 18 November 1986 p3.
- 18 See Small A and Jansen C *Oos wes tuis bes: Distrik Ses* (1973); Schoombee I 97n 199.
- 19 In 1975 she was commissioned by the Cape Provincial Institute of Architects to record the fading life of District Six. During March 1986 seventy of her photographs were exhibited in Cape Town as part of the Institute's *District Six in retrospect* program - see *Cape Times* 27 March 1986 p 3 and 28 March 1986 p 5, and Small A & Wissema J *District Six* (1986).
- 20 See n18 above.
- 21 (1986).

- 22 Melvin Whitebooi's *Dit sal die blerrie dag wees* (1983).
- 23 Lindy Wilson's *Last supper at Horstley Street* (1983) and Yunus Ahmed's *Dear Grandfather, Your Right Foot is Missing* (1984). Showings of the former have been restricted by the Directorate of Publications to 'educational institutions': *Cape Times* 9 December 1986 p1.
- 24 See Western 144-5.
- 25 On the significance of the spatial dimension, see Western 146 et seq.
- 25a In *Blom en Baaierd*.
- 26 22.
- 27 *Theron Commission* par 9.39.10.
- 28 Personal Communication Prof M Wiechers November 1986.
- 29 Maasdorp & Pillay 188.
- 30 See, *inter alia*, Pinnock D 'Breaking the web: gangs and family structure in Cape Town' in Davis D & Slabbert M (eds) *Crime and Power in South Africa* (1985) 21-33.
- 31 See Maasdorp & Pillay 20.
- 32 Survey 84 374 et seq; Maasdorp & Pillay 169-75.
- 33 Maasdorp & Pillay 171.
- 34 Ibid.
- 35 Ch 1 n12.
- 36 See *Die Burger* 10 October 1985 p 9.
- 37 See *Cape Times* 23 October 1986 p 9.
- 38 See also the discussion of the following cases in ch 5: *Surtee's Silk Store* (n91) and *Suliman* (n131).
- 39 Maasdorp & Pillay 22-5, 46.
- 40 The Community Development Act 3 of 1966 and the Expropriation Act 63 of 1975 - the latter governs the procedure and compensation payable in the case of expropriation. In general, the compensation payable in South Africa upon expropriation falls short of adequate compensation in several respects. See Schoombee J T Book review of Jacobs M S *The Law of Expropriation in SA*, 1982 *Acta Juridica* 130.

- 41 That is where the leased property is acquired by this Board in terms of an agreement with the owner - s 15(2)(hA) of the Community Development Act.
- 42 See Gildenhuys A & Grobler G 'Expropriation' 10 LAWSA par 132-6.
- 43 Section 15(2)(h).
- 44 See Maasdorp & Pillay 175-80.
- 45 Maasdorp & Pillay 183.
- 46 Maasdorp & Pillay 189-190.
- 47 See Weekly Mail 7-13 March 1986 p 4.
- 48 The points made in this section would appear to apply *mutatis mutandis* to 'mixed' towns as well.
- 49 See n1 above.
- 50 At 154. Complete segregation is represented by the index 1,00; no segregation by 0.
- 51 *Patterns of Non-white population distribution in Port Elizabeth, with special reference to the application of the Group Areas Act (1971)* 101.
- 52 Western 35-6: it was calculated that in 1936 37% of the residential area of the city could be described as 'mixed'.
- 53 Western 48-56; Davies W J op cit (n51) 101-3.
- 54 See *inter alia* Simon D 'Desegregation in Namibia: the Demise of Urban Apartheid?' (1986) 17 *Geoforum* 289 at 290.
- 55 Theories on colonial cities should be seen against the background of more general theories about plural societies - for the latter, see, for instance, Boulle L J SA and the *Consociational option* (1984) 29-44.
- 56 See Kuper et al ch v; Western 42.
- 57 Western 56.
- 58 See Kuper et al 141-148; Maasdorp & Pillay 54; Glazer N & Moynihan D P *Beyond the Melting Pot* (1970) xii.
- 59 Op cit (n51) 103.
- 60 Kuper et al 148.

- 61 This manifested itself strongly against Indians - see Kuper et al 143-152, 158. See also generally Maasdorp & Pillay 92, and the second reading debate on the original Act: col 7433-7551; 7556-7829 29-31 May 1950.
- 62 Maasdorp & Pillay 88.
- 63 Kuper et al 33.
- 63a Western 55.
- 64 On the early history of urban segregation, see Davenport TRH op cit (nl); 'African Townsmen? SA Natives (Urban Areas) legislation through the years' (1969) 68 *African Affairs* 95, and 'The triumph of Col Stallard: the transformation of the Native (Urban Areas) Act between 1923 and 1937' (1970) 2 *SA Historical Journal* 77; Rich P B 'Ministering to the white man's needs: the development of urban segregation in SA, 1913-1923' (1978) 37 *African Studies* 177.
- 65 See Davenport op cit (nl) 63.
- 66 For a discussion hereof, and the rival theory that contact promotes harmony through common interests and shared experiences, see Kuper et al ch 1.
- 67 HAD col 7442; 7452-3 29 May 1950.
- 68 Minister of the Interior HAD col 7453 29 May 1950.
- 69 Minister of the Interior HAD col 7810, 7827 31 May 1950.
- 70 See the sources cited in the revealing discussion by Raath AWG 'Die instelling van groepsgebiede - 'n geoorloofde rassedifferensiasie?' (1983) 16 *De Jure* 110 at 123n 56 and par 3.1.2 (125 et seq).
- 71 Cape Town provided several examples of Coloured enclaves - see Western 39. Indians lived all over Cape Town - see Western 51 and the facts revealed in the Harnaker litigation above under 5.4.3.2..
- 72 HAD col 7453 29 May 1950.
- 73 Ibid col 7442-53 29 May 1950; Maasdorp & Pillay 92.
- 74 Kuper et al 34.
- 75 Op cit (nl) 69-70. (Words in brackets constitute my correction of probable printing errors.) Cf Western ch 3-5.
- 76 Ibid.

- 77 See, for example, Western 109 et seq for discussion of 'spatial anomalies' in Cape Town after the introduction of group areas.
- 78 For the layout of Durban and Pretoria as *apartheid cities* in 1970, see Figure 9 in Davies op cit (nl) 70; for Cape Town in 1979, see Western 104.
- 79 See Schoombee I 90n 137, and sources there cited.
- 80 Ibid.
- 81 Cited by Maasdorp & Pillay 185n 5.
- 82 See Davies R J 'Changing residential structures in SA cities, 1950-70' *International Geography* 2 (1972) 801 at 804.

CHAPTER SEVEN

SOME RECENT DEVELOPMENTS AND THE PROSPECTS FOR REFORM

7.1 *Introduction*

In chapter one the point was made that the law relating to group areas was, as a species of 'governmental law', subject to constant changes. The changes that do occur differ of course in magnitude and importance. In this part of the present chapter a summary of the more important recent changes will be given. They may be classified under four headings: 'liberalising' measures; measures strengthening the philosophy of group areas; changes prompted by developments in other legal spheres, and problems regarding the enforcement of group areas. For present purposes changes since 1983/1984 have been taken as 'recent', except in two cases: firstly, the limited 'mixed' trading allowed in 'old' s 19 'use' areas (where the changes in the enabling legislation occurred as far back as 1961), and secondly the opening up of industrial areas which started in 1977.

After the recapitulation of the recent changes discussed in previous chapters, we shall move on to two other recent developments, namely free trade areas and regional services councils. Thereafter the more important commissions that have investigated aspects of group areas in recent years will be discussed, to pave the way for an assessment of the prospects for reform in the final section.

1.1 *'Liberalising' measures*

(i) The new 'honorary' White status of Chinese in a group areas context discussed under 2.2.2 above, can probably be included under the present heading.

(ii) The latest (wider) categories of occupation by disqualified persons exempted from the general prohibition by means of proclamation, commented upon in 2.4.4.1, would further appear to qualify under this heading.

(iii) The introduction of free trade areas, discussed in 7.2 below, is a further significant liberalising measure.

1.2 *Measures strengthening the philosophy of group areas*

Here the most important developments have been in the sphere of local government. Since 1983 management committees may be vested with executive powers (2.6.2 above) and the regional services councils (7.3 below) constitute a major entrenchment of group areas thinking.

1.3 *Changes prompted by developments in other areas of the law*

(i) On 19 June 1985 the statutory prohibitions against 'mixed' marriages and sex across the 'colour line' were lifted.¹ This means that for the first time since 1949 'mixed' marriages are now legal, while 'mixed' cohabitantes need no longer fear prosecution. How do 'mixed' couples fit into group areas law and practice? When the aforementioned prohibitions were repealed, the government made it clear that it was willing to take such a step only because, as it was put by the Minister of Internal

Affairs,

'the continued ordering of own communities at the social, educational and constitutional level will not be affected by the repeal of the relevant legislation'²

In a television interview at the time, the Minister emphasized that 'grey areas' would not be set aside for 'mixed' couples and this fits in with the general refusal to allow 'grey areas'. The position is thus that while 'mixed' couples are *tolerated*, they are not positively accommodated in the group areas sphere. This appears from the various aspects relating to such couples already discussed in the previous chapters. Thus issues relating to the classification of partners and their children, were discussed in 2.2.3 (vi) above. At the same time one of the few concessions made to 'mixed' married couples, namely the retention of certain rights by the wife upon dissolution of the marriage, was examined. The possible application of a general occupation exemption to such married couples, was dealt with in 2.4.4(1), and the conclusion reached that it afforded relief in very limited circumstances. The difficult position of such couples was illustrated in 3.6.1 with reference to the schooling of their children.

(ii) General constitutional developments have brought about changes in the sphere of group areas. Thus the 1983 Constitution with its 'general affairs/own affairs' categories caused the administration of the sister act of the Group Areas Act, namely the Community Development Act, to devolve essentially upon 'own affairs' departments, as set out in 3.4 above.

(iii) A further constitutional development which has affected group areas, is the general trend to transfer certain central government powers to provincial authorities. Thus the second half of 1986 saw the transfer of the administration of the group areas permit system to provincial authorities, as explained in 2.8.4 above.

1.4 *Problems in enforcing group areas segregation*

In 7.2.1 above reference was made to the fact that there is some hesitation, particularly in the Transvaal, to prosecute 'non-Whites' living unlawfully in White group areas. This situation appears to have come about through a combination of factors: the growth of large, relatively stable 'grey' areas in cities like Johannesburg; the decision in *Govender* which complicates the relocation of persons convicted for unlawful occupation as part of the criminal process, and the present political uncertainty about group areas. The question arises for instance whether drastic changes are going to be introduced once the President's Council has brought out its long awaited report.³

7.2 *Free trade areas*⁴

In 2.4.4 above the controlled and limited 'mixed' trading allowed since 1961 in 'old' section 19 'use' areas, was discussed. Several of the commissions which investigated group areas from the mid-seventies onwards, recommended the establishment of free trade areas to replace section 19 'use' areas.⁵ The government eventually acted upon the recommendation of the Strydom Committee which reported in 1983,⁶ and in 1984 the

present section 19, which provides for free trade areas, was placed on the statute book.⁷

The new section reads:

19. Free trading areas.- (1) The State President may, after consultation with the Administrator of the province concerned and subject to the provisions of subsection (2), by proclamation in the Gazette declare that from a date mentioned in the proclamation, the provisions of one or more of sections 13, 14, 15, 17, 18, 20, 26(1), 27, 35, 37 and 40 shall not be applicable in respect of any building, land or premises in the area defined in the proclamation, subject to the condition that such building, land or premises may only be occupied or used for trading, commercial, professional or religious and educational purposes in terms of a town planning scheme which is in operation or binding under any law in that area.

(2) If the area defined in a proclamation contemplated in subsection (1) is situated in an area declared under section 23 for occupation and ownership by a particular group, the provisions of section 27 shall remain applicable in respect of any building, land or premises which are occupied or used exclusively or partially for residential purposes.

(3) If the area defined in a proclamation contemplated in subsection (1) is situated in the controlled or a defined area the State President may simultaneously determine the group which may occupy any building, land or premises situated in that area for residential purposes.

The general effect of this section may be summarised as follows.

A so-called 'free trade area' is established by a declaration of the State President published in the Government Gazette. This declaration defines the boundaries of the area. At the same time the State President determines that either all or some of the restrictions of the Act in respect of the acquisition of immovable property and the occupation or use of land and premises no longer apply in the area in respect of those specific categories of buildings, land or premises mentioned in 19(1) - namely those which have a town planning zoning allowing only one or more of the five stated categories of town planning use.

A further important consequence not specified in section 19 itself flows from the declaration of such a 'free trade area'. The present proclamation which extends the meaning of 'occupation' in terms of section 1(4) of the Act⁸ and thus in effect provides for apartheid in places of public entertainment, restaurants and clubs, states that it does not extend to 'free trade areas'. It would thus appear that enforced segregation no longer applies to the uses of amenities in these areas.

Section 19 will now be given more detailed consideration.

It should be noted firstly that 'free trade areas' may be declared in group areas (proclaimed in respect of occupation or ownership, or both), specified areas or controlled areas. Section 19 then envisages that some or all of the restrictions of the Act relating to the type of area in issue would be lifted. Traditionally the most important business areas have been situated in White group areas. In the case of Johannesburg, Durban and Cape Town the restrictions of sections 26(1), 27, 35, 37 and 40 of the Act have been lifted in terms of the recent proclamations under section 19.⁹ This means that any disqualified person or company may now acquire immovable property in the areas concerned, and occupy or use land and premises in the areas concerned. There is, however, nothing to prevent the Executive from departing from the example of Johannesburg, Durban and Cape Town, in respect of other free trade areas yet to be proclaimed, by not lifting the restrictions of say section 27 in respect of a business area in a White group area. The prohibition against the acquisition of immovable property by

disqualified persons (in casu 'non-Whites') contained in section 27 would remain applicable. In the past it has been hinted in government circles that this restriction may remain in respect of non-Whites with regard to certain free trade areas.¹⁰ If this were to occur (say in respect of the central business districts of 'conservative' cities or towns), the introduction of a free trade area would largely be nullified, by reason of the very wide ambit of the prohibition against the acquisition of *immovable property*.¹¹ A disqualified trader would then not be able to lease premises in the so-called free trade area without a permit.

The marginal note of the section ('Free trade areas') is in a sense misleading. Where an area has been declared under the section, the lifting of restrictions applies not only for trade purposes, but in respect of any building, land or premises that may 'only be occupied or used for *trading, commercial, professional or*¹² *religious and educational purposes*' in terms of a town planning scheme. So as long as the town planning zoning restricts use to any¹² of the five stated categories, the lifting of restrictions applies. The word 'only' implies that the zoning may not also authorise any other distinct use category (such as residential use) if the section is to apply.¹³ But there is no (implied) requirement that the authorized zoning must allow the use in question without any approval¹⁴ - so the section would apply to (say) a zoning for 'religious and (with approval) educational purposes.' In the present context a point made in the discussion of the occupation exemption relating to use for professional purposes (2.4.4.1(5) above) should further be borne

in mind: in town planning practice trading for commercial and professional purposes is usually covered by an umbrella zoning such as 'general business use'. It is submitted that the latter would suffice to render section 19 applicable. In principle and subject to section 19(2) discussed below, this should be the case even though in Cape Town for instance 'general business use' allows incidental occupation for residential purposes (such as a caretaker living in an office block), as long as the area covered by residential occupation is not more than 50% of the surface area of the erf.¹³ In this instance there is no zoning allowing for a distinct category of use not covered by 19(1), and the section should apply.

By way of summary the point may be made that the applicability of section 19 turns primarily on zoning, not actual use. (Here section 19(2) does, however, introduce an important exception). In contrast with the position under s 49A relating to industrial land (discussed in 2.4.5 above), unauthorised use (eg for residential purposes) would accordingly only render section 19 inapplicable in the circumstances set out in section 19(2).

This brings us to section 19(2). It is a somewhat curious provision and its ambit is not entirely clear. It does, however, appear to pose a serious and unjustified limitation upon the principle of free trading and contradicts the reliance placed in sub-section (1) upon zoning rather than actual use. It provides, in short, that in a free trade area, any residential occupation or use of any building, land or premises situated in a group area for occupation and ownership, causes the restrictions of section

27 relating to the acquisition of immovable property to remain applicable in respect of the building etc. Taken at face value, this entails the far-reaching consequence that if a caretaker lives in an office block, the very wide restrictions of section 27 remain applicable - even though his occupation would be in accordance with the town planning scheme's 'general business use' zoning (as explained above), and would probably also be lawful in terms of the Group Areas Act even if he were to be a disqualified person without a permit - he would be occupying as a bona fide employee while on duty (2.4.4 1 (4) above). That section 19(2) brings about this result, appears to be the interpretation given to the sub-section by the government. In Parliament the Minister observed that a permit would have to be obtained in such circumstances:

'In the case of caretaker's flat in a business complex, there should be no problem in granting a concession for such building to be used (freely) for business and relevant purposes.'¹⁶

Of course the reliance on the permit system suggested by the Minister would undermine the whole principle of a free trade area.¹⁷

The only way in which the impact of section 19(2) can be limited and the sub-section given a less destructive and sensible meaning, is to say that it refers *only to residential occupation or use not covered by sub-section (1)*. Section 19(1) would only cover residential occupation or use which is incidental to and *allowed as part of one of the five stated categories of use* - such as residential occupation by a caretaker in an office block where such occupation is permissible in terms of the 'general

business use' zoning applicable to the premises. All other forms of residential occupation would not be covered by 19(1) and would, on the present suggested interpretation, render the provisions of section 19(2) applicable.

Even if the suggested interpretation were to be accepted, section 19(2) remains an ill-conceived provision. How must a disqualified trader who wishes to lease one of many shops in a sprawling complex know whether someone is using a room in the complex for residential purposes, thereby rendering 19(2) applicable to the whole building, and his lease unlawful? Moreover, it appears that the trader in our example could easily get round section 19(2). In cities like Cape Town, Durban and Johannesburg the proclamations which have introduced free trade areas under section 19(1) have lifted *inter alia* the applicability of sections 26 (dealing with occupation by disqualified persons), 35 (use by disqualified persons) and, it should be noted, 40 (which proscribes nominee holding). If section 19(2) applies, it only 're-introduces' the provisions of section 27 - dealing with the acquisition of immovable property. There is thus nothing preventing the disqualified trader in our example from getting a (qualified) friend to lease the premises as a nominee - nominee holding is no longer prohibited in the free trade area and the trader can also occupy and/or use it.

The legislature's sensitivity concerning residential occupation also appears from section 19(3). This empowers the State President to determine which group may reside in any building, land or premises in a 'free trade area' falling within

a controlled or specified area. In the case of Cape Town and Durban where the proclamations under section 19 apply also to areas envisaged in section 19(3), it has been determined that members of the White group may occupy for residential purposes any building, land or premises in these areas.¹⁸

Section 19 does not specify the procedure to be followed in declaring free trade areas. In practice the regional offices of the Department of Constitutional Development and Planning have called on local authorities to submit proposals for free trade areas within their jurisdictions, and these proposals have then been investigated by the Group Areas Board after advertisement for comment.¹⁹ So far this has left the initiative, and decisive influence, to the local authorities. The Minister has been quoted as saying that free trade areas are 'in the first instance a matter for the local authorities',²⁰ although government spokesmen have mentioned that other bodies may put forward proposals.²¹ It appears doubtful whether in the present political climate the government would force the issue with conservative (White) local authorities that refuse to submit proposals. Enquiries addressed to the Department in this regard during September 1986 elicited the response that the proposals which had been submitted called for so much attention that the issue of possible recalcitrant local authorities had not yet been addressed.²² Earlier, in March 1986, it was stated that proposals for free trade areas in 41 towns and cities had been accepted and that 10 further areas were under investigation.²³

What were the policy reasons for the creation of free trade areas and how does this development fit in with traditional group areas thinking? In arguing for free trade areas the Strydom Committee²⁴ put forward the following grounds which were in essence accepted by the government:

- (i) Racial restrictions in an economic context conflicted with 'our capitalistic free market system',²⁵
- (ii) The group areas aim of 'own communities' originally required the Coloureds to be protected in a trade sphere. Now Coloureds could stand on their own feet. (This is a curious argument *inter alia* because free trade areas have opened up White, not Coloured, business areas.)
- (iii) At the time the Act was introduced Whites complained of unfair competition by Indians who lived on their business premises with their families. These family members constituted free (and, according to White traders, unfair) labour in the business run by the head of the Indian family. Now, the Committee pointed out, Indian families were living in group areas removed from free trade areas.
- (iv) Substantial racial mixing existed in business areas and 'non-Whites' served there in various capacities.
- (v) The number of disqualified ('non-White') persons who would benefit from free trade areas would be limited.
- (vi) Free trade areas could be introduced gradually.
- (vii) Local authorities would have a say in this regard. (The Strydom Committee actually proposed that free trade areas should

only be established in central business districts and only upon application of the local authority concerned.)²⁶

The most important of the aforementioned factors appears to have been the 'free enterprise' argument and the fact that the potential number of beneficiaries amongst 'non-Whites' would be limited. There are also other very significant factors and reasons for the introduction of free trade areas which have not been explicated by the Strydom Committee or the government. These will now briefly be considered.

For many years the government has been faced with a situation of significant social integration in everyday business life, as well as a degree of 'non-White' 'penetration' in White business areas. The opening of certain business areas thus, in a sense, confirmed the status quo. Economic factors would further prevent a 'swamping' of the formerly White business areas, and White businesses already established in these areas could rely on a head start. The recognition of the permanence of a substantial number of urban Blacks also meant that there was no longer the strong ideological imperative to keep them out of White business areas and to deny them rights of ownership in these areas. Coloured and Indian businessmen have further constituted an important target group in the government's strategy of co-option and co-operation which underlies the 1983 Constitution. The concession in respect of free trade areas was meant to benefit and impress them, as well as the National Party's junior partners to be in government, namely the dominant Coloured and Indian political parties. These politicians could point to the creation

of free trade areas by the last White Parliament as a sign of things to come.

Does the opening of certain business areas really constitute a major development in a group areas context? In addressing this question a distinction should be drawn between the ideological and practical levels. On the *ideological level*, it does present a significant step, namely a recognition that economic integration is unavoidable and that economically separated 'own communities' with 'own business' areas, unattainable. The argument may be raised that this situation surely points to the conclusion that the maintenance of residential segregation is also not viable in the long run, because residential segregation has always been justified in terms of an 'own communities' philosophy, and own communities must surely have an independent economic base. So far the government has denied the inevitability of this consequence. It will be seen in the next section that the regional services councils in fact present an effort to get round the problem of the lack of an independent economic base for 'non-White' urban communities, by channelling funds from business districts to poorer, racially defined local authorities.

On a *practical level*, the opening of certain business areas is less significant. This is so because, as explained below, the impact of this move has been limited. Moreover, the opening of business districts has relatively limited social implications - it does not, for instance, put pressure on the segregated school system - something which the opening of residential areas would

do in the long run. The opening up of restaurants and cinemas²⁷ in the 'non-neighbourhood' context of free trade areas also has a relatively limited social impact.

The opening of business districts has not resulted in a flood of formerly disqualified businessmen into these areas. The reasons for this are partly related to some of the considerations which led to the opening of the areas in the first place. Many of those most desirous to be there are probably there already through the use of nominees. Moreover, anyone wishing to move into the opened areas faces a limited choice of buildings to purchase and if he should wish to lease premises, stiff rentals. At the same time there exists an economic recession. Business districts situated in the centre of cities also face declining popularity. (Of course, not only central business districts in the narrow sense, but also some suburban centres, have been opened up.) 'Non-White' traders moving into the new areas would have to adjust to different markets. There appears to have been a greater move by professionals seeking office space in opened business districts than by traders.²⁸

7.3 Regional Services Councils²⁹

7.3.1 Introduction

The analysis of Regional Services Councils (RCSs) is to be undertaken in the present section to bear out essentially three propositions relating to the interconnection between these bodies and group areas, namely that RCSs:

- ~~(i)~~ constitute an effort to overcome the serious problems besetting 'non-White' local authority bodies operating in group areas;
- ~~(ii)~~ increase the constitutional significance of group areas; and
- ~~(iii)~~ represent generally an entrenchment of group areas thinking.

In the concluding part of the analysis something will be said about the probable chances of success of RSCs. At the present time such an evaluation, and the general analysis of RSCs for that matter, are problematic: although the Regional Services Councils Act 109 of 1985 (hereinafter 'the RSC Act') came into effect on 31 July 1985, not a single RSC had been instituted by the end of 1986, while various problems in the implementation of the RSC Act and the creation of RSCs have been widely reported.

7.3.2. *Synopsis of RSCs*

The legislation envisages that the jurisdictions of a number³⁰ of what the RSC Act terms 'local bodies' (White local authorities, Indian and Coloured local authorities or management committees, and Black local authority bodies) will be combined to constitute a region, and that these local bodies or 'primary local authorities' (PLAs), as they are also termed in the RSCs Act, will then nominate representatives to serve on the Regional Services Councils. RSCs are to operate as super local authorities. They will undertake the provision of important 'hard' or 'general affairs' services such as the bulk supply of water and electricity to the PLAs bodies and their constituents, while the PLAs will be responsible for 'soft', 'own affairs'

services such as swimming pools, housing and streets.³¹ RSCs will be financed by newly created levies in the form of payroll and turnover taxes payable by trade, business and professional enterprises operating in the region in question. The PLAs will continue to be financed in respect of their own budgets primarily through rates on immovable property.

7.3.2 Background to and aims of RSCs

The government memorandum which accompanied the RSC Bill³³ put forward as the three objects of the legislation:

(1) *More effective rendering of services*

The co-ordination of services is said to ensure cost-efficiency and efficiency by economies of scale.

(2) *Political participation*

RSCs would 'give all people of the country a say in decision-making affecting their interests', in accordance with the own affairs/general affairs distinction of the 1983 Constitution:

'At local government level provision is therefore made for self-determination over own affairs and for co-responsibility in matters of mutual concern in a manner which safeguards the rights of each group'.

During 1984 the Minister of Constitutional Development and Planning stated in Parliament that the legislation would embody the 'principle of maximum devolution of powers and decentralisation of administration to the local level of government and of minimal administrative control over local authorities'. At the same time he emphasized the group areas basis of RSCs - 'wherever possible, local authorities should be

established for the various population groups on a territorial basis'.³⁴

(3) *Collection and distribution of new additional sources of revenue*

The RSCs are to collect and distribute the revenue generated by the newly created levies. These levies, it was stated by the government, would replace state subsidies to local authorities (for instance in respect of transport) and the Memorandum described them as sources of revenue which are 'generated and applied in the region itself'. The latter description echoes a 'free-market' or 'consumer' approach: local services are to be funded by user charges. It was further stated that the levies would act as indirect, financial means of control over the establishment of factories in metropolitan areas (of central importance to the government's policy of industrial decentralisation), replacing the direct, administrative control of the Physical Planning Act 1967.

* * * * *

These stated objects do not tell the whole story. A major motivation behind the RSC Act is undoubtedly the government's desire to clothe ethnic local authority bodies for Coloureds, Indians and Blacks with greater legitimacy. The RSC legislation seeks to achieve this in a number of ways. The ethnic bodies are to be given significantly greater power and influence than before, because they will now function as primary local authorities.³⁵ Their status is supposed to reflect equality with White authorities (even though their voting power will be

considerably less).³⁶ The new dispensation aims at enabling them to respond to electoral demands, because they are to obtain an independent financial basis - not only through levying rates on immovable property for their own budgets but more importantly, through funds channelled to them from the RSCs. Section 12(6) of the RSC Act is an important provision which determines that in appropriating funds, all RSCs

'shall give preference to the establishment, improvement and maintenance of infrastructural services and infrastructural facilities in areas where the greatest needs therefor exist.'

This is obviously aimed at improving 'non-White' areas. Finally, on this point, the participation of ethnic bodies in multi-racial RSCs is meant to lessen the 'racial' image of local government.

Tied to the legitimacy aim, is the political aim to use RSCs to quell political unrest - as part of 'the total strategy of upliftment and stabilisation of non-White communities'.³⁷ Or, as it was put even more bluntly by Mr L D Dekker, Director of Constitutional Development: 'RSCs are definitely cheaper than Casspirs'.³⁸

The point should also be made that RSCs do not represent a devaluation of political power to local authorities, as asserted by the government. On the contrary, as explained more fully under 7.3.6. herebelow, local government legislation in general, and the RSC Act in particular, clearly result in increased state centralisation of power and control.

7.3.4 *Establishment of RSCs*

The Administrator of the Cape Province has stated that the creation of a RSC in a metropolitan area involves 68 steps,³⁹ but

for our purposes the process may be more simply represented as involving essentially four steps,⁴⁰ requiring in each case a decision or decisions by the Administrator, viz:

- (i) Demarcation of the boundaries of PLAs⁴¹;
- (ii) Deciding on which PLAs are to constitute a particular RSC, and functions to be performed by the RSC;
- (iii) The demarcation of industrial areas and central business districts within the RSC area in terms of section 9(1)(a) of the RSC Act. (Regional services rendered in these areas do not count for the purposes of apportioning votes in the RSC);
- (iv) The creation of the RSC itself (for example the appointment of the chairman by the Administrator, and of members by the constituent PLAs).

The process of demarcation [(i) above] affirms the enhanced constitutional significance of group areas and the entrenchment of group areas thinking, as will be explained shortly.

The aim of demarcation in respect of local authorities which are to constitute PLAs in the RSCs context, is to establish a local government area which, according to the government, 'must be able to be demarcated as a geographically identifiable unit'.⁴² The size thereof 'and its development potential should be sufficient to enable self-supporting progress and to provide for the necessary expansion'.⁴³ The final decision in this demarcation process, and also in respect of the establishment of a RSC, or the investment of a management committee with executive powers,⁴⁴ is taken by the Administrator of the province concerned. He in fact acts as an instrument of the central

government. He has to consider a report by the Demarcation Board and consult local government institutions, but, more importantly, has to act with the concurrence of certain Ministers.⁴⁵

Section 17A of the Promotion of Local Government Affairs Act 91 of 1983 provides that the demarcation powers of the Administrator in respect of local authorities shall be exercised in accordance with general directives issued by the Minister of Constitutional Development and Planning. These directives obviously exercise a pervasive influence upon the demarcation process - the Demarcation Board would for instance naturally bear them in mind in advising the Administrator. The directives in question⁴⁶ provide that the Administrator must seek to establish 'a geographically demarcated area of jurisdiction according to the principles determined in Schedule 2.' And Schedule 2 then specifies as first criterion:

'The boundaries of an existing group area for the community concerned.'

So group areas constitute a vital component in the demarcation of PLAs which in turn function as the constituent units of RSCs.

Industrial areas and business districts obviously pose a problem in this group areas orientated demarcation process. They tend not to have such a pronounced group character - either on a *de facto* or *de jure* basis, by reason of the developments discussed in 2.4.5 and 7.2 above. Moreover, although these areas are excluded for the purposes of apportioning votes between PLAs in RSCs, their inclusion or exclusion from the area of a particular PLA would still be very significant, by reason of the high local authority rates payable on an industrial and

commercial property - which accrue to the PLA, not the RSC. To aid 'non-White' PLAs, the government has suggested that commercial and industrial areas falling generally within what may be termed 'non-White' areas, are to be taken away from White PLAs and transferred to 'non-White' ones.⁴⁷ An even stronger suggestion was made in the dying days of the 1985 Parliamentary session in an effort to discourage the blocking of the RSC Bill by the Indian and Coloured political parties. It was announced that in future the system of traditionally including industrial areas in White local authorities would be abandoned and that when new local authority areas were demarcated, industrial areas would be re-allocated to the local authority areas from which most of the workers came.⁴⁸ Whether these suggestions will actually be implemented, remains to be seen.

7.3.5 *Functioning of RSCs*

Much will turn upon the question whether a significant part of the revenue collected by RSCs will be channelled to the poorer 'non-White' areas. Such a process may not solve the legitimacy crisis and unrest situation facing government institutions in these areas, but on the other hand, lack of significant gains in this direction will certainly spell doom to the newly created RSCs.

The point has been made that section 12(6) of RSC Act provides that RSC revenues should preferentially be directed towards infrastructural services and facilities in the less well-endowed areas. This in effect espouses a limited

'redistribution of wealth' principle, and it appears bound to encounter problems on at least three levels.

Firstly, it runs counter to the strong 'free enterprise' rhetoric of the government which has also found application in the RSC Act. Thus under RSCs business enterprises are meant to fund local authority services on a consumer basis.⁴⁹ But what they pay will then not be spent on them by reason of the redistribution principle.

Secondly, and on a more specific level, such redistribution is contrary to 'the principle, which is accepted either explicitly or implicitly in local financing, that different areas of the city (however defined) should be self-financing - that is, that public expenditure on services in an area should preferably not exceed the revenue which can be raised from its residents.'⁵⁰ Thus White local authorities have consistently asserted through their mouthpiece, the United Municipal Executive, that they do not consider it their function to subsidise 'non-White' local authorities.⁵¹

Thirdly, because voting power on RSCs is to be apportioned on the basis of the amounts paid for regional services by the respective areas represented by the constituent PLAs,⁵² White local authorities representing the wealthier areas may well combine forces and block the channelling of funds under section 12(6). The central government will then have to force the issue - which brings us to the topic of central government control.

7.3.6 Central Government control

An examination of the RSC Act, and the other local government legislation which supports it, bears out a point made by several commentators:⁵³ RSCs do not represent a 'broadening of democracy' or 'devolution of power', as asserted by the government, but a centralisation of power with, at most, a delegation of administrative functions. This proposition may be substantiated by referring to the following illustrative features of RSCs:

(1) The Administrator plays a decisive role⁵⁴ in the establishment and control of RSCs. In our constitutional law he has traditionally been the representative of the central government,⁵⁵ and this is even more so under the new Provincial Government Act 69 of 1986.

(2) The financial affairs of RSCs are under strict central government control. The levels of the levies to be collected by RSCs are determined by the Minister of Finance.⁵⁶ He has to approve the RSC's annual budget,⁵⁷ and can generally regulate the financial affairs of RSCs by regulation.⁵⁸ The Administrator has a complementary general regulatory power which extends to all aspects of RSCs except financial matters. One very important financial matter does, however, resort under the Administrator: he may make regulations to ensure the preferential treatment of less well-endowed areas, as envisaged by section 12(6). So if White PLAs refuse to implement the limited 'redistribution of wealth' principle enshrined in this sub-section, the Administrator can enforce it by regulation.

(3) A wide range of decisions of a RSC is subject to appeal⁵⁹ to an appeal board consisting of (in non-financial matters) the Administrator, Minister appointed to administer local government matters for Blacks, and the three 'own affairs' Ministers for local government. In financial matters, the Minister of Finance takes the place of the Administrator on the appeal board.

7.3.7 RSCs - some conclusions

It is submitted that the chances of the RSCs operating successfully are slight. In the context of the present analysis, which has focussed on the group areas aspects of RSCs, the problems which face RSCs may be subsumed under two headings:⁶⁰ LACK OF LEGITIMACY and SYSTEMICAL CONTRADICTIONS. The latter refers to features of RSCs which conflict with policies or characteristics present in the South African political, constitutional or economic system.

(1) Lack of legitimacy

Separate representation by different racial groups based on the Group Areas Act is fundamental to the structure of RSCs. RSCs are further tied to the own affairs/general affairs distinction of the 1983 Constitution. These features completely overshadow the 'multi-racial' character of the RSCs themselves. As a matter of political judgment and political perception, Mr Gavin Reilly⁶¹ of Anglo American and many others⁶² appear to be right when they say that most 'non-White' communities reject all forms of separate representation and that this rejection extends to RSCs. The legitimacy crisis of management committees and community councils will thus be carried over to RSCs. It is

highly unlikely that the bringing about of material improvements in 'non-White' communities, even if this were to occur under RSCs, would reverse the deep-seated and long-standing political perceptions which underlie the legitimacy crisis besetting apartheid institutions.

(2) Systemical contradictions —

(1) RSCs seek to entrench group areas, and apartheid thinking in general, at a time when there is pressure for more social and political integration. When this issue is considered, in a group areas context, the position is that industrial areas and key business areas are being opened up, while, as indicated in 7.4.6 herebelow, the President's Council has apparently recently been willing to recommend the creation of residential 'grey areas'. RSCs represent a movement in the opposite direction, a clinging to and furthering of the original 'own communities' ideal of group areas. Gildenhuys has argued in the present context that the government is hedging between integrative and segregative options.⁶³

It may, however, be countered that this uneasy 'middle position' adopted by the government, viz open industrial areas and some open trade areas, but segregated residential areas represented in ethnic local authorities, makes sense in consociational or pluralistic terms. This issue is discussed under 7.5.2-3 herebelow. At this stage the following short answer may be offered: the present situation does not fit into any coherent consociational model; it is an *ad hoc* constitutional

construction which at most draws on certain pluralist notions and terminology.

(ii) The RSC Act presently provides⁶⁴ that Black local authorities *within the Black national states*, and even within the TBVC states, may form part of RSCs by agreement with the governments of these areas. The intention appears to be to include in RSCs Black townships (eg in Natal) which lie within national states (eg KwaZulu) but which abut metropolitan areas (eg Durban). As Cobbett et al point out, this constitutes 'a decisive break with the notion of the bantustans constituting independent economic and political units...'⁶⁵, which has been fundamental to much of government thinking to the present.

(iii) Representation of 'own communities' in the case of 'non-Whites' within the context of RSCs is belied by autocratic (White) central government controls. There is no true devolution of power to 'own communities'.

(iv) RSCs are intended to effect a limited 'redistribution of wealth' to areas with infrastructural deficiencies. This redistributive aim stands in contradiction to traditional principles of local government expenditure (which have not been abolished across the board) and also to the non-subsidy, consumer basis of RSC revenues. It also conflicts with the government's 'free enterprise' rhetoric. The redistribution aim embodied in section 12(6) of the RSC Act also comes up against a further systematic contradiction. The redistribution principle is stated in racially neutral terms but although White areas may theoretically benefit by it, it is obviously intended for the

upliftment of 'non-White' areas. This in itself does not pose such a problem - there may well be a large measure of consensus in our society with regard to the urgent need for the upliftment of such areas. But under RSCs the funds channelled for such upliftment (the necessity of which is to be judged in racially neutral terms) are to be administered by racially defined local authorities in respect of racially defined areas. Upliftment is thus not simply a town planning or urban renewal exercise - it strengthens group areas.

(v) The improvement of the financial position of local authorities is vital to RSCs. This aim is, however, undermined by certain government policies which operate at a national level. Metropolitan industrial development, which is required to boost RSCs' revenues, conflicts with the government's policy of industrial deconcentration and decentralisation. The stimulation of industrial development in a particular urban area may also conflict with physical planning policies enshrined in guide plans.⁶⁶ The Draft Guide Plan for the Cape Metropolitan Area for instance limits the amount of new industrial land which may be developed since it is government policy that industrial development should be concentrated at Atlantis or alternatively, outside the Western Cape Region.⁶⁷

* * * * *

Having examined free trade areas and RSCs as two important recent developments in a group areas context, we now turn to deal with public commissions which have investigated various aspects of group areas. This discussion is to serve as a springboard for

the evaluation undertaken in the final section of this chapter, namely of the prospects for further reform in respect of group areas.

7.4 *Commissions of Inquiry*

In recent years a number of government commissions and committees have investigated and reported upon the Group Areas Act or aspects thereof. In the present section the more influential of these will briefly be referred to or discussed. This is done to reflect developments in thinking on matters relating to group areas and to give an indication of the background to some of the legislative developments discussed in the earlier parts of this study. Ultimately the present overview of commissions of enquiry is to serve as a basis for the concluding part of this chapter, dealing with an Evaluation of the Prospects for Reform.

7.4.1 *Theron Commission*

This commission,⁶⁸ which investigated the position of the Coloured population group, came to the conclusion in 1976 that a 'point of no return' had been reached as far as the principle of group areas was concerned. Group areas, it was stated

'form part and parcel of the basic pattern according to which society as a whole is ordered, the essential structure of which cannot therefore be disturbed, particularly so far as residential areas are concerned'.⁶⁹

It did recommend the opening up of main business and industrial areas, and that local authorities be given the power to authorize the use of entertainment and recreational facilities by all groups.⁷⁰ The government accepted the first recommendation (in the case of business areas relying on the 'old' section 19), but

only went along with the second to the extent of accepting the need for the existence of Coloured facilities in White towns and for the selective opening up of certain facilities.⁷¹

7.4.2 Riekert Commission

In reporting on legislation affecting the utilisation of manpower, the Riekert Commission⁷² in 1979 again recommended the institution of free trade areas, which recommendation was accepted by the government.⁷³ A further important recommendation⁷⁴ which was likewise accepted,⁷⁵ called for the exemption from the application of the Group Areas Act of 'all categories of bona fide employees so that they may occupy the premises of their employers with the object of performing the work for which they were employed'.⁷⁶ This recommendation was first implemented subject to 'racial' conditions such as the provision, in proclaimed group areas, of separate ablution and toilet facilities for different groups, but these conditions have been omitted from the present exemption relating to employees.^{76a}

7.4.3 President's Council

The President's Council, which was created in 1980, has concerned itself with group areas since it started to function in 1981. In that year it reported on two particularly controversial group areas, namely District Six and Pageview. It recommended that District Six (White since 1966) be proclaimed Coloured and that the proposed 21-hectare Cape Technikon be erected elsewhere. In the case of Pageview, it was proposed that it should become an Indian area.⁷⁷ Probably as a result of the recommendations, approximately one-fifth of District Six was proclaimed a Coloured

group area in January 1983.⁷⁸ The construction of the Technikon, however, went ahead in District Six, and Pageview has remained White.⁷⁹ It was also recommended that a committee be appointed under the chairmanship of a judge to investigate the Act and related matters. This led to the appointment of the Strydom Committee in November 1981 (7.4.5 below).

In 1982 the President's Council reported⁸⁰ on the principles and implementation of the Act. The Joint Committee reported that it was not 'opportune' to recommend the repeal of the Act to the State President at this stage.⁸¹ The most significant recommendation made was that the Group Areas Board should be required, before reporting to the Minister on the proclaiming of a group area, to satisfy itself that suitable accommodation of a standard comparable with that of the accommodation in the area in question was available for disqualified persons outside the area.⁸²

In 1982 the President's Council also published an influential report on local and regional management systems, which is discussed in 7.4.4 below.

The Council's Committee for Economic Affairs reported in 1985 on regulatory measures which hinder small businesses.⁸³ It urged the opening of all business and industrial premises and warned against giving local authorities a decisive say in the matter, because conservative White local authorities could then thwart the principle of free participation in the economy.⁸⁴

7.4.4 Local Government

late 70's implementation

Since the late seventies there has been a ~~spate~~ of commissions and committees investigating aspects of local government which touch upon group areas. For the purposes of our discussion, these will be grouped as follows:

- (i) the three committees of the late seventies dealing with the management committee system;
- (ii) the comprehensive 1982 report of the President's Council, and
- (iii) the Browne and Croeser reports focussing on financial aspects of local government.

The Yeld,⁸⁵ (TG) Schlebusch⁸⁶ and Slatter⁸⁷ Committees affirmed that management committees were beset with severe problems⁸⁸. Yeld and Slatter found that Coloured and Indian group areas were generally incapable of being constituted as independent, viable local authority areas. Financial restraints were noted, as well as the need for outside financial support if such local authorities were to be created. All three committees also found widespread rejection of the management committee system amongst Coloureds and Indians - even those working 'within the system'.

The 1982 report of the President's Council on local and regional management systems⁸⁹ is of particular importance, since it laid the foundation for RSCs. It also set out criteria for the establishment of new local authorities. Economic viability and geographical distinctness were stressed, as well as ethnicity as 'a factor round which local government (could be)

organized'.⁹⁰ Additional sources of local authority revenue in the form of payroll and turnover taxes were suggested, and a distinction drawn between 'hard' and 'soft' services - the former should be supplied by regional bodies. The management committee system was labelled as 'far from satisfactory' but its retention pending 'more satisfactory arrangements' recommended.⁹¹

On the financial side of things, the Browne Committee⁹² in 1980 made numerous recommendations affecting local authority finance. For our purposes two are presently of importance. It did not recommend additional sources of revenue and did recommend the subsidising of 'non-White' local bodies by means of regular transfer payments from White local authorities.

Both these recommendations met with opposition from various quarters and the subsequent investigations and reports⁹³ of the Croeser Working Group of the Department of Finance (which during 1983 became the Permanent Finance Liaison Committee) led to their rejection. Croeser advocated new sources of local authority revenue in the shape of a payroll, turnover and investment tax. The Margo Commission of inquiry into tax structures has been requested to look into the latter,⁹⁴ but the other two taxes have, of course, now been introduced as the two types of levies which are to finance RSCs. Two further recommendations of Croeser which have found their way into the RSC Act relate firstly to the joint provision of services at the regional level, and secondly the need to impose central government control over the financial expenditure patterns of local authorities.

7.4.5 Strydom Committee

The report of the Strydom Committee which was published in the second half of 1983,⁹⁵ is of particular importance in a group areas context. Its terms of reference specifically stated that the principles contained in the Group Areas Act and other Acts to be investigated could not be questioned - in particular, the 'principle of separate residential areas as contained in the Group Areas Act' had to be retained.⁹⁶ The most important guidelines accepted by the Committee in its report were the retention of separate residential areas, 'balanced participation' of all groups in the economy and trade in a 'capitalistic free market system', and the devolution of control of spatial segregation from the central government - to local authorities, owners of property and controllers of public facilities.⁹⁷

The Committee's findings and recommendations were embodied in a draft Bill, entitled the Land Affairs Act - the title was explained on the basis that 'land is the basis of all human behaviour on which the (four) acts (incorporated into the new Act)⁹⁸ have a bearing'.⁹⁹ The most significant proposal incorporated in the Bill entails replacement of the present group areas system of control and enforcement with control through restrictive conditions in title deeds - a complete reversal of the present position.^{99a} The proposed Act would insert conditions in title deeds in all group areas, excluding 'holding' or occupation by disqualified persons.¹⁰⁰ These conditions would then be enforceable 'as if they were conditions of title in township establishment',¹⁰¹ thus as reciprocal negative

servitudes applicable to all erven in the township.¹⁰² Any owner in the township, the township developer or the local authority could enforce the restriction,¹⁰³ and the Committee intended that enforcement would largely be left to their initiative. (It is interesting to note that the chairman of the committee, Mr Justice JJ Strydom, comes from Namibia. As explained in 8.2.2 below, the Group Areas Act never applied in Namibia; in a city like Windhoek residential areas for Whites were reserved through township establishment conditions). The Act proposed by the Strydom Committee does, however, contain further drastic sanctions. Owners of land must see to it that there is no occupation in conflict with a condition of title applying to their land. Any owner who 'knowingly neglects' to comply with this duty, commits an offence - and the criminal court may 'confiscate the land for the State'.¹⁰⁴

It is also provided that any court which finds that land is held ('besit') contrary to such condition, may order that the proprietary right ('eiendomsreg') to the land 'shall pass to the State'.¹⁰⁵ (These draconian measures prompted *inter alia* a sharply worded memorandum of protest from the General Council of the Bar.)¹⁰⁶

In contrast with the Group Areas Act, the proposed Act leaves 'immovable property' undefined. 'Occupation' is equated with 'physical presence' and certain activities are then exempted from this very wide definition: the performance of work, temporary physical presence to use services or conveniences

offered to the public, attendance at sports meetings and presence as a guest (also in a club).¹⁰⁷

Further noteworthy proposals included free trade areas (in central business districts only)¹⁰⁸ and tying group identity under the proposed Act to classifications under the Population Registration Act 1950 - but retaining the 'rule of attraction' of the present Group Areas Act.¹⁰⁹

The Report also contains an alternative, consolidating draft Bill.¹¹⁰ It follows the present Group Areas Act more closely in that it does not resort to the use of title deed conditions. It does, however, also incorporate the other suggested innovations, such as the far-reaching forfeiture provisions discussed above.

In December 1984 the Strydom Report was referred to the President's Council for consideration and advice.¹¹¹

7.4.6 Latest investigation by President's Council

By August 1986 the Council had completed its investigations and prepared its report, which was submitted to the Cabinet. During November 1986 it was then in effect embargoed by the Cabinet in a move which caused a small political storm¹¹² - the President's Council, prompted by the Cabinet, referred the report back to its Constitutional Committee, and the Council's secretary stated that it would only be released 'some time' during 1987.¹¹³

In the circumstances it is not possible to discuss the report. Brief reference will, however, be made to background aspects of the report and also to the probable reasons for the eleventh hour embargo imposed by the government, as these have a bearing on future prospects for reform.

The Council was originally requested to investigate and report on the Strydom Report, and also two further reports which were published during 1984: that of the Van Zyl Committee on the demarcation of geographical areas of jurisdiction of local authorities,¹¹⁴ and the Venter Commission on township establishment.¹¹⁵ These last two reports will now briefly be discussed.

The report of the Van Zyl Committee is remarkable for the extent to which it recognised group areas as the guiding principle for the establishment of local authorities. Existing group areas, it was said, 'should serve as a basis and point of departure for the demarcation of a geographical area of jurisdiction'.¹¹⁶ With regard to the process of demarcation, the first criterion put forward was 'the principle of own homogenous areas for the various population groups in which each group can realise self-determination'.¹¹⁷ It was proposed that a new body, the Demarcation Board, should advise on the demarcation of both group areas and new local authorities.¹¹⁸ To 'prevent divided control', free trade areas and industrial areas should preferably form part of the jurisdiction of a single authority.¹¹⁹ Industrial areas which fall outside existing group areas, should be allocated to 'non-White' authorities to improve their financial basis.¹²⁰

The Venter Commission investigated township establishment primarily to establish ways in which more residential erven (and housing) could be provided more expeditiously and less expensively. Again the (majority) report was premised on group

areas thinking. Housing needs for population groups were differently assessed on the basis of the 'the present housing pattern',¹²¹ and it was suggested that group areas should formally be made part and parcel of the general planning process. It was recommended

'that group area planning activities and the identification of residential areas for Blacks ... should be dealt with as part of guideline planning at the regional, subregional and urban levels and that group area planning should form an element of the above-mentioned plans.'¹²²

(We have seen that in practice considerable 'group area planning' is in fact done by guide plan committees.)¹²³

The PFP members of the Commission filed a minority report,¹²⁴ condemning the negative influence of the Group Areas Act in the supply of housing and the planning process. According to them it intruded into the free market system by creating imbalances between supply and demand, and by limiting private sector initiative.

Having now discussed the three reports which the President's Council had to consider, we turn again to the question why the Council's report was embargoed late in 1986. The relevant press reports¹²⁵ at the time (which, on the basis of my own investigations, appear reliable) stated that particularly the State President and Minister of Constitutional Development and Planning were concerned about the Council's recommendation that 'grey' residential areas may be created in terms of a 'local option'. This was feared because it could

(i) undermine segregated schooling and (ii) fuel demands for 'mixed' electoral rolls at municipal and national level. The

important question thus arises: what would be the practical impact of 'liberalising' measures such as 'grey' residential areas and to what extent can such a development be encompassed within the ideological framework of the government's constitutional plans? This brings us to the final section in this chapter.

7.5 *Evaluation of prospects for reform*

7.5.1 *Introduction*

The law relating to group areas appears to have reached a critical stage. At the moment this area of the law is subject to strongly conflicting political inputs. On the one hand, there is a 'liberalising' trend which has manifested itself not only in numerous calls for the abolition or drastic modification of the Act,¹²⁶ but also in legislative reforms such as the creation of open industrial and free trade areas, and the relaxation of social apartheid. On the other hand, there is a 'conservative' tendency, manifested primarily in the present government's determination and elaborate legislative efforts to constitutionally entrench group areas through RSCs and, apparently, to resist any further changes (such as 'grey' residential areas by way of a local option) which could jeopardize its political 'non-negotiables' such as segregated residential areas and segregated schools.

The aim of the present section is to provide an evaluation of the prospects for reform on a theoretical level - in other words, to assess what changes or reforms are compatible with current constitutional theories. As it appears that the present

government will remain in power for the foreseeable future, special attention will be paid to the constitutional theories espoused by it and developments which may flow from these theories.

No general attempt will be made to predict when or under what *political* or *socio-economic* circumstances the changes to be discussed, would come about, but some of the factors influencing the prospects for change, and the probable effects of certain changes (such as the introduction of 'grey' residential areas) will be pointed out. The probable effects of the *abolition* of all group areas legislation are to be canvassed in the next chapter.

7.5.2 The 1983 Constitution¹²⁷

Although consociationalism,¹²⁸ and consociationalist or pluralist¹²⁹ concepts featured prominently during the early planning stages¹³⁰ of the new Constitution, the government eventually rejected reliance on consociationalism in sponsoring the 1983 Constitution. The Minister of Constitutional Development and Planning said in Parliament during 1983:

'The President's Council recommended a consociational democracy (but) we did not accept that. We accepted elements of a new system, and retained elements of the old.'¹³¹

The legal and political regime created by the 1983 Constitution, and the legislation that complements it, cannot be described as 'consociational' when tested against the central tenets of this constitutional theory in its developed form.¹³² The 1983 Constitution is rather an *ad hoc* construction which displays elements of diverse constitutional models - essentially

of the Westminster system, presidentialism, consociationalism, the conflict pluralist model¹³³ and partition.

The Constitution's limited (or 'pseudo-') consociational features are of importance in the present context because some of them tie in with the present constitutional role of group areas. This interconnection will be discussed after a brief evaluation of the (non-) consociational nature of the 1983 Constitution. In this evaluation familiarity with the general structure and operation of the 1983 Constitution is assumed..

Consociational democracy seeks to accommodate the deep cultural or ethnic cleavages in a plural society essentially through the interaction of four constitutional principles: (i) grand coalition of political élites of all significant groups; (ii) mutual veto for groups; (iii) high degree of internal autonomy for groups; (iv) proportional representation and proportional allocation of civil service positions and funds.¹³³

Analysis of the 1983 Constitution reveals how far it deviates from a truly consociational model. Here the following may be mentioned: there is firstly no grand coalition or consensus of political élites. Blacks are excluded from participation in most of the important political processes. The groups that are allowed to participate have been defined and circumscribed by the dominant (White) group. The Constitution allows domination by a segment of the White group (the majority party in the House of Assembly) which in effect elects the State President who occupies a pivotal position.

There is secondly no genuine mutual veto. By reason of the dominance of the majority party of the House of Assembly in the President's Council, (which can in effect pass legislation rejected by one or two of the three Houses of Parliament) only a dilatory veto is, for instance, available to Coloureds and Indians in the legislative process.

Thirdly, genuine segmental autonomy is absent. 'General affairs' institutions and processes dominate those of 'own affairs' - for instance, through financial control and in relation to the determination of the dividing line between 'general' and 'own' affairs.

Fourthly, the majoritarian features of the constitution negatives proportional representation and there is no guarantee or practice of the proportional allocation of civil service positions or public funds.

In measuring the Constitution against the precepts of consociational *democracy*, it should be added that the Constitution is operating not in an environment of political freedom, but of progressive authoritarian control - particularly in terms of the State(s) of Emergency.

Although the 1983 Constitution thus deviates sharply from a consociational model, it does display some of the structural features of consociationalism and utilizes its terminology. In relation to group areas, the most important such feature is the dichotomous distinction between 'general' and 'own' affairs. 'Own affairs' are said to be matters 'which specially and differentially affect a population group in relation to the

maintenance of its identity and the upholding and furtherance of its way of life, culture, traditions and customs',¹³⁴ and include housing, schools, social welfare and local government.¹³⁵ In relation to 'own affairs' matters, so it is asserted by the government, each group is to exercise what in consociational terms would be 'segmental autonomy', that is manage its own affairs with as little as possible interference from other groups. Thus in relation to the RSCs Act the government stated that it envisages:

'own local government institutions through which each group exercises self-determination over own affairs and which are a constitutional mechanism to protect minority rights; and general local government institutions such as regional services councils in which the various groups make use of their own institutions as a power base to co-operate with one another on matters of general concern which affect all groups.'¹³⁶

The special importance of the system of group areas to this constitutional set-up is that it enables 'own affairs' to be 'territorialized'. This is so not only in relation to local government (where ethnic PLAs are to administer essentially ethnic areas) but also in relation to housing, schools, social welfare and health (eg clinics): the existence of group areas enables the ethnic 'own affairs' administrations to focus these services in 'their' respective areas.

If group areas were to be abolished, it would sever the conceptual link between 'own affairs' and specific areas. (On a practical level it would, of course, take some time for the areas to lose their by now firmly established group character.) In as much as the government appears to be wedded to a pluralist or

group orientation in its constitutional plans, it would then have to cope with 'the jurisdictional complications inherent in non-territorial units'.¹³⁷

The fact that group areas serve to 'territorialize' own affairs explains the government's reluctance to allow the introduction of residential 'grey' areas in terms of a generally available local option. Of course, a limited number of 'grey' residential areas could be tolerated as exceptions and handed over to established local authorities such as the Cape Town City Council, in the way that open industrial and free trade areas are to fall within the jurisdiction of specific (ethnic) PLAs in terms of the pending process of demarcation of local authorities. But the severing of the own affairs - ethnic PLAs - group areas conceptual chain would raise serious problems - for instance, would everybody living in a 'mixed' area be allowed to vote for the PLA in question? Moreover, on a practical level a substantial number of such areas would generally undermine ethnic local authorities. The rise of legally recognized 'grey' areas would also complicate the 'territorialising' of own affairs services - whether they are to be performed by third tier ethnic PLAs (eg aspects of housing) or by the first tier own affairs government departments (eg schooling). If the territorial basis of own affairs were to be dissipated, the own affairs/general affairs distinction of the 1983 constitution could only be sustained by relating own affairs matters to group members on a personality rather than a territorial basis. But certainly at the local authority level of government this would simply be

impractical. All the South African commissions and committees of enquiry dealing with local authorities have accepted the inevitability that the jurisdiction of a local authority must be coupled to an area capable of demarcation as a geographically distinct unit. And in Namibia the Commission of Experts on Legislation for Local Authorities accepted that with 'the opening of all residential areas to all races, all talk of Black, Brown or White towns has lapsed'.¹³⁸

The significance of group areas to the new Constitution is further reflected in the ambivalent attitude that the Coloured Labour Party, one of the National Party government's 'junior partners', has displayed towards it. At its 1985 party congress its leader said loudly: 'To hell with group areas'.¹³⁹ Yet in a parliamentary debate on abolition of group areas during the same year, Mr D Curry, its Minister of Local Government, Housing and Agriculture cautioned that the structures within which the party operated, at parliamentary and local government level, 'are closely connected to where people may live in defined areas'.¹⁴⁰

1985
 Rev. Nona Hendricks
 ...
 ...

7.5.3 *The 1983 Constitution - possible developments*

In the discussion of consociationalism and the 1983 Constitution the point was made that the latter was not truly consociational. Although the own/general affairs distinction is held out by the government as a manifestation of segmental autonomy, this is far from true. General affairs predominate over own affairs and general affairs are in turn controlled by the dominant faction within the White group.

The 1983 Constitution and the legislation which complements it (like the RSC Act) display some of the structural features of consociationalism and partake of its vocabulary, but this appears best explicable with reference to Lustik's¹⁴¹ theory of control relating to deeply divided socio-political systems. This theory shares with consociationalism the pluralist notion that certain societies are fundamentally divided into rivalling segments. But whereas consociationalism (and particularly consociational democracy) seek to accommodate societal division through mutual co-operation, compromise and consensus, the control theory espouses a conflict pluralist model¹⁴² and holds that political hegemony of one segment is necessary for stability and prosperity in society. Translated into the South African context, this has meant domination by the White group. In general terms domination can be imposed by coercive and non-coercive measures, and the 1983 Constitution features both types of measures. Thus the own affairs/general affairs dichotomy of the new Constitution has both coercive and non-coercive sides to it. It is coercive in the sense that the definition of the participating groups

(primarily Whites, Coloureds and Indians and in RSCs, also Blacks) and the division between own and general affairs have been dictated by the dominant White group. It also has non-coersive aspects: the Constitution can only function on a 'multi-racial' level¹⁴³ through the co-option and co-operation of at least a certain number of Coloured and Indians, and at the level of RSCs, also Blacks.

It appears probable that, certainly for the near future, the government would (i) persist in opting for a control model in dealing with the South African plural society and (ii) would seek broad continuity with the 1983 Constitution when implementing reforms. But ways may very well be sought to minimise the profile of the controversial group areas system. Of interest in this context is the analysis by Cobbett et al of the governments regionalisation strategy.¹⁴⁴ As the authors point out, there are indications that the government is considering a federation of the eight development regions. These new spatial units would 'cross-cut or by-pass existing, highly politicised spatial units - such as bantustans and group areas'.¹⁴⁵ (An interesting example of such cross-cutting at a lower level has recently occurred through an amendment to the RSC Act which allows Black local authorities *within Black national states* to participate in RSCs).¹⁴⁶ In terms of this scheme of regionalisation, group areas would continue to be of significance at the lowest and most parochial level of local government, but race or ethnicity would cease to be the organizing principle at the higher levels of government.

Such a scheme would, however, retain the essence of group areas. When more fundamental change is considered, there appear to be, broadly speaking, two possible directions of change. Group areas may be retained but within a different pluralist constitutional theory - such as consociational democracy. This is to be examined in the next section. Or group areas may be abolished and political accommodation in South Africa sought along lines which reject territorial segregation of a group areas type. Aspects of this latter possibility are discussed in chapter eight.

7.5.4 *The SPROCAS proposals*

On the basis of the foregoing argument the introduction of reforms such as 'grey' residential areas would, certainly in the long run, require changes to the present constitutional set-up. In this regard the 1973 SPROCAS Report *South Africa's Political Alternatives* deserves close attention. It effectively introduced consociational thinking to the South African political and constitutional scene and although its impact was limited at the time, 'it laid the groundwork for much reformist thinking in the National Party as well as in white opposition parties in the late 1970's'.¹⁴⁷

A number of important recent developments with regard to group areas, namely free trade areas, ethnical local authorities and RSCs, have closely echoed the reform proposals of this Report.¹⁴⁸ The Report certainly at present appears to have a continuing influence on government thinking with regard to group areas and related matters. It is also of special importance

because in general much reformist thinking in South Africa presently involves consociational or pluralist concepts.¹⁴⁹ One of the special merits of the Report, namely that it advocates a transition from an apartheid society to an *open, democratic* plural society, does, of course, render it inconsistent with the present government's policies. But the intellectual and moral weight of a striving to achieve such a society, coupled with the practical necessity for true change, to avoid a prolonged civil war, may well cause the ideas espoused in the Report to have a decisive influence with regard to group areas.

The model for transition proposed by the SPROCAS Report¹⁵⁰ provides essentially for the phasing out of the majority of group areas. This gradualism may be perceived as an advantage vis-à-vis the issue of White acceptance.

At the first stage of the transition it is proposed that 'grey' (open) areas should be created, including in all areas 'frozen' under race legislation at the time (which would presumably include for instance Durban's Block AK and Cape Town's District Six). Open areas so created should be allocated to specific local authorities and all those living there should be fully represented on the authority in question. 'Ethnic' local authorities should be created for declared Coloured and Indian group areas, and for Black townships. The declaration of further group areas should be avoided, but if unavoidable, all population groups should be consulted and represented on the Group Areas Board. (It is of interest to note that the President's Council is apparently contemplating a proposal for a 'mixed' Group Areas

Board¹⁵¹). Local authorities (and communal councils for Coloureds, Indians and Blacks¹⁵²) are to be represented on Planning and Co-ordinating Committees, which are to have co-ordinating responsibilities and powers for matters such as regional planning and transport - in other words bodies similar to RSCs.

The second stage would involve transitional constitutional negotiations by all groups which would determine the shape of the new constitution. Certain arrangements which may flow from the first stage are, however, suggested in the Report. These include the expansion of 'open areas' - all commercial centres of cities and towns and industrial areas, as well as specified new residential areas, would be open. These 'open' or 'common' areas would be administered by fully representative multi-racial local authorities. Proclaimed group areas would be 'retained mainly in residential areas and only where that is required by the local residents themselves.'¹⁵³ Group areas would be administered by ethnic local authorities. In such group areas the local authority would still be allowed to segregate public facilities, and privately owned facilities in common areas might be segregated by the owners with approval of the municipal authority.

The situation envisaged in the Report differs from the government's RSC system in that (according to the Report) group areas are retained only by way of exception, while large areas will be controlled by multi-racial (primary) local authorities. The 'local option' suggested in the Report (namely the retention

of group areas where required by local residents) suffers, however, from the familiar drawbacks of such an option: it allows those privileged through the operation of an unfair apartheid system to perpetuate their privileged position and leads to the establishment of 'enclaves of segregation' which, if the history of the US civil rights movement is considered, are both hard to eradicate and a particularly divisive influence in society.

On the other hand, such a local option does allow for flexibility and as a method to initiate a desegregation movement in South Africa, it may well be acceptable to the majority of the Whites - the group that happens to have the most political power in South Africa.

A merit of the SPROCAS proposals is that they clearly seek to break the stranglehold of the system of group areas upon constitutional planning. The political, moral, economic and practical difficulties besetting group areas have been brought out in the present study. Group areas are also unacceptable to the majority of South Africans. It follows that any constitutional model which seeks to cater for ethnicity or group rights, cannot use group areas as a component if it is to be successful. Although the SPROCAS proposals allow for the retention of group areas in a limited and residual sense, their main thrust¹⁵⁴ appears to be that ethnicity or group rights should be accommodated through a federal constitutional structure, with the constitutional entrenchment of civil liberties and minority rights, and corporate federalist representation for those ethnic groups which seek such

representation - with the important rider that membership of such groups (such as the 'Afrikaans National Culture Group') should be voluntary.

The retention of group areas, albeit in a limited sense, at the final stage of constitutional development does, however, remain a serious weakness in the SPROCAS proposals. As argued more fully in the concluding section of the next chapter, the abolition of group areas legislation and the counter-acting of the long-term effects of group areas, appear to be prerequisites for a just and endurable constitutional solution in South Africa.

CHAPTER SEVEN

ENDNOTES

- 1 In terms of Act 72 of 1985.
- 2 As cited in *Cape Times* 16 April 1985 p 4.
- 3 See below 7.4.6.
- 4 See generally Van Wyk I 75 - 77; Schoombee I par 7.2; Pirie G 'More of a blush than a rash: changes in urban Race Zoning' in SARS (ed): *South African Review* III (1986) 186.
- 5 See Schoombee I 104 and herebelow under 7.4.
- 6 See report part 19. In a press release by the Minister of Constitutional Development and Planning of 18 February 1985, it was stated that the Strydom Committee's report was referred to a select committee of the House of Assembly. The latter recommended the introduction of free trade areas as a matter of urgency.
- 7 By means of the Group Areas Amendment Act 101 of 1984 which came into operation on 30 May 1985 (Proc 91 of 1985 GG 9759 of 30 May 1985).
- 8 Proc 17 of 1986 - Appendix IV.
- 9 For Johannesburg see Proc 18 of 1986 and Durban Proc 19 of 1986 (GG 10100 of 21 February 1986) and Cape Town Proc 79 of 1986 (GG 19224 of 7 May 1986).
- 10 See *Die Burger* 9 October 1985 p 17.
- 11 See 4.2 above.
- 12 The use of 'or' is somewhat curious, but it is submitted that no special grouping of the five categories is intended - see Van Wyk I 76 n105.
- 13 The zoning requirement is thus stricter than the one contained in the exempted category of occupation relating to use for professional purposes (2.4.4.1(5) above), and akin (subject to the issue of use with permission discussed in the text) to the exemption in s 49A relating to industrial use (2.4.5 above).
- 14 Contrast the position in respect of industrial land (2.4.5 above).
- 15 Personal communication Mr Ward, Land Survey Branch of Cape Town City Council, December 1986.
- 16 HAD col 10107 28 June 1984.

- 17 See remarks by Mr D W Watterson NRP MP HAD col 9979-80 27 June 1984.
- 18 See n9 above.
- 19 Press release n6 above.
- 20 As quoted in *Cape Times* 24 March 1986 p6.
- 21 Minister of Community Development HAD col 9961 27 June 1984.
- 22 Interview Mr J W Fourie 5 September 1986 Cape Town.
- 23 See n20 above.
- 24 See par 52-60.
- 25 Par 54; and NP spokesmen in Parliament: HAD col 9979 & 9995 27 June 1984.
- 26 See par 60 and clause 13 of draft Bill (Report Annexure 1 p 24).
- 27 See above at n8.
- 28 See Evans G 'Jo'burg opens for black trade - but don't expect a flood' *Weekly Mail* 14-20 February 1986 p 4; Hurford N 'No scramble for 'open' trade' *Cape Times* 7 May 1986 p 9.
- 29 See in general Todes & Watson; Bennett M et al (eds) *Servicing the nation. Local & Regional Government Reform* (1986); Dewar N 'Municipal government under the new SA constitution: who gets what, where, who decides and who decides who decides?' (1985) 11 *Social Dynamics* 37; Todes et al 'Local government restructuring in SA: the case of the Western Cape' (1986) 12 *Social Dynamics* 49; Cameron R 'The rhetoric and reality of local government reform' (1986) 12 *Social Dynamics* 70.
- 30 It is apparently envisaged that in the Cape Province all or some of the Divisional Councils will individually be converted into RSC's - *Cape Times* 6 August 1986 p 7.
- 31 Functions to be undertaken by RSC's are listed in Schedule 2 of the RSC Act. Local bodies (PLAs) would be responsible for remaining local authority services. The position is, however, somewhat unclear, because Sch 2 refers *inter alia* to 'roads and stormwater drainage' and 'recreation facilities', while the President's Council's *Report on Local and Regional Management Systems in the Republic of S A* (PC 1/1982) which paved the way for RSC's, listed in par 6.18 swimming baths, pavements and streets in suburbs as 'soft' services to be undertaken by PLAs. See also Dewar N *op cit* (n29) 37 at 45 n8.

- 32 See n29 above, and 2.6 above; further also the discussion of the relevant commission reports in 7.4 below.
- 33 No 83-85 (GA) p 30.
- 34 HAD col 10762 6 July 1984.
- 35 Cf also s 17B of the Promotion of Local Government Affairs Act 1983 which provides for the transfer of executive functions to management committees even prior to the institution of RSC's - 2.6.2 above. This would enable management committees to function as PLAs in a RSC context without first becoming fully-fledged local authorities.
- 36 See below 7.3.5.
- 37 Mr C F Scheepers, deputy director-general of constitutional development, SABC news 29 November 1985, cited in Cameron op cit (n29) 72.
- 38 Quoted in *The Argus* 19 September 1986 p 1.
- 39 *Cape Times* 1 August 1986 p 3.
- 40 Cf Cameron op cit (n29) 74.
- 41 Existing local authority boundaries may be adjusted to allow the creation of new 'non-White' local authorities.
- 42 *Memorandum on the objects of the Local Government Affairs Amendment Bill 1985* (No 105-85 (GA)) p 17. See also President's Council's Report (n31) par 10.7 and n34 above.
- 43 *Memorandum* (n42) *ibid.*
- 44 In terms of s 17B of the Promotion of Local Government Affairs Act 91 of 1983.
- 45 See s 17B(5)(b) of Act 91 of 1983 and s 2(2)(a) of RSC Act.
- 46 GN 1111 of 24 May 1985 (GG 9751 of 24 May 1985).
- 47 Minister of Constitutional Development and Planning quoted in *Cape Times* 14 March 1986 p 4.
- 48 See Bennett M 'From the top down. RSC Structures' in *Servicing the nation* (n29) 5 at 10.
- 49 See above 7.3.3 (3).
- 50 Todes & Watson 49. See also *Cape Times* 26 May 1986 p 11.
- 51 Cameron op cit (n29) 73.

- 52 See s 9. Note that industrial areas and central business districts are excluded for present purposes. The RSC Act contains provisions which seek to prevent domination of a RSC by any single PLA - a particular PLA may not have more than 50% of the vote. Decisions in RSCs are also to be taken by a two-thirds majority vote - s 11(1).
- 53 See contributions in n29 above (except that of Dewar) and in *Servicing the nation* (n29), more specifically the contributions of Gildenhuys J S H 'The broadening of autocracy' 51 and Mansfield P 'Back to the drawing board' 59 at 65.
- 54 See Cameron op cit (n29) 73 and above at n40-41.
- 55 *Staatsreg* 398-400.
- 56 Section 12(1).
- 57 Section 12(4).
- 58 Section 13(2).
- 59 See generally s 11.
- 60 Other problem areas also exist: (i) RSCs will result in the creation of yet another unwieldy and costly bureaucracy. (ii) There have already been serious disputes on the demarcation of regions, (eg whether the Swartland Divisional Council should form part of the Cape RSC: *Cape Times* 26 February 1986 p 3; 1 March 1986 p 21). (iii) It has also been convincingly argued that the new turnover tax levies will discriminate against enterprises with large turnovers and low profit margins (see Solomon D 'Financial Implications of the Croeser Tax Package' in *Servicing the Nation* (n29) 26 at 29; *Cape Times* 5 May 1986 p 3). (iv) The payroll levy will affect workers' earnings, and both taxes will ultimately have to be paid by the workers and the consumer (Solomon ibid; Mr L Dekker of the Department of Constitutional Development and Planning, as cited in *The Argus* 19 September 1986 p 1). (v) These additional taxes are inflationary (*Cape Times* ibid; *The Argus* ibid).
- 61 See *Cape Times* 30 March 1986 p 4.
- 62 See inter alia Schlemmer L 'Concluding Assessment' in *Servicing the Nation* (n29) 68 at 70.
- 63 Op cit (n53).
- 64 See s 4(3), and also par (d) of definition of 'management body', inserted by Act 78 of 1986, which refers to Black local authorities in scheduled or released areas outside the National and TBVC states.

- 65 'South Africa's Regional Political Economy: A Critical Analysis of reform strategy in the 1980s' in SARS(ed) SA Review III (1986) 137 at 143. See further at n142 et seq below.
- 66 Gildenhuys op cit (n53) 54; on guide plans, see above 2.5.2.
- 67 See Draft Guide Plan (1984) 110-112, 136-8, and Todes et al (n29) 64.
- 68 See Report of the Commission of Inquiry into matters relating to the Coloured population group (RP 38/1976).
- 69 488.
- 70 Ibid.
- 71 White paper on the report of the commission of inquiry into matters relating to the coloured population group (WPD-1971) 7.
- 72 Commission of inquiry into legislation affecting the utilization of manpower (excluding the legislation administered by the departments of labour and mines) (RP 321 1979) par 7.192.
- 73 White paper on Report (WPT-1979) 14.
- 74 Par 7.194.
- 75 White paper 13-14.
- 76 See above 2.4.4.1 (4).
- 77 Report of the President's Council on the Group Areas Act...with special reference to Zonnestoep (District Six) and Pageview (PC 1/1981) 9-10.
- 78 Survey 83 242; Cape Times 11 January 1983.
- 79 Survey 84 483-4.
- 80 Joint Committee consisting of the Planning Committee and the Committee for Community Relations of the President's Council: Report on Principles and Implementation of the Group Areas Act (PC 2/1982).
- 81 Par 7.1.1.
- 82 Par 7.2.2, with reference to s 5(6) and 23(1) of the Act. on the present state of the law, see 5.4.3. above.
- 83 Report on Strategy for small business development and for deregulation (PC 4/1985).
- 84 Par 3.18. Contrast the earlier Report on Measures which restrict the functioning of a free market orientated system in SA

(PC 1/1984) which still stated that free trade areas should be established 'in consultation with, but preferably at the request of the local authorities concerned'. (par 6.17).

85 *First and Second interim reports of the Committee of Inquiry into the establishment of independent local authorities in Coloured Group Areas. (1978).*

86 *Final report of Work Committee that inquired into the powers, duties and functions of Management Committees (1978).*

87 *Report of the Committee of Inquiry into the establishment of independent local authorities in the Indian group areas (1979)*

88 Their findings correspond with the points made in 2.6.3 above.

89 See n31 above.

90 Par 10.8 and p 106.

91 Par 10.9

92 See *Report of the Committee of Inquiry into finances of local authorities in SA (RP 50, 51, 80 & 81/1980).*

93 See *Report of the Croeser Working Group on the report of the Committee of Enquiry into the finances of local authorities (1982).* See further Survey 1984 153-4 and Dewar op cit (n29) 40-1.

94 Survey 1984 155.

95 *Report of the Technical Committee of Enquiry into the Group Areas Act 1966, the Reservation of Separate Amenities Act 1953 and related legislation.*

96 Par 1.

97 Par 166.

98 These are the Group Areas Act 1966, the Reservation of Separate Amenities Act 1953, the Slums Act 1979 and the Community Development Act 1966 - see par 167-8 of Report.

99 Par 169.

99a See ch 8 n117.

100 Section 5; annexure 1 p 12.

101 Section 7; op cit 14.

102 See Van der Merwe 357.

- 103 See Van der Merwe 357-60; Baxter 663-4.
- 104 Section 19 Annexure 1 p 30. Knowledge on the part of the owner is to be presumed until the contrary is proved *beyond reasonable doubt*. The owner or his assignee may without obtaining a court order eject anybody who occupies in conflict with a condition of title - if necessary by force.
- 105 Section 7; op cit 14.
- 106 General Council of the Bar of S A: *Chairman's Report (39th) 1984/1985* (1985) 8.
- 107 Section 1; op cit 4. Provision is also made for further exemptions by the Minister - s 3(2), while the provisions of the present Reservation of Separate Amenities Act 1953 are essentially contained in s 1(2) and (3).
- 108 See above at n24-26.
- 109 Respectively ss 1 and 4.
- 110 Annexure 2.
- 111 See GN 896 of 1984 (GG 9532 of 21 December 1984).
- 112 See *The Argus* 21 November 1986 p 1; *Cape Times* 22 November 1986 p 6, 24 November p 3, 25 November p 1, 26 November p 3.
- 113 Reported in *Cape Times* 21 November 1986 p 3.
- 114 Council for the Co-ordination of Local Government Affairs *Report and Recommendations of the Committee of Enquiry into the demarcation of geographical areas of jurisdiction of local authorities* (1984).
- 115 *First-Third Reports of the Commission of Inquiry into township establishment and related matters* (RP 20, 21 and 52/1984).
- 116 Par 5.4.2; also par 6.4.
- 117 Par 6.1.
- 118 Par 5.3.10. Such an advisory Board was created in 1985 by the insertion of Ch 1A in the Promotion of Local Government Affairs Act 91 of 1983. It has, however, not yet taken over the functions of the Group areas Board and the Demarcation Board is not bound by statutory criteria (as suggested by the Van Zyl Committee par 6). In demarcating local authorities the Administrator is, however, bound by 'general directives' issued by the Minister of Constitutional Development and Planning (s 17A of aforementioned Act).

- 119 Par 7.2.7.
- 120 Par 7.2.4.
- 121 First Report par 4.3.
- 122 Third Report par 2.4.2.
- 123 Above 2.5.2.
- 124 Par 10 (Annexure 1).
- 125 See above n112-3. An earlier, unconfirmed report indicated that the President's Council would reject the reliance of the Strydom Committee upon title deed conditions instead of the prohibitions of the Act, and would propose a mixed Group Areas Board - *Cape Times* 24 April 1985, p 5. At the end of 1986 the indications were, however, that the President's Council was favourably considering the transposition of group areas controls to a town planning sphere by means of conditions of establishment (which would be noted against the title deeds of the property concerned).
- 126 See ch 1.1. above.
- 127 This is meant to refer primarily to the Republic of South Africa Constitution Act 110 of 1983, and secondarily to the most important legislation (eg the RSCs Act) that complements it.
- 128 See generally Boulle and for a recent statement relating to SA, Lijphart *A Power-sharing in SA* (1985).
- 129 'Pluralist' and 'pluralism' are used herein with reference to what Boulle described as: 'the plural society tradition (which) focusses on the cultural diversity in society and its negative implications for the political process and the stability of the system.' (33) In the context of the 1983 Constitution, two opposing accommodations of this basic pluralist point of departure arise: the conflict pluralist model (characterised by the domination of one group) and the consociational model (where stability and conflict avoidance are sought through negotiation and co-operation at the élite level) - cf Boulle 34.
- 130 Particularly the *First Report of the Constitutional Committee of the President's Council* (PC 3/1982). It favoured 'consociational democracy' for non-Blacks and 'multiple partition' for Blacks. See generally Boulle ch 6 et seq.
- 131 HAD col 11579 18 August 1983.
- 132 Boulle ch 3; Lijphart 6.
- 133 See n 132 above.

- 134 Section 14(1) of 1983 Constitution Act.
- 135 See Schedule 1 of the 1983 Constitution Act. In terms of s 16 the State President has the final say on where the dividing line should be drawn. See generally Dean WHB 'A new constitution for SA?' (1984) 33 *Jahrbuch des öffentlichen Rechts der Gegenwart* 459 at 471.
- 136 *Memorandum on the Objects of the Regional Services Councils Bill 1985* (No 83-85 (GA)) 30.
- 137 Boulle 53.
- 138 See Simon I 520, and ch 8.2 below; the Commission did, however, propose local authorities for 'homogeneous local communities' in an attempt to retain a quasi-racial approach.
- 139 Rev Alan Hendrickse, on 6 October 1985, as cited in the *Cape Times* 7 October 1985 p 2.
- 140 *Debates of House of Representatives* col 382-3 11 February 1985. While the Minister was talking, time ran out, and the motion lapsed (col 383).
- 141 Lustik I 'Stability in Deeply Divided Societies: Consociationalism versus Control' 1979 *World Politics* 325. See also Boulle 220-222 and Adam H & Giliomee H *The Rise and Crisis of Afrikaner Power* (1979) 61-82.
- 142 See above n 129.
- 143 If the Coloureds and Indians were to abandon participation in Parliament altogether, the 'failsafe provisions' (s 37) would enable the White House of Assembly to carry on, but any semblance of 'multi-racialism' would then disappear.
- 144 Cobbett W et al 'Regionalisation, federalism and the reconstruction of the South African state' (1985) 10.5 *South African Labour Bulletin* 87.
- 145 Op cit 88.
- 146 See n 64-5 above.
- 147 Lijphart 47.
- 148 See Report 204, 230-4, 240-1.
- 149 Lijphart *ibid*.
- 150 Ch 13.
- 151 See *Cape Times* 25 April 1985 p 5.

152 These are effectively the equivalent of the present House of Representatives and Delegates.

153 At 241.

154 At 238 et seq.

CHAPTER EIGHT

A FUTURE WITHOUT GROUP AREAS LEGISLATION

8.1 *Introduction*

The aim of this chapter is to examine the most important probable effects and implications of the abolition of group areas legislation. The focus will be on the abolition of the Group Areas Act, but the analysis is also meant to encompass the abolition of group areas type of restrictions relating to Blacks, particularly in the case of residential segregation in an urban context.

In the previous chapters we have examined group areas legislation as a major piece of governmental legislation, and have analysed *inter alia* how group areas legislation functions, what legislation complements it, what its impact and legacy have been and, in chapter seven, its constitutional significance. If one reflects upon the probable effects and implications of the abolition of the Group Areas Act in the light of this previous discussion, a number of difficult questions arise. How significant would the societal impact of such abolition be? Have group areas not already left an indelible mark on our society? What would the impact of such abolition be if all or some of the apartheid legislation which has traditionally complemented the group Areas Act remains in force? What factors would tend to either perpetuate or undermine the patterns of occupation and ownership established through group areas? Would it make sense for any constitutional theory or model to stress the importance

of the abolition of group areas legislation without a concomitant 'affirmative action' program to undo the effects of group areas?

Some answers to these questions will be suggested in the concluding section (8.3) of this chapter, but we will first refer to recent developments in Windhoek, Namibia. During 1979-1981 the legal restrictions which imposed controls similar to South Africa's group areas legislation were abolished in Namibia. This raises interesting possibilities for the present study, because as Simon has pointed out, Namibia may be seen 'as a social laboratory for testing the implications of changes to cornerstones of apartheid policy.'¹ For the purposes of the present study, the focus has naturally fallen on Windhoek, the capital of the region. With its population of just under 100,000,² it constitutes the only area in Namibia which may be described as metropolitan. The examination of changes in metropolitan areas are obviously of prime importance for an assessment of the effects of the abolition of group areas legislation.

8.2 *Excursus: The abolition of group areas type of restrictions - the case of Windhoek, Namibia*

8.2.1 *Introduction*

It is beyond the scope of this study to attempt a general analysis of the position of Namibia in terms of constitutional or international law, or of political developments there.³ For the purposes of this section it is assumed that the reader is broadly familiar with the aforementioned issues. In discussing changes in respect of 'group areas' in Namibia, reference will

incidentally be made to certain general constitutional and political developments in order to contextualise the 'group areas' discussion.

The discussion in this section will draw considerably on a 547 page report by two urban geographers, Dr David Simon and Prof Ron Davies, entitled *Aspects of Urban Change in Windhoek, Namibia during the transition to independence*,⁴ which covers the 1977-1982 period,⁵ as well as Simon's other published research on Windhoek.⁶ I have further undertaken research of my own in respect of the matters covered in this section - part of the investigation was undertaken in Windhoek during July 1986.

8.2.2 *The legal position prior to 1979*

Despite Namibia's disputed international status as a mandated territory after the demise of the League of Nations, the South African government continued to administer it practically as a fifth province of South Africa till the 1970s. Thus the policy of apartheid was also applied there - either by making South African legislation applicable there, or by means of indigenous equivalents. It should, however, be noted that the Group Areas Act has never applied in Namibia. Urban segregation there was in fact effected under legislation of a different kind, although the latter also produced what may loosely be termed 'group areas'. This brings us to the question: How was urban segregation effected?

When the history of modern Windhoek is considered, it appears that from its foundation in 1890 it developed as a typical colonial city. This entailed *inter alia* residential

segregation of indigenes and settlers from the outset,⁷ and the development of a White central business district. This segregationist pattern was continued after the surrender of the German forces in the territory to South African troops in 1915.

Under South African control three sets of legislative measures provided for the continuation of urban segregation, namely the legislation which (i) specified the powers of municipal councils, (ii) provided for townships establishment and (iii) governed Blacks in urban areas. Like the Group Areas Act in S A, (i) and (ii) were meant to apply to 'non-Blacks', while the separate legislative regime in respect of Blacks also echoed the South African position.

As to (i), the Municipal Proclamation of 1920⁸ provided in Section 17(u) that the powers of municipal councils extended to the 'control and management of municipal locations', and that councils had 'the power to set aside certain areas for occupation of persons other than Europeans.' In 1939 the applicable legislation was amended and the power added to set aside

'other areas for the exclusive occupation of Europeans: provided that ownership rights vested in any non-European as at 1 May 1939 shall not be disturbed.'⁹

The above provisos found their way into s 240(20) of the present Municipal Ordinance 13 of 1963, which only differs from the earlier legislation in that it distinguishes between Europeans and Coloureds (not 'non-Europeans' generally).

It appears that these powers were used, in conjunction with the legislation on township establishment discussed herebelow, to create specific segregated areas such as the Coloured township of

Khomasdal which lies to the north-west of Windhoek's central business district.¹⁰

On a few occasions the Municipal Council contemplated the use of its powers under the Municipal Ordinance to issue a group areas type of declaration which would have reserved all of Windhoek (that is excluding Khomasdal and the Black township of Katutura) exclusively for White residence. These intentions were not carried out as the Council had been requested by the South African government to desist, so as not to aggravate the position of the government at the UN, and in later years, so as not to prejudice 'detente' efforts.¹¹

The second set of legislation relates to the establishment of townships and is of particular importance because it was used extensively in Windhoek for the creation of White residential areas, and one Coloured area, through the imposition of restrictive conditions of establishment when the particular area was proclaimed a township. In terms of section 6(3)(e) of the Townships and Division of Land Ordinance 11 of 1963, the Administrator had the right, when he granted an application for the establishment of a township, to impose such conditions as he may have deemed fit in regard to 'the group or class of persons which may be permitted to own or occupy the land concerned'. In a recent unpublished memorandum of the Namibian Secretary of the Department of Governmental Affairs addressed to the office of the Administrator-General, it was affirmed that prior to 1979 the practice had been that 'daar in elke blanke dorp se stigtingsvoorwaardes bepaal (is) dat kleurlinge of inboorlinge

nie die betrokke persele mag besit of okkupeer nie.'¹² It would appear that this refers to the practice since World War II, and that erven in older residential areas were not subject to such conditions.¹³

The racial conditions were imposed in favour of the City Council - it acted as township developer by reason of the fact that virtually all land in the Windhoek area available for township development has at all material times vested in the municipality.¹⁴ The conditions were moreover imposed at the request of the City Council.¹⁵ (The latter was represented on the Townships Board as local authority concerned and also had a say in the matter in its capacity as townships developer.)

The imposition of such conditions of establishment, which are registered against the title deed of each erf in the township, meant that they could be enforced by the City Council through court proceedings such as an application for an interdict. Normally conditions of township establishment constitute in law reciprocal negative servitudes applicable to all erven which may be enforced by any property owner in the township,¹⁶ but the fact that in the case of Windhoek the conditions were imposed specifically in favour of the Council probably precluded such a possibility.¹⁷

Transgression of the conditions would further constitute a criminal offence.¹⁸ A typical condition in respect of a White township read:

'Neither the erf nor any portion thereof shall be transferred, leased or in any other way granted or disposed of to any person other than a white person and no person other than a white person shall be permitted to reside on

the erf or any portion thereof or to occupy it in any other manner.¹⁹

Earlier township proclamations imposing racially restrictive conditions of establishment, exempted from the prohibition against occupation by 'non-Whites', bona fide domestic servants²⁰ of the White occupier (or, in some cases,²¹ one such servant), but the 1972 proclamation for Eros,²² and the 1974²³ and 1976 ones for respectively Olympia and Klein Windhoek's Ludwigsdorf (cited above²⁴) contained no such exemption. In these cases domestic servants could only be kept with the permission of the Council.

Simon & Davies state that to bring all title deeds in line with the 1974 Town Planning Scheme the City Engineer was empowered to approve amendments to existing title deeds to incorporate a condition of racially restrictive ownership.²⁵ The latter assertion relating to racial conditions does not appear to be correct; the power of amendment related only to amendments which would bring the title deed conditions in line with the Town Planning Scheme - *and the latter has never itself contained race zoning provisions.*²⁶ In any event, no such power was exercised to impose uniform racial conditions in respect of all erven.

In the case of Windhoek's only Coloured township, the most elaborate racially restrictive conditions of establishment were imposed²⁷ - these are set out in Appendix VI. The conditions provide *inter alia* that only companies in which all the shares are held by Coloureds, may own property there. White companies can own property there in order to provide lodgings for their Coloured employees and White religious bodies can similarly own

property in order to conduct Coloured church and mission school activities. 'Non-Coloured' mortgagees can further buy in the mortgaged property at an execution sale - this has obviously been allowed so as to enable them to preserve their security. The restrictions set out in Appendix VI display interesting similarities with the Group Areas Act - most importantly the emphasis on the control of occupation, rather than ownership.

In the case of Blacks, the controls mirrored the South African position. The 1923 and 1945 Urban Areas legislation²⁸ of South Africa was transposed to Namibia by means of Proclamations in 1924 and 1951, and a myriad of related legislation. Thus the Namibian Natives (Urban Areas) Proclamation 56 of 1951 provided *inter alia* for the establishment of locations, compulsory segregation of Blacks therein²⁹ and a 72-hour limit on stays in urban areas without a permit. Windhoek's Black township Katutura was established in terms of this legislation.

8.2.3 Windhoek as an apartheid city³⁰ prior to 1979

By the mid-1970s segregation in Windhoek was virtually complete and in fact in a number of respects a more thorough 'apartheid city' had been achieved here than in most of the large cities of South Africa. This was particularly so in respect of layout. Extensive buffer strips (with public servitudes and physical barriers such as roads running through them) separated the White Windhoek, Coloured Khomasdal and Black Katutura; the two 'non-White' areas lay on the periphery of the city and in the same direction (to the north-west from the central business district and White residential areas), had adequate hinterlands

for expansion away from White areas, and were both served by single access roads, which facilitated control for security purposes. There were no 'grey' areas of any significance in Windhoek. The division of land also reflected spatial inequality of the kind recorded in 6.2 above. In 1985 Katutura had 56,85 persons per hectare, Khomasdal 30,42 and Windhoek only 7,98.³¹

As at 1975 Simon and Davies calculated the segregation index of Whites vis-à-vis 'non-Whites' at a very high ,952 on the basis of the 1975 Municipal census data.³² In terms of this analysis 'non-Whites' living in White areas were mostly domestic servants, contract workers, nurses and secondary school pupils who did not have their own households.³³ There is, however, evidence that at least by the mid-1970s a not insubstantial number of Coloureds and Bastards were living illegally in certain White areas (for instance in servants' quarters), but the City Council was hesitant to take action particularly after legislation in 1977³⁴ allowed 'mixed' marriages and cohabitation.³⁵

It is of interest to note that Windhoek was created an apartheid city without the aid of a comprehensive legislative measure such as the Group Areas Act. This came about through a combination of several factors. The segregation of Blacks (the largest 'non-White' group) did occur in terms of legislative measures which were even more stringent than the Group Areas Act. In the late 1960s Blacks were, for instance, relocated from the location in Klein Windhoek and from the Old Location close to the central business district of Windhoek to Katutura, amidst serious political controversy. In the Old Location Coloureds had lived

amongst Blacks, and with its destruction most of them were relocated in Khomasdal, which was opened in 1966 as an exclusive Coloured township - this caused them to fall in with the apartheid city plan.

The racially restrictive title deed conditions in respect of newer White residential areas discussed above also contributed to the creation of the apartheid city, while other important factors included the fact that the city was in all respects planned and developed along apartheid lines - Coloured schools were, for instance, established in Khomasdal and Coloured children could not go to other schools. As pointed out in chapter three, school segregation is an important example of measures which help to create and maintain segregated residential areas. Moreover, the near total social, political and economic dominance of the White group in Namibia meant that the need for a measure such as the Group Areas Act was less than in say Cape Town. So-called Indian 'penetration' which had played such a large part in bringing about the Group Areas Act, was not an issue - there were no Indians, or any other equivalent group which could challenge White economic and commercial skills and power.

8.2.4 *Legislative changes since 1979*

8.2.4.1 *Background*

It is not possible to do justice to the complex political, social and economic background³⁶ to the changes under discussion in this section. The present discussion is only meant to serve as a brief introduction to the discussion of the legislation which brought about changes in respect of 'group areas' in

Namibia from 1979 onwards. The following sketch should, however, serve to contextualise the legislative measures in issue.

As a former mandated territory under the League of Nations, Namibia's disputed status has long been a bone of contention in international law and politics. Till the late 1960s the SA government followed a policy of tightening South African control over the territory, but the first part of the 1970s brought a realisation that Namibia could not be incorporated into South Africa, or governed indefinitely as a 'neo-colony', or *cordon sanitaire* for the benefit of South Africa. This led to a willingness on the part of the SA government to co-operate towards Namibian independence. It is fair to add, however, that the SA government has always shown a determination to secure independence on a basis as favourable as possible to its own interests.

Developments in respect of Namibia may be viewed on two separate yet interrelated levels. The first is the *internal*, which relates to political and constitutional developments in the territory itself. Here the main actors have been the SA government (and its Defence Force) and Namibian political groupings, including the SWAPO liberation movement. The second level concerns the *international* position of Namibia, and the long process of seeking an internationally acceptable political and constitutional solution for the territory. Here the actors include the SA government, the UN, the Western Contact Group, SWAPO (the major liberation movement opposed to South Africa's presence in Namibia which espouses a socialist approach and wages

a guerilla war in the territory), the internal Namibian political parties, the so-called Frontline States (especially Angola) and the Angolan opposition faction UNITA which wages a guerilla war against the Angolan government, supported *inter alia* by Cuban troops).

For our purposes an awareness of the inter-connection between the two levels is of particular importance because the legislative changes in respect of 'group areas' to be discussed were sponsored by internal Namibian political parties largely as part of an effort to achieve an internationally acceptable independence for the territory.

In turning to deal with specific events relating to Namibia, our enquiry may be commenced in September 1975, when the Turnhalle Constitutional Conference was launched. A number of representatives of the ethnic groups of Namibia participated in what was essentially an internal exercise in constitution building. This was backed and sponsored by the South African government. On the international level a major development during this time was that Pretoria expressed its agreement with entering into negotiations with the United Nations on Namibia's political future.

In August 1976, the Turnhalle Conference issued the Turnhalle Declaration of Intent, wherein independence for Namibia was envisaged on 31 December 1978. In April 1977 the Conference petitioned the SA government to establish an interim government which would steer Namibia to independence. This government was to operate in terms of the three tier constitution worked out by

the Conference. This provided for 11 ethnic second tier governments, and a national first tier government with clearly defined powers. Executive powers would be vested in a council of ministers. At the local (third tier) level of government, separate municipal authorities were envisaged for areas like (White) Windhoek, Khomasdal and Katutura.

The Conference held its final meeting in November 1977. It had failed to reach agreement on three issues:³⁷ the distribution of functions between the first and second tier ethnic authorities; the occupation of farming land by members of different ethnic groups (the second tier ethnic authorities would control the allocation of communal farm land), and on what restrictions should remain in respect of occupation and ownership in White (urban) areas.

Following the second Cape Town summit between representatives of the SA government and the Western Contact Group during June 1977, as well as the internal developments outlined above, the SA Parliament enacted the SWA Constitution Amendment Act 95 of 1977. This provided *inter alia* for the appointment of an Administrator-General for Namibia. His task was to supervise elections for a constituent assembly, which would draw up a constitution to serve as basis for Namibia's independence. At this stage internationally supervised and recognized elections were envisaged in the near future, but after repeated breakdowns in further negotiations on the international level, the SA government opted for internal elections in Namibia during December 1978. This led to the establishment of a

Constituent Assembly, which was converted to a National Assembly (to function as interim government) by Proclamation AG 21 of 1979. In the National Assembly, a body with 'original' legislative power, the majority of seats was held by the Democratic Turnhalle Alliance (DTA), a centrist political grouping of ethnic political parties under the chairmanship of Mr Dirk Mudge of the White Republican Party. Whereas the principles worked out earlier by the Turnhalle Constitutional Conference had provided for separate White, Black and Coloured townships, but had envisaged that 'open' residential areas in existing towns and cities could be created if the need for such areas should arise, the DTA advocated that *all* residential areas should be opened.³⁸ In proposing this course of action, as well as the forced desegregation of certain public facilities, it appears that the DTA was motivated not only by the general political concern to promote non-discrimination in residential areas and anti-discrimination in respect of certain public facilities, but also more specifically by the need to establish credibility for itself with a view to what was then regarded as imminent internationally-supervised elections which would include SWAPO amongst the participants. In speaking in support of the Abolition of Racial Discrimination (Urban Residential Areas and Public Amenities) Bill in the National Assembly during June 1979, Mr Dirk Mudge referred to 'an election which has to be conducted' and stated:

'The policy concerning exclusive residential areas could in the past election not gain the support of the moderate black people in the country. How will it succeed in³⁹ gaining the support of those people who are more radical?'

The legislation was also motivated in the National Assembly as 'a step in the right direction', rather than a comprehensive measure against racial discrimination.

It is important to bear in mind these background circumstances to the legislation. They help to explain why the legislation left so much undone. It should also be remembered that while the DTA was advocating open residential areas, it was at the same time committed to ethnic second tier authorities which would administer the communal lands of the specific group on an ethnic basis.

Before considering the legislation itself, reference should also be made to other preceding legislative developments in Namibia. Soon after assuming office in October 1977, the Administrator-General repealed a number of key apartheid measures. These included the prohibition on mixed marriages and sex across the colour line,⁴⁰ pass laws and influx control relating to Blacks⁴¹ and the limitation upon Blacks acquiring ownership of land in urban areas.⁴²

8.2.5 *The Abolition of Racial Discrimination Act 3 of 1979 ('the Act')*

Four stages may be identified in respect of the Act:

- (i) The original Act which came into force on 11 August 1979, (subject to (ii) immediately below);⁴³
- (ii) Sections 3 (prohibition of racial discrimination in public amenities) and 4 (penalty clause) which came into operation on 1 July 1980 by virtue of a proclamation of the Administrator-General;⁴⁴

(iii) Amendments in 1980 which substituted cancellation of business licences for imprisonment as punishment for discrimination, and provided that the Director of Economic Affairs could issue discriminators with a warning notice;⁴⁵

(iv) Amendments in 1981 which extended the application of the Act to business and industrial premises.⁴⁶

The Act deals essentially with two topics: non-discrimination in respect of ownership and other rights in land, and anti-discrimination in respect of certain public facilities. These will now be discussed in turn.

Ownership and rights in land

Section 2 provides that membership of any racial group shall not debar anyone from acquiring ownership, or any rights in, or from possessing, occupying or residing upon land situated in any township, and section 5 provides that any title deed condition or legal provision repugnant to section 2 is null and void. Section 7(1) further strikes down empowering provisions which authorize any act repugnant to section 2, but 7(2) then contains a (curious) limitation which in effect nullifies the first subsection: empowering provisions which allow for the setting aside of part of a township on racial grounds are not void - any racially restrictive determinations made under such provisions only have no force or effect. (This was explained during the debate in the National Assembly on the basis that the intention was not to strike down all or large portions of the legislation in terms of which a Black township like Katutura was originally established but only to allow anyone to live there.)⁴⁷

The fact that business and industrial premises were only included in the legislation in 1981, was explained as an 'omission' in 1979 and again in 1981.⁴⁸ The 1981 amendment was prompted by a post-1979 case of a Coloured who could not acquire business premises in ownership because of a restrictive title deed condition.

Two aspects of the non-discrimination in respect of ownership and other rights in land should be noted. Firstly, the legislation only strikes down title deed conditions, town planning provisions and the 'provisions of any law'. It does not strike down, or prohibit, racially restrictive practices or agreements in respect of dealings in land. Nothing in the Act prevents the owner of a house or flat from refusing to sell or let it to members of a particular group, and it would appear that an agreement to this effect (for instance between neighbours) is also not rendered invalid by the legislation.

Secondly, the provisions only apply in respect of land in proclaimed townships, and consequently do not extend to, for instance, Rehoboth, White 'military' towns such as Oshakati, or settlements on tribal lands.

Public Amenities

In respect of certain public amenities, the Act is anti-discriminatory, in the sense that it prohibits and penalizes discrimination. It applies to four categories of public amenities, namely:

- (i) *Public accommodation establishments* - these are defined to mean 'any hotel, guesthouse, pension, rest camp, guest farm,

holiday farm, caravan park or other premises'⁴⁹ which supply accommodation to tourists, travellers or persons resident elsewhere. ('Holiday flats' would thus be included, but not ordinary flats in an apartment building; nor, of course, dwelling houses let in the ordinary course of events);

(ii) *Public recreation areas* - defined as meaning any 'game park, nature reserve, tourist recreation area, holiday resort or similar area'.⁵⁰ (Although the matter is not without difficulty, it would appear that in terms of the *eiusdem generis* rule of interpretation, 'similar area' would not include a public swimming pool.)

(iii) *Public restaurants*; and

(iv) *Cinemas* to which members of the public may obtain admission for reward.

Section 3 of the Act prohibits racially discriminatory practices in respect of these public amenities, and section 4 makes such discrimination a criminal offence - punishable by a fine and cancellation of the business licence of the establishment involved. (Punishment by imprisonment was repealed in terms of an amendment in 1980.)

Section 4 bis empowers the Director of Economic Affairs to send a warning notice to persons suspected of contravening the anti-discrimination provisions. The person concerned must then sign a declaration to the effect that he does not conduct the public amenity in contravention of section 3. If he fails to do this, the Director may cancel his licence upon further notice.

In the *Van den Berg* case⁵¹ the Appellate Division held that *audi alteram partem* does not apply to the (first) warning notice.

8.2.6 *The effects of legislative changes since 1979*

The legislative changes discussed in the previous section provide for the removal of racial restrictions in respect of urban residential properties and the prohibition of the imposition of such restrictions in respect of a limited category of public amenities. The effects of these changes will now be discussed with reference to residential mobility; the affect on property values; the issue of urban planning and administration; the position in the central business district; and public amenities, health services and schools.

(i) *Residential mobility - general*

The first and most important question that arises relates to the issue of residential mobility and inter-suburb migration as a result of the opening up of residential areas during August 1979.

Using details of municipal electricity and water connections/disconnections and supplementary questionnaires, Simon & Davies monitored residential mobility during the period August 1979-December 1981. The focus of their inquiry was 'integration cases', that is households moving into areas previously forbidden to them, and 265 such connections and 113 disconnections were found, 'reflecting a remarkably steady rate of movement averaging 9 households per month'.⁵² Those moving were overwhelmingly 'non-White' households.

The point should be made, however, that the overall picture to date is one of limited residential mixing.

Thus a comparison of the 1975 and 1985 Municipal census figures⁵³ reveals the following percentages in respect of the residents in Windhoek's traditionally White areas:

	<i>White</i>	<i>Coloured</i>	<i>Black</i>
1975:	95,40	2,64	1,96
1985:	86,08	8,01	4,73

This constitutes an increase of Coloured and Black residents in former White areas of 8,14% over the ten year timespan which includes a period of six years since the legislative changes of 1979.⁵⁴ (The movement of Whites to Khomasdal and Katutura has been negligible - this has occurred virtually only in the case of 'mixed' couples.)

Windhoek, Khomasdal and Katutura have also retained their respective ethno-centricities from the apartheid era. In 1985 99,69% of all Whites still lived in Windhoek, 76,53% of all Coloureds in Komasdal, and 94.02% of all Blacks in Katutura.⁵⁵

The changes in respect of specific suburbs are reflected in the 1975 and 1985 census figures, set out in Appendix VII.⁵⁶ As the post-1979 inter-suburb racial migration has been at the instance of Coloured and Blacks, special attention will be paid to those suburbs outside Khomasdal and Katutura where Whites constituted 75% or less of the total population during 1985. These suburbs (or zones, as set out in Appendix VII) may be termed 'mixed'. They can be divided into two broad categories for the purposes of the present analysis: 'genuine' mixed areas (Windhoek North, Windhoek West and the Central Business District) and areas where special factors result in an exaggerated or

distorted picture of racial mixing in a residential context.

This applies to the zones Avis, Eros Airport, Northern Industrial and Hochlandpark. As appears from Appendix VIIB, these areas have very low residential populations and cannot really be described as residential areas. Further distortion is caused by the fact that, for instance, in Eros Airport, Black employees of the motel were added to the count,⁵⁷ while in Hochlandpark 151 Coloured and Baster, and 43 Black borders of the new Concordia school were so added.⁵⁸

In assessing mobility patterns in Windhoek after 1979 Simon & Davies point out that these 'can be largely explained in terms of the physical, social and economic characteristics of the various suburbs on the one hand, and the demographic and socio-economic characteristics of the people involved on the other'.⁵⁹

The movement of especially Coloured and Basters to Windhoek North and West, ties in with a phenomenon observed in other cities such as Harare after the opening of residential areas: the movement occurs into areas closest to the formerly exclusive areas of the inmoving group. In Windhoek there are a number of explanations for this proximity phenomenon. The most compelling appears to be the fact that government schools in Namibia have remained segregated to date. Coloureds wishing to send their children to such schools (which are concentrated in Khomasdal) would thus be under strong pressure to limit their migration to nearby suburbs like Windhoek West. (When the schools in Khomasdal close in the afternoon, a steady line of Coloured children may be observed crossing the bridge over the freeway

into Windhoek West.) The same would apply to Blacks wishing to move out of Katutura, and the 'genuine' mixed areas are also close to Katutura.

Suburbs like Windhoek West are further also close to the CBD (where most people work), on bus routes which serve Khomasdal and Katutura, and not too expensive. By way of contrast the more expensive suburbs of White Windhoek are further away from the CBD and are not served by any public transport.⁶⁰ (It will be appreciated that the latter is a potent factor in discouraging, for instance, young 'non-Whites' without private transport from lodging in the more expensive eastern suburbs).

In respect of the central business district, the relatively high incidence of rented accommodation in the form of flats and apartments is an additional factor which has encouraged 'non-Whites' to move into the area.⁶¹

In general economic factors appear to have played a major role in both restricting the rate of residential 'mixing' and in determining the suburbs which would attract racial migration. Most importantly, race and economic class have tended to coincide in Namibia, as in South Africa.⁶² The affluent Whites stand at the top of the scale, followed by the Coloured middle group, with Blacks at the lowest end of the scale. In Windhoek housing in White suburbs has generally been expensive - certainly when compared with equivalent⁶³ housing in Khomasdal or Katutura. Windhoek has also recently been experiencing a housing market boom - there has, for instance, been a 'desperate shortage' of properties in the R80 000 to R100 000 bracket⁶⁴ and in July 1986

a leading estate agent estimated that there existed a shortage of some 300 housing units in traditional White areas.⁶⁵ This has meant that only a limited number of 'non-Whites' could afford to buy in White areas, and that the emphasis has been on moving to middle or lower class suburbs. In examining the personal circumstances of those moving into White areas, Simon & Davies found that a clear picture emerged:

'(T)he people moving into areas previously closed to them are almost all economically better-off than average in Katutura and Khomasdal, being lower-middle to middle class, predominantly Coloured or Baster, under 45 years of age, and with families in many cases.'⁶⁶

In dealing with residential mobility, two further factors should finally be mentioned, namely public sector employment and White attitudes. An important aspect of public sector employment is public sector housing which accounts for roughly 38%⁶⁷ of all housing in White areas. Even after 1979 many public authorities reserved their houses in these areas for Whites. Even in the absence of such explicit restriction, the racial skill structure still tended to favour Whites in the allocation of housing. In response to enquiries during July 1986, the South African Transport Services (which has continued to operate in Namibia) indicated that it was not following any 'racial' policy in Namibia in the allocation of its housing, but that the 'large scale' accommodation of 'non-White' SATS employees in traditional White areas was still the subject of negotiations between the SATS and first tier Namibian government authorities.⁶⁸

Public sector employment is also important vis-à-vis housing by reason of the housing subsidies claimable by most public

sector employees. Estate agents in Windhoek indicated that the availability of such subsidies has become an important factor in enabling 'non-Whites' to move to White areas.⁶⁹ According to the 1985 Municipal census⁷⁰ the State employs 28,97% of the work force in Windhoek, and of the State employees 44,13% are White, 17,21% are Coloured and 38,66% are Black. Unfortunately, the census figures do not indicate at what levels the respective groups are employed, but a White-Coloured-Black hierarchy can generally be assumed. As Coloured and Blacks move into higher paid positions which carry higher subsidies, more of them would be able to move into White areas.

We turn to deal with White attitudes. After a comprehensive survey covering the period 1979-1981, Simon & Davies came to the conclusion that the majority of 'non-Whites' moving into White areas did not encounter any real hostility from Whites. A small but significant proportion of migrants did experience some serious problems, particularly in part of the central city and Suiderhof (but not in Windhoek West which has one of the highest concentrations of 'non-Whites'); they appear, however, to have encountered little lasting hostility or resistance on the whole. This prompted the authors to observe: 'None of the calamities predicted by racially conscious observers has occurred'.⁷²

It would appear that White fears of 'non-White' 'penetration' do still play a considerable role in respect of the marketing of certain categories of housing. Three leading estate agents indicated that the number of Whites owning houses in traditional White areas who instruct estate agents not to sell to

'non-Whites' were 'very limited' or 'relatively' insignificant,⁷³ but two of them who market flats fairly extensively indicated that in apartment blocks where 'penetration' had not already occurred, 75-85% of White owners would instruct agents not to sell flats to 'non-Whites'.⁷⁴ When it came to leasing, racial attitudes were far more marked. The estimations were that where 'penetration' had not already occurred, 70-75% of flat owners instructed agents not to lease their flats to 'non-Whites'; in the case of houses, 90-95% of the owners would not lease to 'non-Whites'.⁷⁵ As explained in 8.2.4. above, these practices have not been outlawed because flats and houses are not 'public amenities' within the meaning of the legislation. Estate agents indicated that they abided by such 'Whites only' instructions.

(ii) Residential mobility - affect on property values

Prior to 1979 Whites opposed to the suggested opening of residential areas argued that 'non-White' penetration would cause property values to drop. This argument was also taken up by the Windhoek City Council (which represents White voters only) and by the SWA Municipal Association, an all-White body representing municipalities in the territory. At a special meeting in August 1979 this body discussed steps to ensure 'that the least possible damage is done to urban areas as a result of integrated residential areas'.⁷⁶ In 1979 the Mayor of Windhoek further cited the hesitancy of most people to invest in a mixed suburb as a reason for the shortage of housing.⁷⁷

Have these fears and prophecies of doom been realised? The answer appears to be no. Windhoek's City Valuator recently

expressed the view that only in the case of Windhoek West, did the arrival of 'non-Whites' initially cause property values to drop relative to other White areas.⁷⁸ A general housing shortage in Windhoek (and housing market boom⁷⁹) and lessened fears of being 'swamped' on the part of Whites, appear to have caused the house market in this suburb to stabilise.⁸⁰ On the other hand, as late as May 1986, a leading estate agent, Mr Jurie van Zyl, felt it necessary to publish an article in defence of Windhoek West and to slate estate agents who 'have often been heard telling potential buyers not to buy in Windhoek West because the area is going down', by reason of buyers from Katutura and Khomasdal moving into the area.⁸¹

Although Windhoek West is probably the suburb which has experienced the most 'penetration', it still has a 75% White population.⁸² It has thus not been subjected to an 'invasion-succession' wave, where migrants outnumber the original ethnic group. As pointed out above, Windhoek as a whole has seen limited 'mixing' in a housing sphere, and it is difficult to predict what would happen to the property market if this situation were to change in specific areas or generally. The outcome would probably be determined by a variety of factors, including the state of the property market and general economy, and the political situation in Namibia.

(iii) *Urban Planning and Administration*

A practical effect of the demise of rigid residential apartheid has been to unfreeze the buffer strips which separate Windhoek, Khomasdal and Katutura. The strip surrounding Katutura is to be used primarily for additional schools, sports fields and roughly 800 residential erven in new extensions to the township.⁸³ Roads, riverbeds and powerline servitudes do, however, traverse the buffer strips and tend to prevent their use in a way which would bring about spatial integration. In fact, the construction of extensive sportsfields in the former buffer strips would entrench the barrier effects of these areas. In general, buffer strips thus seem destined to retain at least some of their barrier effect. In utilizing buffer strips the City Council also seeks to avoid placing low cost housing next to more prestigious areas.⁸⁴ This fits in with a pattern of 'economic neo-apartheid', to which further reference will be made herebelow.

The Windhoek Municipality's 1980 *Guide Plan for the Windhoek Basin* is an interesting document because it is an example of a Southern African guide plan drawn after the demise of official apartheid. Its forward planning extends to the year 2020. The Municipal planning policy contained in the *Guide Plan* turns on a combination of racial and socio-economic differentiation. Population growth has been projected on a racial basis 'as significant differences occur in the population growth rates between the three ethnic population groups'.⁸⁵ The three population groups are tied to the three income groups and their

related housing needs, which have been taken as the basis for the planning of future housing development:

'The intention is to relate income group to housing density. In broad terms the Black population group can be identified as the lowest income group and the projection of family accommodation requirements for the black population group may thus conveniently be taken to indicate housing demand at the highest density. Similarly one would expect the projections for the Coloured group to provide the estimate of medium density housing and the White group the low density figure'.⁸⁶

The housing needs of the three income groups are to be catered for in geographically distinct, economically homogeneous areas. For the immediate future, low income/high density and medium income/medium density zones are to extend from Katutura and Khomasdal respectively, and are to tie in with existing developments there. At a later stage high, medium and low income housing is to be established to the south of Windhoek, but again the three types of housing areas are to be kept geographically distinct.⁸⁷

The use of the correlation between income group and housing density is consistent with conventional Western urban planning principles,⁸⁸ but because there is also a close correlation between race and income group in a Southern African context, a large measure of racial exclusivity (save in élite areas) will be maintained - so-called 'economic apartheid'. The Guide Plan is very significant for what it does not do - it does not espouse the contact theory of racial harmony in terms of which town planning should serve to bring together the (racial) elements of a pluralistic society by increasing close contact, for instance, through the creation of economically diverse residential areas.⁸⁹

The three way split of the Windhoek area into (White) Windhoek, Khomasdal and Katutura created under the apartheid regime, has further persisted in the financial administration of these areas during the post-1979 period. Separate budgets are drawn for the three areas and each area is meant to be self-financing. This results in severe per capita inequalities in resource allocation and distribution between the three areas.⁹⁰

(iv) The Central Business District

As indicated in 8.2.4.2 above, legislative changes in respect of business areas were only introduced during 1981. Prior to this, title deed restrictions did operate in respect of certain business premises, but the White character of central business districts appears to have been more the result of general political and economic factors than specific legal restrictions. Since the lifting of restrictions, there is still very limited evidence of Coloured and Black businesses in Windhoek's CBD. During July 1986 only three such businesses (a clothing shop, furniture store and 'knick-knack' business) could be identified. The reasons for this limited presence appear to be broadly similar to those discussed in 7.2 above in relation to South Africa's open CBDs. Windhoek estate agents emphasized lack of capital, limited availability of business premises, high rentals and the unfamiliar CBD clientele as factors discouraging a 'non-White' presence in the CBD.

(vi) Public Amenities, Health Services and Schools⁹¹

The opening of certain public facilities by reason of the 1979 legislation met with considerable White hostility, and

regular press reports have appeared through the years of discrimination⁹² and gratuitous violence against 'non-Whites' (and particularly 'mixed' couples) in, for instance, hotel bars, camping sites and cinemas. Despite these problems most public facilities which have been opened now experience relatively peaceful 'mixing', and overt hostility against 'non-Whites' appears to have abated in this sphere.

In respect of the important facilities and services not covered by the 1979 anti-segregation legislation, White segregationists have put up a far more determined fight. Simon & Davies summarise the position succinctly when they say:

'Given changing circumstances, some whites have been prepared to tolerate mixed residential areas and, to a certain extent, work places and public amenities. But where close or intimate contact is involved, as in the classroom, hospital ward or swimming pool, opposition has been overwhelming.'⁹³

The present position in respect of these facilities may be summarised by drawing a threefold distinction between

- i) Amenities and services which have been opened after a long battle - the swimming pool in Windhoek was opened during 1985,⁹⁴ and the public library during 1986;
- ii) Facilities which have remained segregated on an *ad hoc* basis. This situation applies in respect of health care where individual hospitals may provide treatment for more than one racial group but where the various groups generally use segregated wards but may share operating facilities. The picture is a complex one, because of the involvement of second tier (ethnic) representative authorities in the provision of health services. In terms of the Representative Authorities Proclamation AG8 of 1980 the various

second tier authorities have the right to claim the health service function in respect of members of their respective population groups. The Whites, Owambos, Caprivians, Kavangos and Damaras have claimed their health functions, although only the first four actually provide a health service to people in their respective communal areas. Health Services are accordingly rendered by the central government department of National Health and Welfare to the Damaras, Bushmen, Coloured, Basters, Hereros, Namas and Tswanas, and on an agency basis to the Owambos, Kavangos, Caprivians and Whites residing outside their communal areas.⁹⁵ This has led to a situation where the exact arrangements in respect of the segregation of health care facilities depends largely on those in control of the institution in question.

iii) Facilities which have remained segregated by operation of law. State schools are the prime example. The important effect segregation in this sphere has had on residential mobility has already been pointed out. It has also served generally to entrench ethnicity. In September 1986 the Namibian Minister of National Education announced that all schools would be opened from 1987,⁹⁶ but the implementation of this decision taken by the Multi Party Conference cabinet at the first tier level of government may well prove difficult to implement in the face of anticipated opposition from especially the second tier White representative authority.⁹⁷

8.2.6 *Some conclusions in respect of developments in Windhoek*

On the basis of the foregoing analysis a number of conclusions may be drawn in respect of developments in Windhoek during the post-1979 period that are of relevance to the general theme of the present chapter, viz an evaluation of the probable effects and implications of the abolition of group areas legislation in South Africa.

By the late 1970s Windhoek was a near perfect 'apartheid city'. Seven years have now passed since the abolition of group areas type of restrictions in respect of residential areas. The resultant societal changes have not been dramatic, nor have they altered the fundamental structure of the spatial ordering of race relations in the city. The limited nature of the developments that have taken place point to the fact that apartheid planning has left an indelible mark on society.

Residential mobility after the abolition of residential segregation has been limited. Inhibiting factors appear to have been the following: a general framework of 'economic apartheid' which meant that 'non-Whites' could not afford to buy in White areas; state schools have remained segregated; the racial hierarchy in public sector employment has restricted 'non-White' access to housing subsidies; restrictive practices in the allocation of certain public sector housing to 'non-White' employees; the absence of public transport to White areas, and negative attitudes on the part of Whites manifested in, for instance, restrictive practices in respect of the letting of residential accommodation to 'non-Whites'.

The foregoing factors have caused the migration of 'non-Whites' to be directed to non-élite suburbs near traditional 'non-White' areas and to flat accommodation in the centre of the city.

The opening of residential areas appears not to have had a negative influence on property values, except in Windhoek West where most of the migration has occurred.

On a more general level, the limited nature of the changes that have occurred in respect of residential mobility may be ascribed to the lack of structural changes in society in general. Economic power in particular has remained in the hands of the Whites. The experience of Windhoek also suggests that a piecemeal dismantling of the complex edifice of apartheid results in a tortuous and unsatisfactory process. Here the point should also be made that the legislative provisions in respect of non- and anti-discrimination were limited in scope. Important areas have not been covered. The DTA, which sponsored the legislation, was keen to make a specific political point with regard to discrimination and segregation in certain spheres rather than to implement a comprehensive desegregated regime through legislation. It faced *inter alia* the problem that ethnicity played a large part in respect of certain of its key policies - particularly with regard to second tier ethnic authorities.

The legislative reforms with regard to segregated residential areas and public facilities have met with strong disapproval on the part of a substantial number of Whites. In the November 1980 elections for the White representative assembly

the National Party, opposed to the reforms, won the majority of seats. There has also been a definite move on the part of White segregationists to try and limit the effects which might flow from the desegregation of residential areas and certain public facilities. Thus key facilities like government schools have remained segregated. In the early 1980s government appointed commissions of enquiry on local government suggested that 'homogeneous local communities' should be given their own local authorities. In the case of smaller townships, a general municipal authority was envisaged, but in the case of an autonomous urban centre such as Windhoek, three separate municipalities were suggested - one each for the predominantly White (Windhoek), Coloured (Khomasdal) and Black (Katutura). These would be defined geographically and not in racial terms, and all residents would be able to vote in municipal elections.⁹⁸ These proposals have not been implemented. If they were to be implemented, the practical result would clearly be to entrench the spatial underpinnings of the already existing racial and socio-economic apartheid in society.

On a different and more subtle level the entrenchment of spatial segregation is, however, being served by the long term municipal planning for Windhoek reflected in the 1980 *Guide Plan*. This occurs through the close coupling of future residential development to existing (segregated) patterns, and by adhering to a definite policy of segregating residential areas on an economic basis - with inevitable racial consequences. In a planning context, the undoing of the effects of apartheid would require

positive steps to ensure or at least encourage non-segregated residential patterns.

The undoing of the effects of apartheid would also require a drive to improve infrastructural facilities and services in deprived 'non-White' areas. Katutura still has the dismal look of a typical South African Black location. When this point was raised with Windhoek's Chief Town Planner and the suggestion made that such upliftment should be given high priority, the response was: 'No, but that's socialism'.⁹⁹

Although the direct effects flowing from the opening of residential areas and certain public facilities have been limited, these developments appear to be part of, and to have contributed to, a movement away from apartheid thinking and, more generally, to a de-emphasis of ethnicity. Thus the 'quasi-racial' local authorities suggested by commissions of enquiry in the early 1980s have not been instituted. It is also of interest to note how ethnicity appears to be playing a progressively smaller part in the thinking of a political grouping such as the Democratic Turnhalle Alliance (DTA) which has had considerable influence in Namibian politics. The DTA was founded in 1977 as a spiritual heir to the earlier Democratic Turnhalle Conference, but it departed from the approach of the latter by *inter alia* advocating the general opening of residential areas.¹⁰⁰ For a considerable period of time the DTA did, however, remain a strong proponent of the ethnic second tier representative authorities. But presently its constitutional proposals envisage a regional

federation and 'no ethnic classification or privileges in the Constitution or constitutional structures',¹⁰¹

When the changes that have occurred in the post-1979 period are considered against the background of the rigid 'group areas' situation which existed before this time, they cannot be dismissed as merely cosmetic or totally insignificant. It is paradoxical that these changes could occur despite strong opposition from the White group which wields so much political and economic power. The explanation appears to lie in the general political situation in Namibia where a process of shared decision-making has arisen which is not subject to a readily available White veto. This contrasts with the situation in South Africa where in respect of a demand by the Coloured Labour Party that the Group Areas Act be abolished, *Rapport*¹⁰² could carry the headline:

'Vergeet dit! sê PW'.

8.3 *A future without group areas legislation - an evaluation*

8.3.1. *Constitutional aspects*

The analysis undertaken in the preceding chapters of the present study brought to light the serious problems besetting the system of group areas. It was *inter alia* pointed out that the original apartheid ideal of completely separate racial communities has been abandoned in the face of the reality of economic integration. Free trade areas and open industrial areas have been the result.

In general more and more exceptions are being introduced in respect of occupation by disqualified persons. The edifice of

rigid social apartheid in cinemas and similar public amenities imposed by means of the Act and other legislation is crumbling. The ethnic local government institutions tied to the system of group areas are in a state of crisis. The government hopes that the RSCs will resolve problems in this sphere, but this is hardly likely. RSCs will have little if any legitimacy in the eyes of 'non-White' communities. Political pressure for the abolition of the Act is constantly mounting, and is based on profound political and moral objections to the very basis of the system. Group areas infringe universally accepted basic human rights and liberties, are inherently discriminatory, and entrench divisive ethnicity and socio-economic privilege.

In discussing the SPROCAS proposals for constitutional reform under 7.5.4 above, the point was made that the system of group areas cannot sensibly be 'reformed' - it has to be abolished, even if this may only be achieved over a period of time.

The abolition of group areas legislation (taken here to include the legislation governing the position of urban Blacks) is bound to have important constitutional implications. In this section the implications of such abolition for group rights, other apartheid legislation, political representation and the administration of 'ethnic' affairs will be discussed in turn.

8.3.1.1 *Group rights*¹⁰³

An argument often advanced by those in favour of group areas is that the system serves to protect group rights - and specifically the right of each of the four racial groups to live

in 'own communities'. It follows that the abolition of the system of group areas would constitute a serious infringement of group rights.

This argument may be attacked on a number of grounds. The first point concerns the nature of the so-called groups. In a group areas context the participant 'groups' have been defined coercively (by one group) and as explained in chapter 2.2, the criteria employed to define the groups are unscientific, impressionistic and artificial. An even more fundamental objection can, however, be raised to the group rights argument in favour of group areas. The objection is that *in a South African context group rights cannot legitimately be coupled to race*. This will now be discussed. It should be noted that this objection cannot be cured by redefining the participant groups or by saying that all those who *voluntarily* associate themselves with (say) the White group, can demand the exclusivity of group areas.

In South Africa the argument for group rights is most frequently applied in respect of the 'White race'. Adam and Moodley rightly observe:

'When Nationalist Afrikanerdom insists on group rights for itself it means right as a racial group. Apart from Whites, however, few South Africans desire legislated protection of their racial identity.'¹⁰⁴

The same authors also make the point that there is nothing wrong with the upholding of *religious* or *linguistic* ethnicity which are not imposed upon a group and to which no unequal political power and economic privilege are attached in public life, but that 'a racial group alone cannot form a moral community'.¹⁰⁵ This is

really the crux of the matter. A claim for the protection of 'White (racial) group rights' is necessarily premised upon an unacceptable differentiation between individuals based upon skin colour and other perceived 'racial characteristics', such as the high cheekbones and flat noses which have featured so prominently in group areas prosecutions. It is of interest to note that the protection of (minority) groups in public international law focusses upon the preservation of a distinctive group culture, religion or language.¹⁰⁶ It can hardly be argued that there exists a distinctive White culture, religion or language in South Africa and it can even less be argued that any such alleged culture, religion or language will perish without the protection of group areas. Even the narrower group of White Afrikaners cannot legitimately advance a claim to such exclusivity.

The conclusion must therefore be that the abolition of group areas legislation would pose no threat to any legitimate group rights. In a post-apartheid society claims can obviously rightly be advanced in respect of legitimate group rights such as education. The State may, for instance, be expected to subsidize private, religious or language education while maintaining a public school system of equal standards for all sizeable language groups.^{107a} The removal of State imposed racial segregation in public schools would, of course, not result in the disappearance of race as a complicating factor in education. In section 8.3.2 herebelow we will briefly look at difficult questions such as whether private segregationist practices (for example, in private schools) should be prohibited by law and whether 'affirmative

action' (such as 'bussing') should be taken to undo the effects of the apartheid society.

8.3.1.2 *Other apartheid legislation*

Two points may be made with reference to the experience of Windhoek, Namibia. The practical impact of the repeal of group areas legislation will firstly be limited if other segregationist measures (in particular separate state schools) which complement group areas are not also repealed. White political attitudes may cause the process of dismantling the intricate legislative edifice which props up apartheid to be a piece-meal one. Again the experience of Windhoek indicates that such a process will be a tortuous one wherein 'systemical contradictions' abound.

The second point concerns the impact of the abolition of group areas legislation on a wider level. On a *psychological* level such abolition would represent a significant victory in the struggle against oppression and discrimination. It will also herald at least the beginning of the end of racial segregation as an all-pervading government policy backed by the force of law, and cause political pressure for the abolition of other apartheid laws to mount. Of particular importance in this context are the 1913 and 1936 Land Acts which deny Blacks property rights in more than 80% of the land in South Africa, and which constitute group areas legislation writ large. The abolition of group areas legislation in an urban context (with which we have been concerned) will point the way to the general abolition of enforced territorial segregation. Again it is interesting to

note that in Namibia the 'ethnic' control of land in rural areas has persisted long after the abolition of urban segregation.

8.3.1.3 *Political representation*

Group areas are tied to political representation most directly at the local authority level, and more specifically in the system of RSCs. Parliamentary constituencies are not defined with reference to group areas, but the pattern of group areas largely determines the constituencies of particularly the Coloured and Indian Houses of Parliament.

Doing away with group areas legislation will pave the way for municipal representation by means of a 'normal' non-racial, ward system. In order to avoid *de facto* segregated wards, delimitation will have to be undertaken in such a way as to cross-cut existing group areas, that is straddle White and 'non-White' areas. The wards will thus have to be fairly large. Adam & Moodley also make the sound suggestion that each ward should have several councillors, elected by proportional voting. In this way, a number of political groupings within a ward could vie for their share and expect to be represented.¹⁰⁸

Outside the sphere of municipal representation, the abolition of group areas legislation will also have an impact on the issue of political representation, because such a step will confirm and act out an important political reality - in South Africa ethnicity cannot be territorialised. As indicated in earlier parts of this study,¹⁰⁹ there are indications that even in government circles constitutional reforms are contemplated

which would cause race and ethnicity to cease to be the organizing principle at the higher levels of government.

The abolition of group areas legislation thus points generally to political representation on a territorial, non-racial basis - be it in a unitary or federal state. Such representation would dispose of territorialized consociationalism as a constitutional option. The further implication is that any accommodation of group representation will have to take place on a non-territorial, 'corporate federalist' basis. Corporate federalism cannot realistically be held out as the central, ordering principle of any future South African constitution. At most there can be some accommodation of group interests on a corporate basis - the best known suggestion in this regard is probably that of the PFP of corporate 'cultural councils' represented in an upper house.¹¹⁰

8.3.1.4 *Administration of 'ethnic affairs'*

Abolition of group areas legislation will severely shake and, in the course of time, destroy the edifice of the 1983 Constitution, because crucial 'own affairs' matters such as housing and education could no longer (or only with increasing difficulty) be territorialized with reference to segregated group areas. This explains the reluctance of the present government to countenance 'mixed' residential areas. The abolition of group areas is essentially incompatible with the administration by the state of schools, housing, health institutions and similar facilities on an 'ethnic basis'. The obvious answer appears to be that such facilities should, after the abolition of group areas

legislation, be administered by non-racial government institutions (within a unitary or federal state), which would be forced by the political process (and, more specifically, possible corporate federalist group representation) to pay due attention to the peculiar needs of any sizeable group.

8.3.2. *Living with the legacy of group areas*

There can be little doubt that group areas have already left an indelible mark on the South African society that would not be removed simply by repeal of the legislation. We have seen that the Theron Commission even went so far in 1976 as to suggest that a point of no return had been reached: group areas were said to form part and parcel of the basic ordering of society and this structure, particularly in respect of residential areas, could not be disturbed.¹¹¹ The difficulty of unscrambling group areas has also been acknowledged by the ANC leader Mr Nelson Mandela. He suggested during 1985 that in a post-apartheid society separate living in a city like Johannesburg would be maintained on a *de facto* basis until new employment opportunities would allow Blacks to move into the city and suburbs with dignity.¹¹²

The discussion of the position in Windhoek (8.2.6 above) provides important clues as to the factors which would influence the manner in which and rate at which actual integration will occur. At the most general level, much will depend on the overall political and economic situation. If group areas legislation were abolished in a political context where 'non-Whites' have a significant or the major say in government, it can be expected that schools and similar institutions will be

desegregated at the same time and that 'non-Whites' will have greater political confidence, and an increased access to public sector employment and housing subsidies - factors which will promote a movement into former White group areas. Even in such a situation economic and other factors will tend to restrict actual integration. The relatively high incidence of home ownership amongst Whites will serve to preserve the 'racial' character of many White neighbourhoods because 'non-Whites' will have to buy their way into these more expensive areas. In the result there will probably be more integration in areas with apartment buildings where accommodation can be leased - Hillbrow is a case in point. The experience in Windhoek points to the fact that patterns of public transport can also have a significant influence on residential patterns. Of course, if a significant redistribution of wealth in society were to occur, it would prevent the otherwise predictable transition from racial apartheid to socio-economic apartheid - with Whites remaining on top.

Residential integration will also be inhibited by predictable resistance on the part of a substantial number of Whites¹¹³ and hesitancy on the part of other groups to move to a possibly hostile neighbourhood. In the United States of America it has been found that

'because the home and neighbourhood are so personal and intimate, housing will be the last and most difficult step in the struggle for equal rights.'¹¹⁴

In most societies there also appears to be evidence of some self-segregation and ethno-centricity as far as housing is concerned.¹¹⁵

If ethno-centricity continues to be a major force, the residential areas of disadvantaged groups (including Blacks, if the legislative restrictions relating to them were also lifted) will probably expand or shift into first of all the nearby areas of more advantaged groups according to the ongoing 'invasion-succession' pattern observed in the United States.¹¹⁶ Some White neighbourhoods may thus become Coloured, some Coloured areas Black. Cities like Cape Town, however, in all probability will develop stable 'grey' areas in parts like Woodstock.

In a *commercial* sphere, the abolition of remaining group areas restrictions will in all probability not have dramatic effects. This prediction may be substantiated with reference to the effects of the opening of certain central business districts, discussed under 7.3 above. Only a significant shift in economic power will cause the general predominance of White businesses to wane. Specific traders (such as Indian small businessmen) can be expected to move (back) into areas presently closed to them.

On a *social* level the abolition of group areas legislation and the resultant desegregation of public amenities such as cinemas and restaurants, as well as all beaches (which must follow), is likely to have a more marked effect. In the social sphere, group areas and related legislation operate by controlling physical presence. In the nature of things the patterns of physical presence so established are less fixed than

patterns of segregated ownership and occupation (in the proper sense of the word.)

Finally, the point should be made that there appear to be essentially three possible approaches to handling or undoing the legacy of group areas. The first, and most conservative, would be to simply abolish State *imposed* group areas and related segregation, but adopt a *laissez-faire* approach to other forms of segregation - in, for instance, private schools, restaurants and in respect of business or residential property. This would enable continued 'private' segregation by relying on incidents of ownership ('Right of admission reserved') or through restrictive title deed conditions, or simply through discriminatory practices similar to those discussed in respect of housing in Windhoek under 8.2.6(i) above. (As to title deed conditions, it should be noted that in 1969 all racial restrictions in title deeds were cancelled by statute but this was, of course, done because group areas largely cover the situation).¹¹⁷

The first approach will cause the divisive legacy of group areas to endure for an indefinite period of time. The point should also be made that in certain important spheres State action cannot really be 'neutral' in respect of racial segregation. The most obvious example concerns the planning of future spatial development. Unless guide plans actually break with the spatial patterns of the apartheid city, its life will simply be prolonged.

In terms of the second approach an active anti-segregation stance would be adopted. Thus, on the Namibian model,

segregation in respect of certain amenities may be prohibited by statute, or more generally, on the pattern of, for instance, the United Kingdom Race Relations Act 1968.

The third and most far-reaching approach would seek to undo the *social* legacy of group areas by 'affirmative action'. In a group areas context the aspects which most urgently call for such attention are the adverse effects of group areas relocations and the infrastructural deficiencies in 'non-White' group areas. Adam & Moodley suggest that in the post-apartheid society the victims of group areas relocations could be compensated for their (financial) losses, or their residential areas could be upgraded through a special tax on properties in White areas.¹¹⁸ (The latter suggestion, of course, echoes section 12(6) of the Regional Services Councils Act 1985). The payment of individual compensation will, however, be exceedingly difficult to administer,¹¹⁹ and the special tax on 'White' properties would carry a penal stigma. It appears more feasible to argue for a concerted program of infrastructural upliftment sponsored by the central government and financed out of general revenue. The programme may then be administered by local authorities in terms of a subsidy scheme.

It also appears that 'affirmative action' would be required in the planning process - guide plans would actively have to promote integrated neighbourhoods by catering *inter alia* for low, middle and high density living in the same area, if the legacy of group areas is to be undone.

Depending on the political programme of the government of the day, more radical affirmative action (or 'reverse discrimination') may be taken to break the pattern of group areas. Disadvantaged groups may be aided to buy or rent accommodation in neighbourhoods closed to them under group areas, or they may even be relocated there by State action - the US 'bussing' to achieve integrated schools transposed into the sphere of housing.

CHAPTER EIGHT

ENDNOTES

¹ 'Desegregation in Namibia: the Demise of Urban Apartheid?' (1986) 17 *Geoforum* 289 at 290 (hereinafter Simon II). The name of the territory is a contentious issue. 'SWA/Namibia' is used in government materials of the territory and of South Africa. In the present study the shorter, and internationally accepted 'Namibia' is used.

² A figure of 92 048 is produced in the 1985 census by the City Council; an adjusted figure of 97 000 was accepted by the Council on 26 February 1986 (*Council Minutes* item 9.1.3.2) The composition firstly per race group and secondly by area:

	<u>White</u>	<u>Coloured</u>	<u>Black</u>	<u>Total</u>
	30 000	17 000	50 000	97 000
	*	* * *	*	
<u>Total</u>	<u>Windhoek</u>	<u>Khomasdal</u>	<u>Katutura</u>	
<u>Population</u>	35 000	14 000	48 000	97 000

³ See eg Dugard J *The SWA/Namibia dispute* (1973) and for a recent general survey of developments Du Pisani A *SWA/Namibia: The Politics of Continuity and Change* (1986) (hereinafter Du Pisani) as well as Simon & Davies (n4 below) passim.

⁴ Unpublished report submitted to HSRC (1986) (hereinafter Simon & Davies)

⁵ The study was initially intended to cover the full period of transition to independence, but this aim was frustrated by political events which have caused the (seemingly indefinite) postponement of Namibian independence.

⁶ See 'Decolonisation and Local Government in Namibia: the Neo-Apartheid Plan, 1977-83' (1985) 23 *Journal for Modern African Studies* 507 (hereinafter Simon I) and Simon II. Also 'Recent trends in Namibian Urbanisation' (1982) 73 *Tijdschrift voor Econ en Soc Geografie* 237. Simon's doctoral thesis *Aspects of urban change in Windhoek, Namibia, during the transition to independence* (Unpublished D.Phil Oxford 1983) was not available to me.

⁷ Simon & Davies 112-115; Municipality of Windhoek *Guide Plan for the Windhoek Basin* (1980) par 3:2.2; cf ch 6 n54.

⁸ Proc 22 of 1920.

- 9 Municipal Ordinance 24 of 1935 s 158(24), as amended by s 2(1)(a) of Ordinance 9 of 1939.
- 10 *Guide Plan* (n7) *ibid*.
- 11 Simon & Davies 205.
- 12 'Belemmering of andersins op grondbesit in SWA' (11 April 1985) 3.
- 13 Simon & Davies 204.
- 14 See Clayton AJ Windhoek. *Past present and future* (1974) 4.
- 15 *Guide Plan* (n7) *ibid*.
- 16 See ch 7 n102.
- 17 Property owners and even lawful residents could possibly have obtained a mandamus against the City Council to enforce compliance with the conditions; it may be argued that the Townships and Division of Land Ordinance 11 of 1963 impliedly imposes a duty on the Council to enforce compliance with township conditions.
- 18 In terms of s 31 of Ordinance 11 of 1963.
- 19 See Proc 24 of 1976 in respect of Klein Windhoek's Ludwigsdorf extention (*Off Gaz* 3563 of 15 September 1976).
- 20 Eg Klein Windhoek (*Off Gaz* 2655 of 16 August 1965).
- 21 Eg Pionierspark Proc 15 of 1968 (*Off Gaz* 2863 of 15 March 1968), Academia Proc 54 of 1970 (*Off Gaz* 3084 of 2 June 1970).
- 22 Proc 84 of 1972 (*Off Gaz* 3292 of 15 December 1972)
- 23 Proc 32 of 1974 (*Off Gaz* 3430 of 1 December 1974).
- 24 See at n19.
- 25 At 204-5; see also Simon II 293.
- 26 The learned authors appear to have misread the report by Clayton, a Windhoek City engineer, cited in n14 above.
- 27 See eg *Off Gaz* 3738 of 15 April 1978, which contains the conditions relating to Khomasdal (Extention 4).
- 28 Ch 3.3 above.
- 29 See ss 2, 7, 8, 9 and 35.
- 30 See ch 6 above.

- 31 See yet unpublished results of 1985 Municipal Census, as contained in Joint Town Planning and Traffic Committee Agenda of 19 June 1986 and also *Guide Plan* (n7) 47-8; cf Simon II 292.
- 32 At 210-11; cf ch 6 n50.
- 33 Simon & Davies 209-10; Simon II 293.
- 34 Proc AG 4 and 8 of 1977.
- 35 Simon & Davies 214-7.
- 36 See generally Du Pisani *passim*.
- 37 Du Pisani 378.
- 38 See Du Pisani 420.
- 39 SWA/Namibia *Debates of the National Assembly* Vol 1 8 June 1979 p 85-6.
- 40 Proc AG 4 and 8 of 1977.
- 41 Proc AG 5 of 1977
- 42 Proc AG 12 of 1977.
- 43 See Proc AG 169 of 1981 (*Of Gaz Ex* 3994 of 11 July 1979). In terms of s 8(1) the Act came into operation 30 days after 11 July 1979, ie 11 August 1979.
- 44 Proc AG 21 of 1980 (*Of Gaz Ex* 4179 of 17 June 1980).
- 45 Act 10 of 1980 (*Of Gaz Ex* 4186 of 20 June 1980).
- 46 Act 21 of 1981 (*Of Gaz Ex* 4573 of 23 December 1981).
- 47 See SWA/Namibia *Debates of the National Assembly* Vol 3 25 June 1979 p 514-5, 517.
- 48 See SWA/Namibia *Debates of the National assembly* Vol 22 26 November 1981 p 161. The Democratic Turnhalle Conference had agreed upon the opening of these premises.
- 49 Section 1.
- 50 Ibid.
- 51 1983 1 SA 106 (A).
- 52 Simon II 296; Simon & Davies 221.

- 53 Set out in Joint Town Planning and Traffic Committee Agenda 10 June 1986 A4. It should be noted that the figures include live-in servants.
- 54 Ibid.
- 55 Ibid; see also n2 above.
- 56 The source is the 1985 census - see n31 above.
- 57 Ibid.
- 58 Personal communication from Mrs E du Toit of Windhoek City Council's Townplanning Section during July 1986.
- 59 At 228.
- 60 On the absence of a bus service to White areas, see *Guide Plan* (n7) par 4.2.2. One of the main reasons for this situation is the high incidence of car ownership amongst Whites. This, it is said, would make a bus service to White areas (especially outside peak hours) unprofitable. See also 1985 Municipal census on Availability of Transport (Joint Town Planning and Traffic Committee Agenda 10 June 1986 A2).
- 61 My interviews with estate agents in Windhoek during July 1986; Simon & Davies 235-6.
- 62 See Simon & Davies 384 et seq.
- 63 Of course, White areas often offer housing not available in Khomasdal or Katutura. This appears to be an important motivation for migration to White areas.
- 64 See *Windhoek Advertiser* 27 March 1986 p 1.
- 65 Personal communication Mr B Joseph.
- 66 At 235.
- 67 Simon & Davies 228-9.
- 68 Personal communication Mr J S Groenewald, Acting Senior Superintendent.
- 69 Personal communications July 1984.
- 70 See Joint Town Planning and Traffic Committee Agenda 14 October 1986 A4.
- 71 See 242-252.
- 72 At 252.

- 73 Personal communications Messrs B Joseph, J van Zyl and C van Niekerk, July 1986.
- 74 Messrs Van Zyl and Van Niekerk (n73).
- 75 Ibid.
- 76 See Simon & Davies 219.
- 77 See generally Simon & Davies 216-219.
- 78 See Gresse G F 'Resultate van die afskaffing van Groepsgebiede Wette in SWA/Namibië' (Unpublished memorandum April 1986).
- 79 See *Windhoek Advertiser* 27 March 1986 p1.
- 80 Gresse op cit (n78) 5; see also comments of Chief City Planner cited by Gresse at p 5 and Annexure 'L' to his memorandum (comments by Mr C van Niekerk, chairman of Institute of Estate Agents of SA - SWA area committee).
- 81 *Windhoek Observer* 16 May 1986.
- 82 See Appendix VII C.
- 83 Simon & Davies 328-9.
- 84 Personal communication Windhoek Chief Town Planner, Mr B P Watson, July 1986.
- 85 Par 8.2.1.
- 86 Par 8.2.2.
- 87 See figure 7.1, p 68.
- 88 Simon & Davies 328.
- 89 Kuper et al ch 1; cf Simon & Davies 328.
- 90 See generally Simon & Davies ch 8.
- 91 Simon & Davies 166.
- 92 Cf *Van den Berg v Direkteur van Ekonomiese Sake* 1983 1 SA 106 (A), and see Du Pisani 435.
- 93 At 434.
- 94 A pool for Katutura was first constructed - Simon & Davies 483-4.

- 95 The exposition in the text is based on an unpublished memorandum on health services in Namibia of the central government Department of Governmental Affairs (December 1986). For the position in the early 1980s, see Simon & Davies 464.
- 96 See *Cape Times* 18 September 1986 p 2.
- 97 See *Namibian* 26 September 1986 p 12.
- 98 See Arnold Commission : *Verslag van die Kommissie van Onderzoek na Munisipale Wetgewing* (1980-1); Van Eeden Commission: *Verslag van die Kommissie van Onderzoek na die Finansiële Verhoudings tussen die sentrale verteenwoordigende en plaaslike owerhede* (1981). For the response of the then Council of Ministers, see *Stellingname van die Ministersraad oor die Verslag van die Kommissie van Onderzoek na die Finansiële Verhoudings tussen sentrale, verteenwoordigende en plaaslike owerhede* (1981), and generally Simon I.
- 99 Personal communication - Mr B P Watson Windhoek July 1986.
- 100 See Du Pisani 420.
- 101 DTA *A Constitution for Namibia* (Second Draft 17 February 1986).
- 102 4 January 1987 p 1.
- 103 See *inter alia* Blaauw LC *Aspects of a theory of group rights and its application to the SA legal system* (HSRC Report P 1-19 1986); Van Dyke V 'Human Rights and the Rights of Groups' (1974) 18 *American Journal of Political Science* 725; Huntingdon SP 'Reform and Stability in a Modernizing, Multi-Ethnic Society' (1981) 8 *Politikon* 8; Adam H and Moodley K *SA without Apartheid. Dismantling racial domination* (1986) ch 7; Du Plessis LM 'Law, Race and Ethnicity in a plural society' (1985) 10 *Tydskrif vir Regswetenskap* 89.
- 104 Op cit (n196) 196.
- 105 Op cit 211 and cf 229.
- 106 See *inter alia* art 27 of the UN International Covenant on Civil and Political Rights 1966. For a discussion of the meaning of 'minority' group in public international law, see Heunis JC *Volkeregtelike beskerming van minderheidsgroepe* (LLM 1981) ch 6.
- 107 See Adam & Moodley op cit 220-1.
- 108 Op cit 225.
- 109 See ch 7 n144 et seq.
- 110 See Adam & Moodley op cit 229.

- 111 See ch 8 n69.
- 112 See *Argus* 13 July 1985. (Interview and publication in *Argus* with permission of Minister of Justice and Department of Prisons.)
- 113 For the negative attitude of many Whites, see Maasdorp & Pillay 162-5 and the 1985 HSRC Report 18-70. According to a poll published in *Rapport* 18 May 1986 there has been a considerable liberalization of White attitudes over the preceding five years. In the USA estate agents and financial institutions have also tended to 'protect' White areas - up to a point: if the 'invasion' of 'non-Whites' appears inevitable, they cash in on the selling spree. (See Maasdorp & Pillay 55-6; Johnston RJ *Urban Residential Patterns* (1971) 265-6.) It is interesting to note that in 1942 building societies in Durban had agreed not to advance loans to Indians for the purchase of property in the predominantly White areas of that city (Maasdorp & Pillay 88).
- 114 Morrill RL 'The Negro ghetto: problems and alternatives' (1965) 55 *Geographical Review* 339.
- 115 Maasdorp & Pillay 54 (it is rightly pointed out that pressures forcing segregation make the significance of voluntary segregation difficult to assess); Glazer N & Moynhan DP *Beyond the Melting Pot* (2 ed 1970) xii.
- 116 Morrill op cit (n114); Maasdorp & Pillay ch 4.
- 117 Section 28 of the General Law Amendment Act 101 of 1969. Such restrictive conditions were valid at common law and frequently used. See Van der Merwe 357n297. The Group Areas Act treated 'racial' title deed conditions variously - in controlled, specified and defined areas they remained operative, but such a condition which conflicted with a Ministerial determination under s 18 was suspended (s 18(5)). Suspension also occurred in case of conflict with the specific 'use' determined under s 19 (prior to its recent amendment), and in the case of conflict with a permit (s 21(12)). In the case of a group area, conflict between an existing racial title deed condition and the racial character of the group area, caused the former to lapse. The insertion of such a conflicting condition was prohibited (ss 26(4) and 27(1)(d)).
- 118 Op cit 223-4.
- 119 On difficulties of compensation, see 6.6 above.

CHAPTER NINE

RÉSUMÉ

9.1 Structure and Essential Characteristics of Group Areas Legislation

In this study an analysis of Group Areas Legislation as a major piece of governmental law was undertaken. The first Group Areas Act was introduced in 1950 as a comprehensive and intricate legislative measure to achieve particular political goals and generally to implement the National Party policy of apartheid. Since then the Act has been widely acknowledged as one of the cornerstones of apartheid. The strong policy orientation of group areas legislation entails *inter alia* that it is subject to frequent changes as shifts in respect of specific policy aspects occur and also explains why such a cardinal role and wide discretionary powers were allocated to the executive branch of government with regard to the implementation of the Act.

Group areas legislation was not entirely novel in aim or structure in the sense that it drew on earlier legislative measures, and in particular segregationist measures aimed at Asiatics (primarily Indians) in the Transvaal and Natal. It distinguished itself from earlier measures however in that it sought to introduce territorial segregation in cities and towns on a comprehensive and countrywide scale in terms of a specific ideology.

In terms of apartheid thinking contact between 'racial' groups breeds friction which can only be avoided through territorial segregation. Moreover, in terms of the ideology of

apartheid in its traditional guise the paramountcy of the White group has to be secured for the benefit of all, and this has led to the adoption of a 'control' model in respect of the pluralistic South African society. In the pursuit of these political goals group areas have played a vital role. Group areas have also achieved particular constitutional significance through the creation of ethnic local authorities which are to administer the 'own affairs' of their group areas based communities and are further to co-operate on regional matters in the system of Regional Services Councils which is about to be introduced. The Government asserts that this new system of local government will grant autonomy to ethnic local communities, but we have seen that in reality central government control over local authorities is being progressively extended and such control serves to entrench the hegemony of the White group.

① Group areas legislation focuses on rights in respect of land because these are of predominant importance when it comes to the control and structuring of society. Group areas controls extend primarily to the ownership of immovable property and the occupation of land and premises. The emphasis is on the control of occupation rather than ownership, because of the more immediate societal consequences flowing from patterns of occupation. Since the late 1950s the Act and delegated legislation made thereunder, were also used to bring about what may be termed social apartheid in sport (up to 1982) and in places such as restaurants, cinemas and clubs. This was done by extending, through delegated legislation, the common law meaning

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of 'occupation' to include mere physical presence upon land for a substantial period of time. This extension constituted a departure from the scheme and objects of the original Act which aimed at the control of the more stable and permanent forms of presence upon land. A further departure from the original scheme and objects of group areas legislation is the catch-all control of the use of land and premises introduced in 1961 and aimed primarily at curbing the trading activities of disqualified companies. As explained in chapter two, the extended control of the use of land and premises fits in ill with the general scheme of group areas legislation.

In controlling the ownership, occupation and use of land, group areas legislation utilizes well-known private law concepts, but often adapts and even distorts the meaning and ambit of these to suit its own aims.

A significant feature of group areas legislation which ties in with its governmental law character, is the central importance of executive discretion in respect of the implementation of the legislation. It is not an exaggeration to say that the implementation and application of the entire Act hinge upon executive discretion. This is borne out when the wide powers given to the executive with regard to the creation of group areas, the delegation of powers under the Act, the administration of the permit system, and the discretionary enforcement of group areas legislation are examined. The Act essentially only creates the framework for the creation of group areas and the when and how are left to the discretion of the executive branch of

no conclusion

government. The discretionary powers contained in the legislation are largely unconfined, unstructured and unchecked and the courts have generally refused to confine, structure or check the exercise of these powers when called upon to do so as part of their common law powers of review. This situation raises grave concerns in constitutional and administrative law when doctrines such as the Rule of Law, principle of legality and separation of powers are considered.

9.2 *The Group Areas Act and the Web of Apartheid Laws*

As a cornerstone of apartheid, group areas legislation has operated in a particular ideological setting and in conjunction with other laws. Group areas legislation has specifically been used to bring about residential and commercial segregation in cities and towns as between the White, Coloured and Indian groups. The application of the Act in respect of Blacks has been limited in that no Black group areas have been created in terms of the Act. The Act does, however, apply to Blacks in the sense that they are disqualified persons *vis-à-vis* the group areas of the other three groups. Essentially though, Blacks have been subjected to extensive controls under a different statutory regime. In an urban context, they have been confined to Black locations through the 1923 and 1945 Urban Areas legislation. Outside urban areas, Blacks have been territorialized in homelands which may be described as macro 'group areas'. This was done mainly in terms of the 1913 and 1936 Land Acts. In respect of Blacks, territorial segregation has been taken the furthest and the original Black homelands are now mostly

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constituted into five semi-autonomous 'national states' and four states (the TBVC countries) which are independent states in terms of the South African if not international law. Two recent developments increased the relevance of group areas legislation in respect of Blacks. The repeal during 1986 of the Blacks (Urban Areas) Consolidation Act 1945 entails that Black rights of ownership and occupation of land in urban areas outside Black locations are now controlled along racial lines only in terms of the Group Areas Act. Secondly, Black urban and local authorities will co-operate with other ethnic authorities created in terms of group areas legislation in the new system of RSCs.

The Group Areas Act is complemented not only by the laws relating to Blacks, but also by the complex set of legislative and administrative measures which ensure racial segregation in schools, public amenities and on beaches. It is of particular importance to note how group areas and segregated schools complement each other. Most schools have a strong 'neighbourhood' basis and segregated residential areas and segregated schools go hand in hand - on an ideological and practical basis.

In the actual implementation of racial segregation by means of group areas, the Community Development Act, the so-called 'sister' Act of the Group Areas Act, plays an important role. It provides *inter alia* for the relocation of disqualified persons from group areas, the expropriation of their property and generally for control mechanisms such as restrictions on the issue of trading licences to disqualified persons.



9.3 The Effects of Group Areas Legislation

The Group Areas Act was first implemented in the early 1950s through the declaration of controlled areas on a countrywide basis. This meant that the racial status quo was preserved.⁽¹⁾ Thereafter the administrative process in terms of which group areas were declared in cities and towns was initiated. This⁽²⁾ process has now practically been completed. Group areas for occupation and ownership constitute the ultimate aim of the Act and provide for the optimum degree of segregation envisaged by the Act.

The Act was implemented by an all-White bureaucracy and in⁽³⁾ keeping with the aim of ensuring White paramountcy, the allocation of land in terms of the Act has been highly discriminatory. The White group ended up with the largest share and most desirable parts of the available land. In general, the negative societal impact of the implementation of the Act has⁽⁴⁾ been severe. The disadvantaged groups in a group areas context, namely the Coloureds and Indians, have had to bear unfair financial burdens, heavy social costs and persistent housing shortages by reason of the Act. Thousands of Coloured and Indian families were relocated from areas declared White where they had often lived for generations, frequently to be resettled in outlying and soulless housing estates which suffer from severe infrastructural deficiencies. Numerous studies and reports have confirmed what is really common knowledge: the Group Areas Act is probably the most detested piece of legislation amongst the Coloured and Indian communities. In a legal context this

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psychological reaction is of importance because it rules out the retention of group areas in any constitutional dispensation based on a genuine consensus of all the major groupings in the South African society.

The implementation of the Act brought about the transformation from the Segregation to Apartheid City. The latter is characterized by rigid segregationist patterns, particularly in a residential context, a layout featuring generally a White centre with 'non-White' areas on the periphery, buffer strips separating the racial groups, and a general design aimed at advancing the physical security and isolation of the White group.

9.4 Group Areas and the South African Judiciary

In Chapter five the approach and attitudes of South African judiciary vis-à-vis group areas legislation were traced by examining the most important reported decisions relating to discrimination and unreasonableness in the implementation of group areas, procedural safeguards, the judicial control of executive discretion, and race classification under the Act.

The analysis reveals, broadly speaking, a split between the approach of the Appellate Division on the one hand, and the Provincial Divisions on the other hand. The approach of the Appellate Division has essentially been a 'hands off' one in respect of administrative action in a group areas context. This court has consistently emphasized the 'high policy' content of group areas decision-making, and it made no real effort to assert its judicial independence or to protect citizens against the

drastic effects of this far-reaching piece of governmental law. The Appellate Division was not even willing to give the recognized principles of administrative law their 'normal' application in this sphere. While the approach of the Provincial Divisions was certainly not always uniform, a significant number of their decisions evidence a willingness to uphold individual rights in the face of the adverse effects of the implementation of group areas, and to give the general principles of administrative law full application in this sphere. This divergence in approach between the Appellate Division and the Provincial Divisions, resulted in the over-ruling of a significant number of judgments on appeal. Here the decisions in *Ramjee*, *Lockhat*, *Mariam* and *Variawa* are examples in point.

On the whole the decisions of the Appellate Divisions in this sphere are not supported by elaborate or impressive reasoning. More often than not the court simply chose to announce the result in favour of the government. The policy arguments most frequently invoked by the court to justify its decisions, were the following: (i) The 'high policy' nature of administrative decision-making in respect of the implementation of group areas calls for judicial restraint when the administrative actions are challenged in review proceedings; (ii) The legislation should be interpreted in such a way as not to impede administrative efficiency in the implementation of the Act; (iii) As a major piece of governmental law group areas represent a 'colossal social experiment' and 'long term policy', and as such the administrative implementation of group areas

cannot be subjected to common law tests relating to non-discrimination and unreasonableness. The Appellate Division accordingly refused to confine or structure the administrative discretion involved in the implementation of the Act.

The courts in general displayed very little, if any, real hostility towards group areas legislation - certainly nothing akin to, for instance, the attitude displayed recently by the Natal Bench towards section 30 of the Internal Security Act 74 of 1982 in *S v Ramgobin*¹. The issue of race classification in terms of the Group Areas Act provides an example of an area where all the courts refused to break with traditional White racial attitudes. Here the courts, unsurprisingly, abided by the White status quo. Of greater significance, however, is the fact that in a number of important decisions the Appellate Division went beyond any broad White consensus on racial matters, and indulged in what may be termed apartheid thinking, in other words echoed the ideology of the National Party Government. The decision in *Adams & Werner* is an outstanding example. The housing shortages created by group areas were described as 'temporary' and inevitable, and attributed to global urban trends, not the policies of the South African government. In *Harnaker* the Appellate Division accepted and acted upon the government's political assurances that the permit system would be used benevolently to alleviate the position of disqualified persons.

The impact of leading cases on group areas has been significant. Decisions such as *Cassem*, *Lockhat*, *Mariam* and *Suliman* practically gave the executive a *carte blanche* in the

implementation of the Act. These decisions precluded any attack on the harsh results of group areas based upon the traditional procedural or quasi-substantive grounds of review. These decisions have also had a general baleful effect in the fields of constitutional and administrative law.

The leading cases in the four specific areas examined all involved a real element of judicial choice. The Appellate Division came down in favour of the government with remarkable consistency. The court tended to justify its findings on the basis of the three policy arguments referred to above, and generally with reference to the 'intention of the legislature'. Analysis of the cases and their background reveals that the court in fact deferred to the political intentions behind the group areas legislation, and hence in the present context reference to the 'intention of the legislature' should not be understood in its usual, depersonalised sense. In thus deferring to the political intentions of the majority of legislators the court appears to have been influenced by a command theory of law and legislation, as well as the view that Parliament was a supreme, democratic institution. The approach of the court in this regard may be criticized on several grounds. At all material times Parliament was not a democratic institution vis-à-vis the disadvantaged groups in a group areas context. The approach of the court also takes majoritarianism too far and negates constitutionally important common law principles governing the exercise of administrative powers. These common law principles can only be given proper scope if the 'intention of the

legislature' (which may exclude their applicability in a specific case) is taken to refer to the depersonalised 'intention' of a reasonable legislature. On the whole, the court also failed in its duty to serve as buttress between the executive and the subject.

9.5 *The Present State of Group Areas Legislation and Practice*
 Pressure for the abolition or in any event drastic reform of
group areas legislation is constantly mounting. Recent years
 have seen the introduction of a number of liberalizing measures
 in respect of group areas, notably open industrial and free trade
areas, wider categories of exempted occupation, and the breakdown
 of rigid social apartheid in respect of sport, and in certain
 localities, in respect of cinemas, beaches and similar public
 amenities.

There appears to be considerable hesitation on the part of the authorities to enforce group areas segregation by means of criminal prosecutions. This situation has been brought about inter alia by the present political uncertainty concerning the future of group areas, the growth of relatively stable 'grey' areas in cities like Johannesburg and the fact that 'mixed' marriages and cohabitation are now lawful.

The local government institutions which owe their existence
to group areas are beset with serious problems and are suffering
a persistent legitimacy crisis. The government hopes that this
crisis will be solved through the introduction of Regional
Services Councils, but as the analysis in 7.3 indicates, this is
 unlikely.

9.6 Prospects for Reform

Significant changes to the system of the group areas appear unlikely if the present government remains in power and adheres to its current policies and constitutional model. We have seen that this constitutional model partakes of some of the features and terminology of consociational democracy but also deviates in material respects from true consociationalism. In fact the 1983 Constitution reflects Lustik's 'control' model of government in deeply divided but relatively stable societies. Group areas play an important role in the present constitutional dispensation set-up by providing the territorial basis for ethnic representation at local authority level and for the administration of ethnic 'own affairs'. This explains the reluctance of the present government to allow the introduction of 'grey' residential areas on any significant scale. Such a step would undermine the territorial basis of the 'own affairs' component of the present constitution. A number of recent reforms in the context of group areas, such as free trade areas, open industrial areas and multi-racial regional bodies (the RSCs) have echoed the proposals contained in the 1973 SPROCAS report on *South Africa's Political Alternatives*. This report argued for the introduction of consociational democracy in South Africa and proposed *inter alia* that group areas should only be retained on a limited scale and if desired by the local community concerned. At the end of 1986 the President's Council apparently recommended to the Cabinet that 'grey' residential areas should be introduced where local communities desire it - again closely following the SPROCAS

proposals. The Cabinet, however, found this proposal unacceptable for the reasons set out above. It would appear that a significant reform of the group areas system, such as the large-scale introduction of 'grey' areas, would necessitate a restructuring of the 1983 Constitution. Senior government spokesmen have repeatedly affirmed that this is out of the question and have moreover listed segregated residential areas and schools as political 'non-negotiables'.

9.7 *Undoing the Legacy of Group Areas*

It is doubtful whether group areas could be reformed so as to remove the profound political and moral objections to the very basis of the system. Group areas infringe universally accepted basic human rights and liberties, such as freedom of movement, sanctity of property and non-discrimination. Moreover, group areas are inherently discriminatory and entrench divisive racial ethnicity and socio-economic privilege. The repeal of all group areas legislation would, however, not remove the serious problems associated with the system because group areas have already left an indelible mark on society.

The experience in Windhoek, Namibia, where enforced residential segregation was abolished in 1979, indicates that the undoing of the legacy of group areas will be a very difficult process. This process will require *inter alia* that the apartheid legislation which complements group areas, and in particular the segregation of public schools, would also have to be abolished. If the abolition of the complementary legislation were to take place on a piece-meal basis, a tortuous political and

constitutional process would result. The segregationist patterns established by group areas will also persist unless discriminatory practices in respect of residential accommodation and public facilities are effectively curbed, and long-term town planning undertaken in a way that will overcome and undo the 'gravitational pull' of existing segregationist patterns of the occupation and ownership of the land. Factors such as natural ethno-centricity in housing will moreover cause segregationist patterns to persist in some form or another.

The abolition of group areas legislation would confirm and act out the political reality that ethnicity cannot be successfully territorialized in South Africa. This would have important constitutional implications for political representation and the administration of the affairs of any particular group. The abolition of group areas would suggest that any constitutional recognition of the representation of groups (either generally or in limited respects) should not be coupled to territoriality, but rather to a corporate federalist model.

Good conclusion.

CHAPTER NINE

ENDNOTES

1. 1985 3 SA 583 (N); 1985 4 SA 130 (N).

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(Note: All criminal cases cited as R vs ..., or S vs ..., are listed under 'S')

A

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Allen vs Emerson (1944) KB 362;

Arnold vs Race Classification Appeal Board 1967 2 SA 267 (C).

B

BAAB Western Cape vs Mithiya 1985 4 SA 754 (A);

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Bhyat vs Dinges NO 1951 3 SA 115 (T);

Bradfield vs Federal Taxation Comr (1924) 34 CLR 1;

Braun vs Blam & Botha NO 1984 2 SA 850 (A);

Brown vs Board of Education, Topeka 347 US 483 (1954);

Bruyns vs Rand Sporting Club 1919 WLD 55;

Boesak vs Minister of Home Affairs (11868/85) Unreported CPD 19 December 1985.

C

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Cassen vs Oos-Kaapse Komitee van die Groepsgebiederaad 1959 3 SA 651 (A);

CIR vs City Deep 1924 AD 298;

CIR vs King 1947 2 SA 196 (A);

Corondinas vs Badat 1946 AD 548;

Council of Civil Service Unions vs Minister of Civil Service (1985) AC 374;

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Cross vs Wiehahn 1954 2 SA 216 (N).

D

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Dampsey vs Minister of Law & Order (6787/86) Unreported CPD 9 July 1986;

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 Diner vs Ensor NO 1967 1 SA 547 (D);
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 Dorklerk Investments vs Hyat's Department Store 1974 1 SA 483 (W);
 Down vs Malan NO 1960 2 SA 734 (A);
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E

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 Escritt & Barrell vs IRC 177 LT 6;
 Essop vs Abdullah 1986 4 SA 11 (C);
 Estate Smith vs Estate Follett 1942 AD 364;
 Ewels vs Leach 1954 4 SA 62 (E);
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F

Fen Sam Jackson vs Conradie 1955 4 SA 266 (E).

G

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 Green vs Griffiths (1886) 4 SC 346;
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H

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 Hamakar vs Minister of the Interior 1966 2 SA 162 (C);
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Hoosain vs Sekretaris van Binnelandse Sake 1970 1 SA 259 (A).

I

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J

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K

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L

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Lek vs Estate Agents Board 1978 3 SA 160 (C);

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M

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Minister of the Interior vs Lockhat 1961 2 SA 587 (A);

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Msoni vs Abrahams NO 1981 2 SA 256 (W)

N

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Ngwenya vs Hindly 1950 1 SA 839 (C);

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O

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P

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 R vs Ah Tong 1918 AD 186;
 R vs Appel 1959 3 SA 944 (C);
 R vs Asmal 1958 3 SA 664 (N);
 R vs Bagas 1957 4 SA 311 (A);
 S vs Bhoolia 1969 3 SA 600 (T);
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2 No. 10296

STAATSKOERANT, 27 JUNIE 1986

No. 112, 1986

VRYSTELLING VAN PERSONE VAN DIE BEPALINGS VAN ARTIKEL 26 VAN DIE WET OP GROEPSGEBIEDE, 1966 (WET 36 VAN 1966)

Kragtens die bevoegdheid my verleen by artikels 26 (2) (c) en 26 (3) (a), gelees met artikel 33, van die Wet op Groepsgebiede, 1966 (Wet 36 van 1966)—

1. Stel ek hierby vry van die toepassing van artikel 26 (1) van genoemde Wet—

- (1) die eggenoot, eggenote, minderjarige kind of afhanklike van 'n persoon (uitgesonderd 'n huisbediende of 'n werknemer) wat wettiglik grond of 'n perseel okkupeer;
- (2) 'n persoon wat op 30 Junie 1986 'n perseel okkupeer ingevolge 'n lisensie aan die eienaar, huurder of okkupeerder daarvan kragtens artikel 9 (4) van die Swartes (Stadsgebiede) Konsolidasiewet, 1945 (Wet 25 van 1945), uitgereik: Met dien verstande dat hierdie vrystelling verval op die datum waarop die geldigheid van die betrokke lisensie sou verval het as genoemde Wet nie herroep was nie;
- * (3) 'n *bona fide*-student aan of skolier by 'n opvoedkundige inrigting wat deur die Staat beheer of ondersteun word;
- (4) 'n *bona fide*-werknemer (uitgesonderd 'n huisbediende) van 'n persoon wat wettiglik grond of 'n perseel okkupeer terwyl sodanige werknemer aan diens is; en
- (5) 'n persoon wat 'n gebou, grond of perseel vir professionele doeleindes okkupeer of gebruik ingevolge 'n dorpsaanlegskema wat kragtens die een of ander wet in die betrokke groepsgebied in werking of bindend is:

Met dien verstande dat 'n in paragraaf 1 (1), (2), (3), (4) of (5) bedoelde persoon wat grond of 'n perseel wettiglik okkupeer nie mag toelaat dat 'n onbevoegde persoon die grond of perseel wat deur sodanige persoon geokkupeer word tussen 22h00 en 08h00 mag betree nie en dat tydens nie-voldoening aan hierdie voorbehoudsbepaling hierdie vrystelling nie op hom van toepassing is nie;

2. verklaar ek hierby dat die bepalings van artikel 26 (2) (c) van genoemde Wet ten opsigte van alle groepsgebiede van toepassings is, op voorwaarde dat 'n huisbediende van 'n persoon wat wettiglik grond of 'n perseel okkupeer nie mag toelaat dat 'n onbevoegde persoon die grond of perseel wat deur sodanige huisbediende geokkupeer word, tussen 22h00 en 08h00 mag betree nie en dat tydens nie-voldoening aan hierdie voorwaarde deur sodanige huisbediende hy nie van die bepalings van genoemde artikel 26 (2) (c) vrygestel is nie;
3. herroep ek hierby Proklamasies 70 van 1970 en R. 109 van 1985; en
4. bepaal ek hierby dat hierdie Proklamasie op 1 Julie 1986 in werking tree.

Gegee onder my Hand en die Seël van die Republiek van Suid-Afrika te Kaapstad, op hede die Dertigste dag van Mei Eenduisend Negehoenderd Ses-en-tagtig.

P. W. BOTHA,
Staatspresident.

Op las van die Staatspresident-in-Kabinet:

J. C. HEUNIS,
Minister van die Kabinet.

* Amended by Proc 133 of 1986 (see next page)

No. 112, 1986

EXEMPTION OF PERSONS FROM THE PROVISIONS OF SECTION 26 OF THE GROUP AREAS ACT, 1966 (ACT 36 OF 1966)

Under and by virtue of the powers vested in me by sections 26 (2) (c) and 26 (3) (a), read with section 33, of the Group Areas Act, 1966 (Act 36 of 1966), I hereby—

1. exempt from the operation of section 26 (1) of the said Act—

- (1) the husband, wife, minor child or dependant of any person (other than a domestic servant or an employee) lawfully occupying land or premises;
- (2) any person occupying premises on 30 June 1986 in pursuance of a licence issued to the owner, lessee or occupier thereof under section 9 (4) of the Blacks (Urban Areas) Consolidation Act, 1945 (Act 25 of 1945): Provided that this exemption shall expire on the date on which the licence concerned would have expired if the said Act had not been repealed;
- * (3) a *bona fide* student or scholar attending an educational institution controlled or aided by the State;
- (4) a *bona fide* employee (other than a domestic servant) of a person lawfully occupying land or premises while such employee is on duty; and
- (5) any person occupying or using any building, land or premises for professional purposes in terms of a town planning scheme which is in operation or binding under any law in the group area concerned:

Provided that any person referred to in paragraph 1 (1), (2), (3), (4) or (5) who lawfully occupies land or premises may not permit a disqualified person to be on the land or premises occupied by such person between the hours of 22h00 and 08h00 and that during non-compliance with this proviso this exemption shall not apply to him;

2. declare that the provisions of section 26 (2) (c) of the said Act shall apply in respect of all group areas on condition that a domestic servant of a person lawfully occupying land or premises may not permit a disqualified person to be upon the land or premises occupied by such domestic servant between the hours of 22h00 and 08h00 and that during non-compliance with this condition by such domestic servant he shall not be exempt from the provisions of the said section 26 (2) (c);
3. repeal Proclamations 70 of 1970 and R. 109 of 1985; and
4. determine that this Proclamation shall come into operation on 1 July 1986.

Given under my Hand and the Seal of the Republic of South Africa at Cape Town this Thirtieth day of May, One thousand Nine hundred and Eighty-six.

P. W. BOTHA,
State President.

By Order of the State President-in-Cabinet:

J. C. HEUNIS,
Minister of the Cabinet.

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PRETORIA, 22 JULIE 1986

No. 10368

PROKLAMASIE

van die

Staatspresident van die Republiek van Suid-Afrika

No. 133, 1986

VRYSTELLING VAN PERSONE VAN DIE BEPALINGS VAN ARTIKEL 26 VAN DIE WET OP GROEPSGEBIEDE, 1966 (WET 36 VAN 1966).—WYSIGING VAN PROKLAMASIE 112 VAN 1986

Kragtens die bevoegdheid my verleen by artikel 26 (3) (a), gelees met artikel 33, van die Wet op Groepsgebiede, 1966 (Wet 36 van 1966), wysig ek hierby Proklamasie 112 van 1986 deur subparagraaf (3) van paragraaf 1 deur die volgende subparagraaf te vervang:

“(3) 'n *bona fide*-student of skolier, alleenlik met die doel om daaglikse akademiese lesings aan 'n opvoedkundige inrigting wat deur die Staat beheer of ondersteun word, by te woon;”.

Gegee onder my Hand en die Seël van die Republiek van Suid-Afrika te Pretoria, op hede die Sewentiende dag van Julie Eenduisend Negehoenderd Ses-en-tagtig.

P. W. BOTHA,
Staatspresident.

Op las van die Staatspresident-in-Kabinet:

J. J. G. WENTZEL,
Minister van die Kabinet.

PROCLAMATION

by the

State President of the Republic of South Africa

No. 133, 1986

EXEMPTION OF PERSONS FROM THE PROVISIONS OF SECTION 26 OF THE GROUP AREAS ACT, 1966 (ACT 36 OF 1966).—AMENDMENT OF PROCLAMATION 112 OF 1986

Under and by virtue of the powers vested in me by section 26 (3) (a), read with section 33, of the Group Areas Act, 1966 (Act 36 of 1966), I hereby amend Proclamation 112 of 1986 by the substitution for subparagraph (3) of paragraph 1 of the following subparagraph:

“(3) any *bona fide* student or scholar only for the purpose of daily attending academic lectures at an educational institution controlled or aided by the State;”.

Given under my Hand and the Seal of the Republic of South Africa at Pretoria this Seventeenth day of July, One thousand Nine hundred and Eighty-six.

P. W. BOTHA,
State President.

By Order of the State President in Cabinet:

J. J. G. WENTZEL,
Minister of the Cabinet.

No. R. 110, 1985

EXEMPTION OF PERSONS FROM THE OPERATION OF SECTION 17 (1) OF THE GROUP AREAS ACT, 1966

In terms of sections 17 (4) and 33 of the Group Areas Act, 1966 (Act 36 of 1966), I hereby—

A. exempt from the operation of section 17 (1) of the said Act—

(1) the husband, wife, minor child or dependant of any person (other than a domestic servant or an employee) lawfully occupying land or premises;

(2) any person occupying land or premises in pursuance of a licence issued to the occupier of such land or premises under section 9 (4) of the Blacks (Urban Areas) Consolidation Act, 1945 (Act 25 of 1945);

(3) any Black occupying accommodation provided for him by his employer in terms of section 2 (1) (e) of the Blacks (Urban Areas) Consolidation Act, 1945 (Act 25 of 1945); and

(4) any *bona fide* student or scholar attending an educational institution controlled or aided by the State, for the purpose of such attendance only;

B. exempt from the operation of section 17 (1) of the said Act, but only for the purpose of performing the work he is engaged to perform—

(1) any *bona fide* employee of any person lawfully occupying land or premises for the purpose of carrying on prospecting or mining operations or operations necessary or incidental thereto on such land or on land on which such premises are situated; and

(2) any *bona fide* employee (other than a domestic servant) of any person lawfully occupying land or premises, but only for the duration of such performance; and

C. withdraw Proclamation R. 3 of 12 January 1968.

Given under my Hand and the Seal of the Republic of South Africa at Cape Town this Seventh day of June, One thousand Nine hundred and Eighty-five.

P. W. BOTHA,
State President.

By Order of the State President-in-Cabinet:
J. C. HEUNIS.

No. R. 110, 1985

VRYSTELLING VAN PERSONE VAN DIE TOEPASSING VAN ARTIKEL 17 (1) VAN DIE WET OP GROEPSGEBIEDE, 1966

Kragtens artikels 17 (4) en 33 van die Wet op Groepsgebiede, 1966 (Wet 36 van 1966)—

A. stel ek hierby vry van die toepassing van artikel 17 (1) van genoemde Wet—

(1) die eggenoot, eggenote, minderjarige kind of afhanklike van 'n persoon (uitgesonderd 'n huisbediende of 'n werknemer) wat wettiglik grond of persele okkupeer;

(2) 'n persoon wat grond of persele okkupeer ingevolge 'n lisensie aan die okkuperder van daardie grond of persele kragtens artikel 9 (4) van die Swartes (Stadsgebiede) Konsolidasiewet, 1945 (Wet 25 van 1945), uitgereik;

(3) 'n Swarte wat huisvesting okkupeer wat deur sy werkgever vir hom verskaf is ingevolge artikel 2 (1) (e) van die Swartes (Stadsgebiede) Konsolidasiewet, 1945 (Wet 25 van 1945); en

(4) 'n *bona fide*-student of skooler wat 'n opvoedkundige inrigting bywoon wat deur die Staat beheer of ondersteun word, alleenlik vir die doel van daardie bywoning;

B. stel ek hierby vry van die toepassing van artikel 17 (1) van genoemde Wet, maar alleenlik met die doel om die werk te doen waarvoor hy in diens geneem is—

(1) 'n *bona fide*-werknemer van 'n persoon wat grond of persele wettiglik okkupeer met die doel om prospekter- of mynwerkzaamhede of werkzaamhede wat daarby nodig is of daarmee in verband staan, uit te voer op sodanige grond of op grond waarop die persele geleë is; en

(2) 'n *bona fide*-werknemer (uitgesonderd 'n huisbediende) van 'n persoon wat wettiglik grond of persele okkupeer, maar alleenlik vir die duur van sodanige werkverrigting; en

C. trek ek hierby Proklamasie R. 3 van 12 Januarie 1968 in.

Gegee onder my Hand en die Seël van die Republiek van Suid-Afrika te Kaapstad, op hede die Sewende dag van Junie Eenduisend Negehonderd Vyf-en-tagtig.

P. W. BOTHA,
Staatspresident.

Op las van die Staatspresident-in-Kabinet:
J. C. HEUNIS.

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JUNE

No. 10296

PROKLAMASIES

van die

Staatspresident van die Republiek van Suid-Afrika

No. 111, 1986

WET OP GROEPSGEBIEDE, 1966 (WET 36 VAN 1966).—WYSIGING VAN PROKLAMASIE R. 110 VAN 1985

Kragtens die bevoegdheid my verleen by artikel 17 (4), geles met artikel 33, van die Wet op Groepsgebiede, 1966 (Wet 36 van 1966), wysig ek, met ingang van 1 Julie 1986, hierby paragraaf A van Proklamasie R. 110 van 1985—

1. deur subparagraaf (2) deur die volgende subparagraaf te vervang:

“(2) 'n persoon wat op 30 Junie 1986 'n perseel okkupeer ingevolge 'n lisensie aan die eienaar, huurder of okkupeerder daarvan kragtens artikel 9 (4) van die Swartes (Stadsgebiede) Konsolidasiewet, 1945 (Wet 25 van 1945), uitgereik: Met dien verstande dat hierdie vrystelling verval op die datum waarop die geldigheid van die betrokke lisensie sou verval het as genoemde Wet nie herroep was nie;” en

2. deur na subparagraaf (4) die volgende subparagraaf in te voeg:

“(5) 'n persoon wat 'n gebou, grond of perseel vir professionele doeleindes okkupeer of gebruik ingevolge 'n dorpsaanlegskema wat kragtens die een of ander wet in die betrokke aangewese gebied in werking of bindend is;”.

Gegee onder my Hand en die Seël van die Republiek van Suid-Afrika te Kaapstad, op hede die Derde dag van Junie Eenduisend Negehoenderd Ses-en-tagtig.

P. W. BOTHA,
Staatspresident.

Op las van die Staatspresident-in-Kabinet:

J. C. HEUNIS,
Minister van die Kabinet.

916—1

PROCLAMATIONS

by the

State President of the Republic of South Africa

No. 111, 1986

GROUP AREAS ACT, 1966 (ACT 36 OF 1966).—AMENDMENT OF PROCLAMATION R. 110 OF 1985

Under and by virtue of the powers vested in me by section 17 (4), read with section 33, of the Group Areas Act, 1966 (Act 36 of 1966), I hereby amend paragraph A of Proclamation R. 110 of 1985 with effect from 1 July 1986—

1. by the substitution for subparagraph (2) of the following subparagraph:

“(2) any person occupying premises on 30 June 1986 in pursuance of a licence issued to the owner, lessee or occupier thereof under section 9 (4) of the Blacks (Urban Areas) Consolidation Act, 1945 (Act 25 of 1945): Provided that this exemption shall expire on the date on which such licence would have expired if the said Act had not been repealed;” and

2. by the insertion after subparagraph (4) of the following subparagraph:

“(5) any person occupying or using any building, land or premises for professional purposes in terms of a town planning scheme which is in operation or binding under any law in the specified area concerned;”.

Given under my Hand and the Seal of the Republic of South Africa at Cape Town this Third day of June, One thousand Nine hundred and Eighty-six.

P. W. BOTHA,
State President.

By Order of the State President-in-Cabinet:

J. C. HEUNIS,
Minister of the Cabinet.

10296—1

No. 113, 1986**VRystelling van persone van die bepalings van artikel 17 van die Wet op Groepsgebiede, 1966 (Wet 36 van 1966)**

Kragtens die bevoegdheid my verleen by artikel 17 (2) van die Wet op Groepsgebiede, 1966 (Wet 36 van 1966), verklaar ek hierby dat die bepalings van artikel 17 (2) (c) van genoemde Wet in alle kragtens artikel 16 daarvan aangewese gebiede van toepassing is met ingang van 1 Julie 1986 op voorwaarde dat 'n huisbediende van 'n persoon wat grond of 'n perseel wettiglik bewoon nie mag toelaat dat 'n onbevoegde persoon die grond of perseel wat deur sodanige huisbediende geokkupeer word tussen 22h00 en 08h00 mag betree nie en dat tydens nie-voldoening aan hierdie voorwaarde die bepalings van artikel 17 (2) (c) nie van toepassing is op die grond of perseel nie.

Gegee onder my Hand en die Seël van die Republiek van Suid-Afrika te Kaapstad, op hede die Derde dag van Junie Eenduisend Negehonderd Ses-en-tagtig.

P. W. BOTHA,
Staatspresident.

Op las van die Staatspresident-in-Kabinet:

J. C. HEUNIS,
Minister van die Kabinet.

No. 113, 1986**EXEMPTION OF PERSONS FROM THE PROVISIONS OF SECTION 17 OF THE GROUP AREAS ACT, 1966 (ACT 36 OF 1966)**

Under and by virtue of the powers vested in me by section 17 (2) of the Group Areas Act, 1966 (Act 36 of 1966), I hereby declare that the provisions of section 17 (2) (c) of the said Act shall apply in respect of all areas specified under section 16 thereof with effect from 1 July 1986 on condition that a domestic servant of a person lawfully occupying land or premises may not permit a disqualified person to be upon the land or premises occupied by such domestic servant between the hours of 22h00 and 08h00 and that during non-compliance with this condition the provisions of section 17 (2) (c) shall not apply to the land or premises concerned.

Given under my Hand and the Seal of the Republic of South Africa at Cape Town this Third day of June, One thousand Nine hundred and Eighty-six.

P. W. BOTHA,
State President.

By Order of the State President-in-Cabinet:

J. C. HEUNIS,
Minister of the Cabinet.

No. R. 111, 1985

APPLICATION IN THE CONTROLLED AREA (OTHER THAN A SPECIFIED AREA) OF THE PROVISIONS OF SECTIONS 20 (2) (h), (i) AND (o) OF THE GROUP AREAS ACT, 1966

In terms of the provisos to sections 20 (2) (h), (i) and (o) and 33 of the Group Areas Act, 1966 (Act 36 of 1966), I hereby declare that—

A. the provisions of section 20 (2) (h) of the said Act shall apply—

(1) in any urban area or rural township situated in the controlled area only in so far as they relate to—

(a) the husband, wife, minor child or dependant of any person (other than a domestic servant or an employee) lawfully occupying land or premises in such area or township; and

(b) a *bona fide* employee (other than a domestic servant) of any person lawfully occupying land or premises in such area or township for the purpose of performing work he is engaged to perform but only for the duration of the intended performance;

(2) in any agricultural holding situated in the controlled area only in so far as they relate to—

(a) the husband, wife, minor child or dependant of any person (including a domestic servant and an employee) lawfully occupying land or premises on such agricultural holding; and

No. R. 111, 1985

TOEPASSING IN DIE BEHEERDE GEBIED (UITGESONDERD 'N AANGEWESE GEBIED) VAN DIE BEPALINGS VAN ARTIKELS 20 (2) (h), (i) EN (o) VAN DIE WET OP GROEPSGEBIEDE, 1966

Kragtens die voorbehoudsbepalings by artikels 20 (2) (h), (i) en (o) en 33 van die Wet op Groepsgebiede, 1966 (Wet 36 van 1966), verklaar ek hierby dat—

A. die bepalinge van artikel 20 (2) (h) van genoemde Wet van toepassing is—

(1) in 'n stadsgebied of plattelandse dorp wat in die beheerde gebied geleë is, slegs vir sover hulle betrekking het op—

(a) die eggenoot, eggenote, minderjarige kind of afhanklike van 'n persoon (uitgesonderd 'n huisbediende of 'n werknemer) wat wettiglik grond of persele in sodanige gebied of dorp okkupeer; en

(b) 'n *bona fide*-werknemer (uitgesonderd 'n huisbediende) van 'n persoon wat wettiglik grond of persele in sodanige gebied of dorp okkupeer met die doel om die werk te doen waarvoor hy in diens geneem is, maar slegs vir die duur van bedoelde werkverrigting;

(2) in 'n landbouhoewe wat in die beheerde gebied geleë is, slegs vir sover hulle betrekking het op—

(a) die eggenoot, eggenote, minderjarige kind of afhanklike van 'n persoon (insluitende 'n huisbediende en 'n werknemer) wat wettiglik grond of persele op sodanige landbouhoewe okkupeer; en

(continued on next page)

(b) a *bona fide* employee (other than a domestic servant) of any person lawfully occupying land or premises on such agricultural holding, provided such person does not, in terms of this provision, employ more than three disqualified persons on such land or premises for such purpose; and

(3) in the controlled area (other than an urban area, rural township or agricultural holding) only in so far as they relate to—

(a) the husband, wife, minor child or dependant of any person (including a domestic servant and an employee) lawfully occupying land or premises in such area, provided that in the case of a domestic servant or employee such persons are accommodated on the land upon which the domestic servant or employee performs his work; and

(b) a *bona fide* employee (other than a domestic servant) of any person lawfully occupying land or premises in such area for the purpose for which he is employed;

B. the provisions of section 20 (2) (i) of the said Act shall apply in the controlled area other than an urban area, rural township or agricultural holding;

C. the provisions of section 20 (2) (o) of the said Act shall apply in the whole of the controlled area;

D. in this Proclamation any expression to which a meaning has been assigned in the Group Areas Act, 1966, shall, when used in this Proclamation, have the same meaning, and the expression—

“agricultural holding” means any agricultural holding or smallholding or smallholding area declared, approved, registered, established or otherwise recognised as such under ordinance 17 of 1954 of the Province of the Orange Free State or under Act 22 of 1919, not situated within nor being an urban area or rural township;

“rural township” means any township, subdivided estate, private township or hamlet established, approved, proclaimed or otherwise recognised as such under Ordinance 33 of 1934 of the Province of the Cape of Good Hope, Ordinance 27 of 1949 of the Province of Natal, Ordinance 9 of 1969 of the Province of the Orange Free State or Ordinance 25 of 1965 of the Province of the Transvaal, not situated within nor being an urban area;

“urban area” means any area under the jurisdiction of an urban local authority; and

“urban local authority” means any municipal council, town council or village council, or any town board, village management board, local board, health board or health committee, and includes, in the Province of the Cape of Good Hope, any divisional council in respect of any local area under the jurisdiction of such council and, in the Province of Natal, the Local Health Commission in respect of any public health area under its jurisdiction; and

E. Proclamation R. 4 of 12 January 1968 is hereby withdrawn.

Given under my Hand and the Seal of the Republic of South Africa at Cape Town this Seventh day of June, One thousand Nine hundred and Eighty-five.

P. W. BOTHA,

State President.

By Order of the State President-in-Cabinet:

J. C. HEUNIS.

(b) 'n *bona fide*-werknemer (uitgesonderd 'n huisbediende) van 'n persoon wat wettiglik grond of persele op sodanige landbouhoewe okkupeer, mits sodanige persoon nie ingevolge hierdie bepaling meer as drie onbevoegde persone op daardie grond of persele vir daardie doel in diens het nie; en

(3) in die beheerde gebied (uitgesonderd 'n stadsgebied, 'n plattelandse dorp of 'n landbouhoewe), slegs vir sover hulle betrekking het op—

(a) die eggenoot, eggenote, minderjarige kind of afhanklike van 'n persoon (insluitende 'n huisbediende en 'n werknemer) wat wettiglik grond of persele in sodanige gebied okkupeer mits, in die geval van 'n huisbediende of werknemer, sodanige persone gehuisves word op die grond waarop die huisbediende of werknemer sy werk verrig; en

(b) 'n *bona fide*-werknemer (uitgesonderd 'n huisbediende) van 'n persoon wat wettiglik grond of persele in sodanige gebied okkupeer vir die doel waarvoor hy in diens geneem is;

B. die bepalings van artikel 20 (2) (i) van genoemde Wet in die beheerde gebied, uitgesonderd 'n stadsgebied, plattelandse dorp of landbouhoewe, van toepassing is;

C. die bepalings van artikel 20 (2) (o) van genoemde Wet in die hele beheerde gebied van toepassing is;

D. in hierdie Proklamasie enige uitdrukking waaraan 'n betekenis in die Wet op Groepsgebiede, 1966, geheg is, dieselfde betekenis het wanneer dit in hierdie Proklamasie gebruik word, en die uitdrukking—

“landbouhoewe” beteken 'n landbouhoewe of klein-hoewe of kleinhoewegebied verklaar, goedgekeur, geregistreer, gestig of andersins as sodanig erken kragtens Ordonnansie 17 van 1954 van die Provinsie Oranje-Vrystaat of kragtens Wet 22 van 1919 wat nie binne 'n stadsgebied of plattelandse dorp geleë is nie, of so 'n gebied of dorp is nie;

“plattelandse dorp” beteken 'n dorp, onderverdeelde landgoed, private dorp of gehug, gestig, goedgekeur, geproklameer of andersins as sodanig erken kragtens Ordonnansie 33 van 1934 van die Provinsie Kaap die Goeie Hoop; Ordonnansie 27 van 1949 van die Provinsie Natal; Ordonnansie 9 van 1969 van die Provinsie Oranje-Vrystaat; of Ordonnansie 25 van 1965 van die Provinsie Transvaal, wat nie binne 'n stadsgebied geleë of so 'n gebied is nie;

“stadsgebied” beteken 'n gebied onder die jurisdiksie van 'n stedelike plaaslike bestuur; en

“stedelike plaaslike bestuur” beteken 'n munisipale raad, stadsraad of dorpsraad, of dorpsbestuursraad of plaaslike raad, gesondheidsraad of gesondheidskomitee, en ook in die Provinsie Kaap die Goeie Hoop 'n Afdelingsraad ten opsigte van enige plaaslike gebied onder die jurisdiksie van sodanige raad en in die Provinsie Natal, die Kommissie vir Plaaslike Gesondheid ten opsigte van enige openbare gesondheidsgebied onder sy jurisdiksie; en

E. Proklamasie R. 4 van 12 Januarie 1968 hierby ingetrek word.

Gegee onder my Hand en die Seël van die Republiek van Suid-Afrika te Kaapstad, op hede die Sewende dag van Junie Eenduisend Negenhonderd Vyf-en-tagtig.

P. W. BOTHA,

Staatspresident.

Op las van die Staatspresident-in-Kabinet:

J. C. HEUNIS.

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FEBRUARY

No. 10101

PROKLAMASIES

van die

Staatspresident van die Republiek van Suid-Afrika

No. R. 17, 1986

VERKLARING DAT DIE BEPALINGS VAN DIE WET OP GROEPSGEBIEDE, 1966, BETREFFENDE DIE OKKUPASIE VAN GROND OF 'N PERSEEL OOK VAN TOEPASSING IS OP PERSONE WAT IN OF OP ENIGE GROND OF 'N PERSEEL, BEHALWE IN 'N VRYHANDELSGEBIED, AANWESIG IS EN OP PERSONE WAT SODANIGE PERSONE TOELAAT OM SO AANWESIG TE WEES

Kragtens die bevoegdheid my verleen by artikel 1 (4) gelees met artikel 33 van die Wet op Groepsgebiede 1966, (Wet 36 van 1966), verklaar ek hierby dat—

- (1) behalwe in 'n gebied omskryf in 'n proklamasie kragtens artikel 19 (1) van bedoelde Wet die bepalings van artikels 17 (1), 20 (1) en 26 (1) van daardie Wet, vir sover hulle die okkupasie van grond of 'n perseel en die toelating van sodanige okkupasie verbied, ook van toepassing is met betrekking tot enige persoon wat te eniger tyd in of op enige grond of perseel in die beheerde gebied of in 'n groepsgebied, na gelang van die geval, aanwesig is, en tot 'n persoon wat sodanige persoon toelaat om so aanwesig te wees vir 'n aansienlike tydperk of met die doel om 'n openbare vermaaklikheidsplek by te woon of om verversings as 'n kliënt te geniet op 'n plek waar verversings bedien word in 'n gelisensieerde restaurant, verversings- of teekamer of eethuis waar die genieting van verversings gewoonlik die gebruik van sitgeriewe meebring, of as 'n lid van of 'n gas in 'n klub (behalwe as 'n verteenwoordiger of gas van die Staat, 'n provinsiale administrasie, 'n plaaslike bestuur of 'n statutêre liggaam), asof sy aanwesigheid neerkom op okkupasie van bedoelde grond of perseel; en

PROCLAMATIONS

by the

State President of the Republic of South Africa

No. R. 17, 1986

DECLARATION THAT THE PROVISIONS OF THE GROUP AREAS ACT, 1966, RELATING TO THE OCCUPATION OF LAND OR PREMISES SHALL APPLY ALSO TO PERSONS PRESENT IN OR UPON ANY LAND OR PREMISES, EXCEPT IN A FREE TRADING AREA, AND TO PERSONS WHO ALLOW SUCH PERSONS TO BE SO PRESENT

Under the powers vested in me by section 1 (4) read with section 33 of the Group Areas Act, 1966 (Act 36 of 1966), I hereby declare that—

- (1) except in an area defined in a proclamation under section 19 (1) of the said Act, the provisions of sections 17 (1), 20 (1) and 26 (1) of that Act, in so far as they prohibit the occupation of land or premises and the allowing of such occupation, shall apply also with reference to any person who is at any time present in or upon any land or premises in the controlled area or in a group area, as the case may be, and to any person who allows such person to be so present for a substantial period of time or for the purpose of attending any place of public entertainment or partaking of any refreshments as a customer at a place where refreshments are served in a licenced restaurant, refreshment or tea-room or eating-house where the partaking of refreshments ordinarily involves the use of seating accommodation, or as a member of or guest in any club (save as a representative or guest of the State, a provincial administration, a local authority or a statutory body) as if his presence constituted occupation of such land or premises; and

(2) Proklamasie R. 228 van 1973 hierby ingetrek word.

Gegee onder my Hand en die Seël van die Republiek van Suid-Afrika te Kaapstad, op hede die Twaalfde dag van Februarie Eenduisend Negehonderd Ses-en-tagtig.

P. W. BOTHA,
Staatspresident.

Op las van die Staatspresident-in-Kabinet:

J. C. HEUNIS,
Minister van die Kabinet.

(2) Proclamation R.228 of 1973 is hereby withdrawn.

Given under my Hand and the Seal of the Republic of South Africa at Cape Town this Twelfth day of February, One thousand Nine hundred and Eighty-six.

P. W. BOTHA,
State President.

By Order of the State President-in-Cabinet:

J. C. HEUNIS,
Minister of the Cabinet.

BYLAE TOT AANSOEKVORM

1. Bestudeer die aansoekvorm asseblief sorgvuldig voordat u dit voltooi. U aandag word in besonder op items 5 (i) en 11 (c), gevestig.
2. Bykomend tot die vereiste gestel in die aansoekvorm, moet die volgende asseblief voorsien word:
 - (a) 'n Kaart waarop die ligging van die onderwerp van aansoek in verhouding tot aanliggende eiendom, in rooi omlyning, aangetoon word asook die gebruike wat op die eiendomme aangrensend aan die onderwerp beoefen word en ook die bevolkingsgroepe van die eienaars en okkupeerders van die eiendomme aanliggend aan die onderwerp. 'n Aanduiding moet gegee word of hulle die aansoek steun of daarteen gekant is.

ANNEXURE TO APPLICATION FOR A PERMIT

1. Please study the application form carefully before completing it. Your attention is drawn to items 5 (i) and 11 (c) in particular.
2. In addition to the requirements stated in the application form, the following must be furnished:
 - (a) A plan showing the locality of the subject of the application (outlined in red) in relation to the surrounding properties as well as the uses exercised on the adjacent properties and the race groups of the owners and occupants of the adjacent properties. It should also be indicated whether they support or object to the application.



AANSOEK OM 'N PERMIT / APPLICATION FOR A PERMIT

(Wet op Groepsgebiede No. 36 van 1966 – Group Areas Act No. 36 of 1966)

Voltooi te word deur applikant of gemagtigde agent / To be completed by applicant or authorised agent.

Dui toepaslike item met 'n X aan / Indicate applicable item with an X.
Skrap wat nie van toepassing is nie / Delete whichever is not applicable.

Lees asseblief die notas op bladsy 4.
Kindly read the notes on page 4.

Besonderhede van die persoon/instansie (applikant) ten behoeve van wie om 'n permit aansoek gedoen word.
Particulars of the person/body (applicant) on who's behalf application for a permit is made.

Volle naam
Full name

Rasegroep / Race group ☐ Blank ☐ Kleurling ☐ Indiër ☐ Sinees ☐ Maleier ☐ ☐ (c)
White Coloured Indian Chinese Malay Telephone No.

Identiteitsnommer:- Applikant Gade Beroep
Identity number:- Applicant Spouse (e) Occupation

Huidige woonadres
Present residential address

Volle naam en noolensvan van gade
Full name and maiden name of spouse

Getal afhanklikes (Verstrek volle name, geslag, ouderdomme en identiteitsnommers op 'n afsonderlike vel).
Number of dependants (Furnish full names, sex, ages and identity numbers on a separate sheet).

Getal lede in gesin Bates van gesin — kontant eiendom
Number of members in household (j) Assets of household — cash R. property R.

Jaarlikse inkomste van gesin — applikant gade kinders ander
Annual income of household — applicant R. spouse R. children R. other R.

Waar het applikant op bepaalde datum gewoon. (Transvaal en Natal, 30 Maart 1951, Kaaprovinsie 26 Oktober 1951).
Where did applicant live on specified date. (Transvaal and Natal, 30th March 1951, Cape Province 26th October 1951).

Aard van permit waarvoor aansoek gedoen word / Nature of permit for which application is made *

Verkry ☐ Vervreem ☐ Te okkupeer ☐ Om 'n huur-ooreenkoms aan te gaan ☐
Acquire (b) Alienate (c) To occupy (d) To enter into an agreement of lease

Te besit ingevolge artikel 27 of 37 (Verstrek dokumentêre bewyse van u pogings om die eiendom in die ope mark te verkoop)
To hold in terms of section 27 or 37 (Submit documentary proof of your endeavours to sell the property on the open market).

Grond of persele in 'n grensstrook te verkoop of anderskinds te vervreem. ☐
Sell or otherwise dispose of land or premises in a border strip.

Gebruik ingevolge artikel 35 ☐ Arbeiders op 'n plaas/landbouhoewe te laat woon ☐
Use in terms of section 35 (h) To allow labourers to live on farm/agricultural holding

Grond of persele in 'n toekomstige groepsgebied/grensstrook — te onderverdeel ☐ oppervlakte te gebruik ☐
Land or premises in a future group area/border strip — (i) to subdivide (ii) use the surface

'n ooreenkoms aan te gaan om 'n persoon die reg te gee om die oppervlakte te gebruik ☐ Registrasie van 'n verband ☐
to enter into an agreement granting a person the right to use the surface (j) Registration of a bond

Optree as bestuurder van 'n besigheid ☐ (Geregistreerde maatskappye moet 'n afskrif van „Sertifikaat van Inkorporasie van Maatskappye" aanheg).
Act as a manager of a business (Registered companies must attach a copy of the "Certificate of Incorporation of Companies").

Besondere doel waarvoor die permit verlang word (bv. handel waarvan die aard aangedui moet word, woon, landbou, ens.)
Specific purpose for which a permit is required (i.e. trade in which case the nature must be stated, residence, agriculture, etc.)

Besonderhede (straatnaam, nommer, dorp, plaas, distrik) van vaste eiendom wat applikant besit, in sy naam geregistreer al dan nie.
Particulars (street name, number, town, farm, district) of fixed property owned by applicant, whether registered in his name or not.

Datum verkry Aard van geboue daarop (woonhuis, winkel, ens.)
Date acquired 19... (b) Nature of buildings thereon (dwelling, shop, etc.)

Naam en rasegroep van huidige okkupeerders.
Name and race group of present occupiers

Indien van die eiendomme in 'n groepsgebied vir die applikant se rasegroep geleë is, die rede waarom die applikant nie die betrokke eiendom kan
If certain of the properties are situated in a group area for the applicant's race group, the reasons why the applicant cannot occupy the property
bewoon nie.
concerned

Besonderhede van eiendom waarvoor om 'n permit aansoek gedoen word.
Particulars of property i.r.o. which a permit is applied for.

Adres
Address
Getal kamers/winkels wat beset sal word Maandelikse huurgeld Okkupasie vanaf
Number of rooms/shops to be occupied (c) Monthly rental R (d) Occupation as from 19
Was applikant voorheen 'n huurder/bewoner van die eiendom Huurtermyn tot
Was the applicant previously a tenant/occupier of the property (f) Period of tenancy 19 to 19
Is huur-ooreenkoms hernubbaar. Groepsgebied
Is agreement of lease renewable (h) Group Area
Ontferming ('n Sertifikaat deur die plaaslike bestuur moet aangeheg word).
Removal (A certificate by the local authority must be attached).

Huur/okkupasie van besigheidsperseel/winkel - Lease/occupation of business premises/shop

Volle handelsnaam van applikant
Full trading name of applicant

Handelslisensie gedateer 19 (c) Waarde van voorraad (d) Bates
Trading licence No. dated 19 (c) Value of stock R (d) Assets R

Jaarlikse omset Laste Aard van besigheid
Annual turnover R (f) Liabilities R (g) Nature of business

Verstrek volledige besonderhede van enige ander besigheid wat aan applikant behoort of waarin hy 'n aandeel/belang het.
Furnish full particulars of any other business owned by the applicant or in which he has a share/interest.

Verduidelik die gronde waarop die aansoek gebaseer is as die aansoek vir die verkryging, besit of okkupasie van grond/persele is - bv. ontbering of in belang
State the grounds on which the application is based if the application is for the acquisition, holding or occupation of land/sites - i.e. hardship or in
an die groep vir wie die groepsgebied ingestel is.
In the interest of the race group for which the group area has been established.

Maatskappy wat 'n onbevoegde maatskappy geword het en grond/persele wil bly besit - dui aan op watter wyse die beheersende belang in die maat-
Company which has become a disqualified company and wishing to continue holding land/sites - indicate in which manner the controlling interest

Maatskappy verander het.
The company has changed

Redes waarom applikant nie in sy eie groepsgebied kan hervestig nie.
Reasons why applicant cannot resettle in his own group area

die ↑ applikant/gemagtigde agent van die applikant verklaar hiermee dat die besonderhede in hierdie aansoek verstrek, volgens my kennis en oor-
the ↑ applicant/authorised agent of the applicant hereby declare that to the best of my knowledge and belief the particulars furnished in this
g waar en korrek is.
Statement are true and correct.

Adres
Address

Datum/Date 19

Handtekening van Verklaarder.
Signature of Deponent.

Geregistreerde eienaar of gemagtigde agent moet onderstaande invul/Registered owner or authorised agent must fill in the undermentioned.

Besonderhede van geregistreerde eienaar/Particulars of registered owner.

Naam

Name

Adres

Address

Rasgroep*

Race group

Blank

White

Kleurling

Coloured

Indiër

Indian

Sjinees

Chinese

Maleier

Malay

(d)

Telefoon

Telephone

Naam en posadres van ekskuteur as die eienaar oorlede is.

Name and postal address of executor if the owner is deceased.

Besonderhede van eiendom/Particulars of property

Titelbeskrywing en grootte

Title description and area

Transportakte

(b) Deed of transfer No.

Beskrywing en gebruik van alle geboue op grond ('n Skets van al die geboue, waarop aangedui moet word vir welke gedeelte/s daar vir 'n permit aan-
Description and use of all buildings on land (A sketch of all the buildings, with an indication thereon of the portion/s for which a permit is applied
soek gedoen word, moet aangeheg word. Die name en rasgroep van ander okkuperders moet asseblief ook verstrek word).
for, must be attached. The names and race group of the other occupiers must also be furnished).

Landdrostdistrik waarin geleë

Magisterial district in which situated

Is eiendom in 'n mynndistrik geleë

(e) Is property situated in a mining district

Is die eiendom onderworpe aan die bepalings van artikel 130 en 131 van die Goudwet (Wet No. 35 van 1908T)

Is the property subject to the provisions of sections 130 and 131 of the Gold Law (Act No. 35 of 1908T)

Besonderhede van okkuperders/Particulars of occupiers.

Naam van okkuperder van perseel op datum van aansoek.

Name of occupier of site at date of application

Rasgroep*

Race group

Blank

White

Kleurling

Coloured

Indiër

Indian

Sjinees

Chinese

Maleier

Malay

(c)

Datum waarop okkupasie begin het

Date on which occupation commenced

Besonderhede van okkuperder van die perseel op die bepaalde datum (Transvaal en Natal, 30 Maart 1951, Kaapprovinsie 26 Oktober 1951).

Particulars of occupier of the site at specific date (Transvaal and Natal 30th March 1951, Cape Province 26th October 1951).

Volle naam

Full name

Rasgroep*

Race group

Blank

White

Kleurling

Coloured

Indiër

Indian

Sjinees

Chinese

Maleier

Malay

Toestemming/Consent.

Keur u goed dat die permit waarvoor aansoek gedoen word uitgereik word.

Do you consent to the issue of the permit for which application is made.

Opmerkings/Remarks:

† geregistreerde eienaar/gemagtigde agent van die geregistreerde eienaar verklaar hiermee dat die besonderhede in hierdie aansoek verstrek, volgens
† registered owner/authorised agent of the registered owner hereby declare that to the best of my knowledge and belief the particulars furnished
/ kennis en oortuiging waar en korrek is.
this application are true and correct.

Posadres

Postal address

Datum/Date

19

Handtekening van Verklaarder
Signature of Deponent

NOTAS

Artikel 21(2)(a) van die Wet bepaal dat die Minister nie die uitreiking van 'n permit kragtens sub-artikel (1), wat magtiging verleen vir die verkryging of besit van onroerende goed of die okkupansie van grond of 'n perseel in 'n groeugebied, gelas nie, tensy hy van oordeel is dat die weiering van die permit te veel ontbering sou veroorsaak of dat die uitreiking van die permit in die belang sou wees van die groep vir wie die groeugebied ingestel is.

Aansoeke met betrekking tot Bantoes moet aan die Bantoesake-kommissaris gerig word op vorm B.A12 welke vorm van die beaampte verkry kan word.

Op planne wat saam met die aansoek ingedien word moet —

(a) straatname en nommers aangestip word en

(b) noord behoortlik na bo georiënteer wees

sodanig die onderwerp van die aansoek maklik geïdentifiseer kan word.

'n Aansoek wat nie volledig ingevul is nie sal na die applikant terug verwys word wat noodwendig die oorweging daarvan sal vertraag.

Die aansoek moet gedreëseer word aan —

Die Direkteur
DEPARTEMENT VAN Plaaslike Bestuur
Privaatsak X9083
KAAPSTAD
8000

NOTES

Section 21(2)(a) of the Act provides that the Minister shall not direct that any permit be issued under sub-section (1) authorising the acquisition or holding of immovable property or the occupation of land or premises in a group area unless he is of the opinion that the refusal of the permit would cause undue hardship or that the issue of a permit would be in the interest of the group for which the group area has been established.

Applications in respect of Bantu must be submitted to the Bantu Affairs Commissioner on form BA12 which form can be obtained from the said officer.

On plans which are submitted with the application —

(a) street names and numbers must be inserted and

(b) north must be properly orientated upwards

in order that the subject of the application may be easily identified.

An application which is not completed in full will be returned to the applicant which will inevitable delay the consideration thereof.

The application must be addressed to —

The Director
DEPARTMENT OF Local Government
Private Bag X9083
CAPE TOWN
8000

STANDARD CONDITIONS REGISTERED AGAINST ERVEN IN KHOMASDAL

- (i) Except where otherwise provided, the erf or any portion thereof shall not be transferred, let or in any other way granted or disposed of to any person other than a Coloured person or to any partnership, company or any other body of persons whether incorporated or unincorporated, of which all the partners, directors and shareholders or members, as the case may be, are not Coloured persons: Provided that the erf may be let to any state department, state administration or company which is registered in terms of the Companies Act, 1973 (Act 61 of 1973) or any other act in connection with the registration of companies, any corporation which is instituted by law or any church denomination which is controlled by Whites for the exclusive purpose of lodging Coloured employees of such state department, state administration, company, corporation or church on the erf: Provided that if the erf is used for religious purposes for Coloured persons, including one dwelling for one minister, or for the purpose of an existing Coloured mission school including a hostel which has been lawfully transferred there, it may be leased by a religious body controlled by Whites: Provided further that if any mortgage bond on the erf is registered with the consent of the local authority and the Administrator the mortgagee shall, notwithstanding any provisions of any law to the contrary be entitled to buy the property mortgaged in his/its favour at a sale in execution and to take transfer of it, whether such mortgagee is a Coloured person or a partnership, company or other body of persons incorporated or unincorporated of which all the partners, directors and shareholders or members, as the case may be, are Coloured persons or not, but such mortgagee gaining possession of the erf in such manner shall be bound by the provisions of this subparagraph regarding any further transfer, lease or alienation.
- (ii) No person, except a Coloured shall be permitted to reside on the erf or to occupy it in any other manner: Provided that only one bona fide Native domestic servant rendering his or her services on the erf shall, subject to the prior written consent of the Administrator and the conditions imposed be permitted to reside on the erf.
- (iii) The erf may not be mortgaged without the prior written consent of both the local authority and the Administrator and then only subject to the conditions the Administrator may impose.

- (iv) The erf may only be used for the purposes which are permitted in accordance with and subject to the conditions which are laid down in terms of the Windhoek Town Planning scheme drafted in accordance with the provisions of the Town Planning Ordinance 1954, (Ordinance 18 of 1954).

The minimum value of the main building/buildings to be erected on the erf shall be R.....

- (v) Notwithstanding any provisions to the contrary contained in subparagraph (i) hereof, the erf may, subject to the prior approval of the Administrator and to the conditions which he may impose, be transferred, or in any other manner alienated or disposed of to any state department, state administration, any company registered in terms of the provisions of the Companies Act, 1973 (Act 61 of 1973) or any other law in connection with the registration of companies, any corporation which is instituted by law or any church controlled by Whites for the sole purpose of supplying accommodation for the Coloured employees of such state department, administration, company, corporation or church on the erf: Provided that if the erf is used for religious purposes for Coloured persons, including one dwelling for one minister, or for the purpose of an existing Coloured mission school including a hostel which has been lawfully transferred there, it may be owned by a religious body controlled by Whites.
-

(Joint Town Planning and Traffic Committee Agenda: 86-06-10) ANNEXURE "M"

BYLAAG 1.2.

(ITEM A.4)

SONE NOMMER	B E S K R Y W I N G
01	Erospark
02	Eros
03	Klein Windhoek Noord
04	Klein Windhoek Suid en Ludwigsdorf
05	Avls
06	Luxury Hill
07	Administrasie
08	Wireless Hill
11	Bismarckstraat - gebied
12	Suidelike Industriële - area
13	Eros Lughawe
14	Spoorweë
15	Noordelike Industriële - area en Lafrenz
16	Windhoek Noord
17	Windhoek Wes
18	Sulderhof, Uitbr. 5 en 11
19	Olympia
20	Academia
21	Pionierspark
22	Hochlandpark
23	Windhoek Onderwyskollege
50	Sentrale Besighheidsdistrik
61	Kat. Prop., Uitbr. 1, 2, 3, 4, 5, 6, 7, 8 en 11
62	Kat. Uitbr. 9, 10, 12, 13, 14 en 16
63	Kat. Uitbr. 15, 17, 18 en 19
81	Kd. Prop., Uitbr. 1 en 2
82	Kd. Uitbr. 3 en Augustineum
83	Kd. Uitbr. 4 en 6
84	Kd. Uitbr. 5

TABEL 1.2.1.a

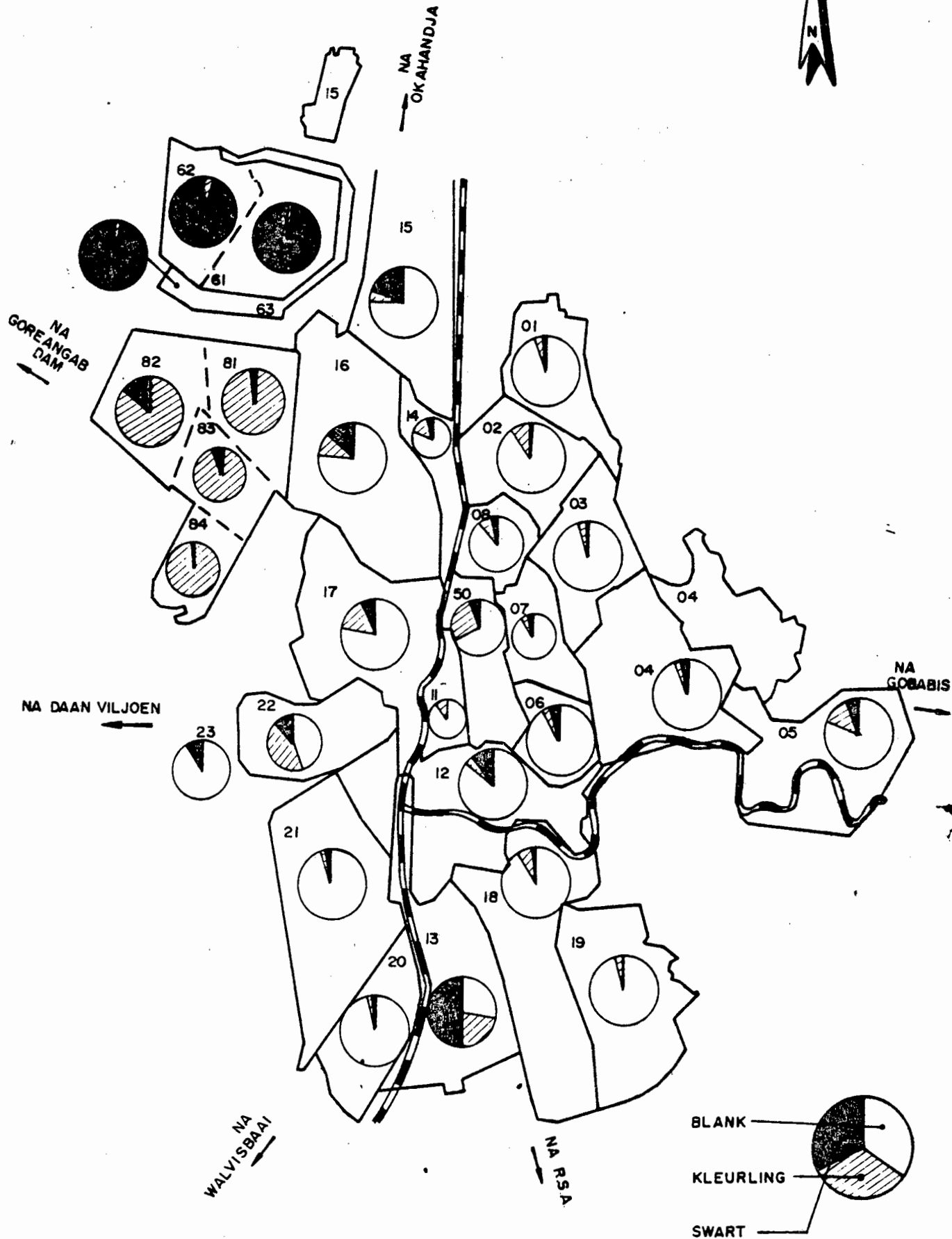
BEVOLKINGSVERSPREIDING: RASSEVERSPREIDING
PER SONE : 1975

SONE	Blank %	Kleurling %	Swart %
01	99,53	0,00	0,47
02	99,18	1,91	1,91
03	95,90	1,69	2,41
04	93,75	2,11	4,14
05	94,92	2,94	2,14
06	94,04	2,43	3,53
07	94,46	2,89	2,65
08	96,77	1,66	1,57
11	97,47	1,86	0,67
12	92,50	3,43	4,07
13	96,43	1,19	2,38
14	96,80	1,97	1,23
15	100,00	0,00	0,00
16	94,88	4,58	0,54
17	96,95	1,86	1,19
18	96,14	2,54	1,32
19	96,58	3,42	0,00
20	96,11	2,59	1,30
21	94,78	3,57	1,65
* 24	50,00	42,22	7,78
50	94,79	1,26	3,95
Subtotaal	95,40	2,64	1,96
Khomasdal	0,01	95,28	4,71

* Zone 24 represented a residual 'Rural' category. Its area has been included under various zones for the 1985 census.

TABEL 1.2.1. BEVOLKINGSVERSPREIDING: RASSEVERSPREIDING PER SONE 1985

S O N E	B L A N K				K L E U R L I N G				S W A R T						TOTAAL
	Manlik	Vroulik	Totaal	% Sone	Manlik	Vroulik	Totaal	% Sone	Manlik	Vroulik	Totaal	% Sone	Ongeldig	% Sone	
01	700	716	1 416	94,78	16	28	44	2,94	4	26	30	2,01	4	0,27	1 494
02	844	982	1 826	88,73	108	78	186	9,04	22	20	42	2,04	4	0,19	2 058
03	600	644	1 244	94,67	14	30	44	3,35	14	8	22	1,68	4	0,30	1 314
04	1 549	1 592	3 141	93,62	36	62	98	2,92	78	30	108	3,22	8	0,24	3 355
05	114	100	214	80,45	18	18	36	13,53	10	6	16	6,02	-	-	266
06	566	522	1 088	91,74	8	34	42	3,54	28	28	56	4,72	-	-	1 186
07	238	252	490	91,08	18	4	22	4,09	20	6	26	4,83	-	-	538
08	660	544	1 204	87,50	32	70	102	7,41	52	18	70	5,09	-	-	1 376
11	512	473	985	90,20	50	56	106	9,71	1	-	1	0,09	-	-	1 092
12	354	338	692	84,80	14	18	32	3,92	86	4	90	11,03	2	0,25	816
13	28	4	32	30,77	2	18	20	19,23	52	-	52	50,00	-	-	104
14	134	110	244	80,80	24	22	46	15,23	4	8	12	3,97	-	-	302
15	58	48	106	75,71	4	2	6	4,29	24	4	28	20,00	-	-	140
16	1 160	1 112	2 272	75,33	76	238	314	10,41	48	372	420	13,93	10	0,33	3 016
17	1 460	1 413	2 873	75,87	300	320	620	16,37	188	98	286	7,55	8	0,21	3 787
18	1 230	1 066	2 296	88,86	126	118	244	9,44	14	26	40	1,55	4	0,15	2 584
19	1 042	1 114	2 156	95,40	28	52	80	3,54	6	14	20	0,88	4	0,18	2 260
20	1 302	991	2 293	94,87	36	44	80	3,31	22	22	44	1,82	-	-	2 417
21	2 264	2 176	4 440	94,11	38	98	136	2,88	34	96	130	2,76	12	0,25	4 718
22	75	87	162	44,75	65	92	157	43,37	35	8	43	11,88	-	-	362
23	86	128	214	89,92	-	-	-	-	22	-	22	9,24	2	0,84	238
50	415	499	914	66,52	100	272	372	27,07	44	42	86	6,26	2	0,15	1 374
SUBTOTAAL	15 391	14 911	30 302	87,08	1 113	1 674	2 787	8,01	808	836	1 644	4,73	64	0,18	34 797
61	4	28	32	0,11	158	174	332	1,13	15 822	13 212	29 034	98,59	50	0,17	29 448
62	2	2	4	0,04	258	286	544	5,17	4 982	4 964	9 946	94,52	28	0,27	10 522
63	-	-	-	-	136	130	266	8,02	1 730	1 318	3 048	91,86	4	0,12	3 318
SUBTOTAAL	6	30	36	0,08	552	590	1 142	2,64	22 534	19 494	42 028	97,09	82	0,19	43 288
81	12	6	18	0,32	2 478	2 954	5 432	98,02	36	54	90	1,62	2	0,04	5 542
82	8	2	10	0,17	2 443	2 547	4 990	85,59	533	289	822	14,10	8	0,14	5 830
83	20	10	30	1,16	816	902	1 718	92,42	41	68	109	5,86	2	0,11	1 859
84	-	-	-	-	322	352	674	98,54	2	8	10	1,46	-	-	684
SUBTOTAAL	40	18	58	0,41	6 059	6 755	12 814	92,09	612	419	1 031	7,41	12	0,09	13 915
TOTAAL	15 437	14 959	30 396	33,04	7 724	9 019	16 743	18,20	23 954	20 749	44 703	48,59	158	0,17	92 000
ONGELDIG													48		48
GROOTTOTAAL															92 048

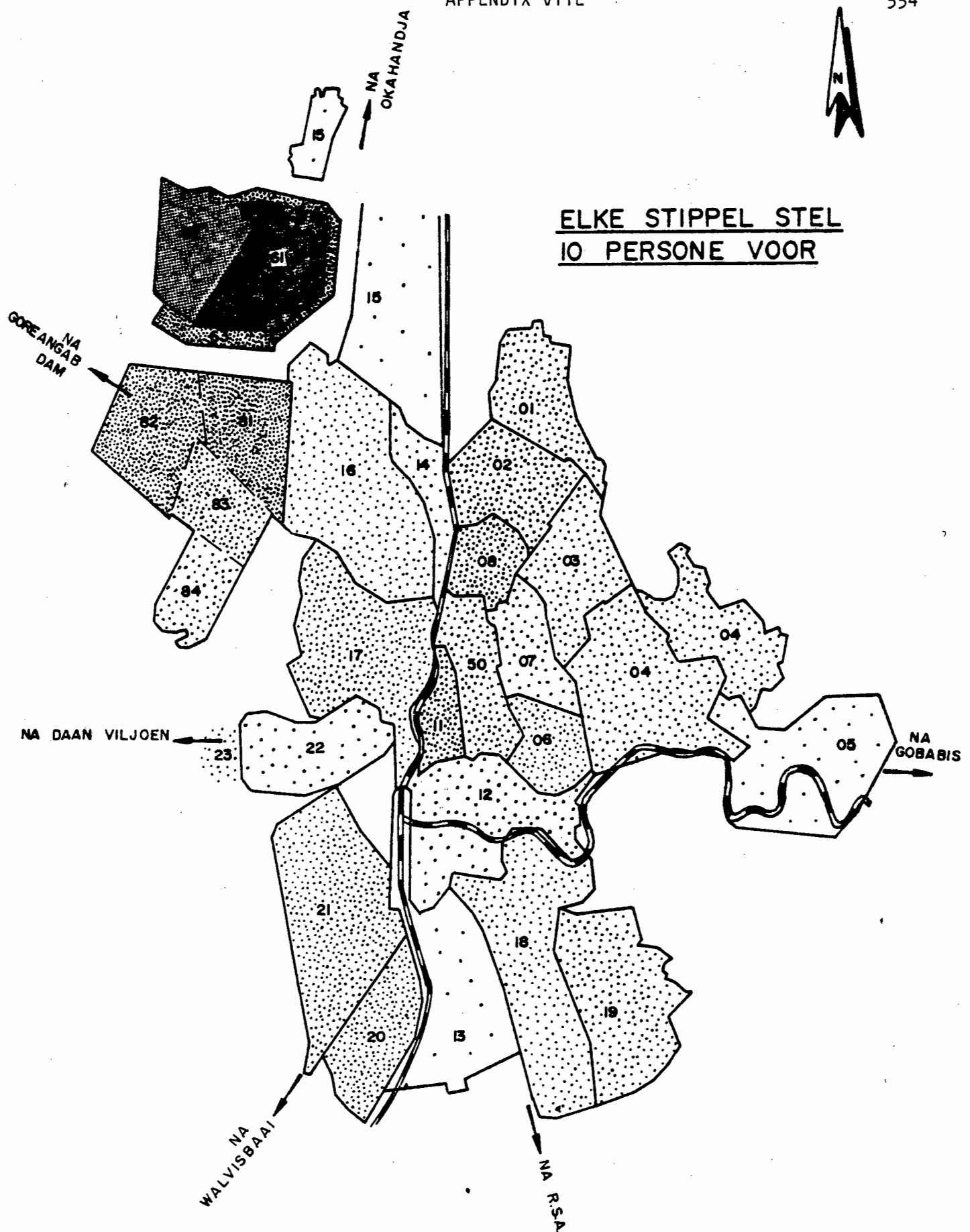


BEVOLKINGSVERSPREIDING

SOOS PER RAS

Saamgestel	E. du.T.	Apr. 1986
Geteken	M. ST. E.	— .. —

Diagram: 1. 2. 1.



BEVOLKINGSVERSPREIDING :

DIGTHEDE PER SONE

Soamgestel	E. du.T.	Apr. 1986
Geteken	M. ST. E.	— — — —

Diagram: 1. 2. 2.

12 AUG 1986